



This is an excerpt from the report of the 2004 Brandeis Institute for International Judges. For the full text, and for other excerpts of this and all BIIJ reports, see www.brandeis.edu/ethics/internationaljustice

The Responsibilities and Challenges of Judging

While international judges serve in institutions with wide jurisdictions and a unique role to play in world affairs, many of the challenges that they face as judges—or as “moral agents,” to use the terminology of one faculty member—are the same as those faced by domestic judges. Participants were asked to evaluate, using their own experiences in international courts, the following recommendations for responsible judging identified by two legal scholars:

- The judge should try to take the perspective of all parties before the court prior to reaching a decision.
- The judge should try to remain open to the newness of each case even if it resembles previous ones.
- The judge should not disguise how he or she actually reached the decision, and should explain the decision not only through post hoc justifications but also with reference to the intuitions and reasons for selecting one principled justification over other possible ones.
- The judge should confront the difficulty of rejecting the arguments of a party by trying to develop reasons that would persuade that party or explain the result in terms that the party would concede are fair.
- The judge should acknowledge what it feels like to have power over the lives of others in the act of judgment.¹

The statutes of all international courts state generally that only persons of the highest moral character and integrity will be appointed or elected to the bench. Such statements fail to articulate, however,

the content of these qualities. BIIJ participants had a lively debate about what an international judge should be like and how their personal models compared to the recommendations above.

Some participants criticized the recommendation to take the perspective of all parties before the court. They argued that this required judges to open themselves up to subjectivities that may, in the end, make an objective judgment difficult. It was asked whether being compassionate destroys the neutrality of a judge and whether emotion and reason can coexist during the act of judging. It was pointed out that while judges should, indeed, be willing to consider all points of view, this does not mean that they come into the process with no preconceptions of their own. No one can escape these. A good judge, it was observed, should be able to recognize his or her own preconceptions, listen to defendants and witnesses with compassion, and then stand back to consider the situation with dispassionate evaluation and reasoning. This is due process and will result in a fair trial.

The recommendation that judges not disguise how they reach decisions was also discussed. While written decisions may reflect the reasoning of the bench, they usually do not include the “intuitions” that come into play in the process. Participants felt that the description, or indeed the consideration, of such subjective feelings might compromise the legitimacy of the judgment. Judges are acutely aware of working in a domain where the *reality* and *appearance* of impartiality are tightly interlinked. If talk of intuitive processes leads to a questioning of the latter, the entire judicial process might be undermined.



One participant brought up the particular difficulty of serving on international criminal courts. While judges strive to retain impartiality at all costs, they are also called upon to judge crimes that have been widely condemned as heinous. It becomes even harder, in such a situation, to take the perspective of all parties before the court and to judge fairly.

In response to the recommendations that judges approach each case as new and produce decisions that are understandable to all parties, participants noted that obstacles to achieving these goals may be imposed from the outside. For example, courts may be encouraged to “bundle” similar cases in order to move more quickly through a large caseload. Some international judges may also be under pressure from the United Nations to streamline the judicial process in order to meet deadlines of the Security Council. This may include the shortening of opinions, which may ultimately produce results less satisfactory to parties before the court as well as less helpful to the development of international law.

The recommendation that judges acknowledge the power their judgments hold over the lives of those before the court was met with some consternation. Courts that judge disputes between states may feel this responsibility less than those that judge the actions of individuals. One participant claimed “I have not made peace with the fact there are winners and losers in criminal cases.” Yet, if the recommendation to produce decisions that satisfy all parties is met, then all, in theory, would be winners. Perhaps, it was suggested, this is what real justice would look like.

Participants pointed out that independence was missing from the six recommendations for responsible judging. Yet this is a perennial concern for judges serving at all judicial levels, from the most local courts to transnational ones. Judges at the institute had the opportunity to comment on the draft “Burgh House Principles on the Independence of the International Judiciary,” developed by a study group composed of practitioners and law professors

under the sponsorship of the International Law Association and PICT.² The assembled judges felt that the following topics could benefit from further examination:

- freedom from interference and political pressures
- the entitlement, or some would prefer “duty,” to maintain the confidentiality of deliberations
- terms of reelection or, alternatively, the banning of reelection
- privileges and immunities for international judges
- security issues for judges and their families
- budgetary control over courts
- extra-judicial activity
- post-service limitations

It was noted that the development of general principles pertaining to independence are important and may be useful to the international judiciary both as guidelines and as “moral rules.” Yet skepticism remained among some participants as to the applicability of such principles across all international courts, each with its own mandate, jurisdiction, supervising institution, and funding source. Mackenzie of PICT informed judges that these principles have been made available on the internet so that they can receive exposure and feedback before being finalized. She also stressed that they were intended to be *general* principles that each court could adapt to its own specific circumstances.

Another important dimension of judging was raised for discussion: the public scrutiny that judges receive as “moral agents.” While all public servants experience such scrutiny, the profession of judging, associated with high moral character and integrity, seems to receive it to an unusually high degree. Many participants felt ambivalent about being placed “in the spotlight.” If judges exhibit blatantly racist or sexist behavior, for example, or have personal failings that might influence the practice of their profession, then the public has the right to know. But too often, other aspects of a judge’s life become public knowledge, and sometime those that are a clear violation of individual privacy, such as sexual preference. In general, participants agreed that in



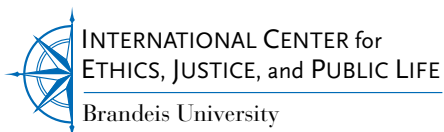
accepting the position of international judge, they had opened themselves up to close, and sometimes unwanted, public supervision. Paradoxically, the same subjectivity that judges are recommended to exercise in their profession may lead to increased scrutiny and possible accusations of bias.³

Notes

¹ C.f. Martha Minow and Elizabeth Spelman, “On Retaining One’s Humanity,” reprinted in Kenneth Winston, ed., *The Responsible Judge: Readings in Judicial Ethics* (1993).

² For the full text of the principles, see http://www.pict-pcti.org/activities/ILA_study_grp.html.

³ The relation between a judges’ high profile position and his or her opportunity to exert positive public influence is examined in the section of this report entitled “Topics in Ethical Practice.”



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