The Role of Complementarity and Cooperation in the Global Legal System

During the institute, the ideas of complementarity and cooperation were examined through a variety of lenses. Given the professional positions of the participants, the relationships that currently and might ideally exist among the institutions they represent were of great interest. International courts and commissions do not operate in a vacuum, however. They are affected in one way or another by the work of national courts and the domestic laws that regulate them, as well as by processes that operate outside of judicial spheres to bring about justice and reconciliation in alternative or locally recognized ways. International courts thus need to consider not only the horizontal links that exist within the international legal order, but also those that could be defined as vertical – between international and national or judicial and non-judicial processes.

As a starting point, participants considered the question, “Does an international legal order really exist?” Some have argued that what the world has today is simply an array of international judicial institutions, each operating on its own jurisdictional turf without much regard for the others. Several BIIJ participants agreed with this view, although they pointed out that growing dialogue among judges is helping to create an integrated system, even if it is only in its beginning stages. Others went further in asserting that there already is an international legal system, but it is still under formation and its ultimate shape will not become clear for many years to come. This is the “baobab perspective” referred to in the Foreword.

Whether a real system exists at the moment or not, it was clear to all participants that there is often a lack of coherence in the way that international justice is pursued. For example, there is no recognized pattern of deferral among courts, a situation that has not yet created turmoil but could potentially undermine the legitimacy of international courts in the eyes of the public. The example discussed by the judges at BIIJ 2006 was that of Serbian genocide trials before the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Court of Justice (ICJ). In Bosnia-Herzegovina v. Serbia-Montenegro, what are the potential implications of the ICJ ruling on Serbia and Montenegro’s state responsibility for genocide in a way that is inconsistent with the findings of the ICTY in cases assessing the criminal responsibility of certain state officials? Such a decision might create questions about the finality and legitimacy of the earlier ICTY decisions. Despite such risks, few practitioners of international law seem to think that establishing a formal hierarchy for deferral among courts is advisable or even possible. As several participants noted, judges have a natural instinct to listen and defer to one another, without formal statutes telling them to do so. Formalizing this practice may, in fact, stunt its development.

Several judges disagreed with this notion, however, stating that it may not be enough to rely on “judicial instinct” in the case of conflicting jurisprudence. Problems of conflicting legal interpretation also arise when international bodies have overlapping jurisdictions, either in terms of specialization or territory. The International Tribunal for the Law of
the Sea (ITLOS), for instance, has had jurisdictional overlap with both the World Trade Organization (Conservation and Sustainable Exploitation of Swordfish Stocks, Chile v. European Community) and The European Court of Justice (MOX Plant Case, Ireland v. United Kingdom). To solve such dilemmas, judges would be well served by having something more formal than instinct to draw upon. Should there perhaps be a written or unwritten principle, some suggested, that a court defer to the interpretations of a more specialized tribunal, or one with greater territorial jurisdiction?

Participants also examined whether coherence in the international judicial system enhances its efficacy. It was pointed out that coherence does not necessarily guarantee that judicial decisions will be implemented. This is a problem that the African Commission on Human and Peoples’ Rights (ACHPR) faces regularly, and the commissioners in attendance expressed their hope that the new African Court on Human and Peoples’ Rights would receive more respect from African states than has their own institution. Another African participant noted wryly that if national governments do not follow their own courts’ decisions, they are even less likely to respect the decisions of international courts. He added, “Traditions of compliance have to originate in the habit of political leaders who see them as having a place in democratic and open societies.”

This discussion of coherence led to a related topic – the nature of precedent in the international legal system. Some felt that precedent could potentially serve as the chief organizing principle for the entire system. Most participants agreed that precedent should have a role in international judicial thinking, but there was disagreement about what this role should be and how it should be established. Judges from criminal courts might find a different value in precedent pertaining to the general jurisprudence of international law – coming, for example, from an ICJ decision – and precedent derived from a decision of a parallel criminal tribunal.

It would thus be difficult to find a “formula” for how these different precedents should be regarded. It was suggested that the decisions of specialized tribunals, like ITLOS, might be given preference in cases before other courts addressing these same areas of special competence. One judge articulated the ambiguity of the role of precedent, and the discretionary power of judges to evaluate it, in this way: “Precedent should be followed. But judges should decide whether the issue is such that precedent should be binding, authoritative, persuasive, or simply worth noting.”

It was observed that legal theory normally bases the binding value of precedent not on blind legal loyalty or hierarchy but on certainty, coherence, and uniformity. These qualities can be recognized in different contexts but are only binding within a particular system. The extent to which different international courts will be bound to each other’s decisions will thus depend on the extent to which these courts are part of the same order. One might ask, for example, whether the WTO is a self-contained regime or whether it should defer to the environmental requirements found in other legal regimes, such as those established by treaties. This raises some fundamental questions about the extent to which courts, tribunals, and other dispute resolution bodies are part of the same legal order. It also brings us back full circle to the initial question that participants attempted to answer – does an international legal order exist? Perhaps the recurrence of this question signifies that such an order is truly under formation but still remains to be defined.

The apparent fragmentation that international law is undergoing was another issue that participants discussed with great interest. Noted signs of this fragmentation were: 1) the recent creation of several international courts and tribunals; 2) the fact that international law is becoming increasingly specialized or compartmentalized; and 3) the seemingly arbitrary division between “international law” and “human rights law.” In relation to the latter point, one participant asserted that human rights law should not be seen as a subset of international law but rather as its very foundation. At the same time, the
number of international courts in existence today makes it sometimes unclear where one should go to enforce certain human rights, such as the right to self-determination or collective rights. Another participant suggested that the international legal “system” is a fiction since it fails to include non-state actors, despite the fact that many such actors are involved in disputes that come before international courts. This was countered with the assertion that only states have the power and responsibility to protect the rights of citizens and enforce the rule of law, so judicial procedures must necessarily engage states and not lower-level organizations or groups.

Not all participants agreed, however, that fragmentation in international law is a problem. It might instead be seen as an opportunity for increased cooperation. In particular, there is no need to establish a formal hierarchy of authoritiveness among international courts. One judge noted:

I, for one, think that the problem of fragmentation is not very serious. We are still in the early stages of the development of international courts and tribunals, and it does not matter if we do not have perfect coordination. Let’s grow and multiply. We see that there is a new sort of common law cooperation emerging even without formal agreements. Look at the Special Court for Sierra Leone. Look at how much it is drawing on the jurisprudence of the ad-hoc tribunals. This is without written agreements, which would be difficult to conclude. The reality is that we are constantly cross-fertilized intellectually by what is happening in other courts.

Another judge agreed, adding her own viewpoint:

I’m not worried about fragmentation either. Judges are thinkers and researchers. Judges like to know about the latest decisions in the world and how they are being received. There’s no need to have a formal treaty or agreement to tell judges how much authority they must give to a particular court’s judgment. In fact, this would be bad; it would hamper judicial freedom.

Discussions on horizontal links among international judicial institutions were interspersed with references to the vertical links that exist between international and national judiciaries. Indeed, the two spheres cannot be separated. If the fragmentation of international law poses a challenge to the global legal system (a notion that not all agree upon in the first place), it was suggested that complementarity and cooperation between international and national judiciaries would serve to lessen the burden placed on this system.

All participants agreed that the complementarity required by the Rome Treaty – the agreement that the International Criminal Court (ICC) will only exercise jurisdiction over a case if the state that has jurisdiction over the matter is unwilling or unable to proceed – benefits the states that have ratified it. Domestic law must often be changed to conform to the treaty’s statutes, thereby raising the laws of many countries to widely accepted international standards. More generally, it was noted that the rule of law is best established at the domestic level. By the time a matter reaches an international court, opportunities for improving national justice are greatly limited. As one participant expressed it, “Once the blue helmets are called in, it is already too late.” However, it was noted that international and mixed (international/national) tribunals are increasingly making efforts to improve domestic justice in the countries within their jurisdictions.

What citizens need in their own countries are good laws, good training, and good people – lawyers, judges, and, very importantly, administrators. Few people will ever come into contact with organs of international law, it was noted. But everyone will inevitably come into contact with their own governments – with tax authorities, the police, social services, and so on. If the rule of law operates at this level, the likelihood of violations of international law taking place is minimized. The more that can be done at the national level, the less international courts and tribunals will have to do.
It has been argued that if the ICC complementarity principle really works, then the court itself should have no “business.” All prosecutions will have taken place successfully at the national level. Some participants felt, however, that the ICC needs to undertake a case soon, simply to demonstrate to the public that it is credible and viable.1 The first ICTY prosecution of Dusan Tadic was invoked; while he was admittedly not the most important of potential defendants, his prosecution for war crimes in the Balkans showed that the ad-hoc tribunal was functioning and should be taken seriously.

While the ICC fosters national adjudication of crimes through the principle of complementarity, other institutions encourage national adjudications through a requirement that litigants exhaust domestic remedies before a case can be heard in the international forum. For example, the European Court of Human Rights (ECHR) calls for a potential litigant to first exhaust domestic remedies, as does the African Commission. These requirements bring with them, of course, certain difficulties. In the human rights context, international courts must determine whether national judicial processes have been “genuine,” that is, fair and impartial. In the criminal context, issues can arise regarding the existence of domestic laws that ensure prosecution to the full extent of the law, whether the sentences delivered are reasonable by international standards, and whether any amnesties have been applied. Moreover, most international law treaties require implementation by domestic legislation, and all contemplate some level of domestic enforcement. Participants agreed that the entire system of international law depends upon the idea of complementarity in its broadest sense.

BIIJ participants also had the opportunity to examine processes that are not strictly judicial but operate in tandem with courts. These processes include truth and reconciliation commissions and commissions of inquiry, both of which have been utilized in a number of post-conflict societies in recent decades. There is currently a trend to combine judicial and non-judicial processes in such situations, South Africa and Sierra Leone being prime examples. Participants were asked to contemplate the role of these sorts of alternative forums and consider how they can be combined with conventional judicial work to achieve the maximum benefit for society.

The point of departure for these discussions was the case of gacaca, the Rwandan grass roots “courts” that have been established to examine the responsibility of thousands of suspected génocidaires currently detained in prison. The rationale for the creation of gacaca was the immense number of individuals under arrest - estimated at 100,000 - who needed to undergo some sort of process in order to be reintegrated into society. Clearly, the Rwandan national judiciary could not handle this number of prosecutions, especially given the number of judges, lawyers and other legal staff who were lost during the genocide itself.

It was noted that gacaca is more akin to a truth and reconciliation commission than a court. Many felt that gacaca does not share enough fundamental characteristics of a judicial process to qualify as such. Although the need for some alternative to a judicial process was clear, the consensus was that “gacaca at best promotes approximate justice.” Still, some BIIJ participants appreciated the work that gacaca is performing, especially its attempts “to put into practice a system close to local ways of dealing with conflict.”

The potential for the political manipulation of gacaca was a concern expressed by several participants. The experience of the South African Truth and Reconciliation Commission shows that alternative processes must be public and highly transparent in order to avoid manipulation by those in power. It was asked whether gacaca was not a form of “victor’s justice,” with only Hutu detainees coming before gacaca judges. It was also asked whether the process actually succeeds in bringing about reconciliation, or whether it was just an expedient way of emptying prisons. Although gacaca promotes the confession of crimes and the demonstration of remorse as a way of promoting community harmony, it has been found that defendants tend to admit to the minimum crime that will get them out of prison and subsequently
back into society. It was asked, do victims and survivors of the genocide feel that their interests are being served by such a process? Would *gacaca* have more legitimacy if it were voluntary instead of mandatory? An international criminal judge was very frank in evaluating the shortcomings of *gacaca*:

I am unhappy at seeing a judicial system that does not comply with the principles of a fair trial. I would prefer a system in which one would take note of the impossibility of proceeding judicially and deal alternatively with the matter, without setting up a system that pretends to be judicial but may be the subject of political manipulations.

By the end of the discussions, it was clear that BIIJ participants are well aware of the inevitability of such processes co-existing with their own institutions. Given this reality, international judges are bound to encounter them, directly or indirectly, and thus need to understand how these processes can complement more mainstream judicial work.