

INDEPENDENCE OF INTERNATIONAL COURTS; THE EXPERIENCE OF INTERNATIONAL COURT OF JUSTICE AND INTERNATIONAL CRIMINAL COURT

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ABSTRACT

The notion of independence of international courts requires a court to make decisions based on the merits of the case and not on any hidden motives or political considerations. Independence of international courts triggers considerations around the court's structure, with the central demand is that, states, individual personal, NGOs, international organizations, and corporations must not interfere with the function of the courts. Moreover, independence of international courts goes beyond court's structure in the sense that, judges should enjoy individual independence in performing their functions as judges. In other words, judge should reach the decision of the case without favour, influence, ill-will, or public pressure.

In this context, this article addresses the independence of the international courts specifically, the International Court of Justice and International Criminal Court, both in terms of and funding of the courts, nomination, selection, election, re-election, tenure of the ICJ and ICC judges, and how each process can undermine the independence of international court.

INTRODUCTION

Independence of international courts has been defined by Erick voetenⁱ as “the set of institutional and other factors that to a lesser or greater extent allows judges autonomy from the preferences of other political factors when they issue legal opinions. Also, in the case of Prosecutor vs Sam Hinga Normanⁱⁱ Independence of international courts was defined to mean “putting judges in a position to act according to their conscience and the justice of the case,

free from pressure of the government, funding bodies, churches, newspapers, armies or any other source of power and influence that may otherwise bear upon them. Additionally, Article 40 of the Rome Statute, expressly provide for Independence of the judges, whereby judges are required to be independent in the performing their functions. Similarly, judges shall not engage in any activity which is likely to interfere with their judicial functions or to affect confidence in their independence and, also, they are required to serve on a fulltime basis at the seat of the Court and shall not engage in any other professional activity.

THE ESTABLISHMENT OF INTERNATIONAL COURT OF JUSTICE (ICJ)

ICJ is the principal judicial organ of United Nations (UN). It was established in June 1945 by the Charter of the United Nations and began its activities in April 1946. ICJ is the successor of the Permanent Court of International Justice (PCIJ) which was brought into being through, and by, the League of Nations in 1920. After the Second World War the League of Nations was replaced by United Nations and PCIJ was replaced by ICJ.

The International Court of Justice (ICJ) has Two Form of Jurisdiction:

1. **Contentious Jurisdiction;** which is to resolve international law disputes of a legal nature that is submitted to it by states. No entity other than a state may bring a dispute before the International Court of Justice. Individuals are also forbidden to bring a dispute before ICJ. The ICJ is normally open to any state that is a party the ICJ Statute however, it may be open to a non-party state in some situations. A non-party state may access the ICJ under conditions provided by the UN Security Council and subject to the provisions in the treaties that were effective when the ICJ Statute took effect. But these conditions must not create a situation in which parties stand before the ICJ in unequal positions.ⁱⁱⁱ

An important limitation on ICJ jurisdiction is consent. The ICJ cannot review a dispute between states unless each state involved has recognize its jurisdiction. The decision of ICJ are final, binding the parties and are not subject to appeal. That is to say, the

decision of ICJ permanently affects the legal rights and obligations of the states involved in the dispute.

2. **Advisory Jurisdiction;** it gives advisory opinions (non-binding opinions) on legal questions at the request of the organs of the united nations, specialized agencies or one related organization authorized to make such a request. The ICJ provides advisory opinion to five UN organs and sixteen specialized agencies. Whereas the General Assembly and Security Council has the power to seek any opinion in any topic but other organizations can only seek opinion on topics certainly connected to their activities.

Composition of the International Court of Justice (ICJ)

The International Court of Justice comprises of 15 judges, each judge elected to a nine-year term of office and may be re-elected. In order to ensure a continuity in the composition of the Court (ICJ), one third of the membership is renewed every three years. Moreover, judges are elected regardless of their nationality from among persons of high moral character, who possess the qualifications required in their respective countries for appointment to the highest judicial offices, or are jurisconsults of recognized competence in international law.^{iv} Also, Article 9 of ICJ Statute requires that, in the body as a whole the representation of the main forms of civilization and of the principal legal systems of the world should be assured". No two Members of the Court may be of the same nationality.

Submission of Applications

All States parties to the Statute of the Court (currently 193) have the right to propose candidates. However, candidates are not nominated directly by states but by the national groups in the Permanent Court of Arbitration (PCA). The Permanent Court of Arbitration was established under the Hague Conventions of 1899 and 1907. Each State party to those Conventions has its own national group in PCA, that is to say, a group of up to four jurists who can be called upon to serve as members of an arbitral tribunal under the Conventions. When an election takes place to fill vacancies at the International Court of Justice, each national group can suggest up to four candidates, not more than two of whom may be of its own nationality. The others may be from any other country. The names of candidates must be communicated to the Secretary-General of the United Nations.

Procedure of Electing Members of the ICJ

Members of the ICJ are elected by the General Assembly and by the Security Council. These organs vote at the same time but independently of one another. For that matter, this procedure is intended to ensure that, the vote in one organ does not influence the vote in the other. Therefore, in order to be elected as a candidate of ICJ one must receive an absolute majority of the votes in both organs. In that sense, currently 97 votes in the General Assembly and 8 votes in the Security Council, where no right of veto applies for the purpose of the election and no difference is made between the votes of the permanent and non-permanent members of the Council.

ESTABLISHMENT OF INTERNATIONAL CRIMINAL COURT (ICC)

ICC is a permanent international judicial body established by Rome Statute of International Criminal Court 1998 and came into force in 2002. ICC was established to investigate and prosecute individuals accused of international crimes like genocide,^v war crime,^{vi} crimes against humanity^{vii} and crimes of aggression.^{viii} ICC unlike the ICJ which hears disputes between states, the ICC investigate and prosecute disputes between individuals. The jurisdiction of ICC is exercised in those international crimes after the failure of the respective country in which the crime(s) was committed has failed to take essential steps to prosecute the alleged criminals or the national court has failed on declined jurisdiction to entertain the matter. Basically, the court will not adjudicate and will instead declare a case inadmissible if it is being investigated or prosecuted by a state which has jurisdiction over it, or if it has already been investigated by such state, and that state has decided not to prosecute that person.^{ix} Moreover, the Court will not adjudicate when the person concerned has already been tried by another court for the conduct which is the subject of the complaint unless the proceedings in the other court were for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court,^x or otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner which in the circumstances was inconsistent with an intent to bring the person concerned to justice.^{xi}

The jurisdiction of ICC extends to offenses that occurred after July 1, 2002 when ICC came into force. Moreover, the jurisdiction of ICC extends to offenses which were committed either in a state that has ratified Rome Statute or nationals of such state. Whereby 123 countries are party to Rome Statute whereas some countries never signed the treaty including China, Ethiopia, India, Indonesia, Iraq, North Korea, Saud Arabia, and Turkey. several countries signed the Rome Statute but their legislatures never ratified it. These include Russia, United States, Egypt, Iran, Israel, Syria, and Sudan. (Burundi and Philippine ratified the Rome Statute but later Burundi withdraw from ICC in 2017 followed by Philippine in 2019). The reason behind some of state did not ratify the Rome Statute or sign the treaty is that ICC undermines national sovereignty. Therefore, due to the extended jurisdiction of ICC to the state that has ratified the Rome Statute or national of such state, United States had threatened to withdraw its troops from United Nations Peace keeping Forces unless its citizen (both military and civilian) were exempted from prosecution by ICC.

Legal Status, Powers and Jurisdiction of the Court (ICC)

ICC have international legal personality.^{xiii} For that matter, it has capacity to exercise its function and fulfillment of its purpose.^{xiii} The ICC exercise its functions and powers on the territory of any state party and by special agreement on the territory of any other state.^{xiv} Essentially, in carrying out its work, the International Criminal Court apply in the first place, Statute, Elements of Crime and its Rules of Procedure and Evidence.^{xv} Also, in the second place where appropriate, the International Criminal Court apply the applicable treaties and the principles and rules of international law, including the established principles of the international law on armed conflict.^{xvi} Failing that, the Court may apply the general principles of law derived by the Court from national laws of various legal systems of the world including, as appropriate, the national laws of the states that would normally exercise jurisdiction over the crime, only if those principles are not inconsistent with the Statute (Rome Statute) and with international law and internationally recognized norms and standards.^{xvii} The Court may also apply the principles and rules of law as it has interpreted them in its previous decisions.^{xviii}

Additionally, the court has jurisdiction over four categories of crimes under international law and these are;

1. Genocide,^{xix}
2. War crime,^{xx}
3. Crime against humanity,^{xxi}
4. Crimes of aggression.^{xxii}

Composition of the court (ICC)

The ICC has eighteen judges,^{xxiii} each judge come from a different member country and elected by member states. Judges and prosecutors are elected to nonrenewable nine years term. The president and two vice presidents of the court are elected from among the judges of the ICC. Moreover, judges are elected regardless of their nationality from among persons of high moral character, who possess the qualifications required in their respective countries for appointment to the highest judicial offices.^{xxiv}

How is International Criminal Court (ICC) funded

International Criminal Court get fund to run its activities from the contribution made by states parties.^{xxv} Another source of ICC's fund is funds provided by the United Nation, subject to the approval of the General Assembly, in particular in relation to the expense incurred due to referrals by the security Council.^{xxvi} Moreover, ICC may receive voluntary contribution from governments, international organizations, individuals, corporations and other entities, in accordance with relevant criteria adopted by the Assembly of States Parties.^{xxvii}

International Criminal Court cases

- The ICC first hearing was held in 2006 to decide whether charges should be brought against Thomas Lubanga who was accused of employing child soldiers Democratic Republic of Congo (DRC). Lubanga's trial was first conducted by ICC in January 2009 and in 2012 the court (ICC) found him guilty and he was imprisoned for 14 years.^{xxviii}
- In 2010 the ICC began an investigation of crime against humanity committed following Kenya's 2007 presidential election. Kenyatta and five other major political figure suspects of the crime against humanity. After Kenyatta won election in 2013 the court (ICC) dropped the charges against Kenyatta for the reason that, the prosecutor's office claimed that the Kenyan government was uncooperative and that witness tampering had undermined the case.

- In 2017 ICC issues arrest warrants for the Omar al-Bashir in Sudan for his allegation of genocide, crime against humanity and war crimes committed in Sudan's Darfur Region.^{xxix}
- In November 2019 the ICC began an investigation of crime committed by the armed forces of Myanmar (Burma) against the Rohingya, a Muslim community concentrated in Myanmar's Rakhine (Arakan) state.^{xxx}
- In 2022 soon after Russia launched a large-scale military invasion of Ukraine, the ICC announced an investigation into possible crimes committed in Ukraine by Russia armed forces.^{xxxi}

THE INDEPENDENCE OF INTERNATIONAL COURTS (THE INTERNATIONAL COURT OF JUSTICE AND THE INTERNATIONAL CRIMINAL COURT)

The independence of the International Court of Justice

International Court of Justice comprise of only independent judges. For that matter, judges must be "persons of high moral character, who possess the qualifications required in their respective countries for appointment to the highest judicial offices or are jurisconsults of recognized competence in international law."^{xxxii} The appointment procedure requires the national groups of the Permanent Court of Arbitration (PCA) to nominate candidates from among individuals who can meet these conditions,^{xxxiii} each group being able to nominate a maximum of four candidates, no more than two of whom may be of that particular nationality.

It is recommended that, before formulating proposals, each national group consults its highest court of justice, its legal faculties and schools of law, and its national academies and national sections of international academies devoted to the study of law. The Secretary-General of the United Nations draws up a list in alphabetical order of all the candidates thus nominated, and submits this list to the General Assembly and the Security Council,^{xxxiv} which shall, independently of each other, proceed to elect the members of the Court.^{xxxv} The candidates who have obtained an absolute majority of votes in both the General Assembly and the Security Council will be considered elected.^{xxxvi} At every election, the electors shall bear in mind not

only the individual fulfillment of the conditions for holding office, but also that in the body as a whole, through these choices, the representation of the main forms of civilization and of the principal legal systems of the world should be assured.^{xxxvii} It is also expressly provided that no two nationals of the same state may be among the 15 members of the Court, and, if more nationals of the same state obtain an absolute majority of votes in both the General Assembly and the Security Council, only the eldest of them will be considered elected.^{xxxviii} Regarding the voting in the Security Council, the Statute provides that no distinction is to be made between the permanent and the non-permanent members of this body.^{xxxix}

The members of the Court are elected for a term of nine years, which can be renewed, and there is also a gap between appointments: regular elections take place every three years and regard five judges. With a view to ensuring independence and impartiality, it is stated that, before taking office, each member of the Court shall make a solemn declaration in open court that he will exercise his powers impartially and conscientiously.^{xl} Also, members are prohibited from exercising any political or administrative function, or any other professional occupation. They are also prohibited from acting as an agent, counsel, or advocate in any case, and also from participating in the decision of any case in which they have previously taken part as agents, counsels, or advocates for one of the parties, or as members of a national or international court, of a commission of enquiry or in any other capacity. When working in the chambers set up according to Articles 26 and 29 of the Statute (specialized chambers, chambers set up for the examination of a specific case, the Chamber of Summary Procedure), if a judge has the nationality of one of the parties, he will retain the right to sit in the case in question. As a measure of leveling the balance, if a judge, who is a national of one of the parties, is included on the Bench, any other party may appoint a person of their choice to sit as judge, and, if no judges having the nationality of the parties are included, each of the parties may proceed in this manner in order to appoint a judge.^{xli}

Moreover, the Statute also provides for the possibility of excuse or disqualification; if for a special reason, one of the members of the Court considers that he should not take part in the decision of a particular case, he shall inform the President^{xlii} and if the President considers that, for a special reason, one of the members of the Court should not sit in a particular case, he should give him notice accordingly.^{xliii} In this regard if in any such case the member of the Court and the President disagree, the matter shall be settled by the decision of the court.^{xliv}

Also, in the spirit of ensuring independence, the members of the Court are entitled to deliver their separate opinion to non-unanimous judgments.^{xlv}

As further measures of protection, the members of the Court shall, in the exercise of their functions, enjoy diplomatic privileges and immunities,^{xlvi} and are entitled to periodic leave and an annual salary (the President receives a special annual allowance, and the Vice-President, a special allowance for each day on which he acts as President). All salaries, allowances and compensations are fixed by the General Assembly and cannot be decreased during the term of office^{xlvii}. For that matter, the expenses of the Court are borne by the UN, in the manner established by the General Assembly.^{xlviii} Three members of the Court cannot be removed from office unless, according to the unanimous opinion of the other members, they no longer fulfill the required conditions.^{xlix}

Independence of the International Criminal Court

The judges of the International Criminal Court (ICC) are chosen from among persons who meet the conditions required in their states for the exercise of the highest judicial offices and are of high moral character.¹ Additionally, the Statute went further by providing that these judges must be known for their impartiality and integrity. Also, candidates must meet a number of specific conditions including, competence in criminal law and procedure, as well as relevant experience in criminal proceedings whether as judge, prosecutor, advocate, or in any other similar capacity,^{li} or the judge have established competence in relevant areas of international law for instance international humanitarian law and the law of human rights, and wide experience in a professional legal capacity which is relevant to the activities of the Court. On the other hand, every candidate shall have an excellent knowledge of and be fluent in at least one of the working languages of the Court.^{lii}

Essentially, for any given election, each State Party may nominate one candidate, who does not necessarily have to be a national of the nominating state, but shall in any case be national of a State Party.^{liii} The nominations must be made either by the procedure for the nomination of candidates for appointment to the highest judicial offices in that state,^{liv} or by the procedure provided for the nomination of candidates for the International Criminal Court in the Statute of that Court.^{lv} Nomination must be accompanied by a detailed statement specifying how the candidate fulfils the necessary requirements provided under Article 36(3) of the Rome Statute.

Basically, in ICC judges are elected by secret ballot at a meeting of the Assembly of States Parties assembled for this purpose and the persons elected are to be the 18 candidates who obtained the highest number of votes and a two-thirds majority of the States Parties that are present and voting.^{lvi} Similar to the ICJ, the ICC may not include more than one judge of the same state.^{lvii} In ICJ, the States Parties shall take into account the need to ensure the representation of the principal legal systems of the world whereas, in the case of the ICC, an equitable geographical representation, as well as a fair representation of female and male judges shall be additionally ensured. Besides, States Parties shall also take into account the need for ensuring the presence of judges with legal expertise in certain areas, including but not limited, to violence against women and children.^{lviii}

If the judges of the ICC are also elected for a nine-year term (full term) shall not be eligible for re-election.^{lix} However, if a judge has been assigned to any trial or appeal the hearing of which has already commenced in a Trial or Appeals Chamber, they shall continue in office until that case is closed.^{lx}

FACTORS AFFECTING INDEPENDENCE OF ICC AND ICJ

Nomination, Selection and Election of Judges in International Courts (ICC and ICJ)

Nomination process is critical in determine the quality of judges selected to the ICJ and ICC. Both ICJ Statute and Rome Statute cover the nomination processes but lack specificity as to exact procedures to be followed.

Nomination of judges in ICC is done where the candidates are first nominated by a states parties and the assessed by an Advisory Committee which interviews and reports on each judicial candidate's qualification. Nominees are then voted on by the Assembly of States parties. While in ICJ judges are nominated through the national groups of the Permanent Court of Arbitration (PCA) and elected by General Assembly (United Nations General Assembly) and the Security Council (United Nations, Security Council).

Nomination of judges in ICC is done by the state party but in ICJ the state is not actually involved in nomination of judiciary candidate. However, in reality of things, states are closely linked to the nomination process of ICJ judiciary candidates. Therefore, this create a greater control of the international courts (ICC and ICJ) by the states. Although both ICJ Statute and

Rome Statute requires a judge to be chosen from among persons of high moral character, impartiality and integrity who possess the qualification required in their respective state for the appointment of the highest judicial officer.^{lxi} But in reality of things, nominating state will not comply with this provision rather they will nominate a candidate who can preserve its interest. It is undisputed fact that, international judges (except ICC judges) in some cases charged with the duty to decide contentious cases that could affect the national interest. For that matter, nominating state will therefore be careful in deciding who to offer that opportunity.

In other way around, the involvement of General Assembly and Security Council in nomination of judges in ICJ reflects a compromise between the thinking and interests of powerful states in having their own judges in the court and the interests of other states who wished to be on equal footing with the great powers. Therefore, it quite difficult for one to conclude that international courts (ICC and ICJ) is independent in term of individual independence, institutional independence, decisional independence and operational independence, as long as states plays great role in nomination, selection and election of judges of international courts (ICC and ICJ).

Security of tenure

Security of tenure means the length of a judge's term in the office. For that matter security of tenure is a key to assessing individual independence. The tenure of office in the ICJ and ICC is nine years by virtue of Article 13 of the ICJ Statute and Article 36(9)(a) of the Rome Statute. The tenure of ICJ and ICC judges are safeguarded from external state influence that could affect their independence and impartiality. This is because international judges of both ICJ and ICC, during their tenure in office can only be removed by the court itself hence removing undue influence from states during the term of the judge.

However, the tenure of the ICJ and ICC Judges is short unlike the judiciary in the national level. Short term normally decreases individual independence while long nonrenewable term enhances it. The issue is whether these judges might be influenced by the need to secure their re-election towards the end of their short term. Article 39(9)(c) of the Rome Statute provides that "*a judge who is selected to serve for a term of three years under subparagraph (b) shall be eligible for re-election for a full term.*" It is undisputed fact that those judges who wish to be re-elected after their tenure in office has expired, they will be driven by ulterior motives which will jeopardize the individual independence of a judge.

The re-election of judges of the ICJ is enshrined under Article 13 of the ICJ Statute. The difference between ICJ and ICC re-election is that, in ICC a judge who have already serve nine years term of office is not eligible for re-election (re-election is available for those judges who serve for a term of three years^{lxii}) while in ICJ judges who served nine years term of office is eligible for re-election. Essentially, the reason behind why ICC Judges are not eligible for re-election is to remove the dependency of the ICC Judges and leave them to perform their duties without any interference for the time they are elected into office. This is due to the fact that, the ICC presides over important and sensitive international crimes matters and as such does the need distractions and possible interferences in the effective implementation of justice. However, the problem is left to ICJ where judges are re-elected after serving full term in office (nine years term), by so doing, the judge's decision making will be compromised because a judge will wish for his or her term to be renewed after his term from office has expired. If that is the case, the individual independence and decisional independence of a judge will be jeopardized.

Additional factors that might affect courts independence are states threatening to ignore court decisions or even by threatening to quit the jurisdiction of the court: For that matter, courts lose legitimacy when they hand down opinions that are regularly or openly ignored. It is undisputed fact that, the existence and full functioning of ICC and ICJ rely on the state, this may therefore jeopardize the individual and decisional independence of the judge. In that sense, the court will be forced to do the will of the State in order to prevent the states not to quit jurisdiction of the Court or ignore the decision of the Court. The following are the examples which illustrate the dependence of international courts (ICC and ICJ) on states and how it can place a constraint on independence of the judges and Court (ICC and ICJ); the ICC relies on states to capture international war criminals who have been accused such as the warrant of arrest issue regarding President Omar Al Bashir in Sudan for his allegation of genocide, crime against humanity and war crimes committed in Sudan's Darfur Region while the ICJ relies on states' continuous acceptance of its compulsory jurisdiction and the implementation of its decision.

Fund of the international courts (ICC and ICJ)

In order to maintain the independence of the international courts in the long and short run, it will be necessary to provide the courts with resources appropriate to enable the courts and

judges to perform their duties with the integrity and efficiency which are essential to the fostering of public confidence in justice. The Courts should be financed in a stable way on the basis of objective and transparent criteria.

Primarily International Criminal Court (ICC) is funded by its member states.^{lxiii} Each member of the state party will contribute fund of the court based on its capacity to pay, national income and population. Additional funding is provided by voluntary government contributions, international organizations, individuals, corporations, and other entities, in accordance with relevant criteria adopted by the Assembly of States Parties.^{lxiv} Moreover, the United Nations may provide fund if it is approved by the General Assembly and is related to a situation referred to the court by the Security Council.^{lxv} On the other hand, fund of the International Court of Justice (ICJ) is open to all states wishing to submit a dispute, provided that the jurisdiction of the court is not or is no longer in question. For that matter, funding provided by state party, voluntary government contributions, international organizations, individuals, corporations, and other entities sends the unfortunate signal that justice for some victim will be prioritized over others, depending on political will, including to make resources available. Moreover, voluntary contribution also raises significant risks when it come to the sustainability of funding, for that matter I can jeopardize operational independence of international courts (ICC and ICJ). Notably, not every contribution of funds given by the states, voluntary government contributions, international organizations, individuals, corporations, and other entities, to the international courts jeopardize the independence of the international courts but the likelihood of the same should not be ignored.

WAY FORWARD

Accountability and transparency; selection of international judges usually takes place in dark corners of political negotiation and deal- making. For that matter, it is very difficult for public to reveal the connections between judicial candidates and the government that nominated them. Consequently, transparency is a crucial key in the process of nominating, selection and election of judges in order to facilitate scrutiny of suspicious ground of selection of judges. Therefore, It is recommended that, International courts (ICC and ICJ) have to be more accountable to the public and the process of electing its judges should to be more transparent.

The dependence of international courts (ICC and ICJ) to states has to be cut off and this can begin with the budget that they so heavily rely on. Attempts could also be made to implement changes that would reduce the dependence on state funding.

The election process of ICC and ICJ should also be formulated in a way that either places check and balances in the process or reduces the level of inclusion governing states have in the entire process. All this is to ensure that those who uphold the international rule of law are protected and permitted to effectively carry out their duties, free from extraneous interference.

Re-election of judges in international courts led the retiring judge to do the wishes of the states so as to receive prestigious future appointments. Therefore, re-election should be avoided for the effective existence of individual and decisional independence of judges in international courts (ICC and ICJ).

States should ensure that qualified candidates who may lack political connections stand an equal chance of being nominated.

CONCLUSION

Therefore, there are significant differences between national and international justice systems. However, respect for certain values and principles such as independence or impartiality, lies at the heart of public justice systems, whether national or international. Just as at the national level, respect for the principles and values of justice must take precedence over the interests of governments and members of the state apparatus. Similarly, at the international level, adherence to the same values even at different standards must constitute a priority, at least in what concerns permanent courts of a general nature. States and other relevant international actors need to understand that they have a duty to protect independence of these judicial institutions so that judges can enjoy a degree of independence to the highest possible standards.

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