

Improving Access to Justice: The Role of the Domestic Court

Third ICJ Geneva Forum for Judges and Lawyers
13 December 2012

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Foreword

The work of the International Commission of Jurists (ICJ) has always been guided by the conviction that an independent legal system is both an indispensable component of and a condition necessary for upholding the rule of law, through which judges and lawyers carry a responsibility for the protection of rights, including through the judicial process and the effective administration of justice.

Throughout its 60-year history, the ICJ has made use of a wide range of tools to advance that conviction. Its Centre for the Independence of Judges and Lawyers (CIJL), which was re-established by the 2008 ICJ World Congress, acts as a focal point in matters concerning the independence of the judiciary and the legal profession and their effectiveness in the administration of justice and realization of human rights. The CIJL gives priority attention to situations where this function is most at risk, such as in times of crisis.

Since 2010, the CIJL has annually organized the ICJ Geneva Forum for Judges and Lawyers, aiming to offer an opportunity for the international legal community to test new thinking and to stimulate reflection regarding judicial independence and the role of the legal profession in human rights protection. The first Geneva Forum in 2010 was devoted to exploring the challenges confronting judges and lawyers as a result of national security laws, policies and practices. In 2011, the Forum focused on the role of lawyers and bar associations in establishing and strengthening democratic institutions in countries undergoing the transition to democracy.

For 2012, the Geneva Forum capitalized on the opportunity presented by convening the Forum immediately after the ICJ's 17th World Congress, which brought together the ICJ Commissioners, Honorary Members, National Sections and Affiliate Organizations for a discussion on the right to a remedy and access to justice in international and regional human rights mechanisms. Complementing the discussion by the Congress, the Forum this year focused on the role of domestic courts in facilitating access to justice.

Domestic courts play an essential role in providing a remedy and reparation to victims of human rights violations. In this respect, international human rights law provides essential guidance to judges and lawyers practicing in domestic jurisdictions. Legal practitioners simultaneously play an important role in integrating international human rights standards into domestic law and judicial proceedings, thus strengthening the function of the domestic court as the provider of an effective remedy and human rights protection.

The Third Geneva Forum for Judges and Lawyers explored this topic in over three discussion sessions, focusing on the impact of national legal, political and cultural particularities on the operations of domestic courts; on the role of the lawyer in strengthening the protection of international human rights law and standards through domestic litigation; and on the

way judges compare the national integration of international human rights law and standards.

To capture the spirit of the 2012 Forum, it is appropriate to cite the words of the late Justice Arthur Chaskalson, former President of the ICJ, in his address to the Cape Town Law Society on 9 November 2012:

"[A]n independent legal profession is an essential guarantee for the promotion and protection of human rights and the establishment and maintenance of the rule of law. The need for this in a constitutional democracy is clear. Taking our Constitution as a model, this is essential to give substance to the right to have access to courts, the right to a fair trial, the right to just administrative action, and generally to the right of the public to enforce the obligation on the state to respect, promote and fulfil all the rights in the bill of rights."

Alex Conte
Director, ICJ International Law and Protection Programmes

Executive Summary

The Third ICJ Geneva Forum for Judges and Lawyers focused on the role of the domestic court in improving access to justice. The Forum was divided into three sessions: Session I focused on how domestic courts grapple with the inherent tension of applying universal standards in the face of domestic particularities; Session II addressed the role of the lawyer in strengthening the protections of international human rights norms through domestic litigation; and Session III concentrated on how judges compare national integration of various international human rights law and standards.

During Session I, participants discussed how national legal, political, social, economic and cultural particularities influence the domestic court's application of universal human rights law and standards. They concluded that the extent to which domestic courts apply international human rights standards depends in large measure on the capacity of legal professionals to present persuasive arguments in favour of their application and the willingness of judges to accept those arguments. Participants reflected upon issues concerning and affecting the latitude of domestic judges in the use of international human rights law and standards and the various factors that influence this, including the domestic legal framework, lack of knowledge or unwillingness by judges to apply such standards, or lack of judicial integrity. Concerning the domestic legal framework, participants discussed the impact, real and perceived, of differences between monist and dualist legal traditions; the status of precedent; and problems with non-incorporation and other deficiencies in domestic law. On the question of willingness of judges to apply international standards in a way that might influence access to justice and accountability, several 'avoidance techniques' were identified, including: jurisdictional arguments to opt out of deciding upon a case; *locus standi*; excessive deference to public policy; deference to the executive on the implementation of judicial decisions; unwillingness to rule on the lawfulness of extradition, deportation and other forms of transfer following the removal of the person; abusive application of the 'clean hands' doctrine; and politicized approaches particular to formerly colonized countries. Structural factors were also identified as influencing the application of international human rights law, namely: corruption; the impact of modernization efforts; the effects of weak guarantees of judicial independence and the interplay between politics and the domestic use of international law. To conclude the session, participants reflected on ways to support and reinforce the use of international human rights standards in the domestic court, stressing the importance of education and an international inter-judicial dialogue, and contemplated the use of "inter-judicial pressure" as a tool.

In Session II, participants discussed the role of lawyers in reinforcing the implementation of international human rights standards through domestic litigation, noting that to obtain access to justice, victims of human rights violations rely on a competent and independent legal profession. Accordingly, Forum participants considered education, guarantees of independence and attacks on the legal profession, and legal professional

integrity. Participants also discussed specific operational aspects that influence lawyers' functioning: legal aid; the role of the lawyer outside the courtroom; political interference in the course of prosecution; and technical problems associated with litigating before different courts in the same jurisdiction.

Session III focused on benefits and pitfalls of the judiciary taking a comparative approach to the integration of international human rights standards into domestic jurisprudence. Considering mostly examples from Southern Africa, participants discussed how domestic judges looking for guidance on the application of such standards in foreign jurisdictions with similar legal systems can be helpful, but comes with a number of risks. They pointed out that international law is not an attractive subject for autocratic regimes, who claim that high human rights standards are incompatible with their country's tradition, and discussed the complex relationship between customary, constitutional and international law. On the side of benefits to the use of a comparative approach, participants indicated the potential positive influence when reference is made to the jurisprudence of a progressive court. However, some also noted that judicial transplants can lead to inconsistencies and that one must bear in mind that the task at hand is to interpret domestic law, rather than an international or foreign instrument. Judges must avoid using law from other national jurisdictions merely to support their own preconceptions or as a tool to add force to a chosen position that is not supported in domestic law.

Session I: The domestic court, caught between universality and domestic particularities?

The Forum's first session was dedicated to a discussion on the tension that exists between the universal nature of international human rights law and standards on the one hand, and the particularities that characterize the environment in which the domestic court operates on the other. Participants looked into legal, political, social, economic and cultural factors, and considered how these can influence the application of international human rights norms in the national context. They also reflected on ways to reinforce the use of international human rights law in the domestic court.

Judges, it was noted, often have some latitude when it comes to the use of international human rights law, which in practice is often dependent on two variables: the legal profession's capacity to argue and show judges the law and subsequently convince them of the advantages of a human rights based approach; and the judiciary's willingness to listen, since they consider themselves bound by the State's obligations or because they consider this approach to be the correct application of the law.

The latter point was said to be key: a case must be reasoned correctly and hence, it was remarked, one must be conscious of the fact that a judge forms part of a domestic system with its own exigencies. If the court does not have a proper appreciation of its rights and duties, it becomes almost impossible to fashion an appropriate remedy. On the other hand, participants pointed to, and generally agreed with, the late Justice Chaskalson's position that the law must always also be about the person affected, not simply the legal argument. Both domestic and international human rights law share the core objectives of protecting human beings and eliminating all forms of oppression. The case of the *Government of the Republic of South Africa v Grootboom* provides an example illustrative of this approach as well as Justice Chaskalson's personal impatience with "clever legal arguments". During the trial, he put a simple question to the applicant's lawyers who argued deference and margin of appreciation in this case related to the conflict of the right to housing and assertion of property interests: "where does the Government suggest Mrs Grootboom sleep tonight?"

Domestic courts' failure to apply international law and State responsibility

The application of international human rights law in domestic courts, as reflected in the discussions, may be influenced by a series of factors, including the characteristics of the domestic legal paradigm over which the judge has no control; a lack of knowledge or unwillingness to apply international human rights standards; or a lack of competence or integrity on the part of the judge. One participant pointed out that where a judge fails to apply international law, for whatever reason and not necessarily where this is inconsistent with domestic law, State responsibility for wrongful conduct may arise.

This point was illustrated by three examples from Sri Lanka, where the actions of the Chief Justice and the Supreme Court triggered the responsibility of the State. In the case of *Fernando v Sri Lanka*, the Chief Justice had condemned a litigant to one year of hard labour for contempt of court when the litigant had refused to be quiet after being told to do so. The Human Rights Committee there found a violation of Article 9 of the International Covenant on Civil and Political Rights (ICCPR). In the case of *Immaculate Joseph et al v Sri Lanka*, the Human Rights Committee found a violation of Articles 18 and 26 of the ICCPR as a result of the Sri Lankan court's decision that deemed the incorporation of a religious order, which had been functioning well for decades, to be oppressive to the Buddhist population. The decision in *Nallaratnam v Sri Lanka* concerned the conviction of someone who alleged to have been tortured in order to obtain a "confession". Under the Terrorism Act, the person alleging torture carries the burden of proof and the domestic court refused to overturn his conviction. The Human Rights Committee found a violation of Articles 2, 7 and 14 of the ICCPR. When the victim's lawyers returned to the Supreme Court asking it to use its review powers, the Court avoided its responsibility by finding that the Government had unconstitutionally ratified the Optional Protocol to ICCPR allowing for communications.

Furthermore, another participant noted that while in clear-cut impunity cases it is easy to determine State responsibility, this is not the case when it comes to fraudulent *res iudicata*. By way of example, the Inter-American Court of Human Rights' decision in the case of *Paniagua Morales et al v Guatemala* showed that manipulation of evidence by the domestic judge can engage State responsibility.

As regards torture, a participant pointed out that impunity in particular would not be as prevalent if the prosecution services and the judiciary were more alert to the problem. It was concluded that this only requires a judge or prosecutor who sees a bruised person in front of her or him to ask: what happened? While many bravely take full account and attempt to tame the excesses of the Executive branch responsible for the initial detention, too often the judge simply looks the other way. To remedy this situation, a minimal level of consciousness needed to be inculcated into the judicial and prosecutorial systems. Participants agreed that much remains to be done in this respect.

Legal factors affecting the domestic court's application of international human rights law and standards

Forum participants discussed, broadly, three legal factors bearing on the domestic judge's position vis-à-vis international human rights law.

One participant raised the difference between monist and dualist legal traditions. While theoretically a stark contrast exists between these paradigms, and it is often assumed that common law systems are dualist and civil law systems are monist, it was observed that in practice a continuum is in play: the academic divide makes way for a more subtle series of distinctions. For example, in the United States, self-executing treaties are the supreme law of the land and in the UK the same is true

for customary international law, whereas Sweden provides an example of a dualist civil law tradition. Additionally, for monist countries the question arises as to whether the whole of international law is incorporated or whether incorporation only applies to treaties.

In dualist States, courts have generally had a propensity to interpret domestic law in a manner consistent with international law. How this theoretical observation plays out in practice, however, differs from one issue and country to the next. For example, in relation to the use of arguments based on the European Convention on Human Rights (ECHR) before United Kingdom courts prior to incorporation of the ECHR into domestic law, it was noted that the political agenda on incorporation rendered courts hesitant to accept lawyers' arguments based on the principle of consistent interpretation, as judges were unwilling to stray into politicians' turf. As a result, it was opined that the UK pulled back further from the Convention than it otherwise might have. A more positive example is the use of the Alien Tort Statute in US courts. Originally part of the Judiciary Act 1789, this previously obsolete basis for jurisdiction was resurrected by creative lawyers in the 1970s and has since led to an impressive range of litigation. However, this evolution first relied on a court willing to decide that torture constitutes a tort under international law, which happened in the seminal case of *Filartiga v Peña-Irala* before the Court of Appeals for the Second Circuit. Jurisdiction under the Alien Torts Statute has since been upheld in dozens of cases. In another pertinent case in the United Kingdom in 1998, the detention of former Chilean military dictator and President Augusto Pinochet on the order of a UK magistrate for possible extradition shocked the political and legal system. As this case was adjudicated prior to the entry into force of the Human Rights Act, the torture argument based on international law was said by a participant to have "clicked". However, the laboured decision is illustrative of a court not fully at ease with the use of customary international law and *jus cogens* in making its judgment. Later cases in the House of Lords and Supreme Court show a court much more comfortable with international law. Participants remarked that the legal profession had made a substantial contribution to this learning process.

On the other hand, there are also monist States where judges may find a way to avoid the application of international law. A classic example is the *Habré* case in Senegal: while a monist country under its own Constitution and a party to the UN Convention against Torture, the Government argued that Hissène Habré should enjoy immunity and that the necessary rules of the Convention moreover had not been incorporated into national law. The lack of trial and conviction then led to the case of *Belgium v Senegal* before the International Court of Justice, in which it was determined that Senegal was in breach of its obligations under the Convention against Torture.

More generally, another participant noted that the dualist/monist paradigms make less sense in the context of human rights law as a way to deal with the tension between universal values and sovereign privileges. Aimed at the protection of individuals, one of the purposes of international

human rights law is precisely the transformation of domestic institutions, both at the legal and at the practical levels.

A second legal issue affecting the domestic judge's application of international human rights standards is the status of precedent. Bearing in mind that in some legal traditions a court is bound to follow (sometimes politically motivated) judgments of higher courts, one participant asked what a lower court judge should do when confronted with decisions from an appellate court that refuses to apply international human rights law to a case, claiming it does not form part of the applicable domestic legal framework? Can one act at variance with a superior court precedent when one knows in good conscience that the precedent is wrong?

The challenge at hand is a tough one, as the decisions of a superior court are formally binding in many legal traditions, and are to be accorded *de facto* deference in others. However, it was pointed out that this does not require one to acquiesce to fallacious reasoning. Indeed, by respectfully pointing out the unpersuasive character of reasoning in a precedent and by distinguishing the case at hand, a lower court judge may be able to justify her or his own interpretation of the applicable law in good conscience.

Another issue raised was the problem of deficiencies in the law.

Colombia presents an example of how this challenge could be tackled. On the one hand, the Constitution prescribes the obligation to interpret domestic law in conformity with treaty obligations, and the Supreme Court and Constitutional Court have expanded this provision to include interpretation in line with some international declaratory instruments or 'soft law'. In the last five years, reference has also been made to *jus cogens* norms. On the other hand, in the field of criminal law, a marked legal deficit persists such that many provisions criminalizing certain war crimes, crimes against humanity, and concepts such as command responsibility are wanting. While lower courts have been hesitant to apply international law, higher courts have systematically applied international law, *jus cogens* and customary law norms to engage such responsibility, *inter alia* in cases of enforced disappearances. In the Colombian example, the legal framework and jurisprudence to close the gaps in the law exist. The remaining challenge, however, is to systematically provide the requisite knowledge regarding international law to the judiciary at all levels and to the legal profession at large.

In the Middle East and North Africa, similar issues of deficiencies in law exist, especially with regard to cases of torture and enforced disappearances committed by former autocratic regimes at a time when adequate domestic provisions incriminating or punishing these crimes were missing. The challenge in this region is how to pursue the prosecution of perpetrators: how can one accept an exception to the principle of legality? And even if this were accepted, for example on the basis of the fact that a country had at the time of the commission of the crime acceded to an international convention that criminalizes the conduct, or that *jus cogens* norms were applicable, how can criminal law

be applied if there was no adequate punishment under the domestic penal code? Are the accused in cases of human rights violations different from other accused, and how does this relate to the principle of equality before the law? In practice, cases of enforced disappearances can be prosecuted as this is a continuous crime, but in cases of torture the conundrum remains.

Similarly, the question remains as to what a judge should do when she or he is confronted with “bad law”, where there is tension between domestic constitutional law and international law. Zimbabwe presents a classic example in point: an amendment to the Constitution excludes the courts’ jurisdiction if a land grab has been gazetted. Subsequently, both the High and Supreme Courts have said that they cannot provide a remedy, as they are the servants of the law, even if they are aware of international law standards. How can the international community and the ICJ assist judicial officers in such a situation, where they are torn between following international human rights law versus directly conflicting constitutional law that is so precise in its terms so as not to be open to interpretation? The same question also arises in countries where the domination of one religious or cultural tradition has yielded discriminatory domestic laws: should these be applied or should one look at the international standards instead?

Domestic courts’ use of “avoidance techniques”

Whereas the discussions summarized above pertained to characteristics of the domestic legal framework that influence the application of international human rights law in domestic courts, participants also explored factors related to the unwillingness of domestic judges to apply these international standards in a way that might influence the access to justice of the victim of human rights violations.

A first “avoidance technique” discussed was the oft-used lack of jurisdiction argument. A poignant example was drawn from US jurisprudence, where some judges are willing to accept that they do not have jurisdiction over Guantanamo detainees, notwithstanding the fact that US authorities hold them in a territory controlled by the US. Several participants noted that, when confronted with such critical questions, some courts opt to find a way to avoid responsibility.

Similarly, the figure of *locus standi* can be used as an avoidance technique. A participant remarked that in Zimbabwe, among other countries, the courts have come to the conclusion that victims lack standing to pursue their complaints.

The Forum’s participants also discussed the avoidance technique of (excessive) deference to public policy. Again an example can be drawn from Zimbabwean jurisprudence related to land reform, such as in the case of *Gramara v Republic of Zimbabwe*. When attempts by expropriated farmers to obtain a remedy before the domestic court proved fruitless, some of them turned to the Southern African Development Community (SADC) Tribunal for recourse. When the SADC Tribunal ruled that the

expropriations were illegal and that the affected farmers were entitled to full compensation, the latter returned to the Zimbabwean High Court for implementation of the SADC Tribunal decision. However, the High Court ruled that implementation of the SADC Tribunal's judgment would be contrary to public policy and thus ignored it. This reasoning was said to be peculiar in light of the grounds for the establishment of the SADC Tribunal, which originated precisely as a public policy measure to provide a remedy in cases where domestic law or proceedings fail to do so. Ultimately, the South African Supreme Court of Appeal gave effect to the SADC decision, which was executed against South African property held by Zimbabwe's Government. However, the decision ultimately led to Zimbabwe's successful efforts to dismantle the SADC Tribunal as a mechanism to hear rights complaints.

One participant mentioned deference to the Executive on the implementation of court decisions as another avoidance technique applied. Canadian jurisprudence in the *Omar Khadr* case provides an illustration. Here, the Supreme Court of Canada decided that the rights of Omar Khadr, a Canadian national who was detained by US forces in Afghanistan when he was just 15 years of age and held for many years at the Guantanamo detention facility, were infringed when Canada actively participated in a process in violation of international human rights law and that offended the most basic Canadian and international standards governing the treatment of detained youth suspects. However, as to remedy, the Supreme Court deemed it sufficient to declare that Omar Khadr's rights under the Canadian Charter of Rights and Freedoms were violated, leaving the decision as to how to remedy that violation to the executive. Although a Federal Court of Appeal had ruled that an appropriate remedy would be for Canadian government to take diplomatic measures to ensure Omar Khadr's repatriation, the Supreme Court ignored the request of his counsel for such a remedy, instead deferring to the discretion of the Executive.

In extradition cases more generally, a participant observed that the argument is often heard that once extradited, "the bird is gone" and that hence, the case has become moot and that a judgment *ex post facto* on the lawfulness of the extradition serves no purpose. However, the case of *Mohamed v President of the Republic of South Africa*, over which Justice Chaskalson presided, shows that this may not necessarily be the case. For example, Khalfan Khamis Mohamed, a Tanzanian national sought by the United States for his part in the 1998 US Embassy bombings in Tanzania, was arrested in Cape Town. Following interrogation, South African immigration authorities handed him over to FBI agents, and he was flown to the US. The Constitutional Court of South Africa decided to pronounce on the lawfulness of the extradition, regardless of the fact that Khalfan Khamis Mohamad was no longer within the jurisdiction of South Africa. the Court ruled that the Government of South Africa may not extradite a suspect who may face the death penalty without seeking prior assurances from the receiving country that the suspect would not be sentenced to death. Ultimately, despite it being a capital case, the US court sentenced Mohamed to life imprisonment without parole. It was proffered that the

South African judgment may well have played a role in the decision not to apply the death penalty.

Zimbabwe provides yet another example of a further avoidance technique, namely the abusive application of the “clean hands doctrine”. In a case concerning regulation and registration of journalists, the court used this doctrine to avoid adjudication, claiming that it had no jurisdiction to hear the applicant newspaper’s complaint until the applicant had obeyed the law. South African jurisprudence from the *apartheid* era, however, shows that the creative use of this doctrine can also be put to work to facilitate remedies for the victim of human rights violations. In the case of *State v Ebrahim*, South African security agents kidnapped the defendant in Swaziland in order to bring him before a court in Pretoria on charges of treason. The Supreme Court concluded that it lacked jurisdiction to try a person brought before it from another State by means of State-sponsored abduction, which it found to constitute a violation of applicable rules of international law that were also part of the domestic law: in other words, when the State is a party to a dispute, it must itself come to court “with clean hands”.

The land issue in Zimbabwe was used to illustrate another avoidance technique applied in formerly colonized countries. In the case of *Campbell Ltd v Minister of National Security Responsible for Land, Land Reform and Resettlement*, in which land invasions had been deemed unlawful by a lower court, the police refused to comply with the court order on the basis that they did not have the personnel, finances or facilities to enforce the judgment throughout the country and remove occupiers from farms. Before the Supreme Court, the Minister of Justice then argued that since the land issue was a legacy from colonial times, it was a political question that could not be solved through judicial processes. He stated that the land had been acquired under colonial rule through unjust means, and the court was thereby prohibited from enforcing unjust law. The judge found these arguments unacceptable and offensive to the rule of law.

Other structural factors influencing domestic courts’ application of international human rights law and standards

In addition to discussing features of the domestic legal framework that influence the application of international human rights standards and avoidance techniques, the Forum participants also discussed other relevant structural factors.

Certain participants pointed to the fact that many judges resist the application of international law or rights-conferring provisions in their own Constitutions as a result of corruption. This may be caused by a lack of adequate resources in the judiciary and/or a lack of integrity of individual judges. In any case, it presents a significant and difficult-to-tackle ethical problem.

The issue of integrity is also at play in cases where judges, in any jurisdiction, are aware of international human rights law but consciously decide to reinforce the *status quo*. In Botswana, for example, the law

contains a provision concerning engaging in sex “against the order of nature” (applied to homosexual relations). In one case, the court said that it was convinced of defence counsel’s legal arguments, but nevertheless entered a conviction because it deemed that “society was not ready”. In a demeaning judgment not grounded in law or empirical evidence, the judge appeared to prioritize his personal views.

Modernization efforts may also have an impact, as an example from Malawi illustrated. During an ICJ training programme in September 2011 on the application of international law by domestic courts, a clear split emerged between participants from the country’s High Court and Supreme Court. While the latter said openly that they would not apply international law that is not expressly incorporated into domestic law, the High Court judges, having gone through a process of modernization, took a different approach.

Furthermore, a Forum participant called attention to the effects of weak guarantees of judicial independence, particularly those related to the career trajectory of judges and to insufficient protection of judges. Another participant said that judges do not function in a separate sphere, but are part of a domestic context in which political and strategic considerations, related to interactions with the public as well as other branches of government, and that they play a role that may indeed be legitimate. It was said, however, when there is a real clash between politics and the law, judges who feel secure in their position will feel empowered to impartially adjudicate the law, whereas those who do not may succumb to external pressures.

Pressure, furthermore, need not be external and can come from within the judicial system as well. A participant raised an example from the Gambia to illustrate this point. In the case of *Denton v The Director-General, National Intelligence Agency and Others*, concerning the arbitrary detention for four months of a prominent human rights lawyer, the Director of Public Prosecution tried to convince the judge that international law could not be used, despite a constitutional provision that provides for incorporation of international instruments into the law of the country. When the judge nevertheless applied international human rights law to her reasoning, not only did the country’s President appear on television stating that, in his eyes, suspects are “guilty until proven innocent”, but some of the judge’s colleagues added to the pressure by stating that her ruling had put the country into disrepute.

A participant illustrated another aspect of the interplay between politics and the domestic use of international law with an example from South America. In Uruguay in the early 1980s, immediately before and during the transition to democracy, a number of cases were lodged in criminal and civil courts, requesting reparations for the victims of human rights violations under the former authoritarian regime. International law was quoted abundantly in pleadings filed in those proceedings, as the lawyers could make use of a wide range of international resolutions and decisions on the country. Initially, all those cases were unsuccessful and the subsequent adoption of an amnesty law necessitated going back to the

international level, where the Inter-American Commission on Human Rights in 1992 took its first decision on amnesty laws in Argentina and Uruguay, providing domestic lawyers with some new tools. However, by that time the Supreme Court of Uruguay had already declared the amnesty law constitutional in a number of cases related to human rights violations committed under the autocratic regime and litigators had ceased filing new matters, as this only led to the automatic repetition of previous jurisprudence. Ten to fifteen years of development with reference to international law followed, but no more cases were filed related to the period of the military dictatorship. Meanwhile, international law was used in so-called “non-political” cases and little by little was referred to in some reparation rulings, but at the time even the most progressive justices generally disregarded international law. It ultimately took almost a quarter of a century for international law to make an appearance in the Uruguayan judiciary’s rulings. This change came about not because of proper guarantees of independence, which were well in place by the mid 1990s, but rather as a result of a government of the left coming to power, effectively unleashing a more robust judicial engagement.

Today, three former presidents, the entire command of the intelligence services under the dictatorship, those directly involved in “Operation Condor” and some other operatives are serving prison sentences. While this evolution is exciting and has helped to promote national reconciliation, certain unease continues to exist with regard to the political trigger that activated this new found judicial interest.

Supporting and reinforcing domestic courts’ use of international human rights law and standards

Lastly, as noted above, the Forum’s participants looked not only into legal, political, social, economic and cultural factors that impact the application of international human rights norms in the domestic court, but also reflected on ways to support and reinforce their use.

Numerous participants in this respect stressed the importance of education. It was deemed useful to convey to judges that rights have two sources: the domestic Constitution and statutes; and international law and its interpretation in global and regional systems. Accordingly, there are bases for interpretation beyond the limits of the domestic law that can be employed. Through knowledge and training, domestic judges can become more receptive and able to apply international human rights law.

One participant moreover noted that international law is often still omitted from university curricula. Hence there exists not only a need to train the students, but also the teachers. In addition to judges, lawyers should also receive a proper education in international human rights law, since they present arguments in court and indeed often introduce the concepts inherent in international law to the judges in the first place.

Furthermore, several participants stressed the importance of an international, inter-judicial dialogue. More and more, the domestic judge

“becomes international”, citing international law and incorporating comparative law into proceedings.

When judges seek to fulfil their duty to protect and provide a remedy, it may be important for them to cite decisions from foreign jurisdictions to support their reasoning. It was seen as important to identify how good practices from other parts of the world might best be adopted within a single jurisdiction. It may be valuable to consider how similar problems were solved in other jurisdictions; although it was also acknowledged that differences in development and legal culture should be borne in mind.

This dialogue is not limited to domestic courts. In the Americas, for example, a participant noted that the Inter-American Court of Human Rights cites good constitutional jurisprudence to show that it is taking care to learn from domestic courts. This mutual exchange of ideas was considered important, in order to ensure that domestic law forms a part of international law and *vice versa*.

Participants warned, however, that the use of judgments from foreign jurisdictions or international law and standards is not always consistent or uniformly positive, as illustrated by an example from Brazil, where the analysis of six hundred cases in which the Supreme Court has used international standards shows no logic in the way they were applied. The Supreme Court appears to have made use of them rather inconsistently, choosing to apply international law only to confirm and reinforce previously held opinions. For example, on the issue of extradition, the Supreme Court has in cases concerning foreign military personnel decided that the person was not protected from prosecution or extradition by amnesty laws (in line with international standards). However, in cases concerning the Brazilian military, the Court came to the opposite conclusion. In this respect, one of the participants pointed out that it would be interesting to monitor Supreme Court decisions over the next several months, to see how it will deal with the tension between the verdict of the Inter-American Court of Human Rights in the case of *Gomes Lund et al v Brazil*, where it decided that the right to truth about gross human rights violations arises from Article 13 of the American Convention on Human Rights, in combination with other articles, and how this fits with the Brazilian Supreme Court’s allegedly politically motivated precedent concerning the validity of amnesty laws.

Several participants lastly illustrated how “inter-judicial dialogue” could be turned into “inter-judicial pressure”, as a tool to advance the application of international human rights law. Judges generally seek to be respected by their peers and accordingly will be more reluctant to exercise choices that lack integrity if they are aware that their colleagues are watching.

This peer pressure can be made operational through the tool of trial observations. Trial observations not only offer an opportunity for professional exchanges of view, but also make the judge acutely aware of the fact that she or he is in the spotlight and that her or his colleagues are watching.

One participant noted that in cases where international human rights law is relevant, but the judge blatantly refuses to accept the arguments, lacks the courage to do so or is in fact inventing obstacles, colleagues may be mobilized to “name and shame”. This tool must only be used after a careful consideration of the applicable legal paradigm and the particularities of the case at hand, in order to come to a balanced assessment of the actions of the judiciary. By way of example, participants pointed to the impact of UK judicial authorities who described the detention regime at Guantanamo Bay as a “legal black hole” on the United States judiciary, who are usually in comity with their British peers.

Session II: Strengthening the protection of international human rights norms through domestic litigation: the role of the lawyer

The Forum's second session focused on the role of the lawyer, as one of the pillars upon which human rights and the Rule of Law rest in strengthening the protection of international human rights law and standards through domestic litigation. In order for the victims of human rights violations to obtain access to justice, participants observed that they rely on the availability of an independent and competent legal profession, where lawyers can assist in providing guarantees for an independent judicial system. Competent and independent legal counsel have knowledge of human rights law, both domestic and international. They are able to show judges what international standards are applicable and, when remedies are exhausted, they can ensure that arguments will be submitted to the appropriate regional or international mechanism.

Hence, several interlinked elements are at play here, which Forum participants explored further: the legal profession requires education on international human rights standards; they require the necessary guarantees to exercise their profession independently, in order to be able to obtain effective remedies and reparation for the victims of human rights violations; and they must act with integrity.

Human rights law education

In order to realize the lawyers' role in obtaining access to justice for their clients, Forum participants noted that lawyers require the necessary knowledge of international human rights law as well as knowledge of constitutional and other domestic law. If qualification standards for the legal profession are too low, a lack of knowledge may interfere with access to justice.

One participant pointed out that education should not be limited to a specific course on international human rights law. Rather, international human rights law and standards should be integrated into constitutional law, criminal law and other courses. If not, there is a risk that international human rights law will appear to be a separate field, full of lofty ideals but unconnected to daily legal practice.

The legal profession's knowledge of international human rights is essential from two perspectives: firstly, for the purpose of defending a client's rights; and, secondly, as a matter of public interest. Indeed, it is the lawyer who can bring the proper interpretation of human rights law to the attention of the judge and, as such, lawyers have a role to play in helping judges to develop their knowledge of human rights law as well.

Furthermore, knowledge of international human rights law is important as part of a comprehensive litigation strategy. To be able to file a case before regional or international mechanisms, international law arguments need to have been exhausted in domestic proceedings. However, a participant

remarked that lawyers may be confronted with a dilemma in this regard because oftentimes presenting a complex argument based on international law and international human rights law at the domestic level may not be the most effective strategy. In that regard, a lawyer must weigh her or his client's best interests against pursuing a precedent-setting strategy based on international human rights law that is for "humanity's greater good". The question was raised how transparent a lawyer must be when advising her or his client in light of any such conflict.

In addition, knowledge of international human rights law is an important tool to kindle lawyers' creativity. For example, in Colombia, Brazil and Peru, lawyers defending indigenous peoples, peasant communities and others who see their interests affected by transnational companies are making creative use of ILO Convention No 169 (Indigenous and Tribal Peoples, 1989), rendering the Convention justiciable through domestic constitutional litigation. In another example, a participant again pointed to the revival of the Alien Torts Statute in the United States, and the way in which lawyers' creativity, inspired by international human rights law, has transformed the application of this private tort law.

Independence of the legal profession

An independent judiciary and legal profession, several participants pointed out, is essential for the realization of democracy. Autocratic regimes by definition do not allow for the independence of the judiciary or legal profession. However, elected governments do not necessarily equate to the existence of full democracies. The Inter-American Democratic Charter is illustrative in this respect, providing three essential elements for democracy: representative government with free and fair elections; the protection of human rights; and the independence of the judiciary and legal profession.

In order to realize the right to obtain an effective remedy, one participant called for consideration to be given to factors beyond judicial independence so as to also consider the safeguards of independence applied to lawyers, prosecutors and the broader legal profession and all judicial actors. The dismantling of the rule of law often begins with the judicial system, with other actors to follow soon. The case of Venezuela is illustrative in this regard. While elections still took place, the Government was implementing a policy of attacking the independence of the judiciary, both implicitly and explicitly. This policy began when the independence of the judiciary was designated a "bourgeois concept" that weakens the power of the people, not only by the Executive but also by the Chief Justice herself. Attacks on the impartiality of the prosecutorial services appeared soon after, coinciding with an increase in attacks on the legal profession.

The process started from the early 2000s onward, with the commencement of a system of favouritism whereby only those loyal to the regime were elected to the Supreme Court. The Supreme Court bench was filled with persons "loyal to the revolution", in the words of the

selection committee chairperson. This became a tool to implement the intervention in the rest of the judiciary. The majority of judges (up to seventy per cent) are now appointed provisionally. The lack of appointment procedure and tenure has had a chilling effect, leading to a lack of protection in politically sensitive cases. This attack on judicial independence has reverberated in the regional human rights system. Some of the leading cases before the Inter-American Court concerning the judicial career, including rulings on key elements regarding appointment, tenure and removal, originate from Venezuela. Some of these cases are very clear, as in the case of Judge Maria Lourdes Afiuni, who was publicly branded a "bandit" by President Chavez after she authorised the release of a prisoner who was being arbitrarily detained, and who has herself been arbitrarily detained ever since.

Attacks on lawyers in Venezuela began soon after the process of dismantling the judiciary had commenced. For example, lawyers' freedom of association came under attack, exemplified by the halting of several elections within Bar Associations. Concerning an election that had taken place already, the Executive suspended the elected representatives and put its own people in place. Lawyers who argue sensitive cases or who plead before the Inter-American Court of Human Rights (IACtHR) are accused in the media, and sometimes in criminal proceedings, of conspiring against the Government and are stigmatized as being "puppets of international capitalism". These actions are not limited to lawyers, but extend to other human rights defenders as well. In a case involving violence in prisons, a particularly pronounced problem in Venezuela, the IACtHR decided to apply provisional measures when a Government agent threatened a lawyer before the court. Another particularly egregious case involved José Amalio Graterol, counsel to Judge Maria Lourdes Afiuni among others. He was detained and criminal proceedings were initiated against him, making it impossible to fully represent his clients.

The evolution in Venezuela, demonstrative of an all-out incursion on the independence of the legal profession as a whole, provides examples of three varieties of attacks on lawyers that are by no means limited to this jurisdiction: harassment, persecution and intimidation of lawyers; the association of be lawyers with their clients' cause; and interference with the profession's freedom of association.

By way of further illustration, several Forum participants also discussed the situation in Zimbabwe, where members of the legal profession, including for example the former President of the Law Society, have been persecuted for fulfilling their professional duties. During election periods in particular, the Government has interfered with clients' access to lawyers. In some cases the authorities deem that suspects should be left to their own devices. Subsequent to taking up legal representation, these suspects' lawyers may often suffer arbitrary arrest and unlawful detention, abduction and/or torture or other ill-treatment.

In respect of Central America, it was noted that attacks on lawyers have been ubiquitous for decades. Some cases date back to the 1970s, concerning lawyers killed or forced to flee in exile, and still cause damage

today. Regarding the stigmatization of lawyers, one Forum participant pointed to the phenomenon of criminalization of protest, which affects the functioning of lawyers, as well as human rights defenders and community leaders, throughout Central and Latin America. In Honduras, the recent killing of human rights lawyer Antonio Trejo demonstrates that this phenomenon poses a real and physical threat to the legal profession.

Some participants further noted that lawyers may enjoy better protection when they act as human rights defenders, as the latter are increasingly shielded by protection mechanisms. While traditionally the legal profession has been recognized in domestic legislation, the concept of a human rights defender finds its origins in international law.

Integrity of the legal profession

Forum participants also considered the relationship between independence and integrity. As with the judiciary, the flipside of independence is the risk of capriciousness, and hence independence needs to be balanced with integrity. This is reflected in the United Nations Basic Principles on the Role of Lawyers and other instruments that containing standards on the judiciary and legal profession, such as the International Bar Association's 2011 Principles on Conduct for the Legal Profession. Lawyers who act against their professional duties and ethics can be subjected to disciplinary proceedings. These must however follow due process and must not seek or serve to reduce the space for independence.

One participant noted that even where lawyers can and do use international human rights law to obtain a remedy for victims of human rights violations, lawyers representing the perpetrators often take advantage of obstacles in domestic law to prevent the operation of international law. To put an end to this practice, domestic laws that facilitate impunity must be reformed, but lawyers should also act in good faith and not abuse domestic laws and regulations.

Lawyers also carry the responsibility to not subvert international human rights and humanitarian law. An emblematic example in this respect are the "torture memos", a set of legal memoranda advising the Central Intelligence Agency, the Department of Defense and the former President of the United States, George W Bush, on the use by US authorities of so-called "enhanced interrogation techniques", i.e. coercion methods that are widely regarded as torture. A competent and ethical lawyer would have given a good faith rendering of the international human rights law and international humanitarian law and the US international legal obligations. John Yoo, the Deputy Attorney General who drafted the memoranda, and Jay Bybee, who signed off on them, instead provided legal cover for these practices, blatantly misapplying international law in the process. Moreover, they were not just acting on their superior's orders, but seemed willing to help embellish them.

Interestingly, the Bush Administration by-passed more appropriate choices for legal advice in the Department of Defense and the State Department and instead opted to ask John Yoo, who was a political

appointee in the Office of Legal Counsel. Later statements by CIA officials, who claim they acted lawfully based on legal authority, demonstrate the weight of these lawyers' actions. One participant noted that in the medical profession, these 'Schreibtischfolger' (an analogy with the term 'Schreibtischmörder' used to describe bureaucrats' role in the Holocaust) who are associated with torture practices are "blacklisted", and wondered if there should perhaps be a similar list for legal professionals. Another participant deplored that the current Obama Administration has chosen to continue the impunity, albeit – to its partial credit – under a slightly different legal framework.

It was also pointed out that in extreme cases, where advice leads to human rights abuses, a lawyer can incur criminal responsibility for bad faith interpretation of the law.

Operational aspects

Lastly, Forum participants during the second session discussed specific operational aspects that influence the lawyer's functioning.

The first of these was legal aid. Several participants pointed out that, in light of the lawyer's key role in securing access to justice, the State should provide for legal aid. If not, a victim's indigence could constitute a major barrier to her or his access to justice. In this respect, one participant pointed out that many gaps still exist, especially as regards the provision of legal aid in cases involving economic, social and cultural rights. Some countries, for example Botswana, are developing interesting programmes to improve the situation.

Secondly, a participant noted that the role of the lawyer seems to be expanding and is not necessarily limited to the courtroom. In Southern Africa, quasi-judicial bodies such as ombudspersons or national human rights commissions are expanding rapidly, gaining popularity because of their swift and straightforward procedures. Often, the State is the perpetrator in these cases and these bodies are producing a lot of interesting jurisprudence.

Thirdly, certain Forum participants pointed out that lawyers are frequently confronted with political interference in the course of prosecution. Hence, it is necessary to take a holistic approach when considering how to remedy gaps concerning access to justice and the role of the legal profession therein. One participant pointed to Colombia, as a particularly disturbing example, where alleged perpetrators often have links to the authorities and several prosecutors have strong ties to the military intelligence services and sometimes conspire to protect the real perpetrators.

Lastly, participants discussed technical problems associated with litigating before different courts in the same jurisdiction. In the example of Colombia, it is not considered problematic to invoke international law in domestic litigation and international law-based arguments are frequently presented and well received. However, it was pointed out that the role of

the lawyer varies by jurisdiction. Sometimes she or he may participate during the investigation phase onwards, through trial, whereas other times the lawyer can only take part in the trial proceedings themselves.

Session III: Looking over the shoulder: how do judges compare national integration of international human rights norms?

During the Forum's final session, participants looked into how judges compare the domestic integration of international human rights law and standards. Participants considered the development of the law, in particular in developing countries, and the potential influence and pitfalls of a comparative approach.

Development of the law

With reference to the words of former Chief Justice of Zimbabwe, Anthony Gubbay, a participant stated that the law in a developing country cannot afford to remain static. It must accommodate economic development, changes in social values and altering views of justice. If the law and its application are too far removed from the people, it will be cast off as being ill-suited to serve them. The relevance of courts, then, is buttressed by their ability to take progressive elements of foreign jurisprudence and adapt them, thus bringing changes taking place elsewhere to the people in their own country. The momentum for change can come from many sources, including international human rights law and international humanitarian law. Indeed, it has been shown that international treaties and standards have brought about legal change that places obligations on the domestic court.

It was pointed out that international law is not an attractive subject particularly for autocratic regimes, who claim that high human rights standards are incompatible with their country's tradition or socio-economic development. This attitude then results in a failure to allow their populations the full enjoyment of human rights and freedoms.

In this context, it is noteworthy that in many Southern African legal systems, international treaties are not automatically incorporated. For example, in Swaziland and Zimbabwe incorporation into domestic law requires an Act of Parliament. Sometimes, governments moreover accede to a treaty knowing full well how difficult – if not impossible – it will be to implement. Zimbabwe, for example, acceded to the UN Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) in 1991 but has not yet taken steps to remove incompatible domestic legislation. Botswana presents a similar situation.

With regard to the "tradition" argument, and elaborating on the example of women's rights in Zimbabwe, a participant raised the interaction between customary law and common law in the country. As these systems operate side by side, it was said to be unrealistic for the government to instantaneously implement international treaties to which it has become a party. Indeed, the Constitution provides that the law in matters of adoption, marriage, divorce, inheritance and personal law cannot be discriminatory if customary law applies, which stops the full application of international treaties such as the CEDAW. A law from 1982 concerning the

age of majority, which set the age at 18 years for both genders and was applicable for the purpose of any law including customary law, was for some time construed as liberating women from all kinds of discrimination. However, within ten years of promulgation, the Supreme Court decided that this Act did in fact not create any rights to women that they did not already have but rather conferred specific competence under certain circumstances. The Court decided that in customary law only a male could inherit property. This Constitutional provision that enables discrimination against women has proven difficult to remove, despite international commitments, as it would signify a departure from patriarchal societal organization and is seen by the political leadership as an assault on the "African way of life". While human rights instruments may be quite easily applied in the sphere of public law, it has proven more difficult in matters of private and personal law. Another participant noted that transforming international human rights norms into "our own norms" can be challenging, in particular in contexts where even the Constitution is a relatively new instrument. However, it was stressed that values, for example on issues of equal justice for both genders, may transcend legal differences and a lot can be learned from other legal cultures and systems.

Participants illustrated the complex relationship between customary and constitutional law in the Southern African sub-region with further examples, noting that even international law is not always clear on this matter. A participant referred to ambiguity within the African Charter on Human and Peoples' Rights. In Botswana, for instance, in a case involving "unnatural offences" (i.e., a homosexual relationship), the Attorney General was quoted as saying that cultural practice should be respected as it is practiced by 91 per cent of the population. On the other hand, the customary principle that provides for the last male child of a family inheriting his father's residence was deemed unconstitutional. In another case, the Court of Appeal found that a law that prevented indigenous people from drilling wells was inconsistent with their right to life, merely saying that water is life. By way of further example, the Constitution in Malawi prevails in the case of a conflict with customary law. In a case involving banishment for witchcraft, the court repatriated the accused and awarded reparations. After judges led the way in reconciling custom and law, powerful chiefs have stopped the practice. In a particularly disturbing example from Swaziland, in the case of *The Commissioner of Police and the Attorney General v Mkhondvo Aaron Maseko*, the Supreme Court seemed erroneously to have decided that the situation, which concerned the dispossession of cattle in favour of the King, was governed by customary law, and then declared a conflict of laws between customary law and civil law, despite a clear Constitutional provision declaring the supremacy of the latter.

Interaction between customary and written law is of course not limited to Southern Africa. In Chile, for example, customary practices of indigenous peoples are recognized when they do not conflict with written law. This has been a useful tool to settle conflicts within indigenous communities and in some cases to reach an agreement on water or land. In Guatemala, in a different example, the legal system is based on Roman-Germanic law

and indigenous custom. Although racism has resulted in the exclusion of the indigenous system, there have been advances since the Peace Accords. For example, combining customary principles and ILO Convention No 169, one judge has accepted a community to be part of a panel process on the basis of the common law. In the context of megaprojects implemented by transnational companies, participants stressed that it is important to make a strong effort to understand the cultures of affected communities.

Related to the above-mentioned unwillingness of States to accord their population human rights, freedoms and access to justice in these matters, Forum participants also devoted some time to the discussion of techniques used by governments to prevent the application of human rights law.

The use of amnesties has entrenched a culture of impunity in a number of countries. In Zimbabwe, for example, there has been a series of amnesty laws, starting with a 1980 amnesty related to the struggle for independence, which was followed by several more. The use of amnesties is of course not limited to Zimbabwe, but is prevalent throughout Central America as well.

Another technique is to amend the applicable law. In the Zimbabwean example, after prolonged detention on death row was declared illegal, the law was changed to accommodate this practice. Furthermore, when in 1989 the Supreme Court ruled that corporal punishment amounts to inhuman and degrading treatment, the Executive negated the decision and instead amended the Constitution to exempt young males from the prohibition against corporal punishment.

Advantages and challenges of a comparative approach

In some countries, the constitution explicitly provides that courts must have regard for international law. In South Africa, for example, the Constitution obliges the courts to do so and, in the same way, they may also consider foreign law. Accordingly, South African courts have a clear authority to enforce international law when they are confronted with a case where domestic law does not provide an appropriate solution, and they may also do so when it is not specifically required. The recently drafted new Constitution for Zimbabwe contains a similar provision.

Today, the legal and systemic compatibility of the legal systems in Southern Africa, which are based on Roman-Dutch law, facilitates the development of interaction between the courts. This compatibility means that the often progressive decisions of the South African Constitutional Court and the Supreme Court of Appeal, and even of the High Courts, are referred to with authority throughout the region.

While some participants concluded that this comparative approach may be helpful, they noted that there are a number of potential pitfalls.

First, judicial transplants and precedent-borrowing can lead to inconsistency or confusion within a jurisdiction and must only be done

after verifying the compatibility between the foreign and domestic legal systems. Judges must not simply align themselves with the international opinion, but must also evaluate the context of the precedent and similarities to their own jurisdictions. A number of Southern African jurisdictions have fallen into this trap, although because the South African Bill of Rights is very progressive – including rights that are not contained in other jurisdictions’ constitutions – this approach is to be welcomed, so long as one remains critical of the context.

Secondly, with reference to the judgments of Arthur Chaskalson in the Constitutional Court of South Africa, one participant noted that comparative jurisprudence is important in the early stages of transition, but that one must bear in mind that the task at hand is to construe a domestic constitution rather than an international instrument or the constitution of a foreign country. Accordingly, one can derive applicable principles from comparative jurisprudence but must not feel bound to do so, as due regard must be had for one’s own history and context.

Lastly, the judge must avoid using law from other jurisdictions merely to support her or his own preconceptions or as a tool to add force to a chosen position that is not supported by domestic law. A participant again underscored the importance of evaluation in light of the domestic law and context. The judge will otherwise risk reinforcing values that are not consonant with the prevailing values of her or his own society. This is particularly so in Africa, because of the dual system of law, where judges may otherwise unwittingly adopt a paternalistic attitude towards customary law and tradition simply because such law and tradition does not accord with their own values.

Closing remarks

By Stefan Trechsel, ad litem judge of the International Criminal Tribunal for the Former Yugoslavia

I have the task of saying something final and was tempted to do a summing up of sorts, but I think you will agree with me that we heard so many different points of view and aspects that this would be an impossible task within the limits of these closing remarks. I must also say: I am a European. I have practically always lived in Europe and to me, today has been very illustrative, recognizing how problems that we are not really familiar with exist in other parts of the world. I thank you all for teaching me so much.

One of the statements that fell very early this morning was that "everything depends on the legal profession". I fully agree: it is the lawyers who bear in the first place the flag of legal progress. Often courts, such as the European Court of Human Rights, are praised; but even when I was associated with that system, I always stressed that it is the lawyers who have the fantasy and bring new cases, thus bringing about development of the case-law.

It has been said, rightly, that lawyers also need training, as do the judges and prosecutors and in certain jurisdictions, apparently also the registrars. A specific characteristic of lawyers' training, however, is that no one can order them to attend. Judges, even when fully independent, still operate in an administrative framework: the Ministry provides the funds for the court and it may direct judges to take part in further education, which is the case in many countries. With lawyers one cannot do that, and moreover they lose billing hours; in my own experience, I have witnessed lower attendance rates with lawyers' trainings, explained by these reasons.

A further point that has been stressed, is the importance of the independence of judges and more generally, of a Rule of Law prevailing in a certain country. Without this, you can forget it all: it does not make sense to try and mend something on the sidelines when the government will not head decisions by the judiciary, for instance.

We should not be too optimistic about what training and other interventions can achieve, as at the basic level there is the need for a political will to limit power: the law is the rule of limitation of possibilities of the government. I have heard arguments to the contrary, for example in Russia when the question arose whether they could join the Council of Europe: in case of conflict between the law and the will of the Executive, it was sometimes argued that the practical thing must then happen; this attitude indeed disregards this limiting force of the law.

I am aware of the fact that probably in some African societies, the very dichotomist perspective we take to the law where things are either right or wrong, lawful or not, is not deeply rooted in the culture, which appears to be based more on taking part in a community than the more

individualist European society. These aspects must be taken into account when the ICJ goes to other countries to teach, to train, to try to bring about change. Let us be aware of the dangers of arrogance and a feeling of superiority: modesty and humility help to open doors, through which one can import ideas furthering the implementation of human rights.

Another point that was put forward early this morning and taken up by many is the idea that the central important person is the human being. How can one disagree?

However, I would venture to issue a warning. The idea that we look at the individual goes back to the administration of the law in the Roman Empire, i.e. equity or looking at the single case. But the law also has another function: it must be reliable. Hence, it may not always be possible to satisfy the needs of the individual: by corroding the rules of law and making them unreliable, one saps the force of the law and ends up worse than before. Many people will not know the law or their rights, or whether they will be respected or not.

In regards to the Rule of Law, I would like to touch on the idea of a clash between human rights and democracy itself. For instance Switzerland has on several occasions had considerable problems in this respect, because the people in popular referenda opted for solutions that are contradictory to fundamental rights. What must one do then? The government tries to play it low key and find compromises, but in the end it is a very difficult conflict.

I think when such a case comes to the European Court of Human Rights, the Court will decide and Switzerland will be bound whether they like it or not. However for a government, it is very embarrassing to be squeezed between an expressed will of the people and an international legal framework that is binding upon them.

To conclude, I will pick up an issue put forward by several speakers, namely the economic aspects. "*Pas d'argent, pas de Suisses*" is a not particularly flattering French saying, but in human rights to some extent "no money, no human rights" is not completely wrong. The organization of legal aid is one point, as is the staffing and the organization of the judiciary.

An anecdote may serve to illustrate this. In 1996, the Council of Europe charged me with examining whether Georgia was ready to join the organization. In the course of process, we heard a lot of allegations of corruption and judges being corrupted. At the end of the visit, President Shevardnadze received us and we raised this issue with him. He started laughing and said: "yes, I know, there are one or two", at which point I expected him to say – as I have often heard before – that there are a few black sheep but no systemic problem; but indeed he expressed the opposite, saying only a couple of honest judges are not corrupt. All the others, according to him, were corrupted because they cannot survive on their miserable salary. It does not stop with the salaries either: for

example today, one needs access to the Internet and electronic equipment, although I realize many can only dream of this.

When budgetary matters are discussed in Parliament, releasing funds for the construction of a hospital is easy as every Member can empathize. But when it comes to judges and prisons, they often do not realize how important this is to the health of the nation and prefer to allocate the money elsewhere.

Fundamentally important is motivation: to try and sell the idea that in the long run, it is only a State that respects the law, that is reliable in its dealings with the citizen and respects the rights of individuals and the limits of its own power, which can prosper. This also means economic prosperity, as foreigners will be very reluctant to invest in a country when they think they will not have access to the court or be faced with corrupt judges deciding on the wishes of the political rulers.

Thank you for your attention.

Annex I: Agenda

09.15-09.45 Welcome and registration of participants

09.45-10.00 Opening ceremony

10.00-12.30 Session One:

The domestic court, caught between universality and domestic particularities?

Domestic courts, whether directly or indirectly, increasingly take into account international human rights norms when adjudicating on cases involving human rights. However, different from the international human rights systems from which these norms are derived, the domestic court operates in a particular national political, socio-economic and cultural context. As such, while applying international human rights norms, domestic actors can get caught in the inherent tension that exists between the universality of these norms on the one hand and on the other hand, the fact that universality does not imply uniformity and that account must be taken of what the 1993 Vienna Declaration has dubbed "national and regional particularities and various historical, cultural and religious backgrounds".

The first session of the Forum focuses on this particular field of tension and the practical questions that arise from it. How can a domestic court be mindful of the relevant international human rights norms the State – of which it forms a structural component – has committed to, while having due regard for its own particular national context? How are domestic human rights standards interpreted consistently with international standards when operating in the domestic legal framework? What are in this respect the differences between incorporated and unincorporated standards; between self-executing and non-self-executing norms; between the effects on constitutional, statute or common law; or between "black letter law" and soft law instruments (to name but a few of the issues at play)? And perhaps most importantly: how can and should this process be used to further integrate international human rights norms into domestic law in a legitimate manner, thus advancing victims of human rights violations' access to justice on the domestic level?

Speaker Professor Sir Nigel Rodley

Comments Justice Azhar Cachalia

Facilitator Dr. Ian Seiderman

Debate

12.45-13.45 Lunch break

International Conference Centre Geneva

13.45-15.15 Session Two:

Strengthening the protection of international human rights norms through domestic litigation: the role of the lawyer.

Lawyers, as one of the pillars upon which human rights and the Rule of Law rest, play an essential role in advancing the victims of human rights violations' access to justice. The Forum's second session will focus on one aspect of this function, namely the role of the lawyer in the application of international human rights norms at the domestic level.

The issues raised during the first session demonstrate that the application of international human rights norms in the domestic context is not a straightforward process; the status of the international norm and the particularities of the national legal context indeed greatly affect their actual impact and effect. Lawyers, then, face a challenging task in navigating these complexities as they try to obtain justice for their clients in their particular domestic context. But how can they make optimal use of the interplay between domestic law and international human rights law? How can they use international human rights law, in its different shapes and forms, as a tool in the context of domestic human rights litigation, whether pertaining to constitutional, statute or common law? And how can they thus realize their role in furthering the protection of human rights norms and improving victims' access to justice in the domestic context?

Speaker Professor Carlos Ayala
Facilitator Professor Marco Sassoli

Debate

15.15-15.30 Coffee break

15.30-17.00 Session Three:

Looking over the shoulder: how do judges compare national integration of international human rights norms?

Many courts, when confronted with questions pertaining to the interpretation of international human rights norms, in their deliberations do not only look at the international jurisprudence, but also ask how high courts in other countries have gone about dealing with similar questions, in a process that could tentatively be called "comparative international law". Are there particular techniques to be applied in this regard, and what are the pitfalls? Are there principles or guidelines to be designed to coordinate this particular interaction between domestic courts? Again we centrally ask: how can this process be used to strengthen international human rights norms and to further their integration into domestic law and improve victims' access to justice?

Speaker Justice Moses Hungwe Chinhengo
Facilitator Professor Theo Van Boven

Debate

17.00-17.30 Closing remarks

Speaker Justice Stefan Trechsel

Annex II: List of Participants

Mr Federico Andreu, *Colombia*

Professor Carlos Ayala, *Venezuela*

Justice Azhar Cachalia, *South Africa*

Justice Moses Chinhengo, *Zimbabwe*

Justice John Dowd, *Australia*, ICJ Vice-President

Justice Ketil Lund, *Norway*

Justice Qinisile Mabuza, *Swaziland*

Mr Emmanuel Magade, *Zimbabwe*

Justice Thomas Masuku, *Swaziland*

Justice Charles Mkandawire, *Malawi*

Justice Sanji Monageng, *Botswana*

Ms Manon Montpetit, *Canada*

Justice Suntariya Muanpawong, *Thailand*

Mr Alec Muchadehama, *Zimbabwe*

Professor Pedro Nikken, *Venezuela*, outgoing ICJ President

Justice Michèle Rivet, *Canada*, ICJ Vice-President

Professor Sir Nigel Rodley, *United Kingdom*, incoming ICJ President

Mr Belisario dos Santos Junior, *Brazil*

Mr Alejandro Salinas, *Uruguay*

Professor Marco Sassoli, *Switzerland*

Mr Douwe Sikkema, *the Netherlands*

Justice Stefan Trechsel, *Switzerland*

Professor Theo Van Boven, *the Netherlands*

Mr Saïd Benarbia, *ICJ Senior Legal Adviser, Middle East and North Africa Programme*

Mr Ramón Cadena, *ICJ Director, Central America Regional Office*

Ms Leah Hocht, *ICJ Legal Adviser, Women's Human Rights*

Mr Laurens Huetting, *ICJ Associate Legal Adviser, Centre for the Independence of Judges and Lawyers*

Mr Carlos Lopez, *ICJ Senior Legal Adviser, Business and Human Rights*

Mrs Sandra Ratjen, *ICJ Senior Legal Adviser, Economic, Social and Cultural Rights*

Mr Ian Seiderman, *ICJ Legal and Policy Director*

Mr Wilder Tayler, *ICJ Secretary General*

Ms Ilaria Vena, *ICJ Associate Legal Adviser, Centre for the Independence of Judges and Lawyers*

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