

BIIJ

2006

Brandeis University

Brandeis Institute for International Judges

Complementarity and Cooperation: International Courts in a Diverse World

Including Topics in Ethical Practice



The International Center for Ethics, Justice and Public Life



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The International Center for Ethics,
Justice and Public Life

Brandeis University
Waltham, Massachusetts



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Foreword

The Brandeis Institute for International Judges (BIJ) has by now become an established component in the interaction among judges from different international courts and tribunals. The fourth BIJ was held from 3 to 6 January 2006 in Senegal.

A few of the participants had attended the BIJ before, while the others were present for the first time. For someone with a certain experience of these institutes, their most striking feature is the immediate interaction that occurs among persons who meet for the first time but have in common the same responsibility and commitment to international justice. As always, the discussion was lively and different perspectives were brought forward. Views were exchanged not only in the formal sessions but also through interactions in more informal settings.



A group of massive baobab trees, Senegal

On this occasion, a very special perspective was added to the gathering – what I call the “baobab perspective.” On our way to the institute venue, we drove through an area dotted with mighty baobab trees. Some of them, we were told, were more than a thousand years old. Feeling the bark of one of these old trees, I realized that when it was a little sprout, we did not yet have codified laws in my country, Sweden.

My reflection, which I later shared with participants, was that what we are trying to achieve in the international justice system will take time, just as it takes time for these majestic trees to grow, cell by cell. To establish the rule of law at both the national and international level is something that cannot be achieved overnight. It is a task that will require the dedicated efforts of many over a long period of time. I am not suggesting that it should take a thousand years to accomplish what we are striving for. But we must be realistic and accept that creating such a system worldwide is a gigantic mission in which we, sadly, also experience setbacks.

Many can contribute to this work in different ways. One such contribution is the work of the BIJ. We thank the Brandeis Institute and its dedicated staff for offering the opportunity for international judges to come together to discuss ethics and other important problems and themes of common concern. We wish them the very best for the future in their unique contribution to the enhancement of international justice.

Hans Corell

Former Legal Counsel of the United Nations and former Judge of Appeal

About the Institute

The International Center for Ethics, Justice and Public Life hosted its fourth Brandeis Institute for International Judges (BIJ) from 3 to 6 January 2006, assembling 17 participants from nine international courts and commissions for an intensive period of confidential dialogue and debate. The institute took place in Dakar, Senegal. This venue was chosen to acknowledge both the recent establishment of the African Court of Human and Peoples' Rights and the prominence of African conflicts in the judicial proceedings of many participating courts and tribunals, including the International Court of Justice, the International Criminal Tribunal for Rwanda, the Special Court for Sierra Leone, and the International Criminal Court.

The institute was co-directed by Richard Goldstone, former Chief Prosecutor of the International Criminal Tribunal for the former Yugoslavia and retired Justice of the Constitutional Court of South Africa, and by Linda Carter, Professor of Law at the University of the Pacific McGeorge School of Law.

Former U.N. Under-Secretary-General for Legal Affairs, Hans Corell, gave the institute's opening presentation, addressing the ways in which international courts can cooperate and complement each others' work. Claire L'Heureux Dubé, retired Justice of the Supreme Court of Canada, further explored the interconnectedness of judicial systems by leading a discussion on the blending of civil law and common law practices within a single court, while Linda Carter discussed the role of alternative processes, such as the *gacaca* courts in Rwanda, in bringing about justice and reconciliation in post-conflict situations. Jane Hale, Professor of French and Comparative Literature at Brandeis University, asked the participants to approach their work from the perspective of the humanities, drawing parallels between the interpretation of literature and the interpretation of law. An exploration of the relationship between local cultures and the international legal order was led by Leigh Swigart, anthropologist and Associate Director of the International Center for Ethics, Justice and Public

Life. Justice Goldstone led two sessions, the first on the challenge that terrorism poses for international law and the other on the delicate balance between achieving peace and justice that international criminal courts are called upon to consider. Chidi Anselm Odinkalu, senior legal officer for the Africa Open Society Justice Initiative, led a further examination of the links that exist in the international legal order and the challenges to creating a seamless system. Finally, Justice L'Heureux-Dubé led a discussion on the topic of judicial dialogue, focusing on the ways in which both international and domestic judiciaries can interact and assist one other through the sharing of jurisprudence as well as experiences.

BIJ 2006 also continued the tradition of exploring the ethical aspects of judicial work, devoting an afternoon to the discussion of "Ethics and the International Judge." Daniel Terris, Center director, led this session, along with Navanetham Pillay of the International Criminal Court, Fausto Pocar of the International Criminal Tribunal for the former Yugoslavia, and John Hedigan of the European Court of Human Rights. The discussion took as its point of departure the notion that the judiciary in many contemporary societies might be seen in the role of a "secular papacy." In other words, judges may hold the power to establish in the public consciousness what is "right" and "moral," much as religious institutions have done and continue to do. Participants debated the basis of this notion and the implications of such power, if it indeed exists, on the work of domestic and international judges.

Participants also had several opportunities to explore Senegal while attending BIJ 2006. The group made a moving visit to the Maison des Esclaves on the Island of Goree, a former transit point for Africans sold into slavery on their way to the New World. Several institute days were spent on the seashore in Mbodiene, three hours south of Dakar, which is situated beside a lagoon full of migratory birds. At the end of the program, many participants made an unforgettable trip into the delta of the Saloum River, surrounded by mangrove trees and far from

roads, electricity, and the sounds of modern life. All of these outings provided a time and space for judges and commissioners to continue their conversations, whether about international law, local vegetation and wildlife, or their national cricket teams. One of the important outcomes of the BIIJ is the collegial ties that are engendered during the intensive institute period, ties that are critical to the formation of a professional identity for international judges.

BIIJ 2006 provided participants with a chance to share their expertise and learn from others in a spirit of open exchange and exploration. The conversations begun will no doubt continue well into the future, serving to enhance further cooperation and dialogue across courts and among those who serve on them. Such collaboration will ultimately contribute to the promotion of justice and human rights across the globe.

Participants

African Commission on Human and Peoples' Rights

- Musa Ngary Bitaye (The Gambia)
- Reine Alapini Gansou (Benin)

Court of Justice of the European Communities

- Egils Levits (Latvia)
- Luís Miguel Pojares Pessoa Maduro (Portugal)

European Court of Human Rights

- John Hedigan (Ireland)

Inter-American Commission of Human Rights

- Clare K. Roberts (Antigua)

International Criminal Court

- Fatoumata Dembele Diarra (Mali)
- Navanethem Pillay (South Africa)

International Criminal Tribunal for Rwanda

- Charles Michael Dennis Byron (St. Kitts & Nevis)
- Andrézia Vaz (Senegal)

International Criminal Tribunal for the former Yugoslavia

- O-Gon Kwon (South Korea)
- Theodor Meron (United States)
- Florence Ndepele Mwachande Mumba (Zambia)
- Fausto Pocar (Italy)

International Tribunal for the Law of the Sea

- Tafsir Malick Ndiaye (Senegal)
- Dolliver Nelson (Grenada)

Special Court for Sierra Leone

- Arachchige Raja Nihal Fernando (Sri Lanka)

Co-Directors

- Richard Goldstone, former Justice of the Constitutional Court of South Africa and former Chief Prosecutor of the ICTY (South Africa)
- Linda Carter, Professor of Law and Director of the Criminal Justice Concentration at the University of the Pacific, McGeorge School of Law (United States)

Session Leaders/Facilitators

- Hans Corell, former Under-Secretary General for Legal Affairs, United Nations (Sweden)
- Claire L'Heureux Dubé, retired Justice of the Supreme Court of Canada (Canada)
- Jane Alison Hale, Associate Professor of French and Chair of the Comparative Literature Program at Brandeis University (United States)
- Chidi Anselm Odinkalu, Senior Legal Officer for the Africa Open Society Justice Initiative (Nigeria)
- Gregory S. Weber, Professor of Law at the University of the Pacific, McGeorge School of Law (United States)

Staff of the International Center for Ethics, Justice and Public Life

- Daniel Terris, Director
- Leigh Swigart, Associate Director
- Christopher Moore, Communications Specialist

The 2006 Brandeis Institute for International Judges consisted of sessions on a wide variety of topics, each of which touched directly on the work of the international judiciary. The extensive discussions were interconnected and revolved around four key themes:

- The role of complementarity and cooperation in the global legal system
- Current challenges to international law: responses to terrorism, and balancing peace and justice
- The impact of legal and cultural diversity on international justice
- The benefits of judicial dialogue

The following summarizes the discussions of these key themes.

The Role of Complementarity and Cooperation in the Global Legal System

During the institute, the ideas of complementarity and cooperation were examined through a variety of lenses. Given the professional positions of the participants, the relationships that currently and might ideally exist among the institutions they represent were of great interest. International courts and commissions do not operate in a vacuum, however. They are affected in one way or another by the work of national courts and the domestic laws

that regulate them, as well as by processes that operate outside of judicial spheres to bring about justice and reconciliation in alternative or locally recognized ways. International courts thus need to consider not only the horizontal links that exist within the international legal order, but also those that could be defined as vertical – between international and national or judicial and non-judicial processes.

As a starting point, participants considered the question, “Does an international legal order really exist?” Some have argued that what the world has today is simply an array of international judicial institutions, each operating on its own jurisdictional turf without much regard for the others. Several BIJ participants agreed with this view, although they pointed out that growing dialogue among judges is helping to create an integrated system, even if it is only in its beginning stages. Others went further in asserting that there already *is* an international legal system, but it is still under formation and its ultimate shape will not become clear for many years to come. This is the “baobab perspective” referred to in the Foreword.

Whether a real system exists at the moment or not, it was clear to all participants that there is often a lack of coherence in the way that international justice is pursued. For example, there is no recognized pattern of deferral among courts, a situation that has not



Participants at BIJ 2006 discuss the development of a unified international judicial system and ways to strengthen it.

yet created turmoil but could potentially undermine the legitimacy of international courts in the eyes of the public. The example discussed by the judges at BIIJ 2006 was that of Serbian genocide trials before the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Court of Justice (ICJ). In *Bosnia-Herzegovina v. Serbia-Montenegro*, what are the potential implications of the ICJ ruling on Serbia and Montenegro's state responsibility for genocide in a way that is inconsistent with the findings of the ICTY in cases assessing the criminal responsibility of certain state officials? Such a decision might create questions about the finality and legitimacy of the earlier ICTY decisions. Despite such risks, few practitioners of international law seem to think that establishing a formal hierarchy for deferral among courts is advisable or even possible. As several participants noted, judges have a natural instinct to listen and defer to one another, without formal statutes telling them to do so. Formalizing this practice may, in fact, stunt its development.

Judges have a natural instinct to listen and defer to one another, without formal statutes telling them to do so. Formalizing this practice may, in fact, stunt its development.

Several judges disagreed with this notion, however, stating that it may not be enough to rely on "judicial instinct" in the case of conflicting jurisprudence. Problems of conflicting legal interpretation also arise when international bodies have overlapping jurisdictions, either in terms of specialization or territory. The International Tribunal for the Law of

the Sea (ITLOS), for instance, has had jurisdictional overlap with both the World Trade Organization (Conservation and Sustainable Exploitation of Swordfish Stocks, *Chile v. European Community*) and The European Court of Justice (MOX Plant Case, *Ireland v. United Kingdom*). To solve such dilemmas, judges would be well served by having something more formal than instinct to draw upon. Should there perhaps be a written or unwritten principle, some suggested, that a court defer to the interpretations of a more specialized tribunal, or one with greater territorial jurisdiction?

Participants also examined whether coherence in the international judicial system enhances its efficacy. It was pointed out that coherence does not necessarily guarantee that judicial decisions will be implemented. This is a problem that the African Commission on Human and Peoples' Rights (ACHPR) faces regularly, and the commissioners in attendance expressed their hope that the new African Court on Human and Peoples' Rights would receive more respect from African states than has their own institution. Another African participant noted wryly that if national governments do not follow their own courts' decisions, they are even *less* likely to respect the decisions of international courts. He added, "Traditions of compliance have to originate in the habit of political leaders who see them as having a place in democratic and open societies."

This discussion of coherence led to a related topic – the nature of precedent in the international legal system. Some felt that precedent could potentially serve as the chief organizing principle for the entire system. Most participants agreed that precedent should have a role in international judicial thinking, but there was disagreement about what this role should be and how it should be established. Judges from criminal courts might find a different value in precedent pertaining to the general jurisprudence of international law – coming, for example, from an ICJ decision – and precedent derived from a decision of a parallel criminal tribunal.

It would thus be difficult to find a “formula” for how these different precedents should be regarded. It was suggested that the decisions of specialized tribunals, like ITLOS, might be given preference in cases before other courts addressing these same areas of special competence. One judge articulated the ambiguity of the role of precedent, and the discretionary power of judges to evaluate it, in this way: “Precedent *should* be followed. But judges should decide whether the issue is such that precedent should be binding, authoritative, persuasive, or simply worth noting.”

It was observed that legal theory normally bases the binding value of precedent not on blind legal loyalty or hierarchy but on certainty, coherence, and uniformity. These qualities can be recognized in different contexts but are only binding within a particular system. The extent to which different international courts will be bound to each other’s decisions will thus depend on the extent to which these courts are part of the same order. One might ask, for example, whether the WTO is a self-contained regime or whether it should defer to the environmental requirements found in other legal regimes, such as those established by treaties. This raises some fundamental questions about the extent to which courts, tribunals, and other dispute resolution bodies are part of the same legal order. It also brings us back full circle to the initial question that participants attempted to answer – does an international legal order exist? Perhaps the recurrence of this question signifies that such an order is truly under formation but still remains to be defined.

The apparent fragmentation that international law is undergoing was another issue that participants discussed with great interest. Noted signs of this fragmentation were: 1) the recent creation of several international courts and tribunals; 2) the fact that international law is becoming increasingly specialized or compartmentalized; and 3) the seemingly arbitrary division between “international law” and “human rights law.” In relation to the latter point, one participant asserted that human rights law should not



BIJ participants, presenters, and staff pose for a group photo on Goree Island off the coast of Dakar.

be seen as a subset of international law but rather as its very foundation. At the same time, the number of international courts in existence today makes it sometimes unclear where one should go to enforce certain human rights, such as the right to self-determination or collective rights. Another participant suggested that the international legal “system” is a fiction since it fails to include non-state actors, despite the fact that many such actors are involved in disputes that come before international courts. This was countered with the assertion that only states have the power and responsibility to protect the rights of citizens and enforce the rule of law, so judicial procedures must necessarily engage states and not lower-level organizations or groups.

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Not all participants agreed, however, that fragmentation in international law is a problem. It might instead be seen as an opportunity for increased cooperation. In particular, there is no need to establish a formal hierarchy of authoritativeness among international courts. One judge noted:

I, for one, think that the problem of fragmentation is not very serious. We are still in the early stages of the development of international courts and tribunals, and it does not matter if we do not have perfect coordination. Let's grow and multiply. We see that there is a new sort of common law cooperation emerging even without formal agreements. Look at the Special Court for Sierra Leone. Look at how much it is drawing on the jurisprudence of the ad-hoc tribunals. This is without written agreements, which would be difficult to conclude. The reality is that we are constantly cross-fertilized intellectually by what is happening in other courts.

“There’s no need to have a formal treaty or agreement to tell judges how much authority they must give to a particular court’s judgment. In fact, this would be bad; it would hamper judicial freedom.”

Another judge agreed, adding her own viewpoint:

I’m not worried about fragmentation either. Judges are thinkers and researchers. Judges like to know about the latest decisions in the world and how they are being received. There’s no need to have a formal treaty or agreement to tell judges how much authority they must give to a particular court’s judgment. In fact, this would be bad; it would hamper judicial freedom.

Discussions on horizontal links among international judicial institutions were interspersed with references to the vertical links that exist between international and national judiciaries. Indeed, the two spheres cannot be separated. If the fragmentation of international law poses a challenge to the global legal system (a notion that not all agree upon in the first place), it was suggested that complementarity and cooperation between international and national judiciaries would serve to lessen the burden placed on this system.

All participants agreed that the complementarity required by the Rome Treaty – the agreement that the International Criminal Court (ICC) will only exercise jurisdiction over a case if the state that has jurisdiction over the matter is unwilling or unable to proceed – benefits the states that have ratified it. Domestic law must often be changed to conform to the treaty’s statutes, thereby raising the laws of many countries to widely accepted international standards. More generally, it was noted that the rule of law is best established at the domestic level. By the time a matter reaches an international court, opportunities for improving national justice are greatly limited. As one participant expressed it, “Once the blue helmets are called in, it is already too late.” However, it was noted that international and mixed (international/national) tribunals are increasingly making efforts to improve domestic justice in the countries within their jurisdictions.

What citizens need in their own countries are good laws, good training, and good people – lawyers, judges, and, very importantly, administrators. Few people will ever come into contact with organs of international law, it was noted. But everyone will inevitably come into contact with their own governments – with tax authorities, the police, social services, and so on. If the rule of law operates at this level, the likelihood of violations of international law taking place is minimized. The more that can be done at the national level, the less international courts and tribunals will have to do.

It has been argued that if the ICC complementarity principle really works, then the court itself should have no “business.” All prosecutions will have taken place successfully at the national level. Some participants felt, however, that the ICC needs to undertake a case soon, simply to demonstrate to the public that it is credible and viable.¹ The first ICTY prosecution of Dusan Tadic was invoked; while he was admittedly not the most important of potential defendants, his prosecution for war crimes in the Balkans showed that the ad-hoc tribunal was functioning and should be taken seriously.

While the ICC fosters national adjudication of crimes through the principle of complementarity, other institutions encourage national adjudications through a requirement that litigants exhaust domestic remedies before a case can be heard in the international forum. For example, the European Court of Human Rights (ECHR) calls for a potential litigant to first exhaust domestic remedies, as does the African Commission. These requirements bring with them, of course, certain difficulties. In the human rights context, international courts must determine whether national judicial processes have been “genuine,” that is, fair and impartial. In the criminal context, issues can arise regarding the existence of domestic laws that ensure prosecution to the full extent of the law, whether the sentences delivered are reasonable by international standards, and whether any amnesties have been applied. Moreover, most international law treaties require implementation by domestic legislation, and all contemplate some level of domestic enforcement. Participants agreed that the entire system of international law depends upon the idea of complementarity in its broadest sense.

BIIJ participants also had the opportunity to examine processes that are not strictly judicial but operate in tandem with courts. These processes include truth and reconciliation commissions and commissions of inquiry, both of which have been utilized in a number of post-conflict societies in recent decades. There is currently a trend to combine judicial and non-judicial



Judge Florence Mumba of the International Criminal Tribunal for the former Yugoslavia shares her thoughts during a session at BIIJ 2006.

processes in such situations, South Africa and Sierra Leone being prime examples. Participants were asked to contemplate the role of these sorts of alternative forums and consider how they can be combined with conventional judicial work to achieve the maximum benefit for society.

The point of departure for these discussions was the case of *gacaca*, the Rwandan grass roots “courts” that have been established to examine the responsibility of thousands of suspected *génocidaires* currently detained in prison. The rationale for the creation of *gacaca* was the immense number of individuals under arrest - estimated at 100,000 - who needed to undergo some sort of process in order to be reintegrated into society. Clearly, the Rwandan national judiciary could not handle this number of prosecutions, especially given the number of judges, lawyers and other legal staff who were lost during the genocide itself.

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It was noted that *gacaca* is more akin to a truth and reconciliation commission than a court. Many felt that *gacaca* does not share enough fundamental characteristics of a judicial process to qualify as such. Although the need for some alternative to a judicial process was clear, the consensus was that “*gacaca* at best promotes approximate justice.” Still, some BIIJ participants appreciated the work that *gacaca* is performing, especially its attempts “to put into practice a system close to local ways of dealing with conflict.”

The potential for the political manipulation of *gacaca* was a concern expressed by several participants. The experience of the South African Truth and Reconciliation Commission shows that alternative processes must be public and highly transparent in order to avoid manipulation by those in power. It was asked whether *gacaca* was not a form of “victor’s justice,” with only Hutu detainees coming before *gacaca* judges. It was also asked whether the process actually succeeds in bringing about reconciliation, or whether it was just an expedient way of emptying prisons. Although *gacaca* promotes the confession of crimes and the demonstration of remorse as a way of promoting community harmony, it has been found that defendants tend to admit to the minimum crime

that will get them out of prison and subsequently back into society. It was asked, do victims and survivors of the genocide feel that their interests are being served by such a process? Would *gacaca* have more legitimacy if it were voluntary instead of mandatory? An international criminal judge was very frank in evaluating the shortcomings of *gacaca*:

I am unhappy at seeing a judicial system that does not comply with the principles of a fair trial. I would prefer a system in which one would take note of the impossibility of proceeding judicially and deal alternatively with the matter, without setting up a system that pretends to be judicial but may be the subject of political manipulations.

By the end of the discussions, it was clear that BIIJ participants are well aware of the inevitability of such processes co-existing with their own institutions. Given this reality, international judges are bound to encounter them, directly or indirectly, and thus need to understand how these processes can complement more mainstream judicial work.



Navanethem Pillay and Fatoumata Diarra of the ICC converse after touring Goree Island.

Current Challenges to International Law: Responses to Terrorism, and Balancing Peace and Justice

As judges and commissioners serving on international bodies, BIIJ participants are only too aware of the challenges facing their institutions. Some of these challenges are structural, such as resolving issues of overlapping jurisdiction among institutions or even tensions within divisions of the institutions themselves. Other challenges may be political in nature, relating, for instance, to inconstant support of their work by states and international agencies. There was concern over the current attitude of the United States toward the ICC and international justice more generally. As one participant noted, “The sole remaining superpower should not arrogate for itself the right to determine if, when, or how to follow international law.”

A more particular challenge facing international institutions at this moment in history is how they will respond to the so-called “war on terror.” Several participants asserted that a fundamental role of international courts and commissions is to ensure that governments and individuals comply with international law. This is especially true for human rights law in times of crisis, when states might neglect their observance of international standards in the interest of “national security.” Judges clearly recognized the tendency of the executive branch to take on too much power in such situations, and they agreed that it is a mistake for courts to grant this power when it compromises principles of law.

The Inter-American Commission of Human Rights has stepped into the role of “watchdog” in this matter. It recently held hearings on responses by the U.S. government to its perceived national insecurity, such as detention without judicial review of status and rendition to third countries. The Commission has issued a report outlining a limited set of situations in which states may derogate from international law – for example, derogating from the right to a public trial for security reasons – and this report has already been cited in the decisions of several U.S. courts. It was noted that human rights courts and commissions generally have authority over states, unlike international criminal courts that have jurisdiction over individuals, so they are particularly important actors in the drama being played out around terrorism.

Several participants expressed dismay at how the response to terrorism has been labeled a “war,” believing that this has already skewed the debate on how to respond to it. Such a conceptualization could produce a continuing struggle that will never be won. Judges asked: How would the end of such a war be determined? Who are the combatants? How does such a struggle fit within the international laws governing the rules of war? It would be better, they continued, to term it a “fight” against terror.

Participants concluded this discussion by pointing out the particular dangers of democracies derogating from international law in these times. It was observed that the openness of democratic societies, and the freedom from undue scrutiny that their citizens enjoy, may leave them vulnerable to terrorist activities. But democracies should feel a responsibility to protect human and civil rights in difficult times. There

It was noted that human rights courts and commissions generally have authority over states, so they are particularly important actors in the drama being played out around terrorism.

are only too many regimes around the world that have welcomed the invitation to impose draconian limitations on their own citizens’ rights in the name of fighting terror, justifying it by claiming to follow the example of certain democratic nations that have historically upheld human rights.

Another challenge for international justice is the debate over the need to balance the interests of peace with those of justice in criminal prosecutions and trials. This issue came up at the ICTY in 1995, when indictments for war crimes were being issued at the same time that the Dayton Peace Accords were being discussed. Many in the international community felt that the indictments should have been suspended until peace had been negotiated. The ICC recently faced a similar dilemma in regard to indictments for crimes by the Lord’s Resistance Army in northern Uganda. Negotiations for a peaceful settlement to this conflict had been taking place for more than a year when the prosecutor’s office came forward to make indictments. There was an outcry by civil society organizations, local leaders, and others who feared that a final peace accord would be imperiled if indicted individuals no longer saw the benefit in continuing the negotiation or feared coming forward.

It is impossible for prosecutors and judges to act without “a certain knowledge of what is going on in the world,” and an indictment that comes when it would block negotiations is ill timed.

BIIJ participants were asked to consider whether prosecutors and judges at international criminal courts should become involved in the domestic politics of a situation for fear of disrupting a peace process. Furthermore, they were asked what Article 53 of the ICC Rome Statute, which exhorts the court to consider the “interests of justice” and “all the circumstances,” really implies for the actions of international prosecutors and judges.²

Responses to this question were mixed. Some participants felt that neither prosecutors nor judges should take into account any political considerations. Their job is to investigate, issue arrest warrants and indictments, and to decide on pretrial issues and cases in an impartial manner. Some participants felt that prosecutors and judges do not have the necessary information to make political decisions and are seldom privy to what is taking place in peace negotiations. Moreover, they are not chosen for their political knowledge but for their prosecutorial and legal skills.

Other participants felt very strongly that this was too facile a response to an important question. It is impossible, one claimed, for prosecutors and judges to act without “a certain knowledge of what is going on in the world,” and that an indictment that comes when it would block negotiations is ill timed. Another participant concurred with this opinion:

I am interested in this matter of timing, whether it be for indictments or judgments. I think the prosecutor should have his feet on the ground, should be aware of wider elements. To indict or not is *not* the question. There needs to be some wisdom in the timing, as long as there isn't an ethical conflict. When issuing a report or indictment, shouldn't it be timed so as not to be a bull in a china shop?

There was also some question as to how Article 53 of the Rome Statute should be interpreted – widely or narrowly? One judge evaluated this question according to his own experience:

Of course, Article 53 gives some latitude. Here we have a problem. We know as judges that when we have a legal problem, and we don't know how to solve it, we say it is in the interest of justice to proceed like this or that. *We always* do that. This expression in the statute is clearly a statement that can be used in any sense. I would go for a narrow interpretation myself. In the end, I believe that the less the prosecutor takes into account certain events, the better.

One of the reasons that this question was so difficult for participants is that it is a new issue, one that is part of the developing field of international criminal law. As one participant noted, “This issue is not so much about international law, but squarely about criminal law applied internationally.” He concluded that the ICC will be called upon to investigate conflicts all over the world. If a narrow interpretation of Article 53 is not made, the court will inevitably be drawn into many difficult political situations and possibly lose credibility.

But all participants did not take this same point of view. The perspective of those whose primary goal is peace-building was added to the conversation:

The arguments made from the point of view of people who have a particular job to do are excellent and sound. But from the point of view of peace-builders, the system of justice looks like a mechanical, single-sided, and unidimensional operation that is determined to move forward without regard for the consequences. Peace-builders see their goal as saving lives and stopping conflict. A system that doesn't prioritize, that insists on taking a narrow interpretation of Article 53, will, in their view, sacrifice the larger interests of society. There must be some way of creating a system of dialogue and conversation that would allow both these things – justice *and* peace – to be taken into account.

While participants were sympathetic to this perspective, many felt that the contributions of well-organized and systematic judicial proceedings to society are too valuable to meddle with. There are certainly costs to the strict observance of the rule of law, as there are to most human endeavors. But the loss of legitimacy that might result from too careful a consideration of political matters by the ICC was considered a very high price to pay.

In conclusion, it was noted that many of the crimes to be prosecuted by the ICC have existed for all of human memory. The vulnerable have always been violated by the powerful, and women have always been raped in times of war. But the establishment of the ICC marked a decision by the international community that “enough is enough.” The first 50 years after the Rome Conference will not be easy – many delicate questions, such as how to balance peace and justice, will arise – but this period in the history of international justice will surely be deemed a milestone. The real challenge to the international justice system now is to fulfill the promise made with the ratification of the Rome Statute.

The Impact of Legal and Cultural Diversity on International Justice

All societies have a system to resolve disputes and render justice. One of the eye-opening discoveries by British and French anthropologists carrying out research in their countries’ colonial territories in the 20th century was the complexity of the legal systems they encountered, so different from those at home but at the same time so logical and appropriate for the societies they served. BIIJ 2006 participants had the opportunity to examine several dimensions of diversity in the legal domain, the familiar one of common vs. civil law practices as well as the more fundamental and problematic diversity that is encountered when international law meets local cultures.

International courts and commissions have staffs that represent a wide variety of linguistic, cultural, and professional backgrounds. Out of this diversity must come a shared understanding of mission, work standards, and procedures. The legal personnel of these institutions have generally been trained in one of two legal systems found worldwide – civil law and common law. International courts and commissions are pioneers in blending these two systems, necessarily creating a unique international system as a result. BIIJ participants had much to say about the challenges and benefits of this blending of common and civil law in their daily work.

One participant noted that while both common and civil law decisions are cited by international courts, individual judges tend to cite jurisprudence coming from their own legal tradition. Judges are also, not surprisingly, more comfortable with procedures from



Hans Corell enjoys the view of the sun setting over the Atlantic Ocean from a vantage point on Goree Island, off the coast of Dakar, Senegal.

If the differences between two Western systems of law have the potential to create disagreement and misunderstanding, what happens when legal traditions and beliefs from parts of the world with widely varying customs and histories come into contact in the course of international judicial proceedings?

their own system. Common law judges identified, for example, the civil law practice of admitting most relevant evidence as requiring some getting used to, as did the admissibility of written evidence over oral testimony. Judicial supervision by prosecutors and the more proactive style of case management used by civil law judges were also noted as challenging practices for common law judges to adopt. Conversely, civil law judges expect to have some control over pre-trial investigations and believe the practice of judges calling their own witnesses is valuable. These are not, however, practices that are followed in all international courts. One participant noted that the recent movement in many civil law countries to adopt elements of common law's adversarial trial procedure has made it easier for international courts to follow suit.

Several participants asserted that it is not appropriate to consider international courts as "blending" common and civil law systems. These systems apply strictly to the domestic context. Rather, international courts and tribunals are creating an entirely new system of judicial procedure, adapted to meet the specific needs of their institutions. It was suggested that judges should always ask themselves, when faced with adapting or creating a new practice, what is the objective of this procedure? As one participant noted:

It is not enough to answer 'justice,' as there are too many aspects of justice. Is it 'the search for truth'? Is it 'consistency'? Is it 'to get the right result'? Different objectives will lead to different decisions on the appropriate procedures for our courts.

Another participant also encouraged courts to consider how their procedures will be viewed by the public. To enhance their credibility, courts were urged not to make their procedures overly complex.

Judges were also asked to discuss how they can best learn about the practices of other legal traditions. As one participant noted, "The more we know about the different systems, the better our ability to create a new one." But no one expressed a desire for formal training in the other system; in fact, several spoke out against such an idea. There was general satisfaction expressed with the informal and collegial learning, the "on-the-job training," that comes through dialogue with those from a different legal tradition.

In the end, there was disagreement among participants as to whether a difference in a judge's training might actually affect the outcome of a particular case. Some felt strongly that law training gives judges enough commonalities to recognize such fundamentals as due process and fair trial procedures. They might have a different way of reaching a decision, but it will be the same in the end. Others, however, claimed, "The devil is in the details!" They expressed the belief that the dissimilarities between legal traditions are so significant that judges from civil and common law systems could easily reach differing decisions.

Discussions of diversity at the institute were then expanded to discuss cultural beliefs. If the differences between two Western systems of law have the potential to create disagreement and misunderstanding, what happens when legal traditions and beliefs from parts of the world with widely varying customs and histories come into contact in the course of international judicial proceedings?

A society's legal system is as much a part of its culture as religion, political structure, kinship, or language. Laws both reflect and direct the values of a society, and they are "enculturated" into society members in such a way that they usually appear both logical

and inevitable. In spite of the “natural” feeling of many legal concepts, it is clear that laws have often been consciously constructed in the attempt to improve the human condition. The 18th century Enlightenment period brought the West many of its most fundamental ideas about society and the self, those that have given rise to its now accepted focus on the individual and belief in the inviolability of human dignity and human rights.

The international legal regime is very much founded on these Enlightenment notions, despite the fact that states from around the world participate in this regime. Through the widespread signing of treaties and charters, and now the establishment of a variety of international courts and commissions, the acceptance of these notions has essentially become the *sine qua non* of membership in the international community. International judges and commissioners were asked to contemplate the role that culture might play in the work they perform, how universal legal concepts might conflict with local understandings of law and justice, and whether there is still a possibility of incorporating points of view into the international legal regime that were not solicited when many of the standards we accept today were codified.

Participants first discussed the notion of cultural relativism – the idea that a person’s beliefs and practices make sense in terms of his or her own culture and that basic tolerance should be thus exhibited toward those outside of one’s own cultural experience. This idea may conflict with the view that there are certain universal rights that are inviolable. Should diverse cultural groups be criticized for continuing practices that do not conform to contemporary human rights standards? At the same time, should these same groups not also enjoy certain collective rights, such as those guaranteeing cultural autonomy and self-determination? How, then, can international appreciation of the importance of human rights be reconciled with the recognized diversity in belief and practice that exists in the world?



A Senegalese musician entertains BIIJ participants on the kora, a traditional West African instrument.

BIIJ participants were asked to offer examples from their own work where different cultural assumptions have become evident or might present challenges. There were many, ranging from problems of cultural interpretation of ICTY and International Criminal Tribunal for Rwanda (ICTR) testimony to the challenges that the ICC is bound to encounter, since its statutes empower judges to offer reparations to victims after convictions. Given the ICC’s current involvement in a number of African conflicts, it was suggested that cultural considerations in determining the form of reparations could well come to the fore for members of the bench. It was noted that the African Charter requires the protection of both human and peoples’ rights, and that these two sets of rights can easily be at odds with one another. Such a conflict surrounds the practice of female genital mutilation, decried by champions of women’s rights but sometimes defended by those who support the right to cultural autonomy. A less contentious example is that nomadic peoples may claim the right to exercise their traditional livelihood, while states may insist that all children have the right to formal education, which usually presupposes a sedentary existence. The difficulty of balancing such conflicting claims has yet to be resolved.



Judge Raja Fernando of the Special Court for Sierra Leone and Judge Dennis Byron of the International Criminal Tribunal for Rwanda continue a discussion of international justice away from the conference room.

Some judges felt that it is necessary to distinguish what in their view are absolutely universal rights – such as the right to life and absence from pain – from others that might be more culturally variable. It was asked, “Does the expansion of a Western lifestyle trigger a corresponding extension of Western rights?” Conversely, should residence in a Western country imply that one necessarily forfeits rights that would be respected at home? The example of Arabs living in Europe, and their call for government authorities to recognize their culturally larger definition of “family,” was cited as an issue with problematic legal and cultural ramifications.

One judge chose to be provocative in his evaluation of the issues under discussion:

I have many doubts regarding cultural relativism. I agree that all voices should be heard in all courts. I agree that we need to take context into account. But that’s different from accepting ‘cultural values.’ Many times, the respect for ‘local values’ is really a respect for ‘local imperialism.’ Many studies show that local values involve the imposition of one group’s values over another.

It was noted that legal systems, like culture itself, are flexible and able to incorporate and accommodate many foreign elements. These systems can easily become hybridized, a reality observable around the world where local populations have adopted the practices and language of international law and human rights, recognizing their utility and power in the global arena. The question was then asked, “Can and should international law incorporate and accommodate positive values of a traditional or local nature?” It was pointed out that many peoples in the world did not have the opportunity to weigh in on the content of the Universal Declaration of Human Rights. Should this document be treated, as one scholar has suggested, “as an experimental paradigm, a work in progress, and not an inflexible truth?” Might the Universal Declaration be revised in order to make it more multicultural?³

These questions inspired a vehement reaction on the part of some participants. One judge asserted that the Universal Declaration already represents universal values held by *all* communities. If a society wishes to derogate from these values, it needs to demonstrate that its citizens would freely forego the rights associated with those values. Another participant claimed that the basis of the Universal Declaration is the notion of human dignity, and that this basis has been unanimously reaffirmed in subsequent declarations. Yet another reasoned this way:

Just because African Americans weren’t part of the drafting of the United States constitution doesn’t mean that it wasn’t valuable for them in claiming their civil rights years later. Similarly, the fact that Africans didn’t participate in the drafting of the Universal Declaration doesn’t mean that it is not an important document for them now.

At the same time, there was some recognition among participants that the questions raised by the existence of cultural diversity cannot be ignored by practitioners and interpreters of international law. Both the multiplicity of views represented by the staff

of international courts and commissions, and the wide variety of contexts that these institutions are called upon to address, require judges to think deeply about what it means to apply international standards in a fair and appropriate manner.

The Benefits of Judicial Dialogue

Since 2002, the BIIJ has been bringing international judges together to discuss issues of importance to their profession. These meetings have created a much-needed opportunity for the exchange of information and the building of a professional network across courts. However, the institutes only take place at 18-month intervals and the format limits attendance to a small number of participants. How can the conversations that occur at the BIIJ occur on a large scale? How can judges from around the world, serving on both international and domestic courts, be engaged in a dynamic exchange of knowledge on a regular basis? BIIJ 2006 examined closely the issue of judicial dialogue, deeming it the true foundation of cooperation and complementarity in the global legal system.

What is now considered a dialogue was once a monologue. That is, certain countries – particularly former colonial powers – exported their jurisprudence to newly independent nations with new constitutions and little judicial experience. There was no expectation that the latter would have anything to contribute in return. But the flow of information is multi-directional now. All courts, be they domestic or international, can be both the producers and consumers of ideas that enhance legal reasoning.

It was suggested that judicial dialogue really began with the Universal Declaration of Human Rights. That document created a common language for judges on issues of critical importance for the 20th century. Still, even twenty years ago, judges could not have imagined that there would be the kind of international legal community that exists today.

Practitioners have access to information from around the world in a way that has transformed the legal profession. With this increased access, however, comes an increased responsibility to be informed. This can be daunting for judges, who realize that decisions from far-flung courts could make important contributions to the judgments they are writing at home.

BIIJ participants discussed a variety of ways that judicial dialogue could be facilitated. Consulting judgments available on the internet, being part of law or judges' associations, compiling and consulting bibliographies of useful sources, and attending workshops (or having legal assistants do so) are all ways that members of the judiciary can ensure that they are informed about developments in jurisprudence from around the globe. Most judges reported that their courts were already benefiting from the jurisprudence of other courts. For example, the ECHR and European Court of Justice (ECJ) regularly look at each other's decisions as well as those from European domestic courts. These domestic courts, in turn, look to the ECHR and ECJ for guidance in national judicial proceedings.

Dialogue is not necessarily confined, however, to one's own region, as the example of a 1996 South African case clearly illustrates. In determining the constitutionality of the death penalty, the South African Constitutional Court examined decisions from India, Zimbabwe, Jamaica, Germany, Canada, the United States, the European Court of Human Rights, Hungary, the U.N. Committee on Human Rights, Botswana, Hong Kong and Tanzania. The United States is a notable exception to this trend in the sharing of jurisprudence. Certain justices of the U.S. Supreme Court have been openly hostile to the use of foreign or international jurisprudence in cases before their bench, claiming that it has no relevance to their reasoning. Several BIIJ participants agreed that there is sometimes a basis for such a view, cautioning that jurisprudence imported from countries with a very different cultural context may create problems. One participant described how his court raised the age of sexual consent to sixteen, in accordance with

“The whole purpose of judicial dialogue is to render better justice. It’s a heavy burden for judges, but they need to do their job properly.”

the laws of many other nations. This exposed younger people who live together, an accepted local practice, to charges of statutory rape. Several participants also noted the unequal engagement in judicial dialogue that can exist between the developed and developing countries. Countries in the developing world may have neither the resources nor the experience to consult electronic sources of jurisprudence in a systematic fashion.

Even if the resources are available, there tends to be a lack of dialogue among judges at the national level. One judge described the situation in her own country:

The dialogue between international and national judges is a new phenomenon. I would like to see it extended more and more within national systems. Inside countries, there is such a fixed hierarchy between the courts that they never meet. You never hear of high court judges meeting with magistrates, for instance. They really believe in their superior status. I feel that judicial dialogue should extend to the lower courts. They need to know about the work of international courts. It would make a difference to those receiving justice at the bottom end.

Another participant concurred with this view and offered a strategy for bringing international jurisprudence to national judges:

Judges in my country are not aware of international jurisprudence, of international instruments. Every time I wrote a decision, I always tried to put in an international convention, whether it was necessary or not, so that my bench would have an education. Judges had to read about international law that way. It’s one way of contributing to your own judiciary.

It was also noted that incorporating the study of international law into the curricula of law schools – something conspicuously absent from many American law schools – would do much to inform legal practitioners, including future judges, about the breadth of jurisprudence being produced by international courts and tribunals.

Discussions on the importance of judicial dialogue ended with two thoughts. First, the principle of complementarity will only succeed if judicial dialogue between national and international judges is promoted. This will ultimately lead to the successful operation of the ICC as well as other institutions. Second, judicial dialogue is happening throughout the world so judges need to be aware of its development. A participant concluded:

The question is how to educate judges so that they have enough information to render justice. The whole purpose of judicial dialogue is to render better justice. It’s a heavy burden for judges, but they need to do their job properly.

It is hoped that the Brandeis Institute for International Judges will make a contribution to the education of judges and increase their opportunities for establishing channels of communication on a range of critical issues for their profession.



BIIJ 2006 participants pose for a group photo as the institute draws to a close.

Justice Without Borders: Judicial Globalization in the 21st Century

Participants of BIIJ 2006 were honored to have as a guest presenter Claire L'Heureux-Dubé, retired Judge of the Supreme Court of Canada. Judge L'Heureux-Dubé gave a presentation on the need for an ever-expanding dialogue between national and international judiciaries, a subject of great interest to all participants. Below is a summary of her remarks:

The late 20th century will no doubt be remembered as an era of technological, economic, and cultural globalization. The explosion of information revolutionized the way we learned, researched, and communicated; the lowering of trade barriers and the creation of global markets caused great changes in economies throughout the world; the expansion of technology and the development of medicine and science brought and continue to bring issues such as the regulation of cyberspace, the mapping of the human genome, and DNA testing to the forefront of law and politics. In short, developments in the 1990s established new world connections in many different areas of our lives.

With the unfolding of the new millennium, we are starting to recognize globalization occurring in other areas as well, including the process of judging and lawyering. Growing international connections influence judicial decisions, particularly at the level of top appellate courts throughout the world. More and more courts are looking to the judgments of other jurisdictions, particularly when making decisions on human rights issues. Deciding on applicable legal principles and solutions increasingly involves a consideration of the approaches that have been adopted to similar legal problems elsewhere.

This development is a tremendous change from the way judicial influence between jurisdictions occurred in the past, when colonial powers such as Britain and France were the most influential, and to many, the only acceptable source of foreign authority on most matters. In the fields of human rights and constitutional principles, the United States often had a similar influence. However, as courts look all over the world for sources of authority, the process of



BIIJ participants take a motorized canoe trip into the delta of the Saloum River to get a glimpse of an oft-overlooked aspect of the Senegalese landscape.

international influence has changed from reception to dialogue; judges no longer simply receive the cases of other jurisdictions and apply or modify them in their own jurisdictions. Today, judges around the world are looking to each other as sources of persuasive authority, rather than some judges being “givers” of law while others are “receivers.”

Reception

Reception of other courts’ decisions, in a broad sense, is what has been most prominent for judges in Canada, as in other former colonies, throughout our history.⁴ The Canadian Supreme Court was bound by the decisions of the British Judicial Committee of the Privy Council until the abolition of appeals to that body in 1949.

As the bonds of colonialism loosened, the prominence of American jurisprudence grew throughout the world. Canada, like many other countries around the world, used the experience of the United States as a pioneer of human rights and constitutionalism to help us develop our own jurisprudence. That is not to say that we always or even usually accepted American approaches or interpretations. However, examining and considering this jurisprudence allowed us to benefit from the expertise built up over two hundred years of interpretation of Constitutional rights in a country with many similarities to our own.

Dialogue

Current trends, however, show how dramatically this picture is changing.⁵ Rather than comparative law being a one-way transmission of existing law from some jurisdictions to others, the development of human rights jurisprudence, in particular, is now increasingly becoming a dialogue. Judges look to a broad spectrum of sources in the law of human rights when deciding how to interpret their constitutions and deal with new problems. To a greater and greater extent, they are reading and discussing each others' jurisprudence. Take the recent Namibian case of *Mwellie v. Ministry of Works*.⁶ In that case, the High Court had to determine an appropriate interpretation of the guarantee of equality in the country's new constitution. In doing so, the Court looked to decisions from high courts in India, the United States, Canada, England, Malaysia, and South Africa, as well as to decisions of the European Court of Human Rights. Another example is the South African case of *State v. Makwanyane*,⁷ where members of the Constitutional Court, in determining the constitutionality of the death penalty, examined in considerable details decisions from India, Zimbabwe, Jamaica, Germany, Canada, the United States, the European Court of Human Rights, Hungary, the United Nations Committee on Human Rights, Botswana, Hong Kong and Tanzania.

There are numerous other examples of dialogue found in court decisions from Zimbabwe, Canada, Australia, and New Zealand. One glaring exception to this picture is the United States, where the Supreme Court continues to focus, with some rare isolated exceptions, only on its own jurisprudence.⁸

Rather than comparative law being a one-way transmission of existing law from some jurisdictions to others, the development of human rights jurisprudence, in particular, is now increasingly becoming a dialogue.

Reasons for Globalization

There are a number of reasons why the legal world is becoming a global one and why this increasing dialogue is taking place. They include some of the same factors that are leading to change and globalization in the world at large as well as other developments internal to the legal community.

Similar Issues

First, perhaps more than ever, the same issues are facing many courts throughout the world. Issues like assisted suicide, abortion, hate speech, gay and lesbian rights, environmental protection, privacy, and the nature of democracy, to name just a few, are being placed before judges in different jurisdictions at approximately the same time. As social debates and discussions around the world become more and more similar, so of course do the equivalent legal debates. Again, the growing similarity of social debates and conflicts can be partially attributed to the advances in global communications and contacts.

The International Nature of Human Rights

Since the Second World War, there has been a global emphasis on human rights, leading to the passage of the Universal Declaration of Human Rights and the signing of the international covenants on Civil and Political Rights and on Economic, Social and Cultural Rights. These have been reflected in regional human rights treaties and in human rights guarantees in national constitutions. In fact, the United States stands out for the fact that its Bill of Rights predates this explosion of international human rights. There are numerous genealogical "links" between national human rights guarantees and international rights documents, as well as between various national and regional human rights provisions. For example, the drafters of the Canadian Charter drew extensively on international human rights treaties,⁹ and those who put together the human rights protections in South Africa and Israel used the Canadian Constitution and these instruments among their sources.¹⁰ These links are reflected in the similar language, organization, and principles of many human rights guarantees.

Because the legal protection of human rights is new to many countries, there is sometimes little or no previous domestic jurisprudence to turn to in giving them meaning, and judgments from elsewhere are particularly useful and necessary. Foreign decisions are often used as a “springboard” to begin the development of human rights jurisprudence, and to fill in the gaps when no previous decisions exist. It is not surprising that the more frequent references to the jurisprudence of other countries come when human rights protections are new, such as in Canada in the 1980s and early 1990s, and in New Zealand, Israel, and South Africa now.

In addition, links to international human rights law help form a kind of “common denominator” of understanding for judges interpreting national or regional human rights documents. National human rights guarantees are inspired by or linked to internationally guaranteed rights, and jurists around the world are increasingly trained in international human rights law. Unlike private law or public law regarding the structure of government, there is a common understanding of the language of human rights that comes from a shared study and knowledge of international treaties and decisions.

Advances in Technology

With the existence of computers, electronic databases, and the internet, access to decisions in a broad range of jurisdictions is possible. For example, anyone with a connection to the World Wide Web can obtain recent decisions of Canada’s Supreme Court, free of charge, as soon as they are released. Decisions of other courts around the world are also disseminated electronically, and there are numerous internet sites that consolidate access to banks of case law, statutes, and other materials from various jurisdictions. These developments make it much easier to consult comparative constitutional sources when making arguments and issuing judgments.

Personal Contact Among Judges

Until recently, it was uncommon for judges working on different continents to have opportunities to get to know each other, let alone communicate regularly about issues of mutual concern. Today, close interactions are becoming commonplace. Judges from various countries often discuss common problems at international judges’ conferences, by email, and over the telephone. I know that the friendships I have developed with judges from countries like the United States, Zimbabwe, South Africa, and Israel, to name just a few, have enabled me to discuss and correspond with them about decisions of our court and their courts, and about issues that cross national boundaries. Speaking and communicating with those from outside the country gives perspectives on the issues facing courts that would otherwise not be heard.



Richard Goldstone, O-Gon Kwon, Navanethem Pillay, Claire L’Heureux-Dubé, and Florence Mumba visit the Maison des Esclaves on Goree Island. Goree was used as a transit point for a number of years during the transatlantic slave trade.

Challenges of Globalization in the 21st Century

Despite these positive aspects of increasing globalization, a caveat is in order. Though the solutions of other countries or of the international community are useful and important considerations, we must ensure that foreign reasoning is not imported without sufficient consideration of the context in which it is being applied. There are important reasons why the solutions developed in one jurisdiction may be inappropriate elsewhere. Political and social realities, values, and traditions differ across borders, regions, and levels of development. The pressing human rights issues in developed and developing countries, in particular, are often significantly different, and different solutions in different places are unquestionably necessary.

"It is my belief that those of us serving as judges in the 21st century, nationally or internationally, must engage in constant vigilance to keep abreast of the changing face of the law around the globe."

This does not mean that it is not useful to look to decisions from jurisdictions where the context is different – only that simply importing foreign solutions is not always appropriate. Considering and articulating the differences that mandate the adoption of a different solution is, in my view, a particularly useful exercise. Cross-pollination helps not only when we accept the solution and reasoning of others, but when we depart from them, since even then, understanding and articulating the reasons that a different solution is appropriate for a particular country helps make a better decision.

New constitutions reflect the developments in human rights law of the latter half of the 20th century, as well as a vision of liberty, and they place less emphasis on individual rights and more on collective interests. Such is the case of international tribunals on war crimes and crimes against humanity, which are crimes against society, our collectivities as human beings.

Due to the increased reliance on international conventions, documents, jurisprudence and treaties, the factors that shape our laws have burgeoned in recent years, and the number and types of sources that judges must turn to have diversified and expanded exponentially. It is my belief that those of us serving as judges in the 21st century, nationally or internationally, must engage in constant vigilance to keep abreast of the changing face of the law around the globe – down to the most incremental jurisprudential shiftings of our sister countries. This endeavour will require more study, more reading, more long nights, and more continuous legal education. “But like it or not” notes Chief Justice Shirley Abramson of the Supreme Court of Wisconsin, U.S. “the world is now our courtroom” and justice demands no less.

Topics in Ethical Practice 2006: The Judiciary as a New Moral Authority?

Each BIIJ examines issues that exist at the intersection of ethics and the work of the international judiciary. In 2006, that examination centered on what Ronald Dworkin has called the “secular papacy,” or the notion that judges have replaced – or should replace – religious figures as modern moral leaders on a national or international level.¹¹

The conversation was framed by opening remarks from three judges who serve as members of the BIIJ Program Committee: John Hedigan of the ECHR, Navanethem Pillay of the ICC, and Fausto Pocar of the ICTY. Daniel Terris, director of the International Center for Ethics, Justice and Public Life at Brandeis University, facilitated the discussion.

Judges who interpret the law in such a way as to broaden the protection of human rights have been labeled by some as “activist.” The 2003 decision by the Supreme Judicial Court of Massachusetts to permit same-sex marriages is a prime example; another is the Constitutional Court of South Africa’s decision declaring the death penalty to be unconstitutional. In both cases, the courts issued their rulings knowing that the values they upheld were not necessarily supported by a majority of the population.

This issue is not limited to domestic courts. The ICTR was the first court to declare rape a crime against humanity and an act of genocide, a decision based on an interpretation of the current state of customary international law. Similarly, the appeals chamber of the ICTY revisited a decision it had made that released a defendant after a very long pretrial detention. The revision of the original judgment was made on the grounds of “new facts,” but some argued that it was done to take into account certain moral grounds. As one judge put it:

In a way, the conditions for revision of the judgment were interpreted loosely in order to revisit the decision.



A merchant displays her array of bead necklaces along the avenue on Goree Island.

Though each of these cases was based on interpretations of constitutions or charters, they all involved decisions with moral ramifications. Were the judges on these courts applying their own personal moral codes, or those of the constituents they served?

As one judge pointed out, “activism” on the part of a judge can mean different things to different people. In some cases, judges are required to “fill in the blanks” left by the legislature; in others, they are left to extrapolate an ages-old document to fit modern times. Invariably, judges are at times faced with the task of creating a ruling based, at least in part, on questions of morality. One school of thought is that, in making their decisions, judges should draw on the moral values held by the majority in their communities. Another judge eloquently captured the countervailing school of thought:

The counter argument is that they protect the rights of individuals and minorities, and thereby create an improvement on majoritarian democracy.

It is a delicate and complex issue, to be sure, and one that is compounded at the level of international courts and tribunals. If a universally accepted moral code is difficult to come by within a given country, it is virtually impossible to achieve on a bench composed of judges from several different nations. The statute that forms the basis of the ICTY requires that judges nominated to the court “shall be persons of high moral character, impartiality and integrity.”

Reflecting on that passage, one judge asked:

What does that mean? The nominations are done by nations, and each nation has its own definition. Who has the definition which can be accepted?

In the United States, nominees to the Supreme Court are asked by the media and by politicians on both sides to make their stance on key issues known before being appointed. Do such declarations threaten their judicial independence, or are they regarded as “campaign promises” that may be easily cast aside? One participant observed a contradiction in this practice:

In certain ways, the current U.S. administration is having it both ways. They say they want judges who simply apply the law, but at the same time they make a big deal about the moral and religious character of the nominees. They suggest that personal views will play an important part.

It is worth noting that the participants at BIIJ 2006 unanimously balked at the suggestion of judges being “moral leaders.” The notion conjures up an image of a jurist who, on an individual basis at least, suspends universal justice in favor of his or her personal agenda. Judges the world over are understandably uncomfortable with such a scenario, having devoted their lives to the discipline of law.

However, when pressed, the participants acknowledged that judges cannot altogether avoid decisions that touch on aspects of morality. One participated noted:

It’s not because they want to make such decisions. But they inevitably have to. Courts anywhere don’t get the easy cases. I don’t think there’s much of an opportunity for a judge to impose his or her moral agenda, but judges are forced into decisions where they have to make certain kinds of ‘moral judgments.’

Several judges agreed.

That’s why we have courts. If there were no choices to be made, there would be no courts. It is possible to have conflicting value judgments or conflicting interpretations of a constitutional rule, both of which would be valid in legal terms. We have to make a choice between competing interpretations; the better way to make that choice is in terms of a set of values.

If one views the interpretation of law as an inherently moral endeavor, the distinction between judges who do and do not factor in a moral component becomes less clear. As one judge put it:

Each judgment is a day-by-day application or execution of morals. If we accept that, then there are only specific problems of immoral laws, but that is not the norm in a democracy.

Even still, all agreed that judges should avoid situations that ask them to develop moral codes in addition to applying them.

The challenge, then, is determining what value system to use. Without a consistent set of values to refer to, judgments of a moral nature will appear arbitrary or preferential, ultimately losing their validity. Within a given country, constitutions and bills of rights can provide a moral framework from which a judiciary may work. On an international level, treaties and charters may fulfill the same roles, making the body of international human rights all the more essential. Regardless of the setting, any value system used should be one based on the normative and systemic theory of the legal system being applied. That will

guarantee that a court's decisions fit into a pattern of consistency and coherence.

If one does expect judges to execute morality in their judgments, how can it be ensured that the morality they employ is appropriate? To whom are judges accountable? Domestically, the answer is relatively straightforward; the judiciary is typically just one branch of government, kept in check by the others. Internationally, the answer varies a bit; a court may have to answer to the United Nations or to the member states that signed the treaty bringing it into existence. Though the chain of authority differs from one court to the next, none exists in a vacuum.

There was a consensus among those who participated in this debate that judges must first and foremost apply the law and not use it to pursue their own ethical agendas. There are, of course, points of divergence on how best to decide a case when the law provides more than one compelling option. Some participants emphasized the importance of a judge's personal background, while others look to the human rights regime for guidance, especially where international courts are concerned. Questions remain as to whether the field of international human rights is sufficiently developed to provide that kind of insight. The discussion will undoubtedly continue in the years to come, as the field of international law continues to expand across the globe.

Notes

¹ One month after BIIJ 2006, the ICC issued an arrest warrant for Thomas Lubanga Dyilo, who is accused of conscripting children to fight in the ongoing conflict in the Democratic Republic of Congo. Dyilo was arrested in Kinshasa on March 17 and transferred to the court, where he appeared before the pretrial chamber. His case is thus likely to be the first taken on by the ICC.

² <http://www.un.org/law/icc/statute/romefra.htm>

³ Makau Mutua, *Human Rights: a Political and Cultural Critique*, ix-xi, 1-9, 71-93 (University of Pennsylvania Press 2002).

⁴ On the use of foreign decisions by Canadian common law courts, see H.P. Glenn, "The Use of Comparative Law by Common Law Courts in Canada" in International Congress of Comparative Law, *Contemporary law/Droit contemporain* (Cowansville: Tvon Blais. 1994) 85.

⁵ See, e.g., B. Ackerman, "The Rise of World Constitutionalism" (1997) 83 *Va. L. Rev.* 771.

⁶ [1995] 4 L.R.C. 184.

⁷ 1995 (2) S.A. 391.

⁸ Heinz Klug, "Model and Anti-Model: The United States Constitution and the "Rise of World Constitutionalism" (2000), *Wis. L. Rev.* 597, at p. 616. See also: Vicki C. Jackson, "Ambivalent Resistance and Comparative Constitutionalism: Opening Up the Conversation on 'Proportionality', Rights and Federalism" (1999), *I U. Pa. J. Const. L.* 583.

⁹ A. Bayefsky, "International Human Rights Law in Canadian Courts" in B. Conforti and F. Francioni, eds., *Enforcing International Human Rights in Domestic Courts* (The Hague: Martinus Nijhoff, 1997) 295, at p. 310; J. Claydon, "International Human Rights Law and the Interpretation of the Canadian Charter of Rights and Freedoms" (1982) 4 *Supreme Court L.R.* 287, at p. 287.

¹⁰ See, e.g., A.M. Dodek, "The Charter... In the Holy Land?" (1996) 8:1 *Constit. Forum* 5; L. Weinrib, "The Canadian Charter as a model for Israel's Basic Laws" (1993) 4:3 *Constit. Forum* 85.

¹¹ *Judges in Contemporary Democracy: an International Conversation* Preface, Ch. 2, Ch. 6 (Robert Badinter and Stephen Breyer, eds., New York University Press 2004).

Judges and Commissioners

☞ **Emmanuel Ayoola** (Nigeria) serves as an appeals judge on the Special Court in Sierra Leone. He previously served as judge of the Supreme Court of Nigeria, president of the Seychelles Court of Appeal, and former chief justice of The Gambia. He has been a vice president of the World Judge's Association, and won the UN Human Rights Fellowship award in 1966. He is a graduate of London and Oxford Universities and has edited the Seychelles Law Digest, the Law Reports of The Gambia, and the Nigerian Monthly Law Reports.

☞ **Musa Ngary Bitaye** (The Gambia), a Commissioner in the African Commission on Human and Peoples' Rights, was born on 26 August 1944, in Banjul, The Gambia. He completed his primary education in The Gambia and finished both his secondary and university schooling in Ghana. After graduating in 1973, he returned home to work for a year as an Imports Manager for the English shipping company Elder Dempster Lines Limited.

In 1974, Bitaye began pursuing the Barrister-at-Law degree at the Inns of Court School of Law in the U.K., graduating in 1978. He subsequently held the positions of State Counsel, Senior State Counsel, Principal State Counsel, and eventually Registrar General of The Gambia. In 1989, he retired and went into private practice. He was appointed Attorney General and Minister of Justice in 1995, after which he resumed his private practice.

☞ **Charles Michael Dennis Byron** (St. Kitts & Nevis) has been serving as a permanent judge on the ICTR since June 2004. He is the presiding judge in two ongoing cases and is a member of the Trial Chamber in a third case. Byron was born in St. Kitts, West Indies on 4 July 1943. He studied law at Cambridge University (1962-1966). He engaged in private legal practice throughout the Leeward Islands with chambers in the Federation of Saint Kitts and Nevis and Anguilla beginning in 1966. In 1982, he was appointed as a judge of the Eastern Caribbean

Supreme Court and to the Appeals Court in 1990. He was appointed Chief Justice in 1999.

Byron is a Bencher of the Inner Temple. He received the award of Knight Bachelor by Her Majesty Queen Elizabeth II and was appointed a member of Her Majesty's Privy Council in 2004. He has taken part in various law conferences and is President of the Commonwealth Judicial Education Institute.

☞ **Fatoumata Dembele Diarra** (Mali) was elected to the ICC for a nine-year term from the African Group of States, and is assigned to the Pre-Trial Division. She has a *certificat de licence en droit* (LLB) from Dakar University, a *maîtrise en droit privé* (LLM in private law) from the Mali École Nationale d'Administration, is a graduate of the École Nationale de la Magistrature (national college for the judiciary) in Paris, and she holds a diploma in the Implementation of Regional and International Standards for the Protection of Human Rights.

Immediately prior to her election to the ICC, Diarra served as an ad litem judge at the International Criminal Tribunal for the former Yugoslavia. She has previously held the positions of National Director of the Mali Justice Department, President of the Criminal Chamber of Bamako Appeals Court, President of the Assize Court, and Examining Magistrate and Deputy Public Prosecutor.

Her civil society positions have included those of Vice President of the International Federation of Women in Legal Careers, Vice President of the African Women Jurists' Federation, President of the Malian Women Jurists' Association, and President of the Women's and Children's Rights Monitoring Body.

☞ **Arachchige Raja Nihal Fernando** (Sri Lanka) is President of the Special Court for Sierra Leone, having been appointed Judge of the Appeals Chamber in February 2004. He is a Justice of the Supreme Court of Sri Lanka. He previously served as Judge of the Court of Appeal from November 2000 to March 2004 and Judge of the High Court from November 1992 to November 2000.

Fernando was born on 4 April 1945, in Divulapitiya, Sri Lanka. He enrolled as an attorney-at-law on 27 July 1971, served as a legal officer in the Sri Lanka Army from August 1973 to November 1975, and later as a Judge Advocate of the Sri Lanka Navy from February 1987 to March 1991. He was Senior State Counsel and State Counsel in the Attorney-General's Department in Sri Lanka from November 1975 to November 1992, and Director of Public Prosecutions in Central America (Belize) from January 1995 to December 1996.

☞ **Reine Alapini Gansou** (Benin) has served as a commissioner on the African Commission for Human and Peoples' Rights since July 2005. She holds a DEA degree in Law and Environmental Policy, and both *license* and *matrise* degrees in Law. Mrs. Gansou teaches in the Faculté des Sciences Juridiques, Economiques et Politiques at the University of Abomey-Calavi of Benin, serves as a trainer in law, and has also worked as an attorney with the Appeals Court of Benin. She has attended numerous training programs in international law and human rights in Africa and elsewhere, and is a member of the international criminal bar, Avocats sans Frontières, l'Association Internationale des Avocats de Défense, and la Commission Nationale de Codification et de Législation.

☞ **John Hedigan** (Ireland) was elected Judge of the European Court of Human Rights in January 1998 by the Parliamentary Assembly of The Council of Europe. He was reelected in April 2004, and in November 2004 he was elected Vice-President of the Third Section of the Court of Human Rights. On the Court, he serves as Chair of the Committees on status and conditions of Judges, of the Languages Committee, and of the Information Technology Committee. He has also served on the Committee for the Reform of the Court and of the European Convention, and he sits on the Rules Committee of the Court.

Born on 14 October 1948 in Dublin, Hedigan was educated at Belvedere College, Trinity College Dublin and Kings Inns. He was called to the Bar in 1976, and has since served as Barrister before the courts in

Ireland and before the European Court of Justice in Luxembourg. From 1972 to 1977, he represented the Trinity College branch of Amnesty International on the National Executive Committee of Amnesty International. Also serving on this committee at the time were Sean McBride SC, winner of the Nobel Peace Prize, and Mary Robinson SC, subsequently President of Ireland and latterly UN Commissioner for Human Rights. From 1976 until 1980, he was national coordinator of Amnesty International's campaign against torture. He practiced as barrister at the Irish Bar until 1990, when he was made a Senior Counsel. He is a member of the English Bar (Middle Temple) and of the New South Wales Bar. From 1992 to 1994, he was Chair of the Irish Civil Service Disciplinary Appeals Tribunal. From 1991 to 1998, he was Chair of the Independent Advisory Committee in Ireland on the continued detention of persons found guilty but insane and detained in the Central Mental Hospital. He is a Bencher of Kings Inns.

☞ **O-Gon Kwon** (South Korea) is serving his second term as one of the permanent Judges of the International Criminal Tribunal for the former Yugoslavia. Prior to joining the Tribunal in 2001, Judge Kwon served in the Judiciary of the Republic of Korea for 22 years as a judge in the various courts, including the Seoul District Court and Taegu High Court. He received his education at Seoul National University (*LL.B., LL.M.*) in Korea and Harvard University (*LL.M.*) in the United States.

As a member of Trial Chamber III, Kwon was hearing the case of *Prosecutor v. Slobodan Milosevic* and is the presiding Judge in the case of *Prosecutor v. Ivica Marijasic and Markica Rebic* (contempt case) and the pre-trial Judge in the case of *Prosecutor v. Jovica Stanisic and Franko Simatovic* and *Prosecutor v. Rasim Delic*. As a member of the Referral Bench created to determine whether a case before the Tribunal should be referred to the authorities of a State, he is currently reviewing five cases before the Bench, having already participated in the completion of such a review in seven other cases. In addition, Kwon is a member of the Rules Committee of the Tribunal.

☞ **Egils Levits** (Latvia) has been at the European Court of Justice since 11 May 2004. He was elected as a Judge to the European Court of Human Rights in 1995, and re-elected in 1998 and 2001. He is an advisor to the Latvian Parliament on questions of international law, constitutional law, and legislative reform.

Born in 1955, Levits graduated from the University of Hamburg with a degree in law and political science. From 1992 to 1993, he served as Latvian Ambassador to Germany and Switzerland, and from 1994 to 1995 as the Ambassador to Austria, Switzerland, and Hungary. He was formerly Vice Prime Minister, Minister for Justice, and acting Minister for Foreign Affairs. Since 1997, he has been Conciliator at the Court of Conciliation and Arbitration within OSCE, and he has been a Member of the Permanent Court of Arbitration since 2001. He has authored numerous publications in the spheres of constitutional and administrative law, law reform, and European Community law.

☞ **Luís Miguel Poiares Pessoa Maduro**

(Portugal) has been Advocate General at the Court of Justice since 7 October 2003. Born in 1967, he earned his law degree from the University of Lisbon in 1990 and his Doctor in Laws degree from the European University Institute (Florence) in 1996. He taught as a professor at Universidade Nova (Lisbon) in 1997, and he is a visiting professor at the College of Europe (Natolin), Ortega y Gasset Institute (Madrid), Catholic University (Portugal), and the Institute of European Studies (Macao). In 1998, he was honored as a Fulbright Visiting Research Fellow at Harvard University. Maduro is co-director of the Academy of International Trade Law, co-editor of the Hart Series on European Law and Integration for the European Law Journal, and a member of the editorial board of several law journals.

☞ **Theodor Meron** (United States) has served on the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia since his election by the U.N. General Assembly in March

2001. From 2000 to 2001, he served as Counselor on International Law in the U.S. Department of State. Between 1991 and 1995 he was a Professor of International Law at the Graduate Institute of International Studies in Geneva, and he has been a Visiting Professor of Law at Harvard and at the University of California (Berkeley). He received his legal education at the Universities of Jerusalem, Harvard (where he received his doctorate), and Cambridge.

In 1998, Meron served as a member of the United States Delegation to the Rome Conference on the Establishment of an International Criminal Court (ICC) and was involved in the drafting of the provisions on crimes, including war crimes and crimes against humanity. He has also served on the preparatory commission for the establishment of the ICC, with particular responsibilities for the definition of the crime of aggression. He is a frequent contributor to various legal journals and the author of several books on international law and human rights, including the forthcoming *The Humanization of International Law*.

☞ **Florence Ndepele Mwachande Mumba**

(Zambia), born in Zambia on 17 December 1948, is a Judge of the Appeals Chamber for the United Nations International Criminal Tribunal for the former Yugoslavia and the United Nations International Criminal Tribunal for Rwanda. She was elected as Judge of the Tribunal for the former Yugoslavia (UN-ICTY) in November 1997 and was re-elected in 2001. Mumba has served as a Trial Chamber Judge and as a Presiding Judge in some cases at the Tribunal. She served as Vice-President of the Tribunal from November 1999 to November 2001.

In Zambia, Mumba was appointed High Court Judge in 1980. In 1989 she was appointed Investigator-General (Ombudsman). In June 1997 she was appointed to the Supreme Court. Between 1976 and 1996, Mumba chaired the Zambian Law Development Commission, the Electoral Commission of Zambia, and the University of Zambia Council.

She was been a member of the United Nations Commission of the Status of Women from 1992 to 1995. She served as Director for Africa on the International Ombudsman Institute Board and later as Vice-President of the Board, from 1992 to 1996. Mumba was a Commissioner on the International Commission of Jurists from 1994 to 2003. As a Legal Expert for the Common Wealth Secretariat, she participated in drafting legislation for the Ombudsman Institution of the Gambia, 1993. She also participated in drafting the Protocol to the African Charter on Peoples and Human Rights for the Establishment of the African Court on Human Rights, 1995.

☞ **Tafsir Malick Ndiaye** (Senegal) has been a member of the International Tribunal for the Law of the Sea since 1 October 1996. Prior to his election, he worked in a variety of capacities, including as director of the Research Centre at the Faculty of Law of the University of Dakar, as counsel and co-agent of the Government of Senegal in the case of the delimitation of the maritime boundary between Senegal and Guinea-Bissau, and as a consultant for the UN. He has advised the Senegalese government on issues such as Senegambia and negotiations concerning Senegal's commercial debt.

Born in Kaolack, Senegal, on 7 February 1953, Ndiaye received his Doctor of Law degree at the University of Paris in 1984. In 1985, he was Counsel and Co-Agent of the Government of Senegal in the case of the delimitation of the maritime boundary between Senegal and Guinea-Bissau. He has been a visiting professor at various universities and is the author of several books and articles in the fields of international law, constitutional law, international organizations, and the law of integration, including *Matières premières et droit international*, 1992.

☞ **Dolliver Nelson** (Grenada), a member of the International Tribunal for the Law of the Sea since October 1996, served as President from 2002 to 2005 and vice president from 1999 to 2002. He is a visiting professor of International Law at the London School

of Economics and was formerly executive secretary of the Preparatory Commission for the International Seabed Authority and the Law of the Sea Tribunal. Since 2000, he has been chairman of the International Law Association Committee on Legal Issues of the Out Continental Shelf.

Nelson has contributed to various international legal periodicals and publications, including *The British Year Book of International Law*, *The American Journal of International Law*, *The International and Comparative Law Quarterly*, *The Modern Law Review*, and *The Netherlands International Law Review*. He also reports to conferences of the International Law Association on Exclusive Economic Zone matters. He was educated at the University of the West Indies and the London School of Economics. He is a Barrister-at-Law, Gray's Inn, London, and has been admitted to the Bar of Grenada.

☞ **Navanethem Pillay** (South Africa) was elected by the Assembly of State Parties to the Rome Statute as one of the 18 Judges of the International Criminal Court in February 2003. She received her Bachelor of Arts and her Bachelor of Law degree from Natal University in South Africa and later a Master of Law and Doctor of Juridical Science at Harvard University.

She opened her law practice in 1967, the first woman to do so in Natal Province. As senior partner in the firm, she handled precedent-setting cases to establish the effects of solitary confinement, the right of political prisoners to due process, and the family violence syndrome as a defense.

In 1995, she was the first black woman attorney appointed acting judge of the High Court of South Africa by the Mandela Government. On the heels of that appointment, Pillay was elected by the United Nations General Assembly to be a judge on the International Criminal Tribunal for Rwanda, where she served for eight years, including four years as president. During her tenure, the ICTR rendered a judgment against Jean-Paul Akayesu, mayor of Taba commune in Rwanda, in which Pillay participated, finding him guilty of genocide for the use of rape in

the “destruction of the spirit, of the will to live and of life itself.” She was presiding judge in the “Media” trial, which set precedential standards for Press Freedom and Press responsibility.

☞ **Fausto Pocar** (Italy) is Professor of International Law at the Law Faculty of the University of Milan. He is currently on leave, after his election as a Judge and, since November 2005, president of the International Criminal Tribunal for the former Yugoslavia.

Born in Milan in 1939, Pocar has extensive experience in United Nations activities, in particular in the field of human rights, humanitarian law, and space law. He served for sixteen years (1984-2000) as a member of the Human Rights Committee under the ICCPR and has been its Chairman. Further, he was appointed Special Representative of the UN High Commissioner for Human Rights for visits to Chechnya and the Russian Federation during the first conflict in 1995 and 1996. He has served several times as Italian Delegate to the Hague Conference on Private International Law, has been co-rapporteur of the Draft Convention on Foreign Judgments and President of the Special Commission on Maintenance Obligations. Pocar is the author of numerous publications on international law, including human rights and humanitarian law, private international law and European Law. He has lectured at The Hague Academy of International Law and is a member of the *Institut de Droit International*, as well as of various other international law associations.

☞ **Clare K. Roberts** (Antigua) is currently the President of the Inter-American Commission on Human Rights. He has served on the Commission since 2002. He is also an Attorney and Principal of Roberts & Co., Attorneys at Law in Antigua and Barbuda. Roberts has held the positions of Attorney General, Minister of Justice and Legal Affairs, and Solicitor General of Antigua and Barbuda, as well as positions as Director of the Antigua Commercial Bank, ACB Mortgage & Trust, and of the National Development Foundation of Antigua and Barbuda, of which he is a founding member. Commissioner

Roberts received his LL.B. (Honours) and B.A. in History from the University of the West Indies and has lectured extensively in the areas of fisheries legislation, administration and management, and the Law of the Sea. He is a Member of the Antigua and Barbuda, Montserrat, Dominica and BVI Bars, an Associate Member of the American Bar Association, and Vice President of the Antigua Offshore Association.

☞ **Andrésia Vaz** (Senegal) was elected in 2001 by the United Nations General Assembly as a judge to the International Criminal Tribunal for Rwanda (ICTR) in Arusha, Tanzania. She was re-elected in February 2003. Since August 2005 she has been a member of the Appeals Chamber common to both the ICTR and ICTY (International Criminal Tribunal for the former Yugoslavia) at The Hague, Netherlands.

She began her career as an Examining Judge of the *Tribunal Première Instance de Dakar*. After that she was President of the Labour Tribunal in Saint Louis, Senegal, Chief of the Examining Judges in Dakar, Vice President of the *Tribunal de Première Instance de Dakar*, and a Judge at the Court of Appeal and at the Supreme Court. In 1992 she became first President of the Court of Appeal and a year later she was appointed first President of the National Electoral Commission of Senegal. She later became President of the High Court of Senegal. In 1997 she became first President of Supreme Court.

Vaz has participated in various conferences, including the International Union of Magistrates, International Federation of Women Lawyers “World Peace Through the Law”, the International Commission of Jurists, and the Conference of Chief Judges of the Commonwealth and Judges of Appeal Courts. Judge Vaz was a Tutor at *l’Ecole Nationale de la l’Administration et de Magistrature du Senegal* until 1991. She is an Associate Member of the International Commission of Jurists and Member of the Permanent Court of Arbitration in The Hague, in The Netherlands. Judge Vaz is a graduate of the National Centre for Judicial Studies (*Centre National d’Etudes Juridiques*) in France (1969).

Directors

☞ **Linda Carter** (United States) is Professor of Law and Director of the Criminal Justice Concentration at the University of the Pacific, McGeorge School of Law, Sacramento, California. Her teaching and research areas are criminal law, criminal procedure, evidence, capital punishment law, and international criminal law. Prior to entering academia, Carter litigated civil and criminal cases. From 1978 to 1981, she was an attorney in the honors program of the Civil Rights Division of the United States Department of Justice in Washington, D.C., where she litigated voting, housing, and education discrimination cases. From 1981 to 1985, she was an attorney with the Legal Defender Association in Salt Lake City, Utah, where she represented indigent criminal defendants on misdemeanor and felony charges. Her most recent publications include *Understanding Capital Punishment Law*; articles on the rights of detained foreign nationals in capital cases under the Vienna Convention on Consular Relations; and a forthcoming book on international issues in criminal law. Her current research areas are *gacaca* trials in Rwanda and the Extraordinary Chambers in Cambodia.

☞ **Richard J. Goldstone** (South Africa) is a Visiting Professor of Law at the University of San Diego. He was made Judge of the Transvaal Supreme Court in 1980, and in 1989 was appointed Judge of the Appellate Division of the Supreme Court. From July 1994 to October 2003, he was a Justice of the Constitutional Court of South Africa. In the spring of 2005, he was the Henry Shattuck Visiting Professor of Law at Harvard University Law School.

From August 1994 to September 1996, Goldstone served as the Chief Prosecutor of the United Nations International Criminal Tribunals for the former Yugoslavia and Rwanda. In December 2001, he was appointed as the co-chairperson of the International Task Force on Terrorism that was established by the International Bar Association. He is presently the co-chairperson of the Human Rights Institute of

the International Bar Association. He was recently a member of the committee, chaired by Paul A. Volcker, appointed by the Secretary-General of the United Nations to investigate allegations regarding the Iraq Oil for Food Program.

Presenters/Facilitators

☞ **Hans Corell** (Sweden) served as Under-Secretary-General for Legal Affairs and the Legal Counsel of the United Nations from March 1994 to March 2004. In this capacity, he was head of the United Nations Office of Legal Affairs. Before joining the U.N., he was Ambassador and Under-Secretary for Legal and Consular Affairs in the Swedish Ministry of Foreign Affairs from 1984 to 1994. From 1962 to 1972, he served first as a law clerk and later as a judge in circuit courts and appeal courts. In 1972, he joined the Ministry of Justice, where he became the Chief Legal Officer in 1981. Corell was a member of Sweden's delegation to the U.N. General Assembly from 1985 to 1993 and has had several assignments related to the Council of Europe, OECD, and the CSCE (now OSCE). He was co-author of the 1993 CSCE proposal for the establishment of the International Tribunal for the former Yugoslavia. In 1998, he was the Secretary-General's representative at the Rome Conference on the International Criminal Court. Upon his retirement from public service in 2004, Corell joined Sweden's largest law firm, Mannheimer Swartling, as a consultant. In parallel, he is engaged in the work of the International Bar Association and the International Center for Ethics, Justice and Public Life at Brandeis University. Corell is the author of many publications. He holds an honorary Doctor of Laws degree at the University of Stockholm (1997).

☞ **Jane Alison Hale** (United States) is Associate Professor of French and Chair of the Comparative Literature Program at Brandeis University. She is a longtime participant in the Brandeis Seminars in the Humanities, where she has worked with judges,

lawyers, teachers, and immigration professionals. She facilitates literature seminars in Massachusetts district courts for youthful criminal offenders in an alternative sentencing program called “Changing Lives Through Literature.” She has been a Peace Corps Volunteer English teacher in Chad, a Fulbright Senior Scholar in Dakar, and is now a Fulbright Senior Specialist in Lesotho, where she works with literacy training in an HIV/AIDS program at the Lesotho College of Education. She has written books on Samuel Beckett and Raymond Queneau, articles on Francophone African literature, and is currently preparing a manuscript about cross-cultural teaching and learning through literature.

☞ **Claire L’Heureux Dubé** (Canada) served on the Supreme Court of Canada between 1987 and 2002 and remains today one of this country’s foremost activists in promoting human rights through equality. Her judgments endorsed and defended equality rights and spanned many areas of law, from family law to civil law to employment, taxation, and criminal law. Throughout her career, she was steadfast in her protection of women, children, Aboriginal people, people of color and other disadvantaged groups in society.

First appointed to the Bench in 1973 as a Quebec Superior Court judge, the Honorable Madame L’Heureux-Dubé was appointed shortly thereafter to chair a Royal Commission into allegations of sexual exploitation of immigrant women by immigration officers. Her recommendations were accepted in full by the federal government. In 1979, she became the first woman appointed to the Quebec Court of Appeal and eight years later, she was the first woman from Quebec appointed to the Supreme Court of Canada.

She received a LL.L cum laude from Laval University in 1951 with special awards in Civil Law and Labour Law. During her career in private practice between 1952 and 1973, the Honourable Claire L’Heureux-Dubé served as partner of the firm Bard, L’Heureux & Philippon and later senior partner with

L’Heureux, Philippon, Garneau, Tourigny, St-Arnaud & Associates. Since her retirement from the bench in July 2002, she has been named to the position of judge in residence at her alma mater, Université Laval.

☞ **Chidi Anselm Odinkalu** (Nigeria) is Senior Legal Officer for the Africa Open Society Justice Initiative. He is also a Lecturer in Laws at Harvard Law School. Prior to joining the staff of the Justice Initiative, Chidi was Senior Legal Officer responsible for Africa and Middle East at the International Centre for the Legal Protection of Human Rights (INTERIGHTS) in London, Human Rights Advisor to the United Nations Observer Mission in Sierra Leone (UNOMSIL), and Brandeis International Fellow at the International Center for Ethics, Justice and Public Life at Brandeis University.

Odinkalu is widely published on diverse subjects of international law, international economic and human rights law, public policy, and political economy affecting African countries. He is frequently called upon to advise multilateral and bilateral institutions on Africa-related policy, including the United Nations Economic Commission for Africa, the African Union, the Economic Community of West African States, and the World Economic Forum. He is a Trustee of the International African Institute University of London, a member of the Human Rights Advisory Council of the Carnegie Council on Ethics and International Affairs, and of the Board of Fund for Global Human Rights.

☞ **Gregory S. Weber** (United States) is a Professor of Law at the University of the Pacific, McGeorge School of Law, in Sacramento, California. He has two principal research interests: dispute resolution processes and natural resources law. He heads the Pacific McGeorge Institute for Sustainable Development, a program focused on transnational natural resources issues. Weber is also an associate mediator with the Center for Collaborative Policy, where he has helped mediate complex natural resources disputes. As an environmental law advisor,

he has studied forestry disputes in Mexico for the World Wildlife Fund and in Canada for the Forest Stewardship Council (FSC). Currently, he is leading a project to revise the FSC dispute resolution protocol, which he wrote while on academic sabbatical in Oaxaca, Mexico. He is also researching the Friendly Settlement practices in the European Court of Human Rights and the Inter American Court of Human Rights. He has also trained Chilean prosecutors and defenders in negotiation skills. Before joining the McGeorge faculty, he clerked for Justice Edmond Burke, Alaska Supreme Court, practiced with a leading California water resources law firm, and was a senior attorney for the California Court of Appeal. He is a co-founder of the California Water Law and Policy Reporter. Weber has published a half-dozen law review articles, mostly on water resources law. He has also co-authored four books, including one on civil pretrial procedure, two on Water Resources Law and one on the Law of Hazardous Wastes and Toxic Substances. He speaks and reads Spanish.

Center Staff

☞ **Dan Terris**, director of the International Center for Ethics, Justice and Public Life, has been at Brandeis University since 1992. Programs initiated under his leadership at the Center and as assistant provost at Brandeis have included: the Slifka Program on Intercommunal Coexistence, the Brandeis Institute for International Judges (BIJ), the Brandeis International Fellowships, Community Histories by Youth in the Middle East (CHYME), the Ethics Center Student Fellowships, Brandeis in the Berkshires, Genesis at Brandeis University, and the University's continuing studies division. He has offered courses on individualism, poverty, American literature and the roots and causes of September 11, as well as teaching in the Brandeis Seminars in Humanities and the Professions, which uses literary texts to engage professionals in discussions on professional values and ethics. Daniel received

his Ph.D. in the history of American civilization from Harvard University, and he has written on 20th century history, literature, and religion. He recently published *Ethics at Work: Creating Virtue in an American Corporation* and is currently working on *The International Judge: Challenges and Opportunities in an Emerging Global System*.

☞ **Leigh Swigart** is the associate director of the International Center for Ethics, Justice and Public Life, and manages the development of seminars for professionals, including the Brandeis Seminars in Humanities and the Professions and the Brandeis Institute for International Judges. Leigh holds a Ph.D. in sociocultural anthropology from the University of Washington. Her academic work and publications have focused on language use in post-colonial Africa and recent African immigration and refugee resettlement in the United States. She has wide experience in international education, including a tenure as director of the West African Research Center in Dakar, Senegal, and has worked in the field of international literacy and indigenous language promotion. Leigh is a two-time Fulbright Scholar and recipient of the Wenner-Gren Foundation Fellowship for Anthropological Research.

☞ **Christopher D. Moore** is the communications specialist for the International Center for Ethics, Justice and Public Life. He holds a B.A. in Slavic and East European linguistics from the University of North Carolina at Chapel Hill and an M.S. in journalism from Boston University. Christopher has worked as a reporter for weekly and daily newspapers and has prior experience in university administration at Wheelock College.

Center Description and Contact Information

The International Center for Ethics, Justice and Public Life

The International Center for Ethics, Justice and Public Life exists to develop effective responses to conflict and injustice by offering innovative approaches to coexistence, strengthening the work of international courts, and encouraging ethical practice in civic and professional life.

The Center was founded in 1998 through the generosity of Abraham D. Feinberg.

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Other Center publications relating to international justice:

- *The Challenges of International Justice: A Report on the Colloquium of Prosecutors of International Criminal Tribunals, 2004*
- *Both Sides of the Bench: New Perspectives on International Law and Human Rights*
- *Literary Responses to Violence*, a collection of presentations made during the 2004 symposium of the same name
- *Brandeis Institute for International Judges* – 2002, 2003, 2004 reports

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About Brandeis University

Brandeis University is the youngest private research university in the United States and the only nonsectarian college or university in the nation founded by the American Jewish community.



Louis Dembitz Brandeis

Named for the late Louis Dembitz Brandeis, the distinguished associate justice of the U.S. Supreme Court, Brandeis was founded in 1948. The University has a long tradition of engagement in international law, culminating in the establishment of the Brandeis Institute for International Judges.

Brandeis combines the faculty and facilities of a powerful world-class research university with the intimacy and dedication to teaching of a small college. Brandeis was recently ranked as the number one rising research university by authors Hugh Davis Graham and Nancy Diamond in their book, *The Rise of American Research Universities*.

A culturally diverse student body is drawn from all 50 states and more than 56 countries. Total enrollment, including some 1,200 graduate students, is approximately 4,200. With a student to faculty ratio of 8 to 1 and a median class size of 17, personal attention is at the core of an education that balances academic excellence with extracurricular activities.