The notion of “fairness” is central to the rule of law. It underlies, among other principles, the equality of all persons before the law, various elements of due process, and the basic tenets of democratic governance. BIIJ participants had the opportunity to explore the degree to which it is the role of international judicial institutions to make the content and application of international law fairer.

The rapid multiplication of international organizations endowed with rule-making authority in the aftermath of the Second World War has spurred the development of the substance of international law. These substantive developments were often not matched, however, with adequate means of implementation. For many decades, the interpretation of international law was thus frequently left to the discretion of states. In the last 20 years, the unprecedented increase in the number of international courts and tribunals has finally equipped the international community with multiple judicial fora, which are designed to provide objective determinations of that law. This phenomenon has, in and of itself, significantly contributed to increasing the inherent fairness of international law, as well as the fairness of its application.

While international courts may further enhance the inherent fairness of the law by interpreting international law in conformity with universal human rights principles, as acknowledged in the opening discussion, this session was centered on the role and responsibilities of international courts in increasing the fairness of their institutions and procedures. Specifically, this session examined two aspects of fairness that cut across the operations of international courts and tribunals: 1) the fairness of their proceedings, and 2) the transparency of their work.

With regard to proceedings in international courts and tribunals, the questions posed to the judges were the following: Do courts have sufficient control over the conduct of their proceedings in order to ensure fairness? How much discretion do courts have in adopting rules that fill gaps or can ensure more fairness to the proceedings? Should judges have the power to modify rules they believe to be unfair?

Before responding to these questions, a number of participants raised preliminary queries about the subject at hand. Asked one judge, is the very notion of fairness unavoidably subjective? If so, how should we approach it? When speaking of fairness, suggested a participant, is it not necessary to specify in relation to whom? The fairness of proceedings could be evaluated differently by parties before the court (states, prosecutors, or individuals), witnesses, victims, parent political bodies, the general public, or any other stakeholder. Finally, it was pointed out that the focal point of fairness might differ according to the type of court under examination. While fairness in proceedings in general applies in all courts and to all parties, fairness to the accused, for example, may be a dominant concern in international criminal tribunals, whereas fairness toward victims of state violations may command more attention in international human rights courts.
Participants noted that even detailed rules might not cover all questions related to fairness in a given situation before a court. This means that judges are often left to resolve any uncertainties, although how this is done varies widely from court to court. Some courts benefit from a wide margin of discretion when amending their procedural rules. The ICJ, for instance, although relatively conservative in its approach toward changes in procedure, has had occasion to revise both the rules and practices of the court in order to improve efficiency and fairness.¹

The experience of the ACHPR is interesting as it is a young court – its first judges were elected in 2006 – and has only recently finalized its rules of procedure. African judges did not consult the court's parent body, the African Union, during this initial process. “My experience is that judges are sovereign in this issue and should adopt the rules they feel are correct,” said one participant. However, when the rules were revised, the court was advised to open up the process to input by NGOs, and the African Commission of Human and Peoples’ Rights was also consulted.² This feedback was found to be informative, although the court retained complete autonomy in deciding the final version of the rules.

Judges of the ICTY and ICTR similarly have the authority to revise their institutions’ rules of procedure and, more surprisingly, their rules of evidence. Indeed, since the ICTY was established in 1993, the rules of procedure and evidence have been revised, according to one participant, 45 times, albeit not without some critical commentary on the part of observers. ICTY and ICTR judges should acknowledge, said one participant, this special privilege they have and take care not to abuse it. Another participant described his reaction to this practice: “I felt that the ICTY followed an excessive practice of amending its rules of procedure. Then I realized I was wrong. The ability of judges to transform practical lessons into modified rules is extremely important to the efficiency of the court.” Many believe that newer international criminal courts and tribunals have been able to learn from the “trial and error” experiences of the so-called “ad hoc tribunals,” and devise rules of procedure and evidence from the beginning that have required less tweaking as their work progressed.

Courts with unique procedural elements, however, cannot benefit from the past experience of peer institutions. The ECCC, for example, has made provision for victims to participate as civil parties in its trials, and it has found little precedent to follow on this matter. The ICC is the only other court that could provide relevant jurisprudence, but its victim participation regime is statutorily different from that of the ECCC. In response to the enormous increase in the number of civil parties wishing to participate in the Cambodian Court’s second case – undoubtedly through public observation of its first case – ECCC judges had to amend the rules of victim participation to apply to the second case and beyond. In the long run, declared a participant, constantly amending rules between cases would not be an optimal strategy.

The ICC contrasts with many other international courts in the restrictions that have been placed upon its judges in the area of rules revision. It happened that a number of 2010 BIJ participants had been in attendance at the 1998 conference in Rome where the ICC treaty was negotiated.³ It was clear, they said, that measures were actively taken during the conference to limit the power of the ICC, and especially its judges. Another participant observed that the process that established the ICC was “highly politicized,” with the result that “the Rome Statute is full of safeguard clauses to ensure that the Court would not be too big of a threat to the sovereignty of states.” In addition to the statute of the Court that was created by treaty among states, the rules of procedure and evidence were promulgated by the Assembly of States Parties (ASP). Consequently, the ASP holds the “unusual power” to change the rules of the court; the judges can only propose changes. This regulation, said one participant, is both “restrictive and cumbersome.” The judges, however, do have the authority to adopt regulations of the court.
The recent Review Conference on the Rome Statute of the ICC seemed to mark a changing attitude toward the court, however.4 “I think that in the international atmosphere, there is much more confidence that the ICC is not a loose cannon,” observed a criminal judge. “There is a real chance that States Parties might be willing to give judges the power they should have.”

The discussion of control over a court’s rules of procedures ended with a reflection about why there are such contrasting views on the appropriate role for judges in their drafting and revision. Might these views reflect the different legal cultures associated with the civil and common law systems, a participant queried? If so, this tension between civil and common law practices can be found in other aspects of the work of international courts and tribunals. For example, international judges may bring to their work certain assumptions, inculcated through their legal education and practice, about methods for witness preparation, the appropriateness of ex parte communication, or the relative importance of written submissions and oral pleadings.5

BIIJ participants then turned their attention to the transparency of the work of their institutions and how it affects their perceived fairness by a number of different stakeholders, including parties before the court, the general public and parent political bodies. It would be difficult to argue against the desirability of international courts being transparent in the way they operate. These institutions require broad understanding and support for their success and impact, and having their proceedings and oral hearings accessible to the public, and open to scrutiny, would seem the best way to achieve this goal. It would certainly be difficult for anybody to trust a completely secret judicial proceeding. Transparency thus necessarily fosters public confidence in the fair administration of justice.

On the other hand, it is undeniable that a level of confidentiality may sometimes be warranted in international courts and tribunals. In criminal proceedings, the identities of witnesses may need to be hidden in order to ensure their safety. And in interstate dispute cases, parties may not wish to reveal sensitive state information in presenting their cases and thus might opt for the submission of redacted documents. Such circumstances require that the right balance be struck between transparency and confidentiality.

The following question was accordingly put to BIIJ participants: What measures do your respective institutions take to ensure the optimal level of transparency? The ensuing discussion highlighted the various ways in which different courts and tribunals attempt to keep their work in the eyes of the public, but it also brought to light a number of concerns judges have about the interface between their institutions and the public.

With regard to the transparency of hearings, it was noted that interstate courts generally allow judges or the parties themselves to decide whether the oral proceedings should be confidential.6 In other courts, like the European Court of Justice (ECJ), human rights courts and international criminal courts, it is incumbent upon the courts – and not the parties – to decide if the hearings should be confidential, and, as a general rule, the public will be denied admission only in “exceptional circumstances” or if there are “serious reasons” to prevent attendance.7 A judge asked, does the public really have an interest in open oral hearings of proceedings involving only states? Some participants were inclined to think that the general public does have a democratic interest in knowing how their national state argues cases before international courts.

The WTO Appellate Body, at the request of parties, recently decided to open up its appellate hearings to the public in certain cases.8 There was initial resistance by some member states to make their arguments in public, as well as some trepidation about the loss of confidentiality. The biggest concern, however, was that the diplomatic negotiation of dispute settlement that had historically been part of proceedings under the General Agreement on
Tariffs and Trade (the predecessor to the WTO) could not be done successfully in public. But both the Appellate Body and many WTO members have since recognized the benefits that come with transparency – better understanding of the Body’s decisions by the public, and greater participation in the process of reaching it. The result is that there are now fewer objections to opening up hearings when requested by the parties.

As a human rights court, the ECHR has had to find a delicate balance between transparency and privacy. On the one hand, it has made an impressive effort to publicize its proceedings by broadcasting them via the Internet. This has allowed populations in countries across the Council of Europe to follow and understand cases with important implications for the protection of the rights guaranteed in the European Convention on Human Rights. If applicants ask to remain anonymous, the Court may decide that their case be referred to using only initials. When two parties decide to settle their dispute, the negotiations are also kept strictly private; a breach of confidentiality may result in the Court rejecting the case altogether.

While transparency is important in all international courts, it is perhaps particularly so in criminal tribunals where individuals are accused of heinous crimes. The media scrutinize such trials closely, as do victim communities and NGOs. The rapid dissemination of information means that unfavorable commentary about the proceedings can quickly “go viral.” The ECCC, which was just releasing its first judgment at the time of BIJI 2010, has come under harsh criticism for not being transparent enough. The Court operates under both international and Cambodian law, and the latter calls for confidential investigations and limited disclosures. However, the NGOs that observe ECCC proceedings want to ensure that it is in compliance with internationally recognized standards of due process. The prosecutors have accordingly disclosed some information and made certain documents public, but it has not been enough to satisfy these NGOs. Some criminal judges at the Institute characterized their courts as much more open. If information needs to be classified for reasons of safety or discretion, it is usually done so temporarily. “Parties may have their own approaches to confidentiality,” commented one participant. “But in the interests of the public and transparency, judges may override their decision.”

Transparency might also have a direct effect on the behavior of judges. One participant suggested that open proceedings are an “important safeguard,” not only for their fairness but also for the independence and impartiality of the bench. If judges know that they are being observed, he suggested, they may behave differently than if all proceedings took place without external scrutiny. In an article, one of the 2010 BIJI participants, Theodor Meron, quoted Lord Cullen as saying that “not being hidden from the public ear and eye is a safeguard against judicial arbitrariness.” On the other hand, it could be argued that judges in high-profile trials might be better able to carry out their role without the pressure or interference that can come with an open courtroom.

While transparency might seem a ideal to strive for in most circumstances, participants agreed that this cannot extend to judicial deliberations. These should be strictly confidential, although publicizing dissenting and separate opinions might shed light on this important part of the judicial process and help the public to understand how judges have arrived at their decisions.

Finally, it was noted that the practice of producing annual reports may enhance the transparency of the work of international courts and tribunals to the benefit of numerous actors, such as parent political bodies, parties (states, prosecutors, individuals), the general public and other stakeholders. Even those institutions that are not required to do so will often summarize the work they have accomplished in such a publication. These publications generally include statistics as well as a sophisticated narrative, in contrast to reports produced by some national courts where there appears to be a reluctance to provide any information to political bodies beyond
statistical data. Reports written and circulated by international judicial institutions generally serve the purpose of explaining their work to those who do not necessarily have legal expertise. They also serve to entice more support.

In addition, the presidents of many courts make annual addresses to parent political bodies, such as the UN General Assembly, the UN Security Council, the Assembly of States Parties (ICC), and the Meeting of States Parties (ITLOS). While this represents yet another channel through which the courts can increase the transparency of their work, it is also an exercise that carries risks, given the highly politicized context in which the addresses are delivered.

In concluding the discussion about transparency, one participant adopted the perspective of “an outsider looking in.” Striking the appropriate balance in judicial proceedings between openness and confidentiality may be “intuitive” for judges. But laypersons may not understand the reasoning behind a certain decision to protect identities or withhold information. In order to promote their reputations as fair institutions, encourage compliance with their judgments, and optimize their impact on constituencies, international courts should make sure that they communicate their actions and decisions effectively to the broadest public possible.

This comment led naturally into a discussion about the role of media in the outreach efforts of international judicial institutions. Several participants noted that journalists are rarely trained to report on international judicial proceedings and frequently fail to present these proceedings accurately or in a balanced way. The result is that the public may not perceive the proceedings of international courts and tribunals as fair.

One judge noted, in fact, that on the very day he traveled to BIJI 2010, he read an editorial in a local paper calling for the closure of his court. “At the same time that we are struggling to survive and asking for help,” said the judge in frustration, “here comes someone who, due to a lack of knowledge of basic issues relating to the court’s existence, says ‘Close it down!’” The failure of the press to understand the court’s central objective of ending impunity, and insistence on the institution’s “unfair” use of resources, could, he suggested, have a detrimental effect on his institution’s legacy.

Another participant cautioned, however, that a distinction must be made between partisanship and ignorance on the part of the press. Criminal courts, in particular, may become the target of criticism by communities that do not agree with the basic assumptions behind their mandates. Occasional negative press may not help an international court’s cause, he continued, but it is crucial that their work be kept in the public eye despite the potential dangers.

Participants then addressed a perennial question with regard to judges: should they explain their rulings so that the public understands the reasoning behind them, or should they let their judgments “speak for themselves”? There were mixed views about this matter. Some participants felt that under no circumstances should members of a bench ever explain their rulings, even if it is to rectify a misunderstanding created by the media. Others were not against the practice in principle, although they recognized that, as one judge said, “it is hard to express legal arguments in a way that is palatable to a media organization.”

Most international courts have resolved this issue by tasking certain staff with the preparation of information for the public. “You need within the institution a special type of communicator,” explained a participant, “who must be a lawyer and who must at the same time know about public relations and press work.” At the CCJ, for example, this role is carried out by an administrative unit that prepares a summary of judgments, approved by the judges before their release to the media. The WTO has taken similar steps, clearly recognizing that it is unrealistic to expect the media to digest immediately a 250-page decision and report on it adequately.
The organization ensures that short summaries of the key arguments of the parties, and decisions of the panels and the Appellate Body, are issued at the time the decisions are circulated, and that its website contains concise summaries of the procedural status and substantive decisions in every case. Criminal courts may find themselves the object of particularly heightened media attention when decisions are announced. “Our trials last two or three years, with judgments that run into the hundreds of pages,” explained a criminal judge. “So the presiding judge will read a summary of the judgment, making clear that it does not replace the judgment, which is the only authoritative version of the trial chamber decision. But the summary can be used by the media and others.”

Communication may be of particular importance for the IACHR, where the dissemination of judgments is sometimes part of the reparation measures called for in a decision. But printing long judgments in their entirety in local newspapers is not an effective way to communicate the content of important decisions, pointed out a judge. Consequently, the court “is now in the process of developing summaries, prepared by the secretary of the court, as well as providing a way to work with TV and radio so they can really reach the public.”

Several participants pointed out that the onus should not only be on courts to communicate well but also on journalists to report well. There should be journalists trained in reporting on international justice issues, ones who “have enough understanding of the complexities of international courts to put their work into perspective and communicate it properly,” one participant declared. Some others agreed that such journalists seem to be in short supply, the result being that international courts and tribunals do not always have the reputations they deserve as fair and just institutions.

Finally, participants were urged to consider with utmost care the actual and perceived fairness of their judicial operations, given that it is an important building block for the establishment of an international rule of law. As the late Thomas M. Franck stated, “International law, even more than any individual state’s legal system, needs [fairness as an] element of promotion of voluntary compliance because of the relative paucity of modes of compulsion.” While international judges, like any other judges, are primarily bound to apply the law, the inherent fairness of that law, as well as the fairness of its application, necessarily play an important part in maximizing the impact of international justice.
Notes

1. The ICJ revised its Rules of Court in 1978, which were subsequently amended in 2005. The ICJ further adopted Practice Directions in 2001, which were amended in 2009.

2. It was noted that the relationship of the African Court and the African Commission is not well articulated in the protocol establishing the former – it simply says that the work of the Court should “complement the protective mandate of the African Commission on Human and Peoples’ Rights.” Consequently, ACHPR judges must also take the lead in determining what this provision means in concrete terms. Cf. Article 2, Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of an African Court on Human and Peoples’ Rights, which was adopted on 10 June 1998 and entered into force on 25 January 2004.


4. The Coalition for the International Criminal Court describes the Review Conference, which took place in Kampala, Uganda from 31 May to 11 June 2010, thus: “ICC states parties, observer states, international organizations, NGOs, and other participants discussed proposed amendments to the Rome Statute and took stock of its impact to date, making the Conference a critical milestone in the evolution of the Rome system. More than 600 Coalition members played a central role in enhancing the dialogue on the Rome system and ensured that the voices of civil society were truly heard through a number of debates, roundtables and other events.” Cf. http://www.iccnow.org/mod-review.


6. See, for instance, Statute of the ICJ, Article 46: “The hearing in Court shall be public, unless the Court shall decide otherwise, or unless the parties demand that the public be not admitted;” Statute of ITLOS, Article 26(2): “The hearing shall be public, unless the Tribunal decides otherwise or unless the parties demand that the public be not admitted.”

7. See, for instance, Statute of the ECJ, Article 31: “The hearing in court shall be public, unless the Court of Justice, of its own motion or on application by the parties, decides otherwise for serious reasons.” See also Rules of Court of the ECHR, Rule 63(1): “Hearings shall be public unless … the Chamber in exceptional circumstances decides otherwise, either of its own motion or at the request of a party or any other person concerned;” Statute of the IACHR, Article 24(1): “The hearings shall be public, unless the Court, in exceptional circumstances, decides otherwise;” and Rules of Procedure and Evidence of the ICTY, Rules 78 and 79.


10. Formally known as The Convention for the Protection of Human Rights and Fundamental Freedoms, it was adopted on 4 November 1950 and entered into force on 3 September 1953.

11. E.g., A. B, and C v. Ireland, European Court of Human Rights (ECHR 2032, Application no. 25575/05), Judgment 16 December 2010.


13. Thomas M. Franck, Fairness in International Law and Institutions (Oxford: Clarendon Press,1995), p. 26. Franck was the Murry and Ida Becker Professor of Law Emeritus at New York University School of Law. Over his long academic career, he also, among numerous other activities, served as a judge ad hoc at the ICJ and acted as a session leader at BIIJ 2004.

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