The Future of International Courts and Tribunals: What Developments and Models Will We See in 20 Years?

The world is witnessing an important time in the life of international courts and tribunals. Some, such as the ad hoc criminal tribunals, are closing. Others, such as the ICJ and WTO AB, are seeing an increase in both the number and types of cases brought before them. At the same time, national jurisdictions are gaining capacity to handle international law issues. The impact of human rights and the impact on human rights are a significant part of these developments.

The final plenary session asked participants to reflect on the direction the international justice system is taking and should be taking as it seeks to create a more just world. This topic is particularly pertinent now, with much scholarly and civil society attention being paid to the legacy of the ICTY, ICTR, and the Special Court for Sierra Leone (SCSL) as they complete their mandates and transition into their so-called “residual mechanisms.” Judges from those courts and others with limited jurisdictions – namely the ECCC and STL – are perhaps particularly aware of what their institutions have (and have not) been able to accomplish, and what long-term effects their jurisprudence may have on international law. All international judges, however, are regularly confronted with questions concerning the effectiveness and relevance of their institutions. This session provided a framework to discuss issues critical to their future development and ultimate success.

Taking stock

The conversation began with an acknowledgment of some of the achievements and challenges of the ad hoc tribunals. “The ICTY and ICTR signaled the end of the notion of impunity,” declared a participant. And they also filled in the vacuum left by the Nuremberg and Tokyo tribunals by providing “a corpus of procedural and evidentiary law, which served as a basis for the ICC later on.”

It was noted that the historical period during which the ICTY and ICTR were created was special. “They were the product of a certain historical moment – the end of the Cold War and the beginning of Perestroika – when there existed a certain good faith and willingness.” A number of participants agreed that if political conditions then were such as they are now, the tribunals would never have been created.

As to the winding down of the non-permanent courts, some judges expressed dissatisfaction with the way in which residual mechanisms have been designed. Their shape has been driven by budgetary concerns, a judge remarked; “it is leaner with judges on a roster – there are no expenses when they are not sitting on a case, no pensions, many fewer staff.” But another judge suggested that there are negative trade-offs to such cost cutting. “The residual mechanism is a complete denial of what should be the ideal scenario for a group of international judges working together. They will work from home, maybe get together in court for a few days. I honestly believe that whoever is responsible for this strategy will have second thoughts and not follow the pattern.
in the future.” Indeed, added another criminal judge, the residual mechanism has serious implications for fair trial principles.

As to the question of legacy, participants were urged to think of it as an ongoing process. “International judges today are shaped by the legacy of what transpired in the past. And even though we talk about the ad hocs and the SCSL ending, the jurisprudence that they generated will be used in national courts for years and years to come.”

_What kinds of changes will be seen in the international judicial landscape?_

Participants had diverse notions of how both specific institutions and international judicial trends might evolve over the coming years. Some predicted that ad hoc institutions were a thing of the past; international organizations and States would content themselves with a single permanent criminal court, the ICC, and the other permanent institutions that address human rights violations and interstate disputes. One judge qualified this statement, observing that ad hoc arbitration bodies were becoming increasingly popular for some kinds of dispute resolution, and predicted that this would continue in the future.

It was predicted that the next four or five years would be determinative for the ECtHR. The Court has been relieved of much external pressure following its improved productivity and reduced backlog of cases. However, its continued success depends largely on factors outside of the Court, namely that States Parties take effective measures to prevent violations of the European Convention and that the Council of Europe assists in the national implementation of the Convention, as outlined in the 2012 Brighton Declaration.¹ The possibility that the WTO Appellate Body might act as a center of dispute settlement in the future for trade agreements across the globe was mentioned. And the prospect of the IACtHR becoming a truly regional court – with Canadian, US and pan-Caribbean membership – was described in hopeful terms.

However, if any States repeal their maintenance of that court, or if other serious challenges arise, it will not bode well for the IACtHR, especially as its parent Organization of American States finds itself at a historically weak point.

Several judges mentioned the important ongoing role that civil society plays in shaping the work of international courts and tribunals. When institutions are subject to political manipulation or public criticism by unsupportive States, NGOs often come to the rescue. As one participant phrased it, “there is sometimes saber rattling, but civil society will ensure that membership in our Court continues.”

Enhanced cooperation among international, regional and national judiciaries was indicated as critical for the future of the international justice system overall. “It is important to strengthen the intermediate judicial institutions with the view of improving justice delivery at national levels,” noted a judge. Another suggested that the UN persuade Member States to incorporate provisions into their constitutions so that any ruling of the ICJ or another international court would have the same status, and be enforced in the same manner, as a judgment of the States’ highest courts.

This point led to a discussion of the potential of advisory opinions by international courts and tribunals to disseminate international law at the domestic level. An interstate dispute judge noted that, in contrast to contentious jurisdiction, advisory jurisdiction “does not infringe on sovereignty but is instead a useful tool for States to sort out their differences.” A human rights judge concurred, observing that if his court is one day allowed to make advisory opinions, it would give rise to productive interaction with States Parties. Another human rights judge expressed the hope that advisory opinions from her court would “strengthen democratic institutions and concepts and promote development.” Although States in her region do not seem interested in such opinions at the moment, “better educated people are replacing the ‘fossils’; there is going to be more dynamism and willingness for change, without fear of change.”
The need for change in the area of international judicial elections was then raised. As one judge phrased it, “the election process needs radical reorganization!” Another participant felt it was critically important that age limits be placed on candidates for judicial positions; given the length of many international judicial terms, he argued, only individuals with the capacity to be productive for years to come should enter into the nomination process. A criminal judge expressed concern about the qualifications of judges. “We are a serious criminal institution and should be staffed and run by experts. What we should have is a properly constituted selection committee made up of experienced practitioners who know what is needed. Judicial elections are divisive in the US, and they are divisive in the international community.” A judge from a small country raised a different issue with the current election system. “It should not only be States with more leverage and diplomatic power that get their candidates on the bench. This is not how justice should be done.”

Discussion about the future shape of the international justice system ended with the reiteration of an idea expressed earlier in the institute: that the next generation of legal experts is certain to be more open and attuned to the needs of the system. “We are living, as suggested, in a human rights era,” said a participant. “We can see at the university level worldwide that students have an interest in international law. They realize that international cooperation is important, and they bring a keen interest in human rights law in particular.”

**The future of the ICC**

Many participants offered their thoughts on the future of the ICC, given its important place as the only current permanent international criminal body, now and probably for some time to come. One criminal judge suggested that if the ICC is to ensure its global relevance, it should establish regional seats in Africa, the Americas, and the Asia Pacific region. Another criminal judge quickly rejoined, “But who is going to pay for it? Establishing permanent ICC seats around the world, especially where there are no ongoing situations, would be hugely expensive. And the Assembly of States Parties (ASP) is already balking at the budget in one location.” This prompted a comment by a third criminal judge, who felt that the Court is being micro-managed by the ASP. However, it was acknowledged that the ASP had recently come forward to ask judges for their ideas on how the Court’s legal framework might be amended so as to accelerate proceedings.

Several participants suggested that the ICC should be more proactive in controlling its costs. One judge suggested that some of its practices are unnecessary. “I have a lot of sympathy for victim participation in proceedings, but it does slow down proceedings and it is expensive.” The ICC pre-trial procedures were also cited as questionable; the Court uses hearings, complete with defense counsel, to confirm charges instead of using written submissions as was practiced at the ICTY, ICTR and SCSL. “There should be no trial before the trial,” observed a judge. He went on to wonder, “Will the sponsors agree to continue funding the ICC at this very high level?” A judge with a military background tried to put such concerns into perspective, noting that building and deploying one F-35 stealth fighter costs twice as much as operating the ICC for one year. “Which benefits humankind more?” he asked.

A novel strategy for establishing stable and adequate funding for the ICC was then put forward. Inspired by the earlier description of how the CCJ is financed through a trust fund, a far-thinking judge suggested that the ASP call on corporations, whose profit margins can be impacted by international crimes, to contribute to the ICC’s budget. States are not the only entities that can support the Court, she urged; in some cases, private companies have more resources. And corporations have interests in ICC situations and cases, just as individual victims do.

In relation to political support for the ICC, one judge expressed his hope that, within 20 years, the ICC would have universal membership. A participant with long experience at the UN opined...
that there is a particular need for powerful States, especially the US, to ratify the Rome Statute and more generally live up to contemporary international legal norms. He reminded the group that the US government is still operating a detention center at Guantánamo, in flagrant violation of international standards. “If the US were subject to the jurisdiction of an international human rights court,” he declared, “the White House could be wallpapered with judgments against it.” However, he added, “unless every major player is on board, it will be difficult to have the world join hands in support of the ICC.”

Another participant disagreed with this point of view, however. “Given political attempts to influence the ICC, maybe it is better for the institution to mature before the US takes a hand in it.” She added that just because the US government is not currently a State Party, it does not mean that all Americans reject the court, and she urged Americans to voice their support. “The ICC is a miracle court. It would have been beyond the comprehension of anyone 20 years ago to believe it would exist. We need to build it up and ensure that no institutions compete with it.”

New kinds of courts

The session ended with a discussion of the new kinds of international courts that might become necessary in the years to come. These included institutions with jurisdictions over piracy, international economic crimes, cybercrimes, environmental disputes, human and drug trafficking and terrorism.

It was noted that during the early negotiations of the Rome Statute, both drug trafficking and terrorism were suggested for inclusion in the ICC’s jurisdiction; these crimes were eventually dropped, however. The gravity of drug trafficking and organized crime in Mexico was then described: more than 70,000 people have been killed as a consequence of organized crime, with the result that the Mexican State has received multiple complaints that it is unable to fulfill its human rights obligation to protect the life and personal security of its citizens. The IACtHR ultimately agreed with this assertion, ruling against Mexico in 2009 in a case involving the murder of women in Ciudad Juárez and Mexico’s failure to investigate and solve the crimes.

One judge wondered if a new chamber of the ICC could be constituted to address economic crimes and cybercrimes. Another suggested that the ICJ take on more cases involving environmental disputes between States. This would be helpful, added a judge; otherwise, the WTO will have to resolve all cases related to the economic aspects of environmental disputes. Several participants believed that creating a court to address terrorism specifically should be a priority. One judge noted that terrorism is endemic and will only increase as globalization increases. “We need a specialized international terrorism court, different from the ICC, so we can keep up with and ahead of international terrorists.” It was also noted that cross-border cases – such as those involving terrorism and environmental degradation – cannot be easily adjudicated by domestic courts. “Globalization will lead to more trans-border issues that call for an international or regional response.”

In closing, session leaders reminded participants that international courts should develop side by side with domestic judiciaries. “Whether we create new courts or use existing ones, we need to increase and enhance cooperation with domestic courts.” The idea of prevention was also raised. While it is critical that international courts and tribunals be as efficient, cost-effective, and responsive as possible to societies’ evolving needs, the best strategy for creating a more just world is for crimes, disputes, and human rights violations to be avoided in the first place. Increased communication across the international/regional/domestic divide, and among the judiciaries operating at those different levels, can also serve to strengthen prevention strategies.
Notes
