

2013

BIIJ

Brandeis Institute for International Judges



The International Rule of Law in a Human Rights Era

The International Center for Ethics,
Justice and Public Life, Brandeis University

in partnership with

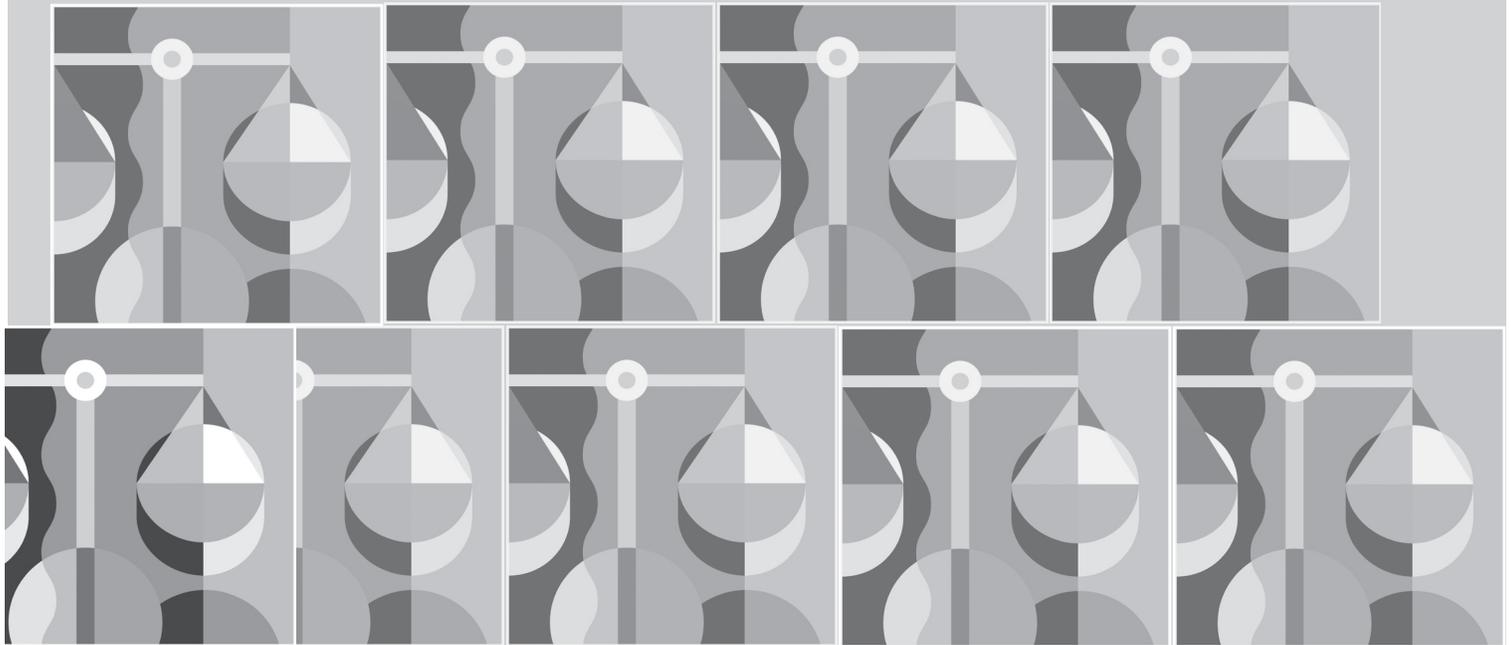
Raoul Wallenberg Institute of Human Rights
and Humanitarian Law

Lund University Faculty of Law

2013

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the David Berg Foundation.



The Brandeis Institute for International Judges (BIIJ) 2013 was convened by Leigh Swigart and Daniel Terris of Brandeis University, in partnership with Rolf Ring of the Raoul Wallenberg Institute of Human Rights and Humanitarian Law and Christina Moëll of the Faculty of Law of Lund University. Special thanks go to Ambassador Hans Corell for his facilitation of Brandeis' relationship with the partner institutions.

BIIJ 2013 was co-directed by Linda Carter and Richard Goldstone. The BIIJ Program Committee, composed of Judges Sanji Monageng, Erik Møse, Hisashi Owada and Fausto Pocar, provided critical guidance during the development of the Institute program.

This report was prepared by Leigh Swigart, with the editorial assistance of Linda Carter and Brandeis interns Rida Abu Rass, Anastasia Austin, and Alexander Glomset, all of the undergraduate class of 2014. Many thanks go to our BIIJ 2013 rapporteurs from the Lund Faculty of Law: Evgenia Pavlovskaja, Matthew Scott, and Britta Sjöstedt. We also thank our participants for providing comments on earlier drafts of this report.

We are grateful to the staff of the Raoul Wallenberg Institute who provided a warm welcome and superb management throughout the BIIJ.



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Foreword

The Brandeis Institute for International Judges (BIJ) has established itself as a significant and world-renowned program that promotes the role of judges working in the domain of international law and justice. Organized by the International Center for Ethics, Justice and Public Life of Brandeis University, the BIJ provides a venue for judges from international and regional courts to discuss important issues relating to the administration of justice across their varied jurisdictions.

In 2013, the BIJ was organized, for the first time in its 12-year history, in partnership with outside academic bodies working in the same field. The institute was held in Lund, Sweden, in collaboration with the Raoul Wallenberg Institute of Human Rights and Humanitarian Law and the Lund University Faculty of Law around the theme “The International Rule of Law in a Human Rights Era.”

This report of the Lund session provides an extremely interesting and useful read for those working in the field of international justice and human rights.



Judge Hisashi Owada of the International Court of Justice.

BIJ 2013 was an enormous success. As one of the regular institute participants and a member of its 2013 Program Committee, I can attest that the intense interaction that took place in Lund between judges, who have to handle the delicate task of administering justice in a difficult political environment, and academics, who are engaged in creating a theoretical framework for international justice, was a valuable experience for all.

In today's world, globalization is not just an economic phenomenon but also a social reality for the international community, which consists of individual human beings. It is of paramount importance that international law, which sets the legal framework for the public order of this human community, should be focused on respect for human dignity through ensuring human security in every corner of the globe. The role of judges engaged in this endeavor – whether at the international, regional or national level – is of ever-increasing importance.

The work of the 2013 Brandeis Institute for International Judges, thanks in part to the cooperation of the Raoul Wallenberg Institute and the Lund Faculty of Law, has made a substantial contribution to the cause of human security, an essential part of which involves the promotion of human rights through the proper functioning of international courts and tribunals.

Hisashi Owada
Judge and former President
International Court of Justice





About the Institute

From 28 to 31 July 2013, 16 judges from 13 international courts and tribunals attended the 9th Brandeis Institute for International Judges (BIJ). The Institute was held in Lund, Sweden and organized in partnership with the Raoul Wallenberg Institute of Human Rights and Humanitarian Law and Lund University Faculty of Law.

Participants hailed from a wide range of judicial institutions, including those that address the violation of human rights by States in Africa, the Americas and Europe, as well as those that resolve disputes among States at the global and regional levels. Other participants represented institutions that investigate and try individuals accused of international crimes, from the International Criminal Court to tribunals focused on crimes committed in Cambodia, Lebanon, Rwanda, Sierra Leone and the former Yugoslavia.

Sessions were held over four days around the overarching theme “The International Rule of Law in a Human Rights Era.” This theme was chosen because of the growing influence of human rights on legal thinking and practice, as well as on the work of international judges and their institutions.

The first session of the Institute, led by Judge Hisashi Owada (Japan) of the International Court of Justice and Judge Fausto Pocar (Italy) of the International Criminal Tribunal for the former Yugoslavia, set the stage with an exploration of the expanding impact of human rights on international courts and tribunals.

Participants went on to examine a number of critical subjects in contemporary global justice through a wide-ranging set of sessions. These

included: the role played by State engagement and diplomacy, led by Ambassador Carl-Henrik Ehrenkrona (Sweden) and Justice Richard Goldstone (South Africa); the impact of international human rights norms at the national level, led by Judge Sanji Monageng (Botswana) of the International Criminal Court and Judge Erik Møse (Norway) of the European Court of Human Rights; an inquiry into the universality of human rights, led by Professor Emeritus of the Lund Faculty of Law Göran Melander (Sweden); and the future of international courts and tribunals, led by Professor Linda Carter (USA) of the McGeorge School of Law and Judge Pocar.

Institute conveners Leigh Swigart and Dan Terris of Brandeis University led a session exploring the legitimacy of the underpinnings of the international justice system. They asked the question, in whose name is international law enacted and international justice enforced, given that it is disconnected from the usual systems of regulation, oversight, and accountability found in the national context?

The Institute ended with a public roundtable, held in nearby Malmö at the famous Turning Torso building. Participants discussed various issues surrounding freedom of expression, including how it plays out in contemporary media, the connection of hate to the crime of hate speech, and the right of citizens not only to speak out but also to have access to certain kinds of information.¹

Funding for BIJ 2013 was provided by the Rice Family Foundation and the David Berg Foundation.

1. Read more about the public event at <http://www.brandeis.edu/ethics/news/2013/2013.July.31.html>.



BIIJ 2013 Participants

Participating Judges

African Court on Human and Peoples' Rights

- President Sophia Akuffo (Ghana)

Caribbean Court of Justice

- President Dennis Byron (St. Kitts and Nevis)

Extraordinary Chambers in the Courts of Cambodia

- Judge Rowan Downing (Australia)

European Court of Human Rights

- Judge Erik Møse (Norway)

Inter-American Court of Human Rights

- President Diego García-Sayán (Peru)

International Criminal Court

- Vice President Sanji Monageng (Botswana)
- Judge Howard Morrison (United Kingdom)

International Court of Justice

- Judge Hisashi Owada (Japan)
- Judge Dalveer Bhandari (India)

International Criminal Tribunal for Rwanda

- President Vagn Joensen (Denmark)

International Criminal Tribunal for the former Yugoslavia

- Vice President Carmel Agius (Malta)
- Judge Fausto Pocar (Italy)

International Tribunal for the Law of the Sea

- Judge Helmut Tuerk (Austria)

Special Court for Sierra Leone

- Judge Shireen Avis Fisher (United States)

Special Tribunal for Lebanon

- President David Baragwanath (New Zealand)

World Trade Organization Appellate Body

- Chair Ricardo Ramírez Hernández (Mexico)

Other Participants

- Ambassador Hans Corell (Sweden)
- Ambassador Carl-Henrik Ehrenkrona (Sweden)

BIIJ Co-Directors

- Justice Richard J. Goldstone, former Chief Prosecutor of the International Criminal Tribunals for the former Yugoslavia and Rwanda
- Professor Linda Carter, Pacific McGeorge School of Law

Brandeis University, International Center for Ethics, Justice and Public Life

- Leigh Swigart, Director of Programs in International Justice and Society
- Daniel Terris, Center Director
- Rida Abu Rass '14, Intern
- Anastasia Austin '14, Intern
- Alex Glomset '14, Intern

Raoul Wallenberg Institute and Lund University Faculty of Law

- Göran Melander, RWI founding Director and Emeritus Professor
- Christina Moëll, Dean of the Faculty of Law
- Rolf Ring, RWI Deputy Director
- Evgenia Pavlovskaja, Rapporteur
- Matthew Scott, Rapporteur
- Britta Sjöstedt, Rapporteur



Key Institute Themes

The principal goal of BIIJ 2013 was to examine the growing influence of human rights on legal thinking and practice, as well as on the work of international judges and their institutions. This was the third session of the BIIJ to explore the notion of an international rule of law. Previous institutes had focused on the development of such a global legal framework (2010) and the role of coordination and collaboration in realizing it (2012). Plenary sessions in 2013 sought to advance earlier discussions by identifying the ways in which contemporary international justice is influenced by the “human rights era” in which we live, and by sharing thoughts about how best to ensure that populations across the globe benefit from this heightened awareness of human rights issues.



International judges at BIIJ 2013.

Sessions were organized around five themes:

- The Expanding Impact of Human Rights Law on International Courts and Tribunals
- The Impact of International Human Rights Norms at the National Level
- How Universal Are Human Rights?
- The Role of State Engagement and Diplomacy in International Justice
- The Future of International Courts and Tribunals: What Developments and Models Will We See in 20 Years?

Theme 1

The Expanding Impact of Human Rights Law on International Courts and Tribunals

The institute began with a session that examined a significant development touching all of the international courts and tribunals represented at BIIJ 2013 – the so-called “humanization” of international law.

In the 65 years following the adoption of the United Nations Universal Declaration of Human Rights in 1948, international law has developed an increasing focus on human rights and the protection of individuals from abuse by their own and foreign governments. At international and regional levels – in Africa, the Americas, and Europe – a vast number of rules, and judicial/quasi-judicial institutions to implement them, have been developed to protect and expand the scope of human rights. It is clear that the protection of human rights is no longer exclusively under the domestic jurisdiction of States.



The opening session explored the role played by various international courts and tribunals in the contemporary development of human rights jurisprudence. This exploration included courts established with the specific mandate to interpret and apply certain human rights conventions, as well as international courts and tribunals that have traditionally had different functions, such as the International Court of Justice (ICJ) and the World Trade Organization Appellate Body (WTO AB). It was acknowledged that human rights principles are already central to the work of international criminal courts and tribunals, as they are called upon both to prosecute individuals who have committed gross human rights violations – war crimes, crimes against humanity, and genocide – and to provide the alleged perpetrators of such crimes with humane detention, fair trials and other human rights guarantees.

Interstate dispute resolution bodies and human rights

The discussion began with a consideration of how human rights issues have been addressed over the past several decades by the ICJ, the international court that has the broadest geographic and subject matter jurisdiction. Participants considered the framework put forward by former ICJ Judge Bruno Simma,² who has characterized the stance of the Court toward human rights as first one of hesitation and restraint, followed – but not in a strictly chronological progression – by one of engagement and integration. This evolution can be seen, according to Simma, in the treatment of human rights issues in the *Tehran Hostages* case (1980)³ and the Vienna Consular Convention

2. Bruno Simma, *Human Rights Before the International Court of Justice: Community Interest Coming to Life?*, in 1 COEXISTENCE COOPERATION AND SOLIDARITY: LIBER AMICORUM RÜDIGER WOLFRUM 577-603 (Holger P. Hestermeyer et al. eds., 2012).

3. United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), ICJ Judgment (24 May 1980).

Mavrommatis Palestine Concessions, Permanent Court of International Justice 1924, Series A, no. 2, 121

“By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own rights – its right to ensure, in the person of its subjects, respect for the rules of international law. Once a State has taken up a case on behalf of one of its subjects before an international tribunal, in the eyes of the latter the State is sole claimant.”*

* As cited in Simma, *supra* note 2, at 587.

cases – *LaGrand* (2001)⁴ and *Avena* (2004)⁵ – which belong to the former phase, and the *Palestinian Wall* advisory opinion (2004)⁶ and *Diallo* case (2010),⁷ which focus squarely on allegations of human rights violations. Simma suggests that the ICJ is relinquishing “the spirit of *Mavrommatis*,”⁸ which views the espousing of individual rights as an assertion of States’ rights, (see sidebar, this page), in favor of recognizing the individual human rights aspects of cases in a more direct way.

Simma concludes that for the ICJ “the human rights genie has escaped from the bottle.”⁹ He advises that “the most valuable contribution the ICJ can make to the international protection of

4. *LaGrand* (Germany v. U.S.), ICJ Judgment (27 June 2001).

5. *Avena and other Mexican Nationals* (Mexico v. U.S.), ICJ Judgment (31 Mar 2004).

6. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ Advisory Opinion (9 July 2004).

7. *Ahmadou Sadio Diallo* (Republic of Guinea v. Dem. Rep. Congo), ICJ Judgment (30 Nov. 2010).

8. Simma, *supra* note 2, at 587.

9. *Id.* at 598.



human rights ... consists of what could be called the juridical ‘mainstreaming’ of human rights, in the sense of integrating this branch of the law into the fabric of both general international law and its various other branches.”¹⁰

Some participants were of the opinion that Simma’s framework was overly simplified, attributing too much conservatism to the ICJ in the past and perhaps too much faith in its new human rights sensitivities. The recent *Belgium v. Senegal* case (2012),¹¹ in which the ICJ considered Senegal’s obligation to prosecute or extradite under the Torture Convention, was described by one judge as a “straightforward human rights case.” It thus shows that the ICJ has embraced the growing trend for courts to directly address human rights considerations. However, in a contemporaneous case, *Germany v. Italy* (2012),¹² the ICJ upheld State immunity in relation to grave crimes committed during World War II, perhaps hailing back to a more classic and State-centered interpretation of international law. The latter case was one that Simma seemed to hope would, instead, set new “priorities between human rights considerations/obligations and other rules of international law, particularly State immunity.”¹³

Human rights considerations also enter into interstate disputes at the International Tribunal for the Law of the Sea (ITLOS). It was pointed out that the drafters of the Law of the Sea Convention made provision for the prompt release of fishing crews when ships are seized for suspected violations, against the posting of bond that serves as a guarantee for any fines that may be levied in the future. The rights of fishermen are thereby protected, keeping them

from detention in potentially unacceptable conditions, without prejudging the substance of the dispute.¹⁴

Finally, a participant noted that trade disputes are increasingly viewed through a human rights lens at the WTO Appellate Body. For example, one State’s right to protect its youth from smoking may come into conflict with another State’s right to export tobacco. Similarly, a dispute over tuna can be conceptualized as the right of consumers to know how the tuna they eat was caught, against the right of a country to export canned tuna.

International criminal tribunals and human rights

The discussion then proceeded to the dual role that human rights law plays in the proceedings of international criminal courts and tribunals. Human rights principles entitle every accused person to due process of law, which guarantees a fair trial without undue delays, and safeguards the integrity of the entire criminal proceeding. At the same time, a criminal proceeding seeks to promote the human rights of those who claim to have suffered from the acts of the accused.

These two uses of human rights law have been termed their “shield” and “sword” functions.¹⁵ In a recent article, former European Court of Human Rights (ECtHR) Judge Françoise Tulkens noted that this double function creates a paradox in which human rights assume both a defensive and offensive role, “a role of both neutralizing and triggering the application of criminal law.”¹⁶

10. *Id.* at 601.

11. Questions Relating to the Obligation to Prosecute or Extradite (*Belgium v. Senegal*), ICJ Judgment (20 July 2012).

12. Jurisdictional Immunities of the State (*Germany v. Italy: Greece intervening*), ICJ Judgment (3 Feb. 2012).

13. Simma, *supra* note 2, at 603.

14. The provisional measures ordered in November 2013 by ITLOS for the release of the crew of a Greenpeace vessel seized in the waters of the Russian Federation is the most recent example of these kinds of protections. See the Arctic Sunrise case (*Kingdom of The Neth. v. Russ. Fed’n*), ITLOS Case No. 22 (Order of 22 Nov. 2013).

15. Françoise Tulkens, *The Paradoxical Relationship Between Criminal Law and Human Rights*, J. Int’l Crim. Just. (2011) 9 (3): 577-595.

16. *Id.* at 579.



BIIJ participants generally agreed that there are multiple, and at times conflicting, interests to be weighed in relation to an international criminal proceeding. In addition to considering the rights of the accused and victims in a case, the following must also be taken into account: the protection of witnesses associated with the proceeding; the interest of the international criminal tribunal itself in effectively discharging its judicial role; and the international community's desire to see a fair and expeditious trial, the end of impunity, and the deterrence of future crimes.

One judge contested the notion that both the accused and victims in a case have "rights" in the same sense. While the rights of accused persons are enshrined in multiple human rights instruments, he characterized victims as having "interests" rather than rights per se.

To what reparations is an accused entitled if his or her rights have been egregiously violated, as in the case of unlawful arrest or detention?

He questioned, in particular, the idea that a victim has the right to see a perpetrator brought to justice, noting that it is instead the right to reparation that is widely accepted. He also asked an important question for contemporary international criminal justice: to what reparations is an accused entitled if his or her rights have been egregiously violated, as in the case of unlawful arrest or detention?

This is not an entirely theoretical question. In the early years of the International Criminal Tribunal for the former Yugoslavia (ICTY), several persons accused of crimes in the Balkans were arrested under questionable circumstances. One

participant reminded the group of the treatment of Dragan Nikolić, a Serbian commander charged with war crimes. He was tracked down by bounty hunters, knocked unconscious, bound hand and foot, and then turned over to United Nations forces who transported him to The Hague. Although Nikolić hoped this unlawful treatment might lead to a dismissal of his case, the remedy was instead a reduction of sentence following his conviction.¹⁷

The circumstances of Nikolić's arrest led to a lively exchange about the rights of the accused. A former prosecutor said that criminal tribunals should not condone any illegality in the arrest of a defendant; they are "in many ways human rights courts and should not be involved in the violations of human rights," he declared. Another noted, "there may have been a place in the Wild West for bounty hunting, but not in the 20th century." Moreover, this same judge was troubled by what he saw as the confusion of substance and procedure in the Nikolić case, noting that an irregularity in his arrest should not have influenced the determination of his sentence. A criminal judge disagreed, explaining that as a human rights violation entails the right to a remedy, a reduction of Nikolić's sentence was the logical remedy following his conviction. It was noted that the Extraordinary Chambers in the Courts of Cambodia (ECCC) had a similar situation with the illegal detention of an accused, and the Court followed the same reasoning as the ICTY, reducing the sentence of the accused upon conviction.

The group then turned to the interests of victims in criminal cases. First, a conceptual challenge had to be addressed – can a victim really be considered as having the "right" to see a perpetrator prosecuted? A leading judgment

17. Prosecutor v. Nikolić, Case No. IT-94-2-A, Int'l Crim. Trib. for the former Yugoslavia Judgment on Sentencing Appeal (4 Feb 2005).

on this question came from the ECtHR in *X and Y v. The Netherlands* (1985),¹⁸ where it was ruled that the impossibility of instituting criminal proceedings against the perpetrator of sexual assault on a minor with a mental disability breached the victim's right to respect for private and family life (Article 8 of the European Convention).¹⁹ One BIIJ participant clarified that any such right is only to see an alleged perpetrator prosecuted, not convicted.

Participants brought a variety of institutional perspectives to bear on how victims avail themselves of this right. Both the ECCC and the International Criminal Court (ICC) have formal provisions for the participation of victims in criminal proceedings. One judge noted that whereas the rights of accused persons at the ECCC have already “crystallized,” the rights of victims are instead solidified only upon the conviction of an accused. At that point, they may ask for compensation. Victims may also come forward at an earlier stage and request an investigation. A note of caution was added to this description of victims' rights at the ECCC. A court can easily become overwhelmed when dispensing justice to satisfy not only its international mandate – that is, to prosecute and punish perpetrators – but also the demands of individual victims. This is especially true when resources are scarce. Another judge opined that criminal procedure is perhaps best understood “from the view of social interests,” adding that “individual benefit is secondary or even incidental to the process.”

It was then noted that victim participation at the ICC has been taken to an even higher level; one judge went so far as to suggest that “victims are the masters.” The court is very careful to confirm that individuals have been truly affected

18. *X and Y v. Netherlands*, App. No. 8978/80 Eur. Ct. H.R. Judgment (26 Mar. 1985).

19. Tulkens, *supra* note 15, at 584.

“A court can easily become overwhelmed when dispensing justice to satisfy not only its international mandate – that is, to prosecute and punish perpetrators – but also the demands of individual victims. This is especially true when resources are scarce.”

by the acts of a particular accused before being granted the status of victim. Their interests are the mandate of the Trust Fund for Victims, which works with affected communities – inter alia to restore medical and educational resources and human resilience – even before there is a conviction. Once an accused is found guilty, reparations for victims can be determined. Although the ICC enjoys a more stable financial situation than the ECCC, it is already clear that making reparations to victims – especially as the numbers increase with each successive ICC case – will constitute a daunting challenge.

This discussion of victims' rights was then interrupted by another conceptual challenge: How can a court classify certain individuals as



Judge Dennis Byron of the Caribbean Court of Justice offers a comment.



“victims” in a case before an accused has actually been convicted? Is that not “putting the cart before the horse”? One criminal judge suggested that another term be coined, perhaps “putative victim,” so that the “uncrystallized” rights of that person can be examined and determined. It seemed reasonable to that judge that a putative victim have at least the right to see a fair prosecution of the accused.

Not everyone agreed, however, with the notion that the status of “victim” can only be definitively granted after a conviction. One participant pointed out that there are persons who are clearly victims of a regime even if individual criminals have not yet been identified. Most of the Cambodian population, for example, was targeted by Khmer Rouge activities, and there is ample evidence to show this even without convictions. The question to be examined through trials is whether particular individuals have criminal responsibility for those activities. “What we need,” another participant suggested, “is a new term to identify survivors of crimes against humanity as individuals and groups, as opposed to victims in a criminal context.”

Over the past 15 years, the Inter-American Court of Human Rights (IACtHR) has had occasion to rule on various issues related to such proceedings at the national level. Rulings of the Court are mandatory for the States that have accepted its jurisdiction. When there have been serious violations of human rights in States that are party to the American Convention on Human Rights, those States then have the obligation to investigate and prosecute the individuals deemed responsible. This obligation has frequently conflicted, however, with national amnesty laws. When the IACtHR has found enough evidence, it has directed national judiciaries through its decisions to open multiple criminal cases, some of them involving the prosecution of former Heads of State. The regional court

then monitors and supervises compliance with its decisions – sometimes holding hearings to receive public feedback – until there has been full implementation. This interaction between the IACtHR and its Member States has resulted in stronger criminal courts at the national level and enhanced dialogue between the regional and national courts.²⁰

The African Court on Human and Peoples’ Rights (ACtHPR) is a relative newcomer and has not yet had to rule on criminal proceedings in member States. But it is already clear that questions of rights in this context are bound to arise.²¹ Indeed, the ACtHPR is already receiving inquiries about how a finding of criminality in the investigation of a human rights violation will be handled. The involvement of the Inter-American Court in monitoring criminal proceedings at the national level can serve as a guide, one judge declared. “When human rights are violated, so many other blisters inevitably pop up. And part of that will be the question of the rights or interests of the victim.” The judge added that the frustration of putative victims without a means of redress may lead to many more problems in the future, at both the individual and societal level. “This is one of the reasons that it is important to always look at the rights of the victim and ensure that prosecution takes place in an effective manner.”

20. In August 2013, the IACtHR issued its first judgment in favor of a living survivor of Pinochet era abuses, finding Chile in violation of its obligations to investigate and remedy the arbitrary detention and torture of a man who was left permanently disabled by the torture he suffered at the hands of the government in the 1970s. Chile was ordered to pay the victim reparations. *See Garcia Lucero et. al. v. Chile, Preliminary Objections, Merits, Reparations and Costs, Inter-Am. Ct. H.R. Judgment (ser. C) No. 627 (28 August 2013).*

21. The ACtHPR did, however, order provisional measures concerning the conditions of detention of Saif Al-Islam Gadafi by the National Transitional Council of Libya, pending his criminal trial. *See In the Matter of African Commission on Human and Peoples’ Rights v. Libya, App. No. 002/2013, Afr. Ct. Hum. & Peoples’ Rts. Provisional Measures (15 Mar. 2013).*

The question of fragmentation

Recognition of the increased inclusion of human rights issues across all categories of international courts naturally led to a discussion of the possible fragmentation of norms. Several judges noted the spontaneous judicial dialogue that has occurred among disparate courts. For example, in *Germany v. Italy*,²² the ICJ took the same approach as that followed by the ECtHR on State immunity for acts committed by its armed forces on the territory of another State. In *Belgium v. Senegal*, the ICJ also refrained from commenting on the ECOWAS Court's ruling that the principle of *nullum crimen sine lege* precluded Senegal from trying former Chadian dictator Hissène Habré under Senegalese laws.²³ In determining crimes against humanity, the Supreme Court of Peru applied the same standards established by the IACtHR, following the regional court's ruling on the *Barrios Altos v. Peru* case (2001).²⁴ And the ICTR was very careful to cite international and regional jurisprudence instead of national jurisprudence in its judgments in order to build up a common body of human rights law. A judge with experience in both criminal and interstate dispute courts suggested that lawyers before international courts should be encouraged to make reference to international jurisprudence in their advocacy. "The simple development of habits in this area goes a long way to minimize the risk of fragmentation."

Other participants were not so optimistic that the fragmentation of human rights norms could be avoided. One pointed out that the ECtHR is not always in line with UN treaty bodies, with

22. Jurisdictional Immunities of the State (*Germany v. Italy*: Greece intervening), *supra* note 12.

23. Questions Relating to the Obligation to Prosecute or Extradite (*Belgium v. Senegal*), *supra* note 11; *see also* Hissène Habré v. Senegal, Decision No. ECW/CCJ/JUD/06/10, Ct. of Justice of the Econ. Union of West Afr. States (18 Nov. 2010) [unofficial translation of the French original].

24. *See Barrios Altos v. Peru*, Inter-Am Ct. H.R. Judgment (Ser. C) No. 87 (30 Nov. 2001).

"We are at a turning point in relation to human rights protections. In the early 1990's, there was enthusiasm for human rights not only in Europe but in other parts of the world. But now States are more reluctant and want a more limited interpretation of their human rights obligations under different treaties."

"one interpretation coming from Strasbourg and another from Geneva." And now that the European Court of Justice is starting to develop its own human rights jurisprudence, there is the worry that the European bodies might diverge from one another as well. "We are at a turning point in relation to human rights protections," this judge continued. "In the early 1990's, there was enthusiasm for human rights not only in Europe but in other parts of the world. But now States are more reluctant and want a more limited interpretation of their human rights obligations under different treaties."

The session ended with reflections on what happens to human rights norms when there is an attempt to spread them universally. Several participants believed that, given wide disparities in cultural and social practices across the globe, the best one can expect from the international human rights system is the implementation of "the lowest common denominator." The notion that States should be afforded a "margin of appreciation" – the doctrine developed through ECtHR case law that allows a local interpretation of international norms that takes into account cultural, historic and philosophical differences – further complicates the establishment of universal standards.



“It is an illusion to believe that the human rights standards found at regional levels can be applied everywhere. It would take a long time to get there.”

BIIJ participants acknowledged that, in general, human rights standards tend to be higher when extended over geographically limited areas. As one judge expressed it, “If we leave human rights interpretation solely to international bodies, the result will be lower standards.” This idea notwithstanding, another judge observed that regional human rights bodies often set higher standards than those found at the level of their own Member States, despite the fact that the protection of human rights remains the duty of individual countries. He concluded, “It is an illusion to believe that the human rights standards found at regional levels can be applied everywhere. It would take a long time to get there.”

The opening session of BIIJ 2013 set the stage for subsequent discussions on the growing influence of human rights on legal thinking and practice across the globe, as well as on the work of international judges and their institutions. What became clear over the course of the discussion was that international courts and tribunals are not merely the beneficiaries of an increased worldwide awareness and appreciation of human rights. They are themselves important actors in the development and articulation of the human rights era that we live in today. Their influence may perhaps be best seen in the ever-increasing influence that these institutions exert over legal practice and procedures in the national sphere.

Theme 2

The Impact of International Human Rights Norms at the National Level

In a human rights era, States cannot operate in a national vacuum; they are increasingly called upon to heed international treaties and conventions to which they are parties and, more generally, to acknowledge and respond to a worldwide awareness of human rights and demands to protect these rights. BIIJ participants had the opportunity to discuss impacts at the domestic level of two international courts that are highly influential, if sometimes controversial, on human rights matters – the European Court of Human Rights and the International Criminal Court. The fact that many of the international judges at BIIJ 2013 had had prior domestic judicial experience made for an especially lively debate and exchange of experience.

The human rights experience in Europe and other regions

In the first part of the session, participants were asked to consider the various complexities of interpreting and applying international human rights norms at the national level. It is clear that States are under an obligation to respect and ensure human rights and to provide an effective remedy to those claiming their rights have been violated.²⁵ Even though States are expected to ensure there is normative harmony between human rights conventions and national law before ratification, experience shows that it is virtually impossible to discover all possible discrepancies through an abstract review. Individual cases or even general situations in a given country will inevitably lead to allegations that the conventions have been violated.

25. See, e.g., International Covenant on Civil and Political Rights, art. 2 (9 Dec. 1966) 999 U.N.T.S. 171; European Convention on Human Rights and Fundamental Freedoms, arts. 1, 13, 4 Nov. 1950, E.T.S. No. 5, 213 U.N.T.S. 221.



Although all branches of government have a responsibility to avoid human rights violations, an independent judiciary is indispensable to ensure that national legislation, regulations and decisions are in conformity with international and regional conventions. Incorporation of such conventions into domestic legislation is considered a particularly faithful method of their implementation; indeed, all 47 Member States of the Council of Europe have now incorporated the European Convention. However, it is still not an easy task for national courts in Europe to lay down the Convention's precise requirements.

Participants were reminded that neither national societies nor international law are static, and it was suggested that human rights conventions be interpreted in an “evolutive” manner to reflect and correspond to changing circumstances. However, in Europe, such a dynamic approach must be balanced against the principle of subsidiarity, which limits the power of the European regional courts to situations where the action of individual countries proves insufficient. Furthermore, the concept of the margin of appreciation, as noted above, allows a State “a certain measure of discretion, subject to European supervision, when it takes legislative,

administrative, or judicial action in the area of a Convention right.”²⁶ A recurring theme in any discussion about the impact of international human rights norms at the national level is thus the important balancing act that must take place between regional and local practices and perspectives.

In Europe, a State found responsible for a human rights violation may be required to respond in multiple ways: to award compensation for costs, as well as both pecuniary and non-pecuniary damages to victims; to adopt discrete measures to comply with the judgment, for instance the reopening of a civil or criminal case at the national level; and to take general measures to stop continuing violations or prevent similar violations in the future.

It was noted that this third element is particularly important if the number of repetitive cases before the ECtHR is to be reduced. At the moment, 10 States account for almost 80 percent of the Court's workload, and many applications relate to issues where the Court has already found violations by the

26. DAVID HARRIS ET. AL., *LAW OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 11 (2d ed. 2009), at 11.



BIIJ participants in session in a conference room of the Raoul Wallenberg Institute.





Justice Richard Goldstone, BIIJ co-director.

respondent State. A strategy adopted by the ECtHR to deal with large groups of identical cases that derive from the same underlying problem is that of “pilot judgments.”²⁷ It is critical that States that have not been parties to specific cases follow the case law nonetheless and adapt their legislation and practice in order to avoid similar violations. In other words, authoritative interpretations of human rights norms by the ECtHR affect all members of the Council of Europe.

BIIJ participants had a number of reactions to the European experience with regard to the impact of human rights in the national domain. One European national laid out what he saw as the three reasons for the lack of implementation of European Convention norms at the domestic level: 1) the complexity of implementation; 2) the lack of resources to make the necessary reforms; and 3) resistance by both executive and legislative bodies. One participant observed

27. See The Pilot-Judgment Procedure, Eur. Ct. H.R., http://www.echr.coe.int/Documents/Pilot_judgment_procedure_ENG.pdf.

that the United Kingdom appears to have gone backwards, with the authorities exhibiting growing skepticism regarding the value of its membership in a larger Europe. “For most people, Brussels and Strasbourg are the same thing,” he added, suggesting that the distinction between the activities of the European Union and the Council of Europe – including the latter’s administration of the European Court of Human Rights – is a detail lost on the average citizen.

The issue of norm implementation led to a discussion of the differences between monist and dualist States. It is clear that in dualist States, where international and national law are considered distinct and the former must be translated into the latter through a process of domestication, the implementation of human rights conventions may hit roadblocks. One judge described how the domestication issue in her country “is passed from hand to hand” within the government, with no one wishing to take the unpopular position of advocating for it. But this is starting to change, she added, “as we are getting more young, open-minded, and intelligent people now.” Another judge reminded the group that if an international treaty has been duly ratified by a State but not yet incorporated into domestic law, there is a presumption of that State’s intention to do so.

Barriers to the implementation of regional human rights standards are not unique to dualist countries, however; a monist country may embrace international law as national law, but that does not necessarily mean that its practices automatically conform to the standards of an international or regional convention. Two judges from monist countries spoke, for example, of the reforms their judicial systems needed to undergo in order to comply with Article 6 of the European Convention, which protects the right to a fair trial.

The human rights situation in the Americas was then described. It was noted that in the constitutions of almost all Latin American countries, the protection of human rights is explicitly included as an obligation of the State. There is a lively judicial dialogue now between the IACtHR and the constitutional courts of its Member States, and national judges use the precedents of the IACtHR in their own judgments. In the local interpretation of standards, there is an important difference, one participant claimed, between the regional human rights systems in Europe and the Americas. There is no concept comparable to the margin of appreciation in the Inter-American system, he explained, suggesting that it was perhaps not necessary, given the cultural, religious and linguistic homogeneity characterizing the region. Another participant from Latin America disagreed with this assertion, however, saying that his own country “could not blindly accept a ruling of the Inter-American Court without taking the national system into account.” It was also noted that the Inter-American Court actively monitors the compliance of its Member States with the various provisions of its judgments, for example the criminal prosecution of those responsible for human rights violations or the awarding of reparations.

The third and most recent regional human rights system in the world is found on the African continent. One participant described how the still young ACtHPR has dealt with Member States whose practices are not in conformity with the provisions of the African Charter. For example, the Court recently ruled against Tanzania and ordered it to amend its constitution regarding the prohibition of independent candidature.²⁸ It was observed

28. *Tanganyika Law Society and the Legal and Human Rights Centre v. The United Republic of Tanzania*, App. 009/2011, Afr. Ct. Hum. & Peoples’ Rts. Judgment (14 June 2013); *Reverend Christopher R. Mtikila v. The United Republic of Tanzania*, App. 011/2011, Afr. Ct. Hum. & Peoples’ Rts. Judgment (14 June 2013).

that such a case “tests the waters” as regards the implementation of judgments at the national level. “We need executable judgments, with the measures to be taken clearly laid out,” said a participant. Subsequent monitoring of Member States’ compliance with ACtHPR judgments is the responsibility of the African Union Council of Ministers. This is another crucial part of the regional human rights enforcement system, and its efficacy will only be revealed in the coming years as the Court delivers more executable decisions.

“We are duty-bound as judges to apply human rights norms [in cases] even if they have not been raised.”

The group then turned to the role of judges – both domestic and international – in the establishment of human rights norms. This role should extend even to cases that are not specifically about human rights issues, argued one participant. “We are duty-bound as judges to apply human rights norms even if they have not been raised.” He also identified judicial activism as an effective strategy when a State is reluctant to implement a convention to which it is a party. A second participant echoed this view – judges have duties as “State actors,” she asserted, and “we can contribute to what we see as the evolving interpretation of human rights, set the local process, and raise standards in terms of general acceptability.” She raised a caution about the fragmentation of norms, however, and suggested that judges use the interpretive rules in the Vienna Convention on the Law of Treaties²⁹ to aim toward harmonization.

29. Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331.



The point around which there was the most agreement, however, was how forcefully a lack of knowledge about human rights can impact conditions at the national level. One judge reported, “In my State there is a human rights charter, but judges don’t know about it.” Another participant spoke of his home country and its constitutional provisions that make both regional and international human rights law binding. “This places a huge burden on judges unless they are given specific human rights training,” he asserted. A judge hailing from Asia, a continent still without a regional human rights system, wondered how members of his national judiciary might learn about and possibly cite the jurisprudence of the ECtHR.

But other participants were quick to point out that familiarity with human rights law and international law more generally is becoming much more common. “Any newspaper in the world will have articles on human rights, while it was hardly mentioned in past decades,” observed a participant. Two judges used the same phrase, “a new generation of lawyers,” when speaking about the young practitioners, knowledgeable about human rights, who are currently joining the profession. This is what is needed, declared a human rights judge; “the whole legal society needs to contribute” to the human rights era.

As the first part of this discussion wound down, one participant returned to the challenges to human rights implementation cited earlier. Delays in implementation, lack of resources for reforms, and other essentially “bureaucratic” issues can be solved, he maintained. The most difficult challenge remains lack of political will at the national level. However, he observed, improvements in education may in turn help to demystify the place of human rights in contemporary life and allay hostility toward the international and regional systems established to protect these rights.

The impact of the International Criminal Court

Participants then moved on to the topic of the ICC and its effects on the domestic law and practice of States. It was pointed out that the Court’s work is intrinsically linked to international human rights norms because of the nature of its mandate; as the Appeals Chamber has stated, “[h]uman rights underpin the [Rome] Statute; every aspect of it” (see sidebar, this page). The ICC regimes related to complementarity and cooperation have perhaps the most potential to impact activities taking place at the national level.

Excerpt from ICC judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to Article 19(2)(a) of the Rome Statute. *

“Article 21 (3) of the Statute stipulates that the law applicable under the Statute must be interpreted as well as applied in accordance with internationally recognized human rights. Human rights underpin the Statute; every aspect of it, including the exercise of the jurisdiction of the Court. Its provisions must be interpreted and more importantly applied in accordance with internationally recognized human rights; first and foremost, in the context of the Statute, the right to a fair trial,** a concept broadly perceived and applied, embracing the judicial process in its entirety.”

* Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06, Judgment ¶ 37 (14 Dec. 2006).

** Rome Statute of the International Criminal Court, art. 64 (2), 67 (1), 68 (1) and (5), Rome Statute. See note 33.



The “complementarity principle” of the ICC – the foundational notion that it acts as a court of “last resort” and will step in only if national jurisdictions have failed to address international crimes – has encouraged many States to make changes to their domestic penal codes, fair trial guarantees, and applicable penalties so as to conform to the Rome Statute. Such changes will allow States to challenge the admissibility of cases before the ICC by demonstrating that prosecutions can effectively take place domestically. As the ICC is still a relatively new institution, much of the admissibility test remains unclear, although admissibility challenges have already arisen in relation to Libya, Kenya and other situations.

While certain aspects of the Court’s jurisprudence may still be crystallizing, it is already a *fait accompli* that the ICC has inspired changes in national law around the globe. It was observed that a number of States – including Australia, South Africa, and the United Kingdom – have now directly incorporated the crimes outlined in the Rome Statute into their domestic law. The crime in the Rome Statute that has likely precipitated the most amendments to national legislation is crimes against humanity, contained in Article 7 of the Statute. While the underlying acts that constitute a crime against humanity, such as murder or rape, have long been defined as criminal in national jurisdictions, they have not been classified as crimes against humanity *per se*. Incorporating this new class of crimes assigns them a stigma commensurate with their gravity. Some States – including Estonia, Germany and Spain – have even gone beyond the Rome Statute by removing the State or organization policy requirement for crimes against humanity, an element required by the Rome Statute but not by the ICTY or ICTR.³⁰

30. Prosecutor v. Kunarac, Case No. IT-96-23& IT-96-23/1, ICTY Judgment on Appeal, ¶ 98 n. 114 (12 June 2002); Prosecutor v. Semanza, Case No. ICTR-97-30-A, Judgment on Appeal, ¶ 269 (20 May 2005).

While the underlying acts that constitute a crime against humanity, such as murder or rape, have long been defined as criminal in national jurisdictions, they have not been classified as crimes against humanity *per se*. Incorporating this new class of crimes assigns them a stigma commensurate with their gravity.

War crimes, on the other hand, have been more commonly criminalized in domestic legal systems, though some countries have made new legal provisions for these crimes following the Rome Statute as well. Japan is an example of a country that had particular difficulty with the war crimes provisions of the Rome Statute. Because the Japanese Constitution states that “the Japanese people forever renounce war as a sovereign right of the nation and the threat or use of force as means of settling international disputes,”³¹ the State was prevented from enacting any legislation whatsoever related to war or war crimes. Japan subsequently adopted several pieces of emergency legislation to incorporate international humanitarian law into its legal system before it acceded to the Rome Statute on 17 July 2007.³²

The requirement for States Parties to cooperate fully with the ICC in the investigation and prosecution of crimes within its jurisdiction³³ has also impacted the domestic law of many nations, as they ensure that their legal systems

31. NIHONKOKU KENPŌ [KENPŌ] CONSTITUTION, art. 9 (Japan).

32. Jens Meierhenrich & Keiko Ko, *How Do States Join the International Criminal Court? The Implementation of the Rome Statute in Japan*, J. Int’l Crim. Just. (2009) 7 (2): 233-256.

33. Rome Statute of the International Criminal Court, 2187 U.N.T.S. 90, entered into force 1 July 2002, art. 86.





Brandeis interns (left to right) Alex Glomset, Rida Abu Rass and Anastasia Austin.

are capable of responding to any request for cooperation that the Court may make. An example is the ICC's power to have nationals surrendered to the Court, provided under Article 89 of the Rome Statute. Prior to ratification, many States had total bans on extraditing nationals. Now, many countries – including Belgium, Finland, Germany, Norway and Slovenia – have changed existing laws to allow for extradition of nationals if an international

Article 27 of Rome Statute: Irrelevance of official capacity

1. This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.

treaty requires it.³⁴ Other States have not gone as far, only making provision for extradition to the ICC as an exception to what remains a general prohibition on national extradition.³⁵

The immunity of certain national officials from prosecution, found in the laws of many countries, has also been affected by ratification of the Rome Statute. While most nations have retained such immunities, Article 27 of the Statute requires that such immunities shall not serve as a bar to an ICC prosecution (see sidebar, this page). The ICC can thus enforce criminal law in situations in which certain national jurisdictions would not be able to prosecute an accused. The ICC has not always had a positive experience in this area, however, especially with the arrest warrant issued for Sudanese President Omar al Bashir. Although Sudan is not a Party to the Rome Statute, it became subject to investigation by referral of the Darfur situation to the ICC through a Chapter VII resolution of the UN Security Council.³⁶

Without its own police force, the ICC is dependent upon the cooperation of national law enforcement systems to execute its arrest warrants. The cooperation obligation of States Parties notwithstanding, Chad and Malawi both allowed President Al-Bashir onto their territory without arresting him. The States were subsequently referred to the UN Security Council for non-cooperation, and their actions were also the subject of an ICC ruling on whether Head of State immunity – specifically referenced in Article 98 of the Rome Statute (see sidebar, opposite page) – applies when the

34. Matthias Goldmann, *Implementing the Rome Statute in Europe: From Sovereign Distinction to Convergence in International Criminal Law?*, (2005/2008)16 Finnish Y.B Int'l L. 5 (27 July 2007).

35. *Id.*

36. Prosecutor v. Omar Hassan Ahmad Al Bashir, Case No. ICC-02/05-01/09, Warrant of Arrest (4 March 2009 & 12 July 2010); see also S.C. Res. 1593, U.N. Doc S/RES/1593 (31 Mar. 2005) (adopting resolution to refer the *Situation in Darfur, Sudan* with 11 votes in favor).

ICC issues an arrest warrant against a sitting Head of State from a non-State Party. In a controversial ruling, Pre-trial Chamber I held that there is an exception to Head of State immunity under customary international law when an international court seeks arrest for an international crime. Malawi and Chad were thus not allowed to rely on Mr. Al-Bashir's Head of State immunity when the ICC sought his arrest for crimes against humanity, war crimes, and genocide.³⁷

Finally, it was noted that non-States Parties do not have to be the subject of an ICC investigation in order for the Court's work to influence their actions. The United States demonstrated this when, in 2013, a Congolese suspect wanted by the ICC, Bosco Ntaganda, surrendered himself at the US embassy in Rwanda. Despite not being formally obligated to surrender Mr. Ntaganda to the Court, the US worked with the ICC and Dutch and Rwandan authorities to secure his transfer to The Hague.

Participants had a number of queries and comparisons about complementarity and cooperation, from the perspective of both their home countries and their respective judicial institutions. Several related how their governments had responded to the need to change their criminal and procedural codes so as to implement the Rome Statute domestically. One judge recounted that his government had charged three soldiers with crimes that it thought might fall under the jurisdiction of the ICC, in order to preempt the ICC from opening an investigation. However, the cases came under domestic military jurisdiction and the military code had not been amended to conform to the Rome Statute, so the soldiers were ultimately released. Another participant suggested that the

37. Prosecutor v. Ahmed Al Bashir, Case No. ICC-02/05-01/09, Decision on Cooperation with the Court (12 December 2011); Prosecutor v. Ahmed Al Bashir Case No. ICC-02/05-01/09, Decision on Cooperation with the Court, (13 December 2011).

Article 98 of Rome Statute: Cooperation with respect to waiver of immunity and consent to surrender

1. The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity.

ICC ruling about exceptions to Head of State immunity for international crimes represents a new interpretation of customary international law and, notably, is not "in sync" with the 2012 ICJ judgment in *Jurisdictional Immunities of the State*.³⁸

Several participants alluded to the situation of former Chadian dictator Hissène Habré, whose prosecution became the subject of multiple judicial fora before Senegal – Habré's country of residence since 1990 – finally committed in 2012 to prosecute him in a special ad hoc tribunal of an international character, to be established within the Senegalese judiciary.³⁹ It was noted that the ICJ judgment that dealt with Belgium's proposal to prosecute Habré under universal jurisdiction took into consideration Senegal's obligation to comply with the UN Convention against Torture, which it had ratified. Just as ratification of the Rome Statute implies obligations by States Parties, it was incumbent

38. *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, *supra* note 12; *but also see* Arrest Warrant of 11 Apr. 2000 (Democratic Republic of Congo v. Belgium), ICJ Judgment (14 Feb 2002), para. 61 (ICJ noted that immunity questions may be resolved differently when the matters are before international criminal courts).

39. *Chambres Africaines Extraordinaires*; *see* <http://www.chambresafricaines.org>.



upon Senegal to prosecute someone charged with torture, or else extradite him to a country that would do so.⁴⁰

A comparison of the approaches of the ICTR and the ICC in the area of complementarity and cooperation then followed. One participant pointed out that the ICTR did not establish complementarity with the Rwandan judicial system so that prosecutions related to the Rwandan Genocide could be directed at all ethnic groups, something that the national courts were unlikely to do. Another judge concurred, saying, “Rwanda was not ready to prosecute a large part of the nation.” In terms of national cooperation in cases concerning international crimes, the situation of a Swedish national suspected of war crimes and crimes against humanity during the Rwandan genocide was raised. Rwanda asked for the suspect to be extradited and the Swedish Supreme Court approved the extradition. After the ruling, however, the suspect appealed this decision to the ECtHR, claiming he would not receive a fair trial in Rwanda. While his case was pending, the ECtHR ordered the suspect released. By the time Strasbourg ultimately ruled that the Rwandan judiciary appeared to be independent and that the extradition could proceed, the suspect had left Swedish territory.⁴¹

The situation of the Special Tribunal for Lebanon (STL) was also brought into the discussion. The Tribunal was created to try the individuals accused of carrying out a 2005 Beirut attack which killed 23 persons, including former Lebanese Prime Minister Rafiq Hariri, and

injured many others, as well as to try other cases relevant to that attack. At the same time, Lebanese authorities also have potential jurisdiction over crimes related to the 2005 attack. If the STL chose to exercise its own jurisdiction over those crimes, it would ask Lebanon to defer to the tribunal, as articulated in an agreement between the United Nations and Lebanon and given effect by a resolution of the Security Council.⁴² As to the cooperation necessary to investigate the crimes in question, the STL issued warrants for four accused persons in 2011, requesting the assistance of authorities including Interpol to determine their whereabouts. As of 2014, the accused are still at large and their trials began, in absentia, in January 2014.

The discussion ended with a question about the alleged bias that many observers – including, notably the African Union – believe the ICC has toward pursuing cases in Africa. There continues to be talk about creating a war crimes chamber to exist alongside the African Court of Human and Peoples’ Rights so that the kinds of African cases currently on the docket of the ICC can be carried out in Africa instead. One African judge observed grimly, “Africa is just not interested in complementarity with the ICC.” Indeed, the current hostility toward the ICC exhibited by many African States Parties was seen as a regrettable development by several participants. A European judge observed, however, that the current African focus of the Court does suggest a kind of neocolonial paternalism. He consequently thought it a good idea that the ICC hold some of its Africa-related trials in situ.

Although this session began with a focus on two important courts and their impacts at the national level, the conversation quickly branched out to cover various ways in which human rights norms and the international jurisprudence

40. Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), *supra* note 11; see also *World Court: Important Victory for Habré Victims*, FIDH, <http://www.fidh.org/en/africa/Chad/Hissene-Habre-Case/World-Court-Important-Victory-for/>. For more about the Habré situation, read the BIJ 2012 report at <http://www.brandeis.edu/ethics/pdfs/internationaljustice/bij/BIJ2012.pdf>.

41. *Ahorugeze v. Sweden*, App. No. 37075/09, Eur. Ct. H.R., Judgment (27 Oct. 2011).

42. S.C. Res. 1757, U.N. Doc S/RES/1757 (30 May 2007).



developed around them have served to push a domestic human rights agenda in a number of States. At the same time, it is clear that many impediments to the full realization of the human rights era continue to exist across the globe.

Theme 3

How Universal Are Human Rights?

Next, BIJ participants stepped back from considering the practical aspects of how human rights influence their institutions and judicial practice and reflected on the fundamental nature of these rights. More particularly, judges focused on an important but elusive question concerning human rights – to what extent can they be considered universal?

The conversation began with a reminder of how universality is addressed in basic human rights instruments. According to the United Nations Charter, the organization shall promote, inter alia, “universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion.”⁴³ The Universal Declaration of Human Rights⁴⁴ was proclaimed by the UN General Assembly in 1948 as a “common standard of achievement for all peoples and all nations,” the objective being to secure the “universal and effective” recognition of and observance for the rights and freedoms recognised therein. As “all human beings are born free and equal in dignity and rights,” the rights and freedoms set forth in the Declaration belong to “everyone” (see sidebar, this page)⁴⁵

It was noted that in international human rights parlance it has become commonplace to state that human rights are “universal, indivisible

43. U.N. Charter, art. 55.

44. G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (10 Dec. 1948) [hereinafter UDHR].

45. UDHR, Preamble & arts 1-2.

Universal Declaration of Human Rights*

Article 1:

All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.

Article 2:

Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.

(emphasis added)

* *Supra* note 44.

and interdependent and interrelated.” This quotation stems from the Vienna Declaration and Programme of Action, adopted by consensus by the World Conference on Human Rights on 25 June 1993.⁴⁶ As to universality in particular, the Vienna Declaration states that the universal nature of all human rights and fundamental freedoms for all “is beyond question.”⁴⁷ The universal nature of human rights continues to be mentioned almost routinely in resolutions adopted by the UN General Assembly, the UN Human Rights Council and other international

46. Vienna Declaration and Programme of Action, G.A. Res. 48/121, ¶ 5, U.N. Doc. A/CONF.157/23 (25 June 1993) (hereinafter Vienna Declaration).

47. Vienna Declaration, ¶ 1.





Judge Shireen Fisher of the Special Court of Sierra Leone, observed by Chair of the World Trade Organization Appellate Body Ricardo Ramirez Hernández.

and regional bodies.⁴⁸ Many assert that the Universal Declaration of Human Rights expresses general principles that have become binding under customary international law.⁴⁹

The principles of the Universal Declaration have since been reaffirmed and developed in numerous global human rights conventions. Some of the core conventions today command something close to universal adherence. The number of Contracting Parties to the Convention on the Rights of the Child is 193. There are 187 to the Convention on the Elimination of All Forms of Discrimination against Women, and 176 to the International Convention on the Elimination of All Forms of Racial Discrimination.⁵⁰ Even the International Covenant on Civil and Political Rights has attracted a fairly high number of ratifications or accessions at 167 (without China

48. See, e.g., UN General Assembly resolution 67/169 (Enhancement of international cooperation in the field of human rights), adopted without a vote on 20 December 2012 (affirming guiding principle of universality). G.A. Res. 67/169, ¶ 7, U.N. Doc. A/RES/67/169 (20 Dec. 2012).

49. On the status and interpretation of the Universal Declaration, see, e.g. The Universal Declaration of Human Rights: A Common Standard of Achievement (Guðmundur S. Alfreðsson & Asbjørn Eide eds., 1999).

50. Status of Ratification of Human Rights Instruments as of 1 March 2014, United Nations, www.ohchr.org/EN/HRBodies/Pages/HumanRightsBodies.aspx.

or Saudi Arabia among the group). The number of Contracting Parties to the International Covenant on Economic, Social and Cultural Rights is a bit lower at 161 (and does not include the United States).

It can be asked to what extent a particular substantive right – or rather the specific content the right has received in a human rights convention – has achieved universal acceptance. However, while a large number of States are still formulating reservations or are unwilling to submit themselves to mechanisms of individual complaints, it is, as stated in the Vienna Declaration, “beyond question” that the very principle of universality has attracted universal endorsement. This phenomenon can be called “international legal universality.”⁵¹

When looked at historically, the picture is rather different. The idea of universally recognized individual human rights is of recent origin. And while most States today pay at least lip service to this idea, it is clear that the actual application and interpretation of the rights recognised under various human rights declarations and conventions, and thus the reality on the ground, represent a wide spectrum of approaches.

It was pointed out that some national practices are presented overtly as applications and interpretations of a given right. Examples include the death penalty – which some countries claim does not constitute an infringement on the right to life – and significant restrictions on freedom of speech, assembly and association, which may be lawful in countries with widespread censorship, prohibition against unauthorized demonstrations, or single political parties. Other national practices take place covertly, without the government or regime in power arguing

51. Jack Donnelly, *The Relative Universality of Human Rights*, Hum. Rts. Q. (2007) 29 (2): 281-306.

that such practices do not, in fact, violate human rights. The most obvious example is the widespread use of torture. Such practices should be given much less legal interpretative relevance, if any.

That human rights, which are in principle universal, may receive widely divergent applications and interpretations in different countries and regions is often linked to the idea of cultural relativity and diversity. While cultural diversity does not in itself pose a challenge to the principle of universality – in fact, respect for cultural diversity *is* a human right⁵² – cultural relativity is sometimes presented as a factor explaining and justifying different approaches to, and interpretations of, internationally recognised human rights. This may be the idea behind a reference in a recent UN General Assembly human rights resolution to the need to take into account not only the duty of all States to promote and protect all human rights but also “the significance of national and regional particularities and various historical, cultural and religious backgrounds.” (This may explain why the vote on that resolution was far from unanimous.⁵³) In the same vein, the Human Rights Declaration of the Association of Southeast Asian Nations of November 2012 states that the realisation of human rights “must be considered in the regional and national context bearing in mind different political, economic, legal, social, cultural, historical and religious backgrounds.”⁵⁴



Leigh Swigart, Brandeis University.

BIIJ participants offered many comments about the universality of human rights. In particular, the role of cultural diversity in the debate over universality, and the evocation of diversity by some States as a justification for not respecting certain rights, provoked a number of questions. One participant asked hypothetically, “If you oppose the notion that all human rights are universal, which ones would you be willing to give up? Would you accept arbitrary arrest? No freedom of speech? If put this way, I am convinced that everyone will accept the universality issue.” Another participant objected to that formulation of the question, however. “The question instead should be, ‘Which restrictions are you prepared to accept to protect cultural traditions?’ If put that way, the answer might be very different.”

These views led to a consideration of different levels of rights: those that might be considered absolute, such as the right to life and the right to be free from torture or slavery, compared to those that might be interpreted in a more relative light, such as certain rights of the family and the freedom of assembly. One participant who had been involved in the Committee on the Elimination of Discrimination against Women

52. *See, eg.*, G.A. Res. 67/169, ¶ 4, U.N. Doc. A/RES/67/169 (20 Dec. 2012) (referring to an international order based on, *inter alia*, ‘respect for cultural diversity and universal human rights’). *See also* International Covenant on Civil and Political Rights, art. 27, 9 Dec. 1996, 999 U.N.T.S. 171 (reaffirming the rights of persons belonging to minorities to enjoy their own culture).

53. G.A. Res. 67/175, ¶ 6, U.N. Doc. A/RES/67/175 (20 Dec. 2012) (adopted by a vote of 126 votes in favour, 53 votes against and six abstentions).

54. ASEAN Declaration of Human Rights, ¶ 7, (19 Nov. 2012), *available at* <http://www.asean.org/news/asean-statement-communicues/item/asean-human-rights-declaration>.



“There is an increasing trend to single out specific crimes from the broad category of crimes against humanity and to regard them as independent international crimes. Genocide was the first one, as of the 1948 Convention, and torture – which may be a crime against humanity as well as a war crime – is frequently identified as an independent international crime. It may well be that rape and sex crimes more generally will follow the same path.”

(CEDAW) noted that although violence against women is often defended as a part of traditional culture, all parties to the CEDAW convention are obligated to report on this phenomenon in their countries. Thus, the “cultural diversity card” cannot be played in all situations. A criminal judge with substantial human rights experience observed that the freedom from rape and other forms of sexual violence is on its way to becoming an “absolute right.” He continued, “There is an increasing trend to single out specific crimes from the broad category of crimes against humanity and to regard them as independent international crimes. Genocide was the first one, as of the 1948 Convention, and torture – which may be a crime against humanity as well as a war crime – is frequently identified as an independent international crime. It may well be that rape and sex crimes more generally will follow the same path.”

Such trends notwithstanding, States continue to submit reservations to human rights treaties, arguing that these reservations reflect national or regional particularities, or local practices and beliefs. These reservations frequently come from States with “conservative” social and religious beliefs, such as Islamic countries that wish to reconcile their human rights obligations with

provisions of Sharia law, or African countries that reject the rights of homosexuals. But Western countries submit reservations as well; one participant noted that both Sweden and Finland made a reservation to Article 20 of the International Covenant on Civil and Political Rights, which prohibits propaganda for war, declaring that it was contrary to the freedom of expression, a right considered fundamental in those two countries.⁵⁵

The idea of reservations to human rights treaties was then explored in more depth. It was agreed that “sweeping reservations” cannot be allowed, and that reservations should furthermore not be contrary to the object and purpose of the treaty in question, as articulated in the Vienna Convention on the Law of Treaties.⁵⁶ But who should decide what is contrary and what is not? And what should be the place of customary international law in this determination? It was pointed out that the ICJ addressed the issue of treaty reservations in an early advisory opinion,⁵⁷ but some participants felt that turning to the Court for its pronouncement on every reservation to a human rights treaty would not be an efficient way to proceed. On the other hand, argued one judge, the ICJ is a judicial organ that by definition represents the principal legal systems of the world,⁵⁸ and furthermore ensures a balanced global representation on its bench. As such the ICJ may offer the best chance of determining what kinds of human rights may really hold universal status and thus not be subject to reservations.

55. International Covenant on Civil and Political Rights (9 Dec. 1996) 999 U.N.T.S. 171.

56. Vienna Convention on the Law of Treaties, *supra* note 29.

57. Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, ICJ Advisory Opinion, at 15, 24 (28 May 1951).

58. Statute of the International Court of Justice, art. 9: “At every election, the electors shall bear in mind not only that the persons to be elected should individually possess the qualifications required, but also that in the body as a whole the representation of the main forms of civilization and of the principal legal systems of the world should be assured.”



The discussion came around once again to the ECtHR principle of “the margin of appreciation,” which, in the thinking of scholar Jack Donnelly, is not incompatible with the idea of “the relative universality of internationally recognized human rights.”⁵⁹ Donnelly has articulated a three-tiered scheme for thinking about this idea: there are 1) broad human rights *concepts*, that have 2) multiple defensible *conceptions*, which in turn will have 3) many defensible *implementations*.⁶⁰ Donnelly notes that a wide range of practices found in different countries, regions, and cultures can be consistent with underlying human rights concepts around which there is universal consensus.⁶¹ One European judge concurred with Donnelly’s thinking about diverse practices and suggested that the margin of appreciation is “a good tool for fostering dialogue between international and national regimes.” He added that the human rights cases around the right of Muslim women in Europe to wear the burqa,⁶² for example, will push both judges and the general populace to consider cultural relativism when thinking about unfamiliar practices. A second European judge added a note of caution, however: “The margin of appreciation has limits – it can go to a certain point but cannot nullify the right itself; there is still a universal part of rights that cannot be restricted by the margin of appreciation.”

A criminal judge noted that it is important to move beyond the language of legal instruments and look at what is happening on the ground when evaluating the status of so-called universal rights, relative or not. There is a difference, she asserted, “between the practical universality of human rights and the universal condemnation of a wrong.” She continued, “If you had access

59. Donnelly, *supra* note 51.

60. *Id.* at 299.

61. *Id.* at 300.

62. Relinquishment to the Grand Chamber of a case concerning the wearing of the full-face veil in public places in France (*S.A.S. v. France*), App. No. 43835/11, Eur. Ct. H.R. (11 Apr. 2011).



Judge Diego García Sayán, President of the Inter-American Court of Human Rights.

to confidential information, you might find that as a practicality there is no universal abandonment of torture despite almost universal condemnation.”

Several participants were eager to identify sources showing that, as one judge expressed it, “there are universal aspirations toward human rights in all kinds of traditions and cultures.” The Bible, Qur’an, Torah, and Rig Veda were all suggested as sources, as were texts associated with Buddhism and Confucianism. The concept underlying all of these, some asserted, is human dignity. One judge remained skeptical about

“The margin of appreciation has limits – it can go to a certain point but cannot nullify the right itself; there is still a universal part of rights that cannot be restricted by the margin of appreciation.”





Rolf Ring, Deputy Director of the Raoul Wallenberg Institute.

citing religious texts in this context, however, arguing “they have been used to throw up barriers to human rights, and are in many ways inconsistent with human rights.”

The conversation then turned to the situation of indigenous peoples. One judge queried, “how will the push to universalize human rights affect indigenous traditions that some countries want to preserve?” This issue is particularly salient in Latin America, where a large number of recognized indigenous groups have expressed an interest in applying their customary law, which is not always in line with accepted human rights norms. For example, the kind of defense afforded to accused persons in indigenous community justice procedures, or the types of punishment meted out to those found guilty, may not satisfy international norms. Some countries in that region insist that customary law must abide by the standards established by the Inter-American human rights system; other countries are leaving the decision up to national courts on a case-by-case basis. The question underlying this dilemma,

one participant suggested, is “what should be the limits of legal pluralism?” Another participant suggested that the best solution might be for Latin American countries to ratify human rights treaties and simply make reservations concerning the rights of indigenous peoples.

The discussion ended by returning to the topic of the domestication of human rights treaties, and how to overcome the resistance of some States to incorporate treaty provisions into domestic law. One participant described the situation in Australia, where the government has signed all major conventions but is a “serial non-implementer.” He recounted how, in the context of a federation, the different Australian states are able to strongly assert their own legal position. For example, the Australian state of Victoria has circumvented the federal government’s inaction by passing state legislation that obliges its local courts to apply the provisions of conventions that the Australian government has signed but not brought into domestic law.

Several European judges reported that membership in the Council of Europe has required States to implement the provisions of the European Convention on Human Rights at the domestic level, giving a bill of rights for the first time to some countries, including the United Kingdom. However, incorporation of the European Convention does not necessarily mean that legal specialists recognize or apply its provisions. A participant reported that the Convention has been part of Swedish legislation since 1996 but that this fact remains unknown to many of the country’s practicing lawyers.

Finally, two African judges reiterated the continuing challenges faced on their home continent regarding the incorporation of international human rights conventions into domestic law. They felt that much capacity building needed to take place so that

implementing legislation could be passed. They furthermore expressed the hope that international and regional courts could assist with this capacity building and persuade national leaders to fulfil their States' obligations vis-à-vis international human rights norms, even if these are interpreted according to local cultures and beliefs.

Theme 4

The Role of State Engagement and Diplomacy in International Justice

Fiat iustitia, pereat mundus.

– Let there be justice, though the world perish
(attributed to Holy Roman Emperor Ferdinand I)

The role of politics in international justice has been a recurring topic of discussion at the Brandeis Institute for International Judges over the years, and the 2013 session was no exception. Participants were challenged to consider how their institutions should act, and how they as judges should respond, when confronted with the demands of realpolitik. A number of issues were raised, in particular in relation to international criminal courts and tribunals, although other types of jurisdictions in the international sphere may also find themselves subject to external pressures from States and diplomatic processes. The underlying question addressed during the discussion was evoked by the Latin motto cited above – should justice be carried out at all costs?

It is clear that all international courts and tribunals work in political contexts and that many judgments have direct or indirect political consequences. But it is also assumed that judges will interpret the law as it stands, leaving political considerations aside. One participant with diplomatic experience played devil's advocate, posing some provocative questions. Is strict detachment from politics a realistic approach on

the part of judges in all circumstances? And will remaining above the political fray lead to the increased legitimacy of international courts, or might it instead undermine their authority?

These questions were particularly pertinent to the ICC, which has been confronted several times with the “peace vs. justice” conundrum – in Uganda, Sudan, and Libya – and been criticized for proceeding with prosecutions despite the claim

Is strict detachment from politics a realistic approach on the part of judges in all circumstances? And will remaining above the political fray lead to the increased legitimacy of international courts, or might it instead undermine their authority?

that the proceedings would worsen conditions on the ground. It was asserted that the ICC has also weakened its own appearance of authority by bringing to trial political leaders in Kenya who were recently elected, and thus clearly enjoy popular support at home. A similar situation would arise, it was suggested, should the ICC undertake to prosecute the “winner” of an armed conflict where the military victory has been reached through alleged war crimes, as in Sri Lanka.

Given that the ICC depends on the cooperation of its States Parties, as mentioned above, and that this cooperation has been difficult to enforce in some instances, the following queries were made:

- Is it wise for the ICC to initiate investigations at all when one can see from the very beginning that the State concerned will not hand over a suspect to The Hague within the foreseeable future?
- Should the Court take action only when there are realistic prospects of having an arrest warrant executed?





Judge Carmel Agius of the International Criminal Tribunal for the former Yugoslavia makes a point, as Judge Erik Møse of the European Court of Human Rights listens intently.

- Is it at all realistic to initiate an investigation against a Head of State who is still in office when there are no signs there will be a change of government?
- Is it appropriate to initiate an investigation in the context of ongoing conflict when the suffering of a civilian population might be exacerbated or prolonged by such an investigation?
- And the question underlying all of the foregoing ones: is it legitimate for the Court to take such considerations into account?

One of the solutions proposed to these challenges was to improve communication between the ICC and the UN Security Council. This would allow the Court, for example, to seek

“The moment you let a perpetrator off the hook, you have created another perpetrator, if the prosecutor does not intervene, then we encourage new war criminals.”

the assistance of the Council in the execution of arrest warrants, especially if the suspected criminals are in positions of power. Dialogue between the Court and the States involved in investigations should also be enhanced. A former diplomat made this suggestion: “The Court should perhaps be encouraged to act as a diplomatic player, at least until the stage of prosecution. That way, there could be a discussion of the timing of investigations and the political consequences that could be expected from a trial.”

Participants had a number of reactions to these questions and viewpoints, as well as numerous experiences to bring to the discussion. A judge from Latin America commented on the dangers of international intervention, pointing out that many observers are concerned about the potential impacts on the ongoing conflict in Colombia of an ICC investigation. “How can the war end when the same persons who would sign the peace agreement are those who expect to be accused of war crimes by the Court?” Such impacts by the ICC might be exacerbated by rulings of the Inter-American Court, which have made clear that no amnesty for serious humanitarian crimes will be permissible in Member States.

One participant felt very strongly that hesitation to act on the part of the ICC carries its own risks. “The moment you let a perpetrator off the hook, you have created another perpetrator,” he insisted. “If the prosecutor does not intervene, then we encourage new war criminals.” A criminal judge suggested that the question of whether or not to start an investigation or indict an individual is not the primary one; it is instead the timing of the action that is critical. Another criminal judge pointed out that the deterrence effect of international prosecutions is not, in fact, knowable.

On the subject of cooperation between international courts and government authorities, a former international prosecutor acknowledged that such cooperation is inevitable, but also that “discussions in dark corners can be a recipe for rumor.” Any communication with States involved in international investigations and prosecutions should thus be out in the open. A former criminal tribunal president concurred, observing that consultations with governments are necessary but should take place with the utmost transparency, which includes keeping fellow members of the bench informed. He contrasted, however, communication about administrative issues with communication concerning an individual case or trial; on the latter, “everyone agrees there will be no intervention or communication whatsoever.” Protecting the integrity of international courts in this area is critical, he added, as “their lifespan is shorter than that of national courts.” A current tribunal president added his voice to the discussion, observing that “a political reality is there, and one cannot be oblivious to it. But at the same time, one cannot sell one’s soul. Anything that could reflect on my role or that of my judges, I will not deal with but leave it to another official.”

The conversation then moved to the topic of funding for international courts and tribunals and the contact with political entities that is sometimes necessary in order for institutions to ensure a stable financial base. Judges serving on courts that depend entirely upon voluntary contributions reported the most difficulty balancing the need to engage with States to garner support with the need to resist pressure from those States. “A number of donors have attempted to use their funding to control outcomes,” recounted a judge. “They have said that they are happy for some cases to proceed but not others. I find this quite reprehensible; you either bring the court to a close in a transparent manner or support it until the end. The judges at



Prof. Linda Carter, BIIJ co-director.

my court feel threatened by this development.” The judge of another donor-supported court reported that, at one point, the financial situation in her institution was so dire that it could not go on without an immediate influx of cash. She made over 100 diplomatic calls, pleading for support, although in the end it was the UN that stepped in to help. “If there is any lesson to learn here,” the judge concluded, “it is never to have donor-funded courts!”

The contrast between donor-supported courts and those set up with regular sources of funding was marked. The IACtHR receives almost half of its funding from European States that have no involvement in cases before the court, so there is little fear of political intervention from those donors. It does, however, run on a proverbial shoestring. ITLOS is afforded a sufficient annual budget with little room for extras, the group heard. But this does not stop some States from pressuring the Tribunal to make further cuts. The Caribbean Court of Justice (CCJ) is perhaps most insulated from undue interference, as it receives all its funding from a trust fund established by member States of the Caribbean Community. Consequently, the Court has no need to interact with governments on budgetary matters. Finally, it was observed that the kinds of problems described during this session – both



“In conflicts between law and politics, it is almost always politics that comes out the winner. This is true not only in the international political arena but also at the national level. I am aware that judges do not like to hear this, but it is a fact that we have to accept.”

of financing and political interference – simply do not exist in relation to the ICJ. “The ICJ is fortunate to have a long tradition and a special place in the international community, which does not wish to interfere,” remarked a participant.

Two recommendations were made at the close of the discussion. The first is for international courts and tribunals to make formal provisions in their rules for consulting with governments on non-confidential matters. The second recommendation is for courts to be fully aware of the political context in which they are working. “In conflicts between law and politics,” a participant declared, “it is almost always politics that comes out the winner. This is true not only in the international political arena but also at the national level. I am aware that judges do not like to hear this, but it is a fact that we have to accept.”

Theme 5

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

The world is witnessing an important time in the life of international courts and tribunals. Some, such as the ad hoc criminal tribunals, are closing. Others, such as the ICJ and WTO AB, are seeing an increase in both the number and types of cases brought before them. At the same

time, national jurisdictions are gaining capacity to handle international law issues. The impact of human rights and the impact *on* human rights are a significant part of these developments.

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

Taking stock

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

It was noted that the historical period during which the ICTY and ICTR were created was special. “They were the product of a certain historical moment – the end of the Cold War and the beginning of Perestroika – when there existed a certain good faith and willingness.” A



number of participants agreed that if political conditions then were such as they are now, the tribunals would never have been created.

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

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

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

Participants had diverse notions of how both specific institutions and international judicial trends might evolve over the coming years. Some predicted that ad hoc institutions were a thing of the past; international organizations and States would content themselves with a single permanent criminal court, the ICC, and the other permanent institutions that address human rights violations and interstate disputes. One judge qualified this

statement, observing that ad hoc arbitration bodies were becoming increasingly popular for some kinds of dispute resolution, and predicted that this would continue in the future.

It was predicted that the next four or five years would be determinative for the ECtHR. The Court has been relieved of much external pressure following its improved productivity and reduced backlog of cases. However, its continued success depends largely on factors outside of the Court, namely that States Parties take effective measures to prevent violations of the European Convention and that the Council of Europe assists in the national implementation of the Convention, as outlined in the 2012 Brighton Declaration.⁶³ The possibility that the WTO Appellate Body might act as a center of dispute settlement in the future for trade agreements across the globe was mentioned. And the prospect of the IACtHR becoming a truly regional court – with Canadian, US and pan-Caribbean membership – was described in hopeful terms. However, if any States repeal their maintenance of that court, or if other serious challenges arise, it will not bode well for the IACtHR, especially as its parent Organization of American States finds itself at a historically weak point.

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

Enhanced cooperation among international, regional and national judiciaries was indicated as critical for the future of the international justice

63. See Brighton Declaration, Eur. Ct. H.R., http://www.echr.coe.int/Documents/2012_Brighton_FinalDeclaration_ENG.pdf.



“We are living, as suggested, in a human rights era. We can see at the university level worldwide that students have an interest in international law. They realize that international cooperation is important, and they bring a keen interest in human rights law in particular.”

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

This point led to a discussion of the potential of advisory opinions by international courts and tribunals to disseminate international law at the domestic level. An interstate dispute judge noted that, in contrast to contentious jurisdiction, advisory jurisdiction “does not infringe on sovereignty but is instead a useful tool for States to sort out their differences.” A human rights judge concurred, observing that if his court is one day allowed to make advisory opinions, it would give rise to productive interaction with States Parties. Another human rights judge expressed the hope that advisory opinions from her court would “strengthen democratic institutions and concepts and promote development.” Although States in her region do not seem interested in such opinions at the moment, “better educated people are replacing the ‘fossils’; there is going to be more dynamism and willingness for change, without fear of change.”

The need for change in the area of international judicial elections was then raised. As one judge

phrased it, “the election process needs radical reorganization!” Another participant felt it was critically important that age limits be placed on candidates for judicial positions; given the length of many international judicial terms, he argued, only individuals with the capacity to be productive for years to come should enter into the nomination process. A criminal judge expressed concern about the qualifications of judges. “We are a serious criminal institution and should be staffed and run by experts. What we should have is a properly constituted selection committee made up of experienced practitioners who know what is needed. Judicial elections are divisive in the US, and they are divisive in the international community.” A judge from a small country raised a different issue with the current election system. “It should not only be States with more leverage and diplomatic power that get their candidates on the bench. This is not how justice should be done.”

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

The future of the ICC

Many participants offered their thoughts on the future of the ICC, given its important place as the only current permanent international criminal body, now and probably for some time to come. One criminal judge suggested that if the ICC is to ensure its global relevance, it should establish regional seats in Africa, the Americas, and the Asia Pacific region. Another criminal



judge quickly rejoined, “But who is going to pay for it? Establishing permanent ICC seats around the world, especially where there are no ongoing situations, would be hugely expensive. And the Assembly of States Parties (ASP) is already balking at the budget in *one* location.” This prompted a comment by a third criminal judge, who felt that the Court is being micro-managed by the ASP. However, it was acknowledged that the ASP had recently come forward to ask judges for their ideas on how the Court’s legal framework might be amended so as to accelerate proceedings.

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

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

cases, private companies have more resources. And corporations have interests in ICC situations and cases, just as individual victims do.

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

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

New kinds of courts

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



“Globalization will lead to more trans-border issues that call for an international or regional response.”

It was noted that during the early negotiations of the Rome Statute, both drug trafficking and terrorism were suggested for inclusion in the ICC’s jurisdiction; these crimes were eventually dropped, however. The gravity of drug trafficking and organized crime in Mexico was then described: more than 70,000 people have been killed as a consequence of organized crime, with the result that the Mexican State has received multiple complaints that it is unable to fulfill its human rights obligation to protect the life and personal security of its citizens. The IACtHR ultimately agreed with this assertion, ruling against Mexico in 2009 in a case involving the murder of women in Ciudad Juárez and Mexico’s failure to investigate and solve the crimes.⁶⁴

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

adjudicated by domestic courts. “Globalization will lead to more trans-border issues that call for an international or regional response.”

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

“Human Rights World”

Over five plenary sessions, BIIJ participants discussed a diverse set of issues related to the increasing centrality of human rights to the rule of law, and the ways in which this centrality manifests itself in both domestic and international legal orders. It was suggested that the title of BIIJ 2013 – “the International Rule of Law in a Human Rights Era” – might not capture the essence of the phenomenon under discussion. The use of the word “era” implies a temporary state of being, one that will be succeeded by another. Participants seemed to agree, however, that awareness of and respect for human rights have become an enduring part of who we are as global citizens of the 21st century. Rather than a “human rights era,” we live in a “human rights world.”

64. See *Caso González y Otras v. Mexico*, Inter-Am. Ct. H.R. Preliminary Objection, Merits, Reparations, and Costs (ser. C) No. 205 (16 Nov. 2009).



Breakout Group Discussions

While most sessions at the 2013 Brandeis Institute for International Judges followed a plenary format, judges serving on the benches of human rights, interstate dispute resolution and criminal courts also had the opportunity to discuss issues of particular interest to their respective types of jurisdiction. Participants conferred with one another before the institute began to determine a list of topics to discuss during these breakout sessions. The following are the highlights of their discussions.

Human rights courts

Judges serving on human rights courts in Africa, the Americas and Europe took as their primary topic of conversation the approach adopted by their respective institutions toward indigenous peoples and other distinctive groups. Given the diverse national backgrounds of those participating in the session, as well as their experiences with different regional human rights systems, the discussion was wide-ranging and instructive.

Of the three regional human rights systems currently in operation, only the African one moves beyond individual rights to make special reference to the rights of “peoples,” that is, distinctive communities and ethnic groups living within sovereign States.⁶⁵ The situation of the Ogiek people in Kenya was raised as an example. The Ogiek are an ethnic and linguistic group that has historically lived in and been sustained by the Mau Forest. When the Kenyan government opened up the forest for development and sought

to relocate the Ogiek, a case was brought by several NGOs to the African Commission on Human and People’s Rights, which then referred the case to the ACtHPR. In March 2013, the Court ruled that development posed the risk of irreparable harm to the Ogiek Community and violated their rights as guaranteed under the African Charter on Human and Peoples’ Rights. It ordered the Kenyan government to reinstate restrictions it had imposed on land transactions in the Mau Forest while the Court reached a decision on the issue.⁶⁶ It was noted that similar situations have arisen with indigenous groups in Malawi, Namibia, Tanzania and Uganda, especially when the rights of traditional communities conflict with government plans for touristic and other kinds of development, which can clearly bring benefits to other sectors of the national population. “It is a balancing act,” declared a judge, noting that the Court must look carefully at the array of rights guaranteed in the African Charter in order to arrive at a fair decision.

The discussion then turned to the situation of indigenous rights in Latin America. Indigenous groups in that region have also struggled with governments as well as multinational corporations seeking to exploit their traditional territories for natural resources, such as rivers that can provide hydroelectric power. Unlike the African Charter, the American Convention on Human Rights does not recognize the rights of indigenous peoples. However, the IACtHR has acknowledged the concept of “collective ownership” through rulings related to Ecuador, Nicaragua, Paraguay and Suriname. A judge explained, “In the

65. For more about the status of indigenous rights, see BIJ 2012 Report, *Making a Place for Indigenous Rights in Global Justice*, at 32, Brandeis U., http://www.brandeis.edu/ethics/pdfs/internationaljustice/bijj/Making_place_2012.pdf.

66. See African Commission on Human and Peoples’ Rights v. Kenya, App. No. 006/2012, Afr. Ct. Hum. & Peoples’ Rts., Order of Provisional Measures (15 Mar. 2013).



jurisprudence of the Inter-American Court over the last ten years, there have been some dramatic interpretations of human rights in a context that was not even mentioned when the Convention was approved of – that indigenous peoples see ownership of land as collective, as part of their patrimony and also their identity.” It was noted by participants that the special connection of indigenous peoples to ancestral lands – a connection that defies contemporary notions of land as a simple commodity – is also found in parts of Africa and Asia.

“In the jurisprudence of the Inter-American Court over the last ten years, there have been some dramatic interpretations of human rights in a context that was not even mentioned when the Convention was approved of – that indigenous peoples see ownership of land as collective, as part of their patrimony and also their identity.”

The complexity of deciding which groups can be designated as “indigenous” was also referenced. It was noted that most ethnic groups in Africa are able to trace their origins to the continent. The term “indigenous” generally refers instead to groups that distinguish themselves from mainstream populations by their mode of production – for example hunting and gathering – and historic attachment to a particular territory. This definition contrasts with that used in Latin America, where indigenous groups are generally those whose ancestors were already occupying the territory upon the arrival of Europeans. There are exceptions to this definition, however, as in the case of Afro-Colombians or other populations descended from Africans brought by Europeans as slave labor. If other populations follow a distinctive lifestyle and have a demonstrable history in a

particular location, they may also be designated as indigenous.

In contrast to Africa and Latin America, Europe has few populations that can be considered truly indigenous. One exception is the Sami people who inhabit the Nordic countries of Europe and have traditionally herded reindeer. One judge spoke of the pressures to assimilate that the Sami have experienced over the years, and also of encroachment on their traditional lands. In Norway, he related, tensions between the mainstream and Sami populations have mostly been resolved not through proceedings before the courts but rather through legislative and political means. The issue of Sami rights to ancestral grazing lands that are now under private ownership came before the ECtHR several years ago, in *Handölsdalen Sami Village and Others v. Sweden*.⁶⁷ The Court declared inadmissible inter alia the complaint by the Sami villages that a violation had occurred of their property rights under Article 1 of Additional Protocol Number 11 of the European Convention.⁶⁸ However, the Court ultimately awarded damages to the Sami applicants for the costs involved in the excessively long national proceedings preceding the ECtHR case.

Another group mentioned in the European context were the Roma. Although this group may not qualify as an indigenous people per se, the distinctive identity of the Roma people has often led to discriminatory actions toward them in the various States where they reside. As noted in *D.H. and Others v. Czech Republic*, “[A]s a result of their turbulent history and constant uprooting the Roma have become a specific type of disadvantaged and vulnerable minority ... As the Court has noted in previous cases, they therefore

67. See *Handölsdalen Sami Village et. al. v. Sweden*, App. No. 39013/04, Eur. Ct. H.R. Judgment (30 Mar. 2010).

68. Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocol No. 11, art. 1, E.T.S. 155, (entered into force 1 Nov. 1998).



require special protection.”⁶⁹ ECtHR cases involving discrimination against the Roma have included issues of access to education, permission to occupy public space, harassment and violence by authorities, and forced sterilization.⁷⁰

Human rights judges also discussed the limits of legal pluralism in their respective regions. To what extent should indigenous or customary law be allowed to exert its authority? What happens when this law is in conflict with national and/or international norms? These are questions that arise not infrequently in Africa and the Americas when indigenous groups seek to exert their autonomy. The question of pluralism also arises in relation to immigrant groups that continue to follow the dictates of another legal system, such as Sharia Law, or have practices that do not conform to those of their adopted country. The discussions in Europe around the practice of female genital mutilation and, more recently, male circumcision, were raised, as well as the contentious debate in some European countries that continues to rage around the wearing of headscarves, veils, and burqas by Muslim women.

Interstate dispute resolution courts

Judges serving on the benches of dispute resolution bodies used their breakout session to discuss how the work of their institutions can be viewed through a human rights lens. They participated in a lively debate, bringing into the conversation the unique experiences of their respective institutions. The resulting discussion addressed a wide range of issues related to human rights, from copyright protection and digital censorship to piracy and compliance challenges, all under the umbrella of interstate claims and disputes.

The session began with a discussion of interstate disputes at the WTO. Two of the most notable issues discussed were what is sometimes dubbed the “iTunes case,”⁷¹ and another set of cases regarding international restrictions on the sale of clove-flavored cigarettes.⁷² The underlying human rights implications of those trade-related cases, especially the iTunes one, managed to surprise some of the participants. In that case, China – a WTO member brought into the organization under strict conditions – requested that government firms be the sole distributors of digital content, arguing this is the only way to “control public morals,” for example through limiting access to child pornography. The balance between two human rights-related issues was extensively discussed: on the one hand, the open trade to which the WTO is committed, and which includes the promotion of freedom of expression, and on the other hand, the protection of children from exploitation by the pornography industry.

The group then turned to the relationship that arises between States and international tribunals with regard to international conventions, particularly the issue of their enforcement. This was an issue about which all participants had concerns, despite representing very different kinds of courts. The questions addressed included: How can (and how do) courts deal with dualism in the legal sense, where States sign treaties that they are not ready to or cannot enforce due to, for example, constitutional constraints? How should courts deal with weak State machinery that has trouble enforcing international conventions? And what should international courts do in cases of non-compliance with their judgments?

69. As cited in Fact Sheet, Eur. Ct. H.R., Roma and Travellers, (Oct. 2013), available at http://www.echr.coe.int/Documents/FS_Roma_ENG.pdf.

70. *Id.*

71. Appellate Body Report, China – *Publications and Audiovisual Products*, WT/DS363/AB/R (21 Dec. 2009).

72. Appellate Body Report, *United States – Measures Affecting the Production and Sale of Clove Cigarettes*, WT/DS 406/AB/R (4 Apr. 2012).



The CCJ recently addressed some of these questions in the case of *Shanique Myrie v. the State of Barbados* (2013).⁷³ It discussed the proposition that where domestic law was not consistent with international obligations to which the State had committed by treaty, as part of the Caribbean Community, the Court could enforce the treaty obligation of the State even when it was not incorporated into domestic law. The case also addressed how States could observe their international obligations domestically, in the absence of action by parliament, through powers exercised by the executive and the judiciary to the extent permitted by national constitutions. The regional press, a judge reported, was heartened by the discussion of these issues and their impact on State responsibility.

The session continued with a discussion about human rights-related issues in the enforcement of the Convention on the Law of the Sea. After a brief explanation of Article ⁷³ of the Convention,⁷⁴ which details the enforcement of laws and regulations of the coastal State, and Article 292,⁷⁵ which addresses the prompt release of vessels and crews, various situations were discussed in which the failure of States Parties to respect the Convention constituted a breach of human rights. A notable example was the “*MV Louisa*” case,⁷⁶ in which a vessel was confiscated and the crew detained. Furthermore, it was related that the daughter of a crewmember, who was not connected to the original incident, came to visit her father and was also subsequently detained. ITLOS ultimately found that it had no jurisdiction in this case, regrettably, since this was an obvious case of human rights violations.

73. *Shanique Myrie v. the State of Barbados* (State of Jamaica intervening), CCJ 3 OJ, Judgment (4 October 2013).

74. *Id.*, art. 73, 10 Dec. 1982, 1833 U.N.T.S. 397.

75. United Nations Convention on the Law of the Sea, art. 292.

76. The *M/V “Louisa” Case* (St. Vincent and the Grenadines v. Kingdom of Spain), Case No. 2, ITLOS Judgment (28 May 2013).

This portion of the discussion also touched upon the issue of piracy, and the measures taken against pirates. Several important questions came out of the discussion about human rights and the law of the sea, including how ITLOS, if it were to have jurisdiction, should react to breaches of human rights, and whether it should offer compensation to victims of such breaches.

The breakout session ended with participants revisiting the issue of State Party compliance, now through the experience of the ICJ. It was explained that the Court’s mandate to resolve interstate disputes does not leave much formal space for the consideration of human rights issues. That being said, and as noted in the opening session of the institute, the ICJ has increasingly found ways to apply a human rights lens to its judicial interpretation. Also, like other international courts, the ICJ is frustrated when parties do not comply with its judgments. It was suggested by a participant that the UN has perhaps more mechanisms to deal with this phenomenon than courts or States. He continued, “If sovereign States truly accept the rule of law, the need for enforcement will become moot.”

Criminal courts

Judges from six international courts and tribunals came together in this breakout group to share their experiences and discuss, among other issues, how ongoing crimes in Syria might be addressed judicially. To frame the discussion, the judges decided to invent a hypothetical situation in which a small nation – “Ruritania” – is experiencing a violent civil conflict. As Ruritania is not a State Party to the Rome Statute, it asks the United Nations to set up a judicial mechanism to address crimes against humanity and war crimes allegedly committed on its territory. The principal question discussed by judges in the session was, “What form should the Ruritanian international criminal tribunal take?”



Given the presence of criminal judges from geographically disparate courts at BIIJ 2013, it was apt that the first issue addressed by judges was whether the Ruritanian court should be of a regional or international character. In other words, should it be located in the same region as Ruritania, and be staffed by prosecutors, judges and administrators who know the region, its laws, and its practices? Or would an international court, staffed by individuals who come from all over the world and are knowledgeable about international norms, produce a better result?

While participants agreed that a regional solution carried with it the advantage of local legitimacy, their overall consensus was that that an international tribunal was better suited to address international crimes. One judge pointed out that while international tribunals might have a harder time with outreach, a regional court would not have the power of the United Nations to back its decisions and compel the cooperation of Member States.

Next the group sought to outline the best ways for the “International Criminal Tribunal for Ruritania” to carry out its function. One judge eloquently described the broad outlines of its mandate: “In principle, the tribunal should aim at getting the people most responsible for the most horrendous crimes that occur.” However, participants had different views on how much flexibility should be given to the prosecutor. Some judges emphasized the need for a strong, autonomous prosecution, but others felt that when it came to case selection, some structure or filtering system would be necessary to put a check on the prosecution’s power.

The judges also recommended that some parallel system be set up to deal with those criminals not deemed “most responsible.” Some participants were strongly in favor of a truth and reconciliation commission, while others

suggested that if Ruritania had retained the rule of law, the best option would be to work through its domestic courts.

As to the exact location of the fictional international criminal tribunal, participants felt that many factors should be taken into account, including practicality, security, ease of evidence collection, objectivity of staff and promotion of its legitimacy. One judge strongly advocated that the tribunal be situated in a country neighboring Ruritania or alternatively in The Netherlands. The idea that it would be untenable to establish a court in situ met with some pushback, however; some judges felt that security would not be an insurmountable obstacle and should not stand in the way of the regional legitimacy that would come from having a court located where the crimes in question took place. Judges also discussed the appropriate time to set up a tribunal in relation to the conflict that produced the crimes under consideration. All agreed that no matter where a court was set up, extra security precautions needed to be taken if the conflict was still ongoing.

The longest and most complicated topic discussed regarded the administrative structure of the proposed international tribunal. This encompassed the language(s) to be used, hiring of personnel, resource allocation, security, witness compensation, and Rules of Procedure and Evidence (RPE). The judges were split over whether an international tribunal should follow the diverse, multilingual approach of the ICTY and ICTR, which had staff and judges from diverse nations with different languages and legal traditions. The alternative would be for the Ruritanian tribunal to forego the election of judges from varying legal cultures in order to minimize the expenses of translation and interpretation. However, this would entail another loss, that of the varied legal expertise and knowledge of relevant jurisprudence from a broad



range of sources that international judges could provide. Some judges felt that the approach of the tribunal, especially its RPE, should be influenced as heavily as possible by local legal tradition. Others felt that the RPE should be adopted not from local judicial institutions, but former international courts and tribunals.

While many of the topics were hotly debated, there was one over which the judges had unanimous agreement. They saw only two viable options for funding this new international criminal tribunal: either it would have to seek UN funding through Chapter VII of the UN Charter, or it must have a self-sustaining system, such as a trust fund, to be fully funded before the launch of the tribunal, and upon whose income the tribunal could depend and reasonably function. Depending on circumstances, either

option could work, but under no circumstances, participants agreed, would it be appropriate for support to be provided on a voluntary basis by donor States or other entities.

This discussion about a fictional situation and criminal tribunal was a neutral way to talk about the lessons learned from the ICTY, ICTR and SCSL. While it is unknown whether any future ad hoc criminal tribunals will ever be created, the advantages and challenges associated with different ways of regulating, financing and staffing such institutions will continue to be analyzed by members of the international legal community for some time to come.

IN THE SPOTLIGHT

International Justice: In Whose Name?

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

The first part of the discussion used a recent article by Armin von Bogdandy and Ingo Venzke⁷⁷ as a point of departure. The authors suggest that the disconnection of international courts and tribunals from the usual systems of regulation, oversight and accountability found in the national context is a source of concern and skepticism. Domestic courts speak the law in the name of the people while invoking the democratic sovereign. But in whose name exactly, the authors ask, do international courts and tribunals render decisions? Many questions have consequently been raised about the source of the authority of these courts and tribunals and their relation to notions of democracy.

One way to counter the “democratic deficit” of international adjudication, the authors argue, is to work more explicitly towards the creation of a global legal system. A more coherent system might offer a kind of stability and protection

of basic principles that would approximate the virtues of democracy in an international context.⁷⁸ They also contend that “the starting point of democratic justifications [of the work of international courts] are the individuals whose freedom shapes the judgments.”⁷⁹

Participants eagerly debated these points and others raised in the article. One judge observed, “It is a fact that a democratic process is not generally followed by States in establishing courts. It has been done in a way that the interests of States are prominent in the selection of judges and in control over the courts.”

Another participant agreed with the authors that a global legal system should be a common goal: “It is a necessity for States to have increasingly harmonious legislation, applying within States and across borders.” Still another questioned the basic relationship between democratic forces and legal systems. “In my own country, the legal order is enshrined in a constitution that was based on the will of the people 100 years ago. If a law was enacted in the name of ‘the people,’ who are they? It is largely a fiction to refer to such an entity.”

Some participants contended that there are essential differences between how national and international legal systems are legitimated. A participant with both domestic and international judicial experience characterized the international justice system as having a certain “limitlessness of judicial function.” Another qualified this viewpoint, adding that “international judges have a broader responsibility for creating their *own* kinds of limits than domestic judges, whose functions may already be circumscribed.”

77. Armin von Bogdandy & Ingo Venzke, *In Whose Name: An Investigation of International Courts' Public Authority and Its Democratic Justification*, 23 Eur. J. Int'l L. (2012) 23 (1): 7-41.

78. *Id.* at 15.

79. *Id.* at 41.



The question then arose, if international courts and tribunals do not have their legitimacy established through democratic processes, how is their authority established? BIIJ participants brought the experience of their respective institutions to bear upon the discussion.

“If international courts and tribunals do not have their legitimacy established through democratic processes, how is their authority established?”

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

Why do parties comply with the judgments of an institution like the ICJ? ...the credibility and moral authority of the Court, the inherent fairness of its judgments, and apprehension of isolation from the international community for non-compliance.

polls, is that people in the region know about the IACtHR and support its work.

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

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

The conversation then turned to international criminal courts and tribunals and in whose name they perform their work. The view of the ECCC was very clear: “We regard as our primary audience the ordinary people of Cambodia, and only second the international community, jurists and academics.” This priority can be clearly seen in the way the Court’s judgments are written – in a linguistically accessible manner



for easy translation, with the “jurisprudential rigor” confined to the footnotes. The ECCC also makes a conscious effort to harmonize its jurisprudence with that of other criminal courts so as to avoid the fragmentation of norms, thereby contributing to the global legal system suggested by von Bogdandy and Venzke in their aforementioned article.⁸⁰

The ICC is also very clear about the primary constituency of its work – the victims of the crimes under the Court’s jurisdiction. “Those who are familiar with how victim participation works at the ICC will know that the international community went full steam ahead,” said a participant, referring to its provisions for legal representation of those designated as victims of the persons standing trial. This same participant wondered whether victims have not been given too much leeway, and whether “judges might have overly interpreted the legal framework regarding victims.” There is also a concern that States, in implementing legislation to domesticate the various provisions of the Rome Statute, might not be able to “deliver” to victims what the ICC does.

Not all criminal judges agreed, however, that their institutions render judgments solely in the name of victims. “Courts should not be accountable just to individuals,” declared one, “but to humanity as a whole.” Another judge added that, ultimately, international courts are created to serve the international community. “And if that community comes to the conclusion that the institution does not serve its purpose, then, in the long term, that would be the end of it.”

The first part of the session ended with a philosophical reflection by a participant with broad international judicial experience that had included service on the bench of an international criminal tribunal. He noted the importance

“When you are sitting on a trial with four accused, where the decisions are breathtakingly complicated, or when a young legal officer comes in late at night and asks, ‘Judge, what are we doing?’, you struggle with that. Who am I, an individual, to decide whether someone should be found guilty or not guilty, based on the testimony of hundreds of witnesses about events that took place years earlier?”

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

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

80. *Id.*





Prince Zeid Ra'ad Zeid Al-Hussein of Jordan speaking at Brandeis University.

The discussion was inspired by the 2013 Distinguished Lecture in International Justice and Human Rights delivered at Brandeis University by Prince Zeid Ra'ad Zeid Al-Hussein of Jordan.⁸¹ He delved deeply into the question of how men and women seek to restore their humanity in the wake of genocide and other atrocities. While a strong supporter of international criminal justice and an important actor in the establishment and early years of the ICC, Prince Zeid nonetheless questioned whether contemporary international criminal justice is satisfactory for those who have suffered, especially given its frequent failure to produce expressions of true remorse by those convicted of grave crimes. In the words of Prince Zeid, “Should we not aspire to something more, something deeper, than merely punishing the guilty?”⁸²

A criminal judge responded to this question by noting that the kind of individuals who commit

81. Prince Zeid Ra'ad Zeid Al-Hussein, Hashemite Kingdom's Permanent Rep. to the U.N., *Beyond Nuremberg: the Future of International Criminal Justice*. Distinguished Lecture in International Justice and Human Rights, Brandeis University (30 January 2013), available at http://www.brandeis.edu/ethics/pdfs/publications/Prince_Zeid_Beyond_Nuremberg_Jan_2013.pdf.

82. *Id.* at 3.

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

Another criminal judge disagreed that the expression of remorse was so very rare. He related the statement of a war criminal convicted by an international tribunal who had recently been granted an early release from prison. “He said that the greatest relief he experienced was when

From “Beyond Nuremberg: the Future of International Criminal Justice”

“[M]ost war criminals are not born with a desire to murder; rather, they are normal people who kill because in the strange cocktails of circumstances that can arise, and impelled by specific aspects of human evolutionary psychology, they feel they have no choice but to obey, thoughtlessly and even reluctantly (invoking the orders of superiors), and out of fear of punishment should they not obey – and if there is any guilt to be borne, they believe it is not their burden to bear. Others, on the other hand, will murder willingly, because the release from moral responsibility fans an inner desire to exercise power without restriction. The evil they all perpetrate is rationalized – or, in the words of one Holocaust historian, “internally justified” – to such an extreme that they do not recognize themselves as evil.”*

* *Supra* note 81 at 7.

he was given the opportunity not only to plead guilty but also to express remorse for what he was responsible for. He had been nobody, and when given power he transformed himself into a beast. For that he showed regret.”

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

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

But the idea that international criminal proceedings consider victims their primary constituency was not shared by all participants. “Coming from the UN system,” said a judge, “I tend to disagree that international courts and

tribunals are created out of concern for the victims. Chapters VI and VII of the UN Charter provide that the Security Council can take measures to preserve and create peace and stability.” Another judge concurred: “I don’t think that the ICTY and ICTR were created in the name or interest of victims. I think the two tribunals were the result of the shock that permeated the international community when, less than 50 years after the Second World War, such atrocities were being committed, one in Europe and one in Africa.”

“My experience is that many witnesses are not seeking a pound of flesh, nor a particular number of years as a sentence. They are happy to be given the opportunity to be heard.”

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

Using a multi-pronged approach to justice applies not only to criminal tribunals but also to human rights courts where systemic problems are often identified and addressed



“We need to make sure that people not only reach the door of the palace of justice but can also pass through.”

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

As to the long-term effectiveness of international criminal justice, there were some expressions of frustration among participants. Said a former

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

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

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



BIIJ 2013 Participant Biographies

Participating Judges

Carmel A. Agius (Malta) is currently the Vice President of the International Criminal Tribunal for the former Yugoslavia (ICTY). He is also a member of the Appeals Chamber of both the ICTY and the International Criminal Tribunal for Rwanda (ICTR). He was first elected a Permanent Judge of the ICTY in March 2001 and was re-elected in November 2004. In 2011 he was elected by the UN General Assembly to serve on the Roster of the Residual Mechanism of the two tribunals. Since his election to the Tribunal, Judge Agius has presided over the Brđanin, Orić, and Popović et al trials. He also formed part of the Trial Chamber that rendered the sentencing judgments in the Dragan Nikolić and Deronjić cases. He acted as Pre-trial Judge in several cases. Since 2009 he has served on the Appeals Chamber in several appeals from judgments of the ICTY and ICTR. Currently he is Presiding Judge in the Djordjević appeal. He also forms part of the Bureau of the ICTY and chairs the Rules Committee of the ICTY. Judge Agius was born in Malta in 1945 where he served on the Constitutional Court and the Court of Appeal before joining the ICTY. On several occasions he served as Acting Chief Justice. Between 1999 and 2006 he was also a member of the Permanent Court of Arbitration of The Hague.

Sophia A.B. Akuffo (Ghana) is the President of the African Court on Human and Peoples' Rights. She has been a Judge of the Court since 2006 and was re-elected in 2008. Between 2008 and 2012, she served as the Vice President of the Court. She has also been a Judge of the Supreme Court of Ghana since 1995. She was educated at the Faculty of Law of the University

of Ghana, Harvard Law School and the Ghana School of Law. She went on to work with the Law Firm of W. E. Fugar and Co. from 1977 to 1979; as a Legal Officer and Deputy Corporation Secretary for Ghana Airways Corporation from 1979 to 1982; and 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, a fellow of the Commonwealth Judicial Education Institute, and a member of the Executive Board of the Commonwealth Judicial Education Institute.

Sir David Baragwanath (New Zealand) is the elected President of the Special Tribunal for Lebanon (STL) and Presiding Judge of the Appeals Chamber. Appointed in 2008, he has been permanently based in The Hague since 2011, regularly working in Beirut. He was formerly Trial and Appellate Judge in New Zealand and President of the Law Commission, and concurrently Presiding Judge of the final court of Samoa. As Queen's Counsel, Sir David was briefed from a number of jurisdictions in public and private law, domestic and international, commercial and criminal law. He led for indigenous Maori in test cases concerning land, forests, fisheries, and broadcasting, which, reversing settled policy, contributed to their renaissance. Sir David's 50 years of experience around the world, and as prosecutor in the longest and most complex High Court criminal trial in New Zealand's history, give him a unique voice in the international forum. An Overseas Bencher of the Inner Temple London



and an Honorary Professor at the University of Waikato (NZ), he has held visiting fellowships at Cambridge, Queen Mary London, the University of Hong Kong and the Netherland Institute of Advanced Studies in the Humanities and Social Sciences. He has received numerous awards and lectures widely.

Dalveer Bhandari (India) joined the bench of the International Court of Justice in 2012. He has degrees in Humanities and Law from Jodhpur University (1968), a Master of Laws from Northwestern University, Chicago (1972), and a Doctor of Laws (LL.D. *honoris causa*) from Tumkur University, Karnataka (2010). Judge Bhandari served in the Indian higher judiciary for more than 21 years as Senior Judge, Supreme Court of India (2005-2012); Chief Justice, High Court of Bombay (2004-2005); and Judge, High Court of Delhi (1991-2004). He has delivered many landmark judgments in various branches of law, including civil, commercial, criminal and public interest litigation, human rights, diplomatic immunities and privileges, environmental law, in the High Courts and in the Supreme Court. He has also practiced as Attorney-at-law and argued many important cases before the Supreme Court of India and other leading High Courts in India from 1977 to 1991.

Sir Charles Michael Dennis Byron (St. Kitts & Nevis) has been President of the Caribbean Court of Justice since September 2011. He graduated from Cambridge University in 1966 with an M.A. and LL.B., after which he was in private practice throughout the Leeward Islands. In 1982 he was appointed as a Judge of the Eastern Caribbean Supreme Court and in 1999, was appointed Chief Justice. During his tenure he engaged in many Judicial Reform Programs. In 2004 Sir Dennis was appointed a Judge of the United Nations International Criminal Tribunal for Rwanda (ICTR). He was elected President of

the Tribunal from 2007 to 2011. Sir Dennis has been President of the Commonwealth Judicial Education Institute (CJJI) since 2000. In 2004, he was appointed an Honorary Bencher of the Honourable Society of the Inner Temple and holds the first Yogis & Keddy Chair in Human Rights Law at Dalhousie University. He was knighted in 2000 and was appointed a member of the Privy Council in 2004.

Rowan Downing QC (Australia) holds the degrees of Bachelor of Arts, Bachelor of Laws and Master of Laws and is a senior Australian lawyer. In 2006 he was appointed through the Secretary-General of the United Nations as an international Judge at the Pre-Trial Chamber of the Extraordinary Chambers in the Courts of Cambodia. He has held senior judicial positions in the Pacific region, including Judge of the Court of Appeal and Supreme Court of Vanuatu. He has also sat on a number of Australian tribunals. He has worked internationally for more than 20 years undertaking work in law reform, human rights law, treaty implementation of human rights, refugee law, administrative law, anti-corruption law and the investigation and prosecution of transnational crime. Justice Downing has also worked with a number of multilateral organizations to improve the independence of the judiciary and systemic integrity within legal systems. He has appeared as an advocate in numerous human rights cases and provided advice to a number of governments concerning human rights, particularly the rights of women and children. He has extensive experience training advocates and members of the judiciary in South East Asia and the Pacific and has a particular interest in victimology.

Shireen Avis Fisher (United States) served as an Appeals Judge at the Special Court for Sierra Leone from 2009 through 2013, and as its president between June 1, 2012 and

June 4, 2013. Prior to her appointment to the Special Court, she was appointed by High Representative, (Lord) Paddy Ashdown, as an International Judge of the War Crimes Chamber of the Court of Bosnia and Herzegovina, where from 2005 through 2008 she adjudicated cases involving allegations of crimes against humanity, war crimes, and genocide arising out of the conflict in the former Yugoslavia. Between 2008 and 2009 she served as a Commissioner on the Kosovo Independent Judicial and Prosecutorial Commission. She was appointed to the Bench of the U.S. State of Vermont in 1986, having been called to the State and Federal Bar ten years earlier. Justice Fisher represented the International Association of Women Judges from 2002 through 2012 as an independent expert to the Hague Conference on Private International Law, participating in Special Sessions for the drafting and review of Hague Treaties on international family law. Justice Fisher received her Juris Doctor from the Columbus School of Law, Catholic University of America, and her LLM in International Human Rights Law from University College London. She has written and lectured extensively on international law. Her latest article, entitled “The SCSL and Gender Sensitivity,” was published in early 2014. Justice Fisher was appointed by the Secretary General of the United Nations to the Residual Special Court for Sierra Leone in October 2013.

Diego García-Sayán (Peru) is Judge of the Inter-American Court of Human Rights and was its President until 31 December 2013 when his second term ended. He is also President of the independent commission appointed by the Peruvian government to organize and inaugurate the Museum of Memory, Tolerance and Social Inclusion, which is currently under construction. He was Minister of Foreign Affairs of Peru (July 2001-July 2002) and Minister of Justice of Peru during the democratic transitional government (2000-2001). Previously he was a member of

the National Congress of Peru. From May to November 2007 he was Head of the Electoral Mission of the Organization of American States in Guatemala. From 1992 to 1994, he was Representative of the UN Secretary-General in charge of verifying the implementation of the El Salvador Peace Accords. He was also a member of the UN Negotiating Team in the Guatemalan peace negotiations between the Government and the Unidad Revolucionaria Nacional Guatemalteca. Dr. García-Sayán is a professor with great academic experience, author of several publications, and a member of many national and international institutions.

Vagn Joensen (Denmark) is the President of the United Nations International Criminal Tribunal for Rwanda. He was recently re-elected to serve a second presidential term commencing from 27 May 2013. Judge Joensen joined the Tribunal in May 2007 as *ad litem* Judge and a member of Trial Chamber III. He has been the Chairperson of the Tribunal’s Rules Committee since its inception in 2007, and was Vice-President of the Tribunal from August 2011 until February 2012. He was elected in December 2011 as a Judge of the successor to the ICTR and ICTY, the Mechanism for International Criminal Tribunals, and has served as Duty Judge for its Arusha Branch since 2 July 2012. Before joining the ICTR, Judge Joensen was a Judge at the Danish High Court, Eastern Division, in Copenhagen since 1994 and served as an International Judge in Kosovo for UNMIK from 2001 to 2002. Born in 1950, Judge Joensen obtained a Master’s of Law in 1973 at the University of Aarhus, and has studied at the City of London College and Harvard Law School. Judge Joensen served in the Danish Ministry of Justice until he was appointed a Judge at the City Court of Copenhagen in 1982, when he was teaching constitutional, criminal and civil law at the Law Faculty of the University of Aarhus and at the University of Copenhagen.



Sanji Mmasenono Monageng (Botswana)

is currently the First Vice President of the International Criminal Court and a member of the Appeals Division. She joined the Court in March 2009. She previously 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. Judge Monageng has wide experience in the promotion and protection of human rights, having been a member of the African Commission on Human and Peoples' Rights, appointed by the African Union, between 2003 and 2009, and was 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, humanitarian law and many other areas of the law. She also served as Deputy Chief Litigation Officer in the United Nations Observer Mission to South Africa in 1994. Judge Monageng served as the founding Chief Executive Officer of the Law Society of Botswana for many years. She possesses expertise in women's human rights issues, indigenous peoples and communities, torture, and children, among other areas. 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. Judge Monageng has sat on numerous national, regional and international boards.

Howard Morrison (United Kingdom) was elected to the bench of the International Criminal Court in March 2012 and assigned to the Trial Division. After graduating in law from

London University, doing voluntary teaching in West Africa, and serving in the military, Judge Morrison was called to the Bar by Grays Inn in 1977. He practiced on the Midland and Oxford Circuit with spells abroad on Foreign Office contracts in Fiji as Chief Magistrate and in Anguilla in the Caribbean as Attorney General. He was also called to the Bars of Fiji and the Caribbean Supreme Court. He practiced in criminal law, defending and prosecuting in the UK and defending in courts martial, from 1986 to 1998 when he started war crimes and genocide defense work at the International Criminal Tribunals for the former Yugoslavia and Rwanda. In 2001 he was appointed Queen's Counsel and in 2004 a Circuit Judge. He has remained active in teaching international criminal and humanitarian law worldwide. He has published widely in journals and contributed book chapters on ICL. In 2008 he was appointed Senior Judge of the Sovereign base areas of Cyprus and Master of the Bench of Grays Inn, and in 2009 was appointed a Judge of the Special Tribunal for Lebanon by the UN Secretary-General. Following the resignation of Lord Bony, the UK Judge to the Yugoslav Tribunal, Judge Morrison was asked by the UN to take his place and in 2011 was elected to the International Criminal Court by the Assembly of States Parties at the UN in New York. He is an Honorary Professor of Law at Leicester University and a Senior Fellow of Cambridge University's International Law Centre. He was a Distinguished Visiting Fellow at Monash University and has been a visiting lecturer at universities in the UK, the US, Holland and Italy.

Erik Møse (Norway) of the Supreme Court of Norway has been a Judge at the European Court of Human Rights since 2011. He previously served as Judge (1999-2009) and President (2003-2007) of the International Criminal Tribunal for Rwanda; Judge of the Court of



Appeals in Oslo (1993-1999); Supreme Court Barrister (Attorney General's office, civil affairs, 1986-1993); and before that Head of Division in the Ministry of Justice and Deputy Judge. Judge Møse has been a part-time lecturer at the University of Oslo and published books and articles in the field of human rights. He has chaired many international and national committees in the field of human rights and is Honorary Doctor at the University of Essex.

Hisashi Owada (Japan) has been a Judge of the International Court of Justice (ICJ) in The Hague since 2003 and was former President of the Court (2009-2012). Before being appointed to the ICJ, he was President of the Japan Institute of International Affairs. One of his country's most respected diplomats, Judge 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. In the academic field, Judge Owada has taught for 25 years at Tokyo University, and more recently at Waseda University as a Professor of International Law and Organization. He has also 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* and is currently its President. He is an Honorary Professor at the University of Leiden and also Professorial Academic Adviser at Hiroshima University. Judge Owada is the author of numerous writings on international legal affairs.

Fausto Pocar (Italy) has been a Judge with the International Criminal Tribunal for the former Yugoslavia since February 2000. He was President from November 2005 until November 2008. 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 and President 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 Emeritus 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*, and President of the International Institute of Humanitarian Law (Sanremo).

Ricardo Ramírez Hernández (Mexico) was appointed a member of the World Trade Organization's (WTO) highest court, the Appellate Body, in June 2009. At 40, he was the youngest Judge ever to serve in this court. Last March he was reappointed by the WTO Membership for a second four-year term in office, starting on 1 July 2013. He currently holds the position of Chairperson in the Appellate Body. For almost three years Judge Ramírez was head of the International Trade Practice for Latin America at Chadbourne & Parke, S.C. For more than 11 years, he was Deputy General Counsel for Trade Negotiations of the Ministry of Economy in Mexico where he provided advice on trade and competition policy matters related to all trade agreements signed by Mexico. Judge Ramírez has been appointed as panelist/arbitrator in various proceedings under NAFTA and ICSID. Also,



he was appointed Independent Trade Expert of APEC in 2008. He is Chair of International Trade Law Professors Association at the National Autonomous University of Mexico (UNAM). He has a law degree from the Universidad Autónoma Metropolitana in Mexico and a Master's in International Legal Studies from the American University Washington College of Law.

Judge Helmut Tuerk (Austria) has been a Judge of the International Tribunal for the Law of the Sea in Hamburg since October 2005 and served as Vice President from 2008 to 2011. He obtained a Doctorate in Law from the University of Vienna in 1963 and subsequently studied at the College of Europe, in Bruges, Belgium. In 1965 he joined the Austrian Federal Ministry for Foreign Affairs, and served as Legal Advisor, as Ambassador to the USA, the Commonwealth of the Bahamas, the Holy See, the Sovereign Military Order of Malta, the Republic of San Marino as well as Director General of the Office of the Austrian Federal President. For many years he was a member of the Austrian delegation to the Third United Nations Conference on the Law of the Sea and also represented his country at numerous other international meetings and negotiations. In 1989 he was the Chairman of the Sixth (Legal) Committee of the United Nations General Assembly. In 1997-1998 he served as President of the Meeting of States Parties of the United Nations Convention on the Law of the Sea. Judge Tuerk is the author of numerous publications in the field of international law, in particular the law of the sea.

BIIJ Co-Directors

Linda Carter (United States) is a Professor of Law and Co-Director of the Global Center, 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, Prof. 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, co-edited with Judge Fausto Pocar, *International Criminal Procedure: The Interface of Civil Law and Common Law Legal Systems*, and articles on the future of the International Criminal Court and on the combinations of international and national post-conflict processes in Sierra Leone and Rwanda. In 2007 Prof. 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; recently lectured at the University of Sierra Leone; and directed a summer program in Kampala, Uganda in May 2013. She is a member of numerous professional organizations, including election to the American Law Institute (ALI).

Richard J. Goldstone (South Africa) is widely regarded by the international community as one of the leading advocates for justice and human rights in the world today. He was a judge in South Africa for 23 years. From 1995 to 2003 he was a justice of the Constitutional Court of South Africa. Justice Goldstone was the Chief Prosecutor of the United Nations Criminal



Tribunals for the former Yugoslavia and Rwanda. From 1991 to 1994, he chaired what became known as the Goldstone Commission, an independent judicial commission that investigated activities and people who posed a threat to the restoration of civil rights during the transition to post-apartheid South Africa. During his career, he has addressed problems of fidelity to law in unjust regimes and worked to define judicial ethics for international judges. He was educated at King Edward VII School and the University of the Witwatersrand, where he graduated in 1962. From August 1999 to December 2001, he was the Chairperson of the International Independent Inquiry on Kosovo. He is the Honorary President of the Human Rights Institute of the International Bar Association, and he was also a member of the Independent Inquiry Committee into the UN Oil for Food Programme (the Volcker Committee). He chaired a United Nations Committee to advise on the archives of the Criminal Tribunals for the former Yugoslavia and Rwanda. Since 2002, he has been a director of the Brandeis Institute for International Judges. He has served as a visiting professor at Harvard, Georgetown, Fordham, Stanford, Yale and New York University. He is presently a Distinguished Visiting Visitor from the Judiciary at Georgetown University Law Center. He chairs the Advisory Boards of Brandeis' International Center for Ethics, Justice and Public Life and the Coalition for the International Criminal Court. In 2008, he was named the recipient of the MacArthur Award for International Justice and as the first "The Hague Peace Philosopher." In April 2009, he was named to head a fact-finding mission investigating alleged war crimes during the conflict in Gaza from December 2008 to January 2009. He is a member of a Commission of Jurists appointed in 2012 to inquire into the cause of the death of UN Secretary-General Dag Hammarskjöld, who was killed in an aircraft crash in 1961.

Brandeis University Conveners

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, as well as other programs for members of the judicial and human rights communities worldwide. Swigart holds a Ph.D. in Sociocultural Anthropology from the University of Washington. She has wide experience in international education, including as Director of the West African Research Center in Dakar, Senegal, and 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 international justice. 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 US Supreme Court Justice Sonia Sotomayor, 2007: University Press of New England).

Daniel Terris (United States) is Director of the International Center for Ethics, Justice and Public Life at Brandeis University. An intellectual historian, he has written on race and ethnicity in the United States, business ethics, and international law and justice. His books include *Ethics at Work: Creating Virtue in an American Corporation* (2005: Brandeis University Press) and *The International Judge: An Introduction to the Men and Women Who Decide the World's Cases* (with Leigh Swigart and Cesare Romano, foreword by US Supreme Court Justice Sonia Sotomayor, 2007: University Press of New England). As an academic entrepreneur and leader, Dr. Terris has overseen the development of many signature programs at Brandeis, including



the Brandeis Institute for International Judges, the Brandeis-Genesis Institute for Russian Jewry, and the Master's Program in Coexistence and Conflict. Dr. Terris has also served as the University's Vice President for Global Affairs, building new connections for Brandeis in Israel, India, The Netherlands, and other countries.

Raoul Wallenberg Institute and Lund University Faculty of Law

Professor Göran Melander (Sweden) is the founder and former Director of the Raoul Wallenberg Institute of Human Rights and Humanitarian Law and Professor of Law (Emeritus) at Lund University, Sweden. He holds a Doctor of Laws degree from Lund University. He has extensive expertise and experience in the areas of human rights, humanitarian law, and refugee law, and has taught and acted as Expert Consultant on human rights issues in Africa, Asia, Europe, and Latin America. An internationally acclaimed scholar of human rights and international law, Prof. Melander is the author and editor of numerous books and articles and is active in a number of international human rights events and organizations. From 2001 to 2004, he was a member of the UN Committee on the Elimination of All Forms of Discrimination against Women.

Professor Christina Moëll (Sweden) is Professor of Fiscal Law and Dean of the Faculty of Law at Lund University. Before joining the Faculty of Law in 1997, Christina Moëll served at the Administrative Court of Appeals in Gothenburg. Her research has followed two main themes: 1) taxes on international trade with special focus on trade with developing countries and 2) administrative and procedural matters in tax law. She has been a member of the Board of Trustees of the Raoul Wallenberg Institute since 2008.

Rolf Ring (Sweden) is the Deputy Director of the Raoul Wallenberg Institute. Prior to joining the Institute, he worked as a project-coordinator for the Swedish Red Cross and served as an assistant to the Chair of International Law at the Faculty of Law, Lund University. Rolf Ring has worked with development, implementation, monitoring and evaluation of human rights capacity development programs worldwide. He holds an LL.M. from Lund University.

Other Participants

Hans Corell (Sweden) served as Under-Secretary-General for Legal Affairs and the Legal Counsel of the United Nations from March 1994 to March 2004. In this capacity, he was head of the Office of Legal Affairs in the UN Secretariat. Before joining the UN, he was Ambassador and Under-Secretary for Legal and Consular Affairs in the Swedish Ministry for Foreign Affairs from 1984 to 1994. From 1962 to 1972, he served first as a law clerk and later as a judge in circuit courts and appeal courts. In 1972, he joined the Ministry of Justice, where he became a Director in 1979. In 1980 he was appointed judge of Appeal but remained in the Ministry where he became the Chief Legal Officer in 1981. He was a member of Sweden's delegation to the UN General Assembly 1985-1993 and had several assignments related to the Council of Europe, OECD, and the CSCE (now OSCE). He was co-author of the 1993 CSCE proposal for the establishment of the International Tribunal for the former Yugoslavia. During his UN tenure he was involved in the establishment of all existing international criminal tribunals except the one in Lebanon, including being the Secretary-General's representative at the Rome Conference on the ICC in 1998. Since his retirement from public service in 2004, he has been engaged in many different activities in the legal field, inter



alia as legal adviser, lecturer, and member of different boards. Among other activities, he is involved in the work of the International Bar Association and the Hague Institute for the Internationalisation of Law. He was Chairman of the Board of Trustees of the Raoul Wallenberg Institute of Human Rights and Humanitarian Law from 2006 to 2012. He is a member of the Commission of Jurists appointed in 2012 to inquire into the cause of the death of UN Secretary-General Dag Hammarskjöld, who was killed in an aircraft crash in 1961.

Carl-Henrik Ehrenkrona (Sweden) grew up in Stockholm. He performed his academic studies at the University of Uppsala (law and history) and took his Master's degree in law in 1974. From 1974 to 1986 he served as a law clerk and Assistant Judge in different district courts in Sweden, mainly in the District Court of Uppsala. From 1986 to 1998 he served at the International Law department of the Ministry for Foreign Affairs in Stockholm as Legal Director, mainly dealing with human rights issues, and acted as Counsel of the Swedish Government (agent) before the European Court of Human Rights. In 1998 he was appointed Judge in the High Court (Court of Appeal) of Stockholm where he served as President of one of the chambers of the Court. From 2001 to 2002 he served as Chairman of the Aliens Appeals Board, dealing with asylum cases. In 2002 he was appointed Director General for Legal Affairs (Chief Legal Adviser) in the Ministry for Foreign Affairs. Since 2010, Mr. Ehrenkrona has been Ambassador and the Permanent Representative of Sweden to the Council of Europe in Strasbourg. Mr. Ehrenkrona has served in several expert committees on human rights within the Council of Europe, in the Committees of Public International Law in Strasbourg and Brussels and has been a member of the Permanent Court of Arbitration in The Hague since 2004. He has also, together with colleagues from Canada,

India, Mexico and Poland, been responsible for organizing and chairing the meetings with legal advisers of the UN member states, which take place each year in New York during international law week. He is the author of a Swedish commentary on the European Convention on Human Rights and a number of articles on Convention issues, mainly in Swedish law journals.

Rapporteurs

Evgenia Pavlovskaja (Russia and Sweden) is a doctoral student at the Law Faculty in Lund University. The area of her research is environmental law. Her doctoral thesis has the title *Sustainability Criteria in a Legal Context and Control of their Fulfilment – an Analysis Based on the EU Policy for Transport Biofuels*. Its main purpose is to develop an approach, and to help investigate the use of sustainability criteria in legal frameworks as a tool to promote and safeguard sustainable production and quality of products, with particular emphasis on the issue of control of the fulfillment of sustainability criteria. During her doctoral studies, Ms. Pavlovskaja has also been engaged in teaching environmental law to the second year students at the Law Faculty.

Matthew Scott (Australia) is a solicitor of England and Wales specializing in immigration and asylum law and a doctoral student at the Faculty of Law at Lund University. His doctoral research is provisionally entitled *Non-Refoulement and Climate Change-Related Migration: International and Human Rights Law and Litigation*. The thesis considers the role that national, regional, and international courts and tribunals can play in determining the scope of States' non-refoulement obligations in the context of migration associated with natural



disasters that can be linked to climate change. Before joining the Faculty of Law, Matthew worked for the Immigration Advisory Service in the United Kingdom and the Australian Department of Immigration and Citizenship in both the Russian Federation and Australia.

Britta Sjöstedt (Sweden) is a doctoral student at the Faculty of Law at Lund University, researching and teaching public international law, mostly international humanitarian law. Her research project concerns the protection of the environment during armed conflict. In particular, it revolves around questions of how international humanitarian law and international environmental law can be reconciled to enhance environmental protection in times of armed conflict. Britta completed her Master of Law at Lund University in 2009. Previous work experience includes working as an assistant for Dr. Jacobsson at the UN International Law Commission and as a clerk at an administrative court in Stockholm.

Interns

Anastasia Austin (United States) is a senior at Brandeis University, majoring in International Global Studies and Russian Studies. She studied in The Hague from February to July 2013. Her time there was spent exploring the field of international law and justice, first as a student of the Brandeis in The Hague program and later as an intern at the Defence Office of the Special Tribunal for Lebanon. Anastasia was born in the Russian Federation and moved to the United States at age six. Prior to coming to Brandeis University, she attended the International Baccalaureate Program at St. Petersburg High School in Florida, where she focused on English, History, and Psychology. The program introduced her to global perspectives on politics and history, which was supplemented by her

involvement in the Model United Nations and the Debate Team. Anastasia is fluent in Russian and speaks French at an intermediate level.

Alex Glomset (United States) is a senior at Brandeis University, where he is majoring in International and Global Studies with minors in French and Legal Studies. He studied with the Brandeis in The Hague program during Summer 2012, and also spent a semester abroad in Geneva where he interned for Genève Droits de l'Homme. During Summer 2013, he was an intern with Physicians for Human Rights, where he worked on its Sexual Violence in Conflict Zones program. Alex has had many opportunities to travel and live abroad, with lengthy stays in Senegal, Australia, and various countries in Europe. His aim upon graduation is to work in some capacity in the international sphere.

Rida Abu Rass (Israel) is a senior at Brandeis University, majoring in International and Global Studies and Philosophy. Originally from Taibe, a Palestinian town located outside the West Bank, his family moved to Jaffa in pursuit of better education. In 2008, he was accepted to study at the United World College in Norway, where he was exposed to a diverse international community in a boarding school atmosphere. As an activist, he hopes to contribute to the solution of the Palestinian-Israeli conflict, and he plans to build a career in international relations as well.



Brandeis International Center for Ethics, Justice and Public Life

The mission of the International Center for Ethics, Justice and Public Life is to develop effective responses to conflict and injustice by offering innovative approaches to coexistence, strengthening the work of international courts, and encouraging ethical practice in civic and professional life. The Center was founded in 1998 through the generosity of Abraham D. Feinberg.



The International Center for Ethics, Justice and Public Life

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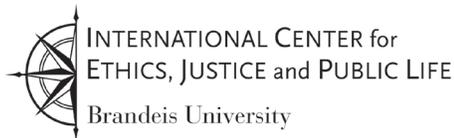
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About Brandeis University

Brandeis University is the youngest private research university in the United States and the only nonsectarian college or university in the nation founded by the American Jewish community.

Named for the late Louis Dembitz Brandeis, the distinguished associate justice of the U.S. Supreme Court, Brandeis was founded in 1948. The University has a long tradition of engagement in international law, culminating in the establishment of the Brandeis Institute for International Judges.

Brandeis combines the faculty and facilities of a powerful world-class research university with the intimacy and dedication to teaching of a small college. A culturally diverse student body is drawn from all 50 U.S. states and more than 56 countries. Total enrollment, including some 1,200 graduate students, is approximately 4,200. With a student to faculty ratio of 8 to 1 and a median class size of 17, personal attention is at the core of an education that balances academic excellence with extracurricular activities.



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.
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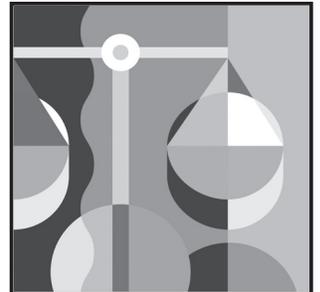
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