During the previous session, participants examined how political commitment to the rule of law has, in recent times, pushed forward the creation of international courts and tribunals. In the last sixty years, the rule of law has also found expression in the development of a specialized field of international law designed to protect human beings, that is, international human rights law.

Human rights courts and specialized quasi-judicial bodies have accompanied and sustained the normative development of international human rights law. Yet international courts with jurisdictions that specialize in other spheres of law, such as international criminal courts and interstate dispute courts, are also increasingly called upon to consider, interpret, and apply human rights norms. Participants were invited to reflect upon this phenomenon and its possible implications for the international legal system.

First, participants examined the applicability of international human rights law within their respective courts. Next, participants offered examples of cases in which human rights issues had arisen, or could arise in the future, within their jurisdictions as well as in domestic courts. The questions of how to resolve conflicting human rights interpretations, and how to avoid diverging jurisprudence, were then tackled. Finally, participants examined the issue of how international organizations as well as international courts and tribunals themselves deal with their own alleged human rights violations.

Participants began their discussions by examining the extent to which international human rights law is applicable in international courts other than those that were specifically established to address human rights complaints. Some courts already have a broad authority to consider sources of law from different fields of international law. As the “principal judicial organ of the United Nations,” the ICJ was granted general jurisdiction to consider a wide array of subject matters, including international human rights law, as illustrated by the Wall case. In this case, the ICJ was called upon to determine, inter alia, whether international human rights law is applicable in times of armed conflicts.

The Rome Statute of the ICC is very specific about the court’s duty with respect to international human rights law. It is bound to interpret and apply its law consistently “with internationally recognized human rights.” Historically, human rights law and humanitarian law developed separately, noted one participant, as “two different branches of law, two separate domains,” which replicated the traditional dichotomy between the law of peace and the law of war. The Statutes of the ICTY and ICTR perpetuated this dichotomy by principally covering violations of humanitarian law and not human rights law. By contrast, the ICC Statute “is unifying these bodies of law,” said a participant. “It is an effort to fight against fragmentation,” added another.

An important question for judges to consider is whether treaty interpretation rules enable any international court to refer to human rights norms.
In this regard, the 1969 Vienna Convention on the Law of Treaties, which embodies customary rules on treaty interpretation, stipulates:

A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. […] There shall be taken into account, together with the context: […] any relevant rules of international law applicable in the relations between the parties.19

However, international courts seem to differ on the extent to which these treaty interpretation rules could pull human rights norms towards courts that specialize in other spheres of international law. According to a participant, these rules clearly open the way to the use of human rights norms in his court, but other jurisdictions seem to be more hesitant to take the same stance. For instance, the constitutive instrument of the WTO dispute settlement system provides that this system:

serves to preserve the rights and obligations of Members under the covered [WTO] agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law. Recommendations and rulings of the Dispute Settlement Body [which include panel and Appellate Body reports] cannot add to or diminish the rights and obligations provided in the covered [WTO] agreements.20

These provisions are often interpreted to mean that only WTO law falls within the purview of the WTO dispute settlement system despite the applicability of “customary rules of interpretation of public international law,” which could make room for human rights norms.

International human rights standards might also constitute general principles of law or crystallize into international customary norms that are consequently binding on all states. “When principles and rights are enshrined in customary law, any judicial body is obliged to take them into account,” opined a participant.

Although not all courts are broadly or specifically mandated to examine human rights norms, participants agreed that parties have raised or are likely to raise human rights issues “in all of them.” While human rights norms could be relevant to the substantive subject matter of many disputes, they could also help assess the fairness of courts’ procedural rules.

Participants offered several examples of cases in which human rights norms had infused the substantive reasoning of decisions by different international courts. International criminal jurisdictions often find inspiration in international human rights law. Participants observed that the ICTY and the ICC refer to human rights instruments and decisions of the ECHR and IACHR, especially those relating to due process rights and the rights of the defense. The ICTY has also had to refer to human rights norms in interpreting customary law on crimes against humanity, as has recently been the case for the crime of “persecution,” for instance. With regard to interstate dispute courts, it was noted that that the ECJ regularly refers to the European Convention on Human Rights and cites decisions of the ECHR. It was also noted that human rights standards could be relevant to ITLOS cases addressing the rights of crews of detained ships, and to cases before the WTO Appellate Body that bring up economic and social rights.

Participants then pointed to several cases in which domestic courts used international and foreign law on human rights issues, for example on the issue of the death penalty. A participant emphasized, “Dialogue between international and domestic courts is important in the human rights field. International human rights law cannot be successful
at the international level if it is not coordinated at the domestic level.”

Further questions arose concerning the treatment of human rights law by all of these diverse jurisdictions. “What will happen if two different courts interpret human rights norms in different ways? There are no mechanisms to deal with this situation. Is that a problem? Is there a risk of fragmentation?” asked a participant. “And what weight should courts ascribe to human rights in the event of a conflict of norms?” inquired another.

A participant from a human rights court welcomed the fact that other judicial institutions have begun to draw upon the practice of human rights courts, but “in doing so, courts interpret and develop human rights law. How far should they go?” He then turned to participants from other courts and asked, “What would you do if you disagreed with principles that are well established in the human rights field? Avoiding legal uncertainty and conflict is the main difficulty.” Another countered, “Is legal certainty very relevant in international human rights law? Better protection is always welcome. Cases of conflicts are very rare.” It was also noted that there were fewer problems of consistency between ECJ and ECHR decisions since these two courts have decided to hold regular meetings to discuss legal issues of common concern.

If human rights issues could surface in any international court, then should human rights background be systematically taken into consideration in judicial selection processes? Should it be reflected in the composition of benches at the international level? Several agreed that human rights expertise or training is advisable for all members of the international judiciary if unintended and unwarranted fractures in human rights norms are to be avoided. Although human rights expertise “appears” on the bench of many international courts, it does not seem to be a formal requirement for most of them. It was noted that the most common requirement for an international judge is to be a highly qualified international lawyer.

“Is understanding human rights issues part of the standard for being a highly qualified international lawyer? The answer would seem to be ‘yes,’” stated a participant. Participants also observed that four of the current judges of the ECJ are former judges of the ECHR.

A participant then raised questions about the universality of international human rights law. “Fragmentation of human rights norms presumes that human rights norms are universal, cutting across culture,” he said. In his view, regional cultures from developing countries do not seem to be properly taken into account in the formulation of human rights norms at the international level. “On the contrary,” responded a participant, “smaller states have more representation than larger ones in most human rights bodies by virtue of the principle that each state is entitled to one vote.” Others pointed out, however, that smaller states often have less “in-house” expertise than larger ones, and are more vulnerable to the economic influence of larger states in treaty negotiations. So in the end, they often have a weaker voice in human rights debates than more powerful nations.

Next, participants turned to the responsibility of international organizations, such as the United Nations, to respect and uphold human rights norms.

First, participants asked, does international human rights law bind international organizations such as the United Nations? A participant exclaimed, “Isn’t it obvious? The United Nations created all these rules! A body that creates human rights norms must be bound by them.” Another emphasized, reading directly from the UN Charter itself, that one of the purposes of the United Nations is “to achieve international co-operation […] in promoting and encouraging respect for human rights and for fundamental freedoms for all […]”21 “That participant also reminded the group that the U.N. secretary-general had issued a bulletin reaffirming the applicability of humanitarian law to U.N. peacekeeping forces in 1999.”22
However, participants noted that there is currently no mechanism within the United Nations system that addresses specifically its responsibility for alleged human rights violations. Arbitration is the ordinary venue for individuals whose rights have been violated by the United Nations or its subsidiary organs, but some participants expressed reservations about the adequacy and efficiency of this dispute settlement method for each and every type of complaint or dispute. Moreover, alleged human rights violations by the United Nations or its subsidiary organs are increasingly the subject of judicial attention outside the confines of the United Nations system and arbitration proceedings, as some participants noted. In their view, the United Nations should thus take the matter into its own hands and establish its own mechanism to settle these claims.

Other judicial fora within international organizations, such as administrative tribunals, seem to be reluctant to consider international human rights law in their interpretation of staff rules and regulations, according to a participant who regretted this stance. In his view, administrative tribunals should be able to use human rights standards as legitimate and persuasive interpretive aids.

Participants then examined the responsibility of international courts to respect human rights. Participants were asked, what happens if international courts are themselves the human rights violators? Thus far, human rights questions have arisen in relation to the ICTY and ICTR, which are subsidiary organs of the United Nations. Such questions have also cropped up in another court, the ECHR, which has received applications alleging violations of fair trial rights in proceedings taking place in “peer institutions,” namely the ICTY as well as the Court of First Instance and the European Court of Justice. The ECHR found them inadmissible, however.

Participants analyzed how the ICTY and ICTR have handled allegations of human rights violations in their own criminal proceedings. The respective governing instruments of the ICTY and ICTR guarantee the protection of certain human rights of the accused, such as the right to be tried without undue delay, and the right to have the assistance of counsel. Yet these instruments do not provide remedies for the infringement of these human rights norms by the prosecutor, by chambers, or by other organs of the courts. Nor do they provide for mechanisms to redress these infringements.

Confronted with this problematic situation, the ICTY and ICTR took it upon themselves to remedy the human rights violations suffered by accused persons in the course of their criminal proceedings. In some cases, their sentences were reduced. When this was not possible, monetary compensation was awarded by the court and paid by the United Nations.

“Should this trend be supported?” inquired a participant. Several agreed that it is important to compensate victims for human rights violations committed by international tribunals, like the ICTY or ICTR, even though their governing instruments do not fully regulate this matter. There was general agreement among participants that arbitration within the United Nations system is neither appropriate nor sufficient in these circumstances.

Then, participants asked, who should take on the duty of compensating victims for human rights violations committed by a court? Courts themselves or a distinct body or jurisdiction?

There was disagreement on this point. One participant asserted that it is incumbent upon the United Nations to settle claims of human rights violations against its subsidiary bodies, including the ICTY and ICTR. In his view, the United Nations needs to establish a new mechanism to settle these claims, in addition to any other claims of human rights violations arising from its operations. He explained, “Certain faults are attributable to the prosecutor. But what if the wrongdoing is attributable to the chamber? I see a problem of consistency here. Although it is an embarrassing and difficult matter, we can’t let this go
Without consequences. The current situation is not satisfactory.”

In response, several participants countered that courts are already entrusted with the inherent power to deal with their own alleged human rights violations. Thus, judges themselves can address the supposed violations of the prosecution, chambers, or other organs of a court. Participants wondered whether the proposed mechanism should tackle the human rights responsibility of chambers, in particular, so that an outside entity could be empowered to consider any alleged violation on their part. One participant disagreed. “Is it necessary to change the situation in relation to judges? Why can’t judges be judged by themselves?” In his view, the judges of a court should be able to make decisions about the wrongdoing of their own colleagues and should be trusted to do so, and therefore, a separate mechanism should not be necessary.

Courts should interpret their inherent powers cautiously, responded a participant. “Courts usually hesitate to create for themselves new recourses and remedies. I am not sure that the use of courts’ inherent powers is the right way to approach this matter. I understand why this route was taken by the ICTY and ICTR, but an alternative mechanism within the United Nations would have been preferable, in my opinion.” Another participant retorted, “In the absence of mechanisms, either you let a right be violated without remedy or you imagine a solution. But I would welcome a new mechanism.”

Finally, as a result of the far-reaching discussions during this session, participants appeared to agree that there are more advantages than disadvantages associated with the existence of multiple judicial fora dealing with human rights norms. “At least these issues are being heard,” stated a participant. But they also wondered if the increasing use of human rights norms across international courts signals a pressing need for the creation of new human rights courts or mechanisms. Several were concerned that some critical human rights issues, which fall outside the purview of most human rights courts, currently remain inadequately addressed or unresolved. This is the case of alleged human rights violations attributable to international organizations, for example.

In this regard, it was noted that a general responsibility mechanism addressing complaints of human rights violations by the United Nations and its subsidiary organs might come as a result of the work of the International Law Commission on the responsibility of international organizations. “A task force should be set up to determine the policy of the United Nations on this question,” a participant suggested.

Notes


10. See, for instance, “Harmonizing International Politics with Fundamental Human Rights and the Rule of Law: the Kadi judgment,” p. 42. See also the following cases from the ECHR in relation to United Nations peacekeeping operations, which were found inadmissible: *Bhabra and Bhabra v. France and Saranrai v. France, Germany and Norway*, Grand Chamber, Decision as to the Admissibility of the Application no. 71412/01 and Application no. 78166/01, 2 May 2007; *Kasumaj v. Greece*, First Section, Decision as to the Admissibility of Application no. 6974/05, 5 July 2007. See also the following case in relation to an international civil administration in the territory of the respondent State, that is, the High Representative in Bosnia and Herzegovina, whose establishment was endorsed and authorized by a UNSC resolution under Chapter VII. The applications were found inadmissible, on the basis of the same reasoning as the one used in the above-mentioned cases: *Beri and others v. Bosnia and Herzegovina*, Fourth Section, Decision as to the Admissibility of Application no. 36357/04, 16 October 2007.

11. Consider, for instance, the following application alleging violations of fair trial rights by an administrative tribunal that has been brought before the ECHR, but it was found inadmissible: *Bošin v. 34 Member States of the Council of Europe*, Fifth Section, Decision as to the Admissibility of the Application no. 73250/01, 9 September 2007. In this case, an individual filed an application before the ECHR against member states of the European Organization for the Safety of Air Navigation (Eurocontrol) claiming violations of fair trial rights by the International Labor Organization Administrative Tribunal (ILOAT). The ILOAT had been granted “sole jurisdiction in disputes between the Organization and the personnel of the Agency, to the exclusion of the jurisdiction of all other courts and tribunals, national or international.”

12. As for the ICTY, see the following decisions by the ECHR declaring the applications inadmissible: *Milošević v. the Netherlands*, Second Section, Decision as to the Admissibility of Application no. 77631/01, 19 March 2002; and *Naletilić v. Croatia*, Fourth Section, Decision as to the Admissibility of Application no. 51891/99, 4 May 2000. With regard to the Court of First Instance and the European Court of Justice, see, for instance, the following decisions by the European Court of Human Rights declaring the applications inadmissible: *Senator Linex GmbH v. Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, Sweden and the United Kingdom*, Grand Chamber, Decision as to the admissibility of Application no. 56672/00, 10 March 2004. See also *Emsa Sugar N.V. v. the Netherlands*, Third Section, Decision as to the Admissibility of Application no. 62023/00, 13 January 2005. It was also noted that fair trial rights, as defined in Article 6 of the European Convention on Human Rights, are sometimes raised before the ECJ to challenge the fairness of proceedings that had previously taken place in the Court of First Instance.

13. See *Jean Bosco Barayagwiza v. The Prosecutor*, Appeals Chamber, Case No. ICTR-97-19-AR72, Decision (Prosecutor’s Request for Review or Reconsideration), 31 March 2000, paras. 74-75, and *The Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza and Hausen Ngtee*, Trial Chamber I, Case No. ICTR-99-52-T, Judgment and Sentence, 3 December 2003, paras. 1106-1107. In this case, the sentence of the accused was reduced from life to 35 years of imprisonment to remedy several human rights violations including a lengthy detention without an indictment being brought against him. See also *Laurent Semanza v. The Prosecutor*, Appeals Chamber, Case No. ICTR-97-20-A, Decision, 31 May 2000 and *The Prosecutor v. Laurent Semanza*, Case No. ICTR-97-20-T, Judgment and Sentence, 15 May 2003, paras. 579-582. In this case, the Appeals Chamber found that prior to his surrender to the Tribunal, the accused had suffered a violation of his right to be informed promptly of the nature of the charges against him. The accused’s sentence was subsequently reduced by a period of six months. Finally, consider *Juvénal Kajelijeli v. The Prosecutor*, Appeals Chamber, Case No. ICTR-98-44A-A, Appeal Judgment, 23 May 2005, paras. 251-255 and 320-324; in this case, the Appeals Chamber found that Mr. Kajelijeli had suffered from several serious human rights violations during his arrest and detention. The Appeals Chamber set aside Mr. Kajelijeli’s two life sentences and fifteen years’ sentence imposed by the Trial Chamber and converted them into a single sentence consisting of a fixed term of imprisonment of 45 years. For a discussion of ICTR and ICTY cases, see Guido Acquaviva, “Human Rights Violations before International Tribunals: Reflections on Responsibility of International Organizations,” (2007) 20 Leiden Journal of International Law 613-636.

14. *The Prosecutor v. André Rwamakuba*, Trial Chamber III, Case No. ICTR-98-44C-T, Judgment, 20 September 2006, in which the accused, Mr. Rwamakuba, was acquitted. Mr. Rwamakuba was subsequently awarded US$2,000 in compensation for the violation of his right to legal assistance during the first months of his detention, which resulted in a delay in his initial appearance. See *Trial Chamber III, Decision on Appropriate Remedy*, 31 January 2007 and Appeals Chamber, Decision on Appeal against Decision on Appropriate Remedy, 13 September 2007.