

# BIIJ

Brandeis University

# 2004

Brandeis Institute for International Judges

## Complementarity and Cooperation: The Challenges of International Justice

Including Topics in Ethical Practice



The International Center  
for Ethics, Justice and Public Life



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## Brandeis Institute for International Judges 2004

Complementarity and Cooperation:  
The Challenges of International Justice

Including *Topics in Ethical Practice*

The International Center for Ethics,  
Justice and Public Life

Brandeis University  
Waltham, Massachusetts  
U.S.A.



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## Foreword

Globalization has reached the judiciary. Or, perhaps better, the judiciary is finding its own place on a global level. Baron de la Brède et de Montesquieu (1689-1755), fighting already at that time for a division and balance of powers, and in particular for the independence of the judiciary, would have enjoyed participating as an observer at the third Brandeis Institute for International Judges held in the beautiful ambience of the Schloss Leopoldskron in Salzburg.

It is a unique experience to meet independent and international judges from nearly all continents and nearly all major international courts and tribunals. It is an eye-opening experience to become aware that your own problems are at the same time the problems of your, until then, unknown colleagues. It is encouraging to see and feel the common desire to establish new avenues to truth, justice, and peace.

And it is a source of joy to have provocative but at the same time creative discussions amongst open-minded judges, having never met them before and yet sharing common concerns, and to look forward to improving regional and global institutions dedicated to implementing the rule of law. And this in times where liberty seems to die by inches.

Speaking, I think, on behalf of all BIIJ participants, I should like with great pleasure to thank the International Center for Ethics, Justice and Public Life, its staff, and our learned academic friends who made this creative step towards enhanced transnational jurisdiction with a human face.

Many fruitful returns!

*Wolfgang Schomburg  
International Criminal Tribunal  
for the former Yugoslavia  
October 2004*



Schloss Leopoldskron, Salzburg, Austria

## About the Institute

The International Center for Ethics, Justice and Public Life held its third Brandeis Institute for International Judges (BIJ) from 28 June to 3 July 2004. Held at the Schloss Leopoldskron in Salzburg, Austria, BIJ 2004 brought together 12 judges from seven international courts and tribunals to reflect on both the philosophical aspects and practical challenges of their work.<sup>1</sup> Faculty members led sessions on a wide range of topics, each carefully planned to both respond to and encourage new thinking about the concerns of the international judiciary.

The first session of the institute, led by South Africa's Justice Richard Goldstone, addressed the delivery of justice in post-war Iraq. Participants agreed that the recent experiences of United Nations criminal tribunals for the former Yugoslavia and Rwanda, as well as the Special Court for Sierra Leone (SCSL), are particularly pertinent in determining the type of court to be established for Iraq as well as its procedures. Two sessions followed on issues central to human rights theory and practice. Marion Smiley, professor of philosophy and women's studies at Brandeis University, illuminated the role of gender and culture in formulations of human rights around the world. Walter Berka of the University of Salzburg Law Faculty led a lively discussion on the notion of human dignity as a basis for universal human rights. Several sessions revolved around the institute's central theme of complementarity and cooperation. These focused on the relations that exist both between international and national courts as well as within the international justice system itself, with its ever-increasing roster of courts and tribunals. The varied interests served by international courts were the topic of a session led by Chidi Odinkalu and Brian Concannon, both of whom hail from non-governmental organizations (NGOs). In another session, Goldstone asked participants to examine exemptions of journalists and humanitarian workers from testifying about people and situations encountered in their work. While most of the institute sessions followed a lecture/discussion format, Concannon led participants in a role-play exercise designed to explore the possibilities



**BIJ 2004 judges**

and difficulties of cooperation between local and international judiciaries in post-conflict societies. Center Director Daniel Terris also led an informal evening activity that used the historical plays of Shakespeare as a lens through which to view the notion of accountability in war and crime.

BIJ 2004 continued its examination of the ethical challenges facing the international judiciary, a focus encouraged by past institute participants and addressed at length at BIJ 2003. In a session entitled "The Judge as Moral Agent," Smiley asked participants to ponder the very nature of judging and their responsibilities toward those whose lives they affect through their judgments. 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) then led a session that addressed ethical questions that arise in the everyday operation of international courts. The 2004 institute addressed whether judges should openly express their views on matters of public debate and the ways in which international judges can preserve the appearance of impartiality of their courts. The ethics sessions ended with an examination of a draft document on the "principles of the independence of the international judiciary." Developed by a study group of the International Law Association, in association with

the Project on International Courts and Tribunals (PICT), these principles were presented by Ruth Mackenzie of University College London. Mackenzie received feedback on the draft document from the institute judges.

As in past years, BIIJ 2004 mixed work with pleasure. Participants continued the discussions begun in sessions during walks around the Schloss Leopoldskron, over wonderful Austrian meals, and during an outing to an impressive ice cave in the vicinity of Salzburg. The Institute combined an intensive program of reflection and discussion with a congenial atmosphere in which judges forged new professional ties. The impact of BIIJ 2004 will reach far beyond the time and space in which the institute took place.

### **Participating Judges**

#### **African Commission for Human and Peoples' Rights (ACHPR)**

- Sanji Mmasenono Monageng, Botswana
- Bahame Tom Mukirya Nyanduga, Tanzania

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

- John Hedigan, Ireland

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

- Navanethem Pillay, former President of the International Criminal Tribunal for Rwanda, South Africa
- Anita Ušacka, Latvia

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

- Fausto Pocar, Vice-President, Italy
- Wolfgang Schomburg, Germany

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

- Mehmet Guney, Turkey
- Inés Weinberg de Roca, Argentina

#### **International Tribunal for the Law of the Sea (ITLOS)**

- Budislav Vukas, Vice-President, Croatia

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

- Emmanuel Ayoola, President, Nigeria
- Renate Winter, Austria

### **Faculty**

- Walter Berka, former Dean of the Law Faculty, University of Salzburg, Austria
- Brian Concannon, Director of the Institute for Justice and Democracy, USA
- Richard Goldstone, former Justice of the Constitutional Court, South Africa (core faculty)
- Ruth Mackenzie, Centre for International Courts and Tribunals, University College London, United Kingdom (guest presenter)
- Chidi Odinkalu, Open Society Institute in Africa, Nigeria
- Marion Smiley, Professor of Philosophy and Women's Studies, Brandeis University, USA (core faculty)

### **Rapporteurs/Program Consultants**

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

### **Staff of the International Center for Ethics, Justice and Public Life**

- Daniel Terris, Director
- Leigh Swigart, Associate Director
- Melissa Blanchard, Communications Specialist

The 2004 Brandeis Institute for International Judges offered sessions on a wide variety of topics of interest and concern to members of the international judiciary. Five main themes repeatedly emerged, however, during both formal sessions and evening activities:

- the unique character of international courts
- complementarity and cooperation in the international legal order
- the responsibilities and challenges of judging
- gender, culture, and human rights
- international courts and their “constituencies”

The following summarizes the discussions surrounding these key themes.

## The Unique Character of International Courts

The BIJ was created as an opportunity for international judges to reflect collectively upon diverse aspects of their work and how that work might be improved, thereby strengthening the international judicial system overall. The special character of international judging, and of the institutions in which judges work, surfaced often in institute discussions. Participants openly discussed the challenges they face as international judges and the significant contributions that their courts have made both to contemporary world affairs and to the development of international law.

Perhaps the most striking characteristic of the international judicial system is the diversity—national, cultural, linguistic, and professional—found within its courts.

This diversity poses a variety of challenges from translation issues to basic procedural approaches. Several participants noted the frustration felt by practitioners trained in civil or common law who are not familiar with the purpose and practice of the other system’s procedures, some of which have been adopted by their courts. The harmonization of civil and common law practices in international courts will continue to be an issue as new regional courts in Africa, whose nations tended to adopt the legal frameworks of their former colonizers, are established and begin operation. This challenge will be accompanied by both the theoretical and the practical challenges posed by extreme cultural and linguistic diversity. BIJ participants agreed that both civil/common law differences and diversity are topics that merit further examination at future institutes.

Participants discussed the uniqueness of international courts, frequently comparing them to national judiciaries. Participants felt generally that their institutions can claim an impartiality that would be hard to find in many national courts. This is especially true for criminal tribunals dealing with the aftermath of civil wars and ethnic violence, where national judiciaries might find themselves



BIJ core faculty Richard Goldstone and Marion Smiley

uncomfortably connected to the events and people being examined. International courts are also able to treat all parties equally—be they average citizens, political figures, or military leaders—since they are not required to observe domestic amnesties and immunities that might hinder national courts vis-à-vis the indictment of a high profile defendant. Participants furthermore noted that international courts are particularly successful in establishing truth through a systematic indictment and trial procedure, which allows victims to see that justice has been achieved. An example is the truth that emerged about the massacre at Srebrenica in Yugoslavia. Before the ICTY trials, it was asserted that only a handful of people had been killed. The final determination, after many indictments and trials, is that the victims of Srebrenica numbered in the thousands. It was also noted that international trials can more effectively establish the accountability of senior political leaders, thus discouraging the idea of impunity and dissuading future crimes of a similar nature. Furthermore, trials in an international tribunal contribute to the reality and perception of fairness to the accused, even those charged with the most heinous crimes.

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Participants, of course, identified the limitations of the international justice system. These include the massive cost of establishing and maintaining courts, whether ad-hoc or permanent, and the risk that such institutions are ill acquainted with local needs or interpretations of justice. Critics sometimes claim that the resources invested in international courts would be better used to strengthen local judiciaries that serve as the first line of defense in a world justice system. Several participants suggested that international judges should, as part of their mandate, be involved in the training of local judges in order to facilitate the reconstruction of local systems. This reconstruction is particularly important in the case of Rwanda because Rwandan courts will eventually “inherit” cases left over from the ICTR.

Another limitation of international justice, often noted by the public, is its ponderous pace. Not only does the slowness of the judicial process lead to greater expense, it is also frustrating to the courts’ “primary beneficiaries”—victims and witnesses as well as whole societies that need a timely resolution of the events under examination in order to resume a normal life. Paradoxically, the slow pace with which trials are carried out is an advantage to the “secondary beneficiaries”—the greater international community that will ultimately benefit from a body of law developed through the careful work of international courts.

Participants also discussed the relative benefits of adjudication and reconciliation. Can even the fairest and speediest of trials bring about reconciliation, either between parties before the court or in the larger society? Or are these essentially different processes, each of which has its unique role to play? Truth and reconciliation commissions, which in some cases coexist with international tribunals, may examine the same events very differently from international tribunals. Whereas truth commissions may elicit franker confessions of wrong-doing, courts have the ability to apply consequences once the truth is



**Inés Weinberg de Roca, ICTR**

uncovered. The two processes thus complement each other, but they may also occasionally find themselves in conflict. This was the case in Sierra Leone, where some of the individuals indicted by the SCSL were requested to come before the truth and reconciliation commission to talk about their crimes before they had even testified at their trials. Had it been allowed, this order of events would have compromised the judicial process. BIJ participants agreed that in order to avoid such dilemmas, the simultaneous operation of courts and truth commissions must be carefully coordinated. They also recognized the importance of truth and reconciliation commissions in general, viewing them as an important method of bringing closure in the aftermath of crimes. As one judge observed, “There can be no justice without truth, no truth without peace, no peace without justice.”

Judges pondered the purposes that would be served by trying leaders of the regime of Saddam Hussein. Trials would contribute to truth and reconciliation, vindication for victims, accountability and punishment for perpetrators, and the establishment of a historical record. Participants agreed that the unique features of the international court system—both positive and negative—should be taken into account when deciding the kind of court that will try the

former Iraqi dictator and his cohorts. There has been controversy over this issue, both within Iraq and in the international community. Some strongly contend that his crimes are solely an Iraqi affair and should therefore be addressed by an Iraqi court. Others disagree, arguing that an international tribunal would be more appropriate, for reasons that include the following:

- Many of Hussein’s victims were not Iraqi; therefore his crimes crossed national borders.
- Hussein’s crimes included those against humanity. Because Iraqi judges have little experience with such crimes, it would be better to create an international tribunal that would have substantive expertise in this area.
- Impartiality may be compromised in a purely Iraqi court.
- There is inadequate security in contemporary Iraq to conduct high-profile trials.
- There are not enough well trained Iraqi judges left from before the Baathist period to constitute a full bench.
- A national court is likely to impose the death penalty, which international law now discourages.

Some BIJ participants felt that the best strategy for trying Hussein and other Iraqis charged with crimes against humanity would be to create an international ad-hoc tribunal for Iraq, similar to the Yugoslav and Rwandan tribunals. Yet another alternative is to create a so-called “mixed tribunal” or “internationalized court,” which would bring together local and international staff. Such courts have been constituted, in varying forms, in Kosovo, East Timor, and Sierra Leone. Some participants felt that such a court, with its balance of local and global elements, might have the best chance of establishing truth and justice in Iraq.

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**“There can be no justice without truth,  
no truth without peace, no peace without justice.”**

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## **Complementarity and Cooperation in the International Legal Order**

The international justice system consists of numerous courts, tribunals, trade agreement bodies, and arbitration panels.<sup>2</sup> Some of these institutions are worldwide in jurisdiction,<sup>3</sup> while others are regional.<sup>4</sup> A small number of courts have been temporarily established to examine a particular set of events.<sup>5</sup> An issue of concern for judges and other international legal professionals is how this vast system might be coordinated, if at all, so that it functions most efficiently and consistently. On this topic, BIIJ participants addressed three questions: 1) How can international courts and tribunals cooperate among themselves; 2) How can international courts and national courts cooperate and establish complementarity; and 3) How might jurisprudence from other courts be effectively used?

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**Ideally, law is unified. But it might still be advantageous to have many bodies engaged in the development of this law rather than just a few.**

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There is currently no established hierarchy among international courts, although many in the field of international justice recognize that the International Court of Justice (ICJ) enjoys the highest status. It was noted that international courts sometimes deliberate simultaneously on similar issues. For example, the ICJ and the Inter-American Court of Human Rights (IACHR) each deliberated in 1999-2001 on the rights of foreign nationals in capital cases in the United States under the Vienna Convention on Consular Relations. Although the two courts ultimately rendered similar judgments, there was a real possibility of conflicting results. BIIJ participants expressed concern that the consequences of producing differing opinions on high-profile questions, such as the definition of genocide, could be disastrous to the legitimacy of international law.

It was suggested by several participants that an online clearinghouse of decisions by international courts be established. It would allow international courts to keep abreast of and cite each other's opinions, thereby allowing for the more systematic development of international law. The problem of overlapping jurisdictions, which might lead to "forum shopping" by plaintiffs, was also raised. It was suggested that these problems might be solved through undertaking an official coordination process for international courts and tribunals. There would be many obstacles to such a process, it was observed. Some judges also feared that coordinating the system might lead to the elimination of specialized tribunals and regional courts, all of which carry out crucial work.

Other participants felt that coordination of the international legal order is not a priority. They noted that there has been no harm up to now in having a non-unified system, one that has, for example, a number of different human rights courts. Indeed, it was suggested, law develops more robustly that way. It is not necessary to establish a hierarchy among courts or eliminate overlapping jurisdictions in order to combat impunity. Ideally, law is unified. But it might still be advantageous to have many bodies engaged in the development of this law rather than just a few.

The question of coordinating the international judicial system with national systems raises another host of issues. Should international courts or their domestic counterparts have primacy in trying particular parties? Can extradition of indicted individuals be required by international courts? How can complementarity between national courts and the ICC be ensured?

The ad-hoc criminal tribunals and the ICC relate to domestic judiciaries in very different ways. National courts in the affected regions must defer to the Yugoslav and Rwandan tribunals, turning over criminals to The Hague and Arusha and generally facilitating their work. This has created frustration and some resentment on the part of both governments and populations in the Balkans and Rwanda. Several judges noted that it will be interesting to see how well the transfer of lower level prosecutions back to national courts in these regions will proceed, a process that will begin as the end date of the tribunals approaches.

The ICC, unlike the ad-hoc tribunals, can only take on cases when national courts are unwilling or unable to handle them. BIIJ participants identified several advantages of this “complementarity” approach. For example, many states parties to the Rome Statute have adopted international law so as to facilitate cooperation with the ICC, and this law has consequently been applied at home. One judge noted, “International law must be dealt with at the domestic level. To apply it only at the international level is to use it incorrectly.” Participants recalled the oft-cited statement of the ICC Chief Prosecutor who noted that if he did his work correctly, ensuring that all cases were first dealt with thoroughly by domestic systems, the ICC would have no cases to try. While this would be ideal, few expect it to become a reality. Regional human rights courts also foster resolution of issues with potential international import in national courts by requiring that parties exhaust domestic remedies before bringing their cases to the regional bodies. This relationship may have benefits for national law as well. States within the jurisdiction of the ECHR, for example, have begun to create their own bodies of domestic human rights law, which the regional court can then reciprocally draw upon.



**Anita Ušacka, ICC, and Bahame Tom Mukirya Nyanduga, ACHPR, engaged in discussion during a break.**

Judges then turned to a discussion of how courts should regard each other’s decisions. Creating a website of international court decisions would certainly aid in unifying international law. It would allow courts in the international system to cite other opinions even if they do not follow them. However, it was noted that this website would not include decisions made by national courts, many of which might be instructive for cases before international courts. There is also the issue of how national courts use decisions by international courts. The United States has, in particular, been criticized for rejecting both foreign and international decisions as references in its own courts. One participant remarked, “This displays an abysmal ignorance of the use of foreign law. It need not be binding, nor even persuasive, but only illustrative.” The U.S. stance was contrasted with that of South Africa, whose constitution invites its courts to look at foreign law and requires them to have regard for international law.

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One participant pointed out, however, that it is more likely that judges will cite foreign or international decisions that *support* their thinking rather than *challenge* it. The other problem with comparative law is that judges are limited by the languages that they read. One judge noted that he recently wished to consult a German decision relevant to a case before his court, but he was only comfortable reading legal decisions in English. It was suggested that the International Bar Association could encourage the use of comparative law by translating important decisions. For the moment, however, it would appear that the use of decisions from other courts will remain, at best, haphazard and, at worst, opportunistic. But once again, information technology holds out the hope that this exercise could become simpler and more systematic in the future.

### **The Responsibilities and Challenges of Judging**

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

- The judge should try to take the perspective of all parties before the court prior to reaching a decision.
- The judge should try to remain open to the newness of each case even if it resembles previous ones.
- The judge should not disguise how he or she actually reached the decision, and should explain the decision not only through post hoc justifications but also with reference to the intuitions and reasons for selecting one principled justification over other possible ones.

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**A good judge . . . should be able to recognize his or her own preconceptions, listen to defendants and witnesses with compassion, and then stand back to consider the situation with dispassionate evaluation and reasoning.**

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- The judge should confront the difficulty of rejecting the arguments of a party by trying to develop reasons that would persuade that party or explain the result in terms that the party would concede are fair.
- The judge should acknowledge what it feels like to have power over the lives of others in the act of judgment.<sup>6</sup>

The statutes of all international courts state generally that only persons of the highest moral character and integrity will be appointed or elected to the bench. Such statements fail to articulate, however, the content of these qualities. BIIJ participants had a lively debate about what an international judge should be like and how their personal models compared to the recommendations above.

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

The recommendation that judges not disguise how they reach decisions was also discussed. While written decisions may reflect the reasoning of the bench, they usually do not include the “intuitions” that come into play in the process. Participants felt that the description, or indeed the consideration, of such subjective feelings might compromise the legitimacy of the judgment. Judges are acutely aware of working

in a domain where the *reality* and *appearance* of impartiality are tightly interlinked. If talk of intuitive processes leads to a questioning of the latter, the entire judicial process might be undermined.

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

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

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

Participants pointed out that independence was missing from the six recommendations for responsible judging. Yet this is a perennial concern for judges serving at all judicial levels, from the most local courts to transnational ones. Judges at the institute had the

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opportunity to comment on the draft “Burgh House Principles on the Independence of the International Judiciary,” developed by a study group composed of practitioners and law professors under the sponsorship of the International Law Association and PICT.<sup>7</sup> The assembled judges felt that the following topics could benefit from further examination:

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

It was noted that the development of general principles pertaining to independence are important and may be useful to the international judiciary both as guidelines and as “moral rules.” Yet skepticism remained among some participants as to the



**Fausto Pocar and Wolfgang Schomburg, ICTY, discuss a point with Linda Carter, McGeorge School of Law.**

applicability of such principles across all international courts, each with its own mandate, jurisdiction, supervising institution, and funding source. Mackenzie of PICT informed judges that these principles have been made available on the internet so that they can receive exposure and feedback before being finalized. She also stressed that they were intended to be *general* principles that each court could adapt to its own specific circumstances.

Another important dimension of judging was raised for discussion: the public scrutiny that judges receive as “moral agents.” While all public servants experience such scrutiny, the profession of judging, associated with high moral character and integrity, seems to receive it to an unusually high degree. Many participants felt ambivalent about being placed “in the spotlight.” If judges exhibit blatantly racist or sexist behavior, for example, or have personal failings that might influence the practice of their profession, then the public has the right to know. But too often, other aspects of a judge’s life become public knowledge, and sometime those that are a clear violation of individual privacy, such as sexual preference. In general, participants agreed that in accepting the position of international judge, they had opened themselves up to close, and sometimes unwanted, public supervision. Paradoxically, the same subjectivity that judges are recommended to exercise in their profession may lead to increased scrutiny and possible accusations of bias.<sup>8</sup>

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to take place . . . outside of the public gaze.**

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## **Gender, Culture, and Human Rights**

One of the challenges to developing and implementing international laws effectively is to recognize when so-called “universal” norms conflict with local beliefs and practices. This multi-cultural challenge is perhaps felt nowhere as strongly as in the domain of gender and human rights. In order for fundamental human rights to be accorded to every person, the problematic status of women in many parts of the world and their particular vulnerabilities must be closely examined.

BIIJ participants were asked to contemplate the nature of human rights and whether they should be differentiated from women’s rights. The following questions were posed:

- Is the experience of women, as a group, so distinct that they should benefit from particular rights, like certain minorities and indigenous populations around the world? Or does the fact that women number more than half the world’s population preclude such a classification?
- How should women’s “harms” be characterized, beyond clear violations of rights such as rape?
- Can the rights of women be protected regardless of the cultural context?

Violations of women’s rights are often difficult to examine since they tend to take place in the domestic sphere or in an intimate context, outside of the public gaze. Historically, there has been a feeling that the state should not intervene in this private realm, a feeling reinforced by many cultural beliefs.

Cultural norms and the law are often in contradiction when it comes to the rights of women. There are many different approaches to addressing this conflict. Some believe that culture should always determine what is appropriate in a given context, while others believe that international laws protecting women should have the ultimate determination. In certain countries, laws have even been enacted that address this conflict. For example, given a choice between gender equality and cultural tradition in South Africa,



**Emmanuel Ayoola, SCSL, and Sanji Mmasenono Monageng, ACHPR**

the courts will support the former. Some argue that the protection of women might best be approached not through international human rights law at all, but instead through social movements and the advocacy of civil society at a more local level. This has been the case with female genital mutilation (FGM), a practice that is culturally defended in many parts of the world but generally viewed as a human rights violation by the international community.

While the dichotomy of culture and international law might appear difficult to bridge, participants were asked to remember that cultures are not fixed in stone but changeable, porous, and often inconsistent. There may be “competing traditions” within a single culture that can be used to reinterpret certain practices, thereby eliminating the need for interference by outside laws. Once again, this has been the case with FGM. Local NGOs have convinced some populations to highlight the coming of age and initiation aspects of the ceremonies surrounding the practice but to abandon the actual physical procedure. Others have encouraged re-readings of religious texts to remove interpretations that apparently but erroneously encourage the practice.

Several BIIJ participants noted that the domestic laws concerning the protection of women’s rights in their countries are inconsistent, outlawing gender discrimination in some areas and allowing it in others. They suggested that the domestication of international instruments concerning women would be a first step in applying such norms both locally and more uniformly. But legal investment in these norms, they added, must be accompanied by political support and public consciousness-raising.

While establishing international standards for the rights of women around the world is far from being a reality, international courts have made strides in defining certain crimes that violate the rights of women. The ICTY was successful in establishing rape as a war crime. The ICTR was the first tribunal to convict a defendant for rape as an act of genocide. The SCSL more recently established that the forced marriage of women is a crime. Yet, women’s rights issues that do not come before high-profile criminal courts—lack of access to education, child marriage, the protection of women refugees, the rights of widows—have received less systematic and sustained attention.

Finally, BIIJ participants discussed another gender inequity, this one closer to home—the under-representation of women in their own courts. It was asked whether women judges bring special insights to the profession or to the judgment of particular cases. Or does this idea itself suggest a bias or stereotyping of gender identities? It has been argued that women tend to be more sensitive to the crimes of rape and domestic abuse. But there is also evidence that some female judges may be less sympathetic to the victims of these crimes, perhaps anticipating accusations of partiality.

Whether women perform differently on the bench or not, it is clear that they are greatly outnumbered by their male peers. The ICC responded to this imbalance by instituting a quota for women judges on their bench. The newly established African Court

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**By sending the message . . . that both states and individuals will be held accountable for their actions, international courts help to end impunity and promote a more just world.**

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for Human and Peoples' Rights, following the lead of the African Commission, will also call for a balanced representation. It was agreed that women face more challenges in becoming judges on international courts and tribunals because they are less likely to hold top positions in law schools or other posts that typically lead to election or appointment. This pattern of discrimination is clearly not confined to the international justice system but is global in nature.

#### **International Courts and Their "Constituencies"**

One session at BIIJ 2004 was devoted to a discussion of the diverse groups that benefit from the work of international courts, what some might call their "constituencies." This topic is relevant because international courts face many obstacles in their search for legitimacy. Some also find themselves with inadequate resources to carry out their mandate. Unlike national courts, which are seen as a necessary institution in virtually every country, international courts must frequently justify their existence. They are seen in many quarters as too expensive, too slow, or too intrusive. Thus, the more that international courts demonstrate the importance and necessity of what they do, the better chance they have of garnering political and financial support for their work.

There was disagreement among participants about defining "constituency" in the context of the international justice system. One definition offered was that it consists of those groups with a stake in the outcome of international judicial proceedings. These would include:

- victims
- witnesses
- accused persons
- communities of those appearing before the courts
- national governments
- human rights organizations and diverse NGOs
- institutions that created the courts
- academics
- international community at large

Session leaders noted that constituencies may be divided into two layers. The primary constituencies, or beneficiaries, of international courts are those that are directly affected by judicial proceedings. This layer includes parties before the court, be they individuals or states, and the communities in which the events under examination took place. The desired outcomes for the primary constituencies include justice for victims, reconciliation in societies touched by the crimes, and the deterrence of future crimes.

The second layer of constituents consists of entities that will benefit from the long-term effects of decisions made by international courts and from the development of international law. This includes NGOs and other civil society groups, academics and practitioners, and the international community more generally. By sending the message, through their decisions, that both states and individuals will be held accountable for their actions, international courts help to end impunity and promote a more just world.

The need to engage these primary and secondary constituencies was raised by some participants. In response, others asked, “Whose job is it exactly to do the engaging?” Many felt that a judge’s only job is to judge well. It is instead the politician’s job to persuade constituencies that the courts are operating effectively and achieving their goals. A court might also have an advocate or spokesperson who can inform the public directly about its work and accomplishments. In addition, there are numerous organizations devoted to furthering the understanding and development of international courts and their work. Learning from the early failures of the two ad-hoc criminal tribunals to engage adequately their constituencies, the ICC and the African Court for Human and Peoples’ Rights have taken an innovative step. They have incorporated civil society input directly into their formation processes and thus benefit at every phase from the advice of a wide range of NGOs, representing diverse populations and interest groups.

There are some problems that may arise, however, from an acute awareness of a court’s constituencies. Judges were concerned that courts might feel pressure to deliver certain verdicts for a particular constituency. It is also possible that various constituencies of the same court might desire different outcomes. For example, states parties and sponsoring institutions would like to see cost-effective justice, while victims and civil society are more interested in achieving *full* justice, no matter how many resources it takes. International courts are often caught in the middle of such conflicts, searching for a way to respond to their various constituents while remaining impartial and independent.

Related to the issue of courts and their constituencies is the issue of “qualified privilege” for journalists and humanitarian workers. This term refers to their right to refrain from testifying before international courts. Both professional groups carry out crucial work—providing news on important events as they unfold and much needed relief for those directly

touched by those same events. Both groups also require special conditions in order to accomplish their work. Journalists rely on confidential sources to obtain accurate information, while humanitarian workers need special access to assist their target populations. In the course of their work, these professionals may acquire information or witness events that have bearing on cases before international courts. On the one hand, by testifying, journalists may lose important sources of information and workers may lose access to a particular region or community. On the other hand, their refusal to testify may hinder the conviction of suspected criminals, thereby compromising the court’s ability to provide justice to victims and other primary constituencies. One participant claimed, “The withholding of exculpatory evidence would be a miscarriage of justice.” Another countered, however, “Judges claim the duty to remain confidential about judicial deliberations. There must be an analogue there to the work of journalists.” In the end, no unanimity was reached about the justification for qualified privilege. Participants felt that decisions about the need for the testimony of journalists and humanitarian workers might better be made case-by-case. However, some felt strongly that if an individual has actually witnessed a crime, then he or she should not be allowed to claim such privilege.



**Navanethem Pillay and Anita Ušacka, ICC, Wolfgang Schomburg, ICTY, John Hedigan, ECHR, and Sanji Mmasenono Monageng, ACHPR**

A final topic was raised in relation to constituents—that of using electronic media in order to engage them fully. Most courts have websites that publicize their docket, proceedings, and, increasingly, their jurisprudence. Again, some judges and practitioners of international law would like to create a central clearinghouse of information where the work of all international courts would be made available. The ECHR has recently discussed the possibility of broadcasting proceedings via the internet. This would allow those in its jurisdiction to follow cases that affect them, regardless of how far they live from Strasbourg. As one participant stated, “Justice is public. It should

be open and visible to all.” Yet others felt that cameras in the courtroom would have a negative impact on the proceedings.

In conclusion, participants agreed that courts must examine themselves closely, engage in constant dialogue with observers and experts, and listen to criticism and public opinion about their performance. But, they agreed, courts must also clearly distinguish between the aims of international justice and the desires of constituents. Only in this way will they justify their existence, ensure adequate support for their work, and remain true to their missions.



**Richard Goldstone and Fausto Pocar, ICTY, wait for a cable car in the mountains outside of Salzburg.**



**A view from the Eisriesenwelt Werfen, the world's largest ice cave**

# Human Dignity as a Human Right

Participants of BIIJ 2004 were privileged to have as a guest faculty member Walter Berka, professor of law at the University of Salzburg. Author of *Fundamental Rights and Human Rights in Austria* (1999), among many other publications, Berka outlined some of the issues that arise when human dignity is taken as a human right, as it is in the laws of the European Union. Berka's incisive presentation led to a provocative discussion among BIIJ participants.

The session began with Berka's reference to a well-known scene in Mozart's opera *The Magic Flute*, appropriate not only for its evocation of Salzburg's most famous citizen but also its encapsulation of the notion of human dignity. In the scene, a character asks the High Priest of Isis and Osiris, Sarastro, whether Tamino will be able to contend with the hard ordeals that await him. "*He is a prince,*" the character points out. "*More than that,*" Sarastro responds forcefully, "*he is a human being!*"

The idea that all human beings have inherent worth, regardless of their social stature or rank, underlies much of contemporary Western culture. A product of 18<sup>th</sup> century Enlightenment philosophy, the notion of human dignity remains difficult to define. In the philosophy of Immanuel Kant, it is associated with the autonomy or inviolability of the person. Others prefer to define human dignity in the negative sense, that is, indicate not what it is but instead what constitutes its violation. Berka asked BIIJ participants to consider a fundamental question in regard to human dignity: "Are all environments able to protect human dignity unconditionally, or is the notion itself dependent on European culture?"



**Walter Berka leads BIIJ participants on a tour of the historic premises of the Law Faculty at the University of Salzburg.**

In the years following the shocking events of World War II, the notion of human dignity was frequently evoked. It consequently became an important element in the founding documents of the United Nations. The preamble to the Universal Declaration of Human Rights states, "The recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world." The International Covenants on Economic, Social and Cultural Rights and on Civil and Political Rights echo this statement in their own preambles, adding, "These rights derive from the inherent dignity of the human person." The constitutions of a number of nations subsequently adopted similar language.

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**"Are all environments able to protect human dignity unconditionally, or is the notion itself dependent on European culture?"**

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**Chidi Odinkalu, Open Society Institute In Africa, and Leigh Swigart, Brandeis University, pose in the frescoed map gallery in the University of Salzburg's Law Faculty.**

The Charter of Fundamental Rights of the European Union, solemnized in December 2000 and incorporated into the European Constitution in June 2004, goes one step further than the UN documents in its treatment of the value of human dignity. In addition to taking human dignity as an underlying principle of human rights generally, it is enacted as a human right in and of itself (Chapter 1, Article I). It is thus listed as a right along with related ones such as the right to life, the right to the integrity of the person, the right to the prohibition of torture or inhuman or degrading treatment or punishment, and the right to the prohibition of slavery and forced labor.

There are, however, consequences to the elevation of human dignity from principle to right. Unlike rights such as freedom of expression or personal liberty, the attributes of, and thus limits of, human dignity are difficult to specify. Whereas legal principles are left open and are not restricted to a certain range of applications, rights necessarily need some act of limitation and concretization. The diffuse nature of human dignity makes it extremely difficult, from a legal point of view, to respond to claims that it has been violated.

Berka suggested that human dignity, despite being seen as a right in the European Charter and several national constitutions, is not a right like others. It has long existed as an umbrella principle underlying other human rights, the idea being that if human rights are protected and respected, then human dignity has been provided. Human dignity has retained the status of umbrella principle in the European Charter while assuming the status of right as well. The decision to amplify the position of human dignity is, Berka believes, a reaction to painful experiences of the past and the expression of a European commitment to respecting and protecting the person.

Berka posed the following questions to BIIJ participants:

- What does human dignity really mean?
- Can human dignity serve as a universal concept in a pluralistic world although its sources are Western philosophy and ideology?
- What are the implications of human dignity as a right in the field of international law?

All agreed that identifying what constitutes human dignity is a challenge. One possible definition is the ability for an individual to determine what feels dignified for him or herself. Yet, such self-determination might lead to situations that are quite untenable. For example, one individual's dignity could depend upon the violation of another's. It is also possible for the same act both to violate and provide human dignity under different circumstances. Thus, although it is widely held that the death penalty violates human dignity, assisted suicide for the dying may, in fact, restore it. Furthermore, the content of human dignity can differ depending on the context. In one society, it might consist of access to basic food and shelter. In another, one's dignity may depend upon the possibility of openly expressing one's homosexuality. While participants agreed that the subjective element in defining human dignity is important, they also felt that such a fluid notion is almost impossible to institutionalize in a legal sense.

The question of whether human dignity is a universal base value is also fraught with difficulties. Can we maintain that every human being is entitled to the same dignity? In theory, participants agreed. But how can such a theory be put into practice? Berka noted:

We know that in order to deal legally with human rights or the concept of human dignity, we have to develop certain criteria or standards for interpretation. The difficulty is that these standards depend upon value judgments, and value judgments will differ depending on culture, religious background, traditions, and philosophical convictions.

Participants noted that, even if comparable standards of human dignity *could* be recognized across societies and cultures, they might be difficult to uphold in a context of economic deprivation. Impoverished populations around the globe could be seen as lacking the human dignity that comes with access to proper nutrition, clean water, health care, education, and other necessities. One participant noted that, in developing countries in particular, the establishment of human dignity as a right may only come with time. In the meantime, it can probably only be indicated as a fundamental value but not a non-derogable right. Providing human dignity for all, while desirable, will thus depend upon local resources, beliefs, and practices.

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**Unlike more easily recognized political, civil, or economic rights, the right to human dignity escapes easy definition but resonates deeply within each of us.**

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Finally, what does elevating human dignity from principle to right imply for international law? Participants identified innumerable difficulties in the application of such a right in the legal sphere, given its overall fuzziness and subjectivity. Can human dignity have a collective aspect; in other words, can it be applied to groups? Or is it a strictly individual notion? What happens if persons appearing before international courts come from countries that interpret human dignity in disparate ways, or if the persons are accorded certain rights by their domestic judiciaries and different ones by their international counterparts? The judges agreed that it is important that there be some universally accepted standards for human dignity in the *legal* sphere, even if such uniformity is not yet possible across different cultural or socioeconomic contexts.

After a wide-ranging discussion, the session concluded with a final thought. The difficulty of establishing human dignity as an entitlement in the judicial context should not preclude judges from appreciating the value of viewing it through a philosophical lens. Perhaps both the difficulty and significance of studying human dignity arise from its fundamentally moral nature. Unlike more easily recognized political, civil, or economic rights, the right to human dignity escapes easy definition but resonates deeply within each of us. As one participant noted, “I cannot say what human dignity is, but I know when it has not been respected.” Such insight may well be one of the ineffable qualities we share as human beings.

## Topics in Ethical Practice

Since its inaugural session, the Brandeis Institute for International Judges (BIJ) 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 BIJ 2003 report or at [www.brandeis.edu/ethics](http://www.brandeis.edu/ethics).

The BIJ’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 on 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.



Center Director Daniel Terris leads the group in a session.

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.

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**"We are the guardians of justice and judicial standards. We shouldn't be seen to be acquiescent in the face of violations."**

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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.



**Judges enjoy a relaxing moment in Salzburg's Old City.**

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-

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**“Preconceptions exist, and having a rule that prevents judges from announcing their views does not serve the purpose of eliminating preconceptions.”**

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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.

## Notes

<sup>1</sup> Two of these participants were commissioners with the African Commission for Human and Peoples’ Rights (ACHPR), and thus not judges, strictly speaking, but rather legal experts. The BIIJ has invited African commissioners since its inaugural session, pending the establishment of an African Court for Human and Peoples’ Rights, the election of judges, and the commencement of its work.

<sup>2</sup> For a complete list and helpful classification of the international justice system, see: [www.pict-pcti.org](http://www.pict-pcti.org).

<sup>3</sup> E.g., the International Court of Justice, the International Tribunal for the Law of the Sea, and the International Criminal Court.

<sup>4</sup> E.g., the European Court of Human Rights, the Inter-American Court of Human Rights, and the African Court of Human and Peoples’ Rights.

<sup>5</sup> E.g., the International Criminal Tribunal for the former Yugoslavia, the International Criminal Tribunal for Rwanda, and the Special Court for Sierra Leone.

<sup>6</sup> C.f. Martha Minow and Elizabeth Spelman, “On Retaining One’s Humanity,” reprinted in Kenneth Winston, ed., *The Responsible Judge: Readings in Judicial Ethics* (1993).

<sup>7</sup> For the full text of the principles, see [http://www.pict-pcti.org/activities/ILA\\_study\\_grp.html](http://www.pict-pcti.org/activities/ILA_study_grp.html).

<sup>8</sup> The relation between a judges’ high profile position and his or her opportunity to exert positive public influence is examined in the section of this report entitled “Topics in Ethical Practice.”

## Judges

**Emmanuel Ayoola** (Nigeria) serves in the Appeals Chamber of the Special Court for Sierra Leone, of which he was elected president in May 2004. He has served as judge of the Supreme Court of Nigeria, president of the Seychelles Court of Appeal, and former chief justice of The Gambia. He has been a vice president of the World Judge's Association, and won the UN Human Rights Fellowship award in 1966. A graduate of London and Oxford Universities, he has edited the *Seychelles Law Digest*, the *Law Reports of The Gambia*, and the *Nigerian Monthly Law Reports*.

**Mehmet Güney** (Turkey) has served as judge for the International Criminal Tribunal for Rwanda since 1998 and was assigned to the Appeals Chamber of the Tribunal in 2001. In 1995, he was appointed to the International Commission of Inquiry for Burundi, established by the Security Council. He has served as ambassador of Turkey to Cuba, Singapore, and Indonesia. Güney also worked for several years in the Turkish Permanent Mission to the United Nations in New York and in the Turkish Embassy in The Hague. In 1998, he headed the Turkish delegation to the United Nations Diplomatic Conference of Plenipotentiaries on the establishment of an International Criminal Court. In 1991, he was elected a member of the International Law Commission by the United Nations General Assembly for five years, eventually serving as vice president.

**John Hedigan** (Ireland) was elected to the European Court of Human Rights in January 1998 and was reelected for a second term in Spring 2004. Hedigan was educated at Belvedere College, Trinity College, Dublin, and Kings Inns. In 1971 he helped refound the Trinity College Dublin branch of Amnesty International (AI). He represented the branch on the National Executive Committee of AI for eight years and served as the national coordinator of the AI Campaign against torture. Called to the Bar of Ireland in 1976, he practiced as a barrister for 22 years and had a wide-ranging practice stretching from constitutional to criminal to commercial law. He also

practiced as a barrister before the European Court of Justice in Luxembourg. He was called to the Inner Bar of Ireland in 1990 as senior counsel, the English Bar in 1983, and the Bar of New South Wales in 1993. He served as chairperson of the Irish Civil Service Disciplinary Appeals Tribunal from 1992-1994. In 2002 he was made a bencher of the Honourable Society of Kings Inns.

**Sanji Mmasenono Monageng** (Botswana) was appointed as a commissioner in the African Commission on Human and Peoples' Right in July 2003, where she is also the focal person for the Prevention of Torture, Inhuman and Degrading Treatment. She is also the chief executive officer of the Law Society of Botswana and sits on numerous boards including the National Broadcasting Board of Botswana, Open Society Initiative of Southern Africa, and the Human Rights Trust of Southern Africa. She chairs the Ethics, Law, and Human Rights sector of the National Aids Council in Botswana and is a member of the International Bar Association. She has worked for over 10 years as a magistrate in the Department of Justice in Botswana and also worked in the banking sector. Active in women's and children's rights issues, Monageng attends conferences and seminars on a variety of subjects and has delivered papers in different fora. She holds a Bachelor of Laws degree from the University of Botswana and is an attorney of the Courts of Botswana.

**Bahame Tom Mukirya Nyanduga** (Tanzania) has been a member of the African Commission on Human and Peoples' Rights since his election in July 2003. An advocate of the High Court of Tanzania, he was admitted to the Tanzanian bar in 1994. Nyanduga served as president of the Tanganyika Law Society (the National Bar Association) from 2000 to 2001 and is currently first deputy secretary general of the East African Law Society. Between 1978 and 1994 he worked for the Ministry of Foreign Affairs and International Cooperation. Between 1984 and 1989, he served at the Tanzania High Commission in London and was responsible for bilateral economic

cooperation and legal affairs. Nyanduga graduated with an LL.B. from the Faculty of Law of the University of Dar es Salaam in 1977. He earned his LL.M. from the London School of Economics, University of London. He holds a post graduate diploma in International Law and Development from the Institute of Social Studies in The Hague and a post graduate diploma in International Relations from the Centre for Foreign Relations in Dar es Salaam.

**Navanethem Pillay** (South Africa) was elected as a judge to the International Criminal Court in March 2003. Previously, she served as president of the International Criminal Tribunal for Rwanda. As an attorney in Durban from 1967 to 1995 she represented members of the African National Congress, Unity Movement, Azapo, Black Consciousness Movement, Trade Unions, and SWAPO. The first woman to start a law practice in Natal Province, South Africa, she was instrumental in bringing a ground-breaking application in the Cape High Court, which spelled out the rights of Robben Island political prisoners. Pillay was also the first black female attorney appointed acting judge of the Supreme Court of South Africa. She was a trustee of Lawyers for Human Rights and The Legal Resources Centre. She also was a member of the Women's National Coalition, the Black Lawyers' Association, cofounder of the Advice Desk for the Abused, and vice president of the Council of University of Durban Westville. She holds B.A. and LL.B. degrees from Natal University and an LL.M. and Doctorate of Juridical Science from Harvard University.

**Fausto Pocar** (Italy) was appointed to the International Criminal Tribunal for the former Yugoslavia in 1999 and is currently the vice president. He also serves as a member of the Appeals Chamber of the International Criminal Tribunal for Rwanda and the former Yugoslavia. He is professor of International Law at the University of Milan, Italy. In 1984, he was elected member of the Human Rights Committee of the United Nations, a position he held until 2000; he was its chairman in 1991 and 1992. He

took part in the world conference on Human Rights in Vienna in 1993, and was special representative of the United Nations High Commissioner for Human Rights in Chechnya in 1995 and in Russia in 1996. Pocar served several times as a member of the Italian delegation to the General Assembly in New York and to the Commission of Human Rights in Geneva. He was also a member of the United Nations Committee on the Peaceful Uses of Outer Space. He is a member of the Institut de Droit International and of several academic associations.

**Wolfgang Schomburg** (Germany) was elected as permanent judge at the International Criminal Tribunal for the former Yugoslavia in March 2001 and from November 2001 to October 2003 he acted as presiding judge of Trial Chamber II. In October 2003 he was appointed judge of the Appeals Chamber of the International Criminal Tribunals for Rwanda and the former Yugoslavia. He started his career as a public prosecutor and later as a judge at the Berlin Regional Court. Following his appointment to the federal prosecutor and the German Parliament, he was elected Under Secretary of State at the Senate Justice Department in Berlin. From 1995 to 2000 he was elected judge at the Federal High Court of Germany. Schomburg has published more than 80 articles and books on international cooperation in criminal matters and assisted the Council of Europe, European Union, and ABA/CEELI in drafting and implementing international criminal law. Schomburg studied law at the Freie Universität Berlin and concluded his vocational education with the 2nd State Law Finals Examination in 1974.

**Anita Ušacka** (Latvia) was elected to the International Criminal Court in 2003. She was elected a judge of the Constitutional Court of the Republic of Latvia upon the creation of the Latvian Constitutional Court in 1996 and served on the Constitutional Court through 2003. She has been a member of the International Association of Women Judges since 1997. From 1994 to 1996, she was the executive director of the Latvian branch for UNICEF. In 2002,

she was appointed full professor at the Department of Constitutional Law of Latvia University, where she has been affiliated since 1975. Her various publications promote the establishment in Latvia of the rule of law, human rights protections, administrative law reform, constitutional law reform, fair trial guarantees, and judicial training and reform. She has expertise in international humanitarian and public law, with a particular focus on the rights of women and children. Ušacka obtained her law degree from the Latvian University and her Ph.D. from the Faculty of Law in Moscow State University.

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

**Inés Weinberg de Roca** (Argentina) was elected as a judge of the International Criminal Tribunal for Rwanda in January 2003 and in June 2003 became a member of the Appeals Chamber of the International Criminal Tribunals for Rwanda and the former Yugoslavia. She was an advisor on international law to the Argentine Ministry of Foreign Affairs from 2000 to 2003 and until 2003 represented Argentina to UNIDROIT and in international conferences. Weinberg de Roca was appointed as a judge of the National Civil Court in Buenos Aires in 1993 and acted in this capacity until she was appointed to the Administrative Court of Appeals in 2000, where she served for three years. A professor of International Law at the Faculty of Law of the University of Buenos Aires and at the Universidad Argentina de la Empresa, Weinberg de Roca has served as a visiting professor and speaker at many universities and conferences. She is the author of numerous books and articles, and is

the editor of a book on the Convention on the Rights of the Child. She studied law at the Universities of Buenos Aires and La Plata, Argentina, and at the Max-Planck-Institut in Hamburg, Germany. She is a member of the Argentine Council for Foreign Relations and several academic associations.

**Renate Winter** (Austria) serves as a judge in the Appeals Chamber of the Special Court for Sierra Leone. She was an international judge of the Supreme Court in the former Yugoslavian province of Kosovo, as part of the United Nations Mission in Kosovo. Winter is an expert on family law, juvenile justice systems, women's issues, pedophilia, child labor, and the role of the media in advocacy. Since 1981 she has been a judge at the Vienna Youth Court where she undertook projects to help rehabilitate youths with problems of drug addiction and mental disability. She has worked on projects relating to youth, juvenile justice, and child soldiers for the United Nations and international NGOs in countries such as Iran, Iraq, Lebanon, and Tunisia, and in West Africa, Nigeria, and Senegal. Throughout the 1990s, Winter chaired numerous international conferences on matters relating to juvenile justice and gender. She is currently vice-president of the International Association of Youth and Family Court Judges.

## Core Faculty

**Richard Goldstone** (South Africa) is the Mulligan Visiting Professor of Law at Fordham Law School. From July 1994 to October 2003, he served as a Justice of the Constitutional Court of South Africa. He also served as chief prosecutor of the International Criminal Tribunals for Rwanda and the former Yugoslavia from August 1994 to September 1996. In 1989 he was appointed Judge of the Appellate Division of the Supreme Court of South Africa. Goldstone is a member of the boards of Human Rights Watch, the International Center for Transitional Justice, and Physicians for Human Rights and a director of the American Arbitration Association. In April 2004 he was appointed to the

Committee of Inquiry into the Iraq Oil for Food program, chaired by Paul Volcker. He has received many awards including the International Human Rights Award of the American Bar Association and Honorary Doctorates of Law from a number of universities, including Brandeis University. He is an honorary bencher of the Inner Temple, London, an Honorary Fellow of St. John's College, Cambridge, an honorary member of the Association of the Bar of New York, and a fellow of the Weatherhead Centre for International Affairs of Harvard University. He is a foreign member of the American Academy of Arts and Sciences. Goldstone holds a B.A. and LL.B. from the University of the Witwatersrand.

**Marion Smiley** (USA) is J.P. Morgan Chase Professor of Ethics at Brandeis University. She is a member of the Department of Philosophy and the Women's Studies Program and serves as an associate faculty member of the politics department and on the core faculty of the Global Studies Program. Her major areas of study are moral, social, and political philosophy, as well as feminist theory, and she has published widely in the fields of ethics and public affairs. Smiley is the author of *Moral Responsibility and the Boundaries of Community*; *Accountability and Power From a Pragmatic Point of View*; *Falling Through the Trap Door*; and *The Philosophy and Politics of Group Identification*, as well as numerous articles on the philosophy of pragmatism, democratic theory, paternalism, individual liberty and collective goods, theories of community, equality and difference, individual and collective responsibility, moral agency, feminism, and rights. Smiley is the recipient of several teaching awards, as well as research fellowships from Princeton University, the Woodrow Wilson Foundation, and Harvard University. She holds a Ph.D. from the Political Philosophy Program of Princeton University.

## Guest Faculty

**Walter Berka** (Austria) is a professor of constitutional law, administrative law, and general theory of the state at the University of Salzburg. He is also director of the Executive M.B.A. Program for Public Administration at the university. He was dean of the Law Faculty until 2003. He has served as the director of the Institute for Administrative Law at the University of Linz. His areas of interest include constitutional and administrative law, fundamental freedoms and human rights, media law, education law, and planning law. He serves as a member of the Austrian Academy of Science, chair of the scientific board of the Austrian Research Association, and board member of the European Association for Education Law and Policy. His publications include *Freedom of the Media and Protection of Individual Rights*; *Testing the Broadcasting Monopoly*; *Mass Media Law*; *Fundamental Rights and Human Rights in Austria*; *Protection of Journalistic Sources and Freedom of the Press*; *Media Law* (Commentary); and *Autonomy in Education*.

**Brian Concannon Jr.** (USA) is director of the Institute for Justice and Democracy in Haiti (IJDH). A human rights lawyer and activist, he worked in Haiti from 1995 until 2004, first with the United Nations, and from 1996 through 2004 with the Bureau des Avocats Internationaux (BAI) in Port-au-Prince. The BAI was established by the Haitian government to help victims and the justice system prosecute human rights cases, mostly from Haiti's 1991-1994 de facto military dictatorship. The BAI's most prominent case was the prosecution of the 1994 Raboteau Massacre, considered the best human rights prosecution in Haiti's history. IJDH was established to respond to the violent and unlawful interruption of Haiti's democratic process in February 2004. The Institute fights for the return of democracy and the rule of law to Haiti by documenting human rights violations, disseminating accurate information and pursuing legal claims in Haiti and abroad. Concannon is a graduate of Georgetown University Law Center and held a Brandeis International Fellowship in Human Rights, Intervention, and International Law

from 2001-2003. He writes and speaks often about justice and human rights in Haiti.

**Chidi Odinkalu** (Nigeria) is developing the programs of the Justice Initiative of the Open Society Institute in Africa. He previously served as senior legal officer for the Africa, Liberty, and Security of Persons Programmes at Interights, London. He has also been a solicitor and advocate of the Supreme Court of Nigeria since 1988. An active member of the executive boards of several NGOs, he has also served as a human rights advisor for the UN Observer Mission in Sierra Leone. Odinkalu held a Brandeis International Fellowship in Human Rights, Intervention and International Law from 2001-2003. His most recent book, *Building Bridges for Rights: Inter-African Initiatives in the field of Human Rights*, follows two monographs on Nigerian legal issues.

### Guest Presenter

**Ruth Mackenzie** (UK) is principal research fellow and assistant director of the Centre for International Courts and Tribunals in the Faculty of Laws at University College London. The Centre is the London home of the Project on International Courts and Tribunals (PICT), a collaborative research and training project which addresses the use, practice and procedures of international courts. Mackenzie co-edited the *Manual on International Courts and Tribunals* for PICT. She is currently acting as one of the secretaries of the International Law Association Study Group on the Practice and Procedures of International Courts and Tribunals, as part of PICT's support to the work of the Study Group on the issue of the independence of the international judiciary. She was formerly director of the Biodiversity and Marine Resources Programme at the Foundation for International Environmental Law and Development.

### Rapporteurs and Program Consultants

**Linda Carter** is a professor of law at the University of the Pacific, McGeorge School of Law, California. Her teaching and research expertise is in the areas of criminal law, criminal procedure, evidence, and capital punishment law. Prior to joining McGeorge, Carter litigated civil and criminal cases. From 1978 to 1981, she was a trial attorney in the honors program of the Civil Rights Division of the United States Department of Justice in Washington, D.C., where she litigated voting, housing, and education discrimination cases. From 1981 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. Carter's most recent publications include a book on capital punishment law in the United States and an article on the rights of detained foreign nationals in capital cases under the Vienna Convention on Consular Relations.

**Gregory Weber** is a professor of law at the University of the Pacific, McGeorge School of Law, California. He heads the Pacific/McGeorge Institute for Sustainable Development, a program focused on transnational natural resources issues. He is also a part-time mediator with the Center for Collaborative Policy, a joint project of California State University, Sacramento, and McGeorge. As an environmental law advisor, he has studied forestry disputes in Mexico for the World Wildlife Fund and in Canada for the Forest Stewardship Council (FSC). Currently, he is leading a project to revise the FSC dispute resolution protocol. Weber is also training Chilean prosecutors and defenders in negotiation skills. Before joining the McGeorge faculty, he clerked for Justice Edmond Burke, Alaska Supreme Court, practiced with a leading California water resources law firm, and was a senior attorney for the California Court of Appeal, Third District, in Sacramento. He is a co-founder of the *California Water Law and Policy Reporter* and has co-authored two books and numerous law review articles.

## Center Staff

**Daniel Terris**, 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 on Intercommunal Coexistence, the Brandeis Institute for International Judges (BIIJ), the Brandeis International Fellowships, Community Histories by Youth in the Middle East (CHYME), 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, as well as teaching in the Brandeis Seminars in Humanities and the Professions, which uses literary texts to engage professionals in discussions on professional values and ethics. 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. His forthcoming book is *Ethics at Work: Creating Virtue in an American Corporation*.

**Leigh Swigart** is the associate director of the International Center for Ethics, Justice and Public Life, and manages the development of seminars for professionals, including the Brandeis Seminars in Humanities and the Professions and the Brandeis Institute for International Judges. Swigart holds a Ph.D. in sociocultural anthropology from the University of Washington. 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 has wide experience in international education, including a tenure as director of the West African Research Center in Dakar, Senegal, and has worked in the field of international literacy and indigenous language promotion. Swigart is a two-time Fulbright Scholar and recipient of the Wenner-Gren Foundation Fellowship for Anthropological Research.

**Melissa Holmes Blanchard** is the communications specialist for the International Center for Ethics, Justice and Public Life. She holds a B.A. in philosophy from Brandeis University and an M.A. in intercultural relations from Lesley University in Cambridge, MA. She has experience as a high school teacher, community mentor, and research assistant in violence prevention, diversity, education, and gender equity. Blanchard has assisted in the coordination of the BIIJ since its inauguration in 2002.

## 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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## 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.



**Louis Dembitz Brandeis**

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.

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.