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Challenges And New Frontiers: National Courts As The Frontline Of International Law

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CHALLENGES AND NEW FRONTIERS: NATIONAL COURTS AS THE FRONTLINE OF INTERNATIONAL LAW

THE HONORABLE M. MARGARET MCKEOWN*

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I. INTRODUCTION

President Bachelet has provided a valuable tour of the challenges facing international law and the difficult hurdles confronting our political leaders. As an admirable trailblazer, she offers a mix of determination, grit, resourcefulness, innovation, and hope to meet these challenges. It is daunting, to say the least, for a judge to be asked to respond to a distinguished president. In this regard, I am very thankful for the principle of separation of powers and will stick to my knitting in offering a perspective from the judicial branch.

President Bachelet poses important questions to ask as we explore the frontiers of international law and urges our recommitment to the global system of governance.¹ Asking these questions is fundamental, but as she suggests—and as I want to highlight—

* Judge McKeown is a judge on the United States Court of Appeals for the Ninth Circuit. This commentary is adapted from Judge McKeown's response to the remarks of President Michelle Bachelet at the Annual American Society of International Law Meeting on March 30, 2016 in Washington, DC. Judge McKeown thanks her law clerks, Clare Ryan (Yale, J.D. 2013) and Tatiana Sainati (Duke, J.D. 2013) for their research assistance.

1. See Amy Porges, *Grotius Lecture: Challenges to International Law in the 21st Century*, AM. SOC'Y OF INT'L L. (Apr. 1, 2016, 10:26 AM), <https://www.asil.org/blogs/grotius-lecture-challenges-international-law-21st-century> (calling for institutionalized solidarity in international legal culture).

meeting contemporary challenges requires a multidimensional response, reaching beyond and below the traditional international order.²

To begin, this means developing new institutions that are outside the traditional order and that tap different approaches, ones not necessarily hide-bound by the state-centered legal order.³ Hugo Grotius, who laid the foundation for international law, emphasized that institutions must develop principles that lead to legitimacy.⁴ I illustrate this key aspect of international law with reference to one of the most challenging frontiers—the Internet.

Second, even as we work toward global solutions, we should redouble our efforts to expand bottom-up approaches by strengthening national courts as a foundation for international law and through rule of law diplomacy. National courts are the front line of international law.⁵

Let me turn, then, to the Internet. One of Grotius' "most impressive contributions" was to eschew *ad hoc* decision-making in favor of "principles that would capture the needs of the world in a given time" and ensure legitimacy in decision-making.⁶ Although Grotius may not have envisioned the phenomena of the Internet and the World Wide Web, the Internet illustrates this challenge in real time.

Apropos of the conference theme—frontiers in international law—the Internet represents both a technological and legal frontier: it is,

2. *See id.* (advocating an approach utilizing both state institutions and non-government actors).

3. *See* Nico Kirsch & Benedict Kingsbury, *Introduction: Global Governance and Global Administrative Law in the International Legal Order*, 17 EUR. J. INT'L L. 1, 3 (2006) (finding that changes beyond traditional international legal institutions are challenging the "central pillars" of international law).

4. *Cf.* EDWARD DUMBAULD, *THE LIFE AND LEGAL WRITINGS OF HUGO GROTIUS* 57-59 (Norman, Univ. of Okla. Press 1969) (finding that Grotius's treatise on the legal obligations of sovereign powers made him the "founder of international law").

5. *See* Anne-Marie Slaughter & William Burke-White, *The Future of International Law is Domestic (or, The European Way of Law)*, 47.2 HARV. INT'L L.J. 327, 328 (2006) (depicting international law as increasingly engaging with and drawing action from domestic legal institutions).

6. *Conferencia American Society of International Law*, PRENSA PRESIDENCIA (Mar. 31, 2016), <https://prensa.presidencia.cl/discurso.aspx?id=30084>.

in short, a game changer.⁷ Although one might argue that the world faced a similar challenge with the telegraph—sometimes called the Victorian Internet—or the telephone, I suggest that the Internet differs dramatically in the speed, scope, and impact of its technological changes.⁸

II. JURISDICTION OF THE INTERNET

To say the Internet is ubiquitous understates its reach. It gives voice to political and civic speech, commercial transactions, debates about human rights and state power, cultural sharing, friends and frenemies, while at the same time it is a platform for cybercrime, sexual exploitation, terrorism, hate speech and more.⁹ With more than 3 billion users worldwide, the Internet knows no borders.¹⁰ To be sure, physical aspects of the Internet, such as servers, reside in various states, and “the cloud” is not a stateless creation hanging out in cyberspace.¹¹ But in so many respects, the lid comes off traditional principles of territorial jurisdiction, national privacy, speech and criminal laws, and legal autonomy based on geographical boundaries in the physical world.¹²

As we enter an era where the pace of change is exponential, and

7. See Heather McGregor, *Law on a Boundless Frontier: The Internet and International Law*, 88 KY. L.J. 967, 967 (1999-2000) (calling new technology, like the internet, a “new frontier” that international law does not accurately address).

8. *Contra* TOM STANDAGE, *THE VICTORIAN INTERNET: THE REMARKABLE STORY OF THE TELEGRAPH AND THE NINETEENTH CENTURY’S ON-LINE PIONEERS* 210, 213 (Walker & Co. 1998) (arguing the novelty of the telegraph made it more revolutionary and life altering than modern technological advancements such as the internet).

9. See Tzip Hotovely, *Free Speech Online Should Not Include Incitement to Violence*, NEWSWEEK (Jan 15, 2016, 11:55 AM), <http://www.newsweek.com/free-speech-online-should-not-include-incitement-violence-411769> (finding the internet both empowers the global underprivileged, and is abused for crime and terror).

10. See *Number of internet users worldwide from 2005 to 2016 (in millions)*, STATISTA, <https://www.statista.com/statistics/273018/number-of-internet-users-worldwide/> (last visited Sept. 22, 2016) (reporting an estimated 3,488 million internet users globally in 2016) [hereinafter Statista].

11. See, e.g., Richard Tauware, *Cloud Computing, Export Controls, and Sanctions*, 19 No. 2 J. INTERNET L. 1, 5 (2015) (explaining how the internet stores information from an individual cloud user on servers in multiple countries).

12. See McGregor, *supra* note 7, at 978 (arguing that changing the conception of a “place” to include non-physical cyberspace could help solve jurisdictional and copyright legal issues regarding the internet).

the reach of the Internet is global, yet decentralized in nature, the need for global governance and legitimacy is heightened.¹³ Global decision-making regarding Internet governance represents a new frontier because, most significantly, it has emerged from the expert technical community and not from the traditional sectors of government or established international organizations.¹⁴ This phenomena highlights the growing role for non-state actors, such as the relatively novel “multistakeholder organizations,” alphabet-laden groups like ICANN, the Internet Corporation for Assigned Names and Numbers, the World Wide Web Consortium, and the Internet Engineering Task Force, which develops standards for the web.¹⁵ What is striking is the significant role given to civil society organizations, a move away from the traditional grip of international organizations and traditional regulatory models.¹⁶ Despite their successes, much remains unsettled about these organizations and their role in governing the Internet frontier. Questions of accountability and transparency are high on the list.¹⁷

13. See Joe Waz & Phil Weiser, *Internet Governance: The Role of Multistakeholder Organizations*, 10 J. ON TELECOMM. & HIGH TECH. L. 331, 333-34 (2012) (finding that debate over the legitimacy of multistakeholder organizations governing the internet is increasing, and that further development of the current governance model is therefore needed).

14. See *id.* at 332 (explaining how multistakeholder organizations, like the Internet Society, create internet norms although the government has little knowledge of them); see also *Internet Governance Observations and Recommendations – From Members of the Internet Technical Community*, INTERNET SOC'Y (Feb. 2014), <http://content.netmundial.br/files/235.pdf> (arguing that internet governance decisions should be made under the guidance of the technical community that already develops and operates the internet).

15. See Waz & Weiser, *supra* note 13, at 335-36 (defining multistakeholder organizations as broad, diverse organizations that have developed and formalized alongside the internet to provide critical functions such as ICANN which regulates domain names); see also Franz C. Mayer, *Review Essay: The Internet and Public International Law—Worlds Apart?*, 12 EUR. J. INT'L L. 617, 621 (2001) (finding that although international organizations compete for control of internet governance, they have recognized ICANN, which is under United States legal jurisdiction, to create internet protocols and standards).

16. See Waz & Weiser, *supra* note 13, at 335-36 (determining that multistakeholder organizations that govern the internet are structured to represent civil society groups, not government or industry).

17. See *id.* at 334, 342 (holding the debate between whether governments or multistakeholder organizations should control modern internet governance requires a reevaluation of the transparency, accountability, and other factors of multistakeholder control).

Internet governance also raises important questions about the responsibility of private corporations in respecting and ensuring rights. Because private corporations run and maintain Internet services, according to the UN Human Rights Council, the private sector has “gained unprecedented influence over individuals’ right to freedom of expression and access to information.”¹⁸

Even if the standard setting and technical aspects of the Internet regime achieve legitimacy, that is just the tip of the iceberg.¹⁹ The digital divide in terms of haves and have-nots still remains.²⁰ President Obama’s March 2016 speech in Havana highlighted the importance of Internet access;²¹ he called the Internet “one of the greatest engines of growth in human history.”²² The President cautioned, however, that “in the 21st century, countries cannot be successful unless their citizens have access to the Internet.”²³ How will international and domestic law deal with the reality that Internet access has been declared a fundamental human right by the United Nations, the European Parliament, and a number of countries?²⁴

18. *Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression*, Hum. Rts. Council, ¶ 44, U.N. Doc. A/HRC/17/27 (May 16, 2011) [hereinafter Report of the Special Rapporteur].

19. *Cf.* Mayer, *supra* note 15, at 621-22 (finding states will have to accept multilateral cooperation over cyberspace governance in order to prevent tech-savvy states from corrupting the essential internet code to obtain individual state interests).

20. *See* Joe Kloc, *Mind the Gap: The World’s ‘Digital Divide’ is not Closing Anytime Soon*, NEWSWEEK (Apr. 24, 2014, 6:08 AM), <http://www.newsweek.com/mind-gap-worlds-digital-divide-not-closing-any-time-soon-248454> (reporting on a World Economic Forum report about how the economic and social advantages of Western states from their superior internet usage as compared to developing states is not likely to be easily).

21. *See* Barack Obama, *Remarks by President Obama to the People of Cuba*, WHITE HOUSE: OFFICE OF THE PRESS SECRETARY (Mar. 22, 2016), <https://www.whitehouse.gov/the-press-office/2016/03/22/remarks-president-obama-people-cuba> (calling for internet access to be extended across Cuba so that Cubans can connect to the world) [hereinafter Presidential Remarks].

22. *Id.*

23. Barack Obama, *Remarks by President Obama and President Raul Castro of Cuba in a Joint Press Conference*, WHITE HOUSE: OFFICE OF THE PRESS SECRETARY (Mar. 21, 2016), <https://www.whitehouse.gov/the-press-office/2016/03/21/remarks-president-obama-and-president-raul-castro-cuba-joint-press>. [hereinafter Joint Press Conference].

24. *See* McKay Cunningham, *Diminishing Sovereignty: How European Privacy Law Became International Norm*, 11 SANTA CLARA J. INT’L L. 421, 428 (2013) (explaining that data privacy is a fundamental right in the European Union);

Beyond novel questions of Internet governance and access, a host of complicated and interrelated legal, social, and moral questions implicate international law.²⁵ Because the Internet is increasingly integral to every aspect of life, it is unsurprising that its potential uses—for good or for ill—are unbounded.²⁶ How to answer these questions in a way that harnesses the beneficial, and limits the malignant, downside consequences of the Internet, will be one of the great legal, political, and social challenges of our time.²⁷

In the area of digital privacy, the Internet presents questions of access, collection, use, and storage of some of our most intimate information, along with key commercial and national security data.²⁸ The demand for free flow of data often collides with privacy and security interests.²⁹ The European Union, for example, has a strong data protection protocol.³⁰ Not long ago, the Court of Justice of the European Union ruled that private companies, like Google, must consider individual requests to have information scrubbed from

see also Report of the Special Rapporteur, *supra* note 18, ¶ 21 (finding that the United Nation's Universal Declaration of Human Rights provides the right to expression by means of any form of media).

25. *See* Daniel Joyce, *Internet Freedom and Human Rights*, 26 EUR. J. INT'L L. 493, 502-03 (2015) (finding that beyond questions of access and infrastructure, internet freedom also raises issues about communication, content, and ethical relationship building).

26. *See id.* at 494, 501 (citing the United States for championing internet freedom, liberal values, and access to markets while simultaneously using the internet for intelligence surveillance and warning of cybercrime, terror, and exploitation of women and children).

27. Hillary Rodham Clinton, *Remarks on Internet Freedom*, U.S. DEPARTMENT OF STATE (Jan. 21, 2010), <http://www.state.gov/secretary/20092013clinton/rm/2010/01/135519.htm> (calling for freedom of expression to be protected online while also asking states to work together to prevent the growing threat of anonymous hate speech and terror online).

28. *See, e.g.*, Cunningham, *supra* note 24, at 425-26 (describing the erosion of personal privacy online, specifically through the growing use of unavoidable internet tracking technology that inhibits personal choice while storing the personal information of internet users).

29. *See id.* at 426-27 (finding that the internet's international and "open architecture" makes it hard for regulators to prevent misuse without harming potential technological benefits as well).

30. *See* Regulation 2016/679, On the protection of natural persons with regard to the processing of personal data and on the free movement of such data, 2016 O.J. (L 119) 59 (harmonizing the desire for a free flow of data with the fundamental right to have personal data security).

search engines.³¹ In contrast, the United States does not recognize data privacy as a fundamental right and has no “right to be forgotten,” as the European approach has been dubbed.³² Serious national differences in approaches make it very difficult to harmonize data privacy laws at a time when citizens are demanding protection worldwide.³³ Even so, multinational progress is on the horizon.³⁴ The European Commission has adopted the European Union (EU)-United States Privacy Shield Agreement, which governs the transfer of data from the EU to the United States.³⁵

Likewise, there are fundamental differences in national treatment of freedom of expression.³⁶ The Internet’s facilitation of free speech and unfettered communication comes at a cost—and increasingly, scholars, commentators, politicians, and judges have to grapple with the benefits and costs of unrestricted freedom of speech online versus greater regulation of speech promoting hate or inciting violence and

31. Case C-121/12, *Google Spain SL v. Agencia Española de Protección de Datos*, 2014 ECLI:EU:C:2014:317.

32. See Steven C. Bennett, *The “Right To Be Forgotten”: Reconciling EU and U.S. Perspectives*, 30 BERKELEY J. INT’L L. 161, 162-68 (2012) (suggesting reconciliation over data privacy policy is needed between that United States and Europe because of disagreement over whether data privacy is a fundamental right).

33. Cf. *id.* at 192-93 (suggesting that although dependent on the politics and perceived needs of the United States and Europe, a consensus on privacy rights “seems almost inevitable”).

34. See *id.* at 194 (finding that an international solution around United States and European disagreement on privacy rights policy can occur if there is “respect for cultural differences” and “attention to technology and business developments”); see also Press Release, European Commission, *European Commission Launches EU-U.S. Privacy Shield: stronger protections for transatlantic data flows*, EUROPEAN COMM’N (Jul. 12, 2016), http://europa.eu/rapid/press-release_IP-16-2461_en.htm (describing the EU-U.S. Privacy Shield adopted by the United States and Europe to ensure legal clarity over privacy rights between the two international actors) [hereinafter European Commission Press Release].

35. See European Commission Press Release, *supra* note 34 (ensuring companies follow EU procedure and transparency in United States government actions regarding individual privacy data).

36. See “*The World Is Moving Online*”: *Promoting Freedom of Expression* OHCHR (Mar. 9, 2012), <http://www.ohchr.org/EN/NewsEvents/Pages/TheWorldIsMovingOnlinePromotingFreedomOfExpression.aspx> (finding that although freedom of expression on the internet is considered to be protected under the Universal Declaration of Human Rights, forty countries still place sanctions on the internet).

terrorism.³⁷ But there is a fine line between fighting hate speech and radicalization by terrorist groups and using national security as a sword to eviscerate free speech and quell dissenting voices.³⁸

A classic example of the tension arose in the Nazi memorabilia case that was heard in both a court in Paris and in the United States Court of Appeals for the Ninth Circuit.³⁹ A French organization, *La Ligue Contre le Racisme*, sued in Paris over the sale of Nazi-related items on Yahoo's auction site.⁴⁰ Citing to a prohibition against such sales in the French criminal code, the French court issued an injunction stopping the sales, leading to further litigation in France and the United States.⁴¹ Apart from difficult issues of jurisdiction related to the borderless Internet, the courts faced novel questions about competing values of free speech and combating anti-Semitism.⁴²

Cybersecurity and cybercrime similarly test the limit of international and domestic legal regimes, because the virtual world in which they transpire blurs established dichotomies between international/domestic, civilian/military, internal/external, and state/non-state that traditionally govern legal responses.⁴³ As we face continued online harassment and sexual exploitation that involves

37. See Jacob Mchangama, *Europe's Freedom of Speech Fail*, CHICAGO TRIBUNE (July 7, 2016, 11:20 PM), <http://www.chicagotribune.com/news/sns-wp-europe-speech-comment-7d3540e2-446c-11e6-88d0-6adee48be8bc-20160707-story.html> (warning European states and policy-makers not to enact too broad a definition of hate speech in internet policy or else democracy will be harmed as even the free speech of innocent comedians and other actors is now being censured).

38. See Sanja Kelly et al., *Tightening The Net: Governments Expand Online Controls*, FREEDOM HOUSE (2014), <https://freedomhouse.org/report/freedom-net/2014/tightening-net-governments> (citing examples of governments around the world using internet hate speech and terrorism laws to repress dissent and journalism, especially in Russia).

39. *Yahoo! Inc. v. La Ligue Contre Le Racisme Et L'Antisemitisme*, 433 F.3d 1199, 1201 (9th Cir. 2006) (en banc).

40. *Id.* at 1202.

41. *Id.* at 1201.

42. *Id.* at 1203-05.

43. See Susan W. Brenner, "At Light Speed": Attribution And Response To Cybercrime/Terrorism/Warfare, 97 J. CRIM. L. & CRIMINOLOGY 379, 381-82, 404 (2007) (explaining how cyberspace blurs the line between a crime and an act of war and therefore negates the "internal-external threat dichotomy" traditionally used by states to decide how to respond to a threat or violation of its laws).

servers in distant countries, players in multiple countries, and victims across the globe, we are faced with the reality that we need to think beyond traditional domestic and international solutions.⁴⁴ For example, a global initiative called the Virtual Global Taskforce—bringing together tech-savvy law enforcement and private sector actors from countries around the world with the support of Europol—targets “transnational sexual exploitation across the digital divide.”⁴⁵

The legal issues spawned by the Internet—from digital privacy to cybersecurity and surveillance—are difficult in a domestic environment and even more complex in an international one.⁴⁶ The challenge is to find a balance in governance that provides for accountability, transparency, and international norms that allow for domestic flexibility. It is a tall order, but one that Grotius would have us tackle in the name of legitimacy reflected in both national and international principles.

III. GLOBAL LAW IN DOMESTIC COURTS

This brings me to my second point: we cannot overlook the importance of a strong domestic system as a foundation for effective international law. In his writings, Grotius consistently recognized the interplay between international law and “municipal” law.⁴⁷ He

44. See, e.g., Susan W. Brenner & Leo L. Clarke, *Distributed Security: Preventing Cybercrime*, 23 J. MARSHALL J. COMPUTER & INFO L. 659, 659 (2005) (finding that a distributed system of criminal sanctions would work better at deterring cybercrime than current systems based on a traditional “real-world urbanization” approach to law enforcement); see Brenner, *supra* note 43, at 474 (concluding that cyber-technology is altering the concepts of nation-states and boundaries in such an unprecedented way that governments need to reconceptualize how they respond to threats like cybercrime).

45. *Global Initiative To Combat Child Sexual Exploitation Leads To 303 Arrests*, EUROPOL (Nov. 13, 2015), https://www.europol.europa.eu/latest_news/global-initiative-combat-child-sexual-exploitation-leads-303-arrests.

46. Cf. Joshua Meltzer, *The Internet, Cross-Border Data Flows and International Trade*, ISSUES IN TECH. INNOVATION 5, 7 (Feb. 2013) (describing how the internet has become a tool for challenging political power referencing the examples of popular uprisings in Tunisia, Burma, Iran, Egypt, and Ukraine being facilitated by the interconnectivity made possible by the web).

47. See HUGO GROTIUS, *THE RIGHTS OF WAR AND PEACE* 201, 379 (M. Walter Dunn ed., A. C. Campbell trans., 1901) (describing how cases where one is released from being answerable for the actions of subordinate agents is a point more for municipal law than the law of nations); see also HUGO GROTIUS,

credited the important role of the judiciary and counseled that “those who are entrusted with the power of appointing magistrates are bound, from motives of public good, to chuse [sic] the properest of persons.”⁴⁸ From the perspective of what I hope is a “proper person,” I want to focus on the role of domestic judiciaries.

Without a firm base, global governance will remain illusory.⁴⁹ Although I share President Bachelet’s belief that some global issues must be met with a coordinated and consistent response, such as the refugee crises, there are also many situations in which local actions honor our commitment to international law and human rights.⁵⁰ On a practical level, because there are so few truly international courts, it usually falls to national courts to give life to international law.⁵¹ With that in mind, I reflect on how domestic and regional courts use bottom-up approaches to respect international law, empower actors at the local and national levels, and infuse international norms into domestic systems.⁵²

At both the local and national levels, courts are a central means of making law and government accessible and relevant to the public and educating citizens about their legal rights and remedies.⁵³ Law, at its best, is not an obscure and arcane code of rules understood only by practitioners, but rather is a means to promote confidence in the

FREEDOM OF THE SEAS 47 (James Brown Scott ed., Ralph Van Deman Magoffin trans., 1916) (explaining that prescription is a matter of municipal law).

48. GROTIUS, WAR AND PEACE, *supra* note 47, at 196.

49. See, e.g., Philippe Moreau Defarges et al., *The United Nations and the Future of Global Governance*, COUNCIL ON FOREIGN RELATIONS (Sept. 24, 2012), <http://www.cfr.org/international-organizations-and-alliances/united-nations-future-global-governance/p29122> (explaining how global governance is illusory with the example of the United Nations as the only global institution with comprehensive competency and universal membership which has long been plagued by concerns about efficiency and effectiveness). *C.f.* Anne Lowe, *Customary International Law And International Human Rights Law: A Proposal For The Expansion Of The Alien Tort Statute*, 23 IND. INT'L & COMP. L. REV. 523, 536 (2013) (describing how today states have significant contact with each other and the decisions made by one state often affect other states in the global community).

50. See Lowe, *supra* note 49, at 537 (explaining the jurisdictional requirements for a foreign plaintiff to bring action under the Alien Tort Statute for a tort committed outside the United States such as a human rights violation).

51. See *id.*

52. See *id.*

53. See Norman Dorsen, *How American Judges Interpret the Bill of Rights*, 11 CONST. COMMENT 379, 379-80 (1994).

system of governance.⁵⁴ Legal mechanisms that are transparent and hold government actors accountable are, in part, an antidote to efforts to seek justice through extra-legal, sometimes violent means.⁵⁵ President Bachelet honored this commitment to transparency when she championed Chile's access to information legislation in 2008, a path now taken by some 105 countries.⁵⁶ These steps toward transparency permit individuals to hold their governments accountable—a crucial element of effective human rights protection.⁵⁷

Courts also act as legitimizing institutions by applying the law in an impartial and independent way.⁵⁸ Judges do much to underscore their own legitimacy by acting independently, with strong judicial ethics, and by supporting access to justice without regard to status, race, gender, gender identity, religious beliefs, economic means, or political connections.⁵⁹ The legitimacy of the judicial system is a key component in ensuring that international human rights and humanitarian principles are taken seriously within a national

54. See Michel Rosenfeld, *The Rule of Law and the Legitimacy of Constitutional Democracy*, 74 S. CAL. L. REV. 1307, 1307-12 (2001).

55. See David K. Deng, *Challenges of Accountability: An Assessment of Dispute Resolution Process in Rural South Sudan*, S. SUDAN L. SOC'Y 13 (March 2013); see also OHCHR, *Independence and Impartiality of Judges, Prosecutors and Lawyers*, in HUMAN RIGHTS IN THE ADMINISTRATION OF JUSTICE: A MANUAL ON HUMAN RIGHTS FOR JUDGES, PROSECUTORS AND LAWYERS 113, 116 (2003) [hereinafter OHCHR Independence].

56. See *Freedom of Information in Latin America and the Caribbean*, UNESCO, <http://www.unesco.org/new/en/communication-and-information/freedom-of-expression/freedom-of-information/foi-in-latin-america-and-the-caribbean/> (last visited June 15, 2016) (identifying nineteen countries who have adopted freedom of information laws within in the Latin American and Caribbean region); see also *Guide To International Freedom Of Information Laws*, ICIJ (Mar. 16, 2012), <https://www.icij.org/resources/2012/04/freedom-of-information>.

57. See *Good Governance and Human Rights*, OHCHR, <http://www.ohchr.org/EN/Issues/Development/GoodGovernance/Pages/GoodGovernanceIndex.aspx> (identifying the key attributes of good governance: transparency, responsibility, accountability, participation, and responsiveness).

58. See Kathy Mack & Sharyn Roach Anleu, *Performing Impartiality: Judicial Demeanor and Legitimacy*, 35 L. & SOC. INQUIRY 137, 140 (2010) (emphasizing the expectation of judges to adhere to ethical guidelines consisting of basing judicial decisions on law, fact, and reason, rather than opinion).

59. *Independence and Impartiality of Judges, Prosecutors And Lawyers*, *supra* note 55, at 115 (reiterating that as a judge, "their duty is and remains to apply the law").

system.⁶⁰

International norms are inculcated into domestic systems through Grotius's key principle that "agreements must be kept."⁶¹ The Venice Commission's Rule of Law Checklist echoes that sentiment by asking: "Does the domestic legal system ensure that the State abide by its bidding obligations under international law? In particular: does it ensure compliance with human rights law, including the binding decisions of international courts? Are there clear rules on the implementation of these obligations into domestic law?"⁶² The Commission rightly focused on the interconnectedness of the domestic rule of law and a commitment to international law.

International law becomes infused into national systems as it is plead and used as a tool by litigants in national courts.⁶³ Sometimes this happens through directly binding international commitments and sometimes through adopting or adapting international norms into domestic practice.⁶⁴ As people, goods, ideas, art, pollution, violence, and investments flow across borders (either physically or electronically), courts around the world are key players in what Anne-Marie Slaughter, an international law scholar, called "judicial globalization."⁶⁵

Every day, national courts are dealing with international law issues, and most of these cases are resolved without controversy. Where there is controversy, it is often dissatisfaction with the outcome, rather than the method.⁶⁶ And, as we know, the rule of law

60. See Dame Sian Elias, Chief Justice of N.Z., "Judicial Legitimacy and Human Rights:" *Address to the International Bar Association Conference, COURTS OF NEW ZEALAND* 1, 3 (Oct. 21, 2002); see also Adama Dieng, *Role of Judges and Lawyers in Defending the Rule of Law*, 21 *FORDHAM INT'L L.J.* 550, 552 (1997).

61. See Victoria Kahn, *Early Modern Rights Talk*, 13 *YALE J.L. & HUM.* 391, 399-400 (2001).

62. See Venice Commission, Rule of Law Checklist, 106th Plenary Sess., Study No. 711/2013, 12 (2016).

63. See Lowe, *supra* note 49, at 537 (stating that although international law is framed at the international level, the implementation of those laws occur at the domestic level when a principle is incorporated into a State's legal system).

64. See Lowe, *supra* note 49, at 534-35.

65. See Anne-Marie Slaughter, *Judicial Globalization*, 40 *VA. J. INT'L L.* 1103, 1104 (2000).

66. See generally Martha Minow, *The Controversial Status of International and Comparative Law in The United States*, 52 *HARV. INT'L L.J. ONLINE* 1 (2010),

does not countenance the “pick what you like” principle.⁶⁷ At the end of the Second World War, Justice Jackson, the U.S. Supreme Court justice who served as the prosecutor at Nuremberg, presciently observed that: “It would be futile to think, as extreme nationalists do, that we can have an international law that is always working on our side. . . . We cannot successfully cooperate with the rest of the world in establishing a reign of law unless we are prepared to have that law sometimes operate against what would be our national advantage.”⁶⁸

Courts routinely adjudicate individual rights arising under treaties, such as the approximately 3,000 immigration cases filed in my court each year—many of which require application of international law, such as the Convention Against Torture—or in entirely different areas, such as disputes over international child custody under the Hague Convention, or intellectual property rights under laws spawned by the Trade-Related Aspects of Intellectual Property Rights agreement (“TRIPS”).⁶⁹ We hear transnational commercial disputes requiring the application of international and foreign laws, enforcement of foreign arbitral awards, the extraterritorial application of antitrust and intellectual property statutes, questions of

<https://dash.harvard.edu/bitstream/handle/1/10511098/Controversial%20Status%20OHILJ.pdf?sequence=1> (explaining that a concern about consulting foreign sources may be that judges are accordingly permitted to impose international legal perspectives onto U.S. constitutional interpretations).

67. See *What Is the Rule of Law*, ABA DIVISION FOR PUBLIC EDUCATION 5, <https://www.americanbar.org/content/dam/aba/Migrated/publiced/features/Part1DialogueROL.authcheckdam.pdf> (discussing the meaning of judicial independence by stating that judges must be independent from political pressures and influences, which ensure fair and impartial decision making).

68. Robert H. Jackson, Associate Justice, Supreme Court of the U.S., *Address to the American Society of International Law*, 39 AM. SOC’Y INT’L L. PROC. 10, 17-18 (1945).

69. See, e.g., *Edu v. Holder*, 624 F.3d 1137, 1143-47 (9th Cir. 2010) (stating that the Convention Against Torture is designed to protect individuals from torture that is more likely than not to occur, and was not designed to protect individuals from having to return to a place where the individual cannot exercise their political rights); see *Cuellar v. Joyce*, 596 F.3d 505, 508-12 (9th Cir. 2010) (affirming that the Hague Convention seeks to deter parents from abducting their children across national borders by eliminating forum shopping for custody disputes); see also *Almaraz v. Holder*, 608 F.3d 638, 641-42 (9th Cir. 2010) (explaining that the specific intellectual property dispute was a result of pressure from the pharmaceutical company in the United States and not because the Guatemalan government wanted to persecute individuals with HIV or AIDS).

foreign sovereign immunity, and issues of comity.⁷⁰ In the criminal arena, extradition, international terrorism, and drug conspiracies are a routine part of the docket.⁷¹

But as Justice Jackson predicted, not all international law cases are without controversy.⁷² Many high profile, less routine issues also find their way into national courts—such as the Spanish Constitutional Court's determination that Spain had universal jurisdiction for certain egregious crimes, such as claims of genocide in Guatemala⁷³; the decision of the Kenyan High Court that it had authority to issue arrest warrants against any person who had committed a crime under the Rome Statute⁷⁴; the Supreme Court of the Netherlands' finding that the Dutch state was partially responsible for the genocide of Bosnian Muslims at Srebrenica by abandoning areas under their effective control as part of the UN peacekeeping mission⁷⁵; and the Latvian Constitutional Court's citation of international norms pre-dating the League of Nations to interpret a border treaty with Russia.⁷⁶

70. See, e.g., *Ministry of Def. & Support for the Armed Forces of Iran v. Cubic Def. Sys. Inc.*, 814 F.3d 1053, 1055 (9th Cir. 2016) (applying international and national law when considering the attachment of an international arbitration decision in favor of Iran to judgment against Iran for injuries arising out of terrorism); see, e.g., *Bennett v. Iran*, 817 F.3d 1132, 1136-37 (9th Cir. 2015) (considering issues of sovereign immunity under the Foreign Sovereign Immunities Act).

71. See, e.g., *Vinh Tan Nguyen v. Holder*, 763 F.3d 1022, 1024 (9th Cir. 2014) (considering a Vietnamese citizen's claim to protection under the Convention Against Torture); see, e.g., *Santos v. Thomas*, No. 12-56506, 2016 U.S. App. LEXIS 21357, at *2 (9th Cir. July 28, 2016) (dealing with potential extradition of plaintiff to Mexico).

72. See generally Robert H. Jackson, *The Challenge of International Lawlessness*, 27 A.B.A.J. 690, 693 (1941).

73. See *Guatemala Genocide Case*, CTR. FOR JUST. & ACCOUNTABILITY, <http://cja.org/what-we-do/litigation/the-guatemala-genocide-case/> (last visited Sept. 22, 2016) (explaining the efforts taken to hold those responsible for an alleged genocide in Guatemalan in Spanish court).

74. See *Kenya Sec. of the Int'l Comm'n of Jurists v. Att'y Gen.* (2011) eK.L.R. 3, (H.C.K.) (Kenya) (applying international law to find that the High Court has jurisdiction to issue warrants of arrest against any person if he committed a crime under the Rome Statute).

75. See HR 6 September 2013, JB 2013, 197 m.nt. HR (Neth/Nuhanović) (Int'l Crime Database trans.) (dismissing appeal and finding the Dutch State's UN troops actions in Srebrenica partially responsible for the genocide).

76. See *The Constitutional Court of the Republic of Latvia, Judgment on Behalf of the Republic of Latvia*, Case No. 2007-10-0102, ¶ 18.2 (Nov. 29, 2007)

Judges and lawyers also engage with international law beyond the bench and the courtroom through legal diplomacy and grass-roots engagement around the world.⁷⁷ As Chair of the American Bar Association (ABA) Rule of Law Initiative Board (ROLI) and a member of the managerial board of the International Association of Women Judges (IAWJ), I have had the good fortune to see first-hand how education and capacity-building projects enhance rights protection at the local level, which, in turn, enables countries to engage credibly and effectively at the international level.⁷⁸ Global commitments mean little if citizens are unable to access justice at home or are unaware of their rights at all.

Key to these efforts is partnerships with local players to develop sustainable programs that live beyond the individual project.⁷⁹ Importantly, the perspective of these project implementers is global, not U.S. centric, and they incorporate local customs and practices.⁸⁰

Some of the programs focus on institution and capacity building.

(highlighting the principle of self-determination of people as the court discusses the constitutionality of a Draft Agreement with the Russian Federation on the state border between Latvia and Russia).

77. See *The Hague Conference on Int'l Legal Diplomacy*, THE HAGUE INST. FOR GLOBAL JUST. (Apr. 23, 2015), <http://www.thehagueinstituteforglobaljustice.org/latest-insights/latest-insights/news-brief/the-hague-conference-on-international-legal-diplomacy> (gathering the legal community to discuss international legal diplomacy).

78. ABA Rule of Law Initiative, *Our Origins and Principles*, A.B.A. http://www.americanbar.org/advocacy/rule_of_law/about/origin_principles.html, (last visited Sept. 20, 2016) (demonstrating the ABA ROLI's commitment to education and engagement internationally).

79. See, e.g., ABA Rule of Law Initiative, *Paralegal Helps His Community Members Get Justice*, A.B.A. (Nov. 2015), http://www.americanbar.org/advocacy/rule_of_law/where_we_work/africa/central-african-republic/news/news-car-paralegal-helps-community-get-justice-1115.html (highlighting the ABA ROLI's partnerships in the Central African Republic training paralegals).

80. See, e.g., ABA Rule of Law Initiative, *Research to Look into the Use of Social Background Investigations in Cases Involving Juveniles*, A.B.A. (Nov. 2015), http://www.americanbar.org/advocacy/rule_of_law/where_we_work/asia/china/news/news-china-social-background-investigations-juvenile-cases-1115.html [hereinafter *Research Involving Juveniles*] (discussing research into local practices about social background investigation for juvenile cases in China); see, e.g., ABA Rule of Law Initiative, *Salvadoran Lawyer Strives for the LGBT's Rights and Visibility*, A.B.A. (Feb. 2016), http://www.americanbar.org/advocacy/rule_of_law/where_we_work/latin_america_caribbean/el-salvador/news/news-elsalvador-promoting-lgbt-rights-0216.html (employing a multi-disciplinary approach to promote LGBT rights in El Salvador).

For example, many countries in Latin America have undertaken a wholesale criminal justice reform; Chile was at the forefront of this movement.⁸¹ Emblematic is the ABA's long-standing work in Mexico, Panama, Ecuador, and Peru to strengthen bar associations and train judges and prosecutors in the transition to an oral adversarial system where precepts like "presumed innocent" will become a reality.⁸² Similarly, in Armenia, the ABA's efforts have led to the first unified national bar and the first federal public defender office in the former Soviet Union.⁸³

The word "training" often conjures up images of endless conferences and thick manuals stuck on a shelf somewhere. It is not always so. As a result of IAWJ training seminars in Malawi, magistrates have given life to provisions in international treaties.⁸⁴ Just this year, in early 2016, a magistrate invoked the Convention on the Rights of a Child to support a conviction for sexual abuse of a minor.⁸⁵ The magistrate wrote that "[s]exual exploitation has become common in our society even internationally and . . . [i]t is a

81. See, e.g., ABA Rule of Law Initiative, *El Salvador Background*, A.B.A. http://www.americanbar.org/advocacy/rule_of_law/where_we_work/latin_america_caribbean/el-salvador/background.html (last visited Sept. 21, 2016) (explaining ABA ROLI's work in El Salvador supporting justice sector reform); see also ABA Rule of Law Initiative, *Revamped Criminal Justice System Good News to Victims, Defendants, and Courts*, A.B.A. (Dec. 2011), http://www.americanbar.org/advocacy/rule_of_law/where_we_work/latin_america_caribbean/panama/news/news_panama_revamped_criminal_justice_system_good_news_1211.html (highlighting ABA ROLI's work in Panama supporting criminal justice sector reform).

82. See ABA Rule of Law Initiative, *Our Rule of Law Work in Mexico*, A.B.A. http://www.americanbar.org/advocacy/rule_of_law/where_we_work/latin_america_caribbean/mexico/programs.html#judicial_reform (last visited Sept. 19, 2016) (explaining ABA ROLI's support of justice sector reform in Mexico to strengthen the judiciary); see also *ABA Rule of Law Initiative Handbook*, A.B.A. 95-97 (2016), <http://www.americanbar.org/content/dam/aba/directories/roli/misc/aba-rol-i-2016-program-book.authcheckdam.pdf> (highlighting the ABA ROLI's justice reform initiatives in Africa, Asia and the Pacific, Europe and Eurasia, Latin American and the Caribbean, and the Middle East and North African).

83. ABA Rule of Law Initiative, *Armenia—Building the Capacity of the Defense Bar*, A.B.A., http://www.americanbar.org/advocacy/rule_of_law/where_we_work/europe_eurasia/armenia/programs.html (last visited June 15, 2016).

84. See IAWJ: *Twenty Five Years of Judging for Equality*, INT'L ASS'N WOMEN JUDGES 172-73 (2016), http://www.iawj.org/Jubilee_Book_2016.pdf (reporting on the work of the Women's Judges Association of Malawi).

85. *Prosecutor v. Antony Zonse, No. 1452, at 3 (2015) (Malawi)*.

shame to [the] Malawian nation to have people who are defiling young girls instead of contributing to the development of the nation.⁸⁶ In a civil case involving domestic violence, a magistrate from Malawi relied on the Universal Declaration of Human rights and the African Charter on Human and People's Rights to grant the petitioner a protection order against her abusive husband.⁸⁷

With training and support from the ABA, a judge in Port-au-Prince conducted one of the first successful high-profile government corruption trials in Haitian history.⁸⁸ Holding government officials accountable is one of the cornerstones of an independent, effective national legal system.⁸⁹

Through her work as former Executive Secretary of UN Women, President Bachelet is all too familiar with gender discrimination and gender violence, which remain a scourge worldwide.⁹⁰ The ABA has worked in the Democratic Republic of the Congo (DRC) to facilitate mobile courts that can respond quickly and effectively to gender violence and to implement technology that provides early alerts of outbreaks of violence.⁹¹ For example, the ABA is currently a partner in a project with local organizations in the DRC to help children obtain birth certificates.⁹² This seemingly small, local action allows

86. *The Republic v. Anthony Zonse*, Criminal Case Number 1452 of 2015 (information on file with author).

87. *Lontia Mhango v. Elifala Chilowa*, Domestic Violence Case No. 04 of 2015 (information on file with author).

88. See ABA Rule of Law Initiative, *Trained Haitian Judge Presides Over Conviction of a Former Gov't Official for Corruption*, A.B.A. http://www.americanbar.org/advocacy/rule_of_law/where_we_work/latin_america_caribbean/haiti/news/news-haiti-anti-aba-rol-i-trained-judge-presides-over-corruption-trial-0116.html (last visited Sept. 19, 2016) [hereinafter *Haitian Judge*].

89. See Claes Sandgren, *Combating Corruption: The Misunderstood Role of Law*, 39 INT'L L. 717, 726-27 (2005) (arguing that independent judiciaries must also be coupled with accountability for prosecutors and judges).

90. See *Michelle Bachelet, former Executive Director*, U.N. WOMEN <http://www.unwomen.org/~media/CommonContent/UNwomen-MichelleBachelet-FormerED-en%20pdf> (last visited Sept. 23, 2016) (highlighting Bachelet's history of working for gender equality and the empowerment of women).

91. See ABA Rule of Law Initiative, *Rule of Law Programs in the Dem. Rep. of Congo*, A.B.A. http://www.americanbar.org/advocacy/rule_of_law/where_we_work/africa/democratic_republic_congo/programs.html#women_rights (last visited Sept. 19, 2016) (explaining ABA ROLI's role in supporting access to justice in remote areas through mobile courts).

92. See generally *id.*

children to access basic services, like healthcare and education, and provides a bulwark against the worst forms of exploitations, such as trafficking and forced labor.⁹³

Other programs address crisis situations, such as the ABA's program to train Turkish lawyers to assist Syrian refugees in understanding their legal rights.⁹⁴ Apropos of my comments on the impact of the Internet, the ABA is working with lawyers in Southeast Asia on strategies to challenge Internet restrictions and advocate for Internet freedom, online expression and privacy.⁹⁵ Yet other programs are totally grass roots, giving a voice to suffering individuals.⁹⁶ In Moldova, the ABA partnered with a local organization to provide a young victim of homophobic violence with a safe place to stay and access to legal representation so that he could pursue justice against his attackers.⁹⁷

IV. CONCLUSION

These examples bring international law home. Given the dysfunction of the international order and the "stubborn" state-centeredness referenced by President Bachelet, we need to work at both the local and national levels, in a bottom-up approach to the global rule of law—educating citizens and working with lawyers, judges, and citizens who are invested in building institutions and a culture of lawfulness that will shape global politics. Globalization underscores the importance of international law and the need to strengthen international cooperation, not abdication.⁹⁸ Sticking our

93. See *ABA Rule of Law Initiative Handbook*, *supra* note 83, at 32 (highlighting the ABA ROLI's justice reform initiatives in DRC including child protection programs).

94. See ABA Rule of Law Initiative, *Turkish Lawyers Trained to Provide Legal Aid and Counseling to Syrian Refugees*, A.B.A. (Apr. 2015), http://www.americanbar.org/advocacy/rule_of_law/where_we_work/middle_east/syria/news/news-syria-legal-aid-counseling-for-refugees-0415.html.

95. See ABA Rule of Law Initiative, *Philippine Lawyers Attend Training on Internet Freedom*, A.B.A. (June 2015), http://www.americanbar.org/advocacy/rule_of_law/where_we_work/asia/philippines/news/news-philippines-training-on-internet-freedom-0615.html.

96. See *ABA Rule of Law Initiative Handbook*, *supra* note 83, at 77 (noting grassroots Anti-Discrimination initiatives in Moldova empowering individuals).

97. See *id.*

98. See Dinah Shelton, *Protecting Human Rights in A Globalized World*, 25 B.C. INT'L COMP. L. REV. 273, 301 (2002) (finding that globalization has led to

head in the sand is no way forward.

Of course when we lift our heads up, we are faced with the reality that many international organizations and efforts have been less than effective.⁹⁹ But before casting the landscape with a “glass half empty” patina, we should acknowledge some of the milestones in international law. Two tribunals come to mind—the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR).¹⁰⁰ Both of these institutions have developed an important body of international criminal law, given voice to victims of war crimes, and brought to justice perpetrators of genocide and war crimes.¹⁰¹ And in March 2016, the ICTY found Mr. Karadzic, a former Bosnian leader, guilty of genocide and war crimes.¹⁰²

International law provides a foundation for the rule of law and a hope for a better, even if imperfect, world.¹⁰³ Focusing on the importance of national courts and the broad reach of judicial diplomacy provides a platform for a way forward.¹⁰⁴ To be sure,

increased cooperation of international actors to promote and protect international human rights law).

99. See, e.g., Ian Johnstone, *Do International Organizations Have Reputations?* 7 INT’L ORG. L. REV. 235, 235 (2010) (citing instances of lost credibility of the World Bank and the IMF as a result of failed projects).

100. See *ICTY Facts & Figures*, U.N. INT’L CRIM. TRIB. FOR THE FORMER YUGOSLAVIA (Sept. 2016), <http://www.icty.org/en/content/infographic-icty-facts-figures> (citing work of the ICTY as the first court to undertake the prosecution of grave international crimes post-Nuremberg and Tokyo trials); see also *The ICTR in Brief*, U.N. MECHANISM FOR INT’L CRIM. TRIB. <http://unictr.unmict.org/en/tribunal> (last visited Sept. 23 2016) (recapping the tribunals pioneering role in establishing a credible international criminal justice system); see generally *About the ICTY*, U.N. INT’L CRIM. TRIB. FOR THE FORMER YUGOSLAVIA <http://www.icty.org/en/about> (last visited Sept. 22, 2016) (emphasizing the precedent-setting establishment of the tribunal contributing significantly to the landscape of international humanitarian law).

101. See *About the ICTY*, *supra* note 100.

102. Marlise Simons, *Radovan Karadzic, a Bosnian Serb, is Convicted of Genocide*, N.Y. TIMES, (Mar. 24, 2016) (discussing the nature of Karadzic’s role in the ethnic cleansing of Bosnia).

103. See Jackson, *The Challenge of International Lawlessness*, *supra* note 73, at 690 (asserting that there is a relatively stable body of customary and conventional international law on which to build a better future).

104. See, e.g., Minow, *supra* note 66 (noting that Justice Breyer and Justice Ginsburg consult on international law sources as they consider national cases); see, e.g., *El Salvador Background*, *supra* note 82 (providing an example of efforts to

dealing with states that do not share our values and goals, and recognizing the shortcomings of international law, is a challenge.¹⁰⁵ But it is a challenge perfectly suited to those of us in the legal community. Please join me in rising to that challenge.

collaborate with lawyers, judges, and others to reform the justice sector in El Salvador); see *Our Origins and Principles*, *supra* note 79 (explaining the core principles of the ABA ROLI to be consultative and promote development of national courts); see also *ICTY Facts & Figures*, *supra* note 100 (highlighting the pioneering work of the ICTY).

105. See Serena Patel, Note, *Cultural Competency Training: Preparing Law Students for Practice in Our Multicultural World*, 62 UCLA L. REV. DISC. 140, 156 (2014) (emphasizing the importance of lawyers developing cross-cultural competencies as they most likely encounter many cultural backgrounds throughout their career).