From One ICJ to Another

Impartiality, Independence and the World Court

Juliette McIntyre

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In early August, Judge Julia Sebutinde of the International Court of Justice (known as the ICJ) gave a speech at Watoto Church in Uganda, her home State, during which she referenced her dissenting opinions in both the South Africa v. Israel genocide case, and the Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem Advisory Opinion. She was reported as saying that "The Lord is counting on me to stand on the side of Israel", and that the "whole world was against Israel, including my country." These statements, as reported, appear to contradict the requirement that Judges remain impartial.

Following these remarks, on 25 August, a non-governmental organization called the International Commission of Jurists – also often abbreviated to ICJ – sent a communication to the President of the Court, Judge Yuji Iwasawa, to urge him to investigate Judge Sebutinde's remarks. While this move was met with general acclaim on social media, it could likewise be perceived as attempting to put external pressure on the Court to reach a certain decision – a threat to judicial independence.

Judge Sebutinde's Remarks: A Demonstrable Lack of Impartiality

Article 2 of the ICJ Statute specifies that it "shall be composed of a body of independent judges". When new judges are appointed to the ICJ, they make a declaration in open court in the following terms:

> *"I solemnly declare that I will perform my duties and exercise my powers as judge honourably, faithfully, impartially and conscientiously."*

This declaration is required by Article 20 of the Statute, and the precise terms are set out in Article 4(1) of the Rules of Court that govern procedure. Swearing-in ceremonies are open to the public. Judges *ad hoc* – appointed for one case at a time – are sworn in on the first day of the oral proceedings for that case.

A Judge's primary duty is therefore impartiality. Judicial impartiality is the Court's freedom from improper influences. This means that there must be no bias or prejudice in favour of one party. Judicial decisions should be made on the basis of the merits of the party's legal arguments. They should never be predecided or based on non-legal factors.

Judge Sebutinde's remarks appear to contradict this integral requirement. To be clear, the problem does not lie with her dissenting from the Court's orders. Dissent is also an important element of the judicial process; it can in fact be a demonstration of judicial independence of thought. The problem arises because Judge Sebutinde has declared her intention – in advance and in respect of an ongoing case – to vote in favour of one of the parties because of her religious convictions and not as a result of the merits of any legal arguments. While everyone has the right to freedom of thought, conscience and religion, and such beliefs might influence how a person views questions of conscience and morality, religious views should never influence the duty of a judge to decide impartially and on the basis of law.

Impartiality and the Court's Procedure

In order to ensure that the judges are independent and impartial, Article 24 of the Court's Statute includes a procedure for recusal from cases where a judge cannot or should not take part:

> *Article 241. If, for some special reason, a member of the Court considers that he should not take part in the decision of a particular case, he shall so*

> *inform the President.2. If the President considers that for some special reason one of the members of the Court should not sit in a particular case, he shall give him notice accordingly.3. If in any such case the member of the Court and the President disagree, the matter shall be settled by the decision of the Court.*

A judge may recuse themselves because they have previously acted as counsel in an ongoing case, or where previously expressed views indicate the potential for bias against one of the parties. For example, Judges Fleischhauer, Higgins, and Kooijmans all recused themselves from the *Bosnia and Herzegovina v. Yugoslavia* revision case on account of their previously expressed positions on matters related to the subject matter of the proceedings.

If Judge Sebutinde does not recuse herself, the Court may still take steps under Article 24 to remove her from the case. The Court President, if they consider that, for some special reason, one of the members of the Court should not sit in a particular case, can give notice of this. There was a controversial incident during the second phase of the *South-West Africa* cases, where Sir Percy Spender pressured Judge Zafrulla Khan to step aside, although without following the procedure set out in Article 24.

Where the Judge refuses to step aside, the matter should be settled by a decision from the Court. Article 48 also empowers the Court to make orders for the conduct of the case – using this power, the Court can hear and decide upon complaints by one party regarding the participation of a certain judge. This happened in the *Namibia* Advisory Opinion, where South Africa unsuccessfully sought the removal of Judges Zafrulla Khan, Morozov, and Padilla Nervo.

The ICJ Communication - A Threat to Independence?

Given these procedures, what is the harm in a letter from a body of "eminent judges, lawyers and legal academics from all parts of the world and all legal systems", urging the ICJ President to investigate Judge Sebutinde's remarks?

In my view, this activity presents a potential threat to perceptions of the Court's independence. While related concepts, impartiality and independence are concerned with different aspects of the judicial function. Judicial impartiality concerns the judge's internal biases. Independence is concerned with the "relationship between the judges and external bodies," which can include the media, the public, and other interest groups. The communication not only requests the President to investigate but also seeks the immediate removal of Judge Sebutinde from the *South Africa v. Israel* case. There appears to be a pre-determination that her recusal is the only acceptable outcome. By putting pressure on the Court to act in a certain way, the other ICJ may have inadvertently threatened the public's view on whether the Court is independent from external agents and interests. There is an important balance to be struck between appropriate calls for accountability and improper attempts at interference in the Court's decisions. It is already the case that the Court receives missives from organizations and members of the public; indeed, during the first provisional measures hearing in *South Africa v. Israel* there was a viral campaign on X (formerly Twitter) calling for people to email the judges and ask them to find in favour of South Africa. Such misguided messages are easily ignored and for the most part understood to be inappropriate. It is less straightforward with the ICJ; their profile and expertise, coupled with the publicity of the communication, potentially create an expectation that the Court should (or will) comply.

Conclusions

Courts are not considered trustworthy and legitimate because they always reach outcomes that align with our moral convictions. We trust courts because they follow clear and certain processes when making their decisions. If the Court is perceived to be bowing to public pressure to reach a certain decision, it loses legitimacy. Certainly, there will also be a legitimacy cost if Judge Sebutinde remains on the case. But she is only one vote out of up to sixteen judicial voices, and her remarks will have damaged her reputation both inside and outside the institution, lessening the effectiveness of her decisions.

It would, in my view, be appropriate for Judge Sebutinde to step aside. Her remarks give rise to a perception of bias, if not actual impartiality. But if the Court takes a vote and decides otherwise, it's still an appropriate outcome and should be respected. Publicly pressuring the Court to reach certain results, rather than follow certain processes, should be avoided.

ABOUT THE AUTHOR

Juliette McIntyre

Dr Juliette McIntyre is a Senior Lecturer in Law at Adelaide University. Her area of specialism is international courts and tribunals, with a focus on procedure.

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