

# 2015 BIIJ

BRANDEIS INSTITUTE FOR INTERNATIONAL JUDGES



## International Courts, Local Actors

The International Center for Ethics, Justice and Public Life of Brandeis University  
in collaboration with The University of Malta

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The Brandeis Institute for International Judges (BIJ) 2015 was convened by Leigh Swigart and Daniel Terris of Brandeis University, in partnership with Jean-Pierre Gauci of the University of Malta, the British Institute for International and Comparative Law, and the People for Change Foundation.

BIJ 2015 was co-directed by Richard Goldstone and Linda Carter. The BIJ Program Committee, composed of Judges Carmel Agius, Erik Møse, Hisashi Owada and Fausto Pocar, provided critical guidance during the development of the Institute program.

This report was prepared by Matthew Scott and Leigh Swigart, with the editorial assistance of Linda Carter, Michael Abrams and Amelia Katan. Many thanks go to our BIJ rapporteurs, Veronique Caruana and Matthew Scott. We also thank our participants for providing comments on earlier drafts of this report.

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# Foreword

Like the nine preceding sessions, the tenth Brandeis Institute for International Judges was an enormous success. This report details the various topics discussed and the range and depth of the conversations that occurred around them.

Over the past thirteen years, the BIIJ has established itself as the only event that regularly brings together members of the international judiciary and provides them with a unique opportunity to meet and discuss important aspects of international justice, especially as they relate to their varied jurisdictions.

The tenth BIIJ was held in Malta around the theme “International Courts, Local Actors.” It was organized in collaboration with the University of Malta and hosted on the university’s historic Valletta Campus, which dates back to the late 16th century.

Fourteen international judges from eleven international courts participated. The discussions focused on the interactions that take place between international courts and the full range of people and institutions found in any given society. The discussions dealt with various scenarios in great detail, as this report amply explains. In particular, the interactions between international courts and local politics, the local impact of international justice, and the important role and influence of NGOs engaged the participants and academics in attendance in a highly interesting exchange of information and opinions. This could not have been otherwise, given that the theme chosen for BIIJ 2015 was of

immediate relevance and interest in light of both current events and the increasingly important roles played by a broad array of international courts on the global stage.

The Institute ended with a public roundtable focused on the challenges created by contemporary migration to Malta and other parts of Southern Europe. The choice of topic and the discussion that it stimulated assume even greater importance now, months later, as we witness the mass exodus of migrants to other parts of Europe and the tragic end of thousands of them. Indeed, the plight of these migrants calls into question the continent’s depth of commitment to the universal protection of international human rights and respect for human dignity.

It is to the credit of the International Center for Ethics, Justice and Public Life of Brandeis University and its Maltese partners to have foreseen the looming crisis and created the opportunity for migrants, politicians, social scientists, NGOs and the Maltese public to voice their views directly to the international judges attending the BIIJ.

I have no doubt that future BIIJs will continue to make a substantial contribution to the better functioning and understanding of international courts and tribunals.

Judge Carmel Agius  
Vice-President of the International Criminal  
Tribunal for the former Yugoslavia



## About the Institute

Judges serving on the benches of eleven international courts and tribunals across the globe gathered in Malta from 4 to 8 January 2015 for the tenth Brandeis Institute for International Judges (BIIJ). The BIIJ is the only such regular gathering of these judges.

The 2015 Institute was organized by the International Center for Ethics, Justice, and Public Life of Brandeis University in collaboration with the University of Malta, which hosted the group of fourteen judges on its historic Valletta campus. The Institute's theme, "International Courts, Local Actors," focused on the role of local entities in the pursuit of global justice. This category includes the full range



### 2015 International Judges

front row (l to r): Carmel Agius, Fausto Pocar, Hisashi Owada, Christine van den Wyngaert

2nd row: Elsie Thompson, Theodor Meron, Erik Møse, Luis Canseco, David Thor Björgvinsson

3rd row: Vagn Joensen, Vladimir Golitsyn, Winston Anderson, Rowan Downing, David Baragwanath

of people and institutions that interact with international courts: individuals whose rights are violated or are the victims of crimes against humanity; governments and political bodies; non-governmental organizations; and legal systems, including members of domestic judiciaries.

Session topics included: the relationships between international and domestic legal orders in a globalizing world; political aspects of the relationships between international and domestic legal actors; responding to the pressure of pace; civil society and international justice; and the local impact of international justice. Participants also had the opportunity to break into small groups to address issues particular to international criminal courts and tribunals or inter-state dispute resolution bodies. The Institute ended with a public roundtable that explored the challenges associated with contemporary migration to Malta and other parts of southern Europe. The roundtable featured legal scholars and a Maltese government representative, and was attended by members of the academic, civil society and migrant communities.

Highlights of this report include:

- A detailed and multi-faceted discussion of the various ways in which politics and international justice intersect and how political pressures can be managed. See Section II, beginning on p. 20.
- A frank conversation among judges about the factors that affect the pace of their work and how considerations of pace might differ across types of jurisdiction. See Section III, beginning on p. 36.

- A description of the various ways in which NGOs may contribute to, and also may detract from, the work of international courts and tribunals. See Section IV, beginning on p. 41.
- An evaluation of victims' participation programs in international courts and tribunals by judges who serve on these courts. See pp. 57-58, and also pp. 43-44 on the role of NGOs in communication with victims.
- Various references throughout the report to how and when ethical issues may emerge in the work of international judges, which is a recurring focus of the BIIJ since its inception in 2002. See:
  - pp. 22-23 and p. 38 on how the self-interest of judges may impact their ethical performance;
  - pp. 32-34 for a discussion of potential ethical challenges related to judicial dialogue;
  - p. 34 and pp. 39-40 on the responsibility of judges to provide clear reasoning and understandable judgments to claimants and the larger public, and pp. 55-56 on the assertion that judges should pay attention to public perceptions of their judgments;
  - p. 44 on the view that transparency is needed when judges and their institutions interact with NGOs;
  - pp. 62-63 on the idea that bias may be introduced into proceedings through the use of expert witnesses not officially appointed by courts and tribunals.

## **BIIJ 2015 Participants**

### **International Judges**

#### **Andean Tribunal of Justice**

- Luis José Diez Canseco Núñez, President (Peru)

#### **African Court on Human and Peoples' Rights**

- Elsie Nwanwuri Thompson, Vice President (Nigeria)

#### **Caribbean Court of Justice**

- Winston Anderson (Jamaica)

#### **Extraordinary Chambers in the Courts of Cambodia**

- Rowan Downing QC (Australia)

#### **European Court of Human Rights**

- Erik Møse (Norway) – *2015 BIIJ Program Committee*
- David Thór Björgvinsson (former Judge, Iceland)

#### **International Court of Justice**

- Hisashi Owada (Japan) – *2015 BIIJ Program Committee*

#### **International Criminal Court**

- Christine Baroness Van den Wyngaert (Belgium)

#### **International Criminal Tribunal for the former Yugoslavia**

- Carmel A. Agius, Vice President (Malta) – *2015 BIIJ Program Committee*
- Theodor Meron, President (United States); also President of the Mechanism for International Criminal Tribunals
- Fausto Pocar (Italy) – *2015 BIIJ Program Committee*





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**International Criminal Tribunal for Rwanda**

- Vagn Joensen, President (Denmark)

**International Tribunal for the Law of the Sea**

- Vladimir Golitsyn, President (Russian Federation)

**Special Tribunal for Lebanon**

- Sir David Baragwanath QC (New Zealand)

**BIJ Co-Directors**

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

**Conveners**

- Leigh Swigart, Ph.D., Director of Programs in International Justice and Society, International Center for Ethics, Justice and Public Life, Brandeis University
- Daniel Terris, Ph.D., Director, International Center for Ethics, Justice and Public Life, Brandeis University

- Jean-Pierre Gauci, University of Malta, British Institute for International and Comparative Law, People for Change Foundation; organizer and panelist for “Migration in the Mediterranean” roundtable

**Rapporteurs**

- Veronique Caruana, Ph.D. candidate, Middlesex University, UK
- Matthew Scott, Ph.D. candidate, Lund University Faculty of Law; panelist for “Migration in the Mediterranean” roundtable

**Invited Observer**

- Henrik Stampe Lund, Administrator, Centre of Excellence for International Courts (iCourts), University of Copenhagen Faculty of Law

**Interns**

- Michael Abrams, Brandeis University, class of 2015
- Amelia Katan, Brandeis University, class of 2015



# Plenary Discussions

## I. Relationships Between International and Domestic Legal Orders in a Globalizing World

### 1. Introduction

The opening session of BIIJ 2015 addressed challenges that arise when the requirements of the international legal order do not correspond with those of the domestic legal order. Discussion began with reference to two articles, each of which highlighted aspects of the international/local relationship. The first article, by Judge Hisashi Owada,<sup>1</sup> concerned the interaction between international and domestic legal orders. Observing that the structure of these orders is changing as the Westphalian model gives way to new forms of international relations in an era of globalization, Judge Owada argues that “...the line between international law and municipal law is becoming blurred...” and that “... a more permanent paradigm for regulating the interaction between the international and domestic legal order is called for.”<sup>2</sup> Much of the discussion that took place over the course of the Institute may be seen as a response to that call.

Focusing more on the interaction between international and domestic actors, the second article by Anne-Marie Slaughter and William Burke-White advanced the argument that “the future of international law is domestic.”<sup>3</sup> Citing examples such as cross-border pollution, terrorist training camps, refugee flows and proliferation of weapons, the authors contend that, “international law must address the

1. Hisashi Owada, *Problems of Interaction Between the International and Domestic Legal Orders*, 5 *ASIAN J. INT'L L.* 2, 247 (2014).

2. *Id.* at 2.

3. Anne-Marie Slaughter & William Burke-White, *The Future of International Law is Domestic (or, The European Way of Law)*, 47 *HARV. INT'L L.J.* 327, 329 (2006).



Judge Carmel Agius of the ICTY speaks as BIIJ Co-Director Linda Carter looks on

capacity and the will of domestic governments to respond to these issues at their sources. In turn, the primary terrain of international law must shift – and is already shifting in many instances – from independent regulation above the national state to direct engagement with domestic institutions.”<sup>4</sup> The multiple ways in which international and domestic actors interact provide the second overarching framework for the exchanges that took place over the course of the Institute.

BIIJ participants considered three judicial cases that show how domestic courts are taking on international legal issues, and the challenges for both domestic and international legal orders and actors that arise as a consequence. The first case concerned the filing of a claim

4. *Id.* at 328.





(l to r) ICJ Judge Hisashi Owada and ICTY President Theodor Meron

by Argentina in the International Court of Justice (ICJ) against the United States of America<sup>5</sup> asserting that the United States had “committed violations of Argentine sovereignty and immunities... as a result of judicial decisions adopted by US tribunals concerning the restructuring of Argentine public debt.”<sup>6</sup> An act by the domestic legal order of the United States is thus being challenged before the ICJ for its alleged violation of international law and consequent adverse impacts on Argentina.

The second case concerned Germany’s challenge to Italy’s Court of Cassation decisions on the issue of immunity from wartime claims.<sup>7</sup> The Italian Court had held that *jus cogens* norms concerning violations of fundamental rights in the context of war crimes had precedence over customary international law principles

like sovereign immunity.<sup>8</sup> The ICJ, however, found that Italian courts had violated Germany’s jurisdictional immunity by allowing lawsuits in Italian courts for damages for war crimes committed by German forces during the Second World War.<sup>9</sup> Here again is an example of a domestic legal system adversely impacting another state in contravention of principles of the international legal order.

Developments in Italy after the ICJ decision further demonstrate the challenges faced by states in implementing international law within a domestic system. The ICJ decision called for Italy to implement immunity for Germany in its national system through legislation or other means to ensure that its judicial system did not infringe on Germany’s immunity.<sup>10</sup> In response, the Italian Parliament passed legislation implementing the ICJ judgment. Prior to that law, lower courts in Italy deferred to the ICJ judgment by attempting to reconcile the earlier Court of Cassation judgment with the ICJ judgment. These legislative and judicial efforts, however, were then thrown into question as the Italian Constitutional Court subsequently held that the legislation unlawfully contravened a fundamental constitutional principle on access to a judge. There is once again a direct conflict between the ICJ decision and Italian national law. This situation is discussed in more detail below.

A third case for discussion came from the Constitutional Court of South Africa, which was called upon to determine the extent to which the South African Police Service (SAPS) had a duty to investigate allegations of torture by the

<sup>5</sup> International Court of Justice Press Release, *The Argentine Republic seeks to institute proceedings against the United States of America before the International Court of Justice* (Aug. 7, 2014), available at <http://www.icj-cij.org/presscom/files/4/18354.pdf>.

<sup>6</sup> *Id.*

<sup>7</sup> *Jurisdictional Immunities of the State (Ger. v. It.: Greece Intervening)*, Judgment, 2012 I.C.J. 99 ¶ 15 (Feb. 3).

<sup>8</sup> Giuseppe Cataldi states there were 12 identical Court of Cassation decisions issued on this question on 28 May 2008. See Giuseppe Cataldi, *Implementation of the ICJ’s Decision in the Jurisdictional Immunities of the State case in the Italian Domestic Order*, 2 EUR. SOC’Y INT’L L., Jan. 24, 2013, available at <http://www.esil-sedi.eu/node/281>.

<sup>9</sup> See *supra* note 7.

<sup>10</sup> *Id.*

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Zimbabwean authorities against Zimbabwean citizens in Zimbabwe.<sup>11</sup> Responding to a request from the Southern African Human Rights Litigation Centre to commence an investigation under South Africa's International Criminal Court Act on the strength of a dossier the organization had compiled, SAPS had refused to investigate, citing principles of state sovereignty and complementarity, along with the need for the presence of an accused to be on the territory of South Africa in order to commence an investigation. Recognizing that the principle of non-intervention in another state's territory must be observed, the Constitutional Court held nonetheless that an investigation could be conducted within South Africa and ordered the SAPS to commence such an investigation.<sup>12</sup>

As these three cases demonstrate, the challenges faced by states in simultaneously adhering to the requirements of their domestic constitutional orders while also fulfilling their international legal obligations are found across the diverse international legal domains represented by Institute participants. These include international human rights law, international criminal law, and public international law.

Participants were invited to consider different aspects of the relationship between international and domestic legal orders, taking both the articles and cases cited above and their own experience as inspiration. Their discussion subsequently revealed both tensions and instances of good practice. In what follows, judges' insights relating to the relationship between the legal orders are summarized, as well as their views on the possible ways that coherence between the international and the domestic orders might be improved.

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<sup>11</sup> National Commissioner of South African Police Service v. Southern African Human Rights Litigation Centre and Another 2014 ZACC 30 (CC).

<sup>12</sup> *Id.* at 42, para. 78 (S. Afr.).

## **2. The relationship between international and domestic legal orders**

A central theme to emerge from the discussion during these sessions was the role of the domestic constitutional order in determining the effective operation of international law. This order determines not only the means by which international law acquires the status of binding law within the jurisdiction of a particular state but also the relationship between different organs of the state that are involved in the implementation of international law. Thus, participants discussed matters relevant to both the manner in which international law is incorporated and how it is implemented in domestic legal orders.

### **- 2.1 How international law is incorporated into domestic legal orders**

Classical theories of international law envisage two systems for the incorporation of international law in domestic legal orders. The "monist system" treats international and domestic law as being part of a seamless whole, with the consequence that international law is directly applicable in domestic legal orders without the need for implementing legislation. In contrast, the "dualist system" sees domestic and international legal orders as distinct, such that international law requires the enactment of implementing legislation before it enters into force domestically.

There was recognition by some of the judges that the concepts of monism and dualism did not necessarily reflect the reality of legal practice, and there are indeed many variations of monism and dualism found in domestic legal orders around the world. Thus, "dualist" systems may evidence instances of monistic application of international law, while "monist" systems can enact implementing legislation, which may even contain provisions that differ from the



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“Judges have the last say. They can use international law to help the arguments. They are in a position to import international law even in a formally dualist system if they are monist enough in their thinking and attitude.”

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international legal provision. However, although few systems may correspond to ideal notions of dualism and monism, the practical implications that flow from a domestic legal order describing itself as dualist as opposed to monist can be quite significant indeed.

The discussion began with a reference to the *Kadi* case,<sup>13</sup> in which the Court of Justice of the European Union (CJEU) was called upon to determine whether the EU Regulation implementing a UN Security Council resolution against Mr. Kadi was in accordance with EU law. Although the CJEU did not make findings in relation to whether the Security Council resolution (binding on all member states under Chapter VII of the UN Charter) had precedence over “domestic” (EU) law, the judgment has been described as being uncharacteristically dualist<sup>14</sup> in holding the implementing Regulation invalid as it failed to ensure due respect for fundamental (constitutional) rights, including the right to property, the right to judicial review, and the right to be heard. This vexing issue regarding the primacy of international versus constitutional legal orders resurfaced many times over the course of the Institute.

Participants then shared their perspectives on the operation of monist and dualist models in the work of their international courts and tribunals,

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<sup>13</sup> Case C-402/05 P and C415/05 P, P. Kadi and Al Barakaat International Foundation v. Council and Commission, 2008 E.C.R. I-6351.

<sup>14</sup> Grainne De Búrca, *The European Court of Justice and the International Legal Order After Kadi*, 51 HARV. INT'L L. J. 1, 2 (2010).

as well as that of the domestic judicial bodies on which some had served. One participant described the increasing willingness of some states to have their own domestic courts preside over trials that have usually been conducted by ad hoc and special criminal tribunals and by the International Criminal Court. Such willingness can sometimes be stymied, however, if “international crimes” such as genocide have not been recognized domestically in a country with dualistic practices. This has been the situation with at least one case that the ICTR transferred to a domestic jurisdiction under Rule 11 *bis* of the Tribunal’s Rules of Procedure.<sup>15</sup>

Dualist systems by name may, however, reveal instances of monism. One judge with experience sitting in a dualist jurisdiction described an instance where, owing to a lacuna in the domestic legislation, he felt required to directly apply relevant international law notwithstanding the fact that the provision had not been incorporated into the domestic legal order.

Another participant, reflecting on how judges can facilitate the introduction of international law within a dualist system, observed: “Judges have the last say. They can use international law to help the arguments. They are in a position to import international law even in a formally dualist system if they are monist enough in their thinking and attitude.”

Further permutations of the dualist system were also identified, including instances of states within a federation enacting state-level legislation that incorporates international legal provisions where the national parliament has failed to do. The judge providing this example anticipated a challenge for judges at his country’s highest court, should a state-level provision incorporating international law be challenged at the federal level.

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<sup>15</sup> Rule 11 *bis* gave the Tribunal discretion to transfer selected ICTR cases to appropriate national jurisdictions.



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This scenario of uneven domestic implementation of international law is reminiscent of the response of the United States in the ICJ *Avena* case on consular relations.<sup>16</sup> In that case, the ICJ held that the United States was in breach of its obligations under Article 36 of the 1963 Vienna Convention on Consular Relations for failing to ensure that non-citizens enjoyed the benefits of consular notification when detained by US authorities.<sup>17</sup> With federal authorities unable to enact legislation<sup>18</sup> except for a provision in the Federal Rules of Criminal Procedure, and a finding by the US Supreme Court<sup>19</sup> that a presidential memorandum<sup>20</sup> requiring states to “give effect to the decision” could not take precedence over state and federal limitations on issues that can be raised in habeas corpus applications, it has fallen to states to take independent initiatives to bring about piecemeal implementation of the judgment.<sup>21</sup> One example comes from the judgment of the Supreme Court of Nevada, which decided in the capital case of Carlos Gutierrez<sup>22</sup> to order a new evidentiary hearing on whether the lack of consular access was prejudicial to his case. This approach contrasts with the response of the Texas judiciary, whose rejection of the presidential memorandum gave rise to the Supreme Court litigation and ultimately led to the execution of José Ernesto

<sup>16</sup> Case Concerning *Avena* and Other Mexican Nationals (Mex. v. U.S.), Judgment, 2004 I.C.J. 12 (March 31).

<sup>17</sup> *Id.*

<sup>18</sup> For a discussion of current efforts to pass legislation relating to the 2004 *Avena* judgment of the ICJ see, UNITED STATES DEPARTMENT OF STATE, DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 2013, 26 (CarrieLyn D. Guymon ed.) (2013), available at <http://www.state.gov/documents/organization/226409.pdf>.

<sup>19</sup> *Medellin v. Texas*, 552 U.S. 491 (2008).

<sup>20</sup> Memorandum from President George W. Bush for the Attorney General concerning *Avena* decisions (Feb. 28, 2005), available at <http://www.state.gov/s/l/2005/87181.htm>. (“...the United States will discharge its inter-national obligations under the decision... by having State courts give effect to the decision in accordance with general principles of comity in cases filed by the 51 Mexican nationals addressed in that decision.”)

<sup>21</sup> See *supra* note 18.

<sup>22</sup> *Gutierrez v. State*, No. 53506, slip op. at 4 (Nev. Sept. 19, 2012).

Medellín,<sup>23</sup> one of the Mexican nationals in the *Avena* case, notwithstanding concerns about the fairness of the trial in the absence of consular assistance.

In light of the foregoing, a view may be reached that monist systems offer greater certainty that international law will operate at the domestic level. However, one participant involved in international criminal adjudication observed, “... most systems, even those that are monist, are not entirely monist. There is always some limit in the constitutional system which gives priority to the local constitution. And this inevitably requires local legislation.”

Thus, even states that have adopted a predominantly monist approach to international law may still enact implementing legislation to incorporate pieces of international law into the domestic legal order. In so doing, provisions in the domestic implementing legislation may differ from the international provision. One example is German legislation incorporating the Rome Statute of the International Criminal Court (ICC), wherein it is stipulated that the principle of “command responsibility” shall be interpreted restrictively. The potential for divergence was identified should the ICC provide a wider interpretation of command responsibility at some point in the future. The participant observed that the international community may “invent a statute, but the implementation of the statute

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“... most systems, even those that are monist, are not entirely monist. There is always some limit in the constitutional system which gives priority to the local constitution. And this inevitably requires local legislation.”

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<sup>23</sup> James C. McKinley Jr., *Texas Executes Mexican Despite Objections*, N.Y. TIMES, Aug. 6, 2008, available at [http://www.nytimes.com/2008/08/06/us/06execute.html?\\_r=0](http://www.nytimes.com/2008/08/06/us/06execute.html?_r=0).





The magnificent interior of Valleta's St. John's Co-Cathedral, home of the Knights of Malta

is not taken care of. Some states implement the statute partially, but I don't know of any state that has implemented the ICC statute completely.”

Moving beyond distinctions between monist and dualist legal orders, one judge with experience sitting on a number of international criminal tribunals observed: “We have had a system where national legislation in most countries has lacked the tools to deal with international crimes.”

This observation has significant implications for the future of global justice as the international ad hoc and hybrid criminal tribunals wind up their caseloads. Will the ICC have the capacity to administer justice at the volume required by the ongoing perpetration of international crimes? What role will domestic courts play in addressing such crimes? And what steps are being taken to develop the tools that are required at

the domestic level? These issues were explored in greater detail in subsequent sessions and will be revisited in this report.

## - 2.2 How international law is implemented in domestic legal orders

The domestic legal order determines not only how international law is incorporated, but also how it is implemented in practice. Executive, legislative and judicial branches of a state can be engaged in the domestic implementation of international law, including the decisions of international judicial bodies. Sometimes, implementation is unproblematic, as one participant demonstrated with an example of Bosnian implementation of a judgment from the European Court of Human Rights (ECtHR). In the case of *Maktouf and Damjanović v. Bosnia and Herzegovina*, the Court held that Bosnia had breached Article 7 (no punishment without law) of the European Human Rights Convention by handing down lengthy custodial sentences to convicted persons that were authorized under a law enacted *after* the commission of the offenses for which they were convicted.<sup>24</sup> Following the ECtHR judgment, the Bosnian constitutional court invalidated the sentences and remanded the matter to the state court for sentencing.

Another example of a domestic legal order responding proactively to the requirements of global justice was provided by one participant with experience of the early days of the International Criminal Tribunal for the former Yugoslavia (ICTY). With judges eager to start work on cases, a preliminary requirement was to secure suspects, some of whom were abroad. Taking the example of Germany, the participant observed that there had been a willingness on the part of the German authorities to transfer suspects

<sup>24</sup> *Maktouf and Damjanović v. Bosnia and Herzegovina*, App. No. 2312/08 and 34179/08, Eur. Ct. H. R. ¶ 76 (2013).

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on their territory to the ICTY, but an inability to fulfill any such requests owing to the absence of domestic legislation to empower domestic courts to order such a transfer. In that case there was the political will to enact appropriate legislation, as a result of which the suspects were eventually transferred to The Hague.

However, domestic political processes may also inhibit the swift resolution of disconnects between domestic and international legal orders. A judge familiar with the case law of the Inter-American Court of Human Rights (IACtHR) recalled the case of *DaCosta Cadogan v. Barbados*, which concerned the statutory imposition of a mandatory death sentence in all cases where an accused is convicted of murder.<sup>25</sup> The Court, on finding a violation of several provisions in the American Convention on Human Rights, required Barbados to take “the legislative or other measures necessary to ensure that the Constitution and laws of Barbados... are brought into compliance with the American Convention.” The government of Barbados has expressed its willingness to comply with this 2009 judgment, but as of 2015 its parliament has yet to pass amending legislation. The judge recognized the challenges inherent in passing amending legislation, noting that such a process “may require the cooperation of the opposition as well as other actors outside of the parliament.” He added that politics was not the only factor affecting the implementation of international judgments, observing, “a lot of the issues relate to the capacity and resources to deal with the judgments.”

This last example raises the much-discussed issue regarding the distinction between non-implementation and non-compliance with the judgment of an international judicial body. At what point will the domestic obstacles to

implementation amount to non-compliance? The issue of non-compliance due to a political decision, in contrast to an institutional impediment, is addressed in the next section of the report.

One participant observed that, particularly in cases where a state is organized as a federation, such as in Russia and Australia, supreme courts may be reluctant to find that a judgment of an international judicial body requires the judgment of the highest court in one of the states of the federation to be altered. This reluctance reflects a delicate political balancing between state and federal legal and political orders, but is also a consequence of the domestic constitutional order that will generally prevent a higher court from directing another court to act in a certain way. An example relating to cases where a national court orders the detention of crews and vessels was provided, and it was observed that when the International Tribunal for the Law of the Sea (ITLOS) subsequently finds the decision of the national court to be contrary to the state’s international legal obligations, “the end result is that the decision... is subsequently not implemented but compliance is assured by the highest court.”

Additionally, it was observed that supreme courts sometimes prefer to find ways of securing compliance with an international judgment with reference to domestic legal provisions rather than by acknowledging the authority of the international judicial body. According to one judge, some courts consider that “it is unacceptable to be in a situation where an international judicial body can be an appellate court that can instruct a national court to act in a certain way.”

A participant with insight into the relationship between the African Court of Human and Peoples’ Rights (ACtHPR) and the supreme

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<sup>25</sup> *DaCosta Cadogan v. Barbados*, Judgment, Inter-Am. Ct. H. R. (ser. C) 2004, ¶ 2 (Sept. 24, 2009).





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One judge observed that one way to address the tension between international and domestic courts is to invite states to rectify an identified breach by means of their own choosing. This approach allows states, in the judge's words, "to try to bridge the gap in order to... make international laws domestic."

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courts of signatory states noted a similar antipathy to international bodies on the part of some national judges. This judge recounted: "When we meet the chief justices, the first thing they say is, 'This is a sovereign state. Why do we need an African court?' We say: 'We recognize you are sovereign and that is why we require that local remedies must be exhausted before people can come to our court.' Then they say, 'If local remedies must be exhausted, and if we have dealt with the matter up to the highest level, then why should they be able to come to your court?'"

Reflecting on the approach taken by the ICJ in the *Avena* case,<sup>26</sup> one judge observed that one way to address the tension between international and domestic courts is to invite states to rectify an identified breach by means of their own choosing. This approach allows states, in the judge's words, "to try to bridge the gap in order to... make international laws domestic." Further thoughts on how the manner in which judgments are drafted may affect their impact at the domestic level are reported in Section V of this report.

Matters become still more complicated when any legislative amendments required to give effect to an international judgment are seen by the domestic judiciary as conflicting with

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<sup>26</sup> See *supra* note 16.

fundamental constitutional provisions. The example of the response of the Italian authorities to the ICJ judgment in the *Jurisdictional Immunities* case<sup>27</sup> was raised by one participant, who described how the Italian Parliament had passed legislation accepting the UN Convention on State Immunity and expressly requiring that final judgments relating to awards for violations by Germany in the Second World War be set aside. The Italian Constitutional Court, however, held that the legislation was unconstitutional and could not be applied.<sup>28</sup> The reasoning of the Constitutional Court was that, while it is for the ICJ to determine the character of the customary international law on sovereign immunity, the Italian constitutional provision accepting customary international law as part of domestic law cannot have effect where the customary international law runs counter to a fundamental principle of the constitution, such as the rule that victims must have redress especially where violations are of rules of *jus cogens*, as was the case here.<sup>29</sup> The judgment of the Constitutional Court thus holds that, notwithstanding Article 94 of the statute of the ICJ requiring countries to implement the decisions of the ICJ, Italy is unable to do so where such implementation would result in a breach of fundamental constitutional principles.

This Italian constitutional dilemma was seen by several participants as sharing some of the characteristics of the *Kadi* judgment.<sup>30</sup> However, one participant noted some distinctions,

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<sup>27</sup> See *supra* note 7.

<sup>28</sup> Judgment has only been published in Italian, Corte Cost, Sentenza N. 238, 22 Oct. 2014, n. 238/2014, available at <http://www.cortecostituzionale.it/actionSchedaPronuncia.do?anno=2014&numero=238>. For further information on the judgment see Serena Forlati, *The Italian Constitutional Court Rules on Immunity of Foreign States from Civil Jurisdiction: A New Twist in the Ferrini Saga*, Aldricus, available at <http://aldricus.com/2014/10/27/the-italian-constitutional-court-rules-on-immunity-of-foreign-states-from-civil-jurisdiction-a-new-twist-in-the-ferrini-saga/>.

<sup>29</sup> *Id.*

<sup>30</sup> See *supra* note 13.



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including the fact that the *Kadi* case concerned a Security Council resolution, which could have been drafted in such a way as to minimize any constitutional challenges, whereas the complicated legal challenge in the *Jurisdictional Immunities* case arose from the judgment of a domestic court and the international judicial body was called upon to help resolve the issue. At the same time, both cases reflect instances of “domestic” non-implementation of international law on the basis of the requirements of the domestic constitutional order. It is thus seen that domestic actors will often take steps to bring their legal orders into compliance with international law, but there are also instances where political and constitutional forces directly interfere with the implementation of international law.

Not all states experience constitutional dilemmas, however, when encountering international legal obligations. One participant pointed to the Peruvian constitutional legal order as an example of a system that affords the same status to international agreements as it does to domestic constitutional provisions, with the express recognition of the supremacy of international agreements.

Whereas modern constitutions such as Peru’s offer one model for increasing coherence between international and domestic legal orders,<sup>31</sup> other approaches are also possible. In what follows, the views of participants on potential ways of improving coherence are presented.

### **3. Improving coherence between international and domestic legal orders**

So far, this opening section has reported the observations of participants regarding relationships between international and domestic

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<sup>31</sup> See e.g. Political Constitution of the Republic of Peru, Oct. 31 1993.

legal orders in particular instances. However, a number of more general observations were also made by participants about the overarching framework within which international and domestic legal orders interact.

Setting the scene for this discussion, one participant made the following observation, which describes the Westphalian legal order based on the sovereignty of nation states as being in need of structural improvements to take account of the changes brought about by globalization:

“There is an inherent dilemma in the Westphalian legal order when state sovereignty dominates. The social reality of the international community is such that it requires a more regulated framework, possibly with a hierarchical order built into it. I don’t think that, [owing to] the basic fundamental nature of the Westphalian legal order we live in, it is possible to have a harmonious framework... We need a mechanism for consultation, either formally or informally.”

In the absence of such a structure, which this participant considered desirable, it is left to the actors themselves to identify ways of bringing about greater coherence between the legal orders. This can be seen in the way the Nevada Supreme Court reasoned concerning one of the complainants in the *Avena* case<sup>32</sup>, and as the Italian courts ruled in trying to reconcile the constitutional challenges presented by the *Jurisdictional Immunities* case.<sup>33</sup>

For another participant, the starting point was to recognize that “governments prefer to comply with international law rather than not comply.

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<sup>32</sup> See *supra* note 22.

<sup>33</sup> See *supra* note 28.



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Where compliance bumps up against contrary political interests is another matter – but the preference is to comply.”

Other participants also noted, however, clear examples of states being willing to opt out of the system of international justice when it suited their interests. A highly publicized situation concerned the US decision to refuse to comply with the judgment of the ICJ in the *Nicaragua* case.<sup>34</sup> Other examples are provided in Section II of this report, as there are clear political dimensions to this phenomenon. However, the focus here is on the structure of the international legal system that makes it possible for states to “pick and choose” how they use international law, not the fact that they do so.

Holding out the Peruvian constitutional order as an example of a system that openly embraces international law, one participant identified what he considered to be the positive implications of having a domestic legal system that encourages coherence with the international legal order: “Experts believe that this is a way to increase human rights in the country. Why? Because the more signals that Peru provides that [it is] a community that respects human rights and due process of law, the more it will be considered a serious country. The country had the Shining Path, revolutions, and a man who was president is now in jail.<sup>35</sup> So the idea is to provide the signal that [Peru] is respectful of everything, the main purpose being to attract investment.” For this participant, there is thus a strong business case to be made for increasing the coherence between domestic and international legal orders.

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<sup>34</sup> *Military and Paramilitary Activities In and Against Nicaragua* (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27).

<sup>35</sup> The reference is to Alberto Fujimori, who is currently serving a sentence after conviction by a Peruvian court on charges of human rights violations.

This same participant pointed to other Latin American states that, in his view, had placed a greater premium on national sovereignty with the consequence that they have experienced numerous challenges before both the IACtHR and the Andean Tribunal of Justice (ATJ). In relation to the latter institution, some cases involve states asserting their sovereign right to “protect their consumers, industries and welfare, and [those states] forget about the main principle of using trade for increasing the welfare of the community.”

One participant identified a statutory obligation in his country for judges to bring serious problems in the law to the attention of a law reform commission, which is mandated to consider such matters and advance recommendations to the government to address the issues. A similar system which would impose a binding obligation on international judges to forward concerns about the operation of the international legal system to a similar kind of law reform body was, in this participant’s view, a desirable and practicable way of addressing some of the problems that arise in the context of international adjudication. Responding to this proposal, another participant expressed cautious interest, but noted that the tradition of judges to refrain from discussing cases they have been involved in could present difficulties in referring any problems with the operation of the law to such a body.

Another participant suggested that international judicial bodies address some of the challenges that arise in the operation of the international legal order directly in the text of their judgments. He argued that courts and tribunals could follow the proactive lead of international human rights courts, where judgments point to a need for states to address elements of the domestic legal order that counter the principles of international



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human rights law. Taking the *Jurisdictional Immunities*<sup>36</sup> case as an example, he continued, the ICJ could have been more proactive by perhaps providing stronger directions to states parties, using terms like “should” rather than “could” when recommending that negotiations be entered into by Germany and Italy with a view to providing reparation to the victims of war crimes committed by the Nazis during WWII.

#### 4. Conclusion

To the extent they are willing to recognize and abide by international legal obligations, sovereign states are bound by the agreements they enter into, as well as by principles of customary international law and rules of *jus cogens*. The domestic constitutional order will determine whether international law is directly binding or requires implementing legislation, and whether international law or the domestic constitution has primacy. Although it may be the case that most states intend to adhere in good faith to the requirements of the international legal order, it is clear that the Westphalian paradigm underpinning the international system provides room for states to prioritize domestic obligations and interests over international ones, creating instances of discord between international and domestic legal orders.

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<sup>36</sup> See *supra* note 7.

In this section of the report, the views of participants on the legal obstacles to coherence between international and domestic were presented. In what follows, the political side of the relationships between international courts and domestic actors is explored.



(l to r) ACTHPR Judge Elsie Thompson, former ECtHR Judge David Thor Björgvinsson, and ITLOS President Vladimir Golitsyn



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## II. Political Aspects of the Relationships Between International and Domestic Legal Actors

### 1. Introduction

International courts and tribunals are affected in varying ways by domestic political realities, which in turn are affected by the work of these international judicial bodies. The purpose of the second BIIJ session was to focus on these political realities and to consider whether and how judges should engage with them.

Providing a background context for the discussion were four academic articles. The first, by Tom Ginsburg, starts by recognizing the aspiration to “construct a zone for autonomous legal decision-making, immune from political considerations, to resolve international disputes,”<sup>37</sup> and goes on to identify various ways in which that aspiration has not been realized in practice. Notable political influences, some of which were raised for discussion by participants, include the method of appointment of international judges and the different approaches taken by states to respond to judgments. Ginsburg also discusses ways in which international courts and tribunals respond to political pressures, for example by communicating with non-state actors and actively avoiding politically sensitive questions.

An article by Laurence Helfer and Karen Alter explores the relationship between the legitimacy of international courts and tribunals and what they term “expansive” judicial lawmaking, focusing on judgments from the CJEU, the ATJ, and the Court of Justice of the Economic

Community of West African States.<sup>38</sup> Noting that the judgments of these courts reveal varying degrees of “expansionism,” the authors advance the argument that it is not the way in which international courts reach their judgments that gives rise to challenges to their legitimacy, but rather the mere fact that the court reaches judgments that are unpalatable to domestic political actors. As one participant put it, “nobody likes to lose.” How states respond to an adverse decision by an international judicial body was in clear focus during discussions.

Participants also considered a report prepared by Diane Orentlicher which raises the question whether international courts and tribunals, and particularly those with criminal jurisdictions, should be judged according to the impact they have on the regions directly affected by their work.<sup>39</sup> The report addresses questions of impact on both victims and perpetrators, as well as on domestic legal orders and the wider public. Although the report focuses on the impact of the ICTY, discussion during the session revealed that similar questions are faced by other international courts, especially regional human rights courts and, to a lesser extent, inter-state dispute resolution bodies.

Finally, an article by Ruti Teitel<sup>40</sup> discusses difficult cases such as the NATO intervention in Kosovo during the Balkan conflict and the

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<sup>37</sup> Tom Ginsburg, *Political Constraints on International Courts* 484 (University of Chicago Public Law & Legal Theory Working Paper No. 453, 2013), at 484.

<sup>38</sup> Laurence R. Helfer & Karen J. Alter, *Legitimacy and Lawmaking: A Tale of Three International Courts*, *Theoretical Inquiries in Law*, 14 DUKE L. J. 479, 481 (2013).

<sup>39</sup> Diane F. Orentlicher, *Shrinking the Space for Denial: The Impact of the ICTY in Serbia*, OPEN SOCIETY JUSTICE INITIATIVE, 12 (2008).

<sup>40</sup> Ruti Teitel, *Kosovo to Kadi: Legality and Legitimacy in the Contemporary International Order*, 28 ETHICS & INT'L AFF. 1 (2014).



judgment of the CJEU in the *Kadi* case.<sup>41</sup> These cases are seen as presenting challenges resulting from a lack of alignment between legal and value systems. In the Kosovo example, the question concerned whether there was a legal basis for NATO intervention into a humanitarian crisis. In the *Kadi* case, the question concerned whether a Security Council resolution whose implementation would interfere with fundamental rights under the European Union constitutional order was nonetheless binding.<sup>42</sup> For Teitel, the international judiciary is well placed to grapple with these hard cases by virtue of their being “at least partly detached or autonomous from national political cultures and constitutionalism... and with the authority of high human values.”<sup>43</sup> The moment values come into the frame of judicial decision-making, however, the issue of judicial activism also appears. This issue gave rise to a range of different opinions during session discussion.

In presenting the insights from this session, the report will first identify the main stakeholders who were seen as being “politically” engaged in the work of international courts and tribunals. Focus then shifts to the ways in which domestic political forces can be seen to impact on these institutions. Finally, the discussion turns to the question of whether and how judges should address political influences on their work, as well as their role as political actors in their own right.

## 2. Stakeholders and interests

“The court has many clients,” observed one participant early in the discussions. In what follows, the different “clients” of international courts and tribunals are identified.

<sup>41</sup> See *supra* note 13.

<sup>42</sup> *Id.* at ¶ 46.

<sup>43</sup> See *supra* note 40 at 111.



CCJ Judge Winston Anderson addressing his fellow participants

Individuals who are victims of international crimes or human rights violations comprise one group of stakeholders with specific interests in the operation of international courts and tribunals. As Orentlicher demonstrates in her report, some of the interests of these stakeholders include seeing justice done in individual cases, but also in creating a record of the events that took place.<sup>44</sup>

In a situation perhaps unique to hybrid courts, where proceedings take place within the geographic area where the relevant events occurred, one participant noted the possibility that judges themselves could fall within the category of victim, particularly in the context of mass atrocities. The distinct possibility that the decision-making of such judges could be influenced by their own experiences was an issue that required further consideration.

Domestic and international civil society actors – some representing the views of victims, others representing the position of the accused, and still

<sup>44</sup> See *supra* note 39.



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“... executive authority and leadership, processes of law-making and legislative activity, the implementation of policy often by the executive branch, by leaders or administrative structures, contests for power between parties and interest groups, public opinion and public discourse – all of these have connections with and influence upon international courts and tribunals.”

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others, in differing judicial contexts, representing other interest groups – may also have an impact upon the work of international courts and tribunals. More attention will be paid to the work of civil society actors in Section IV of the report.

States are, as the discussion revealed, highly political actors. However, the state itself is not monolithic, and executive, legislative and judicial branches of government may perceive obligations and interests in relation to international judicial bodies differently. As one participant observed, “... executive authority and leadership, processes of law-making and legislative activity, the implementation of policy often by the executive branch, by leaders or administrative structures, contests for power between parties and interest groups, public opinion and public discourse – all of these have connections with and influence upon international courts and tribunals.”

Another participant observed that it is not only parties to an international agreement that may have political influence on the work of associated courts and tribunals, as the example of the position taken by the United States, Russia and China towards the ICC demonstrates. The issue of selective justice was raised in this connection, with one participant noting that these states are not subject to the jurisdiction of the ICC,

yet they retain the power to initiate referrals to the ICC as well as to veto referrals. For this participant, in light of such an arrangement, “the discussion with respect to international justice actually stops.”

Politics, according to some, could be seen to play a role even at the point when states consent to be bound by international or regional agreements. One participant made reference, for example, to the recent accession of the Palestinian Authority to the Rome Statute, which has been seen by commentators as a decidedly political act intimately connected to the ongoing conflict between the Palestinian Authority and Israel.<sup>45</sup>

Last, but not least, international judicial bodies, as well as the individuals who work within these institutions, are themselves political actors with personal and institutional interests that can affect how they operate. Referring to the suspension in 2010 of the Southern African Development Community (SADC) Tribunal and the later decision to ultimately constitute a new Tribunal with jurisdiction restricted to inter-state matters, one judge recounted: “[What] happened to the Southern African Tribunal has had a chilling effect on judges. When you want to say anything, colleagues will remind you what happened to the SADC Tribunal. Maybe you don’t want a job anymore? Judges are human beings and are affected by local politics.” An express reason for suspending the Tribunal was the fact that judges had made several findings against Zimbabwe in cases brought by individuals.<sup>46</sup>

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<sup>45</sup> See e.g., Miša Zgonec-Rožej, *Palestine’s ICC Accession: Risks and Rewards*, CHATHAM HOUSE (Jan. 8, 2015), available at <http://www.chathamhouse.org/expert/comment/16604>; Ido Rosenzweig, *Guest Post: The Palestinian Accession to the Rome Statute and the Question of the Settlements*, OPINIO JURIS (Jan. 22, 2015), available at <http://opiniojuris.org/2015/01/22/guest-post-palestinian-accession-rome-statute-question-settlements/>.

<sup>46</sup> SADC Tribunal, SOUTHERN AFRICAN DEVELOPMENT COMMUNITY, <http://www.sadc.int/about-sadc/sadc-institutions/tribun/>; SADC: Q&A on The Tribunal: Regional Court’s Future Hangs in the Balance, HUMAN RIGHTS WATCH (Aug. 11, 2011), <http://www.hrw.org/news/2011/08/11/sadc-qa-tribunal>.



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In a similar vein, a participant highlighted the challenge faced by international judicial bodies in addressing the demands of multiple stakeholders while simultaneously protecting their own institutional longevity. “The judiciary...have to try to please... the general public – the individual who should benefit from the rights enshrined in the Convention, NGOs and international organizations. [At the same time there is the] inclination of all international organizations... for self-preservation. The institution wants to keep going, and there are interests invested with people working there for life, amongst others.”

This participant referred to the *Hirst* case,<sup>47</sup> which concerned the voting rights of prisoners and the highly politicized response of the UK government. He then identified the subsequent *Scoppola v. Italy (No 3)* case as a potential example of how human rights courts can be affected by political reactions to their judgments.<sup>48</sup> In that case the Grand Chamber of the ECtHR held that Italy had not breached the applicant’s rights under Article 3 of Protocol 1 by depriving him of the right to vote, given the way in which Italian legislation had carefully distinguished the circumstances in which the right to vote can be deprived, thus differentiating the case from *Hirst*. For this participant it was “easy to see the [*Scoppola*] judgment as a retreat of the Court from the position in *Hirst*. Of course it is couched in legal arguments but it is easy to interpret the judgment as [as a way of avoiding] this negative reaction. ‘Let us save face here...’” The consequence of such “sensitivities,” he continued, is that “the Court runs the danger of being less assertive in holding up the rights of the individual whose interests it is meant to protect.”

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<sup>47</sup> *Hirst v. United Kingdom (No. 2)*, App. No. 74025/01, Eur. Ct. of H.R. (2005).

<sup>48</sup> *Scoppola v. Italy (No. 3)*, App. No. 126/05 Eur. Ct. H.R. 868 (2012).

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International judicial bodies interact with a variety of different stakeholders in a range of scenarios that vary in their political character. Domestic and international legal orders are operated by actors whose interests and circumstances at times incline them towards active collaboration and at other times towards non-cooperation.

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Some courts, on the other hand, appeared to embrace assertiveness to a point approaching political activism. One judge described an institutional initiative entailing “...getting into countries and getting in touch with entrepreneurs, consumer NGOs, and the judiciary to make them our allies to push governments to have [a certain] kind of legislation. In the end this will reflect and create a better standard of living.”

In what follows, the observations of BIIJ participants regarding some of the political dynamics that operate between the different stakeholders are presented. Ways in which domestic politics impact on the work of international courts and tribunals are discussed first, then the ways in which these international judicial bodies impact on local realities.

### **3. Ways in which local politics impact upon the work of international courts and tribunals**

In many ways, this section reflects some of the central concerns that were addressed during BIIJ 2015. International judicial bodies interact with a variety of different stakeholders in a range of scenarios that vary in their political character. Domestic and international legal orders are operated by actors whose interests







ICC Judge Christine Van den Wyngaert offers her perspective during a plenary discussion

and circumstances at times incline them towards active collaboration and at other times towards non-cooperation. This political aspect is distinct from, but closely interconnected with, technical legal factors such as constitutional constraints on the powers of different branches of government, which can impede or promote the implementation of international law in domestic arenas.

Political forces may operate at many levels – exclusively within a domestic arena, between domestic and international actors, and between international actors themselves. In some scenarios, the power relations between the actors are pronounced, to the extent that it is possible to analyze interactions from a perspective whereby one party acts and the other is expected to respond in a relatively vertical power relationship. Such scenarios include those where states are expected to implement the decisions of

international judicial bodies as well as scenarios where states determine operational aspects of international courts and tribunals, such as in the setting of budgets and the appointment of judges.

At other times, the relationship between international and domestic actors is more horizontal, and entails an expectation of cooperation rather than compliance. Such scenarios include, for example, cooperation in tracking suspects in international criminal cases.

These two types of relationships are described in more detail below.

### - 3.1 “Vertical” relationships

#### *3.1.1 Scenarios where states are legally subject to the jurisdiction of the court*

As a point of departure, several participants considered how political factors operate differently depending on the kind of international judicial body in focus. Thus, one participant saw a meaningful distinction between human rights courts and international criminal courts and tribunals. It was observed that human rights courts deal with situations where states have taken a decision in a certain matter and it falls to the human rights court to “overrule or not to overrule” in a kind of supervisory context, as in the *Hirst* case noted above.

Here the concept of “subsidiarity” — which recognizes the primary responsibility of states to implement and enforce the rights and freedoms guaranteed in the European Convention on Human Rights<sup>49</sup> — creates a situation where the court, in reviewing the actions of the national authority, can be seen, in the words of one participant, to “create problems after a matter has been discussed and carefully balanced in the Supreme Court and legislative assembly.” This same participant considered that national politics

<sup>49</sup> See e.g. *Scordino v. Italy* (no. 1), App. No. 36813/97, Eur. Ct. H.R. ¶ 64 (2006).

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would interact differently with the ICC. That Court operates on the basis of “complementarity” whereby either the domestic authorities or the international authorities would adjudicate without the same kind of review function.

A number of judges in attendance identified what they considered to be a distinctly political aspect of the work of some international criminal courts and tribunals, namely the requirement to engage in “extra-legal activity” as part of their judicial function. One example provided was that of Article 53 of the ICC Rome Statute, which grants the Pre-Trial Chamber the power to review a decision of the Prosecutor *not* to pursue a prosecution where it is determined that such action would not be “in the interests of justice.”<sup>50</sup> The concern was that this provision requires judges to apply reasoning of a political, as opposed to a judicial, nature, which those who commented considered to be undesirable and problematic.

A similar concern was raised about provisions for judges to be involved in reconciliation work, on which one judge commented: “The most difficult issue is when a court is given tasks that are not judicial, the reconciliation task for instance. It is not a judicial task [although] criminal courts are frequently given that task... [The judicial] role is to be just and to deliver correct judgments. Other [tasks] are for states.”

In addition to the differences noted between international human rights and international criminal courts and tribunals, some participants observed a distinction between international courts and tribunals adjudicating matters concerning individual claimants and those addressing inter-state disputes. Although both types of body could be affected by politics, it was considered that the ways in which they were affected were different. At the same time, it was recognized that even inter-state dispute

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<sup>50</sup> Rome Statute of the International Criminal Court, U.N. Doc A/ Conf. 183/9 (1998), Art. 53.

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“The most difficult issue is when a court is given tasks that are not judicial, the reconciliation task for instance. It is not a judicial task [although] criminal courts are frequently given that task... [The judicial] role is to be just and to deliver correct judgments. Other [tasks] are for states.”

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resolution bodies are called upon to consider questions of individual human rights from time to time. For example, ITLOS has had to deal on a regular basis with human rights considerations relating to the detention of vessel crew members.

Differences aside, as the discussions in this session revealed, many of the political pressures faced by international courts and tribunals are shared across the full gamut of mandates and jurisdictions. Participants observed several ways in which the domestic political realities of parties to a case impact on the work of their institutions. One clear way is when states refuse to cooperate with the work of international courts and tribunals. Within the ICC context, the example of how the Kenyan authorities responded to charges brought against the then future Kenyan President Uhuru Kenyatta in relation to post-election violence in 2007-2008 was considered illustrative.<sup>51</sup> Indeed, one participant noted that President Kenyatta seemed to be elected on an “anti-ICC platform.” Reflecting on scenarios such as this where domestic politics works actively against the work of international judicial bodies, one participant remarked that some countries ratify conventions “in order to get the human rights community off their backs... without the intention of being bound or to participate.”

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<sup>51</sup> Prosecutor v. Uhuru Muigai Kenyatta, Case No. ICC-01/09-02/11, Decision on the Withdrawal of Charges Against Mr. Kenyatta (Mar. 13, 2015).



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Domestic actors may be very willing to comply with judgments of international judicial bodies, although notions of national sovereignty and situation-specific political evaluations can sometimes discourage cooperation at the local level. One participant noted that there may even be a longer-term initiative within some states to disregard the decisions of international courts with the intention of changing domestic law in that same direction in the long run.

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Domestic political factors were also seen as impacting the work of inter-state dispute resolution bodies, such as the ICJ, ITLOS and others. Making reference to the arbitration proceedings concerning maritime jurisdiction initiated by the Philippines against China under Annex VII of the UN Convention on the Law of the Sea (UNCLOS),<sup>52</sup> one participant noted that political factors in China contributed to that party's decision to refuse to recognize the jurisdiction of the Arbitral Tribunal to hear the case. Under Article 288 of UNCLOS, disputes over jurisdiction are to be determined by the relevant court or tribunal.<sup>53</sup> However, in this case the Chinese authorities chose instead to circulate an official paper setting out their position that the Tribunal had no jurisdiction to hear the case.<sup>54</sup> The impact on international law was considered significant by this participant as the action represented a denial of what is considered to be a major achievement of UNCLOS,

<sup>52</sup> Position Paper of the Government of the People's Republic of China on the Matter of Jurisdiction in the South China Sea Arbitration Initiated by the Republic of the Philippines, Ministry of Foreign Affairs of the People's Republic of China (Dec. 7, 2014), available at [http://www.fmprc.gov.cn/mfa\\_eng/zxxx\\_662805/t1217147.shtml](http://www.fmprc.gov.cn/mfa_eng/zxxx_662805/t1217147.shtml).

<sup>53</sup> United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397, Art. 288.

<sup>54</sup> See *supra* note 52.

namely the consent by signatories to submit to compulsory dispute resolution procedures.

A third aspect of the impact of local politics on the work of international courts and tribunals concerns the question of compliance with international judicial decisions. What emerged from the discussion was that international courts and tribunals are highly invested in seeing their judgments implemented at the domestic level, while recognizing that a range of political and constitutional forces can make implementation a challenge for local actors. Domestic actors may be very willing to comply with judgments of international judicial bodies, although notions of national sovereignty and situation-specific political evaluations can sometimes discourage cooperation at the local level. One participant noted that there may even be a longer-term initiative within some states to disregard the decisions of international courts with the intention of changing domestic law in that same direction in the long run.

There are also instances where domestic political factors incline actors towards active non-cooperation with international judicial bodies. A participant brought up once again the *Hirst* case<sup>55</sup> in which the ECtHR found that the United Kingdom law excluding all prisoners from voting in parliamentary or local elections breached Article 3 of Protocol 1 of the European Convention on Human Rights. He observed that the government of the United Kingdom had taken a decidedly political approach to the judgment<sup>56</sup> and had refused to amend its legislation over the course of many years. Here then, is a clear case of politically motivated, undisguised non-compliance with international law, as distinct from earlier identified instances

<sup>55</sup> See *supra* note 47.

<sup>56</sup> Including by the Prime Minister David Cameron, who declared that the idea of prisoners having a right to vote made him "physically ill" – see Alex Aldridge, *Can 'physically ill' David Cameron find a cure for his European law allergy?*, THE GUARDIAN (May 6, 2011), available at <http://www.theguardian.com/law/2011/may/06/david-cameron-european-law-allergy>.



of non-implementation owing to impediments within the domestic legal and political orders. A participant observed, “where politics come into play, a certain incompleteness of these legal systems becomes very apparent.”

Similar observations were made in the session devoted to the local impact of international justice on the management of migration in Malta, in light of recurrent ECtHR judgments finding the country’s practices to be in breach of its obligations under the European Convention. It was noted that a preponderance of negative public attitudes towards migration in Malta might help to explain the slow pace of change in the Maltese approach to immigration control.

One judge recognized the challenge that non-compliance with the judgments of international judicial bodies presents to the public legitimacy of these bodies. Discussing a case where a member state had delayed paying damages awarded by the Caribbean Court of Justice (CCJ),<sup>57</sup> the judge observed that the failure to pay “attracted a lot of debate and criticism of the process and threatened to undermine the Court in the eyes of the regional population.” He considered that a provision within the constitution of the member state giving judgments of the regional court the same status and force as judgments of the supreme court of the country would have enabled the claimant to take domestic legal action to enforce the judgment of the regional court.

Another interesting mechanism for enforcing judgments of international judicial bodies was identified in the context of the order made by the SADC Tribunal against Zimbabwe,



The modern Renzo Piano gate to the old city of Valletta

introduced above.<sup>58</sup> One participant noted that Zimbabwe had refused to comply with the judgment awarding costs, but the claimants had successfully secured their award for the payment of legal costs through the South African Courts, which ordered the sale of assets owned by Zimbabwe. This participant noted that there had been a diplomatic upset in this connection, with Zimbabwe claiming sovereign immunity, and South Africa asserting that sovereign immunity in this connection was waived when Zimbabwe joined the SADC Tribunal.<sup>59</sup>

In contrast, one judge noted the practice of his own state in relation to judgments of international courts and tribunals: “We comply

<sup>57</sup> *Myrie v. Barbados (State of Jamaica Intervening)*, CCJ 3 OJ, Judgment (Oct. 4, 2013), available at <http://www.caribbeancourtofjustice.org/wp-content/uploads/2013/10/2013-CCJ-3-OJ.pdf>.

<sup>58</sup> See *supra* note 46; *Government of the Republic of Zimbabwe v. Fick et. al.* 2013 (5) SA 325 at 3 para. 5 (CC) (S. Afr.), available at <http://www.saflii.org/za/cases/ZACC/2013/22.html>.

<sup>59</sup> *Id.* at 10 para. 19.



with the decisions... In cases of human rights it is very clear. The IACtHR says ‘A’ and we apply it directly... It is of direct application. ... There is an award and the injured party will then go to Ministry of Economics through the Ministry of Foreign Affairs, and they have to pay. Usually we do our best to comply with whatever the Court says, so... the kind of problems we have discussed here are alien to us.”

This observation triggered a more general comment by one participant, who returned to a point made earlier in the discussion about compliance with the judgments of international judicial bodies and how it might be seen as a surrender of national sovereignty. Why not see such compliance as a positive exercise of national sovereignty instead? The participant wondered what kinds of factors might encourage states to see their relationship with international judicial bodies in this light. Some possible benefits were identified, including the economic benefits of being seen as a country that complies with its international obligations and respects the rule of law, as well as the ability to “outsource” matters that cannot readily be resolved domestically.

What should a state party do when it considers that the decision reached by an international judicial body contradicts fundamental principles of international law? One participant gave the example of the *Yukos* case that came before the arbitral tribunal under the Energy Charter Treaty of 1994.<sup>60</sup> In three arbitrations, an identically constituted tribunal held unanimously that the Russian Federation “had taken measures with the effect equivalent to an expropriation of Claimants’ investments in Yukos and thus had breached Article 13(1) of the Energy Charter

Treaty.”<sup>61</sup> The Russian Federation was ordered to pay a total of more than US\$ 50 billion to former shareholders of the Yukos oil company. However, Russia has asserted that the tribunal did not have jurisdiction to consider the merits of the claim because Russia had not ratified the Energy Charter Treaty, from which the jurisdiction of the tribunal purportedly derived.<sup>62</sup> The participant noted his expectation that Russia would choose not to comply with the judgments in these cases, from which no onward appeal on the merits is available.

Finally, a perhaps unique position enjoyed by international judicial bodies is the power they have to question the basis of their own existence. Arising first in the *Tadić* case<sup>63</sup> before the ICTY, the challenge that the UN lacked jurisdiction to establish an international criminal tribunal has also been raised before the Special Tribunal for Lebanon (STL) in the *Ayyash* case.<sup>64</sup> Discussing the latter, one participant noted the occasional need for international courts and tribunals to consider the lawfulness of the actions of their parent body, here the UN Security Council. In both the ICTY and STL cases, there had been a challenge to the establishment of the international judicial bodies following a claim that the Security Council had been acting *ultra vires* in establishing them, given a defense contention that in neither case was there a threat to international peace and security. The

<sup>60</sup> *Hulley Enterprises Limited (Cyprus) v. The Russian Federation* PCA Case No. AA 226 *Yukos Universal Limited (Isle of Man) v. The Russian Federation*, PCA Case No. AA 227, *Veteran Petroleum Limited (Cyprus) v. The Russian Federation* PCA Case No. AA 228, Permanent Court of Arbitration, Final Award, (Jul. 18, 2014).

<sup>61</sup> Permanent Court of Arbitration, Final Awards Issued in 3 Arbitrations Between Former Shareholders of Yukos and the Russian Federation, undated, available at [http://www.pca-cpa.org/shownews3be5.html?ac=view&pag\\_id=1261&cnws\\_id=440](http://www.pca-cpa.org/shownews3be5.html?ac=view&pag_id=1261&cnws_id=440).

<sup>62</sup> Refer to the interim awards on jurisdiction, which have an interesting discussion on the constitutional separation of powers as it relates to the binding nature of signed, but not yet ratified, international treaties starting at para. 350 of each interim award, *Hulley Enterprises Limited (Cyprus) v. The Russian Federation*, see *supra* note 60.

<sup>63</sup> Prosecutor v Tadić, Case No. IT-94-1-T, Judgment (Int’l Crim. Trib. For the Former Yugoslavia May 7, 1997).

<sup>64</sup> Prosecutor v. Ayyash et al, Case No. STL-11-01/T/AC/AR126.9, Decision on Appeal by Counsel for Mr. Oneissi Against the Trial Chamber’s Decision on the Legality of the Transfer of Call Data Records, (Special Trib. for Leb. July 28, 2015).



fact that the tribunals have the power to review the actions of the Security Council and to take decisions accordingly indicates that the power dynamics between parent bodies and international criminal institutions are not always unilateral, notwithstanding the examples of the subordination of international justice to political calculus, as will be reported below.

### *3.1.2 Scenarios where courts are subject to the political power of states*

Political factors are at least as apparent in scenarios where states operate from a distinct position of power in relation to international courts and tribunals. States exercise this power through means such as direct intervention, judicial appointments, and the setting of budgets.

The example provided earlier, of the decision to suspend the SADC Tribunal, shows direct political intervention into the work of an international judicial body. Participant discussion suggested that there appears to be a particular scope for this kind of scenario in the work of international criminal courts and tribunals. For example, speaking of an international hybrid court, one participant noted that the filing of an application had been rejected, apparently because a senior political figure had expressed opposition to two cases proceeding.

Similarly, speaking of the work of the ICC, one participant noted how the Security Council may introduce political considerations into the operation of the Court. For example, the Council referred the Darfur situation to the Court on 31 March 2005 after the passage of Resolution 1593,<sup>65</sup> but then failed to support the Court in its endeavors to have Sudanese president Omar al-Bashir surrendered to its authority. It was as if, said a participant, the Security Council had

<sup>65</sup> UN Security Council Resolution 1593 (2005), *available at* <http://www.icc-cpi.int/NR/rdonlyres/85FEBD1A-29F8-4EC4-9566-48EDF55CC587/283244/N0529273.pdf>.



(l to r) Brandeis University's Dan Terris, BIJ Co-Director Richard Goldstone, and ICTY Judge Fausto Pocar

first “switched on” the Court but later decided to “switch it off.”

The observation made in the Ginsburg article cited above, regarding how domestic political considerations influence the process of appointment of judges to international courts and tribunals, resonated with some participants. Speaking about the ACtHPR, one participant observed that the foreign ministers of member countries elect the Court's judges, and their continued service on the bench depends upon re-election. There is a potential for political considerations to influence both the initial election and re-election of judges.

Speaking about the Extraordinary Chambers in the Courts of Cambodia (ECCC), one judge discussed the Supreme Council of the Magistracy, which is a politically controlled body with the ability to take disciplinary proceedings against judges, and which is also responsible for promotion and demotion of judges on a professional career path. At one point in the history of the ECCC, it was discovered that all of the Cambodian members of the bench were members of the ruling political party.



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The setting of budgets was also brought up as a significant issue facing participants' respective courts, with several participants noting how financial control of their court can be used to achieve political ends. One participant noted the sometimes uncomfortable position of judges "winning and dining" with politicians to this end. Another participant from a regional court recounted an "acid" discussion with the Ministry of Foreign Affairs of one member state regarding the state's unwillingness to provide the money required by the court.

A final aspect of the vertical relationship between international judicial bodies and parent bodies concerns the reliance by the former on the latter for support in the enforcement of their mandates. One participant recounted that when the newly founded ICTY sought assistance from UN peacekeepers in the execution of arrest warrants, the domestic political considerations of Security Council members effectively prevented that kind of cooperation from taking place. He noted: "... everyone... took it as a given that the UN forces in the former Yugoslavia would quickly jump to execute arrest warrants. They were in control. They had the firepower and soldiers. It was assumed that as a sister UN Chapter VII organization we were on the same team, and it came as a huge shock that UN troops said they would not make arrests." Similarly, participants recounted that even when an initiative for ICC criminal prosecutions has come from the Security Council, that body has not been supportive when states decline to cooperate. This was very clear in the case of Sudan, whose government has refused to turn over President Omar al-Bashir following the ICC charges brought against him, with the Security Council doing nothing to enforce that state's cooperation.

### - 3.2 "Horizontal" relationships

At times, the relationship between international judicial bodies and individual states can have a predominantly horizontal character, for example

in the case of international criminal courts and tribunals and states associated with criminal investigations and/or proceedings. Relationships may involve cooperation in providing evidence, tracking and extraditing fugitives, and, in the case of hybrid courts, much closer interaction between the international body and domestic political and legal structures. In some cases, the relationship can be characterized as collaborative, if not always without incident. At other times, the relationship can be entirely uncooperative.

#### 3.2.1 *Cooperative relationships*

The example provided earlier of how Germany amended its legislation in order to facilitate the transfer of suspects to the ICTY may be considered an example of good practice both in terms of the relationship between executive and legislative branches of government within a state and that between the German state and the ICTY.

Notwithstanding good intentions, BIIJ participants identified scenarios where certain domestic political actors wanted to facilitate the work of international courts and tribunals but were prevented from doing so by local conditions. Providing an example from the STL, one judge noted the desire of the Lebanese authorities to see criminal trials take place with the five accused in custody, but they had been unable to implement arrest warrants. As a consequence, the Tribunal had to commence proceedings with the accused *in absentia*. Similar difficulties had been observed by judges serving on the ICTR bench. One judge with experience of that Tribunal observed that political obstacles had sometimes hindered assistance with tracking fugitives, making arrests, conducting investigations, and securing witnesses.

#### 3.2.2 *Non-cooperative relationships*

At times, these operational impediments may extend beyond conflicts between domestic political actors and entail non-cooperation at the state level. Such a stance is exemplified by



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the Rwandan authorities' success in avoiding the prosecution of any of the members of the Rwandan Patriotic Front (RPF) before the ICTR, despite a UN Commission of Experts conclusion in 1994 that war crimes had been committed by RPF members.<sup>66</sup> Another example of non-cooperation is the *volte face* of the Museveni government in Uganda regarding the prosecution of Lord's Resistance Army (LRA) leaders, following the initial – and what some participants considered politically-motivated – invitation to the ICC Prosecutor to investigate crimes against humanity in the country.<sup>67</sup> The recent transfer of LRA leader Dominic Ongwen to the ICC, however, shows a swing of the pendulum back toward cooperation.<sup>68</sup> A perhaps more striking instance of non-cooperation was the recent obstruction of the Kenyan authorities in response to ICC charges against political leaders for crimes against humanity stemming from 2007-08 post-election violence.<sup>69</sup>

#### 4. Strategies for managing political aspects of the relationships

In light of the discussions that took place and considering the observations from the academic commentators whose works were consulted for the session, it was not disputed by participants that local political realities interact with the work of international judicial bodies in multiple ways. However, experience and opinions differed considerably when discussion turned to the

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<sup>66</sup> U.N. S.C., *Letter dated 28 September 1994 from the Permanent Representative of Rwanda to the United Nations*, U.N. Doc. S/1994/1115 (Sept. 29, 1994).

<sup>67</sup> Mark Kersten, *Sudan's President and ICC's Most Wanted to Visit Uganda?*, JUSTICE IN CONFLICT (May 11, 2011), available at <http://justiceinconflict.org/2011/05/11/sudans-president-and-iccs-most-wanted-to-visit-uganda/>.

<sup>68</sup> Press Release, Dominic Ongwen Transferred to the Hague, INT'L CRIM. CT. (January 20, 2015), [http://www.icc-cpi.int/en\\_menus/icc/press%20and%20media/press%20releases/pages/pr1084.aspx](http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/pages/pr1084.aspx).

<sup>69</sup> Anthony Deutsch, *Global Court to Reopen Obstruction Case Against Kenya*, REUTERS (Aug. 19, 2015), available at <http://www.reuters.com/article/2015/08/19/us-kenya-court-idUSKCN0QO0RB20150819>.

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... this question was seen as having “existential” significance for the international judge, as it enquires into the limits of the international judicial function.

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question that was in part raised by the Teitel article regarding whether and how international judges should engage with political factors in their work.<sup>70</sup> Discussion focused to a large extent around the question whether international courts and tribunals should consider the impact of their work on local political realities, but also on strategies for responding to the political pressures that have been described above.

For some BIIJ participants, this question was seen as having “existential” significance for the international judge, as it enquires into the limits of the international judicial function. In what follows, strategies and considerations relating to the management of political interference in the operation of the court, approaches to drafting judgments, the importance of communication, and problems concerning the implementation of judgments are reported.

##### - 4.1 Managing political interference in the operation of the court

At one extreme of the spectrum, the need for judges to actively confront political interventions in the work of international courts and tribunals was identified. One judge with experience of hybrid courts recounted an experience where confrontation was chosen as the necessary strategy: “We needed to bring [a particularly egregious intervention] to the attention of the international community. The matter could have gone further than it did, but that could have destroyed the court itself. It was not for us to destroy the court... but to draw attention

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<sup>70</sup> See *supra* note 40.





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[in the context of politically sensitive cases] judges should “try to stick to normality, or business as usual. The more you make a situation special, the more you increase the tension and suspicion that the court is not acting judicially, but acting politically.”

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to the matter and for others to consider what should happen. This resulted in a great deal of unpleasantness for period of about a year.”

#### **- 4.2 Approaches to drafting judgments**

For some judges, adopting a “business as usual” approach was considered the most appropriate way of responding to some forms of political pressure. One participant advocated such an approach in the context of politically sensitive cases, noting that, rather than having a particular strategy or trying to send a signal through a judgment, judges should “try to stick to normality, or business as usual. The more you make a situation special, the more you increase the tension and suspicion that the court is not acting judicially, but acting politically.”

Not all participants considered adopting a more “political” approach to judicial decision-making as necessarily problematic. The approach described by some as “judicial activism” was considered by several participants to be appropriate and desirable in some cases. There were several aspects to this approach.

One feature of “judicial activism” involved how legislation is interpreted, with several judges advocating a purposive or teleological approach. Judicial activism was firmly rejected by some other participants, with one judge saying, “I disagree with those ideas. [International judges] have only one mandate; to decide in accordance with the law... [Judges] should work according

to a narrow and legally correct agenda. Only that will be accepted by the entire international community.”

However, as the Teitel article demonstrated, it may not always be possible to identify what one participated called a “narrow, legally correct agenda” in hard cases.<sup>71</sup> Although time did not permit detailed discussion of this question, a helpful reformulation of the question was, “what happens when the law does not provide all the answers for the problems bubbling up?” This question was seen as being “extremely important” by one participant and may invite further reflection at future Institutes.

#### **- 4.3 The importance of communication**

Irrespective of their position on judicial activism, many participants agreed that communication is a crucial aspect of the work of the international judiciary, whether that entails communication with national political and judicial actors or with the wider public.

Communication was seen, for example, as an essential element in the operation of the STL, as it strives “to account to the people of Lebanon for what [the Special Tribunal] is doing.” Speaking to the media, while choosing the times when it is and is not appropriate to do so, was considered of paramount importance.

Judicial dialogue was one communicative approach that many participants regarded positively, although there were different meanings that could be attached to the concept. Some courts, such as the ECtHR, have institutionalized the process of dialogue with domestic courts. In this process, judges from domestic courts in member states visit the Strasbourg court for discussions with international judges. The ECtHR judges themselves also travel to Council of Europe countries to meet with national

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<sup>71</sup> *Id.*



judges, and this is “seen as an important part of the dialogue,” not least because the Convention system expects rights to be protected at the national level in accordance with the principle of subsidiarity. Judges may not express views on cases pending before the Court but can discuss judgments already delivered as long as they are careful to respect the secrecy of deliberations. This dialogic approach was also considered to include judges who teach at universities. This activity helps “to promote awareness of Convention rights,” which one participant saw as being “of great importance for the proper functioning of the Convention system.”

A similar practice was operational within the African system for the protection of human rights, with one participant discussing the 2013 dialogue program hosted by the ACtHPR with chief justices of African countries.<sup>72</sup> This approach was considered both necessary, as there is a lack of awareness of the African Charter on Human and Peoples’ Rights amongst some domestic judges, and fruitful, given the opportunities it presented to discuss the challenges relating to the enforcement of judgments.

Considering the position of the Andean regional system, another participant echoed what had been said about the European and African systems, emphasizing the value of judicial dialogue in terms of awareness raising among the domestic judiciary, and also as a tool for promoting regional integration.

Other judges took a more reserved approach to this form of judicial dialogue, suggesting that this kind of communication can backfire. An example from the ICTR was provided: after



“Migration in the Mediterranean” roundtable, featuring (l to r) Maltese Minister for Home Affairs and National Security Carmelo Abela, David Thor Björgvinsson, Carmel Agius, Matthew Scott, and Jean-Pierre Gauci

a visit by Tribunal officials to the Rwandan government in Kigali, a participant recounted, “a number of motions were raised during trials asserting that the ICTR was biased as it had met with the president of Rwanda.”

Another participant confirmed that he would not accept an invitation to discuss legal issues relating to matters that were the subject of ongoing adjudication or even prospective cases on which a judge may in future sit, for fear of having his perspective affected. Other participants also shared the view that such consultations between domestic and international judges were “not advisable.” Another participant “agree[d] entirely,” recognizing “a fundamental danger of compromise and judicial embarrassment.” Speaking more concretely, this participant noted an ongoing process considering an application for the disqualification of a judge who had addressed a number of domestic judges about international law problems that had arisen in the court.

Similarly, speaking of the process whereby the Rwandan authorities have begun trying cases referred by the ICTR, one judge explained his view that it would be inappropriate to provide

<sup>72</sup> See Press Release, Dialogue between the Court and National Judiciaries in Arusha, AFRICAN COURT OF HUMAN AND PEOPLE’S RIGHTS (Nov. 18, 2013), available at <http://www.african-court.org/en/index.php/news/latest-news/488-seminar-on-the-judicial-dialogue-between-the-african-court-and-national-judiciaries-opens-in-arusha>.



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Instead of judicial dialogue taking the form of a close conversation, one participant favored the approach of making the reasoning behind judgments very clear, to help to avoid fragmentation of international law. In this way, domestic judges, as well as judges in other international courts and tribunals, would better understand how and why a particular decision was reached in a particular case, and how relevant legal principles are understood within that body.

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training to the Rwandan courts out of concern that he may later find himself sitting on the revocation bench if an application for revocation [of the authority to try ICTR cases] were to be made.<sup>73</sup>

Instead of judicial dialogue taking the form of a close conversation, one participant favored the approach of making the reasoning behind judgments very clear, to help to avoid fragmentation of international law. In this way, domestic judges, as well as judges in other international courts and tribunals, would better understand how and why a particular decision was reached in a particular case, and how relevant legal principles are understood within that body.

Interestingly, it was made known during the course of the discussions that the BIIJ convener, the International Center for Ethics, Justice and Public Life at Brandeis University, had itself sponsored a number of colloquia bringing together international and domestic judges. It could not be said whether some of the concerns

<sup>73</sup> A revocation process is currently underway in the case of Prosecutor v Jean Uwinkindi. Case. No. MICT-12-25-R14.1, Decision on Request for Revocation of an Order Referring a Case to the Republic of Rwanda and Assigning a Trial Chamber, (Mechanism for Int'l Crim. Tribunals, May 13, 2015).

raised by participants during the Institute had been entirely avoided during the colloquia, but participants were invited to consider the documentation about the colloquia on the Center's website<sup>74</sup> and reflect on the relative benefits and drawbacks of such an initiative.

#### **- 4.4 Addressing problems in the implementation of judgments**

In relation to issues of compliance with states' international obligations, one judge saw benefits in a "naming and shaming" approach. However, it was recognized that judges have very limited power in this context, with another participant noting, "most of what should be done should not be done by the courts, but by states."

Another participant observed: "I think that in our zeal for ensuring compliance we sometimes go too far. We forget about the nature of judicial bodies which are independent and impartial, and anything that can compromise and put in question that impartiality will ruin the credibility of the judicial body."

Interestingly, a participant with a background in international criminal law turned the previous proposition on its head by arguing that enforcement of judgments is crucial to ensuring the credibility of the international judicial body. In that connection, he observed that in the statute of his tribunal, the president is responsible for ensuring the enforcement of judgments. Similar observations had been made in the context of the CCJ in relation to the connection between enforcement and legitimacy. Another view was advanced in reply, which asserted that it is the parent body of an international criminal tribunal that should be concerned with enforcement, as opposed to the tribunal itself.

<sup>74</sup> Judicial Colloquia, BRANDEIS INTERNATIONAL CENTER FOR ETHICS, JUSTICE AND PUBLIC LIFE, <http://www.brandeis.edu/ethics/internationaljustice/judicialcolloquia/index.html>.



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The reference to the responsibility of parent bodies for the enforcement of judgments prompted further observations regarding practice in different contexts. One participant commenting on the role of the Security Council in ensuring compliance with the judgments of international criminal tribunals expressed the view that the Council would not seek to compel a state to act, while another emphasized the fact that states nevertheless had a legal obligation to comply.

It was not only parent bodies such as the UN Security Council that were seen as having responsibility for ensuring compliance with the judgments of international judicial bodies. A different mechanism was identified in the context of ITLOS, where compliance with judgments regarding deep seabed mining is monitored by the International Seabed Authority,<sup>75</sup> an autonomous international organization established under UNCLOS. Another participant identified a similar mechanism within the European system for the protection of human rights where the Committee of Ministers of the Council of Europe<sup>76</sup> monitors the compliance of states with the judgments of the ECtHR. Yet another participant commented on the approach taken by the Assembly of Heads of Government regarding compliance with the judgments of the ACtHPR. Here, the African Court is required to report to the Assembly on compliance at every sitting of the Assembly, which take place every six months.

It would therefore appear that although enforcement is a crucial consideration for all international judicial bodies, there is no consensus about the methods that courts

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“I think that in our zeal for ensuring compliance we sometimes go too far. We forget about the nature of judicial bodies which are independent and impartial, and anything that can compromise and put in question that impartiality will ruin the credibility of the judicial body.”

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may use for seeking to achieve it. Variation in approach notwithstanding, most participants acknowledged the importance of having an effective political body to monitor the implementation of their institutions’ judgments.

## 5. Conclusion

With none of the participants in this session disputing that political factors impact in various ways upon the work of international courts and tribunals, the main point of contention turned on whether and how international judges should respond to these pressures. Although holding divergent views on the desirability of judicial activism, most participants considered the need to communicate with a wide range of stakeholders to be a relatively uncontroversial element of a court’s mandate

Regrettably, communication alone cannot release international judicial bodies from external pressures, as the next session on the pace of international justice revealed.

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<sup>75</sup> About the International Seabed Authority, INTERNATIONAL SEABED AUTHORITY, <http://www.isa.org.jm>.

<sup>76</sup> Supervision of the execution of judgments and decisions of the European Court of Human Rights, COUNCIL OF EUROPE, *available at* [http://www.coe.int/t/dghl/monitoring/execution/default\\_en.asp](http://www.coe.int/t/dghl/monitoring/execution/default_en.asp).



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### III. The Pace of Justice

#### 1. Introduction

The pace at which international justice proceeds is a topic that has arisen at each of the Brandeis Institutes since its inaugural session in 2002. In 2015, the organizers decided to devote a special session to the issue and address it head on. Tying in with previous discussions around the role of politics in international justice, this session addressed the reality of political pressure that is exerted on courts and tribunals to resolve cases more quickly, as well as some of the ways in which political factors impact the pace of international justice itself. Participants were also invited to look beyond the political dimension and reflect upon the full range of factors relevant to two important questions, namely, how to define, and then how to achieve, the right pace of justice for a given international judicial body.

It was acknowledged at the start of the session that multiple stakeholders have an interest in the pace of international justice. First, “parent bodies” of certain international courts and tribunals want to ensure that the institutions they established to address war crimes and mass violations of human rights complete their work in a timely fashion. Frequent calls for completion of proceedings – to bring about both political resolution and budgetary relief – have been keenly felt particularly by international criminal tribunals with temporary jurisdictions. Furthermore, victims of international crimes and human rights violations may feel an individual need for the “closure” that judgment and sentencing of the convicted might bring. Pressure to dispense justice within a reasonable time frame exists in other kinds of international fora as well, as the strict timetable for completion of cases established by the WTO Appellate body attests. At least one participant expressed during the session the familiar notion that “justice delayed is justice denied.”

The issue of pace carries high stakes for many international courts and tribunals; indeed, external evaluations of their performance on this score may have implications for their very legitimacy. It has been noted, for example, that delays in the resolution of cases at the ECtHR sometimes exceed the maximum time limit set by that same body for judicial proceedings in the domestic courts of its member states.<sup>77</sup> Such inconsistencies do not pass unnoticed by the Court’s constituents.

To launch the discussion, participants considered three articles relevant to the topic of pace, each with its own insights into the issue. An article by A. Alvarez-Jimenez celebrates the approach taken by the WTO Appellate body (AB), which consistently delivers judgments in cases within its 90-day target.<sup>78</sup> Alvarez-Jimenez attributes the AB’s achievement to its adoption of streamlined procedures, which include limitations on both the time afforded for consideration of the case and the submission of evidence by the parties, the smaller size of the judicial panels (decisions are taken by divisions of three Members), and the flexible approach AB members take in determining the outcome of a case (distinguishable in particular from the ICJ which allows dissenting opinions, whereas the AB does not). An issue for discussion by participants was whether the approach taken by the AB would be feasible or desirable in different international judicial contexts, for example international criminal or international human rights bodies.

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<sup>77</sup> Laurence Helfer, *Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime*, 19 EUR. J. INT’L L. 125, 133 (2008).

<sup>78</sup> A. Alvarez Jimenez, *The WTO Appellate Body’s Decision-Making Process: A Perfect Model for International Adjudication?*, 12 J. INT’L ECON. L. 289 (2009).



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Alex Whiting takes a somewhat contrasting approach in his article, which is focused on international criminal adjudication,<sup>79</sup> arguing that delay can sometimes be a necessary ingredient in these cases. Noting the significant societal disruption that generally accompanies mass atrocities, Whiting argues that allowing for the passage of time can enable evidence to emerge with increased distance from the conflict.

Finally, an article by Laurence Helfer<sup>80</sup> touches upon the relationship between the ECtHR and member states of the Council of Europe. He argues that the ECtHR has (and should) become more “embedded” in domestic legal orders through, for example, the Court’s critical engagement with judgments of domestic courts and tribunals, its ability to act in a fact-finding capacity in some cases, and its award of specific non-monetary orders that require action by domestic authorities. When these authorities take responsibility for compliance with international legal obligations, the result, in theory, is that fewer cases will come before international judicial bodies.

In what follows, the views of participants on defining the right pace for international justice are presented, followed by suggested strategies for speeding up the pace. As regards this last point, it was noted that temporal gains might have an impact on other aspects of the administration of international justice, not least in relation to fundamental principles such as the right to a fair trial. Finding the right balance between the competing pressures of time and quality of proceedings remains a substantial challenge for many international judicial bodies.

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<sup>79</sup> Alex Whiting, *In International Criminal Prosecutions, Justice Delayed Can Be Justice Delivered*, 50 HARV. INT’L L. J. 323, 323-29, 360-64 (2009).

<sup>80</sup> See *supra* note 77.

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## 2. How to define the right pace

In determining the right pace for a particular international judicial body, it is important to note the factors that can contribute to delay. Certain factors are common to most international judicial bodies, while other factors are unique to a particular branch of international law, such as international criminal law.

A 1998 ICJ press release included as background reading for the session identifies a number of factors that are common to many international courts and tribunals.<sup>81</sup> First, the sheer increase in the volume of cases before a court affects the pace of international justice. Workload is an issue that has particularly affected the ECtHR, which has received a greatly increasing number of applications on an annual basis. Participants from other courts and tribunals also identified workload pressures as a significant cause of delay in proceedings. Workload will always be relative to the capacity of the available staff working within the court or tribunal to perform their particular functions. Regrettably, several judges observed shortages in this area, with particular impediments seen as resulting from a shortage of translating and interpreting staff.

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<sup>81</sup> International Court of Justice, *The International Court of Justice revises its working methods to expedite the examination of contentious cases*, Press 1998/14 (Apr. 6, 1998), *available at* <http://www.icj-cij.org/presscom/index.php?pr=618&pt=8&p1=6&p2=1>.





Maltese colleagues Jean-Pierre Gauci, BIJ co-convener, and Veronique Caruana, rapporteur

More generally, the issue of language was seen as a source of considerable delay for some courts and tribunals, particularly where translation of judgments and other documents into second languages was required. In one international criminal tribunal, it was observed that first instance judgments may be as long as 1,500 pages, which can take up to two years to translate. Considering that any appellate process cannot proceed before the judgment has been translated into the other working language of the court, the implications for the pace of international justice are clear. Similarly, a participant with experience of international hybrid courts noted the costs for translation of documents amounted to approximately 25% of the court's budget.

Staffing levels owe much, of course, to the budget of an international judicial body. Funding was thus seen by many participants to impact directly on the ability of their courts and tribunals to efficiently carry out their work.

Another element related to staffing, which will vary among institutions, is what some participants considered to be a negative incentive to follow efficient working practices. Where staff find themselves employed with

comfortable salaries and secure jobs, there may be an individual interest in seeing a slower pace of justice than could otherwise be attained. In some cases, participants observed this perspective at the level of judicial as well as support staff, raising serious ethical issues. Although perhaps not alone in this experience, hybrid courts were identified as being particularly vulnerable to this phenomenon. However, a judge from a regional court also recognized that members of the bench sometimes seemed to enjoy the perks of their position without actively seeking to fulfill the mandate of the court.

Finally, procedural matters, perhaps the area most within the power of international judges to address, were identified as causing delays in some cases. However, the need to strike the right balance between efficiency strategies and procedural safeguards was seen as critical. Some of the ways in which procedural matters affect the pace of international justice included the right of the accused in criminal cases to self-representation, and the need to reach a consensus in the writing of judgments. The latter point hearkened back to the Alvarez article where the single judgment procedure was deemed the most expeditious.<sup>82</sup> However, some BIJ participants did not agree that the publication of dissenting opinions significantly slows down the pace of proceedings.

If the factors above were seen as relevant to most international judicial bodies, other factors raised were particular to different types of proceedings. It was recognized that the nature of international criminal proceedings differs substantially from both inter-state dispute resolution and the processing of international human rights claims. There are several reasons for this. First, the scale of mass atrocities in countries like the former Yugoslavia, Rwanda, Cambodia and Lebanon places particular

<sup>82</sup> See *supra* note 78.

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demands on the judicial bodies charged with determining individual guilt or innocence. These situations have also created many victims and witnesses, whose participation in proceedings inevitably takes time.

Second, as Whiting observes in his article, mass atrocities cause severe individual and societal disruption, which creates significant impediments to the gathering of evidence. As one criminal judge observed, “We have to make sure that the proper evidentiary foundation is there to ensure we can adjudicate. It might be different where the parties control the case and have interests in the speed of proceedings.”

Third, the role of states is critical in the work of international criminal courts and tribunals. Participants noted that state cooperation was essential for investigations as well as for tracking and arresting persons accused of participation in international crimes, and that such cooperation was not always forthcoming.

Here then, the question of how to define the right pace for particular international judicial bodies begins to move towards some tentative answers. For international criminal justice, the speed of proceedings is important, but cannot outweigh the need for procedural safeguards or ignore the scale of disruption caused to individuals and societies by mass atrocities. For human rights and inter-state dispute resolution proceedings, the need for a timely outcome may weigh more heavily.

### 3. How to achieve the right pace

It was clear from discussions that the subject of pace was of concern to many of the BIIJ participants. Focusing primarily on the steps that courts and tribunals can take independently from other actors, the group identified a range of procedural mechanisms that can help to speed

up the pace of proceedings. However, as several judges noted, what gains are made with regard to pace may entail consequences in other areas, not least the administration of justice itself.

The approach taken in recent years by the ECtHR provides an example of the delicate balance that exists between efficiency and the administration of justice. For years the Court has struggled under an enormous backlog, which had reached more than 140,000 cases by 2010.<sup>83</sup> With the entry into force in June 2010 of Protocol 14, the Court began implementing a single-judge procedure for determining the admissibility of individual claims – until that time, three-judge panels had carried out this work. The need for such a streamlined procedure was highlighted by the fact that 90% of claims are ultimately determined to be inadmissible.<sup>84</sup>

While recognizing that reduction from a backlog of 140,000 to 70,000 cases demonstrates undeniably the effectiveness of the single-judge procedure, participants raised serious concerns about the implications of the new approach in terms of potentially diminished procedural safeguards. Whereas previously an applicant whose claim was determined to be inadmissible would receive written reasons supporting the finding, applicants are now issued with a standard letter with no reasoning. Some participants saw this as a serious threat to the legitimacy of the court. Balanced against these concerns, however, was the view that “most of the cases are unquestionably inadmissible.” The upshot is that although challenges to the legitimacy of the court owing to delays in processing claims are diminished, in their

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<sup>83</sup> EUROPEAN COURT OF HUMAN RIGHTS, ANNUAL REPORT 2010 6 (2011).

<sup>84</sup> COUNCIL OF EUROPE, PROTOCOL NO. 14 TO THE CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS, AMENDING THE CONTROL SYSTEM OF THE CONVENTION: EXPLANATORY REPORT, para. 5 (2009).





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place have come new challenges based on the loss of depth, breadth of judicial oversight, and communication of reasons supporting the decision.

Another way of accelerating the pace of proceedings was discussed in relation to international criminal cases. At the ICTY, judges have the power to limit the number of witnesses that may be called in a case, and to set time limits. Although these powers have the potential to impact on the quality of justice administered, it was observed that discretion rests with the judge to determine what is required in the individual case. Participants with knowledge of the system did not consider there to have been adverse impacts resulting from the use of these powers. As one participant observed, judges “are the masters and they must be the ones to ensure that the pace is acceptable.”

Reducing duplication across proceedings was considered to offer potential efficiency savings in some contexts. For example, judges may take judicial notice of findings that have been made in other cases as well as facts considered to be “common knowledge.” Such observations were made in the context of both international criminal and international human rights courts and tribunals.

Addressing the performance of individual judges was considered to be somewhat more problematic, with one participant noting that there were “complicated and cumbersome

political issues that could not be cured instantly.” The issue of judicial selection proceedings was seen as relevant to this issue. It was also suggested that having a case management strategy, where cases are tracked so that judges know their performance is being monitored, might prove beneficial. A further step might involve the presiding judge having a “friendly discussion” with a slow-moving judge and offering support staff to spur an increase in pace.

As regards factors beyond the control of the court itself, some participants pointed to the potential role of the UN Security Council in being firmer with states that fail to comply with their international obligations. Others viewed such an idea as merely “wishful thinking.”

On a final note, it is worth recalling that not all courts are weighed down by heavy workloads. The CCJ, a relatively new international judicial body, actively seeks cases. Consequently, the Court interprets the admissibility criteria expansively, in stark contrast to the ECtHR, which introduced a threshold test, through Protocol 14, requiring that a claimant demonstrate the purported human rights breach has caused “significant disadvantage” as an additional way of reducing the number of cases crossing the bench.<sup>85</sup>

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<sup>85</sup> *Id.* at para. 12.

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## IV. Civil Society and International Justice: Help or Hindrance?

### 1. Introduction

Earlier in the institute, participants examined the interrelationship of international judicial bodies and domestic actors as it plays out within institutions of government. In this session, the focus shifted to the particular role of local and international NGOs, as representatives of civil society, in the administration of international justice. The overarching question for this session was what role, if any, NGOs should have in proceedings in international courts and tribunals. This question invited discussion on the forms of interaction that already exist between NGOs and international judicial bodies, as well as the sharing of experiences and thoughts about good practice in this domain.

Participants were invited to consider two academic works that address aspects of the relationship between NGOs and international judicial bodies. First, a piece by Eduardo Szazi<sup>86</sup> advocates for a stronger role for NGOs in international justice and describes forms of interaction between NGOs and international judicial and “quasi-judicial” bodies, including the ICJ, ICTY, ICTR, ICC, CJEU, ECtHR, IACtHR, WTO, and smaller regional bodies. Many of the forms of interaction he identifies, including participation in litigation both as a party and through submission of amicus curiae briefs, were discussed in depth during the session.

Second, an article by Anna Dolidze<sup>87</sup> provides an overview of the developing role of amicus briefs in international proceedings in tribunals,

including in criminal courts, human rights courts, the ICJ, the WTO AB, and ITLOS. From her compilation, participants could see a cautious growing use of amicus briefs in cases before international tribunals. Issues raised by Dolidze include whether amicus briefs are a positive development and what limitations should exist on submission and consideration of the briefs. This subject received robust consideration during the session.

In what follows, the different ways in which NGOs interact with international judicial bodies are presented from the perspective of the BIIJ participants. Following some general observations, two forms of interaction are discussed: those that are ancillary to judicial decision-making, and those that seek to influence the process of deciding cases.

### 2. Different ways in which NGOs interact with international judicial bodies

It was recognized at the outset of the discussion that the benefits and drawbacks of the increased involvement of NGOs in the pursuit of international justice were identifiable along a scale from wholly negative to wholly positive. This distinction was made a number of times in the session through the refrain “there are NGOs and *then* there are NGOs...” At one end of the spectrum were a relatively small number of very high caliber NGOs that assist the cause of international justice in many ways. At the other end were NGOs that engaged in manifestly one-sided advocacy.

To some extent, the nature of the interaction will depend on the profile of the NGO. Several participants pointed to credibility considerations when discussing how their courts and tribunals

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<sup>86</sup> Eduardo Szazi, *NGOs in Judicial and Quasi-Judicial Bodies*, in *NGOs: LEGITIMATE SUBJECTS OF INTERNATIONAL LAW* (Leiden University Press 2012).

<sup>87</sup> Anna Dolidze, *Advisory Opinion on Responsibility and Liability for International Seabed Mining (ITLOS Case No. 17) and the Future of NGO Participation in the International Legal Process*, 19:2 *ILSA J. INT'L & COMP. L.* 1 (2013).



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engaged with different civil society organizations. For example, one participant recounted learning that an NGO had provided misleading information to the court, which made the institution very cautious in the contacts it had with that organization thereafter. The type of NGO involved in international justice, and the ways in which it is involved, also depend on whether the institution is an international criminal, human rights, or inter-state dispute resolution body.

### **- 2.1 Activities that are ancillary to judicial decision making**

The discussion began with an examination of the following NGO activities that are for the most part ancillary to judicial decision-making: lobbying, provision of technical support, representing the views of stakeholders, and the monitoring of international judicial bodies.

#### *2.1.1 Lobbying*

One participant saw the role of NGOs in lobbying for certain conduct by states as being the main contribution that NGOs can make to the cause of international justice. “What should be encouraged is essentially the impact on the behavior of states and their attitudes towards the court.” The ability of NGOs to influence political decision-making through advocacy and lobbying activities was seen as having exceptionally positive impacts in some circumstances.

One participant asserted that there was “no question at all that NGOs over the years have proven themselves to be indispensable to the creation and sustainability of some international criminal institutions.” Another pointed to the substantial contribution of NGOs in the establishment of the ICC as an example of the positive role that such organizations can play in the interests of international justice. Yet another participant recalled the role of the Coalition for the International Criminal Court (CICC),

which, at the time of the entry into force of the Rome Statute, consisted of more than 1,000 NGOs. The CICC lobbied intensively in multiple countries to secure the 60 ratifications necessary for the Rome Statute to enter into force.<sup>88</sup>

The CICC was also seen as having played an instrumental role in reforming the process of electing judges to the ICC. A participant noted that, prior to establishing an Assembly of States Parties Advisory Committee on Nominations,<sup>89</sup> “There was no vetting of the qualifications of judges who were nominated by countries. Rather unfortunate appointments were made, including judges who qualified under neither List A nor List B,<sup>90</sup> as required in the Rome Statute. The Coalition set up an independent committee of eleven people for the 2011 elections... [and after vetting the candidates] publicly announced that of the fifteen or so nominees at the time, three were not qualified.” None of those three candidates was subsequently elected.

#### *2.1.2 Provision of technical support*

Harking back to the issue of the cost of international justice, touched upon during earlier discussions, one participant provided an example of how NGOs can be instrumental in the operation of international courts and tribunals where parent bodies, such as the United Nations, do not provide sufficient resources. Referring to the role of the International Bar Association (IBA) in the *Tadić* case,<sup>91</sup> this participant

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<sup>88</sup> Our History, COALITION FOR THE INTERNATIONAL CRIMINAL COURT, <http://www.iccnw.org/?mod=cicchistory>.

<sup>89</sup> See [http://www.icc-cpi.int/iccdocs/asp\\_docs/Publications/Compendium/Resolution-ACN-TOR-ENG.pdf](http://www.icc-cpi.int/iccdocs/asp_docs/Publications/Compendium/Resolution-ACN-TOR-ENG.pdf).

<sup>90</sup> Article 36 of the Rome Statute of the International Criminal Court sets out that two lists shall be prepared regarding candidates for judicial office in accordance with their professional experience, either in the practice of law (for example as a judge, prosecutor and so forth) or as a person with established competence in an area of relevance, such as human rights or humanitarian law. Rome Statute of the International Criminal Court, U.N. Doc A/Conf. 183/9 (1998), Art. 36.

<sup>91</sup> See *supra* note 63.



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explained: “the IBA was responsible for ensuring that the *Tadić* trial was a fair trial. The UN said that they would only pay for one lawyer. His lawyer had never observed, let alone conducted, a cross-examination. The IBA employed two British barristers as part of the team and then the UN took over the cost. This was hugely important to ensuring a fair trial.”

Similarly, in the inter-state dispute resolution context, one participant noted that NGO assistance to smaller states with limited resources involved in litigation before the WTO was considered positive. This topic was discussed in detail during BIIJ 2012, in particular the important role played by the Advisory Centre on WTO Law in assisting developing countries to write briefs and develop legal arguments.<sup>92</sup>

### 2.1.3 Representing the views of stakeholders

It was recognized by participants that the role of NGOs in communicating the views of stakeholders could have clearly political overtones. For example, some participants considered demonstrations organized by NGOs outside of international criminal courts and tribunals as unhelpful, if not necessarily harmful, to the interests of international justice. Other ways of representing the views of stakeholders were considered more beneficial to the administration of international justice. For example, the role of NGOs as facilitators of communication with different interest groups was seen as potentially very important. Speaking about a regional court, one participant noted that its decisions, which are binding on the member states, have “important cultural, value-laden implications... In those circumstances where the court is making law not just to the parties, but for the community, we listen to all voices interested in being heard on a topic like that.”

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<sup>92</sup> Brandeis Institute for International Judges, *The International Rule of Law: Coordination and Collaboration in Global Justice*, THE INTERNATIONAL CENTER FOR ETHICS JUSTICE AND PUBLIC LIFE 30 (2012).

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In the context of international criminal justice, one participant described the STL practice of inviting a wide spectrum of NGOs based in Beirut to The Hague to exchange views on the Tribunal. It was observed that “[The STL] shares with other international tribunals the problem of distance justice. Less than one fifth of [the] personnel are in Beirut. NGOs are an invaluable means of helping to get over that problem. [The STL] periodically invite[s] all NGOs in Beirut — not just those in favor of the Tribunal — to a meeting, which goes on for several hours... The result is a spectrum of opinion. There are direct criticisms but the opportunity to fire back is precious.”

In regard to the “legacy initiative” of the ICTY, one participant referred to conferences<sup>93</sup> that had taken place in The Hague, Sarajevo, Zagreb and Belgrade, to which numerous NGOs were invited. The participant observed, “These conferences... were well-attended and the discussions were quite hot. Some people made a nuisance of themselves but [the conferences] were a huge success.”

NGOs representing groups of victims in international criminal cases were also seen as providing an important line of communication between courts and victims in some contexts.

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<sup>93</sup> Legacy Conferences, United Nations International Criminal Tribunal of Former Yugoslavia, <http://icty.org/sid/11449>.





Some BIJ participants on a tour of the historic Maltese city of Mdina

However, this activity was not entirely unproblematic. Speaking about the wide scope for victim participation in the ICC, one participant noted that NGOs were sometimes responsible for creating expectations that the court may not be able to satisfy.

A representative of a hybrid criminal court described the very cautious approach taken with regard to interactions with NGOs and the particular premium placed on transparency. “Judges do not meet with NGOs individually. We may attend public fora, but only if we are sure that the defense and prosecution are also represented. We are careful about that. We have capacity building through [international organizations] on our terms and ensure that the prosecution and defense are involved. We don’t want any [interaction] with any NGO that is not entirely transparent.”

#### *2.1.4 Monitoring of international judicial bodies*

The role of NGOs in monitoring international courts and tribunals, be it their proceedings or other aspects of their operation, was met with a qualified welcome by many participants.

Describing the attitude of a hybrid court, one participant stated, “We welcome NGOs monitoring us. However, one major complaint about NGOs in monitoring is that I wish they would be competent. They send people who are not experienced. We get comments that are ill-founded and inappropriate. At any time, we have fifty NGOs looking at us. This is, I think, an industry and it is self-perpetuating. They are good at commenting on the rights of the prosecution and victims and poor at commenting on the rights of the accused.” Thus, for this participant, a more competent and balanced oversight by NGOs was called for.

In relation to the ICC, some participants felt that the monitoring of the Court by NGOs was not entirely positive. One participant observed, “There is this sort of ‘mission complex’ on the part of NGOs. They think they are destined by God to watch the ICC in perpetuity, particularly in this early age where the Court still has to blossom and they will be watching each and every step... it is there and working, and the more interference, the worse it gets.” Another participant agreed that NGOs might broaden their focus to the anticipated growth in the domestic pursuit of international criminal justice, but did not wish to exclude the role of NGOs in supporting the ICC.

Other participants identified examples where the monitoring of the administration of international justice by NGOs was largely helpful. The role of Human Rights Watch in monitoring ICTR cases that have been referred to Rwanda,<sup>94</sup> for example, was seen in a positive light by one participant.

<sup>94</sup> See e.g. HUMAN RIGHTS WATCH, RWANDA: JUSTICE AFTER GENOCIDE: 20 YEARS ON 8-9 (March 28, 2014), available at [http://www.hrw.org/sites/default/files/related\\_material/2014\\_March\\_Rwanda\\_0.pdf](http://www.hrw.org/sites/default/files/related_material/2014_March_Rwanda_0.pdf).

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The Coalition for an Effective African Court on Human and Peoples' Rights,<sup>95</sup> an umbrella NGO representing a diverse group of over 300 individuals, academic institutions and other organizations, was identified by one participant as being actively engaged in monitoring the Court, but also in communicating directly with the Court: "Any time [there is] a session, they have a meeting. If [there are] public hearings, they attend. At meetings, judges come and interact and discuss.... They make comments on procedure, what they think is good and not good."

Such helpful activities notwithstanding, it was observed that sometimes the interest of NGOs in monitoring the work of international judicial bodies can go too far: "[They] wanted to be in attendance in our *in camera* hearings and wanted to sit in on our deliberations," said a participant. "That was truly amazing!"

### **- 2.2 Activities that seek to influence judicial decision-making**

Participants expressed the need for greater caution when the discussion turned to the different ways in which NGOs may seek to influence the process of judicial decision-making itself. One participant noted that different considerations arise depending on the nature of the judicial body. As one participant observed: "It is clear that when you have a criminal court, where there is the strict principle of legality, interference has to be discouraged. It can be different in human rights courts where it is the individual against the state. It is a different kind of procedure. The inter-state case may again be different."

In what follows, observations of participants regarding the role of NGOs in gathering evidence, lobbying, participation in litigation and submitting amicus curiae briefs are presented.

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<sup>95</sup> COALITION FOR AN EFFECTIVE AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS, <http://www.africancourtcoalition.org>.

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#### *2.2.1 Gathering evidence*

NGOs can assist the cause of international justice by contributing to the process of gathering evidence. In some cases, evidence gathered by NGOs has been admitted into evidence for trials at international courts and tribunals. A participant with insight into the ICC considered the work of NGOs such as Human Rights Watch to be important at the investigation stage and noted that the prosecution had based findings on the evidence provided by that NGO. This participant left open the question to what extent such reports could be used as evidence at the pre-trial and trial stages.

Speaking about the experience of the ECtHR, one participant noted that reliance is placed on reports by NGOs such as Human Rights Watch, not least when the Court is asked to issue a Rule 39 injunction<sup>96</sup> prohibiting the expulsion of a person to a country where there is the risk that the person will be exposed to serious human rights violations.

NGOs can also assist by providing training on the conduct of investigations. The intergovernmental facility Justice Rapid Response<sup>97</sup> was identified as conducting international criminal investigations as well as

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<sup>96</sup> Rules of Court of the European Court of Human Rights, Jun. 1, 2015. Rule 39 sets out the interim measures provision.

<sup>97</sup> JUSTICE RAPID RESPONSE, <http://www.justicerapidresponse.org>.





ATJ Judge Luis Canseco enjoying a plenary session

providing training. The benefits provided by this kind of organization included that investigations are conducted “in a professional manner so that [material] can be used as evidence” and they “only have the agenda of the body that commissions them.” The participant continued: “This type of NGO might be able to play a significant role in the future... [T]rials concerning mass atrocities always happen years after the events occurred and investigation on the part of the Prosecution in these courts commences very late. It would be more effective if we had some kind of investigative body in place, maybe while events are taking place.”<sup>98</sup>

Again, the activities of NGOs within the territory where mass atrocities were committed gave rise to the refrain “there are NGOs and *then* there are NGOs...” One participant with experience in Kosovo recounted how some NGO workers would arrive “with no money and expect funding from UN agencies for food and accommodation.”

<sup>98</sup> Since BIJ 2015 took place, the International Bar Association has launched the “eyeWitness to Atrocities” app, which will allow those filming or photographing abuses on their smartphones to document the exact time and place of the events and save them to a secure archive, so that the images can be used later as evidence in court proceedings. See <http://eyewitnessproject.org/>.

In relation to evidence-gathering itself, participants from several international criminal tribunals identified the inappropriate handling of evidence as being a significant issue. One judge commented, “What [the prosecution] have told me is that [the NGOs] contaminate the evidence so the prosecution can’t use it.” Another participant noted that some NGOs have impacted upon cases by seeking to influence witnesses.

### 2.2.2 Lobbying

Although, as noted earlier, lobbying is predominantly an activity that is ancillary to judicial decision-making, at times NGOs can lobby with the aim of influencing the outcome of specific proceedings. A participant brought up the *Brdanin* trial,<sup>99</sup> in which the ICTY Prosecutor sought to subpoena *Washington Post* war correspondent Jonathan Randal, who refused to testify, citing a qualified journalistic privilege not to give evidence. It was noted that substantial lobbying efforts<sup>100</sup> took place around the question, which ultimately became a sort of “trial within a trial.” The original decision of the Trial Chamber to subpoena Mr. Randal was ultimately overturned by the Appeals Chamber,<sup>101</sup> which considered an amicus brief submitted by 34 press companies and associations of journalists.

<sup>99</sup> Prosecutor v Radoslav Brđanin, Case No. IT-99-36-T, Judgment, ¶ 1195 (Int’l Crim. Trib. For the Former Yugoslavia, Sept. 1, 2004).

<sup>100</sup> See William Safire, *Enter the Globocourt*, N.Y. TIMES (Jun. 20, 2002), <http://www.nytimes.com/2002/06/20/opinion/20SAFI.html>; Reporters Without Borders, *Journalist Forced to Give Evidence to Rights Court* (June 13, 2002), available at <http://en.rsfb.org/bosnia-herzegovina-journalist-forced-to-give-evidence-13-06-2002,02595.html>; IFEX, *12 IFEX Members Support Legal Appeal of Subpoenaed Reporter* (August 13, 2002), available at [http://www.ifex.org/2002/08/13/12\\_ifex\\_members\\_support\\_legal\\_appeal/](http://www.ifex.org/2002/08/13/12_ifex_members_support_legal_appeal/).

<sup>101</sup> Press Release, The Prosecutor v. Radoslav Brđjanin & Momir Talic “Randal Case”: Appeals Chamber Defines a Legal Test for the Issuance of Subpoenas for War Correspondents to Testify at the Tribunal (Dec. 11, 2002), available at <http://www.icty.org/sid/8047>.



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Interestingly, one participant, referring to the *Arctic Sunrise* case<sup>102</sup> at ITLOS, expressed the view that the Russian Federation may have felt that it would be hard to receive an impartial judgment from the Tribunal following the intensity of both political and civil society pressure brought to bear in the case.

### 2.2.3 Participating in litigation

A less common way in which NGOs interact with international courts and tribunals – and which may be unique to human rights cases – is through direct involvement in litigation as an interested party or by providing legal advice and assistance to an interested party. Describing the rules in force at the ACtHPR, one participant explained that NGOs only have access to the court if they have observer status with the Commission<sup>103</sup> and the state party has made the declaration allowing them access.<sup>104</sup> This participant noted that NGOs had been directly involved in three cases before the Court, in which they had filed as applicants, with an affected individual identified as a second applicant.

NGOs are also entitled to seek an advisory opinion from the African Court, but here the NGO must be recognized by the African Union, not the Commission. An example of NGOs making use of this entitlement can be found in the request made by the Pan African Lawyers Union (PALU) and the Southern African Litigation Centre (SALC), which requested an advisory opinion on the legality of the

suspension of the SADC Tribunal<sup>105</sup> (referred to earlier in the report). In a different kind of NGO/Court interaction, the ACtHPR also has a practice of referring applicants to the Pan African Lawyers Union<sup>106</sup> when they are in need of legal assistance.

According to one participant with knowledge of the ECtHR, the European Convention on Human Rights protects not only individuals but also legal persons, thus enabling NGOs to bring claims as victims of human rights violations, which might involve, for example, issues relating to freedom of expression or the right to privacy. NGOs are also involved in litigation brought by individuals, and can assist in preparations for the proceedings, although they cannot (generally) bring a case on behalf of a particular individual.

But the general exclusion of NGOs from having standing in individual claims at the European Court appears to allow for an exception in certain cases. Recalling the Grand Chamber case of *Centre for Legal Resources on Behalf of Valentin Câmpeanu*,<sup>107</sup> which concerned the death in an institution of a person with mental and physical health challenges, one participant noted that the Court had ruled in that case that the NGO was able to lodge the claim themselves on behalf of the deceased “applicant,” given the exceptional nature of the case. Notably, several other NGOs also intervened with amicus briefs in this case,<sup>108</sup> including Human Rights Watch, the Euroregional Center for Public Initiatives, the Bulgarian Helsinki Committee and the

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<sup>102</sup> The “Arctic Sunrise” case (Neth. v. Russ.), Case No. 22, Order of Oct. 25, 2013, [International Tribunal for the Law of the Sea (ITLOS)].

<sup>103</sup> AFRICAN COMMISSION ON HUMAN AND PEOPLES’ RIGHTS, <http://www.achpr.org>.

<sup>104</sup> Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of the African Court on Human and Peoples’ Rights, *available at* <http://www.achpr.org/instruments/court-establishment/>. Art. 5(3) provides for the institution of cases by NGOs and individuals provided the relevant state has accepted the jurisdiction of the court to hear such cases under Article 34(6) of the Protocol.

<sup>105</sup> In the Matter of a Request by the Pan African Lawyers Union (PALU) and Southern African Litigation Centre (SALC) for an Advisory Opinion Before the African Court on Human and Peoples’ Rights, Advisory Opinion No. 2 of 2012, (African Court on Human and Peoples’ Rights, Nov. 23, 2012).

<sup>106</sup> What PALU Does, PAN AFRICAN LAWYERS UNION, <http://lawyersofafrica.org/what-palu-does>.

<sup>107</sup> *Centre for Legal Resources on Behalf of Valentin Câmpeanu v. Romania*, App. No. 47848/08 Eur. Ct. H.R. 789 (2014).

<sup>108</sup> Briefs were submitted with the permission of the President under Article 36 § 2 of the Convention and Rule 44 § 3 of the Rules of the European Court of Human Rights.





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Mental Disability Advocacy Center, particularly with reference to the question of the standing of the Centre for Legal Resources. This participant considered the case to offer a greater opportunity for NGOs to participate directly in litigation before the ECtHR, and found it surprising that it had not received more attention.

#### 2.2.4 *Amicus curiae* briefs

The issue regarding the role of *amicus curiae* briefs in the pursuit of international justice received robust consideration during the session, with a range of different practices and perspectives brought to the discussion. Although *amicus* briefs are submitted by states, academics, and various entities, NGOs in particular often seek to file them.

In relation to the role of *amicus* briefs in the international criminal context, one participant pointed to the intervention in the ICTY *Furundzija* case<sup>109</sup> by the Coalition for Women's Human Rights in Conflict Situations as an example of a helpful contribution. The brief concerned the re-opening of proceedings, calling for full disclosure of medical and psychological records, and allowing cross-examination of a witness in relation to those records.<sup>110</sup> The participant considered the submissions to be "very important for the purpose of the case."

Another participant with experience in the ICTY said that the Tribunal had not received many applications for filing of *amicus* briefs. However, Rule 74 of the ICTY Rules of Procedure

specifies, "A Chamber may, if it considers it desirable for the proper determination of the case, invite or grant leave to a State, organization or person to appear before it and make submissions on any issue specified by the Chamber."<sup>111</sup>

Participants with experience in the ICTR noted the contribution of *amicus* briefs, particularly in relation to cases referred to the Rwandan courts. The ICTR has faced challenges in some of these cases owing to complicating "equality of arms" factors, including situations where the prosecution requests a referral, the Rwandan government is invited to make submissions, the accused is a fugitive, or there is a lack of experienced duty legal counsel in any proximity to the court. For this participant, *amicus* briefs offering insight into the Rwandan legal system "provided the balance we needed."

As for other criminal institutions, the ICC has, according to one participant, accepted *amicus* briefs from NGOs, but only "sparsely." The ECCC can invite or grant leave for an *amicus* brief from either an organization or person. However, "[the ECCC] does not want someone pushing a particular agenda, and [it is] careful about that," said one participant with insight into that institution. The STL has also invited *amicus* briefs in several cases. One participant recalled the valuable contribution of the numerous briefs submitted in relation to the question of whether non-natural persons may be prosecuted for contempt of court, following the publication by a Lebanese media outlet of the names of purported confidential witnesses before the Tribunal. In that case,<sup>112</sup> an open

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<sup>109</sup> Prosecutor v Anto Furundzija, Case No. IT-95-17/1-T, Judgment (Int'l Crim. Tribunal of the former Yugoslavia, Dec. 10, 1998).

<sup>110</sup> Prosecutor v Anto Furundzija, Case No. IT-95-17/1-T, *Amicus Curiae Brief Respecting the Decision and Order of the Tribunal of 16 July 1998 Requesting that the Tribunal Reconsidering Its Decision Having Regard to the Rights of Witness "A" to Equality, Privacy and Security of the Person, and to Representation by Counsel*, ¶ 5 (Int'l Crim. Tribunal of former Yugoslavia), available at <http://www.iccwomen.org/publications/briefs/>.

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<sup>111</sup> International Criminal Tribunal for Yugoslavia, Rules of Procedure and Evidence, Rule 74, U.N. Doc. IT/34/REV. 49 (2013).

<sup>112</sup> In the Case against NEW TV S.A.L. & Karma Mohamed Tahsin Al Khayat, Case No. STL-14-05/T/CJ, (Special Tribunal for Lebanon, 2015).



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invitation to “any interested party, such as media organizations, non-governmental organizations, or academic institution” was issued by the Contempt Judge. Twenty briefs were submitted, for example from the President of the Beirut Bar Association, the Order of Lebanese Press Editors, a former Lebanese Prime Minister, and the legal representatives of victims in a related case.

The role of amicus briefs appeared to be significant for human rights courts. The ACtHPR appeared very welcoming of amicus briefs, with one participant noting: “[NGOs] must apply to the Court, stating the reasons why they want to submit an amicus brief and [the Court] then makes a judicial ruling on whether the NGO should be allowed to file the brief or not. ...the briefs are quite good and well researched, so it reduces [the judges’] research work. [The Court] almost always allows them to come.” The ECtHR also makes provision for the admission of amicus briefs according to an admissibility procedure under Rule 44 of the Rules of Court.<sup>113</sup> Here, as with other international courts and tribunals, the focus is on whether the submission is “in the interests of the proper administration of justice,” which is doubtful where the intervention appears, as one participant noted, “too biased or general.” There are substantial examples of amicus interventions in ECtHR jurisprudence,<sup>114</sup> including in many Grand Chamber cases.

In relation to inter-state dispute resolution mechanisms, the ICJ appeared to have a somewhat unique approach to the submission of statements or documents by international NGOs in advisory opinion cases. In accordance with

Practice Direction XII,<sup>115</sup> such documents are not to be considered as part of the case file, but will be treated as publications readily available and may be referred to by states and intergovernmental organizations presenting written and oral statements in the case in the same manner as publications in the public domain. ITLOS followed a similar procedure with amicus briefs in a recent case in which the briefs were not part of an official case file, but were nonetheless treated favorably in that the submissions were posted on an accessible website. In general, though, ITLOS rules do allow for the possibility of amicus submissions by intergovernmental organizations.

Somewhat in contrast to the restrictive approach taken by the ICJ, the ATJ invites extensive involvement by NGOs in many aspects of the Tribunal’s work, including in relation to proceedings. According to one participant, “the position the Tribunal has now is to try to get into the proceedings as much of civil society as possible, as this kind of work reflects directly on our society. The more they provide their views and participate, the better the integration process.” Regarding the question of procedure, the participant observed, “there is no explicit rule against it. So if [there is no rule against it, the Tribunal] can admit it.” This position echoes that adopted by the IACtHR, as noted in the Szazi article.<sup>116</sup> Addressing the possibility that such an open approach to participation in proceedings before the ATJ could become overwhelming, this participant expressed the view that the technical nature of many cases made it unlikely that the Tribunal would receive substantial applications to intervene.

Still other institutions, such as the CCJ, were considering amending their Rules of Procedure to allow for the submission of amicus curiae

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<sup>113</sup> Rules of Court of the European Court of Human Rights, Jun. 1, 2015. Rule 44 is titled “Third-party intervention.”

<sup>114</sup> See Laura Van den Eynde, *An Empirical Look at the Amicus Curiae Practice of Human Rights NGOs Before the European Court of Human Rights*, 31 NETHERLANDS QUARTERLY OF HUMAN RIGHTS 271, 282 (2013), who identifies the involvement of over 140 NGOs in the case law of the ECtHR. Interestingly, she finds that the intervention of amici does not increase the likelihood that the Court will find a violation.

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<sup>115</sup> *Practice Directions*, INTERNATIONAL COURT OF JUSTICE, available at <http://www.icj-cij.org/documents/index.php?p1=4&p2=4&p3=0>.

<sup>116</sup> See *supra* note 86.



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Some courts accept applications to submit briefs whereas others adopt a practice of inviting submissions on questions when the court or tribunal requires expert insight. Several participants felt that what mattered most was not the method chosen for dealing with amicus briefs, but that there was some form of admissibility procedure.

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briefs. The CCJ has decided to engage with NGOs and formalize the process of their participation. Under the proposed new rules, amici can submit written briefs and can even make oral submissions at the Court's discretion. Some national governments have questioned these steps on the ground that these developments threaten to slow the judicial process and increase costs. Additionally, NGOs are not legal individuals, further complicating their relationship with the Court. The CCJ is exploring whether cost orders could be made and be imposed against NGOs. However, there is no question that wider participation will be accorded to the participation of civil society.

From the discussion it was clear that most international courts and tribunals have come to accept amicus curiae briefs, albeit following differing criteria. Some courts accept applications to submit briefs whereas others adopt a practice of inviting submissions on questions when the court or tribunal requires expert insight. Several participants felt that what mattered most was not the method chosen for dealing with amicus briefs, but that there was some form of admissibility procedure.

On a final note, in addition to the issue of admissibility, the issue of procedural fairness was also raised in relation to the submission of amicus briefs that support one side in an adversarial procedure. Here, views seemed to

emphasize the need for a contextual approach to the question, with one participant noting, "There is really a situation in which the court would have to take into account that, if it admits a brief on the law that goes in a certain direction, [someone] should submit a brief in the other direction... But it really depends on the situation, in particular the situation in favor of the accused. It is not necessary to adopt a protective approach for the prosecution."

### 3. Conclusion

By the end of the session it was clear that NGOs have come to play a significant and often positive role in the administration of international justice. Activities that seek to directly support international courts and tribunals were naturally very well regarded by participants, although plainly unhelpful activities, such as disseminating inaccurate information about judgments and the workings of international judicial bodies, were criticized. Between these extremes, however, there lay considerable variation in practice and perspective, based in part on the nature of the judicial body (criminal, human rights or interstate) and in part on the particular activity being considered. Where NGO activities sought to influence the decision-making process, for example through the submission of amicus curiae briefs, some judges adopted a very cautious approach whereas others invited a wide range of submissions. Where activities sought to bring the perspectives of stakeholders to the attention of the court or tribunal, many participants were welcoming although others saw the need to exercise considerable caution in this connection as well.

As one element of the dynamic relationship between international judicial bodies and local actors, the answer as to whether NGOs are a help or hindrance to the cause of international justice depends, as with many issues discussed during the Institute, on who is asked.



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## V. The Local Impact of International Justice

### 1. Introduction

International judicial bodies are charged with adjudicating cases that come before them on the facts presented. However, depending on the nature of the court or tribunal, there will be a wider or narrower range of stakeholders who are affected by the resulting judgment. The purpose of the institute's final session was to explore the impact of international justice at the local level from the perspective of international human rights courts, international criminal courts and tribunals, and inter-state dispute resolution bodies. Several aspects of this impact were discussed, including the decisions of international courts and tribunals that are binding on states not party to the proceedings, the specific role of domestic courts in applying international law, and the proper approach the international judge should take with regard to the potential local impact of a judgment. As a starting point, the session focused on the politically charged issue of migration in the Mediterranean, an issue that has only increased in significance since the Institute took place in January 2015. As background for this discussion, participants had read a report entitled *Access to Protection: A Human Right? National Report – Malta*,<sup>117</sup> which describes the numerous international law challenges presented by migration in the Mediterranean. These include, amongst other things, obligations of *non-refoulement* under international refugee law and international human rights law, as well as the duty to rescue under the international law of the sea.

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<sup>117</sup> Jean-Pierre Gauci & Patricia Mallia, *Access to Protection: A Human Right? National Report – Malta*, PEOPLE FOR CHANGE FOUNDATION, 2013, available at <http://www.pfcmalta.org/access-to-protection-a-human-right.html>.

### 2. Migration in the Mediterranean – the local impact of judgments of the European Court of Human Rights in the Maltese response to irregular movement

At the start of the session, three cases from the ECtHR relevant to the Maltese context were presented. The first two cases, *Aden Ahmed v. Malta*<sup>118</sup> and *Suso Musa v. Malta*,<sup>119</sup> concerned Malta's practice of detaining asylum-seekers and the conditions of detention. In *Aden Ahmed*, the Court held that Malta had violated the applicant's right not to be exposed to inhuman or degrading treatment, as guaranteed by Article 3 of the European Convention on Human Rights, due to the conditions of detention in which she had been held. The adverse conditions included the fact that "dormitories were shared by so many people with little or no privacy, that she suffered from heat and cold, that an inadequate diet was provided, that there was a lack of female staff to deal with the women detainees and above all that there was a lack of access to open air."<sup>120</sup> The Court reiterated the principles elaborated by the Grand Chamber in *M.S.S. v. Belgium and Greece*<sup>121</sup> concerning the obligations of host states towards asylum seekers, including in the context of immigration detention.

In both the *Aden Ahmed* and *Suso Musa* cases, the Court also found violations of Article 5 of the European Convention, namely the rights not to be arbitrarily detained and to be provided with a means of challenging the lawfulness of detention. In *Aden Ahmed*, for example, there

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<sup>118</sup> *Aden Ahmed v. Malta*, App. No. 55352/12, Judgment, Eur. Ct. H.R. 720 (2013).

<sup>119</sup> *Suso Musa v. Malta*, App. No. 42337/12, Judgment, Eur. Ct. H.R. 721 (2013).

<sup>120</sup> See *supra* note 118 at para. 92 (2013).

<sup>121</sup> *M.S.S. v. Belgium and Greece*, App. No. 30696/09, Judgment, Eur. Ct. H.R.108 (2011).





A stairway in the labyrinthine lanes of historic Malta

was no evidence that the Maltese authorities had taken any steps to arrange for the removal of the applicant from Malta during the entire period of her detention, despite the requirement that a person shall only be detained for as long as deportation or extradition proceedings are in progress. In both judgments, the Court recalled numerous previous instances where it had found Malta's legal procedures to fall short of its obligations under Article 5.

In relation to the central theme of the session – the local impact of international justice – the questions that emerged for participants were the extent to which states may prefer to act in breach of their international obligations and the conditions under which they may consider it appropriate to do so. It was noted that Malta had operated a system of almost automatic immigration detention of asylum seekers for many years, and there are clear political incentives for the continued practice, notwithstanding occasional chastisement and

financial penalties imposed by the European Court of Human Rights.<sup>122</sup>

The final case, *Abdi Ahmed and others against Malta*,<sup>123</sup> concerned a challenge by a group of migrants to their proposed expulsion to Libya. According to the case's statement of facts,<sup>124</sup> more than one hundred migrants in a boat off the Maltese coast were intercepted in 2013 by the Armed Forces of Malta. Without being given the opportunity to apply for asylum, the migrants were issued with removal orders and taken to a location in the vicinity of the airport. During that day, the Maltese prime minister was asked what the government was planning to do with the migrants. His reply was reported as follows: "All the options are being considered. This is not a question of push-backs. This country has to send a message and we are sending a message that we are considering all the options, that we are not pushovers." When asked whether he was aware that push-backs were illegal, the prime minister responded, "We are considering all options in the interest of the country."

Media outlets subsequently reported that two Air Malta flights had been booked to ferry the migrants back to Libya that night. Acting as "persons concerned," according to Rule 39 of the Rules of Procedure of the ECtHR,<sup>125</sup> The People for Change Foundation and the Jesuit Refugee Services, supported by a group of NGOs, applied to the Court for an interim measure prohibiting the expulsion of the migrants. The act of applying for the injunction itself gave pause to

<sup>122</sup> It is worth noting that significant developments on the policy and practice of detention have taken place since these decisions. Indeed at the end of 2014, there were only 30 people in detention. The Malta Human Rights Report for 2015, published by The People for Change Foundation, provides useful information in this regard.

<sup>123</sup> *Abdi Ahmed and others against Malta*, App. No. 43985/13, Decision, Eur. Ct. H.R. para. 14 (2013).

<sup>124</sup> *Id.* at para. 3.

<sup>125</sup> Rule 39, Rules of Court of the European Court of Human Rights, Jun. 1, 2015.

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the government, with the Prime Minister, in the process of confirming that arrangements for the transfer of the migrants to Libya were in place, commenting, “While undertaking these considerations we have been verbally informed that a number of NGOs have lodged a request for an interim measure before the ECtHR, to stop a decision which the Maltese Government has not yet taken. We are still waiting for a written confirmation of this procedure and all these points... I reassure this House that the Government’s, the people’s and the country’s obligations towards the rule of law and the decisions of the ECHR will be respected.”<sup>126</sup>

The acting president of the Section handling the Rule 39 application decided to grant the application and informed the Maltese authorities that the migrants should not be removed for the duration of proceedings before the Court. He also asked the Maltese authorities to provide information. According to the statement of facts, “following the interim order the migrants were transferred to the regular detention centers and detained in accordance with the provisions of the Immigration Act. UNHCR was granted access to the applicants in the evening of that same day. The applicants learnt about the situation and the original Government’s plans only at that time.”<sup>127</sup>

This case provided BIIJ participants with clear evidence of the local impact of the ECtHR as an institution whose authority is respected by the Maltese authorities, and whose procedures for the protection of human rights are known and accessible to sections of civil society who use them to effectively protect individuals vulnerable to human rights violations. At the same time, the scenario as described highlights a weakness in the system, given that the case came approximately a year and a half after the Grand Chamber

judgment in *Hirsi Jamaa*.<sup>128</sup> In this case, the ECtHR ruled that Italy was in breach of Article 3 of the European Convention by intercepting boats at sea and forcing them to return to Libya, where there was a risk of torture or inhuman or degrading treatment and a further risk of onward *refoulement* to countries of origin. Moreover, the interim measure application was followed by another instance where the Maltese (and Italian) authorities instructed the master of the MT *Salamis*, a private vessel, to return migrants it had rescued to Libya, instructions which were challenged by the master and led to the vessel being out at sea for some days before finally landing in Italy.

To what extent, then, was Malta bound by the *Hirsi* judgment? This question elicited a robust discussion, revealing differing perspectives on the issue of the wider application of rules of international law as interpreted by international courts and tribunals.

### **3. The extent to which decisions of international courts and tribunals bind non-parties**

A first point in the discussion was that the extent to which non-parties may be bound by a judgment would depend on the court or tribunal that issued it. Here, one participant observed that the statute of the ICJ provides that its decisions are binding on the parties to the particular litigation, but considered that, perhaps, while bearing in mind the fact-specific aspects of judgments, a different approach may be required in a human rights context.

Speaking of the European system for the protection of human rights, one participant

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<sup>126</sup> See *supra* note 123 at para. 19.

<sup>127</sup> *Id* at para. 22.

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<sup>128</sup> *Hirsi Jamaa and others v. Italy*, App. No. 27765/09, Judgment, Eur. Ct. H.R. 1845 (2012).



observed that while each case turns on its individual facts, the case law that has been developed by the Court can have wider implications for states not party to the litigation. Thus, whereas the *Hirsi* case turned on the specific facts relating to the actions of the Italian state authorities toward ships carrying non-citizens seeking to enter the EU, the principle that a state taking control over a vessel at sea has jurisdiction for the purpose of establishing responsibility for the protection of human rights under Article 1 of the European Convention is of wider application. Nevertheless, this participant emphasized the fact-specific, individual nature of the Strasbourg process, which would suggest that the existence of the *Hirsi* jurisprudence would not automatically entail a breach of Article 3 by the Maltese authorities had they returned the migrants in the *Abdi Ahmed* case to Libya. A fact-specific, individual assessment would have to be conducted in order to establish the extent of Malta's obligations on a case-by-case basis.

Similarly, reference by the Court in the *Aden Ahmed* case to the principles in the Grand Chamber judgment in *M.S.S. v. Belgium and Greece*<sup>129</sup> reflects the way in which the Court develops principles of wider application as part of its consideration of a particular set of facts in an individual case.

In an effort to have a more widespread impact at the local level, the Court has introduced a pilot judgment procedure,<sup>130</sup> now codified by Rule 61 of the Rules of Court, with one objective being to “assist the 47 European States that have ratified the European Convention on Human Rights in solving systemic or structural problems at national level.” Judgments are specifically directed at states party to the litigation, but

in a more expressly prescriptive way than judgments that are restricted to the resolution of an individual complaint. Examples of measures requested by the Court include, for example, “to introduce ... at the latest within one year from the date on which the judgment became final, an effective domestic remedy against excessively long court proceedings.”<sup>131</sup>

The wider application of the judgments of the African Court was also acknowledged by a participant with knowledge of that system. When an application is filed with the African Court, notice of the application is given to all state parties, but there is no obligation to participate. Judgment is served on all state parties, although no decision has been taken as to the extent to which these judgments are binding on non-parties to the litigation. An example of the potential efficacy of this practice was provided in relation to a finding by the Court that a Tanzanian prohibition on independent political candidates breached the Charter.<sup>132</sup> Not only is Tanzania taking steps to comply with the judgment, but Nigeria, which has a similar legislative provision, has also taken steps to amend its constitution in this respect. It remained unclear whether the action taken by Nigeria was in response to the judgment of the African Court, but the participant recognized the possibility.

Thus, for human rights courts, it would appear that the scope for judgments impacting non-parties is significant, even if such parties may choose not to acknowledge the relevance of particular judgments for political or other reasons.

<sup>129</sup> See *supra* note 121.

<sup>130</sup> *Pilot Judgments*, EUROPEAN COURT OF HUMAN RIGHTS PRESS UNIT (July 2015), available at [http://www.echr.coe.int/Documents/FS\\_Pilot\\_judgments\\_ENG.pdf](http://www.echr.coe.int/Documents/FS_Pilot_judgments_ENG.pdf).

<sup>131</sup> *Rumpf v. Germany*, App. No. 46344/06, First Pilot Judgment in Respect of Germany, Eur. Ct. H.R. 2259 (2010).

<sup>132</sup> *Tanganyika Law Society and the Legal and Human Rights Centre and Reverend Christopher Mtikila v. The United Republic of Tanzania*, App. No. 009&011/2011, Judgment, (African Court on Human and Peoples' Rights, Jun. 15, 2013).



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Speaking from the perspective of inter-state dispute resolution mechanisms, one participant explained that, with an exclusive focus on addressing the specific subject matter of the dispute between the parties, courts and tribunals such as the ICJ and ITLOS frame their judgments in a way that allows a margin for the states to decide how they will implement them. “[Inter-state courts and tribunals] try to avoid interfering into... how that will be implemented as it is counterproductive and interferes in domestic means. [Inter-state courts and tribunals] rely on the fact that states will find the right means to implement [the judgment]. At least for the inter-state courts, this is the common approach adopted in every judgment.”

As for international criminal courts and tribunals, it may be observed that some judgments can have a persuasive authority in other international criminal jurisdictions, and there was also substantial discussion of the legislative and operational measures states may take to both facilitate the work of these international judicial bodies and to develop domestic legal systems to promote complementarity. Whether the judgments of international criminal courts and tribunals actually contribute to the reduction of impunity in the world remains, however, an open question.

#### **4. The role of domestic courts in applying international law**

As observed at the outset of the Institute, an important way in which international law has local impact is through the work of the domestic judiciary. The concept of embeddedness as discussed in the Helfer article<sup>133</sup> was seen by one participant as having particular relevance to the issue of the local impact of the European system for the protection of human rights. This

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<sup>133</sup> See *supra* note 77.

participant noted that national courts “repeatedly refer to the case law of the [European] Court as guidance on how to interpret the national legislation and the Convention in the national context.”

The already mentioned case heard by the South African Constitutional Court, concerning the duty of the South African Police Service to investigate allegations of torture against Zimbabwean citizens in Zimbabwe by Zimbabwean officials, was also seen by one participant as an example of “harmonization” between national and international criminal courts.<sup>134</sup>

Finally, the example of the Nevada Supreme Court responding to the *Avena* case<sup>135</sup> reaffirms the view that domestic courts are playing an increasingly active role in all aspects of international justice.

#### **5. To what extent should international judges be concerned with the local impact of their work, and what should they do about it?**

To the extent that these questions concern the need for judges to be conscious of how judgments will be received by different stakeholders, including the general public, one participant considered it desirable for international judges to take pains to explain how a decision was reached. “I think that judges should be careful not only to explain the judgment itself in the reasoning part of the judgment, to make it persuasive to lawyers and themselves, but also to be aware of the possible impact of the judgment in order to avoid misunderstanding. This is an important consideration for a judge.”

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<sup>134</sup> See *supra* note 11.

<sup>135</sup> See *supra* note 22.





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This participant gave the example of the judgment in the *Jurisdictional Immunities* case concerning compensation awarded by Italian courts against the German state for crimes committed during the Second World War.<sup>136</sup> He pointed to the general emotional feeling that the conduct of Germany in relation to the Italian victims who were not compensated was not commendable. He explained, “The Court went out of its way in its judgment to say that the judgment does not mean to say that Germany is free from responsibility. It was free from the kind of responsibility the [Italian] Court of Cassation claims it has, but compensation was not paid to a group of people who suffered, and that should be left to further negotiation between the parties. [This passage was] totally irrelevant to the text of the judgment but it was important to say that and to make the position of the Court clear and be acceptable to public opinion, which was justifiably enraged by what Germany did and the implication of soft judgments.”

A second example concerned the ICJ advisory opinion in the Kosovo Independence Case.<sup>137</sup> Having expressed the opinion that the declaration of independence was not prohibited under international law, the text “tried to explain that this view was not an endorsement

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<sup>136</sup> See *supra* note 7.

<sup>137</sup> Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 2010 I.C.J. 403 (Jul. 22).

of the declaration in a legal sense. It answers the question posed, which was whether what the Kosovo authorities did was legal in the eyes of international law... This is also relevant to public attitudes...”

Importantly, while this judge saw the importance of explaining a judgment in a way that could help the wider public to understand how it was reached, there was no question of allowing public pressure to influence the decision-making process itself, or the factors that are taken into consideration.

## 6. Conclusion

Just as domestic factors impact upon the work of international judicial bodies, so too does the work of international judicial bodies impact in many ways at the local level: legislation is updated, individuals are compensated, retrials are ordered. However, reflecting back to the first section of this report, the Westphalian legal order does not invite consideration of a system of international law that includes one or several international judicial bodies whose decisions are binding on all states, as opposed to the states that are party to particular litigation (and only then to the extent that the states are willing and/or able to be bound). Although there appears to be a greater expectation of harmonization across states parties to regional human rights agreements, in this context as well there is no binding system of judicial precedent such as that found in common law jurisdictions. Moreover, notwithstanding a general trend towards adapting the domestic legal framework to respond to judgments of regional human rights courts, there are at times powerful political incentives against adaptation. This last observation recalls the dominance of the state sovereignty paradigm, where compliance with international legal obligations is generally considered desirable by most states, so long as their crucial interests are not compromised.



# Breakout Discussions

## I. International Criminal Courts and Tribunals

Judges hailing from international criminal courts, along with colleagues from human rights jurisdictions, identified victim participation in proceedings and the definition of charges as the central topics to address during their breakout session. Comparison of varying processes, challenges, and benefits among the courts made for a lively and diverse discussion.

### 1. Victim participation

There was general agreement that the introduction of victim participation into criminal proceedings was made with good intentions; mass atrocity trials call for mass participation. The group conceded, however, that having victims participate in the trials of alleged perpetrators is fraught with challenges.

Deciding who can participate is a primary challenge. At the ICC, for example, only victims affected by the crimes charged by the prosecution, as opposed to those affected by the general situation, can participate or receive reparations.<sup>138</sup> As one judge observed, “from the point of view of victims, this mechanism is discriminatory. Some will have access and some will be left out. This is clearly not in the interest of the victims themselves.” The general feeling was that limiting victim participation undermined the goal of bringing victims into direct contact with justice procedures.

Maintaining “equality of arms” was another major concern raised – it was argued that having victims represented in the courtroom serves to

double, in effect, the strength of the prosecution. One judge counter-argued, however, that trials with co-accused persons also represent an inequality of arms, although one that has not been called into question. Furthermore, it was argued that the victims’ representatives at the ICC do not overpower the defense since they are more concerned with battling the scope of the prosecution’s case. There was some disagreement as to whether victim participation created an unfair trial, and if so, to what extent.

A third concern – and one that built upon the earlier session on the pace of justice – was that victim participation prolongs proceedings, thereby infringing on the right of the accused to a trial without undue delays. The ECCC serves as a case in point. Its proceedings have faced significant delays since “civil parties” – that is, victims of the crimes in question – run into the thousands. These parties can request investigative action, and then they usually appeal when their requests are denied. The result is a significantly slowed down justice procedure. The numbers of victims wishing to participate in proceedings is also increasing, which exacerbates the problem. The ECCC’s first trial had 90 civil parties; the second saw almost 4,000 come forward. The ICC has seen a similar jump, with 129 victims represented at its first trial, 366 for its second, and almost 5,000 for its third.<sup>139</sup>

Perhaps one of the most pertinent critiques raised was the high cost of maintaining victim participation programs. The fact that 15% of the ECCC’s budget goes towards victim participation was offered to support this point.

<sup>138</sup> Rome Statute of the International Criminal Court, U.N. Doc A/ Conf. 183/9 (1998), Art. 57.

<sup>139</sup> These figures, drawn from the respective court’s websites, are accurate as of March 2015.



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The place of reparations in victim participation was also discussed. At the ICC, reparations only come at the end of proceedings if the accused is found guilty. However, even with a guilty verdict, victims may not feel that the reparations offered meet their needs. In some cases, there can be a concern that collective reparations awarded to victims could spur reprisals, especially in cases where the reparations come at a time when the conflict is still ongoing. Furthermore, some victims say that they prioritize ending the conflict above all else. Therefore, even when reparations are eventually distributed to a limited pool of victims, this action may not align with local priorities. In comparison, at the ECCC, victims can approach donors to request reparations. Most victims request symbolic reparations, such as memorials or public ceremonies that acknowledge their suffering, since they realize that financial reparations are essentially unattainable.

The judges in the breakout group widely recognized a need for reforming victim participation as it exists currently, although they had a variety of opinions about what form it should ideally take. Some participants went even further, however, and suggested that victim participation be eliminated altogether. One judge proposed that the ICC remove victims from criminal proceedings and provide reparations solely through the Victims' Trust Fund, which would also incorporate some form of truth-telling process for victims. Another judge cited potential precedent for such reform in the resolutions of the UN Congress on Crime, which dictate that the international community has a responsibility to compensate victims irrespective of whether the person responsible for the crime is tried, punished, or can provide compensation.

Meanwhile, another participant offered the STL as an example of how victim participation can actually work. The Tribunal's positive experience

in this area was attributed to professionalism on the part of the victims' counsel and limitations placed on that role. It was recommended that victim participation be tightly controlled rather than "flinging the baby out entirely with the bath water." There was also discussion about restricting victim involvement to opening and closing statements, which would afford victims emotional catharsis without obstructing the trial.

By the end of the discussion, the general consensus, as expressed by one participant, was that victim participation "is not of general direct assistance in reaching conclusions." Furthermore, while it can be effective in some kinds of justice procedures, "in the mass atrocity crimes there are problems and it is not a very good idea in practice."

## 2. Definition of charges

The second subject the judges addressed was the question of "who defines the charges in international criminal law proceedings," a question that encompassed both a literal comparison of different courts' modalities and a normative discussion of how charges should be defined. It was acknowledged that confirmation of charges procedures varied between courts. At the ICC, the prosecution defines the charges in the Document Containing the Charges, which is approved by the Pre-Trial Chamber. That Chamber's exact means of approving the charges or requesting greater clarity has varied by case. At the Lebanon Tribunal, a single pre-trial judge either dismisses or remits an indictment. The case then goes to a Trial Chamber, which sees the case for the first time.

There was disagreement as to whether a single judge or a panel of judges was preferable to confirm the charges and whether the same judge(s) should then serve during the trial phase.



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It was highlighted that a judge confirming the charges and then sitting on the trial would know excluded evidence. On the other hand, it was mentioned that when there is no crossover in the judges, evidence has to be disclosed a second time and this prolongs the process. Ultimately, there was a wide variety of opinions about the optimal procedures for pre-trial confirmation of charges.

Several problems with current confirmation of charges approaches were also discussed. One judge expressed concern that an initial lack of clarity in the charges and evidence allows “cherry picking” of both later during the trial phase. This risks “surprising” the defense and undermining the overall fairness of the trial. In one case at the ECCC, the charges were adjusted during an appeal process on the grounds that issues of law since the initial charges had been brought were long and convoluted. There was ultimately a retrial, which included facts established in the previous trial, which disrupted the strategy of the defense. Participants also recognized that sometimes there are discrepancies between what the prosecution discloses during the pre-trial phase and the trial phase, for example when witnesses remember additional information.

The breakout group concluded with a brief discussion of a recent judgment issued by the ECtHR on the admittance of hearsay evidence at trial.<sup>140</sup> In the United Kingdom’s *R v Horncastle* case,<sup>141</sup> the UK Supreme Court upheld a decision allowing hearsay evidence. This case was appealed to the ECtHR, which had previously held that hearsay could not be the sole or decisive evidence proving guilt of the accused, and it eventually

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<sup>140</sup> *Horncastle and Others v. the United Kingdom*, App. No. 4184/10, Judgment, Eur. Ct. H.R. (March 16, 2015).

<sup>141</sup> *R v Horncastle* [2009] UKSC 14 (appeal taken from the Court of Appeal Criminal Division) (U.K.).

came before the Grand Chamber. The ECtHR ultimately held that its mandate is not to create law but to ensure fair trial standards, that admissibility of evidence is primarily a matter for regulation by national law, and furthermore that English common law has developed sophisticated counterbalancing tests to ensure a fair trial. The original convictions were thus held to entail no violation of the European Convention on Human Rights.

One judge highlighted that evidentiary rules in the common law are based on the jury system, and juries are absent from international criminal trials. There had previously been debate whether the use of both juries and hearsay evidence could arguably infringe Article 6 of the European Convention on Human Rights and Article 14 of International Covenant on Civil and Political Rights, which both guarantee the right to a fair trial.

Indeed, the ideal of a fair trial, and how it can be guaranteed in the face of the various policies and practices of international courts and tribunals, constituted the common thread in the criminal breakout group discussions.



Brandeis interns Amelia Katan and Michael Abrams



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## II. Inter-state Dispute Resolution Courts

During the inter-state dispute resolution breakout session, two primary topics were discussed. The group continued the exploration of issues surrounding the implementation of international decisions at the national level from the perspective of their respective institutions, and also discussed various aspects of the use of experts appointed by tribunals to clarify issues.

### 1. Implementation of decisions at the national level

The implementation of decisions plays out in different ways according to the country concerned. Countries have a certain amount of discretion regarding implementation, which sometimes generates confusion and even non-implementation. This issue also covers the question of compliance with decisions at the national level. This is especially true at ITLOS where no provision for ensuring compliance with its decisions exists. In the ICJ's case, there is the UN Charter, which permits the Security Council to involve itself when non-compliance occurs. The question for each judge during this session was: How do issues of implementation affect the inter-state dispute resolution regime?

It was pointed out that the ATJ faces implementation challenges in relation to its different kinds of procedures. For example, the Tribunal may nullify any decision from either the Andean Council of Foreign Ministers or the Commission of the Andean Community, and even any resolution from the General Secretariat of the Andean Community, which violates the Cartagena Agreement. There have been several such cases and no serious implementation issues have been encountered. Once the ATJ has struck them down, they are already void. Other cases require specific non-compliance procedures. These occur when countries pass

national legislation that is contrary to the legislation of the Andean Community, or they are developing administrative measures that hamper the integration of the Andean Community. In such cases, the parties raise claims and the Tribunal decides whether the measures in question are hindering the integration process. Some governments tend to be reluctant to immediately accede to decisions that rule that their policies are against integration. The Tribunal can respond through regulatory measures, such as permitting the country that brought the suit to institute a retaliatory policy. Unfortunately, a participant declared, "this creates a generalized non-compliance of the entire process, because country A is, for example, hampering free trade and the measure we impose is to allow country B to do the same thing."

Fortunately for the ATJ, it does have compulsory jurisdiction. This means that if it renders clear decisions, there is no way for the decision to be manipulated or misconstrued within the bounds of the law binding the community. The Tribunal thus has the responsibility to make quality decisions that limit the ability of recalcitrant states to twist the Tribunal and its decisions to their own political ends. Additionally, there is a growing push to include more businesses and civil society representatives in the process, as decisions largely affect economics and social relations, not just government policy. This may have the added benefit of reducing non-compliance, as more actors are invested in a successful judicial process and will demand government compliance.

One of the most important procedures, and that which constitutes the vast majority of cases before the ATJ, is to provide preliminary



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rulings (*interpretaciones prejudiciales*) through which the ATJ advances an interpretation of the legislation of the Andean Community. Its purpose is to ensure the uniform application of such laws across the territory of member countries. During the last two years, the ATJ has received four times the number of requests for preliminary rulings (nearly 500) than in previous years.

The importance of the preliminary ruling procedure is greater than its statistical relevance. As a rule, the development of Andean law is based on preliminary ruling procedures. Binding interpretation of Andean law by the ATJ is to ensure legal unity within the Community in everyday practice. The procedure also acts as an instrument of cooperation between national judges and the Community judges so that they can together preserve this unity through uniform interpretation and application of Community law.

The CCJ faces some similar issues to the ATJ, although the CCJ (unlike CARICOM's Competition Commission) cannot initiate non-compliance actions. There is a referral procedure for matters involving the interpretation or application of a regional treaty. A national court or other tribunal is required to refer the cases involving the interpretation or application of the Revised Treaty of Chaguaramas to the CCJ, but there have been no referrals in the Court's ten years of existence. National courts in the CCJ system are granted wide scope in resolving cases on their own, and can decide not to refer a case if it believes the matter may be properly resolved without a referral. The European system and ATJ require referral in similar cases. It is important to note that regional courts do not decide the dispute, but provide the requested treaty interpretation that the national courts then apply to resolve

disputes. This does mean that if the regional court produces an overly broad interpretation, this does not aid the national courts in their tasks to decide actual cases. Whilst not dictating an outcome, it may be necessary for the regional court to be as definitive as possible.

As for the other inter-state courts, it was found that the ICJ and ITLOS share elements regarding implementation issues. These often stem from the following scenario: 1) A national court issues a judgment that creates a situation where the state is in non-compliance with its international obligations; 2) The matter then goes to an international judicial body—the ICJ, ITLOS, an arbitral tribunal, etc. – which renders a decision on the matter; 3) However, the implementation of this decision may not be straightforward because the executive branch cannot unilaterally enforce the international decision due to a separation of powers. Rather, the international ruling must be adopted through an internal judicial process. There does not seem to be a solution to this problem, barring significant constitutional reform in many states; instead international courts must trust supreme national courts to respect their rulings.

Despite the provision in the UN Charter that dictates compliance with ICJ decisions, the World Court is not immune to issues of non-implementation. The *Avena* case, discussed in Section I of this report, illustrates this amply.<sup>142</sup> The ICJ decision interpreted the Vienna Convention on Consular Relations (VCCR) as requiring a review and reconsideration of the conviction and death sentence given to 54 Mexican nationals, taking into account a violation of the notification provision. In circumstances where the violation was not raised until post-conviction habeas corpus proceedings, U.S. law prohibited such a review.

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<sup>142</sup> See *supra* note 16.



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Although the United States was bound by the 2004 ICJ decision in *Avena*, the U.S. Supreme Court held that the decision was not binding in U.S. courts.<sup>143</sup> Without enforceability directly in judicial proceedings, a legislative response was needed. After several failed attempts, a partial solution was finally reached ten years later. The Federal Rules of Criminal Procedure were amended in 2014 to require notification at the initial appearance hearing.<sup>144</sup> Some U.S. states, too, have incorporated the notification provisions into their criminal procedure codes. There is, however, no general right to a hearing on a VCCR violation if it is not raised before the federal habeas corpus stage as required by the *Avena* decision. A case like *Avena* requires a more comprehensive legislative solution that has not been forthcoming. This unfortunately means that most of the Mexican nationals in the case never received judicial relief.

## 2. Use of experts appointed by courts and tribunals

The question presented by this topic was whether or not it is advisable for the court to appoint experts on its own. For example, is it appropriate for courts to bring in experts to offer internal expertise to the judges, without the consent of the parties? In some international courts and tribunals, experts are treated as “temporary” assistants to the registry. While this might be necessary when courts are tasked with adjudicating complex technical cases, questions remained about whether this is the proper method of using experts.

It was pointed out that civil society commentators sometimes raise questions about the competency of international judicial bodies to provide judgments that are scientifically well grounded, for example in cases involving environmental

matters like climate change, and border delimitation matters. In the latter, it is known that experts are brought in to draw boundaries and offer their expertise. Parties are not, however, necessarily privy to the identity of such experts. A participant also brought up the ICJ *Australia v. Japan* case, involving Japanese whaling, where there was debate about whether the expert testimony from the parties provided sufficient background to render a decision.<sup>145</sup> The International Whaling Commission’s (IWC) Scientific Committee had not yet finished its study of Japanese practices, so there was a question as to whether the ICJ was competent to determine the case without benefit of the IWC’s findings.

Participants generally agreed that international courts should rely on experts, as they are critically important in giving judges the technical knowledge they require to make a proper judgment. There do, however, need to be formalized processes for selecting experts. Cases involving complicated topics, or fields unfamiliar to the judges, can only be properly adjudicated after experts have given the judges enough information to understand the subject matter. It may be difficult to find experts with sufficiently broad and detailed knowledge, but the effort must be made to ensure the most judicious and legitimate outcome.

However, it was felt that if international courts use experts behind the scenes, then there will be no external check on the quality of the advice given to the court. Moreover, the experts may be given too much influence over the final decision of the court and the judges will become “hostage [to] what the experts tell [them].”

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<sup>143</sup> See *supra* note 19.

<sup>144</sup> FED. R. OF CRIM. P. 5.

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<sup>145</sup> Whaling in the Antarctic (Austl. v Japan: N.Z. Intervening), G. L. No. 148, Judgment, (International Court of Justice, Mar. 31, 2014).



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This may also be true when external experts are used, however. Even when the parties play a role in the appointment of experts, it is impossible to be certain that the experts chosen are the most qualified and unbiased. This can ultimately result in prejudicial and incorrect judgments, and undermine the legitimacy of the judicial process.

The proposed solution of having a court-appointed expert has neither been implemented nor rejected by ITLOS and the ICJ. Right now, these courts utilize informal confidential consultations with one or more experts. The experts provided by the party are very useful in fully understanding the argument made by the party, but the use of court-appointed experts would perhaps help to ensure neutrality.





# BIIJ 2015 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 the *Popović et al* trials. He also formed part of the Trial Chamber which rendered the sentencing judgements in the *Dragan Nikolić* and *Deronjić* cases. He also acted as Pre-trial Judge in several cases. Since 2009 he has also served on the Appeals Chamber in several appeals from judgements of the ICTY and ICTR. Currently he is presiding judge in the *Stanisić and Zupljanin* appeal. Judge Agius 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.

**Winston Anderson (Jamaica)** has been a judge of the Caribbean Court of Justice since 15 June 2010. He is a graduate of the University of the West Indies and Cambridge University. Prior to joining the CCJ, Justice Anderson was Professor of International Law at the University of the West Indies, where he engaged in the teaching

and research of the law for over twenty years. He has also served as General Counsel of the Caribbean Community. In addition to the discharge of his judicial duties, Justice Anderson continues to engage in research. The second edition of his *Caribbean Private International Law* was published in August 2014 by Sweet & Maxwell, London, and in 2012 his *Principles of Caribbean Environmental Law* was published by the Environmental Law Institute, Washington. Justice Anderson is a founding member of the International Advisory Council of the United Nations Environment Programme (IAC/UNEP), which is mandated to act as a global voice for environmental sustainability, giving guidance to UNEP, the OAS and other global organizations.

**Sir David Baragwanath QC (New Zealand)** is a judge of the Special Tribunal for Lebanon and served as its President from 2011-2015. He was a barrister for 30 years before being appointed to the High Court and later Court of Appeal of New Zealand. He served as President of the NZ Law Commission and presided in the Samoan Court of Appeal for some years. He was active in other Pacific jurisdictions during his career and had extensive international civil and criminal experience including appearances before the Privy Council in London. His academic appointments include universities in New Zealand, the USA, the UK, the Netherlands and Hong Kong. He is an Overseas Bencher of the Inner Temple.

**David Thór Björgvinsson (Iceland)** was a judge at the European Court of Human Rights in respect of Iceland from 2004 to 2013. He studied history, philosophy and law at the University of Iceland and legal philosophy at Duke University School of Law in the USA.



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He has a doctorate in international law from Strasbourg University. Before serving at the ECHR, Judge Björgvinsson was a professor of law at Reykjavik University School of Law and the University of Iceland Faculty of Law. His main field of research has been in the field of general legal theory, EU (EEA) law, and human rights. He has done research in his field at the University of Edinburgh in Scotland, Rand Afrikaans Universiteit in Johannesburg in South Africa, University of Copenhagen, Max Planck Institute in Heidelberg, Germany and Oxford University in England. He has held numerous other positions for public and private entities. Judge Björgvinsson has written books and published numerous articles on his studies and given courses and lectured in his field in many countries. Judge Björgvinsson has been seated at iCourts, the Danish National Research Foundation Centre of Excellence, at the University of Copenhagen Faculty of Law since 1 Jan 2014.

**Luis José Díez Canseco Núñez (Peru)** is Justice at the Court of Justice of the Andean Community, in Quito, Ecuador. He studied law at the Pontifical Catholic University of Peru (1985), received a Master of Laws at George Washington University Law School (1988), and is currently a Professor of Law at the Pontifical Catholic University. He has served as a Fulbright Scholar (1987-1988), a Hubert H. Humphrey Fellow (2001-2002), a Visiting Scholar at George Washington University Law School (2002), Visiting Scholar at the Max Planck Institute for Innovation and Competition, Munich (1986), and Visiting Scholar at the Universidad de Santiago de Compostela, Spain (1987). His prior professional positions include Judge at the Competition and Intellectual Property Tribunal of Peru; Economic Officer at the United Nations Conference on Trade and Development (UNCTAD); International Officer at the World Intellectual Property Organization (WIPO); Legal Counsel at the General Secretariat of the

Andean Community; and General Coordinator of the Competitiveness Program (Office of the Prime Minister of Peru and the World Bank). His areas of expertise are Integration Law, International Economic Law, International Trade Law, Competition Law, Unfair Competition Law, Advertising Law, Consumer Protection, Market Access, Export Promotion, Antidumping and Subsidies, Intellectual Property, Judicial Reform and Anti-corruption.

**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 twenty 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 and the operation of hybrid courts.

**Vladimir Golitsyn (Russian Federation)** is a judge of the International Tribunal for the Law of the Sea and was elected its president on 1



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October 2014. He has been active in the field of International Law for almost four decades. At the Government level, he has served as Head of the Division of Public International Law in the Ministry for Foreign Affairs of the former USSR and as head or member of delegations at various negotiations on fishery, navigation and maritime boundary matters, as well as the Arctic and Antarctica. At the United Nations, where he has worked for 25 years, he has been involved in a wide range of legal matters, in particular those related to environmental and maritime issues, as well as such issues as the establishment and implementation of the oil-for-food program for Iraq, negotiation of arrangements related to the Lockerbie case, etc. Judge Golitsyn is currently Vice-President of the Russian Association of Maritime Law and also works as Professor of international law at the Moscow State Institute of International Relations and the Moscow State University.

**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.

**Theodor Meron (United States)** was elected to the International Criminal Tribunal for the former Yugoslavia (ICTY) by the U.N. General Assembly in March 2001. Since then, he has served on the Appeals Chamber, which hears appeals from both the ICTY and the International Criminal Tribunal for Rwanda (ICTR). Judge Meron is also the ICTY's current President, elected to this position by his fellow judges on October 19, 2011 and again on October 1, 2013. He previously served as President of the ICTY between March 2003 and November 2005. In December 2011, he was elected by the U.N. General Assembly to the roster of Judges of the Mechanism for International Criminal Tribunals (MICT). On February 29, 2012, he was appointed by the Secretary-General of the United Nations as President of the MICT for a 4-year term. A leading scholar of international humanitarian law, human rights, and international criminal law, Judge Meron wrote some of the books and articles that helped build the legal foundations for international criminal tribunals. A Shakespeare enthusiast, he has also written articles and books on the laws of war and chivalry in Shakespeare's historical plays. He is a member of the Institute of International Law, the Council on Foreign Relations and a Fellow of the American Academy of Arts and Sciences. Judge Meron has also served as Co-Editor-in-Chief of the American Journal of International Law (1993-98) and as Honorary President of the American Society of International Law. He is Officer of the (French) Legion of Honour and a Grand Officer of the (French) National Order of Merit. He delivered the general course at The Hague Academy of International Law on



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International Law in the Age of Human Rights (1993) and is an author of eleven books and more than a hundred articles.

**Erik Møse (Norway)** is Justice of the Supreme Court of Norway and a judge at the European Court of Human Rights since 2011. He has previously been 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 Deputy Judge and Head of Division in the Ministry of Justice. He chaired, inter alia, the Council of Europe's Steering Committee for Human Rights, the expert committee that drafted the European Convention for the Prevention of Torture, and the committee on incorporation of human rights conventions into Norwegian law. Judge Møse was for many years a part-time lecturer at the University of Oslo, has published books and numerous articles about human rights issues, 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 served as President of the Court from 2009 to 2012. Before being appointed to the Court, he was President of the Japan Institute of International Affairs and professor of international law and organization at Waseda University in Japan. One of his country's most respected diplomats, 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 for many years been teaching at Harvard

Law School, Columbia Law School, and New York University Law School. He is a member of *l'Institut de Droit International* (IDI) and its former President (2011-2013). 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 in the Appeals Chamber of the ICTY and the ICTR since 2000 and was president of the ICTY from November 2005 until November 2008. In 2000 he also served on a Trial Chamber of the ICTY. Judge Pocar has a 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 under the ICCPR 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 member of the roster of arbitrators on outer space disputes of the PCA. He is a professor emeritus of international law at the University of Milan, where he has also served as Faculty Dean and Vice-Rector. He is the author of numerous publications on human rights and international 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 the *Institut de Droit International*, and president of the International Institute of Humanitarian Law (Sanremo).

**Elsie Nwanwuri Thompson (Nigeria)** is the first Nigerian to be elected into the African Court on Human and Peoples' Rights. She was elected on 27 July 2010 for a term of six years. She is currently the Vice President of the Court. Justice Thompson is a serving Judge of the High Court of Rivers State of Nigeria. She



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was called to the English bar in 1984 after an LLB Honours degree from Queen Mary College, University of London. She was later called to the Nigerian bar in 1985. Prior to her appointment as a High Court Judge, she was in active private legal practice for 20 years and worked on human rights cases, especially on women's rights. She has served in several associations, notably the International Federation of Women Lawyers (FIDA) where she held several posts including Country Vice President (National President) and Regional Vice President for Africa. Justice Thompson has participated in several seminars and conferences as a resource person. She has presented several papers on women and children's rights as well as other topical legal issues. She also participates regularly in legal education for students in the areas of seminars and moot courts. She is a member of the honourable society of Gray's Inn and also a Fellow of the Chartered Institute of Arbitrators.

**Christine Van den Wyngaert (Belgium)** is a judge of the Appeals Chamber of the International Criminal Court. She graduated from Brussels University in 1974 and obtained a PhD in International Criminal Law in 1979. She was a professor of law at the University of Antwerp (1985 - 2005) where she taught criminal law, criminal procedure, comparative criminal law and international criminal law. She authored numerous publications in all these fields. She was a visiting fellow at the University of Cambridge (Centre for European Legal Studies (1994 - 1996), Research Centre for International Law (1996-1997)) and a visiting professor at the Law Faculty of the University of Stellenbosch, South Africa. Her merits as an academic have been recognized in the form of a Doctorate Honoris Causa, awarded by the University of Uppsala, Sweden (2001), the University of Brussels, Belgium (2010), Case Western Reserve University, the US (2013), and Maastricht University, The Netherlands (2013). Judge Van den Wyngaert has been an

expert for the two major scientific organizations in her field, the International Law Association and the International Association of Penal Law. She was an observer of the Human Rights League at the trial of Helen Passtoors in Johannesburg in 1986 and has made human rights a focal point in her teachings and writings throughout her career. In 2006, she was awarded the *Prize of the Human Rights League*. In 2013, the Flemish Government awarded her a golden medal for her achievements in international criminal law. In 2014, she was elected Vice President of the International Association of Penal Law. Judge Van den Wyngaert has been granted the title of Baroness by the King of Belgium for her merits as an academic and an international judge.

## **BIJ Co-Directors**

**Linda Carter (United States)** is a Distinguished Professor of Law at the 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*



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*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. In 2013-2014, Prof. Carter assisted in ICL curriculum development at universities in Sierra Leone, Zimbabwe, and Kenya, and directed a summer program in Kampala, Uganda. 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 Universities. He was recently the first Scholar-in-Residence at the Sorensen Center for International Peace and Justice at CUNY Law School. He chairs the Advisory Boards of Brandeis' International Center for Ethics, Justice and Public Life, the Coalition for the International Criminal Court and the International Center for Transitional Justice. 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 was 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.

## 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 tenure as Director of the West African Research Center in Dakar, Senegal, and she is a two-time



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Fulbright Scholar and recipient of the Wenner-Gren Foundation Fellowship for Anthropological Research. Her academic work and publications have focused on the international judiciary, the role of African languages in international criminal justice, language use in post-colonial Africa, and recent African immigration and refugee resettlement in the United States. She is co-author of *The International Judge: an Introduction to the Men and Women Who Decide the World's Cases* (with Dan Terris and Cesare Romano, foreword by 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 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.

**Jean-Pierre Gauci (Malta)** is a founder and director of The People for Change Foundation and research coordinator for public international law at the British Institute for International and Comparative Law. He is also a visiting lecturer

in international migration law at the University of Malta. Jean-Pierre holds a Ph.D. in Law from King's College London, and a Doctor of Laws (LLD) and a Magister Juris in international law from the University of Malta. Jean-Pierre has extensive experience in research and work on various human rights-related issues on both the national and European level. He has consulted with various national and international organizations.

### Invited Observer

**Henrik Stampe Lund (Denmark)** is Center Administrator and daily manager at Centre of Excellence for International Courts (iCourts), Faculty of Law at University of Copenhagen. He is responsible for budgeting, allocation of resources and strategic planning related to research activities at iCourts. Over the last decade, he has in four different positions (in the humanities, the veterinary field and law) worked with larger EU-applications and EU consultancy, and is especially experienced in writing the strategic parts of research applications. He has followed the development of research policy closely and published academic articles about European research policy. He has also worked as a lobbyist in Brussels on behalf of the Technical University of Denmark and as a veterinary medical industrial partner. Lund holds a Master of Arts and Ph.D. in literature and has nine years of research experience within the field of literary studies. His scientific publications reflect a broad and interdisciplinary interest in topics such as European literature and history, democracy and governance, political theory and philosophy of law. In addition, he has published books on the practice and theory of judgment and democracy. He has taught in the university sector for more than 20 years.



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## Rapporteurs

**Veronique Caruana (Malta)** is currently a doctoral student under the supervision of Prof. William Schabas at Middlesex University. Her research focuses on the assessment of witness credibility in international criminal trials. She holds a B.A. and LL.D. from the University of Malta and an LL.M. in Public International Law from King's College London. Veronique has worked as a junior lawyer in a law firm and has interned in the Prosecution Division at the International Criminal Court. She has also served in the diplomatic service of the Government of Malta.

**Matthew Scott (Australia)** is a UK-qualified solicitor and a doctoral candidate at the Faculty of Law at Lund University in Sweden. His research examines the scope of the *non-refoulement* obligation in the context of disasters and asks to what extent existing law can address the international protection needs of individuals unwilling to return to their home countries owing to seriously adverse conditions of existence they would encounter there. Drawing on literature from the social sciences as well as field reports from international humanitarian organizations, the research seeks to articulate a concept of disaster-related harm that reflects the complex interplay of human and environmental causes. Scenarios involving recent disasters are then tested against existing interpretations of the *non-refoulement* obligation. Where protection needs are not accommodated in existing interpretations, questions about the role of lawyers and courts in developing the law arise and will be addressed through a combination of doctrinal and empirical legal research.

## Brandeis Interns

**Michael Abrams (United States)** recently graduated from Brandeis University, where he majored in History and minored in Legal Studies and Social Justice and Social Policy. In 2014, he participated in the Brandeis in the Hague program, where he studied international law and legal and economic initiatives in developing countries. During his time in The Netherlands, Michael interned with Amnesty International, performing legal research at their office in The Hague. Complementing his legal work abroad, Michael interned in 2014 at the district office of U.S. Representative Rush Holt. He helped constituents with legal problems to navigate government bureaucracy, and he communicated with various state and federal agencies to resolve problems. Michael has also worked at the Schuster Institute for Investigative Journalism where he investigated cases of men wrongfully convicted of homicide in an effort to overturn their sentences. He plans to attend law school and enter public interest law, ideally focusing on human rights or environmental issues.

**Amelia Katan (United States)** recently graduated from Brandeis University, where she majored in International and Global Studies and Politics, with a minor in Legal Studies. She studied with the Brandeis in The Hague program from February to May 2013, during which time she interned in the Office of Public Information and Documentation at the International Criminal Court. This experience inspired her subsequent studies from September to December 2014 in Gulu, Uganda, where she sought to truly understand the impact of the Court in "situation countries." During this time, she conducted research on local perceptions of the International Criminal Court in relation to developments on the ground. Amelia prepared a senior thesis on the ICC and Northern Uganda, which received highest honors. She is interested in law as a tool for conflict prevention and mitigation and intends to pursue a law degree.





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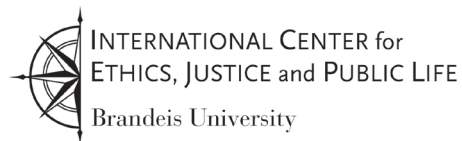
## Brandeis International Center for Ethics, Justice and Public Life

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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## About Brandeis University

**B**randeis 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.





INTERNATIONAL CENTER for  
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