

Brandeis Institute
for International Judges

BIIJ

2009



*International
Justice:
Past, Present,
and Future*



Brandeis University

Brandeis Institute for International Judges
2009

International Justice: Past, Present, and Future

The International Center for Ethics,
Justice, and Public Life

Brandeis University
Waltham, Massachusetts

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Table of Contents

4	Foreword
5	About the Institute
8	Key Institute Themes
8	The Interplay Between Politics and Justice
13	International Justice in a Human Rights Era
19	Language and International Courts
25	Professional Conduct in the International Justice System
30	What is Success in International Justice?
36	Break-out Group Sessions
36	Interstate Dispute Courts
38	International Criminal Courts and Tribunals
40	Human Rights Courts
42	Current Developments in International Justice
	<i>Harmonizing International Politics with Fundamental Human Rights and the Rule of Law: the Kadi judgment</i>
47	Biographies
55	Center Description and Contact Information
56	About Brandeis University

This report of the Brandeis Institute for International Judges 2009 is online at www.brandeis.edu/ethics/internationaljustice/bij/index.html.

Foreword

Rules and institutions are necessary in any given society, but they would be ineffective without good and competent human beings behind them. This is particularly true for courts and tribunals because of the lofty values they represent – the search for truth and justice.

Good and competent judges know how challenging it is to reach and maintain the highest possible level of professional performance. In all modesty, they realize that nobody can achieve that objective without continuously learning. Learning by doing. And also learning by sharing experiences and thoughts with colleagues.

Offering good and competent judges an opportunity to get to know one other, to develop friendly ties, to share their experiences and thoughts in a mutually beneficial manner on a variety of issues of common interest – this is precisely what the Brandeis Institute for International Judges achieves, in a remarkable way.

The experience of participating in a session of the institute is unique. Each individual participant knows how much he or she has received from this very special event. However, it would be a pity not to have a summary of the main lessons learned and not to make it available to interested non-participants. Here again, the International Center for Ethics, Justice, and Public Life at Brandeis University provides a valuable service by writing and publishing this report, in keeping with the fundamental requirements of confidentiality. Readers will hopefully reflect on some of the challenges faced and successes achieved by judges on international courts.

Not being a judge myself, I had the privilege of participating in the institute as a presenter. With deep feelings of appreciation for the organizers, I wish to express to them my admiration and gratitude. I also want to thank the judges who participated in the institute for their warm and cordial welcome, as well as for the very open, fruitful, and friendly discussions among good and competent human beings.

Nicolas Michel
Professor of International Law in Geneva
Former Legal Counsel of the United Nations

About the Institute

The sixth Brandeis Institute for International Judges (BIIJ) was held from 4 to 8 January 2009 in Trinidad. The BIIJ 2009 brought together 14 judges from 11 international courts and tribunals to discuss issues relevant to their profession and to their institutions. The Caribbean Court of Justice, established in 2005, served as co-host for the event. This was the largest number of judicial institutions to participate in an institute since the BIIJ was inaugurated in 2002. It was also the first time an institute was held on the home turf of one of its participating courts.

The aim of the BIIJ is to provide a time and space for judges sitting on international courts and tribunals to meet and reflect, discuss issues of mutual interest, generate ideas that enrich their work, and move toward developing policies that strengthen their standing. Each institute is the subject of a report that summarizes the content of its sessions and the ensuing discussions that take place among participants.¹

The institute theme for 2009 was “International Justice: Past, Present, and Future.” Institute organizers chose this theme since the international justice system finds itself at a historical crossroads. Some international courts are currently completing their mandates, encountering many challenges in the process. New courts have also recently come onto the scene and are trying their first cases while working out their institutional kinks. Permanent courts continue to establish themselves firmly in the international legal system, with their judgments becoming increasingly recognized by both their peer international institutions and domestic courts. Each of the 2009 institute

¹ See www.brandeis.edu/ethics/internationaljustice/biij/index.html for past reports.

sessions assessed, using a variety of perspectives, the status and impact of international courts and tribunals, be they established, emerging, or on the way to closing their doors.

The first day of the institute was held on the premises of the Caribbean Court of Justice in Port of Spain. That session, led by Nicolas Michel, former Under-Secretary-General for Legal Affairs and Legal Counsel at the UN, examined the interplay of justice and politics in the international justice system. He noted that political support plays an important, if sometimes complicating, role in the establishment of international courts and tribunals, using as an illustration the recent creation of the Special Tribunal for Lebanon. At the same time, he acknowledged the duty of judges to remain independent and to resist political interference. Following his remarks, participants discussed, among other topics, whether judges and their institutions can contribute to peace as well as deliver justice.

Next, an information-gathering session was led by Ruth Mackenzie, deputy director of the Centre for International Courts and Tribunals at



BIIJ 2009 took place on the Caribbean island of Trinidad, home to the Asa Wright Nature Centre.



Ivor Archie, chief justice of the Supreme Court of Trinidad and Tobago, welcomes BIIJ participants.

University College London, on the development and articulation of professional standards to govern the conduct of lawyers involved in proceedings before international courts and tribunals.

After relocating to the coastal village of Salybia, participants reconvened to examine how different courts look at human rights issues. This third session, titled “International Justice in a Human Rights Era,” was led by Fausto Pocar, judge of the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia, and Linda Carter, institute co-director and professor at McGeorge School of Law. Participants discussed human rights cases that have arisen in courts that do not have a specific human rights mandate but have had to take into account the fundamental principles of international human rights law. Participants also addressed the responsibility of international organizations and international courts themselves to protect and uphold human rights standards during their own operations.

The following session focused on issues of multilingualism in international courts. Leigh Swigart, director of Programs in International Justice and Society of Brandeis’ International Center for Ethics, Justice, and Public Life,

addressed challenges related to the diverse linguistic background of international judges and court staff as well as the parties who appear before courts. Language issues have an impact on international justice institutions at many levels, including in their internal functioning, in the cases themselves, and in the ways that courts communicate with the greater public.

As in the previous session of the BIIJ, judges had the opportunity to divide into break-out groups representing the types of courts in which they serve – criminal, human rights, or interstate dispute resolution. Participants embraced the opportunity to share issues of mutual concern in a smaller group setting where interchanges were lively and direct.

In the final gathering, before a closing session that served to recap the proceedings and look ahead to other possible BIIJ topics, participants tackled the broad issue of measuring success in the international justice system. Richard Goldstone, former chief prosecutor for the International Criminal Tribunal for the former Yugoslavia, offered opening remarks that centered on the purposes for which the ad hoc international criminal tribunals were established. Judges then offered their analysis of whether their own courts have accomplished the goals for which they were created and how the international justice system can be improved in the future.

In addition to these formal sessions, the institute also featured an informal evening session in which judges discussed ethical dilemmas they might encounter in their profession, such as whether they might attend functions of political candidates or associate with people who have potential interests before their courts. Finally, participants were able to explore Trinidad through an outing to the Asa Wright Nature Reserve, where they hiked and viewed the large variety of birds that inhabit the island.

Participants²

African Court of Human and Peoples' Rights (ACHPR)

- Joseph Mulenga (Uganda)

Caribbean Court of Justice (CCJ)

- Rolston Nelson (Trinidad and Tobago)
- Duke Pollard (Guyana)

European Court of Human Rights (ECHR)

- Nina Vajić (Croatia)

European Court of Justice (ECJ)

- Egils Levits (Latvia)

Inter-American Court of Human Rights (IACHR)

- Margarete May Macaulay (Jamaica)

International Criminal Court (ICC)

- René Blattmann, Vice-President (Bolivia)

International Criminal Tribunal for the former Yugoslavia (ICTY)

- Fausto Pocar (Italy)
- Iain Bonomy (United Kingdom)

International Criminal Tribunal for Rwanda (ICTR)

- Charles Michael Dennis Byron, President (St. Kitts and Nevis)

International Tribunal for the Law of the Sea (ITLOS)

- Anthony Amos Lucky (Trinidad and Tobago)
- Dolliver Nelson (Grenada)

Special Court for Sierra Leone (SCSL)

- Jon M. Kamanda (Sierra Leone)

World Trade Organization Appellate Body (WTO AB)

- Jennifer Hillman (United States)

Presenters

- Linda Carter, Professor, McGeorge School of Law
- Richard J. Goldstone, former Justice of the Constitutional Court of South Africa
- Ruth Mackenzie, Deputy Director, Centre for International Courts and Tribunals, University College London
- Nicolas Michel, former Legal Counsel of the United Nations
- Leigh Swigart, Director of Programs in International Justice and Society, International Center for Ethics, Justice, and Public Life, Brandeis University
- Daniel Terris, Director, International Center for Ethics, Justice, and Public Life, Brandeis University

Rapporteur and Report Editor

- Stéphanie Cartier, Adjunct Professor, Fordham University

Institute Staff

- Lewis Rice, Communications Specialist, International Center for Ethics, Justice, and Public Life, Brandeis University

² Judges who attend the BIIJ are granted anonymity for their remarks during the conference in order to allow them to speak frankly about often sensitive matters. Thus, this report does not attribute statements to specific judges and uses the personal pronoun "he," regardless of whether the speaker was male or female, in order to ensure that a judge cannot be identified.

Key Institute Themes

*“Caminante, no hay camino.
Se hace camino al andar.”³*

**Traveler, there is no path.
The path is made by walking.**

This evocative saying, offered by a BIIJ participant, captures the magnitude of the challenge that awaited many international judges when they joined their newly established international judicial institutions in recent years. They were required to forge new paths routinely in their daily judicial operations while striving to preserve and safeguard their institution’s impartiality, independence, authority, and legitimacy.

In 2009, the BIIJ proposed to take stock of these international judicial institutions. At the same time that some international courts are winding down (the International Criminal Tribunal for Rwanda, International Criminal Tribunal for the former Yugoslavia, and Special Court for Sierra Leone), others are just starting out on their journey (the International Criminal Court, Extraordinary Chambers in the Courts of Cambodia, Special Tribunal for Lebanon, and the Caribbean Court of Justice). But each of them has forged a new path in one way or another. Even more established courts are “making new paths by walking,” as they become more central to the spread of universal legal concepts, like human rights.

³ A well-known Spanish proverb, which was also incorporated into a poem by Spanish poet Antonio Machado, “Proverbios y Cantares XXIX,” from *Campos de Castilla* (1912).

As in previous years, the BIIJ offered sessions on a number of topics, each chosen for its pertinence to the work of those who serve on the bench of international courts and tribunals, and to the overall theme of the institute. Participants were able to engage in long discussions on each topic and share their perspectives and experiences with fellow judges. Throughout these discussions, five principal themes emerged:

- The interplay between politics and justice
- International justice in a human rights era
- Language and international courts
- Professional conduct in the international justice system
- What is success in international justice?

The following summarizes the discussions that took place in Trinidad around these themes.

The Interplay Between Politics and Justice

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



International judges in the courtroom of the Caribbean Court of Justice

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

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

The STL was established to prosecute “persons responsible for the attack of 14 February 2005

resulting in the death of former Lebanese Prime Minister Rafiq Hariri and in the death and injury of other persons”⁴ and for “other attacks that occurred in Lebanon between 1 October 2004 and 12 December 2005,” which are “connected” and “of a nature and gravity similar to the attack of 14 February 2005.”⁵ Considering that these crimes appeared to be politically motivated, it was believed that a court of an international character would be better suited to deal with this matter than Lebanon’s national judiciary. Following the assassination of Rafiq Hariri, the idea of an international response garnered broad support in Lebanon and abroad, and Lebanon requested the assistance of the United Nations in establishing a special tribunal.

However, the 2006 war in Lebanon and national Lebanese politics ended up complicating this process. The Tribunal was to be established by a bilateral agreement between the United

⁴ Article 1(1) of the Agreement between the United Nations and the Lebanese Republic on the establishment of a Special Tribunal for Lebanon in Annex 1 to the *Report of the Secretary-General on the establishment of a special tribunal for Lebanon*, S/2006/893, 15 November 2006, and Article 1 of the Statute of the Special Tribunal for Lebanon, in an Attachment to the same Report.

⁵ *Ibid.*

Nations and Lebanon. The bilateral agreement was negotiated and signed swiftly by Lebanon and the United Nations, but an internal political crisis broke out in Lebanon after the war and led to an impasse in the parliamentary process, despite the continued and explicit support of a majority of Lebanese parliamentarians. The United Nations Security Council, acting under Chapter VII of the United Nations Charter, nonetheless decided to push forward the creation of that Tribunal.⁶ The judges of the STL began their work in March 2009.⁷

On the one hand, international politics may facilitate the establishment of international courts and tribunals. On the other hand, it may also play a role in restricting the scope of jurisdiction of courts whose establishment it had supported. For instance, participants observed that the subject-matter jurisdiction of the STL was limited to “ordinary” or “common” crimes under Lebanese law, and that crimes against humanity were excluded from its jurisdiction because “there was insufficient support for the[ir] inclusion” by “interested members of the Security Council.”⁸

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

The majority of participants agreed that in designing post-conflict mechanisms, the interests

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

Participants also commented on the Nuremberg Declaration on Peace and Justice,⁹ made public in June 2008, which epitomizes this new culture to end impunity. In particular, the first principle of the Declaration enshrines the idea that peace and justice are complementary: “Peace and justice, if properly pursued, promote and sustain one another. The question can never be *whether* to pursue justice, but rather when and how.” The second principle provides that the most serious international crimes – notably genocide, crimes against humanity and war crimes – “must not go unpunished” and that “amnesties must not be granted to those bearing the greatest

⁶ United Nations Security Council Resolution, S/RES/1757 (2007), 30 May 2007: “*The Security Council* [...] 1. *Decides*, acting under Chapter VII of the Charter of the United Nations, that: (a) The provisions of the [bilateral agreement], including [the Statute of the STL] shall enter into force on 10 June 2007, unless the Government of Lebanon has provided notification [of ratification] under Article 19 (1) of the [bilateral agreement] before that date [...]”

⁷ That is, two months after the BIIJ 2009 was held.

⁸ *Report of the Secretary-General on the establishment of a special tribunal for Lebanon*, S/2006/893, 15 November 2006, para. 25. See also *Report of the Secretary-General on the establishment of a special tribunal for Lebanon, Addendum, Statement by Mr. Nicolas Michel, Under-Secretary-General for Legal Affairs, the Legal Counsel, at the informal consultations held by the Security Council on 20 November 2006*, S/2006/893/Add.1, 21 November 2006, p. 2.

⁹ Nuremberg Declaration on Peace and Justice, June 2008, available at: <http://www.peace-justice-conference.info/declaration.asp>. Footnote ‘a’ explains that this declaration emanates from an international conference entitled “Building a Future on Peace and Justice,” that was held from 25-27 June 2007, in Nuremberg, Germany, and organized by three countries, Germany, Finland, and Jordan, together with several civil-society organizations. “[M]ore than 300 policymakers and practitioners” attended that conference. The declaration was drafted by “a group of international experts designated by Conference organizers,” under the guidance of Óscar Arias, President of Costa Rica, and was “the subject of consultations [...] with practitioners and civil society organizations” before its publication. In June 2008, the Governments of Germany, Finland, and Jordan conveyed the declaration to UN Secretary-General Ban Ki-moon, to be circulated as a General Assembly document: *Letter dated 13 June 2008 from the Permanent Representatives of Finland, Germany and Jordan to the United Nations addressed to the Secretary-General*, A/62/885, 19 June 2008.

responsibility” for those crimes. Participants agreed that the Nuremberg Declaration constitutes “an important step in recognizing that amnesty is no longer acceptable.” One participant also mentioned that as a judge, he had found “inspiration in the fact that a group of politicians at the UN considers that peace restoration and courts go together, and that the impartiality of judges is an essential part of the peace process.”

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

It was noted that prosecutors probably play some role in coordinating peace and justice by exercising their discretion to indict or not, or by delaying indictments and arrests. At the same time, it was also noted that judges might have to decide questions of a political nature, such as the question whether a suspect’s custody or release pending trial is warranted even if it risks destabilizing a country. Two participants reminded the group that a political “excuse” of this nature had been used to delay the capture of Radovan Karadžić for over ten years after his indictment by the ICTY.

The influence of politics on prosecutorial discretion arouses criticism in the civil society, a participant reported, especially in relation to the ICTR and Rwanda. “Prosecutorial discretion also impacts on the question of who is or is not a victim,” one participant said. He explained that in Rwanda, “Tutsi victims have seen justice because the most important perpetrators are being tried by the ICTR, but there is no prosecution against Tutsis who are suspected of having committed crimes against Hutus. Absence of prosecution of Hutu complaints by the ICTR may be an impediment to lasting peace and reconciliation because a segment of the community is ignored or their complaints disregarded. This has been to some extent the result of prosecutorial discretion.”

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

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

Participants agreed that courts might facilitate reconciliation and peace in the long run by providing a historical record of horrendous crimes, but they cautioned that the fact-finding

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

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

Participants then examined the relationship between peace and justice in light of contemporary events in Uganda. Should the ICC investigations on alleged crimes committed by the Lord’s Resistance Army in Uganda, upon its government’s own referral, be suspended in order to reach a peace agreement after over twenty years of a devastating war? It was noted that the Rome Statute does not allow states to withdraw from the ICC’s jurisdiction once they have referred a situation on their territory to that body. If Uganda wants to draw back from the ICC, it now has to challenge the court’s

jurisdiction by arguing that it has the capacity and willingness to prosecute those crimes and that its available domestic proceedings satisfy the complementarity principle. While the Security Council may defer ICC investigations and prosecutions for 12 months by a resolution under Chapter VII of the United Nations Charter taking into account the interests of peace and security,¹⁰ the ICC prosecutor, on his part, is entitled to refuse to initiate or to proceed with investigations and prosecutions “in the interests of justice,” but not in the interests of peace.¹¹

Yet many victims in Uganda seem to be inclined to resort to traditional reconciliation methods, in the view of one participant. “Those traumatized for fear that justice will continue their suffering are saying that even if people get away with it and it brings peace, let’s bring peace,” he said. “Should courts take into consideration what the people seem to think is necessary?” Another participant added: “If we employ traditional methods, is that any less a justice process than other processes that are employed?”

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

¹⁰ Rome Statute of the International Criminal Court, A/CONF. 183/9, adopted on 17 July 1998 and entered into force on 1 July 2002, Article 16 (available at: <http://www.icc-cpi.int/Menus/ICC/Legal+Texts+and+Tools/Official+Journal/Rome+Statute.htm>).

¹¹ Rome Statute of the International Criminal Court, *ibid.*, Article 53.

Security Council resolutions [to] bear in mind judicial aspects at all times and not reserve them for later as used to be the case.”

International Justice in a Human Rights Era

During the previous session, participants examined how political commitment to the rule of law has, in recent times, pushed forward the creation of international courts and tribunals. In the last sixty years, the rule of law has also found expression in the development of a specialized field of international law designed to protect human beings, that is, international human rights law.

Human rights courts and specialized quasi-judicial bodies have accompanied and sustained the normative development of international human rights law. Yet international courts with jurisdictions that specialize in other spheres of law, such as international criminal courts and interstate dispute courts, are also increasingly called upon to consider, interpret, and apply human rights norms.¹² Participants were invited to reflect upon this phenomenon and its possible implications for the international legal system.

First, participants examined the applicability of international human rights law within their respective courts. Next, participants offered examples of cases in which human rights issues had arisen, or could arise in the future, within their jurisdictions as well as in domestic courts. The questions of how to resolve conflicting human rights interpretations, and how to avoid diverging jurisprudence, were then tackled. Finally, participants examined the issue of how international organizations as well as international courts and tribunals themselves deal

¹² See, for instance, “Harmonizing International Politics with Fundamental Human Rights and the Rule of Law: the *Kadi* judgment,” p. 42.

with their own alleged human rights violations.

Participants began their discussions by examining the extent to which international human rights law is applicable in international courts other than those that were specifically established to address human rights complaints. Some courts already have a broad authority to consider sources of law from different fields of international law. As the “principal judicial organ of the United Nations,”¹³ the ICJ was granted general jurisdiction to consider a wide array of subject matters, including international human rights law, as illustrated by the *Wall* case.¹⁴ In this case, the ICJ was called upon to determine, *inter alia*, whether international human rights law is applicable in times of armed conflicts.¹⁵

The Rome Statute of the ICC is very specific about the court’s duty with respect to international human rights law. It is bound to interpret and apply its law consistently “with internationally recognized human rights.”¹⁶ Historically, human rights law and humanitarian law developed separately, noted one participant, as “two different branches of law, two separate domains,” which replicated the traditional dichotomy between the law of peace and the law of war. The Statutes of the ICTY and ICTR perpetuated this dichotomy by principally covering violations of humanitarian law and not human rights law. By contrast, the ICC Statute “is unifying these bodies of law,” said

¹³ Charter of the United Nations, signed on 26 June 1945 and entered into force on 24 October 1945, Article 92 (available at: <http://www.un.org/aboutun/charter/>); Statute of the International Court of Justice, annexed to the Charter of the United Nations, Article 36 (available at: http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0#CHAPTER_II).

¹⁴ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, I.C.J. Reports 2004, p. 136, at pp. 177-178, paras. 102-106.

¹⁵ See also Fausto Pocar, “Human Rights under the International Covenant on Civil and Political Rights and Armed Conflicts,” in L.C. Vorah et al. (eds.), *Man’s Inhumanity to Man: Essays in International Law in Honour of Antonio Cassese*, Kluwer, 2003.

¹⁶ Rome Statute of the International Criminal Court, *supra* note 10, Article 21.

a participant. “It is an effort to fight against fragmentation,” added another.

An important question for judges to consider is whether treaty interpretation rules enable any international court to refer to human rights norms. In this regard, the 1969 Vienna Convention on the Law of Treaties, which embodies customary rules on treaty interpretation, stipulates:

A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. [...] There shall be taken into account, together with the context: [...] any relevant rules of international law applicable in the relations between the parties.¹⁷

However, international courts seem to differ on the extent to which these treaty interpretation rules could pull human rights norms towards courts that specialize in other spheres of international law. According to a participant, these rules clearly open the way to the use of human rights norms in his court, but other jurisdictions seem to be more hesitant to take the same stance. For instance, the constitutive instrument of the WTO dispute settlement system provides that this system:

serves to preserve the rights and obligations of Members under the covered [WTO] agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law.

¹⁷ Vienna Convention on the Law of Treaties 1969, done at Vienna on 23 May 1969 and entered into force on 27 January 1980, United Nations, Treaty Series, vol. 1155, p. 331, Article 31(1) and 31(3)(c) (available at: http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf).

Recommendations and rulings of the Dispute Settlement Body [which include panel and Appellate Body reports] cannot add to or diminish the rights and obligations provided in the covered [WTO] agreements.¹⁸

These provisions are often interpreted to mean that only WTO law falls within the purview of the WTO dispute settlement system despite the applicability of “customary rules of interpretation of public international law,” which could make room for human rights norms.

International human rights standards might also constitute general principles of law or crystallize into international customary norms that are consequently binding on all states. “When principles and rights are enshrined in customary law, any judicial body is obliged to take them into account,” opined a participant.

Although not all courts are broadly or specifically mandated to examine human rights norms, participants agreed that parties have raised or are likely to raise human rights issues “in all of them.” While human rights norms could be relevant to the substantive subject matter of many disputes, they could also help assess the fairness of courts’ procedural rules.

Participants offered several examples of cases in which human rights norms had infused the substantive reasoning of decisions by different international courts. International criminal jurisdictions often find inspiration in international human rights law. Participants observed that the ICTY and the ICC refer to human rights instruments and decisions of the

¹⁸ Understanding on rules and procedures governing the settlement of disputes (Dispute Settlement Understanding, DSU), Annex 2 of the Agreement establishing the World Trade Organization, adopted on 15 April 1994 and entered into force on 1 January 2005, Article 3(2) (available at: http://www.wto.org/english/tratop_e/dispu_e/dsu_e.htm).

“International human rights law cannot be successful at the international level if it is not coordinated at the domestic level.”

ECHR and IACHR, especially those relating to due process rights and the rights of the defense. The ICTY has also had to refer to human rights norms in interpreting customary law on crimes against humanity, as has recently been the case for the crime of “persecution,” for instance. With regard to interstate dispute courts, it was noted that that the ECJ regularly refers to the European Convention on Human Rights and cites decisions of the ECHR. It was also noted that human rights standards could be relevant to ITLOS cases addressing the rights of crews of detained ships, and to cases before the WTO Appellate Body that bring up economic and social rights.

Participants then pointed to several cases in which domestic courts used international and foreign law on human rights issues, for example on the issue of the death penalty. A participant emphasized, “Dialogue between international and domestic courts is important in the human rights field. International human rights law cannot be successful at the international level if it is not coordinated at the domestic level.”

Further questions arose concerning the treatment of human rights law by all of these diverse jurisdictions. “What will happen if two different courts interpret human rights norms in different ways? There are no mechanisms to deal with this situation. Is that a problem? Is there a risk of fragmentation?” asked a participant. “And what weight should courts ascribe to human rights in the event of a conflict of norms?” inquired another.



Opening session of the BIIJ, with (from left) Ralston Nelson of the Caribbean Court of Justice, Nicolas Michel, former UN legal counsel, and institute co-director Richard Goldstone, former chief prosecutor of the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda.

A participant from a human rights court welcomed the fact that other judicial institutions have begun to draw upon the practice of human rights courts, but “in doing so, courts interpret and develop human rights law. How far should they go?” He then turned to participants from other courts and asked, “What would you do if you disagreed with principles that are well established in the human rights field? Avoiding legal uncertainty and conflict is the main difficulty.” Another countered, “Is legal certainty very relevant in international human rights law? Better protection is always welcome. Cases of conflicts are very rare.” It was also noted that there were fewer problems of consistency between ECJ and ECHR decisions since these two courts have decided to hold regular meetings to discuss legal issues of common concern.

If human rights issues could surface in any international court, then should human rights background be systematically taken into consideration in judicial selection processes?

Should it be reflected in the composition of benches at the international level? Several agreed that human rights expertise or training is advisable for all members of the international judiciary if unintended and unwarranted fractures in human rights norms are to be avoided. Although human rights expertise “appears” on the bench of many international courts, it does not seem to be a formal requirement for most of them. It was noted that the most common requirement for an international judge is to be a highly qualified international lawyer. “Is understanding human rights issues part of the standard for being a highly qualified international lawyer? The answer would seem to be ‘yes,’” stated a participant. Participants also observed that four of the current judges of the ECJ are former judges of the ECHR.

A participant then raised questions about the universality of international human rights law. “Fragmentation of human rights norms presumes that human rights norms are universal, cutting across culture,” he said. In his view, regional cultures from developing countries do not seem to be properly taken into account in the formulation of human rights norms at the international level. “On the contrary,” responded a participant, “smaller states have more representation than larger ones in most human rights bodies by virtue of the principle that each state is entitled to one vote.” Others pointed out, however, that smaller states often have less “in-house” expertise than larger ones, and are more vulnerable to the economic influence of larger states in treaty negotiations. So in the end, they often have a weaker voice in human rights debates than more powerful nations.

Next, participants turned to the responsibility of international organizations, such as the United Nations, to respect and uphold human rights norms.

First, participants asked, does international human rights law bind international organizations such as the United Nations? A participant exclaimed, “Isn’t it obvious? The United Nations created all these rules! A body that creates human rights norms must be bound by them.” Another emphasized, reading directly from the UN Charter itself, that one of the purposes of the United Nations is “to achieve international co-operation [...] in promoting and encouraging respect for human rights and for fundamental freedoms for all [...]”¹⁹ That participant also reminded the group that the U.N. secretary-general had issued a bulletin reaffirming the applicability of humanitarian law to U.N. peacekeeping forces in 1999.²⁰

However, participants noted that there is currently no mechanism within the United Nations system that addresses specifically its responsibility for alleged human rights violations. Arbitration is the ordinary venue for individuals whose rights have been violated by the United Nations or its subsidiary organs, but some participants expressed reservations about the adequacy and efficiency of this dispute settlement method for each and every type of complaint or dispute. Moreover, alleged human rights violations by the United Nations or its subsidiary organs are increasingly the subject of judicial attention outside the confines of the United Nations system and arbitration proceedings, as some participants noted.²¹ In their view, the

¹⁹ Charter of the United Nations, *supra* note 13, Article 1(3).

²⁰ Secretary-General’s bulletin, *Observance by United Nations forces of international humanitarian law*, ST/SGB/1999/13, issued on 6 August 1999.

²¹ See, for instance, “Harmonizing International Politics with Fundamental Human Rights and the Rule of Law: the *Kadi* judgment,” p. 42. See also the following cases from the ECHR in relation to United Nations peacekeeping operations, which were found inadmissible: *Behrami and Behrami v. France and Saramati v. France, Germany and Norway*, Grand Chamber, Decision as to the Admissibility of the Application no. 71412/01 and Application no. 78166/01, 2 May 2007; *Kasumaj v. Greece*, First Section, Decision as to the Admissibility of Application no. 6974/05, 5 July 2007. See also the following case in relation to an international civil administration in the territory of the respondent State, that is, the High

United Nations should thus take the matter into its own hands and establish its own mechanism to settle these claims.

Other judicial fora within international organizations, such as administrative tribunals, seem to be reluctant to consider international human rights law in their interpretation of staff rules and regulations, according to a participant who regretted this stance.²² In his view, administrative tribunals should be able to use human rights standards as legitimate and persuasive interpretive aids.

Participants then examined the responsibility of international courts to respect human rights. Participants were asked, what happens if

Representative in Bosnia and Herzegovina, whose establishment was endorsed and authorized by a UNSC resolution under Chapter VII. The applications were found inadmissible, on the basis of the same reasoning as the one used in the above-mentioned cases: *Beric and others v. Bosnia and Herzegovina*, Fourth Section, Decision as to the Admissibility of Application no. 36357/04, 16 October 2007.

²² Consider, for instance, the following application alleging violations of fair trial rights by an administrative tribunal that has been brought before the ECHR, but it was found inadmissible: *Boivin v. 34 Member States of the Council of Europe*, Fifth Section, Decision as to the Admissibility of the Application no. 73250/01, 9 September 2008. In this case, an individual filed an application before the ECHR against member states of the European Organization for the Safety of Air Navigation (Eurocontrol) claiming violations of fair trial rights by the International Labor Organization Administrative Tribunal (ILOAT). The ILOAT had been granted “sole jurisdiction in disputes between the Organization and the personnel of the Agency, to the exclusion of the jurisdiction of all other courts and tribunals, national or international.”

²³As for the ICTY, see the following decisions by the ECHR declaring the applications inadmissible: *Milošević v. the Netherlands*, Second Section, Decision as to the Admissibility of Application no. 77631/01, 19 March 2002; and *Naletilić v. Croatia*, Fourth Section, Decision as to the Admissibility of Application no. 51891/99, 4 May 2000. With regard to the Court of First Instance and the European Court of Justice, see, for instance, the following decisions by the European Court of Human Rights declaring the applications inadmissible: *Senator Lines GmbH v. Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, Sweden and the United Kingdom*, Grand Chamber, Decision as to the admissibility of Application no. 56672/00, 10 March 2004. See also *Emesa Sugar N.V. v. the Netherlands*, Third Section, Decision as to the Admissibility of Application no. 62023/00, 13 January 2005. It was also noted that fair trial rights, as defined in Article 6 of the European Convention on Human Rights, are sometimes raised before the ECJ to challenge the fairness of proceedings that had previously taken place in the Court of First Instance.

international courts are themselves the human rights violators?

Thus far, human rights questions have arisen in relation to the ICTY and ICTR, which are subsidiary organs of the United Nations. Such questions have also cropped up in another court, the ECHR, which has received applications alleging violations of fair trial rights in proceedings taking place in “peer institutions,” namely the ICTY as well as the Court of First Instance and the European Court of Justice. The ECHR found them inadmissible, however.²³

Participants analyzed how the ICTY and ICTR have handled allegations of human rights violations in their own criminal proceedings. The respective governing instruments of the ICTY and ICTR guarantee the protection of certain human rights of the accused, such as the right to be tried without undue delay, and the right to have the assistance of counsel. Yet these instruments do not provide remedies for the infringement of these human rights norms by the prosecutor, by chambers, or by other organs of the courts. Nor do they provide for mechanisms to redress these infringements.

Confronted with this problematic situation, the ICTY and ICTR took it upon themselves to remedy the human rights violations suffered by accused persons in the course of their criminal proceedings. In some cases, their sentences were reduced.²⁴ When this was not possible, monetary

²⁴ See *Jean Bosco Barayagwiza v. The Prosecutor*, Appeals Chamber, Case No: ICTR-97-19-AR72, Decision (Prosecutor’s Request for Review or Reconsideration), 31 March 2000, paras. 74-75, and *The Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza and Hassan Ngeze*, Trial Chamber I, Case No. ICTR-99-52-T, Judgment and Sentence, 3 December 2003, paras. 1106-1107. In this case, the sentence of the accused was reduced from life to 35 years of imprisonment to remedy several human rights violations including a lengthy detention without an indictment being brought against him. See also *Laurent Semanza v. The Prosecutor*, Appeals Chamber, Case No. ICTR-97-20-A, Decision, 31 May 2000 and *The Prosecutor v. Laurent Semanza*, Case No. ICTR-97-20-T, Judgment and Sentence, 15 May 2003, paras. 579-582. In this case, the Appeals Chamber found that prior to his surrender to the Tribunal, the ac-

compensation was awarded by the court and paid by the United Nations.²⁵

“Should this trend be supported?” inquired a participant. Several agreed that it is important to compensate victims for human rights violations committed by international tribunals, like the ICTY or ICTR, even though their governing instruments do not fully regulate this matter. There was general agreement among participants that arbitration within the United Nations system is neither appropriate nor sufficient in these circumstances.

Then, participants asked, who should take on the duty of compensating victims for human rights violations committed by a court? Courts themselves or a distinct body or jurisdiction?

There was disagreement on this point. One participant asserted that it is incumbent upon the United Nations to settle claims of human rights violations against its subsidiary bodies, including the ICTY and ICTR. In his view, the United Nations needs to establish a new mechanism to settle these claims, in addition to any other claims of human rights violations arising from

cused had suffered a violation of his right to be informed promptly of the nature of the charges against him. The accused’s sentence was subsequently reduced by a period of six months. Finally, consider *Juvénal Kajelijeli v. The Prosecutor*, Appeals Chamber, Case No. ICTR-98-44A-A, Appeal Judgment, 23 May 2005, paras. 251-255 and 320-324; in this case, the Appeals Chamber found that Mr. Kajelijeli had suffered from several serious human rights violations during his arrest and detention. The Appeals Chamber set aside Mr. Kajelijeli’s two life sentences and fifteen years’ sentence imposed by the Trial Chamber and converted them into a single sentence consisting of a fixed term of imprisonment of 45 years. For a discussion of ICTR and ICTY cases, see Guido Acquaviva, “Human Rights Violations before International Tribunals: Reflections on Responsibility of International Organizations,” (2007) 20 *Leiden Journal of International Law* 613-636.

²⁵ *The Prosecutor v. André Rwamakuba*, Trial Chamber III, Case No. ICTR-98-44C-T, Judgment, 20 September 2006, in which the accused, Mr. Rwamakuba, was acquitted. Mr. Rwamakuba was subsequently awarded US\$2,000 in compensation for the violation of his right to legal assistance during the first months of his detention, which resulted in a delay in his initial appearance. See Trial Chamber III, Decision on Appropriate Remedy, 31 January 2007 and Appeals Chamber, Decision on Appeal against Decision on Appropriate Remedy, 13 September 2007.

Participants appeared to agree that there are more advantages than disadvantages associated with the existence of multiple judicial fora dealing with human rights norms.

its operations. He explained, “Certain faults are attributable to the prosecutor. But what if the wrongdoing is attributable to the chamber? I see a problem of consistency here. Although it is an embarrassing and difficult matter, we can’t let this go without consequences. The current situation is not satisfactory.”

In response, several participants countered that courts are already entrusted with the inherent power to deal with their own alleged human rights violations. Thus, judges themselves can address the supposed violations of the prosecution, chambers, or other organs of a court. Participants wondered whether the proposed mechanism should tackle the human rights responsibility of chambers, in particular, so that an outside entity could be empowered to consider any alleged violation on their part. One participant disagreed. “Is it necessary to change the situation in relation to judges? Why can’t judges be judged by themselves?” In his view, the judges of a court should be able to make decisions about the wrongdoing of their own colleagues and should be trusted to do so, and therefore, a separate mechanism should not be necessary.

Courts should interpret their inherent powers cautiously, responded a participant. “Courts usually hesitate to create for themselves new recourses and remedies. I am not sure that the use of courts’ inherent powers is the right way to approach this matter. I understand why this route was taken by the ICTY and ICTR, but an

alternative mechanism within the United Nations would have been preferable, in my opinion.” Another participant retorted, “In the absence of mechanisms, either you let a right be violated without remedy or you imagine a solution. But I would welcome a new mechanism.”

Finally, as a result of the far-reaching discussions during this session, participants appeared to agree that there are more advantages than disadvantages associated with the existence of multiple judicial fora dealing with human rights norms. “At least these issues are being heard,” stated a participant. But they also wondered if the increasing use of human rights norms across international courts signals a pressing need for the creation of new human rights courts or mechanisms. Several were concerned that some critical human rights issues, which fall outside the purview of most human rights courts, currently remain inadequately addressed or unresolved. This is the case of alleged human rights violations attributable to international organizations, for example.

In this regard, it was noted that a general responsibility mechanism addressing complaints of human rights violations by the United Nations and its subsidiary organs might come as a result of the work of the International Law Commission on the responsibility of international organizations. “A task force should be set up to determine the policy of the United Nations on this question,” a participant suggested.

Language and International Courts

Like any area of human knowledge, law is necessarily communicated through language. Yet language is more than the simple mediator of law – the two are connected and act upon one another in complex ways. Many view law itself as a sophisticated linguistic exercise, one that can be manipulated and misinterpreted, intentionally or not.²⁶ Legal language is also subject to law, which requires the drafting of rules that are reasonably clear in order to protect individuals from the arbitrary exercise of power.²⁷ Rules of interpretation may also help decipher the legal meaning of particular words. Finally, law also protects language in its own right. International human rights law, for instance, protects the linguistic rights of persons who are considered to be vulnerable, such as accused persons in criminal proceedings and minority groups.

How do these complicated relationships between law and language play out in the diverse context of international courts and tribunals? The staffs of these institutions are made up of individuals who hail from numerous countries, represent a variety of professional backgrounds, and have training in different legal traditions. Judges and other court personnel add to this diversity by bringing to their work environment the different languages they speak. This simple fact differentiates the international justice system from most of its domestic counterparts and has significant implications for the ways in which international courts carry out their work.

²⁶ See Lawrence M. Solan, *The Language of Judges*, University of Chicago Press, 1993, and Lawrence M. Solan and Peter M. Tiersma, *Speaking of Crime: the Language of Criminal Justice*, University of Chicago Press, 2005.

²⁷ Lon L. Fuller, *The Morality of Law*, revised edition, Yale University Press, 1965, pp. 63-65.

International Court of Justice

Article 39

1. The official languages of the Court shall be French and English. If the parties agree that the case shall be conducted in French, the judgment shall be delivered in French. If the parties agree that the case shall be conducted in English, the judgment shall be delivered in English.

2. In the absence of an agreement as to which language shall be employed, each party may, in the pleadings, use the language which it prefers; the decision of the Court shall be given in French and English. In this case the Court shall at the same time determine which of the two texts shall be considered as authoritative.

3. The Court shall, at the request of any party, authorize a language other than French or English to be used by that party.

From Statute of the ICJ: <http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0>

In this session, it was noted that the languages used by international courts and tribunals have an impact at three distinct levels of interaction:

- 1) At the internal level, where communication, both oral and written, has to take place regularly and efficiently among judges and those they work with on a daily basis.
- 2) At the level of interactions that the court has with the parties that come before it, also through both oral and written channels.
- 3) At the level of communication with the larger public, who need to be informed about significant aspects of their work, including the issuing of arrest warrants and indictments, and the rendering of judgments.

BIIJ participants discussed a number of issues related to multilingualism in international

Special Court for Sierra Leone

Article 24: "Working Language"

The working language of the Special Court shall be English.

From Statute of the SCSL:
<http://www.sc-sl.org/LinkClick.aspx?fileticket=uClnd1MJeEw=&tabid=176>

courts and tribunals. Some of these were practical issues: How do courts carry out their work given the ever-present linguistic diversity of those participating in international justice procedures? What are the problems associated with translation and interpretation? How can courts best communicate their accomplishments to a multilingual public? Other issues were more speculative: Should the linguistic knowledge of candidates for the international bench be taken into account in the selection process? What is the international justice system losing, if anything, by being dominated by a few languages? Do the gains outweigh the losses?

Participants began by examining the sections of the statutes or constitutive instruments of international courts and tribunals that address the multilingual challenges that they routinely face. These documents vary greatly both in detail and in flexibility regarding language use (see sidebars). Some courts explicitly designate both "official" and "working" languages, such as the ICC, IACHR, and the ACHPR. Other courts designate one or the other; for example the ICTY, ICTR, and SCSL have working languages, while ITLOS, the ICJ, and the WTO Appellate Body have official languages.²⁸ Some courts provide details in their statutes about what is to be done if a party before the court is not knowledgeable in a working or official language. Others even specify how costs of interpretation are to be covered and how interpreters and

²⁸ These statutes or constitutive instruments do not specify, however, what exactly "official language" or "working language" means in the context of their institution.

Inter-American Court of Human Rights

Article 21: “Official languages”

1. The official languages of the Court shall be those of the OAS, which are Spanish, English, Portuguese, and French.
2. The working languages shall be those agreed upon by the Court each year. However, in a specific case, the language of one of the parties may be adopted as a working language, provided it is one of the official languages.
3. The working languages for each case shall be determined at the beginning of the proceedings, unless they are the same as those already being employed by the Court.
4. The Court may authorize any person appearing before it to use his own language if he does not have sufficient knowledge of the working languages. In such circumstances, however, the Court shall make the necessary arrangements to ensure that an interpreter is present to translate that testimony into the working languages. The interpreter must take an oath or make a solemn declaration, undertaking to discharge his duties faithfully and to respect the confidential nature of the facts that come to his attention in the exercise of his functions.
5. The Court shall, in all cases, determine which text is authentic.

From Rules of Procedure of the Inter-American Court of Human Rights (Approved by the Court during its XLIX Ordinary Period of Sessions, held from November 16 to 25, 2000, and partially amended by the Court during its LXXXII Ordinary Period of Sessions, held from January 19 to 31, 2009):
<http://www.corteidh.or.cr/reglamento.cfm>

translators are to be approved. Participants described to their fellow judges how language policies were interpreted and applied in their respective courts.

There is generally a logic attached to the selection of languages that have working or official status in a court. Sometimes they are widely spoken within a court’s geographic jurisdiction and are thus a natural choice. In other cases, languages are chosen because they have a worldwide reach and are commonly spoken by persons working in international organizations. Official languages may also occupy a special status in a court’s “parent institution.” For example, French and English are the working languages of the ICTY, just as they are at the United Nations. Yet the languages spoken most frequently by those testifying before the court, as well as by

many defense lawyers – Bosnian, Croatian, and Serbian²⁹ – are not official. This means, among other things, that authorized versions of ICTY judgments cannot necessarily be read by the tribunal’s primary “audience,” those living in the Balkan region.

In a multinational and multilingual legal system, translation and interpretation are always going to be needed. They thus play an essential role in the work of international courts, despite the fact that these tools create their own sets of problems. Several judges noted the difficulty of translating various legal terms from English to French, and contributed examples of situations where “semantic shift” from one to the other had been particularly problematic.

²⁹ These closely related languages are referred to at the ICTY as “BCS.”

“Translation is not an *art mineur*,” claimed one participant; it takes enormous skill, and translators may play a more important role in the creation of legal knowledge than is generally acknowledged. Several participants even agreed that the translation process may enhance the quality of judgments and other court documents in their original language.³⁰ Further, two participants urged their colleagues to adopt and circulate official documents only *after* they have been scrutinized by the watchful eyes of translators and *after* the translation has been verified by judges and legal staff. One judge recounted that her court had “gotten burned” once in this regard. Judges had spent days debating key paragraphs only to find out that the English did not translate comprehensibly into the other official languages of that court. That institution has since started the practice of simultaneously drafting and translating the most important paragraphs of judgments.

Sufficient time and resources need to be devoted to translation, participants agreed. It was noted in this regard that some courts were specifically requested by the parent body financing the court to reduce the volume of pages of their decisions in order to reduce translation costs. Several participants were concerned that such requests could affect the overall transparency of judicial processes.

A criminal judge in the group described one of the current linguistically complex cases at his court, characterizing it as a virtual “Tower of Babel.” The chamber is mostly English-speaking and the defense team is entirely French-speaking, while the witnesses and victims frequently testify in a language of their home country. Interpretation in the courtroom is thus constantly called for, and the translation of

³⁰ This is because translators often ask for clarification when they have difficulty in rendering an unclear passage into a second language, which then leads to a revision of the original.



René Blattmann (left) of the International Criminal Court and Dennis Byron of the International Criminal Tribunal for Rwanda at the BIJ opening reception

documents to be shared by the prosecution and defense furthermore slows down the flow of the trial. The cost in terms of both time and money, he said, is immense.

Several participants suggested that requiring judges and staff to speak more than one working language of their courts would solve many of the difficulties that occur at the level of internal communication. The need for translation of documents being used by a mixed-language chamber, and for interpretation during deliberations, would disappear. Mutual understanding of a wide array of legal terms and notions, coming from both civil and common law, would also be enhanced through multilingualism on the bench, as well as through a comparative knowledge of legal systems. (In fact, these two forms of knowledge often go hand in hand.) As one judge observed of his own institution, “Speaking both languages [of the court] would allow judges to better reach compromises between concepts.” It was also pointed out that judges who speak only the less frequently used official language of their court are at a disadvantage since their ability to communicate with colleagues – on matters both great and small – is compromised.

Despite their multiple institutional languages and the recognized benefits of multilingualism, however, international courts seem more interested in having a staff that is balanced along lines of geographic representation, legal training, and in some cases, gender than one that speaks most if not all the relevant languages. Diversity along multiple lines is clearly critical if an international court is to be perceived as an institution capable of serving a broad constituency. Yet inattention to linguistic balance, in particular, means that certain courts are unable to compose chambers of judges who use a common language. According to one criminal judge, this imposes an undue burden on the entire criminal proceedings. Many believe, however, that there is already a limited pool of candidates who are qualified to serve on international benches. Requiring multilingualism on top of expertise in various fields of law would reduce the pool even further.

While the internal operation of courts might be facilitated through widespread staff multilingualism, linguistic diversity among the parties that come before a court will always be present. The ECJ and the ECHR experience this diversity to a heightened degree, as they accept “applications” in any of the languages spoken within their wide geographic jurisdictions (covering 27 and 47 states respectively). In oral proceedings, the “language of the case” at the ECJ remains the original language of the application. In contrast, once an application is deemed admissible at the ECHR, one of the working languages, either English or French, is normally used both for oral proceedings and for document submission by states. In the judgment phase, there are also differences between the two European courts. The ECJ is particularly concerned that its judgments be communicated effectively to member states so that they can be incorporated into domestic law. To that end, ECJ judgments are translated into 23 different

*If the accused cannot understand
the charges against him
in either French or English,
then they must be presented in a language
he can understand.*

languages, an exercise that accounts for 15% of its annual budget and 50% of its staff time. The ECHR, on the other hand, does not have a policy of translating its judgments into the languages relevant to a particular case. It is left up to the respondent state to bring its judgment from Strasbourg “back home.”

Paradoxically, the two courts with the widest geographic jurisdictions – the ICJ and ITLOS – demonstrate the least flexibility in terms of language. Submissions by the parties are accepted, proceedings are carried out, and judgments are rendered in only the official languages, French or English, unless special authorization is obtained to use another. The World Trade Organization Appellate Body is similarly stringent in its language policies, restricting the use of languages in all aspects of the institution’s work to English, French, and Spanish. These global institutions thus place the burden of linguistic accommodation on the state parties that come before them.

The opposite policy is found in criminal tribunals, where effective communication with parties is “a matter of human rights” and where tremendous efforts at linguistic accommodation are consequently made by the institutions. If the accused cannot understand the charges against him in either French or English, then they must be presented in a language he *can* understand. The fact that the indictment is very long and expensive to translate is not a consideration. The accused also has the “fair trial right” to understand all the proceedings.

If international courts are to serve their multilingual jurisdictions and publicize their work, accommodating the language needs of their constituents cannot be avoided.

The ICC will certainly feel the burden of respecting the linguistic rights of the accused in the years to come. The cases currently before the court involve languages that do not necessarily have a preexisting cadre of professionals who can carry out the necessary translation and interpretation, which could cause long delays in the proceedings. Too long a delay could also, then, result in an infringement of the rights of the accused. The court also cannot anticipate the languages that will be involved in future cases and thus prepare for the work ahead. This contrasts with the work of the ECJ, for example, where translation is performed in a great number of languages but generally the same ones.

Another judge emphasized the critical role of good interpreters for the fact-finding aspect of criminal proceedings. He observed that in his own court, none of the judges speak the language most frequently used for testimony. He has the impression, however, that interpreters are sometimes influenced too strongly by the manner in which testimony is given, which may lead to inaccurate renderings of witness statements. At the same time, judges are wholly dependent on interpreters for their understanding of witness statements and are usually not in a position to evaluate their accuracy. One participant pointed out that when discrepancies between an original testimony and the translation *can* be identified, it is clear they have the potential to affect fact-finding. He related how in the early years of the ICTY, an interpreter mistakenly translated a witness' statement into English as "they were digging a furrow" rather than "they were digging a trench," thereby suggesting that the activity

observed was agricultural instead of potentially for the disposal of bodies.

Over the course of discussions, participants noted that, notwithstanding the adoption by their institutions of multiple official or working languages, in almost all cases one has become dominant – English. This trend parallels, of course, the increasing importance that English plays on the world stage, particularly in business, science and research, and the media.

This linguistic dominance has several important implications for the world of international justice. It has been noted, for example, that English speakers have become overrepresented in judicial institutions that are meant to reflect the world's diversity. Judges and court staff who are native or near-native speakers of English are also at an advantage in relation to their colleagues from other language groups. They are already fluent in the language most commonly used in their courts and thus do not carry the additional professional burden of functioning professionally in a second (or third or fourth) language.

The importance of English is also expanding at the expense of one language in particular – French. Many francophone judges and personnel of international courts and tribunals feel that legal thinking in their language has been historically influential in the development of international law and that its declining importance impoverishes the field. From a pragmatic point of view, however, the official status of French in many courts may not be logical. One participant observed that few of the judges in his court, much less the parties before it, speak or understand French. "The French language has got a place in the system that it would not merit," he declared, "if looked at from a fresh and purely practical perspective." The ECJ is an exception among international courts in the status it accords to French – all if its judges

deliberate on cases in French, without the use of interpreters.³¹

Participants also discussed whether the dominance of English creates the “side effect” of privileging common law within international courts and tribunals. The greater the number of judges and staff (especially legal assistants) who function in English, the more likely they are to read and cite jurisprudence from the English-speaking world. The eventual effect of this trend, some fear, will be the decreased influence of civil law notions in international legal thinking. One participant agreed that language plays a role in the expansion of the common law in international courts and tribunals. He asked, “Was it not inevitable to have Statutes for the ICTY and ICTR so much influenced by common law? They were both drafted in English.” But another judge rejected this characterization for his own court. It is true that chambers with a majority of judges from common law countries often privilege their own legal thinking, he conceded. But this is less a question of language than of the tendency to apply familiar domestic legal procedures at the international level.

The gist of the session’s discussions was twofold. First, multilingualism poses many challenges – practical, philosophical, and financial – for the international justice system. But, realistically, courts with large geographical jurisdictions have little choice but to embrace this diversity. As one European judge noted, “European law is multilingual law. For the legitimacy of the court, it is important to have many languages on board. The cost argument should not be taken into account – some costs are inherent to a democratic order.” If international courts

³¹ Another notable exception to the domination of English in international courts is the IACHR. Although English is one of the court’s official languages, the majority of states parties are Spanish-speaking and the overwhelming majority of staff, judges, and parties before the court are Spanish speakers.

are to serve their multilingual jurisdictions and publicize their work, accommodating the language needs of their constituents, to a greater or lesser degree, cannot be avoided.

The second conclusion drawn from the discussions was that lack of linguistic knowledge among some international judges places a burden on their institutions. Monolingual judges may be impaired in their capacity to interact with other members of their benches. They also lack the ability to review the validity of translated versions of judgments in other official languages. Furthermore, monolingualism limits access to legal knowledge and new perspectives that could be helpful in drafting a decision that is understandable and acceptable to parties who come from diverse cultural and legal settings.

BIJ participants generally agreed, then, that it is strongly desirable for international judges to be multilingual, both for reasons of practicality and collegiality. International judges should strive to improve their language skills and, very importantly, international justice institutions should support them as much as possible in this endeavor.

Professional Conduct in the International Justice System

Most international courts and their actors strive to achieve a difficult objective – that of serving justice across a multiplicity of nations with culturally diverse populations and different systems of law. During the institute, participants addressed two areas of professional conduct in the international justice system: first, the professional conduct of counsel and advisers who appear in proceedings before international courts and tribunals; and second, the ethical considerations inherent in the exercise of freedom of expression and association by international judges.

Principles of professional conduct for counsel and advisers in proceedings before international courts and tribunals

During an information-gathering session led by Ruth Mackenzie, deputy director of the Centre for International Courts and Tribunals at University College London, participants debated whether it would be advisable and feasible to develop common standards to govern the professional conduct of lawyers involved in proceedings before international courts and tribunals.³²

Mackenzie noted that the governing instruments of many international courts and tribunals generally regulate who may appear but provide little detail as to standards of conduct. International criminal jurisdictions have developed more comprehensive codes of conduct for counsel.³³ However, most international courts have no detailed codes or rules governing conduct.

Mackenzie also observed that when issues of ethics and professional conduct arise, most

lawyers fall back on their domestic codes of conduct, to the extent that they are bound by such a code through membership in a domestic bar. However, given that they originate from different national jurisdictions and legal traditions, it is frequently the case that counsel will be subject to different standards, principles, and approaches. Moreover, given the permissive rules in some international tribunals as to who may act as counsel in proceedings, it may not always be the case that a lawyer appearing before a tribunal is subject to a professional code of conduct through membership of a domestic bar or law society. Mackenzie asked, “Is that a problem? Are there issues that should be addressed through common sets of principles? If codes are developed, how should they be implemented and enforced?”

BIJ participants were in agreement that counsel and advisers should be primarily responsible for regulating their own professional conduct in international court proceedings through bar associations. While counsel’s competence for appearing before courts is generally a matter to be determined by courts themselves, the disciplining of lawyers should be principally a matter for regulation by the legal profession, participants agreed. As a participant cautioned, “There are dangers associated with courts assuming the role of disciplining lawyers.”

At the same time, some participants noted that judges sometimes have no other choice but to impose disciplinary measures on counsel for the sound and orderly administration of justice, a practice that has occurred most especially in criminal jurisdictions. For example, they occasionally need to address abuse of process, non-compliance with orders on the production of documents, or abusive language in courtrooms. In cases of serious misconduct, judges may sometimes avail themselves of the power of contempt of court. Therefore, international courts might need more guidance

³² Mackenzie outlined the initiative of the International Law Association Study Group on the Practice and Procedure of International Tribunals, which is co-chaired by Professor Philippe Sands QC (University College London), Professor Campbell MacLachlan (Victoria University Wellington), and Professor Laurence Boisson de Chazournes (University of Geneva). Further information on the Study Group’s work will appear on the website of the Centre for International Courts and Tribunals, at: <http://www.ucl.ac.uk/laws/cict>.

³³ See, for instance, the Code of professional conduct for counsel appearing before the international tribunal (ICTY), as amended on 12 July 2002 and 29 June 2006 (IT/125 REV. 2), available at <http://www.icty.org/sections/LegalLibrary/Defence>. See also the Code of Professional Conduct for Defense Counsel, ICTR, 14 March 2008, and Prosecutor’s Regulation No. 1 of 1999, Prosecutor’s Regulation No. 2 of 1999 and Prosecutor’s Regulation No. 1 of 2005 (ICTY/ICTR), available at: <http://www.unictcr.org/default.htm> (“Basic Legal Texts”). See, further, the ICC Code of Professional Conduct for Counsel, ICC-ASP/4/Res.1, adopted on 2 December 2005, and entered into force on 1 January 2006, available at: http://www.icc-cpi.int/Menus/ICC/Legal+Texts+and+Tools/Official+Journal/Code+of+Professional+Conduct+for+counsel+_ .htm. However, Mackenzie indicated that given that specific codes have already been developed for the international criminal tribunals, it is not proposed initially to include them within the scope of the Study Group’s work. Nonetheless, experience with the application of such codes may provide useful guidance to the development of general principles.

on the nature of sanctions to be imposed, according to a participant. “Any working group should examine or recommend sanctions to apply to various levels of misconduct.”

Would it be desirable and possible to devise one single self-regulating body of counsel and advisers appearing before international justice institutions? Given the diversity and specialty of international tribunals, some questioned the feasibility of such a plan. Instead, national bar associations should be encouraged to develop codes that could apply universally, in the view of some participants. Other associations with a broader mandate and geographical scope, such as the International Bar Association and the International Association of Lawyers, should also be included in these efforts, according to another participant.

BIIJ participants then wondered whether the jurisdiction of home bar associations should be extended to allow them to discipline professional misconduct occurring in international courts. There was disagreement on this matter. Several opined that international justice institutions should be able to refer disciplinary matters back to national bar associations, while others questioned the suitability of this option, explaining that home bar associations had often only reluctantly cooperated with international jurisdictions. A participant reported that his court had decided to refer disciplinary matters back to home bar associations but subsequently never heard back from them.

“If cases are referred back to home bar associations, does it matter if these associations do not apply the same rules or standards?” inquired Mackenzie. The majority appeared to agree that there should be minimal standards of conduct for counsel appearing before international courts to ensure uniformity and consistency. Although the rules of conduct

and methods of enforcement are often similar from one country to another, their differences may sometimes be too important to ignore. Participants asked: When rules of conduct conflict, which one should prevail? Another suggested that in order to harmonize rules of professional conduct, each bar or law society, at the national or international level, should treat violations of other associations’ rules as violations of their own rules.

Participants agreed that one particular issue of professional conduct seems to require immediate attention – post-service limitations for former judges and legal staff of international justice institutions. Several participants expressed concern about former judges appearing as counsel before benches that they had previously occupied or before former fellow judges. One opined, “It creates an appearance of fundamental unfairness that seriously affects the credibility of courts.” Many participants from across the international judicial spectrum also took issue with former legal staff turning around to represent parties or to act as counsel for prosecution or defense before the court for which they had previously worked. Institute participants agreed that legal staff, like judges, should be subject to post-service limitations such as a mandatory “cooling-off” period.

What should be the duration, then, of such “cooling-off” periods for former judges and legal staff of international jurisdictions? The practice directions of the ICJ suggest a three-year restriction period for former judges as well as for the “registrar, deputy-registrar or higher official of the Court” (see sidebar, page 28). The Burgh House Principles on the Independence of the International Judiciary also recommend a three-year restriction period for former international judges as a “benchmark” (see sidebar, page 28). It was also noted that in some domestic jurisdictions, judges cannot appear for a period

Post-Service Limitations (“Cooling-Off” Period) for Former Judges and Legal Staff

Practice Directions of the International Court of Justice,

adopted in October 2001, as amended on 20 January 2009.

Practice Direction VIII

The Court considers that it is not in the interest of the sound administration of justice that a person who until recently was a Member of the Court, judge ad hoc, Registrar, Deputy-Registrar or higher official of the Court (principal legal secretary, first secretary or secretary), appear as agent, counsel or advocate in a case before the Court. Accordingly, parties should refrain from designating as agent, counsel or advocate in a case before the Court a person who in the three years preceding the date of the designation was a Member of the Court, judge ad hoc, Registrar, Deputy-Registrar or higher official of the Court.

<http://www.icj-cij.org/documents/index.php?p1=4&p2=4&p3=0&lang=en>

The Burgh House Principles on the Independence of the International Judiciary,

adopted by the International Law Association Study Group on the Practice and Procedure of International Courts and Tribunals, in association with the Project on International Courts and Tribunals, 2004.

Principle 13.3

Former judges shall not act as agent, counsel, adviser or advocate in any proceedings before the court on which they previously served for a period of three years after they have left office or such other period as the court may establish and publish.

http://www.ucl.ac.uk/laws/cict/docs/burgh_final_21204.pdf

of ten years before a court on which they had previously served. Other jurisdictions impose a lifetime restriction on appearance before one's former court.

While some participants argued in favor of a lifetime restriction for the international judiciary, others would prefer less stringent limitations depending on the circumstances. For example, a participant stated, “In my court, judges are appointed for four-year terms. Should they give up for the rest of their lives the possibility of appearing before that court?” Others pointed out that post-service limitations should not disproportionately affect the capacity of former judges to earn a living after their judicial mandate, especially if these individuals still need to be active in the labor market or if pension funds are not available to them.

It was noted that some international courts authorize former judges to appear before them immediately after leaving the bench provided that they do not argue the cases that they had been previously assigned or those that were pending during their term of office.

Participants agreed that reasonableness and proportionality should dictate the terms and duration of any post-service limitation, including “cooling-off” periods. Since the possibility of influencing former colleagues decreases with time, life bans would seem disproportionate in most cases. Three years of appearance limitation can be excessive for courts where judges are appointed for short terms of office. However, one participant asked skeptically, “Does a limitation on appearance before courts seriously undermine the possibility of making a living as a consultant

or adviser, for example? It does not prevent earning a living.”

Ethical considerations by international judges in the exercise of their freedom of expression and association

During an informal evening session, participants wrestled with the question of how international judges can balance their individual right to freedom of expression and association on the one hand, and the interests of international justice on the other. In other words, how can judges best reconcile these personal freedoms with their public judicial function without affecting their independence and impartiality (see sidebar, right)? Participants answered this question by weighing several hypothetical dilemmas in a lively, frank, and open manner.

Participants first discussed whether they should refrain from attending certain social events in order to preserve their neutrality. For example, is there an appearance of impropriety if a judge attends a gathering for a friend whom he has known since law school and who is now running for a national executive office? Would there be ethical concerns if a judge from a regional human rights court, previously in the diplomatic service, spends a holiday week with the family of his country’s foreign minister? What if a small private dinner at the home of a judge of an international criminal court includes the deputy prosecutor of that court? Should a judge from a regional court decline an invitation to attend a symposium on global climate change if other attendees include senior executives of multinational corporations that have appeared before his court? Participants also pondered whether judges can associate with certain organizations, such as fraternal orders, without compromising their appearance of impartiality.

Participants additionally broached possible restrictions on their capacity to express personal

The Burgh House Principles on the Independence of the International Judiciary, adopted by the International Law Association Study Group on the Practice and Procedure of International Courts and Tribunals, in association with the Project on International Courts and Tribunals, 2004.

Principle 7.1

Judges shall enjoy freedom of expression and association while in office. These freedoms must be exercised in a manner that is compatible with the judicial function and that may not affect or reasonably appear to affect judicial independence or impartiality.

http://www.ucl.ac.uk/laws/cict/docs/burgh_final_21204.pdf

views in public gatherings or events. For example, does an international judge display bias by speaking at the celebration of the 50th anniversary of a human rights association with which he has been associated for years? Participants also discussed whether international judges should generally abstain from making regular contributions to online blogs on general issues of punishment, prosecution policy, gender discrimination, and other matters.

While there was general agreement on how to handle these hypothetical cases, there were enough differences of opinion to suggest that a fundamental judicial concept like “independence,” and a term like “freedom of association,” do not hold objectively and universally defined semantic values but are instead open to some individual interpretation on the part of judges. Even those international courts that have a judicial code of conduct are bound to encounter situations where the boundary between acceptable and unacceptable behavior is debatable.

What remained unquestionable, however, was the necessity for judges to maintain the

appearance of impartiality at all times.³⁴ This necessity may often outweigh judges' individual rights to freedom of expression and association. When the boundary between acceptable and unacceptable behavior is unclear, the general practice of international judges is to seek advice from peers and from the president of their respective courts on how best to preserve the integrity of the judicial function. Therefore, participants appeared to agree that, in case of doubt, one should generally abstain from engaging in the public forum of ideas or in other social events or organizations until the matter is fully discussed with colleagues.

Furthermore, since most international courts serve justice to a multiplicity of nations, each with its own understanding of judicial ethics, perhaps the necessity for judges to discuss ethical quandaries with peers is felt more acutely in the international justice system than in domestic ones.

What is Success in International Justice?

Participants concluded the institute by engaging in a lucid assessment of the accomplishments of institutions of international justice as well as the obstacles they continue to face. What lessons from the past can help determine the successful course of international justice in the future?

Participants began by pondering the meaning of "success" in international justice. What are the ways in which the successes, and failures, of international courts can be gauged? A number of parameters were identified. First, participants examined whether their respective courts had realized the purposes for which they were created.

³⁴ This essential element of the judicial persona was similarly highlighted during discussions on judicial ethics that took place at the 2003, 2004, and 2007 sessions of the BIJ. See reports at <http://www.brandeis.edu/ethics/internationaljustice/bij/index.html>.

Next, they turned to additional measures of success, such as cooperation and compliance on the part of states with international court decisions. Participants then discussed hurdles encountered by international courts in the realization of their aims. Finally, this empirical and comparative survey sparked reflections on the contribution of international courts, individually and collectively, to the success of the developing system of international justice as a whole.

The objectives of international justice institutions derive from their respective jurisdictions and mandates. They are by nature wide-ranging and encompass, for instance, the peaceful settlement of international disputes, the protection and promotion of human rights, or the prosecution of war crimes, crimes against humanity, and genocide. Participants also observed that international courts' objectives are not static. New objectives and roles may emerge in international justice – sometimes in a rather unforeseen and startling manner.

The courts that seem to have trouble reconciling their everyday work with the publicly stated rationale for their creation are the United Nations ad hoc criminal tribunals (ICTR and ICTY). Created by the Security Council under Chapter VII of the United Nations Charter, the ad hocs were predicated upon the necessity of reestablishing peace and security in Rwanda and in the former Yugoslavia. Yet war continued in the latter, and mass atrocities, including genocide, were committed after the ICTY was set up. Therefore, participants asked, can international criminal courts alone bring about peace? Echoing discussions from the first session of the institute about the interplay between politics and justice, participants observed that courtrooms are just one of the tools – albeit an important one – to achieve peace. A participant opined, "Truth-seeking and reconciliation cannot be the result of international criminal courts

“Would domestic courts prosecute war crimes today if there had been no example that international justice is possible?”

acting alone.” Another one added, “We cannot expect international criminal courts to establish peace, but contributing to peace is an achievable purpose for international criminal jurisdictions.”

How can international criminal courts, then, contribute to peace? By concentrating on their judicial duties, that is, “bring[ing] war criminals to justice and justice to victims in a fair and expeditious manner,” a participant stated. Although the absence of war in Sierra Leone cannot be directly attributed to the work of the Special Court of Sierra Leone, said another, that court seems to be successful in sustaining the peace that was established by military means by “teaching the lesson that any leader of a future rebellion will face the same consequences.” Some participants also pointed out that international criminal courts can participate in peace efforts through outreach programs.

In spite of the difficulty in reconciling their judicial mandates with peacekeeping objectives, the ICTY and ICTR are bearing fruits that were largely unanticipated at the time of their creation. They spearheaded the unprecedented and global movement to end impunity, several observed. The fight against impunity has resolutely gained ground both across and within nations since their creation. The multiplication of criminal jurisdictions at the international level as well as the establishment of the ICC “can be attributed to the success of the ICTY and ICTR,” in the view of a participant. At the national level, wondered another, “Would domestic courts prosecute war crimes today if there had been no example that international justice is possible?” As a result of this development in international and national criminal justice, perpetrators of war

crimes around the world now know that they are “at least at risk of being pursued,” claimed a participant.

International criminal courts have also been praised for developing a specialized field of international law, one that had not been actively utilized since the Nuremberg trial – international criminal law. The jurisprudence generated by these courts, as well as the so-called “highest standards of international criminal justice” that they are establishing, are now gradually infusing domestic legal systems and even percolating into other international courts, and this to a much larger extent than could have been predicted in the early 1990s. It was noted, for instance, that since the establishment of the ICTR, Rwanda has abolished the death penalty completely.

Geographical proximity of international criminal courts with the locus of crimes was also identified as an important factor contributing to the success of international criminal justice. It was observed that the establishment of the SCSL on the territory of Sierra Leone, a country that was convulsed by war crimes, had bolstered the court’s legitimacy among the local population as well as the effectiveness of its outreach efforts. Geographical proximity is not always either feasible or desirable, however. Moreover, investigating war crimes that allegedly occurred on the site of ongoing armed conflicts creates its own set of hurdles. Ensuring the security of staff, victims, and witnesses in such circumstances considerably complicates the execution of criminal justice at the international level.

Some more established jurisdictions have also seen their purposes evolve over time. For instance, the ECHR’s historical objective was to reinforce the rule of law in post-World War II Europe in order to prevent the atrocities of that war from occurring again. Currently, the ECHR ensures the protection and promotion of human rights in an enlarged European territory

“When parties are handed a decision rendered by a fair court in which their due process rights were respected and safeguarded, and when parties understand why they lost, they feel duty bound by the decision.”

comprising 47 states parties, many of them so-called “states in transition.” It is for this reason that the ECHR is seized of an ever-increasing number of individual applications.

Other measures of the success of international justice, participants observed, are the level of coordination and cooperation between international jurisdictions and domestic legal systems and the extent to which states comply with international judicial decisions.

In the opinion of one participant, if domestic courts applied international law correctly, there would be fewer international disputes. He asserted, “The case for international law is lost if domestic systems do not take it up.” In his view, cooperation between domestic legal systems and international courts must thus be strengthened by all means.

International criminal justice is particularly dependent upon states’ cooperation, it was pointed out, for the arrest and transfer of suspected war criminals. Bringing fugitives to court is essential to end impunity as well as to sustain peace efforts. It was reported that some fugitives from Rwanda, who are still at large, have continued to foment rebellion and to commit war crimes in the Democratic Republic of the Congo. It was also noted that at the beginning of their operations, states only grudgingly complied with orders from the ICTY and ICTR for the arrest and transfer of suspected war criminals even when binding Security

Council resolutions supported them.³⁵ Against all odds, political pressures were ultimately successful and yielded the capture of two leading political figures of the former Yugoslavia, Slobodan Milošević and Radovan Karadžić. One highly significant figure, Ratko Mladić, is still at large.

Unlike the ICTY and ICTR, the ICC does not benefit from the Chapter VII enforcement powers of the Security Council that bind all member states. In order to carry out its operations, the ICC is dependent upon states acting in accord with their treaty obligations under the Rome Statute. In the case of non-states parties, there is no obligation to cooperate at all. Yet a participant noted that ICC indictments and arrest warrants appear to have a deterrent effect in war-torn areas, regardless of compliance or noncompliance by states.

As for interstate and human rights courts, participants consistently reported a high level of compliance with their judicial decisions. A participant pointed out that even when certain judicial decisions are deemed non-binding and thus unenforceable, like ICJ advisory opinions, they are nonetheless generally respected because they are viewed as persuasive and authoritative interpretations of norms that are binding.

In the reverse situation, where sophisticated arsenals of enforcement measures (such as sanctions and retaliatory measures) may help induce or coerce compliance with judicial decisions from interstate dispute courts, they do not appear to be the only factors explaining states’ conforming behavior. “Ultimately, there is a belief in the rule of law,” affirmed a participant. That participant added, “When parties are handed a decision rendered by a fair court in

³⁵ See, for instance, Gabrielle Kirk McDonald, “Problems, Obstacles and Achievements of the ICTY,” (2004) 2 *Journal of International Criminal Justice* 558-571 at 562-567.

which their due process rights were respected and safeguarded, and when parties understand why they lost, they feel duty bound by the decision.”

With regard to human rights courts, it was noted that while states generally execute the judgments rendered against them in individual cases, they often fail to effect more meaningful systemic change by amending laws, regulations or practices to bring them in line with their international obligations. If more substantive changes were brought about as a result of international court judgments, “the number of cases [in these courts] would go down,” according to a participant. An “alleged lack of resources” may also impede the effective enforcement of decisions by states parties, regretted another participant.

Yet another metric for the success of international courts is the role they play in providing objective determinations on the meaning of international law. This is particularly important, wrote a former BIIJ participant in a law journal, for a “system that has notoriously suffered, throughout its existence, from the dearth (not to say lack) of [such] objective determinations.”³⁶ As an example of this role, ITLOS may soon be called upon to shed light on certain areas of the law of the sea, such as the legal regime on deep seabed resources, which will become exploitable in the near future.

³⁶ Georges Abi-Saab, “Fragmentation or Unification: Some Concluding Remarks,” (1999) 31 *New York University Journal of International Law and Politics* 919-933 at 925.

³⁷ See, for instance, the United Nations Convention on the Law of the Sea, which entered into force on 16 November 1994, Article 187 on the jurisdiction of the Seabed Disputes Chamber (available at: http://www.un.org/Depts/los/convention_agreements/texts/unclos/closindx.htm). See also Articles XII(d), XVIII, and XXIV of the Agreement Establishing the Caribbean Court of Justice (signed on 14 February 2001, inauguration of the Court on 16 April 2005), which pertain to the original international law jurisdiction of that Court. Pursuant to Article XXIV, “nationals of a Contracting Party” may be allowed to appear as parties in proceedings before the Court (with the special leave of the Court) and Article XVIII provides that a “person” may apply to the Court to intervene as third party. (This Agreement is available at: <http://www.caribbeancourtjustice.org/legislation.html>).

Finally, accessibility of international courts by private parties was regarded as a sign of success of the international legal system,³⁷ and a desirable outcome, especially for individuals in human rights courts.³⁸

Participants then discussed the existence of a number of impediments to the realization of their courts’ objectives. How do these impediments affect the capacity of international courts to meet their objectives fruitfully? How can they be overcome?

There was general agreement that interstate dispute resolution is hampered by the lack of compulsory jurisdiction of some interstate dispute courts. Only 66 states have accepted the compulsory jurisdiction of the ICJ, for instance.³⁹ “This is not sufficient, considering that the ICJ is the principal judicial organ of the United Nations, which comprises 192 member states,” said a participant. In recent years, the ICJ has had an abundant docket, “but it isn’t filled with so many cases as compared with the number of cases that should be submitted to the court or that would require judicial attention.” He also regretted that the Security Council seldom recommends parties to refer their “legal disputes” to the ICJ, in contradiction with its duties under Chapter VI of the United Nations Charter.⁴⁰ Another participant noted that there is “the

³⁸ It was noted that only two states, Burkina Faso and Mali, have accepted the jurisdiction of the ACHPR on individual petitions pursuant to Articles 5(3) and 34(6) of the Protocol to the African Charter on Human And Peoples’ Rights on the Establishment of an African Court on Human and Peoples’ Rights, which was adopted in Ouagadougou, Burkina Faso, on 10 June 1998, and entered into force on 25 January 2004 (available at: http://www.achpr.org/english/_info/court_en.html).

³⁹ It was also noted that the declarations recognizing the jurisdiction of the ICJ as compulsory often contain nuances or reservations limiting the scope of that jurisdiction. See <http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=1&p3=3>.

⁴⁰ Charter of the United Nations, *supra* note 13, Article 36: “In making recommendations under this Article the Security Council should also take into consideration that legal disputes should as a general rule be referred by the parties to the International Court of Justice in accordance with the provisions of the Statute of the Court.”

“We all need to do a better job at promoting each other’s work. We need to increase our knowledge of and respect for other courts in order to support an international rule of law.”

need to develop a culture of peaceful settlement of interstate disputes through compulsory jurisdiction, but the mere existence of these tribunals already creates a positive atmosphere.”

Participants from two other international justice institutions were also of the view that their courts were underutilized. They shared the impression that this situation could be attributed to their constituents’ lack of knowledge about the existence and purpose of their courts. Others referred to some states’ reluctance to engage in adversarial litigation proceedings against one another, most especially in the Caribbean region. While many participants believed that courts must only speak through their judgments, some agreed that judicial institutions and their actors should be able to promote their work to their constituents in order to “attract” cases and thereby fill their dockets with disputes in need of judicial consideration.

Another impediment to success is the lack of resources. Participants agreed that in order to realize their objectives, international justice institutions must have sufficient means. Financial shortfalls plagued the ICTY and ICTR at the beginning of their operations, a situation that appears to have been reversed, since they are currently accorded 10% of the total annual UN regular budget. Some noted that the ICJ budget, in comparison, hardly accounts for 10% of the budget of the ICTY and ICTR, and the ICJ was recently unable to secure enough funding to cover the costs of hiring one law clerk per judge.⁴¹ Human rights courts may also suffer

from a lack of sufficient funding from their parent institution. It was pointed out that the ECHR, with its crushing caseload, receives barely a fifth of the funding awarded to the ECJ by the European Community.

At the same time, it was noted that some commentators have frowned upon the “mammoth bureaucracies” that have expanded both at the ICTY and the ICTR, in particular, since their inception.⁴² But a participant observed that costs and budgets are relative and should be put into perspective. For example, the annual budget of the ICTY in 1998 was roughly comparable to the cost of two days of NATO bombings in Serbia in 1999.

International courts may also face challenges when they need to reform rules and practices. Although reforming the course and pace of international justice is sometimes essential to ensure efficiency and fairness in judicial proceedings, this can be a near impossible goal to achieve, especially when the consensus of states parties is required. This is illustrated by the stalemate on the entry into force of Protocol No. 14 to the European Convention on Human Rights, which essentially aims to improve the efficiency of the European Court of Human Rights. All of the states parties of the Council of Europe ratified Protocol No. 14, except one, Russia. As long as Russia refuses to ratify it, it cannot enter into force.

Finally, the closing of courts can produce unexpected obstacles to international justice. As the ICTY and ICTR wind down, novel and thorny political issues are cropping up. There is no tradition for courts to close down, a participant explained. “The process of shutting down a functioning court creates unique challenges which we have to grapple with,

⁴¹ It was noted that there are currently nine law clerks working for the ICJ, which is composed of 15 judges.

⁴² Ralph Zacklin, “The Failings of Ad Hoc International Tribunals,” (2004) 2 *Journal of International Criminal Justice* 541-545, at 543.

especially considering that the judicial bodies themselves, the ICTY and ICTR, do not have authority to make decisions in this regard,” he said, “Only the Security Council does.”

This wide-ranging inquiry into the meaning of “success” for each individual court prompted participants to wonder what the notion of “success” means or should mean for the international justice system as a whole. What benchmarks should be used to assess the development of the system of international justice?

Peer recognition was identified by BIIJ participants as a tangible and reliable indicator of success for each court individually, as well as for the international judicial system as a whole. It can be measured by the extent to which courts’ decisions are referred to by other jurisdictions, for instance. Cross-pollination of jurisprudence is not only desirable to coordinate the system of international justice,⁴³ it also hints at an emerging judicial comity at the international level. More could be done to consolidate this judicial comity, however. One participant welcomed opportunities like the BIIJ, which help increase awareness and appreciation of the unique contributions of each court to the international legal system. But, he exhorted all BIIJ participants, “We all need to do a better job at promoting each other’s work,” and added, “We need to increase our knowledge of and respect for other courts in order to support an international rule of law.” Others wondered whether judicial comity should require their respective courts to decline jurisdiction in certain circumstances.

⁴³ Report of the Brandeis Institute for International Judges 2007, “The influence of precedent in international courts,” pp. 11-13 (available at <http://www.brandeis.edu/ethics/internationaljustice/bijj/2007.html>).

Participants pinpointed another strong measure of success in the enduring legacy that international judges have imprinted in the international legal system as they “made their path by walking.” Their experience and precedents have laid solid foundations for the future of international justice, and others following them will have that path. It was also noted that a new generation of international lawyers has accompanied them on this path, sometimes from one court to another, and they are contributing to the emergence of a new law of international justice institutions.

Finally, the vast majority of participants agreed that an overarching principle had revealed itself, not only during the concluding session but also more generally over the course of the entire institute – the idea that each court, both individually and as part of a collective, has contributed to the emerging international rule of law. The last question participants addressed was whether steps could be taken to consolidate the “tremendous successes and advancements” in the rule of law both within and across international courts. In this context, it was decided that the theme of the next institute, to be held in summer 2010, would be: “Toward an international rule of law.”

Break-out Group Sessions

For the second time since the inception of the BIIJ, judges from interstate dispute, criminal, and human rights courts had the opportunity to confer on issues specific to their work. Participants agreed beforehand on the topics that would be addressed and, in some cases, relevant documents were circulated to the group.

Interstate Dispute Courts

Judges from four interstate dispute courts with global and regional scopes – the WTO AB, ITLOS, the ECJ and the CCJ – began their session by comparing their respective jurisdictions and procedures, and examined cases in which their court’s jurisdiction had overlapped or could have potentially overlapped with that of others. They then debated how to resolve such conflicts of jurisdiction. Finally, they concluded by discussing compliance by states with international judicial decisions.

“While some of the lack of comity appears to be caused by courts’ jurisdictional limits, it might also be caused by a lack of understanding of other courts.”

While comparing their jurisdictions and procedures, participants noted that some of the interstate dispute courts represented at the BIIJ 2009 enjoy compulsory and/or exclusive jurisdiction over subject matters that could overlap. How should these courts resolve conflicting jurisdictions if such circumstances arose? In particular, one participant asked, would courts with compulsory and/or exclusive jurisdiction, like the WTO Appellate Body, refuse to hear and decide cases if the same dispute were brought before another regional or international tribunal that also has compulsory and/or exclusive jurisdiction over the same matter?

In response, it was noted that, currently, WTO panels and the Appellate Body do not have the capacity to decline jurisdiction once they are seized of a dispute. Parties themselves could decide to request a suspension or cessation in the proceedings or reach a mutually agreeable solution to the matter. The *Brazil – Retreaded Tyres* case was referred to as an example of the kinds of conflicts that are likely to arise again between the WTO and regional trade organizations. In that case, the WTO Appellate Body found that Brazil was acting inconsistently with its WTO obligations even though it was trying to comply with a decision made by a regional trade organization tribunal, a MERCOSUR panel.⁴⁴ It was also noted that there are approximately 400 regional trade agreements containing rights and obligations similar to the ones enshrined in WTO agreements. Each of these agreements provides for a dispute settlement system, which could potentially adopt conflicting interpretations of similar norms.

Participants referred to other cases in which their court’s jurisdiction had overlapped and competed with that of others, and they opined that “clashes are only going to get greater and more complicated because more and more issues intersect – for instance, trade, fisheries

⁴⁴ WTO Appellate Body Report, *Brazil – Measures Affecting Imports of Retreaded Tyres*, WT/DS332/AB/R, 3 December 2007. “MERCOSUR” stands for *Mercado Común del Sur*, a regional trade agreement between Argentina, Brazil, Paraguay and Uruguay.

and climate change.”⁴⁵ Some participants were worried that a same set of facts could give rise to conflicting decisions in these different courts because the same issue could be treated differently. Others expressed concern about forum shopping and the possible competition for cases among international courts and tribunals.

Participants then asked, might we reach a point where judicial comity should preclude international judges from deciding a case if another, better-situated judicial institution has jurisdiction? How should courts or tribunals determine whether or not there is a preferable forum for the dispute before them? Participants agreed that judicial institutions need to address this matter and to develop a process for determining a better forum. “But where does comity end?” wondered another participant.

Another participant was concerned that in his legal regime, there seemed to be a “tendency to be willfully blind to other international obligations, a tendency not to see that there are other obligations outside [our legal regime].” Thus, in his opinion, “While some of the lack of comity appears to be caused by courts’ jurisdictional limits, it might also be caused by a lack of understanding of other courts.”

A participant brought to the attention of his fellow judges an order of an arbitral tribunal constituted pursuant to the United Nations Convention on the Law of the Sea that suspended further proceedings on jurisdiction and the merits of a case essentially because

⁴⁵ Participants discussed a number of cases, including: the swordfish dispute between the European Union and Chile, which had been brought before the WTO dispute settlement system and ITLOS; and the MOX Plant dispute between Ireland and the United Kingdom, which involved ITLOS, an arbitral tribunal established pursuant to UNCLOS, and court proceedings in the EU.

the legal system of the European Community was seized of the same matter. He read the following passage from that order in which the Tribunal said:

[B]earing in mind considerations of mutual respect and comity which should prevail between judicial institutions both of which may be called upon to determine rights and obligations as between two States, the Tribunal considers that it would be inappropriate for it to proceed further with hearing the Parties on the merits of the dispute in the absence of a resolution of the problems referred to. Moreover, a procedure that might result in two conflicting decisions on the same issue would not be helpful to the resolution of the dispute between the Parties.⁴⁶

⁴⁶ Arbitral Tribunal Constituted Pursuant to Article 287, and Article 1 of Annex VII, of the United Nations Convention on the Law of the Sea for the Dispute Concerning the MOX Plant, International Movements of Radioactive Materials, and the Protection of the Marine Environment of the Irish Sea, The MOX Plant Case, Ireland v. United Kingdom, Order No. 3, 2003: Suspension of Proceedings on Jurisdiction and Merits and Request for Further Provisional Measures, 24 June 2003, para. 28, available at: www.pca-cpa.org.



BIJ participants visit the high-tech courtroom of the Caribbean Court of Justice.

Finally, participants discussed the issue of compliance by states with international judicial decisions. One participant asked: “How far can you go telling a government how to implement a decision without breaching the sovereignty of that state? To what extent can a court tell states what to do? Should courts only tell states that they are not in compliance or should they be more directive and tell them what they must do to implement decisions?” In the WTO context, measures taken by member states to comply with decisions by panels and the Appellate Body could themselves constitute further violations of WTO law. As for the ECJ, the Court gives directions on compliance. The European Commission then monitors the implementation of ECJ rulings. At ITLOS, states are obliged to report on how they have implemented provisional measures, and it was noted that, thus far, states had always complied with orders of the court. Failure to comply with a decision constitutes grounds for a new action before the CCJ.

International Criminal Courts and Tribunals

Judges from the ICC, the ICTY, the ICTR and the SCSL raised a wide range of procedural, systemic and substantive issues that are important to their respective institutions. In relation to procedural and systemic issues, the discussions revolved around victims’ participation in trials, judicial input on rules, disclosure issues, the so-called “completion strategy” of the ad-hoc tribunals, the relationship

Part of the process of achieving justice is the perception of justice for victims, but fairness of the process should still remain the guiding light.

between benches and registries, and interlocutory appeals. Participants then scrutinized substantive issues in international criminal law, such as the recruitment and use of child soldiers, gender-based sexual violence crimes such as sexual slavery and forced marriage, and the concept of joint criminal enterprise,

Unlike most other courts, the ICC is required by the Rome Statute to allow for some victim participation, but the parameters for victim participation are still being decided. Most other courts are not specifically required to accommodate victims’ participation. Participants asked, what are the benefits derived from victims’ participation in international criminal proceedings? Some opined that although there are no benefits as such in judicial terms, there may be a benefit in political terms. Victims’ participation may alleviate the general feeling of dissatisfaction that victims have with the prosecution process. Part of the process of achieving justice is the perception of justice for victims, but fairness of the process should still remain the guiding light, according to participants. They also wondered whether victims’ participation could negatively affect the length and fairness of the proceedings. The sheer number of potential victims in international criminal cases suggests that it could significantly encumber the flow of criminal proceedings

Another systemic issue in international tribunals that was discussed was whether judges should or should not provide input on recommended changes in the rules governing their courts’ procedures. Participants were in general agreement that it is both appropriate and important for judges to have input into the rules. No one has more knowledge of courts’ governing instruments than the judges whose role in judicial management includes the development of procedural rules.

Participants from the different courts then shared similar concerns and difficulties with respect to disclosure of evidence by the prosecution. In some cases, this has created constant clashes between the bench and the prosecution. Several agreed that judges must be vigilant in disciplining prosecutors when disclosure rules are violated, and even use contempt as a sanction “in extreme cases.” The failure to disclose exculpatory evidence, in particular, can delay proceedings considerably. There cannot be a deadline on exculpatory material. In one case, the defense discovered an important exculpatory document that had not been disclosed though the prosecutor appeared to have possessed the document for seven years. The document was admitted on appeal. Further questions arose about disciplining lawyers. One participant pointed out that courts have to be strong in their reaction to misconduct in order to create a culture of compliance among the lawyers appearing before them.

Of particular concern to the ad-hoc tribunals (ICTY and ICTR) are their respective completion strategies. These courts need to improve pretrial and trial management exercises in order to complete their work on time, but it is a serious challenge to speed up the process while ensuring fairness. In the 14 months to follow BIIJ 2009, for example, the ICTR was planning to deliver the same number of judgments that it had in the previous 14 years.

Concern was also expressed about the role of the registrar and the relationship between court registries and chambers. This issue resonated with all of the criminal tribunals. In particular, issues were raised about the registrar having too much power, making decisions without consulting judges, and being accountable to the Security Council rather than to the presidency of the tribunal. At times, registries make decisions that are more properly judicial management decisions. An example given was

of a registry refusing to authorize co-counsel on the retrial of part of a case. This decision was subsequently reversed by the trial chamber. There is also friction between registries and chambers over completion strategies and the balance between expediting cases and maintaining fairness. Conflicts may arise between registries and the Offices of the Prosecutor as well, for example on the question of which organ carries responsibility for the protection of witnesses. One recommendation was that judges meet with registry officials and invite them to reconsider certain decisions. Another suggestion was that the structure of court management should place certain functions, such as the defense management, directly under chambers. The structure of the ICC may have improved on this situation as it is designed with the registry under the authority of the presidency. It was also suggested that the role of the registry would be an interesting topic for future research.

Another procedural issue that was discussed by participants was interlocutory appeals in international criminal courts, and how they may be limited. Participants observed that the ICTY, for example, began with a very open-ended system of interlocutory appeals and now requires leave of the trial chamber to do so.

Next, participants tackled a number of substantive issues in international criminal law. The most nuanced one discussed was the use of the theory of joint criminal enterprise (JCE).

JCE has been used to prosecute the highest-ranking political and military leaders in the ad-hoc tribunals. These tribunals have used three categories of JCE.⁴⁷ The first two categories

⁴⁷ In essence, the three categories of JCE are:

1. Shared common purpose to commit a crime;
2. Shared common purpose to commit a crime in the context of an organized activity, such as a detention camp; and
3. Extended liability for crimes outside the common purpose if they were foreseeable.

correspond to liability for concerted action in many domestic systems. The third category, however, is less well defined and extends liability for crimes occurring outside the common purpose if they were foreseeable. There was some discussion about what type of *mens rea* is or should be required for the third category of JCE. It was also pointed out that the vagueness of the concept of “foreseeability” in this third category can delay proceedings, as judges wrestle with the meaning of the term or interlocutory appeals are needed to resolve the issues. Examples of the use of JCE in international criminal prosecutions included leaders who had no direct involvement in sexual crimes but were still responsible for their occurrence, and leaders who were aware of the substantial likelihood that a crime such as torture would be committed.

Participants completed their session by discussing various substantive issues surrounding the crime of recruiting child soldiers and gender-based crimes of violence, in particular forced marriage and sexual slavery and how they are distinguished within the context of the SCSL.

Human Rights Courts

The judges representing the world’s regional human rights courts - the ECHR, the IACHR and the ACHPR - discussed two main topics. They first examined the role of human rights judges in monitoring the implementation of their decisions. It was noted that judges of the ECHR are not involved in this monitoring process. That task is left to the Committee of Ministers, which has been reasonably effective over the years. In practice, the active group consists of a group of professional deputies, who meet regularly and monitor closely states’ actions in response to ECHR judgments.

In contrast, the IACHR itself directly oversees compliance by states with its decisions. The court requires reports from the states in question, and also requests reports from the applicants if the judgment has gone against the state. The court can directly take further action if the states have not complied. For instance, the court re-opened a hearing regarding Brazil on prison conditions after the applicants in the original case sent a videotape showing that the required changes had not been made.

It was noted that the Protocol of the ACHPR seems to go in the direction of the ECHR solution, which says that a committee of ministers will be responsible for compliance. But since no cases have been brought to the court, this language has not yet been implemented or tested. The judges would appear to have the opportunity to voice opinions regarding how the compliance mechanism will be established.

The next topic discussed was compensation and reparation for violations of human rights. Participants observed that the IAHCR has broader discretion than the ECHR in the different forms of compensation and reparations that it requires of states.

The IAHCR may award compensation not only to the families of a deceased victim, but directly to a deceased victim himself or herself (in which case it ultimately goes to the beneficiaries of the victim’s estate). The ECHR’s practice is more restricted, and has more reference to the internal law of the state involved. Neither court awards punitive damages, however.

A number of additional reparation measures can be utilized by the IACHR. The IAHCR has taken a lead in requiring states to take public responsibility for violations of human rights as determined by the court. For example, the court requires that states involved in court proceedings

publish the full decision rendered by the court in their leading national newspapers. The court has also, in the past, required public apologies, sometimes even naming which official should provide them. The court can also require such measures as the re-training of police officers or teachers in human rights principles, or even mandate that a certain public space be named in honor of a victim. Other reparations sometimes awarded by the IAHCRC include educational scholarships for children; medical treatment (mental or physical); funds for psychotherapy; and overseas scholarships for children. It was noted that the Inter-American Commission on Human Rights also plays a role in the reparations and compensation process, as it can make a recommendation regarding these issues as well.

With regard to the ECHR, it was noted that it publishes all judgments itself, but has no formal requirement that they be published by or within the relevant states parties. In practice, however, and in accordance with the duty of states parties to promote the Convention, most countries do publish at least some of the Court's judgments in their respective languages, in particular those concerning their own country and other significant cases.

Some additional issues were also addressed by participants. For example, participants appreciated the role that their courts play in amicable settlements. The IAHCRC sometimes



BIJ program committee member Fausto Pocar of the International Criminal Tribunal for the former Yugoslavia and institute co-director Linda Carter of the McGeorge School of Law

oversees amicable settlements, when cases have been referred by the commission but not yet heard by the court. At the ECHR, friendly settlement is attempted in all cases after they are deemed admissible. This procedure is confidential. In practice, it may even take place before admissibility, especially in repetitive cases.

Given its emerging status, the ACHPR is still working through most of the issues discussed during this session. The judge who represented the African Court expressed his appreciation for this opportunity to learn some of the ins and outs of judging on a human rights bench.

Current Developments in International Justice

Harmonizing International Politics with Fundamental Human Rights and the Rule of Law: the *Kadi* judgment

The *Kadi* judgment⁴⁸ of the European Court of Justice (ECJ) served to illustrate a number of issues that cut across institute sessions. First, participants had the opportunity to analyze the complex interplay between politics and justice in the *Kadi* case. The judgment also showed how human rights issues are increasingly being raised before international judicial institutions that are not specifically designated as human rights courts. Participants wondered how such courts should resolve conflicts around human rights norms when they arise. Finally, this case touched upon the subject of court remedies for alleged human rights violations committed by international organizations.

⁴⁸ Judgment of the European Court of Justice, Grand Chamber, 3 September 2008 in the joined cases *Kadi/Al Barakaat* (C-402/05 P and C-415/05 P) [hereafter "*Kadi*"].

In the *Kadi* case, the ECJ reviewed the consistency with EU human rights standards of an EU regulation implementing sanctions adopted by the UN Security Council to combat terrorism.

The appellants, Yassin Abdullah Kadi, a resident of Saudi Arabia, and the Al Barakaat International Foundation, established in Sweden, were deemed by the United Nations Sanctions Committee to be associated with Osama bin Laden, Al-Qaeda, or the Taliban. Pursuant to a number of Security Council resolutions, all UN member states were required to freeze the funds and other financial resources of these designated persons or entities. The Council of the European Union accordingly adopted a regulation ordering the freezing of the funds and other financial



A BIJ session at the Salybia Resort

resources of the persons and entities whose names appeared in a list annexed to that regulation.⁴⁹ However, these persons and entities had not been informed that their names were included on the list or the reasons and evidence for inclusion, nor were they given an opportunity to challenge this status through review mechanisms.

Both the Court of First Instance (CFI) and the ECJ were confronted with a conflict between fundamental human rights norms recognized in EU law, such as due process and property rights, and UN Security Council resolutions adopted under Chapter VII of the United Nations Charter, which are meant to prevail over “any other international agreement” in the event of a conflict.⁵⁰ However, each treated this conflict of norms in its own way.

The CFI refused to review the lawfulness in EU law of the contested EU regulation giving effect to Security Council resolutions because, in its view, UN Charter obligations “clearly prevail over every other obligation of domestic law or of international treaty law.”⁵¹ However, the CFI opined that it could review “indirectly” the validity of Security Council resolutions with

regard to peremptory norms of international law (*jus cogens* rules) on the grounds that resolutions violating these norms would cease to bind UN member states and, in consequence, the EU.⁵² In the present case, the CFI found that there had been no violations of *jus cogens* rules.⁵³ Accordingly, the CFI dismissed the action.⁵⁴

On appeal, the ECJ did not follow the same path. The ECJ asserted jurisdiction to review the lawfulness in EU law of the contested EU regulation, despite the primacy of UN Charter obligations, on the grounds that the relevant Security Council resolutions had been implemented by a regulation of the EU, that is, a “Community act.”⁵⁵ As such, that regulation could not avoid review of its conformity with fundamental human rights standards recognized in EU law since “the Community is based on the rule of law.”⁵⁶ The Court also opined that respect for human rights is a condition of the lawfulness of Community acts and that “measures incompatible with respect for human rights” are not “acceptable” in the Community⁵⁷ (see pertinent excerpts from the ECJ judgment on page 46).

The ECJ then found that the EU regulation at issue had breached the appellants’ “rights of the defense, in particular the right to be heard, and the right to effective judicial review.”⁵⁸ The Court also found that Mr. Kadi’s fundamental right to respect for property had been infringed.⁵⁹ As a result, the ECJ decided to annul the contested EU regulation, in relation to the appellants, but maintained the effects of that regulation for a period of three months following the

⁴⁹ See *Kadi*, paras.11-45.

⁵⁰ Charter of the United Nations, *supra* note 12, Article 103. Consider also Articles 24 and 25 of the Charter. Article 25 provides: “The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.”

⁵¹ *Yassin Abdullah Kadi v. Council of the European Union and Commission of the European Communities, supported by United Kingdom of Great Britain and Northern Ireland*, Judgment of the Court of First Instance, Second Chamber, Extended Composition, 21 September 2005 (Case T-315/01) [hereafter “*Kadi* CFI”], para. 181. See paras. 221-225, and paras. 215 and 216:

“Any review of the internal lawfulness of the contested regulation, especially having regard to the provisions or general principles of Community law relating to the protection of fundamental rights, would therefore imply that the Court is to consider, indirectly, the lawfulness of those resolutions. [...] In particular, if the Court were to annul the contested regulation, [...] such annulment would indirectly mean that the resolutions of the Security Council concerned themselves infringe those fundamental rights. In other words, the applicant asks the Court to declare by implication that the provision of international law at issue infringes the fundamental rights of individuals, as protected by the Community legal order.”

⁵² *Kadi* CFI, paras. 226 and 230.

⁵³ See, generally, *Kadi* CFI, paras. 233-291.

⁵⁴ *Kadi* CFI, para. 292.

⁵⁵ *Kadi*, para. 286.

⁵⁶ *Kadi*, para. 281.

⁵⁷ *Kadi*, para. 284.

⁵⁸ See *Kadi*, para. 334. See, generally, paras. 333-353.

⁵⁹ See *Kadi*, paras. 354-371.

Will other international courts follow suit and review the conformity with human rights standards of domestic statutes or regulations adopted pursuant to Security Council resolutions?

judgment in order to allow the Council of the European Union to replace it by a new regulation remedying the infringements found.⁶⁰

While the CFI has explicitly accepted the possibility of reviewing the lawfulness of Security Council resolutions – albeit in narrowly defined circumstances – the ECJ preferred to avoid a direct confrontation by stating that it was only reviewing the validity of the contested EU regulation in EU law. Still, both levels of the EU court system have agreed to perform some form of direct or indirect judicial review of the lawfulness of Security Council resolutions, to varying extents, in the *Kadi* case.

Many BIIJ participants expressed views on issues raised by the *Kadi* case. A participant stated that the Security Council should always be held accountable for its alleged human rights violations. Another pointed out that in discharging its duties for the maintenance of international peace and security, the Security Council is obliged to “act in accordance with the Purposes and Principles of the United Nations,”⁶¹ and one of the “Purposes” of the United Nations is “[t]o achieve international co-operation [...] in promoting and encouraging respect for human rights and for fundamental freedoms for all [...]”⁶²

In the view of one participant, the ECJ appears, in effect, to be sending a “political signal” to

the Security Council to respect fundamental human rights when it adopts sanctions against individuals. Another noted a parallel that could be drawn between the *Kadi* case and the 1974 *Solange* case in which the German Constitutional Court refused to recognize the primacy of EU law if it did not provide adequate protection of the fundamental human rights enshrined in the German Constitution.⁶³ The *Solange* case was widely perceived, at the time, as a warning by the German Constitutional Court to the EU regime to tighten up its human rights protection.

“In the fight against terrorism, there can be no peace without justice,” affirmed a participant. “In my view, any individual has the right to a judicial process and the right to be heard.”

But some participants wondered whether it would even be possible to implement the Security Council sanction regime *without* violating human rights. At the same time, if the so-called “autonomy” of the EU legal regime prevents EU member states from implementing UN sanctions, could it undermine the global fight against terrorism undertaken by the Security Council?

A participant said, “I wonder if the ECJ would have made the same decision four or five years ago, when the balance between security and human rights appeared to be different.” This proposition was firmly rejected by two participants. One of them reacted by saying that the judgment builds upon fifty years of human rights protection and development, and asserted, “The question before the Court was whether there should be an exception to the rule of law for dealing with terrorism. The Court said ‘no.’”

⁶⁰ See *Kadi*, paras. 372-376.

⁶¹ Charter of the United Nations, *supra* note 13, Article 24(2).

⁶² Charter of the United Nations, *supra* note 13, Article 1(3).

⁶³ *Internationale Handelsgesellschaft GmbH v. Einfuhr- und Vorratsstelle Für Getreide und Futtermittel (Solange I)*, decision of 29 May 1974, BVerfGE 37, 271, [1974] CMLR 540.

Some participants took issue with the United Nations and its member states for failing to provide adequate mechanisms to address human rights claims arising from their operations, including peacekeeping operations. A participant stated, “When the UN creates subsidiary bodies, it should foresee protection for human rights. States parties are also responsible for raising these issues when creating subsidiary bodies within the UN.” Currently, arbitration is the ordinary venue for individuals having human rights claims against the United Nations. Another participant agreed, and insisted, “An internal mechanism should be set up to ensure that the UN is acting in conformity with international human rights instruments.”

Will other international courts follow suit and review the conformity with human rights standards of domestic statutes or regulations adopted pursuant to Security Council resolutions? Some were inclined to think it likely.

Several agreed that the *Kadi* case also illustrates one of the many difficulties created by the absence of a formal hierarchy among international courts, or the absence of a coordinated “system” of international justice. In this case, a regional European court with a limited geographical scope ended up reviewing indirectly the lawfulness of Security Council resolutions, which bind virtually all of the states in the world. Two participants asked, if this judgment had been issued by another regional court with a less established reputation, would it have been considered legitimate and acceptable by the international community? Another one responded, “Now that regional courts are examining the legality of Security Council sanctions indirectly, it may provide an incentive to the ICJ to do it itself. It would be more legitimate to proceed this way.”



The staff of the Caribbean Court of Justice join BIIJ participants at the opening reception.

During the preceding institute in 2007, participants had examined international courts’ preference to avoid conflicting jurisprudence in order to maintain the unity of international law, despite the absence of a formal hierarchy among courts. But they had asked, “Might international courts reach a point where they make unwarranted distinctions or restrain themselves excessively in their decisions, simply to avoid conflicts?”⁶⁴ In 2008, the ECJ in the *Kadi* case addressed and resolved a conflict of norms by prioritizing fundamental human rights and the rule of law over inconsistent standards.

⁶⁴ Report of the Brandeis Institute for International Judges 2007, p. 12. See www.brandeis.edu/ethics/internationaljustice/biiij/2007.html.

Excerpts from the *Kadi* judgment (European Court of Justice)

281 In this connection it is to be borne in mind that the Community is based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid review of the conformity of their acts with the basic constitutional charter, the EC Treaty, which established a complete system of legal remedies and procedures designed to enable the Court of Justice to review the legality of acts of the institutions [...].

282 It is also to be recalled that an international agreement cannot affect the allocation of powers fixed by the Treaties or, consequently, the autonomy of the Community legal system [...].

283 In addition, according to settled case law, fundamental rights form an integral part of the general principles of law whose observance the Court ensures. For that purpose, the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international instruments for the protection of human rights on which the Member States have collaborated or to which they are signatories. In that regard, the ECHR has special significance [...].

284 It is also clear from the case-law that respect for human rights is a condition of the lawfulness of Community acts [...] and that measures incompatible with respect for human rights are not acceptable in the Community [...].

[...]

286 In this regard it must be emphasised that, in circumstances such as those of these cases, the review of lawfulness thus to be ensured by the Community judicature applies to the Community act intended to give effect to the international agreement at issue, and not to the latter as such.

[...]

288 However, any judgment given by the Community judicature deciding that a Community measure intended to give effect to such a resolution is contrary to a higher rule of law in the Community legal order would not entail any challenge to the primacy of that resolution in international law. [...]

291 In this respect it is first to be borne in mind that the European Community must respect

international law in the exercise of its powers [...], the Court having in addition stated [...] that a measure adopted by virtue of those powers must be interpreted, and its scope limited, in the light of the relevant rules of international law.

[...]

294 [...] [I]t is necessary for the Community to attach special importance to the fact that, in accordance with Article 24 of the Charter of the United Nations, the adoption by the Security Council of resolutions under Chapter VII of the Charter constitutes the exercise of the primary responsibility with which that international body is invested for the maintenance of peace and security at the global level [...].

[...]

298 It must however be noted that the Charter of the United Nations does not impose the choice of a particular model for the implementation of resolutions adopted by the Security Council under Chapter VII of the Charter, since they are to be given effect in accordance with the procedure applicable in that respect in the domestic legal order of each Member of the United Nations. The Charter of the United Nations leaves the Members of the United Nations a free choice among the various possible models for transposition of those resolutions into their domestic legal order.

299 It follows from all those considerations that it is not a consequence of the principles governing the international legal order under the United Nations that any judicial review of the internal lawfulness of the contested regulation in the light of fundamental freedoms is excluded by virtue of the fact that that measure is intended to give effect to a resolution of the Security Council adopted under Chapter VII of the Charter of the United Nations.

300 What is more, such immunity from jurisdiction for a Community measure like the contested regulation, as a corollary of the principle of the primacy at the level of international law of obligations under the Charter of the United Nations, especially those relating to the implementation of resolutions of the Security Council adopted under Chapter VII of the Charter, cannot find a basis in the EC Treaty.

The complete judgement is available online at <http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=EN&Submit=rechercher&numaff=C-402/05>

Biographies

Participating Judges

René Blattmann (Bolivia) is a judge of the Trial Division and vice president of the International Criminal Court. He has been a practicing lawyer for 25 years and has been a professor of criminal and international law. As Minister of Justice in Bolivia, he focused his work on the systematization and modernization of the judiciary system and on implementing the protection and promotion of human rights and citizen guarantees. He served as chief of the Human Rights and Justice Area of the United Nations Verification Mission in Guatemala.

For his commitment and achievements in Human Rights and Justice Reforms, he has been distinguished with international awards, *inter alia*: The Robert G. Story International Award for Leadership presented by the Southwestern Legal Foundation – Academy of American and International Law (USA); the Latin American Prize for Human Rights Monseñor Leonidas Proaño; the Prize Carl Bertelsmann 2001 of the Bertelsmann Foundation (Germany) for his “outstanding efforts and contribution to the development of democracy and consolidation of the rule of law and promotion of civil participation as well as successful transformation of the political system and development processes”; has been distinguished with the title of *Doctor Honoris Causa* by the University of Basel (Switzerland); and has been awarded the Grand Cross of Merit of the Federal Republic of Germany (Bundesverdienstkreuz).

Lord Iain Bonomy (United Kingdom)

practiced law as a litigator in the civil field and as a prosecutor and defense counsel in the domestic

criminal field for 26 years before his appointment to the Bench of the Supreme Courts in Scotland in 1997. There he presided in a wide range of cases until his appointment in 2004 to the Trial Chamber of the International Criminal Tribunal for the former Yugoslavia, where he conducted the trial of Slobodan Milošević following the illness and resignation of his U.K. predecessor in the Trial Chamber, Sir Richard May. Lord Bonomy has continued to sit in trials at the ICTY, and currently is the presiding judge in the trial of six former leading government ministers and senior army and police officers alleged to have participated with Milošević in a joint criminal enterprise to ethnically cleanse Kosovo of Kosovo Albanians in 1999. He is also the pre-trial judge overseeing the pre-trial phase of the case against Radovan Karadžić. His professional interests include intrusive surveillance in the fight against organized crime, the operation of The Hague Convention on International Child Abduction, and criminal procedure, on which his reports have led to material reforms in Scottish and ICTY practice and procedure.

Charles Michael Dennis Byron (St. Kitts and Nevis) has been serving since May 2007 as president of the UN International Criminal Tribunal for Rwanda (ICTR), where he had been a judge since June 2004. Before joining ICTR, he was chief of the Eastern Caribbean Supreme Court. He was also chairman of the Judicial and Legal Services Commission, president of the Commonwealth Judicial Education Institute, and chairman of the Commonwealth Judicial Distance Learning Committee (1999).

Judge Byron was in private practice throughout the Leeward Islands with chambers in the

Federation of Saint Kitts and Nevis and Anguilla (1966-1982). He took part in several law conferences, such as the conference of United States Government Roundtable II for Judicial Reform in Latin America and the Caribbean, in Washington, D.C. (1996).

Judge Byron studied law at Cambridge University (1962-1966) and received an M.A., L.L.B. [Cantab.]. He received the award of Knight Bachelor by Her Majesty Queen Elizabeth II (2002).

Jennifer Hillman (United States) serves as a member of the World Trade Organization's Appellate Body, which adjudicates all appeals of international trade disputes brought before the WTO's dispute settlement panels. She also serves as a senior transatlantic fellow at the German Marshall Fund of the U.S., doing research, writing, and speaking on international economic policy issues. Prior to her appointment at the WTO, she was a distinguished visiting fellow and adjunct professor at Georgetown University Law Center's Institute of International Economic Law, teaching in the area of World Trade Organization dispute settlement and trade remedies.

In March 2007, she completed nine years of service as a commissioner on the U.S. International Trade Commission (USITC), where she was responsible for rendering injury determinations in antidumping, countervailing duty, and safeguards investigations, along with investigating patent and other intellectual property cases. Prior to her appointment to the USITC, she served as general counsel at the Office of the U.S. Trade Representative (USTR), overseeing the U.S. participation in disputes before panels of the WTO and the North American Free Trade Agreement (NAFTA) as well as supervising the legal developments necessary to implement the Uruguay Round

Agreement. Before assuming the general counsel's role, Ms. Hillman served as ambassador and chief textile negotiator for the U.S., negotiating over 40 bilateral trade agreements on textiles and clothing imports, along with leading negotiations for market access for U.S. exports of textiles. Prior to joining USTR, Ms. Hillman was the legislative director and counsel to U.S. Senator Terry Sanford of North Carolina, responsible for international trade and finance issues. She began her professional career as an international trade attorney in the Washington firm of Patton, Boggs, LLP. She is a graduate of Harvard Law School and received a M.Ed. and a B.A., magna cum laude, from Duke University.

Jon M. Kamanda (Sierra Leone), a graduate of the University of Durham (Fourah Bay College) and the University of Sierra Leone, was trained as a barrister at the Inns of Court School of Law in London. He was called to the Bar at the Middle Temple in 1975. From 1976 to 1980, he worked as state prosecutor in the Government Law Office, rising to the rank of senior state counsel, and later as special prosecutor in the Courts Martial set up by the Government of Sierra Leone to try renegade soldiers who had collaborated with rebels. Justice Kamanda also has had an extensive private legal practice in criminal law.

In 1982, Justice Kamanda was elected to Parliament and has served as deputy minister of Mineral Resources and later as Minister of Health. In 1986 he was appointed managing director of the National Diamond Mining Company. He has served as High Court judge in both the Criminal and Civil Divisions of the Sierra Leone Judiciary. He was lately the presiding judge in the Criminal Appeals Court of Sierra Leone. Justice Kamanda is the current vice president of the Special Court for Sierra Leone and is a judge of the Appeals Chamber.

Egils Levits (Latvia) graduated in law and in political science from the University of Hamburg. He was an advisor to the Latvian Parliament on questions of international law, constitutional law, and legislative reform. He served as Latvian ambassador to Germany and Switzerland, and later to Austria, Switzerland, and Hungary. Judge Levits served as vice prime minister and minister for Justice, acting minister for Foreign Affairs, and member of the Parliament. He was conciliator at the Court of Conciliation and Arbitration within the Organization for Security and Co-operation in Europe and member of the Permanent Court of Arbitration. Elected as judge to the European Court of Human Rights in 1995, he was reelected in 1998 and 2001. He has served as judge on the European Court of Justice since May 2004. Judge Levits has written articles in numerous publications in the spheres of constitutional and administrative law, law reform, and European Community law.

Anthony Amos Lucky (Trinidad and Tobago) has been a member of the International Tribunal for the Law of the Sea since September 2003. He was president of the Chamber for Marine Environmental Disputes from October 2005 to October 2008. He was reelected a member of the Chamber in October 2008 until 2011. He is a former magistrate, secretary of the Law Reform Commission, and judge of the Supreme Court of Trinidad and Tobago. He was appointed a justice of the Court of Appeal in Trinidad and Tobago in 2000. He has a master's degree in International Relations, Faculty of Social Sciences, University of the West Indies. Judge Lucky was called to the Bar at Grays London in 1961.

Margarette May Macaulay (Jamaica) is an attorney-at-law in private practice since 1976. She is a mediator of the Supreme Court of Jamaica, a women's and children's rights advocate, and an associate arbitrator. She was

married for 39+ years until the death of her husband, Berthan Macaulay Q.C., in September 2006. She is a mother of one and stepmother of five. Judge Macaulay was elected as a judge of the Inter-American Court of Human Rights in June 2006 and sits on the court in Costa Rica in Ordinary Sessions and in other member states in Extraordinary Sessions between four to six times a year. She is an active member of the Disciplinary Committee of the General Legal Council and has chaired and is a member of the Committees of the Jamaica Bar Association. Judge Macaulay has presented in international, regional, and national conferences and has facilitated in training sessions, including on violence against women, domestic violence, the laws relating to sexual violations, and women's and children's human rights issues and instruments. Judge Macaulay is also a weekly columnist in the *Jamaica Observer* newspaper on human and legal rights.

Joseph Nyamihana Mulenga (Uganda) was awarded an LL.B. degree by London University in 1965, and was called to the Bar by the Middle Temple in 1966.

He started legal practice in the Department of Public Prosecutions in the Ministry of Justice in Uganda, rising to the position of senior state attorney. In 1970 he started private practice as an advocate and built the legal firm of Mulenga and Kalemera Advocates, of which he was managing partner until 1997, when he retired from the firm to join the bench. During the 37 years at the Bar, he was a general legal practitioner with a strong bias for litigation and held diverse positions of responsibility, including president of Uganda Law Society for five terms (1973-1979); vice president of the African Bar Association (1975-1977); African representative on the Commonwealth Legal Bureau (1975-1977); president of the Professional Centre of Uganda (1978-1986); and minister of Justice and attorney general of Uganda (1986-1988).

In September 1997, he was elevated to the bench as a justice of the Supreme Court of Uganda, from which position he retired on 22 January 2009. He was appointed to the East African Court of Justice in November 2001, and served as vice president until June 2008, when he was appointed president. He retired from the court in October 2008. In June 2008, he was elected to the African Court of Human and Peoples' Rights for a term of six years.

Dolliver Nelson (Grenada), a member of the International Tribunal for the Law of the Sea since October 1996, served as president from 2002 to 2005 and vice president from 1999 to 2002. He was a visiting professor of International Law at the London School of Economics, 1995-2003. He was formerly secretary of the Drafting Committee of the Third United Nations Conference on the Law of the Sea, 1974-1982, and executive secretary of the Preparatory Commission for the International Seabed Authority and the Law of the Sea Tribunal. Since 2000, he has been chairman of the International Law Association Committee on Legal Issues of the Outer Continental Shelf. He was president of the Annex VII Arbitral Tribunal (Guyana-Suriname), 2004-2007. He has contributed to various international legal periodicals and publications, including *The British Year Book of International Law*, *The American Journal of International Law*, *The International and Comparative Law Quarterly*, *The Modern Law Review*, and *The Netherlands International Law Review*. He also has reported to conferences of the International Law Association on Exclusive Economic Zone matters. He was educated at the University of the West Indies and the London School of Economics. He is a Barrister-at-Law, Gray's Inn, London, and has been admitted to the Bar of Grenada.

Rolston Nelson (Trinidad and Tobago) obtained his secondary education at Queen's

Royal College, where he was a House Scholar and National Scholar. He read Modern Languages and Jurisprudence at the University of Oxford, graduating with honors in each discipline. He later specialized in commercial law and was awarded the degree of Master of Laws (LL.M.) of the University of London.

After a distinguished 24-year career as an advocate, Justice Nelson was sworn in directly from the Bar as justice of appeal of the Supreme Court of Judicature of Trinidad and Tobago in May 1999. Justice Nelson was sworn in as judge of the Caribbean Court of Justice in February 2005.

In addition to his private practice, Justice Nelson has been an associate tutor at the Sir Hugh Wooding Law School since 1978. He is the author of several articles and case notes appearing in legal journals, including the *British Tax Review* and the *Jamaica Law Journal*. Since 1987, Justice Nelson has been the editor of *The Lawyer*, the journal of the Law Association of Trinidad and Tobago, of whose every council he has been a member since its inception in 1987. He is a former vice president of the association, and a member of the Rules Committee of Trinidad and Tobago as a nominee of the association. He is an honorary distinguished fellow of the University of the West Indies.

Justice Nelson is a former chairman of the Trinidad and Tobago Unit Trust Corporation, presiding over the growth of funds under management to over \$1 billion in 1997. He is also ex-chairman of the Workers' Bank (1989) Limited, and until his elevation to the bench, was a director of Republic Bank Limited.

Fausto Pocar (Italy) was president of the International Criminal Tribunal for the former Yugoslavia from 2005 to 2008. He has served on the court since February 2000. Since his

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

Duke Pollard (Guyana) received his secondary education at Queen's College (Guyana), after which he took the B.A. (Hons) and the LL.B (Hons) degrees from the University of London. He followed these with Master of Laws (LL.M.) degrees from both McGill and New York Universities. He is also the holder of the Legal Education Certificate from the Norman Manley Law School; a member of the Bars of Guyana and Jamaica; and a Fellow of the Centre for International and Comparative Law of McGill University.

From 1970 to 1974, Justice Pollard served as minister-counselor in the Guyana Permanent Mission to the United Nations. Over the period 1972-1974, he was legal advisor in the Ministry of Foreign Affairs of Guyana and acted as permanent secretary in that ministry. He was also legal advisor to the International Bauxite

Association from 1974 to 1982, and, as of 1984, consultant on diverse international law projects for the United Nations, the Commonwealth Secretariat, the Caribbean Law Institute and the Caribbean Community (Caricom) Secretariat. His career within the Caricom Secretariat included the post of officer-in-charge, Legal & Institutional Development Division (1996-2002), and director of the Caricom Legislative Drafting Facility (2003-2005), before his elevation to the Bench of the Caribbean Court of Justice on 15 February 2005.

Apart from holding representational posts in numerous and varied international conferences, Justice Pollard has written extensively on a multiplicity of aspects of international law and has participated in the drafting of many important Caricom instruments, including the original and revised Treaty of Chaguaramas and many of the agreements and protocols that pertain specifically to the Caribbean Court of Justice. He has authored a significant body of studies, articles, monographs, and draft treaties and legislation.

Nina Vajić (Croatia) is a judge at the European Court of Human Rights in Strasbourg, elected in respect of Croatia, since November 1998. She has also been sitting as section vice-president since 5 February 2008. Prior to joining the European Court of Human Rights, Judge Vajić was professor of Public International Law at the Faculty of Law, University of Zagreb, Croatia. She studied law in Zagreb and obtained an LL.M. and J.S.D in International Law. Judge Vajić also attended (1978-1980) the Diploma Program at the Graduate Institute of International Studies (*Institut universitaire de hautes études internationales* – IUHEI), in Geneva. From 1991 to 1994 she was director of the Institute of Public and Private International Law of the Faculty of Law in Zagreb. In 1994, she was nominated

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

BIJ Presenters

Linda Carter (United States) is professor of law and director of the Legal Infrastructure Institute at the University of the Pacific, McGeorge School of Law. Prior to entering academia, she was a trial attorney in the honors program of the Civil Rights Division of the U.S. Department of Justice and a criminal defense attorney. She teaches in the areas of criminal law and procedure, evidence, capital punishment law, and international criminal law. She has taught international criminal law at summer programs in Salzburg, Austria (2006), in St. Petersburg, Russia (2008), and as a visiting Fulbright Scholar at the Université Cheikh Anta Diop de Dakar (2009). Her current research area is in the field of international criminal law. In the spring of 2007, Professor Carter was a visiting professional at the International Criminal Court in The Hague for three months and served in a similar capacity for two months at the International Criminal Tribunal for Rwanda in Arusha, Tanzania. She also researched the Gacaca trials in Rwanda in 2005. She has participated in the Brandeis Institute for International Judges since 2003, serving as co-director in 2006, 2007, and 2009. She has also served as a consultant and presenter at two Brandeis-sponsored West African Judicial Colloquia in Senegal and Ghana. Professor Carter is a member of numerous professional

organizations, including the American Law Institute.

Professor Carter has written on death penalty, evidence, and international treaty and criminal procedure issues. She is the coauthor of two books and numerous articles. Her work includes *Global Issues in Criminal Law* (West/Thomson 2007) and articles on clemency in capital cases, Gacaca trials in Rwanda, and innocence in capital cases. Forthcoming articles include “The Importance of Understanding Criminal Justice Principles in the Context of International Criminal Procedure” and “The Challenge of ‘Firsts’ in International Criminal Justice: First Courts, First Judges, and Issues of First Impression.”

Richard J. Goldstone (South Africa) served as a justice of the Constitutional Court of South Africa and as the chief prosecutor of the United Nations International Criminal Tribunal for the former Yugoslavia and Rwanda. He has taught at New York University, Fordham, Georgetown, and Harvard law schools. He recently received the MacArthur Award for International Justice, which cited his role in the development of the modern era of international justice, and was named 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.

A foreign member of the American Academy of Arts and Sciences and an honorary member of the Association of the Bar of New York, he is an honorary member of the Inner Temple, London, and an honorary fellow of St. John’s College, Cambridge. He also serves on the boards of the Human Rights Institute of South Africa, Human Rights Watch, Physicians for Human Rights, the International Center for Transitional Justice, and the Center for Economic and Social Rights. He is

the co-chair of the Human Rights Institute of the International Bar Association and was a member of the Independent Inquiry Committee into the UN Iraq Oil for Food Inquiry (the Volcker Committee).

Ruth Mackenzie (United Kingdom) is principal research fellow and deputy director of the Centre for International Courts and Tribunals (CICT) at the Faculty of Laws, University College London. She is a director of the Project on International Courts and Tribunals. Ms. Mackenzie was a lawyer at the Foundation for International Environmental Law and Development (FIELD) in London from 1994 to 2003, directing FIELD's Biodiversity and Marine Resources program. Before joining FIELD, she qualified as a solicitor of the Supreme Court of England and Wales.

Ms. Mackenzie is currently working on a CICT research project on international judicial selection processes, and is principal investigator at UCL on a research project on the impact of international courts on domestic criminal procedures in mass atrocity cases (www.domac.is). She also acts as co-secretary of the International Law Association Study Group on the Practice and Procedure of International Tribunals. Ms. Mackenzie is co-editor of the *Manual on International Courts and Tribunals* (Butterworths, 1999), which is presently being revised for publication of the second edition in 2009. She is a member of the ILA Committee on International Law and Biotechnology and of the IUCN Commission on Environmental Law, and adjunct senior fellow of the United Nations University Institute of Advanced Studies.

Nicolas Michel (Switzerland) is professor of Public International Law at the Law Faculty of the University of Geneva, at the Graduate Institute of International and Development Studies, and at the Academy of International

Humanitarian Law and Human Rights in Geneva, since 1 September 2008. Before, and for four years, he served as Under-Secretary-General for Legal Affairs and Legal Counsel of the United Nations.

From 1987 to 2004, he was a professor of Public International Law and European Law at the Law Faculty of the University of Fribourg, Switzerland, before being partially seconded between 1998 and 2003 to work as the director of the Public International Law Directorate of the Swiss Federal Department of Foreign Affairs.

From 1980 to 1985, he was Secretary-General of the Department of Education and Culture of the State of Fribourg. Mr. Michel holds a "licence," a doctor's degree, a *privat docent* in Law from the University of Fribourg, an attorney's license and a master's degree in International Relations from the University of Georgetown, Washington, D.C. He also holds a *honoris causa doctorat* from the University Robert Schuman of Strasbourg. He is the author of several books and a number of articles on International and European law.

He was born at Fribourg and is married with children. French is his mother tongue and he is fluent in English and German.

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 Fulbright Scholar and recipient of the Wenner-Gren Foundation Fellowship for

Anthropological Research. Her academic work and publications have focused on language use in post-colonial Africa, recent African immigration and refugee resettlement in the United States, and international justice. She is co-author of *The International Judge: an Introduction to the Men and Women Who Decide the World's Cases* (with Daniel Terris and Cesare Romano, University Press of New England, 2007).

Daniel Terris (United States), director of the International Center for Ethics, Justice, and Public Life, has been at Brandeis University since 1992. Programs initiated under his leadership at the Center and as assistant provost at Brandeis have included the Slifka Program in Intercommunal Coexistence, the Brandeis Institute for International Judges (BIJ), the Brandeis International Fellowships, Community Histories by Youth in the Middle East (CHYME), the Ethics Center Student Fellowship (recently renamed the Sorensen Fellowship), Brandeis in the Berkshires, Genesis at Brandeis University, and the University's continuing studies division. He has offered courses on individualism, poverty, American literature, the roots and causes of September 11, and the annual writing seminar for the Ethics Center Student Fellows. Terris received his Ph.D. in the history of American civilization from Harvard University, and he has written on 20th-century history, literature, and religion. He is the author of *Ethics at Work: Creating Virtue in an American Corporation* (University Press of New England, 2005) and the co-author of *The International Judge: an Introduction to the Men and Women Who Decide the World's Cases* (with Leigh Swigart and Cesare Romano, University Press of New England, 2007).

Rapporteur and Report Editor

Stéphanie Cartier (Canada) is an adjunct professor at Fordham University teaching public international law and international human rights. She is currently writing a Ph.D. dissertation on the institutionalization of international justice under the supervision of Prof. Peter Van den Bossche, Maastricht University, with the support of a fellowship from the Social Sciences and Humanities Research Council (SSHRC) of Canada. A Canadian citizen and a member of the Quebec and New York State Bars, she graduated with distinction from the Law Faculty of McGill University, obtaining two degrees in law, one in common law and one in civil law (1998). She also obtained a master's degree in international law from the Graduate Institute of International and Development Studies, Geneva. Ms. Cartier has worked with human rights NGOs, with the ILO, and with the WTO Appellate Body. She also collaborated on some of the research ventures of the Project on International Courts and Tribunals (PICT). In July 2007, she acted as *rapporteur* for the 2007 Brandeis Institute for International Judges (BIJ), and she again served as *rapporteur* of BIJ 2009.

Institute Staff

Lewis Rice (United States) is the communications specialist for the International Center for Ethics, Justice, and Public Life. A freelance writer and editor before joining the Center, he previously served as editor of the *Harvard Law Bulletin*, the alumni magazine of Harvard Law School, and prior to that worked as a newspaper editor and reporter. He holds a B.A. in English from Brandeis and a master's degree in journalism from Northeastern University.

Center Description and Contact Information



INTERNATIONAL CENTER for
ETHICS, JUSTICE, and PUBLIC LIFE
Brandeis University

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.

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Other Center publications relating to international justice:

- *Both Sides of the Bench: New Perspectives on International Law and Human Rights*
- *Brandeis Institute for International Judges* – 2002, 2003, 2004, 2006, 2007 reports
- *The Challenges of International Justice*
- *Justice Across Cultures*
- *The North American Judicial Colloquium Report*
- *The West African Judicial Colloquia Report*

These publications are available online at: www.brandeis.edu/ethics/publications/index.html

Also of interest:

The International Judge: An Introduction to the Men and Women Who Decide the World's Cases
by Daniel Terris, Cesare Romano, and Leigh Swigart
(University Press of New England 2007)

The 2009 Brandeis Institute for International Judges was convened by Leigh Swigart and Dan Terris, and directed by Linda Carter and Richard Goldstone. The BIIJ Program Committee, composed of Judge Fatsah Ouguergouz and Judge Fausto Pocar, provided important guidance during the development of the institute program.

This report was prepared by Stephanie Cartier, BIIJ rapporteur and editor, with the assistance of Leigh Swigart and Lewis Rice of the International Center for Ethics, Justice, and Public Life.

Special thanks are owed to our collaborators at the Caribbean Court of Justice who flawlessly carried out the program in Trinidad and Tobago: The Right Honourable Mr. Justice Michael de la Bastide TC, Michael Anthony Lilla, Christie-Anne Morris-Alleyne, Seanna Annisette, and Vaughn Halliday. We are grateful to Justice Désirée Bernard of the Caribbean Court of Justice for suggesting Trinidad as the 2009 institute venue.

We also thank our institute presenters and participants for providing comments on earlier drafts of this report.

About Brandeis University

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

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

Brandeis combines the faculty and facilities of a powerful world-class research university with the intimacy and dedication to teaching of a small college. Brandeis was recently ranked as the number one rising research university by authors Hugh Davis Graham and Nancy Diamond in their book, *The Rise of American Research Universities*.

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.



Louis Dembitz Brandeis