

# “Should political influence in the decision–making processes of international courts and tribunals be anticipated?”

## Abstract

The question of inserting ‘political considerations’ into the judicial decision making processes of international courts and tribunals (ICT’s) is a much contested issue. However ICT’s do not stand in isolation on this issue and what occurs at a national level is relevant as well. Looking at a cross section of examples of where this has occurred with national courts and comparing it with examples of what has occurred at the international level uncovers significant differences but also some interesting similarities. While ‘what courts do’ is not restricted to judges alone, because other functionaries such as prosecutors can insert political considerations into the process as well, the important end result is often what matters most for the participants concerned.

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## Introduction

The terms ‘political considerations’; ‘political influence’ and ‘political interference’ mean different things to different people, so clarification of the meaning of these terms for the purpose of this article is useful. The most passive of the three terms is ‘political considerations’ because it connotes a legitimate and appropriate evaluation of the policies and principles of the actors be they states or non-state actors, affected by the outcome. Whereas ‘political influence’ suggests a more intrusive, yet not necessarily aggressive act of asserting power in an effort to affect a result. The term ‘political interference’ on the other hand suggests an aggressive act, which may be illegitimate, by imposing upon those invested with legal authority to exercise judicial power in a way that will achieve their desired outcomes, often irrespective of the merits of the case.

Courts frequently take into account ‘political considerations’; ‘political influence’ is also common; but ‘political interference’, especially at the international level is comparatively rare. The insertion of ‘political considerations’ and even ‘political influence’ into the decisions of courts at a national level is not uncommon or necessarily unorthodox, consequently it should not be surprising if it occurs at the international level as well. However the motivation of the relevant actors for doing so can be quite different, because domestically the political considerations may focus on the ideology of the government in power, whereas internationally the considerations may impinge on a state or state’s economic, military or strategic interests.

It is the very nature of courts that affected parties try to influence judges to decide in a way that will enhance or not adversely affect their interests. There is nothing sinister about this, what is sinister is when it is done ‘behind closed doors’ and in circumstances where other affected parties are precluded from making a reply. What is argued in this article is that the inherently political nature of International Courts and Tribunals (ICT’s) is such that they should openly acknowledge this political reality and as a consequence expand or relax, the scope of standing of parties before them, so that states or other interested parties may more readily participate in the curial process. If ICT’s

were more open to such a procedure then arguably any excuse justifying ‘behind closed doors’ interference would be obviated.

The notion that politics should play no part in the judicial process defies reality and as a proposition is unhelpful. Ideally there is merit in having judges removed from circumstances where there might arise a perception that their decisions are based more on their political allegiance, than on a ‘black letter’ interpretation of law but even this ‘ideal’ remains an ever diminishing ‘faint hope’.<sup>1</sup>

## Role of politics in national courts

International Courts and Tribunals often share jurisdiction with national or domestic courts and as ICT’s are generally modelled on national courts any rigorous examination of ICT’s should start with an analysis of what happens at the domestic level. However it needs to be recognised that the settings of ICT’s are quite different to national courts where there are legislatures, constitutions and divisions of powers doctrines. But even an entrenched ‘separation of powers’ doctrine as found in the Australian Constitution,<sup>2</sup> does not ensure that judges appointed by a government of a particular political persuasion are not supportive of the political ideology of that government and are likely to interpret the law consistent with that ideology. Nor are judges deaf to the political discourse going on around them about an issue that they may be called upon to decide. In the absence of a conflict of interest, there is nothing inappropriate or unprofessional about judges having conservative or liberal views and interpreting the law consistent with those views.<sup>3</sup> Indeed a good many judicial appointments are of lawyers who were at one time or another, a politician or person otherwise connected to or associated with a particular political party.<sup>4</sup>

<sup>1</sup>Morrison AB. “Perspectives on the New Code - Judges and Politics: What to do and what not to do about some inevitable problems” (2007) 28 The Justice System Journal 283.

<sup>2</sup>*Commonwealth of Australia Constitution Act 1900 (Australian Constitution)* Chapters I; II; and III;

<sup>3</sup>Allan C Hutchinson “Judges and Politics: an Essay from Canada” at 275 HeinOnline Viewed May 4 2016.

<sup>4</sup>Disney J. “Lawyers” (1977) Law Book Co. Ltd. p 198.

The subject matter of disputes that judges are sometimes called upon to resolve can in themselves be inherently political. Courts can, by constitutional interpretation, determine the division of power between the states and the federal government;<sup>5</sup> they can rule on the validity of electoral disputes; or on the constitutional validity of legislation passed by parliament. In cases such as these, where there are polarised political views, it may be impossible to separate the legal principle from the political objective so as to provide a politically untarnished principled decision.<sup>6</sup>

The spectrum of judicial political involvement is not only limited to matters temporal but can in some jurisdictions also include the spiritual. Conservatives in the USA praised the religious ideals of the former Justice Scalia describing him as "... a man of God..." who staunchly defended "...Religious freedom".<sup>7</sup> In Israel the Supreme Court is not only divided according to conservative or liberal ideologies but as those ideologies are reflective of the role of religion in politics. Non-religious judges in Israel tend to support a secular liberal judicial activism aimed at removing religion from the political discourse. While conservative judges support an Orthodox monopoly as a formal part of the function of government.<sup>8</sup> This politico-religious debate in the Israeli Supreme Court is more or less viewed as 'normal' in Israeli society, with it being preferred to alternative dispute resolving mechanisms. It is considered to be a healthy and desirable part of the democratic structure of the State of Israel.<sup>9</sup>

The fact that political controversy may erupt from a courts judicial review of the activities of the executive or the legislature does not (in itself) make the decision bad. A court that preferences the individual rights of a citizen over legislative or executive majoritarian action, may be labelled 'unelected activists', or conversely as 'conservative traditionalists' if they decide in favour of the government, but whatever the label attached, there may simply be no way to tease out the law from the politics in the dispute that they are resolving.<sup>10</sup>

Judicial 'activism' attracts strident opposition from conservative ideologists because judicial activism is susceptible to anti-majoritarian criticism; the argument being that the legislature and the executive reflect and uphold the democratic will, whereas the unelected judges should do not more than interpret the law consistent with the wishes of the majority. This criticism not only ignores the important role courts play in protecting the individual from the oppression of the majority but is logically inconsistent, because if the courts where there to only interpret the law consistent with the will of the majority, they would be acting politically by supporting the government of the day. A better approach would be to accept the fact that courts play an important but different role in the democratic process; that inevitably their decisions will (at times) reflect political ideology of one form or another and avoid unhelpful anti-majoritarian labelling as a basis for attacking the validity of their decisions.<sup>11</sup> Certainly this approach is more consistent with the 'separation of powers' doctrine because it accepts that each arm of political power (legislature, executive and judiciary) has a

different role to play and that no one source of power should usurp the role of the other.<sup>12</sup>

When interpreted this way, the legitimate inquiry into what can be seen as a judicial decision which reflects a political ideology is not whether it is biased in favour of one view or the other but whether the decision properly serves the interests of democracy within the constitutional remit of the court.<sup>13</sup> In order to reach this point however one must accept the fact that law and politics are inextricably entwined and efforts to untangle them are not only futile but counterproductive. This does not mean that the criticism of a judicial decision which prefers one political view over another is wrong because the political reasoning underpinning that view is flawed. What is wrong is to attack the decision on the basis that it supports a political view, one way or the other. The more honest approach is to accept the presence of politics in law and abandoned attempts to try and disguise or hide the reality.<sup>14</sup>

Jurisdictions differ on the degree on the transparency of this politico-legal mix in the judicial decision making process. In the United States of America, the fact that judges hold political views and at times adhere to those views when deciding cases is much more widely accepted than in countries like Australia where more effort is put into concealing the reality. Courts such as the United States Supreme Court are closely linked to the political process, where the expression of political views by the court is more or less seen by the community as 'normal'.<sup>15</sup> This is largely due to the fact that the appointment process in the US is a much more openly political event where either side of the political spectrum line up to support or oppose the Presidential nominee.<sup>16</sup> The community expect the President to nominate someone who openly supports the ideology of the President's political party, be it Democrat or Republican. US political parties are committed to fashioning Federal and State Courts by appointing judges who are known to be committed to their own political ideology.<sup>17</sup>

While US Republican Presidential candidate Donald Trump may have earned a reputation for expressing radical political views, commentators in the US did not express alarm about his overly politicised approach to judicial appointments, when he said in his nomination acceptance Speech: "We are also going to appoint justices to the United States Supreme Court who will uphold our laws and our Constitution. The replacement for Justice Scalia will be a person of similar views and principles. This will be one of the most important issues decided by this election. My opponent wants to essentially abolish the 2nd amendment. I, on the other hand, received the early and strong endorsement of the National Rifle Association and will protect the right of all Americans to keep their families safe."<sup>18</sup>

In the United States, the appointment of state judges is even more directly political because they are elected by popular ballot. As candidates for judicial office must raise money in order to fund their

<sup>5</sup>*Commonwealth v Tasmania* (Tasmanian Dams Case) (1983) 158 CLR 1

<sup>6</sup>Hutchinson, n 3, p 278-279.

<sup>7</sup>Martin Pengelly, "Supreme Court Justice Antonin Scalia Dies: legal and political worlds react" *The Guardian Australian Edition* 14 February 2016.

<sup>8</sup>Gad Barzilai, "Law is Politics: Comments on 'Law or Politics: Israeli Constitutional Adjudication as a Case Study'" p 4 Department of Political Science, Tel Aviv University. August 2016

<sup>9</sup>Gad Barzilai n 8, p 6.

<sup>10</sup>Hutchinson, n 3, p 279.

<sup>11</sup>Hutchinson, n 3, p 283

<sup>12</sup>Hutchinson, n 3 p287.

<sup>13</sup>Hutchinson, n 3, p 284.

<sup>14</sup>Hutchinson, n 3, p 285.

<sup>15</sup>Karen J Alter. *The New Terrain of International Law*, Chapter 9 International Courts and Democratic Politics Princeton University Press. (2014) pp 337-339. For comparative Australian position see Matthew Kerby & Andrew C Banfield. *The Determinants of Voluntary Judicial Resignation in Australia, Canada, and New Zealand, Commonwealth a Comparative* (2014) p 337.

<sup>16</sup>Alter, n15, p337.

<sup>17</sup>Alter n 15, p 337.

<sup>18</sup>Presidential Candidate, Donald Trump, Acceptance Speech, 2016

election campaign, they are in a similar position to politicians, which inevitably requires them to demonstrate, during the campaign, why a particular fund donor should prefer them over their opponent based on their views on any given political or legal question.<sup>19</sup> If a fund donor subsequently becomes a litigant before that judge, it is hard to see how the judge could not at least appear to be biased in favour of that litigant.<sup>20</sup> Similarly, if a candidate for judicial office elicits a campaign donation from a lawyer who regularly practices in the judge's court, there must it would seem, be an impression that any decision in favour of that lawyer's case, is based more on the fact of the donation rather than the merits of the case.<sup>21</sup>

Whatever the perception of this overly political process might be outside the USA, there is no significant pressure to change this system from within the country, indeed if anything, and there is considerable support for it, even in the wider community. In the *Republican Party Case*<sup>22</sup> the US Supreme Court held that a rule that forbade candidates for judicial office from "announcing" their views on issues likely to come before their court violated the First Amendment. The politicization of the judicial function becomes even more acute when a judge is running for re-election and has decided on an issue in a case that becomes an issue in the campaign, it would seem that even this proximity of the political to the judicial does not offend the constitutional arrangements as they pertain in the USA.<sup>23</sup>

While judges may of their own volition take into consideration political issues, the executive and legislature can also exert political pressure upon the judiciary by reason of the constitutional arrangement, whereby they appoint the judges; determine the size of the court in terms of the number of judges appointed; and may override their decisions by specifically passing laws that nullify their effect.<sup>24</sup> Politicians often consult members of the court on the suitability of a proposed candidate for appointment to the court but there are no constraints on whether the judges consulted represent both sides of the political divide or are only those supportive of the political ideology of the politician making the enquiry.<sup>25</sup> The legislature can also signal its approval or disapproval of the court by how they determine the size of the courts annual budget.<sup>26</sup> The budget allocation may go beyond appropriation for the administrative costs of the court but in some jurisdictions could include the level of judicial remuneration as well.<sup>27</sup>

In Australia, (unlike the USA) the appointment of judges is a more covert affair. Anecdotally within the legal profession, appointments to the magistrate and district court bench can sometimes be based more on political favouritism than on legal talent whereas appointments to the State Supreme Courts and the High Court generally require proof of legal talent over and above political orientation. However this practice does not always hold true. In 2014 the Newman Government in Queensland found itself embroiled in a political controversy when the Attorney-General Jarrod Bleijie, sought to appoint the Chief Magistrate as Chief Justice of the Supreme Court. The President of

the Queensland Bar Association resigned in protest claiming that the whole appointment process lacked integrity and that the proposed candidate was one of those "people whose ambition exceeds their ability".<sup>28</sup>

Conversely a highly qualified lawyer may be denied judicial appointment on political grounds. In the 1970's, Adelaide barrister Elliott Johnston, a committed Communist was denied appointment to the Supreme Court of South Australia because the then, otherwise progressive Premier Don Dunstan, considered the appointment of a Communist to the bench as 'inappropriate'. This was notwithstanding the fact that Johnston was at the time the most senior lawyer at the Bar. Fortunately by 1983, the political climate had changed and the Labor Government of John Bannon quietly appointed him to the bench.<sup>29</sup>

Judges and politicians may work together in order to bring about a desired political outcome. For example a judge may bring forward their retirement date so that the political party that appointed them is in power at the time their retirement thus enabling a like-minded successor to be appointed before the party loses office. Similarly if the Judge was appointed by an opposition party, they may await the outcome of an impending election in the hope that the opposition will win office and be able to appoint a judge of similar political disposition once they are in power.<sup>30</sup> This not only a reality in the more politicised environment of the USA but has also been found to happen in less politicised jurisdictions such as Canada, Australia and New Zealand.<sup>31</sup>

Sometimes judges work in concert with the ruling party to blunt the actions of opposition parliamentarians. In the Maldives, the opposition party complained of politically motivated court rulings of their Supreme Court in 2013, when the Court stripped some opposition members of their seats over dubious 'unpaid debts' shortly before a no confidence motion was to be debated against the Attorney-General for corruption.<sup>32</sup> Fortunately in jurisdictions with a strong tradition of freedom of speech and an equally strong media, behaviour of this type can bring about serious adverse consequences for the judges and politicians alike, thus making the risk too great to take.

Judges rarely express their decisions in terms of their political preference. In most cases they apply legal reasoning and the fact that this legal reasoning coincides with a recognisable political ideology gives rise to an inference that they are influenced by the specific political ideology. Hence it is difficult to know why judges make the decisions they do. The best that can be done is to evaluate the available statistical correlation between the known political orientation of the judge, the ideology of corresponding political party and their decisions which can arguably be said to reflect that ideology. If this process shows up a statistically significant correlation, then it can be argued from an empirical base that a political ideology may have caused the judge to decide in the way that they did?<sup>33</sup>

The more important questions are however—'Does it really matter?' The executive, legislature and the judiciary (divisions of power),

<sup>19</sup>Morrison, n 1, p 285.

<sup>20</sup>Morrison, n 1, p 285

<sup>21</sup>Morrison, n 1, p 286.

<sup>22</sup>*Republican Party of Minnesota v. White* (2002), 436 U.S. 765 (2002).

<sup>23</sup>Morrison, n 1, p 289.

<sup>24</sup>Toma E. "Congressional Influence and the Supreme Court: The Budget as a Signalling Device" (1991) 20 *Journal of Legal Studies* 131, p 133.

<sup>25</sup>Morrison, n 1, p 297.

<sup>26</sup>Toma, n 24, 134.

<sup>27</sup>Toma, n 24, p 134.

<sup>28</sup>Lynch A. "History of Unchecked Executive Haunts Queensland in Judge Fight" 16 June 2014 *The Conversation*.

<sup>29</sup>Debelle P. "Judge Red - The Communist on the Bench" *The Advertiser* viewed August 2016.

<sup>30</sup>Kerby, n 15, p 341.

<sup>31</sup>Kerby, n 15, p 353.

<sup>32</sup>Oct 25, 2013 "Opposition MPs "purged" as Supreme Court strips Ali Azim, Mohamed Nashiz of Parliament Seats" *BBC Worldwide Limited*, August 2016.

<sup>33</sup>Alter, n 15, p 338.



represent the government of a country and while there may at times be differences between them they are essentially vital components of the same team, they simply play different roles, for this reason it is essential that judges and politicians work together in the overall interests of the country, if it were otherwise the system would break down and chaos would prevail. Hence it is not only a reality that judges act politically but, at times, it is a good thing that they do.<sup>34</sup> The reality in most democratic societies is that there is a political divide supported by a recognisable ideology for either view. Citizens in these societies are encouraged to embrace on side or the other of this divide. Judges are no different to the rest of the community in this regard and the fact that they hold a political view is entirely appropriate. Provided their decisions are not contrary to the evidence of a case or otherwise perverse, then the fact that their decisions may fit more comfortably with one particular political ideology over another, should in the scheme of things be considered as normal.

In most instances this political influence relates to issues of a domestic nature. However if the issue has international consequences then judges may well be more explicit in expressing themselves consistently with the government of the day. Generally if the matter is of 'international concern' or impacts on the security of the country the court will side with the government.<sup>35</sup> Sometimes working in concert with the government in this fashion may not look very elegant but is consistent with the courts "being on the same team".

During the Second World War, US President Roosevelt had to deal with 8 Nazi saboteurs who had landed on the US mainland coast by a German submarine. While the Nazi plan was somewhat shambolic, Roosevelt, as Commander in Chief of the US Military, resolved that the saboteurs had to be executed. Being conscience of what the US Supreme Court might do he sought advice from a sitting Supreme Court Judge, Felix Frankfurter. Frankfurter confirmed that it would be constitutionally valid for the President to establish a military commission so that the saboteurs could be dealt with by the executive in a manner acceptable to the President—which he then proceeded to do. When the case inevitably came before the US Supreme Court in *Quirin*<sup>36</sup> the Court fully endorsed the action of the executive. While arguably the court acting in this politically motivated way can be justified during war, the decision of the courts created an unsatisfactory precedent which had to be distinguished during times of peace. *Quirin* was used as a precedent to justify the unsatisfactory military commission trial that saw the execution of Japanese General Yamashita,<sup>37</sup> and relied on by President G. W. Bush to create the notorious Guantanamo Bay military commissions. Fortunately in the case of Guantanamo Bay, the Court pulled back on what it considered to be constitutionally appropriate during the Second World War to a more moderate and just position appropriate for the 21st Century.<sup>38</sup> Even the arch conservative Justice Scalia was to later remark that *Quirin* was "...not our finest hour".<sup>39</sup>

<sup>34</sup>Alter, n 15, p 338.

<sup>35</sup>*Commonwealth v Tasmania* (1983) 158 CLR 1 per Mason J at 126; see also *Polyukhovich v Commonwealth* (1991) 172 CLR 501 at 607, 689, 703-4; and *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 26.

<sup>36</sup>*Ex parte Quirin* 317 US 1 (1942).

<sup>37</sup>*Application of Yamashita* 317 US 1 (1946).

<sup>38</sup>*Rasul v Bush* 542 US 124 (2004) and *Hamdan v Rumsfeld* 548 US 557 (2006).

<sup>39</sup>Staab J. The Political Thought of Justice Antonin Scalia: A Hamiltonian on the Supreme Court (2006) Rowen Littlefield p111; *Walker S, Presidents and Civil Liberties from Wilson to Obama: A Story of Poor Custodians* (2012)

While national judges often see themselves as 'part of the team' when the security of the country is at stake, the same does not pertain for international judges, especially those who are not nationals of the country whose security interests may be impacted by the decision. At the international level attempting to influence an international court or tribunal to rule in a particular way is a much more complex affair.

### Political nature of international law

The modern globalised world has significantly changed the way that national governments are required to respond to international law. When international law was less developed states had more flexibility in terms of whether or not they would comply with international legal prescriptions. Most binding international legal obligations arose as a consequence of states entering into bilateral or multilateral treaties. In the absence of a treaty, states could more or less 'pick and choose', which international laws they would regard themselves as bound by. When vying for strategic advantage in an 'anarchic system', the resort to *realpolitik* by states, was crude and confronting especially when compared to the equivalent machinations at the domestic level, but such behaviour was considered the norm at the international level.<sup>40</sup> However with an increasing reliance on international courts states are now confronted with international judicial determinations which may declare their activity illegal. In order for states to avoid such adverse findings they must now take a much greater and more nuanced political interest in what is happening before international courts.<sup>41</sup>

States are no longer the only 'players in the field'. The exclusive 'states club' has been forced to open its membership to non-state actors who can significantly impact upon a state's agenda and may pursue interests diverse from those of a state or a number of states. Non state actors may invoke legal remedies before international courts which can find support in the international community but be contrary to the interests of a state or a block of states.<sup>42</sup> The emergence of different players allows courts to craft international law so as to embrace a wider constituent than just states. The presence of non-state actors may temper state behaviour and discourage the resort to *realpolitik* solutions. States are no longer free to engage in 'gun boat' diplomacy, to annex their neighbour's lands, or to employ prohibited weapons, or to erect tariff barriers in order to protect their domestic industries.<sup>43</sup>

The traditional *modus operandi* for states to secure their strategic goals is the diplomatic forum. Diplomacy is fundamentally political.<sup>44</sup> The essence of the foundation of customary law—state practice—arises as a consequence of political action, be it diplomatic discussion, treaty negotiation, or state action.<sup>45</sup> In other words, the emergence of new legal norms would not occur if it were not for state action based on political forces.<sup>46</sup> State action, which is inherently political, is often justified by an interpretation of international law, which if new, could

Cambridge University Press pp 100–101.

<sup>40</sup>Reus-Smit C, *Cambridge Studies in International Relations: The Politics of International Law* (2004) Cambridge University Press, p 15.

<sup>41</sup>Alter, n 15, p 336–337.

<sup>42</sup>Alter, n 15, p 65.

<sup>43</sup>Alter, n 15, p 340.

<sup>44</sup>F. Dekker & E. Hey (eds.) *Netherlands Yearbook of International Law*, Philip Liste in Chapter 7 'Public International Law? Democracy and Discourses of Legal Reality' (2012) Stichting T.M.C. ASSER Instituut, The Hague, p 179

<sup>45</sup>Liste, n 44.

<sup>46</sup>Liste, n 44.

lead to norm creation, but the influence of politics on the emergence of the new norms is unmistakable.<sup>47</sup>

As noted above in a domestic environment the executive and legislature can and does assert influence over the judiciary. However the proximity of a national government to an international court is more remote, hence the ability to influence an international court is tempered. Consequently states must, through their diplomatic channels, form alliances with 'like-minded states', if they are to successfully modify judicial behaviour at the international level. While they can and do influence international courts they do so through their diplomatic channels and as a consequence the source of the influence is only political.<sup>48</sup> When states articulate their views on questions of international law the source of that articulation is the government of the state—a political source, so if anything the division between law and politics at the international level is even more blurred than what pertains at the domestic level. Hence politics and law are closely intertwined at the international level and it is counterintuitive to try and unravel the two.<sup>49</sup>

Increasingly international law is being embedded in national laws because the demands of globalization require states to be able interact with each other on multiple fronts and across a wider variety of issues. In today's global society, observance of the rule of law is something that is emerging as a unified concept recognisable in international as well as domestic law.<sup>50</sup> The government of a state is now expected to serve the needs of its people and not the interests of those in positions of power. The 'responsibility to protect' obligations has domestic as well as international legal force.<sup>51</sup>

Even with powerful states the forces of international law can subdue the arrogance of hegemonic powers by a process of 'naming and blaming' them for breaching international law. International law provides a platform from which states can be identified as international delinquents when they pursue national policies that run counter to internationally recognised human rights standards. International actors can use international law as a means to constrain the excesses of internationally unacceptable state behaviour. The concept of international law can in itself become an instrument of power. Used in this way the politics of international law becomes more significant than attempts to directly enforce the international law that is said to have been breached. Thus the horizontal nature of international law is still very much alive but the degree of self-imposed observance due to external influences is much more widespread.<sup>52</sup>

Viewed in this way, international law and politics can be seen as opposite sides of the same coin – one could not operate without the other.<sup>53</sup> States in their political commentary about a decision of an international court may claim that the effect of the decision, limits their sovereign power, but generally they accept that in a globalised world absolute sovereignty is neither a reality nor desirable and that sharing sovereign power among international actors brings more benefits than disadvantages.<sup>54</sup>

## Political influence and or interference over international courts and tribunals

There is not a lot of evidence to support the view that states try to influence judges to decide in a way favourable to their strategic objectives, outside of making formal submissions to the court by means of an *amicus* brief. There is however some evidence that supports the view that international judges are concerned with whether states will comply with their rulings and may fashion their decisions in such a way so that states will be inclined to comply with their decisions.<sup>55</sup> This may be the case with European Court of Justice and the World Trade Organization (WTO). In the case of the WTO the Appellate Body exercises judicial constraint by limiting its rulings to only those matters that are essential in order to decide the question before it. This judicial economy limits the scope of its case law and allows subsequent cases to be distinguished of their facts. This permits states greater flexibility and avoids them being overly constrained when dealing with their trading arrangements.<sup>56</sup>

For example in the Biotech case, Australia, as an intervener, neither supported nor opposed the legal position of the complainant or the defendant, but instead urged the panel to exercise 'judicial economy' by limiting the scope of its decision so as not to encroach on the interests of states other than the immediate parties. Australia further submitted that the panel should allow the participation of all interested states. The panel in due course took cognisance of this plea by expanding third-party rights and limiting the ambit of its ruling.<sup>57</sup>

Covertly trying to influence an international judge in an unorthodox way is a 'risky business' and states are aware of the dangers to their international reputations should their nefarious activities be uncovered. While states may be able to limit any fallout should they be uncovered doing this at a national level, their ability to control the situation at an international level is far more difficult. Besides the 'horizontal' nature of international law permits states greater options, so it is easier for them to publically signal their displeasure with the rulings of an international courts, without having to engage in 'murky undercover tactics'. States can often decline to recognise the jurisdiction of an international court or emphasize that their rulings are advisory only in effect. On the other hand, international courts are acutely aware of the limitations on the scope of their judicial authority and will often pre-empt the reaction of interested states by tailoring their decisions so as to ensure greater international acceptance. International courts do not want to be perceived as being irrelevant, so they are conscience of the need to provide practical useful decisions that can be helpful to states in dealing with their international affairs.<sup>58</sup>

The judicial appointment process of modern international courts is designed to ensure that no single country can dominate judicial representation on the bench. While at a national level a political party, when in power, can to some extent 'stack' the court by appointing judges who are sympathetic to their political ideology, the opportunity to stack an international court with judges of a particular nationality is far more constricted.<sup>59</sup> With courts such as the International Criminal Court (ICC) only those states who have ratified the Rome Treaty may

<sup>47</sup>Liste, n 44, p 181

<sup>48</sup>Reus-Smit, Christian, ed. Cambridge Studies in International Relations : The Politics of International Law (2004) Whippman D . Chapter 7 'The International Criminal Court' Cambridge University Press p158.

<sup>49</sup>Reus-Smit n 40, p 16.

<sup>50</sup>Alter. n 15, p 342.

<sup>51</sup>Alter. n 15, p 352.

<sup>52</sup>Reus-Smit. n 40, p 23.

<sup>53</sup>Reus-Smit. n 40, p 36.

<sup>54</sup>Alter. n 15, p 339.

<sup>55</sup>Alter. n 15, p33

<sup>56</sup>Busch M & Pele K. "The Politics of Judicial Economy at the World Trade Organization International Organization", 64, No. 2 Cambridge University Press on behalf of the International Organization Foundation Stable), pp. 257-279 <http://www.jstor.org/stable/40608015> viewed August 2016.

<sup>57</sup>Busch. n 56, p 267.

<sup>58</sup>Busch. n 56, p260

<sup>59</sup>Alter. n 15, p 338.

nominate judges for appointment to the court.<sup>60</sup> Hence powerful states such as USA, Russia, India and China, cannot nominate one of their nationals for appointment to the Court.

Majoritarian arguments lack validity when directed at international courts because there is no international democratically elected legislature competing for power. Hence the argument that judges are not democratically elected and should not encroach on the law making pursuits of the legislature has no relevance at the international level. An assembly of states, such as the UN General Assembly does not legislate, nor is it democratically elected. Hence judges are no more or less democratic than states themselves. So those who would assert that the decisions of international courts should not be observed because they are undemocratic fail to recognise the inconsistency of their argument.<sup>61</sup>

A more legitimate complaint might arise where an international court seeks to impose a decision upon a democratically elected state government that runs contrary to a law or policy that has been endorsed by the electorate of that country. However the opportunity for an international court to do this is extremely limited and would generally only happen where the actions of that state are clearly contrary to international law.<sup>62</sup> Hypothetically an international court might for example rule that Australia's 'turn back the boats' immigration policy is contrary to international law but Australia would in these circumstances probably argue the 'democratic mandate' is the dominate consideration and simply ignore the court's ruling.

All courts, be they national or international, rely on someone else to enforce their orders. At the state level courts rely on state agencies, such as the police to enforce their judgements. International courts also rely on these state agencies to enforce their judgments but with international courts states can refuse to allow their agencies to be used for this purpose. To this extent an international court simply cannot assume that a particular state will allow its enforcement agency to enforce its decisions no matter how authoritative their rulings might be. While this may be seen as a weakness with the international judicial system, it is in reality simply a reflection of the different 'horizontal' nature of international law with the 'vertical' nature of national law.<sup>63</sup>

Judicial decisions at the international level are enforced because the international community applies pressure for those decisions to be acted upon. States may be able to resist enforcing the decision of an international court but if the failure to do so would be contrary to the rule of law then states have to be careful just how far they are prepared to go in 'snubbing their noses' at the rest of the world. Most states are fearful of being regarded as international pariahs especially if they are dependent on world trade for their financial survival. With globalization the interdependency of states upon each other means that political ostracism can mean isolation and financial ruin.<sup>64</sup> Accordingly the ability of states to influence the decisions of international courts by threatening to ignore their decisions or refusing to enforce them, (unless they favour their political or strategic objective), is becoming

a far less potent mechanism of influence.

The horizontal nature of international law and the dependence upon states to effects its enforcement means that states and other actors do have a legitimate role in being able to express their views before these international courts and tribunals. While it may become unworkable if third parties were allowed too much access to domestic courts (although victims now have such a voice) the dependence of international courts upon the assistance of states means that states do have a legitimate role to play. Indeed the presence of state parties before the court allows the court to canvass with them issues such as the arrest of indicted persons and other measure that allow the court to perform its function. Conversely states can inform the courts of the difficulties in performing certain functions that the court may wish assistance with.

These third parties should not be limited only to states. Modern international law embraces a wide spectrum of non-state actors who also perform legitimate functions within the international community. Sometimes special interests groups have a particular insight that they can bring to a case that may not be articulated by the immediate parties before the court. For example the Inter American Court of Human Rights has relied on the assistance of academic anthropologists to assist it with assessing the effect of its decision on Indigenous interests in cases where the immediate parties before the court failed to adequately address this question.<sup>65</sup>

In some instances it is now possible for private actors to actually initiate litigation before international tribunals. At times this can be advantageous for states as it demonstrates an even handed balanced approach to a case and at the same time relieves states of their need to address any political fallout from receiving an adverse ruling.<sup>66</sup> For example in the Yukos Oil Company case Spanish investors won an award by invoking an investment dispute provision of the Energy Charter Treaty that the Russian Duma had never ratified. This obliged the Russian Government to pay compensations to the investors for illegally seizing control of the Yukos oil company. To many the persons most affected – the investors – this brought about a far better result than that which was achieved by the investors in the *Barcelona Traction Case*.<sup>67</sup>

## International criminal law enforcement

The emergence of international criminal courts has added a new dimension to the political concerns of states because these courts deal with individuals and those individuals can be in positions of power such as presidents and generals. Before the era of international criminal courts states did not have to worry about the senior political or military personnel being tried for international crimes but this is no longer the case. International criminal law operates somewhat differently from human rights and economics law, for instance in the Charles Taylor case, the former Liberian President, although initially securing a limited 'safe haven' in Nigeria, was denied amnesty or immunity from prosecution, due to the international nature of the indictment issued against him.<sup>68</sup>

In the first 5 years of the life of the International Criminal Tribunal for the former Yugoslavia (ICTY) the USA exercised considerable

<sup>60</sup>Article 36 of the *Rome Statute of the International Criminal Court 1998* (*Rome statute of the ICC*)

<sup>61</sup>Alter. n15 p 356.

<sup>62</sup>Alter. n15 p 355.

<sup>63</sup>Alter K. *The New Terrain of International Law* Chapter 2 International Courts Altering Politics Princeton University Press. (2014) p32

<sup>64</sup>Alter. n15, p 359.

<sup>65</sup>Alter. n15 p 349.

<sup>66</sup>Alter. n15 p 359.

<sup>67</sup>Alter. n15 p 363.

<sup>68</sup>Alter. n15, p 349.



influence over the tribunal by directly supplying legal staff to the Office of the Prosecutor. The legal staffs were not employees of the UN but remained on the payroll of the US Government. These lawyers were in regular contact with their government and no doubt put the interests of their government first. The cash strapped UN could do little about this even if it wanted to because without US financial support the ICTY would not have survived.<sup>69</sup> More importantly the ICTY had no capacity to arrest indicted defendants. Many of the defendants were at the time still in positions of power in the former Yugoslavia. They had armies and militias at their disposal. ICTY investigators simply lacked the means of arresting these alleged war criminals. The logistics of carrying out arrests were enormous and risks involved quite deadly. It soon became apparent to the fledgling ICTY that without US military support, the arrests of Tribunal indictees could not be achieved. In a curious way it was the US staff at the ICTY who were able to persuade their (USA) Government to commit the military resources necessary to affect the arrest of the indictees. While this process was clearly political rather than legal, it nevertheless worked.<sup>70</sup>

International criminal tribunals are also dependent upon states for intelligence about military operations and the location of suspects. This dependence makes the tribunals susceptible to political pressure, in that information can be withheld making the investigation so much harder for the tribunal. If it is not in the interest of a state for a suspect to be arrested then they can simply withhold information as to the person's whereabouts. Conversely if a state would like a person arrested they can supply the necessary information and the means of affecting the arrest to the court or tribunal in order to achieve their strategic objectives.<sup>71</sup>

States are not the only entities capable of applying pressure on international courts and tribunals, NGO's and interests groups can also attempt to influence prosecutorial decision making. Since the early 1990's feminist groups have successfully influence international tribunals such as the ICTY to prosecute rape and sexual slavery as a war crimes.<sup>72</sup> This has now been formerly incorporated into the Rome Statute of the International Criminal Court where for the first time rape and sexual slavery have been specifically identified as a war crime.<sup>73</sup>

The creation of the International Criminal Court (ICC) was of itself a highly politicised event with politics being the centre of the arguments both 'for and against'. While politics drove the normative debate the material concerns of the relevant states also reflected their political and strategic interests.<sup>74</sup> By the time of the Rome Conference many of the relevant international crimes had been tested and settled by the pre-existing *ad hoc* tribunals but this did not quell debate on what crimes would and would not fall within the jurisdiction of the court. Nor did it prevent considerable argument erupting over such issues as procedure; prosecutorial discretion; investigation trigger mechanisms and the role of the Security Council.<sup>75</sup> Unlike the earlier *ad hoc* tribunals, the highly politicised nature of the 'birth' of the

ICC, at the Rome Conference, fated the ICC to a continued existence whereby politics remained as a central feature of its operation. Indeed it is hard to find a case conducted by the ICC where 'international' politics has not played a significant role.

The intense political debate at the Rome Conference on allowing the prosecutor to initiate *proprio motu* investigations,<sup>76</sup> has certainly evidence itself in practice. Kenya ratified the Rome Statute in 2005. In 2010 the ICC Pre-Trial Chamber granted the Prosecutor's request to open an investigation *proprio motu* into crimes against humanity alleged to have committed in the context of post-election violence in Kenya in 2007-2008. The Prosecutor alleged that more than 3500 people were seriously injured; 1,000 people were killed; 900 people were subjected to rape and sexual violence; and approximately 350,000 people were displaced.<sup>77</sup> Notwithstanding assertions by the ICC that it is influenced by law rather than politics,<sup>78</sup> the politics at the heart of this prosecution are inescapable.

The circumstances of the Kenya case where the defendants Kenyatta and Ruto are themselves sitting politicians means that the politics of Kenya will inevitably intrude on the curial process. However because they are also defendants before the court, means that the legitimacy of the political interference needs to be evaluated in the light of their conflict of interest. Expressed differently a state may have a legitimate political concern about a matter before the court and wish to persuade the court to decide in a particular way so as not to harm their political or strategic interests. However when the politicians are also the accused it becomes difficult to determine whether or not their attempts to influence the court are motivated by a legitimate political concern of Kenya or because they wish to escape prosecution action by the ICC. In the case of Kenyatta and Ruto it would seem that the latter is the motivational basis for their actions because they or their supporters have attempted to undermine the ICC investigation by using delaying tactics and threatening vulnerable witnesses. They have also silenced journalists who have sought to publish material in favour of the ICC investigation.<sup>79</sup> Being in a position of political power means that they have the means to prevent the ICC from actually carrying out their investigations 'on the ground' in Kenya. However the fact that defendants charge with serious criminal offences that have the capacity to frustrate the courts investigation would behave in this way should not really come as a surprise to anyone. What is more interesting is that this interference is not limited to *proprio motu* investigations where the defendants are sitting politicians but other investigations as well.

Even cases where state parties of their own volition refer a matter to the court have not escaped political controversy. A case in point is the Uganda Referral. On 16 December 2003 President Museveni of Uganda referred the situation concerning the Lord's Resistance Army (LRA) to the ICC under the Rome Statute of the ICC.<sup>80</sup> This was the first time that a state party had voluntarily submitted a matter to the jurisdiction of the court. An ICC investigation team was then sent to Uganda to conduct the investigation with the full support of the Ugandan Government. This resulted in ICC arrest warrants being

<sup>69</sup>Jonathan G. Cedarbaum, "Restrictions on U.S. Attorneys Practicing before International Criminal Tribunals" *The American Journal of International Law*, Vol. 98, No. 1 (Jan., 2004), pp. 141-149 at p 143

<sup>70</sup>Whippman. n. 48 p. 180.

<sup>71</sup>Whippman. n. 48, p. 181.

<sup>72</sup>Nicola Henry. 'The Fixation on Wartime Rape: Feminist Critique and International Criminal Law' *Social & Legal Studies* 2014, Vol. 23(1) 93-111 at p 94 see also Alter Chap 9 p 346

<sup>73</sup>Article 8 (2) (b) (xxii) of the Rome Statute of the ICC.

<sup>74</sup>Whippman. n. 48, p. 156.

<sup>75</sup>Whippman. n. 48, p. 165.

<sup>76</sup>Article 15 (1) *Rome Statute of the ICC*.

<sup>77</sup>*Situation in the Republic of Kenya* ICC-01/09, 2016.

<sup>78</sup>Mueller S. "Kenya and the International Criminal Court (ICC): Politics, the Election and the law" (2014) *Journal of Eastern African Studies*, Vol. 8, No. 1,

25-42, at pp 28 - 33.

<sup>79</sup>Mueller. n. 78, p. 26.

<sup>80</sup>*Situation in Uganda* ICC-02/04.

issued in 2005. However in 2006 representative of the Ugandan Government held peace talks with the LRA in Juba South Sudan where the LRA insisted that before they would reach any peace agreement with the Uganda Government, the Government must withdraw their support for the ICC investigation. Subsequently President Museveni distanced himself from the ICC investigation and offered LRA leader, Joseph Kony, amnesty from prosecution.<sup>81</sup>

When the ICC refused to drop the LRA prosecution it was subjected to a barrage of criticism from a variety of sources (not only from the Government of Uganda) that it imposed Western notions of retributive justice on communities that were culturally attuned to restorative justice principles and hence frustrated attempt to achieve peace by means of reconciliation.<sup>82</sup> What seems to have been ignored by those critical of the ICC was that the retributive justice model adopted by the ICC was well known to the Ugandan Government well before they referred the LRA investigation to the ICC and that if had not been for the ICC investigation the LRA would not have come to the negotiating table in the first place.

## Conclusion

States can at times clearly have an interest in the outcome of international cases. The dependence of international courts on the assistance of states in order for them to perform their function is so fundamental to the whole process that endeavouring to operate in a vacuum where states can play no part in the proceedings is illogical. Facilitating state access removes the need for states to resort to *real politic* mechanisms in order for them to acquaint courts with their specific concerns. It not only legitimises the process but allows international court to speak directly to states about enforcement issues.<sup>83</sup> It is also fairer for the immediate parties (plaintiff/prosecution and defence) because what states are saying to the courts is transparent

<sup>81</sup>Lanz D. "The ICC's Intervention in Northern Uganda: Beyond the Simplicity of Peace vs. Justice" (2007) The Fletcher School of Law and Diplomacy, p. 8.

<sup>82</sup>Lanz. n. 81, pp. 9-11.

<sup>83</sup>Alter. n. 15, p. 349.

and can be responded to in the course of the proceedings.

While allowing states to submit appropriate *amicus curiae* briefs may lengthen proceedings, this should not be a reason for preventing the ventilation of issues of international concern where states have a genuine and legitimate interest in what international courts are doing. While at a national level it is perhaps unusual for governments to become involved in criminal proceedings through representation by means other than their the state prosecutors, international prosecutors do not represent any one particular state or even a combination of states and may well have an interest quite different from that of a state.

When the International Criminal Tribunal for the former Yugoslavia (ICTY) was established the use of *amicus curiae* briefs in criminal cases was still in its infancy. However it was used to good effect in the Tadic Jurisdictional Case<sup>84</sup> and later in the Blaskic Subpoena Case.<sup>85</sup> However by the time the *Rome Statute* was negotiated the ability of a state to involve itself in the proceedings of the court were significantly expanded by inserting specific provisions in the Statute.<sup>86</sup> While it is still early days in the development of this jurisprudence the wisdom of allowing an expanded role for third parties including states, means that the incentive for states to try to influence the court behind 'closed doors' is significantly reduced. This allows for greater transparency and a better justice outcome for all concerned.

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None.

## Conflict of interest

Author declares there is no conflict of interest.

<sup>84</sup>*The Prosecutor v. Tadic*, 17 July 1995, (Case No. IT-94-1-T), at 35-6 Submission of the Government of the United States of America (U.S. Amicus Curiae Brief).

<sup>85</sup>*Prosecutor v. Blaskic* Judgement on the Request of the Republic of Croatia (1997) IT-95-14-AR108 bis.

<sup>86</sup>Articles 9; 12; 13; 14; 18; 19; 36; 51; 53; 54; 68; 70; 72; 75; 87; 90; 91; 92; 93; 96; 97; 103; of *the Rome Statute of the ICC*