

Opening Statement: “The Rule of Law at the International Level”

David Kennedy¹

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Thank you. I would like to thank the Legal Counsel for framing our discussion with such a helpful review of the historic relationship between the United Nations and the international legal order and the ongoing efforts to strengthen the role of international law in the relations among states. As she reminded us, these long term efforts to strengthen the role of the UN Charter and expand the ambit of international law have been joined in recent years by efforts focused on strengthening the rule of law as practiced by Member States within their own jurisdiction and as respected by the United Nations system itself in its ongoing administrative, operational and other institutional activities. Although all part of a global “Rule of Law,” these diverse projects present quite different challenges.

The United Nations’ long effort to promote international law as a language for diplomacy and global governance has had many successes. The transnational economic, political and cultural space is by now densely legal. The challenge for the United Nations is to move beyond the conventional project of rule making, restating and implementing to a more open engagement with a differentiated policy process. The great challenges facing the world community – poverty, health, environment and more – will not yield to universal rules proclaimed and reinforced by intergovernmental institutions. They will yield, if at all, to complex, differentiated and hybrid regulatory and policy initiatives at many levels. The United Nations could contribute most here by expanding its ability and appetite to participate in a fragmented global policy process, operating as a clearing house for diverse policy ideas and an equalizing force for those with less expertise and opportunity to participate effectively in global policy making.

Efforts to promote the rule of law *within* Member States are generally components of either a human rights or an economic development agenda. On both counts, the danger is imposition of a one-size-fits-all recipe. The relationship between law and economics is notoriously quite poorly understood, ideological slogans and hypotheses substituting for careful and context-specific economic, legal and political analysis. As the human rights canon has expanded and institutionalized itself, moreover, the effort to define justice and human emancipation in one way for the entire world seems ever more tone deaf to the specifics of local struggles and the usefulness of other humanitarian strategies. The direction here must be to open the rule of law conversation to local knowledge, to economic expertise and to responsible political choice.

If in both these areas the United Nations will need to learn to open up to a more heterogenous and politically engaged approach to the “rule of law,” when it comes to the institution’s own operations the way forward is precisely the opposite. In its own operations, the United Nations must be a paragon of good governance. As it has moved from a diplomatic to a more operational role, institutional procedures have lagged far

¹University Professor of Law and David and Mariana Fisher University Professor of International Relations, Brown University, and Manley O. Hudson Visiting Professor of Law, Harvard Law School.

behind. The problem will only become more difficult as the United Nations becomes a participant in global policy management. Without significantly tightening the system's internal procedures, including the opportunity for affected individuals to contest and obtain redress for institutional error or misconduct, it is hard to imagine the United Nations playing an effective role in the complex policy challenges now facing the international community.

Before considering how the United Nations may improve its rule of law activities, you have asked that I comment on the general nature of international law in today's world and on the obstacles to its effective implementation. In that respect, the General Assembly's call for sustained reflection on "the rule of law at the national and international levels" could hardly be more timely.² The global economic crisis has placed the entire international order under stress. The first diplomatic consequences are now becoming visible – participation by new regional powers in global diplomatic forums, renewed attention to the global financial architecture, new clients and challenges for the international financial institutions. Governments are everywhere taking on new roles and shifting their policy focus. The social and political consequences of so dramatic – and uneven -- an erosion of wealth will be with us for a long time.

At such a moment, it is not surprising that many are rethinking our capacity for effective and sustainable global governance. Or that so many share the conviction that our current legal and institutional arrangements are not up to the challenges we face. I am convinced that much of this new thinking about international law reflects how little we actually know about how we are governed – if only because a great deal about the structure of a changing global society itself eludes our grasp.

International law promises to play three quite distinct functions in international society.

First, international law identifies the legitimate actors and their powers – most formally by enumerating the "rights and duties of states." This is partly sociological – simply registering the powerful and their capacities. And of course it is also normative --- offering a measure of the legitimate uses and misuses of power which may be useful in resolving disputes about who can do what.

Second, international law catalogs the policy tools and institutional arrangements at our disposal as we confront global problems. Like the European Union, only more so, the international order by and large governs in the key of law rather than that of budgets or a monopoly of force. The international public purse is small, the ability to harness enforcement to our policy tools meager. But law and institutions we have.

Third, many in the international community look to international law for the expression of universal values, most commonly in the human rights canon.

² GA Resolution A/RED/63/128-10, December 11, 2008. "The Rule of Law at the National and International Levels."

At a time like this, it is entirely appropriate for the international community to ask – for the General Assembly to ask – how we international lawyers are doing in fulfilling these three tasks. I’m afraid I have to say that in the face of a rapidly changing global social, economic and political order, we are barely earning a gentleman’s B. There’s much room for improvement.

Let me take each of these functions in turn, very briefly.

First – identifying the legitimate actors and their powers.

Global governance today is indeed mysterious --- just who *are* the players and what *are* their powers? Simply mapping the levers of influence and public capacity remains an enormous sociological challenge.

For many years it has been said that the state has been opened up, broken apart, replaced by the shifting internal dynamics of national bureaucracies and local powers. We have long known that we are governed by a hodge-podge of national and international norms, made, interpreted, enforced or ignored by all manner of actors. But somehow we forget these things when we turn to international law.

The global administrative law project underway at NYU has brought this starkly into view --- once we think of international public administration as a legal *function* it is clear lots of people do it. Corporations do it, national and local governments do it, private standards bodies do it.

We have only begun to see the importance of *private* law as a global governance system. Property rights and contract obligations travel, confounding public policy in all sorts of ways. Credit default swaps and securitization so complex no regulator can unravel it stand in a long tradition of private arrangements – including slavery – legally made in one place which restrict the public policy alternatives elsewhere, at the local and global level.

At the same time, the informal and clandestine sides of global order are increasingly important --- customary norms, background patterns of private and public expectation, black markets and illegal flows. These too are part of the international “rule of law.”

Once we expand our focus beyond the authority of agents we can see to act within structures we understand, it becomes clear that the sheer density of rules and institutions in the global space is already astonishing. Although globalization has *fragmented* economic and political power, it has not de-legalized them. The globalization of law, the legalization of politics and economics, has brought with it a tremendous dispersion of law. Think of the network of impenetrable obligations which has tied our global financial system in knots. Even war today – asymmetric war, high-tech war, war

stretched across a global battlespace, war of missiles and missives – is an affair of rules and regulations and legal principles.

Mysterious and dispersed governance is not at all the same thing as no governance. It is just that the rules and principles and institutions are not predominantly rooted in the public international legal order – nor do they “add up” into a coherent “international rule of law.” And global governance is likely to remain extremely disorderly, plural and uncertain. For example, strange as it may sound, and despite the heroic codification efforts of the ICRC, there are today more than one laws of armed conflict. Different coalition partners sign up for different rules, regulate their military forces differently. The same principles mean different things to different actors. Norms are interpreted by military leaders, soldiers, civilians, media outlets – and courts – in many authoritative ways.

The uncertainty, pluralism and fragmentation of the international legal order have made international law’s *normative project* -- delimiting the legitimate uses and misuses of power -- far more difficult.

International law is not an external machine for evaluating state behavior, however much we may sometimes still talk about it as if it were. International law is dynamic and social. The world’s elites inhabit a fluid policy process in which they as often make as follow the law. International law provides a vernacular for discussing political issues – not a recipe book for resolving them, and it rarely helps to pretend that it is.

Assertions that international law compels this or that outcome are now so common and so diverse that they are routinely understood as political claims dressed up in legal language. And so they are. International law can be a vernacular for political discussion, but not a substitute for it.

Moreover, the legal materials are quite often elastic enough that parties on all sides of a dispute will believe – in good faith – that theirs is the just and legal path, their adversary a perfidious violator of the most fundamental norms. When this happens, international law can fuel as well as calm conflict.

We international lawyers need to remember some simple truths. In today’s world, people want different things. They disagree about the most fundamental matters. Global governance occurs in a system of global power – it demands allies and creates losers. Talking about “the international community” as the source, origin and guardian of a universal international law obscures this fact. Imagining an “international community” behind the legal order is no less magical thinking than imagining “sovereignty” behind state power – a habit of mind Hans Kelsen compared to imagining spirits in trees.

Once we go down that road, it is easy to imagine the “international community” (and international law) as an unambiguous force for good. And it is striking how hesitant we international lawyers are to admit that things we don’t like – war or poverty or

environmental damage --- may also be legal institutions and structures of governance. But they are.

We think “international environmental law” is all about environmental protection, forgetting that the law also offers comfort to the sovereign or property owner who wants to cut down that forest. Indeed, we rarely pay enough attention to the governance significance of *legal privileges*. Despoiling the rainforest, like refusing to admit a person you fail to acknowledge as a refugee, is not only an economic decision – it is also the exercise of legal privilege.

So on this score – offering normative and sociological maps of the players and powers, what could the United Nations do to strengthen the rule of law?

The crucial point is to bring our collective conception of international law up to date. In doing so, we could improve the maps we have of global governance itself – who are the actors and what are their powers? Surely it is no longer all about the rights and duties of states – any more than it is exclusively a matter of treaties, custom and general principles. We all know that the interstate world of diplomacy is no longer the only, or even the leading, arena through which global power is exercised. The “rights and duties of states” coexist with – and bump up against -- the rights and duties of myriad other actors. But in what way exactly?

Of course there are areas in which the traditional institutions and the conventional rules can still be helpful. For example, we can all think of situations in which national governments hoping to resolve tensions with a neighbor have found common ground in placing the “dispute” before the ICJ. The number of cases before the ICJ is now large and growing – border disputes seem particularly well suited to this kind of reference from politics to adjudication. But at the same time, the ICJ and the Charter principles remain largely irrelevant to the ebb and flow of international political, social and economic life. Cultural and economic globalization, institutional complexity and diversity, the divorce of international economics and politics, the explosion of technical, private and informal arrangements at all levels, have all simply left them behind.

The United Nations ought to be at the forefront of promoting a new understanding of just what the international rule of law is and can be – and what it cannot and ought not to try to be. We must come to understand international law as a flexible and diverse language for articulating problems, claims, concerns, rather than a recipe for justice. As a reminder of the views of others – rather than as a rebuke to their interests. And as a regime of privileges – including, in some case, the privilege to injure one’s neighbors or the common good. Ultimately, the international rule of law is a force articulated in the capillaries of international social, political and economic life more often than in grand summits and intergovernmental meetings. It is a terrain for political engagement rather than a substitute for political choice and decision.

In this light, let me turn to international law’s second function – offering a **toolkit of policy levers and instruments**.

It is only to be expected that if our maps of actors and powers are off, we will have a very anemic toolbox of policy instruments at our disposal. International conferences, multilateral treaties, intergovernmental administrative agencies are surely important as we think about problems from global warming to pandemics or warfare. But so are national and local rules, private arrangements, and the entire informal and customary world. How can they be harnessed?

We know that financial regulations and management in a few financial centers tipped the entire global economy into crisis. Just as we know that threats to global peace and social welfare come as often from private actors and informal flows as from nation states. We must improve the UN's ability to participate in a fragmented global governance process, harnessing its strength as a diplomatic and intergovernmental establishment to a policy process which reaches beyond the UN's classic tools of universal declarations and law making, administration or even humanitarian action or peace keeping.

There are perils in doing so --- the UN is not structured for flexible and diverse engagements. Some of the difficulties were visible in the institution's effort to develop more targeted sanctions over the last years. A large multilateral institution can be a blunt instrument for focusing on individuals, on private transactions involving property and finance or implicating local institutional and cultural forms. More transparent administrative procedures can help. Human rights and due process protections ought to accompany the exercise of global as of national policy authority. The UN itself must epitomize good governance if it is to substitute for local and national authority or serve as a model for the development of local policy capacity. But even here there are limits – the advantages of almost universal jurisdiction and applicability, at least in form, brings with it the disadvantage of loss of nuance and differentiation.

For a global health issue like AIDS or for global warming the right policy response, from a global perspective, will doubtless be a cocktail of quite different legal regimes. A mix of strict patent protection here, looser rules there, open access elsewhere. Combined with private standards, social institutions, transnational activist networks, antitrust arrangements and more.

Complex institutional and normative cocktails are difficult to design and implement – it can seem far easier to come up with a new multilateral treaty or declaration. But the call for a universal normative response will only very rarely be the best policy tool. Here – and I think particularly for the UN system – we face the classic problem that if you've got a hammer, you'll proceed as if every problem could sure use a nail.

What could the United Nations do here? First, promote greater equality in knowledge about how the game is played. Experts and expertise are a terribly misunderstood component of global governance. If for a generation everyone thinks an economy is a national input/output system to be managed, and then suddenly they all

become convinced that an economy is a global market for the allocation of resources to their most productive use through the efficiency of exchange in the shadow of a price system, lots has changed. That is also governance. Moreover, we rarely have a good picture of the blind spots and biases introduced by expertise. Training for global governance is not only a matter of learning the ropes – it also requires critical capacity to resist what seems the global common sense. The United Nations could be helpful in developing codes of conduct for the transnational professions --- including international lawyers and judges --- and in strengthening the critical capacities which make those who govern resistant to the spread of popular but unwise common sense.

Moreover, knowledge about how we are governed is very unevenly spread about the planet. The United Nations could do a great deal to equalize the knowledge and opportunity for those at the margins of the world system to engage in the global policy process. Those in a system's center can often see how the order is ordered in ways inaccessible at the periphery. From the outside, it can seem the powerful know and intend all that they do, while from the inside, it is easy to feel buffeted by one thing after another. We might say much the same thing about those who live in the worlds of public and private power on the global level. Private actors at the center of the global economy understand how to operate within a plural and disaggregated global legal order far more instinctively than do their counterparts in national government service, diplomacy or the world of international public institutions. Through research and training, the United Nations could be a force equalizer on these issues.

The UN may also be able to make a more powerful contribution to a more effective international rule of law as a think tank and clearing house for heterogenous and inventive policy arrangements and “best practice.” I could foresee the UN expanding its independent policy capacity to develop and promote the kind of complex and differentiated policy cocktails necessary to address global problems in an extremely diverse world – integrated programs of action for things like trafficking or global warming or AIDS which highlight opportunities for quite different approaches in a variety of locations.

This is not “coordination” – the right response will often be more diffuse than that. It would mean empowering experts in at all levels to understand, criticize, and engage the ideas and practices by which we are globally governed. All this could require a larger policy staff, and a move away from both diplomacy *and* operations towards the worlds of policy, ideas and expertise. In short, the UN less as norm entrepreneur, global administration or policeman than policy expert, attuned to the potential for diverse and heterogenous policy agendas and interests, strengthening public capacity throughout the system.

And it is here that we come to the challenge of universal values.

We know global governance is as much a work of the spirit – the liberal spirit, the humanitarian spirit, the spirit of human rights or free trade – as it is a matter of rules and institutions. It often seems that the enunciation of a clear universal value can be an

effective global policy tool. Over the last decades, the UN has often sought to act as a normative entrepreneur in just this way.

But it is easy to get carried away by the dream of universal values – and by the pleasure of speaking self-confidently in the name of the universal. Sixty years after the Universal Declaration of Human Rights, the human rights idea, the human rights movement, the human rights establishment, is at once more powerful and less innocent – chastened.

Over the years, we have learned that human rights can also legitimate a regime. It is nothing new to point out how *narrowly* the human rights tradition views human emancipation --- focusing on what governments do to individuals, on participatory rather than economic or distributive issues, on legal, rather than social, religious or other remedies. Problems which are hard to formulate as rights claims for individuals --- collective problems, economic problems, problems of poverty or health --- are easy to overlook. And human rights are all about focus – shining a light on this or that. With focus comes a common *tips of the iceberg* problem – focus on the real problems of refugees can make it more difficult to contest the closure of borders to economic migration.

I have often spoken with human rights advocates who are proud of one or another of the movement’s real achievements – when you ask them “what costs were associated with that success?” they rarely have a worked out response – it is as if human rights improvements had no costs. This kind of magical thinking should raise a red flag. We should be on guard when someone seeks to recruit us to a project that only has up sides. The most significant challenges for the human rights movement in the years ahead will be to understand what it means to be a responsible participant in governance and not just a critic of it.

Moreover, we know that the most revered texts in the human rights canon are vague and open to interpretation. It is unlikely that any articulation of a global normative consensus will escape being perceived by those who disagree --- and people will disagree – as partial, subjective, selective. We should be disturbed when the international human rights movement acts as if it knows what justice means, always and for everyone. Justice is not like that. It must be built by people each time, struggled for, imagined in new ways

What ought the United Nations to do here? Take a step back. Universal rules, rooted in universal values, uniformly implemented may not be the best way forward.

Oscar Schachter famously credited Dag Hammarskjöld with realizing the ubiquity of opposed and conflicting principles in international law – a realization which opened the way for creative diplomacy, for engaging and respecting those with different interests and viewpoints, just as it closed the door on asserting a monopoly on virtue.

There has always been something odd about turning the articulation and development of human rights over to *governments* in the first place. That governments would want to judge one another, to chastise their enemies and praise their friends, in a widely shared ethical vocabulary is not surprising. What is surprising is that the human rights community has been so enthusiastic about their taking up the task. The limits of a diplomatic ethics parallel the limits of any established church in a plural society: not good for the government, not good for the church.

There are, moreover, real dangers to universal normative entrepreneurialism. Expressing the ethical conviction of the international community can suggest that there is, in fact, an “international community” ready to stand behind one’s pronouncements. It can lead people to intervene, multilaterally or otherwise, where there is no stamina, in fact, to follow through.

It can suggest that those who disagree with this elite – and many do – are somehow outside the circuit of “civilization.” When this happens, international law can seem the handmaiden of the status quo in a rapidly changing world, rather than midwife of a more just and peaceful order. These are the wages of speaking universally in a plural world.

No matter how you slice it, the benefits of even the best global governance – even the most universal of values -- will be unevenly distributed. We need to be conscious not only about who will win and lose, but about whom we expect to carry the program to victory.

In the early days, for the United Nations it was to be the United States, founder, host and leading source of funds, along with the other Allied Powers granted veto status in the Security Council. As the G8 becomes the G20 – or the G2 – this seems less viable as a strategy for building a global rule of law. New partners, new configurations and new leadership will be necessary to ensure that an invigorated international Rule of Law, given its origins, its spokesmen, its preoccupations – will not become a vocabulary of the center against the periphery, a vehicle for, rather than an antidote to one or another empire.

I began by noting the timeliness of the General Assembly’s focus on the international rule of law. A global economic crisis can focus the mind on problems long left to fester. My final thought is a cautionary one.

In the end, global governance and the international rule of law are about more than management and problem solving. They concern the structure and ends of our global political life. As a result, in building the global legal order, we must grasp the depth of the injustice of the world today and the urgency of change.

We have built fault-lines into the political economy of the world. At the top and the bottom of the economy, we have deracinated ourselves, moving ever more often across ever greater distances. In relative terms, the middle classes are the ones who

have become locked to their territory. Increasingly, the relative mobility of economics and territorial rigidity of politics have rendered each unstable as political and economic leadership have drifted apart. The result is a mismatch between a national politics on the one hand, and a global economy and society on the other.

At the same time, the rumbling fault line of an accelerating social and economic dualism haunts our world. We face a revolution of rising frustrations among the hundreds of millions of individuals who can see in, but for whom there seems no route through the screen except through rebellion and spectacle. Globalization makes people nervous. What government has not tried to stoke such fears as its grasp of economic and cultural authority has ebbed?

Revitalizing the international rule of law is to remake the forms and channels of global political life. My own hope is that we carry the revolutionary force of social justice and the democratic promise – of individual rights, of economic self-sufficiency, of citizenship, of community empowerment, and participation in the decisions that affect one's life --- to the sites of global and transnational authority, however local they may be.

There are lots of institutional ideas lying around --- utopian heuristics for a politics remade. Perhaps the new politics will be about *experimentation and institutional diversity*, protected by a re-activated sovereignty in the middle powers of the South. In such a vision, we might strengthen and defend small pockets of public sovereignty in cities and churches and corporations and nations which have the capacity to experiment, as shields for the weak, guarantors of policy diversity and arenas for democratic political life. Perhaps the new politics will be about *mobility*, involving a grand bargain linking free trade in goods, free movement of capital, with free movement of persons. A new global politics may also be about building a *transnational political will*, through which sovereignty would come to be seen as an open-ended promise of inclusion. If the new politics is to be about *empowerment*, we might imagine citizens not only informed, consulted, their polling data serving as base line for expert management, but actually *deciding*.

It took a long time to invent a national politics and to organize the world in nation states. Building a national public politics across the planet had a strong emancipatory dimension – slaves, women, workers, peasants, colonial dominions obtained citizenship in relationship to the new institutional machinery of a national politics. Building a new politics for a global society and a global economy will be equally difficult. Let us hope it does not take as long. And does not require as much violence to be born.

The challenge for the United Nations and for the international legal profession is get in front of that process, rather than waiting to mop up the mess.