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The Globalization of the Rule of Law

A Presentation in the Provost's Lecture Series

State University of New York at Stony Brook

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At 1:00 pm

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I am honored to be invited to deliver this presentation within the Provost's Lecture Series. The selection of the topic denotes the commitment of this great institution to explorations of new ideas and philosophies which shall guide its steps in the 21st century. For under the present leadership of SUNY at Stony Brook with which I have been associated in a variety of ways since 1972, this campus has acquired a hallowed ring to its name throughout the world.

I stand before you only a few hours before I travel to the Cairo University School of Law, to conduct, with US government funding and support, a SUNSGLOW training symposium for judges and legal counsel from Afghanistan, Egypt, Iraq, and the Palestinian Territories. This is an

from Afghanistan, Egypt, Iraq, and the Palestinian Territories. This is an area of the world where the US has long-range commitments, especially after 9/11, and to which my organization, SUNSGLOW which I established 6 years ago with the endorsement of the UN Secretary General, Kofi Annan, has a broad reach, hence the US interest in supporting us as a credible instrument in the globalization of the Rule of Law in a region where 9/11 began. I am honored to have on our distinguished Board of Advisors Dean Yacov Shamash and Mr. Carl E. Hanes, Jr. of SUNY, Stony Brook, not to mention several young SUNSGLOW Associates who volunteer their services after graduating from this great institution.

As an introduction to this presentation, I would like to advance the following propositions: There is no consensus as to the meaning of globalization, but there is general agreement, especially after 9/11, that respect for the Rule of Law, when practiced across borders, time zones and

diverse cultures, is a security imperative. The question is what do we mean by the Rule of Law, which laws, who decides on the degree of compliance, who enforces the sanctions on violators, and what mechanisms do we need to make the globalization of the Rule of Law a reality in the 21st century.

The irony is that we know a great deal about what we should do, and very little about how to do it. We have begun a journey along an uncharted road, with no road signs and no way of measuring our progress. In essence we do not yet have a credible globalization of the Rule of Law. But the future is promising.

Against this background, I would like to focus on four challenges facing us as a global community in our universal quest. These are: (1) The doctrine of state sovereignty; (2) The doctrine of Humanitarian Intervention; (3) The rise of the twin menaces of religious fundamentalism and of imperial conservatism; (4) The weaknesses of international institutions. These four

challenges are intertwined, and none of them can be treated in isolation of the other three.

As to State sovereignty, let us bear in mind that the Charter of the UN of 1945 has sided with that concept for the past sixty years to the detriment of the globalization of the Rule of Law. From the post-Holocaust period to Darfur, the Sudan, the UN's Charter Article 2 has been a problem that cannot be overcome without a whole sale revision of the Charter. For the Charter provides for non-intervention in the domestic affairs of Member States, although it has a back-door to intervention. But the front door has the word "sovereignty" emblazoned on it. The supremacy of the State, especially in a dictatorship, is the supremacy of the dictator himself, whether it is Saddam Hussein, or Pinochet of Chile, or Noriega of Panama, or Kim Jung Il of North Korea. Sovereignty, which is the capacity to enact territorial laws, and human rights which guarantee for the populace the right to work,

worship, live and govern within a framework of due process are in permanent tension. Whenever sovereignty trumps human rights, the Rule of Law is in jeopardy.

To cite a few universal examples: In Darfur, the Sudan. 200,000 people have been killed, and 2 million people have been displaced. In Rwanda, close to one million people have been killed. In Kosovo in 1999, the Serbs had the temerity to go to the ICJ seeking to block NATO from intervening on behalf of the Kosovar who were being slaughtered under the banner of sovereignty. The ICJ rejected the Serbian sovereignty claim. Under the UN Genocide Convention of 1948, what is going on in Darfur is nothing less than genocide. Yet a world debate is going on now as to whether in Darfur, the government-supported militias are committing genocide or only war crimes or crimes against humanity. Even we as international lawyers have a hard time distinguishing one calamity

(genocide) from another (war crimes). Sovereignty of the Sudan is the shield for this denial of the Rule of Law.

Our second challenge is the doctrine of humanitarian intervention. As early as the 13th century, St. Thomas Aquinas made references to the fact that one sovereign has the right to intervene in the internal affairs of another. This doctrine is an outgrowth of the evolution of human rights from a mere social issue up until the Nuremberg and the Tokyo trials of 1945 and 1946, to a peace and security issue culminating in the UN Universal Declaration of Human Rights, 1948, the Geneva Conventions, 1949, the UN Declaration on Civil and Political Rights, 1966. This doctrine is generally defined as the coercive deployment of the military by the State or States for the purpose of alleviating a humanitarian crisis in another State. Fine, but, do you go over the walls of sovereignty unilaterally or multilaterally? And when should the State place its troops in harm's way? A third question: Do we give license

to humanitarian intervention when the intervening power or powers (such as the US and the UK in the Iraqi war) make no claim to be acting in self defense or repelling aggression? Article 51 of the UN Charter insists on the right to self-defense, but the interpretation of that right is left to the intervening power. There is little doubt that the US doctrine of clear and present danger has been ignored in the rush to war in Iraq, ostensibly to topple a world class brutal dictator like Saddam Hussein. Now suppose that Lebanon degenerates into chaos, and Hezbollah, as it is doing now, sides with the Syrian occupiers of Lebanon, and Lebanese freedom fighters are slaughtered, should the US under the doctrine of humanitarian intervention invade Syria or Lebanon or both?

Most people think that George W. and the neo-conservatives who now have the ascendancy in Washington, DC were the first to invoke the doctrine of unilateral intervention with regard to Iraq in 2003. Actually, it was

President Reagan who, in the twilight of the Cold War, opted for regime change, thus, putting humanitarian intervention above state sovereignty. The Reagan doctrine, formulated against the backdrop of the humiliating incarceration of 59 US diplomats and consular officials in Iran for 444 days, simply posits that traditional bases of the international order (such as under the UN regime) are to be subordinated to the right of intervention against non-democratic governments.

Within that doctrinal framework, Reagan invaded Grenada, Bush I intervened in Noreiga's Panama, and Clinton supported the same concept in his address to US troops preparing to enter Kosovo in late June 1999, if, as he put it: "somebody comes after innocent civilian and tries to kill them." In fact, the UN Security Council whose majority opposed the US war in Iraq in 2003, in effect ratified the Clinton doctrine by endorsing NATO's occupation of Kosovo, even if NATO is not regarded as a regional

organization under the UN Charter. So the present US neo-conservatives are not the initiators.

From the foregoing, we could see that chaos and confusion are thoroughly surrounding the interpretation and application of the Rule of Law; hence globalization of the international legal order is, at present, a forbidding quest.

Our third challenge is the rise of religious fundamentalism and neo-conservatism. There is little doubt that 9/11 was a manifest act of horrendous terrorism, using Islam villainously re-interpreted as a cover. Since that aggression against the US citizens used faith as a sanctioning instrument, it gave fresh impetus to neo-conservatism and to militant evangelism. These new forces seem to feed on one another, to need one another, and together aim at subverting the Rule of Law. The US, in this respect, is my primary target of analysis because of the US evident retreat from the historical US

search for a sane global legal order. It is the US that lobbied for the establishment of the League of Nations, and it was the US that created and hosted the UN.

Our war on terror is now being lost through the creation, under the fictitious banner of good vs. evil, of a war without end, and without friends. It is my conviction that neither the Department for Homeland Security, nor the billions of dollars which we are now pouring in the bottomless pit called Iraq, not to mention the more than 1500 troops lost to the war and insurgency, will stem the ugly tide of homeland insecurity. But alliances, multilateralism, legitimacy through universal and regional organizations, cultural and linguistic sensitivity towards the 1.3 billion Muslims, and above all, respect for international law and conventions, are better security agents for the US than the super-security regime which we have in place today.

Our new attorney-general, Judge Gonzales, stated that the Geneva Conventions were "obsolete" and "quaint." Under the Bush II administration, the US may detain any person, including US citizens identified by the President as "an enemy combatant"; non-citizen detainees may be tried by military commissions, and sentenced to death without recourse to the courts; and that someone committing torture can be exonerated as long as his or her specific intent was to obtain information. It is therefore gratifying that 8 out of 9 of the US Supreme Court Justices spoke in Hamadi vs. Rumsfeld of the right of detainees to access to the judicial process to challenge their detention.

Of course national leaders, like Gonzales, have the capacity to change. But for the time being, we who are in the business of globalizing the Rule of Law, which should really mean all of us, must worry about the nomination of Secretary John Bolton to the position of Permanent Representative of the

US to the UN. About that nomination, David Keene, Chairman of the American Conservative Union said: "He's been our man at the State Department." Bolton is a former protégé of Senator Jesse Helms of North Carolina who once said, "If the UN Secretariat building in New York lost 10 stories, it wouldn't make a bit of difference."

Our fourth challenge confronting the globalization of the Rule of Law is the weakness of international institutions. I have already addressed that element in part when I spoke of the need to overhaul the UN, through a thorough review of the Charter and the democratization of the UN Security Council. Not too many people are aware of the fact that any one of us can be sanctioned as individuals by the UN Security Council through placement on the travel ban list and the freezing of assets without ever being arraigned, charged or even informed. Although I have declined to assist in the defense of detainees in Guantanamo because my role as a defense attorney would

largely be window dressing, I did not hesitate to defend an Israeli citizen who was, without due process, deprived of his liberty to travel and of his assets of more than 15 million US dollars. My case as an international defense lawyer was before the UN Security Council. It was largely based on the absence of due process in an organization that is supposed to stand for the globalization of the Rule of Law. Here is what I presented to the UN Security Council on behalf of my Israeli client whose complex case was referred to me by the Cardozo School of Law:

He was not legally arraigned;

He was not legally charged;

There was no specific law under which he was criminalized;

He was not tried before a competent judicial body;

His accusers became his judges and jury at the same time;

No proper jurisdiction was established;

His false imprisonment in Italy was at least in part the result of his being deprived by the UN machinery of any semblance of due process;

His investigators relied on hearsay evidence, thus no evidence at all;

There was no statute of limitations, thus it is a cruel and inhuman punishment, with no end in sight; and the legal principle that the burden of proof is on the accuser was ignored."

The case proved to be unwinnable because I was not before a court of law. I was before a highly-politicized political body, namely, the Security Council. Nevertheless, through that case, I was able, with the help of UN former colleagues at the UN Secretariat to cause the beginning of a review of these unlawful procedures which use diplomatic immunity to ignore the essential tenets of due process and the rights of the accused.

So in closing, I pose this question: Is there a chance for the globalization of the Rule of Law? Yes. As States, we need to come together,

as we did in the Tsunami disaster, in order to act as a world community. We have to respect sovereignty without sacrificing the positive aspects of humanitarian intervention. We have to replace the collective security doctrine of the UN Charter by the European Union's human security doctrine. This is a mix of military and civilian capabilities, whose goal is not victory but a cessation of violence to provide space for political solutions. We have to reform the UN, weed its corruption and change its sanctions system to direct it towards abusive and corrupt rulers, not towards their hapless citizens who until now have paid the price for being victimized by their dictators. We have to realize that law is territorial, so we should find the joints between the various legal systems and educate the global lawyer accordingly. Multijurisdictional licensing for lawyers is fortunately a growing practice. We have to treat the International Criminal Court (the ICC) as a permanent and viable institution. More than 139 states have either

ratified the Charter of that Court or signed it. The US, so far, has done neither.

The fear of the US that US armed forces personnel may be brought before the ICC on politicized charges is unjustified in view of the changes introduced to the Rome Charter to allay these very fears. Without US participation in the work of the ICC, that institution will remain hopelessly weakened- another blow to the globalization of the Rule of Law.

The US has to regain its stature as a force for international legality. And we have to spread legal education at the mass level. We should also recognize that democracy is not for export. It is an internal product that should be shaped by each culture in accordance with its traditions, morays, and tempo. Most importantly, the US has to reshape the Patriot Act in order to eliminate provisions that run counter our civil liberties as guaranteed by our Bill of Rights. By doing so, the US would be practicing internally what

it preaches externally. America should globally lead, not by force, but by the power of Jeffersonian and Wilsonian precepts in our post- Cold War world.

Two developments in the US over the past 100 hours underline the urgency of the US to return to multilateralism and to respect of international treaties which under our Supreme Court rulings, since the 19th century, are a part of the law of the land. The first is our withdrawal on March 9th from the Optional Protocol of the International Court of Justice (ICJ)- the legal arm of the UN. This withdrawal was prompted by the ICJ's decision last year ordering new hearings for 51 Mexicans on death row in the US, on the grounds that the inmates' cases had been hurt by the failure of local authorities to allow them to contact consular officials. US legal experts regarded such withdrawal from the Optional Protocol of the ICJ as unbecoming. It is, in my view, also dangerous to ourselves in that any US citizen incarcerated by foreign authorities may be denied by that foreign

sovereign, let us say such as Mexico, from contacting their consular officials for legal assistance. The second is the memorandum of Defense Secretary Rumsfeld, divulged on March 10th, regarding the US vision for remaking the US military to be far more engaged in heading off threats prior to hostilities. When one considers the main objectives of that important memorandum, which is intended to enhance the US influence around the world, one cannot see how those objectives can be accomplished without the cooperation of other countries.

The road toward universal respect for the Rule of Law and for the globalization of the Rule of Law is tough. So should our will to overcome these challenges through training, education, legal culture for the masses, exchanges of representatives of all cultures and civilizations through all sectors of civil society. We should accord public diplomacy adequate attention and thereby foster people to people interaction, thus win the

affection of the street in the developing world, not the connivance of the palace. The UN of 1945 is no longer meeting the lofty goals for which it was created 60 years ago. It is terribly burdened by State to State diplomacy, not people to people diplomacy. It is also hobbled by inept and bloated bureaucracy which is tarnished by allegations of massive corruption. Cold War II is now threatening to be upon us, largely because the great enterprise called the US has unfortunately turned its back on important instruments of international law, especially the Geneva Conventions of 1949, customary law of due process towards those detained in connection with the global war on terror, and international treaties and US laws dealing with torture. This is while nuclear proliferation seems to be unstoppable and justice to the poor and to women all over the world is terribly lagging.

In this age of free-lance terror, of free-lance torture, of hegemonic attempts to look upon failed States as failed cultures, we need to universalize

our standards of justice and equity, and renew our faith in a world based on the Rule of Law, and in which the US is a pro-active partner. It is through such faith in a common destiny through positive globalization and multilateralism that we shall be able to defeat the scourges of terrorism, imperial unilateralism, legal revisionism, and interminable civilizational conflicts which will do nothing to advance the lofty cause of global freedom from fear, want, and oppression.