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 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?
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.

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?

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.