

Brandeis Institute  
for International Judges

# BIJ



2007

The International Center  
for Ethics, Justice, and Public Life  
Brandeis University

Independence and  
Interdependence:  
The Delicate Balance  
of International Justice

Including Topics  
in Ethical Practice



# Brandeis University

## Brandeis Institute for International Judges 2007

Independence and Interdependence:  
The Delicate Balance of  
International Justice

Including *Topics in Ethical Practice*

The International Center for Ethics,  
Justice, and Public Life

Brandeis University  
Waltham, Massachusetts



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Participating for the first time in the Brandeis Institute for International Judges, convened for the fifth time from 23 to 28 July 2007 in the historic surroundings of Bretton Woods, New Hampshire, I was struck from the outset by two aspects relating to the group of 15 judges who attended. First, I noticed that I happened to know a good number of them rather well, our paths having crossed, sometimes frequently, in the course of our respective careers. And I think that this must be the case for the other participants as well. Secondly, the newcomers to international justice among the participants, either because of the newness of their bench or because they came from outside international legal circles, were quick to integrate intellectually into the group dynamics and very eager to learn from the experiences of others.

The exchanges were intense, often thought-provoking, driving us to clarify further our ideas and to seek convergence amid diversity, at different levels of analysis. The highly convivial atmosphere that prevailed throughout encouraged debate and the establishment of closer and hopefully more durable bonds among participants.



**The White Mountains of New Hampshire**

The general theme of the institute was “Independence and Interdependence: The Delicate Balance of International Justice.” It entailed the examination of the place of international courts and tribunals within their larger environment, and more particularly several types of relations that they are bound to have or maintain in this environment:

- The vertical relations with the bodies that established them, or the political organs of the organization to which they also belong, that elect their judges and approve their budgets – relations that carry with them the risk of interference and are hence a threat to independence, against which antidotes do however exist;
- The horizontal relations with other international courts and tribunals, not as a matter of obligation (as they are not formally linked together), but of cross-learning and cross-fertilization through precedents and best practices; and
- Finally, at a further remove, relations with the media and through them with public opinion, which make their work and decisions better and more widely understood and thus enhance their social acceptability.

These relations, as well as the ensuing problems and possible solutions, though largely common to all international courts and tribunals, differ in shape, content, and degree of intensity from one judicial organ to another. This is because we do not have on the international level, as in domestic law, an integrated judicial system, but rather an amalgam of judicial and quasi-judicial organs, established by different international bodies or groups of states, in different circumstances, to respond to different needs and demands. Consequently, these organs were structured in different ways and given different mandates, with nothing to relate them formally to one another.

What then brings them together and enables them to act as a common front in the face of threats to their independence? In order to answer this question, we have to identify what they have in common, not so much in terms of common problems, but rather of common denominators that are in the make-up of their “genetic code.”

Foremost among these is a shared concept of the international judicial function. This concept has developed slowly and rather imperceptibly, through the jurisprudence of the World Court (a term covering both the Permanent Court of International Justice and the International Court of Justice), being the only permanent court of general international law over most of its more than 80 years of existence. It is not exactly the same as the concept of judicial function in and of itself. Of course, there is something generic in the judicial function that can be found in domestic as well as in international law. What makes the difference is the international environment, particularly the fact that there is no centralization of power on the international level – no international legislature nor an international executive in general international law (only to some extent in special regimes).

The great achievement of the World Court during the years from the 1920s up until the present day is its constant fine-tuning, adjusting the generic concept of judicial function to the conditions of this environment and identifying its specific contours and limits: how to act as an independent judicial organ, while drawing its jurisdiction from the consent of the parties, and identifying what is compatible or incompatible with this posture. That was also particularly clear in the manner in which the Court drew the configuration and modalities of its new advisory function: how to give authoritative legal opinions to political organs in what were sometimes highly political matters, while still preserving its independence vis-à-vis these organs and also preserving the judicial character of the process.

For the concept of international judicial function, we thus have a profile, or a model for a consistent pattern of conduct. But each court or tribunal has a different mandate and has to carry out its activities within the specific bounds of its mandate. And here intervenes a second element that helps bring these organs together. It is what can be called the “epistemic community” of international justice, composed of the persons who are the usual suspects or actors on the international adjudicative scene. If we consider judges, counsel, and those who have served as commentators on the ensemble of international courts and tribunals, we will find that it is a fairly limited number of individuals. Many have appeared at different times in different capacities and in different fora. This limited community adheres to the same epistemology, i.e., it shares roughly the same understanding of the concept of the international judicial function, and it deals with or adjusts to it according to the variable geometry of the mandates of the different tribunals.

This brings me back to my initial remarks. The judges participating in the fifth Brandeis Institute acted, whether consciously or unconsciously, as members or new entrants in this epistemic community, and the session of the institute itself was one further step in the consolidation of this community and in the clarification of the concept of the international judicial function.

*Georges Abi-Saab*

*Member and former chairman of the Appellate  
Body of the World Trade Organization*

*Emeritus professor of international law at the  
Graduate Institute of International Studies  
in Geneva*

*Former ad hoc judge on the International Court  
of Justice*

*Former appeals judge at the International Criminal  
Tribunal for the former Yugoslavia*

The fifth Brandeis Institute for International Judges (BIJ) was held from 23 to 28 July 2007 in Bretton Woods, New Hampshire, USA. BIJ 2007 brought together 15 judges from nine international courts and tribunals to discuss issues relevant to their profession and institutions. BIJ organizers were particularly pleased to be joined by judges from the Caribbean Court of Justice, established in 2005, and the African Court of Human and Peoples' Rights, whose first bench was elected in 2006. The institute was also enriched by the participation for the first time of two well-established judicial institutions, the International Court of Justice and the World Trade Organization Appellate Body.

The aim of the BIJ is to provide a space and time for judges sitting on international courts and tribunals to meet and reflect, discuss issues of mutual interest, generate ideas that enrich their work, and move toward developing policies that strengthen their standing. Each institute is the subject of a report that summarizes the content of its sessions and the ensuing discussions that take place among participants.<sup>1</sup>

The institute theme for 2007 was "Independence and Interdependence: the Delicate Balance of International Justice." Each of the institute's sessions explored, from various perspectives, the ways in which international judges and their institutions are necessarily connected to outside entities and the challenges they sometimes face in remaining independent in their judicial function.

The first session, entitled "International Courts and their Relationships: the Challenges of Interdependence," was led by Stephen Schwebel, former judge and president of the International Court of Justice (ICJ). Taking into consideration judicial cases and difficult situations that have arisen in courts over the years, participants reflected on the extent to which their institutions feel a need to defer to the bodies that constituted

them (or to states parties), the effect of such relationships on the policies and practices of their courts, and whether such relationships have consequences for their independence as judges.

Institute co-directors Richard Goldstone, retired justice of the Constitutional Court of South Africa, and Linda Carter, professor at McGeorge School of Law, led the second session, entitled "The Role of Precedent in the Decision Making of International Judges." Judges discussed the issue of how international courts take into account the jurisprudence of other international courts and whether there is a need for some regulation of, or perhaps a less formal understanding about, the precedential value of decisions among courts dealing with or interpreting the same legal rule or principle.

The third session represented an innovation in the format of the BIJ. Participants divided into break-out groups with other judges serving on similar kinds of courts in order to address topics of particular relevance to their institutions.

The question of ethics in the judiciary was addressed in the fourth session, "Integrity and Independence: the Shaping of the Judicial Persona." Led by Gil Carlos Rodríguez Iglesias, professor of law at the Universidad Complutense de Madrid and former judge and president of the European Court of Justice, this session addressed questions of independence, impartiality, and integrity across international courts.

The important topic of how international courts deal with the media was explored with Edward Lazarus, who consults regularly with U.S. courts on their public image and how it can be enhanced. In "International Courts and the Media: the Dilemma of Public Scrutiny," participants were asked to think about how their courts currently interact with different organs of the media and how public perceptions can impact the effectiveness of international judicial work.

The BIIJ concluded with a session on the forthcoming book written by institute convenors Daniel Terris and Leigh Swigart, in collaboration with Cesare P. R. Romano. *The International Judge: An Introduction to the Men and Women Who Decide the World's Cases* was inspired largely by Brandeis University's work with international judges through the BIIJ and related programming. *The International Judge* adopted a multidisciplinary perspective in order to paint a broad yet detailed portrait of the international judiciary and the institutions in which judges serve.

The BIIJ 2007 combined formal sessions with the natural network building that takes place outside of the meeting room, through leisurely walks and meals among judges, always with the beautiful White Mountains of New Hampshire in the background. The history of the institute venue, the Mt. Washington Hotel, served to intensify the international flavor of the event: in 1944, delegates from 44 nations gathered in this same hotel to establish the World Bank and International Monetary Fund.

### **Participants**

#### *African Court of Human and Peoples' Rights (ACHPR)*

- Bernard Ngoepe
- Fatsah Ougergouz

#### *Caribbean Court of Justice (CCJ)*

- Désirée Bernard

#### *European Court of Human Rights (ECHR)*

- John Hedigan
- Nina Vajić

#### *International Court of Justice (ICJ)*

- Hisashi Owada
- Peter Tomka

#### *International Criminal Court (ICC)*

- Navanethem Pillay

#### *International Criminal Tribunal for the former Yugoslavia (ICTY)*

- Carmel Agius
- Fausto Pocar

#### *International Criminal Tribunal for Rwanda (ICTR)*

- Mehmet Güney
- Khalida Rashid Khan

#### *Special Court for Sierra Leone (SCSL)*

- George Gelaga King

#### *World Trade Organization Appellate Body (WTO AB)*

- Georges Abi-Saab
- Giorgio Sacerdoti

### **Directors**

- Richard Goldstone, retired Justice of the Constitutional Court of South Africa and former Chief Prosecutor of the International Criminal Tribunal for the former Yugoslavia
- Linda Carter, Professor, McGeorge School of Law, University of the Pacific

### **Presenters**

- Stephen Schwebel, former Judge and President of the International Court of Justice
- Gil Carlos Rodríguez Iglesias, Director of the Real Instituto Elcano de Estudios Internacionales y Estratégicos, Professor at the Universidad Complutense in Madrid, and former Judge and President of the European Court of Justice
- Edward Lazarus, Lazarus Strategic Services

### **Convenors**

- Daniel Terris, Director, International Center for Ethics, Justice, and Public Life, Brandeis University
- Leigh Swigart, Director of Programs in International Justice and Society, International Center for Ethics, Justice, and Public Life, Brandeis University

### **Staff and rapporteurs**

- Stéphanie Cartier, Adjunct Professor, Fordham University
- Christopher Moore, Communications Specialist, International Center for Ethics, Justice, and Public Life, Brandeis University
- Andrew Ginsberg, Brandeis University
- Leila Alciere, Brandeis University
- David Drayton, Brandeis University

## Key Institute Themes

The Brandeis Institute for International Judges 2007 offered sessions on a number of topics, each chosen for its pertinence to the work of those who serve on the benches of international courts and tribunals. As in past years, participants were able to engage in long discussions on each topic and share their perspectives and experiences with fellow judges. Throughout these discussions, four principal themes emerged:

- Balancing independence and interdependence in the international justice system
- The influence of precedent in international courts
- International courts and their interface with the public
- The development of the international judiciary as a distinct professional group

The following summarizes the discussions that took place in Bretton Woods around these themes.

### **Balancing independence and interdependence in the international justice system**

International courts and tribunals have been established in different ways and have different status. Some have been conceived as organs of international organizations, like the ICJ,



**Participants convene for a session at the BIJ.**

which is the principal judicial organ of the United Nations, or the ACHPR, which is an organ of the African Union. Others have been established by an organ of an international organization, like the two ad hoc criminal tribunals that were established by the Security Council and are thus its subsidiary bodies. Other international courts do not form part of the institutional structure of any international organization. In some instances, a court has been established by agreement between the United Nations and the government of a particular country (SCSL). In other cases, the courts have been established by states parties to an international convention or treaty that provides for the creation of a judicial institution (like the ICC, ITLOS, ECHR, WTO AB, or CCJ). BIJ participants exchanged their views on the nature of the relationship of courts with other organs of their parent organizations or with the assembly (or meeting) of the states parties to an establishing convention.

Just as national judiciaries are in some respects accountable to a legislative body, minister of justice, or other entities, so are international courts and tribunals accountable to the bodies that established them. While there was little disagreement about this position among participants, it was more difficult to agree about the extent to which such accountability might create problems of independence for a court. Three areas arose as particularly sensitive in this regard – re-election procedures for judges, courts' dependence on parent organizations in budgetary matters, and the demand addressed to the two ad hoc criminal tribunals to complete their work.

It was noted that political as well as other considerations play a certain role in the elections of international judges, just as they do in election campaigns to other organs or bodies of international organizations. For



example, support of a nation's judicial candidate may become a matter of vote trading among diplomatic missions seeking spots for their own citizens in other international courts, or in a variety of high-profile positions in international organizations such as the UN. Election to the bench of the ICJ or an ad hoc criminal tribunal may also require aggressive "campaigning" by nominees and strategic meetings with various UN ambassadors, activities that are sometimes considered inappropriate for judges.

The issue of independence of judges may, and perhaps should, be viewed also in the context of the possible re-election of a judge. One participant went so far as to characterize re-election procedures as "pernicious." Sitting judges have an individual record of decision making that, in most courts, is accessible to the public and can be consulted at re-election time.<sup>2</sup> If a judge has ruled against his or her state, or otherwise written a decision that is displeasing to a government, how might such a record affect chances of nomination for a second term? Might judges wishing to continue on the bench modify, or be perceived to modify, their decisions toward the end of a first term so as to become more "re-electable"? It was also noted that in some courts sizable portions of the bench tend to stand for re-election at the same time, so that many judges are necessarily distracted from their judicial work by "campaigning" activities.

Although BIIJ participants believe that most international judges do not alter their conduct in order to stay on the bench, the threat that re-election pressures pose to their judicial independence – or at least its appearance – is too great to be ignored. One judge who had served two terms on a European court noted that when first appointed by his country, he was in favor of re-election. But after having experienced the re-election process firsthand, he became adamantly opposed to the practice.

This judge, like many others at the institute, recommended two possible correctives to current election practices: 1) that international judges be elected for a single non-renewable term of considerable length, or 2) that judges be given a lifetime tenure with a mandatory retirement age that would allow them to reintegrate into the job market later on if they so desire. Either policy would eliminate the potential pressure that international judges might feel at re-election time and consequently serve to shore up public confidence in their institutions more generally. The Caribbean Court of Justice has opted for a mandatory retirement age, with the possibility of an extension to a maximum of three years, which lies within the discretion of the appointing body, and only during the evolutionary period of the Court.

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Participants identified another potential threat to the independence of their courts, this time stemming from outside control of their budgetary matters. International courts depend upon their parent bodies for an operating budget, but the funds they dispense do not necessarily conform to the courts' needs. This can, in turn, affect the functioning of courts in a way that can compromise their efficiency, the morale of their judges, or even their very missions. Judges at the ECHR, for example, do not have a retirement pension, as the Council of Europe has not agreed to provide them this standard and expected benefit. This issue remains at the back of judges' minds



**BIJ 2007 judges at the Mount Washington Resort in Bretton Woods, New Hampshire**

throughout their judicial terms and creates a climate of insecurity on the ECHR bench. Requests made by the ECHR for financing are also sometimes rejected by the Council of Europe, reported one participant. The budget of the ICJ is similarly exposed to scrutiny by administrative and budgetary organs at the United Nations, and successive court presidents have had to point out the insufficiency of resources at their court's disposal, usually to no avail. Financial issues at the United Nations are decided by a committee that is often influenced by major state contributors to the organization. Thus, as in election procedures, politics intrudes into the basic administration of judicial institutions.

In the context of criminal tribunals, a shortage of funding can have an even more direct impact on justice. Tribunals may not have the funds to recruit the number of judges needed to cope with heavy caseloads. The result may be delayed trials and long pre-trial detention of indictees. Budgetary constraints may thus compromise the basic human rights standards that tribunals are attempting to institute through their work. One criminal court judge observed that politics and budgetary issues may be tightly linked. The United States, for example, has periodically withheld its dues in an attempt to effect change

in the United Nations. In the late 1990s, the resulting financial shortfall had a direct impact on the ad hoc tribunals' operations when their own budgets were frozen.

Among all the courts present at the BIJ, the Caribbean Court of Justice seems to have found the most innovative approach to remaining independent of an establishing institution on budgetary issues. A trust fund was created to support the court, which is administered by a board of trustees. This board is responsible for funding the court but has no influence in the actual administration of the court. Thus, the CCJ does not find itself in the position of asking for funds from a body that oversees its operations and may demand certain kinds of accountability in return for adequate financial support.

The UN ad hoc criminal tribunals currently find themselves in an awkward push-and-pull between independence and interdependence in relation to the United Nations, with the implementation of a "completion strategy" for their work. Both the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda are operating under deadlines, endorsed by the Security Council, that anticipate the completion of all their trials by 2008 and their appeals procedures by 2010. While these strategies are in response to the length and cost of judicial procedures at the tribunals – and perhaps the public's reaction to them – judges often feel that working under such deadlines may place undue pressure on the ability to dispense the best justice.

Yet the time pressure placed on the ad hoc tribunals has motivated judges to find ways and means of accomplishing their principal task of bringing to justice those responsible for genocide, war crimes, and crimes against humanity. As one criminal judge put it, "The

Security Council induces us to reexamine the way we are operating on a regular basis and to devise new ways that make it possible to complete our work more efficiently.” Another noted, “The completion strategy has brought about many changes that judges had not seen fit to institute before.” These include a greater reliance on judicial notice as well as written evidence over oral testimony. Yet another criminal judge added that the length of trials at his court disturbed him – he considered that their time frame may have violated one of the principles of a fair trial, and extended pre-trial detention for the accused also may have violated basic human rights standards. He applauds the completion strategy for his court, if only because it ensures respect for these standards.

It was noted that the completion strategies being pursued at the ad hoc tribunals may appear as an undue form of pressure by their parent organization. It should be up to judges, some argue, to determine independently the appropriate pace of justice in the cases they are trying. In the meantime, the ad hoc tribunals are doing their best to abide by the deadlines that have been put in place. Even if the judges feel that the completion strategies may impact judicial independence, there are some benefits to those on trial, and the time constraints are now part of the operating framework for the courts.

Participants acknowledged that there are indeed potential risks, mostly of an indirect nature, arising from the relationship between courts and the bodies that created them. But they also agreed that such risks affect only the administration and judicial policy of their courts. The decision making of judges and the outcome of the cases before them remain immune, they believe, from the pressures that inevitably come with interdependence.

Overall, BIIJ participants concurred that while there is necessarily some degree of influence exerted by parent organizations over the courts they established – in terms of political, monetary, or administrative controls – such influence is impossible to measure and quantify. More importantly, the question of whether this influence detracts from the judicial quality of the courts must remain just that – a question. Once again, this uncertainty underscores the critical place that individuals play in the courts. As one participant pointed out, “The reality is that the independence of judicial institutions really depends, in the end, on the quality of the people who make up those institutions.”

### **The influence of precedent in international courts**

If decision making by judges of a particular court is largely invulnerable to the influence of its parent institution, what is the impact of the work of judges of other international courts on this critical function? What is, or should be, the relevance of jurisprudence from courts deciding similar issues? BIIJ participants explored this subject by considering the use of precedence in international courts.



**Désirée Bernard of the Caribbean Court of Justice and George Gelaga King of the Special Court for Sierra Leone.**

The so-called “proliferation” of international courts and tribunals over the last decade has been much discussed in legal circles, with many questioning its impact on the international legal regime. Institute participants seemed already in agreement, however, that the increasing number of international judicial institutions is more desirable than undesirable, as it will lead to a more robust development of law and provide more diversified venues for the adjudication of issues. Participants did acknowledge that international law risks becoming fragmented through the multiplication of international courts and pointed out some of the techniques that have traditionally been used by judges to avoid conflicts of jurisprudence in their decisions. These include distinguishing cases that are factually different and the exercise of judicial restraint.

Some participants questioned whether these techniques could work indefinitely, however. Might international courts reach a point where they make unwarranted distinctions or restrain themselves excessively in their decisions, simply to avoid conflicts? In this case, should there be another tool at the disposal of international judges to resolve conflicts? There was no general agreement on this issue, although most participants did not believe that the creation of a formal hierarchy among international courts was either advisable or possible.

The discussion of this subject was particularly timely, given the ICJ’s 2007 judgment in the *Case Concerning the Application of the Convention on the Prevention and Punishment*

*of the Crime of Genocide*.<sup>3</sup> The bench of the ICJ was faced with many precedents on the issues that they had to consider in their decision, primarily from the ICTY but also from the ICTR, in regard to the definition of and liability for genocide. The ICJ avoided a potential conflict by agreeing with the ICTY that genocide had occurred in Srebrenica, a point that further relied heavily on the factual and legal findings of the tribunal. However, the ICJ found that Serbia held no state liability in the direct commission of genocide (although it was responsible for failure to prevent and punish genocide) because Serbia did not have “effective control” over the Bosnian Serb perpetrators of the atrocities. The use of the “effective control” test put the ICJ at odds with a decision from the ICTY Appeals Chamber that had used an “overall control” test.<sup>4</sup> For the most part, the ICJ distinguished the ICTY decision as deciding a different legal issue. The ICJ noted that the issue in the case before them was one of state responsibility while the issue before the ICTY was whether a conflict was international. They also distinguished the ICTY decision on the basis of the nature of the cases. The case before the ICJ involved state parties while the case before the ICTY was a prosecution of an individual. However, to the extent that the ICTY decision had concluded that the “overall control” test was applicable to the determination of state responsibility, the ICJ indicated its disagreement with that finding. In an exercise of judicial restraint, the ICJ refrained from deciding whether the effective control test or the overall control test should be used to determine the international character of a conflict as that issue was not directly before the court.

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**Might international courts reach a point where they make unwarranted distinctions or restrain themselves excessively in their decisions, simply to avoid conflicts?**

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Participants discussed some of the implications of the recent ICJ decision. In general, participants thought that the ICJ was wise to distinguish issues, applying the effective control test with respect only to state responsibility

and leaving open the issue of the appropriate test for the determination of whether a conflict is international or non-international. This distinction was viewed as a way in which the two decisions could be reconciled. One participant commended the ICJ for its perspective on the jurisprudence of the ICTY: “In the Bosnian case, it is the first time that the ICJ took the bull by the horns and referred largely to the decision of another tribunal. It also took judicial notice of some of its findings. For the first time, the ICJ showed that it is aware of other courts!” It was noted, however, that the ICJ failed to refer to an important decision by the ICTR on genocide and the involvement of a head of state.<sup>5</sup>

Other conflicts in legal thinking have, of course, occurred in the international judicial system. There was a potential conflict, for example, in the *“Bosphorus Airways” v. Ireland* case between decisions of the ECJ and the ECHR regarding human rights restrictions imposed by an EC regulation and its conformity with human rights obligations in the ECHR system.<sup>6</sup> The question of “forum-shopping” was also raised in relation to the potential it creates for conflicting jurisprudence. A human rights judge spoke of being disturbed when the UN Human Rights Committee decides differently from his court in a particular case, believing that judicial restraint should be exercised more generally when different outcomes might create legal uncertainty about international human rights protection.

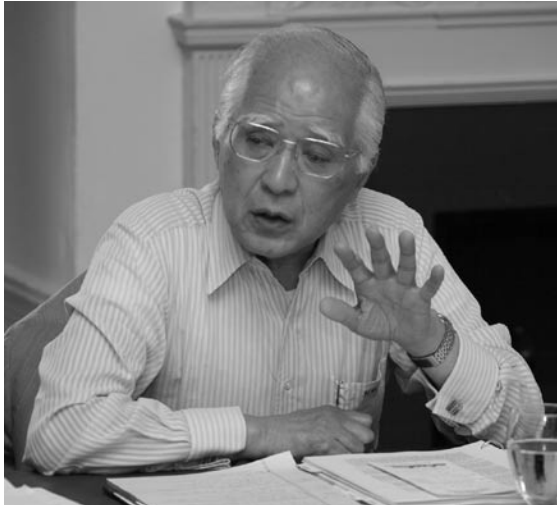
The potential for conflict in legal thinking has brought about several attempts at harmonization. The statute of the Special Court for Sierra Leone specifies that the court “shall be guided by the decisions” of the International Criminal Tribunals for the former Yugoslavia and Rwanda.<sup>7</sup> Participants were surprised to note that this is the only international court to create such correlations at its inception. As

one judge noted, “When creating courts, there should be a disposition allowing courts to look at each others’ jurisprudence.” However, certain patterns of judicial reference have developed, despite the absence of formal provisions requiring it. The ECJ, for example, regularly refers to the findings of the ECHR when it considers cases involving human rights issues. The ICTY and ICTR share an appeals chamber, which creates a unified body of jurisprudence. Avoidance of conflict might also be necessary at the internal level of a court. The ECHR, with its broad geographic jurisdiction of 47 nations, has found it necessary to ensure consistency in its own jurisprudence. It thus has a unit charged specifically with harmonizing the decisions produced by the five different chambers of the court. Some BIIJ participants wondered if a body could similarly be established to harmonize jurisprudence across courts in the international judicial system.

But are such attempts to promote interdependence in legal reasoning enough? One judge, a veteran of several international courts, observed, “Rules of interpretation to soften conflicts, and respect for each other’s decisions, are approaches that do not go to the heart of the matter.” The heart, several agreed, is the need to maintain consistency and coherence in the law and universality in applying the law. BIIJ participants generally agreed that conflicting jurisprudence can indeed raise problems in the international system. But they also concurred that the problems are not yet serious enough to require immediate attention. This, then, is a challenge that the international legal regime will likely face in the future.

### **International courts and tribunals: interfacing with the public**

In an omnipresent media environment, international judges should consider the role they play in communicating their work and decisions to the public.



**Hisashi Owada of the International Court of Justice**

That was the message of the session “International Courts and the Media: The Dilemma of Public Scrutiny,” presented by Edward Lazarus, president of Lazarus Strategic Services. Lazarus has conducted extensive public opinion research on the civil justice system in the United States and provides strategic, political, and consulting services to the legal community.

In his introductory remarks, Lazarus outlined the distinct layers of public opinion that international judges face. First is the less than one percent of the general population that is familiar with international law. Then there are the opinion leaders and media who make up about 10 percent of international judges’ audience, followed by the informed public representing about 15 percent. The remaining 75 percent are “real people,” who worry about basic life needs and are less informed about the work of democratic institutions.

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**Courts often protect what is unpopular and must decide how to face the resulting fallout.**

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Criticism of those institutions is appropriate from any audience, but if dissatisfaction is high enough the system changes, Lazarus said. Courts often protect what is unpopular and must decide how to face the resulting fallout:

Courts find themselves in the situation where, because they’ve done the right thing, they stand up to severe criticism publicly. How do you deal with that paradox? If you ignore it entirely, you lose your legitimacy. If you are too responsive, then it could start to influence the way you do your work.

In the discussion that followed, one participant noted that judges do not and should not go public in defense of their decisions. Lazarus responded that courts can still structure their responses in such a way as to communicate with the public, for example through summaries of their judgments or public information offices that are accustomed to reaching a larger audience.

Another way that courts can communicate their work is through technology, as one judge outlined. The European Court of Human Rights has recently started offering webcasts of hearings, providing access and transparency that will serve the public interest:

Ninety-nine percent of people in the Council of Europe never see court in session. But if it’s online, people anywhere can see the affairs of their country being dealt with. This will have a very educative effect on the countries of the Council of Europe. Also, it’ll make it hard for governments to mislead their people.

Lazarus noted, however, that “real people” will likely not understand the business of the court even if proceedings are offered online. He urged participants to think: “How can I communicate this in a way that’s quickly, simply, commonly understood?” He also advised that each court communicate an overarching principle in its press releases on individual cases.

In the case of the International Criminal Tribunal for Rwanda, the challenge of communicating with the public is magnified by the tribunal’s location in Arusha, Tanzania, far from where the genocide took place. In the early years, the people of Rwanda questioned the effectiveness of the tribunal, said one participant. In response, the tribunal launched an outreach program, establishing an information center in the capital of Rwanda that broadcasts the proceedings on television.

In contrast, the Special Court for Sierra Leone is located in the country in which the crimes under consideration were committed. According to one participant, that court employs a press officer who works with the senior advisor to the trial chamber and the presiding judge. “In controversial decisions, we’ve done our best to enlighten people on why it was decided this way,” said the judge.

Participants also discussed how media interpret proceedings from international courts. Media outlets typically present information to the 75 percent of the public with little knowledge of the courts. But some judges contended that the media do not do a good job of it. As one said:

International courts don’t attract a lot of media except in huge cases. These don’t happen often, so when it does the media aren’t ready for it and don’t handle it well and don’t really know what the international courts are. It can be extremely misleading. The decisions are skewed and misinterpreted.

Judges discussed what they can and should do to educate the media in order to convey an accurate message to the public. Some advocated offering more simple language in their summaries while others cautioned against it. “We can try to put our judgments into simple language, but it’d be very hard to preserve the quality of the legal reasoning,” said one.

One participant argued that judges should not let the media influence the way they work. They should remain strictly independent from media outlets:

I don’t think we should care about the media. You should do what your conscience tells you. Have honesty and integrity with them, and they shouldn’t misinterpret it.

But Lazarus argued for the benefits that would come through *interdependence* with the media and the public more generally. International courts do not operate in a vacuum; they need the support of the public in order for their institutions to maintain legitimacy. Judges were urged to explain the importance of their work in a concrete fashion and to present the court’s statement of purpose in a simple way. Repeat that message again and again and it will stick, he said. “I hope you realize that eventually it does make a difference,” Lazarus said. “It takes a long, persistent effort, but it’s worth it.”

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**International courts do not operate in a vacuum; they need the support of the public in order for their institutions to maintain legitimacy.**

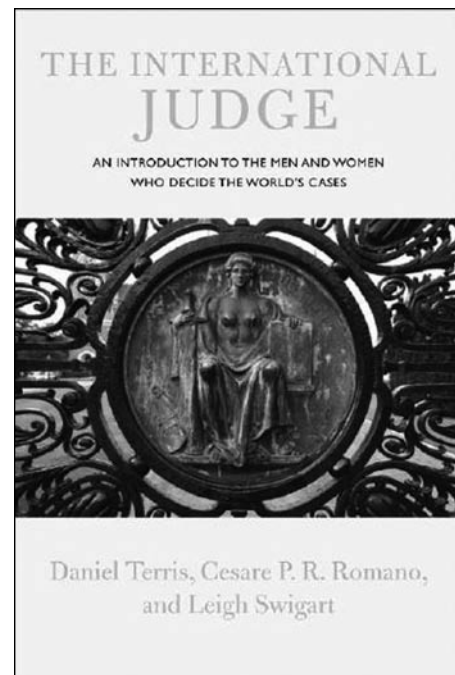
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## **The development of the international judiciary as a distinct professional group**

Over the past two decades, the number of individuals serving as international judges has grown with the rapid development of the international justice system. In addition to the 15 members of the ICJ bench, international judges are now hearing cases and making decisions on a diverse range of issues on the benches of courts and tribunals in Europe, Latin America, and Africa. The judges hail from many countries, reflecting different linguistic, professional, social, and political backgrounds. They have been educated in distinct legal traditions, and sit on courts with widely varying jurisdictions and missions. Despite these apparent differences, judges share a remarkable sense of commonality and shared purpose about what it means to deliver justice in the context of an institution that serves an international purpose, one crossing national boundaries and sometimes spanning continents.

Since 2002, the Brandeis Institute for International Judges has brought together members of the international judiciary for discussion and reflection about their unique work. Those events have shown that international judges are generally animated by a desire to bridge their many differences in the interest of delivering the best justice possible. Their diversity, instead of acting as a weakness, has become a strength, as individuals bring with them to the bench the wide range of skills, backgrounds, and knowledge necessary to tackle the kinds of cases that international courts deal with on a daily basis. As one court president expressed it, members of his bench are able to “start working together and reconcile their differences in order to form a united approach to justice.”

The BIJ has furthermore inspired the researching and writing of a book focused specifically on international judges, by convenors Daniel Terris and Leigh Swigart, in collaboration with Cesare P. R. Romano. *The International Judge: An Introduction to the Men and Women Who Decide the World's Cases*<sup>8</sup> views its subject through the lens not only of law but also those of history, international relations, and anthropology. The result is a portrait of the international judiciary, one broad enough to encompass judges sitting on courts as different as the International Tribunal for the Law of the Sea, the Inter-American Court of Human Rights, and the UN ad hoc criminal tribunals. The portrait also provides details about the views and experiences of the men and women who serve on such benches, drawn from more than 30 in-depth interviews with judges, carried out by the authors.



**The BIJ has inspired the researching and writing of a book focused specifically on international judges, by convenors Daniel Terris and Leigh Swigart, in collaboration with Cesare P. R. Romano.**



Profiles of five judges give the reader an even clearer picture of the professional trajectories, challenges, and perspectives of individuals who serve on international courts and tribunals. Thematic chapters treat a number of pertinent subjects, including the working environment of international judges in courts around the world, the challenge of carrying out work in multiple languages, the necessary but sometimes problematic interdependence that exists between judges and their courts' administration, and issues of politics and ethics in the courts.

Participants at BIIJ 2007 discussed the emergence of a professional identity associated with the international judiciary. They suggested other aspects of the international judiciary that might be explored, such as varying views on the nature of the judicial function among international judges, the differences in outlook that exist between those who serve on part-time and full-time courts, and how the decisions of international courts are implemented.

Some judges questioned the accuracy of separating international judges from their peers who sit on domestic courts, noting that, in many cases, individuals move between the systems. National and international judiciaries are also increasingly inter-connected as a result of the ICC's "complementarity principle" and the necessity that plaintiffs before regional human rights courts must demonstrate that they have first exhausted domestic remedies. Thus, international judges and their institutions should not be looked at in isolation.

However one characterizes the evolutionary stage of international judges as a professional group, their ranks have swelled in recent years and the roles they play on the world stage are becoming more prominent. Brandeis University will continue to offer programming to international judges in the years to come in the attempt to facilitate the development of their common professional identity.

# BIIJ 2007 Break-out Sessions

Judges from human rights, criminal, and inter-state dispute courts confer on issues specific to their work.

An innovative part of the program of BIIJ 2007 was the afternoon devoted to discussions among participants who serve on similar kinds of courts. Participants agreed beforehand on the topics that would be addressed, each judge suggesting those that were of particular interest to his or her institution. These break-out sessions marked a departure from the usual BIIJ format, where judges discuss issues in plenary, across the full range of courts represented at the institute.

## Inter-state dispute courts

Participants from the inter-state dispute courts (the International Court of Justice, the World Trade Organization Appellate Body, and the Caribbean Court of Justice) chose to discuss how domestic law is treated in international law disputes. In particular, participants wrestled with the traditional international law doctrine whereby domestic law is to be treated as a question of facts before international courts.<sup>10</sup> Participants explained that, according to this theory, domestic law is simply an act of the state that needs to be proved through evidence as a fact, but not interpreted and handled as law by international courts and tribunals. However, participants pointed to examples in the jurisprudence of the Permanent Court of International Justice (PCIJ), the ICJ, and the WTO AB that reveal that the practice of international courts and tribunals does not always reflect this traditional doctrine. Participants observed that in some cases, courts have examined domestic law using the terms and techniques of textual interpretation as if they were making their own appreciation or interpretation of the meaning of the text.<sup>11</sup> Participants asked: Is “domestic law” a special kind of fact? Is an international court empowered to determine “autonomously” the meaning of the provisions and rules of domestic law?

Participants agreed that the answers depend on the extent to which the meaning, effect,



**Fatsah Ouguergouz of the African Court of Human and Peoples’ Rights**

and application of domestic law are contested. According to them, although international courts and tribunals are not empowered to interpret domestic law as such, it is sometimes necessary for them to conduct a detailed examination of that law in order to assess its conformity with the international obligations of states.

One of the participants identified situations in which an international court may have to examine domestic law. These include determining whether certain provisions of that law or their application constitute a breach of an international obligation, whether a claimant has exhausted domestic remedies, whether there has been a denial of justice, or, in diplomatic protection cases, whether a private party is entitled to a certain nationality.

Participants explored the meaning of the term “domestic law” and observed that domestic law can be found in a variety of formal and less formal sources. In their view, it encompasses a wide array of domestic acts and instruments,

such as statutes, regulations, administrative measures, judicial decisions, as well as administrative practices. Domestic law can also be found in public declarations by state officials, statements of administrative actions, “policy bulletins,” and even computer software programs, for example those involved in anti-dumping calculations in the WTO context, as long as they carry with them the normative authority of law that governs the conduct of the subjects.<sup>12</sup>

Considering the diversity and complexity of the different sources of domestic law, participants recognized that the ascertainment of domestic law before an international tribunal may be a daunting task for the claimant. The burden of proving the defendant’s domestic law, like any other “fact,” generally rests on the claimant. However, participants expressed concern about this burden of proof in situations where the defendant’s domestic law is particularly difficult to ascertain. When assessing the burden of proof on the claimant, should international courts and tribunals take into account the level of difficulty in ascertaining the defendant’s domestic law? The majority of the participants said “yes.” Some participants even indicated that it might sometimes be preferable to empower the courts to appoint their own experts to ascertain the domestic law at issue instead of relying on the parties’ experts.

Finally, participants discussed how the relative uncertainty of domestic law affects international decisions. Inter-state courts have sometimes made decisions with a reservation saying that the decision had been made “on the basis of facts available to the court.” Judges contrasted this practice with that of international criminal tribunals, which can never make such a reservation. A participant said that an expression like this one seems to mean “the court does not want to go beyond certain limits. At one point you stop and you say, ‘We decide on this basis.’ It is as if whatever you do, you will never be sure to get to the heart of the matter.”

Participants concluded that inter-state courts have to deal with issues arising from state sovereignty to a greater extent than other kinds of international courts, which makes their task a uniquely difficult one, declared one judge: “Because inter-state disputes involve sovereignty, it might be a more delicate task to examine domestic law.” Participants also expressed interest in discussing rules of evidence in inter-state courts in a future break-out group session.

### **International criminal courts and tribunals**

The judges representing criminal judicial institutions at the BIJ (the International Criminal Court, the International Criminal Tribunal for the former Yugoslavia, the International Criminal Tribunal for Rwanda, and the Special Court for Sierra Leone) brought to their break-out session a number of questions regarding procedure and courtroom management. Given the complexity of the trials carried out at these courts, judges had many views and experiences to share.

The challenges inherent in establishing the calendar for a case was the first topic broached. Trials in international criminal courts are notorious for being drawn out, which is inevitable to some extent since both prosecution and defense call and cross-examine large numbers of witnesses, many of whom travel long distances to testify, and almost all of whose statements need to be translated into several languages. In addition, there are intermittent pauses called in the proceedings, to provide short “home leave” for counsel, to allow counsel to prepare a particular

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element in their case, or in response to unforeseen circumstances like illness. Such pauses clearly draw out trials even further.

Some participants felt that the lawyers involved in international criminal cases should devote themselves entirely to the task at hand instead of trying to juggle courtroom appearances with other work at home. One judge commented, “There is a big temptation for lawyers to keep other commitments, because they know you’re going to pause their cases periodically.” Others believed that flexibility has its benefits: “I feel that if you accommodate a lawyer, he’ll then work with you. I don’t think it creates problems to pause. It makes for good relations with the parties involved.” It was agreed that trial calendars should be made as firm as possible but that judges should always expect some delays.

A related issue is that of defense counsel being dismissed by the accused partway through a trial and the unavoidable delays brought about when new counsel is engaged. Some participants expressed frustration at such a situation, especially if it is brought about by the accused and counsel falling out over a “fee sharing” arrangement, whereby a portion of the counsel’s payment goes to the family of the accused. One judge commented, “This presents ethical issues for counsel; if the accused wants them to withdraw

for that reason, counsel can’t tell the court because of attorney-client privilege.” One judge suggested that requests for new counsel be avoided by requiring indictees to choose from an approved list of lawyers for their defense.

The preparation of witnesses for trial was also discussed at length. Criminal courts do not have a consistent approach to how this is carried out, which is partly a result of how differently judges from civil and common law traditions view this issue. Whereas civil law views witnesses as “belonging to the court,” that is to prosecution and defense alike, common law expects witnesses to be called by either one side or the other. It thus makes sense, from a common law perspective, that witnesses be prepared for testimony by the party that calls them to testify. But in the civil law tradition, it is inappropriate to engage in “witness proofing” and may be considered a breach even to have witnesses review their own prior statements, much less be prepared by one party or the other. Not only do practices on witness preparation differ between courts like the ICTY – which has more of a common law approach – and the ICC – which has adopted many aspects of both civil law and common law traditions – but different chambers of judges in the ad hoc tribunals may even adopt slightly different practices, according to the system they know best.

One judge from an ad hoc tribunal declared that the ICC system was more logical than that found at his own court:

I’m not a defender of the civil law system. Each one has its shortcomings. But in this matter, it’s clear that the position taken by the ICC is preferable... Prosecution at the ICTY hears witnesses, takes reports, statements, then when it comes to putting together the case, prepares the case. Some elements are missing. These elements can very easily be put in the mouths of



**Participants wait to board a train to climb Mount Washington.**

witnesses. The witness will not recall exactly what he said. It's very open to manipulation. I have sometimes had the impression sitting on a case that a witness has been prepared.

Another judge countered that any such manipulation can be uncovered through careful cross-examination and should thus not pose a problem. Careful witness preparation, on the other hand, makes for a smoother trial.

Criminal judges discussed a number of other topics pertinent to their courts, including the role of plea bargaining, issues surrounding the cross-examination of witnesses, and the challenge of carrying out joint or multi-accused trials. Their break-out session underscored the variation that exists among international criminal courts, which is perhaps inevitable given the way these institutions have been shaped by distinct legal traditions and their respective practitioners.

### **Human rights courts**

Judges from the African Court of Human and Peoples' Rights, which is newly established and not yet operational as of 2007, took the opportunity to question their experienced peers from the European Court of Human Rights in an information-gathering session. Their discussions revolved around many topics of a practical nature, given the long experience of the European Court and the fledgling status of the other.

The assembled group first addressed how the ACHPR might handle its caseload. At present, a large caseload for the ACHPR is theoretical. Nevertheless, all agreed that planning is essential because it would not be easy to modify court rules after they are initially established. The group agreed that a filtering body is an essential tool to manage cases. Whether that body should be a separate entity or a division of the court was discussed at length.



**John Hedigan of the European Court of Human Rights joins Stephen Schwebel, former president of the International Court of Justice.**

It was noted that the ECHR now has a caseload of approximately 100,000 pending cases.

The responsibility for filtering these cases lies entirely with the ECHR, since the European Commission was abolished.<sup>13</sup> Unlike in the European system, the African Commission for Human and Peoples' Rights still exists. It could thus potentially act as a filtering body, much as the Inter-American Commission of Human Rights does for the Inter-American Court of Human Rights. If the African Commission were to perform this function for the ACHPR, the court could, ideally, focus on making decisions instead of determining the admissibility of cases submitted to the court, which is very time-consuming. The ACHPR currently has some leeway in setting the role of the African Commission vis-à-vis the ACHPR, as the roles are not clearly delineated in the African Charter. This will allow significant room for negotiation.

The African judges were also curious about the status of "national judges" on the ECHR bench. According to the ECHR rules, judges can and do sit on cases involving their fellow citizens or their own governments. However, with respect to particularly sensitive cases, national judges

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**Legal aid is an issue of great importance  
in the African context, given the poverty levels found  
across the continent.**

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generally do not serve as rapporteur, the judge who takes the lead in reporting on the case to fellow members of his or her chamber and in drafting the decision.

The drafters of the protocol establishing the ACHPR have decided to approach the question of nationality differently. A judge cannot sit on a case involving his or her country. There are only 11 judges on the bench, so even if two of the judges are recused due to conflicts of nationality, nine judges will remain. This number is in excess of the quorum requirement of seven.

Legal aid is an issue of great importance in the African context, given the poverty levels found across the continent. The ECHR provides free legal assistance to indigent litigants, with funding provided by the Council of Europe. According to ECHR procedures, free legal aid is proposed by the rapporteur of a case, upon request by an applicant, and approved by the president of the chamber. With respect to the ACHPR, Article 10 of the protocol provides for free legal representation “where the interests of justice so require.” It was suggested that NGOs might get involved and use their own funds to provide counsel to indigent litigants. However, NGOs do not necessarily pay for such services. The ECHR judges pointed out that NGOs have sometimes asked for fees from their court.

Human rights courts, like many other courts, routinely need access to documents that states possess. ECHR judges related that sometimes the court asks for a complete file from a government. Generally, governments comply but sometimes cooperation is not forthcoming, with states arguing that the files are “confidential.”

When this happens, “the Court may draw such inferences as it deems appropriate,” according to the Rules of Court. The ECHR may also conduct its own investigation, which it is empowered to do pursuant to the European Convention Article 38. ACHPR judges wondered about the challenges to cooperation by African states that their court might encounter in the future and how they would deal with them.

The ACHPR questioned their European colleagues about whether the part-time status of their court was feasible in light of the ECHR’s experience. The ECHR used to be a part-time court before 1998. The judges responded that whether this is possible depends primarily on caseload. They added that having a court that operates part time has clear drawbacks. Judges may not be able to respond quickly to the demands of the court due to their other work. Currently judges of the ACHPR have to earn a livelihood through their law practices or academic positions. Accordingly, the judges will not always be able to drop other commitments for urgent cases. The ACHPR will have to do what the ECHR did when it operated part time – make schedules regular and give good notice of court calendars. However, the best practice would be to make the court full time.

Other discussions included how to distribute cases among judges, methods for financing the court, time frames for case completion, and the role of dissenting opinions. At the end of the break-out session, participants agreed that the ACHPR needed an opportunity to study further the procedures and practices of the ECHR. A previous trip made to the ECHR by African judges was too short to discuss the complexities of the ECHR’s operation. Participants felt that the ACHPR should send some of its attorneys to the ECHR for a few weeks to study the procedures in the ECHR in-depth. In addition, everyone encouraged further dialogue between judges of the two courts.

# Topics in Ethical Practice 2007

## Integrity and Independence: the Shaping of the Judicial Persona

Since the inaugural BIJ in 2002, the issue of ethics in the judiciary has always been featured in the program. This time, participants examined the implications of the need for judicial independence and integrity on international courts and tribunals as well as on the members themselves.

Featuring an introduction by Gil Carlos Rodríguez Iglesias, former judge and president of the Court of Justice of the European Communities, and conducted by Daniel Terris, director of the International Center for Ethics, Justice, and Public Life, the session focused on three broad subjects: values, that is the degree to which judges bring their own personal convictions into their work and the degree to which it's appropriate to do so; the balance between judicial independence and responsibility to outside entities; and international judges' relation to their own countries.

In his introductory remarks, Rodríguez Iglesias offered this observation on judicial independence, which he said preserves the objectivity of judges: "Security of tenure is the most important of guarantees when it comes to assuring independence, in substance and appearance."

He went on to cite judges' personal views on such controversial issues as abortion, gender equality, and affirmative action as a factor that may play a role in their decisions. The legal system itself also incorporates certain values into the mandates of the institutions it creates, for example the value in human rights. In the end, judges need to have the capacity to resist external influence and to take some distance from their own personal views:

In order to carry out his role, a judge must have functional legitimacy that flows from the combination of the principles of independence and

submission to law. Through training, recruitment methods, and status, the judge must be made capable of acting with full independence and responding in an enlightened way to the demands placed on him by law.

Participants later joined the discussion on key issues that shape the judicial persona.

### Values

Americans tend to believe that all judges bring their own values to work with them, Terris said. Participants addressed this perception and how values may affect their work.

One participant asked whether judges have a responsibility to present their values to the public. The speaker had to make a decision on this matter when conducting a radio interview on the day Saddam Hussein was captured by American forces. Because of the breaking news, the interviewer queried the judge on whether the former ruler of Iraq deserved the death penalty. In that instance, the judge did not offer an opinion about the death penalty but instead focused on the law's presumption of innocence.



**Giorgio Sacerdoti of the World Trade Organization Appellate Body at the top of Mount Washington**

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**Some participants observed that human rights courts seem to be in a better position to inject social values into their decisions through an evolving interpretation of human rights.**

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But in other cases, judges have revealed their values in the public arena. One participant cited a statement released by nearly 100 judges that condemned the Bush administration's detention policy in Guantanamo Bay. Rodríguez Iglesias acknowledged personal support of the statement but offered caution about presenting a "group attitude of judges," particularly one that does not correspond to a consensus of all national or international judges. Even if there is consensus, he added, such a statement could still influence the public perception of the individual position of judges when it comes to deciding a case.

According to Rodríguez Iglesias and many other participants, the possibility of injecting social values into judicial work depends on a court's particular jurisdiction. For example, some participants observed that human rights courts seem to be in a better position to inject social values into their decisions through an evolving interpretation of human rights. A participant from a human rights court even mentioned that, in order to reflect contemporary values, some rights have to be "read into" older human rights treaties.

Participants questioned, however, whether all international courts and tribunals should play a role in crystallizing emerging social values, or, as some put it, act as the "midwives" of social values. Participants from inter-state dispute courts believed that it is political bodies that are entrusted with assisting the "birth" of new norms, not courts. Some judges observed, furthermore, that international courts and tribunals with a specialized jurisdiction cannot

recognize and enforce nascent social values that lie outside of their mandate. However, one participant emphasized that no international court or tribunal can ignore emerging social values when they are cloaked in strong resolutions adopted by competent international organizations. This participant urged political bodies and specialized organizations, such as the World Health Organization and the Food and Agriculture Organization, to continue developing firm and clear standards on emerging social values within their respective mandates.

The activism displayed by different courts is not only a matter of jurisdiction, however. An activist approach may also depend on the professional background of a court's judges. Former professors, one participant noted, tend to be more progressive in their approach to decision making while former national judges are more cautious.

Whatever the place of values in the decision making by judges, their values will only be accepted in a well-reasoned judgment, said one participant. One participant noted that values have to be checked against the law. Judges' values should be the values of the international community. But another participant noted that those values are not always so clear-cut:

A national judge comes from an established community with very clear social values. The values of the international community are synthetic.... We shouldn't take it for granted that we know what the social values of the international community are or even of a specific tribunal or the region that tribunal is covering.

Judges are products of their upbringing, and that includes certain prejudices, one judge noted. Therein lies a challenge to impartiality:

If a judge comes to the bench with some social agenda, is the judge not



essentially failing the first test of impartiality in that he has a view on a case before it's been argued? And yet what can you do if it's human beings sitting on the bench? The biggest challenge every judge has to face is to overcome prejudices and fears. The extent to which we do that is the measure of how good or bad a judge we are.

### **Independence and accountability**

In the next portion of the session, Terris asked the question: To whom are judges accountable? He noted that problems could arise under any potential solution. Political bodies disciplining judges could lead to a threat to judicial independence. But judges who police their own members could lead to a threat of "corporate solidarity," particularly in the tight-knit world of international law, said one participant:

Impartiality becomes more important when an international judge is involved. We all know that international criminal law is a very small community. Judges are more likely to have worked together, studied together.

One participant cited a case of a judge who had previously published a book about Sierra Leone in which he called two people who were to appear before his court "criminals." Nevertheless, the judge did not want to recuse himself from a case in which one was to be tried. Other members of the bench, however, decided unanimously that the judge should recuse himself. That situation also raised the question of whether the judge should have been appointed to the court in the first place, given the opinions proffered in the book and how they would affect the public perception of impartiality.

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### **Parties may abuse the idea of perception, calling for the judge's recusal for no legitimate reason.**

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Not every case is as clear on the question of a judge's impartiality. One judge described a case on the ICTY for which he was asked to recuse himself because of what the accused believed his religion to be. While the speaker said that it's incumbent upon a judge to abstain if he believes the reason is sufficient, in most cases the judge consults with the presiding judge of the chamber. The last word would rest with the appeals chamber. The "verdict" was that this judge could remain on the case.

Another judge spoke of the difficulties of establishing regulations or mechanisms to bring judges to account. The question is not only one of judicial independence but the protection of the institution itself. The judge also noted the awkwardness of challenging colleagues on issues of unethical conduct.

Most of the time, however, judges will recuse themselves whenever there's a perception of impartiality, said another participant:

One may come to the conclusion that it'll be useful to have strict regulation or a strict approach, so that when there is a problem of perception, the judge should recuse himself even when it's not a matter of substance.

The problem is where to set the line. Parties may abuse the idea of perception, calling for the judge's recusal for no legitimate reason. The participant cited a case in which a judge was challenged because she previously worked to promote the idea that rape should be regarded as an international crime. In that case, the ICTY decided that the very experience that made the judge qualified for the bench should not then disqualify her from sitting on a case.

### **National judges, international courts**

Some participants were concerned that the practice in some courts of including a judge of the same nationality as one of the parties to a case, or an ad hoc judge nominated by one of the parties to the litigation, may imply a threat to judicial independence.<sup>14</sup> But the majority of the participants agreed that it was helpful for an international court to have on the bench judges from the same country as the parties. They then outlined the practical reasons for it. As one participant said:

Practically speaking, the presence of the national judge doesn't affect the outcome of the case. But the national judge may bring a good deal of insight into the law and practice of the state of which he's a national.

For that reason, the ECHR requires a national judge on the bench at every stage of the procedure. Participants also noted that international adjudication depends on the confidence of the states in the courts. The ICJ does not have compulsory jurisdiction, and thus having a judge on the bench of their nationality may induce certain states to accept its jurisdiction. Many states, like the U.S., would not agree to bring a dispute before an international court that did not have a judge of their own nationality sitting on the bench.

Participants also discussed the role of the ad hoc judge at the ICJ or ITLOS, who is nominated by a party who does not have a national judge already on the court. One participant observed that ad hoc judges are very careful to maintain



**Stéphanie Cartier, Fordham Law School, and Navi Pillay of the International Criminal Court**

their integrity; they are furthermore not under political pressure to adopt the position of the state that appointed them to serve on the bench. National judges at the ECHR similarly remain independent from the position of their home country. “It would be very difficult for a judge to become a defender of his own country, because it would mean losing credibility,” noted one participant, “and no one wants to do that.”

The three issues covered in the session revealed some of the challenges facing international judges as they navigate their roles in the courts on which they serve as well as in the court of public opinion. BIIJ participants showed that ethical considerations play a crucial role on the bench, as do judges' personal backgrounds and values. “The judge must be capable of acting with full independence and responding in an enlightened way to the demands placed on him by the law,” concluded Rodríguez Iglesias.

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## Notes

<sup>1</sup> See [www.brandeis.edu/ethics/international\\_justice](http://www.brandeis.edu/ethics/international_justice) for past reports.

<sup>2</sup> The European Court of Justice issues only collective decisions with no separate or dissenting opinions. In the WTO Appellate Body, when a decision cannot be arrived at by consensus, the matter at issue can be decided by a majority vote. Individual opinions of Appellate Body members may be expressed but it must be done anonymously. In both of these courts, outside parties may still be able to discern the way that individual judges have ruled or reasoned on a certain issue.

<sup>3</sup> *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, International Court of Justice, Judgment of 26 February 2007.

<sup>4</sup> In the ICJ's view, the overall control test would have extended state responsibility too far compared with the more restrictive effective control test.

<sup>5</sup> *Prosecutor v. Jean Paul Akayesu* (ICTR-96-4-1)

<sup>6</sup> In this case, the ECHR was called upon to examine an EC regulation authorizing the seizure of an aircraft pursuant to a UN sanctions regime, and an ECJ decision which had found that the human rights restrictions imposed by the EC regulation at issue were justified by objectives of general interest. In its judgment on this case, the ECHR applied the presumption of conformity of EC regulations with ECHR obligations if the protection of fundamental rights by EC law can be considered to be, and to have been at the relevant time, "equivalent" or "comparable" to that of the ECHR system. The ECHR also

explained that this presumption could be rebutted if, in a particular case, it was considered that the protection of ECHR rights was manifestly deficient. In such cases, the interest of international cooperation would be outweighed by the role of the European Convention on Human Rights as a "constitutional instrument of European public order" in the field of human rights. *Case of Bosphorus have yollari turizm ve ticaret anonym sirketi ("Bosphorus Airways") v. Ireland*, European Court of Human Rights, Judgment of 30 June 2005, (App. No. 45036/98), paras. 155 to 167.

<sup>7</sup> Statute of the Special Court for Sierra Leone, <http://www.sc-sl.org/scsl-statute.html>, 16 January 2002, Article 20(3).

<sup>8</sup> *The International Judge: An Introduction to the Men and Women Who Decide the World's Cases*, by Daniel Terris, Cesare P. R. Romano, Leigh Swigart; Sonia Sotomayor, fwd. Brandeis University Press 978-0-19-923873-6; Oxford University Press 978-0-19-923873-6.

<sup>9</sup> "The International Criminal Court will complement national courts so that they retain jurisdiction to try genocide, crimes against humanity, and war crimes. If a case is being considered by a country with jurisdiction over it, then the ICC cannot act unless the country is unwilling or unable genuinely to investigate or prosecute. A country may be determined to be 'unwilling' if it is clearly shielding someone from responsibility for ICC crimes. A country may be 'unable' when its legal system has collapsed." (see <http://www.icc-cpi.int/about/ataglance/faq.html>)

<sup>10</sup> See, for instance, *Certain German Interests in Polish Upper Silesia*, (1926) PCIJ Series A, No. 7, Judgment of 25 May 1926, p. 19.

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<sup>11</sup> Participants found support for this view in a number of PCIJ and ICJ cases, namely the Serbian Loans case in which the PCIJ noted that “the dispute relates to a question of municipal law rather than to a pure matter of fact,” ((1929) PCIJ Series A, No. 20, Judgment of 12 July 1929, p. 19); and the Brazilian Loans case, where the PCIJ said that international courts “may possibly be obliged to obtain knowledge regarding the municipal law which has to be applied” and “it will rest with the Court to select the interpretation which it considers most in conformity with the law” ((1929) PCIJ Series A, No. 21, Judgment of 12 July 1929, p.124). Participants also referred to a recent ICJ decision on preliminary objections: *Case Concerning Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, International Court of Justice, 24 May 2007, in which the ICJ examined DRC domestic law to determine whether the claimant had exhausted the local remedies as a pre-condition for diplomatic protection and to appreciate the legal nature of two domestic business entities involved. In the WTO context, see, *inter alia*, *India – Patents (US)*, paras. 65-67 (WT/DS50/AB/R); *US – Hot-Rolled Steel*, para. 200 (WT/DS184/AB/R), *US – Section 211 Appropriations Act*, paras. 105-106 (WT/DS176/AB/R), *US – Offset Act (Byrd Amendment)*, para. 259 (WT/DS217/AB/R, WT/DS234/AB/R), *US – Softwood Lumber IV*, para. 56 (WT/DS257/AB/R); *US – Gambling*, paras. 361, 362, and 364 (WT/DS285/AB/R), *Dominican Republic – Import and Sale of Cigarettes*, para. 112 (WT/DS302/AB/R).

<sup>12</sup> In WTO law, dumping occurs when a company exports a product at a price lower than the price it normally charges its own home market. In WTO law, duties may be imposed on the companies that are found to be “dumping” products in another market. The methodology used by an importing state to calculate dumping margins – which may involve sophisticated computer software programs – has been at the heart of some cases in the WTO dispute settlement system. In WTO law, a state’s “methodology” for calculating dumping margins is regarded as a form of “domestic law.”

<sup>13</sup> It was abolished by Protocol 11 to the European Convention of Human Rights, which entered into force on 1 November 1998.

<sup>14</sup> In some courts, a national judge is appointed by his or her country to sit on the bench of a court where each member state is entitled to a judge. This judge does not “represent” the home country but may be called upon to provide an insider’s perspective and knowledge on the country’s legal practices, history, and language. The European Court of Human Rights has a judge from each of the 47 members of the Council of Europe, and the European Court of Justice has a judge from each of the 27 members of the European Union. An ad hoc judge is appointed by a state party appearing before the International Court of Justice or the International Tribunal for the Law of the Sea to sit with its regular bench only for the case in question and only when the state does not already have a judge from its country serving at the court. An ad hoc judge need not be a citizen of the state that appoints him or her.

## Participating Judges

☞ **Georges Abi-Saab (Egypt)** is a member and former chairman of the Appellate Body of the World Trade Organization, a member of the Administrative Tribunal of the International Monetary Fund and of various international arbitral tribunals. He is Emeritus Professor of international law at the Graduate Institute of International Studies in Geneva (having taught there from 1963 to 2000); Honorary Professor of the Faculty of Law, Cairo University; and a Member of l'Institut de Droit International.

He served as consultant to the Secretary-General of the United Nations for the preparation of his first two reports on the Respect of Human Rights in Armed Conflict (1969 and 1970) and his report on the Progressive Development of Principles and Norms of International Law relating to the New Economic Order (1984). He was a member of the Egyptian delegation to the Conference of Governments Experts (1972) and the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts (1974-1977).

Abi-Saab has been counsel and advocate of numerous governments before the International Court of Justice and in international arbitration. He served twice as ad hoc judge on the International Court of Justice and also as a Member of the Appeals Chamber of the International Criminal Tribunals for the former Yugoslavia and for Rwanda. He is the author of numerous books and articles, including *Les exceptions préliminaires dans la procédure de la Cour internationale; Etude des notions fondamentales de procédure et des moyens de leur mise en oeuvre* (Paris, Pedone, 1967); *International Crises and the Role of Law: the United Nations Operation in the Congo 1960-1964* (OUP, 1978); *The Concept of International Organization* (editor) (Paris, UNESCO, 1981; French edition 1980); and two courses at The Hague Academy of International Law: Wars of National Liberation in the Geneva Conventions

and Protocols, Recueil des Cours, vol. 165, 1979-IV) and the General Course on Public International Law (in French), Recueil des Cours, vol. 207, 1987-VII).

☞ **Carmel A. Agius (Malta)** is currently the Presiding Judge of Trial Chamber II of the International Criminal Tribunal for the former Yugoslavia. He was first elected a Permanent Judge of the Tribunal in March 2001 and was re-elected in November 2004.

Since his election to the ICTY, Agius has presided over the Brđanin and the Orić trials. He has also served on the Appeals Chamber in the Krnojelac case and formed part of the Trial Chamber which rendered the sentencing judgments in the Dragan Nikolić and Deronjić cases. He has been a Pre-trial Judge in several cases and is currently presiding over the Popovic trial, one of the Tribunal's mega-trials involving seven people charged with the events of Srebrenica of July 1995. Agius also forms part of the Bureau of the ICTY and chairs the Rules Committee of the ICTY.

Agius was born in Malta in 1945, where he served on the Constitutional Court and the Court of Appeal before joining the ICTY. Between 1999 and 2006 he was also a member of the Permanent Court of Arbitration of The Hague.

☞ **Désirée Patricia Bernard (Guyana)** is a judge on the Caribbean Court of Justice. She joined the court after retiring from her post as Chancellor and Head of the Judiciary in Guyana. She was appointed the first female judge of the Supreme Court of Guyana in 1980, after practicing as a lawyer in the civil jurisdiction of the courts. In 1992 she was appointed the first female justice of the Court of Appeal, and in 1996 the first female chief justice of Guyana.

In 1982, Bernard was selected to sit as a member of the United Nations Committee on the Elimination of Discrimination Against Women, and served as Rapporteur and later Chairperson over a period of 12 years. Bernard has written

extensively on the legal rights of women and children, and she has presented papers internationally on the impact of international human rights treaties on the rights of women and on the application of such treaties within the domestic judicial system. Since the inauguration of the Caribbean Court, Bernard has addressed groups on the Court and its relationship with the Caribbean Community Single Market.

☞ **Mehmet Güney (Turkey)**, a judge on the Appeals Chamber for the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda, began his career in the Legal Department of the Ministry of Foreign Affairs in Turkey, where he rose through the ranks from Senior Legal Counselor to Chief Legal Advisor.

Following his service in the Ministry of Foreign Affairs, Güney was appointed Ambassador of Turkey to Cuba, then to Singapore and later Indonesia. He then worked for several years in the Turkish Permanent Mission to the United Nations in New York and in the Turkish Embassy in The Hague. During the years 1984-1989, Güney served as a Judge on the European Nuclear Energy Tribunal in Paris. In 1991, he was elected a member of the International Law Commission by the United Nations General Assembly, where he also served as Vice-President. At the same time, he was a member of the ILC working group, which established the initial “Draft Statute for an International Criminal Court.”

A few years later, in 1995, the Secretary General of the United Nations appointed Güney to “The International Commission of Inquiry for Burundi,” which was established by the Security Council. In 1998, he headed the Turkish delegation to the United Nations Diplomatic Conference of Plenipotentiaries on the establishment of an International Criminal Court.

☞ **John Hedigan (Ireland)** was appointed to the High Court of Ireland by the President of

Ireland on 24 April 2007. He previously served as a judge of the ECHR from 1998 to 2007.

Born in 1948 in Dublin, Hedigan was educated at Belvedere College, Trinity College Dublin, and Kings Inns. He was called to the Bar in 1976, and has since served as Barrister before the courts in Ireland and before the European Court of Justice in Luxembourg. From 1972 to 1977, he represented the Trinity College branch of Amnesty International on the National Executive Committee of Amnesty International. From 1992 to 1994, he was Chairperson of the Irish Civil Service Disciplinary Appeals Tribunal. He has been Senior Counsel since 1990 and is a member of the English Bar (Middle Temple) and of the New South Wales Bar.

☞ **Khalida Rachid Khan (Pakistan)** is a trial judge at the International Criminal Tribunal for Rwanda. In 1974, she was the first woman to become a Civil Judge in Pakistan, in the North West Frontier Province. She would go on to hold the positions of Senior Civil Judge, District & Sessions Judge, and judge of the High Court of Peshawar. She was the first woman in Pakistan on the Superior Judiciary. She is a member of the International Association of Women Judges and contributed a paper titled “Women and Human Rights in the Asia/Pacific Region: A perspective from South Asia” at the Asia/South Pacific Regional Judicial Colloquium in Hong Kong in May 1996. She also presented a paper titled “Judicial Creativity in Action” in Dublin at the 6th Biennial Conference of the International Association of Women Judges in May 2002. She has recently presented a paper in Sydney on challenging corruption in the judiciary at the 8th Biennial Conference of the International Association of Women Judges. She has worked extensively to eradicate child labor in Pakistan and South Asia.

☞ **George Gelaga King (Sierra Leone)** has been the president of the Special Court for Sierra Leone since May 2006. He was previously

president of the Sierra Leone and The Gambia courts of appeal. He was awarded Sierra Leone's Premier National Honour of Grand Officer of the Republic of Sierra Leone in April 2007.

After obtaining his LL.B. in London, King returned to his homeland in 1964 where he began a career in private legal practice. He participated as defense counsel with Desmond de Silva (now Sir Desmond), former chief prosecutor of the Special Court, in Sierra Leone's first treason trials in the late 1960s. From 1974 to 1978, he was Sierra Leone's first ambassador to France, Spain, Portugal, and Switzerland, as well as Sierra Leone's permanent representative to UNESCO. From 1978 to 1980, he was Sierra Leone's ambassador and permanent representative to the United Nations, becoming chairman of the Committee of Twenty-Four. He is chairman of the Sierra Leone Law Journal, a bencher of the Sierra Leone Law School, and a Fellow of the Royal Society of Arts. He has published extensively.

☞ **Bernard Makgabo Ngoepe (South Africa)** is a judge on the African Court of Human and Peoples' Rights. Since 1999 he has also been president of the High Court of South Africa, Transvaal Provincial Division, a court he has served on since 1995. He acted as a judge of the Supreme Court of Appeal for two terms in 1998, served one term as a judge on the Constitutional Court in 1995, and in 1996 was appointed a member of the Amnesty Committee of the Truth and Reconciliation Commission. He was admitted as an attorney of the Supreme Court of South Africa in 1976, and in 1983 he was admitted as an advocate of the Court. He is a member of the Judicial Service Commission and chancellor of the University of South Africa.

☞ **Fatsah Ouguerouz (Algeria)** is a judge of the African Court of Human and Peoples' Rights (Arusha, Tanzania). He is also founding member and Executive Director of the African Foundation for International Law in The Hague, as well as Associate Editor of the African Yearbook

of International Law. Until very recently, he was Secretary of the International Court of Justice, where he worked for almost 12 years. Before joining the ICJ, he was a legal officer at the Office of Legal Affairs of the United Nations (New York). Ouguerouz taught Public International Law at the Law School of the University of Geneva and is the author of numerous publications, including books, the most recent being *The African Charter on Human and Peoples' Rights - A Comprehensive Agenda for Human Dignity and Sustainable Democracy in Africa*.

☞ **Hisashi Owada (Japan)** has been serving as a judge of the International Court of Justice since 2003. Before being appointed to this post, he was professor of international law and organization at Waseda University in Japan and president of the Japan Institute of International Affairs. Owada previously served as Legal Adviser of the Japanese Ministry of Foreign Affairs and Vice Minister for Foreign Affairs of Japan, as well as Permanent Representative of Japan to the Organization for Economic Cooperation and Development (OECD) in Paris and Permanent Representative of Japan to the United Nations in New York. In the academic field, Owada has taught at Tokyo University for 25 years and more recently at Waseda University as a professor of international law and organization. He has for many years been teaching at Harvard Law School, Columbia Law School, and New York University Law School. He is a member of l'Institut de Droit International. He is currently an honorary professor at the University of Leiden and also professorial academic adviser at Hiroshima University. Owada is the author of numerous writings on international legal affairs.

☞ **Navanethem Pillay (South Africa)** was elected by the Assembly of State Parties to the Rome Statute as one of the 18 Judges of the International Criminal Court in February 2003. She received her Bachelor of Arts and her Bachelor of Law degree from Natal University

in South Africa and later a Master of Law and Doctor of Juridical Science at Harvard University.

She opened her law practice in 1967, the first woman to do so in Natal Province. As senior partner in the firm, she handled precedent-setting cases to establish the effects of solitary confinement, the right of political prisoners to due process, and the family violence syndrome as a defense.

In 1995, she was the first black woman attorney appointed acting judge of the High Court of South Africa by the Mandela Government. On the heels of that appointment, Pillay was elected by the United Nations General Assembly to be a judge on the International Criminal Tribunal for Rwanda, where she served for eight years, including four years as president. During her tenure, the ICTR rendered a judgment against Jean-Paul Akayesu, mayor of Taba commune in Rwanda, in which she participated, finding him guilty of genocide for the use of rape in the “destruction of the spirit, of the will to live and of life itself.” She was presiding judge in the “Media” trial, which set precedential standards for freedom and responsibility of the press.

☞ **Fausto Pocar (Italy)** is president of the International Criminal Tribunal for the former Yugoslavia, a position he has held since November 2005. He has served on the court since February 2000. Since his appointment, he has served first as a judge in a Trial Chamber and later in the Appeals Chamber of ICTY and ICTR, where he is still sitting. Pocar has long-standing experience in United Nations activities, in particular in the field of human rights and humanitarian law. He has served as a member of the Human Rights Committee and was appointed Special Representative of the UN High Commissioner for Human Rights for visits to Chechnya and the Russian Federation in 1995 and 1996. He has also been the Italian delegate to the Committee on the Peaceful Uses of Outer Space and its Legal Subcommittee. He is a professor of International Law at the Law Faculty of the University of

Milan, where he has also served as dean of the Faculty of Political Sciences and Vice-Rector. Pocar is the author of numerous publications on human rights and humanitarian law, private international law and European law. He has lectured at The Hague Academy of International Law and is a member and treasurer of l’Institut de Droit International.

☞ **Giorgio Sacerdoti (Italy)** is a professor of International and European Law (Jean Monnet Chair) at Bocconi University Milan, the leading private Italian university for business and economics. His areas of teaching include international economic law, private international law (conflicts of laws), including international business law, contracts, arbitration, conflicts of jurisdictions, and law of the European Community. He is a member of the Appellate Body of the WTO (Geneva), serving as chairman from 2006 to 2007. He has been appointed several times as arbitrator and chairman of Arbitral Tribunals under the ICC-International Chamber of Commerce (Paris), and the LCIA-London Court of International Arbitration Rules, and in ad hoc arbitration proceedings for the settlement of international commercial disputes. He is a consultant and lawyer representing private companies in international business law matters and litigation, focusing on international contractual matters, arbitration, recognition, and enforcement of foreign judgments. He has rendered legal opinions and has been heard as an expert witness on Italian and European international law in proceedings before domestic courts in various jurisdiction, arbitral, and international tribunals. He has over 130 published works in several languages dealing with public and private trade, investments, and conflicts of laws and jurisdictions.

☞ **Peter Tomka (Slovakia)** has been a judge of the International Court of Justice since February 2003. Prior to his election, he worked in the diplomatic service of Czechoslovakia and later Slovakia, including as Ambassador and



Permanent Representative of Slovakia to the United Nations in New York, Director General for Legal Affairs and Legal Adviser of Slovakia's Foreign Ministry. He has been a member of the Permanent Court of Arbitration since 1994 (Arbitrator in the Iron Rhine case, Belgium/Netherlands) and of the panel of arbitrators of the International Centre for Settlement of Investment Disputes. Between 1999-2002, he served on the UN International Law Commission. He was elected chairman of the Sixth (Legal) Committee of the UN General Assembly (1997), President of the Meeting of the States Parties to the UN Convention on the Law of the Sea (1999), and Chairman of the UN Committee on the Applications for Review of the Judgments of the Administrative Tribunal (1992). In 2001 and 2002, he served as chairman of the Committee of Legal Advisers on Public International Law of the Council of Europe. Between 1993-2003 he acted as Agent of Slovakia in the Gabčíkovo-Nagymaros Project case before the ICJ. Tomka graduated from Charles University Law School in Prague where he obtained his LL.M., J.D., and Ph.D. degrees. He previously taught international law at Charles University and Comenius University in Bratislava.

☞ **Nina Vajić (Croatia)** has been a judge at the European Court of Human Rights in Strasbourg since November 1998. Prior to joining the Court, she was professor of Public International Law at the Faculty of Law, University of Zagreb, Croatia. She studied law in Zagreb and obtained an LL.M. and J.S.D. in International Law. She also attended (1978-1980) the Diploma Program at the Graduate Institute of International Studies in Geneva. From 1991 to 1994 she was director of the Institute of Public and Private International Law of the Faculty of Law in Zagreb. Vajić has published numerous articles and studies in different fields of international law and human rights law, participated in domestic and international conferences as speaker or commentator and has been a guest professor at several domestic and foreign universities.

## Co-Directors

☞ **Linda Carter (United States)** is a Professor of Law and Director of the Criminal Justice Concentration at the University of the Pacific, McGeorge School of Law, Sacramento, California. She has assisted the Brandeis Institute for International Judges since 2003. Her teaching and research areas are criminal law and procedure, evidence, capital punishment law, and international criminal law. Prior to entering academia, Carter litigated civil and criminal cases. From 1978 to 1981, she was an 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 to 1985, she was an attorney with the Legal Defender Association in Salt Lake City, Utah, where she represented indigent criminal defendants on misdemeanor and felony charges. Her most recent publications include a book, *Global Issues in Criminal Law*, and articles on how innocence can be raised post-conviction in death penalty cases and on the rights of detained foreign nationals in capital cases under the Vienna Convention on Consular Relations.

Carter has lectured or researched international criminal law issues in Rwanda and Cambodia, and recently served as a Visiting Professional in the Appeals Chamber of the International Criminal Court. During the past year, she also participated in conference panels on the Gacaca trial in Rwanda and the question of redefining genocide.

☞ **Richard J. Goldstone (South Africa)** is a Visiting Professor of Law at Harvard Law School. He was appointed as Judge of the Transvaal Supreme Court in 1980, and in 1989 was appointed Judge of the Appellate Division of the Supreme Court. From July 1994 to October 2003, he was a Justice of the Constitutional Court of South Africa. In the fall of 2006, he was a Hauser Global Visiting Professor at New York University School of Law.

From August 1994 to September 1996, Goldstone served as the Chief Prosecutor of the United Nations International Criminal Tribunals for the former Yugoslavia and Rwanda. In December 2001, he was appointed as the co-chairperson of the International Task Force on Terrorism that was established by the International Bar Association. He is presently the co-chairperson of the Human Rights Institute of the International Bar Association. He was a member of the committee, chaired by Paul A. Volcker, appointed by the Secretary-General of the United Nations to investigate the Iraq Oil for Food Program.

### **BIJ Presenters**

☞ **Edward Lazarus (United States)** is the president of Lazarus Strategic Services, as well as a partner in the trial strategy firm Winning Works. Lazarus' clients include political campaigns, bar associations, and attorneys preparing for settlement negotiations or litigation. Lazarus' clients have included professional associations and political candidates in the US and abroad, with a specialty since the late 1990s in working with the legal community. He has done work for the Association of Trial Lawyers of America; many state Trial Lawyer Associations; the State Bar Associations of Arizona, Florida, Massachusetts, Nevada, and Hawaii; the state courts in Arizona, Hawaii, Massachusetts, Maryland, and Idaho; specialty bar associations nationally as well as in more than half of the states in the US and several provinces in Canada; and individual law firms. Lazarus has also worked with the ABA, the National Center for State Courts, and the National Conference of Bar Presidents. Lazarus lectures at Continuing Legal Education programs on jury bias, jury selection, and jury persuasion. Services Lazarus provides to attorneys include jury selection, focus groups, community attitude surveys, case theme development, opening and closing arguments, and supplemental jury questionnaires.

☞ **Gil Carlos Rodríguez Iglesias (Spain)** served as a judge on the Court of Justice of the European Communities from 1986 to 2003 and was the Court's president for the last nine of those years. He is director of the Real Instituto Elcano de Estudios Internacionales y Estratégicos and a professor at the Universidad Complutense in Madrid. He is also president of the Spanish Association for European Law and editor of the *Revista de Derecho Comunitario Europeo*. He has previously been the director of the Department for European Studies at the Instituto Universitario de Investigación Ortega y Gasset. He has taught at several universities and is a member of the Supervisory Board of the Max-Planck Institute of International Public Law and Comparative Law in Heidelberg.

☞ **Stephen M. Schwebel (United States)** was judge of the International Court of Justice from 1981 to 2000, serving as vice president and president for three years each. He is currently president of the Administrative Tribunal of the International Monetary Fund, a position he has held since 1994. He is also a member of the Administrative Tribunal of the World Bank. He was a member of the United Nations International Law Commission (Geneva) from 1977 to 1981, and until recently he was a member of the panels of Conciliators and of Arbitrators of the International Center for Settlement of Investment Disputes. He has previously been executive vice president and director of the American Society of International Law, assistant legal advisor for United Nations Affairs for the U.S. Department of State, and assistant professor of law at Harvard Law School. Over the years, he has been appointed arbitrator or president in 48 arbitral proceedings. He is a member of the Council on Foreign Relations, the American Society of International Law, the International Law Association, l'Institut de Droit International, l'Institut pour l'Arbitrage International, and the Permanent Court of Arbitration. He has published extensively on matters of international law and arbitration.

## Convenors

☞ **Leigh Swigart (United States)**, director of programs in international justice and society, oversees the Brandeis Institute for International Judges as well as other programs for members of the judicial and human rights communities worldwide. Swigart holds a Ph.D. in sociocultural anthropology from the University of Washington. She has wide experience in international education, including tenure as director of the West African Research Center in Dakar, Senegal, and she is a two-time Fulbright Scholar and recipient of the Wenner-Gren Foundation Fellowship for Anthropological Research. Her academic work and publications have focused on language use in post-colonial Africa and recent African immigration and refugee resettlement in the United States. She is co-author of *The International Judge: An Introduction to the Men and Women Who Decide the World's Cases* (with Daniel Terris and Cesare Romano, University Press of New England, 2007).

☞ **Daniel Terris (United States)**, director of the International Center for Ethics, Justice, and Public Life, has been at Brandeis University since 1992. Programs initiated under his leadership at the Center and as assistant provost at Brandeis have included: the Slifka Program in Intercommunal Coexistence, the Brandeis Institute for International Judges (BIJ), the Brandeis International Fellowships, Community Histories by Youth in the Middle East (CHYME), the Ethics Center Student Fellowships (formerly the Ethics and Coexistence Student Fellowships), Brandeis in the Berkshires, Genesis at Brandeis University, and the University's continuing studies division. He has offered courses on individualism, poverty, American literature, and the roots and causes of September 11, and he offers the annual writing seminar for the Ethics Center Student Fellows. Terris received his Ph.D. in the history of American civilization from Harvard University, and he has written on 20th century history, literature, and religion. He is the author

of *Ethics at Work: Creating Virtue in an American Corporation* (University Press of New England, 2005) and the co-author of *The International Judge: An Introduction to the Men and Women Who Decide the World's Cases* (with Leigh Swigart and Cesare Romano, University Press of New England, 2007).

## Rapporteurs

☞ **Stéphanie Cartier (Canada)**, an adjunct professor at Fordham University, teaches international law and international human rights. Under the supervision of Maastricht University, and with the support of a fellowship from the Social Sciences and Humanities Research Council (SSHRC) of Canada, she is currently writing a Ph.D. dissertation on the role of international tribunals as actors in international law. A Canadian citizen and a member of the Quebec and New York State Bars, she graduated with distinction from the Law Faculty of McGill University, obtaining two degrees in law, one in common law and one in civil law. She also obtained a master's degree in international law from the Graduate Institute of International Studies, Geneva. Cartier has worked with human rights NGOs, with the ILO, and was a legal officer for the WTO Appellate Body and for the Claims Resolution Tribunal located in Zurich, Switzerland. She has also collaborated in research ventures overseen by the Project on International Courts and Tribunals (PICT).

☞ **Christopher Moore (United States)** is the communications specialist for the International Center for Ethics, Justice, and Public Life. He holds a B.A. in Slavic and East European linguistics from the University of North Carolina at Chapel Hill and an M.S. in journalism from Boston University. He has worked as a reporter for weekly and daily newspapers and has prior experience in university administration at Wheelock College.

# Center Description and Contact Information

## **The International Center for Ethics, Justice, and Public Life**

The mission of the International Center for Ethics, Justice, and Public Life is to develop effective responses to conflict and injustice by offering innovative approaches to coexistence, strengthening the work of international courts, and encouraging ethical practice in civic and professional life.

The Center was founded in 1998 through the generosity of Abraham D. Feinberg.

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Other Center publications relating to international justice:

- *The International Judge: An Introduction to the Men and Women Who Decide the World's Cases*
- *The Challenges of International Justice: Report on the Colloquium of Prosecutors of International Criminal Tribunals, 2004*
- *Both Sides of the Bench: New Perspectives on International Law and Human Rights*
- *Brandeis Institute for International Judges—2002, 2003, 2004, 2006 reports*

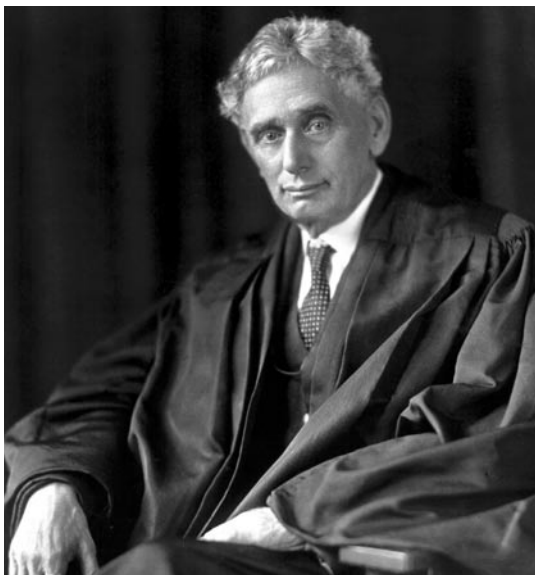
Special thanks for the hospitality of the conference center staff at the Mt. Washington Hotel in Bretton Woods, New Hampshire, and for the invaluable assistance from Brandeis University student interns Leila Alciere, David Drayton, and Andrew Ginsberg.

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## About Brandeis University

Brandeis University is the youngest private research university in the United States and the only nonsectarian college or university in the nation founded by the American Jewish community. Named for the late Louis Dembitz Brandeis, the

distinguished associate justice of the U.S. Supreme Court, Brandeis was founded in 1948. The University has a long tradition of engagement in international law, culminating in the establishment of the Brandeis Institute for International Judges.



**Louis Dembitz Brandeis**

Brandeis combines the faculty and facilities of a powerful world-class research university with the intimacy and dedication to teaching of a small college. Brandeis was recently ranked as the number one rising research university by authors Hugh Davis Graham and Nancy Diamond in their book, *The Rise of American Research Universities*.

A culturally diverse student body is drawn from all 50 states and more than 56 countries. Total enrollment, including some 1,200 graduate students, is approximately 4,200. With a student to faculty ratio of 8 to 1 and a median class size of 17, personal attention is at the core of an education that balances academic excellence with extracurricular activities.