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Contemporary International Law Issues in the Asia Pacific: The Importance and Challenge of the Difference Between Principles and Rules in International Law

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By
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Introduction

Lord Mance, Professor Schriver, Professor Yang, Honorable Judges of the International Tribunal for the Law of the Sea, fellow members of the International Law Association, ladies and gentleman, friends.

I come before you at the end of a substantial intellectual feast; I join with all present in expressing my very sincere congratulations to the organizers. Like others, I am unhappy that I had to choose between enticing panels. But like all others, I have learned a great deal. I go home with new friends and an even greater respect for Asian hospitality.

I bring the friendship and admiration of your sister society, the American Society of International Law. We have enjoyed the company of many of you at our annual meeting held every year in late March. For our friends in the Asia-Pacific region, I want to emphasize that the American Society has two important initiatives. First, the Society has begun to hold mid year meetings in November in locations other than Washington, D.C, the first was in Miami last year, the next is to be in Los Angeles. Second, the Society begins this year the

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1 President, American Society of International Law; C. William Maxeiner Distinguished Professor of Law, University of California at Berkeley.
ASIL Research Forum, an event aimed at presenting the best works in progress for discussion. The Research Forum will be a central event of the mid year meeting. The point of my mentioning these initiatives is that on occasion the ASIL mid meeting and research forum will rotate within the United States to its west coast and therefore closer to you – this will happen this year in Los Angeles on November 4-5.

1. The Context and Thesis of My Remarks

My remarks today explore the difference between principles and rules. I take this focus because it is my thesis that although principles as an element of a legal order carry within them substantial practical and normative challenges, they are an important part of the way forward in some instances for international legal order generally and in the Asia-Pacific Region specifically.

In my opinion, the present time is not merely another moment, but it is a point of inflection – a turn in the river – of human events, although whether that turn is managed well or poorly is of course up to all of us. Clearly, we are in time where technological change continues, as it has for over a century, to give us – and the law -- new challenges. The challenges are new, but the pattern is a continuing one. Today, I would like to focus our attention on two other historical strands that also are shaping the challenges we have before us.

First, several long chains of events are yielding a more complicated world. In 1999, I wrote an article on the 1899 Peace Conference. The third of those conferences was to be held in The Hague in 1914, but was cancelled with the start of the First World War. As I researched that article, it became apparent how the panorama of the 20th century can be viewed as one long effort to silence the guns of August 1914. World War I yielded not only World
War II, it also precipitated the end of empires and created the fertile ground in which the Soviet revolution occurred. The end of empires in turn sped the effort to bring about decolonization. And even as the Soviet Union disintegrated at the end of the 20th century, we found ourselves dealing with the residual aftermath of the Ottoman Empire in places like the former Yugoslavia. Most relevantly, today, we see a revitalized Asia – Pacific region growing in leaps and bounds looking to a bright future even while it seeks to keep past differences from frustrating future promise. In sum, as we all appreciate, the East – West simplicity of the Cold War have become far more complex: globally, the political and legal order is multipolar, more diverse, and, increasingly, more regional.

This shift reminds me of Professor Lee’s call in this Conference for “the reconstruction of international law as a polyphonic system,” that is, a system that listens to more voices, their differences, and is sensitive to their pasts.

The second major shift in our time runs in the opposite direction, namely even as ‘differences to be appreciated’ remerge globally we find ourselves more complexly tied to one another than ever before. Financial crises spread like viruses. The environment demands that we – the world as a whole – pay attention. Terrorism slips through the interstices of our modern world periodically making mockery of a normalcy we seek to recall. In this sense, although global governance once was concerned with international order solely in the sense of interactions between states as though they existed separately, today global governance also is concerned with governance of a complexly interactive interdependent world which happens to be divided politically and where much of the task of governing therefore is necessarily – and appropriately to be done by national governments. Global governance today therefore seeks agreement on the objectives and polices of national
government. And even as such important matters are entrusted to the states, global governance recognizes that a few states will not be good partners and that quite a few states perhaps do not possess the capacity to carry out the tasks that must be given them. Thus we see global governance today also seeking to ensure that national governments possess the capacity to govern, that is, they possess rule of law and the regulatory machinery necessary.

The first strand appreciates diversity while the second strand seeks for us all to act together. It is in the context of these two aspects of our present situation that I place my modest topic, the difference between principles and rules. Because in several respects, it is my submission that it is principles that provide one key as to the way forward, they are important but also challenging, but with them we can pursue in some instances what I will term diversity within convergence.

2. The Terms “Principles” and “Rules”

Throughout this Conference, I have listened for the word ‘principle’ – and it has come up repeatedly. Justice del Castillo referred to the precautionary principle and the principle of intergenerational equity in international law as a part of the law of the Philippines. Professor Rothwell looked back to the Corfu Channel case and the principle of freedom of navigation. Yet although we use the words, principles and rules, we need ask what is the difference between them.

We can start by saying what we do not mean when using the word principle. For example, although the word “rule” tends to be used in the sense of something legally binding, it is not so regularly the case that the word “principle” is meant to refer to a principle that is legally binding. ‘I lead a
principled life’ is not a statement of law, but rather one of morality. Likewise, a principle may be one of politics, rather than of law. So my remarks focus on the difference between legally binding principles and legally binding rules.

And it is remarkable that although the word principle in particular may be used loosely in practice and be somewhat indeterminate, we nonetheless have a sense of what it means and how it differs from rule.

But in order to be less abstract, let me give a concrete example of the difference between a principle and a rule in international law.

3. The Difference in International Law

An instructive illustration of the difference between rules and principles can be found in *Anglo-Norwegian Fisheries Case* decided by the International Court of Justice in 1951.

In this case, the United Kingdom asserted before the Court that Norway in establishing certain maritime zones had utilized baselines (the lines from which the outer limit of such maritime zones are measured) that were contrary to custom. The United Kingdom argued that the rules of custom required that the baselines as a general matter follow the low water mark along the coastline, acknowledging some exceptions to this such as the allowance of drawing a closing line no more than ten miles in length across a bay. Norway pointing to the highly indented nature of its coastline argued that its adoption of straight baselines jumping from coastal point to coastal point, more often than not at distances substantially greater than ten miles, argued that its approach was lawful and that the rules asserted by the United Kingdom either were not customary or were at least not applicable *vis a vis* Norway.
The Court agreed with Norway that the rules asserted by the UK were not applicable, but it did not therefore conclude that Norway’s choice, following the consensual view espoused in *The Lotus* case, therefore was permitted. The Court writes instead:

“’It does not follow that, *in the absence of rules* having the technically precise character alleged by the United Kingdom Government, the delimitation . . . is not subject to certain principles which make it possible to judge as to its validity under international law.’”

The Court continued on to explain the function of these particular “principles.” The Court wrote: “certain basic considerations inherent in the nature of the territorial sea, bring to light certain criteria which, though not entirely precise, can provide courts with an adequate basis for their decisions, which can be adapted to the diverse facts in question.” The Court went on to conclude that although Norway had not adopted the particular set of baseline rules utilized by the United Kingdom, the set of baselines rules adopted by Norway (that is, a system of straight baselines) did not breach the abstract principle applicable, namely that the baselines follow the general direction of the coastline.

From this example, we can take away a first sense of principles and rules. First, the Court views principles as a more general truth, they are foundational. Professor Bin Cheng in his treatment of general principles of law explains that “this part of international law does not consist, therefore, in specific rules formulated for practical purposes, but in general propositions underlying the various rules of law which express the essential qualities of juridical truth

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3 *Id.*, p. 133.
Second, in the sense that principles are foundational there likely exists a greater consensus as to their validity and, indeed, as to the degree of legitimacy they possess. Third, and last, rules tend to be a manifestation of what a principle requires in a given set of facts. The rule is less flexible, less self-adapting. In this sense, a principle is a proposition from which a variety of rules may flow.

Before I go on to the importance of this distinction for governance, let me make two small points about what I have said thus far.

First, the Anglo Norwegian Fisheries case implicitly makes clear that principles and rules exist side by side in all the sources of international law. I sometimes find persons who equate the possibility of principles in international law with “general principles of law recognized by civilized nations.” This is incorrect. Principles of international law may be found in custom as well as treaties. As far as the residual source of “general principles of law recognized by civilized nations” provided for the International Court of Justice in its Statute, principles of course are found. What is significant about “general principles of law” as a source is that it – unlike custom or treaty – contains only principles and not also rules.

Second, let me observe that there is a very lively debate in jurisprudential circles as to the place of rules and principles in the law generally. This debate centers on a challenge by Dworkin to views expressed by Hart. I address the relevance of this debate to the present subject in a separate article. At this point, let me merely note that this debate, although phrased in general terms, in its examples is deeply rooted in the British and U.S. legal systems, and in this

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sense it may be that international law for several reasons both has, and should have, more principles than other legal systems.

4. How this Difference Alter The Contours of Governance And the Evaluation of Breach

What difference might this difference between principles and rules make in the context of global governance, in terms of allowing diversity within convergence?

The key insight in approaching this question is the recognition that the placement on a state of the obligation of a principle, rather than of a rule, gives a measure of discretion to that state as to how it fulfills it obligation. This discretion provides the space for diversity in each state’s choices regarding implementation while simultaneously the repetition of the principle evidences convergence in state consensus as to the normative strength of the principle. This proposition can be explored and elaborated upon by how a court or tribunal is to decide whether there has been a breach of a principle.

Returning to the *Anglo-Norwegian Fisheries Case*, let us assume that the Court had accepted the UK position that the maximum closing line for a bay is ten miles. The test for the Court to determine whether Norway in exercising authority over its territory has breached this *rule* is simple and precise – does the closing line exceed ten miles in length? There is no discretion for Norway in implementation. But if rather than a rule, there is a principle involved, how is the Court to determine whether there is a breach? How does one determine that a line does or does not follow the general direction of the coast? What is the test a Court should employ when determining whether a principle – as
opposed to a rule -- has been breached? Let us approach this question by returning to the difference between a rule and a principle.

A principle provides a guiding objective in an area of conduct. A rule in contrast provides a particular and more precise statement of what must or must not be done in an area of conduct. For example, a principle may say you should go toward the mountain on the horizon, while a rule might say stay on the road (a road that goes toward the mountain.) If a Court is asked to determine whether the rule is breached, one need merely ask whether the traveler departed the road. And the rule is violated even if the road takes twists on its way to the mountain and the traveler actually was traveling more directly to the mountain when he or she departed from the road. If the Court is asked to determine whether the principle is breached by the traveler (or by the twisty road -- rule -- just mentioned), one must ask whether the choices of the traveler meet the requirements of the principle.

But to observe that the test is different does not tell what the test is. One way to express the test is as follows. Consider this principle: An archer should endeavor to strike the center of the target. The target is the normal one that might be imagined having a center and concentric rings. The test of whether the principle is followed can’t be whether the arrow hit the bull’s eye because the principle provides only the objective of hitting the center. Let us assume that ten archers all shoot -- hitting the target at different distances from the center and that all ten archers have hit the target within the scope of their intention and skill. Have any of them breached the principle? Let’s assume an eleventh archer shoots wide of the target, and the archer is known to be sufficiently skilled that we can infer she or he intended to shoot wide? Does she or he breach the principle? Stepping past the obvious line drawing exercise present and the limits of this example, the key insight for me about the test that
emerges from this example is that the test for breach of a principle can not be the epitome of the principle. That is, the test cannot be hitting the center of the target. Similarly it can’t be, taking my earlier example, whether the traveler always walked directly to the mountain. And therefore the small twists and turns the traveler takes also may not be enough to show a breach. Rather a breach requires a deviation substantially outside of the route to the mountain, a manifest disregard of the objective of the principle.

Thus, and more pertinent to evaluating a breach of a legal principle, assume that ten nations are given the same exact situation and asked to execute an obligation in good faith. All ten may do different things and yet all may act within the principle of good faith. Perhaps one might argue that one actor appears to have acted more in good faith than another. But, the test is not to look for the epitome of good faith, but for a manifest lack of it.

What did the Court do in the Anglo-Norwegian Fisheries Case. Implicitly, the Court adopted the test I suggest and thus gave Norway a margin of appreciation in its choice as to the means it would use to implement the principle. The Court found Norway to have not breached international law because the choice of Norway is not a case of “manifest abuse” and that the line “appears to the Court to have been kept within the bounds of what is moderate and reasonable.” 6 It is noteworthy that this reasoning suggests that in the case of a principle such as the general direction of the coastline, several baseline constructions would have been “reasonable and moderate.”

In other words, and this is the critical point, a principle placing an obligation on an actor to perform in a certain manner necessarily provides a measure of discretion. That discretion rests on a measure of trust in the actor and is to a significant extent not reviewable.

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A similar line of reasoning is present in Judge Schwebel’s Separate Opinion in the *Gulf of Maine* case where in the context of the Court applying a law that involves equitable considerations he writes that:

Despite the extent of the difference between the line of delimitation which the Chamber has drawn and the line which my analysis produces, I have voted for the Chamber’s Judgment. I have done so . . . because I recognize that the factors which have given rise to the difference between the lines are open to more than one legally – and certainly equitably – plausible interpretation. . . . On a question such as this, the law is more plastic than formed, and elements of judgment, of appreciation of competing legal and equitable considerations are dominant. . . . [I]t is to be expected that differences of judgment on the application of equitable principles will arise . . . .

Consequently, application of a principle by a Court gives a measure of discretion to the judge, and, similarly, application of a principle by an actor means that the judge must give that actor a measure of discretion in evaluating that choice. Principles vary in their specificity, and therefore in the measure of discretion granted.

Principles therefore allow for some diversity in their implementation; a diversity that will be difficult for a tribunal to rigorously police because such diversity results from a measure of discretion that is difficult to second-guess. As Bin Cheng observes: “since discretion implies subjective judgment, it is
often difficult to determine categorically that the discretion has been abused.”

The Anglo-Norwegian Fisheries case states that the principle of good faith requires that every right be exercised honestly and loyally. Professor Cheng explains that a discretionary power must be exercised in good faith, which means “reasonably, honestly, in conformity with the spirit of the law and with due regard to the interest of others.” At root, a challenge based on a lack of observance of a principle of good faith, in my opinion, is an inquiry as to whether a particular action may be said to “reasonably” fit within the outer boundaries of the norm indicated by the abstract principle. As discussed above, given that it is difficult to ascertain whether an act falls within such outer limits, it not uncommon for tribunals to inquire as to the reverse: Namely, is the act clearly outside of the boundaries of the principle or, in other words, does the act manifestly violate the principle of good faith?

Although diversity within convergence in some instances therefore can be gained, it is gained at a cost and with risks. First, there is the possibility that the discretion possessed by an actor under a principle is, or is not, undertaken in good faith. A second possible cost is that states inappropriately seek to phrase obligations as principles rather than rules not because of consensus about the principle, nor to allow for needed variations; but so as to avoid the clarity of rules.

It is noteworthy that Professor Michael Reisman reflecting on the concept of softness in international law looked in particular to the Anglo-Norwegian Fisheries Case. He observes the statement of the ICJ in that case “the drawing of baselines must not depart to any appreciable extent from the

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7 Id.
general direction of the coast.” But Reisman stresses that “General direction of the coast” is not defined, “appreciable extent” is not defined, and “departure” is not defined. He concludes that such an approach “in many ways [yields] a very permissive formula.”

And it is precisely the inherent softness of principles in terms of lack of specificity and, indeed, in the discretion provided the actor as discussed previously, that leads some States to strongly urge that some normative developments not be expressed as rules but rather as principles. An example of this is the precautionary principle. When something is labeled a principle not because it is universally acknowledged fundamental truth, but rather in order to avoid the clearer (harder) obligations that would be present if it was phrased as a rule. Indeed, some nations seek that the precautionary principle be referred to as an “approach” rather than even as a “principle.”

Thus, in recognizing the value of true principles in appropriate circumstances where some variation in implementation is needed, we need also acknowledge both the risk of bad faith hidden within the range of discretion implicit in a principle as well as the risk of principles which are not deeper juridical truths but rather illusory undertakings intended to avoid the articulation of real obligations.

Conclusion

In conclusion, I suggest that the discretion inherent in principles can allow for diversity within convergence. The provision of a range of discretion by way of a principle is comparable to what in the human rights field is termed

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a margin of appreciation. In some jurisprudential circles examining national law, it is argued that principles give way to rules over time. But internationally, the circumstances addressed can vary dramatically, the cultures that face those circumstances may vary substantially, and the law making system is weak. In that system, we may expect some principles not only to out last rules in some cases, but also that it may be preferable that they do so. That preference lies at the heart of notions of global pluralism, of complimentarity in international criminal law and of subsidiarity in European legal order.

Clearly, principles also present challenges because they come with the risk of the loss of normative clarity of rules and the risk that the objective of diversity can be used disguise bad faith. Moreover, there are difficult questions of when a single rule is preferable to the range of actions permissible under a principle. However, in the complex world ahead where those with authority must move forward toward the same objective yet on occasion will wish to do so in somewhat different ways, principles may play an important role.