Participants began the institute by exploring the multifaceted, at times tempestuous, and yet indispensable relationship that exists between politics and international justice. Depicted by a participant as an “interesting and attractive but also sensitive and dangerous” topic, this subject matter elicited numerous reflections on the part of judges. First they examined the impact of politics on the creation and use of international courts and tribunals, before turning to the connection between international criminal justice and peace.

Everybody agreed that justice must resist political interference at all costs, that “justice must be independent and impartial.” Participants noted, however, that international courts and tribunals would not exist in the absence of a strong political will. In recent years, political support has spawned the unprecedented expansion of international judicial mechanisms in all spheres of international law. Furthermore, each time political organs decide to create tribunals, they bolster and breathe new life into the culture of the rule of law – *la culture de l’État de droit* – at the international level. In creating international courts and tribunals, politics and justice lean toward the same goal, that is, the establishment of checks and balances on power that are independent and impartial.

At the same time, national as well as international politics may complicate the execution of international justice at various levels, a situation that is illustrated by the difficulties of creating and establishing the Special Tribunal for Lebanon (STL).

The STL was established to prosecute “persons responsible for the attack of 14 February 2005 resulting in the death of former Lebanese Prime Minister Rafiq Hariri and in the death and injury of other persons” and for “other attacks that occurred in Lebanon between 1 October 2004 and 12 December 2005,” which are “connected” and “of a nature and gravity similar to the attack of 14 February 2005.” Considering that these crimes appeared to be politically motivated, it was believed that a court of an international character would be better suited to deal with this matter than Lebanon’s national judiciary. Following the assassination of Rafiq Hariri, the idea of an international response garnered broad support in Lebanon and abroad, and Lebanon requested the assistance of the United Nations in establishing a special tribunal.

However, the 2006 war in Lebanon and national Lebanese politics ended up complicating this process. The Tribunal was to be established by a bilateral agreement between the United Nations and Lebanon. The bilateral agreement was negotiated and signed swiftly by Lebanon and the United Nations, but an internal political crisis broke out in Lebanon after the war and led to an impasse in the parliamentary process, despite the continued and explicit support of a majority of Lebanese parliamentarians. The United Nations Security Council, acting under Chapter VII of the United Nations Charter, nonetheless decided to push forward the creation of that Tribunal. The judges of the STL began their work in March 2009.
On the one hand, international politics may facilitate the establishment of international courts and tribunals. On the other hand, it may also play a role in restricting the scope of jurisdiction of courts whose establishment it had supported. For instance, participants observed that the subject-matter jurisdiction of the STL was limited to “ordinary” or “common” crimes under Lebanese law, and that crimes against humanity were excluded from its jurisdiction because “there was insufficient support for the[ir] inclusion” by “interested members of the Security Council.”

Participants then embarked upon a thought-provoking analysis of the complex relationship between peace and justice.

The majority of participants agreed that in designing post-conflict mechanisms, the interests of both peace and justice should be taken into account by political authorities. “It is now widely understood that it is no longer acceptable to identify peace and justice as a dilemma or as contradictory ideas: There can’t be lasting peace without justice,” said one participant. In the last fifteen years, a new “culture” has emerged to end impunity, illustrated by the growing number of ratifications of the Rome Statute across the globe. But he also cautioned that this new culture is “fragile,” and needs to be protected: “It cannot be taken for granted.” Today’s question is “how to ‘sequence’ steps toward justice and peace, or how to coordinate peace and justice, and to determine the most appropriate mechanisms depending on the circumstances.”

Participants also commented on the Nuremberg Declaration on Peace and Justice, which epitomizes this new culture to end impunity. In particular, the first principle of the Declaration enshrines the idea that peace and justice are complementary: “Peace and justice, if properly pursued, promote and sustain one another. The question can never be whether to pursue justice, but rather when and how.” The second principle provides that the most serious international crimes – notably genocide, crimes against humanity and war crimes – “must not go unpunished” and that “amnesties must not be granted to those bearing the greatest responsibility” for those crimes. Participants agreed that the Nuremberg Declaration constitutes “an important step in recognizing that amnesty is no longer acceptable.” One participant also mentioned that as a judge, he had found “inspiration in the fact that a group of politicians at the UN considers that peace restoration and courts go together, and that the impartiality of judges is an essential part of the peace process.”

While the majority of participants agreed that peace and justice deserve equal consideration in post-conflict mechanisms, it was more difficult to agree on the extent to which peace should play a role in courtrooms. Should the politics of peace affect judicial decision making? “Judges and courts should not be hidebound by the concept that there must be peace with justice,” stated one participant. In the view of another, the constitutive instruments that create international criminal courts are political messages conveyed to judges, but “the judges’ duty is to apply the law.” He added that “what is under our control and what makes us so strong is that we have an instrument to apply and that is the law. Judges shouldn’t get involved in political considerations.”

Another participant maintained, “The real problem is whether courts have to behave differently […] because of the political goals the Security Council wants to achieve.”

It was noted that prosecutors probably play some role in coordinating peace and justice by exercising their discretion to indict or not, or by delaying indictments and arrests. At the same time, it was also noted that judges might have to decide questions of a political nature, such as the question whether a suspect’s custody or release pending trial is warranted even if it risks destabilizing a country. Two participants reminded the group that a political “excuse” of this nature had been used to delay the capture of Radovan Karadžić for over ten years after his indictment by the ICTY.
The influence of politics on prosecutorial discretion arouses criticism in the civil society, a participant reported, especially in relation to the ICTR and Rwanda. “Prosecutorial discretion also impacts on the question of who is or is not a victim,” one participant said. He explained that in Rwanda, “Tutsi victims have seen justice because the most important perpetrators are being tried by the ICTR, but there is no prosecution against Tutsis who are suspected of having committed crimes against Hutus. Absence of prosecution of Hutu complaints by the ICTR may be an impediment to lasting peace and reconciliation because a segment of the community is ignored or their complaints disregarded. This has been to some extent the result of prosecutorial discretion.”

One of the most difficult yet important questions asked during the institute was whether international courts and tribunals could themselves bring about peace. Participants could not agree on the extent to which international criminal justice can achieve this goal.

One participant observed: “peace doesn’t always lead to a just conclusion and justice doesn’t always lead to peace.” Asked another participant: “What do victims want? They want justice. What does it mean? First, they want the perpetrators to be identified, an acknowledgment of the wrong, an apology, and lastly, compensation.” What if those bearing the greatest responsibility in the commission of the most serious international crimes do not get indicted? What if the “winners” do not get prosecuted for their own alleged war crimes? One participant opined that peace might sometimes be better achieved with proper reparation measures for victims than with a multiplicity of convictions.

Participants agreed that courts might facilitate reconciliation and peace in the long run by providing a historical record of horrendous crimes, but they cautioned that the fact-finding capacity of courts is always limited by the relevance of the evidence. Hence, indictments and convictions can only partially depict the events that occurred in a war-torn country. As one participant said, “We are asking a lot of international criminal courts because we are looking to them for lots of different purposes.” He explained, further, that truth and reconciliation commissions are probably better equipped to provide comprehensive historical records than criminal courts whose primary function is to try individuals.

One participant mentioned that the Nuremberg trial helped achieve peace and reconciliation in Europe in a way that the ICTY still hasn’t been able to do for the former Yugoslavia. “It is interesting to see how few Nazi Germans were prosecuted and how successful peace and reconciliation was.” Unlike the case of World War II, however, one participant opined, “It is not clear-cut who has lost and who the bad guys were” in the former Yugoslavia. As he noted, “In most cases, those being held criminally responsible in The Hague continue to believe that what they did was right.” The same applies to large parts of the population of the countries concerned. Hence, peace and reconciliation are only going to be harder to achieve in such circumstances, despite a far-reaching “judicialization” of the conflict.

Participants then examined the relationship between peace and justice in light of contemporary events in Uganda. Should the ICC investigations on alleged crimes committed by the Lord’s Resistance Army in Uganda, upon its government’s own referral, be suspended in order to reach a peace agreement after over twenty years of a devastating war? It was noted that the Rome Statute does not allow states to withdraw from the ICC’s jurisdiction once they have referred a situation on their territory to that body. If Uganda wants to draw back from the ICC, it now has to challenge the court’s jurisdiction by arguing that it has the capacity and willingness to prosecute those crimes and that its available domestic proceedings satisfy the complementarity principle. While the Security Council may defer ICC investigations and prosecutions for 12 months by a resolution under Chapter VII of the United Nations Charter taking into account the interests of peace and security, the ICC prosecutor, on his part, is entitled to refuse to initiate or to proceed with investigations and prosecutions “in the interests of justice,” but not in the interests of peace."
Yet many victims in Uganda seem to be inclined to resort to traditional reconciliation methods, in the view of one participant. “Those traumatized for fear that justice will continue their suffering are saying that even if people get away with it and it brings peace, let’s bring peace,” he said. “Should courts take into consideration what the people seem to think is necessary?” Another participant added: “If we employ traditional methods, is that any less a justice process than other processes that are employed?”

Although there had been disagreement during the discussion about whether peace should be factored into the judicial decision making, and about the extent to which justice can bring about peace, participants were urged to “insist always on the fact that impunity is not acceptable. Peace must go with justice, the question is how.” Participants were reminded: “Warlords around the world now know that they may face justice. They follow closely arrest warrants issued by international criminal courts. Hate speech in Côte d’Ivoire stopped when people thought they were at risk of facing justice.” One participant also exhorted “those in New York who prepare Security Council resolutions [to] bear in mind judicial aspects at all times and not reserve them for later as used to be the case.”

NOTES


2. Ibid.


4. That is, two months after the BIIJ 2009 was held.


6. Nuremberg Declaration on Peace and Justice, June 2008, available at: http://www.peace-justice-conference.info/declaration.asp. Footnote ‘a’ explains that this declaration emanates from an international conference entitled “Building a Future on Peace and Justice,” that was held from 25-27 June 2007, in Nuremberg, Germany, and organized by three countries, Germany, Finland, and Jordan, together with several civil-society organizations. “[M]ore than 300 policymakers and practitioners” attended that conference. The declaration was drafted by “a group of international experts designated by Conference organizers,” under the guidance of Óscar Arias, President of Costa Rica, and was “the subject of consultations […] with practitioners and civil society organizations” before its publication. In June 2008, the Governments of Germany, Finland, and Jordan conveyed the declaration to UN Secretary-General Ban Ki-moon, to be circulated as a General Assembly document: Letter dated 13 June 2008 from the Permanent Representatives of Finland, Germany and Jordan to the United Nations addressed to the Secretary-General, A/62/885, 19 June 2008.