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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 16th and 17th 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].