The Accessibility of International Courts and Tribunals

Through exploring the notion of fairness in international justice proceedings, BIIJ participants began the process of developing their definition of the international rule of law. They next addressed an area of increasing focus in the international justice system, that of how accessibility to international courts and tribunals is structured and whether increased access can serve as one of the indices of a robust international rule of law.

Participants began their discussion by recognizing the dramatic shifts that have occurred in the types of actors that participate in international justice proceedings. It was noted in the first session that international law has evolved from a system focused on states to one that increasingly involves individuals and non-state entities. Indeed, this development “mirrors an increased participation of private or non-state actors in many other fields of international life,” commented a participant. Most of the international judicial institutions established over the past two decades highlight this new focus – criminal tribunals have the individual as their subject, while human rights courts respond to claims by individuals or the organizations representing them. They thus stand in contrast to courts that address disputes between states, which are the “traditional” subjects of international law.

But even interstate dispute resolution bodies increasingly deal with the concerns of individuals and non-state entities, if only indirectly. It was pointed out that the ICJ cases addressing alleged violations of the Vienna Convention on Consular Relations by the United States – the Beard, LaGrand, and Avena cases – were brought by Paraguay, Germany, and Mexico respectively on behalf of their nationals awaiting execution in US prisons. The WTO Appellate Body and ITLOS similarly take on cases where a state essentially stands in for the interests of an individual, a commercial body, or other entity. Interestingly, one participant pointed out that the converse also exists. The ECHR occasionally receives “disguised state applications,” when hundreds of individual applicants of the same nationality make a claim against a foreign state.

Participants were asked to consider the ways in which access to their institutions – either direct or indirect – has developed over the years. They also had the opportunity to point out both the advantages and challenges that come with these new patterns of access. Their responses illustrated that international courts and tribunals face many common issues as they seek to adapt to changes in the way their institutions function.

Interstate dispute judges began with reflections on their own type of institutions, those where access is usually limited to states. At the WTO, “to get in the door, a government has to bring the case.” However, many governments will agree to bring cases when commercial entities based in their countries ask for a legal determination on trade measures they can show are disadvantageous. ITLOS has gone further by formally extending its jurisdiction to include non-state actors in cases before its Seabed Chamber. In disputes between states over deep-sea mining issues, the private contractors involved must submit to the Chamber’s jurisdiction or to binding arbitration. In situations where a vessel is seized on the high seas, the flag state and shipping company also frequently join forces when bringing a case before the tribunal.
The agreement that established the CCJ in 2001, and the interstate treaty that the court is required to interpret, provide for even more permissive access. They allow private entities to initiate a suit against a state provided they first seek the permission of their home state. The latter can then permit the private entity to proceed to sue, or it could itself institute the action, essentially then becoming the private entity to proceed to sue, or it could itself their home state.

If the permission was denied, the private entity could then seek the permission of the state, arguing that the entity could not prosecute the action in the face of its own state's refusal to grant permission to sue. After looking at various articles of the treaty, the CCJ judges decided that the private entity should be allowed to pursue the suit in order to avoid a violation of another provision of the treaty regarding non-discrimination. The court held that 1) to deny standing to private entities in such circumstances could have the effect of frustrating the goals of the treaty, and 2) the purpose of the relevant article was to avoid a duplication of suits, and that the requirement to seek permission was a procedural device to avoid a state allegedly in violation of the treaty being twice vexed, once by an injured private entity, and again by the contracting party of that private entity.

The oldest international court, the ICJ, continues to retain its status as a state-only forum, while acknowledging that many of its cases have the interests of non-state entities behind them. In certain situations, however, the definition of “state” may not always be clear. The Court was once called upon to decide whether a “super-state” – the European Community – fell under its jurisdiction and concluded that it did not. There has also been some discussion about whether individuals should have full access to the Court to bring a case. Indeed, former ICJ President Rosalyn Higgins “has convincingly explained that there are powerful reasons for amending the Statute to allow for this development.” However, not all judges agree on the wisdom of opening up historically “state-only courts” to non-state action. One judge even characterized himself as an outright “opponent” to such a move, given that there are already other judicial fora where individuals can be direct parties to a case.

Human rights courts offer a very different picture from interstate dispute courts when it comes to the role of the individual. Their mandate is to determine whether there have been violations of the individual human rights set out by the respective conventions that each court was created to uphold – namely, the European Convention on Human Rights, the American Convention on Human Rights, and the African Charter on Human and Peoples’ Rights. The status of the individual is thus central to their work.

However, access to these courts is not necessarily direct for individual claimants. Only the ECHR accepts, without condition, individual petitions alleging human rights violations, a policy that has opened its doors to thousands of applications from across the Council of Europe every year and created a backlog of over 145,000 cases as of February 2011. Unlike its sister human rights courts in the Americas and Africa, the European Court no longer has a commission – it was abolished by Protocol 11 to the Convention, according to which the ECHR became a full-time institution in 1998. The result is that it has no body to “filter” the massive number of applications, an overwhelming percentage of which will eventually be found to be inadmissible on various grounds. The ECHR is constantly seeking strategies to streamline its approach to admissibility review so that the court can operate more efficiently and prioritize cases that involve the most serious human rights violations and have important implications for the promotion and protection of human rights across Europe.

In contrast, individuals do not have direct access to the IACHR. Its cases must be referred by either the Inter-American Commission on Human Rights – which does accept individual petitions alleging...
violations – or a state party to the Organization of American States. However, it is almost automatic for the Commission to refer cases when it has found a violation, so that individuals have reliable indirect access to the Court. Furthermore, victims have the right to participate in a proceeding at the IACHR, with a status akin to being a party. Occasionally, states have requested an advisory opinion from the IACHR in hopes of appealing an unfavorable decision by the Inter-American Commission. For example, Argentina and Uruguay requested in 1990 a general appeal of a Commission decision regarding the disappearance of political opposition figures. The Court found that the admissibility requirements for this appeal had not been met. More generally, it has never fully reversed a decision of the Commission, although it has arrived at different findings.

The ACHPR shares characteristics with both of these courts – it accepts applications from states and also from individuals, but only if the defendant state has accepted the jurisdiction of the court to receive individual cases. So far, only four countries out of 53 members of the African Union have done so. However, individuals do have direct access to both the African Commission on Human and Peoples’ Rights – which can only issue recommendations, not binding decisions, and thus is less attractive to claimants – and to regional courts that have jurisdiction over human rights issues. Nonetheless, ACHPR judges are anxious to open up direct access to their court and are working toward this goal, despite the opposition of most African states.

A final question about access to human rights courts was raised. Given the broad geographic jurisdictions of all the human rights courts, it may be a real challenge for some victims and claimants to reach the actual court and pursue their cases in person. The Inter-American system has made provision for this challenge, having created funds to help both the Commission and Court cover the cost of participation in proceedings.

Of all the types of international courts and tribunals, those with criminal jurisdictions are most closely associated with individuals, that is, the persons who stand accused of war crimes, crimes against humanity, and/or genocide. However, there is another category of individual becoming increasingly important in the proceedings of international criminal tribunals: the victim. BIIJ 2010 hosted judges from six different criminal institutions, and all had experiences to share about how and when victims may access their proceedings.

The discussion started with the ICC, the first court to make specific provision for the participation of the victim in trials (see text box, below). This has been hailed as a positive development in international criminal justice by many observers, and most judges agreed that it was a worthwhile development. But it was also acknowledged that the modalities of participation are still being explored and that a truly workable model for victim participation has yet to be devised.

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**Article 68(3) of the Rome Statute: Protection of the victims and witnesses and their participation in the proceedings**

Where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. Such views and concerns may be presented by the legal representatives of the victims where the Court considers it appropriate, in accordance with the Rules of Procedure and Evidence.

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* Cf. Rome Statute of the International Criminal Court, which was adopted on 17 July 1998 and entered into force on 1 July 2002.
Several “deficits” in the system were pointed out. For example, many victims are represented by just a few counsel, so that the ideal scenario – that victims personally come to the ICC and, as one participant described it, ”see that the perpetrator is investigated and prosecuted so that they might restore their lives” – is far from a reality. Furthermore, it is unclear how much the counsel, whose services are paid by the court itself, communicate with the victims, solicit their views, and so on. In the cases currently underway, the victims of the crimes are in Africa, thousands of miles away from The Hague. Victim participation also has implications for the functioning of the ICC itself. “I am troubled by the time that ICC judges spend on this issue,” commented a judge from another court. “It slows down the procedures.”

As a human rights expert, I am all in favor of tribunals with strong victim representation. But there needs to be much stronger and better management of court proceedings.” These challenges notwithstanding, the role played by victims’ counsel in ongoing ICC trials serves to remind the world that international criminal justice is not just about convictions, sentencing, and the development of a new body of law. It is also about providing reparations and healing to those who suffered from the crimes in question.

The ECCC also provides for the participation of victims, allowing them access to case files as well as the right to submit evidence, question witnesses and the accused, and appeal. Unlike at the ICC, however, victims cannot be awarded monetary compensation, but instead “moral and collective reparations.” The Court currently finds itself overwhelmed, however, by the increasing popularity of victim participation. For the ECCC’s first case, there were 100 civil parties. For the second, 4000 civil parties had registered as of July 2010. “How can we appropriately manage this huge number, while trying to hear their voices in an efficient and meaningful manner?” asked a participant. “I don’t think we have established the best practice with the Court, but we are trying to improve the system to have satisfactory victim participation.”

The newest international criminal tribunal, the STL, also allows the input of victims: it permits them to cross-examine witnesses, to report on the personal impact of the crimes under investigation, and provides them access to the documents filed by the parties. However, the pre-trial judge must consider their participation as necessary to the proceedings in order for it to be authorized. This criterion was established, at least partly, “to avoid the problems faced by the ICC.”

The other criminal tribunals represented at the BIIJ – the ICTY, ICTR, and SCSL – do not have specific provisions for victim participation. Nonetheless, as one criminal judge pointed out, “We may not have victim representation but we face them every day.” That is, victims participate as witnesses, which is what another criminal judge considered to be their only appropriate role. “More than 1000 victims have been heard as witnesses in my tribunal. They have a clear and important role – to tell their stories. But at the ICC, is it clear what it means for a victim to participate?” It is also uncertain, he added, whether the NGOs advocating for victim participation actually have the same agenda as those they purport to represent. A third judge was disappointed that, while there had been a great outcry for victims to participate at his court, it was not acted upon. What exists instead is a small number of perpetrators brought to trial and thousands of victims who feel frustrated.

Having access to international courts does not always mean, however, being a party to a case. Access may also come in the form of providing information relevant to a case. This usually happens through the submission of amicus curiae briefs from NGOs and other bodies interested in the outcome of proceedings. The admissibility of amicus briefs has been a subject of debate in a number of institutions, and at the WTO it was especially controversial. Because the WTO rules do not directly address the question, the Appellate Body determined that amicus briefs could be accepted under the general authority for panels to seek information from any relevant source. While many NGOs, particularly those working in the environmental and food safety areas, welcomed this ruling, many WTO members do not approve of a role for non-parties in dispute
settlement proceedings. In practice, amicus curiae submissions are frequently filed as attachments to the submission of a party, in which case the Appellate Body considers such material to be an integral part of the submission of that participant. Unsolicited amicus curiae briefs, on the other hand, are not required to be accepted but may be considered where deemed pertinent and useful. Other interstate dispute courts, like the ICJ, do not accept amicus briefs at all. The CCJ, as of 2010, had not yet been faced with this challenge.

As for the role of amicus curiae briefs in human rights courts, there seems to be little debate about the importance of these additional sources of information. At the ECHR, amicus briefs – called “third party interventions” – are unsolicited but usually accepted, and the IACHR similarly accepts them. In the African system, a provision has been made to allow amicus briefs but, given that the Court had only had one inadmissible case as of BIJ 2010, it had not yet been put to the test.

Finally, views on amicus curiae access to international criminal courts and tribunals were mixed. The SCSL allows amicus briefs and finds them very effective. At the ICC, amicus briefs are allowed at the discretion of judges. One participant commented that judges should be careful and selective in what they accept, so as to verify that the brief makes a substantive contribution and is not merely “an application where an organization wants to enhance its profile by appealing to an international court.” Other judges noted that at their courts, they already have a plethora of information and do not accept any more from outside sources.

While most BIJ participants agreed that increased access to international courts is, overall, a positive change, there were a number of concerns expressed about potential associated dangers. If increased access is going to benefit everyone equally, it was suggested, there needs to be more education about who has the right to approach an international court, and more provision of legal assistance to individuals who want to pursue a claim. This is especially pertinent for the developing world.

Increased access to international judicial fora might also lead to abuse, cautioned another judge, with individuals pursuing simultaneous litigation of the same case in multiple venues.

One participant mentioned the pressing need to define the borderline between the responsibilities of international and domestic adjudication. Increased participation by individuals in international human rights courts, in particular, may become a justification for states not to exercise proper jurisdiction or ensure the rule of law domestically. “It is undesirable that the role of ensuring the rule of law shift to the international level,” he declared, “when it is the primary responsibility of states in their own jurisdictions.”

The most vigorous warnings related to increased access were about the potential dangers of victim participation. While in principle a positive development, victim participation, if not managed properly, could compromise the fair trial rights of the accused. There are already concerns that defense counsel in criminal tribunals operate at a disadvantage, financial and otherwise, in relation to the prosecution. Does the counsel for victims become a kind of second prosecution, acting to strengthen the case against the accused? Does victim participation further slow down criminal proceedings that already move at a ponderous pace? Does consideration of victims’ needs complicate the already challenging work of international judges? These are questions that need to be considered as international criminal procedure evolves.

In the end, it was acknowledged by participants that the shift from a paradigm of state agreement to one of individual rights is an important transition for international law, and access is an important part of this new paradigm. “It is crucial that the person concerned by the law can participate in its development,” said one judge. Another concurred that “the increasing involvement of individuals in international tribunals has become an essential element in enhancing the rule of law at an
international level. However,” he continued, “if the number of individual complaints reaches such a level that the court in question can only handle them with great difficulty, then the system becomes to a certain extent self-defeating.” In other words, balance is crucial if increased access to international courts and tribunals is to strengthen the international rule of law.

Notes


2. See Article XXIV of the Agreement Establishing the Caribbean Court of Justice (2001), and Article 222 of the Revised Treaty of Chaguaramas, which was adopted in 2001 and entered into force on 1 January 2006.


4. Supra note 23, p. 57.


8. The first case of the African Court, Michelot Yogogombaye v. Republic of Senegal (15 December 2009) was ultimately deemed inadmissible since Senegal had not accepted jurisdiction over cases initiated by individuals. Cf. http://www.african-court.org/en/cases/latest-judgments/.

9. An example is the Court of Justice of the Economic Community of the West African States (ECOWAS).

Information for notes with “supra” references can be found in the full text version of this report.