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**International Law and Practice Section
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“Ethics, Rule of Law and Human Rights”

Address

by

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Mr. Chairman,
Colleagues and friends,

The topic of our discussion this morning is “*Ethics, Rule of Law and Human Rights*”. I will attempt to address all these three elements and in particular focus on how the responsibility for realizing them should be distributed between the national and international level.

In the debate one often hears criticism of international institutions. It is said that they are not living up to their responsibilities. The United Nations, in particular, is subjected to this kind of criticism. In an address a couple of years ago I focused on this dilemma, asking the question: who needs reforming the most – the United Nations or its members.¹ And I am sure that you can already guess the answer. The United Nations could certainly do better, but much of the criticism of the Organization should be directed at its members. It is actually the members that need reforming the most.

In my presentation today, I will make the following three points:

- There is an ethical element when it comes to applying the law both at the national and international level that needs to be strengthened.
- One of the most important objectives mankind should be striving for is the observance of the principles of the rule of law both at the national and international level.
- True rule of law is not possible without diligent observance of internationally recognised fundamental human rights.

The ethical element

One of the fundamental principles of international law is expressed in the Latin concept *pacta sunt servanda* – agreements must be honoured. This principle is actually respected for the most. The simple reason for this is that it is in the interest of states to abide by their commitments in order to be able to conduct their business in an orderly manner.

However, when it comes to questions of state sovereignty and what is perceived as security matters, the climate often hardens. Based on their experiences from two world wars in the last century, states decided to establish the United Nations, an organization in which almost every sovereign state is a member today – 192 to be exact.

The UN Charter is legally binding. As all international law it actually trumps national law, including national constitutions. If a state has concluded an international agreement, the state in question is bound by that agreement in relation to other parties to the treaty. Detailed rules about this are laid down in the Vienna Convention on the Law of Treaties. With respect to the UN Charter there is also a provision (Article 103)

¹ See <http://www.havc.se/SelectedMaterial2004.htm> under “United Nations.”

that says that “in the event of a conflict between the obligations of the Members of the United Nations under the present Charter and the obligations under any other international agreement, their obligations under the present Charter shall prevail”.²

However, in the debate you sometimes hear people in responsible political positions belittling international law, claiming that it constitutes an infringement on state sovereignty. That is a great misconception. When states enter into international agreements they actually exercise their sovereignty.

Let me share a recent experience with you. I had the privilege of assisting the InterAction Council of Former Heads of State and Government at their 26th Annual Plenary Session in June this year. The Council has some 30 members from all over the world, among them former Presidents Jimmy Carter and Bill Clinton, although they were not present this time. On this occasion 22 of them participated. One of the topics they discussed was “Restoring International Law: Legal, Political and Human Dimensions”. The Plenary was preceded by a High-level Expert Group Meeting, from which the Chairman produced a report that was endorsed by the Plenary.³

In their Final Communiqué, issued on 27 June 2008, the InterAction Council made a number of recommendations.⁴ Among those were the following two:

- States must acknowledge that the challenges mankind faces must be addressed through multilateral solutions within a rule-based international system;
- Insisting that states observe scrupulously their obligations under international law, in particular the Charter of the United Nations and encouraging the leading powers to set an example by working within the law and abiding by it, realising that this is also in their interest.

And yet we see flagrant violations of some of the core obligations in the Charter, in particular the rules that lay down the conditions under which use of force may be resorted to.

Many events over the last few years have demonstrated that states are not fully committed to act in accordance with their international obligations. One could mention the illegal attack on Iraq, the failure to act with sufficient determination in Darfur, Zimbabwe and Myanmar. Much of the situation in the Middle East has its root causes in violations of international law, or the application of this law with double standards. The latest sad experience is Russia’s attack on Georgia.

This situation simply must come to an end. The challenges that mankind is facing today have probably never been greater. The combined effect of the shifting geopolitical focus on the globe, climate change, and the growing world population

² See <http://www.un.org/aboutun/charter/>

³ <http://www.interactioncouncil.org/meetings/report/m081.pdf>

⁴ <http://www.interactioncouncil.org/sessions/communique/s26.pdf>

constitute a threat that must be addressed with the utmost care. This can be done only by strict adherence to an international rule-based system.

We can then ask the question: what is the role of the lawyers in this field?

The professional ethics in the legal profession is a topic that is often discussed – as it should be. Also this issue was discussed by the InterAction Council. In the Chairman’s report, it is observed that recent experiences point to the need for members of the legal profession to strictly observe the professional and ethical standards that are fundamental to their vocation and that their role should be respected. This resulted in the following recommendation, endorsed by the Plenary:

- Respecting that members of the legal profession and in particular those who give advice in matters relating to international law have an obligation to strictly observe the professional and ethical standards that are fundamental to their vocation.

Since our meeting is a NYSBA event it is noteworthy that this matter has been raised also at the national level in the U.S. I could exemplify by referring to William H. Taft IV, the former Legal Adviser of the State Department. In an address at Yale University on 4 March 2006 he gave a lecture under the title “View from the Top: American Perspectives on International Law After the Cold War”. In his lecture, he criticised members of the legal profession in the following words:

“Bearing an abstract hostility to international law, developed in the sheltered environment of academic journals, and equally unfamiliar and unconcerned with our broader policy interests in promoting respect for the rule of law, among states as well as within them, these lawyers proposed to create a regime in which detainees were deprived of all legal rights, and the conditions of their treatment were a matter of unreviewable executive discretion. Why lawyers, of all people, should want to establish the point that such a lawless regime could legally exist, even as a theoretical matter, much less recommend that one actually be created, is, I confess, beyond me, and in itself is a sad commentary on the extent to which sophistry has penetrated what used to be widely regarded as an honorable and learned profession.”⁵

Ethical issues are omnipresent. But when we have to deal with the unprecedented challenges that mankind is facing today they become even more insistent. The factors that I just mentioned – the changing world economy, climate change and the growing world population – will put extremely heavy demands on decision-makers around the world.

How do we use the resources of the globe? This question involves ethical considerations not only with respect to the existing world population but also among the present generation and coming generations. A translation of the CO2 emissions in

⁵ William H. Taft IV, Keynote Address at the Yale Journal of International Law Young Scholars Conference, View from the Top: American Perspectives on International Law After the Cold War (Mar. 4, 2006), *reprinted in* 31 *Yale J. Int’l L.* 503 (2006). Cf. also a Keynote Address by Jeffrey H. Smith printed in *Michigan Journal of International Law*, Vol. 28:543-552.

the world in per capita emissions demonstrates a glaring inequality. The U.S. alone, representing 4.5 per cent of the world population, is responsible for 25 per cent of the total emissions. Expressed in other terms the CO₂ emissions in the U.S. were some 20 tonnes per capita in 2002. The corresponding figure for Sweden was some 6 tonnes. China and India were slightly above 2 and slightly above 1, respectively.⁶ Surely, China and India and many developing countries will increase their contribution considerably in the years to come. Are we prepared to lower our contribution?

The Doha Round just collapsed, partly because of national interest in Europe, India and the U.S. This also points to a democratic dilemma: the politicians are dependent on the electorate as they should be. But the electorate has a tendency to look very narrowly at its own interests with the result that there is limited room for compromise in intergovernmental negotiations.

And what will happen if climate change leads to increased migration? Are we prepared to receive a growing number of immigrants who may have to leave their countries for environmental reasons? Already now there is a fence between Mexico and the U.S. In Sweden we are noticing tendencies of hostility towards immigrants and we may have a new party with very determined views on this topic, if I put it euphemistically, in our Parliament after the 2010 elections.

Ultimately, standpoints in these matters will have to be translated into legislation or decisions of an administrative or judicial nature. As lawyers, we will be involved in this activity in one way or the other. It is important that we do not lose our moral and ethical compass.

Observance of the rule of law both at the national and international level

I will now address my second point: the importance of observing the principles of the rule of law both at the national and international level.

There are many who are looking for an agreed definition of the rule of law. Personally, I do not believe that one should devote too much time to this exercise. It is better to identify some fundamental elements that constitute components of a society under the rule of law.

Looking at the national level, I maintain that at least four elements are necessary to establish a society under the rule of law: (1) democracy; (2) proper legislation respecting international human rights standards; (3) institutions to administer this law; and (4) individuals with the necessary knowledge and integrity to handle this administration.

⁶ Source the World Bank. Central to any study of climate change is the development of an emissions inventory that identifies and quantifies a country's primary anthropogenic sources and sinks of greenhouse gas. Emissions are not usually monitored directly, but are generally estimated using models. Some emissions can be calculated with only limited accuracy. Emissions from energy and industrial processes are the most reliable (using energy consumption statistics and industrial point sources). Some agricultural emissions, such as methane and nitrous oxide carry major uncertainties because they are generated through biological processes that can be quite variable.

Correspondingly, at the international level the precondition is that international law is respected and that the principle *pacta sunt servanda* is honoured. This applies in particular to the UN Charter and its rules that forbid the use of force against the territorial integrity or political independence of any state, unless certain conditions are met.⁷

But the rule of law can be expressed also in other terms. An interesting example is the definition that was used in the World Justice Forum, organised by the ABA in Vienna last July. We just heard a presentation by Kathryn Grant Madigan, past president of NYSBA, of the Role of Law Index, which I think is a tremendous achievement.⁸

In that context a working definition of the rule of law is used that comprises four universal principles: (1) the government and its officials and agents are accountable under the law; (2) the laws are clear, publicized, stable and fair, and protect fundamental rights, including the security of persons and property; (3) the process by which the laws are enacted, administered and enforced is accessible, fair and efficient; and (4) the laws are upheld, and access to justice is provided, by competent, independent, and ethical law enforcement officials, attorneys or representatives, and judges, who are of sufficient number, have adequate resources, and reflect the makeup of the communities they serve.

It is important to emphasize that the Rule of Law Index is not to name and shame but to assist states in identifying elements in their legal system that need to be attended to, maybe through legal technical assistance (or *pro bono* assistance as you sometimes call it). And this is where lawyers in other countries may be able to help. Maybe members of NYSBA?⁹

Obviously, many countries have a long way to go before it can be said that they observe those principles. In many cases the reason is that there is a lack of competence and resources at the national level. But the explanation could also be that the existing administration of the country is well aware that they would be out of business if rule of law and democracy were introduced.

In the United Nations, the question of the rule of law has increasingly come to the forefront. The General Assembly has discussed it on several occasions. Of particular significance is the so-called Summit resolution, adopted in September 2005. In this resolution Member States recommitted themselves to actively protect and promote all human rights, the rule of law and democracy.¹⁰ Also the Security Council has engaged itself in this field for the simple reason that the rule of law has become a prominent

⁷ Article 2, paragraphs 4 and 7 and Article 51 of the UN Charter.

⁸ <http://www.abanet.org/wjp/rolindex.html>

⁹ Many organisations are involved in this activity, but I believe that a more coordinated and systematized approach might be valuable. See references to the Rule of Law at my website at <http://www.havc.se>.

¹⁰ General Assembly resolution A/RES/60/1. See in particular paragraphs 11, 16, 21, 24 (b), 25 (a), 119 and 134.

element in peacekeeping and peacebuilding operations. In this context I never fail to quote a presidential statement, adopted by the Security Council on 22 June 2006:

“The Security Council reaffirms its commitment to the Charter of the United Nations and international law, which are indispensable foundations of a more peaceful, prosperous and just world.”¹¹

But it is sad to note that Member States too often do not live up to those proud declarations and commitments. It goes without saying that the permanent members of the Security Council have a special responsibility in this context. If they do not live up to the standards that they themselves have agreed upon they cause tremendous damage to our common effort to achieve peace and security in the world.

By way of example, the U.S. attack on Iraq in 2003 and the Russian Federation’s attack on Georgia little more than a month ago are disastrous. The Security Council has been entrusted with the primary responsibility for the maintenance of international peace and security. In carrying out its duties under this responsibility the Council acts on behalf of the Member States.¹² It goes without saying that the members of the Council, and in particular the permanent members, must abide scrupulously by the UN Charter. What signal does the behaviour of the two states mentioned send to the world?

At the national level, there should be more focus on the establishment of a state under the rule of law. One way of achieving this is through legal technical assistance. The World Justice Project launched by the ABA is one effort of this kind. Let me just express the hope that it will be an effective contribution to our common effort.

The dilemma is of course that assistance originating in states that themselves do not demonstrate a highly recognised performance in this field will not be credible. Many countries fall short here, including countries from which one would be entitled to expect better. Probably nobody is above criticism here.

Therefore, the moral and ethical side of the work for the rule of law has to be put at the centre. One lesson we should have learnt from the past is that without the rule of law and ultimately democracy there is no way that we will be able to create a peaceful world. Why is it so difficult to take this knowledge to heart and act accordingly?

Diligent observance of internationally recognised fundamental human rights

I now come to the third main point: the connection between the rule of law and human rights.

In this context it should be noted that the definition of the rule of law may become an issue. Among the many suggestions for such a definition there are those that are quite elaborate (“thick denotions”) and those that are more narrow (“thin denotions”). Some of these definitions are based on the precondition that the rule of law cannot exist unless there is democracy. Others are more “open” in this respect.

¹¹ S/PRST/2006/28. See also <http://www.un.org/News/Press/docs/2006/sc8762.doc.htm>

¹² Article 24 of the UN Charter.

In my view, a true rule of law system can only exist in a democracy. But this does not disqualify a country that is not a democracy from working in this direction. Quite the opposite!

To the forefront comes the legislation of the country in question. In a modern society the concept of the rule of law cannot be “neutral” with respect to the contents of the law. On the contrary, international obligations that states have undertaken form a very important framework with which national legislation has to conform.

This applies in particular to the field of human rights. A quick glance at the rate of acceptance of the most central treaties for the protection of human rights shows the following:¹³

- The International Covenant on Economic, Social and Cultural Rights – 157 parties
- The International Covenant on Civil and Political Rights – 160 parties
- The Convention on the Elimination of All Forms of Discrimination against Women – 185 parties
- The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment – 145 parties
- The Convention on the Rights of the Child – 193 parties (but not Somalia and the U.S.)

In addition, the Universal Declaration of Human Rights has now acquired the status of customary international law, which means that this Declaration, adopted through a General Assembly resolution, is a binding on all states. We celebrate this year the sixtieth anniversary of this important document.¹⁴

Considering that there are 192 Member States of the United Nations, this means that a very large part of the state community and in two of the cases quoted almost the whole state community is bound by treaty law to respect the rights laid down in those treaties. And all states are bound to respect the rights protected by the Declaration.

In practical terms, this means that no legislation at the national level can be enacted without a thorough examination of how the contemplated legislation relates to these international obligations. From personal experience I recall that during my years in the Swedish Government Office and, in particular, during my years as the Legal Adviser of the Ministry of Justice and later of the Ministry for Foreign Affairs there were officers designated to review every piece of draft legislation with what I used to call “the human rights spectacles”.

When the UN was charged with governing Kosovo and later East Timor, I introduced the same system in the UN Office of Legal Affairs. The Special Representatives of the Secretary-General in these two regions were not authorised by the Secretary-General to issue regulations unless they had been vetted by the Office of Legal Affairs.

¹³ Reference is made to the United Nations Treaty Collection at <http://treaties.un.org/>.

¹⁴ The Declaration can be found at <http://www.un.org/events/humanrights/udhr60/declaration.shtml>

Of course, this procedure is not a 100 per cent guarantee that legislation adopted at the national level might not come in conflict with international human rights obligations. This holds true in particular in countries that are parties to conventions where the application is supervised by a court. In Europe we have European Court of Human Rights in Strasbourg.¹⁵ In the Americas there is a similar court, The Inter-American Court of Human Rights, based in Costa Rica.¹⁶ It goes without saying that in applying the respective conventions, courts of this nature can come to conclusions that differ from what the contracting state thought was the direct application of the convention in the case at hand.

In this context I just want to draw your attention to the fact that the UN Security Council is in clear risk of violating international human rights standards because of the way the Council has established the system of listing individual physical or legal persons suspected of terrorist connections. I know that Christian Ahlund¹⁷ will address this matter later this morning with reference to a judgement that was handed down by the Court of Justice of the European Communities on 3 September 2008.¹⁸ I have warned about this for some time, since it gives a very bad impression if the Security Council adopts procedures that conflict with human rights standards.¹⁹

Looking at substance, obviously the provisions on the right to life and the right not to be held in slavery or subjected to torture or to cruel, inhuman or degrading treatment come to the forefront. However, in the present context I believe it is of particular interest to point to the provisions that guarantee freedom of thought, opinion, expression, information, assembly and association.

If these rights are respected at the national level, this will eventually lead to democracy. I have pointed out in another context that there are presently some 120 representative democracies in the world. The remaining states represent various stages on a scale where you would find right out dictatorships on one end and countries in transition to democracy on the other.

Conclusion

In conclusion: What is important is to engage states that still have some way to go in this respect and encourage them to work to enhance the rule of law at the national level. Taken together, the elements that I have raised here should lead towards a world community where the auspices for international peace and security should be positive.

¹⁵ <http://www.echr.coe.int/>

¹⁶ <http://www.corteidh.or.cr/>

¹⁷ Executive Director of the International Legal Assistance Consortium (ILAC). See <http://www.ilac.se/>

¹⁸ Joined Cases C-402/05 P & C-415/05, Yassin Abdullah Kadi and Al Barakaat International Foundation v Council and Commission. See Press Release N° 60/2008 at <http://curia.europa.eu/en/actu/communiques/index.htm>

¹⁹ See e.g. Reflections on the Security Council and Its Mandate to Maintain International Peace and Security. In: *Law at War – The Law as it was and the Law as it Should Be*. Ed. O. Engdahl and P. Wrange. Koninklijke Brill BV. The Netherlands (2008) (p. 61-74, in particular p. 68-70) available at <http://www.havc.se/res/SelectedMaterial/20080901corellonunsecuritycouncil.pdf>

But this will simply not come true unless states that maintain that they are democracies under the rule of law actually live as they preach.

Some would say: You have said this so many times before! Are you not simply stating the obvious? My answer would be: Of course I am stating the obvious! But if it is so obvious, why do we not see this demonstrated in a determined, consequent and credible manner?

The root causes of conflicts that threaten international peace and security are the same: no democracy and no rule of law. Consequently, this is where we have to focus – before it is too late.

Thank you for your attention!