1. Introduction

The pace at which international justice proceeds is a topic that has arisen at each of the Brandeis Institutes since its inaugural session in 2002. In 2015, the organizers decided to devote a special session to the issue and address it head on. Tying in with previous discussions around the role of politics in international justice, this session addressed the reality of political pressure that is exerted on courts and tribunals to resolve cases more quickly, as well as some of the ways in which political factors impact the pace of international justice itself. Participants were also invited to look beyond the political dimension and reflect upon the full range of factors relevant to two important questions, namely, how to define, and then how to achieve, the right pace of justice for a given international judicial body.

It was acknowledged at the start of the session that multiple stakeholders have an interest in the pace of international justice. First, “parent bodies” of certain international courts and tribunals want to ensure that the institutions they established to address war crimes and mass violations of human rights complete their work in a timely fashion. Frequent calls for completion of proceedings – to bring about both political resolution and budgetary relief – have been keenly felt particularly by international criminal tribunals with temporary jurisdictions. Furthermore, victims of international crimes and human rights violations may feel an individual need for the “closure” that judgment and sentencing of the convicted might bring. Pressure to dispense justice within a reasonable time frame exists in other kinds of international fora as well, as the strict timetable for completion of cases established by the WTO Appellate body attests. At least one participant expressed during the session the familiar notion that “justice delayed is justice denied.”

The issue of pace carries high stakes for many international courts and tribunals; indeed, external evaluations of their performance on this score may have implications for their very legitimacy. It has been noted, for example, that delays in the resolution of cases at the ECtHR sometimes exceed the maximum time limit set by that same body for judicial proceedings in the domestic courts of its member states. Such inconsistencies do not pass unnoticed by the Court’s constituents.

To launch the discussion, participants considered three articles relevant to the topic of pace, each with its own insights into the issue. An article by A. Alvarez-Jimenez celebrates the approach taken by the WTO Appellate body (AB), which consistently delivers judgments in cases within its 90-day target. Alvarez-Jimenez attributes the AB’s achievement to its adoption of streamlined procedures, which include limitations on both the time afforded for consideration of the case and the submission of evidence by the parties, the smaller size of the judicial panels (decisions are taken by divisions of three Members), and the flexible approach AB members take in determining the outcome of a case (distinguishable in particular from the ICJ which allows dissenting opinions, whereas the AB does not). An issue for discussion by participants was whether the approach taken by the AB would be feasible or desirable in different international judicial contexts,
for example international criminal or international human rights bodies.

Alex Whiting takes a somewhat contrasting approach in his article, which is focused on international criminal adjudication, arguing that delay can sometimes be a necessary ingredient in these cases. Noting the significant societal disruption that generally accompanies mass atrocities, Whiting argues that allowing for the passage of time can enable evidence to emerge with increased distance from the conflict.

Finally, an article by Laurence Helfer touches upon the relationship between the ECtHR and member states of the Council of Europe. He argues that the ECtHR has (and should) become more “embedded” in domestic legal orders through, for example, the Court’s critical engagement with judgments of domestic courts and tribunals, its ability to act in a fact-finding capacity in some cases, and its award of specific non-monetary orders that require action by domestic authorities. When these authorities take responsibility for compliance with international legal obligations, the result, in theory, is that fewer cases will come before international judicial bodies.

In what follows, the views of participants on defining the right pace for international justice are presented, followed by suggested strategies for speeding up the pace. As regards this last point, it was noted that temporal gains might have an impact on other aspects of the administration of international justice, not least in relation to fundamental principles such as the right to a fair trial. Finding the right balance between the competing pressures of time and quality of proceedings remains a substantial challenge for many international judicial bodies.

2. How to define the right pace

In determining the right pace for a particular international judicial body, it is important to note the factors that can contribute to delay. Certain factors are common to most international judicial bodies, while other factors are unique to a particular branch of international law, such as international criminal law.

A 1998 ICJ press release included as background reading for the session identifies a number of factors that are common to many international courts and tribunals. First, the sheer increase in the volume of cases before a court affects the pace of international justice. Workload is an issue that has particularly affected the ECtHR, which has received a greatly increasing number of applications on an annual basis. Participants from other courts and tribunals also identified workload pressures as a significant cause of delay in proceedings. Workload will always be relative to the capacity of the available staff working within the court or tribunal to perform their particular functions. Regrettably, several judges observed shortages in this area, with particular impediments seen as resulting from a shortage of translating and interpreting staff.

More generally, the issue of language was seen as a source of considerable delay for some courts and tribunals, particularly where translation of judgments and other documents into second languages was required. In one international criminal tribunal, it was observed that first instance judgments may be as long as 1,500 pages, which can take up to two years to translate. Considering that any appellate process cannot proceed before the judgment has been translated into the other working language of the court, the implications for the pace of international justice are clear. Similarly, a participant with experience of international hybrid courts noted the costs for translation of documents amounted to approximately 25% of the court’s budget.

Staffing levels owe much, of course, to the budget of an international judicial body. Funding was thus seen by many participants to impact directly on the ability of their courts and tribunals to efficiently carry out their work.

Another element related to staffing, which will vary among institutions, is what some participants
considered to be a negative incentive to follow efficient working practices. Where staff find themselves employed with comfortable salaries and secure jobs, there may be an individual interest in seeing a slower pace of justice than could otherwise be attained. In some cases, participants observed this perspective at the level of judicial as well as support staff, raising serious ethical issues. Although perhaps not alone in this experience, hybrid courts were identified as being particularly vulnerable to this phenomenon. However, a judge from a regional court also recognized that members of the bench sometimes seemed to enjoy the perks of their position without actively seeking to fulfill the mandate of the court.

Finally, procedural matters, perhaps the area most within the power of international judges to address, were identified as causing delays in some cases. However, the need to strike the right balance between efficiency strategies and procedural safeguards was seen as critical. Some of the ways in which procedural matters affect the pace of international justice included the right of the accused in criminal cases to self-representation, and the need to reach a consensus in the writing of judgments. The latter point hearkened back to the Alvarez article where the single judgment procedure was deemed the most expeditious. However, some BIIJ participants did not agree that the publication of dissenting opinions significantly slows down the pace of proceedings.

If the factors above were seen as relevant to most international judicial bodies, other factors raised were particular to different types of proceedings. It was recognized that the nature of international criminal proceedings differs substantially from both inter-state dispute resolution and the processing of international human rights claims. There are several reasons for this. First, the scale of mass atrocities in countries like the former Yugoslavia, Rwanda, Cambodia and Lebanon places particular demands on the judicial bodies charged with determining individual guilt or innocence. These situations have also created many victims and witnesses, whose participation in proceedings inevitably takes time.

Second, as Whiting observes in his article, mass atrocities cause severe individual and societal disruption, which creates significant impediments to the gathering of evidence. As one criminal judge observed, “We have to make sure that the proper evidentiary foundation is there to ensure we can adjudicate. It might be different where the parties control the case and have interests in the speed of proceedings.”

Third, the role of states is critical in the work of international criminal courts and tribunals. Participants noted that state cooperation was essential for investigations as well as for tracking and arresting persons accused of participation in international crimes, and that such cooperation was not always forthcoming.

Here then, the question of how to define the right pace for particular international judicial bodies begins to move towards some tentative answers. For international criminal justice, the speed of proceedings is important, but cannot outweigh the need for procedural safeguards or ignore the scale of disruption caused to individuals and societies by mass atrocities. For human rights and inter-state dispute resolution proceedings, the need for a timely outcome may weigh more heavily.

3. How to achieve the right pace

It was clear from discussions that the subject of pace was of concern to many of the BIIJ participants. Focusing primarily on the steps that courts and tribunals can take independently from other actors, the group identified a range of procedural mechanisms that can help to speed up the pace of proceedings. However, as several judges noted, what gains are made with regard to pace may entail consequences in other areas, not least the administration of justice itself.

The approach taken in recent years by the ECtHR provides an example of the delicate balance that exists between efficiency and the administration
of justice. For years the Court has struggled under an enormous backlog, which had reached more than 140,000 cases by 2010.\footnote{7} With the entry into force in June 2010 of Protocol 14, the Court began implementing a single-judge procedure for determining the admissibility of individual claims – until that time, three-judge panels had carried out this work. The need for such a streamlined procedure was highlighted by the fact that 90% of claims are ultimately determined to be inadmissible.\footnote{8}

While recognizing that reduction from a backlog of 140,000 to 70,000 cases demonstrates undeniably the effectiveness of the single-judge procedure, participants raised serious concerns about the implications of the new approach in terms of potentially diminished procedural safeguards. Whereas previously an applicant whose claim was determined to be inadmissible would receive written reasons supporting the finding, applicants are now issued with a standard letter with no reasoning. Some participants saw this as a serious threat to the legitimacy of the court. Balanced against these concerns, however, was the view that “most of the cases are unquestionably inadmissible.” The upshot is that although challenges to the legitimacy of the court owing to delays in processing claims are diminished, in their place have come new challenges based on the loss of depth, breadth of judicial oversight, and communication of reasons supporting the decision.

Another way of accelerating the pace of proceedings was discussed in relation to international criminal cases. At the ICTY, judges have the power to limit the number of witnesses that may be called in a case, and to set time limits. Although these powers have the potential to impact on the quality of justice administered, it was observed that discretion rests with the judge to determine what is required in the individual case. Participants with knowledge of the system did not consider there to have been adverse impacts resulting from the use of these powers. As one participant observed, judges “are the masters and they must be the ones to ensure that the pace is acceptable.”

Reducing duplication across proceedings was considered to offer potential efficiency savings in some contexts. For example, judges may take judicial notice of findings that have been made in other cases as well as facts considered to be “common knowledge.” Such observations were made in the context of both international criminal and international human rights courts and tribunals.

Addressing the performance of individual judges was considered to be somewhat more problematic, with one participant noting that there were “complicated and cumbersome political issues that could not be cured instantly.” The issue of judicial selection proceedings was seen as relevant to this issue. It was also suggested that having a case management strategy, where cases are tracked so that judges know their performance is being monitored, might prove beneficial. A further step might involve the presiding judge having a “friendly discussion” with a slow-moving judge and offering support staff to spur an increase in pace.

As regards factors beyond the control of the court itself, some participants pointed to the potential role of the UN Security Council in being firmer with states that fail to comply with their international obligations. Others viewed such an idea as merely “wishful thinking.”

On a final note, it is worth recalling that not all courts are weighed down by heavy workloads. The CCJ, a relatively new international judicial body, actively seeks cases. Consequently, the Court interprets the admissibility criteria expansively, in stark contrast to the ECtHR, which introduced a threshold test, through Protocol 14, requiring that a claimant demonstrate the purported human rights breach has caused “significant disadvantage” as an additional way of reducing the number of cases crossing the bench.\footnote{9}
Notes


4 See supra note 1.


6 See supra note 2.


9 Id. at para. 12.