

BIIJ Brandeis University *2003*

Brandeis Institute for International Judges

Authority and Autonomy: Defining the Role of International and Regional Courts

Including Report on Ethics Guidelines



The International Center for Ethics, Justice and Public Life



Brandeis University

Brandeis Institute for International Judges 2003

Authority and Autonomy:
Defining the Role of International
and Regional Courts

*Including Toward the Development
of Ethics Guidelines for International
Courts*

The International Center for Ethics,
Justice and Public Life

Brandeis University
Waltham, Massachusetts

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The second annual Brandeis Institute for International Judges (BIIJ) was held, at the initiative of the International Center for Ethics, Justice and Public Life, in Salzburg, Austria over 20-26 July 2003.

This BIIJ attracted many more participants than the first meeting. There were 14 judges from international courts, including the International Criminal Court, International Criminal Tribunal for the former Yugoslavia, International Criminal Tribunal for Rwanda, European Court of Human Rights, Inter-American Court of Human Rights, International Tribunal for the Law of the Sea, Special Court for Sierra Leone, U.N. Mission in Kosovo, African Commission for Human and Peoples' Rights as well as the Legal Counsel from the U.N., Office of Legal Affairs, Justice Goldstone of the South African Constitutional Court, and many academics and contributors.

The judges engaged in a week of reflection and debate over issues and challenges facing their respective courts and particularly the international judiciary.

In March 2003, the judges of the ICC were elected and sworn in. The second BIIJ provided a timely forum for discussions of relevance to the ICC as it begins its operations. The experience and knowledge of the judges who have served in international courts informed the debate on how best to anticipate, plan against pitfalls and difficulties, and achieve efficiency and impartial justice.

As part of the BIIJ program, a day-long workshop was held to examine issues of ethical concern for judges who sit on international courts with the purpose of developing guidelines for international judges on matters such as "impartiality and outside activities" and "selection criteria and the nomination process for judges."

The judges were extremely appreciative of the initiative taken by the Brandeis International Center for Ethics, Justice and Public Life to provide a forum for such collegial discussions. We commend them for their commitment to the cause of international justice.

*Judge Navanethem Pillay
International Criminal Court
Former President, ICTR
October 2003*

About the Institute

Brandeis University hosted its second Brandeis Institute for International Judges (BIJ) in July 2003 at the Schloss Leopoldskron in Salzburg, Austria. BIJ 2003 brought together 14 judges from nine international courts and tribunals for a week of reflection and discussion about their unique work. Faculty led sessions on a wide variety of topics, each designed to provoke new kinds of thinking about both the pragmatic challenges and the ethical dilemmas faced by judges whose courts have transnational or regional jurisdiction.

Participation in BIJ 2003 was by invitation only. Presidents of selected international courts and tribunals were invited to attend and were also asked to select up to two judges to participate.

Participating judges:

The African Commission for Human and Peoples' Rights (ACHPR)

- Jainaba Johm, Vice-Chairperson, The Gambia
- Kamel Rezag Bara, Chair, Algeria

The European Court of Human Rights (ECHR)

- John Hedigan, Ireland

The Inter-American Court for Human Rights (IACHR)

- Antônio A. Cançado Trindade, President, Brazil

The International Criminal Court (ICC)

- Maureen Clark, Ireland
- Navanethem Pillay, former President of the International Criminal Tribunal for Rwanda, South Africa

The International Criminal Tribunal for the former Yugoslavia (ICTY)

- Fausto Pocar, Vice-President, Italy

International Criminal Tribunal for Rwanda (ICTR)

- Mehmet Güney, Turkey
- Erik Møse, President, Norway

International Tribunal for the Law of the Sea (ITLOS)

- Budislav Vukas, Vice-President, Croatia



BIJ 2003 participants, faculty, and staff

Special Court for Sierra Leone (SCSL)

- Hassan Jallow, The Gambia
- Geoffrey Robertson, President, United Kingdom
- Bankole Thompson, Sierra Leone

United Nations Mission in Kosovo-Pristina District Court (UNMIK)

- Agnieszka Klonowiecka-Milart, Poland

Faculty:

- Jeffrey Abramson, Professor of Law and Politics, Brandeis University (core faculty)
- Hans Corell, Under-Secretary General for Legal Affairs and Legal Counsel for the United Nations
- Louise Doswald-Beck, Secretary-General of the International Commission of Jurists
- Thomas Franck, Professor Emeritus of Law, New York University
- Richard Goldstone, Justice of the Constitutional Court of South Africa (core faculty)
- Anthony Kennedy, Justice of the United States Supreme Court
- Gerhard Loibl, Professor of International and European Law, Diplomatic Academy of Vienna

Rapporteurs:

- Linda Carter, Professor, McGeorge School of Law, University of the Pacific
- Gregory Weber, Professor, McGeorge School of Law, University of the Pacific

The Institute addressed the following topics within the overarching theme of “Authority and Autonomy: Defining the Role of International and Regional Courts”:

- Challenges Facing the New International Criminal Court
- Adjudicating International Human Rights
- Resolving Inter-State Disputes
- The Growing Importance of Environmental Law
- A Code of Ethics for International Courts?

The Institute commenced with a session that used the “humanities-based approach” developed as part of the long-standing Brandeis Seminars in the Humanities and the Professions program. Led by Professor Jeffrey Abramson, the session called for judges to ponder in an abstract manner some of the ethical issues that might arise in the course of their work. Justice Richard Goldstone followed this session with a provocative one on the spread of terror in the post 9-11 era and its consequences for international law. Professor Emeritus Thomas Franck focused his session on the functioning of the International Court of Justice, perhaps the best established of all international judicial bodies. Professor Gerhard Loibl addressed the increasingly important domain of environmental law and the manner in which states are encouraged to comply with international environmental treaties. The problematic issue of how the public views international courts and tribunals was the topic of the session led by Louise Doswald-Beck. Justice Anthony Kennedy spoke to judges about concepts of law held by the U.S. Supreme Court as well as some of the recent decisions it has rendered, including *Lawrence and Garner v. Texas*. Problems facing the newly established and, in some quarters, controversial International Criminal Court were discussed frankly by Hans Corell and Richard Goldstone.

One of the most innovative parts of the BIIJ program was a day-long workshop on the development of common themes and guidelines that can inform codes of ethics for international courts and tribunals. Led by Daniel Terris, director of the International Center for Ethics, Justice and Public Life, and Professor Gregory Weber of the McGeorge School of Law at the University of the Pacific, this discussion brought to light many ethical challenges faced by the judicial bodies represented by participating judges. These challenges include how to achieve a truly independent judiciary and how to ensure the impartiality of international judges. This workshop is seen as the first step in a continuing discussion about ethics guidelines for international courts and tribunals and how they might be formulated and applied.

Another highlight of the Institute week was the keynote address delivered by Theodore Sorensen, international lawyer and former special counsel and advisor to President John F. Kennedy. Sorensen spoke on the topic of “International Jurisprudence: the Best and Worst of Times.” BIIJ participants also had the opportunity, while at the Schloss Leopoldskron, to attend the first annual Jacques Delors Lecture, sponsored by the Salzburg Seminar. It was delivered by former Austrian Chancellor Franz Vranitzky on the topic of “The State of the European Union.”

While the week-long Institute featured sessions on a wide range of topics relevant to the work of international judges, five themes emerged repeatedly during both formal and informal discussions among participants. The following summarizes these key themes.

Morality and Legality in International Courts and Tribunals

One of the objectives of the BIJ is to allow participants to step back from the everyday practice of their profession to reflect upon their work in new ways. This reflection was sometimes stimulated by provocative questions posed by faculty members who led Institute sessions. One such question, raised at the beginning of the week, was whether judges believe in the existence of absolute ethical principles that guide their decisions on the bench. In other words, is there a universal morality that all human societies recognize and that international courts are called upon to uphold?

While some might expect the judgments made by international courts and tribunals to reflect immutable ethical principles, the discussion of this question revealed that most judges find such a notion highly problematic. They stated that decisions about right and wrong cannot be made in the absence of a circumstantial or, indeed, a social context. Attempts to elicit absolutist statements from judges about the status of a given act generally resulted in requests for more precise contextual details, so that a fair judgment could be offered.

Many judges agreed that a variety of factors could influence a judgment. Utilitarianism may become part of the equation when determining right or wrong. In some cases, necessity may well be considered an appropriate defense for certain criminal acts. Some defendants may also have admittedly committed crimes that they judged at the time to be the lesser of two evils. Judges noted that such considerations are often taken into account during sentencing.

Despite the tendency of many participants to think relativistically about moral and ethical principles, others were willing to take a more absolutist stance. One participant stated that “when it comes to our roles as judges, we are the bulwarks and defenders of the norm,” adding, however, that there was still a place for discretion in sentencing in the face of problematic circumstances. Another judge admitted the existence of culturally specific notions about crime, such as the strongly held belief in many African countries that delving in the supernatural may constitute an act of aggression. It was noted that, for the greater good, courts situated in these countries must still submit to international legal norms concerning criminal acts.

Judges were asked to contemplate the tension that might exist between how they would act personally in a situation and what the law requires of them as judges of the same action. One participant stated that she would be willing to kill to protect her children but, as a judge, would have to regard this act as the most serious of crimes. More abstractly, it was asked whether judges can really interpret law according to a given legal or moral standard, or whether the law is always interpreted in reference to personal values.



Justice Richard Goldstone in discussion with ACHPR Chair Kamel Rezag Bara

An equally difficult tension emerges when acts that are widely considered a crime, such as killing, are also felt to be justified in certain circumstances—the so-called “just war theory.” Thus was Mandela charged with subversion in South Africa only to plead the righteousness of his cause. A similar case arose in regard to the intervention of NATO forces in Kosovo—an illegal action by the standards of international law but widely considered “legitimate,” given the likely consequences of non-intervention. Morality and legality may thus be closely intertwined but not coterminous, a reality that renders even more complex the work of practitioners of international justice.

International Law and the Protection of Human Rights

The issue of human rights and how they can be safeguarded by the international legal system has long been an area of concern for the international community and its institutions. Since the end of WWII, it has been recognized that some crimes are so heinous that they constitute crimes against humanity, and, furthermore, that the jurisdiction over such crimes is not limited to the nation in whose territory they occur. The post 9-11 era, however, brings with it a whole host of challenges to these legal safeguards, as the security of the world’s populations from terrorist attacks is balanced against the rights of alleged terrorists, particularly those residing in Western nations.

International conventions have produced case law that forms a common patrimony of humankind.

Many participants noted that the stance of the United States in the post 9-11 era is especially troublesome, particularly given its earlier support of both U.N. ad-hoc criminal tribunals and human rights issues more generally. The United States’ decision to act unilaterally in Iraq, without the sanction of the United Nations, and its willingness to ignore the civil liberties of its own citizens who are suspected, justifiably or unjustifiably, of terrorist activities or affiliations, produce much anxiety among proponents of human rights. They fear that 50 years of progress in international law and human rights might be lost in response to 9-11.

It was noted that protecting human rights in good times is easy; it is more difficult, but also critically important, to honor human rights conventions in troubled times. One judge from a human rights court made this persuasive plea:

Even though we face dangers, we cannot give away the achievements of international law, such as the absolute prohibition of torture, inhuman treatment, and retroactive application of the law. International conventions have produced case law that forms a common patrimony of humankind. There are more than ten conventions that confront international terrorism, and we should continue to fight it within the framework of international law. We must preserve the progress we have achieved.

Participants also raised the question of sovereignty and how decisions about human rights interventions are made. The Goldstone Report about NATO action in Kosovo suggested that a humanitarian intervention could be morally legitimate even if technically illegal. The question then arises of who decides on the appropriateness of an intervention, if the Security Council is not accepted as the ultimate authority. And how can the international community deter powerful nations from taking matters into their own hands, from becoming, in essence, “their own judges”? Currently, only the charter of the African Commission for Human and Peoples’ Rights specifies the grounds for humanitarian intervention on the territory of its member states.

BIIJ participants also discussed the idea of a clean environment as a human right. Currently, many conventions on environmental protection exist but violations of environmental law are rarely brought before an international court. Instead, an array of non-compliance procedures are utilized, with varying levels of success, to bring the violating party into line with treaties it has signed. The interconnection of environmental law and human rights has yet to emerge fully. But recent cases concerning the responsibility of oil companies for environmental degradation in Nigeria and the responsibility of states to protect the traditional livelihood and ecosystems of indigenous peoples living within their borders show that environmental questions may increasingly be viewed through the lens of human rights conventions. It was suggested that environmental violations might even qualify as war crimes—for example, the dumping of genocide victims' bodies in Rwandan rivers and their resulting contamination—although this has not yet been seen in the ad-hoc tribunals.

The Authority of International Courts

A fundamental question that arose in various forms during the Institute was “what is the basis of an international court’s authority?” Unlike a domestic court, whose legitimacy is paramount and jurisdiction evident, international courts exist in a supra-national realm whose relation to states and parties is not always clear. BIIJ participants discussed a wide array of topics in their attempt to define the place of their institutions in the contemporary legal landscape.

Participants first discussed the notion of “justiciability” in relation to the kinds of issues that come before international courts and tribunals. It was asked whether some matters are simply not amenable to judicial settlement, or whether such settlement depends instead on the will of parties to submit to a judicial process. It was warned that if courts decide that certain matters are *not* justiciable, this may encourage resolutions beyond the law. It is also sometimes unclear whether cases before a court could not also have been subject to diplomatic or political



Judge John Hedigan of the ECHR with Professor Thomas Franck of NYU.

resolution. This raises the question of whether courts provide a unique forum for the resolution of disputes or whether they are one among several alternatives. It was pointed out that, for many states, judicial settlement of a dispute is a last resort and it may even occur in the wake of overt hostilities. Courts should, instead, attempt to bring parties to a court before such hostilities begin. The slowness with which some courts render decisions may, however, discourage the judicial settlement of urgent inter-state disputes.

The legitimacy of international courts and tribunals in the eyes of the public is also an area of concern for practitioners of international justice. Variable election procedures and terms among courts, inconsistent rules of evidence among courts, open campaigning by would-be and re-electable judges, and “vote trading” by states who support a particular judge in exchange for favors from his or her country all create an image of courts as overly politicized institutions that may lack the necessary independence to operate with true authority. This image may overshadow the view of international judges as an extremely dedicated group of professionals who take their work and their independence very seriously. Furthermore, the press tends to report on the failures of international courts and tribunals while ignoring their successes. The result is that the public is usually unaware of the important decisions these courts render, the critical role they play in resolving conflicts that might otherwise turn violent, their efficiency in working through a staggering case load with limited funding, and the overall integrity of the judges on their benches.

The issue of fundraising was raised by participants several times during the Institute, as some courts find themselves with severely limited budgets but still high expectations on the part of the public about what they should accomplish. Financial gaps clearly have to be filled if the work of these courts is to progress. It was generally felt, however, that judges and court presidents should not engage in any activities on behalf of their courts that would compromise their appearance of independence or the reputation of the court. As one judge stated, fundraising “injects a corporate element into the international judiciary that is highly suspect.”

The authority of international courts may also be compromised by the fact that most do not have compulsory jurisdiction; it is instead determined by treaties and thus limited to willing parties. Institute participants wondered whether compulsory jurisdiction for all international courts might be established in the future; many felt that this is a necessary step for the solid establishment of

It was noted by many that there is a lack of coherence in the global legal system and many missed opportunities for cooperation and complementarity.

international law. The decisions of some international courts are also not binding, even for states that have signed their establishing treaties. It is thus possible for states displeased with a court’s decision against them to ignore it completely, although public sanction might be a powerful deterrent against such a response. And even if a decision *is* considered binding, there is usually no enforcement mechanism to ensure its implementation. Participants agreed that, without the legal establishment of their authority, or the creation of armies or police to enforce judgments, the appearance of independence and impartiality in international courts is the best way to encourage voluntary compliance with their decisions.

Relations Among International Courts and Tribunals

A number of discussions during the week centered on the kinds of connections that currently exist among international courts as well as between these institutions and their domestic counterparts. It was noted by many that there is a lack of coherence in the global legal system and many missed opportunities for cooperation and complementarity. The relationship of international to domestic courts is especially problematic; participants felt that the conditions under which international courts should defer to national courts are generally unclear and need to be articulated for the benefit of all.

It was evident from discussions that there exists an undeclared but widely recognized hierarchy in the international judicial system. The International Court of Justice (ICJ) occupies the highest status, as the oldest and best established among all courts, and its actions often reflect its *de facto* position. Some participants noted that the ICJ, for example, does not defer to the decisions of other international courts, although the latter tend to take into account decisions from their peer tribunals, that is, other human rights or criminal courts.

This discussion led more generally to the uncertain role of precedential authority in international jurisprudence and the relevance of international decisions on cases coming before national high courts. It was noted that the judgment in the recent anti-sodomy case brought before the United States Supreme Court (*Lawrence and Garner v. Texas*) cited decisions rendered by the European Court of Human Rights (ECHR).

The question of appellate courts in the international system and their effect on other courts was also raised. Currently, only the criminal courts have appeals chambers, with the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) sharing a single chamber. Even in this arrangement, the appellate decisions of the ICTY are not binding for the ICTR, and vice-versa, and it was unclear what effect decisions made in those courts would have on the International Criminal Court (ICC) or the Special Court for Sierra Leone (SCSL). As one participant declared, “it is like the criminal courts are always starting over again.” It was asked whether other international courts should have appellate bodies and whether this would affect the way courts are perceived or how they operate internally.

Participants also noted that international courts have different practices when it comes to interpreting law and writing opinions. The ICJ bench includes many former diplomats who prefer to interpret the law in a narrow manner. This contrasts with courts that have law practitioners and professors on the bench. These judges tend to give a broad reading of the law, which in turn can lead to the development of new international jurisprudence.

Autonomy in the International Judicial Sphere

Throughout the Institute, questions arose about the independence with which international courts can reasonably operate. All agree that the appearance of independence is critical in lending legitimacy to a court’s decisions. At the same time, courts are the creation of states and have ties with states as part of their very structure. For example, judges are often appointed by the executive branch of their state’s government. In the case of the ECHR, each of the 45 member states of the Council of Europe elects one judge. Special criminal courts face another kind of suspicion—that they lack impartiality. The public often feels that their goal, to try particular crimes against humanity, biases judges from the start against the indicted. The accused are not seen to benefit



ICTR President Erik Møse

from the presumption of innocence, a fundamental element of the judicial process. The challenge faced by international courts is thus to carry out their work with autonomy, that is with as little outside influence as possible, while at the same time remaining aware of how they are viewed from the outside so as to achieve maximum credibility.

It was suggested that in order for international courts to be perceived as truly independent, three points need to be answered: 1) Who is selecting the judges who sit on the courts? 2) What kind of security of tenure do judges have? 3) Are there guarantees against outside pressures on judges? Questions of impartiality can take two different forms: 1) Does a judge have any *personal bias* regarding a given case, for example a prior connection to parties before the court or a particular stake in a case’s outcome that might affect his or her judgment? 2) Is there any possible *appearance of impropriety* in a judge sitting on a given case, that is, any reason that a judge would be *suspected* of bias in relation to parties before the court, such as sharing their nationality?

Judges are understandably concerned by allegations of lack of independence and impartiality in their work. They feel that they are practicing their profession with overall integrity and that most criticisms are groundless, based on the appearance and not the reality of influence and bias. Participants noted, for example, that judges have to guard against a tendency to vote *against* their home country, simply because they are so conscious of appearing preferential. It was

In a world of vastly different, culturally conditioned ways of perceiving reality, is there enough of a common sense that one can legitimately decide a case to carry the confidence of the public one is serving?

also pointed out that while banning the re-election of international judges might eliminate the suspicion that their independence may be compromised through pandering to states for votes, such an action would also destroy the important continuity and efficiency provided by having experienced judges on the bench. As one participant pointed out, there needs to be “the right balance between real and unfounded claims” of judicial impropriety.

Questions about the existence of hidden bias among judges were also raised. Hidden biases, such as those arising from a judge’s cultural background, race, or gender are the most difficult to detect but may also deeply influence his or her judgments. Evaluations of such bias should not, however, be reductive; a judge is not necessarily more sexist or racist because he or she comes from a particular group. One participant pointed out, for example, that some male judges are more sensitive to issues about women than are female judges.

The general question of the autonomy of international courts and how it can be both guaranteed and articulated has a philosophical component that emerged through long discussion. Judges were asked to ponder their conceptions of the role of international judges. Are they there to decide cases or to develop the law? Do they have a mission to fulfill, that of achieving ideal justice? Or do they view their work in a more positivistic light, as a practical profession that must be carried out in the best and most rational way possible? One participant posed a difficult question but one that cannot be ignored:

In a teleological sense, is it really possible, with so many different legal cultures, to have a common understanding? In a world of vastly different, culturally conditioned ways of perceiving reality, is there enough of a common sense that one can legitimately decide a case to carry the confidence of the public one is serving?

Institute participants shared the notion that they were all engaged in an exercise of enormous importance and worth in the contemporary world. The challenges and pitfalls associated with the profession of international judge are real and shared, and they need to be met with the utmost integrity but also with pragmatism and realism.



Center Director Daniel Terris with Professor Jeffrey Abramson, Brandeis University

Challenges Facing the New International Criminal Court

Of the many interesting discussions that took place at BIIJ 2003, those regarding the new International Criminal Court (ICC) were among the liveliest. There has been much controversy surrounding the establishment of this court, especially in the United States whose government has withdrawn its signature from the Rome Statute of the ICC and refused to become a party to it. BIIJ participants were fortunate in having Hans Corell and Justice Richard Goldstone as institute faculty. Corell was responsible for the organization of the 1998 conference that was charged with drafting the Rome Statute. Goldstone is the former chief prosecutor of the International Criminal Tribunal for the former Yugoslavia (ICTY). Together they led a session that addressed some of the challenges that the ICC is encountering as it begins to carry out its important work.

Corell took the floor first, addressing a number of challenges facing the ICC with regard to prosecutors, judges, member states, the United Nations, and the United States. The Office of Legal Affairs at the United Nations is very interested in the role of international criminal prosecutors. There is now a growing body of knowledge that can inform the work of ICC prosecutors, drawn from the experiences of the criminal tribunals in Yugoslavia, Rwanda, and Sierra Leone. Corell noted that the diversity of the ICC prosecutorial team—investigators, assistant prosecutors, and so on, all hailing from different countries and jurisdictions—calls for the chief prosecutor to be open-minded and to take advantage of the varied experiences of his colleagues.

The diversity of the ICC bench presents another challenge to the success of the Court. Judges come from 18 different countries, and not all have had prior experience in the courtroom or even the bar. Corell has been impressed with how quickly these judges have formed a cooperative and collegial group. He noted how important it is that judges not become the target of undue pressure from outside interests or of threats to their personal safety. He also noted that the



Hans Corell and Richard Goldstone (left to right) lead participants in a lively discussion on the International Criminal Court

ICC is bound to develop a unique relationship with the media, given the high profile cases it will handle. There is a danger in such a relationship, asserted Corell. Having judges too much in the public eye could compromise their appearance of independence at a time when the ICC very much needs to prove itself as an institution. He suggests that judges thus refrain from engaging in too many public events and instead focus on the work at hand.

The actions of member states of the ICC will play a significant role in the success of the court. It is particularly important that member states deliver persons under their jurisdiction who are indicted by the court for crimes. Corell posed this question about member states: “Is there political will to cooperate with the court in concrete situations?” Only time will reveal whether this is, indeed, the case.

Although the ICC is not an organ of the U.N., the two institutions must work closely together if the court is to achieve its goals. Corell pointed out that it is vital that all members of the Security Council endorse the ICC’s involvement in addressing any future crimes against humanity, if the creation of additional ad hoc criminal tribunals is to be avoided. He is also concerned about officials of the U.N.—those working, for example, with UNICEF or United Nations High Commissioner for Refugees (UNHCR)—being called before the court as witnesses. This could put them at risk in the field as they carry out humanitarian assistance.

. . . it should be remembered that the ICC was established to defend those who suffer most in today's wars, namely women, the elderly, and children.

Finally, Corell addressed the thorny issue of the United States' resistance to the ICC and to international law more generally. Although, as a sovereign nation, the U.S. is entitled to withhold its support from the court, it should be remembered that the ICC was established to defend those who suffer most in today's wars, namely women, the elderly, and children. Supporters of the ICC hope fervently that, with time, the U.S. will recognize the importance of the court and refrain from taking steps to undermine its position in the world.

Goldstone took the floor, speaking at length on his own experiences as chief prosecutor for the ICTY in order to illuminate the challenges that his counterparts at the ICC might encounter. One of the frustrations experienced in the early days of the ICTY was that the judges were elected and sitting in The Hague for more than a year before a prosecutor was nominated and approved by the Security Council. This meant that Goldstone was under heavy pressure, upon his arrival, to produce indictments quickly, not only for the credibility of this first international criminal tribunal, but also in order that the U.N. approve the court's operating budget. There were also issues of separation and distance between the judges' chambers and the prosecutor's office, which were

partially a result of differences in civil and common law practices. This was complicated by the fact that there is a pre-trial procedure in the ICTY whereby judges consult on the appropriateness of particular indictments. The result is that pre-trial judges risk having to recuse themselves from sitting in subsequent trials. The ICC has chosen the same two-stage procedure so similar issues may arise.

Goldstone then discussed the external role of the prosecutor of international courts. It is the prosecutor, he asserted, who must become the public face of the court. He agreed with Corell that it is inappropriate for international judges to be too much in the public eye—making public statements about court activities, calling for arrests and investigations, or holding press conferences. This might compromise their appearance of independence and impartiality and otherwise impair the reputation of the court as a whole. On the other hand, public relations work is an important part of establishing the credibility of an international criminal court, and Goldstone undertook this work unashamedly when he joined the ICTY. In this way, he was able to build government confidence in the court. He remarked that the ICC has clearly recognized the importance of public relations work.

The chief prosecutor also plays an important role in smoothing the way for his or her court's investigations. At the ICTY, Goldstone was careful to inform countries of any investigations that would be pursued in their territories and to receive their prior consent. "If an international prosecutor goes into a foreign country," he remarked, "[it] has to be done in a diplomatic fashion." Building the trust of governments is crucial in obtaining evidence, particularly sensitive evidence, and that can only be done through face-to-face meetings with the appropriate officials.

Furthermore, the chief prosecutor of international courts must develop a good relationship with international humanitarian organizations, such as the International Committee of the Red Cross (ICRC) and the UNHCR. These institutions need to understand that “the prosecutor’s not going to do something contrary to their interests, because we’re in the same business,” that is, the business of human rights. Goldstone stated that “it is crucial for a prosecutor to nurture a culture of human rights in his or her own office.” The first concern of a prosecutor must be to ensure fair trials.

Another public relations “target” for international courts is civil society. Goldstone remarked that “relationships with NGOs [non-governmental organizations] are important for the prosecutor and, I suggest, for the court generally. NGOs and international and national human rights organizations, today in the modern world, play a crucial role ... in influencing public opinion and, through that, government policy.” He added that “Human Rights Watch and other organizations are going to possibly play a very important role in changing the attitude of the U.S. government to the ICC, as they did with regard ... to other areas of international law.” Like Corell, Goldstone hopes that the efficient functioning and integrity of the ICC will persuade the U.S. to become a party to the Rome Statute in the future.

Discussion among BIIJ participants after the presentation by Corell and Goldstone was wide-ranging and provocative. The points raised include the following:

- The two ICC judges present, Navanethem Pillay and Maureen Clark, remarked upon various aspects of their court’s operation thus far, including the relation of the ICC to national courts, the inevitable delays involved in making international indictments, and the creation of a new provision for representation of victims in the court.

- Several participants bemoaned the marginalization of international law within the curricula of law schools, particularly in the United States.
- Others commented on the difficulty of defining “aggression” for the purposes of international law.
- One criminal judge expressed frustration that NGOs expect international courts to mete out perfect justice, even though they may be hampered by financial constraints, indictment overload, and judges new to international courts.
- A human rights judge pointed out that individual responsibility for international crimes does not necessarily exclude state responsibility for the same crimes.
- The principle of complementarity between national courts and the ICC was widely discussed. While it is an important element of the Rome Treaty that indicted criminals be dealt with first by their national judicial systems, these systems do not always have the personnel or resources to undertake such prosecutions. One judge suggested that the ICC might provide technical assistance in such cases.

... it is crucial for a prosecutor to nurture a culture of human rights in his or her own office.

- Some judges felt that while international courts need to conduct outreach on their activities so the public understands the importance of their work, there is no need for a public relations office in each court.
- A criminal judge noted that the challenges faced by the ICC are appropriate and necessary at this early stage of its operation. Since they are being addressed behind closed doors, the public has the impression that nothing is happening. However, the BIIJ session on the ICC has shown that this is not the case.

Toward the Development of Ethics Guidelines for International Courts

Report of a workshop on judicial ethics
held in conjunction with the Brandeis
Institute for International Judges
July 24, 2003 - Salzburg, Austria



(left to right) Mehmet Guney (ICTR), Navanethem Pillay (ICTR/ICC), Erik Møse (ICTR), and Fausto Pocar (ICTY) on the terrace of the Schloss Leopoldskron

Preface

This report is of a workshop organized by Brandeis University on the need for codes of ethics in the international justice system. This endeavor sprang from a discussion at the first Brandeis Institute for International Judges, held at Brandeis University in June 2002. At that time, it was felt that such codes could act firstly as a guide for judges themselves but also an assurance to the outside world that certain standards of conduct exist and are capable of being implemented. It was also felt that people should be aware that judges could be amenable to some form of disciplinary action where appropriate.

The workshop that sprang from that first institute provoked an interesting and stimulating discussion of all the difficult questions that inevitably arise in regard to the profession of international judge. Is a code of ethics a sword or a shield? Should a code contain general or specific provisions? Who disciplines who and in what way, publicly or privately? What does accountability mean? To whom, if anyone, should international judges be accountable? How would accountability measures impact upon the independence of the judiciary at international level?

The areas of discussion and the issues that arose are very well described and presented in this report. Naturally, many questions remain to be answered. And, ultimately, individual international courts will need to draft their own codes of ethics. But the guidelines that emerge from this most worthwhile effort on the part of Brandeis University will, I have no doubt, be of inestimable assistance in that endeavor.

*Judge John Hedigan
European Court of Human Rights
October 2003*

I. Background

From July 20-26, 2003, the International Center for Ethics, Justice and Public Life held its second annual Brandeis Institute for International Judges (BIIJ) in Salzburg, Austria. This forum brought together 14 judges from international courts and tribunals for a week of reflection and discussion about issues and challenges facing their respective courts and the international judiciary more generally.

One of the highlights of BIIJ 2003 was a day-long workshop focusing on ethical principles for the international judiciary. This topic had emerged during discussions that took place during the inaugural BIIJ, held on the Brandeis University campus in June 2002. Recognizing the centrality of ethical conduct to both the internal efficient functioning and the external credibility of their courts, this first group of BIIJ judges recommended that future institutes explore this topic in depth.¹

BIIJ organizers implemented this recommendation when designing the 2003 institute. They concluded that a productive discussion on ethics might be launched by using the statutes and rules of various international courts as a point of departure. Brandeis University consequently prepared, in collaboration with the McGeorge School of Law at the University of the Pacific, a document that compared the language used by a number of international courts and bodies to address judicial conduct. These included the International Court of Justice (ICJ), the European Court of Human Rights (ECHR), the Inter-American Court of Human Rights (IACHR), the International Criminal Court (ICC), the International Criminal Tribunal for Rwanda (ICTR), the International Criminal Tribunal for the former Yugoslavia (ICTY), the International Tribunal for the Law of the Sea (ITLOS), the Special Court for Sierra Leone (SCSL), and the African Commission on Human and Peoples' Rights (ACHPR). The resulting document was given to BIIJ 2003 participants before the institute so that they might reflect on how these approaches



Bankole Thompson (SCSL) and Maureen Clark (ICC)

either fit or did not fit the circumstances of their own courts. Judges were also asked to study the Bangalore Principles, a set of principles and applications for the ethical conduct of judges in national courts. These Principles were developed over several years by the Judicial Integrity Group, a multi-national committee of high court judges, with additional input from judges of the International Court of Justice. The Bangalore Principles were finalized in November 2002 and endorsed by the member states of the United Nations Commission on Human Rights in April 2003.²

The judicial ethics workshop took place on July 24, 2003. The format was interactive, designed to elicit from judges the areas of ethical engagement in their profession that are of particular concern. These topics then became the focus of more in-depth discussions. The workshop was led by Daniel Terris, director of the International Center for Ethics, Justice and Public Life, and Professor Gregory Weber of the McGeorge School of Law at the University of the Pacific. Among the possible topics identified by meeting planners and participants for detailed discussion were: 1) judicial oaths; 2) nationality; 3) impartiality and outside activities; 4) ex parte communication; 5) accountability and disciplinary procedures; 6) selection of judges; 7) retirement, temporary absence, and incapacity; 8) relations with



Budislav Vukas (ITLOS) with Mehmet Güney (ICTY) in between sessions

the media; 9) gender and other balancing issues on the bench; 10) recusal; 11) linguistic issues for judges from small countries; 12) judge elections and campaigning; and 13) problems associated with the push for “least-cost justice.” After reviewing these suggestions, judges agreed to focus their attention on the topics of “impartiality and outside activities” and “accountability and disciplinary procedures.”

The following judges took part in the workshop:

- *Antônio Cançado Trindade*, President of the Inter-American Court of Human Rights
- *Maureen H. Clark*, International Criminal Court
- *Mehmet Güney*, International Criminal Tribunal for the former Yugoslavia
- *John Hedigan*, European Court of Human Rights
- *Hassan B. Jallow*, Special Court for Sierra Leone
- *Jainaba Johm*, Vice-Chair of the African Commission for Human and Peoples’ Rights
- *Agnieszka Klonowiecka-Milart*, Pristina District Court, United Nations Mission in Kosovo
- *Erik Møse*, President of the International Criminal Tribunal for Rwanda

- *Navanethem Pillay*, International Criminal Court and former President of the International Criminal Tribunal for Rwanda
- *Fausto Pocar*, Vice-President of the International Criminal Tribunal for the former Yugoslavia
- *Kamel Rezag Bara*, Chair of the African Commission for Human and Peoples’ Rights
- *Geoffrey Robertson*, President of the Special Court for Sierra Leone
- *Bankole Thompson*, Special Court for Sierra Leone
- *Budislav Vukas*, Vice-President of the International Tribunal for the Law of the Sea

Also in attendance for the day were:

- *Jeffrey Abramson*, Professor of Legal Studies and Politics, Brandeis University
- *Melissa Blanchard*, Communications Specialist, International Center for Ethics, Justice and Public Life, Brandeis University
- *Linda Carter*, Professor of Law, McGeorge School of Law, University of the Pacific
- *Hans Corell*, Under-Secretary-General for Legal Affairs and Legal Counsel for the United Nations
- *Thomas Franck*, Professor Emeritus of the School of Law, New York University and former ad-hoc judge for the International Court of Justice
- *Richard Goldstone*, Justice of the Constitutional Court of South Africa and Former Chief Prosecutor of the International Criminal Tribunal for the Former Yugoslavia
- *Leigh Swigart*, Associate Director, International Center for Ethics, Justice and Public Life, Brandeis University
- *Daniel Terris*, Director, International Center for Ethics, Justice and Public Life, Brandeis University
- *Gregory Weber*, Professor of Law, McGeorge School of Law, University of the Pacific

II. Exploring Ethics for International Courts: Opportunities and Challenges

The workshop began with an extended discussion of the opportunities and challenges associated with developing a general code of ethics for international courts. Several participants noted the timeliness of the discussion, as both the ICC and the ECHR are currently working toward some form of code for their own institutions. While the original intent of the workshop was to explore the possibility of an ethical code that would apply to all international courts and tribunals, it became clear early in the day's conversation that such an outcome was highly unlikely if not impossible. The group strongly suggested that it was more reasonable to think of the outcome instead as a set of "ethics guidelines" to which these courts and tribunals might refer.

Diversity in legal culture and practice

One theme that emerged during the discussion of "opportunities" and "challenges" was triggered by a unique feature of international courts: their judges bring with them to the bench diverse legal cultures and traditions. Participants noted that differences may be substantive, attributable to a training in civil and common law respectively. They may also exist in the realm of practice, which is inevitably influenced by the national laws and justice systems of judges' home countries. These differences may result in varying views, for example, on the proper relationship between parties before the court and the bench, between counsel and the bench, or on ex parte communication. One specific problem that was noted arises when judges, in their personal lives, behave in accordance with the laws of their home countries but break those of the country in which their court sits. For example, in some countries, homosexual relations or polygamous unions are permissible, while in many others they are not.

It was suggested that the ambiguity produced by this confluence of legal traditions in international courts may be significant, and it cannot be dispelled by an assumed "judicial instinct." As one judge commented, "With the best will in the world, judges simply do not agree on what is appropriate behavior." Many workshop participants felt that the development of generalized ethics guidelines would help individual courts specify what constitutes proper and improper conduct on the part of their judges. Guidelines could also spell out professional obligations for members of the bench, such as the importance of attendance, punctuality, preparedness, and the equitable sharing of work. The result, many felt, would be an enhanced *esprit de corps* among peers.



Professor Gregory Weber, McGeorge School of Law, leads a session on ethics

Commonalities among international courts

Judges also commented that an exploration of judicial ethics could help identify the characteristics that are specific to international courts. In addition, it could identify any commonalities that already exist, as laid out both in courts' statutes and in the unwritten practices that may be powerful regulators of judicial behavior but have not been incorporated into documents. Furthermore, the discussion could make courts aware of any lacunae that exist in accepted approaches to practical judicial challenges so that these might be filled. It was also suggested that comparative studies of judicial ethics and practice, carried out by a law school or other academic entity, would be a helpful addition to existing knowledge about international courts and tribunals.

Enhancing the public image

Several participants urged that the most critical opportunity provided by a systematic development of ethics guidelines is enhancement of the credibility of international courts and tribunals in the public's eye. It was noted that criticism by the U.S. of the ICC has thrown a shadow over the international justice system more generally. Some critics of the international judiciary have raised questions over the qualifications of international judges and their alleged lack of supervision. In light of these criticisms—largely believed unjustified by participants—it was suggested that international courts must be careful, perhaps more than national judiciaries, to ensure not only ethical behavior by judges but also the *appearance* of ethical behavior. Accordingly, it was urged, a broader public awareness that international courts are developing ethics guidelines would strengthen their public image in addition to aiding their internal operation. It was noted that a strengthened public image was especially important since many courts are still forming and thus need to establish widespread public support.

Obstacles to the development of guidelines

Despite the positive results that might emerge from international courts' review of ethical issues, workshop participants generally agreed that the development of ethics guidelines for international courts would encounter many roadblocks. Some judges asserted that ethical issues had not arisen in their courts and thus were not yet perceived as ripe for discussion. Many pointed out that international courts are so different from one another that a single set of guidelines could not apply to them universally. A few remarked that although such guidelines might liberate judges in some areas of activity, they would bind judges in others. There were many doubts about the form that such guidelines might take, and whether the resulting document would be for the internal use of courts or opened for more public use. If the latter, some worried that the guidelines might become a "sword," i.e., a tool to be used against the courts by critics, instead of a "shield," i.e., something that judges could use to protect themselves from assertions of improper behavior.

The question of legitimacy

Participants generally agreed that however such guidelines might be used, the issue of their legitimacy would be paramount. Participants questioned how such guidelines could become authoritative enough to guide the conduct of international judges. Since there is no professional association for international judges, several judges noted, how would their viewpoints and needs be accurately represented in the development process? Discussion also considered whether other parties needed to be involved in the drafting of guidelines so that they assume legitimacy not only for judges but for others as well. These others could include prosecutors, witnesses, victims, judicial monitoring groups and NGOs, and the general public. Concern was expressed that the development of such guidelines might simply be a move toward the *overcodification* of practice regulations already well understood by judges, and thus unnecessary. Others wondered about the ultimate utility of such ethics guidelines. Finally, it was also noted that any such guidelines raised both implementation and enforcement issues.

Guideline considerations

At the end of these frank discussions about both the opportunities and the challenges associated with a review of ethical issues in international courts, workshop participants generally concluded that an examination of these issues would be productive and helpful. However, the following questions need to be kept in mind as the process unfolds:

- 1) What would be the purpose of any guidelines developed as a result of such examination?
- 2) What exact process is foreseen for developing any such guidelines?
- 3) How would any such guidelines achieve legitimacy once they were elaborated?
- 4) What would be the scope of any such guidelines? This last point is critical as many elements and procedures of courts are laid down by their establishing statutes and cannot be changed. The ethics guidelines in question should thus focus on the aspects of judicial conduct over which individual judges and courts have control.³

The discussion concluded with a suggestion that participants avoid thinking of the guidelines as moving toward either a uniform code for all international courts or a completely individualized code for each court. These two options, it was offered, represent the ends of a continuum. As the process unfolds, it was predicted, judges will probably find that the end-product of such an examination will instead be guidelines that fall somewhere in the middle, i.e., a set of generally relevant ethical principles fleshed out with more specific issues that individual courts can draw upon as they develop their own codes of ethics.

III. Impartiality and Outside Activities

After consideration of a dozen or more topics for more detailed discussion, workshop participants first chose to focus on “impartiality and outside activities.” It was noted that both the Bangalore Principles and the statutes of many international courts state that judges should not engage in activities outside of their judicial work that compromise their impartiality and independence. The fourth Rule of Court for the ECHR is typical:

... the judges shall not during their term of office engage in any political or administrative activity or any professional activity which is incompatible with their independence or impartiality or with the demands of a full-time office. Each judge shall declare to the President of the Court any additional activity. In the event of a disagreement between the President and the judge concerned, any question arising shall be decided by the plenary Court.

A wide array of issues and concerns were discussed in relation to this topic, and workshop participants agreed that existing language about the kinds of outside work judges can legitimately engage in is quite vague and in need of elaboration. The following summarizes this discussion.



Fausto Pocar (ICTY) makes a point.



Center Associate Director Leigh Swigart with Hassan Jallow (SCSL)

The case of “waiting” judges

Some workshop participants were concerned that too many restrictions on outside activities were placed on judges who are “waiting.” This refers to judges of the ICC who have been elected and sworn in but who will only be called to serve when warranted by the court’s caseload. These waiting judges do not receive a salary unless actively serving; at the same time, their ability to continue their former occupation may be severely limited. This clearly creates an economic predicament for many judges.

Definition of “office-holder”

The discussion of “waiting judges” led to questions about the definition of the judicial office. Participants queried whether one is an office-holder, and thus bound by all pertinent restrictions, from the day one is elected, or when sworn in, or when he or she takes up full-time duties. They then asked, “if being an office-holder implies full-time occupation, then are restrictions on other employment dropped if one is ‘waiting?’” It was suggested that changing appointment procedures to eliminate “waiting judges” would solve this thorny question. It was also pointed out, however, that this strategy was specifically adopted in response to criticism of the high cost of running other international tribunals, which generally includes the salaries of judges who are not always fully occupied.

Judges as professors

Part-time judges, or full-time judges whose courts have lighter caseloads, find themselves similarly challenged. Participants addressed the kinds of outside work considered appropriate for such international judges. For example, it was asked whether they should be allowed to accept fees for public lecturing or writing about their experiences. It was noted that many international judges hold law professorships in their home countries, which is not generally thought to compromise their impartiality on the bench. But even these positions, it was noted, raised potential concerns. Judges discussed whether: 1) it was appropriate to use illustrations from cases before their court as a teaching tool; 2) they could write about these cases once decisions have been rendered; or 3) whether they should wait to write about them until after they had left the service of the court. At some point, it was noted, the scholarly production of judges might also compromise diligence in their judicial function, since such work requires much time and dedication. It was also urged, however, that restricting active scholars from the bench could adversely affect its overall competence. As one participant noted, “We want judges to be thinkers.”

Judges as arbitrators

Another outside activity discussed at length was arbitration. It was noted that it is not uncommon for international judges to participate in arbitral tribunals, which are an alternative forum for dispute settlement, particularly between states. If the matter arbitrated subsequently comes before the arbitrating judge’s permanent court, he or she would then be required to recuse him or herself from the case.

Non-remunerative activities

Participants also considered the appropriateness of certain unpaid outside activities. They discussed whether it is proper for judges to sit on editorial boards of journals, on advisory boards of philanthropic organizations, or even on boards of directors of companies. Other questions that arose included: Should judges receive honorary degrees? Or should they be members of professional organizations and law societies? The general feeling was that this kind of activity does not necessarily threaten the impartiality and independence of judges — it can, in fact, make them better judges — and thus should not be restricted. However, it was noted, if any institution or organization to which a judge has connections should be brought before his or her court, recusal would be the appropriate response.

The acceptance of restrictions

Although a few participants felt that judges are held to impossibly high standards and that the restrictions imposed on their activities are onerous, many more felt that this was simply a predictable aspect of their profession. This latter group suggested that once judges are officially in office, they should expect to limit their activities so that both impartiality and the *appearance* of impartiality are strictly maintained. As one participant commented, “That is the price judges have to pay.” It was also pointed out that compatibility of outside activities is very much tied to availability. That is, judges should not be so overextended in their outside commitments that it compromises their ability to perform their judicial function with diligence.

The need for flexibility and increased guidance

The discussion on impartiality and outside activities for the international judiciary thus developed along two lines. First, there needs to be some flexibility so that judges can deal properly with their functions while continuing their intellectual life and other appropriate pursuits, which will ultimately benefit the courts. Second, the language about outside activities in existing documents is too vague and could benefit from elaboration. In some courts, it was noted, there are already well-established practices, but they are often unwritten. Despite participants’ generally perceived need for further formal ethical direction, they had mixed feelings about the desirability of generating an actual list of permissible and non-permissible outside activities for judges. Some felt that this would constitute a helpful guide. Others considered that such a list would have to be so general that it would ultimately be useless. And yet others felt that court presidents should decide on the compatibility of their judges’ outside activities.

The form of guidelines

A “compromise solution” that was raised might be a list of questions that individual courts could refer to when formulating their own codes of ethics. Such a list would act as a starting point to help courts to become aware of each other’s ethical concerns and regulations. A partial list of this kind, addressing impartiality and outside activities, and based upon the foregoing discussion, is found in the last section of this report.

IV. Accountability and Disciplinary Procedures

The second topic that workshop participants chose to focus on in detail was “accountability and disciplinary procedures.” In comparing the language found in the statutes and rules of various international courts on this topic, the workshop group found that details about what constitutes a breach of conduct and the disciplinary consequences of such a breach are often lacking. The following excerpt from Article 20:1 & 2 of the statutes of the Inter-American Court of Human Rights is an example:

1. In the performance of the duties and at all other times, the judges and staff of the Court shall conduct themselves in a manner that is in keeping with the office of those who perform an international judicial function. They shall be answerable to the Court for their conduct, as well as for any violations, act of negligence or omission committed in the exercise of their functions.
2. The OAS [Organization of American States] General Assembly shall have disciplinary authority over the judges, but may exercise that authority only at the request of the Court itself, composed for this purpose of the remaining judges. The Court shall inform the General Assembly of the reasons for its request.

The issue of accountability plays into the discussion of disciplinary procedures since it was generally expressed that international judges should be answerable not only to their courts, but also perhaps to external entities. What these entities should be and how a judge’s accountability to them should be evaluated are, the group agreed, complex questions to answer. Yet it was also widely felt that the development of recognizable mechanisms to ensure accountability, and disciplinary measures for cases where standards of conduct are not met, would go far in allaying the fears of critics who believe that international courts answer to no one.

Defining accountability

The starting point of the group’s discussion was the definition of “accountability.” One judge pointed out that this English term has no easy equivalent in any other language. Another participant asserted that a distinction must be drawn between the independence of the judiciary and its accountability. It was suggested that independence relates to how a judge carries out his or her work, whereas accountability relates to how this work is *perceived* – by a higher court, by writers of law reviews and editorials, or by the public at large. “International judges are operating under the eyes of the world,” noted one participant. “That is their ultimate accountability.”⁴

Accountable to whom?

It soon became clear that, as one participant put it, “accountability has no meaning until you ask yourself ‘accountable to whom?’” On this matter, there were differing opinions. Some felt that it is academia—professors and law review writers—that keeps judges accountable by analyzing their decisions. One participant called this forum the “marketplace of ideas,” noting that the practice of publishing dissenting opinions has forced many judges into the marketplace in a way they otherwise might not be. Some participants questioned whether this practice put too much pressure on individual judges, who fear they will be subject to retaliation from states that do not like their votes. It was asked whether there might be such a thing as “too much accountability.” Others felt that judges are ultimately accountable to their own consciences and that there may sometimes be a disjuncture between the dictates of this internal mechanism and either public opinion or academic analysis.

Accountability for conduct vs. judgments

Questions were also raised about the difference between judges’ accountability for their conduct and accountability for their decisions. Are these different forms of accountability? If so, some wondered, was only the former amenable to self-regulation? Others asked whether judges should be answerable only to their fellow judges for issues of conduct and

to society or academia for their decisions. Others focused on possible feelings of accountability to the member states of the treaty that established a judge's court, or dependence on those states for reelection. It was asked, if judges feel such accountability or dependence, does this introduce a political element that could compromise judicial independence and, ultimately, in a kind of boomerang effect, judicial accountability as a whole?

Serious vs. less serious judicial misconduct

The discussion then focused upon accountability for judicial conduct. While it was noted that most international courts have clear mechanisms for disciplining judges who commit serious breaches of conduct—e.g., suspension, pecuniary sanction, or even the “nuclear weapon” of removal—the appropriate disciplinary procedures for less serious breaches remain vague or may go unmentioned altogether. The exception is the ICC, which has clearly defined both “serious misconduct and serious breach of duty” and “misconduct of a less serious nature.”²⁵ Participants noted, however, that other international courts must deal with a “gray zone” of violations that are not heinous but still either undermine the standing of the court in the public eye or impair its internal efficiency. As one participant stated, “A judge who is rude in the courtroom or who is continually late in producing judgments does substantial damage to the administration of justice and the perception of justice among the people.” It was suggested that having normative rules regarding these and other minor violations would act as a preventive measure as well as take the pressure off the court president to monitor and sanction such violations. And, it was urged, just as there is a range of judicial misconduct, there needs to be a corresponding range of appropriate disciplinary rules and sanctions.

Accountability through external evaluation

The discussion ended with a plea by several participants for international courts to answer the assertion that they are unaccountable. It was suggested that this is “a stick for beating international justice” and needs to be answered in three ways. 1) Each court should have its own mechanism for disciplining judges who commit serious breaches of conduct. 2) Each court also needs a system for disciplining judges appropriately for less serious misconduct, such as sleeping on the bench or failing to control the courtroom. This system would ideally not depend on the court president to be the final arbiter of appropriate behavior. 3) Perhaps most importantly, each court should be ready to answer criticisms in their most vulnerable area—that of accountability in the judgments they make. It was urged that being accountable to academia is not enough, because academia is not humanity. Courts are also accountable, for example, to the victims who come before war crimes tribunals and to the media. One participant suggested that this kind of accountability will only come about by international courts opening themselves up to criticism and evaluation by external bodies such as the International Bar Association and the International Commission of Jurists. It was urged that this kind of external evaluation would go far in rebutting critics of the international justice system.

It should be noted, however, that some judges disagreed with this recommended response to allegations of unaccountability. It was pointed out that many judgments by international courts and tribunals speak for themselves. Furthermore, judgments may already be the result of much internal judicial debate and compromise. Courts should thus leave academia and professional bodies to analyze decisions, a task they already carry out with much vigor. Evaluation by external organizations, it was argued, would not necessarily enhance public perceptions of the international justice system.

V. Recommended Steps in the Future

At the end of the day's discussions, the workshop group agreed on four further steps to advance the development of ethics guidelines for international courts.

1. Production of a report on these workshop discussions that will be circulated to participants for approval and then afterwards made accessible to the interested public.
2. Subsequent production of a statement of ethical principles relevant to international courts, accompanied by a more elaborated list of specific issues that came up for discussion in this workshop and which courts could refer to as they formulate their own code of ethics.
3. Consideration of the merits of including "outsiders" in this guideline process, so that courts can benefit from their input. These outsiders might include: politicians, members of legislative bodies, or others who have the power to remove judges; NGOs and monitoring organizations; and other "consumers of justice," such as prosecutors, victims, defendants, and witnesses.
4. Continuation of ethics guideline discussions at the 2004 Brandeis Institute for International Judges



Agnieszka Klonowiecka-Milart, UNMIK

Notes for Ethics Guidelines

1. The BIJ 2002 report can be downloaded at http://www.brandeis.edu/ethics/publications_resources.
2. The Bangalore Principles may be found at http://www.transparency.org/building_coalitions/codes/bangalore_conduct.html.
3. The International Law Association (ILA) has highlighted a similar issue in relation to the independence of the international judiciary. In a background paper on this topic, a distinction is drawn between "the independence of individual judges and that of the collective independence of the judges of courts as a whole." The former has to do with such matters as outside activities, nomination and election procedures, terms and conditions of service, and disciplinary procedures. The latter relates rather to institutional factors, such as the court's relationship with states parties and political organs. See http://www.pict-pcti.org/research/ethics_indepce.html for this paper and information on the ILA Study Group, sponsored by the Project on International Courts and Tribunals.
4. For a more detailed discussion of these concepts, see "The Law and Practice of International Courts and Tribunals," Vol. 2, No. 1, 2003, a special issue devoted to "The Independence and Accountability of the International Judge."
5. See Rules 24 and 25 of Section IV of the ICC Rules of Procedure and Evidence.

Sample Guidelines

Following are two sample lists of questions on various ethical issues discussed in the workshop that courts might refer to as they develop their own codes of ethics. These are partial lists that can be further elaborated through consultation with judges and other involved parties.

Impartiality and Outside Activities

1. What is the employment status of judges?
 - a. Are they part-time, full-time, or “waiting”?
 - b. Are judges guaranteed a salary even if not actively serving?

2. Should the kind of employment status determine the restrictions on outside activities? E.g., if judges are “waiting” or otherwise unoccupied during long periods of time, may they pursue gainful employment? If so, what restrictions should be imposed on the types of employment?

3. May judges collect fees for:
 - a. Lecturing?
 - b. Writing about professional experiences?
 - c. Arbitration activities?

4. May judges be allowed to write about particular cases (beyond simply referring to the case or court ruling):
 - a. While they are still on the court but the case is completed?
 - b. Only after they have left the service of the court?
 - c. Not at all?

5. May judges be active:
 - a. In publishing scholarly work while on the bench?
 - b. On editorial boards of law reviews or journals?
 - c. On advisory boards of non-profit organizations?
 - d. On boards of companies or commercial entities?

Accountability and Disciplinary Procedures

1. Do judges have a clear idea of their professional and ethical obligations as members of the court?

2. To whom are judges of the court accountable?
 - a. Peer judges?
 - b. Member states of the court?
 - c. Their own consciences?
 - d. Academia (writers of law reviews, professors of law)?
 - e. NGOs and judicial monitoring organizations?
 - f. Victims, witnesses, or other participants in the judicial process?
 - g. The media and interested public?

3. Does the court have mechanisms to respond to serious violations of judicial conduct?
 - a. Is what constitutes a serious violation laid out clearly in the statutes or rules of the court?
 - b. Are the consequences of serious violations laid out clearly in the statutes or rules the court?
 - c. Is the removal process subject to undue political influence?

4. Does the court have mechanisms to respond to less serious violations of judicial conduct?
 - a. Is what constitutes a less serious violation laid out clearly in the statutes or rules of the court?
 - b. Are the consequences of less serious violations laid out clearly in the statutes or rules of the court?
 - c. Is there an appropriate range of disciplinary procedures to respond to less serious violations?
 - d. Is the onus placed on the president of the court to arbitrate less serious violations?

5. How are the judgments of court evaluated?
 - a. Does the court publicize how its judges vote?
 - b. Do judges prepare dissenting opinions?
 - c. Are judges safe from retaliation by member states displeased by their voting record?
 - d. Is the court open to external evaluation?

Judges

Maureen Harding Clark was the first candidate elected as a judge of the International Criminal Court (ICC). As a trial judge, she will take up such duties when the first case has completed its pre-trial and appeals stage. As with other judges of the ICC, she has not yet taken up her full time position and is currently engaged in a part-time capacity in reviewing and writing the new rules of practice for the Court. Prior to her appointment, she served as a judge *ad Litem* at the International Criminal Tribunal for the former Yugoslavia. While a senior counsel, she served for four years on the Bar Council where she was secretary. Clark was called to the Bar in Dublin following her education at Lyons in France and University College and Trinity College, both in Dublin. She has expertise in criminal law, with extensive experience in both the prosecution and defense of serious crimes including rape, murder, money-laundering, and fraud.

Mehmet Güney is a judge on the International Criminal Tribunal for Rwanda and the former Yugoslavia. After becoming a member of the Ankara Bar Association in 1964, he joined the legal department of the Ministry of Foreign Affairs and eventually became chief legal adviser until his appointment as ambassador of Turkey to Cuba, then to Singapore, and to Indonesia. He worked for several years in the Turkish Permanent Mission to the United Nations in New York and in the Turkish Embassy in The Hague. Between 1984 and 1989, he was judge at the European Nuclear Energy Tribunal in Paris. In 1991, Güney was elected a member of the International Law Commission (ILC) by the United Nations General Assembly for a five-year term. He also served as vice president of the ILC. In 1995, he was appointed by the secretary general of the United Nations to the International Commission of Inquiry for Burundi, established by the Security Council.

John Hedigan, judge in respect of Ireland to the European Court of Human Rights, was elected to the Court in January 1998. He was educated at Belvedere College, Trinity College, Dublin and Kings Inns. In 1971, he helped re-found the Trinity College, Dublin

branch of Amnesty International (AI). He represented the branch on the National Committee of AI for eight years and served as the national coordinator of the AI campaign against torture. Called to the Bar of Ireland in 1976, he practiced as a barrister for 22 years with a practice ranging from constitutional to criminal to commercial law. He was called to the Inner Bar of Ireland in 1990 as senior counsel; to the English Bar in 1993; and the Bar of New South Wales in 1983. In 2002 he was made a bencher of the Honourable Society of Kings Inns.

Hassan Bubacarr Jallow became prosecutor of the United Nations International Criminal Tribunal for Rwanda (ICTR) in October 2003. Prior to his appointment, Jallow was permanent Judge at the Special Court for Sierra Leone. He served as The Gambia's attorney-general and minister of justice from 1984 to 1994 and later as a judge of The Gambia's Supreme Court. In 1998, he was appointed by the United Nations secretary-general to serve as an international legal expert to carry out a judicial evaluation of the ICTR and the International Criminal Tribunal for former Yugoslavia. He has also served as a legal expert for the Organization of African Unity and the Commonwealth and worked towards drafting the African Charter on Human and Peoples' Rights, which was adopted in 1980. He is the author of two books.

Jainaba Johm is vice-chairperson and a consultant with the Africa Commission on Human and Peoples' Rights, which she joined in June 1999. She is a barrister and has served as director of Civil and International Law Division; human rights desk officer at the attorney general's chambers in Banjul, The Gambia; and chairperson of the National Civic Education Commission in The Gambia. She worked as a consultant for the United Nations Office of the High Commissioner for Human Rights and was a public prosecutor, state counsel, and acting curator of interstate estates at the attorney general chambers in The Gambia. She has practiced and rendered legal advice on criminal, civil, and international law. She is most interested in areas relating to women, children, refugees, and displaced persons.

Agnieszka Klonowiecka-Milart is an international judge with the United Nations Mission in Kosovo, serving on the Pristina District Court. She also serves as a District Court Judge in Lublin, Poland. Klonowiecka-Milart began her international judicial experience in 1998 when she was selected by the United Nations as head of the Judicial Review Team that examined the judiciary system in Bosnia and Herzegovina. Prior to her time on the bench she taught criminal law and procedure in Poland.

Erik Møse is president of the International Criminal Tribunal for Rwanda, having served as vice-president from 1999 until his current appointment in May 2003. He served as head of division in the Norwegian Ministry of Justice until 1986; supreme court barrister, attorney general's office (Civil Affairs) until 1993; and appeals court judge from 1993 to 1999. Møse is the chairman of many committees, such as the Council of Europe's Steering Committee for Human Rights, the Expert Committee that drafted the European Convention for Prevention of Torture, as well as the Committee proposing the incorporation into Norwegian law of human rights conventions. He has also been a lecturer at the University of Oslo since 1981; a fellow at the Human Rights Centre, University of Essex, UK, and is the author of two books and more than 50 articles.

Navanethem Pillay was elected as a judge to the International Criminal Court in March 2003. Previously, she served as president of the International Criminal Tribunal for Rwanda. As an attorney in Durban from 1967 to 1995 she represented members of the African National Congress, Unity Movement, Azapo, Black Consciousness Movement, Trade Unions, and SWAPO. The first woman to start a law practice in Natal Province, South Africa, she was instrumental in bringing a ground-breaking application in the Cape High Court, which spelled out the rights of Robben Island political prisoners. Pillay was also the first black female attorney appointed acting judge of the Supreme Court of South Africa. She is a trustee of Lawyers for Human Rights and was a trustee of The Legal Resources Centre, a member of the Women's National

Coalition, the Black Lawyers' Association, cofounder of the Advice Desk for the Abused, and vice president of the Council of University of Durban Westville.

Fausto Pocar is a judge on the International Criminal Tribunal for the former Yugoslavia. Elected in 1984 as a member of the Human Rights Committee of the United Nations, he was its chair in 1991 and 1992. In 1993, he took part in the World Conference on Human Rights in Vienna. Pocar also conducted various missions for the high commissioner for human rights (among others in Chechnya in 1995 and in Russia in 1996). He served several times as a member of the Italian delegation to the General Assembly in New York and to the Commission on Human Rights in Geneva. Pocar was also a member of the United Nations Committee on the Peaceful Uses of Outer Space. He has served as a professor of international law at the University of Milan, Italy, and has taught at The Hague Academy of International Law. Author of numerous legal publications, Pocar is a member of various associations, such as the Institut de Droit International and the International Law Association.

Kamel Rezag Bara is chairperson of the African Commission on Human and Peoples' Rights of the African Union, which he joined in October 1995. He was assistant professor of Law at the Law School of Algiers University and the Algerian institute for magistrates. He practiced law in international commercial arbitration. Being one of the founding members of the Algerian League of Human Rights, he served as chairperson of the Algerian Human Rights National Commission from 1993 to 2000. He recently joined the diplomatic service and has been appointed Ambassador of Algeria to Libya.

Geoffrey Robertson was elected president of the Special Court for Sierra Leone in 2002. He is also the head of the Doughty Street Chambers in London and has been leading counsel in criminal, constitutional, and administrative law cases before the House of Lords, the Court of Appeal of the United Kingdom, and the European Court of Human Rights. Robertson has been a visiting professor in a number of universities and since 1999, an appointed

recorder (part-time judge). He conducted a number of missions on behalf of Amnesty International to South Africa and Vietnam, and led the 1992 Bar Council/Law Society Human Rights mission to Malawi. In 1990 he served as counsel to the Royal Commission investigating traffic in arms and mercenaries to the Columbian drug cartels. He was made a Bencher of the Middle Temple in 1997. Robertson is the author of several books, including three textbooks.

Bankole Thompson is the presiding judge of the Trial Chamber of the United Nations Special Court for Sierra Leone. During the seventies until 1987 he served in various capacities as State Counsel rising to the rank of principal state counsel, and as legal officer of the Mano River Union, a West African economic integration union, and then judge of the High Court of Sierra Leone. He is also a founding member of the Sierra Leone Reform Commission. He served as associate professor of criminal justice at Kent State University; professor of criminal justice; and most recently as dean of the Graduate School, Eastern Kentucky University. His specialties are criminal law, comparative constitutional law and international criminal justice. Thompson has written extensively on criminal law, constitutional law, human rights, and children's rights issues and is the author of two books.

Antônio Augusto Cançado Trindade has served as president of the Inter-American Court of Human Rights since 1999 and was previously vice-president of the court. He was the executive director of the Inter-American Institute of Human Rights from 1994 to 1996 and has consulted on various matters to the United Nations Environment Programme; the Organization of American States; the United Nations High Commissioner for Refugees; the Council of Europe; and UNESCO. He also served as legal advisor to the Ministry of External Relations of Brazil from 1985 to 1990; deputy head of the Delegation of Brazil to the U.N. Conference on the Law of Treaties between States and International Organizations in 1986; and Delegate of Brazil to the II U.N. World Conference on Human rights in 1993. Cançado Trindade is professor of international law

at the University of Brasilia and at the Rio-Branco Diplomatic Academy of Brazil and has been a visiting professor at universities in Europe and the Americas.

Budislav Vukas has served as vice-president of the International Tribunal for the Law of the Sea (ITLOS) since October 2002 and has been a member of ITLOS since October 1996. He is also a professor of public international law at the University of Zagreb, Croatia and has lectured at many universities throughout the world. He is the author of numerous books, monographs, articles, and papers in various fields of public international law, in particular law of the sea, international environmental law, international protection of human rights, and national minorities.

Core Faculty

Jeffrey Abramson is the Louis Stulberg Professor of Law and Politics at Brandeis University. He received his Ph.D. in Political Science in 1977, and Juris Doctor in 1978 from Harvard University. Abramson served as a law clerk to the chief justice of the California Supreme Court, and then as an assistant district attorney and assistant attorney general in Massachusetts before beginning his teaching career. In addition to teaching at Brandeis, Abramson has taught at Harvard University and Wellesley College. He is the author of *We, the Jury: The Jury System and the Ideal of Democracy*, *The Electronic Commonwealth: The Impact of New Media Technologies on Democratic Values*, and *Liberation and its Limits: The Moral and Political Thought of Freud*. Professor Abramson is also the recipient of numerous academic awards and fellowships, including the American Bar Association Citation of Merit for *We, the Jury*, the National Endowment for Humanities Constitutional Fellowship and the Woodrow Wilson Honorary Fellowship.

Richard Goldstone is a justice of the Constitutional Court of South Africa, a position he has held since 1994. He earned his B.A. LL.B. from the University of the Witwatersrand. In 1980 he was made judge of the Transvaal Supreme Court and then in 1989 he was appointed judge of the Appellate Division

of the Supreme Court. From 1991 to 1994, he served as chairperson of the Commission of Inquiry regarding Public Violence and Intimidation, which came to be known as the Goldstone Commission. Following his work with the Commission until 1996 he served as the chief prosecutor of the United Nations International Criminal Tribunals for the former Yugoslavia and Rwanda. From August 1999 to December 2001, he served as chairperson of the International Independent Inquiry on Kosovo and was appointed chairperson of the International Task Force on Terrorism established by the International Bar Association. Goldstone is the recipient of many local and international awards, including the International Human Rights Award of the American Bar Association (1994) and Honorary Doctorates of Law from many Universities. He is a foreign member of the American Academy of Arts and Sciences, served as faculty of the Salzburg Seminars in 1996, and has been a visiting professor at various universities.

Guest Faculty

Hans Corell has served as under-secretary-general for legal affairs and the legal counsel of the United Nations since March 1994. In this capacity, he is head of the Office of Legal Affairs in the U.N. Secretariat. Before joining the U.N., Corell,—a national of Sweden—was ambassador and under-secretary for legal and consular affairs in Sweden's Ministry of Foreign Affairs from 1984. He served as under-secretary for legal affairs in the Ministry of Justice from 1981 to 1994; as assistant under-secretary from 1979 to 1981; and as legal adviser in 1972 and from 1974 to 1979. Corell also served as a member of the Svea Court of Appeal in 1973; as associate judge of appeal in 1974; and as judge of appeal in 1980. From 1985 through his current appointment, he was a member Sweden's delegation at the U.N. General Assembly. Corell was a member of the Permanent Court of Arbitration at The Hague from 1990 to 1994. He has been a member of various expert committees in Sweden, within the Council of Europe, the Organisation for Economic Cooperation and Development, and the Conference on Security and Cooperation in Europe (CSCE), including the CSCE Moscow Human

Dimension Mechanism to Bosnia and Herzegovina and Croatia, which presented the first proposal for the establishment of an international criminal tribunal for the former Yugoslavia. In 2003, Corell was the head of the United Nations delegation negotiating the Agreement between the U.N. and the Government of Cambodia for the Trial of the Khmer Rouge leaders.

Louise Doswald-Beck is a professor of international law at the Graduate Institute of International Studies and Director of the University Centre for International Humanitarian Law. She was Secretary-General of the International Commission of Jurists (ICJ) until August 2003, a position she held from March 2001. She was responsible for recommending policies and planning the programs of the ICJ, and ensuring their implementation. Previously a lecturer in Law at University College, London and author of numerous works, she joined the International Committee of the Red Cross (ICRC), Geneva in 1987. In 1998 she became head of the Legal Division, with lead responsibility for development of ICRC's policy directions regarding international humanitarian law, human rights law, disarmament, and arms control law. She was instrumental in lobbying for the creation of the International Criminal Court, through the negotiation of the Rome Statute and in particular, the drafting of the Elements of Crimes and the Rules of Procedure. She has worked for the adoption of various instruments of international humanitarian law, including the Ottawa treaty banning anti-personnel landmines, and a pre-emptive treaty banning blinding laser weapons.

Thomas Franck is Murry and Ida Becker Professor of Law Emeritus at New York University School of Law. His research is in the fields of international law, law of international organizations, and foreign relations law. Franck received his B.A. from the University of British Columbia in 1952, his LL.B. from the University of British Columbia in 1953, both his LL.M. in 1954 and his S.J.D. in 1959 from Harvard Law School, and his LL.D. from the University of British Columbia in 1995. His past appointments include Murry and Ida Becker Professor of Law (1962), director of the Center for International Studies (1965), and associate professor

of law (1960). He is the author of many publications, including his most recent book, *The Empowered Self: Law and Society in the Age of Individualism*.

Anthony M. Kennedy was appointed to the United States Court of Appeals for the Ninth Circuit in 1975. President Reagan nominated him as an associate justice of the Supreme Court, and he took his seat February 18, 1988. Kennedy received his B.A. from Stanford University and the London School of Economics, and his LL.B. from Harvard Law School. He was in private practice in San Francisco, California from 1961–1963, as well as in Sacramento, California from 1963–1975. From 1965 to 1988, he was a Professor of Constitutional Law at the McGeorge School of Law, University of the Pacific. He has served in numerous positions during his career, including a member of the California Army National Guard in 1961, the board of the Federal Judicial Center from 1987–1988, and two committees of the Judicial Conference of the United States: the Advisory Panel on Financial Disclosure Reports and Judicial Activities, subsequently renamed the Advisory Committee on Codes of Conduct, from 1979–1987, and the Committee on Pacific Territories from 1979–1990, which he chaired from 1982–1990.

Gerhard Loibl is the chair for international and European law at the Diplomatic Academy of Vienna and is associate professor at the University of Vienna. He is also a visiting professor at the University of London; chairman of the Water Resources Committee of the International Law Association; and a consultant to the Federal Ministry of Foreign Affairs and the Federal Ministry for the Environment. A graduate of the Universities of Vienna and Cambridge, Loibl has served as secretary of the President of the United Nations Conference on the Law of Treaties between States and international organizations or between international organizations and as director for International Affairs at the Ministry for the Environment. As a member of the Austrian delegation in numerous bilateral and multilateral negotiations since 1986 he participated in the negotiations, *inter alia*, of the United Nations Conference

on Environment and Development; the Kyoto Protocol; the Cartagena Protocol; and the Stockholm Convention on Persistent Organic Pollutants. He is editor-in-chief of the *Austrian Review of International and European Law* and his publications cover a broad area of international and European law.

Rapporteurs

Linda E. Carter is a Professor of Law on the faculty of the University of the Pacific, McGeorge School of Law, Sacramento, California. In 2002, she received the University's Eberhardt Teacher/Scholar award. Prior to joining the McGeorge faculty, Carter litigated civil and criminal cases. From 1978 to 1981, she was a trial attorney in the honors program of the Civil Rights Division of the United States Department of Justice in Washington, D.C., where she litigated voting, housing, and education discrimination cases. From 1981–1985, she worked for the Legal Defender Association in Salt Lake City, Utah, where she represented indigent criminal defendants on misdemeanor and felony charges. Carter has authored articles and is the co-author of a forthcoming book on capital punishment law in the United States. Her current research area is the use of treaty rights in capital cases.

Gregory S. Weber is a professor of law at the University of the Pacific, McGeorge School of Law, Sacramento, CA. He is also a part-time mediator with the Center for Collaborative Policy, a joint project of California State University, Sacramento, and McGeorge. As an environmental law advisor, he has studied forestry disputes in Mexico for the World Wildlife Fund and in Canada for the Forest Stewardship Council (FSC). Currently, he is leading a project to revise the FSC dispute resolution protocol, which he wrote while on academic sabbatical in Oaxaca, Mexico. Before joining the McGeorge faculty, he clerked for Justice Edmond Burke, Alaska Supreme Court, practiced with a leading California water resources law firm, and was a senior attorney for the California Court of Appeal, Third District, in Sacramento. He is a co-founder of the *California Water Law and Policy Reporter* and has co-authored two books and a half-dozen law review articles.

Center Description and Contact Information

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