Eurasian Experiment Journal of Arts and Management (EEJAM)
ISSN: 2992-412X
©EEJAM Publications Volume 5 Issue 2 2024

Critical Examination of the Challenges Faced by the International Court of Justice during Election and Re-election of Her Judges

Kaanyi Immaculate

School of Law Kampala International University, Uganda.

ABSTRACT

This article interrogates the challenges facing the international criminal court of justice during election and reelection of her judges. The article revealed that in order for the ICJ to creditably meet the challenges of the 21st century, it must begin to address some of the issues that have hindered its maximum performance since it began operation in 1946. Though most rules governing the ICJ strive to create an unbiased and honorable entity, the courts' legitimacy and impartibility have been compromised by issues surrounding (A) the election and re-election of its judges, (B) the UN security council's permanent members roles in the ICJ, (C) the courts compulsory jurisdiction and (D) the nomination of the adhoc judges by parties before the court. It is on this note that the article calls for the abolishment's of article 31 of the ICJ statute so that the ICJ can begin to regain its full image of impartiality and fairness. The current provision of article 31, which entitles a party before the court of the nominate an adhoc judge if none of the judges of the court is national of the party, immensely tarnishes the impartialities image of the apex court. the court must command universally accepted image of impartiality such that any party before it must have un edified confidence in the ability and courage of the court to dispense states blind justice.

Keywords: Challenges, ICJ, Impartiality, Judges, Member states.

INTRODUCTION

The effectiveness of the international court of justice is criticized for global survival and progress in the 21st century[1], unfortunately after over six decades in existence, the court's influence is declining. This work argues that to revitalize the influence and effectiveness of the court, some vital reforms must be undertaken in the international court of justice system. These reforms must address [1] the process of election or reelection of judges of the international court of justice [2]. The conflict of interest arising from the presence of permanent members of the United Nations Security Council on the Court [3]. The issue of the court's compulsory jurisdiction and (4) the appointment of adhoc judges under Article 31 of the Statute of the courts. According to Article 1 of the statute of the international court of justice [2], it provides that the international court of justice is a principal justice organ of the United Nations established by the United Nations Charter. The court has two functions. To settle legal disputes between member states, in accordance with the international law, and secondly, as provided under Chapter iv of the international court of justice statute, to give advisory opinion on legal questions referred to it by authorized UN organs and specialized agencies. Thus these functions are exercised in accordance with the provision of the present statute[3]. According to Article 3 of the statute of the international court of justice, the court shall be composed of judges elected to nine-year's terms of office by the United Nations General Assembly and the Security Council [3]. Provided under Article 4 of the statute of the international court of justice, these organs vote simultaneously but separately in order to be elected, a candidate must receive an absolute majority of the votes in both bodies. Judges are elected to the international court of justice in accordance with the statute international court of justice, the rules of procedure of General Assembly and the rules of procedure of the Security Council. Usually, the General security meets simultaneously. Depending on the number of vacancies and nominations are prepared. There may be several rounds of voting by secret ballot. Summary results are given in the meeting records of the meeting. This article critically examined the challenges faced by the international court of justice during election and reelection of her judges.

Historical background origin of permanent court of justice

Before the establishment of the international court of justice, the permanent court of international justice existed which due to its weaknesses led to the outbreak of the international court of justice in 1946[4, 5]. Article 14 of the covenant of the League of Nations gave the council of the league responsibility for formulating plans for the establishment of a permanent court of international justice, Sudan court to be competent not only to entertain any dispute of an international character submitted to it by the parties to the dispute, but also to give an advisory

opinion up on any dispute or question referred to it by the council or by the assembly [6]. It remained for the league council to take the necessary action to give effect to Article 14. At its second session early in 1920, the council appointed an advisory committee of jurist to submit a report on the establishment of the permanent court of international justice. The committee sat in The Hague, under chairpersonship of Baron Decamps (Belgium). In August 1920, a report containing a parliamentary draft statute for the future court was submitted to the council which after making certain amendments, transmitted it to the first Assembly of the League of Nations, which opened at Geneva in November of that year [7–9]. The Assembly instructed its committee to examine the questions of the court's constitution. In December 1920, after an exhaustive study of the latter by a sub-committed, the committed submitted a revised draft it the Assembly which was unanimously adopted and which became the statute of the permanent court of informational justice. The Assembly took the view that a vote alone would not be sufficient to establish each state represented in the Assembly would formally have to ratify the stature[10]. In a resolution of 13 December 1920, it called upon on the council to call upon the council to submit to the members of the League of Nations a protocol adopting the statute and decided that the state should come into force as soon as the protocol had been identified by a majority of members. The protocol was opened for signature on 16th December. By the time of the next meeting of the Assembly, in September 1921, a majority of the members of the league had signed and notified the protocol. The statute thus entered, it was revised only once, in 1929, the revised version coming into force in 1936 [11].

Among other things, the new statute resolved the previously insurmountable problem of the election of the members of a permanent international tribunal. It provided that the judges were to be elected currently but independently by the council and the Assembly of the league, and that those elected, "should reference the main forms of civilization and the principal legal systems of the World"[12]. Simple as this solution may now seem in 1902, it was a considerable achievement to have devised it. The first elections were held on 14 September, 1921. Following steps taken by the Netherlands Government in the spring of 1919, it was decided permanent seat at the peace palace in the league; it was accordingly in the peace palace that on 30 January, 1922 the court preliminary session devoted to the elaboration of the court's Rules opened and it was there too that its inaugural sitting was held on 15th February 1922, with the Dutch jurist holder as president [13].

The permanent court of international justice was thus a working reality. The great advance it represented in the history of international legal proceedings can be appreciated by considering the following.

(a) Unlike arbitral tribunals, the permanent court of international justice was a permanently constituted body governed by its own statute and rules of procedure fixed beforehand and binding on all parties having recourse to the court[14].
(b) It had a permanent registry which inter alia, served as a channel of communication with governments and international bodies [14].
(c) Its proceedings were largely public and provision was made for the publication of the written pleadings, of verbatim records of the sittings and of all documentary evidence submitted to it [14].
(d) As a permanent tribunal, it was able to develop a constant practice and maintain a certain continuity in the decides, there by contributing to both legal certainty and the development of international law [14].
(e) In principle the permanent court of international justice was accessible to all stages for the judicial settlement of their international disputes and they were able to declare before land that for certain classes of legal disputes, they recognized the court's jurisdiction as compulsory in relation to other sides accepting the same obligation [14].
(f) The permanent court of international justice was empowered to give advisory opinions on any dispute or question referred to it by the league of nation councilor Assembly [14].
(g) The courts statute specifically listed the sources of law it was the apply in the deciding contentious cases and giving advisory opinions, without prejudice to the power of the court to decide a case ex aeqeo et bono if the parties so agreed [14].
(h) The permanent court of international justice was more representative of the international community and of the major legal systems of the world than any previous international tribuna l[14].

Although the permanent court of justice was brought into being through, and by the League of Nations, it was nevertheless not formally apart of the league. [30]There was a close association between the two bodies which found expression inter alia periodically elected the members of the court and that both the council and Assembly were entitled to seek advisory opinions from the court. Moreover, the assembly adopted the court's budget. But the court never formed an integral part of the league, just as the statute never formed part of the covenant. In particular, a member state of the League of Nations was not by this fact alone automatically a party to the court's statute [15].

Between 1922 and 1940 the permanent court of international justice dealt with 29 contentious cases between states and delivered 27 advisory opinions. At the same time, several 'action upon it over specified classes of disputes. Thus any debts that might have existed as to whether a permanent international judicial tribunal could function in a practical and effective manner were disputed [16]. The court's value to the international community was

demonstrated in a number of ways. First it developed a true judicial technique which found expression in the rules of court, drawn up by the permanent court of international justice in 1922 and subsequently revised on three occasions in 1931 and 1936. Mention should also be made of the permanent court of international justice's resolution concerning the judicial practice of the court, adopted in 1931 and revised in 1936 which laid down the internal procedure to be applied during the court's deliberations on each case [17]. In addition, whist helping to resolve some serious international disputes, many of them consequences of the first world war, the decisions of the permanent court of justice often clarified previously under areas of international law or contributed to its development [18].

History and origin of ICJ

The outbreak of war in September 1939 inevitably had serious consequences for the permanent court of international justice, which had already for some years been experiencing a period of diminished activity. After its last public sitting on 4th December 1939, the permanent court of international justice did not deal with any judicial business and no further judicial elections were held. In 1940, the court removed to Geneva, a single judge remaining at the Hague, together with a few registry officials of Dutch nationality [19]. The upheavals of war led to renewed thought about the future of the court and the creation of a new international legal order. In 1942, the United States security of state and the foreign secretary of the United Kingdom declared themselves in favor of the establishment or re-establishment of an international court after the war, and the inter- American juridical committee recommended the extension of the permanent court of international justice's jurisdiction[20]. Early in 1943, the British Government took the initiative of inviting a number of experts to London to constitute an informal inter-allied committee to examine the matter. This committee under the chairmanship of Sir William Malkin (United Kingdom), held 19 meetings which were attended by jurists from 11 countries. In its report which was published on 10 February, 1944, it recommended:

(a) That the state of any new international court created should be based on that of the permanent court of international justice.
(b) That advisory jurisdiction should be retained in the case of the new court.
(c) That acceptance of the jurisdiction of the new court should not be compulsory.
(d) That the court should have no jurisdiction to deal with essentially political matters[21].

Meanwhile, on 30th October 1943, following a conference between china, the USSR, the United Kingdom and the United States a joint declaration was issued recognizing the necessity "of establishing at the earliest practicable date a general international organization based on the principle of the sovereign equality of all peace-loving states, and open to membership by all such states large and small, for the maintenance of international peace and security" [22].

This declaration led to exchanges between the four powers at Dumbarton Oaks, resulting in the publication on 9th October 1944 of proposal for the establishment of a general international organization, to include on international court of justice. The next step was the covering of a meeting in Washington in April 1945 of a committee of jurists representing 44 states. This committee, under the chairmanship of G.H Hackworth (United States), was entrusted with the preparation of a draft statute for the future international court of justice for submission to the San Francisco conference which during the months of April to June 1945 was to draw up the United Nations Charter. The draft statute prepared by the committee was based on the statute of the permanent court of international justice and was thus not a completely fresh text [23].

That conference decided against compulsory jurisdiction and in favor of the creation of an entirely new court which would be a principal organ of the United Nations, on the same footing as the General Assembly, the security council, the economic and social council, the trusteeship council and the secretariat and with its statute annexed to and forming part of the charter [24]. The chief reasons that led the conference to decide to create a new court were the following.

(a) As the court was to be the principal judicial organ of the United Nations, it was considered inappropriate for this role to be filled by the permanent court of · international justice which was linked to the League of Nations then on the verge of dissolution [25].
(b) The creation of a new court was more logical in light of the fact that several states that were parties to the statute of the permanent court of international justice were not represented at the San Francisco justice conference and conversely several states represented at the conference were not parties to the statute [25].

There was a feeling in some quarters that the permanent court of international justice formed part of an older order in which European states had dominated the political and legal affairs of the international community and that the creation of a new court would make judicial settlement more accessible to non-European states. This has in fact happened as the membership of the United Nations has grown from 51 states in 1945 to 193 [26]. Participants at the San Francisco conference nevertheless emphasized that all continuity with the past should not be broken; particularly since the statute of the permanent court of international justice had itself been drawn-up on the basis of past experience and it was considered better to change something that in general had worked well [26].

The charter therefore stated that the statute of the international court of justice was based upon that of the permanent court of international justice, moreover, provisions were included in it to ensure that the permanent court of international justice's jurisdiction was transferred as far as possible to the court ofjustice. The permanent court of international justice met for the last time in October 1945, when it was decided to take all appropriate measures to ensure the transfer of its achieves and effects to the new international court ofjustice, which like its predecessor was to have its seat at the peace palace[27]. The judges of the permanent court of international justice still formally in office all resigned on 31 January 1946 and the election of the first members of the international court of justice took place on 5th February 1946 at the first session of the United Nations General Assembly and Security Council[25]. In April 1946, the permanent court of international justice was formally dissolved and the international court of justice, meeting for the first time, elected as its president judge Guerrero, the last president of the permanent court of international justice and appointed the members of its registry (largely from among former officials of the permanent court of international justice). On 18th April 1946, the new court held its inaugural public sitting which is the international court ofjustice.

Jurisdiction of the Court

The most important challenge facing the international court of justice borders on its jurisdiction. Jurisdiction is the sine qua non for the exercise of power. It is the authority by which courts and judicial officers take cognizance of and decide cases [1]. Where court or judicial officer lacks the requisite authority, any attempt to take cognizance of and decide up an any case will be declared null and void. Indeed, just like a person a court cannot give what it does not possess. Jurisdiction is simply the legal right by which judges exercise their authority [28]. The question naturally arises is from where then does a court derive this legal right? In other wards from which fountain of legal water does the court derive its jurisdiction and source? The answer will depend inevitably on what kind of judicial body is under consideration; from different judicial bodies derive their jurisdictional authorities from different sources. For instance, in the national sphere all judicial bodies derive their jurisdictional authorizes form the constitution of the country [29]. Counter wise, in the international sphere the source of the jurisdictional authorizes differ according to the judicial body and the parent organization. Unlike a unified national system governed by the same ground norm the international sphere consists of a galaxy of international organizations charged with the pursuance of distinctively separate sets of objectives and goals. Just as their objectives and goals differ, so do their compositions and jurisdictional authorizes. Therefore, the court in the international sphere derive their jurisdictional authorizes form the constitutive charter of their respective organizations, charged with a distinctive set of judicial goals and objectives [30].

The international court of justice, in particular exercises both original jurisdictions, as well as a limited appellate jurisdiction. The original jurisdiction of the court can be exercised under two main grounds (a) contentious jurisdiction· and (b) advisory jurisdiction [31]. According to Zarbiyev [32], in the exercise of its jurisdiction, only the international court ofjustice is decisions in contentious cases are binding and only on the parties to each particular case. Therefore, they can create res judicata with respect to the parties. He further asserts that despite this fact, the authority of the court is such that both its judgments and advisory opinions effectively carry and authority as indications of international law.

Contentious Jurisdiction

The contentions jurisdiction of the international courts of justice can only be involved where there exists a genuine dispute of a legal nature such an international legal dispute can be defined as a disagreement on a question of low or fact, a conflict a dash of legal views or of interests. The jurisdictional basis can be found under article 34(1) of the international court of justice statute which explains that only states· may be parties in cases before the court [33].

Another critical basis for the exercise of the court is jurisdiction in contentious cases is the consent of the parties. It is noteworthy that "the form in which consent is expressed determines the manner in which a case may be brought before the court. Article 36 of the statute of the international court of justice states the jurisdiction of the court comprises all cases which the parties refer to it and all matters specially provided for in the charter of the United Nations or in treaties and convention in force. It is critical to note that the consent of the parties may be made unconditionally or on condition of reciprocity on the part of several or certain states or a certain time [34].

In essence, the consent of the parties may take a variety of forms ranging from unconditional consent to consent based up on reciprocity or consent limited in time, whatever form the consent may take, it must still serve as a prerequisite for the exercise of the court's jurisdiction. The consent of the state parties may explicit or implicit and is derived from several areas.

I. By special agreement
II. In treaties or contentions
III. By compulsory jurisdiction 1v. via forum prorogatum
IV. By the courts own determination ofits jurisdiction.
V. From interpretation ofajudgment
VI. From the revision ofajudgment.

Special agreement

Adhere the parties conclude a special agreement to submit a legal dispute to the court, the agreement can be said to be an express and unequivocal consent to the court's jurisdiction. Typically, the parties send such notification of special agreement or written application to the court's registry, specifying the subject of the dispute s well as the parties to the dispute[35].

Treaties or conventions

The state parties may also consent to the court is jurisdiction in bilateral or multi-lateral treaties by the inclusion of jurisdictional clauses in such treaties. Adhere a legal dispute arises from such treaty or convention, a party can unilaterally bring a written application instituting proceedings such application must state the parties, the subject of the dispute as well as the treaty or convention provision up on which the issue arose.[72] Included under this category are treaties and conventions which were meant to barefaced to a tribunal instituted under the league of nations or the permanent court of international justice which were inherited by article 37 ofthe international court of justice statute [35].

Compulsory jurisdictions

State parties may consent to the jurisdiction of the court by reorganizing as compulsory the jurisdiction of the court. The local points for such compulsory jurisdiction can be seen in article 36, paragraph 2 of the international court of justice statute, which states as follows. The state parties of the present statute may at any time declare that they recognize as compulsory ipso facto and without special agreement, in relation to any other, state accepting the same obligation, the jurisdiction of the court in a legal dispute concerning. The interpretation of a treaty, b) any question at international law, c, the existence of any fact which, if established, would constitute a breach of an international obligation d) the nature ,0r extent of the reparation to be made for the breach of an international obligation[2]. In other words, article 36(2) is an optional clause which state parties may choose to adhere to. If both parties have previously recognized such compulsory jurisdiction, consent is present and the court has jurisdiction over the matter.[75]

Forum porogatum

The rule of forum porogatum enables a state which had the not recognized the jurisdiction of the court when a legal proceeding was filed against it to subsequently consent to the court's jurisdiction.[35]

Determination of its own jurisdiction

Under article 36 (6) of the state, the court id empowered to determine whether it has jurisdiction with respect to a legal dispute. As discussed above in the event of a dispute over the court's jurisdiction, the international court of justice may resolve the issue its own accord[35].

Interpretation of a Judgment

Where there is a legal dispute with respect to the meaning or scope of a judgment, the court c construe it up on the request for interpretation such request may be made by an agreement of all the parties or any party[35].

Revision of a judgment

Any party may apply to the court prevision of the judgment of the courts such a rare application may be entertained up on the discovery of some fact such a nature as to be a decisive factor[35]. More over such a fact must be unknown to the court and the party seeking revision when the judge was rendered.

CONCLUSION

In order for the ICJ to creditably meet the challenges of the 21st century, it must begin to address some of the issues that have hindered its maximum performance since it began operation in 1946. Though most rules governing the ICJ strive to create an unbiased and honorable entity, the courts' legitimacy and impartibility have been compromised by issues surrounding (A) the election and re-election of its judges, (B) the UN security council's permanent members roles in the ICJ, (C) the courts compulsory jurisdiction and (D) the nomination of the adhoc judges by parties before the court. It is on this note that the article calls for the abolishment's of article 31 of the ICJ statute so that the ICJ can begin to regain its full image of impartiality and fairness. The current provision of article 31, which entitles a party before the court of the nominate an adhoc judge if none of the judges of the court is national of the party, immensely tarnishes the impartialities image of the apex court. the court must command universally accepted image of impartiality such that any party before it must have un edified confidence in the ability and courage of the court to dispense states blind justice.

REFERENCES

1. Ogbodo, S. An Overview of the Challenges Facing the International Court of Justice in the 21st Century. Annual Survey of International & Comparative Law, 2012; 18.
2. Rome Statute of the International Criminal Court, https://www.ohchr.org/en/instruments-mechanisms/instruments/rome-statute-international-criminal-court
3. Statute of the Court Of Justice | INTERNATIONAL COURT OF JUSTICE, https://www.icj-cij.org/statute

4. Permanent Court of International Justice, https://en.wikipedia.org/w/index.php?title=Permanent_Court_of_International_Justice&oldid=1206703799, (2024)
5. History | INTERNATIONAL COURT OF JUSTICE, https://www.icj-cij.org/history
6. Minutes of the Public Hearings held at the Peace Palace, The Hague, from 2 to 22 October and on 21 December 1962, the President, Mr. Winiarsky, presiding | INTERNATIONAL COURT OF JUSTICE, https://www.icj-cij.org/node/102247
7. Hudson, M.O. The Fourteenth Year of the Permanent Court of International Justice. The American Journal of International Law, 1936; 30, 1–26. https://doi.org/10.2307/2190554
8. International Justice - Rishabh Gandhi and Advocates, https://www.rgaa.co.in/international-justice/
9. Statute of the Permanent Court of International Justice, https://www.refworld.org/legal/constinstr/lon/1920/en/57478
10. Written Statement of Mauritius | INTERNATIONAL COURT OF JUSTICE, https://www.icj-cij.org/node/105667
11. The Covenant of the League of Nations | The United Nations Office at Geneva, https://www.ungeneva.org/en/about/league-of-nations/covenant
12. Towards Legalization: Constructing an International Court | The International Court of Justice and the Judicial Function | Oxford Academic, https://academic.oup.com/book/3116/chapter-abstract/143928434?redirectedFrom=fulltext
13. Treaties and other International Agreements: The Role of the United States Senate, https://www.govinfo.gov/content/pkg/CPRT-106SPRT66922/html/CPRT-106SPRT66922.htm
14. Rethinking Jurisdiction in International Law | British Yearbook of International Law | Oxford Academic, https://academic.oup.com/bybil/article/84/1/187/2262836
15. League of Nations | History, Definition & Purpose | Britannica, https://www.britannica.com/topic/League-of-Nations
16. Chapter 7 General Principles Ascertained by the Permanent Court of International Justice (1922–1940) in: General Principles of Law Recognized by Civilized Nations (1922-2018), https://brill.com/display/book/9789004400184/BP000010.xml?language=en
17. The Statute of the Permanent Court of International Justice on JSTOR, https://www.jstor.org/stable/2192381
18. The International Court of Justice and the development of international humanitarian law | International Review of the Red Cross, https://international-review.icrc.org/articles/the-international-court-of-justice-and-the-development-of-ihl-920
19. The Security Council and the International Court of Justice (Chapter 8) - The UN Security Council and International Law, https://www.cambridge.org/core/books/abs/un-security-council-and-international-law/security-council-and-the-international-court-of-justice/633F3874483A00EEDD56638EE71138EB
20. 2The Global Evolution of Foreign Relations Law | American Journal of International Law | Cambridge Core, https://www.cambridge.org/core/journals/american-journal-of-international-law/article/abs/global-evolution-of-foreign-relations-law/B8C6E6C5C88C7CDCB1A9F721DBBE7B5C
21. Rosenne, S. The Establishment and Constitution of the Court. In: The Law and Practice of the International Court, 1920-2005, 2006; 4, pp. 43–96.
22. Historical Documents - Office of the Historian, https://history.state.gov/historicaldocuments/frus1943v01/d684
23. Dumbarton Oaks Conference | Definition, History, & Facts | Britannica, https://www.britannica.com/event/Dumbarton-Oaks-Conference
24. Convention: Charter of the United Nations, UNO, 1945, https://www.whatconvention.org/en/convention/59
25. The Role of the International Court of Justice as the Principal Judicial Organ of the United Nations | Brill, https://brill.com/display/title/8977
26. International Legal Argument in the Permanent Court of International Justice, https://www.researchgate.net/publication/34504168_International_Legal_Argument_in_the_Permanent_Court_of_International_Justice
27. Nations, U. Chapter XIV: The International Court of Justice (Articles 92-96), https://www.un.org/en/about-us/un-charter/chapter-14
28. Judicial Review Lecture, https://www.lawteacher.net/lectures/public-law/judicial-review/what-is-judicial-review/
29. Dramadri v Elwoku & 7 Ors (Miscellaneous civil application no. 0014 OF 2016 and Miscellaneous civil application no. 0003 OF 2016) [2017] UGHCCD 86 (15 June 2017). (2017)

30. Courts & Monitoring Bodies – International Justice Resource Center, https://ijrcenter.org/courts-monitoring-bodies/
31. How the Court works, https://www.icc-cpi.int/about/how-the-court-works
32. Judicial Activism in International Law—A Conceptual Framework for Analysis | Journal of International Dispute Settlement | Oxford Academic, https://academic.oup.com/jids/article/3/2/247/874874
33. Contentious Jurisdiction | International Court of Justice, https://www.icj-cij.org/contentious-jurisdiction
34. Basis of the Court's jurisdiction | International Court of Justice, https://www.icj-cij.org/basis-of-jurisdiction
35. Oxford Public International Law: 2 The Caroline Incident—1837 in: The Use of Force in International Law, https://opil.ouplaw.com/display/10.1093/law/9780198784357.001.0001/law-9780198784357-chapter-2

CITE AS: Kaanyi Immaculate (2024). Critical Examination of the Challenges Faced by the International Court of Justice during Election and Re-election of Her Judges. Eurasian Experiment Journal of Arts and Management, 5(2):30-36.