

2012

BIIJ

Brandeis Institute for
International Judges



The International Rule
of Law: Coordination
and Collaboration
in Global Justice

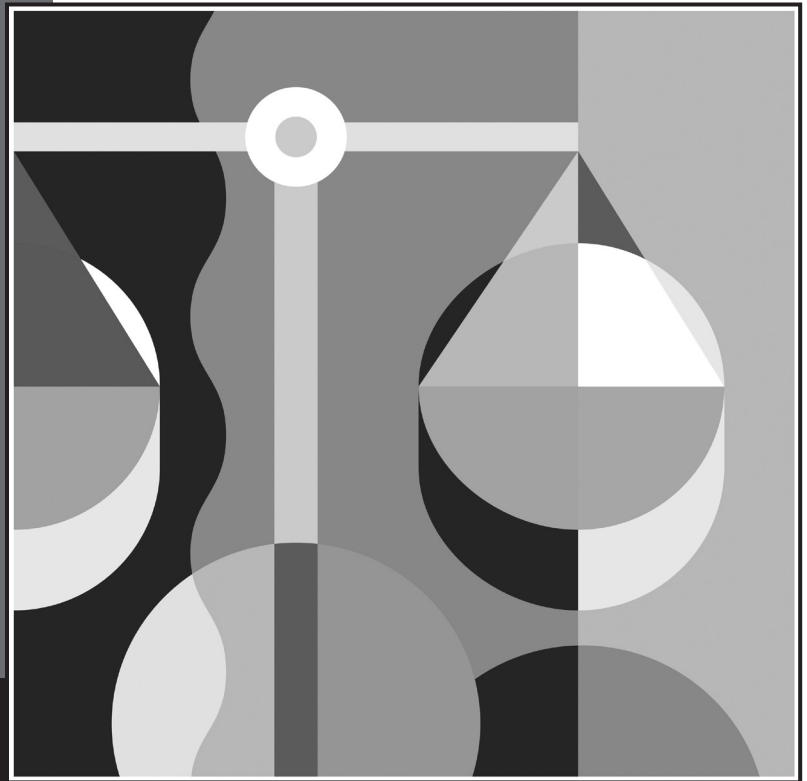
The International Center for Ethics,
Justice and Public Life

Brandeis University

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The International Center for Ethics,
Justice and Public Life

Brandeis University
Waltham, Massachusetts, USA

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by the Rice Family Foundation.



The 2012 Brandeis Institute for International Judges was convened by Leigh Swigart and Daniel Terris, and directed by Linda Carter and Richard Goldstone. The BIJ Program Committee, composed of Jennifer Hillman, Sanji Monageng, and Fausto Pocar, provided important guidance during the development of the Institute program.

This report was prepared by Leigh Swigart, with the editorial assistance of Micaela Neal. Many thanks go to Micaela and Cassandra Shaft, our BIJ 2012 rapporteurs, and to Alex Glomset and Ivan Ponieman, who carried out numerous useful tasks as interns at the Institute. We also thank our Institute presenters and participants for providing comments on earlier drafts of this report.

BIJ 2012 was held at the Alcázar del Rey Don Pedro in Carmona, Spain. We are grateful for the efficiency and professionalism of the entire staff, and in particular that of Antonio Rodríguez.



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Foreword

Approximately every 18 months, the International Center for Ethics, Justice and Public Life of Brandeis University organizes a very special “Olympic” event with the august name of the Brandeis Institute for International Judges (BIJ). In January 2012, this international judicial Olympus was situated in the historic Alcázar del Rey Don Pedro, which towers above the ancient town of Carmona, Spain.

Judges of 12 international courts and tribunals had come together with academics for the eighth BIJ to engage in discussions on a subject of immense importance: the international rule of law. In fact, this subject had already been embraced by the seventh BIJ. Then, the focus had been on whether or not there is such a thing as the international rule of law and, if so, to what extent it had emerged. Now, building on the outcomes of that Institute, the focus was on how to strengthen and further develop the international rule of law. Participants focused specifically on how to coordinate and collaborate on global justice.

This, of course, is an area of great complexity. International law embraces so many and such varied subject matters: trade and economic integration law, humanitarian and human rights law, criminal law, law of the sea, environmental law, consular law, etc. Some of the courts and tribunals deal with the same or similar subject matters; others do not. Some have general jurisdiction; others have a more specific jurisdiction. Some cover “the world;” others just a region.

Further adding to the complexity is the fact that no formal hierarchy exists among these adjudicative bodies. And, if that is not enough, there is the issue of the relationship between international and domestic courts, with the latter’s cooperation and approach to international law and decisions of international courts being of the greatest importance for the reception and implementation of those decisions.

Still, that is not all. The very concept of the rule of law assumes, on the one hand, the capacity of courts to somehow curb political power and keep political arbitrariness within the bounds of the law and, on the other hand, the willingness of politicians generally to accept and abide by the rulings of the courts. One does not have to know much about foreign politics to understand that here lays a huge challenge, even more than at the domestic plane. One increasingly hears criticisms launched at international courts and judges, not only by politicians but also by academics.

Arguably, for international law and its courts to remain acceptable to both politicians and their peoples as a restraint to what they would be naturally inclined to do or omit, international judges will have to be cautious to stay within the bounds of their own sphere of competence and not to transgress their own powers. But at the same time, in cases of clear violations of the law they must never bow to the political powers that be. The international rule of law requires a very complex balancing act, indeed.

Those who came together in January on the “Olympus” in Carmona were of course not gods. However, the *ambiente* of both the venue and the discussions was certainly divine. I felt truly honored and privileged to be among this



group of knowledgeable and experienced judges and academics with their great passion for the law. We all enjoyed the many interesting and productive discussions and, as one judge put it, the frank, educative and forthright debates. All of us came away feeling that our stay in Carmona had been a most rewarding and tremendous experience. The *communis opinio* was that this had been one of the most successful Institutes ever.

The jury is still out on whether BIIJ 2012 constitutes a new Olympic record. Those who will read this report will be the judge of that. As I see it, events like these Institutes are critically important for the future of international adjudication. May there be many more to come. Goodbye Carmona 2012... Hello Lund 2013!

Justice Jacob Wit
Caribbean Court of Justice



About the Institute

From 3 to 7 January 2012, 17 judges from 12 courts and tribunals, including those that address criminal, human rights, and inter-state dispute matters, gathered at the historic Alcázar del Rey Don Pedro in Carmona, Spain for the eighth Brandeis Institute for International Judges (BIIJ).

Organized every 18 months, the BIIJ convenes members of the international judiciary to discuss critical issues concerning the theory and practice of international justice. This is the only such regular gathering of judges from international courts and tribunals situated across the globe. Reports of past Institutes can be downloaded at <http://www.brandeis.edu/ethics/internationaljustice/biiij.index.html>.

The theme of this year's institute was "The International Rule of Law: Coordination and Collaboration in Global Justice." Judges discussed issues critical to contemporary international justice, including conflicts and coordination among different jurisdictions, comparison of decision-making frameworks, power politics and its impact on the work of courts, the appropriate role of international judicial institutions in enhancing global justice, and the emergence of indigenous rights law.

A hallmark of the BIIJ is its exploration of ethical issues in the international judicial domain. In 2012, the focus was on pre- and post-judicial service considerations for international judges. Another session, led by Brandeis University Prof. Richard Gaskins, Director of the Legal Studies Program, focused on the legacy of U.S. Supreme Court Justice Louis Brandeis, the namesake of Brandeis University.

One thread that ran throughout the institute discussions was the need for international justice institutions to join with both regional and domestic courts in the interest of establishing an international rule of law. Whether addressing the harmonization of jurisprudence across the globe, the need for courts to resist political pressure, or the role of international institutions in building judicial capacity in domestic legal systems, the coordination of efforts and the exercise of mutual respect among courts and judges from different spheres are paramount. BIIJ 2012 participants spoke openly of the challenges they face as agents of justice in a world where national interests and disregard for international institutions often complicate the critical mandates they have been given.

Since 2002, Brandeis University has hosted more than 75 international judges and law experts at the BIIJ. Participants have met in Africa, the Caribbean, Europe, and the United States to reflect on their unique profession, share best practices, and expand their judicial network.

BIIJ 2012 was supported by a generous grant from the Rice Family Foundation.



El Alcázar del Rey Don Pedro



BIIJ 2012 Participants

Judges

African Court on Human and Peoples' Rights (ACHPR)

- Sophia A.B. Akuffo, Vice-President (Ghana)

Caribbean Court of Justice (CCJ)

- Jacob Wit (The Netherlands)

Court of Justice of the European Union (ECJ)

- Konrad Hermann Theodor Schiemann (United Kingdom)

Extraordinary Chambers in the Courts of Cambodia (ECCC)

- Agnieszka Klonowiecka-Milart (Poland)

European Court of Human Rights (ECHR)

- Nina Vajić (Croatia)
- John Hedigan (Ireland, currently a Justice of the High Court of Ireland)

Inter-American Court of Human Rights (IACHR)

- Margarete Macaulay (Jamaica)

International Criminal Court (ICC)

- Erkki Kourula (Finland)
- Sanji Mmasenono Monageng, First Vice-President (Botswana)

International Court of Justice (ICJ)

- Hisashi Owada, President (Japan)

International Criminal Tribunal for the former Yugoslavia (ICTY)

- Theodor Meron, President (United States)
- Fausto Pocar (Italy)

International Criminal Tribunal for Rwanda (ICTR)

- Solomy Balungi Bossa (Uganda)

Special Court for Sierra Leone (SCSL)

- Emmanuel Ayoola, Vice-President (Nigeria)
- George Gelaga King (Sierra Leone)

World Trade Organization Appellate Body (WTO AB)

- Jennifer Hillman (United States)
- David Unterhalter (South Africa)

Co-directors

- Linda Carter, Professor, University of the Pacific, McGeorge School of Law; Director of the Legal Infrastructure and International Justice Institute
- Richard J. Goldstone, retired Justice of the Constitutional Court of South Africa; former Prosecutor of the International Criminal Tribunals for the former Yugoslavia and Rwanda

Presenters

- Justice Emmanuel Ayoola
- Prof. Linda Carter
- Richard Gaskins, Professor of Political Science and Director of Legal Studies, Brandeis University
- Justice Richard Goldstone
- Judge John Hedigan
- Ms. Jennifer A. Hillman
- Judge Sanji Monageng
- Judge Fausto Pocar
- Leigh Swigart, Ph.D., Director of Programs in International Justice and Society, International Center for Ethics, Justice and Public Life, Brandeis University
- Daniel Terris, Ph.D., Director, International Center for Ethics, Justice and Public Life; Vice-President for Global Affairs Brandeis University
- Judge Nina Vajić

Rapporteurs

- Micaela Neal, University of the Pacific, McGeorge School of Law '12
- Cassandra Shaft, University of the Pacific, McGeorge School of Law '12

Interns

- Alexander Glomset, Brandeis University '14
- Ivan Ponieman, Brandeis University '14



Key Institute Themes

Over the past decades, justice has expanded from the domestic sphere into regional and international arenas. Where once the citizens of a nation could only turn to their own courts when wronged by the government or other authorities, they can now petition regional courts that specialize in the protection of human rights. Individuals suspected of committing war crimes, crimes against humanity, and genocide can no longer count on protection by sympathetic political forces but can instead be prosecuted by courts set up by international organizations, states, or treaties. Disputes among states on a wide range of issues can be resolved by international courts and tribunals established to ensure the harmonious coexistence of nations. Justice has become a global affair.

It is clear that this globalization of justice requires a certain level of coordination and collaboration among the various actors and stakeholders involved in judicial activities if universal norms

are to be established across systems and regions. BIIJ 2012 aimed to explore what international judges and their institutions – in conjunction with national and regional counterparts – can and should do in the effort to promote the rule of law around the world.

Plenary discussions centered on the following themes:

- Issues of Concurrent Jurisdiction
- The Impact of Different Frameworks on Judicial Decision-Making
- International Courts in the World of Power Politics: Facing the Critics
- The Appropriate Role of International Courts and Tribunals in Enhancing Global Justice
- Making a Place for Indigenous Rights in Global Justice



Participating judges in the Brandeis Institute for International Judges 2012.



Participants also had the opportunity to address a number of additional topics in smaller groups, as detailed at the end of this section.

Issues of Concurrent Jurisdiction

As the number of international and regional tribunals has expanded in recent years, the possibility that multiple bodies will have conflicting, competing, or concurrent jurisdiction over the same disputes has also increased. The 2012 institute began with a session in which participants could explore the array of issues emerging from the increased overlap found among international, regional, and domestic courts. The participants acknowledged that such overlap can produce certain benefits, including the development of international norms and enhanced access to justice for individuals, states, and other entities. However, participants showed concern for the potential conflicts that jurisdictional overlap may also create.

An article by Rosalyn Higgins, former Judge and President of the ICJ, served as a springboard for the discussion. In “A Babel of Judicial Voices? Ruminations from the Bench,”¹ Judge Higgins points out that overlapping jurisdiction among courts may result in fundamental questions about whose views should prevail and which norms are applicable. She explores several possible solutions, including creating an institutional hierarchy and establishing a hierarchy of international norms. Judge Higgins is not persuaded that either of these solutions is the answer and suggests that, for now, judges should instead develop a respect for and use of other courts’ judgments to promote consistency.²

1. Rosalyn Higgins, *A Babel of Judicial Voices? Ruminations from the Bench*, 55 *Int’l & Comp. L.Q.* 791 (2006).

2. *Id.*

During their discussion, BIIJ participants focused on the various types of conflict that may emerge in situations of overlapping jurisdiction. One type occurs when more than one court is seized of the same matter, resulting in confusion and sometimes even inaction. Such lack of coordination and collaboration has been evident in the attempts to prosecute former Chadian dictator Hissène Habré.³ Belgium and Senegal simultaneously asserted jurisdiction over Habré’s case, both finding probable cause to prosecute him for his alleged crimes in Chad between 1982 and 1990.⁴ Senegalese courts finally dismissed the case, claiming they lacked jurisdiction for the crimes in question, while Belgian courts asserted universal jurisdiction over the case, claiming that international crimes had been committed abroad. However Senegal, which has been Habré’s place of residence since 1990, refused to extradite him to Belgium. The African Union became involved at Senegal’s request, and indicated that Senegal should proceed with prosecution. In order to do so, Senegal modified its laws to allow for the prosecution of the alleged crimes and requested millions of dollars from the international community to conduct the investigation and prosecution. Funding negotiations, however, took a considerable amount of time, and in the interim, Belgium brought the case in 2009 to the ICJ, demanding that Senegal either prosecute or extradite⁵ (see sidebar, opposite page). Meanwhile, a Chadian national brought a case against Senegal before the African Court on Human and Peoples’

3. See Jan Arno Hessbruegge, *ECOWAS Court Judgment in Habré v. Senegal Complicates Prosecution in the Name of Africa*, *Am. Soc’y of Int’l L.* (Feb. 3, 2010), <http://www.asil.org/pdfs/insights/insight110203pdf.pdf>.

4. *Id.*

5. Since BIIJ 2012 took place, a judgment has been rendered in Questions Relating to the Obligation to Prosecute or Extradite (Belg. V. Sen.), Judgment (July 20, 2012), available at <http://www.icj-cij.org/docket/files/144/17064.pdf>; see Press Release, Int’l Court of Justice, Questions Relating to the Obligation to Prosecute or Extradite (Belg. V. Sen.) (July 20, 2012), available at <http://www.icj-cij.org/docket/files/144/17084.pdf>; see infra sidebar.



Rights (ACHPR), attempting to suspend that nation's ongoing proceedings against Habré on the grounds that it had violated the principle of non-retroactivity of criminal law. This case was deemed inadmissible since Senegal had not made any declaration accepting the jurisdiction of the Court to deal with applications brought by individuals.⁶ Finally, the Court of Justice of the Economic Community of Western African States (ECOWAS) issued a ruling that prevents Senegal from trying Habré in its national courts on the basis of *nullum crimen sine lege*, but permits a trial within the scope of "an ad hoc special procedure of an international character."⁷ The struggle over jurisdiction of Habré's case has led to a decade-long stalemate, and ironically has prevented his being prosecuted anywhere, despite the many jurisdictions – two national, two regional, and one international – that have been involved.

The Habré situation has implications reaching beyond the disposal of the case itself. The delay and conflict over jurisdiction have called into question both the legitimacy of the courts involved and the credibility of international and regional justice more generally. Furthermore, the situation has highlighted the threat of a similar jurisdictional "tug-of-war" arising among other courts, as well as the pressing need to determine how such situations might be resolved and by whom. BIIJ participants agreed that, should

6. *Yogogombaye v. Republic of Senegal*, App. No. 001/2008, Afr. Ct. Hum. & Peoples' Rts., Judgment (Dec. 15, 2009) available at <http://www.african-court.org/en/index.php/2012-03-04-06-06-00/judgments/82-michelot-yogogombaye-versus-the-republic-of-senegal>.

7. *Habré v. Republic of Senegal*, Decision No. ECW/CCJ/JUD/06/10, Ct. of Just. of the Econ. Community of W. Africa, Judgment (Nov. 18, 2012), available at http://www.jurisafrika.org/html/pdf_ecowa.pdf; see also Hessbruegge, *supra* note 3, at pg 4.

The reasoning was that since the crimes allegedly committed by Habré — crimes against humanity, war crimes, and torture — were not crimes under Senegalese law at the time they were committed, he could not be tried thereunder retroactively. They were, however, crimes under international law at that time and could thus be addressed by an international body.

Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)

ICJ Judgment of 20 July 2012

V. Remedies

The Court recalls that Senegal's failure to adopt until 2007 the legislative measures necessary to institute proceedings against Mr. Habré on the basis of universal jurisdiction delayed the implementation of its other obligations under the [United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984]. It further states that Senegal was in breach of its obligation under Article 6, paragraph 2, to make a preliminary inquiry into the crimes of torture alleged to have been committed by Mr. Habré, as well as of the obligation under Article 7, paragraph 1, to submit the case to its competent authorities for the purpose of prosecution. In failing to comply with its obligations under those provisions, Senegal has engaged its international responsibility. Consequently, Senegal is required to cease this continuing wrongful act, in accordance with general international law on the responsibility of States for internationally wrongful acts. The Court concludes, therefore, that Senegal must take, without further delay, the necessary measures to submit the case to its competent authorities for the purpose of prosecution, if it does not extradite Mr. Habré.

Excerpt from the ICJ Press Release (see footnote 5).





ICJ Judge Hisashi Owada, Brandeis Professor Richard Gaskins, and ICTY Judge Fausto Pocar (l to r) continue their discussion of global justice issues over lunch.

this type of predicament not have a clear and quick resolution, a dangerous precedent could be established, one that could undermine justice and potentially violate the human rights of both accused parties and victims. One BIIJ participant summed up his view of the Habré situation thus: “It has been almost a complete failure of justice at every level – for victims, accused, and for the international institutions. While I think competition can be a good thing, if you look to the efficacy of what is required and look to the spectacle it has given rise to, it does not create respect for what has resulted... International law and justice begin to fray at the edges with these types of instances.”

Jurisdictional overlap may give rise to a second kind of conflict, when the body of substantive law differs between two international courts, or the law of a country differs from that applicable in a regional or international tribunal to which it is a party. Higgins describes the phenomenon as a “competition of norms,” and recognizes that a choice of one set of plausible applicable norms over another could lead to different solutions.⁸ A country’s criminal code, for example, may differ

8. Higgins, *supra* note 1, at 792-93.

from the international criminal law that the country has agreed to enforce by virtue of a treaty agreement, or the case law of one international court may be deemed more favorable to particular doctrines or interests than that of another.⁹ Recognizing such inconsistencies, applicants may resort to “forum shopping” in situations of overlapping jurisdiction – taking into consideration factors such as “court access, applicable procedure, court composition, its case-law and even its capacity to issue urgent orders”¹⁰ – in order to find the court most likely to favor them. This kind of forum selection may give undue advantage to certain parties in a case.

Some countries have avoided conflicts in substantive law, one judge pointed out, by meticulously comparing their local laws to the Rome Statute when joining the International Criminal Court, thereby guarding against inconsistencies. Another judge noted that if international criminal law were made part of the domestic legislation of all states, then such conflicts could be largely avoided. Furthermore, resolving conflicts of substantive law would eliminate the issue of which court is best suited to take on a particular case. A participant declared, “What difference does it make which court tries an accused if the substantive law to which he is subjected and the definition of crimes is the same? That issue fades away.”

BIIJ participants discussed another factor that can come into play when there is a conflict between substantive law at the state and international levels – non-compliance with judgments. When the ECHR held in the “prisoners’ voting rights case”¹¹ that Britain’s blanket ban on prisoner voting was a violation of

9. See Gilbert Guillaume, *Advantages and Risks of Proliferation: A Blueprint for Action*, 2 J. Int’l Crim. Just. 300 (2004).

10. Higgins, *supra* note 1, at 798-99.

11. *Greens v. United Kingdom*, App. Nos. 60041/08 & 60054/08, Judgment (Nov. 23, 2010), available at hudoc.echr.coe.int/webserVICES/content/pdf/001-101853?TID=xoluqvkqgg. See also *Hirst v. United Kingdom* (No. 2), 2005-IX 187.

the European Convention on Human Rights, the United Kingdom threatened to withdraw from the Convention in order to sidestep compliance with the court's ruling.¹² This threat brought up the question of what such a move would mean for the U.K.'s membership in the European Union (EU), given that that the EU is now itself a party to the Convention.¹³ By examining this case, the participants recognized that conflict between national, regional, and international tribunals has a very far-reaching effect, going beyond the court systems and into the very heart of contemporary international relations.

Finally, participants identified a third type of conflict associated with jurisdictional overlap, that arising from differences in the interpretation of the same legal norm. Even where tribunals agree on the substantive law to be used, "the reasons set out in the judgments may ... show divergent interpretations of the same legal principle, thus undermining the unity of international law, or even its certainty."¹⁴ Higgins notes that this kind of conflict is exemplified by the ICTY *Tadić* case, where the tribunal used an "overall control" test in contrast to an "effective control" test as elaborated by the ICJ in the *Nicaragua v USA* case.¹⁵ On the other hand, Higgins points out that the ICTY's overall control test pertained to a different context, and even a different issue, from the effective control test in the *Nicaragua* case. The ICTY's test was necessary to determine whether a conflict was an international one for purposes of grave breaches of the Geneva Conventions, while the ICJ's test was part of an analysis of state responsibility for the actions of irregular forces.

12. *Prisoners' Right to Vote: the Blurred Line Between the European Convention on Human Rights and the European Union, Briefing Note*, Open Eur. (Feb. 2011), <http://www.openeurope.org.uk/Content/Documents/PDFs/EUECHRprisoners.pdf>.

13. *Id.*

14. Guillaume, *supra* note 9, at 302.

15. Higgins, *supra* note 1, at 794.

After commenting on the various kinds of conflicts that may emerge through jurisdictional overlap, BIIJ participants pondered possible solutions to the problem. One solution raised was that promoted some time ago by Gilbert Guillaume, former ICJ Judge and President. He suggested the establishment of a hierarchy in the international legal order that would empower certain courts – and in particular the ICJ – to ensure consistency in international jurisprudence.¹⁶ BIIJ participants pointed out that it is unclear which entity could set up such a system. Since international and regional courts are established by different constituencies and instruments, no single body has the authority to give order to these diverse agreements.

Some participants noted that there are international courts whose statutes already mandate certain kinds of hierarchical relationships. The SCSL, for example, has concurrent jurisdiction with the courts of Sierra Leone; however, in cases of conflict, the Special Court takes primacy over its domestic counterparts. Conversely, the ICC's "complementarity principle" specifies that domestic criminal prosecutions should take precedence over those of the ICC, provided that the domestic judicial system is willing and able to carry them out.¹⁷ The specificity of the complementarity principle has not, however, prevented disagreement about which bodies – national or international – are entitled to prosecute in the current ICC cases concerning alleged crimes in Kenya and Libya.¹⁸

16. *Id.* at 798.

17. The principle of complementarity is spelled out in paragraph 10 of the Preamble to the Rome Statute and in Articles 1, 15, 17, 18, and 19 of the Rome Statute. UN General Assembly, Rome Statute of The International Criminal Court, July 17, 1998, 2187 U.N.T.S. 3, available at <http://www.icc-cpi.int/Menus/ICC/Legal+Texts+and+Tools/Official+Journal/Rome+Statute.htm>.

18. For information on the Kenya case see *Situation in the Republic of Kenya*, Int'l Crim.Ct., (Jan. 2009), <http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/Situations/Situation+ICC+0109/>. For information on the Libya case see *Situation in Libya*, Int'l Crim.Ct., (Jan. 2011), <http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/Situations/ICC0111/>.



Overall, however, participants agreed that the political will necessary to set up such a generalized institutional hierarchy does not exist. In fact, it was noted that the notion of political sovereignty was “the elephant in the room” during this discussion. Thus, even if courts were able to develop a hierarchy to solve issues emerging from overlapping jurisdiction and the fragmentation of law it may engender, the politics of sovereign states would inevitably interfere. “When there is serious conflict or competition between judicial and political grounds,” one participant declared, “judges will always lose. Judges don’t like to accept that.”

Participants recognized that while issues of political sovereignty may discourage any attempt to establish a hierarchy of international judicial institutions, the reality of sovereign political interests makes it even more important for international courts to work together to increase their sway, credibility, and legitimacy. One BIIJ participant summarized the unlikelihood of a judicial hierarchy like this: “What it goes to show is we have all these international bodies, some of them existing for a very long time. But the length of existence doesn’t seem to have gelled into any particular order or hierarchy. It’s still

“When there is serious conflict or competition between judicial and political grounds judges will always lose. Judges don’t like to accept that.”

a work in progress. In the end, adjudicators on these various bodies should not see multiplicity as a liability, but rather as an asset.” If a formal hierarchy of institutions is not feasible, then international courts and tribunals should at least strive toward recognizing a hierarchy of international legal norms. Many judges commented, however, that such an endeavor is also fraught with difficulties.

BIIJ participants next reflected on the feasibility of establishing doctrines of deference among international courts. Rather than a strict institutional hierarchy, a more helpful and cautious approach would be for courts to defer to other institutions when appropriate. In such a scenario, courts could elect *not* to exercise, or to defer, jurisdiction until another entity seized of the matter has made a decision.

Some participants suggested that courts with general jurisdiction should defer to those with specific jurisdiction. This suggestion was met by concern from others. An inter-state dispute judge noted, “There are courts with competence in certain areas, like the WTO, created to handle certain instances. On the other hand, the ICJ was created to have universal, general jurisdiction that covers all types of matters. If we were to say that there is a specific court with special knowledge about a type of matter, and that general jurisdiction courts must defer, it would create a very confusing state of affairs.” A human rights judge observed that while jurisdictional deference might be good in theory, its practice is another matter. The public would not necessarily understand a court’s reason “for saying no,” and perhaps perceive the decision to defer jurisdiction as an abdication of responsibility. Finally, a criminal judge expressed concern about what a court’s decision to defer jurisdiction would mean for victims of alleged crimes and their access to justice. Participants also observed that the larger an area within which institutional deference was attempted, the harder it would be to apply. While regulating the courts within the European Union might be possible, implementing a deference policy among all of the world’s international and regional tribunals would prove as impossible as establishing an institutional hierarchy.

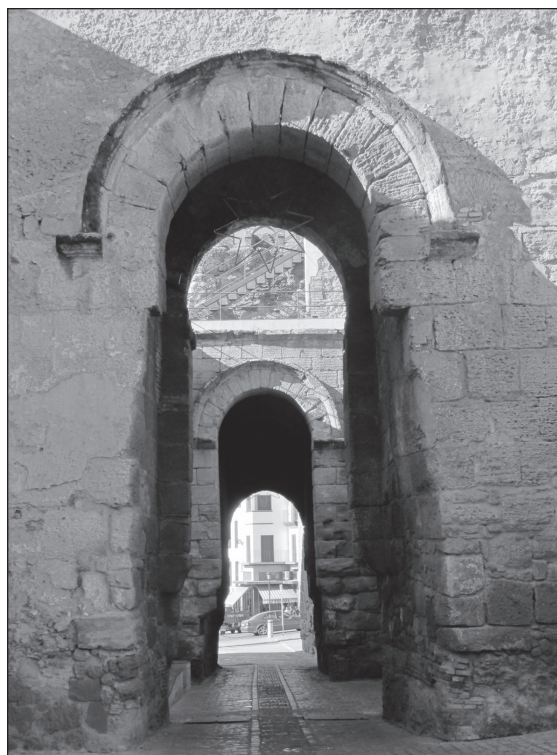
As the BIIJ participants worked through the challenges of institutional hierarchy and doctrines of deference, it became apparent that Rosalyn Higgins was perhaps accurate



in her conclusion that awareness of and mutual respect for each other's courts and judgments are the best hedge against systemic fragmentation.¹⁹ But, participants added, this review and respect should be more than just surface acknowledgment. One judge declared, "Discrepancies between international courts are very dangerous for the state of law – international law – so not only do we need to read each others' judgments as much as possible, we need to follow or explain why we distinguish our judgments." Furthermore, decisions from other courts that are not applicable should be filed away for future reference, and disagreement with judgments coming out of other tribunals should not be dismissed but rationally discussed. "Don't just throw a judgment out because it didn't come from your jurisdiction," said a judge. "Look at it for what it is worth!" Participants also suggested that counsel might contribute to knowledge of other courts' decisions by citing them in their briefs and thereby bringing them to the attention of judges.

Participants supporting the idea of awareness and mutual respect concluded that if they were reading each other's judgments, then the substantive law of different courts and tribunals would eventually become aligned. So even if not perfect, many participants decided that "review and respect" was the best approach. "I'd like to see a magic solution allowing us to have completely harmonious courts, but things don't work that way. The best we can hope for is collegiality among international judges – respecting each others' decisions, taking them into account," said one judge.

This strategy was, however, met with some skepticism by other participants. One judge described the approach as "wishy-washy" and questioned whether judges could actually be expected to review and respect each other's judgments in practice. "I think there are very



La Puerta de Sevilla in Carmona, Spain.

big and difficult questions that pragmatism [as suggested by Higgins] does not answer." These skeptics felt that while Higgins' suggestion was good, it is in need of added structure. Rather than merely hoping that judges will consider other judgments, courts should implement an organized approach to ensure that they are reviewing the judgments of other courts relevant to their own cases in a reasoned manner.

It was noted that at least one court is proactive in this regard. The ECHR has an internal body whose role is to make sure that the decisions produced by the court's various sections are consistent both with one another and with the norms of international law. If a decision differs from these norms, "at least the judges made their decision with this knowledge." It was suggested that other courts establish a similar procedure for reviewing their own and other courts' judgments, thereby ensuring that there is consistency both within their institutions and across the array of

19. Higgins, *supra* note 1, at 804.



international courts. “These issues arise through accidental inconsistencies, not deliberate ones. Judges everywhere try to apply consistent law; that is the very essence of justice.”

Participants’ discussion of the conflicts emerging from overlapping jurisdiction ended inconclusively. It was acknowledged, however, that competition among courts does not always engender negative outcomes. Likewise, criticism by politicians was recognized as positive in some respects. To be criticized means that a court is doing important work, one judge noted. Another added, “Both political counterforces and competition between courts with concurrent jurisdiction can lead to better efficiency and procedure. Otherwise, international law and court practice run the danger of becoming esoteric.”

This first session of BIIJ 2012 addressed a number of challenges that arise in the context of a varied and multi-faceted global justice system. It thereby set the stage for the sessions to follow, which examined a variety of topics relevant to contemporary law and legal practice.

The Impact of Different Frameworks on Judicial Decision-Making

BIIJ participants next turned to the ways in which different frameworks for decision-making affect the coordination and collaboration of international tribunals with each other and with regional and domestic jurisdictions. In some national contexts, there is an institutional framework in which constitutions require the application or consideration of international law. In other contexts, there is a limited or non-existent framework, such as when application of international law is allowed only after being enacted into national law. Frameworks may also outline the degree of judicial discretion permitted. Such differences give rise to some unevenness across the landscape of global justice,

much as competing and concurrent jurisdictions may result in its decreased effectiveness.

At the national level, most participants acknowledged that inconsistency, in either legal thinking or application of the law, does exist. They generally agreed, however, that it does not really threaten the interests of justice. The main framework for decision-making on the national level is each country’s constitution or founding instrument. No national judicial institution can go beyond that which is authorized by its founding instrument, which places natural limits on variation in decision-making.

Judicial decision-making at the national level is fundamentally affected, however, by whether a country has a monist or dualist approach to international law. Under the monist framework, international law does not need to be incorporated into national law—the act of ratifying the treaty means that it immediately becomes part of national law and can be invoked by citizens and applied by domestic court judges. Under the dualist framework, on the other hand, even after a state adopts a treaty, the international law must be transformed into national law in order to be invoked and applied. One participant observed, “Many judges really have a problem with this dualist approach. I cannot see any rationale in creating a common law that cannot be directly applied across the board. I do not see the logic of that reasoning.” Given that national judges must work within their own nation’s framework, however, he added, “I think that international judges must be sensitive to these differences in framework, and be mindful that sometimes national judges are willing to follow international norms but their framework makes it impossible for them to do so.”

The ECHR addresses potential inconsistencies found in legal thinking across member states of the Council of Europe by utilizing what is called “the margin of appreciation doctrine”



(see sidebar at right). A participant noted that the ECHR expects – indeed wants – member states to interpret the European Convention on Human Rights according to local frameworks. Furthermore, given the enormous backlog of cases at the Court, such interpretation can help to decrease the number of applications made against a state by developing human rights law at the national level. Although a certain inconsistency is thus normal across the Council of Europe, it is only a problem when states drop below the standards of the Convention, not when they exceed their obligations.

The ECJ also expects variation in practice across the member states of the European Union. The ECJ research department will often compile the view of each of its member states on a particular topic, as to the relevant approach taken in their legislation and case law. Similar to the ECHR, the ECJ is not concerned with strict consistency among member states. A judge explained, “Rather, we want to know if the Court will end up with a judgment that is at odds with primary practice. We want to know if there will be a disparity that causes problems.”

BIIJ participants next acknowledged that different frameworks exist not only among national systems but also among distinct areas of law; these differences, too, may affect application and consistency. For instance, in human rights law there is a clearly established framework of which all countries are aware. “Human rights are the subject of international conventions – on torture, social and economic rights, non-discrimination against women and against racial groups – and so there is unified thinking about them.”

The problem in the context of the human rights law framework, then, arises in application. Even among common law jurisdictions, application differs depending on the circumstances of each case. What appears as disparity between jurisdictions’ interpretations of the principles

From the website of the Council of Europe

The term ‘margin of appreciation’ refers to the space for manoeuvre that the Strasbourg organs are willing to grant national authorities, in fulfilling their obligations under the European Convention on Human Rights (the Convention)... Given the diverse cultural and legal traditions embraced by each Member State, it was difficult to identify uniform European standards of human rights. Therefore, the Convention was envisaged as the lowest common denominator... The margin of appreciation gives the flexibility needed to avoid damaging confrontations between the Court and the Member States and enables the Court to balance the sovereignty of Member States with their obligations under the Convention.

See The Margin of Appreciation, Council of Eur., http://www.coe.int/t/dghl/cooperation/lisbonnetwork/themis/ECHR/Paper2_en.asp.

may simply be a function of the difference in the circumstances of the cases. Finding harmonious interpretations across the various national courts is therefore improbable. The participants thought this was concerning, particularly because human rights are so fundamental to all people in every society, regardless of political and cultural differences.

“Human rights are the subject of international conventions – on torture, social and economic rights, non-discrimination against women and against racial groups – and so there is unified thinking about them.”



Contrary to human rights law, the development of principles in criminal law is incremental, established less through international treaty than through the steady accretion of case law. As a result, decisions are not as similar across criminal courts as they are across human rights courts. Furthermore, because national courts and international courts have different trial frameworks, there is no standardized criminal procedure. Even with different trial frameworks, however, decisions may make the same determinations. One participant noted that even though his court's framework is different than that in other criminal courts, his court refers to decisions of other courts more often than might be expected. He explained, "There is no point in reformulating the principles established by other jurisdictions." After all, in the end, decisions should be in the best interests of justice. Examining judgments from other courts – even though they have a different framework – can establish what result is in the best interests of justice. The consensus, therefore, was that differing national or legal frameworks do not necessarily result in inconsistent decisions, and when they do, it is still not a serious problem. Judges can and do go beyond the constraints

of the frameworks they are given – their "black boxes," as one participant described them – and use the judgments of other courts to their benefit and to the benefit of the development of international law.

What, then, is the consequence of inconsistency in legal thinking or application of the law at the international level? Is it more problematic than at the national level? BIIJ participants agreed that, at present, there is a real danger that international law might be interpreted in conflicting ways by different international tribunals. Furthermore, with the globalization of law, this danger will only increase. It was pointed out, however, that legal fragmentation is perhaps a necessary part of the globalization process. "Globalization is in its infancy," observed a judge. "And in its infancy, it must develop some teething problems."

The participants examined international human rights law as an example of how inconsistency may play out. While the ICJ sometimes hears human rights cases, and also partners with the ECHR to protect human rights, it still sees human rights through a lens of interstate relations and humanitarian law.²⁰ The ECHR, on the other hand, works in the context of human rights of individuals under the Convention. Additionally, "the [European] Court has long recognized that 'the principles underlying the Convention cannot be interpreted in a vacuum'; it must also take into account any relevant rules of international law."²¹ The two courts thus use different decision-making frameworks when considering comparable human rights issues, which may lead to a fragmentation of



Jacob Wit (CCJ) and Konrad Schiemann (ECJ) share their experiences as judges from courts of regional integration.

20. Rosalyn Higgins, President, Int'l Ct. Just., Speech at Ceremony Marking the 50th Anniversary of the European Court of Human Rights: The International Court of Justice and the European Court of Human Rights: Partners for the Protection of Human Rights (Jan. 30, 2009), available at http://www.echr.coe.int/NR/rdonlyres/38D1E6A5-DE24-42BD-BC3D-45CCCC8A7F8A/0/30012009PresidentHigginsHearing_eng_.pdf.

21. *Id.* at 1-2.

the law. This, in turn, may create “the danger of conflicting and incompatible rules, principles, rule-systems and institutional practices.”²²

In response to such possible fragmentation, the International Law Commission proposed in its 2006 Report “the principle of harmonization:” “when several norms bear on a single issue they should, to the extent possible, be interpreted so as to give rise to a single set of compatible obligations.”²³ The idea had its basis in a 1974 ECJ decision that it cannot uphold measures that conflict with an identified human right.²⁴ A 2008 ECHR case, *Demir and Baykara v. Turkey*, similarly found that the ECHR must take into account international human rights laws beyond the treaties and convention its members have signed.²⁵

The International Law Commission hoped that harmonization would be achieved by judges keeping an eye on each others’ work. Indeed, some BIIJ participants reported that the courts in Strasbourg and Luxembourg have a special relationship, working together to protect human rights. The ECHR frequently looks to ECJ judgments for statements on general international law, charter interpretation, and state responsibility. Similarly, the ECJ often looks to the ECHR jurisprudence on specific human rights. Both courts are European, so it might seem that the danger of fragmentation would

22. Françoise Tulkens, President of the Second Section, Eur. Ct. H. R., Seminar Organized on the Occasion of the 50th Anniversary of the Establishment of the European Court of Human Rights: Fifty Years of the European Court of Human Rights Viewed by its Fellow International Courts (Jan. 30, 2009) (quoting U.N. Int’l Law Comm’n, Report on the Work of its 58th Sess., May 1-June 9, July 3-Aug. 11, 2006, U.N. Doc. A/61/10; GAOR, 61st Sess., Supp. No. 10 (2006), available at <http://untreaty.un.org/ilc/reports/2006/2006report.htm>).

23. *Id.*

24. Case 4/73, *Nold, Kohlen- und Baustoffgrosshandlung v. Comm’n* 1974 E.C.R. 419 (1974).

25. *Demir & Baykara v. Turkey*, (App. No. 34503/97, Eu. Ct. H.R., Judgment (Nov. 12, 2008), ¶¶ 76, 85, available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-89558>).

“Courts should respect each others’ views, which they do, and listen to each other, which they do,” commented a European judge.

“These courts are learning from each other all the time, rather than diverging.”

be greater in this context, given the number of nations in the region and their disparate legal traditions and experience. But this has clearly not been the case. “Courts should respect each others’ views, which they do, and listen to each other, which they do,” commented a European judge. “These courts are learning from each other all the time, rather than diverging.”

BIIJ participants concluded the discussion by considering the effect of different frameworks on the overall consistency of law, and the role that international courts and judges should take on to promote it. Participants agreed that differing frameworks do affect consistency, but did not think that such inconsistency was necessarily harmful. For example, at the ECHR, judgments are issued in consideration of the extent to which a nation’s courts have extended human rights protections. A judgment will be harsher against a country that has developed human rights law further and issued more extensive legislation, as opposed to a country just beginning to interpret human rights protections. The participants identified two possible views on this variation in decision-making. On the one hand, every member state has the same obligations under the convention: the law is the law, and therefore the burden of a judgment on a member state should not be considered. On the other hand, if the capacity of a given state to implement a particular judgment is not considered during its formulation, the ultimate result may be non-compliance. And in the end, the impact of





SCSL Judges Emmanuel Ayoola and George King relax between sessions with IACHR Judge Margarette Macaulay (l to r).

non-compliance may be more detrimental to the interests of global justice than the inconsistency that comes with tailoring measures to state capacity.

No clear answer was reached as to the appropriate role for international courts and judges in developing consistency. One participant stated, “My conclusion is essentially that it is a difficult issue – especially the question of whether international courts should focus on the need to establish a coordinated system, and to what extent this system should take into account the different frameworks of international and national courts. From the viewpoint of the rule of law, I wonder whether it should be done at all. In many cases it is much better for national courts, in particular, to stay within their own framework.” While it is important for courts like the ECHR to be aware of the interpretation of other courts, and for judges to be educated in the approaches of other courts to the same issues, true coordination of the system may not be necessary. Instead, it must be kept in mind that, in speaking of an “international justice system,” one is essentially referring to a collection of separate legal orders.

Finally, it was generally agreed that rather than force complete consistency and coordination, or impose a hierarchy, perhaps the goal should be to find a point of convergence where all the courts can operate. “Judges should make their decisions by doing what is right, fair, and just. In doing that, they must ensure that there is no element of arbitrariness—they must be guided by the framework of decision-making in their own jurisdiction, by the thoughts of other judges in sister jurisdictions and the international system, and by the reasoning of other institutions in the system.” The BIIJ participants therefore favored a judicial discretion approach to consistency over a strict framework. They noted that success of such an approach to consistency will increase as special tribunals fade out, and judges who have served on international benches – and thus absorbed their thinking and flexibility – move on to other international courts or return home to serve in domestic judiciaries.

International Courts in the World of Power Politics: Facing the Critics

Over the years, many sessions of the BIIJ have addressed the intersection between law and politics in the work of international courts and tribunals. There have been candid discussions about the challenges of operating within the global political environment; the politicized nature of many of the judicial selection processes; and the intrusion of political actors into legal processes, for example through exerting external pressure on the ad hoc criminal tribunals to hasten their completion strategies.²⁶

In 2012, BIIJ participants were presented with two pervasive critiques of international courts and tribunals by outside observers. These critiques are not new, but they have taken on

26. Various BIIJ thematic discussions are available in pdf format at *Judicial Dialogue in Action: International Judges Reflect*, Brandeis U., http://www.brandeis.edu/ethics/internationaljustice/bijj/bijj_articles.html.

an empirical form in recent years, as the post-Cold War expansion of international courts and tribunals reaches the end of its second decade. Rather than relying only on theoretical arguments, these critiques are increasingly resting on the analysis of the contemporary history of the greater range of courts.

Discussion centered on the following critiques:

- 1) Critics have argued that strong states have disproportionate impact on international judicial institutions – either by directly shaping the configuration of the courts themselves, or by opting out of their jurisdiction if they feel disfavored. This impact, it is argued, renders the work of international courts either warped, irrelevant, or sometimes both.
- 2) Another critique argues that international courts and tribunals are self-perpetuating bureaucratic institutions that seek to apply a legal solution to all problems and seek primarily to expand their power and influence, sometimes at the expense of achieving their underlying goals.

Fundamental to these two critiques is the argument that these problems are inevitable in a global legal network that lacks a structure of government, accountability, and enforcement.²⁷

A number of participants immediately reacted to the litany of failures pointed out in the session readings, which included numerous examples of non-compliance with international judgments, the great time and expense associated with litigation in an international court or tribunal, and the unwillingness of some courts and tribunals to ruffle the feathers of powerful states. “The reality is that we are operating in the international system. We exist in a system that politics created,” observed a judge. “But to say

that the law is always subject to these politics is overly broad.” When evaluating the performance of international courts and tribunals, he added, it is important to acknowledge “the better world we have created through our system of courts.” Another participant concurred. “I think the world, as a result of international courts, is now less safe for those who commit genocide and for despots. I do not think this is just about legal window dressing.” A criminal judge contributed a similar point of view: “People never expected international criminal tribunals to have this degree of influence in the world at large. We have established that international prosecutions and trials can observe due process.”

The declaration of these successes notwithstanding, BIIJ participants were honest about the challenges facing their respective institutions and the potential impact of negative public perceptions concerning the politicization of international justice. The continued flouting

“I think the world, as a result of international courts, is now less safe for those who commit genocide and for despots. I do not think this is just about legal window dressing.”

of the ICC arrest warrant for Sudanese President Omar al Bashir was mentioned several times as an example of the powerlessness of courts to bring about compliance in the absence of an enforcement mechanism. One participant expressed the hope that such situations did not represent a “slippery slope,” whereby other ICC states parties would feel free to ignore their own obligations under the Rome Treaty. Several voiced the view that the U.N. Security Council should play a more forceful role in bringing about compliance with both international court rulings and obligations to cooperate, for criminal institutions in particular. At the moment, the

27. Readings for the session were excerpted from two recent publications: Matthew Parish, *Mirages of International Justice* (2011); Eric Posner, *The Perils of Global Legalism* (2009).



Security Council seems to play the ICC both ways, said a judge; when it does not wish to directly address violations of international law, it refers the situation to the Court. But when the Court needs its support, the Council does not respond effectively.

Non-compliance with judgments is not an issue for all courts, however. Indeed, the WTO Appellate Body issues few rulings that do not see a rapid response on the part of losing parties, either because the same parties anticipate future rulings where they may be the winners and in turn desire compliance, or because there is the possibility of establishing retaliatory sanctions against recalcitrant states. Some participants hastened to add that the compliance record for courts without such sanctions or other enforcement mechanisms is still quite high. Despite this fact, a judge pointed out that some defensiveness on the part of states is to be expected. “Experience has shown that states admire the work of international courts until the courts turn their attention to the states in question. Then they react.”



Justice John Hedigan (l) of the High Court of Ireland (and formerly the ECHR) with ICTY Judge Fausto Pocar.

The frequently heard critique that international courts and tribunals are too expensive was then discussed. A criminal judge declared that the high cost of international trials was worth it. “When you are setting an international standard, it must be as perfect as possible in order to inspire national institutions. You must adhere as closely as possible to fair procedures. I think it is permissible to raise concerns about huge expenses. And then we must show those who criticize why the costs are justifiable.” On the subject of both cost and state support, a human rights judge wondered whether some judicial institutions have not been created with a “built-in failure factor.” “How can you set up a court of that nature and then include a claw-back clause and hide it in the ratification process?²⁸ And when the court requests funds to carry out sensitization work in the region, it is accused of being self-promoting!”

Regarding the slow pace of most international judicial procedures, it is clear that speed is a relative notion. One court’s efficient pace is another’s delay. One criminal court judge commented, “We have been criticized for slow judgments, but suddenly we do not appear to be such turtles when compared to an 11-year delay before the start of the Lockerbie trial! That does not mean that there are not many things that we can do to improve efficiency. We *can* work better and we should ask ourselves how.” Another judge urged, “I think there is more that judges can do to bring succinctness to the proceedings. But we cannot do this unless the parties are part of making things faster.” She added, “Decisions should also be short and sweet.” At the moment, the only international institution that can count

28. See Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of an African Court on Human and Peoples’ Rights, art. 34(6), *opened for signature* June 9, 1998, OAU Doc. OAU/LEG/EXP/AFCHPR/PROT (III) (entered into force Jan. 25, 2004) *available at* <http://www.african-court.org/en/images/documents/Court/Court%20Establishment/africancourt-humanrights.pdf>.

on speediness is the WTO Appellate Body, which dictates that cases take no longer than three months. “This creates quick and efficient decisions,” said a participant, “which then helps with enforcement.”

As for the critique that powerful states wield disproportionate power in the world of international justice, it was pointed out that these nations can largely take credit for the creation of international courts and tribunals in the first place. That does not mean, however, that the same nations do not occasionally throw their weight around, overtly or covertly. The ICC has issued arrest warrants for leaders in Sudan and Libya, observed a participant, but shied away from doing the same in Syria and Bahrain, both of which have allies among the permanent members of the U.N. Security Council. The United Kingdom has been a supporter of the ECHR over its more than 60-year history, it was noted, but recently has rejected the Court’s rulings on issues unpopular at home.²⁹ The UK also attempted to enact reforms that would limit ECHR jurisdiction during its recent mandate as leader of the Council of Europe, particularly in regard to interpretation of the Court’s so-called “subsidiarity principle,” which determines whether national courts have dealt satisfactorily with human rights complaints and thus may avoid answering to the ECHR. And Brazil recently withdrew its financial support from the Inter-American Commission on Human Rights after the Commission issued precautionary measures directing a halt on construction of the Belo Monte hydroelectric dam, pending an investigation of its potential impact on both indigenous populations and the environment.³⁰ One participant was philosophical about such situations: “It is true that some states dominate,

29. *Greens v. United Kingdom*, App. Nos. 60041/08 & 60054/08, Eur. Ct. H.R., Judgment (Nov. 23, 2010), *available at* hudoc.echr.coe.int/web/services/content/pdf/001-101853?TID=xoluqvkqgg.

30. See 2011 Precautionary Measures, OAS, *available at* <http://www.oas.org/en/iachr/decisions/precautionary.asp>.

“Decisions are not only speaking to the parties in litigation but to the rest of society. They are not only speaking to the present but also to the future. My position is that we must continue to have faith in legal solutions wherever it is possible.”

but this is a fact of international political life. I do not think this should reflect on the effectiveness of international courts.”

In response to the criticism that courts “legalize” every problem, some considered that it could not be otherwise, given their mandates. “We must have legal solutions to problems,” said a judge. “This should not depend on whether decisions are enforceable or not. Decisions are not only speaking to the parties in litigation but to the rest of society. They are not only speaking to the present but also to the future. My position is that we must continue to have faith in legal solutions wherever it is possible.”

One participant maintained that the critiques of international courts and tribunals put forward in the readings were essentially flawed because they failed to distinguish, using a musical metaphor, between “instruments” and “players.” The courts are instruments, created to perform a certain role, while states are those who play them. And too often, he added, they are poorly played; that is, states do not cooperate or use the courts competently or responsibly, instead impeding their work or interfering for political reasons. The criticism that courts tend to act independently and to take their own decisions may, in fact, be an institutional solution to avoid control by badly performing states. Should this really be considered a criticism, the judge wondered? Or is it instead a sign of the robustness and success of international courts and tribunals?



Toward the end of the discussion, participants seemed to agree that many of the common critiques of international justice institutions are a result of unrealistically high expectations about what they can accomplish. A criminal judge noted, “International justice has been seen as a magic wand to bring about reconciliation and do all kinds of things that courts cannot do. I think that criticism has been fueled by excessive

as their “educating voices.” Not only official spokespersons but also academics and NGOs should do a better job of educating the public about the pressures put on courts and tribunals – by victims and advocate groups as well as governments – which may result in unavoidable compromises and negative press. Finally, a number of participants felt that states themselves should take on the role of defending international courts and tribunals, which are, after all, their own creations.

... courts and tribunals need to *deconstruct* and then *reconstruct* the definition of their own success.

statements, made especially by prosecutors, and huge publicity for arrest warrants.” He contrasted the dilemma of criminal courts to that of the ICJ, whose decisions garner a lot of attention but do not raise the same kinds of expectations about impact. A human rights judge offered his view on the issue: “Managing excessive expectations is a difficult thing. There are also dangers in recognizing one’s own limitations. But broadly speaking, international courts are aware of these dangers.”

A second response to unrealistic expectations is to reframe the understanding of compliance with judicial rulings. While it is true that compliance with some judgments may not be immediate, an extended time frame may show parties eventually coming into compliance. Another participant concurred, noting that the non-enforceability of judgments should not be considered a sign of failure of the international justice system. “There is wisdom in waiting, as events occur later, and decisions that are not enforced become enforced.” He offered as an example his own country, where an ECHR ruling on the rights of homosexuals was ignored for years. In time, however, the government changed its legislation to conform to the European Convention.

Two responses that might correct the tendency toward overblown expectations of international justice, and the critiques they generate, were then suggested. First, courts and tribunals need to *deconstruct* and then *reconstruct* the definition of their own success. Each institution should articulate what its optimal role is, as well as what alternatives might exist to judicial procedures. For example, criminal courts could openly recognize non-judicial paths toward reconciliation in the wake of war crimes and crimes against humanity, thereby acknowledging the inherent limits of their strictly legalistic approach. Furthermore, international courts and tribunals should decide who will serve

In conclusion, it was acknowledged that there is indeed a relationship between law and politics that comes together perfectly in international courts and tribunals. However, one participant insisted that the authors of the works under discussion are misguided: “These critical writings miss the mark by focusing too much attention on the courts themselves. It is not that courts are beyond criticism, because earlier discussions in this institute – on overlapping and conflicting jurisdictions, and on issues of consistency and differing frameworks – show that there is an active internal self-evaluation. The authors’ failure to understand or acknowledge the different frameworks under which courts operate



– for example, that criminal courts have different aims and needs than the WTO or ICJ – has allowed them to fill the explanatory vacuum with their own favored premises.”

Another participant declared that such criticisms, in the end, should be taken as a sign of the success of international courts and tribunals. “The more strength courts have, the more strongly will those affected by them react. The real danger is the eventual withdrawal of support, or irrelevance.” Finally, a judge ended the discussion by remarking, “I welcome these critiques because I see them as an accountability mechanism. Against the background of criticism, international courts are only likely to improve.”

The Appropriate Role of International Courts and Tribunals in Enhancing Global Justice

A common theme throughout BIIJ 2012 was the manner in which international courts and tribunals (including those that operate at the regional level) interact with their domestic counterparts. The global legal system is undoubtedly interconnected, with judgments rendered by international courts directly affecting the states that are party to their respective governing agreements, and sometimes even states with which courts have no direct relationship. Toward the end of the institute, participants turned their attention to another channel of interaction among judicial spheres: the various ways in which international courts and their judges can and should build the overall capacity of national justice systems, as well as how they might assist developing countries to participate in international justice procedures.

As already discussed, globalization has led to a situation of overlapping and concurrent jurisdictions over many legal matters. Paradoxically, even when domestic jurisdictions

have theoretical primacy over international ones – as reflected in the ECHR’s principle of subsidiarity or the ICC’s principle of complementarity – international courts often take the leading role in developing and promoting the global rule of law. This is because both their geographical jurisdictions and symbolic spheres of influence are wider than that of their domestic counterparts. The first question on the table during this session was whether and to what extent international courts should take concrete practical steps to share the knowledge and best practices developed in their own institutions in order to develop the capacity of national judicial systems.

To begin the debate, one participant asked an important question about such activities: is it a question of responsibility, or rather one of desirability? International courts are generally not under an obligation to enhance national justice systems. However, participants agreed that it is at least desirable for them to bring their rulings to the attention of national courts and help them to see why they matter. The ICTY has voluntarily



David Unterhalter of the WTO Appellate Body.





BIIJ directors and conveners (l to r): Linda Carter, Dan Terris, Leigh Swigart and Richard Goldstone.

gone further and formed a partnership with domestic courts in the Balkan region by aiding them to take up complex cases involving war crimes and crimes against humanity. Judges from the ICTY have held numerous meetings with judges from relevant domestic courts and distributed a manual on ICTY practices to this end.³¹

For some courts, however, such activities are not merely desirable but instead part of their mandate. The regional human rights courts of the Americas, Africa, and Europe, for example, regularly issue advisory opinions to countries that have agreed to their jurisdiction or are members of their governing conventions. One judge described the process at her court: “The countries can pose a question related to national law or human rights, and ask for the court’s advisory opinion about whether their constitution or any piece of legislation is contrary to the Convention or international law.” Such advisory opinions ideally help states to avoid coming before the regional courts at a later date, explained another judge. “The ultimate aim is that respective states

31. Fausto Pocar, *Completion or Continuation Strategy?: Appraising Problems and Possible Developments in Building the Legacy of the ICTY*, 6 J. Int’l Crim. Just. 655 (2008).

will end up in a position where there is no need to come to the court because the nation’s own courts and agencies pursue principles consistent with the overriding Convention.”

The ECJ is perhaps unique in the nature of its contact with the domestic courts of its jurisdictional area. A participant reported that fully half of that court’s work consists of answering questions about European law – treaties, secondary legislation established by treaties, and so on – posed by the 27 national jurisdictions in the European Union. “We were anxious from the very beginning to set ourselves up as partners with national judges rather than act as a supreme appellate court. We have always played that role down. We are here instead to help interpret European law.” Assistance to national courts of a more informal nature may also take place. Occasionally national judges may contact the ECJ judge who sits in respect of their country or a judge advocate to request guidance on a particular legal matter. The regional judge can then direct the national judges to look at certain cases, suggest they wait for a pending ECJ case to be decided before acting on the home front, or otherwise guide the national court’s resolution of the matter. Such a personal approach may not be possible, it was pointed out, for regional or international courts with a larger group of states under their jurisdiction.

Participants also noted that advice on legal issues may be communicated through conferences or face-to-face meetings between senior judges from domestic judicial systems and judges from regional and international courts. But while such informal advising is often helpful and desired, it may raise confidentiality concerns, such as when a case on the issue at hand is pending. Some BIIJ participants expressed concern about other potential ethical concerns. “It is hard,” said one judge, “when a communication is from an international judge to a national judge, to decide whether that communication should be

considered *ex parte*. Such informal conversation sounds very desirable in terms of building relationships, etc. But from an ethics standpoint, it strikes me as inappropriate and unacceptable in other contexts.”

Despite such concerns about direct personal contact, participants generally agreed that it is important for international and regional judges – and their institutions – to help their domestic counterparts understand governing charters and principles of the law in some manner or other. There are a number of strategies that can be used: invoking the aid of academics and non-governmental organizations when necessary and appropriate; writing clear and concise judgments that can be easily understood; and broadcasting courtroom proceedings live on the internet. One judge stressed the critical importance of good judgments in particular: “The more that judgments are clear and present the issues in a way that is accessible, the more they will be accessed by other courts. This is fundamental to establishing the rule of law – reducing the distance between international and domestic adjudication.” A human rights judge noted that all of these strategies will “promote the work of international courts and develop adherence to human rights.”

The question of how judicial decisions should best be disseminated was then addressed. Media outlets can register with most international courts and tribunals to receive both press releases and full decisions in a timely manner. International judgments, and increasingly broadcasts of proceedings, are available in databases as well and can be consulted by not only domestic judges but also the media and legal experts. Some participants expressed reservations about such databases, however. Although they are rich in content, there is the logistical problem of knowing where and how to look for particular decisions or broadcasts. Additionally, the websites of international courts and tribunals are often

difficult to navigate, and each institution has its own format for accessing resources.

Participants recognized that facilitating access to the decisions of international courts and tribunals could directly benefit domestic jurisdictions. It was pointed out, however, that domestic courts do not have to be passive recipients of jurisprudence from the international domain, particularly on issues of human rights. A judge explained, “States shouldn’t wait for a violation to be found against them. When they see that a practice or law of their own country has been condemned by the court in relation

“The more that judgments are clear and present the issues in a way that is accessible, the more they will be accessed by other courts. This is fundamental to establishing the rule of law – reducing the distance between international and domestic adjudication.”

to another country, they should be incited to change things at home and not wait for a similar charge against them.” She added that the decision against the UK concerning the voting rights of prisoners³² led some European countries to immediately change their own laws on this matter. This kind of proactive behavior on the part of states can have the additional benefit of lessening the caseload of human rights courts. Furthermore, added a participant with both national and international experience, it is best for domestic courts to use their own legal traditions when incorporating human rights law. Otherwise, these issues will be decided by international judges from other countries. “It’s in the interest of countries to engage in these processes; the more they incorporate, the less power Strasbourg has.”

32. *Hirst v. United Kingdom (No. 2)*, 2005-IX Eur. Ct. H.R. 187.



BIIJ participants agreed that disseminating information about the jurisprudence of international courts and tribunals must be approached with an eye to the future as well as the present. In addition to holding conferences with senior judges of domestic tribunals to aid their understanding of fundamental principles of international law, seminars with law students should be organized. The individuals just entering the practice of law increasingly need a solid understanding of international jurisprudence. Internship programs that both import and export skills, knowledge, and expertise can be tremendously helpful in training the next generation of lawyers and judges. Students could work and learn in regional and international tribunals, then bring those skills back to domestic courts and implement them there, which would benefit less developed jurisdictions in particular. Sponsored lectures should also be delivered by visiting international judges; such events are inspirational and expose national jurisdictions to developing international jurisprudence. On a larger scale, international courts and other entities could organize colloquia to engender cooperation, coordination, and exchange of ideas between domestic, regional, and international tribunals.³³

Whether BIIJ participants felt that it was a responsibility of international courts to build capacity, or merely desirable for them to do so, they agreed that there are certain concerns with the appearance of impropriety that courts must be aware of conveying. Judges must preserve their impartiality even while advising national judges and jurisdictions on legal questions, and avoid the appearance of fostering the interests of one party over those of another. International

courts must also take steps to avoid accusations of self-aggrandizement, or trying to build their *own* capacity rather than that of domestic courts. “The job of capacity building must be approached as thoughtfully and respectfully as judges approach adjudication,” declared a participant. “There will inevitably be not only judicial but also economic, social, and cultural sensitivities when other institutions step in.” Furthermore, the successful outcome of such efforts is not a given. Several participants noted that it would be wise for other institutions—such as NGOs and academic organizations—to help domestic courts build capacity so that it is not left to international courts alone.

When it comes to building the capacity of domestic courts, participants noted that some situations are more critical than others. This is the case for the jurisdictions in the Balkan states and Rwanda that are taking over cases from the ICTY and ICTR, as the two ad-hoc tribunals reach the end of their mandates. BIIJ participants discussed briefly the term “completion strategy,” usually used to refer to this winding-down period. Should it more appropriately be called an “exit” or “continuation” strategy? For while it is true that the ad hoc tribunals need to complete their work and exit the scene, domestic tribunals will be continuing their legacy.³⁴ After all, as noted in reference to the ICTY, “the Tribunal was never intended to act indefinitely as a substitute for national courts, particularly those in the region, which have an essential role to play in ensuring that justice is served, reconciliation is promoted, and closure is brought to the families and victims of the war.”³⁵ Thus, a “completion strategy” does not so much complete the work of a special tribunal “as it is a strategy designed to allow continuation by local actors of those activities that were initially

33. In addition to the BIIJ, Brandeis University organizes such meetings among judges serving in international, regional, and domestic jurisdictions. See *Judicial Colloquia*, Brandeis U., <http://www.brandeis.edu/ethics/internationaljustice/judicialcolloquia/index.html>.

34. Pocar, *supra* note 31.

35. *Id.* at 658.





WTO Appellate Body member Jennifer Hillman (l) with ECHR Judge Nina Vajić.

‘kicked off’ by the [special tribunal] under the mandate of the Security Council.”³⁶ However the current strategies of the ICTY and ICTR are conceptualized, participants agreed that these courts have a duty to train the receiving domestic courts on how to handle these continuing cases using the same strict standards of fairness as their international counterparts.

Participants then turned their attention to a very different question for international courts, particularly those that adjudicate inter-state disputes: should they be involved in assisting states to access their institutions by helping them understand the process? Also, should they strive to “level the playing field” when one party is a developed nation and the other a developing nation? Specifically, participants examined whether there is perhaps a greater duty to do so in institutions like the WTO, where claims cannot be brought before national systems, leaving the international tribunal as the only option.

According to author Gregory Shaffer, there are three principle stages of dispute resolution that must be considered if a WTO member is to use

36. *Id.*

that system successfully.³⁷ Each of these may present difficulty for developing countries. The first stage is “naming;” identifying how imports or exports are being impeded. Developing countries often lack legal experience in WTO law as well as the “capacity to organize information concerning trade barriers and opportunities to challenge them.”³⁸ The second stage is “blaming;” identifying the country or countries causing the trade issues, as well as the measures of the identified government(s) – law, regulation, or practice – that are causing the problem. Developing countries may fear political and economic pressure from WTO members with dominant market power at this stage.³⁹ The last stage is “claiming,” where the affected country brings a claim before the WTO. Developing countries may have difficulty if they do not have a well-functioning government that is willing to prosecute the claim. The government may also lack expertise in bringing claims before the WTO, as well as the required resources to hire outside legal counsel versed in the

37. Gregory Shaffer, *The Challenges of WTO Law: Strategies for Developing Country Adaptation*, 5 *World Trade Rev.* 177 (July 2006).

38. *Id.* at 177.

39. *Id.*





McGeorge Law School rapporteurs and Brandeis University interns on the patio of the Alcázar.

WTO system.⁴⁰ Given the difficulties that may arise at each phase of the dispute resolution procedure, the question is the following: is it the responsibility of the WTO and other international entities to help disadvantaged countries access WTO procedures?

BIIJ participants discussed three possible ways in which international courts could assist developing and least developed countries. One way would be to push for the creation of a special prosecutor or advocate who could do the blaming and claiming for these countries. Some judges were skeptical of this approach. Trade issues, one participant noted, are not like criminal violations that must necessarily be prosecuted. It is up to the WTO party to decide whether or not it is in its interest to pursue a claim.

40. *Id.*

Another possible form of support could come through legal assistance from a third party. An example is the Advisory Centre on WTO Law, a subsidized legal services organization established at a WTO Ministerial Meeting through an international agreement. The Centre aids developing countries in writing briefs and developing legal arguments, and advises those that wish to join cases as parties or third parties.⁴¹ Additionally, the Centre advises countries on the consistency of their proposed laws or another country's laws with the WTO agreement. The Advisory Centre on WTO Law has been regarded as successful; it is well respected, and its assistance has helped to make developing country clients into a significant group of claimants in the WTO system. Further, the Centre has enhanced the fairness and legitimacy of the WTO system by not serving only dominant trading partners.

Despite these successes, however, some BIIJ participants expressed misgivings about such assistance. Are the Centre's services adequate for developing countries, they wondered? After all, the Centre cannot help with naming – its assistance comes into play only after a country has recognized that its rights are being violated. Similarly, the Centre cannot help if a country is unwilling to bring a claim. Other participants raised the concern that the Centre does not correct the power imbalances that create the heart of the problem – it cannot prevent dominant states from skewing the system in a way that cannot be corrected. A participant from another inter-state dispute resolution court mentioned a similar difficulty: while his institution takes care to treat all countries on an equal footing in the formal sense, there still remain issues of substantive inequality when dealing with dissimilar nations, such as differences in the quality of counsel at their disposal.

41. *Id.*

One participant objected to painting all developing countries with the same brush. Larger developing countries like China and Brazil, he noted, play an increasingly important and sophisticated role in dispute settlement with clearly articulated strategies; they therefore do not require special help. Developing countries may also not require the same kind of assistance if they are acting as respondents instead of claimants in a trade dispute.

Furthermore, an entity like the Advisory Centre on WTO Law must be aware of perception problems, just as international courts must be when building capacity in national judicial systems. Some observers believe that the WTO is using the Centre to bring itself more cases, thereby creating the impression of more robust participation in the WTO system. The Centre is also funded largely by developed countries,⁴² whose citizens may feel it is unjust that their tax money is used to underwrite the ability of poorer states to bring trade claims against donor governments, including their own.

Lastly, participants touched on the issue of fairness: a court or other dispute settlement body should not make the arguments for a particular party just because it is a developing country. The court's responsibility is to provide access, not to defend the party itself, which is what some participants felt is the real role of the Advisory Centre.

After an extensive discussion on the need for assistance, and the benefits and disadvantages of providing it, one judge mentioned the possibility that the whole topic is a non-issue. "It doesn't mean poorer countries shouldn't have access to the system, but when assessing the extent of the problem, one must ask how much of a difference such access would make when regrettably these countries engage in very little foreign trade, and

when they do, the extent of trade is modest – often only one commodity. I am not sure it is a huge problem." Another participant immediately responded with the opposite view: "But for any one of those countries, it seems to me the case involved might be very large and important. So their perceived need for adequate assistance in appearing before the WTO might be larger to them than it seems in the global picture."

Despite some differences in opinion, the majority of the BIIJ participants seemed to agree in the end with Shaffer's statement: "[i]f developing countries are to participate meaningfully in the WTO dispute settlement system, they will need to continue to increase institutional capacity and coordination of trade policy at multiple levels, from the national to the regional to the global."⁴³ It is thus reasonable that some sort of assistance be provided to disadvantaged parties before an inter-state dispute settlement body, just as defense counsel is offered to accused parties before international criminal tribunals when they do not have the resources to pay for representation.

This session's discussion highlighted that the simple existence of international courts and tribunals is not enough to ensure the establishment of global justice. Rather, these institutions have a role to play in ensuring that the law and procedures they have created are accessible, both to their counterparts in the domestic sphere and the parties that come before them. The question remains as to how the sharing of international law and procedures can be done most effectively and with the least risk of impropriety or conflicts of interest. BIIJ participants had the opportunity to at least begin the discussion of what will certainly become an increasingly important topic as legal globalization continues at a rapid pace.

42. *Id.*

43. *Id.* at 197.



Making a Place for Indigenous Rights in Global Justice

The final topic for plenary discussion was inspired by the life's work of a native son of Sevilla, the regional capital of Andalucía located a short distance from the BIIJ 2012 venue. Bartolomé de Las Casas (1474-1566) is considered by many as the first Western advocate of the rights of indigenous peoples. BIIJ participants considered the potential impacts of the body of law emerging around the concept of indigenous rights. Participants were asked to reflect on how this concept might influence the work of international courts and tribunals as well as the future development of international law.

A historian and Dominican friar, Las Casas wrote in 1542 *A Short Account of the Destruction of the Indies* (*Brevísima relación de la destrucción de las Indias*). This work recounts the mistreatment of indigenous peoples by the Spanish colonial system and makes an argument for new laws regulating the use of native labor by Spanish settlers. In later works, Las Casas emphasized the inherent humanity and dignity of the peoples of the New World, as well as their rights to freedom, sovereignty, and property.

It was not until four centuries later, however, that a formal movement to articulate the rights of indigenous peoples was undertaken. First the International Labour Organization and later the UN Working Group on the Rights of Indigenous Peoples took on this task, through consultation and collaboration with representatives from around the world. This process went on for almost 50 years.

A general concern by governments throughout this articulation process was that the “self-determination” of indigenous peoples in their territories might be taken as their right to secede or otherwise challenge state sovereignty. Many

governments consider that the right to self-determination should necessarily be limited by the duty of indigenous peoples to respect the territorial integrity and political unity of states.

Governments were also concerned that the notion of “indigenous people” might be conceived of so broadly that it would include all minority groups or any other sub-state populations that consider themselves disadvantaged, politically or otherwise. African states were particularly concerned about this issue since most of their populations could be categorized as indigenous to their respective territories.

The indigenous peoples movement began with the “first peoples” of the Americas and Australasia, those dispossessed of their lands through colonial domination. The movement was eventually expanded, however, to include populations in other regions of the world that are distinguished by their unique livelihoods and marginalization from modern state building, such as nomadic pastoralists and hunter-gatherers (e.g. the Sami of Scandinavia, the Awas Tingni of Nicaragua, the Endorois of Kenya, and the San of southern Africa).

The following criteria are generally used for determining a population's status as an indigenous people:

- occupation and use of a specific territory;
- voluntary perpetuation of cultural distinctiveness;
- self-identification as a distinct collectivity, as well as recognition by other groups;



- experience of subjugation, marginalization, dispossession, exclusion, or discrimination.⁴⁴

The result of this long articulation process was the United Nations Declaration on the Rights of Indigenous Peoples (the Declaration),⁴⁵ adopted on 13 September 2007 by most U.N. member states.⁴⁶ An explicit definition of “indigenous people” is notably absent from this document.

The Declaration is a non-binding instrument. Some observers believe that, like the UN Declaration of Human Rights, it will have a powerful top-down influence on the adoption of minimum standards of protection and serve as a foundation on which indigenous rights law can develop. Others believe that the rights of indigenous peoples can best be ensured through local action and national political processes.

BIJ participants began their discussion by considering several prominent cases addressing indigenous rights claims. The first concerned the San people of the Kalahari Desert. In 2002, the Botswana government evicted the San from their ancestral lands in order to develop the Central Kalahari Game Reserve for touristic purposes and for diamond mining. The High Court supported the government’s actions, in particular the decommissioning of a borehole that provided water to San who refused to be relocated. The Botswana Court of Appeal ruled in 2011 that



ICC Judge Sanji Monageng comments on an indigenous rights case in her native Botswana.

the government’s actions were unconstitutional and constituted “degrading treatment.” One observer of this case has written, “This judgment has sent a strong signal to the government that economic interest even for the benefit of the overall population is not a justification for non-recognition of the basic rights of indigenous peoples.”⁴⁷

A recent decision concerning the Endorois people in Kenya was also referenced. The Endorois are an indigenous population in Kenya that was evicted from its ancestral lands around Lake Bogoria in the 1970’s by the state to make room for a game lodge and other touristic infrastructure. In return, individual members of the group were offered minimal compensation and relocated to lands that could not support their livestock (lacking water, vegetation, and salt licks), that did not have the plants used for their traditional medicines, and that separated

44. See Clive Baldwin & Cynthia Morel, *Using the United Nations Declaration on the Rights of Indigenous Peoples in Litigation*, in *Reflections on the UN Declaration on the Rights of Indigenous Peoples* 121, 133 (Stephen Allen & Alexandra Xanthaki eds., 2011) (referring to Erica-Irene Daes, chairperson of the United Nations Working Group on Indigenous Populations).

45. United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, U.N. Doc. A/RES/61/295 (Oct. 2, 2007), available at www.un.org/esa/socdev/unpfi/documents/DRIPS_en.pdf.

46. The Declaration was initially rejected by four powerful nations – Australia, Canada, New Zealand, and the United States – all of which possess particularly problematic histories vis-à-vis the populations indigenous to their territories. All four have since recognized the Declaration.

47. *Indigenous Peoples’ Rights Upheld in the CKGR Appeal Case, Case Analysis 2*, Center for H.R., U. of Pretoria, (2011), <http://www.chr.up.ac.za/index.php/human-rights-news.html>.



the Endorois from sites of religious and cultural significance.

After domestic remedies were exhausted, the Endorois situation was brought before the African Commission on Human and Peoples' Rights. In 2010, the Commission found that the Kenyan state had violated the Endorois' rights to freedom of religion, property, health, culture, and natural resources under the African Charter on Human and Peoples' Rights. It directed the Kenyan government to compensate the Endorois for the losses suffered through their dispossession, recognize their rights of ownership, restore their access to ancestral lands, and take a number of other reparatory measures.

The issues raised by these two cases, as well as the very notion of indigenous rights, elicited a spirited exchange among participants. The fact that there is no explicit definition of "indigenous people" in the Declaration was troubling to some participants. "If a claim by an indigenous people comes before me in court, I must know what an indigenous people *is*," declared one judge. "That's fundamental and you must tackle it before you proceed." Another judge noted the counter-intuitive categorization of some peoples as indigenous. In the contemporary Caribbean, for example, there are mixed populations descended from Amerindians, Europeans and Africans – the latter two groups clearly not autochthonous to the region. However, due to their separate

identity and language, such populations are generally recognized as indigenous peoples. One judge experienced in the area of indigenous rights asserted that it is best to have no single definition of the concept. "We are safer without a definition. Who is recognized as an indigenous person in Africa is different than in Australia. It took a lot of compromises to get the Declaration adopted by the overwhelming majority of General Assembly members. I think we should let sleeping dogs lie."

The issue of definitions led to another question: what exactly are indigenous rights, and how do they differ from human rights? "I'm trying to understand the nature of these rights," said one participant. "The modern conception of human rights is often deeply antithetical to the idea of a cultural distinctiveness that makes people who they are. I see the threads of this antithesis running throughout the Declaration."

Another participant agreed, characterizing the Declaration as "full of paradoxes," such as its simultaneous assertion of both collective and individual rights for indigenous peoples, despite real potential for conflict between the two. For example, the right of indigenous peoples "to practice and revitalize their cultural traditions and customs" (Article 11)⁴⁸ may not mesh with guarantees for the protection of indigenous women and children and their freedom from discrimination (Article 22).⁴⁹ There is also a potential contradiction in the Declaration between the right of indigenous peoples to self-determination and "to freely determine their political status" (Article 3)⁵⁰ and the assertion that nothing in the Declaration should be interpreted as sanctioning the destruction of "the territorial integrity or political unity of sovereign and independent States" (Article 46).⁵¹

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48. United Nations Declaration on the Rights of Indigenous Peoples, *supra* note 45.

49. *Id.*

50. *Id.*

51. *Id.*



The question was then raised as to the relationship between indigenous rights and minority rights, such as those guaranteed by Article 27 of the Covenant on Civil and Political Rights (see sidebar, at right). A participant with past service on the U.N. Human Rights Committee suggested that international bodies should deal with indigenous peoples as minorities since there is currently insufficient legislation to address a different special status. Another judge pointed to the rich case law produced by the Inter-American Commission and Court of Human Rights involving indigenous peoples. Despite the fact that the Inter-American system does not explicitly recognize indigenous rights, it has used the rights to property and landholding, freedom of movement, and self-determination to great effect.⁵² “The Inter-American system has been extremely brave and forward in upholding the rights of these peoples,” a judge declared. It was acknowledged that recent cases surrounding indigenous rights in Africa have drawn substantially from Inter-American jurisprudence.

The occupation and use of a specific territory – one of the criteria by which indigenous peoples are identified – was then discussed by participants. It is clear that many populations have been dispossessed of their traditional lands and questions of compensation consequently arise. One judge was bothered by the “backward-looking” character of some demands for compensation. Does it make sense to compensate the descendants of those whose land was originally seized, sometimes centuries earlier? And doesn’t the state have the right to take some land if it is in the common interest in the first place? More generally, the same participant expressed puzzlement at the public apologies issued by certain governments for

52. See American Convention on Human Rights, Nov. 21, 1969, 1144 U.N.T.S. 143, available at http://www.hrcr.org/docs/American_Convention/oashr.html.

International Covenant on Civil and Political Rights, Article 27

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

Available at <http://www2.ohchr.org/english/law/ccpr.htm>.

actions taken against indigenous peoples in the past, for which those alive today are not directly responsible. Other participants disagreed, clearly believing apologies and other kinds of “symbolic compensation” can aid in efforts toward peaceful coexistence among populations.

Another judge observed that some indigenous populations are not interested in being compensated for their loss of land; what they really want is to have the land returned. The cases of the San and Endorois summarized above suggest that this was their desired goal. The Sami of the Nordic countries feel equally strongly, a judge commented, about the return of the land that they have traditionally used to herd reindeer. Furthermore, this population is well informed about the international treaties and conventions that might help them achieve their goal. The understanding of the African Commission on Human and Peoples’ Rights on this issue, a participant noted, is that traditional lands of indigenous peoples should be returned if this is feasible. Otherwise, there should be fair compensation.



The session ended with a reminder by one participant that indigenous peoples are not monolithic entities, with all group members in agreement about what they need and wish for in terms of rights and aspirations. Furthermore, the search for indigenous rights may exacerbate fault lines that already exist within their cultures. Legal negotiations about indigenous rights may well bring new challenges – and not just remedies – to the groups that wish to avail themselves of the provisions of the relatively recent Declaration on the Rights of Indigenous Peoples. Recognition of these rights adds one more piece to the complicated puzzle of contemporary global justice.

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Other topics of discussion

BIIJ 2012 offered several opportunities for small groups of participants to gather for focused discussion on topics of particular interest. Judges serving on inter-state dispute resolution bodies covered a number of legal issues pertinent to their institutions, including those raised by the ECJ *Kadi* case.⁵³ Human rights judges discussed a number of logistical challenges facing their courts, including how to cover the costs of cases, handle requests for adjournment, and respond to state representatives before their courts who use abusive language or otherwise show contempt for the proceedings. Judges serving in criminal jurisdictions shared their respective institutional practices on limiting the scope of indictments, amending indictments, dismissing cases, and recharacterizing the facts of a case. BIIJ participants also convened informally to exchange views on the special roles played by the presidency and other leadership positions in international courts and tribunals, the challenges associated with reappointment to an international judgeship by one's state, and the position of women in the international justice system.

53. Joined Cases C-402/05 P & C-415/05 P, *Kadi & Al Barakaat Int'l Found. v. Council of the European Union*, 2008 E.C.R. I-6351. A full discussion of the *Kadi* judgment can be found in the BIIJ 2009 report at Brandeis U., <http://www.brandeis.edu/ethics/internationaljustice/bijj/index.html>.

Topics in Ethical Practice: Pre- and Post-Judicial Service Considerations for International Judges

Every Brandeis Institute for International Judges since the inaugural session in 2002 has devoted a session to ethical issues that arise in international courts and tribunals.⁵⁴ In 2012, participants focused on the potential impact of past professional activities on international judicial service and, in turn, how this service may affect future employment after leaving an international court or tribunal. Participants also had the opportunity to discuss a resolution adopted by the Institut de Droit International (IDI) in September 2011 on “the Position of the International Judge.”⁵⁵ This was the first IDI resolution to be adopted since one in 1954 that focused on the ICJ, the only international court then in existence. BIIJ participants were particularly interested in articles from the recent resolution relevant to judicial terms and the status of international judges.

There has been a growing consensus among both international judges and observers of international justice about the desirability of term limits for judges. The IDI resolution reflects this view (see sidebar, at right). This strategy may be especially important for judges serving on courts whose parties are states – such as the ICJ or WTO Appellate Body – or whose respondents are states – such as regional human rights courts. When serving a single term, judges need not be concerned that their own governments – the usual nominating entity for international judges – will take offence at unfavorable rulings and consequently forego the judges’ reelection

or reappointment to a further term. Nor do judges have to worry that their own decision-making might be influenced – or be perceived as influenced – by concerns about their continued judicial service.

This very situation had recently occurred at the time of BIIJ 2012. A powerful Western nation had decided to block the reappointment of its own judge because it felt that this individual had not sufficiently protected its interests in cases before the institution in which the judge served. BIIJ participants were chagrined by the reaction of this nation’s government, which openly expressed its reasons for blocking the reappointment. “This is contrary to the very notion of judicial independence!” exclaimed a participant, noting that governments should recognize that nomination and election by a state does not mean being accountable to it. A judge from a non-Western country expressed surprise but also some relief in hearing about the dilemma: “It is usually only developing countries that behave in this way. I am not happy but still comforted that for once it is a world leader that is guilty.” Some participants were

Institut de Droit International, *The Position of the International Judge*

Article 2(1): In order to strengthen the independence of judges, it would be desirable that they be appointed for long terms of office, ranging between nine and twelve years. Such terms of office should not be renewable.

Available at http://www.idi-iil.org/idiE/resolutionsE/2011_rhodes_06_en.pdf.

54. For a full list of ethical topics addressed to date and to download pdfs see *Ethics and the International Judiciary*, Brandeis U., <http://www.brandeis.edu/ethics/internationaljustice/ethicsintljud.html>.

55. *The Position of the International Judge*, Institut de Droit International, (Sept.9, 2011), http://www.idi-iil.org/idiE/resolutionsE/2011_rhodes_06_en.pdf.



more philosophical about such interference by states. One judge stated, “What this country did was the symptom and not the disease. You need to expect that governments will act in their own self-interest. Such occurrences are the most powerful argument against renewable terms for international judges.” It was noted that at the ECJ, judges are largely free from such pressures even though their terms may be renewed; the voting record of judges is not made public, so states have difficulty determining the viewpoints of their own judges.

While most participants agreed that non-renewable terms help judges and courts avoid the appearance or reality of external influence, several pointed out that there is one obvious drawback: the loss of valuable judicial experience that can only be acquired over time. Such experience helps “the new judge on the court to move on to being the president, which requires a good amount of time.” On the other hand, a participant reflected, one term in some situations may be *too* long: “the problem with the single long term is that while there are very good judges, there are also those who are not so good, and the court ends up stuck with them.”

**Institut de Droit International,
*The Position of the International Judge***

Article 3(4): It is undesirable for judges serving in courts and tribunals with a heavy workload to engage in arbitrations or in substantial teaching activities.

Article 3(5): The president will decide, first and foremost, according to the interest and the needs of the international court or tribunal.

Available at http://www.idi-iil.org/idiE/resolutionsE/2011_rhodes_06_cn.pdf.

Participants also discussed the need for limitations to be placed on the outside activities that may be pursued by international judges while in service. Teaching and arbitration have historically been the most popular “sidelines” of international judges, and participants felt that there is no reason that they cannot be exercised within reason. Indeed, teaching and other academic pursuits by international judges play an important role in the dissemination of knowledge about international justice and provide valuable insights by those who are actual actors in the system. However, commitment to a full schedule of teaching can impede the optimal performance of judges by decreasing both their time and flexibility.

Arbitration can raise even more serious problems. Not only does it take judges away from their primary work, but it may also involve them in cases that lead to future conflicts of interest in their primary judicial role. This is more likely for judges who serve on interstate dispute courts, and who represent in arbitral procedure states that may later come before their court as parties.

The IDI resolution makes explicit recommendations about the regulation of outside activities by international judges (see sidebar, at left). The resolution also indicates that presidents should make decisions about such matters when necessary. It was noted that while presidents already play this role in most institutions, there is sometimes pushback by other members of the bench who feel they should be able to make decisions about their own time and availability. It is thus helpful, observed a participant, to have the authority of presidents authorized by an external resolution.

Participants then turned to the perennial question of how courts should decide when recusal by a judge is necessary. One articulated an obvious point: “International judges are not



empty vessels that litigants fill with content.” They are elected to their positions because they are recognized experts in criminal law, human rights law, trade law, or other relevant specialized areas. As experts, they have often made public statements about certain issues or published articles that make their views clearly known. This may create a paradoxical situation whereby the pre-service activities that have provided international judges with their qualifying expertise may also be seen to create potential bias.

There have been a number of calls for judges to recuse themselves from cases before international courts and tribunals, some of them very high profile.⁵⁶ However, sure-fire guidelines on how to determine the existence or appearance of bias or conflict of interest have yet to be determined. Several participants noted the variability in how judges view such situations. “I find this to be a very cultural issue, what constitutes a conflict and what may indicate a bias.” Another added, “Our discussions here show that it is difficult to frame rules at an abstract level that will be applicable to all situations. At the end of the day, recusal is dependent on the honor of the particular judge concerned. The problem is that the sense of what is honorable varies from society to society.” A third judge, with experience as president of his court, offered this as a rule: “If a judge decides to recuse himself, that is not a problem. But if the judge disputes a recusal, then it is for the court to decide.” A participant described a particularly difficult situation at her own court, where both the president and vice-president were accused of having connection to a case through prior involvement with an NGO. “The state party disagreed with referring a matter to the court on the basis that they had been members of an NGO before their appointment.

56. See Frédéric Mégret, *International Judges and Experts’ Impartiality and the Problem of Past Declarations*, in 10 *THE LAW AND PRACTICE OF INTERNATIONAL COURTS AND TRIBUNALS*, 33 (2011).

“It is not at all clear to me that a person who has expressed opinions publicly is more dangerous than one who keeps them to himself. He may, in fact, be less dangerous. What is really at the heart of the issue is whether his convictions are so strong that he is not capable of reviewing them.”

The court considered the matter and decided that their involvement had not been so activist as to necessitate their recusal.”

Finally, a participant posed a critical question, one that is rarely raised during discussions about pre-judicial activities and their potential to create bias. Is it right to focus the discussion solely on judges whose views are known? “It is not at all clear to me that a person who has expressed opinions publicly is more dangerous than one who keeps them to himself,” said a participant. “He may, in fact, be less dangerous. What is really at the heart of the issue is whether His convictions are so strong that he is not capable of reviewing them.” Another judge expressed dismay at the projected outcome of laying down too many rules and admitting too many possible dangers: “It would be a pity if this resulted in international courts as a collection of gray people who have never had a firm view on anything.”

The session ended with discussion of a problem that is just beginning to be noticed: the challenges that may face international judges *after* they step down from the bench. While virtually all participants agreed with the IDI resolution that non-renewable terms for international judges are desirable, this limitation also means that individuals cannot count on a long “career” in that function. Former international judges will now often find themselves back on the job



market after they leave their respective courts and tribunals. This challenge is exacerbated by the fact that in some international courts, judges are serving at increasingly young ages. Judicial positions on international courts and tribunals were once largely the “swan song” of an individual’s legal career, whether they spent their working lives as academics, diplomats, or domestic judges. In contrast, a quarter of the judges currently sitting on the bench of the ECHR are under the age of 50.⁵⁷ Since the ECHR is among those courts with a single non-renewable judicial term⁵⁸ – along with the ICC and CCJ – this means that these judges will have many years of work left between the time they leave the Court and their retirement age. Other international courts have also seen a decreasing age in some portion of their benches in recent years, albeit not as pronounced as at the ECHR. The modal age for international judges remains, nevertheless, in the 60-69 range.⁵⁹

What does one do after serving as an international judge? And what impact might one’s record while on the bench have on employability? One participant commented, “You have to remember that international judges have the expertise of the particular court on which they served. They will have expanded that expertise during their service and will want to continue work in that domain.” If they have displeased their home states through

their judicial decisions, however, they may not be welcomed back to a government post or other position of similar standing. Writes one international judge, “This is a fact of reality of ‘post-service life’ of many former judges and may sometimes even be linked to their actual independence while sitting on the bench in a jurisdiction in which all cases are brought against the State of which they are a national.”⁶⁰ Thus the issue of potential state influence on the decision-making of judges in reference to future employment – in contrast to aspirations for reappointment to one’s current post – raises its head.

More generally, it was pointed out that individuals are often required to give up their positions upon joining an international bench, with no guarantee that they will be able to return to their former post. “It is a topic that is extremely important and we should think about it,” said one judge. “It might have a chilling effect on colleagues who might wish to present their candidacy for an international judgeship.” One proposed solution to this problem in the Council of Europe might be for states to guarantee reinsertion of former international judges into their highest domestic courts. “... former judges are better acquainted with the [European] Convention and the case-law as well as with the functioning of the Court than most of their colleagues at home... The ‘personal capital’ they bring back with them thus represents a real asset for their country, a resource that can be seen as rather useful in particular within the national judicial system.”⁶¹

57. See Leigh Swigart & Daniel Terris, *Who are International Judges?*, in *The Oxford Handbook of International Adjudication* (Cesare Romano, Karen J. Alter, and Yuval Shany, eds., forthcoming).

58. Protocol 14 to the European Convention on Human Rights and Fundamental Freedoms, which entered into force on 1 June 2010, introduced this reform. Previously, judges could serve for a term of six years and be reelected for another six. The age limit remains at 70. The aim of the reform was to increase judges’ independence and impartiality. See *Fact Sheet on Protocol 14*, Council of Eur. (May 15, 2010), <http://www.echr.coe.int/NR/rdonlyres/57211BCC-C88A-43C6-B540-AF0642E81D2C/0/CPProtocole14EN.pdf>.

59. Swigart & Terris, *supra* note 57.

60. Nina Vajić, *Some Remarks Linked to the Independence of International Judges and the Observance of Ethics Rules in the European Court of Human Rights*, in *Grundrechte und Solidarität, Festschrift für Renate Jaeger* 179, 185 (Kehl, N.P. Engel ed., 2011).
61. *Id.*



Participants had various reactions to this issue. Several thought that former academics might have the easiest time reinserting themselves after international judicial service. Another pointed out that future employment is very much dependent on a particular country's policy toward civil servants: "In France, once a *fonctionnaire*, always a *fonctionnaire*," noted a participant, explaining that former judges will always be able to find another government job. In contrast, an African participant described how former domestic judges often find that they have burned their bridges: "The only option may be private practice, but judges should be allowed to earn a living!"

As during former institutes, this discussion about ethics ended with no clear-cut positions. Rather, the session allowed participants to air a range of views in an open and safe environment. However, one veteran international judge had this to say: "I think we should all be guided by a very strong sense of our responsibility to our institutions. International courts are still in a very fragile state. We must take into account the views of the political and legal communities." In other words, international judges must be aware at all times of how they can both preserve their independence and project the integrity of the institutions in which they serve.



Learning from the Past: the Judicial Philosophy of Louis Brandeis

Richard Gaskins, Brandeis University

Early 20th-century America saw rapid changes in economy and society, with increasing stress placed on the country's governance systems. National institutions remained weak in relation to those of sovereign "states" within the Union, while facing mounting pressures from global trends in regional conflict and economic expansion. Following the pivotal 1912 national U.S. elections, new progressive voices helped Americans embrace a modern future, defining a pragmatic middle path between rural populists and urban finance capitalists. Among those emerging voices was that of Louis Dembitz Brandeis, raised in the state of Kentucky after the Civil War by European parents, and based in Boston as a public-interest lawyer with national recognition.

As the architect of President Woodrow Wilson's economic platform in 1912, Brandeis would soon be appointed to the U.S. Supreme Court, marking a shift from his notable career in grass-roots legislative activism. A gifted lawyer, Brandeis championed the idea that legal expertise was ideally suited to crafting practical solutions to dynamic social problems. At age 60, Brandeis could draw on a lifetime of innovative legal practice in shaping his judicial role – a masterful performance lasting two more decades, and widely assessed as placing him among the greatest U.S. judges of the past century.

Louis Brandeis' service as a Supreme Court Justice opened a new dimension for his strategic, problem-solving concept of law. Complexity and complementarity were central to his approach, which promoted the spirit of democratic



Louis Dembitz Brandeis

pluralism, celebrated cultural diversity in the American melting pot, and integrated overlapping jurisdictions of national, state, and local levels of legal authority.

Had Louis Brandeis miraculously appeared at the 2012 BIIJ, he might have recognized common themes and concerns across the intervening century. While his specific concerns were domestic nation-building and balancing authority across overlapping internal jurisdictions, his methods may offer some inspiration for our century's concerns with securing the international order in a diverse and complex world. For Brandeis, the overarching legal framework was not a static system that merely conserved privileged doctrine or authority at the top. Even the language of rights was to be employed in strategic ways.

His aim was ultimately practical and experimental: to strengthen the capacity of regional and local governments to respond to new problems. Such goals are situated in real history: in Brandeis' era the entire nation was facing the economic tumult of the Great Depression. There was an imperative for development and growth, notwithstanding deep uncertainty about how to move forward. Federal judicial power – one pivotal point within a broad dynamic network – could be the catalyst for nurturing these capacities, tapping the energy of pluralistic values and diverse governing procedures. Neither strict judicial neutrality nor judge-managed reform could fulfill this nuanced vision for overarching judicial frameworks. Human rights, whatever their status in legal doctrine, must be enabled to flourish under concrete conditions.

For building a modern nation, Brandeis saw opportunities in overlapping jurisdictions: finding virtues in conflicting, competing, and concurring layers of governance. Brandeis was not overly concerned to iron out inconsistencies, but rather saw each level as a point of leverage for improving the performance of the others. In one spectacular instance, near the end of his judicial career, he identified an entire jurisdictional layer (federal common law) as stifling creativity at other levels – so he used his authority as a Supreme Court Justice to abolish it outright. This well-known case, *Erie Railroad. Co. v. Tompkins*,⁶² drew from Constitutional principles, but notably justified its bold action in terms of “social and economic” purposes.

62. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

Along with managing jurisdictional frictions, Brandeis understood the importance of structures and frameworks. His legal frameworks were not doctrines frozen in time, but dynamic, integrative systems that stressed human “capacities” over human “rights.” These systems took allowance of distinct cultural identities in pluralistic societies, and emphasized the importance of “groups” along with the classic legal categories of states and individuals.

Brandeis understood that courts were surrounded by politics, and could not – should not – evade that connection. Drawing on his entire career as a policy reformer, Brandeis thought it was not enough for courts to declare broad human rights; they had to work actively to build political capacities at the lower jurisdictional levels. As the author of the two greatest civil liberties decisions in American law (*Whitney v. California*⁶³ and *Olmstead v. United States*),⁶⁴ Brandeis gave lyrical expression to the importance of legal rights as the condition for human expression. In his judicial philosophy, the challenge was to enable such conditions to flourish for all peoples, in all corners of the nation.

63. *Whitney v. California*, 274 U.S. 357 (1927) (Brandeis, J., concurring).

64. *Olmstead v. U.S.*, 277 U.S. 438 (1928) (Brandeis, J., dissenting).



BIIJ 2012 Participant Biographies

Judges

Sophia A.B. Akuffo (Ghana) has served as the Vice-President of the African Court on Human and Peoples' Rights since 2006 and was reelected in 2008. She has served as a Judge of the Supreme Court of Ghana since 1995. She was educated at Harvard Law School and the Ghana School of Law, and went on to work as a Legal & Relations Manager for Mobil Oil Ghana Limited, with functional responsibility for Mobil Oil Liberia and Mobil Oil Sierra Leone from 1982 to 1992. She was also a Managing Consultant for Akuffo Legal Consultancy from 1992 to 1995. She is a member of Ghana's General Legal Council, the Board of Trustees of Central University College and King's University College, and a fellow and member of the executive board of the Commonwealth Judicial Education Institute.

Emmanuel Ayoola (Nigeria) serves on the Appeals Chamber of the Special Court for Sierra Leone, of which he is currently the Vice-President. He has served as judge of the Supreme Court of Nigeria, President of the Seychelles Court of Appeal, and Chief Justice of the Gambia. He was Vice-President of the World Judges Association, Chairman of the governing council of the National Human Rights Commission of Nigeria, and Chairman of the governing council of the Centre for Democracy and Human Rights Studies, an international NGO based in Banjul, Gambia. In 1966 he won the UN Human Rights Fellowship award. He is a graduate of London and Oxford Universities and has edited the *Seychelles Law Digest*, the *Law Reports of the Gambia*, and the *Nigerian Monthly Law Reports*.

Solomy Balungi Bossa (Uganda) has been a serving judge (ad litem) on the United Nations International Criminal Tribunal for Rwanda since August 2003. Before joining the Tribunal, she served as judge of the East African Court of Justice (2001 to 2006), a supra-national court for the East African Community. She has been a judge with the High Court of Uganda since August 1997 to date. Before joining the Uganda Bench, she practiced law for ten years (1988 to 1997). She was also a Law teacher/Law reporter for seventeen years at the Uganda Law Development Centre (1981 to 1997). She has held a number of responsibilities, leading and serving in various capacities, in a number of non-profit organizations nationally, regionally and internationally, that deal with legal aid, lawyers' associations, constitutional development, good governance, free and fair elections, and empowerment and human rights issues, particularly those affecting women. She has been recognized for these services and efforts with a number of awards. She is currently serving her final term as a member with the International Commission of Jurists. She is also a member of the International Association of Women Judges, the African Centre for Democracy and Human Rights, the East African Judges and Magistrates Association, and the Uganda Federation of Women Lawyers (FIDA).

John Hedigan (Ireland) was appointed to the High Court of Ireland on 24 April 2007. He previously served as a Justice of the ECHR from 1998 to 2007. Immediately prior to his election to the ECHR, he was Chairperson of the Independent Advisory Committee on the continued detention of persons found guilty but insane and detained in the Central Mental



Hospital (1991 to 1998). Hedigan was educated at Belvedere College, Trinity College Dublin and Kings Inns. He was called to the Bar in 1976, and has since served as Barrister before the courts in Ireland and before the European Court of Justice in Luxembourg. From 1972 to 1977, he represented the Trinity College branch of Amnesty International on the National Executive Committee of Amnesty International. From 1992 to 1994, he was Chairperson of the Irish Civil Service Disciplinary Appeals Tribunal. He has been Senior Counsel since 1990 and is a member of the English Bar (Middle Temple) and of the New South Wales Bar.

Jennifer Hillman (United States) currently serves as the Chairman of the World Trade Organization Appellate Body, which is the seven-member appeals court for all international trade disputes arising under the rules of the WTO. She also serves as a Senior Transatlantic Fellow at the German Marshall Fund of the United States. Prior to her service at the WTO Appellate Body, Hillman served as a Commissioner at the United States International Trade Commission (USITC) and an adjunct professor at the Georgetown University School of Law. Before her appointment to the USITC, she served as General Counsel at the Office of the U.S. Trade Representative (USTR) and before that she served as USTR's Chief Textile Negotiator with the rank of Ambassador. Prior to joining USTR, Hillman was the Legislative Director and Counsel to U.S. Senator Terry Sanford of North Carolina. She began her professional career as an international trade attorney. Hillman is a member of the Council on Foreign Relations and serves on the selection panel for Truman Scholars, and on the board of the DC Stoddert

Soccer League, Duke University's Arts and Sciences Board of Visitors, and the Trade Policy Forum. She is a graduate of the Harvard Law School and received an M.Ed. and a B.A., magna cum laude, from Duke University.

George Gelaga King (Sierra Leone) was appointed a justice of the Appeals Chamber of the Special Court for Sierra Leone in December 2002 and was its President from 2006 to 2008. He was awarded Sierra Leone's Premier National Honour of Grand Officer of the Republic of Sierra Leone (GORSL) on 27 April 2007. He is Chairman of the Sierra Leone Law Journal, Chairman of the Gambian National Council for Law Reporting, Bencher of Sierra Leone Law School, Fellow of the Royal Society of Arts, and a tutor for fifteen years at the Sierra Leone Law School. King obtained his LL.B. from London University in 1960 and was called to the Bar of Gray's Inn, London. He thereafter set up legal practice in Sierra Leone until 1974 when he was appointed Sierra Leone's first Ambassador to France, Spain, Portugal, and Switzerland, and Permanent Representative to UNESCO through 1978, with residence in Paris. From 1978 to 1980 he was Sierra Leone's Ambassador and Permanent Representative to the United Nations. Upon returning to Sierra Leone, King continued in private practice until 1987, when he was appointed to Sierra Leone's Court of Appeals, later becoming its President until 1997, when he left for The Gambia. He was appointed a justice and President of The Gambia Court of Appeal until his return to Sierra Leone in 2002. In August 2006, King was appointed as a Distinguished Visiting Professor of Kingston University in Essex, U.K.



Agnieszka Klonowiecka-Milart (Poland) currently serves as international judge on the Supreme Court Chamber of the Extraordinary Chambers in the Courts of Cambodia [ECCC], a hybrid tribunal for international crimes committed during the period of the Khmer Rouge, 1975 to 1979. Prior to her appointment to the ECCC, she was a UN-appointed international judge on the Supreme Court of Kosovo, adjudicating, among others, charges of genocide and war crimes arising from the conflict. Klonowiecka-Milart started her legal career as an assistant professor at the Law Faculty of the University in Lublin, Poland. She entered the judiciary in 1991 and since has been several times seconded to the Ministry of Justice to work on the harmonization of Polish laws with international standards. Since 1998 she has been active in the international rule of law arena, including UN judicial and legal reform programs in Bosnia and Afghanistan.

Erkki Kourula (Finland) was elected to the International Criminal Court on 11 March 2003, for a term of nine years. He was assigned to the Appeals Division. Kourula has a Ph.D. in international law from the University of Oxford. He has held various research positions in international law, including international humanitarian law and human rights, and has acted as a professor of international law. His experience includes working as a district judge in Finland dealing with criminal cases. Between 1985 and 2003, he served the Finnish Ministry for Foreign Affairs in various legal capacities, culminating in his appointment as Director General for Legal Affairs. He was also an agent for Finland before the European Court of Human Rights and the Court of Justice of the European Communities. In 1991 he was appointed Legal Adviser to the Permanent Mission of Finland to the United Nations in New York, serving until 1995. He closely followed the developments leading to the establishment of the ICTY and ICTR and was

actively involved in the negotiations of the Rome Statute (1995 to 1998) as head of the Finnish delegation to the Preparatory Committee, as well as head of the Finnish delegation to the Rome Conference on the Establishment of an International Criminal Court. From 1998 to 2002, Kourula served in Strasbourg as Permanent Representative of Finland (Ambassador), holding the chair of the Rapporteur Groups on Human Rights and National Minorities of the Council of Europe (2000 to 2002). He has participated in many international conferences, contributed to publications, and written articles on international law, including victims' issues.

Margaret Macaulay (Jamaica) has been an Attorney-at-Law in private practice in Jamaica since 1976. She is also a member of the Bars of other Commonwealth countries. She is a notary public, a mediator of the Supreme Court of Jamaica and an associate arbitrator. Macaulay was elected as a judge of the Inter-American Court of Human Rights in June 2006. She is an active member of the Disciplinary Committee of the General Legal Council and has chaired committees of the Jamaica Bar Association, as well as women and children's NGOs, both nationally and regionally. She has lobbied for and assisted in the formulation of amendments and the enactment of new legislation to ensure protection of citizens' rights for many years. Macaulay is also a weekly columnist in the *Jamaica Observer* newspaper on human and legal rights.

Theodor Meron (United States) has served on the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia since his election to the ICTY by the UN General Assembly in March 2001. Between March 2003 and November 2005, he served as President of the Tribunal. Since 1977, Judge Meron has been a professor of international law and, since 1994, the holder of the Charles L. Denison Chair at New York University Law School. In



2000 and 2001, he served as Counselor on International Law in the U.S. Department of State. Between 1991 and 1995 he was also professor of international law at the Graduate Institute of International Studies in Geneva. He was Co-editor-in-Chief of the *American Journal of International Law* (1993 to 98) and is now an honorary editor. He is a member of the Institute of International Law and the American Academy of Arts and Sciences, and a patron of the American Society of International Law. He has been a Sir Hersch Lauterpacht Memorial Lecturer at the University of Cambridge and Visiting Fellow at All Souls College, Oxford. He was awarded the 2005 Rule of Law Award by the International Bar Association and the 2006 Manley O. Hudson Medal of the American Society of International Law. He was made an Officer of the Legion of Honor by the Government of France in 2007. He received the Charles Homer Haskins Prize of the American Council of Learned Societies for 2008. In 2009, he was elected Honorary President of the American Society of International Law. He is an author of 10 books and many articles.

Sanji Mmasenono Monageng (Botswana) was elected to the International Criminal Court in 2009 for a term of nine years and assigned to the pre-trial division. Monageng formerly served as a High Court judge in the Kingdom of Swaziland, responsible for criminal and civil cases as well as constitutional matters as a Commonwealth Expert. Prior to this, she served as a judge of the High Court of the Republic of The Gambia in the same capacity. She started her legal career as a Magistrate in Botswana. Monageng has broad experience in the promotion and protection of human rights issues, having been a member of the African Commission on Human and Peoples' Rights, appointed by the African Union, between 2003 and 2009. She was then appointed as the Commission's Chairperson in November 2007. She has also chaired one of the special mechanisms of the Commission, the

Follow-up Committee on torture, inhumane, degrading and other treatment. Judge Monageng has given a number of lectures on human rights issues, criminal law, and humanitarian law. She also served a Deputy Chief Litigation Officer in the United Nations Observer Mission to South Africa in 1994. Monageng was the founding Chief Executive Officer of the Law Society of Botswana. She is a member of many international organizations including the International Association of Women Judges, the International Commission of Jurists and the International Society for the Reform of Criminal Law, and has sat on numerous national, regional and international boards.

Hisashi Owada (Japan) is a judge of the International Court of Justice in The Hague (since 2003) and was elected President of the Court in 2009. Before being appointed to the Court, he was President of the Japan Institute of International Affairs and professor of International Law and Organization at Waseda University in Japan. One of his country's most respected diplomats, Owada previously served as Vice-Minister for Foreign Affairs of Japan, as well as Permanent Representative of Japan to the Organization for Economic Cooperation and Development (OECD) in Paris, and Permanent Representative of Japan to the United Nations in New York. Owada taught at Tokyo University for 25 years and recently at Waseda University. He taught for many years at Harvard Law School, Columbia Law School, and New York University Law School. He is a member of *l'Institut de Droit International*. He is currently an honorary professor at the University of Leiden and a professorial academic adviser at Hiroshima University. Owada is the author of numerous writings on international legal affairs.

Fausto Pocar (Italy) was president of the International Criminal Tribunal for the former Yugoslavia, from November 2005 until November 2008. He has served on the court



since February 2000. Since his appointment, he has served first as a judge in a Trial Chamber and later in the Appeals Chamber of ICTY and ICTR, where he is still sitting. Pocar has long-standing experience in United Nations activities, in particular in the field of human rights and humanitarian law. He has served as a member of the Human Rights Committee and was appointed Special Representative of the UN High Commissioner for Human Rights for visits to Chechnya and the Russian Federation in 1995 and 1996. He has also been the Italian delegate to the Committee on the Peaceful Uses of Outer Space and its Legal Subcommittee. He is a professor of international law at the Law Faculty of the University of Milan, where he has also served as Dean of the Faculty of Political Sciences and Vice-Rector. He is the author of numerous publications on human rights and humanitarian law, private international law, and European law. He has lectured at The Hague Academy of International Law and is a member and treasurer of *l'Institut de Droit International*.

Konrad Hermann Theodor Schiemann (United Kingdom) has been a judge at the Court of Justice of the European Union since 7 January 2004. He was born in Germany in 1937 but moved to England as an orphan in 1946 and was educated there. Schiemann has a Master of Arts and Bachelor of Laws from Cambridge University. He is an Honorary Fellow of Pembroke College, Cambridge, a Barrister (1964-1980), a member of the Queen's Counsel (1980-1986), and a Bencher of the Inner Temple (1985). He was a High Court Judge from 1986 to 1995, a Lord Justice of Appeal from 1995 to 2003.

David Unterhalter (South Africa) was appointed as a member of the World Trade Organization Appellate Body in 2006. He holds degrees from Trinity College, Cambridge; the University of the Witwatersrand; and University

College, Oxford. He was a lecturer at University College, Oxford, but returned to South Africa to commence practice at the Johannesburg Bar in July 1990. Silk was conferred upon him in 2002. At the Bar, he has specialized in constitutional law and regulatory law (in particular competition law and international trade law). He has appeared in many leading cases in these fields. In addition to his practice at the Bar, he is a professor of Law at the University of the Witwatersrand. He has been a visiting professor at the University of Columbia, New York University, and University College, London. Unterhalter served on a number of World Trade Organization (WTO) panels before his appointment to the Appellate Body. He continues to serve as a member of the Appellate Body and for two years was its Chairman. In 2009, he was called to the Bar in London and is a tenant at Monckton Chambers. He has been published widely in the fields of public law, evidence, and competition law. He is a co-author of *Competition Law* (an account of South African competition law).

Nina Vajić (Croatia) has been a judge at the European Court of Human Rights in Strasbourg, elected in respect of Croatia, since November 1998. She has also been sitting as Section Vice-President since February 2008. Prior to joining the European Court of Human Rights, Vajić was professor of public international law at the Faculty of Law, University of Zagreb, Croatia. She studied law in Zagreb and obtained an LL.M. and J.S.D. in International Law. She also attended the Diploma Program at the Graduate Institute of International Studies (*Institut universitaire de hautes études internationales – IUHEI*), in Geneva (1978 to 1980). From 1991 to 1994 she was director of the Institute of Public and Private International Law of the Faculty of Law in Zagreb. In 1994, she was nominated as an alternate Arbitrator to the International Court of Conciliation and Arbitration in the



Framework of the OSCE. From 1997 to 1998, she was a member of the European Commission against Racism and Intolerance (ECRI) of the Council of Europe. Vajić has published numerous articles and studies in different fields of international law and human rights law, participated in domestic and international conferences as speaker or commentator, and acted as guest professor at several domestic and foreign universities.

Jacob Wit (The Netherlands) took the Oath of Office as a judge of the Caribbean Court of Justice in June 2005. He earned a degree of Master of Laws with honours from *Vrije Universiteit* (Free University) of Amsterdam in 1977. He was enrolled as a Judicial Trainee at the *Studiecentrum Rechtspleging* (Training and Study Centre for the Judiciary) in Zutphen, The Netherlands, from March 1978 until March 1984. During this period, he held the posts of Law Clerk in the Rotterdam District Court (1978 to 1980); Deputy Prosecutor at the Amsterdam District Court (1980 to 1982); and worked as an attorney-at-law with a private law firm in Rotterdam. Wit was appointed by Her Majesty Queen Beatrix of the Netherlands as judge of the Rotterdam District Court in 1985, and judge of the Netherlands Antilles and Aruba Court of Justice on 1 October 1986. There he functioned inter alia as Coordinating Judge, Court of First Instance, Curaçao (1993 to 1996); Coordinator Judge of Instruction, Netherlands Antilles (1994 to 1997); Coordinating Judge for the Dutch Windward Islands, and from 2001 to 2005 as Senior Justice and Acting Chief Justice. He is a judicial educator and a lecturer in law. He was installed as President of the Constitutional Court of Sint Maarten in 2010 (a part-time judicial office).

Presenters

Linda Carter (United States) is a professor of law and Director of the Legal Infrastructure and International Justice Institute, University of the Pacific, McGeorge School of Law, Sacramento, California. She has assisted with the Brandeis Institute for International Judges since 2003 and also participated in two Brandeis-sponsored West African Colloquia for judges of the supreme courts in West Africa. Her teaching and research areas are criminal law and procedure, evidence, capital punishment law, international criminal law, and comparative legal systems. Prior to entering academia, Carter was an attorney in the honors program of the Civil Rights Division of the United States Department of Justice in Washington, D.C., where she litigated voting, housing, and education discrimination cases. She then worked as an attorney with the Legal Defender Association in Salt Lake City, Utah, where she represented indigent criminal defendants on misdemeanor and felony charges. Her most recent publications include a book, *Global Issues in Criminal Procedure*, and articles on the blending of civil and common law legal systems in the procedure of international criminal tribunals. In 2007, Carter served as a Visiting Professional in the Appeals Chamber of the International Criminal Court and as a legal researcher at the International Criminal Tribunal for Rwanda. She taught in Senegal in the spring of 2009 as a Fulbright Senior Specialist. She is a member of numerous professional organizations, including the American Law Institute (ALI).

Richard Gaskins (United States) is the Joseph M. Proskauer Professor of Law and Social Welfare at Brandeis University. Before joining Brandeis in 1994 he taught at Bryn Mawr College, the University of Chicago, and the Graduate Faculty at the New School for Social Research. He received his Ph.D. in Philosophy in 1971, and his J.D. in 1975,



both from Yale University. His publications include *Environmental Accidents: Personal Injury and Public Responsibility* (1989), part of a comparative research program on injury prevention and compensation policies, with emphasis on New Zealand (where he has been a repeating visiting professor in the Law Faculty of Victoria University of Wellington). Another research theme deals with argumentation theory in both legal and philosophical terms (*Burdens of Proof in Modern Discourse*, 1993, and later articles). A specialist in medieval Icelandic sagas, he publishes on legal and social frameworks for saga analysis. As Director of the Legal Studies Program at Brandeis, he teaches courses in law, American Studies, philosophy, and economics. He is Academic Program Director for Brandeis University's new study-abroad programs in The Hague, in collaboration with colleagues from the University of Leiden.

Richard J. Goldstone (South Africa), 1959 B.A., 1962 L.L.B. (Wits) has practiced as an advocate at the Johannesburg Bar. In 1980, he was made judge of the Transvaal Supreme Court. In 1989 he was appointed judge of the Supreme Court of Appeal. From July 1994 to October 2003 he was a justice of the Constitutional Court of South Africa. In recent years he has been a visiting professor of law at Harvard, Georgetown, Stanford, Fordham, and NYU Schools of Law. From October 1991 to April 1996 he headed the Commission of Inquiry into Political Violence in South Africa that came to be known as the Goldstone Commission. From 15 August 1994 to September 1996 he served as the Chief Prosecutor of the United Nations International Criminal Tribunals for the former Yugoslavia and Rwanda. He is an Honorary Bencher of the Inner Temple, London, an Honorary Fellow of St. Johns College, Cambridge, and an Honorary Member of the Association of the Bar of New York. He is a Foreign Member of the American Academy of Arts and Sciences. In

2009, he received the John D. and Catherine T. MacArthur Award for International Justice and the Stockholm Prize for International Justice.

Leigh Swigart (United States) is Director of Programs in International Justice and Society at the International Center for Ethics, Justice and Public Life at Brandeis University. She oversees the Brandeis Institute for International Judges, Brandeis Judicial Colloquia, and other programs for members of the judicial and human rights communities worldwide. Swigart holds a Ph.D. in socio-cultural anthropology from the University of Washington. She has wide experience in international education, including tenure as Director of the West African Research Center in Dakar, Senegal, and she is a two-time Fulbright Scholar and recipient of the Wenner-Gren Foundation Fellowship for Anthropological Research. Her academic work and publications have focused on language use in post-colonial Africa, recent African immigration and refugee resettlement in the United States, and the international judiciary. She is co-author of *The International Judge: an Introduction to the Men and Women Who Decide the World's Cases* (with Daniel Terris and Cesare Romano, foreword by Supreme Court Justice Sonia Sotomayor, University Press of New England, 2007).

Daniel Terris (United States), Director of the International Center for Ethics, Justice and Public Life, and Vice-President for Global Affairs at Brandeis University, has been at Brandeis since 1992. Programs initiated under his leadership at the Center and as assistant provost at Brandeis have included the Slifka Program in Intercommunal Coexistence, the Brandeis Institute for International Judges (BIJ), the Brandeis International Fellowships, Community Histories by Youth in the Middle East, the undergraduate Sorensen Fellowship, Brandeis in the Berkshires, Genesis at Brandeis University, the Brandeis-Genesis Institute, and the



University's continuing studies division. Terris has offered courses on individualism, poverty, American literature, and the roots and causes of September 11, as well as the annual writing seminar for the Sorensen Fellows. Terris received his Ph.D. in the history of American civilization from Harvard University, and he has written on 20th-century history, literature, and religion. He is the author of *Ethics at Work: Creating Virtue in an American Corporation* (University Press of New England, 2005) and co-author of *The International Judge: An Introduction to the Men and Women Who Decide the World's Cases* (with Leigh Swigart and Cesare Romano, foreword by Supreme Court Justice Sonia Sotomayor, University Press of New England, 2007).

Rapporteurs

Micaela Neal (United States) is studying at the University of the Pacific, McGeorge School of Law and is a J.D. candidate for May 2012. She is Editor-in-Chief of the *Pacific McGeorge Global Business and Development Law Journal*, and is earning her concentration in environmental law. Ms. Neal's primary areas of interest are international, environmental, and real estate law. She plans to work in private practice in these areas after taking the California State Bar Exam in Summer 2012.

Cassandra Shaft (United States) is a third-year law student at McGeorge Law School with a focus in public international law. She has an undergraduate degree in international relations with a minor in French. Ms. Shaft has been extensively involved in the moot court program at McGeorge, including competing in the Phillip C. Jessup Competition. She has taken a range of international courses and is pursuing an international studies certificate along with her J.D. degree.

Interns

Alexander Glomset (United States) is majoring in international and global studies and French at Brandeis University (2014). He is involved in the Phi Kappa Psi fraternity and also serves as captain of the Brandeis club soccer team. Alex has had many opportunities to travel and live abroad, with lengthy stays in West Africa, Australia, and Europe. He hopes to study abroad in both The Hague and Geneva over the next year. His aim upon graduation is to work in some capacity in the international sphere.

Ivan Ponieman (Spain/United States) is a double major in international and global studies and economics at Brandeis University (2014). He was born in the United States, of Argentinean parents, but spent most of his childhood in Spain. He is active in many organizations on campus, including the International Club, the soccer club, and the Brandeis Zionist Alliance. Ivan is also a musician, specializing in both rock and classical guitar. He looks forward to future internships related to diplomacy and international economics.



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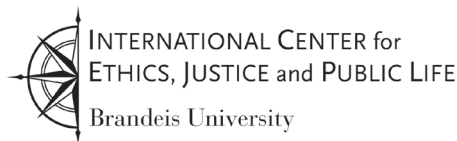
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Brandeis Institute for International Judges 2002-2012

2002, Brandeis University, Waltham, Massachusetts, USA.

“The New International Jurisprudence: Building Legitimacy for International Courts and Tribunals.”

2003, Salzburg, Austria.

“Authority and Autonomy: Defining the Role of International and Regional Courts.”

2004, Salzburg, Austria.

“Complementarity and Cooperation: The Challenges of International Justice.”

2006, Dakar, Senegal.

“Complementarity and Cooperation: International Courts in a Diverse World.”

2007, Bretton Woods, New Hampshire, USA.

“Independence and Interdependence: the Delicate Balance of International Justice.”

2009, Port of Spain, Trinidad.

“International Justice: Past, Present, and Future.”

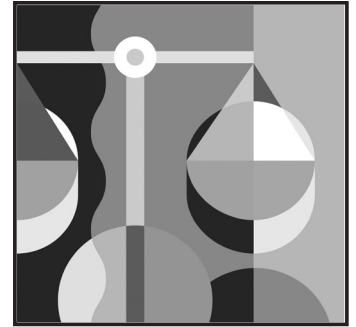
2010, Salzburg, Austria.

“Toward an International Rule of Law.”

2012, Carmona, Spain.

“The International Rule of Law: Coordination and Collaboration in Global Justice.”

- Published reports of all Institutes may be found at: <http://www.brandeis.edu/ethics/internationaljustice/bij/index.html>. -



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Justice Across Cultures

The Legacy of International Criminal Courts and Tribunals in Africa, with a focus on the jurisprudence of the International Criminal Tribunal for Rwanda

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