The Authority of International Courts and Tribunals

1. Definitions and Dilemmas
The opening session of BIIJ 2016, led by iCourts Director Mikael Rask Madsen, was designed to flesh out the concept of “authority” in relation to international courts and tribunals. This concept had been articulated in a recent article by Madsen, Karen J. Alter, and Laurence R. Helfer entitled “How Context Shapes the Authority of International Courts.” The article provides the framework and general theory for a larger project of comparatively assessing the authority of a large sample of currently active international courts (ICs) in the world.

The main objective of the article is to explain wide variation in the activity and influence of the nearly two dozen ICs currently in existence. What factors lead some ICs to become active and prominent judicial bodies that cast a rule-of-law shadow beyond the courtroom, while others remain moribund or legally and politically sidelined? The article provides both a novel conceptualization of authority tailored to ICs and an in-depth discussion of the many contextual factors that impact ICs’ authority.

The authors also describe three levels of IC authority: i) “narrow authority,” which exists when only the parties to a particular dispute take meaningful steps toward compliance with a court’s ruling; ii) “intermediate authority,” which is achieved when the ruling is respected also by potential future litigants as well as “compliance partners”—executive branch officials, administrative agency officials, and judges; and iii) “extensive authority,” which exists when an international court’s audience expands beyond its compliance partners to encompass a broader range of actors, including civil society groups, bar associations, industries, and legal academics. ICs with extensive authority consistently shape law and politics for one or more legal issues within their jurisdictions.

Interestingly, these levels of authority do not necessarily increase incrementally from narrow to extensive. In fact, an IC may well achieve extensive authority—that is recognition and influence in wider legal circles and with the general public—without having achieved compliance by parties directly affected by its decisions or by government actors.

Furthermore, the article makes a slightly controversial distinction between “legitimacy” and “authority.” The argument for sidelining questions of legitimacy is that it appears from empirical studies that ICs can do everything that normative theorists might expect of a legitimate international judicial body and still not have authority in fact. In other words, why audiences recognize ICs and take consequential steps with regard to their decisions is not assessed as a key factor for explaining ICs’ authority.
Madsen asked BIIJ participants to think about how this model of authority fits their own institutions and the contexts in which they operate. What are the external factors shaping the authority of their institutions at the political, legal and societal levels? What means are available to international judges inside and outside the courtroom to influence audiences and contexts? How can ICs build trust in key audiences, including domestic courts? What kinds of implementation and compliance challenges do judges’ institutions face?

Judges had a number of reactions and queries regarding this model of authority. One institution not mentioned in the Madsen et al article was the International Tribunal for the Law of the Sea (ITLOS). A participant explained that its authority might look weak given that it had just celebrated its 20th anniversary but only adjudicated 20 cases to date. But the reality is that States have alternatives to bringing a case concerning law of the sea matters before ITLOS, namely using the International Court of Justice (ICJ) or a special arbitration panel instead. It was suggested that the authority model should take into account whether an institution has mandatory jurisdiction or not. It was also pointed out that the limited cases decided by ITLOS have seen an excellent compliance rate, and its jurisprudence has clarified much about the prompt release of vessels and the setting of bond. The participant concluded, “The Tribunal is quite authoritative, so much so that states don’t need to bring [these kinds of] cases.”

The Madsen et al article did assess the authority of the World Trade Organization (WTO) Appellate Body, indicating that it has authority at all levels. A participant noted that when the Appellate Body rules, it always keeps its constituencies in mind as the rulings are binding on them. It is also important to think about the interests of business, the interface between trade and the environment, as well as views on the benefits of globalization and interdependence. There are many “questioning voices” about these issues and sometimes a breakdown in consensus. He conceded that “like it or not, outside opinions inform Appellate Body decisions.”

A human rights judge suggested that, in order to really understand the authority and impact of an IC, one must look at the relation of its rulings to state parties. If a judgment results in a definition of the continental shelf, for example, “no one is a loser in the long run.” And if the International Criminal Court (ICC) rules against Kenyan defendants, it is bad for the Kenyan government “but it doesn’t change the game for the community.” On the other hand, if a court like the European Court of Human Rights (ECtHR) takes a position on police powers, “it changes the game for all states and they may all feel like they are losers.”

Another human rights judge questioned the distinction between de jure and de facto authority. “For me, legal authority, de jure authority, is linked to the authority of the judgment itself, a judgment of good quality. And de facto authority is its overall impact on society.” He furthermore suggested that it is important to see how a court contributes to “fertilizing the soil” in its jurisdiction so that it can strengthen the rule of law.

Judges from international criminal tribunals had the most questions about how the authority of their institutions might be assessed. Several asked about the role of their formal sources of authority—the United Nations Charter’s Chapter VIIa for the International Criminal Tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR), and to some extent the Special Tribunal for Lebanon (STL); and the Rome Treaty for the ICC, with special situation referral by the Security Council also based on Chapter VII. One judge noted, in relation to Serbia and the ICTY, that “just because something comes from Chapter VII doesn’t mean there is compliance.” Another remarked of the STL that its authority appears “to turn on things beyond the Charter itself.” Basing the ICC on a multi-party treaty instead of a Security Council resolution, pointed out a participant, “was considered at the time a better democratic foundation for a court.” But this has also led to problems of de jure authority. “An institution which is global should be globally supported,” the judge continued, alluding to the fact that a number
of states, including some very powerful ones, have not ratified the Rome Treaty. “If an institution is perceived as weak, it cannot address the matters that people think are important.”

The discussion then turned to the relationship between a criminal tribunal’s mandate, its actual accomplishments, and its perceived authority. ICTY objectives included not only prosecutions and trials, but also reconciliation and establishment of a narrative about the Balkans conflict. The population of that region may evaluate the ICTY’s authority not just on its jurisprudence but also its success in the latter, non-legal areas. How authoritative can the ICTY be, asked a judge, when “each of the regions still has its own narrative where they see themselves as victims and don’t accept others as victims?”

Another judge brought up the ICTR, noting that its “factual authority” is weaker than that of the ICTY, given that it closed its doors with some indictees still at large. On the other hand, he continued, “the gold standard of the ICTR is Rwanda, a haven of stability, whereas wars continued in Bosnia and broke out in Kosovo after the creation of the ICTY.” Nonetheless, the authority model discussed in the session would assign more complete authority to the ICTY. A judge from another criminal court raised a fundamental issue: “When we discuss performance indicators [of ICs], it is important to ask about how to measure impact. And impact on what? And on whom?”

Madsen replied that the framework on IC authority is not about performance in a narrow sense, that is, about whether courts are accomplishing what is outlined in their mandates. He also explained that their concept of authority does not depend on a formal source but rather, in a Weberian approach, on the impacts a court has on various levels of society. Indeed, the model is a sociological construct that goes beyond performance-based assessment. Madsen conceded, however, that the model seems to have better explanatory power for courts dealing with regional and economic matters and human rights than for international criminal tribunals.

BIIJ participants clearly appreciated their discussion of this new model of authority in the international judicial sphere, as well as the new perspectives it offered on their own and colleagues’ institutions. Following this discussion of a more abstract theory of the authority of international courts, the next session gave the participants the opportunity to explore how challenges to authority play out in the daily operation of ICs.

2. Challenges and Strategies

The second session of BIIJ 2016 aimed to further the discussions around IC authority initiated in the first. Session leaders Vagn Joensen, President of the ICTR during its final three years of operation, and Richard Goldstone, former ICTY Prosecutor and BIIJ Co-Director, delved into the authority challenges faced by international criminal courts and tribunals in particular, in order to set the stage for the sharing of experiences across other types of jurisdictions. The ultimate objective of this session was for the assembled judges to think about possible strategies for both overcoming challenges to authority and for enhancing authority.

Joensen, who has continued to serve as judge of the Residual Mechanism for International Criminal Tribunals (MICT) since the ICTR closed, presented some of the issues faced by international criminal institutions in relation to: (i) their de jure authority, in particular the challenge of persuading states to become state parties to the permanent criminal court(s) and the challenge of persuading state parties to these courts—as well as partner states to the hybrid courts—not to reverse their membership; (ii) their de facto authority, in particular when states do not comply with their obligations to cooperate on investigations and the arrest and transfer of suspects and/or by interfering with witnesses (whether the non-compliance/interference aims at preventing influential suspects from being prosecuted or at retaining suspects for—possibly more robust—domestic prosecution); and (iii) the authority of international courts at the domestic level, in
particular the impact of international courts on the jurisprudence as well as the ability and willingness of domestic jurisdictions to prosecute international crimes in accordance with international standards.

To illustrate some of these issues, Joensen described various difficulties encountered by the ICTR over its lifetime. These included: the Rwandan government’s changing stance on cooperation with the Tribunal; problems with the arrest and transfer of indictees from other African countries; dealing with unforeseen legal problems, such as compensating for the extended pre-trial detention of an ICTR accused in a foreign country; and the inability of the Tribunal to investigate cases against Tutsis for political reasons. All of these issues necessitated a certain flexibility on the part of the ICTR—a “principled” flexibility, Joensen stressed—if it was to carry out its important mandate.

Goldstone then elaborated on a particular challenge to the authority of the ICC that came from his home country of South Africa. In 2015, the authorities failed to arrest Sudanese President Omar Al Bashir when he attended an African Union summit in Johannesburg. The ICC had issued two separate arrest warrants in 2009 and 2010 for President Al Bashir, following a Security Council referral under Chapter VII, and as a State Party to the Rome Statute, South Africa had an obligation to cooperate with the Court. The South African government decided instead to honor Al Bashir’s head of state immunity, established under customary international law. The Rome Statute explicitly rejects, however, such immunity. Subsequently, the South African Litigation Centre brought a suit against the government on this matter to the High Court in Pretoria, which rejected the position of the government. Upon appeal to the Supreme Court of Appeal the government was again judged to be in violation—not of its Rome Treaty obligations but rather the South African legislation passed to implement the Rome Treaty domestically in 2002. Goldstone wondered if this incident might suggest that international judges “should have in mind domestic law that is relevant to their courts when framing requests to governments.”

After these introductory remarks by the session leaders, participants broke into smaller groups according to their institution’s subject matter jurisdiction—human rights, interstate dispute resolution, or criminal—in order to discuss how the experiences of the ICTR and ICC may or may not be instructive to their own everyday realities. If not, then what are their overriding concerns in relation to institutional authority? They were asked to ponder the following questions: 1) To what extent should international or regional courts bargain with states in order to obtain their cooperation? 2) To what extent should principles be bent in order to obtain that cooperation? 3) How should the judges of those courts react to criticisms of bias and playing politics?

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Judges of interstate dispute resolution courts focused their conversation on what their institutions can do to enhance their authority. They agreed that there are limits on what courts can actually do beyond draft judgments and advisory opinions that “matter” and speak to the public. One participant was concerned that his institution issued press releases so technical in their language that they are hard for the media, much less the average layperson, to interpret. He suggested that the communications department try to “simplify its language so that stakeholders can understand decisions of the court.” Other judges suggested that outreach by their courts, including workshops and other specialized events, can do much to raise their profiles in a positive manner. Finally, it was stressed that ensuring “collegiality and confidentiality” on the bench, especially to protect the opinions of individual judges, contributes to bolstering institutional authority.

Participants who serve on the benches of international criminal courts and tribunals discussed whether ad hoc and hybrid courts have more authority than the permanent ICC. Indeed, they returned to a topic raised in the first session, that of the source of an institution’s authority and whether it plays a role in its level of authority. The judges collectively concluded, “We need political support from states.” This led to two follow-up questions: “How much do our courts need to bargain to maximize this support? And who will do the bargaining?” It was noted that criminal courts and tribunals comprise not only Chambers but also Offices of the Prosecutor and Registries. Each of these organs may have a role in maximizing the support of states for their work.

Session 2 ended with some general remarks arising from participants’ examination of IC authority. One criminal judge felt that the assessment of authority should take into account the particular circumstances of an institution: “If you are working in a post-crisis country, you necessarily have less authority.” A judge from a human rights court noted that his institution’s work is so multi-leveled—with individuals, states and NGOs all bringing in their interests—that it is complex to evaluate. Another added that perceptions of human rights courts depend on which audience—political, societal or legal—is assessing its work. A participant who was a long-time domestic judge before joining an international bench stated an obvious aim for all judges but one that always bears repeating: “It is vital to produce good quality judgments that are accessible to the community, clear and principled.” This may be the most effective and least controversial path to maximizing the authority of any court.
NOTES


2. The other empirical studies are available as open source at: https://lcp.law.duke.edu/.


4. According to the Council of Europe, the parent body of the ECtHR, “The term ‘margin of appreciation’ refers to the space for manoeuvre that the Strasbourg organs are willing to grant national authorities, in fulfilling their obligations under the European Convention on Human Rights.” See: https://www.coe.int/t/dghl/cooperation/lisbonnetwork/Themis/echt/paper2_en.asp.