



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

Topics in Ethical Practice 2004

The Role of Judges in Public Life and Securing the Appearance of Impartiality

Since its inaugural session, the Brandeis Institute for International Judges (BIIJ) has explored issues of ethics that frequently confront the international judiciary. In 2003, this exploration took the form of a daylong workshop where participants sketched out ethics guidelines for international courts in two areas: impartiality and outside activities, and accountability and disciplinary procedures. An account of these discussions may be found in “Toward the Development of Ethics Guidelines for International Courts” in the BIIJ 2003 report or at www.brandeis.edu/ethics.

The BIIJ’s focus on ethical issues continued in 2004 with a session exploring the way that these issues are dealt with in the everyday operation of international courts and tribunals. The “topics in ethical practice” chosen for discussion were ones that judges find of perennial concern: 1) Do members of the international judiciary have the responsibility to speak out on pertinent issues of public debate, or alternatively the responsibility to remain silent? 2) How can international judges best preserve the appearance of impartiality of their courts? How should they react if a fellow judge refuses to recuse him or herself from a case in which the public perceives the judge to have a personal connection or interest? This session was led by three judges, all of whom attended the 2003 institute and could thus build upon discussions that took place there. These judges were John Hedigan of the European Court of Human Rights (ECHR), Navanethem Pillay of the International Criminal Court (ICC), and Fausto Pocar, Vice-President of the International Criminal Tribunal for the former Yugoslavia (ICTY).

Unlike some ethical questions, that of the openness with which judges should express themselves on issues of public debate did not elicit a uniform response from the participants. They considered the public commentary made by Lord Steyn, a Lord of Appeal in Ordinary on Britain’s highest court, on what he calls the “monstrous failure of justice” that has occurred in regard to detainees in the U.S. military camp in Guantánamo Bay. Steyn asks, in an editorial appearing in the *International Herald Tribune* on 28 November 2003: “Ought the British government to make plain publicly and unambiguously its condemnation of the utter lawlessness at Guantánamo Bay?”

Some participants clearly believed that “entering into the public fray,” as Lord Steyn has, could create problems for international judges. It may open them up to the appearance of bias and may compromise future impartial deliberation or require withdrawal from related cases. Indeed, Lord Steyn ended by recusing himself from a hearing in October 2004 on the legality of detaining non-U.K. nationals without a trial, following objections to his participation by the British government based precisely on his public statements made about Guantánamo. Participants also brought up the recent removal of Geoffrey Robertson, former president of the Special Court for Sierra Leone (SCSL), from trials involving members of the Revolutionary United Front (RUF). Robertson had harshly criticized the RUF in his 2002 publication entitled *Crimes Against Humanity*, which was written before his appointment to the SCSL. He was accused of bias by the defense counsel for certain RUF leaders indicted by the



SCSL, and was subsequently required to recuse himself from their trial in order to preserve the court's appearance of impartiality.

A fundamental question here is whether, *despite* the potential consequences of such public commentary, international judges should use their influential positions to speak out on actions that contradict international law. It was noted that judges have the unique expertise to inform the public about abuses of international conventions and treaties. The judiciary can also question the executive branches of government when they overstep the limits of their power. Pillay asserted:

We are the guardians of justice and judicial standards. We shouldn't be seen to be acquiescent in the face of violations. Shouldn't we, as judges, reiterate principles that are regulated by the torture convention or point out that the rule of law must not be replaced by the rule of force?

It was noted, however, that public statements might be made in a number of ways, some more appropriate for the judiciary than others. Hedigan mentioned the skillful manner in which a colleague had once presented to journalists a "masterpiece of critical diplomacy." He set out basic and fully accepted legal principles, related these to a controversial topic, and then posed questions to the audience as to whether certain actions with which they were familiar and in which some were involved were in conformity with these principles. He left the audience to draw their own conclusions.

Pocar agreed with such an approach, asking BIIJ participants:

Is there a duty to inform the public, not necessarily taking a position on a case but instead explaining the issue and how it is dealt with under international law? I would answer yes.

In these ways, judges might inform and encourage a questioning of certain actions without making compromising statements. Pillay added:

Judges have authoritative voices and it can be a comfort to the public to hear such figures speak out about legal principles that may not be widely known or understood.

Participants generally agreed that judges should avoid speaking with the press and refrain from making public statements about their decisions or cases likely to come before their courts. Some judges believed, indeed, that members of the bench should *only* speak through their decisions, leaving a court spokesperson to make any public commentary. Although most judges agreed in theory, some found it to be unrealistic. Hedigan noted:

In many common law countries, it was traditional that certain government ministers had the role of defending the judiciary. These ministers no longer seem to want that role because they do not wish to defend, among other things, very unpopular decisions by the judges. So do the judges need to defend themselves and their independence? Probably. Should they do so themselves? That is a good question.

Pillay commented that ICC judges are often called upon to explain their court and its function in their home countries. In this case, they willingly assume the task of spokesperson as it will result in strengthened support for their institution.

There is another kind of speaking out that judges routinely perform, this one less controversial. In the interest of maintaining the appearance of impartiality, judges are expected to disclose any relationship or financial interest that they might have concerning parties before their court. Too close a connection is generally seen to compromise the judicial process, and judges will be expected to recuse themselves from the case in question.

What happens, however, when judges protest that they are impartial and even refuse to recuse themselves? What is the responsibility of fellow judges as "watchdogs" in such situations? BIIJ



participants considered three recent examples of this exact scenario during the “Topics in Ethical Practice” session. The first, alluded to above, was the removal of Geoffrey Robertson of the SCSL from trials involving the rebel group. His fellow judges voted that it was in the best interest of the court that he recuse himself. The second example pertained to the potential recusal of a judge of the International Court of Justice (ICJ) from deliberations on the legal consequences of the construction of a wall in the occupied Palestinian territory. Judge Nabil Elaraby, who had previously published critical pieces on the state of Israel, was considered by certain colleagues to be biased on this subject. The overwhelming majority of the ICJ bench, however, supported his participation in the deliberation process. The third example took place not in an international court but in the United States Supreme Court. Judge Antonin Scalia refused to recuse himself from a case involving U.S. Vice-President Dick Cheney, despite their having traveled and socialized together while the case was pending. Although many public critics and journalists called for Scalia’s recusal, he insisted on his impartiality and said he would remain on the bench for this case. The U.S. Supreme Court does not have a procedure whereby fellow judges can decide on the best course of action in such a situation and, consequently, judges have the final word on whether or not they will step down from a case.

The session leaders raised a number of points in regard both to these cases and to more general issues of impartiality. Pocar noted that silence on the part of a judge should not be equated with lack of bias: “Preconceptions exist, and having a rule that prevents judges from announcing their views does not serve the purpose of eliminating preconceptions.” It is also, he pointed out, more difficult to ascertain the *appearance* of bias than its actual existence. To address this, the ICTY applies a two pronged test when a judge is accused of bias: 1) Does the judge have an interest in one of the parties or in a particular outcome for the case? 2) Would a reasonable observer, properly informed, be led to assume bias? If the answer to both questions is negative, the judge is allowed to serve.

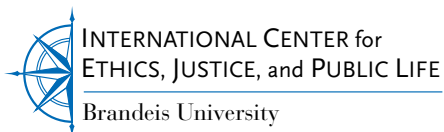
Hedigan wondered about the state of impartiality and independence of ad-hoc judges in his own court, the ECHR. These judges are appointed by countries appearing before the court when their own national judge cannot sit on the case. Since an ad-hoc judge is appointed at a time when the facts of the case are already known, and the country in question has every reason to appoint a sympathetic judge, how can impartiality—or at least its appearance—be maintained?

BIIJ participants contributed many points in the ensuing discussion. Those hailing from small countries described the difficulty of finding national judges who are not at all acquainted with parties before a court. If connection to the parties, or prior public statements made about various issues, necessitates recusal from a case, then judges would rarely be able to perform their duties. A similar issue was raised in one of the session readings, this time by a judge hailing from the remote American state of Alaska. In rural areas, it is quite likely that a judge will be acquainted with or even regularly socialize with parties who come before the court. Standards for recusal from a case, it was suggested, must therefore be different from those in force in urban areas or the justice system would be severely hampered. Furthermore, in countries where there have not been political freedoms or where opportunities for education are limited, the same individuals who become judges tend to be those who comment on public affairs and controversies, sit on the boards of NGOs, and so on. Possibilities for conflict of interest, or at least its appearance, thus arise frequently. Although strict election procedures for international judges make such conflicts less frequent than in the national domain, the above-mentioned recusal cases on international courts demonstrate that ensuring impartiality remains an issue of concern.

This exploration of “topics in ethical practice” allowed BIIJ participants to reflect upon difficult issues that arise in each of their courts. Like so many of the BIIJ sessions, this one illustrates the importance of bringing together international judges from a variety of courts and tribunals. Participants



bring to the discussion the particularities of their court system, their own views and experiences, and also the collective wisdom of the judicial communities in which they serve. Frequently, participants conclude that although many, or even all, of them might agree to something in “theory,” the applications of that theory can vary widely depending on the resources available to a court, its practices, and even the personalities of its staff.



Brandeis University
MS 086 P.O. Box 549110
Waltham, MA 02454-9110 USA
(781) 736-8577
www.brandeis.edu/ethics