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TEN NEW COMMANDMENTS FOR HiIL

Hague Institute for the Internationalisation of Law
Committee of Honorary Patrons

Programmatic Steering Workshop II

The Hague, The Netherlands
17 November 2010

The Hon. Michael Kirby AC CMG

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(Australia)

In the course of the Scenario Workshop II, a second high level interactive session to refine the law scenarios to 2030 proposed by HiiL, the participants in Group D formulated ten propositions, or 'commandments', which they considered should be observed by HiiL in taking further the 'scenarios' proposed to date. These commandments were delivered to the plenary of the workshop. What follows is a summary of the 'commandments' which are commended to the Executive Team and Programmatic Steering Board in HiiL as well as to the Director and Deputy Director. They were adopted unanimously by Group D.

1. *Women's participation*

There is an urgent need for an increased participation of women in the development of HiiL's project to explore the legal environment of the world in the 21st century. Of the nominated experts who will take part in the ultimate deliberations, only about 10 percent of those presently named are women. Given the large changes occurring in legal systems everywhere to enhance the role of women in the law and in society and

given that the third Millennium Development Goal adopted by the United Nations is to promote gender equality and to empower women throughout the world, a futurology exercise in law must consult, and involve, women as a high proportion of the participating experts.

This includes in the design and expression of any 'scenarios' that are to be addressed. For example, women might possibly suggest a shorter time frame for consideration of the 'law of the future' than 20 years because of differing, more practical, and less theoretical approaches they often take to the problems and potentialities of the here and now and the future. This point has been made before in relation to participation of women in HiiL. It should be seriously addressed by the Institute and as a matter of priority.

2. *Participation by non-Europeans*

An invitation to participants from outside Europe adds significantly to costs. These must be contained by HiiL for budgetary reasons. Nevertheless, an extremely high proportion of the presently invited and named experts are from Europe. If HiiL wishes truly to engage globally with the law of the future, it will be essential for it to reach out to secure more participants than are presently named from Asia, Africa and Latin America.

In the case of Asia, the very strong links between the still applicable substantive law of Indonesia and the law of The Netherlands makes it imperative, and desirable, to invite appropriate participants from Indonesia. It would be surprising not to. It is a country building a democratic and rule of law society. The Netherlands should support this development. Participation in HiiL is one way of doing so. A democratic

country with the largest Islamic population in the world must be listened to. The Netherlands and HiiL can provide a bridge to help this to happen.

As well, participants should be included at least from the major countries in Asia, including Japan, China and India. India, in particular, should be included because of its large English-speaking legal profession and judiciary which share many values and aspirations with those of Europe. Current contact with leading law schools in India by universities in The Netherlands provides a link which should be brought to HiiL's advantage.

It should not be assumed that the 'scenarios' that are attractive, or seem probable, to lawyers in Europe, will necessarily be shared by lawyers in Asia, Africa or Latin America. If need be, procedures should be found for regional consultations by teleconference or telephone hook-up to enhance a truly international participation in the fourth HiiL Law of the Future conference.

3. *Clarifying Culture and religion*

In some of the 'scenario' language it has suggested, or assumed, that religion is simply part of the culture of countries. In some countries, this may be so. But in others, the role of religion in the state and in the legal system is radically different from that in Europe with its relatively recent principles of separation of religion and the state and secularism in the law.

To ensure a true reflection of international values, it will be important to include participation of experts from countries where religion plays a

predominant or highly influential role in legal values and discourse. Thus, the participation of judges and lawyers from Islamic countries, such as Indonesia, Malaysia, Egypt, Pakistan etc. and a description of the future of Shariah law would be an important element to be explored. Likewise, the influence of religious traditions in Africa and the Caribbean will need to be examined. It should not be assumed that law will evolve in the next 20 years without taking into account the growing religious elements in many contemporary societies.

4. Including indigenous law

The adoption by the United Nations of the Declaration on Indigenous Peoples reflects a major development that is happening in many countries, including (but not limited to) those with European settlers who displaced the original indigenous peoples and their laws. In some societies (e.g. New Zealand), early recognition, by treaty, of indigenous laws has been established for 150 years or more. In others (e.g. Canada, USA), treaties have ensured some protection for indigenous laws and customs. But in others (e.g. Australia), recognition of indigenous law has come belatedly (as in the *Mabo* decision (1992) and *Wik* (1996) ruling of the High Court of Australia).

This is a global development in the law which also affects many countries of Latin America (e.g. Mexico). But the disadvantaged position of indigenous peoples extends beyond European conquests into nations such as Cambodia, Russia, Japan and Taiwan, where indigenous peoples are seriously disadvantaged in law and society. It would be desirable to reflect these features in the 'scenarios' and in debate. Particular problems are sometimes presented by apparent disparities between universal human rights and the specifically patriarchal features

of some indigenous laws and customs. How are these clashes to be resolved? This will be an increasingly important debate in the future.

5. *Utilising telecommunications*

Acknowledging that participation by experts from great distances at the conference in June 2011 might prove prohibitive for HiiL in its current budgetary position, consideration should be given to telecommunications hook-ups for particular sessions so as to permit experts to provide short interventions based on their skills and experience. HiiL must become more adept in the use of contemporary technology to minimise cost and enhance true globalism in its deliberations. This proposal should be given attention and in particular to enlarge the number of participants in HiiL from developing countries.

6. *Involving youthful participants*

The Group welcomed the HiiL essay competition and other initiatives already taken by HiiL to increase the participation of the young in the work of HiiL. However, in its view, this was insufficient.

One proposal of the Group was that a youth forum should be convened in conjunction with the Law of the Future conference in June 2011 and chosen from high schools and colleges in The Netherlands and perhaps neighbouring countries. Consideration might be given to permitting the participants to speak in their own languages so as to enhance spontaneity and to allow young rapporteurs to report to the plenary conference in English. The young have the major stake in the shape of the law of the future. Symbolically and in terms of ideas, they should be consulted energetically on legal and societal futurology. In particular, their lifetime experience with information technology will make them

much more aware of likely directions and problems, in this respect, than older lawyers are prone to be.

7. *Acknowledging informal systems of law*

It is also vital to ensure that the work of HiiL includes adequate outlet and voice to those who will describe current developments that are occurring in the informal systems of law that are tending, in part, to replace the traditional third branch of the judicature and conventional legal systems. These developments include:

- * The growing role of traditional, customary or native courts in many countries in order to make law more accessible and understandable to affected populations;
- * The special courts and tribunals being created in developed countries for indigenous minorities and their problems (e.g. Maori land courts and native title tribunals in Australia and New Zealand); and
- * Neighbourhood justice systems that are springing up in many countries to respond to local disputes more cheaply and effectively than the formal legal system does.

In addition to this type of informal system, there is a need to reflect the rapid advance in developed countries of various forms of alternative dispute resolution, such as mediation, conciliation and arbitration. The very high cost of litigation and its often unpredictable outcomes in many countries has led to a shift to ADR which needs to be given voice in the 'scenarios' and at the conference. In particular, in international commercial transactions, arbitration is now quite common and no exploration of the law of the future can fail to address the rapid growth of international commercial arbitration, its problems, potentialities and

advantages. Speakers from international commercial arbitration centres in London, Paris, Hong Kong, Singapore, Kuala Lumpur and Sydney might be willing to travel to The Hague at their own expense to speak of their vision of arbitration in the law of the future.

8. Clarifying the mission of HiiL

One issue needs to be considered at the threshold. The title of HiiL is ‘The Hague Institute *for the* Internationalisation of Law’. Does this title imply that HiiL is intended by its mission to be an institute that is neutral about internationalisation of law? Or is it an institute that is positively in favour of internationalisation of law? In the ordinary connotation of the title of HiiL in the English language, it implies that the Institute favours and advocates the process of internationalisation. But the Institute needs to clarify its stance.

One argument for adopting a *positive* attitude towards internationalisation is that, without a measure of internationalisation, it is impossible to think that the world could cope with the variety and difficulty of the challenges that are now facing it, and that such challenges will *require* some degree of internationalisation. In any case, as recent experience shows, internationalisation is happening and will continue to occur. These challenges include:

- A. Recent suggestions that governance, especially in developed countries, has become almost impossible because of the size and complexities of the issues with which elected political leaders must now grapple. See e.g. D. Stone, “Hail to the Chiefs”, *Newsweek*, November 22, 2010, 40;
- B. Nuclear non-proliferation is another highly urgent problem which, if unresolved, may lead to accidental or deliberate life-destroying

catastrophes. A greater sense of urgency for international law and policy may be needed;

- C. Poverty will be one of the major challenges to global society in the coming decades, including the growth of the global poor; the expansion in the number of refugees; the enlargement of the role of remittance to developing countries; and global movement of people in search of peace, opportunities and happiness. Flash points of conflict are presented which national and international law will have to grapple with;
- D. Women's empowerment is a major objective of the United Nations; but this sometimes conflicts with religious and other traditional values in ways that law may need to resolve (see the *Lina Joy Case* on apostasy in Malaysia, 2008);
- E. Religious extremism, terrorism and oppression present special challenges to the law, including the risk of the over-reach and extinguishment of traditional rights;
- F. Economics and the Global Financial Crisis show that steady and continuous growth of the global economy cannot be assured;
- G The democratic deficit of globalism must be addressed. Although national constitutions (and even the *Charter* of the United Nations) are commonly expressed in the name of the people, the reality of democratic governance and the disempowerment of people from participation in most vital decisions affecting their welfare has led to serious difficulties in constituting clear governmental majorities (as witnessed in recent national elections in Canada, The Netherlands, Australia and the United Kingdom).
- H. Nationalism remains a potent challenge to internationalisation of law. It should not be assumed that steady development of rule of law values is assured, particularly in developing countries. The

fierce nationalism that is evident in some parts of China presents risks to trans-national mutually respectful dialogue and safe containment of differences. (See Cathrin Hille, “The Big Screening – China and Censors”, *Financial Times*, London, November 18, 2010, 8).

- I. Energy shortages: A further flashpoint in the world will be shortages of energy and the scramble for other scarce resources in the world, including food and water; and
- J Corruption: In the absence of effective institutions, proper procedures for law reform and adequate salaries for judges and officials, corruption is not easily contained or suppressed. Sometimes it is the only way of securing decisions and breaking the logjam of incompetence and of inert or unresponsive institutions. Merely imposing higher penalties on corrupt officials, once caught will not solve such institutional and structural incapacity. There is a need for realism in the demands for the rule of law.

9. *Studying systems of convergence and competition*

One issue that will need to be considered is the growing interaction and possible merging, on a global scale, of civil law and common law legal systems. To what extent are these systems tending to interact and to what extent is their competition leading to the prevalence of one system? A World Bank survey on the comparative speed and cost of litigation in different societies tended to prefer the common law system on grounds both of speed and cost. Transparency might have been added. But does the civil law system deal more effectively with the legal problems of poorer citizens who cannot afford to pay for skilled legal

representation? Any reflection on the future of law should consider the two main systems on offer and their possible coming together.

10. *Embracing our NGO assembly and technological insights*

Whilst it is important to secure the voices of lawyers and other experts in the ‘scenarios’ and predictions for the law of the future, the Group considered that it was also vital to procure an input of more diverse opinions and predictions. One way of doing this might be to convene or at least facilitate, an assembly of non-governmental organisations/civil society organisations so as to produce an “alternative” report with predictions that are more likely to move beyond the well worn path of legal professional expectations. In many important meetings now, side conferences of NGOs convene, e.g. the NGO Forum at the time of the meeting of the Commonwealth Heads of Government Meeting (CHOGM) has become an established feature of that biennial gathering. HiiL could signal its commitment to transparency, diversity and openness of dialogue by facilitating, hosting, or at least stimulating, such a civil society forum.

Predictions of the future, made today, are more likely to be accurate where offered by persons who have a sound knowledge of the present, and an appreciation of future, developments in technology rather than those who have long time participation within current institutions and structures. Technology is driving many of the major changes in the law and its institutions today. It is imperative that the HiiL project should work closely with technological experts. It should invite their participation both at a civil society session and also in the main conference so that predictions can be well grounded in evidence and in well informed predictions. (See Joseph A. Camilleri and Jim Falk,

Worlds in Transition: Evolving Governance Across A Stressed Planet,
(Elgar, UK, 2009).
