THE USE OF INTERNATIONAL LAW IN THE AMERICAN ADJUDICATIVE PROCESS

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Thanks very much for the introduction. I'm delighted to be here. Actually, it's my third appearance at a Federalist Society program. I've always found them very interesting, and I suspect this one will be both interesting and provocative.

Now the title that I was given to talk about or "debate"—we'll see which it turns out to be—was the use of international law in the American adjudicative process. That's quite a broad topic, and I wanted to emphasize that right at the beginning, because it includes quite diverse situations: for instance, it includes the use of international treaties and compacts to guide American courts in disputes over international trade, contracts, and the like. The United States, as we all know, has signed and ratified dozens, maybe even hundreds, of international compacts on subjects such as the international sale of goods, the World Trade Organization, the North American Free Trade Agreement, the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, and the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

Now clearly when the U.S. is a party to such contracts, the terms of those agreements will bind our courts. Even when we're not, I doubt that there's much controversy over whether our courts can look at those compacts as evidence of the practices of reasonable persons or nations under particular circumstances. And we also have our own Supreme Court in the area of statutory construction as far back as *Murray v. Schooner Charming Betsy* in 1804 telling us "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains."[13]

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* At the time of these remarks, Judge Patricia Wald was chair of the Open Society Justice Initiative. Judge Wald formerly served on the International Criminal Tribunal for the former Yugoslavia and as Chief Judge of the United States Court of Appeals for the D.C. Circuit. Judge Wald originally delivered these remarks at the Federalist Society National Lawyer's Convention, on November 15, 2003.

1. 6 U.S. (2 Cranch) 64, 118 (1804).

There are, however, two areas where even though it is accepted that international law is relevant, controversy exists as to which sources American judges can look to discover that international law.

The first is the area known as the Alien Tort Claims Act ("ATCA"), which accords jurisdiction to the district courts over torts "committed in violation of the law of nations."[14] Now I recognize there is an initial dispute about whether ATCA confers a cause of action for such torts or whether that would need separate legislation, as the U.S. Government argues in its brief in a case currently awaiting decision by the Supreme Court.[15]

But leaving that aspect aside, there's also been controversy—and I think this is more relevant to the subject of our "debate"—over what sources American judges can look at when deciding what are the elements of such torts that violate the law of nations. In other words, should they look at our own tort law or something called customary international law, which the United States has alleged in an amicus brief authorizes reference to "unratified or non-self-executing treaties, non-binding United Nations General Assembly resolutions, and purely political statements?"[16]

It bears mentioning that American courts have, in fact, said that violations of international law for purposes of the ATCA must be "of a norm that is specific, universal, and obligatory;"[17] the fundamental debate appears to be whether treaties the U.S. has not agreed to abide by, or compacts that it does not accept as self executing or as creating private causes of action, can nevertheless be viewed by courts as evidence of international customary law in deciding whether the elements of a violation of the law of nations has been proven.

Of course, I would agree that caution and thoughtful consideration is needed in classifying documents and resolutions and unratified treaties to see whether they satisfy the definitional requirements of

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14. 28 U.S.C. § 1350 (2000).

15. *See* Reply Brief for the United States as Respondent Supporting Petitioner at 1-2, Sosa v. Alvarez-Machain, 331 F.3d 604 (9th Cir. 2003), *cert. granted*, 72 U.S.L.W. 3370 (U.S. Dec. 1, 2003) (No. 03-339) (arguing that § 1350 is "solely a grant of jurisdiction"). *But see* Brief for the Respondent at 3-4, *Alvarez-Machain* (No. 03-339) (arguing that "the plain words of the statute and the overwhelming weight of the historical evidence" demonstrate that Congress intended for ATCA to create a private cause of action).

16. Brief for the United States of America, as Amicus Curiae at 3, Doe v. Unocal, 248 F.3d 915 (9th Cir. 2001) (Nos. 00-56603, 00-56628), *available at* http://www.hrw.org/press/2003/05/doj050803.pdf.

17. Hilao v. Estate of Marcos, 25 F.3d 1467, 1475 (9th Cir. 1994); *see also* Eastman Kodak Co. v. Kavlin, 978 F. Supp. 1078, 1091 (S.D. Fla. 1997); Wiwa v. Royal Dutch Petroleum Co., No. 96 Civ. 8386 (S.D.N.Y. Feb. 28, 2002).

customary international law for that purpose. That process, however, in my view, has in the main been carried out responsibly by our American judiciary, and it's not a new one.

For hundreds of years, our Supreme Court has recognized the existence of customary international law as that which, while not ensconced in binding treaties, represents norms to which civilized nations feel obliged to conform, and the Supreme Court has identified its sources as "the works of jurists and commentators, who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat. Such works,"—listen to this language—"are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is."[18]

Then the opinion goes on to cite—just to give you some examples—ordinances of foreign states, the opinions of eminent jurists and diplomats in Italy, Argentina, Portugal, and many other countries, French histories on international law, and so on.[19]

In ATCA cases, American courts are acting as the enforcers of international law norms. Like it or not, that appears to be what the original drafters of the ATCA intended. Those norms in turn don't depend, I think, on whether the U.S. has ratified treaties but rather on the evidence that the bulk of civilized nations considers the norm to be binding on them, as expressed in some of these documents.

If that policy bothers some, and I know it does from reading the literature, the refuge should be Congress. As long as the ATCA stays on the books, it seems to me the American courts have an obligation to consult accepted sources of customary international law that have been spelled out in respected international law treatises and in decisions by international courts, such as the International Court of Justice, and as specifically alluded to, in our own Supreme Court.

Now there's a second area in which American courts, this time military tribunals, must apply international law. In this case we're talking about the law of armed conflict or international humanitarian law.

The U.S. Government, as I read its statements, agrees that these new tribunals, the military tribunals that are going to be set up to try the cases of Guantanamo detainees, are designed to try and to punish persons for violations of the international law of armed conflict, not

18. The Paquete Habana, 175 U.S. 677, 700 (1900).
19. *Id.* at 686-708.

our own domestic laws or even our own versions of international law. In fact, the Department of Defense ("DOD") has published guidelines on the elements of these offenses to be tried in the military tribunals and purports to base them on internationally accepted definitions of war crimes.[20] This claim has, however, itself become a matter of some dispute, as many of you know. Commentators on the original draft of the definition of these "war crimes," including organizations which I know are dear to some of your hearts, like Human Rights Watch, National Association of Criminal Defense Lawyers, and the Lawyers Committee for Human Rights, objected that many crimes of war were left out, including torture and inhumane treatment of prisoners and sexual offenses against women other than rape. Some commentators also said that for other offenses the "customary law of war" had been extended beyond its legitimate boundaries as defined in international law for those offenses. For example, the Lawyers Committee said that the executive did not have the power under our own Constitution to unilaterally expand the definitions of war crimes. That would be the prerogative of Congress alone.[21]

Now once these tribunals begin operations, I would suspect that some of these same issues are going to resurface in defense motions in individual trials. We'll have to see what happens. But I think that whether or not Congress down the road decides to change or revise definitions of the war crimes that are tried in these tribunals, at the present time the Government is purporting to rely upon international law in defining them. In fact, the DOD officials who held a press conference on the regulations emphasized again and again that they were incorporating what they said were internationally accepted definitions of the crimes to be tied in the military tribunals.

One of the interesting questions that will therefore arise for the U.S. authorities is the appropriateness, or indeed some would say the necessity, of consulting interpretations of those internationally accepted definitions by international criminal courts, courts which have been set up with the help of the U.S. and in most cases supported by the U.S. Government. In short, when it comes time to interpret one

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20. *See* DEP'T OF DEF., MILITARY COMMITTEE INSTRUCTION NO. 2, at 1 (2003) (stating that "[t]hese crimes and elements derive from the law of armed conflict, a body of law that is sometimes referred to as the law of war"), *available at* http://www.defense.gov/news/May2003/d20030430milcominstno2.pdf.

21. *See generally* LAWYERS COMM. FOR HUMAN RIGHTS, TRIALS UNDER MILITARY ORDER: A GUIDE TO THE FINAL RULES FOR MILITARY COMMISSIONS (2003) (arguing, *inter alia*, that the jurisdiction of the military tribunals is overbroad), *available at* http://www.humanrightsfirst.org/us_law/a_guide_to_the_final_rules.pdf.

of those definitions, in the DOD guidelines of what constitutes a war crime in the context of the military tribunals, are those tribunals going to look to international court interpretations of those war crimes definitions that have been brought down by courts the U.S. supports, like the Yugoslav tribunal on which I served or the Rwanda tribunal or even the Sierra Leone tribunal, which the U.S. also supports? It is difficult to see how they can avoid doing so.

Now the United States is also claiming to rely, at least in part, on international law as the basis for the treatment of so-called enemy combatants. I'm not going to get into the merits of this subject both for the reason that Judge Wilkinson has had a hand certainly in *Hamdi v. Rumsfeld*, which is a pending decision in the Supreme Court,[22] and because I myself have been involved in two amicus briefs involving enemy combatants.

The issue these cases raise that is relevant for the debate is whether the United States in fact is following international law when it maintains that these designations of enemy combatants can be made by the Executive alone with no review in any forum—civilian court or military tribunal—of the alleged facts underlying the designations. Again, the government maintains that its position is fully supported by international law. I only want to emphasize that the relevant question for this debate is whether our domestic courts should look to the definitions of international or even foreign courts for guidance on questions such as this.

The Supreme Court, which has heard arguments on three of these enemy combatants cases, may answer that question before the Term is out.[23] I note that the briefs in all of these cases[24] are chocked full of references to the Geneva Conventions, to the pronouncements of the Organization of American States ("OAS"), to the positions of the International Red Cross, to the U.N. Commission on Human Rights, and to United Kingdom Court of Appeals decisions.[25]

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22. 316 F.3d 450 (4th Cir. 2003) (Wilkinson, C.J.), *cert. granted*, 72 U.S.L.W. 3446 (U.S. Jan. 9, 2004) (No. 03-6696). Judge Wald delivered her remarks before the Supreme Court granted certiorari in *Hamdi* and its companion case, *Padilla v. Rumsfeld*, 352 F.3d 695 (2d Cir. 2003), *cert. granted*, 72 U.S.L.W. 3486 (U.S. Jan. 23, 2004) (No. 03-1027).

23. *See supra* note 10.

24. Al Odah v. United States, 321 F.3d 1134 (D.C. Cir. 2003), *cert. granted*, 72 U.S.L.W. 3327 (U.S. Nov. 10, 2003) (No. 03-334).

25. *See, e.g.*, Brief Amicus Curiae of Law Professors, Former Legal Advisors of the Department of State and Ambassadors, Retired Judge Advocates General and Retired Military Commanders, and Other International Law Specialists in Support of Respondents at 4 n. 5, 10 n. 15, Rasul v. Bush, *cert. granted*, 72 U.S.L.W. 3327 (U.S. Nov. 10, 2003) (Nos. 3-334, 03-343) (citing, *inter alia*, to positions of OAS and the International Red

Finally, the United States has "unsigned" the Rome statute setting up the International Criminal Court and has pursued a course of very vigorously and successfully seeking bilateral so-called Article 98(2) agreements with over 70 nations in the world to ensure those nations will not turn over any Americans (or certain allied nationals called "covered persons") who are charged by the ICC to the Court, but rather give them over to U.S. authorities.[26] There is an implied, I believe, obligation, not an explicit but an implied obligation, that if these people are turned over pursuant to these 98(2) agreements, that some investigation, and in appropriate cases trial or prosecution, will take place under our own domestic laws. But here again the question is going to arise as to whether the United States will follow international law precedent in determining the elements of such crimes, or whether we even have adequate domestic legislation to try them for the kind of international law violations with which they were originally charged. Many people feel our current domestic war crimes legislation doesn't cover anywhere near the swath of crimes that are covered by the international tribunals.

Most of these war crimes derive from the Geneva and Hague Conventions and the customary law of war, and it would seem to many highly appropriate for us to look at how others who have joined those conventions or made judgments on what customary law covers have said about the elements of such crimes.

Finally, I'm going to turn to the area that seems to be getting the most attention: the use by American judges, particularly Supreme Court Justices, of decisions by the high courts of foreign countries as guides to or as persuasive authority for decisions involving our own Constitution. Several of the Justices have spoken on the subject. I'd say three or four in favor of, and three against, so far, publicly. The commentators have rushed in to join both sides of the debate.

It's interesting that back in 1989 Chief Justice Rehnquist said, "[n]ow that constitutional law is solidly grounded in so many countries, it is time that the United States courts begin looking to the decisions of other constitutional courts to aid in their own deliberative process."[27] I fully recognize, before somebody gets up to object, that

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Cross), *available at* http://www.humanrightsfirst.org/us_law/inthecourts/gitmo_briefs/Law_Professors2.pdf.

26. *See* Christopher Marquis, *U.S. Is Seeking Pledges to Shield Its Peacekeepers from Tribunal*, N.Y. TIMES, Aug. 7, 2002, at A1.

27. William Rehnquist, *Constitutional Courts: Comparative Remarks*, *in* GERMANY AND ITS BASIC LAW: PAST, PRESENT, AND FUTURE—A GERMAN-AMERICAN SYMPOSIUM

his dissent in *Atkins v. Virginia* took quite the opposite tack,[28] but he did make the original quote back in 1989. Justice O'Connor has said as well that "[n]o institution of government can afford any longer to ignore the rest of the world."[29] Justices Ginsburg and Breyer have also spoken in a similar vein.

More specifically, Justice O'Connor has predicted that American courts will "rely increasingly on international and foreign law in resolving what now appear to be domestic issues, as we both appreciate more fully the ways in which domestic issues have international dimension, and recognize the rich resources available to us in the decisions of foreign courts."[30]

Now until very recently, citations and references to foreign court decisions or even foreign non-decisional material by American judges have been fairly sparse. But in at least two major cases in the past three years, they have been prominently cited. In *Atkins*, the majority cited—albeit in a footnote—a European Union amicus brief which dealt with the execution of mentally retarded individuals as evidence of what they called the overwhelming disapproval of the "world community" to that practice.[31]

In *Lawrence v. Texas,* last Term's sodomy case, Justice Kennedy characterized "the right that petitioners seek in this case"—that was to consensual sex in their own homes—"has been accepted as an integral part of human freedom in many other countries," citing several cases from the European Court of Human Rights in Strasbourg.[32] Several of the other Justices' concurrences and dissents have also included

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411, 412 (Paul Kirchhof & Donald P. Kommers eds., 1993).

28. *See* 536 U.S. 304, 322 (2003) (Rehnquist, C.J., dissenting).

> I write separately . . . to call attention to the defects in the Court's decision to place weight on foreign laws . . . in reaching its conclusion. The Court's suggestion that these sources are relevant to the constitutional question finds little support in our precedents and, in my view, is antithetical to considerations of federalism, which instruct that any "permanent prohibition upon all units of democratic government must [be apparent] in the operative acts (laws and the application of laws) that the people have approved."

Id. (internal citations omitted).

29. Justice Sandra Day O'Connor, Remarks at the Southern Center for International Studies (Oct. 28, 2003), *available at* http://www.southerncenter.org/OConnor_transcript.pdf.

30. *Id.*

31. *See* 536 U.S. at 316 n.21 (citing the Brief for The European Union as Amicus Curiae at 4, State v. McCarver, 462 S.E.2d 25 (N.C. 1995), *cert. dismissed*, 533 U.S. 975 (2001), as evidence for the proposition that "within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved").

32. 123 S.Ct. 2472, 2483 (2003).

foreign citations in that and other cases.

But let me clarify two points. One, there are two kinds of foreign law that get cited, and sometimes there's a confusion about which is involved. One, of course, is decisions of foreign courts; the other is non-decisional materials, such as statements by the executive and parliaments of other countries. The second point is that the decision of a single foreign court, or even several foreign courts, is not the kind of law of nations or international law that we've been talking about in the other contexts I have mentioned. Thus evaluating the trend toward the use of foreign materials in American courts both descriptively and judgmentally often raises different questions depending on the context.

For instance, as to non-decisional material, the relevant question might be should our courts care about the results or conclusions or opinions which are held abroad about a practice whose legitimacy is before them? As to decisional material, the question might be different; e.g., is that decision, given many of the factors I'm going to discuss, persuasive or relevant in construing our own Constitution? In many instances, the answers might be very much different in the two situations.

This is not to say that there are not severe critics of both the growing practice of citing to foreign decisions and foreign or international expressions of opinion about disputes heard in our courts. Justice Scalia, with whom Chief Justice Rehnquist agreed in the main, dissenting in *Atkins* scored as—and it has now become a famous quote—"irrelevant . . . the practices of the 'world community,' whose notions of justice are (thankfully) not always those of our people."[33]

Justice Thomas has also warned against "impos[ing] foreign moods, fads, or fashions on Americans."[34] Thomas Sowell, writing in the *Wall Street Journal*, said, "It is a symptom of how little regard some jurists have for the fundamental right of the American people to govern themselves that what foreigners have chosen to do should be taken into account in American law."[35]

Judge Bork, in his new book *Coercing Virtue*, complained that "legal interpretations of constitutions with very different texts and histories are now giving way to common attitudes expressed in

33. 536 U.S. at 347-48 (Scalia, J., dissenting).

34. Foster v. Florida, 537 U.S. 990 (2002) (Thomas, J., concurring).

35. Thomas Sowell, *Who Needs Europe?*, WALL ST. J., Aug. 25, 2003, at A10.

judicial rulings . . . from the United States to Germany to Israel, from Scandinavia to Canada to Australia."[36]

Again, quoting from Judge Bork, "[w]e are witnessing the growth of an international constitutional common law" that he believes is illegitimate. "The American Constitution," he argues, "was framed and amended in the light of specific American history, culture, and aspirations. It has a meaning given to it not only by judicial decisions but by the practices of national and state governments. It is not apparent," he concluded, "why an American court should take guidance from the decisions of the courts of Jamaica, India, and Zimbabwe, reflecting their very different histories, cultures, aspirations, and practices."[37]

There's some truth in Judge Bork's critique, though I differ with the inference he draws from those facts with which I agree. It's hard for me to see that the use of foreign decisional law is an up-or-down proposition. I see it rather as a pool of potential and useful information and thought that must be mined with caution and restraint.

I point out here that other disciplines certainly draw from foreign-created research: the medical community, physics, engineering, even regulators, although in many cases the milieus in which those decisions or those norms are created for the other disciplines are very different from ours. But I do think Judge Bork is right to the degree that judicial decisions of constitutional magnitude are made in a wider context than the stark statement of the actual legal issue often suggests.

That context includes the national jurisprudence as a whole, the nation's fundamental charter, and its prior decisions construing that charter over the history of the country. Principally, I think that the concept of the role of the judiciary vis-à-vis other branches of government and even the customs and attitudes of the people may vary from country to country as well. Foreign decisions also reflect different procedures that another country may follow. For instance: were the decisions made on the basis of a factual record through adversarial procedures or was the foreign decision made as an abstract decision, which some foreign constitutional courts are allowed to do, or even rendered as an advisory opinion? Did all interested parties

36. ROBERT H. BORK, COERCING VIRTUE: THE WORLDWIDE RULE OF JUDGES 11 (2003).

37. *Id.* at 137.

have a stake in the decision? Are judges in the system independent? Do they have a reputation for integrity? Are they allowed to pursue their own notions of natural law and morality rather than being bound by legislative or judicial precedents? Or are the foreign justices confined by restraints similar to our own, at least in theory?

In my view, all of these factors and probably others *sui generis* to the issue should affect the weight that our American courts give to foreign decisions. But to my mind, they don't militate towards any form of censorship or bar to their use, just as they don't militate towards a full-faith-and-credit regime for their use.

Candidly, American judges are used to making judgment calls on the caliber of the courts and even sometimes of the individual judge authors whose decisions they decide to cite or rely upon, assuming the decisions are not binding precedent in their own circuit. Justice Breyer recently said, for instance, that the Court finds "particularly instructive opinions of former Commonwealth nations insofar as those opinions reflect a legal tradition that also underlies our own Eighth Amendment."[38]

I don't think that using foreign decisions should be, as my former colleague Harold Leventhal said about legislative history, "looking over a crowd and picking out your friends."[39] But I do think that American judges are in the habit of making judicious selection of the precedents in the context of the court and the judges that write them. And I would trust them to do so in the case of foreign court judgments as well.

I think there are also really interesting questions about whether or not, if American judges use foreign law, they should give decisions of so-called international courts or regional courts more weight than those of single national courts because they represent the input of several nations, pointing out again that Justice Kennedy in *Lawrence* used cases from the European Court of Human Rights in Strasbourg.

Another interesting question is what the United States should do if the International Criminal Court, which is already up and running even without our support, starts issuing decisions. Can it cite those decisions? Can it research those decisions? I point to the American Service-Members' Protection Act (ASPA), which says that "no

38. Knight v. Florida, 528 U.S. 990, 997 (1999) (Breyer, J., dissenting); *see also* Duncan v. Louisiana, 391 U.S. 145, 149 n.14 (1968).

39. Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court*, 68 IOWA L. REV. 195, 214 (1983).

agency or entity of the United States Government . . . including any court"—that's right in the statute itself—"may provide support to [or use] funds appropriated under any provision of law . . . for the purpose of assisting the . . . prosecution of any United States citizen . . . by the International Criminal Court."[40] Does that include judge and law clerk time spent reading and searching for foreign judgments dealing with cases brought before them? It's an interesting question; we'll see what happens down the line.

All of this comes down, I think, to my own view, which advises caution and restraint in the use of foreign decisions, but not an absolute bar. I think at bottom I certainly trust our American judges to make the decisions about which cases are truly relevant.

Finally, I want to point out that our original Founding Fathers did not display, so far as I can see, any anathema to looking abroad for guidance. Madison in the Federalist Papers asked of the embryonic United States, "how many errors and follies would she not have avoided, if the justice and propriety of her measures had, in every instance, been previously tried by the light in which they would probably appear to the unbiased part of mankind?"[41] If you look at John Marshall's jurisprudence, there are citations to a great many foreign authors and there are several cases in which he discusses English precedent. Even in *Brown v. Board of Education*, the United States' brief cited English Chancery cases to show the potential breadth of discretion that could be given to district courts in equity to supervise segregated cases.

So in one concluding sentence, I do believe that the trend for American judges to look at, in full context, foreign decisions certainly not as precedent but for knowledge as to how other judges have dealt with similar problems is one that should be encouraged. I believe that the law shouldn't be the only discipline that is totally isolated from the rest of the world. So I would say that judicial use of foreign decisions and other foreign law material, as well as international law, should be deliberate and cautious and subject to much judicial restraint, but it should definitely move ahead.

Since World War II the U.S. has been investing billions of dollars and thousands of envoys to spread the "rule of law" and human rights across the globe. Such an effort can only be justified on the premise that citizens of most countries have common aspirations, a sense of

40. 22 U.S.C.S. § 7423 (Lexis Supp. 2003).

41. THE FEDERALIST NO. 63, at 350 (James Madison) (Clinton Rossiter ed., 1999).

dignity and worth, and intuitions and feelings about justice. Why then would we consciously shut the door to American judges on looking at the law of these countries as it affects the basic human needs and dilemmas of their people? There are, moreover, global movements, events, and trends that sweep across many nations in the same time periods. For example, books have been written as to how *Brown v. Board* reflected the U.S. need after the war to show the world it was not a racist nation; the antislavery campaign and the women's movement were international; our national advocates drew heavily on their foreign counterparts for ideas and arguments. I like to think the increasing interchange among judges around the world is not a kind of conspiracy to impose the views of a few on the many but rather a genuine search for common denominators of basic fairness governing relationships between the governors and the governed.

Thank you.