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“Sovereignty and Humanity: Reality and Possibility”

Address at a meeting at Oriel College

by

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Jeffrey Golden, Chairman of the ABA Section on International Law,
Professor Nanda,
Members of the Planning Committee,
Colleagues and friends,

Let me begin by thanking the members of the Planning Committee for inviting me to speak on this occasion. Thanks also to Jeffrey Golden for his kind words of introduction.

It is with great pleasure that I address you tonight. Isabella Bunn suggested that almost any theme related to sovereignty and humanity would be ideal. I therefore choose for my presentation the somewhat provocative title "*Sovereignty and Humanity: Reality and Possibility*".

The point I am going to make is that both sovereignty in its modern sense and humanity are necessary to create human security and that human security can only be created through democracy and the rule of law.

Earlier today, we discussed new developments in public international law, war crimes tribunals, torture, and tensions between sovereignty and humanity. In a sense, it is sad that topics of this kind are on the agenda of a meeting of lawyers at the beginning of the 21st century. But unfortunately, they reflect the reality of today's world.

Let us first look at sovereignty. Many challenge state sovereignty today. Some would suggest that the word carries with it a negative connotation – a reflection of an old system with its roots in the peace of Westphalia in 1648. According to this system, the head of state or government would be entitled to deal with matters within the boundaries of his or her state without interference from abroad. The right of a foreign state to intervene would be limited to protecting its own interests or the interests of its citizens – *jus protectionis*.

Others would argue that state sovereignty is less relevant today for the simple reason that other actors have entered the scene – actors with more power than many sovereign states. There are today multinational corporations that by far overshadow many states in economic terms. Unfortunately, there are also transnational criminal syndicates that do the same.

I would suggest, however, that if we look at world governance there is presently no alternative to the sovereign nation state. On the contrary, the problem is that too many states are too weak and pose a risk to international peace and security.

But sovereignty is not the same as in the past. Today, sovereignty means among other things that the state should be governed under the rule of law with full respect for the human rights and the fundamental freedoms of those who reside in its territory.

You will recall that in September 2003 the then UN Secretary-General Kofi Annan appointed a High-level Panel on Threats, Challenges and Change. On 1 December 2004, the Panel presented its recommendations. In so doing, the Panel maintained among other that any event or process that leads to large-scale death or lessening of

life chances and undermines states as the basic unit of the international system is a threat to international security.

It is also important that we remind ourselves that the UN Charter is built on the principle of the sovereign equality of all its members. Another principle is that all UN members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state. It is true that enforcement measures are permitted, but this is subject to a decision by the Security Council, based on the determination that there is a threat to the peace, breach of the peace, or an act of aggression.

The reality is that these provisions are not always respected – not even by states from which one has reason to expect better.

Let us now look at humanity. If we consult the dictionary that is named after the city where we are presently gathered, we find that one of the basic meanings of the word is humaneness/benevolence.

Sadly, humanity in the sense of human beings is often treated with little humaneness and benevolence. And yet, humanity in this latter sense is an aspiration that is generally recognised.

Over time an impressive body of law has been developed both at the national and international level for of the protection of the human being. Human rights and humanitarian law are constant elements in the political debate. The number of conventions and other binding instruments in these fields is just as impressive as their contents. But the reality is that their implementation is far from satisfactory.

Human rights and humanitarian law are also high on the agenda of the United Nations and other international organisations. Numerous bodies have been set up to supervise the implementation of this law, including international courts and tribunals, commissions and committees.

And yet, when we watch the daily news a frightening portion portrays violations of this law in different parts of the world. The reality is that we have become so accustomed to these images that we may have lost the ability to fully understand the extent of the horrors to which some of our fellow human beings are being subjected. Earlier today in the panel with Sir Nigel Rodley and Ved Nanda, Jonathan Black-Branch made that point with respect to torture. But I believe that human suffering in a more general sense is also difficult to imagine for someone who does not have personal experience of such suffering.

Today we are trying to address the situations in the Middle East and Iraq. The same is true for Darfur and other regions in Africa. The situation in Zimbabwe is a tragedy. We are also following with concern the development in Pakistan and Burma.

There are presently 16 UN peacekeeping operations around the world, engaging some 90 000 troops, policemen and civilian personnel. Four international war crimes tribunals are in operation, including the International Criminal Court, and the Extraordinary Chambers of the national courts of Cambodia recently started to

address crimes committed in that country over 30 years ago. During my time in the UN, I was involved in the establishment of all these organs.

Among them is the International Tribunal for the former Yugoslavia (ICTY). Yesterday, when I arrived at Oxford, I read in The Times that on the day before Mile Mrksic had been sentenced to 20 years in prison by this tribunal for his role in the notorious 1991 massacre of nearly 200 Croats in the town of Vukovar in Eastern Slavonia.

Today, it is exactly 15 years ago since I visited Vukovar with two colleagues in our capacity as CSCE rapporteurs on possible war crimes in Croatia and Bosnia Herzegovina. A Canadian police officer in the ongoing UN operation took us aside and told us that there was reason to believe that the patients and doctors of the hospital at Vukovar had all been taken away, killed and buried in a mass grave at Ovcara. This we included in our report. An exhumation four years later proved that the police officer was right. The judges had now ruled that at least 194 persons were killed. It felt like a strange coincidence reading about this judgement immediately before addressing you tonight.

In this context, I cannot but draw attention to the fact that the two main suspects before the ICTY – Radovan Karadžić and Ratko Mladić – are still at large. It is incomprehensible that the Security Council can allow this situation to continue year after year. The Council must uphold its authority. It goes without saying that the ICTY cannot be wound up before these two are brought to justice.

So, if we look at the reality we quickly come to the conclusion that human beings are subjected to great sufferings also in today's world, in many cases because states are allowed to hide behind the shield of sovereignty.

The High-level Panel on Threats, Challenges and Change examined this issue and pointed to the successive humanitarian disasters in Somalia, Bosnia and Herzegovina, Rwanda, Kosovo and Darfur. The Panel maintained that these situations had concentrated attention not on the immunities of sovereign governments but their responsibilities, both to their own people and to the wider international community.

The Panel then endorsed what they called an emerging norm that there is a collective international responsibility to protect, exercisable by the Security Council authorising military intervention as a last resort, in the event of genocide and other large-scale killing, ethnic cleansing or serious violations of international humanitarian law which sovereign governments have proved powerless or unwilling to prevent.

Focusing on the question of legitimacy to use military force, the Panel suggested that the Security Council should always address at least five basic criteria that the Panel framed in terms of: the seriousness of threat, proper purpose, last resort, proportional means, and balance of consequences. The last criterion is of particular interest and should be examined by posing the question: Is there a reasonable chance of the military action being successful in meeting the threat in question, with the consequences of action not likely to be worse than the consequences of inaction?

The notion of responsibility to protect was later affirmed by the UN General Assembly in its resolution A/RES/60/1, entitled World Summit Outcome. The Assembly did not pronounce itself on the five criteria but stated that “we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity.” But even if the General Assembly did not endorse the five criteria they are on record and will undoubtedly play a role in the Council’s analyses in the future.

You may ask: is this a step forward? I strongly believe so. One important element here is that the general public and in particular the media and the legal community now have a standard against which they can hold the Security Council to account before an informed general public. The General Assembly has accepted the notion of “responsibility to protect”. The five criteria are there, and the Security Council simply cannot allow its authority to be undermined.

But there are also other threats to humanity. Terrorism, transnational organised crime and corruption have surfaced as major threats in later years. In particular, the tendency to use religion to legitimise terrorism will have terrible consequences if this is not countered in an appropriate manner. The present stalemate in the disarmament negotiations is another threat that might lead to a new arms race and in the worst-case scenario to proliferation of arms – maybe nuclear, chemical and biological.

However, to most people in the world the economic and social threats are the most serious. Millions of people today are suffering from poverty, infectious diseases and environmental degradation. This is where the resources should be concentrated rather than on armament and peacekeeping operations made necessary by ruthless leaders and warlords.

Let us look at the environment. The key conclusions of the Intergovernmental Panel on Climate Change (IPCC) are criticised by some but they constitute a clear warning that something must be done to stop the global warming:

- It is "unequivocal" that global warming is occurring.
- The probability that this is caused by natural climatic processes is less than 5 per cent.
- The probability that this is caused by human emissions of greenhouse gases is over 90 per cent.

Another threat may be generated by the growing world population. This question was addressed already in the Stockholm Declaration on the Human Environment, adopted on 16 June 1972. Since then, the world population has risen to some 6.5 billion. The predictions are that it will be 9.1 billion by mid-century – a 40 per cent rise.

A significant feature in today’s geopolitical situation is that there is only one superpower. However, this may soon change. It is difficult to assess the effects of the geopolitical shift that is under way, but the economic realities will be a determining factor. The predictions are that they will change dramatically over the next few years.

Now to possibility, the fourth element in this presentation. What are the possibilities to deal with all these threats?

It goes without saying that we must look to the future in a positive spirit. In many ways, the living conditions of human beings are far better today than they were in the past. But the threats are there and we must act now and with determination.

This applies in particular to the protection of the environment. If the predictions of the IPCC are correct the effects of global warming will be desertification and a rising sea level. Seen in this perspective, global warming must now be regarded not only as an environmental issue but also as a matter of international peace and security.

In addressing these issues, we have to realise that this is not only a matter of inventing energy-saving technologies. In this context we must also – and most importantly – address questions of a more profound nature involving human rights, moral and ethics.

How do we best create peace and security? In my view by addressing the root causes of conflict. Looking through the rear mirror at the conflicts with which the United Nations has had to deal, there is a common denominator: no democracy and no rule of law.

In an address at Lund University in Sweden last May, entitled “*International Law and Changing Climate*”, I pointed to the many actors that have to be engaged in this work. And we must start at the national level. A systematic and organised effort must be made in which all countries should be involved. Needless to say, this will not succeed unless it has the wholehearted support of the most powerful UN Members.

Basically, there are two situations that require different approaches in this context: first, situations where peacekeeping operations are involved and, second, other situations.

With respect to peacekeeping operations we should remember that peacekeeping has been a UN activity for almost 60 years. To illustrate the intensity of that activity in later years I could give you the following figures. In the first 40 years, 13 peacekeeping operations were set up. Thereafter some 50 missions have been deployed.

Let us also recall that the September 2005 World Summit agreed to establish a Peacebuilding Commission as a forum for international players to work out a common strategy for countries emerging from conflict, to ensure that they do not go back to war again.

UN peacekeeping operations are today multifaceted and complex operations. As compared to the past, there are now many more aspects that have to be taken into consideration.

The first concern relates to personnel, which today are not only troops but also police officers and civilian staff with expertise in justice, civil administration, economic development or other specialized fields.

Another concern is the need to restore basic services and government. This relates in particular to basic state services, such as the judiciary, civil administration and public utilities. It is important to return post-conflict societies to normality and stability as quickly as possible. It is therefore necessary to focus on law and order. The need for a functioning judicial system presents itself at a very early stage in post-conflict societies.

Another field of activity is elections and restoration of democracy which may entail arranging a transparent voter registration process and the elaboration of a constitution.

Yet another field is providing security until a trustworthy local police force is organised.

But all of this is more or less self-evident and based on lessons learned. What I would like to focus on in addressing members of the ABA is the importance of dealing with the other situation, namely how to assist countries where there are no peacekeeping operations. Basically, this means all other countries. No country is above criticism in this field. This is also where governments should focus when they decide how to allocate their development assistance.

But also civil society should be engaged. On this occasion it is natural to look at the bar associations. There is much to be said here, but let me focus on the International Bar Association (IBA) and ABA.

In my lecture at Lund, I mentioned that IBA has adopted a resolution to strengthen the rule of law and is supporting a Rule of Law Movement. In that context it has also established an International Rule of Law Directory, which is the first centralised, fully searchable, online database of entities engaged in rule of law work throughout the world. It is established to provide users with reliable information and a compiled directory of Internet resources and links to organisations offering assistance to the rule of law. The IBA Human Rights Institute is engaged in extensive legal assistance work in many countries. On 19 October, at this year's Annual Meeting, IBA will devote a full day to the rule of law.

With respect to your own association, I am sure you are aware that ABA has launched a Rule of Law Initiative. It is a formal consolidation of ABA's international rule of law programs into a single entity which has some 400 staff and volunteers in over 40 countries, including the U.S. The whole idea of this initiative is to strengthen the rule of law.

May I also recall that, in September 2006, the IBA and the ABA jointly organised a Rule of Law Symposium in Chicago to strengthen their cooperation.

The latest news are that ABA is presently consulting with others – including through regional consultations – with a view to developing a Rule of Law Index to be able to measure the adherence to the rule of law at the national level around the world. This is

done within the context of the Global Justice Initiative, which has been initiated by William Neukom, who just took over after Karen Mathis as ABA's President.

I would be remiss if I did not also mention the initiatives that are now increasingly being taken by business. Many enterprises have joined Secretary-General Kofi Annan's Global Compact, which he launched by in January 1999. In addition, Corporate Social Responsibility (CSR) has become a major issue in the decision-making at the highest level, in particular in transnational corporations. That CSR now constitutes an important element in their risk management was confirmed inter alia in a very interesting panel at this year's Annual Meeting of the American Society of International Law with the participation of the corporate counsels of General Motors, Walmart and ExxonMobil.

These are just a few examples of the possibilities that exist.

Let me conclude by a quote from the "World Summit Outcome-resolution". Under the title "Human security" the following paragraph appears (143):

"We stress the right of people to live in freedom and dignity, free from poverty and despair. We recognize that all individuals, in particular vulnerable people, are entitled to freedom from fear and freedom from want, with an equal opportunity to enjoy all their rights and fully develop their human potential. To this end, we commit ourselves to discussing and defining the notion of human security in the General Assembly."

To me this does not sound very proactive. The answer to the question how to establish human security should be fairly simple: democracy and the rule of law. The difficulty is to implement this. There are no shortcuts. This requires an enormous effort over many years. What I am hoping for is a more organised and systematic approach to this work.

But now you may ask: is this not merely stating the obvious? It is! At least to a gathering of lawyers.

And yet, it is so difficult to organise a systematic effort to make a difference here. As lawyers we have a duty to spread this message and to work in practical terms through legal technical assistance. The ABA is setting a good example here.

In addition, we must speak up when our leaders fail to respect the principles of the rule of law, when they forget the lessons of the past, when they repeat mistakes committed in the past.

Oriel College was founded in 1326, nearly 700 years ago. Over the main entrance there is a coat of arms – three white feathers behind a gold coronet under which appears the motto "Ich dien" (German for "I serve"). When I saw this, my association immediately went to a favourite quote from President Harry S. Truman. Speaking before Congress in his first State of the Union on 16 April 1945, referring to the victorious states after the Second World War as the great states, he said:

“While these great states have a special responsibility to enforce the peace, their responsibility is based upon the obligations resting upon all states, large and small, not to use force in international relations except in the defense of law. The responsibility of the great states is to serve and not to dominate the world.”

There is something to be learned from this and other experiences from the past. Why is it so difficult to accumulate wisdom? May I therefore end with my *praeterea censeo*: we need statesmanship!

It so happened that a couple of months ago, I re-read *Antigone* by Sophocles (495-405 B.C.). It struck me that the last lines of the tragedy – although spoken in a different context – have a deep meaning also today:

“Wisdom is the supreme part of happiness; and reverence towards the gods must be inviolate. Great words of prideful men are ever punished with great blows, and, in old age, teach the chastened to be wise.”

Thank you for your attention!