

IMPARTIALITY IN INTERNATIONAL ADJUDICATION

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ABSTRACT

Impartiality is generally accepted as central to the rule of law, indispensable for legitimacy and effectiveness, necessary for legal interpretation and fundamental for fair treatment. But there are key issues that remain unresolved: What should impartiality mean in the context of international adjudication? How can one proceed to identify the principles and rules of impartiality? Why do different international courts and tribunals apply different rules and standards of impartiality?

By providing an understanding of the concept of impartiality, this thesis seeks (1) to explain the pluralism of the principles and rules of impartiality and the insufficiency of the legal norms to guarantee the full achievement of impartiality, and (2) to illustrate the relationship between the functions and characteristics of different international courts and tribunals and the principles and rules of impartiality that correspondingly apply to these courts and tribunals.

Moreover, the thesis seeks to identify the principles and rules of impartiality to be applied by international courts and tribunals when the statutes of these judicial organs do not specify the principles and rules to be applied. The thesis recognizes the inherent indeterminacy in answering this question as a result of the argumentation structures composed of induction and deduction underlying the source-based approach in international law, but nonetheless proceeds to employ analogical reasoning to clarify further the content of principles and rules of impartiality applicable to international courts and tribunals. The thesis also identifies functions and characteristics of international adjudication that can be utilised to decide what principles and rules of impartiality are applicable to different forms of international adjudication.

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TABLE OF ABBREVIATIONS	
Appeal Chamber	AC
The American Journal of International Law	AJIL
Anglo-American Law Review	Anglo-AmLR
American Political Science Review	APSR
Amsterdam University Press	AUP
Boston University Law Review	BULR
British Yearbook of International Law	BYBIL
California Law Review	CaliLR
Caribbean Court of Justice	CCJ
Columbia Journal of European Law	CJEL
Cambridge Journal of International and Comparative Law	CJICL
Chinese Journal of International Law	CJIL
Canadian Journal of Philosophy	CJP
Civil Justice Quarterly	CJQ
Cambridge Law Journal	CLJ
Current Legal Problems	CLP
Cornell Law Review	CorLR
Cambridge University Press	CUP
European Court of Human Rights	ECtHR
Fordham International Law Review	FILJ
Florida Law Review	FLR
Georgetown Journal of International Law	GJIL
German Law Journal	GLJ
George Washington International Law Review	GWILR
Harvard International Law Journal	HILJ
Harvard Journal of Law and Public Policy	HJLPP
Harvard Law Review	HLR
Harvard University Press	HUP
International Criminal Court	ICC
Statute of the International Court of Justice	ICJ Statute
International and Comparative Law Quarterly	ICLQ
The 1965 Convention on the Settlement of Investment Disputes between States and Nationals of Other States	ICSID Convention
International Criminal Tribunal for Rwanda	ICTR
International Criminal Tribunal for the former Yugoslavia	ICTY
International Journal of Law in Context	IJLC
International Law Association	ILA
Indian Journal of International Law	Indian JIL
International Organization Law Review	IOLR
Indian Yearbook of International Law	IYIL
Johns Hopkins University Press	JHUP

Journal of International Arbitration	JIA
Journal of Legal Studies	JLS
The Journal of Philosophy	JP
Journal of Political Ideologies	JPI
Journal of Political Philosophy	JPP
The Journal of Value Inquiry	JVI
Law and Philosophy	L&P
Loyola of Los Angeles International and Comparative Law Review	Loy. LAI&CLR
Law and Practice of International Courts and Tribunals	LPICT
Michigan Journal of International Law	MJIL
Missouri Law Review	MLR
The Notre Dame Journal of Law, Ethics and Public Policy	NDJLEPP
Northwestern University Law Review	NULR
New York International Law Review	NYILR
New York University Law Review	NYULR
Osgoode Hall Law Journal	OHLJ
Oxford Journal of Legal Studies	OJLS
Oregon Law Review	OLR
Oxford University Press	OUP
Proceedings of the Aristotelian Society	PAS
Permanent Court of International Justice	PCIJ
Project on International Courts and Tribunals	PICT
Philosophy & Public Affairs	PPA
Philosophy and Phenomenological Research	PPR
Princeton University Press	PUP
Rome Statute of the International Criminal Court	ICC Statute
Stanford Journal of International Law	Stan JIL
Statute of the International Court of Justice	ICJ Statute
Statute of International Tribunal for the Law of the Sea	ITLOS Statute
Special Tribunal for Lebanon	STL
South Texas Law Review	STLR
Texas A&M Law Review	TA&MLR
University of Chicago Law Review	UCLR
University of California Press	UCP
United Nations Commission on International Trade Law	UNCITRAL
United Nations University Press	UNUP
University of Pennsylvania Journal of International Law	UPJIL
Vienna Convention on the Law of Treaties	VCLT
The Western Political Quarterly	WPQ
Washinton University Law Review	WULR
Yale Law Journal	Yale LJ
Yale University Press	YUP

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<i>Application of the Convention on the Prevention and Punishment of the Crime of Genocide</i> (Bosnia and Herzegovina v. Serbia and Montenegro)(Provisional Measures)[1993] ICJ Rep 408.	96
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<i>Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)</i> (Jurisdiction/admissibility)[2002] ICJ Rep 3	40
<i>Article 3, Paragraph 2, of the Treaty of Lausanne (Frontier between Turkey and Iraq)</i> (Advisory Opinion) [1925] PCIJ Rep Series B No 12	3,8,78,79, 80,81,82, 83,94
<i>Asylum (Colombia v. Peru)</i> (Judgment) [1950] ICJ Rep 266	46
<i>Barcelona Traction (Belgium v. Spain)</i> (Second Phase, Judgment)[1970] ICJ Rep 64	46
<i>Campbell and Fell v. UK</i> (1984) Series A no 80	52
<i>Chagos Marine Protected Area Arbitration (The Republic of Mauritius v. The United Kingdom)</i> (Reasoned Decision on Challenge)(2011) PAC Case No. 2011-03	3,5,8,50, 54,55
<i>Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America)</i> (Judgment)[1984]ICJ Rep 246	40
<i>East Timor</i> (Portugal v. Australia) (Judgment)[1995] ICJ Rep 90,	47
<i>Eastern Carelia</i> (Advisory Opinion)PCIJ Rep Series B No 5,	47
<i>Ecuadorian-United States Claims Commission</i> (1862) 3 Intl Arbitration 2731	95
<i>E-Systems, Inc. v. Iran</i> (1983) 2 Iran-USCTR 51	59
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<i>Heathrow Airport User Charges (United States–United Kingdom)</i> (1993) 102 ILR 564	60
<i>Hrvatska Elektroprivreda v. Slovenia</i> , ICSID Case No ARB/05/24, Ruling (2008)	59
<i>Interhandel</i> (Switzerland v. United States of America)[1957] (Merits) ICJ Rep 105	50
<i>Iran v. United States</i> (Iran–US Claims Tribunal, Decision Ruling on Request for Revision by Iran) Decision No DEC 134-A3/A8/A9/A14/B61-FT (2011)	59
<i>Jurisdictional Immunities of the State (Germany v. Italy, Greece intervening)</i> (Merits) [2012] ICJ Rep 99	40
<i>LaGrand (Germany v United States)</i> (Judgment)[2001] ICJ Rep 466	59
<i>Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276</i> (1970) (Advisory Opinion)[1971] ICJ Rep 1971	61,85,88

<i>Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory</i> (Order) [2004] ICJ Rep 3	3,8,13, 61,62,100
<i>María Cristina Lagunas Castedo v Spain</i> (2008) UN Doc CCPR/C/94/D/1122/2002	52
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<i>Mondev Int'l Ltd. v. United States</i> , ICSID Case No. ARB(AF)/99/2, Award (2002)	71
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<i>North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)</i> (Merits)[1969] ICJ Reports 3	29,40
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INTRODUCTION

A. Background and Research Questions

Impartiality is generally accepted as an ethical value ‘central to an international rule of law’,¹ a condition of legitimacy and effectiveness of international tribunals,² a necessary virtue for legal interpretation,³ and ‘one of the most elementary requirements of fair treatment’.⁴ However, the possibility of impartiality of international adjudication is often subject to criticism. Much social science research has found that judges cannot avoid being influenced by their ideological inclinations,⁵ policy preference,⁶ the perceptions of the audiences,⁷ race and gender,⁸ as well as subconscious biases,⁹ *etc.* Even before the PCIJ was established, the members of the Advisory Committee of Jurists warned that it was impossible to find persons prepared to denationalize themselves to be an impartial international judge.¹⁰ Hersch Lauterpacht also spoke about the impossibility of achieving

¹ Frederic Megret, ‘What is “International Impartiality”’, in Vesselin Popovski(ed) *International Rule of Law and Professional Ethics*(Routledge 2016) 101.

² Diane Marie Amann, ‘Impartiality Deficit and International Criminal Judging’, in William A. Schabas, Ramesh Thakur and Edel Hughes(eds) *Atrocities and International Accountability: Beyond Transitional Justice*(UNUP 2007) 214; The ILA Study Group and PICT, ‘The Burgh House Principles on The Independence of The International Judiciary’ <https://www.ucl.ac.uk/international-courts/sites/international-courts/files/burgh_final_21204.pdf> accessed 16 July 2019(‘The Burgh House Principles’).

³ H.L.A. Hart, *The Concept of Law*(2nd edn, Clarendon 1996) 205.

⁴ D. J. Galligan, *Due Process and Fair Procedures*(OUP 1997) 437.

⁵ Jeffrey A. Segal and Harold J. Spaeth, *The Supreme Court and the Attitudinal Model*(CUP 1993) xvi.

⁶ Lee Epstein and Jack Knight, *The Choices Justices Make*(CQ Press 1998) xiii.

⁷ Lawrence Baum, *Judges and their Audiences: A Perspective On Judicial Behavior*(PUP 2006) 4.

⁸ Pat K. Chew and Robert E. Kelley, ‘Myth of the Color-Blind Judge: An Empirical Analysis of Racial Harassment Cases’(2009) 86 WULR 1117.

⁹ Chris Guthrie et al., ‘Blinking on the Bench: How Judges Decide Cases’(2007) 93 CorLR 1, 3-6, 15, 17-18, 27.

¹⁰ League of Nations Advisory Committee of Jurists, *Procès-verbaux of the proceedings of the Committee, June 16th-July 24th, 1920, with Annexes*(Van Langenhuysen 1920) 187-88. <<https://archive.org/details/procsverbauxof00leaguoft>> accessed 18 July 2019.

impartiality through ‘formal safeguards’.¹¹ The impartiality of international adjudicators becomes more questionable when international legal argumentation is found to possess inherent indeterminacy.¹²

The sceptics of international adjudication generally accept that impartiality should be guaranteed in international adjudication, but the meaning, scope, and standard of impartiality they use to assess international adjudication are not clear. Despite the notion of impartiality frequently being used to describe or evaluate international judges, there is no clear conceptual understanding of the concept.¹³ On the one hand, it is difficult to define impartiality with certainty¹⁴ and to clarify the relationship between impartiality and other complex concepts and values such as social justice,¹⁵ legitimacy and rationality,¹⁶ legal interpretation and judicial discretion,¹⁷ accuracy and objectivity;¹⁸ yet on the other hand, there are many scenarios where concrete principles and rules of impartiality should be identified to evaluate international adjudication, especially in cases regarding whether a

¹¹ Hersch Lauterpacht, *The Function of Law in the International Community* (Clarendon 1933) 232-33.

¹² Martti Koskeniemi, *From Apology to Utopia: The Structure of International Legal Argument* (CUP 2006) 553 (‘How to fulfil the ideal of integrity in the absence of an objective law?’)

¹³ Gleider I. Hernández, ‘Impartiality and Bias in the International Court of Justice’ (2012) 1 CJICL 183, 188-89.

¹⁴ See eg Megret(n1) 117-23; Charles Gardner Geyh, ‘The Dimensions of Judicial Impartiality’ (2014) 65 FLR 493; *Republican Party of Minn. v. White*, 536 US 765, 775-78 (2002); William Lucy, ‘The Possibility of Impartiality’ (2005) 25(1) OJLS 3.

¹⁵ Richard K. Greenstein, ‘Social Justice as an Essentially Contested Concept’ (2016) 3 TAMLR 537, 540.

¹⁶ William Lucy, ‘Adjudication’ in Jules L. Coleman, Kenneth Einar Himma, and Scott J. Shapiro (eds) *The Oxford Handbook of Jurisprudence and Philosophy of Law* (OUP 2004) 207.

¹⁷ See eg W. Bradley Wendel, ‘Impartiality in Judicial Ethics: A Jurisprudential Analysis’ (2008) 22 NDJLEPP 305; Ofer Raban, *Modern Legal Theory and Judicial Impartiality* (Glasshouse 2003); Hart(n3) 160; Ronald Dworkin, *A Matter of Principle* (HUP 1985) 119-45; Jochen von Bernstorff, *The Public International Law Theory of Hans Kelsen* (CUP 2010) 216.

¹⁸ See eg Devika Hovell, *The Power of Process: The Value of Due Process in Security Council Sanctions Decision-Making* (OUP 2016) Chp 5; Remus D. Valsan, *Understandign Fiduciary Duties: Conflict of Interest and Proper Exercise of Judgment in Private Law* (2012) Phd Thesis submitted to McGill University, 178. <http://digitool.library.mcgill.ca/webclient/StreamGate?folder_id=0&dvs=1561207218848~322> accessed 16 July 2019.

particular judge can sit on the bench to make decisions.¹⁹

To propose guarantees for international impartiality, some international law literature proceeds on the assumed basis that the principles and rules of impartiality developed in domestic law provide the correct model for international adjudication. Bin Cheng, for example, states that the two principles governing impartiality in domestic public law are applicable to international adjudication: *i.e.*, ‘*nemo debet esse judex in propria sua causa*’ (‘no one shall be a judge in his own case’), and ‘*audiatur et altera pars*’ (‘all sides must be heard’).²⁰ A number of domestic institutional and procedural guarantees of impartiality are adopted in international courts and tribunals, such as the prohibition of conflict of interests, the prohibition of *ex parte* communication, the regulation of extra-judicial activities, the recusal and disqualification, and the obligation of disclosure.²¹

However, in practice, it is difficult to ascertain which state’s or states’ standards should be the criteria against which the international adjudication can be assessed.²² Even if common criteria from domestic law can be identified, the domestic standards are often not fully satisfied in international adjudication. For example, many of the domestic

¹⁹ See eg *Chagos Marine Protected Area Arbitration*(*The Republic of Mauritius v. The United Kingdom*)(Reasoned Decision on Challenge)(2011)PAC Case No. 2011-03(‘*Mauritius v. UK*’); *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*(Order)[2004] ICJ Rep 3(‘*Wall Advisory Opinion*’); Article 3, Paragraph 2, of the *Treaty of Lausanne*(*Frontier between Turkey and Iraq*)(Advisory Opinion)[1925] PCIJ Rep Series B No 12(‘*Mosul case*’); *Prosecutor v. Anto Furundzija*(Judgment) IT-95-17/1-A(21 July 2000)(‘*Furundzija*’); *Voting Procedure on Questions Relating to Reports and Petitions Concerning the Territory of South-West Africa*(Advisory Opinion)[1955] ICJ Rep 67.(‘*South-West Africa Advisory Opinion*’)

²⁰ See Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals*(Stevens & Sons 1953) Chaps 13 and 14; For origin of these principles from natural justice principles, see Paul Craig, *Administrative Law*(6th edn, Sweet & Maxwell 2008) Chaps 13 and 14.

²¹ See Anja Seibert-Fohr, ‘International Judicial Ethics’, in Cesare P. R. Romano, Karen J. Alter, and Yuval Shany(eds) *The Oxford Handbook of International Adjudication*(OUP 2013) 757-78.

²² For example, the principle ‘*nemo judex in sua causa*’ is applied differently in different countries. See eg George Schwarzenberger, ‘The Nemo Judex in Sua Causa Maxim in International Judicial Practice’(1972) 1 *Anglo-AmLR* 482; TONG Zhiwei. ‘Judicial Impartiality: the Key to improve the Party’s Lead’(2014) 9 *Yanhuang Chunqiu* 1; John Leubsdorf, ‘Theories of Judging and Judge Disqualification’(1987) 62 *NYULR* 237, 252-67; Craig(n20) Chp 13.

guarantees of impartiality are missing in international adjudication, especially in international arbitration which is characterized by looser qualification requirements for appointment, less prohibition on extra-judicial activities, allowance for ‘forum shopping’, closer links between parties and the adjudicators.²³ Even in standing inter-state courts, some criticize the institution of *ad hoc* judges at the PCIJ and ICJ because it violates the principle ‘*nemo debet esse iudex in propria sua causa*’.²⁴

Some others refuse the domestic law model, because of the differences between domestic and international adjudication in many aspects such as jurisdiction,²⁵ the hierarchy or distribution of labour among the courts,²⁶ the relationship between the parties and the courts,²⁷ the normative contexts,²⁸ the applicable law,²⁹ and the existence of challenges peculiar to international adjudication.³⁰ As a result of such difficulties in transposing principles and rules of impartiality from domestic adjudication to international

²³ Catherine A. Rogers, ‘Regulating International Arbitrators: A Functional Approach to Developing Standards of Conduct’(2005) 41 Stan JIL 53, 56. Some permanent international courts also suffer from similar problems, and strong control by parties is even one of the reasons for states to establish international courts. See Laurence R. Helfer and Anne-Marie Slaughter, ‘Why States Create International Tribunals: A Response to Professors Posner and Yoo’(2005) 93 CaliLR 899, 945–47.

²⁴ See eg Lauterpacht(n11) 232-35; M. C. Chagla, *An Ambassador Speaks*(Asia Publishing House 1962) 109-15, cited in Mani ‘*Audi alteram partem*: journey of a principle from the realms of private procedural law to the realms of international procedural law’(1969) 9 INYIL 381, 403.

²⁵ Samantha Besson, ‘Legal Philosophical Issues of International Adjudication’ in Casare P R Romano, Karen Alter and Yuval Shany(eds) *The Oxford Handbook of International Adjudication*(OUP 2013) 417; Hersch Lauterpacht, ‘The Absence of an International Legislature and the Compulsory Jurisdiction of International Tribunals’(1930) 11 BYBIL 134, 135; Alain Pellet and Daniel Müller, ‘Article 38’, in Andreas Zimmermann *et al*.(eds) *The Statute of the International Court of Justice: A Commentary*(3rd edn, OUP 2019) 931.

²⁶ Besson(n25) 417; *Prosecutor v Tadić*(Decision) IT-94-1-AR72(2 October 1995) para. 11.(‘*Tadić*’)

²⁷ Hersch Lauterpacht, *The Development of International Law by the International Court*(Stevens 1958) 39; Iain Scobbie, “‘Une heresie en matiere judiciaire’” – The Role of the Judge *ad hoc* in the International Court’(2005) 4 Law & Practice of International Courts and Tribunals 421, 433.

²⁸ cf Ronald Dworkin, *Law’s Empire*(HUP 1986) 239; Ulrich Fastenrath, ‘Relative Normativity in International Law’(1993) 4 EJIL 333; Andreas Paulus, ‘International Adjudication’ in Samantha Besson and John Tasioulas(eds) *The Philosophy of International Law*(OUP 2013) 209.

²⁹ Donald H. Regan, ‘International Adjudication: A Response to Paulus’, in Samantha Besson and John Tasioulas(eds) *The Philosophy of International Law*(OUP 2010) 228.

³⁰ Tom Dannenbaum, ‘Regulation of the International Bench’, in William Schabas & Shannonbrooke Murphy(eds) *Research Handbook on International Courts & Tribunals*(Edward Elgar 2016) 382-5.

contexts, some others suggest that there should be a conception of impartiality defined specifically for international adjudication.³¹ The statutes and rules of many international courts and tribunals all provide their own guarantees of impartiality by restricting the judges' non-judicial activities, their links and interest with the case, and disqualifying them when there are grounds of bias.³² Where there are gaps in such written norms, it may be possible to seek inspiration from the norms of impartiality in other international courts and tribunals.³³

The difficulty in borrowing norms from existing international judicial practice is that there are different types of international adjudication,³⁴ and different courts and tribunals may have different standards of impartiality. Despite this, an informal attempt to codify the international judicial practice on independence and impartiality has been made by the Burgh House Principles of the International Law Association.³⁵ However, the drafters of the Burgh House Principles admit that the application of the codified principles can be different by reference to the 'functions and characteristics' of different international courts and tribunals.³⁶ This might indicate that the rules and standards of impartiality should vary with the functions and circumstances in different contexts of international adjudication, but it is unclear what constitute the relevant functions and appropriate circumstances. For example, should standing courts and *ad hoc* tribunals adopt the same standards of impartiality? Should party-appointed judges be bound by the same rules of

³¹ See eg Rogers(n23) 57; Megret(n1) 120-22.

³² See Ruth Mackenzie *et al.*, *The Manual on International Courts and Tribunals*(2nd edn, OUP 2010).

³³ eg *Mauritius v. UK*(n19).

³⁴ Benedict Kingsbury, 'International Courts', in James Crawford and Martti Koskenniemi(eds) *The Cambridge Companion to International Law*(CUP 2012) 205-209; Regan(n29) 226.

³⁵ The Burgh House Principles(n2).

³⁶ *ibid*; See also Fabien Gélinas, 'The Independence of International Arbitrators and Judges: Tampered With or Well-Tempered?'(2011) 24 NYILR 1, 12; C.F. Amerasinghe, 'Reflections on the Judicial Function in International Law', in Tafsir Malick Ndiaye and Rüdiger Wolfrum(eds) *Law of the Sea, Environmental Law and Settlement of Disputes*(Martinus Nijhoff 2007) 125.

impartiality with other judges? Should inter-state cases have different standards of impartiality from investor-state arbitration or international criminal courts?

The above discussion about the impartiality of international courts and tribunals raise a number of issues which this thesis addresses:

- On the concept of impartiality, what meaning and content should be given to it? How should this be done? Is it indeed possible to achieve impartiality? How should one approach the application of the concept to international adjudication and is it possible to formulate clear principles and rules of impartiality that apply in international adjudication?
- Where there is uncertainty about the applicability of a particular principle or rule of impartiality to a specific international court or tribunal, to what extent can this be informed from the law of impartiality from domestic courts and other international courts and tribunals?
- In a particular context of international adjudication, to what extent can the functions and characteristics of the international court or tribunal determine how and to what extent the concept of impartiality applies? How can we identify these relevant functions and characteristics?

B. Arguments and Structure of the Thesis

The purpose of this research is to bring some order to such a chaotic field of study on judicial impartiality. But it is indeed difficult to provide some models or categories which can ‘exhaust the universe’³⁷ of the literature and practice on judicial impartiality in international courts and tribunals, or to propose a universally acceptable conception of impartiality applicable to all international adjudicative contexts. This thesis argues that the

³⁷ See Jan Klabber, Book Review(2016) 13 IOLR 379, 385.

inherent difficulties in reaching such goals are due to the ideal nature of the concept of impartiality as well as the argumentation structures³⁸ underlying the process of identification of the applicable principles and rules of judicial impartiality in international courts and tribunals.

The thesis proposes an ideal-oriented theory and a functional approach to understand the different conceptions, principles and rules of impartiality. Ideals are values that can never be fully achieved or clearly formulated, and they can be translated into concrete principles and rules.³⁹ The ideal-oriented theory is inspired by Fuller's accounts of morality,⁴⁰ and is also useful to understand complex legal concepts.⁴¹ In Chapter I, I argue that impartiality can be understood as an ideal by synthesizing the accounts of impartiality of several legal and political philosophers, such as Fuller, Hart, Dworkin, Lucy, Rawls, and Young. Framing impartiality as an ideal can explain the pluralism of the principles and rules of impartiality in different contexts of adjudication as well as the insufficiency of legal principles and rules to guarantee the full achievement of judicial impartiality.

A functional approach can help to derive some concrete principles and rules from the ideal of impartiality. The approach can be seen as a combination of deductive and inductive reasoning. Through this approach, we can deduce more concrete principles and rules of impartiality from the role or function of adjudication, which in turn can be induced through an analysis of some relevant characteristics, such as the reasoning process, the

³⁸ Namely, the 'structure and hidden codes' lying behind the surface of explicit legal arguments. See Mario Prost, 'Born again Lawyer: FATU as an Antidote to the Positivist Blues' (2006) 7 German Law Journal 1037, 1040.

³⁹ Wibren van der Burg, 'The Importance of Ideals' (1997) 31 JVI 23, 25.

⁴⁰ Lon L. Fuller, *The Morality of Law* (YUP 1969) Chp 1. ('MoL')

⁴¹ See Wibren van der burg and Sanne Taekema, 'The Importance of Ideals: Debating Their Relevance in Law, Morality, and Politics', in Wibren van der Burg and Sanne Taekema (eds) *The Importance of Ideals* (Presses Interuniversitaires Europeennes 2004) 16.

relationship between parties and the court, the means of appointment, and the procedural rules. This concurs with the Burgh House Principles which require to consider the functions and appropriate circumstances when applying the principles of impartiality in international courts and tribunals.

In Chapter II and III, the thesis will show how the ideal nature of impartiality and the functional approach are manifested in international adjudication through exploring the legal arguments on the identification of the principles and rules of judicial impartiality in international law. The examples in these two chapters focus on the issue how to ascertain the applicable principles and rules of impartiality when the constitutive instrument of a particular international court or tribunal does not expressly confer the power or duty to apply them. Such principles and rules of impartiality can be applied to determine issues such as whether a particular judge should be disqualified,⁴² what kind of voting rules should be adopted,⁴³ and whether the institution of *ad hoc* judges in the PCIJ and ICJ is compatible with impartiality.⁴⁴

A typical approach to address such gaps in statutory rules is to rely on other sources in international law, such as customary international law and general principles. But relying on such a source-based approach has deficiencies in some circumstances.⁴⁵ Koskenniemi, for example, demonstrates the inherent indeterminacy in adopting the source doctrine in international legal argumentation due to the ‘oscillation’ between the inductive and deductive reasoning.⁴⁶

In Chapter II, Koskenniemi’s thesis on indeterminacy of international legal

⁴² *Mauritius v. UK*(n19); *Wall Advisory Opinion*(n19); *Furundzija*(n19).

⁴³ *Mosul case*(n19); *South West Africa Advisory Opinion*(n19).

⁴⁴ See n24.

⁴⁵ See eg Devika Hovell. ‘The Authority of Universal Jurisdiction’(2018) 29 EJIL 427; Hovell(n18) Chp 3.

⁴⁶ Koskenniemi(n12).

argumentation is applied and tested in the process of identification of the principles and rules of impartiality from sources such as general principles from domestic law, general principles from international judicial practice, and the notion ‘inherent power’.⁴⁷ It confirms the need to consider the functions and characteristics of different international courts and tribunals, and demonstrates the inherent difficulties in identifying determinate principles and rules of impartiality because neither the source-based doctrine nor the functional approach clearly indicate which functions or characteristics of an international court or tribunal should be taken into account when identifying the principles and rules of impartiality. This, in turn, concurs with the ideal nature of judicial impartiality in the sense that it cannot be clearly formulated or fully achieved.

Despite such inherent difficulties, it is always desirable to seek to formulate the principles and rules of impartiality more clearly, and to further clarify what constitute the functions and characteristics relevant to the principles and rules of impartiality. Chapter III will do so through analogical reasoning. The distinction between induction and deduction does not exhaust all forms of the ‘structure and hidden codes’ underlying the surface of international legal argumentation. There is a third argumentation type, *i.e.*, analogical reasoning consisting of ‘abduction’ which involves transferring from the ‘source domain’ a rule that could address the uncertainty in the ‘target domain’ and the justification of the abduction based on relevant similarities.⁴⁸

In Chapter III, the thesis argues that proper use of the analogical reasoning can contribute to further clarifying the functions and characteristics relevant to the norms of

⁴⁷ Chester Brown, ‘Inherent Powers in International Adjudication’, in Cesare P. R. Romano, Karen J. Alter, and Yuval Shany(eds) *The Oxford Handbook of International Adjudication*(OUP 2014) 831; Chester Brown, *A Common Law of International Adjudication*(OUP 2007) 40-41.

⁴⁸ Scott Brewer, ‘Exemplary Reasoning: Semantics, Pragmatics, and the Rational Force of Legal Argument by Analogy’(1996) 109 HLR 923.

impartiality applicable to a particular international court or tribunal. A case-by-case analysis is undertaken in the Chapter III, as the relevant similarities warranting analogous application of the principles and rules of impartiality may vary in different cases. Chapter III examines the analogous application of the principles and rules of impartiality in standing inter-state courts. It argues that the standing inter-state courts should not apply by analogy the maxim *nemo judex in sua causa* from domestic public law but should take inter-state arbitration as a source domain. This analogical reasoning can be justified by reference to the critical differences between inter-state standing courts and the domestic public adjudication (*e.g.*, the existence of division of judicial and other functions, the relationship between parties and the court, state consent and equality of states, whether there are sufficient numbers of qualified judges), and by reference to the relevant similarities between inter-state standing courts and inter-state arbitration (*e.g.*, the similar legal position and function of the party-appointed adjudicators).

Chapter III also examines examples of the analogous application of the principle *nemo judex in sua causa* in semi-judicial international decision-making bodies, such as the Council of the League of Nations. It identifies some other functions and characteristics relevant to the application of the principles and rules of impartiality in such contexts, *e.g.*, the binding nature of the decisions of the international bodies, the composition of decision makers, the subject matter of the dispute, the *ad hoc* or standing nature of the body, the existence of an obligation to subject to international supervision, *etc.* Although absolute determinacy is hard to achieve, a valid analogical reasoning justified by such relevant similarities can provide some rational force to the legal argumentation.

CHAPTER I

THE CONCEPT OF IMPARTIALITY: THE IDEAL, PRINCIPLE AND RULE ASPECTS

Chapter I proposes an ideal-oriented theory and a functional approach to understand the different conceptions, principles and rules of impartiality. This theoretical basis can explain why different courts and tribunals can have different norms of impartiality, what shapes their content and scope, and why it is impossible for legal norms to fully guarantee judicial impartiality.

To illustrate the theory, part A starts with a more familiar distinction between aspiration and duty in morality made by Lon Fuller, before showing that a similar distinction between ideals, principles and rules exists in law. Part B shows how impartiality can be understood as an ideal by synthesizing the accounts of impartiality of several legal and political philosophers, such as Fuller, Hart, Dworkin, Lucy, Rawls, and Young. Finally, part C will illustrate how a functional approach can contribute to translating the ideal of impartiality into concrete principles and rules of impartiality by reference to the functions and characteristics of a particular adjudicative body.

A. The Distinction between Ideal, Principles and Rules in Law

The distinction between the ideals, principles and rules in law is inspired by Fuller's Distinction between the morality of aspiration and duty in his famous book *The Morality of Law*.⁴⁹ Some other scholars also support such a distinction as well as the role of the aspirational or ideal elements in law.⁵⁰ The distinction is useful for understanding and

⁴⁹ Fuller, *MoL*(n40).

⁵⁰ Eg Wibren van der Burg, 'The Morality of Aspiration', in Willem J. Witteveen and Wibren van der Burg(eds) *Rediscovering Fuller*(AUP 1999) 170-1; Philip Selznick, *The Moral Commonwealth: Social Theory and the Promise of Community*(UCP 1992) 38; Kenneth I. Winston, 'The Ideal Element in a Definition of Law'(1996) 5 L&P 89, 89-111.

prescribing standards for professional ethics.⁵¹ This following part highlights that it is also useful for understanding impartiality for both domestic and international adjudication.

1. The Distinction between Aspiration and Duty in Morality

According to Fuller, aspiration is the morality ‘of excellence, of the fullest realization of human powers’.⁵² Aspiration represents the highest standards, and achievement of it is worthy of a compliment, but the failure to achieve it should not lead to punishment.⁵³ As a comparison, the morality of duty ‘lays down the basic rules’ the violation of which should bring about punishment and condemnation.⁵⁴ Both the aspirational and duty aspects are needed in social ordering.⁵⁵

Fuller uses the metaphor of locating the pointer on the scale between aspiration and duty to illuminate that the two aspects are not distinct, but rather belong to a continuum.⁵⁶ Prescribing professional ethics requires properly setting the pointer on the scale. If the pointer is set too high, *i.e.*, too many rigid regulations and rules are imposed on the professionals, they may feel depressed due to incapacities to satisfy the strict requirements and it is impossible for them to ‘practice the “art of the profession”’.⁵⁷ If the pointer is set too low, *i.e.*, there are insufficient rules and standards to regulate the profession, this will cause neglect of some essential minimum norms.⁵⁸

⁵¹ Fuller himself uses this distinction in his report on professional responsibility submitted to the American Bar Association. See David Luban, ‘Rediscovering Fuller’s Legal Ethics’, in Willem J. Witteveen and Wibren van der Burg(eds) *Rediscovering Fuller*(AUP 1999) 199; John M. A. DiPippa, ‘Lon Fuller, the Model Code, and the Model Rules’(1996) 37 STLR 303, 327-42.

⁵² Fuller, *MoL*(n40) 5.

⁵³ *ibid* 30-31.

⁵⁴ *ibid*.

⁵⁵ Philip Selznick(n50) 146.

⁵⁶ Fuller, *MoL*(n40) 27.

⁵⁷ Burg(n50) 172.

⁵⁸ *ibid* 173; Fuller, *MoL*(n40) 170.

One consequence of making such a distinction is that different aspects of morality correspond to different kinds of regulatory methods. Moral aspiration encourages a person to pursue excellence, while duties prevent a person from violating the minimum standards. Thus aspiration is usually stated positively, while duties are addressed negatively.⁵⁹ Applying Fuller's theory to professional ethics, Wibren van der Burg argues that '[t]he aspirational aspect of professional morality is usually better left to professional autonomy; we should not try to formulate strict legal rules for it', while 'the morality of duty better lends itself to legal regulation'.⁶⁰

If applied to judicial impartiality, as professional ethics for judges,⁶¹ Fuller's distinction between aspiration and duty recognizes the existence and value of both the vague and flexible aspirational standards as well as the detailed rules of conduct in regulation of judges,⁶² and calls for consideration of whether the pointer between the two is located properly in a particular context. As shown in the next session, Fuller's distinction between aspiration and duty not only applies in morality, it is also in parallel with the distinction between ideal, principle and rule in law.

2. Bridging Fuller's Theory of Morality to Law through 'Ideal-Oriented Theory'

Fuller's distinction between the aspiration and duty might be unfamiliar to lawyers who usually deal with legal principles and rules.⁶³ To address this problem, Wibren van der Burg suggests using the distinction between ideals (or values), principles, and rules⁶⁴

⁵⁹ Fuller, *MoL*(n40).

⁶⁰ Burg(n50) 173.

⁶¹ See Seibert-Fohr(n21) 757-78.

⁶² cf Rogers(n23) 58.

⁶³ Wendel(n17) 307.(What regulates the conducts of judges should be 'positive law' rather than 'judicial ethics'.); cf *Wall Advisory Opinion*(n19) Diss Op Buerghenthal, para 10.

⁶⁴ Burg and Taekema(n41) 16.

in law to ‘make Fuller’s idea of the two moralities work in practice’.⁶⁵ Ideals can be defined as

values that are implicit or latent in the law ... that usually cannot be fully realized, and that partly transcend contingent, historical formulations, and implementations in terms of rules and principles.⁶⁶

As for the difference between rules and principles, rules are of an all-or-nothing nature, meaning that they are applicable or non-applicable, whereas principles have a weight dimension that makes it possible for principles to be more or less relevant to a legal case.⁶⁷

The relationship between ideals, principles and rules is similar to that between aspiration and duty in morality. Both can be seen as belonging to a continuum. When going along the continuum of duty/aspiration, or the continuum of rule/principle/ideal, the moral force becomes weaker in three aspects: its obligatory force decreases, it becomes vaguer and more ambiguous, and its interpretation becomes more subjective.⁶⁸

As will be further illustrated in the following sections, impartiality can be perceived as an essential ideal or value that adjudication should pursue for.⁶⁹ It can also be formulated into concrete principles and rules the violation of which should lead to negative consequences. The formulation of such principles and rules may be different in different legal cultures. Judicial impartiality in the UK, for example, is translated into natural justice principles.⁷⁰ In the US, impartiality can be understood as detachment from parties,⁷¹ thus

⁶⁵ Burg(n50) 174-80.

⁶⁶ Burg, ‘The Importance of Ideals’(n39).(Values and ideals are generally replaceable, but Burg argues that ideals can be distinguished from other values in the sense that ideals ‘cannot be completely grasped in a description or fully realized’.)

⁶⁷ Burg and Taekema(n41) 16; Hart(n3) 136.

⁶⁸ Burg, ‘The Morality of Aspiration’(n50) 176.

⁶⁹ See Chapter 1.C.

⁷⁰ Hart(n3) 160.(These principles, ie, ‘*nemo debet esse iudex in propria sua causa*’ and ‘*audiatur et altera pars*’, ‘are guarantees of impartiality or objectivity’).

⁷¹ See comparison of the UK and US law on bias and the disqualification, in Margaret Allars, ‘Disqualification for Bias and International Tribunals: Room for a Common Test’(2013) 78 MLR 379.

the pre-hearing review of files and the *ex parte* communication are absolutely prohibited and constitute reasons to challenge judicial impartiality,⁷² but these situations are considered natural for judicial positions in some civil law systems.⁷³

3. The Possible Benefits of Adopting the Ideal-Oriented Theory

It might be argued that ideals are irrelevant to law. However, authors with philosophical backgrounds would argue for the necessity of studying ideals in the context of law, as a means ‘to understand, to interpret and to work within a legal system’ , ‘to understand the concept of law or the phenomenon of law’ and ‘to understand certain specific phenomena, ranging from legal development to legal pluralism and legal ethics’.⁷⁴

Ideal can be considered as the value which is impossible to be clearly formulated and fully realized. The unrealizable nature of the ideal means that ‘we can never grasp the meaning of ideals completely; there is always a surplus of meaning’.⁷⁵ This character of ideals explains why they become key elements in pluralism and in controversy and debate.⁷⁶

Besides, ideals are also useful as an evaluative tool and as guidance for legal development. Ideals can be considered ‘as the foundations of normative theories, as the ultimate value from which all principles and rules and concrete judgments can be deduced’.⁷⁷ They function as points of orientation for legal practices and can thus play a

⁷² See the below texts corresponding to nn 168-188.

⁷³ Rogers(n23) 103.

⁷⁴ Burg and Taekema(n41) 21.

⁷⁵ Wibren van der Burg, ‘Law as a Second-Order Essentially Contested Concept’(2017) 8(2) Jurisprudence 230, 245.

⁷⁶ *ibid.*

⁷⁷ Burg, ‘The Importance of Ideals’(n39) 27.

role in motivating the law toward perfection and in justifying decisions and opinions.⁷⁸ It is believed that framing a concept as an aspiration or ideal can help criticize the use of the ideal, the way it is interpreted and the extent to which it is neglected or overemphasized in law and practice.⁷⁹

The following discussion shows two major benefits of adopting the ideal-oriented theory to the notion of judicial impartiality. Firstly, framing judicial impartiality as an ideal can explain the pluralism and controversy in the norms of impartiality in different contexts, and the insufficiency of legal principles and rules to guarantee the achievement of impartiality. (Part B) Secondly, more concrete principles and rules of impartiality can derive from the ideal of impartiality by reference to the functions and characteristics of different contexts of adjudication. (Part C)

B. The Ideal Aspect of Judicial Impartiality

The following parts will demonstrate three aspects of judicial impartiality as an ideal: (1) Judicial impartiality is a derivative concept; (2) It is impossible to formulate judicial impartiality clearly; and (3) It is impossible to achieve judicial impartiality fully. As illustrated below, viewing judicial impartiality as an ideal can explain the pluralism of normative practices and contestations on the meaning of impartiality, and the insufficiency of legal principles and rules to guarantee the full achievement of impartiality.

1. Judicial Impartiality as a Derivate Concept

Ideals are usually complex and cluster concepts. The difficulty in clearly formulating the ideal is partly owing to the fact that its content and scope can be ascertained

⁷⁸ Burg and Taekema(n41) 18.

⁷⁹ *ibid* 13.

only when connected with some other complex ideals or concepts.⁸⁰ This part illustrates the nature of impartiality as a derivative concept by discussing its relationship with other concepts such as social justice, judicial discretion and legal interpretation.⁸¹

a. Judicial Impartiality and Social Justice

In the literature of moral and political philosophy, impartiality is now and then viewed as the premise of any adequate conception of justice for a pluralistic society.⁸² Some legal scholars also use the impartiality defined in the literature of social justice as criteria to evaluate domestic and international adjudication.⁸³ They may take it for granted that the meaning of impartiality in moral and political philosophy is the same with that in judicial contexts.⁸⁴ As illustrated below, relying on the literature of social justice, however, can hardly ever provide an objective and universally accepted conception of impartiality applicable to all legal contexts.

The meaning, demands, and scope of impartiality are controversial in moral and political philosophy. The first controversy lies in what is required for an impartial decision maker. The debate focuses on whether impartiality should be conceptualized as ‘detachment’ and ‘disinterest’ or should include elements such as ‘compassion’.⁸⁵ Rawls, for example, argues that the impartial decision makers should distance themselves from

⁸⁰ Greenstein(n15) 540; Lucy, ‘Adjudication’(n16) 207.

⁸¹ The conceptions of impartiality can also be informed when connected with some other values, such as legitimacy and rationality. See Lucy, ‘Adjudication’(n16).

⁸² See T. Jollimore, ‘Impartiality’, *Stanford Encyclopedia of Philosophy*(2019) <<https://plato.stanford.edu/entries/impartiality/>> accessed 16 July 2019; Susan Mendus, ‘Impartiality’, in John S. Dryzek, Bonnie Honig, and Anne Phillips(eds) *The Oxford Handbook of Political Theory*(OUP 2008) 423-35.

⁸³ See eg Diane A. Desierto, ‘Rawlsian Fairness and International Arbitration’(2015) 36 UPJIL 939; Laverne Jacobs, ‘From Rawls to Habermas: Toward a Theory of Grounded Impartiality in Canadian Administrative Law’(2014) 51 OHLJ 543.

⁸⁴ Lucy, ‘Impartiality’(n14) 5.

⁸⁵ Jollimore(n82).

‘their immutable personal characteristics and socio-economic circumstances’.⁸⁶ But some others argue that such a view confuses impartiality with impersonality, disinterest, or indifference.⁸⁷ It is like the ‘god’s point of view’, beyond ‘the capacity of the typical moral agents’.⁸⁸ Also, an abstract or impersonal evaluator might not be able to make credible decisions on substantive moral issues because she could not comprehend the particular circumstances of the parties concerned.⁸⁹

Some scholars find it problematic to define impartiality in negative or abstract terms. It is hard to identify ‘which elements must be *absent* from the psychology of the decision-maker, or which must *pretend* to be absent’.⁹⁰ One account of impartiality defines impartiality as ‘being exclusively influenced by the considerations which it is supposed to influence the particular case in hand; and resisting the solicitation of any motives which prompt to conduct differently from what those considerations would dictate’.⁹¹ Such a definition is circular as it begs the question what constitutes proper influence and what is not.

Another controversy about the scope of impartiality focuses on the issue whose views should be taken into account when we attempt to judge impartiality.⁹² Rawls’s notion of impartiality is restricted to the structure of a particular nation-state, while some others believe that a wider view should be taken to include the viewpoints of ‘others’, whether or

⁸⁶ John Rawls, *A Theory of Justice* (HUP 1971) 9-10, 19, 20-21; See also Jacobs(n83) 547.

⁸⁷ M.C. Henberg, ‘Impartiality’ (1978) 8(4) CJP 715, 718.

⁸⁸ See Jollimore(n82).

⁸⁹ Iris Young, *Justice and the Politics of Difference* (PUP 1990) 104-5; cf Seyla Benhabib, ‘The Generalized and the Concrete Other: The Kohlberg-Gilligan Controversy and Feminist Theory’ (1987) 5(4) PRAXIS International 402.

⁹⁰ Young, *ibid*.

⁹¹ J.S. Mill, *Utilitarianism* [1861], in *On Liberty and Utilitarianism* (Everyman’s Library 1992) 154; See also Roderick Firth, ‘Ethical Absolutism and the Ideal Observer’ (1952) 12(3) PPR 317, 336.

⁹² Jollimore(n82).

not belong to a fixed group or not.⁹³ Marty Sen, for example, distinguishes between ‘open’ and ‘closed’ impartiality, which ‘turns on whether or not the exercise of impartiality assessment is confined ... to a fixed group’.⁹⁴

The above discussion on social justice raises many questions to judicial impartiality: Should judicial impartiality be understood as detachment or disinterest? What constitutes improper influence upon his or her psychology? Should an impartial international judge be confined to the views of parties to the dispute, or should also consider the interest of other members of the international community? As impartiality can be considered as a derivative concept of social justice, different conceptions of social justice will lead to different answers to these questions.⁹⁵

b. Judicial Impartiality, Judicial Discretion and Legal Interpretation

As mentioned by Wendel, a theory of judicial impartiality must address how judges exercise their judicial discretion and the problem of legal interpretation.⁹⁶ In other words, the conception of judicial impartiality derives from one’s theory about judicial discretion and legal interpretation, and different theories of the latter would lead to different conceptions of the former.

One view of legal interpretation, for example, considers that the goal of judges is to apply the law accurately,⁹⁷ and judges should decide cases based on law rather than

⁹³ Charles Jones, *Global Justice: Defending Cosmopolitanism*(OUP 1999); Amartya Sen, ‘Open and Closed Impartiality’(2002) 99(9) JP 445.

⁹⁴ Sen(n93) 445.

⁹⁵ See Greenstein(n15).

⁹⁶ Wendel(n17) 307.

⁹⁷ See eg *Marshall v. Jerrico, Inc.*, 446 US 238, 242(1980)([A]n impartial tribunal is to prevent ‘unjustified or mistaken deprivations...’ based on ‘an erroneous or distorted conceptions of the facts or the law’); To ensure accuracy in decision-making is also a rationale for rules against bias in private law. See Valsan(n18) 178.

extra-legal considerations.⁹⁸ To achieve this task, the judicial process should be objective, and free from the influence of subjective preferences.⁹⁹ This account of judicial process rests on the presumption in positive legal theory that law can be separated from non-law based on an objective standard.¹⁰⁰ It presumes the existence of a legitimate authority to make law, and the judicial process operates as a ‘transmission belt’ to implement the will of the legislation.¹⁰¹ Impartiality, in this sense, is understood as interpreting and applying the law accurately and objectively. In addition to the positivist account of impartiality, Dworkin also establishes a theory of law to describe proper legal interpretation as necessarily impartial.¹⁰²

As a comparison, Kelsen argues that judges are free to integrate their ‘personal value judgements’, ‘political maxims’, and ‘ideas of justice’ into law through their decisions.¹⁰³ More so, those taking a critical approach to legal interpretation would see law as a camouflage of politics and thus judicial impartiality is impossible.¹⁰⁴

The above analysis shows that the conceptions of impartiality derive from other complex concepts, which partly explains why it is difficult to formulate impartiality clearly. More examples of the different formulations of judicial impartiality are shown in the following section.

⁹⁸ Wendel(n17).

⁹⁹ See Leubsdorf(n22) 261.(Leubsdorf may refer to this view as a ‘cognitive model’ to judicial process, but he does not agree that this model can properly explain the rules of judicial disqualification in the United States.) cf Hovell, ‘The Power of Process’(n18) 66.(‘The adjudicatory framework is well placed to achieve the instrumentalist model’s goal of accuracy in the implementation of the substantive law.’)

¹⁰⁰ See Hart(n3) 160.(Hart’s conception also connects impartiality to objectivity.)

¹⁰¹ Richard B. Steward, ‘The Reformation of American Administrative Law’(1975) 88 HLR 1667, 1672; Duncan Kennedy, ‘Legal Formality’(1973) 2 JLS 351, 358-59.

¹⁰² See also Raban(n17) Chp 6;Dworkin, *A Matter of Principle*(n17) 119-45.

¹⁰³ Bernstorff(n17) 216.

¹⁰⁴ See Wendel(n17) 315.

2. The Difficulty in Formulating the Ideal of Judicial Impartiality Clearly

Different ways of formulating judicial impartiality can be identified. Charles Geyh, for example, provides a framework to analyse judicial impartiality by focusing on the beneficiaries of impartial adjudication: ‘whether a judge is “impartial enough” to uphold the law may depend on whom we are trying to convince, why they care, and what is needed to convince them’.¹⁰⁵ Three different audiences (in the context of the US domestic courts) care about judicial impartiality, which leads to three different dimensions of impartiality: (i) ‘parties and the procedural dimension’, (ii) ‘the public and the political dimension’, and (iii) ‘judges and the ethical dimension’.¹⁰⁶

Differently, Justice Scalia of the US Supreme Court, in *Republican Party of Minnesota v. White* identified three meanings for judicial impartiality:

1. *Party Neutrality*, which the Court identified as a ‘lack of bias for or against either *party* to the proceedings.’
2. *Open-mindedness*, which the Court defined as a ‘willing[ness] to consider views that oppose his preconceptions, and remain open to persuasion, when the issues arise in a pending case.’
3. *Issue neutrality*, which the Court defined as a ‘lack of preconception in favor of or against a particular *legal view*.’¹⁰⁷

William Lucy provides another analysis of impartiality by dividing it into three aspects: attitude and role, outcome impartiality and procedural impartiality.¹⁰⁸ His view is introduced below in more detail, which will be used in next section to test whether this conception of impartiality can be fully achievable or not.¹⁰⁹

Lucy thinks that impartiality is relevant only when one plays particular roles (*i.e.*,

¹⁰⁵ Geyh(n14) 511.

¹⁰⁶ *ibid.*

¹⁰⁷ *Republican Party of Minn. v. White*, 536 US 765, 775-78(2002).

¹⁰⁸ Lucy(n84) 14-24.

¹⁰⁹ See Section B.3.b of this chapter.

it is a role requirement), one of which is to settle disputes as a mediator, arbitrator or judge, or as a referee to a competition.¹¹⁰ In these conflictual or competitive contexts, impartiality goes beyond solely a requirement of attitude (*i.e.*, the decision-maker is expected to address the dispute or competition ‘in a non-partisan frame of mind’¹¹¹), it is also incorporated in the very process of the decision making, and may also be required for the outcomes of the decisions.¹¹² These latter two different senses of impartiality are called ‘outcome impartiality’ and ‘procedural impartiality’.¹¹³ Outcome impartiality, in a broad sense, requires the decision to be reached regardless of (1) ‘the needs’ and (2) ‘the status’, and (3) ‘the past or present conduct of the parties to dispute in dispute or competition’, and (4) ‘impact to exactly the same degree on disputants or competitors’.¹¹⁴ But these four aspects are not always achievable in all contexts. According to Lucy, in the judicial context, only the first two elements of outcome impartiality are satisfied, while the satisfaction of the last two is questionable.¹¹⁵ Procedural impartiality emphasizes on the quality of the ‘rules’ and ‘practices’ that make up the judicial process. It requires the rules and practices to have equal impacts upon disputants with the significant differences between disputants given due consideration (*e.g.*, the ability of disputants to speak the language and understand what is going on), and to ensure both parties be heard and represented.¹¹⁶ Procedural impartiality also has a role requirement, which is embodied in the rules specifying how the decision-maker should behave. The decision makers are required to exclude themselves from

¹¹⁰ Lucy(n84) 7.

¹¹¹ *ibid* 12.

¹¹² *ibid* 7-8.

¹¹³ *ibid* 8. See also A. Montefiore(ed) *Neutrality and Impartiality*(CUP 1975) 128-32, 222-7; K. Malleson, *The New Judiciary*(Ashgate 1999) 64-65; cf M.D. Bayles, *Procedural Justice*(Kluwer 1990) 22-3.

¹¹⁴ Lucy, ‘Impartiality’(n14) 8.

¹¹⁵ *ibid*.

¹¹⁶ *ibid* 9-10.

decision-making if they have or appear to have a genuine interest in the outcome.¹¹⁷ To summarize Lucy's view, impartiality is a requirement of role and attitude. In judicial contexts, it is complemented with procedural requirements (e.g. ensuring equal treatment/representation of parties and duties on the adjudicators). In some cases, judicial impartiality also extends to outcome impartiality.¹¹⁸

It is hard to accommodate these different accounts of judicial impartiality within a single conception of impartiality. Also, each of the components of judicial impartiality may be competing against each other. Highlighting different aspects of judicial impartiality drives the principles and rules on judicial impartiality towards divergent directions.¹¹⁹

3. The Impossibility to Achieve the Ideal of Judicial Impartiality Fully

As there are different conceptions of impartiality, it is difficult to test whether all of them can be achieved. The following discussion on the possibility of impartiality mainly focuses on the conceptions of impartiality in the views of Hart, Dworkin and Lucy. As will be explained below, it is impossible for a human being to be free from any bias, for legal reasoning to completely exclude bias, and for legal rules and practices to have exactly the same impacts upon different parties (and potential parties) in a case.

a. The Inability of Legal Reasoning to Guarantee Impartiality

Should there be an impartial judge free from any bias, there must be no improper influence upon his or her psychology.¹²⁰ However, social science research has found that human beings are subject to human prejudices and judges are not exceptions: the decisions

¹¹⁷ *ibid* 12.

¹¹⁸ *ibid* 13.(He also discusses the relationship between impartiality and neutrality.)

¹¹⁹ Geyh(n14) 512.

¹²⁰ Raban(n17) 1.

of judges may be influenced by their ideological inclinations, policy preference, the perceptions of the audiences, race and gender, as well as subconscious biases, *etc.*¹²¹

It may be proposed that the improper influence upon judicial decisions can be conceived to be eliminated provided that the adjudicators decide their cases based on law and provide reasoning. However, an examination of the debates between Hart and Dworkin shows that the extra-legal considerations of judges may necessarily influence the outcome of cases.¹²² Judicial impartiality in this sense requires judges to follow the law,¹²³ but it remains unanswered how the judges ascertain the content of the law and whether legal reasoning can preclude ‘politics’.¹²⁴

i. Hart’s Concept of Law

According to Hart’s theory of law, an impartial interpretation of law can be achieved through following the ‘rules of recognition’ which everyone agrees to be a conventional standard and can be ascertained empirically by reference to social facts.¹²⁵ Proper legal interpretation is to follow linguistic conventions regarding the right use of a general term.¹²⁶ It is not to make any real choices but only to refer to a choice already made by the linguistic community.¹²⁷ In this way, if judges make decisions based and solely based on law, and following this ‘rule of recognition’, an impartial decision is always achievable as no improper extra-legal preferences will be taken into account.

¹²¹ See nn 5-9.

¹²² This part mainly focuses on how Hart and Dworkin address this issue, but there are other possible answers. See Wendel(n17) 315-16.

¹²³ See also Hernández(n13) 207.

¹²⁴ Politics can be broadly defined as whatever normative opinions not incorporated into law. See Duncan Kennedy, *A Critique of Adjudication*(HUP 1997) 24-25.

¹²⁵ Hart(n3) 100; Raban(n17) 10.(The precondition for determinacy of international law thus existence of a conventional standards of ‘rule of recognition’ agreed by all.)

¹²⁶ Hart(n3) 125-26.

¹²⁷ Hart(n3) 126; Raban(n17) 15.

However, this view does not completely preclude the possibilities of taking extra-legal considerations into decision-making. Firstly, the linguistic communities cannot be drawn upon in the cases of ‘essentially contested concepts’ which leave much room for exercise of individual discretion.¹²⁸ In cases involving interpretation and application of the essentially contested concepts, or in Hart’s words, terms with ‘open texture’, he views the function of judges as more of ‘judicial legislation’ than ‘judicial interpretation’.¹²⁹ Thus, it is questionable to what extent his theory about impartiality is applicable to legal practice if the ‘essentially contested concepts’ are not only ‘margins of rules’ but form the very essence of certain legal systems, such as international law.¹³⁰

Secondly, a distinction should be made between a theory of law and a theory of adjudication.¹³¹ In other words, the content of law is one thing, but its interpretation and application by judges are another.¹³² Even if the content of law can be ascertained through objective facts, judges may exercise discretion in balancing different legal reasons and deciding which one prioritizes over another in interpreting and applying the law. In such cases, the judges effectively create new law by reference to extra-legal considerations instead of simply discovering what the law is.¹³³ Judges may ‘habitually and legitimately’ take into account factors beyond what the law requires when making decisions.¹³⁴

¹²⁸ Hart(n3) 135-36; Raban(n17) 15.

¹²⁹ Hart(n3) 135.

¹³⁰ *ibid* 16-22. See also Samantha Besson, ‘Sovereignty in Conflict’ (2014) 8(15) *European Integration online Papers*, Section 3.1-3 <<http://eiop.or.at/eiop/texte/2004-015.htm>> accessed 7 January 2019; Koskenniemi(n12) Chp 4; Dan Sarooshi, *International Organizations and their Exercise of Sovereign Powers* (OUP 2005) 3-4.

¹³¹ Raban(n17) 22.

¹³² Wendel(n17) 314.

¹³³ *ibid* 318.

¹³⁴ Raban(n17) 23.

ii. Dworkin's Views

Dworkin disagrees with the very existence of some morality-free rules of recognition suggested by Hart.¹³⁵ He considers that moral argumentation is necessary for establishing any legal rules,¹³⁶ which brings in extra-legal influence upon judges. When explaining why judges disagree with each other, his position is that there are uncertainties over the grounds which determine whether a legal proposition is right or wrong.¹³⁷ These grounds, named by Dworkin as 'principles', are part of the law. Unlike Hart's rules of recognition, principles are not stable conventions that judges rely on, nor are they determined by social facts.¹³⁸ To prove the existence of a principle, judges should relate it to previous legal precedents and apply his 'own moral and political convictions' to argue that the proposed principle shows the political morality of the community in its best light.¹³⁹

Legal principles are distinguished from the extra-legal 'policy' considerations, because it is one thing to say what is the point of having law, while it is another to make a political argument regarding the function of law.¹⁴⁰ In this sense, it might be argued that judges are impartial as long as they decide cases by reference to rules and principles and exclude policies. However, the distinction between 'policy' and 'principles' is unhelpful for excluding extra-judicial considerations, because the process of delineating the

¹³⁵ cf Joseph Raz, *Ethics in the Public Domain*(Clarendon 1994) 194-221(He defends the source-based criteria.)

¹³⁶ Dworkin, *Law's Umpire*(n28) 4;Wendel(n17) 313.

¹³⁷ *ibid.*

¹³⁸ *ibid.*

¹³⁹ See Gerald J. Postema, "'Protestant' Interpretation and Social Practices'(1987) 6 L&P 283, 297-98.

¹⁴⁰ Dworkin, *Law's Umpire*(n28) 65-68.

boundary between ‘principles’ and ‘policy’ also requires normative political arguments.¹⁴¹

To conclude, the examination of the Hart and Dworkin debate shows that elimination of all extra-legal considerations in judicial decisions is impossible. Thus, to the extent that impartiality is understood as judging cases based on law, full achievement of the ideal of impartiality is impossible. Some others may argue against this conception of impartiality by drawing on William Lucy’s conception which emphasizes on the equal impacts upon disputants or potential disputants in a case. However, the following part shows that the impartiality in the sense of actual equal impacts is also not fully achievable.

b. The Impossibility of Actual Equal Treatment of Parties

Impartiality, including judicial impartiality, can be understood in the sense of equal impacts or equal treatments. It is generally accepted in the literature on social justice that impartiality reflects ‘a commitment to equality’.¹⁴² Outcome and procedural impartiality for adjudication also requires that both parties be treated equally.¹⁴³ It is also considered as a requirement for natural justice,¹⁴⁴ and as a general principle of international law.¹⁴⁵ However, actual equal impacts upon parties is not fully achievable because parties are in fact different. This view can be exemplified via examination of Rawls’s view and the responses to him, as well as the manifestations of these views in judicial contexts.

In social justice theories, the concept of impartiality is raised in the background of inequalities in social positions. Rawls’s approach of making impartial decision is through ‘abstraction’ and ‘distance’. Decisions should be made by those who have removed

¹⁴¹ Wendel(n17) 320.

¹⁴² Mendus(n82); Tomas Nagel, ‘Moral Conflict and Political Legitimacy’(1987) 16 PPA 215; Brian Barry, *Justice as Impartiality*(Clarendon Press 1995) 8.

¹⁴³ Lucy, ‘Impartiality’(n14) 10, 20.

¹⁴⁴ Craig(n20) Chp 14.

¹⁴⁵ Cheng(n20) Chp14.

themselves from the individual qualities and social-economic conditions such as age, race, gender and degree of wealth.¹⁴⁶ However, this view is not necessarily workable in real life. It is impossible for such an abstract decision maker to actually empathize with another in a different social location.¹⁴⁷

Law and adjudication also purport to treat both parties equally by adopting a similar approach of abstraction (*i.e.*, viewing each party as abstract legal persons), and disregard legally irrelevant features.¹⁴⁸ In the law and adjudication, impartiality as ‘equality of impact and treatment’ means equal impact on abstract legal persons occasionally associated with the features of real or reasonable individuals, or put in the position or context of the real or reasonable persons.¹⁴⁹

However, it can be criticized that the abstraction approach in law and adjudication fails to accommodate the real particularities sufficiently.¹⁵⁰ For example, regarding the institution of *ad hoc* judge in the ICJ, the fact that judges might be influenced by their national interests was considered as a legally relevant feature, thus the institution of *ad hoc* judge was introduced to mitigate the inequality caused by the difference that one party to the dispute may have its national sitting on the bench while the other party does not have one.¹⁵¹ However, other actual differences might fail to be considered by the drafters of the Statute, – *e.g.*, only appointing one *ad hoc* judge could not guarantee equality when states sometimes group together on one side of a case,¹⁵²—or ‘when the President is a national of

¹⁴⁶ Rawls(n86) 19.

¹⁴⁷ Young(n89) 104-105.

¹⁴⁸ See also Vaughan Lowe, ‘The Function of Litigation in International Society’(2012) 61 ICLQ 209, 211(‘[T]he law strips away all of the ostensible justifications and arguments that are regarded as irrelevant.’)

¹⁴⁹ Lucy, ‘Impartiality’(n14) 26-28.

¹⁵⁰ *ibid.*

¹⁵¹ See further discussion in the text corresponding to nn 453-484 in chapter III.

¹⁵² Lauterpacht(n11) 227; Dannenbaum(n30) 391.. For example, the Netherlands and Denmark together only appointed one *ad hoc* judge in their joint cases against West Germany. See *North Sea Continental Shelf*

one of the parties who may decide a case by casting vote'¹⁵³.

An alternative approach is to draw on the views of feminists who seek to accommodate and elucidate the particularities. But the sources from which they draw the differences are sometimes oblique and inconsistent.¹⁵⁴ In addition, relying on the feminist approach would completely replace law with ethical considerations of contextualists and feminists. Thus, it is quite tough to accommodate the 'broad and deep sensitivity' to actual different features with the account of judicial impartiality which requires equal impacts upon parties and potential parties.¹⁵⁵ In a word, impartiality in the sense of equal treatment cannot be fully achieved due to the unclear contours of what constitute legally relevant particularities.¹⁵⁶

To conclude, the above analysis shows that judicial impartiality satisfies the three characteristics of an ideal, which can explain the pluralism in the law of impartiality in different legal contexts and the insufficiency of legal principles and rules to guarantee the full achievement of impartiality.

The discussion of ideals must be combined with specific rules and problems in law, otherwise it will become a 'wholesale ideological critique'¹⁵⁷. The ideal aspect of the judicial impartiality corresponds to the aspirations in morality, and failure to achieve it

Cases(Germany v Denmark and the Netherlands)(Judgment)[1969] ICJ Rep 3; See Art. 31(5) of ICJ Statute.

¹⁵³ PCIJ Series D, No. 2, addendum, 247-248 (1926), citing Sienho Yee, 'The Presidency of the International Tribunal for the Law of the Sea and the 'National State Extension' Concern' (2011) 10 Chinese Journal of International Law 739, 754; The rule to disqualify national president was later added in the Article 32(1) of the ICJ Rules of Court of 1978.

¹⁵⁴ Lucy, 'Impartiality'(n14) 26-28.

¹⁵⁵ *ibid* 29; Nicola Lacey, 'Violence, Ethics and Law: Feminist Reflections on a Familiar Dilemma' in Susan James and Stephanie Palmer(eds) *Visible Women: Essays on Feminist Legal Theory and Political Philosophy*(Hart Publishing 2013) 129-33.(She specifies the deep difficulties in contextualism.)

¹⁵⁶ There is also inherent indeterminacy in adopting the source doctrine in international law to draw a clear contour of what constitute the particularities relevant to principles and rules of impartiality. See chapter II.

¹⁵⁷ Burg and Taekema(n41) 13.

fully should not lead to condemnation;¹⁵⁸ while the rules of impartiality, corresponding to the duties in morality, should be specified more clearly and achieved fully. It is therefore worthy of exploring how the ideal of impartiality can be translated into the concrete principles and rules of impartiality for adjudication.

C. Translating the Ideal into Concrete Principles and Rules of Impartiality

Translating the ideal of impartiality into principles and rules involves two steps: The first step is going ‘from concept to conception’ ; The second is going ‘from conception of the ideal to less abstract principles and policies’.¹⁵⁹ With the examples of deriving principles and rules of impartiality in adversarial and civil law traditions, this section shows that this process involves consideration of the relevant functions and characteristics of different kinds of adjudication.

1. Example 1: The Principles and Rules of Impartiality Deriving from Fuller’s Conception of Adjudication

Fuller and even his opponents both believe that the relevant ideal is ‘a logical determinant of the existing law’.¹⁶⁰ Since impartiality as an ideal can be interpreted in different ways, the concrete principles and rules of impartiality may also be different in different contexts. Kenneth comments that different types of adjudication give judges different aims, which entail ‘transformations in the ideal structure of a typical lawsuit, which in turn is regulated by a different set of canons to achieve impartiality’.¹⁶¹ The following part introduces how Fuller deduces more concrete principles of impartiality from

¹⁵⁸ Fuller, *MoL*(n40) 30-31.

¹⁵⁹ Burg, ‘The Morality of Aspiration’(n50) 177-78.

¹⁶⁰ Winston(n50) 111.

¹⁶¹ *ibid.*

his conception of impartial adjudication.¹⁶²

a. The Principles of Impartiality Proposed by Fuller

Fuller identifies six principles of impartiality as the internal morality of adjudication:

(1) The judge does not act on his own initiative, but on the application of one or both of the disputants. (2) The judge has no direct or indirect interest (even emotional) in the outcome of the case. (3) The judge confines his decision to the controversy before him and attempts no regulation of the parties' relations going beyond that controversy. (4) The case presented to the judge involves an existing controversy, and not merely the prospect of some future disagreement. (5) The judge decides the case solely on the basis of the evidence and arguments presented to him by the parties. (6) Each disputant is given ample opportunity to present his case.¹⁶³

Later, he added judicial duties connected to statutory interpretation.¹⁶⁴ These principles are applicable not only to judges, but also to other adjudicators, such as 'commissioners, hearing officers, arbitrators, members of administrative boards, referees, umpires and even "bureaucrats"'.¹⁶⁵ The satisfaction of the above conditions of impartiality can make 'the moral force of a judgment of decision' be 'at a maxim'.¹⁶⁶ But he recognizes that these conditions cannot all be achieved in practice, and it sometimes may be unwise to comply with all of them. He agrees that some of the principles of impartiality can be sacrificed for the realization of other principles or values.¹⁶⁷

¹⁶² cf Burg, 'The Morality of Aspiration'(n50) 176.(claiming 'Fuller is of little help in this respect.')

¹⁶³ Winston(n50) 110. See also Lon L. Fuller, *The Problems of Jurisprudence*(The Foundation Press 1949) 706. cf Lon L. Fuller and Kenneth I. Winston, 'The Forms and Limits of Adjudication'(1978) 92 HLR 353, 381-93.

¹⁶⁴ Fuller, *MoL*(n40) 132; Winston(n50) 111.

¹⁶⁵ Fuller, *The Problems of Jurisprudence*(n163) 708.

¹⁶⁶ *ibid* 706.

¹⁶⁷ *ibid*.

b. How the Principles are Derived from the Ideal of Impartiality

A full illustration of these principles (and others not specified) requires demonstration of the way they derive from the ideal of impartiality.¹⁶⁸ To do this, Fuller firstly adopts a broad understanding of adjudication, defined as ‘a process of decision that grants to the affected party a form of participation that consists in the opportunity to present proofs and reasoned arguments’.¹⁶⁹ Based on this understanding on the function of adjudication, he argues that the way adjudicators are supposed to articulate norms has implications on the proper design of the legal process, including the requirements of judicial conducts.¹⁷⁰

The judges’ reasoning process plays an important role in the ‘authoritative determinations of questions raised by claims of right and accusations of guilt’.¹⁷¹ Both their interpretation of statutory rules and the making of common law involve a process of fitting existing legal norms into particular contexts,¹⁷² that is, judges need to reason about the implications of general principles by taking into account the specifics of the context.¹⁷³ He argues that such a reasoning process has implications on the design of the legal process, because

[T]o reason in this way, the adjudicator had to be able to engage sympathetically with each parties’ situation, but at the same time, maintain sufficient detachment to be able to reflect on the overall social practice at the necessary level of generality.¹⁷⁴

¹⁶⁸ *ibid.* See also Winston(n50) and the special issue of Law and Philosophy 13(1994) 3,

¹⁶⁹ Fuller and Winston(n163) 353-409, esp 369.

¹⁷⁰ Robert G. Bone, ‘Lon Fuller's Theory of Adjudication and the False Dichotomy between Dispute Resolution and Public Law Models of Litigation’(1995) 75 BULR 1273, 1301.

¹⁷¹ Fuller and Winston(n163) 368; Bone(n170) 1303.

¹⁷² Bone(n170) 1305.

¹⁷³ *ibid.*

¹⁷⁴ Fuller and Winston(n163) 382-84, 391.

Adversarial systems, according to Fuller, should be adopted to balance the tension between the sympathy and detachment, otherwise

[A]ny arbiter who attempts to decide a dispute without the aid of partisan advocacy...must undertake not only the role of judge, but that of representative for both of the litigants.¹⁷⁵

Judicial impartiality, therefore, should be understood together with party participation through reasoned argument and the adversarial presentation in the US legal system, all of which are designed to accommodate the tension between sympathy and detachment which is considered by Fuller as inherent in adjudication as a form of moral reasoning.¹⁷⁶

Fuller's analysis arguably only applies to adversarial systems addressing conflicts between private parties, and it overlooks some other important characteristics of adjudication (*e.g.*, the relationship between judges and their appointing power¹⁷⁷) or other types of adjudication (*e.g.*, public law litigation¹⁷⁸ and adjudication in civil law traditions¹⁷⁹). However, the method by which he derives the principles of impartiality from the ideal can be extended beyond the common law system.¹⁸⁰ His approach shows that more concrete principles and rules can be deduced from a conception of the role, function or goal of an impartial adjudication which in turn can be induced through an analysis of the characteristics such as the approach of judicial reasoning and the relationship between judges and parties.

¹⁷⁵ *ibid* 382.

¹⁷⁶ Bone(n170) 1309.

¹⁷⁷ Geyh(n14) 511.(Geyh also adds a third dimension, ie, the ethics dimension based on the inter-relationship between the professions of judges themselves.)

¹⁷⁸ Winston(n50) 111; Owen M. Fiss, 'The Forms of Justice'(1979) 93 HLR 39.

¹⁷⁹ Fuller questions whether the judges in non-adversarial systems can be impartial, see n175.

¹⁸⁰ See eg Rogers(n23) 58.(Catherine A. Rogers states that her functional approach to the ethics of international arbitrators is inspired by Fuller's theory.)

2. Example 2: The Principles and Rules of Impartiality in Civil Law Systems

To explain the regulations of behaviours of civil law judges, Catherine A. Rogers builds on Fuller's functional approach which considers the characteristics such as legal reasoning process, relationship between judges and participants, and she adds the means of appointment as another characteristic relevant to determining the principles and rules of impartiality.¹⁸¹

In terms of the legal reasoning process, she considers that a civil law judge 'mechanically applies legislative provisions to given fact situations'.¹⁸² When required to fill gaps in law, judges in civil law systems sometimes expressly make policy-oriented decisions, but their primary task remains to figure out the legal answer which is consistent with the written law and help to realize 'the manifestation of the "organic whole"'.¹⁸³ Prior decisions play a small role, as the norm of *stare decisis* is not applicable. In terms of the appointment process, the judicial selection is more 'a technical selection of the most qualified personnel to perform the judicial function' than a political action.¹⁸⁴ These factors indicate that civil law judges are viewed more as a technician to apply the written law rather than being capable of shaping the development of law like common law judges.

In terms of the relationship between judges and participants, civil law judges are much more active. They should conduct a pre-hearing evaluation of the documents and find out how the case should continue before coming to the case.¹⁸⁵ In addition, as the case

¹⁸¹ Rogers(n23) 100.

¹⁸² Mitchel de S.-O.-I'E. Lasser, 'Judicial(Self-) Portraits: Judicial Discourse In The French Legal System'(1995) 104 Yale LJ 1325, 1334.

¹⁸³ Vivian Grosswald Curran, 'Romantic Common Law, Enlightened Civil Law: Legal Uniformity and the Homogenization of the European Union'(2001) 7 CJEL 63, 100.

¹⁸⁴ Rogers(n23) 101.

¹⁸⁵ *ibid* 102.

advances, the judge discusses it with the parties, sometimes suggesting temporal opinions on the probable outcome and sometimes inviting the party to give up a case that turns out to be futile.¹⁸⁶

These factors are combined to shape the function of judges and the principles and rules of impartiality. Compared to the common law judges, the civil law judges' control over witness questioning and pre-hearing reviewing of files are not considered as judicial bias like in the US system. As a result of the 'quasi-collaborative' relationship between judges and lawyers in civil law countries, *ex parte* communication is not absolutely prohibited as it is in the US, same for judicial statements regarding the relative strengths of each party's case during proceedings and some prior knowledge of the case.¹⁸⁷ These factors explain why a judge's impartiality in the US might be called into question in situations which are considered natural for judicial positions in the civil law systems.¹⁸⁸

Different types of adjudication give judges different goals or functions.¹⁸⁹ Based on the functional approach, we can *deduce* more concrete principles and rules of impartiality based on a conception of the role, function or goal of adjudication, which in turn can be *induced* through an analysis of some characteristics of adjudication, such as the reasoning process, the means of appointment, the relationship between judges and parties, and the procedural rules.

However, a critique can be made against the functional approach. It seeks to find concrete principles and rules of impartiality to apply to international adjudication based on

¹⁸⁶ *ibid.*

¹⁸⁷ *ibid* 103.(As a comparison, the method of legal reasoning in common law and the law-making role of judges imply that granting equal participation becomes paramount.)

¹⁸⁸ *ibid.*

¹⁸⁹ Winston(n50) 111.

a combination of deductive and inductive reasoning.¹⁹⁰ But as shown in Koskenniemi's treatise and the analysis of the argumentation structures of several examples in the next chapter, a combination of deductive and inductive reasoning could not necessarily lead to determinate principles and rules of impartiality. This indicates the inherent insufficiency of legal principles and rules to guarantee the full achievement of judicial impartiality.

As illustrated in next two chapters, the ideal-oriented theory and the functional approach can also play an explanatory and prescriptive role in the law of impartiality in international adjudication: international law also witnesses the pluralism of norms of impartiality in different contexts of adjudication, the connection between functions and characteristics and the applicable principles and rules of impartiality, and the insufficiency of legal principles and rules to guarantee the full achievement of impartiality.

¹⁹⁰ cf Burg(n50) 179.(Burg describes this as 'a continuous process of mutual adjustment'.)

CHAPTER II

THE ARGUMENTATION STRUCTURES FOR IDENTIFYING THE PRINCIPLES AND RULES OF IMPARTIALITY IN INTERNATIONAL ADJUDICATION: INDUCTIVE AND DEDUCTIVE REASONING

Impartiality is considered by some as being connected to the value of objectivity and accuracy.¹⁹¹ Such an understanding of law, judicial process and impartiality is also adopted by some scholars of international law. It is referred to as the ‘rule-approach’ by Matti Koskenniemi,¹⁹² with the typical example being the work of George Schwarzenberger.¹⁹³ This rule-approach separates law from subjective politics by reference to ‘an objective test of pedigree (sources)’.¹⁹⁴ According to this approach, objective law is considered superior to subjective politics.¹⁹⁵ In the same vein, the views of international courts, particularly the ICJ, are considered more authoritative as a law-determining agency compared to the views of individual states or scholars, because of its impartiality and objectivity.¹⁹⁶ International courts are presumed to be able to guarantee ‘impartiality and the freedom of their members from personal interest in the issues at stake’, because the cases are presented by two or more parties represented by experienced lawyers and the court is composed of judges with diversified legal training backgrounds and experiences, which enable them to make more comprehensive and authoritative decisions.¹⁹⁷

As a critique to the rule approach to impartiality, Koskenniemi’s monograph

¹⁹¹ See above texts corresponding to nn 102-104.

¹⁹² Koskenniemi(n12) 189-96.

¹⁹³ *ibid* 189.

¹⁹⁴ *ibid*; See also Oscar Schachter, ‘The Invisible College of International Lawyers’(1977) 2 NULR 217, 219.

¹⁹⁵ Koskenniemi(n12) 189.

¹⁹⁶ Georg Schwarzenberger, ‘The Inductive Approach to International Law’(1947) 60 HLR 539, 553.

¹⁹⁷ *ibid* 552.

From Apology to Utopia exposes a tension between the deductive approach and inductive approach in international legal argumentation.¹⁹⁸ As a result of this tension, the source doctrine is arguably unable to reach a determinate and objective result in international legal argumentation without giving rise to the criticism of either utopia or apology.¹⁹⁹ If international law is inherently indeterminate, it follows that the possibility of the impartiality of judges is called into question,²⁰⁰ since their value systems and extra-judicial preference will inevitably influence their legal argumentation.²⁰¹ It also follows that it is difficult to impartially determine whether judges are impartial,²⁰² because the legal argumentation on rules of impartiality is also characterized by the ‘oscillation’ between the inductive approach and deductive approach.²⁰³

This chapter shows that his thesis confirms the applicability of the functional approach to international adjudication and indicates the insufficiency of the functional approach for identifying determinate principles and rules of impartiality applicable to international adjudication. This chapter will firstly introduce the use of induction and

¹⁹⁸ The inductive/deductive dichotomy is used in Schwarzenberger, ‘Inductive Approach’ (n196). Martti Koskenniemi actually uses the terms ‘ascending patterns’ and ‘descending patterns’ of argumentation, but they ‘bear a relationship to the more familiar dichotomy of deductivism/inductivism’. See Koskenniemi(n12) 59; The induction/deduction dichotomy is also relevant to the naturalism/positivism dichotomy. See eg Kevin jon Heller, ‘What is an International Crime: A Revisionist History’ (2017) 58 HILJ 353, 356.

¹⁹⁹ Koskenniemi(n12) 306.

²⁰⁰ *ibid* 503; Megret(n1) 108-109.

²⁰¹ Schachter(n194) 218.

²⁰² A distinction can be made between first-order impartiality and a higher-order impartiality. First-order impartiality requires a decision maker to judge impartially, while a higher-order impartiality requires impartiality in assessing whether the first-order decision maker is impartial. In case of judicial disqualification, for example, higher-order decision makers are needed to assess whether a challenged judge is impartial by reference to applicable principles and rules of impartiality. See a similar distinction in Thomas Nagel, ‘Moral Conflict and Political Legitimacy’ (1987) 16(3) PPA 215.

²⁰³ Koskenniemi(n12) 161. (‘[D]octrine oscillates between a descending and an ascending perspective in its effort to avoid apology and utopia.’)

deduction in international legal argumentation. Then it will use three examples on the identification of the applicable principles and rules of impartiality in international law to test Koskenniemi's idea.

A. The Use of Induction and Deduction in International Legal Argumentation

Both induction and deduction are used in international legal argumentation. Induction is used by logicians to mean 'the inference of a universal proposition from a finite number of particular instances'.²⁰⁴ The deduction can be defined as 'inference, by way of legal reasoning, of a specific rule from an existing and generally accepted ... rule or principle'.²⁰⁵ Induction is from specific to general, while deduction is from general to specific.²⁰⁶ Induction and deduction can be correlative. The universal propositions established through induction can then be used as the basis for deductive reasoning.²⁰⁷

The inductive and deductive approaches are often used in judicial practice, although there are some disputes on which approach should be preferred. For example, in the Separate Opinions of Judge Bhandari of the *Whaling in the Antarctic*, he used both deductive and inductive reasoning to reach the conclusion that JARPA II is a commercial whaling programme.²⁰⁸ In the Dissenting Opinion of Judge Torres Bernárdez in *Fisheries Jurisdiction*, he argued that the reasoning of the judgment was

²⁰⁴ Wilfred Jenks, *The Prospects of International Adjudication* (Stevens & Sons 1964) 628.

²⁰⁵ Stefan Talmon, 'Determining Customary International Law: The ICJ's Methodology between Induction, Deduction and Assertion' (2015) 26(2) EJIL 417, 420.

²⁰⁶ *ibid.*

²⁰⁷ Jenks(n204) 629.

²⁰⁸ *Whaling in the Antarctic* (Australia and New Zealand (intervening) v Japan) (Judgment) [2014] ICJ Rep 226, Sep Op Bhandari, para 23.

wrongfully based on a deductive approach and is a ‘free interpretation’, while the interpretive approach for a unilateral declaration should be an inductive one.²⁰⁹ As a comparison, in the *Bemba* case of the International Criminal Court, one appellant argued that the Trial Chamber wrongfully adopted the inductive reasoning, in breach of the principle of legality in article 22(2) of the Rome Statute,²¹⁰ while the Appeal Chamber held that the Trial Chamber’s reasoning is correct.²¹¹

Similar controversies exist in cases on the identification of customary international law. In the *Gulf of Maine* case, for example, the Court mentioned that ‘customary international law ... comprises a set of customary rules whose presence in the *opinio juris* of States can be tested by induction based on the analysis of sufficiently extensive and convincing practice and not by deduction from preconceived ideas’.²¹² Despite this, the deduction is still used by judges in practice to identify customary international law.²¹³

In the legal literature on international legal argumentation, different scholars also have different preferences on which one should be adopted,²¹⁴ and many of them agree that both of the two approaches are required in some circumstances.

²⁰⁹ *Fisheries Jurisdiction (Spain v Canada)* (Jurisdiction) [1998] ICJ Rep 432, Diss Op Torres Bernárdez, para 130.

²¹⁰ *Prosecutor v. Bemba Gombo* (Judgment) ICC-01/05-01/13-2275-Red (8 March 2018) para 1381.

²¹¹ *ibid*, H14.

²¹² *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America)* (Judgment) [1984] ICJ Reports 246, 229, para 111; See also the use of inductive reasoning in *Jurisdictional Immunities of the State (Germany v. Italy, Greece intervening)* (Judgment) [2012] ICJ Reports 99.

²¹³ *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)* (Judgment) [2002] ICJ Report 3; See also Talmon (n205) 418; But Bordin argues that this is an illustration of the structure of analogical reasoning. See Fernando Lusa Bordin, *The Analogy between States and International Organizations* (CUP 2019) 18; *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)* (Judgment) [1969] ICJ Reports 3. (Deduction is used by five judges in their separate opinions.)

²¹⁴ See the debate between Georg Schwarzenberger and Wilfred Jenks. Jenks (n204); Schwarzenberger, ‘Inductive Approach’ (n196).

Schwarzenberg, for example, prefers the inductive approach, but he suggests that international lawyers who adopt the inductive approach should consider the views of those using the deductive approaches (*e.g.*, ‘naturalists’, ‘Grotians’, and ‘voluntarists’), while those who adopt a deductive approach should ‘reserve judgment whether such speculations are rules of international until they have been confirmed by the application of inductive methods’.²¹⁵ Stefan Talman accepts the widespread agreement that induction should be used in identifying customary international law, but he also finds several circumstances where deduction becomes necessary.²¹⁶

Martti Koskenniemi even argues that the ‘oscillation’ between the inductive and deductive reasoning makes international law inherently indeterminate. This can be shown with his example of treaty interpretation.²¹⁷ One of the goals of treaty interpretation is to find out the intent of parties.²¹⁸ The intent needs to be discovered via an inductive process, through an examination of some empirically observable factors such as texts, context, subsequent practice, and preparatory work.²¹⁹ However, the existence of these different factors does not necessarily lead to a determinate interpretation as they may conflict with each other,²²⁰ and there is no ‘constraining

²¹⁵ Schwarzenberg, ‘Inductive Approach’(n196) 566-67; See also Jenks(n204) 658-62.(Inductive and deductive reasoning are complementary to each other).

²¹⁶ Talmon(n205) 421-22. These situations include scenarios where there are(1) lack of state practice,(2) conflicting state practice,(3) lack of *opinio juris*, or(4) conflicts between state practice and *opinio juris*.

²¹⁷ Koskenniemi(n198) 333-45.

²¹⁸ ILC, ‘Report of the International Law Commission on the Work of its 68th Session’(2 May-10 June and 4 July-12 August 2016) UN Doc A/71/10, 136; Hersch Lauterpacht, ‘Restrictive Interpretation and the Principles of Effectiveness in the Interpretation of Treaties’(1949) 26 BYBIL 48, 83.

²¹⁹ Vienna Convention on the Law of Treaties(VCLT) 1155 UNTS 331, arts 31, 32; Koskenniemi(n198) 336; G. G. Fitzmaurice, ‘The Law and Procedure of the International Court of Justice: Treaty Interpretation and Certain Other Treaty Points’(1951) 28 BYBIL 1, 7; Lauterpacht, ‘Restrictive Interpretation’(n218) 62.

²²⁰ It is unclear which one of these elements should be given more weight than others. See Richard Gardiner, *Treaty Interpretation*(OUP 2015) Chp5.

hierarchy among them’.²²¹ To solve the conflicts, some deductive basis may be relied on to address the issue which factor should be given more weight over others. As said by Koskenniemi, ‘intent can be known only in its manifestations – which manifestations (e.g., text, behavior, teleology) count depends on whether they express intent.’²²² In this sense, Koskenniemi argues that the combination of induction and deduction makes treaty interpretation a ‘*perpetuum mobile*’, and the argument becomes ‘hopelessly circular’.²²³ The identification of customary international law also faces a similar problem.²²⁴

B. The Structure of Legal Argumentation on the Principles and Rules of Impartiality: Examples

Koskenniemi’s thesis is now applied and tested in this section and indeed it reveals that the oscillation between inductive and deductive reasoning can explain some of the potential uncertainties in identifying the norms of impartiality in international adjudication.

These examples address the question: where there are no express rules, does any international organ or institution have an implied power or duty to apply certain legal principles and rules to guarantee impartiality, and how to ascertain the content and scope of them?

To answer this issue, the sources of international law should be addressed. Article 38 of the ICJ Statute is the generally accepted points of departure for sources.²²⁵

²²¹ *ibid.*

²²² Koskenniemi(n12) 337.

²²³ *ibid* 337.

²²⁴ *ibid* 303-87.

²²⁵ ICJ Statute, art 38.

As for procedural matters, more attention has been attached to the constitutive instruments of international courts, as a result of state consent. But the constitutive instruments may have gaps: either because drafters intentionally to leave the gap, or are unable to expect all the circumstances,²²⁶ or fail to reach a consensus (as a result, they use ambiguous language).²²⁷ To fill the gaps, international courts would rely on other sources, such as customary international law, general principles of law, and judicial decisions, provided that they are not contrary to the explicit norms of the instruments. Apart from these sources, the notion ‘inherent power’ is also used to fill the gaps in procedural norms. These rules are applicable to courts or tribunal by virtue of their functions regardless of whether they are expressly conferred to them via their statutes and rules of procedure.²²⁸ The following examples on identifying the principles and rules of impartiality mainly focus on the latter three types of sources: general principles from domestic law, general principles from international judicial practice and the notion ‘inherent power’.²²⁹

1. Example 1: General Principles of Impartiality from Domestic Law

Domestic law is sometimes relied on to inform the principles and rules of impartiality in international law. In the *Furundzija* case, for example, the domestic rules and cases of several countries are used to interpret the law of disqualification of the ICTY.²³⁰ The general principles from domestic law have played an important role in

²²⁶ Chester Brown, ‘Inherent Powers’(n47) 831. The drafters of the PCIJ Statute leaves the Court itself with the power to amend its procedural rules and this is maintained by the ICJ.(PCIJ Statute, art 30; ICJ Statute, art 30).

²²⁷ Chester Brown, *A Common Law of International Adjudication*(n47) 40.

²²⁸ *ibid* 41.

²²⁹ Koskeniemi has already demonstrated in his monograph how the oscillation between induction and deduction operates in treaty interpretation and identification of customary international law. This thesis will mainly focus on the sources which he does not address specifically.

²³⁰ *Furundzija*(n19) paras 164-215.

filling gaps (or to avoid ‘*non liquet*’),²³¹ preventing judicial legislation and subjectivity,²³² and inspiring the interpretation and development of international law.²³³

Identifying general principles from domestic law usually involves a two-step method: the first step is to identify the commonality of domestic law and to distil the essence of the principle; the second is to modify the principle to suit the particularities of international law.²³⁴ This section shows how the induction and deduction operate in these two steps, and how the different characteristics between domestic and international adjudication can be taken into account when identifying principles and rules of impartiality for international courts and tribunals.

a. Finding Commonality of the Law of Impartiality from Domestic Legal Systems

The first step starts with an inductive process of examination of the domestic law of all or most states. If the domestic law of only a few states is considered, criticism would arise regarding whether the selected countries represent the major legal systems in the world.²³⁵ If too many states are selected, their domestic law on judicial impartiality may be conflicting with each other, making it difficult to distil a coherent principle from domestic law. In case of the law on judicial disqualification, for example, as explained by Leubsdorf, the underlying rationale and preconditions of

²³¹ Lauterpacht, *The Development of International Law by the International Court*(n27) 166; Neha Jain, ‘Judicial Lawmaking and General Principles of Law in International Criminal Law’(2016) 57 HILJ 111, 114; Pellet and Müller(n25) 930.

²³² Catherine Redgwell, ‘General Principles of International Law’, in Stefan Vogenauer and Stephen Weatherill(eds) *General Principles of Law: European and Comparative Perspectives*(Hart Publishing 2017) 8-9.

²³³ Cheng(n20) 390. These functions are not mutually exclusive. See Miles Jackson, ‘State Instigation in International Law’(2019) 39(2) EJIL 391, 398.

²³⁴ Jaye Ellis, ‘General Principles and Comparative Law’(2011) 22(4) EJIL 949, 953.

²³⁵ Neha Jain, ‘Comparative International Law at the ICTY: The General Principles Experiment’(2015) 109(3) AJIL 486, 490-92. The requirement of representativeness in the inductive process is informed by a deductive basis, ie, the principle of sovereign equality of states. See Jackson(n233) 398.

disqualification law are essentially different in ‘a system of political adjudication’ and in ‘a system of cognitive judging’.²³⁶ Similarly, when Schwarzenberger seeks to examine whether there is a general principle of international law corresponding to the maxim *nemo judex in sua causa*, he finds inconsistencies between the domestic laws of some states. In states where this maxim applies, he finds that one of the preconditions for applying this principle is ‘the existence of a judiciary, which is distinct and independent of other public offices’,²³⁷ and the law of impartiality requires avoidance of improper links between judges and parties to the dispute. But this is different from the institutional design of courts in some countries. In the Chinese context, for example, by the constitutional design, the courts are necessarily associated with a party to the dispute in some scenarios,²³⁸ which arguably brings an inherent tension to the maxim *nemo judex in sua causa*.²³⁹

Even if some common denominators can be identified from domestic law, they may be too vague and too general to be of real value in practice.²⁴⁰ For example, even in countries where the principle *nemo judex in sua causa* is generally accepted, it is only generally agreed that monetary links are improper,²⁴¹ while there remain many other links that are contestable in the domestic law of different states.²⁴²

In these circumstances where it is difficult to use induction, a deductive

²³⁶ Leubsdorf(n22) 252-67.

²³⁷ Schwarzenberger, ‘The Nemo Judex in Sua Causa Maxim’(n 22) 483.

²³⁸ eg The connection between the court with the prosecutor in criminal cases through the ‘lead of the Party’, see TONG(n22).

²³⁹ *ibid*.

²⁴⁰ Ellies(n234) 958.

²⁴¹ But how much money constitutes impropriety may be disputable. See Craig(n20) Chp13.

²⁴² See a brief analysis of the meaning of judicial impartiality in a selected number of nations in Rogers(n23) pt II. B.

foundation may be relied on to eliminate the practice of some states from consideration.²⁴³ Stefan Talmon also argues that deduction can be used to ‘lower the standard of inductive evidence’.²⁴⁴ For example, to address the contradiction in different domestic law on judicial impartiality, Schwarzenberger suggested that the notion ‘civilized nations’ could serve as a basis to exclude the law of all authoritarian and totalitarian systems from consideration.²⁴⁵ However, this approach may not be accepted today since the term ‘civilized’ is now out of date.²⁴⁶

The notion of state consent may also serve as a deductive basis.²⁴⁷ But as Koskenniemi indicates, identifying the true consent of states again requires an inductive process.²⁴⁸ With regard to the question whether states have consented to apply rules of impartiality comparable to domestic adjudication to an international-decision making body, a comparison between the relevant characteristics of domestic and international adjudication is needed.²⁴⁹

b. Modifying the Principles to Suit the Particularities of International Adjudication

As shown below, there are many differences between domestic and international adjudication.²⁵⁰ It is questionable to what extent they should be taken into

²⁴³ In *Asylum* case, for example, the ICJ could not reach a decision by using induction, it deduces from the principle of territorial sovereignty a burden of proof to deal with the uncertainties in state practice. *Asylum(Colombia v. Peru)*(Judgment)[1950] ICJ Report 266, 274-77.

²⁴⁴ Talmon(n205) 427.

²⁴⁵ Schwarzenberger, ‘The Nemo Jux in Sua Causa Maxim’(n 22) 485.

²⁴⁶ Hugh Thirlway, *The Sources of International Law*(2nd edn, OUP 2019) 108.

²⁴⁷ William Thomas Worster, ‘The Inductive and Deductive Methods in Customary International Law Analysis: Traditional and Modern Approaches’(2014) 45 GJIL 445, 445.

²⁴⁸ See the texts corresponding to above nn 217-224.

²⁴⁹ Schwarzenberger, ‘The Nemo Jux in Sua Causa Maxim’(n 22) 497.

²⁵⁰ See also *Barcelona Traction(Belgium v. Spain)*(Second Phase, Judgment)[1970] ICJ Rep 64, 66, Sep Op Fitzmaurice, para 5.

account to decide whether states have intended to adopt principles and rules of impartiality comparable to domestic adjudication to international adjudication.

First of all, one of the critical features of national adjudication is that domestic courts usually have general and compulsory jurisdiction,²⁵¹ while compulsory jurisdiction in international adjudication is not necessary.²⁵² The level of judicialization of international disputes is lower than that in domestic contexts and many disputes even could not be adjudicated in international contexts.²⁵³ Based on this difference, Schwarzenberger argues that the lack of compulsory jurisdiction in international contexts explains why the principle *nemo iudex in sua causa* is not applicable as a matter of customary international law.²⁵⁴

Secondly, international adjudication is not centralized, nor does there exist a hierarchy or division of labour among different international courts and tribunals.²⁵⁵ Thus, certain domestic guarantees against improper judicial overreach (*e.g.*, the appeal mechanisms²⁵⁶) hardly ever exist in international adjudication.

Thirdly, the normative contexts within which international adjudication and domestic adjudication operate are also different. Ronald Dworkin draws a relatively

²⁵¹ See *eg Eastern Carelia* (Advisory Opinion) PCIJ Rep Series B No 5, 7, 27; *East Timor* (Portugal v. Australia) (Judgment) [1995] ICJ Rep 90, 101, para 26; *Armed Activities (new Application)* (DRC v. Rwanda) (Judgment) [2006] ICJ Rep 6, 32, para. 64; Even the UNCLOS compulsory dispute settlement mechanism does not establish 'a truly comprehensive regime of compulsory jurisdiction entailing binding decisions'. See *Southern Bluefin Tuna Case* (Australia and New Zealand v Japan) (Jurisdiction and Admissibility) (Arbitral Tribunal constituted under annex VII of UNCLOS) (Award of 4 August 2000) para 62.

²⁵² Besson (n25) 417; Hersch Lauterpacht, 'The Absence of an International Legislature' (n25) 135; Pellet & Müller (n25) 931.

²⁵³ Kingsbury (n34) 211.

²⁵⁴ Schwarzenberger, 'The Nemo Iudex in Sua Causa Maxim' (n 22) 497.

²⁵⁵ Besson (n25) 417; *Tadić* (n26) para. 11.

²⁵⁶ See Wendel (n17) 321-22.

coherent picture of value and principles for domestic adjudication,²⁵⁷ which can arguably guide judges in making impartial decisions,²⁵⁸ but the international community is characterized by a pluralism of values.²⁵⁹

Fourthly, the sources of law they rely on are generally different. International law may be more difficult to identify.²⁶⁰ In some cases, the role played by international judges may go beyond ‘adjudication’: their role in identifying the law to be applied is quite different from the judge’s usual role in domestic systems, especially when identifying customary law.²⁶¹ According to the post-modern critique, there may be more political influence in international adjudication, because international adjudicators need to ‘identify the law before applying it’, leading to an inevitable political contribution by the judge, and possibly of a greater level than domestic adjudication.²⁶²

Owing to these differences, questions would arise as to whether international adjudication is adjudication in the proper sense.²⁶³ If not, imposing the domestic requirements of impartiality upon international adjudicators would be questionable. But opposite views do exist. Besson, for example, argues that international and domestic adjudication are similar in law-enforcement and adjudicative functions in a dispute, as both of them settle disputes by reference to law. Other differences do exist and may be relevant to other functions of international law, but they do not affect such an

²⁵⁷ Ronald Dworkin, *Law’s Empire*(n28) 239.

²⁵⁸ Wendel(n17) 305.

²⁵⁹ Fastenrath(n28); cf Paulus(n28) 209.

²⁶⁰ Regan(n29) 228.

²⁶¹ *ibid.*

²⁶² *ibid* 229.

²⁶³ Gélinas(n36) 17.

adjudicative function itself.²⁶⁴ In addition, domestic adjudication is not independent of international adjudication, thus the differences should not be exaggerated too much.²⁶⁵

However, even if domestic approaches can be applied to international adjudication, this does not solve the distinct problems regarding impartiality present in international adjudication. Domestic law may be useful for addressing threats common to international and domestic courts, but they may be useless for treating threats peculiar to international courts. As identified by Tom Dannenbaum, international adjudication faces three special challenges to impartiality which are usually not present in domestic contexts. Firstly, almost all judges of international courts are elected by states and the national allegiance of judges is believed to create strong biases upon judges.²⁶⁶ Secondly, different from domestic courts, international adjudication lacks strong enforcement measures and therefore are highly dependent on states or parties themselves for cooperation and enforcement. The reliance on states and parties, in theory, can prevent inappropriate judicial overreach, but in practice, this guarantee of judicial impartiality proves to be problematic: it depends on ‘states having a roughly equal capacity to refuse cooperation and on state non-cooperation being driven primarily by a valid assessment that the court acted *ultra vires*’.²⁶⁷ Thirdly, diversity of backgrounds of international adjudicators and parties renders different normative expectations upon the adjudicative roles and disagreements on what it means to be an impartial judge.²⁶⁸

²⁶⁴ Besson(n25) 418.

²⁶⁵ *ibid* 417.

²⁶⁶ Dannenbaum(n30) 382.

²⁶⁷ *ibid* 383-84.

²⁶⁸ *ibid* 385.

To sum up, there are many differences and similarities between international and domestic adjudication, but it is questionable to what extent they constitute the relevant functions and characteristics which can determine whether states have intended to apply the domestic standards of impartiality to international adjudication.

2. Example 2: General Principles of Impartiality from International Judicial Practice

In addition to the general principles from domestic law, international judicial practice is often relied on to fill gaps in the statutes and rules of procedure of international courts and tribunals.²⁶⁹ The law and practice of international courts and tribunals is also used to identify the standards of impartiality of the UNCLOS Annex VII Tribunal in the *Mauritius v. UK* case.²⁷⁰

a. The Method of Deriving General Principles of Impartiality from International Judicial Practice

Similar to finding general principles from domestic law, identifying general principles of impartiality from international judicial practice can start with an inductive process of examination of the law of different international courts and tribunals. The difficulty of such a process lies in that there is no single type of international adjudication.²⁷¹ Kingsbury, for example, identifies ten types of international courts and tribunals: (1) inter-governmental claims commission created by two governments on

²⁶⁹ See eg *US—Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, DSR 1997-I, 323, 335(ABR)(The WTO relied on international judicial practice for applying the rule on allocation of burden of proof); *MOX Plant*(Procedural Order No 3 of 24 June 2003) 42 ILM 1187, 1197(The UNCLOS Annex VII tribunal relies on international judicial practice in granting provisional measures); See further examples in *Nottebohm* [1953] ICJ Rep 111, 119; and *Interhandel* [1957] ICJ Rep 105, Sep Op Lauterpacht, 117, 118.

²⁷⁰ *Mauritius v. the UK*(n19).

²⁷¹ Regan(n29) 226.

the Jay Treaty Model, (2) *ad hoc* inter-state arbitration governed by law, on the Alabama model, (3) inter-state arbitration embedded in pre-existing legal institutional structures, (4) standing international courts, (5) international criminal courts, (6) international administrative tribunals, (7) the European Court of Human Rights model, (8) the European Court of Justice model, (9) GATT and WTO, (10) investment-state arbitral tribunals.²⁷² These different types of international adjudicative mechanisms may have different law of impartiality.²⁷³ It is questionable how a coherent general principle of impartiality can be derived from international judicial practice.

Despite this, an informal attempt to codify the international judicial practice on judicial independence and impartiality is undertaken in the Burgh House Principles of the International Law Association.²⁷⁴ Principle 9, for example, is of particular relevance to judicial impartiality:

9.1 Judges shall not serve in a case in which they have previously served as agent, counsel, adviser, advocate, expert or in any other capacity for one of the parties, or as a member of a national or international court or other dispute settlement body which has considered the subject matter of the dispute.

9.2 Judges shall not serve in a case with the subject matter of which they have had any other form of association that may affect or may reasonably appear to affect their independence or impartiality.²⁷⁵

Principle 9.1 replicates Article 17(2) of the ICJ Statute,²⁷⁶ while principle 9.2 significantly broadens the scenarios where the impartiality of adjudicators can be challenged. The appearance of bias standard is based on the common law maxim that

²⁷² Kingsbury(n34) 205-209.

²⁷³ For example, the standards of impartiality in inter-state cases are different from international criminal courts and tribunals, and from investor-state arbitration. See texts corresponding to below nn 284-302; ICSID Convention, art 57.

²⁷⁴ The Burgh House Principles(n2).

²⁷⁵ *ibid* Principle 9.

²⁷⁶ ICJ Statute, art 17(2).

‘justice must not only be done, but should manifestly and undoubtedly be seen to be done’ as well as the Roman law notion that ‘litigations should proceed without suspicion’.²⁷⁷ It is reasonable to argue that this principle represents *lex lata*, which is supported by many international instruments,²⁷⁸ international judicial practice,²⁷⁹ and academic work.²⁸⁰

Even if it is possible to find a general principle of impartiality by induction based on international judicial practice, the principle has to be modified to suit the particularities of an individual court or tribunal in order to apply in that context. The Burgh House Principles itself acknowledges that the requirements must vary in their detail given the number and variety of international courts and tribunals, noting in the preamble ‘that each court or tribunal has its own characteristics and functions and that in certain instances judges serve on a part-time basis or as *ad hoc* or *ad litem* judges’.²⁸¹

This step involves a deductive process of going from the general principles of impartiality to a particular rule of impartiality suitable to a court or tribunal by taking into account its specific functions and circumstances. The requirement to consider the function and circumstance of a particular court or tribunal is also mentioned in the scope

²⁷⁷ *Rex v. Sussex Justices, ex parte McCarthy* [1924] 1 KB 256, at 259; Code of Justinian, Book III, Title 1, section 3, cited in Yuval Shany and Sigall Horowitz, ‘Judicial Independence in The Hague and Freetown: A Tale of Two Cities’ (2008) 21(1) LJIL 113, 122.

²⁷⁸ eg Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) UN Doc A/CONF.183/9(1998) 37 ILM 999, art 41(2)(a); ICC Rules of Procedure and Evidence, Rule 34(1); ICTY Rules of Procedure and Evidence, Rule 15(A); ICTR Rules of Procedure and Evidence, Rule 15(A).

²⁷⁹ eg *Furundzija* (n19) paras 189, 199-200; *Sramek v. Austria* (1984) Series A no 84, para. 42; *Campbell and Fell v. UK* (1984) Series A no 80, para 85; UNHRC, ‘General Comment no 32: Article 14: Right to Equality before Courts and Tribunals and to a Fair Trial’ (2007) UN Doc CCPR/C/GC/32, para. 21; *Wolfgang Jenny v Austria* (2008) UN Doc CCPR/C/93/D/1437/2005, paras 9.3–9.6; *María Cristina Lagunas Castedo v Spain* (2008) UN Doc CCPR/C/94/D/1122/2002, paras 9.5–9.8.

²⁸⁰ Theodor Meron, ‘Judicial Independence and Impartiality in International Criminal Tribunals’ (2005) 99 AJIL 359, 359–60; Shany and Horowitz (n277) 122.

²⁸¹ The Burgh House Principles (n2) Preamble.

of application of the Principles:

[The Principles] shall apply to standing international courts and tribunals (hereafter “courts”) and to full-time judges. The Principles should also be applied as appropriate to judges *ad hoc*, judges *ad litem* and part-time judges, having regard to their particular functions and circumstances, and to international arbitration proceedings taking place under the 1982 UN Convention on the Law of the Sea, the International Centre for the Settlement of Investment Disputes and similar international institutions.²⁸²

Several questions arise from these conditions for the application of the principles: what functions and circumstances ‘as appropriate’ should be considered in deciding how the principles can be applied? Do judges *ad hoc* and *ad litem* have different functions from standing judges and therefore have different applicable rules of impartiality due to their different ways of appointment? Do the function and circumstances between the permanent court and arbitration differ to such an extent that they should apply different rules of impartiality? These issues are worthy of more attention, as Gélinas comments,

[T]he overwhelming majority of international cases, disputes are not decided by the full-time members of standing international courts who were clearly taken as an ideal type of an international adjudicator by the Study Group.²⁸³

b. Example: The Mauritius v. UK Case

The *Mauritius v. UK* case is a good example showing how the above puzzles manifest themselves in practice. In this case, an UNCLOS Annex VII tribunal was established to evaluate the legality of a Marine Protected Area around the Chagos Islands created by the UK. The UK appointed Sir Christopher Greenwood as an

²⁸² *ibid.*

²⁸³ Another codification effort of standards of impartiality for international courts and tribunals is the IBA A guidelines. See IBA Guidelines on Conflicts of Interest in International Adjudication(2014) < https://www.ibanet.org/ENews_Archive/IBA_July_2008_ENews_ArbitrationMultipleLang.aspx > accessed 30 July 2019; Gélinas(n36) 12, 15-16.

arbitrator, who was then challenged by Mauritius on the ground of his previous role as an advisor and legal counsel to the UK. The rest of the arbitrators, composed of a Mauritius-appointed arbitrator, and the three arbitrators appointed by the President of ITLOS, heard the challenge.²⁸⁴ One of the disputed issues in this case is whether the applicable law regarding the independence and impartiality of arbitrators should be the general principles derived from inter-state cases (*i.e.*, the ‘specific prior involvement standard’), or the standard generally adopted in international arbitration (*i.e.*, the ‘appearance of bias standard’ as evidenced by the IBA Guidelines).

The Tribunal firstly examines the requirements of arbitrators in Annex VII of the UNCLOS which addresses the qualifications of arbitrators appointed by the President of ITLOS,²⁸⁵ but these requirements do not apply to party-appointed arbitrators. The Tribunal adds that the requirements ‘from general principles of international law and from the practice of international courts and tribunals’ equally apply. They include, among others, ‘fairness, competence and integrity’.²⁸⁶ The party-appointed arbitrators are also required to make a Declaration of Acceptance and a Statement of Impartiality and Independence which directs the arbitrators to ensure that there are no ‘circumstances that might give rise to justifiable doubts as to the arbitrators’ impartiality or independence’.²⁸⁷ But it is unclear which standard should be adopted to assess whether certain circumstances can give rise to such justifiable doubts.

The Tribunal further considers whether there are additional requirements from

²⁸⁴ *Mauritius v. the UK*(n19) paras 5-8.

²⁸⁵ *ibid* para 135.(Art 2 and 3(e) of the Annex require that the arbitrators should be drawn from the list of arbitrators nominated by state party to the UNCLOS Convention.)

²⁸⁶ *ibid* para 135.

²⁸⁷ *ibid* para 136.

general international law applicable to the arbitrators in the present case.²⁸⁸ It examines the law applicable to the ICJ,²⁸⁹ the ITLOS²⁹⁰ and the standard adopted in a number of inter-state arbitrations.²⁹¹ As a comparison, the standards in other international courts and tribunals and codification made by non-governmental bodies²⁹² are also discussed, but the Tribunal does not believe that they are directly applicable to the present case.²⁹³ The Tribunal, therefore, concludes that a party challenging an arbitrator must demonstrate and prove that, applying the standards applicable to inter-state cases, there are justifiable grounds for doubting the independence and impartiality of that arbitrator in a particular case.²⁹⁴

The Tribunal provides two reasons to explain why it only relies on the law and practice in inter-state cases: first, inter-state dispute mechanism is based on state consent and ‘rules of public international law, the sources of which are set out in Article 38(1) of the Statute of the ICJ’, the standards in other international courts and tribunals or non-governmental bodies are not applicable unless they are accepted by states.²⁹⁵ Secondly, the Annex VII tribunals are alternatives of the ICJ and the ITLOS in settlement of disputes under the UNCLOS, there’s no reason why the tribunals should adopt different standards of independence and impartiality compared to the ICJ and

²⁸⁸ *ibid* para 139.

²⁸⁹ *ibid* paras 141-7. ICJ Statute, arts 2, 16, 17, 24 and 31(6); Rules of the ICJ, art 4(1).

²⁹⁰ A similar standard to the ICJ is adopted in the ITLOS Statute, arts 7, 8 and 17.

²⁹¹ The standard in The PCA Optional Rules for Arbitrating Disputes Between Two States (articles 6(4), 8(3), and 10) is particularly relevant. The standard in art 10 has been adopted in a number of PCA-administered arbitrations: eg *Eritrea-Ethiopia Boundary Commission*, *OSPAR* case, *MOX Plant* case. See *Mauritius v. the UK*(n19) para 151.

²⁹² eg ICC, ICTY, UNCITRAL, Standards developed by non-governmental bodies such as the IBA Guidelines and the Burgh House Principles of the International Law Association.

²⁹³ *Mauritius v. the UK*(n19) paras 152-55, para 156 and 166 specifically mention that standards in the commercial and investment arbitration are not applicable.

²⁹⁴ *ibid* para 166.

²⁹⁵ *ibid* para 167.

ITLOS.²⁹⁶

In light of these reasons, the Tribunal mainly relies on the general principles as evidenced in the rules and practice of other international courts and tribunals dealing with inter-state cases (*i.e.*, an adjudicator may be disqualified only if he or she previously participated in the same case), and refuses to disqualify Professor Greenwood based on his previous role as advocates and advisor of the UK government in other cases. This view presumes that the standard of impartiality in inter-state adjudication are and should be different from other international courts and tribunals.

This case shows the possibility of relying on the law and practice of other international courts and tribunals to fill the gaps in the law of impartiality, but it is contestable whether the Tribunal should only rely on standards in the inter-state cases but reject those decisions or guidance provided by other international courts and tribunals. For example, Yuval Shany and Sigall Horovitz disagree that the perceived differences between inter-state adjudication and other international dispute settlement mechanisms can justify the differences in the law of impartiality. Firstly, they argue that all international courts and tribunals claim to conduct their business under the notion of justice which is underlying the principles of judicial independence and impartiality, and the ICJ is no exception. A theory of linking judicial roles and degrees of judicial independence and impartiality is not reflected in domestic practice.²⁹⁷ Secondly, international courts like the ICJ have already suffered from some problem in their level of independence and impartiality,²⁹⁸ they should therefore strive harder to

²⁹⁶ *ibid* para 168.

²⁹⁷ Shany and Horovitz(n277) 128.

²⁹⁸ See also Dannenbaum(n30).

maintain legitimacy.²⁹⁹ Shany and Horovitz might be wrong in claiming that the role and function of a court are irrelevant to the standards of impartiality. As illustrated in the last chapter of this thesis, this linkage is shown in both common law and civil law traditions.³⁰⁰

But it makes sense to raise the doubt why the difference in parties to the dispute can make the standards of impartiality in inter-state cases different from other courts and tribunals. The approach of the Annex VII Tribunal could not explain, for example, why the PCA Optional Rules for inter-state cases draws inspiration from the UNCITRAL Arbitration rules which are applicable to mixed arbitration,³⁰¹ and why both the PCA Optional Rules for inter-state cases and the PCA Optional Rules for mixed arbitration adopt the same provisions on challenge of arbitrators without specifying that the application of the provision should be different by virtue of the different parties to the conflict.³⁰²

To sum up, the process of identifying general principles of impartiality from international judicial practice also witnesses a combination between inductive and deductive reasoning. It requires an inductive process to generalize some principles and rules of impartiality from different international courts and tribunals. Where different courts and tribunals have different principles and rules of impartiality, a deductive basis should be relied on to determine which international court or tribunal should be excluded from consideration in order to identify a coherent and workable principle. To establish the deductive basis again requires an inductive process of considering the

²⁹⁹ Shany and Horovitz(n277) 128.

³⁰⁰ See chapter I.C.

³⁰¹ See n 291.

³⁰² The Optional Rules for Arbitrating Disputes between Two States(1992) art 10; The Optional Rules for Arbitrating Disputes between Two Parties of Which Only One is a State(1993) art 10.

various characteristics of different international courts and tribunals. But it remains questionable which characteristic should be taken into account.

3. Example 3: The Rules of Impartiality and Inherent Power

Impartiality can be considered inherent in adjudication.³⁰³ Judge Buergenthal in *Wall Advisory Opinion* and some scholars suggest viewing the application of the law on judicial impartiality (especially the law of disqualification) as ‘inherent power’ the scope of which is defined by the function of international adjudication. This section shows how the induction and deduction operate in the process of applying the functional approach to ascertain the content and scope of the principles and rules of impartiality inherent in international adjudication.

a. Inherent Power and the Functional Approach

This part introduces the use of the notion ‘inherent power’ in international judicial practice and how its scope is determined by the functions of international adjudication.

Inherent power refers to the power that ‘derives from an office, position, status’.³⁰⁴ The inherent power of the court ‘derives from its nature as a court of law’.³⁰⁵ It allegedly originated from the UK, used for prevention of abusing judicial process and other procedural matters, and is applied in other common law countries and civil law countries.³⁰⁶ Inherent powers need not be expressly stipulated in the constitutional instruments of international courts. When they are explicitly mentioned by the statutes,

³⁰³ Gleider I Hernández, *The International Court of Justice and the Judicial Function*(OUP 2014) 42.

³⁰⁴ Bryan A. Garner, *Black’s Law Dictionary*(7th edn, West Publishing 2000) 953.

³⁰⁵ IH Jacob, ‘The Inherent Jurisdiction of the Court’(1970) 23 CLP 23, 24.

³⁰⁶ Brown, ‘Inherent Powers’(n47) 833.

the stipulation does no more than declaring the existence a power which has already been possessed by the international court. Examples of these inherent power include, *e.g.*, *compétence de la compétence*,³⁰⁷ and power to grant provisional measures,³⁰⁸ the power to set its own procedures,³⁰⁹ *etc.*

The possession of inherent powers is recognized in cases of many international courts and tribunals. The international courts and tribunals are considered to have the inherent powers - regardless of whether they are explicitly granted to the court or not - to take actions to ‘to ensure the exercise of its jurisdiction over the merits’,³¹⁰ and to ‘preserve the integrity of the proceedings’.³¹¹ They can be seen as the ‘necessary consequence of parties’ fundamental intent to create an institution with a judicial nature’.³¹²

Ascertaining the content of an inherent power involves a deductive process going from the function of international courts to specific rules for exercising inherent power. It has been suggested in case law that ‘the source of the inherent power of international courts and tribunals is their need to ensure the fulfilment of their

³⁰⁷ See *eg Nottebohm (Liechtenstein v. Guatemala)* [1953] ICJ Rep 111, 119–120; See also *Certain Norwegian Loans (France v. Norway)* [1957] ICJ Rep 9, Sep Op Sir Hersch Lauterpacht, 34, 44; ICJ Statute, art 36(6).

³⁰⁸ See *eg LaGrand (Germany v United States) (Judgment)* [2001] ICJ Rep 466, 502–3; *E-Systems, Inc. v. Iran* (1983) 2 Iran-USCTR 51, 57; *Velásquez Rodríguez* (1989) 28 ILM 291, 302.

³⁰⁹ Brown, *A Common Law of International Adjudication* (n47) 215-16; Hernández (n303) 55.

³¹⁰ *Nuclear Tests (Australia v. France)* [1974] ICJ Rep 253, 259–60; also *Nuclear Tests (New Zealand v. France)* [1974] ICJ Rep 457, 463; *Application of El Sayed* (STL, Decision on Appeal of Pre-Trial Judge’s Order Regarding Jurisdiction and Standing) CH/AC/2010/2, AC(2010) para 45. (The STL states that it has ‘inherent jurisdiction over incidental legal matters which arise as a direct consequence of the primary matter’.)

³¹¹ *Hrvatska Elektroprivreda v. Slovenia*, ICSID Case No ARB/05/24, Ruling (May 6, 2008) para 33.

³¹² *Iran v. United States* (Iran–US Claims Tribunal, Decision Ruling on Request for Revision by Iran of July 1, 2011, Decision No DEC 134-A3/A8/A9/A14/B61-FT) para 59, citing D Caron, L Caplan, and M Pellonpää, *The UNCITRAL Arbitration Rules: A Commentary* (OUP 2006) 915; Brown, ‘Inherent Powers’ (n47) 835.

functions'.³¹³ Chester Brown also argues that the functional thesis provides the most desirable source for the inherent power and can, therefore, limit the scope of this power.³¹⁴ Two schools regarding the functions of international adjudication are identified by Brown. The first is the private function, that is, international courts have the power for dispute settlement.³¹⁵ The second is regarding the public function, *i.e.*, to ensure the proper administration of justice, create and progressively develop international law, and to concern interests other than those represented by parties.³¹⁶ The extent of the functions of a court can arguably determine the content of the inherent powers.³¹⁷ Different international courts and tribunals have different functions, therefore can have different inherent powers. These functions constitute restraints upon such powers. Another constraint can be the explicit language of the constitutive instrument itself.³¹⁸

The above discussion about inherent power and its connection with the function of a court are also manifested in the debates on the law of impartiality of international courts and tribunals. As shown in the following example, applying the norms of impartiality can be considered as an inherent power of international courts and tribunals, regardless of whether they are explicitly mentioned in their statutes or not. But the distinction between public and private function might be insufficient to categorize the

³¹³ *ibid.*

³¹⁴ Brown, 'Inherent Powers'(n47) 841.(He identifies four possible sources:(1) general principles of law,(2) implied power,(3) nature of international courts as judicial bodies, and(4) functions of international adjudication, but he argues that the functional approach is the most persuasive one.)

³¹⁵ *ibid* 842.

³¹⁶ *ibid* 843-45.

³¹⁷ *ibid* 844.

³¹⁸ See eg *Nottebohm(Liechtenstein v Guatemala)*(Preliminary Objections)[1953] ICJ Rep 111, 119; *Norwegian Loans* (Preliminary Objections)[1957] ICJ Rep 9, Sep Op Sir Hersch Lauterpacht, 34, 45; *Heathrow Airport User Charges(United States–United Kingdom)*(1993) 102 ILR 564.

function of international adjudication for the purpose of deducing concrete rules and standards of impartiality.

b. Example: The Wall Advisory Opinion and Inherent Power

In the *Wall Advisory Opinion*,³¹⁹ the Israel Government requested the Court to disqualify Judge Elaraby due to his previous position as a government representative of Egypt -- in particular, his role as Egyptian Ambassador to the session of UNGA which eventually led to the request for the *Wall Advisory Opinion* -- as well as his personal opinions expressed in an interview in which he claimed, *inter alia*, Israel perpetrated atrocities on Palestinian civilian populations, is occupying Palestinian territory, and violated international law.³²⁰ According to Israel, the past activities of Judge Elaraby demonstrate he ‘has been actively engaged in opposition to Israel including on matters which go directly to aspects of the question now before the Court’.³²¹

Article 17, para.2, of the Statute of the Court reads:

2. No Member may participate in the decision of any case in which he has previously taken part as agent, counsel, or advocate for one of the parties, or as a member of national or international court, or of a commission of enquiry, or in any other capacity.

Based on this article, the Court rejected to disqualify Judge Elaraby on the basis of his previous professional capacity, because the activities are ‘performed in his capacity of a diplomatic representative of his country’ rather than expressing his own views.³²² As for his statements in the newspaper interview, the Court considered that

³¹⁹ *Wall Advisory Opinion*(n19).

³²⁰ An excerpt of the interview can be found in Dissenting opinion of Judge Buergenthal, para 8.

³²¹ *Wall Advisory Opinion*(n19) para 5.

³²² See also *Legal Consequences for Status of the Continued Presence of South Africa in Namibia(South West Africa) notwithstanding Security Council Resolution 276*(Advisory Opinion)[1971] ICJ Rep 16, 18,

‘Judge Elaraby expressed no opinion on the question put in the present case’.³²³

Judge Burgenthal in his dissenting opinion, shared with the Court’s opinion regarding Judge Elaraby’s previous professional position because the opinions expressed by him in his role as government representatives are not his personal views, but views of his government.³²⁴ He also agreed that the words of Art. 17(2) of the ICJ Statute does not apply to the views expressed by Judge Elaraby expressed in his interview. But he added:

[That power and obligation to disqualify judges based on appearance of bias] is *implicit in the very concept of a court of law* charged with the fair and impartial administration of justice. To read them out of reach of Article 17, paragraph 2, is neither legally justified, nor is its wise judicial policy.³²⁵

Applying the above rationale to the construction of the ICJ Statute, Judge Buergenthal found the approach in the Order of the Court too formalistic and narrow.³²⁶ In his dissenting opinion, Judge Buergenthal argued that the court has ‘power and obligation’ that is ‘implicit in the very concept of a court of law charged with the fair and impartial administration of justice’.³²⁷ This can be seen as reliance on the inherent power of the court.³²⁸ Yuval Shanny and Sigall Horovitz also agree that that Judge Buergenthal’s argument is based on a ground very similar to justifications for inherent

para. 9. (*‘South-West Africa 1971 Advisory Opinion’*)

³²³ *Wall Advisory Opinion*(n19) para 8.

³²⁴ *Wall Advisory Opinion*(n19) Diss Op Buergenthal, para 6.

³²⁵ *ibid* para 11. [emphasis added]

³²⁶ *ibid* para 13.

³²⁷ *ibid* para 11.

³²⁸ Implicit power and implied power are connected to each other, although they are not the same. See Martins Paparinskis, ‘Inherent Powers of ICSID Tribunals: Broad and Rightly So’, in T Weiler and I Laird(eds) *Investment Treaty Arbitration and International Law*(JurisNet 2012) 14-15.

power, and it arguably includes ‘the power to disqualify judges whose participation in the proceedings might undermine their fairness and legitimacy’.³²⁹

If the application of the law of impartiality can be viewed as an inherent power, a question arises as to whether Judge Buerghenthal and the scholars correctly define the scope of such an inherent power. The functional approach to inherent power concurs with the functional approach to impartiality discussed in the last chapter.³³⁰ It shows that based on the functional approach, more concrete rules of impartiality can derive from a conception of the role, function or goal of adjudication, which in turn can be induced through an analysis of some characteristics, such as the reasoning process, the means of appointment, and the procedural rules.

However, a reasonable critique can be made that such a combination of inductive and deductive approach may cause indeterminacies in ascertaining the content and scope of the principles and rules of impartiality. Similar to the problems raised in the above examples on general principles from domestic law and international judicial practice, it remains questionable what functions and circumstances ‘as appropriate’ should be considered in deciding how the principles and rules of impartiality can be applied.³³¹ The selection of which characteristics should be taken into account can be subjective, and varying from context to context. For example, both Fuller and Rogers derive their principles and rules regulating judicial behaviours from the function and characteristics of adjudication, but the factors they rely on to establish the basis are different. Fuller’s initial approach does not consider the appointment

³²⁹ Shany and Horowitz(n277) 123.

³³⁰ See Chp I.C.

³³¹ See the text corresponding to above n 281-283.

mechanism, Rogers' functional approach does, while some others would rely on other factors to establish the functions of international courts.³³²

To summarize, the above three examples on the identification of the content and scope of the principles and rules of impartiality in international courts and tribunals share common argumentation structures, *i.e.*, a composition of deduction and induction. The three examples all involve an inductive process of generating a universal proposition from some specific circumstances. But only adopting the inductive approach is insufficient to reach a universal principle, because the law of impartiality in different contexts is not necessarily the same. In addition, even if a generally accepted universal principle of impartiality can be established, it should be modified to apply to a particular context of an international court or tribunal. A deductive approach is needed to address these problems. More specific rules of impartiality may be deduced from state consent, or from the function of an international court or tribunal. But the establishment of the consent of states or functions of a court or tribunal should be based on empirically observable factors which is again an inductive process. In this sense, the above analysis confirms Koskeniemi's thesis that international legal argumentation is like a '*perpetuum mobile*', and the argument may become 'hopelessly circular'.³³³

The ideal-oriented theory and the argumentation structures identified in this chapter illustrate the inherent difficulties in identifying determinate principles and rules

³³² cf Yuval Shany, *The Effectiveness of International Courts*(OUP 2014) 97-116; Kingsbury(n34) 215-22; Lowe(n148) 212-3; Catherine A. Rogers, *Ethics in International Arbitration*(OUP 2014) 343 ff; Gélinas(n36) 38 ff(Yuval Shany builds a goal-based approach to evaluate impartiality of international adjudicators by relying on 'structural, procedural and outcome aspects of the operation of international courts'. Kingsbury categorizes the functions of international courts into 'dispute settlers', 'institutions to make commitments credible', 'governance', 'producers of legal knowledge', and embodiments of 'justice and rules of law'. Some others draws on the distinction between a contractual, private, retrospective adjudication model and a public, prospective adjudication model to define the role of international adjudicators.)

³³³ Koskeniemi(n12) 337.

of impartiality due to the oscillation between induction and deduction, and the uncertainties regarding which functions and characteristics should be taken into account in determining the content and scope of the principles and rules of impartiality. But as shown in the next chapter, it is still possible to make a reasonable case on the principles and rules of impartiality applicable to an international body by reference to domestic law and international judicial practice, provided that it is supported by good analogical reasoning. Some functions and characteristics relevant to the content and scope of principles and rules of impartiality can be identified in this process.

CHAPTER III

THE ARGUMENTATION STRUCTURE FOR IDENTIFYING THE PRINCIPLES AND RULES OF IMPARTIALITY IN INTERNATIONAL ADJUDICATION: ANALOGICAL REASONING

Koskenniemi's distinction between induction and deduction does not exhaust all forms of the 'structure and hidden codes' underlying the surface of international legal argumentation. Some others would add a third argumentation type, *i.e.*, analogical reasoning composed of abduction and the justification of the abduction.³³⁴ This technique can to some extent help address the issues of uncertainty in legal argumentation.³³⁵

The proper use of analogical reasoning can provide some rational force to the process of identification of the norms of impartiality applicable to international bodies.³³⁶ This part will introduce the use of analogical reasoning in international legal argumentation, discuss the method to identify suitable analogies and then use several examples to show how the functions and characteristics relevant to the applicability and scope of the rules of impartiality are identified in the process of analogical reasoning.

A. Analogical Reasoning in International Legal Argumentation

1. Definition and Structure of Analogical Reasoning

Analogical reasoning is a type of argument which 'relies on judgments of relevant similarity in the process of inferring a conclusion from a set of premises'.³³⁷ The basis of analogical reasoning is generally agreed as that 'because two (or more)

³³⁴ Brewer(n48) 942.(He divides the reasoning process into three forms: induction, deduction and abduction.)

³³⁵ Bordin(n213) 7.

³³⁶ Brewer(n48) 942.

³³⁷ Brewer(n48) 950; See also Bordin(n213) 10.

“analogized” items share some characteristics, one may infer that the lesser-known item shares some additional characteristics with the better-known one’.³³⁸

Klug identified a formula for the logical structure of analogical reasoning:

- i. If A then B;
- ii. If C is similar to A;
- iii. Therefore, if C then B.³³⁹

A is referred to as the ‘source domain’ (i.e., ‘the domain from which the analogy is drawn’³⁴⁰). C is referred to as the ‘target domain’ (i.e., ‘the domain where a problem has to be solved’³⁴¹). A valid analogy is premised on that the source and the target share some relevant similarities.³⁴²

2. The Use of Analogical Reasoning in International Legal Argumentation

Analogical reasoning can be used to codify and make international law,³⁴³ and interpret the content of explicit and implicit rules of international law.³⁴⁴ Hart also observes that there are a ‘range of principles, concepts, and methods which are common to both municipal and international law, and makes the lawyers’ technique freely

³³⁸ Brewer(n48) 951.

³³⁹ See R. Alexy, *A Theory of Legal Argumentation*(OUP 2010) 281.

³⁴⁰ Gerhard Minnameier, ‘Abduction, Induction, and Analogy: On the Compound Character of Analogical Inferences’, in Lorenzo Magnani(ed) *Model-Based Reasoning in Science & Technology*(Springer-Verlag 2010) 108.

³⁴¹ *ibid.*

³⁴² Alexy(n339) 282; Brewer(n48) 1027-28.

³⁴³ Sandesh Sivakumaran, ‘Techniques in International Law-Making: Extrapolation, Analogy, Form and the Emergence of an International Law of Disaster Relief’(2017) 28 EJIL 1097.

³⁴⁴ Dan Sarooshi, ‘Role of Domestic Public Law Analogies in the Law of International Organizations’(2008) 5 International Organization Law Review 237, 237; ILA Study Group, *The Use of Domestic Law Principles in the Development of International Law*, 33 <www.ila-hq.org/images/ILA/DraftReports/DraftReportSG_DomesticLawPrinciples.pdf> accessed 19 July 2019; Schwarzenberger, ‘The Nemo Judex in Sua Causa’(n22) 497.(Domestic law analogy can be used to determine the intention of parties to grant implied jurisdiction to an international organ to apply rules behind the maxim *nemo iudex in sua causa*.)

transferable from the one to the other'.³⁴⁵ In some contexts of international law, analogies are even considered unavoidable.³⁴⁶

In early time, a lot of international law rules were borrowed from domestic private law. Hersch Lauterpacht's work shows that domestic private law plays an important role in forming international law.³⁴⁷ The presumption that states as equal actors in the international order are similar to individuals in domestic order influenced international law to borrow rules from domestic private law, such as contracts, torts or property law.³⁴⁸

However, the analogy between states and individuals has been challenged nowadays.³⁴⁹ With the paradigm shift of international law from 'bilateralism' to 'community interest', some scholars argue that contemporary international law should draw more domestic public law analogies than private law analogies.³⁵⁰

Despite the opinions in favour of drawing on the domestic law analogies, some others question the undue 'inter-systemic analogy' between international law and domestic law.³⁵¹ Some criticize that domestic law analogies may not fully cover the

³⁴⁵ Hart(n3) 237.

³⁴⁶ ILC, 'Summary record of the 633rd meeting' A/CN.4/SR.633(1962) para 36.

³⁴⁷ Hersch Lauterpacht, *Private Law Sources and Analogies of International Law*(Archon Books 1937).

³⁴⁸ *ibid* 297-303.

³⁴⁹ Eg Philip Allott, *Eunomia: A New Order for a New World*(OUP 2001); Jeremy Waldron, 'The Rule of International Law'(2006) 30 HJLPP 15; Hugh Thirlway, 'Concepts, Principles, Rules and Analogies: International and Municipal Legal Reasoning'(2002) 294 *Collected Courses of the Hague Academy of International Law* 265.

³⁵⁰ R. Portmann, *Legal Personality in International Law*(CUP 2010) 139-46; B. Kingsbury and M. Donaldson, 'From Bilateralism to Publicness in International Law', in Fastenrath et al.(edn) *From Bilateralism to Community Interest*(OUP 2011) 83-86; Anthea Roberts, 'Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System'(2013) 107(1) *AJIL* 45, 63-68.

³⁵¹ ILC, 'Summary record of the 676th meeting' A/CN.4/SR.676(1963) para 42; ILC, 'Summary record of the 737th meeting' A/CN.4/SR.737(1964) para 28; ILC, 'Summary record of the 972nd meeting' A/CN.4/SR.972(1968) para 87; ILC, 'Summary record of the 1573rd meeting' A/CN.4/SR.1573(1979) para 20.

situation in particular cases of international law,³⁵² ‘were often misleading’³⁵³, or even ‘not possible’.³⁵⁴ As international law becomes more robust with more and more treaty-making, codification projects, decisions of international courts and tribunals, systemic analogies drawn from existing rules and principles of international law become possible.³⁵⁵

The use of analogical reasoning in international law can be explained by several reasons. Firstly, one of the basis of analogical reasoning is the principle of distributive justice, *i.e.*, same cases should be treated alike.³⁵⁶ Secondly, analogical reasoning is prevalent and even necessary in a field which is new, hybridized, and lacks specificity.³⁵⁷ Analogical reasoning can justify legal decisions in such ‘hard cases’ when ‘the law is unclear or when novel factual circumstances have arisen which are not yet directly regulated by an existing rule’.³⁵⁸ As pointed out by the Special Panel for Serious Crimes East Timor, quoting prof. Bassiouni and engaging in a brief historical overview of the permissibility of analogy in several criminal law systems,³⁵⁹ the use of analogy is necessary ‘because traditionally, international criminal law has lacked the specificity of national criminal law in defining crimes’.³⁶⁰ Another example is the law

³⁵² ILC, ‘Summary record of the 742nd meeting’ A/CN.4/SR.742(1964) para 19.

³⁵³ ILC, ‘Summary record of the 1227th meeting’ A/CN.4/SR.1227(1973) para 27.

³⁵⁴ ILC, ‘Summary record of the 1370th meeting’ A/CN.4/SR.1370(1976) para 7; ILC, ‘Summary record of the 1369th meeting’ A/CN.4/1369(1976) para 28.

³⁵⁵ Bordin(n213) 2(He uses the term ‘inter-systemic and systemic analogy’).

³⁵⁶ Patrick Nerehot(ed) *Legal Knowledge and Analogy*(Kluwer Academic Publishers 1991) 6.(‘[A] case not covered by the law should nevertheless be treated equally to covered cases, because it is similar in its relevant respects.’)

³⁵⁷ Roberts(n350) 50.

³⁵⁸ Fernando Lusa Bordin, ‘Analogy’, in Jean d'Aspremont and Sahib Singh(eds) *Concepts for International Law*(Edward Elgar 2019) 37.

³⁵⁹ M. Cherif Bassiouni, *Crimes Against Humanity in International Criminal Law*(2nd edn, Martinus Nijhoff 1999) 143-44.

³⁶⁰ *Prosecutor v. Joao Franca da Silva Alias Jhoni Franca* , Judgment) Case No. 04a/2001(2002) paras 74-75.

on non-international armed conflicts whose content is usually clarified by drawing an analogy to the law on international armed conflict.³⁶¹ A lot of investment treaties also have gaps and ambiguities which may be filled by reference of analogy.³⁶²

3. Analogical Reasoning and Formal Sources of International Law

There may be some confusion about the relationship between analogies and the formal sources of law. For example, some scholars conflate general principles of law with analogies from domestic law,³⁶³ and some consider general principles as ‘formal dress worn by analogy when invited to contribute to the law’.³⁶⁴ But general principles of law are not the only sources of law which might be relevant to analogical reasoning. Analogies can be incorporated into international law through treaties,³⁶⁵ and customary international law.³⁶⁶

Criteria for good analogical reasoning in international law may be considered similar to the source doctrine. Some argue that what makes certain analogies applicable in international courts is that states have accepted them as part of international law.³⁶⁷ In the context of domestic law analogies in the law of international organizations, a similar distinction can be made between domestic law analogies ‘of gentle persuasive

³⁶¹ See Sandesh Sivakumaran, ‘Reenvisaging the International Law of Internal Armed Conflict’ (2011) 22 EJIL 219. Analogical reasoning is also used in international human rights law to inform the content of economic and social rights. See Katharine G. Young, *Constituting Economic and Social Rights* (OUP 2012).

³⁶² Roberts (n350) 50.

³⁶³ Martti Koskenniemi, *The Gentle Civilizer of Nations* (CUP 2002) 375.

³⁶⁴ Hugh Thirlway, *The Sources of International Law* (OUP 2014) 405.

³⁶⁵ An Hertogen, ‘The Persuasiveness of Domestic Law Analogies in International Law’ (2018) 29(4) EJIL 1127, 1131.

³⁶⁶ Stefan Talmon, ‘Determining Customary International Law: The ICJ’s Methodology between Induction, Deduction and Assertion’ (2015) 26 EJIL 417, 423.

³⁶⁷ See eg ILC, ‘Comments on report on State Responsibility by the Special Rapporteur Arango-Ruiz’, A/CN.4/425 & Corr.1 (1989) para 29.

value’ and domestic law analogies considered as ‘a formal source of law’. For a domestic law analogy to be considered as being incorporated into the ‘formal source of law’, it should be found in the domestic systems of a number of member states.³⁶⁸ This approach corresponds to Article 31(3)(c) of the Vienna Convention on the Law of Treaties which requires interpreters to take into account other relevant rules of international law applicable in the relations between the parties..³⁶⁹ In addition to this requirement, the application of this rule may be complicated by the rule on *lex specialis*.³⁷⁰ Put in the context of analogical reasoning, this indicates that the special characters of a treaty regime may render certain analogies from domestic law or other fields inapplicable.³⁷¹

In practice, however, the criteria of analogical reasoning drawn from the source doctrine could not necessarily justify the use of domestic law analogies from states other than the member states or treaty parties, or analogies from other areas of international law or even fields outside international law (such as international commercial arbitration).³⁷² In investor-state arbitration cases, for example, the participants may rely on analogies from trade law,³⁷³ human rights law,³⁷⁴ EU law,³⁷⁵

³⁶⁸ Sarooshi(n344) 238.

³⁶⁹ VCLT art 32.

³⁷⁰ ILC, ‘Articles on Responsibility of States for Internationally Wrongful Acts’, A/56/49(Vol. I) /Corr.4(2001) Art 55. See also Roberts(n350) 51.(When treaty law in a particular regime and general international law overlap, ‘it is unclear to what extent the former codifies, ousts, or exists alongside the latter’.)

³⁷¹ Sarooshi(n344) 239.

³⁷² Roberts(n350) 52.

³⁷³ cf *S.D. Myers, Inc. v. Canada*(nAFTA Ch. 11 Arb. Trib.)First Partial Award(2000) paras 243–51.(It draws on GATT and WTO jurisprudence in conceptualizing ‘likeness’.)

³⁷⁴ eg *Mondev Int’l Ltd. v. United States*, ICSID Case No. ARB(AF) /99/2, Award(2002) para 144.

³⁷⁵ eg *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/1, Decision on Liability(2010) paras 128–34.

and other legal regimes that do not bind the parties. As Anthea Roberts summarizes,

When invoking such analogies, participants are often not claiming that these principles and cases are applicable in the relations between the parties or cross-apply to the investment treaty system as a matter of law. Rather, they are often arguing or simply assuming that textual or functional similarities between these fields make it instructive to draw comparisons when resolving difficult issues.³⁷⁶

In light of the above discussion, analogical reasoning is an ‘argument type’ or ‘pattern of argument’³⁷⁷ or ‘process’ which is separate from but can be incorporated into formal sources of law.³⁷⁸ The above criteria for assessing analogical reasoning based on the formal source doctrine can distinguish analogies as ‘a formal source of law’ from those only of ‘general persuasive value’. But in practice, the participants may simply resort to analogy based on assumed textual or functional similarities between different fields to resolve difficult cases without consideration of the formal criteria in the source doctrine. Besides the formal criteria based on the source doctrine, the thesis will address what constitute good analogical reasoning in international legal argumentation by reference to the normative theories about analogies.

4. Identifying Suitable Analogies in International Law

Many efforts are made to develop normative theories about analogies,³⁷⁹ but no general rules have been identified to determine what constitutes valid analogical reasoning.³⁸⁰ The validity of a proposed analogical reasoning should be judged on a

³⁷⁶ Roberts(n350) 52.

³⁷⁷ Brewer(n334) 942.

³⁷⁸ Hertogen(n365) 1131.

³⁷⁹ Hertogen(n365) 1132.(An Hertogen identifies several normative theories on analogy: ‘multi-constraints theory’, ‘structure-mapping theory’, ‘articulation model and material theory of analogy’.)

³⁸⁰ Paul Bartha, ‘Analogy and Analogical Reasoning’ *Stanford Encyclopedia of Philosophy*(2019) <<https://plato.stanford.edu/entries/reasoning-analogy/>> accessed 19 July 2019.

case-by-case basis.³⁸¹

According to Brewer, analogical reasoning begins with ‘abduction’, that is, ‘inference ... from chosen examples to a rule that could resolve the doubt’.³⁸² The abduction then should be justified by providing an explanation that the source and the target share relevant similarities for the purpose of extending the rule. What constitute relevant similarities depend on ‘the legal system in question’,³⁸³ or by its ‘legal tradition’.³⁸⁴ Hart also recognizes that the relevant similarities ‘depend on many complex factors running through the legal system and on the aims and purpose which may be attributed to the rule’.³⁸⁵

Applying this method to analogies in international law, An Hertogen identifies three steps for analogical reasoning in international law:

- (i) the retrieval of the source domain;
- (ii) the mapping of the similarities between the target and the source domain; and
- (iii) the analogical transfer from the source to the target based on the presence of relevant similarities and the absence of critical dissimilarities.³⁸⁶

These steps will be applied to answer the question to what extent analogical reasoning can be used to identify principles and rules of impartiality in international adjudication.

³⁸¹ Bordin, ‘Analogy’(n358) 36.

³⁸² Brewer(n334) 925.

³⁸³ Bordin, ‘Analogy’(n358) 36.

³⁸⁴ Z. Bankowski, ‘Analogical Reasoning and Legal Institutions’ in P. Nerhot(ed) *Legal Knowledge and Analogy: Fragments of Legal Epistemology, Hermeneutics and Linguistics*(Kluwer 1991) 208, 212.(According to Bankowski, the unavoidable ‘leap of imagination’ inherent in every abduction is ‘domesticated within the tradition or discourse and so loses its capacity to surprise, radically to change direction, to transcend’.)

³⁸⁵ Hart(n3) 127, 130.

³⁸⁶ Hertogen(n365) 1133(She draws on a connectionist model of analogical reasoning). See Bartha(n380) 3.5.1.

(i) Abduction of a Rule from the Source Domain

According to Brewer, the first step for analogical reasoning is ‘*abduction* in a *context of doubt* about the extension of some predicate or the meaning of some text’.³⁸⁷ In other words, this step involves the discovery of ‘potentially useful’³⁸⁸ rules or solutions from the ‘source domain’ to be transferred in the ‘context of doubt’ (or the ‘target domain’).³⁸⁹ The scope of the ‘context of doubt’ or the ‘domain’ is flexible, depending on what is to be compared.³⁹⁰ One ‘context of doubt’ in the legal context, for example, is where a judge or lawyer is uncertain about whether to apply a legal concept or term to a given object or event.³⁹¹ For the purpose of this thesis, the context of doubt is an international court or tribunal where the applicability and scope of the law of impartiality is uncertain.

About a century ago, abduction as an argumentation pattern was identified by Charlese Sanders Peirce to describe how scientists can choose a comparatively tiny amount of hypotheses for confirmation or disconfirmation from an unlimited amount of logically feasible explanations of a puzzling natural phenomenon.³⁹² Thus, compared to inductive approach to identifying general principles,³⁹³ the process of abduction does not require an examination of all the particular instances to distil some common

³⁸⁷ Brewer(n334) 962; See also Minnameier(n340) 111.(In analogical reasoning, ‘one first abduces from the problem in the target domain to a possibly suitable structure in the source domain that might also do the job for the target’.)

³⁸⁸ Keith J. Holyoak, ‘Analogy’, in K.J. Holyoak & R. G. Morison(eds) *The Cambridge Handbook of Thinking and Reasoning*(CUP 2005) 117.

³⁸⁹ Holyoak(n388) 122-23; Bartha(n380) 2.2.(The term ‘domain’ can be defined as ‘a set of objects, properties, relations and functions, together with a set of accepted statements about those objects, properties, relations and functions’.)

³⁹⁰ Hertogen(n365) 1134.

³⁹¹ Brewer(n48) 962.

³⁹² See Charles S. Peirce, *Philosophical Writings of Peirce*(Justus Buchler ed, Dover Publications 1955) 150-6.

³⁹³ See Part B. 1 & 2 of chapter II.

principles, while it only need to select one or a relatively small number of instances.

However, this process of selecting one or some out of an indefinite number of possibilities can be considered very intuitive,³⁹⁴ and some suggest that more formal rules should be developed to guide analogical reasoning.³⁹⁵ As shown above, international law may draw on an inter-systemic analogy from domestic private law or domestic public law, as well as a systemic analogy from existing norms of international law.³⁹⁶ In other words, domestic private law, domestic public law and existing norms of international law may all serve as source domains for analogical reasoning. Thus, abduction itself is insufficient for a good analogical reasoning; it further requires justification of the abduction by reference to relevant similarities or critical differences.

(ii) Identifying Relevant Similarities and Critical Differences to Justify or Negate the Abduction

The process of identifying the source domain for a particular target domain can be considered as a process of identifying *prima facie* similar cases.³⁹⁷ In other words, there must be some similarities between the source domain and the target domain for any analogies to be possible.³⁹⁸

An Hertogen, for example, distinguishes between domestic private law analogies and domestic public law analogies, and argues that ‘in some areas of international law, private law analogies are appropriate, while in other areas public law

³⁹⁴ Brewer(n48) 1026.

³⁹⁵ Norton writes that in analogical reasoning, ‘there always seems to be some part of the analysis that must be handled intuitively without guidance from strict formal rules’. He suggests developing more formal templates guiding analogical reasoning. J.D. Norton, *Analogy*(2018) 1 <www.pitt.edu/~jdnorton/papers/material_theory/4.%20Analogy.pdf> accessed 19 July 2019.

³⁹⁶ Part A. 2 of chapter III.

³⁹⁷ Bartosz Brozek, ‘Is Analogy a Form of Legal Reasoning?’, in Hendrik Kaptein and Bastiaan van der Velden(eds) *Analogy and Exemplary Reasoning in Legal*(AUP 2018) 61.

³⁹⁸ Hertogen(n365) 1134.

analogies might be more suitable'.³⁹⁹ She focuses on functional similarities when identifying the source domain for making domestic analogies in international law. Building on Joseph Weiler and Wolfgang Friedmann's work, she distinguishes four purposes of international law which 'exist alongside each other' as different 'strata':⁴⁰⁰ coexistence, coordination, cooperation, and regulation.⁴⁰¹ In the layer of coexistence and coordination, states are comparable to individuals in private law, thus domestic private law is a suitable source domain for analogy.⁴⁰² When it comes to the layer of cooperation and regulation, international law establishes obligations 'in the common interest', and states are becoming increasingly integrated in global governance, similar to a government branch or agency charged with the implementation of rules, the basic contours of which have been decided at the international level.⁴⁰³ In the regulation 'strata', we are approaching the re-establishment of state-like structures at global level.⁴⁰⁴ In these latter two levels, international law is more similar to domestic public law. Hertogen's approach to identifying the source domains indicates that both domestic private law and domestic public law may be relevant for drawing analogies, but she does not describe clearly which particular international court or tribunal belongs to which strata. It might be easier to find that international criminal courts and tribunals and human rights courts fall in the 'strata' of 'regulation', thus domestic public law analogies would be more suitable for them. But the functions of many other courts and tribunals are not as straightforward as them, as many of them may both involve private

³⁹⁹ Hertogen(n365) 1136.

⁴⁰⁰ She uses Joseph Weiler's metaphor of the different strata of international law. See J. Weiler, 'The Geology of International Law' (2004) 64 *ZaöRV* 547.

⁴⁰¹ Hertogen(n365) 1136-42.

⁴⁰² *ibid* 1138.

⁴⁰³ *ibid* 1139.

⁴⁰⁴ *ibid*.

as well as public functions.⁴⁰⁵

Regarding the issue of judicial impartiality in international adjudication, the question arises as to: Which one should be chosen as the source domain for the purpose of transferring the principles and rules of impartiality to an international body? What are the relevant similarities and critical differences to justify or negate the analogy?

B. Application of Analogical Reasoning for Identification of the Principles and Rules of Impartiality in International Adjudication: Examples

As the validity of analogical reasoning should be judged on a case-by-case basis,⁴⁰⁶ this part does not intend to enumerate the principles and rules of impartiality for all types of international courts and tribunals, but only use several examples (mainly in inter-state dispute settlement mechanisms) to show the utility and difficulties in adopting the analogical reasoning to identify the principles and rules of impartiality in international courts and tribunals. The lynchpin of this process is the identification of the relevant similarities and critical differences justifying or negating a particular analogy.

1. Example 1: Analogous Application of the Principles and Rules of Impartiality to Semi-Judicial Decision-Making Bodies

One of the manifestations of the principle of impartiality, the maxim '*nemo judex in sua causa*' or 'no one should be a judge in his own case', exists not only in international courts and tribunals defined in a narrow sense, but also extends to international decision-making bodies exercising semi-judicial functions. This is illustrated below by reference to two cases in the PCIJ and the ICJ. The cases involve

⁴⁰⁵ See eg Roberts(n350) 58; Rogers(n332) 349-63.

⁴⁰⁶ Bordin, 'Analogy'(n358) 36.

an analogous application of the principle '*nemo judex in sua causa*' and other relevant rules to the Council of the League of Nations ('the League Council'). The following analysis focuses on a comparison between the characteristics and functions of the League Council in these two cases and those of other decision-making contexts. Through this process, some relevant similarities and differences can be identified for the analogous application of the principles and rules of impartiality.

a. Example 1.1: Analogous Application of 'Nemo Judex in Sua Causa' to the League Council in Mosul case

In 1925, the PCIJ issued an advisory opinion which involved a dispute brought before the League Council based on an agreement between the United Kingdom and Turkey on the delimitation of boundaries in the area of Mosul ('*Mosul case*'). Apart from the issue on the nature of the decision of the Council (*i.e.*, whether it is an arbitral award, recommendation or mediation), the case also discussed the applicable voting rule and whether the representatives of the two parties should be excluded from participating in the voting. These three issues were considered as interrelated in this case,⁴⁰⁷ and were relevant to the principle '*nemo judex in sua causa*'.

The agreement⁴⁰⁸ which provided the Council with jurisdiction did not specify the procedures to be adopted to settle the dispute. The PCIJ applied the principle '*nemo judex in sua causa*' to the case and decided that the representatives of the parties to the dispute were not allowed to participate in the voting.⁴⁰⁹ It reached this finding by an

⁴⁰⁷ *Mosul case*(n19).

⁴⁰⁸ Treaty of Peace with Turkey Signed at Lausanne(24 July 24 1923) in *The Treaties of Peace 1919-1923*, Vol. II(new York: Carnegie Endowment for International Peace 1924) <https://wwi.lib.byu.edu/index.php/Treaty_of_Lausanne> Article 3(2) specifies that '[i]n the event of no agreement being reached between the two Governments within the time mentioned, the dispute shall be referred to the Council of the League of Nations.'

⁴⁰⁹ *Mosul case*(n19) 32.

analogous application of the voting rules regarding settlement of disputes by the League Council when a dispute was brought before it based on Article 15 of the Covenant of the League of Nations ('League Covenant'), while rejected the analogous application of the voting rule in Article 5 of the League Covenant,⁴¹⁰ as well as the voting rule in the narrowly-defined international arbitration.⁴¹¹

According to Article 15 (6) of the League Covenant, the Council is granted the power to make recommendations for disputes brought before it.⁴¹² The voting rule is a qualified unanimity, which is an exception from the general requirement of absolute unanimity stipulated in Article 5.⁴¹³ In the scenario where Article 15(6) applies, the representatives selected by both parties to the dispute can participate in the proceeding but their vote cannot be taken into account. The legal effect of a recommendation achieved through such a qualified unanimity is very limited: members of the League are not allowed to go to war with the party which complies with the recommendation.⁴¹⁴

The following part discusses the factors which might constitute the relevant similarities and critical differences to justify or deny the analogy.

(i) Whether parties to the dispute are members of the international body

One of the differences between the present case and the scenario where a dispute is brought before the Council based on Article 15(6) is that a party to the dispute in this case is not a member of the League of Nations, while the Article 15(6) procedures can only be triggered when both parties to the dispute are members of the League of Nations.

⁴¹⁰ *Mosul case*(n19) 29-32.

⁴¹¹ *ibid* 27.

⁴¹² Covenant of the League of Nations(adopted 28 April 1919, entered into force 10 January 1920) 13 AJIL Supp. 128('League Covenant') art 15.

⁴¹³ League Covenant, art 5.

⁴¹⁴ *ibid* art 15.

However, this difference was not considered critical for refusing the analogous application of Article 15(6), which can be shown through comparison of the case with the *Péter Pázmány University* case.⁴¹⁵ In the latter case, the PCIJ decided on the voting rule for disputes between members of the League of Nations brought before the Council. The disputed issue in the *Péter Pázmány University* case was whether to adopt a report aimed at settling a particular dispute according to Article 11 of the League Covenant.⁴¹⁶ The PCIJ did not discuss the application of the principle ‘*nemo judex in sua causa*’ or the accompanied rule of qualified unanimity, but relied on the rule of absolute unanimity.⁴¹⁷ Had the factor whether the parties are members of the League been a critical factor for analogous application of the rule of qualified unanimity in Article 15 of the Covenant, it would be more appropriate for the rule to be adopted in the *Péter Pázmány University* case (*i.e.*, a dispute between members to the League of Nations) than in the *Mosul* case (*i.e.*, a dispute between a member and non-member).⁴¹⁸ But obviously the PCIJ did not take this difference on parties to the dispute into account when deciding on the applicable rule. What is more relevant, as shown below, is the express intention of parties to reach a binding and final decision to settle the dispute.

(ii) Whether parties to the dispute have intended the international body to make a binding and final decision

Another seemingly difference between the *Mosul* case and the case under Article 15 is that the Council in the *Mosul* case has been authorized by the parties to

⁴¹⁵ *Appeal from a Judgment of the Hungaro/Czechoslovak Mixed Arbitral Tribunal (Czechoslovakia v Hungary)* (Merits) [1933] PCIJ Series A/B No 61. (‘*The Peter Pázmány University*’)

⁴¹⁶ League Covenant, art 11.

⁴¹⁷ *The Peter Pázmány University* (n415) 142.

⁴¹⁸ See Schwarzenberger, ‘*The Nemo Judex in Sua Causa Maxim*’ (n 22) 490.

make a binding decision,⁴¹⁹ while the recommendation issued under Article 15(6) only has a limited legal effect.⁴²⁰

To the extent that the Council was authorized to make a binding decision, the Council was considered as ‘arbitration’ in a wide sense,⁴²¹ which might explain why the principle ‘no one can be a judge in his own suit’ applies.⁴²² The PCIJ reasoned that:

If such unanimity is necessary in order to endow a recommendation with the limited effects contemplated in paragraph 6 of Article 15 of the Covenant, it must *a fortiori* be so when a binding decision has to be taken. The well-known rule that no one can be a judge in his own suit holds good.⁴²³

The express intention to reach a binding and final decision by parties prevented the court from applying the rule of absolute unanimity in Article 5(1) of the Covenant, and the main reason was that ‘it would prove impossible to obtain any decision if unanimity were required’.⁴²⁴

Therefore, in the comparison between the present case and the Council operating under Article 5 and Article 15(6) of the League Covenant, whether the parties to the dispute is a member to the League is not a relevant concern. What matters more is whether the decision made by the Council has binding force. This indicates the ‘semi-judicial’⁴²⁵ nature of the Council in this case and justifies the analogous application of

⁴¹⁹ *Mosul case*(n19) 26.

⁴²⁰ See texts corresponding to above nn 409-414.

⁴²¹ *Mosul case*(n19) 26.(The PCIJ states that ‘if the word “arbitration” is taken in a wide sense, characterized simply by the binding force of the pronouncement made by a third Party to whom the interested Parties have had recourse, it may well be said that the decision in question is an “arbitral award”’.)

⁴²² As will be discussed below, that the application of the rule ‘*nemo judex in sua causa*’ is connected to the nature of the Council as ‘arbitration’ in a broad sense is also confirmed in the separate opinions of Judge Lauterpacht and Judge Klaestad in the *South-West Africa Advisory Opinion*(n19).

⁴²³ *Mosul case*(n19) 31.

⁴²⁴ *ibid* 31.

⁴²⁵ See the separate opinions of Judge Lauterpacht and Judge Klaestad in *South-West Africa Advisory Opinion*(n19).

the principle ‘no one can be a judge in his own case’ and the accompanied voting rule of qualified unanimity, while refused the analogous application of the rule of absolute unanimity in Article 5 of the League Covenant.

However, factors such as the ‘organization and functions’, particularly the composition of the decision-makers (*i.e.*, whether they are composed of government representatives or judges who apply the law), the subject matter of the dispute, and whether it is *ad hoc* or a standing body with own rules of organization and procedure, were not addressed in the above analysis. But as shown below, these factors might be relevant in other contexts where the rules of impartiality are applied.

(iii) The composition of decision-makers, the subject matter of the dispute, and whether it is *ad hoc* or a standing body

Besides comparing with the Council operating under Article 5 and Article 15 of the League Covenant, the PCIJ also compared the Council in the *Mosul* case with arbitration defined in a narrow sense but rejected the analogous application of the voting rule from the latter domain. As shown below, the principle ‘no one can be judge in his own suit’ qualifies the rule of unanimity in the *Mosul* case, but it does not apply in the same way in arbitration defined in a narrow sense.

To decide whether the Council can apply by analogy the voting rule of majority commonly used in arbitration, the PCIJ firstly compared the ‘organization and functions’⁴²⁶ with that of a narrowly-defined arbitral tribunal ‘which has the object of the settlement of differences between States by judges of their own choice and the basis of respect for law’.⁴²⁷ The PCIJ found that both the Council in this case and the

⁴²⁶ *Mosul* case(n19) 29.

⁴²⁷ *Mosul* case(n19) 26-7. See also Hague Convention for the pacific settlement of international disputes(18 October 1907) 1 Bevens 577, 2 AJIL Supp. 43, art 37.

narrowly-defined arbitration have the power to make a pronouncement with binding force, but the composition of the bench and the considerations based on which they settle the differences are different. The Council in *Mosul* case was ‘composed of persons delegated by their respective Governments, from whom they receive instructions and whose responsibility they engage’ and does not need to apply the law the settle disputes.⁴²⁸ In other words, the different legal positions between the representatives upon the Council and the arbitrators appointed by the parties explain the different voting rules between the Council and arbitration.⁴²⁹ The PCIJ also considered the mission of the Council which deals with issues ‘affecting the peace of the world’⁴³⁰ and therefore ‘observance of the rule of unanimity is naturally and even necessarily indicated...’⁴³¹ In addition, the fact that the Council as an standing organization ‘already constituted and having its own rules of organization and procedure’ also distinguished it from the case of ‘arbitrators appointed *ad hoc* and not forming a permanent body’.⁴³² In light of these differences, the PCIJ considered that the voting rule of majority commonly used in arbitration does not apply to the Council in this case. Instead, the rule of qualified unanimity should be applied.

To sum up, with respect to the issue on voting rule, the PCIJ refused the analogous application of the rule of majority in arbitration due to the critical differences in ‘organization and functions’ , particularly the composition of the decision-makers (*i.e.*, whether they are composed of government representatives or judges who apply the law), and the missions (*i.e.*, whether it involves issues affecting the peace of the

⁴²⁸ *Mosul* case(n19) 29.

⁴²⁹ *ibid* 31.

⁴³⁰ *ibid* 29.

⁴³¹ *ibid*.

⁴³² *ibid* 31.

world) and whether it is *ad hoc* or a standing body with own rules of organization and procedure.

However, both the Council and the arbitral tribunals can apply the principle ‘no one can be judge in his own suit’, in spite of their different voting rules. The relevant similarities justify the analogous application of the principle ‘no one can be judge in his own suit’ are the intention of the parties to have a final and binding settlement of the dispute and the consideration of the effectiveness of international obligations.⁴³³ As shown below in the comparison between the Council as a supervisory organ of mandates system with the Council in the *Mosul* case, this connection was also confirmed in the separate opinions in Klaestad and Lauterpacht in the *South-West Africa Advisory Opinion* of 1955.⁴³⁴

b. Example 1.2: Analogous Application of ‘Nemo Judex in Sua Causa’ to the League Council as a Supervisory Organ of Mandates

(i) The semi-judicial function of the international body

In the separate opinion of Judge Lauterpacht in the *South-West Africa Advisory Opinion* of 1955, he discussed whether the rule of absolute unanimity was applicable in the League Council when it acted as a supervisory organ of the Mandates System. If the rule of unanimity applies, South Africa would have veto power over any decision on its mandate over South West Africa.⁴³⁵ Relying on the *Mosul* case, Judge Lauterpacht argued that the application of the principle *nemo judex in sua causa* qualified the rule of unanimity when the Council acts as a judicial or supervisory

⁴³³ *Mosul case*(n19) 31; cf Schwarzenberger, ‘The Nemo Judex in Sua Causa Maxim’(n 22) 489.

⁴³⁴ *South-West Africa Advisory Opinion*(n19).

⁴³⁵ *South-West Africa Advisory Opinion*(n19) Sep Op Lauterpacht, 98–100.

organ.⁴³⁶

In Judge Lauterpacht's dissenting opinion, he rejected the analogous application of the rule of absolute unanimity in Article 5 of the Covenant while relied on an analogous application of the qualified unanimity in the *Mosul* case.

Several reasons could explain why the analogous application of Article 5 was not appropriate. It could be argued by reference to the different functions: supervising mandatory power was considered by Judge Lauterpacht as more similar to the semi-judicial function in *Mosul* case than the administrative function in which situation the rule of absolute unanimity is usually applicable.⁴³⁷ Another critical difference was whether the states concerned have an obligation to bring their disputes for international supervision. He accepted that 'there were reasons of some cogency for maintaining the rule of absolute unanimity having regard to the principle that States cannot be compelled, directly or indirectly, to bring their disputes before the Court'.⁴³⁸ But in this case, the state concerned has an obligation to bring the mandates for supervision, thus a different voting rule should apply.

In the comparison between the present case and the *Mosul* case, Judge Lauterpacht did not consider that the difference between the function of the Council as a supervisory organ over mandates system and the semi-judicial function in the *Mosul* case is a critical one, but rather treated them as relevant similarities.⁴³⁹ Nor did he

⁴³⁶ *ibid* 100.

⁴³⁷ See Quincy Wright, *Mandates under the League of Nations* (Praeger 1930) 132, 522, cited in *ibid* 104.

⁴³⁸ *South-West Africa Advisory Opinion* (n19) Sep Op Lauterpacht, 106.

⁴³⁹ *ibid* 100; See *South-West Africa 1971 Advisory Opinion* (n322), Sep Op De Castro, 206. Judge De Castro agrees with Judge Lauterpacht that 'the principle *nemo judex in re sua* prohibits an administrator, guardian (*tuteur*) or mandatory from being the person who decides or judges whether or not he has fulfilled his obligations as such'.

consider the differences regarding parties to the dispute⁴⁴⁰ or the different instruments which grant the Council jurisdiction over the disputes⁴⁴¹ as critical differences negating the analogy.

(ii) The existence of an international obligation to observe definite rules, and an obligation to submit to international supervision

The relevant similarities Judge Lauterpacht identified between the present case and the *Mosul* case were that in both cases, there existed a dispute between states which are bound by ‘international obligations to observe a definite rule of conduct and to submit to the international supervision of its observance’.⁴⁴²

In all cases in which there is a difference of opinion, brought to the point of a formal discordant vote, between the supervising organ and the administering authority as to the conformity of the conduct of the latter with its international obligations, such difference has the essential elements of a dispute as to the application of a binding international instrument. In any such controversy the principle that no one is judge in his own cause must be deemed to apply... Both administer, in different ways, a system of binding rules of conduct.⁴⁴³

(iii) The effectiveness of international obligations

Another consideration warranting the analogy was the ‘effectiveness of international obligations’.⁴⁴⁴ According to Lauterpacht, without express exception, a state cannot:

by acting as judge in its own case, possess the right to render inoperative a solemn international obligation to which it has subscribed. This principle ought to be kept prominently in mind when it is a question of the supervised State claiming the right to frustrate

⁴⁴⁰ *South-West Africa Advisory Opinion*(n19) Sep Op Lauterpacht, 100.

⁴⁴¹ *ibid* 100.

⁴⁴² *ibid* 99.

⁴⁴³ *ibid* 100.

⁴⁴⁴ *ibid* 104.

by its own vote the legal efficacy of the supervision.⁴⁴⁵

(iv) The legal nature of the subject matter of the dispute

The subject matter was also considered relevant by Judge Lauterpacht for analogous application of the rule of *nemo judex in sua causa*. He justified the connection by arguing that conception of the rule of *nemo judex in sua causa* was ‘a principle of good faith’,⁴⁴⁶ and that it was therefore ‘particularly appropriate in relation to an instrument of a fiduciary character such as a mandate or a trust in which equitable considerations acting upon the conscience are of compelling application.’⁴⁴⁷ In other words, the connection between the subject matter in the dispute (*i.e.*, exercising of fiduciary duties) and the application of the ‘*nemo judex in sua causa*’ was justified by the rationale that both of them share a common nature as ‘a principle of good faith’.

(v) The institutional limitation of the international body and the competence of the authority assessing the impartiality

Judge Lauterpacht’s opinion can be juxtaposed with the Separate Opinion of Judge Klaestad. Judge Klaestad agreed with Judge Lauterpacht’s interpretation of the *Mosul* case that ‘no one can be judge in his own suit’ was applicable to the Council when it exercised ‘a competence of a judicial character to give a definitive and binding decision in a particular dispute between two States with regard to the final determination of a frontier’,⁴⁴⁸ but he refused the analogical application of the principle to the present case where the Council exercises supervisory power of mandates.⁴⁴⁹

⁴⁴⁵ *ibid.*

⁴⁴⁶ *ibid* 105.

⁴⁴⁷ *ibid.*

⁴⁴⁸ *South-West Africa Advisory Opinion*(n19) Sep Op Klaestad,86.

⁴⁴⁹ *ibid* 86.

The reasons for his rejection of the analogical application are two-fold. Firstly, he referred to the institutional limitation of the Council. He interpreted the rule of absolute unanimity in the Covenant as the general rule and found that no other exceptions to this rule can be found in the voting practice of the Council regarding mandates.⁴⁵⁰ Secondly, he considered that the restriction on the competence of the ICJ also limited the analogical application of the principle ‘no one can be judge in his own suit’.⁴⁵¹

To sum up, in the separate opinions of *the South-West Africa Advisory Opinion of 1955*, Judge Lauterpacht and Judge Klaestad discussed the analogical application of the principle ‘*nemo judex in sua causa*’ and the accompanied voting rule from the *Mosul* case (1925). They agreed with the finding in the *Mosul* case that that semi-judicial function of the Council is a relevant factor for analogical application of the principle ‘*nemo judex in sua causa*’, although they disagreed on whether exercising supervisory function over mandates is similar to exercising the semi-judicial function or not. When Judge Lauterpacht compared the *Mosul* case with the *1955 Advisory Opinion*, he found that the supervisory function and the judicial function were similar in the sense that ‘[b]oth administer, in different ways, a system of binding rules of conduct’. The ‘effectiveness of international obligations’⁴⁵² and the subject matter under dispute (*i.e.*, mandates) were also considered relevant for application of the rule of *nemo judex in sua causa*, because both of them are ‘a principle of good faith’. As a comparison, Judge Klaestad rejected the analogical application of the rules in *Mosul*

⁴⁵⁰ A similar view is expressed in the dissenting opinion of Judge Fitzmaurice in *South-West Africa 1971 Advisory Opinion*(n322), Diss Op Fitzmaurice, 50, fn 49.

⁴⁵¹ *South-West Africa Advisory Opinion*(n19) Sep Op Klaestad, 86.

⁴⁵² *South-West Africa Advisory Opinion*(n19) Sep Op Lauterpacht, 100.

case due to the institutional limitation of the Council expressly mentioned in its constituting instrument, and the limits of the competence of the ICJ.

2. Example 2: Analogous Application of the Principles and Rules of Impartiality to Standing Inter-State Courts

There is little dispute that the principles and rules of impartiality apply in standing inter-state courts, but the content and scope of them may be disputed. This section shows that analogical reasoning can be adopted to justify why the content and scope of the principles and rules of impartiality in the context of standing inter-state courts is more similar to those in inter-state arbitration rather than those in domestic public law. This is illustrated with the example on the debate whether the institution of *ad hoc* judge in standing inter-state courts is compatible with the maxim *nemo iudex in sua causa*.

a. The Dispute on the Institution of ad hoc Judges in Standing Inter-State Courts

In some standing inter-state courts, states are allowed to appoint an *ad hoc* judge to a case if they don't have a judge of their nationality on the bench,⁴⁵³ but it is argued by some that the institution of *ad hoc* judge violated the rule *nemo iudex in sua causa*. James Brown Scott, for example, argued in 1909 that the institution of *ad hoc* judges impugned the impartiality of an international tribunal, because 'a member of the tribunal is more or less biased by national interest, and the less the representation of national interests, the greater the guarantee for impartiality'.⁴⁵⁴ Some others at his time argued against the retention of *ad hoc* judges on the ground that it violated the principle

⁴⁵³ ICJ Statute, art 31; ITLOS Statute, art 17.

⁴⁵⁴ James Brown Scott, *The Hague Conferences of 1899 and 1907* (JHUP 1909) 284.

‘no man shall be a judge of his own case’.⁴⁵⁵ Hersch Lauterpacht also agreed that the institution of *ad hoc* judges is incompatible with the requirement of impartiality. He contended that the very existence of judge *ad hoc* impinged on the appearance of impartiality of the court by introducing an element of representation of the interests of state into the bench.⁴⁵⁶ The national bias of *ad hoc* judges is further evidenced by the fact that the *ad hoc* judges are found in most of the cases to vote in favour of their appointing states.⁴⁵⁷ Chagla, after acting as a judge *ad hoc* in the *Right of Passage Case*, argued against the institution of judge *ad hoc* based on similar grounds.⁴⁵⁸

Those who argue against the retention of *ad hoc* judge can be seen as adopting an analogous application of the principle *nemo judex in sua causa* from domestic public law to inter-state standing courts. Chagla, for example, drew an analogy from domestic criminal cases:

I think the system of *Ad Hoc* Judges is bad. There are fifteen permanent judges of the International Court who are reputed to be the finest jurists in the world. The countries should learn to have confidence in these judges. What would one think of a defendant who wants to nominate a representative on the Court which is trying a case against him?⁴⁵⁹

Indeed, the maxim *nemo judex in sua causa* derives from a principle of natural justice in domestic public law.⁴⁶⁰ In domestic legal systems where the rules corresponding to *nemo judex in sua causa* exist, they constitute part of domestic public law system and cannot be derogated by the consent of parties.⁴⁶¹ However, as shown

⁴⁵⁵ See Mani(n24) 403; Megret(n1) 112.

⁴⁵⁶ Lauterpacht, *The Function of Law in the International Community*(n11) 232-35.

⁴⁵⁷ *ibid* 230.

⁴⁵⁸ Chagla(n24) 109-15.

⁴⁵⁹ *ibid*.

⁴⁶⁰ H. H. Marshall, *Natural Justice*(Sweet & Maxwell 1959) 5, cited in Mani(n24) 382; Craig(n20) Chp13.

⁴⁶¹ Schwarzenberger, ‘The Nemo Judex in Sua Causa Maxim’(n 22) 485.

below, it makes more sense to argue that the inter-state courts should not apply by analogy the maxim *nemo judex in sua causa* from domestic public law, but should take inter-state arbitration as a source domain.

b. Critical Differences Negating Analogical Application of the Principles of Impartiality from Domestic Public Law

This part identifies the critical differences mentioned by international lawyers which render the domestic public law analogy of the rules of impartiality inapplicable in inter-state standing courts. As there is no case law on whether or not the institution of *ad hoc* judge complies with the principles and rules of impartiality, this part mainly identifies relevant considerations by reference to the legal literature and the diplomatic negotiation leading to the establishment of the courts.

(i) The separation between judicial and other functions in a society

The first critical difference identified by scholars is the lack of division between judicial and other functions in international order. According to Schwarzenberger, one of the presumptions for the application of the maxim *nemo judex in sua causa* in domestic public law is that ‘the existence of a judiciary, which is distinct and independent of other public offices’.⁴⁶² As there is no such separation of power in inter-state relations, the rules corresponding to *nemo judex in sua causa* can be applied only when states consent to them.⁴⁶³

(ii) The relationship between parties and the court

The relationship between litigants and the Court might also be relevant. Guyomar, for example, argued that the Court’s relationship with litigant States had a

⁴⁶² *ibid* 483.

⁴⁶³ *ibid* 484; Mani(n24) 403.

‘diplomatic aspect’ which has no counterparts in domestic public law.⁴⁶⁴ Hersch Lauterpacht also agreed to take into account this factor when comparing administration of justice in international courts to domestic courts:

The administration of justice within the State can afford to rely on purely formal and procedural grounds. It can also afford to disregard the susceptibilities of either of the parties by ignoring such of its arguments as are not indispensable to the decision. This cannot properly be done in international relations, where the parties are sovereign States, upon whose will the jurisdiction of the Court depends in the long run...⁴⁶⁵

(iii) State consent and the equality of states

Two predominant factors – state consent and the equality of states – can arguably explain why the principle of impartiality does not prohibit the institution of *ad hoc* judge in the context of the standing inter-state courts.⁴⁶⁶ Firstly, there is no compulsory obligation to resort to an impartial court to settle the disputes among states. This difference from domestic public judging explains why the right to an independent and impartial trial can be waived and the rules corresponding to ‘*nemo iudex in sua causa*’ can be derogated in inter-state dispute settlement mechanisms.⁴⁶⁷ Secondly, during the establishment of the PCIJ, states did not consider that appointing a judge *ad hoc* violated a non-derogable principle of impartiality, otherwise they would have accepted the alternative proposal which suggested admitting party-nominated assessors who would have the right to participate in discussion but have no right to vote. The latter choice was rejected by the states, because they want the party-appointed actors to

⁴⁶⁴ G. Guyomar, *La revision du reglement de la Cour internationale de Justice*(1973) 77 RGDIP 751, 761, cited in Scobbie(n27) 433.

⁴⁶⁵ Lauterpacht(n27) 39. See 37-43 generally.

⁴⁶⁶ See also Mani(n24) 403.

⁴⁶⁷ Gélinas(n36) 38-39.

participate with complete equality.⁴⁶⁸ Instead of refusing the institution of national judges on the ground of lacking impartiality, the states rather considered that the requirement of equality, a principle inseparable from the principle of impartiality,⁴⁶⁹ formed one of the reasons that support the institution of *ad hoc* national judges.⁴⁷⁰

(iv) Whether there are sufficient qualified decision makers

Another relevant factor identified is whether there are sufficient qualified judges to replace the disqualified judge.⁴⁷¹ The limited number of judges in the standing interstate courts can explain why *ad hoc* judges are not disqualified despite the pattern that they usually vote in favour of the states that appoint them in most of the cases. Such consensus of views is usually a precondition for one to be appointed by a state to act as an *ad hoc* judge, but is not necessarily a violation of the rule of impartiality.⁴⁷² This is because if such a voting pattern indicates a lack of impartiality to the extent that the whole institution of *ad hoc* judges should be abolished, similar reasoning can be adopted to remove all judges whose voting patterns favour the interests of his or her national states or friendly states before the court.⁴⁷³ This would lead to insufficient judges to decide a case.⁴⁷⁴

⁴⁶⁸ See Stephen M Schwebel, 'National judges and judges ad hoc of the International Court of Justice' (1999) 48 ICLQ 889, 889-90.

⁴⁶⁹ Lucy, 'Impartiality' (n14) 28.

⁴⁷⁰ James Brown Scott, *Report and Commentary on the Project of a Permanent Court of International Justice and Resolutions of the Advisory Committee of Jurists* (Carnegie 1920) 86-90; The principle of impartiality is inseparable from the requirement of equality of parties. See Mani(n24) 402-3.

⁴⁷¹ Schwarzenberger, 'The Nemo Judex in Sua Causa Maxim' (n 22) 483.

⁴⁷² Scobbie(n27) 429.

⁴⁷³ See Daniel D. Nsereko, 'The International Court, Impartiality and Judges *ad hoc*' (1973) 13 IYIL 207.

⁴⁷⁴ Also, the representation of 'the main forms of civilisation and the principal legal systems of the world' would at stake. This would also 'strike at the unity of the court and also cast doubt upon the judge's impartiality'. See the view of the Advisory Committee in Scobbie(n27) 432.

c. Analogical Application of the Principles of Impartiality from Inter-State Arbitration to Standing Inter-State Courts

In addition to the factors identified above, this part shows that the similar legal position and function of between party-appointed judges and party-appointed arbitrators can justify the analogous application of *nemo judex in sua causa* in inter-state arbitration to standing inter-state courts.

(i) The similar legal position of the party-appointed adjudicators

The relevance of legal position of decision makers in analogous application of voting rules is mentioned above in the *Mosul* case. The PCIJ found that:

[I]t may perhaps be well to observe that since the Council consists of representatives of States or Members, the legal position of the representatives of the Parties upon the Council is not comparable to that of national arbitrators upon courts of arbitration.⁴⁷⁵

In other words, when the League Council is compared to arbitration in a narrow sense, the different legal position of the decision makers is a critical difference negating the analogical application of the voting rule in the latter scenario to the former. Also, in the context of League Council, the legal status of some decision makers as representatives of States is incompatible with the applicable rule ‘*nemo judex in sua causa*’, thus the representatives of States are not allowed to vote.

Different from the League Council, in the context of inter-state arbitration, the arbitrators appointed by states are not considered as representatives of the parties and are not incompatible with ‘*nemo judex in sua causa*’.⁴⁷⁶ In the Ecuadorian-United States Claims Commission, for example, the United States Commissioner Hassaurek

⁴⁷⁵ *Mosul case*(n19) 32.

⁴⁷⁶ Cheng(n20) 282-84.

clearly indicated that that they were not representatives of states, but were ‘judges appointed for the purpose of deciding the questions submitted to them, impartially, according to law and justice, and without reference to which side their decision will affect favourably or unfavourably’.⁴⁷⁷ Similarly, in the *Mckenny Case* before the Mexican-United States Claims Commission, with respect to the issue whether Commissioner Wadsworth should be precluded from participating in the inquiry, he considered ‘the nature and character of the office of a commissioner under the convention between the United States and Mexico’:

Mr. Commissioner Wadsworth is not a ‘judicial representative of the United States in this commission,’ nor ‘a judicial officer’ of that government. The authority which he possesses derives from both the United States and Mexico, and is obliged to exercise it impartially for the benefit of both.⁴⁷⁸

Based on these practices, Bin Cheng argued that the maxim *nemo judex in sua causa* was not breached by the existence of national judges, since their positions were not that of their nations, but that of impartial judges for both sides.⁴⁷⁹ He explained that:

It may be said that in so far as a national acts as a representative of his State, *qua* party to a dispute, he is an organ of one of the parties, and is identifiable with it. But in so far as the same national is divested of his capacity as an organ of his State *qua* party to the dispute, especially when he has been appointed to act impartially even in matters involving his own State, he may be regarded as unconnected with the dispute.⁴⁸⁰

Based on the similar legal positions of party-appointed judges, he considered that the ‘*nemo judex in sua causa*’ applied in the same way to *ad hoc* judges in the standing inter-state courts.⁴⁸¹ A decision-maker appointed by a state might be

⁴⁷⁷ *Ecuadorian-United States Claims Commission*(1862) 3 Intl Arbitration 2731, 2733-34, cited in Cheng(n20) 282.

⁴⁷⁸ *Mckenny*(1868) 3 Intl Arbitration 2881, 2883-4, cited in Cheng(n20) 283.

⁴⁷⁹ Cheng(n20) 284.

⁴⁸⁰ *ibid* 283.

⁴⁸¹ *ibid* 284.

considered as a state representative rather an impartial judge, and several factors could be identified to determine this (e.g., failure to give legal reasoning, failure to take both parties' view into account).⁴⁸² But this does not mean that in the context of inter-state courts the principle of impartiality is violated solely because the adjudicator is appointed by a state to the dispute.

(ii) The similar function of party-appointed adjudicators

Also considered relevant for the analogous application of '*nemo iudex in sua causa*' to standing inter-state courts is the function of the party-appointed judges. The function of *ad hoc* judge is to ensure that every points of the party who appointed him or her must be properly reflected and considered during the deliberation. This role is different from being a representative of the state to the dispute. Elihu Lauterpacht, when sitting as judge *ad hoc* at the *Genocide in Bosnia* Case, talks about the role of a judge *ad hoc*: the institution of judge *ad hoc* is not contrary to the principle of impartiality. The principle does not allow an *ad hoc* judge to be a representative of the state that appoints him, but it does allow the judge to endeavour to ensure 'every relevant argument in favour of the party that appointed him has been fully appreciated in the course of collegial consideration'.⁴⁸³ This view was endorsed by many other *ad hoc* judges.⁴⁸⁴

To summarize, this section argues that the standing inter-state courts should not apply by analogy the maxim *nemo iudex in sua causa* from domestic public law but

⁴⁸² *Arakas(The Georgios) Case*(1927) Greco-Bulgarian Mix. Arb. Trib., 7 Rec. des Décisions des Trib. Arb. Mixtes Institués par les Traités de Paix, 43-45, cited in Cheng(n20) 283.

⁴⁸³ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide(Bosnia and Herzegovina v. Serbia and Montenegro)*(Provisional Measures)[1993] ICJ Rep 408, Sep Op Elihu Lauterpacht, 408-409, paras 4-6.

⁴⁸⁴ See Scobbie(n27) 429.

should take inter-state arbitration as a source domain. This analogical reasoning can be justified by reference to the critical differences between inter-state standing courts and the domestic public adjudication (*e.g.*, the existence of division of judicial and other functions, the relationship between disputes and the court, state consent and equality of states, whether there are sufficient numbers of qualified judges), and by reference to the relevant similarity between inter-state standing courts and inter-state arbitration (*e.g.*, the legal position and function of party-appointed adjudicators).

This chapter shows that proper use of the analogical reasoning can contribute to identifying the existence and scope of the applicable principles and rules of impartiality in international courts or tribunals. Although absolute determinacy is hard to achieve, a valid analogical reasoning justified by relevant similarities can add some rational force to the legal argumentation. However, the relevant similarities warranting the analogous application of the rules of impartiality may vary in different cases. What constitutes a relevant characteristic in one context may be irrelevant in another, thus case-by-case analysis is always needed.

CONCLUSION

It is now possible to answer the questions raised at the beginning: (1) What meaning and content should be given to the concept of impartiality? (2) To what extent the applicable principles and rules of impartiality in a particular international court or tribunal can be informed from those in domestic courts and international judicial practice? (3) How to identify the functions and characteristics relevant to the applicable principles and rules of impartiality in a particular context of international adjudication?

Impartiality is conceptualized as ideal, principles and rules in this thesis. Impartiality, as an ideal, cannot be fully achieved nor fully formulated, which makes it possible for different international courts and tribunals to have different principles and rules of impartiality. The principles and rules can derive from the ideal of impartiality by reference to the functions and characteristics of different courts and tribunals. For example, in Fuller's conception of adjudication, judicial impartiality should be understood together with party participation through reasoned argument and the adversarial presentation, all of which are designed to accommodate the tension between sympathy and detachment which is considered by Fuller as inherent in adjudication as a form of moral reasoning.⁴⁸⁵ As a comparison, in civil law systems, the legal reasoning process, ways of appointment, and judges' relationship with parties can explain why a judge's impartiality in the adversarial systems might be called into question in situations which are considered natural for judicial positions in the civil law systems, e.g., the civil law judges' control over witness questioning and pre-hearing reviewing of files are not considered as judicial bias like in the adversarial systems.⁴⁸⁶

Where there is uncertainty about the applicable principles or rules of

⁴⁸⁵ See nn 168-180.

⁴⁸⁶ See nn 181-188.

impartiality in an international court or tribunal, the norms from domestic law or international judicial practice can be relied upon to fill the gaps according to the source-based approach, but the oscillation between induction and deduction underlying the legal argumentation may make the answer inherently indeterminate.

Analogical reasoning can also be adopted in case of uncertainty, as long as the ‘target domain’ and the ‘source domain’ share similar functions and characteristics. The thesis has used several examples to show how the relevant functions and characteristics can be identified. For example, one of the manifestations of the principle of impartiality, the maxim ‘*nemo iudex in sua causa*’ (‘no one should be a judge in his own case’), applies not only in international courts and tribunals defined in a narrow sense, but extends by analogy to international decision-making bodies exercising semi-judicial functions. In the *Mosul* case and the *South-West Africa Advisory Opinion*, some judges apply this principle by analogy to the Council of the League of Nations to limit its voting rule to a qualified unanimity, as opposed to the absolute unanimity applied when the Council exercises administrative functions. This can be justified by the relevant functions and characteristics such as the binding nature of the decisions of the international bodies, the consideration of effectiveness of international obligations, the subject matter of the dispute, and the existence of an international obligation to subject to international supervision, *etc.*⁴⁸⁷

However, the applicable principles and rules of impartiality and the relevant functions and characteristics justifying their application can be different in other contexts. In standing inter-state courts, for example, the principles and rules of impartiality prohibit a judge from sitting before a case in which he or she previous participated in some capacities, but do not prohibit the participation of a judge who has

⁴⁸⁷ See nn 415-452.

some other close links with a party or the case, such as same nationality,⁴⁸⁸ or prior opinions over the relevant facts of the case.⁴⁸⁹ Such principles and rules can be considered as analogous application of the law of impartiality in inter-state arbitration, as justified by the relevant similarities in the legal position and function of the adjudicators. The differences between the law of impartiality in inter-state cases from that in other contexts (such as domestic public law) can be explained by factors such as the existence of division of judicial and other functions, the relationship between parties and the court, state consent and equality of states, and whether there are sufficient numbers of qualified judges.

As for future research on this topic, it is suggested that more examples can be examined to test to what extent the functions and characteristics identified in such inter-state cases can be extended to other contexts. Indeed, it has to be admitted that analogical reasoning, like induction and deduction, cannot fully guarantee determinacy and objectivity in drawing the contours of the applicable principles and rules of impartiality in international adjudication. This concurs with the ideal nature of impartiality and indicates the insufficiency of legal principles and rules in regulating judicial conducts. In this sense, it is fair for Judge Buergenthal to argue that judicial ethics are not just ‘matters strictly of hard and fast rules’ but are ‘matters of perception and of sensibility to appearances that courts must continuously keep in mind to preserve their legitimacy’.⁴⁹⁰

The research also has implications in the broader context of the methods of international legal research. It provokes the reflection of the relationship between the ‘formalist approach’ and the ‘normative approach’ (or between the ‘source-based

⁴⁸⁸ See n453.

⁴⁸⁹ *Wall Advisory Opinion*(n19).

⁴⁹⁰ *Wall Advisory Opinion*(n19) Diss Op Buergenthal, para 10.

approach' and the 'value-based approach'). Their relationship may not be a matter of 'either this or that', but they can be blended with each other. This is particularly the case when there are gaps in the statutory rules, as shown in the examples in Chapter II and III. In such circumstances, it is usually difficult to distinguish between when judges are identifying the *lex lata*, or when they are using the inherent indeterminacy of the source-based approach as camouflage of their extra-legal normative considerations.

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