1. Introduction

International courts and tribunals are affected in varying ways by domestic political realities, which in turn are affected by the work of these international judicial bodies. The purpose of the second BIIJ session was to focus on these political realities and to consider whether and how judges should engage with them.

Providing a background context for the discussion were four academic articles. The first, by Tom Ginsburg, starts by recognizing the aspiration to “construct a zone for autonomous legal decision-making, immune from political considerations, to resolve international disputes.” and goes on to identify various ways in which that aspiration has not been realized in practice. Notable political influences, some of which were raised for discussion by participants, include the method of appointment of international judges and the different approaches taken by states to respond to judgments. Ginsburg also discusses ways in which international courts and tribunals respond to political pressures, for example by communicating with non-state actors and actively avoiding politically sensitive questions.

An article by Laurence Helfer and Karen Alter explores the relationship between the legitimacy of international courts and tribunals and what they term “expansive” judicial lawmaking, focusing on judgments from the CJEU, the ATJ, and the Court of Justice of the Economic Community of West African States. Noting that the judgments of these courts reveal varying degrees of “expansionism,” the authors advance the argument that it is not the way in which international courts reach their judgments that gives rise to challenges to their legitimacy, but rather the mere fact that the court reaches judgments that are unpalatable to domestic political actors. As one participant put it, “nobody likes to lose.” How states respond to an adverse decision by an international judicial body was in clear focus during discussions.

Participants also considered a report prepared by Diane Orentlicher which raises the question whether international courts and tribunals, and particularly those with criminal jurisdictions, should be judged according to the impact they have on the regions directly affected by their work. The report addresses questions of impact on both victims and perpetrators, as well as on domestic legal orders and the wider public. Although the report focuses on the impact of the ICTY, discussion during the session revealed that similar questions are faced by other international courts, especially regional human rights courts and, to a lesser extent, inter-state dispute resolution bodies.

Finally, an article by Ruti Teitel discusses difficult cases such as the NATO intervention in Kosovo during the Balkan conflict and the judgment of the CJEU in the Kadi case. These cases are seen as presenting challenges resulting from a lack of alignment between legal and value systems. In the Kosovo example, the question concerned whether there was a legal basis for NATO intervention into a humanitarian crisis. In the Kadi case, the question concerned whether a Security Council resolution whose implementation would interfere with fundamental rights under the European Union...
constitutional order was nonetheless binding. For Teitel, the international judiciary is well placed to grapple with these hard cases by virtue of their being “at least partly detached or autonomous from national political cultures and constitutionalism… and with the authority of high human values.”

The moment values come into the frame of judicial decision-making, however, the issue of judicial activism also appears. This issue gave rise to a range of different opinions during session discussion.

In presenting the insights from this session, the report will first identify the main stakeholders who were seen as being “politically” engaged in the work of international courts and tribunals. Focus then shifts to the ways in which domestic political forces can be seen to impact on these institutions. Finally, the discussion turns to the question of whether and how judges should address political influences on their work, as well as their role as political actors in their own right.

2. Stakeholders and interests

“The court has many clients,” observed one participant early in the discussions. In what follows, the different “clients” of international courts and tribunals are identified.

Individuals who are victims of international crimes or human rights violations comprise one group of stakeholders with specific interests in the operation of international courts and tribunals. As Orentlicher demonstrates in her report, some of the interests of these stakeholders include seeing justice done in individual cases, but also in creating a record of the events that took place.

In a situation perhaps unique to hybrid courts, where proceedings take place within the geographic area where the relevant events occurred, one participant noted the possibility that judges themselves could fall within the category of victim, particularly in the context of mass atrocities. The distinct possibility that the decision-making of such judges could be influenced by their own experiences was an issue that required further consideration.

Domestic and international civil society actors – some representing the views of victims, others representing the position of the accused, and still others, in differing judicial contexts, representing other interest groups – may also have an impact upon the work of international courts and tribunals. More attention will be paid to the work of civil society actors in Section IV of the report.

States are, as the discussion revealed, highly political actors. However, the state itself is not monolithic, and executive, legislative and judicial branches of government may perceive obligations and interests in relation to international judicial bodies differently. As one participant observed, “… executive authority and leadership, processes of law-making and legislative activity, the implementation of policy often by the executive branch, by leaders or administrative structures, contests for power between parties and interest groups, public opinion and public discourse – all of these have connections with and influence upon international courts and tribunals.”

Another participant observed that it is not only parties to an international agreement that may have political influence on the work of associated courts and tribunals, as the example of the position taken by the United States, Russia and China towards the ICC demonstrates. The issue of selective justice was raised in this connection, with one participant noting that these states are not subject to the jurisdiction of the ICC, yet they retain the power to initiate referrals to the ICC as well as to veto referrals. For this participant, in light of such an arrangement, “the discussion with respect to international justice actually stops.”

Politics, according to some, could be seen to play a role even at the point when states consent to be bound by international or regional agreements. One participant made reference, for example, to the recent accession of the Palestinian Authority to the Rome Statute, which has been seen by commentators as a
decidedly political act intimately connected to the ongoing conflict between the Palestinian Authority and Israel.9

Last, but not least, international judicial bodies, as well as the individuals who work within these institutions, are themselves political actors with personal and institutional interests that can affect how they operate. Referring to the suspension in 2010 of the Southern African Development Community (SADC) Tribunal and the later decision to ultimately constitute a new Tribunal with jurisdiction restricted to inter-state matters, one judge recounted: “[What] happened to the Southern African Tribunal has had a chilling effect on judges. When you want to say anything, colleagues will remind you what happened to the SADC Tribunal. Maybe you don’t want a job anymore? Judges are human beings and are affected by local politics.” An express reason for suspending the Tribunal was the fact that judges had made several findings against Zimbabwe in cases brought by individuals.10

In a similar vein, a participant highlighted the challenge faced by international judicial bodies in addressing the demands of multiple stakeholders while simultaneously protecting their own institutional longevity. “The judiciary…have to try to please… the general public – the individual who should benefit from the rights enshrined in the Convention, NGOs and international organizations. [At the same time there is] the inclination of all international organizations… for self-preservation. The institution wants to keep going, and there are interests invested with people working there for life, amongst others.”

This participant referred to the Hirst case,11 which concerned the voting rights of prisoners and the highly politicized response of the UK government. He then identified the subsequent Scoppola v. Italy (No 3) case as a potential example of how human rights courts can be affected by political reactions to their judgments.12 In that case the Grand Chamber of the ECtHR held that Italy had not breached the applicant’s rights under Article 3 of Protocol 1 by depriving him of the right to vote, given the way in which Italian legislation had carefully distinguished the circumstances in which the right to vote can be deprived, thus differentiating the case from Hirst. For this participant it was “easy to see the [Scoppola] judgment as a retreat of the Court from the position in Hirst. Of course it is couched in legal arguments but it is easy to interpret the judgment as [as a way of avoiding] this negative reaction. ‘Let us save face here…’.” The consequence of such “sensitivities,” he continued, is that “the Court runs the danger of being less assertive in holding up the rights of the individual whose interests it is meant to protect.”

Some courts, on the other hand, appeared to embrace assertiveness to a point approaching political activism. One judge described an institutional initiative entailing “…getting into countries and getting in touch with entrepreneurs, consumer NGOs, and the judiciary to make them our allies to push governments to have [a certain] kind of legislation. In the end this will reflect and create a better standard of living.”

In what follows, the observations of BIIJ participants regarding some of the political dynamics that operate between the different stakeholders are presented. Ways in which domestic politics impact on the work of international courts and tribunals are discussed first, then the ways in which these international judicial bodies impact on local realities.

### 3. Ways in which local politics impact upon the work of international courts and tribunals

In many ways, this section reflects some of the central concerns that were addressed during BIIJ 2015. International judicial bodies interact with a variety of different stakeholders in a range of scenarios that vary in their political character. Domestic and international legal orders are operated by actors whose interests and circumstances at times incline them towards active collaboration and at other times towards non-cooperation. This political aspect is distinct from, but closely interconnected...
with, technical legal factors such as constitutional constraints on the powers of different branches of government, which can impede or promote the implementation of international law in domestic arenas.

Political forces may operate at many levels – exclusively within a domestic arena, between domestic and international actors, and between international actors themselves. In some scenarios, the power relations between the actors are pronounced, to the extent that it is possible to analyze interactions from a perspective whereby one party acts and the other is expected to respond in a relatively vertical power relationship. Such scenarios include those where states are expected to implement the decisions of international judicial bodies as well as scenarios where states determine operational aspects of international courts and tribunals, such as in the setting of budgets and the appointment of judges.

At other times, the relationship between international and domestic actors is more horizontal, and entails an expectation of cooperation rather than compliance. Such scenarios include, for example, cooperation in tracking suspects in international criminal cases.

These two types of relationships are described in more detail below.

– 3.1 “Vertical” relationships

3.1.1 Scenarios where states are legally subject to the jurisdiction of the court
As a point of departure, several participants considered how political factors operate differently depending on the kind of international judicial body in focus. Thus, one participant saw a meaningful distinction between human rights courts and international criminal courts and tribunals. It was observed that human rights courts deal with situations where states have taken a decision in a certain matter and it falls to the human rights court to “overrule or not to overrule” in a kind of supervisory context, as in the Hirst case noted above. Here the concept of “subsidiarity” — which recognizes the primary responsibility of states to implement and enforce the rights and freedoms guaranteed in the European Convention on Human Rights — creates a situation where the court, in reviewing the actions of the national authority, can be seen, in the words of one participant, to “create problems after a matter has been discussed and carefully balanced in the Supreme Court and legislative assembly.” This same participant considered that national politics would interact differently with the ICC. That Court operates on the basis of “complementarity” whereby either the domestic authorities or the international authorities would adjudicate without the same kind of review function.

A number of judges in attendance identified what they considered to be a distinctly political aspect of the work of some international criminal courts and tribunals, namely the requirement to engage in “extra-legal activity” as part of their judicial function. One example provided was that of Article 53 of the ICC Rome Statute, which grants the Pre-Trial Chamber the power to review a decision of the Prosecutor not to pursue a prosecution where it is determined that such action would not be “in the interests of justice.” The concern was that this provision requires judges to apply reasoning of a political, as opposed to a judicial, nature, which those who commented considered to be undesirable and problematic.

A similar concern was raised about provisions for judges to be involved in reconciliation work, on which one judge commented: “The most difficult issue is when a court is given tasks that are not judicial, the reconciliation task for instance. It is not a judicial task [although] criminal courts are frequently given that task… [The judicial] role is to be just and to deliver correct judgments. Other [tasks] are for states.”

In addition to the differences noted between international human rights and international criminal courts and tribunals, some participants observed
a distinction between international courts and tribunals adjudicating matters concerning individual claimants and those addressing inter-state disputes. Although both types of body could be affected by politics, it was considered that the ways in which they were affected were different. At the same time, it was recognized that even inter-state dispute resolution bodies are called upon to consider questions of individual human rights from time to time. For example, ITLOS has had to deal on a regular basis with human rights considerations relating to the detention of vessel crew members.

Differences aside, as the discussions in this session revealed, many of the political pressures faced by international courts and tribunals are shared across the full gamut of mandates and jurisdictions. Participants observed several ways in which the domestic political realities of parties to a case impact on the work of their institutions. One clear way is when states refuse to cooperate with the work of international courts and tribunals. Within the ICC context, the example of how the Kenyan authorities responded to charges brought against the then future Kenyan President Uhuru Kenyatta in relation to post-election violence in 2007-2008 was considered illustrative. Indeed, one participant noted that President Kenyatta seemed to be elected on an “anti-ICC platform.” Reflecting on scenarios such as this where domestic politics works actively against the work of international judicial bodies, one participant remarked that some countries ratify conventions “in order to get the human rights community off their backs… without the intention of being bound or to participate.”

Domestic political factors were also seen as impacting the work of inter-state dispute resolution bodies, such as the ICJ, ITLOS and others. Making reference to the arbitration proceedings concerning maritime jurisdiction initiated by the Philippines against China under Annex VII of the UN Convention on the Law of the Sea (UNCLOS), one participant noted that political factors in China contributed to that party’s decision to refuse to recognize the jurisdiction of the Arbitral Tribunal to hear the case. Under Article 288 of UNCLOS, disputes over jurisdiction are to be determined by the relevant court or tribunal. However, in this case the Chinese authorities chose instead to circulate an official paper setting out their position that the Tribunal had no jurisdiction to hear the case. The impact on international law was considered significant by this participant as the action represented a denial of what is considered to be a major achievement of UNCLOS, namely the consent by signatories to submit to compulsory dispute resolution procedures.

A third aspect of the impact of local politics on the work of international courts and tribunals concerns the question of compliance with international judicial decisions. What emerged from the discussion was that international courts and tribunals are highly invested in seeing their judgments implemented at the domestic level, while recognizing that a range of political and constitutional forces can make implementation a challenge for local actors. Domestic actors may be very willing to comply with judgments of international judicial bodies, although notions of national sovereignty and situation-specific political evaluations can sometimes discourage cooperation at the local level. One participant noted that there may even be a longer-term initiative within some states to disregard the decisions of international courts with the intention of changing domestic law in that same direction in the long run.

There are also instances where domestic political factors incline actors towards active non-cooperation with international judicial bodies. A participant brought up once again the Hirst case in which the ECtHR found that the United Kingdom law excluding all prisoners from voting in parliamentary or local elections breached Article 3 of Protocol 1 of the European Convention on Human Rights. He observed that the government of the United Kingdom had taken a decidedly political approach to the judgment and had refused to amend its legislation over the course of many years. Here then, is a clear case of politically motivated, undisguised non-compliance with international law, as distinct from earlier identified instances of non-
implementation owing to impediments within the domestic legal and political orders. A participant observed, “where politics come into play, a certain incompleteness of these legal systems becomes very apparent.”

Similar observations were made in the session devoted to the local impact of international justice on the management of migration in Malta, in light of recurrent ECtHR judgments finding the country’s practices to be in breach of its obligations under the European Convention. It was noted that a preponderance of negative public attitudes towards migration in Malta might help to explain the slow pace of change in the Maltese approach to immigration control.

One judge recognized the challenge that non-compliance with the judgments of international judicial bodies presents to the public legitimacy of these bodies. Discussing a case where a member state had delayed paying damages awarded by the Caribbean Court of Justice (CCJ), the judge observed that the failure to pay “attracted a lot of debate and criticism of the process and threatened to undermine the Court in the eyes of the regional population.” He considered that a provision within the constitution of the member state giving judgments of the regional court the same status and force as judgments of the supreme court of the country would have enabled the claimant to take domestic legal action to enforce the judgment of the regional court.

Another interesting mechanism for enforcing judgments of international judicial bodies was identified in the context of the order made by the SADC Tribunal against Zimbabwe, introduced above. One participant noted that Zimbabwe had refused to comply with the judgment awarding costs, but the claimants had successfully secured their award for the payment of legal costs through the South African Courts, which ordered the sale of assets owned by Zimbabwe. This participant noted that there had been a diplomatic upset in this connection, with Zimbabwe claiming sovereign immunity, and South Africa asserting that sovereign immunity in this connection was waived when Zimbabwe joined the SADC Tribunal.

In contrast, one judge noted the practice of his own state in relation to judgments of international courts and tribunals: “We comply with the decisions… In cases of human rights it is very clear. The IACtHR says ‘A’ and we apply it directly… It is of direct application. …There is an award and the injured party will then go to Ministry of Economics through the Ministry of Foreign Affairs, and they have to pay. Usually we do our best to comply with whatever the Court says, so… the kind of problems we have discussed here are alien to us.”

This observation triggered a more general comment by one participant, who returned to a point made earlier in the discussion about compliance with the judgments of international judicial bodies and how it might be seen as a surrender of national sovereignty. Why not see such compliance as a positive exercise of national sovereignty instead? The participant wondered what kinds of factors might encourage states to see their relationship with international judicial bodies in this light. Some possible benefits were identified, including the economic benefits of being seen as a country that complies with its international obligations and respects the rule of law, as well as the ability to “outsource” matters that cannot readily be resolved domestically.

What should a state party do when it considers that the decision reached by an international judicial body contradicts fundamental principles of international law? One participant gave the example of the Yukos case that came before the arbitral tribunal under the Energy Charter Treaty of 1994. In three arbitrations, an identically constituted tribunal held unanimously that the Russian Federation “had taken measures with the effect equivalent to an expropriation of Claimants’ investments in Yukos and thus had breached Article 13(1) of the Energy Charter Treaty.” The Russian Federation was ordered to pay a total of more than US$ 50 billion to former shareholders of the Yukos oil company.
However, Russia has asserted that the tribunal did not have jurisdiction to consider the merits of the claim because Russia had not ratified the Energy Charter Treaty, from which the jurisdiction of the tribunal purportedly derived. The participant noted his expectation that Russia would choose not to comply with the judgments in these cases, from which no onward appeal on the merits is available.

Finally, a perhaps unique position enjoyed by international judicial bodies is the power they have to question the basis of their own existence. Arising first in the Tadić case before the ICTY, the challenge that the UN lacked jurisdiction to establish an international criminal tribunal has also been raised before the Special Tribunal for Lebanon (STL) in the Ayyash case. Discussing the latter, one participant noted the occasional need for international courts and tribunals to consider the lawfulness of the actions of their parent body, here the UN Security Council. In both the ICTY and STL cases, there had been a challenge to the establishment of the international judicial bodies following a claim that the Security Council had been acting ultra vires in establishing them, given a defense contention that in neither case was there a threat to international peace and security. The fact that the tribunals have the power to review the actions of the Security Council and to take decisions accordingly indicates that the power dynamics between parent bodies and international criminal institutions are not always unilateral, notwithstanding the examples of the subordination of international justice to political calculus, as will be reported below.

3.1.2 Scenarios where courts are subject to the political power of states

Political factors are at least as apparent in scenarios where states operate from a distinct position of power in relation to international courts and tribunals. States exercise this power through means such as direct intervention, judicial appointments, and the setting of budgets.

The example provided earlier, of the decision to suspend the SADC Tribunal, shows direct political intervention into the work of an international judicial body. Participant discussion suggested that there appears to be a particular scope for this kind of scenario in the work of international criminal courts and tribunals. For example, speaking of an international hybrid court, one participant noted that the filing of an application had been rejected, apparently because a senior political figure had expressed opposition to two cases proceeding.

Similarly, speaking of the work of the ICC, one participant noted how the Security Council may introduce political considerations into the operation of the Court. For example, the Council referred the Darfur situation to the Court on 31 March 2005 after the passage of Resolution 1593, but then failed to support the Court in its endeavors to have Sudanese president Omar al-Bashir surrendered to its authority. It was as if, said a participant, the Security Council had first “switched on” the Court but later decided to “switch it off.”

The observation made in the Ginsburg article cited above, regarding how domestic political considerations influence the process of appointment of judges to international courts and tribunals, resonated with some participants. Speaking about the ACtHPR, one participant observed that the foreign ministers of member countries elect the Court’s judges, and their continued service on the bench depends upon re-election. There is a potential for political considerations to influence both the initial election and re-election of judges.

Speaking about the Extraordinary Chambers in the Courts of Cambodia (ECCC), one judge discussed the Supreme Council of the Magistracy, which is a politically controlled body with the ability to take disciplinary proceedings against judges, and which is also responsible for promotion and demotion of judges on a professional career path. At one point in the history of the ECCC, it was discovered that all of the Cambodian members of the bench were members of the ruling political party.
The setting of budgets was also brought up as a significant issue facing participants’ respective courts, with several participants noting how financial control of their court can be used to achieve political ends. One participant noted the sometimes uncomfortable position of judges “wining and dining” with politicians to this end. Another participant from a regional court recounted an “acid” discussion with the Ministry of Foreign Affairs of one member state regarding the state’s unwillingness to provide the money required by the court.

A final aspect of the vertical relationship between international judicial bodies and parent bodies concerns the reliance by the former on the latter for support in the enforcement of their mandates. One participant recounted that when the newly founded ICTY sought assistance from UN peacekeepers in the execution of arrest warrants, the domestic political considerations of Security Council members effectively prevented that kind of cooperation from taking place. He noted: “… everyone… took it as a given that the UN forces in the former Yugoslavia would quickly jump to execute arrest warrants. They were in control. They had the firepower and soldiers. It was assumed that as a sister UN Chapter VII organization we were on the same team, and it came as a huge shock that UN troops said they would not make arrests.” Similarly, participants recounted that even when an initiative for ICC criminal prosecutions has come from the Security Council, that body has not been supportive when states decline to cooperate. This was very clear in the case of Sudan, whose government has refused to turn over President Omar al-Bashir following the ICC charges brought against him, with the Security Council doing nothing to enforce that state’s cooperation.

3.2 “Horizontal” relationships
At times, the relationship between international judicial bodies and individual states can have a predominantly horizontal character, for example in the case of international criminal courts and tribunals and states associated with criminal investigations and/or proceedings. Relationships may involve cooperation in providing evidence, tracking and extraditing fugitives, and, in the case of hybrid courts, much closer interaction between the international body and domestic political and legal structures. In some cases, the relationship can be characterized as collaborative, if not always without incident. At other times, the relationship can be entirely uncooperative.

3.2.1 Cooperative relationships
The example provided earlier of how Germany amended its legislation in order to facilitate the transfer of suspects to the ICTY may be considered an example of good practice both in terms of the relationship between executive and legislative branches of government within a state and that between the German state and the ICTY.

Notwithstanding good intentions, BIIJ participants identified scenarios where certain domestic political actors wanted to facilitate the work of international courts and tribunals but were prevented from doing so by local conditions. Providing an example from the STL, one judge noted the desire of the Lebanese authorities to see criminal trials take place with the five accused in custody, but they had been unable to implement arrest warrants. As a consequence, the Tribunal had to commence proceedings with the accused in absentia. Similar difficulties had been observed by judges serving on the ICTR bench. One judge with experience of that Tribunal observed that political obstacles had sometimes hindered assistance with tracking fugitives, making arrests, conducting investigations, and securing witnesses.

3.2.2 Non-cooperative relationships
At times, these operational impediments may extend beyond conflicts between domestic political actors and entail non-cooperation at the state level. Such a stance is exemplified by the Rwandan authorities’ success in avoiding the prosecution of any of the members of the Rwandan Patriotic Front (RPF) before the ICTR, despite a UN Commission of Experts conclusion in 1994 that war crimes had been committed by RPF members. Another example of non-cooperation is the volte face of the Museveni government in Uganda regarding the prosecution
of Lord’s Resistance Army (LRA) leaders, following the initial – and what some participants considered politically-motivated – invitation to the ICC Prosecutor to investigate crimes against humanity in the country. The recent transfer of LRA leader Dominic Ongwen to the ICC, however, shows a swing of the pendulum back toward cooperation. A perhaps more striking instance of non-cooperation was the recent obstruction of the Kenyan authorities in response to ICC charges against political leaders for crimes against humanity stemming from 2007-08 post-election violence.

4. Strategies for managing political aspects of the relationships

In light of the discussions that took place and considering the observations from the academic commentators whose works were consulted for the session, it was not disputed by participants that local political realities interact with the work of international judicial bodies in multiple ways. However, experience and opinions differed considerably when discussion turned to the question that was in part raised by the Teitel article regarding whether and how international judges should engage with political factors in their work. Discussion focused to a large extent around the question whether international courts and tribunals should consider the impact of their work on local political realities, but also on strategies for responding to the political pressures that have been described above.

For some BIIJ participants, this question was seen as having “existential” significance for the international judge, as it enquires into the limits of the international judicial function. In what follows, strategies and considerations relating to the management of political interference in the operation of the court, approaches to drafting judgments, the importance of communication, and problems concerning the implementation of judgments are reported.

4.1 Managing political interference in the operation of the court

At one extreme of the spectrum, the need for judges to actively confront political interventions in the work of international courts and tribunals was identified. One judge with experience of hybrid courts recounted an experience where confrontation was chosen as the necessary strategy: “We needed to bring [a particularly egregious intervention] to the attention of the international community. The matter could have gone further than it did, but that could have destroyed the court itself. It was not for us to destroy the court… but to draw attention to the matter and for others to consider what should happen. This resulted in a great deal of unpleasantness for period of about a year.”

4.2 Approaches to drafting judgments

For some judges, adopting a “business as usual” approach was considered the most appropriate way of responding to some forms of political pressure. One participant advocated such an approach in the context of politically sensitive cases, noting that, rather than having a particular strategy or trying to send a signal through a judgment, judges should “try to stick to normality, or business as usual. The more you make a situation special, the more you increase the tension and suspicion that the court is not acting judicially, but acting politically.”

Not all participants considered adopting a more “political” approach to judicial decision-making as necessarily problematic. The approach described by some as “judicial activism” was considered by several participants to be appropriate and desirable in some cases. There were several aspects to this approach.

One feature of “judicial activism” involved how legislation is interpreted, with several judges advocating a purposive or teleological approach. Judicial activism was firmly rejected by some other participants, with one judge saying, “I disagree with those ideas. [International judges] have only one mandate; to decide in accordance with the law… [Judges] should work according to a narrow and legally correct agenda. Only that will be accepted by the entire international community.”
However, as the Teitel article demonstrated, it may not always be possible to identify what one participated called a “narrow, legally correct agenda” in hard cases. Although time did not permit detailed discussion of this question, a helpful reformulation of the question was, “what happens when the law does not provide all the answers for the problems bubbling up?” This question was seen as being “extremely important” by one participant and may invite further reflection at future Institutes.

– 4.3 The importance of communication
Irrespective of their position on judicial activism, many participants agreed that communication is a crucial aspect of the work of the international judiciary, whether that entails communication with national political and judicial actors or with the wider public.

Communication was seen, for example, as an essential element in the operation of the STL, as it strives “to account to the people of Lebanon for what [the Special Tribunal] is doing.” Speaking to the media, while choosing the times when it is and is not appropriate to do so, was considered of paramount importance.

Judicial dialogue was one communicative approach that many participants regarded positively, although there were different meanings that could be attached to the concept. Some courts, such as the ECtHR, have institutionalized the process of dialogue with domestic courts. In this process, judges from domestic courts in member states visit the Strasbourg court for discussions with international judges. The ECtHR judges themselves also travel to Council of Europe countries to meet with national judges, and this is “seen as an important part of the dialogue,” not least because the Convention system expects rights to be protected at the national level in accordance with the principle of subsidiarity. Judges may not express views on cases pending before the Court but can discuss judgments already delivered as long as they are careful to respect the secrecy of deliberations. This dialogic approach was also considered to include judges who teach at universities. This activity helps “to promote awareness of Convention rights,” which one participant saw as being “of great importance for the proper functioning of the Convention system.”

A similar practice was operational within the African system for the protection of human rights, with one participant discussing the 2013 dialogue program hosted by the ACtHPR with chief justices of African countries. This approach was considered both necessary, as there is a lack of awareness of the African Charter on Human and Peoples’ Rights amongst some domestic judges, and fruitful, given the opportunities it presented to discuss the challenges relating to the enforcement of judgments.

Considering the position of the Andean regional system, another participant echoed what had been said about the European and African systems, emphasizing the value of judicial dialogue in terms of awareness raising among the domestic judiciary, and also as a tool for promoting regional integration.

Other judges took a more reserved approach to this form of judicial dialogue, suggesting that this kind of communication can backfire. An example from the ICTR was provided: after a visit by Tribunal officials to the Rwandan government in Kigali, a participant recounted, “a number of motions were raised during trials asserting that the ICTR was biased as it had met with the president of Rwanda.”

Another participant confirmed that he would not accept an invitation to discuss legal issues relating to matters that were the subject of ongoing adjudication or even prospective cases on which a judge may in future sit, for fear of having his perspective affected. Other participants also shared the view that such consultations between domestic and international judges were “not advisable.” Another participant “agree[d] entirely,” recognizing “a fundamental danger of compromise and judicial embarrassment.” Speaking more concretely, this participant noted an ongoing process considering an application for the disqualification of a judge who had addressed a number of domestic judges about international law problems that had arisen in the court.
Similarly, speaking of the process whereby the Rwandan authorities have begun trying cases referred by the ICTR, one judge explained his view that it would be inappropriate to provide training to the Rwandan courts out of concern that he may later find himself sitting on the revocation bench if an application for revocation [of the authority to try ICTR cases] were to be made.  

Instead of judicial dialogue taking the form of a close conversation, one participant favored the approach of making the reasoning behind judgments very clear, to help to avoid fragmentation of international law. In this way, domestic judges, as well as judges in other international courts and tribunals, would better understand how and why a particular decision was reached in a particular case, and how relevant legal principles are understood within that body.

Interestingly, it was made known during the course of the discussions that the BIIJ convener, the International Center for Ethics, Justice and Public Life at Brandeis University, had itself sponsored a number of colloquia bringing together international and domestic judges. It could not be said whether some of the concerns raised by participants during the Institute had been entirely avoided during the colloquia, but participants were invited to consider the documentation about the colloquia on the Center’s website and reflect on the relative benefits and drawbacks of such an initiative.

– 4.4 Addressing problems in the implementation of judgments

In relation to issues of compliance with states’ international obligations, one judge saw benefits in a “naming and shaming” approach. However, it was recognized that judges have very limited power in this context, with another participant noting, “most of what should be done should not be done by the courts, but by states.”

Another participant observed: “I think that in our zeal for ensuring compliance we sometimes go too far. We forget about the nature of judicial bodies which are independent and impartial, and anything that can compromise and put in question that impartiality will ruin the credibility of the judicial body.”

Interestingly, a participant with a background in international criminal law turned the previous proposition on its head by arguing that enforcement of judgments is crucial to ensuring the credibility of the international judicial body. In that connection, he observed that in the statute of his tribunal, the president is responsible for ensuring the enforcement of judgments. Similar observations had been made in the context of the CCJ in relation to the connection between enforcement and legitimacy. Another view was advanced in reply, which asserted that it is the parent body of an international criminal tribunal that should be concerned with enforcement, as opposed to the tribunal itself.

The reference to the responsibility of parent bodies for the enforcement of judgments prompted further observations regarding practice in different contexts. One participant commenting on the role of the Security Council in ensuring compliance with the judgments of international criminal tribunals expressed the view that the Council would not seek to compel a state to act, while another emphasized the fact that states nevertheless had a legal obligation to comply.

It was not only parent bodies such as the UN Security Council that were seen as having responsibility for ensuring compliance with the judgments of international judicial bodies. A different mechanism was identified in the context of ITLOS, where compliance with judgments regarding deep seabed mining is monitored by the International Seabed Authority, an autonomous international organization established under UNCLOS. Another participant identified a similar mechanism within the European system for the protection of human rights where the Committee of Ministers of the Council of Europe monitors the compliance of states with the judgments of the ECtHR. Yet another participant commented on the approach taken by the Assembly of Heads of Government regarding compliance with
the judgments of the ACtHPR. Here, the African Court is required to report to the Assembly on compliance at every sitting of the Assembly, which take place every six months.

It would therefore appear that although enforcement is a crucial consideration for all international judicial bodies, there is no consensus about the methods that courts may use for seeking to achieve it. Variation in approach notwithstanding, most participants acknowledged the importance of having an effective political body to monitor the implementation of their institutions’ judgments.

5. Conclusion

With none of the participants in this session disputing that political factors impact in various ways upon the work of international courts and tribunals, the main point of contention turned on whether and how international judges should respond to these pressures. Although holding divergent views on the desirability of judicial activism, most participants considered the need to communicate with a wide range of stakeholders to be a relatively uncontroversial element of a court’s mandate.

Regrettably, communication alone cannot release international judicial bodies from external pressures, as the next session on the pace of international justice revealed.
Notes


4 Ruti Teitel, Kosovo to Kadi: Legality and Legitimacy in the Contemporary International Order, 28 ETHICS & INT’L AFF. 2014.


6 Id. at ¶ 46.

7 See supra note 4 at 111.

8 See supra note 3.


13 See e.g. Scordino v. Italy (no. 1), App. No. 36813/97, Eur. Ct. H.R. ¶ 64 (2006).


18 See supra note 16.

19 See supra note 11.

20 Including by the Prime Minister David Cameron, who declared that the idea of prisoners having a right to vote made him “physically ill” – see Alex Aldridge, Can ‘physically ill’ David Cameron find a cure for his European law allergy?, THE GUARDIAN (May 6, 2011), available at http://www.theguardian.com/law/2011/may/06/david-cameron-european-law-allergy.


23 Id. at 10 para. 19.


26 Refer to the interim awards on jurisdiction, which have an interesting discussion on the constitutional separation of powers as it relates to the binding nature of signed, but not yet ratified, international treaties starting at para. 350 of each interim award, Hulley Enterprises Limited (Cyprus) v. The Russian Federation, see supra note 60.

27 Prosecutor v Tadić, Case No. IT-94-1-T, Judgment (Int’l Crim. Trib. For the Former Yugoslavia May 7, 1997).

28 Prosecutor v. Ayyash et al, Case No. STL-11-01/1T/AC/AR126.9, Decision on Appeal by Counsel for Mr. Oneissi Against the Trial Chamber’s Decision on the Legality of the Transfer of Call Data Records, (Special Trib. for Leb. July 28, 2015).


34 See supra note 4.

35 Id.


