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Toward an International Rule of Law

Brandeis Institute for International Judges

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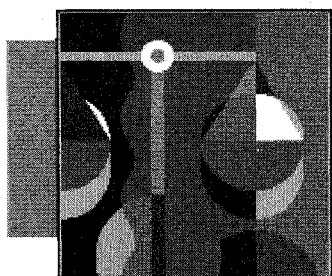
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BIIJ

**Brandeis Institute for
International Judges**

2010

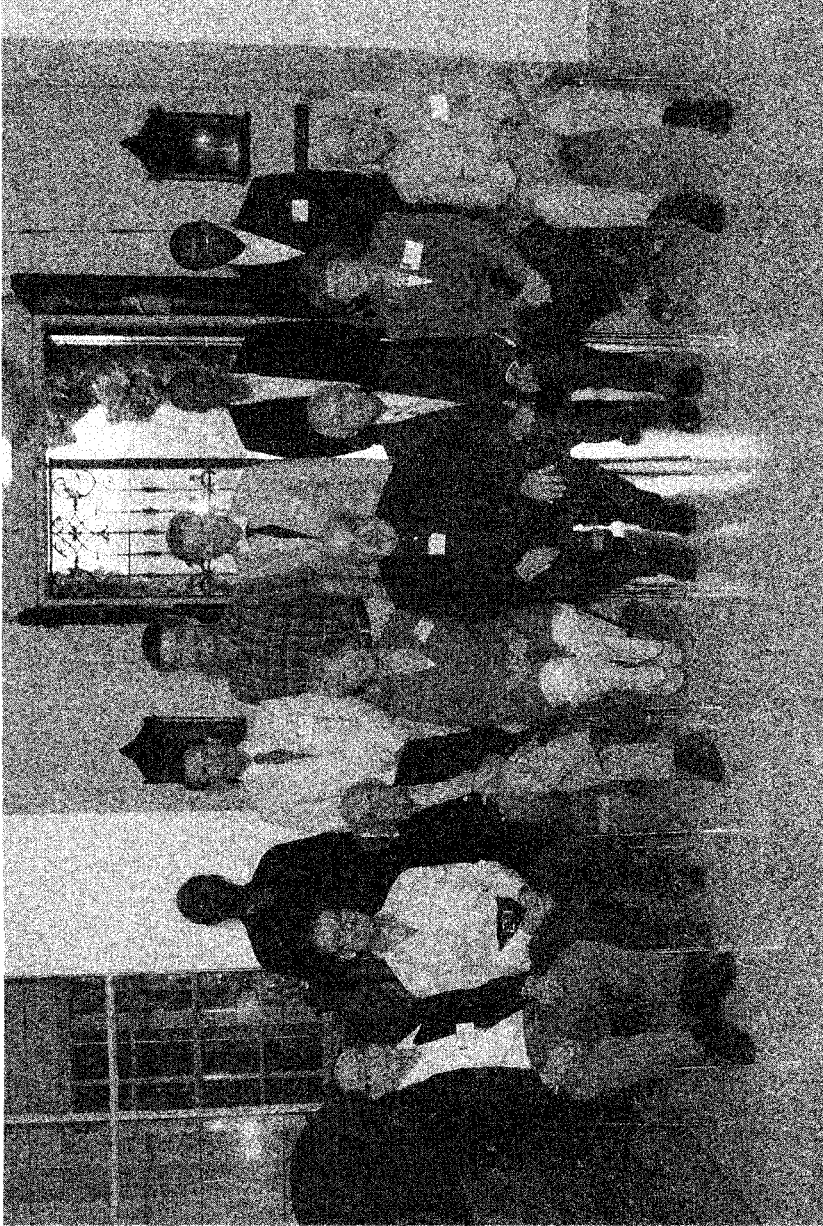


**Toward an International
Rule of Law**

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provided by
MacArthur Foundation
Rice Family Foundation
David Berg Foundation**

**The International Center for Ethics,
Justice, and Public Life**

**Brandeis University
Waltham, Massachusetts**



Back Row (from left): Jon M. Kamanda, Fatsah Ougergouz, Bakhtiyar Tuzmukhamedov, Hans-Peter Kaul, Adrian Saunders, Gérard Niyungeko,
Front Row (from left): Moteo Noguchi, Daniel Fransen, Theodor Meron, Nina Vajčić, Alberto Pérez Pérez, Hisashi Owada, Jennifer Hillman,
Fausto Pocar.

FOREWORD

Virtually everyone in a civilized society would declare support for the “rule of law.” But few are given the chance to reflect on just what this notion means and, more particularly, whether achieving it in the international sphere is possible. Yet that is just what the participants of the Brandeis Institute for International Judges (“BIIJ”) did in July 2010. Sixteen judges from a wide variety of international courts and tribunals came together to debate whether the rule of law does or can exist at the international level and to discuss what roles their institutions play in its establishment.

We gathered in the contemplative atmosphere of the Schloss Leopoldskron, a grand historic residence outside of Salzburg, Austria, for the seventh session of the BIJJ. As always in this unique forum, Brandeis convened international judges from nearly every continent and from virtually all of the international courts and tribunals in the world, allowing each participant to discover anew what a small world we live in and how often we face similar legal issues. And as always, the personal connections made between participants were immediate and palpable.

Brandeis University offered the judges in attendance at BIJJ 2010 a rare combined gift of time, space, and intellectual stimulus, allowing them to delve deeply into the issues surrounding the definition of the “rule of law” and the forms it assumes at the international level.

Many kernels of wisdom on these and related questions emerged from our discussions in Salzburg. This report wonderfully captures these insights, while respecting the confidentiality of all speakers and the spirit of openness that characterized our conversations. Readers will, I believe, be able to both discern the enduring commitment to the rule of law felt by participants and appreciate the challenges they face as they strive to uphold and reinforce its mandates in the international arena.

I was honored to be a participant and presenter at BIJJ 2010. I know I speak for everyone at the Institute when I thank the staff of Brandeis University’s International Center for Ethics, Justice and Public Life, and our academic friends and colleagues, for bringing us together to learn from one another, to develop bonds across our institutions, and to debate some of the most critical issues in international justice of our time. We wish the Brandeis Institute for International Judges every success in the future.

Jennifer Hillman
World Trade Organization Appellate Body
BIIJ 2009 & 2010

ABOUT THE INSTITUTE

From July 25-30, 2010, sixteen judges from thirteen international courts and tribunals gathered in Salzburg, Austria for the seventh Brandeis Institute for International Judges (“BIIJ”).

The BIJJ provides members of the international judiciary with the opportunity to meet and discuss critical issues concerning the theory and practice of international justice. Institutes are held approximately every eighteen months, bringing together judges serving on international courts and tribunals around the world to reflect on the practical challenges as well as philosophical aspects of their work. The proceedings of each Institute are summarized in a report that is distributed widely in the international legal community.¹

The judges at BIJJ 2010 represented a wide spectrum of international justice institutions, including long-time participants such as the International Court of Justice, the International Criminal Court, and the European Court of Human Rights; as well as two institutions participating for the first time: the Extraordinary Chambers in the Courts of Cambodia and the Special Tribunal for Lebanon.

The theme of this year’s Institute, “Toward an International Rule of Law,” encompassed topics including fairness in international judicial institutions, the accessibility of international courts and tribunals, and the impact of diversity on the establishment of an international rule of law. The Institute also continued a tradition of examining ethical issues faced by members of the international judiciary. Sessions were led by Institute co-directors, presenters, and members of the BIJJ program committee.

In addition to these thematic discussions, the Institute featured a keynote address by Patricia O’Brien, United Nations Under-Secretary-General for Legal Affairs, as well as an informal session led by Associate Justice of the United States Supreme Court Anthony Kennedy.

Since 2002, Brandeis University has hosted more than eighty international judges and law experts at the Brandeis Institute for International Judges. Participants have met in Africa, the Caribbean, Europe, and the United States to reflect on their unique profession, share best practices, and expand their judicial network.²

The Brandeis Institute for International Judges 2010 was funded by the MacArthur Foundation, the Rice Family Foundation, and the David Berg Foundation.

1. Reports of past Institutes may be downloaded at <http://www.brandeis.edu/ethics/internationaljustice/biij/index.html>.

2. BIJJ participants are granted anonymity for remarks offered during the discussions in order to allow them to speak frankly about any sensitive matters that arise. Thus, this report does not attribute statements to particular individuals without their explicit permission. It furthermore uses the masculine personal pronoun, regardless of the speaker’s gender, in order to ensure that a judge cannot be identified.

PARTICIPATING JUDGES

African Court of Human and Peoples' Rights (ACHPR)

- Gérard Niyungeko, President (Burundi)
- Fatsah Ouguergouz (Algeria)

Caribbean Court of Justice (CCJ)

- Adrian Saunders (St. Vincent and the Grenadines)

European Court of Human Rights (ECHR)

- Nina Vajić (Croatia)

Extraordinary Chambers in the Courts of Cambodia (ECCC)

- Motoo Noguchi (Japan)

Inter-American Court of Human Rights (IACHR)

- Alberto Pérez Pérez (Uruguay)

International Criminal Court (ICC)

- Hans Peter Kaul, Second Vice-President (Germany)

International Court of Justice (ICJ)

- Hisashi Owada, President (Japan)

International Criminal Tribunal for the former Yugoslavia (ICTY)

- Theodor Meron (United States)
- Fausto Pocar (Italy)
- Patrick Robinson, President (Jamaica)

International Criminal Tribunal for Rwanda (ICTR)

- Bakhtiyar Tuzmukhamedov (Russian Federation)

International Tribunal for the Law of the Sea (ITLOS)

- Helmut Tuerk, Vice-President (Austria)

Special Court for Sierra Leone (SCSL)

- Jon Kamanda, President (Sierra Leone)

Special Tribunal for Lebanon (STL)

- Daniel Fransen (Belgium)

World Trade Organization Appellate Body (WTO AB)

- Jennifer Hillman (United States)

Co-directors

- Richard Goldstone, retired Justice of the Constitutional Court of South Africa, former Prosecutor of the International Criminal Tribunals for the former Yugoslavia and Rwanda
- Linda Carter, Professor, McGeorge School of Law, University of the Pacific

Presenters

- Linda Carter
- Stéphanie Cartier, Professor, Fordham University
- Richard Goldstone
- Jennifer Hillman, BIIJ Program Committee Member
- Anthony Kennedy, Associate Justice of the United States Supreme Court
- Theodor Meron
- Patricia O'Brien, United Nations Under-Secretary-General for Legal Affairs
- Fatsah Ouguergouz, BIIJ Program Committee Member
- Fausto Pocar, BIIJ Program Committee Member
- Leigh Swigart, Director of Programs in International Justice and Society, International Center for Ethics, Justice, and Public Life, Brandeis University
- Daniel Terris, Director, International Center or Ethics, Justice, and Public Life, Brandeis University

Rapporteurs

- Micaela Neal, Student, McGeorge School of Law, University of the Pacific
- Cheri Reynolds, Student, McGeorge School of Law, University of the Pacific

KEY INSTITUTE THEMES

Since the Brandeis Institute for International Judges was first held in 2002, the world of international justice has evolved considerably. A number of new courts and tribunals have come into operation, including the International Criminal Court, the Special Court for Sierra Leone, the African Court of Human and Peoples' Rights, the Caribbean Court of Justice, the Extraordinary Chambers in the Courts of Cambodia, and the Special Tribunal for Lebanon. The result is that more regions of the world now have access to international judicial processes, and serious legal issues have come under international scrutiny. The jurisprudence produced by international judges over the past decade has furthermore had a powerful impact on the development of law in many fields.

The present moment also finds the mandates of several international criminal tribunals coming to a close, inspiring scholars and observers to ponder the legacy they will leave behind as well as the lessons to be derived from their successes and shortcomings. The closure of these institutions calls perhaps even more attention to the justice institutions that are permanent and have global reach. The International Criminal Court, the International Court of Justice, the International Tribunal for the Law of the Sea, and the World Trade Organization Appellate Body will assume primary responsibility for fighting impunity and bringing about the peaceful resolution of disputes in the years to come.

At the conclusion of BIIJ 2009 in Trinidad, Institute directors and organizers took stock of the various discussions that had occurred over the preceding days. They noted, in particular, a recurring reference to what participants viewed as an evolving sense of the power of international law and respect for its mandates. It was decided that developing an Institute program around the theme "Toward an International Rule of Law" would allow for a fruitful exploration at BIIJ 2010 of the role that international law and its institutions can and do play in the contemporary world. Discussions centered around six themes:

- What is the International Rule of Law?
- Fairness in International Judicial Institutions
- The Accessibility of International Courts and Tribunals
- The Impact of International Justice
- What Does Diversity Imply for an International Rule of Law?
- Topics in Ethical Practice: Challenges to Judicial Independence

The following is a summary of these discussions.

What is the International Rule of Law?

“ . . . the rule of law in the international order is, to a considerable extent at least, the domestic rule of law writ large.”³

“ . . . analysis of the role of the Rule of Law as applied at the international level requires a reconceptualization of the principle in such a way as to take account of systemic differences between the domestic and international legal order.”⁴

Few would dispute the desirability of establishing and maintaining the rule of law across the globe. Finding common agreement on the precise meaning of this concept, however, is less easy to achieve. Frequently invoked and promoted in the discourse of legal practitioners, lawmakers, and development experts alike, the semantic content of the term “rule of law” is not a constant but instead depends upon who uses it and to what purpose.

Extending the notion of the rule of law beyond its habitual domestic context and into an international one further complicates the search for broad agreement on its definition. This is clear from the quotations beginning this section, which presume different relationships between the domestic and international legal orders. This difficulty also became immediately apparent as BIIJ 2010 participants began their first session, devoted to sketching out the broad outlines of the “international rule of law.”

The launching point for this exercise was a comparison between the rule of law at the domestic and international levels. There was general consensus about essential elements that belong to both, including equality before the law, strict observance of due process, and judicial independence. Several participants offered what they personally viewed as the central tenets of the rule of law. “Whether at the domestic or international level, sovereignty over arbitrariness is the essential meaning of the rule of law,” declared a criminal judge. “The rule of law means that no one is above the law, including the authorities,” said a judge from a human rights court. Furthermore, he continued, “The law to which everyone submits cannot be an oppressive law but one that protects human rights.”

It was suggested that the principles that emerged from the Conference on the Human Dimension of the Commission on Security and Cooperation in Europe, convened in Copenhagen at the end of the Cold War era, provide a good elaboration of the rule of law at the domestic level (see excerpt on p. 212-14). These principles “represent the international standards we expect states to apply,” declared a participant, although another cautioned that they represent “more a

3. TOM BINGHAM, *THE RULE OF LAW* 111 (2010).

4. Hisashi Owada, *The Rule of Law in a Globalizing World*, in *THE RULE OF LAW: PERSPECTIVES FROM AROUND THE GLOBE* 155 (Francis Neate ed., 2009).

blueprint than a reality.” Central to the so-called “Copenhagen Principles” are basic human rights guarantees in addition to procedural ones. The United Nations (“U.N.”) also employs a definition that encompasses both kinds of guarantees.⁵

Not all BIIJ participants accepted, however, that the rule of law concept should cover both kinds of guarantees. One judge felt strongly that individual rights are essentially procedural rights, adding, “I find it hard to conceive of a substantive application of the principles of the rule of law that has any meaning without procedural rules.” Another judge concurred, pointing out that in certain countries during the Soviet era, the laws were “perfectly done” and included extensive human rights protections. “But the laws were not applied, or they were applied arbitrarily,” which resulted in an overall absence of the rule of law.

The converse situation was also noted, one where existing domestic laws were strictly observed but flawed from a human rights perspective. This was the case in both Nazi Germany and apartheid South Africa, where the systematic disenfranchisement of certain minorities was based on duly enacted laws that were, nevertheless, unjust. In the same light, one participant brought up the infamous mid-nineteenth century *Dred Scott* decision of the United States Supreme Court, which ruled that slaves and former slaves were not citizens and, as such, could not pursue a lawsuit in federal court where jurisdiction was based on the parties being citizens of different states. *Dred Scott* was viewed as the “property” of his “owner.” The participant described this as “the worst decision ever penned by any judge in any country in any era.”⁶

While all participants seemed to agree that procedural principles of the rule of law are critical—that “they undergird all substantive principles,” as one judge expressed it—most also felt that a proper conceptualization of the rule of law necessarily includes both kinds of principles. The rule of law is much more than “rule by the laws,” asserted one judge, the former being both broader and deeper. Participants suggested that human dignity is the foundation of both the substantive and procedural aspects of the rule of law.

Participants also concurred in a general way that there already exists a rule of law at the international level, at least in an emergent form. However, it was pointed out that there are important differences between the international and domestic levels that need to be acknowledged.

The separation of powers, for example, is often indicated as a crucial element in the domestic rule of law. But where does this element fit into the international context? There is an international judiciary, of course, of which the BIIJ participants are themselves representatives. But from what exactly does this judiciary need to maintain separation in order to uphold the rule of law? There is

5. See Patricia O’Brien, Keynote Address at the Brandeis Institute for International Judges: Toward an International Rule of Law 2 (July 29, 2010), available at http://untreaty.un.org/ola/media/info_from_lc/Brandeis%20Institute%20for%20International%20Judges,%20Salzburg,%2029%20July%202010.pdf.

6. *Scott v. Sandford (Dred Scott)*, 60 U.S. 393 (1857).

no international legislature, strictly speaking, although there is a body of international law, composed of international treaties and customary international law.⁷ One participant argued that the appearance that international decision-making is a kind of lawmaking may lead to conservatism on the part of international judges. This is because they wish to avoid the appearance of overreaching their authority to interpret the law in the absence of a lawmaking branch that can respond to judicial determinations.

What, then, about an executive branch in the international sphere? It was suggested that the Security Council acts as the executive for courts that operate under the aegis of the United Nations, as do States Parties or parent political bodies for various other courts. Several criminal judges noted that their courts sometimes feel inappropriate pressure from their executives to complete trials in the shortest time possible, regardless of concerns for due process. Another criminal judge questioned the independence of his own court, due to its financial dependence on certain donor states. “When our president or prosecutor has traveled to all capitals to beg for money, will their answer depend on the issuance of an indictment and its content?” he wondered aloud. The entities holding a court’s purse strings, in other words, may act as another kind of executive power, one that may overstep its role.

These comments suggest that the freedom to exercise the judicial function as judges see fit, along with guarantees of independence for prosecutors and other organs of their institutions from outside entities, are critical parts of what participants see as the rule of law in the international sphere. Their concerns about interference and influence by external forces recalled discussions that have taken place during past sessions of the BIIJ in relation to the politicization of international justice.⁸

There are other differences between the domestic and international rule of law, in addition to those related to the separation of powers. The international rule of law, for example, must deal with issues not found at the domestic level, such as interstate trade, warfare, and territorial disputes, pointed out one judge. The “content” of the international rule of law is also less clear than that of the rule of law at the level of a single state. One judge suggested that it is important that the basis of the international rule of law represent “the lowest common denominator,” that is, just those essential values that can be shared by

7. As one of the session readings noted, “[t]he absence of an international legislature makes law-making a little cumbersome and time-consuming, but that is an inevitable consequence of sovereignty.” Cf. Justice Richard Goldstone, Inaugural Address at the Salzburg Global Seminar: The Rule of Law: Indispensable Prerequisite for Democracy 7 (Nov. 9, 2009), available at <http://www.salzburgglobal.org/current/news.cfm?IDMedia=51481>.

8. See BRANDEIS INST. FOR INT’L JUDGES, BRANDEIS UNIV., INDEPENDENCE AND INTERDEPENDENCE: THE DELICATE BALANCE OF INTERNATIONAL JUSTICE (2007) [hereinafter 2007 BIIJ REPORT], available at <http://www.brandeis.edu/ethics/pdfs/internationaljustice/bij/BIIJ2007.pdf>; see also BRANDEIS INST. FOR INT’L JUDGES, BRANDEIS UNIV., INTERNATIONAL JUSTICE: PAST, PRESENT, AND FUTURE (2009) [hereinafter 2009 BIIJ REPORT], available at <http://www.brandeis.edu/ethics/pdfs/internationaljustice/bij/BIIJ2009.pdf>.

populations across the globe. Attitudes toward the death penalty provide an interesting case in point. A number of states resist its prohibition by international law, although some have been forced to acquiesce through their membership in a regional entity with its own human rights convention.⁹ Participants wondered about the role of the international community in imposing such a ban across the globe, given that many states still view the death penalty as an appropriate punishment in some circumstances. One judge pointed out that while it is important that the international rule of law have substance, this does not mean that *all* substantive issues should be included under its protective rubric. This runs counter to the increasing tendency, described by another participant, to view the rule of law as “embodying all good things.”

Very importantly, it was observed that international law has evolved considerably beyond the traditional “law of nations” to encompass norms applicable directly to individuals. Indeed, the international protection of human rights has served to unify formerly discrete spheres of law, as national courts become active interpreters and enforcers of the individual rights enumerated in various international conventions.¹⁰ There is clearly, one judge declared, a “synergistic relationship” between the rule of law at the domestic and international levels.

This nexus of issues pertaining to the rule of law—procedural versus substantive, domestic versus international, and state-focused versus individual-focused—are subtly interconnected. Judge Hisashi Owada sought to clarify these relationships in a 2009 article in which he described the evolution that international law has undergone over the past decades.¹¹ The increasingly prominent place of human rights in the international legal order has brought with it a shift of focus from the state to the individual as a subject of international law, as well as a new emphasis on a rule of law that transcends national boundaries. He writes that “these developments place further legal constraints on the conduct of sovereign states in the international community; they also prescribe international norms to guarantee an international standard of justice that is substantive in character, stretching the rule of law beyond its narrower, more formalistic aspects.”¹² The international rule of law can only achieve its objectives, he asserts, if it incorporates “certain basic universal values” as well as “traditional formal aspects, such as the supremacy of the law, equality before the law, and the existence of independent monitoring systems.”¹³

9. This is the situation with the Russian Federation and the Council of Europe.

10. BINGHAM, *supra* note 3, at 117.

11. Owada, *supra* note 4, at 187.

12. *Id.* at 195.

13. *Id.* at 196.

These discussions about the nature of the international rule of law set the stage for BIIJ 2010 participants to address a number of related topics in the following sessions. Despite some variation in personal interpretations of the term, it was clear that all participants are engaged, through their judicial work and institution building, in the progressive development and recognition of a rule of law that can establish desirable legal norms and practices across the globe.

***From Document of the Copenhagen Meeting of the Conference on the Human Dimension of the Commission on Security and Cooperation in Europe:*¹⁴**

(1) The participating States express their conviction that the protection and promotion of human rights and fundamental freedoms is one of the basic purposes of government, and reaffirm that the recognition of these rights and freedoms constitutes the foundation of freedom, justice and peace.

(2) They are determined to support and advance those principles of justice which form the basis of the rule of law. They consider that the rule of law does not mean merely a formal legality which assures regularity and consistency in the achievement and enforcement of democratic order, but justice based on the recognition and full acceptance of the supreme value of the human personality and guaranteed by institutions providing a framework for its fullest expression.

(3) They reaffirm that democracy is an inherent element of the rule of law. They recognize the importance of pluralism with regard to political organizations.

(4) They confirm that they will respect each other's right freely to choose and develop, in accordance with international human rights standards, their political, social, economic and cultural systems. In exercising this right, they will ensure that their laws, regulations, practices and policies conform with their obligations under international law and are brought into harmony with the provisions of the Declaration on Principles and other CSCE commitments.

(5) They solemnly declare that among those elements of justice which are essential to the full expression of the inherent dignity and of the equal and inalienable rights of all human beings are the following:

(5.1) - free elections that will be held at reasonable intervals by secret ballot or by equivalent free voting procedure, under conditions which ensure in practice the free expression of the opinion of the electors in the choice of their representatives;

(5.2) - a form of government that is representative in character, in which the

14. Org. for Sec. and Co-operation in Eur. [OSCE], *Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE* (June 29, 1990), available at <http://www.osce.org/odihr/elections/14304>.

executive is accountable to the elected legislature or the electorate;

(5.3) - the duty of the government and public authorities to comply with the constitution and to act in a manner consistent with law;

(5.4) - a clear separation between the State and political parties; in particular, political parties will not be merged with the State;

(5.5) - the activity of the government and the administration as well as that of the judiciary will be exercised in accordance with the system established by law. Respect for that system must be ensured;

(5.6) - military forces and the police will be under the control of, and accountable to, the civil authorities;

(5.7) - human rights and fundamental freedoms will be guaranteed by law and in accordance with their obligations under international law;

(5.8) - legislation, adopted at the end of a public procedure, and regulations will be published, that being the condition for their applicability. Those texts will be accessible to everyone;

(5.9) - all persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law will prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground;

(5.10) - everyone will have an effective means of redress against administrative decisions, so as to guarantee respect for fundamental rights and ensure legal integrity;

(5.11) - administrative decisions against a person must be fully justifiable and must as a rule indicate the usual remedies available;

(5.12) - the independence of judges and the impartial operation of the public judicial service will be ensured;

(5.13) - the independence of legal practitioners will be recognized and protected, in particular as regards conditions for recruitment and practice;

(5.14) - the rules relating to criminal procedure will contain a clear definition of powers in relation to prosecution and the measures preceding and accompanying prosecution;

(5.15) - any person arrested or detained on a criminal charge will have the right, so that the lawfulness of his arrest or detention can be decided, to be brought promptly before a judge or other officer authorized by law to exercise this function;

(5.16) - in the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone will be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law;

(5.17) - any person prosecuted will have the right to defend himself in person or through prompt legal assistance of his own choosing or, if he does not have sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

(5.18) - no one will be charged with, tried for or convicted of any criminal offence unless the offence is provided for by a law which defines the elements of the offence with clarity and precision;

(5.19) - everyone will be presumed innocent until proved guilty according to law.

Fairness in International Judicial Institutions

The notion of “fairness” is central to the rule of law. It underlies, among other principles, the equality of all persons before the law, various elements of due process, and the basic tenets of democratic governance. BIJJ participants had the opportunity to explore the degree to which it is the role of international judicial institutions to make the content and application of international law fairer.

The rapid multiplication of international organizations endowed with rule-making authority in the aftermath of the Second World War has spurred the development of the substance of international law. These substantive developments were often not matched, however, with adequate means of implementation. For many decades, the interpretation of international law was thus frequently left to the discretion of states. In the last twenty years, the unprecedented increase in the number of international courts and tribunals has finally equipped the international community with multiple judicial fora, which are designed to provide objective determinations of that law. This phenomenon has, in and of itself, significantly contributed to increasing the inherent fairness of international law, as well as the fairness of its application.

While international courts may further enhance the inherent fairness of the law by interpreting international law in conformity with universal human rights principles, as acknowledged in the opening discussion, this session was centered on the role and responsibilities of international courts in increasing the fairness of their institutions and procedures. Specifically, this session examined two aspects of fairness that cut across the operations of international courts and tribunals: 1) the fairness of their proceedings, and 2) the transparency of their work.

With regard to proceedings in international courts and tribunals, the questions posed to the judges were the following: Do courts have sufficient control over the conduct of their proceedings in order to ensure fairness? How much discretion do courts have in adopting rules that fill gaps or can ensure more fairness to the proceedings? Should judges have the power to modify rules they believe to be unfair?

Before responding to these questions, a number of participants raised preliminary queries about the subject at hand. Asked one judge, is the very notion of fairness unavoidably subjective? If so, how should we approach it? When speaking of fairness, suggested a participant, is it not necessary to specify in

relation to whom? The fairness of proceedings could be evaluated differently by parties before the court (states, prosecutors, or individuals), witnesses, victims, parent political bodies, the general public, or any other stakeholder. Finally, it was pointed out that the focal point of fairness might differ according to the type of court under examination. While fairness in proceedings in general applies in all courts and to all parties, fairness to the accused, for example, may be a dominant concern in international criminal tribunals, whereas fairness toward victims of state violations may command more attention in international human rights courts.

Participants noted that even detailed rules might not cover all questions related to fairness in a given situation before a court. This means that judges are often left to resolve any uncertainties, although how this is done varies widely from court to court. Some courts benefit from a wide margin of discretion when amending their procedural rules. The ICJ, for instance, although relatively conservative in its approach toward changes in procedure, has had occasion to revise both the rules and practices of the court in order to improve efficiency and fairness.¹⁵ The experience of the ACHPR is interesting as it is a young court—its first judges were elected in 2006—and has only recently finalized its rules of procedure. African judges did not consult the court's parent body, the African Union, during this initial process. "My experience is that judges are sovereign in this issue and should adopt the rules they feel are correct," said one participant. However, when the rules were revised, the court was advised to open up the process to input by NGOs, and the African Commission of Human and Peoples' Rights was also consulted.¹⁶ This feedback was found to be informative, although the court retained complete autonomy in deciding the final version of the rules.

Judges of the ICTY and ICTR similarly have the authority to revise their institutions' rules of procedure and, more surprisingly, their rules of evidence. Indeed, since the ICTY was established in 1993, the rules of procedure and evidence have been revised, according to one participant, forty-five times, albeit not without some critical commentary on the part of observers. ICTY and ICTR judges should acknowledge, said one participant, this special privilege they have and take care not to abuse it. Another participant described his reaction to this practice: "I felt that the ICTY followed an excessive practice of amending its rules of procedure. Then I realized I was wrong. The ability of judges to

15. The ICJ revised its Rules of Court in 1978, which were subsequently amended in 2005. The ICJ further adopted Practice Directions in 2001, which were amended in 2009.

16. It was noted that the relationship of the African Court and the African Commission is not well articulated in the protocol establishing the former—it simply says that the work of the Court should "complement the protective mandate of the African Commission on Human and Peoples' Rights." Consequently, ACHPR judges must also take the lead in determining what this provision means in concrete terms. Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights art. 2 (June 9, 1998), OAU doc. OAU/LEG/EXP/AFCHPR/PROT (III) [hereinafter ACHPR] (adopted on June 10, 1998 and entered into force on Jan. 25, 2004).

transform practical lessons into modified rules is extremely important to the efficiency of the court.” Many believe that newer international criminal courts and tribunals have been able to learn from the “trial and error” experiences of the so-called “ad hoc tribunals,” and devise rules of procedure and evidence from the beginning that have required less tweaking as their work progressed.

Courts with unique procedural elements, however, cannot benefit from the past experience of peer institutions. The ECCC, for example, has made provision for victims to participate as civil parties in its trials, and it has found little precedent to follow on this matter. The ICC is the only other court that could provide relevant jurisprudence, but its victim participation regime is statutorily different from that of the ECCC. In response to the enormous increase in the number of civil parties wishing to participate in the Cambodian Court’s second case—undoubtedly through public observation of its first case—ECCC judges had to amend the rules of victim participation to apply to the second case and beyond. In the long run, declared a participant, constantly amending rules between cases would not be an optimal strategy.

The ICC contrasts with many other international courts in the restrictions that have been placed upon its judges in the area of rules revision. It happened that a number of 2010 BIJ participants had been in attendance at the 1998 conference in Rome where the ICC treaty was negotiated.¹⁷ It was clear, they said, that measures were actively taken during the conference to limit the power of the ICC, and especially its judges. Another participant observed that the process that established the ICC was “highly politicized,” with the result that “the Rome Statute is full of safeguard clauses to ensure that the Court would not be too big of a threat to the sovereignty of states.” In addition to the statute of the Court that was created by treaty among states, the rules of procedure and evidence were promulgated by the Assembly of States Parties (“ASP”). Consequently, the ASP holds the “unusual power” to change the rules of the court; the judges can only propose changes. This regulation, said one participant, is both “restrictive and cumbersome.” The judges, however, do have the authority to adopt regulations of the court.

The recent Review Conference on the Rome Statute of the ICC seemed to mark a changing attitude toward the court, however.¹⁸ “I think that in the

17. United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, Italy, June 15-July 17, 1998, *Rome Statute of the International Criminal Court*, U.N. Doc. A/CONF.183/9 (July 17, 1998) [hereinafter Rome Statute], available at <http://untreaty.un.org/cod/icc/rome/proceedings/contents.htm>.

18. The Coalition for the International Criminal Court describes the Review Conference, which took place in Kampala, Uganda from May 31-June 11, 2010, thus:

ICC states parties, observer states, international organizations, NGOs, and other participants discussed proposed amendments to the Rome Statute and took stock of its impact to date, making the Conference a critical milestone in the evolution of the Rome system. More than 600 Coalition members played a central role in enhancing the dialogue on the Rome system and ensured that the voices of civil society were truly heard through a number of debates, roundtables and other events.

international atmosphere, there is much more confidence that the ICC is not a loose cannon,” observed a criminal judge. “There is a real chance that States Parties might be willing to give judges the power they *should* have.”

The discussion of control over a court’s rules of procedures ended with a reflection about why there are such contrasting views on the appropriate role for judges in their drafting and revision. Might these views reflect the different legal cultures associated with the civil and common law systems, a participant queried? If so, this tension between civil and common law practices can be found in other aspects of the work of international courts and tribunals. For example, international judges may bring to their work certain assumptions, inculcated through their legal education and practice, about methods for witness preparation, the appropriateness of *ex parte* communication, or the relative importance of written submissions and oral pleadings.¹⁹

BIIJ participants then turned their attention to the transparency of the work of their institutions and how it affects their perceived fairness by a number of different stakeholders, including parties before the court, the general public and parent political bodies. It would be difficult to argue against the desirability of international courts being transparent in the way they operate. These institutions require broad understanding and support for their success and impact, and having their proceedings and oral hearings accessible to the public, and open to scrutiny, would seem the best way to achieve this goal. It would certainly be difficult for anybody to trust a completely secret judicial proceeding. Transparency thus necessarily fosters public confidence in the fair administration of justice.

On the other hand, it is undeniable that a level of confidentiality may sometimes be warranted in international courts and tribunals. In criminal proceedings, the identities of witnesses may need to be hidden in order to ensure their safety. And in interstate dispute cases, parties may not wish to reveal sensitive state information in presenting their cases and thus might opt for the submission of redacted documents. Such circumstances require that the right balance be struck between transparency and confidentiality.

The following question was accordingly put to BIIJ participants: What measures do your respective institutions take to ensure the *optimal* level of transparency? The ensuing discussion highlighted the various ways in which different courts and tribunals attempt to keep their work in the eyes of the public,

Delivering on the Promise of a Fair, Effective and Independent Court: Review Conference of the Rome Statute, COALITION FOR THE INT’L CRIM. CT., <http://www.iccnw.org/?mod=review> (last visited Nov. 1, 2011).

19. See also BRANDEIS INST. FOR INT’L JUDGES, BRANDEIS UNIV., COMPLEMENTARITY AND COOPERATION: INTERNATIONAL COURTS IN A DIVERSE WORLD (2006) [hereinafter 2006 BIIJ REPORT], available at <http://www.brandeis.edu/ethics/pdfs/internationaljustice/bij/BIIJ2006.pdf>. Cf. DANIEL TERRIS, CESARE P. R. ROMANO & LEIGH SWIGART, THE INTERNATIONAL JUDGE: AN INTRODUCTION TO THE MEN AND WOMEN WHO DECIDE THE WORLD’S CASES (2007).

but it also brought to light a number of concerns judges have about the interface between their institutions and the public.

With regard to the transparency of hearings, it was noted that interstate courts generally allow judges or the parties themselves to decide whether the oral proceedings should be confidential.²⁰ In other courts, like the European Court of Justice (“ECJ”), human rights courts and international criminal courts, it is incumbent upon the courts—and not the parties—to decide if the hearings should be confidential, and, as a general rule, the public will be denied admission only in “exceptional circumstances” or if there are “serious reasons” to prevent attendance.²¹ A judge asked, does the public really have an interest in open oral hearings of proceedings involving only states? Some participants were inclined to think that the general public *does* have a democratic interest in knowing how their national state argues cases before international courts.

The WTO Appellate Body, at the request of parties, recently decided to open up its appellate hearings to the public in certain cases.²² There was initial resistance by some member states to make their arguments in public, as well as some trepidation about the loss of confidentiality. The biggest concern, however, was that the diplomatic negotiation of dispute settlement that had historically been part of proceedings under the General Agreement on Tariffs and Trade (the predecessor to the WTO) could not be done successfully in public.²³ But both the Appellate Body and many WTO members have since recognized the benefits that come with transparency—better understanding of the Body’s decisions by the public, and greater participation in the process of reaching it. The result is that

20. See, e.g., Statute of the International Court of Justice art. 46, June 26, 1945, 59 Stat. 1055 (“The hearing in Court shall be public, unless the Court shall decide otherwise, or unless the parties demand that the public be not admitted.”); Statute of the International Tribunal for the Law of the Sea art. 26(2), Dec. 10, 1982, 1833 U.N.T.S. 561 (“The hearing shall be public, unless the Tribunal decides otherwise or unless the parties demand that the public be not admitted.”).

21. See, e.g., Protocol No. 3 on the Statute of the Court of Justice of the European Union, 2010 O.J. (C 85) 31(Mar. 30, 2010) (“The hearing in court shall be public, unless the Court of Justice, of its own motion or on application by the parties, decides otherwise for serious reasons.”); see also RULES OF COURT OF THE EUROPEAN COURT OF HUMAN RIGHTS (ECHR), R. 63(1) (2009), available at <http://www.echr.coe.int/NR/rdonlyres/D1EB31A8-4194-436E-987E-65AC8864BE4F/0/RulesOfCourt.pdf> (“Hearings shall be public unless . . . the Chamber in exceptional circumstances decides otherwise, either of its own motion or at the request of a party or any other person concerned.”); Statute of the Inter-American Commission on Human Rights art. 24(1), O.A.S. Res. 447 (IX-0/79), O.A.S. Off. Rec. OEA/Ser.P/IX.0.2/80, Vol. 1 at 88 (1979) (“The hearings shall be public, unless the Court, in exceptional circumstances, decides otherwise.”); Rules of Procedure and Evidence of the International Criminal Tribunal for the Former Yugoslavia, R. 78-79, U.N. Doc. IT/32/REV.7 (2009), available at http://www.icty.org/x/file/Legal%20Library/Rules_procedure_evidence/IT032Rev45_en.pdf.

22. See, e.g., Appellate Body, *Annual Report for 2009*, WT/AB/13 (Feb. 17, 2010). In 2009, the number of individuals who registered to observe the oral hearing was thirty-three in Appellate Body, *U.S.—Continued Zeroing*, WT/DS350/AB/R (Feb. 19, 2009); thirty-seven in Appellate Body, *U.S.—Zeroing (EC) (Article 21.5—EC)*, WT/DS294/AB/RW (June 11, 2009); thirty-six in Appellate Body, *U.S.—Zeroing (Japan) (Article 21.5—Japan)*, WT/DS322/AB/RW (Aug. 31, 2009). See also Appellate Body, *Annual Report for 2008*, WT/AB/11 (Feb. 9, 2009).

23. Cf. Francisco Orrego Vicuña, *Individuals and Non-State Entities before International Courts and Tribunals*, 5 Max Planck U.N.Y.B. L. 53 (2001).

there are now fewer objections to opening up hearings when requested by the parties.

As a human rights court, the ECHR has had to find a delicate balance between transparency and privacy. On the one hand, it has made an impressive effort to publicize its proceedings by broadcasting them via the Internet. This has allowed populations in countries across the Council of Europe to follow and understand cases with important implications for the protection of the rights guaranteed in the European Convention on Human Rights.²⁴ If applicants ask to remain anonymous, the Court may decide that their case be referred to using only initials.²⁵ When two parties decide to settle their dispute, the negotiations are also kept strictly private; a breach of confidentiality may result in the Court rejecting the case altogether.

While transparency is important in all international courts, it is perhaps particularly so in criminal tribunals where individuals are accused of heinous crimes. The media scrutinize such trials closely, as do victim communities and NGOs. The rapid dissemination of information means that unfavorable commentary about the proceedings can quickly “go viral.” The ECCC, which was just releasing its first judgment at the time of BIIJ 2010, has come under harsh criticism for not being transparent enough. The Court operates under both international and Cambodian law, and the latter calls for confidential investigations and limited disclosures. However, the NGOs that observe ECCC proceedings want to ensure that it is in compliance with internationally recognized standards of due process. The prosecutors have accordingly disclosed some information and made certain documents public, but it has not been enough to satisfy these NGOs. Some criminal judges at the Institute characterized their courts as much more open. If information needs to be classified for reasons of safety or discretion, it is usually done so temporarily. “Parties may have their own approaches to confidentiality,” commented one participant. “But in the interests of the public and transparency, judges may override their decision.”

Transparency might also have a direct effect on the behavior of judges. One participant suggested that open proceedings are an “important safeguard,” not only for their fairness but also for the independence and impartiality of the bench. If judges know that they are being observed, he suggested, they may behave differently than if all proceedings took place without external scrutiny. In an article, one of the 2010 BIIJ participants, Theodor Meron, quoted Lord Cullen as saying that “not being hidden from the public ear and eye is a safeguard against

24. Formally known as The Convention for the Protection of Human Rights and Fundamental Freedoms, it was adopted on Nov. 4, 1950, and entered into force on Sept. 3, 1953. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter ECHR].

25. *E.g.*, *A., B., and C. v. Ireland*, App. No. 25579/05, 2032 Eur. Ct. H.R. (2010).

judicial arbitrariness.”²⁶ On the other hand, it could be argued that judges in high-profile trials might be better able to carry out their role without the pressure or interference that can come with an open courtroom.

While transparency might seem an ideal to strive for in most circumstances, participants agreed that this cannot extend to judicial deliberations. These should be strictly confidential, although publicizing dissenting and separate opinions might shed light on this important part of the judicial process and help the public to understand how judges have arrived at their decisions.

Finally, it was noted that the practice of producing annual reports may enhance the transparency of the work of international courts and tribunals to the benefit of numerous actors, such as parent political bodies, parties (states, prosecutors, and individuals), the general public and other stakeholders. Even those institutions that are not required to do so will often summarize the work they have accomplished in such a publication. These publications generally include statistics as well as a sophisticated narrative, in contrast to reports produced by some national courts where there appears to be a reluctance to provide any information to political bodies beyond statistical data. Reports written and circulated by international judicial institutions generally serve the purpose of explaining their work to those who do not necessarily have legal expertise. They also serve to entice more support.

In addition, the presidents of many courts make annual addresses to parent political bodies, such as the U.N. General Assembly, the U.N. Security Council, the Assembly of States Parties (“ICC”), and the Meeting of States Parties (“ITLOS”). While this represents yet another channel through which the courts can increase the transparency of their work, it is also an exercise that carries risks, given the highly politicized context in which the addresses are delivered.

In concluding the discussion about transparency, one participant adopted the perspective of “an outsider looking in.” Striking the appropriate balance in judicial proceedings between openness and confidentiality may be “intuitive” for judges. But laypersons may not understand the reasoning behind a certain decision to protect identities or withhold information. In order to promote their reputations as fair institutions, encourage compliance with their judgments, and optimize their impact on constituencies, international courts should make sure that they communicate their actions and decisions effectively to the broadest public possible.

This comment led naturally into a discussion about the role of media in the outreach efforts of international judicial institutions. Several participants noted that journalists are rarely trained to report on international judicial proceedings and frequently fail to present these proceedings accurately or in a balanced way.

26. Theodor Meron, *Editorial Comment: Judicial Independence and Impartiality in International Criminal Tribunals*, 99 AM. J. INT’L L. 360 (2005).

The result is that the public may not perceive the proceedings of international courts and tribunals as fair.

One judge noted, in fact, that on the very day he traveled to BIJ 2010, he read an editorial in a local paper calling for the closure of his court. "At the same time that we are struggling to survive and asking for help," said the judge in frustration, "here comes someone who, due to a lack of knowledge of basic issues relating to the court's existence, says 'Close it down!'" The failure of the press to understand the court's central objective of ending impunity, and insistence on the institution's "unfair" use of resources, could, he suggested, have a detrimental effect on his institution's legacy.

Another participant cautioned, however, that a distinction must be made between partisanship and ignorance on the part of the press. Criminal courts, in particular, may become the target of criticism by communities that do not agree with the basic assumptions behind their mandates. Occasional negative press may not help an international court's cause, he continued, but it is crucial that their work be kept in the public eye despite the potential dangers.

Participants then addressed a perennial question with regard to judges: should they explain their rulings so that the public understands the reasoning behind them, or should they let their judgments "speak for themselves"? There were mixed views about this matter. Some participants felt that under no circumstances should members of a bench ever explain their rulings, even if it is to rectify a misunderstanding created by the media. Others were not against the practice in principle, although they recognized that, as one judge said, "it is hard to express legal arguments in a way that is palatable to a media organization."

Most international courts have resolved this issue by tasking certain staff with the preparation of information for the public. "You need within the institution a special type of communicator," explained a participant, "who must be a lawyer and who must at the same time know about public relations and press work." At the CCJ, for example, this role is carried out by an administrative unit that prepares a summary of judgments, approved by the judges before their release to the media. The WTO has taken similar steps, clearly recognizing that it is unrealistic to expect the media to digest immediately a 250-page decision and report on it adequately. The organization ensures that short summaries of the key arguments of the parties, and decisions of the panels and the Appellate Body, are issued at the time the decisions are circulated, and that its website contains concise summaries of the procedural status and substantive decisions in every case. Criminal courts may find themselves the object of particularly heightened media attention when decisions are announced. "Our trials last two or three years, with judgments that run into the hundreds of pages," explained a criminal judge. "So the presiding judge will read a summary of the judgment, making clear that it does not replace the judgment, which is the only authoritative version of the trial chamber decision. But the summary can be used by the media and others."

Communication may be of particular importance for the IACHR, where the dissemination of judgments is sometimes part of the reparation measures called for in a decision. But printing long judgments in their entirety in local newspapers is not an effective way to communicate the content of important decisions, pointed out a judge. Consequently, the court “is now in the process of developing summaries, prepared by the secretary of the court, as well as providing a way to work with TV and radio so they can really reach the public.”

Several participants pointed out that the onus should not only be on courts to communicate well but also on journalists to report well. There should be journalists trained in reporting on international justice issues, ones who “have enough understanding of the complexities of international courts to put their work into perspective and communicate it properly,” one participant declared. Some others agreed that such journalists seem to be in short supply, the result being that international courts and tribunals do not always have the reputations they deserve as fair and just institutions.

Finally, participants were urged to consider with utmost care the actual and perceived fairness of their judicial operations, given that it is an important building block for the establishment of an international rule of law. As the late Thomas M. Franck stated, “International law, even more than any individual state’s legal system, needs [fairness as an] element of promotion of voluntary compliance because of the relative paucity of modes of compulsion.”²⁷ While international judges, like any other judges, are primarily bound to apply the law, the inherent fairness of that law, as well as the fairness of its application, necessarily play an important part in maximizing the impact of international justice.

The Accessibility of International Courts and Tribunals

Through exploring the notion of fairness in international justice proceedings, BIIJ participants began the process of developing their definition of the international rule of law. They next addressed an area of increasing focus in the international justice system, that of how accessibility to international courts and tribunals is structured and whether increased access can serve as one of the indices of a robust international rule of law.

Participants began their discussion by recognizing the dramatic shifts that have occurred in the types of actors that participate in international justice proceedings. It was noted in the first session that international law has evolved from a system focused on states to one that increasingly involves individuals and

27. THOMAS M. FRANCK, *FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS* 26 (1995). Franck was the Murry and Ida Becker Professor of Law Emeritus at New York University School of Law. Over his long academic career, he also, among numerous other activities, served as an ad hoc judge at the ICJ and acted as a session leader at BIIJ 2004.

non-state entities. Indeed, this development “mirrors an increased participation of private or non-state actors in many other fields of international life,” commented a participant. Most of the international judicial institutions established over the past two decades highlight this new focus—criminal tribunals have the individual as their subject, while human rights courts respond to claims by individuals or the organizations representing them. They thus stand in contrast to courts that address disputes between states, which are the “traditional” subjects of international law.

But even interstate dispute resolution bodies increasingly deal with the concerns of individuals and non-state entities, if only indirectly. It was pointed out that the ICJ cases addressing alleged violations of the Vienna Convention on Consular Relations by the United States—the *Breard*, *LaGrand*, and *Avena* cases—were brought by Paraguay, Germany, and Mexico respectively on behalf of their nationals awaiting execution in U.S. prisons.²⁸ The WTO Appellate Body and ITLOS similarly take on cases where a state essentially stands in for the interests of an individual, a commercial body, or other entity. Interestingly, one participant pointed out that the converse also exists. The ECHR occasionally receives “disguised state applications,” when hundreds of individual applicants of the same nationality make a claim against a foreign state.

Participants were asked to consider the ways in which access to their institutions—either direct or indirect—has developed over the years. They also had the opportunity to point out both the advantages and challenges that come with these new patterns of access. Their responses illustrated that international courts and tribunals face many common issues as they seek to adapt to changes in the way their institutions function.

Interstate dispute judges began with reflections on their own type of institutions, those where access is usually limited to states. At the WTO, “to get in the door, a government has to bring the case.” However, many governments will agree to bring cases when commercial entities based in their countries ask for a legal determination on trade measures they can show are disadvantageous. ITLOS has gone further by formally extending its jurisdiction to include non-state actors in cases before its Seabed Chamber. In disputes between states over deep-sea mining issues, the private contractors involved must submit to the Chamber’s jurisdiction or to binding arbitration. In situations where a vessel is seized on the high seas, the flag state and shipping company also frequently join forces when bringing a case before the tribunal.

The agreement that established the CCJ in 2001, and the interstate treaty that the court is required to interpret, provide for even more permissive access.

28. Vienna Convention on Consular Relations (Para. v. U.S.), Provisional Measures, 1998 I.C.J. 248, 258 (Apr. 9); *LaGrand* (F.R.G. v. U.S.), 2001 I.C.J. 466, 514 (June 27); *Avena and Other Mexican Nationals* (Mex. v. U.S.), 2004 I.C.J. 128 (Mar. 31). Cf. Linda E. Carter, *Lessons from Avena: The Inadequacy of Clemency and Judicial Proceedings for Violations of the Vienna Convention on Consular Relations*, 15 DUKE J. COMP. & INT’L L. 259 (2005).

They allow private entities to initiate a suit against a state provided they first seek the permission of their home state. The latter can then permit the private entity to proceed to sue, or it could itself institute the action, essentially then becoming the claimant.²⁹ Caribbean judges had to grapple with the complexities of this provision when a private entity sought to sue its *own* state, whose government naturally denied the entity permission, saying that it (the state) could not simultaneously act as a claimant and defendant. When the private entity approached the court directly, the state in question resisted the suit, arguing that the entity could not prosecute the action in the face of its own state's refusal to grant permission to sue. After looking at various articles of the treaty, the CCJ judges decided that the private entity should be allowed to pursue the suit in order to avoid a violation of another provision of the treaty regarding non-discrimination.³⁰ The court held that, 1) to deny standing to private entities in such circumstances could have the effect of frustrating the goals of the treaty, and 2) the purpose of the relevant article was to avoid a duplication of suits, and that the requirement to seek permission was a procedural device to avoid a state allegedly in violation of the treaty being twice vexed, once by an injured private entity, and again by the contracting party of that private entity. The oldest international court, the ICJ, continues to retain its status as a state-only forum, while acknowledging that many of its cases have the interests of non-state entities behind them. In certain situations, however, the definition of "state" may not always be clear. The Court was once called upon to decide whether a "super-state"—the European Community—fell under its jurisdiction and concluded that it did not. There has also been some discussion about whether individuals should have full access to the Court to bring a case. Indeed, former ICJ President Rosalyn Higgins "has convincingly explained that there are powerful reasons for amending the Statute to allow for this development."³¹ However, not all judges agree on the wisdom of opening up historically "state-only courts" to non-state action. One judge even characterized himself as an outright "opponent" to such a move, given that there are already other judicial fora where individuals can be direct parties to a case.

Human rights courts offer a very different picture from interstate dispute courts when it comes to the role of the individual. Their mandate is to determine whether there have been violations of the individual human rights set out by the respective conventions that each court was created to uphold—namely, the European Convention on Human Rights, the American Convention on Human

29. See Agreement Establishing the Caribbean Court of Justice, art. XXIV, Feb. 14, 2001, U.N.T.S. 2255; see also Revised Treaty of Chaguaramas, art. 222, Jan. 1, 2006.

30. See *Trinidad Cement Ltd. v. Guyana*, App. No. OA 2/2009, [2009] CCJ 1 (OJ).

31. Vicuña, *supra* note 23, at 57.

Rights, and the African Charter on Human and Peoples' Rights.³² The status of the individual is thus central to their work.

However, access to these courts is not necessarily direct for individual claimants. Only the ECHR accepts, without condition, individual petitions alleging human rights violations, a policy that has opened its doors to thousands of applications from across the Council of Europe every year and created a backlog of over 145,000 cases as of February 2011.³³ Unlike its sister human rights courts in the Americas and Africa, the European Court no longer has a commission—it was abolished by Protocol 11 to the Convention, according to which the ECHR became a full-time institution in 1998.³⁴ The result is that it has no body to “filter” the massive number of applications, an overwhelming percentage of which will eventually be found to be inadmissible on various grounds. The ECHR is constantly seeking strategies to streamline its approach to admissibility review so that the court can operate more efficiently and prioritize cases that involve the most serious human rights violations and have important implications for the promotion and protection of human rights across Europe.

In contrast, individuals do not have direct access to the IACHR. Its cases must be referred by either the Inter-American Commission on Human Rights—which *does* accept individual petitions alleging violations—or a state party to the Organization of American States. However, it is almost automatic for the Commission to refer cases when it has found a violation, so that individuals have reliable indirect access to the Court. Furthermore, victims have the right to participate in a proceeding at the IACHR, with a status akin to being a party. Occasionally, states have requested an advisory opinion from the IACHR in hopes of appealing an unfavorable decision by the Inter-American Commission. For example, Argentina and Uruguay requested in 1990 a general appeal of a Commission decision regarding the disappearance of political opposition figures. The Court found that the admissibility requirements for this appeal had not been met. More generally, it has never fully reversed a decision of the Commission, although it has arrived at different findings.

The ACHPR shares characteristics with both of these courts—it accepts applications from states and also from individuals, but only if the defendant state has accepted the jurisdiction of the court to receive individual cases.³⁵ So

32. ECHR, *supra* note 24; see African Charter on Human and Peoples' Rights, June 27, 1981, 21 I.L.M. 58; see also Organization of American States, American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123.

33. *Statistics 1/1-31/8/2011*, EUR. CT. OF HUM. RTS., http://www.echr.coe.int/NR/rdonlyres/7B68F865-2B15-4DFC-85E5-DEDD8C160AC1/0/Statistics_2011.pdf (last visited Nov. 1, 2011).

34. Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocol No. 11, May 11, 1994, E.T.S. No. 155, available at <http://conventions.coe.int/Treaty/EN/Treaties/html/155.htm>.

35. The first case of the African Court, *Michelot Yogogombaye v. Republic of Senegal* (Dec. 15, 2009),

far, only four countries out of fifty-three members of the African Union have done so. However, individuals do have direct access to both the African Commission on Human and Peoples' Rights—which can only issue recommendations, not binding decisions, and thus is less attractive to claimants—and to regional courts that have jurisdiction over human rights issues.³⁶ Nonetheless, ACHPR judges are anxious to open up direct access to their court and are working toward this goal, despite the opposition of most African states.

A final question about access to human rights courts was raised. Given the broad geographic jurisdictions of all the human rights courts, it may be a real challenge for some victims and claimants to reach the actual court and pursue their cases in person. The Inter-American system has made provision for this challenge, having created funds to help both the Commission and Court cover the cost of participation in proceedings.

Of all the types of international courts and tribunals, those with criminal jurisdictions are most closely associated with individuals, that is, the persons who stand accused of war crimes, crimes against humanity, and/or genocide. However, there is another category of individual becoming increasingly important in the proceedings of international criminal tribunals: the victim. BIJ 2010 hosted judges from six different criminal institutions, and all had experiences to share about how and when victims may access their proceedings.

The discussion started with the ICC, the first court to make specific provision for the participation of the victim in trials (*see infra* Article 68(3) of the Rome Statute). This has been hailed as a positive development in international criminal justice by many observers, and most judges agreed that it was a worthwhile development. But it was also acknowledged that the modalities of participation are still being explored and that a truly workable model for victim participation has yet to be devised.

From Article 68(3) of the Rome Statute: Protection of the victims and witnesses and their participation in the proceedings³⁷ Where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings

was ultimately deemed inadmissible since Senegal had not accepted jurisdiction over cases initiated by individuals. *Yogogombaye v. Republic of Senegal*, App. No. 001/2008, Afr. Ct. on Hum. & Peoples' Rts., Judgment (Dec. 15, 2009), available at http://www.african-court.org/fileadmin/documents/Court/Latest_Judgments/English/JUDGMENT_MICHELOT_YOGOGOMBAYE_VS._REPUBLIC_OF_SENEGAL_1_.pdf.

36. An example is the Court of Justice of the Economic Community of the West African States (ECOWAS). ECON. COMMUNITY W. AFR. STS., <http://www.ecowas.int/> (last updated June 8, 2011).

37. Rome Statute, *supra* note 17, at art. 68(3).

determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Such views and concerns may be presented by the legal representatives of the victims where the Court considers it appropriate, in accordance with the Rules of Procedure and Evidence.

Several “deficits” in the system were pointed out. For example, many victims are represented by just a few counsel, so that the ideal scenario—that victims personally come to the ICC and, as one participant described it, “see that the perpetrator is investigated and prosecuted so that they might restore their lives”—is far from a reality. Furthermore, it is unclear how much the counsel, whose services are paid by the court itself, communicate with the victims, solicit their views, and so on. In the cases currently underway, the victims of the crimes are in Africa, thousands of miles away from The Hague. Victim participation also has implications for the functioning of the ICC itself. “I am troubled by the time that ICC judges spend on this issue,” commented a judge from another court. “It slows down the procedures. As a human rights expert, I am all in favor of tribunals with strong victim representation. But there needs to be much stronger and better management of court proceedings.” These challenges notwithstanding, the role played by victims’ counsel in ongoing ICC trials serves to remind the world that international criminal justice is not just about convictions, sentencing, and the development of a new body of law. It is also about providing reparations and healing to those who suffered from the crimes in question.

The ECCC also provides for the participation of victims, allowing them access to case files as well as the right to submit evidence, question witnesses and the accused, and appeal. Unlike at the ICC, however, victims cannot be awarded monetary compensation, but instead “moral and collective reparations.” The Court currently finds itself overwhelmed, however, by the increasing popularity of victim participation. For the ECCC’s first case, there were 100 civil parties. For the second, 4000 civil parties had registered as of July 2010. “How can we appropriately manage this huge number, while trying to hear their voices in an efficient and meaningful manner?” asked a participant. “I don’t think we have established the best practice with the Court, but we are trying to improve the system to have satisfactory victim participation.”

The newest international criminal tribunal, the STL, also allows the input of victims: it permits them to cross-examine witnesses, to report on the personal impact of the crimes under investigation, and provides them access to the documents filed by the parties. However, the pre-trial judge must consider their participation as necessary to the proceedings in order for it to be authorized. This criterion was established, at least partly, “to avoid the problems faced by the ICC.”

The other criminal tribunals represented at the BIJ—the ICTY, ICTR, and SCSL—do not have specific provisions for victim participation. Nonetheless, as one criminal judge pointed out, “We may not have victim representation but we face them every day.” That is, victims participate as witnesses, which is what another criminal judge considered to be their only appropriate role. “More than 1000 victims have been heard as witnesses in my tribunal. They have a clear and important role—to tell their stories. But at the ICC, is it clear what it means for a victim to participate?” It is also uncertain, he added, whether the NGOs advocating for victim participation actually have the same agenda as those they purport to represent. A third judge was disappointed that, while there had been a great outcry for victims to participate at his court, it was not acted upon. What exists instead is a small number of perpetrators brought to trial and thousands of victims who feel frustrated.

Having access to international courts does not always mean, however, being a party to a case. Access may also come in the form of providing information relevant to a case. This usually happens through the submission of *amicus curiae* briefs from NGOs and other bodies interested in the outcome of proceedings. The admissibility of *amicus* briefs has been a subject of debate in a number of institutions, and at the WTO it was especially controversial. Because the WTO rules do not directly address the question, the Appellate Body determined that *amicus* briefs could be accepted under the general authority for panels to seek information from any relevant source. While many NGOs, particularly those working in the environmental and food safety areas, welcomed this ruling, many WTO members do not approve of a role for non-parties in dispute settlement proceedings. In practice, *amicus curiae* submissions are frequently filed as attachments to the submission of a party, in which case the Appellate Body considers such material to be an integral part of the submission of that participant. Unsolicited *amicus curiae* briefs, on the other hand, are not required to be accepted but may be considered where deemed pertinent and useful. Other interstate dispute courts, like the ICJ, do not accept *amicus* briefs at all. The CCJ, as of 2010, had not yet been faced with this challenge.

As for the role of *amicus curiae* briefs in human rights courts, there seems to be little debate about the importance of these additional sources of information. At the ECHR, *amicus* briefs—called “third party interventions”—are unsolicited but usually accepted, and the IACHR similarly accepts them. In the African system, a provision has been made to allow *amicus* briefs but, given that the Court had only had one inadmissible case as of BIJ 2010, it had not yet been put to the test.

Finally, views on *amicus curiae* access to international criminal courts and tribunals were mixed. The SCSL allows *amicus* briefs and finds them very effective. At the ICC, *amicus* briefs are allowed at the discretion of judges. One participant commented that judges should be careful and selective in what they accept, so as to verify that the brief makes a substantive contribution and is not

merely “an application where an organization wants to enhance its profile by appealing to an international court.” Other judges noted that at their courts, they already have a plethora of information and do not accept any more from outside sources.

While most BIIJ participants agreed that increased access to international courts is, overall, a positive change, there were a number of concerns expressed about potential associated dangers. If increased access is going to benefit everyone equally, it was suggested, there needs to be more education about who has the right to approach an international court, and more provision of legal assistance to individuals who want to pursue a claim. This is especially pertinent for the developing world. Increased access to international judicial fora might also lead to abuse, cautioned another judge, with individuals pursuing simultaneous litigation of the same case in multiple venues.

One participant mentioned the pressing need to define the borderline between the responsibilities of international and domestic adjudication. Increased participation by individuals in international human rights courts, in particular, may become a justification for states not to exercise proper jurisdiction or ensure the rule of law domestically. “It is undesirable that the role of ensuring the rule of law shift to the international level,” he declared, “when it is the primary responsibility of states in their own jurisdictions.”

The most vigorous warnings related to increased access were about the potential dangers of victim participation. While in principle a positive development, victim participation, if not managed properly, could compromise the fair trial rights of the accused. There are already concerns that defense counsel in criminal tribunals operate at a disadvantage, financial and otherwise, in relation to the prosecution. Does the counsel for victims become a kind of second prosecution, acting to strengthen the case against the accused? Does victim participation further slow down criminal proceedings that already move at a ponderous pace? Does consideration of victims’ needs complicate the already challenging work of international judges? These are questions that need to be considered as international criminal procedure evolves.

In the end, it was acknowledged by participants that the shift from a paradigm of state agreement to one of individual rights is an important transition for international law, and access is an important part of this new paradigm. “It is crucial that the person concerned by the law can participate in its development,” said one judge. Another concurred that “the increasing involvement of individuals in international tribunals has become an essential element in enhancing the rule of law at an international level. However,” he continued, “if the number of individual complaints reaches such a level that the court in question can only handle them with great difficulty, then the system becomes to a certain extent self-defeating.” In other words, balance is crucial if increased access to international courts and tribunals is to strengthen the international rule of law.

The Impact of International Justice

The idea of an international rule of law embodies many lofty principles and goals. It is clear, however, that without their real-world implementation, the notion remains empty. BIIJ participants thus found it helpful to discuss an important and enduring concern for international justice institutions—the impact of their work and how it might be measured. Much like the fairness and accessibility of international courts and tribunals, their impact is one of the elements to consider when gauging the conformity of contemporary international justice to the emerging notion of an international rule of law.

The impact of international courts and tribunals is complicated to describe and difficult to document. The impact may include successfully preventing armed conflict, securing a peaceful settlement of boundaries, deterring serious violations of the law, achieving the overall objectives of an international treaty, and obtaining compliance with specific judgments. Moreover, the impact may be dependent upon action by a national jurisdiction, which, in turn, might be carried out by the executive, legislative, or judicial branch of the government. Additionally, international tribunals may have an anticipatory effect on the actions of nations or individuals that is difficult to record.

Participants chose to approach the topic by examining two issues: 1) rates of compliance with the decisions of their respective courts and tribunals, and 2) other types of impact created through their work.

One of the definitions suggested for “compliance” was that articulated by Aloysius Llamzon: “Compliance connotes many things, but to be meaningful it should consist of acceptance of the judgment as final *and* reasonable performance in good faith of any binding obligation.”³⁸ Participants noted, first of all, that courts and tribunals need to establish “climates of compliance” since most do not have formal enforcement mechanisms. This is the case with ITLOS, for example, as the 1982 United Nations Convention on the Law of the Sea does not provide for such a mechanism. Nonetheless, parties to disputes brought before ITLOS are required to comply with its decisions, which are considered final, and, to date, they have consistently done so.

The WTO is also frequently pointed out as an institution that has an excellent compliance record for its various decisions. Some observers believe that this is due to its ability to impose retaliatory sanctions if the losing party does not come into compliance. But others disagree with this interpretation, believing instead that nations comply less out of fear of retaliation but rather because they believe it is in their interest to do so. They benefit from rules, and care about their reputations as well as their relationships with other countries.³⁹ Nations also may

38. Aloysius P. Llamzon, *Jurisdiction and Compliance in Recent Decisions of the International Court of Justice*, 18 EUR. J. INT'L L. 815, 822 (2007).

39. ROBERT Z. LAWRENCE, COUNCIL ON FOREIGN RELATIONS, THE UNITED STATES AND THE WTO

calculate that if they comply with an unfavorable decision now, in the future when they win, the losing party will also be more likely to come into compliance. Despite this positive attitude by parties, there are an increasing number of cases pending at the WTO Dispute Settlement Body that pertain to compliance issues. "One party states that they have complied completely, while the other says there is non-compliance," observed a judge. As a result, a separate set of proceedings have arisen where dispute panels and the Appellate Body determined whether or not the steps taken by the losing party constituted full compliance.

With regard to compliance with ICJ judgments, there was some difference of opinion about how to assess it. Some scholars think that compliance rates for ICJ judgments have been poorly studied and thus little is known about what happens after the judgments are issued.⁴⁰ Others believe that states bringing cases under the system of compulsory jurisdiction at the Court do not have the same interest in the judicial process as those that voluntarily bring a case for dispute settlement. Their compliance is thus less certain.⁴¹ One BIIJ participant contested such views. "The function of the Court is squarely focused on Chapter VI of the United Nations Charter. A judgment of the ICJ is the one strictly judicial means of settling disputes and therefore compliance is important." Furthermore, compliance is obligatory according to Chapter XIV of the Charter (*see infra*). He added that while the level of compliance with judgments is not inconsiderable, the Court should not be "complacent" in this area. Furthermore, the Court could benefit from more support from the Security Council in ensuring compliance. It was pointed out that a weakness in the U.N. system is that a permanent member of the Security Council can veto sanctions for non-compliance—an option not open to a less powerful state—thereby undermining the Court's authority.

From The Charter of the United Nations⁴²
Chapter VI. Pacific Settlement of Disputes, Article 33

1. The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.

DISPUTE SETTLEMENT SYSTEM (2007).

40. Llamzon, *supra* note 38.

41. *Id.*

42. U.N. Charter art. 33, paras. 1-2, art. 94, paras. 1-2 (the Charter of the United Nations was opened for signature on June 26, 1945 and entered into force on October 24, 1945).

2. The Security Council shall, when it deems necessary, call upon the parties to settle their dispute by such means.

Chapter XIV: The International Court of Justice, Article 94

1. Each Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party.

2. If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment.

The *Avena* case might serve as an illustration of how a powerful country reacts to an unfavorable decision. In the course of two decisions, *LaGrand* and *Avena*,⁴³ the ICJ found that the United States was in violation of the Vienna Convention on Consular Relations (“VCCR”)⁴⁴ for its failure to notify detained foreign nationals of the right to contact their respective consulates. The ICJ further found that, in order to be in compliance with the treaty, the United States had to “allow the review and reconsideration of the conviction and sentence by taking account of the violation of the rights set forth in the VCCR.” Most observers would agree that U.S. compliance with the *Avena* judgment has been slow and uneven. Nevertheless, there are some gradual developments towards compliance. In July 2010, the U.S. State Department requested that Texas postpone an execution in a case in which a VCCR violation was claimed. The basis for the request was that a federal legislative proposal was under consideration that would allow for a hearing on the violation.⁴⁵ Even more recently, in January 2011, the Massachusetts Supreme Judicial Court recognized the importance of the ICJ decisions and held that a review of the effect of VCCR violations could be conducted under their state rules on motions for new trials (*see infra*).

43. *LaGrand Case* (F.R.G. v. U.S.), 2001 I.C.J. 466, 514 (June 27); *Avena and Other Mexican Nationals* (Mex. v. U.S.), 2004 I.C.J. 128 (Mar. 31).

44. Vienna Convention on Consular Relations, Apr. 24, 1963, 596 U.N.T.S. 261 (entered into force Mar. 19, 1967).

45. Craig Kapitan, *Foreign Killer's Death Slated*, SAN ANTONIO EXPRESS-NEWS (Nov. 4, 2010), <http://www.mysanantonio.com/default/article/Foreignkiller-sdeathslated-798848.php>.

*From Massachusetts Supreme Judicial Court, Commonwealth v. Gautreaux*⁴⁶

"Although a decision of the ICJ is not binding on this court, it is entitled to respectful consideration . . . The ICJ is the judicial organ designated to resolve disputes regarding implementation of the Vienna Convention, and as signatory to the Optional Protocol, the United States agreed to be bound by its decisions. We acknowledge and accept the conclusion of the ICJ regarding the obligation that Art. 36 creates when clear violations of its notice protocols have been established, that is, to provide some process by which the soundness of a subsequent conviction can be reviewed in light of the violation."⁴⁷

An issue that has been raised in relation to international judgments, such as those of the ICJ, is the effect of compliance on the sovereignty of nations. Some believe that WTO decisions may also challenge sovereignty by encouraging "anticipatory compliance," whereby lawmakers refrain from taking action that would be in accordance with national law because they anticipate that such laws would violate WTO rules.⁴⁷ The CCJ has sought to avoid such reactions on the part of member states of the Caribbean Community, even incorporating language into its first judgment explicitly about the relationship between Community membership and sovereignty:

The rule of law brings with it legal certainty and protection of the rights of states and individuals alike, but at the same time of necessity it creates legal accountability. Even if such accountability imposes some constraint upon the exercise of sovereign rights of states, the very acceptance of such a constraint in a treaty is in itself an act of sovereignty.⁴⁸

The question of how to monitor compliance with judgments was a topic of interest to all participants. Unlike many international courts and tribunals, the ECHR has a mechanism to follow up on the many judgments it issues every year. Fortunately for the Court, it is not charged with reviewing the "execution of judgments," as it is termed in the European system. This task falls instead to the Committee of Ministers of the Council of Europe, which meets regularly to examine the measures taken by the states named in judgments.⁴⁹

46. *Commonwealth v. Gautreaux*, 458 Mass. 741 (2011).

47. Tina Potuto Kimble, *Anticipatory Compliance with WTO Rules and the Erosion of US Sovereignty*, 25 QUINNIPIAC L. REV. 97 (2006).

48. *Trinidad Cement Ltd. v. Guyana* [2009] CCJ 1 (OJ) ¶ 32 (Jan. 15, 2009), available at http://www.caribbeancourtofjustice.org/judgments/ar1_2008/ar12008_judgement.pdf.

49. *Execution of Judgments of the European Court of Human Rights*, COUNCIL OF EUR.,

There are several actions that have to take place in order for a judgment of the ECHR to be deemed fully executed. The state is naturally required to end the violation cited in the judgment and to make reparation to the victim(s). But perhaps the most important step to be carried out is a modification of legislation or activity at the national level in order to prevent a recurrence of the violation in question. It was reported that the first part of the judgment is typically not hard to execute. But when it comes to taking legislative measures, the challenges to full execution are much greater. Some judgments are reviewed repeatedly before the Committee of Ministers is satisfied with their execution.

The execution of IACHR judgments is also followed closely, although it is the Court itself that does the monitoring. Like its European counterpart, the Inter-American Court does not consider a case closed until full compliance is obtained. Ultimately there is a high rate of compliance, but cases often remain “active” for many years before all of the necessary measures are taken.

As for the ACHPR, it has yet to test the efficacy of its monitoring mechanism. Its protocol makes provision, however, for the Executive Council of the African Union to monitor judgment compliance by the defendant state and to pinpoint cases of non-compliance.⁵⁰

Participants then took the conversation beyond compliance as it pertains strictly to judgments. There are also a number of “compliance issues” faced by criminal courts that have to do with cooperation and assistance by states. One judge commented on the difficulty of forcing powerful states to comply with a court’s request. He recounted that his chamber once called for documents pertaining to a trial from a permanent member of the Security Council and the state only partially satisfied the request. What are the limits of a judicial body, he wondered, in ensuring full compliance in such a situation?

Another criminal judge noted that lack of compliance can begin long before a case comes to trial, with the refusal of states to act on arrest warrants issued by tribunals. “All tribunals have suffered from the lack of cooperation, at least of swift cooperation, by states,” he declared. Often this resistance comes from states that have not ratified the treaty establishing the court or tribunal. In other cases, however, even those states bound to comply are unwilling to do so. “We need to measure compliance with regard to international criminal courts and tribunals in terms of effective criminal cooperation,” suggested a participant. “This is the lifeblood of courts, the air they need to breathe. They can’t function without it.”

While acknowledging the existence of these difficulties, another criminal judge pointed out that states have by and large cooperated with his tribunal. “Typically, the compliance has been quite good. We issue hundreds of decisions,

<http://www.coe.int/t/dghl/monitoring/execution/> (last updated Oct. 14, 2011).

50. ACHPR, *supra* note 16, art. 29 (“Notification of Judgment: 1. The parties to the case shall be notified of the judgment of the Court and it shall be transmitted to the Member States of the OAU and the Commission. 2. The Council of Ministers shall also be notified of the judgment and shall monitor its execution on behalf of the Assembly.”).

logistical questions, requests for documents, and so on. Most of these orders are complied with quickly and routinely.” When a state does not wish to cooperate, for example by carrying out an arrest warrant or subpoenaing a witness, it usually argues “inability to comply.” This may occur even with states that are highly supportive of the tribunal’s work. He added that the rate of compliance has increased following a move by the international community—including the United Nations, United States, and European Union—to pressure states for cooperation.

Participants next turned their attention to the impact of international justice that is beyond the scope of compliance with judgments or requests for cooperation. It was pointed out that the decisions of international courts and tribunals have had an enormous impact on “the legal awareness of the world.” One example cited was the groundbreaking work of the ad hoc tribunals: “The impact of the ICTY and ICTR cannot be measured in terms of the indictments and cases decided. It’s shortsighted, too narrow if you want to measure the real impact,” said one judge. He added, “How would we think about crimes against humanity if we didn’t have the ICTY clarifying that they can be committed in non-international as well as international armed conflict, and in peacetime!”

Another judge concurred, stating that the international community is now well aware that international prosecutions and trials can be done credibly, and that criminal tribunals have contributed to substantive, procedural, and evidentiary criminal law. Furthermore, it is clear that the message about impunity is being communicated: “There is no question whatsoever that in the most recent practice of armed forces, the possibility of condemnation and prosecution is taken much more seriously.” Clearly, as ICTY Judge Fausto Pocar has written, the so-called “completion strategy” of his tribunal should more properly be viewed as a “continuation strategy.” The temporary criminal tribunals will continue to impact the development of international law as well as the implementation of that law in national jurisdictions long after they formally close down.⁵¹

An important point was also made about the powerful impact that international courts and tribunals have had on legal education as well as interest by the media and general public in international law. “There is a completely new world that began in 1993 with the creation of the ad hoc tribunals,” declared a participant. “Go to any bookstore, legal or non-legal, and you will find hundreds of books dealing with this issue.”

The discussion ended by circling back to ideas raised in earlier sessions. The notion that the standing of international justice can be enhanced through opening it up to those it affects was reiterated. “To increase the impact of international law, recipients need to feel that they are participating in its creation. Perhaps then they will be more willing to comply with its mechanisms. We should look at this

51. Cf. Fausto Pocar, *Completion or Continuation Strategy?*, 6 J. INT’L CRIM. JUST. 655 (2008).

issue from the recipients' viewpoint." Another judge stressed the importance of looking at the question of impact in a holistic manner. "One should not separate out compliance with judgments from other kinds of impacts," he said, noting the systemic nature of the international rule of law.

Very importantly, a participant pointed out that the relationship between the rule of law in different spheres should not be forgotten. Compliance with an international decision contributes not only to the resolution of an interstate dispute or the conviction of a war criminal, he offered. "It contributes also to enforcing and strengthening the rule of law altogether, at both the domestic and international levels."

What Does Diversity Imply for an International Rule of Law?

International courts and tribunals are by nature heterogeneous institutions, bringing together judges and staff who have various nationalities and languages as well as different types of legal training and professional experience. This diversity extends to the parties appearing before courts and tribunals and, of course, to the public affected by their work. BIIJ participants discussed some of the questions surrounding diversity and its potential impact on the establishment of a rule of law that can be embraced and supported across the globe. For example, does the varied experience of international justice actors with the rule of law at the domestic level influence their understanding of how it might function at the international level? Is some uniformity in the conception and application of the rule of law a prerequisite for its international extension? Does the long-term legitimacy of international justice institutions depend on a shared sense of the notion?

Several participants prefaced the conversation by noting that diversity was not a topic that they were accustomed to discussing, although they acknowledged its importance to the work of their institutions and, ultimately, for the development of an international rule of law. The discussion began with reflections on the concept of "dissonance" and its impact on the work of international courts and tribunals. One legal scholar has used this term to describe the "poor sociological fit" that exists between the methods and concepts used in international criminal justice and some of the non-Western contexts in which they are applied.⁵² More generally, this term can be extended to signify any kind of "mismatch" created by the coming together of distinct cultural systems. Judges were asked whether they experience any situations of dissonance in their own institutions and, if so, how they are resolved.

52. Tim Kelsall, *International Criminal Justice and Non-Western Cultures* (Oxford Transitional Just. Research, Working Paper Ser. 1, Apr. 2010), available at http://www.csls.ox.ac.uk/documents/Kelsall_InternationalCriminalJustice_Final.pdf.

A criminal judge quickly responded to the question, remarking, “What you call dissonance, we experience it every day!” In the case of his court, the mismatch is between legal cultures: the adversarial trial approach of the common law system and the inquisitorial trial approach of the civil law system. He explained that in the early days of his institution, common law judges discovered that they had to draw considerably from the civil law system to develop practices that expedited procedures. “We had to reconcile the two systems, but it can be done by looking at fairness. That is the overarching principle.” Another criminal judge noted the same tensions in his own chamber, but believed they could be resolved by appealing to another principle. “We have a judge who is from a civil law tradition, a presiding judge from a common law tradition, and another who is an academic. Our common denominator is common sense.”

Several participants objected, however, to the idea that there is a “common sense” that all judges can call upon to resolve differences in approach or thinking. “Common sense isn’t always so common,” said one. Judges have to actively shed their presumptions about how to reason and move toward a position consistent with international law, he continued. Nonetheless, suggested a participant from a regional court embracing five regions and three legal systems (civil, common, and Islamic), “judges can develop their own culture of compromise, common understanding, and tolerance.”

A number of other diversity issues were raised in relation to international criminal jurisdictions. Some judges mentioned the problems associated with language diversity, both among judges and among parties before the court.⁵³ One participant noted that courts dealing with inter-ethnic conflicts are “constantly examined through a magnifying glass to see that we do not prefer group X over group Y and that we are fair in selecting the targets of our prosecution.” Another kind of dissonance was described as arising in criminal courts: that between the expectations of the parties—that is, the prosecutor and criminal defendants—on the one hand, and the broader public on the other. Whereas the former may understand a trial to be about the guilt or innocence of the accused, the latter may expect it also to establish a historical record or contribute to the healing of victims.

Moving beyond the experience of international criminal courts, which may experience diversity in particularly vexing ways due to the nature of their jurisdictions, participants brought up issues more general to the international justice system. A human rights judge mentioned how the different professional backgrounds of fellow judges seem to correlate with a variable willingness to consider the court’s own precedents in the interest of creating a consistent and coherent body of caselaw. On such matters, it was noted, “courts need to have their own internal rule of law.”

53. Challenges associated with language diversity in international courts and tribunals were treated at length at BIIJ 2009. For a summary of this discussion, see 2009 BIIJ REPORT, *supra* note 8.

It was also pointed out that possible misunderstandings or misperceptions in the media about international judicial decisions may stem from another difficulty facing international judges—the challenge of writing judgments in a manner that is understood and accepted not only by the parties to the dispute but also by different peoples and populations in the world. This challenge may be particularly acute in cases that have important repercussions on questions such as the self-determination of peoples, for instance.⁵⁴

In the end, most participants agreed that diversity at the level of the bench or institution, even if the source of occasional dissonance, does not generally inhibit effective work or the overall aim of delivering justice. “This diversity exists; it is a fact of life, a positive thing if managed properly,” said one. Where diversity may pose a problem, however, is at the level of the societies that must collectively engage in establishing an international rule of law. Some parts of the world are already part of the effort, while others appear to need more time and preparation before fully joining in. This came out clearly in comments from non-European participants who spoke from a dual perspective—that of global citizen and local culture-bearer—on the place of their respective societies in this global endeavor.

One participant explained how certain international norms are seen in his country and offered a rationale for these views. It is clear that contemporary notions of the rule of law, like the separation of powers, were imposed as part of European colonial rule. “Ours is a tribal and cultural society, where judicial and executive roles are all embodied in the chief. So when a new institution came with a separation of powers, there was a measure of confusion and the traditional leaders saw their powers being drained away.” This unfamiliarity has impeded the establishment of a domestic rule of law; participation in an international one is an even more distant goal.

The colonial experience was referenced by a second judge as well, not in the context of cultural diversity but instead with regard to the differences that exist between poor and affluent countries.

I think we need to be patient with developing countries, where certain aspects of the rule of law, like the separation of powers, are relatively new ideas. What is the impact on the psyche of a people in an emerging state that has been ravaged by colonialism for hundreds of years? How do we expect a people and a state coming out of that to advance and progress in the same fashion and at the same rate as countries that have not had that same experience?

54. *E.g.*, *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, 2010 I.C.J. 141 (July 22, 2010).

In response, a European judge reminded the group that the separation of powers is a very recent phenomenon in Western societies as well, dating back in some cases only to the 19th century.

Whereas these participants invoked situations in which international legal norms were imposed from the outside and met with some resistance, a third judge described how his country actively embraced these norms in order to “become accepted into the civilized community of nations.” It now stands at the forefront of nations in its region on issues of international law, serving as “a symbol to the whole world,” he said. This judge vehemently rejected the view that different fundamental values should be allowed to hold sway in his region, especially when this view is espoused by repressive regimes wishing to justify their policies. Another judge concurred: “Is it not possible that some governments may use real or alleged diversity as a pretext for not accepting their international legal obligations?”

Some participants remained certain, however, that similarities outweigh differences on basic issues pertaining to international norms. One judge commented thus on the Rome Statute:

Cultural diversity may be a complicating factor for the international rule of law, but it does not make it impossible. Support for the Rome Statute overcame the traditional dividing lines between North/South and East/West. It is my assumption that, despite all cultural diversities, there is a common view among all populations of the world that perpetrators of genocide, war crimes, and crimes against humanity must be held accountable, regardless of their rank or nationality or ideology.

He added that polling among the populations impacted by the crimes currently under investigation by the ICC largely shows support for the court’s work, despite its distance and “strangeness.” People seem to trust the ICC more than their local judiciary, he claimed, an observation that recalled an earlier comment by a participant about how the international rule of law may in some cases replace a failed domestic rule of law.

Over the course of the discussion, queries about the impact of diversity on an international conception of the rule of law gradually evolved into the inverse question: Might the search for universally accepted legal norms be impeded instead by a *lack* of diversity? In other words, might the absence of input from all concerned parties undermine the persuasive power of an international rule of law?

It was pointed out that “not all states are equal” in the international arena. The historically disproportionate presence of economic and political powerhouses—including the permanent members of the Security Council—in institutions like the ICJ and the WTO Appellate Body exemplifies this situation. The ICC’s focus to date on serious crimes in Africa, to the exclusion, critics say,

of those crimes committed in other regions, is also frequently cited as evidence of the developing world's relative powerlessness in the international community. The fundamental question is, then, the following: if all societies have not contributed equally to the development of international institutions and the legal foundations upon which they rest, will they be as committed to what these institutions stand for and uphold them accordingly?

This question clearly struck a chord among participants, European and non-European alike. Said one judge, "I'd like to emphasize that diversity itself doesn't matter. Overcoming diversity is related to a sense of participation. It is crucial that you've participated in the process, even if your opinion was not taken as a majority opinion and the final structure is different from what you wanted." Another elaborated on the theme of participation: "We need the participation of countries all over the world, whether East, West, North, or South, in creating international processes."

One scholar has suggested that problems in international criminal justice derive from "the relation between the international 'community' that makes international law—comprised of activists, academics, statesmen and lawyers, at the pinnacle of which are the States Parties themselves—and the less cosmopolitan communities existing on their periphery."⁵⁵ BIIJ participants articulated this same dilemma in terms of domination. One judge suggested,

To ensure that diversity is not a problem for an international rule of law, but instead good for it, I think the most important and critical thing is that all institutions and diverse groups are fairly represented in the statutes. There should be no domination of one group over another, and no apparent imbalance. If representation is agreed to, diversity should not be an impediment.

His view was echoed by another: "Diversity as such—cultural, ethnic, and so on—is not a negative factor per se for the emergence of international law. But there must not be domination."

It is clear that despite the global dissemination of information and commodities, the world will continue to be diverse—in culture, language, religion, political belief, and many other ways—for the foreseeable future. International justice institutions, like other entities meant to serve broad constituencies, would do well to consider what this fundamental characteristic of human life means for their work. They furthermore should be careful to listen to the many voices with something to say about it. Although BIIJ participants reached no definitive conclusions about the impact of diversity—or the lack thereof—on an international rule of law, it was clear that a consideration of diversity can only contribute to its ascendancy.

55. Kelsall, *supra* note 52, at 2.

Topics in Ethical Practice: Challenges to Judicial Independence

As in past Institutes, BIIJ 2010 participants had the opportunity to reflect on ethical issues confronting judges who serve on international courts and tribunals. Discussions about judicial ethics in the international sphere are a hallmark of the BIIJ; earlier institutes have focused on topics as wide-ranging as “the international judiciary as a new moral authority,” “the shaping of the judicial persona,” and “the development of ethics guidelines for international courts and tribunals.”⁵⁶ In 2010, participants addressed the recurring topic of judicial independence, with particular emphasis on its critical relation to the rule of law.⁵⁷ More specifically, they discussed the challenges of working under the gaze of a public that holds judges to the highest standards of behavior and practice and criticizes any deviation—real or perceived—from the ideal.

The first topic participants grappled with was the election and reelection of judges in the international context.⁵⁸ The manner in which international judges reach their posts has often been criticized, and a recently published monograph on the topic does little to reassure the public that the process is transparent or politically neutral.⁵⁹ Given the importance of public confidence in international courts and tribunals—to encourage compliance with their judgments as well as to ensure their financial and moral support—it is crucial that the members of their benches be seen as independent beyond a doubt. Current practices surrounding the election and reelection of international judges may serve, however, to cast public doubt upon their independence.

Participants had many comments to offer about the election and reelection procedures in their respective courts and tribunals. Elections that take place within the U.N. system were particularly criticized, both for the lack of transparency in how judicial candidates are nominated, and for “horse trading” at election time. This term refers to the promises and counter-promises made among states to support one another’s candidates for high-profile posts, including judicial positions at the ICJ, ITLOS, ICTY, and ICTR. It was noted that the qualifications of a candidate are just one of the factors that come into play. When the ICC was established, the Assembly of States Parties valiantly tried to keep its judicial elections from following the model of the U.N. courts, but it was not successful. “It simply turned out to be impossible,” reported a participant who attended the Rome Conference, “to achieve a prohibition on these kinds of

56. To download the ethical discussions from all past sessions of the BIIJ, see Int’l Ctr. for Ethics, Justice, and Pub. Life, *Ethics and the International Judiciary*, BRANDEIS UNIV., <http://www.brandeis.edu/ethics/internationaljustice/ethicsintljud.html> (last visited Oct. 4, 2011).

57. Meron, *supra* note 26.

58. See also 2007 BIIJ REPORT, *supra* note 8.

59. RUTH MACKENZIE, KATE MALLESON, PENNY MARTIN & PHILIPPE SANDS, *SELECTING INTERNATIONAL JUDGES: PRINCIPLE, PROCESS, AND POLITICS* (2010).

agreements among states.”⁶⁰ One participant also remarked on the inappropriate “judicial campaigning” that, he said, inevitably accompanies elections at the United Nations: “Judges depend on the General Assembly for their election and reelection and it is standard practice for them to visit various diplomatic delegations to lobby for their votes.”

Several judges pointed to institutional practices that seek to emphasize the merits of judicial candidates, thereby mitigating the influence of national interests in election procedures. Some members of the WTO now put forward several candidates for a position on the Appellate Body, allowing the organization to select the one they consider the most qualified. The protocol of the ACHPR also allows states to put forward multiple candidates for the coveted spots on its eleven-member bench. But only one can be their own national—any additional nominees must be nationals of another African state.

If inappropriate influence sometimes intrudes into the election of judges, this occurs to an even greater extent, it was agreed, when they stand for reelection. One participant noted that at his court, judges have four-year initial terms with the possibility of reelection: “Even the most honest and honorable of my colleagues feel pressure to tone down their decisions; even hardworking, ethical people feel that they need to be careful when elections are coming.” Another participant observed, “At my court, judges are no doubt aware that taking a controversial position in an unpopular decision could have an effect on their reelection.” However, he was not convinced that they would act on this knowledge: “I am confident that the judges’ sense of professionalism would prevail.”

It was pointed out, however, that reelection is one of the ways to achieve continuity, which is particularly important in courts with a temporary jurisdiction. At the ICTY and ICTR, where terms are short and the work intense, it may be beneficial for the institutions to have reelected judges on the bench for this reason. “Otherwise, there would be a sacrifice in judicial experience and efficiency.” As part of the ad hoc tribunals’ “completion strategy,” ICTY and ICTR judges recently had their terms extended, by a Security Council resolution,⁶¹ until the completion of the trials to which they are assigned. This obviates the need for any future elections, which would further slow down the tribunals’ work, while also contributing to the stability of the institutions and the accumulation of judicial expertise. The international judges serving on the ECCC benefit from a similarly open-ended situation—they have no fixed term

60. Civil society can play a role in depoliticizing the nomination and election of international judges. In anticipation of the election of six new ICC judges in 2011, the Coalition for the International Criminal Court convened the Independent Panel on International Criminal Court Judicial Elections to oversee this process with the goal of having the most qualified judges for the 2012-2021 term. *Announcement to the Assembly of State Parties on the Independent Panel on International Criminal Court Judicial Elections*, COALITION INT’L CRIM. CT. (Dec. 2010), http://www.coalitionfortheicc.org/documents/Judicial_Panel_Announcement.pdf.

61. S.C. Res. 1931, ¶¶ 3–5, U.N. Doc. S/RES/1931 (June 29, 2010).

at all, but rather were appointed by the United Nations to serve on the bench “for the duration of the proceedings.”⁶² The judges of the STL, in contrast, were appointed for an initial term of three years in 2009 and may be reappointed “for a further period to be determined by the Secretary-General in consultation with the [Lebanese] Government.”⁶³

However, for permanent courts with longer judicial terms—ICJ and ITLOS judges, for instance, sit for nine years—a prohibition on reelection would not have the same potential effect on institutional performance. In arguing for term limits, a participant also observed that “it is not only good judges who get reelected.” Many international judges try for second terms, and since they have an advantage in the election process, they may prevail over other candidates. One participant pointed out another possible negative impact of having judges serve for years and years on the same bench: if judges make judging a “lifetime career,” he suggested, “it may not be helpful to the international system or the development of international law.”

Notably, the ICC chose to avoid the suspicions and problems that accompany reelection by instituting nine-year non-renewable terms,⁶⁴ a seemingly wise decision for a closely observed court that deals with sensitive matters and is engaged in the development of a still emerging field, international criminal law. In fact, all BIIJ participants essentially agreed that instituting a single and relatively long term for judgeships in international courts and tribunals would do much to remove the threats to judicial independence as well as other drawbacks of reelection.⁶⁵ Even judges who had benefited from reelection expressed this point of view. “I am on record,” said a judge who has served consecutive terms, “as preferring single, non-renewable terms for judges at international tribunals.” Said another judge in the same situation, “The reelection of judges is not a desirable practice to be used in international courts, including my own.” One participant even suggested that BIIJ participants make a collective and public statement recommending that international judicial reelections be abolished.

62. Agreement Between the United Nations and the Royal Government of Cambodia Concerning the Prosecution Under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea, G.A. Res. 57/228B, art. 3(7), 2329 U.N.T.S. 117 (June 6, 2003).

63. Agreement Between the United Nations and the Lebanese Republic on the Establishment of a Special Tribunal for Lebanon, S.C. Res. 1757, annex art. 2(7), U.N. Doc. S/RES/1757 (May 30, 2007).

64. The first cohort of ICC judges elected in 2003 had terms of variable length—three, six, or nine years. Those with the shortest terms were allowed to stand for reelection. Going forward, however, all ICC judges are to be elected for a single nine-year term.

65. Long non-renewable terms are also seen as optimal at the domestic level. *See* Special Rapporteur on the Independence of Judges and Lawyers, U.N. Doc. A/HRC/4/25 (Jan. 18, 2007) (by Leandro Despouy). The report expresses concern with short terms of office at the domestic level and recommends the gradual extension of judicial tenures so as to progressively introduce life tenure in domestic systems (especially in states in transition from authoritarian regimes to democracy).

But such a prohibition would still leave some problems unresolved. If an unqualified individual is sitting on the bench, a single term can still be too long, declared one participant. "When the initial election is not a good one, you have to wait for years before changing the judge!" Single terms may also increase the number of former international judges looking for a professional niche where they can apply their expertise. Some may take on the role of counsel or agents before international courts, including the one in which they recently served. This tendency necessitates the establishment of "cooling-off periods," during which time former judges may not be involved in proceedings before their old court. This phenomenon may lead to a certain "recirculation" of legal experts in international justice circles, which could ultimately stifle the development of international law, as mentioned above. It could also, however, produce the opposite effect by leading to a richer and fuller development of international law by those with great experience and expertise.

The issue of post-judicial professional life may be most acute at the ECHR. Not only has it recently instituted a single, non-renewable judicial term,⁶⁶ but its judges are becoming younger and younger; some are even elected to the court while in their thirties. Furthermore, most ECHR judges are drawn from national legal professions, not from the ranks of international lawyers. This means that they will naturally look to return home after leaving the ECHR, and will seek to work for the state in some capacity. This creates a new dilemma in terms of judicial independence: will judges nearing the end of their terms at the ECHR issue judgments more favorable to their states, as insurance for a future position at home? Clearly, threats to independence do not necessarily disappear with the prohibition of judicial reelection. One participant suggested that international judges should be nominated for single terms toward the ends of their careers to minimize such risks.

Participants then turned their attention from judicial elections and reelections to other matters that may create public doubt about the independence of international judges. "Judges do not come to the bench as virgins of public life," declared one participant. They may have affiliations with political organizations and NGOs, a long list of publications if they are scholars, and an easily accessible record of non-judicial activities, speeches, and commercial interests. All of these may be raised as possible reasons that international judges are unable to perform their work with independence and impartiality.

The question of when interest in or connection to a case by a judge necessitates recusal was immediately raised. One criminal court has had high-profile cases where its judges were on the record expressing opinions about the behavior of accused persons. One participant asked whether it would be preferable for a body outside the court to determine recusal in such situations,

66. Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Amending the Controls System of the Convention, May 13, 2004, C.E.T.S. No. 194.

instead of judicial colleagues. Are fellow judges not likely to support the judge in question, or alternatively to join against him, he wondered? And does an internal decision not create a perception of bias in the public eye? A different issue related to bias was brought up with reference to the ECCC. Normally a judge should not sit on a case with which he has a personal connection. But it was virtually impossible to find Cambodian judges who had not been touched by the Khmer Rouge events under investigation by the court. The recusal provisions in the ECCC rules were debated and ultimately made more flexible so as not to systematically preclude the participation of local judges in the trials.

Participants also discussed when experience on one international court should prevent participation in a related matter before another. For example, should a criminal judge who has deliberated on questions of genocide refrain from sitting on an interstate dispute resolution body that is looking at the crimes from a different standpoint? One judge offered this opinion: "I don't see much of a problem if it is only a legal question of genocide. I think this is a situation that domestic judges deal with every day, sitting on cases that deal with the same legal issues." Another judge added this comment: "Disqualifying someone just because they have expressed certain views on crimes against humanity or war crimes is not a good enough reason." Human rights institutions may also see situations where their judges have dealt with an issue before the court while previously serving in their capacity as judges in their home country. While some believed that this would not necessarily pose a legal problem, others felt that this might well create a perception of bias.

How judges interact with the media, and when these interactions overstep an appropriate boundary, also came up as a topic of discussion. How should a judge deal with requests for interviews, or answer questions that the press may have about the judge himself or his institution? "On the one hand," said a participant, "a judge should not seem aloof from society, but on the other hand, he should avoid seeking the limelight." He recounted an incident in which a fellow judge gave a lengthy interview to a newspaper where he made critical comments about the political situation of the country hosting the court. "Our president felt obliged to disavow the interview and publicly reprimand the judge," he continued, a response justified by the court's code of ethics. Another participant reported that he had recently been asked by the media in his home country to speak about his court and explain its function to the local population. "I think this is useful and important for the public; we need to explain what our courts do and do not do, but not to speak on specific cases. My inclination is that this is a good exercise of discretion from the viewpoint of educating the public." Another participant went on to suggest that speaking to the press about cases, once a judgment has been delivered, should not be out of the question. "I would cautiously encourage it because I think the court should enlighten and educate, and this is better done by a judge than a press secretary. That is, if he is capable of going out and facing a microphone and camera."

Participants noted a number of other questions about judicial ethics, and its perception, that cannot be answered by referring to their courts' rules or codes of conduct.⁶⁷ In what situations can a judge carry out arbitrations, particularly of a commercial nature? What kinds of secondary employment are compatible with a part-time judicial position? How much can and should an international judge speak in public about legal issues of contemporary importance? Since such questions do not generally involve potentially serious violations of judicial ethics, they are often left up to the discretion of individual judges, with advice from the court president or colleagues when requested. It was suggested that international courts might do well to look for guidance in detailed codes of judicial conduct, like the Code of Conduct for United States Judges.⁶⁸ However, some courts have resisted the elaboration of such codes, believing that broad notions of appropriate judicial conduct suffice.⁶⁹

It is clear that trust in the international justice system relies to an important degree on public confidence in those who serve as its judges. It is thus up to judges themselves, one judge exhorted, "to exercise continuous discretion in order to preserve a sense of judicial independence and impartiality." He went on to add an important point, undoubtedly already acknowledged by those in attendance at the BIIJ: "In becoming a judge, you must sacrifice some of the private space that others take for granted." Having judges who accept these limitations without question is another foundational element for the international rule of law.

Toward an International Rule of Law: Some Critical Elements

The sessions at the Brandeis Institute for International Judges 2010 raised a wide array of issues related both to the practice of international judging and its relationship to the international rule of law. Some issues are still under consideration and will be developed further at future sessions of the BIIJ. However, by the end of the Institute, certain key aspects of the international rule of law had emerged from participant discussions and were the subject of general consensus.

Under an international rule of law:

67. Indeed, not all international courts have such codes. For more information on judicial ethics in the international sphere, to access the codes of ethics of international courts and tribunals that do exist, and to find a link to the Burgh House Principles on the Independence of the International Judiciary, see Int'l Ctr. for Ethics, Justice, & Pub. Life, *supra* note 56.

68. See *Code of Conduct for United States Judges*, U.S. CTS., <http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/RulesAndPolicies/conduct/Vol02A-Ch02.pdf> (last updated June 2, 2011).

69. TERRIS, ROMANO & SWIGART, *supra* note 19.

- States observe widely-shared international law commitments consistent with fundamental principles of human rights and respect for human dignity.
- Interested constituencies (states, intergovernmental organizations, non-state groups, and private entities and individuals) have access to international judicial institutions.
- International judicial institutions embody principles of independence, impartiality, equality before the law, fairness, non-arbitrariness, openness, and respect toward cultural diversity.
- International judicial institutions and government authorities cooperate to ensure compliance with decisions of international judicial institutions.
- All subjects and recipients of international law are able to contribute to its substance and participate in its development.

Brandeis University hopes to create opportunities for a continued exploration of what constitutes the international rule of law and how it can be successfully built.

BREAK-OUT SESSIONS

While most sessions at the Brandeis Institute for International Judges 2010 followed a plenary format, judges serving on the benches of criminal, human rights, and interstate dispute courts also had the opportunity to discuss issues of particular interest to their type of jurisdiction. Participants conferred with one another before the Institute and decided on a list of topics to discuss during their respective break-out group sessions.

International Criminal Courts and Tribunals

In 2010, the BIJ hosted judges from six international criminal courts and tribunals, the largest number represented at the BIJ to date. The institutions are in different stages of operation, with the ICTY, ICTR, and SCSL finishing their mandates, the ECCC closer to the halfway mark, and the STL just beginning its work. The only permanent criminal court in existence, the ICC, has been operational since 2002 and, at the time of the Institute, had recently been the subject of an extensive review conference at which its successes and challenges were closely analyzed.⁷⁰ The eight criminal judges in attendance addressed two critical issues for their institutions during the break-out session: the efficient

70. Rome Statute, *supra* note 17.

conduct of trials, and the relationship between peace and justice in the work of international criminal jurisdictions.

The international community frequently singles out for criticism both the length and accompanying cost of proceedings in international criminal courts and tribunals. Trials have an “expected lifespan,” as one judge expressed it, but they are frequently subject to slowdowns, often for reasons beyond the control of the court. Given that the assembled group included two criminal court presidents and a criminal court vice-president, in addition to two former presidents, the question naturally arose as to what measures, if any, can be taken by those in court leadership roles to ensure that there are no undue delays in proceedings. A judge from a court working under a “completion strategy” noted that outside parties, including funders and parent bodies, sometimes push for the quick conclusion of a case.

There comes a time when pressures on funding or personnel—which might be down-sized, as it is in my court—just make it wiser to end the course of proceedings as early as possible. What can the president do to see that more work is done in less time so the completion strategy may be achieved?

“Even if there is not an outside concern,” noted another participant, “judges, including the president, have an overwhelming obligation to speak up about due process proceedings because of the fundamental right to a speedy trial.”

Participants acknowledged that court presidents have wide-ranging responsibilities and powers, several of which can contribute to the efficient conduct of trials. However, the measures they take have less to do with expediting individual cases than with efficiently managing the court’s overall caseload. For example, the rules and procedures of a court may be amended to maximize efficiency. The experience of the ICTY, which has been in operation longer than the other institutions represented at the BIIJ, was particularly instructive.

Among the many amendments made to the ICTY rules of procedure since the tribunal’s establishment were three that have helped to streamline judicial proceedings: 1) the replacement of some oral testimony with written documents; 2) reduction in the scope of indictments, sometimes by as much as one-third; and 3) acceptance of “adjudicated facts” from earlier cases.

Regarding the latter, one judge expressed some misgivings: “What I don’t like is that this puts the burden on the defendant to disprove facts submitted by the prosecution from previous cases.” While court presidents generally do not have a specific power to amend rules, they have the practical power to suggest important changes to the rules committee or oversight body. As noted in an earlier session of the Institute, the statutes of some courts do not allow for an easy or rapid amendment process.

Court presidents also carry out various managerial functions that impact the efficiency of proceedings. For example, they oversee the scheduling of trials and consult with the registry to ensure staff availability. Participants commented on the unique way in which the ICTR schedules trials. While trial judges of both ad hoc tribunals sit on two cases concurrently, ICTR judges switch back and forth between the cases at two-month intervals. While this approach aims to bring multiple trials to completion in a timely manner, it also creates issues in the flow of work and necessitates that judges frequently readjust to a different case and a different set of judicial colleagues. This scheduling model may also, pointed out one judge, create subsequent problems. “In the long run, this will not speed up trials because it means finishing many cases at the same time, which means delaying the appeals. The appeals chamber will be flooded!”

More generally, participants agreed that the overall efficiency of their courts is enhanced by cooperation and coordination among the different organs, represented by the president—who often takes the lead during meetings—the prosecutor, the registrar, and in some cases the head of defense. The ECCC is at a disadvantage in this respect; it does not have a single president, but rather a president for each of the chambers—pre-trial, trial, and appeals. It also does not have a formal registry. The structure of the ECCC thus leads to challenges in coordinating efforts for greater efficiency, some participants thought.

In some criminal courts and tribunals, the president has a direct power to assign members of the bench to particular panels or cases; in others, he has the power to recommend assignments. Either way, knowledge of which judges work best together, and for which roles they are best suited, is important for the composition of successful and efficient chambers. One participant noted,

We have two types of judges: criminal judges with experience in high-profile cases and international lawyers. Judges are the natural choice for the trial division. You should have an experienced criminal trial judge as the presiding judge of the chamber. On the other side, academic and international lawyers are maybe better in the appeals division.

The importance of having a “reserve” or “alternate” judge assigned to a case was also noted. If a member of the panel falls ill, the reserve member can quickly take over, eliminating the need for delays in the proceedings.⁷¹

Finally, participants pointed out the important function a president plays in relation to external parties. In some courts, the president oversees negotiations with funding organizations and donors in order to secure the resources necessary

71. The high-profile trial of former Liberian President Charles Taylor by the SCSL has taken this precaution. The alternate judge on the case sits in on the proceedings so he is abreast of all developments. He does not, however, have voting power unless he is called upon to replace one of the regular three judges of the trial chamber. Statute of the Special Court for Sierra Leone art. 12(4) (2002), <http://www.sc-sl.org/LinkClick.aspx?fileticket=uClnd1MJeEw%3D&>.

to carry out the institution's work in a timely manner. The president also represents his court or tribunal before parent bodies, such as the U.N. Security Council or the ICC Assembly of States Parties, and ensures that they understand its needs and appreciate its successes.

In addition to performing a critical formal role in regard to the general efficiency of his institution, a court or tribunal president also has a critical but delicate *informal* role to play in coaxing along a particularly slow trial. A participant expressed it this way:

The informal role of the president is difficult to explain. In addition to his formal role, the personal influence of the president, exercised discreetly and properly, can be very, very important. But even if he feels that a trial could go faster, he must be respectful of judicial independence. The extent to which a president can mention concerns to a presiding judge depends on the temperament, vision, and character of the president regarding what is appropriate to discuss.

Another criminal judge agreed with the need for caution in this regard. "The president may set a general goal that a case be conducted in the most expeditious manner, but not at the expense of the fairness of the trial." Several participants observed that in the case of tension between the demands of the ad hoc tribunals' completion strategies and due process, considerations of fairness and due process trump all others.

The group then turned its attention to the issue of whether and how their institutions can seek a balance between the objectives of peace and justice. A fundamental question was asked: Should efforts to make peace during an ongoing conflict have priority over the work of international criminal jurisdictions? The peace versus justice issue is of increasing concern to certain sectors of the international community and constituted one of the focus areas of the recent ICC Review Conference.

Those in attendance agreed that the question of delaying justice in order to promote peace in a situation of ongoing conflict does not usually fall within the purview of judges. It is the prosecutor's role to issue an arrest warrant or bring an indictment, and some discretion can be exercised around these issues in relation to the particular circumstances. "But once the matter is before the court," declared a judge, "the judicial process must take precedence and run its course. Otherwise international criminal justice would be severely compromised." The ICC is unique in that its statute explicitly states that the Security Council may temporarily suspend an investigation or prosecution in the interest of peace.⁷² One

72. Rome Statute, *supra* note 17, at art. 16. Deferral of investigation or prosecution:

No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by

judge reported that he had objected strongly to the inclusion of this jurisdictional limitation during the drafting of the Rome Statute.

Prosecutorial discretion and limitations notwithstanding, the reputations of international criminal courts and tribunals suffer when the public believes that an indictment or arrest warrant has stood in the way of peace. This in turn impacts the work of judges. “So even when the decision to go ahead with the application of an arrest warrant is in the hands of the prosecutor, we are all affected because he is an integral part of the court!” bemoaned one judge. Reactions to the indictment of Slobodan Milosević in the early days of the ICTY, and more recently the arrest warrant of Omar al-Bashir by the ICC, illustrate how international courts may be seen by some observers as “the bad guys,” foiling peace efforts and prolonging the misery of local populations.

Participants then analyzed the peace versus justice issue from the standpoint of rights. One judge’s viewpoint was that whereas the right to justice is individual, the right to peace is collective. How can one decide which is more important? “It is not possible for a court to give preference to collective rights,” he declared, “so justice must prevail.” Another participant offered a different view: “You describe peace as a collective right, but isn’t it also an individual right? Justice could be seen as a collective right, too—the two things have quite a link.”

Assembled judges once again had occasion to note the particularities of the ECCC. The crimes under consideration by the court took place more than 30 years ago, and the conflict is long over. However, the tensions surrounding the Khmer Rouge era still exist, and some parties believe that the court’s work might rekindle them and bring about another civil war. For how long after an incident does an international criminal tribunal need to think about the relative benefits of peace and justice, one judge queried? Another answered, “When mass crimes occur in a country, the mere fact of exercising justice, even late, is a way of coming to terms with the past.”

Finally, participants observed that their institutions contribute to the regions within their jurisdictions in several ways. In addition to investigating crimes and bringing criminals to account, their work ideally engenders a sense of reconciliation between victims and perpetrators. Courts also frequently engage in capacity-building in the affected regions, particularly in the judicial sector, and their jurisprudence may have an important impact on domestic law there. These contributions should be acknowledged and added into the peace-justice equation. One judge commented, “The idea of ‘no peace without justice’ is always a simplistic way of looking at the problem.”

The group concluded that the topic of peace versus justice will continue to be relevant for international criminal jurisdictions and recommended that it be discussed in greater depth at a future Brandeis Institute for International Judges.

the Council under the same conditions.

Human Rights Courts

When the BIIJ established the practice of break-out groups in 2007, the ACHPR was a very young institution with little concrete experience. African judges have often used this dialogue among human rights judges to learn about how the African Court's peer institutions in Europe and the Americas deal with a range of issues and challenges, such as how to coordinate the work of regional human rights commissions and courts, how to monitor compliance with judgments, and what types of reparations might be made to victims of human rights violations. During BIIJ 2010, when the break-out session began by addressing the sources of applicable law for human rights courts, the African Court found itself a leader in the discussion.

Each human rights court has its own legal instrument that articulates the rights that it has been established to protect, namely the European Convention on Human Rights, the American Convention on Human Rights, and the African Charter on Human and Peoples' Rights. However, the protocol establishing the African Court further indicates that the court shall also apply the provisions of "any other relevant human rights instruments ratified by the States concerned."⁷³ This creates a potentially vast jurisdiction for the African Court and poses some fundamental questions, including how the term "human rights instrument" is to be defined, and how the African Court can adequately assess violations of other instruments.

The assembled human rights judges mentioned a wide array of human rights instruments that might be pertinent to the work of the African Court. These include the International Covenant on Civil and Political Rights, the Conventions of the International Labour Organization, and the case law of the U.N. Human Rights Committee. One judge mentioned that even the latter's many comments and recommendations might have to be taken into account.

One participant wondered whether the protocol should not be amended so as to specify more clearly which additional instruments African judges are required to consider as part of their jurisdiction. Could the judges do this themselves, or might the Court's parent institution, the African Union, be called upon to restrict the Court's jurisdiction? Another participant pointed out that the Court's jurisdiction should not be conflated with its sources of law. The latter is more easily specified, and, in some cases, there will be a body to resolve disputes around a particular treaty so that the court can simply reject its own competence. When the limits of jurisdiction are not clear, however, situations may arise in which the Court is not sure whether a certain matter falls within its competence or not.

Some members of the human rights group hesitated to take the openness of the African Protocol toward multiple sources of law as a problem. "We can call it

73. ACHPR, *supra* note 16, at art. 7.

a 'specificity' or 'feature' of the African system," one remarked. It is clear that the Court should always start with an interpretation of the rights protected by its own charter, and then "take inspiration from other pertinent legal instruments" as needed, he continued. This may mean that the Court has to be careful not to go against the interpretation or the jurisprudence of the United Nations or of other treaty bodies. Not everyone agreed with this stance, however. "You will bind your hands if you decide to follow the jurisprudence of a different body than your court," declared one judge. Another suggested that cases from other relevant bodies be cited by the African Court as "persuasive evidence," without being considered binding.

In the end, most of the group agreed that while the African Court faces challenges unfamiliar to its European and Inter-American counterparts, those challenges can be resolved through future practice. Only through judicial interpretation of matters before the African Court will the implications of the provision to apply multiple human rights instruments become clear. "You have to develop your own jurisprudence," exhorted one judge. "And this is very easy at the beginning, when you have only one or two cases. But as you get more and more, there is a fear of a lack of consistency." Over the coming years, the African Court will need to balance its institutional independence against the desirability of contributing to a coherently developed and global body of human rights jurisprudence.

Human rights judges also discussed the justiciability of economic, social, and cultural rights in their respective courts. Once again, the African Charter of Human and Peoples' Rights is broader than the conventions of its sister courts, guaranteeing, for example, rights to both education and health, among many other rights. African judges thus eventually expect to see a number of applications to their court claiming a violation of these rights. One judge expressed some trepidation about handling such cases at the international level, observing that "the justiciability of these rights is not yet understood or resolved at the *national* level in many countries."

The European and Inter-American Courts have had some experience in economic, social and cultural rights, and this was subsequently shared with the group. The American Convention does not explicitly guarantee these rights—they are instead covered by the San Salvador protocol to the Convention,⁷⁴ which falls outside of the IACHR's jurisdiction—except for the right to property. Rights that are not spelled out in the Convention have, in some cases, been interpreted as an adjunct to property rights, particularly with regard to the land and natural resources of indigenous peoples. The ECHR similarly has much jurisprudence on the right to property, as well as on the right to education, including whether higher education is to be included as part of this right. There is no specific right to health

74. Additional Protocol to the American Convention on Human Rights (Protocol of San Salvador), Nov. 16, 1999, O.A.S.T.S. No. 69.

in the European Convention, but these issues are examined under Article 8 of the Convention.⁷⁵ Also, cases on the issue of withholding medical care, in particular from prisoners, can be found as constituting a form of torture or of inhuman or degrading treatment under Article 3 of that convention.⁷⁶

Participants concluded the session by agreeing that the African Court needs to have a wide and inclusive approach to interpreting rights if it is to satisfy its mandate. The experience of its sister courts will certainly be invaluable as it navigates its way through a complex landscape of human rights law and jurisprudence.

Interstate Courts

Judges serving on interstate dispute resolution bodies used the break-out session to explore in more depth a number of issues raised in the plenary sessions. These included access to their courts, the reluctance of states to submit disputes to judicial resolution, securing the independence of judges, and the enforcement of judicial determination.

The group began by providing the details of how parties access their respective institutions—the ICJ, ITLOS, ECJ, and WTO Appellate Body. Several follow a strict “state-only” model, so that any private party with a complaint needs to have their state initiate a proceeding. One judge observed of the WTO Appellate Body, “it may be difficult for private individuals or corporations to convince their government to bring a case. They need to find enough information that any harm to their imports or sales is the result of a government measure and not a private behavior.” Furthermore, it is also necessary that a government function well and have the necessary resources to bring a case. “There may also be reluctance on the part of some governments to participate unless the case is very strong and they have an excellent chance of winning.”

The ICJ also stands firm in allowing only states to come before it, and has rejected cases that involved entities like the European Union or NATO. On the other hand, the Permanent Court of Arbitration, which shares premises with the ICJ in The Hague, has expanded its original state-only jurisdiction to include disputes, especially those of a financial nature, between states and companies. While ITLOS is similar in many ways to the other U.N. dispute resolution body, the ICJ, they differ on the matter of access. “The Law of the Sea Convention recognized the need to grant access to international organizations and investors involved in deep sea activities. That is why they broadened access.” The CCJ also accepts petitions from private parties, viewing them as an important part of their constituency, one judge explained:

75. ECHR, *supra* note 24, at art. 8 (“Right to respect for private and family life.”).

76. *Id.* at art. 3 (“Prohibition of torture.”).

This was a court established pursuant to the goals of a treaty that sought to bring about a single Caribbean economy, and private actors were naturally required to play a critical role in establishing this economy and in making use of the advantages which this single economy afforded them. It was thus important to permit and also give a generous interpretation to the treaty that would give them access. We rejected the notion that a private actor was incompetent to sue their own state.

With regard to the hesitation felt by states to submit disputes to international courts, the assembled judges clearly recognized the political sensitivities that might arise from an international proceeding. “That state that thinks it is in the weaker position is often reluctant and puts the brakes on submitting a case for international resolution.” Sometimes a dispute will instead be submitted for arbitration, a process over which states may feel they have more control. ITLOS, in particular, currently finds itself underutilized. Eighteen cases have been submitted to the Tribunal since it became operational in 1996, a record that does not, however, compare unfavorably to that of other international judicial bodies in the initial stages of their existence.

In contrast, the WTO Appellate Body does not suffer from a lack of “business.” Since the WTO Dispute Settlement Understanding was reached fifteen years ago, it has received 414 requests for dispute settlement and issued 160 panel reports, two-thirds of which have been appealed to the Appellate Body. However, WTO cases are skewed toward developed countries—roughly three-quarters of its cases have involved the United States or the European Community—so a reluctance to submit disputes has existed among WTO members that are less strong economically, although recent trends show more cases being initiated by developing countries. One judge made the following observation on this issue:

Some countries may have feared bringing an action against a more powerful country. They may have been afraid of ramifications that they could not be sure of, where in a sense they have created an adversarial relationship with a country today that they may have to be in negotiations with tomorrow.

The question of whether some countries are naturally more litigious than others also came up over the course of the discussions. Stereotypes would suggest that some regions, like Asia, have cultures that lend themselves more to diplomatic negotiation than adversarial proceedings. Some judges felt that such stereotypes should not be given much credence. In fact, it was pointed out, one-third of WTO cases involve China, although often as a third party. It was stressed, however, that the need for neighboring countries to maintain good relations can be a real factor in discouraging interstate litigation. The jurisdiction of the CCJ, for example, covers a small geographic area made up of tiny nations

with interconnected histories. To date, there has been no state versus state case, with governments in the Caribbean opting for non-judicial means to resolve their disputes.

Other factors affecting a state's decision to submit a dispute for judicial resolution were mentioned. One judge felt that commercial disputes were more likely to be submitted than sovereignty disputes. Not only may there be pressure from the private sector behind the former, but disputes over boundaries and other disputes involving sovereignty may not be as detrimental if they linger on. Another participant noted that cases involving human rights violations often have strong civil society pressure impelling a government to bring an action. In the end, the group agreed that the most compelling factor leading states to bring a dispute for judicial resolution is the legal obligation to do so. Few courts operate, however, with compulsory jurisdiction in relation to all states and all situations.

In regard to securing the independence of judges, the problems associated with reelection to the benches of international courts and tribunals were once again raised. The CCJ has a very different approach to judicial tenure than its peer institutions, granting an appointment until age seventy-two (with the possibility of a three-year extension to judges serving at this evolutionary phase of the court).⁷⁷ The Caribbean Court also has a distinctive financial arrangement, designed to ensure the independence of the bench vis-à-vis its parent body. When the CCJ was established, members of the Caribbean Community contributed to a trust fund whose annual returns would be sufficient to run the court. The institutional leadership consequently does not find itself in the potentially compromising position of soliciting funds from states that may end up as parties before the court.

The question of the nationality of judges and its impact on their work was also discussed. Nationality is a particularly sensitive issue for the courts represented in the break-out group since the parties that appear before them are states, and judges may be perceived as having an unavoidable bias in favor of their home country. Institutions have dealt with this in different ways. At the ICJ and ITLOS, "ad hoc" judges may be appointed to a case if a party does not have a judge of its nationality sitting on the permanent bench. This strategy to "neutralize" assumed bias is not seen as the optimal solution by many observers; automatic recusal by judges from cases involving their home states is seen by some as more logical. However, the addition of ad hoc judges to benches that are already large may not, in the end, complicate matters too much, said a participant. "And when you have an ad hoc judge, he can explain the domestic

77. Protocol to the Agreement Establishing the Caribbean Court of Justice Relating to the Tenure of Office of Judges of the Court, June 7, 2007, <http://www.caribbeancourtofjustice.org/courtinstruments/Protocol%20relating%20to%20the%20Tenure%20of%20Judges,%20CCJ%20with%20signatures%20June%202007.pdf>.

legal system much better, and we do at times have to apply domestic law. Sometimes ad hoc judges have a useful purpose.”

The WTO Appellate Body has adopted a different approach to nationality. Its members are permitted to sit on cases involving their home states. “In a sense, we are considered citizens of the world,” explained a participant. An even more delicate issue might be the former professional positions held by Appellate Body members. Many have formerly worked for their governments on trade issues and policies. These experiences may be what qualified them for their current position in the first place, but may also require recusal from certain cases. The Appellate Body adheres to an internal disclosure and recusal system for members to recuse themselves from participating in cases in which the matter before the Appellate Body is essentially the same as one addressed in their prior government work. This system, however, suffers from a lack of transparency.

Interstate judges finished their session by revisiting the issue of compliance with judgments and the implementation of decisions. The details of particular cases were offered by the various participants, with descriptions of how recalcitrance on the part of losing parties was dealt with. The WTO Appellate Body is perhaps unique in that non-compliance by the losing party can be countered with sanctioned retaliatory measures by the winning party. Generally, participants agreed that compliance with their institutions’ decisions was high, even if they do not have a specific enforcement mechanism. As one participant noted of his institution, “There is a growing tendency to believe that the judgment of the court is the judgment you get from the global international community. So there is a culture of shame if you do not follow it.”

KEYNOTE ADDRESS

The BIIJ was honored to have as its keynote speaker Ms. Patricia O’Brien, Under-Secretary-General for Legal Affairs and Legal Counsel of the United Nations. She addressed BIIJ participants and members of the Salzburg legal community on U.N. perspectives toward the Institute theme, “Toward an International Rule of Law.” The following is an excerpt from her address.⁷⁸

Excellencies, Ladies and Gentlemen,

I am very pleased to be here at the Brandeis Institute for International Judges and am greatly honoured to have been asked to give this keynote address.

It is quite a daunting task for me to speak nearing the end of a week of discussions on the topic “Toward an International Rule of Law.” The debate on the meaning of an “international rule of law” is undoubtedly a crucial one in the

78. The entire text of the keynote address may be downloaded at the website of the United Nations. Patricia O’Brien, Keynote Address at the Brandeis Institute for International Judges: Toward an International Rule of Law (July 29, 2010), available at http://untreaty.un.org/ola/media/info_from_lc/Brandeis%20Institute%20for%20International%20Judges,%20Salzburg,%2029%20July%202010.pdf.

challenging times in which we live. And the promotion of the rule of law at the international level necessarily requires an understanding of the role that the international judge has to play in this context.

It is now almost two years since I joined the U.N. as Legal Counsel to head the Office of Legal Affairs, which employs over 200 on a full time basis and effectively acts as in-house Counsel to the Secretary-General, the senior management and the wider U.N. system. Much of our work is, understandably, carried out quietly and behind the scenes. But OLA's horizons, and the expectations of OLA from within the U.N., run very wide.

Many of the issues that you have been discussing are an integral part of my daily work. My perspective on these issues is therefore influenced by my own professional experiences, by the legal work of the United Nations which I have received the mandate to conduct, and by the challenges faced by the Organization as I witness them every day.

I propose to describe some of the issues and challenges which the U.N. is currently facing. It can safely be said that, since 1945, the Organization and its Members have constantly striven to give practical meaning to the Charter's resolve to establish conditions under which justice and respect for international obligations can be maintained, and to develop legal bases for peaceful relations between States. However, we all know that, in any political situation, the importance given to a genuine legal assessment may vary: the U.N. has thus seen periods of great advancement in international jurisprudence, just as there have been times when our function as guardian of the global legal architecture has seemed more peripheral. After almost two years in office, I believe that we live in times where international law—and the role of the U.N. as its champion—is absolutely central to the Organization and to the Secretary-General and his team.

My objective today is to demonstrate how this legal perspective has contributed to a trend "toward an international rule of law." In doing so, I will first refer to those numerous instances where the Organization reaches out to the world and strives to contribute to the establishment of an international rule of law. But I would also very much like to draw your attention to a less visible aspect of the paradigm of the rule of law for the U.N. or, to be more specific, within the U.N. In our Organization, acting in conformity with legal requirements is a constant and dynamic pattern which is present in all our activities. In other words, respect for the rule of law is, for the Organization, a goal to be achieved every day.

1. Contributing to the Establishment of an International Rule of Law

So, to my first point: how the U.N. contributes to the establishment of an international rule of law. Under Article 1 of the Charter, the United Nations is expected to be "a centre for harmonizing the actions of nations" in the attainment of a number of common ends. These ends include: the maintenance of

international peace and security; the development of friendly relations among nations; international co-operation on economic, social, cultural or humanitarian matters; and the promotion of human rights and fundamental freedoms. It became obvious that the Organization is expected to take an active stance in the attainment of the purposes of the Charter. From a legal perspective, this has meant that the United Nations was to play a key role in upholding the law in contemporary international relations.

It is almost a truism to observe that the realization of this objective cannot be confronted in the same manner in the dawn of the twenty-first century as it was originally foreseen in the immediate aftermath of World War II. The U.N. has shifted its attention to new pending issues and has proposed innovative ways of addressing them. The promotion of the rule of law at the international level obviously lies at the heart of these contemporary endeavors. But, beyond the direct efforts made to promote the concept of “*l'état de droit*,” the U.N. constantly strives to build up an international rule of law when we have to manage post-conflict situations and to reconcile peace and justice; or when we explore new concepts, such as the “responsibility to protect,” which are aimed at ensuring greater respect of international law. I hope to show to you how the Organization has been able to propose novel legal ways of responding to the changing political environment, while maintaining a solid attachment to the principles and mechanisms provided for under the Charter.

A. Promoting the Rule of Law at the International Level

The concept of the “rule of law” is today at the centre of the United Nations’ concerns. Many offices within the system, including my own, are involved in its promotion. In view of the significance and diversity of the Organization’s involvement in this area, the Secretary-General proposed in 2006 to establish a Rule of Law Coordination and Resource Group to ensure the overall coordination of the U.N. efforts. The Group is chaired by the Deputy Secretary-General, and I am a member together with other senior U.N. officials. Furthermore, the issues relating to the rule of law are being discussed by Governments both in the Security Council and in the General Assembly. These efforts are well-known within the system and focus much of the attention of my Office every day. What may, however, be less evident is that the “rule of law” is a theme that has always been present in the Organization.

In the preamble of the Charter, the Peoples of the United Nations express their determination “to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained.” It is in this perspective that the purposes and principles proclaimed in the Charter are to be understood. Principles such as the sovereign equality of States, the fulfillment in good faith of international obligations, the peaceful settlement of disputes or the prohibition of the threat or use of force in

international relations, constitute the foundations of an international society based on the supremacy of the law, equality before the law, and accountability under the law. As recently recalled by the Secretary-General in a report on strengthening and coordinating U.N. rule of law activities, “the demand of the Charter for a rule of law . . . aims at the substitution of right for might”; as he pointed out, “the equal protection of the law as the means to achieve freedom from fear and freedom from want is the most sustainable form of protection,” and “[p]erhaps, the United Nations contributions to such protection are its most profound achievements.” Today, the concept of the “rule of law” is present in most of the areas of action of the Organization, from the protection of human rights to the maintenance of peace and security, from the fight against poverty to the most sensitive political affairs.

This concept, which is so familiar to us lawyers, has the effect of placing our field of expertise at the very heart of the Organization’s mission. This raises an interesting question: how does the U.N. conceive what some have called the “exceedingly elusive notion” of the rule of law?

Within the Organization, the “rule of law” has been described as:

“a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.”⁷⁹

What is of particular interest—and plainly stems from the emphasis put on the universality of the principles which inspired the Organization’s action in this area—is that the U.N. recognizes the existence of two interdependent dimensions to the concept of the “rule of law,” one national and the other international. This interdependence is explicitly acknowledged in the Millennium Declaration, whereby the Heads of State and Government affirmed their resolve to “strengthen respect for the rule of law in international as in national affairs.” As was authoritatively stated, this implies that “every nation that proclaims the rule of law at home must respect it abroad and that every nation that insists on it abroad must enforce it at home.”⁸⁰

79. U.N. Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, ¶ 6, U.N. Doc. S/2004/616 (Aug. 23, 2004).

80. U.N. Secretary-General, *In Larger Freedom: Towards Development, Security, and Human Rights for All*, ¶ 133, U.N. Doc. A/59/2005 (Mar. 21, 2005).

The “rule of law” acts as a vector for the engagement of the Organization in various areas of the international arena when properly combined with the principles and purposes of the Charter. In the 2005 Outcome Document, Member States acknowledged that “good governance and the rule of law at the national and international levels are essential for sustained economic growth, sustainable development and the eradication of poverty and hunger,”⁸¹ and that human rights, and the rule of law and democracy “are interlinked and mutually reinforcing.”⁸² These general statements are accompanied by calls for action on more specific issues of concern, such as the adherence to international treaties, implementation of international law at the domestic level, the enhanced role of the International Court of Justice in the peaceful settlement of disputes, the protection of civilians, or the eradication of policies and practices which discriminate against women. The Security Council, for its part, also expressed support for the peaceful settlement of international disputes and for rule of law activities in the peacebuilding strategies in post-conflict societies. The Council has amply emphasized the importance it attaches to the responsibility of States to comply with their obligations to end impunity and to prosecute those responsible for the most serious international crimes.⁸³

This broad scope of the rule of law within the U.N. has been reaffirmed as recently as last month, in the context of an open debate of the Security Council on “the promotion and strengthening of the rule of law in the maintenance of international peace and security.” That debate was proposed by the Mexican presidency both with the objectives of “more strongly embedding the rule of law and international law in the daily work of the Security Council” and of “increasing the level of adherence to the rule of law and international law,” both of which were considered indispensable for the Council to fulfill its primary responsibility. I participated in this debate and, as was apparent from the various interventions, the U.N. has endorsed the idea that the promotion of the rule of law may not be limited to specific situations or circumstances, but should expand to cover the rule of law at the international level.

In sum, the concept of the rule of law in the U.N. embraces the most classical and fundamental principles of the international legal order, and allows us to use these principles to face the most urgent and contemporary concerns of the international community.

Ms. O'Brien completed the first part of her keynote by discussing how the U.N. Legal Office manages post-conflict situations by reconciling peace and justice, promotes the “complementarity” of domestic and international justice

81. U.N. Secretary-General, *Report of the Secretary-General on the Work of the Organization*, ¶ 11, U.N. Doc. A/62/1 (Aug. 31, 2007).

82. *Id.* ¶ 119.

83. Statement by the President of the Security Council dated June 22, 2006, U.N. Doc. S/PRST/2006/28 (June 22, 2006).

systems in the prosecution of perpetrators of the most serious crimes, and explores new ways to ensure respect for the law, including the “responsibility to protect.”

2. *Enhancing Respect for the Rule of Law at the United Nations*

Let me now turn to the second part of my presentation, which—as I mentioned before—will be devoted to enhancing respect for the rule of law within the U.N.

As the Secretary-General has underlined, the U.N., as an organization involved in setting norms and standards and advocating for the rule of law, must itself “practice what it preaches.” This implies that it should be legally accountable for its actions, and that mechanisms are to be put in place in order to ensure that the Organization acts according to the law. There are many dimensions to this issue, which have included in the past years, for instance, discussions in the Sixth Committee on the criminal accountability of U.N. officials and experts on mission, or the reform of our internal system of administration of justice. As for today, I would like to examine in more detail two areas in which significant progress has recently been made: the implementation of sanctions and the responsibility of international organizations. Something indeed needs to be said as to the necessity for the U.N. to face the impact that its acts may have on actors outside the system, even—or, should I say—most importantly when these acts have prejudicial consequences.

A. *Adapting the Regime of Sanctions*

I will be very brief in addressing how the U.N. has adapted the regime of sanctions which the Security Council has been using as an important tool in the fight against terrorism. The issue has attracted numerous debates, both in international and regional fora and in legal literature, and I would not like to oversimplify the complexity of the matter. Allow me simply to emphasize significant recent developments which, in my view, illustrate how the U.N. constantly seeks to adapt its methods and processes.

It may certainly be argued that, in the turmoil following September 11th, and faced with a new kind of imminent threat against peace and security, the U.N. may not have immediately paid sufficient attention to the guarantees to be associated with the imposition of sanctions. Much has been said about the external factors that have called the Organization to address this issue. One of the most frequently mentioned among these external factors is certainly the Judgment of September 3, 2008, rendered by the Grand Chamber of the European Court of Justice in the joined cases of *Yassin Abdullah Kadi, Al*

Barakaat International Foundation.⁸⁴ As you certainly are aware, the Court annulled in this Judgment a regulation giving effect to Security Council resolutions and ordering the freezing of the funds and other economic resources of the persons and entities whose names appeared in the summary list drawn up by the U.N. Security Council Sanctions Committee. The Court did so in part because it concluded that the rights of the defense (in particular the right to be heard) and the right to effective judicial review of those rights were not respected in the circumstances of the case.⁸⁵

This Judgment undoubtedly marks an important development in the consideration of the legal regime of sanctions. It would, however, be an unfair assessment to consider that adaptations of the sanctions regimes developed by the Security Council have only been triggered by such external elements. Even before September 2008, the U.N. had taken significant steps to improve the fundamental guarantees to be attached to the imposition of sanctions without undermining their efficiency. In 2006, the Security Council had already considerably rationalized the submissions by Member States of names of individuals and entities to be placed in the sanctions Consolidated List and instituted a focal point to receive requests for “delisting.” In June 2008, the Security Council had further improved the system of notifications associated with listing procedures and directed a review of the Consolidated List. These efforts have culminated with the adoption of Resolution 1904 (2009) of December 17, 2009, by which the Security Council decided that an Ombudsperson shall be appointed in order to assist the Sanctions Committee in the consideration of delisting requests. The review of the regime of sanctions is, in other words, an ongoing effort undertaken by the Security Council, which shows once again how the Organization is active in seeking to ensure that its activities are conducted in conformity with the rule of law.

B. Determining Responsibilities

Lastly, allow me to address the topic of international responsibility as applied to the United Nations. In all fairness, this issue does not belong to the traditional culture of the U.N. As an Organization striving for peace and justice, the U.N. has been more used to the position of a victim or injured party than to that of a wrongdoer. After all, it was after the murder of a U.N. agent, Count Bernadotte, that the International Court of Justice, in its famous advisory opinion on the *Reparation for Injuries Suffered in the Service of the United*

84. Joined Cases C-402/05 P & C-415/05 P, *Yassin Abdullah Kadi & Al Barakaat Int'l Found. v. Council of the European Union*, 2008 E.C.R. I-6351.

85. For a discussion of this case by international judges, see 2009 BIII REPORT, *supra* note 8, at 42-46 (“Harmonizing International Politics with Fundamental Human Rights and the Rule of Law: the Kadi judgment.”).

Nations,⁸⁶ expressly asserted the autonomous legal personality of the Organization. However, with the multiplication and diversification of its mandates and its increased involvement in the field, the question of the responsibility of the U.N. necessarily arises.

In addressing this topic, we have to strike the right balance between two imperatives. The first one is credibility: if the U.N. fails to assume its responsibility, if it gives the impression that it ignores the consequences of its acts, the confidence the Organization inspires may end up seriously damaged. On the other hand, and this is the second imperative I was referring to, we need to protect the Organization against the detrimental effects of claims against actions on which the U.N. has had no actual control. If we do not collectively resist the temptation to shift to the U.N. more than its share of responsibility, the efficiency of the Organization, this need to deliver which is so central to the work of the Secretary-General and its administration, will be durably hampered.

Allow me to illustrate the importance of this issue with a concrete example. As you know, on May 31, 2007, the European Court of Human Rights adopted a decision on two cases, *Behrami* and *Saramati*, brought against France and Norway. I do not intend to discuss the merits of the cases under the special legal regime created by the European Convention on Human Rights. In some respects however, this decision draws upon significant aspects of the activity of the United Nations.

The two cases concerned events that occurred in Kosovo. You will remember that, in resolution 1244 (1999), the Security Council authorized Member States and relevant international organizations to establish an international security presence in Kosovo—KFOR—as well as an international civil presence named UNMIK. In *Behrami*, the applicants complained of the killing and serious injury inflicted on two young brothers in a tragic accident caused by the detonation of a cluster bomb, arguing that French KFOR troops had failed to de-mine the site concerned. The *Saramati* case was based on complaints relating to the arrest of the applicant by UNMIK police and his extra-judicial detention by KFOR.

The decision is one of *inadmissibility*: the European Court finds that the conduct of the United Nations falls beyond its jurisdiction *ratione personae*, as the Organization has a legal personality separate from that of its Member States and is not a party to the European Convention. The reasoning of the Court, however, raises concerns. The Court considered, in particular, that conduct of Member States carried out in the context of an operation under Chapter VII of the Charter was “in principle” attributable to the U.N.. The Court based its decision on its own evaluation of the “delegation” of Security Council powers, coupled to an approach of the criterion of “effective control” for attribution of

86. *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, 1949 I.C.J. 174 (Apr. 11).

conduct which has been recently criticized by the International Law Commission.

It is worth adding that the reasoning of the Court has since been replicated in a number of cases relating to very diverse types of involvement of the United Nations. For instance, the European Court considered that the conduct of the High Representative in Bosnia and Herzegovina was attributable to the U.N.⁸⁷ The *Behrami* reasoning has also been extensively referred to, if not always adopted, by certain national courts. In the *Al-Jedda* case for example,⁸⁸ the United Kingdom House of Lords was confronted with issues of detention in Iraq by British troops belonging to the “multinational force under unified command” authorized by Security Council resolution 1511(2003). The argument that the conduct was attributable to the U.N. was rejected by all Lords with the exception of one. Other Lords pointed to the fact that the force was not acting under U.N. auspices; in doing so, some relied on *Behrami*’s criterion of “ultimate authority and control,” thus basing their assessment on the European Court’s line of reasoning. More recently, two civil cases⁸⁹ brought before the District Court of The Hague raised the issue of the attribution of conduct carried out by the Dutch Battalion supporting UNPROFOR during the war in Bosnia and Herzegovina. The Dutch Court accepted The Netherlands’ argument that the impugned conduct was exclusively attributable to the U.N., since the forces formed part of the UNPROFOR operation, which exercised operational command and control over them.

There thus seems to be a trend in the case-law for a wide conception of attribution of conduct to the U.N. The Organization does not intend in any way to elude its responsibility, whenever this responsibility is actually entailed by a conduct over which it has effective control. But it seems fair to acknowledge that a broader conception of attribution will have significant implications on the formulation of mandates and on the effective fulfillment of U.N. functions. The Court’s reasoning could, for example, be used to confer upon the U.N. responsibility for conduct carried out in the context of peacekeeping operations authorized by the Organization and operated by a coalition of the willing on which the U.N. has no actual control. Any finding of this kind would have significant implications not only for the Organization itself, but also for States as members of the Organization who are ultimately responsible for its financing. What is more, it could seriously hamper the capability of the Organization and

87. *Beric v. Bosnia & Herzegovina*, App. No. 36357/04, 46 Eur. H.R. Rep. SE6, 91 (2008) (decision on admissibility).

88. *R. v. Sec’y of State for Def.*, [2007] UKHL 58 (appeal taken from EWCA).

89. *H.N. v. State of the Netherlands (Ministry of Def. and Ministry of Foreign Affairs)*, *Rechtbank’s-Gravenhage* [HA ZA] [Dist. Court in the Hague], Sept. 10, 2008, 265615 / HA ZA 06-1671 (Neth.), M. M.-M. v. *State of Netherlands, Rechtbank’s-Gravenhage* [HA ZA] [Dist. Court in the Hague], Oct. 9, 2008, 265618 / HA ZA 06-1672 (Neth.).

the flexibility it requires to fulfill its key mission of maintaining international peace and security.

I have chosen this example in order to better illustrate how the Organization is constantly assessing its methods and procedures. Following the *Behrami* decision, I have actually engaged my Office in a thorough internal review of the past and current practice of the Organization regarding issues of international responsibility. I have also committed to submit to the International Law Commission—which is currently considering the topic of the responsibility of international organizations—to submit our assessment of the issues arising from the draft articles adopted by the Commission on first reading, including our comments on the evolving jurisprudence generated by the *Behrami* decision. In none of the instances I have just referred to has the U.N. been held accountable. We cannot however satisfy ourselves with such short-sighted reasoning. As I have striven to demonstrate today, the United Nations needs to lead by example.

Conclusion

Excellencies, Ladies and Gentlemen,

In reaching the conclusion of this statement, I become aware that I have imposed upon you a daunting journey through a wide number of very diverse legal issues. In a sense, by so doing, I may have given you a taste of what a day looks like at the U.N. Office of Legal Affairs. For these issues have one thing in common: they represent the legal challenges facing the U.N. in the twenty-first century. And as such, they are the challenges that the entire international legal community, including this learned Institute, needs to face together in the years to come.

Thank you very much.