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THE CHALLENGES OF GLOBAL GOVERNANCE AND DIPLOMACY ACROSS VARIOUS AREAS OF INTERNATIONAL LAW

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Abstract

The scramble by United States of America and China to govern, control and influence the other countries of the world is connected with spirit to reshape international law to further their respective individual interest. This is notwithstanding the objective and spirit of their common umbrella organization; the United Nations, with other countries of the world. These struggles definitely will change the various areas of International Law such as the United Nations Charter, Genera Conventions (otherwise called the treaty law), customary international law; established by states practice and legal intentions, General Principles of Law recognized by civilized Nations. Diplomacy is the activity of managing relations between different countries, the skills in doing this: international diplomacy. Axiomatically, countries that traditionally have led the way in shaping international law are ceding space as a consequence of reduced global power, tarnished prestige and rising nationalists' settlement. Challenges ordinarily depict new or difficult tasks that test somebody's ability or skill. Global means the idea of covering or affecting the whole world. Governance on the other hand means the activity of governing a country or the way a country is governed. International law on the other hand is the body of legal rules, norms, and standards that apply between sovereign states and other entitles that are legally recognized as international. The challenges of Global Governance across the various areas of international law, therefore, explains the uphill or struggle surrounding the governing or administering international law in its aspects. In so far as international law remains uncontested, facilitating the daily workings of an interconnected world; and states continue to rely on the law to settle disputes peacefully. The continued legitimacy of international law in a multipolar world demands greater plurality. A degree of contestation is thus inherent and healthy in the Law's evolution. Thus, greater assertiveness on the part of states with a sovereigntist or transactional approach carries risks for areas of the law dealing with progressive liberal values. The pushback on such rights is not restricted to states from the Global South: The America and a number of European States are increasing advocating illiberal values. China and many developing countries are likely to increase pressure for greater attention to economic rights. Progress on addressing inequalities through economic rights is long overdue. Nonetheless, the danger remains that advocacy on economic rights can be used by some as cover up for encouraging restrictive approaches to civil and political rights. In relation to emerging challenges for international law, achieving consensus may become increasingly complicated in the short term. The time when United Nations through its different agencies should

assuage these countries is now, else, their struggle for independence, liberty and self-government may do more harm than good to the union. We made some recommendation as a way forward.

Keywords: Challenges, Global Governance, Diplomacy, Globalization, International Law, America, China, World.

1. Introduction

Countries that traditionally have led the way in shaping international law are ceding space as a consequence of reduced global powers, tarnished prestige and rising nationalists' settlement. Besieged by a multiple of hostile forces that their authoritarianism and exploitative practices had engendered those in power were so involved in the struggle for survival that they could not address the problem of development. Nor could they abandon it. For one thing, development was an attractive idea for foregoing a sense of common cause and for bringing some coherence to the fragmented political system (Ake, 2003).

More importantly, it could not be abandoned because it was the ideology by which the political elite hoped to survive and to reproduce its domination (Ake, 2003). This, in fact is a challenge to global governance.

Globalization and the rise of global governance are transforming the structure of international law, though much of this transformation takes place beneath the surface of the international legal order and often goes unnoticed (Krisch & Kingsbury, 2006). From the perspective of classical, inter-state, consent-based international law, global governance may still appear merely as a quantitative increase in international legal instruments, some changes in procedures of treaty-making. Yet central pillars of the international legal order are seen from a classical perspective as increasingly challenged: the distinction between domestic and international law becomes more precarious, soft forms of rule-making are ever more widespread, the sovereign equality of states is gradually undermined, and the basis of legitimacy of international law is increasingly in doubt. Diplomacy is the social practice by which states interact with other states. It takes place in the medium of international law as states use international law to explain and justify their policies to other states and other audiences and to understand them themselves. It is clear to see that in practice, states invoke law to strengthen their positions relative to other state by constructing justifications that situate their policies and preferences as consistent with international laws and norms. This is ubiquitous practice in contemporary international politics. It can also be used to inform a theory of diplomacy as the intersection of international law and international politics (Krisch & Kingsbury, 2006).Indeed, it was realized from the beginning of the articulation of the right to development in the 1980s that its achievement hinged on deep rooted transformations in the authorities, institutions and processes of decision making at multiple levels within which nation states pursued their development goals (Rajagopal, 2020). These levels were not only national and international but also substate and within social systems in constant interaction – in other words, a transformation of global governance rather than simply international governance. It is in this sense I used the term "global governance instead of "global" as the arena beyond/outside the state and "governance" as a one-dimensional exercise of authority rather than an interactive one among layers of decision making.

In a globalized world, however, global governance – referring to rule-making and rule-implementation on a global scale – is no longer a task managed by the state alone (Braithwaite & Drahos, 2000). Today, Transnational Corporation (TNCs), as well as civil society groups, increasingly participate in the formulation and implementation of rules in policy areas that were once the sole responsibility of the state or international governmental organizations. The activities of TNCs and civil society groups include e.g. involvement in peace-keeping (Dunfee & Fort, 2003), protecting human rights (Kinley & Tadaki, 2004), or implementing social and environmental standard (Scherer & Smid, 2000). This development indicates a shift in global business regulations from state-centric forms toward new multilateral, non-territorial modes of regulations with the participation of private and non-governmental actors. It was therefore suggested that the concept of regulation needs to be enlarged to include complete self-regulation without the help of state agencies (Parker & Braithwasite, 2003). International standards as defined by corporations, non-governmental organizations (NGOs), or international organizations, create worldwide standards of conduct that are "gradually beginning to override claims of national or regional singularity"(Matthews, 1997). NGOs or corporations do not dictate American or EU Law. However, they "advocate, protect, and mobilize public support, do legal, scientific, technical and policy analysis; provide services, shape, implement, monitor and enforce national and international commitments; and change institutions and norms". Many of these activities manifest themselves in the pressure NGOs exert on corporation (Dryzek, 1999). In this sense, "civil society actors pursue political ends outside the traditional confines of the state apparatus" (Teegen, Doh & Vactiani, 2004). These are part of challenges of global governance across various areas of international law that should be looked at, internalized, adjusted and of course, be adopted by the players of international cum global governance for sustainable development.

The Concept of Global Administrative Law

The concept of global administrative law begins from the twin ideas that much global governance can be understood as administration and that such administration is often organized and shaped by principles of an administrative law character (Kingsbury, Krisch & Stewart, 2005). With the expansion of global governance, many administrative and regulatory functions are now performed in a global rather than national context, yet through a great number of different forms, ranging from binding decisions of international organizations to non-binding agreements in intergovernmental networks and to domestic administrative action in the context of global regimes. Examples include UN Security Council decisions on individual sanctions: World Bank rule-making for developing countries the setting of standards on money laundering by the Financial Action Task Force; or domestic administrative decisions on market access of foreign products as a part of the WTO regime. Many regulatory functions in global governance are also performed outside such formally public, government structures, namely by hybrid private-public or purely private institutions, such as ICANN, the Internet Corporation for Assigned Names and Numbers, or the International Organization for Standardization (ISO)(Alvarez, 2005).

Despite these widely varying forms and institutions, we can observe in all these examples the exercise of recognizably administrative and regulatory functions; the setting and application of rules by bodies that are not legislative or primarily adjudicative in character. If similar actions were performed by a state agency, there would be little doubt as to their administrative character (except, perhaps, for the examples of private regulation). Classically, however,

regarding them as administrative would have been difficult because of their international nature; the term 'administration' was closely tied to the state framework and could, at most, point to the domestic implementation of international norms (Alvarez, 2005). This categorical distinction, however, has today become problematic: too interwoven are the domestic and-the international elements in these processes of regulation. This is most obvious for government networks in which domestic officials are engaged in both the rule-making on a global scale and the implementation on the domestic level, often without any intervening act. Likewise, when the UNHCR conducts status determination for individual refugees, the posited distinction of an international level for relations between states, and a domestic level for relations between states and individuals breaks down (Pallis,2005). And WTO dispute settlement can in many cases be regarded as another layer of judicial review of domestic administrative action. It is this interwovenness of the different spheres that leads us to regard the conglomerate of regulatory forms as part of one very variegated but recognizably 'global' administrative space.

The enmeshment of the domestic and international in governance also has important repercussions for the mechanisms through which administrative actions can be held to account. Under the classical distinction between the domestic and the international realms, international norms were agreed upon on the international level, but the state remained free to adopt them or not, as their obligatory character and effect depended on domestic ratification and implementation. Because of this freedom, domestic accountability mechanisms were thought to be (reasonably) effective: parliamentary process and administrative procedures could have a meaningful impact (Benvenisti, 1999). The more the domestic and international processes are interwoven, however, the more this freedom breaks down, and with it the effectiveness of classical accountability mechanisms. Decisions in an intergovernmental network such as the Basel Committee for Banking Supervision, though not formally binding, commit the participating domestic officials to implementation and will thus have a strong impact on any later domestic administrative procedure. UNHCR findings on refugee status directly determine the fate of the individual refugee. And WTO dispute settlement decisions are in most cases factually decisive for domestic administrative action: the costs of non-compliance would simply be too high to allow domestic administrative processes real freedom to deviate from a WTO decision. In the global administrative space, the classical distribution of labour between the different levels has largely broken down when it comes to ensuring regulatory participation and accountability.

The resulting accountability and participation problems are beginning to be addressed. in part because of an interest of global regulatory institutions and actors in bolstering their legitimacy in the face of growing political challenges. In many areas of global governance, and in highly variegated forms, mechanisms are emerging that seek to enhance participate the accountability of global regulatory decision-making. The structural similarities between many of these disparate phenomena are striking: they testify to a growing trend of building mechanisms analogous to domestic administrative law systems to the global level; transparency, participation, and review are central among them. This trend is reflected, for instance, in the Inspection Panel set up by the World Bank to ensure its compliance with internal policies; in notice-and-comment procedures adopted by international standard-setters such as the OECD (Benvenisti, 2005); in the inclusion of NGOs in regulatory bodies like the Codex Alimentarius Commission; or in rules about foreign participation in domestic

administrative procedures as set out in the Aarhus Convention. We argue that this is a general trend of practice toward a global administrative law.

Whether pursuit of accountability, participation and transparency is desirable in particular cases involves far-reaching issues. Accountability can dissipate effectiveness, participation can result in captire by special interests and transparency can mean populism triumphs over justice. Institutional design is important: there may be robust accountability but to the wrong people or on the wrong topics. Bracketing such issues in descriptive terms global administrative law as we understand it encompasses the legal mechanisms, principles and practices, along with supporting social understandings, that promote or otherwise affect the accountability of global administrative bodies, in particular by ensuring these bodies meet adequate standards of transparency, consultation, participation, rationality and legality, and by providing effective review of the rules and decisions these bodies make. We describe this field of law as 'global' rather than 'international' to reflect the enmeshment of domestic and international regulation, the inclusion of a large array of informal institutional arrangements (many involving prominent roles for non-state actors), and the foundation of the field in normative practices, and normative sources, that are not fully encompassed within standard conceptions of international law.

The Relationship between development, globalization and human rights

Human rights have been brought to bear on globalization in recent years insofar as decisions made at the meta-State levels - in international organizations, foreign Governments and private networks - affect the fundamental human rights of ordinary people around the world, who have little say in making those decisions. A traditional understanding of human rights as the rights of citizens of a single State to whom that State owes corresponding obligations became increasingly untenable as the model of accountability and justice in a world in which the source of violations and the remedy for them appeared to arise beyond the traditional regulatory competence of such States. A usual call by human rights policy advocates has relied on the idea that globalization can be famed by human rights, by more participation in the processes of decision-making - usually in the form of civil society - or by developing new norms that impose obligations, which include extraterritorial obligations on States for the conduct of non-State actors (www.maastrichiuniversiry.nl). The idea is that there is nothing basically wrong with globalization except that the weak and the vulnerable get little of its benefits and most of its burdens. The idea is that if we can tweak, change, humanize globalization, we can then have it all.

It is fair to say that this assumption is not universally accepted. Many scholars and practitioners believe that, in the light of our experience with development and globalization, human rights violations are often essential for the production and reproduction of wealth and productivity in the economic sense. In this view, the violation of human rights is often part and parcel of what we call successful development or globalization. Such a view maintains that in fact it is not the denial of development or the exclusion from globalization that causes human rights violations and economic and social deprivation in general, but that the misery of the poor is in fact a "planned misery", as Susan Marks has called it (Susan Marks, 2011).

The two above radically opposing views on the nature of globalization and its relationship to human rights have a fundamental impact on how we think about global governance. If we

start from the premise that globalization is essentially benign in its impact on the weak and subalterns, and the problem is one of lack of adequate insertion of the poor into global markets, circuits of capital and culture, the reform of global governance yields one set of proposals. Those may include the further democratization of international organizations by increasing the voice of developing countries in their governance, increasing the participation of civil society in global governance and imposing and enforcing obligations against private entities and so on.

However, if we start from the premise that globalization is a problematic project because it has a structural bias against the weak and the poor and the vulnerable which is hard to separate from its logic of production, consumption and distribution, one must then address a different set of reform proposals regarding global governance. Such reforms may be more far-reaching and fundamental than any which are currently on the global agenda. They might include fundamental changes to the way markets, finance and governance are organized at multiple levels and call for sharp augmentation of the capacity for solidarity, collective action and 'self-governance. There is nothing inherent in the right to development that makes us choose one view over the other, but the politics of that right, and of other human rights, especially the struggle for economic and social rights, may yet determine such a choice.

It is imperative to bear this structural dimension in mind as we approach global governance from the perspective of the right to development.

The Shift from Government to Governance

The second issue that we must consider regarding governance is the meaning of the term "governance". Implied in it is a rejection of the term "government" as the appropriate frame. Indeed, a shift from "government" to "governance" has been one of the signal shifts of the post-cold war consolidation of neo-liberal democracy on a global scale (James Rosenau & Ernst-Otto Czempiel, 1992). This shift, which occurred in the literature on international relations, is distinct from but related to the shift to the language of '"governance" in new governance theory (Bob Jessop, 1998) as -well as to "good governance" in the development field (World Bank, 2002). The common ground between the first two senses of the term "governance" is that a government-centred regulatory approach to effectiveness and legitimacy of functioning social and economic systems is no longer adequate. This is due to many reasons, including the rise of non-State actors, networks among them, their ability to act in situations where conventional State-based action seemed to be lacking, as well as the absence of supranational systems of order. But at a deep normative level, the "governance" focus was too often parasitic on the "good governance" agenda, which articulated an idea vision of what the limits of State action ought to be (Thomas Weiss, 2000). It was postulated that such an approach must emphasize deregulation, privatization, public-private partnerships, decentralization, democratization (often procedural), human rights and transparency. The problems of this ideal vision have, during the last two decades, become apparent, and in many respects, it has been abandoned in practice. “Good governance” agenda served to undermine the development potential of robust State action, while disciplining the populations using a highly limited and hypocritical deployment of human rights and democracy (Gothii, 1999). Robust State action is now, once again, recognized as central to development success (Gerschenkron, 1962) while the need to ensure the accountability of States through human rights and democracy is also well recognized. Where one or the other is missing, it has

produced undesirable, and often violent, social consequences. The recent rise of global protests and instability is a consequence.

An approach to global governance must begin by clarifying what one means by governance and, in particular, whether it is related to "good governance" with its anti-third world government ideology. A global governance agenda is doomed to fail if grounded in the idea of disciplining States and celebrating private actors while failing to recognize the centrality of States for positive economic and social outcomes, or if it celebrates a narrow understanding of development while sacrificing accountability of State and private actors. Rather, the challenge we face is the need for a global governance agenda that reinstates accountable and embedded statehood as part of the solution, while committing itself to deep democratic structural transformation of such States, private networks and supranational systems of order, and the creation and strengthening of norms and structures to hold States and other actors accountable to their commitments.

New Challenges

One hundred years ago the question of the future of diplomacy was raised as a result of technological progress – the invention of the radio and telegraph and the intervention of public into the domain of foreign policy. The first factor brought the apprehension that diplomats would become "honorary mailmen" and the second raised the issue of open diplomacy. However, the role of diplomacy in the twentieth century has not been restricted by these two factors (Petrovsky & Kurbalija, 1998).The functioning of diplomacy is influenced by a complicated combination of different interrelated factors and I would like to start with a brief analysis of their impact on the evolution of diplomacy.

To begin with, there is a set *of political factors.* During most of the twentieth century, two world wars, the Cold War, the rivalry of two super powers, the ideologization of international affairs and military confrontation have made diplomacy a subsidiary instrument of power politics and ideology. As a result, diplomacy has very often executed the "dance of death." The end of the Cold War has radically changed the international political scene. Moreover, today we are facing the shift of the civilizational paradigm, which affects not only the major units of world polities - the states - but which also brings new actors into the forefront of international relations.

The major political factor influencing diplomacy is-the relative decline of the role of the national governments. Today governments are facing stern competition from other actors. Private sector, religious groups, immigrants, media and other entities of the civil society are demanding from the government that their interests be taken into consideration and that they have a say in making and implementing foreign policy. People want to travel freely, to conduct business abroad or to be involved in various types of cultural exchange.

Perhaps the most active "intruders" into the modern diplomacy from outside are non-governmental organisations (NGOs). This is particularly well seen from the UN viewpoint. For example, in Geneva there are currently about 1,400 NGOs officially registered with the UN Office. All of them are international, and have branches in at least two or more countries. Although their status is different from that of the diplomats, in practice they often participate in the diplomatic process, in particular in the promotion and discussion of such issues as

human rights and environmental protection. Nowadays, international decisions are more often shaped according to the opinions of the NGOs. Gradually-they are expanding the sphere of their influence. Last year NGOs prevented the adoption of the Convention on the Copyright Law in Electronic Media which was prepared by the International Telecommunications Union. Perhaps the most vivid example of their influence is the world-wide campaign to ban anti-personnel land-mines which led to the signature in Ottawa last December of the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Antipersonnel Mines.

Curiously, not only NGOs but legislative branches of the states themselves are contributing to this diplomatic process. The parliamentarians of the world have successfully set up a structure of global and regional interaction and are now claiming a role in diplomatic meetings which was traditionally reserved for the executive branch.

An important aspect of the "degovernmentalization" of foreign affairs is the growing involvement in the international interactions of local or provincial authorities.

The immediate implication of this development for the diplomatic practitioners is that now, in addition to their colleagues representing formally recognised states; they also have to deal with numerous other non-state counterparts who conduct their own "foreign policy."

On the macro level, one of the major developments is the proliferation of multinational institutions and regional and subregional organisations. The EU, APEC, ASEAN, CIS, NAFTA, - this is just a short list of the most well known transnational structures which claim part of their member's sovereignty. The major motive behind their creation is the same as in the case of the increased activity of the local authorities - to facilitate cross-border co-operation and to weaken or eliminate restrictions imposed by the national states, such as customs tariffs.

The second set of factors that makes the life of a modern diplomat increasingly difficult is of an economic nature. In general, *economic diplomacy* is gradually taking over the traditional politics-oriented diplomacy. A lot has been written in recent years about the phenomenal growth of transnational economic interactions. Indeed, with the huge expansion of international trade, the power of private companies and the electronic transfer of money, private entrepreneurs 'and fund managers are eclipsing central bankers and finance ministers.

Meanwhile the international economy is becoming more and more competitive. With the rapid development of the Pacific Rim countries, and the opening to the outside world of the economies of such huge states as China and Russia, the world market has expanded dramatically, but so has the number of economic actors. Governments everywhere are primarily concerned with maintaining the competitiveness of their economies. Accordingly, private economic decisions are now largely controlling political choices of the governments, and diplomats have to devote more time and energy than ever before to the creation of a favourable environment for trade and commerce.

Last but not least, an important factor influencing modern diplomacy is the *revolution in telecommunications.* This is a big issue that deserves special attention. Of particular relevance

to the diplomatic services are two technological developments - satellite broadcasting and digital networks including the internet.

One of the functions of the diplomatic missions accredited to UNOG is to collect UN documents and send them to their Foreign Ministries or other government agencies in their capitals. A few years ago UNOG introduced an electronic system of document distribution. It is no longer necessary for the missions' staff to collect documents from the Palais des Nations - they can obtain them via computer connection without leaving their offices.

Diplomacy and compliance

It is often said that the modern era of international politics is characterized by the idea of the rule of law. Ikenberry, for instance, suggests that the post-1945 "liberal international order" is distinct for being "relatively open, rule-based, and progressive"(John Ikenberry, 2011). "The principle *of pacta sunt servanda* ("agreements should be honored") is the central norm of international law and politics. Academics argue about the foundations of that obligation (or lack thereof), but the premise of all this discussion is the shared commitment to the view that states are required to comply with the rules that they have accepted. The conventional approach has it that *pacta sunt servanda,* consent, legal obligation, and the ordering power of the rule of law are fundamental to international society, and that effective law is law that states choose to follow despite holding an interest in noncompliance.

This is uncontroversial to many scholars of international law and politics, but it is contradicted by the practice of diplomacy, where all states claim to be uniformly complying with their own interpretation of the rules. The preceding discussion leads instead to the conclusion that-the idea of compliance is built into the practice of diplomacy and so cannot be modeled as a matter of choice. States face an international environment in which complying with international law is valued and noncompliance is in almost all situations a negative. They therefore engage in diplomacy to present their interests and behaviors as consistent with the terms of international law. This is evident in the degree to which states do not admit to violations of the law (Herman, 2005). It also suggests that compliance and noncompliance are not structural equals in the process of international law and politics. Compliance occupies a privileged position as the default self-interpretation of state behavior, and noncompliance is a term of diplomatic attack used against opponents.

This is sometimes taken as evidence that international rules are inconsequential or non-binding or epiphenomenal. This is the view of the "new sovereigntists" in US public discourse and neorealists academic international relations (Spiro, 2004).

Diplomacy generates a constant stream of claims regarding compliance. States' references to law and lawfulness in explaining then-actions often mask rule violation and also often construct new law, and often do both at the same lime. The function of international law in these cases is to provide the resources for diplomacy, and individual rules are consequential only insofar as they are invoked by actors and deployed in the public domain. The law-making capacity of diplomacy points to a philosophy of international law along the lines suggested by Hans Morgenthau, following Carl Schmitt, that law emerges from the struggle among social forces rather than from formal legislation (Byers, 2000).

Conclusion

There is no doubt challenges exist in global governance across the various areas of international law. These challenges started with people and organizations such civil society and nongovernmental organizations being aware of politics at both national and international arena. The demands for inclusion into the international political affairs really portend changes in international law. This is sequel to world wars and United Nations Charter which opened the eyes and consciousness of their global non state actors; thus making key players to make adjustment for their inclusion and participation in international politics. Diplomacy was encouraged and international laws made to enable these challenges for societal development.

Recommendations

The present levels of political consciousness at national, regional and international levels call for political super powers of the world to encourage shift from government to governance at global arena. This task can be discharged by the United Nations using their various agencies. Thus, a government-centred regulatory approach to effectiveness and legitimacy of functioning social and economic system is no longer adequate.

The United Nations should continue to be supported and respected as rallying point of the world (father) in global governance. However, they should continue to allow non state actors to participate and contribute in the shaping of international affairs and politics. International laws should be used rather than administrative laws to regulate the activities of states for sustainable development.

There is need to use alternative dispute resolutions to settle differences and disputes between member states of the United Nations rather than litigations. This will encourage peace rather than enmity. Members of the UN Security Council: the United State of America and China should be advised to use their high technological advantages for the development of the world rather than indulging in unnecessary arms testing against each other. These are some of the ways to reduce the challenges in global governance across various areas of international law for the development of the world and the people. We hope that with the change of government in America on January 20, 2021 and with his new policies, the relationship among the UN member states will improve for the development of global governance and international law. This will definitely reduce the challenges of global governance across various areas of international law for better.

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