

Both Sides of the Bench

New Perspectives on International Law and Human Rights



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**Projects and Symposium Presented by
the Brandeis Fellows in Human Rights,
Intervention, and International Law**

**Sponsored by the International Center for Ethics,
Justice and Public Life at Brandeis University**

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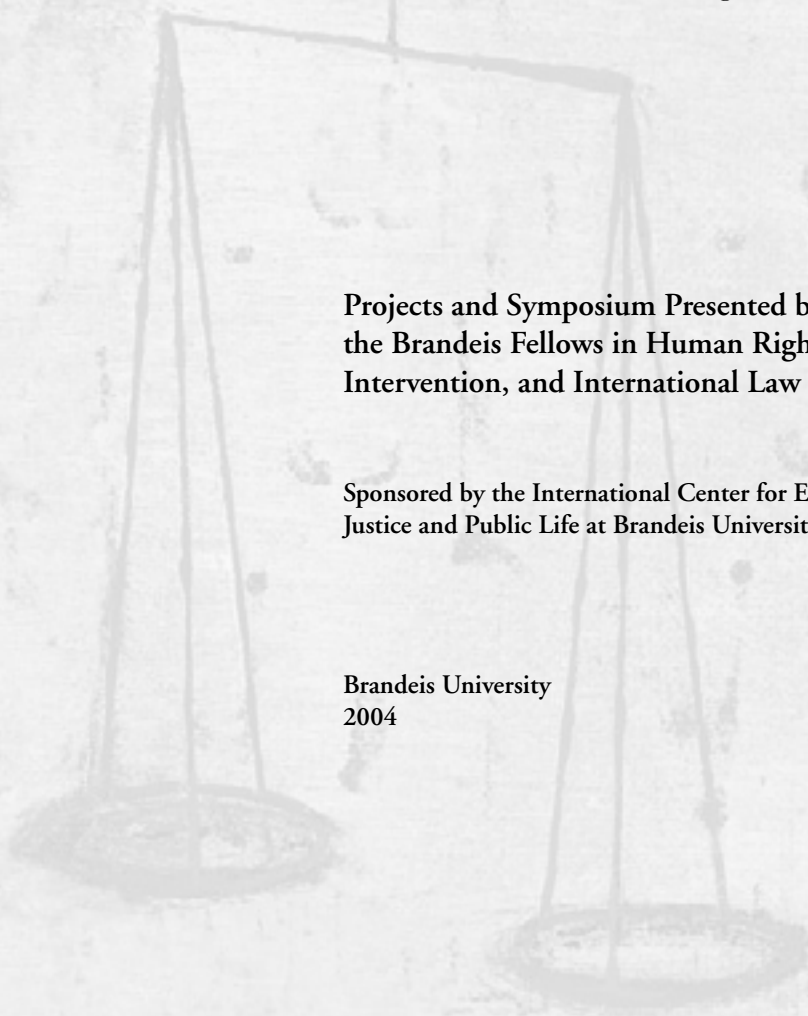


Table of Contents

I	Introduction to the Brandeis International Fellows Program in Human Rights, Intervention, and International Law	5
II	Projects	7
	The Nature of Rights <i>David Benatar</i>	9
	Paddling on Both Sides of the Boat: Cooperation Between International and National Justice <i>Brian Concannon Jr.</i>	15
	International Criminal Courts: The Political Context <i>Peter Ford</i>	33
	Equality, Human Rights, and Women: Justice and Jurisprudence <i>Naina Kapur</i>	37
	The View from the Courtroom <i>Nancy L. Paterson</i>	41
	Human Rights, Equality, and Judges <i>Shiranee Tilakawardane</i>	47
	Forensic Anthropology in Context <i>Silvana Turner</i>	59
III	Symposium Program	65
IV	Summaries of Symposium Proceedings	67
	The Nexus Between National and International Law	69
	Rights, Bias, and the Courts	71
	NGOs and Human Rights	75
	Victims, Witnesses, and Evidence	77
	Diplomacy and International Justice	79
V	Fellows' Biographies	81

Introduction

Both Sides of the Bench: New Perspectives on International Law and Human Rights highlights the work of the 2001-03 Brandeis International Fellows in Human Rights, Intervention, and International Law. It also documents the themes raised in the related symposium, entitled “Both sides of the Bench,” held on April 1-3, 2003 at Brandeis University. This publication is intended to serve as a resource for individuals and institutions involved in the work of the international judiciary.

Hosted by the International Center for Ethics, Justice and Public life, the Brandeis International Fellowship (BIF) program was designed to provoke new kinds of thinking about, and innovative approaches to, the work of judges serving on international and regional courts. In fall 2001, the Center convened ten scholars, educators, activists, and judges from around the world for the first of a series of three institutes at Brandeis University, each combining collaborative sessions and individual reflection. The program was built on the Center’s conviction that the successful administration of justice at any level depends on judges’ considering perspectives from “both sides of the bench.”

Informed both by the content of the institutes and

personal experience, each fellow authored a project—ranging from scholarly articles to curriculum modules—over the course of the program. These projects are diverse, in form and function as well as in geographical and ideological perspective. The common thread that binds them together is the idea that social, political, and personal contexts matter in international law.

During the symposium, Fellows were joined by US-based judges, scholars, and other professionals with experience in law and international affairs. The symposium sessions asked the question of how to integrate non-judicial perspectives into the work of international justice system. The Fellows drew upon their projects to tackle this and related questions in their symposium presentations. Respondents drew in turn upon their own experiences in suggesting fruitful interactions between the international legal system and the worlds of NGOs, scholars, diplomacy, and other fields.

The Brandeis International Fellows Program is funded by the Rice Family Foundation.

Projects

The Nature of Rights

David Benatar

Paddling on Both Sides of the Boat: Cooperation
Between International and National Justice

Brian Concannon Jr.

International Criminal Courts: The Political Context

Peter Ford

Equality, Human Rights, and Women: Justice and
Jurisprudence

Naina Kapur

The View from the Courtroom

Nancy L. Paterson

Human Rights, Equality, and Judges

Shiranee Tilakawardane

Forensic Anthropology in Context

Silvana Turner

The Nature of Rights

• David Benatar

David Benatar is associate professor in the Department of Philosophy at the University of Cape Town, South Africa. Benatar teaches or has taught courses in applied ethics, contemporary moral and political philosophy, critical thinking, bioethics, and philosophy of law. He is the author of numerous articles and editor of Ethics for Everyday.

Introduction

One contemporary political philosopher has noted insightfully that future historians of ideas are likely to name our age the Age of Rights. Indeed, the concept of rights, although having rudimentary form in ancient times, and explicitly articulated by Enlightenment thinkers, has gained unprecedented currency only in the last six decades in the wake of the atrocities of the Holocaust. Since the end of the Second World War there have been numerous international declarations of (human) rights, many more states have committed themselves to rights principles, and popular moral discourse has been so transformed by the concept of rights that most people are now prone to couch all moral discussion in the language of rights.

Most people, however, are ignorant of what exactly rights are. That is to say, they are unaware of the conceptual logic of a right, and how it differs from other moral concepts. The main aim of this session, therefore, is to provide an introduction to clearer thinking about rights. Some elementary features of rights theory will be introduced and participants will have the opportunity to explore and improve their understanding of the nature of rights.

That the participants will be judges in international courts makes this undertaking particularly important. It is a sad truth that notwithstanding the inroads that rights have made in declarations, law and popular discourse, they have failed all too often in half a century to prevent the very sorts of atrocities that vaulted them into the spotlight. Many states have not yet committed themselves to (individual human) rights. In the international arena, the declarations and increasing body of international law have, with some

exceptions, not been enforced. The recent move to increased enforcement of international law, by means of international courts and tribunals is thus a welcome development. The session will lay a foundation for understanding the theory behind the rights that international judges enforce.

The subject of this session is, then, the nature of rights. More specifically, the session will address the differences between legal and moral rights, between rights and other moral concepts, and between different kinds of rights. The distinctive features of rights will be examined and discussed. With an enhanced understanding of the nature of rights, participants will then be invited to consider some practical legal issues and actual cases on which rights theory can shed some light.

This session will be approximately two to two-and-a-half hours long. Roughly the first thirty minutes will be devoted to presenting the issues and outlining a schema for thinking about rights. In the remainder of the session these issues will be discussed. The discussion will be partly theoretical—to clarify the theoretical issues—and partly practical—to see how the theoretical issues can be applied to thinking about actual legal provisions and cases.

The ideal size of the group participating in this session is between ten and fifteen. However, there is some room for latitude. One could obviously have fewer participants (although too few would detract from the discussion dynamic). One could also have more than 15 participants. However, if there are too many, the discussion would involve too few of the participants.

Questions for Consideration

The main question that will be considered in this session is: *What are rights?*

In pursuit of the answer to this question, a number of other, subsidiary questions may be asked. These include:

1. What is the difference between moral rights and legal rights?
2. How do Interest and Choice theories of rights differ?
 - 2.1. What implications do each of these theories have for the kinds of beings that can be rights-bearers?
3. How do rights differ from other moral concepts?
 - 3.1. With what are (claim) rights correlated?
 - 3.2. How strong are moral rights?
4. What is the difference between positive and negative rights?
5. What relevance does rights theory have for (human) rights law?
 - 5.1. What is the relationship between rights law and the Interest and Choice theories of rights?
 - 5.2. How do competing conceptions of the nature of rights bear on socio-economic legal rights?
 - 5.3. How do competing conceptions of the nature of rights bear on the strength of legal rights?

Rationale and Objectives

Most people know remarkably little about what rights are and how they operate, even if they regularly speak about rights. Now many might think that even if this is true of most people it is not true of judges. However, most judges and other legal professionals, although often engaged in rights law, are surprisingly uninitiated in rights theory.

The justification for this session is thus the need for greater conceptual clarity about the nature of rights. I am not suggesting that what international and other judges do cannot be done without

such an understanding of rights theory. Often practitioners operate in a way that bypasses theoretical understanding. However, such a way of working is impoverished. This impoverishment can make a difference in some cases, but even where it does not, the general level of operation is deficient. It seems particularly important that judges, who enforce rights, should have an understanding of what rights are.

Obviously, it would be impossible to convert judges into experts in rights theory in a single session. The objectives of the session, therefore, must be more limited. By the end of the session the participants should be aware that there is a realm of inquiry with which they may previously not have been familiar. They should also be able to answer some of (the less contentious) questions in rights theory (such as how positive and negative rights are conceptually distinguishable). The session should also supply them with a schema for thinking about the more difficult questions in rights theory (such as whether there *are* any positive moral rights or how strong rights are).

In sum, it is hoped that the judges will leave this session with a more nuanced understanding of the concept of rights, a way of approaching questions about rights and a sense of the importance of these issues.

Detailed Outline of the Session

A protracted Socratic dialogue, perhaps over many days, weeks or months, could yield a schema for thinking about rights (or other topics). As we do not have this amount of time at our disposal, the session will begin with the *presentation* of the issues and an approach to thinking about the problem. In this component of the session, ideas will be imparted, distinctions presented and arguments outlined. Although the presentation is the more formal aspect of the session, it need not take the form of a mini-lecture. Participants can be involved in a somewhat interactive presentation. The interaction here, however, should not become distracting. It should facilitate the presentation and ensure clarification.

The more informal aspect of the session is the discussion that follows the presentation. Here participants are invited to further clarify issues, raise problems and objections, and venture alternative ways of thinking about any of the issues. As there are better and worse ways of thinking about rights, the discussion should actively engage views that are advanced rather than simply note them and move on. (If any view were as good as any other, there would be no point, other than a curiosity about the opinions of others, in discussing them.) A probing of views is necessary. Just as the presentation, although the more formal aspect of the session, should be somewhat interactive, the discussion, which is the more informal aspect of the session, should be guided. Entirely unguided discussions about such issues tend to be unenlightening and unproductive.

The plan is for the presentation to take approximately thirty minutes and for the remainder of the session to be devoted to discussion.

As it is impossible to predict the course the discussion will take, only the content of the presentation can be outlined. Here, the first conceptual distinction to be drawn is between legal and moral rights. However, it will also show how some rights are both legal and moral. The sense in which moral rights can be said to exist will also be outlined.

Next, two competing views of rights will be presented – the Interest (or Benefit) and Choice (or Will) theories. The implications of these views for the kinds of beings that can qualify as rights-bearers will be made explicit.

Then rights will be distinguished from other moral concepts (such as duties, virtues, and supererogatory acts). The distinctive role that rights play, but also their limitations, will be conveyed.

Focusing on claim rights (rights in the strict sense), it will be explained how these have correlative duties. Distinctions will also be drawn between rights arising contingently and those that exist *ab initio*. This will facilitate a distinction between natural and non-natural moral rights.

Then the distinction between positive and negative rights will be drawn and the problem of whether there can be any positive moral rights discussed. The notion of three “generations” of rights will be introduced in this context.

Finally, the strength of rights will be discussed. More specifically, competing views of rights as absolute or non-absolute but very strong, will be presented. Different senses of “absolute” will be probed here. The distinction between a “prima facie” and an “all-things-considered” view of rights will be explained and the implications for the strength of rights described.

The discussion should range over all of the above features of the presentation. In addition, these considerations will be applied to some practical legal issues and actual cases. Among the issues that may be discussed are the following: (a) Although law does not appeal explicitly to either Interest or Choice theories of rights, there may be an implicit (and arguably confused) dependence of legal rights on *both* of these theories. (b) Legal provisions for and cases of socio-economic rights, and the notion of “progressive realisation” of such rights. (c) Whether legal rights of different kinds are best understood as being trumping or prima facie considerations.

Faculty Presenters

It would be important to have a faculty presenter with a background in moral, political, or legal philosophy, and preferably with a special interest in rights theory. Familiarity with legal issues would be an advantage. It is important that the faculty presenter be capable of making the concepts accessible to non-specialists and be able to facilitate a good discussion.

Readings

• Prescribed core reading:

Jeremy Waldron, “The Philosophy of Rights” in G.H.R. Parkinson, *An Encyclopaedia of Philosophy*, London: Routledge, 1988, pp. 713-735.

Some people prefer to prescribe a large volume of reading. My preference, especially in introductory contexts, is to limit the quantity of reading, both in order to maximize the chances that the reading will actually be done and to allow for a closer reading. This is why I am suggesting only one prescribed reading. It is a general introduction to issues in rights theories. Although other prescribed readings could be offered, they would likely either cover the same ground or be unduly focused on some or other feature of rights theory.

• **Additional readings:**

Joel Feinberg, *Social Philosophy*, Englewood Cliffs NJ: Prentice-Hall, 1973, chapters 4-6.

Joel Feinberg, *Freedom and Fulfillment*, Princeton: Princeton University Press, 1992, chapters 8 – 10.

These additional readings could be suggestions to those who would like to deepen their understanding. (There would likely be copyright problems with copying all of these additional readings for each of the participants, given that a number of chapters are being suggested from each of the two books. Nevertheless, participants could be provided with the references.)

Additional Issues

It is often hard to identify sensitivities potential participants may have. This is because sensitivities vary and are often misplaced or arise from misunderstanding. Theoretical issues tend to be less sensitive than practical ones. However, because people make inferences from theory to practice (often mistakenly) the theoretical issues can become sensitive.

For instance, Choice theories about rights imply that neither animals nor human infants can be rights-bearers and this may trouble some people. I plan to engage this issue head-on. It is noteworthy that even if these sorts of beings cannot be rights-bearers, it does not follow that they may be treated in any way one pleases. Other moral principles may restrict how they may be treated.

Another example is that of welfare rights. Some people have reservations with the notion that there are such rights. Others are troubled by such reservations. Again, I think that the sensitivities can be addressed by noting that what government ought to provide its citizens is not necessarily settled by whether there are welfare rights. It is possible, for example, to think that government has robust duties to provide welfare services, without one's thinking that the best way to express this is in terms of the citizens' rights to such services. Similarly, it is possible for somebody to think that citizens do have welfare rights, while thinking that these are either meagre in scope or easily defeasible.

Addressing sensitivities is important in moral discussion. They often provide valuable insight, but they equally or more often cloud judgement. A skilled discussion leader will highlight this and thereby advance the discussion.

Follow-Up

There are innumerable possible readings that could be suggested to participants as follow-up literature. Here are just a few suggestions:

- Buchanan, Allen, "What's so special about rights?" in E.F. Paul, F.D. Miller Jr & J. Paul (Eds.), *Liberty and Equality*, Oxford: Blackwell, 1985.
- Dworkin, Ronald, *Taking Rights Seriously*, London: Duckworth, 1977, chapters 6, 7, 12 and 13.
- Feinberg, Joel, *Rights, Justice and the Bounds of Liberty*, Princeton: Princeton University Press, 1980, chapters 6-9.
- Freedman, Michael, *Rights*, Milton Keynes: Open University Press, 1991.
- Hohfeld, Wesley N. *Fundamental Legal Conceptions*, New Haven: Yale University Press, 1919.

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- Thomson, Judith Jarvis, “Some Ruminations on Rights”, in *Rights, Restitution and Risk*, Cambridge MA: Harvard University Press, 1986.
 - Thomson, Judith Jarvis, *The Realm of Rights*, Cambridge MA: Harvard University Press, 1990.
 - Waldron, Jeremy (Ed.), *Theories of Rights*, Oxford: Oxford University Press, 1984.
 - Waldron, Jeremy (Ed.), *Nonsense upon Stilts: Bentham, Burke and Marx on the Rights of Man*, London: Methuen, 1987.
 - Wellman, Carl, *A Theory of Rights*, Totowa NJ: Rowman & Allanheld, 1985.

The extent to which participants will be re-engaged by the issues arising in the session will depend largely on their own proclivities. One could send relevant readings periodically, but whether they are read will depend on how inclined the participant is to read them. One could also draw to the judges’ attention new (or old) cases in which (theoretical) rights issues feature prominently.

Evaluation

There are many criteria by which one can evaluate a session. For instance, a session might be evaluated on the basis of how much it engaged the attention of the participants. That is hard to determine in any precise way. Feedback forms, although sometimes illuminating, can be over-rated as respondents tend to err on the positive side. Alternatively, a session can be evaluated on the basis of how much the participants learn or how much understanding they gain. Again, these are hard to quantify. I would suggest, therefore, that open-ended feedback be solicited from the participants. This would allow participants to offer whatever comments they might have on what they did and did not find helpful. Although some such feedback can be obtained through discussion, one allows for more critical responses if anonymous written responses are requested. As always, participant feedback needs to be assessed rather than simply accepted.

Paddling on Both Sides of the Boat: Cooperation Between International and National Justice

• Brian Concannon

Brian Concannon Jr. is a human rights lawyer and activist. Since 1996 he has co-managed the Bureau des Avocats Internationaux, an office established by the Haitian government to help victims and the judiciary prosecute human rights violations from Haiti's 1991-94 dictatorship. Concannon writes and speaks frequently on human rights in Haiti. He recently completed a book chapter about victims of political rape in Haiti and their struggle for justice for Women and International Human Rights Law, Vol. IV: International Gender Justice and Accountability.

Introduction

Over the last decade the international community has expended enormous (if still inadequate) resources, including money, time, and energy on “international justice” as a response to massive violations of human rights. These include the permanent International Criminal Court, two ad-hoc international tribunals, hybrid courts in former Yugoslavia and Sierra Leone, and proposed tribunals for Cambodia and East Timor.

At the same time, much less attention has been paid to the national justice systems of those countries where the violations took place, or cooperation between International Justice and the government, people and justice systems of these countries. Although there are many obstacles to such cooperation, including the potential bias and inexperience of national justice officials, and scarce time and money in the international system, there are also many opportunities for cooperation. Cooperation can enhance the performance of both national and international justices, provide better service to victims, witnesses and defendants, and realize everyone's goal of effectively addressing and deterring massive human rights violations.

Better cooperation could help both national and international justice provide better services to victims and witnesses. Victims as a rule prefer high a quality national trial, if possible, to a high quality international one, because it is more familiar, less intimidating, and can help transform their national judiciaries. If the circumstances make an international trial preferable, the participation of local prosecutors,

investigators and other officials can reduce the international tribunal's unfamiliarity to both victims and witnesses.

Cooperation could also help national judiciaries. International courts could share evidence, legal research and expertise at little or no cost, and could help train national justice officials through work on its cases. By handling sensitive cases when they would impose too much stress on the national system, but deferring to local courts when possible, international courts could help the local courts progressively develop competence and a constituency.

Cooperation could also help international justice, especially with its most vexing problems. Coordination with local authorities, where possible, could help investigators and prosecutors find effective witnesses and victims. To the extent that local officials can make victims and witnesses more comfortable with international proceedings, they would provide better and more timely testimony. To the extent that local justice functions well, it can reduce the international tribunal's caseload and financial burden. Finally, helping local judiciaries improve their performance and providing better services to victims and witnesses fulfills the mandate of international courts, all of which were specifically charged with advancing broader goals of justice.

Although there have been some efforts by judges and others in international justice to collaborate with national judiciaries, the overall level of cooperation

has been inadequate. The reasons for this shortfall are many and often legitimate: people are already overloaded with important, urgent work, and there are continuous demands from others in the system, from the UN, from donor countries. The international systems are also insulated from national judiciaries, by distance, language, culture, and a justified reluctance to be entangled in national politics. Judges are further insulated by custom and by barriers imposed to ensure the integrity of their judging.

This session is designed to encourage judges to “think outside the box” about the value of international/national cooperation, especially the potential advantages to their courts, to victims and to national judiciaries. It should also help them identify concrete ways that they, as judges and administrators, can promote such cooperation.

The session will be two and one half hours long, including breaks. The first two parts will be role plays. Participants will all be given a fact pattern, detailing the recent history of Atlantis: the five-year dictatorship with massive human rights violations, the creation of the International Criminal Tribunal for Atlanta (ICTA), and the mixed success of both the tribunal and the Atlantan justice system in providing justice.

Part I of the session will be a plenary conference convened to discuss improving the ICTA’s performance to date. Each participant will be assigned

a character, such as an ICTA investigator, a national prosecutor, a victim, or the minister of justice. The main fact pattern will include a brief sketch of all the other characters, but each participant will also receive a more detailed description of his or her perspective and objectives. The conference’s agenda will raise issues involving national/international cooperation, and each participant is to stay in character and represent his or her interests at the conference.

After the break, all the participants will become international judges, appointed to a panel to make recommendations for enhanced cooperation between the ITCA and the Atlantan justice system. The panel should focus on concrete ways that ITCA judges can make a difference, on the bench, through their administrative activities and as advocates within the system. By the end of the session, they should be able to produce an outline of the most promising areas for cooperation.

Part III will synthesize the participants’ thinking in terms of cooperation, and evaluate the efficacy of the session. Participants will be “in character” as themselves.

The target audience is judges and other officials working in international justice. The ideal size would be from 7-15. There would not be any formal presentations, but there would be a moderator, for both parts of the session.

Detailed Outline

Part I: Plenary Conference (80 minutes)

- A. Introduction (Moderator, 8 minutes)
 - B. Agenda Items (16 minutes each):
 1. Obtaining evidence, including witness statements
 2. Atlantan nationals working in the International Tribunal for Atlantis (ICTA)
 3. Victim issues
 4. Speeding up the trials
 - C. Conclusion (Moderator, 8 minutes)
- Break: 20 minutes

Part II. Follow-up report outline (25 minutes)

The report is to be presented to the UN and to the ICTA Judges Association. It will provide non-binding recommendations for ways that the judges can enhance cooperation with the Atlantan justice system, through their work on the bench, administrative duties and as advocates within the system. The objective of this initial meeting is to prepare an outline of the most promising areas for collaboration in three areas: a) evidence sharing, b) victims' concerns and c) supporting the Atlantan justice system.

The participants should be divided evenly among the three three topics. Each group should identify at least five concrete steps that the ICTA judges can take to enhance cooperation in their subject area.

Part III. (25 minutes) Moderator-led discussion to conclude

This section should be geared to two objectives: first, synthesizing the participants' thinking with respect to cooperation, and second, evaluating how well and deeply the session has provoked them to consider the cooperation issue. These two issues are not necessarily separate, so they need not be treated separately. The moderator may, however, want to guide the discussion towards neglected areas.

Readings

Advance readings are the fact pattern, the ICTA's statute and the character sheet. The readings will be kept short, to encourage the participants to study and think about the fact pattern ahead of time. Participants should spend at least an hour with these readings. It is preferable that the preparation be done at least a few days before the session.

Potential problems or sensitivities

Some people may be uncomfortable with the role-play. Familiarity with the character and the fact pattern will help reduce this discomfort, so participants should be encouraged to prepare in advance. It may be worth making a special effort with some participants, asking them personally to play a leading role in the discussion. This could be done on the basis of characters that are either more difficult or more central to the discussion, or on the basis of participants who may be more likely to help the process get a good start. Conversely, participants who might otherwise be reticent may rise to the occasion if given special responsibility.

In addition to potential resistance to the overall issue, if a participant perceives that an issue is close to one confronting him or her in his work, the participant may transfer defensiveness or some other reaction from the "real world" to the session.

The fact pattern has been drafted to avoid discussing race. Avoiding an issue which some consider central to this type of discussion may raise some sensitivities.

Although most of the characters can be gender-neutral, some, such as a rape victim or an accused might have specific gender, which could raise sensitivities.

Knowing something about the participants ahead of time, especially gender, race, national origin and institutional affiliation would help tailor the fact pattern and the character descriptions.

Follow-up

A selection of readings from the perspectives of a) victims and b) human rights professionals on why cooperation might be desirable.

Distribute a document based on the outline achieved in the second section.

Evaluation

The primary evaluation would be based on the outline from Part II, and the comments in Part III. The success of the session will depend on the extent to which the outline shows that the participants have thought a) seriously and b) concretely about the potential for themselves to contribute to national/international cooperation. Observing the first session should help evaluate the materials themselves. Aspects of the fact pattern that generate defensiveness or sensitivity, or that lead to unfruitful digressions could be changed. So could characters or characteristics

that do not inspire productive participation. The amount of information in the materials should also be evaluated, as it is a fine balance between providing enough information to raise complex issues, and having too much information to digest and process in the allotted time.

Materials

The complete materials packet should contain:

1. Fact pattern: detailed outline and important names and dates in recent Atlantan history
2. Character sheet
3. ICTA Statute
4. An introductory letter to participants
5. An outline of the moderator's introduction

The moderator's outline proposes a brief video presentation. The video is not essential, but may provide a good introduction to the theme.

The Search for Justice in Atlantis: Fact Pattern

A. Background

Atlantis is an island country of 10 million. It is partially industrialized, with a solid middle class that enjoys a decent standard of living, especially in the capital, Nirpuat, and other cities. But 60% overall, and more in the rural areas, do not share this prosperity, lacking adequate access to healthcare, education, food, or all three. Half of these are below the poverty line. Everyone speaks Atlantian, a language not well known outside the country. English is taught in the schools, and many professionals speak it, but poor people do not speak it at all.

For most of the 20th century, political power in Atlantis was shared by a few prominent families. In a peaceful transition from oligarchy, the country held elections with universal suffrage in 1980. Over the next decade, a series of civilian governments wrestled with the country's underdevelopment, with limited success. Inflation and crime rose. The civilian governments had made some progress in providing basic services to rural areas, but did not come close to matching either the needs or expectations. Efforts to replace the oligarchy's corrupt government institutions with more honest and efficient ones were sincere but ineffective. One of the most frustrating areas of reform was the justice system: lawyers, judges and others vested in the old, corrupt system held their ground tenaciously. Although a few young idealistic lawyers started to have some influence at the lower levels, the existing power structure remained intact. Cases continued to be decided more by money and influence than by facts and law.

B. The dictatorship

In 1990, amid spiraling inflation and frequent street protests both for and against the government, the military seized power. On May 15, 1990, President Artreb Ditsira, who was a year into a four-year term, was exiled, the legislature dissolved, and several constitutional provisions suspended. Executive and legislative functions were vested in a junta composed of General Sardec, the head of the army, Admiral Maib

of the Navy and General Ocnarf of the Air Force. Public support for the move was mixed: about half the population welcomed the coup, hoping it would restore order and allow for accelerated economic and social development. The other half preferred the tradeoffs of democracy, and opposed it. Hundreds of thousands of the latter throughout the country poured into the streets to protest, as soon as the coup was announced. In some cities soldiers shot at the crowds, killing one thousand in the first three days.

The killings moved the protestors from the streets, but did not snuff out dissent. Thousands continued to protest non-violently and subtly: disseminating information, clandestine radio broadcasts, small group organizing. About 2,000 fled to the mountainous Nobitra province at the western end of the island to form a guerilla army under the umbrella of the Popular Front for Atlantis (PFA). The PFA consistently held about 10% of Atlantian territory, mostly in Nobitra, and conducted regular attacks in urban areas throughout the country.

Vincent Niassu was a prominent politician in Nobitra before the coup. He remained in the province throughout most of the dictatorship, leaving occasionally to represent the Nobitra People's Movement (NPM) to foreign governments and the UN. Although there were no formal links, the NPM was widely believed to be the civilian arm of the PFA. The NPM is believed to have engaged in fundraising for the PFA, and the activities of the two appeared well coordinated.

The dictatorship ruthlessly pursued both armed and unarmed opposition. Captured guerilla soldiers were shot on site, as were many civilians suspected of helping them. Those accused of unarmed opposition were arrested, beaten or otherwise tortured, and sometimes killed. The dictatorship also provided guns and training to sympathetic gangs, and looked the other way when the gangs attacked suspected pro-democracy activists. These attacks involved beating, killing, rape, and other torture, and theft and destruction of property.

Among several prominent killings was the assassination of Judith Remzi, a prominent Atlantan journalist, with a reputation for independence and integrity. She wrote a column supporting a peace march to commemorate the third anniversary of the coup, on May 15, 1993. Despite warnings, she attended the march, walking at its head. In broad daylight, and despite a police escort, a carload full of armed men pulled in front of the march. One of the marchers pointed Remzi out, and she was led at gunpoint around the side of a building, and shot dead. The police did not intervene or make any arrests.

Etrela Ecnale was a women's rights activist in Nirpuat. She was not involved with any political party, preferring to concentrate on grassroots organizing of women. In April 1994, she was abducted from her home by masked men in civilian clothes. She was raped repeatedly, then hacked with machetes and left for dead in a field. She managed to crawl to the road, where a motorist picked her up and drove her to a hospital. Soldiers came into the hospital looking for her, but a nurse hid her in a supply closet. She later sneaked out of the hospital and the country, and spent two years in hospitals abroad, recovering from her injuries.

Two prominent massacres took place early in 1995. The first was in the village of Tobar, a working-class suburb well known as a bastion of the Ditsira regime, and believed to be a base of operations for PFA attacks on the nearby city of Sevia. On the morning of February 17, two army companies from the local garrison and dozens of paramilitaries surrounded Tobar, on the pretext of executing a search warrant for Ray Atem, a local leader accused of coordinating PFA activity. They went from house to house searching and pillaging. Many residents suspected of being PFA sympathizers were beaten or arrested. Tobar's young men, who the army considered to be PFA supporters as a class, were rounded up in the town square. The paramilitaries, many from the area, pointed out forty-seven of the young men, who were handcuffed and marched out of town. They were never heard from again.

The second massacre took place in the town of Grobua, in Nobitra. Grobuans had a proud tradition of serving in the armed forces. Although most of Nobitra sympathized with the PFA and much was controlled by it, Grobuans supported the dictatorship. The army frequently used Grobua as a base for operations elsewhere in Nobitra, and kept a detachment there throughout most of the war. On March 3, two weeks after the Tobar massacre, PFA forces surprised and overwhelmed the Grobua garrison. Five soldiers were killed in the fighting, seven more were executed after surrendering. The PFA went from house to house looking for young men, sometimes breaking furniture and stealing valuables. It rounded up 47 young men at random, and shot them in front of the town hall.

The justice system remained nominally independent from the dictatorship, but the junta appointed all judges and prosecutors. Lawyers who brought cases on behalf of the dictatorship's victims were intimidated, threatened, and occasionally arrested. Ten were killed. Judges who ordered the liberation of political prisoners were intimidated, and two prominent judges were killed by paramilitaries. Many judges supported the dictatorship. By the end of the second year of the dictatorship, all remaining judges, out of fear, ambition or political conviction, were cooperating with the Executive. They routinely convicted and imprisoned people under "national security" laws, for organizing, speaking, writing, and other constitutionally protected conduct. Judges refused to hear *habeus corpus* petitions, but did admit confessions obviously extracted by torture.

Government forces generally contained the PFA to the western end of the island, but were not able to take back any territory for long, or prevent regular attacks on urban areas and infrastructure, especially the electrical grid. The war and the PFA's sabotage was a drain on the economy, and generated severe unemployment and inflation. The economic hardship combined with the military stalemate eroded the dictatorship's support. Under mounting national and international pressure, the junta agreed to UN-

sponsored peace talks, which culminated in a cease-fire on June 1, 1995, and a comprehensive Peace Accords signed on December 31, 1995.

C. Transition to democracy

Under the terms of the peace, both the PFA and the army demobilized, and agreed to turn in their weapons. President Ditsira and the May 1990 Parliament were reinstated, for a one-year transitional period, during which elections were to be held for all elective posts. In the first elections, in December 1996, Ditsira's Labor Party won the Presidency, and 40% of the seats in both houses of Parliament. For seven years the Labor Party has cobbled together coalitions of various strengths to form Labor-led governments. Ditsira won a second (and last per the Constitution) four-year term in the December 2000 elections, and the Labor Part won a slim, but outright majority in Parliament in December 2002.

The Peace Accords created the Atlantis Truth Commission (ATC), charged with which investigating human rights violations on both sides, and submitting a report to the general public. The ATC was specifically not granted judicial powers such as subpoena, arrest or trial. The ATC filed a report on June 1, 1996. The Commission called the report "provisional," because it claimed it had neither the time nor the material resources to adequately fulfill its mandate. It did conclude that there were massive violations of human rights committed by both sides, including war crimes and crimes against humanity.

The ATC report estimated that politically motivated violence during the dictatorship included 15,000 murders, 100,000 incidents of false arrest and/or torture, including 1,500 political rapes, and 500,000 incidents of theft or destruction of property. It estimated that the dictatorship and its paramilitary supporters were responsible for 80% of the human rights violations, the PFA 20%. It recommended that all those accused of involvement in human rights violations be arrested immediately, and prosecuted. As the judiciary was widely mistrusted for its historical performance as well as its complicity in the military's

repression, the Commission recommended that the top leaders of the military, paramilitary and guerrilla, as well as anyone accused of multiple homicides, be tried by the ad-hoc ICTA. It recommended that the government establish an accelerated, year-long training program for new judges, prosecutors and investigators, who would then be appointed to special courts to try the remaining accused.

The Peace Accords also requested the United Nations to create the ITA, which was established by a Security Council resolution, and started operating in November, 1996.

Immediately upon the signature of the Accords, Generals Sardec and Ocnarf fled to the country of Thule, which had been supportive of the junta, and which granted them political asylum. Admiral Maib disappeared from public view. Sightings of him were reported from time to time in different countries, but he has never been apprehended. Most senior military officers, and some lower level soldiers, fled to countries that had provided tacit support to the dictatorship, or had large Atlantan populations.

The PFA disbanded immediately, and most of its fighters reintegrated to civilian life. Some commanders fled, to the same countries with high Atlantan population as the soldiers, or to countries that had provided the guerilla support. A few former commanders remained in remote areas of Nobitra and continued to exercise unofficial control through remnants of their units. Although they melt away before a large Atlantan police force, the underfunded police are unable to sustain a large presence everywhere, and the former PFA regain control as soon as the police leave.

Atlantis' new civilian government arrested 2,000 people accused of serious human rights violations during the dictatorship period in its first six months. Although the police force, which had cooperated with the military authorities, was slow to arrest former soldiers and their paramilitary allies, the dictatorship's civilian opponents were not. Most of those arrested

were rounded up by groups of civilians, sometimes beaten, and led forcibly to the prison. Special “prison watch” brigades kept a vigil outside of the gates of the National Penitentiary, where most of the accused perpetrators were held. The brigades threatened to kill any prisoner who escaped or was released by a judge who had collaborated with the dictatorship.

D. The Atlantan justice system

Seven years after the Peace Accords, the Atlantan justice system’s progress in both developing its overall capacity and prosecuting those accused of human rights violations has been concrete, but disappointingly slow. In addition to confronting past human rights violations, the system has had to rise to the challenge of increasing common crime. Citizens complain that their streets are not safe, business owners that robberies are ruining them, and human rights activists that criminal defendants spend too much time in pre-trial detention.

The government created a Judicial Academy, with international assistance and instructors, that held intensive year-long training sessions for law school graduates interested in becoming judges and prosecutors. Many of these lawyers’ educations had been impaired by the upheavals of the dictatorship, so the Academy spent much time on remedial legal education. The Academy had difficulty hiring qualified instructors: many experienced Atlantan judicial officials were considered tainted by anti-democratic activities during the dictatorship, and others were reluctant to cooperate with the new government. The international staff were highly qualified in human rights law and general legal principles, but less competent in the details of Atlantan law and practice. Few international staff spoke Atlantan, and only half of the students were fluent in English, the most common foreign language.

As they had before the dictatorship, lawyers and judicial officials as a group resisted legal reform, successfully. No major law reform passed the legislature, and most practitioners continued on as before. Atlantan courts continued to be slow, corrupt, and unpopular.

Some graduates of the Academy were appointed to important prosecutorial and judicial posts. Although as a group they suffered from inexperience, some learned quickly, and handled legal proceedings with more honesty and diligence than their colleagues. But all suffered from a lack of adequate resources: transportation, support staff, legal references, and office equipment. The new guard was also criticized for political bias, as their diligence and honesty seemed disproportionately directed at supporters of the dictatorship and other Labor Party opponents.

Atlantan justice has struggled with its prosecution of those accused of human rights violations during the dictatorship. The first trial, for the killing of journalist Judith Remzi, took place in November 1996. Most of those accused were tried *in absentia*. Only one defendant, Babmiz, a paramilitary member accused of pointing Remzi out to the hit squad, was actually in the court. Babmiz had a lawyer, and was allowed to contest the evidence against him and present a defense. But his lawyer was neither vigorous nor effective, and Babmiz complained that his alibi witnesses were too scared to testify. Babmiz was convicted as an accessory to murder, and most of those accused *in absentia* were convicted for murder or accessory to murder by the jury (in Atlantis, serious felonies are automatically heard by a jury).

Another major trial, of the Tobar massacre, took place in May 1999. Because the attackers were familiar to the people of Tobar, they were able to name thirty-two soldiers and paramilitaries who had participated in the attack. The complaint also accused the Colonel in charge of the military department and Generals Sardec and Ocnarf and Admiral Maib on a command responsibility theory. Twenty defendants, mostly lower level soldiers and paramilitaries, were arrested and tried, while sixteen people, including the top military leaders, were tried *in absentia*. The *in absentia* defendants were all convicted, as were fifteen of those in court. The Tobar trial was a large improvement over the Remzi trial. The defendants were energetically represented by some of Atlantis’ most prominent lawyers. Four prosecutors, all Academy graduates,

presented a well-prepared case. The presiding judge, also an Academy graduate, was inexperienced but determined to conduct a trial up to international standards. He had difficulty controlling lawyers, witnesses and defendants, so the trial was unruly, and dragged on much longer than necessary. But in the end, national and international observers agreed that the main procedural safeguards had been respected, and that the trial was fair to defendants and victims alike.

The success of the Tobar trial raised hopes that the Atlantan justice system had turned the corner, and would conduct a series of similarly successful trials. But in over four years since then, not a single case has gone to trial. Many are in the pipeline, and individual judges and prosecutors have done good preparatory work. But the cases always seem to stall, for a host of reasons: an investigating judge's term expires, and he is not renominated; the police fail to execute warrants, because the special team formed for the prominent cases cannot get a car; the file gets lost between judge and prosecutor.

A particularly frustrating case is the Grobua Massacre, which is seen by many in the international community, and by Labor Party opponents, as a litmus test of the justice system's ability to put justice over politics. Investigating Judge Nassag, interviewed over fifty witnesses, victims and suspects. The judge received excellent logistical support for his investigation, and issued arrest warrants against seventeen accused in February 2000, including Vincent Niassu, now a popular and influential Senator from Nobitra. A special police team, given adequate resources, made ten arrests, including some Labor Party supporters.

Judge Nassag sent a formal request to the Senate, asking it to lift Niassu's parliamentary immunity in March 2002, but the Senate has never officially voted on the request. Niassu has publicly criticized Nassag's inquiry, calling it a politically-motivated witch hunt. In October 2002, Nassag's term expired. Although the judge was supported by the Grobua victims, and by many in the international community, his term was

not renewed by the Minister of Justice. Since then, a series of judges have taken over the case, none of them with Nassag's energy.

Despite the small number of prominent trials, about half of those arrested since 1996 for human rights violations during the dictatorship have been released or tried. Most cases were dismissed, for lack of evidence, by individual judges. Although the files for all but a handful of the remaining 1,000 human rights defendants in Atlantan prisons are believed to contain little evidence, the Atlantan government has declined to systematically review them. Officials do not openly contest the defendants' rights to a speedy trial, but claim they do not have the resources to adequately investigate all of the cases immediately. They say releasing guilty people under these conditions is a greater injustice to the innocent victims. In response to foreign criticism, Atlantan officials assert that the rights of both victims and accused could be respected if the international community helped provide the justice system with the resources to effectively try everyone, and if the ICTA shared its evidence with the Atlantan courts.

Atlantan officials also claim that though they have enough defendants, they do not have the right ones. Most of those in prison are accused of being low-level soldiers and paramilitary. Prosecutors say it is unfair to just punish the followers while the leaders go free. They would like the ICTA to hand over at least the mid-level defendants in its custody, and to pressure third countries to extradite defendants to Atlantis. Atlantan officials also say that they need more information about the structure of the repression, especially the operation of the army and paramilitary groups. They claim this information can come from two sources: the middle and top level leaders and foreign intelligence reports.

One of the Atlantan justice system's principal difficulties has been filling top leadership posts. Most of the lawyers with adequate legal and administrative experience are associated with the dictatorship. Since 1996, there have been five Ministers of Justice, none

of them highly effective. Two were prominent lawyers, popular with the organized bar but unwilling to push for reform. Two were Labor Party stalwarts. Both pushed aggressively for reform, but encountered resistance from the bar, and were successful neither in reform nor in managing the day to day operations of the justice system. In October 2003, the government named Jean Nalbel as Minister of Justice. Nalbel is a highly educated lawyer, who has not been involved in politics since the 1980's. Her/His nomination was strongly encouraged by the international community, and in fact was considered a prerequisite for several foreign projects supporting the justice system.

E. The ICTA

The ICTA has now been in operation for seven years. Its seat is in Mahtlaw, four hours by plane from Atlantis. It has 15 judges, and six well-equipped courtrooms. The prosecutor's and registrar's offices are fully functioning, and it has its own jail facilities. The ICTA has convicted 27 defendants in nine trials, mostly mid-level military and PFA commanders. Fifteen defendants are in custody awaiting trial, and there are 147 outstanding arrest warrants.

The ITA's most prominent defendant is General Sardec. Both the ICTA and Atlantis had sought his extradition since 1996. Thule refused both for three years, despite repeated requests and a growing international outcry for extradition to the ITA. After the success of the Tobar trial, there were many calls for extradition to Atlantis to be tried in the Tobar case (*in absentia* defendants have the right to a new trial). In November 1999, Sardec surrendered to the ITA, with an agreement that the ICTA would not turn him over to Atlantan authorities, regardless of the trial's outcome. Sardec's trial started in June 2003, and is expected to last for 18 months.

The ICTA has also issued a warrant for Niassu, not as a defendant but as a material witness, in its investigation of PFA atrocities. Niassu has refused to cooperate with the ITA, and the Atlantan government asserts that Niassu's Parliamentary immunity prevents the government from forcing his cooperation.

One prosecution that has particularly challenged the ICTA has been that of accused rapist and political prison guard Trebe Buod. After the prosecution provided Buod's lawyer with the names of the witnesses against him, several witnesses living in Atlantis received death threats. To protect the witnesses, the prosecutor replaced the disclosed witnesses' testimony with that of three more witnesses whose identity had not been disclosed. The witnesses did testify and their identities were protected, but they complained bitterly afterwards that Buod's lawyer attacked them viciously, without the judge and prosecutors intervening. Buod was convicted of rape, but before his sentencing the prosecution found some information that it had inadvertently failed to disclose to Buod's lawyer. The prosecutor duly reported this omission to the judge, who found the information material to Buod's defense, and ordered a new trial.

The ICTA has received high marks for the quality of its trials and jurisprudence, but people within and without the system are frustrated with quantity of justice achieved so far. The Tribunal's principal difficulty is obtaining eyewitness testimony. The first team of ICTA investigators sent to Atlantis in early 1997 was deluged by so many victims and witnesses that it decided to do brief preliminary interviews first, then return later for in-depth interviews in selected cases. As time passed, however, the investigators found it increasingly difficult to obtain witness cooperation. Some declined to cooperate outright, or changed their stories. Others moved, or would not respond to investigators' efforts to contact them.

ICTA Investigators complain that Atlantan police provided little assistance with victims and witnesses. Police officials replied that they had their hands full with the common crime wave, and could not justify diverting scarce resources to help the relatively wealthy ITA. The Atlantan government did not officially discourage witness/victim cooperation with ITA, but it did not encourage it either, and investigators believed that many officials privately discouraged cooperation.

Some Atlantan victims' groups have complained that the ICTA does not treat them well. They criticize investigators as being too unfamiliar with Atlantan culture, and claim that testifying before the Tribunal has been unnecessarily traumatic for many victims. They want the Tribunal to do more through its victim/witness unit to help victims, including medical and psychological treatment, and compensation for their injuries. Many victims think that the ITA's prison sentences are too light (Atlantis, but not the ITA, has a death penalty for aggravated homicide), and that the prisons are too comfortable.

The ICTA does have excellent information regarding the structure of both the Atlantan armed forces and the paramilitaries, through intelligence information provided by third countries that monitored events during the dictatorship. Some, but not all, of this information came to the Tribunal on the condition that it be used for trial purposes only, and not shared with Atlantan authorities. Atlantis has requested that the ICTA share all non-restricted information and pressure third countries to release the restrictions. The ICTA has declined to do either, claiming that doing so will harm delicate negotiations it is conducting for additional intelligence information.

The ICTA has struggled over the appropriate balance in prosecutions between the dictatorship and its opponents. The ATC's allocation of 80% of the violations to the dictatorship and its supporters is generally accepted. On the other hand, only 5% of defendants in Atlantan jails are suspected PFA, and not a single PFA member has been convicted for a serious human rights violation. The ICTA is under pressure, from opponents of the Atlantan regime in the country and in exile, and from some foreign countries, to compensate for this imbalance. Nine of the 27 people convicted to date by the ICTA are PFA, as are 50% of those indicted. Atlantan politicians frequently criticize this balance, accusing the international community of favoring the dictatorship.

The ITA's relationship with UN Headquarters has been difficult. Although all appreciate the quality of the trials so far, the UN is under pressure to cut costs, and the ITA's \$85 million per year, approximately 5% of the entire UN budget, is an attractive target. Headquarters is especially concerned that there is no defined date for the ad-hoc tribunal's termination, or a viable exit strategy.

The government of Atlantis and some of its allies have complained loudly in the General Assembly about the perceived pro-dictatorship bias and lack of cooperation with the Atlantan justice system. Former allies of the dictatorship lobby quietly but persistently against pursuing former soldiers. Proposals currently under consideration include abolishing or reducing the tribunal, and creating a hybrid Atlantan/International tribunal. Atlantis will start a term as a non-permanent member of the Security Council in May.

Acronyms

ATC: Atlantan Truth Commission
NPM: Nobitra People's Movement
PFA: Popular Front for Atlantis, guerilla umbrella group
ICTA: International Criminal Tribunal for Atlantis
UN: United Nations

Important Names and Dates in Recent Atlantan History

A. Chronology

- 1980:** First elections with universal suffrage
- 1990:** May 15: Coup d'etat. President Ditsira exiled, legislature dissolved and junta composed of Army General Sardec, Navy Admiral Maib and Air Force General Ocnarf takes over
- 1993:** May 15: Journalist Judith Remzi assassinated at march commemorating the third anniversary of the coup
- 1994:** April: Etrela Ecnale attacked

1995: February 17: Tobar massacre
 March 3: Grobua Massacre
 June 1: UN-sponsored talks lead to cease-fire
 December 31: Peace Accords signed, transitional government assumes office

1996: June 1: Atlantan Truth Commission Report filed
 November: ICTA created by UN Security Council resolution. Judith Remzi assassination trial in Atlantis
 December: general elections, Labor Party wins the Presidency and 40% of Parliament.

1999: May: Tobar massacre trial in Atlantis
 November: General Sardec surrenders to ICTA

2000: February: Judge Nassag issues arrest warrants for Vincent Niassu, sixteen others in Grobua massacre
 December: General elections, Ditsira re-elected to 4-year Presidential term

2001: March: Judge Nassag requests parliament to waive Vincent Niassu's parliamentary immunity

2002: October: Judge Nassag's term expires
 December: general elections, Labor party wins outright majority in Parliament

2003: June: ICTA commences General Sardec trial.
 October: Jean Nalbel named Atlantan minister of justice

B. Names

Buod, Trebe: Accused political prison guard and rapist; convicted by the ITCA, but the conviction was overturned

Ditsira, Artreb: president of Atlantis, 1989-90, 1996, 2001-2005

Ecnale, Etrela: Women's rights activist in Nirpuat, abducted, raped, hit with machetes and left for dead in April 1994; survived and fled the country

Grobua: Town in Nobitra, site of massacre by PFA in March 1995

Mahtlaw: Seat of the ICTA, four hours by plane from Atlantis

Maib, Admiral: Head of the Atlantan navy, member of the 1990-1995 junta

Nalbel, Jean: Atlantan minister of justice

Nassag, Judge: Atlantan Investigating Judge for Grobua massacre until October 2002, when his term expired

Niassu, Vincent: Nobitra politician, leader of the NPM, and current Senator from Nobitra; has outstanding arrest warrant in the Grobua massacre case

Nirpuat: Capital of Atlantis

Nobitra: Mountainous western province of Atlantis, controlled by the PFA during the dictatorship

Nobitra People's Movement (NPM): Organized against the dictatorship, considered by some to be the PFA's civilian arm

Ocnarf, General: Head of the Atlantan air force, member of the 1990-1995 junta

Popular Front for Atlantis (PFA): Guerilla umbrella group

Ralam, Yves: Law professor and Ditsira supporter; killed, along with his family, when his house was firebombed on October 5, 1994

Remzi, Judith: Prominent Atlantan journalist, assassinated on May 15, 1993

Sardec, General: Head of the Atlantan army, member of the 1990-1995 junta

Tobar: Working-class suburb, site of 1995 army massacre

International Criminal Tribunal for Atlantis (ICTA) Statute

Article 1:	Purpose of the International Criminal Tribunal for Atlantis (ICTA)
Article 2:	Competence of the ICTA
Article 3:	Crimes against Atlantis
Article 4:	Conventions and Additional Protocol II
Article 5:	Personal Jurisdiction
Article 6:	Individual Criminal Responsibility
Article 7:	Territorial and Temporal Jurisdiction
Article 8:	Concurrent Jurisdiction
Article 9:	Non Bis in Idem
Article 10:	The Prosecutor
Article 11:	Investigation and Preparation of the Indictment
Article 12:	Review of the Indictment
Article 13:	Commencement and Conduct of Trial Proceedings
Article 14:	Rights of the Accused
Article 15:	Protection of Victims and Witnesses
Article 16:	Penalties
Article 17:	Review Proceedings
Article 18:	Enforcement of Sentences
Article 19:	Pardon or Commutation of Sentences
Article 20:	Cooperation and Judicial Assistance
Article 21:	The Status, Privileges, and Immunity of the ICTA
Article 22:	Working Languages
Article 23:	Annual Report

By the Security Council acting under Chapter VII of the Charter of the United Nations, the International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Atlantis between 15 May 1990 and 1 June 1995 (hereinafter referred to as "ICTA") shall function in accordance with the provisions of the present Statute.

Article 1: Purpose of the ICTA

Recognizing that the Serious Violations of International Humanitarian Law Committed in the Territory of Atlantis between 15 May 1990 and 1 June 1995, if not punished, are a threat to international stability and respect for international law, as well as a continuing threat to the security and development of Atlantis, the ICTA is established to assure accountability for those Serious Violations, to promote lasting respect for the enforcement of international law, and to encourage stability, reconciliation and the rule of law in Atlantis.

Article 2: Competence of the ICTA

The ICTA shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of Atlantis between 15 May 1990 and 1 June 1995, in accordance with the provisions of the present Statute.

Article 3: Crimes against Humanity

The International Criminal Tribunal for Atlantis shall have the power to prosecute persons responsible for the following crimes when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial, or religious grounds:

- (a) Murder
- (b) Extermination
- (c) Enslavement
- (d) Deportation
- (e) Imprisonment
- (f) Torture
- (g) Rape
- (h) Persecutions on political, racial and religious grounds
- (i) Other inhumane acts

Article 4: Violations of Article 3 Common to the Geneva Conventions and of Additional Protocol II

The ICTA shall have the power to prosecute persons committing or ordering to be committed serious violations of Article 3 common to the Geneva Conventions of 12 August 1949 for the Protection of War Victims, and of Additional Protocol II thereto of 8 June 1977. These violations shall include, but shall not be limited to:

- (a) Violence to life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation, or any form of corporal punishment

- (b) Collective punishments
- (c) Taking of hostages
- (d) Acts of terrorism
- (e) Outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution, and any form of indecent assault
- (f) Pillage
- (g) The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples
- (h) Threats to commit any of the foregoing acts

Article 5: Personal Jurisdiction

The ICTA shall have jurisdiction over natural persons pursuant to the provisions of the present Statute.

Article 6: Individual Criminal Responsibility

1. A person who planned, instigated, ordered, committed, or otherwise aided and abetted in the planning, preparation, or execution of a crime referred to in Articles 3 and 4 of the present Statute, shall be individually responsible for the crime.
2. The official position of any accused person, whether as Head of state or government or as a responsible government official, shall not relieve such person of criminal responsibility nor mitigate punishment.
3. The fact that any of the acts referred to in Articles 3 and 4 of the present Statute was committed by a subordinate does not relieve his or her superior of criminal responsibility if he or she knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.
4. The fact that an accused person acted pursuant to an order of a government or of a superior shall not relieve him or her of criminal responsibility, but may be considered in mitigation of punishment if the ICTA determines that justice so requires.

Article 7: Territorial and Temporal Jurisdiction

The territorial jurisdiction of the ICTA shall extend to the territory of Atlantis including its land surface and airspace. The temporal jurisdiction of the ICTA shall extend to a period beginning on 15 May 1990 and ending on 1 June 1995.

Article 8: Concurrent Jurisdiction

1. The ICTA and national courts shall have concurrent jurisdiction to prosecute persons for serious violations of international humanitarian law committed in the territory of Atlantis between 15 May 1990 and 1 June 1995.
2. The ICTA shall have the primacy over the national courts of all States. At any stage of the procedure, the ICTA may formally request national courts to defer to its competence in accordance with the present Statute and the Rules of Procedure and Evidence of the ICTA.

Article 9: *Non Bis in Idem*

1. No person shall be tried before a national court for acts constituting serious violations of international humanitarian law under the present Statute, for which he or she has already been tried by the ICTA
2. A person who has been tried before a national court for acts constituting serious violations of international humanitarian law may be subsequently tried by the ICTA only if:
 - (a) The act for which he or she was tried was characterised as an ordinary crime; or
 - (b) The national court proceedings were not impartial or independent, were designed to shield the accused from international criminal responsibility, or the case was not diligently prosecuted.
3. In considering the penalty to be imposed on a person convicted of a crime under the present Statute, the International Criminal Tribunal for Atlantis shall take into account the extent to which any penalty imposed by a national court on the same person for the same act has already been served.

Article 10: The Prosecutor

1. The Prosecutor shall be responsible for the investigation and prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of Atlantis between 15 May 1990 and 1 June 1995.
2. The Prosecutor shall act independently as a separate organ of the ICTA. He or she shall not seek or receive instructions from any government or from any other source.

Article 11: Investigation and Preparation of Indictment

1. The Prosecutor shall initiate investigations ex-officio or on the basis of information obtained from any source, particularly from governments, United Nations organs,

intergovernmental and non-governmental organizations. The Prosecutor shall assess the information received or obtained and decide whether there is sufficient basis to proceed.

2. The Prosecutor may enter into such arrangements or agreements, not inconsistent with this Statute, as may be necessary to facilitate the cooperation of a State, intergovernmental organization, or person;
3. The Prosecutor shall have the power to question suspects, victims and witnesses, to collect evidence and to conduct on-site investigations. In carrying out these tasks, the Prosecutor may, as appropriate, seek the assistance of the State authorities concerned.
4. If questioned, the suspect shall be entitled to be assisted by Counsel of his or her own choice, including the right to have legal assistance assigned to the suspect without payment by him or her in any such case if he or she does not have sufficient means to pay for it, as well as necessary translation into and from a language he or she speaks and understands.
5. Upon a determination that a *prima facie* case exists, the Prosecutor shall prepare an indictment containing a concise statement of the facts and the crime or crimes with which the accused is charged under the Statute. The indictment shall be transmitted to a judge of the Trial Chamber.

Article 12: Review of the Indictment

1. The judge of the Trial Chamber to whom the indictment has been transmitted shall review it. If satisfied that a *prima facie* case has been established by the Prosecutor, he or she shall confirm the indictment. If not so satisfied, the indictment shall be dismissed.
2. Upon confirmation of an indictment, the judge may, at the request of the Prosecutor, issue such orders and warrants for the arrest, detention, surrender or transfer of persons, and any other orders as may be required for the conduct of the trial.

Article 13: Commencement and Conduct of Trial Proceedings

1. The Trial Chambers shall ensure that a trial is fair and expeditious and that proceedings are conducted in accordance with the Rules of Procedure and Evidence, with full respect for the rights of the accused and due regard for the protection of victims and witnesses.
2. A person against whom an indictment has been confirmed shall, pursuant to an order or an arrest warrant of the International Criminal Tribunal for Atlantis, be

taken into custody, immediately informed of the charges against him or her and transferred to the International Criminal Tribunal for Atlantis.

3. The Trial Chamber shall read the indictment, satisfy itself that the rights of the accused are respected, confirm that the accused understands the indictment, and instruct the accused to enter a plea. The Trial Chamber shall then set the date for trial.
4. The hearings shall be public unless the Trial Chamber decides to close the proceedings in accordance with its Rules of Procedure and Evidence.

Article 14: Rights of the Accused

1. All persons shall be equal before the ICTA.
2. In the determination of charges against him or her, the accused shall be entitled to a fair and public hearing, subject to Article 15 of the Statute.
3. The accused shall be presumed innocent until proven guilty according to the provisions of the present Statute.
4. In the determination of any charge against the accused pursuant to the present Statute, the accused shall be entitled to the following minimum guarantees, in full equality:
 - (a) To be informed promptly and in detail in a language which he or she understands of the nature and cause of the charge against him or her
 - (b) To have adequate time and facilities for the preparation of his or her defense and to communicate with counsel of his or her own choosing
 - (c) To be tried without undue delay
 - (d) To be tried in his or her presence, and to defend himself or herself in person or through legal assistance of his or her own choosing; to be informed, if he or she does not have legal assistance, of this right; and to have legal assistance assigned to him or her, in any case where the interest of justice so require, and without payment by him or her in any such case if he or she does not have sufficient means to pay for it
 - (e) To examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her
 - (f) To have the free assistance of an interpreter if he or she cannot understand or speak the language used in the ICTA
 - (g) Not to be compelled to testify against himself or herself or to confess guilt

Article 15: Protection of Victims and Witnesses

The ICTA shall provide in its Rules of Procedure and Evidence for the protection of victims and witnesses. Such protection measures shall include, but shall not be limited to, the conduct of in camera proceedings and the protection of the victim's identity.

Article 16: Penalties

1. The penalty imposed by the Trial Chamber shall be limited to imprisonment. In determining the terms of imprisonment, the Trial Chambers shall have recourse to the general practice regarding prison sentences in the courts of Atlantis.
2. In imposing the sentences, the Trial Chambers should take into account such factors as the gravity of the offence and the individual circumstances of the convicted person.
3. In addition to imprisonment, the Trial Chambers may order the return of any property and proceeds acquired by criminal conduct, including by means of duress, to their rightful owners.

Article 17: Review Proceedings

Where a new fact has been discovered which was not known at the time of the proceedings before the Trial Chambers or the Appeals Chamber and which could have been a decisive factor in reaching the decision, the convicted person or the Prosecutor may submit to the ICTA an application for review of the judgment.

Article 18: Enforcement of Sentences

Imprisonment shall be served in Atlantis or any of the States on a list of States which have indicated to the security council their willingness to accept convicted persons, as designated by the ICTA. Such imprisonment shall be in accordance with the applicable law of the State concerned, subject to the supervision of the ICTA.

Article 19: Pardon or Commutation of Sentences

If, pursuant to the applicable law of the State in which the convicted person is imprisoned, he or she is eligible for pardon or commutation of sentence, the State concerned shall notify the ICTA accordingly. There shall only be pardon or commutation of sentence if the President of the ICTA, in consultation with the judges, so decides on the basis of the interests of justice and the general principles of law.

Article 20: Cooperation and Judicial Assistance

1. States shall cooperate with the ICTA in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law.
2. States shall comply without undue delay with any request for assistance or an order issued by a Trial Chamber, including but not limited to:
 - (a) The identification and location of persons
 - (b) The taking of testimony and the production of evidence
 - (c) The service of documents
 - (d) The arrest or detention of persons
 - (e) The surrender or the transfer of the accused to the ICTA
3. The ICTA may provide assistance to other states in order to advance any of the aims of Article 1.

Article 21: The Status, Privileges and Immunities of the International Tribunal for Atlantis

1. The Convention on the Privileges and Immunities of the United Nations of 13 February 1946 shall apply to the ICTA, the judges, the Prosecutor and his or her staff, and the Registrar and his or her staff.
2. The judges, the Prosecutor, and the Registrar shall enjoy the privileges and immunities, exemptions and facilities accorded to diplomatic envoys, in accordance with international law.
3. The staff of the Prosecutor and of the Registrar shall enjoy the privileges and immunities accorded to officials of the United Nations under Articles V and VII of the Convention referred to in paragraph 1 of this article.
4. Other persons, including the accused, required at the seat or meeting place of the ICTA shall be accorded such treatment as is necessary for the proper functioning of the ICTA.

Article 22: Working Languages

The working languages of the International Criminal Tribunal for Atlantis shall be Atlantan and English.

Article 23: Annual Report

The President of the ICTA shall submit an annual report of the ICTA to the Security Council and to the General Assembly.

Character Sheet

Riga Alpod: Alpod is President of the ICTA Defense Lawyer's Association (ITADLA).

Etrela Ecnale, rape victim: Ecnale has filed complaints with both the Atlantan courts and the ITA, and has stated often her willingness to cooperate with both. No arrests have been made in her case.

Allen/Ellen Dracoub, ICTA translator: Dracoub has worked for the ICTA since 1997, and is president of the Atlantan Employees of the ICTA Union (AEITAU).

Judge Bernard/ Bernadette Litnias, ITA: Judge Litnias has served on the ICTA bench since 1998.

Julie/Jules Mihar, UN Secretariat: Mihar is part of a task force formed to "re-engineer" the UN. Mihar is supportive of international justice in general, but feels that current UN funding levels require tribunals to deliver more results with less time and resources.

Jean Nalbel, Minister of Justice, Atlanta: Nalbel is from a prominent Atlantan family, Nalbel's grandfather and great-grandfather were both government ministers. Yet, as a student in the late 1970's, Nalbel was active in the pro-democracy movement that led to the oligarchy's fall. In 1985, Nalbel went abroad for graduate legal studies at the University of Mahtlaw, finishing a doctorate in human rights law just after the 1990 coup d'etat. Reluctant to return to Atlantis under the dictatorship, Nalbel worked for four years as Legal Director of the respected Human Rights Lawyer's Association in London. Nalbel then moved to Geneva, and spent five years with the UN High Commission for Human Rights. Nalbel returned to Atlantis in 2000, and has been teaching at the State University Law School, and the Judicial Academy. Nalbel has not been involved in politics, and is considered neutral. Nalbel was named Minister in October, 2003.

Petra/Peter Nivo, Grobua Victims' Association (GVA): Nivo was mayor of Grobua from 1988 until 1996. Nivo's two brothers were executed in the Grobua massacre. Nivo was away at the time, but the house was searched thoroughly and violently. Nivo claims to have lost \$45,000 in theft and damage.

Antonio/Antonia Olim, ICTA Investigator: Tolim has worked for the ICTA since 1997, investigating several prominent cases.

Frances/Francis Tihl, Advocacy Director, Human Rights Lawyer's Association: Tihl has followed both the ICTA and the Atlantan justice system for the HRLA since 1997.

Christine/Christian Tonerf, Atlantan State Prosecutor: Tonerf is a long-time Labor Party activist, who graduated from the first class of the Judicial Academy. Tonerf was immediately named prosecutor, and has worked on many prominent human rights cases, including the Tobar and Grobua massacre cases.

International Criminal Courts: The Political Context

• Peter Ford

Peter Ford is British ambassador to Syria. Formerly ambassador to Bahrain, he is also a linguist and a Middle East specialist with extensive experience in the politics and economics of the region. Prior to becoming Ambassador, Ford served as head of the Near East and North Africa Department in the British Foreign Office and senior advisor to the foreign secretary on the Middle East peace process. His other diplomatic posts have included Riyadh, Paris, Cairo, and Beirut.

Introduction

Critics of international criminal courts claim inter alia that the courts dispense “winners’ justice,” mount show trials, hinder national justice, are sops to Western public opinion, hamper national reconciliation and are part of a supranational agenda. Judges may benefit from exploring these issues and seeing their work in its broad political context.

The crimes tried in international criminal courts are by definition political crimes and the courts themselves are political creations. Unless judges can form an appreciation of both the political context in which the crimes occurred and the politics surrounding the courts themselves their judgments may be based on incomplete knowledge of the facts.

This does not mean that judges should be swayed by political considerations. On the contrary a fuller appreciation of the political background may help judges avoid unconscious political bias, resist political pressure and protect their independence.

Session Format

The session will cover

- The nature of political crimes
- The politics surrounding the creation of international criminal courts
- The usefulness of international judicial intervention in fractured nations
- Alternatives to international criminal courts
- Are international criminal courts a threat to national sovereignties?

Goals of the Session

The aims are to help judges

- Understand fully the nature of the political crimes they are trying
- Form better insights into the intent of the accused
- Resist unconscious or institutional bias
- Consider the effects of their decisions not only on individuals but also wider society

Target Audience

Judges from the international criminal courts

Ideal size: 8-12

Duration

A day and a half

Session Outline

The nature of political crimes

Most ordinary crimes are easy to define. But “political” or “international” crimes are more slippery.

International criminal courts have jurisdiction over “the most serious crimes of concern to the international community as a whole”(preamble to the Rome Statute establishing the International Criminal Court), specifically genocide, war crimes, crimes against humanity and aggression. Is this not rather arbitrary and open to interpretation? Is the only difference between ordinary crimes and ICC crimes that they should be considered shocking to the international community? Shocking to whom? Shocking because the Western press chooses to deem them so? Crimes against humanity represent a particularly fuzzy category. Is the

existence of political intent a sufficient condition to make an ordinary crime a crime against humanity?

A major problem with prosecuting political crimes is often their sheer scale. When killings occur of hundreds or thousands of people, how to decide which crimes to punish?

The best known example may be Rwanda where victims were counted in the hundreds of thousands. It is only possible to seek justice for a fraction of the victims. How satisfactory is it for the International Criminal Court for Rwanda (ICTR) arbitrarily to choose the cases it will prosecute?

Another problem is when should the judicial clock start ticking? When a conflict has been going on for many years at what point does it become fitting to start applying justice? When in Bosnia Serbs took the offensive in the 1990's they were at least partially motivated by a genuine feeling that that this was pay back time for what they had suffered at the hands of Croats and Muslims during the Second World War, crimes for which no justice was done. And had their ancestral fears of the "Turks" not been fed by inflammatory statements by the likes of Izetbegovic calling for a new Muslim empire, by floods of Arab money coming in to support Islamic activities and by the formation of Islamist groupings with a radical ideology?

A murderer or a rapist generally sees himself as such. But the perpetrators of war crimes usually do not see themselves as criminals but as people who are defending themselves or their communities or who are themselves delivering justice. Is this a mitigating circumstance? Where for example on the spectrum of guilt for war crimes should we put targeted killing of Palestinians by Israel or Al Qaida militants by the US? Why Srebrenica but not Jenin? Does might not in practice often make right?

The above are some of the questions which will be touched on in the following presentation by X (a speaker from Serbia or another "perpetrator" community).

The politics surrounding the creation of international courts

The international community has been very selective in the situations it has judged worthy of the attention of an international criminal court.

Since Nuremberg and Tokyo only the International Criminal Tribunal for Yugoslavia (ICTY) and the ICTR have seen the light of day. Critics say that both courts were set up to public opinion, that the ICTY was set up to mask the unwillingness of Western countries to intervene more forcefully in Bosnia and the ICTR to assuage Western guilt at allowing genocide to take place in Rwanda. How much truth is there in these charges? Do they betray naivety on the part of the critics, bearing in mind political and practical realities?

This situation has changed with the arrival on the scene of a standing court, the ICC, which is empowered to deal with cases arising in the states which are parties to the Rome Statute setting up the Court. Half the world, however, is outside the jurisdiction of the ICC, possibly the half where political crimes are most likely to occur.

The existence of the ICC does not rule out the setting up of new ad hoc tribunals, for a post-Saddam Iraq, for example. Would this however not be another example of "victors' justice" might making right?

The selection of judges and prosecutors for international courts is itself highly political. Some of the major powers are suspicious of judges from developing countries. Are sufficient safeguards in place to guarantee the objectivity of the courts?

These questions will be addressed by Y (a speaker from the UN Legal Secretariat?).

The usefulness of international judicial intervention

There is little doubt that the Nuremberg Tribunal, for all its flaws, performed an invaluable task not only in punishing senior Nazis but also in anathematizing Nazi ideology and inoculating Germany against its re-emergence.

But the Tokyo trials were less successful. Japanese felt guilty for losing but not starting the war. Up until 1995 Japanese governments refused to make any apology. Was this because the US for political reasons decided not to prosecute the Emperor or the scientists working on biological warfare?

It must be debatable whether the ICTY has done much to promote reconciliation in the ex-Yugoslavia. Is reconciliation even a realistic goal when only one side bears the overwhelming brunt of judicial wrath?

Similarly with Rwanda the evidence is thin that the trials of Hutus have led that community to internalise its guilt or led the Tutsis to feel assuaged.

More generally, is there any evidence of the new courts having had any deterrent effect or any effect as exemplars encouraging states to incorporate ICC standards into national practice? Is the Pinochet case an example of this? What of the attempted indictment in a Belgian court of Ariel Sharon?

Messrs. X and Z will speak to us on the experiences of their countrymen of the ICTY and the ICTR respectively.

Alternatives to international courts

Alternatives to international courts include:

- National courts,
- National courts with international assistance,
- Truth commissions,
- Doing nothing, or
- Combinations of the above.

Ethiopian national courts tried members of the Mengistu regime and the former dictator Mengistu himself (in absentia). International observers found the proceedings generally sound. Critics however saw the trials as victors' justice and it must be considered debatable that they contributed greatly to reconciliation between the Tigreans and the Amharas.

Even Western countries have often been loth to punish criminals under their domestic jurisdictions e.g. France

with Nazi collaborators, the US with perpetrators of killings and other abuses in Vietnam.

Truth commissions are often seen as an acceptable compromise between justice and expediency. Some see the example of South Africa as an indication that truth commissions can help a country through a transition. Whether however they help victims come to terms with their loss or whether they pile on bitterness and frustration is debatable.

Lebanon is a country which has effectively chosen the route of national amnesia. A general amnesty absolved all but a handful of individuals. The perpetrators of the notorious massacres of Palestinians in Sabra and Shatila refugee camps were never prosecuted. Perhaps this was inevitable given the inconclusive outcome of the Lebanese conflict, only ended when the protagonists were war-weary and when an outsider, Syria, was available to help impose peace. The results have been mixed: an absence of further conflict but lingering resentments and a sense of unfinished business.

Post-Franco Spain offers another example of a country which has turned its back on recrimination, with considerable success. Is it true that "time heals" and if so under what conditions?

To explore these issues we have (someone from South Africa and someone from Lebanon)

International criminal courts: a threat to national sovereignty?

The case from the right against the ICC is that it:

- may hamper necessary international police actions by countries such as the US by exposing them to legal sanction e.g. for the bombing of Yugoslavia in the war over Kosovo;

- may expose US or other peace-keeping forces to politically motivated prosecution;

- may hobble peace negotiations e.g. by mediators who may need to offer amnesties in the interests of peace, or

- trespasses on national sovereignty: an international court would decide in certain circumstances whether the actions of the US (and others) are legal; and

- has too much prosecutorial discretion. The Prosecutor can issue indictments subject only to review by a panel of three judges. The Security Council can only quash an indictment if all the permanent members agree. Similarly the ICC has discretion to decide whether a state which has taken over a prosecution is doing so adequately and whether to claw it back.

The case made from the left is that:

- The ICC lacks teeth: in practice for example it can only try individuals from among the law-abiding countries which are parties to it and not, say, Israeli generals and politicians accused of war crimes because Israel is not a party.

- Too much is left vague. For example, harm to civilians from the launching of military operations must be “clearly excessive” for the Court’s jurisdiction to be triggered.

- The ICC will be subservient to the Security Council, the agreement of which will be essential for many prosecutions to go forward.

- The Court’s jurisdiction over “crimes of aggression” will only become operative when the states parties agree on a definition of aggression.

- More broadly questions have been raised as to whether the ICC is the right way to deal with serious human rights abuses: will it make the situations where it acts better or worse? May it not serve as an excuse for governments’ failure to intervene in more decisive ways, such as use of UN- approved force?

- Other criticisms of the ICC have been levelled at its method of financing, with contributions from NGO’s being welcomed (with the NGO’s agenda?) and its procedures, deemed to offer insufficient protection to the accused, for example, by accepting hearsay evidence.

The Issues Arising from this Requisitory Include:

- How much are the criticisms from the right simply a cloak for naked national interest of “big powers” wanting to remain above the law but at the same time see it applied with full force to weaker states?
- Are the criticisms from the left over-dismissive of the real advance in international law that the ICC represents? Are they not coloured and distorted to some extent by anti-US prejudice?

To help us address these issues we have either a speaker from the UN Legal Secretariat, a U.S. State Department Legal Adviser, or a representative of Amnesty International or Human Right Watch.

Guest Presenters

Presenters should include experts experts on

- the conflict in the ex-Yugoslavia (to help explain the Serb mind-set) e.g. a Serb journalist;
- the creation of the ICTY and ICTR;
- the creation of the ICC;
- truth and reconciliation commissions; and
- a formerly fractured country which has witnessed only limited judicial proceedings (e.g. Lebanon).

Readings

- Minow: *Between Vengeance and Forgiveness*
- Ivo Andric: *The Bridge over the Drina*
- Jean Said Makdisi: *Beirut Fragments*
- Neil Biggar (editor): *Burying the Past*
- Vamik Volkan: *Blood Lines: from ethnic pride to ethnic terrorism*

* Ambassador Ford was prevented by the Iraq war from attending the third institute.

Equality, Human Rights, and Women: Justice and Jurisprudence

• Naina Kapur

Naina Kapur is an attorney and director of Saskhi, a creative education center in New Delhi, India. She is also co-chairperson of the Asia-Pacific Advisory Forum on Judicial Education and Equality Issues, an ongoing judge-led effort to mainstream equality issues within the judiciary with specific emphasis on women's equality rights. The project has recently extended itself to students of law and social work. She has initiated a number of test cases before the supreme court of India affecting women's rights and is currently legal counsel in a test case inviting the court to re-interpret the existing rape law.

Introduction

This session is designed to introduce judges to the relevance of equality to decision making especially in the context of how women experience human rights.

Traditionally, despite guarantees in domestic and international documents, real equality for women continues to elude the law of nations in practice. The session will address judges from courts most likely to respond to human rights of women (without ghettoizing women's concerns vis-à-vis their rights). Participants will include at least 15 judges with two or three additional representatives from human rights organizations of countries that may not necessarily be represented on the International bench. A controlled diversity of voices in the room is consistent with the equality principle sought to be delivered in this session. In practice, participants should leave the room with a better understanding of the relevance of equality to fair and equal decision-making along with minimum skills on how to incorporate that understanding into jurisprudence for women's human rights.

Goal

To sensitise judges to the issue of equality in human rights cases for women complainants drawing upon international and domestic developments in jurisprudence.

Learning Objectives

By the end of this session, participants will

- a. be able to reflect on the purpose of International Courts and the need for cross-fertilisation i.e. justice and/or jurisprudence;
- b. consider the relevance of the equality principle to women's rights, in particular sexual rights;
- c. understand the relevance and application of the Convention on the Elimination of Discrimination Against Women (CEDAW) to fair and effective decision-making; and
- d. practice application of the equality principle to a case example.

Elements

- a. Introductory Presentation: The Purpose of International Courts (20 minutes)
- b. Discussion (30 minutes)
- c. Presentation on "Equality and CEDAW" (30 minutes)
- d. Discussion (20 minutes)
- e. Small group exercise (60 minutes)
- f. View from the bench (15 minutes)

Outline and Process

a. Introductory presentation

The presentation will explore the purpose of international courts, the relevance of justice and jurisprudence, and how to balance each. Often justice is determined according to the formal parameters of law and interpretation. However, new

equality jurisprudence examines the importance of social context and how domestic developments in jurisprudence are critical to effective interpretation in international courts. The session will be a joint presentation in which a judge presents the relevance of justice and an activist lawyer, the interchangeable relevance of jurisprudence for domestic/international courts/contexts using examples.

b. Discussion

A discussion will invite participants to respond to the relevance of the presentations for their purposes and how they perceive their role in decision-making. The discussion can highlight any number of issues relevant to judges including for example:

- Social context information and its relationship to judicial independence
- Apprehensions about compromising the rule of law

c. Equality

This will look at the meaning of equality (formal vs. substantive) and how CEDAW comes closest to illustrating substantive equality for disadvantaged groups. Global examples of women and violence related abuses will provide an effective means of illustrating inequality according to the life experience of women as one such group. Illustrations will also be provided on how CEDAW as an international instrument has been effectively applied by domestic courts in creating redress for women's human rights abuses and how international courts may benefit from such processes.

d. Discussion

Participants are given an opportunity to further explore the relationship between formal and substantive equality within their own contexts and how international instruments such as CEDAW may be effective in offering justice consistent with the needs and concerns of disadvantaged groups.

e. Small group exercise

Taking a case from existing case law affecting women's rights, participants will be asked to demonstrate the application of CEDAW to a case example. The group is divided in half. Each has the same fact situation to

respond to however the complainant in one group is male and in the other, is female. The two groups will reconvene after 30 minutes and discuss the results. This is an opportunity for participants to explore the depth of their understanding, obstacles as well as apprehensions in applying newly evolved concepts and the impact.

f. View from the bench

This last section also demonstrates how CEDAW is represented on the bench and how women on the bench may make a difference to decision-making.

Audience Size

15-20 Participants

Faculty

Faculty should include a judge and human rights activist who are well-versed in equality issues and CEDAW. The judge/activist combination lends credibility to a three-dimensional perspective of the issue in terms of law, reality, and application. Each should have a minimum level of experience in adult education (preferably with judges) and with social context issues (of which women's rights should have formed a part). A guest speaker should be invited. Examples include Justice Claire L'Heureux Dubé—Supreme Court of Canada Rtd.; Justice Ruma Pal—Supreme Court of India or; any female judge well versed in new equality issues. She will speak on the difference it makes to have women on the bench.

Readings

Preparatory materials should include academic papers and case law that develop as well as demonstrate application of the substantive equality principle and of CEDAW. These may include the following:

a. Papers

- L'Heureux Dubé, Justice C. "The Search for Equality: A Human Rights Issue". Keynote Address at protocol meeting of the Asia-Pacific Advisory Forum on Judicial Education on Equality Issues, Nepal, 2001.

• Sachs, Justice A. “Equality Jurisprudence: the Origin of Doctrine in The South African Constitutional Court”. Tenth McDonald Lecture, Edmonton, Alberta, April 21, 1998.

• Kapur, N. “Equality and The Truth of Brahma”. Violence Against Women. An International and Interdisciplinary Journal. Volume 7, Number 9, Sept. 2001. Sage Publications.

• Sigrun Skogly, “Article 2 (of the Universal Declaration of Human Rights)”, in Gudmundur Alfredson and Asbjorn Eide (eds), *The Universal Declaration of Human Rights: A Common Standard of Achievement*, Martinus Nijhoff, The Hague, Boston, London, 1999.

• Slaughter, Anne-Marie, “Judicial Globalization”, *Virginia Journal of International Law Association*, 2000.

b. Sample case law

• India:
Vishaka and Ors v. St. of Rajasthan and Ors. (1997) 6 Supreme Court Cases 241

• Nepal:
Forum for Women, Law and Development v. His Majesty's Government, Ministry of Law, Justice and Parliamentary Affairs, Supreme Court, Special Bench, Writ No. 55 of 2058 BS (2001-2002)

• Canada:
R. v. Malott, [1998] 1 S.C.R. 123
R. v. Ewanchuk, [1999] 1 S.C.R. 330

• South Africa:
The National Coalition For Gay and Lesbian Equality and Ors v. The Minister of Home Affairs and Ors
1998 (12) BCLR 1517 (CC)

• International Tribunal for former Yugoslavia:
Prosecutor v. Anto Furund Ija. ICTY (IT-95-17/1-T) 10-12-98
Prosecutor v. Dragoljub Kunarac & Ors. ICTY 22/02/01

Potential Problems or Sensitivities

Given that an audience of judges is still largely comprised of male representatives, the issue of women's human rights (presently illustrated through sexual rights in international case law) tends to make most, uncomfortable. This is because sexual entitlement is the heart of such concerns. It can best be dealt with in two ways:

- The presentations should seek to be global and then narrow to specific concerns. It is also important that there is a fair representation of participants and information to avoid unwarranted stereotypes about either countries or regions; this is often a concern when North-South dialogues occur.
- An exercise which helps demonstrate positive results for decision-makers may help eliminate any threat perception. For example, fears of indoctrination or compromised independence.
- Expert facilitation is critical to ensure a buffer for educators as well as participants. For this purpose it is important to ensure role clarity between the chair, leader, trainer, and facilitator. The last two may be one person even though the roles are quite distinct.
- Ensure receptivity through light-hearted interventions. For example, anecdotes and personalising.
- It is important that program persons involved are supportive of the process and can be relied on as potential allies for sensitive sessions. If a group leader compromises the issue, no learning will take place.

Acknowledgement

The development of the aforesaid material has been made possible through my work with the Asia-Pacific Advisory Forum on Judicial Education on Equality Issues.

The View from the Courtroom

• Nancy L. Paterson

Nancy L. Paterson is currently investigating fraud, corruption, and staff misconduct cases for a large, multi-national organization in Washington, DC. From 1994 to 2001 she was a trial attorney at the International Criminal Tribunal for the former Yugoslavia (ICTY). During her tenure at the ICTY, Paterson was actively involved in several investigations and trials. In 1999 she was instrumental in the investigation and indictment of Slobodan Milosevic. Prior to joining the ICTY, Paterson worked as an assistant district attorney in New York City for 11 years where she specialized in sex crimes prosecution and served as the deputy bureau chief of the Child Abuse and Domestic Violence Bureau.

The Reason or Need for the Session

The purpose of this session is to engage the judges in a debate about the role that witnesses can and should play in the justice process in international courts. The creation of the *ad hoc* International Criminal Tribunals for Yugoslavia and Rwanda (ICTR and ICTY) and the special courts for Sierra Leone and East Timor, as well as the birth of the International Criminal Court (ICC), have brought new attention to the role of witnesses in these unique proceedings. Unfortunately, however, rather than taking an embrace, modern approach to witnesses and witness testimony, recent actions taken by the tribunals to limit the testimony of witnesses in the court proceedings raises serious concerns about the shrinking role witnesses play in the international court context. Facing severe criticism over the length and complexity of the trials, as a time saving device the judges at the tribunals have chosen to marginalize the role of witnesses. This controversial action has alienated the witnesses, frustrated the press and public, stifled the prosecutors' ability to present a comprehensive case, and is depriving the judges of a valuable resource in determining the guilt or innocence of the accused.

As a means of “speeding up” the testimony of witnesses, the ICTY and ICTR have revised their *Rules of Procedure and Evidence* to encourage the prosecutors to introduce written witness statements and depositions, and they have set strict time limits for the questioning of witnesses at trial. These actions, while arguably well intentioned, fail to take

into account the important role played by witnesses in assisting the judges to reach their verdict and it severely restricts the important healing function the justice system provides for the victims and witnesses of horrific crimes. Furthermore, by minimizing the role of witnesses in the proceedings, the courts are failing to meet the mandate given them by the United Nations that the tribunals should also “contribute to the restoration and maintenance of peace.”

Session Goals

This session will explore these issues by discussing the many ways listening to testimony from live witnesses and giving them a full opportunity to tell their stories can be a great asset to the judges in helping them to better understand the case before them. In addition, the discussion will focus on how the criminal justice system, especially in international courts, can serve as a healing mechanism for victims and the community as a whole. Most lawyers would argue that the only goal of the criminal justice system is to see that the defendant receives a fair trial—that there is no place in the system for the court to address the special needs of witnesses. This session will strive to have the judges reconsider this limited and perhaps outdated attitude regarding the role of witnesses. The judges will be asked to “think outside the box” and consider the possibility that the tribunals, special courts, and the ICC are unique institutions that do, in fact, have a wider role to play than that ascribed to domestic criminal courts. The judges will be encouraged to

consider that they also have a duty to see to it that the victims of the crimes, including those who come to testify or would like to come to testify, also feel that they and their loved ones received some measure of justice. *Justice must not only be done, but must be seen to be done.*

Questions Raised

“It is one thing to say with the prophet, Amos, ‘Let justice roll down like mighty waters,’ and quite another to work out the irrigation system. Clearly there is more certainty in the recognition of wrongs than there is in the prescription for their cure.” –William Sloan Coffin

- Does international justice require only fairness and justice for the accused or does it also have a responsibility to the witnesses?
- Is it conceivable that in the future a system can evolve that virtually does away with victim/witness testimony?
- If that were to occur, what would that mean to the international justice system?
- One of the justifications for establishing the ICTY and the ICTR was the hope that the creation of the courts would lead to the restoration of peace and stability in the region. If peace and stability is to occur, must not the victim/witnesses play a role in the process?
- If the witnesses are not given an opportunity to tell their stories and to confront those who committed the crimes, will not this action undermine the effort to restore peace and stability?
- If the courts do have a responsibility to witnesses, what is the extent of that responsibility?
- If they do have a responsibility, what more do the judges need to know about witnesses, the issues that are important to them, and the dynamics that arise when witnesses testify?

Issues that Need to Be Raised and Discussed

Rather than seeing the courtroom through their eyes, or the eyes of the defendant, the judges should be encouraged to see the courtroom through the eyes of the witnesses and the wider community.

Discussion should be held about the role of witnesses in international criminal courts. Consideration should be given to the strict legal view of the courtroom as well as a more expansive social and psychological view of the courtroom.

A discussion should be held regarding Dr. Judith Herman’s contention that victims of violent crimes experience a phenomenon she has coined “betrayal of the bystanders.” The judges will be encouraged to consider whether limiting witness testimony contributes to this phenomenon.

Discussion should be focused on what the witnesses think the goals of the justice system should be, many of which are in direct contrast to the legal goals of providing a fair trial for the defendant. The issues witnesses hope to see addressed are:

- acknowledgement of facts;
- acknowledgement of harm (by bystanders, by the community);
- an apology;
- an effort to make amends; and
- prevention of future harm.

A discussion should also be initiated that considers the “emotional labor of judging” and whether that affects the judges’ view of witnesses and their role in the criminal justice process.

Questions to Be Answered

- What is the significance of victim/witness testimony in international courts?
- Are different dynamics at work in international courts that are not present when a witness testifies in a domestic court?
- How do witnesses view their role in the trial; what do they think they are contributing to the process?
- Does the witnesses' view of their role coincide with the judges' view of their role? If not, how can that "disconnect" be resolved?
- How much should the judges know about the personal situations of the witnesses—should they be sensitized to what life is like for the witness at home?
- How can judges be helped to better understand the situation in a country recovering from armed conflict and how that impacts on the witnesses?
- How can judges be educated about the dynamics of the relationship that develops between a witness and the prosecutor?
- How can judges be helped to understand better how some of their actions can help or hurt that relationship?
- How can judges be helped to better understand the different cultural issues that must be considered when taking testimony from witnesses in international courts?
- How can judges be helped to better understand the gender issues that must be considered when taking testimony from witnesses in international courts?
- What should the judges know about the dynamics at work when a defendant chooses to defend himself and is allowed to cross-examine witnesses himself? Are there things the judges can do to better protect the needs and interests of the witnesses in this situation?
- Are there different dynamics that affect the witness depending on the nature of the crime?
- What is it like for a witness to describe the murder of a friend or relative, the torture of a friend or relative, the murder of a child, the sexual assault of a friend or relative?

- How are the dynamics different for the witness if the person is describing crimes committed against them as opposed to crimes committed against others?
- Are there different dynamics at work if a witness is elderly, handicapped, young, illiterate, nervous, afraid, etc.? How can you sensitize the judges to those dynamics and what can they do to help witnesses with "special needs" provide better quality testimony?

What should be achieved by presenting this session to judges?

The ultimate goal of the session should be to encourage the judges to take a broader and more understanding view of the role of witnesses and victims in the criminal justice system as it is administered in international criminal courts. Hopefully the judges will start to consider the possibility that the traditional ways of conducting trials may have to be reconsidered and revised. The "prescription for the cure" may have to be different now and expanding the role of witnesses in international courts can be done without impacting on the ability to guarantee the defendant a fair trial. As U.S. Supreme Court Justice Harlan said, "For the Constitution to have vitality, this Court must be able to apply its principles to situations that may not have been foreseen at the time those principles were adopted."

What do you intend for the judges to take away from the sessions?

Judges will be encouraged to:

- Learn how they can create an environment of safety in the courtroom
- Consider how they can create an "evidence friendly" environment in the international context
- See the broader context of the trial including the psychological and sociological issues that arise
- Troubleshoot specific problems that come up and learn practical solutions that can be applied in the international court

- Think about how the victim feels in court
- Consider how the attitude of the victim/witness affects the quality of the evidence?
- Consider the negative consequences to the justice system if the witnesses are not fully included in the process
- Accept that they can attend to the rights of witnesses while not infringing on the rights of defendants
- See the broader context of their work
- Consider how this new way of seeing affects the judge's own psychology
- Understand that if the witness feels that he or she is being given an appropriate opportunity to tell his or her story, that his/her testimony is being listened to, and that his/her personal needs and concerns have been appropriately addressed—before, during, and after their testimony—then the quality of the testimony will be better
- Appreciate that better testimony helps the judges make better decisions.
- Accept that witnesses who are treated badly can doom a case and ultimately the reputation of the court
- Realize that well-treated witnesses who are satisfied with their experience will go home and encourage other witnesses to come forward

Detailed Outline of the Session

Length and format of the session

The session should be an all day session divided into five parts.

a. Legal discussion on witness testimony.

The first session should be a one hour moderated discussion during which a debate would be conducted looking, in broad terms, from a purely legal perspective, at the issue of witness testimony. The judges would be encouraged to discuss how witness testimony is handled in the international courts where they currently work and in the legal systems they come from. Questions will be put to the group to

provoke them to think about why their legal systems handle witness testimony in the way they do and how it might be possible to approach it from a different perspective. The purpose of the beginning session would be to get everyone thinking and considering alternatives. (Moderator should be a law professor.)

b. Presentations by actual witnesses.

The second morning session should be one and one-half to two hours long and would be a moderated discussion with victim/witnesses who have testified before international tribunals or courts. Hopefully two victim/witnesses could attend who would be encouraged to talk for about 20 minutes each about their wartime experience, their experience when they testified before the court, what they expected from the court before they went, and what the actual experience turned out to be. After the victim/witnesses speak (45 minutes, then a 15 minute break), a series of questions will be put to the entire group designed to provoke a debate and analysis of the victim/witnesses' courtroom experiences. The questions will be a combination of legal and non-legal questions and the judges will be encouraged to actively participate by sharing their legal views on the subject (30 minute session). The final portion of the morning session would be a 30 minute moderated discussion designed to have the group try to pinpoint the most significant positive and negative experiences of the victim/witnesses and to propose possible ways the problems could be dealt with. Throughout this session the victim/witnesses will be encouraged to be full and active participants in all discussions.

c. Psychological and sociological issues related to victim/witnesses.

The afternoon session would be divided into three parts. The first part would be a one-hour presentation and discussion with a psychiatrist/psychologist and a victim/witness advocate to discuss the social and psychological dynamics that affect witnesses, especially witnesses who might come before an international court to give testimony. A period of time should be left at the end for questions and answers.

d. Video presentation of actual witness testimony.

The second afternoon session, if possible, would be a one-hour session consisting of a presentation of some video clips of actual witness testimony before some of the international courts. The video clip would run no more than half an hour and the second half hour of the session would be a discussion session focused on critiquing the actual experiences both from the judge's perspective and from the victim's perspective.

e. Discussion of the mandate of international courts, where witnesses fit into that mandate, and suggestions for improving the system.

The final session would be a 45-minute wrap up session. The first 20-30 minutes would be a discussion on the mandate of the international courts and a consideration of how witness testimony fits into that mandate. The final portion, approximately 15 minutes, would be a summary session in which practical, implementable suggestions for improving the witness experience would be solicited from the group.

Measurable objectives

There are three primary objectives for the session:

1. To get the judges to better understand the experience of giving testimony from the perspective of a witness "on the other side of the bench" (*the view from the courtroom*)
2. To get the judges to think about the mandates of international courts, to consider the difference in their mandates from those of domestic courts, and to consider whether or not taking witness testimony needs to be viewed from a different perspective in the international forum
3. To come up with some practical suggestions that could make the taking of testimony from witnesses a more positive and rewarding experience for the witnesses, the judges, and the wider community

Readings

- Judith Herman, M.D., *Trauma and Recovery*, New York: NY, Basic Books.
- Nancy Paterson, *Silencing The Victims In International Courts—Neglecting A Solemn Obligation*, Georgetown Journal of International Affairs, Winter/Spring 2003.
- UN Commission on Human Rights, Fifty-second session: *Report of the Special Rapporteur on violence against women, its causes and consequences*, Ms. Radhika Coomaraswamy, in accordance with Commission on Human Rights resolution 1994/45; Report on the mission to the Democratic People's Republic of Korea, the Republic of Korea and Japan on the issue of military sexual slavery in wartime, E/CN.4/1996/53/Add.1, 4 January 1996.
- Transcript of Mock Tribunal for Sex Slaves, *Tokyo Tribunal & Public Hearing*, December 8 - 12, 2000. (<http://www.whrnet.org/tribunal/tribunal.htm>)
- *The Universal Declaration of Human Rights: Fifty Years and Beyond*, edited by Yael Danieli, Elsa Stamatopoulou, and Clarence J. Dias.
- Jeffrey T. Frederick, Ph.D., National Legal Research Group, *Making Better Witnesses – the LOFT Model*, Jury Research Update.
- Jeffrey T. Frederick, Ph.D., National Legal Research Group, *Tips for Increasing the Effectiveness of Witnesses* (Jury Research Update).
- *Victims and Witnesses in the ICC: Report of a Panel Discussion*, "International Seminar on Victims Access in the International Criminal Court," 26-29 April 1999, Paris, France.

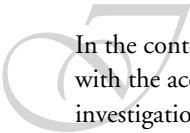
Potential Problems or Sensitivities

It would be helpful to have some detailed information on the background of each judge and what legal system they come. By knowing that in advance, the moderators would be better able to frame their questions and direct the discussions to take into consideration the different legal models with which judges are familiar.

Human Rights, Equality, and Judges

• Shiranee Tilakawardane

Shiranee Tilakawardane is a supreme court judge in Sri Lanka. She was the first woman appointed as a court of appeal judge in Sri Lanka. Previously, she was a high court judge and an admiralty court judge. Tilakawardane's efforts are focused on the fields of equality, gender education, and child rights. She has been active in Sakshi of India's gender workshops for judges, the Asia Pacific Forum for Gender Education for Judges, and serves on the International Panel of Judges for the Child Rights Bureau.



In the context of the law, rights are often associated with the accused of the crime, the subsequent police investigation, and the many competing forces of our criminal justice system that focus on the desire of the community to bring criminals to justice. Over many years, rights have developed to be concomitant with the right of the accused to a fair trial and include concepts like “proof beyond reasonable doubt,” the “presumption of innocence,” and other such rights that have strived to ensure that the innocent may not be convicted.

However, in the larger context of the law “rights” also mean living in an atmosphere of mutual respect and trust without fear and discrimination. It includes the right to a criminal justice system that is effective in implementing of the laws of the nation to ensure the safety and security of all citizens from crimes and corruption.

It is important to note that in considering the rights of an accused, a person's civil liberties must be safeguarded. There must be an assurance of protection against state power. In the recognition and interpretation of rights in modern courts of law, there is an inevitable balancing of competing rights. However, one of the fundamental needs of modern society is to understand that to achieve the overall goal of ensuring the right of a community to live without fear and discrimination, courts must ensure that most vulnerable members of society are protected.

It has been aptly stated by the Minister of Justice and Attorney-General of Canada, “to maintain the respect of the role of law, the criminal justice system must meet the needs of all groups in society including those historically disadvantaged by the law.” Women are at the top of this list, but they are not alone. The list includes other disadvantaged groups such as children, the disabled, aboriginal people, people of colour, people of different races, gay and lesbian people, and people of different faiths. Inherently, the public nature of crime often mutes the voice of the victim at all stages of the criminal process.

By contrast, modern courts have realized that in the administration of justice there must be the inclusion of the victim's rights. In order for the community to have confidence in its system of law, the inclusion of victim's rights must be also recognized and interwoven into the criminal justice system, both in substantive laws as well as in rules of procedure and evidence and sentencing.

It should be noted that terrorism has placed a greater burden on the judiciary and the administration of justice. With regard to terrorism, one envisages that there must necessarily be a clash between the interest of the state and the civil liberties of individuals. In this instance, national security ultimately prevails. Perhaps one has to foresee the development of a different weight being considered in balancing the rights of the individuals against the rights of the state. However, even under extreme situations, it becomes vitally

important that the judiciary, as the sole institution entrusted with the safeguarding of the constitutional rights of a community, ensures that the rights of all citizens are protected to the greatest extent possible.

It is therefore important to recognize that human rights today involve more than the accused person's rights. Human rights today include the quality rights of others, including victims, and the rights of a state. Clearly the role of both parliament and the judiciary would ultimately be to recognize, identify, and strike the appropriate balance between these competing rights in the role of decision making.

The Charter of Human Rights which has been signed and adopted by many of the countries in the world, including Sri Lanka, assures the rights to life and to liberty and security of the person including freedom from torture and cruel or inhuman treatment, freedom from slavery, servitude and forced labour; freedom from arbitrary arrest and other deprivations of liberty. It provides an overall guarantee and ensures the right to respect one's privacy and the respect and protection of the family of the nation. It is important to note that the Human Rights Charter and the safeguards and guarantees enshrined therein are pivotal in ensuring the quality of all people. It includes certain fundamental freedoms and guarantees that are inalienable. The fundamental freedom of speech, expression, movement, choice, justice, thought, religion, information, conscience, and action are but some of the freedoms that had been guaranteed by the Charter of Human Rights.

There are many international instruments that have been adopted by many countries around the globe. The importance of such international instruments of law is to ensure that all people are protected equally by the law. Examples of such international instruments are as follows:

- The Universal Declaration of Human Rights
- The International Covenant on Civil and Political Rights
- The International Covenant on Economic, Social and Cultural Rights

- The Convention on the Elimination of all forms of Discrimination against Women (CEDAW)
- The Convention on the Rights of a Child
- The American Convention on Human Rights
- The Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women
- The Declaration on Eradication of Violence against Women
- The Convention against Torture and other Cruel, Inhuman and Degrading Treatment and Punishment
- Other complementary Conventions on the Abolition of Slavery, Slave Trade and Institution and practices similar to slavery

Many of these international instruments have been signed and adopted by countries. For example, Sri Lanka is a signatory to CEDAW. What this translates into practically is that it is incumbent upon the state to take all appropriate measures to eliminate discrimination against women in all matters, including matters relating to marriage and family. This includes the responsibility of the judiciary as an organ of the state to respect and carry out its policy to accord with this fundamental concept against discrimination of women. In fact, in this respect Sri Lanka has in its own constitution included and encapsulated the norm of equality.

Article 12(1) of the Constitution of the Democratic Socialist Republic of Sri Lanka states that "all persons are equal before the law and are entitled to equal protection of the law". Article 12(2) states that "no citizen shall be discriminated against on the ground of race, religion, language, caste, sex, political opinion ...

Specific reference has to be made to the international law contained in CEDAW where Articles 5 and 11 guarantee the equality of women. Article 5 of the CEDAW states:

State parties shall take all appropriate measures to modify the social and cultural pattern of conduct of men and women with a view to achieving the elimination of prejudices on customary and all

other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for women and men.

Unfortunately the constitutional guarantees of fair and equal treatment, though highlighted and contained in the Charter of Human Rights and even in the national constitutions of the nations throughout the world, often go unrecognized because of certain intrinsic ramifications that are not easily identifiable in the delivery of justice. It is beyond any controversy that the bedrock of the delivery of justice is the independence of the judiciary and impartiality of its judges. Equality is the bedrock on which impartiality devolves. Unfortunately, equality has meant many different things to different people. There is a lack of understanding that equality is the catalyst that gives reality to all other rights. Without equality, other rights would only be symbolic, devoid of true meaning. In the pursuit of justice, human beings have embarked on an arduous journey in search of truth, impartiality, and equality.

However it is important to remember what has been said by Alexis de Tocqueville in “The Democracy in America.”¹ He states, “*equality is the foundation upon which all other rights are built.*” Indeed, equality is the intimate link between human rights, justice, and impartiality. This makes it the ultimate instrument for the definition and recognition of all rights.

What is equality?

Equality can be defined in uncertain terms and be characterized by subjectivity. In order to delve into the co-meaning of equality, this must be understood. Every time we use the word equality, we either directly or indirectly infuse it with our own knowledge, experiences, biases, pre-conceptions, and stereotypes.

Diana Majury, in “Equality in a Post Modern Time” (Canadian Constitutional Dilemmas revisited)² states:

Equality is a place from which stereotypes and prejudices can be challenged and, at the same time, it is also a place where stereotypes and prejudices can be reinforced and perpetuated and therefore sometimes the notion of equality has even been a powerful tool

or vehicle for inequality”. Aristotle, for instance, spoke of equality in terms of proportionality. Equals should be treated equally. But “unequals” must be treated in proportion to their inequality.³

This approach, of course, begs the question. Equals or unequals in what?

Focusing on egalitarianism, equality was considered by Martin Luther. He complained that differences or inequalities among human beings were unacceptable and the products of “the laws and fabrications of men.”⁴ Even under the reformation envisaged by Luther, he accepted the hierarchy of the church, thereby tolerating the inequality.

In the mid-eighteenth century, John Locke said that each individual is equally entitled to freedom. But he underscored that the freedom of man succumbs to state intrusion. Jean Jacques Rousseau, in his “Social Contract,” rejected egalitarianism, emphasizing that human beings are naturally equal and that egalitarianism re-creates governments by social contract in order to correct the inequalities caused by the ills of civilization. His thesis inspired a revolution in France to the cry “Liberty, Equality and Fraternity.”

John Stuart Mill, Immanuel Kant, and Simone de Beauvoir also examined the relationship between individual human dignity and the good of the community. Their vision emphasized that equality was about dignity and respect. Their thinking gave rise to the notion of human rights and ultimately to the theory that human beings must not only be free from intrusive states but also free from discrimination.

Social discussions and debates around the world on the nature of equality have placed these issues before judges in different jurisdictions. Over the decades, the judicial world has become a global one. It is increasingly seeking to interpret its own human rights provisions in a global perspective. Judges look at a broad spectrum of sources in human rights law, in particular when deciding how to interpret their constitutions and deal with new problems. In the Namibian case of *Mwellie v.*

The Ministry of Works, equality was interpreted after observing the decisions in India, Canada, United States, Malaysia, South Africa, and the European Courts of Human Rights. In doing so, the fundamental concept of equality has changed from the old Aristotelian precept of “similar treatment.” The concept of equality has evolved from a *formal equality* precept to one of *substantive equality*.

In the book *Canadian Justice Celebrating Differences and Sharing Problems*⁵, Justice L’Heureux-Dubé of the Supreme Court of Canada states

Equality, as that concept is enshrined as a fundamental human right within s.15 of the Charter, means nothing if it does not represent a commitment to recognizing each person’s equal worth as a human being, regardless of individual differences. Equality means that our society cannot tolerate legislative distinctions that treat certain people as second class citizens, that demean them, that treat them as less capable for no good reason, or that otherwise offend fundamental human dignity.

It has been recognized that true equality demands a contextual approach. With the lens of equality as a guide, respect and protection of human dignities has begun to influence our approach in recognizing rights. In this context, three important questions become crucial in the identity of the modern approach to the recognition of substantive equality.

1. Does the law draw a distinction based on personal characteristics? Does it fail to take into account a person’s already disadvantaged position within society?
2. Is the person treated differently because of an enumerated or analogous ground of discrimination?
3. Does the differential treatment discriminate in a substantive sense, bringing into play the purpose of the equality guarantee?

The emphasis is on whether the different treatment lends itself to prejudice, stereotyping or the propagation of historical disadvantage. Substantive equality is important because it causes the law to be sensitive to the fact that it has tended to exclude the

experiences and perspectives of the more marginalized members of society.

Courts and jurists today are becoming attentive to social context and historical patterns of discrimination in determining whether a particular rule, inference, or presumption is based on myth and historical disadvantage rather than on the principle of substantive equality. Because of today’s movement from formal equality toward substantive equality, the importance of women’s rights as human rights has been recognized and affirmed throughout historical decisions given in all parts of the globe.

The U.N. Committee on the Elimination of Discrimination Against Women has recognized that violence against women is as much a matter of equality as it is an offence against human dignity and a violation of human rights.

The Committee in 1992 recommended that:

State parties should ensure that laws against family violence and abuse, rape, sexual assault and other gender-based violence give adequate protection to all women, and respect their integrity and dignity. Appropriate protective and support services should be provided for victims. Gender-sensitive training of Judicial and Law Enforcement Officers and other public officials is essential for the effective implementation of the Convention.

The U.N. General Assembly has since expressly recognized the need for states to pursue appropriate measures to “modify the social and cultural patterns of conduct of men and women and to eliminate prejudices, customary practices, and all other practices based on the idea of the inferiority or superiority of either of the sexes and on stereotyped roles for men and women.” The Declaration on the Elimination of Violence against Women, for example, stipulates that:

States should pursue by all appropriate means and without delay a policy of eliminating violence against women and, to this end, should: (i) Adopt all appropriate measures, especially in the field of education, to modify the social and cultural patterns

of conduct of men and women and to eliminate prejudices, customary practices and all other practices based on the idea of the inferiority or superiority.

This recognition is extremely important. In the past, erroneous assumptions about women led to the denial of the very existence, not to mention the seriousness, of the problem of discrimination and violence against women. To give a recent example, it has taken great persistence and dedication to break down traditional barriers between the public and private spheres in order for the international community to recognize rape, sexual slavery, enforced prostitution, forced pregnancy and enforced sterilization as war crimes and crimes against humanity. Recent crises in Yugoslavia, Rwanda, and Afghanistan are just a few reminders of how far we still have to go.

What do equality and human rights mean for women? Why have we, through most of history, failed to consider women in terms of true equality? Indeed, it is when dealing with discrimination, violence against women, sexual assault, domestic violence, and child abuse that the principles of equality are most at stake. While societies have advanced to a higher understanding of equality, discrimination and violence against women have not been eradicated. While society has acknowledged that women are entitled to a multitude of rights, it has often done so without addressing the values that lie at the very heart of the question: freedom, equality, respect, and dignity. Until we understand that true equality encompasses all of these values, and until we apply this understanding, inequalities will continue to rage rampant. In the words of Madam Justice Rosalie Abella:

... Women, and especially minority, disabled, elderly and Aboriginal women who suffer double jeopardy, are waiting for human rights to hit them, for the rhetoric of equality they can hear to turn into the reality of equality they can live. They expect that men and women who have been lucky enough to learn how to speak and live equality will use those strengths to articulate and generate the same equality for

others. They expect, and (in Canada) they are constitutionally right to expect, that both ... official genders should be fluently equal.

The following table sets out the importance of identifying the differences between formal equality and substantive equality that could be clarified as follows:

Formal Equality	Substantive Equality
Context: not relevant	Context: always relevant, is the key to analysis
Goal: same treatment to all	Goal: eradicating inequality
Government duty: avoid discrimination by differential treatment	Government duty: positive obligation to level the playing field
Focus: on procedures of law	Focus: on substance of law
Intent: required to prevent discrimination	Intent: not requiring proof, neutral
Neutral legislation is not discriminatory	Legislation can violate equality; guaranteed to have adverse impact on disadvantaged groups
Disadvantaged groups-protected to the extent that they are the same as the disadvantaged	Comparison not necessarily required; emphasis on historic, external economic reality
Discrimination-"unlike" can be "unlike" in proportion to "unlikeness" but "alike" must be treated as "alikes"	Determined in terms of group's disadvantages

In *substantive equality* it is vital to analyze the social context. It also needs a deeper understanding of the particular practices of different societies, communities, the law, and its impact on various classes. It is important to understand that this is to ensure availability of equal rights to all disadvantaged people. Equality is, therefore, the central pillar in ensuring justice to all those who are treated with discrimination by the administration of justice.

The hurdles that separate the woman from her right to equality include social stigma, disbelief, fear of ostracism, lack of sexual language, fear of blame, fear of being disbelieved even if she complained, and family honour (as the perpetrator of violence is

within her family, silence, shame and humiliation). An overwhelming umbrella of fear dominates her life.

Yet when she comes to the courtroom, the judicial process treats her at par with the accused, completely negating the hurdles she faces. This equality is what is called *Formal Equality*, which operates from an assumption that all are equal. A sameness of treatment is not needed but rather an acknowledgement that differences exist. Thus for women and children in situations of violence, it will mean creating systematic support in bridging the gap. Sameness of treatment will not serve the purpose. Similar is the case of a person with disability who is not at par with an able bodied person. Thus it is important that there is an institutional stake in creating an environment conducive to accommodate individual contexts. An understanding of equality that integrates social context and focuses on equal impact is *Substantive Equality*. In the context of cases of violence, if the courts choose to treat the accused and the complainant on a similar basis it would negate the hurdles faced by the women. The outcome would then be unequal and would violate the human rights of the woman.

What is of paramount importance is understanding not only the issue in the context of women facing violence, but also eliminating existing assumptions about them that hinder their search for justice. It is also important to understand the role that one plays especially as a judge in decision making. It requires one to examine oneself and one's own perceptions that form opinions about all those who are marginalized in society, especially women, children, gays, and lesbians in the context of their situations when faced with violence, especially sexual violence.

For many years it was not understood that judges, who played a pivotal role in the delivery of justice, needed to be educated on social context issues. Most judges in the process of delivering a decision assumed that they acted impartially. However, Cardozo, in "The Nature of the Judicial Process"⁶ states:

"There is in each of us a stream of tendency, whether you choose to call it philosophy or not, which gives

coherence and direction to thought and action. Judges cannot escape that current any more than other mortals. All their lives, forces which they do not recognize and cannot name, have been tugging at their inherited instincts, traditional beliefs, acquired convictions: and the result is an outlook on life, a conception social needs . . . In this mental background every problem finds its setting. We may try to see things as objectively as we please. None the less, we can never see them with any eyes except our own . . ."

Justice Ted Thomas states:

The challenge for judging at the outset of the twenty first century is to adopt a functional and practical approach which will promise justice and equality in the law and better ensure that the law meets the needs and the reasonable expectations of the community.

Further, Justice Jerome Frank states:

In addition to those acquired social value judgments, every judge however, has many unavoidable idiosyncratic "leanings of the mind", uniquely personal prejudices which may interfere with his fairness . . . Much harm is done by the myth that, merely by putting on a Black robe and taking the oath of office ceases to be human and strips himself of all predilections, becomes a passionless thinking machine.

Lord Scrutton states

The habits you are trained in, the people with whom you mix lead to your having a certain class of ideas of such a nature that, when you have to deal with other ideas, you do not give as sound and accurate judgments as you would wish.

Lord Macmillan⁷ states:

The ordinary human mind is a mass of prepossessions inherited and acquired, often nonetheless dangerous because unrecognized by their possessor . . . every legal mind is apt to have an innate susceptibility to particular classes of arguments.

Therefore as judges are charged with the ultimate decision over freedom, rights, duties, and properties of citizens, judges must understand that in delivering their judgments (as judges) they are called upon to weigh and balance competing values of

others. They must also make themselves aware of how one's own values affect the judicial decision making process as this is a key to judicial fairness. Therefore it behooves the judiciaries of all nations to understand and identify the judicial biases that exist. As such judicial bias may quite unconsciously detract from the fundamental norm that all persons are equal before the law and are entitled to the equal protection of the law. These biases may lie for different and varied reasons. Such biases are part of the cultural and social context reality of the environment in which a decision making is taken. Despite all that has been said and written about the equality of all persons and the adoption of the Human Rights Charter, the natural social order, of social reality, is one of stratification and therefore the response of one in society is accordingly spontaneously stratified depending on the divisions that exist in society. These broad divisions are sex, age, race and ability. In other words, the spontaneous reaction is to discriminate against, for instance, a disabled person, on the belief that they are less than normal and therefore entitled to a lesser share of rights, due to their disability. It has been found that children are often chastised with violence and therefore discriminated against simply on the belief that because of this stratification they have to be disciplined and controlled with violence, if necessary. Women are also subject to discrimination due to this stratification in society. Today, however, studies have revealed that whatever artificial stratification may take place the rights of all people are guaranteed equally by the Human Rights Charter and that it is incumbent upon a state to incorporate this value in all its organs, including the judiciary.

In understanding one's response to the social context reality of stratification, one begins to understand and question certain norms that measure to be acceptable prior to the globalization of the rights contained in the Human Rights Charter. Today, such practices which discriminate, whether they are cultural or social, are (according to the CEDAW Convention) a travesty of justice and detract from the norms of equality which is a safeguard enshrined for all human being in the

Human Rights Charter. Therefore it is key to recognize and address the politics of law and the impact that plurality has in the courtroom. It is essential for judges to be better informed about recognizing one's biases and the beneficiaries would be those who come to the 'Temple of Justice' to resolve their disputes.

In recognizing biases that exist in decision making of judges, the sources of biases must be analyzed. Such sources could be unconscious or subconscious. We have to recognize that judges are not free from the impact of their social baggage that affects their decision making. Therefore, the family into which they were born, their friends, their education, and their political and religious affiliations, influence their decision making. Thus upon a cursory examination, although it appears that judges hear evidence then use the facts and apply the law to these facts to arrive at a decision, this is not the true process of decision making. In other words, the law plus the facts does not equal the decision. Quite unconsciously, while analyzing the facts the judge's social baggage plays a pivotal role in the decision making of that judge.

For example, a judge may agree that a woman wearing a short dress could provoke a rapist. It is through unpacking our social baggage and examining the source of our beliefs that one learns that the perception exists. Perhaps while growing up someone in the judge's family emphasized that "good women" do not wear short clothes because they provoke men. This belief carries over into adulthood. Eventually myth propagates itself and sustains itself in the environment that is very real to most women, an environment of fear. So that women also believe that in order to grow up safely, they must not wear short clothes and that if a woman who wears a short dress faces any form of sexual violence, the complainant's dress and her behavior is often accepted as a justifiable reason for the violence which detracts from the focus on the perpetrator of the criminal behavior.

This social baggage gives rise to many myths and stereotypes that are carried into our decision making.

Myths and stereotypes are assumptions that we have about certain groups of people and are not supported by any fact nor do they conform to the individualistic traits that are identified with human rights. The danger of this social baggage, if unidentified, is that these assumptions rule the decisions and prejudice the outlook of society in general, and of judges in particular. Thus the judicial process is not only about evidence in law but also intrinsically about the social baggage that we carry with us. This inevitably affects the judicial decision making process resulting in discrimination.

Once we identify the social baggage, then we are able to see that the decision making cannot be based on these myths and stereotypes. This is best illustrated by the judgment that was given. *Phipson's On Evidence* carries a case which refers to a statement made and the decision made by the judge who decided the case in *James vs. R.* (1971) 55 Cr. App R. 229. In this case there is the following citation:

Because human experience has shown that in these courts girls and women do sometimes tell an entirely false story which is easy to fabricate but extremely difficult to refute. Such stories are fabricated for all sorts of reason ... and sometimes for no reason at all.

Clearly this is a myth. But this myth led to the Law of Corroboration, which has been followed in most of the Commonwealth countries. Even today, some cases of rape follow the belief that it is unsafe to convict on the testimony of the prosecutrix alone. Therefore in cases of sexual offense one has to have the statement of the witness or the prosecutrix corroborated either by medical evidence or by some other form of evidence. Many cases failed in this sense, even in the Sri Lankan context where the prosecutrix has been disbelieved, until recently when the law changed merely on the basis that it was unsafe to convict on the uncorroborated statements of the prosecutrix. Now, clearly the decision given is wrong because it was based on an assumption that the prosecutrix in the case had lied or had a propensity to lie, which had been on the broad basis of a myth that women tend to lie. Contrary to this decision, there is the decision of *Rex vs. James*, which is devoid of the myth that

women tend to lie. The judge explained why the evidence of one witness, namely the prosecutrix, was acceptable. He concluded that one can see the emergence of the principles of equality as it applies to other cases, such as robbery or theft, where if the evidence of one witness would suffice (if the myth and stereotype plans did not come into effect) then there was no need for corroboration. The same rule would, therefore, apply to the evidence of the prosecutrix and one could get a conviction on the evidence of her testimony alone.

What has to be understood here is that because of existing myths and stereotypes, the outcome of the decision rendered by a judge could be different. This is why it is important to identify these myths and stereotypes.

Apart from 'subconscious baggage,' biases are also formed due to fears, suppressed ambition, trauma, personal experiences, and even the upbringing of that person, whether the person is a judge or a member of a community. But the relevance and importance of the role that these factors play in the judge's mind is that they unconsciously affect the process of decision making and the interpretation of the facts that are placed before the judge. For the facts will be evaluated through the lens of these experiences, these unconscious and subconscious matters that affect the emotions, and intellectual predilections which ultimately affect the process of decision making and ultimately the decision itself. It is the recognized principle in law that biases are an anathema for they affect the impartiality associated as a fundamental norm in the process of decision making.

This has often been referred to by judge such as Cardozo. Frustration, anger, likes, and dislikes unconsciously tend to distort the decision making process of the judge. If the judge was conscious of these matters, was able to identify them, then he or she could take steps to avert the decision and having identified the bias would be able to circumvent the decision making process around such biases. For example, a judge who had experienced a traumatic childhood due to a drunken father beating up his

mother would have a disproportionate reaction subconsciously towards an accused that has behaved in a similar manner. It is important for decision making to be above such biases.

The first step toward averting partiality to these biases is to be able to be educated and experienced in order to identify and accept that these biases exist. Failure to identify the bias or the lack of education to understand the ramifications of the bias would lead to these biases affecting the decision of a particular court.

Cultural or belief patterns that have been imbibed through race, religion, or nationality also affect decision making. The U.N. General Assembly has expressly recognized the need for states to pursue appropriate measures to “modify the social and cultural patterns of conduct of men and women and to eliminate prejudices, customary practices and all other practices based on the inferiority or superiority of either of the sexes and on stereotyped roles for men and women.”⁸ This recognition is vital because myths and stereotypes about women have led to the denial of the very existence, not to mention the seriousness, of the problem of violence against women.

For instance, it has taken enormous persistence and dedication to break down traditional barriers between the public and private spheres in order for the international community to recognize rape, sexual slavery, enforced prostitution, forced pregnancy, and enforced sterilization as war crimes and crimes against humanity. (This has now been incorporated into the Rome statutes of the International Criminal Court.) Recent crises in Yugoslavia, Rwanda, and Afghanistan disclose the importance of the steps that have to be taken in order to protect the women and children from being sexually marauded during times of war. As far as individual women are concerned, the judicial process itself often re-victimizes through a legal process that has permitted brutal cross-examination of complainants regarding the prosecutrix’s sexual history. Complainants are also denied justice due to biased legal characterizations of concepts such as consent,

discovery, and self-defense that has failed to take into account women’s perspectives.⁹

In order to understand how impartiality and substantive equality allows us to identify and dispel myths and stereotypes as they arise in law, we need to understand definitions. By definition, a myth or stereotype is an unvarying form or pattern of fixed or conventional notion or conception of a person, group, or idea held by a number of people. It allows for no individuality or critical judgment. There is an untrue stereotype that women are bad drivers. Statistically women are found to be more cautious and careful in driving their vehicles. These stereotypes often exist for several reasons, sometimes cultural, sometimes religious. But they can also exist due to socialization that is in fairy tales, in advertisements, and in movies where critical roles are given to men and women, which socialize them into two definite and defined roles. This definition leads them into the belief that such roles are the set norm and a variation of that role would be an alienation of something distorted. For instance, a forward girl would be called a “Tom Boy,” an aberration. Beauty would be described as fair and demure, and a woman endowed with other “feminine qualities.” Whereas, strong, positive, or forward women would be relegated as “too forward” and perhaps play the role of a stepmother or witch in a fairy tale.

This does not allow any room for the operation of human rights which decrees that equality means freedom to choose whether to be forward, whether to be demure, whether to exercise freedom of sexuality, or whether to choose one’s sexual pattern, whether to be a lesbian or gay. Due to this socialization, there is often a stereotypical role that is set as a norm. Women in the decision making process are often judged on some mythical stereotypical role which is often non-existent and detracts from the concept of equality and the freedom guaranteed under the Charter. Inherent ability and toys are often other matters that cause the existence of stereotypes. For instance, thinking that dolls are for girls, and that guns and power toys are for boys creates the

stereotypes. Of course, stereotypes sometimes are simply wrong, as in the case of women drivers. Even if they are accurate as a matter of statistical average, they may be completely wrong as to a particular individual and leave no room for the fact that equality is based on individual rights. Stereotypes may also be a product of social and cultural forces and as we know society and culture changes, metamorphoses, evolves and therefore cannot be static and cannot be a norm for judgment. Unfortunately stereotypes sometimes become self-fulfilling properties. When women are told that they are ugly, or cannot do any mathematics, they develop low self esteem. They can hinder their development and unconsciously adopt these stereotypical roles in order to conform with these beliefs.

In order to change the biases and attitudes, we need to first recognize gender stereotypes in law and practice, but more importantly, we need to apply international law to concrete problems of discrimination and violence in order that we can rise above discriminatory national and cultural practices. It is important to remember that myths and stereotypes are often fictional, irrational, non-scientific narratives used to explain what is not fully understood. They are incompatible with any rational truth seeking legal system.

Because myths and stereotypes are pervasive, it is difficult to recognize their cultural and collective origins. Because we learn them from our families, colleagues, and cultural heritage (in the form of art, literature, media, jokes, music, and advertisements) myths and stereotypes are deeply embedded in our unconscious, and affect our conscious reasoning processes. They are usually generated by those dominant in the political, social and economic structures of the given society and even the victims of the stereotypes are sometimes structured into believing them and accepting the victimization.

Myths and stereotypes are therefore incompatible with judicial impartiality and must be eradicated as fictions from the decision making. Impartiality is a global and recognized principle of decision making by judges and

requires a constant and conscientious effort by every judge to prevent bias from arising through reasoning based on myths and stereotypes.¹⁰

The collective unconscious nature of myths and stereotypes usually lead to unintentional discrimination. Discrimination limits peoples' rights on the basis of irrelevant or wrongly attributed characteristic and is not consistent with substantive equality. It is only then that the judges can consider prevailing norms from the perspective of those alleging discrimination.

Therefore substantive equality provides a contextual and multi-faceted antidote to myth and stereotype in the law. An example of such would be where Justice Wilson took guidance from the Constitutional Principle of Substantive Equality, which required the court to consider the perspective of a woman who had been the victim of domestic abuse as potentially different from that of the "reasonable man." Taking this perspective into account she held that courts needed to keep a more open mind as to when battered women might perceive a legitimate threat or imminent danger.¹¹

It is therefore important that national legislatures and courts take international human rights instruments into account in the drafting and interpretation of national laws. International human rights instruments are always persuasive, if not binding, indications of the need to take active steps to eliminate discriminatory myths and stereotypes from the law and from the society as a whole.

Human rights principles therefore demand nothing less than a challenge to the collective narrative of culture. As Chief Justice Catherine Fraser of the Alberta Court of Appeal has remarked:

We have seen equality become in these 50 short years the overarching principle of international human rights. Equality is the common bond that runs through our world idea of justice. It represents everything that is noble in a nation and it brings out the best in its people—respect, tolerance, fair play and a willingness to accommodate differences.

As jurists and concerned members of society, there is, therefore, an obligation to transcend myths and stereotypes in biases and predilections in order to achieve true impartiality, equality and ultimately justice. Justice Claire L'Heureux Dubé has often stated “we must always remember to keep impartiality at the top of our list of priorities as judges, and substantive equality as our first priority as citizens of the world.”

For all these matters to be clearly understood by the decision makers of the globe—the judges, we have to understand that it is important to educate experienced judges for several reasons.

Why educate experienced judges?

- To answer specific needs arising from experience
- To keep judges current and confident in a changing world; law is not static
- To acknowledge the importance of the role of judges in a democracy and provide the necessary ongoing support and resources
- To remind judges of the need to preserve their independence, even in relation to their colleagues: there may be a difference between doing what is right and doing what is expected
- To preserve the legitimacy of the justice system through *best practices*: judicial education is an extremely important forum for judges to obtain information and feedback from peers, members of the academy, and the community
- To renew and adapt judges' visions over time

The challenge for judging at the outset of the twenty-first Century ... is to adopt a functional and practical approach which will promote justice and equality in the law and better ensure that the law meets the needs and reasonable expectations of the community.¹²

The question is how we can enable all judges, indeed all individuals in positions of authority and power, to make a difference, and to ensure that the law responds not only to the needs of those whose interests it has traditionally served, but to those of all members of society.¹³

Judicial decision making consists of fact finding, framing of issues, identification of relevant law, application of relevant law, conclusion, and disposition. It is also being identified that in judicial decision making a contextual inquiry has become an accepted step towards judicial impartiality.¹⁴

Judges are expected to understand constitutional equality principles and awareness of the context within which a case occurred and this does not constitute evidence that the judge is not approaching the case with an open mind fair to all parties. On the contrary, such awareness is consistent with the highest tradition of judicial impartiality.

In the judgment processes inevitably, and quite properly a judge's decision making process will reflect their own background and assumptions. In fact, for the purposes of decision-making, what is most desirable is a judge with as complete a store of knowledge as possible—a store of knowledge which is more than just the accidental result of the judge's particular life experiences and social world.¹⁵

In conclusion, it is important to identify that inequality leads to violent interpersonal conflict resolution that results in domestic violence, rape, etc. It leads to economic inequality between men and women. It also leads to violence due to misconceived ideals of marriage, dominance, toughness, and honour, which often lead to male economic decision making authority in the family.

All this is an abuse of power and is the cause of inequality in the system.

Therefore, in judicial decision making it is important to incorporate substantive equality into the decision making process and eradicate myths and biases and stereotypes which often lead to discrimination in the decision making process.

It is for this reason that a study must be designed specifically for judges with the purpose of increasing an awareness and understanding of principles of

equality and fairness in an era of rapid change within the society in which the judicial duties are performed. The ultimate goal is to become better judges. It is for this reason that social context education must be the global norm and must be implemented with alacrity.

Endnotes

¹ 10th Edition Vol. I, at page 41.

² 1997 Edition at page 45

³ (The politics of Aristotle E. Barker, C 1946 Book VI, 130 La).

⁴ (Martin Luther, "An open Letter to the Christian Nobility of the German Nation Concerning the Reform of the Christian Estate" (1520) in Selected Writings Ed. T.G.Tappert 1967 at 268

⁵ (1995) Journal of Supreme Court History 5 at page 8.

⁶ (1921) at page 12-13

⁷ Handbook for Judges

⁸ See Declaration on the Elimination of Violence Against Women, G.A. Res. 48/104, U.N.Doc A/48/49 (1993).

⁹ Vide Lord Justice Sedly's Freedom, Law and Justice pages 48 to 50.

¹⁰ "The Virtue of Impartiality" Handbook for Judges - The American Judicature Society, 1975 57 at page 58.

¹¹ Rex Vs. Malert 1998 1 SCR 123 at page 140.

¹² The Right Honourable Ted Thomas, New Zealand Court of Appeal.

¹³ Hon. Justice Claire L'Heureux-Dube (2001).

¹⁴ R.D.S. Vs. Her Majestic the Queen decided on 26/09/1997 in the Supreme Court of Canada.

¹⁵ Rosemary Cairns Way, NJL 1999.

Forensic Anthropology in Context

• Silvana Turner

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Historical Background

The development of forensic anthropology is directly related to concrete socio-political problems. It would not be novel to mention this in the case of Argentina, but this connection has, in fact, existed from the earliest beginnings of forensic anthropology. Nevertheless, the originality of its application is worth noting in the case of Latin American countries, beginning with Argentina, as a result of the systematic violation of human rights that occurred in the region, primarily on the part of government institutions under the control of military dictatorships between the 1960's and 1980's.

Major advances in forensic anthropology occurred initially in the United States. The questions posed by investigators in the late 19th and early 20th centuries form the basis of contemporary forensic anthropology and are related to the search for bone indicators that can be used to reliably determine sex and estimate age, at the time of death.

Investigators initially had large collections of skeletons of different sex and age groups (although there was a predominance of males between the ages of 20 and 40), making it possible for physical anthropologists to note and systematize morphological changes in skeleton characteristics and to develop new charts intended to determine the population group, sex, age, and stature of individuals with greater accuracy.

The main skeleton collections came from hospitals and morgues, with thousands of victims of wars that occurred during the 20th century, particularly from World War II, as well as the Korean and Vietnam Wars, all conflicts in which the United States had

been involved. Although victim identification was the main goal, developing investigative methods was also considered important.

Formalization of the Discipline

In 1972 a growing interest in the field of forensics led to the formation of the Section of Physical Anthropology within the American Academy of Forensic Sciences (AAFS). A new stage in the development of North American forensic anthropology occurred at this time as a result of the collaboration of governmental agencies and physical anthropologists, in turn leading to advances in research in this field. This was the first formal step in the development of forensic anthropology as a field in its own right. In 1977 the American Board of Forensic Anthropology (ABFA) was formed to guarantee the quality of official experts and to professionalize practitioners.

The Interdisciplinary Nature of Forensic Anthropology

At the beginning of the 1970's, an important change occurred in the methods used to collect skeletal remains. Some forensic anthropologists, specifically Dr. Clyde Snow, began to use traditional archaeological techniques to excavate and collect buried skeletal remains. This was a fundamental advance, since it made it possible to recover all the bones from a skeleton along with items associated with it (clothing, projectiles, etc.). At the same time, it was possible to precisely and reliably reconstruct and document the conditions in which the body was buried and the context in which it was located.

forensic anthropology can be defined as the application of knowledge of the biological variability of humans from the field of physical anthropology applied to legal-medical cases. Human skeletal or semi-skeletal remains are studied in order to identify them and to determine the cause and manner of death of the individual whose remains are being studied.

The scope of this field includes not only archaeological excavation techniques, but also procedures specific to other scientific disciplines ordinarily applied in the field of forensic criminology, such as medicine, radiology, odontology, and ballistics.

Human Rights and Forensic Anthropology within the Latin American Context

During the decade of the 1970's, many Latin American countries shared similar socio-political situations stemming from military dictatorships that had gained power through coup d'états. An illegal strategy of repression operating within national governmental institutions was unchained throughout this period. Different repressive techniques were applied, conspicuous among them forced disappearances, which implied the absence of the victim's body.

Once the period of dictatorship had passed, the urgency on the part of the courts to clear up the crimes that had been committed was hindered by the absence of victims. The practice of forced disappearances of individuals as a repressive strategy made Argentina a fertile ground for the development of forensic anthropology in the mid-1980's, and consequently a leader in applying it to violations of human rights.

At this time, various types of difficulties arose. On the one hand, given the length of time that had passed since the events had occurred, from a professional point of view, forensic doctors accustomed to dealing with fresh bodies lacked the knowledge and experience to analyze skeletal remains. On the other, from an ethical and political point of view, the institutions in which these investigations were carried out, as well

as the professionals involved in them, depended on and belonged to the governmental apparatus. As a result, their actions during the previous regime created a lack of confidence on the part of civilian society, represented by non-governmental human rights organizations.

In addition, the methods used for exhumation at the time, far from providing proof to the authorities, contributed to the destruction of skeletal remains and associated evidence, since bulldozers were used and cemetery workers and firemen carried out excavation.

These difficulties were partially overcome by the fact that forensic anthropology was developed and applied outside governmental structures and outside an exclusively academic scientific setting. This alternative was implemented through the formation of a team of investigators who broadened the application of forensic anthropology to specific investigations of cases involving human rights violations in close collaboration with non-governmental human rights organizations, and particularly those representing the families of victims.

This experience, that occurred in an unprecedented way in Argentina through the formation of the Argentine Forensic Anthropology Team (*Equipo Argentino de Antropología Forense, EAAF*) pervaded the continent and was gradually adopted by various Latin American countries such as Chile, Guatemala, and more recently Perú, where socio-political and academic conditions made it possible to implement it.

There are certain unusual features to the development of the field in this context. In the first place, it was possible to create organizations exclusively and permanently dedicated to forensic investigations instead of using scientists and investigators brought together specifically for a forensic investigation of cases of human rights violations. In addition, as mentioned above, these organizations were unusual in their independence from governmental institutions and their closeness to the non-governmental sector.

On the other hand, there was an emphasis on interdisciplinary work. Not only have archaeological techniques been incorporated into the retrieval of skeletal remains, but investigations have also involved the application, for example, of social anthropology and computer sciences to the retrieval of information on the history and reconstruction of cases through the analysis of written and oral sources.

The incorporation of these methods comes from a logical necessity given the priority of identifying and returning the victims to their families, beyond the legal context in which the investigation occurs, and considering purely humanitarian concerns. As a result, having the families provide physical data on the disappeared and assassinated individuals that could later be compared with information obtained from the analysis of skeletal remains retrieved was a basic priority that was helped by the institutional independence of the investigative team and its connection to human rights organizations.

The investigative model used for analysis consist of three stages:

1. *Preliminary investigation*

Evaluation of available historic information and the creation of a pre-mortem record of physical features. Development of an investigative strategy appropriate to the case, given the objectives of the investigation.

2. *Field work or archaeological stage*

Recovery of the body or skeletal remains and any accompanying evidence.

3. *Laboratory work or analysis of skeletal remains*

Analysis of recovered remains and the accompanying evidence in order to identify the victim and determine the cause and manner of death.

The relationship between the forensic anthropologist and justice starts with the appointment of the former as an expert witness before the court in the investigation. In the specific case of Argentina, some of the results of the early forensic investigations were offered as elements of proof in homicide cases brought before the national courts that conducted the trials

of those principally responsible for crimes committed during the last military dictatorship (1976-1983). Thus, records for legal prosecution were exhausted and as a result of Due Obedience (*Obediencia Debida*), Full Stop (*Punto Final*), and subsequent pardons, support arose for the creation of a team applying forensic anthropology to the field of human rights. Its objectives and scope have continued to broaden throughout its almost 20 years of development.

The need to return the remains of identified victims to their families; the possibility of collaborating with a historic reconstruction and the recovery of memory, not only with regard to the families directly affected, but also to society as a whole, based on the scientific documentation of human rights violations; the increase in scope of forensic anthropology in the area of the courts and humanitarian organizations; as well as collaboration in the training of similar teams in countries where they are needed; all are the bases of the continuing development of forensic anthropology in Argentina in an independent and interdisciplinary manner.

The Global Context

Since the 1980's and more intensely since the 1990's, increased discussion of the treatment of the facts of recent past political violence in various countries around the world has led to a series of developments and experiences intended to express the relationship between the search for truth, justice, reparations, and reconciliation and to try to resolve it.

This difficult and inevitable problem was addressed at the national level, appealing to the existing local courts and/or through the formation of ad hoc investigatory commissions, (combining the formula of truth, justice, peace and reconciliation). Alternatives to these cases were expanded because of the interest of multinational organizations (notably the United Nations) in undertaking the investigation into human rights violations. This situation encouraged the creation of combined international commissions and courts or the replacement of national resolution authorities.

In any of the cases presented this increase in investigations into the facts of the massive violence in the past once again advanced the development and application of forensic anthropology. Possible contributions touch on at least two of the focal points of these cases: to assist the courts by providing scientific evidence in cases investigated by national or international tribunals; and to document the facts and to try to identify, in those cases where it is necessary, victims' remains to be returned to their relatives.

In general, the level of development and application of forensic science varies according to the specific country and the setting in which it was developed (academic, legal, etc.). Countries with fewer resources for scientific-technical development in this field are lagging behind in its implementation. Another factor to consider is the lack of historical antecedents or the political decision that requires crimes be investigated some time later and on a large scale. In the specific case of forensic anthropology, in many countries, its use is simply nonexistent.

These circumstances prompted the summoning of call for foreign scientists to advise local institutions and organizations on this subject. This is the case of Argentina, which in turn expanded the scope of its experience by spreading it to other countries, through the training of professionals and the introduction of anthropology to the field of forensics, or through changes in its application within the context of investigations into human rights violations.

Minnesota Protocols

In 1991, the United Nations published a manual entitled "*Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions.*" This manual was written with the assistance of the International Committee on Human Rights of lawyers in Minnesota, who called together a number of international experts in different fields who agreed to participate in writing the manual.

This manual came from a need to establish minimum medical-legal standards that must be met on an international basis in any autopsy of a body or any analysis of skeletal remains. Both were originally known as the Minnesota Protocols. Complying with the standards outlined in the Protocols makes it possible to perform a correct diagnosis of the cause and manner of death, and to determine the identity of the victim in cases where this is possible.

The ultimate goal is to improve the administration of justice as a result of more controlled and systematic inquiries, particularly in investigations of critical or conflicted cases such as extrajudicial executions, forced disappearances of people followed by death, summary executions, acts of genocide, as well as death as a result of maltreatment or torture while in custody.

As pointed out in the manual, "When a government respects these standards, regardless of the results of the investigations, this will increase national and international confidence in the government as well as in its respect for human rights standards."

Present and Future

Other documents outlining the relationship between the forensic sciences and human rights have been added to the Minnesota Protocols. The United Nations Commission of Human Rights has adopted six resolutions since 1992. In 1995 the "*Guidelines for the conduct of United Nations inquiries into allegations of massacres*" was also published. All these documents primarily detail the need to guarantee minimum international standards for the practice of forensic anthropology within the context of the courts and to create the necessary mechanisms for the training and scientific evaluation of people participating in these investigations.

Without denying the importance of these aspects and the need to continue to develop this field, it should not be ignored that conflicts arise between

the main objective of conducting an investigation strictly within the scope of the judicial process with the limited resources that that implies and, from a broader humanitarian point of view, the expectations that these trials raise on the part of relatives of the victims.

Concretely, as a result of experience in international tribunals during the last decade, the urgency of bringing forensic evidence to the courts, such as establishing the cause of death of the victims, has clashed with the interests of the families in determining the victim's identity, and of having the analyzed remains returned.

In part this is a result of the fact that the complicated process involved in the identification of human remains, along with all the implications on an individual, social, political, economic, and humanitarian level, plainly reveals some specific mistakes. Principally, the lack of consideration for the specifics of each case and for each cultural, religious, and legal context. This fact translates into difficulties in articulating strategies between national and international authorities, whether they are official institutions or non-governmental organizations. The lack of communication and mutual understanding, as well as the absence of common interests and goals, undermines the scope and results of the investigations.

What still remains is the task of deepening the assessment of the humanitarian aspects of these investigations even further and favoring the participation of those sectors of society most directly affected. The possibility of magnifying the restorative impact of the treatment of facts regarding violence in the past on relatives of the victims and society as a whole, is directly related to these sectors.

EAAF Recommendations¹

Witness protection programs

On each commission or tribunal, there is usually a core group of 10-15 or fewer key witnesses to major incidents. Often these individuals need protection, including, eventually, safe emigration to another country. In most cases, this type of Commission has no mechanism for dealing with witness safety. Something may eventually be organized depending upon the specific mandate and how it is interpreted, and upon the flexibility of the international, national, and regional bodies that help in the process. Though setting witness protection programs is clearly a complicated issue, we think it extremely important to include some sort of mechanism from the planning phase as a matter of course.

Counseling or psychological support for persons who testify, and for families and friends of victims before, during, and after exhumations

These are all clearly very difficult and painful moments, involving complicated and unusual processes of mourning, at the individual, community, and national level. Community and/or individual counseling has already been developed by local non-governmental organizations in some countries for example, AMANI Trust in Zimbabwe, and the Archbishop's Office of the Catholic Church (ODHAG) in Guatemala. We think that contracting a local or regional NGO, already familiar with the culture, language, and situation of the victims, offers extremely valuable benefits to the people involved, and can also lead to a more effective reparations stage in the resolution of the conflict.

Counseling or psychological support for the staff members who receive testimonies for such commissions

In addition to the sometimes overwhelming weight of the victims' and the victims' families testimonies, researchers on commissions investigating atrocities often express conflicting feelings of exhaustion, guilt, and depression. In some instances, international investigative missions have provided psychological

support, but this still seems to be the exception. Counseling may prove especially helpful when truth commissions extend their work to a year or more, as they often do.

Mechanisms to continue the recovery and identification process beyond a commission's or tribunal's mandate

The time in which a truth commission or tribunal operates tends to be very short in comparison with the time necessary for exhumations and identification of victims of a given conflict. After 25 years, we are still searching for the disappeared in Argentina. Similarly, in Chile and Guatemala the work will continue for years. Most commissions do not set up mechanisms or include in their recommendations specific ways to continue with this work, despite the fact that these special investigations come to an end. The forensic work sometimes continues, with difficulties and interruptions; sometimes it ends with the commission. Yet locating and identifying the victims is a right of their families, as well as an obligation of the parties to a conflict. We encourage commissions to provide specific guidelines in their final recommendations for continuing the search for the identities of victims of massive human rights violations.

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Endnotes

¹ From EAAF Annual Report 2001.

EAAF has worked with the following Truth Commissions and Special Tribunals:

- National Commission on Disappeared People (CONADEP), Argentina
- Truth and Justice Commission, Haiti
- Truth and Reconciliation Commission, South Africa
- Peace Commission, Uruguay
- Truth Commission, Panama
- Special Prosecutor's Office, Addis Ababa, Ethiopia
- United Nations Secretary General Investigative Mission to the Democratic Republic of Congo
- United Nations Truth Commission for El Salvador
- United Nations Investigative Mission to the Ivory Coast
- United Nations Commission of Experts for the former Yugoslavia
- United Nation International Criminal Tribunal for former Yugoslavia
- United Nations Special Crimes Unit for East Timor

Symposium Program

Both Sides of the Bench: New Perspectives on International Courts and Human Rights

April 1 – 3, 2003

Hassenfeld Conference Center, Brandeis University

TUESDAY, APRIL 1, 2003

Opening remarks by Judge John Hedigan of the European Court of Human Rights

WEDNESDAY, APRIL 2

The Nexus between National and International Law

Presenters: Brian Concannon Jr. and Naina Kapur

Respondents: Brandeis Fellow Agnieszka Klonowiecka-Milart; Michael Hartmann, senior fellow at the Jennings Randolph Program for International Peace

Keynote Luncheon

Keynote delivered by John Shattuck, former assistant secretary of State for Democracy, Human Rights and Labor and former U.S. ambassador, The Czech Republic

Rights, Bias, and the Courts

Presenters: David Benatar and Shiranee Tilakawardane

Respondents: Brandeis Fellows Brian Concannon Jr. and Nancy Paterson; Marion Smiley, professor of philosophy, Brandeis University

NGOs and Human Rights

Presenter: David Hawk

Respondents: Carol Rose, executive director, ACLU, Massachusetts; Joseph Short, former executive director for Oxfam America; Laurence Simon, professor of international development, Brandeis University; Andreas Teuber, professor of philosophy, Brandeis University

THURSDAY, APRIL 3

Victims, Witnesses, and Evidence

Presenter: Nancy Paterson

Respondents: Brandeis Fellows David Benatar and Naina Kapur; Judge Mark Wolf, United States District Court; Jeffrey Abramson, professor of politics, Brandeis University

Diplomacy and International Justice

Presenter: Agnieszka Klonowiecka-Milart

Respondents: Brandeis Fellows David Hawk and Shiranee Tilakawardane; Diego Arria, former ambassador to the United Nations, Venezuela; Judge Mark Wolf; Seyom Brown, professor of politics, Brandeis University

Summaries of Symposium Proceedings

The Nexus between National and International Law

Rights, Bias, and the Courts

NGOs and Human Rights

Victims, Witnesses, and Evidence

Diplomacy and International Justice

The Nexus between National and International Law

Presenters: Brian Concannon Jr. and Naina Kapur
Respondents: Brandeis Fellow Agnieszka Klonowiecka-Milart;
Michael Hartmann, senior fellow at the Jennings
Randolph Program for International Peace

Naina Kapur and Brian Concannon opened their session by noting that although they are both lawyers, they spend more time as activists working to transform national systems. Kapur works at Sakshi, a violence intervention center in New Delhi, India that educates judges about the social context of women. Concannon works at Bureau des Avocats Internationaux, an organization that addresses human rights in Haiti by helping victims assert their interests both in and out of the court.

Violence against women is not a priority issue for nations. There are few convictions and many acquittals because of the prevalence of stereotypes and misconceptions regarding violence against women. In addition, national laws stress the rights of the accused, which is often at the expense of the rights of society. Though her work with Sakshi, Kapur encourages judges to not be confined by the “letter of the law,” but rather, to examine the social context of how women experience violence.

Kapur explained that although women experience sexual violence as a violation of their human rights, judges do not always identify such violent acts as human rights violations. This is because judges do not understand the social context of women’s lives. To counteract this, Sakshi has sought to educate judges through partnerships with NGOs where judges visit women in their homes, shelters, or prison. This experience provides judges with the very rare opportunity to get a view of women’s lives from the “other side of the bench.”

She believes that a similar experience to the one she provides for national judges would be very effective

for international judges. Since international judges work in a more political arena than domestic judges, they tend to be isolated. Therefore, to get an accurate view of the realities faced by the women served in their courts, international judges must interact with individuals from the communities where the violations occurred.

Although the issue of sexual crimes has always existed, prosecution at the international level is new. In World War I and World War II there were many instances of mass rape. However, only with the advent of the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) has rape been seen as a war crime. The tribunals had the opportunity to set a new precedent. They looked at existing laws and progressed from “rape is about lack of voluntary consent” to “it’s about preservation of sexual autonomy.” This is a change for which advocates have lobbied for years. And yet, Kapur contends that the tribunals should have gone further, incorporating the language of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) into their jurisprudence.

Even without the language of CEDAW, such advances in international jurisprudence can have a huge impact on national law. For example, the Indian Supreme Court has made many references to international conventions and laws. This has led to an increase in human rights protection by the Indian legal system. Concannon noted that cases coming from the international tribunals have made a significant difference in his work with Le Bureau des Avocats d’Haiti. For example, mass human rights violations,

including systematic rape, took place in Haiti in 1996. When victims asked le Bureau des Avocats d'Haiti for help, the organization looked for models of how to address systematic rape during wartime. Two years later, in 1998, mass political rape became illegal under international law. This development informed Haiti's legal system and now mass political rape is illegal according to Haiti's national law. International court opinions can act as roadmaps, especially in countries such as Haiti where jurisprudence is underdeveloped. National systems also feel pressure because they know international systems will take notice of their actions. International law has made national law more responsible. Both Kapur and Concannon hope that more national systems will look to international law for guidance.

Le Bureau des Avocats d'Haiti works closely with victims: representing them in court, helping them assert their interests outside the court, writing letters and press conferences, and testifying. With a history of more than 300 years of dictatorship, Haiti's justice system is designed for a dictatorial, not democratic, government. However, although changes are slow, there is much promise.

Concannon concluded the presentation by discussing the advantages of holding perpetrators accountable in national/local justice systems versus international systems. First, national trials provide an opportunity to develop a nation's justice system. For example, Haiti has benefited from this and consequently its current legal standards far exceed the initial expectations. Now victims expect more from their legal system, demanding justice and requesting the services of specialists such as forensic anthropologists. Second, although international justice has advantages in terms of quality, the national or local level processes have much larger numbers. This is very significant because the reality is that there will never be the will or resources to conduct cases everywhere using international jurisprudence. Lastly, victims and communities that have suffered prefer a good national prosecution to a good international one. Not only is it more familiar—victims understand the

language and rules—but it is empowering for victims to use the justice system as an agent for liberation.

Panelists' Discussion

The following is a representative sampling of the questions and issues raised by members of the panel.

- The major responsibility for identifying and prosecuting crimes lies with states.
- International law can be a double-edged sword if not used with critical reflection.
- The international forum is a last resort. It cannot and should not solve all problems because nations are entitled to address their own issues. International courts are used when a national jurisdiction fails to deal with its own matters.
- In societies tormented by conflict, international law is perceived as something better, nobler, and more desirable. Victims often prefer the “bigger” stage it provides. For example, in Kosovo, they knew that cases tried in The Hague would be widely publicized.
- Albanian Kosovars testifying against members of their own community felt safer in The Hague where they couldn't be pressured by neighbors.
- Problems arise when international courts are not located in the country where the crimes occurred. For example, victims often don't want to testify, fearful that the court cannot protect them from outside their country.
- Although there is a need to be more creative, not limiting justice by the strict letter of the law can be dangerous. For example, the European Court of Human Rights (ECHR) is limited by the law—a treaty signed by 43 countries.
- The European Convention of Human Rights and the International Covenant on Civil and Political Rights (ICCPR) have influenced code revisions in almost every newly democratic state.

Rights, Bias, and the Courts

Presenters: David Benatar and Shiranee Tilakawardane
Respondents: Brandeis Fellows Brian Concannon Jr.
and Nancy Paterson; Marion Smiley, professor
of philosophy, Brandeis University

- Human rights are often based on the richness and resources of a society. Forcing a one-size-fits-all model on all countries will cause problems.

David Benatar opened his presentation by explaining that he would discuss the nature of rights and the theory of rights. There is a pervasive confusion about what rights really are and many do not realize the full implications of this term. Today, it seems that many people discuss all moral issues using the language of rights. Therefore, clarification can be valuable for thinking practical issues through more clearly. A right is only one of a host of moral concepts that need to be considered.

It is important to distinguish between legal rights and moral rights. Legal rights can vary by jurisdiction. Moral rights are often used to criticize a particular law. One may have legal rights that are not moral rights, and there may be moral rights that are not incorporated into law.

Benatar explained that rights have a number of distinctive features. First, a right has a correlative duty. To say that someone has a right is to say someone else has a duty in relation to the right. For example, if someone has the right not to be killed, someone else has the duty not to kill that person. When ascribing rights, one needs to identify the corresponding duty bearer.

Second, rights are unusually strong principles. They can override other moral considerations such as general welfare or social utility. We could perhaps ensure greater security by violating peoples' rights. But, if they have a right not to be treated in that way,

then their rights override the social consideration of security.

When it is said that a right is universal, the claim is not that everyone accepts the right. Instead what is meant is that the right applies everywhere, regardless of whether everyone accepts that there is such a right.

A distinction can be drawn between positive and negative rights. Positive rights have correlative positive duties. For example, the right to have one's life saved imposes the correlative duty on someone else to save one's life. Someone must positively do something. By contrast, the right not to be killed is a negative right. There is a negative duty of other people not to kill. Positive and negative rights are not completely separated. To protect negative rights, there must be some positive duties. Negative rights do cost something, in that we need positive resources and actions to protect them.

Benatar concluded by noting that although he welcomes the "age of rights" and the way we protect individuals, he is concerned about the faddishness of rights. Are we insufficiently critical in our use of the term "rights?"

Shiranee Tilakawardane explored the role that gender bias plays in the courtroom and how social context education—educating judges so they can better understand their biases—can alleviate this bias. Judges agree that "impartiality," defined as the need for an absence of bias in the courtroom, and equality are critical to jurisprudence. Yet, gender biases are prevalent in national and international courts. These biases are shaped by false stereotypes and assumptions

and lead to a violation of the principle of equality in the courtroom and the rights of women.

With half of the population being female, gender rights are obviously very important and yet, they are not always treated as such. This is because international judges bring the cultural forces from their home country with them into the international arena. Therefore, social context education is critical to move from formal equality to substantive equality.

In *James vs. R.* (1971) 55 Cr. App R. 229, the judge suggested that women are prone to lying and such lies are hard to refute. This led to a requirement for corroboration in rape cases. This verdict confirmed an existing assumption held by many judges—women lie with regard to sexual assault. Assumptions such as this unconsciously affect judges' verdicts and in the process, violate the rights of women in their courtroom. To address and counteract these biases, judges must first recognize their biases and second, learn about the backgrounds of their female victims. This can be achieved through social context education.

Tilakwardane illustrated the prevalence of stereotypes about women by showing clips from fairy tales that depict women belonging in the home, being slim, and gentle. The stories give a clear and unconscious message about the role of women. Judges, like others, are influenced by these messages. Therefore, they must be taught about these stereotypes and their impact. Once they are aware of the unseen forces that guide their thinking, judges will look for bias, and avoid it.

Panelists' Discussion

The following is a representative sampling of the questions and issues raised by members of the panel in response to Benatar's discussion.

- The history of human rights discourse has dictated that rights are natural, meaning that rights are either natural facts or develop naturally in all known communities.

- Can natural rights be balanced against competing social goods? Natural rights trump everything else, thereby making it difficult to balance natural rights with other goods.

- Rights can be seen as ascribed, rather than natural.

- People fear that if rights are ascribed, they will be taken away, and the primacy of rights could be undermined. Many arguments for natural rights are against allowing us to think of rights as social inventions.

- How do ascribed rights address evolutionary rights, such as the prevention of economic deprivation?

- Are ascribed rights necessarily culturally relevant?

- In thinking about the origin of rights—natural or ascribed—you get different solutions to the question of “what is a human right?”

- Are human rights able to cross cultural barriers? Can Western-oriented human rights override tribal rights or restrictions that some societies ascribe to women?

- Rights need to be balanced with liberties, utilitarian consideration, and matters of expediency. The balancing act requires an examination of rights, not just as natural facts or trumps, but as part of a social fabric in which rights are valued for particular reasons.

- A third possibility to the natural and ascribed right distinction is an acquired right. (For example, if I lend you some money, I acquire a right to the money I lent you.)

- Are we watering down the concept of rights? The more rights you articulate, the less able communities are to fulfill them.

- Although Milosevic has the legal right to defend himself, does he have a moral right?

- How do you protect the rights of victims who don't want to be cross-examined by Milosevic?

The following is a representative sampling of the questions and issues raised by members of the panel in response to Tilakwardane's discussion.

- Biases play a significant role in prosecutors' decisions. There were debates among prosecutors in The Hague, especially in regard to rape cases, that illustrated their biases. They also act as "preliminary judges," deciding which cases to bring to trial. Therefore, they could also benefit from social context education.

- Is education the only way to address the problems with bias? What about increased female representation?

- Female judges can be overly critical of a female victim, assuming she played a role in perpetuating a sexual assault. While this could be attributed to the judge's desire to appear impartial, it might also be that some female judges feel "safer" believing that assault only happens those who bring it upon themselves.

The Non-Governmental Sector and Human Rights

Presenters: David Hawk,
Respondents: Michael Hartmann, senior fellow at the Jennings Randolph Program for International Peace, Carol Rose, executive director, American Civil Liberties Union (ACLU) Massachusetts; Joseph Short, former executive director for Oxfam America; Laurence Simon, professor of international development, Brandeis University; Andreas Teuber, professor of philosophy, Brandeis University

David Hawk outlined the history of non-governmental organizations (NGOs) in the human rights field in the 20th Century. Groups from the 1940's, '50's, and '60's included: the International Commission of Jurists, the New York-based International League for Human Rights (an outgrowth of a French group), religious groups such as the Bishops group and the American Jewish Congress. In the 1960's Amnesty International was formed in Europe. It was the first international membership organization with sections in countries worldwide. Amnesty International continues to expand in reach and numbers.

Since the '70's, there has been an explosion of NGO formation, including many professionally based groups. Groups such as Oxfam, the Dutch group Novid, and Handicapped International were developed with a focus on human rights. Indigenous human rights groups were also formed, and organizations were developed to support democracy and protest communist states, Apartheid, and dictatorships. As military regimes and the Iron Curtain fell, there was a huge emergence of NGOs in Africa, Latin America, and Asia. With the emergence of new organizations, new networks and resources were created to provide support.

Over the past 15 years, the number of NGOs has grown to thousands worldwide. The Internet has played a huge role in this growth. As a result, a new relationship between human rights, NGOs,

and international criminal law has been forged. As tribunals were established, NGOs proliferated and became specialized. This led to NGO involvement in the establishment of international tribunals. One example of NGO influence is the Ottawa Convention, an international treaty banning the use of landmines that was initiated by groups in the 1990s.

Panelists' Discussion

The following is a representative sampling of the questions and issues raised by members of the panel.

- NGOs support international courts by collecting and disseminating information; serving as a bridge or nexus between the victims and the courts, police, and doctors; and providing expert technical assistance.
- NGOs can cause problems for the international courts by draining resources; frequently duplicating training; and creating an overload of programs. In addition, they are often in a position to testify but refuse to cooperate with the courts—for a variety of reasons.
- Conflicts of interest may emerge because an NGO employee/volunteer cannot serve both as a neutral monitor and an advocate for the defense.
- The domestic human rights movement can learn from international human rights law.
- Negative rights, such as defensive strategies of liberty and security, tend to be regarded as more important and worthy of protection than positive rights, such as social or economic rights. One should ask, "Which are more basic, negative or positive rights?"

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- NGOs have no real system of accountability.
 - NGOs are highly influential because they pressure governments to do something.
 - Should NGOs be dismissed because of having special interest in the client (funder)?
- There are several considerations in approaching NGO funding: what is the nature or source of funding; do NGOs have strategies for developing reasonable independence; what percentage of funding is from governmental versus independent sources? Ideally, funding should come from a large number of sources, which would ultimately give NGOs more independence.

Victims, Witnesses, and Evidence

Presenter: Nancy Paterson
Respondents: Brandeis Fellows David Benatar and Naina Kapur; Judge Mark Wolf, United States District Court; Jeffrey Abramson, professor of politics, Brandeis University

Nancy Paterson became dedicated to examining the needs of victims through her work with child abuse and rape cases. Although she has seen advances in the criminal justice system, it cannot meet the needs of the victims because it is very defendant focused. Paterson explored issues related to the protection of victims' rights while with the International Criminal Tribunal for the former Yugoslavia (ICTY).

The purpose of the ICTY is to maintain and restore peace and to bring war criminals to justice. Yet, Paterson contends, the ICTY has failed to restore peace by failing to meet the needs of victims. Victims' needs must be met in order for a community to move forward. In the Milosevic trial, victims' needs were not met. Their testimony was very limited; written statements were not viewed; witnesses were only allowed to give ten minute statements; and the cross-examination of lawyers was not accepted. Witnesses often felt disappointed after testifying in the ICTY. The experience of one witness, a survivor and farmer from the town of Izbetza, is representative of the experiences of many witnesses. A small village in Northwest Kosovo that was attacked early in the war, Izbetza is the site of a mass grave that holds the remains of 165 murdered victims. Feeling that he could just read the farmer's written statement, the judge only permitted the witness to respond to three questions. This man was frustrated, not having been given the opportunity to speak out against the atrocities that he experienced.

Is it necessary that all witnesses have the chance to tell their stories? Over time, listening to victims' statements takes an emotional toll on judges. Judges

are not provided with counseling. Since trials cannot go on indefinitely, should victims' statements be limited to move the case along? Once it is established that a massacre took place, can the court move away from witness testimony to identify the perpetrators? And yet, one cannot ignore the fact that testifying can be a definitive moment in victims' lives. It is a chance for them to speak in court, not only for themselves, but also for their dead relatives and for their communities.

Since the judges in the ICTY knew the world was watching, they made every attempt to ensure defendants' rights were respected. Milosevic was able to defend himself throughout the trial. From a legal perspective, there is nothing wrong with this scenario. However, one must look to the judges and see how they are dealing with this issue. One must ask "how appropriate is it for Milosevic to be able to cross-examine victims?" The victims did not want to sit five feet away from Milosevic; they cannot even look at him. Yet, lawyers and investigators must get them to testify. What if some of these individuals are rape victims? Is this appropriate? How must it feel for these women to be cross-examined by Milosevic? Was the court so concerned with Milosevic's rights that we should put victims in these situations?

The ICTY gets a large amount of money from the UN, yet few resources are dedicated to victims' assistance. After testimony, they leave with no support system, most often returning to a community where the perpetrator also resides. Victims must be treated fairly if they are to comply with the courts. Word spreads after victims return to their villages and speak

about their experiences. Because investigators just don't have enough training for these issues, they often make false promises to victims in an effort to comfort them or create a sense of security.

What role do victims play in the criminal justice system? Does international justice require only fairness for defendants or for the victims as well? Could the system evolve into one with no victim testimony in the future and would this undermine the opportunity to restore peace? How do witnesses view their role in trials? Is this the same as the judge perceives? Should judges go into the field? Without a visit to the field, is it not impossible for judges to truly know what took place on the ground during the war? Yet, is this financially feasible? How can judges be helped to understand better the relationship between investigators and witnesses? Should witnesses be prepped, and how would that process work? How can judges be helped to better understand victims' needs? Paterson emphasized the need to be creative in addressing these questions. She argued that we must look to other courts and systems of law, not just Western systems, for answers.

Panelists' Discussion

The following is a representative sampling of the questions and issues raised by members of the panel.

- In creating the ICC they should have looked to the ICTY for input.
- Not listening to repetitive evidence is useful and practical. Doing so could mean the difference between hearing 10 or 100 cases.
- There is often a difference between a truth-finding process and a process to determine if the accused is guilty. Where a balance is struck depends on the phase of the trial and its purposes. The purpose may vary between 1) was a crime committed?, 2) did the defendant commit the crime?, and 3) if convicted, what is the sentence?
- Victim impact statements are irrational. What role do emotions and irrationality play?
- Witnesses and victims may be concerned with reconciliation rather than a conviction.
- The tribunals were established because nations, not necessarily individuals, want justice.
- What about a model such as the Truth and Reconciliation Commission (TRC)?
- Victims in Kosovo and Bosnia would not have been satisfied with a TRC model.
- Why justice OR reconciliation? Can we have both?
- Since victims should have an open forum and there is not enough time in court, why not have a separate forum where the victims can speak?

Diplomacy and International Justice

Presenter: Agnieszka Klonowiecka-Milart
Respondents: Brandeis Fellows David Hawk and Shiranee Tilakawardane; Diego Arria, former ambassador to the United Nations, Venezuela; Judge Mark Wolf, United States District Court; Seyom Brown, professor of politics, Brandeis University

Agnieszka Klonowiecka-Milart began her session by asking, “What should be the rules of engagement for criminal justice following instances of humanitarian intervention?” The attributes of intervention are: independence, procedures, quality of justice, and logistical support. Although the basis of creating the various tribunals may differ, there is a similar form between them. Currently, UN peacekeeping operations can include international judges and prosecutors. Will this be seen as part of their function in the future?

The purpose of international tribunals is to prevent impunity of the main offenders. Tribunals are also meant to act as a deterrent, and although retribution is not the major purpose of the tribunals, it is a consideration. Another side effect of functioning courts may be reconciliation.

The creation of the International Criminal Court (ICC) addresses the issue of the responsibility of leaders. However, should other crimes be viewed under the ICC structure? Should it cover interethnic conflicts, crimes against international peacekeeping, organized crimes, crimes against women and children, and political assassinations? There are two possible approaches to determining which crimes will be addressed. Either the crimes to be addressed need to be clearly specified or the court must be allowed to choose its cases.

The latter is the case in Kosovo, where the court has the power to choose cases. Although this provides flexibility, it has been criticized for non-compliance

with legality. When the court chooses the cases, victims do not know if their case will fall under the jurisdiction of local or special courts.

Now we seek criteria to establish the same norms for domestic and international jurisdictions. One must ask “which human rights violations should lead to intervention?” Jurisdiction must always be prescribed by statute. The special court should have a majority of internationals and can only act as representatives. International judges can be bound by domestic law. We cannot compromise human rights standards in creating further institutions.

International courts should be both independent and have absolute freedom from political interference. But then the question remains, “To what extent should domestic international courts be protected from political interference?”

Panelists’ discussion

The following is a representative sampling of the questions and issues raised by members of the panel.

- How a court is supposed to work and how it actually works can be very different.
- Some members of the international courts/tribunals have never been judges or prosecutors, but were elected for political reasons.
- The relationship between tribunals and reconciliation will only be seen in the future.
- Tribunals were created “after-the-fact,” addressing what other states failed to prevent.

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- Member states are motivated to create tribunals, not by justice but because they need to develop a system to hide the fact that they let atrocities occur.
 - How should international tribunals include domestic systems of due process?
 - Prevention should be the goal. This symposium demonstrates how difficult it is to address atrocities after they occur. We need a system that deters people from committing atrocities, either by military force or through jurisdiction.

Fellows' Biographies

The Brandeis International Fellows in Human Rights, Intervention, and International Law

David Benatar is associate professor in the Department of Philosophy at the University of Cape Town, South Africa. Benatar teaches or has taught courses in applied ethics, contemporary moral and political philosophy, critical thinking, bioethics, and philosophy of law. He is the author of numerous articles and editor of *Ethics for Everyday*.

Brian Concannon Jr. is a human rights lawyer and activist. Since 1996 he has co-managed the Bureau des Avocats Internationaux, an office established by the Haitian government to help victims and the judiciary prosecute human rights violations from Haiti's 1991-94 dictatorship. Concannon writes and speaks frequently on human rights in Haiti. He recently completed a book chapter about victims of political rape in Haiti and their struggle for justice for *Women and International Human Rights Law, Vol. IV: International Gender Justice and Accountability*.

Peter Ford is British ambassador to Syria. Formerly ambassador to Bahrain, he is also a linguist and a Middle East specialist with extensive experience in the politics and economics of the region. Prior to becoming Ambassador, Ford served as Head of the Near East and North Africa Department in the British Foreign Office and senior advisor to the foreign secretary on the Middle East peace process. His other diplomatic posts have included Riyadh, Paris, Cairo, and Beirut.

David Hawk consults for the Landmine Survivors Network and is preparing a major report on prison-labor camps for the US Committee for Human Rights in North Korea. A former executive director of Amnesty International, USA, in the 1980s, under the auspices of the Columbia University Center for the Study of Human Rights, he documented the extreme violations of human rights in Cambodia under Khmer Rouge rule. In 1996-97 Hawk headed the Cambodia Office of the UN High Commission for Human Rights.

Naina Kapur is an attorney and director of Saskhi, a creative education center in New Delhi, India. She is also co-chairperson of the Asia-Pacific Advisory Forum on Judicial Education and Equality Issues, an ongoing judge-led effort to mainstream equality issues within the judiciary with specific emphasis on women's equality rights. The project has recently extended itself to students of law and social work. She has initiated a number of test cases before the supreme court of India affecting women's rights and is currently legal counsel in a test case inviting the court to re-interpret the existing rape law.

Agnieszka Klonowiecka-Milart is an international judge with the United Nations Mission in Kosovo, serving on the Pristina district court. She also serves as a district court judge in Lublin, Poland. Klonowiecka-Milart began her international judicial experience in 1998 when she was selected by the United Nations as a member of Judicial System Assessment Programme that examined the judiciary system in Bosnia and Herzegovina. Prior to her time on the bench she taught criminal law and procedure in Poland.

Chidi Anselm Odinkalu is developing the programs of the Justice Initiative of the Open Society Institute in Africa. He previously served as senior legal officer for the Africa, Liberty, and Security of Persons Programmes at Interights in London. He has also been a solicitor and advocate of the supreme court of Nigeria since 1988. An active member of the executive boards of several NGOs, he has also served as a human rights advisor for the U.N. Observer Mission in Sierra Leone. Odinkalu's most recent book *Building Bridges for Rights: Inter-African Initiatives in the field of Human Rights*, follows two monographs on Nigerian legal issues.

Nancy L. Paterson is currently investigating fraud, corruption, and staff misconduct cases for a large, multi-national organization in Washington, DC. From 1994 to 2001 she was a Trial Attorney at the International Criminal Tribunal for the Former Yugoslavia (ICTY). During her tenure at the ICTY, Paterson was actively involved in several investigations and trials. In 1999 she was instrumental in the investigation and indictment of Slobodan Milosevic. Prior to joining the ICTY, Paterson worked as an Assistant District Attorney in New York City for eleven years where she specialized in sex crimes prosecution and served as the Deputy Bureau Chief of the Child Abuse and Domestic Violence Bureau.

Shiranee Tilakawardane is a supreme court judge in Sri Lanka. She was the first woman appointed as a Court of Appeal Judge in Sri Lanka. Previously, she was a high court judge and an admiralty court judge. Tilakawardane's efforts are focused on the fields of equality, gender education, and child rights. She has been active in Sakshi of India's gender workshops for judges, the Asia Pacific Forum for Gender Education for Judges, and serves on the International Panel of Judges for the Child Rights Bureau.

Silvana Turner is an investigator and researcher for the Argentine Forensic Anthropology Team, an organization that applies the techniques of forensic anthropology to the investigation of human rights violations. Turner is also an assistant lecturer at the University of Buenos Aires, Argentina. In addition to participating in investigations in Argentina, she has joined forensic teams working in Brazil, Bolivia, Colombia, Panama, Guatemala, Honduras, Bosnia, Kosovo, the Philippines, and Ethiopia.

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