Keynote Address to the 20th Annual Fulbright Symposium – International Law in a Time of Change

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GOLDEN GATE UNIVERSITY SCHOOL OF LAW

PROFESSOR MICHAEL ALSUEL NTUMY

I. INTRODUCTION

Distinguished Fulbright Scholars, International Lawyers, Diplomats, Students of International Law, and Ladies and Gentlemen, I bring you greetings and tidings of hope from the motherland. I am deeply honored to give the Keynote Address at this 20th Annual Fulbright Symposium of Golden Gate University School of Law. I would like to start by extending my sincere congratulations to the President and staff of Golden Gate University, and, in particular, to the organizers of this symposium on its successful convocation.

Ladies and Gentlemen, the theme of this symposium is International Law in a Time of Change. Considering the events that have engulfed international law in recent times, it is hard to imagine a more important or timely topic than this one. Whether one focuses on the rules, principles and concepts, or the institutions of international law, there is

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no escape from the fact that these things all bear the indelible imprint of change. This fitting theme has undoubtedly been influenced, I believe, by the “Change” campaign of President Barrack Obama, the “new Prince of Change.” For this reason, I am inclined to think that it is no coincidence that the recently concluded meeting of the American Society of International Law in Washington, DC was also based upon the same theme.

In line with the theme of change, the goal of today’s symposium is to survey the international law scene in a number of areas and to trace and identify the impact of the major developments in key areas of international law, as these developments continue to be shaped within the framework of changing global realities. The substantive issues arising from these developments range from armed conflict to climate change and from the financial crisis to terrorism. Hence, I hope that the delegates to this symposium will direct their attention to issues such as the following:

a) The debate about the rise and fall of international law after 9/11 and preventive action;

b) Anticipatory self-defense as aggression under cover or lawful use of force;

c) International criminal tribunals establishing a new culture in international relations;

d) Legal and political issues with respect to the International Criminal Court;

e) Terrorism as an international crime;

f) The link between the system of individual accountability and the maintenance of international peace and security;

g) Questions of legality and legitimacy of operations;

h) The emerging debate regarding emerging subjects of international law.

II. INTERNATIONAL LAW AND CHANGE

Ladies and Gentlemen, the world is faced today with critical global and supra-national problems which transcend national boundaries and threaten the very survival of our planet. These problems are
characterized by structural and systemic changes that have resulted in diverse interrelated challenges to international law. Prominent among the challenges are the proliferation of weapons of mass destruction, armed conflicts, climate change, financial crisis, terrorism, globalization, large-scale human rights violations, poverty, disease, and terrorism. These challenges have severely affected the global prosperity of the Western nations while worsening the conditions of developing countries where the problems of disease, poverty, and instability have generated incessant conflict.

International law has responded to these challenges in a variety of ways. At the top of the list, we can identify the expansion of the jurisdictional reach of international law with the establishment of the International Criminal Court (ICC) 2002, which has been rightly hailed as a milestone in international human rights law and enforcement. In addition, human rights abuses and terrorism are now regarded as threats to international peace and security, leading to new ideas about intervention and the use of force. Perhaps the most far reaching of the responses is the emergence of legal norms that address the role and needs of the individual, an area of international concern and legislation that has seen tremendous growth since the end of the Cold War. The changing perceptions about the variety of roles and the range of needs of individuals have led to the expansion of the scope of international law to protect and prosecute individuals rather than states. Consequently, the action that states may take, under a responsibility to protect and prosecute individuals to uphold the new norms of intervention and preemption has also changed the way we consider restrictions on the right of states to resort to force.

The adaptation of law to change and new situations, on one hand, shows the will of states to move in the direction of promoting institutional solutions and applying them to the new problems and proves the dynamic nature of legal rules. On the other hand, the law seems to be used sometimes as an alibi for the pursuit of strategic objectives and political interests without any legitimate basis or justification. And, at the same time, the international community seems to remain indifferent to a whole array of potential challenges to international peace and security that strike at the very foundations of international law.

III. EMERGING SUBJECTS OF INTERNATIONAL LAW

Ladies and Gentlemen, permit me to address you on some of the approaches of international law to emerging subjects that aptly illustrate the dynamics of law and the changing perceptions of international law in response to change. I take as the point of departure the historic purposes
of international law. And, attaching great importance to ideational factors without going off the constructivist deep end, I point to the United States’ shift in international opinions that occurred after the election of President Obama as being indicative of the response of international law to change. It is indeed remarkable that the Obama administration has already signaled a lead in responding to change by its dynamic approach towards international problem-solving.

For a long time, international law, or the law of nations (as it was then known), was understood as the panacea for resolving inter-state disputes. Those who viewed international law through the lens of criticism could quote but a few instances of its absolute failure. However, even the most persistent of its critic could not criticize international law endlessly because there were no Iraqs, Afghanistans, 9/11’s or 7/7’s, for that matter. Today, the same is no longer true. A layman or a lawyer alike would rather paint a bleak picture of international law based upon the realities of ongoing armed conflicts, climate change, financial crisis, terrorism, globalization, etc. to which international law has failed to put an end. Ladies and Gentlemen, this is the challenge that international law faces in a time of change.

Historically, international law has served two main purposes. First, it has provided a platform for like-minded states (the traditional subjects of international law) to resolve their disputes through mutual debate. Second, it has narrowed down exceptions regarding the use of force. Unfortunately, these very purposes continue to be cast in serious doubt by recent developments at the international level. States are increasingly refusing to enter into negotiations with emerging subjects of international law on the pretext that the emerging subjects are opposed to civilization or that they do not share their vision of “like-mindedness.” Consequently, a disparity or grey area now exists between states and emerging subjects and seems to be growing by the day.

In their recent publication entitled *The Dynamics of International Law*, Paul Diehl and Charlotte Ku have shown that like-mindedness has become a comforting triggering factor for states to agree on a dispute resolution framework and nothing more. In advancing the positivist view of international law, which holds that only states could be subjects of international law, many states have relied upon the doctrine of inalienable state sovereignty - the jealously guarded claim by a state over its territory and existence against recognition of emerging subjects. According to the states who are opposed to emerging subjects, sovereignty is, by its very nature, opposed to claims by insurgents or terrorists. Relying on this same positivist legal framework, state
sovereignty has provided the justification for insurgencies, rebellions and terrorist acts to be controlled by states with iron fists.

Parenthetically, it should be pointed out that, on occasion, the veil of sovereignty has been pierced by international law in deference to the collective will of the international community. For instance, the United Nations Security Council authorized collective action against Iraq in 1990 in which the sovereignty of Iraq was thereby negotiated by the collective will of the international community. It is for this reason that Doris König et.al. have argued that sovereignty does not and can never constitute the biggest threat to international law. In their publication entitled *International Law Today: New Challenges and the Need for Reform*, they contend that the gravest threats to contemporary international law lie in the following:

a) The non-recognition that the context of like-mindedness as originally envisaged is in a gradual state of transition;

b) That emerging subjects of international law are now a reality of the times in which we live;

c) The belief of states and emerging subjects that power is the sole constitution of international law.

Nathan Huber has defined like-mindedness in his book, *The Challenges of Expanding International Law*, as the most essential precept of the earliest foundations of international law. According to him, like-mindedness is conceptually grounded in the belief that “peace and mutual co-existence” is the right of every state in the world. Based upon this precept, states elevate themselves to a horizontal level of the status of equals in line with the understanding that equals cannot be treated unequally. At the same time, states identify themselves as equals in terms of their legal rights and obligations towards one another even if the political and economic influence that they hold individually would change.

In 1945, the United Nations established like-mindedness as an integral part of traditional international law with the stated purpose of reaffirming international rule of law, developing friendly relations among states, and achieving international cooperation in resolving disputes between states. Today, however, in a time of change, international law is viewed differently by various groups. Groups who see the glass as half empty quote instances of the United Nations failing to provide a solution to the Israel-Palestine dispute, failing to put an end to the Cold War, and failing
to stop the invasion of Iraq. Those who see the glass as half-full paint a picture in which the world without the United Nations would be held hostage to chaos, with war as the rule and peace the exception.

Ladies and Gentlemen, it is my humble submission that both these views are tenable but fail to explain the dynamics of law and the inherent capacity of international law to respond to change. The like-mindedness, which was a founding feature of international law and the United Nations, has apparently failed to comprehend the reality posed by the emerging subjects of international law. In the past few years, notably after the tragic events of September 11th, international law has been put on trial. The established principles of international law have been cast into doubt, leading to the tenuous argument that international law does not apply to emerging subjects. It is my considered view that this argument is based upon a fallacy because when the law and material reality face an imminent collision it is the law that must yield. The simple but profound reason why the law must yield is that while law is a concept that can change in response to social and economic conditions, insurgencies and terrorism are material reality that threatens the survival of the planet. Therefore, concerted international efforts need to be made to find solutions to accommodate emerging subjects through dialogue and debate, taking into account the political milieu through which the emerging actors of international law have to pass in order to mature at the international level.

Ladies and Gentlemen, it is my considered view that disputes between states and emerging subjects of international law must be addressed through a bi-lateral framework in which they are treated as the new equals in an evolved paradigm of like-mindedness. International law needs to avoid the allegation that its constitution is grounded in power. Rather a sense of shared responsibility and ownership over international law is crucial to international dispute resolution. It is one thing to despise terrorist acts and quite another to rule out negotiations or dialogue with terrorists. The first is a corollary of justice and humanity. The second is a rejection of common sense and wisdom. The case for allowing emerging subjects of international law to benefit from international rights and guarantees is based on the rationale that such allowance would inculcate in them a sense of responsibility toward international law.

As cautioned by U.N. General Assembly, 59th Session in its Report of the High-Level Panel on Threats, Challenges and Change, contemporary international law has taken centuries to evolve but could easily fall victim to power if reason does not guide its journey. It is, therefore, important for international lawyers to understand change and grasp the
full ramifications of change that are introduced by emerging subjects of international law. In my view, this is absolutely necessary for the development of international law. Only then would nations, in their responses to the challenges posed by emerging subjects that correspond with and conform to reality, avoid misconstruing the purposes of international law. Whatever fear there might be of risking sympathy towards emerging subjects of international law must, therefore, be discarded altogether in favor of positive engagement in an environment of dialogue.

IV. CONCLUDING REMARKS

Ladies and Gentlemen, times are changing and international law is facing very challenging times indeed. For international law to respond adequately in this time of change, I submit that we need an entirely new way of thinking about global governance, institutional change, the mode of lawmaking with regard to international legal rules and structures, and the actors who are engaging in international and transnational problems. And we need to think about new substantive rules that will address the evolving and complex problems facing international law.

It is my belief that this gathering of distinguished Fulbright scholars and international lawyers is uniquely positioned to respond to the full range of legal issues raised by change and to present a broad range of perspectives on the future of international law. In accordance with the theme of the symposium, I believe that it is appropriate for the distinguished lawyers gathered here to consider the full impact of change on the following issues:

- The nature of international lawmaking. In particular, whether international law can change the world through the present enforcement vehicles available to it;
- How, if at all, can the model of sovereign and equal nation states consenting to law encompass the increasing roles of sub-national, non-governmental, and corporate actors and the networks interconnecting them?
- In what ways should treaties and customary international law include new actors and approaches? And, which existing and new fora should be available to them?
- What new international institutions or institutional reforms do contemporary challenges demand?
How will the embrace of new institutions and actors or the failure to embrace them affect the legitimacy of international law?

What dangers or challenges to the international legal system do new approaches to international lawmaking present?

Above all, what new substantive norms are required, and how should they be achieved?

Thank you all, and God bless you. I wish all the delegates to this symposium and the group of international law experts the best of luck in their deliberations.

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