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In Search of International Impartiality

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The idea that the administration of international law and governance should be impartial is one of the great founding pillars of the international legal order. At the very least, international adjudicators, international civil servants, and even international organizations should be impartial. Yet international impartiality remains a more complex and fraught concept than its ritual incantation.

The more polarized the environment, of course, the more difficult it is to think of impartiality as possible, and accusations of bias are a good barometer of international (dis)harmony. Impartiality of civil servants was, for example, famously a casualty of the rise of fascism (with Italian and German League employees rapidly aligning with their powers), or the emergence of the Cold War (with the Soviet Union and China holding their nationals on a tight leash by ensuring that their contracts would not be renewed). The Israeli-Palestinian conflict, as perhaps the most polarizing issue of the day in international law, has provided no shortage of anxiety about the impartiality of various UN Special rapporteurs or members of fact-finding commissions, including Christine Chinkin, Richard Falk, Richard Goldstone, Bill Schabas or Christian Tomuschat.

However, even in less fraught situations, controversies about impartiality seem merely dormant, waiting to be reawakened, and the suspicion that “ties of partiality” are hard to sever always in the background. There has long been a suspicion for example that international judges will tend to naturally identify with their state or at least similarly situated states.¹ Indeed, there seems to be something involved beyond particular “flashpoints” that goes to the definition and, indeed, the very possibility of “international impartiality.”² The question may be asked, therefore, what does it mean exactly for international lawyers to be “impartial” and is the notion not made to carry expectations that are ultimately hard to shoulder?

¹ Eric A Posner and Miguel de Figueiredo, ‘Is the International Court of Justice Biased?’ (2005) 34 *The Journal of Legal Studies* 599; Erik Voeten, ‘The Impartiality of International Judges: Evidence from the European Court of Human Rights’ (2008) 102 *American Political Science Review* 417.

² Frédéric Mégret, ‘What Is “International Impartiality”?’ in Vesselin Popovski (ed), *International rule of law and professional ethics* (Ashgate Publishing, Ltd 2014).

Some Definitional Challenges

The demands of impartiality will of course vary in relation to the body, office or the function. Entire organizations or bodies may be expected to be more or less impartial. For example, it is only to be expected that a political body such as the General Assembly will be partial to some degree. The perceived partiality of a body such as the Human Rights Council is more problematic because of its association with the promotion and enforcement of human rights, and the perception that this would require a more even-handed treatment. When it comes to individuals, the standard fit for a judge or a prosecutor may not be the same as that applicable to civil servants, or special rapporteurs.

Impartiality, in its simplest form, manifests itself to international lawyers through a series of discrete rules. These might focus, for example, on recusal in cases in which one might have a specific material interest or some prior involvement. Yet impartiality is more defined in the negative than in the positive: we know what bias is and must infer the nature of impartiality a contrario. The Code of Conduct for Special Procedures Mandate-Holders is a good example of an instrument that emphasizes impartiality but never defines it. Indeed, our understanding of impartiality seems quite limited to the more blatant cases where, for example, one is judge and party in a case, but typically less good (and arguably less interested) at detecting deeper-seated forms of partiality linked to national allegiance, not to mention various forms of “world outlook” influenced by gender, class, religion or racialized experience, that linger below the veneer of formalist abstraction.³ Moreover, international law is particularly bad at detecting the considerable biases that come from being an international lawyer in the first place.

One way round the problem is to emphasize the “need for justice to be seen to be done” and thus focus on subjective perceptions of partiality. However, simply because one is accused of and intensely perceived by some as being biased, does not make one so. Allegations of partiality can be made in bad faith to discredit international actors. Amongst those crying foul with most intensity are often, perhaps ironically, what must count as some of the most partial actors in the international system (authoritarian states, single issue NGOs, defendants before international criminal tribunals, etc.). Even *good faith* perceptions of partiality and the fact that some may have trouble believing in a particular actors’ impartiality do not in and of themselves make for partiality. Irrational or morally problematic perceptions of partiality cannot be the measure of bias.⁴ In an intensely divided world, it may simply be impossible to convince all constituencies of a particular actor’s impartiality.

³ Frédéric Mégret, ‘International Judges and Experts’ Impartiality and the Problem of Past Declarations’ (2011) 10 *The Law and Practice of International Courts and Tribunals* 31.

⁴ The domestic case law typically points at the existence of a “real danger or likelihood of partiality” or “a reasonable suspicion” of partiality by “fair minded and informed members of the public.” Kate Malleson, ‘Judicial Bias and Disqualification after Pinochet (No. 2)’ (2000) 63 *The Modern Law Review* 119, 2.

If there is a problem with impartiality, I want to suggest the problem goes deeper and has to do with persistent difficulties in (i) defining what impartiality might entail objectively, and even (ii) how desirable impartiality as typically conceived is really for the international legal order. As a result, one might say that impartiality is chronically in crisis because of the intensely problematic character of what constitutes desirable impartiality in the first place. In fact, one could argue that “international impartiality” has always been in crisis and that this crisis goes to the simple question once asked by Thomas Franck, namely: whether “any man, or any group of men [can] administer justice impartially in an ideologically and culturally divided world”?⁵

The Genesis and Ambiguities of International Impartiality

The idea of “international impartiality” arguably goes beyond discrete rules of recusal applicable to, for example, international judges. It is intimately linked to the idea that there is an “international public interest,” distinct from that of states. It is thus tied at a deeper level to the philosophical question of whether international law itself can be described as based on a vision of impartiality.⁶ It is born from Wilsonian thought of the first half of the XXth Century and the idea of impartial justice involving “no discrimination between those to whom we wish to be just and those to whom we do not wish to be just (...) a justice that plays no favourites,” focused on the “common interest of all.”⁷ Linked to this idea is, crucially, the notion that a certain caste of men (for they were and remain, largely, *men*), could elevate themselves as international civil servants and international lawyers above the narrow self-interest of states to embody this emerging international public interest.⁸ To be impartial, then, is to adopt an Archimedean standpoint, one that is above the fray of international politics and cut off from national moorings.

Notwithstanding, it is worth noting that the international system itself has long had a more ambiguous relationship to impartiality than appears at first. For example, whilst international civil servants are required to be impartial, there is a tradition of choosing some of the higher members of the international organizations’ Secretariat strategically on the basis of their nationality in the understanding that they might reflect unique national and cultural sensitivities and even serve as channels of communication and persuasion vis-à-vis their home state. And whilst all international judges make a solemn declaration to be impartial, it is not clear how this commitment fits with, for example, the institution of the ad hoc judge in ICJ disputes, which seems a concession to the need to have “one of one’s own” on the bench. Even the effort at “equitable geographic representation” in the international civil service and the obligation to represent “the main forms of civilization and of the principal legal systems of the world”⁹ at the ICJ suggest

⁵ Thomas M Franck, ‘Some Psychological Factors in International Third-Party Decision-Making’ (1967) *Stanford Law Review* 1217, 1217.

⁶ Steven R Ratner, ‘Is International Law Impartial?’ (2005) 11 *Legal Theory* 39.

⁷ Woodrow Wilson and Albert Bushnell Hart, *Selected Addresses and Public Papers of Woodrow Wilson* (The Minerva Group, Inc 2002) 279.

⁸ Frédéric Mégret, ‘The Rise and Fall of “International Man”’ in Prabhakar Singh (ed), *Critical International Law: Post-realism, Post-colonialism and Transnationalism* (Oxford University Press 2013).

⁹ Article 9 of the Statute of the ICJ.

that national and cultural biases are considered to be an inherent part of the international mosaic. At times, it is therefore as if international lawyers only partly believed in impartiality of outlook, not least because being nationally “tainted” may actually assist and legitimize international expertise.

Moreover, there has long been a deeper and problematic scepticism that impartiality might quickly degenerate into passivity. Too often, impartiality has seemed in retrospect to have stood for a fake equanimity, as in Wilson’s misleading fifth of “Fourteen points” promising “Impartial adjustment of all colonial claims *weighing equally the interests of the populations with the claims of governments.*” The League of Nations’ response to the Abyssinia crisis, slowly and meticulously mediating between Mussolini and Emperor Selassie, but failing until it was too late to find Italy responsible for aggression, is generally remembered as a dismal failure. In the 1990s, it is the trusted “impartiality” of peacekeeping operations that was repeatedly put in question as opening the door to ethnic cleansing and even genocide. Even the ICRC, that most impartial of institutions, acknowledged the limitations of impartiality when confronted with the Holocaust. The message seems to be that, when it comes to certain core values at least, international lawyers ought to be ready to take more of a stand.

Imagining the “Impartial International Lawyer”

In turn, one of the foundational ambiguities of impartiality relates to how one conceives of international law. On the one hand, international law may be seen as an interstitial law, a law coordinating sovereigns and perhaps other actors, that provides a cadre of neutral arbitrators committed to deciding inter-subjective disputes in which international law has no particular substantive stake. On the other hand, international law can be seen as more of a purposive project, one that includes a number of positive goals and values. In both cases, a certain kind of impartiality is required, but in the former case it borders on neutrality whilst in the latter case the international lawyer sees herself as a dynamic conduit for the constant becoming of the law.

These broad views of the function of international law can be connected to discrete psychological attitudes of the professional international lawyer and how they relate to the perceived needs of “impartiality.” I would suggest that, as career models go, there is a big split within the international legal profession between what might be described as an *ethos of detachment* and an *ethos of commitment*. One perhaps dominant professional identity of the international lawyer is that of studied aloofness, a form of disciplinary divorce from the “real.” There are, to be sure, significant professional benefits to be reaped by international lawyers from adopting a low profile and generally keeping their cards close to themselves in relation to real world issues. In a sense, the entire arc of positivism can be understood as the investment in a professional know-how that is not dependent on ever adopting what might be construed as a political position (regardless of whether such an attitude can be achieved in an intellectually cogent way). The international lawyer is seen as interchangeable and neutral, a “sphinx” whose impartiality is beyond reproach because she seems to hold no views on anything except

the technical corpus of the law. This conspiracy of silence, then, is part of the preservation of the specific *cachet* of international law, one that foregrounds the idea of the international lawyer as dutiful international public servant of the law (even outside or in the absence of such an international public service).

Against this model of detachment, a model of international legal activism has also always existed. This view might be characterized as one of “militant internationalism.” The idea of militant internationalism borrows in part from the idea of “militant democracy” in that it is based on the notion that international law should depart from liberal indifference when the system itself is threatened. It is used here as describing a particular predisposition in which detached “fairness” is not the decisive value as much as the ability, at least on decisive occasions, to dynamically stand for the system. Just as some domestic judicial systems are said to have owed much to outspoken judges unwilling to hide behind a smokescreen of impartiality, it may be argued that the last rampart of international law lies in the resilience of its professionals’ conscience.

International lawyers in this tradition may be more suspicious of the pompous generalities of the profession, and wary that talk of the “international community” and “international justice” in the absolute allows the profession to monopolize considerable clout whilst never getting its hands dirty. They may be more sceptical of the power of international legal rules to translate into prescribed normative outcomes, without some strategic vision by lawyers. For many in the XXth Century, becoming international lawyers entailed a sometimes exceptionally close connection with a particular *cause célèbre*, whether it be war/peace, colonization/decolonization, or empire/self-determination. Being active in the international legal battles of the age provides an escape from the stifling constraints of “impartiality.” But it does bring international lawyers closer to the moment where the discipline’s own subtle and not-so-subtle biases are exposed.

Drawing the line

The question, then, is typically framed as where to draw the line between partiality and standing for the best international legal tradition. Does the militant international lawyer betray the discipline’s conspiracy of political silence, or is the problem the hypocrisy of the sphinx? How far should one go in projecting an air of impartiality even in the face of transgressions that call for a response? Is going on the record against aggression, colonization, Apartheid, genocide, crimes against humanity or illegal occupation a form of partiality, even as international law condemns all these things? Should international lawyers only ever express themselves in generic terms or risk being understood as biased? And what of the danger that international lawyers will remain silent rather than risk having certain statements invoked against them?

International law provides tools to defer the anxiety about impartiality. Broad support for international law and human rights, for example, is typically not understood as a manifestation of “partiality,” nor should it. As Richard Goldstone once put it, it is fair to

“assume that judicial officers have strong views against criminal conduct, and a convicted murder or robber should not expect a judge to have neutral views concerning murder and robbery.”¹⁰ Often, when judges or human rights experts are accused of partiality, they are really only accused of having sided energetically with the project of international law. Their only *faute de goût* is to have been a little too graphic about their condemnation of particular cases. It seems important to acknowledge that international law is not a quietist project, and that it thrives on its vigorous embodiment. If anything, international law is becoming an increasingly “thick” project requiring its practitioners to buy into an entire range of values.

By the same token, there may be times when it is to ask too much of the public to trust an adjudicator who has been explicit about his opinions in a particular case (especially given the availability of persons who have not gone on the record). As Lord Hutton hinted in the Pinochet case “there could be cases where the interest of the judge in the subject matter of the proceedings arising from his strong commitment to some cause or belief (...) could shake public confidence in the administration of justice.”¹¹ Geoffrey Robertson, for example, before becoming a judge in the Appeal Chamber of the Special Court for Sierra Leone, had described one of the accused as “despicable” and as “the nation’s butcher,” and the RUF as a “warring faction... guilty of atrocities on a scale that amounts to a crime against humanity,” prompting his fellow judges to push him to resign.¹² Note that the issue was not whether RUF members were butchers, but whether it sat comfortably with a judicial role that one had gone on the record to say so in such chosen terms.

Conclusion

The idea of international impartiality is thus constantly threatened simultaneously from “below” and from “above.” It is threatened from below in that the ground is always at risk of collapsing under international lawyers’ feet, exposing them as little more than sophisticated spokespersons for a particular world view. It is threatened from above in that in some cases the defense of international law requires that one be impartial about everything except international law itself, yet in the process expose one’s own politics of international law. Impartiality exists in a not entirely plausible area of discretion and effacement between the two, that involves the coopting of international lawyers’ talent for dissimulation. Finally, although the focus of partiality/impartiality is typically on the national/internationalist dichotomy, one may wonder whether that focus does not serve to simultaneously hide the importance of other biases, be they of gender, race, or class.

¹⁰ Richard Goldstone, ‘Do Judges Speak Out’ (1994) 111 South African Law Journal 258, 266–267.

¹¹ House of Lords, Judgment – In re Pinochet, 17 December 1998.

¹² Q.C. Geoffrey Robertson, *Crimes Against Humanity—The Struggle for Global Justice* (Penguin, 2000), respectively 220, 277 and 469.