Justice 2018: Charting the Course

Keynote address by Judge Thomas Buergenthal of the International Court of Justice for the 10th anniversary celebration of the International Center for Ethics, Justice, and Public Life, on March 13, 2008, at Brandeis University

Let me first congratulate you on the first ten years of the International Center for Ethics, Justice, and Public Life. I am honored to be here on this special occasion. The annual conferences organized by the Brandeis Institute for International Judges have pioneered valuable professional conversations between judges of different international courts. They have greatly benefited our respective courts and the international justice system in general. Permit me therefore to thank Brandeis University, the Center and the Institute for International Justice as well as its director, Dr. Daniel Terris, for performing this important service and for forcing the international judiciary to reflect on how to improve the international justice system and on our role in it. I hope that you will continue and expand your participation in these activities in the years to come.

I have been charged by Dan Terris to address you on the topic of "Justice 2018: Charting the Course." When I asked what that meant, I was told that the topic would allow me to speak on anything I wanted to speak on. Let me therefore focus on the contemporary international justice system, the role it performs and is likely to perform in the future.

Today there exist a large number of international and regional judicial institutions. Among international courts, as distinguished from regional courts, we have, in addition to the International Court of Justice, which is the principal judicial organ of the UN, two other permanent judicial institutions, the International Criminal Court and the UN Law of the Sea Tribunal. There are three regional human rights tribunals in existence today: the European Court of Human Rights, the Inter-American Court of Human Rights and the African Court of Human and Peoples' Rights. We also have an increasing number of regional economic courts. All of these are, in one way or the other, modeled on the grandfather of them all, the Court of Justice of the European Communities.

Not to be forgotten are two important ad hoc tribunals: the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda. These courts have in turn spurred other such ad hoc criminal tribunals in Africa and now even in Asia. I am sure that more such tribunals will have to be created in the future. Frequently overlooked are the many international and regional administrative tribunals in existence today. These bodies were established as forums for employees of international and regional organizations, which enjoy immunity from lawsuits in national courts, to enable them to sue these organizations for alleged breaches of their employment contracts and related rights. I have also not mentioned the various inter-state arbitral tribunals, among them the World Bank's International Centre for Settlement of Investment Disputes, the Permanent Court of Arbitration, and the dispute settlement mechanism of the World Trade Organization. These quasi-judicial bodies decide an increasing number of important international cases.

Some of you may be surprised to hear that but for the International Court of

Justice and its predecessor, the Permanent Court of International Justice, which was established in 1922 by the League of Nations, all the major judicial institutions I listed a minute ago were created after the Second World War; most of them in the past four to five decades, the earliest being the European Court of Human Rights and the European Court of Justice, which date back to the 1950s.

The proliferation of international and regional courts has prompted some international legal scholars to contend that this development might lead to the fragmentation of international law, impairing its universal character, and that the creation of more such courts should be opposed. This is not a view I share. I believe instead that we could use some additional courts, particularly regional human rights courts. The three regional human rights courts in existence today cover only three regions of the world - Europe, the Americas and Africa. No such courts exist in Asia, for example. Here a regional court, or better still, a number of sub-regional human rights courts could play an important role in stimulating the protection of human rights in a part of the world that the contemporary human rights revolution has largely passed by. In the human rights area, we have a vast body of international law but still an insufficient number of judicial and quasi-judicial bodies to interpret, apply and enforce that law.

I also wonder whether it would not make sense to consider the creation of various regional criminal tribunals. I realize that some might object that such judicial bodies might weaken the International Criminal Court. But despite the fact that a large number of States has ratified the Statute of the International Criminal Court - more than 100 - I believe that States in certain regions of the world would feel more comfortable with regional criminal courts. Of course, the substantive law to be applied in such courts could

be that codified in the Statute of the ICC, but each region should be free to add other crimes, such as cross-border trafficking in drugs, women and arms, for example. I have no doubt, moreover, that the next decades will see the creation of more regional economic or trade courts; these will come with the creation of more economic unions or related trade arrangements.

Paradoxically, while we have witnessed the proliferation of international and regional courts, not all the courts in existence today are working at their full or even partial capacity. That is due to the fact that many States still have not accepted the jurisdiction of these courts and that others have done so with extensive jurisdictional reservations. Some governments see international courts as a threat to their sovereignty; others do not trust international courts to be impartial; while still others, particularly some of the most powerful nations in the world, prefer to believe that their diplomacy cum their military might and/or political power are more likely to achieve their objectives than international adjudication. Some, like the United States and a handful of other countries, oppose international adjudication for all of the above reasons. In these countries the opposition to international courts is deeply ingrained in their national psyche. It will take a long time to change these attitudes, but change they will, if only because these states will increasingly find it advantageous, particularly in trade-related disputes, to resort to international adjudication.

In this connection, it is worth remembering that in some parts of the world, for example in Europe, the idea that international disputes should be settled by international courts has now gained wide public acceptance, even though in the 1950s and '60s there was great reluctance to do so. The opposition in the United Kingdom and France was

particularly strong when it came to the acceptance of the jurisdiction of the European Court of Human Rights. It took some time for these countries and others to gain confidence in international adjudication. These days the European Union is apparently even considering the possibility of having all of its members jointly accept the jurisdiction of the ICJ. This is how far we have come in at least one region of the world. To summarize where we are today when it comes to the international justice system: on the one hand, we have more international courts than ever before; on the other, we have many areas of the world that remain largely unaffected by or left out of the contemporary international justice system. If you were to try to picture where we are today, you might say that the situation resembles a medieval map of the world. These maps tended to identify large empty spaces of land, usually in white, as terra incognita. There is still too much terra incognita in the world when it comes to the international justice system, but the white areas are slowly getting smaller.

It is frequently not realized that we need international courts not only to settle disputes; we also need them to help develop international law. In the process of applying and interpreting international law, international judicial and quasi-judicial institutions contribute to the making of international law. The notion that courts don't make law is a myth, both as far as domestic and international courts are concerned. It was never true and it cannot be true, for courts cannot interpret or apply law, regardless of the legal system within which they operate, without at the same time engaging in judicial lawmaking. True, it is lawmaking that differs from legislation because it is narrow in scope, but it is lawmaking nevertheless. The availability of this lawmaking method is particularly important in the international law area, where lawmaking by legislation, that

is by treaty and by custom - the two formal sources of that law - tend to be slow and cumbersome. The growth in the number of international and regional courts has resulted in a veritable explosion of judge-made international law. That is what it is as a practical matter, whether we call it that or not. As a result, international courts today play a much more important role than ever before, if only because there are more of them. Since the very existence of international law influences the conduct of governments, probably not as much as one might wish, but certainly more than ever before, and in some parts of the world more than in others, what courts do in deciding international disputes has normative consequences for international law in general. And it has these consequences for the entire international community and not only for the States parties to any particular international judicial institution or treaty.

In my opinion, the risk of fragmentation of international law caused by an increase in the number of courts is minimal when compared with the benefits to be derived from the creative interaction between international courts. It allows and frequently compels judges of different courts to study each other's judgments in the search for better judicial solutions to common legal problems. This interaction between international courts has a direct bearing on the fragmentation issue: it strengthens the universality of international law and thus counteracts its fragmentation.

There are many factors, of course, that affect the decisions of governments to create international and regional courts or to bring their disputes to them. The growth in the number of international courts suggests that States increasingly feel that courts have a role to play in settling certain types of dispute, particularly disputes that are not primarily political in nature, but which nevertheless have a negative effect on their relations with

other States with which they need, for one reason or another, to have good relations. The world is full of such long-festering disputes and referring them to international adjudication tends to reduce the political tensions they generate. The attempt to settle such disputes by negotiations is frequently more difficult or risky than referring them to adjudication. This is so because a settlement arrived at by negotiations makes a government vulnerable to charges by its domestic opponents that it negotiated a bad deal, that it gave away national rights or territory, or that it somehow betrayed the nation. The political consequences of losing a case in a court are much less serious because the legitimacy of an adverse judicial decision is more difficult to challenge. That also explains why in many cases before the ICJ, for example, countries unnecessarily in my opinion, hire the most renowned international lawyers to represent them. This enables them avoid the charge, if they lose the case, that they mounted a weak legal defense of their country's claims.

It should also not be forgotten that the increasing role international organizations play today in international affairs, on the one hand, and the emergence of regional economic and political groupings, on the other, call for judicial institutions capable of ensuring that the component parts of these organizations operate within their assigned functions and that disputes between the members and the organization are settled peacefully. The more such organizations are created, the more courts will likely be established, and the more courts there are, the more States will gradually come to recognize their potential importance in settling disputes. In the past, when foreign ministries reflected on possible methods that might be resorted to in dealing with a dispute with another State, it was very rare indeed for them to think of adjudication. That

is no longer true, even when one or the other dispute does not eventually end up in an international court. Of course, I am here talking of legal disputes that are not deemed to affect a country's perceived vital national interests. Such disputes rarely get to courts, and they probably shouldn't because their political character makes them unsuitable for adjudication.

A very important development that tends to be overlooked when we reflect on the contemporary international justice system is the interaction between national courts and international courts. National courts are ever more frequently called upon to apply international law. This is particularly true of cases that deal with commercial treaties, immigration law (asylum), international humanitarian law and human rights law, the law of the sea, the rights of aliens, antitrust law, and so on. Moreover, in countries that belong to regional human rights treaties or to economic unions of one type or another, national courts almost daily apply the law of these treaty-based institutions. This development is facilitated by the fact that in some countries, national constitutions elevate some international treaties to constitutional rank. They consequently override national legislation. In other countries, duly ratified treaties enjoy either a higher normative rank than domestic legislation or the same status as domestic laws, with the later in time, be it a treaty or national law, prevailing.

These developments, taken together with the increase in the number of international courts and consequently also the growth of judge-made international law, have meant that national judges, when called upon to interpret or apply a treaty or other rules of international law in national disputes, look to the precedents established by international or regional courts. More and more domestic courts do exactly that, and

some are required to do so either because that is what their constitutions provide or because, if they fail to apply the relevant international law, their governments will be held in violation of their international obligations. For example, a national judge sitting in a country that has ratified the European Convention on Human Rights cannot afford not to comply with the rulings of the European Court of Human Rights because to do so will mean that its government will eventually and predictably be held in violation of the European Convention. The same is true, for example, for national courts of countries that belong to the European Union. Similar developments, albeit to a lesser extent, are taking place in other parts of the world. Moreover, it is not only national courts that have to pay attention to the jurisprudence of international courts, national legislative and executive branches of government must increasingly do the same if they want to comply with their international obligations.

The result of all these developments is that the decisions of international and regional courts take on a significance they never had before, a significance that increasingly and dramatically blurs the lines between national and international law. The blurring of these lines is very much a modern phenomenon that has transformed the status of international law from a largely marginal legal system to one that affects the decision-making processes of a growing number of governments and international organizations. Of course, there are still countries that continue to be bypassed by these developments simply because they have been able for one reason or another to stay out of the contemporary justice system. By and large, however, even these countries are gradually being affected by it as well.

The fact that countries increasingly resort to and depend on the work of

international courts does not mean these courts or their judges are uniformly held in high esteem. A frequent claim in a few countries is that the judges serving on international courts are not or cannot really be impartial when their countries are plaintiffs or defendants and that, if they know what is good for them, they will as a rule vote for their countries or in support of the political or ideological policies of their home states. The view is also frequently expressed that domestic judges are accountable to national parliaments, ministries of justice or other institutions, which appoint or elect them and which also have the power to impeach them. International judges, it is claimed, do not seem to be accountable to anyone, other than to their colleagues, who will rarely if ever move against the bad apples in their midst.

Given the manner in which judges are selected for some international courts, it is argued that they are frequently nominated because of their political connections and not because of their qualifications. These are serious charges and there is some truth to them, although I believe, based on my experience as a judge who has served on three international courts, that they are on the whole greatly exaggerated by certain commentators in some countries who oppose international courts in general. It should also be noted that in many countries, the public, rightly or wrongly, has a much greater faith in the impartiality and honesty of international judges than in their own judges, largely because people in these countries have long been victimized by corrupt judges and/or by courts doing what the government tells them to do. That is also why the public in many countries favors the creation of more international courts, particularly international human rights and international criminal courts.

The election of international judges varies from court to court. And the selection

of candidates for these courts tends to be more politicized in some countries than in others. Some international organizations that elect judges have tended to politicize the electoral process; others try to develop mechanisms designed to ensure the election of good and honest judges. Overall the selection process has produced some outstanding judges and some incompetent ones, men and women of integrity and a few lacking that important character trait. But as one reflects on this problem, it must be recognized that much the same can be said about the selection of national judges. That does not excuse the manner in which some international judges are nominated or elected, nor does it mean that we should not attempt to create conditions that will make it possible to elect honest and able judges to international courts who are committed to the rule of law, to the advancement of justice, and who will try to apply the law honestly and impartially.
We must recognize, of course, that there are limits on legislating honesty, integrity or moral courage. I doubt, too, that it will ever be possible to keep politics entirely out of the judicial selection process. It is clear to me nevertheless that some measures can and need to be taken in the future to address these problems, if we wish to strengthen the international justice system and ensure that it enjoys legitimacy around the world.

It is reasonable to assume, for example, that when international judges need to worry that they might not be renominated if they vote against their home country, they will think twice how they should vote. This might be the case particularly of judges whose judicial compensation in an international court is much higher than what they would be able to earn at home. Some judges may also have to worry about the political consequences for them or their families if they vote against the wishes or policies of their governments.

Some of these problems might be dealt with by longer non-renewable terms of office and appropriate pensions. Another solution might consist of providing for relatively short terms of office with the possibility of re-election on the recommendation of a special judicial council established within the organization to which the court is attached. To reduce the politicization of the electoral process and to get better candidates, countries might also be required to nominate more than one candidate for a given judgeship. Here it might be possible to require such candidates to have different professional backgrounds, including among them university professors, practicing attorneys (defense attorneys or prosecutors) and national judges. Mechanisms might also be developed to enable national bar associations and related professional bodies to submit comments on the qualifications of judicial candidates to the international bodies responsible for the election of judges. To address the accountability problem, it might be useful to provide for a judicial council, composed of members from different international courts, national bar associations or law faculties. Such councils might be empowered to hear complaints against individual judges and to remove them in serious cases. I have long believed that the institution of ad hoc judges has no place in modern international judicial proceedings. It is an anachronism and should be abolished. This would mean that national judges sitting in cases involving States that have no judges on the court should have to recuse themselves from hearing such cases. These are some possible topics for discussion in future meetings organized by the Brandeis Institute for International Judges.

All in all, we live in a world in which international courts are needed more than ever before, if only because there are few major political, legal, economic, social and

cultural issues that confront us which are entirely or even predominately local in character. It is an interdependent world, whether we like it or not, and such a world needs an effective international justice system. We are not there yet, but I believe that we are getting there. That is why the work of the Brandeis Institute for International Justice is so important and valuable.