Secretary-General's closing remarks

This conference has been about a number of things, but at its heart has been an attempt to renew and strengthen the bonds between us as a community of scholars interested in constitutional law. The building of a community is always a contradictory enterprise. Contradictory because, in reaching out to some of our fellow human beings we at the same time by definition leave others out of account. However benign our intentions in building a particular community, the enterprise of community-building may have adverse consequences we do not intend. Others may understand our community differently from the way we do.

The best way I can think of to illustrate this point is to recall an occasion when my family and I were camping in the open air at a nature reserve about 100 kilometres outside Johannesburg in South Africa. The setting was beautiful, but it was an Easter weekend, and consequently the campsite was very crowded, with about twenty different groups scattered amongst the trees. As the evening progressed, and the sun went down, each group became demarcated as a separate entity around its own campfire. If one did not concentrate, the conversations of each group merged into a formless whole, a hubbub of common humanity. However, if one made a conscious effort, one could hear quite clearly the separate conversations being carried on, and eavesdrop on what was being said by each group. Listening and eavesdropping like this for ten minutes or so it suddenly struck me with horrible force that each conversation was somehow based on establishing the group's

togetherness at the expense of others. So the group of office workers 50 metres to our left laughed at the foibles of their absent colleagues. And the churchgoers to our right bemoaned the lack of commitment by some of their members. And, being South Africa, yet others sought community in shared complaints about the consequences of affirmative action.

It would be foolish to pretend that the conversation we have been having at this conference might not strike an eavesdropper in the same way. Professor Cass Sunstein, the well-known American constitutional theorist, is fond of introducing a bit of psychology into his work. In one of his books he cites the example of internet chat groups, where it has been shown that extended and repeated conversations between people of mildly prejudiced views eventually produces a group with strongly prejudiced views about the topic they have been talking about. So, whilst the primary challenge for everyone committed to the IACL must be to strengthen the bonds that bind us together as a community of scholars, we must somehow seek to achieve this without closing the door on other points of view. Recent world events provide only too telling an example of how difficult it is to proselytize about democracy and human rights, as though it were some modern religion we were, as true believers, required to propagate to those less blessed by God than ourselves.

Fortunately, the theme for this conference – *Rethinking the Boundaries of Constitutional Law* – has been deliberately meta-theoretical, forcing us to examine the nature of the conversation we are having, even as we try to take that conversation further and

make it deeper. I have not been able to attend all of the workshops or indeed read more than a handful of the 160 papers presented at this conference, but my impression has been that at least three themes or types of boundary have emerged as the main ones requiring to be re-thought.

The first and most obvious boundary is the disciplinary boundary that surrounds constitutional law itself. Coming from a common-law tradition as I do, where lawyers distinguish themselves from others by endlessly discussing cases, it has always struck me how close to comparative politics many of the papers presented at IACL events are. In fact I raised this point at one of the Executive Committee meetings in which the programme for the World Congress was being discussed, and was told, no doubt rightly, that things were understood differently elsewhere. Nevertheless, I do think that any group of people with pretensions to being a scientific organization must attempt to understand the boundaries of their discipline, if only to grasp what it is that they are specialized in, and what must be left to others. It must be possible to distinguish a meeting of the International Association of Constitutional Law from a meeting of the International Sociological Association, or indeed from an intelligent conversation between two journalists reporting on current affairs of state.

My own interest is in the boundary between political science and comparative constitutional law, where the problem can be quite easily stated. In order to do good comparative constitutional law, one must perforce understand the political dynamics that drive rule-formation and institution-building in the countries studied. But

the goal must surely not be to build a science of those dynamics, which is what political scientists do, but to understand enough of the political dynamics so as to know which of the rules and institutions one is studying may be transplanted to other jurisdictions, and which may not.

The second boundary that we have been discussing at this conference has been the boundary between the social and political conflicts that constitutional law may properly address, and those that it must leave to other forms of dispute resolution or regulation. We may think here of the view that international terrorism is such an awful phenomenon that combating it requires the heavy hand of the security forces rather than the firm grip of constitutional law, or of the view that social rights, though they may exist in state policy, may not cross the boundary into the more demanding arena of fundamental human rights. In one of the workshops I *was* able to attend, the workshop on politically sensitive questions, the conclusion seemed to be that the 'constitutional-outside' was shrinking all the time, and that judges all over the world seem to want to let ever more complicated aspects of social and political life into their courtrooms. The reasons for this cannot quickly be assessed here, but, to the extent that judges are doing this and getting away with it, it must follow that constitutional law is thought by many to have been legitimately extended into these areas.

The third and last issue concerning the boundaries of constitutional law concerns the nature of those boundaries themselves. Are they culturally determined, such that the boundaries of constitutional law in one country may be thought to be different from the

boundaries in another? Are there some universal boundaries that we can say define the core content of liberal constitutionalism in any country if it is to be worthy of that name? The third plenary session on religion, state and society produced an interesting discussion of this issue, with Judge Michael McConnell providing an eloquent defence of the core claims of liberal constitutionalism, and an account of those forms of religious and cultural expression which, though touching at the margins of what we think permissible, liberalism should in the end be prepared to accommodate.

In this day and age of polarized world views, he seemed to be saying, it is important for liberalism to be very clear about what it will and won't tolerate: slavery, forced marriage, child labour, female genital mutilation – these are all practices that liberalism must universally condemn, whatever the political consequences. But the wearing of one or the other garment as an expression of religious faith contradicts no principle of liberal constitutionalism. At least, it would be politically foolish for liberals to make this kind of issue a terrain of struggle.

There were aspects of this debate in the exchange between Professor Ronald Dworkin and Professor Olivier Beaud, with Dworkin proposing that principles of freedom of expression and freedom of religion could be defined at the level of political philosophy in a way valid for all liberal societies, and Prof Beaud defending the right of liberal societies to define for themselves a culturally specific notion of how these principles should be balanced. Although I was unable to attend it, I am certain that the

workshop on balancing and proportionality would have taken this debate further, discussing as it must have how judges weigh competing principles like these in concrete factual settings.

In this way the boundaries of constitutional law may be said to have certain hard edges that go to the very definition of what liberal constitutionalism is about. Other boundaries, on the other hand, may well be culturally defined, and it is one of the tasks of comparative constitutional law to discover through careful scholarship what these may be. One of the great benefits of a World Congress such as this is that we are forced to present our research in a form intelligible to a wide audience. In this way the conventional wisdom of our own smaller research communities may rapidly be exposed as having been founded on false assumptions. And the forms of rhetoric we lawyers use to make our arguments more forceful are revealed for the unscientific methods they often are.

It remains for me to say that I am very honoured to serve this community as its Secretary-General. I pledge my ongoing support and that of the Deputy Secretary-General, Norman Taku, to the work of this organization, to its new President, Professor Didier Maus, and to the organizer of the next World Congress, Professor Hector Fix-Fierro. Thank you.