International Justice: In Whose Name?

The Brandeis Institute for International Judges traditionally includes a session that allows participants to take their conversation to a higher plane of reflection while still remaining anchored in the realities of their judicial work. At the 2013 session, the group explored the basis of the legitimacy of their institutions. It is clear that international courts no longer function solely as a dispute resolution mechanism between consenting States; they have acquired more autonomy and scope over the last few decades. What, then, are international courts really for? On whose behalf do they speak? And how do such questions affect the day-to-day work of judges?

The first part of the discussion used a recent article by Armin von Bogdandy and Ingo Venzke as a point of departure. The authors suggest that the disconnection of international courts and tribunals from the usual systems of regulation, oversight and accountability found in the national context is a source of concern and skepticism. Domestic courts speak the law in the name of the people while invoking the democratic sovereign. But in whose name exactly, do international courts and tribunals render decisions? Many questions have consequently been raised about the source of the authority of these courts and tribunals and their relation to notions of democracy.

Participants eagerly debated these points and others raised in the article. One judge observed, “It is a fact that a democratic process is not generally followed by States in establishing courts. It has been done in a way that the interests of States are prominent in the selection of judges and in control over the courts.” Another participant agreed with the authors that a global legal system should be a common goal: “It is a necessity for States to have increasingly harmonious legislation, applying within States and across borders.” Still another questioned the basic relationship between democratic forces and legal systems. “In my own country, the legal order is enshrined in a constitution that was based on the will of the people 100 years ago. If a law was enacted in the name of ‘the people,’ who are they? It is largely a fiction to refer to such an entity.”

Some participants contended that there are essential differences between how national and international legal systems are legitimated. A participant with both domestic and international judicial experience characterized the international justice system as having a certain “limitlessness of judicial function.” Another qualified this viewpoint, adding that “international judges have a broader responsibility for creating their own kinds of limits than domestic judges, whose functions may already be circumscribed.”
The question then arose, if international courts and tribunals do not have their legitimacy established through democratic processes, how is their authority established? BIIJ participants brought the experience of their respective institutions to bear upon the discussion.

One judge began his remarks by distinguishing between legality and legitimacy. He assumed that all international courts and tribunals operate within their given legal frameworks and cannot alter them. But institutions can make conscious changes in their activities in order to increase their legitimacy. As an example, the efforts of the IACtHR were described: 1) The Court holds public hearings, often transmitted live through television and the internet; 2) it also holds hearings around the Latin American region, instead of always at its seat in Costa Rica, so that thousands of people have direct contact with its proceedings; 3) the IACtHR has forged close connections with the media, not only for publicity but also so that the judgments of the Court can be explained to the public; and finally, 4) the Court engages in jurisprudential dialogue with other regional and international courts, and also with domestic courts when possible. The result of these efforts, clearly shown through polls, is that people in the region know about the IACtHR and support its work.

One judge noted the absence of a central authority that ensures compliance with the judgments of most international courts and tribunals. This is markedly different from the domestic context, where flouting a judgment could entail serious consequences. Why, then, do parties comply with the judgments of an institution like the ICJ? Several reasons were suggested, including the credibility and moral authority of the Court, the inherent fairness of its judgments, and apprehension of isolation from the international community for non-compliance. “In the eyes of the world, countries feel obliged to comply,” explained a judge.

The experience of the WTO AB was then described. “Its story is different,” claimed a participant. It has earned legitimacy through deciding a very large number of cases since its establishment 20 years ago – 119 at the time of BIIJ 2013. It has also consistently rendered decisions within its 90-day time limit. “We should think of legitimacy as being earned through judgments rather than through the design of a court,” continued the participant. It was also noted that the WTO AB has a 90% compliance rate with its judgments. Furthermore, failure to follow the provisions of WTO AB judgments carries consequences, as countermeasures may be put in place against the non-complying party.

The conversation then turned to international criminal courts and tribunals and in whose name they perform their work. The view of the ECCC was very clear: “We regard as our primary audience the ordinary people of Cambodia, and only second the international community, jurists and academics.” This priority can be clearly seen in the way the Court’s judgments are written – in a linguistically accessible manner for easy translation, with the “jurisprudential rigor” confined to the footnotes. The ECCC also makes a conscious effort to harmonize its jurisprudence with that of other criminal courts so as to avoid the fragmentation of norms, thereby contributing to the global legal system suggested by von Bogdandy and Venzke in their aforementioned article.4

The ICC is also very clear about the primary constituency of its work – the victims of the crimes under the Court’s jurisdiction. “Those who are familiar with how victim participation works at the ICC will know that the international community went full steam ahead,” said a participant, referring to its provisions for legal representation of those designated as victims of the persons standing trial. This same participant wondered whether victims have not been given too much leeway, and whether “judges might have overly interpreted the legal framework regarding victims.” There is also a concern that States, in implementing legislation to domesticate the various provisions of the Rome Statute, might not be able to “deliver” to victims what the ICC does.
Not all criminal judges agreed, however, that their institutions render judgments solely in the name of victims. “Courts should not be accountable just to individuals,” declared one, “but to humanity as a whole.” Another judge added that, ultimately, international courts are created to serve the international community. “And if that community comes to the conclusion that the institution does not serve its purpose, then, in the long term, that would be the end of it.”

The first part of the session ended with a philosophical reflection by a participant with broad international judicial experience that had included service on the bench of an international criminal tribunal. He noted the importance of the conscience of judges, day in and day out. “When you are sitting on a trial with four accused, where the decisions are breathtakingly complicated, or when a young legal officer comes in late at night and asks, ‘Judge, what are we doing?, you struggle with that. Who am I, an individual, to decide whether someone should be found guilty or not guilty, based on the testimony of hundreds of witnesses about events that took place years earlier?” But he concluded that this is part of the job that international judges have been given: “We have been entrusted to apply the law in an independent and impartial way, with fairness and independence.” Another participant offered his own interpretation of their mandate: “Judges are only responsible to their own sense of rectitude, of what is right and wrong. We have to recognize that.”

The group then turned from general questions of authority and legitimacy in the sphere of international justice to a challenge faced by international criminal courts and tribunals in particular – the question of whether they are effective in bringing about a justice that is meaningful for the victims in whose name – at least in part – they speak.

A criminal judge responded to this question by noting that the kind of individuals who commit the crimes addressed by international criminal tribunals cannot be expected to show remorse. “No normal person behaves like that. They have no empathy; so...
many are sociopaths or have a narcissistic personality disorder.” But another participant pointed out that one of Prince Zeid’s assertions is exactly the opposite – that normal people, given a particular combination of circumstances, can become capable of heinous acts (see sidebar, previous page).

Another criminal judge disagreed that the expression of remorse was so very rare. He related the statement of a war criminal convicted by an international tribunal who had recently been granted an early release from prison. “He said that the greatest relief he experienced was when he was given the opportunity not only to plead guilty but also to express remorse for what he was responsible for. He had been nobody, and when given power he transformed himself into a beast. For that he showed regret.”

A third criminal judge brought a slightly different interpretation to the expression of remorse. She agreed that war criminals are a particular kind of person, but not because they are necessarily abnormal – they are instead dangerous, as they may continue to command a loyal following. She noted that among the conditions for early release of those persons convicted by her court is the requirement that they “make amends through public declarations and reach out to victims.” This is not just for humanitarian reasons, she explained. If convicted criminals have issued a public statement of their wrongdoing, even if it is only symbolic, it is on record and their followers will hear of it.

Several participants agreed with Prince Zeid that an apology or expression of remorse by perpetrators does something unique for victims. A judge said that he was proud of his own government for having made a public apology to members of his country’s indigenous population for human rights violations they had suffered over the years. The restorative impact on victims of telling their stories in front of truth and reconciliation commissions was also described. A judge who had served for more than a decade on a criminal tribunal offered his viewpoint: “My experience is that many witnesses are not seeking a pound of flesh, nor a particular number of years as a sentence. They are happy to be given the opportunity to be heard.”

But the idea that international criminal proceedings consider victims their primary constituency was not shared by all participants. “Coming from the UN system,” said a judge, “I tend to disagree that international courts and tribunals are created out of concern for the victims. Chapters VI and VII of the UN Charter provide that the Security Council can take measures to preserve and create peace and stability.” Another judge concurred: “I don’t think that the ICTY and ICTR were created in the name or interest of victims. I think the two tribunals were the result of the shock that permeated the international community when, less than 50 years after the Second World War, such atrocities were being committed, one in Europe and one in Africa.”

A number of participants went on to articulate their views that the interests of international justice extend beyond individual victims to the larger societies in which crimes or violations have taken place. “Especially when you have international violations of human rights, or crimes of a magnitude that is regarded by the international community as a gross violation, these crimes offend everybody, not only victims. So healing the society has to be expressed through the role of the court.” One judge went so far as to say that there are three interests to be taken into account: “victims, societies, and the future.” Another participant returned to the importance of remorse, noting, “Not only expressing remorse but also telling those stories in other ways can help people in the future understand how vulnerable their societies may be to the recurrence of such crimes.”

Using a multi-pronged approach to justice applies not only to criminal tribunals but also to human rights courts where systemic problems are often identified and addressed through individual cases. One participant noted that the IACtHR includes in its judgments many measures characteristic of transitional justice mechanisms, in order “to compensate the affected persons and also
heal that society.” For example, public apology ceremonies may be ordered, as well as truth-seeking activities such as criminal investigations or truth commissions, and changes in public policy or law so that future violations of a similar nature may be avoided. The ACtHPR, though a much younger court, is seeking to have the same kinds of impacts through its judgments, and also through outreach activities, including outreach to domestic courts. It is critical to help the average person access institutions of justice by making the application process simple and providing legal counsel where necessary. Said one participant, “We need to make sure that people not only reach the door of the palace of justice but can also pass through.”

As to the long-term effectiveness of international criminal justice, there were some expressions of frustration among participants. Said a former criminal judge, “When sitting and hearing testimony, I thought that one of the things we were doing was trying to make certain that something like that never happened again. I thought that was part of our reason for functioning. But as matters unfolded in Syria, the entire world could see what was going to happen and nothing was done, because the political interests of the major parties prevented the obvious action.” Another criminal judge expressed his doubts about the deterrent effect of criminal proceedings. “I know in my heart that deterrence is not easily evidenced. But there is no empirical proof, after a lot of study, that certain kinds of sentencing actually work to deter crimes.”

The discussion ended with two general statements about the status of justice in human society. One participant bemoaned the fact that we never seem to learn from our mistakes. “Why is it so difficult to transfer wisdom from one generation to another?” he asked rhetorically. A colleague agreed, noting that humankind sometimes seems incapable not only of learning from the past but also from the present. He nonetheless offered a more optimistic view. “We seem to have an unreasoned hope for the future. It is part of the human condition.”

Perhaps, in the end, it is in the name of this “unreasoned hope” that international justice is enacted.
Notes


2. *Id.* at 15.

3. *Id.* at 41.

4. *Id.*


6. *Id.* at 3.