

## Overview

Table of Contents	17
List of Abbreviations	29
Chapter A: Introduction	33
I. Introduction to the Research Theme	33
II. Motivation for the Research	39
III. Outline of the Research and Methodology	42
IV. Focal Questions	45
Chapter B: The Notion of Judicial Independence – The Analytical Framework	47
I. Introduction	47
II. The Usefulness of Legal Definitions	47
III. Textual Approach – What do We Mean by Judicial Independence?	49
IV. Substantive Approach – Theoretical Justification and Concretization	55
V. Summary	87
Chapter C: The International Judiciary – Defining the Object of Investigation	89
I. Introduction	89
II. Judicial Independence in its Historical Context – From Ad Hoc Arbitration to Compulsory Jurisdiction	89
III. Why does Independence Matter?	102
IV. The Basis for a Systematic Approach – Defining International Courts and Tribunals	111
V. Summary	121
Chapter D: Judicial Independence in the International Court of Justice	124
I. Introduction	124

Overview

II. Genesis and Organizational Setting of the ICJ	125
III. The Functions Served by the ICJ	135
IV. The Notion of Judicial Independence in the Statute of the ICJ	144
V. Structural Independence	152
VI. Personal Independence	171
VII. Conclusions	208
Chapter E: Judicial Independence in the International Tribunal for the Law of the Sea	212
I. Introduction	212
II. Genesis and Organizational Setting of the ITLOS	214
III. The Functions Served by the ITLOS	221
IV. Structural Independence	229
V. Personal Independence	268
VI. Conclusions	281
Chapter F: Judicial Independence in the International Criminal Court	284
I. Introduction	284
II. Genesis and Organizational Setting of the ICC	285
III. The Functions Served by the ICC	292
IV. Structural Independence	298
V. Personal Independence	328
VI. Conclusions	340
Chapter G: Judicial Independence in the Ad Hoc International Criminal Tribunals for the Former Yugoslavia and Rwanda	343
I. Introduction	343
II. Genesis and Organizational Setting of the ICTY and ICTR	344
III. The Functions Served by the ICTY and ICTR	352
IV. Structural Independence	363
V. Personal Independence	396
VI. Conclusions	422
Chapter H: Judicial Independence in the European Court of Human Rights	425
I. Introduction	425

	Overview
II. Genesis and Organizational Setting of the ECtHR	426
III. The Functions Served by the ECtHR	439
IV. Structural Independence	443
V. Personal Independence	492
VI. Conclusions	509
Chapter I: Summary of Conclusions and Outlook	512
I. The Need for an Independent International Judiciary – Balancing Independence and Courts’ Political Nature	512
II. Contents and Deficits of a Common Core of Judicial Independence	513
III. The Prospects of an Independent International Judiciary	520
Annex: Ad Hoc Judges of the ICJ	523
Appendix: International Courts – A Chart	525
Zusammenfassung: Die Unabhängigkeit internationaler Gerichte – Die Einhaltung eines grundsätzlichen Werts der Rechtspflege durch die internationale Judikative	531
I. Problemstellung und Aktualität der Fragestellung	531
II. Untersuchungsgegenstand	533
III. Gang der Untersuchung	533
IV. Ergebnis	534
Bibliography	539
I. Monographs	539
II. Articles	549
III. Treaties, Conventions and Other Legal Instruments	566
IV. Table of Cases	588
V. Press	593
VI. Other Sources	594

## Table of Contents

Overview	13
List of Abbreviations	29
Chapter A: Introduction	33
I. Introduction to the Research Theme	33
II. Motivation for the Research	39
III. Outline of the Research and Methodology	42
IV. Focal Questions	45
Chapter B: The Notion of Judicial Independence – The Analytical Framework	47
I. Introduction	47
II. The Usefulness of Legal Definitions	47
III. Textual Approach – What do We Mean by Judicial Independence?	49
1. The Protected Apparatus – The Subject of Independence	49
2. The Attribute of Independence	51
IV. Substantive Approach – Theoretical Justification and Concretization	55
1. Preliminary Reflections	55
2. Origin of the Concept of Judicial Independence – A Practical Example	56
3. Separation of Powers and Independence of the Judiciary	61
a) Historical and Philosophical Context	61
b) The International Judiciary and the Trisection of Powers	65
4. The Rule of Law and the Independence of the International Judiciary	68
5. Judicial Independence: Meaning and Elements	71
a) The Rejection of the Notion's Absoluteness	71
b) Modes of Exercising Influence	73
c) Institutional v. Individual Independence	75

## Table of Contents

d) The Source of Intervention – (In-)Dependence from Whom?	77
(1) The Ideal Judge is Impartial	78
(2) Non-Involvement – Independence from the Parties	81
(3) Political Insularity – Influence Exerted by States and Other Political Actors	82
(4) Judicial Insularity – Independence Within the Judiciary	84
(5) Social Liberty – Independence Vis-À-Vis Social Actors	86
(6) Inner Sovereignty – Personal Suitability for Judicial Office	86
V. Summary	87
Chapter C: The International Judiciary – Defining the Object of Investigation	89
I. Introduction	89
II. Judicial Independence in its Historical Context – From Ad Hoc Arbitration to Compulsory Jurisdiction	89
1. Early Development of Third Party Adjudication	89
2. From the Permanent Court of Arbitration to the End of the World Wars	92
3. The Post-World War and Cold War Period	97
4. The Trend Towards Compulsory Jurisdiction	100
III. Why does Independence Matter?	102
IV. The Basis for a Systematic Approach – Defining International Courts and Tribunals	111
1. Court or Tribunal?	111
2. Elements of a Substantive Definition	113
a) The Permanence Criterion	114
b) Adjudication of International Disputes	116
c) Application of International Law	117
d) Pre-Determined Rules of Procedure	118
e) The Binding Character of Judicial Decisions	119
V. Summary	121
Chapter D: Judicial Independence in the International Court of Justice	124
I. Introduction	124

II. Genesis and Organizational Setting of the ICJ	125
1. The Prototype of the PCIJ's Organizational Ties	125
2. The Organizational Contextualization of the ICJ	130
3. Conclusions	134
III. The Functions Served by the ICJ	135
1. The Function of Dispute Settlement – The Dispute Settlement Mandate Rooted in the UNC	135
2. Contributing to the Development of International Law	138
a) The Power of the ICJ to Interpret International Law	138
b) Factors Influencing the Development of International Law through Adjudication	141
3. Subsidiary Functions	142
4. Conclusions	144
IV. The Notion of Judicial Independence in the Statute of the ICJ	144
1. Drafting Background of the Inclusion in Art. 2 ICJ Statute	144
2. Basic Contents and Function of Art. 2 ICJ Statute	145
3. The Temporal Reach of the Requirement of Judicial Independence	148
4. The Distinction between Independence and Impartiality	150
V. Structural Independence	152
1. Issues Regarding the ICJ's Relationship Vis-À-Vis States	152
2. The Composition of the Court	153
a) The Normative Framework of the Nomination and Election Procedure	153
b) National Groups of the PCA as the Nominating Bodies	154
c) Politicization of the Election Process: a Legacy from the PCIJ	159
d) The Special Problem of Ad Hoc Judges	163
(1) Ad Hoc Judges at the ICJ – Normative Framework and Rationale	163
(2) Ad Hoc Judges and Independence – An Attempt to Harmonize Two Conflicting Concepts	166
3. Financing the ICJ	169
VI. Personal Independence	171
1. The Pre-Electoral Requirements of Integrity and Qualification	171
a) High Moral Character	171
b) The Required Competence	173
2. Tenure and Security of Tenure	176
a) Length of Office and the Possibility of Re-Election	176

Table of Contents

b) Removal from Office	179
3. Remuneration	182
a) Considerations Influencing the Level of Salary	182
b) The Importance of Equality – The Impact of UNGA Resolution 61/262	183
c) The Assessment of the ICJ	188
d) Appraisal	189
4. Privileges and Immunities	191
a) The Normative Framework	191
b) Does Art. 19 ICJ Statute Provide the Necessary Protection?	194
c) The Waiver of Immunities	197
5. Incompatible Activities	198
a) Simultaneous Side Activities and Prior Involvement – The Legal Framework	198
b) Incompatible Activities in the Practice of the ICJ as Threats to Independence	199
c) Assessing Prior Involvement in a Case – The Application of Art. 17(2) ICJ Statute	204
(1) The Order on the Composition of the ICJ in the Case of Legal Consequences of a Wall in the Occupied Palestinian Territory – Facts of the Case	204
(2) The Majority’s Order	205
(3) The Dissenting Opinion of Judge Buergenthal	206
(4) Assessment – Formalism versus Judicial Policy in the Interest of Impartial Administration of Justice	207
VII. Conclusions	208
Chapter E: Judicial Independence in the International Tribunal for the Law of the Sea	212
I. Introduction	212
II. Genesis and Organizational Setting of the ITLOS	214
1. The First and Second UN Conferences on the Law of the Sea (1958 and 1960)	214
2. The Third UN Conference on the Law of the Sea (1973-1982)	215
3. The Rationale Underlying the ITLOS	218
4. Conclusions	220

III. The Functions Served by the ITLOS	221
1. The Mandate of Dispute Settlement as the Main Function of the ITLOS	221
2. The Auxiliary Task of Enforcing Environmental Concerns	224
3. The Emergency Powers of the ITLOS	226
4. Conclusions	228
IV. Structural Independence	229
1. The Relationship with other Organs Established under UNCLOS – the ITLOS and the ISA	229
2. A Court Within the Court – The Special Status of the Seabed Disputes Chamber	231
3. The ITLOS as Part of an Independent Treaty Regime – Consequences for its Self-Conception as an Independent Tribunal	235
4. The Composition of the Tribunal	238
a) The Elected Members of the Tribunal	238
b) The Nomination and Election Procedure – Normative Framework and Practical Implementation	242
(1) The Required Qualifications of Judges	242
(2) The Procedure for the Making of Nominations – The Discretion of States	243
(3) The Election of Judges – Regulating the Influence of States on the Composition of the ITLOS	246
(4) The Selection Process in Practice Thus Far	250
(5) Conclusions	255
c) The Role of Ad Hoc Judges at the ITLOS	256
(1) The Legal Framework	256
(2) The Particularities of Ad Hoc Judges at the ITLOS	257
d) The Use of Scientific and Technical Experts	261
5. Financing the Tribunal	264
V. Personal Independence	268
1. The Pre-Electoral Requirements of Integrity and Qualification	268
2. Tenure and Security of Tenure	270
3. Remuneration	272
4. Immunities and Privileges	275
5. Incompatible Activities	277
VI. Conclusions	281



Chapter F: Judicial Independence in the International Criminal Court	284
I. Introduction	284
II. Genesis and Organizational Setting of the ICC	285
1. Early Beginnings and the Hurdle of State Interests	285
2. The Rome Conference	289
III. The Functions Served by the ICC	292
1. On the Need for a Permanent International Criminal Jurisdiction	293
2. The Fight against Impunity as the Core Function of the ICC	294
3. The Contribution to the Preservation of Peace	296
4. Conclusions	297
IV. Structural Independence	298
1. The Legal Nature of the ICC	298
a) The ICC as a Subject of International Law	299
b) The Question of Objective International Personality	301
c) The Role of the Prosecutor	303
(1) Distinguishing Between the Court and the Office of the Prosecutor?	303
(2) Does the Independent Prosecutor Enhance the Court's Independence?	307
d) Summary	308
2. The Composition of the Court	309
a) The Required Qualifications of Judges	309
b) The Two Procedures for Making Nominations	311
c) The Advisory Committee on Nominations – Real Defence of Judicial Independence or a Paper Tiger?	313
d) The Election Procedure	317
e) The Administrative Functions of the Presidency of the ICC	319
3. Financing the Court	321
a) Outline of the System of Financing	321
b) Funds Provided by the UN – The Example of the Darfur Referral	323
c) Voluntary Contributions as a Means of Influencing the Court's Activities?	324
d) Appraisal of the System of Financing	327

V. Personal Independence	328
1. Tenure and Security of Tenure	328
a) Can Non-Renewable Terms Strengthen Judges' Independence?	328
b) Removal from Office	330
2. Incompatible Activities – Inclusion of the Appearance as a Criterion	334
3. Excusing and Disqualification	337
4. Disciplinary Measures	338
VI. Conclusions	340
 Chapter G: Judicial Independence in the Ad Hoc International Criminal Tribunals for the Former Yugoslavia and Rwanda	 343
I. Introduction	343
II. Genesis and Organizational Setting of the ICTY and ICTR	344
1. The Establishment of the ICTY	344
2. The Establishment of the ICTR	348
3. Conclusions	351
III. The Functions Served by the ICTY and ICTR	352
1. Conviction and Punishment of Individuals for Criminal Responsibility	352
2. Restoring and Maintaining International Peace and Security	355
3. Ancillary Functions	357
a) Deterring Future Crimes – Ad Hoc Prosecution Taken Serious	357
b) Reconciliation – The Value of Independently Establishing the Truth	358
c) The Role of Victims	361
4. Summary	362
IV. Structural Independence	363
1. The Legal Framework of the Establishment of the Ad Hoc Tribunals and its Relevance for the Tribunals' Independence	363
a) The Relationship Between the UNSC and the Tribunals Due to the Latter's Classification as Subsidiary Organs	364
(1) The Legal Framework Governing Subsidiary Organs	364
(2) The Relationship Between Principal and Subsidiary Organs – Issues of Definition	366

(3) Features Prescribing Structural Independence Following from the Classification of the Ad Hoc Tribunals as Subsidiary Organs	367
(4) Conclusions	372
b) Limits to the Exercise of Powers under Chapter VII UNC	373
(1) Generally on Limits to the UNSC's Powers Under Chapter VII UNC	373
(2) The Right to be Judged by an Independent Tribunal as a Human Right	374
(3) Judicial Independence as a Non-Derogable Right?	375
(i) Non-Derogability of the Right to Judicial Independence in the ICCPR	375
(ii) Non-Derogability of the Right to Judicial Independence in the ECHR	378
(iii) Non-Derogability of the Right to Judicial Independence in the ACHR	379
(iv) Non-Derogability of the Right to Judicial Independence in the Arab Charter on Human Rights and the African Charter on Human and Peoples' Rights	380
(v) The Right to be Judged by an Independent Tribunal as a Peremptory Norm?	381
(4) Conclusions	383
2. The Composition of the Tribunals	383
a) The Organs of the Tribunals	383
b) Election and Nomination of the Judges	385
(1) The Legal Framework for the Selection of Permanent Judges	385
(2) The Practice of not Appointing to the Bench Nationals of the Parties to the Underlying Conflict	389
(3) The Determination of the Composition and Structure of the Chambers by the UNSC	390
c) Appointment of the Registry and of Registry Staff	392
3. Financing the Ad Hoc Tribunals	395
V. Personal Independence	396
1. Tenure and Security of Tenure	396
a) The Short Tenure of ICTY and ICTR Judges	396

b) The Ad Hoc Extension of Tenure by the UNSC – Exercise of Administrative Authority or Violation of the Tribunals’ Independence?	399
c) Removal from Office	402
d) Excursus: Removal from Office at the SCSL	406
2. Remuneration	408
3. Recusal and Disqualification – The Tribunals’ Standard of Impartiality	409
a) The Legal Framework for Disqualification	409
b) The Test of Impartiality Developed by the ICTY – Factual Background of Prosecutor v. Furundžija	410
c) The Submissions of the Appellant and the Respondent	411
d) The Appraisal by the Appeals Chamber	414
e) Appraisal of the Standard Developed by the Appeals Chamber	418
4. Incompatible Activities	420
5. Privileges and Immunities of the Judges	422
VI. Conclusions	422
 Chapter H: Judicial Independence in the European Court of Human Rights	 425
I. Introduction	425
II. Genesis and Organizational Setting of the ECtHR	426
1. Adoption of the ECHR and the Vision of a Regional Human Rights Court	426
2. Initial Steps – From a Two-Tiered Control Mechanism to a Single Court	430
3. The Restructuring of the Control Machinery Through Protocol No. 11	433
4. Functioning of the New Court and the Need for Further Changes	436
5. Conclusions	438
III. The Functions Served by the ECtHR	439
1. The ECtHR as a Guardian of Human Rights	439
2. The Quasi-Constitutional Character of the ECtHR	441
IV. Structural Independence	443
1. The Status of the ECtHR	443
a) The Legal Capacity of the ECtHR	444

## Table of Contents

b) The Status of the ECtHR Vis-À-Vis the CoE	447
c) Conclusions	449
2. Administration of the ECtHR	450
a) Appointment of Registry Staff – Definition of a Problem	450
b) The Normative Framework – The Procedure for the Appointment of Registry Staff	451
c) The Special Case of the Registrar	454
d) Considerations on Registry Staff Being Answerable to the Secretary General of the CoE	456
e) Assessment	457
f) Excursus: The Status and Administration of the Inter-American Court of Human Rights	458
(1) The Inter-American Court of Human Rights and its Status in the Inter-American Human Rights Protection System	458
(2) The Responsibility for Court Administration – In Particular Appointment of Administrative Staff	460
3. The Composition of the ECtHR	461
a) Legal Framework and Introduction to the Selection Procedure	461
b) The Nomination of Candidates – The <i>Domaine Réserve</i> of States?	463
c) Inadequacies in the Nomination Process and Their Relevance for Independence	468
d) Nomination by Contracting States – A Practical Example	469
e) Election of the Judges by the PACE	471
4. Distribution of Cases	473
5. The Institution of National Judge and Ad Hoc Judge	476
a) Normative Framework and Rationale	476
b) Safeguards for the Independence of Ad Hoc Judges	478
c) The Voting Behaviour of Ad Hoc Judges – Evidence of (In-) Dependence?	481
d) Conclusions	484
6. The Single-Judge Formation – Increasing the Court’s Efficiency at the Expense of Independent Decision-Making?	484
7. Financing the ECtHR	488
a) The Court’s Budget as Part of the Ordinary Budget of the CoE	488

b) The Lack of the Court's Influence on the Process of Adopting the Budget	490
c) Assessment of the System for Financing of the ECtHR	492
V. Personal Independence	492
1. Required Qualifications of Judges	492
2. Tenure and Security of Tenure	494
a) Duration of the Term of Office – The Length of Office and the Need for Re-Election	494
b) A Fixed Retirement Age – Is it Necessary and What are the Advantages?	497
c) Security of Tenure – Removal of Judges	498
d) Assessment of the Tenure System of the ECtHR	500
3. Incompatible Activities	503
4. Inability to Sit, Withdrawal or Exemption	506
5. Privileges and Immunities	508
VI. Conclusions	509
Chapter I: Summary of Conclusions and Outlook	512
I. The Need for an Independent International Judiciary – Balancing Independence and Courts' Political Nature	512
II. Contents and Deficits of a Common Core of Judicial Independence	513
1. Structural Safeguards	513
2. Personal Independence	516
III. The Prospects of an Independent International Judiciary	520
Annex: Ad Hoc Judges of the ICJ	523
Appendix: International Courts – A Chart	525
Zusammenfassung: Die Unabhängigkeit internationaler Gerichte – Die Einhaltung eines grundsätzlichen Werts der Rechtspflege durch die internationale Judikative	531
I. Problemstellung und Aktualität der Fragestellung	531
II. Untersuchungsgegenstand	533
III. Gang der Untersuchung	533
IV. Ergebnis	534

Table of Contents

Bibliography	539
I. Monographs	539
II. Articles	549
III. Treaties, Conventions and Other Legal Instruments	566
IV. Table of Cases	588
1. International Courts and Human Rights Bodies	588
2. Arbitration Awards	593
3. National Courts	593
V. Press	593
VI. Other Sources	594