

Playing musical chairs with international justice: evaluating the appointment of judges *ad hoc* in proceedings before the International Court of Justice

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Under Article 31 of the Statute of the International Court of Justice, an ad hoc judge may be appointed by either of the parties before the Court, where they do not have a judge of their nationality on the Bench. This provision has been heavily criticised as it detracts from the notion of impartiality essential for justice in the international arena. This paper builds upon this perception by looking at the voting behaviours of judges in cases where they have been appointed ad hoc and the effect this has had on the impartiality of the tribunal itself.

Introduction

The International Court of Justice ('the Court') is typically composed of fifteen judges elected to serve nine-year terms. There is an informal understanding that the Court will maintain an equitable distribution of judges by geographical region, with Article 9 of the Statute of the International Court of Justice ('the Statute') ensuring that representation on the Bench encompasses the 'main forms of civilization and of the principal legal systems of the world.'¹ Such norms in the Court are certainly uncontroversial of their own merit, but are compromised by provisions under Article 31 for the appointment of judges *ad hoc*.

Such appointments are qualified under Article 31, permissible only in cases where neither of the interested State Parties has a judge already sitting at the Court. This mechanism has been both criticised and lauded. On the one hand, it is seen as an instrument which has contributed to expanding the scope of the jurisdiction of the Court; on the other, it is charged with having jeopardised the Court's impartiality. This essay will explore both sides of this debate, with the aim of making apparent the irrelevance of the *ad hoc* judge in the modern legal landscape.

Composition

The composition of international courts has been a matter of concern since the advent of the permanent international judicial body. Allocating seats on the Bench of the International Court was a compelling reason behind the successive failures in establishing a court at The Hague Peace Conferences in 1899 and 1907.² By contrast, in some regional *ad hoc* tribunals, the constitutive instrument allows each state to have a permanent judge on the Bench of the court.³ In these

¹Statute of the International Court of Justice, April 1946, Article 9.

²David D Caron, 'War and International Adjudication: Reflections on the 1899 Peace Conference' (2000) 94 *American Journal of International Law* 4, 21–22.

³ See for example the European Court of Human Rights and the European Court of Justice.

circumstances, each state that is a party will nominate a candidate for appointment, either by supplying a list of potential candidates or by way of common agreement.

The balance between power and judicial representation at the Court is regulated by the relevant agreements that exist between the five members of the Security Council who hold permanent seats at the Court. Whilst these agreements are not written into the legal provisions of the Court's constitution, they lend a platform to the power politics and tacit conventions of the Court. This contrasts with Article 2 of the Statute, which requires that judges should be elected 'regardless of their nationality'⁴, though this has yet to be seriously challenged.

The Judge *ad hoc*, the Creator of Equality

Article 10 of the Universal Declaration Human Rights affirms the need for 'an independent and impartial tribunal' to guarantee the protection of rights. It is certain that the appointment of impartial and independent judges is effectively crucial to the functioning of the rule of law.

Issues on the composition of the Court and the judicial appointment process become apparent the moment the need for a judge *ad hoc* arises. In some cases, states attempt to frustrate proceedings by trying to dispel the need for them to sit.⁵ The functional credibility of any tribunal that derives its authority from the international community is hinged on the competencies, professionally and against international standards of impartiality. The selection of arbitrators in these proceedings is the critical precursor to such a test, as they undoubtedly influence the perceptions of legitimacy associated with the tribunal, with scrutiny often falling upon the judges who render decisions. The perception of legitimacy is most vital in such an evaluation, and it is precisely in this respect that the use of judges *ad hoc* to some extent alleviates 'the instinctive mistrust felt by nations for a court composed of foreign judges'⁶, and any allegations of bias from the Bench.

Typically, the selection procedure before international courts involves the nomination of a candidate by a state. This has rendered the process increasingly political,⁷ as states jostle for some sort of political influence in the Court. Borrowing from the earlier argument on perceptions of legitimacy, the presence of a judge *ad hoc* on the Bench appears more likely to result in state parties accepting the jurisdiction of the Court. This premise is marred by the same imbalanced representation of many international organs, as not all permanent members of the Security Council have yet to accept the Court's jurisdiction without reservation.⁸ Only the United Kingdom has accepted compulsory jurisdiction, while China, Russia, France, and the United States continue to resist doing so.

Judges certainly play an essential role in achieving and maintaining the acceptance of the states that utilise the Court. In relation to the Court, Abi-Saab has observed that what counts is not to

⁴ Statute of the International Court of Justice, Article 2.

⁵ See for example Caron (n 2) 21–2 on debates over the establishment of a permanent international court at the 1899 and 1907 Hague Peace Conferences.

⁶ Hilary Charlesworth, 'Judge Ad Hoc of the International Court of Justice' in Tim McCormack and Cheryl Saunders (eds), *Sir Ninian Stephen: A Tribute* (Melbourne University Press 2007), 184.

⁷ G Abi-Saab, 'Ensuring the Best Bench: Ways of Selecting Judges' in C Peck and RS Lee (eds), *Increasing the Effectiveness of the International Court of Justice: Proceedings of the ICJ/UNITAR Colloquium to Celebrate the 50th Anniversary of the Court* (The Hague: Martinus Nijhoff 1997) 176.

⁸ Charlesworth (n 6).

eliminate politics from the elections, which is a contradiction in terms, but to improve and widen the range of nominations so that political choice can be exercised from among a sufficient number of highly qualified candidates.⁹ While the intergovernmental context means that there is always a political dimension to the judicial appointment process, the choice is between a process in which the politics is open, acknowledged, and possesses some degree of balance, or a system in which political power and influence is masked, unacknowledged, and unilateral.¹⁰

Specialised Arbitrators

The provisions of Article 31 of the Statute suggest that the usage of both *ad hoc* and elected judges serves as an advantage and should be viewed as a means by which states can 'protect their interests and enable the Court to understand certain questions which require highly specialised knowledge.'¹¹ In this sense, it may be argued that the role of the judge *ad hoc* is to ensure that a case is fully understood before it is accepted or rejected by the Court, taking into account an assumed specialist knowledge of national sensibilities. The judge sitting *ad hoc* offers the Court a unique and relativist perspective on the differences between legal systems, which allows for nations to go before the Court with a case that is well received and understood.¹²

The *Avena* case¹³ is a classic example where a thorough understanding of the constitutional law of the United States was necessary, as the matters concerned the domestic law of the appointing party.¹⁴ That being said, 'the International Court treats municipal law as a fact stated by the relevant domestic courts.'¹⁵ The supposed influence or benefit of the judge *ad hoc* is then misunderstood, as the interpretation of municipal law in a case is fixed by the previous decision in the municipal court,¹⁶ thereby underlining the lack of influence a judge *ad hoc* would hold in cases of this nature.

Adding to the Bench: Creating Impartiality?

Where the judicial selection process leaves room for manipulation, there is surely a negative effect on the perceived independence of the tribunal.¹⁷ This is more prominent in the international context as judicial appointments are often not controlled by any one state, so they are 'institutionally less subject to appointment politics than their domestic counterparts.'¹⁸ That being

⁹ Statute of the International Court of Justice, Article 9.

¹⁰ PH Russell, 'Conclusion' in K Malleson and PH Russell (eds), *Appointing Judges in an Age of Judicial Power: Critical Perspectives from around the World* (University of Toronto Press 2006) 420.

¹¹ League of Nations, *Procès-Verbaux of the Advisory Committee of Jurists* (Van Langenhuyzen, The Hague 1920) 528–29 (Lord Phillimore).

¹² "Statements by the Congress of the United States and by Congressmen opposed to United States support of the *contras*", Military and Paramilitary Activities in and Against Nicaragua, ICJ Report 1986, 480–488.

¹³ *Avena and Other Mexican Nationals (Mexico v United States of America)*, Judgment, ICJ Reports 2004, 12.

¹⁴ E Lauterpacht, 'The Role of *Ad Hoc* Judges' in C Peck and RS Lee (eds), *Increasing the Effectiveness of the International Court of Justice* (Martinus Nijhoff, The Hague 1997).

¹⁵ Iain Scobbie, 'Une hérésie en matière judiciaire? The role of the judge *ad hoc* in the international court' (2005) 4(3) *The Law & Practice of International Courts and Tribunals* 421, 459.

¹⁶ Serbian Loans PCIJ, Ser A, No 20/21, 46–47.

¹⁷ RO Keohane, A Moravcsik and AM Slaughter, 'Legalized Dispute Resolution: Inter-State and Transnational' in JL Goldstein et al (eds), *Legalization and World Politics* (MIT Press 2001) 76.

¹⁸ KJ Alter, 'Agents or Trustees? International Courts in their Political Context' (2008) 14 *EJIR* 33, 46.

said, certain states may exercise their discretion and either veto or act decisively in the appointment process so as to influence the outcome. This highlights the problems underlying politically infused control in the recruitment process, an example of which concerns the Southern African Development Community (SADC) Tribunal, where a member was suspended when SADC member states failed to reappoint or replace judges once the Tribunal handed down a decision against a member state.¹⁹

A testament to its inherent significance in society, the notion of judicial independence finds its roots in many provisions in the governing instruments of most international courts and tribunals, as well as in declarations of independence.²⁰ Note that this position appears to be threatened by certain provisions which pit the nexus of judicial independence against the Tribunal's composition, an example of which specifies that for 'independence... [to be best served, the judicial body] must be balanced with...representativeness of the tribunals' composition'.²¹ Despite this, one crucial fact remains: there are fewer seats on the judicial bench than there are states that have affirmed the Court's constitutive instrument. In these situations, there is inevitable competition between states and judicial candidates for a seat. To alleviate this pressure, there is often a provision governing allocation within the Court's rules, though rules requiring equitable geographic representation on the Bench appear at odds with the concept of independent and meritocratic appointments. Scobbie agrees, suggesting that, on the face of it, the very idea that a litigant may appoint a judge of its own choice to the Bench would appear to be in flagrant breach of the *nemo iudex in sua causa* principle and the general notion of judicial independence.²²

By contrast, in the overwhelming majority of domestic cases, a judge with such an interest in a case would be expected to recuse him- or herself as this would go against the principle of impartiality. Instead, international law creates a paradox whereby the appointment of a judge *ad hoc* is for the preservation of impartiality in the adjudication of the dispute. In this respect, the tribunal's impartiality is inseparable from notions of procedural equality.²³

Lauterpacht argued that there should never exist a fear of the unconscious bias of a sitting member of the Bench where the interests of one's state are concerned, as this would constitute an abuse of judicial power and would violate the judicial oath which turns on the notion of impartiality.²⁴ Lauterpacht further argued that a judge *ad hoc* had a negligible effect on the outcome of a case where there were often 15 judges. Rather, he argued, 'the interest of the parties must be represented and defended by advocates and counsel—not by judges pledged by their oath to the duty of impartiality.'²⁵ Yet in many respects, this is a 'perfectionist' view and not in tune with the realities of cases before the Court. The use of judges sitting *ad hoc* has invariably been to ensure

¹⁹ F Cowell, 'The Death of the Southern African Development Community Tribunal's Human Rights Jurisdiction' (2013) 13 Human Rights Law Review 153, 154.

²⁰ See P Sands, C McLachlan, and R Mackenzie, 'The Burgh House Principles on the International Judiciary' (2005) 4 Law and Practice of International Courts and Tribunals 247, 247.

²¹ G Ulfstein, 'The International Judiciary' in J Klabbers, A Peters and G Ulfstein (eds), *The Constitutionalization of International Law* (Oxford University Press 2009) 126, 130.

²² Scobbie (n 15) 428.

²³ Gerhard Wegen, Book Review of 'VS Mani, International Adjudication: Procedural Aspects' (1982) 6(2) Fordham International Law Journal, Article 6 <<http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1070&context=ilj>> accessed 16 April 2016.

²⁴ E Lauterpacht (n 14) 374.

²⁵ 45 *Annuaire de l'Institut de Droit International* (1954) Vol 1, 534.

that the Court fully understands and considers the arguments of the parties in the dispute, although this does not detract from the fact that the majority of *ad hoc* judges vote by aligning with their countries.²⁶

Voting Behaviour

Ogbodo argues that Article 31 'corrupts the integrity of the Court by allowing a party before it to nominate an *ad hoc* judge if none of the Court judges is a nationality of the party'.²⁷ However, this practice may be contrastingly viewed as a fairness provision,²⁸ ensuring that every party before the Court has a judge of the same nationality as the parties in a case, or a 'favourable' *ad hoc* judge. Yet on closer inspection, this practice portrays an abuse of the judicial system at the highest level.²⁹ This is based on research which has shown that, ultimately, *ad hoc* judges tend to vote for their country of nationality irrespective of the Court's majority decision.³⁰ This casts doubt on the Court's impartiality. One observation to be made is that without representation on the judicial Bench of the Court a party cannot be guaranteed fair and impartial justice. This also puts question marks over the Court's ability to dispense States-blind justice.³¹ The problem lies in the fact that, as an *ad hoc* judge is an appointee of one of the state parties with a pending case before the Court, the probability of a future appointment *ad hoc* will undoubtedly influence whether a judge is likely to be sympathetic towards the proposing state party.

That being said, opinions stemming from cases before the Court³² have generally sought to dismiss the idea that the judicial role of a judge *ad hoc* is a mouthpiece of the appointing state or represents a 'guaranteed' vote in a set of proceedings. Interestingly, when analysing the appointment of judges *ad hoc* over the years there has been a correlation between their respective voting behaviours and the states which have appointed them to their roles.³³ This highlights that the character of the Court is altered the moment an *ad hoc* judge is added to the Bench, particularly as such appointees appear tend to side with their appointing state when analysing past records.

Conclusion: Should the Judge *ad hoc* Sit?

It is undeniable that the provisions of Article 31 of the Statute allowing a state to nominate a judge *ad hoc* if none of the current judges of the Court are a national of the party tarnishes the impartiality and rule of law associated with the Court. As an international body, the Court should give parties unqualified confidence in its ability to arbitrate disputes fairly with a states-blind approach to justice. To facilitate this move, Article 31 must be removed from the Court's statute book.

²⁶ W Samore, 'National Origins v Impartial Decisions: A Study of World Court Holdings', (1956) 34(3) Chicago-Kent Law Review 193, 193.

²⁷ S Gozie Ogbado 'An Overview of the Challenges Facing the International Court of Justice in the 21st Century' (2012) 18(1) Art 7 *Annual Survey of International & Comparative Law* 93,108.

²⁸ Samore (n 26) 193.

²⁹ *ibid.*

³⁰ Ii Ro Suh, 'Voting Behavior of National Judges in International Courts' (1969) 63 AM J INT'L L 224, 236.

³¹ *ibid.*

³² See for example, the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia)* and the *Arrest Warrant of 11 April 2000*.

³³ Samore (n 28).

Arguments also point strongly towards ensuring equality of arms at the Court between parties,³⁴ in the sense that 'the presence of a judge *ad hoc* may reassure the party which has appointed him that the nuances of its pleadings have been understood by at least one member of the Court.'³⁵ However, significant criticism is levelled when both parties appoint judges *ad hoc*. In this situation, each respective advantage is neutralised by the other, thereby becoming redundant. All the same, Rosenne and Ronen have argued that to date there has been no 'significant *political* demand for change' in the system of appointing judges *ad hoc* at the Court.³⁶ One argument put forward is that states continue to view it as one of the tools to safeguard their rights. This stems from what states perceive as their moral position and political interest, as affected by the decisions of the Court.

Rather, Judge Loder, a former President of the Court, has put forward an argument with significant resonance: judges sitting *ad hoc* represent the idea of arbitration as opposed to justice. Instead, judges *ad hoc*, if necessary, should only take part in the proceedings where they are needed in an advisory capacity.³⁷ The role of the judge *ad hoc* is near its tether; the institution 'contradicts[s] essential principles of judicial activity such as the independence of the judiciary, but the International Court of Justice functions in an extremely politicised *milieu*.'³⁸

³⁴John Collier and Vaughan Lowe, *The Settlement of Disputes in International Law* (Oxford University Press, 1999) 131.

³⁵ *ibid* 131.

³⁶ Shabtai Rosenne and Yael Ronen, *The Law and Practice of the International Court, 1920-2004* (4th edn, Martinus Nijhoff 2006) 202-05.

³⁷ Stephen M Schwebel, 'National Judges and Judges Ad Hoc of the International Court of Justice' (1999) 48(4) *International and Comparative Law Quarterly* 889-900.

³⁸ Scobbie (n 15) 463.

Bibliography

Journal Articles

Alter KJ, 'Agents or trustees? International courts in their political context' [2008] 14(1) *European Journal of International Relations* 33–63

Caron DD, 'War and International Adjudication: Reflections on the 1899 Peace Conference' [2000] 94(1) *The American Journal of International Law* 4

Cowell F, 'The Death of the Southern African Development Community Tribunal's Human Rights Jurisdiction' [2013] 13(1) *Human Rights Law Review* 153–165

Elsig M and Pollack MA, 'Agents, Trustees, and International Courts: The politics of judicial appointment at the world trade organization' [2012] 20(2) *European Journal of International Relations* 391–415

Klabbers J, Peters A, and Ulfstein G, *The Constitutionalization of International Law* (Oxford University Press 2009)

Lauterpacht E, 'The Role of *Ad Hoc* Judges' in C Peck and RS Lee (eds), *Increasing the Effectiveness of the International Court of Justice* (Martinus Nijhoff, The Hague 1997).

Ogbodo SG, 'An Overview of the Challenges Facing the International Court of Justice in the 21st Century' (2012) 18(1) *Annual Survey of International & Comparative Law*

PH Russell, 'Conclusion' in K Malleon and PH Russell (eds), *Appointing Judges in an Age of Judicial Power: Critical Perspectives from around the World* (University of Toronto Press 2006)

Samore W, 'National Origins v Impartial Decisions: A Study of World Court Holdings', (1956) 34(3) *Chicago-Kent Law Review* 193

Sands P, McLachlan C, and Mackenzie R, 'The Burgh House Principles on the Independence of the International Judiciary' (2005) 4(2) *The Law & Practice of International Courts and Tribunals* 247–260

Schwebel SM, 'National Judges and Judges Ad Hoc of the International Court of Justice' (1999) 48(4) *International and Comparative Law Quarterly* 889–900

Scobbie I, '“Une hérésie en matière judiciaire”? The role of the judge ad hoc in the international court' (2005) 4(3) *The Law & Practice of International Courts and Tribunals* 421–464

Slaughter AM, *Legalization and world politics: Special issue of international organization* (Judith L. Goldstein, Miles Kahler, and Robert O. Keohane eds, MIT Press 2001)

Suh IR, 'Voting Behavior of National Judges in International Courts' (1969) 63(2) *The American Journal of International Law* 224

Voeten E, 'The Politics of International Judicial Appointments' *SSRN Electronic Journal*

Books

Charlesworth, H 'Judge Ad Hoc of the International Court of Justice' in Tim McCormack and Cheryl Saunders (eds), *Sir Ninian Stephen: A Tribute* (Melbourne University Press 2007)

Collier J and Lowe V, *The Settlement of Disputes in International Law: Institutions and Procedures* (Oxford University Press 2000)

Birdsall A, *The international politics of judicial intervention* (Routledge 2008)

45 *Annuaire de l'Institut de Droit International* (1954) Vol 1

Megzari A, *The Internal Justice of the United Nations: A Critical History 1945-2015* (Brill - Nijhoff 2015)

Romano C, Alter KJ, and Shany Y (eds), *The Oxford Handbook of International Adjudication* (Oxford University Press 2014)

Rosenne S and Ronen Y, *The Law and Practice of the International Court, 1920-2004* (4th edn, Martinus Nijhoff 2006)

Tams CJ, *The Statute of the International Court of Justice: A Commentary* (Andreas Zimmermann, Karin Oellers-Frahm, and Christian Tomuschat eds, 2nd edn, Oxford University Press 2012)

Thirlway HWA, *The Law and Procedure of the International Court of Justice: Fifty Years of Jurisprudence* (Oxford University Press 2013)

Online Resources

'Full text of 'Procès-verbaux of the proceedings of the committee, June 16th-july 24th, 1920, with Annexes'',