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*348 KEYNOTE ADDRESS

Sandra Day O'Connor [FNa1]

What I wanted to tell you tonight is that I do not deserve to be your speaker. I do not know much about international law. I am just learning; I am trying to learn and I have no words of expertise to give you on that subject. I am here because I think it is important and because I think I need to know more. Most people in the United States need to know more. That is where you come in. And I am really very nervous about speaking to this audience of experts tonight.

The other thing I wanted to tell you was that, as we get older, we are less inclined to reach out and establish new friendships. When we are young, it is completely natural to be open and accepting of new people and new friends. Later on, we become comfortable with the people we already know. We are not eager to reach out. We are settled in one place, we develop our habits, our routines, and we are just not as open to new contacts as in our youth.

The ASIL is really a relatively new friend of mine, developed in my later years. I became aware of the Society only a few years ago, basically through work I had been doing for the Central Eastern European Law Initiative (CEELI). I had met and admired, many years ago in my home state of Arizona, Rita Hauser, who has been active with you in a variety of ways, and I learned of her involvement with this association.

I was invited, as Arthur Rovine explained, to help establish an advisory group for judicial outreach for the Society to explore ways in which judges in this country might become more knowledgeable about international law. I agreed to chair the advisory group and invited a number of federal judges across the country to join me in thinking about ways in which the Society could help those of us on the bench become better informed about principles of international law and current issues in the field, that we might be likely to encounter on the bench.

The result of the effort has been extremely encouraging. It has resulted in the development of this new friendship for me with the Society and with some of you. With the help of the Society, we have succeeded in providing programs on different aspects of international law at circuit conferences in six of our federal circuits. Three more are presently scheduled. There have been programs for the National Association of Women Judges and the Federal Judicial Center.

We are trying to complete drafting an international law overview for distribution to all federal judges who want it. That is going to be quite an accomplishment: not sophisticated enough for those of you who are experts, but something for people who are not experts to use as a basic primer, if you will. We are also preparing a handbook on

procedural aspects of international civil litigation and an international human rights overview.

All of these activities have been the result of the effort this association has made in judicial outreach. Chris Borgen, who has been working for this organization, has done a superb job in every respect. The organization has been fortunate to have him.

Despite the robust agenda of the advisory group, I really do feel like a fish out of water in speaking to this group of international law experts in light of my own limited knowledge of the subject.

*349 I ask myself, why does information about international law matter so much? Why should judges and lawyers who are concerned about the intricacies of ERISA, the Americans with Disabilities Act, and the Bankruptcy Code care about issues of foreign law and international law? The reason, of course, is globalization. No institution of government can afford now to ignore the rest of the world.

The importance of globalization should not be underestimated. Thirty percent of our gross domestic product is internationally derived. We operate today under a large array of international agreements and organizations: the UN Convention on Contracts for the International Sale of Goods, the North American Free Trade Agreement, the World Trade Organization, the Hague Conventions on collection of evidence abroad and on service of process, the New York Convention on the Enforcement of Arbitral Awards, to mention only a few of a great many such agreements.

But globalization is so much more than simply these agreements and organizations. Globalization also represents a greater awareness of, and access to, peoples and places far different from our own. The fates of nations are more closely intertwined than ever before and we are more acutely aware of the connections we have with others.

As we learned in this country on September 11th, these connections can sometimes be devastating rather than constructive. But as we are learning in the post--September 11th world, the power of international cooperation and international understanding is much greater than the obstacles we face.

The word globalization has many connotations, some positive, some negative. These varying views reflect both the potential for globalization to increase world harmony and the risk that it will suppress desirable difference and become simply a tool for imposing the preferences of powerful nations, such as our own, on the rest of the world. Harnessing the good that can come from our increasingly global world while avoiding these pitfalls involves--indeed, requires--those with power and influence in our country to develop a greater knowledge and understanding of what is happening outside our nation's borders. This is true of courts as much as it is of any other governmental body. One of the topics discussed at this annual meeting is the internationalization of legal relations. We are already seeing this in American courts, and should see it increasingly in the future. This does not mean, of course, that our courts can or should abandon their character as domestic institutions. Very few treaties are directly enforceable in American courts. In the Breard case, [FN1] for instance, our Supreme Court declined to entertain a Vienna Convention claim in a death penalty case on the basis of a procedural default, as well as a belief that neither the text nor the history of the Vienna Convention clearly provides a foreign nation a private right of action in United States courts to set aside a criminal conviction and sentence for violation of the consular notice provisions.

On the somewhat rare occasions when we are called upon to consider international law,

however, the court on which I sit often refuses. Just this term, we declined to hear a case about the definition of custody in the Hague Convention on International Child Abduction, despite the fact that the lower court's ruling contradicted that of courts in several other signatory countries. Since the Second Circuit's decision in Filartiga v. Peña-Irala, [FN2] American courts have entertained Alien Tort Claims Act and Torture Victim Protection Act cases involving international law violations by other sovereigns with significant impacts on the international terrain. In the Karadzic case, [FN3] for instance, the Second Circuit allowed a suit against Radovan Karadzic for crimes against women in the *350 Bosnian conflict, expanding the act's coverage to include suits against those who are not recognized as heads of states.

Exemplified by suits like these, international human rights litigation has become a sort of cottage industry in the United States. Yet our Supreme Court has not reached in to clarify these statutes, despite the explicit urgings of some lower court judges who do not have such control over their own dockets.

Those federal courts that have no choice but to entertain suits like the Karadzic case may be doing so without full awareness of the implications for the international arena. These judgments against foreign leaders, which are rarely if ever enforced in any traditional sense, play an important role in shaping diplomatic initiatives around the globe. The impact of such litigation on international relations is not always positive, as Curtis Bradley has pointed out. [FN4] Whatever the merits of allowing these suits, courts should be aware of the effects their decisions in such important cases may have.

Although international causes of action like these are still relatively rare, there are many other ways that international issues are coming before American courts. This is because international law is no longer confined in relevance to a few treaties and business agreements. Rather, it has taken on the character of transnational law--what Philip Jessup has defined as law that regulates actions or events that transcend national frontiers. Both public and private international laws are included, as are other rules that do not wholly fit in to such standard categories.

Although international law and the law of other nations are rarely binding upon our decisions in U.S. courts, conclusions reached by other countries and by the international community should at times constitute persuasive authority in American courts. This is sometimes called "transjudicialism."

American courts have not, however, developed as robust a transnational jurisprudence as they might. Many scholars have documented how the decisions of the court on which I sit have had an influence on the opinions of foreign tribunals. One scholar has even said that, when life or liberty is at stake, the landmark judgments of the Supreme Court of the United States, giving fresh meaning to the principles of the Bill of Rights, are studied with as much attention in New Delhi or Strasbourg as they are in Washington, DC or the state of Washington or Springfield, Illinois.

This reliance, unfortunately, has not been reciprocal. There has been a reluctance on our current Supreme Court to look to international or foreign law in interpreting our own Constitution and related statutes. While ultimately we must bear responsibility for interpreting our own laws, there is much to learn from other distinguished jurists who have given thought to the same difficult issues that we face here.

The court on which I sit has held, for more than two hundred years, that acts of Congress should be construed to be consistent with international law, absent clear expression to the

contrary. Somewhat surprisingly, however, this doctrine is rarely utilized in our court's contemporary jurisprudence. I can think of only two cases during my more than twenty years on the Supreme Court that have relied upon this interpretive principle.
We have refused to consider international law and the law of other nations when interpreting our own Constitution. We are sometimes asked to do so, particularly when dealing with Eighth Amendment challenges to the death penalty. Litigants claiming that the execution of those who were juveniles at the time they committed the crime violates the International Covenant on Civil and Political Rights, as well as general international norms, are sometimes before us.
*351 This very term, we are considering a case involving the constitutionality of executing people who are mentally retarded. Several of the briefs focus on the practice of other nations. We have even received an amicus brief from a group of American diplomats, discussing the difficulties posed for their missions by the American death penalty practice. Until now, however, we have always held that when interpreting the meaning of cruel and unusual punishment, under the Eighth Amendment, only national norms are relevant.
Although our reliance on international and foreign law is rare, it is not nonexistent. For instance, we have looked to international law notions of sovereignty when shaping our federalism jurisprudence and to international law norms in boundary disputes between American states. In areas such as these, it would be a mistake to ignore the rich resources developed in the law of nations. I suspect that, with time, we will rely increasingly on international and foreign law in resolving what now appear to be purely domestic issues.
I have not even scratched the surface of the issues and areas of application of foreign and international law in U.S. courts. The fact is that international and foreign law are being raised in our courts more often and in more areas than our courts have the knowledge and experience to deal with. There is a great need for expanded knowledge in the field, and the need is now.
This is an interesting time in world history. For one thing, for the first time there are now democratically elected governments in more than half the countries of the world. By last count there are approximately 120 democracies out of 190 nation states. Even in countries that do not have democratically elected governments, there are laws and legal systems and judicial systems. Law is basically a formal expression of society's agreement on basic principles by which we will conduct ourselves in relation to others. It is the way in which we express the ideals of our respective societies.
To the Western world of law, the great gift of the Magna Carta, signed in 1215, was the notion that no person, including the sovereign, is above the law and that all persons shall be secure from the arbitrary exercise of the powers of government. The Magna Carta is the spiritual and legal ancestor of the concept of the rule of law.
With the breakup of the Soviet Union, we have had a sudden expansion of nation states striving to establish democratic societies under the rule of law. The rule of law and the ideals it enforces exist in only part of the world today. Since September 11th, we have been reminded that other parts of the world do not share our notions of the rule of law, or the notion that it is the key to liberty. But it seems to me that at some level, every nation state, including Iraq, Iran, and North Korea, has relations, commerce, and other dealings with other nations and with businesses in other nations. There is inevitably the need for the resolution of international disputes.

The classic statement about how and why international law is developed was made some years ago by Louis Henkin. It bears quoting:
Every nation derives some benefits from international law and international agreements. Law keeps international society running, contributes to order and stability, provides a basis and a framework for common enterprise and mutual intercourse. Because it limits the actions of other governments, law enhances each nation's independence and security. In other ways, too, by general law or particular agreement, one nation gets others to behave as it desires. [FN5]
*352 Just as we have said since the Paquete Habana case, "International law is part of our law." [FN6] International law, which is the expression of agreement on some basic principles of relations between nations, will be a factor or a force in gaining a greater consensus among all nations concerning basic principles of relations with nations that, as of now, are withholding their agreement on some aspects. It can be, and is, a help in our search for a more peaceful world.

A broad consensus on how nations should treat prisoners of war has recently to a degree influenced our own government in its handling of prisoners taken in Afghanistan; they were perhaps not technically covered by the Geneva Convention but they will nevertheless be treated largely as if they were.

Acting in accord with international norms may increase the chances for development of broader alliances, or at least silent support from other nations. The efforts of each of you who belong to this society to educate other lawyers and judges, both in the United States and abroad, about international law really are efforts well spent. Kofi Annan has said that the rule of law is essential to peace, development, and the realization of human rights. The practice of law is a privilege, but a privilege that carries with it a heavy responsibility to ensure respect for the law.
Through the ASIL's efforts, American judges are becoming more aware of their responsibilities to respect not only domestic law but also the law of nations. But more effort is needed. Law schools must ensure that their students are well versed in the increasingly international aspects of legal practice. The University of Michigan Law School has just begun requiring all students to complete a two-credit course in transnational law.
Developments like this are surely welcome, but understanding law in a global context requires more than reference materials and classroom education. It requires travel to foreign nations and a dialogue with foreign jurists and lawyers.
I have been fortunate through my involvement with CEELI and through the opportunities presented by virtue of my office to meet with the members of the judiciaries of many countries. In fact, on September 11th, I arrived at the airport in New Delhi, India, for a meeting with representatives of the Indian Supreme Court and other high courts.
Much of my dialogue with foreign jurists involves American judges giving guidance to countries developing their legal systems about how to make them run more fairly and effectively, but the dialogue has not been a one-way street. We have learned a great deal from other nations' jurists, as well.

For instance, I recall vividly how impressed I was with watching the more efficient selection of jurors in British courts, and in observing a higher degree of respect and civility given by lawyers to each other and to courts in some nations other than our own. There are, of course, other ways to encounter foreign legal systems. The New York University Law School, for instance, has brought foreign law professors to the United States to share their expertise and perspectives with students and faculty. Yale Law School has established a seminar for members of constitutional courts from around the world.

Developments like these are important if the American legal profession is going to take seriously the realities of practice, not only the ways in which transnational legal issues must be addressed but also the potential for using the law to make a difference in the issues facing our world.

In remarks I have given to groups of lawyers since September 11th, I have noted the need for lawyers in this difficult time has not decreased, it has increased. Because of the *353 scope of the problems that we face, understanding international law is no longer just a legal specialty. It is becoming a duty.

I like to say we must not be tone deaf to the music of the law. There are lawyers who never do hear the law's music as they go through life. Indeed, there are those who think there is none, who think the law is just a business, one for which high fees can be charged, and maybe collected, for the necessary services only a lawyer can provide. But if you listen and understand the law's music, to quote a former law school classmate of mine,

it is a music filled with the logic and clarity of Bach, the thunder, sometimes over-blown and pompous, of Wagner, the lyrical passion of Verdi and Puccini, the genius of Mozart, Gershwin's invention, Rossini and Vivaldi's energy, and Aaron Copeland's folksy common sense, Beethoven's majesty, and unfortunately not a little of the ponderous tedium of Mahler, and the sterile intellectualism of Schoenberg.

The words you can hear to the music of the law are words of equality, justice, fairness, consistency, predictability, equity, the wrongs righted, and the repose of disputes settled without violence, without undue advantage, and without leaving either side with bitter feelings of having been cheated. It is the music sung in the world of childlike innocence in which the lion lies down with the lamb. Perhaps it is not a world that ever was, or ever will be, but it is a world worth living toward.

[FNa1]. Associate Justice, United States Supreme Court.

[FN1]. Breard v. Pruett, 134 F.3d 615 (4th Cir. 1998), cert denied sub nom. Breard v. Greene, 523 U.S. 371 (1998).

[FN2]. Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980).

[FN3]. Kadic v. Karadzic, 70 F.3d 232 (2d Cir. 1995).

[FN4]. See, e.g., Curtis A. Bradley, The Costs of International Human Rights Litigation, 2 CHI. J. INT'L L. 457 (2001).

[FN5]. Louis Henkin, How Nations Behave 29 (2d ed. 1979).

[FN6]. The Paquete Habana, 175 U.S. 677, 700 (1900).