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## International Rule of Law Symposium: Introductory Essay

David R. Andrews

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# International Rule of Law Symposium: Introductory Essay

By  
David R. Andrews\*

We live in a world plagued by serious gaps in the rule of law – the legal doctrines and institutions that help ensure basic human security and the just and efficient functioning of society. In a globalized world, we cannot afford to and indeed we may not be able to isolate ourselves from the effects of rule of law deficits abroad. Because so much of the world economy is intertwined – a significant and growing percentage of the GDP of the U.S. is generated overseas – the lack of the rule of law, even in faraway countries, can strip the world's economies of the predictability and stability they need to thrive. Furthermore, in purely human terms, gaps in the rule of law cause terrible suffering. In a shrinking, globalized world this poses tangible risks to our prosperity and security at home. The need for the rule of law is clear.

There is an emerging consensus among foreign policy and development experts that the rule of law should be a greater priority and play a more important role in our efforts to address today's global problems – from health pandemics to conflict, poverty to terrorism. Already, the rule of law figures prominently in the international policy scene as a central feature of the World Bank's investment strategies, the UN's Peace Building Commission, and President Bush's "Freedom Agenda." In its 2005 Summit Resolution, the UN General Assembly declared that "good governance and the rule of law at the national and international levels are essential for sustained economic growth, sustainable development and the eradication of poverty and hunger."<sup>1</sup> Multinational corporations joining the UN's Global Compact embrace a rule of law program to advance human rights, uphold labor standards, safeguard the

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1. A/Res/60/1, para 11.

environment, and combat corruption.<sup>2</sup> The rule of law is a cause whose time has come.

Yet, beneath the grand rhetorical level, there remain important unanswered questions about the rule of law: what exactly it means, why it matters, and what different actors should be doing to advance it. In November 2005, the American Bar Association (“ABA”) convened its first International Rule of Law Symposium to begin answering those questions and to build a broader and more effective network of stakeholders who can work together to strengthen the rule of law throughout the world.

It was my privilege to serve on the Symposium Steering Committee and to moderate a panel at the Symposium. I have long believed that the innumerable constraints imposed on a society governed by the rule of law are ultimately the source of its liberation—liberation that unleashes the creative and entrepreneurial spirit and allows for the orderly pursuit of the common good. Therefore, during most of my professional career, I have been active in a number of non-governmental organizations that in one way or another are committed to promoting the rule of law, such as the Lawyers Committee for Civil Rights Under Law, The Asia Foundation, and the ABA’s Central European and Eurasian Law Initiative (CEELI).

In addition to my focus on the rule of law from the non-governmental angle, my government service has significantly influenced my approach to fostering the rule of law globally. It was at the State Department that I was reminded that while the rule of law is central to both democracy and a market economy, it requires more than technical or mechanical reforms of laws or legal institutions. The financial crisis in Asia in 1997, which was considered a major national security matter, is a clear example of this point. Many, if not most, of the countries known as the Asian “Tigers” were engaged in rule of law reforms of one sort or another. However, ingrown circles of bankers, businessmen and politicians brought the economies of their countries to their knees by subverting the reforms, thereby precipitating a downturn in the world economy. In this instance, as elsewhere in the world, the primary obstacle to reforms and the advancement of the rule of law was not technical or financial, but rather political and human.

Likewise, my subsequent tenure as General Counsel of PepsiCo, which operates in more than 200 countries, only confirmed what I had learned during my government service – that political will and a changed mindset among the governed is at least as important to advancing the rule of law as technical prowess. For example, numerous countries in Asia, the former Soviet Union, Eastern Europe, Latin America, sub-Saharan Africa, and the Middle East

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2. See UN Global Compact, The Ten Principles,  
<http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/index.html>.

continue to engage in a variety of law reform initiatives, such as rewriting constitutions, laws and regulations. That is the easy part. Far-reaching institutional reforms and the creation of a “rule of law culture,” especially in countries emerging from an era of repressive rule, is another matter altogether. With few if any exceptions, such change is proving to be a multi-generational undertaking.

While I generally hold to the notion that the rule of law and economic and democratic development are closely if not inextricably linked, we must recognize and puzzle through the exceptions to this rule, namely China and to a lesser degree, Russia. What can we learn from the China experience, where the absence of the rule of law seems not to have stymied economic growth, at least in the short term? Will the absence of the rule of law ultimately undermine the long term sustainability of this economic titan? The existence of these and many other unanswered questions merely points to the fact that the study and promotion of the rule of law must be a multi-disciplinary undertaking, involving social scientists, economists, educators, and others. It cannot be the sole province of lawyers. The organizers of the International Rule of Law Symposium, the ABA, firmly understand this. It was their vision to bring together leaders from a variety of disciplines to discuss ways to better promote the rule of law. When I was asked to serve on the Symposium Steering Committee, I eagerly accepted the challenge of building a broader-based movement to promote the rule of law globally.

As readers of this special edition will see, the International Rule of Law Symposium highlighted the importance of the rule of law in addressing today’s global challenges. The keynote speeches published here reflect a commitment at the highest levels of government, in the U.S. and abroad, to advancing the rule of law. Additional panel discussions summarized by Symposium Rapporteur Professor Katharina Pistor grappled with the subject in greater detail. Symposium panelists and attendees from over forty countries – representing business, advocacy groups, government, non-governmental organizations, academia, etc. – shared their insights about the nexus between the rule of law and poverty, conflict, terrorism, corruption, public health, and economic opportunity.

We heard from The Boeing Corporation’s Thomas Pickering that large multinational corporations consider the rule of law a significant factor in investment decisions. Governance issues present an especially difficult challenge for small and medium-sized companies that lack the clout to bargain for the investment stability they need when dealing with governments. Juan Mendez of the International Center for Transitional Justice underscored the importance of post-conflict accountability and the rule of law to long-term peace building and the dangers of foregoing accountability as a condition of peace. Geeta Gau Gupta of the World Bank described how gaps in the rule of law that particularly affect women have devastating effects on health and economic well-

being. The discussions of the ways in which the rule of law shapes the world in which we live were wide-ranging and rich.

We also heard that efforts to address these problems through rule of law assistance programs can founder if inadequately resourced or poorly designed. In some cases, rule of law assistance efforts have missed the mark because they were not adequately coordinated with other international donors, or failed to take into consideration local conditions, buy-in and political will for reform. Efforts by private actors to promote the rule of law have also faced challenges: in some circumstances, multilateral corporations have felt constrained to press an aggressive rule of law agenda for fear that it might alienate the government in the countries in which they invest. In her article appearing in this special Symposium Edition, Professor Pistor reports on these and other challenges, and the sometimes conflicting views on how best to meet them.

The Symposium did not purport to resolve all of these differences nor to yield an agreed upon blueprint for action. Its chief contribution was to foster a high level conversation among diverse constituencies on the questions I posed at the beginning of this article, and to develop a basis for on-going dialogue and concrete problem solving in this critical field. The Symposium was a clear success, serving as an important starting point, carried forward by this publication. Already, the Symposium has been a springboard for a number of important follow-on initiatives that focus on the role that both lawyers and non-lawyers can play in rule of law promotion efforts worldwide.

Based on the Symposium presentations and discussions, I would like to suggest five ways in which the work begun in that valuable forum might beneficially continue.

First, as nearly every Symposium panelist and speaker remarked, we need clarity around the definition of the rule of law and other complex questions such as whether it varies in different contexts and how it relates to democracy and economic development. To engage in effective development of policy related to the rule of law, we need a clear standard and regular measurement of how different governments measure up. A number of organizations conduct assessments that address elements of the rule of law. The World Bank issues its "Doing Business" reports that gauge the regulatory environment for business; Freedom House measures democratic freedoms in its "Freedom in the World" report; Transparency International's Transparency Index ranks countries according to perceptions of the level of corruption; the ABA issues in-depth qualitative reports on the status of judicial reform, legal education reform, legal profession reform, prosecutorial reform, and various rights protections, and the UN is developing a rule of law assessment tool for post-conflict settings. But no organization yet comprehensively measures and reports on the status of the "rule of law." Development of such a tool would be an invaluable contribution to the field.

Second, as a number of Symposium panelists remarked, there is a critical

need for greater donor coordination in the rule of law field. Too often, reformers in developing countries are bombarded by competing or redundant recommendations from various international advisors, some of whom appear more intent on proselytizing their own native legal code than they are on supporting a suitable and sustainable reform for the country in question. Rule of law promotion would be greatly enhanced by regular donor coordination meetings on a country and international level. A related recommendation is that those active in rule of law promotion efforts must work more closely with donors in disparate fields, such as donors active in promoting public health. While rule of law promotion efforts might, superficially, appear to be peripheral to a public health reform agenda, they are in fact closely connected. For example, in certain African countries, as much as seventy percent of donated pharmaceutical drugs fail to reach patients in need, instead vanishing into the black market. These and other disturbing reports beg the question of whether money spent on a sustained and robust rule of law and anti-corruption initiative might save more lives in the long run, allowing critical aid to flow freely and reliably to intended beneficiaries in a country beset by a significant rule of law deficit.

Third, there is a need for an increase in funding for rule of law promotional activities, and, as former USAID Administrator Andrew Natsios observed during the Symposium, rule of law promotion should be mainstreamed as a part of all development assistance. Currently, only a very small fraction of all U.S. (or worldwide) assistance is devoted to rule of law promotion efforts. As both Joy Ezeilo of the Women's Aid Collective in Nigeria and Samuel P. Fried of the Limited Corporation observed at the Symposium, there is a particular need for assistance to grassroots civil society organizations working on rule of law issues in developing countries. Consideration should be given to establishing a dedicated global rule of law fund to address these needs, as expanding the capacity and reach of indigenous reformers is one of the most effective ways of promoting the rule of law.

Fourth, global efforts to promote the rule of law should include a robust campaign to educate the broad public about this issue and its relevance to pressing global concerns. The rule of law requires broad-based public understanding and buy-in, as well as appropriate laws and effective justice sector institutions. As Senator Hillary Clinton put it at the Symposium, "The rule of law may begin in law books and congressional or legislative debates and courtrooms. It doesn't end there. It finds its most vibrant expression in the actions of citizens—ordinary men and women who draw courage from the law to take a stand for their own rights and for those of others." To borrow from economics, attention must be paid to the "demand side" of the rule of law equation, as well as the "supply side." In this vein, the former Minister of Finance of Afghanistan, Ashraf Ghani, told Symposium attendees how he worked to curb tax evasion by visiting mosques and explaining to the general

public how government revenues would facilitate the provision of the public goods they needed.

Fifth, there is a need for expanded research to capture lessons learned about effective rule of law promotion efforts. Although bilateral and multilateral donors have spent billions on legal reform efforts over the past two decades, relatively little has been devoted to documenting and publishing accounts of which strategies have worked, which have not, and why. This gives rise to what Thomas Carothers of the Carnegie Endowment for International Peace has called “the problem of knowledge” in this field.<sup>3</sup> The *Berkeley Journal of International Law* is to be commended for its focus on this issue, and other journals should follow suit, while donors should devote increased resources to research and evaluation in the rule of law field. Regular on-line and in-person fora should be developed through which rule of law stakeholders can meet as they did under the ABA auspices in November 2005 to share their experiences and insights on effective strategies to advance effective rule of law reforms.

These are but five of the many initiatives that could spring from the Symposium discussions begun last November, breathing life into what former Chief Justice of the Philippines Hilario Davide declared the commencement of a “Rule of Law Movement” at the close of the meeting.

I hope that law students, practicing lawyers, and others who read this special Symposium Edition will be inspired to devote some portion, or maybe all, of their professional energies to the advancement of the rule of law worldwide. More immediately, I hope that review of the report and transcripts from the Symposium published here will inspire further thought and study on how to build a more robust rule of law movement. Finally, I commend the ABA and the *Berkeley Journal of International Law* for their leadership in this critically important cause.

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3. See, e.g., Thomas Carothers, Promoting the Rule of Law: The Problem of Knowledge, Carnegie Paper No. 34, January 2003; <http://www.carnegieendowment.org/publications/index.cfm?fa=view&id=1169&proj=zdr1>; see also, Thomas Carothers, ed., *Promoting the Rule of Law: In Search of Knowledge*, Carnegie Endowment for International Peace, 2006.



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## Advancing the Rule of Law: Report on the International Rule of Law Symposium Convened by the American Bar Associations November 9-10, 2005

Katharina Pistor

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# Advancing the Rule of Law: Report on the International Rule of Law Symposium Convened by the American Bar Association November 9-10, 2005

By  
Katharina Pistor\*

## PART I: INTRODUCTION

### *A. The Rule of Law Symposium*

The American Bar Association hosted the first International Rule of Law Symposium in Washington, D.C. on November 9-10, 2005. The Symposium brought together representatives from all over the world who share a common interest in advancing the rule of law as a means to tackle major obstacles that hamper social and economic growth and development around the globe. Some were ministers and government officials, others entrepreneurs and business people, yet others represented non-governmental organizations or employees of multilateral donor organizations. The topics addressed at the Symposium were equally far reaching in scope, covering everything from poverty alleviation and improving public health, to fighting corruption, promoting private business development and dealing with the terrorist threat. For two days, participants at the conference listened to panels, participated in discussions and engaged in Q&A sessions.

Given the range of people in the room and topics addressed, it should not surprise anyone that the views varied widely as to the definition of the rule of law, its meaning to different constituencies and how best to promote it in

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different settings. Yet, there was sufficiently common ground at the close of the two day symposium for a standing ovation when Hilario G. Davide, Jr. Chief Justice of the Supreme Court of the Philippines, pronounced the launch of a “global rule of law movement.”

For those who believe in the universality of the rule of law ideal, the major ills of the world today can be addressed by promoting the rule of law. Improving accountability, creating monitoring mechanisms (checks and balances), enhancing access to justice, and promoting human, political and civil rights will improve the livelihood of people around the globe and ensure sustainable social and economic development. On the other hand, those who are more skeptical of the universality of the ideal believe that the rule of law is of varying significance to various constituencies. They further noted that rule of law promotion efforts did not always bring about hoped for results, in part because these efforts were not adequately attuned to local circumstances.

The aim of this report is not to reconcile the different views. Instead it tries to highlight the primary points of the debates and their implications for launching yet another round of rule of law reform. The occasional lack of clarity may appear to obscure simple recipes for advancing the rule of law. This, however, is intentional. Early rule of law movements were denounced by its key promoters in the 1970s due to the mixed results of the extensive rule of law projects implemented in Latin America and the former socialist countries.<sup>1</sup> Today, it seems more sensible to acknowledge contestation and debate than to tout rule of law promotion efforts as an elixir of sorts.

### *B. Symposium Themes and Focal Points*

Today’s world poses new challenges for the rule of law and those concerned with developing, strengthening and spreading it. Rule of law cannot any longer be restricted to its classic domain, that is, controlling state authority and ensuring predictability and procedural fairness of government actions. In many countries the development of such structures remain, at best, an aspiration, as was pointed out by Philippine Chief Justice Hilario G. Davide, Jr. and Ana Palacio, a member of Spain’s Parliament and a former Foreign Minister, in the *Opening Discussion: Why the Rule of Law Matters*. In still other countries the scope of the rule of law discourse has expanded, challenging assumptions about the balance of power between executive, legislative and judicial branches, particularly where governments struggle to fight new threats such as terrorism.

While stressing the need to uphold and build the basic tenants of the rule of

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1. According to David Trubek, since the early 1990’s the World Bank alone conducted over 300 rule of law projects with an expenditure of \$2.9 billion. See David Trubek, *The “Rule of Law” in Development Assistance: Past, Presence, and Future*, in *THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL*, 74-95 (David M. Trubek & Alvaro Santos, eds., Cambridge Univ. Press, 2006).

law's classic domain, the Symposium has sought to broaden the rule of law agenda and has linked it specifically to debates on terrorism and international security, public health and health pandemics, and global poverty. Moreover, the Symposium's agenda explicitly recognized various constituencies as integral to a rule of law agenda. Governments and citizens of a nation state are not the only players anymore. Instead, in today's world the players participating in building and shaping the emergent rule of law includes civil society and non-governmental organizations, corporations and business associations, as well as bilateral and multilateral donor organizations. Recognizing multiple players within and across the confines of the nation state implies that building the rule of law is no longer limited to a national agenda. Building and sustaining the rule of law is a process that takes place at each step from the local to the international, and at each point where the interests of different constituencies conflict.

Broadening the debate in this fashion entails a potential cost: the blurring of boundaries between rule of law and other aspects of "governance." Instead of being confined to formal legal governance mechanisms, a broader rule of law agenda embraces other forms of governance, which are often described as "informal," or "non-legal." Such structures include social norms, communities and self-governing organizations in economic, political and social life. What then is the rule of law? Few panelists or speakers sought to resolve this issue at the Symposium – not surprising given the millennia old debate about the meaning and contents of this concept. Instead, the participants at the Symposium took a pragmatic approach, assuming a common understanding of basic features of the rule of law without confining it to a particular definition. However, upon closer analysis of the Symposium debates, three primary themes emerged.

### *1. The Rule of Law is a Process in the Making*

The rule of law is a core aspiration of mankind alongside peace, democracy, and freedom. In his opening remarks to the Symposium, the ABA's President, Michael Greco, stated that building the rule of law "is a never ending process." Similarly, Ashraf Ghani, Afghanistan's former Minister of Finance and now Chancellor of the University of Kabul, reminded us that "Rule of law is an ideal – and as such is always in the making."

What societies are striving for in the rule of law is not a set of easily definable outcomes, but the creation of procedures or fair systems of governance. Symposium speakers emphasized the need for fair structures to ensure the delivery of the most fundamental social needs such as: peace, security, recognition of human rights, protection against abuse of state power and—if not prosperity—then at least the absence of severe poverty. The inability of societies to deliver these is the first indicator of the lack of the rule of law. Thus, even though it may be difficult to define the rule of law in different contexts, its absence can be more easily observed.

## *2. The Rule of Law is a Complex System*

Societies that can justifiably claim to be governed by the rule of law are not immune to weakening and partial breakdowns in the rule of law. Basic security and social order can and do break down rapidly when confronted with shocks, such as natural disasters or the sudden outbreak of violence. Such incidents are a reminder of how fragile the rule of law is. They highlight how much its sustainability depends on its perceived legitimacy in the eyes of the people whom it is supposed to serve and who are its ultimate guardians. The resilience of the rule of law is revealed by how these various constituencies of the rule of law respond to a breakdown and their ability to rebuild its core tenets.

Because the rule of law is a complex system, it cannot be easily reduced to a set of institutional variables, such as independent and impartial judiciary, effective law enforcement based on due process, and rules governing a transfer of political power, even though these remain crucial elements of the rule of law. To be effective, these institutions must be embedded in the broader political and social context; it follows that a sustainable rule of law system cannot be simply constructed top down, but must be rooted in the local culture. Most importantly, legal institutions must be legitimate in the eyes of the citizenry whose support and readiness to defend the basic principles of due process, fairness, and equitableness are critical for sustaining the development towards an ideal rule of law.

## *3. Building the Rule of Law is an Inherently Political Process*

Building the rule of law involves constraining political, social and economic power. While in the long run constraints that come with the rule of law are likely to benefit all, in the short term some can and will take advantage of their absence and may actively oppose being subjected to them. Building the rule of law therefore is inevitably a contested political process. Countries that have built the rule of law over centuries have experienced episodes of civil war and civil unrest along the way, giving testimony to how strong the resistance against the rule of law can be.

The best guarantor for a peaceful process towards the rule of law seems to be a participatory political process where contests take the form of debates and are resolved in electoral processes, not by violence or brute force. Democracy with universal suffrage and contested elections remains the most participatory political system to this day. Experience with attempts to build democracy, however, have shown that formal attributes such as elections and voting rules are a necessary, but not a sufficient condition for democracy to take hold. Ideally, the rule of law and democracy are closely intertwined processes that reinforce each other. Democracy fosters the rule of law by ensuring broad participation in the contest over the allocation of resources and powers in society. The rule of law in turn should protect the democratic process by protecting participation in the political process. However, the rule of law also

constrains the democratic process, in that every ruler, including the *demos*, is bound by the rule of law. The precise nature of the legal constraint and the relation between rule of law and political regime will differ across countries and over time.

### *C. The Rule of Law in a Changing World*

Today's world is extremely intertwined, and becomes more so with each passing year. Capital, people and organizations are less constrained by national borders than they have ever been. Information technology facilitates communication and coordinated action among people in distant places. These processes have led some to declare the demise of the nation state; they claim that in its stead, markets and multinational firms, or transnational networks are shaping peoples' lives. If the rule of law were confined to the boundaries of nation states and their formal legal systems, this would also imply the deterioration of the rule of law. In fact, the international order has become ever more rule bound with increasingly interconnected and interdependent rules. Examples include not only the United Nations, but the European Union and the World Trade Organization. Many countries have ceded sovereignty and accepted restraints on exercising their own powers for the benefit of a rule bound international order. Amplifying the need for a global rule of law is the ever increasing participation of non-state entities acting to form the international order. They include businesses, non-governmental organizations, and interest groups that often transgress the boundaries of individual nation states.

Even traditional areas of law enforcement, that is, the fight against fraud and corruption, organized crime, or terrorist acts require not only coordinated efforts among enforcement agents across different nation states, but also participation by the communities whom they serve. Community involvement is critical for collecting information, building support for law enforcement, separating perpetrators from sympathizers and containing recruitment into criminal or terrorist organizations.

In short, in an era of globalization, there is a need for complex new forms of governance that stretch across traditional state boundaries. But the need for local governance capacity and informal structures persists and indeed these must be integrated with new international governance mechanisms.

A major challenge for advancing the rule of law in a global world then is to discover how formal legal institutions can facilitate and support the emergence of governance structures capable of addressing the critical challenges the world faces – from alleviating poverty to ensuring peace, security and prosperity. Of equal concern is the fact that law can be and often is used to discourage and undermine effective governance by restricting access to legal institutions, prohibiting organization, or restricting funding sources for non-governmental organizations. Whether domestic laws are used to foster or to inhibit social and economic development varies by country. Advancing the rule of law cannot

mean the simple spread of formal law. That would advance the rule *by* law. Instead, it is the advancement of broader social goals closely associated with justice, fairness, and predictability. As Symposium discussions suggest, it is important to keep these goals in mind and to assess critically which strategies under which conditions are most effective in achieving them.

#### *D. Outline of the Report*

The following summary of the discussions and debates that took place at the Symposium is divided into three parts.

Part I, “Fundamental Social Needs and the Rule of Law,” focuses on poverty, health pandemics and the absence of peace and security, all strong indicators of the absence of the rule of law. It is therefore critical to understand what remedies may work and how building the rule of law might contribute to the fight against poverty, health pandemics, war and civil strife.

Part II, “Rule of Law and Economic Development,” emphasizes the relation between rule of law and economic development. Two panels specifically addressed this relation, “The rule of law and Economic and Business Development,” and “Corruption as a Threat to the Rule of Law.” The discussion at these panels suggested that the presence or absence of the rule of law, or of corruption, is not simply a feature of a particular host country, but is shaped by the players themselves, including by multinational corporations (MNCs).

Part III, “Constituencies Involved in Building the Rule of Law,” reports on the role of the three main constituencies actively engaged in building the rule of law: civil society, the private sector, and governments and international organizations. Although they all share an interest in the rule of law, the goals they associate with the rule of law, and by implication their preferred strategies for building it, differ significantly. Bringing these diverse groups together was one of the major achievements of the Symposium and potentially the most fruitful foundation for a new rule of law movement.

Part IV concludes with a discussion of the different objectives that are pursued by various constituencies interested in advancing the rule of law. It advocates continuing discussions and reflection of the goals and means used by different organizations.

Each of the key sections below includes a bulleted text box highlighting critical areas of concern and suggestions raised throughout the symposium.

#### **PART II: FUNDAMENTAL SOCIAL NEEDS AND THE RULE OF LAW**

Societies cannot develop and prosper when large numbers of people suffer from crushing poverty, debilitating diseases and health pandemics, or when they are facing persistent unrest and civil strife. Poverty, health, and peace are closely intertwined, making it difficult to prioritize them. A strong argument has been made that peace and stability is a pre-condition for social and economic

prosperity.<sup>2</sup> Yet, the reverse may also be true: societies that are beset by poverty are often engulfed in repeated episodes of civil unrest, making it difficult to identify the direction of causality. Building the rule of law seems to be a critical ingredient to address both ills. Constraints on executive powers and basic protections of civil liberties should help prevent conflict, while institutions that curb corruption and ensure monitoring and checks and balances should help alleviate poverty. Unfortunately, the same factors that may impede poverty alleviation and give rise to civil unrest also create major obstacles to building the rule of law. Among those identified by the panels were severe inequality, ethnic tensions and marginalization of entire groups within society. To break this vicious cycle, institutional and legal reforms must be backed by the actual delivery of better living conditions and security, as well as some form of compensation for those who might be losing out in the process.

#### *A. Poverty Alleviation:*

- ◆ *Poverty results from institutional bottlenecks to prosperity and the lack of resources which cause them. Effective development strategies will identify such bottlenecks rather than expanding additional resources across the board.*
- ◆ *In many countries, local, regional and central governments hinder development by creating barriers to property ownership, failing to provide basic property rights protection or engaging in outright expropriation.*
- ◆ *Women suffer disproportionately from poverty. Educating and promoting women's participation in political and economic decision-making are crucial for helping societies to grow out of poverty. Promoting women's rights can help women become more effective participants in the political sphere and as economic actors.*
- ◆ *The international aid system is in need of reform. Aid should not be regarded as an entitlement nor should it be used by donors to protect powerful elites or to advance short term agendas that undermine long term development. Instead, international aid should ensure self-help by promoting access to information, education, rights recognition and rights enforcement.*

#### *1. Building Trust in Government*

Mistrust in government action and skepticism about government's willingness and ability to alleviate poverty and promote growth is often the result of repeated experience that requires deep political and economic reform. As pointed out by Symposium panelist and Professor of Economics at New York University, Bill Easterly, in many poor societies law is an instrument for

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2. See generally ROBERT H. BATES, PROSPERITY AND VIOLENCE: THE POLITICAL ECONOMY OF DEVELOPMENT (2001).



the ruling elite to entrench its power and privilege. He gave examples from Latin America, where local entrepreneurship was destroyed by local governments that expropriated successful new businesses, sometimes pretending that such actions were legal, and other times in open violation of the law. Access to local courts may not be sufficient to address this problem, as judges often are part of the local elite, or may otherwise find it difficult to distance themselves from their interests. Historical experience suggests that in such settings competition among law enforcement agencies may be an important strategy.

Building trust in public institutions and ensuring that power is perceived to be legitimate is not easy. Familiarity with customs at the regional and local level may help in taking first steps in changing peoples' perception of the role of the state and its needs for revenue. Ashraf Ghani reported in his key note address that as Minister of Finance in Afghanistan he attended community meetings at mosques and explained the need for tax collection, government revenues and the public purposes for which they would be deployed. The direct contact with important social leaders (in this case religious figures) and their constituencies was important in building trust in law and in the government function of law enforcement.

More generally, building trust in government requires communication, transparency, and access to information and education as critical resources for ensuring that power is allocated through fair institutions—and not simply taken by those who have the power to do so.

## *2. Women's Rights*

There was broad agreement among the panelists that women's rights are critical for alleviating poverty. Geeta Gao Gupta, President, International Center for Research on Women, pointed out that empirical studies have shown that women's property rights in land is critical for land improvement and land productivity. Other studies suggest that women's basic education is important for bringing down birth rates and improving family health. A recent comprehensive study by the World Bank has compiled strong evidence that discrimination against women impedes economic growth and development.<sup>3</sup> More generally, in most societies women are the central contributors to the survival and prosperity of the household – the cell of social and economic life. Yet, women often do not possess property rights and decision making powers, which instead are vested with men, be they fathers, husbands, brothers, or brothers in law. The devastating effects of depriving women of basic economic and social rights have come to the fore in the AIDS crisis that is ravaging Africa. In certain countries, women whose husbands have died from AIDS, experience appropriation of the household's property. Valuable assets are transferred to the

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3. See generally WORLD BANK AND OXFORD UNIVERSITY PRESS, *ENGENDERING DEVELOPMENT: THROUGH GENDER EQUALITY IN RIGHTS, RESOURCES AND VOICE* (2001).

deceased husband's family. The widows themselves are either left homeless or are often forced into marriage with a brother in law or other relative.

The role of women in society is determined by a combination of formal law and social norms. In many countries, the formal law sanctions social norms that deprive women of their internationally recognized rights, for example, by negating their ability to exercise property rights, subject their decision making powers to approval by male members of the household, and by diluting their power to give evidence in court trials. In other countries, the formal law may support women's rights, but is left un-enforced. Women often do not know about their rights or are afraid to invoke them in fear of social sanctions against such behavior.

Using formal law to change social customs is not a quick or easy response to such problems. Additional steps, such as community-based education programs, the organization of support groups and the mobilization of civil society, etc., must be taken to trigger a process of change that will ultimately transform the lives of women and their position in the community. This is one example of how law reform may aid social change, but on its own is unlikely to accomplish it.

A specific legal intervention that may trigger social change is affirmative action particularly in politics. Afghanistan has become a prominent example for a political system that now ensures women representation in parliament by reserving twenty-five percent of the seats in the lower house and seventeen percent in the upper house for female representatives. Perhaps even more important than the numbers alone is that the presence of women in political debates may have ramifications beyond the immediate elections or even parliamentary debates: it may encourage more participation even in areas where affirmative action laws are not in place.

International coordination and publicity aids the cause of women's rights by exerting political pressure on repressive regimes, thereby contributing to the alleviation of poverty. This point was stressed by Senator Hillary Rodham Clinton. The senator recalled her participation in the 1995 Beijing Conference United Nation's Fourth World Conference on Women. Women from around the globe participated in the official conference, as well as the parallel event organized by non-governmental organizations. These events have triggered a series of initiatives that have greatly advanced the role of women in today's world. Some initiatives were primarily legal in nature. They included the drafting of laws that better protect women's rights. Others have been non-legal, such as the creation of networks and organizations devoted to advancing women in politics, business and society. Together, both legal and non-legal initiatives can combine to advance the rule of law, as the rule of law is rarely advanced by legal reform alone.

### 3. *International Aid System*

A major goal of international aid is to alleviate poverty and to help less developed countries catch up. Increasing evidence, however, suggests that these goals are often not attained. One explanation is that donors often pursue multiple goals, including foreign policy goals that might be at odds with poverty alleviation. In the past, the absence of monitoring mechanisms failed to ensure that aid funding and resources reached the poor for whom they were intended and were not siphoned off along the way. This not only neutralized aid efforts, it actually furthered corruption and control by well connected insiders. A major condition for successful aid programs therefore must be the establishment of robust monitoring systems to track the management and disbursement of resources.<sup>4</sup> Such mechanisms should be enforced even in the face of demands that international aid is an entitlement. While there may be strong historical and moral reasons for the rich West to deliver aid to the poor in other parts of the world, transfers that are blind to how resources are used on the ground will entrench existing elites and fuel corruption, but will not deliver growth.

Closely intertwined with the delivery of aid to those in need is the question of who defines the purposes for which aid should be allocated. Some panel members pointed out that aid is too often supply driven and lacks active participation by aid recipients. There is little evidence that the supply of aid alone can improve the livelihood of the poor and promote economic growth and development, as Bill Easterly has suggested in his work.<sup>5</sup> In fact, aid organizations have often failed to monitor the delivery of financial aid to those in need and have thereby often contributed to corruption and the entrenchment of elites. Improving monitoring mechanisms, including accounting and book-keeping of externally provided aid flows could address some past abuses.<sup>6</sup>

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4. For a critical assessment of post IMF policies in this regard, see Melissa Thomas, *Getting Debt Relief Right*, FOREIGN AFF., Sept. – Oct. 2001, at 36.

5. See generally WILLIAM EASTERLY, *THE ELUSIVE QUEST FOR GROWTH: ECONOMISTS' ADVENTURES AND MISADVENTURES IN THE TROPICS* (2002).

6. Thomas, *supra* note 6.

## B. Public Health:

- ◆ *The local health sectors in developing countries are often plagued by resource constraints, under-staffing, and institutional corruption that diverts resources away from those who need them.*<sup>7</sup>
- ◆ *Weak governance structures that fail to ensure the delivery of aid or minimize corruption exacerbate the effects of devastating diseases, such as HIV/AIDS and malaria.*
- ◆ *Many health pandemics affect children and women disproportionately. Ensuring that women enjoy legal and political rights on par with men can help ensure a more robust response to international health pandemics.*
- ◆ *The World Health Organization (WHO) plays a critical role in coordinating efforts to contain health pandemics. However, neither WHO nor any other international health organization has enforcement powers.*
- ◆ *Dispute remains as to whether a stronger role of international organizations in containing pandemics is desirable.*
- ◆ *Collaboration between local, state and international agents may be more important than clear allocation of rights and responsibilities – which may take too long to establish.*
- ◆ *For the private sector, effective intellectual property rights protection is a pre-condition for investments in research and development for pharmaceuticals, including drugs to fight diseases that are prevalent in developing countries.*
- ◆ *Poor countries and poor people are often unable to afford the drugs produced by multinational corporations. The inherent conflict between private investments in R&D and public need for the low cost provision of life-saving drugs may require more systematic public intermediation.*

Symposium discussions on public health highlighted the mutual dependence of international and local governance structures in fighting disease and health pandemics. For example, the constitution of a particular country may vest the power to act in the international realm exclusively in the president, prime minister or foreign minister, as the case may be. In order to respond swiftly to a health pandemic, however, local agents, including non-governmental actors, will have to respond immediately to calls by the World Health Organization to take action. Discussions also highlighted the tension between business interests and the need to protect intellectual (and other) property rights of drug suppliers on the one hand, and a country's need for affordable and accessible drugs on the other. These conflicting interests cannot be resolved by protecting one or the other side – that is, domestic sovereignty against the demands of an international organization, or private property rights vs. the right

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7. According to an IMF study, countries with high levels of corruption experience much higher infant mortality than others. See Daniel Kaufmann et al., *Governance Matters: From Measurement to Action*, FIN. & DEV., June 2000 at 10, <http://www.imf.org/external/pubs/ft/fandd/2000/06/kauf.htm>.

to live. Instead, the underlying interests must be recognized and governance structures developed that ensure responsiveness to pressing needs with the potential of causing irreversible harm. At the same time, precaution must be taken that the extreme case does not become a justification for watering down legal rights and entitlements. Separately, corruption and the absence of the rule of law were cited as pernicious, aggravating factors in fighting disease, with the lack of adequate governance structures impeding the delivery of services, and, in many cases, facilitating the illegal diversion of assistance aimed at the afflicted.

### *1. Corruption and Local Institutional Challenges*

There is no doubt that resources in poor countries are scarce. With increasing aid from other countries, multilateral aid organizations or NGOs the problem of scarcity can be addressed. Yet, many organizations involved in supplying additional resources, whether food or health products have encountered formidable obstacles in ensuring that these resources reach the people in greatest need of them. Corruption that diverts the flow of aid is among the most troubling problems for international donor organizations. The Global Fund,<sup>8</sup> an organization charged with fighting HIV/AIDS set out to build private/public partnerships as an alternative to formal monitoring mechanisms. The hope was that building trust would ensure aid delivery even absent such costly devices. However, according to Bartolomeo Migone, Legal Counsel of the Global Fund, a series of bad experiences, including diversion of funds, has prompted the Fund to reverse this policy and re-install more conventional monitoring and supervision mechanisms.

### *2. International Health Governance*

To contain the danger of international health pandemics, there is an urgent need to ensure local responsiveness, as well as coordination across countries. Effective containment of potential global health pandemics may require concerted efforts to ensure efficient allocation of limited resources (vaccines, medication, health care providers, etc.) and the imposition of restrictions (quarantines) to fight the pandemics.

One approach to tackle this challenge would be for sovereign states to delegate critical decision-making powers to an international organization, such as the World Health Organization ("WHO"). Indeed, one panelist argued that such delegation is indispensable in fighting the outbreak of highly contagious diseases. Other panelists recognized the need for coordination at the international level and for clear and effective guidance by an international organization such as the WHO. However, the discussion suggested that these steps alone would be insufficient and were unlikely to be accomplished prior to

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8. The Global Fund Home Page: <http://www.theglobalfund.org/en/>.

the outbreak of an international health pandemic.

The WHO depends on local institutions to learn about the outbreak of disease and to implement measures to contain it. Cooperation from national ministries of health and government – run health clinics, and private or non-governmental health care providers, will be a critical requirement. Thus, at least in times of disaster, more flexible structures are needed that ensure effective responsiveness to the disaster, even if this requires the temporary suspension of some sovereign rights.

The potential danger of contagious disease is not limited to new diseases, such as SARS or the avian flu. More conventional forms of disease, such as tuberculosis, for which treatment is already known, continue to pose new challenges when allowed to spread. Often such diseases spread among marginalized groups of the population such as prison inmates, and are particularly common in countries, like Russia, where the rights of inmates are underdeveloped. Rule of law promotion efforts that improve their rights in general might not only improve their individual health care, but help avoid the spread of highly infectious disease.

### 3. *Intellectual Property Rights and Public Health*

Private pharmaceutical companies play a critical role in the development of drugs and vaccines that can help treat disease, prevent their outbreak, or at least mitigate their impact. As profit maximizing entities, private corporations have a keen interest in ensuring that pharmaceuticals will be sold for an adequate price and that their intellectual property rights will be respected. Absent such protection, there is little incentive to invest the considerable resources needed to develop life saving drugs in the first instance. That said, the price finally charged for new drugs are often too high for developing countries. The tension between private profit maximization and public health interests has received much public attention in the fight against HIV/AIDS. Some countries have weakened intellectual property rights and allowed local firms to produce generic drugs. Others have reverted to compulsory licensing schemes.

As reflected in the panel discussion, these conflicting interests, each with its own merits, are not susceptible to easy resolution. Both sides desire predictability, which may favor more stable legal solutions. The private sector is most interested in a clear allocation of property rights to ensure predictability. The public sector, by contrast, wants to ensure access to drugs needed to fight or contain devastating disease when needed. If left to themselves, the two sides are unlikely to find a mutually agreeable solution. A possible solution may lie in properly designed public intervention, such as the creation of vaccine or drug funds that directly or indirectly subsidize the production and/or dissemination of drugs and vaccines to the poor.<sup>9</sup>

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9. See, e.g., Michael Kremer, *A Purchase Commitment for Vaccines*, in GLOBAL PUBLIC

C. *Preventing Conflict and Rebuilding Societies:*

- ◆ *Reconciliation is a significant factor in successfully rebuilding societies and establishing sustainable peace. Foregoing the punishment of perpetrators in an attempt to “bribe” them into a peace process presents a tension between the rule of law and political considerations and realities.*
- ◆ *Post-conflict societies are plagued by an institutional vacuum, which is too often filled by organized crime and powerful interests that block rather than foster rebuilding efforts. The establishment of effective law-based institutions often come too late to prevent the entrenchment of such groups in society.*
- ◆ *Local knowledge in rebuilding society is not sufficiently utilized by foreign and international organizations involved in post-conflict rebuilding efforts. This can result in misallocation of resources and the fostering of corruption.*
- ◆ *The effectiveness of the international community in preventing conflict and rebuilding societies has been mixed. Multiple efforts exerted by different organizations and governments often compete with each other. Effective rebuilding efforts require multi-pronged approaches and coordination at both the international and the local level.*
- ◆ *Perpetrators of conflict can be tried either locally or in international tribunals, be they ad hoc tribunals or standing ones. The choice between these tribunals is often contested with little guidance at hand to resolve this issue in future crises.*

Security is the most fundamental condition for social and economic prosperity.<sup>10</sup> A major source of insecurity in today's world are domestic conflicts, often fueled by ethnic tension or competition over critical resources. Symposium panel discussions focused primarily on the rule of law promotion efforts that can contribute to rebuilding conflict-torn societies and on preventing future conflicts in these societies.

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GOODS FINANCING: NEW TOOLS FOR NEW CHALLENGES - A POLICY DIALOGUE, Inge Kaul et al. eds., UNDP, 2002, <http://www.undp.org/ods/monterrey-papers/kremer.pdf>.

10. Bates, *supra* note 4.

### 1. *Complexity of Tasks and New Strategies*

Post-conflict societies face a multitude of complex tasks that require urgent attention for stabilization and social peace. A series of recent conflicts has prompted the UN to establish its new Peace Building Commission, while the State Department of the United States has developed new strategies for ensuring a successful transition. As part of this effort, the U.S. has developed an Essential Task Matrix that identifies the most pressing tasks in a post-conflict situation and seeks to prioritize among them.<sup>11</sup> Ambassador Carlos Pascual, Coordinator for the Office of Reconstruction and Stabilization at the U.S. Department of State, explained its basic elements as being: (1) security, (2) governance and participation, (3) humanitarian assistance and social well-being, (4) economic stabilization and infrastructure and (5) justice and reconciliation.

None of these tasks can be accomplished in a single step, but require several stages of investment. For each of the categories listed, the matrix suggests an initial response, a longer-term strategy aimed at fostering transformation, and finally a strategy aimed at fostering sustainability. The first step in this staged transformation management include stabilization, that is, efforts by local and/or international forces to impose order and stop civil strife and warfare. This is the bare minimum for any state aspiring to stability and the rule of law. The second stage is aimed at addressing the root causes of the conflict, including inequality, access to critical resources, corruption and capture of public institutions. Addressing these causes is a complex task, as it may trigger a renewed outbreak of conflict when entrenched interests are sufficiently threatened by restructuring efforts. Building the rule of law is not a straightforward answer to this underlying conflict, as some constituencies will undoubtedly lose out under the new rules of the game. Nevertheless, Carlos Pascual suggested that the resultant conflict may be resolved as societies shift away from authoritarian regimes to free societies. In order to facilitate the transition a society must establish such critical institutions as an independent judiciary, an effective police force, and institutions of democratic representation. Comparative research, however, suggests that for a judiciary to become independent, a competitive political system must already be in place. Finally, according to the Matrix, to ensure strong support for such societal change, the demand for it must be generated through the strengthening of civil society. Thus, just as in the case of poverty alleviation, peace building is another example of a complex mutual dependence of elements of the rule of law with other political and economic factors.

The State Department's new approach to peace building also raises new questions as suggested by commentators from the floor. Some commentators

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11. Office of the Coordinator for Reconstruction and Stabilization, U.S. Dep't of State, Post-Conflict Reconstruction Essential Tasks (2005), <http://www.state.gov/documents/organization/53464.pdf>.



criticized the strategy for ignoring local conditions and local capacities. Foreign and international forces were said to frequently move into post-conflict societies attempting to create a new order without building on existing reconciliation and peace building attempts on the ground. Experience from various countries with recent conflicts (including Nigeria, Uganda, and Sudan) suggest that little headway is made in building local capacity once the conflict has subsided. Such countries often find themselves abandoned by the international community once the basic conditions of order have been re-established. This would argue in favor of a multi-year effort to bolster institutions capable of promoting the rule of law (for example, judiciary, legal profession), long after order is seemingly re-established and the massive, post-conflict foreign relief effort vanishes.

## *2. Dealing with Perpetrators*

Resolving conflict poses a critical rule of law challenge in the form of accountability for the conflict's main perpetrators. In an attempt to stop violence and begin the process of rebuilding societies it is not uncommon to strike a bargain with some of the perpetrators that involves their safe passage to exile thereby escaping punishment. Several commentators voiced concerns that this bargaining may be misguided and even harmful. At the Symposium, President for the International Center for Transitional Justice, Juan Mendez, stressed the important link between reconciliation and accountability, arguing that reconciliation is the result of accountability. By implication, failing to hold key perpetrators accountable may impede efforts of reconciliation.

Reconciliation efforts can take different forms. Constructing a Truth and Reconciliation Commission at the national level is one strategy that has been tried in South Africa, East Timor and other places with varying results. This indicates that the idea and institutional structure of such commissions can easily be transplanted, but that their impact will depend on local conditions such as: the willingness of critical constituencies to buy into the structure; the legitimacy of advocates of conciliation as opposed to adjudication; and the legitimacy of those serving on the commission. Other accountability and reconciliation models include ad hoc international tribunals, such as the International Criminal Tribunals set up to deal with perpetrators of crime and violence in Rwanda (ICTR)<sup>12</sup> and former Yugoslavia (ICTY).<sup>13</sup> Finally, the International Criminal Court (ICC)<sup>14</sup> provides a more permanent institutional setting, which may enhance the credibility and deterrence effect of international intervention. However, unresolved disputes over the jurisdiction of the ICC have resulted in several countries – most notably the U.S. – withholding their support for the Court. The U.S. position was forcefully defended at the symposium by John

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12. Internet Site of the International Criminal Tribunal for Rwanda: <http://www.ictr.org>.

13. International Criminal Tribunal for the Former Yugoslavia: <http://www.un.org/icty/>.

14. International Criminal Court: <http://www.icc-cpi.int/>.

Bellinger III, Legal Adviser to the Secretary of State at the U.S. Department of State, who pointed out that efforts by the US to agree on a compromise solution were ignored, leaving the U.S. no choice but to oppose the creation of the ICC. The most contentious issue was the right of the ICC's chief prosecutor to initiate proceedings against individuals without a member state referring a case to the court.

The Symposium discussion of this issue highlighted that building the rule of law and corresponding institutions at the international level also is an inherently political process. Even though there might be common interest in a permanent criminal court at the international level, the different role countries play in world politics influences their assessment of the costs and benefits of such an institution from the perspective of their national interest. This is not fundamentally different from obstacles faced in promoting rule of law in a domestic setting. In both arenas interest groups will take sides notwithstanding the fact that this may undermine the prospects of building the rule of law, which would be in their collective interests.

### *3. Rebuilding the Rule of Law at the Local Level*

Fostering reconciliation and rebuilding the rule of law is not limited to punishing instigators of violence. The root causes of violent conflict often lie in poverty and inequality exacerbated by ethnic or religious divides. Gaps in the rule of law further facilitate discrimination and human rights abuse. Poor governance and inadequate law enforcement may also create a vacuum in which criminal elements thrive and in turn challenge the state. In some cases this escalates into full-scale conflict, fueled by the criminal activity that provides organized criminal groups with the resources necessary to procure weapons. Moreover, criminal groups can have a strong stake in sustaining conflict and the chaos it entails, as these conditions further facilitate criminal activity, including very lucrative trafficking in arms, drugs, and people.

Against this backdrop, re-establishing the rule of law in conflict-torn societies poses unique challenges. As Jonathon Fanton, President of the John D. and Catherine T. MacArthur Foundation and moderator of the session, alluded in his opening remarks, law and legislation may play a rather ambiguous role in the breakdown of law and order. One group in society may use law to entrench its own position while denying equal rights to opponents. This abuse of law may have even triggered the original outbreak of violence. Such a legacy makes it difficult to count on the credibility of law as a means for re-establishing peace and security. In others contexts, legal institutions may be too weak to deal with crime or conflict as it arises, further weakening the population's trust in the legal institutions that control the rebuilding process. As noted above, such difficulties militate for long-term, sustained peace-building and rule of law-promotion programs in post-conflict settings.

*D. Terrorism and International Security:*

- ◆ *Weak or failing states without the rule of law increase the possibility of generating terrorist activities that may affect people and countries around the globe*
- ◆ *The fight against terrorism today takes essentially two forms: war and criminal law enforcement. The former may entail combat and warfare potentially triggering application of the laws of war. The latter relies on law enforcement efforts at the national and international level and treats terrorists as criminals.*
- ◆ *The different approaches entail varying costs and benefits for the countries employing them. On the one hand, criminal law enforcement appears to place greater constraints on states fighting terrorists. On the other hand, opinions in the communities from which terrorist emerge will be greatly influenced where war-like means are used to fight terrorism.*

*1. The Rule of Law and the Terrorist Threat*

The panel on the relationship between the rule of law and terrorism and international security demonstrated that the response to a particular phenomenon – such as terrorism – depends very much on how one perceives and analyzes the problem. This also affects the assessment of the rule of law in the context of this debate. At one extreme, the rule of law may be perceived as an unwarranted constraint on the state's powers to fight a threat. Alternatively, it may be regarded as an essential tool in undermining the support basis for terrorists and as such a necessary and indeed welcome constraint on state power.

The panelists agreed that failing and weak states enable the organization of groups that use terrorist tactics to advance their ideas. Yet, they also pointed out that strong democratic states are also vulnerable to terrorist attacks and to the organization of terrorist activities on their territory. This is well illustrated by the terrorist movements in the late 1970s in Germany and Italy, and, in recent years, by the fact that cells committed to terrorist methods have emerged in the U.S., Germany, the U.K., and Spain. By implication, rule of law is not a guarantee against terrorism. Nor is rule of law a "silver bullet" to deal with the terrorist threats, as was explained by Graham Allison, the Director of the Belfer Center for Science and International Affairs and a Douglas Dillon Professor of Government at the Kennedy School of Government at Harvard University.

Much of the panel's discussion was devoted to the debate over the most appropriate means for responding to terrorist attacks: criminal adjudication or warfare. Those advocating criminal adjudication, such as Ambassador Hans Correll, the former Under Secretary General for Legal Affairs and Legal Counsel of the United Nations, pointed out that warfare is appropriate in dealing with states subject to the international laws of warfare. They also suggested that because terrorism is a tactic used by groups that can re-invent themselves, a war

against terrorism by definition cannot be won. By contrast, those advocating warfare, including Senator Graham Allison, pointed out that in light of the magnitude of the terrorist threat a state must have all possible means at its disposal to respond to the threat.

This debate suggests that the framing of the issue will influence the means chosen to address the threat. Nonetheless, whether war or law enforcement is the preferred framing of the issue, rule of law principles place constraints on the means available to counter the threat. The international law on warfare establishes rules for dealing with prisoners of war, for example. Law enforcement is bound by domestic rules of due process and fair hearings. A critical question therefore was whether these constraints should be relaxed in order to allow governments greater leeway in combating the terrorist threat. The dilemma is clear: relaxing existing constraints could weaken the rule of law, and ultimately destroy the very principles that ought to be defended. However, upholding the rule of law without any adjustment to account for the nature of the threat that governing systems face, may weaken the response and thereby also threaten the survival of the system itself. If the rule of law were a simple mechanism that could easily be switched on and off where needed, the temporary weakening of constraints might not give rise to much concern. As explained above, however, a viable rule of law system depends on the vigilance of the citizenry, which in turn requires that it believes and supports the basic principles of the rule of law. Weakening these principles may change the rule of law culture and thereby change a system more fundamentally than might be predicted.

## *2. Dealing with the Terrorist Threat: Lessons Learned*

While terrorist tactics have been extensively used in recent years, in particular by radical Islamic groups, such tactics are not new. The Irish Republican Army, the Italian Red Brigades and the Baader-Mainhoff Group in Germany in the 1970s are important examples of groups that have used such tactics in the past – and most notably, in strong states with well developed rule of law. Louise Richardson, Executive Dean at the Radcliffe Institute, delivered findings from a comparative research project on the relationship between democracy and terrorism.<sup>15</sup> She argued that a state's response to a terrorist attack and its treatment of the terrorist perpetrators it captures are important factors in dealing successfully with the terrorist threat. Richardson reasoned that terrorists aim to provoke governments, including governments that generally adhere to rule of law principles, into over-reaction. This is an important recruitment tool, because any over-reaction can be interpreted as revealing the "true fascist" side of the government. This in turn nurtures sympathizers, from

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15. See generally DEMOCRACY AND TERRORISM: THE ROOTS OF TERRORISM, VOL. 1 (Louise Richardson, ed., Routledge, 2006).

among whom future terrorists can be recruited. Richardson also pointed out that the use of courts to resolve disputes that give rise to the use of terrorist tactics in the first place, may help in tipping the sympathy in favor of a rule-based resolution as opposed to a violent one. Furthermore, the subversive minority that may feel that it will loose out unless it reverts to terrorist tactics must be assured that other means are not only available, but that they will actually provide an acceptable resolution.

Some of these lessons may be transferable to the current wave of terrorist attacks, others may not. Asked about the major lessons learned since 9/11, Louise Richardson replied that the most important lesson is the ability to learn from success as well as failure. Specifically, the US seems to recognize that terrorism cannot be fought through military means alone. Rather, perpetrators who use terrorist means should be removed from their communities. Efforts should be made to win the hearts and minds of the people who remain in those communities so that they do not support terrorist activity. An example was the generous relief efforts of the American people in response to the tsunami in South East Asia. According to Richardson, in Indonesia in particular, public opinion about the United States increased substantially following these events, while support for Bin Laden plummeted.

This experience suggests that opinions on counter-terror activities as held by those who would benefit under a functioning rule of law, is critical. Their perceptions develop as they witness actions taken by those who promote the rule of law, the United States in particular. Thus, promoting the rule of law abroad while violating it at home will be considered hypocrisy. Worse still, the contradiction may weaken the appeal of the rule of law, as its promotion may be regarded only as yet another device to promote American interests.

### PART III: RULE OF LAW AND ECONOMIC DEVELOPMENT

Societies that can ensure that they meet the fundamental social needs of the people may still find that economic growth and development are difficult to achieve. There is a vast literature in development economics that seeks to identify relevant factors for economic growth.<sup>16</sup> Over the past twenty years, the consensus that “institutions” are important for economic growth and development has received substantial support.<sup>17</sup> The definition of institutions is often broad, encompassing both formal and informal institutions. The prevalence of corruption is an indicator of institutional weakness and correlates

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16. See ROBERT J. BARRO, DETERMINANTS OF ECONOMIC GROWTH - A CROSS-COUNTRY EMPIRICAL STUDY, (1998) (for a standard approach to identify growth factors). Many of the models identified in cross-country studies, however, fail to predict results for individual countries' growth prospects. See IN SEARCH OF PROSPERITY: ANALYTICAL NARRATIVES ON ECONOMIC GROWTH (Dani Rodrik, ed., 2003).

17. See generally DOUGLASS C. NORTH, INSTITUTIONS, INSTITUTIONAL CHANGE, AND ECONOMIC PERFORMANCE (1990).

with low scores for integrity of the judiciary and the bureaucracy. Corruption further sparks fears of expropriation.<sup>18</sup>

Formal law is often used as an alternative measure for the quality of legal institutions. For example, a selected number of specific legal indicators is used to assess the quality of shareholder or creditor rights.<sup>19</sup> The value of measuring the laws on the books, however, is disputed. Many commentators have suggested that implementation of the laws is a more critical gauge and that the quality of formal legal indicators may be secondary.<sup>20</sup> Moreover, some studies have shown that transplanting legal rules and blue prints from one country to another fails to produce effective institutions.<sup>21</sup> These results cannot be explained simply by a time lag between legal reforms and their actual enforcement. Instead, these studies suggest that absent local participation and demand, enforcement is unlikely to catch up.

Impressive growth has been achieved by countries without standard laws and legal institutions in place,<sup>22</sup> a theme that was reflected in some of the panel discussions. A possible explanation for observed deviations from the close relation between rule of law and economic development is that early stages of economic development may not be as dependent on a well-established rule of law system as later ones. An alternative explanation is that the attributes typically associated with the rule of law, such as an independent judiciary and other institutions that generate predictability and accountability, may be provided by other governance mechanisms, such as administrative guidance, business-government partnerships, or state sponsored mediation.<sup>23</sup> Examples include the spectacular growth of the East Asian Tigers and Dragons in the second half of the twentieth century,<sup>24</sup> and more recently China's growth experience.<sup>25</sup> These experiences notwithstanding, several multilateral and bilateral aid organizations advocate convergence on a specific set of rules for the

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18. Stephen Knack and Philip Keefer, *Institutions and Economic Performance: Cross-Country Tests Using Alternative Institutional Measures*, ECON. AND POL. Nov. 1994, at 207-27; Paolo Mauro, *Corruption and Growth*, 110 Q. J. OF ECON., 681 (1995).

19. See Rafael La Porta et al., *Law and Finance*, JOURNAL OF POL. ECON. 106, 1113-55 (1998) (using six indicators of minority shareholder protection and four indicators of creditor rights protection to assess investor protection in forty-nine countries).

20. Joseph E. Stiglitz, *Whither Reform? - Ten Years of the Transition*, Paper Presented at the Annual World Bank Conference on Development Economics (April 30, 1999).

21. Dan Berkowitz et al., *Economic Development, Legality, and the Transplant Effect*, 47 EURO. ECON. REV. 165 (2003).

22. Franklin Allen et al., *Law, Finance, and Economic Growth in China* (Wharton Financial Institutions Center, Working Paper No. 02-44, 2005); KATHARINA PISTOR & PHILIP A. WELLONS, *THE ROLE OF LAW AND LEGAL INSTITUTIONS IN ASIAN ECONOMIC DEVELOPMENT: 1960-1995* (1999).

23. For an extensive review of non-legal governance mechanisms during the high growth period in Asia, see Pistor and Wellons, *supra* note 22.

24. Pistor & Wellons, *supra* note 22.

25. Allen, *supra* note 22.

protection of property rights, corporate governance, bankruptcy, and the like.<sup>26</sup> Similarly, the World Bank's "Doing Business" report ranks countries on pre-defined indicators, many of which are formal, legal indicators or closely associated with the operation of legal institutions in the West.<sup>27</sup>

Arguably, these objective indicators may be superior to perception indices that survey business people and ask them about the subjective ranking of countries on a one to ten "rule of law" or "judicial efficiency" scale. However, they might be confusing form with substance. Ultimately what matters is whether contracts, property rights and other entitlements are enforced impartially in a fair and transparent fashion, not whether a country subscribes to a particular version of a corporate code or court organization.

The Symposium investigated the nexus between economic growth and development through the eyes of foreign investors and multilateral aid organizations. Roberto Dañino, the World Bank's former General Counsel, suggested that competition for scarce capital fosters convergence of countries around the globe on basic rule of law principles. As a result, countries should and do eventually adopt a legal framework conducive to foreign investors. According to panelist John Bohn, the Chairman of the Board of Directors of the Center for International Private Enterprise, the rule of law even "magnifies" economic development, mostly by way of encouraging foreign capital inflows. Although this notion formed the backdrop for the discussion, other panelists did point to a paradox when comparing foreign investment in Russia and China. While Russia has closely followed Western advice and has built a formal legal system that meets most of the so-called "best practice" standards advocated by the IMF, the World Bank, and the EBRD, among others,<sup>28</sup> China still lags far behind on those indicators. Yet, not only have growth rates in China been considerably higher than in Russia, but foreign investors have greater confidence that "deals will get done" in China than in Russia. Thus, law on the books alone may not be the best predictor for stability and predictability. Both of these indicators can also be assured by regimes that do not meet rule of law

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26. The International Monetary Fund's program on creating an international financial architecture includes benchmarking countries against a set of "best practice rules" compiled by staff members. World Bank, International Financial Architecture: An Update on World Bank Group Activities (2001), <http://www.worldbank.org/ifa/IFAUupdate1101.pdf>.

27. The World Bank advertises this program as follows: "The Doing Business database provides objective measures of business regulations and their enforcement. The Doing Business indicators are comparable across 155 economies. They indicate the regulatory costs of business and can be used to analyze specific regulations that enhance or constrain investment, productivity and growth." Home Page, Doing Business, The World Bank Group, <http://www.doingbusiness.org/> (last visited June 23, 2006).

28. Several studies have pointed out that Russia performs remarkably well on these benchmarks, but lacks behind in outcomes such as financial market development indicators. See, e.g., Bernard Black, et al., *Russian Privatization and Corporate Governance: What Went Wrong?* 52 Stan. L. Rev. 1731 (2000). See also Katharina Pistor, et al., *Law and Finance in Transition Economies*, 8 ECON. OF TRANSITION 325 (2000).

standards. An extensive literature has demonstrated the importance of long term business networks to sustain trade and investment.<sup>29</sup> Some commentators advocated for lower expectations that all countries would converge on a common understanding of the rule of law, pointing out that the perception of the importance of law and its enforcement may continue to diverge in some parts of the world.

There was substantial agreement among panelists that the private sector, and in particular multinational corporations, should continue to play an even greater role in promoting rule of law development. To this end, some MNCs engage in a dialogue with local lawmaking and law enforcement agencies trying to convince them of the relevance of rule of law. For example, Nancy Anderson, Vice President and Deputy General Counsel of Microsoft, explained that Microsoft Corporation seeks to convey to local policy makers that they share a common interest in promoting a vibrant local economy. To further such goals, MNCs and government agents in the host country should collaborate on critical aspects of law making (for example, protection of property rights) and law enforcement (for example, identifying and prosecuting individuals violating laws by placing internet worms and viruses). Panelists emphasized that improving the implementation of laws is at least as important as promoting “good laws.”

Ambassador Thomas Pickering, the Senior Vice President of International Relations for The Boeing Company, a former U.S. Under-Secretary of State and former Ambassador to Russia, emphasized that Russia has built an impressive arsenal of laws over the past decade, but that implementation lags behind substantially. He suggested that smaller sized companies are more adversely affected by the lack of the rule of law than larger ones. For example, large corporations, such as Boeing, have sufficient bargaining power – not only because of the capital, technology and expertise they bring, but also because of the number of employees they hire locally – thus ensuring that their interests are heard. Smaller companies, by contrast, are more likely to be taken advantage of on an uneven playing field. Thus they are the ones who benefit most from advancing the rule of law locally. As they have little bargaining power to advance their interest, they are most likely to avoid markets that do not afford them legal protection.

Sam Fried, a Senior Vice President and General Counsel for Limited Brands, Inc., suggested that advancing formal laws and law enforcement is not the only strategy MNCs should consider when investing abroad. Non-governmental organizations are particularly important

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29. Allen, *supra* note 22; Avner Greif, *Impersonal Exchange and the Origins of Markets: From the Community Responsibility System to Individual Legal Responsibility in Pre-Modern Europe*, in *COMMUNITIES AND MARKETS IN ECONOMIC DEVELOPMENT*, (Masahiko Aoki & Yujiro Hayami, eds. 2001); Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55 (1963).



constituencies that can help MNCs better acquaint themselves with local conditions. They can even resolve likely disputes through negotiation and collaboration before they arise. If MNCs take their role seriously, they will engage in capacity building on the ground, as it is broadly understood. This would include helping to build civil society, not only public institutions. His advice was for each MNC to build partnerships with local NGOs as an important way of ensuring medium to long term stability for their investment strategy.

Questions from the floor pointed out the correlation between countries with a high natural resource endowment, which should indicate wealth and prosperity and the contradictory poor development of the rule of law in those countries. The so-called “resource curse” is well supported by empirical studies showing that countries with strong natural resource endowments tend to be significantly poorer and more corrupt than countries with little or no valuable natural resources.<sup>30</sup>

Where governments are unlikely to promote the rule of law, greater responsibility might fall on corporations, including MNCs. Hans Correll suggested that corporations should embrace corporate social responsibility by building local capacity and promoting trust in public as well as private institutions. Comments from the floor questioned the link between labor rights and the rule of law, pointing out that the panel had focused almost exclusively on the importance of the rule of law for the flow of capital. They pointed out that business all too often ignores human rights concerns and limits the notion of rule of law to protecting foreign investors.

#### A. *Business and the Rule of Law:*

- ◆ *Rule of law offers much desired predictability and stability to multinational corporations and domestic businesses alike.*
- ◆ *The absence of rule of law does not imply that no investment takes place. It will, however, take different forms.*
- ◆ *Multinational corporations are profit maximizing entities. They will invest in helping build the rule of law in their host countries if and when it is in their self-interest and in the interests of their shareholders.*
- ◆ *These investments can take different forms, including influencing legislation in host countries, promoting bilateral investment treaties, supporting efforts in strengthening law enforcement, and building partnerships with local non-governmental organizations.*

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30. Jeffrey D. Sachs & Andrew Warner, *The Big Push, Natural Resource Boom and Growth*, 59 J. OF DEV. ECON. 43 (1999).

### 1. *Legislative Foundations*

Corruption has been at the forefront of international development policy making only for the past ten years, owing, in significant measure, to the leadership of former World Bank President James Wolfensohn. Corrupt practices are, of course, age old, and it has been well known that systemic corruption impedes economic growth and development.

Attempts to curb corrupt practices are often triggered by scandals that reveal the extent of corrupt practices, which previously escaped closer scrutiny. When the U.S. enacted the Foreign Corrupt Practices Act (FCPA) in 1977, which holds U.S. citizens and corporations liable for bribing foreign officials, it responded to the disclosure of a series of major corruption scandals, involving, among others, United Brands.<sup>31</sup> It took other countries in the developed world decades to catch up with the U.S. In fact, many countries accepted and even encouraged corrupt practices abroad by allowing their corporations to deduct bribery expenses from their taxable income. Finally, in 1997, the Organization for Economic Cooperation and Development (OECD), along with five non-member countries adopted a Convention on Combating Bribery of Foreign Officials in International Business Transactions. The Convention entered into force in February of 1999.<sup>32</sup> In December 2003, the United Nations added another convention to the international instruments aimed at curbing corruption, the United Nations Convention Against Corruption.<sup>33</sup> This Convention entered into force in December 2005 after thirty countries had ratified it. There are currently 140 signatories and forty-seven parties to the Convention.

The impact of these international conventions in practice is still unclear. The OECD Convention triggered legislative change in many OECD countries, but actual enforcement has remained low. One panelist suggested that at the time of the Symposium thirty-seven enforcement cases based on legislation enacted based on the OECD Convention were pending across the thirty-nine states that are parties to the Convention, or about one case per country. This is further evidence of the common discrepancy between legislative activism and the lack of implementation or enforcement. In fact, one panelist referred to a legislative “Convention Congestion.”

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31. Rebecca Koch, Note, *The Foreign Corrupt Practices Act: It's Time to Cut Back the Grease and Add Some Guidance*, 28 B.C. INT'L & COMP. L. REV. 379 (2005).

32. Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 18, 1997, 37 I.L.M. 1, available at [http://www.oecd.org/document/21/0,2340,en\\_2649\\_37447\\_2017813\\_1\\_1\\_1\\_37447,00.html#text](http://www.oecd.org/document/21/0,2340,en_2649_37447_2017813_1_1_1_37447,00.html#text).

33. United Nations Convention against Corruption, Dec. 11, 2003, 43 I.L.M. 37, available at [http://www.unodc.org/unodc/en/crime\\_convention\\_corruption.html](http://www.unodc.org/unodc/en/crime_convention_corruption.html).

*B. Containing Corruption:*

- ◆ *Corruption can have devastating consequences for societies. In extreme cases, it can cause injury and death, for example, when safety standards for buildings and roads are evaded by side payments.*
- ◆ *Systemic corruption undermines the political process and its legitimacy as those with connections and cash resources can buy political outcomes.*
- ◆ *Systemic corruption is more common in societies with weak legal institutions. These problems are often exacerbated when outsiders (foreign firms, for example) succumb to bribing officials in order to secure outcomes that benefit their interests. Nonetheless, corruption is also prevalent in developed countries with high levels of rule of law, although the probability of being caught and sanctioned severely for engaging in such practices tends to be higher.*
- ◆ *Corruption can be found at the highest levels of government as well as in multilateral organizations, aid agencies, and similar organizations.*
- ◆ *Corruption can equally affect the judiciary. Judicial corruption is particularly problematic as it affects a core institution needed in the fight against corruption.*
- ◆ *Corruption cannot be eliminated, but it can be reduced. While international conventions may signal intent to eliminate it, actual enforcement is critical. Well trained judges, prosecutors and police forces at the local level are critical actors in improving enforcement.*

*1. Enforcement Practices and Strategies*

Reducing corruption requires, among other things, specific enforcement actions to be taken against all parties that engage in corrupt practices. This includes, first and foremost the briber (entrepreneur, corporate representative) and the bribed official. However, Eva Joly, the Assistant Secretary – General of Norway’s Ministry of Justice and a former Investigating Judge in France, pointed out that the most lucrative corrupt transactions could not be undertaken without the expertise and help of intermediaries, including multinational banks that harbor accounts used to launder or park money from such transactions. The panel discussed who should take the lead on enforcement actions. Glenn T. Ware, former Senior Legal Advisor to the World Bank’s Department of Internal Integrity, suggested that the home countries of MNCs need to come to the fore. By contrast, Eva Joly suggested that effective enforcement is more likely to come from the host countries of MNCs, primarily because enforcement agencies in the MNC’s home country might not take actions against firms in their jurisdiction, instead putting the blame on officials in the host country. This may be changing as member states of the OECD, for example, have committed to

prosecute firm representatives for bribing foreign officials. As noted above, however, enforcement has not been robust. Even the host countries have primarily focused on prosecuting officials who accepted bribes, not representatives of foreign firms that offered them. By way of example, Joly described the prosecution of three former presidents of Costa Rica for having accepted bribes by the French multinational Alcatel. In contrast, not a single action had been taken against the company in either Costa Rica or in France. Again, this may be changing as the global fight against corruption strengthens the hands of law enforcement officials in countries around the world.

Effective enforcement strategies require legal backing. Daniel Lipsic, former Deputy Prime Minister and Minister of Justice of the Slovak Republic, pointed out a tension between the effective prosecution of corrupt practices on the one hand, and on the other, legal limitations constraining the powers of the executive, including law enforcement activities. The Slovak Republic, for example, amended its Criminal Procedure Code in 2003 to permit “sting operations,” where law enforcement agents are permitted to use deception to catch a person committing a crime. Frequently this involves a law enforcement agent participating in a staged “crime”, that is, by bribing or taking a bribe. He reported that in a recent case a high level judge was caught in the act of accepting bribes by way of such a sting operation. The constitutionality of the law that authorized this tactic has now been challenged and the case is pending at the country’s constitutional court. Other recent legal changes described by Lipsic include the introduction of “crown witness” rules in the fight against corruption. On the institutional side, the Slovak Republic established a special unit in charge of corruption within the Ministry of Justice and another within the general office of the prosecutor.<sup>34</sup> According to Lipsic, creating new institutions staffed with well trained professionals is more effective than attempting reform within existing institutions.

## *2. The Role of the Private Sector*

The private sector may also play a role in combating corruption. Jonathan P. Graham, Vice President of Litigation & Legal Policy for General Electric Company, explained that MNCs can pursue two strategies. First, they may refrain from investing in countries with high levels of corruption, thus depriving them of much needed capital, expertise, and development potential. He noted that GE currently invests in over 130 countries around the globe. Still, the company refrains from investments in countries where corruption levels were deemed to be excessive. The major reason given for staying away from countries with high levels of corruption was that corruption creates an uneven

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34. For details for anti-corruption measures developed in the Slovak Republic see The Ministry of Justice of the Slovak Republic, Fight Against Corruption, <http://www.justice.gov.sk/a/wfn.aspx?pg=r6&htm=r6/r6comcor.htm>.

playing field and undermines predictability of outcomes.

The second strategy MNCs and domestic companies have at their disposal is the implementation of compliance programs within corporations. GE's compliance programs encourage anonymous reporting by whistle blowers, sanction violators by firing them and make public dismissals for corruption in an attempt to deter such behavior. Transparency International, a non-governmental organization that has spearheaded the fight against corruption, together with Social Accountability International, have developed "Business Principles for Countering Bribery."<sup>35</sup> The Principles advise companies to adopt a program suited to its size, business, and operations. A number of guidelines are spelled out, such as one prohibition against offering bribes to advance business interests and another against making party or charitable contributions that may be deemed bribes in disguise. Devising the appropriate governance structure and monitoring its implementation is left to the company's board of directors.

### *3. Combating Corruption in International Organizations*

More recently, a number of international organizations have subjected themselves to a review in an effort to reduce corrupt practices within them. An important example is the World Bank, which set up a Department of Institutional Integrity in 1999. This was part of the anti-corruption campaign launched by the former President of the World Bank, James Wolfensohn. Staff for this unit was recruited from US prosecutorial offices. They investigated over 2000 cases of corruption over the past six years. Glenn Ware, who participated in this effort as Legal Advisor to the Department of Institutional Integrity, suggested that the investigated cases were no different from cases of corruption and fraud found elsewhere. By implication, the means to fight them can be learned and transferred from places where they have been successfully employed in the past, provided that such efforts are backed by the leadership in the relevant organizations. The World Bank must recognize that corruption is a common phenomenon and thus likely to occur in any organization including its own. Each project and each program grant should be reviewed for its vulnerability to corruption, fraud, and similar schemes. Due diligence studies should be undertaken in order to identify the ultimate beneficiaries of such grants and to assure that they are eligible in the first place. He pointed out that in many of the investigated cases the ultimate beneficiary of World Bank loans was not even known, making it difficult to trace the money once released. Finally, Ware encouraged multinational aid organizations to collaborate and to share information about corrupt practices involving the use of aid money. Many of these measures have been advocated by Transparency International ("TI") for

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35. For details see Transparency International, *Business Principles for Countering Bribery*, [http://www.transparency.org/global\\_priorities/private\\_sector/business\\_principles](http://www.transparency.org/global_priorities/private_sector/business_principles) (last visited June 24, 2006).

years. TI has developed a set of “tool kits”, some of them targeted at particular transactions (that is, government procurement), others focusing on corruption in politics, health, education, and even sports.<sup>36</sup>

#### PART IV: CONSTITUENCIES INVOLVED IN BUILDING THE RULE OF LAW

As stated in the introduction, building the rule of law is a goal that is shared by numerous constituencies. It is no longer a question resolved between rulers and ruled within a given jurisdiction, but includes business, non-governmental organization, as well as bilateral and multilateral donor organizations. This signals broad support for the principles of fairness, due process, and equity that are embodied in the rule of law. However, these multiple constituencies can create additional challenges. There is substantial overlap and sometimes conflicting advice. Moreover the allocation of resources to local and international civil society organizations (CSOs), as well as the use of local and foreign expertise to develop investment strategies may create conflict among various non-state constituencies. This conflict is less of a problem for the private sector whose activities are more focused on specific investment strategies. This is, in part, because its notion of the rule of law is limited to security for investment, property rights, and contract enforcement. However, as panel discussion underscored, civil society and multinational organizations have broader concerns. In particular, both the Panel on Civil Society, and the panel on Multinational Organizations and Governments emphasized that in order to promote the rule of law either domestically or abroad, the overlap must be addressed. Of equal importance, rule of law donors and implementing organizations must improve their mechanisms for coordination.

##### *A. The Private Sector's Contribution to Building the Rule of Law*

The panelists stressed once more that building the rule of law is in the inherent self-interest of multinational corporations in their search for safe and predictable investment environments. William Neukom, the Chair of Preston Gates & Ellis LLP and former General Counsel for the Microsoft Corporation, asserted that rule-based systems of self-governance backed by an independent judiciary capable of enforcing contracts, property rights, and human rights, are important ingredients for the rule of law. He stressed that these principles are not only compatible with corporate interests, but are even desirable from their perspective. At the very least, corporations can realize reputational benefits by actively engaging host governments in discussion on these issues.

While in general agreeing with the notion that rule of law investments

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36. For details see Transparency International Global Priorities, [http://www.transparency.org/global\\_priorities](http://www.transparency.org/global_priorities).

advance the reputation of multinationals, Thomas Gottschalk, the Executive Vice President for Law and Public Policy, and General Counsel of General Motors, suggested that the reputation effect might be contingent on how people around the globe perceive the legitimacy of the rule of law agenda. With the reputation of the U.S. government and U.S. corporations declining, especially but not exclusively in the Islamic world, insistence on what might appear to be U.S. centric world views could be counter productive. John Scriven, a Senior Vice President, General Secretary and Company Secretary at ABB Ltd., supported Gottschalk in arguing that profit maximizing entities cannot afford to attach themselves to a particular imperative at a particular point in time. Instead they must be flexible and develop long-term strategies. Moreover, as multinational investors, they must be culturally sensitive.

Panelists discussed specific strategies that multinational corporations have pursued in advancing the rule of law, including: (1) placing economic pressure on particular regimes, such as South Africa under apartheid; (2) subscribing to broadly accepted principles, such as the Sullivan Principles, an initiative to promote voluntary acceptance of basic standards of social responsibility;<sup>37</sup> (3) accommodating religious beliefs of company employees, even if it is contrary to state policy (such as praying by an employee in China); and (4) collaborating with government officials in developing new legislation and improving enforcement practices. In contrast, panelists expressed concern regarding strategies for forcing corporations to abide by certain principles, such as boycotts and other external pressures, as this was deemed at odds with their need for flexibility. The Business Principles for Countering Bribery,<sup>38</sup> which were developed by a steering committee comprised of representatives from business, civil society organizations, multilaterals and academia, suggest that the most powerful response to these problems is self-governance by business according to broadly framed rule of law principles.

### *B. CSOs' Contribution to Building the Rule of Law*

In recent years there has been a proliferation of organizations at the domestic and international level that pursue certain policy goals relating to the rule of law (For example the promotion of human rights, environmental protection, civil and political rights, and access to justice). A widely used catch phrase for these various organizations is Civil Society Organizations (CSOs) or non-governmental organizations. They include professional organizations, such as bar and judges associations, advocacy groups, interest groups and development assistance organizations. The goal of CSOs is to complement the political process. They organize people with similar goals and try to influence political processes and private decision making through a variety of measures

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37. Global Sullivan Principle: <http://www.thesullivanfoundation.org/gsp/default.asp>.

38. *Supra* note 35.

including public information campaigns, investigating misconduct by private and public actors, and enforcement actions, such as boycotts. CSOs may even initiate litigation.

CSOs are typically funded by a mix of private donations (namely, individual and corporate), foundations, other non-governmental organizations, and bilateral or multilateral donor programs. Not surprisingly, their objectives and strategies differ depending on their primary constituencies, their objectives, and their primary source of funding.

Local and international CSOs active in developing countries often pursue broadly similar goals, but their strategies may differ significantly depending both on who they are and the constituencies whom they ultimately serve. This point was illustrated by an exchange between Joy Ezeilo, the Executive Director of Women's Aid Collective, Nigeria, and Mark Ellis, the Executive Director from the International Bar Association. Joy Ezeilo suggested that throughout Africa CSOs have switched from confrontational tactics vis-à-vis governments to a more collaborative practice and that this has enhanced their ability to achieve their goals. By contrast, Mark Ellis insisted that the essence of CSOs is to hold governments accountable. He insisted that to achieve this goal CSOs must remain separate from government and adopt more arms-length practices.

The discussion also revealed that adversarial strategies are dependent on a legal and institutional infrastructure that is often not in place. In particular, litigation can only be used to hold governments accountable where relevant legislation is supported by a sufficiently independent and impartial judiciary. James Goldston, the Executive Director of the Open Society Justice Initiative, emphasized that shortcomings at the local level can sometimes be overcome by supra-national institutions. An example is the European Court of Human Rights in Strasbourg, to which citizens from member states of the Council of Europe have access – although such recourse can be slow in coming, due to the lengthy nature of such proceedings.<sup>39</sup>

Local and international CSOs often compete against each other in developing countries, if not for funds, then for access to government officials and participation in the development of programs and their implementation. Joy Ezeilo explained that the current Nigerian government has a strong bias in favor of foreign CSOs. While the reasons are not entirely clear, funding and expertise gained in other contexts might play a role. Her concern, however, was that foreign or international CSOs are often unfamiliar with local circumstances. Moreover, local knowledge, capacity, and talent is frequently ignored in the process of building institutions, which may affect the success of policy goals common to both local and international CSOs.

The importance of local constituencies and home grown strategies for sustainable development was also stressed by Michael Posner, the Executive

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39. European Court of Human Rights: <http://www.echr.coe.int/ECHR>.



Director of Human Rights First. He criticized donors in particular for short term horizons, which imply that policy strategies funded by them tend to focus on specific measurable outcomes, and not necessarily on sustainable, foundational change.

In many countries, however, local CSOs have little leverage vis-à-vis governments. Sanjaarusen Oyen a Parliamentary Representative of Great Hural, Mongolia, pointed out that many governments have few incentives to listen to local CSOs. This affects their standing in local society, as organizations lacking both a clear mandate and a record of tangible success can generate little support. Finally, local CSOs often lack funding. Governments can hamper the development of a viable CSO sector by making donation to these organizations unattractive. In Mongolia, for example, donations to non-governmental organizations in general, are not tax deductible.

Commentators from the floor suggested that in many countries CSOs are not only ignored but that governments have taken measures to crack down on them. One example given was Uzbekistan, where repeated enforcement action against NGOs was said to have discouraged donors from providing continued support. These comments suggest that civil society and CSOs are not substitutes for rule of law as a constraint on government actions. Their very existence and scope of permissible operation depends on an environment that is conducive to self-organization, freedom of expression and political activism.

Government regulation, including tax regulation, can play a crucial role in shaping the role that CSOs can possibly play in a given society. In fact, an issue of increasing concern is the regulation of foreign or internationally funded CSOs. How one might assess this phenomenon depends very much on the purposes the relevant CSO pursues and the identity of its sponsors. The recent attempt by Russia to limit the operation of CSOs with foreign funding has generated much criticism. The major concern is that without such sponsorship CSOs with human rights, environmental, rule of law, and similar agendas are unlikely to survive in today's Russia.<sup>40</sup>

### *C. Multilateral and Bilateral Aid Organizations as Contributors to the Rule of Law*

Multilateral and bilateral aid organizations have spent billions of dollars on promoting legal reforms and the rule of law over the past decade.<sup>41</sup> The first law

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40. The Russian government, of course defends the measure by pointing out that CSOs could also be used as a front for fundamentalist or politically radical groups. Nikolas K. Gvosdev, *Russia's NGOs: It's Not So Simple*, INTERNATIONAL HERALD TRIBUNE, Dec. 8, 2005, <http://www.iht.com/articles/2005/12/08/opinion/edgvosdev.php>.

41. The World Bank alone has spent \$2.9 billion on over 300 projects. *Supra* note 1. Over the past three years USAID, the U.S. government aid agency has appropriated between \$10 million and \$16 million each year for rule of law, democracy, and governance projects. USAID: Office of Democracy and Governance, Budget,

and development movement in the post war era focused primarily on Latin America and was sponsored by government agencies as well as private foundations, such as the Ford Foundation.<sup>42</sup> After the fall of the Berlin Wall, a second wave of rule of law projects was launched with the goal of ensuring a successful transition of the former socialist countries to democracy and market based economies. In the aftermath of 9/11 the regional focus has shifted towards the Middle East. At the Symposium, U.S. Congressman Jim Kolbe explained that this event galvanized substantial support in the U.S. Congress for the promotion of the rule of law. Congress recognized that failed states and lack of the rule of law in some parts of the world could have disastrous consequences for the U.S.

In many cases multiple agencies set up programs for advancing the rule of law in a country that they target for such reforms. This can sometimes lead to duplications of efforts, or even to contradictory advice. Carol Bellamy, President and CEO of World Learning and former Executive Director of UNICEF, stressed the need for better coordination of multiple efforts. The Nordic countries were cited to as an example of a consortium of bilateral donors who coordinate amongst themselves to share information and collaborate on major aid programs. Bellamy suggested that the United Nations already provided opportunities for such coordination along with other major multi-lateral donors and that its role in this arena could be expanded.

By contrast, Congressman Kolbe noted that substantial coordination may also come from individual governments, in particular the United States. He cited the example of the Bush administration, which has extended substantial efforts to commit major multi-lateral organizations, such as the World Bank, the IMF, the European Bank for Reconstruction and Development, and the Asian Development Bank, to converge on certain policy goals. In particular, since 9/11 the Bush administration has emphasized the need to improve law enforcement efforts in the fight against terrorism. Part of this strategy is to advocate grant distribution as opposed to loans to promote capacity building in law enforcement—investments that are unlikely to create short term revenue that would allow countries to easily pay back these loans.

Some panelists advocated a better division of labor among various aid organizations. Congressman Kolbe suggested that international organizations, as opposed to national governments, may be particularly well placed for rule of law assistance. He defined this assistance as including training programs for judges, prosecutors, advocates, police, law enforcement officers, and the like; assistance

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[http://www.usaid.gov/policy/budget/cbj2006/cent\\_progs/central\\_dcha\\_dg.html](http://www.usaid.gov/policy/budget/cbj2006/cent_progs/central_dcha_dg.html).

42. For details on the first law and development movement, see David M. Trubek and Marc Galanter, *Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States*, 1974 WISC. L. REV. 1062 (1974). For a more positive assessment of this movement, compare Brian Z. Tamanaha, *The Lessons of Law-and-Development Studies*, 89 AM. J. OF INT'L L. 470 (1995) (reviewing LAW AND DEVELOPMENT, VOL. 2, LEGAL CULTURES, Anthony Carty, ed.).

in drafting criminal and civil codes; the transfer of expertise and personnel to support these training programs, and support for establishing an independent judiciary.

#### PART V: CONCLUDING REMARKS

The summary of the debates that took place at the Symposium highlights the costs and benefits of using the rule of law umbrella to analyze, discuss, and develop solutions for a host of different development issues. There is little doubt that the absence of constraints on executive power and the lack of institutions able to ensure responsible governance contribute to severe poverty. The absence further entrenches already defunct institutions that fail to provide basic public health or security and which are unable to promote economic growth and development. That, however, does not suggest that the absence of rule of law is causal, nor that improving rule of law will ensure resolution of the underlying issues. What is needed, therefore, is a multi-pronged approach that links rule of law strategies to the specific social, political and economic problems different societies face. Creating trust in law and legal institutions is not something that can be administered like a vaccine, but requires engagement with critical constituencies at the local level.

##### *A. The Rule of Law's Multiple Meanings:*

- ◆ *The aspirations of justice and fairness associated with the rule of law are widely shared, notwithstanding the fact that the meaning of the rule of law is difficult to define.*
- ◆ *Participants of the Symposium associate the rule of law with different institutions and different outcomes.*
- ◆ *In part this reflects different experiences with law and legal institutions as well as with the agencies that promote rule of law in countries around the globe. In part it reflects the specific interests of core constituencies for building the rule of law, including governments, civil society organizations, business, and donor agencies.*

##### *1. Differences across Countries*

At the country level, the greatest difference appears to exist between countries with a long tradition of the rule of law on the one hand, and, on the other, countries where the rule of law remains only an aspiration. In the former, the rule of law has become almost standardized, with specific institutional features, including an independent judiciary, an independent and fairly autonomous private bar, and a set of formal rules that are announced in advance and enforced impartially. In the latter countries, the precise institutional form of the rule of law is still in the making. As a result, strategies adopted by local advocates of the rule of law may differ from those promoted by their foreign and

international counterparts.

Put simply, countries with advanced rule of law systems place a lot of emphasis on the autonomy and neutrality of law and legal institutions that have come to support the rule of law. This has often led to the assumption that similar institutions replicated elsewhere will perform similar functions. By contrast, countries in the midst of building the rule of law tend to experience rule of law promotion primarily as politically and socially contested. Moreover, they may associate rule of law with different institutions – a domestic prioritization of the most urgent obstacles to enforcing the rule of law. These priorities reflect local perceptions of the strength of various rule of law institutions and local preferences for addressing institutional needs.

## *2. Differences Across Constituencies*

Different constituencies also differ in their understanding of the rule of law. Representatives from the private sector focused on stability and predictability of host countries' legal regimes and their commitment to enforce contracts and protect property rights. From this perspective, the rule of law serves to ensure safe investment and the enforcement of contracts. Multilateral and bilateral aid agencies also tend to regard rule of law as a means to further another agenda. Economic growth and development, including a country's integration into world markets is one, and international security is another. Priorities may change over time and as a result investments in specific rule of law building strategies (for example, strengthening criminal law and criminal law enforcement as opposed to protecting private contracts and property rights) change as well.

Differences in the meaning and understanding of the rule of law can also be found between different types of civil society organizations (CSOs). International CSOs (as well as multilateral aid organizations) benefit from using similar strategies across different countries. They tend to advocate universal principles and universal responses to problems. By contrast, local CSOs seek solutions to the specific problems in the environment they operate in, and may be unaware of strategies used in addressing similar problems in neighboring countries. They may be reluctant to promote boundaries between civil society and the state – something that is anathema to many international CSOs that view CSOs as counterparts to, not partners with, the state.

## *3. Rule of Law: A Means or an End?*

Rule of law is a fundamental aspiration of mankind, and as such cannot be reduced to a means to obtain other ends—poverty alleviation, a functioning health care system, peace and security, etc. Still, the discussions at the Symposium suggest that it is critical to keep such ends in perspective when embarking on strategies to build the rule of law. At the very least, these ends can serve as a benchmark for assessing the presence or absence of the rule of law.

Equally important, the discussions have made clear that not all constituencies willing to partake in advancing the rule of law globally will do so without qualifying this aim by pointing to the specific ends they are trying to achieve at the same time. Representatives from the corporate sector, for example, were explicit about the fact that what they need is predictability and security to protect their investments. They will promote the rule of law to achieve these ends, but their enthusiasm for rule of law principles is dampened whenever it puts them at odds with their profit maximizing interests. Similarly, the official objective of multi-lateral organizations, such as the World Bank, is economic growth and development. These organizations do not have a mandate to intervene in political processes of the countries they advise. For such institutions, rule of law strategies must be defined as strategies for promoting economic growth and development. Yet, the relation between economic growth and development and the rule of law is complex and the direction of causality between the two remains unclear. Broad empirical patterns suggest that countries with high levels of rule of law also enjoy economic prosperity,<sup>43</sup> but this does not prove the direction of causality or show that policies aimed at economic development and building the rule of law are always re-enforcing.

Given that many rule of law projects seek to achieve other goals in addition to establishing the rule of law in itself, their multiple objectives should be made transparent. This may benefit the rule of law agenda overall, as it will counter the suspicion that rule of law is used as a “Trojan horse”<sup>44</sup> to advance other interests.

#### *D. Future Strategies*

The most important contribution of this Symposium was that it brought together people and organizations who share a deep belief in the importance of the rule of law, most with years of experience in rule of law programming from countries and communities around the globe. The Symposium created a forum for debate between these different stakeholders, which furthered their mutual understanding of each other and each others’ goals. It also exemplified that these kinds of exchanges are indispensable for advancing our understanding of what it takes to build the rule of law worldwide. While the temptation is great to distill a list of items, or building blocks, that will promote the rule of law anywhere and for any subject matter, such an approach is unlikely to have a major impact. As U.S. Supreme Court Justice Sandra Day O’Connor put it in her concluding remarks, we can fairly easily identify the absence of the rule of law: “we know it when we see it.” What has proved much harder is to develop strategies that not

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43. Knack & Keefer, *supra* note 19.

44. Matthew Stephenson, *A Trojan Horse Behind Chinese Walls?: Problems and Prospects of U.S.-Sponsored “Rule of Law” Reform Projects in the People’s Republic of China*, 18 UCLA PACIFIC BASIN L. J. 64 (2000).

only signal some superficial commitment to rule of law principles, but actually make a difference in practice. For this to happen, rule of law strategies must be rooted in the societies that shall benefit from them, and this requires local knowledge and contributions from key constituencies on the ground.

Much could be gained by ensuring that various constituencies with a shared interest in building the rule of law cooperate in this endeavor. Fostering future debates and facilitating the exchange of information between business and civil society organizations, international CSOs and local ones, donor agencies and local stakeholders appear to be among the most important contributions that organizations such as the American Bar Association can make to advancing the rule of law.

2007

## Challenges of Promoting the Rule of Law: Opening Remarks

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# Challenges of Promoting the Rule of Law: Opening Remarks November 9, 2005

PARTICIPANTS: WILLIAM NEUKOM, STEVE ZACK, ASHRAF GHANI, AND  
SALAHEDDIN AL-BASHIR.

WILLIAM NEUKOM: First of all, it seemed to us that a premise underlying our learning about the rule of law was that what we're seeking to achieve is the creation of communities of opportunity and merit. Communities of a scale as small as a neighborhood or as large as a nation-state. Places where individuals have a chance to achieve their potential and to contribute as useful citizens. So there is a sense in which, I think, we can think about the rule of law as a way of doing community building. Those kinds of communities that afford opportunities, that are inclusive, and that are tolerant. We learned a lot today and were reminded today of the barriers to building those kinds of communities and how difficult it is to build those communities of opportunity and merit where the folks living in those communities are confronted by terrorism and a lack of economic development, corruption, lack of an adequate public health system and the threat of pandemics. Tomorrow we will learn about poverty and what that does to make community-building more difficult, in some cases nigh onto impossible.

The thought occurred to us that an approach that we might all think more about in trying to deal with the challenge of creating these communities through the rule of law against those kinds of daunting barriers is to try to take a more interdisciplinary approach to recognize that none of us, in fact none of the sectors – whether it's public or private or nonprofit – has all of the insights and all the knowledge or, indeed, all the resources to achieve the desired results. And that we ought to be thinking more in terms of interdisciplinary multi-sector approaches to those thorny, but...terribly important, problems and opportunities.

Finally, it occurred to us that one of the ways in which we can improve our chances for making progress in this community-building exercise is to find ways to raise the awareness of more people about the fundamental importance of the rule of law by means of public education and by means of deepening our understanding of the importance of the rule of law and ways in which it can be implemented, that we can develop what you might think of as a culture of the



rule of law, which would be global in its extent and would be well-reasoned and thoughtful and, one hopes, would attract the sort of resources it will take to accomplish what we hope it might accomplish.

So we learned a lot today and were reminded of a lot today. We're only at the halfway point. There's a full program of presentations tomorrow, beginning with a breakfast at 8 a.m. and there will be more to be shared by way of observations at the end of the second day. But this evening, we are going to turn to two of our honored guests, and we're going to ask them to share some insights and observations with us from their perspectives about the rule of law. Here this evening we have the privilege of having Steve Zack to introduce our two speakers this evening. Steve is the chair of the House of Delegates of the American Bar Association. He is one of the country's preeminent trial lawyers. He's in the Miami office of Boies, Schiller & Flexner law firm. Steve has served as a past chair of our Latin America Initiative Counsel. And he has been very much a leader within the ABA and within his community for the rule of law. Steve, will you join us and introduce our guests, please?

[*Applause*]

STEVE ZACK: Thank you for those kind remarks, Bill. Before I do, however, introduce our speakers, I want to thank you for all you have done, both in your private practice and in your public life for the rule of law and the leadership that we know you'll continue to show as president of the American Bar Association for the goals of this symposium. I want to publicly recognize you for all those efforts. Thank you.

[*Applause*]

We knew we were going to have a very special evening tonight when we were told that Dr. Al-Bashir was going to address us. We didn't know how painful this moment in time would be for him and we recognize the pain that he and his country are going through and we greatly appreciate his desire to continue to address us this evening. What has happened in his country today really puts in context his life work. Dr. Al-Bashir is recognized as a committed and innovative leader of efforts to promote the rule of law in Jordan and throughout the Middle East. He has a diverse background which includes service in – it says here – several ministerial posts. I honestly believe it's every ministerial post in Jordan. He has been the Minister of Industry and Trade, the Minister of Justice, the Minister of State, the Minister of Government Performance. He clearly cannot keep a job. He has told me that people in his country say that there have been more Al-Bashir sightings than Elvis from all his great efforts in that country. He has taught law at the University of Jordan, where he has also worked in private practice. He holds degrees from the Jordan University, Harvard Law School, and has a Ph.D. in International Law from McGill University.

As the Minister of Justice, Dr. Al-Bashir spearheaded key judicial reforms. He was the author of Jordan's judicial upgrading strategy. He engaged the

judicial counsel in policy dialogues on critical justice issues such as judicial independence, judicial governance, and judicial accountability. Among the many things that you have heard about today and we'll hear more about tomorrow, he's developed a reform strategy for the Judicial Institute of Jordan and involved stakeholders in recommending changes to enhance the legal education in Jordan. While Minister of Trade, Dr. Al-Bashir was involved in formulating and advocating key reform initiatives – the creation of a special economic zone, privatization enterprise and regulatory reforms related to the information technology sector. On the regional level, Dr. Al-Bashir, of course, is a great leader. His efforts include serving as the committee chair for the Good Governance for Development in the Arab countries. This is an initiative to build consensus on legal regional reform priorities pertaining to judicial reform, public sector reform, management of public finance and the civil society empowerment.

He is also the lead advisor for the ABA-supported Arab Counsel for Legal and Judicial Studies Initiative. When I asked Dr. Al-Bashir yesterday – it was the first time I had the opportunity to meet him – and I said with everything you've done, what is your greatest achievement? With great humility, he said I just haven't achieved enough. I said this is more than three lifetime's work for most people. Tell me what you think you'll be remembered for. And he said that he has increased the public's perception of the bench and the good that the bench does and the ethical qualities of the bench in Jordan from 61% to 80% of the people of Jordan. You have many things to be proud of and we are most certainly delighted you could be here today. And we share in your sorrow, but we're glad that you're here to share your thoughts with us.

*[Applause]*

SALAHEDDIN AL-BASHIR: Thank you, Mr. Zack. You have made it very hard, actually, to say what I wanted to say. It has put me in probably a lower standing than actually what you try to achieve this evening. I am over-thankful for the sentiments that were expressed to my country and to my countrymen. I am sure that such events are not new and not just particular to Jordan. Many of the countries in the world have paid for this terrorism and I'm sure it will make all of us more resilient to hold life too precious. I'm sure it will make my country more resilient, to make it more secure and to continue with the path of reform.

Distinguished justices, President Greco, past-president Gray, Mr. Newcomb, Mr. Ide, my colleague, co-speaker tonight, Mr. Ashraf Ghani, it is my honor to address all of you tonight. Also I would like to express my thanks to the American Bar Association for allowing me this opportunity.

In the Middle East, as in many other regions, the countries are seizing the window of opportunity to engage in and achieve meaningful public policy reforms. Undoubtedly, such reforms are often driven by the need to affect a rapid economic growth and development in business in order to address the

pressing problems of poverty and unemployment. Typically, such initiatives involved general trade and economic liberalization recipes, private sector and market liberalization and development programs. However, the high hopes spent on such enterprises, it is fair to say, that the region is, today, increasingly facing another realization that all such attempts will not bear fruition and ultimately won't reach that end if they don't go hand-in-hand with a public sector reform and, more importantly, political reform.

This realization remains a conception in many parts of the region as political liberalization lags behind. Indeed, it is becoming a constraining factor for economic and social reform. This fact creates tension in the minds of people that talk about rule of law, since rule of law facilitates political reform and protects it. Can we divorce political reform from rule of law? And if so, how can we ensure that natural progression to support and expedite political reform? Finally, can we be optimistic then if political reform is lagging . . . ? Before addressing these questions, I would like to argue a position regarding them. Let me first acknowledge the following – the meaning of rule of law may vary across countries and cultures depending on their relative maturity of the political system – the democratic system and process – and also the internal coherence of the different institutions in any given country.

Indeed, I think it's worth initiating [a] symposium to talk about rule of law, its interpretation and similar concepts across time and space. Secondly, and before also arguing my thesis, which is the validity of a technical approach of what I would call rule-by-law rather than rule of law, I'd like to say that I am sure that we are all convinced, like you are, that the end game is clear for all of us. It is democratization. It is improving social inclusion. It is good governance. It is empowering civil society. It is ensuring respect of human rights, especially, freedom of speech. All these are necessary for a livable state that is worthy of humans. Definitely those are the characterizations of a country that belongs to this 21st century.

Accordingly, if you will accept with me the premise that rule of law is a concept that is affected by geography and historical progression, then one can meaningfully engage such a concept in countries where political reform and democratizations are lagging behind. I say so not apologetically. I say it with conviction. That dispensing justice by a technically efficient judiciary ensuring equality by law is the only way to sustain economic and social reform while allowing political reform, its natural historical friend, to catch up.

Let me pose the following question for all of us – does it really matter if countries fighting the uphill battle for economic, social, and political reforms, eliminating poverty, epidemics, focusing on employment, to adopt and embrace rule-by-law as opposed to rule of law? In the ideal world, the answer is clear and simple. However, where resources are finite and visionaries and institutions have to pick their fights intelligently, I maintain that a professional, efficient judiciary that delivers justice should be priority number one. And I further

maintain that rule-by-law is a necessary first step to rule of law.

This is more so since both the man in the street in the Arab countries, as well as political elite are in agreement to support building such professional judiciaries. Where they vary is the reason for such conviction. Suffice it to say, that recent years talk about justice, reform and rule of law has become center stage in many of the countries in the region regarding reform discourse, whether we're talking within the region or without. Reform means change and change makes people before governments nervous. Therefore, a trusted judiciary that delivers justice is a key prerequisite to ask the public to bite the bullet and endure the hardship and cost of reform and change.

The question now becomes how do we professionalize said justice sector? The answer will not vary or will not be different from other countries, including developed ones. We need to ensure the independence of the judiciary, fight corruption – which is extremely important – improve human resources, enhance infrastructure, leverage information technology, provide sufficient financing, training, and technical resources, improve case management and eliminate delays, and ensure faithful enforcement of court rulings.

Many Arab countries face significant challenges in professionalizing their justice sector. These include, in addition to the above challenges: limitations on resources; available reform tools needed for reform; actual shortages in domestic technical assistance; absence of data; absence also of benchmarking data; lack of generally accepted policies, practices, and principles of judicial independence; principles about the role of the public and the role of the media; and almost a total disconnect in dialogue of the relevant local and regional justice sector stakeholders; weak capacity of training; and, definitely not a very clear understanding of accountability of the justice institutions.

The approach to achieve a professional, sufficient, and efficient justice sector will add some meat here. And some words of caution, which I will probably use some of my very short experience in the post of Minister of Justice in Jordan and I will address them very quickly and thematically in the following few minutes.

First, the independence of the judiciary. Independence of the judiciary in its Anglo-Saxon traditional sense as opposed to independence of judges is a thorny and complicated issue in the internal legal debate in the Middle East. More so with the opening up and inclusion into the internal debate of regional and international players and a donor community. The debate, in my view, focused more on institutional structure and traditional interpretation of separation of powers at the expense of more elaborate discussions of the true meaning of independence of the judiciary. How do we create a more trusted judiciary? Because of the poor capacity of the judicial corps, independence will be significantly enhanced in the region by emphasis on codes of conduct, training, speedy justice, adequate and effective protection of vulnerable groups more so than the preoccupation with the configurations of the judicial councils

and who runs the court staff.

The second theme is what I learned to call the common wisdom syndrome. One learns the hard way, and certainly I did, that much of most diagnostics by lawyers and judges alike are intuitive rather than scientific. In my opinion, one should resist the temptation to rely on such diagnosis even if they come from a long-serving judge or lawyer. I cannot emphasize enough how important it is to rely on solid, local data, which is usually lacking, especially in the initial diagnostic stages. Without having the basis for such data, future benchmarking is impossible and evaluating where we are heading will become counterproductive.

I remember in the very first days of taking my post, I asked how many cases do we have in this country? They figured it was from a quarter of a million to a million. Almost fourfold. How [long does an] average case stay in court? How many judges do we have per case? How many cases do we have per judge? Nothing of that was there. The more important thing is actually everybody had a theory of how to fix things. One important element in delays was actually the local post. Nobody figured that out. It took a month to get a court service from one court to another with twenty kilometers difference.

The third theme I would like to address is the public as a reform track. First, the public. The public knows. In the several polls that we have conducted to gauge people's reactions to the justice reform program, we surveyed courts, court users, the public at large, litigants, lawyers, and judges. What we found is that the public is fair and informed. Any attempt to exclude the public or the media from playing a central role in the justice reform is wrong. The public should be the informed driver of all of this. If the public is fully engaged, then everybody should rest assured that senior political leadership is engaged and definitely the ministers of finance are engaged, too.

The reality and perception when dealing with rule of law and the judiciary, reality and perception are one in the same thing. That's true in many sectors, but it's mostly true in the judiciary. Corruption and perception of corruption are equally detrimental. Real influence and the perception of influence are equally harmful. To achieve success, one should not address what is believed to be real problems, but also should address what are perceived problems. With brick and mortar, shortage of the financial and other resources, I see problems in the Middle East. Limitation of infrastructure, information technology and judicial pay are very serious. The problem is that also the donor community does not like to fund brick and mortar or current expenditure. I think a reconsideration of such policy is timely. An exception for supporting judiciaries will prove to be an excellent investment, which is a fact that I have learned also very fast. And what actually Mr. Zack has said, improving the clearance rate in Jordan from seventy percent to 150 percent over six months because of information technology utilization actually meant that we have created enough time for almost all of the judges of the Amman First Instance, which is the biggest trial

court in the country. We have allowed that judges would probably have two months in the year without work when the common wisdom was [that] we needed to add about another twenty-five percent to handle the caseload of that court.

Finally, I have to talk about homegrown reforms. Building a professional judiciary must be a homegrown effort in reality and in perception. This does not mean that others can't help. Others can and should help. What is needed here is a sense of ownership, not at the Chief Justice level or the Minister of Justice, but also to the different strata interested in the field. Even when we are dealing with the common international practice, that too has to have ownership within the country. I believe that it is important to start with a clear mandate – a public initiative by the Chief Justice, by the Minister of Justice that sets the stage besides the vision, invites buying-in by the judiciary, by the rest of the country, by the public, by civil society, the media, and definitely the donor community. And decides that this is for a delivery for the public, first and foremost. And also this is to achieve justice and rule of law at the end of the road.

It is important to talk about instilling accountability and to move a step at a time. Patience is a virtue. We need to give it time. Any new initiatives should build on old initiatives. It should not negate them. Justice and law are traditional institutions and they should stay as such. Therefore, there has to be a holistic approach that takes and learns from the past and builds on it. An expanded dialogue in the community that involves everybody, that addresses a quantitative, qualitative analysis of every step of the way, court's rulings, enforcement, university work, bar association work, the police, civil society, so on and so forth. A detailed diagnostic should be addressed. Reform initiatives should also talk about monitoring and accountability and how we move forward. One should not forget that at the heart of the judiciary, it's human resources which counts. Therefore law schools, bar associations, and judiciary institutes are the key players.

The key outcome of all of this is a consensus with any given country on the vision and the strategic plan, the deliverables and how to measure and attain. This will facilitate a healthy engagement of the public and the media. It will open doors for civil society and donors who wish to help and will start an irreversible path to entrenching the judiciary as the guardian of rule of law and protector of civil rights and political rights.

Ladies and Gentlemen, thank you very much for your patience and attentive listening. I'm looking forward to discussion afterwards by making sure that the rule by law is a functioning concept. I am sure that rule of law will be the next step. We're walking on that irreversible path to it. It is long, but it is surely attainable. Thank you very much.

*[Applause]*

STEVE ZACK: Doctor, thank you for those thoughtful remarks. We know that Jordan has a bright future under the rule of law and we know that you will

be at the center of that future. Thank you for being with us tonight. Our next speaker is our keynote speaker, who is also a great leader and advocate for the rule of law, not only in his country of Afghanistan, but throughout the region and throughout the world. To try and list Dr. Ghani's accomplishments would be foolish. He has so many and our time is short. I am going to limit my remarks to just a few, but I could spend the rest of our evening going through his many accomplishments.

Dr. Ghani earned a B.A. and Master's Degree at the American University in Beirut and has received numerous degrees, including a Ph.D. from Columbia University. He served on the faculty of Kabul University from '73 to '77. From 1982 to '83, he decided to come to Berkeley to serve on their faculty. He then proceeded in 1983 through 1991 to Johns Hopkins to serve on their faculty. In 1991 through 2002, he served at the World Bank. And from October of 2001 to February of 2002, at the United Nations. In February of 2002, after the overthrow of the Taliban, he joined the Afghan government as the chief advisor to President Karzai. From June 2002 to 2004, he was the Finance Minister of Afghanistan. During his tenure as Finance Minister, he implemented many wide-ranging monetary and fiscal reforms and prepared a comprehensive seven-year public investment plan called, of course, Afghan's future. In response to the plan, donors pledged \$8.2 billion for three years and agreed to consider an additional \$19.3 billion in three years. It's not very surprising that in 2003, Dr. Ghani earned the award of Asia's best finance minister. He has also received Afghanistan's highest civilian award.

Dr. Ghani has contributed to the *Financial Times*, *Los Angeles Times*, the *Wall Street Journal*, *New York Times*, and the *Washington Post*. He has appeared frequently on major radio and television programs and of great concern to Dr. Ghani is his abiding interest in Islam. He has published his first articles on Islamic law in 1997. He is currently writing on strategies for state-building. We are honored by your presence and we are pleased that you could be our keynote speaker this evening.

[Applause]

ASHRAF GHANI: Thank you very much for that generous introduction. In the middle of the Great Depression, John Dewey asked the question, what's a public? And he offered the remarkable answer. He said a public is constituted by debate. Discussion is disagreement, is prelude to agreements that result in enduring changes. Today, my remarks are a contribution to a concern that today challenges us at the global level.

After nearly 200 years of debate, OECD countries have achieved a rare consensus on capitalism as the organizational form of the economy, on democracy as the organizational form of polity, and on rule of law as the glue that binds everything together. But this consensus is limited to a billion people. Unless it truly encompasses the six billion people, it will remain fragile and threatened. So consequently, we have a challenge that requires the same level of

imagination that it took to defeat the great depression or the rise of fascism. Today, issues of exclusion, lack of access of the majority of the world's population, to rule of law and to economic opportunity is not a marginal concern, but a central challenge of our times. We must rise to this challenge or otherwise none of us will be secure.

Let me quickly highlight first six functions that, in my view, law has performed historically. First, law has tamed power. Power is unaccountable without law. It is law that has transformed power from a raw physical force to an instrument [for the] realization of public goals. It is giving the public value by defining the consensus in defining both the limitations and the users. It has both defined positive power and negative power. What should not be done with public power and what should public power be harnessed for?

Second, law has civilized the market. Without law, the market is unruly. And it is law that has turned the market into an instrument of the greatest prosperity that we have seen, because it has brought it under predictable regulation.

Three, law has been critical to allowing us to form voluntary organizations. That has truly given rise to what we are calling civil society. There's a lot of misunderstanding regarding civil society. But to me, civil society is inconceivable without volunteers for an organization. It is important to see these three components as all being rule-bound and balancing each other.

Fourthly, unless remarked upon, law has allowed us to turn collective fights into individual disputes. Without law, very small quarrels can become group conflicts. It is law that, through procedure, has turned these into instruments of predictable individualization.

Fifth, law has actually been critical to our categories of personhood. Most of our relationships, as parents, as friends, as colleagues, are legal relationships. The social realm has become legal. It has been law, of course, that has also been, in the past, the greatest instrument of separation.

Lastly, from the economic side, law has provided the ground for repeated play and thereby, that important and most missing commodity – trust. Because without repeated play, we do not have the incentive to trust. But to conclude regarding these functions, the rule of law is still an idea. There is nowhere where the rule of law is complete. Because the threat of abuse of power or crisis of the market or failure of the market or our failure to enter into volunteer organizations and its ever-present possibility. Because it's an ideal, it is always in the making. Let us not forget that England in the 19th century was the greatest source of corruption in the world. It was called the Great Corruption.

In U.S. cities in the 1920s, as you are reminded, were called the shame of the cities. There is no distinction here between the West and the rest of the world. It has been an historical process of consolidating the rule of law. Therefore, we must learn and act and not take an oppositional stance and say



that these things are bound in culture. Every great civilization has had respect for rules. And I have worked in half of the world – whether it has been China or India or Russia. The hungering of the ordinary woman and man for law is nowhere less than anywhere else. It's not the question of demand for law that's the problem. It's the question of the supply of law.

Therefore, our definition of institutions becomes very simple. They are the rules of the game, humanly-devised rules of the game, through which we agree to govern ourselves. But it's repetition and trust in these institutions that allows us to make the future predictable. It is routinization that becomes significant. In terms of basis of law, we either have moral commitment – law gets internalized as the moral system and finds a basis in our morality or our common social consent. All sanctioned by the power of the state. While moral consent is enormous power, it also must be recognized that then it becomes an obstacle to change. Even moral consent poses a problem of flexibility in adaptation. Therefore, mechanisms of change become extremely important.

And it is here that the critical nature of rule of law must be linked to a mechanism of both interpretation and legislation. It is not sufficient to export various pieces of legislation. One has to think of the necessary checks and balances and the nested set of mechanisms that allow us to move forward. What is most important, of course, is participation. Law must become a category of daily interaction so people see it as engaging and involving their interests. Without that fundamental sense of the public being in the public domain and in public law, we are not going to have sustainability of rule of law.

From an historical perspective, 20th century expansion of law in OECD countries involves expansion of justice through citizenship rights in OECD countries. Let us not forget that it took civil rights to overcome the legacy of race in this country. Rule of law is not the same as justice. To have justice, there must be equality before the law. And on that standard, most of the world is still wanting. Enormous progress, but it is an objective of the future. Gender has still an enormous way to go. As for indigenous people in the Northern countries – whether it is Native Americans or Native Australians or Native New Zealanders. To claim that there is equality of law of all these citizens truly I think would be a mistake.

One must recognize the nature of the challenge that is ongoing. Law is both an instrument of freedom and wealth creation, as well as an instrument of oppression and an instrument where obstacles from a previous consensus prevent future flexibility. The social model in Europe today is at the center of a series of debates as to whether it's a constraint or an asset. It is totally legal, but is it advantageous? In non-OECD countries, the story is one of the crisis of the state. The market and civil society. Power has not been tamed. The market is not civilized, and association life is still highly problematic. One causal factor, of course, can be isolated. It was called the Cold War. The long years of Cold War were not years for the slogan of rule of law to find its focus. The politics of

Cold War revolved around who was with us or against us. And mostly, it involved support for dictators and authoritarian regimes around the world regardless of which bipolar.

Today, most of our crisis is the debris of the Cold War. The choices that were made then were both transforming and also destructive. Now in terms of the specifics of legal reform, basically there are three criteria – desirability, feasibility and credibility. I think the legal reform movement or the rule of law movement has done a remarkable job in creating the desirability of rule of law. When it comes to feasibility and credibility, we still have a very long way to go. Part of the reason is what Alfred Whitehead characterized as misplaced concreteness. Something that works in one context is taken uncritically and applied to another.

Rule of law is not a technology. It's a tissue of relationship that must, in terms of transplanting, find an organic home. And oftentimes, the reading of context has been lacking. Pieces do not make the whole. Oftentimes, in terms of interventions, the whole has been less than the sum of the parts. One has to be able to conceive of an architecture, if it is going to invoke a metaphor, as a whole process. That requires thinking through feasibility from the perspective of the citizen who is going to be the ultimate beneficiary and the steps. It requires what I call backward mapping from an objective to the inputs, not from an objective thinking the desirable outcomes are going to be realized.

But simultaneously, now that we have discussed and discovered institutions, we must disagree on one fundamental issue with institutional analysts, particularly from the economic side. It should not require 200 years to create credible institutions. None of us have that kind of patience. [*Laughter*] Even if the technology to give us long life – some of my colleagues are talking about 500 years, God forbid . . . So in the rest of my talk let me give some examples as to how one can address the question of institutional change to short, medium and long-term perspectives.

Let me disagree with one thing of Graham Allison this morning. He said rule of law was not necessary or sufficient to fighting terrorism. In the immediate short-term, we might make that claim. But I think in the medium to long-term, the most effective way of fighting terrorism is actually going to be our investment in rule of law. First, let me take an example from Russia, where I worked from '96 to 2001. In '96, when I arrived in Russia on a World Bank program, the Russian coal sector was receiving \$2 billion in subsidies but had 8 months of unpaid wages. It was essential to pay the workers because they had thrown two governments out. The issue here was how rules become constituted. What was the problem? The problem was that money was being put in a big pot without any control and any accountability. What we did was extremely simple. First we divided the pot into ten categories and put a rule that no money could be transferred from one category to another. We put checks and balances in. So the ministry of finance and the department of treasury had the right to veto any

request that did not correspond to those rules. Second, the most important issue which was salaries, we figured out how no one should touch the money because before that, cash was being handled at multiple levels of this complex system. The system that we put in place involved individual deposits of worker's salaries into their bank accounts. Of course, we had to persuade each piece of this. Within six months, everybody was receiving their wages on time. It did not involve more than four consultants. We worked with the Russians. Afterwards, because it had been a Russian-driven process, with us as catalysts of change, they generalized it themselves.

In China, when I worked there, it's extremely difficult to interact with Chinese through Western legal categories because the system is configured differently. We must recognize that institutions are not just configured in one way. Their strength, which needs to be appreciated, is in the notion of contract. They have an enormously sophisticated notion of contracts and contracts can be a binding instrument. It was one of the largest displacement projects in history that displaced about 400,000 people to stabilize the Yellow River. But everybody was compensated in time and in full because the local mechanisms were used to enforce contracts and elaborate measures were provided.

In Afghanistan, I want to give several examples to be able to bring this. In September of 2001, of course nobody expected radical change in Afghanistan on the ninth of September. On the 11th, the world changed. So things had to be devised, very rapidly. That's when I joined the U.N. The key to us, in order to face our critical challenge, which was a lack of a legitimate center, was to devise a process of rules, a set of rules, through which a legitimate center could be established. How did we do this? Administrator Natsios spoke of this. It was to harness an institution called the *loya jirga*, the grand council, and reshape it radically. We reshaped it by making people elected to it. Then those people became the electors of the presidency. Second, the same mechanism became the constitutional convention. What was extremely important in terms of short-term gains was to mark the time for participation over a two-year process where the rhythm of change was so well marked that people's energies could be geared. This resulted in a remarkable document, which is the constitution of Afghanistan. Twenty-five percent of the seats in Afghanistan are reserved for women and they've all been elected. But not only that, it is a constitution that both recognizes the centrality of Islam as our political culture, but also in the first ten articles, recognizes the Universal Declaration of Human Rights.

Because it was negotiated and every comma literally was fought over, it has the chance of becoming the rules of the game. This is a very different document than something that is dictated by a gun. Because of that, the elections that took place for the presidency, again, are very important because we are enormously proud of the fact that our president was only elected with 54.5 percent of the vote. Not 99.9. [Laughter] I think legitimacy requires contestation. Roughly sixty percent of the vote, I think, would be enormous

guilt.

That's at the grand level of the nation. But what did we do with the village? The untold story of Afghanistan is at the village. We have 20,000 villages. 10,000 of these villages have elected their village leaders by a secret ballot-based election, both involving election of men and women. And this in a country where gender apartheid from '96 to 2001 was the rule. They decide on block grants of \$20,000 to \$60,000. In turn, there is a very simple set of rules – democracy, namely election, accountability, namely that minimally sixty percent of the village has to be present for the decisions to be made on their priorities, and transparency, posting every cent that comes. Administrator Natsios is not here, so I tease him. But USAID managed to build eight schools in Afghanistan when it promised 500. These villages built 600 schools, not promising one.

A contractor to build a school through a USAID contract costs \$250,000 without village contribution. When these villages build it, it costs a maximum of \$50,000 and they contribute at least \$10,000 of their own money. And they will be sustaining. So rule of law has got many instruments. I think it is important to think of this nested hierarchy.

The other example is communication. In 2002, Afghanistan had 100 mobile phones. Every ambassador was coming to me, asking me to intervene to give them one of them. Today we have over a million and a half mobile phones. All thanks to one decision on the part of the president, then selecting a minister of communication who conducted a transparent bidding process for the private sector to participate. All the money has come from the private sector. Last year, the largest two taxpayers were the two mobile telephone companies that were awarded the contract.

It is important to think of rule of law as a resource. The way rules are framed, you could have awarded the same thing under the table, but awarding it transparently and with due diligence, not a single member of that one cabinet or any member of the government was involved in the technical evaluation. We all showed up when the final decisions were being announced and by the technical experts.

If you are seeing the positive, there's also the negative. The negative is that the worst corporations in the world harness legal power to literally rob the developing countries blind. We had one contract where they had written – we were able to defeat it – but they had managed to get some of our ministers to agree to a contract that would have resulted in loss of at least a billion dollars over fifty years. I described it as Leopold getting the Congo. The point here is a very simple one. Some of the corporations harness legal resources not to promote, but to undermine transparency and rule of law. And it is extremely important that the balance shifts. As a country that had gone through twenty-four years of conflict, we did not have the legal power to be able to review such contracts. And it is extremely important that priority in legal assistance be focused on those domains that subsequently create a nightmare instead of an

asset.

Last two points in terms of example – one was customs. When I became the minister of finance, I looked at the tariffs. I did one week of work. For an Afghan citizen to pay two dollar in taxes required paying eight dollars in bribes in one week of their lives. Nobody could understand the law. There were 120 categories on the tariff. There were five or six different tariffs in every customhouse. What became extremely critical to us was simplification. We mapped every part of the process. It required twenty-four pages of documentation. It required twenty signatures to get a piece of goods out.

The burden of rules that exist – you know, we have usually a positive image of rules – but rules, as I have seen, again, in Russia, in Vietnam and other places or in India – can be an enormous burden. Simplification of rules is absolutely essential to investing the system with transparency.

At the end, we reduced the tariff to six categories and reduced the number of signatures to four and the document to one page. As a result, revenue increased quite substantially. But that, again, shows that corruption is not just a moral problem, it is also a problem of rules and the way we need to approach the rules to simplifying it. By the time I left, we were working on the tax accord. We had 110 taxes on the book. And nobody had an understanding of what our tax system was. Sometimes we are spending \$1,000 to collect \$1 in taxes.

Here, again, is that legacy issue. It is important to clear the legacy. But legacy cannot be cleared without understanding the fundamental social categories through which law and justice are experienced. When I reformed the justice, there was a province in Southwestern Afghanistan called Herat. And the governor was extremely powerful because he was a military figure and the coalition and allies had backed him. When I wanted to make my case, I needed cash and I needed to pay the army. So the arena where I took my case were the mosques. I went to seven mosques in this province, including the Friday mosque. And put my case to the people. My case was very simple. Islamic theory of governance requires that the public purse be accountable to the public. And that it be unified. And as Minister of Finance, I argued that that was my job.

At the end of seven days, I just sat with the governor for half an hour and took \$20 million in cash from him. Because by then he knew he had lost the moral argument. The notion that I was invoking is called the cycle of justice. It's over 2,000 years old. And this notion says a state needs a public purse because a state cannot defend itself without an army. But an army cannot be sustained without a public contribution. But the public will not contribute unless they realize that there is justice.

Justice becomes foundational. It is extremely important to understand this legacy. Because of this, one of the neglected issues is legal composition. The greatest difficulty that we have had with technical assistance has been off-the-shelf legislation. My colleagues in the Ministry of Justice are extremely proud

carriers of a tradition of rule of law. But they wanted to make sense of the legislation that they were going to approve. The two lawyers that gained their greatest respect were people who could compose with them. Not people who handed them something in translation. And you do realize, at times, things have come across my desk – not once, but many times – where people have even not bothered to change the name of a country.

One auditing code in one very major important country is a code where every single paragraph is taken from a different country. That does not create the confidence that is required to underwrite this. In here, it is very important to look at co-production of rules and to look into this as a ten to twenty year program. Not 200, but not one year or six months again. The right time horizon must be there for the type of partnership to transform. Spain, Portugal, and Greece are examples of this. Who would have thought in the 1950s that Southern Europe was capable of democracy? Or that Central Europe today would be embracing wholesale Europe?

In conclusion, to return, consensus on democracy, the market and rule of law should require us to think on the global scale. This is not a case of charity. It's a case of investment – investment in our collective security, ourselves, but particularly of our children and of our grandchildren.

Rule of law is critical to get states that function in economies that are predictable. The key to stability is to create trust between the citizens and the state and open up paths of opportunity. Mr. Newcomb was referring to where individuals can see a better future. It was the creation of the middle class in the OECD countries that solidified the rule of law and put an end to the great tensions and then the civil rights movement that allowed the problem of race to end. This requires thinking carefully about investing in human capital. It cannot be done just through transfers constantly. The catalytic mechanisms are to invest in the institutions of learning and the critical facilities. This is a partnership because it brings about a culture of tolerance, a culture of acceptance, but more importantly than anything else, a common culture of globalization where we see globalization as a common asset – global public asset – to be left for the benefit of all of us.

In this regard, ABA has been a tremendous partner to us in Afghanistan and, I think, globally. And I would like to thank all of you for giving me this opportunity to address you.

[*Applause*]

WILLIAM NEUKOM: I think we have a few minutes for questions, if you'd like to ask them, of Dr. Al-Bashir or Dr. Ghani, or indeed Dr. Zack.

DOROTHY BEASLEY: I think it was Monday in the *New York Times* – if you don't mind my referring to that article on the front page – very critical about some of the aid to Afghanistan, what has happened to it and what has been accomplished. I was reminded of it when you talked about the local

governments not promising and building schools and the[n] promising not delivering. Could you comment on that and the report that was given?

ASHRAF GHANI: On aid, I have the following observation – aid is not a right of the recipient or the duty of the provider. We should enter into compacts of mutual responsibility. My colleague, Claire Lockhart, and I have coined the term – it's called a double compact. Aid is a broken system today. It was designed in a different era in 1945 for different purposes. USAID is over-burdened by a series of regulations that would make [the] life of anybody a nightmare. [laughter] They have so many requirements, so what happens? A series of beltway bandits get all the contracts and then it becomes a check. Out of one dollar, spent by the American public for the benefit of Afghanistan, at best twenty cents comes to Afghanistan. Eighty cents goes back around the beltway. This is a problem. What is really required in terms of efficiency is to be able to use the government processes that government designs.

When I went back, in four months, we put a developmental strategy. In two years, we had a seven-year plan. USAID is burdened by a lot of constraints. For instance, the number of people it can have. No USAID official can serve more than a year in a country like Afghanistan. Their spouses are not permitted. So in four years, they were not capable of putting together a strategy. But they also militate against using our strategy as their common framework. Some fundamental thinking is required. The argument here, to tie it back to rule of law, is that rule of law is actually being fragmented to a variety of donor regulation complexities.

Take purchase of goods and services. I needed to master at least twenty different sets of rules for purchases. We need simplification. We need harmonization to be able to truly harness the aid that the public in these countries so generously gives to [*Unintelligible*]. But, the other side is our obligation. For instance, the compact that I put in Berlin involved raising of domestic revenue significantly every year. We have to focus on both sides.

SALAHEDDIN AL-BASHIR: I have to say that the USAID have been involved in much in the reform programs of Jordan for the last six years. If I may say also, I believe they have been a very efficient contributor to our reform program and very responsive. I remember that I managed to get the buy-in for the judicial upgrading strategy. About fifteen, twenty days later on, mobilization happened on the ground and ABA was the first to arrive. But I would like to talk about donor help from another point of view, whether it is USAID or anybody else. I have only good things to say about donor communities' work in Jordan in governance and elsewhere.

It does provide continuity. That could not be judged by terms of time or probably some efficiencies or some politically or secured form of where the contractors go – whether they come back home or they benefit peoples contracting from that side. The continuity element, especially in politically volatile situations – they help being spotted in more places than Elvis than

actually if there is somebody who is an institution of stature and caliber where also his accountability helps to become a partner. Indeed, I'm very happy that at least part of our judicial work, USAID, ABA, and other contractors are on the ground to also keep the agreed term of reference to see that it is there. Sometimes there is some pushing. Sometimes there is some compromise. But indeed, it keeps the boat going and delivery will happen, if not this year, within two years. And that's much better than not happening at all.

JIM MICHAEL: Thank you. My name is Jim Michael. I work with DPK Consulting we've had the privilege of working with Dr. Al-Bashir and his efforts in Jordan. I had a question for him. First, sir, I want to express solidarity with the Jordanian people at this time of tragedy. Sir, can you tell me what your expectations are with respect to the National Agenda of reform that has been awaited? And whether you see perhaps new incentives for reform at this time in Jordan with respect to both the political agenda and the rule of law agenda? Thank you.

SALAHEDDIN AL-BASHIR: The National Agenda is an exercise, actually, that started from the Jordanian government where there has been an attempt to have an agreement across society for the priorities of Jordan for the coming ten years. Part of it is a private dream that if we could build a consensus, then popular support for some of the reform programs could be forthcoming. It has eleven pillars. To address the most important one of which is the political reform program. Election laws, party laws, media, freedom of speech, civil society, and so on and so forth. But it has economic, judicial, health, education, and so on and so forth. We started this program about a year ago and almost before the end of the year, breaking down between the government and parliament happens and some ministers had to go. However, I am happy to say that the work has finished and there is a document, which is a beautiful document, that has been accepted across the whole sector of society and political life from the far right to the far left, and in each group, the business community and NGOs. It will come out soon. I believe it will really invigorate the vision of the country and it will buy us small mileage into the coming years.

The difference in this document from any previous work that we've done in a country is that it has milestones and it has deliverables and standards to deliver. Therefore, we will be able to gauge what we are doing year in and year out. I think it will create a lot of momentum for the future.

STEVE ZACK: I was taken when I looked at both your resumes at how similar the resumes were on a lot of different levels. I was very curious; do you have opportunities to share your experiences in your respective countries in other forums? And how transferable is the knowledge you have from one country to the experiences in the other, particularly since you're in the same region? *[Laughter]*

ASHRAF GHANI: I think what is really important is to think through a range of options for reform. What is very important is to be able to formulate



scenarios. Scenarios are very useful devices, I have found, because you can depersonalize it. Four months ago, for instance, I went for ten days to Sudan and had a meeting with the late John Garang. We were supposed to meet for one hour. We ended up meeting for five hours in Cairo because I told him there were three scenarios. I knew Sudan could be accountable, a stalemated country, or reversion back to violence. In all of that I could draw on the drivers of change as to what were institutional drivers of change. This is where understanding a comparative range becomes very important to be able to see. Second, our common traditions. For instance, Jordan has made enormous advances in legal interpretation of Islam – are very dynamic. That's the tradition we have in common though our's was interrupted. Last year, when President Karzai and King Abdullah met together, we agreed that we will share experience in that regard. It's also, for instance, in terms of the regional donors, the Arab Fund or the Saudi Fund or others; Jordan has acquired an immense reputation for predictability, for being a very good client. That provides the type of examples as to what should be done. I think what is also really important today, now, in terms of legal education, for instance, is to think wider in terms of sub-collaboration. For instance, what has happened with legal education in India and some of the most dynamic states like Andhra Pradesh or Karnataka, where Bangalore is the capital, is remarkable. The people who are graduating from a five-year program in Bangalore are getting the same wages as M.B.A.s. And they've managed to think through some really fundamental issues. My last example would be Dubai – the investment zone in Dubai, for instance. They have invested \$100 million in simplification of investment legislation. This is now a patrimony, a common legacy that is made available to other countries because Dubai's growth provides an enormous possibility. Just on transparency and accountability, to get their other story. If you look into 1992, the number of countries that rank six, nine being highest. In 1992, no Middle Eastern country was on that list. No country from Central Europe was on that list. United States and Japan and France have stayed at six. New Zealand is at nine. Now, Bahrain Dubai, Qatar have all made it to ranking of six. As have Latvia and Lithuania. It is very encouraging to see that kind of change and then identify those drivers and build on it.

AL-BASHIR: It is disturbing for the intelligentsia within that region – the Arab-Islamic region – to work with the processes that connote somewhere else. So there is something called the Barcelona process for those who understand the lingo of the European-Mediterranean partnership. There is something called the Sea Island or the Common Future which was started actually in the Sea Island and the thinking before that. All of these wanted to work with some kind of reform programs, necessarily from outside the region to address it from Morocco to Afghanistan and even beyond. That cleared some need to actually what Mr. Ryan said to actually have sub-sub. For two reasons. One of them is probably, it won't work unless it becomes from within. I'd like to stress the

homegrown element of it. And there have been several initiatives. One of them also referred to which is the Good Governance for Development within that region, which is an initiative that was able to get forty-five prime ministers and ministers to commit on the 16th for good governance there. But all this goes well until you touch political reform. So if we're talking the economy, if we're talking simplification of investment, if we're talking about an efficient judiciary, some parts of public sector reform that deals with processes, then that's all fine. The moment you touch political reform, gerrymandering or one of the hot issues, then probably even that appears to me whether we are from the same alma matter or not.

WILLIAM NEUKOM: Very well. Three good questions and superb answers. Will you join me in thanking, please, Dr. Ghani and Dr. al-Bashir and Steve Zack?

*[Applause]*

2007

## Remarks of United States Secretary of State Condoleezza Rice

Condoleezza Rice

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## Remarks of United States Secretary of State Condoleezza Rice November 9, 2005

Thank you. And thank you, Dave, for that kind introduction. I know that I like Dave and I've always liked him, despite the fact that he went to Berkeley, and now I understand his son went to Stanford—that makes perfectly good sense. But thank you very much for that great introduction.

I would like to thank the leaders of the American Bar Association for inviting me to speak. I know I'm a bit the warm-up act for Andrew Natsios, who's going to talk to you later about the very important work that the USAID is doing around the world in helping countries to promote the rule of law and to develop institutions of the rule of law. But all of you today at this Symposium are helping to lead an important movement to support the rule of law worldwide. The topics you are covering are very important topics and the very same issues that we wrestle with daily at the State Department.

President Bush and I share your commitment to the rule of law. And let me just say that I personally have always viewed issues of law as fundamental because I remember in my own life in my own time that as a black girl growing up in the segregated South, the rule of law did not always serve me. And so I think I have a particular appreciation for how important it is that the state respect the rule of law.

Ladies and gentlemen, the advance of freedom and the success of democracy and the flourishing of human potential all depend on governments that honor and enforce the rule of law. Today, America's belief in the universal nature of human liberty, a belief we expressed in our Declaration and enshrined in our Constitution, now leads us into a world to help others win their freedom and secure it in law.

Today, the greatest challenges that we face emerges more from within states than between them—from states that are either unable or unwilling to apply the rule of law within their borders. In a world where threats pass even through the most fortified boundaries, weak and poorly governed states enable disease to spread undetected and corruption to multiply unchecked and hateful ideologies to grow more violent and more vengeful.

As the fate of nations grows ever more connected, our challenges are unprecedented, but our purposes are clear: where weaker governments possess

the will but the lack of means to enforce the rule of law, we must empower them with the strength of our partnership. And where autocrats still rule by coercion of the state rather than by the consent of the governed, we must support the rights of their oppressed citizens, wherever they raise their voice for equal justice and lawful government.

Where the rule of law is undermined by government corruption, we are offering incentives for honest and transparent behavior. Anti-corruption is one of the key standards of our Millennium Challenge Account initiative, an initiative that rewards good governance and the fight against corruption. And in just the past year, the Millennium Challenge Corporation has signed new development compacts with five countries that are worth hundreds of billions of dollars to those countries, each of which involves significant political and legal reforms.

Where the rule of law is flouted by immoral rulers and war criminals, we are helping citizens to operate international tribunals and special courts of justice. The United States helped to launch such efforts in Rwanda and Sierra Leone and the former Yugoslavia. And we continue to support all people who seek justice for their nations by lawfully trying the criminals who ravaged them.

Finally, where the rule of law is emerging from decades of tyranny, the United States is helping newly democratic peoples to liberate themselves.

In Afghanistan, we have dedicated more than \$62 million since the fall of the Taliban to build new courthouses, to train new judges and to reform the nation's regulatory system. To help the Afghan people enforce the rule of law themselves, we have also trained 32,000 new police officers who are now patrolling the streets of that country as well as its highways and its borders.

And in Iraq, we have committed approximately \$1 billion to train and equip the men and women of Iraq's new national police force to better protect and serve their fellow citizens. We have spent nearly \$400 million to strengthen the rule of law across all of Iraq, helping the Iraqi people to reform their system of legal education, to secure their country's many courtrooms and to frame their new democratic constitution. These judicial reforms are enabling the Iraqi High Tribunal to begin holding fair trials for the leaders of the Baathist regime, including Saddam Hussein himself.

Well, as we empower our partners in weak and poorly governed states to uphold the rule of law, we also expect them to meet their international obligations. For the United States, an essential element of the rule of law has always been, and still remains, law among nations. We've always respected our international legal obligations and we have led the world in developing new international law.

Indeed, this has made America somewhat unique in the world and in world history because we try and use our great power not to win glory or imperial gain for ourselves but to establish international rules and norms that we encourage

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others to follow. After World War II, we negotiated new treaties and built new international institutions for the peaceful resolution of disputes. And today, one of my highest priorities is to transform our great institutions, like the United Nations, to reflect the world as it is in 2005, not as it was in 1945.

Ladies and gentlemen, we Americans have never viewed liberty and law as detracting from one another. Indeed, our Founding Fathers believed, as John Locke did, that the purpose of law is not “to abolish or restrain [freedom], but to preserve and enlarge freedom.” And from the earliest days of our Republic, America has proclaimed the principle that without law, liberty becomes licentiousness and without liberty, law becomes oppression.

America strives to realize our calling as a nation of laws, not of men, a nation that holds all governments and citizens, especially our own, to principles that transcend mere brute force or will to power. When Americans violate the law, whether in our country or in foreign lands, we do and we should hold them accountable for their crimes as we saw in the aftermath - after the horrific events that sickened us all at Abu Ghraib.

The virtue of the rule of law is not that it erases all human imperfection but that it upholds a standard of justice that enables democratic societies to improve themselves over time.

America is a country of laws. We will always be a country of laws. And we will remain an international leader because we will be committed, not simply to our strength but to our love of liberty, our support for democracy and most of all, our devotion to the rule of law. Here in this setting, for those of you who hold deep a commitment to the rule of law, I want to thank you for that commitment. I want to thank you for helping to be the conscience of America in that commitment. And for all that you do every day to educate, to train and to spread that commitment to the rule of law.

Thank you very much and I hope you enjoy the rest of today’s events.

*[Applause]*

2007

## Remarks of Andrew S. Natsios, Administrator, United States Agency for International Development

Andrew S. Natsios

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## Remarks of Andrew S. Natsios, Administrator, United States Agency for International Development November 9, 2005

Thank you for that introduction. It is an honor to take part in this Symposium.

In his Second Inaugural Address, President Bush announced the Freedom Agenda. I have to say, I have heard many inaugural addresses since I was in college as I was a student in history and American Jurisprudence. Some inaugural addresses become historic and this Second Inaugural Address will be remembered for its clear call for democracy and a democracy revolution in the world. Which in fact has been occurring whether or not people have been noticing. There has been a profound shift going on. The question of course is how far it will go, how permanent it is. Our job in AID is to assist people who have made a decision in the developing world or transition countries to make that change themselves. We do not build democracies. We help people at the local level build democracies. Ensuring the rule of law and safeguarding human rights are key aspects of the President's Freedom Agenda.

USAID is working closely with Secretary Rice, who I report to, and the Department of State to advance the Freedom Agenda. USAID is the lead implementer of U.S. democracy programs worldwide, implementing \$1.2 billion of democracy programs in FY 2004. We have more than 400 Democracy and governance specialists working in AID missions in over eighty countries. With this vast field presence, we can move quickly to support incipient democratic movements.

Rule of law as you know has always been at the heart of the USAID democracy promotion program. This year, USAID celebrates twenty years since the initiation of our first major rule of law program. We now have rule of law programs in more than fifty countries. In all regions, there are significant achievements.

In Latin America and the Caribbean, our programs have maintained a strong focus on criminal justice reform and human rights protection. Many Latin American countries have adopted some form of modern accusatory trial process;



thereby, ending the abuses of the former criminal systems. Human and institutional capacity has been improved, and access to justice for marginalized groups and the poor is improving. USAID is working to improve commercial dispute resolution in the CAFTA countries - which will be a major factor in attracting foreign and domestic investment.

In 1989, when the Berlin Wall came down, USAID's rule of law programs expanded to former "captive nations," with the ABA as a vanguard of our reform work in Eastern Europe. We supported judicial reform, trained judges and lawyers, modernized legal education, created bar associations, and improved access to justice. We worked to restore justice to the war-torn countries of the former Yugoslavia. Increasing judicial independence was a central theme. Now, across the region, previously unknown concepts of constitutionalism, separation of powers, and judicial independence are part of the legal culture.

I just came back from a four day trip to Russia. I had lunch in the hometown of the great Russian poet Pushkin outside of St. Petersburg. I had lunch with two Russian women judges- and this was one of the most fascinating lunches I have had. And I have been to sixty countries around the world in the last five years now. The two of them had been judges for more than thirty years. And I asked what are the biggest changes between before the Soviet Union collapsed and now? And they said there have been many changes. So I asked what are the changes and what role did USAID play in that? USAID is a technical assistance agency along with doing infrastructure and humanitarian relief and other things. But technical assistance is one of our strongest contributions to the development process.

They responded that we have not adopted the common law Anglo-Saxon tradition of your system, nor have we adopted the Napoleonic Code tradition of Continental Europe. We have adopted parts of both and accommodated them to the history of Russia and its institutions. They went through an hour long lecture – without notes, listing all of the changes which they have transferred from the American judicial system to their judicial system in precise detail. It was absolutely fascinating. So then I asked, "Are you a branch of the executive?" And you know President Putin has a particular view of what democracy is and this is not how we would necessarily view it in the United States. And they said "No, we are an independent branch." No one in the Soviet Union who was a judge or any member of the judicial system, would have said that they were independent of the executive branch. In fact, there was no executive branch, there was simply the Communist Party which was of course a parallel to the government of Russia, which was actually subservient to the Communist Party. So I asked, "What pressures are you under?" It was very interesting to listen to what they had to deal with on a daily basis. But they said that the "system is holding. We do have an independent judiciary, and you helped over the last fifteen years in your judicial exchange programs." They mentioned the tours they had taken of the United States and the problems they

had technically with their old systems and how we would work together on fashioning a correction to a problem they had and then implementing that change.

In Ukraine, USAID supported a CEELI [Central European and Eurasian Law Initiative] program to train judges on election law and adjudication of election disputes. In December 2004, as the Orange Revolution appeared to falter, the Ukrainian Supreme Court ruled that the November presidential elections had been stolen and ordered new elections, (now in the Soviet system that would never had happened) paving the way for victory of the pro-democracy Yushchenko government. The courageous and historic decision of the Ukrainian Supreme Court in Yushchenko versus the Central Election Commission was testament to the success of CEELI's program, which provided legal materials (a judicial bench-book and legal commentary), and training for several of the Supreme Court judges.

USAID's rule of law programs in Africa also commenced in the post-1989 period. In Rwanda, we helped rebuild the judiciary after the genocide. We supported legal advocacy NGOs as they mounted challenges to apartheid in South Africa. We are now working to re-establish basic judicial institutions in southern Sudan. Sudan is very close to my heart, I have been involved with the Sudan for the past sixteen years. I was in Rumbek before the peace agreement was signed between the North and the South, which of course the United States played a central role in negotiating. I was outside one evening in what was the Supreme Court of the South. And I said, "This is the Supreme Court?" And they said, "There are eight judges, there is no building, but there are eight judges." And they showed me the law book. And I said, "What is this?" They said "This is the legal code of the Southern Sudan. You helped us design it. We are all lawyers and we are judges in our Southern Court." This is a new court. We helped them set it up technically. They still need a building- it's a next project of ours when Rumbek is transferred to the capital of the South to Juba which is the historic capital. But the fact that they had a text, and they began to develop a body of law by which they could make decisions was a big shift. Because they had not had that in the past- ever.

In Afghanistan, we constructed twenty judicial facilities, trained 550 judges, and we printed Afghanistan's basic laws in Dari and Pashto. We provided funding, security and logistics for two Loya Jirgas. [The Loya Jirga] by the way, is the *shurah* tradition of Afghanistan which is a non-western form of democracy on the village level in which the elders of the community get together and make decisions. They have extended that on the national level. This is why democracy building must have its own local roots. I think the *shurah* tradition of Afghanistan is the basis for a modern democratic state but it is going through a transition now. We help with the logistics and the background and just setting things up. This helps to facilitate the Afghans owning their own system and constitution.

In Asia and the Near East Region, beginning in the 1990s, we helped rule of law programs in Bangladesh, Mongolia, Nepal, Egypt, Philippines, Cambodia, and Indonesia. We established peace-building programs in East Timor and court administration programs in West Bank/Gaza.

To go back to Iraq, we supported drafting of the constitution and the training of judges and lawyers. We are now working in both countries to improve the legal framework and judicial system, train judges and legal professionals, and increase access by the common person to justice. We are also working with the State Department and the ABA on the Middle East Legal Initiative, aimed at strengthening judicial independence and legal training, and improving the status of women legal professionals throughout the region.

USAID undertakes rule of law programs as part of democracy promotion and to promote economic growth. But we also see rule of law as a broad and cross-cutting challenge. We know that our development goals—whether addressing poverty, economic growth, health, trade-capacity building, environment, or democracy – cannot be realized in the absence of the rule of law. (Before I took this job as AID Administrator, I was speaking as at my alma mater, the Kennedy School . . . One of my old friends on the faculty is a policy expert in domestic policy, but also has a fascination in international development. He said, “We all know on the faculty that the most serious problem facing Africa is HIV/AIDS. That’s right isn’t it?” I said “No, actually, that’s not right. If you eliminated, completely eliminated HIV/AIDS tomorrow, do you think Africa’s problems are going to go away? What percentage of Africa’s population is infected with HIV/AIDS?” There are 800 million Sub-Saharan Africans. Most people think it’s like fifty or eighty percent by the news media. It is five percent. And that is still terrible. We have to deal with that and the President has proposed and is implementing with Health and Human Services a \$33 Billion per year program to deal with that terrible crisis- forty million people are a lot of people to have HIV/ AIDS.

The principal problem in the developing world generally is not infrastructure, although that is important, it is not health programs, not education—it is governance. Why is that? Because it affects every single sector. And the rule of law affects every single sector. It effects economic growth because business people will not invest in a country in which they have no alternative to arbitrary and capricious officials in the government using bribery or corrupt means, or just arbitrary imposition of their own opinions on business people who are investing money. They have to have a redress of grievances, they have to have some organized, predictable system of law. And so it affects economic growth, affects every regulatory function of the government, affects obviously the police, the judicial system, affects order in the streets, affects the control the central government exercises in society in general. We can also see the rule of law as a broad challenge that affects other areas.

I am grateful for our partnership with our host, the ABA. This public-

private partnership began in 1990, when USAID established the first program with CEELI in Bulgaria. Since then, we have supported CEELI programs in twenty-five countries in Europe and Eurasia.

USAID has also established programs or relationships with the newer ABA Councils —with ABA-Africa, ABA-Asia, and ABA- Latin America-Caribbean. We look forward to the same productive partnership with the new ABA Councils as we have enjoyed with CEELI.

Development requires hope and a long-term commitment. People who think countries develop overnight are living in a fantasy. They do not know how the process works. I tell this story often, but since I have not spoken for you before, I will tell this repeated story. My staff has heard it a couple dozen times. I traveled with my parents, who were born in the United States, in 1963, when I was thirteen years old, to my grandparents' village in Thessaloniki. (My grandparents were born in the old country in Greece.) The village was extremely poor. People were stunted in growth, they had eye infections, child mortality rates were high- it was a Third World Country. My father said that he was never going to return because it was to depressing. In 1995, which would have been thirty years later, I took my wife and kids to the same village. This is the same village thirty years later. There were no donkeys, only tractors. They had restaurants and cafes (this is a remote village in the Thessaloniki plains in Greece). They had a new church, a new school, everyone was prosperous. Most people were taller than I was. There was no malnutrition, no illness and child mortality rates were similar to those of the United States. So I asked "What happened?" "We developed." We went from a Third World country to a First World Country in thirty years. "How did this happen?" Trade, a functioning judicial system and infrastructure. And we saw this transition in thirty years. Thirty years is not two years, but it is not a century either. So, Americans have to learn a little patience. Countries develop at their own pace. They have their own challenges and we have to respect that and their own traditions when we do our work.

In her book, *The Majesty of the Law*, Justice O'Connor identifies the pillars on which lasting democratic reform is built. She writes, "Rest a political system on an unstable foundation, and it will crumble under pressure and fall away like sand. But build that system on solid stones, and it will hold up and withstand the tests of time."

Building those foundational pillars of democracy has been USAID's mission for more than two decades. It is a mission that we have embarked on together with many of you. In the President's words, it is the "calling of our time." It is a mission that must succeed because the human costs of failure - grinding poverty, conflict, extremism, and lives devoid of human dignity - are too great to bear.

Thank you very much for inviting me and I would be glad to answer any of your questions.

2007

## The Role of the Judiciary: Panel Discussion with United States Supreme Court Justices Participants

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## The Role of the Judiciary: Panel Discussion with United States Supreme Court Justices November 10, 2005

PARTICIPANTS: JUSTICE ANTHONY KENNEDY; JUSTICE SANDRA DAY  
O'CONNOR, JUSTICE STEPHEN BREYER.

MODERATOR: Justice O'Connor, I am going to begin by propounding a compound question to you because I have never gotten to ask a compound question to a Supreme Court Justice.

JUSTICE O'CONNOR: [*Laughing*] Well, you might just get a compound answer!

MODERATOR: I have had so many people come up to me and ask me to ask you how did you get interested in rule of law work. After that opening, I would also like you to speak about a topic which you speak eloquently on every time I see you – and that is the independence of the judiciary in the foreign context.

O'CONNOR: Well, first why did I get so involved in these rule of law efforts. It was with the break up of the Soviet Union. And all of sudden, there was this enormous part of the world that was breaking up and forming separate nation-states. We ended up with twenty-six of them being formed. And they had to decide what kind of governmental structure they wanted to have. It was the just the most remarkable time in history. I do not think that we will ever see anything like it again. It was the idea of I think, Sandy D' Alemberte and Homer Moyer on behalf of the American Bar that we ought to volunteer as lawyers and judges in this country to help if any of these emerging states wanted some help. They made some inquiries and what do you know, they did want some help and an effort was made to provide it. And help was forthcoming by good hearted, well meaning lawyers and judges from across this country in the best American tradition of being volunteers. Now, that kind of sets us apart a little bit frankly from many countries in that we have such a strong tradition of volunteer service here. Help was provided for writing constitutions, for writing codes for criminal law, bankruptcy, you name it, and for just setting up structures of governance that might work.

Now what is the most important structure in a new government from the standpoint of a lawyer or a judge? It is an independent judiciary – one with

qualified judges who are honest, decent, ethical, intelligent and with the independence provided to them by their nation's charter to enable them to make fair decisions and not be afraid of following the law and being thrown out of office because they did that. So, that is a short answer to both questions.

MODERATOR: Thank you. Justice Kennedy, what is the rule of law?

JUSTICE KENNEDY: Piece of cake. I can not remember hearing the phrase "rule of law" when I was in law school. I think it is a phrase that has become current in the last twenty years or so. It resonates in *per legum terra*, a phrase used in the Magna Carta, "for law of the land," and you can see references to it, particularly if judges are in trouble, "Well, this is not the rule of law." But, it is a phrase that we ought to think about and ought to attempt to define, although I believe you should define it at a high level of generality, just so that we don't get bogged down in all the details. I was asked that question once in China. And in China, it's often effective to tell an audience that something has three parts . . .

And so I said, well, the rule of law has three parts. Number one, the government is bound by the law. That of course includes the court, and through that, you have judicial independence. The government is bound by the law. This probably reflects a large—well it is just a corollary of the larger principle. That the law must emanate from the people. Look, the law lives in the consciousness of the people. If you don't have that, you don't have law. And that's a corollary that the government is bound by the fact that the law must originate in the consciousness of the people and be sustained by the democratic process over time.

That's number one, the government's bound by the law. Number two, the law must treat all persons with equality, all persons in an equal manner. And without attempting an exclusive list of prohibited classifications, you can give some illustrated examples, because those classifications, those persons, those groups that can claim equal protection and that are discriminated against must be disclosed to us, as the law evolves, as time continues. We are blind to the injustices of our own times. So it would be unwise to have an exclusive list of those classifications that deserve equal protection. But illustrative of those classes are groups that are classified by race, color, ethnicity, gender or religious beliefs. That's just a partial list.

So first, the government's bound by the law. Second, the law applies equally to include all persons. Third, the law must recognize that in each person, there is a core of spirituality and dignity and humanity. And within that broad general formulation, you can begin to define those rights that are fundamental to our own humanity. And we'll leave it at that. Because again, the definition of human rights is something that evolves over time as we begin to understand ourselves and the world around us, which is the duty of every generation to study anew.

MODERATOR: Thank you. Justice Breyer, your recent book, "Active

Liberty,” has raised—has resulted in some very favorable reviews. I don’t know whether you’ve had time to look at any of them.

JUSTICE BREYER: No, I don’t look at them. *[Laughter]*.

MODERATOR: In the book, you acknowledge America’s debt to the ancients: the far ancients, the Greeks and the Romans, and perhaps the near ancients, the French, the venerable Montesquieu, Benjamin Constant and Britain, of course. And you talk about the people’s right to an active and constant participation in collective power, and at the same time, you talk about judicial modesty as a concomitant part of this.

You are, I know, a student of modern constitutions. How is this active liberty of the ancients faring in modern constitutions, and how is judicial modesty faring as well?

JUSTICE BREYER: I think within pretty broad limits, it’s faring pretty well. Do you want me to elaborate? *[Laughter]*.

MODERATOR: If you don’t mind, since you’re here. *[Laughter]*.

JUSTICE BREYER: The point that I was trying to make in the book is really based on what Justice Kennedy said, elaborating from there. There are two interesting ideas that are terribly important to us and to other people about the kind of rule of law that we want. And the first is why I call that “ancient liberty,” the Greeks. It had a point besides showing the historical erudition, which some have found lacking. The point is that the idea, from ancient Greece on, was one of the ideas upon which our Constitution rests, and that is, all citizens—now, they had a rather limited idea of who those citizens were, and so did we at the time of the founding, but still—those who were citizens would participate in the creation of the government and the laws under which they lived. That’s called democracy, basically. And the Constitution, I think we all see, is a document first and foremost that creates democracy. That’s the first idea.

With the three of us—we’re at a meeting at Mrs. Annenberg’s where they were discussing what to teach high school students, and tell me if I’m wrong about this. They had asked the bar associations, and the ALI and other very, very good groups to say what was the main thing to teach, listed in order of priority. First Amendment tended to be the answer. Equal equality. And they had way down on the list something that surprised us to be that far down, because to us it’s number one. Number one. And we all said, this is number one. This is what the Constitution is about. What it does first and foremost is create a structure of government that is a democratic structure of government, basically. That’s the first idea. And we see that, and that’s why I say it’s doing pretty well. We all see that. There is no disagreement, I think, among judges or scholars or anybody on that one. That’s the first thing.

Now there are boundaries, and that is the second thing. The boundaries really became very important just after the French Revolution, when people



began to discover that if you let Democrats or Republicans—I don't mean to be partisan in that . . . [*Laughter*] But I mean, democracy isn't enough. Because acting under democracy, people can do terrible things. And if they didn't know that at the time of the revolution in France, which they should have, we certainly know it. We are old enough to remember the mid-20th century, Second World War, etcetera. I needn't point that out, but it's obvious. You cannot let even a majority trample very important rights of the minority. And that's the second part.

And we've written a constitution that has that as the boundaries. Now sometimes, we all argue like mad. But what are we arguing about? We're arguing about the precise nature of the boundaries. Is this on this side or that side, and we can disagree like mad over that. But that's implementing a system that creates boundaries protective of human rights, assuring a degree of equality, assuring a rule of law, assuring division of power. Boundaries that within there is a democratic space. Those two types are of the—are really, I think, what the Constitution is about.

And of course the book, it says, lets not forget that first one. Let's not forget the importance of democracy, because I think we as judges can say – we will tell you something from our experience. I don't know if you have to participate or don't participate. That's up to you as a person. But we can say, and I'll say, that the Constitution won't work if you don't participate, because the Constitution foresees a citizen-run country, that is, a government that depends upon the active participation of the ordinary citizen. Thank you.

MODERATOR: The chief justice came by, Justice Kennedy, and I wrote down what he said. I thought it was very interesting.

And later, some of our visitors came to me and also asked me to pose this topic to you. He said, "It was not that long ago that this place was an emerging democracy, and it is important for us to appreciate that the values we hold dear came at great personal price. We want to do everything we can to support our brave compatriots in other lands. The topic is individual courage, and I want to let you all talk about that."

But Justice O'Connor, I heard you speak about it in Wyoming, a specific example in Ukraine, and I wondered if you might talk about the personal courage of judges.

JUSTICE O'CONNOR: We really had an interesting situation in the world not too long ago, an example of judicial intelligence and courage. And there was an election in Ukraine for Ukraine's highest elected position, and there were two competing candidates. And the election was held, and immediately there were allegations by the declared loser of widespread voter fraud, and some of those were documented by election observers who had been there for the election. And a challenge was made in the courts and made its way to the Supreme Court of Ukraine, or the—whatever they call it—constitutional court—I don't know. There's someone here from Ukraine who can correct me on the proper title.

And that court did a remarkable job. They held hearings over a period of about five days, and they agreed to have it televised so that every citizen in Ukraine could listen to the arguments and hear the evidence being presented on both sides. And the court reached a conclusion that there had been voter fraud and declared that there had to be a new election. And because of the, I think, widespread opportunity for citizens of the country to see for themselves what the allegations were and how they were dealt with, there was acceptance of that decision. And a new election was conducted and it altered the final outcome, but it was done without bloodshed in an area where it wasn't at all clear that that necessarily would be the case. And I thought it was a very important milestone occurring in relatively new nation-states, one that had organized itself well enough to survive what could have been quite a crisis. Very impressive, I thought.

JUSTICE KENNEDY: Yeah, the higher up you are on the judicial ladder, the less discretion you have in a sense or even the law enforcement ladder. The most discretion with a police officer, he's going to charge you or not; and the United States Attorney or if it's a federal system; or district attorney and then the trial judge. By the time you get to a high appellate court, there's not that much discretion, and there's a lot of insulation.

We get criticized from time to time in the newspapers, and one of my children will say, "Hey Dad, how are you doing?" Because they've read this lousy article. [*Laughter*]. That's nothing. There are trial judges worldwide, who have to live in the community after they've made an unpopular decision. That's hard. And there are judicial heroes throughout the world, including in our own states where they're elected judges and have to make unpopular decisions and they do, and that's not written about enough. And you know all— you know those examples. I could repeat many, many of them.

But if we can foster a climate, if we can nurture the idea that there is such a thing as a profession of judging, as a commitment to judicial independence—and we can talk about what that would mean—and if the people understand, then they will respect this thing we call the rule of law. They will respect the independence of the judiciary. But this is a matter of educating. Look, democracy is not inherited. You don't take a DNA test to see if you believe in freedom. It's taught. And you can't comprehend what you have never studied. You can't defend what you don't know. And we must do a better job of educating our own young people in this nation and of people around the world. It's the essentials and the requisites of what Stephen was talking about in regards to a democracy being a structure with certain rules. And I don't think we're doing a good job of educating our own young people, and I don't think we're doing—you can never do enough—and I don't think we're doing enough in the rest of the world.

MODERATOR: Justice Breyer?

JUSTICE BREYER: What would I add to that? I'll add something that

Justice Kennedy said that I quote a lot because it meant something to me at the time and still does. We were talking to a group of Russian judges about ten years ago. The Russians, after all, remember, had what was called telephone justice, as they did in Eastern Europe. The telephone would ring, it was the party boss saying, “decide this way or that way.” And we’d heard them talk about why did we do that, and they said, “It’s obvious. Our children needed the apartment, we needed the education, and there was not too much choice.” And they’re trying to get over that. And that’s why Justice O’Connor, and you and others, have gone to Eastern Europe to help them build institutions. And we were having dinner with some of the people who were trying to do it, which isn’t always easy for them, by any means—a lot harder than here.

What he said to that group rings a bell here, though. He said, the thing about judicial independence, when you apply it, and when you take the decision independently, nobody will know whether you were or were not. They won’t know, but for you. I mean, the newspaper says how brave you were. I don’t mean to sound cynical, but sometimes that means they like the results of your decision.

The lawyers? Well, they know the record, and you want to be true to that record. But they do have a view of this, and they do perhaps react in light of their advocacy.

The other judges? Maybe. It depends on how involved they were in the case.

And ultimately, it can’t be a question of whether the greatest civil right groups in the world or the greatest wrong groups in the world or whoever they are say you’re good or bad or independent or not independent— in here. And other judges may know sometimes what you’re going through, but they can’t sympathize very well, either, because it isn’t them, it’s you. And when you know, you know. And the problem—and that made a big impression. I think that’s absolutely right. And I think the problem for all of us is to try to create those institutions, including here at home, where you get a pretty good assurance that that’s what will go on in your case, whether your case is the most minor thing in the world or the most major, whether it means a lot to your client or only a little. It’s easy to say that it’s important, and it’s hard to do—the building of that institution.

JUSTICE KENNEDY: Judicial independence is such—judges almost overuse it. If you were all a group of judges, 100 percent judges, I say I’m here to talk about judicial independence [*Applause*] because it sounds somewhat like a kind of guild protectionism.

JUSTICE BREYER: Yeah, that’s true.

JUSTICE KENNEDY: But it’s much more fundamental than that. Judges must be independent not so they can do as they choose, they’re independent so they can do as they must . . .

JUSTICE BREYER: And I'll give you an example. Can I give an example? This is sort of funny in a certain way. Because I'll sometimes, as you may or may not realize, say something that I think to myself is uproariously funny [*Laughter*]. Or at least meant in a comic way, and the audience might not understand it. So we were talking at one of these groups at the bar association, and there were some judges there from a different country. I'll not say which. And they were talking about judicial independence, which mostly meant salary increases—which it can mean here, too, you see. [*Laughter*].

But the point was, they're going on about it and I said that, well, I know it's really hard, but to build that independent institution, I think it's hard for you, the judge, to tell the public how important it is, because the public thinks, of course you think it's important. It's your job. You've got to get other groups to do it. And the other groups have to explain why it's important to people who aren't judges, who aren't lawyers, you know, the public. Why do they benefit from it? That's what's hard to explain. There are only two people who can do it. One is—I said they're both such pests, really. We just get so annoyed at them because they do so many things that irritate you. The first is the press. [*Laughter*]. I said I know they're trouble, but they have to be enlisted in this, and you have to have the free press, or you won't get what you want.

And the other I said is the bar. Those lawyers can be very difficult sometimes. [*Laughter*].

But basically you need the bar, because they're the only ones who understand it. They're the only ones who understand it, who can explain it. So remember that. A free bar, and a free press. So the other person gets up from the other country. He says, "Justice Breyer is completely right. The press and the bar are terrible pests." [*Laughter*].

JUSTICE O'CONNOR: Well, judicial independence really is sort of hard to define because judges can be subject to discipline for legitimate reasons. And the political branches, of course, control, correctly to some degree, both the jurisdiction and the political makeup of most courts in most countries. And on the other hand, I'll coin a phrase, "I know judicial independence when I see it."

And just suppose that during a period of stormy relations between the White House and the Chief Justice, the president's bodyguards killed the Chief Justice's pet cat? Or suppose the executive branch threatened to cut the water supply to the Supreme Court building to prevent the court from meeting and making anti-presidential statements? Or suppose the Council of Ministers tried to evict the constitutional court from its offices?

Now the first two events actually happened in the early to mid- 1990s in Russia under Yeltsin. And the third happened in Bulgaria in 1995. Now, I think we can all agree that those aren't examples of judicial independence. And judicial independence just doesn't happen all by itself. It's very hard to create, and it's easier then most people imagine to destroy. I mean, we face certain issues in this country today by various members of our nation's legislative

branch suggesting a number of ways to strip courts of jurisdiction, perhaps have mass impeachments and all kinds of criticisms that don't suggest a wide-open notion of judicial independence. So this is not easy, either here or in any other country of the world.

JUSTICE KENNEDY: But the bar must also insist that judges be held to a certain standard.

JUSTICE O'CONNOR: That's right.

JUSTICE KENNEDY: They just must give reasons for what they do. I sometimes say we're the only branch of the government that has to give reasons for what we do. [*Laughter*].

And, the bar has some very special duties with reference to the judiciary, and both Justice Breyer and Justice O'Connor have indicated that. Lots of people think judges have a lot of political clout. Once they get on the bench, they don't. And we really rely, first of all, on members of the bar to defend the judiciary when it is under attack. This is a little easier in the Anglo-American legal system than in other systems. In our system, as you know, in our tradition, judges are selected from the ranks of the practicing bar, and that gives us a built-in bond and affinity and affection over time. And there's this close relation, and we can rely on the bar to defend us when independence is under attack.

In other countries, as you all know—many better than I do because you're from those countries—you elect a judicial career very, very early after you've finished your education, and you go two separate tracks. You're going to be a judge or an attorney for the rest of your professional life. And in those countries, I think it's important that we do a lot more work to impress upon both bench and bar that they are allies, not competitors. They are working in a single cause, which is the cause of justice, which is the cause of the law, which is the cause of independence. And there are bar associations around the world that I think we should begin to work with and have them meet with their judges and discuss problems of common concern to address mutual problems. I think we can do much more in that regard, Judge Henry, than we're doing.

MODERATOR: Thank you. If someone wants to begin to bring me some of the cards, I would appreciate that.

Justice O'Connor, one of the things you mentioned brought up another topic that our visitors wanted us to talk about, and that is, judicial discipline and codes of conduct. I wondered if you might give us your views on how important the code of conduct is, and what it can do to develop the authority and independence of the judiciary.

JUSTICE O'CONNOR: I think it's pretty critical at all court levels to have codes of judicial conduct, so that the judges serving in those courts have a clear understanding of conduct that is acceptable and conduct that isn't. And it can be particularly challenging in newly formed countries, or countries where a certain amount of telephone justice has occurred, or a certain level of corruption has

been going on for some time. And it is crucial to get a code drafted telling judges what is and is not acceptable, and to set up committees of people who can enforce violations of the code, can call judges to account when a complaint is made, and when they determine that there has been a violation. I think it makes a tremendous difference in enabling the public of the nation to have a little bit of confidence in the impartiality and the fairness and integrity of the judges that are serving.

JUSTICE KENNEDY: Justice Breyer and I—and Justice O'Connor, you were actually there the day before—we were with a group of judges, and we were talking about judicial ethics and judicial discipline, judicial codes of conduct. And we explained that there's some very simple—there are basic rules. You don't have ex parte contacts where the judge talks to one attorney without the knowledge of the other. You do not sit in cases where you have conflicts. These are very simple things—rudimentary rules.

And we talked about this for an hour, and then I asked if there were any questions. And a judge stood up—and he was a friend of mine from another country—he said, “Justice Breyer, Justice Kennedy, thank you very much for speaking with us about these things. There's not one suggestion, not one precept, not one principle that you've mentioned that we disagree with, that we don't long for or to which we don't aspire. But the culture of my country just will not allow that.”

Well, it was one of those moments where you're having a meeting, where everybody's quiet; they're looking to you for an answer—a defining moment. And I just—I wasn't sure what to say. All I could say is, “Judge, this must change. The rule of law is on the line. You cannot wait, hoping that a judicial independence, an independent judiciary, will emerge out of an atmosphere of corruption. You must change it and you must change it now if you're going to defend the rule of law.”

JUSTICE BREYER: Yeah, well, one of the things—that's not popular abroad, and it's not popular at home, but I think it's absolutely necessary—I tell often the judges, just in respect to that, that we fill out these forms every year, and it's expensive to do because we have to hire an accountant, probably. And those forms report every single penny. No, there are no loopholes in it. Every single penny that I earn, or my wife earns or gets from any source whatsoever of income, or the minor children and all the assets that you have so they can be compared year by year. And there is no way, given those forms, that some surreptitious form of income could come through to benefit the judge. Are they a pest? Yes. They're expensive, and they put in the newspaper how much money they guess you have by multiplying the top of every category. [*Laughter*]. And nobody likes that. Nobody likes it. And they're right not to like it. But they're wrong to oppose it because I think it is absolutely necessary to have those kinds of assurances through the press that they're—and you have to—that there is not dishonesty going on within the judiciary. And there are prosecutions of judges

from time to time. And you have to toe lines. But that the public sees there are those checks in play as well as the ethical rules, as well as the reasons for the opinion, I think all help to assure a public that this can be an institution that can be trusted with independence.

JUSTICE O'CONNOR: I think regular financial disclosure is a very important tool. And yet there are some countries in the former area of Eastern Europe which had experienced so much unfortunate invasion of privacy during totalitarian eras that their constitutions protect privacy to such a degree that they are unable to require financial disclosure, which I think makes it pretty tough.

And you have some questions.

MODERATOR: I do have some questions. *[Laughter]*.

JUSTICE KENNEDY: I've got a lifetime job. That's okay.

MODERATOR: Some of these are on oil prices. *[Laughter]*.

Now here's one you don't often get. Do you have any views on the significance to a discussion on the rule of law of such historical documents as the Code of Hammurabi and the Edict of Cyrus?

JUSTICE O'CONNOR: Whoa! *[Laughter]*. I haven't read —

JUSTICE KENNEDY: I was reading it last night. *[Laughter]*.

JUSTICE O'CONNOR: Oh, gosh. Well, I think *[Laughter]* we're deep in Iraq, and that's where the Code of Hammurabi can be found *[Laughter]* and we actually have taken a look or two at that recently, just out of historical interest. But I can't say we've looked at the —

JUSTICE KENNEDY: It's a deep-seated desire of a human to organize his or her society. And we were very fortunate; there was a congruence of factors at the time of the founding. And I teach constitutional law; I sometimes ask any students if they've read the Constitution cover to cover. And they usually say no. I say, well, if you do it, it's one of the great documents in the history of human thought. If you do it, your mind will wander. You can't read it cover to cover without your mind wandering. But if you go to specific portions of it, you can learn and it is a brilliant document.

The Declaration of Independence you can read through, cover to cover. It was designed to be read to the troops to get them angry at King George. The mad—the longer you read it, the madder you'll get at King George. *[Laughter]*.

And both of these documents are different. One is to instill with you the passion for freedom, and the other is to make freedom work.

JUSTICE BREYER: The Edict of Cyrus? *[Laughter]*. I myself am not an originalist. *[Laughter, Applause]*.

MODERATOR: That's very, very ancient liberty.

Is it possible to reform a judicial system that is corrupt without changing the people? Do they ever see the light?

JUSTICE O'CONNOR: Well, they could, obviously. It depends on the

person. It's just like finding people who are other offenders of the law, and you take correct—and you find them responsible and suggest ways of education and training, and sometimes they turn around. So it could happen with judges as well. And I would think that would happen if the country installed a pretty good code of ethics with teeth and started enforcing it. I think that could happen.

JUSTICE KENNEDY: Part of the problem is, as many of you know—in fact, it's in other countries—is that there is—it's part of the economics of being a judge that you get money from outside sources, and this is wrong.

When we go to different countries, I like to meet with legislators as well as judges. And I tell them that you must appropriate resources for your judiciary because the judiciary and the legal system are part of the capital infrastructure. Now you're a legislator and judges come and say, "Well, we need higher salaries, and we need more judges, and we need courthouses, and we need"—you need schools, roads, hospitals. You've got people that are hungry. And you go back and you tell your constituents, "Well, I voted for a lot of money for the judiciary." That's not an easy sell.

So it must be understood that the judiciary is part of the capital infrastructure. It's as important as roads and bridges and utilities and schools. You can't have a progressive society without a stable rule of law; without a functioning, efficient judicial system.

MODERATOR: Justice Breyer—that's what it says here [*Laughter*] where do you consider Latin America will/should go in the 21st century in developing a rule of law? How should the legal profession in the Americas contribute?

JUSTICE BREYER: That's a good question. . . [W]e've been working to try to answer that question. The reason I think it's a very interesting, important and difficult one at the most general level is what Alan Greenspan said, that most of the countries in the world—indeed, all of them—want to have a rule of law for two basic reasons. More and more, they've realized that a rule of law means not just human rights. It means also contract law; it means also that maybe when you invest, you have a neutral arbitrator who's called a judge who can get you your investment back if you're entitled to it. And it isn't going to be decided politically. And the more you can assure that kind of institution, the more you'll get the investment and the more prosperous people will be. Prosperity. And of course it does include human rights. Prosperity and liberty. So those are the two slogans, which are more than slogans.

How do you get there in Latin America? My personal view of it is that they find it difficult in part because they see two separate systems. Most of them have codes. Most of them base their law upon the Code Napoleon, which was all over continental Europe and came to Latin America. And they also want the kinds of protections that you can find in some separation of powers—independent prosecutors and protection of basic human rights and an independent judiciary—which is probably predominantly found in Britain and the United States.



Now how to combine those things? My own view is they have to be combined. I don't have the answer, nor do any—I bet few of us have the answer for any single other nation. I think what we are trying to do is to give those who are in those countries, judges and others, an opportunity to learn something about our system, and I would say also learn something about the systems in Spain and France, continental Europe, so that you can go back and figure out what works best for you because we don't know the answer to that question.

Our current effort, if I can have fifteen seconds of advertising . . . is to try to see if in Puerto Rico we might be able to establish an institution that helps to do that with teachers from Europe as well as the United States and a potential audience of Latin American judges, because there you have this mix of the Spanish language and English, and the Spanish culture, Latin American culture, as well as that of the United States.

But there, I think that is the direction. And the more we say it's just us, I think the more wrong we are. The more, if we say, you have to learn enough from several systems so that you can figure out what's going to get you that prosperity and protection of liberty that you want, I think the better off we are.

JUSTICE KENNEDY: But Stephen, don't you see particularly in Europe, being the example, and I think it will soon be evident in South America, there's a convergence of code system, codification systems, and a structure of a transnational human rights documents or basic constitutional documents which are interpreted by an independent judiciary to elaborate rights. These two systems are merging.

JUSTICE BREYER: I did go to a conference in France, which I found very interesting, actually, as well as enjoyable. But I sat there for a day and listened to a lot of speeches which—various judges who came there about the 200th anniversary of the civil code, which is really like the Constitution. It embodied all kinds of basic values of great importance.

At the end of this quite long set of speeches, they had a few questions. A person got up—a man got up from the audience. Three questions were asked, and the second one is very relevant to what you said.

The first question, of course, we could have heard anywhere. He said, "This code has been modified to embody the equal status of women. So why is it over a day and half we haven't seen one woman?" I said, that's a question I could get in Boston or Washington or anywhere else.

Second question, the same. I could find it anywhere. We say just what you said, but we're not certain what to do. I mean, our French system is now only one of several, and these several more and more are necessary to the businesspeople in our country, for example.

And are we supposed to refine our own codes? Are we supposed to try to integrate that code with a European code from different nations? Are we supposed to write a new European code from scratch? What should we do? So I

say the tendency is there, and the answer is not clear. . .[W]e find similar how we do integrate, in commercial cases, a large amount of foreign law, and integrate it into the heads of the students who will become the lawyers, who will have to have those cases where American law alone is not going to give them the answer they want.

And the third question, of course, I'll simply repeat, because we all believe it. And that was the question—she said, “Well, how are we going to teach these values?” And by that I think that the questioner certainly meant that human liberty as a basic fairness and so forth of that Napoleonic code of 200 years ago, how are we going to transmit them to our children? My goodness. That's a question we all face all the time.

So as I say, I could've heard those questions in Paris, I could've heard them in Des Moines, or Boston, or probably anywhere. And those are the ones that you have these conferences not to answer, but to get people working on them.

MODERATOR: Here's one you can knock out of the park. A recent article in *The New York Times* suggested that all justices and judges have one common denominator: baseball. Please explain to a non- American. [*Laughter*].

JUSTICE KENNEDY: That's a sensitive subject. I want to change a rule in the rules of baseball, and it's almost as hard as changing the Constitution of the United States. I'm having a tough time. [*Laughter*].

JUSTICE BREYER: I don't think I can explain it to a non-American. [*Laughter*]. A little hard. Just watch the game. [*Laughter*].

MODERATOR: Noah Feldman says American baseball is a non-mobile concept. So —Justice O'Connor?

JUSTICE O'CONNOR: Well, now, it did move to Japan —

MODERATOR: It did, indeed.

JUSTICE O'CONNOR:—to Cuba, to lots of countries. And, not that I'm just the strongest baseball fan in the world, but I do think that baseball players are the best athletes in the world because they have to run fast—[*Laughter*].—they have to throw, they have to catch, they have to make instant decisions. And it's pretty impressive, all put together. [*Laughter, Applause*].

MODERATOR: Any other concurrences, dissents on that? [*Laughter*].

For Justice O'Connor, fundamentally, the role of the justices of the Supreme Court of the Philippines in promoting the rule of law [is] in deciding cases in accordance with the constitution and the law involved, that is the role. As a woman magistrate in the highest court of this country, I would like to know some of your experiences. Kindly give me advice or suggestions on how women can enhance their abilities to promote rule of law in higher courts.

JUSTICE O'CONNOR: Well, of course, I think there ought to be women on all courts at all levels in all countries. [*Applause*]. Women constitute a little over half the population of most nations in the world today, and to the extent that we're living in democratic societies, I think it gives the public more

confidence to look at their nation's major institutions, including courts, and to see that there are women on those courts and other governmental institutions. I think it is a factor of importance in having citizens have some faith and trust in the institutions serving them.

And how do you get there? You just have to work hard to do a good job and be noticed in whatever you're doing before you ever are selected or considered for that office. I don't think it's necessarily easy in every culture for women to make that progress, and we see parts of the world today where there are very few women in office. And my heart goes out to them, frankly. I would like for every nation to have decent representation of women, and I hope that we can all reach out and offer suggestions and help around the globe to make that happen.

MODERATOR: Justice O'Connor praised the Ukrainian court for showing its hearings on television. Would there be a similar benefit in public respect for America's system of law if the U.S. Supreme Court –

JUSTICE O'CONNOR: Now I knew that was a bad thing to talk about [*Laughter*] because there are those in this country who think that there should be no increase in pay for judges in this country until there's television in all the courts, including ours, and there is some debate among judges in this country about the desirability of television cameras in the courtroom. But there are times and places where I think it can be very helpful, and Ukraine was a perfect example.

I don't think in this country there is a total consensus as yet on having cameras in all courts. Most of you probably saw that criminal trial in Los Angeles involving a prominent sports figure [*Laughter*] and it went on for weeks, if not months, and was shown around the world because the trial judge had the camera in the courtroom. And I thought it was pretty sad. I was very uncomfortable with it.

JUSTICE KENNEDY: Sometimes if the system is flawed, the people ought to know it. And if television shows a flawed system, then let them see it.

JUSTICE O'CONNOR: Well, we saw it there. [*Laughter, Applause*].

JUSTICE KENNEDY: But television can be a teacher. And if we were going to have a debate on television in the courtroom, and you drew the affirmative side of the debate, you could make probably more positive points. And we sometimes wish lawyers were better prepared, but they haven't seen us at work. If they had a videotape or a DVD, then they could see it. So you can make a lot of arguments for it.

But remember, by not having the press in the courtroom, we also teach. We teach that our court is based on the reasons that we give in our opinion. We will be judged by what's in those opinions on the books . . . Our timeline, our language, our grammar, our ethic, our chronology, our dynamic are different from the political branches. Not better, not worse. Different . . . And by keeping

the TV out, you teach that.

JUSTICE O'CONNOR: We do have the press in the courtroom. They're sitting right there taking notes. We also have audio tapes made of every word spoken in the courtroom. So it's not that the press isn't there. They are. But we don't have cameras, as yet, in our court, although in many courts around our country we do.

JUSTICE KENNEDY: There are a number of people who want to make us part of the national entertainment network. *[Laughter]*.

JUSTICE BREYER: It's actually a pretty difficult question for me.

JUSTICE O'CONNOR: Yeah, it is.

JUSTICE BREYER: There are things to be said for it, which were said, of—it's very—it's the teaching thing. I think of that term limits case that we had which was such a difficult case. Hamilton's on one side, or Marshall's on the other, and Madison says one thing. You go back to history and then you look up to date—and it's really an evenly balanced case. And the judges are all up there trying to figure out how to get to a right answer. It'd be wonderful, I think, for the court, if people saw that. And also you do have the problem of uncovering things, on the one side. But then, I think what bothers many people, at least me, on the other side, is that if it were in the Supreme Court, I think it would become a symbol for every court, and therefore it would be in every criminal trial in the country. And when I start thinking about witnesses . . . I don't want them thinking how they look to their neighbors —

JUSTICE O'CONNOR: And jurors.

JUSTICE BREYER: Right. I think about that, and I do think about the O.J. Simpson case. And I think I'm not certain I would vote in favor of having it in every criminal trial in the country. And then I also think a problem in the appellate court is that when we decide something, it's decided for millions of people. Of the millions of people who will be affected, only two or three are actually there in the form of parties.

And when somebody watches something on television, they tend to identify with the individuals in front of them, and the human story before them, and not the boring, legal issue that affects millions of people who are not on that screen. Now I'm not saying that that's determinative; I'm saying those things are negative features of having television in the Supreme Court, as well as the fact, of course, that ninety-eight percent in a case is in writing, oral arguments two percent or five percent, but everybody would think the opposite.

Now, if you have some things for it, and some things against it, how would I proceed?

JUSTICE O'CONNOR: Slowly.

*[Laughter]*.

JUSTICE BREYER: Right. Correct. And I said fifty times, on television as I see us here today—I said, look, if I, being an old teacher, I would say to those

who want it, since they want to change the status quo, to get some neutral facts. There are plenty of places that have it, plenty who don't. There are people who are not paid by the networks or paid by the press that are called neutral research institutes. So let's look at public attitudes. Let's see if the concerns of those who don't want it can be shown to be valid or invalid. Let's do a little work before deciding the things just as a matter of principle. Because principle here has to overcome an obstacle, and the obstacle is, I believe that each one of us on the Supreme Court of the United States really thinks that he is a trustee for a marvelous institution on which the public depends, which neither he nor she created. I didn't write *Brown v. Board of Education*. I wasn't on the court that desegregated America that abolished that rule of law that was so vicious. But the court's reputation today, and its acceptance, depends on those other people. Every day we see in front of us, every day—I've said this five million times, so I might as well say it five million and one—we see men and women of every race, every religion, every point of view, who have come into our court to resolve their differences under law that's taken 200 years, it's taken a Civil War, it's taken eighty years of segregation, it's taken paratroopers in Arkansas to take the black children into the white school—it's taken a lot. And we are trustees of that institution. And none of us, I think, wants to do anything to harm that institution, irrespective of what kind of slogan you can give for one side or the other.

And therefore, I'd say, generalizing from my own experience, a decision of this issue, this kind of issue, which carries with it threats to that institution as well as benefits, should be decided after really pretty serious research and study, and not decided on the basis of something that happens to strike somebody two minutes in a conversation. And that goes, by the way, for me as well as for everybody else.

[Applause].

MODERATOR: Justice Breyer noted that Americans argue heatedly over the contours . . . of the Constitution. But all Americans see the constitution as sacred, almost in a religious way. Why is that? And isn't that the essence of what we call the rule of law?

JUSTICE KENNEDY: I was in Poland . . . and a judge said, how do you keep the Constitution for a long time? Very important for Poland; they've only had theirs for a few years. And I wasn't sure how to answer the question. And I said, ultimately the people have to come to revere their Constitution. America is very fortunate because there was a congruence of factors. When we declared our independence, we said we wanted freedom. And the people in England and Western Europe said, 'Freedom? What are the Americans talking about? There's nothing you can do with those people on that side of the Atlantic. They have all the land they want, they can do what they want. Pay taxes when they want, not when they don't want.' And so we had to give them an answer back. We had to fax them an answer so that we could justify the Revolution. And the answer was first in the Declaration and then in the Constitution. We use the Constitution to

define the meaning of our own existence as a nation. Americans come from many backgrounds, from many countries, but in large part they define themselves as being one people because of the Constitution. And that's a felicitous, priceless link that America has with its Constitution. And we must never sever that link. We must never endanger it. And it's very, very fortunate that Americans identify themselves with their Constitution. And that's a strength, and that's our strength.

JUSTICE O'CONNOR: I was just going to point out that one reason our Constitution has survived so long is cause it's so small. There it is! Look at that!

[*Laughter*].

And every American can pick up this little document and read it and understand it. And it's okay. Do you remember when the European Union tried to write a so-called constitution? I think it was about 450 pages long. And then people were expected to vote on it. How could you? So I think brevity has been great. And it dealt only with structure until the Framers were told if you don't include some fundamental rights in there, we won't vote in favor of it. So we got the first ten amendments, the Bill of Rights, and that's what people respect and admire and have grown to know and understand. And it worked pretty well. If a constitution gets long and complicated, it's going to be amended often and it no longer becomes that treasured little charter that might survive. And this is written in very broad language.

JUSTICE KENNEDY: One of the things the court does is to explain that the Constitution has relevance in the context of your own time. The flag—not flag suit—the flag-burning case was a case in which Americans get infuriated when you burn their flag. We have a beautiful flag. It's a transcendent symbol of national unity. And we had a case where people were put in jail because they burned the flag. And I thought this was a great teaching case; it teaches that the Constitution has meaning in your own time. And I remember we talked in the court before we issued the decision, how unpopular it would be. And ninety senators went on the floor of the Senate to denounce the decision. But over time, there was a quiet reflection and people said, you know, that Constitution means something to me; it's got this First Amendment. The government can't take away my right of speech. And it was just like *Gibbons v. Ogden*, one of the popular decisions in the Marshall court. Steamboat fares all over the Atlantic dropped after *Gibbons v. Ogden*. And people said that Constitution up there has something to do with me. And so we must never forget to teach Americans, particularly our young people, that the Constitution has a meaning now.

MODERATOR: I'm trying to—some of these questions are really not on topic. And I'll answer those after the meeting.

[*Laughter*].

When you have a judicial system that is both corrupt and not independent, can you solve both problems at once, or do you have to address one before the

other? Both corrupt and not independent?

JUSTICE O'CONNOR: Boy, I don't know how to answer that. I'd think you'd want to tackle the whole business and try to get a system that would affect the selection of judges more favorably, and try to build in a structure and a little education for the nation as a whole on what we mean by judicial independence. It has both an institutional component and an individual one. You want judges who aren't just free to go do any crazy thing in the world; they're bound by the text of the Constitution and the law, and they're bound to apply it fairly and impartially.

But individual independence means that a judge can freely resolve questions based on the Constitution and laws of the country without fear of reprisal because it ends up being an unpopular decision.

They won't find their pet cat murdered, or their salary diminished the next day, or their apartment taken away.

And institutional independence, in the sense that the other branches of government understand that the judicial branch is separate and apart, and may make decisions that at times the other branches don't particularly like. And that's so hard to do. I mean, these things don't happen naturally, it's the result of a tremendous amount of effort by citizens in a country to embody these principles in their nation's laws and constitution and then to make them work.

JUSTICE KENNEDY: There are some models—and this is not precise—I'm going to talk about South Africa, not because their judiciary was corrupt, but that it lacked respect because it was chosen under the rules of apartheid. What do you do? Do you dismiss all of them and start all over? You don't have the resources. You need judges. So what was done in South Africa is they kept that system, but then they created a new court as a superstructure. So that was one—that isn't necessarily part of the corrupt problem.

MODERATOR: What can concerned citizens do to encourage popular analysis of judicial decisions on the basis of the legal principles at issue rather than the presumed political or partisan orientation of the judges?

JUSTICE O'CONNOR: Well, I think you have to hope that you have some intelligent media reporters to interpret decisions for the general public. And we don't always have that, although I think we're blessed with having a few here. But that's certainly an important component.

JUSTICE KENNEDY: Newspapers do a fairly good job of reporting what we do, not why we do it. And I understand that, because of their short timeline, you have to have the news today. So I think the reporters, by and large, given their timelines, do a good job.

What I can't understand is why editorial writers for major newspapers in major cities that are proximate to us [*Laughter*] will write an editorial without reading the opinion. And it happens all the time. I'm just baffled by that.

JUSTICE BREYER: I think that there are things to do there. Namely, the

bar being organized can help in two ways. I think one way, at least if we're talking about the Supreme Court, is to meet occasionally with the newspaper editorial board or the editors of the local paper and encourage them, first, to have reporters who've developed a little expertise in the area. I think the difference in our court between a full-time reporter—I say, everyone thinks they do a good job. They're there all the time. They understand it. You read pretty much in *The Washington Post*, in *The New York Times*, and some other ones where they have good reporters, I think, who read what's going on, in my opinion, pretty much. And by the way, if I think it's—I say only pretty much because I think it wasn't quite right, I think at times maybe they're right and I'm wrong. I mean, you know, they do a good job if they're professionals. And if they, for reasons of economy, as happens more and more, they cut that full-time legal expertise and say, oh, we'll give it to the person who covers terrorism, after all, there's a lot of terrorism cases, well, I think that's goodbye to the kind of analysis that I would like to think the public should understand. So I think the bar can be helpful in just saying: Cover it. We're not saying anything about the words, just cover it properly.

And I also think they can be very helpful in making certain that judges in this context, or maybe just lawyers, sometimes talk to the local papers about the nature of the judicial institution. I can't tell you how—what positive responses we get sometimes not because of the words that come out of our mouths, but rather because they see what we're trying to do, if only from attitude. And people aren't prepared to understand that there are institutions called judicial institutions that do try to approach these questions without a political content. Today, they don't understand that. And the bar can explain it to the reporters and show them, show them. And then, of course, you can set up ways of explaining particular cases that they may develop trust in. And if they do, they'll have a better understanding of what the case is about. But I underline all this—that I think members of the bar and bar associations can play a very important role in helping the public understanding in this respect.

MODERATOR: I have one more question for the two of you, but we need to let Justice Kennedy go. I'd like to present you with this watch for [Laughter]. I do think we need to thank Justice Kennedy. He has a speech that he has to go make.

[Applause].

I hold in my hand the last question. I think this is really important, and I want to hear the answer, particularly. In terms of aspiration, what do each of you want this group to do or think about now?

JUSTICE O'CONNOR: Oh. We're so blessed at this meeting to have people here from at least forty different countries from around the globe. That's remarkable. And the fact that we're assembled under one roof and talking to each other about something that I think there's no disagreement on, and that is the notion of the rule of law is a sound one, that it helps a nation evolve in ways



that enable the citizens of the nation to have their rights protected, to have their commercial agreements enforced, to have the country function as it should. It's so important to each one of us.

I want things to go well in my country. I want to feel that if there's a real dispute, that it can be solved fairly in the courts. I want to feel that people are going to be able to protect their fundamental rights through our court system. And I think there's kind of broad agreement about it. But we achieve those goals in different ways, and every country has to develop its own institutions and its own way of approaching it. Some of the countries here follow a civil law system. Most countries in the world do. And that works. But you can still have the same fundamental concepts, at the end of the day, of rule of law and an independent judiciary to help make it work. And I just hope that those concepts can spread among additional nations around the globe and really make the thing work. If we want to have any kind of global understanding and peaceful relations with other nations, I think we have to rely on the institutional notion of rule of law, and along with it, an independent judiciary. So that's what I'd like to see have happen. [*Applause*].

MODERATOR: Justice Breyer?

JUSTICE BREYER: I certainly agree with Justice O'Connor. Thinking that, as you can see, my predilection is to want action and to think that the judges can't do it. I would take as a given what is really an experiment. It's a gamble. And Brandeis or Holmes said that something was a gamble, maybe it was free speech, like all life is a gamble. It's a gamble as to whether this institution called an independent judiciary can help, help—maybe only in a small way—guarantee basic liberty and help with prosperity. But we all accept that gamble in this room, and that's taken as a given, and we're trying to do more for it.

I think that the institutions are right. It has to be the bar, and it has to be the press. And the bar and the press organize. Who's going to organize? The bar. Because the bar, however much they dislike this judge's decision or this judge, understands the need for the institutions. And so basically, we need your support. And the judges in other countries need similar support elsewhere. I mean, it's a bar association. One thing this bar association really understands is to help to organize bar associations. I mean, they're great. I mean there are 600,000 or maybe 700,000—that's what I usually say, it's the ABA, isn't it? That's why I usually say it's 700,000 lawyers and 800,000 committees. They understand how. [*Laughter*]. All right? Then do it! The organization at a lot of levels, whether it's here or abroad, and the bringing in of the press, the tensions between the institutions are nothing compared with what unites them.

And so what I think—what my aspiration is what you're doing. My aspiration is here and then spreading abroad, you help to maintain here and to build abroad the institutions with the lawyers that can bring in those who communicate, namely the press, in order to achieve that independence of which

Justice O'Connor speaks, all in the interests of furthering the gamble, that by doing so we help to maintain that prosperity that can flow from investment and the human liberty that flows from protection of basic human rights. [*Applause*].

JUSTICE O'CONNOR: That's great. I want to say thank you to all the people who came long distances to participate in this conference and to put your heads together and think what you want to have happen and see is needed. So, many thanks to all of you.

MODERATOR: I have tried to fulfill the role of moderator with moderation, and lack of bias, but here's where I get in trouble. I know my good friend Steve Breyer will forgive me this. He's our circuit justice, too. There is a special person here who has done so much for this country. She has shattered glass ceilings internationally as well. And she's very hard to replace. And I think—as a member of the American Bar Association, I think my association should thank both these justices, but offer Justice O'Connor a standing ovation.

JUSTICE O'CONNOR: Oh, dear! Oh, no! [*Extended Applause*].

2007

## Remarks of United States Senator Hillary Rodham Clinton November 10, 2005

Rodham Clinton

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## Remarks of United States Senator Hillary Rodham Clinton November 10, 2005

Thank you, Karen. I can't think of a better person to introduce me because after all those much too generous comments it's only fair to say that Karen herself is a trailblazer for women in the law. And she has given a lot of time over the years very generously to smooth the way for women entering the law here and internationally.

I'm pleased that I could be here because as many of you know the Senate is in session and we had votes and it wasn't at all apparent until the very end that I could get here and, unfortunately, I'll have to speak and leave and go back to the Hill. But I want to commend the ABA for convening this International Rule of Law Symposium. I want to recognize Michael Greco, the ABA President and other elected heads of the various committees along with the House of Delegates and of course Bill Ide with whom I've worked over the years.

I also, before getting started, want publicly to express my condolences and sympathy to the people of Jordan because of the horrible attack which they endured yesterday with loss of life and casualties. Our thoughts and prayers are with them, particularly with those who perished, and their loved ones. It's a further brutal reminder of the importance of the rule of law and the necessity of our efforts to spread the rule of law and help to embed it in societies as a guarantee not only of freedom, but against violence.

Two years ago the Nobel Peace Prize was awarded to Shirin Ebadi, an Iranian lawyer, judge, and activist for the rights of women, children and the oppressed. In announcing her award the Nobel Committee wrote, "No country deserves to be labeled civilized unless the rights of women and children are respected." Malalai Joya would agree. She came of age in Afghanistan's twenty-year spiral of war, warlords, extremism, and repression. She had a different vision for her country – one where the law, not the gun, held sway for women and men alike. And she spoke out bravely against the warlords who still tyrannize too many Afghans and stand in the way of the rule of law and the spread of freedom. Two months ago she was a top vote getter in Parliamentary elections and today she sits with sixty-seven women colleagues in the Afghan National Assembly.

I've been asked to address briefly the rule of law as it affects the role of

women and girls around the world. It obviously is part of a much broader agenda that you are discussing, but I commend you for coming to this conference with the important goal of creating an international rule of law movement, because you and many of us around the world know that without the rule of law we do not have a solid foundation for democratic freedom, for peace and stability, and for economic growth.

Women like Shirin and Malalai are living in the 21st century the words that John Locke wrote in the 17th century: "The end of law is not to abolish or restrain, but to preserve and enlarge freedom." Around the world today, women are struggling to gain access to those levers. They're using law to preserve and enlarge the freedoms that they, their families, and their entire societies enjoy. Their successes over the last decade form the strongest argument I can imagine for the law's power to end conflicts, lift lives, and transform societies. The ABA knows this, and your pioneering work on the rule of law in Central and Eastern Europe, as well as your support for women in the law here at home and around the world, has been an important part of that success.

But what do we do now to keep that movement going? How do we provide the education so that women and men together are empowered to understand their rights and to act on them? How do we provide better health care and law enforcement so that women and men have the resources they need to keep their families healthy and safe? How do we fight to end the scourge of human trafficking, a modern day form of human slavery?

When we talk about promoting the rule of law, especially when we talk about it in other places and recognize leaders who are fighting on behalf of the rule of law, we cannot forget that we, in the United States, have a special heritage and responsibility to uphold the rule of law. That heritage begins with our priceless Constitution and Bill of Rights. But equally important is our centuries-long journey toward applying the protection and dignity of those laws to every human being.

From our own civil rights and women's rights movement, we can see shining examples. People like Rosa Parks, who we honored in death for her life and legacy last week. Of those who used our tradition of the rule of law to right the wrongs of the law. We have inspired millions around the world to attempt to do the same. But with that inspiration comes responsibility, not to be perfect, for that is impossible, but to admit our mistakes and use the rule of law to mend them, not cover them up. When we fail that standard, we harm the ideals we most seek to promote and undermine the foundations of our own society and our influence around the world.

Showing the world that we hold ourselves to the rule of law, even when it is not easy to do, will do more to promote our common values than a dozen public diplomacy listening tours or rule of law speeches. When we show the world that our system is premised on the rule of law, that we do not fear transparency into the workings of our government, when we aim to hold every

part of our government accountable, then we, much more than in words, but in deeds, promote the rule of law.

I certainly hope that as we debate these matters right now in the Congress, that the Congress and the Administration will demonstrate that commitment to the rule of law that has always been the hallmark of America. Because it becomes difficult when we promote the rule of law elsewhere if we do not abide by it at home. It makes it more challenging for us to show the world that we value the rule of law and be a catalyst for changes elsewhere. Today for example, I'm sending the President a letter urging him to raise the issue of the rule of law and human rights when he engages in critical summit meetings next week during his visit to the People's Republic of China. While there has been progress in China, too often laws are ignored with dire consequences for businesses, individuals, and families.

I am particularly concerned that twenty-six years after China repealed its repressive one-child policy, officials apparently continue to punish women and couples for bearing children. These abuses have reportedly included denial of social benefits, fines, detention, destruction of property, forced abortion and forced sterilization – everything that runs against our deepest feelings and values. I support the government of the United States speaking out strongly against these coercive measures and at the same time promoting non-coercive family planning programs that respect the rights and choices of women.

Strength and respect for the rule of law is a value that knows no national boundaries. And social and economic advances can only be lasting if they are built on a foundation of respect for human rights.

The rule of law may begin in law books and congressional or legislative debates and courtrooms. It doesn't end there. It finds its most vibrant expression in the actions of citizens – ordinary men and women who draw courage from the law to take a stand for their own rights and for those of others.

Over the past decade, an extraordinary global movement for women's rights has breathed new meaning into the rule of law, beginning as Karen pointed out, in a most unlikely place: The 1995 United Nations Fourth World Conference on Women in Beijing. Now many doubted that a United Nations conference on women and one held in Beijing would have any impact. And many of you may recall there was a good deal of grumbling about whether the United States should participate and certainly whether I, as First Lady at the time, should participate.

But I believed then, as I believe now, I don't think we promote our ideals and goals by disengaging from those with whom we disagree. I think it is especially important, in fact, to engage in a very assertive way; to make it clear that we stand for different values and ideals and to help bring a consensus into being around them.

I thought that this could be a historic conference that would shine a bright

light on the issues that matter most in the lives of women and their families: access to education, health care, jobs and credit. The opportunity to enjoy the full range of political, legal, and human rights. Some of you were there. It was a gathering that lasted only a few days and it had a counterpart in Huairou that was the national nongovernmental organization meeting, and between the two of them it launched a campaign to change laws and change attitudes across our globe.

Here in the United States we also took a hard look at ourselves. The Clinton Administration became the first to both understand and publicly state that investments in women and girls should be an integral part of our foreign policy. We started the President's Interagency Council on Women, which I was honored to Chair, and we followed up on Beijing to make sure that if we were going around telling other countries what they should do to make sure they promoted the rule of law on behalf of women and girls, that we had done all we needed to do at home.

We launched the Vital Voices Democracy Initiative to help women build democratic institutions and market economies, to get the training they needed personally to participate in the economic and political life of their societies. And that continues as the independent nonprofit Vital Voices Global Partnership. Now it is widely accepted today that focusing on women as a key to building democracies, growing economies, ending conflicts, and strengthening the rule of law is understood. But just ten years ago that was news to a lot of people. And we have seen the results as that news has impacted on the political and economic structures of various countries. Nations from Mongolia to Indonesia to Tajikistan are passing better laws, protecting women from discrimination, abuse, and violence.

Worldwide, more women than ever are writing laws and enforcing them at the highest levels of government. The proportion of women legislators worldwide has grown every single year, and more women have become heads of state or government in the ten years since Beijing than in the previous twenty-five years.

I think it's worth noting that some of the fastest growth has come in post conflict countries, where anyone, man or woman, must be particularly brave to enter politics. Afghanistan has had its first woman presidential candidate, its first woman provincial governor. In this year's legislative elections, women made up ten percent of the candidates and forty-four percent of the voters. Female turnout actually rose since the 2004 presidential elections. When I was last in Afghanistan earlier this year, I met with many of these women, urban, rural, secular, religious, who are just anxious to take their place in rebuilding their country.

This is also true in Iraq, where women of every faith and ethnicity are braving the very dangerous security conditions to fight for change. Last week, I met with Iraqi women journalists who shared with me how the lack of personal

security in the face of a violent, deadly insurgency affects everything they are trying to do - yet they keep trying. The number of voters who have braved that insurgency has continued to increase. They will have a new election on December 15<sup>th</sup> that will finally choose a legislature to write the rules that will determine women's rights, personal security, and so much else.

Now under Saddam Hussein, women, like all Iraqis, were brutally repressed, despite the fact they were given rights on paper in the Iraqi Civil Code. I am very alert to the fact that we must ensure that women have rights more than just on paper in Iraq. It would be a cruel irony if when there is an opportunity finally to have an elected government that writes the laws, the legal protections Iraqi women have are lessened or ignored.

So there's a lot to do. The agenda ahead of us, when it comes to women and girls, is full, in part because despite all these advances, and there are so many more that I could reference, women still comprise the majority of the world's poor, illiterate, and uneducated.

Many women lack the most basic rights and the ability to enforce even the rights they have. In Afghanistan, a beloved national poet was beaten to death by her husband after an argument as her own mother stood by. She was twenty-five.

I want to focus my calls to action on three areas particularly related to the rule of law. First, ending the scourge of human trafficking, second giving women legal and actual control over their health, and third, educating women and men to know and defend their rights.

We must prevent and punish violence against women. One of the great advances we made after Beijing was to underscore the point that domestic violence was not cultural, it was criminal. And there needed to be laws in every society against domestic violence.

We now face a new and growing form of violence against women: organized trafficking that enslaves and degrades hundreds of thousands a year. We've made progress in raising awareness about this new slavery, but not enough to break the criminal organizations that profit from it.

In recent years, first under the Clinton Administration and then the Bush Administration, we had passed laws against trafficking. We had made it a primary issue in international and bilateral negotiations, and I'm delighted that just this last week we deposited our ratification of the protocol to prevent, suppress, and punish trafficking in persons, especially women and children.

But we've got to do more to back up our rhetoric with actions. We need to fund the organizations that provide care and legal assistance to the victims of all forms of trafficking. We have to make sure that it is not viewed as a marginal crime to be ignored by law enforcement in countries where it is taking place.

We face a particularly horrific problem with re-trafficking. I've been to countries where there is a very high rate of trafficking of young girls into sexual



slavery, brothels, legalized prostitution. And I've seen, in parts of Southeast Asia particularly, places where you can tell just by driving by which families have sold their daughters and which have resisted. Families who have sold their daughters often have a satellite with television reception or a new vehicle, maybe the first in their family. And I've met the girls who've been trafficked, sold by their fathers, sometimes escaping, making it back home only to be shunned, facing stigma, and sometimes sold again.

We need to do more to both raise the visibility of this issue, recognize that it happens even in the United States, and do more to provide the resources to combat it, and make it a primary objective of any rule of law initiative.

We also have to do more to get medical care and health information, particularly family planning information and prevention of HIV/AIDS to women and girls. We still face an unacceptably high level of maternal and child mortality in many places in the world.

The HIV/AIDS pandemic is one of the leading threats to women. In Africa, young women often have absolutely no authority to resist early marriage or sexual advances. In fact, they are three times as likely to contract the virus as young men. They try to protect themselves, but often do so without the full support of the law.

In too many places inheritance laws, for example, leave a widow nothing with which to support her children, often sending mothers or daughters into prostitution and continuing the cycle of HIV. Property and divorce laws often leave a woman little control over her situation within marriage and little ability to escape. The rule of law needs to recognize the rights of these women and girls. And although we've made some progress in some African countries, we have a long way to go.

We also need to ensure that women enjoy the fundamental right to plan their own families and have access to family planning services. Unfortunately in recent years, our government has not been making the commitment to this that I wish it would. We should be attempting to educate people about reproductive health and how to prevent unsafe and unwanted pregnancies.

It does not help that we had the Global Gag rule reinstated, which means that no U.S. support can go to local health providers who offer not only abortion or abortion counseling in circumstances that we often would believe is appropriate, but because these organizations often provide a range of services, the failure to fund them means that the full range is shut down. We know that one of the most effective ways to reduce the number of abortions is to empower women to make decisions about their own health.

We also need to ensure that the doors of education are open to every girl and boy in every country on every continent. Rule of law societies demand citizens prepare to know and defend their rights. Educating girls is one of the most important ways we can advance the rule of law. Not only are we likely to

produce healthier families and lower rates of mortality, malnutrition and disease, educating children, particularly girls, correlates to economic growth, and it is one of our best weapons against the spread of terrorism.

I introduced the Education for All Act in Congress last year because serving on the Armed Services Committee, I have had the opportunity to ask a number of officials in the current administration what else we could be doing to combat terrorism. And I recall very well the response that I received from Former Deputy Secretary Wolfowitz, who said the most important thing we could do would be to educate girls and women.

So I took that as perhaps a good sign we might actually do something about it and introduced legislation that calls for a clear global strategy to achieve universal global education by 2015. I think making the education of girls a top priority is one of the most important ways we can combat terrorism and advance the rule of law.

There is much work to be done, and I think that this conference and the initiative that the ABA has undertaken comes at a particularly timely moment. Not only because of what we see happening around the world as democratic governments such as our own and those in Europe grapple with civil unrest, grapple with the challenge of suicide bombers, and try to figure out how we can maintain open, free societies and provide security and stability to our people.

But we know the way forward. Keeping in mind the rule of law gives us the best example that we could have and debating these issues in sessions like the one you're holding here, using the combined intelligence and experience of people from our own country as well as around the world, is important and more likely to lead us to the appropriate conclusions.

Nelson Mandela said in 1989 when he saw a brave young man confronting a Chinese tank in Tiananmen Square he thought of Rosa Parks. He called it a "Rosa Parks moment." We've been thinking a lot about Rosa Parks, and I think that one of the reasons for the great outpouring of support for her, the unprecedented decision to allow her to lie in state, the first woman, the first African American to do so, is certainly a great tribute to her life and legacy, but it also demonstrates that at this moment in our own history we are looking for examples. We are searching for ways that peacefully, we could use the law to make changes here at home and around the world that will benefit ourselves and our children.

The rule of law is a powerful force. It has the potential not only to harness, but unleash human potential beyond our understanding, rooted in the drive for justice. Rosa Parks understood that. She did not come to that day on the bus as a tired seamstress who just decided not to move. She tried to vote three times and had to take literacy tests and was turned down until finally, local officials gave in and allowed her to register.

She joined the NAACP and learned about what it would take to be part of

nonviolent, civil disobedience. She attended the Highland School, where with other likeminded advocates, she was instructed in ways to take a stand and to make it clear that in this country, that believes in the rule of law, we had a lot of work left undone. So on that day on the bus, it may have been a decision that she made in the spur of the moment, but it was a lifetime in making. And it could only have been made within the context of a conviction that the rule of law would finally triumph.

That's what sends people like Shirin Ebadi into Iran's courtrooms and Malalai Joya onto Afghanistan's campaign trail. That is what's driving women and men all over the world to change their societies for the better. And at this point, in American history and international history, it is more important than ever that they be joined by lawyers and judges across the world who are committed to furthering the rule of law and making it possible for every boy and girl to believe that they have the right to grow up and live up to their own God-given potential.

Thank you all very much.

2007

## Launching a Global Rule of Law Movement: Next Steps November 10, 2005

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## Launching a Global Rule of Law Movement: Next Steps November 10, 2005

PARTICIPANTS: KATHARINA PISTOR, WILLIAM IDE, JUSTICE SANDRA DAY  
O'CONNOR, AND JUSTICE HILARIO DAVIDE.

KATHERINE PISTOR: Let me just first express my thanks to the American Bar Association for asking me to be the rapporteur for this conference. I've always felt honored for having been asked. I have to say I feel now even more humbled by the collective wisdom and experience and know-how that has been assembled here and has been expressed over the past two days. So I am in no position right now to pull it all together and give you the strategy of how to move forward. In fact, I do plan to come back to many of you and ask you specific questions so that we can find more specific examples to develop our strategy. But let me try to pull together, at least, some of the recurring themes that I have heard. And I will put some of these themes, also, in the web dialogue. If I missed some that you find more important, I do encourage you to respond and use this web dialogue as a way to communicate various ideas.

What were the major themes? I think the most important theme, the first one, is that the rule of law is a process is the making. As Michael Greco said on the first day, rule of law is a never-ending process. Ashraf Ghani has reminded us last night that the rule of law is an ideal, and, as such, it is always in the making. This doesn't mean that we are succumbing to relativism when we talk about the rule of law. In fact, we all agree that there are fundamental principles that underlie the rule of law – we know it when we see that it's not there. We also know that the rule of law should deliver some fundamental social goods, such as: it should limit the abuse of state power, it should protect us from terrorism, health pandemics, and severe poverty, hunger, and diseases. So the absence of these basic social goods are first indicators that the rule of law is not present.

The second theme is that the rule of law is a complex system. It's a system and it's complex and, as such, is fragile as Justice O'Connor has reminded us. We all can recount recent experience, even from countries with well-developed

rule of law systems where we have experienced a partial breakdown of the rule of law. The task is here, I think, to identify these partial breakdowns and collectively work on them because they are dangerous signals. The viability of a rule of law system, I think, reveals itself by being able to resolve these issues as they come along.

The third theme is that building the rule of law is inherently a political process. It does involve the reallocation of power from some who have it to those who that, so far, have not been able to exercise it. As we also know, all politics is local. So we have to focus our intention on localities. We cannot strive to build the rule of law exclusively from the outside. We have to take into account social, political, cultural and economic factors of key actors that are present in localities. Finally, related to that, of course rule of law and democracy are inherently intertwined, which does not mean that we can't move forward on one step with one ideal without having achieved perfection on the other.

The fourth theme is that globalization implies that people living in one part of the world cannot afford any longer to be indifferent to the lack of rule of law in other parts of the world. It is absolutely clear when we think about health pandemics that this is true. We also know this from business that is operating globally that they have to engage in building local governance structures and the rule of law in places where they go.

Fifth, the world's interdependence in our age of globalization calls, in addition to the local strategies that I am going to outline shortly, also for some major global law initiatives. After having recounted these five themes, let me just lay out a couple of strategies. Most important, I want to focus on the local strategies and I want to reiterate one theme that, again, came out again and again and again. And that is education. Education is a huge asset and I think we can all realize how important it is when we think about those people who have spoken to you over the past couple of days. Many of them have been beneficiaries of the American education system and of generous grants to come to this country in the first place and study your institutions and systems, myself included. I was the beneficiary of two such programs which were put in place post-World War II. One was the American Field Service and that brought me to Artesia, New Mexico in 1979 and 1980 as an exchange student. Then I came back in the early 1990s as a McCloy student, another program for Germans to come and learn your institutions. I want to remind you that Salaheddin Al-Bashir, Ashraf Ghani, Roberto Danino, and Monica Macovei all have benefited from American institutions and American learning. I would encourage you to make sure that this can continue and obviously that we have to strike a balance between security needs and visa entry requirements to continue this learning process.

Having said that, we are a tiny elite. I often remind my students that the United States has a population that amounts to only about five percent of the

world population. The rest of the world lives by different rules and our tiny elites won't change this fundamentally. We can trigger processes of change, but we also have to bring the education to different levels. We have to bring education to primary levels. We have to educate school children that they have rights and have to show them how to build the rule of law. Some of you might be reminded of the little video clips that you have seen as children, how a bill becomes a law – I am just a bill. I have seen this only when I came to the United States and thought it was quite neat. I don't think you can simply transplant it. *Sesame Street*, when it was disseminated around the world, made sure that in each locality where they went and showed the show, they incorporated some local actors, some local fairy tale figures to make sure that people had an anchor to associate with.

Education should also not be a one-way road. And that's what I'm learning when I teach as a German lawyer at Columbia Law School. Many American students just don't know enough about the rest of the world. We're trying hard to bring them to the other countries through dual-degree programs, exchange programs, etc. But if ninety-five percent of the world is living under different institutions, we have to learn to understand them to help them to grow out of them. Education is empowerment and we have to make sure that particularly girls and women – as has been reiterated by Hillary Rodham Clinton today – will have access to these empowerments. They are the key for development. We have to learn how to share know-how. Again, this is not only a one-way road. It is not that we have all the recipes here. I have been fascinated again and again by comments that came from the floor that reiterated how much local knowledge there is. I think one of the most important things in going forward, for me, will be to learn from you and from local players what the knowledge is that is out there. This is what I will try to tease out from the web dialogues and with direct e-mails, faxes, and telephone calls if I have to.

Let me just give you a few examples that have been spelled out here. One was, again, Ashraf Ghani who made a comment yesterday about how he convinced people that it was important to collect taxes and give taxes to the state. He went to the mosques and talked to the populous there. And talked to the leaders there. After that, it was apparent that this was a strategy that actually did work. As an outsider you might have not thought about it. As an insider, you know how to build legitimacy in your own localities and we have to learn from that to move forward. Other examples, Monica Macovei just gave us an example of how to build independent judiciaries in Romania. We want to follow that. We want to learn the little mechanisms.

Beyond education, I think we have to develop new strategies. Some of these strategies will require that we join forces, interdisciplinary, and we have to join civil society, international organizations, and corporate sectors. I was trying to zoom between the three this morning and at some point, I'd hope we would have all been around a table to talk to each other to really join forces. I know

it's happening on the ground. We have to learn how this is working out and what contribution each of these constituencies can really make.

To move forward and develop a strategy, I think we have to identify anchor institutions that can help us coordinate these efforts and really help us set the agenda. The American Bar Association is one and I would think that legal education and training is one where they have a comparative advantage. But there are other institutions. The corporate sector. Some firms might step forward and promote certain activities in some areas, bringing in stakeholders from other groups. Universities or other institutions. They have the liberty of being in academia, of being free to research what they want and we are having greater efforts to do interdisciplinary research at many top universities. We can build networks with local ones, as well.

I could name many more and I think, again, this is a strategy going forward. Who would be anchor institutions for particular issues that we are interested in? Building poverty, dealing with the health issues, and always making sure that these anchor institutions get involved, local actors, so we will learn from them and don't only teach them our lessons. There is a big issue that is looming in the background and that is when and how do we know whether we will succeed. There is a measurement issue here. Let me just say a few words about that. One is that it is often said that rule of law is too complex to be measured quantitatively. Let me remind you that it took Kuznets to win the Nobel Prize in economics to find a way to measure economic development quantitatively. Economies are also very complex systems, hard to measure. By the way, GDP might not be always the best measurement, but that's what we go by. It is enabling. We can measure. It's also constraining because we are not measuring perfectly. Just not being able to measure perfectly should not constrain us from measuring at all. But I think we have to be true to what we think the rule of law is all about when we started developing indicators for measuring. If the rule of law is a process and if you agree with me on that, then we have to start to learn how to measure processes, not simple, technocratic outcomes. In my own work, I have used existing rule of law indicators – and actually there are quite a few – mostly based on perception data and survey data, etc. I have found, with a couple of coauthors, that if you think about rule of the law as the outcome variable – this is what we want to promote – then simple indicators of the law on the books – creditor rights, shareholder rights, etcetera, etcetera – are very poor indicators or predictors for rule of law.

What is a very powerful predictor for the rule of law is the process of law development. Countries that have transplanted formal legal systems wholesale from elsewhere are not doing well on the rule of law. Those that have developed indigenous processes of legal development score quite highly. Those that wait and see and pick and choose and have capacity on the ground to do so are doing much better.

I want to leave my comments at this right now. I think it is a great



intellectual challenge to think about how to measure processes. Again, I would invite you to help me on that and comment on the web dialogue. Let me just go back to the basic theme here. We are talking about a big process – building the rule of law is incremental. It involves multiple actors. The key issue will be to bring the right actors together in different localities. Thank you very much.

[*Applause*].

WILLIAM IDE: Thank you very much. If we remember the first day, I posed to you three questions that I was going to address. Why are we here? What are we going to do while we're here? And what will we do together when we leave? Well, I think you know the answer to the first two and it couldn't have gone better. I think you just got a blueprint as to what we need to do when we leave. Now let's talk about the how. I was overjoyed to see so many young people here and participating and speaking out. It reminded me of my early years of practice, which was during the civil rights movement. During another remarkable occurrence in this country, and that was legal services for the poor. It was a wonderful time. It was an idealistic time. We look back in history and we look at those two movements like a giant ship with lights at night on the bay with the silver shining and just the majesty of all of it. But if you got closer and closer to that ship or those movements, you would find a thousand boats with lights on them banging into each other, barely going in the same direction. And that's sort of the nature of NGOs and idealist people breaking down the barriers for movements. And yet, during those two movements, those thousand ships with their lights were able to pull together, sail through the seas of evil, ignorance, apathy, create an armada and the rest is history for those two movements.

And here we are today. I submit we probably have many of those same challenges – a lot of well-meaning groups of people, organizations very much caring, but how can we work better together? How can we sort of pull it together? When I say "we," I don't mean just the ABA or lawyers. This is much too important for lawyers, much less American lawyers. This is something for all of us. And each of us is indispensable in solving these global challenges. The core theme that has emerged from our discussions these past two days is that we all have a stake in building the rule of law and we all have a contribution to make to that cause. And that we can only truly be effective if we'll join together and make one and one equal three. A number of organizations and institutions that join with us to bring you here together have already committed to move forward jointly on what we'll call a movement. Senator Clinton talked about the movement and that's really what it is emotionally. It will be the rule of law movement. We at the ABA are eager to play whatever role we can in furthering that movement.

So let me mention three follow on activities that we're committed to do. First, we will continue the communications and the dialogue. I've talked to you incessantly about this website. But we're in a new era. When I was in the

private sector, I was amazed because I had a few challenges for my company with some NGOs. They were so much more nimble than we were because they used the Internet. Like that, they could get information around the country, the world. Let's use the Internet. We will get to you all these proceedings. Please show them to your friends. Please show them to your constituencies. Show them to law schools. It's remarkable what we've seen in the past two days. It's not often you get three Justices of the Supreme Court of the United States having such a frank discussion and every law school should see that no matter where that law school is located. We will maintain that. We expect you to chime in and chat with us so you'll know what's going on.

Secondly, we will take the report. You've heard an outline of it. We'll have that published by January. That will be a wonderful blueprint with documentation as to what the issues are. By then you'll know exactly the rule of law is, in three sentences be able to find it. We'll have it boiled down with such a great rapporteur. But that will be a remarkable document, we believe, based on the past two days. We're going to disseminate it widely to all of you, to your organizations, to governments, to NGOs, bar associations, think tanks and to corporate general counsels, civil society – to groups and foundations.

Thirdly, we will convene a rule of law coalition of those of you who are interested in moving further to forward the rule of law movement. Here are some ideas that we've been talking about of areas where we could work together – educating and recruiting new constituencies to support the rule of law. We have a lot of work to do with the media. We have a lot of work to do in the law schools and educational institutions. The rule of law must become mainstream. Justice Kennedy mentioned that twenty years ago, you didn't hear of that term. Well, it means something very special to us now. It's our job to reach out because those other two great movements I mentioned to you – the civil rights movement and legal services for the poor – only prevailed because they reached the people in the middle. The people that just did not know what they issues were, but when they were educated, they had great hearts and they moved to support it. That's our mission. Second, we need new research to identify, document and publicize new ways of thinking in dealing with these societal problems that we talked about today – poverty, health pandemics, corruption, etc. So we can work together and share and come up with new ideas, , find resources. Third, we talked about benchmarking. Indicators to better measure rule of law progress and to bring focus on countries needing greater progress in that area. There are indexes out there, but there may not be the right one yet that maybe we, together, can work on to bring the spotlight on where rule of law progress is needed. Fourth, coordination. Get those little boats not banging so much and moving the same direction. Coordination among all of us and coordination between us and other development assistance programs. Fifth, finding new collaborative areas where we can work together, particularly between the corporate community, the private sector and civil society. It was

wonderful to see and hear the general counsels of major corporations talking about what they're doing and they're doing very many interesting, fabulous things. But there's a role we can all play together. We need to collaborate more and look for more joint projects.

The ABA needs to do a much better job and President Greco has pledged to reach out to bar associations throughout the world and coordinate and bring the rule of law mainstream within the ABA and mainstream within bar associations. Finally, conducting further symposiums like this. We can't flip around and do this next week, but we can do it soon. Meanwhile, President-elect Mathis has already planned a rule of law gathering September 16<sup>th</sup> and 17<sup>th</sup> that will be a continuation and you'll be hearing about this.

This is what we are pledged to do. But, it's not for us to set the agenda. We will help drive the process, but it takes all of us working together. We will commit our time and energy to reach out to you and to develop an idea of a coalition further and to make it reality. We hope to convene the first coalition meeting by February of 2006. Then we pledge to have regular meetings going forward after that. Please contact me or our staff and let us know of your ideas and your interest of your groups.

This has been an inspiring two days. Now we need to set sail together to act on that inspiration and to carry it forward. Last night we heard Dr. Ghanii remind us that everyone throughout the world yearned for the same basic protections and opportunities promised by the rule of law, but the vast majority – billions of people – live without that guarantee today. Our goal must be to continue the work of this symposium to develop a global rule of law culture and make the rule of law a reality in every corner of the world. So if you can remember our opening session, so that John Mroz's daughter and every other child everywhere understands and appreciates the relevance of the rule of law. If I may now have the honor of introducing Justice O'Connor to you because she is the inspiration for CEELI. In many ways, she's the inspiration for why we're all here today and she honors us for giving the final closing remarks. Justice O'Connor.

JUSTICE O'CONNOR: I want to thank the American Bar Association for all of the important work that it does to promote the rule of law and for convening this really important meeting to advance that cause. Now why? It's because the rule of law offers a basic guarantee of good government, of fair treatment and accountability. These are the building blocks for a society that can effectively protect its citizens and help them reach their own potential.

The discussions held here have underscored the urgency of promoting the rule of law, not just to realize the human potential, but also as part of an effective strategy to address some pressing social problems. We have some critical challenges: combating terrorism, combating corruption, poverty and the threat of pandemics. All of these would be alleviated, in part, by a rule of law movement. But this can't be a project of just one organization or one profession

or one country.

I think each of us has a stake in the rule of law and we have to work together toward the goal. No one country has all the answers. Certainly, our country does not. You've learned that in the United States, there are current threats to the independence of our judiciary and the rule of law. And I think there are problems in most countries in that regard. So one of the important contributions that this gathering has made has been bringing together a wide range of different stakeholders in the concept of the rule of law – from the private sector, from government, from media, from civil society and from more than forty countries.

This is, I think, where you come in because there is no natural constituency, for example, for judicial independence except perhaps for a responsible lawyer class. And we certainly can't trust the courts to protect themselves. For one thing, somebody has to people those courts on both sides of the bench. And those someones include many of you. For another, much of what makes a true threat to judicial independence is the offending politician's motivation, which courts are ill-equipped to ferret out. So it seems to me that the best defense against threats to the rule of law is the maintenance and the expansion of a culture in each of our nations in which such threats are frowned on and are unlikely to even get off the ground.

But it really is for all of us to be dedicated to the practice and the promise which makes our nations, our courts, our systems of justice armed with the power of judicial review and protected by judicial independence a part of the arsenal which each nation has to enforce the rule of law and protect individual freedoms. We have so much more to gain if we work together. I hope that all of you who participated here will continue the dialogue you began here and work to develop some joint initiatives in the future that support the innovative legal reformers and to identify and develop effective strategies for improvement and to build a broad base of support in each nation for this approach.

Many thanks to each one of you for being part of this. You've been great contributors. We are all indebted to each one of you who helped make this possible. Thanks so much.

*[Applause]*.

WILLIAM IDE: One final thing – I would ask all of the staff that worked and helped pull this, if you'd please stand up. Look around, because they did a fantastic job. *[Applause]*. I told you there are no goodbyes. We'll see each other again soon. I don't know whether it will be a month or a year. Wait a minute, the Chief Justice of Philippines is standing, so I will step back.

JUSTICE HILARIO DAVIDE: After listening to the position taken and in light of the theme for the last portion on the launching of the global rule of law movement, I do not know if it would be appropriate at this time if I will move for unanimous approval of the launching of the global rule of law movement

subject to the definition of details as outlined by Justice O'Connor and Madam Pistor and, of course, William Ide. Because it is important that we have to make formal a declaration that we are launching it. And I so move that we now resolve to adopt unanimously the formal launching of the global rule of law movement. You can call it the Washington Declaration.

*[Laughter, Applause].*

WILLIAM IDE: Well, you have your work cut out because we're now in business. We will see you soon. Thank you very much for being here.

*[Applause].*