ADDRESS

REFLECTIONS ON JUDGING: AT HOME AND ABROAD

Patricia M. Wald

INTRODUCTION

It is a privilege to be invited to deliver the Owen J. Roberts lecture. My topic—differences in the arts of judging on national and international courts—is in fact only a few degrees of separation from Justice Roberts’s own career. Telford Taylor, a Chief Prosecutor at the Nuremberg trials following World War II, wrote that he tried unsuccessfully to have Justice Roberts nominated as the American judge on that court just as the Justice was retiring from his fifteen-year tour of duty on the Supreme Court. But as it turned out, the University of Pennsylvania got there first. The alternate American judge at Nuremberg was U.S. Court of Appeals Judge John J. Parker whose nomination to the Supreme Court back in 1930 had failed by one vote. And it was Owen Roberts who succeeded to that seat. Justice Roberts, of course, sat on several of the key war crimes cases of the 1940s, such as In re Yamashita, where a Japanese general was tried before a military tribunal and executed for the crimes committed by his troops; Ex parte Quirin, the Nazi saboteur case; and Korematsu v.
the Japanese-American internment case; cases which still today are widely cited—as either justification or warning—in the ongoing controversies about the government’s current antiterrorist policies.

Before beginning on that topic, I hasten to say that the judgments and views I express here are in no sense universal (or even scholarly); they derive from my own parochial experience which at least has the virtue of vividness in recollection.

In 1999, I was nominated by the State Department and appointed by the United Nations to serve a two-year term as the American judge on the International Criminal Tribunal for the former Yugoslavia (“ICTY”) which was set up in 1993 to try and punish perpetrators of war crimes, crimes against humanity, and genocide committed during the Bosnian War and later in the Kosovo campaign. I had at that time completed over twenty years of service on the U.S. Court of Appeals for the District of Columbia Circuit. The ICTY was a United Nations court—the first international court since Nuremberg, which was of course a military tribunal, albeit with many of the rights, rules, and transparencies of an international court. The United States was a prime supporter in money, personnel, evidence, and moral backing of both the Nuremberg and Yugoslavia courts. It has been the United Nations, however, who has had to pay the bills—now annually more than $250 million—for the ICTY, located in the Hague; and it is the U.N. General Assembly that elects the Tribunal’s judges from sixteen separate countries. The U.N. Security Council selects the prosecutor. Slow in starting up, the Tribunal has now—after a decade—tried and, except for a handful of acquittals, convicted nearly fifty Balkan civic and military leaders of serious violations of international humanitarian law, better known as the law of armed combat or IHL.

The Yugoslav court is now in an exit strategy under pressure from the United Nations and is striving to close down by the end of this

---

4 323 U.S. 214 (1944).
decade.⁷ There is a wide consensus among international law experts that it has left an important legacy of judicial opinions and judgments fleshing out the law of war, crimes against humanity, and the law of genocide which, except for the Nuremberg and Tokyo Tribunals after World War II and a few national court decisions in the intervening fifty years, had never comprehensively been interpreted and applied by civilian judges to individuals accused of war crimes.⁸

The ICTY and its sister court, the International Criminal Tribunal for Rwanda ("ICTR"), which was established in 1994 to try perpetrators of the Rwandan genocides,⁹ have become the flagships for a fleet of international courts created or proposed in the past few years to deal with horrendous human rights violations committed during the civil wars in Sierra Leone, the independence conflicts in East Timor, the Khmer Rouge atrocities of the 1970s in Cambodia, and recently, its record has been debated in the context of how to try the crimes of Saddam Hussein. The ICTY also gave a strong kick-start to the creation in 2002 of the International Criminal Court ("ICC") after fifty years of study and talk. The United States has in varying degrees supported these attempts to internationalize justice save for the ICC, which, after many years of active participation in its negotiation, the United States now vigorously opposes.¹⁰

Current debates on what form international justice should take focus on whether countries devastated by war should be left to conduct their own prosecutions of war crimes. This is apparently what

---


⁸ See, e.g., Kelly D. Askin, Reflections on Some of the Most Significant Achievements of the ICTY, 37 NEW ENG. L. REV. 903, 907-10 (2003) ("The jurisprudence of the Tribunals is particularly rich in regards to delineating, defining, and developing substantive crimes."); Symposium, The ICTY at Ten: A Critical Assessment of the Major Rulings of the International Criminal Tribunal over the Past Decade, 37 NEW ENG. L. REV. 865 (2003) ("This volume ... contains a dozen articles generated by [a conference with the same title as the symposium], which we believe represent a significant contribution to the literature about the Yugoslavia Tribunal and international criminal law and procedure.").


the United States favors for Iraq and what Iraq favors for itself. Historically, however, most strife-ridden countries have lacked anything approaching adequate resources in terms of sophisticated, noncorrupt judges and prosecutors trained in the laws of war, as well as the expert technicians needed for collection and maintenance of evidence in the field, mass exhumations, and expensive witness protocols. And frequently there are people in those countries still in leadership positions who are loyal to the “homeland heroes” on trial who sought to disrupt or even corrupt the judicial process. After a decade, war crime prosecutions grew in numbers in Serbian, Croatian, and Bosnian national courts, but there remains much skepticism among international observers and among victims’ groups about the fairness of the trials and the impartiality of the verdicts. The Indonesian domestic prosecutions of military officials who reportedly spearheaded the East Timor massacres in 2000 have mostly resulted in acquittals; prosecution witnesses have reportedly been intimidated; little or no protection has been accorded by the court; and prosecutors have been suspiciously docile in pushing their cases. The sentences imposed on the few found guilty of any crime have been absurdly low. So far, then, there is little proof that countries racked by war, tyranny, and poverty can effectively and fairly punish the worst violators of their citizens’ human rights. The victims, primarily innocent and powerless women and children, are often left without recourse.

Some, of course, say that the criminal trial model is the wrong one and that the advent of truth and reconciliation commissions, beginning with South Africa in the post-apartheid period, offer greater hope of diffusing tensions and animosities and encouraging perpetrators to confess when community-service-type punishments are substituted for trials and prison. But here too, the experience is mixed.


12 Eighteen political and military leaders in Jakarta were charged only with failing to prevent violence, though the Indonesian Human Rights Commission and international observers reported that those same leaders had orchestrated the violence. See DAVID COHEN, INTENDED TO FAIL: THE TRIALS BEFORE THE AD HOC HUMAN RIGHTS COURT IN JAKARTA (Int'l Center for Transitional Justice, ed. 2003) (discussing Indonesia’s failures to deliver justice to war crime perpetrators), available at http://ist-socrates.berkeley.edu/~warcrime/East_Timor_and_Indonesia/Reports/IntendedtoFail.pdf.

13 But see INDONESIAN JUDGES SEMINAR ON INTERNATIONAL HUMANITARIAN LAW, CONCLUSIONS AND RECOMMENDATIONS 2 (Univ. of Calif. Berkeley War Crimes Studies Ctr. et al. eds., 2003) (“[I]t is important to recognize that there are significant variations in the quality and performance of the different [judicial] panels. . . . In the face of . . . obstacles, many of the judges remained committed to conducting trials in accordance with international standards.”), available at http://www.hrcberkeley.org/download/seminar_indonesia.pdf.
The South African commission ended primarily with mid-level rather than top leaders participating, and throughout the process it wielded a threat of criminal investigations and prosecution if the penitent did not admit to the full scope of his wrongdoing. In some countries, like Serbia, the commissions have been failures, never winning the confidence of the people or engaging major perpetrators, and in some, like Sierra Leone, the commissions have operated on a parallel track alongside criminal tribunals that try the worst violators, leaving to the commissions the truth-finding functions as to the deeds of middle- or lower-level perpetrators.

So it appears that unless a country or the international community decides to bypass altogether the terrible crimes of war or against humanity, some form of international courts will be empowered for some time to come. The ICC, with its worldwide potential jurisdiction, already operates without the United States’ help. This reality sets the stage for my main topic today—the differences between judging nationally and internationally. There are now some three hundred international judges serving in fifty international courts around the globe (some on civil rather than criminal courts), and I expect that American judges, despite our rejection of the ICC, will continue to have significant representation in this group as a whole. It thus makes sense to consider just what judging on an international court is about and how the processes may be improved to make that experience more rewarding and productive. I do not pretend to have an intimate knowledge of all international courts, but I draw on my own experience as a judge on one major international tribunal and on my later work with legal programs abroad.

I. SELECTION AND TENURE OF INTERNATIONAL JUDGES

How to pick judges is a major issue inside democratic countries walking the fine line between assuring judicial independence and impartiality and governing according to the will of the people. Even we Americans—it is widely conceded—have not yet gotten it entirely right. Independence-oriented critics deplore the pressures imposed by direct election of the high court judges in a majority of states, and

14 See Helena Cobban, The Legacies of Collective Violence, BOSTON REV., April/May 2002 (drawing preliminary lessons learned from the ICC), http://bostonreview.mit.edu/BR27.2/cobban.html; Ginger Thompson, South African Commission Ends Its Work, N.Y. TIMES, March 22, 2003, at A5 (“But almost since its beginning, the commission’s work has been blocked by legal obstacles, raised by some of the high-level officials it aimed to expose, and dogged by disappointment from the people it aimed to lift from obscurity.”).

15 See Daniel Williams, A Faint Path to Truth in Serbia, WASH. POST, July 5, 2002, at A12 (“It is hard to find people in Belgrade who view the commission as a vehicle for coming to terms with the wars and Serbia’s role in them.”).
democracy-oriented critics are constantly reminding us of the unaccountability of life-tenured federal judges who they say are too often free to follow their own preferences rather than "the law" or the public's will. Our Constitution, of course, bestows that life tenure on the President's federal court nominees subject to confirmation by a majority of the Senate and to the judges' continuing good behavior. But any first-year law student knows that is not the whole story. The President nominates men and women he believes will rule in accordance with his party's basic philosophy (historically over ninety percent have been chosen from the President's party). The principle check on his discretion is whether he believes they will be confirmed by a mixed-party Senate or, as we have recently seen, their nominations may be stalled or filibustered in response to campaigns by mobilized groups of voters who oppose the nominee's past record or predicted future judicial stance. The nominee must appear before the Senate Judiciary Committee and parry questions in a way that does not taint his future independence in specific cases but yet seems responsive. (I myself had a somewhat anxious confirmation back in 1979 as a number of right-wing groups attacked me as anti-family for my work on the rights of juveniles. Fortunately, my five kids showed up at the hearings to blunt that challenge.)

One thing that can be praised in our process, however, is its transparency; if the President tries to sneak in too extreme a nominee, he is likely to provoke a fateful and sometimes fatal opposition. Usually, however, we can count on the public nature of the proceedings to insure that judicial candidates meet minimum qualifications of intelligence, experience, objectivity, and ability to render fair judgments. Most agree that judges are—and ought to be—picked not just for technical skills in finding what law reposes on library


17 U.S. CONST. art. III, § 1.
shelves (or in the computer), but for proven integrity, their reflection of the broader values and commitments of the society in their decisions, and their ability rightfully to predict the consequences of their decisions most of the time.  

Judges selected for international courts get there by a different route. Telford Taylor’s account of how the Nuremberg judges were chosen and how they performed is both an instructive and fascinating study in realpolitik. Robert Jackson, already selected as Chief Prosecutor by President Truman, felt free to recommend names for the American judge and alternate judge on the court. Truman ultimately picked Francis Biddle, who had recently resigned as Franklin D. Roosevelt’s Attorney General, as the American judge, in part because Truman felt guilty about forcing Biddle’s resignation; and he picked John J. Parker, years earlier rejected for the Supreme Court, as the alternate, as a favor to James Byrnes, then Secretary of State, a fellow Carolinian. Biddle was an enthusiastic recruit for the Nuremberg Tribunal although he had little judicial experience, having served only a few discontented months as a federal circuit judge, while Parker went reluctantly citing his “comfortable well-defined life” on the Fourth Circuit and his fear that, as a mere alternate judge, he would be a “voteless cipher.” In the end, Taylor thought Biddle was smart but “impatient, often caustic, did not suffer fools gladly and could never have projected the aura of fairness that [the British judge who was selected President of the Court over Biddle] radiated.” On the other hand, Taylor thought Parker was “the wisest head in the room” due largely to his long judicial experience at home. Taylor found the entire Nuremberg panel “not a brilliant group. But their work was professional, honest, and did no discredit to the heavy task that was set before them.”

Fifty years later, when it came time to choose the fourteen judges for the International Criminal Tribunal for the former Yugoslavia, the only requirements laid down in its enabling statute, contained in a Security Council Resolution, were that they be selected by the U.N. General Assembly from among “persons of high moral character, im-

---

19 See Taylor, supra note 1, at 94–95.
20 Id. at 95.
21 Id.
22 Id.
23 Id. at 226.
24 Id. at 632.
25 Id.
partiality and integrity who possess the qualifications required in their respective countries for appointment to the highest judicial offices.\textsuperscript{26} How those aspirational criteria would be applied was left to each country's discretion, although informally it was acknowledged that the judges must represent a wide geographical span as well as different legal cultures, and they must include, if so desired, representatives of the "big five" on the Security Council—the United States, the United Kingdom, Russia, France, and China.

Thus, the opening roster of the Yugoslav Tribunal included eleven judges from the United States, the United Kingdom, Canada, Nigeria, France, China, Costa Rica, Pakistan, Malaysia, Italy, and Australia. Although the ICTY statute said "due account shall be taken of the experience of the judges in criminal law, international law, . . . international humanitarian law and human rights law,"\textsuperscript{27} the results of the General Assembly elections more accurately reflected geographical and cultural diversity than judicial experience. United Nations officials readily admit that they have never felt free to override member countries' nominees on their candidates' individual merits, and although negotiations go on among member countries as to whose candidates they will support, they do not generally focus on individual qualifications as much as regional concerns and non-judicial areas of mutual interest. Many of the ICTY judges in the beginning were former diplomats and scholars without courtroom experience of any kind; a few were quite old and even infirm (one Chinese judge was ninety); and there was a decided mix of able, experienced jurists and criminal law neophytes. Until 2001, when a corps of \textit{ad litem} judges was added to sit on one or two trials apiece to clear the docket, there were never more than three female judges on what grew to be a sixteen-person court. (I do note that two of three U.S. judges have been women.) In my experience, this mode of selection left a cluster of hardworking, experienced judges to bear the laboring oar for the substantive work of the Tribunal, particularly the writing of judgments; in other perforce chambers the legal assistants did much of that work. And when a judge unfamiliar with the trial process was assigned to preside over a three-judge panel, the trials frequently took longer than they might have otherwise.\textsuperscript{28} Occasionally, too, reversible errors were committed, inappropriate questions

\textsuperscript{26} ICTY Statute, supra note 5, at art. 13.
\textsuperscript{27} Id.
\textsuperscript{28} Trials at the Tribunal have generally been criticized as too long, consuming in the beginning years an average of over a year with several (leaving Milosevic aside) taking two years. \textit{See Justice in the Balkans: Hague Tribunal Sets a Valuable Precedent}, GUARDIAN (London) Aug. 6, 2001, at 17 ("The Tribunal has often seemed to proceed at snail's pace, delayed by the complexities of evidence gathering and its judges' inexperience as much as by difficulties in apprehending suspects."). \textit{But see Askin, supra note 8, at 913–14} (noting that most trials average nine months).
were asked, and uninformed rulings were made from the bench. However, I hasten to add that I saw no case in which the fundamental rights of the accused were impugned which did not eventually get righted. It was more a case of efficiency than ultimate fairness. Perhaps because ICTY jurisdiction was limited to criminal cases that arose from the Bosnian and Kosovo conflicts, there were few ideological quarrels among the judges; but there were a myriad of legal and interpretive disputes about the content of international law as well as the requirements of procedural fairness in a criminal trial. When such questions arose, it was sometimes difficult to conduct a constructive dialogue between those who were intimately familiar with some form of the criminal trial process and those who were not.

Other international courts have encountered such problems as well and are considering reforms in the selection process. Judicial selection at the European Court of Human Rights, a creature of the Council of Europe which has jurisdiction over forty-five signatory countries to the European Convention on Human Rights in that region, is a topic of current controversy. A report by the International Centre for the Legal Protection of Human Rights ("INTERIGHTS") warns that: "[The court's] credibility and authority risk being undermined by the ad hoc and often politicized processes currently adopted in the appointment of its judges."\(^\text{29}\) The complaints are not dissimilar to the charges leveled at the ICTY process: lack of visibility or guidelines for the in-country nomination process. According to the INTERIGHTS report, a candidate's success more "often rewards political loyalty... than merit."\(^\text{30}\) And when the Council of European Parliamentary Assembly makes final picks from the various countries' nominees, the individuals are only cursorily assessed in fifteen-minute interviews, and no reasons are given for the ultimate choices.\(^\text{31}\) The complaint resurfaces that there needs to be more emphasis on judicial experience in addition to familiarity with international law. With the growing number of European countries subject to the European Court of Human Rights, there is also apprehension that member countries sometimes try to exert pressure on their representatives to rule in their favor; the brevity of the judges' terms along with their eligibility for re-election intensifies that pressure.\(^\text{32}\)

There is much at stake. International courts risk vital loss of credibility if their judges are perceived as representatives of their


\(^{30}\) Id.

\(^{31}\) Id. at 4–5.

\(^{32}\) Id. at 24–25.
homelands rather than as independent judges construing and applying tenets of international (or regional) law. Some critics of international courts, like my former colleague Robert Bork, express outright skepticism that any judge can be expected to rise above, or rule against, the interests of her native land.\(^3\) My own experience and the record of some American judges on the International Court of Justice at the Hague, which hears cases brought by one state against another, does not bear out that harsh assessment.\(^4\) One commentator, however, has suggested that there should be an international corps of judges who rotate service in more than one tribunal and become true internationalists; in their varied experience they would also, hopefully, transfer the best practices from one tribunal to another.\(^5\)

A special note should be made as to the unique situation of judges in the newer international "hybrid courts"—Sierra Leone, Kosovo, East Timor, and Cambodia—where the country most involved in the war crimes selects a majority of judges, but several international judges, usually chosen by the United Nations, are added for credibility and expertise in international law.\(^6\) For varied reasons, this hybrid model, rather than the Yugoslav and Rwanda models, may be the wave of the future. On these hybrid courts the international judges carry an even heavier responsibility for ensuring impartiality and conformity with international standards of fairness and consistent interpretation of international law; accordingly, their selection requires

---

\(^3\) ROBERT H. BORK, COERCING VIRTUE: THE WORLDWIDE RULE OF JUDGES 41 (2003) ("[O]ne must wonder whether an international tribunal can ever be entirely free of the foreign policy interests of the nations whose jurists sit on the tribunal.").


even greater attention to their experience in the courtroom and to their record as strong and independent jurists. International nongovernmental organizations ("NGOs") (nongovernmental advisory bodies interested in human rights and international justice), which have taken an acute interest in these hybrid courts, are already working with in-country NGOs in Cambodia, for instance. These countries are expected to make the major financial contribution to that tribunal in an effort to assure that the best and least Khmer-Rouge-affiliated Cambodian judges are chosen, and that truly competent international judges complement them. There is additionally an interesting provision in the Cambodian Extraordinary Chambers law that no decision can be reached without the consensus of at least one international judge.37

The drafters of the Rome Statute, creating the new International Criminal Court,38 drew on lessons from earlier international courts in setting the rules for selection of judges. Article thirty-six of the Rome Statute sets out the usual formula that the judges must be "persons of high moral character, impartiality and integrity who possess the qualifications required in their respective states for appointment to the highest judicial offices."39 But it goes further to require that every judicial candidate has established either competence in criminal law and procedure and relevant experience as judge, prosecutor, or advocate in criminal proceedings, or competence in international humanitarian law and human rights and extensive experience in a professional legal capacity relevant to the judicial work of the court.40 The nomination procedures in the individual states that are parties to the statute must be either those used to appoint the highest judicial offices in the country or those used to nominate persons to the International Court of Justice in their state, and nominations must be accompanied by a declaration of the person’s specific qualifications.41 There are two lists of candidates: one with qualifications in criminal law, the other with qualifications in international law.42 Nine judges are to come from the criminal law list and five from the international

---

39 Id. at art. 36(3)(a).
40 Id. at art. 36(3)(b).
41 Id. at art. 36(4)(a).
42 Id. at art. 36(5).
Election is by secret ballot at a meeting of the state parties (that is, those that have ratified the Rome Statute). The eighteen candidates who get the highest number of votes with a two-thirds majority of the states present and voting will become judges. The parties are told to take into account the need for representation of different legal systems, geographical representation, and—for the first time—gender representation. (There is also an expressed desire for judges with specific experience in violence against women and children.) Judges can serve for one nine-year term. Article thirty-nine of the Rome Statute also mandates that in assigning judges to chambers (five to the appellate chamber, six each to the trial and pretrial chambers) the principal functions of the division shall be aligned with the experience of the judges, and the trial and pretrial divisions specifically shall be composed predominantly of judges with criminal trial experience.

These details attempt not only to provide for more transparency in the in-country nomination process, but also to ensure adequate numbers of judges with criminal trial experience are assigned to the trial chambers. The first eighteen judges were elected on March 18, 2003, and for the most part appear to fill the qualification requirements nicely: seven are women. It took, however, thirty-three voting rounds to elect the eighteen judges, and at the end there was some horse-trading among countries as to whose candidate they would support. But because of the structural nature of the selection process the horse-trading played a much smaller part than in the earlier tribunals. And there was significant and relatively powerful pressure by local and international NGOs inside the countries to withdraw some unsuitable candidates and to nominate more suitable ones. It is fervently hoped that the relative success of the first ICC election round will pave the way for selection of even more qualified judges across the board on future international courts. I do want to point out that

---

43 Id.
44 Id. at art. 36(6) (a).
45 Id.
46 Id. at art. 36(8) (a).
47 Id. at art. 36(8) (b).
48 Id. at art. 36(9) (a).
49 Id. at art. 39(1).
50 As one reporter noted with regard to the newly-established African Court on Human and Peoples' Rights:

In Africa, the process is progressing at a startling, and worrying, pace. Nominations for the first bench are due by the end of April, with the aim of holding elections at the African Union summit meeting in Addis Ababa starting July 5. Past experience teaches that once the judges have been appointed and the rules of procedure adopted, they are there to stay—with all their faults and shortcomings. . . . It took more than four years from the adoption of the Rome Statute to the appointment of the judges of the [ICC], and end-
there are immense advantages to a multinational bench in being able to draw on experiences and procedures from different systems for the solution of common problems. It does take effort to overcome the logistical problems, and it does require hardworking smart judges. But in my view the effort is decidedly worthwhile in terms of the results achieved.

II. JUDICIAL INDEPENDENCE AND ACCOUNTABILITY

Issues of judicial independence and accountability dominate critiques of the American federal judicial system. Total independence of judges from private party or governmental influence is the paradigm; and life tenure, guarantees of no diminution of salary, and removal by impeachment only for high crimes and misdemeanors are the incentives to achieve that ideal. In fact, no federal judge has ever been removed by impeachment for rendering an unpopular decision, although the media and politicians regularly level all kinds of scornful epithets at judges. Instances of judges taking bribes or showing favoritism to interests in which they have a financial or personal stake do occur, but such cases have been blessedly rare.

Thus, critiques of the federal bench in recent years have focused more on accountability than independence, on the seemingly anomalous role of unelected judges in a majoritarian democracy. What forces—the commentators ask—actually hold judges in line so that they do not rule on the basis of their personal preferences? The answers proffered are many; among them that our federal courts are structured in a hierarchical way so that, except for the Supreme Court, judges’ decisions are subject to review and reversal by higher courts. Congress may pass laws to nullify decisions based on statutory interpretation or, except in constitutional cases, to take away the courts’ jurisdiction over certain kinds of cases altogether. The press and academic criticism are powerful tools to make a judge think hard about her rulings. It is up to the executive branch to enforce most court decisions of import, and although our history provides only a few instances where that branch has balked, unpopular decisions in fact do not lend themselves to speedy and wholehearted implementation, and no judge wants her decision to die on the vine. Finally, for

less meetings and travail to establish the tribunal. It required a massive effort both by the United Nations, several major countries and hundreds of [NGOs] and think tanks.


31 See THE FEDERALIST NO. 78 (Alexander Hamilton) (stating that the judicial branch “may truly be said to have neither FORCE nor WILL but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments”); Stephen B. Burbank & Barry Friedman, Reconsidering Judicial Independence, in JUDICIAL INDEPENDENCE AT
the vast majority of federal judges, there is a sincere commitment to carry out the law, the will of Congress, or the precedents of prior courts; and if a judge veers too far from either mark, he will likely be overridden by higher courts or fail to obtain the second vote he needs on an appellate court. Federal judges are acutely aware that they are being watched at all times—by the parties, the legislature, the academics, the press, peers, and ultimately by the populace. And the judge herself is being judged for her adherence to constitutional or statutory text, as well as *stare decisis.* Most constitutional experts in the United States now view the judiciary as one part of a "governmental apparatus" which:

provides for an ongoing and often messy political dialogue over our nation's values and ideals. All three branches are granted a voice in that dialogue and each brings to the table a different perspective . . . . The genius of our system is that, through limits on the power of each branch, those strengths are pooled.

For U.S. judges there are also a myriad of internal "institutional rules and norms [that] motivate judges to behave in ways that further the institutional mission." These include the formidable Federal Rules of Civil Procedure, Criminal Procedure and Evidence drafted by advisory committees, which include practitioners, academics, and judges and which must run the gamut of both the Supreme Court and Congress before taking effect. Permanently recorded and widely disseminated opinions also make for responsible judgments, as do the oral processes of court arguments and the scrutiny of a regular and alert bar trained in the same legal culture as the judges.

The external and internal dynamics of being a judge on an international court like the ICTY are *quite* different in terms of accountability. Once selected by the U.N. General Assembly, the judge is not likely to have much subsequent contact with that body. Although the United Nations has been publicly impatient with the rate of progress in trials by both the ICTY and the ICTR, in no way has it expressed directly or indirectly its desires as to the results in particular cases. It has no power to pass laws that would undo verdicts or cabin future

---

52 But see Kim Lane Scheppele, *Declarations of Independence: Judicial Reactions to Political Pressure*, in *JUDICIAL INDEPENDENCE AT THE CROSSROADS*, supra note 16, at 227, 228 ("[N]ew constitutions and expanded conceptions of judicial review have given extraordinary powers to judges to work around the positive law in the name of constitutional principles . . . [and to] bend [it] to a judicial conception of what the law should be . . . .").

55 Burbank & Friedman, *supra* note 51, at 15.


ones (it cannot by itself enact international law). In the absence of any hierarchy of the international courts, there are no higher judicial posts with which it can reward judges of whom it approves or withhold from those of whom it disapproves. Thus, except for its ability to cut off funds from these tribunals and its control over personnel serving the court, the United Nations exercises little leverage over judges.

The ICTY statute defines that court’s substantive jurisdiction in fairly cryptic fashion, leaving a fair amount of discretion in the judges’ hands in defining the necessary elements of proof of the covered crimes. The judges at the ICTY prescribe their own rules. Often these rules may as critically impact a decision as the statute itself. Over the years, the rules—amended some thirty times—have added substantively to such vital issues as witness protection, rights of counsel at various pretrial stages, special rules for cases of sexual violence, procedures for sentencing, and introduction of new evidence on appeal. And the rules can and do change with the perceived needs, desires, and experiences of the judges. Thus, what was originally a predominantly adversarial common-law mode of trial has over the years assimilated many civil law practices, and what was once a largely permissive judicial attitude toward numbers of witnesses and length of testimony has now become much more judicially disciplined and managed. An important pretrial stage has been added to ICTY proceedings and accommodations made for a fast-growing guilty plea regime. One can question whether the judges themselves should have such near-absolute power over the rules; by contrast, at the ICC, draft rules must be adopted by a two-thirds majority of the Assembly of State Parties, the ratifiers of the Rome Statute setting up the court.

International law is law that is accepted in practice by a majority of civilized nations. It consists of treaties and customary international law—practices accepted as obligatory by a majority of nations. United Nations resolutions may be evidence of international law but must be accepted by nations before they can be recognized as constituting international law themselves. See, e.g., Michael J. Glennon, Sometimes a Great Nation, WILSON Q., Autumn 2003 at 45, 45 (“A state is not bound by any rule it does not accept.”); Jed Rubenfeld, The Two World Orders, WILSON Q., Autumn 2003, at 22, 31 (“Americans do not quite recognize the UN Charter as law.”); Anne-Marie Slaughter, Leading Through Law, WILSON Q., Autumn 2003, at 37, 37 (defining international law as “a complex of treaties and customary practices . . . based in the consent of states to a specific set of rules that allow them to reap gains from cooperation and thereby serve their collective interests.”).

See Betsy Pisik, War-Crimes Tribunals Forced to Borrow Cash, WASH. TIMES, Nov. 24, 2003, at A01 (reporting that U.N. member nations were behind in payments to tribunals, requiring them to dip into U.N. peacekeeping accounts to sustain their prosecutions, and that diplomats expressed frustration with the slow pace of trials).

See ICTY R. P. & EVID. (evidencing more than thirty revisions since their original adoption), http://www.un.org/icty/basic/rpe/IT32_rev32.htm (last revised Aug. 12, 2004).

Rome Statute, supra note 38, at art. 51.
In the United States, federal judges must realistically take account of the possibility of congressional action that may nullify their rulings, and the rulings themselves are in large part based on interpretation of the laws Congress passed (albeit filtered through executive agency first-cut interpretations under the rule of *Chevron U.S.A. v. Natural Resources Defense Council, Inc.*). There is no counterpart to this law-giving and law-interpreting relationship for international judges; there is no international legislature. The judges' rulings are based on something called "international law"—which is itself a compendium of treaties, customs, practices, and declarations along with a fairly sparse collection of national and international tribunal applications; none of the latter is by itself authoritative as there is no hierarchy of international courts. Thus, international courts can and sometimes do differ in their interpretations of the same treaty language and as to what qualifies as customary international law. If they err, there is no one except an appellate panel of their own court or an acute journalist or academic commentator to complain (usually months or years later). And the public reaction to their decision—if it exists at all—may well differ from country to country as well as from group to group. All of this makes for less theoretical accountability than our U.S. judges have, and candidly, it also means that international tribunals typically have more leeway than our domestic courts today enjoy in making their judgments as to what the law says or requires.

Here, however, we need to remember that international courts are a relatively new phenomenon on the scene. If we look back at the early history of our own federal judiciary over two hundred years ago, under the very activist Chief Justice John Marshall, before there were thousands of precedents to follow and before principles of federalism or court/congressional relationships were developed, I suspect we will find the same judicial innovations, surprises, leaps of faith, and adventuresome reasoning that international judges today must often engage in to create a jurisprudential body of law. With time, experience, and constructive criticism, we can expect a culling of the best judgments which, while they can never be compulsorily imposed on other courts, can be very persuasive.

---

60 467 U.S. 837, 843 (1984) (holding that the Court must construe an ambiguous statute in accordance with a permissible executive agency interpretation).

61 See supra note 56.

62 See Thomas Buergenthal, *Proliferation of International Courts and Tribunals: Is It Good or Bad?*, 14 LEIDEN J. INT'L L. 267, 272 (2001) ("[T]he jurisprudence of the different international tribunals can ... lead to the development of conflicting or mutually exclusive legal doctrines, and thus eventually threaten the universality of international law."); Jonathan I. Charney, *International Law Threatened By Multiple International Tribunals?*, 271 RECUEIL DES COURS 134 (1998) ("Significant variations ... could undermine the perceived uniformity and universality of international law.").
But it must be admitted, as I mentioned before, that even for the most conscientious international judge bent on finding and following existing international law, there are logistical problems. True, American judges must often flesh out, elaborate on, or fill the interstices of statutory law and extend or cut back on prior precedents, but they start out with a robust host of sources, embedded in authoritative books neatly stacked in library shelves or on computer disks. International judges have a tougher time of it. At the ICTY, as in other international courts, there is a basic charter or statute, usually just a few pages in length, setting out the temporal and geographical jurisdiction of the court (crimes committed on the territory of the former Yugoslavia after January 1, 1991). The earlier international criminal courts were typically given fairly laconic definitions of war crimes (crimes against humanity, grave breaches of the Geneva Convention, and genocide) to apply to a wide array of different fact scenarios. It should be noted, however, that these definitions have expanded and proliferated in the century since the original Hague and Geneva Conventions and the Nuremberg Charter. They now encompass explicit gender crimes against women, including rape and sexual slavery, and new crimes against humanity, such as disappearances from the Argentine and apartheid from the South African experiences. And each successive international court has tended to define the categories of war crimes and crimes against humanity with new components or variations (even the United States, in publishing its own elements of crimes for the military tribunals to be held in Guantanamo, has added new elements it claims are justified by customary law). The ICC now has the most elaborate and comprehensive definitions which, before our withdrawal, had been drafted and extensively critiqued with the help of our own Pentagon officials, though administration critics of the ICC now ironically complain that they are too vague or too susceptible to subjective interpretation. But the

---

64 Burbank & Friedman, supra note 51, at 24 ("[T]here is leeway in the law and because judges are human, some decisions will depend in part on who sits on the bench."); Linn Hammergren, Judicial Independence and Judicial Accountability: The Shifting Balance in Reform Goals, in GUIDANCE, supra note 16, at 149 (noting widespread "concern that judges' ability to interpret laws as they apply them may give them excessive power in reshaping the legal framework according to values and views shared neither by the public nor by the other branches of government").

65 See ICTY Statute, supra note 5, at art. 1.

66 See Rome Statute, supra note 38, at art. 7 (defining "crimes against humanity").

67 See MILITARY COMMISSION INSTRUCTIONS SOURCEBOOK 9-105 (Nat'l Inst. of Military Justice 2003) (reprinting the original draft of Military Commission Instruction 1 defining crimes and their elements, commentaries submitted to the Commission by numerous interested parties, and the final text of the Instruction).

68 See Bruce Fein, Commentary, Torching the Constitution, WASH. TIMES, Aug. 1, 2000, at A18 ("The criminal jurisdiction of the tribunal is frightening because it is vulnerable to political
bottom line is that in the absence of a universal legislature to define crimes and punishments, the series of disparate international courts located in far-distant places and largely unsupervised over extended periods of time must develop what is basically an international common law of criminal responsibility.

At a practical level, parsing international law to ascertain if a jurisdictional crime has been committed is not like going to the U.S. Code, the Supreme Court Reports, or F.3d for answers. Until Nuremberg, no national or international court had ever defined, let alone applied this concept of International Humanitarian Law ("IHL"), to individual criminal defendants. Ironically, only military courts-martial and commissions had done so. The Nuremberg court relied on military precedent for the legitimacy of holding the Nazi leaders individually guilty for their wartime atrocities.

Just locating sources of IHL is an elusive job, especially the determination of whether particular treatises, diplomatic documents, local cases, or even treaties ratified by some but not all nations constitute evidence of customary international law. Some authorities go so far as to say that there is no "international law" at all; most agree that the boundaries are cloudy at the edges. Databases on IHL are still in the developmental stages; many potential sources of IHL have not even been translated into major languages (for instance, it was only a few years ago that the annals of the World War II Tokyo Trials were finally translated into English). While I was at the ICTY we had only a rudimentary library; legal assistants regularly queried each other as to where sources of IHL might be in their respective countries' jurisprudence and then informally translated them into one of the ICTY's operating languages—French, English, or Serbo-Croatian. But, as time goes on, many of these logistical and research problems can and are being solved with a little money and willpower. The exact dimensions of international law by its very nature will never be discernible in the same way as domestic law, but as international court applications grow and interact, we can confidently expect an increasing number of agreed-upon principles and applications to emerge. The only alternative is to abandon international law altogether as a governing and controlling source of criminal law. There are indeed some who advocate that course, but it is surely not the right one for a rule-of-law democracy such as ours to adopt or advocate.

Another more practical but just as important shortcoming in international courts' relationship with their host governments is the inability to obtain enforcement of their orders. American judges can depend on the national executive (or state officials in most cases) to

manipulation in enforcement and disturbingly vague.

enforce their judgments, however unpopular. The international court has no enforcer. It is dependent on the good will of national governments to apprehend indictees and to hand over vital evidence or witnesses (except within the Dayton Accords confederation where NATO's Stabilisation Force (SFOR) is empowered to arrest ICTY accuseds, but performs erratically). Although the ICTY charter mandates cooperation from all U.N. members, the degree of that cooperation has fluctuated radically depending on the politics of the country. In Serbia, there was no cooperation under Milosevic, then a degree with the initial successor regimes, and it is now deteriorating again with the rise of nationalists to power. In Croatia, similarly, cooperation was nonexistent with Tujman, good with his successor, Mesic, and is now at risk under a new nationalist government. Needless to say, the judges on an international court have no leverage over sovereign governments to compel enforcement of their orders, and complaints to the Security Council rarely produce results.

On the other hand, international courts do on occasion come under intense pressure from national governments when a particular decision gores a powerful local ox. In one case, the government of Rwanda threatened total boycott of the ICTR because of an unpopular decision freeing a defendant held too long without trial. In another, SFOR's arrests of indicted suspects in the Balkans dropped from one a month to none for several months when the trial court ordered NATO countries to report on how a named indictee had been captured. In the former case, the court reversed its ruling on the basis of self-labeled "new facts," a result skeptically viewed not surprising by some. In the latter, the prosecutor settled on a lesser charge and the defendant withdrew his original motion on which the court had acted.

In such situations, the court has no popular constituency to invoke—international experts or the media may side with it, but only by happenstance; few feel their long-term interests are bound up with the court as an institution the way many interest groups in the United States do, as they rise quickly to the court's defense. In turn, the in-

---


69 See Thomas Henquet, Mandatory Compliance Powers vis-à-vis States by the Ad Hoc Tribunals and the International Criminal Court: A Comparative Analysis, 12 Leiden J. Int'L L. 969, 969-99 (1999) (describing the lack of control the tribunals have when dealing with the national laws of the countries in which they are located).

70 See Prosecutor v. Simic, 2000 I.C.T.Y. IT-95-9 (holding that the North Atlantic Council shall provide the defense with all documents and recordings in relation to the capture of Stevan Todorovic); J. Coll Metcalfe, An Interview with United Nations' Chief War Crimes Prosecutor Carla Del Ponte, Internews Reps., Feb. 15, 2000 (questioning Ponte's reaction to the release of the Jean-Bosco Barayagwiza due to prosecutorial mishandling), at http://www.internews.org/activities/ICTR_reports/ICTRDelPonte.htm.
ternational courts find it hard to decipher the "mood" of the affected populations the way American courts sense the temper of the people and factor it into their decisions.\textsuperscript{71} The end result is that informal, even ephemeral constraints on, or sources of support for, national judges are missing in the international scene. For example, it would be unheard of for the Congress to threaten to cut off all funds for the courts because they were no longer worth the investment as the United Nations appears now to be doing with respect to the ICTY and ICTR.

In sum, then, international courts—at least the ICTY species—do not function as the third branch of a constitutional triumvirate in which checks and balances limit their independence somewhat but also provide important support for the legitimacy of their decisions. Nor do they have the at-hand access to popular opinion that American judges do. In some ways they may appear to be less accountable than their American counterparts both because there is no hierarchical structure for external review of their decisions, and because they have no dynamic relations with other branches of government. The "law" they apply is itself more diffuse and less developed than any single country's jurisprudence. In the area of judicial behavior, there was no Code of Ethics during my tenure at the ICTY (though the ICC's Rome Statute and Rules do contain the core of such a code\textsuperscript{72}), and there was no mechanism for disciplining judges, although in theory the Security Council might have removed a judge for cause. (Again, it is good to relate, the ICC has progressed to a definite procedure for removal of judges and for their discipline for less serious offenses.\textsuperscript{73}) Again, an example of how successive international courts, even in the short period of a decade, have taken "lessons learned" from earlier courts to heart.

\section*{III. Relationships Among the Court Players}

In the final analysis, it is usually the talents, character, and dedication of the judges themselves that ultimately determine the reputation of a court. This is true of an international court as well as a national one, though the obstacles to be overcome in a multinational

\textsuperscript{71} GUIDANCE, \textit{supra} note 16, at 2–3 ("A society's expectations of its judiciary play a critical role in fostering independence. . .").

\textsuperscript{72} \textit{See} Rome Statute, \textit{supra} note 38, at art. 40(2) (prohibiting judges from engaging in activities "likely to interfere with their judicial functions or to affect confidence in their independence").

\textsuperscript{73} \textit{See id.} at art. 41 (governing the excusing and disqualification of judges); \textit{id.} at art. 46 (requiring removal from office under certain circumstances); \textit{id.} at art. 47 (prescribing disciplinary measures for lesser offenses); \textit{see also} ICTY R. P. \& EVID., \textit{supra} note 58, at 24–25, 29, 32, 34 (defining the scope of procedural rules for the internal workings of the tribunal).
court are inherently greater. Telford Taylor wrote about Nuremberg's judges:

[D]espite the members' disagreements and profound differences, they were bent on bringing their enterprise to a successful conclusion. In conference, opinions were forcefully stated, but all realized that in some situations personal opinions must be suppressed in order to reach a voteable conclusion. Nikitchenko [the Russian judge, formerly a Soviet prosecutor] was well aware of this necessity, and his dissenting opinion was not savagely written.74

My former colleague on the D.C. Circuit, Judge Harry Edwards, has written that collegiality is the essential ingredient of a well-functioning court, the genuine willingness of each judge to listen to and take others' views into account.75 Hard cases make tense colleagues, and a yearning for the respect, even the sporadic affection of one's fellow judges, counts for something, often a great deal, in pushing judges toward common solutions. The isolation of the court's inward workings from direct outside pressures and influence inevitably means that one's colleagues, their approval or disapproval, come to play an important role in a judge's life.76

Getting to collegiality, as Judge Edwards defines it, is harder on an international court. It is obviously more difficult for judges who do not speak each other's language or come from each other's legal culture to engage in the kind of thoughtful discourse and exchange of views that breeds collegiality. I found exchanges among judges at the ICTY to be relatively formalistic; the tug and pull discussions I was

74 TAYLOR, supra note 1, at 631.
75 Edwards, supra note 55, at 1644-45.
76 As one former judge wrote:

There is intimacy, continuity, and dynamism in the relations among judges . . . . They interact with each other, influence each other, and have each other in mind almost from the time they first read briefs for the next session of court. In a sense, the relationship among judges who differ in their values and views is a bargaining one, yet it is a continuing negotiation, where each player lays his cards on the table just as soon as he discovers what cards he has.

used to at the D.C. Circuit were more often held with or among the legal assistants rather than the judges. Civil law judges in general were not as easily inclined to discuss their reasons for going one way or another as I was used to at home. And although dissents and separate opinions were allowed at the ICTY, with few exceptions they did not provide the same spirited exchanges that characterized the opinions of my former court.

While judges on the two permanent international courts, the ICC and the International Court of Justice ("ICJ"), have nine-year terms, tenures of judges on ad hoc specialized international courts like the ICTY are typically brief. Thus, most of these short-term judges typically have less time to grow into their roles than we do at home, or to develop over time and by trial and error a full-blown judicial personality or philosophy; they must draw immediately and throughout their term on the intellectual and temperamental capital gleaned from their former lives and jobs. The cluster of seasoned veterans Judge Edwards talked about as the core of a stable collegial court is rarer on an ad hoc international court. In my experience judges at the ICTY were pleasant, always civil, though sometimes a bit remote; inevitably—as at home—only a few formed close friendships. Understandably, all these factors incline a judge on one of these temporary courts to feel and act more as an individual than as part of an institution with a history, a future, and an integral relationship with other institutions of government. And realistically this part of the international judge’s career will not likely affect his future in the same way an at-home judgeship will. It is a bit like taking a sabbatical—it does not count for much in the career calculus. His relationships with other judges are not a lifetime preoccupation.

Many, if not most, multinational courts will combine civil law and common law judges, and the rules of procedure as well will feature a mix of both systems, which themselves often reflect basic differences in the concept of what a judge should do and what kind of role in the trial she should play. These variations in turn affect the ability of

---

77 See Hammargren, supra note 63, at 152 ("Cultures which still privilege traditional authority may be less inclined to demand transparency from their judges. In the civil law tradition, the persistent belief that judges only apply the law may also diminish the demand.); see also Herman Schwartz, The Struggle for Constitutional Justice in Post-Communist Europe 246 (2000) (urging new constitutional court judges to reject the "tendency to issue terse opinions . . . without full explanation" and the "archaic Civil Law notion that the law is fixed, clear, and discernible, and that all that judges do is discover and apply it," calling that notion "nonsense").

judges to appreciate opposing points of view and to interact constructively.

A civil law proceeding generally features an investigative judge who directs the investigation, questions witnesses, evaluates documents, and decides whether a trial is warranted. His dossier becomes the focus of the trial, and he or a replacement judge is likely to do most of the questioning. Our trials place the judge in the role of an umpire with prosecution and defense putting on their own evidence and trying to break down the other's and the judge (or jury) deciding if the prosecution has carried the burden beyond a reasonable doubt. While the judge may ask questions, he is not the central interlocutor and may indeed be reversed if he asks too many. The ICTY rules, which basically follow a common law adversarial mode of trial, but with a number of civil-law-based innovations, do permit judges to ask questions—and they ask them regularly—though usually at the end of the direct and cross. They may also call their own witnesses, which is done with some frequency, though with some risk. In the trial of the Srebrenica massacres, the judges called two former Bosnian Muslim generals when the prosecution had failed to do so, and their testimony appeared to be relevant. After the guilty judgment was handed down, the prosecutor announced both generals were being indicted for separate war crimes arising out of other incidents—a circumstance unbeknownst to the judges beforehand.

The primacy of the judge's role in a civil law mode of trial, however, reinforces a view of the judge as inherently endowed with superior faculties that (1) allow him to evaluate evidence without the kind of credibility constraints our common law system imposes on admissibility, and (2) do not require from him the fully reasoned explanation of decisions that we are accustomed to. Both of these notions reflect basic judging philosophies that do not always easily merge or give way.

A prominent example of this is the use of written testimony to supplement or supplant live witnesses which has from the beginning been controversial at the ICTY. Our Federal Rules of Evidence embody the basic bar against hearsay evidence along with the several exceptions that have been recognized by the courts over the years. The concept that an accused has the right to demand his accusers

\[79 \text{Id. at 764 ("The ICTY uses basically an adversarial mode of trial. That is, the independent prosecutor brings an indictment to be confirmed by one of the trial judges—assigned by rotation.").}
\[80 \text{See ICTY R. P. & Evid., supra note 58, at 85(A) ("Each party is entitled to call witnesses and present evidence.").}
\[81 \text{See FED. R. EVID. art. VIII, advisory comm. notes (proposed rules 1972) (listing "three conditions under which witnesses ideally will testify: (1) under oath, (2) in the personal presence of the trier of fact, (3) subject to cross-examination").} \]
testify in person and subject themselves to cross-examination and to an evaluation of their demeanor by the judges remains, however, fundamental, as we have been reminded this very term by the Supreme Court. Although the ICTY rules initially stated a clear preference for live testimony, they have always contained more liberal allowances for depositions, video testimony, transcripts of prior testimony, and judicial notice of "adjudicated facts" than our own; still, while I was there, ICTY appeals chambers decisions insisted that written documents evidence some indicia of credibility and reliability, rejecting, for example, admission of an unsworn, un-cross-examined statement of a witness to a field investigator. In recent years, however, the rules have been liberalized to allow admission of written witness statements so long as they do not go to the core of the challenged conduct or role of the accused, and the latest decisions have permitted written witness statements to be introduced across-the-board so long as the witness is held available on request for cross-examination (eliciting, I note, a blistering dissent from one of the Tribunal's most able appellate judges—predictably from a common law jurisdiction).

When I have asked civil law judges about the greater receptivity to written testimony, they say that the American system requires oral testimony because of untrained lay juries' need to see and hear witnesses. This kind of one-on-one exposure is not thought necessary for professional jurists who, it is postulated, have the skill and training to evaluate the worth of a written statement and to give it what credence it deserves. This was hard for me to accept. I thought it evident that we could not tell from a written statement whether a witness is truthful unless her testimony was so inherently incredible or so contradictory as to be unbelievable. And I saw too many witnesses on the stand change their stories from prior written statements in ways big and small, not from perjurious motive but from having faulty

---

82 See Crawford v. Washington, 124 S. Ct. 1354 (2004) (holding that out-of-court testimonial statements by witnesses may not be introduced at trial, under the Confrontation Clause, unless the witnesses are unavailable and the defendants had a prior opportunity to cross-examine them, regardless of whether such statements are deemed reliable by the court).

83 See Patricia M. Wald, To "Establish Incredible Events by Credible Evidence": The Use of Affidavit Testimony in Yugoslavia War Crimes Tribunal Proceedings, 42 HARV. INT'L L.J. 537 (2001) ("[T]he ICTY has been moving... toward a trial mode in which written testimony will play a far more significant role than in past ICTY prosecutions or in our own American system.").

84 As Judge David Hunt saw it:

The only reasonable explanation for these decisions appears to be a desire to assist the prosecution to bring the Completion Strategy to a speedy conclusion. I have been unable to agree with those decisions because I do not believe that, in doing so, I would be performing my duties "honourably, faithfully, impartially and conscientiously" as the solemn declaration which I took when I became a judge of the Tribunal requires me to do.

REFLECTIONS ON JUDGING

memories. Thus, with many witnesses the truth only surfaced through persistent probing. In my view then, the reversion to written evidence, incremental though it was, was a far more troubling trend in individual applications than it was to my civil law colleagues.

The idea of the judge as specially endowed carries through in other parts of civil law jurisprudence. The system has clung longer than ours to the notion that judges find law, not make it. It also appears in the sometimes initial avoidance of reasoning in detail. The template for judgments at the ICTY, especially in the early years, was sometimes a lengthy statement of facts, hornbook expositions of the law, and then judgment with scant analysis in between as to how the law was applied to the facts—ironically, a result much like our jury verdicts. Over time, however, the bureaucratic style of the earlier ICTY judgments has been replaced by more reader-accessible discussions of the issues; this comes, I think, from the court’s increasing adjustment to the bright light of transparency and from its own maturation and the interaction of its judges from both systems. ICTY opinions continue to be excessively long, however, exposing the committee product they sometimes are. The decisions themselves, unfortunately, are not reproduced in any permanent hard-copy form like our federal reporter system; they are available only unbound and online. My guess is that few outside of international law scholars and practitioners get around to reading them.

All judgments are per curiam (though, as I have said, dissents and separate statements are permitted), and perhaps an individual judge, uncredited, may be less motivated to pour his heart and soul into his work product. As a result, some judges write their own opinions; others delegate the task largely to staff assistants and limit their review to the final drafts. But that is not entirely unlike how the process works in some of our own appellate courts with which I am familiar.

I have held for last what is probably the most critical difference between judging here and abroad—the simple but profound effect of language differences. It does affect the process of judging at every stage. The ICTY courtrooms are supplied with first-rate translators who provide the judges with instantaneous translations through high-tech audio, supplemented by close-captioned television monitors in English, French, or Serbo-Croat—the native language of most defendants, witnesses, and many defense counsel. In our chamber, the presiding judge spoke in French; I spoke in English with limited French; the third judge alternated between the two. Typically, the

---

prosecution asked a question in English, pausing while it was translated to the witness in Serbo-Croat, whose answer in Serbo-Croat was translated into both French and English for the court and prosecution. There is no question that the process slowed down trial proceedings measurably (some estimates are by fifty percent). Translation disputes frequently arose. And, if the judges had to huddle together to make a ruling on some procedural matter, we usually did so in vaguely imperfect English with asides in French.

In chambers deliberations—again without translators—it was perceptibly more difficult to debate or argue; there was first the problem of finding the counterpart words in the other language for what you wanted to say, but, perhaps more basically, there was the problem of finding the contextual analog in a different legal system for the procedure or the concept that you want to discuss—which in the end might not even exist outside your own system. Both interim and final decisions at the ICTY had to be issued in both English and French, but only one was the authoritative version. In my own case, if it were drafted in French, it would have to await my approval until translated into English (reportedly, some judges were willing to sign on to a document in a different language on faith, but I was not). Often my colleagues blinked first and were willing to approve a final version in English after our legal assistants mediated the discussion in both languages.

Language vexed elsewhere in the process, as well. Accuseds had to be provided discovery documents in their own language—Serbo-Croat—which, if derived from English or French, took extra time. And at the core of the process I found it a vastly more difficult job to evaluate a witness’ demeanor and credibility when I did not understand directly what she was saying, but heard her speak only through the translator’s voice and idiom.

Other courtroom relationships bore the brunt of language differences. Defense counsel came from all over the world, often drawn by salaries higher than at home; many were not familiar with the adversarial mode of trial and maladroit at cross-examination, thereby prolonging the process. Although all counsel were supposed to have fluency in either English or French, the requirement was often waived for Balkan counsel because their clients insisted on a native speaker. The result was that questioning witnesses often proceeded in a slow and awkward fashion and the crackling give-and-take of cross-examination as we know it in the American courtroom was impossible. Briefs written by counsel who were not really comfortable with the operating language—French or English—proved hard to follow, and the judge often had to work overtime even to understand the argument that he had to evaluate. The prosecutors on the other hand were generally well-trained regulars in the courtroom and usually had greater language skills.
There were non-language impediments to a swiftly moving trial as well. For obvious reasons, a large percentage of witnesses—especially survivors or victims—testify under fairly elaborate protective measures ranging from pseudonyms or gag orders on mention of their names to anyone outside the defense team to voice and face distortions (the proceedings are routinely televised into the Balkans). Witnesses are often subject to intimidation in their home villages, and reliving their wartime experiences are tortuous for them, so the emotional atmosphere in the courtroom is high. There are many joint trials involving a half-dozen accused individuals and more than a dozen counsel along with the security guards, the court deputies, the translators, and the legal assistants, resulting in a crowded scene, not always conducive to a smoothly running trial. Witness outbursts are fairly common, as are barbed exchanges between defense counsel and prosecutors. All of this and the overlay of everyone listening to the proceedings through headphones in one of three different languages means the level of concentration required from a judge to stay with it six hours a day, five days a week for months at a time is hugely demanding. Judges, moreover, are aware that there are many powerful NGOs rooting for convictions, watchful of any real or perceived mistreatment of victims and, since capital punishment is unavailable, critical of sentences short of life imprisonment. Ironically, the same groups that worry about defendants’ rights at home tend to worry primarily about prosecution witnesses’ rights in international trials.

The trial culminates in the majority of cases in a finding of guilty beyond a reasonable doubt which, ironically, can be found on a 2–1 decision, followed by sentencing, where linguistic and cultural differences persist. The ICTY has minimal sentencing guidelines other than the ban on capital punishment. The judges are told to take account of sentences in the former Yugoslavia, but after the abolition of the death penalty there, the upper limit was forty years. Gravity of the crime and mitigating and aggravating circumstances are frequently cited, but there is no sentencing tariff or ranges for particular crimes or categories of crimes. Informally, judges do think about saving the highest sentence—life—for the worst criminals, some of
whom have not yet been apprehended. But the judge’s own cultural background inevitably factors into what she thinks is a severe or lenient sentence. I am no fan of our federal sentencing guidelines, but I do think some form of presumptive range for certain categories of crime would give a more uniform face to the process. This is especially important now as the Tribunal is accepting more and more guilty pleas to reduced charges in an attempt to clean up its docket by its sunset date of 2008. Sentences are served in “neutral” countries with whom the ICTY has made arrangements—some, like Sweden, have felicitous surroundings that have inspired critics to chastise the Tribunal as not punitive enough. But they are all far removed from the prisoners’ homeland and families, and the likelihood of hearing their own language spoken is minimal.

What can be done to ease the language burden? American students, especially those contemplating work abroad, should get training in foreign languages earlier and more urgently. Desirably, judges should be fluent in both working languages of an international tribunal; at least one of the principal defense lawyers should be as well. Ideally, international tribunals would do business in one language except, of course, for accused individuals and witnesses. Diversity is much to be desired in the personnel of international courts, but it must be melded with the capability to run a criminal trial with optimum efficiency and fairness.

**CONCLUSION**

In the United States we worry about judges’ independence and accountability. We want our judges to be independent of all political influences and personal loyalties in their judgments, but to be responsive to the will of Congress in reading statutes, to defer to executive agencies’ interpretations, and to at least recognize and weigh popular attitudes and moods (where they do not interfere with constitutional rights or guarantees). We expect them to follow prior judicial precedents of their own and higher courts, and we expect them to exert restraining influences on each other through peer pressure and collegiality. Our judges know that they are one-third of an interactive constitutional scheme. In most cases, the system works to produce judges with both independence and sensitivity to the total environment in which they function.

---

International judges operate in a different milieu. There is no executive or legislative body to which they must defer. There is no body of precedent they must adhere to—except the appeals panel of their own court. The law they administer is hard to pin down, diffused through treaties, customs, declarations, and a small corpus of decisions around the globe. Judicial collegiality is hard to develop when judges do not speak the same language or are not drawn from similar legal cultures. These impediments are exacerbated when tenure is brief. A judge’s performance on an international court—shrouded as it is in the anonymity of per curiam decisions—usually has little bearing on his career when he returns to his native country.

Selection of international judges is a vexing process. Up to now—with the possible exception of the International Criminal Court—selections have been largely unregulated, and decisions among competing nations’ candidates have often been made on tradeoffs not relevant to individual merit. Hopefully, and we are seeing encouraging signs that this is happening, as international courts multiply and the critical nature of their decisions becomes more evident, nominating nations will exercise greater care. But the appointing authority, whether the United Nations, Assembly of States Parties, or the international or regional court itself, ought to have power to examine the qualifications of the candidates themselves and to set minimal criteria, including courtroom practice for trial court candidates and linguistic facility. Whenever possible, tenure should be longer than four to five years so that a court can develop an integrated working routine and a coherent body of jurisprudence over a period of time. International court judgments must be subjected to pervasive academic and professional critiques. Many of our international experts, sympathetic to the tribunals’ birth pangs perhaps, have bent over backwards not to be too critical, but in a system where there is no binding authority among tribunals, judgments can persuade only on their merits, and they often need mature criticism to perceive errors or alternatives.

International judges need regularized opportunities to discuss problems and techniques with each other. For example, a more candid, face-to-face exchange of views and experiences among tribunals on subjects such as written versus live testimony, witness protection, and enforcement of orders would be beneficial. Ideally, the international judge should consider herself not simply the representative of her own country, but also a member of a corps of judges implementing the common law of a community of civilized nations. But as of now, the only source of pressure on most international courts is likely to come from the judge’s home country when that country’s interests are at stake in the court. This source of pressure should be minimized by education, longer terms, admonitions from the court’s
leadership to national authorities, and ultimately by a code of ethics for international judges that transcends national influence.

International judges themselves must show diligence, sophistication in international law, familiarity with courtroom procedures, and linguistic diversity. *Ad hoc* efforts of training that now exist for new judges need to be dramatically upgraded. Service as an international judge can be isolating and lonely—in my experience much more so than for national judges—but it also offers an exhilarating opportunity to move justice forward on an international stage. We must—and can—do more to create an atmosphere in which the best, the brightest, and the most creative and productive of our national judges will be drawn to that service. The fairness and even the efficiency in the process in these international courts is advancing with experience; the language impediments may not disappear, but they can be mitigated and compensated for, and in the end the growing pains and deficiencies of these path-breaking courts should not obscure their major achievements in bringing to justice for the first time in history some of the most terrible predators against the innocent victims of war and tyranny.