Autonomy in the International Judicial Sphere

Throughout the Institute, questions arose about the independence with which international courts can reasonably operate. All agree that the appearance of independence is critical in lending legitimacy to a court’s decisions. At the same time, courts are the creation of states and have ties with states as part of their very structure. For example, judges are often appointed by the executive branch of their state’s government. In the case of the ECHR, each of the 45 member states of the Council of Europe elects one judge. Special criminal courts face another kind of suspicion—that they lack impartiality. The public often feels that their goal, to try particular crimes against humanity, biases judges from the start against the indicted. The accused are not seen to benefit from the presumption of innocence, a fundamental element of the judicial process. The challenge faced by international courts is thus to carry out their work with autonomy, that is with as little outside influence as possible, while at the same time remaining aware of how they are viewed from the outside so as to achieve maximum credibility.

It was suggested that in order for international courts to be perceived as truly independent, three points need to be answered: 1) Who is selecting the judges who sit on the courts? 2) What kind of security of tenure do judges have? 3) Are there guarantees against outside pressures on judges? Questions of impartiality can take two different forms: 1) Does a judge have any personal bias regarding a given case, for example a prior connection to parties before the court or a particular stake in a case’s outcome that might affect his or her judgment? 2) Is there any possible appearance of impropriety in a judge sitting on a given case, that is, any reason that a judge would be suspected of bias in relation to parties before the court, such as sharing their nationality?

Judges are understandably concerned by allegations of lack of independence and impartiality in their work. They feel that they are practicing their profession with overall integrity and that most criticisms are groundless, based on the appearance and not the reality of influence and bias. Participants noted, for example, that judges have to guard against a tendency to vote against their home country, simply because they are so conscious of appearing preferential. It was also pointed out that while banning the re-election of international judges might eliminate the suspicion that their independence may be compromised through pandering to states for votes, such an action would also destroy the important continuity and efficiency provided by having experienced judges on the bench. As one participant pointed out, there needs to be “the right balance between real and unfounded claims” of judicial impropriety.

Questions about the existence of hidden bias among judges were also raised. Hidden biases, such as those arising from a judge’s cultural background, race, or gender are the most difficult to detect but may also deeply influence his or her judgments. Evaluations of such bias should not, however, be reductive; a judge is not necessarily more sexist or racist because he or she comes from a particular group. One participant pointed out, for example, that some male judges are more sensitive to issues about women than are female judges.
The general question of the autonomy of international courts and how it can be both guaranteed and articulated has a philosophical component that emerged through long discussion. Judges were asked to ponder their conceptions of the role of international judges. Are they there to decide cases or to develop the law? Do they have a mission to fulfill, that of achieving ideal justice? Or do they view their work in a more positivistic light, as a practical profession that must be carried out in the best and most rational way possible? One participant posed a difficult question but one that cannot be ignored:

In a teleological sense, is it really possible, with so many different legal cultures, to have a common understanding? In a world of vastly different, culturally conditioned ways of perceiving reality, is there enough of a common sense that one can legitimately decide a case to carry the confidence of the public one is serving?

Institute participants shared the notion that they were all engaged in an exercise of enormous importance and worth in the contemporary world. The challenges and pitfalls associated with the profession of international judge are real and shared, and they need to be met with the utmost integrity but also with pragmatism and realism.