

## UNA - USA Chicago Past President Lydia Lazar Spoke in Istanbul in July, 2010 at the International Law Students Association conference on Human Rights and the United Nations



### **Text of Lydia's Speech on July 10, 2010**

The organizers of this exciting conference asked me to address you today about the prospects of solving global problems through the mechanism of the United Nations. In my remarks today I hope I can inspire you to deepen your advocacy efforts and action on human rights concerns in the days and years ahead.

We can think about the entire United Nations system as a fleet of vehicles that are traveling in the same direction, more or less in caravan, pulling together, and trying to lift humanity out of the quagmires of poverty, disease, discrimination and desperation that have dragged our communities down. Each of these vehicles – the UN agencies – is staffed by dedicated men and women who are doing their best to implement the agency mission. Each agency is supported more or less by the member states - as we all know, some states actively participate in the UN system and others are more passive supporters. There are countries that support the UN with words, countries that support the UN with money, and countries which support the UN with action such as sending peacekeeping troops or supplying critically needed logistical support after natural disasters.

These UN vehicles, these agencies, represent a new force in human affairs, and while not every vehicle moves forward at the same pace, and though nations may concentrate their efforts on different issues, progress is happening. It can seem like some societies are keeping their feet on the brake pedals when it comes to such critical issues as ensuring universal female education and political empowerment, preventing nuclear proliferation, or combating global warming, but overall, there is no doubt that progress is

being made in many domains. I am sure that you were as thrilled as I was to hear that the newest vehicle to be created – the UN Entity for Gender Equality and the Empowerment of Women – to be called UN Women – was formally announced this week. This new agency represents real progress in elevating the very critical human rights concerns of women and girls to the global level and will help millions and millions of our sisters, mothers and daughters as they fight for their equal rights to health, education and work opportunities.

As we know all too well, today's global governance system -such as it is - is premised on nation state sovereignty. The United Nations that we have today is the child of the United Nations that was possible after the Second World War ended: its structural limitations and the aspirational quality of its rhetoric reflect the original geostrategic balance of power, as well as the tension between what the founders dreamed of and what they could get the nation states to agree to.

Of course, the United Nations system is not truly a global governance regime, since at the end of the day, implementation of any initiative, advancement of any idea or cause - always remains within the domain – and the control - of the member nation states. And no matter how much we may describe ourselves as citizens of the world, we remain the nationals of one or another nation in order to have the rights of citizens in at least one country.

So we know, personally, that we must each have some official connection to some nation, yet for more and more people today, citizenship in one society, while necessary, is simply not sufficient. Many see themselves building careers and lives that crisscross borders, some are not comfortable with the policies and actions of the nations they are born into, and some believe that only a global governance regime can advance the causes of peace, of equality, and of prosperity for all. Each of us finds our own reason for supporting efforts to strengthen the UN system, and conferences like this one help to introduce new generations of students to the accomplishments – and the many challenges still facing – the UN system we have inherited.

This problem of nation state vs international allegiance is often cited as the reason we cannot have more effective global governance. Recently, the Council on Foreign Relations and World Public Opinion

created a comprehensive digest of data from a wide range of international polls, and when they analyzed the data relating to how people around the world feel about the balance of power between national and international institutions, the results were striking.

For example, many leaders cite their peoples' nationalism as the source of their resistance to international law – they say that their people will not permit them to give up any of their state's sovereignty so that international institutions will have the necessary power to resolve international problems. However, international polls show a different picture: most people around the world support an international order based on international law, and majorities in most countries believe that international laws do create normative obligations for nations to follow.

As reported by Dr. Steve Kull, the director of World Public Opinion.org, “majorities in most countries favor having a much stronger United Nations and favor giving it new powers.” That is, public opinion polls show that most people reject the view that nations should not feel obliged to abide by international law when doing so is at odds with their perceived national interest.

With respect to the UN and human rights, the polls show that robust majorities in many countries approve of UN intervention in the internal affairs of states to investigate human rights abuses, and equally large majorities say that the UN has a responsibility to protect people, by force if necessary, from severe human rights abuses by their own governments. As you know, this idea of R2P – responsibility to protect – is one of the most exciting developments of the past decade in terms of the UN and human rights.

The United Nations system has, in the decades since its founding, been the home for a wondrous outpouring of human aspiration that has taken the form of declarations, treaties, commissions, councils and numerous advisory bodies issuing innumerable white papers and reports. Generations of statesmen and, increasingly, stateswomen, have risen in the halls and meeting rooms of the UN to declare humanity's collective disgust and contempt, as well as our common hopes and dreams.

The protection of human rights is advanced through a variety of mechanisms in the UN system. There is a wide range of legal instruments and agencies and task forces and commissions. These include the General Assembly Third Committee and the UN Human Rights Council, as well as the Office of the High

Commissioner for Human Rights and the treaty bodies that monitor implementation of the core international human rights treaties.

Not all member states have ratified all the human rights treaties, and in addition to the treaties there are many different legal instruments, such as declarations, principles, guidelines, standard rules and recommendations that do not have binding legal effect yet have moral force and may guide state practice. Ratified or not, these human rights treaties and the many other legal instruments that have been debated and discussed help shape the context for state behavior – and for global assessment of that behavior.

But human rights abuses, as I am sure this audience is aware, are not committed by states in the abstract but rather are perpetrated by specific individuals, and since the founding of the UN there have been many meaningful developments in both treaty-based and customary international law that now enable the prosecution of individuals for atrocities they may have committed or abetted.

For example, since the 1998 decision by the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia (the ICTY) in the *Tadic* case, it has been widely accepted that the mode of international criminal responsibility known as Joint Criminal Enterprise liability is part of international customary law. In dozens of cases before the ICTY, the International Criminal Tribunal for Rwanda (the ICTR), the Special Court for Sierra Leone (SCSL), and the Special Panels for the Trial of Serious Crimes in East Timor, courts have recognized and applied JCE liability over the past ten years, including the extended form of JCE III which is known in Anglo-American jurisprudence as the felony murder rule.

Under JCE III, a person who willingly participates in a criminal enterprise can be held criminally responsible for the reasonably foreseeable acts of other members of the criminal enterprise even if those acts were not part of the original plan.

Recently, the Extraordinary Chambers in the Courts of Cambodia (the ECCC) faced the question of whether it could hold the surviving leaders of the Khmer Rouge liable under JCE and JCE III for atrocities which took place during 1975-1979 –well before the ICTY's *Tadic* decision.

Scholars use the concept of a “Grotian moment” to encompass the idea that customary international

law can emerge with unusual rapidity and acceptance, and according to a recent article by Professor Michael Scharf, both JCE and the extended form known as JCE III have in fact been part of customary international law since the post- WWII Nuremberg trials. As a Special Assistant to the International Prosecutor of the Cambodian Genocide Tribunal, Professor Scharf helped prepare the brief in reply to the Defense Motion to Exclude JCE and JCE III, and he argued convincingly that the Nuremberg Tribunal precedent, combined with the UN's universal and unqualified endorsement of the Nuremberg Principles in 1946, represented a paradigm-shifting moment in the development of customary international law. The original Cambodian tribunal ruled in favor of the Prosecution, and though the ECCC Appeals Chamber reversed, the arguments for JCE at the international level are profound and we can be sure the JCE issue will be debated and pursued.

*[note: after this speech was delivered, the ECCC ruled in the case of Kaing Guek Eav (Duch) finding him guilty and sentencing him to 19 years in prison, and on Sept 16, 2010 the court formally indicted another four surviving leaders on charges of genocide, war crimes, crimes against humanity and murder.]*

Notwithstanding these kinds of legal successes, when we look around the world it is easy to be cynical about progress toward the protection and advancement of human rights – after all, despite all the fine treaties and declarations, millions of people live today in conditions of utter desperation without access to clean water, healthy food or decent living conditions. Many others live under regimes where they are not free to express themselves, nor free to leave, and there are many deadly conflicts – such as in Congo – where human rights abuses, including the use of rape as a weapon- are widespread. From the perspective of too many on our planet, the realization of their basic human rights is an impossible dream.

Indeed, according to a recent article in Foreign Policy, there are currently at least 23 dictators in power who have control over the lives of more than 1.9 billion people...and when we take a look at the Failed States Index published by Foreign Policy and the Fund for Peace, there is a sad convergence between the metrics of state decay and the lack of democratically accountable government. The most troubled nations among the United Nations show similar vulnerabilities and similar devastating challenges “from refugee flows to economic implosion, human rights violations to security threats.”

Citizens of these troubled states face lowered life expectancies and higher child mortality risks while at the same time they are falling further and further behind the rest of the world in terms of mobile phone

access and internet connectivity – the newly critical foundations for economic development.

We all know that being cynical about the United Nations is easy, but there are many areas where the UN gets it right, especially when it comes to promoting and protecting human rights. In particular, we should applaud and strongly support UN efforts to promote democracy around the globe through capacity building. As is well known, only about 60% of the member states are democracies, and even some of the countries in that group are only nominally democratic. When the UN sends technical support in the form of electoral observers, it supports the conduct of free and fair elections which should lead to the true expression of people's sovereignty and, hopefully, the creation of legitimate national institutions, the establishment of an independent judiciary and the evolution of a strong civil society embedded in a democratic regime – all the building blocks of the rule of law.

The United Nations, and particularly the work of the international judiciary, has helped establish new norms of international law, and these normative developments have in turn created a new context for judging the behavior of the nation states. Without effective enforcement it can be argued that the new legal norms remain aspirations, but the fact remains that there are now different expectations for state behavior and over time, as discussed previously, these norms and expectations can take the force of international customary law and serve to anchor prosecutions of individuals for atrocities committed under color of state authority.

Despite the progress in developing international norms to advance the protection of human rights, nation state sovereignty still presents the global community with a paradoxical dilemma: on the one hand, we cannot seem to get more effective international institutions because these would diminish state sovereignty, and a weak and ineffective UN cannot help when instability and violence lead to devastating impacts on people's lives – impacts that member states ignore with impunity when they are not actually perpetrating the devastation themselves.

On the other hand, we cannot expect the UN to guarantee the protection of human rights on the ground around the world – we must rely on local governments – that is, nation states themselves. So what can you as individuals – and particularly as jurists - do to promote human rights around the world? First, and

most importantly, be empowered advocates in your own communities and dedicate yourselves to help build and support strong, democratically accountable national institutions wherever you can. We cannot be complacent about the democratic space available in the world – since September 11, 2001 at least 65 countries have passed laws cutting the rights of NGOs and curtailing their activities. Fight injustice by working within your own communities to ensure fair and equitable treatment under law as well as equality of opportunity guaranteed by the law. Second, look for opportunities to collaborate with like minded individuals at home and abroad. Be inspired change agents and role models for others who may need inspiration to become effective advocates in their own right.

Before I conclude I just want to mention the case of Peter Erlinder, an American law professor who was recently imprisoned in Rwanda over accusations relating to negating the Rwandan genocide. Professor Erlinder has been an outspoken critic of the Kagame regime, and he has been frequently criticized by the Rwandan government. His name recently appeared on a publicized list of foreigners who the Rwandan government allegedly wants silenced for their views. Peter Erlinder traveled to Rwanda to act as defense counsel for presidential candidate Victoire Ingabire related to charges brought against her by the Rwandan government. Mrs. Ingabire, a political opponent of current President Kagame, was jailed and is currently under house arrest for expressing her political views, which are in opposition to official government policies. Professor Erlinder is a defense lawyer and a leader of the association of defense attorneys at the International Criminal Tribunal for Rwanda in Arusha, Tanzania. Professor Erlinder was reportedly arrested on charges of "genocide negationism," which means that he disagrees with the current Rwandan regime's official version of the 1994 genocide. This law is frequently applied to silence critics of the regime. In the past it has been applied to Mrs. Ingabire, to Human Rights Watch investigators, and even to the BBC. Many people spoke up in the US and around the world in response to the arrest of Professor Erlinder, and fortunately he was released from prison and permitted to leave Rwanda. I mention his case as an example of a committed advocate whose work helps to establish that the rule of law must apply especially for those who oppose the policies of their government. The right to a fair trial, including the right to legal representation in such proceedings, is essential to the protection of human rights in all societies, and your training as legal advocates puts you at the forefront of that effort.

Indeed, I look out at you today and I know that, despite the challenges, the future is bright for the

protection of human rights. I know this because the past twenty years have seen a transformation of the international legal landscape as a direct result of the transformation of the technological landscape. Just twenty years ago it was nearly impossible to get any information about international legal developments. It was hard to find out which treaties had been signed and ratified by which countries, and it was hard to get definitive treaty texts, reports and white papers – all the information that an advocate needs to make legal arguments was hard to come by.

All that has changed, and you literally can be as informed and as empowered as you want to be. You can read UN reports and white papers the day they are published. You can find cases from courts around the world and draft effective briefs using a wide range of international precedent, and you can do all this in collaboration with colleagues half way around the world.

The technological revolution that you are living through empowers you to demand accountability for human rights abuses. You can develop – working alone but even more powerfully in collaboration with others - the intellectual capital needed to support the reinforcement of the principles of the rule of law wherever it is undermined. You can and you will lead the world as technologically empowered, passionate idealists who are skeptical of authorities and who know how to collect and use evidence to make sound legal arguments in support of the rights of the weak and powerless. I salute you and I thank you for the opportunity to speak before you today.