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Conclusion: The Rule of Law Among Countries

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Conclusion: The Rule of Law *Among* Countries

Stephen C. McCaffrey*

I, too, have been seeking to draw some lessons from these very interesting and illuminating discussions over the past couple of days. I will start with human rights, which Lucien Dhooge addressed. We have talked a little about water, which is a subject near and dear to my heart, not only because I drink it, but also because much of my work focuses on the law of international watercourses. There is a United Nations body called the Committee on Economic, Social and Cultural Rights which made a big splash in November of 2002 when it issued General Comment 15 on the Human Right to Water.¹ This document actually says that countries have an immediate obligation to do certain things, such as ensure that every person in their territory has not only access, but *safe* access to potable water in sufficient quantities to assure an adequate standard of living. Many governments will find it difficult to comply with this obligation without significant help from the international donor community and the private sector. But some see the privatization of water supply systems as an abdication of governmental responsibility to guarantee the human right to water. Not only governments, but also international financial institutions may become involved. For example, we have heard a lot about the Asian Development Bank's work in the context of the privatization of the water supply in Manila. It is going to be very interesting to watch over the next decade or so to see how many states say to this U.N. committee when reporting on compliance with their obligations—as they are required to do under the Covenant on Economic Social and Cultural Rights—yes, of course we are providing water to every member of our population and it is accessible, safe, and healthful. Stay tuned.

This is McGeorge's 23rd annual International Law Symposium. Its title is "Markets in Transition: Reconstruction and Development." On Friday we discussed some of these "markets"—Russia, China, Kosovo, Cape Verde, and Iraq, with sidelights on Chile and Palestine. One clear lesson that emerged is that there is no one-size-fits-all approach to reconstruction and development in emerging or transitional markets; each "market," or country, presents its own conditions, needs and challenges.

We had an "apple debate" on Friday, triggered by Hernando De Soto's videotaped remarks. This debate ranged from the question whether the "apple"—the market—can work without the rule of law (Hernando De Soto said "no," of course) to how the "rule of law" is in fact defined. Is it the situation produced by

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1. U.N. Committee on Economic, Social and Cultural Rights, *General Comment No. 15 (2002)*. The right to water (Articles 11 and 12 of the International Covenant on Economic, Social and Cultural Rights), U.N. Doc. E/C.12/2002/11, 26 November 2002.

such things as the judicial transformation in Chile? Or is it exemplified by another illustration that was given, the dog barking when you walk by “its” yard. That was thought to be an apt metaphor for the rule of law in some settings.

Ed Villmoare told us about “Laws-R-Us” outfits that provide cookie-cutter laws for enactment in any country. But, as he explained, that does not work either. We also discussed the role of culture. Is there a culture clash? Is Samuel Huntington right? We debated that question, looking at different areas of the world. This morning, Don Wallace named the elephant in the room when he asked whether a foreigner can impose his or her vision on a country. The answer seems to be resoundingly in the negative even if the foreigner, as it were, is the United Nations. That is the lesson of Kosovo.

Then Marjorie Florestal told us a wonderful story—which to me symbolizes many of the difficulties that were discussed—of the Americans coming to install their security equipment in the Cape Verde airport but there being no local people that knew how to monitor and use it. One could simply walk through, set off all the bells and nobody does anything. That tells you a lot about imposing your vision on a country that is not ready to receive it. The soil has not always been cultivated to receive the lovely seeds that we drop into these nations. All this may mean that it will take more than twenty years for many of these countries to make their transitions, as Ed Villmoare said of Kosovo.

This brings me to a case study that I am particularly familiar with, which demonstrates that there is sometimes yet another level of complexity. This is the Nile River Basin. The Nile is the longest river in the world, flowing some 4,000 miles from the Lake Victoria region to its outlet into the Mediterranean through the Nile Delta in Egypt. There are ten states in the Nile River Basin: Burundi, the Democratic Republic of Congo (“DRC”), Egypt, Eritrea, Ethiopia, Kenya, Rwanda, Sudan, Tanzania, and Uganda. The conflicts between and within these countries are well known. The states of the Nile Basin also include some of the poorest countries in Africa and in fact, some of the poorest in the world.

There is a saying that nothing flows among the states of the Nile River Basin except water: no power, no transportation, no communication, and no trade. This led the ten countries in the 1990s to launch the Nile Basin Initiative, a program supported by the World Bank and whose “shared vision” is “to achieve sustainable socio-economic development through the equitable utilization of, and benefit from, the common Nile Basin water resources.” Maybe you see where I am going with this. We have talked a great deal about development, alleviation of poverty, and raising standards of living; the question is whether this can be done in isolation, country-by-country, in the Nile River Basin—a geographical context in which cooperation can significantly enhance benefits to each country. These states prepared a number of draft proposals for projects that are basin-wide, sub-regional, and trans-border in nature, and placed them before a donors’ conference in June of 2000. The conference attracted a number of industrialized states and multilateral development banks; pledges of some \$140 million were made for project preparations. This will involve thorough preparation of project

proposals so they can be floated for possible financing. A hundred forty million dollars is a lot of money in Africa. Again, however, this represents only the amount necessary for project preparations. When it comes to actually building out these projects or executing them, it has been estimated that they will cost somewhere in the neighborhood of twenty billion dollars over a period of perhaps twenty years.

Where is that money going to come from? I am looking at Don Wallace, because he rang that bell this morning. It is going to come from the private sector. It is not going to come from donor countries or multilateral development banks. That raises the question, how can we make the environment attractive to the private sector? How can this be done in a way that is reasonably expeditious and effective? Of course, each individual country has to make some advances on its own, but there is also the problem of inter-country conflict, such as the Sudan People's Liberation Army ("SPLA") launching attacks against Sudan from Uganda; the Lord's Resistance Army attacking Uganda from Sudan; troops from Rwanda and Uganda in the DRC; and even wars between countries, such as the recently concluded one between Eritrea and Ethiopia. What can be done to alleviate this, and to improve the climate for economic development in general and private sectors for investment in particular?

Among the many elements of a solution, one which is a necessary predicate to basin-wide development aid and investment is a treaty between the ten states in the basin. In fact, since the mid-1990s these countries have been working on an agreed cooperative framework that will contain principles and rules governing their relations with regard to the basin, and will establish an institutional mechanism to help implement the treaty and facilitate cooperation between the parties. Such an agreement would thus establish what might be thought of as the rule of law on a macro basis. While far more general than the legal systems and institutions being established in the emerging markets we have discussed, it is needed. Not only the sharing of water, but also the sharing of benefits of development and indeed greater economic integration of the states in the basin all require a legal framework. Optimization of benefits to all cannot happen if each of the states goes its own way, any more than social, economic and political development can occur within a single country if each of its citizens marches to a different drummer. Such coordination of the development efforts of different countries through treaties and institutions amounts to an added layer of the rule of law. There is certainly more than enough complexity on the national level, which is what we have been talking about these last two days. However, there is another layer that needs to be considered.

I would like to conclude by returning to Iraq, although not literally, please. The French philosopher Ernest Renan defined a "nation" as "a group of people united by a mistaken view about the past and a hatred of their neighbors." I think this pretty well describes Iraq with one possible exception, and that is the first element - a group of people. Obviously, more than one group exists, and this is going to present the ultimate challenge as power (not "sovereignty" as Antonio

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Perez reminded us yesterday, since sovereignty has always remained in Iraq) or control is transferred from the Coalition Provisional Authority back to the Iraqis. Is there going to be *a* group of people, and is there going to be an environment that is stable enough to attract and retain the investment that I think we all recognize is necessary for the future development of Iraq? Perhaps that is a topic for a future symposium.