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Keynote Address

Ethical Dimensions of International Jurisprudence and Adjudication

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Welcome

First of all, I would like to thank the International Center for Ethics, Justice and Public Life at Brandeis University for taking the initiative to organize—under the auspices of the Brandeis Institute for International Judges—these sessions on "The New International Jurisprudence: Building Legitimacy for International Courts and Tribunals."

I am pleased to see among the participants colleagues from the International Tribunal for the Law of the Sea, the International Criminal Tribunal for the former Yugoslavia, the International Criminal Tribunal for Rwanda, the European Court of Human Rights, and the African Commission for Human and Peoples' Rights. I am also particularly pleased that I am able to deliver this lecture in public and in the presence of students. I have kept this specifically in mind preparing this address.

Introduction

The purpose of the sessions is to provide for judges sitting on international courts and tribunals the opportunity for reflection and discussion amongst themselves. Participants will grapple with important problems and themes that have emerged with the development of an international legal order in the context of globalization.

Within the over-arching theme "Ethical Dimensions of International Jurisprudence and Adjudication," four broad categories will be addressed:

- Global Law: Sovereignty, Jurisdiction and Enforceability
- An International Rule of Law, Law Making, and Judicial Independence
- Substantive and Procedural International Law
- Ethics and Justice: International Human Rights

My presentation will be on the over-arching theme with the main focus on "an international rule of law and ethics and justice." It goes without saying, however, that in a short keynote address one can only touch upon a few aspects of these interesting topics. My role as keynote speaker is to call attention to certain questions with the view to stimulating the discussion in the coming sessions.

Today there is much talk about globalization. I agree with the view that the phenomenon of globalization is the product of human society and that, as such, it is motivated by specific ideologies, interests, and institutions. We know that many view globalization with great concern. In my opinion, it is important to participate in this process and, above all, to make sure that the positive aspects of globalization benefit not only a few but are equally shared. On the legal side, we definitely see how international law is reaching out into even wider areas and that institutions are created to address matters of common interest and need.

The Rule of Law in International Relations

The development in the field of international law over the last few years has been remarkable. Yes, there are those who are critical and even deny the very existence of this law. However, the development is there; the international system of rules, based on

treaties, is growing exponentially. There is no turning back. We must realize that no state, not even the strongest, can today act on its own. We are all dependent on each other in the so-called "global village."

And those who think that they can turn inward and ignore this development may be wise to listen to those who know better. I have quoted The Sayings of Vikings before in this context. Also on this occasion, I would like to refer to the following lines, written more than 1,000 years ago:

He is truly wise who's traveled far and knows the ways of the world.
He who has raveled can tell what spirit governs the men he meets.

Efforts aimed at enhancing the rule of law in international relations encompass the field of law making as well as acceptance of and respect for international law by all states. Moreover, they should be accompanied by increased encouragement of dissemination and wider appreciation of international law.

During the 20th century, international law has been developed at the universal and regional levels. It has been incorporated in a great number of universal, regional, and bilateral treaties.

The evolution of the new jurisprudence is a major challenge for the international community and, in particular, for the United Nations; justice and respect for the obligations arising from treaties and other sources of international law continues to be a key goal of the Charter. Since its establishment, the United Nations has helped create a global legal culture necessary for the promotion of respect for the rules and principles of international law.

In particular, the United Nations and its agencies have played a critical role in advancing the international rule of law through multilateral treaties. These efforts have led to the elaboration of hundreds of multilateral treaties dealing with essential issues of relations among states as well as the individual rights to which human beings are entitled. They cover the spectrum of human interaction, including human rights, humanitarian affairs, terrorism, international criminal law, refugees and stateless persons, the environment, disarmament, commodities, organized crime, the oceans, transport, communications, space, commerce and trade, etc. The secretary general of the United Nations alone is the depositary of more than 500 multinational treaties.

This process not only put in writing the custom. It also allowed all members of the international community to participate in the formulation of international law. It has been fundamental to the very conduct of international relations and the legitimization and acceptance of international law. Some of the products of this codification process have laid the structure of an entire field or domain of international law, setting forth principles and rules that define the basic lineaments of the law and the framework within which problems are analyzed.

In addition, today's international law making has to catch up with the speed of technological and scientific developments. The latest topic on the agenda of the Sixth Committee of the General Assembly is human cloning. Forecasting future needs and making policy decisions about how such needs should be addressed has become part of the required skills of lawyers and policy makers.

However, at the present stage, in securing the rule of law in international relations, focus should be not so much on a further increase in the number of legal instruments, but rather on a strengthening of the political will to apply existing instruments when the need arises and on a more widespread knowledge of their content. This is a matter of law, but it is clearly also an ethical issue.

The level of adherence by states to the rules of international law, whether treaty based or custom based, has gradually become consolidated. Many individual and national activities are undertaken on the basis of existing international legal rules, and

there is a growing expectation of the need to comply with international law by States and other entities. Breaches have been widely reported and extensively discussed.

In early 1999, the secretary general of the United Nations, Kofi Annan, and his senior managers sought to identify the key policy goals for the organization for the new century. To my great satisfaction, the consolidation and the advancement of international rule of law were identified as the second-most important goal for the organization, next to the maintenance of international peace and security. This priority is now clearly reflected in the secretary general's statements and in his reports to the General Assembly.

In its Millennium Declaration in September 2000, the General Assembly further affirmed the importance of rule of law in international relations.

Since 2000, the millennium year, the United Nations Secretariat has organized treaty events in connection with high-level meetings of the General Assembly or international conferences to encourage wider participation in the multilateral treaties deposited with the secretary general. The response to these events has been impressive.

Users around the world currently access the UN Treaty Collection on the Internet more than 800,000 times every month. It is available free of charge to nongovernmental organizations and users from developing countries in addition to the UN family and governments. The secretariat is also discussing how to increase the assistance provided to countries to enable them to participate in the international treaty framework.

Personally, I have written to legal advisers of foreign ministries around the world seeking their assistance in encouraging law schools to include international law in their curricula, where they did not do so already. A Website developed by the Office of Legal Affairs of the United Nations seeks to provide guidance in locating legal material and sources of assistance within the UN system.

However, maybe even more important is the contribution by academia and the many nongovernmental organizations that are engaged in this work. Much of the progress in many countries in the field of international law is due to the active engagement of many people of good will and knowledge of the areas that we now discuss. Not least their scrutiny of how governments respect their international obligations is an important factor. Ethics and justice are high on their agendas.

Ethics and Justice

When discussing this topic in an international setting, it is necessary to start from a national perspective. Let me, therefore, offer some thoughts based upon my own experience serving in the judiciary at the national level. I will then move to the international level, where I will draw upon experiences from representing my country before international institutions and in international negotiations and my experiences during the last eight years as the Legal Counsel of the United Nations.

At the national level, judges are subject to various standards and disciplinary regimes. This is the first thing you are made aware of when you join the judiciary. I have still in fresh memory December 1962 when I appeared before the full Court in the district where I served to take the judge's oath, as prescribed in the Code of Judicial Procedure of my country. What made the deepest impression on me at the time, however, were the seriousness and the precision with which my senior colleagues went about their daily work.

I recall the encouragement I received from those senior colleagues and the admonition to bow to no one but to the law. The "Rules for the Judges," printed for the first time in 1619 and included in our now yearly law book since 1635, was a particular source of guidance and inspiration. Among them are the following sentences (in an attempt to translate the archaic language):

"All laws shall be such that they serve best the community and therefore, when the law becomes

harmful, then it is no more law, but unlaw and should be abolished."

"A good and kind judge is better than a good law, because he can always adjust to the circumstances. Where there is an evil and unfair judge, there is no avail because he will twist and do them injustice after his own mind."

"A known matter is as good as witnessed."

I thought of these rules when I read Thomas M. Franck's article, "What? Eat the Cabin Boy? A theory of mitigation in international law." It was included as a reading for these sessions. Franck argues that it is in the law's interest to bridge the gap between itself and the predominant private perception of what is just and moral. I agree.

Certainly, judges are human beings too, and there were instances where I had views on how my senior colleagues acted. But those were marginal observations. The remaining impression was the example set by persons who independently and impartially exercised their judicial functions without side-glances and to the best of their ability. Many times later in life I have thought of these colleagues with gratitude. The 10 years in the judiciary of my country in the 1960s an early in the 1970s taught me a lot and in particular the importance of experience, confidence, and integrity.

It is important to note that considerable efforts have been made at the international level to elaborate common principles for the independence of the judiciary. These principles can be seen as a common denominator for states under the rule of law.

In this context, I would note first, the Basic Principles for the Independence of the Judiciary, which were adopted by the United Nations seventh Conference on the Prevention of Crime and the Treatment of Offenders, held in 1985. During the preparatory work, contributions had been made, inter alia, by the international Association of Judges and the International Commission of Jurists. I recall that I was involved on the margin when certain preparatory studies were made, and a seminar was held at the International Institute of Higher Studies in Criminal Sciences in Siracusa, Sicily, in the beginning of the 1980s. However, otherwise I have no experiences of my own from this work.

In these basic principles it is laid down that the independence of the judiciary shall be guaranteed by the state and should be laid down in law, preferably in the constitution. Furthermore, it is made clear that justice presupposes that everyone hs a right to a fair and public trail before a competent, independent, and impartial court. Reference is made to the United Nations Universal Declaration of Human Rights from 1948 and the International Covenant on Civil and Political Rights from 1966. Other criteria for the status of judges are also laid down, e.g., their qualifications, their education, their conditions of service, and the period during which they are to serve. Confidentiality and immunity are also addressed.

By resolution 1989/60 of 24 May 1989 the Economic and Social Council of the United Nations adopted procedures for the effective implementation of the Basic Principles on the Independence of the Judiciary. In this resolution, States are requested to adopt and implement the basic principles in accordance with the national constitutional rules and practice. States are also requested to publish the principles and make the text available to the judiciary. Seminars and courses about the judiciary and its independence are also encouraged.

It should be noted that the work of the United Nations in this important field no only focuses on the judiciary. Obviously, all who have function in the justice system must fulfill certain requirements and observe certain standards. Reference can be made to the United Nations fundamental principles for the role of the lawyer and guidelines for the profession of the prosecutors.

Another measure taken by the United Nations is that the Commission on Human Rights has appointed a special rapporteur for the independence of the judiciary who reports on his work to the Commission on a yearly basis.

The documents to which I have referred can easily be found on the Internet.

In this context it is also important to note that the Council of Europe has been engaged in this work. Certainly, guidance can be sought in the European Convention on Human Rights and in the case law of the European Court of Human Rights. But there is also a recommendation on the independence of the judiciary. A European Charter on the statue for judges was adopted on July 10, 1998 and is an additional contribution to the strengthening of the judicial institutions.

International Judicial Institution

In some cases these institutions have existed for a long time: the Permanent Court of Arbitration since 1899, the International Court of Justice since 1945, when it took over from the Permanent Court of International Justice instituted by the League of Nations in 1920.

However, in the last 50 years we have seen many more instances appear: The European Court of Human Rights in 1950 (including the right of individual application which became effective in 1955); the European Court of Justice in 1958 with jurisdiction over European Community law, the African Commission for Human and Peoples' Rights in 1986, the International Criminal Tribunal for the former Yugoslavia in 1993, the International Criminal Tribunal for Rwanda in 1994, and the International Tribunal for the Law of the Sea in 1996. On July 1, 2002, the Rome Statute of the International Criminal Court will enter into force. For the first time, we will have a standing international criminal court to deal with the most serious crimes against humanity, war crimes, and genocide.

Also, other institutions could be mentioned here, such as the mechanisms introduced within the World Trade Organization (WTO) and the Administrative Tribunals within the United Nations, the International Labour Organization, the International Monetary Fund (IMF), the World Bank and the Council in Europe. In addition, on a daily basis various international arbitration panels are addressing disputes mainly of a private law nature.

It is reassuring to note that the services of the International Court of Justice are requested to a greater and greater extent. However, the most dramatic development has been in the area of international criminal law. It is true that we do not have at the international level the same means of legislation, adjudication, and enforcement as at the national level.

States can conclude agreements and ratify them, they can establish courts and appoint judges to adjudicate, but there is very little muscle when you come to the enforcement. Certainly, the Security Council has a special role in this context (see Articles 36 and 37 of the United Nations Charter), but this is a measure that is hardly used.

Therefore, it is important that state adhere to their undertakings under the various treaties setting up these international institutions and accept their rulings also when they are not in their favor. This is a matter of law, but again with ethical dimensions.

It is against this background that we should take a closer look at what is required from those who are set to administer justice in international organs. It is, of course, natural for every person serving as a judge in an international court or tribunal to draw upon the national experiences and seek guidance in the instruments on the independence of the judiciary that I just mentioned. But let us now look at the specific requirements at the international level.

Needless to say, there are provisions of a disciplinary nature in the instruments that govern the respective international institution. Such provisions are

necessary, but I do not intend to go into detail about them here. It is evident that they should not have to be applied. And if they are, we have certainly left the scope of our discussions, which should address elements of a much more subtle nature.

The point that I would like to make is that the standards that international judges must uphold must be set even higher than at the national level. International judges are operating under the eyes of the whole world, and the impression they give and the way in which they perform their work will directly reflect on the standing of the institution that they serve. This is a very important aspect of international rule of law that I think should be addressed in our sessions. We have already touched upon some of them.

In discussing these aspects, it may be necessary to look at the specific circumstances under which judges serve in the different institutions that are represented here. What is characteristic at the international level is that judges must always possess the general qualifications of a judge. But these qualifications must also in most cases be combined with extensive expertise in a particular field of law.

The International Tribunal for the Law of the Sea has just recently been set up. The judges are all recognized experts in the law of the sea and ocean affairs. To date, the court has only heard a few cases but is has already established itself as an institution that reacts expeditiously in the matters entrusted to it. It will be interesting to hear from the representatives of this Tribunal about the special circumstances that apply there.

I know that you have discussed one issue of particular interest in this context, namely what kind of other occupations you may engage in, in view of the fact that you do not serve full-time on the Tribunal (except for the president). This issue is important and could be examined in a broader perspective during the discussions.

Courts dealing with human rights issues have their special characteristics. Not only would judges serving on such courts have to observe the standards that apply generally to persons holding judicial office. In practice, these courts, and in particular, the European Court of Human Rights, function as constitutional courts at the international level. In the 11 years (1983-1994), during which I acted as agent for my government before the European Court of Human Rights, I had the privilege of seeing this court in action.

Certainly, for a state to lose a case before this court and be found in violation of international human rights standards is a painful experience. Also, almost invariably, the conclusion is that the case was lost because the national legislation is deficient in some way. This is so, since the decisions at the national level must always be taken by the highest instance (mostly the Supreme Court or the government) before the case can be brought before the Human Rights Court. This means that the national legislation as it exists has been applied correctly; the highest instance ahs had its say. Consequently, if the case is lost before the international court, the conclusion to be drawn at the national level is that the law must be amended in order to avoid similar situations in the future.

Seen in this perspective, the adjudication of international human rights courts may cause a certain strain on the patience of governments. Therefore, these courts must strike a delicate balance here. States must be allowed a certain "margin of appreciation" in applying the international standards. At the same time, those who rightly seek justice before them are entitled to a fair hearing and a just treatment. This exercise becomes a delicate interaction among the international human rights courts and the states that have established them.

I have in the pas expressed some caution here since there are limits to what a few judges of international institutions of this kind can manage. It is necessary that the members of these courts be looked upon

as prominent personalities that may risk being alienated from the conditions in member states. It is also important that the members of these courts exercise their functions with great wisdom in order to maintain the integrity of the system so that it can function in situations where the need is the greatest; these courts must be able to act as beacons in times when fundamental human rights and freedom risk being tramped under the feet.

The International Criminal Tribunal and the International Criminal Court

In my opinion, it is important that judges of these courts have extensive experience of criminal justice and of serving in the national systems as judges. This question first came to my close attention when two colleagues and I elaborated, under the auspices of the Conference on Security and Cooperation in Europe (CSCE), the first proposal for an International War Crimes Tribunal for the Former Yugoslavia in 1992-93.

In the commentary to the provision on appointment of judges we stated: "In corresponding provisions of other drafts there is a reference to knowledge of international law. No doubt, knowledge of international law in addition to the requirements proposed in [paragraph 3] would be of great importance. This is, however, not specifically included in the provision. The reason is that in view of the tasks that the judges are facing it is more important that they are well acquainted with the adjudication of criminal cases in their respective States. Once the Tribunal is set up, the main feature of the work of the court will be very similar to the work in an ordinary criminal court at the national level. A demonstrated ability to deal in a competent and expedient manner with complex criminal cases ought therefore to carry particular weight. Judges with such qualifications will no doubt rapidly acquaint themselves with the international elements of the work."

The corresponding provision in the Statute for the Tribunals for the Former Yugoslavia and Rwanda reads as follows (ICTY, Article 13, paragraph1):

The judges shall be persons of high moral character, impartiality, and integrity who possess the qualifications required in their respective countries for appointment to the highest judicial offices. In the overall composition of the Chambers due account shall be taken of the experience of the judges in criminal law, international law, including international humanitarian law and human rights law.

It is interesting to note that the Rome Statute is more elaborate in this context and foresees two categories of judges in the court. In accordance with Article 36, paragraph 3 (a), the judges "shall be chosen from among persons of high moral character, impartiality, and integrity who possess the qualifications required in their respective states for an appointment to the highest judicial offices." Furthermore, in accordance with subparagraph (b) of the same provision, every candidate for election to the court shall: (i) have established competence in criminal law and procedure, and the necessary relevant experience, whether as judge, prosecutor, advocate, or in other similar capacity in criminal proceedings; or (ii) have established competence in relevant areas of international law such as international humanitarian law and the law of human rights, and extensive experience in a professional legal capacity that is of relevance to the judicial work of the court.

Interestingly, in accordance with paragraphs 5 and 6 of Article 36, the candidates shall be listed in two separate lists: list A for candidates with qualifications specified in paragraph 3(b) (i), and list B for candidates with qualifications specified in paragraph 3 (b) (ii). At least nine judges shall be elected from list A and at least five judges from list B.

Let me state emphatically that, when the judges are to be elected for the International Criminal Court, it is of utmost importance that the persons elected will be seen as competent not only by fellow judges at the national level but, more importantly, by the general public. It is therefore imperative that States present candidates for the International Criminal Court and the international criminal tribunals who have

extensive experience of serving in the criminal justice system of their own states.

A few days ago, someone drew to my attention to an advertisement in The Times by the Government of the United Kingdom. Advertising under the job title "Judge of the International Criminal Court," the government invites applications from candidates possessing the necessary qualifications and expertise for election for this senior judicial appointment. The "job description" makes clear in no uncertain terms that the government is looking for a candidate with significant judicial experience. I was very glad to see this approach, and I have brought with me the material that the Foreign and Commonwealth Office sends to those who express an interest in the position. It is my hope that other states' parties to the Rome Statute will follow this excellent example.

It is important to note, and this is evident to anyone who has served as a judge in a criminal court, that this function puts heavy demand on the person in question. First of all, a judge must be able to uphold the order in the courtroom and to see to it that cases are moved forward. This is of paramount importance in order to maintain respect for the judicial institution. Furthermore, the personal convenience of a judge in a criminal court must be second to the interest of the proper administration of justice. For example, according to international standards, and in particular Article 9 f the International Covenant on Civil and political Rights and Article 6 of the European Convention on Human Rights, anyone arrested or detained on a criminal charge has the right to be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. International criminal courts must uphold these standards scrupulously.

I have heard the argument that, since the persons detained by the international tribunals are suspected of very grave crimes, it does not matter much if they have to spend a little more time in detention than in ordinary cases. Unfortunately, it is inevitable that persons detained as suspects of genocide, war crimes, or crimes against humanity are detained for long periods because of the complexity of the investigations. However, it is only that element that should determine the length of the detention. It is wholly unacceptable that other elements (e.g., the convenience of the judges) should be allowed to influence the time under which persons are being detained. The moment a case is ready for a hearing, the trial should take place. This is in the interest not only of the person detained but also of victims and the general public—in short, it is in the interest of justice.

Those appointed as judges of international tribunals (and for that mater also prosecutors) have high visibility in he media and elsewhere. They will often be invited to various functions and, maybe, sometimes also offered awards and other recognitions. Whether such awards should be accepted is also an ethical question. In the United Nations, such award may not be accepted if they originate from a government. If they originate from other institutions, however, they may be accepted if the secretary general gives his permission. In my humble opinion, this kind of recognition should not be offered to judges and other high officials of international courts while they hold office.

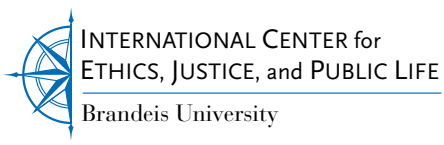
Conclusion

It is not possible in a short keynote speech on ethical dimensions of international jurisprudence and adjudication to cover all the many issues that arise under the topic. I have focused on a few of them and hope that my reflections will serve the purpose that I indicated at the outset—to stimulate the discussions. My comments are certainly not meant to offend anyone, but I think that it is important that we talk about these issues in view of the very delicate situation in which international judges operate. In particular, it is important to focus on the problem that stems from the fact that it is difficult to establish accountability at the international level in the same way as you can do at the national level. By accountability in this context, I do not mean how judges adjudicate a particular case but the way in

which they perform and conduct themselves in exercising their function.

At the international level, a classic dilemma presents itself: Quis custodet custodies? Who supervises the supervisors? This must always be present in the minds of judges who serve at the international level. I can think of no higher calling for a lawyer than to serve in this capacity. But precisely because it is a high judicial office with limited ways of establishing accountability, it must be assumed with a humble mind. What is required is a deep insight that a competent, independent, and impartial international judiciary is an indispensable element when we are making our best efforts to establish the rule of law in international relations.

Thank you for your attention.



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