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Editors

# Judicial Power in a Globalized World

## Liber Amicorum Vincent De Gaetano

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# Protecting the Independence of International Judges: Current Practice and Recommendations

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All the rights secured to the citizens under the Constitution are worth nothing, and a mere bubble, except guaranteed to them by an independent and virtuous Judiciary.—Andrew Jackson

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# 1 Introduction

Much scholarship has been devoted to the independence of the judiciary as a concern for potential litigants. Given that "judges are charged with the ultimate decision over life, freedoms, rights, duties and property of citizen",[1] independence and impartiality of the court are indispensable to the rule of law. But an equally important area that has received less attention is how to secure the independence of international judges. Members of international courts share the problems confronting domestic judges like freedom from political influence and backlash, but they also face unique challenges deriving from the distinct nature of the international legal order.

Many factors are considered crucial from the perspective of protecting judicial independence in the international context. Selection, tenure and reappointment of judges are the most obvious elements. However, questions regarding the composition of the court, ability to write dissenting opinions, remuneration, judicial discretion over material and human resources, political mechanisms, exit options, and interstate competition are also important parts of the context in which international judges deliver justice.[2]

In hopes of contributing to the discussion on how best to secure the independence of international judges, this article reviews the rules for selection, status and immunities of judges in five international courts: International Court of Justice, International Criminal Court, European Court of Human Rights, European Court of Justice, and the Inter-American Court of Human Rights. After offering an analysis of the most common issues arising from current practice, this article will then offer suggestions on how to better support international judges to be independent and impartial actors, while protecting them from political retaliation during their tenure and beyond.

# 2 Overview of the Selection and Status of Judges at International Tribunals

## *2.1 International Court of Justice ("ICJ")*

### 2.1.1 Selection

There are fifteen judges at the ICJ, all elected to nine-year terms by the United Nations General Assembly and the Security Council. Judges' terms may be renewed once. One-third of the Court is elected every three years to ensure continuity of the bench. Any candidate must receive an absolute majority of the votes in both organs, which vote simultaneously but separately. Some elections can be quite contentious, prompting multiple rounds of voting.[3]

All States Parties have the right to propose candidates. The proposals are made not by the government, but by a national group at the Permanent Court of Arbitration ("PCA") designated by that State (i.e. four jurists who can be called upon to serve as members of an arbitral tribunal).[4] If a country does not participate in the PCA, a group constituted in a parallel way makes the nominations. Each group can propose up to four candidates, no more than two of whom may be of its own nationality, while the others may be from any country around the world. In addition, a State Party to a case which does not have a judge of its nationality on the bench may choose a person to sit as an *ad hoc* judge in that case under specific conditions.[5] Judges *ad hoc* do not have to be, and often are not, nationals of the State that designates them. Judges *ad hoc* are on terms of complete equality with the rest of the bench vis-à-vis the particular case.

Members of the bench must be persons of high moral character, who possess the qualifications required in their respective countries for appointment to the highest judicial offices, or have recognized competence in international law. The Court may not include more than one national of the same State. Moreover, the Court as a whole must represent the main forms of civilization and legal systems of the world.

### 2.1.2 Safeguards for Independence (Immunity, etc.)

Once elected, an ICJ judge is not a delegate of any country. As such, all judges—including *ad hoc* judges—must exercise their powers impartially and conscientiously.[6] Independence of the judges is also ensured by the fact that they cannot be dismissed unless, in the unanimous opinion of the other members, the judge has ceased to fulfil the required conditions.[7] To date, this has never occurred.[8] Since the power of removal belongs only to the Court, judges are protected from potential retaliation through the form of impeachment or removal.

While engaged in the business of the Court, judges also enjoy diplomatic privileges and immunities.[9] These immunities continue beyond the judges' tenure for any liability concerning the words or actions during their term in office. The

[1]Basic Principles on the Independence of the Judiciary Adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders (1985).

[2]Pérez (2015), p. 182.

[3]See, e.g., *No British judge on world court for first time in its 71-year history*, The Guardian (2017).

[4]For more details on the composition of the PCA national groups or equivalent groups for the purposes of nomination, see Mackenzie et al. (2010), pp. 69–73. See also Mackenzie (2014), pp. 737–756; Seibert-Fohr (2014), pp. 757–778.

[5]Under Article 31, paragraphs 2 and 3 of the Statute of the Court; Articles 35–37, Rules of the Court.

[6]International Court of Justice, Members of the Court.

[7]Statute of the International Court of Justice [hereinafter "ICJ Statute"], art. 18.

[8]International Court of Justice, Members of the Court.

[9]ICJ Statute, art. 19.

Registrar of the Court, with the President's approval, has the right and the duty to waive the immunity if the immunity would impede the course of justice, and can be waived without prejudice to the interests of the Court.[10]

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

### 2.2.1 Selection

The ICC has eighteen judges who are elected by the Assembly of States Parties for their "qualifications, impartiality and integrity".[11] No two judges from the same country may be elected.[12] The makeup of the bench must account for "the representation of the principal legal systems of the world, equitable geographical representation and a fair representation of female and male judges."[13] Judges serve nine-year terms that are not renewable.[14]

Any State Party to the Rome Statute can nominate candidates, either by the procedure for the nomination of candidates for appointment to the highest judicial offices in the State in question, or by the procedure for nomination of candidates to the International Court of Justice.[15] Each State Party may put forward one candidate for any given election who need not necessarily be its own national, as long as that candidate is a national of a State Party.[16]

The nomination rules are meant to "insulate nominations from political influence".[17] However, without more detailed guidance, States have essentially been left to establish their own practice. Judges are elected by a secret ballot at the Assembly of States Parties—namely those who obtain the highest number of votes and a two-thirds majority of the States Parties present and voting.

### 2.2.2 Safeguards for Independence (Immunity, etc.)

Articles 46 and 47 of the Rome Statute outline the removal and disciplinary procedures for judges. A judge is removed from office for committing "serious misconduct or a serious breach of his or her duties under [the] Statute" or being "unable

[10]Resolution 90 (I) of the General Assembly of the United Nations (1946), 4(B).
[11]International Criminal Court, Judicial Divisions.
[12]Rome Statute of the International Criminal Court (1998) [hereinafter "Rome Statute"], art. 36(7).
[13]Rome Statute, art. 36(8)(a)(i)-(iii).
[14]Rome Statute, art. 9(a).
[15]Rome Statute, art. 36 (4)(a).
[16]Rome Statute, art. 36 (4)(b).
[17]Mackenzie et al. (2010), p. 65.



to exercise the functions required by th[e] Statute."[18] For misconduct or breach of duty that does not amount to being "serious", disciplinary measures may be imposed.[19] A decision to remove a judge must be made by a two-thirds majority vote in the Assembly of States Parties by secret ballot.[20] Judges facing such proceedings are guaranteed a full opportunity to present and receive evidence and to make submissions.[21]

Similar to other international courts, judges enjoy diplomatic privileges and immunities when engaged in or with respect to the business of the Court. In addition, after the expiry of term in office, their immunity continues "from legal process of every kind in respect of words spoken or written and acts performed by them in their official capacity."[22] However, the privileges and immunities of a judge may be waived by an absolute majority of the judges.[23] In addition, the ICC has an Agreement on the Privileges and Immunities of the International Criminal Court, covering a range of areas from tax exemption to the status of family members of judges.[24]

## 2.3 *European Court of Human Rights ("ECtHR")*

### 2.3.1 Selection

Each Member State nominates three candidates, from the list of whom one judge is elected by the Parliamentary Assembly of the Council of Europe. Like the ICC, ECtHR judges serve a non-renewable term of nine years. The Court does not dictate the process through which national governments pick their list of candidates. However, concern about the quality of nominees has led to changes in the national selection procedure to make it more transparent and inclusive.[25] The result has been an increased judicialisation of the domestic selection processes, such as the inclusion of judges from the highest courts in the advisory selection committees.[26] Nonetheless, it is ultimately up to the national governments to decide the nominees.

[18]Rome Statute, art. 46(1).
[19]Rome Statute, art. 47.
[20]Rome Statute, art. 46(2)(a).
[21]Rome Statute, art. 46(4).
[22]Rome Statute, art. 48(2).
[23]Rome Statute, art. 48(5)(a).
[24]Agreement on the Privileges and Immunities of the International Criminal Court (2002).
[25]See Guidelines of the Committee of Ministers of the Council of Europe on the Selection of Candidates for the Post of Judge (2012).
[26]Council of Europe, Steering Committee for Human Rights (CDDH), Selection Of Candidates For Election as Judge to the European Court of Human Rights: Procedure And Selection Criteria In Member States (2017).

### 2.3.2 Safeguards for Independence (Immunity, etc.)

Judge are accorded the same privileges and immunities extended to those at the Council of Europe. In accordance with Article 51 of the European Convention on Human Rights, judges and ad hoc judges are entitled, during the exercise of their functions, to the privileges and immunities provided for in Article 40 of the Statute of the Council of Europe and in the agreements made thereunder.[27]

In addition, judges, their spouses and minor children have the privileges and immunities, exemptions and facilities accorded to diplomatic envoys under international law.[28] In order to secure freedom of speech and complete independence in the discharge of their duties, post-mandate judges are accorded immunity from legal process in respect of work done at the Court.[29] Spouses and minor children of the judge are also granted diplomatic immunity during the term of office. This jurisdictional immunity includes immunity from criminal proceedings as well as immunity from civil and administrative proceedings, with certain limitations.[30] However, the immunity may be waived by the Court sitting in plenary.[31]

As for removal, no judge can be dismissed from his or her office unless the other judges decide by a majority of two-thirds of the current judges that the person has ceased fulfilling the required conditions. Any judge may trigger the procedure for dismissal of another judge. Before such voting takes place, the judge must first be heard by the plenary Court.[32]

## 2.4 *European Court of Justice ("ECJ" or "CJEU")*

### 2.4.1 Selection

Starting in 2019, the General Court will comprise of two judges from each EU country; the bench of the Court of Justice will have 1 judge from each EU country, plus 11 advocates general.[33] Judges serve six-year terms, and may be reappointed.

[27]Sixth Protocol to the General Agreement on Privileges and Immunities of the Council of Europe, 5.III.1996, Preamble.

[28]Sixth Protocol to the General Agreement on Privileges and Immunities of the Council of Europe, 5.III.1996, art. 1.

[29]Sixth Protocol to the General Agreement on Privileges and Immunities of the Council of Europe, 5.III.1996, art. 3.

[30]Vienna Convention on Diplomatic Relations, art. 31.

[31]Sixth Protocol to the General Agreement on Privileges and Immunities of the Council of Europe, 5.III.1996, art. 4.

[32]European Court of Human Rights, Rules of Court (1 Aug. 2018), Rule 7.

[33]European Union, Court of Justice of the European Union: Overview.



National governments choose their own candidate, who is then confirmed by other Member States. Although the other Member States may oppose the candidacy, nominees presented are usually endorsed by the Council of Ministers "without any real discussion."[34] Thus, the candidacy almost entirely depends on the nominating government; there may be a "strong and direct accountability to the home state, but only very limited accountability to other states."[35]

However, there is some effort to introduce quality-check in the process. Article 255 of the Treaty on the Functioning of the European Union (TFEU) has established a panel that produces an opinion on the suitability of candidates. This panel was a response to calls for objective criteria to be applied for assessing nominees, and for an independent body to assist in this process.[36] But the influence of this panel is rather limited, since it is consulted only before the Member States proceed to the appointment phase.

### 2.4.2 Safeguards for Independence (Immunity, etc.)

Judges and advocates-general are immune from legal proceedings. After they have ceased to hold office, they continue to enjoy immunity in respect of acts performed by them in their official capacity. However, the immunity may be waived by the full Court; in such a case, criminal proceedings against the Judge may be commenced only by the court competent to judge the members of the highest national judiciary.[37] Judges may be removed from office only by a unanimous decision of the Court.[38] In addition, privileges and immunities of the European Union also apply.[39]

## 2.5 *Inter-American Court of Human Rights ("IACtHR")*

### 2.5.1 Selection

The Court consists of seven judges. Six months prior to expiration of the term to which the judges of the IACtHR were elected, the Secretary General of the Organization of American States (OAS) addresses a written request to each State

[34]Guillaume (2003), p. 163.

[35]Dunoff and Pollack (2017), pp. 225, 235.

[36]De Waele (2015), pp. 25–26.

[37]Protocol No 3 annexed to the Treaties on the Statute of the Court of Justice of the European Union, art. 3.

[38]Protocol No 3, art. 3.

[39]Protocol No 3, art. 3.

Party for nomination of candidates.[40] Each State Party may nominate up to three candidates, who can be the State's own nationals or of any other member state of the OAS; at least one of the candidates must be a national of a state other than the nominating one.[41] Judges are elected by the States Parties at the OAS General Assembly by secret ballot and by an absolute majority of the States Parties. Judges are elected to six-year terms, and may be reelected a second time.[42]

Thus, the entire process of appointment lies in the discretion of the States Parties. Civil society or other stakeholders have no means of participating in the national selection of the candidates or in the election. The OAS also has no independent institution to supervise the nomination of candidates by States Parties, and the States Parties do not control the process of each other; they have no mechanism to formally object to a candidature who does not meet the requirements.[43] While they nonetheless may raise concerns about the competence of a candidate with the General Assembly, there is no institutional process to make sure that these concerns are properly addressed before a candidate is confirmed.

### 2.5.2 Safeguards for Independence (Immunity, etc.)

From the moment of election and throughout their term of office, judges at the Inter-American Court enjoy diplomatic immunities and privileges under international law. During the exercise of their functions, they also enjoy the diplomatic privileges necessary for the performance of their duties.[44] The judges of the Court cannot be held liable for any decisions or opinions issued in the exercise of their functions after their tenure ends.[45]

However, judges may be dismissed for holding a concurrent position that is incompatible with the duties of the Court, such as high-ranking officials of the executive branch of government, or international organizations.[46] While there is no formal mechanism for dismissal laid out in the Statute of the Court, the General Assembly of the Organization of American States has disciplinary authority over the judges, which may be exercised only at the request of the Court itself, i.e. the remaining judges.[47]

[40]Statute of the Inter-American Court of Human Rights, art. 8(1).

[41]Statute of the Inter-American Court of Human Rights, arts. 7(2) and (3).

[42]Statute of the Inter-American Court of Human Rights, art. 5.

[43]Ruiz-Chiriboga (2012), pp. 111, 118.

[44]Statute of the Inter-American Court of Human Rights, art. 15(1).

[45]Statute of the Inter-American Court of Human Rights, art. 15(2).

[46]Statute of the Inter-American Court of Human Rights, art. 18.

[47]Statute of the Inter-American Court of Human Rights, art. 20.



## 3 Issues Surrounding the Independence of International Judges[48]

International courts and tribunals "serve a function where the legal and the political are intimately conjoined", such that "the work of international courts can never be entirely divorced from the world of international politics".[49] Such "fragmented"[50] nature of the international legal order gives rise to challenges that are distinct from those to a national system.

The selection and appointment mechanisms of international courts surveyed in Sect. 2—whether global or regional—uniformly emphasize the judge's nationality by imposing geographical or national representation requirements. For instance, the Assembly of States Parties resolutions dictate that the ICC bench must contain at least three judges each from Western European and Other Group, Africa, Latin America and the Caribbean and two from Eastern Europe and Asia.[51] Thus, there is a general, implicit "assum[ption] that the judges who sit on those courts are inherently and irreversibly partial to, and perhaps dependent on, their respective countries of origin."[52] Indeed, this reflects a decades-long scepticism that "international judges, like international arbitrators, would be inclined to determine cases according to the wishes of the government of which they were nationals, or according to what they perceived to be their country's political interests."[53]

Three common issues stand out in the survey of international courts. First, transparency regarding the nomination and election processes; second, the recognition of the judge as an actor with potential bias for one's own country; and third, the interference of or influence by the national government that threatens the judges' independence before, during, and after their tenure.

### *3.1 Lack of Transparency or Regulation in Nomination and Election Processes*

The nomination and election of judges to international courts and tribunals are often "subject to little transparency, and to widely varying . . . nomination mechanisms at

[48]Here, we are discussing solely external independence, i.e. the independence of judges and the courts vis-à-vis extrajudicial influence. Judge Pinto has written about both internal and external independence in a separate article. See Albuquerque (2018), pp. 119–133. One of his main suggestions is that of a "cooling-off period" for holders of some state positions as regards applying for judicial posts at the European Court as well as for ECtHR judges as regards applying for certain state positions for a period of five years after their mandate. This period would put an end to any risk of a "revolving door" between the Court and Government-dependent posts.

[49]Terris et al. (2007), pp. xxi, 149.

[50]Mahoney (2008), pp. 313, 317.

[51]Mackenzie et al. (2010), p. 29.

[52]Dannenbaum (2013), p. 77.

[53]Gordon (1989), pp. 508–529. Internal quotations omitted.

the national level".[54] For instance, ICJ judges are nominated by national groups that are intended to be independent from national governments, but transparency is still limited. "Very little is known about the way they operate,"[55] and these groups' suggestions are not always binding on the States, either. This means that even where there is an independent body, States may be able to abuse the gaps in the system to nominate whoever they wish, but with a façade of accountability at the nomination stage.[56]

Poor transparency has a direct consequence on "enhancing the qualities of the judges selected."[57] Without an objective process in place, the chances of improper, external factors determining the 'desirability' of a judge are extremely high. For instance, the lack of scrutiny from the public eye has led to the practice of vote-trading between States.[58] At the ICJ and the ICC, most votes are based on 'reciprocals', or 'mutual support agreements',[59] a mechanism by which a State promises to vote for a candidate in exchange for a vote in the same or another election, or in exchange of other benefits. As the term suggests, these give-and-take agreements are "largely motivated by political considerations rather than merit."[60] Thus, States seek to serve their geopolitical interests across different candidates, or even elections at different international bodies.[61]

Lack of transparency is also an obstacle to achieving greater diversity and representation in the international judiciary. An opaque process hinders the "integration of diverse views and their open and deliberative processing",[62] which in turn decreases the chances of having a diverse judiciary. Diversity of the judiciary—in terms of social representativeness or gender balance—has increasingly been raised as a desirable, yet overlooked, goal.[63]

[54]Mackenzie and Sands (2003), p. 278.

[55]Keith (2017), pp. 137, 145 (2019).

[56]One scholar has pointed to an election of an ECtHR judge in 2004 as an example of government maneuvering to seat the candidate of their choice on the Court. The government in the case selected as the two other judges on the candidacy list those with significantly less experience at the top domestic courts so that the candidate of choice would have a huge comparative advantage at the Parliamentary Assembly. While such "rigged selection process at the national level" was eventually detected by the Council of Europe and another candidate was selected, this was a cautionary tale of governments attempting to override a checks-and-balances system. See Kosař (2015), p. 150.

[57]Mackenzie et al. (2010), p. 138.

[58]Mose (2014), p. 191.

[59]Mose (2014), p. 122.

[60]Mose (2014), p. 122.

[61]See The Institute of International Law, The Position of the International Judge (2011), art. 1 (6) Vol. 74 Annuaire (recommending that "elections of judges should not be subjected to prior bargaining which would make the voting in such elections dependent on votes in other elections").

[62]Bogdandy and Krenn (2015), p. 169.

[63]See, e.g., Lord Justice Etherton (2010) ("a judiciary with a diversity of experience ... is more likely to achieve the most just decision and the best outcome for society").

## 3.2 *Perceived—or Real—National Bias of International Judges*

The perceived bias of international judges is different from *personal partiality* (based on the judge's personal interests as they pertain to the parties of the case or the subject of the dispute), or *jurisprudential partiality* (revealing the judge's inclinations that arise from a jurisprudential worldview). Instead, the traditional concern is that the judge, as a nationally-appointed actor, may be tempted or motivated to decide in a manner that favours one's own country or the country's allies.[64]

There is an additional issue of what Richard Falk calls "structural impartiality", or "the reality of a world of sovereign states in which the primacy of these states is critical to the effectiveness of law".[65] In other words, there is a worry that states with "power to implement their views as to what appropriate understanding of law is about can advance an interpretation of bias that is really a reflection of geopolitics and power."[66] At the level of individual judges, this translates to judges from countries with less political muscle power enjoying less authority than those from richer, stronger nations. A telling example of this imbalance is the low number of Eastern European judges elected as section presidents in the European Court of Human Rights and consequently as members of the highly critical "Bureau" of the Court[67] in spite of the fact that they represent more than half of the Council of Europe population.

The idea that different legal systems and the judges coming from them have unequal value also inspires misguided resistance to the international legal order. For instance, some politicians have argued that European Court of Human Rights judges lack political legitimacy to act as a subsidiary legislator, a problem aggravated by the fact that some judges come from "alleged second-class democracies".[68] According to these voices, the undemocratic pedigree of some Contracting Parties tainted in the past, and continues to taint, the judges' independence and the Court's authority.

Thus, this scepticism is related to the broader critique that international law is an "instrument of policy to encompass the policies also of interested ethnic, racial, or

[64]See Voeten (2008), pp. 417, 421 (highlighting that "international judges may favour important allies of their national governments").

[65]Falk (1989), pp. 508–529.

[66]Falk (1989), pp. 508–529.

[67]This body has no Convention basis, which has led some Judges to be rightfully vocal about its illegitimacy. See Loucaides (2010), pp. 61, 63–64.

[68]Albuquerque (2018), pp. 119–133. The same concern was expressed in Judge Pinto de Albuquerque's separate opinion in *Hutchinson v. the United Kingdom (GC)*, no. 57592/08, 17 January 2017, § 40, where reference is made to the "biased understanding of the logical obverse of the doctrine of the "diversity of human rights", namely the doctrine of the margin of appreciation".

religious groups, of ideological groupings, and of constituency interests."[69] Such perception of national bias can expand beyond the citizenship of the judge—it can pertain just as well to the so-called Western versus non-Western values, or different blocs of culture.[70] Critique of national bias can be especially salient vis-à-vis judges facing inter-state disputes. For instance, Israel challenged Judge Elaraby's impartiality in the ICJ's decision on the Israeli Wall,[71] which was echoed by Judge Buergenthal in his dissenting opinion.[72] Eric A. Posner and Miguel de Figueiredo have gone further, alleging "strong evidence that [ICJ] judges favour the states that appoint them, and . . . favour states whose wealth level is close to that of the judges' own state".[73]

Of course, this argument potentially conflates *implication* with *bias*. As with domestic judges, it is undeniable that the education and training, cultural background and values of individual international judges will impact their decision-making to varying degrees. Some have suggested that there is no evidence that this prevents international courts from adjudicating fairly.[74] Indeed, if such bias has been systematic and conspicuous, the international legal order would have lost the confidence of stakeholders long ago. This is a problem that is simply inherent in human judiciaries, and does not rise to the level of concern: "[i]f being implicated means bias, then everyone is biased, and perhaps then no one can judge."[75] There is thus a need to distinguish one's identity and perspectives from one's ability to judge impartially.

Nonetheless, there is some basis to suspect that the national bias of judges is not entirely disassociated from decision-making. For instance, Erik Voeten's quantitative study of the voting behaviour of the ECtHR bench revealed that a number of factors lead to judges not being "fully impartial when they evaluate their national governments."[76] A former judge of the European Court of Human Rights also lamented that:

[69]Burton (1989), pp. 508–529.

[70]Burton (1989), p. 514.

[71]*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory,* Advisory Opinion ICJ Reports 2004, p. 3, at 4, para. 2. The exact complaint of Israel was that Judge Elaraby "had previously played an active, official and public role as an advocate for a cause that is in contention in [that] case".

[72]*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory,* Advisory Opinion, p. 9, para 11.

[73]Posner and Figueiredo (2004). See also Kuijer (1997), pp. 49–67.

[74]See Hernández (2012), pp. 183, 185 ("Although factors such as national loyalty, the selection process, the manner in which judges align themselves into voting blocs on the bench and questions of procedural fairness could surely prove important considerations if empirically cognisable, there is no evidence that the Court's judges systematically "vote their preferences" or are instructed by their governments").

[75]Minow (1992), pp. 1201, 1207.

[76]Voeten (2008), p. 425.



> [T]he majority of the judges were reluctant to find violations in cases that would present serious problems to a State's financial capabilities, to the general legal or governmental system or to the political objectives of the respondent State.[77]
>
> [. . .]
>
> During my term of office as a judge I also experienced a consistent general attitude of the Court toward not finding a violation of the right to a fair trial on the ground of unfair national court judgments. The Court was concentrating on the procedural safeguards of a trial and it has established a practice of not interfering with the result of a trial on the ground that such an interference would transform the Court into a court of "fourth instance".[78]

Even if these concerns do not amount to the same level at every international court,[79] such perception can constitute a basis for challenging the broader international legal order. Therefore, it is important to address it institutionally: after all, "justice should not only be done, but should manifestly and undoubtedly be seen to be done."[80] Nomination, selection, and immunity of judges can all have an impact on how those outside the judiciary evaluate the independence of the judge. In order to build confidence of the participants in international tribunals, it is necessary to build a framework that minimizes any risk of national bias among judges.

## 3.3 *Interference or Influence by National Government*

Judicial independence means that judges must be able to exercise their functions without direct or indirect interference by an unauthorized actor. In the context of international courts, the independence of judges must be guarded especially from the intervention of states, "since States are parties to disputes and it is usually States who nominate judges to international tribunals".[81] Given that international courts are more frequently involved in holding a government to its nation's laws than domestic courts, the stakes of independence in the former are even higher and more difficult to protect than in the latter.

[77]Loucaides (2010), pp. 61, 64.

[78]Loucaides (2010), pp. 61, 68.

[79]For instance, Permanent Court of Arbitration judge Dr. Bossuyt has suggested that the bigger problem is judicial activism against States exercising their political discretion in protecting human rights. See Bossuyt (2014). ("In M.S.S., the Court has also extended the applicability of Article 3 to the living conditions of asylum seekers. In doing so, the Court is transforming the civil right by excellence (the absolute prohibition of torture is an obligation not to do something, an obligation that has to be and can be respected regardless the available resources) into an obligation to provide social benefits to asylum seekers which requires considerable expenditures. At this very moment of a deep financial crisis, according to the Court, Greece should give priority to asylum seekers rather than to its own citizens.")

[80]R v Sussex Justices; Ex parte McCarthy [1924] 1 KB 256, 259.

[81]Shetreet (2003), p. 129.

It must be acknowledged that at the international level, the relationship between judges and their nominating States is more complex and nuanced than at the domestic level. Since actual separation of powers is difficult to achieve at the highly politicized process of international legal order, "appointments to international courts and tribunals cannot be entirely insulated from political processes."[82] Indeed, countries' voluntary participation in the international legal order may be premised on the "belief that having a national on the bench furthers the interests of the state in some way."[83] Some have even suggested that it should be openly accepted that international court judges are not wholly independent, arguing that acknowledging these vested interests would make decision-making in international courts more effective.[84]

As such, governments exert a great deal of influence over the choices of even formally independent international judges in all of the international courts surveyed.[85] A reasonable inference from the effort that goes into having their candidate of choice join the bench at international courts is that appointing States put forward only those candidates who generally share the values of the government. Indeed, looking back at his time at the ECtHR, Judge Loucaides lamented that "[t]here were countries in which the selection was made on the basis of criteria such as the friendly relations of the candidate with influential political personalities or the affiliation of the person proposed with the political party in power. It was therefore obvious that the States concerned did not aim to propose the most qualified candidate."[86]

Moreover, none of the international courts surveyed in Section II grants lifelong tenure to their judges. Therefore, there is an inevitable concern for 'what is next' in the life after the international court, especially for judges of younger age. In most cases, judges seek to return to their home countries—therefore, it is not in the judge's personal interest to be disfavoured by the national government. Of course, this consideration applies with less force to judges who reach the retirement age by the time they leave the international tribunal; however, it would be both unrealistic and undesirable to fill the bench with only judges of senior age.

There is thus a need to reform the current selection process and after-tenure conditions to counter the geopolitical forces that come into play. As seen in Section II, geopolitical influence needs to be combatted with particular vigour when judges are sensitive to the threats of noncompliance, legislative override, or withdrawal of institutional support. In other words, there must be safeguards in place that address the motivation of States to nominate those that they believe will tend to rule in their favour. Such mechanisms should also keep in mind the judge's personal concern for one's career after the expiry of his or her term in office at the international court, so that such external factors do not interfere with fair decision-making.

[82]Pocar (2010), p. 603.

[83]Mackenzie et al. (2010), p. 25.

[84]See, e.g., Posner and Yoo (2005), pp. 1–74.

[85]See, e.g., Carrubba et al. (2008), pp. 435–452; Stephan (2002), pp. 333–352.

[86]Loucaides (2010), pp. 61, 62.



## 4 Suggestions and Recommendations

Since international tribunals are a newer phenomenon than domestic courts, they do not have the luxury of "deeply rooted confidence in society and operating within one legal system with generally shared ethical principles."[87] Consequently, international courts have a *de facto* heavier burden to prove that they deserve the confidence of those under their jurisdiction. In other words, the independence of international judges tends to be more easily attacked than that of domestic judges.[88] To earn and maintain this confidence, it is essential to have "judges who are independent of political or other pressures" to "adjudicate the disputes brought to them with an eye to the guiding legal principles and without any undue influence by external sources."[89] Ensuring the reflection of this principle in reality requires structural safeguards to eliminate external leverage on judges—especially that coming from national governments—and to support their function as guardians of justice. This section makes a few proposals in this regard in hopes of inspiring further discussion on strengthening the independence of the international judiciary.

### *4.1 Checks and Balances in the Selection of Judges*

How international judges are chosen and appointed is one of the most significant determinants of their independence.[90] Needless to say, selection and nomination of judges must be based on objective criteria, with paramount importance placed on the ability to exercise judicial functions. But in reality, as Sects. 2 and 3 have demonstrated, the process is often dominated by governments that attempt to seat candidates in their favour.

One alternative to a selection system controlled by national governments is to establish independent bodies at the national level to help oversee the nominations. Indeed, there is already a trend in favour of "advisory 'screening' procedure prior to the election or appointment of candidates, to review the qualifications and experience of nominees in order to ensure they meet the criteria established in the

[87]Mose (2014), p. 189.

[88]For instance, the Hungarian Government advanced an alarming position in *Baka v. Hungary*: "judicial service at an international court cannot be equated with national judicial service from the point of view of the independence, or the perceived independence, of the judiciary." See ECtHR, *Baka v. Hungary* [GC], App. No. 20261/12, 23 June 2016, Joint Concurring Opinion of Judges Pinto de Albuquerque and Dedov, § 21.

[89]Meron (2005), p. 359.

[90]See Malenovský (2011), p. 118 («En effet, [les accords internationaux] prévoient le plus souvent, soit les modalités de l'élection des juges internationaux (au cas où le nombre de candidats est supérieur au nombre de postes à pourvoir), soit celles de leur nomination (au cas où l'élection n'est pas prévue)»).

governing instrument of the court in question."[91] The ICJ and ICC[92] have sought to do this by having national groups or other selection-aiding bodies involved in the nomination process.

However, "[i]f the state has already decided to nominate a particular candidate, [such bodies] may be cut out of the picture and merely act as a rubber stamp for the formal nomination."[93] Similarly, while both the CJEU and the ECtHR have two dedicated advisory bodies to scrutinize the suitability of judicial candidates, the Member States still have wide discretion in assessing the independence and merits of their own candidates. Indeed, the "strong vested interest of governments in strictly controlling the nomination process in order to influence the composition of international courts" can often derail the insulation of elections from political lobbying.[94] After all, it is no secret that domestic and international political considerations heavily affect nominations.

Therefore, international courts should have a system in place to ensure that overriding of the choice of a selection or advisory committee is done only sporadically and with legitimate reason. If the national government wishes to go against the recommendations of the domestic independent panel, there should exist some reasonable basis for their disagreement, promptly communicated. In essence, such committee should really have the decisive say in the nomination of a national candidate.

Having a uniform model of selection across different countries also helps ensure that the level of different nominees will be on par. Presently, the considerable divergence across the different selection mechanisms at the national level accounts in large part for the discrepancy in the relative experience in or knowledge of international law among judges at the same court, as well as their skills and acumen; such disparity within the bench in turn affects the overall quality of the jurisprudence of the courts.[95] Moreover, it also affects judicial independence in that the less competent judges will be less inclined to vote with confidence or go against the wishes of their government.

One desirable alternative for selection of judges is that used by the Caribbean Court of Justice (CCJ). At the CCJ, the Regional Judicial and Legal Services Commission appoints all judges with the exception of the President, who is

[91]Mackenzie (2014), p. 752. The existence of such mechanisms is also implicit proof that governments "sometimes nominate candidates who do not fulfill the minimum requirements."

[92]ICC Article 36 (4) provides that the national nomination shall follow the procedure for the nomination of candidates for appointment to the highest judicial offices in the state in question, or the procedure prescribed by the ICJ Statute.

[93]Mackenzie et al. (2010), p. 74.

[94]Ibid. at 65.

[95]See Malenovský (2011), p. 135 («Ces divergences considérables entre les nombreuses procédures de sélection à l'échelle nationale sont regrettables. En effet, l'équivalence de ces différentes procédures n'étant pas assurée, celles-ci ne sont pas, en principe, de nature à produire des candidats équivalents. Les disparités de niveau des candidats sont susceptibles de se répercuter sur la qualité de la juridiction concernée et sur sa fiabilité. . .»).



appointed by the governments upon the Commission's recommendation.[96] The President also serves as the chairperson of the Commission, facilitating a systematic dialogue between the selection committee and the bench.[97] Other members of the Legal Services Commission "include bar representatives, academics, chairpersons of national judicial and public services commissions, and civil society representatives."[98] Furthermore, if any of the members of the Commission fail to make a nomination, the heads of judiciaries of the Member States can make the nomination jointly.[99] Thus, national judges also have a role in the selection process.

Similarly, judges of the Central American Court of Justice are elected by the supreme courts of justice of the Member States.[100] If the presumption of separation of powers holds and the judges are indeed more independent from political pressure in their home countries, this judiciary-led model could also be a suitable alternative. Another model is the domestic selection process for the ECtHR in Portugal, which involves the High Judicial Council, the Prosecutor General, the President of the Portuguese Bar Association, law professors and one senior ministerial official.[101] The makeup of this selection body, chaired by the President of the Supreme Court, reflects different and competing interests in the society while ensuring legal expertise in assessing the quality of a potential nominee.

### 4.2 *Transparency in the Nomination and Election Processes*

As a positive development, there is a "tendency in favour of increased transparency in election processes and insistence on the personal qualifications of judges."[102] However, the current system of selecting international judges remains largely obscure, taking place in "dark corners of political negotiation and deal-making".[103] Lack of transparency gives rise to concerns for independence that can prevent judges from freely exercising their decision-making power. Some judges may even feel indebted by a "sentiment of gratitude" to the governments that nominated them,

[96]Malleson (2009), pp. 671, 686. Jiri Malenovský also notes that States are increasingly open to the idea of conferring the competence to designate international judges to an international political authority. See Malenovský (2011), p. 143.

[97]The Agreement Establishing the Caribbean Court of Justice, art. V (1) (a).

[98]Tsereteli and Smekal (2018), pp. 2137, 2151.

[99]The Agreement Establishing the Caribbean Court of Justice, art. V(2).

[100]The Statute of the Central American Court of Justice, art. 10.

[101]See the Minister of Justice's Decree n. 11884/2018, of 28 November, published in the official gazette, II series, n.° 238, of 11 December 2018.

[102]Mose (2014), p. 197.

[103]Pérez (2015), p. 195.

affecting the independence of the judge in a strongly prejudicial way.[104] One way to ward off this danger is to reform the selection process to be more open, transparent and consultative of various stakeholders.

Transparency is particularly important where the rules governing selection of judges are vague and arbitrary, as is the case in many international courts. It counters the risk of governments choosing judges of their own liking, such as former or current government agents[105]; governments are likely aware that judges who served as diplomats or in other government functions tend to defer to stated national interests more than those who were human rights activists before joining the bench.[106] Indeed, a recent statistical study has noted that governments have gradually appointed more restrained judges at the ECtHR, and, as a result, the Court has "become more reluctant to rule against consolidated democracies".[107] These findings seem to be confirmed by another expert report which detected a more frequent use of expressions "margin of appreciation" and "wide(r) margin of appreciation" at the ECtHR after the Brighton conference, leading to these two striking conclusions: firstly, that "the supposedly new approach of weighting more procedural aspects of the national human rights protection creates a bias in favour of Western states that are assumed to provide more solid legal guarantees in this regard"; and secondly, that "an international institution like the ECtHR is receptive to external inputs of non-legal or semi-legal nature."[108]

As the Council of Europe has acknowledged, transparency of public authorities is particularly important in a pluralistic, democratic system.[109] Given that international courts and tribunals are part of this democratic, multilateral order, they should embrace transparency as an important value and a helpful tool for sustainability; more transparency in nomination and election of judges also enhances the legitimacy of the court in the eyes of all stakeholders.[110] A transparent process would pressure governments to convince the public and the voting body of objective grounds of qualification.

[104]Malenovský (2011), p. 115 («l'intéressé se considère, en conscience, comme le débiteur de ceux qui l'ont choisi de manière non impartiale et nourrisse ainsi à leur égard un sentiment de gratitude non désintéressée. Ce sentiment de gratitude suspecte s'avère fortement préjudiciableà l'indépendance d'un juge en fonction,...»).

[105]See Malenovský (2011), p. 132 («Il n'est donc pas étonnant que les Etats choisissent assez souvent et précisément, en tant que candidat à la fonction d'un tel juge, leur agent respectif.»).

[106]Voeten (2008), p. 422.

[107]Stiansen and Voeten (2019), pp. 30–31.

[108]Madsen (2017).

[109]Council of Europe, Convention on Access to Official Documents (18 June 2009), CETS 205, Preamble.

[110]See Res. 1726 (2010) on the effective implementation of the European Convention on Human Rights: the Interlaken process, 29 April 2010; CM/Res/(2010)26 on the establishment of an Advisory Panel of Experts on Candidates for Election as Judge to the European Court of Human Rights. The committee has seven members and is presided over by a previous president of the ECtHR.

Indeed, a transparent process of judicial selection would strengthen the independence of judges by bringing to the public eye any connections or conflicts of interest, thereby facilitating the scrutiny and vetting of candidates. As Justice Cullen of Scotland stated, quoting Jeremy Bentham, publicity is the best guarantee of probity.[111] In this way, transparency is interconnected to having healthy checks and balances in the nomination system—it allows more parties to check the quality and any grounds for impartiality of the nominees.

As discussed in Sect. III.A, having a more transparent process also leads to greater diversity, which in turn strengthens the democratic legitimacy of courts: a diverse bench is "essential to shore up public support for and confidence in the judiciary."[112] Of course, diversity as a concept is "plainly not restricted to, or synonymous, with gender, ethnicity or sexual orientation ... [although] those factors are likely to be an indication of valuable experience which is different to the norm".[113] Different life experiences of judges also inevitably contribute to different perspectives and sensitivities,[114] which are particularly useful in an international court that must face a wide range of issues that crosses borders and cultures.

There is ample guidance at the domestic level for tools to enhance the transparency of judicial selection. Some examples are public recruitment of judges through open advertisements; consultation with civil society or academia; public hearings before parliamentary commissions or other advisory bodies that give an opportunity for public screening of the candidate.[115] In short, "[i]nformation regarding the nomination, election and appointment process and information about candidates for judicial office should be made public, in due time and in an effective manner".[116]

### 4.3 *Removal and Discipline of Judges*

It is uncontroversial that "[t]he security of tenure and conditions of service of judges are absolutely necessary elements for the maintenance of judicial independence, according to all international legal standards."[117] Indeed, in the domestic context,

[111]Cullen (1999), pp. 261–262.

[112]Rackley (2010), Oct, pp. 655, 656.

[113]Lord Justice Etherton (2010), pp. 745–746.

[114]See Caflisch (2003), p. 169 ("Members of international tribunals are, of course, conditioned, up to a point, by their upbringing, their former activities and their personal circumstances.")

[115]Committee on Legal Affairs and Human Rights, Nomination of Candidates and Election of Judges to the ECtHR. Part B of the Appendix to Assembly Doc. 11767: Overview of Member States' Replies to a Questionnaire, AS/Jur (2008) 52, 2 December 2008.

[116]"The Burgh House Principles on the Independence of the International Judiciary', the Study Group of the International Law Association on the Practice and Procedure of International Courts and Tribunals, in Association with the Project on International Courts and Tribunals, § 2.4 (University College, London).

[117]ECtHR, *Baka v. Hungary* [GC], App. No. 20261/12, Joint Concurring Opinion of Judges Paulo Pinto de Albuquerque and Dedov, 23 June 2016.

irremovability of judges from office by the executive is a "corollary of their independence."[118] As a general rule, international judges should also enjoy absolute protection from removal during their tenure—except for personal misconduct not associated with their role as judges or actual incapacity (because of a serious illness, for instance).[119]

As for disciplinary measures, it is important for each court to have rules of procedure to address misconduct or breaches of duty.[120] There should also be active participation of judges in the relevant disciplinary body. Disciplinary proceedings must also guarantee the possibility of recourse or appeal.[121] It appears that a few international courts have established clear procedures for disciplinary actions that are led by the courts themselves.

### 4.4 *Re-election or Re-nomination of Judges*

The practice of re-election in many international courts has implications for both the independence and diversity of the international judiciary. First, the independence of judges can be hindered by fear of putting the second term at risk, especially if the national government controls the process. The concern "that a judge on an international court who is apprehensive about the prospects of renomination by his government or reelection may decide cases so as not to antagonize powerful [] member states, and especially his own state"[122] is justified and reasonable: there is evidence that States sanction judges by precluding them from a second term if the decisions have not been favourable to the government.[123] Indeed, the length of tenure and possibility of re-election combined augments the possibility that judges "who need to secure re-election, particularly toward the end of their term, would allow political pressure to affect their decision-making."[124]

[118]Laffranque (2014), p. 132.

[119]See Opinions Nos 1(2001), 2(2001) and 3(2002) of the Consultative Council of European Judges for the attention of the Committee of Ministers of the Council of Europe on standards concerning the independence of the judiciary and the irremovability of judges, on the funding and management of courts with reference to the efficiency of the judiciary and to Article 6 of the European Convention on Human Rights (the ECHR), and on the principles and rules governing judges' professional conduct, in particular ethics, incompatible behaviour and impartiality ("the CCJE Opinions Nos 1, 2 and 3") Documents CCJE (2001) OP N°1, CCJE (2001) OP N°2 and CCJE OP N°3.

[120]See 'The Burgh House Principles on the Independence of the International Judiciary', § 17.1.

[121]See Consultative Council of European Judges (CCJE), Magna Carta on Judges (Fundamental Principles), 6, November 2010.

[122]Meron (2005), pp. 359, 363.

[123]Mackenzie (2014), p. 753.

[124]Pocar (2010), p. 603.



Diversity is another problem that is rarely discussed alongside re-election, but is certainly relevant. In theory, a diverse membership of the court would help ensure that the bench *as a whole* remains independent, because there are many competing forces of influence. But re-election has proven to entrench the status quo of membership as to impede the entry of judges from countries with less experience with the international judiciary. For instance, in the International Court of Justice, "[t]he 106 members of the Court elected since 1946 come from only 50 countries, and the nationals of just 11 of those countries – the P5, Brazil, Germany, Italy, Japan, Nigeria and Poland – have served on the Court for nearly half of the total judge years available."[125]

Therefore, a non-renewable term is recognized as an "efficient and less restrictive tool" for the independence of judges.[126] Indeed, the European Court of Human Rights eliminated a second term through Protocol no. 14, with the explicit intention "to reinforce their independence and impartiality".[127] All international courts should follow the lead of the ECtHR and the ICC, shifting towards "longer, non-renewable terms that will better protect judicial independence."[128]

### 4.5 *Financial and Job Security for Judges During and Post-mandate*

During their mandate, judges should not fear for their salaries and working conditions. The financing, management and personnel requirements of the courts should be set in stone, and not subject to changes deriving from political manipulation. For instance, unjustified salary reduction may be understood as punishment for 'unpleasant' jurisprudence. Only very exceptional, publicly demonstrated circumstances should lead to a decrease of the financial package accorded to serving international judges. And any such measure should be previously consulted with the affected judges.[129] This issue evidently deals with the broader problem of administrative and budgetary autonomy of international courts.[130]

The traumatic experience of the Southern African Development Community Tribunal, which was first paralysed and then scaled down by the Member States due to an unpopular judgment, is a haunting tale for international judges and judicial

[125]Keith (2017), p. 147.

[126]Malenovský (2010).

[127]Explanatory Report to Protocol no. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention, para 50.

[128]Dunoff and Pollack (2017), pp. 225, 228.

[129]Laffranque (2014), p. 147.

[130]Opinion No. 10 of the CCJE on the Council for the Judiciary at the service of society underlines that judicial independence is increasingly perceived as also applying to the financing, management and personnel requirements of the courts.

staff.[131] There is a constant worry that the Contracting parties may financially asphyxiate or simply close down their respective courts. Indeed, they become "hostages"[132] of their own fear, being paralysed by the ever present critique of judicial activism.

Regarding post-mandate financial security, it is no secret that some former judges have experienced difficulties in finding appropriate functions at the end of their terms of office.[133] Naturally, the international judge who does not reach retirement age by the time of the end of mandate would be thinking about the career afterwards—usually, back home[134]; this may trigger national bias and other political considerations that affect one's decisions on the bench.[135] There is thus a need to ensure that the international judge would have financial autonomy after her mandate—either through a sustainable pension scheme or through a comparable post—so that she would not have to choose between casting the right vote and securing a livelihood for herself and the family.

In general, regardless of career prospects after tenure, international judges should be permitted a decent pension that allows them to carry out their functions in what Gilbert Guillaume called "en toute sérénité".[136] While the exact amount that allows such tranquillity would depend on the cost of living and financial circumstances back home, the general idea is that judges' pension post-mandate should not present an opportunity for political retaliation by States. For instance, courts should counter State efforts to impose excessive taxes on the pension of retired international judges. The pension scheme from the ICJ offers an ideal model: upon retirement from the Court, judges receive an annual pension which is equal to half the annual base salary.

The issue of pension does weigh on judges' minds; the provision of adequate pension cover for judges was a "constant demand" from the ECtHR[137] until Resolution 5 (2009) was passed, which included the Court's judges in the Council of Europe's new pension scheme.[138] If budgetary concerns restrict the court's ability to guarantee a proper pension system, international courts should at least require States to preserve one's domestic post upon election or appointment, so that the judges would have a secure job to which they may return. The period of service at the international court should also be included in the period of employment for pension rights and retirement purposes.

[131]Mackenzie (2014), p. 741.

[132]Cohen (2017).

[133]Laffranque (2014), p. 145 [citing N. Vajic, 'Some Remarks Linked to the Independence of International Judges and the Observance of Ethical Rules in the European Court of Human Rights', *in* C. Hohmann-Dennhardt, P. Masuch & M. Villiger (Eds.) *Grundrechte und Solidaritat. Durchsetzung und Verfahren. Festschrift fur Renate Jaeger*, N.P. Engel Verlag, Kehl, 2011, pp. 179–193, at 186].

[134]See Pocar (2010), p. 605 ("As long as international judges are put in the situation of being forced to ensure that their positions are maintained in their home countries, the intimate connection between an individual and the country of origin could continue to pose a problem").

[135]See Voeten (2008), p. 417 ("There is some evidence that a career insecurities make judges more likely to favor their national government when it is a party to a dispute").

[136]Gilbert Guillaume, *La Situation de juge international*, Institut de droit international: 6 Res Fr Final (9 Sept. 2011, 6th Commission) (discussing remuneration of judges).

[137]Laffranque (2014), p. 146.

[138]Resolution CM/Res(2009)5 on the status and conditions of service of judges of the European Court of Human Rights and of the Commissioner for Human Rights (adopted by the Committee of Ministers on 23 September 2009 at the 1066th meeting of the Ministers' Deputies), as amended by Resolution CM/Res(2013)4 amending Resolution CM/Res(2009)5 on the status and conditions of service of judges of the European Court of Human Rights and of the Commissioner for Human Rights (adopted by the Committee of Ministers on 27 March 2013 at the 1166th meeting of the Ministers' Deputies).



## 4.6 *Extrajudicial Activity*

Since a judge's impartiality must exist in fact and by appearance, judges should engage in extrajudicial activity with particular caution. Given their expertise in international law and high renown, many international judges are invited to teach, speak/write, or even serve on bodies of a similar nature where they are asked to share their knowledge and opinion. It is generally desirable for an international judge to contribute to legal and professional education and discussion outside of their judicial function.[139] The Bangalore Principles of Judicial Conduct, adopted by the United Nations, also recognize that "[s]uch professional activities by judges are in the public interest and are to be encouraged."[140]

International judges must, however, be mindful that indiscreet extrajudicial activity may hinder their independence—and thus, their legitimacy and authority. For instance, participation in fancy conferences where the judge is given particularly generous accommodation arrangements, honoraria, or other treats is vulnerable to challenges of favouritism, or even corruption. Where the occasion is organized by States or other potential parties appearing before the tribunal in which the judge serves, there should be additional caution to ensure that the interaction is strictly distinct from the interplay of any special interests. Generally, judges should proceed with care whenever they are in personal contact with potential parties, agents, advocates and advisers[141]—especially repeat players at the court.

In speaking or writing outside the court, judges must be particularly sensitive in the tone and language used so that they do not constitute a ground to suspect

[139]However, there must be concrete policy at the level of the court to guide such behaviour. The guidelines for judges' teaching activities, adopted by the ECtHR Bureau on 5 October 2011, are illustrative. According to these guidelines, teaching shall in principle take place during periods of 'light schedule' (when there are no hearings). Otherwise, it is only acceptable outside normal working hours, which means in the evening and weekends.

[140]Judicial Group on Strengthening Judicial Integrity, *The Bangalore Principles of Judicial Conduct*, ECOSOC, UN Doc E/CN.4/2003/65 (2002) [*Bangalore Principles*].

[141]'The Burgh House Principles on the Independence of the International Judiciary', § 12.1.

apparent bias or prejudice.[142] Many international tribunals are not specialized—their work is not focused on a narrow area of law, such as labour matters or family law. Therefore, international judges could face dockets consisting of any number of issues, and the chances of a judge having written opinionated pieces on a topic that may be pending before the court are high.

Since many international judges have been diplomats, academics, and legal advisors who are accustomed to taking an active part in these occasions, such "adaptation and discipline" may not always be intuitive.[143] The best solution in this regard would be to empower the Court's President to evaluate and eventually reject certain judges' extrajudicial activities. This is indeed the common choice of national courts in Europe.[144] Having the President decide the judge's participation in extrajudicial activities serves to liberate judges from having to make difficult or sensitive decisions without institutional guidance, allowing them to benefit from the discretion of actors with experience. After all, a judge's primary responsibility should not be to "manag[e] public relations."[145] It also helps unify the practice of different judges at a particular court, diminishing room for controversy. On the other hand, too much power in the hands of the Court's President may raise an issue of internal independence. Respecting the principle that every judge may freely perform his or her extra-judicial activities, the list of grounds for refusal of such activities must be strictly established by the Rules of the Court and the President must explain his rejection on the basis of one or more of such grounds.

In deciding to reject judges' requests for outside activity, the following conditions highlighted by Lucius Caflisch, former judge of the ECtHR, are helpful: (1) they may not hamper the court's regular work; (2) they may not be detrimental to the judge's independence; and (3) they should not result in public disclosure of discreet information regarding the court's work.[146] To this, we would add that (4) even where the independence of the individual judge may not be at stake, the activity cannot cast into doubt the legitimacy of the court as a whole. For instance, an ad hoc judge should refrain from accepting touristic trips paid for by the government which he or she is called to represent.

### 4.7 *Immunity*

In 2017, Turkey convicted Judge Aydin Sefa Akay of the United Nations Mechanism for International Criminal Tribunals (MICT) to more than seven years in prison

[142]See, e.g., Moran (2015), p. 453 (arguing that judicial silence is desirable).

[143]Meron (2005), pp. 359, 360.

[144]See Blisa and Kosar (2018), p. 2031.

[145]Eltis and Mersel (2017), pp. 247, 277.

[146]Caflisch (2003), pp. 169, 172. See also 'The Burgh House Principles on the Independence of the International Judiciary', § 8.1.



over alleged ties to the Gülenist network, the group blamed for the failed coup d'etat attempt one year earlier. Judge Akay's conviction was a direct affront to extensive efforts by the MICT and the international legal community to secure Judge Akay's release; in January 2017, the MICT had ordered Turkey to "cease all legal proceedings against [the Judge] and to take all necessary measures to ensure his release" by a set deadline. When Turkey refused to comply, the MICT referred the matter to the Security Council.[147] Yet, despite these interventions, Judge Akay remains in detention.[148]

All international courts surveyed in Section II grant diplomatic privileges and immunities to their judges, as does the MICT. Indeed, granting of diplomatic immunity is an area where there is very little variation across international courts. Given that judges are involved in highly sensitive matters of international relevance, the immunities of the international judge should be much broader than those of national ones. This enhanced protection of international judges is "not only opportune but necessary."[149] However, as the detention of Judge Akay demonstrates, it is clear that such simple rules on the book are not enough to protect international judges from being implicated in domestic proceedings that are politically motivated.

Although immunity of judges from criminal proceedings on personal conduct unrelated to their function in international courts has not been the norm so far, it is worthwhile to think about mechanisms to ensure the independence of judges by strengthening their immunity. Indeed, there has already been some recognition that the current standard of 'lifelong functional immunity' is not enough—for instance, the Council of Europe's Parliamentary Assembly has called on State Parties to provide judges and their families with diplomatic immunity for life.[150]

While lifelong diplomatic immunity may sound like a radical proposition, it should trigger a serious consideration of all possible means to ensure that former judges are protected from the risk of reprisal or retaliation disguised in legitimate sanctions or proceedings. Judge Akay's case is explicit and easy to notice—but there are more nuanced ways of retaliation that are more difficult to pinpoint and condemn. For instance, a judge may face excessive tax inquiries once returning home, or other similar administrative procedure that can be incredibly stressful and burdensome. Others may be subjected to home searches, phone tapping, or interference with conversations or communications for matters that are on the surface unrelated to their actions on the bench but motivated by them. In sum, there are many ways to harass judges out of retaliation through seemingly lawful judicial proceedings; yet, current privileges and immunities provisions of international courts do little to

[147]Escritt and Jones (2017).

[148]See *Imprisoned UN Judge has no Diplomatic Immunity to be Released: Turkish Justice Minister*, Daily News (1 Feb. 2017), http://www.hurriyetdailynews.com/imprisoned-un-judge-has-no-diplomatic-immunity-to-be-released-turkish-justice-minister.aspx?pageID=238&nID=109239&NewsCatID=509.

[149]Pocar (2010), p. 605.

[150]Resolution 1914 (2013), adopted by the Parliamentary Assembly on 22 January 2013 (7.6.1).

address these nuanced and implicit methods of harassment, especially when they take place after the expiry of the mandate.

One proposal to address this issue would be to set up a procedural safeguard that falls short of lifelong diplomatic immunity, but gives equivalent protection on a case-by-case basis. Under such a scheme, the State would be required to prove to the plenary of the international court that the former judge's activities on the bench have not motivated and are not related to prosecuting or subjecting her to legal process. In other words, the court in which the judge served alone should "be competent to waive the immunity of judges; it should waive immunity in any case where, in its opinion, the immunity would impede the course of justice and can be waived without prejudice to the exercise of the judicial function."[151] The burden of proof on the State to convince the Court that the investigation is unrelated to the judge's time at the Court should be equivalent to the burden of proving the alleged wrong underlying the investigation—for instance, where it is a criminal proceeding, beyond reasonable doubt.

Courts have proven capable of exercising this discretion in a fair manner. For instance, the European Court of Human Rights originally backed a judge who claimed immunity for his wife investigated for corruption.[152] This was a principled response, since carrying out a search in the home of the judge inevitably implicated him as well. However, following a request from Romanian prosecutors, the plenary split the judge's immunity and waived only the part that applies to his wife "to the extent strictly necessary for the conduct of the investigation."[153] In this way, the Court did its best to both conserve the judge's immunity and facilitate the implementation of justice in the home country.

### *4.8 Other Issues*

The freedom to choose with whom and to what extent staff members are involved in preparing cases is another crucial element of the judge's autonomy. It is an important responsibility of the judge to exercise the discretion not to work on cases with certain registry members, especially those seconded by governments. The number and legal competence of lawyers at international courts—who are often tasked with applying and developing case-law in "blurring boundaries" between professional staff and the judiciary—can "either reinforce or undermine judges' potential capture to the staff".[154] In other words, the responsibility lies with the judge to ensure that judicial discretion is not undermined by imprudent or irresponsible conduct of registry members.

This autonomy is particularly consequential in a system where the judge's workload makes it inevitable for registry lawyers to be heavily involved in

[151] 'The Burgh House Principles on the Independence of the International Judiciary', § 5.2.

[152] Pop (2011a).

[153] Pop (2011b).

[154] Cohen (2017), p. 79.



decision-making. In an insightful reflection of his time at the ECtHR, Judge Loucaides noticed that "[t]he extent of intervention, supervision and work of the judge Rapporteur depended on the personality, diligence and industry of the particular judge. Not all the judges had such qualities. The result was that the view of the member of the Registry frequently prevailed".[155] Ultimately, with or without institutional safeguards in place, "it is up to the judges – and to each judge individually – to act independently in their daily activity."[156] At the end of the day, what matters most is the extent to which the judges themselves value the independence of the lawyers with whom they work on a daily basis.

## 5 Conclusion

The founding documents of international courts and tribunals consistently require that candidates for the bench be persons of integrity, independence, and impartiality. These "requirements are emphasized and supported by the rules and practices relating to the solemn declarations made by new judges as they take office, their tenure, including immunity from suit, and guarantee of salary, recusal, and removal from office."[157] In other words, having judges with the proper qualifications and decision-making ability is invariably interconnected with making sure that the various aspects of their function are protected from external pressure and political or personal considerations.

In today's increasingly intolerant world that is experiencing a renewed backlash against human rights and shared values, judges at international courts are indispensable guardians of the rule of law and democracy.[158] Protecting their independence by improving the nomination and selection procedures, removal and disciplinary procedures, as well as immunity and security after tenure are essential to promoting justice and upholding the international legal order.

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[155] Loucaides (2010), pp. 61, 62.

[156] Pocar (2010), p. 598.

[157] Keith (2017), p. 141.

[158] See generally Stiansen and Voeten (2019) (noting "increasing backlash from consolidated democracies" to international courts and how it affects the behavior of the courts).

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