

THE BROOKINGS INSTITUTION

THE INTERNATIONALIZATION OF LAW

NINTH ANNUAL RAYMOND ARON LECTURE FEATURING
PROFESSOR MIREILLE DELMAS-MARY AND
JUSTICE STEPHEN BREYER

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Discussant:

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MR. TALBOTT: Good afternoon, everybody. I'm Strobe Talbott, and it's my great pleasure to welcome you here for the Ninth Raymond Aron Lecture here at the Brookings Institution. I look around the room and I see a lot of friends and colleagues and a number of you who have contributed in your own way to the topic of the afternoon, which is the internationalization of law and I might add applying law wherever possible to international affairs. It's particularly good to see Tom Pickering here, a distinguished fellow of the Brookings Institution, and I'm surprised that you could get away from the 16 projects you're working on to be with us today, Tom.

The Aron Lecture is housed in our Center for the United States and Europe here at the Brookings Institution, represented by Justin Vaïsse, a fellow in the center and in our Foreign Policy Program, which is headed by Martin Indyk here in the front row.

We are very grateful for the partnership that we had developed over the years with the Policy Planning Staff of the (speaking in French) and with the French Embassy here in Washington. And, in particular, Ambassador Delattre who had another engagement, but will join us, we hope, during the course of discussion.

I don't think I need to say to a group like this why it is so appropriate that we should have a lecture here at Brookings in the name and memory of Raymond Aron. In his scholarship, in his intellect, he was very much a citizen of the world, while being, of course, a French patriot, and he was distinguished among other things by the combination of depth and breadth of his interests, his expertise, and his analysis. He did a lot of work in philosophy, international relations, governance in general, and, of course, the law. Hence, this year's choice of a topic: the internationalization of law.

It is our great honor to have Professor Mireille Delmas-Marty here to give

the Ninth Aron Lecture. She is one of France's and I might say the world's most distinguished legal scholars. She is professor emeritus in comparative legal studies and appropriately in the field of internationalization of law.

Mr. Ambassador, I just welcomed you and thanked you a moment ago. I'm so glad you could get here. You're not missing anything so far, believe me.

(Laughter)

At *Collège de France*. She has been during her distinguished career a visiting professor at numerous universities on both sides of the Atlantic, as well as in Asia, and she has advised the French government and European institutions on the issues in which she is so thoughtful an expert.

I might add it is absolutely heroic of her to be with us this afternoon. She fell ill on route here to Washington, and, yet, she has soldiered on. She will be assisted, if that should be necessary, during the course of the conversation by Professor Vivian Curran, who is professor of law at the University of Pittsburgh and also has the same specialty as Professor Delmas-Marty.

After the Professor gives her opening remarks, Justice Stephen Breyer will offer a response. Just a quick word about Justice Breyer, although he hardly needs an introduction, but I want to emphasize the Brookings connection. Stephen Breyer is not just a member of the Brookings community, we like to think of ourselves as a family and he's very much a part of that family, too, as is his wife Joanna, who is here in the front row today. Very early in his career, he was a Brookings Institution Press author and he has been a frequent participant in events, symposia, events like this over the course of recent years, and just in the past couple of weeks, he took part here in the Falk Auditorium in a seminar of rule in law in China, and he spent most of a weekend attending the Saban Forum in the Middle East, which Martin puts together every year.

Justice Breyer is a Francophile and a francophone. Six years ago, he presented the 2006 Aron Lecture with Robert Badinter and Sandra Day O'Connor. And today's subject is particularly one that is close to his heart and, in fact, the relationship between law and in particular the law of this country, the United States, and international life may well be the subject of a forthcoming book. He is looking into the subject of the Supreme Court and the world. So, in due course, we'll have an event around that publication.

Finally, let me just say a quick word of thanks to Ben Wittes, who is a senior fellow in our Governance Studies Program and who also works in the international realm, particularly on the relationship between law, international law and national law, and issues of security. The word drones comes to mind in this context. But as we were talking with the two professors before coming in here, Ben said that in many ways what you're going to hear from Professor Delmas-Marty goes to the underlying tense of the whole concept of international law and she is going to then set up a discussion that Ben will moderate and we'll bring all of you into the conversation a little later in the afternoon.

So, with that, Professor, I turn the program over to you. (Applause)

MS. DELMAS-MARTY: Thank you for this kind presentation. First of all, allow me to apologize, apologize for this state of my voice. I hope you can hear me. If my voice gives out during the talk, my friend, Professor Vivian Curran will continue reading the text. But mostly I would like to say that it's a great honor and a real pleasure to deliver the Raymond Aron Lecture to this distinguished audience of colleagues and friends and to listen to the comments of my friend, Justice Breyer.

When we created (speaking in French) international law network with Justice Breyer, it was in Paris in 2005, and the objective seemed rather clear, it was to understand by means of concrete situations the dynamic process of interaction between

national and foreign law, between national and international law. I should say that seven years later, landscape has become increasingly complex, not so clear as it was at the beginning.

But interaction is still the key word and Raymond Aron, the French scholar we celebrate in these lectures, was right when he stated in 1962 in his famous book "*Peace & War*" between nations, that in transnational society interaction is the lower form, a form of failure of solidarity, the higher form being self-regulation. He wrote that in 1962. But the world he described, the world of a Cold War was a bipolar one and interaction was not legal as it is now, but only political.

Today, bipolarity has become multi-polarity and national bodies of law are increasingly reshaped by transnational forces like for many examples: economic globalization, human rights law, and globalization of risks. I should say that the most visible consequence of economic globalization is the transformation of state governance into multi-actor governance.

State actors are still there and now a number nearly 200, but rule-makers and rule-enforcers include non-state actors like international organizations nearly --

MS. CURRAN: Three thousand. Three thousand.

MS. DELMAS-MARTY: Three thousand.

SPEAKER: (off mic)

MS. DELMAS-MARTY: No.

MS. CURRAN: Thirty thousand.

SPEAKER: Thirty?

MS. DELMAS-MARTY: Three thousand?

MS. CURRAN: Thirty.

MS. DELMAS-MARTY: Three thousand.

MS. CURRAN: Thirty thousand.

MS. DELMAS-MARTY: And private global actors most important perhaps such as multinational corporations and we know that many of them are more powerful than small states. At the same time, interaction has developed as a legal, not just a political phenomenon, and human rights law is changing the relationship between different fields, different levels of organization: national, regional, global, and even what should present like different speeds, different speeds just compared with law evolution of human rights law to the rapid evolution of trade law. The result is introducing a multifaceted legal order.

And, finally, for globalization of risks triggers, new interactions between present and future generations in our multi-risk human community, preventive measures are supposed to put now not only our wellbeing, but also that of future generations against growing enforcing risks. This is why the topic of internationalization of law is not only (inaudible) by interactions and multi-polarity as changes in the legal agenda are rapid and often unforeseen, it also means instability, but how can we conceive that law might be unstable is contrary of our image of law.

How you actually can unify a static image of a pyramid of norms proposed by the Austrian France (inaudible) is inadequate to describe this complexity. So, some colleagues like (inaudible) use (inaudible) of legal networks, but legal networks do not evoke instability.

So, I would quote Edith Brown Weiss. When looking at environmental global risks, she uses the wonderful image of a legal world as a "kaleidoscopic world," a continually shifting pattern, and I should say that with the same concern, I have used the image, perhaps a little bit provocative, of clouds in the sky on a windy day.

Both images are perhaps more (inaudible) legal networks because they

may suggest that ordering different legal systems like putting the clouds or like stabilizing a kaleidoscope image is impossible. Actually, many observers see the legal landscape as a great legal disorder of a new legal world order. They're right. They are right if we consider the situation is static, but if we consider the present situation as a work in progress, the (inaudible) failure of the internationalization of law could be a first step in the process of transformation.

But to present this possible transformation, I focus on three main challenges. First, the challenge of accountability, *responsabilité* in French. It arises as multi-actor governance, tends to create new unbalanced powers, for example, multinational corporations when they violate human rights abroad or international financial institutions like the World Bank with their recommendations have negative effects on poor countries or poor communities. Or scientific experts, when their probability-based statements lead to bad political decisions.

Second, the challenge of legitimacy. In a multi-faceted legal order, it raises the question of preserving consistency without imposing uniformity. Even at the regional level when human rights instruments make supranational review possible, the international human rights courts try to improve what I call ordering probabilism; not uniforming, but harmonizing. Legitimacy for global process of harmonizing is fair objective.

First, the challenge of predictability seems inherent to a multi-risk human community. Just think what happened after Fukushima. The world's management of nuclear power was criticized and a couple of months ago, we had another example in Europe with a L'Aquila case, as an Italian court sentenced seven geologists to prison of several years because of a failure of their forecasting methods. Predictability requires rationalizing the process of anticipating risks and now I shall say some examples for

these three challenges. I'll give some examples.

The challenge of accountability in the context of multi-actor governance, rulemaking is shared by states, interstate actors, or non-state actors, and internationalization could, therefore, prepare us for a transition, a transition towards a new model of governance with new forms of shared responsibility, it's a new expression we heard, especially in Europe, where we have a charter of shared responsibilities. But accountability requires not only a self-check of peer review, but we have a check of judicial review. That is why judges, national or international, play a key role in the effort to avoid expansion of unbalanced power. The problem is there is no clear framework for organizing global monitoring and review. There are only valid partial frameworks for various actors, notably state actors and transnational corporation.

Can you understand me? It's clear enough? So, I try to continue.

Beginning with state actors, if in those states of traditional actors, there is still not clear mechanism for establishing variability of holding them responsible or accountable, and for jurisdiction of the International Court of Justice, ICJ depends on the willingness of states and it has no means to enforce its judgment.

The U.S. Medellin case shows how unclear the question is of which treaty provisions are self-executing or automatically binding on states? The Supreme Court has previously found many self-executing provisions that involve, for example, property rights, contract and commercial rights, taxation, and so on. But in Medellin, where the conditions for applying the death penalty to foreigners were at issue. The majority of the court considered the U.N. treaty obligation to comply with the ICJ judgment was not self-executing. I read especially with the sentencing opinion on that point. (Laughter)

It is true that of a means to monitor and reviews states' practices have

developed as a global or regional level, but their effectiveness varies depending on the field. As we can see, if we compare, for example, criminal law with human rights law, on the one hand, human rights law is focused on state responsibility, but judicial review of state action is limited to regional courts, namely European Court of Human Rights, the Inter-American Court for Latina America, and also now the African Charter of Human Rights and the African Court. And these regional courts meet a certain amount of resistance from national supreme courts as we saw recently in Brazil, concerning a Brazilian and the (inaudible) law. The Brazilian Supreme Court issued a decision ignoring the convention and the case law of the Inter-American Court. And in November of that year, the court held that Brazilian law did not comply, but this did not result in any concrete change.

On the other hand, international criminal liability which is limited to individuals may include prosecution of state leaders and now some (inaudible) have been launched by the International Criminal Court, ICC.

The ICC, you know, is a very young institution. It was created in 2002. Ten years is a very short period to build something as revolutionary as truly universal criminal justice, but there are some signs of growing credibility and I want to expose them.

One sign is the number of communications sent to the court for preliminary examination by non-state actors. They are not member actors, non-party actors, like (inaudible) for example in the case of (inaudible).

Another sign is the support of a United Nations Security Council which referred the situation in Libya to the court following a few days' discussion instead of several months that we see (inaudible) in 2005.

A third sign, perhaps even most important, is the indirect effort the ICC

creates. The court's long shadow to use the image that (inaudible) invoked, even if veto rights in the Security Council of the United Nations allow for a large part of political discretion, the influence of the ICC may be observed in many countries. But there is a limit (inaudible) jurisdiction of the ICC concerning the actions against multinational corporations.

And then I should say coming to non-state actors that there is a real contrast between the abundance of soft law mechanisms and the absence of hard law because the ICC's jurisdiction is limited to physical persons. Of course, there are technical difficulties, but there are solutions to technical difficulties. In practice, the revision of a status (speaking in French) has not improved the question for multinational corporations and there is still a long work in that field.

But the multinational responsibility or accountability is principally at the national level. At the national level, not so much in the developed countries because they don't have a means to prosecute, but in practice, the principal of universal jurisdiction makes it possible to invite complete impunity even if the application of this principle is being developed differently in the U.S. and in Europe.

More precisely, in the common law and Romano-Germanic Systems, in American law, there are many mechanisms for holding transnational corporations accountable is or was the situation, it evolves. At the moment, the main mechanism is the alien tort statute adopted in September of 1789. You know the statute assigns federal courts' jurisdiction to award civil damages to compensate violations of international law. It's a translation of a French expression (speaking in French) the law of nations. So, it has been applied even when the violation is committed abroad and even when both parties are foreigners to punish for gravest violations of international human rights law.

The first case in which a judge held that the ATS is not limited to violations committed by states or agents, but applies to individuals and transnational corporations, as well, is due Unocal in 1998. It was interesting to look at the case because it was a group of farmers from Myanmar, Burma, who sued Unocal, claiming that it has caused serious environment damage and that it had the country's armed forces and police in committing grave human rights violations. Since then, numerous transnational corporations have been sued on the basis of the ATS (inaudible). In this new incarnation, the ATS, when considered for the first time by the Supreme Court in 2004 in such a case in which the court upheld this law application, but limited it in the name of committee (inaudible) international.

But, recently, the court was petitioned again regarding the appellate decision in Kiobel, in which 12 plaintiffs claimed that the company was complacent in human rights violations committed by the (inaudible) and military against the Ogoni people during demonstrations against the pollution caused by oil exploration. So, the Supreme Court must decide whether the statute allows U.S. courts to judge violations of the law of nations committed in another country by transnational corporations.

The problem is that in several civilian countries, Belgium, Finland, France, Germany, many of the functions of U.S. tort law are performed by criminal law. National legislation codifies international standards and grants universal jurisdiction to national criminal courts to punish the gravest violations of (speaking in French).

As Vivian Curran suggests in her brief, which I support, civilian criminal law and U.S. civil tort law have more or less the same functions in their respective legal orders. So, it seems a good argument to counter the criticism which is strongly, also, but criticism against the U.S. quasi monopoly as it, yes, is probably one of the most effective ways to improve transnational corporations' accountability.

But effectiveness is not the only criteria. The question is also legitimacy which implies for recognition of common values, so, some words about the second challenge. The challenge of legitimacy in a multi-faceted legal order is particularly difficult.

The solution cannot be the utopia of a universal global order imposed by a global state, which could be the new costume of hegemony. We must remember that beyond the universalities of values declared by the Universal Declaration of Human Rights, the legal diversity is also protected by the convention of UNESCO about diversity of culture and it is even protected as the common heritage of humanity. So, we must at the same time universalize the relativism of national legal orders by integrating common values and pluralize universalism by contextual design or localizing common rules. The problem is to find the legal processes appropriate to ordering (inaudible) in the traditional legal culture of this expression is completely unusual and evokes a kind of monster. Pluralism implies differences, the expression fragmentation, whereas legal order evokes a unified structure, hierarchical, and static.

But the world is not static. It has changed in Europe, where a supranational legal order was established after the end of World War II, and it has been changing across the world since the end of Cold War (inaudible) internationalization of law. So, there are different processes for ordering pluralism like cross-fertilization (speaking in French). As Justice Breyer knows, it's rather strongly controversial. The most ambitious is hybridization, but it's rather rare. And probably the best process for promoting legitimacy is harmonization because it combines integration and contextualization and it is built on legal technique which is the called the National Margin of Appreciation.

But let me say some words to the challenge of predictability. National

communities are built essentially on the memory of the past, but the new global community still emerging looks to the future rather than the past where that it shares a common fate even with a new category of future generations. I should say that no one knows if the monuments to the dead will one day be replaced by monument to future generations. But we can already see that the traditional representation of law does not accurately describe the current situation, particularly the area of global risks. Global risks may come from nature, technology, or human behavior, and they are supposed to be foreseen. They're supposed to be foreseen, but how shall we rationalize this foresight? It's difficult to make something clear in that field. It's a great challenge in our topological vision of the world.

One of my masters in international law, Officer Dupree quoted always the Native American proverb: We do not inherit the land from our ancestors; we borrow it from our children. So, how shall we introduce the protection of future generations in our legal system? I should say we need two kinds of indicators, indicators of a probability of risks, of protective gravity, but we must never forget the (inaudible) risk, risk (inaudible) is an illusion and it's impossible to eliminate all (inaudible). It would paralyze society's evolution.

So, foresight or precaution, therefore also requires indicators of acceptability, I should say indicators of (inaudible) of risks. As we know, for example, after Chernobyl or Fukushima, affected people's level of concern has changed for level of acceptability is not the same after such an event. So, we have also to work in that direction.

But I think it's time to conclude. I should say that in the work in progress, internationalization of law is still evolving, improving, and we should be patient. As I said two years ago in the ASIL conference, patient, but not passive. We should not give way

to this enchantment. If we think that legal order is better than arms or money to force the trust among all state and all peoples, then we have a duty to adopt the legal methods. That is why the second meaning of the acronym IL is imagination and law, perhaps for most important to face the challenge.

And to finish, I would like to paraphrase the title of Justice Breyer's last book "Making Our Democracy Work," and I raise the question: What could make the rule of law -- I cannot say democracy at the global level, but what could make the rule of law work in the transnational legal order is the next question?

Thank you for your attention because I think it was difficult to follow my poor voice. Thank you. (Applause)

MR. BREYER: Very interesting. We'd like to welcome you, Mireille.

You know General de Gaulle said that England, Britain is an island, that Europe is a peninsula, but the United States and America is another world. (Laughter) We welcome you to that other world and your whole point is we're not another world.

I mean, what is going on is very interesting. What you're going to see, in particular what you're going to see in the next 10, if it's okay, is it's a work in progress. I mean, Mireille is looking at the legal world, which does involve everybody from 10,000 feet, and what she sees are the clouds that she's above and say what are the patterns? And anyone who thinks it's just a pattern of 200 sovereign nations, each applying its law to those people within its territory, has somehow been asleep because that isn't what's going on.

You noticed we paused because she says is it 3,000 or 30,000? It's 30,000 organizations in the world with the power to make law, which law applies more than people of 1 nation at this moment? And it's changed the nature of these treaties so that actually what a lot of them set up are groups of people who were in the process of

making rules and do those rules actually bind? Oh, now we hesitate. Do they really bind us?

Well, in a sense, yes, they bind the nation. Well, do they bind us as individuals and in what area are you talking about? Are you talking about commerce? Are you talking about security? Are you talking about human liberty? Are you talking about the environment? And, in fact, the answer may differ and it may differ within each difference and we're not certain exactly how much, but we know some and the clouds shift. There we are.

And what she is trying to do, and read this book that she's written, which is very good. If you want to see it in more detail, is impose a way of thinking about what's going on.

Well, I don't actually have to. I mean, if you had listened to Strobe's introduction, you would have thought I never do any work; I just spend my time here listening to very interesting lectures. (Laughter) But that is not true. Though I will point out, and that's what I want to talk about for 10 minutes, what's my job like? Because Mireille's right in what she describes, but I see it not from 10,000 feet, I see it, I was going to say, from the troth or from, if you like, the trenches or the nature of my job as a justice of the United States Supreme Court has significantly changed in the nearly 2 decades I've been there in the direction that she's talking about.

So, I'll give you eight examples. And you take those eight examples and think about them and think about what she's saying and you'll both see that things are changing and then you will get into the business, we hope, of trying to impose upon this an intellectual framework that advances the ball, as Mireille has done. Taking account of more and more specific cases. Or what, what exactly do I break down? A lot of cases, I mean, in the first week when we heard six cases this year, two of those cases involved in

major ways international security and international commerce. Two out of six. It's quite a lot. Would have not occurred 20 years ago. And it's absolutely commonplace to say our problems are international security, commerce, environment, but the law with which we deal these problems is national. Well, that isn't quite true, you see. Now go back to her lecture. But at ground level or in the trenches or at the troth -- I call it the "troth" because they do pay something out of it, but the point is what are they specifically? Eight examples, you can find many, many more.

One, the normal human rights case. What do I mean by "normal?" Death penalty. That's pretty good. I mean, good or bad, I'm not say morally, but it's a good example because the constitution says that we cannot have a cruel or unusual punishment, and unusual where? Unusual in Utah? Unusual in Cambridge, Massachusetts? Unusual in the United States? Unusual in the world? It doesn't say. And, so, what you do see is that you see different judges looking at different places to find what is or is not unusual and reading what courts abroad may or may not say about this matter as applied in their own world.

And, by the way, if we do, in fact, refer to a case in another nation, that becomes a political issue. I don't have to worry about that, luckily, because I'm not in politics, but it does become a political issue, when Justice Kennedy, in fact, referred to no other country in the world applying the death penalty to juveniles, those who are under 18, at the age of 18 when they commit the crime, he was then criticized. I joined it, but he was criticized.

He said what are you referring to these foreign courts for? This is an American constitution. To which I say well, that's true, but judges more and more are doing the same kind of work I do all over the world. They more and more have documents like I have, very similar. They more and more respect democracies and basic

human rights as our document respects, and they more and more have similar problems.

So, if I have a similar problem and a judge has written an opinion on this matter, why don't I read it? I'm not bound by it, but I might learn something. That's a pretty good answer, isn't it? It's convinced no one so far, not one human being.

(Laughter)

So, I say look, the courts have always done this. We've always done that. I give them some history. You think that convinces anybody else? No, not somebody who wasn't already convinced.

So, what's going on? I think what's going on is there is almost inarticulate, but a serious concern which should be taken seriously of are we going to lose our own values as expressed in this document when we enter into the world that you say already exists? And there are many Americans who worry about that. And that's a legitimate concern.

So, now let me go back to my eight examples. Because I will share this concern, but say you're not going to help in alleviating that concern by stopping me from referring to cases abroad or by stopping the array from telling you what situation really exists, a situation that exists because of the nature of problems of security of commerce, of the environment, and other things. Not a situation that exists because she writes a book or because I decide an opinion. So, let's remember the criticism, that concern, and a legitimate and honest concern for our losing our own sovereignty by which they mean, losing sight of the values in this document and now let's look at the world as I actually see it.

One, lots of cases or a certain number along the lines I just talked about: human rights protected by our constitution, protected elsewhere, and maybe we learn something by reading abroad. Anyway, the language seems to permit us to do it.

Two, the same kind of basic problem that exists now in many, many countries, how do we both protect human liberty as guaranteed in this document, while at the same time permitting the president and Congress to do what this document gives them authority to do, to protect our security? It's their job to protect our security, but it's our job to worry about the rights of individuals in this document and what do we do when they conflict? Well, there's a challenge in this area, a major challenge.

I hope some of you might be interested and read the Guantanamo cases, and there, you'll see language such as Justice O'Connor writing protecting the individual at Guantanamo, but saying such things as the constitution does not write the president "a blank check" in this area, and I joined that. I thought that was a very good expression of what we were doing, and but many critics say but that's awfully vague. Really, that's a bumper sticker. Why don't you go further? Why aren't you more specific?

And, of course, the challenge in the area is in exactly what direction and how and precisely in what way should we be more specific? And we are saying we don't know yet. We don't know yet. But if we're entering this world that you're describing, where human rights are being protected in the presence of security threats and we're not quite certain exactly how, but we better learn. Then judges are going to have to learn something about international relations and judges are going to have to learn something about security. They're going to have to know enough to know at least not to work havoc. You see? You see the nature of the problem and see the nature of the challenge and see the difficulty? That's there in our lives coming up once, twice, maybe three times every single year.

Three: the question that Mireille brought beautifully. I mean, Medellin, I'll tell you what that was about. That was about by coincidence we signed a treaty which said that if the police arrest somebody, they have to tell that person if he's a Mexican or

some other foreigner you have a right to go see your counsel. And what happens if you don't? The police forgot in Texas, or maybe the Texas police didn't know or who knows, but they didn't do it. And he was sentenced to death.

And the question was: Did that make a difference that they didn't tell him about this right? And now our treaty says ask the ICJ, and the ICJ said give him a hearing. All right. Give him a hearing to do what? To see if it made a difference. Who are they telling that to? The United States. But where is this prisoner? In Texas. So, who says give him a hearing? ICJ. Texas says the ICJ says we should give him a hearing. George Bush, the president of the United States wrote a letter to Texas and said give him a hearing. We withheld the case for a year so they could give him a hearing. Did they give him a hearing? Well, that's Texas, you know. They said no, we're not going to give him a hearing. We haven't found anybody yet that told us we really have to. And what the president did is said I'm asking you, can you tell him? Good legal question. Good legal question. And, ultimately, it comes to the court, and ultimately six to three, I think. The court said no, this treaty is not written into domestic law by the president, by the Congress. It was ratified by the Senate, but it doesn't automatically become domestic law. That's quite a challenge. That's quite a question.

Congress can change that if it wishes in many areas. And should it? Why is it a big question? Not because of the death penalty, because of those 30,000 institutions that are busy, they're writing rules about health, sanitation, et cetera, and will that question come up again?

Well, all you have to imagine is that somebody internationally who's in charge of food safety does through a bureaucracy write a rule which says do "dah, dah, dah" in respect to carrots, okay, and suppose our Food and Drug Administration says do "dah, dah, dah" in respect to carrots, and some lawyer, a good lawyer says to the FDA

why are you doing that? And they say we have only one reason, because they did it internationally. Question: Is that an adequate response? We haven't had that case yet. But that's happening more and more and is that a good response or not?

And fear, fear that if that is a good response, we have outsourced the legislative process and can we do that under our constitution and should we do that under our constitution? Or, or, or. Have I said enough so you see the nature of the problem? And Mireille just encapsulated that problem and we just don't have in my opinion a very good answer yet, but it's coming along the pike. And does it affect those 30,000? Of course it does.

Four, you talked about the alien tort statute. The alien tort statute was enacted in 1790-something or 1789 or 1791 or something like that. What year?

SPEAKER: 1789.

MR. BREYER: Thank you, good. I knew if I named enough years, I'd get it right. (Laughter)

But, yes, and what was it about? I can't say too much about this because it's in front of us, but it does seem fair enough to say that what they were worried about then, among things, were pirates, and you could try and catch a pirate and take his money where you found him. You hanged him, then you took all his money. He didn't (inaudible) anyway, but that the result is and you gave it to the victims or something like that and you could do that wherever you found him.

Well, who are today's pirates? Are the torturers today's pirates? Are the genocide people today pirates? And how do we limit the scope of the statute? And, by the way, if we say that we can take the Paraguayan torturers wherever we find them and then give the money that we can catch them with to their victims, so can every other country do the same? And there is no international supreme court to say what exactly

when this country does that and this country does the other thing all in the same name, but they conflict how we iron out that conflict, lots of difficulties there.

And don't worry, we'll work it out some way, but, I mean, do you see the nature of the problem that comes up and how do we answer these questions, and they come up in bits and pieces. And, again, do we know enough about it to have a wise answer? To what extent should we hesitate? To what extent do we make this the advanced guard of an enforcement of human rights? Those are some of the questions in front of us.

Five, well, the most common thing in the world, if number four was do we open the courts to these people, the victims of the Paraguayan torturers so they can sue their torturers in New York, that's four, open up the gates. Five is where does this American statute apply?

Now, there's a lot of law in that going back to 1500 probably. I mean, there wasn't America -- I don't know but it was certainly in from 1789 on, but suddenly, there's case after case bringing up that issue. There suddenly is, and this is different than it was 20 years ago. There suddenly is the plaintiff, who is in Ecuador, who is a vitamin distributor, who in fact says there was a vitamin cartel involving a Dutch manufacturer and maybe one American, but I'm interested in that Dutch company, and I want to sue in my antitrust case in New York.

Why does he want to bring his antitrust case in New York, bring it in Holland. Well, maybe, you see, he didn't get the vitamins, they were too expensive, so, he's weak and he can only reach New York. But that's one possibility. The other possibility is treble damages. And, so, he wants to bring it in New York. Does the statute apply? To get the answer to that question, we're helped by briefs being filed by the E.U., by England, by France, by Japan, and these are not just briefs that sort of say we are for

or we are against.

And that's also the case, for example, in the ATS case. We have a brief from the Government of the Netherlands. We have a brief from the Government of Britain, and we have two briefs from the lawyers in each country who say the briefs by the governments are wrong, okay? We have briefs by a French expert; we have briefs from all over the place, and so did we in that vitamin cartel case and so do we in a copyright case that is before us.

And if you think oh, well, international copyright, that's sort of interesting. I mean, it's billions and billions and billions of dollars. I mean, it involves copyrights on dresses, it involves copyrights on little gimmicks that happen to be essential elements of every automobile. It involves copyrights of, of, of, and there's international commerce in a big way in the question of trying to read some fairly obscure words in a statute to decide how it applies abroad. Well, that's five.

Six, well, what about the judgments of foreign courts or what about arbitration awards? What about the case that was in France, where they decided that Yahoo! could not run in France certain Nazi propaganda, but maybe our First Amendment would let them run it here and what do we do about that judgment when they try to enforce it against Yahoo! in California? And that's just a tip of an iceberg because that kind of thing with the Internet is going to come up more and more and more.

Seven, what about your diplomatic judge, the judge as diplomat? I like that; it seems to give me a promotion. (Laughter) But, nonetheless, the diplomats get involved in exchanges, and what do we exchange?

Well, when we're not talking bumper stickers, what we exchange are legal concepts and in Europe and in Canada and in many places to give one example, they use a concept called proportionality, which I think is very useful when you're talking

about the First Amendment and a lot of other individual rights because it tempers on the one hand the need to protect expression, for example, while on the other hand what happens when expression runs up against some value that's very important, like somebody's life? And how do we measure that, how's it done? And they do it in a lot of countries with a concept called proportionality. We have concepts that do that, too. We call them strict scrutiny, medium scrutiny, lesser scrutiny. I mock it slightly because I think that this proportionality works a little better, but that's arguable.

And we have things to contribute. We have something which I like, lawyers like it, some of them do, called teleological jurisprudence, look to the purpose of the statute. We probably use that more in Europe. They might have to pick up something or might want to. There are concepts that can be exchanged and there are people. I mean, I found that absolutely home, they really targeted home.

When I was here at Brookings, I was here at Brookings, and if you're going to welcome me at Brookings, you ought to remember that I did write a Brookings book, and it was called "*Regulation of Energy by the Federal Power Commission*," and it's still number 2,867,432 on the Amazon list. (Laughter)

But anyway, the point is when I was here two weeks ago; there is a gentleman, a professor from China, Professor Hu, and my goodness, read what he writes. And I had been to China, and I had talked to some of the law students there and I have talked to some of the judges there, and what the big problem that he was talking about was how do we get from here to there? How do we get from a world in which informed people in China seem to want democracy and some protection of human rights, and, yet, the government feels it has a tiger by the tail and is afraid to let go. That would be, I think, how he was describing it.

And now because I've been to some of these places and because some

of my colleagues have, we could discuss that question and we're interested. So, we start discussing particular things. How do you in a practice begin to make judges feel that they're somewhat more independent? Tenure, pay, I don't know.

What about a rule that we have under the APA that says if it isn't public, it isn't a law. So, when somebody tries to convict somebody and you say where's the law and they say well, it's in my pocket or it's in the drawer, no, no, that's not a law, you can't use it. That's an administrative law principle.

What about a really technical point called ex parte communications? Hardly anyone understands that who isn't a lawyer. But it's an important point because the rule of ex parte communications assures that while judges are free to deliberate in private, they're not free to get information in private. Any information that goes into that judge has to be public. It has to be known to the parties.

What about minimum notions of due process? Professor Cohen was saying that they send 370-some-odd-thousand people to labor, forced labor camps, and the police chief can do it and they're afraid they'll never be able to stop that. Well, the police chief doesn't want to send the wrong person, does he? I mean, it doesn't help. That happens. I explain that to people. They think it's slightly funny, but then they see the point. When a terrible crime is committed, it doesn't help to say good, let's put the wrong person in jail. So, that doesn't help.

So, maybe you find methods of minimal due process for the purpose at least of seeing through neutral decision-makers and opportunities to present proofs and arguments exactly who is the person who should be deported? There's a step forward. In other words, we discuss and can discuss in relation to China steps forward. Who knows if some would work?

But the discussion is there and the discussion occurs whether an African

judge comes into my office as the president of the Court in Ghana did and said why is it that people follow the law in the United States? Why do they do it? And it's too easy just to think oh, it's a different civilization, we could never do that. No, no, that isn't an intelligent answer. I mean, it requires thought and it provokes thought.

And, so, meeting with these people, meeting with judges abroad, making these exchanges, getting involved in exchanging concepts, worrying about the enforcement of judges from abroad, finding out where these statutes really apply, asking who does the American court's door, who does it open? Who gets in that door? Worrying about the relation of the 30,000 and whether their laws are going to be enforced and exactly how in the United States, worrying about the security liberty balance, worrying about the content of some of the rights, and that's the world I live in.

So, I go back to the critics and say now that you've heard me even in 10 or 15 minutes, describe that world. Don't you see what I think of your concern about my citing foreign courts? What has that got to do with it? I mean, that isn't the problem, is it? The problems are the challenges that are accompanied by the eight different categories and perhaps more than that that I've listed. And they're full of problems and they are full of challenges, and they are being met one way or the other, hence, your "clouds," as you described it, from 10,000 feet.

So, where we agreed was on the last line, absolutely agreed. She said, and I'm going to incorporate that in the future. I mean, what we're both trying to do, what everyone's law is trying to do, we're trying to promote, and we certainly believe in that, a rule of law, and the rule of law is the opposite of the arbitrary, the unreasonable, the tyrannical, the undemocratic, the autocratic, et cetera.

That's what we're trying to do through this sort of down in the ditch, or, if you like, up in the clouds, through this work. And she says if you have patience, you continue. I

said to her a few minutes ago it's sort of like if I want to give a classical reference, it's like Penelope's carpet or whatever she was weaving. We weave it during the day and then somebody comes in the night and undoes the whole thing. And there we are. And, so, her recommendation was well, keep going. Keep going. It's called, I wrote it down, patience, but perseverance. And that's it. Now you're all enlisted in this enterprise. Now that you see what the enterprise is, both from the bottom and from the top. Thanks.

(Applause)

MR. WITTES: So, we actually have very little time, and, therefore, I am going to dispense with any questions that I had in order to go directly to questions from the audience. If you want, if you have a question, I have two sort-of housekeeping rules. One, the first is be brief because we actually do have very little time. I'd like to get as many people in as possible. And the second, which there's always somebody in an audience like this who thinks that he's figured out the clever way to get the Justice to say how he's going to vote in some pending case. (Laughter) Don't try it. You're just going to waste people's time.

So, I'm going to ask Professor Curran to give some thoughts in reaction, and if you flag me in the meantime if you'd like to get in on the conversation.

MS. CURRAN: Since there's so little time, I'll be very brief. Let me go back to the intriguing image that Justice Breyer gave us of being in the troth while Mireille Delmas-Marty is in the clouds, and I think the issue is that never the twain shall meet. And one of the things that seems to me fascinating is that Mireille Delmas-Marty said about herself and I think she's known for this is of mixing everything. She says "je mélange tout": I mix everything. And the two --

MS. DELMAS-MARTY: It's true.

MS. CURRAN: It's true, it is. The two got together and they organized in

2005, as Professor Delmas-Marty's presentation alluded to, this network of scholars and judges to meet on the issue of the internationalization of law, and it seems to me that there you have if you want the troth and the clouds meeting each other.

And, so, it also seems to me one of the fascinating aspects about laws' internationalization is that sort of effort is actually part of it. It may change the role of scholars. Justice Breyer, perhaps in part as a result of it has spoken in law faculties, suggesting that they teach foreign law to students so that they can brief judges about foreign law for what will be necessary in the generation to come. All of that process, I think, is part of the internationalization of law.

So, I'll end my comments here to allow the audience to address the speakers, yes.

MR. WITTES: Sir? Sir?

MR. CHERNEW: Thank you. My name is Michael Chernew, a fellow at Brookings here.

The Brookings Institution has made an enormous effort, very forward-looking; to articulate the set of guiding principles for treating internally displaced populations. That happened about a decade, a decade-and-a-half ago, and the progress has been very limited, although there is progress, encouraging. Maybe we need more patience and perseverance, but there is adoption gradually in some countries, but United Nations and the Commission on the Human Rights didn't even want to discuss those set of guiding principles based on human rights.

On the other side, international development institutions like the World Bank have developed a similar set of principles called safeguard policies for internally or for developmentally displaced people which are massive throughout the world in the tens of millions, and this policy has been gradually adopted by a number of state governments

and it applies in hundreds and thousands of projects financed by those multilateral development agencies because they have the power of money and the policies of the World Bank, Asian Development Bank, and so on to apply to all policies.

How would you comment about the mechanisms which have to be put in motion to make the guiding principles of Brookings more embraced and to replicate more on the state level, as you said to write in the domestic law the principles which are in the World Bank policy for forcibly displaced people by development?

(Pause)

MR. BREYER: While she's translating that, I'll say the most obvious way is get Congress to enact some of it into law. I mean, that's what they did with the refugees. You find that's a simple way other than just the State Department will say it and you try to build a coalition and try to get them to enact it. Then we enforce it.

MS. DELMAS-MARTY: But I should say that we cannot separate different sectors because we are interlinked together. So, human rights are not respected everywhere, that's true, but, at the same time, the World Bank puts several problems of (inaudible) and protecting.

I make a reference to the article of Ms. Brown Weiss who is in the panel controlling and receiving the complaints. So, I think it's impossible to have a global idea without taking account of fragmentation of international sectors.

At the same time, there are more risk fragments, human rights, World Bank, trade law, environmental law. We begin to interact, the interaction is beginning, and the problem is, as I tried to say, the world is not a multi-state actor's world. But also other actors, other actors not only international organizations, but private economic actors, experts in certain fields, for example, environmental law, climate change. The role of experts is predominant. I think that we never organize the protocol on climate

change without NGOs and without scientific experts.

So, a problem of power, it's difficult because power is not only in the hands of states, and if you take another example with Internet law, it's a private power and even the users of Internet participate to control. So, it's at the same time fragmentation and interaction. That's why the first impression is for great legal disorder. But the positive phases would be transition to a world, a new kind of much more complex organization, but it's not a guarantee. We have to work for that.

MR. WITTES: I'll take another question.

MS. SOMENBERG: Hi, thank you. My question has to do with shared values that the two of you --

MR. WITTES: Introduce yourself first.

MS. SONNENBERG: Oh, Vanda Sonnenberg. I'm not an attorney. So, my question is out of ignorance.

But related to shared values, we've seen since the Euro Crisis since 2008 a fragmentation on economic policies in Europe. So, I was wondering if we've seen a concomitant fragmentation in legal decisions because the concept of shared values is definitely an interesting one. I think that when countries are under assault from different threats, some agreement breaks down. So, I was just curious if that's happened on the legal side.

MR. WITTES: So, this is an excellent question, and if I could just sharpen it a little bit, I mean, there is this area of human rights law where the European Court of Human Rights is just in a sort of profoundly different place from certainly the United States government, and from a lot of opinion within the United States, and I'm interested how do you bridge profoundly different political cultures and legal cultures and expectations on core values issues that lie at the heart of this?

MS. DELMAS-MARTY: As far as values are concerned, I think the starting point is fragmentation, but we have new common instruments. First, with a declaration, universal declaration on human rights, and then with many other instruments about human rights law.

So, there is a slow process of harmonizing common values and what I tried to say in my talk was that harmonizing is not uniform-izing, but (inaudible) because we have to at the same time to recognize universalism and to introduce the national context which is a sort of guarantee of preserving diversity (inaudible) diversity because it's (inaudible) common heritage of humanity is diversity and at the same time we have universal declaration on human rights. So, that's the problem, to make them work together and I put the technique is one of (inaudible) techniques (inaudible) but one of these techniques is the notion of national margin of acquisition.

Of course, if a margin is too wide, there are no common values, but the interest of a concept of national margin is that it may evolve as far as social compartments evolve. So, it's a dynamic process to introduce some common values without suppressing identities of nations. I think it's very important when you talk about values.

MR. WITTES: So, we have time for one more question if it's brief.

MS. ROBINSON: Okay, I'll keep it brief. Hillary Robinson. I'm a visiting researcher at Georgetown Law Center and doing some work in the Metropolitan Policy Program here at Brookings.

So, of course the framers of the U.S. Constitution had an innovation for bringing order out of disorder and diverse a few points to a central table, and that idea was federalism. And allocating certain issues of central concern to a federal government and letting the states figure out the rest. Justice Brandeis used the term "laboratories of

experimentation.”

My question is whether this is a workable model, particularly for the international community picking up on the idea of risk, maybe allocating the riskiest subjects to this central control model and leaving the rest to the diverse few points of the individual states and whether that might work.

MR. WITTES: Justice Breyer, do you want to take the last word?

MR. BREYER: Well, I'd like to see, too, what Mireille has to say or maybe you take another question, too.

MR. WITTES: Okay.

MR. BREYER: On this one, yes, I mean, I think your last point --

MS. DELMAS-MARTY: We discussed already on that point.

MR. BREYER: Well, there are different areas of the world. You don't have to have a world universal government or anything. There are different places and different places may find something to be gained by this grouping or that grouping and different groupings take place in different ways.

And the E.U. has adopted a form of what we think of as federalism. They don't want to use that word because it has a connotation there, but and we have some fairly successful examples, like when I'm talking about it there to give the example of Dormant Commerce Clause, rather technical, but you see we say that a state cannot start interfering with the interstate commerce because that way law is chaos. They'll all protect their own industries and we won't have a common market. And it's an awfully technical area, so, we often don't know, but Congress has the power, in fact, to change what we say. In fact, it could even delegate that power, which it has done, to the Department of Transportation, and if they say one thing and we say another, they win. Okay. So, there are many, many ways of organizing different groupings for different

purposes and federalism, a whole range of different ways is certainly an important instrument.

MR. WITTES: Mireille?

MR. BREYER: Do you want --

MS. DELMAS-MARTY: In the federal system, remember we had a discussion with Justice Breyer about the margin.

MR. BREYER: Of the margin of appreciation. That's another great --

MS. DELMAS-MARTY: Yes.

MR. BREYER: The margin of appreciation, that's a very, very good tool. That what's they use in the E.U., the European Human Rights Court, and what we say is we don't use a margin, we say we give deference to. And when I worked for Arthur Goldberg, he said that doesn't work. It means that they have a margin of appreciation.

In other words, the same thing if the Federal Communications Commission even is looking at the communications statute and they come to an interpretation, and we say, actually, they know more about it than we do and we ought to pay some attention to what they say. And, similarly, if a state is going to decide certain areas traditionally called police powers and they interpret the state law in a particular way and say it does that, we really listen to that, and even if they're trying to figure out how the state and federal fit together, we may pay some attention to that. They say there are degrees of what she calls the margin of appreciation, but when she steps back, she says that's a wonderful tool because it permits us to have a diversity of cultures which together nonetheless promote certain single values such as rule of law or such as a degree of democracy, a degree of protection of basic human rights, et cetera, while maintaining diversity. That's the point.

MR. WITTES: Vivian, final thoughts?

MS. CURRAN: (No response.) (Laughter)

MR. WITTES: Thank you, all, for coming. Join me in thanking our panel.

(Applause)

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