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Topics in Ethical Practice 2010

Challenges to Judicial Independence

As in past Institutes, BIJJ 2010 participants had the opportunity to reflect on ethical issues confronting judges who serve on international courts and tribunals. Discussions about judicial ethics in the international sphere are a hallmark of the BIJJ; earlier institutes have focused on topics as wide-ranging as “the international judiciary as a new moral authority,” “the shaping of the judicial persona,” and “the development of ethics guidelines for international courts and tribunals.”¹ In 2010, participants addressed the recurring topic of judicial independence, with particular emphasis on its critical relation to the rule of law.² More specifically, they discussed the challenges of working under the gaze of a public that holds judges to the highest standards of behavior and practice and criticizes any deviation – real or perceived – from the ideal.

The first topic participants grappled with was the election and reelection of judges in the international context.³ The manner in which international judges reach their posts has often been criticized, and a recently published monograph on the topic does little to reassure the public that the process is transparent or politically neutral.⁴ Given the importance of public confidence in international courts and tribunals – to encourage compliance with their judgments as well as to ensure their financial and moral support – it is crucial that the members of their benches be seen as independent beyond a doubt. Current practices surrounding the election and reelection of international judges may serve, however, to cast public doubt upon their independence.

Participants had many comments to offer about the election and reelection procedures in their respective courts and tribunals. Elections that take place within the UN system were particularly criticized, both for the lack of transparency in how judicial candidates are nominated, and for “horse trading” at election time. This term refers to the promises and counter-promises made among states to support one another’s candidates for high-profile posts, including judicial positions at the ICJ, ITLOS, ICTY, and ICTR. It was noted that the qualifications of a candidate are just one of the factors that come into play. When

the ICC was established, the Assembly of States Parties valiantly tried to keep its judicial elections from following the model of the UN courts, but it was not successful. “It simply turned out to be impossible,” reported a participant who attended the Rome Conference, “to achieve a prohibition on these kinds of agreements among states.”⁵ One participant also remarked on the inappropriate “judicial campaigning” that, he said, inevitably accompanies elections at the UN: “Judges depend on the General Assembly for their election and reelection and it is standard practice for them to visit various diplomatic delegations to lobby for their votes.”

Several judges pointed to institutional practices that seek to emphasize the merits of judicial candidates, thereby mitigating the influence of national interests in election procedures. Some members of the WTO now put forward several candidates for a position on the Appellate Body, allowing the organization to select the one they consider the most qualified. The protocol of the ACHPR also allows states to put forward multiple candidates for the coveted spots on



its 11-member bench. But only one can be their own national – any additional nominees must be nationals of another African state.

If inappropriate influence sometimes intrudes into the election of judges, this occurs to an even greater extent, it was agreed, when they stand for reelection. One participant noted that at his court, judges have four-year initial terms with the possibility of reelection: “Even the most honest and honorable of my colleagues feel pressure to tone down their decisions; even hardworking, ethical people feel that they need to be careful when elections are coming.” Another participant observed, “At my court, judges are no doubt aware that taking a controversial position in an unpopular decision could have an effect on their reelection.” However, he was not convinced that they would act on this knowledge: “I am confident that the judges’ sense of professionalism would prevail.”

It was pointed out, however, that reelection is one of the ways to achieve continuity, which is particularly important in courts with a temporary jurisdiction.

At the ICTY and ICTR, where terms are short and the work intense, it may be beneficial for the institutions to have reelected judges on the bench for this reason. “Otherwise, there would be a sacrifice in judicial experience and efficiency.” As part of the ad hoc tribunals’ “completion strategy,” ICTY and ICTR judges recently had their terms extended, by a Security Council resolution,⁶ until the completion of the trials to which they are assigned. This obviates the need for any future elections, which would further slow down the tribunals’ work, while also contributing to the stability of the institutions and the accumulation of judicial expertise. The international judges serving on the ECCC benefit from a similarly open-ended situation – they have no fixed term at all, but rather were appointed by the UN to serve on the bench “for the duration of the proceedings.”⁷ The judges of the STL, in contrast, were appointed for an initial term of three years in 2009 and may be reappointed “for a further period to be determined by the Secretary-General in consultation with the [Lebanese] Government.”⁸

However, for permanent courts with longer judicial terms – ICJ and ITLOS judges, for instance, sit for nine years – a prohibition on reelection would not have the same potential effect on institutional performance. In arguing for term limits, a participant also observed that “it is not only good judges who get reelected.” Many international judges try for second terms, and since they have an advantage in the election process, they may prevail over other candidates. One participant pointed out another possible negative impact of having judges serve for years and years on the same bench: if judges make judging a “lifetime career,” he suggested, “it may not be helpful to the international system or the development of international law.”

Notably, the ICC chose to avoid the suspicions and problems that accompany reelection by instituting nine-year non-renewable terms,⁹ a seemingly wise decision for a closely observed court that deals with sensitive matters and is engaged in the development of a still emerging field, international criminal law. In fact, all BIIJ participants essentially agreed that instituting a single and relatively long term for judgeships in international courts and tribunals would do much to remove the threats to judicial independence as well as other drawbacks of reelection.¹⁰ Even judges who had benefited from reelection expressed this point of view. “I am on record,” said a judge who has served consecutive terms, “as preferring single, non-renewable terms for judges at international tribunals.” Said another judge in the same situation, “The reelection of judges is not a desirable practice to be used in international courts, including my own.” One participant even suggested that BIIJ participants make a collective and public statement recommending that international judicial reelections be abolished.

But such a prohibition would still leave some problems unresolved. If an unqualified individual is sitting on the bench, a single term can still be too long, declared one participant. “When the initial election is not a good one, you have to wait for years before changing the judge!” Single terms may also increase the number of former international



judges looking for a professional niche where they can apply their expertise. Some may take on the role of counsel or agents before international courts, including the one in which they recently served. This tendency necessitates the establishment of “cooling-off periods,” during which time former judges may not be involved in proceedings before their old court. This phenomenon may lead to a certain “recirculation” of legal experts in international justice circles, which could ultimately stifle the development of international law, as mentioned above. It could also, however, produce the opposite effect by leading to a richer and fuller development of international law by those with great experience and expertise.

The issue of post-judicial professional life may be most acute at the ECHR. Not only has it recently instituted a single, non-renewable judicial term,¹¹ but its judges are becoming younger and younger; some are even elected to the court while in their thirties. Furthermore, most ECHR judges are drawn from national legal professions, not from the ranks of international lawyers. This means that they will naturally look to return home after leaving the ECHR, and will seek to work for the state in some capacity. This creates a new dilemma in terms of judicial independence: will judges nearing the end of their terms at the ECHR issue judgments more favorable to their states, as insurance for a future position at home? Clearly, threats to independence do not necessarily disappear with the prohibition of judicial reelection. One participant suggested that international judges should be nominated for single terms toward the ends of their careers to minimize such risks.

Participants then turned their attention from judicial elections and reelections to other matters that may create public doubt about the independence of international judges. “Judges do not come to the bench as virgins of public life,” declared one participant. They may have affiliations with political organizations and NGOs, a long list of publications if they are scholars, and an easily accessible record of non-judicial activities, speeches, and commercial interests. All of these may be raised as possible reasons

that international judges are unable to perform their work with independence and impartiality.

The question of when interest in or connection to a case by a judge necessitates recusal was immediately raised. One criminal court has had high-profile cases where its judges were on the record expressing opinions about the behavior of accused persons. One participant asked whether it would be preferable for a body outside the court to determine recusal in such situations, instead of judicial colleagues. Are fellow judges not likely to support the judge in question, or alternatively to join against him, he wondered? And does an internal decision not create a perception of bias in the public eye? A different issue related to bias was brought up with reference to the ECCC. Normally a judge should not sit on a case with which he has a personal connection. But it was virtually impossible to find Cambodian judges who had not been touched by the Khmer Rouge events under investigation by the court. The recusal provisions in the ECCC rules were debated and ultimately made more flexible so as not to systematically preclude the participation of local judges in the trials.

Participants also discussed when experience on one international court should prevent participation in a related matter before another. For example, should a criminal judge who has deliberated on questions of genocide refrain from sitting on an interstate dispute resolution body that is looking at the crimes from a different standpoint? One judge offered this opinion: “I don’t see much of a problem if it is only a legal question of genocide. I think this is a situation that domestic judges deal with every day, sitting on cases that deal with the same legal issues.” Another judge added this comment: “Disqualifying someone just because they have expressed certain views on crimes against humanity or war crimes is not a good enough reason.” Human rights institutions may also see situations where their judges have dealt with an issue before the court while previously serving in their capacity as judges in their home country. While some believed that this would not necessarily pose a legal problem, others felt that this might well create a perception of bias.

How judges interact with the media, and when these interactions overstep an appropriate boundary, also came up as a topic of discussion. How should a judge deal with requests for interviews, or answer questions that the press may have about the judge himself or his institution? “On the one hand,” said a participant, “a judge should not seem aloof from society, but on the other hand, he should avoid seeking the limelight.” He recounted an incident in which a fellow judge gave a lengthy interview to a newspaper where he made critical comments about the political situation of the country hosting the court. “Our president felt obliged to disavow the interview and publicly reprimand the judge,” he continued, a response justified by the court’s code of ethics. Another participant reported that he had recently been asked by the media in his home country to speak about his court and explain its function to the local population. “I think this is useful and important for the public; we need to explain what our courts do and do not do, but not to speak on specific cases. My inclination is that this is a good exercise of discretion from the viewpoint of educating the public.” Another participant went on to suggest that speaking to the press about cases, once a judgment has been delivered, should not be out of the question. “I would cautiously encourage it because I think the court should enlighten and educate, and this is better done by a judge than a press secretary. That is, if he is capable of going out and facing a microphone and camera.”

Participants noted a number of other questions about judicial ethics, and its perception, that cannot be answered by referring to their courts’ rules or codes of conduct.¹² In what situations can a judge carry out arbitrations, particularly of a commercial nature? What kinds of secondary employment are compatible with a part-time judicial position? How much can and should an international judge speak in public about legal issues of contemporary importance? Since such questions do not generally involve potentially serious violations of judicial ethics, they are often left up to the discretion of individual judges, with advice from the court president or colleagues when requested. It was suggested that international courts might do well to look for guidance in detailed codes of judicial conduct, like the Code of Conduct for United States Judges.¹³ However, some courts have resisted the elaboration of such codes, believing that broad notions of appropriate judicial conduct suffice.¹⁴

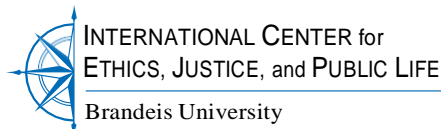
It is clear that trust in the international justice system relies to an important degree on public confidence in those who serve as its judges. It is thus up to judges themselves, one judge exhorted, “to exercise continuous discretion in order to preserve a sense of judicial independence and impartiality.” He went on to add an important point, undoubtedly already acknowledged by those in attendance at the BIIJ: “In becoming a judge, you must sacrifice some of the private space that others take for granted.” Having judges who accept these limitations without question is another foundational element for the international rule of law.



Notes

1. To download the ethical discussions from all past sessions of the BIJ, see <http://www.brandeis.edu/ethics/internationaljustice/ethicsintljud.html>.
2. *Supra* note 26.
3. Also see the report of BIJ 2007, *supra* note 1.
4. Cf. Ruth Mackenzie, Kate Malleson, Penny Martin and Philippe Sands QC. *Selecting International Judges: Principle, Process, and Politics* (Oxford: Oxford University Press, 2010).
5. Civil society can play a role in depoliticizing the nomination and election of international judges. In anticipation of the election of six new ICC judges in 2011, the Coalition for the International Criminal Court convened the Independent Panel on International Criminal Court Judicial Elections to oversee this process with the goal of having the most qualified judges for the 2012-21 term. Cf. http://www.coalitionfortheicc.org/documents/Judicial_Panel_Announcement.pdf.
6. Cf. Security Council Resolution 1931, 29 June 2010.
7. Cf. Agreement between the United Nations and the Royal Government of Cambodia concerning the Prosecution under Cambodian Law of Crimes Committed during the Period of Democratic Kampuchea, 6 June 2003, Article 3(7).
8. Cf. Agreement between the United Nations and the Lebanese Republic on the establishment of a Special Tribunal for Lebanon in S/2006/893, Article 2(7).
9. The first cohort of ICC judges elected in 2003 had terms of variable length – three, six, or nine years. Those with the shortest terms were allowed to stand for reelection. Going forward, however, all ICC judges are to be elected for a single nine-year term.
10. Long non-renewable terms are also seen as optimal at the domestic level. Cf. the 2009 Report of the UN Special Rapporteur on the independence of judges and lawyers (by Leandro Despouy). The report expresses concern with short terms of office at the domestic level and recommends the gradual extension of judicial tenures so as to progressively introduce life tenure in domestic systems (especially in states in transition from authoritarian regimes to democracy).
11. Cf. Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, which entered into force on 1 June 2010.
12. Indeed, not all international courts have such codes. For more information on judicial ethics in the international sphere, to access the codes of ethics of international courts and tribunals that do exist, and to find a link to the Burgh House Principles on the Independence of the International Judiciary, see <http://www.brandeis.edu/ethics/internationaljustice/ethicsintljud.html>.
13. Cf. <http://www.uscourts.gov/RulesAndPolicies/CodesOfConduct/CodeConductUnitedStatesJudges/CodeOfConduct.aspx>.
14. Cf. *The International Judge*, *supra* note 19.

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



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