1. The iCourts Research Agenda and Presentation of Findings by Two Affiliated Researchers

Mikael Rask Madsen opened this part of the institute with a general introduction to iCourts and its principal research areas. He explained that iCourts supports pioneering studies that systematically explore the new role of international courts in the global order. These studies aim at examining how international courts result in a significant change in the mode of producing law across substantive areas of international law, and how they transform the interface of law and politics both nationally and internationally. The Center is particularly interested in issues related to the authority of international courts. In this regard it develops research around three key issues—the institutionalization, autonomization, and legitimization of international courts. The iCourts working paper series demonstrates the broad range of scholarship on international courts and tribunals that the institution has supported to date.

As an example of the kinds of work that is being done by iCourts-affiliated scholars, Madsen introduced recent projects by Urška Šadl and Federico Fabbrini, both Associate Professors of Law at the Faculty of Law, University of Copenhagen. The scholars then had the opportunity to speak in depth about their projects and take questions and comments from the assembled international judges.

1.1 Research on the Court of Justice of the European Union

Šadl presented on the topic “Do International Courts Make Law in Small Steps? The Case of the European Court of Justice.” She contended that one of the reasons for the success of the CJEU is its use of “principled incrementalism,” a step-by-step judicial decision-making that strives for a workable balance between societal and legal concerns. Šadl explained that principled incrementalism allows courts to consciously or unconsciously balance the demands of the individual case against the demands of the whole body of law, in particular legal coherence and consistency. This ultimately lets them preserve the authority to interpret legal norms in the long run.

In the case of international courts, such balancing is additionally constrained by the increased political pressure from various states with dissimilar legal systems, conflicting political interests, varying degrees of international commitment, and the absence of a central enforcement mechanism that makes international courts particularly vulnerable and dependent on cooperation by powerful political actors. Šadl argued that by constructing its legal doctrines in a series of small steps, the CJEU has avoided political conflict and significant push back from the legal community.

The main findings of her study demonstrate that the CJEU’s use of principled incrementalism can be seen through its own citation patterns. There is a significant delay—one average more than
To this end, the book adopts a comparative approach: departing from the prevailing literature in the field, the book explains that the European system is not exceptional and develops a comparison with the federal system of the United States of America. In a comparative perspective, the book identifies two recurrent challenges in the interplay between different state and transnational human rights standards—a challenge of ineffectiveness and a challenge of inconsistency. It explains that these challenges arise when transnational law operates either as a floor or as a ceiling of protection for a specific human right.

In addition, the book maps the most important transformations taking place in the European system and assesses their impact on these challenges. In an empirical part, the book considers four case studies: 1) the right to due process for suspected terrorists; 2) the right to vote for non-citizens; 3) the right to strike; and 4) the right to abortion. On the basis of these case studies, the book reconsiders the main scholarly theories on the protection of fundamental rights in Europe: sovereigntism and pluralism. It questions their validity and claims that steps need to be taken toward a new theoretical framework, which—for its capacity to reconcile the dilemmas of identity, equality and supremacy—will partake of a “neo-federal” vision.

1.3 What are potential benefits of academic research for members of the international judiciary?

This session aimed not only to expose international judges to recent and ongoing scholarship on international courts and law but also to create a dialogue between scholars and practitioners. International judges were asked what kinds of academic research they, as practicing judges, find most relevant or instructive for their work.

First, several judges responded to various points made by Šadl and Fabbrini. A criminal judge wondered how to define what constitutes a “leading case” whose influence can subsequently be tracked.
He suggested that the ICTY *Tadić* judgment could be put in this category, as it was later “quoted everywhere.” Another judge queried Šadl about how decisions of the CJEU may or may not be in sync with those of the ECtHR, given their overlapping regional jurisdictions but different legal foundations. She asked, “How do you not conflict and also develop law incrementally, without stepping on toes?” Šadl responded that courts do sometimes step on toes, so they need “to cite each other politely and respectfully.”

In reference to Fabbrini’s presentation, a number of judges asked for clarification of his notions of transnational law acting as either a “floor” or “ceiling” for human rights protections. Can an international court actually impose a ceiling and require a state to lower its existing protections to meet that standard? If so, how is this reconciled with the European Convention on Human Rights? A human rights judge wondered where economic and social rights fit into Fabbrini’s model. Fabbrini responded that the Court is “creatively interpreting Article 115 to bring social rights back in and expand them.” A second human rights judge commented that he sometimes felt like the ECtHR “opted for the lowest level” of protection. He gave as an example the court’s refusal to raise the standard on the right to abortion, given strict legislation on this issue in certain member states. A third human rights judge pointed out that “the low protection of one thing allows the high protection of another,” and that “conventions are tools of priorities.” Finally, a judge countered that the ECtHR is, after all, “antidemocratic” in the way it requires certain standards across the Council of Europe despite the existence of local opposition. He opined that it is sometimes appropriate that “courts not become too authoritative.”

The discussion then moved on to the place of scholarly publications in the work of international judges. A judge and former professor observed that “the impact of academia on international judges is less than I expected before becoming one.” Another judge noted that in his court, scholarly articles are seldom cited as judges “don’t want to privilege Professor X against Professor Z.” Their legal writing thus becomes very “self-referential.” A criminal judge added that “judges in international criminal law don’t feel comfortable citing academics as authorities; they are much more comfortable citing other courts.” Another criminal judge expressed some frustration that academics are not interested in judges’ evaluations of their own work—“the attitude of some academics is that we should shut up and let them assess our accomplishments.” “There is danger in academics trying to influence process,” added a participant.

Notwithstanding recognized restraints around the citation of scholarly publications, several participants emphasized the important role that academic research has to play in their work. One declared, “The reality is that academics are not far from the judiciary. Rather, judges, bar associations, and the academy are all part of the legal firmament.” He went on to make a plea for academics to see themselves as “part of the exercise.” Judges also recognized the important role of expert knowledge in legal proceedings that involve certain scientific matters, intellectual property, or other specialized fields. Some participants believed that having libraries in courts is essential, although sometimes administrators seek to eliminate them, considering them unnecessary.

Scholars from iCourts then weighed in on this subject. Madsen noted that iCourts’ research shows that the foundation between academics and practitioners is “strong and patterned.” He also emphasized that ongoing connections between the two groups can keep judicial outputs from becoming, as one judge had earlier phrased it, “self-referential.” Fabbrini suggested that “academics can develop a common language of ideas and facilitate communication,” creating paradigms that allow judges to perform better. Šadl observed that judges and scholars seem to sometimes struggle over who has ultimate authority on the law: “Both judges and academics engage. Judges contribute by issuing well written opinions, and then academics do the empirical analysis.”
A final question arose during this session that engendered some lively responses. Given the nature of much research on judicial opinions and systems, is there an assumption that “international judges are essentially interchangeable parts”? In other words, does it matter which individual judges sit on particular courts? One president declared, “We want to matter. And, perhaps unfortunately, individual judges do matter.” This participant noted the frequent circulation of judges on and off the bench, and suggested that the institution needed to “develop a homogeneous judicial culture” that would unite judges from different countries and backgrounds. Another participant concurred, saying that the role of individual judges in developing law is critical, especially in international criminal institutions. This can be clearly seen in the development of law around rape and genocide, for example. He added, “But judges hesitate to speak about this law-making function, and we cannot discuss it in any public forum.”

2. The Ad Hoc Tribunals Oral History Project

Leigh Swigart and Daniel Terris of Brandeis University then had the opportunity to introduce BIIJ participants to the Ad Hoc Tribunals Oral History Project, initiated in Fall 2014 by the International Center for Ethics, Justice and Public Life. The Project seeks to capture the memories, perspectives and reflections of the individuals who participated in and observed the rapid institution building that occurred during the early years of the ICTY and ICTR.

The Project chose an oral history approach to document the development of the Ad Hoc Tribunals for its potential to contribute perspectives and understandings that have not emerged either through legal scholarship about the Tribunals or their own extensive jurisprudence. Oral history interviews preserve the voices of individual actors who worked to bring justice to Rwanda and the former Yugoslavia, and who contributed to the development and “institutionalization” of international criminal law during the early years of the ICTY and ICTR. The Project also seeks insights into what the Ad Hoc Tribunals have and have not been able to achieve. The aim of the Project is to produce an archived collection that will allow honest analysis, now and into the future, of the challenges and successes of the Tribunals.

As of the writing of the BIIJ 2016 report (April 2017), the Project had interviewed 30 judges, prosecutors, defense counsel, administrators, and other staff connected to the ICTY and ICTR, as well as commentators on international criminal law. The Project website provides profile pages for each interviewee, downloadable individual transcripts, and a link to the Brandeis Institutional Repository where a search across the entire collection can be made. Full transcripts of all these interviews will be available by summer 2017. A number of video clips are also available on the website. These are based on selected excerpts from the interviews and have been produced to provide a “window” into the kinds of perspectives and memories that can be retrieved through an oral history approach.

Brandeis believes that documenting the early years of the Ad Hoc Tribunals is important for several reasons:

• The creation of the ICTY and ICTR represents a critical development in the roles and responsibilities of the international community in the late 20th and early 21st centuries, a development that informs global action today and underscores the need to establish the rule of law and human rights protections everywhere.

• Individuals and institutions—from advocates and scholars to the ICC and other contemporary or future international criminal tribunals—can learn important lessons from an archive documenting the innovative work that started at the ICTY and ICTR and is now given fuller expression through “successor” institutions.

• As a primary resource, this growing collection of oral history transcripts can be used in a variety of ways to inform the public about the Ad Hoc Tribunals and international criminal justice more...
generally. Students, scholars, and educators can use the materials in their research and analysis, in written histories of international criminal tribunals, and in studies across disciplines such as human rights, criminal law, sociology, history, and international relations.

- The collection will be particularly powerful when used for educational purposes in post-conflict societies. The interviews convey in an evocative manner the dedication, commitment, hard work, and innovation of individuals who believe in the capacity of international criminal justice to bring about accountability and reconciliation in societies affected by mass violence and human rights violations.

Brandeis furthermore contends that exploring international courts and tribunals through the subjective views and specific experiences of individual actors can act as a complement to more analytical and objective approaches to these institutions and their work. Such an approach is not uncommon to social scientists working on issues of the law. But the unscripted and narrator-driven oral history interview has, in particular, the potential to bring forth unexpected and powerful stories about judicial institutions, including those pertaining to how they function internally, how they are perceived from the exterior, and ways in which they are understood to exert authority.

This latter point was perhaps most germane to the “authority theme” of BIIJ 2016. One question inspired by the Project is whether new kinds of narratives about international courts and tribunals can bolster their legitimacy and/or authority by showing constituents how they operate, especially at levels that are not normally visible to the outsider. As noted by Alter et al, “Constituency support is a key determinant of IC authority.”

Session leaders asked judges to ponder these questions: 1) What can an investigation of the stories of individual actors—especially those who are “under the radar”—contribute to relevant constituencies’ understanding and appreciation of international courts and tribunals? 2) What are the benefits and risks of giving voice to new perspectives on international courts and tribunals, not all of which may be positive? Might the authority of international courts and tribunals be undermined instead of reinforced by such “unfiltered” narratives? 3) Does the “official narrative” about participants’ courts and tribunals—controlled by the institutions themselves, or as presented through their jurisprudential output or by legal scholars—leave out something that the public should know in order to believe in their legitimacy and authority?

International judges had a number of reactions to the Ad Hoc Tribunals Oral History Project, after having read several excerpts, viewed selected video clips, and listened to a presentation of its aims and methods. Many expressed the view that it was valuable in principle. One judge noted that such an archive “will be useful in history writing and as guidance to future participants in new courts.” Another commended the project, saying it was “important for posterity to see the lessons learned and the people involved in the Ad Hocs.”

At the same time, some of the criminal judges in attendance expressed concern about the possible impact of “problematic” narratives on the legacy of the Ad Hoc Tribunals. They reacted, in particular, to the excerpt of an interview with an ICTR defense counsel who felt that the Tribunal had not supported defense work as fully as that of prosecutors. It was suggested that, moving forward, the Project seek to balance viewpoints across the collection by carefully selecting interviewees. The importance of having a wide representation of nationalities and backgrounds among interviewees was stressed as well. Several participants also wondered if a series of questions could be formalized so that a standard number of areas could be covered during interviews.

Svigart and Terris took note of these points, explaining that they hoped to see the Project move into a second phase, at which point such suggestions could be considered. They reiterated to the group, however, that conducting an oral history interview is unlike a study where researchers seek to explore
pre-determined areas of inquiry and therefore strive for consistency as they engage with research subjects. While interviewers for the Ad Hoc Tribunals project prepared a number of questions in advance for narrators—based upon those narrators’ professional positions and biographies—they also allowed narrators to foreground the aspects of their experience that were personally significant and salient. The resultant oral history collection thus comprises a disparate range of subjects and viewpoints around its principal theme, some of which will inevitably be at odds with the “official narrative” of the Tribunals as presented through their jurisprudence, outreach initiatives, and the messaging of MICT, the Tribunals’ residual mechanism institution. Brandeis believes that this richness and complexity is an important part of the Ad Hoc Tribunals’ “story,” and that the collection will constitute a valuable primary resource for researchers whose future areas of inquiry cannot be foreseen.

**NOTES**


7. See https://bit.brandeis.edu/handle/10192/30830.
