Over the years, many sessions of the BIIJ have addressed the intersection between law and politics in the work of international courts and tribunals. There have been candid discussions about the challenges of operating within the global political environment; the politicized nature of many of the judicial selection processes; and the intrusion of political actors into legal processes, for example through exerting external pressure on the ad hoc criminal tribunals to hasten their completion strategies.1

In 2012, BIIJ participants were presented with two pervasive critiques of international courts and tribunals by outside observers. These critiques are not new, but they have taken on an empirical form in recent years, as the post-Cold War expansion of international courts and tribunals reaches the end of its second decade. Rather than relying only on theoretical arguments, these critiques are increasingly resting on the analysis of the contemporary history of the greater range of courts.

Discussion centered on the following critiques:

1) Critics have argued that strong states have disproportionate impact on international judicial institutions – either by directly shaping the configuration of the courts themselves, or by opting out of their jurisdiction if they feel disfavored. This impact, it is argued, renders the work of international courts either warped, irrelevant, or sometimes both.

2) Another critique argues that international courts and tribunals are self-perpetuating bureaucratic institutions that seek to apply a legal solution to all problems and seek primarily to expand their power and influence, sometimes at the expense of achieving their underlying goals.

Fundamental to these two critiques is the argument that these problems are inevitable in a global legal network that lacks a structure of government, accountability, and enforcement.2

A number of participants immediately reacted to the litany of failures pointed out in the session readings, which included numerous examples of non-compliance with international judgments, the great time and expense associated with litigation in an international court or tribunal, and the unwillingness of some courts and tribunals to ruffle the feathers of powerful states. “The reality is that we are operating in the international system. We exist in a system that politics created,” observed a judge. “But to say that the law is always subject to these politics is overly broad.” When evaluating the performance of international courts and tribunals, he added, it is important to acknowledge “the better world we have created through our system of courts.” Another participant concurred. “I think the world, as a result of international courts, is now less safe for those who commit genocide and for despots. I do not think this is just about legal window dressing.”

A criminal judge contributed a similar point of view: “People never expected international criminal tribunals to have this degree of influence in the world at large. We have established that international prosecutions and trials can observe due process.”
The declaration of these successes notwithstanding, BIIJ participants were honest about the challenges facing their respective institutions and the potential impact of negative public perceptions concerning the politicization of international justice. The continued flouting of the ICC arrest warrant for Sudanese President Omar al Bashir was mentioned several times as an example of the powerlessness of courts to bring about compliance in the absence of an enforcement mechanism. One participant expressed the hope that such situations did not represent a “slippery slope,” whereby other ICC states parties would feel free to ignore their own obligations under the Rome Treaty. Several voiced the view that the U.N. Security Council should play a more forceful role in bringing about compliance with both international court rulings and obligations to cooperate, for criminal institutions in particular. At the moment, the Security Council seems to play the ICC both ways, said a judge; when it does not wish to directly address violations of international law, it refers the situation to the Court. But when the Court needs its support, the Council does not respond effectively.

Non-compliance with judgments is not an issue for all courts, however. Indeed, the WTO Appellate Body issues few rulings that do not see a rapid response on the part of losing parties, either because the same parties anticipate future rulings where they may be the winners and in turn desire compliance, or because there is the possibility of establishing retaliatory sanctions against recalcitrant states. Some participants hastened to add that the compliance record for courts without such sanctions or other enforcement mechanisms is still quite high. Despite this fact, a judge pointed out that some defensiveness on the part of states is to be expected. “Experience has shown that states admire the work of international courts until the courts turn their attention to the states in question. Then they react.”

The frequently heard critique that international courts and tribunals are too expensive was then discussed. A criminal judge declared that the high cost of international trials was worth it. “When you are setting an international standard, it must be as perfect as possible in order to inspire national institutions. You must adhere as closely as possible to fair procedures. I think it is permissible to raise concerns about huge expenses. And then we must show those who criticize why the costs are justifiable.” On the subject of both cost and state support, a human rights judge wondered whether some judicial institutions have not been created with a “built-in failure factor.” “How can you set up a court of that nature and then include a claw-back clause and hide it in the ratification process?” And when the court requests funds to carry out sensitization work in the region, it is accused of being self-promoting!

Regarding the slow pace of most international judicial procedures, it is clear that speed is a relative notion. One court’s efficient pace is another’s delay. One criminal court judge commented, “We have been criticized for slow judgments, but suddenly we do not appear to be such turtles when compared to an 11-year delay before the start of the Lockerbie trial! That does not mean that there are not many things that we can do to improve efficiency. We can work better and we should ask ourselves how.” Another judge urged, “I think there is more that judges can do to bring succinctness to the proceedings. But we cannot do this unless the parties are part of making things faster.” She added, “Decisions should also be short and sweet.” At the moment, the only international institution that can count on speediness is the WTO Appellate Body, which dictates that cases take no longer than three months. “This creates quick and efficient decisions,” said a participant, “which then helps with enforcement.”

As for the critique that powerful states wield disproportionate power in the world of international justice, it was pointed out that these nations can largely take credit for the creation of international courts and tribunals in the first place. That does not mean, however, that the same nations do not occasionally throw their weight around, overtly or covertly. The ICC has issued arrest warrants for leaders in Sudan and Libya, observed a participant,
but shied away from doing the same in Syria and Bahrain, both of which have allies among the permanent members of the U.N. Security Council. The United Kingdom has been a supporter of the ECHR over its more than 60-year history, it was noted, but recently has rejected the Court’s rulings on issues unpopular at home. The UK also attempted to enact reforms that would limit ECHR jurisdiction during its recent mandate as leader of the Council of Europe, particularly in regard to interpretation of the Court’s so-called “subsidiarity principle,” which determines whether national courts have dealt satisfactorily with human rights complaints and thus may avoid answering to the ECHR. And Brazil recently withdrew its financial support from the Inter-American Commission on Human Rights after the Commission issued precautionary measures directing a halt on construction of the Belo Monte hydroelectric dam, pending an investigation of its potential impact on both indigenous populations and the environment. One participant was philosophical about such situations: “It is true that some states dominate, but this is a fact of international political life. I do not think this should reflect on the effectiveness of international courts.”

In response to the criticism that courts “legalize” every problem, some considered that it could not be otherwise, given their mandates. “We must have legal solutions to problems,” said a judge. “This should not depend on whether decisions are enforceable or not. Decisions are not only speaking to the parties in litigation but to the rest of society. They are not only speaking to the present but also to the future. My position is that we must continue to have faith in legal solutions wherever it is possible.”

One participant maintained that the critiques of international courts and tribunals put forward in the readings were essentially flawed because they failed to distinguish, using a musical metaphor, between “instruments” and “players.” The courts are instruments, created to perform a certain role, while states are those who play them. And too often, he added, they are poorly played; that is, states do not cooperate or use the courts competently or responsibly, instead impeding their work or interfering for political reasons. The criticism that courts tend to act independently and to take their own decisions may, in fact, be an institutional solution to avoid control by badly performing states. Should this really be considered a criticism, the judge wondered? Or is it instead a sign of the robustness and success of international courts and tribunals?

Toward the end of the discussion, participants seemed to agree that many of the common critiques of international justice institutions are a result of unrealistically high expectations about what they can accomplish. A criminal judge noted, “International justice has been seen as a magic wand to bring about reconciliation and do all kinds of things that courts cannot do. I think that criticism has been fueled by excessive statements, made especially by prosecutors, and huge publicity for arrest warrants.” He contrasted the dilemma of criminal courts to that of the ICJ, whose decisions garner a lot of attention but do not raise the same kinds of expectations about impact. A human rights judge offered his view on the issue: “Managing excessive expectations is a difficult thing. There are also dangers in recognizing one’s own limitations. But broadly speaking, international courts are aware of these dangers.”

Two responses that might correct the tendency toward overblown expectations of international justice, and the critiques they generate, were then suggested. First, courts and tribunals need to deconstruct and then reconstruct the definition of their own success. Each institution should articulate what its optimal role is, as well as what alternatives might exist to judicial procedures. For example, criminal courts could openly recognize non-judicial paths toward reconciliation in the wake of war crimes and crimes against humanity, thereby acknowledging the inherent limits of their strictly legalistic approach. Furthermore, international courts and tribunals should decide who will serve as their “educating voices.” Not only official spokespersons but also academics and NGOs should do a better job of educating the public about the pressures put on courts and tribunals – by victims and advocate
groups as well as governments – which may result in unavoidable compromises and negative press. Finally, a number of participants felt that states themselves should take on the role of defending international courts and tribunals, which are, after all, their own creations.

A second response to unrealistic expectations is to reframe the understanding of compliance with judicial rulings. While it is true that compliance with some judgments may not be immediate, an extended time frame may show parties eventually coming into compliance. Another participant concurred, noting that the non-enforceability of judgments should not be considered a sign of failure of the international justice system. “There is wisdom in waiting, as events occur later, and decisions that are not enforced become enforced.” He offered as an example his own country, where an ECHR ruling on the rights of homosexuals was ignored for years. In time, however, the government changed its legislation to conform to the European Convention.

In conclusion, it was acknowledged that there is indeed a relationship between law and politics that comes together perfectly in international courts and tribunals. However, one participant insisted that the authors of the works under discussion are misguided: “These critical writings miss the mark by focusing too much attention on the courts themselves. It is not that courts are beyond criticism, because earlier discussions in this institute – on overlapping and conflicting jurisdictions, and on issues of consistency and differing frameworks – show that there is an active internal self-evaluation. The authors’ failure to understand or acknowledge the different frameworks under which courts operate – for example, that criminal courts have different aims and needs than the WTO or ICJ – has allowed them to fill the explanatory vacuum with their own favored premises.”

Another participant declared that such criticisms, in the end, should be taken as a sign of the success of international courts and tribunals. “The more strength courts have, the more strongly will those affected by them react. The real danger is the eventual withdrawal of support, or irrelevance.” Finally, a judge ended the discussion by remarking, “I welcome these critiques because I see them as an accountability mechanism. Against the background of criticism, international courts are only likely to improve.”

Notes


2. Readings for the session were excerpted from two recent publications: Matthew Parish, Mirages of International Justice (2011); Eric Posner, The Perils of Global Legalism (2009).

