

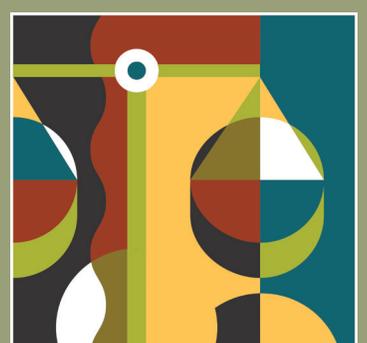
BIIJ

Brandeis Institute for International Judges

The Authority of International Courts and Tribunals: Challenges and Prospects

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

iCourts, the Danish National Research Foundation's Centre of Excellence
for International Courts, University of Copenhagen, Faculty of Law



The Brandeis Institute for International Judges (BIJ) 2016 was convened by Leigh Swigart and Daniel Terris of Brandeis University, in partnership with Mikael Rask Madsen and Henrik Stampe Lund of iCourts, Faculty of Law, University of Copenhagen. BIJ 2016 was co-directed by Richard Goldstone and David Thór Björgvinsson. The BIJ Program Committee, composed of Judges Dennis Byron, Vagn Joensen, Fatsah Ouguergouz, and Christine Van den Wyngaert, provided critical guidance during the development of the Institute program.

This report was prepared by Leigh Swigart. Many thanks go to our rapporteurs, Kerstin Bree Carlson and Harry James Rose, for their careful documentation of the discussions. We also thank our participants for providing comments on earlier drafts of this report.

We are grateful to the conference planning staff of the University of Copenhagen, Faculty of Law, particularly Maria Lotz whose efficiency and patience were much appreciated.



The 2016 Brandeis Institute for International Judges was supported by the Rice Family Foundation, the Louis D. Brandeis Legacy Fund for Social Justice and the Danish National Research Foundation.

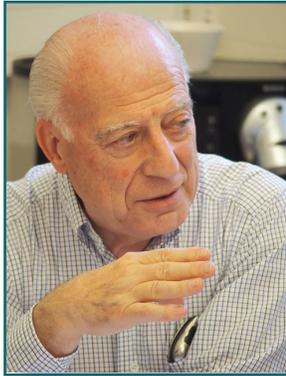
This report of the Brandeis Institute for International Judges 2016 is online at brandeis.edu/ethics/pdfs/internationaljustice/bij/BIJ2016.pdf



Table of Contents

■ Foreword	4
■ About the Institute	6
■ BIIJ 2016 Participants	7
■ Plenary Discussions	9
1. The Authority of International Courts and Tribunals: Definitions and Dilemmas	9
2. The Authority of International Courts and Tribunals: Challenges and Strategies	12
3. The Role of International Judges in Building a Coherent International Legal Order	15
4. Internal Aspects of the Functioning of International Courts and Tribunals	17
5. Evaluating the Performance of International Courts and Tribunals	21
■ Contributions by iCourts and Brandeis University to the Study of International Courts and Tribunals	26
1. The iCourts Research Agenda and Presentation of Findings by Two Affiliated Researchers	26
1.1 Research on the Court of Justice of the European Union	26
1.2 Research on the European Human Rights System	27
1.3 What are potential benefits of academic research for members of the international judiciary?	28
2. The Ad Hoc Tribunals Oral History Project	30
■ Participant Biographies	33

Foreword



Fausto Pocar, International Criminal Tribunal for the former Yugoslavia

The proliferation over recent decades of international courts and tribunals with various jurisdictions and structures, as well as of judicial institutions with international participation, inevitably begs the following questions: What is the nature of their authority?

And what should be their role in the shaping of a coherent international legal order? As some of these courts and tribunals have recently reached the end of their mandates or are about to close their doors, it is time for an assessment of their performance. In this context, the Copenhagen session of the Brandeis Institute for International Judges (BIJ), held in July 2016, proved a timely and challenging event. Judges from different courts and tribunals, along with academics from the Danish research project on international courts (“iCourts”) of the local university, gathered to discuss the authority of the international judiciary in a very stimulating and beneficial partnership.

The debate, initially introduced by an article of the iCourts director, was passionate, rigorous and comprehensive while at the same time varied, as suggested by the term “authority.” In referring in general to the “authority” of international courts and tribunals, the theme of the Institute was clearly not a univocal one. As reflected in any dictionary, the word “authority” has different meanings, and each of them may

capture features of the status and activity of a judicial body – from merely formal and factual legal implications to the reliability and moral performance of an institution that must be authoritative so as to inspire trust and respect in society. The purpose was to capture all or as many as possible of these relevant features, and this report of the Institute abundantly shows how this goal was achieved.

Where does the authority of international courts and tribunals lie? The capacity to carry out their mandate under their respective statutes, and the degree of compliance with their decisions, are certainly useful indicators, but they do not exhaust the question. The impact of their judicial activity on States and the communities of individuals within their jurisdictions, as well as the acceptance of their decisions, are even more significant indicators. Ultimately, the quality of their jurisprudence, and the degree of their public reliability as an independent expression of justice, appear to be decisive factors in assessing the authority of international courts. In this perspective, are international courts and tribunals under an obligation to discharge their function by contributing to the formation of a coherent international legal order? Fragmentation and differences of views are unavoidable, but inter-judicial dialogue can remove inconsistencies and contribute authoritatively to the evolution of international customary law as a common legal denominator in international relations, thus removing incoherence on basic legal principles.

The debate remains open on most of the issues raised during the Institute, but the discussions were intense and rewarding. They also frequently built upon conversations from previous sessions



regarding ethical aspects of the international
judicial function.

I have personally had the opportunity to
participate in each BIJ since the program's
inception in 2002 – as a participant, session
leader, and member of the Program Committee
– and thus have been witness to its progressive
development. After fifteen years, the initiative
taken by the International Center for Ethics,
Justice and Public Life of Brandeis University
should be regarded as an invaluable and
irreplaceable forum for addressing fundamental
ethical as well as practical questions which are
central to the action and performance of the
international judiciary.

Fausto Pocar
Appeals Judge and former President,
International Criminal Tribunal for the former
Yugoslavia



About the Institute

Judges serving on the benches of twelve international courts and tribunals met in Copenhagen from 27 to 30 June 2016 for the eleventh session of the Brandeis Institute for International Judges (BIJ). This small and confidential event, unique in the world of international justice, was carried out as an institutional partnership between the International Center for Ethics, Justice and Public Life of Brandeis University, and iCourts, the Danish National Research Foundation's Centre of Excellence for International Courts at the University of Copenhagen, Faculty of Law.

The Institute's theme, "The Authority of International Courts and Tribunals: Challenges and Prospects," took its inspiration in part from research currently being conducted by iCourts scholars. The aim of the institute was to explore the nature of the authority of international courts and tribunals, the various challenges this authority may face in different types of jurisdictions, and the ways in which judicial institutions might enhance their authority in the eyes of constituents, parties and the broader public.



2016 International Judges and Co-Directors

Front row (left to right): András Sajó, Silvia Fernández de Gurmendi, Fatsah Ouguergouz, Solomy Bossa, Richard Goldstone, Christine Van den Wyngaert, Fausto Pocar, Ujal Bhatia

Back row (left to right): David Baragwanath, Emmanuel Ugirashebuja, Olivier Beauvallet, Tómas Heidar, Vagn Joensen, Dennis Byron, David Thór Björgvinsson



Session topics included: the authority of international courts; definitions and dilemmas; challenges and strategies related to the authority of judicial institutions; the role of international judges in building a coherent international legal order; the internal aspects of the functioning of international courts; and evaluating the performance of international courts. Participants were also introduced to the iCourts research agenda by Director Mikael Rask Madsen and heard from two scholars about their findings. This was followed by a stimulating discussion between scholars and judges about how research on international courts and tribunals can be relevant to judicial practice.

Brandeis Ethics Center Director Daniel Terris and Director of Programs in International Justice and Society Leigh Swigart also had the opportunity to present the Center's Ad Hoc Tribunals Oral History Project and receive feedback about its future shape.

The Institute ended with a public roundtable on "The Role of International Courts in Combatting Terrorism and Ensuring Peace." Judge David Baragwanath of the Special Tribunal for Lebanon, University of Copenhagen Professor Jens Elo Rytter, and former United Nations Under-Secretary-General for Legal Affairs Hans Corell each offered insightful remarks on this topic, which current events have rendered increasingly critical to global well-being.

BIIJ 2016 Participants

International Judges

African Court of Human and Peoples' Rights

- Solomy Bossa (Uganda)
- Fatsah Ouguergouz (Algeria/France), Program Committee member

Caribbean Court of Justice

- President Sir Dennis Byron (St. Kitts & Nevis), Program Committee member

East African Court of Justice

- Emmanuel Ugirashebuja (Rwanda)

European Court of Human Rights

- Vice-President András Sajó (Hungary)

Extraordinary Chambers in the Courts of Cambodia

- Oliver Beauvallet (France)

International Criminal Court

- President Silvia Fernández de Gurmendi (Argentina)
- Christine Van den Wyngaert (Belgium), Program Committee member

International Criminal Tribunal for Rwanda

- President Vagn Joensen (Denmark), Program Committee member

International Criminal Tribunal for the former Yugoslavia

- Fausto Pocar (Italy)

International Tribunal for the Law of the Sea

- Tómas Heidar (Iceland)



Residual Mechanism for International Criminal Tribunals

- President Theodor Meron (USA)

Special Tribunal for Lebanon

- David Baragwanath (New Zealand)

World Trade Organization Appellate Body

- Ujal Bhatia (India)

BIIJ Co-Directors

- David Thór Björgvinsson—Professor, University of Copenhagen, Faculty of Law; former Judge of the European Court of Human Rights in respect of Iceland
- Richard Goldstone—former Chief Prosecutor of the International Criminal Tribunals for the former Yugoslavia and Rwanda; retired Justice of the South African Constitutional Court

Conveners

- Henrik Stampe Lund—Administrator, iCourts
- Mikael Rask Madsen—Professor and Director, iCourts
- 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

Rapporteurs

- Kerstin Bree Carlson—Researcher, iCourts
- Harry James Rose—LL.M. student, University of Copenhagen

Interns

- Chantal Sochaczewski—Brandeis University, class of 2017
- Lee Wilson—Brandeis University, class of 2018

Invited Guests and Presenters

- Hans Corell—former United Nations Under-Secretary-General for Legal Affairs
- Federico Fabbrini—Associate Professor and Researcher, iCourts
- Andreas Føllesdal—Co-director, PluriCourts, University of Oslo
- Urška Šadl—Associate Professor and Researcher, iCourts
- Geir Ulfstein—Co-director, PluriCourts, University of Oslo



Plenary Discussions

1. The Authority of International Courts and Tribunals: Definitions and Dilemmas

The opening session of BIIJ 2016, led by iCourts Director Mikael Rask Madsen, was designed to flesh out the concept of “authority” in relation to international courts and tribunals. This concept had been articulated in a recent article by Madsen, Karen J. Alter, and Laurence R. Helfer entitled “How Context Shapes the Authority of International Courts.”¹ The article provides the framework and general theory for a larger project of comparatively assessing the authority of a large sample of currently active international courts (ICs) in the world.²

The main objective of the article is to explain wide variation in the activity and influence of the nearly two dozen ICs currently in existence. What factors lead some ICs to become active and prominent judicial bodies that cast a rule-of-law shadow beyond the courtroom, while others remain moribund or legally and politically sidelined? The article provides both a novel conceptualization of authority tailored to ICs and an in-depth discussion of the many contextual factors that impact ICs’ authority.

The article introduces a key distinction between *de jure* and *de facto* authority. The implication is that formally delegated authority is insufficient for an IC to be effective. The authors argue instead that for an IC to gain *de facto* authority, it requires 1) recognition that there is an obligation to comply with an institution’s rulings, and 2) engagement in meaningful action that pushes toward giving full effect to those rulings.

1. Karen J. Alter, Laurence R. Helfer and Mikael Rask Madsen, “How Context Shapes the Authority of International Courts.” *Law and Contemporary Problems*, Vol. 79, No. 1 (2016): pp. 1-36.

2. The other empirical studies are available as open source at: <https://lcp.law.duke.edu/>.



Tómas Heidar (left), International Tribunal for the Law of the Sea, discusses a point with Olivier Beauvallet, Extraordinary Chambers in the Courts of Cambodia

The authors also describe three levels of IC authority: i) “narrow authority,” which exists when only the parties to a particular dispute take meaningful steps toward compliance with a court’s ruling; ii) “intermediate authority,” which is achieved when the ruling is respected also by potential future litigants as well as “compliance partners”—executive branch officials, administrative agency officials, and judges; and iii) “extensive authority,” which exists when an international court’s audience expands beyond its compliance partners to encompass a broader range of actors, including civil society groups, bar associations, industries, and legal academics. ICs with extensive authority consistently shape law and politics for one or more legal issues within their jurisdictions.

Interestingly, these levels of authority do not necessarily increase incrementally from narrow to extensive. In fact, an IC may well achieve extensive authority—that is recognition and





András Sajó (left), European Court of Human Rights, and Solomy Bossa, African Court of Human and Peoples' Rights

influence in wider legal circles and with the general public—without having achieved compliance by parties directly affected by its decisions or by government actors.

Furthermore, the article makes a slightly controversial distinction between “legitimacy” and “authority.” The argument for sidelining questions of legitimacy is that it appears from empirical studies that ICs can do everything that normative theorists might expect of a legitimate international judicial body and still not have authority in fact. In other words, why audiences recognize ICs and take consequential steps with regard to their decisions is not assessed as a key factor for explaining ICs’ authority.

Madsen asked BIIJ participants to think about how this model of authority fits their own institutions and the contexts in which they operate. What are the external factors shaping the authority of their institutions at the political, legal and societal levels? What means are available to international judges inside and outside the

courtroom to influence audiences and contexts? How can ICs build trust in key audiences, including domestic courts? What kinds of implementation and compliance challenges do judges’ institutions face?

Judges had a number of reactions and queries regarding this model of authority. One institution not mentioned in the Madsen et al article was the International Tribunal for the Law of the Sea (ITLOS). A participant explained that its authority might look weak given that it had just celebrated its 20th anniversary but only adjudicated 20 cases to date. But the reality is that States have alternatives to bringing a case concerning law of the sea matters before ITLOS, namely using the International Court of Justice (ICJ) or a special arbitration panel instead. It was suggested that the authority model should take into account whether an institution has mandatory jurisdiction or not. It was also pointed out that the limited cases decided by ITLOS have seen an excellent compliance rate, and its jurisprudence has clarified much about the prompt release of vessels and the setting of bond. The participant concluded, “The Tribunal is quite authoritative, so much so that states don’t need to bring [these kinds of] cases.”

The Madsen et al article did assess the authority of the World Trade Organization (WTO) Appellate Body, indicating that it has authority at all levels. A participant noted that when the Appellate Body rules, it always keeps its constituencies in mind as the rulings are binding on them. It is also important to think about the interests of business, the interface between trade and the environment, as well as views on the benefits of globalization and interdependence. There are many “questioning voices” about these issues and sometimes a breakdown in consensus. He conceded that “like it or not, outside opinions inform Appellate Body decisions.”

A human rights judge suggested that, in order to really understand the authority and impact of an IC, one must look at the relation of its rulings to state parties. If a judgment results in a definition of the continental shelf, for example, “no one is a loser in the long run.” And if the International Criminal Court (ICC) rules against Kenyan defendants, it is bad for the Kenyan government “but it doesn’t change the game for the community.” On the other hand, if a court like the European Court of Human Rights (ECtHR) takes a position on police powers, “it changes the game for all states and they may all feel like they are losers.”

Another human rights judge questioned the distinction between *de jure* and *de facto* authority. “For me, legal authority, *de jure* authority, is linked to the authority of the judgment itself, a judgment of good quality. And *de facto* authority is its overall impact on society.” He furthermore suggested that it is important to see how a court contributes to “fertilizing the soil” in its jurisdiction so that it can strengthen the rule of law.

Judges from international criminal tribunals had the most questions about how the authority of their institutions might be assessed. Several asked about the role of their formal sources of authority—the United Nations Charter’s Chapter VII³ for the International Criminal Tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR), and to some extent the Special Tribunal for Lebanon (STL); and the Rome Treaty for the ICC, with special situation referral by the Security Council also based on Chapter VII. One judge noted, in relation to Serbia and the ICTY, that “just because something comes from Chapter VII doesn’t mean there is compliance.” Another remarked of the STL that its authority appears “to turn on things beyond the Charter

3. This chapter of the Charter addresses “action with respect to threats to the peace, breaches of the peace, and acts of aggression.” See: <http://www.un.org/en/sections/un-charter/chapter-vii/>.

“An institution which is global should be globally supported. If an institution is perceived as weak, it cannot address the matters that people think are important.”

itself.” Basing the ICC on a multi-party treaty instead of a Security Council resolution, pointed out a participant, “was considered at the time a better democratic foundation for a court.” But this has also led to problems of *de jure* authority. “An institution which is global should be globally supported,” the judge continued, alluding to the fact that a number of states, including some very powerful ones, have not ratified the Rome Treaty. “If an institution is perceived as weak, it cannot address the matters that people think are important.”

The discussion then turned to the relationship between a criminal tribunal’s mandate, its actual accomplishments, and its perceived authority. ICTY objectives included not only prosecutions and trials, but also reconciliation and establishment of a narrative about the Balkans conflict. The population of that region may evaluate the ICTY’s authority not just on its jurisprudence but also its success in the latter, non-legal areas. How authoritative can the ICTY be, asked a judge, when “each of the regions still has its own narrative where they see themselves as victims and don’t accept others as victims?”

Another judge brought up the ICTR, noting that its “factual authority” is weaker than that of the ICTY, given that it closed its doors with some indictees still at large. On the other hand, he continued, “the gold standard of the ICTR is Rwanda, a haven of stability, whereas wars continued in Bosnia and broke out in Kosovo after the creation of the ICTY.” Nonetheless, the authority model discussed in the session would assign more complete authority to the ICTY. A judge from another criminal court





Richard Goldstone, BIIJ Co-Director

raised a fundamental issue: “When we discuss performance indicators [of ICs], it is important to ask about how to measure impact. And impact on what? And on whom?”

Madsen replied that the framework on IC authority is not about performance in a narrow sense, that is, about whether courts are accomplishing what is outlined in their mandates. He also explained that their concept of authority does not depend on a formal source but rather, in a Weberian approach, on the impacts a court has on various levels of society. Indeed, the model is a sociological construct that goes beyond performance-based assessment. Madsen conceded, however, that the model seems to have better explanatory power for courts dealing with regional and economic matters and human rights than for international criminal tribunals.

BIIJ participants clearly appreciated their discussion of this new model of authority in the international judicial sphere, as well as the

new perspectives it offered on their own and colleagues’ institutions. Following this discussion of a more abstract theory of the authority of international courts, the next session gave the participants the opportunity to explore how challenges to authority play out in the daily operation of ICs.

2. The Authority of International Courts and Tribunals: Challenges and Strategies

The second session of BIIJ 2016 aimed to further the discussions around IC authority initiated in the first. Session leaders Vagn Joensen, President of the ICTR during its final three years of operation, and Richard Goldstone, former ICTY Prosecutor and BIIJ Co-Director, delved into the authority challenges faced by international criminal courts and tribunals in particular, in order to set the stage for the sharing of experiences across other types of jurisdictions. The ultimate objective of this session was for the assembled judges to think about possible strategies for both overcoming challenges to authority and for enhancing authority.

Joensen, who has continued to serve as judge of the Residual Mechanism for International Criminal Tribunals (MICT) since the ICTR closed, presented some of the issues faced by international criminal institutions in relation to: (i) their *de jure* authority, in particular the challenge of persuading states to become state parties to the permanent criminal court(s) and the challenge of persuading state parties to these courts—as well as partner states to the hybrid courts—not to reverse their membership; (ii) their *de facto* authority, in particular when states do not comply with their obligations to cooperate on investigations and the arrest and transfer of suspects and/or by interfering with witnesses (whether the non-compliance/interference aims at preventing influential

suspects from being prosecuted or at retaining suspects for—possibly more robust—domestic prosecution); and (iii) the authority of international courts at the domestic level, in particular the impact of international courts on the jurisprudence as well as the ability and willingness of domestic jurisdictions to prosecute international crimes in accordance with international standards.

To illustrate some of these issues, Joensen described various difficulties encountered by the ICTR over its lifetime. These included: the Rwandan government’s changing stance on cooperation with the Tribunal; problems with the arrest and transfer of indictees from other African countries; dealing with unforeseen legal problems, such as compensating for the extended pre-trial detention of an ICTR accused in a foreign country; and the inability of the Tribunal to investigate cases against Tutsis for political reasons. All of these issues necessitated a certain flexibility on the part of the ICTR—a “principled” flexibility, Joensen stressed—if it was to carry out its important mandate.

Goldstone then elaborated on a particular challenge to the authority of the ICC that came from his home country of South Africa. In 2015, the authorities failed to arrest Sudanese President Omar Al Bashir when he attended an African Union summit in Johannesburg. The ICC had issued two separate arrest warrants in 2009 and 2010 for President Al Bashir, following a Security Council referral under Chapter VII, and as a State Party to the Rome Statute, South Africa had an obligation to cooperate with the Court. The South African government decided instead to honor Al Bashir’s head of state immunity, established under customary international law. The Rome Statute explicitly rejects, however, such immunity. Subsequently, the South African Litigation Centre brought a suit against the government on this matter to the High Court

in Pretoria, which rejected the position of the government. Upon appeal to the Supreme Court of Appeal the government was again judged to be in violation—*not* of its Rome Treaty obligations but rather the South African legislation passed to implement the Rome Treaty domestically in 2002. Goldstone wondered if this incident might suggest that international judges “should have in mind domestic law that is relevant to their courts when framing requests to governments.”

After these introductory remarks by the session leaders, participants broke into smaller groups according to their institution’s subject matter jurisdiction—human rights, interstate dispute resolution, or criminal—in order to discuss how the experiences of the ICTR and ICC may or may not be instructive to their own everyday realities. If not, then what *are* their overriding concerns in relation to institutional authority? They were asked to ponder the following questions: 1) To what extent should international or regional courts bargain with states in order to obtain their cooperation? 2) To what extent should principles be bent in order to obtain that cooperation? 3) How should the judges of those courts react to criticisms of bias and playing politics? Upon reassembling as a plenary, a spokesperson for each group summarized their respective conversations.

Human rights judges framed their discussion around the discretionary powers of their respective benches to “interact” with states found in violation of their human rights obligations. The question was raised: can such interactions be considered as “negotiation”? A judge of the African Court of Human and Peoples’ Rights (ACtHPR) described the situation of his institution: “The Court is called to interact with different actors both upstream and downstream. The Court is not bargaining; it is calling for African Union states to be party to the treaty and to file declarations on allowing individual



... a long-time domestic judge before joining an international bench stated an obvious aim for all judges but one that always bears repeating: “It is vital to produce good quality judgments that are accessible to the community, clear and principled.”

access to the Court. This is one interaction. The second interaction is on the budget, and that is done initially with the ambassadors, and then the ministers. Downstream there are rulings of the Court, declarations and measures, and judgments.” Judges of the European Court of Human Rights (ECtHR) compared such interactions to the principle of the “margin of appreciation” found in the European system.⁴ Said one, “From a sociological perspective, yes, this is bargaining.” Another opined, “The margin of appreciation has become unwieldy and large; it prevents principled decisions because the Court shies away from treading on state toes.”

Judges of interstate dispute resolution courts focused their conversation on what their institutions can do to enhance their authority. They agreed that there are limits on what courts can actually do beyond draft judgments and advisory opinions that “matter” and speak to the public. One participant was concerned that his institution issued press releases so technical in their language that they are hard for the media, much less the average layperson, to interpret. He suggested that the communications department try to “simplify its language so that stakeholders can understand decisions of the court.” Other judges suggested that outreach by their courts, including workshops and other specialized events, can do much to raise their profiles in

4. According to the Council of Europe, the parent body of the ECtHR, “The term ‘margin of appreciation’ refers to the space for manoeuvre that the Strasbourg organs are willing to grant national authorities, in fulfilling their obligations under the European Convention on Human Rights.” See: https://www.coe.int/t/dghl/cooperation/lisbonnetwork/themis/echr/paper2_en.asp.

a positive manner. Finally, it was stressed that ensuring “collegiality and confidentiality” on the bench, especially to protect the opinions of individual judges, contributes to bolstering institutional authority.

Participants who serve on the benches of international criminal courts and tribunals discussed whether ad hoc and hybrid courts have more authority than the permanent ICC. Indeed, they returned to a topic raised in the first session, that of the source of an institution’s authority and whether it plays a role in its level of authority. The judges collectively concluded, “We need political support from states.” This led to two follow-up questions: “How much do our courts need to bargain to maximize this support? And who will do the bargaining?” It was noted that criminal courts and tribunals comprise not only Chambers but also Offices of the Prosecutor and Registries. Each of these organs may have a role in maximizing the support of states for their work.

Session 2 ended with some general remarks arising from participants’ examination of IC authority. One criminal judge felt that the assessment of authority should take into account the particular circumstances of an institution: “If you are working in a post-crisis country, you necessarily have less authority.” A judge from a human rights court noted that his institution’s work is so multi-leveled—with individuals, states and NGOs all bringing in their interests—that it is complex to evaluate. Another added that perceptions of human rights courts depend on which audience—political, societal or legal—is assessing its work. A participant who was a long-time domestic judge before joining an international bench stated an obvious aim for all judges but one that always bears repeating: “It is vital to produce good quality judgments that are accessible to the community, clear and principled.” This may be the most effective and least controversial path to maximizing the authority of any court.



3. The Role of International Judges in Building a Coherent International Legal Order

The third session of BIIJ 2016 addressed an issue about which international judges frequently express concern: the fragmentation of international legal norms, a phenomenon that, among other consequences, might decrease the authority of international courts and tribunals. During this session, led by Judge Dennis Byron, President of the Caribbean Court of Justice (CCJ), and Fausto Pocar, Judge and past President of the ICTY, participants had the opportunity to examine some strategies that international judges and their institutions can use to reinforce the coherence of the international legal order.

The potential of the fragmentation of international legal norms to undermine this order has received much attention by scholars over the past decade. Eva Kassoti, for example, focuses on what she terms “substantive fragmentation,” defined as “the possibility of divergent interpretations by the plethora of international adjudicatory bodies interpreting and applying the same substantive law.”⁵ She argues that substantive fragmentation “poses a threat to adjudicative coherence, namely the need for consistency in judicial reasoning,”⁶ and that “judicial dialogue, in the sense of active engagement with the jurisprudence of other courts, is an important factor in counteracting substantive fragmentation.”⁷

Byron described to participants how his court has embraced this idea of active engagement through “cross-referencing” the jurisprudence of various international courts and tribunals, both those with similar subject matter jurisdictions and those whose jurisprudence derives from a

different legal domain but proves relevant to the elements of a particular case. The CCJ has thus cited judgments of the Court of Justice of the European Union (CJEU) as well as those of regional human rights courts, namely the ECtHR and the Inter-American Court of Human Rights (IACtHR).

He then referred to an article by former International Court of Justice (ICJ) Judge Gilbert Guillaume, who delves further into the idea of shared legal thinking by examining the use of precedent by international judges and arbitrators.⁸ International judicial institutions, in general, do not recognize the binding authority of legal precedent, even in relation to their own jurisprudence. This position notwithstanding, taking account of previous decisions, in order to treat persons in comparable situations as comparable, lends an important predictability to the law. At the same time, referring to judgments previously rendered—if only persuasively—in a mechanical fashion may stifle the development of law and its need to adapt to the evolving demands of society. Guillaume notes that an expansion in the number of international courts and tribunals “not only creates risks of contradictory decisions in specific cases, but also risks of contradictions of jurisprudence.”⁹ Guillaume concludes that “the challenge is to navigate between two risks: that of jurisprudential incoherence and that of government by judges. Legal precedent in international dispute settlement is neither to be worshipped nor ignored.”¹⁰

In his introductory remarks, Pocar reiterated that predictability is vital if the public is to have confidence in the application of international law. He suggested that coherence can be pursued not only through reference to

5. Eva Kassoti, “Fragmentation and Inter-Judicial Dialogue: the CJEU and the ICJ at the Interface,” *Journal of European Legal Studies*, Vol. 8, No. 2 (2015), pp. 21-49, at 29.

6. *Id.* at 48.

7. *Id.* at 48.

8. Gilbert Guillaume, “The Use of Precedent by International Judges and Arbitrators,” *Journal of International Dispute Settlement*, Vol. 2, No. 1 (2011), pp. 5-23.

9. *Id.* at 18.

10. *Id.* at 5.



“... coherence can be pursued not only through reference to established jurisprudence—whether from one’s own or another court—but also through the joint development of international customary law. This endeavor is particularly important for the prosecution of international crimes, which aims to protect values that should be shared by all mankind.”

established jurisprudence—whether from one’s own or another court—but also through the joint development of international customary law. This endeavor is particularly important for the prosecution of international crimes (war crimes, crimes against humanity, genocide, torture), which aims to protect values that should be shared by all mankind. He asked, “How far is derogation justified when dealing with crimes that offend the international community as a whole? Can we afford fragmentation?” He added that, in his view, the most important contemporary challenge for international criminal law is “ensuring effective application of the principle to fight impunity.”

Pocar noted in closing that while the procedures to protect fundamental values may vary, the values themselves should be part of a common legal framework. He had earlier summed up this view in a published article: “An inter-judicial and inter-institutional dialogue ensures that despite apparent inconsistencies in the application of international criminal law, the proliferation of international jurisdictions will ensure integration and contribute to the evolution of international human rights and humanitarian law, and therefore contribute to international customary law.”¹¹

11. Fausto Pocar, “The International Proliferation of Criminal Jurisdictions Revisited: Uniting or Fragmenting International Law?” In *Coexistence, Cooperation and Solidarity* (2 Vols.), Holger P. Hestermeyer, Doris König, Nele Matz-Lück, Volker Röben, Anja Seibert-Föhr, Peter-Tobias Stoll and Silja Vöneky (eds.), pp. 1705-1724, at 1722 (Brill Online Books and Journals, 2011).

Both session leaders expressed their belief that the specter of fragmentation has been exaggerated by scholars. International judges understand the need to inform themselves of relevant jurisprudence issued from other international courts; indeed, it goes with the job. But this aspect of their work has perhaps not been sufficiently articulated to the public, nor is it a given that perfect coherence may ever be achievable in the international legal system.

Entering the discussion period, session leaders asked their fellow judges to think about the following questions: 1) Should international courts consider that it is part of their duties to contribute to the coherence of the international legal order? Or do the history and development of multiple courts suggest that achieving coherence may be a losing battle? 2) What is the philosophy or policy of their own courts in this regard? 3) How far can an open dialogue go in improving the common legal framework of international courts and tribunals? What are its limitations?

BIIJ participants had many thoughts and experiences to bring to the ensuing conversation. A criminal judge declared at the outset that, in his opinion, fragmentation was a real problem and that it undermined institutional authority. Such incoherence in international criminal law was understandable “in the beginning,” but by now, he continued, there should be more coherence. Another criminal judge observed that for there to be real coherence in the field, newer criminal courts and tribunals should follow the jurisprudence established by the pioneering ICTY and ICTR. However, the ICC has declined to do so in a number of areas, including in its rulings around the mode of liability termed “joint criminal enterprise.”

An inter-state dispute resolution judge suggested that fragmentation should be considered a



challenge rather than a problem. Inter-court dialogue was desirable, he stressed, where appropriate. For example, ITLOS and the ICJ had held a useful dialogue concerning an issue that has engaged both institutions, the delimitation of the continental shelf beyond 200 nautical miles. Another judge described how the East African Court of Justice (EACJ) decided in a particular case that it had the right to interpret the African Charter on Human and Peoples' Rights, the primary legal instrument of the continent-wide ACtHPR. Although the possibility of contradicting interpretations of the Charter arose, he accepted that "sometimes incoherence cannot be avoided."

The issue of fragmentation within the same institution was also raised. Separate chambers or panels within a single court may apply law in different ways; consequently, one judge declared, "there also needs to be dialogue within an institution." The practice of the Appellate Body, described by a participant, appeared exemplary for its capacity to counter internal fragmentation: a panel of three members sitting on a particular case will have exhaustive discussions around the relevant law, after which they present, in what is called "an exchange of views," their thinking to the other four Appellate Body members, who then play "devil's advocates" in order to check the robustness of the panel's views. Through this exercise, a well-reasoned and common decision is reached in the end.

In response to the idea that the cross-referencing of jurisprudence across courts will decrease the chance of incoherence, one participant remained skeptical. Such cross-referencing, in his opinion, is totally "instrumentalized" because courts cite whatever jurisprudence serves their strategic interest. "This is troubling," he continued, "because you cannot build legitimacy by being one-sided. Either disregard that side—this is the poor man's way—or give both sides. It is best to admit fragmentation and deal honorably with it."

"Different opinions don't mean incoherence. When there is incoherence on legal *principles*, then you have a problem in the international system."

As to international judges' duty to contribute to the coherence of international law, questions were also asked about what this might mean. "A coherent system doesn't mean all decisions go in the same direction," said one judge. Another asked, in a more philosophical bent, "Should civilization be condemned to apply the first expression of law?" He added, "Law must be dynamic, but the reasoning process must be consistent. That doesn't mean that everyone thinks the same way." Another participant seemed to believe that seeking for coherence at all was unrealistic: "We are in a developing field and there is no coordination mechanism. It's a fragmented world and there is no way out of it!"

All in all, the assembled judges appeared to conclude that the risks of fragmentation are overestimated and that the perceived need to make international law more coherent may itself undermine the authority of their institutions by interfering with the judicial function. Pocar ended the session with this insight: "Different opinions don't mean incoherence. When there is incoherence on legal *principles*, then you have a problem in the international system."

4. Internal Aspects of the Functioning of International Courts and Tribunals

BIIJ participants turned their attention in this session to the realities of day-to-day work in their respective institutions. To lead this session, Fatsah Ouguergouz, Judge of the ACtHPR and former secretary of the ICJ Registry, joined forces





Judges of international criminal jurisdictions in a breakout session

with David Thór Björgvinsson, Professor of Law at the University of Copenhagen, Faculty of Law, former ECtHR Judge and BIJ Co-Director. Their introductory remarks laid out the wide array of factors that affect how complex judicial bodies function and the implications of practices that are less than optimal.

The internal aspects of the functioning of international courts and tribunals are undoubtedly critical to both their authority and their performance (to be addressed in the following section), whatever the type of jurisdiction—human rights, criminal, interstate dispute resolution or trade. Indeed, their authority and performance may mostly be assessed on the basis of the number and quality of the rulings of these judicial bodies, as well as on their capacity to reply within a reasonable time to the demands for justice by litigants or parties. These “outputs” depend, in turn, on various factors and parameters.

Among these factors and parameters, some may be categorized as being “exogenous,” that is, established by parent organizations; they are therefore outside the control of

international judges. These would include: the scope of jurisdiction of the courts and tribunals (contentious and advisory); financing and budgets; the number and choice of judges (nomination and election/appointment process); the full-time or part-time status of judges; the salaries and honoraria for judges; access by litigants (compulsory or optional); and the choice of official languages (one, two or more). One might also mention the clarity and preciseness of the institutions’ constitutive acts—regarding material and personal jurisdiction, for example—as well as the content of instruments of ratification or accession, including reservations relating to access by litigants.

Other factors and parameters may be categorized as being “endogenous” and therefore more or less under the control of international judges themselves. The long list may include, depending on the court or tribunal in question:

- working methods (rules of procedure and internal judicial practice)
- composition into chambers or sections
- the role of the president
- the relationship between judges and the registry (division of work, role of legal staff)
- influence of registry members on judicial decision-making
- number and length of ordinary sessions (for courts with part-time judges)
- scope of activities (judicial, administrative, budgetary, promotional or diplomatic)
- speedy treatment of repetitive cases and pilot judgments
- measures to secure consistency in case law
- selection of cases for single judge procedure (where relevant)
- choice of personal working language(s)

-
- use of technology (case management system or remote access to case files by judges)
 - outreach and communication (with technologies such as Twitter, Facebook, Flickr, Vimeo, etc.)
 - legal aid programs or funds
 - exchange of technical expertise and best practices with other courts and tribunals; training of judges and staff
 - relationships with civil society stakeholders
 - and, *last but not least*, dedication of judges to their work.

Given the length and breadth of this list of endogenous factors, the session leaders suggested that participants focus on some that are essential for ensuring optimal institutional authority. They considered those to be: relationships among members of the bench; the role and structure of the registry, including its relations with judges; and relationships between courts and tribunals and their key stakeholders. Participants were exceptionally open in their remarks during the discussion period, especially in regards to what does not work well within their institutions. The summary below scrupulously respects the confidentiality of participants and thus is more general than the conversation upon which it is based.

Participants began by describing the level of collegiality and cooperation that exists among members of their benches. The Appellate Body practice of institutionalized consultation with all members in the formulation of a single decision was once again presented as a model of collegiality. Several participants bemoaned the fact that some judges were clearly better than others in terms of both their knowledge and their willingness to pull their weight. “Individuals *do* count” was the general feeling of participants (see a later section of this report for more on this issue).

“The quality of judges makes the difference between a court that is respected and deemed credible or not.”

The character of the judge who presides over a particular case is also important, particularly in a criminal case where he or she controls the conduct of proceedings. A “weak” judge may lead to a slow trial. As one participant noted, “a qualified judge is not always a quality judge.” There was mention of the need for reforms in the nomination and election processes of international judges. As one participant said, “The quality of judges makes the difference between a court that is respected and deemed credible or not.”

The troubling “de-responsibilization” of judges in certain courts was also raised by a number of participants. This can be seen through the increasingly important role of legal assistants in the work of chambers, even in substantively shaping draft judgments, a task usually considered to be the primary responsibility of judges. Participants from criminal institutions defended a certain dependence on these staff members, explaining that legal assistants play the vital role of sifting through mounds of evidence and helping on the small procedural decisions that may render the workload of criminal judges extremely heavy. Several participants mentioned the important reality that legal staff are often long-time employees of a court or tribunal, and thus may carry the institutional memory and have a better familiarity with its practices than judges, who necessarily come and go. This important input of legal staff notwithstanding, a participant insisted, “It is important for the credibility and authority of courts that judges bear responsibility for decisions. Staff members do not have accountability.” Another participant concurred: “If courts are inefficient, judges are responsible. If it doesn’t work, judges should change it!”



One president in attendance wondered what the limits of appropriate engagement with the public might be and if there was a point beyond which an institution's authority might be compromised by exchanges with stakeholders.

Discussion then moved to the registries of international courts and tribunals and the central role they play in their functioning. As one very experienced international judge noted, "The registry has a tremendous impact on the perception of a court." Despite a general recognition of all that a registry does, the frustrations that participants expressed about their respective administrative branches were many and varied. These included: the control exerted by registries in some courts over provision of legal assistants, so that they are not answerable to the judges they assist; the ability of the registry, in institutions where it assigns judges to cases, to purposefully deploy judges perceived as "conservative" or "radical" to influence judicial decision-making; a registry's ability to impose shape on the development of case law in institutions where it produces draft judgments; the registry's attempt to "second guess" a judge's decision about an accused person's need for legal aid, presumably for budgetary reasons; the need to thwart the "imperialist tendencies" of certain individual registrars; and more generally, the undue influence and power of registry staff who may be long-term employees of a court or tribunal. While participants did not offer any concrete strategies for resolving such conflicts between chambers and registries, they appreciated the opportunity to articulate their misgivings about various aspects of this relationship, one that is fundamental to the smooth functioning of any court or tribunal.

Finally, BIIJ participants turned to the question of how their institutions reach out to stakeholders. Many international courts and tribunals have dedicated units that take care of this important function. The most elaborate outreach program may be the ICC's, with six "field offices" in situation countries and a liaison office in New York City. In this way, the Court attempts to have positive relationships with states, populations affected by crimes, and relevant NGOs. Judges from other types of jurisdictions weighed into the discussion, describing how their institutions attempt to communicate their work to various audiences, be it through press releases, publication of judgments and law reports, public speeches, or promotional activities in member states. There was some feeling that court presidents may be called upon to have a more public persona vis-à-vis stakeholders. One president in attendance wondered, however, what the limits of appropriate engagement with the public might be and if there was a point beyond which an institution's authority might be compromised by exchanges with stakeholders. Outreach activities designed to "drum up business," sometimes used by newer courts that are underutilized, were also mentioned. Such a strategy contrasts with that of a court like the ECtHR, which is instead looking to slow down the flow of cases in order to decrease its backlog.

The aspects of internal functioning addressed in this session, and their implications for how courts and tribunals carry out their mandates, led naturally into the following one that took on the complicated question of how to evaluate the performance of international courts and tribunals.



5. Evaluating the Performance of International Courts and Tribunals

The authority of international courts and tribunals had already been examined through a variety of lenses during BIIJ 2016, from using a somewhat abstract sociological model to considering what judges themselves can do to improve their everyday functioning as well as bolster the coherence of the legal system in which their institutions operate. Participants now turned to a critical question that is inevitably linked, in the minds of many, with how authoritative international courts and tribunals are perceived to be—how well do they perform? This session was co-led by Richard Goldstone and Christine Van den Wyngaert, Judge of the ICC and former Judge of the ICTY. It used as a launching point a recent “performance self-evaluation” conducted by the ICC.

Van den Wyngaert began her introductory remarks by noting that assessing the performance of international courts and tribunals has become a topical issue in recent years. A crucial question at the outset of any such evaluation is how to define the concept of performance itself. Evaluating an international court’s performance cannot simply be a matter of calculating profit margins, as with private companies, or even conviction rates and workloads, as with national judicial systems. If it is “hard to put a price on justice,” then this applies *a fortiori* to international justice, she declared. This is why courts have been trying to develop “performance indicators” which will allow them to measure their performance. At the ICC, all the organs of the Court (judges, prosecutors, members of the registry) recently engaged in a court-wide exercise to develop such indicators. Van den Wyngaert observed that this was a fascinating exercise, and one which proved more difficult than expected at the outset. They learned that it is indeed difficult to measure the work of a court.



Ujal Bhatia (left), World Trade Organization Appellate Body, and David Baragwanath, Special Tribunal for Lebanon

It was noted that there has been a lot of recent scholarly work on the performance of international courts and tribunals, and different models have been used to analyze their performance. The nature of these models, however, is such that only those aspects of the court’s work that are quantifiable are capable of being assessed in a meaningful way. The most common models for analysis were then discussed and critiqued.

a) The *compliance rate approach* looks at the degree of compliance by parties with court orders made against them. By this token, the higher the compliance rate, the more successful the international court or tribunal. It is one of the few variables that is capable of being quantified. The problem with this model is that compliance may relate to extra-legal factors and may have nothing to do with the quality of the ruling. For criminal courts, a further problem is that they rely almost completely on the cooperation of states at all possible levels: execution of arrest warrants, evidence gathering, the conduct of investigations, and the enforcement of sentences. The ICC has faced the problem of non-compliance, notably in the



failure by states to arrest and surrender President Al Bashir from Sudan, as already discussed in Session 2 by Richard Goldstone. Reliance on signatory states for the functioning of the Court therefore attaches too high a price to cooperation and non-cooperation and may be too narrow a test for measuring the ICC's performance. The compliance rates approach therefore does not seem to be suitable for all international courts.

b) The *usage rates approach* refers to the extent of the court's workload. Applying this model to international courts may be very different from one court to another. For example, the ICJ was hardly used during the Cold War years. At the celebration of the 70th anniversary of the ICJ on 20 April 2016, many speakers praised the fact that, in recent years, the workload had considerably increased, which had made the court more relevant and important as the principal judicial organ of the UN. By comparison, the usage model as applied to the ICC begs the question: usage by whom? This is in view of the triggering mechanisms under the Statute which can be States, the Security Council, but also the Prosecutor acting proprio motu. At the ICC, which is based on the complementarity principle, less "usage" of the court may mean that complementarity is working and that investigations and prosecutions are effectively taking place on the national level. For the ICC, in an ideal world, it should have no work at all. Like the compliance model, the usage model does not seem to be an adequate model for measuring the performance of all international courts and tribunals.

c) The *goal-based approach* looks at whether and how a court effectively fulfils the mandate set out in its charter. This model was originally applied to private companies and NGOs to measure their effectiveness and is now proposed by one of the leading authors in the field, Yuval Shany, to measure the performance of international courts

and tribunals.¹² This model allows for taking into account the fact that several goals may exist simultaneously. In doing so, it allows for a more nuanced assessment of the performance of an institution. Interestingly, and perhaps most problematically for international courts, is the fact that, in contrast to private companies or even national (criminal) justice systems, there may be disagreement about the court's goals.

Thus, before answering the question whether an international court or tribunal is attaining its goals, a preliminary normative question is *what should be these goals?* There are many problems with this. Some goals, particularly ultimate goals, may be vague and thus open to interpretation. What Shany defines as "goal ambiguity" may therefore leave too much room for irreconcilable views on the perceived goals of the court. The diverse number of stakeholders in any one international court or tribunal means that entirely dichotomous goals may exist with little chance of these being reconciled. Also, the precise time frame for the attainment of goals is especially difficult to gauge. Of particular importance to infant courts is the extent to which the first years of existence of a court can really be used to gauge levels of performance in the long term in light of inevitable "teething problems."

There can also be a divergence between performance measurement from an internal perspective (i.e. by actors and stakeholders from inside the institution) and performance measurement from an external perspective (i.e. by actors and stakeholders from outside the institution). The ICC suffers from such divergence. Its most important goals from the inside are ending impunity by increasing accountability of state officials for international crimes, deterrence or prevention of these crimes, ensuring international peace and

12. Yuval Shany, *Assessing the Effectiveness of International Courts* (Oxford University Press, 2014).



security, enhancing international cooperation in the prosecution of international crimes, and guaranteeing lasting respect for and the enforcement of international justice. However, the common goals projected on the ICC from the outside may be quite different, coming from states parties, accused persons, victims' groups, and various NGOs. "It is important to consider the question of acceptance in situation countries," Van den Wyngaert stressed. The fact that the work of the ICTY did not result in a shared narrative about the Balkan conflict in Serbia, Croatia and Bosnia points, she believes, to a failing of the Tribunal. She contrasted this with the South African Truth and Reconciliation Commission (TRC), which succeeded in establishing a common narrative about that country's apartheid era.

Van den Wyngaert then noted that the divergence between internal and external goals may be more extreme for the ICC and other criminal institutions than for other types of international and regional jurisdictions. However, she believes that it is important for all international courts and tribunals to consider the external perspective when they attempt to measure their own performance. She also applauded the iCourts' model discussed in Session 1 for utilizing the external impact of ICs as one of the ways to determine their authority.

Goldstone then opened the discussion period of the session with the following two questions: 1) Should judges be involved in assessing the performance of their respective institutions? If yes, how? 2) What are the performance indicators that are relevant for judges' respective courts or tribunals? A lively and wide-ranging conversation ensued.

Judges from criminal institutions identified with the tension between internal and external performance indicators experienced at the ICC.

"If we play to constituencies, we lose the credibility that the international community is willing to accord us. The mandate of a judge must be to decide guilt beyond a reasonable doubt. If we go beyond that, there is a problem."

One participant observed that criminal tribunals operate in an extremely political environment, and that some prosecutors take positions motivated by extraneous considerations, such as the interests of victims or balance between ethnic groups. He recommended the exercise of caution: "If we play to constituencies, we lose the credibility that the international community is willing to accord us. The mandate of a judge must be to decide guilt beyond a reasonable doubt. If we go beyond that, there is a problem." He contrasted a criminal tribunal to the South African TRC, which could seek other outcomes as it was not a purely judicial entity.

It was pointed out that criminal tribunals are often evaluated by insiders and parent organizations on the expeditiousness and fairness of their proceedings. A participant declared that the ICTY trials represent the "gold standard" of fairness, even though proceedings were often protracted. Another observed that the participation of victims in ICC trials—a development lauded by external stakeholders—will inevitably slow down the proceedings. "That's where I see a discrepancy between what an internal and external assessment might be," he said. In other words, pleasing the victim "audience" may compromise the Court's performance from the point of view of internal stakeholders. A judge with experience in a hybrid criminal institution expressed his view that judges should organize proceedings for efficiency as they see fit, and then assess their





Silvia Fernández de Gurmendi (left) and Christine Van den Wyngaert of the International Criminal Court

own performance against the standards they set. “As for how their work is assessed externally, that is up to scholars to do.”

Judges in interstate dispute resolution institutions shared some of the views of criminal judges. In speaking of the Appellate Body experience, a participant presented several benchmarking goals: first of all, the “prompt and fair resolution of disputes,” but also “avoidance of disputes” that may arise from disagreements around what constitutes compliance with past rulings. Another external stakeholder issue is access to the Appellate Body by some member states. It might cost upwards of \$1 million to have a case adjudicated, so there is now assistance for poorer countries to file disputes.

A member of a regional court opined that “performance improves when there are standards.” Judges should then be intimately connected to assessment procedures and undertake reforms if specific milestones are not met. A colleague from another regional court agreed, adding that such assessment should remain confidential. “You don’t want a document appraising what you do, and then have the

temptation to make it more appealing to the outside world.” If individual judges are found to be the source of inefficiencies, then this needs to be worked out internally.

Responding to the assertion that speed of adjudication should be a primary indicator of success, an interstate dispute resolution judge noted that this criterion only goes so far. “Let’s not lose sight of the most important theme, which is the substantive quality of our judgments, the rational outcome of our cases.” He admitted that this benchmark is, however, hard to measure. Another participant pointed out that the way individual judges approach deliberation is also critical to performance. He asked, “Do they keep an open mind till the end?” A judge countered that in criminal jurisdictions, “there is a clash of judicial philosophy—civil law wants the truth, and common law just wants to know if the Prosecutor proved the case.” The need for judgments to be “expressed in a language the [stakeholder] community can understand” was also raised. And once again, it was suggested that external parties be involved in the assessment of judges’ arguments.

Human rights judges then brought in the perspective of their institutions, which are charged with establishing standards across wide and diverse regions. Sometimes their benches must consider what is “realistic” and whether their rulings can be enforced. Returning to the standard of the speedy resolution of cases, it was pointed out that the ECtHR seems to have sacrificed transparency for expeditiousness. Under pressure from the Council of Europe (COE) to decrease its case backlog, most cases are now resolved by a single judge who produces no opinion laying out a legal argument. This makes an assessment of the Court’s output by external actors more difficult. But in any case, a participant observed, the COE seems more interested in the number of cases won than in the legal rationale behind rulings.

Another human rights judge said of his younger institution, “Number and quality should not be the only yardsticks.” He observed that his court is involved in enhancing the rule of law across its broad jurisdiction. “Think of human rights and justice as two beautiful flowers, which cannot develop in poor soil. Our court is fertilizing the soil.” He urged his colleagues not to overlook how their institutions relate to civil society, national judiciaries, and national human rights commissions when assessing their performance.

“Think of human rights and justice as two beautiful flowers, which cannot develop in poor soil. Our court is fertilizing the soil.”

Over the course of this discussion on performance, participants also brought up several issues of recurring interest and concern to international judges, issues that have been addressed during past Brandeis Institutes. These included: whether there should be a general code of conduct for international judges; methods for removing a problematic judge from an international bench; how term limits and considerations of post-service employment may affect the independence and performance of judges; and the need to vet nominees for international judicial positions and de-politicize their election/appointment so that the most qualified individuals can join the international bench.

Mikael Rask Madsen noted, as the session ended, that BIIJ participants had “come full circle” by linking the notion of how the external community views international courts with how judges themselves assess their work. Both are critical in understanding the authority of international courts and tribunals, and the reception and ultimate impact of their rulings.



Contributions by iCourts and Brandeis University to the Study of International Courts and Tribunals

1. The iCourts Research Agenda and Presentation of Findings by Two Affiliated Researchers

Mikael Rask Madsen opened this part of the institute with a general introduction to iCourts and its principal research areas. He explained that iCourts supports pioneering studies that systematically explore the new role of international courts in the global order. These studies aim at examining how international courts result in a significant change in the mode of producing law across substantive areas of international law, and how they transform the interface of law and politics both nationally and internationally. The Center is particularly interested in issues related to the authority of international courts. In this regard it develops research around three key issues—the institutionalization, autonomization, and legitimization of international courts. The iCourts working paper series demonstrates the broad range of scholarship on international courts and tribunals that the institution has supported to date.

As an example of the kinds of work that is being done by iCourts-affiliated scholars, Madsen introduced recent projects by Urška Šadl and Federico Fabbrini, both Associate Professors of Law at the Faculty of Law, University

of Copenhagen. The scholars then had the opportunity to speak in depth about their projects and take questions and comments from the assembled international judges.

1.1 Research on the Court of Justice of the European Union

Šadl presented on the topic “Do International Courts Make Law in Small Steps? The Case of the European Court of Justice.” She contended that one of the reasons for the success of the CJEU is its use of “principled incrementalism,” a step-by-step judicial decision-making that strives for a workable balance between societal and legal concerns. Šadl explained that principled incrementalism allows courts to consciously or unconsciously balance the demands of the individual case against the demands of the whole body of law, in particular legal coherence and consistency. This ultimately lets them preserve the authority to interpret legal norms in the long run.¹³

In the case of international courts, such balancing is additionally constrained by the increased political pressure from various states with dissimilar legal systems, conflicting political interests, varying degrees of international commitment, and the absence of a central enforcement mechanism that makes international courts particularly vulnerable and dependent on cooperation by powerful political actors. Šadl argued that by constructing its legal doctrines in a series of small steps, the CJEU has avoided political conflict and significant push back from the legal community.



13. Urška Šadl. “The Role of Effet Utile in Preserving the Continuity and Authority of European Union Law: Evidence from the Citation Web of the Pre-accession Case Law of the Court of Justice of the EU,” *European Journal of Legal Studies*, Vol. 8, No. 1 (2015), pp. 18-45.

The main findings of her study demonstrate that the CJEU's use of principled incrementalism can be seen through its own citation patterns. There is a significant delay—on average more than eleven years—between the handing down of an important decision and the moment when it starts to have significant effect on subsequent case law. This “gestation period” is even longer for cases that introduce new doctrines or principles, versus cases that further develop or entrench them. These findings suggest that the CJEU has been careful not to immediately apply its newly established principles, especially in cases with symbolic rather than practical importance. Furthermore, qualitative examination shows that when the CJEU introduces or extends its doctrines, it often mitigates the effects of the judgment by decoupling the abstract rule or principle from its effects (remedy from the principle), or delaying its effects. On this basis it can be argued that the CJEU develops its doctrines in a step-by-step fashion, as predicted by the theory of principled incrementalism.

Šadl's analysis contributes to a lively debate on judicial authority and law-making of international courts in Europe and beyond,¹⁴ an investigation that is relevant also because of the increasing normative, interpretative and political authority of international courts.¹⁵ It importantly adds to the existing literature, first by demonstrating empirically how international courts make international law and, second, by providing a deeper insight into the long term maintenance rather than establishment of (legitimate) supranational judicial authority.

14. Ingo Venzke, *How Interpretation Makes International Law: on Semantic Change and Normative Twists* (Oxford University Press, 2012); Marc A. Jacob, *Precedents and Case-Based Reasoning in the European Court of Justice: Unfinished Business* (Cambridge University Press, 2014); Armin von Bogdandy and Ingo Venzke, “In Whose Name? An Investigation of International Courts' Public Authority and Its Democratic Justification,” *European Journal of International Law*, Vol. 23, No. 7 (2012), pp. 7-41.

15. Karen J. Alter, *The New Terrain of International Law: Courts, Politics, Rights* (Princeton University Press, 2014).

... principled incrementalism allows courts to consciously or unconsciously balance the demands of the individual case against the demands of the whole body of law, in particular legal coherence and consistency.

1.2 Research on the European Human Rights System

Federico Fabbrini discussed his recent monograph *Fundamental Rights in Europe: Challenges and Transformations in Comparative Perspective*.¹⁶ The book argues that, today, fundamental rights on the continent are simultaneously protected at the levels of States, the European Union, and the European Convention on Human Rights. The book aims to analyze the implications of this multilevel architecture and to examine the dynamics that spring from the interaction between different human rights standards in Europe.

To this end, the book adopts a comparative approach: departing from the prevailing literature in the field, the book explains that the European system is not exceptional and develops a comparison with the federal system of the United States of America. In a comparative perspective, the book identifies two recurrent challenges in the interplay between different state and transnational human rights standards—a challenge of ineffectiveness and a challenge of inconsistency. It explains that these challenges arise when transnational law operates either as a floor or as a ceiling of protection for a specific human right.

16. Federico Fabbrini, *Fundamental Rights in Europe: Challenges and Transformations in Comparative Perspective* (Oxford University Press, 2014).



. . . these challenges arise when transnational law operates either as a floor or as a ceiling of protection for a specific human right.

In addition, the book maps the most important transformations taking place in the European system and assesses their impact on these challenges. In an empirical part, the book considers four case studies: 1) the right to due process for suspected terrorists; 2) the right to vote for non-citizens; 3) the right to strike; and 4) the right to abortion. On the basis of these case studies, the book reconsiders the main scholarly theories on the protection of fundamental rights in Europe: sovereigntism and pluralism. It questions their validity and claims that steps need to be taken toward a new theoretical framework, which—for its capacity to reconcile the dilemmas of identity, equality and supremacy—will partake of a “neo-federal” vision.



iCourts scholars (left to right): Urška Šadl, Mikael Rask Madsen, and Federico Fabbrini

1.3 What are potential benefits of academic research for members of the international judiciary?

This session aimed not only to expose international judges to recent and ongoing scholarship on international courts and law but also to create a dialogue between scholars and practitioners. International judges were asked what kinds of academic research they, as practicing judges, find most relevant or instructive for their work.

First, several judges responded to various points made by Šadl and Fabbrini. A criminal judge wondered how to define what constitutes a “leading case” whose influence can subsequently be tracked. He suggested that the ICTY *Tadić* judgment could be put in this category, as it was later “quoted everywhere.” Another judge queried Šadl about how decisions of the CJEU may or may not be in sync with those of the ECtHR, given their overlapping regional jurisdictions but different legal foundations. She asked, “How do you not conflict and also develop law incrementally, without stepping on toes?” Šadl responded that courts do sometimes step on toes, so they need “to cite each other politely and respectfully.”

In reference to Fabbrini’s presentation, a number of judges asked for clarification of his notions of transnational law acting as either a “floor” or “ceiling” for human rights protections. Can an international court actually impose a ceiling and require a state to lower its existing protections to meet that standard? If so, how is this reconciled with the European Convention on Human Rights? A human rights judge wondered where economic and social rights fit into Fabbrini’s model. Fabbrini responded that the Court is “creatively interpreting Article 11¹⁷

17. Article 11 of the European Convention on Human Rights protects the freedom of assembly and association. See http://www.echr.coe.int/Documents/Convention_ENG.pdf.

to bring social rights back in and expand them.” A second human rights judge commented that he sometimes felt like the ECtHR “opted for the lowest level” of protection. He gave as an example the court’s refusal to raise the standard on the right to abortion, given strict legislation on this issue in certain member states. A third human rights judge pointed out that “the low protection of one thing allows the high protection of another,” and that “conventions are tools of priorities.” Finally, a judge countered that the ECtHR is, after all, “antidemocratic” in the way it requires certain standards across the Council of Europe despite the existence of local opposition. He opined that it is sometimes appropriate that “courts not become too authoritative.”

The discussion then moved on to the place of scholarly publications in the work of international judges. A judge and former professor observed that “the impact of academia on international judges is less than I expected before becoming one.” Another judge noted that in his court, scholarly articles are seldom cited as judges “don’t want to privilege Professor X against Professor Z.” Their legal writing thus becomes very “self-referential.” A criminal judge added that “judges in international criminal law don’t feel comfortable citing academics as authorities; they are much more comfortable citing other courts.” Another criminal judge expressed some frustration that academics are not interested in judges’ evaluations of their own work—“the attitude of some academics is that we should shut up and let them assess our accomplishments.” “There is danger in academics trying to influence process,” added a participant.

Notwithstanding recognized restraints around the citation of scholarly publications, several participants emphasized the important role that academic research has to play in their work. One declared, “The reality is that academics are not far from the judiciary. Rather, judges,



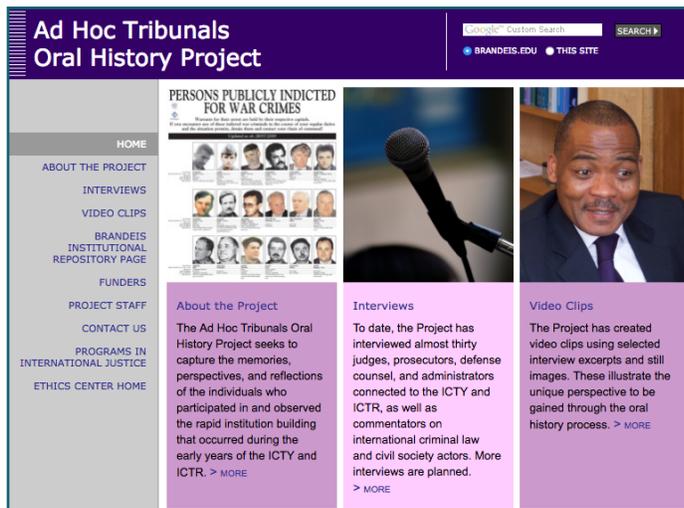
Emmanuel Ugirashebuja, East African Court of Justice

bar associations, and the academy are all part of the legal firmament.” He went on to make a plea for academics to see themselves as “part of the exercise.” Judges also recognized the important role of expert knowledge in legal proceedings that involve certain scientific matters, intellectual property, or other specialized fields. Some participants believed that having libraries in courts is essential, although sometimes administrators seek to eliminate them, considering them unnecessary.

Scholars from iCourts then weighed in on this subject. Madsen noted that iCourts’ research shows that the foundation between academics and practitioners is “strong and patterned.” He also emphasized that ongoing connections between the two groups can keep judicial outputs from becoming, as one judge had earlier phrased

“The reality is that academics are not far from the judiciary. Rather, judges, bar associations, and the academy are all part of the legal firmament.”





law around rape and genocide, for example. He added, “But judges hesitate to speak about this law-making function, and we cannot discuss it in any public forum.”

2. The Ad Hoc Tribunals Oral History Project

Leigh Swigart and Daniel Terris of Brandeis University then had the opportunity to introduce BIIJ participants to the Ad Hoc Tribunals Oral History Project, initiated in Fall 2014 by the International Center for Ethics, Justice and Public Life.¹⁸ The Project seeks to capture the memories, perspectives and reflections of the individuals who participated in and observed the rapid institution building that occurred during the early years of the ICTY and ICTR.

The Project chose an oral history approach to document the development of the Ad Hoc Tribunals for its potential to contribute perspectives and understandings that have not emerged either through legal scholarship about the Tribunals or their own extensive jurisprudence. Oral history interviews preserve the voices of individual actors who worked to bring justice to Rwanda and the former Yugoslavia, and who contributed to the development and “institutionalization” of international criminal law during the early years of the ICTY and ICTR. The Project also seeks insights into what the Ad Hoc Tribunals have and have *not* been able to achieve. The aim of the Project is to produce an archived collection that will allow honest analysis, now and into the future, of the challenges and successes of the Tribunals.

As of the writing of the BIIJ 2016 report (April 2017), the Project had interviewed 30 judges, prosecutors, defense counsel, administrators, and other staff connected to the ICTY and

it, “self-referential.” Fabbrini suggested that “academics can develop a common language of ideas and facilitate communication,” creating paradigms that allow judges to perform better. Šadl observed that judges and scholars seem to sometimes struggle over who has ultimate authority on the law: “Both judges and academics engage. Judges contribute by issuing well written opinions, and then academics do the empirical analysis.”

A final question arose during this session that engendered some lively responses. Given the nature of much research on judicial opinions and systems, is there an assumption that “international judges are essentially interchangeable parts”? In other words, does it matter which individual judges sit on particular courts? One president declared, “We want to matter. And, perhaps unfortunately, individual judges *do* matter.” This participant noted the frequent circulation of judges on and off the bench, and suggested that the institution needed to “develop a homogeneous judicial culture” that would unite judges from different countries and backgrounds. Another participant concurred, saying that the role of individual judges in developing law is critical, especially in international criminal institutions. This can be clearly seen in the development of

18. See <http://www.brandeis.edu/ethics/internationaljustice/oral-history/index.html>.



ICTR, as well as commentators on international criminal law. The Project website provides profile pages for each interviewee, downloadable individual transcripts, and a link to the Brandeis Institutional Repository¹⁹ where a search across the entire collection can be made. Full transcripts of all these interviews will be available by summer 2017. A number of video clips are also available on the website. These are based on selected excerpts from the interviews and have been produced to provide a “window” into the kinds of perspectives and memories that can be retrieved through an oral history approach.

Brandeis believes that documenting the early years of the Ad Hoc Tribunals is important for several reasons:

- The creation of the ICTY and ICTR represents a critical development in the roles and responsibilities of the international community in the late 20th and early 21st centuries, a development that informs global action today and underscores the need to establish the rule of law and human rights protections everywhere.
- Individuals and institutions—from advocates and scholars to the ICC and other contemporary or future international criminal tribunals—can learn important lessons from an archive documenting the innovative work that started at the ICTY and ICTR and is now given fuller expression through “successor” institutions.
- As a primary resource, this growing collection of oral history transcripts can be used in a variety of ways to inform the public about the Ad Hoc Tribunals and international criminal justice more generally. Students, scholars, and educators can use the materials in their research and analysis, in written histories of international criminal tribunals, and in studies across disciplines such as human rights, criminal law, sociology, history, and international relations.

19. See <https://bir.brandeis.edu/handle/10192/30830>.

. . . the unscripted and narrator-driven oral history interview has, in particular, the potential to bring forth unexpected and powerful stories about judicial institutions, including those pertaining to how they function internally, how they are perceived from the exterior, and ways in which they are understood to exert authority.

- The collection will be particularly powerful when used for educational purposes in post-conflict societies. The interviews convey in an evocative manner the dedication, commitment, hard work, and innovation of individuals who believe in the capacity of international criminal justice to bring about accountability and reconciliation in societies affected by mass violence and human rights violations.

Brandeis furthermore contends that exploring international courts and tribunals through the subjective views and specific experiences of individual actors can act as a complement to more analytical and objective approaches to these institutions and their work. Such an approach is not uncommon to social scientists working on issues of the law.²⁰ But the unscripted and narrator-driven oral history interview has, in particular, the potential to bring forth unexpected and powerful stories about judicial institutions, including those pertaining to how they function internally, how they are perceived from the exterior, and ways in which they are understood to exert authority.

20. See, for example, Richard Ashby Wilson, *Writing History and International Criminal Trials* (Cambridge University Press, 2011); and Salvatore Caserta and Mikael Rask Madsen, “Between Community Law and Common Law: the Rise of the Caribbean Court of Justice at the Intersection of Regional Integration and Post-Colonial Legacies,” *Law and Contemporary Problems*, Vol. 79, No. 1 (2016), pp. 89-115.



This latter point was perhaps most germane to the “authority theme” of BIJ 2016. One question inspired by the Project is whether new kinds of narratives about international courts and tribunals can bolster their legitimacy and/or authority by showing constituents how they operate, especially at levels that are not normally visible to the outsider. As noted by Alter et al, “Constituency support is a key determinant of IC authority.”²¹

Session leaders asked judges to ponder these questions: 1) What can an investigation of the stories of individual actors—especially those who are “under the radar”—contribute to relevant constituencies’ understanding and appreciation of international courts and tribunals? 2) What are the benefits and risks of giving voice to new perspectives on international courts and tribunals, not all of which may be positive? Might the authority of international courts and tribunals be undermined instead of reinforced by such “unfiltered” narratives? 3) Does the “official narrative” about participants’ courts and tribunals—controlled by the institutions themselves, or as presented through their jurisprudential output or by legal scholars—leave out something that the public should know in order to believe in their legitimacy and authority?

International judges had a number of reactions to the Ad Hoc Tribunals Oral History Project, after having read several excerpts, viewed selected video clips, and listened to a presentation of its aims and methods. Many expressed the view that it was valuable in principle. One judge noted that such an archive “will be useful in history writing and as guidance to future participants in new courts.” Another commended the project, saying it was “important for posterity to see the lessons learned and the people involved in the Ad Hocs.”

At the same time, some of the criminal judges in

21. *Supra* note 1, at 22.

attendance expressed concern about the possible impact of “problematic” narratives on the legacy of the Ad Hoc Tribunals. They reacted, in particular, to the excerpt of an interview with an ICTR defense counsel who felt that the Tribunal had not supported defense work as fully as that of prosecutors. It was suggested that, moving forward, the Project seek to balance viewpoints across the collection by carefully selecting interviewees. The importance of having a wide representation of nationalities and backgrounds among interviewees was stressed as well. Several participants also wondered if a series of questions could be formalized so that a standard number of areas could be covered during interviews.

Swigart and Terris took note of these points, explaining that they hoped to see the Project move into a second phase, at which point such suggestions could be considered. They reiterated to the group, however, that conducting an oral history interview is unlike a study where researchers seek to explore pre-determined areas of inquiry and therefore strive for consistency as they engage with research subjects. While interviewers for the Ad Hoc Tribunals project prepared a number of questions in advance for narrators—based upon those narrators’ professional positions and biographies—they also allowed narrators to foreground the aspects of their experience that were personally significant and salient. The resultant oral history collection thus comprises a disparate range of subjects and viewpoints around its principal theme, some of which will inevitably be at odds with the “official narrative” of the Tribunals as presented through their jurisprudence, outreach initiatives, and the messaging of MICT, the Tribunals’ residual mechanism institution. Brandeis believes that this richness and complexity is an important part of the Ad Hoc Tribunals’ “story,” and that the collection will constitute a valuable primary resource for researchers whose future areas of inquiry cannot be foreseen.



Participant Biographies

Judges

David Baragwanath (New Zealand) is an Appellate Judge of the Special Tribunal for Lebanon, where he served for 3 ½ years as President. He practiced in New Zealand as Queen's Counsel and was a judge of the High Court and later a permanent member of the Court of Appeal. He was President of the New Zealand Law Commission, presiding judge of the Court of Appeal of Samoa and a New Zealand Member of the Permanent Court of Arbitration. He is a graduate of the Universities of Auckland and Oxford, an Honorary Professor of the University of Waikato and an Overseas Bencher of the Inner Temple. He has had visiting appointments at universities in England, the USA, Hong Kong and The Netherlands. He has adjudicated, lectured and written extensively on subjects including private and public international law (including international criminal law and terrorism), administrative law, commercial law (he is a member of the Advisory Board of the Dutch charity P.R.I.M.E. Finance, concerned with dispute resolution in complex financing transactions), judicial cooperation and other aspects of the common law.

Olivier Beauvallet (France) assumed his duties as a Judge in the Pre-Trial Chamber at the Extraordinary Chambers in the Courts of Cambodia in April 2015, after initially serving as Reserve Co-Investigative Judge. He was previously a prosecutor within the EU Special investigative Task Force and a prosecutor within the special prosecution office of the EULEX mission in Kosovo. There he was in charge of various cases related to organized crime, war crimes and terrorism. Previously an Investigative Judge in France, he recently served in a special



A historic meeting room at the University of Copenhagen

court for organized crime based in the French West Indies (Special court for organized crime in Fort-de-France). He has participated in various international projects in the Balkans, Africa and Central Asia. Following his Ph.D. in law (EHESS Paris), Judge Beauvallet authored various books and articles, on both criminal and international criminal law, and he oversees the *Traité Pratique de l'Instruction*, a guide to the practice of investigative judges. He leads various trainings and seminars in l'École Nationale de la Magistrature (National Judiciary School), l'École des Hautes Études en Sciences Sociales (Paris) and many other law schools.

Ujal Singh Bhatia (India) has been a member of the World Trade Organization since December 2011. He was elected Chair of the Appellate Body and assumed this position in January 2017. He was India's Ambassador and Permanent Representative to the WTO from 2004 to 2010 and represented India in a number of dispute



settlement cases. He also served as a WTO dispute settlement panelist in 2007-2008. Mr. Bhatia has also served as Joint Secretary in the Indian Ministry of Commerce, apart from two decades in Orissa State in various field and State-level administrative assignments that involved development administration and policy-making. His legal and adjudicatory experience spans over three decades, and focuses on domestic and international legal/jurisprudence issues, negotiation of trade agreements and policy issues at the bilateral, regional, and multilateral levels, as well as the implementation of trade and development policies in the agriculture, manufacturing, and service industries. Mr. Bhatia has often lectured on international trade issues and has published numerous papers and articles on a wide range of trade and economic topics. He holds an M.A. in Economics from the University of Manchester and from Delhi University, as well as a B.A. (Hons) in Economics, also from Delhi University.

Solomy Bossa (Uganda) has eighteen years' experience as a judge with exposure in international judicial practice, international human rights, international criminal law, international humanitarian law and constitutional law at the national, regional and international levels. She has served as Judge of the High Court of Uganda, the East African Court of Justice, and the United Nations International Criminal Tribunal for Rwanda. She is currently a judge of the African Court on Human and Peoples' Rights, the United Nations Mechanism for International Criminal Tribunals, and the Court of Appeal of Uganda. Judge Bossa has advanced the status of women, the rights of victims of simple and grave international crimes, and human rights abuses. She has published papers and made presentations on varied legal issues. As a human rights activist since 1980, she has founded/chaired many non-profit organizations, including the East African Law

Society; Kituo cha Katiba, the Uganda Network on HIV/AIDS, Ethics and the Law; and the National Organization for Civic Education and Election Monitoring. She has also presided over the Uganda Law Society, and the Legal Aid Projects of the Uganda Law Society and the Law Development Centre. She has received national, regional and international awards in recognition of her distinguished services as a Bar leader, judge and human rights activist.

Sir Charles Michael Dennis Byron (St. Kitts & Nevis) was appointed President of the Caribbean Court of Justice in September 2011. He graduated from Cambridge University in 1966 with an MA. an LL.B., after which he was in private practice throughout the Leeward Islands. In 1982 he was appointed as a Judge of the Eastern Caribbean Supreme Court, and in 1999 was appointed Chief Justice. During his tenure he engaged in many Judicial Reform Programs. In 2004 Sir Dennis was appointed a Judge of the United Nations International Criminal Tribunal for Rwanda (ICTR). He was elected President of the Tribunal in 2007 and served in this capacity until 2011. Sir Dennis has been President of the Commonwealth Judicial Education Institute (CJEI) since 2000. In 2004, he was appointed an Honorary Bencher of the Honourable Society of the Inner Temple and holds the first Yogis & Keddy Chair in Human Rights Law at Dalhousie University. He was knighted in 2000 and was appointed a member of the Privy Council in 2004.

Silvia Fernández de Gurmendi (Argentina) has been Judge of the International Criminal Court since 2010, and President since 2015. She has over 20 years of practice in international and humanitarian law and in human rights. Coming to the Court from the Ministry of Foreign Affairs where she was the Director General for Human Rights, Judge Fernández de Gurmendi acted as a representative of Argentina in cases



before the Inter-American Commission of Human Rights and the Inter-American Court of Human Rights. She has also represented Argentina before universal and regional human rights bodies and advised on transitional justice issues related to the prevention of genocide and other international crimes. Judge Fernández de Gurmendi contributed to the creation and set-up of the ICC. She was also instrumental in the negotiations of the complementary instruments of the Rome Statute as chair of the Working Group on Rules of Procedure and Evidence, as well as the Working Group on Aggression. Her academic experience includes professorships of international criminal law at the Universities of Buenos Aires and Palermo and as an assistant professor of international law at the University of Buenos Aires. Judge Fernández de Gurmendi has also published a number of national and international publications related to the ICC including, amongst others, the role of the Prosecutor, criminal procedure, and the definitions of victims.

Tómas Heidar (Iceland) became a Judge of the International Tribunal for the Law of the Sea on 1 October 2014. Previously, Judge Heidar served as Legal Adviser of the Ministry for Foreign Affairs of Iceland for almost twenty years. As such, he was responsible for all matters of public international law. He represented Iceland regularly at meetings on oceans and the law of the sea at the United Nations in New York and other international fora. He was also in charge of a number of negotiations with neighboring countries on maritime delimitation and fisheries. He was also Chairman of the National Commission on Continental Shelf Limits, was in charge of preparing the Submission of Iceland to the Commission on the Limits of the Continental Shelf, and was Head of Delegation at meetings with the Commission. Judge Heidar is the Director of the Law of the Sea Institute of Iceland, and Co-director and Lecturer of the

Rhodes Academy of Oceans Law and Policy, which holds a prominent Summer Course each year in Rhodes, Greece. He is also Guest Lecturer on the Law of the Sea at the University of Iceland and many other universities. Judge Heidar is author and editor of a number of books and articles on ocean affairs and the law of the sea, and lecturer in numerous academic conferences and seminars in this field. He was awarded the title of Ambassador on 1 September 2014.

Vagn Joensen (Denmark) is currently a Judge at the United Nations Mechanism for International Criminal Tribunals and one of three Duty Judges at its Arusha Branch. Judge Joensen also served as President and presiding Judge of the Trial Chamber of the United Nations International Criminal Tribunal for Rwanda (ICTR). Judge Joensen was first elected as ICTR President at a special election held in February 2012 to fill the seat of the departing President upon her assignment to the Appeals Chamber. Judge Joensen was re-elected to a second term as ICTR President in April 2013 and served as ICTR President until its closure on 31 December 2015. He originally joined the Tribunal in May 2007 as ad litem Judge and member of Trial Chamber III. Before joining the Tribunal, Judge Joensen was a Judge at the Danish High Court, Eastern Division, in Copenhagen for more than a decade and served as an international Judge at the United Nations Mission in Kosovo (UNMIK) from 2001 to 2002. He obtained a Master of Law in 1973 at the University of Aarhus, and studied at the City of London College and Harvard Law School. Judge Joensen served in the Danish Ministry of Justice until he was appointed a Judge at the City Court of Copenhagen in 1982. He has taught constitutional, criminal, and civil law at the Law Faculty of the University of Aarhus and of the University of Copenhagen.



Theodor Meron (USA) has been a Judge of the Appeals Chambers of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) since his election to the ICTY in March 2001. He has served a total of four terms as President of the ICTY and recently started on his second term as President of the MICT. A leading scholar of international humanitarian law, human rights, and international criminal law, President Meron is the author of a dozen books on international law and chivalry in Shakespeare and more than a hundred articles, including some of the books and articles that helped build the legal foundations for international criminal tribunals. He is a member of the Institute of International Law and of the Council on Foreign Relations; a fellow of the American Academy of Arts; and the recipient of numerous awards, honors, and medals such as the Hudson Medal (ASIL) and the Haskins Prize (ACLS), as well as Officer of the French Legion of Honour and Grand Officer of the National Order of Merit. He is also past honorary President of the American Society of International Law and past Editor-in-Chief of the American Journal of International Law. He is Charles L. Denison Professor of Law Emeritus at NYU Law School and since 2014 a Visiting Professor of International Criminal Law at Oxford.

Fatsah Ouguergouz (Algeria/France) is Judge and former Vice-President of the African Court of Human and Peoples' Rights in Arusha, Tanzania. He was United Nations Independent Expert on the Situation of Human Rights in Burundi and has occupied various other positions within the United Nations System, including at the International Court of Justice (The Hague) and at the Office of Legal Affairs (New York). He holds a Ph.D. in International Law from the Graduate Institute of International Law of Geneva, and has taught Public International Law at the University of Geneva. He is a former

Orville H. Schell Fellow (Yale Law School, New Haven CT, USA), former Visiting Professor at the University Panthéon-Assas (Paris II), and Father Robert F. Drinan Professor of Human Rights at Georgetown University Law Center (Washington D.C.). Judge Ouguergouz is a Founding Member of the African Foundation for International Law (The Hague) and the African Institute of International Law (Arusha). He is notably Member of the International Commission of Jurists (Geneva) and of the Governing Board of the International Institute of Human Rights (Strasbourg). He has published many articles and books and is Associate Editor of the *African Yearbook of International Law*.

Fausto Pocar (Italy) was President of the International Criminal Tribunal for the former Yugoslavia from November 2005 until November 2008. He has served on the Tribunal 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 international humanitarian law. He has served as a Member and President of the Human Rights Committee under the ICCPR and was appointed Special Representative of the UN High Commissioner for Human Rights for visits to Chechnya and the Russian Federation in 1995 and 1996. He has also been the Italian delegate to the Committee on the Peaceful Uses of Outer Space and its Legal Subcommittee. He is a Professor Emeritus of international law at the University of Milan, where he has also served as Dean of the Faculty of Political Sciences and Vice-Rector. He is the author of numerous publications on international human rights and humanitarian law, public and private international law, and European law. He has lectured at The Hague Academy of International Law and is a member and treasurer of the Institut



de Droit International, and President of the International Institute of Humanitarian Law (Sanremo).

András Sajó (Hungary) has been a Judge of the European Court of Human Rights since 1 February 2008 and ECtHR Vice-President since 1 November 2015. He obtained a law degree at the ELTE Law School of Budapest in 1972. He has held various research fellow positions at the Institute for State and Law at the Hungarian Academy of Sciences since 1972. In 1977 and 1982, he obtained a Ph.D. and Habilitation at the Hungarian Academy of Sciences, respectively. He was the founder and spokesperson of the Hungarian League for the Abolition of the Death Penalty in Budapest from 1988 to 1994 and was also the Legal Counselor to the President of Hungary from 1991 to 1992. Judge Sajó was the Chair of Comparative Constitutional Law and a University Professor at the Central European University in Budapest from 1993 to 2007.

Judge Sajó has been a member of the American Law Institute since 1996 and a member of the Hungarian Academy of Sciences since 1997. Since 1990, he has been a recurrent Visiting Professor at the Cardozo School of Law in New York and since 1996, at the Global Faculty of New York University Law School. He was a member of the Board of Directors of the Open Society Justice Initiative of New York from 2001 to 2007. His recent publications include *Constitutional Sentiments* (Yale University Press, 2011) and *Comparative Constitutionalism* (with Dorsen et al.) (West Academic Publishing, 3rd edition, 2016).

Emmanuel Ugirashebuja (Rwanda) was appointed Judge of the East African Court of Justice Appellate Division in November 2013. He was subsequently appointed President of the EACJ in June 2014. He holds a Ph.D. in law, University of Edinburgh; an LL.M., University of Edinburgh; and an LL.B., National University

Rwanda. He is also the recipient of a Draper Hills Summer Fellowship at Stanford University. Judge Ugirashebuja was previously Dean of the Law School, University of Rwanda (2009-2014); Member of the Superior Council of Judiciary (2009-2014); Member of the Supreme Council of Prosecution (2009-2014); Senior Lecturer at the National University of Rwanda; part of the Team of Experts in the East African Community on Fears, Challenges and Concerns towards the East African Political Federation (2010-2011); Legal Advisor at the Rwanda Environment Authority (2009); and Legal Advisor at the Rwandan Constitution Commission (2001-2003). He has lectured at the University of Edinburgh, University of Dar es Salaam, Rwanda Senior Command and Staff, and Rwanda National Police College. He is an expert and arbitrator in both national and international arbitrations.

Christine Van den Wyngaert (Belgium) was elected Judge of the International Criminal Court as of 11 March 2009 for a term of nine years. Assigned to the Trial Division, she assumed full-time duty on 1 September 2009. Prior to joining the ICC, Judge Van den Wyngaert served as a Judge in the International Criminal Tribunal for the former Yugoslavia (2003-2009) and as Judge *ad hoc* in the *Arrest Warrant Case* (Democratic Republic of the Congo v. Belgium) at the International Court of Justice (2000-2002). In 2017 she was appointed as Judge of the Kosovo Specialist Chambers, a position she will assume when her term ends at the ICC.

Judge Van den Wyngaert served as an expert for the International Law Association, the European Union, and the International Association of Penal Law (in 2014 elected Vice-President). In addition, she was a member of the Criminal Procedure Reform Commission in Belgium (*Commission Franchimont*) (1991-1998). Judge Van den Wyngaert has been a Professor of law at the University of Antwerp (1985-2005), a



visiting Fellow at the University of Cambridge (1994-1997), and a Visiting Professor at the Law Faculty of the University of Stellenbosch. Human rights have been a focal area of her teachings and writings throughout her career. In 2006, she was awarded the Prize of the Human Rights League.

In 2013, the Flemish Government awarded Judge Van den Wyngaert a golden medal for her achievements in international criminal law. She was granted the title of Baroness by the King of Belgium for her merits as an academic and as an international judge. This was followed in 2017 by an award of the Grand Medal of Honour of the Flemish Government. She graduated from Brussels University in 1974 and obtained a Ph.D. in International Criminal Law in 1979. She has been awarded four doctorates honoris causa (Uppsala University, Sweden; University of Brussels, Belgium; University of Cleveland, Ohio, USA; and Maastricht University, The Netherlands).

Co-Directors

David Thór Björgvinsson (Iceland) is a Professor of law at the Faculty of Law, University of Copenhagen. Prof. Björgvinsson served as Judge of the European Court of Human Rights in respect of Iceland from 2004 to 2013. Before he became a professor of law at Reykjavik University School of Law and the University of Iceland Faculty of Law, he held numerous other positions for public and private entities. Prof. Björgvinsson has written books and published numerous articles on his studies, given courses, and lectured in his field in many countries. His main fields of research are general legal theory, EU (EEA) law, and human rights. He studied history, philosophy and law at the University of Iceland and legal philosophy at Duke University School of Law in the USA. He is a doctor of international law from Strasbourg University. He has done research in his field at the University of Edinburgh in Scotland; Rand Afrikaans

Universiteit in Johannesburg in South Africa; the University of Copenhagen; Max Planck Institute in Heidelberg, Germany; and Oxford University in England.

Richard J. Goldstone (South Africa) was a Judge in South Africa for 23 years, the last nine as a Justice of the Constitutional Court. Since retiring from the bench he has taught as a visiting Professor in a number of United States law schools. From August 1994 to September 1996 he was the Chief Prosecutor of the United Nations International Criminal Tribunals for the former Yugoslavia and Rwanda. He is an honorary Bencher of the Inner Temple, London and an honorary fellow of St. John's College, Cambridge. He is an honorary member of the Association of the Bar of the City of New York and a foreign member of the American Academy of Arts and Sciences. He is an honorary life member of the International Bar Association and Honorary President of its Human Rights Institute. He chaired the Advisory Board of Brandeis University's International Center for Ethics, Justice and Public Life from 2009 to 2017.

Brandeis University

Leigh Swigart (USA) 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, the only regular event convening members of the international judiciary across a wide spectrum of geographic and subject matter jurisdictions. She also organizes the Brandeis Judicial Colloquia series, which brings together international and national judges for dialogue about the growing intersections between their spheres of work. Swigart is the coauthor, with Center Director Daniel Terris and Cesare Romano, of *The International Judge: An*



Introduction to the Men and Women Who Decide the World's Cases (Brandeis University Press and Oxford University Press, 2007). Her academic work and publications have focused on the challenges of language diversity in international criminal courts and tribunals; language use in post-colonial Africa; and African immigration and refugee resettlement in the United States. Her current research focuses on how the International Criminal Court is managing the challenges associated with accommodating African language speakers in its investigations, in the courtroom, and in its outreach programming to affected regions and victims. Swigart has a Ph.D. in sociocultural anthropology from the University of Washington and is a two-time Fulbright scholar.

Daniel Terris (USA) is the Director of the International Center for Ethics, Justice and Public Life at Brandeis University. An intellectual historian, he has written on race and ethnicity in the United States, business ethics, and international law and justice. His books include *Ethics at Work: Creating Virtue in an American Corporation* and *The International Judge: An Introduction to the Men and Women Who Decide the World's Cases* (with Leigh Swigart and Cesare P.R. Romano). As an academic entrepreneur and leader, Dr. Terris has overseen the development of many signature programs of Brandeis University, including the Brandeis Institute for International Judges, the Brandeis-Genesis Institute for Russian Jewry, the Master's Program in Coexistence and Conflict, and the University's Division of Graduate Professional Studies. Dr. Terris has also served as the University's Vice-President for Global Affairs, building new connections for Brandeis in Israel, India, The Netherlands, and other countries. Daniel Terris received his Ph.D. in the history of American civilization from Harvard University.

Brandeis interns

Chantal Sochaczewski (USA/Canada) is from Montreal. She graduated from Brandeis University in 2017 with a double major in Business and Psychology and a double minor in Legal Studies and Global Studies. During the summer of 2014, after her first year of university, she participated in the Brandeis in The Hague program. During her junior year, she studied abroad in Sydney, Australia and had the opportunity to intern for the International Commission of Jurists Australia.

Lee Wilson (USA) recently completed his junior year at Brandeis University, where he is majoring in International and Global Studies and Economics and is minoring in French and Francophone Studies and History. He attended the Brandeis in The Hague program during the summer of 2015, where he studied international criminal justice and legal implications of certain international institutions and initiatives. During his time in The Hague, Lee had the opportunity to participate in a moot court, where he pleaded before Judge Ivana Hrdličková of the Special Tribunal for Lebanon. His previous experience with law also includes an internship with Christos Diktas, Esq., who specializes in municipal law. Lee intends on pursuing a degree in law to be used as a tool for justice and for the prevention of future conflicts.

iCourts/Faculty of Law, University of Copenhagen

Federico Fabbrini (Italy) is a tenured Associate Professor of European & International Law. He holds a B.A. in European & Transnational Legal Studies from the University of Trento (2006), a J.D. in International Law from the University of Bologna (2008), and a Ph.D. in Law from the European University Institute (2012). He interned as a clerk for Justice Sabino



Cassese at the Italian Constitutional Court (2010-2011) and qualified for the bar exam in Italy (2011). Before joining iCourts, he was Assistant Professor of European & Comparative Constitutional Law at Tilburg Law School in the Netherlands, where he was awarded tenure. Prof. Fabbrini's main areas of research are European, comparative and international law, with a focus on federalism, fundamental rights, separation of powers, economic governance, and national security, mainly in a comparative perspective between the European Union and the United States. On these topics he has published in, among others, the *Oxford Yearbook of European Law*, *Cambridge Yearbook of European Legal Studies*, *European Constitutional Law Review*, *Common Market Law Review*, *European Law Review*, *Columbia Journal of European Law*, *Georgetown Journal of International Law*, *Berkeley Journal of International Law*, *Human Rights Law Review*, and *Harvard Human Rights Journal*. Prof. Fabbrini has published two monographs with Oxford University Press: *Fundamental Rights in Europe: Challenges and Transformations in Comparative Perspective* (2014, the published version of his Ph.D. thesis at the EUI); and *Economic Governance in Europe: Comparative Paradoxes and Constitutional Challenges* (2016). Moreover, he has co-edited four other volumes with Hart Publishing and Elgar Publishing, and edited two Special Journal Issues.

Henrik Stampe Lund (Denmark) is Center Administrator and daily manager at iCourts, Centre of Excellence for International Courts, at the Faculty of Law, University of Copenhagen. He is responsible for budgeting, allocation of resources and strategic planning related to research activities at iCourts. Over the last decade, he has in four different positions (in the humanities, the veterinary field and law) worked with larger EU applications and EU consultancy, and is especially experienced in writing the strategic parts of research applications. He has

followed the development of research policy closely and published academic articles about European research policy. He has also worked as a lobbyist in Brussels on behalf of the Technical University of Denmark and as a veterinary medical industrial partner. Lund holds a Master of Arts and Ph.D. in literature and has nine years of research experience within the field of literary studies. His academic publications reflect a broad and interdisciplinary interest in topics such as European literature and history, democracy and governance, political theory and philosophy of law. In addition, he has published books on the practice and theory of judgment and democracy. He has taught in the university sector for more than 20 years.

Mikael Rask Madsen (Denmark) is Professor of European Law and Integration and Director of iCourts, Centre of Excellence for International Courts, at the Faculty of Law, University of Copenhagen. Trained as both a sociologist and a jurist, Madsen's research is focused on international courts and the globalization of legal practices and practitioners. Madsen is author of more than a hundred articles and book chapters, as well as *La Genèse de l'Europe des droits de l'homme: Enjeux juridiques et stratégies d'Etat* (Presses Universitaires de Strasbourg, 2010); and co-editor of *The European Court of Human Rights between Law and Politics* (Oxford University Press, 2011/13); *Making Human Rights Intelligible: Towards a Sociology of Human Rights* (Hart Publishing, 2013); *Transnational Power Elites: The New Professionals of Governance, Law and Security* (Routledge, 2013); and *Law and the Formation of Modern Europe: Perspectives from the Historical Sociology of Law*.

Urška Šadl (Slovenia) is an Associate Professor at iCourts Centre of Excellence for International Courts at the Faculty of Law, University of Copenhagen. She holds an LL.M. in Legal Studies from the College of Europe in Bruges



and a Ph.D. from the University of Copenhagen. Urška completed longer research stays at King's College, London, Institute of European and Comparative Law at the University of Oxford, and most recently visited the University of Michigan in Ann Arbor as a Grotius Research Scholar. Her primary research interests include empirical studies of European courts, the theory and practice of judicial precedents, European citizenship, and topics in European constitutional law more generally. Her research appears *inter alia* in the *European Law Journal*, *European Law Review*, *Columbia Journal of European Law*, and *European Constitutional Law Review*. Prof. Šadl is currently completing a research project, *The Atlas of Legal Evolution: The Case of EU Law*, which is financed by The Danish Council for Independent Research and the Sapare Aude Research Talent grant.

iCourts Rapporteurs

Kerstin Bree Carlson (USA/Ireland) is a post-doctoral researcher at iCourts, the Danish National Research Foundation's Centre for Excellence in International Courts at the Faculty of Law, University of Copenhagen, where she works on questions pertaining to international criminal law. She has written several articles and a manuscript regarding the ICTY and its reception in the former Yugoslavia, and is currently working on the Habré trial in Senegal. Prior to coming to iCourts, she was an Assistant Professor and department co-chair (International & Comparative Politics) at The American University of Paris. Kerstin practiced international arbitration at Cleary Gottlieb Steen & Hamilton in Paris, clerked for a U.S. district court judge, the Honorable David Folsom, in Texas, and is the recipient of two Fulbright research grants, one to Croatia and the second to UNESCO in Paris. She has a J.D. and a Ph.D. from the University of California-Berkeley, and originally hails from the U.S.'s east coast.

Harry James Rose (UK) is an LL.M. student at the Law Faculty of the University of Copenhagen. His studies thus far have focused on questions surrounding international trade and development law. Prior to coming to the University of Copenhagen, he studied for his LL.B. at the University of Durham (Van Mildert College), where he graduated with upper 2nd class honours. Rose spent a year working in an international consultancy in the UK, which provided advice to large world-leading companies on maintaining positive stakeholder and shareholder relations. Rose is a fluent speaker of German, having lived in Hannover, and originally hails from the English county of Worcestershire.

Institute Guests

Hans Corell (Sweden) served as Under-Secretary-General for Legal Affairs and the Legal Counsel of the United Nations from March 1994 to March 2004. In this capacity, he was head of the Office of Legal Affairs in the United Nations Secretariat. Before joining the United Nations, he was Ambassador and Under-Secretary for Legal and Consular Affairs in his native Sweden's Ministry of Foreign Affairs from 1984 to 1994. From 1962 to 1972, he served first as a law clerk and later as a judge in circuit courts and appeal courts. In 1972, he joined the Ministry of Justice, where he became a Director in 1979 and the Chief Legal Officer in 1981. Corell was a member of Sweden's delegation to the UN General Assembly from 1985 to 1993 and has had several assignments related to the Council of Europe, OECD, and the CSCE (now OSCE). He was co-author of the CSCE proposal for the establishment of the International Tribunal for the former Yugoslavia, which was transmitted to the UN in February 1993. In 1998, he was the Secretary-General's representative at the Rome Conference on the International Criminal Court. Since his retirement from public service in



2004, Corell has been engaged in many different activities in the legal field, *inter alia* as legal adviser, lecturer, and member of different boards.

Andreas Føllesdal (Norway) is Professor of Political Philosophy at the Faculty of Law, University of Oslo. He is Principal Investigator of European Research Council Advanced Grant MultiRights 2011-16, on the Legitimacy of Multi-Level Human Rights Judiciary; and Co-Director of the PluriCourts Centre of Excellence for the Study of the Legitimate Roles of the Judiciary in the Global Order. Føllesdal received his Ph.D. 1991 in Philosophy from Harvard University. He publishes in the field of political philosophy, mainly on issues of international political and legal theory, globalization/Europeanization, human rights, and socially responsible investing.

Geir Ulfstein (Norway) is Professor of international law at the Department of Public and International Law, University of Oslo and Co-Director of the PluriCourts Centre for the Study of the Legitimate Roles of the Judiciary in the Global Order. He was Director of the Norwegian Centre for Human Rights, University of Oslo from 2004 to 2008. Ulfstein has published in different areas of international law, including the law of the sea, international environmental law, international human rights and international institutional law. He is General Editor (with Andreas Føllesdal) of the two-book series, *Studies on Human Rights Conventions* and *Studies on International Courts and Tribunals* (CUP). He is Member of the Executive Board of the European Society of International Law and Co-Chair of the International Law Association's Study Group on the Content and Evolution of the Rules of Interpretation.

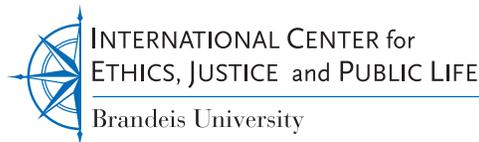


International Center for Ethics, Justice and Public Life

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

The International Center for Ethics, Justice and Public Life

Brandeis University, MS 086
Waltham, MA 02454-9110 USA
+1-781-736-8577 Tel
+1-781-736-8561 Fax
www.brandeis.edu/ethics
www.facebook.com/EthicsBrandeis
www.twitter.com/EthicsBrandeis



About Brandeis University

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

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

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

