International courts and tribunals are by nature heterogeneous institutions, bringing together judges and staff who have various nationalities and languages as well as different types of legal training and professional experience. This diversity extends to the parties appearing before courts and tribunals and, of course, to the public affected by their work. BIIJ participants discussed some of the questions surrounding diversity and its potential impact on the establishment of a rule of law that can be embraced and supported across the globe. For example, does the varied experience of international justice actors with the rule of law at the domestic level influence their understanding of how it might function at the international level? Is some uniformity in the conception and application of the rule of law a prerequisite for its international extension? Does the long-term legitimacy of international justice institutions depend on a shared sense of the notion?

Several participants prefaced the conversation by noting that diversity was not a topic that they were accustomed to discussing, although they acknowledged its importance to the work of their institutions and, ultimately, for the development of an international rule of law. The discussion began with reflections on the concept of “dissonance” and its impact on the work of international courts and tribunals. One legal scholar has used this term to describe the “poor sociological fit” that exists between the methods and concepts used in international criminal justice and some of the non-Western contexts in which they are applied. More generally, this term can be extended to signify any kind of “mismatch” created by the coming together of distinct cultural systems. Judges were asked whether they experience any situations of dissonance in their own institutions and, if so, how they are resolved.

A criminal judge quickly responded to the question, remarking, “What you call dissonance, we experience it every day!” In the case of his court, the mismatch is between legal cultures: the adversarial trial approach of the common law system and the inquisitorial trial approach of the civil law system. He explained that in the early days of his institution, common law judges discovered that they had to draw considerably from the civil law system to develop practices that expedited procedures. “We had to reconcile the two systems, but it can be done by looking at fairness. That is the overarching principle.” Another criminal judge noted the same tensions in his own chamber, but believed they could be resolved by appealing to another principle. “We have a judge who is from a civil law tradition, a presiding judge from a common law tradition, and another who is an academic. Our common denominator is common sense.”

Several participants objected, however, to the idea that there is a “common sense” that all judges can call upon to resolve differences in approach or thinking. “Common sense isn’t always so common,” said one. Judges have to actively shed their presumptions about how to reason and move toward a position consistent with international law, he continued. Nonetheless, suggested a participant from a regional court embracing five regions and three legal systems (civil, common, and Islamic), “judges can develop their own culture of compromise, common understanding, and tolerance.”
A number of other diversity issues were raised in relation to international criminal jurisdictions. Some judges mentioned the problems associated with language diversity, both among judges and among parties before the court. One participant noted that courts dealing with inter-ethnic conflicts are “constantly examined through a magnifying glass to see that we do not prefer group X over group Y and that we are fair in selecting the targets of our prosecution.” Another kind of dissonance was described as arising in criminal courts: that between the expectations of the parties – that is, the prosecutor and criminal defendants – on the one hand, and the broader public on the other. Whereas the former may understand a trial to be about the guilt or innocence of the accused, the latter may expect it also to establish a historical record or contribute to the healing of victims.

Moving beyond the experience of international criminal courts, which may experience diversity in particularly vexing ways due to the nature of their jurisdictions, participants brought up issues more general to the international justice system. A human rights judge mentioned how the different professional backgrounds of fellow judges seem to correlate with a variable willingness to consider the court’s own precedents in the interest of creating a consistent and coherent body of caselaw. On such matters, it was noted, “courts need to have their own internal rule of law.”

It was also pointed out that possible misunderstandings or misperceptions in the media about international judicial decisions may stem from another difficulty facing international judges – the challenge of writing judgments in a manner that is understood and accepted not only by the parties to the dispute but also by different peoples and populations in the world. This challenge may be particularly acute in cases that have important repercussions on questions such as the self-determination of peoples, for instance.

In the end, most participants agreed that diversity at the level of the bench or institution, even if the source of occasional dissonance, does not generally inhibit effective work or the overall aim of delivering justice. “This diversity exists; it is a fact of life, a positive thing if managed properly,” said one. Where diversity may pose a problem, however, is at the level of the societies that must collectively engage in establishing an international rule of law. Some parts of the world are already part of the effort, while others appear to need more time and preparation before fully joining in. This came out clearly in comments from non-European participants who spoke from a dual perspective – that of global citizen and local culture-bearer – on the place of their respective societies in this global endeavor.

One participant explained how certain international norms are seen in his country and offered a rationale for these views. It is clear that contemporary notions of the rule of law, like the separation of powers, were imposed as part of European colonial rule. “Ours is a tribal and cultural society, where judicial and executive roles are all embodied in the chief. So when a new institution came with a separation of powers, there was a measure of confusion and the traditional leaders saw their powers being drained away.” This unfamiliarity has impeded the establishment of a domestic rule of law; participation in an international one is an even more distant goal.

The colonial experience was referenced by a second judge as well, not in the context of cultural diversity but instead with regard to the differences that exist between poor and affluent countries. “I think we need to be patient with developing countries, where certain aspects of the rule of law, like the separation of powers, are relatively new ideas. What is the impact on the psyche of a people in an emerging state that has been ravaged by colonialism for hundreds of years? How do we expect a people and a state coming out of that to advance and progress in the same fashion and at the same rate as countries that
have not had that same experience?” In response, a European judge reminded the group that the separation of powers is a very recent phenomenon in Western societies as well, dating back in some cases only to the 19th century.

Whereas these participants invoked situations in which international legal norms were imposed from the outside and met with some resistance, a third judge described how his country actively embraced these norms in order to “become accepted into the civilized community of nations.” It now stands at the forefront of nations in its region on issues of international law, serving as “a symbol to the whole world,” he said. This judge vehemently rejected the view that different fundamental values should be allowed to hold sway in his region, especially when this view is espoused by repressive regimes wishing to justify their policies. Another judge concurred: “Is it not possible that some governments may use real or alleged diversity as a pretext for not accepting their international legal obligations?”

Some participants remained certain, however, that similarities outweigh differences on basic issues pertaining to international norms. One judge commented thus on the Rome Statute: “Cultural diversity may be a complicating factor for the international rule of law, but it does not make it impossible. Support for the Rome Statute overcame the traditional dividing lines between North/South and East/West. It is my assumption that, despite all cultural diversities, there is a common view among all populations of the world that perpetrators of genocide, war crimes, and crimes against humanity must be held accountable, regardless of their rank or nationality or ideology.” He added that polling among the populations impacted by the ICC largely shows support for the court’s work, despite its distance and “strangeness.” People seem to trust the ICC more than their local judiciary, he claimed, an observation that recalled an earlier comment by a participant about how the international rule of law may in some cases replace a failed domestic rule of law.

Over the course of the discussion, queries about the impact of diversity on an international conception of the rule of law gradually evolved into the inverse question: Might the search for universally accepted legal norms be impeded instead by a lack of diversity? In other words, might the absence of input from all concerned parties undermine the persuasive power of an international rule of law?

It was pointed out that “not all states are equal” in the international arena. The historically disproportionate presence of economic and political powerhouses – including the permanent members of the Security Council – in institutions like the ICJ and the WTO Appellate Body exemplifies this situation. The ICC’s focus to date on serious crimes in Africa, to the exclusion, critics say, of those crimes committed in other regions, is also frequently cited as evidence of the developing world’s relative powerlessness in the international community. The fundamental question is, then, the following: if all societies have not contributed equally to the development of international institutions and the legal foundations upon which they rest, will they be as committed to what these institutions stand for and uphold them accordingly?

This question clearly struck a chord among participants, European and non-European alike. Said one judge, “I’d like to emphasize that diversity itself doesn’t matter. Overcoming diversity is related to a sense of participation. It is crucial that you’ve participated in the process, even if your opinion was not taken as a majority opinion and the final structure is different from what you wanted.” Another elaborated on the theme of participation: “We need the participation of countries all over the world, whether East, West, North, or South, in creating international processes.”

One scholar has suggested that problems in international criminal justice derive from “the relation between the international ‘community’ that makes international law – comprised of activists, academics, statesmen and lawyers, at the pinnacle of which are the States Parties themselves – and
the less cosmopolitan communities existing on their periphery.” BIIJ participants articulated this same dilemma in terms of domination. One judge suggested, “To ensure that diversity is not a problem for an international rule of law, but instead good for it, I think the most important and critical thing is that all institutions and diverse groups are fairly represented in the statutes. There should be no domination of one group over another, and no apparent imbalance. If representation is agreed to, diversity should not be an impediment.” His view was echoed by another: “Diversity as such – cultural, ethnic, and so on – is not a negative factor per se for the emergence of international law. But there must not be domination.”

It is clear that despite the global dissemination of information and commodities, the world will continue to be diverse – in culture, language, religion, political belief, and many other ways – for the foreseeable future. International justice institutions, like other entities meant to serve broad constituencies, would do well to consider what this fundamental characteristic of human life means for their work. They furthermore should be careful to listen to the many voices with something to say about it. Although BIIJ participants reached no definitive conclusions about the impact of diversity – or the lack thereof – on an international rule of law, it was clear that a consideration of diversity can only contribute to its ascendancy.

Notes


2. Challenges associated with language diversity in international courts and tribunals were treated at length at BIIJ 2009. For a summary of this discussion, download the 2009 BIIJ Report, supra note 1.


4. Supra note 52, p. 2.

Information for notes with “supra” references can be found in the full text version of this report.