

A map of West Africa is shown in shades of orange and yellow against a blue background representing the ocean. The title 'THE WEST AFRICAN JUDICIAL COLLOQUIA' is centered over the map in a bold, purple, serif font. A black silhouette of a gavel is positioned in the lower right quadrant of the map, pointing towards the bottom right corner.

# THE WEST AFRICAN JUDICIAL COLLOQUIA

DAKAR, SENEGAL – JANUARY 2006

ACCRA, GHANA – OCTOBER 2007

**ORGANIZERS** ■ Brandeis University ■ African Foundation for International Law  
■ Faculty of Law of the University of Ghana ■ West African Research Center

With funding from

■ *The Ford Foundation*

■ *The JEHT Foundation*

■ *The Rice Family Foundation*

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This report of the West African Judicial Colloquia is available on line at:  
<http://www.brandeis.edu/ethics/internationaljustice/judicialcolloquia/index.html>

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# THE WEST AFRICAN JUDICIAL COLLOQUIA

**Dakar – January 2006**

**Accra – October 2007**

## **Background**

In 2002, the International Center for Ethics, Justice, and Public Life of Brandeis University inaugurated a program called the Brandeis Institute for International Judges (BIJ). This regularly occurring event convenes judges from across the spectrum of international courts and tribunals to discuss critical issues concerning the theory and practice of international justice.<sup>1</sup>

BIJ organizers observed that participating judges frequently remarked upon the important role to be played by national judiciaries in firmly establishing international law across the globe. In response, Brandeis decided to bring international judges together with their national counterparts for dialogue about the increasing interconnections that exist between international and national justice. The requirement by regional human rights bodies (the European Court of Human Rights, Inter-American Court of Human Rights, and African Court of Human and Peoples' Rights) that plaintiffs first exhaust domestic remedies before bringing a case before their courts is an important example of the necessary cooperation that must take place between national and international judicial systems. The “complementary principle” of the International Criminal Court, whereby the court will not consider a case unless a national judiciary is either unwilling or unable to do so, is another. More generally, many domestic judges are called upon to ensure their own states' compliance with international treaties to which they are parties, or they may find it helpful to cite the case law of international courts in their decisions. Judges in the Brandeis network agreed that the opportunity for international and national judges to discuss the challenges and benefits of such interconnections, in an intimate and informal setting, would benefit all.

The West African Judicial Colloquia were the first events to be organized with this aim. The first took place in Dakar, Senegal, in January 2006 and the second in Accra, Ghana, in October 2007. Participants included justices from supreme and high courts from around the West African region and judges serving on a variety of international courts and tribunals. This report summarizes the proceedings from each Colloquium and the follow-up activities that have been suggested by participants. Brandeis University and the organizations with which it partnered in the planning and execution of these two events plan to facilitate such activities to the extent possible.

The West African Colloquia were supported by generous grants from the Ford Foundation and the JEHT Foundation, with additional funding from the Rice Family Foundation.

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<sup>1</sup> [http://www.brandeis.edu/ethics/international\\_justice/bij.html](http://www.brandeis.edu/ethics/international_justice/bij.html)

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# Connecting International and National Justice

## THE 1st WEST AFRICAN JUDICIAL COLLOQUIUM

Dakar, Senegal – January 2006

From 9 to 11 January 2006, the International Center for Ethics, Justice, and Public Life of Brandeis University<sup>2</sup> and the West African Research Center (WARC)<sup>3</sup> hosted the West African Judicial Colloquium in Dakar, Senegal. Twelve high court judges from the sub-region, four international judges, and eight other legal specialists gathered in Dakar for the event, the aim of which was to foster an exchange of experience and expertise between national and international judges. Participants included national judges from Benin, Burkina Faso, Cape Verde, Chad, Guinea Bissau, Guinea Conakry, Liberia, Mali, Niger, Nigeria, Mauritania, and Togo. International judges attended from the International Criminal Court, the International Criminal Tribunal for the former Yugoslavia, and the International Criminal Tribunal for Rwanda. Presenters included law specialists from Canada, Nigeria, Senegal, South Africa, and the United States.

The first day of the Colloquium opened with welcome addresses from Daniel Terris, the Director of the International Center for Ethics, Justice, and Public Life of Brandeis University, Colloquium co-director Richard Goldstone, and the Director of the West African Research Center, Ousmane Sene. The Colloquium was held at the Hotel Méridien Président in Dakar.

Following the opening addresses were two morning sessions: “Basic Rights and Human Rights in International and National Jurisdictions” and “National Courts and the Use of International Law - the Experience of South Africa.” The first session was led by Colloquium co-director Babacar Kante, Professor of Law at the Université Gaston Berger de St. Louis and Vice President of the Senegalese Constitutional Council, and the second by Justice Richard Goldstone, retired justice of the Constitutional Court of South Africa.



Ambassador Abdallah Ould Abdallah, UN Special Envoy to West Africa, introduces Richard Goldstone (left) to Cheikh Tidiane Sy, Minister of Justice, at the opening ceremony.

The Colloquium’s keynote address was delivered that afternoon by Ambassador Ahmedou Ould-Abdallah, Special Representative of the United Nations Secretary General in West Africa.<sup>4</sup> The keynote session, held on the campus of the Université Cheikh Anta Diop de Dakar, was chaired by the Senegalese Minister of Justice, His Excellency Cheikh Tidiane Sy. The keynote was followed by an elegant and lively reception held in the gardens of WARC, where guests were entertained by the ever-popular Senegalese band, l’Orchestre Baobab.

During the next two days, sessions continued at the Hotel Méridien Président. Topics included “Judicial Independence,” “The Application of Human Rights Treaties in Africa,” “Relations among Law, Custom, and Religion in Africa,” “The Death Penalty in National and International Jurisdictions,” “The Importance of Judicial Dialogue,” and “The New African Court of Human and Peoples’ Rights:

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<sup>2</sup> <http://www.brandeis.edu/ethics/>

<sup>3</sup> <http://www.warc-croa.org/>

<sup>4</sup> See page 9 for the entire text of this keynote address.

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Opportunities and Challenges.” Each session included an hour-long discussion among participants, where the issues raised by the session leader were debated in a frank and even provocative manner.

### Session summaries

Babacar Kante’s opening session set the stage for the rest of the Colloquium by raising a problem of judicial interpretation that has both philosophical and pragmatic ramifications — the nature of basic rights and human rights. Both national and international judiciaries base their judgments, in part, on conceptions of human rights found in their constitutions or various legal instruments. On the national level, such conceptions may come from the domestication of international treaties or from constitutions drafted from the ground up. Regardless of the document, discussions of human rights will often refer to both “public freedoms” and “fundamental rights” without differentiating between the two. A question that national and international judges must consider in their work is whether to establish a hierarchy in the protection of rights.

At the heart of the debate is the definition of “fundamental rights.” To some, those words describe freedoms to which all human beings are entitled and which cannot be taken away, the right to life being a primary example. Others see all rights allowed by a state to be fundamental rights and do not see a need to differentiate among them. In their eyes, the right to demonstrate and the right to life should be equally protected by law.

However, Kante pointed out, classifying a right as “funda-

mental” does not mean that the right will be guaranteed. Few would argue that every individual has a basic right to education, employment, and housing; yet all of those are subject to the economic capacity of the state. Does calling them “fundamental rights” put them in the same category as freedom from rape or torture, violations of which can be tried in a domestic or international court? As one participant noted, “I don’t know of a country where a citizen who is unemployed can sue the government for it. That is an objective of a fundamental value, but not a fundamental right.”

Several participants noted that one right is often restricted to make room for another. If a judge is put in a position to rule on the legality of a garbage worker strike, for example, he or she will invariably have to balance the right to strike with the right of citizens to have certain public services provided. Whatever decision is made will infringe on someone’s rights and establish a *de facto* hierarchy, if only in that particular case.

It is in those cases where participants saw the discussion of fundamental rights as being most applicable to their work. Simply classifying a right as fundamental or otherwise does not necessarily determine whether an individual will value that right more or less than another. As one participant put it, “Who is deciding on the nature of fundamental rights? The plaintiff. When you feel you are violated, it is you who decides.”

In the end, there was general agreement among the assembled judges that establishing a fixed hierarchy of rights



Justice Kassoum Kambou of Burkina Faso elaborates a point, observed by his colleagues from (left to right) Guinea Bissau, Chad, and Niger.



Justice Claire L'Heureux-Dubé of Canada (left) and Professor Aminata Sow Sidibe of Université Cheikh Anta Diop lead a session on the implementation of human rights treaties in Africa.

was an interesting academic exercise, but not a practical one. Judges must approach their work in the same way an individual decides when his or her rights have been violated: on a case-by-case basis. If a plaintiff's concern was not heard because it contradicted some theoretical hierarchy of rights, justice would not be served. It is important for each ruling to be achieved after a consideration of the facts at hand to ensure that personal, public, and national concerns are being adequately balanced.

Abdoullah Cissé, Professor of Law and Dean of the law school of the Université Gaston Berger de St. Louis, raised an equally important question in his session — that of the relationship among law, custom, and religion in Africa. Since African judges are often called upon to consider both customary and religious practices in the course of their legal work, it would be helpful if their relationship could be better understood. Cissé characterized this relationship as taking three possible forms: harmony, disorder, or vagueness. In other words, custom and religion may reinforce the law but through different means, these three systems may contradict one another, or it may be unclear, in fact, exactly what their relationship is.

Participants raised a number of issues in the ensuing discussion. The question of inheritance and land tenure came up several times, as these are issues that tend to be settled according to customary and religious practices instead of the codified law in many countries. The result is that women are frequently disadvantaged in the outcomes, and yet they often feel pressure not to appeal to their legal rights in these matters.

Several judges objected to the opposition drawn between custom and law. One supreme court justice asked what is the law in Africa besides codified French custom. If Africa had colonized the West, then African custom would be the basis of law around the world, just as Western legal concepts have become dominant.

The session led by Amsatou Sow Sidibé on the implementation of human rights treaties in Africa also elicited some strong reactions. African states are in the habit of signing any treaty that comes along, she observed, without necessarily having the capacity or even the political will to enforce it. Sidibé characterized judges as “the custodians of human rights.” Yet several judges in attendance noted that they are not even aware of the content of some of the treaties signed by their own states, since the documents are not made available. So it is clear that they cannot implement the provisions of these treaties through their own judicial decisions. Furthermore, parliaments need to pass legislation that enables judges to enforce the treaties that have been signed.

Sidibé suggested that the notorious lack of protection of human rights in Africa is a result of various administrative obstacles, including corruption and the protection and resulting impunity of national leaders who have abused their own citizens' rights. Charles Taylor, ex-president of Liberia, who was in exile in Nigeria at the time of the Colloquium, and former Chadian president Hissène Habré, whom Senegal has declined to extradite, are cases in point. Furthermore, the way in which many African nations ratify treaties “with reservations,” thus allowing custom and religion to take precedence when they are in conflict with international norms, empties the original treaties of their meaning. Sidibé concluded by suggesting that an advocacy campaign for the more effective implementation of human rights conventions is very much needed on the continent.

The ongoing problem of threats to judicial independence in West Africa was also a theme that resonated deeply with Colloquium participants. It was striking to hear the candor with which judges spoke about this challenge, whether the threats they experienced came directly from an overly controlling executive branch in their governments or less directly through the lack of an independent budget process

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for the judiciary. Judges pointed out the need for appropriate living and working conditions that would lessen the vulnerability of the judiciary to outside influence. Judge El Hadj Malick Sow, coordinator of the Senegalese Committee for Human Rights and leader of the session on judicial independence, noted the importance of constant mobilization and unflagging solidarity among magistrates and judges in order to ensure their ability to carry out their work independently. He asked participants to imagine a system in the West African sub-region that would be charged with monitoring judicial independence.

In another session, the idea of “judicial dialogue” inspired a variety of reactions by Colloquium participants. Claire l’Heureux-Dubé, retired Justice of the Supreme Court of Canada, is committed to the notion of sharing jurisprudence and knowledge across judiciaries. She exhorted the assembled judges to inform themselves of decisions made by other courts, both national and international, and to incorporate this other jurisprudence into their own legal thinking. Judges cannot afford to be parochial in this age of globalization, l’Heureux-Dubé said; the world is now characterized by “justice without borders.”

Richard Goldstone noted in his session that some nations are more supportive of this use of foreign jurisprudence than others. The Constitutional Court of South Africa is required to look at international law in making its decisions, and its interpretations must be consistent with this law. Furthermore, the court is invited to look at foreign law, that is, the domestic law of other nations. The United States Constitution, on the other hand, makes no specific provision for the use of foreign jurisprudence and the U.S. Supreme Court has several justices who are outright hostile to the idea that the decisions of either international courts or other national courts might be relevant to their work.

Several of the judges had questions about the primacy of national constitutions over international law or vice-versa. How are such controversies to be resolved? Does international law need to be “domesticated” in order to be referenced by judges? Has the South African government, in asking its judges to look at foreign and international law, made provision for their education in these two bodies of law? Many African judges noted that their courts are not equipped so as to allow them access to the decisions

of other courts and there is no room in their budgets to develop this kind of dialogue.

One situation where national courts must take international obligations seriously involves extradition and the death penalty. In a session building on Richard Goldstone’s theme of the use of international and foreign law, Professor Linda Carter noted the applicability of the International Covenant on Civil and Political Rights (ICCPR) in most countries of the world. Under the treaty, there is an obligation, developed through interpretations by the U.N. Human Rights Committee, that no country *without* the death penalty may extradite a person to a country *with* the death penalty without assurances that a death sentence will not be imposed. It is thus imperative that countries without the death penalty be aware of the decisions of the Human Rights Committee. In addition to the binding obligation of the ICCPR on any state that is a party to the treaty, it is also useful as a reference for national courts to know the jurisprudence of other national courts that have had to restrict extraditions because of the death penalty, either due to the obligation under the ICCPR or under their own national constitutions.

Parallels between national constitutions is another area in which national courts benefit from the interpretations of other national courts. One example offered during the session was the interpretation by the Constitutional Court of Uganda of its provision on “cruel, inhuman, or degrading treatment or punishment.” In the course of deciding whether a mandatory death sentence and whether a



Dan Terris of Brandeis University (right) relaxes between sessions with Justice Yussif D. Kaba of Liberia.

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lengthy time on death row violated this constitutional provision, the Ugandan Court used decisions from national courts with similar provisions (e.g., India, Nigeria, South Africa, Tanzania, Jamaica, and Zimbabwe) as nonbinding references in interpreting its own constitution. Even the United States Supreme Court has recently referred to international and foreign jurisprudence in deciding two death penalty cases. In both cases, the Court used the references to support its conclusions that the execution of the mentally retarded and of those who were juveniles at the time of their crimes were unconstitutional. The conclusion of this session's discussions was that the use of international and foreign law is useful in decision making on national courts, and efforts must be made so that all courts have access to these sources.

A related issue raised during the Colloquium was that of social context and how much influence it should have in the face of “universal” — or international — norms. Many speak of the promotion of “positive African values” as a way to resolve some of the conflicts seen to exist between local practices and international standards, for example in the status of women or the treatment of children. One judge noted that “because we are guardians of justice and values in our countries, we are daily concerned with what are positive practices. But we need to remember that values are always evolving.” This is an important point to remember in Canada as much as in Africa, observed l’Heureux-Dubé. Judicial dialogue can only be effective if all stakeholders are heard.

### **The start of a regional judicial network**

The discussions that took place during the first West African Judicial Colloquium represented an important step in establishing connections between international and national judicial systems and their practitioners. These connections are becoming increasingly important. The African Court of Human and Peoples’ Rights, whose inaugural bench was elected in January 2006, calls for the exhaustion

of domestic remedies before it will consider a case. Chidi Odinkalu, of the Africa Open Society Justice Initiative, took advantage of the presence of participants from around the continent to bring up some of the problems that the Court is already facing, and how judges and legal experts across systems can work together to resolve them. The complementarity that is required between national courts and the International Criminal Court (ICC) in bringing criminals to justice will also lead to increased contact between judicial systems. The presence of two ICC judges at the Colloquium created the opportunity for interesting reflections on the obstacles as well as opportunities inherent in such cooperation with their national counterparts. Finally, the legality of the death penalty in many African nations and the effect of international law on its application are issues that will certainly arise, observed Professor Carter, as national and international judicial institutions work together to bring about justice on the continent.

The Colloquium was formally concluded on 11 January, with addresses made by the sponsoring organizations (WARC and Brandeis University) and the Colloquium directors, Richard Goldstone and Babacar Kante. The West African Judicial Colloquium provided participants with a chance to share their expertise and learn from others in a spirit of open exchange and exploration. Many of the participants voiced their desire for follow-up programming to the Colloquium, noting the ability of such encounters to enhance their judicial performance and expand their network of professional contacts. Continued conversations will enhance further cooperation and dialogue across courts, both domestic and international, and among those who serve on them. Such dialogue will ultimately contribute to the promotion of justice and human rights across the globe.

1ST WEST AFRICAN JUDICIAL COLLOQUIUM  
9 JANUARY 2006 - DAKAR

## *Meeting the Justice Challenge in Africa: Independence, Cooperation, and Conflict Prevention and Resolution*

**Ahmedou Ould-Abdallah**

Special Representative of the Secretary General of the United Nations for West Africa

Senior Minister Mr. Cheikh Tidiane Sy, Honorable Judge Goldstone, Professor Babacar Kante, honorable guests, ladies and gentlemen:

The choice of Dakar to host this meeting is appropriate. It is a symbol of support for the recent efforts made in Africa in judicial matters, especially with the establishment of the African Court for Human and Peoples' Rights and the sustained actions of international tribunals such as those in Rwanda and Sierra Leone. In that respect, I would like to thank the International Center for Ethics, Justice, and Public Life of Brandeis University and the West African Research Center for their achievement and the quality of the organization. I would also like to give special thanks to Prof. Babacar Kante and, in particular, to Dr. Leigh Swigart, whose determination has been well demonstrated. The Brandeis Ethics Center, on whose Advisory Committee I am pleased to serve, is inaugurating today an enterprise of great public importance. The presence here of its director, Mr. Daniel Terris, testifies to this fact.

Today, justice can no longer be ignored. People demand it everywhere as much as they demand environmental protection and the control of HIV/AIDS. Due to globalization, peoples have become increasingly concerned by the necessity to protect citizens and communities against abuses of all kinds, first and foremost by the misuse of power by their own governments.

### **The importance of justice**

There is much work to do on the continent in the field of justice: the independence of judicial systems, their capacity building, their credibility, etc. Finding ways to address



Ambassador Ould Abdallah, UN Special Envoy to West Africa, delivers the 1st Colloquium's keynote address.

these challenges is very important for both populations and governments.

The United Nations Regional Office for West Africa (UNOWA) strongly believes that justice is a very important element for peace, stability, and development. Therefore, justice is very much a determining factor in preventing and resolving conflicts, and thus ensuring peace. UNOWA is prepared to ensure the follow-up of this meeting, in collaboration with its organizers.

The main theme of this colloquium is the relation between national and international justice. In order to fully understand this theme, I think we should consider what lies at the heart of our daily concerns about justice: impunity, the lack of respect of human rights, and the violation of humanitarian law in times of armed conflicts. These topics, along with women's rights, are some of the issues discussed during the 38th ordinary session of the African Commission on Peoples' and Human Rights, which was held in Banjul, the Gambian capital, less than three months ago.

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The violation of those rights dangerously hampers the development of a credible justice and, with it, a peaceful society as well as a balanced socioeconomic development.

### The independence of justice

Real justice implies first of all the credibility of the judiciary. It is important to ensure the independence of the judiciary across the continent because, otherwise, it would be difficult to think about genuine collaboration at the international level. But priority should be given to justice at the national level, in order to make sure that governments practice at home what they preach at the continental level.

Obstacles to the independence of justice are found everywhere in the world, but especially in Africa. There are a number of reasons for the persistence of these obstacles, including:

- a political culture still dominated by one-party system mentalities;
- the absence or non-respect of the constitutional state, considered as an unnecessary luxury;
- corruption, at times endemic, which brings discredit upon public institutions;
- a stranglehold by the apparatus of government on the judiciary;
- impunity, which is both the source of conflicts and the reason for their perpetuation;
- the obsolescence of administrative and physical infrastructure, which constitutes an obstacle to national integration and the emergence of a strong civil society.

Your colloquium will certainly address the development of mechanisms aimed at strengthening the independence of judges and enhancing efficiency in the administration of justice in Africa through:

- the professionalization of justice, particularly through the independence of judges and magistrates;
- the strengthening of the status of judges (which implies a renovation of infrastructures) and of their credibility through moral and financial support;
- an investment in the training of new generations of judges and lawyers;
- the depoliticization of high courts of justice;
- the setting up of professional or regulatory bodies as part of legal systems;

- compliance by public authorities with legal texts and procedures;
- strict enforcement of judicial decisions by the state.

The establishment of a politically sound environment, allowing the respect of basic human and citizens' rights, is thus a *sine qua non* for the emergence of a truly independent justice.

### Judicial cooperation

Judicial cooperation between states and the complementarity of national justice systems present a challenge but are absolutely necessary. Such cooperation implies that states strictly respect the above-mentioned principles. Furthermore, for more effective cooperation, states should be on the same wavelength. They should therefore make sure that both texts and treaties are harmonized and that mutual assistance is forthcoming, both at the African regional and international levels.

West and Central Africa have already made important progress in harmonizing business law. One of those achievements is the OHADA treaty (Organization for the Harmonization of Business Law in Africa), which has succeeded in establishing the supremacy of community law over national law, and creating a single institution for control and conflict resolution. But justice is a work in progress. Tremendous efforts should be made to harmonize national legislations (on the trafficking of children, the proliferation of light arms, the fight against corruption, etc.) and to unify jurisprudences. Such efforts should be made at the following two levels:

(1) Between African states:

- ratification, application, and enforcement of existing treaties;
- compatibility of systems (French-speaking vs. English-speaking vs. Portuguese-speaking...), following the example of Europe;
- strengthening exchanges in terms of practice; and
- creation of vocational or advanced training institutions in the sub-region.

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(2) Between African states and the rest of the world

- Establishment and strengthening of treaties and conventions on legal assistance;
- Strengthening of institutional relations; and
- Assistance in training and exchanges.

### **Judicial systems, conflict prevention, and resolution**

As for the United Nations, it can play an important role in the:

- establishment of basic humanitarian standards;
- resolution of conflicts (the example of the Bakassi Peninsula);
- creation of special international criminal courts;
- fundamental issue of impunity and its role in cycles of violence should be stressed here.

I would like to conclude with a certain number of issues that concern us all.

- The need for justice becomes indispensable in the context of globalization. It has become a precious consumer good for all citizens. The need to protect populations and individuals, especially against the misuse of power by governments, is a necessity for these modern times.

- “There will be no more justice behind closed doors.” It is more than ever accepted that, as Martin Luther King once said, “Injustice anywhere is a threat to justice everywhere.” As a result, it is our responsibility to protect everybody by recalling their rights and by defending them whenever there is an injustice.
- This is not about giving up national sovereignty, but rather about strengthening the constitutional state so that it can serve the most vulnerable. Of course, the feeling that there exists a double standard or two sets of rules, which comes out in some situations, may suggest the rejection of international law by some peoples. The credibility of the law and decisions of major international organizations is essential to their own legitimacy.
- Today, the struggle for justice should be carried out with the same resolve as the struggle against poverty, which it can help alleviate.
- While the debate on issues surrounding national and international law goes on, it is urgent to explore the cultural legacy of African countries in the area of customary law. This would help strengthen local justice in those countries and in other places where the majority of the people still live in traditional societies.

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# Participants in the 1st West African Judicial Colloquium

## DIRECTORS

**Richard GOLDSTONE**, retired Justice of the Constitutional Court of South Africa and former Chief Prosecutor of the International Criminal Tribunal for the former Yugoslavia

**Babacar KANTE**, Professor of International Law at l'Université Gaston Berger in St. Louis, Senegal, and Vice President of the Conseil Constitutionnel du Sénégal

## JUDGES

**Victor D. ADOUSSOU**, Justice of the Supreme Court of Benin

**Amar BALDE**, Advocate General of the Supreme Court of Guinea

**Abderahim BIREME HAMID**, President of the Supreme Court of Chad

**Fatoumata Dembele DIARRA**, Judge of the International Criminal Court

**Ribeiro Fernando JORGE**, Justice of the Supreme Court of Guinea-Bissau

**Yussif D. KABA**, Justice of the Supreme Court of Liberia

**Kassoum KAMBOU**, Justice of the Supreme Court of Burkina Faso

**Etienne KENE**, Justice of the Supreme Court of Mali

**Arlindo MADINA**, Justice of the Supreme Court of Cape Verde

**Bouba MAHAMAN**, President of the Supreme Court of Niger

**Florence Ndepele Mwachande MUMBA**, former Judge of the International Criminal Tribunal for the former Yugoslavia, Justice of the Supreme Court of Zambia

**Mohamed OULD HANNANI**, President of the Supreme Court of Mauritania

**Navanethem PILLAY**, Judge of the International Criminal Court

**Fausto POCAR**, President of the International Criminal Tribunal for the former Yugoslavia

**Tètê Théodose TEKOE**, President of the Supreme Court of Togo

**M.L. UWAIS**, Chief Justice of the Supreme Court of Nigeria

**Andrésia VAZ**, Judge of the International Criminal Tribunal for Rwanda

## SESSION LEADERS

**Linda CARTER**, Professor of Law and Director of the Criminal Justice Concentration at the University of the Pacific, McGeorge School of Law

**Abdoullah CISSÉ**, Professor of Law and Dean of the Law School at the Université Gaston Berger de St. Louis, Senegal

**Claire L'HEUREUX DUBÉ**, retired Justice of the Supreme Court of Canada

**Chidi Anselm ODINKALU**, Senior Legal Officer for the Africa Open Society Justice Initiative

**Amsatou Sow SIDIBÉ**, Professor of Law, Director of the Institute for Human Rights and Peace at the Université Cheikh Anta Diop de Dakar

**Judge El Hadji Malick SOW**, Coordinator of the Senegalese Committee for Human Rights

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### Staff of the International Center for Ethics, Justice, and Public Life, Brandeis University

**Daniel TERRIS**, Director

**Leigh SWIGART**, Director of Programs in International Justice and Society

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### Staff of the West African Research Center

**Ousmane SENE**, Director

**Moulaye KEITA**, Colloquium Coordinator

**Abdoulaye NIANG**, Director of Administration and Telecommunications

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# Promoting Judicial Independence and Access to Global Jurisprudence

## THE 2<sup>ND</sup> WEST AFRICAN JUDICIAL COLLOQUIUM

Accra, Ghana – October 2007

From 8-10 October, the International Center for Ethics, Justice, and Public Life organized the 2nd West African Judicial Colloquium around the theme “Promoting Judicial Independence and Access to Global Jurisprudence.” The Faculty of Law of the University of Ghana and the African Foundation for International Law partnered in the organization of the 2nd Colloquium, with principal funding provided by the Ford Foundation. Participating judges hailed from Benin, Burkina Faso, Chad, The Gambia, Ghana, Guinea, Ivory Coast, Liberia, Mali, Mauritania, Niger, Nigeria, Senegal, Sierra Leone, and Togo.

The 2nd Colloquium, held in Accra, Ghana, at the Fiesta Royal Hotel, aimed to build upon the experience of the first by furthering efforts to create a strong and sustainable network among supreme and high court judges in West Africa. Participants at the 1st Colloquium considered that such a network would help them to remain independent in their judicial work and create an opportunity for expanded judicial dialogue, both of which are fundamental to well-functioning judiciaries. The program of the 2nd Colloquium was designed both to enhance the networking begun in Dakar and to provide critical information about how judges can access and utilize legal decisions from other national courts as well as the international courts. Six judges from the first Colloquium attended the second as well, which reinforced the sense of judicial community first fostered in

Convenors and speakers preside at the opening ceremony of the 2nd Colloquium in Accra.

Dakar. Several participants also had international judicial experience.

The Colloquium began with an opening ceremony, presided by Professor Clifford Nii-Boi Tagoe, Vice Chancellor of the University of Ghana. Welcoming remarks were offered by Professor Henrietta Mensa-Bonsu, acting Dean of the Faculty of Law of the University of Ghana; Dr. Leigh Swigart, Director of Programs in International Justice and Society at Brandeis University;<sup>5</sup> Fatsah Ouguergouz, Judge of the African Court of Human and Peoples’ Rights and Executive Director of the African Foundation for International Law;<sup>6</sup> Georgina Wood, Chief Justice of the Supreme Court of Ghana; and Joseph Gitari, Human Rights Program Officer of the Ford Foundation – West Africa. These remarks were followed by the colloquium’s keynote address, delivered by Professor Justice Modibo Ocran of the Supreme Court of Ghana, which focused on the way in which global legal norms can be received into national legal systems around the world.<sup>7</sup>

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<sup>5</sup> [http://www.brandeis.edu/ethics/international\\_justice/index.html](http://www.brandeis.edu/ethics/international_justice/index.html)

<sup>6</sup> <http://www.afil-fadi.org/>

<sup>7</sup> See page 29 for the entire text of this keynote address.





Ghanaian drummers ended the opening ceremony with traditional entertainment.

### The view from national judiciaries in West Africa

In the introductory session, participating judges had the opportunity to speak briefly about the successes and challenges of their respective courts. Virtually every judge reported that his or her court is not allocated sufficient resources to operate optimally. This means that courts do not have enough staff, including legal assistants and researchers, and salaries and working conditions are considered sub-standard. While most supreme and high courts in the region have a library or resource center, they often lack sufficient information and communications technology, and when it exists the court staff may not know how to utilize it to full advantage. Many judges do not have their own computers or Internet access, while realizing full well how important they are for accessing foreign and international legal sources. Furthermore, judges would like to see their own courts' decisions made available on-line so they can be easily accessed by others. Some judges noted that corruption and threats to judicial independence are not unknown in their countries. Others remarked that it is difficult to implement decisions that have ruled against the state. The majority of judges expressed a desire for ongoing judicial training and increased dialogue with fellow judges in West Africa and elsewhere.

On the positive side, some judges reported that their courts, in recent years, have decreased case backlogs and shortened delays in their judicial systems. The justice from Niger reported that computerizing his court's case

management system has improved its performance in this area. The Ivorian participant noted that recent cases in his court have demonstrated to citizens that it is possible to win a case against the state itself, and citizens also feel increasingly empowered to challenge the legality of certain decisions. The Gambian Chief Justice observed that progress has been made in instituting alternative dispute resolution in his country, which has lessened the need for litigation, and furthermore that the benches of the highest courts are increasingly made up of Gambians instead of nationals of other Commonwealth countries.<sup>8</sup> Justices from Benin and Mauritania noted that they are currently working in favorable political environments and feel that their independence is formally ensured. The Nigerian judge spoke of an anti-corruption commission that has been established in his country and a society-wide move to eliminate corruption from the public sphere, including the judiciary. Finally, the Sierra Leonean and Liberian participants described the progress that their judiciaries have made in recent years, as their countries recover from situations of civil conflict and the disruption in basic services that resulted.

All participants expressed an eagerness to learn from one another and an appreciation of the opportunity provided by the Colloquium.

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<sup>8</sup> Judges from Commonwealth countries are sometimes appointed to the benches of other Commonwealth countries.

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## Dialogue across borders and cross-fertilization

A number of sessions in the Colloquium addressed the issue of how national judges can open themselves up to outside sources of law and legal thinking in order to enrich their own judicial work. The first such session was entitled “The Use of International and Foreign Law in National Judicial Decision-Making.” It was led by Emmanuel Ayoola, Vice President of the Special Court for Sierra Leone<sup>9</sup> (SCSL), and formerly Judge of the Supreme Court of Nigeria, President of the Seychelles Court of Appeals, and Chief Justice of the Supreme Court of The Gambia. Justice Ayoola brought to his topic the dual perspective of someone experienced in both international and national judging.

Ayoola told participants that his varied career has given him the opportunity to practice law in pluralist legal systems, which variously combine common and civil law with customary and Islamic law. In his current work as a judge of the SCSL, Ayoola, who is from a common law system, also works alongside judges who come from civil law countries. He noted that all the legal systems he knows are based on the same principles — when one removes the different language and terminologies, there is a common thread running throughout them all. This makes it easier than some might think to cross the barriers between systems. Speaking of the bench of the SCSL, Ayoola remarked, “When we sit as a bench, we don’t pay attention to systems but to justice.”

The use of foreign law by national judges is to be encouraged, according to Ayoola. Not only does it enrich national jurisprudence but it can also show directions for law reform. His native Nigeria regularly borrows law from the UK and other Commonwealth countries, including India, Canada, and Australia. The SCSL also borrows from national jurisprudence in addition to that of other international criminal courts, although it tends to turn toward common rather than civil law as it uses an adversarial trial procedure.

Ayoola cautioned, however, that African countries must be careful in how they cite foreign law. African legal systems are already a blend of indigenous law and another legal system, such as civil law, common law, or religious law. Law from other countries should be borrowed carefully,

taking into account its consistency with local circumstances and culture. He noted that it is easier for common law countries to look abroad than their civil law neighbors, whose laws derive from legislation. But this reality should not close the door entirely on the use of foreign law by civil law jurisdictions.

African countries should also, Ayoola urged, look to international legal instruments, especially in cases concerning individual rights and freedoms. Guidelines for applying these instruments in the domestic context are articulated in the Bangalore Principles on the Domestic Application of International Human Rights Norms.<sup>10</sup> National courts will also, he remarked, be increasingly drawn into the realm of international criminal law by the principles of complementarity and universal jurisdiction.

On the African continent, widespread knowledge of foreign and international law is hampered by lack of access to foreign law reports and journals, as well as lack of Internet connectivity. Ayoola believes that every national court in Africa should make Internet training for judges compulsory. Furthermore, comparative and international law should be a core component of every country’s legal education. Regrettably, Africa is unable to contribute to worldwide developments in jurisprudence, since the decisions of most of its national courts are unavailable on the Internet and thus go ignored by judges in other parts of the world.

In response to Ayoola’s remarks, several participants asked how national judges can become familiar with international standards; they claimed it was not a lack of will on their part, simply a lack of opportunity that was keeping them from this critical knowledge. One judge made a plea for foreign decisions to become more readily available to his court so his own decisions could take advantage of other legal thinking on similar matters.

Some judges expressed concern that there is no provision in their laws that would allow them to apply international standards through their decisions. In case of a conflict between national and international law, which takes supremacy? Several participants noted that women in their countries have initiated gender discrimination cases

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<sup>9</sup> <http://www.sc-sl.org/>

<sup>10</sup> [http://www.cbr.up.ac.za/br\\_docs/african/docs/other/cwm1.doc](http://www.cbr.up.ac.za/br_docs/african/docs/other/cwm1.doc)



Justice Ade Renner Thomas of Sierra Leone in discussion with Chief Justice Georgina Wood (center) and Appeals Judge Vida Akoto-Bamfo of Ghana.

based on their rights as guaranteed in the Convention on the Elimination of Discrimination Against Women (CEDAW).<sup>11</sup> Although their states are parties to this convention, the norms in the convention are in conflict with local customary inheritance practices. Judges from civil law countries might have an advantage in such cases, as the legislation of their countries automatically recognizes international instruments as “self-executing.” But judges still must decide to privilege international law over local norms.

A fundamental question was raised by several participants: Are international norms always to be viewed as better than local ones? One judge urged his fellow participants to be critical about the international conventions that are brought to national courts. An example is agreements pertaining to intellectual property (IP) rights. Some Asian countries have developed their economies by replicating the technologies invented in other parts of the world. Why should Africa, it was asked, be compelled to respect IP conventions if it impedes economic progress? Another participant suggested it was equally important to know the community law of West Africa, as developed by the Economic Community of the West African States (ECOWAS),<sup>12</sup> and not just international law.

Ayoola concluded the session by urging courts to institute continuing legal education programs for judges and other legal personnel. He agreed that it would be impossible to keep abreast of recent developments in worldwide law without some regular training mechanism. Having interns

in national courts — law school students or recent graduates — would also help judges to become familiar with the latest jurisprudence in many different areas. Many national and international courts have regular intern programs. It is now time for African courts to follow their lead.

He also urged judges to promote human rights in whatever ways they can through their judicial decisions. There should be no national constitution inconsistent with human rights norms, he said, and it is the role of national judges to uphold the norms enshrined there.

Participants had the opportunity to hear the thoughts of two eminent West African legal scholars on topics that reinforced these initial discussions about the place of foreign and international law in national courts around the region. Professor Saidou Nourou Tall, of the Faculté des Sciences Politiques et Juridiques de l’Université Cheikh Anta Diop,<sup>13</sup> spoke on the topic of “Access to International Human Rights Standards and Interpretation: Human Rights Organizations as a Resource.” His Ghanaian colleague, Professor Kofi Quashigah of the Faculty of Law at the University of Ghana,<sup>14</sup> addressed the group on “Promoting the Independence of National Courts through their Application of other National and Internationally-Developed Legal Standards.”

Professor Tall laid out for participants the wide array of human rights instruments and texts that exist in the world today. While these instruments are available and pertinent to the work of both international and national judges, problems may sometimes arise in their application. These problems can be evaluated from two different perspectives, he noted: 1) a spatial angle, considering whether norms are global or regional in scope, and 2) the angle of how human rights norms fit into national legal orders.

All legal practitioners are familiar with the various United Nations instruments that pertain to human rights: the Universal Declaration of Human Rights; the Covenant on Civil and Political Rights; the Covenant on Economic, Social and Cultural Rights; as well as various instruments

<sup>11</sup> <http://www.un.org/womenwatch/daw/cedaw/cedaw.htm>

<sup>12</sup> <http://www.ecowas.int/>

<sup>13</sup> <http://www.ucad.sn/>

<sup>14</sup> <http://www.ug.edu.gh/>

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dealing with the rights of women, children, refugees, prevention of discrimination, as well as bans on torture, genocide, etc.<sup>15</sup> The UN has created various committees and bodies to monitor and promote the implementation of the provisions of these different instruments, and it has generated an impressive number of documentary and jurisprudential resources that can be useful to judges and their respective jurisdictions.

The impact of human rights and its “judicialization” is felt even more strongly, however, at the regional level. The Council of Europe has its Convention on Human Rights, with 15 additional protocols, and the European Court of Human Rights looks at charges brought against states parties for violations of its provisions.<sup>16</sup> The Court of Justice of the European Union also looks at supposed infringements of community law.<sup>17</sup> The Inter-American Convention of Human Rights is protected by a “double watch-dog” system composed of both a commission in Washington, D.C.,<sup>18</sup> and a court based in Costa Rica.<sup>19</sup> The African Commission of Human and Peoples’ Rights is tasked with protecting and promoting the rights laid out in a charter of the same name,<sup>20</sup> and an African Court of Human and Peoples’ Rights was recently established to look at charges of violations of the charter by the states parties to the Protocol establishing the Court.<sup>21</sup>

The jurisprudence created by various international and regional courts — such as the International Criminal Tribunals for the former Yugoslavia and Rwanda,<sup>22</sup> the Special Court for Sierra Leone, as well as regional African courts like the Court of Justice of ECOWAS<sup>23</sup> — should also be noted by national judges. These courts pay special attention to the rights of human beings and legal entities through the resolution of contentious cases or through advisory processes.

The rich jurisprudence created by global and regional human rights bodies does not, however, automatically enter into the legal sources utilized by national jurisdictions. Professor Tall pointed out that this requires rationalization, dissemination, and ownership by national judges. First, as most human rights norms are not self-executing, they need to be internalized into the laws of the state in order to be applied. Sometimes, international human rights are limited due to reservations made when a state ratified the



Judge Fatsah Ouguergouz of the African Court of Human and Peoples’ Rights with supreme court justices from (left to right) Ivory Coast, Guinea, Togo, and Benin.

treaty, or there may be derogations of rights in particular circumstances. Regional human rights norms may also not overlap perfectly with the universal ones found in UN instruments, which can create confusion for national jurisdictions. Tall stressed the need for a process of socialization whereby both judges and citizens are made aware of international human rights conventions and how they can be applied in their own countries.

In response to Tall’s presentation, some participants echoed their earlier expressed frustration at not having adequate technology to access the wealth of human rights norms in the cited instruments. Another remarked that his court had a case where a plaintiff charged he did not have proper access to justice, as specified in various human rights charters. But providing such access is the role of the state, argued the participant; if resources are not allocated for this purpose, courts can do little to respect the international norms. One participant noted that while some international conventions are binding (“hard law”), others are merely recommended (“soft law”). This distinc-

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15 See <http://www2.ohchr.org/english/law/> for full list of human rights instruments.

16 <http://www.echr.coe.int/echr/>

17 <http://curia.europa.eu/>

18 <http://www.iachr.org/>

19 <http://www.corteidh.or.cr/>

20 <http://www.achpr.org/>

21 <http://www.pict-pcti.org/courts/ACHPR.html>

22 <http://www.un.org/icty> and [www.ictj.org](http://www.ictj.org)

23 <http://www.court.ecowas.int/>



Henrietta Mensa-Bonsu of the University of Ghana's Faculty of Law with Justice George Adeshola Oguntade of Nigeria (center) and Judge Emmanuel Ayoola of the Special Court of Sierra Leone.

tion can pose a problem for judges who wish to conform to human rights norms. The relative powerlessness of the African Commission on Human and Peoples' Rights was also noted; it has produced some good jurisprudence but has no authority to enforce its decisions. Finally, one judge urged his colleagues to not forget the role that non-governmental organizations can play in educating the African populace about human rights norms. NGOs are natural partners in what Tall called human rights "socialization" and judges should work with these organizations.

Professor Tall ended by reminding participants that international law must have supremacy over national law, so it is for judges to conform to international law and not vice versa. "It is like a man who has given his word," said Tall. "Once you have given your word, you have to follow it!"

Professor Quashigah addressed a different aspect of the relationship between national courts and external legal standards — the notion that national judges can utilize these standards to promote their own independence. He pointed out to participants that a country's substantive law is sometimes at variance with the values held by a majority of the populace or by the international community. Although judges are bound to uphold the laws of their states, they have also sworn to carry out justice. In cases where there is a disparity between law and values — especially values that are enshrined in human rights treaties and covenants — it may be useful for judges to look to foreign and international law in order to justify narrowing the application of rules they consider unjust. Such a strategy may

also preserve the judiciary's reputation for independence and impartiality. In this vein, Professor Quashigah cited the following: "Judicial training, knowledge of comparative law, access to law materials from other parts of the world, and facility with international norms all can make a difference even where the substantive law is unattractive."<sup>24</sup>

The South African judiciary was known to use such a strategy during the Apartheid era in its attempt to mitigate the impact of laws it considered unjust. The Supreme Court of Ghana more recently turned to external norms in the case of *Twum v. Attorney General*, which dealt with attempts for initiating a process for the removal of the Chief Justice by the government following a petition by a citizen.<sup>25</sup> While the removal appeared to be supported by a poorly written section of the Ghanaian constitution, the Supreme Court ruled that it could not be interpreted as such, supporting its decision by reference to principles developed in other jurisdictions. Quashigah offered other examples where foreign law has been cited by national courts to support their decisions and to enhance their ability to perform independently. But he cautioned that foreign norms can only be of persuasive value in such situations; they cannot be used as sources of law themselves.

Professor Quashigah ended with this advice: "We cannot shy away from the idea of cross-fertilization. We are gradually developing common jurisprudence all over the world. And courts can use this jurisprudence to protect their back and to protect their independence."

Participants had a number of reactions to Professor Quashigah's advice. Several objected to his suggestion that judges can enhance their independence by referring to the law of other jurisdictions. The fact that they have chosen to look beyond their borders is already a sign of their independence, declared one judge. Another participant suggested that judicial independence is not something over which judges have complete control; it cannot be exercised without an enabling political environment. It was

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<sup>24</sup> *Guidance for Promoting Judicial Independence and Impartiality*, January 2002, Technical Series, Office of Democracy and Governance, Bureau for Democracy, Conflict, and Humanitarian Assistance, US Agency for International Development, Washington, DC. See [http://www.usaid.gov/our\\_work/democracy\\_and\\_governance/publications/pdfs/pnacm007.pdf](http://www.usaid.gov/our_work/democracy_and_governance/publications/pdfs/pnacm007.pdf).  
<sup>25</sup> *Twum v. Attorney General*, Writ No. J11/7/2006, 12th July 2006 (Decision of the Supreme Court of Ghana).

also pointed out that the “audience” for the decisions of national courts is not necessarily the other branches of government — which sometimes need to be reminded of the principle of judicial independence — but instead academics and fellow judges who will notice if new developments in law are not cited. Other participants bemoaned the fact that in the cases described by Professor Quashigah, African courts cited European and North American law to support their own decisions instead of the law of other African countries. Why is a 19th century decision of the House of Lords more appropriate than that of a neighboring country’s court, asked a participant, noting that he and his fellow West African judges should take inspiration from other jurisdictions but also take their own circumstances into account. Africa needs landmark cases, it was noted, which are relevant for African purposes and can be used by judges on the continent.

### Interactions between the national and international

One of the central themes of the Colloquium was how national and international legal systems have become increasingly interconnected, not only through the sharing of law but also through the complementary functioning of various judicial processes as well as the work of international organizations to enhance the work of national judiciaries. Judge Fatsah Ouguergouz addressed a number of issues related to this contact between the national and international in two different sessions.

In the first, “The National Judge and the International Judge – Synergistic and Complementary Relationships,” Ouguergouz explored with participants the polyvalent relationship that exists between international and national judges. As Africa has by far the greatest number of international and regional jurisdictions in the world — it has two international and many more regional courts dealing variously with economic integration, business, and other matters — national judges are bound to come into contact with their peers who serve on these various bodies.<sup>26</sup>

Ouguergouz outlined three patterns of influence that can characterize the relationship between national judges and their international counterparts:

1. The work of national judges serves as a guide for the work of international judges. This can be seen in the

way that members of international judiciaries utilize basic principles of law that have been developed by national judges. For example, the Statute of the International Court of Justice states that it will apply “the general principles of law recognized by civilized nations.”<sup>27</sup> Furthermore, some international courts, like the African Court of Human and Peoples’ Rights, have adopted the rule of the exhaustion of local remedies, whereby full utilization of national courts becomes a prerequisite for a judicial proceeding before an international court.<sup>28</sup>

2. The work of international judges also influences the work of national judges. There are different degrees of receptiveness to international law found at the national level, depending upon several factors. First, monist legal systems can apply international law automatically at the domestic level whereas dualist systems must “domesticate” international law before applying it. Second, national jurisdictions that are well integrated into an international system are also more likely to be influenced by the law generated there. Ouguergouz stressed furthermore that international bodies “closer to home” will be more successful at influencing national judiciaries; the regional ECOWAS Court of Justice, for example, is in a position of more authority in West Africa than the United Nations Human Rights Committee.<sup>29</sup> Third, a judge can only apply what he knows, so a judge’s level of knowledge about international law is a critical component in how much he incorporates international law into his own legal thinking.
3. National judges and international judges can cooperate. The importance of such cooperation is demonstrated in the relationship between national courts and the International Criminal Tribunal for Rwanda, where jurisdiction can be concurrent although the tribunal retains primacy.<sup>30</sup> The International Criminal

<sup>26</sup> See the website for African International Courts and Tribunals for more information: <http://www.aict-ctia.org>.

<sup>27</sup> See <http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0>

<sup>28</sup> See <http://www.africa-union.org/root/au/Documents/Treaties/treaties.htm>.

<sup>29</sup> The ECOWAS Court of Justice statute holds that “The decision of the Court shall be binding on the Member States, the Institutions of the Community and on individuals and corporate bodies.”

See <http://www.ecowascourt.org/home.html>.

<sup>30</sup> See Article 8 of the ICTR Statute: <http://www.un.org/ict/statute.html>.

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Court has configured its relationship with national courts to be one of “complementarity,” whereby cases can only be brought before it if the states with jurisdiction over them are unwilling or unable genuinely to investigate or prosecute (see discussion on ICC below).

In response to Ouguergouz’ presentation, several participants noted with perplexity the multiplicity of international jurisdictions on the African continent. If a national court does not feel competent to decide a case, to which international institution does it refer the matter? And does the establishment of so many regional and international courts suggest a fundamental lack of confidence in national courts in the first place? Another judge questioned the notion that the integration of national courts into the international scene allows judges to take inspiration there. The regional integration of legal systems may pose more problems than that of economic systems, he said; one has only to look at French resistance to European community law to understand that. One participant reiterated a comment made in an earlier session, that a judge may wish to respect international law but find his hands tied if that law has not been incorporated into domestic legislation. The imbalance between support for international and domestic judicial institutions was also brought up. Given the lack of resources available for domestic courts, perhaps Africa should not afford itself the luxury of multiple international jurisdictions that might duplicate one another’s work.

Judge Ouguergouz defended the role of international courts, saying that some types of litigation cannot be adequately resolved domestically. Ideally, human rights issues are resolved at the national level, but these issues possess an international dimension and international norms should play a role in their resolution. The only institutions that can supervise the application of such norms are international courts. He agreed that it was important that institutions not have overlapping jurisdictions, however. Establishing more linkages among international courts — like that envisioned between the African Court of Human and Peoples’ Rights and the African Court of Justice — will be a start.

Colloquium participants were led in further reflections about the interconnection of national and international

institutions in Ouguergouz’ second session, “International Organizations – How Can They Enhance the Work of National Judiciaries?” His presentation first described the contributions that international organizations have made to the definition of standards guiding many national legal regimes. These standards include many United Nations documents. In addition to the Universal Declaration of Human Rights, the Covenant on Civil and Political Rights, and the Covenant on Economic, Social, and Cultural Rights, there are others that should be mentioned — the Code of Conduct for Law Enforcement Officials,<sup>31</sup> Basic Principles on the Independence of the Judiciary,<sup>32</sup> Basic Principles on the Role of Lawyers,<sup>33</sup> and Guidelines on the Role of Prosecutors.<sup>34</sup> Non-governmental organizations like Africa Legal Aid have also played a role in articulating important standards, like the Cairo-Arusha Principles on Universal Jurisdiction in Respect of Gross Human Rights Offences: an African Perspective.<sup>35</sup>

International organizations also contribute to the strengthening of national judiciaries by holding training programs, conferences, and study visits for judges, as well as providing hands-on assistance in projects aimed at strengthening the rule of law, providing equal access to justice, and so on. Ouguergouz pointed to the sponsoring partners of the Colloquium as examples. His own organization, the African Foundation for International Law, aims to use international law to promote the rule of law in Africa, which is an integral element in the development of the continent. The International Center for Ethics, Justice, and Public Life of Brandeis University regularly organizes gatherings of judges so that judicial dialogue and networking can become a routine part of the judicial profession.

Throughout his presentation, Ouguergouz stressed the importance of access to justice as the most essential human right, the first ever to be codified in international law, and well before the emergence of the modern human rights regime. This right is a pivotal one, belonging to the category of political and civil rights, as well as to that of economic, social, and cultural rights. It is also a right of equal signifi-

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31 [http://www.unhchr.ch/html/menu3/b/h\\_comp42.htm](http://www.unhchr.ch/html/menu3/b/h_comp42.htm)

32 [http://www.unhchr.ch/html/menu3/b/h\\_comp50.htm](http://www.unhchr.ch/html/menu3/b/h_comp50.htm)

33 [http://www.unhchr.ch/html/menu3/b/h\\_comp44.htm](http://www.unhchr.ch/html/menu3/b/h_comp44.htm)

34 [http://www.unhchr.ch/html/menu3/b/h\\_comp45.htm](http://www.unhchr.ch/html/menu3/b/h_comp45.htm)

35 See <http://www.africalegalaid.org/aftaprograms.html>

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## Programming for National Judges

A sample of organizations that provide programming for national judiciaries:

- **International Center for Ethics, Justice, and Public Life, Brandeis University:**  
[www.brandeis.edu/ethics/international\\_justice](http://www.brandeis.edu/ethics/international_justice)
- **African Foundation for International Law:**  
[www.afil-fadi.org](http://www.afil-fadi.org)
- **Africa Legal Aid:**  
[www.africalegalaid.org](http://www.africalegalaid.org)
- **International Legal Assistance Consortium:**  
[www.ilac.se](http://www.ilac.se)
- **International Association of Women Judges:**  
[www.iawj.org](http://www.iawj.org)
- **International Judicial Academy:**  
[www.ijaworld.org](http://www.ijaworld.org)

cance for national and international judicial systems.

Participants were inspired by this discussion of the right of access to justice. Some pointed out that this right can only be guaranteed through the existence of a well-working justice system. This means that their courts need to be supported by other branches of the government, and they need to be allowed their independence. Yet many countries do not have a proper separation of powers, several judges noted, with the Ministry of Justice overseeing the judicial system, the Attorney General acting as a member of the Ministry, and so on. Reforms are needed so that real judicial independence is achieved. One participant asked whether an appropriate ratio between a country's population and its number of judges has ever been determined. Another asked whether there have ever been instances where a state has been found liable for not ensuring sufficient means and conditions for judges to do their work.

Giving voice to a different perspective, one participant noted that there are judges in his country who have learned that touting human rights in their judgments can increase their popularity, especially if they rule against the government. Their hope is that they will find an important job somewhere else through their reputation as a "human rights judge." Yet some of these judgments, he continued,

are not based on any aspect of the law; they are just an example of jumping on the human rights bandwagon. Good judges should maintain their integrity, resisting the temptation to make popular decisions that are unfounded in the law.

Ouguergouz concluded the session by acknowledging that the right of access to justice is far from being fulfilled in Africa. Efficiency, resources, and independence are lacking in too many instances. This is one reason that West African nations could benefit from the work of international organizations and civil society groups — based both regionally and abroad — that aim to advance reforms in the judicial and related sectors.

Perhaps the most discussed interconnection between national and international justice in recent years is the "complementarity principle" established by the Rome Treaty of the International Criminal Court. Professor A.P. van der Mei of Maastricht University in the Netherlands spoke to participants on this timely topic in his session "National Judiciaries in West Africa and the International Criminal Court: Complementarity Issues."

The complementarity principle includes the following elements:

- The International Criminal Court will complement national courts so that they retain jurisdiction to try genocide, crimes against humanity, and war crimes.
- If a case is being considered by a country with jurisdiction over it, then the ICC cannot act unless the country is unwilling or unable genuinely to investigate or prosecute.
- A country may be determined to be "unwilling" if it is clearly shielding someone from responsibility for ICC crimes. A country may be "unable" when its legal system has collapsed.<sup>36</sup>

Van der Mei provided background to the establishment of the ICC. The first war crimes tribunals, the Nuremberg and Tokyo Tribunals, were set up in the wake of WWII. Although a universal criminal court was discussed for decades afterward, it was only in the 1990s, with the

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<sup>36</sup> See <http://www.icc-cpi.int/about/ataglance/faq.html#faq4>.

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establishment of the International Criminal Tribunals for the former Yugoslavia and Rwanda, that the international prosecution of war crimes and crimes against humanity was institutionalized. These courts are ad-hoc institutions with jurisdictions restricted to particular time periods, substantive matters, and geographic areas. The Special Court for Sierra Leone,<sup>37</sup> a hybrid court with both national and international staffing, was established in 2002, and the Extraordinary Chambers in the Courts of Cambodia, designed along similar lines, was created in 2003.<sup>38</sup> These courts also have very restrictive temporal, substantive, territorial jurisdictions. All of these courts will close when their mandates have been completed.

The ICC differs from these courts in being a permanent and ongoing institution with potentially universal territorial jurisdiction. Its temporal jurisdiction is to look only at crimes committed after 1 July, 2002. Its substantive jurisdiction is limited to genocide, crimes against humanity, and war crimes. Immunities cannot be granted with respect to these crimes. As for personal jurisdiction, the ICC can investigate only natural persons who are citizens of state parties or who have committed crimes on the territory of states parties (unless the state concerned accepts the jurisdiction of the Court). The United States, which is not a party to the Court, has been particularly resistant to the personal aspect of the ICC's jurisdiction, fearing that U.S. citizens fighting abroad might be subjected to prosecution. To avoid this, it has negotiated a number of bilateral treaties with ICC states parties to ensure that they will not turn over U.S. citizens to the Court if they are suspected of committing crimes that fall under its jurisdiction.

Van der Mei then explained to participants how cases are initiated before the ICC. Unlike cases that come before the ICTY and ICTR, it is not the Court that takes final responsibility for the decision to prosecute. If a national court is prosecuting a particular case, then it is not admissible before the ICC in accordance with the complementarity principle, unless the national trials are deemed inadequate. In exceptional circumstances, cases may also be referred to the Court by the UN Security Council, even when a crime is committed in a country that is not a state party. This is how certain Sudanese officials have come to be charged by the ICC, despite Sudan's lack of participation in the Court. Sudan has subsequently refused to coop-

erate in the extradition of the suspected criminals.

ICC states parties are called upon to adopt implementing legislation that will allow their domestic courts to try cases of war crimes, crimes against humanity, and genocide. In Africa, only South Africa has done this to date. Implementing statutes may not be necessary, however, in countries that have already incorporated genocide and other crimes into their national law, based on being parties to the Geneva Conventions or other pertinent international agreements.

Professor van der Mei raised several questions for group discussion. Is Africa only paying lip service to the ICC without taking any real action to support its mandate? Should there be a regional African office for the ICC, as many of its cases may concern the continent? Are there North-South issues at play during these early years of the ICC, with developed states pushing for prosecution in poorer African states?

Participants had a variety of observations about the general role of the ICC as well as its specific place in Africa. Although they support the mandate of the Court, several judges wondered why it was not created under the auspices of the United Nations, which would have lent it authority and guaranteed its support. The fact that the U.S. is not on board also lowers its credibility, declared several.

Emmanuel Ayoola of the Special Court of Sierra Leone posed a fundamental question: With which national law is the ICC to be complementary? The ICTR and ICTY have created a lot of jurisprudence that national courts should take into account if they are to act in cooperation with the ICC. But many issues still have to be sorted out at the national level. For instance, crimes have sometimes not been clearly defined, national systems may use different terminologies to refer to these crimes, and laws pertaining to these crimes differ from country to country. Ayoola suggested that if African courts are to make a reality of complementarity, they should not rush into it. There should first be a study of the standards in criminal law that exist in various jurisdictions. And a crucial question

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<sup>37</sup> <http://www.sc-sl.org/>

<sup>38</sup> <http://www.eccc.gov.kh/>

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must be answered — is international criminal law first and foremost criminal law, or international law? If it is criminal law, then offenses need to be defined at the national level and then harmonized across the continent. If it is international law, these definitions should be written internationally and disseminated to the national level.

There was some skepticism among participants about the amount of money being spent on the ICC. Would it not be a better idea to distribute these resources to member states so that a culture of crime prevention could be developed locally? This would seem to be more effective than a global court. Perhaps another solution would be to have an African Chamber of the ICC that would carry out its work on the continent, in proximity to the populations affected by the crimes being investigated and tried.

Fatsah Ougergouz of the African Court of Human and Peoples' Rights addressed the issue of North-South tensions in the work of the ICC. If affluent countries are pushing for prosecutions in poor countries, this could be interpreted as a violation of sovereignty, and is thus of dubious legality according to international law. The best scenario is for neighboring states to suggest cases that might fall under the jurisdiction of the ICC, instead of countries far removed from local realities. If a case cannot come before the ICC, the next best option is a regional tribunal. Only as a last resort should universal jurisdiction be implemented as a means of pursuing justice, and even in this instance, the prosecution should be initiated by a state that is similar to the one where crimes have allegedly been committed.

Van der Mei responded that the idea of establishing an African Chamber of the ICC would ensure that justice would be carried out as close to home as possible. But given that Africa is not the only continent where injustices are committed, and the court in The Hague has not yet been fully utilized, it is unlikely that such a chamber would be created anytime soon. It might also undermine the enormous efforts that have been made to establish the legitimacy of the Court as a global institution in its early years. He also noted that the U.S. attitude toward the ICC is becoming softer, even under the Bush administration. Officials are starting to believe that U.S. citizens would not be unfairly targeted for prosecutions that are politically motivated. As for the question of allocating more resources

for national judiciaries in Africa, van der Mei believes that this should be carried out, but not at the expense of the ICC. Even if national judicial systems were perfect, there would still be a need for the ICC.

### **Pragmatic issues of training and continuing legal education**

In addition to exploring the importance of dialogue across borders and across the national-international divide, Colloquium participants had the opportunity to learn about and discuss practical ways in which such dialogue could be instituted within their courts. The first session devoted to pragmatic issues, led by Dr. Kwadwo Appiagyei-Atua of the Faculty of Law, University of Ghana, was entitled "Information-Sharing as Key to Promoting Effective Judicial Training and Judicial Reform in West Africa." He noted that the common law tradition has come to accept judicial education as an essential integral component of the professional development of the judiciary. At the same time, the civil law tradition has instituted major reforms to make judicial education more relevant and applicable to the changing times. Finally, donor assistance to promote justice sector reform in sub-Saharan Africa has, over the last decade, increased substantially.

Despite this favorable climate for change, the judiciary in many African countries is still struggling to measure up to minimum international standards and cannot function effectively as the third arm of government in a democratic order. Appiagyei-Atua identified a lack of information on the African judiciary as one of the principle obstacles to establishing training programs that serve the needs of courts and judges. Without meaningful research on the African judiciary to identify factors affecting its growth, independence, integrity, and competence, training programs will continue to be haphazard, uncoordinated, and sometimes redundant.

Appiagyei-Atua suggested that five types of information be made available with the aim of facilitating the design of effective judicial training for African judiciaries:

1. General information on judicial systems in each country. This information can be gleaned from a variety of sources, including the constitutions of the target countries; legal materials on the judiciary in the

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target countries; state reports presented to the UN Human Rights Committee, the African Commission on Human and Peoples' Rights, and other treaty-based human rights bodies; human rights reports on the country presented by international NGOs such as Human Rights Watch, Amnesty International, and the International Commission of Jurists; indirect sources, such as Transparency International reports; and bibliographical references on the judiciary in Africa, extracted from academic journals.

2. An analysis of this information, with conclusions about which kind of training and reforms are needed in each country.
3. A list of best practices in the region. These would include, *inter alia*, adult education formats that ensure a user-friendly environment for judicial training, and transitional justice and reform procedures used in countries undergoing transition from civil war or dictatorship to peaceful democratic rule.
4. Publication of decided cases in the region, particularly those that touch on human rights, commercial law, and land law.
5. A database of African judicial training institutes; international training institutes and partners; donor communities; judicial reform projects (completed and ongoing); and NGOs working in the areas of access to justice, rule of law and human rights, and education.

Making available these kinds of information would facilitate the formulation of practical solutions to the challenges facing judicial training institutes, allowing them in turn to play their vital role in ensuring a truly functioning judiciary in Africa. This information would also serve as a crucial tool for those doing comparative research between countries or between the two main legal traditions — common and civil law — as well as between hybrid legal traditions. Finally, this information would improve public accountability for the judiciary and judicial training institutes, as well as provide a rich area of research for academics, law students, and lawyers wishing to critique decisions and suggest ways to improve judicial decision-making.

Participants agreed with Dr. Appiagyei-Atua that there was a general lack of information about their respective judiciaries, and they also acknowledged judicial training efforts in the region need to be improved. Several participants thought that judicial training should be a centralized initiative in the region. There already exists an association of West African judges, one judge pointed out, and in 2006 it adopted a plan for the training of magistrates. But information about this plan has not been widely disseminated, said another. This should be done to avoid repetitive efforts. It was also suggested that the premises of the Special Court for Sierra Leone, in Freetown, might become a region-wide judicial training center once the mandate of the court is completed. The United Nations has already appointed a legacy committee for the SCSL, and strong advocacy on behalf of West African judiciaries might persuade donors to fund the use of the former court for this purpose. Appiagyei-Atua concluded by reiterating that having basic information would help all efforts to establish regular and centralized judicial training programs in West Africa, which would lead to much-needed reforms.

Professor Linda Carter, of the University of the Pacific's McGeorge School of Law, described to participants some ways in which identified gaps in effective judicial training in Africa might be filled by individual courts. In her session "Models for Internal Legal Training and Internship Programs," Carter outlined how some American and international courts keep abreast of new developments in law.

Carter described how legal research in a court can be enhanced by creating an internal training program for the legal staff. A program designed for the needs of the court can provide the basic substantive and procedural knowledge necessary as a background for the legal work at the court. If yearly or biannual programs are developed, the legal staff can be updated on new developments in the law. Internal training programs can be delegated to one of the senior legal staff members or provided by outside groups, such as foundations or universities. As an example, attorneys working for all six of the District Courts of Appeal in California attend a Staff Attorney Institute once a year. The institute is conducted by an administrative office of courts, with lectures on current legal issues provided by justices from the courts, academic scholars, and senior staff attorneys. The topics and approaches of any internal legal

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training program should be designed, she stressed, for the specific needs of the court and its legal staff.

Carter noted, however, that in domestic and international courts around the world there often are too few staff attorneys to adequately provide the legal research that supports the work of judges. One of the research resources developed by the judiciary to fill this gap is the use of interns. Judicial internships vary in their requirements and content, as Carter illustrated in her discussion of how they work in both international tribunals and U.S. courts.

Interns are typically highly qualified law students or recently graduated attorneys. The interns are generally not compensated or receive only a small stipend. The duration of the internship is usually from one month to six months. Although it is unpaid work, the interns gain valuable experience in researching legal issues and learning from experienced and knowledgeable judges. In both U.S. courts and in international tribunals, internships are considered to be highly prestigious and the process for selection of the interns is very competitive. The qualifications required for an internship usually include high standing in the law school class, excellent writing and research skills, and strong letters of reference.

From the perspective of the courts, the interns assist the work of the judges by researching assigned legal issues or doctrines. Often the interns will research an issue and write an internal memorandum for the judge that can then be used by the court in deciding a case or writing a judgment. All interns are asked to sign a confidentiality agreement so that research projects, written materials, and discussions about issues remain completely confidential.

Judicial internship programs in domestic courts are often developed in conjunction with a university. Students may be able to earn credit for the internship within their university studies. For instance, McGeorge School of Law has a program in which a few of the students at the top of the class may intern with a judge in a state appellate court or a federal district court for a full semester (14 weeks). The students receive credit that is the equivalent of a semester of courses at the law school. One benefit of using students who are receiving law school credit is that the student may seek the expertise of professors on difficult concepts and is-

sues. The student is not, however, allowed to give anything that is confidential to the professors. Another benefit to establishing a program with a university is that the court gains the assistance of professors in recommending the best students and in receiving interns on a regular basis.

Judges were asked to think about whether internships would assist the judicial work in their own courts and, if so, what features would be the most important to incorporate into a program. Each court and domestic system has different structural and legal research needs, and an internship program should be designed in a way that best assists the work of the specific court.

Judges were very open to the idea of creating both internal training and internship programs in their courts, although many were unfamiliar with such models. The new Chief Justice of the Supreme Court of Ghana had recently announced, however, that her court intends to establish an internship program. Not surprisingly, given its close links to the United States, Liberia already uses the system of clerkships so common in the U.S. Clerks are newly graduated law students who work closely with a judge for a year or two in order to gain hands-on legal experience. Unlike interns, they are well paid and this is considered a regular professional position.

Courts in some of the francophone countries also have a system whereby *auditeurs*, advanced students of law who are training to become magistrates, will carry out legal research for judges after having sworn an oath. There were questions about whether interns should have access to confidential material as they are not yet members of the profession. Professor Carter responded that in some courts, like the Special Court for Sierra Leone and California courts, interns are required to sign an agreement of confidentiality. In other courts, only clerks — those who have already finished their law studies — will have access to confidential material while interns carry out simpler tasks. Judge Ayoola of the SCSL complimented the work carried out by interns at his court, stating that it was as good — and sometimes better than — the work of the actual lawyers.

A number of judges were inspired by the possibility of creating relationships with local and foreign law schools

to create pools of both interns and clerks. Fatsah Ouguer-gouz, executive director of the African Foundation for International Law, expressed some dismay that it is easier for law students from wealthy universities to procure funding for unpaid but intellectually rewarding internships. Students from poorer universities, including many African law students, are at a distinct disadvantage, as they cannot afford to work without compensation. Carter also emphasized the benefits that can be derived from using law students from local law schools, including the strengthening of the legal infrastructure within each country.

Ouguer-gouz suggested that AFIL might be able to facilitate the placing of interns and clerks in national courts, by providing funds for this purpose and negotiating with African universities the creation of credit systems similar to those that exist in American universities. AFIL might also establish a centralized training for legal staff and judges in West African courts. Such training would include workshops on the African Commission of Human and Peoples' Rights, the African Court of Human and Peoples' Rights, and other international bodies whose work is pertinent to that of West African judges. The Foundation could moreover serve as a focal point for the provision of books, legal documentation, or computers to the national courts in the region.

Colloquium discussions about the need for courts and judges to keep abreast of new developments in both foreign and international law — be it through formal judicial training institutes, internal continuing legal education programs within courts, or the assistance of interns or clerks — were appropriately followed by two intensive sessions in which participants were able to navigate the Internet in search of legal information. These sessions were led by John Abbosey of the DataCenta of Accra,<sup>39</sup> and Mila Versteeg, a doctoral student in law at Oxford University. The hands-on sessions began with the basics of accessing the web and using a search engine for those who had little prior experience. Judges quickly moved on to exploring sites of potential interest and significance to their judicial work, such as the sites of supreme courts around the world and those devoted to African law. Mr. Abbosey also spoke to judges about the digital collections of Ghanaian case law produced by his center. Many participants expressed the desire to see their own courts' decisions made similarly

### Models for Internship Programs

Information about internships in international tribunals:

- International Criminal Court  
[www.icc-cpi.int/recruitment/cc1g.html](http://www.icc-cpi.int/recruitment/cc1g.html)
- International Criminal Tribunal for Rwanda  
<http://69.94.11.53/ENGLISH/opportunities/internship/program.htm>
- Special Court for Sierra Leone  
[www.sc-sl.org/internships.html](http://www.sc-sl.org/internships.html)

Examples of internships at U.S. Law Schools:

- Indiana School of Law  
[www.indylaw.indiana.edu/courses/internships.cfm](http://www.indylaw.indiana.edu/courses/internships.cfm)
- University of Baltimore School of Law  
<http://law.ubalt.edu/clinics/index.html>
- Brooklyn Law School  
[www.brooklaw.edu/academic/clinics/internships.php](http://www.brooklaw.edu/academic/clinics/internships.php)

Law review articles on the role of law school judicial internships that provide academic credit to the students:

- Stacy Caplow, *From Courtroom to Classroom: Creating an Academic Component to Enhance the Skills and Values Learned in a Student Judicial Clerkship Clinic*, 75 Neb. Law Rev. 872 (1996).
- Linda F. Smith, *The Judicial Clinic: Theory and Method in a Life Laboratory of Law*, 1993 Utah L. Rev. 429 (1993).

available on the Internet, for use by lawyers and judges at home and abroad.

Ms. Versteeg then led participants through a series of exercises that showed them the wealth of legal and legislative information to be found on various Internet sites. These included the LexisNexis collection of case law from various countries; the Worldlii database, which acts as a portal to case law databases in different regions of the world; the European Union-sponsored Codices project, which has search engines leading to case law in both French and English; and the Droit Francophone database for case law in

<sup>39</sup> [http://www.datacenta.com/dc\\_about.htm](http://www.datacenta.com/dc_about.htm)

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### On-line Legal Resources

Legal databases:

- [www.lexisnexis.com](http://www.lexisnexis.com) (*subscription required*)
- [www.worldlii.org](http://www.worldlii.org)
- <http://codices.coe.int>
- <http://droit.francophonie.org>

On-line international legal scholarship network:

- <http://www.ssrn.com/lisn/index.html>

Comprehensive guides to international and foreign jurisprudence and legislation:

- [http://www.brandeis.edu/ethics/international\\_justice/judicialcolloquia/index.html](http://www.brandeis.edu/ethics/international_justice/judicialcolloquia/index.html)

French-speaking countries, including those of West Africa. In addition, the judges explored websites that contain the text of international treaties (as well as information on who ratified them) and websites that contain the decisions of international courts and tribunals. Some of the judges were pleasantly surprised to find some of their own decisions online in the Worldlii database, or found that they were cited in a decision by a foreign court. Some judges inquired whether it would be possible for them to find legal scholarship online as well. They were advised to sign up to the international legal scholarship network that provides free access to legal scholarship all over the world. This network generally provides access to the working papers of articles that have been published in legal journals and law reviews. Through this network, judges can also distribute their own articles and scholarship, if they desire. Versteeg had prepared and distributed to participants a comprehensive Internet guide to jurisprudence in both national and international courts, as well as sources of foreign and international legislation (see box above). Participants who were Internet novices left these sessions vowing to become computer literate so that they could become better informed for their work. They also declared that it was critical that their courts be equipped with up-to-date computers and have easy Internet access for both judges and staff.

### Establishing a self-sustaining judicial network in the region

Over the course of three days, Colloquium discussions were characterized by several recurring themes. These included: the need for direct access to international legal norms and case law through the Internet and legal training; the need to know the law of other African countries with similar legal issues; the responsibility of states to domesticate international treaties so that they can be applied by national judges; the difficulties of establishing international norms in societies with conflicting local values and customs; the need to establish an ongoing discussion of issues surrounding court management among the West African courts; and a need to establish a consensus on the basic requirements for an independent, functioning judiciary.

The Colloquium ended with participants outlining a number of activities that would allow their newly created network to continue and flourish. Judges were adamant that the Anglophone/Francophone divide be bridged through their network and that institutions as well as judges become members. All participants noted the important place of law schools and universities in the outlined activities.

Following are their recommendations:

- West African judges should meet each other on a regular basis, perhaps once or twice a year. As for the content of these meetings, it was suggested that decisions around a particular topic from different jurisdictions be compared to each other. There is a need for the judges from the common law-based systems to understand the principles of the civil law-based systems and vice versa. Comparing cases from several jurisdictions on the same topic would provide a useful way to consider the differences between Francophone and Anglophone courts. It was suggested that a small executive group could identify the topics for each meeting. Examples included international human rights issues and the independence of the judiciary. Network interaction would not need to be limited to these meetings, however.
- In between meetings, the Internet could facilitate networking. Different suggestions were made in this respect: listserv mailing lists, so that all judges could



Participants of the 2nd West African Judicial Colloquium

be mailed at once; a West African Judges Working Paper series in which judges could publish their work; a general website on which decisions could be uploaded so that West African judges would be able to have easy access and reference to each other's jurisprudence; and perhaps even an electronic discussion forum on which the judges could exchange thoughts.

- Anglophone and Francophone coordinators should be appointed to maintain and facilitate contact within their respective language-based networks and ensure contact with their fellow coordinator. This responsibility could rotate on an annual basis.
- A documentation and research service/center should be created in each West African court, with both Internet access and paper format resources.
- Ongoing training is important. The annual meetings should not just serve the purpose of networking, but should also provide opportunity for training (although it was suggested that it would be better not to speak of "training" but rather to speak of "skills enhancement" or another similar term). Training should furthermore extend to lower court judges. Therefore,

what is required is something like a West African judicial training centre. It was suggested that the premises of the current Special Court for Sierra Leone could serve that purpose. Discussions on allocation of the premises have already started and, therefore, requests and negotiations should begin as soon as possible.

- As a result of the second West African judicial colloquium, the "Accra Principles for West African Courts" could be adopted. These should focus on the minimum resources required for optimal performance by national judiciaries in the region. They would highlight necessities such as computers, Internet connections, Internet literacy, salaries for judges, and training programs. The Accra Principles could be used by the participants to support discussions with their governments on resource allocation.

Brandeis University hopes to play a role in the future programming of this newly formed regional judicial network, as do the other institutions involved in the Colloquium, the African Foundation for International Law and the Faculty of Law of the University of Ghana.

2nd West African Judicial Colloquium  
8 October 2007 – Accra

## *Access to Global Jurisprudence and Problems in the Domestic Application of International Legal Norms*

**Modibo Ocran**

Justice of the Supreme Court of Ghana and Professor of Law, the University of Ghana

**M**r. Chairman and Vice-Chancellor of the University of Ghana, Professor Nii-Boi Tagoe; Honorable Chief Justice of Ghana, Her Ladyship Georgina Wood; Honorable Attorney General of Ghana, Mr. Joe Ghartey; Acting Dean of the Faculty of Law, University of Ghana, Professor Henrietta Mensa-Bonsu; Dr. Leigh Swigart, Director of Programs in International Justice and Society, International Center for Ethics, Justice, and Public Life, Brandeis University, U.S.; distinguished guests and participants; ladies and gentlemen.

I wish to join the previous speakers in welcoming all of you to this Colloquium. We are also grateful that the organizers selected Ghana as the forum for the discussion of this important subject. And I personally wish to thank the Dean and members of the Law Faculty for inviting me to deliver the keynote address.

The theme of this Judicial Colloquium, “Promoting Judicial Independence and Access to Global Jurisprudence,” is a rather broad one; and so in this keynote address, I will crave your indulgence and address just one aspect of it



Professor Justice Modibo Ocran delivers the 2nd Colloquium’s keynote address.

— namely, access to global jurisprudence. But that is a big topic in its own right.

Jurisprudence itself is a widely used and often misused word. But by access to global jurisprudence in this Colloquium, I assume we are not referring to access to comparative philosophies of law in various parts of the world; for example, post modernist legal theories such as law and economics and critical legal studies, versus conceptual or analytical jurisprudence. I take it that our interest this morning lies not in jurisprudence in the sense of legal philosophy, but in a more pressing concern: that is, the various ways in which useful international legal norms, including human rights law, could be received into the national legal systems around the globe for the betterment of their peoples. So, to draw the distinction using French legal categories, we are not talking of jurisprudence in the sense of *la philosophie de droit*, but rather in the sense of *la jurisprudence constante et l’écrit*.

The problems with access to international legal norms within a given domestic legal system are often baffling to the ordinary citizen who wishes to benefit from their provisions. Indeed, they can be baffling even to lawyers not schooled in international law. Perhaps this matter should not have become such a big problem but for the intricate minds of international lawyers and legal philosophers.

Intelligent and educated lay persons might very well argue that if the national constitution of their country stipulates treaties and other norms of international law as among the formal sources of law within their legal system, there is really no reason why an aggrieved person cannot proceed to court or some other law enforcement agency and simply ask for their direct enforcement to vindicate a right or

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enforce an obligation ostensibly owed to them. There is the second situation where, as in the Ghanaian context, the national constitution does not even mention international law, including treaties, as one of the formal sources of law. Yet a politically astute citizen might well argue that there are fundamental freedoms and forms of personal liberty that are inherent in a liberal democracy, and that it is the business of the court to use its judicial power to secure the freedom and dignity of mankind.

We are all privy to many forms of individual human rights violations in many parts of the world, including this sub-region of Africa. There are the prisoners who sleep routinely on bare cement floors and are denied blankets on cold nights, and there are those that are made to wear near-permanent handcuffs within prison walls. There are the detainees who are denied access to doctors, leading to deterioration in their health, and there are cases of starvation of prisoners. Then there is the violation of group human rights such as forms of oil production operations that cause environmental degradation and resultant health problems for the local population. There is the unreasonably long closure of schools and non-payment of teachers' salaries, such as the case against the Democratic Republic of Congo communicated to the African Commission on Human and Peoples' Rights in the 1990s, which was viewed as a violation of the socio-economic right to education because it prevented the teachers from holding classes for the benefit of the students.

In all this, intelligent lay citizens wonder why the victims cannot get the courts to directly apply, for example, Article 10 of the International Covenant on Civil and Political Rights (ICCPR), namely, that "All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person"; or Article 5 of the African Charter on Human and Peoples' Rights, prohibiting torture and other cruel, inhuman, and degrading forms of treatment; or Article 16 of the same Charter on the right to health.

The national judiciaries in this subregion and elsewhere should, indeed, have found it easier to apply international norms more frequently in the resolution of such specific cases of human rights violations but for the presence of a little devilish theory of the relationship between domestic

and international law known as dualism, along with its concomitant doctrine of transformation.

Dualism postulates that municipal law and international law arise from distinct institutional sources and belong to two different legal orders. Thus it insists that international legal norms, including ratified treaties, have to be formally adopted into municipal law by the appropriate legislative bodies in order to acquire domestic legal validity. In other words, international legal norms would have to be "transformed" or actually adopted into the municipal legal system before they can be applied.

Dualism takes its intellectual roots from great legal and political philosophers like Hobbes, Pufendorf, Bentham, and Austin. Was it not John Austin, the foremost English legal positivist, who referred to the law of nations as "law improperly so called," because he could not find its determinate human superior functioning as a sovereign at the base of the international legal order? And Hans Kelsen, for all his fidelity to international law, did inadvertently undermine its intellectual roots by linking his ultimate *grundnorm* — the norm that underlies the entire, national legal system and determines the validity of lesser norms — with a historically original constitution "set up by some single usurper or by some kind of corporate body." In the case of the development of international legal norms, who, one might ask, is this usurper?

The opposing perspective to dualism is the theory of monism, which views municipal law and international law as part of the same universal legal order. Since they belong to the same legal order, international law should automatically become part of the domestic legal order by a simple process of incorporation. The greatest classical proponents of monism include Hugo Grotius, reputed to be the father of international law, the *jus gentium* European legal thinkers of the post-Renaissance period, and Immanuel Kant, with his philosophy of the unitary conception of law.

It is clear that monism and dualism emanate from rather different conceptions of state sovereignty and variations in the adherence to legal positivism. I believe the case for monism is stronger if we confine its claims to treaty law — written laws specifically agreed upon between international legal persons — and if we also eschew the notion

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that international law has inherent primacy over municipal law. The process of formation of customary international law, and the problem of ascertainment of its content as well as that of the so-called general principles of law derived from mature legal systems, makes the wholesale incorporation of these sources of international law into the domestic legal system rather unpalatable for many of the newer, post-colonial nations of the world, which reject the wholesale succession to international norms as handed down to them by their colonial masters.

Kaplan and Katzenbach have remarked in their *Political Foundations of International Law* (1961) that “sometimes international law is viewed as a rather strange breed of law to which the term ‘law’ is applied only by courtesy, if at all.” Those of us who are committed internationalists would like to turn this view on its head and to assist in the development of international legal norms into mainstream global jurisprudence.

But how do we do this effectively in a jurisprudential world in which the dualist position remains the dominant approach? Here, some national and regional judiciaries have been surprisingly courageous in coming up with doctrines that partially get around the conceptual problem. Two such attempts readily come to mind: the American judicial doctrine of “self-executing treaties” and the European Court of Justice concept of “direct effects.”

The Vienna Convention on Treaties (1969) draws distinctions between treaty conclusion, signature, state consent, and effectiveness in municipal law. After a treaty has been concluded and signed by the negotiating governments, and ratified by the state, the state in question is of course bound in international law by the treaty. But the effectiveness of the treaty in municipal law is another matter. From the dualist perspective, we could have a situation in which there is an embarrassing but perfectly logical disconnect between the state’s international obligation and the court’s ability to apply the norms of a treaty in the domestic setting.

In the American doctrine of self-executing treaties, this embarrassment is partially resolved by referring to some treaties as self-executing; that is, those whose provisions are immediately effective in municipal law without the neces-

sity of ancillary legislation, because the provisions of the treaty presumably supply sufficient rules by which a right given to a person may be enjoyed, or a duty imposed, on him or her. Not all treaties qualify as self-executing, and so if a treaty is non-self-executing, or is an “executory” treaty, it would require further domestic legislation to make it effective because it is deemed to be essentially providing principles without laying down specific rules giving them the force of law.

Chief Justice John Marshall, in announcing the doctrine in the 1829 case of *Foster & Elam v. Neilson* [27 U.S. (2 Pet.) 253 (1829)] stated: “Our constitution declares a treaty to be the law of the land [by the supremacy clause of Article VI]. It is consequently to be regarded in courts of law as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision...”

Thus, even though the United States legal system basically takes a dualistic stance, the judiciary has successfully made a dent in the theory by hiving off a category of treaties and making them directly effective in municipal law. As you can imagine, the executive branch likes the idea of self-executing treaties, while the legislature dislikes it because it denies them part of the action in the legislative-making process.

So, who decides whether a treaty is self-executing or not? In U.S. practice, the President, in transmitting a treaty or convention to the Senate for its constitutionally required “advise and consent” as part of the ratification process, will typically state how the treaty should be treated. For example, the President declared the United Nations Convention on the Sale of Goods of 1980 as a self-executing treaty. So no special legislation followed its ratification by the Senate. By contrast, with the WTO Uruguay Rounds Agreement of 1994, which displayed more complexity and covered more extensive areas of international economic law — not just trade in goods, but also trade in services, new levels of intellectual property rights, and dispute settlement process rivalling that of the International Court of Justice — the executive deemed them to be non-self-executing, and it became necessary for Congress to pass a separate legislation — the Uruguay Rounds Agreements Act — to make them part of U.S. domestic law.

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Sometimes the U.S. Senate asserts itself and may, in the course of ratification, make reservations and declare a treaty to be non-self-executing. This means that the entire Congress will have to debate it in the effort to enact the appropriate legislation. For example, in 1992, in the ratification process involving the United Nations Covenant on Civil and Political Rights, the Senate declared the treaty non-self-executing. The conservative circles within the Senate wished to ensure that the potentially far-reaching constitutional implications of some of the provisions of the Covenant were not inconsistent with U.S. federal or state constitutions.

In Europe, the thought that a treaty or other norm created by the international community or a supranational body could directly become part of municipal legal system was easier to absorb, since historically some of the national constitutions had at one time or another referred to the supremacy of international law over domestic law. However, the issue of “direct effect” of internationally created norms was brought to the fore as the Treaty of Rome sought to develop Europe into a community as opposed to a mere common market. The old debate between monism and dualism re-emerged within the context of regional economic integration law.

In the 1963 landmark case of *Van Gend En Loos v. Nederlandse* [26/62, 1963 ECR 1, 1963 CMLR 105], the plaintiff had sought to import a chemical into the Netherlands from Germany at a time when notional customs duties were being phased out in the European Common Market. The original Article 12 of the Treaty of Rome banned the imposition between member states of any new customs duties on imports or exports, or any charges having equivalent effect. When the goods arrived in the Netherlands, the shipment was subjected to a Dutch customs duty that was higher than previously applied to the same product. The plaintiff sued the Netherlands in the European Court of Justice (ECJ), arguing a violation of Article 12 of the Treaty. One of the defences put up by the Netherlands was that the Court had no jurisdiction, in that the plaintiff’s request related not to the interpretation of the Treaty but to its application within the framework of the constitutional law of the Netherlands.

In rejecting the latter’s arguments, the ECJ articulated the doctrine of direct effect in the following terms: “The purpose of the E.E.C. Treaty — to create a Common Market, the functioning of which directly affects the citizens of the Community — is more than an agreement which merely creates mutual obligations between the contracting states... The Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals.” Article 12 of the EEC Treaty “must be interpreted as producing direct effects and creating individual rights which national courts must protect.”

When a provision is said to have direct effect, it means that it is self-executing and that individuals can directly challenge their governments or regional integration institutions and make a claim in court based on that provision. There is no need for a national implementing statute to serve as a basis for claim. In practice, however, the ECJ has been selective as to which provisions of the Treaty of Rome and successive European Union treaties have direct effect. For example, whereas the Court had no difficulty interpreting Article 12 as directly applicable, the old Article 2, describing measures aimed at avoiding distortion of competition, would be viewed as purely inspirational and therefore non-self-executing. At the same time, the doctrine of direct effect has been applied to EU Regulations; and, surprisingly, to some directives, which in theory permit member states to design the specific manner in which the broad objectives of the directives should be implemented. This clearly implies variation in the modalities and raises an issue as to what it is that is supposed to be directly applicable.

I believe that the concept of self-executing treaties and of the doctrine of direct effect of international norms have helped in increasing access to global jurisprudence. Are we ready to embrace and apply these concepts in the West African sub-region? Here the national judiciaries with a common law background start with an uphill task: the dualist position bequeathed to us by our colonial masters still sticks to us like an albatross around our necks. Again, the conventional position is that if there has been no implementing legislation, a particular treaty is simply not part of the domestic law.

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However, in the Ghanaian Supreme Court case of *NPP v. A-G (CIBA)*, 1996-97 SCGLR), Justice William Atuguba M.C. took a more magnanimous stand on the possibility of incorporating notions of international fundamental human rights and freedoms even if not specifically mentioned in Chapter 5 of the Ghana Constitution of 1992, the main human rights chapter of our Constitution. Article 33(5) provides that the rights and freedoms enumerated in that Chapter do not exclude others not specifically mentioned, which are considered to be inherent in a democracy and intended to secure the freedom and dignity of man.

In the *NPP* case, Atuguba stated that, “the principles of international instruments relating to fundamental human rights are enforceable to the extent that they fit into the provisions set out in Article 33(5).” It is fair to assume from this assertion that such international instruments could conceivably include those that are yet to be ratified, or ratified but awaiting an implementing legislation.

I should like to go a step farther than my brother Justice Atuguba and assert that where no legislative action is required to bring existing domestic law in line with a country’s freshly assumed treaty obligation, there is really no need in principle to insist on explicit statutory implementation, and the only impediment would be the received doctrine of dualism.

As for the doctrine of direct effect, it has already been thrust upon us by the growing regional integration law of the Economic Community of West African States (ECOWAS). Such regional law constitutes both international and transnational law, and it is becoming part of the domestic law of each member state of the community.

Article 9 of the revised ECOWAS Treaty, 1993, provides that decisions of the authority of heads of states and governments shall be binding on member states and institutions of the community. And Article 12 states that regulations made by the Council of Ministers shall be binding on member states after their approval by the authority. In a paper presented at the first Conference of ECOWAS Chief Justices and the ECOWAS Court of Justice held in Accra in November 2005, Dr. Ibn Chambas, now president of the ECOWAS Commission, asserted that such decisions of the heads of state and regulations of the Council “assumed

the status of legal texts, immediately binding on member states and Community institutions respectively.” At the same conference, the president of the ECOWAS Community Court of Justice, Madam Justice Donli, submitted a paper in which she relied on European Court of Justice case law to buttress her strong position that the ECOWAS community law had direct effect in the jurisdiction of member states.

And what about the judgments or decisions of the ECOWAS Court of Justice, which has jurisdiction in appropriate matters over all ECOWAS member states? Article 15(4) of the Revised Treaty provides that all such judgments shall be binding on member states, the institutions of the community, and on individuals and corporate bodies. In the Supplementary Protocol of January 2005 Amending the Protocol Relating to the Community Court of Justice, Article 10 widens access to the Court by adding human rights violations and those of corporate bodies.

The new Article 24 of the Protocol introduces a singular interface between this regional court and the national courts of the ECOWAS member states by providing that execution of any decision of the ECOWAS Court “shall be in the form of a writ which shall be submitted by the registrar of the Court to the relevant member state for execution according to the rules of civil procedure of that member state.” That writ is to be enforced by the recipient member state, upon verification that it emanated from the regional court.

I should hasten to add that without the appropriate ratifications and possible constitutional amendments in some cases, it is difficult to imagine how the well-intentioned and progressive provisions of the Supplementary Protocol can be constitutionally implemented by a number of ECOWAS member states.

Whatever happens to the grand debate between monism and dualism, between direct effect and transformation, there are ways in which global jurisprudence, including treaty law, can be brought to bear on municipal law through a bold, innovative interpretation of national constitutions and core statutes that provide them with some internationalist flavour.

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First, for the purpose of removing ambiguity or filling a gap in such instruments, Dr. Justice Anand, one-time Chief Justice of India, has remarked that courts may have regard to international obligations already assumed by the state concerned, and thereby resolve the ambiguity in favour of the meaning which is more in accord with the treaties to which that state is a contracting party. [Dr. Justice Anand, “Domestic Application of International Legal Norms,” p.6.]

Second, where there is ambiguity or a gap, it is preferable to adopt a constitutional or statutory construction which conforms most closely to established rules of international law in general, and not just to the state’s prior treaty obligations. For there is a presumption in most common law jurisdictions that Parliament does not intend to act in breach of international law.

Thirdly, a constitutional provision might actually enjoin the courts to have recourse to international law as a guide in interpreting the Constitution itself, or any other law of the country. Such is the case with the Ghana Constitution of 1992, Chapter 6, dealing with the directive principles of state policy. Under Article 34(l), the entire body of directive principles are expected to guide all citizens, Parliament, the President, the Judiciary, etc. in their application and interpretation, of the Constitution or any other law. More specifically, Article 40, dealing with international relations, enjoins the Government to promote respect for international law, treaty obligations, and the settlement of international disputes by peaceful means.

Let me also suggest at this point that the relevance of international law to domestic law issues may arise well before the issues of ratification, approval, accession, and post-ratification implementing legislation, which we have been discussing so far. Under the Vienna Convention on Treaties (1969) to which Ghana is a party, a state’s treaty obligations predate ratification. Under Article 18 of the Treaty, a state is “obliged to refrain from acts which would defeat the object and purpose of a treaty when it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification ... until [it] shall have made its intention clear not to become a party to the treaty ...” In other words, the moment a state’s representatives

sign a treaty, the state assumes a negative obligation — an obligation not to defeat the object and purpose of the treaty — while awaiting ratification.

It was on this basis that I applied the United Nations Convention on the Carriage of Goods By Sea (the so-called Hamburg Rules) in fixing the extent of the liability of a carrier of goods by sea from New York in the Ghana Supreme Court case of *Delma America v. Kisko Product* [2005-2006], even though Ghana merely signed the Convention in 1978 and had not ratified it by the time of the litigation.

Now, having made a case for the relevance of pre-ratification treaties, as well as treaties ratified but without accompanying implementing legislation, I still wish to make a strong appeal to the legislative authorities to see to the ratification of the many treaties we have signed, because it gets us closer to the goal of effective domestication of worthwhile international legal norms with minimum controversy. This appeal goes especially to the legal officers from the treaty sections of our Attorney General’s Department and the Ministries of Foreign Affairs, to the Parliamentary Committees on legislation, to work together more closely and on tighter schedules to ensure not just the ratification of signed treaties but also their speedy enactment into statutes, so that the treaty rights and obligations of our citizens will become more easily justiciable in court. One modality worth investigating might be to draft the ratifying instruments in statutory language, attach the signed treaties as annexes, schedules, or appendices, and exhaust the usual parliamentary process of law-making, so that the ratification package, provided it contains no reservations, would simultaneously serve as the implementing statute.

Mr. Chairman, distinguished ladies and gentlemen, may I conclude on a light linguistic note by saying to you all: put a little loving into international law, and all will be well with access to global jurisprudence. Thank you very much.

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# Participants in the 2nd West African Judicial Colloquium

## DIRECTORS

**Leigh SWIGART**, Director of Programs in International Justice and Society, International Center for Ethics, Justice, and Public Life, Brandeis University

**Henrietta MENSA-BONSU**, Acting Dean and Professor of the Faculty of Law, University of Ghana, member of the Liberian Truth Commission

**Fatsah OUGUERGOUZ**, Executive Director of the African Foundation for International Law, Judge of the African Court of Human and Peoples' Rights

## JUDGES

**Victor D. ADOUSSOU\***, Justice of the Supreme Court of Benin

**Vida AKOTO-BAMFO**, Justice of the Court of Appeal of Ghana

**Amar BALDE\***, Advocate General of the Supreme Court of Guinea

**Gbaza BOBY**, Justice of the Supreme Court of the Ivory Coast

**Rabo DILLÉ**, Vice President of the Supreme Court of Niger

**Kassoum KAMBOU\***, Justice of the Supreme Court of Burkina Faso

**Etienne KENE\***, Justice of the Supreme Court of Mali

**Johnnie N. LEWIS**, Chief Justice of the Supreme Court of Liberia

**Papa Makha NDIAYE**, Justice of *la Cour de Cassation* of Senegal

**George Adeshola OGUNTADE**, Justice of the Supreme Court of Nigeria

**Mohamed OULD HANNANI\***, President of the Supreme Court of Mauritania

**Ade RENNER THOMAS**, Chief Justice of the Supreme Court of Sierra Leone

**Abdou Kareem SAVAGE**, Chief Justice of the Supreme Court of The Gambia

**Têtê Théodose TEKOE\***, President of the Supreme Court of Togo

**Annadjib YOUSOUF**, Commissioner in the Supreme Court of Chad

## SESSION LEADERS

**K. APPIAGYEI-ATUA**, Senior Lecturer, Faculty of Law, University of Ghana

**Emmanuel AYOOLA**, Vice President of the Special Court for Sierra Leone, former justice of the Supreme Court of Nigeria, the Supreme Court of The Gambia, and the Court of Appeal of the Seychelles

**Linda CARTER**, Professor, McGeorge School of Law, University of the Pacific

**E.K. QUASHIGAH**, Professor, Faculty of Law, University of Ghana

**Saidou Nourou TALL**, Professor and Vice-Dean of the Faculté de Sciences Politiques et Juridiques, Université Cheikh Anta Diop de Dakar

**A.P. VAN DER MEI**, Professor of Law, Maastricht University

## STAFF

**John ABBOSEY**, Attorney and Internet trainer, DataCenta, Accra

**Clement AKAPAME**, Colloquium program assistant and student, Faculty of Law, University of Ghana

**Mila VERSTEEG**, Electronic legal resource consultant and colloquium rapporteur, Doctoral student in law, Oxford University

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\* Indicates that the judge also participated in the 1st West African Judicial Colloquium

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**This report of the West African Judicial Colloquia is available on line at: <http://www.brandeis.edu/ethics/internationaljustice/judicialcolloquia/index.html>**

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