SOUTHERN CENTER FOR INTERNATIONAL STUDIES

Atlanta, Georgia
October 28, 2003

Remarks by
Sandra Day O'Connor
Associate Justice, Supreme Court of the United States

President White, Judge Dorothy Beasley, Secretary Sullivan and friends of the Southern Center for International Studies.

The impressions we create in this world are important and can leave their mark. A friend of mine tells the story of a bus driver who was becoming angry but still kept his composure when a woman passenger made many complaints during the trip. She was rude and made the trip very unpleasant for those around her. It wasn't until the driver opened the door at her stop to let her off the bus that the driver said, "Lady, you left something behind." She turned and snarled, "And what was it I left behind?" The driver smiled and said softly, "A bad impression."

On the whole, the United States judicial system leaves a favorable impression around the world. But when it comes to the impression created by the treatment of foreign and international law in United States courts, the jury is still out.

A skeptic of the relevance of non-U. S. law to the United States legal system would begin by asking why judges and lawyers should divert their attention from the intricacies of the Employee Retirement Income Security Act, or the Americans with Disabilities Act, or the Bankruptcy Code, to the principles and decisions of foreign and international law. The reason, of course, is globalization. No institution of government can afford any longer to ignore the rest of the world. One-third of our gross domestic product is internationally derived. We operate today under a large array of international agreements and organizations directly impacting judicial decisionmaking, including the U.N. Convention on Contracts for the International Sale of Goods, NAFTA, the World Trade Organization, the Hague Conventions on Collection of Evidence Abroad and on Service of Process, and the New York Convention on Enforcement of Arbitral Awards. But globalization is 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.

The word "globalization" has many connotations, some positive and some negative. These varying views are reflective of both the potential of globalization to increase world harmony, and the risk that globalization will suppress desirable differences and become no more than a tool for imposing the preferences of powerful nations like our own upon the rest of the world. Harnessing the good that can come from our increasingly global world while avoiding these pitfalls 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. There is talk today about 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. But conclusions reached by other countries and by the international community, although not formally binding

upon our decisions, should at times constitute persuasive authority in American courts—what 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 remarked 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, D. C., or the State of Washington, or Springfield, Illinois*.[1]

This reliance, however, 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 be learned from other distinguished jurists who have given thought to the difficult issues we face here.

For instance, the Court on which I sit has held for more than 200 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 invoked in the Court's decisionmaking. I can think of only two cases during my now more than 20 years on the Court that have relied upon this interpretive principle.[2]

We have also, historically, declined 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.

But the first indicia of change have appeared. Two terms ago, in *Atkins* v. *Virginia*, we considered the constitutionality of executing individuals who are mentally retarded. Several of the briefs submitted to the Supreme Court focused on the practice in other nations, and one "friend of the court" brief from a group of American diplomats discussed the difficulties posed for their missions by American death penalty practice. The Court's opinion in *Atkins* made note of the fact that "within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved."

Solicitude for the views of foreign and international courts also appeared in last term's decision in *Lawrence* v. *Texas*. In ruling that consensual homosexual activity in one's home is constitutionally protected, the Supreme Court relied in part on a series of decisions from the European Court of Human Rights. I suspect that with time, we will rely increasingly on international and foreign law in resolving what now appear to be domestic issues, as we both appreciate more fully the ways in which domestic issues have international dimension, and recognize the rich resources available to us in the decisions of foreign courts.

Doing so may not only enrich our own country's decisions; it will create that all-important good impression. When U. S. courts are seen to be cognizant of other judicial systems, our ability to act as a rule-of-law model for other nations will be enhanced.

This is an interesting time in world history. For the first time, there are now democratically elected governments in more than half the countries of the world—approximately 120 democracies by last count out of 190 nation states. Even in countries which do not have democratically elected governments, there are laws, legal systems, and judiciaries. Law is essentially 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. The great gift from the Magna Carta in 1215 was the fundamental premise of the rule of law: 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.

I recently had the privilege of convening an Arab Judicial Conference in Manama, Bahrain, attended by representatives of thirteen Arab nations. A motivating force behind the conference was a desire on the part of several countries in the region to strengthen their commitment to the rule of law. It was fascinating to discover how deeply embedded fundamental rule-of-law principles are in these nations' legal systems. For example, the principle that an independent judiciary is essential to the proper administration of justice appears, in some form, in virtually every Arab constitution. Bahrain's own constitution provides that "The honor of the judiciary, and the probity and impartiality of judges, is the basis of government and the guarantee of rights and freedoms. No authority shall prevail over the judgment of a judge, and under no circumstances may the course of justice be interfered with." The Egyptian constitution proclaims that "the independence and immunity of the judiciary are two basic guarantees to safeguard rights and liberties."

I left the conference with the conviction that the differences between nations with regard to their commitment to the rule of law are fewer and less important than the similarities. And it is in everyone's interest to foster the rule-of-law evolution. Again, the United States will be in the best position to assist in this development if, in its own treatment of foreign and international law, it has left a good impression on politicians and members of the legal profession in the countries in which the evolution is taking place.

Kofi Annan has said: "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."[3] American judges are becoming more aware of their responsibilities to respect not only domestic law, but also the law of nations. Organizations like your own, can assist the Southern Center for International Studies in this development. Initiatives of particular note are the programs on different aspects of international law created for the Circuit Conferences of the United States Courts of Appeals; programs for the National Association of Women Judges and the Federal Judicial Center; and the handbook on international law for federal judges recently published by the American Society of International Law.

The effort should spread more widely through the legal profession as well as in high schools and universities. Law schools must ensure that their students are well-versed in the increasingly international aspects of legal practice. Some schools have already taken up the challenge: For example, NYU Law School has brought foreign law professors to the United States to share their expertise and perspectives; Yale has established a seminar for members of constitutional courts from around the world; and the Michigan Law School requires all students to complete a two-credit course in transnational law.

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. Because of the scope of the problems 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 and lay people who never hear the law's music—indeed, those who think there is none; those who think the law is just a business—one for which high fees can be charged and collected for the necessary services only a lawyer can provide. But if you understand and hear 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 overblown and pompous, of Wagner, the lyric passion of Verdi and Puccini, the genius of Mozart, Gershwin's invention, Rossini and Vivaldi's energy, 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 Schonberg.... The words [of the music of the law you can hear] are words of equality, justice, fairness, consistency, predictability, equity, 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, nor ever will be, but it is a world worth living toward."*

Endnotes

[1] Anthony Lester, the Overseas Trade in the American Bill of Rights, 88 Colum. L. Rev. 537, 541 (1988).

[2] *Weinberger* v. *Rossi*, 456 U. S. 25 (1982); *Trans World Airlines* v. *Franklin Mint*, 466 U. S. 243, 252 (1984).

[3] Kofi A. Annan, Guest Foreword to Global Law in Practice v, v-vi (1997).