

Nationality and the International Judge: The Nationalist Presumption Governing the International Judiciary and Why it Must Be Reversed

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Introduction

Independence and impartiality are among the qualities most fundamental to effective and legitimate judging. However, despite acknowledging explicitly the importance of those concepts, the foundational texts of most international courts assume that the judges who sit on those courts are inherently and irreversibly partial to, and perhaps dependent on, their respective countries of origin. This assumption is most clearly manifested in three provisions, one or more of which are adopted by the majority of international courts. First, most international courts are bound by strict limits on the number of judges of a given nationality that may sit on the bench. Second, under the rules governing a number of international courts, each party in a given case may appoint a judge *ad hoc* when necessary to counterbalance the presence of a national of an opponent party on the bench. Finally, judges on some international courts must recuse themselves from cases involving their countries of nationality. Underlying these rules is a deep anxiety about judicial nationalism and the threat it poses to the independence and impartiality of international courts.

This Article finds these rules to be both misguided and counterproductive on their own terms. First, nationality is not a characteristic of sufficient potency to raise concern about the impartiality of a judge. Second, even if one were to accept anxiety about judicial nationalism, extant approaches to mitigating the perceived threat fail completely in their endeavor. Third, lending statutory imprimatur to such anxiety may actually exacerbate the threat of bias by normalizing the notion of judicial nationalism and thus contributing injuriously to the international judge's conception of her professional role.

The Article is organized as follows. Part I adopts a standard classification of international courts into four types. Part II describes the various approaches taken by international courts to the issue of judicial nationality. Courts from all four court-types adopt what is termed here the “original approach,” or a derivative thereof. The texts governing these courts regulate the spread of nationalities on the court as a whole and/or the composition of judicial nationalities on the bench in any given case. A small minority of international courts instead adopts a “cosmopolitan approach,” whereby judicial nationality is deemed irrelevant. Part III argues that the dominant focus on judicial nationality is grounded fundamentally in a deep-seated anxiety about judicial nationalism and its impact on independence and impartiality. Part IV contends first that this anxiety is not justified, and second that even if it were justified, the provisions used to ameliorate the anxiety are misguided and ultimately counterproductive on their own terms. Part V examines alternative bases for these provisions and finds none to be plausible. Part VI advocates a broad shift among international courts to the cosmopolitan paradigm exemplified most powerfully by the World Trade Organization Appellate Body and the Caribbean Court of Justice.

I. International Courts and Statutory Approaches to Nationality

Since the Permanent Court of International Justice (PCIJ) was reincarnated as the International Court of Justice (ICJ) following World War II, the number of international courts has expanded dramatically, proliferating at a particularly high rate in recent decades.¹ The younger international courts cover new areas of the law and reach deeper into the internal workings of states than do their longer-established counterparts.² Debates about the composition, structure, and legitimacy of international courts are thus of growing consequence for both states and individuals. To set the context for considering the status of judicial nationality in those debates, two preliminary clarifications are in order.

First, courts must be distinguished from similar institutions that operate in the international arena, such as arbitral tribunals³ and treaty bodies.⁴ It is sufficient for the purposes of this Article to adopt the five

1. Ruth Mackenzie & Philippe Sands, *International Courts and Tribunals and the Independence of the International Judge*, 44 *HARV. INT'L L.J.* 271, 272-273 (2003) (noting the “virtual monopoly on the judicial resolution of international disputes” held by the ICJ and its fifteen judges until the late 1950s, and charting the dramatic expansion since, both in terms of numbers and spheres of influence).

2. *Id.*

3. See, for example, the system of arbitration that operates under the auspices of the Permanent Court of Arbitration. Convention for the Pacific Settlement of International Disputes [Hague I] arts. 20-29, July 29, 1899, 32 Stat. 1779, 1 Bevens 230; Convention for the Pacific Settlement of International Disputes [Hague II] arts. 41-50, Oct. 18, 1907, 36 Stat. 2199, 1 Bevens 577.

4. See, for example, the Human Rights Committee, which is charged with interpreting the International Covenant on Civil and Political Rights. International Covenant on Civil and Political Rights arts. 28-45, G.A. Res. 2200A (XXI), 21 U.N. GAOR at 52, 999

characteristics of international courts proposed by Terris et al.: (1) an international court is “permanent, or at least long-standing”; (2) it is “established by an international legal instrument”; (3) it “use[s] international law to decide cases”; (4) it “decide[s] cases on the basis of rules of procedure which pre-exist the case and usually cannot be modified by the parties”; and (5) its judgments are legally binding.⁵

Second, contemporary international courts fulfill a diverse array of purposes, in a number of areas of law, with varying consequences for the entities subject to their jurisdiction. This diversity is a function of the courts’ different, but overlapping jurisdictions *ratione loci*,⁶ *ratione materiae*,⁷ and *ratione personae*.⁸ Building on these distinctions, this Article adopts the following four-part taxonomy.

A. The Classic International Court

The Classic International Court is distinct from other types of courts in its global reach and in that typically only states are parties in cases before the court.

The Classic International Court

<i>Ratione Loci</i>	Global ⁹	<u>Courts:</u> Permanent Court of International Justice (PCIJ) International Court of Justice (ICJ) International Tribunal for the Law of the Sea (ITLOS) World Trade Organization Appellate Body (WTO AB)
<i>Ratione Materiae</i>	Varied. ¹⁰	
<i>Ratione Personae</i>	Typically, the parties in cases before the court are states. ¹¹	

Although technically preceded by the short-lived *Corte de Justicia Cen-*

U.N.T.S. 171 (Dec. 16, 1966) (entered into force Mar. 23, 1976); *Human Rights Committee: Monitoring Civil and Political Rights*, OFFICE OF THE U.N. HIGH COMMISSIONER FOR HUMAN RIGHTS, <http://www2.ohchr.org/english/bodies/hrc> (last visited Nov. 12, 2011).

5. DANIEL TERRIS, CESARE P. R. ROMANO & LEIGH SWIGART, *THE INTERNATIONAL JUDGE: AN INTRODUCTION TO THE MEN AND WOMEN WHO DECIDE THE WORLD’S CASES* 4 (2007).

6. Courts such as the ICJ and the International Tribunal for the Law of the Sea (ITLOS) are global in reach, whereas those such as the European Court of Justice (ECJ), Caribbean Court of Justice (CCJ) and Inter-American Court of Human Rights (IACtHR) are limited only to certain regions. See *infra* notes 9, 27, 38 and accompanying text.

7. While the ICJ and CCJ, for example, are courts of general competence in public international law, the ITLOS may consider only disputes related to the law of the sea, and the European Court of Human Rights (ECtHR) has competence only over human rights law under the European Convention on Human Rights. See *infra* notes 10, 28, 44.

8. Like the ICJ, most international courts have jurisdiction only over states, and sometimes—as in the case of the ECJ—supra-national institutions. The International Criminal Court (ICC) and the various ad hoc international criminal tribunals, however, have jurisdiction only over individuals. See *infra* note 57 and accompanying text.

9. Statute of the International Court of Justice art. 35, June 26, 1945, 59 Stat. 1031, 3 Bevans 1179 [hereinafter ICJ Statute]; Statute of the Permanent Court of International

troamericana (Central American Court of Justice),¹² the PCIJ¹³—and by

Justice art. 34, Dec. 16, 1920, 6 L.N.T.S. 390 (amended by the Protocol of September 14, 1929) [hereinafter PCIJ Statute]; Statute of the International Tribunal for the Law of the Sea, Annex VI of the United Nations Convention on the Law of the Sea art. 20, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter ITLOS Statute]; Understanding on Rules and Procedures Governing the Settlement of Disputes, Annex 2 of the Marrakesh Agreement Establishing the World Trade Organization arts. 2–3, Apr. 15, 1994, 1869 U.N.T.S. 401 [hereinafter WTO Understanding]. The reach of these institutions is not truly global insofar as it is limited by membership of the relevant treaty, in the case of the ITLOS and the WTO AB, and state acceptance of jurisdiction (permanent or ad hoc) in the case of the ICJ. However, the point here is to distinguish these bodies from fundamentally regional supra-national courts, such as those discussed *infra*. As a matter of empirics, 161 states are currently subject to ITLOS jurisdiction. *General Information*, INT'L TRIB. FOR THE LAW OF THE SEA, <http://www.itlos.org/index.php?id=8> (last visited Nov. 12, 2011).

10. For the ICJ (and the PCIJ before it), the *ratione materiae* is general international law. ICJ Statute, *supra* note 9, art. 38; see also PCIJ Statute, *supra* note 9, art. 38. As a specialized international court designed to adjudicate disputes over the law of the sea, the ITLOS's jurisdiction *ratione materiae* is more restricted than that of the ICJ. ITLOS Statute, *supra* note 9, arts. 21–23; United Nations Convention on the Law of the Sea art. 293, Dec. 10, 1982, 1833 U.N.T.S. 397. Like the ITLOS, the WTO AB is more restricted in its jurisdiction *ratione materiae* than is the ICJ, covering only a specified number of trade agreements, rather than the full scope of international law. WTO Understanding, *supra* note 9, art. 1, app. 1.

11. ICJ Statute, *supra* note 9, art. 34 (“Only states may be parties in cases before the Court.”); PCIJ Statute, *supra* note 9, art. 34 (“Only States or Members of the League of Nations can be parties in cases before the Court.”). Emphasizing the archetypical status of this rule, Robert Badinter has commented when discussing international criminal courts: “It always seemed to me that . . . [i]t was disputes between nations, not those who commit crimes against humanity, which were brought before international courts.” Remarks of Robert Badinter, in *Discussion: International Criminal Justice*, in *JUDGES IN CONTEMPORARY DEMOCRACY: AN INTERNATIONAL CONVERSATION* 189, 204 (Robert Badinter & Stephen Breyer eds., 2004). It should be noted, of course, that in addition to its role as adjudicator of international legal disputes between states, the World Court is also empowered to give advisory opinions on matters of international law upon the request of the U.N. Security Council or General Assembly (and their respective League of Nations predecessors). U.N. Charter art. 96; ICJ Statute, *supra* note 9, arts. 65–68; League of Nations Covenant art. 14; PCIJ Statute, *supra* note 9, arts. 65–68. With respect to its jurisdiction *ratione personae*, the ITLOS is not a pure classic international court because it provides for the possibility of non-state “entities” gaining access to the Tribunal under certain conditions. ITLOS Statute, *supra* note 9, art. 20, para. 2; United Nations Convention on the Law of the Sea, *supra* note 10, art. 291. However, the core parties before the ITLOS are states, ITLOS Statute, *supra* note 9, art. 20, para. 1, and this focus is borne out in its caseload. Of the nineteen cases that have been brought to the Tribunal, just one involves a non-state entity, namely the European Union. See *List of Cases*, INT'L TRIB. FOR THE LAW OF THE SEA, <http://www.itlos.org/index.php?id=35> (last visited Nov. 12, 2011). As such, it is most usefully classified as a classic international court for the purposes of this taxonomy. The WTO AB hears only disputes between WTO members. WTO Understanding, *supra* note 9, arts. 2–3. Almost all of the Members of the WTO are states, with a few exceptions such as the European Union and Chinese Taipei. *Understanding the WTO: The Organization: Members and Observers*, WORLD TRADE ORG., http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm (last visited Nov. 12, 2011).

12. The *Corte de Justicia Centroamericana* was established in 1907 to maintain peace and resolve disagreements among five states: Costa Rica, El Salvador, Guatemala, Honduras, and Nicaragua. However, this original incarnation of the *Corte* is of limited relevance here. “[O]nly a few cases actually reached the merits phase, and with only meager results.” CACJ: *Central American Court of Justice*, PiCT: PROJECT ON INT'L CRTS. & TRIBS.,

extension its successor, the ICJ¹⁴—has a foundational and paradigmatic status among international courts.¹⁵ This is recognized in the “World Court” appellation ascribed to the two bodies in conjunction.¹⁶ It is for this reason that this first class is labeled the “Classic International Court.” Joining the World Court in this category are the International Tribunal for the Law of the Sea (ITLOS)¹⁷ and the World Trade Organization Appellate Body (WTO AB).¹⁸ The primary distinction between these bodies and the World Court is that the latter has jurisdiction *ratione materiae* over all areas of international law, whereas the former are limited to specific areas of law—namely the law of the sea and the law enshrined in a specified number of trade agreements, respectively.¹⁹

The WTO AB was not originally intended to be a court in the strict sense.²⁰ However, it has functioned as a court “[f]rom the outset,”²¹ and “now decides dozens of cases per year and is widely considered a true international court.”²² An important distinction between the WTO AB and

<http://www.pict-pecti.org/courts/CACJ.html> (last visited Nov. 12, 2011). Indeed, the Court was short-lived, disbanding after just a decade. *Id.*

13. The PCIJ was provided for in the Covenant of the League of Nations in January 1920, and established through the PCIJ Statute less than 12 months later. League of Nations Covenant art. 14; PCIJ Statute, *supra* note 9.

14. Following World War II and the demise of the League of Nations, the PCIJ was essentially recreated as the International Court of Justice through the U.N. Charter and the attached Statute of the ICJ. U.N. Charter arts. 7, 36, 92–96; ICJ Statute, *supra* note 9; TERRIS ET AL., *supra* note 5, at 3.

15. Technically the ICJ and the PCIJ are separate institutions. However, as Terris et al. note, the distinction is somewhat superficial, being more a reflection on the replacement of the League of Nations with the United Nations than on the changes in the judicial institution itself. TERRIS ET AL., *supra* note 5, at 3 (“The PCIJ disappeared with the demise of the League of Nations at the outbreak of World War II, to be reestablished, with only marginal changes, at the war’s end as the International Court of Justice (ICJ), the ‘principal judicial organ’ of the United Nations.”). Indeed, the ICJ regularly uses PCIJ case law as precedent in much the same way it does its own case law. MOHAMED SHAHABUDEEN, *PRECEDENT IN THE WORLD COURT* 23–26 (1996).

16. TERRIS ET AL., *supra* note 5, at 4.

17. Of course, the Tribunal has jurisdiction over only those states that have ratified the UN Convention on the Law of the Sea. However, there are no regional limits to the Convention’s membership or the Court’s jurisdiction. ITLOS Statute, *supra* note 9, art. 20. One hundred sixty-one states are currently subject to ITLOS jurisdiction. *General Information*, INT’L TRIB. FOR THE LAW OF THE SEA, <http://www.itlos.org/index.php?id=8> (last visited Nov. 12, 2011).

18. See *Dispute Settlement: Appellate Body*, WORLD TRADE ORG. http://www.wto.org/english/tratop_e/dispu_e/appellate_body_e.htm (last visited Nov. 12, 2011).

19. See sources cited *supra* note 10.

20. TERRIS ET AL., *supra* note 5, at 107.

21. Isabelle van Damme, *Treaty Interpretation by the WTO Appellate Body*, 21 EUR. J. INT’L L. 605, 606 (2010).

22. TERRIS ET AL., *supra* note 5, at 106, see also van Damme, *supra* note 21, at 648 (“[T]he Appellate Body’s place in the international judiciary should, in principle, be undisputed.”). It is worth noting in this regard that although Appellate Body reports must be adopted by the WTO Dispute Settlement Body (DSB), each WTO AB report “shall be adopted by the DSB and unconditionally accepted by the parties to the dispute unless the DSB decides by consensus not to adopt the Appellate Body report within 30 days following its circulation to the Members.” WTO Understanding, *supra* note 9, art.17, para. 14 (emphasis added). The DSB necessarily includes representatives of all

the other courts in this category is that the Appellate Body is not a court of first instance, but serves as an appeals chamber²³ for the WTO's system of dispute resolution panels.²⁴ As such, the Appellate Body deals with questions of law, but—unlike the ICJ and ITLOS—not with questions of fact.²⁵

B. The Court of Regional Political and/or Economic Integration

The characteristics of the Court of Regional Integration are described in the table below. Only the four “most active and consequential” courts of regional integration are considered here.²⁶

Courts of Regional Political and Economic Integration

<i>Ratione Loci</i>	Regional ²⁷	<u>Courts:</u>
<i>Ratione Materiae</i>	Disputes and claims relating to member states' and supra-national community organs' compliance with a dense body of community law; ²⁸ Advisory or binding opinions on the meaning of community law; ²⁹ Service as appellate courts of last instance for certain questions concerning the domestic law of community member states. ³⁰	The European Court of Justice (ECJ) ³¹ The European Free Trade Association Court of Justice (EFTACJ) ³² The Caribbean Court of Justice (CCJ) ³³ The Court of Justice of the Andean Community (CJAC). ³⁴
<i>Ratione Personae</i>	A wide range of parties, including states bringing or receiving complaints, supra-national community organs bringing or receiving complaints, individual citizens of community members bringing complaints against either community organs or states, and domestic courts requesting advisory or binding opinions. ³⁵	

The four courts that fit this category vary somewhat in the scope of

parties to the dispute, *id.* art. 2; so, in effect, the rule is that “a report of the panel or the Appellate Body is adopted automatically unless WTO members, *including the prevailing member*, decide by consensus to block it . . .” Richard H. Steinberg, *Judicial Lawmaking at the WTO: Discursive, Constitutional, and Political Constraints*, 98 AM. J. INT'L L. 247, 247 (2004) (emphasis added). This principle of “negative consensus” rule preserves the independence of the WTO AB from any DSB interference.

23. WTO Understanding, *supra* note 9, art. 17, para. 1.

24. For more on the dispute resolution panels, see *id.* arts. 6-16.

25. *Id.* art. 17, para. 6.

26. TERRIS ET AL., *supra* note 5, at 5.

27. Twenty-seven states come under the jurisdiction of the ECJ: Austria, Belgium, Bulgaria, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, and the United Kingdom. *Countries*, EUROPA: GATEWAY TO THE E.U., http://europa.eu/abc/?european_countries/eu_members/index_en.htm (last visited Nov. 12, 2011). Three states fall under the jurisdiction of the EFTACJ: Iceland, Liechtenstein, and Norway. Agreement between the

their jurisdictions *ratione materiae* and *ratione personae*.³⁶ However, in general, they cover a wider range of disputes, delve deeper into the internal workings of states, and hear claims from and against a broader range of entity types than do classic international courts.

EFTA States on the Establishment of a Surveillance Authority and a Court of Justice art. 1(b), May 2, 1992, 1994 O.J. (L 344) 1 [hereinafter EFTACJ Agreement]. Twelve states fall under the jurisdiction of the CCJ: Antigua & Barbuda, Barbados, Belize, Grenada, Guyana, Jamaica, St. Kitts & Nevis, St. Lucia, Suriname, Trinidad & Tobago, Dominica, and St. Vincent & The Grenadines. *About the Caribbean Court of Justice*, CARIBBEAN CRT. OF JUST., <http://www.caribbeancourtofjustice.org/?about.htm>. Originally five states fell under the jurisdiction of the CJAC: Bolivia, Colombia, Ecuador, Peru, and Venezuela; but Venezuela has since withdrawn (see *infra* note 209). Treaty Creating the Court of Justice of the Cartagena Agreement pmbl., May 28, 1979, 18 I.L.M. 1203 (as amended by the Cochabamba Protocol, May 28, 1996) [hereinafter CJAC Treaty]; Codification of the Andean Subregional Integration Agreement art. 5, May 26, 1969, available at http://www.sice.oas.org/trade/junac/?carta_Ag/index.asp (modified in 1987 by the Quito Protocol (the Andean Pact Treaty), by the Trujillo Act of March 10, 1996, and by the Protocol of Sucre signed on June 25, 1997) [hereinafter Cartagena Agreement].

28. Protocol (No. 3) on the Statute of the Court of Justice of the European Union, May 9, 2008, 2008 O.J. (C 115) 210 [hereinafter ECJ Statute].

29. EFTACJ Agreement, *supra* note 27. Three states fall under the jurisdiction of the EFTACJ: Iceland, Liechtenstein, and Norway. *Id.* art. 1(b).

30. Agreement Establishing the Caribbean Court of Justice art. 17, Feb. 14, 2001, available at http://www.caricom.org/jsp/secretariat/legal_instruments/agreement_ccj.pdf [hereinafter CCJ Agreement].

31. CJAC Treaty, *supra* note 27.

32. See, e.g., Consolidated Version of the Treaty on the Functioning of the European Union arts 218(11), 259, 263, 265, 269, 271, 273, May 9, 2008, 2008 O.J. (C 115) 47 [hereinafter TFEU]; CJAC Treaty, *supra* note 27, arts. 17-31; CCJ Agreement, *supra* note 33, art. 17 (applying international law rather than community law); EFTACJ Agreement, *supra* note 27, art. 32. The CCJ also considers the application of international law more broadly. CCJ Agreement, *supra* note 33, art. 17. The ECJ also considers disputes between the European Union and its servants “within the limits and under the conditions laid down in the Staff Regulations of Officials and the Conditions of Employment of other servants of the Union.” TFEU, *supra*, art. 270.

33. TFEU, *supra* note 28, art. 267; EFTACJ Agreement, *supra* note 27, art. 34; CJAC Treaty, *supra* note 27, arts. 28-31.

34. See, e.g., CCJ Agreement, *supra* note 33, art. 25. *About the Caribbean Court of Justice*, *supra* note 27 (“In its appellate jurisdiction, the CCJ is the highest municipal court in the region . . .”). Note, however, that while many member states are subject to the CCJ’s “original jurisdiction,” only three (Belize, Guyana, and Barbados) have accepted this appellate jurisdiction, which was instituted to replace the London-based Privy Council as the region’s final court of appeal. Press Release, Caribbean Community Secretariat, CARICOM Welcomes Belize’s Move to CCJ (June 2, 2010), available at http://www.caricom.org/jsp/pressreleases/pres248_10.jsp (welcoming Belize’s decision to accept the Court’s appellate jurisdiction, following the lead of Barbados and Guyana).

35. See, e.g., TFEU, *supra* note 28, arts. 218, 258, 259, 263, 265, 269, 270, 271; Consolidated Version of the Treaty on European Union art. 19, para. 3, May 9, 2008, 2008 O.J. (C 115) 13 [hereinafter TEU]; ECJ Statute, *supra* note 31, arts. 40-42; CJAC Treaty, *supra* note 27, arts. 17-19, 23-25, 29; CCJ Agreement, *supra* note 33, art. 12, para. 1, art. 24; *About the Caribbean Court of Justice*, *supra* note 27 (noting that individuals can appear before the CCJ “by special leave of the Court in special circumstances where the Court determines that the interest of justice requires”); EFTACJ Agreement, *supra* note 27, arts. 32, 34, 37.

36. See *supra* notes 28-30.

C. The Regional Human Rights Court

The third category of international courts, the Regional Human Rights Court, is also regionally limited, but is distinct from the Court of Regional Integration in two key respects. First, courts in this class deal exclusively with human rights claims. Second, only states party to the relevant treaty may be brought before a regional human rights court.³⁷

The Regional Human Rights Court

Ratione Loci	Largely restricted to their respective regions, ³⁸ although, under the doctrine of effective control, member states can be liable for extraterritorial violations under certain circumstances. ³⁹	Courts: The European Court of Human Rights (ECtHR) ⁴⁰ The Inter-American Court of Human Rights (IACtHR) ⁴¹ The African Court on Human and Peoples Rights (ACtHPR) ⁴²
Ratione Materiae	These courts are attached to specific regional human rights treaties. ⁴³ The IACtHR and the ECtHR are limited to adjudicating questions of member states' compliance with, or breach of, its obligations under those treaties. ⁴⁴ The ACtHPR, however, extends its jurisdiction beyond the African Convention on Human and Peoples' Rights to "any other relevant Human Rights instrument ratified by the States concerned." ⁴⁵	
Ratione Personae	Claims may be brought only against states (or other entities) party to the relevant treaty. ⁴⁶ However, the courts differ on which persons have standing to bring complaints against those states. ⁴⁷	

Regional Human Rights Courts address a considerable range of issues,

37. As noted below, it will soon be possible to bring suit against the European Union before the European Court of Human Rights. See *infra* note 46. As such, the European Union will become the first non-state to be subject to a Human Rights Court's jurisdiction.

38. Forty-seven states are subject to ECtHR jurisdiction: Belgium, Denmark, France, Ireland, Italy, Luxembourg, Netherlands, Norway, Sweden, United Kingdom, Greece, Turkey, Iceland, Germany, Austria, Cyprus, Switzerland, Malta, Portugal, Spain, Liechtenstein, San Marino, Finland, Hungary, Poland, Bulgaria, Estonia, Lithuania, Slovenia, Czech Republic, Slovakia, Romania, Andorra, Latvia, Albania, Moldova, Republic of Macedonia, Ukraine, Russia, Croatia, Georgia, Armenia, Azerbaijan, Bosnia and Herzegovina, Serbia, Monaco, and Montenegro. *Member States*, COUNCIL OF EUR. IN BRIEF, <http://www.coe.int/aboutCoe/index.asp?page=47paysleurope&l=en> (last visited Nov. 17, 2011). Twenty-five states are subject to the jurisdiction of the IACtHR: Argentina, Barbados, Bolivia, Brazil, Colombia, Costa Rica, Chile, Dominica, Ecuador, El Salvador, Grenada, Guatemala, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru,

Dominican Republic, Suriname, Trinidad & Tobago, Uruguay, and Venezuela. *History*, INTER-AM. CRT. OF HUM. RTS., <http://www.corteidh.or.cr/?historia.cfm> (last visited Nov. 17, 2011). Twenty-three states are subject to the jurisdiction of the ACtHPR: Algeria, Burkina Faso, Burundi, Côte D'Ivoire, Comoros, Gabon, Gambia, Ghana, Kenya, Libya, Lesotho, Mali, Mozambique, Mauritania, Mauritius, Nigeria, Niger, Rwanda, South Africa, Senegal, Tanzania, Togo, and Uganda. *ACHPR: The African Court on Human and Peoples' Rights*, AICT: AFRICAN INT'L CRTS. & TRIBS, http://www.aict-ctia.org/courts_conti/achpr/achpr_home.html (last visited Nov. 17, 2011).

39. See, e.g., Tom Dannenbaum, *Translating the Standard of Effective Control into a System of Effective Accountability*, 51 HARV. INT'L L.J. 113, 130–34 (2010). Most recently, the ECtHR reaffirmed and rearticulated the doctrine applicable to the extraterritorial application of the European Convention when applying it to the U.K. with respect to the actions of British troops in Basrah, Iraq. *Al Skeini v. United Kingdom*, App. No. 55721/07, Eur. Ct. H.R. paras. 130–50 (July 7, 2011), available at <http://www.bailii.org/eu/cases/ECHR/2011/1093.html>. For a thorough examination of the issue of extraterritoriality and human rights, see MARKO MILANOVIC, *EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS TREATIES: LAW PRINCIPLES, AND POLICY* (2011).

40. Convention for the Protection of Human Rights and Fundamental Freedoms arts. 19–51, Nov. 4, 1950, E.T.S. No. 5 (as amended by protocols 11 (E.T.S. No. 155) and 14 (C.E.T.S. No. 194) to the Convention) [hereinafter ECHR].

41. Statute of the Inter-American Court of Human Rights, Oct. 1979, available at <http://www.corteidh.or.cr/estatuto.cfm> (entered into force Jan. 1, 1980) [hereinafter IACtHR Statute].

42. Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, June 1988, available at http://www.achpr.org/english/_info/court_en.html (entered into force Jan. 25, 2004) [hereinafter ACtHPR Protocol].

43. ECHR, *supra* note 40; American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 [hereinafter American CHR]; African [Banjul] Charter on Human and Peoples' Rights, June 27, 1981, 21 I.L.M. 58 [hereinafter African CHPR].

44. See IACtHR Statute, *supra* note 41, art. 1; ECHR, *supra* note 40, arts. 19, 32.

45. ACtHPR Protocol, *supra* note 42, art. 3, para. 1.

46. See IACtHR Statute, *supra* note 41, art. 1; ECHR, *supra* note 40, arts. 19, 32; ACtHPR Protocol, *supra* note 42, art. 3. The European Union is in the middle of a process of accession to the ECHR, which would extend ECtHR jurisdiction to claims made against the European Union. On the accession process, see *EU Accession to the European Convention on Human Rights*, COUNCIL OF EUR., <http://www.coe.int/lportal/?web/coe-portal/what-we-do/human-rights/eu-accession-to-the-convention> (last visited Dec. 11, 2011); 8th Working Meeting of the CDDH Informal Working Group on the Accession of the European Union to the European Convention on Human Rights (CDDH-UE) with the European Commission, *Draft Legal Instruments on the Accession of the European Union to the European Convention on Human Rights* (July 19, 2011), available at http://www.coe.int/t/dghl/standardsetting/hrpolicy/CDDH-UE/CDDH-UE_documents/CDDH-UE_2011_16_final_en.pdf [hereinafter *Draft Legal Instruments*].

47. The American Convention on Human Rights provides that “[o]nly the States Parties and the [Inter-American] Commission [on Human Rights] shall have the right to submit a case to the [IACtHR].” American CHR, *supra* note 43, art. 61. Of course, it is relevant to note that natural persons who are citizens of states parties to the Convention have standing to bring a complaint before the Commission. *Id.* art. 44. The ACtHPR is less restricted. It can receive complaints from any of the following: states parties to the African Convention, the African Commission on Human and Peoples' Rights, an African Intergovernmental Organization, or, under certain circumstances, a relevant NGO or natural person authorized by the Court to make such a submission. ACtHPR Protocol, *supra* note 42, art. 5. That said, to date only five states have accepted ACtHPR jurisdiction over individual complaints. To submit a complaint to the ACtHPR a state must (i) have already lodged a complaint with the African Commission on Human and Peoples' Rights; (ii) be complaining about violations committed against its citizens; or (iii) be the

“in many regards similar to that addressed by national supreme courts.”⁴⁸ With potential plaintiffs numbering in the millions and extensive dockets, they are busier than most other international courts.⁴⁹

D. The International Criminal Court or Tribunal

The final class of courts—the International Criminal Court or Tribunal—has as its precursor the Nuremberg and Tokyo tribunals that followed World War II.⁵⁰

The International Criminal Court or Tribunal

<i>Ratione Loci</i>	The jurisdictions <i>ratione loci</i> of the ICTY and ICTR are narrowly defined by the relevant theater of conflict. ⁵¹ The ICC, however, is global in reach. ⁵²	<u>Courts:</u> International Criminal Tribunal for the former Yugoslavia (ICTY) ⁵³ International Criminal Tribunal for Rwanda (ICTR) ⁵⁴ International Criminal Court (ICC) ⁵⁵
<i>Ratione Materiae</i>	A specific list of international crimes. ⁵⁶ The outcome of a case is criminal conviction or acquittal, not civil or quasi-constitutional judgment.	
<i>Ratione Personae</i>	International criminal courts and tribunals hear criminal cases brought by an international prosecutor against natural persons. ⁵⁷ States do not appear except with respect to a narrow range of specific, tangential proceedings. ⁵⁸	

defendant against a complaint lodged with the Commission. *Id.* art. 5, para. 1(b)-(d). The ECtHR has perhaps the broadest mandate in this regard. It can hear petitions from “[a]ny High Contracting Party . . . [or] any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto.” ECHR, *supra* note 40, arts. 33, 34. As an empirical matter, almost all of the petitions brought to the European Court are brought by individuals or NGOs. Similarly, the IACtHR has never received a petition from a state; all of its cases have been initiated by the Inter-American Commission, acting essentially on behalf of the individual or NGO that petitioned the Commission in the first place. Article 55 of the American Convention on Human Rights, Advisory Opinion OC-20/09, Inter-Am. Ct. H.R. (ser. A) No. 20, ¶ 34 (Sept. 8, 2009) (Garcia Ramirez, J., concurring).

48. TERRIS ET AL., *supra* note 5, at 7.

49. *Id.*

50. Charter of the International Military Tribunal art. 8, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279; Charter of the International Military Tribunal for the Far East 1946, T.I.A.S. No. 1589; G.A. Res. 95(1), U.N. Doc. A/RES/95(1) (Dec. 11, 1946). Nuremberg and Tokyo were preceded by failed efforts at international criminal prosecutions following World War I in Leipzig and Constantinople. See, e.g., Gary Jonathan Bass, *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals* 58-146 (2000).

The key areas of variance within this class are with respect to jurisdiction *ratione loci* and jurisdiction *ratione temporis*. The ICTY and ICTR have jurisdiction only over crimes committed in specific locations, during narrow time windows.⁵⁹ The ICC, by contrast, has potentially universal geographic reach and is temporally limited only insofar as it has no retroactive jurisdiction.⁶⁰

II. How Different Courts Address the Issue of Judicial Nationality

The observation animating this Article is that international courts of each of the types outlined above give central constitutional importance to the nationality of their judges. Section 2.1 outlines the original two-pronged approach to judicial nationality adopted by the PCIJ and followed by several courts since. Section 2.2 examines derivatives of that approach adopted by several subsequent courts. Finally, Section 2.3 describes the minority of courts that eschew the prevalent focus on judicial nationality and instead adopt a cosmopolitan approach to bench composition.

51. Statute of the International Criminal Tribunal for the former Yugoslavia, S.C. Res. 827, art. 8, U.N. Doc. S/Res/827 (May 25, 1993) (most recently updated by S.C. Res. 1877, U.N. Doc. S/Res/1877 (July 7, 2009)) [hereinafter ICTY Statute]; Statute of the International Criminal Tribunal for Rwanda, S.C. Res. 955, art. 7, U.N. Doc S/Res/955 (Nov. 8, 1994) [hereinafter ICTR Statute].

52. The ICC can exercise jurisdiction over any crimes committed on the territory of a State Party to the Rome Statute, *or* committed by the national of a State Party, regardless of the territorial location of the crime, *or* committed by anyone in a situation referred to the Court by the U.N. Security Council, regardless of whether the crime is committed in a State Party or by a State Party national. Rome Statute of the International Criminal Court arts. 12, paras. 2, 13(b), U.N. Doc. A/CONF.183/9 (July 17, 1998) [hereinafter Rome Statute].

53. ICTY Statute, *supra* note 51.

54. ICTR Statute, *supra* note 51.

55. Rome Statute, *supra* note 52.

56. Rome Statute, *supra* note 52, art. 5, para. 1; ICTY Statute, *supra* note 51, arts. 1-5; ICTR Statute, *supra* note 51, arts. 1-4.

57. Rome Statute, *supra* note 52, art. 25, para. 1; ICTY Statute, *supra* note 51, art. 6; ICTR Statute, *supra* note 51, art. 5.

58. Perhaps the most notable of such proceedings are those in which the disclosure of the information or documents of a State would, in the opinion of that State, prejudice its national security interests. *See, e.g.*, Rome Statute, *supra* note 52, art. 72; International Criminal Tribunal for the former Yugoslavia, Rules of Procedure and Evidence, Rule 54 bis, para. D, IT/32/Rev. 44 (Dec. 10, 2009) [hereinafter ICTY Rules]; Prosecutor v. Tihomir Blaškić, Case No. IT-95-14-T, Decision of Trial Chamber I on the Protective Measures for General Philippe Morillon, Witness of the Trial Chamber (Int'l Crim. Trib. for the Former Yugoslavia May 12, 1999); *see also* Bert Swart, *General Problems*, in 2 THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 1589, 1597 (Antonio Cassese, Paola Gaeta & John R.W.D. Jones eds., 2002) (“[T]he crucial difference between the system of the [Rome] Statute and that of the *ad hoc* Tribunals is that the [ICC] may not order the reluctant State to cooperate but must, instead, refer the matter to the Assembly of States Parties.”). Other forms of interaction between states and such courts include states’ duties with respect to requests by international criminal courts and tribunals for cooperation. *See, e.g.*, ICTR Statute, *supra* note 51, art. 28; ICTY Statute, *supra* note 51, art. 29; Rome Statute, *supra* note 52, arts. 86-102.

59. ICTY Statute, *supra* note 51, art. 8; ICTR Statute, *supra* note 51, art. 7.

60. Rome Statute, *supra* note 52, art. 11, para. 1.

A. The Original Approach

As the foundational international court,⁶¹ the PCIJ set an important precedent. Its influence is clear on the issue of judicial nationality, which the PCIJ Statute addressed in two key ways. First, it limited the number of judges of a given nationality. Second, it provided for a system of judges *ad hoc* for states appearing before the court without already having a national on the bench. These two provisions are fundamental to what is here called the “original approach” to judicial nationality.

The PCIJ was not wholly consistent on this issue. Article 2 of the World Court Statute—in both its PCIJ and ICJ forms—states that a judge’s nationality should be irrelevant to her chance of nomination.⁶² However, the rule implicit in Article 10 of the PCIJ Statute contradicts this position, providing that “[i]n the event of more than one national of the same Member of the League [of Nations] being elected by the votes of both the Assembly and the Council, the eldest of these *only* shall be considered as elected.”⁶³ This provision indirectly proscribes the appointment of more than one judge of any given nationality to the PCIJ.⁶⁴ That rule was codified explicitly in the ICJ Statute, which provides in Article 3, “The Court shall consist of fifteen members, *no two of whom may be nationals of the same state.*”⁶⁵

The second provision fundamental to the original approach is that establishing the judge *ad hoc*. Article 31 of both the ICJ and PCIJ statutes states: “If the Court includes upon the Bench a judge of the nationality of one of the parties, any other party may choose a person to sit as judge.”⁶⁶ If neither party has a judge on the bench, both may choose to appoint one.⁶⁷ Additionally, if a permanent judge properly recuses herself from a case that happens to involve the state of which she is a national, or if she is

61. A failed attempt to supplement the existing practice of international arbitration with one of adjudication was made thirteen years prior to the completion of the PCIJ Statute. See Draft Convention Relative to the Creation of a Court of Arbitral Justice, in *The Proceedings of the Second Hague Peace Conference*, at Annex B to the Proceedings of the Ninth Plenary Session, held on Oct. 16, 1907.

62. ICJ Statute, *supra* note 9, art. 2; PCIJ Statute, *supra* note 9, art. 2.

63. PCIJ Statute, *supra* note 9, art. 10 (emphasis added).

64. Mariano Aznar-Gómez, *Article 3*, in *THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE: A COMMENTARY* 219, 220 (Andreas Zimmermann, Christian Tomuschat & Karin Oellers-Frahm eds., 2006) (noting that there was no explicit nationality limit in the PCIJ statute, but that it was recognized at the time that one could be “indirectly derived” from Article 10).

65. ICJ Statute, *supra* note 9, art. 3, para. 1. With respect to dual nationals, the Statute adopts what is often termed the principle of “effective nationality.” *Id.* art. 3, para. 2 (“A person who for the purposes of membership in the Court could be regarded as a national of more than one state shall be deemed to be a national of the one in which he ordinarily exercises civil and political rights.”). For further elaborations of this standard in a non-judicial context, see *Nottebohm Case* (second phase) (*Liech. v. Guat.*), 1955 I.C.J. 4, 16–23 (April 6).

66. ICJ Statute, *supra* note 9, art. 31, para. 2; see also PCIJ Statute, *supra* note 9, art. 31 (“If the Court includes upon the Bench a judge of the nationality of one of the parties, the other party may choose a person to sit as judge.”).

67. ICJ Statute, *supra* note 9, art. 31, para. 3; PCIJ Statute, *supra* note 9, art. 31.

unable to sit for health reasons, that state is entitled to appoint a replacement judge *ad hoc*.⁶⁸ Although the right to appoint a judge *ad hoc* is optional, states rarely forgo the opportunity.⁶⁹

Article 31 further provides that in cases in which several states are “in the same interest, they shall, for the purpose of the preceding provisions, be reckoned as one party only.”⁷⁰ Although the presence of a permanent judge who is a national of one of the parties to a case negates that party’s right to a judge *ad hoc*, a judge *ad hoc* need not be a national of the appointing state. Moreover, there is no rule against appointing a judge *ad hoc* who is a co-national of a permanent judge, and this has occurred several times.⁷¹

Although not defined here as a pillar of the original approach, a final ICJ rule is worth noting. Statutorily, the Court President casts the deciding vote in the case of a deadlocked bench.⁷² However, Article 32 of the Rules of the Court revokes presidential authority from the Court President in cases in which he or she is a national of one of the parties before the court.⁷³

The PCIJ set a crucial precedent for later international courts. In addition to the ICJ, the contemporary courts that hew most closely to the original approach are the ITLOS and the IACtHR. Each allows a maximum of one judge of any given nationality and each provides for a system of judges *ad hoc* almost identical to that provided in the PCIJ Statute almost a century ago.

68. International Court of Justice, Rules of Court art. 37 (Apr. 14, 1978) (amended Apr. 14, 2005) [hereinafter ICJ Rules]. This situation arose in the *Lockerbie* case, in which the United Kingdom nominated Sir Robert Jennings to replace Judge Higgins following the latter’s recusal. Questions of Interpretation of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libya v. U.K.), Preliminary Objections, Judgment, 1998 I.C.J. 9, ¶ 9 (Feb. 27).

69. Pieter Hendrik Kooijmans, *Article 31, in THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE*, *supra* note 64, at 495, 499.

70. ICJ Statute, *supra* note 9, art. 31, para. 5; PCIJ Statute, *supra* note 9, art. 31.

71. Kooijmans, *supra* note 69, at 500; Shabtai Rosenne, *International Court of Justice: Practice Directions on Judges Ad Hoc; Agents Counsel and Advocates; and Submission of New Documents*, 1 L. & PRAC. INT’L CRTS. & TRIBS. 223, 231 (2002); Eduardo Valencia-Ospina, Editorial Comment, 1 L. & PRAC. INT’L CRTS. & TRIBS. 1, 10 (2002).

72. ICJ Statute, *supra* note 9, art. 55.

73. ICJ Rules, *supra* note 68, art. 32. Thus, for example, President Schwebel’s presidential duties were relinquished in the *Lockerbie* case. Questions of Interpretation of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libya v. U.S.A.), Preliminary Objections, Judgment, 1998 I.C.J. 115, ¶ 9 (Feb. 27).

Court	Type	Nationality Limits	Case-Specific Regulation of Judicial Nationality
ITLOS	Classic International Court	Article 3: "No two [of the 21] ⁷⁴ members of the Tribunal may be nationals of the same State." ⁷⁵	Article 17 codifies precisely the same institutional structure for judges <i>ad hoc</i> as that used by the World Court. ⁷⁶
IACtHR	Regional Human Rights Court	The American Convention on Human Rights and the IACtHR Statute, both state that "[n]o two [of the seven] ⁷⁷ judges may be nationals of the same State." ⁷⁸	Both governing texts stipulate a judge <i>ad hoc</i> system identical to that used by the ICJ and the ITLOS. ⁷⁹ This applies to disputes between states. However, in cases brought by the Inter-American Commission on Human Rights against a state, the IACtHR requires instead that any judge who is a national of the impugned state be recused. ⁸⁰

In addition to its conformity to the two pillars of the original approach, the ITLOS follows the ICJ in annulling the power of the Tribunal President to cast the deciding vote in tied cases in which she is a national of one of the parties before the Tribunal.⁸¹ The IACtHR also adopts this standard.⁸²

74. ITLOS Statute, *supra* note 9, art. 2, para. 1.

75. *Id.* art. 3, para. 1. The Statute also uses the ICJ formulation for addressing the issue of dual nationality. *Id.*

76. *Id.* art. 17.

77. IACtHR Statute, *supra* note 41, art. 4, para. 1; American CHR, *supra* note 43, art. 52, para. 1.

78. IACtHR Statute, *supra* note 41, art. 4, para. 2; American CHR, *supra* note 43, art. 52, para. 2.

79. IACtHR Statute, *supra* note 41, art. 10; American CHR, *supra* note 43, art. 55.

80. See *infra* notes 87–88 and accompanying text.

81. ITLOS Statute, *supra* note 9, art. 29, para. 2. However, under the Rules of the Tribunal, a national of one of the parties to the case may not exercise presidential powers. International Tribunal for the Law of the Sea, Rules of the Tribunal art. 16, para. 1 (Mar. 17, 2009), available at http://www.itlos.org/fileadmin/itlos/documents/basic_texts/Itlos_8_E_17_03_09.pdf.

82. Article 19 of the IACtHR Rules provides that in state-v.-state cases in which the judge President is a national of one of the parties, she must cede her functions. Rules of Procedure of the Inter-American Court of Human Rights art. 19, para. 2, approved on Dec. 4–8, 2000 (as amended by the Inter-American Commission on Human Rights at its 116th regular period of sessions (Oct. 7–25, 2002)), available at http://www.oas.org/xxxivga/english/reference_docs/Reglamento_CIDH.pdf [hereinafter IACtHR Rules]. These functions include casting the tie-breaking vote in the case of a deadlocked bench. IACtHR Statute, *supra* note 41, art. 23, para. 3.

The application of the judge *ad hoc* rule to the IACtHR is complicated by the fact that, in addition to its jurisdiction over disputes between states, the Inter-American Court can also hear petitions brought against states by the Inter-American Commission on Human Rights, acting on behalf of individual complainants.⁸³ Neither governing text addresses separately the application of the judge *ad hoc* system to this scenario.⁸⁴ This creates a twofold ambiguity: (1) Does the impugned state have the right to appoint a judge *ad hoc* to hear a case brought by the Commission when there is no permanent judge of that state's nationality? (2) May a permanent judge of the impugned state's nationality hear a case brought by the Commission? With the Commission having brought all of the Court's cases thus far,⁸⁵ the ambiguity is of clear practical significance.

Until recently, the IACtHR allowed an impugned state without a national among the permanent judges to appoint a judge *ad hoc* and allowed permanent judges to hear cases brought by the Commission against their national states.⁸⁶ However, in a remarkable September 2009 Advisory Opinion on these two questions, the Court undertook a complete reversal. It found that the impugned state in a case brought by the Commission has no right to appoint a judge *ad hoc* and that a permanent judge who is a national of the impugned state must be recused automatically from hearing the case against that state.⁸⁷ Shortly thereafter, the Inter-American Court amended its Rules of Procedure to reflect this dramatically revised interpretation of the Convention, effective from January 1, 2010.⁸⁸

Article 19 of the new rules provides that in cases brought by the Commission following a petition by a person, group of persons, or nongovernmental entity, "a Judge who is a national of the respondent State *shall not* be able to participate in the hearing and deliberation of the case."⁸⁹ Simi-

83. The American Convention on Human Rights provides that "[o]nly the States Parties and the [Inter-American] Commission [on Human Rights] shall have the right to submit a case to the [IACtHR]." American CHR, *supra* note 43, art. 61.

84. IACtHR Statute, *supra* note 41, art. 10; American CHR, *supra* note 43, art. 55.

85. Article 55 of the American Convention on Human Rights, Advisory Opinion OC-20/2009, Inter-Am. Ct. H.R. (ser. A) No. 20, ¶ 34 (Sept. 8, 2009) (Garcia Ramirez, J., concurring).

86. *Id.* ¶¶ 19-22.

87. *Id.* ¶ 87.

88. See Inter-American Court of Human Rights, Statement of Motives for the Reform of the Rules of Procedure (Nov. 16-28, 2009) <http://www.corteidh.or.cr/reglamento.cfm> (last visited Nov. 22, 2011); *The Inter-American Court and Inter-American Commission Reform their Rules of Procedure*, CEJIL: CENTER FOR JUST. & INT'L L. (Dec. 18, 2009), <http://cejil.org/en/comunicados/inter-american-court-and-iachr-reform-their-rules-procedure>.

89. IACtHR Rules, *supra* note 82, art. 19, para. 1 (emphasis added); see also American CHR, *supra* note 43, art. 44 (describing cases brought to the Commission by persons, groups of persons, or nongovernmental entities). Interestingly, the Commission has long operated under the blanket rule that "Members of the Commission may not participate in the discussion, investigation, deliberation or decision of a matter submitted to the Commission . . . if they were nationals or permanent residents of the State which is subject of the Commission's general or specific consideration . . ." Regulations of the Inter-American Commission on Human Rights art. 19, para. 2, in Basic Docu-

larly, Article 20 of the new rules eliminates the judge *ad hoc* in such circumstances.⁹⁰ In cases brought by a state against another state, the rules on both of these issues remain as stipulated in the Statute.⁹¹

The ICJ, the ITLOS, and the IACtHR are the international courts that hew most closely to the “original approach.” Each imposes the two core provisions designed by the drafters of the PCIJ Statute almost a century ago: a limit of one judge of any given nationality on the permanent bench and a system of judges *ad hoc* to manipulate bench composition on a case-specific basis.

B. Derivatives of the Original Approach

The impact of the PCIJ precedent, however, reaches far beyond that legacy. International courts of varying types have adopted or adapted one or the other of the two features of the original approach.

Court	Type	Nationality Limits	Case-Specific Regulation of Judicial Nationality
ICTY	International Criminal Court / Tribunal	“The Chambers shall be composed of a maximum of sixteen permanent independent judges, no two of whom may be nationals of the same State, and a maximum at any one time of twelve ad litem independent judges . . . no two of whom may be nationals of the same State.” ⁹²	None.
ICTR	International Criminal Court / Tribunal	“The Chambers shall be composed of sixteen permanent independent judges, no two of whom may be nationals of the same State, and a maximum at any one time nine ad litem independent judges . . . no two of whom may be nationals of the same State.” ⁹³	None.
ICC	International Criminal Court / Tribunal	“No two judges may be nationals of the same State.” ⁹⁴	None.

ments Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc. 6 rev.1 at 103 (1992).

90. IACtHR Rules, *supra* note 82, art. 20.

91. IACtHR Rules, *supra* note 82, art. 20; *see also* American CHR, *supra* note 43, art. 45 (describing cases brought by states against states).

ACtHPR	Regional Human Rights Court	"No two judges shall be nationals of the same State." ⁹⁵	Mandatory nationality-based recusal: "If the judge is a national of any State which is a party to a case submitted to the Court, that judge shall not hear the case." ⁹⁶
ECtHR	Regional Human Rights Court	On November 1, 1998 the rule providing that "no two judges [of the ECtHR] may be nationals of the same State" was deleted from the European Convention on Human Rights. ⁹⁷ However, it was expected that there would never be more than two nationals of the same state, ⁹⁸ in part because the number of judges is equal to the number of High Contracting Parties ⁹⁹ and judges are to be "elected by the Parliamentary Assembly with respect to each High Contracting Party by a majority of votes cast from a list of three candidates nominated by the High Contracting Party." ¹⁰⁰	Whenever a state is party to a case before the Chamber or the Grand Chamber, the judge elected "in respect of" that state must sit on the bench assigned to that case. If that is not possible, the President of the Court will select a replacement from a list submitted in advance by that party to sit "in the capacity of judge." ¹⁰¹ However, "[w]hen sitting as a single judge, a judge shall not examine any application against the High Contracting Party in respect of which that judge has been elected." ¹⁰²
ECJ	Court of Regional Integration	"The Court of Justice shall consist of one judge from each Member State." ¹⁰³	None.

As shown in the table above, the most widely adopted element of the

92. ICTY Statute, *supra* note 51, art. 12, para. 1. The Tribunal adopts the same approach to dual nationals as that taken by the ICJ. *Id.* art. 12, para. 4.

93. ICTR Statute, *supra* note 51, art. 11, para. 1. The Tribunal adopts the same approach to dual nationals as that taken by the ICJ. *Id.* art. 11, para. 4.

94. Rome Statute, *supra* note 52, art. 35, para. 7.

95. ACtHPR Protocol, *supra* note 42, art. 11, para. 2 ("No two judges shall be nationals of the same State.").

96. *Id.* art. 22.

97. Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Restructuring the Control Machinery Established Thereby: Explanatory Report ¶ 59, May 11, 1994, E.T.S. No. 155, available at <http://conventions.coe.int/treaty/en/Reports/Html/155.htm> [hereinafter Explanatory Report]. For the original provision, see Convention for the Protection of Human Rights and Fundamental Freedoms art. 38, Nov. 4, 1950, 213 U.N.T.S. 221, E.T.S. No 5, available at http://www.hrcr.org/docs/Eur_Convention/euroconv.html.

98. Explanatory Report, *supra* note 97, ¶ 59.

99. ECHR, *supra* note 40, art. 20.

100. *Id.* art. 22 (emphasis added). A similar right will be granted the European Union upon accession to the ECHR. *Draft Legal Instruments, supra* note 46, at 21 (¶ 69 of Draft Explanatory report to the Agreement on the Accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms).

101. ECHR, *supra* note 40, art. 26, para. 4; Gilbert Guillaume, *Some Thoughts on the Independence of International Judges vis-à-vis States*, 2 L. & PRAC. INT'L CRTS. & TRIBS.

original approach is the proscription on the appointment of more than one judge of any given nationality.¹⁰⁴ John R.W.D. Jones calls this “a standard provision in the statutes of international courts and tribunals”¹⁰⁵

One interesting feature of the nationality proscription rules of the ICTY and ICTR is that they do not prohibit the appointment of a judge *ad litem* of the same nationality as a permanent judge. Indeed, at the time of writing, both the ICTR¹⁰⁶ and the ICTY¹⁰⁷ have two pairs of co-national *ad litem* and permanent judges. The oddity of this loophole in what is otherwise a strict nationality limit becomes plain when one considers that both the ICTY and the ICTR assign three-judge panels to hear any given case at the trial level,¹⁰⁸ and judges *ad litem* are eligible to serve at the trial level.¹⁰⁹ So, there is the statutory possibility that two judges of the same nationality could sit alongside one another on a three-judge panel that convicts or acquits by majority, rather than by unanimity.¹¹⁰

Of course, this has not yet occurred in practice. Moreover, concerns about trial bench composition are generally somewhat mitigated by the right of parties to appeal¹¹¹ trial chamber decisions to a 5-judge appellate bench composed solely of permanent judges.¹¹² Nonetheless, these considerations cannot disguise the anomaly of a regulatory structure that imposes strict nationality limits, only to leave an obvious loophole that potentially undermines whatever end(s) the original limits are designed to

163, 164 (2003) (noting the similarity between the ICJ and ITLOS judge *ad hoc* and the ECtHR judge elected “with respect to” a High Contracting Party).

102. ECHR, *supra* note 40, art. 26, para. 3.

103. TEU, *supra* note 35, art. 19.

104. Dinah Shelton, *Legal Norms to Promote the Independence and Accountability of International Tribunals*, 2 L. & PRAC. INT’L CRTS. & TRIBS. 27, 34 (2003) (“Most courts add a nationality restriction as well, not allowing more than one judge from any country to be elected.”); Aznar-Gómez, *supra* note 64, at 224 (noting that a number of “courts and tribunals have incorporated a provision similar to that included in Art. 3, para. 1 *in fine* of the ICJ Statute”).

105. John R.W.D. Jones, *Composition of the Court*, in THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, *supra* note 58, 235, 246 n.57.

106. Mparany Rajohnson (*ad litem*) and Arlette Ramaroson (permanent) of Madagascar, and Aydin Sefa Akay (*ad litem*) and Mehmet Güney (permanent) of Turkey. See Sixteenth Annual Report of the International Criminal Tribunal for Rwanda, ¶¶ 17-18, p.7, A/66/209 - S/2011/472 (July 29, 2011). Until recently, the ICTR had a third pair of co-nationals: Joseph Masanche (*ad litem*) and William H. Sekule (permanent) of Tanzania, but Masanche left after the completion of his case. *Id.* ¶¶ 15, 17.

107. Fausto Pocar (permanent) and Flavia Lattanzi (*ad litem*) of Italy, and Jean-Claude Antonetti (permanent) and Michèle Picard (*ad litem*) of France. See *The Judges*, UNITED NATIONS: INT’L CRIM. TRIB. FORMER YUGOSLAVIA, <http://www.icty.org/sid/151> (last visited Dec. 11, 2011).

108. ICTR Statute, *supra* note 51, art. 11, para. 2; ICTY Statute, *supra* note 51, art. 12, para. 3.

109. ICTR Statute, *supra* note 51, art. 11 para. 2, 12quater; ICTY Statute, *supra* note 51, art. 12, para. 2, 13quater.

110. ICTR Statute, *supra* note 51, art. 22, para. 2; ICTY Statute, *supra* note 51, art. 23, para. 2.

111. ICTR Statute, *supra* note 51, art. 24; ICTY Statute, *supra* note 51, art. 25.

112. ICTR Statute, *supra* note 51, art. 11, para. 3; ICTY Statute, *supra* note 51, art. 12, para. 3.

achieve.¹¹³ The nature of those ends and the overall function of nationality regulations in international courts are discussed in greater detail below. Here it is sufficient to note that the Criminal Tribunals adopt a derivative of the original approach to nationality, albeit one with an obvious internal weakness.

The ICC does not use judges *ad litem* and thus avoids the above loophole.¹¹⁴ Nonetheless, a related issue arises with respect to its pre-trial process.¹¹⁵ Like the ICTR and ICTY, the International Criminal Court has trial chamber benches of three judges and an appellate bench of five judges.¹¹⁶ However, unlike the *ad hoc* Tribunals, the ICC also uses Pre-Trial Chambers, many of the functions¹¹⁷ of which can be performed by a single judge.¹¹⁸ Already at this early stage in the ICC's history, single judges have been charged with determining the admissibility of certain evidentiary items for the purposes of the confirmation hearing (during which the Pre-Trial Chamber determines whether to send the case to trial),¹¹⁹ issuing a decision on the accused's application for interim release,¹²⁰ determining the scope of victims' participation at the confirmation hearing,¹²¹ and managing victims' issues more broadly.¹²² Of course, all substantive decisions are subject to appeal.¹²³ However, if the concentration of influence in the hands of judges of a single nationality provokes concern, one would expect that concern to apply to the grant of any decision-making authority to a single judge.

113. After all, if the right to appeal is considered adequate to overcome concerns related to having multiple judges of the same nationality on a trial bench, why put any nationality limit on judges *ad litem*? Similarly, if the Tribunals' systems for assigning judges to trial benches can be trusted to avoid panels including more than one judge of a given nationality, what need is there to regulate judicial nationality *ex ante*?

114. Rome Statute, *supra* note 52, art. 35, para. 1 ("All judges shall be elected as full-time members of the Court and shall be available to serve on that basis from the commencement of their terms of office.")

115. Rome Statute, *supra* note 52, art. 36, para. 7. The Rome Statute also adopts the same effective-nationality approach to dual nationals as the World Court. *Id.* Interestingly, the Statute provides that the Prosecutor and Deputy Prosecutor must be of different nationalities. *Id.* art. 42, para. 2.

116. *Id.* art. 39, para. 2(b)(i-ii).

117. *Id.* art. 57, para. 2.

118. *Id.* art. 39, para. 2(b)(iii); see also Scorro Flores Liera, *Single Judge, Replacements, and Alternate Judges*, in *THE INTERNATIONAL CRIMINAL COURT: ELEMENTS OF CRIMES AND RULES OF PROCEDURE AND EVIDENCE* 311 (Roy S. Lee ed., 2001).

119. Prosecutor v Katanga, Case No. ICC-01/04-01/07, Decision on the admissibility for the confirmation hearing the transcripts of the interview of deceased witness, 12 (Apr. 18, 2008).

120. See, e.g., Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08, Decision on the Interim Release of Jean-Pierre Bemba Gombo and Convening Hearings with the Kingdom of Belgium, the Republic of Portugal, the Republic of France, the Federal Republic of Germany, the Italian Republic, and the Republic of South Africa (Aug. 14, 2009).

121. Prosecutor v Katanga, Case No. ICC-01/04-01/07, Decision on the Application for Participation of Witness, 166 (June 23, 2008).

122. Situation in Uganda, Case No. ICC-02/04, Decision Designating a Single Judge on Victims' Issues (Mar. 23, 2009).

123. Rome Statute, *supra* note 52, art. 82.

In addition to the approach taken by the international criminal courts, two other derivatives of the original approach are found in the texts governing the African and European regional human rights courts. The ACtHPR codifies the standard nationality limit¹²⁴ while eschewing a judge *ad hoc* system in favor of a rule of mandatory nationality-based recusal.¹²⁵ Although distinct, judges *ad hoc* and nationality-based recusals exhibit the same underlying disquiet about the position of a judge who is a national of one of the states before her in a contentious case. The nature of this disquiet and its normative implications are addressed in Parts III and IV *infra*. Here it is sufficient to note that nationality-based recusals are properly considered a derivative of the judge *ad hoc* system.

Until November 1, 1998, the ECtHR adhered completely to the original approach, rather than a derivative thereof. With the entry into force of Protocol 11 on that date,¹²⁶ however, the rule providing that “no two judges [of the ECtHR] may be nationals of the same State” was deleted from the European Convention on Human Rights.¹²⁷ The Explanatory Memorandum to the Protocol suggested that the change was motivated by the fact that under the Court’s new structure there was no longer a need to stipulate such a rule to guarantee the desired outcome: “In principle, [under the new rule] there should be no more than two judges of the same nationality on the Court.”¹²⁸ Explaining this prediction, the Memorandum emphasized the number of judges and the appointment process.¹²⁹ Article 20 of the amended Convention provides, “The Court shall consist of a number of judges equal to that of the High Contracting Parties.”¹³⁰ This is important in light of Article 22, which stipulates, “The judges shall be elected by the Parliamentary Assembly with respect to each High Contracting Party by a majority of votes cast from a list of three candidates nominated by the High Contracting Party.”¹³¹

The upshot of these two provisions is that each judge is connected fundamentally to one High Contracting Party. Of course, there is no requirement that a state nominate only candidates of its own nationality.¹³² However, ordinarily that is the outcome.¹³³ Moreover, even in the

124. ACtHPR Protocol, *supra* note 42, art. 11, para. 2 (“No two judges shall be nationals of the same State.”).

125. *Id.* art. 22.

126. *List of the Treaties Coming from the Subject-Matter: Human Rights (Convention and Protocols only)*, COUNCIL OF EUR., <http://conventions.coe.int/Treaty/Commun/Liste-Traites.asp?MA=3&CM=7&CL=ENG> (last visited Feb. 12, 2011).

127. Explanatory Report, *supra* note 97, ¶ 59. For the original provision, see Convention for the Protection of Human Rights and Fundamental Freedoms art. 38, Nov. 4, 1950, E.T.S. No. 5, available at <http://www.echr.coe.int/library/annexes/CEDH1950-ENG.pdf>.

128. Explanatory Report, *supra* note 97, ¶ 59.

129. *Id.*

130. ECHR, *supra* note 40, art. 20.

131. *Id.* art. 22 (emphasis added).

132. Indeed, there are cases in which judges have been elected “with respect to” High Contracting Parties of which they are not nationals. EUR. PARL. ASS., *Candidates for the European Court of Human Rights*, ¶ 11, 2d Sess., Doc. No. 11243 (2007) (“a Swiss judge is currently serving on behalf of Liechtenstein, and, in the past, there has even been a

rare cases when the judge is not a national of the state that nominated her, the link is strong; a Council of Europe body has described the judge as “serving on behalf of” the country that nominated her.¹³⁴ Thus, although there is no *nationality* limit, there is a limit of one judge “serving on behalf” of any given high contracting party.¹³⁵

More importantly, this judge’s role reflects the influence of the original approach. Traditionally, the 46 judges of the ECtHR were organized to sit “in committees of three judges, in Chambers of seven judges and in a Grand Chamber of seventeen judges.”¹³⁶ Committees determined only matters of admissibility.¹³⁷ However, after five years of intransigence, Russia recently ratified Protocol 14,¹³⁸ allowing its amendments to the ECtHR process to come into effect on June 1, 2010.¹³⁹ These include the addition of “Single Judge Formations”¹⁴⁰ with the limited authority to make determinations on admissibility.¹⁴¹ In line with the original approach, however, the judge elected “in respect of” the impugned state is proscribed from sitting as a single judge.¹⁴² The Protocol also expands the competence of Committees to include substantive judgments in certain straightforward cases,¹⁴³ and in so doing stipulates that the judge elected “in respect of” the impugned state may be invited to participate in such decisions in place of another judge.¹⁴⁴

Canadian judge on the Court”). The Canadian was also nominated by Liechtenstein. GARRY STURGESS & PHILIP CHUBB, *JUDGING THE WORLD: LAW AND POLITICS IN THE WORLD’S LEADING COURTS* 537 (1988) (quoting Thomas Buergenthal).

133. FRANCIS JACOBS & ROBIN WHITE, *THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 396-400 (3d ed. 2002).

134. See sources cited *supra* note 132. Similarly, former ICJ President Gilbert Guillaume has called the judge nominated by a state the “national judge” of that state. Guillaume, *supra* note 101, at 164. Terris et al. describe her as “[t]he judge from that country” TERRIS ET AL., *supra* note 5, at 151.

135. See *supra* notes 130-131 and accompanying text.

136. Convention for the Protection of Human Rights and Fundamental Freedoms art. 27, para. 1, Nov. 4, 1950, E.T.S. No. 5 (as amended by Protocol 11 to the Convention (E.T.S. No. 155), but *prior* to amendment by Protocol 14 to the ECHR (C.E.T.S. No. 194)).

137. *Id.* art. 28.

138. Press Release, Council of Europe, PACE President Mevlüt Çavuşoğlu Warmly Welcomes Russia’s Ratification of Protocol No. 14 (Feb. 18, 2010), available at <https://wcd.coe.int/ViewDoc.jsp?Ref=PR141%282010%29&Language=lanEnglish&Ver=original&Site=DC&BackColorInternet=F5CA75&BackColorIntranet=F5CA75&BackColorLogged=A9BACE>.

139. Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Amending the Control System of the Convention, May 13, 2004, C.E.T.S. No. 194 [hereinafter Protocol 14].

140. *Id.* art. 6; ECHR, *supra* note 40, art. 26, para. 1.

141. Protocol 14, *supra* note 139, art. 7; ECHR, *supra* note 40, art. 27. The Protocol also made possible five-judge Chambers. Protocol 14, *supra* note 139, art. 6; ECHR, *supra* note 40, art. 26, para. 2.

142. Protocol 14, *supra* note 139, art. 6; ECHR, *supra* note 40, art. 26, para. 3.

143. Protocol 14, *supra* note 139, art. 8; ECHR, *supra* note 40, art. 28, para 1(b).

144. Protocol 14, *supra* note 139, art. 8; ECHR, *supra* note 40, art. 28, para. 3. As a condition of its ratification, Russia demanded and secured a guarantee that the Russian judge would sit on all claims brought against Russia. *Russian Parliament Ratifies Euro-*

With respect to the more complex substantive decisions taken by Chambers and the Grand Chamber, the system that predates Protocol 14 remains in force. The judge elected “in respect of” a High Contracting Party sits *ex officio* in all cases involving that state, and, if this is not possible, “a person chosen by the President of the Court from a list submitted in advance by that Party shall sit in the capacity of judge.”¹⁴⁵ Under the Court’s rules “[i]f two or more applicant or respondent Contracting Parties have a common interest, the President of the Chamber may invite them to agree to appoint a *single* judge elected in respect of one of the Contracting Parties concerned as common-interest judge who will be called upon to sit *ex officio*.”¹⁴⁶ If a case is referred to the Grand Chamber, the only two judges who may sit on the Grand Chamber having also sat on the referring Chamber are the President and “the judge who sat in respect of the High Contracting Party concerned.”¹⁴⁷ These quasi-national judges are also restricted in certain respects. They may not preside in cases involving the state in respect of which they were elected, or of which they are nationals,¹⁴⁸ and they may not participate in a Chamber’s decision to refer a case involving “their” state to the Grand Chamber.¹⁴⁹

Ultimately, then, although the ECtHR’s deletion of the strict nationality limit in 1998 removed the Court from the class of institutions that take the original approach to judicial nationality, the ECtHR’s approach to judges elected “with respect to” High Contracting Parties remains very much in the mould of the judge *ad hoc* paradigm.¹⁵⁰ The Court thus adopts a derivative of the original approach.

The final court that could be considered in this derivative class is the European Court of Justice. The ECJ’s nationality limit takes a unique form, stipulating, “The Court of Justice shall consist of one judge from each Member State.”¹⁵¹ One might argue that this is a nationality-based representativeness or diversity provision rather than a nationality *limit*. However, because the rule has the effect of imposing the kind of limit required by the original approach, it is tentatively included as a derivative of that approach here. This classification is evaluated further (and ultimately reversed) below.¹⁵²

pean Court Reform, Int’l Just. Tribune, Jan. 27, 2010, at 2, available at <http://www.rnw.nl/int-justice/article/russian-parliament-ratifies-european-court-reform>.

145. ECHR, *supra* note 40, art. 26, para. 4.

146. Rules of Court, Registry of the European Court of Human Rights, rule 30, para. 1 (Apr. 1, 2011), available at http://www.echr.coe.int/NR/rdonlyres/6AC1A02E-9A3C-4E06-94EF-E0BD377731DA/0/RulesOfCourt_April2011.pdf [hereinafter ECtHR Rules].

147. ECHR, *supra* note 40, art. 26, para. 5.

148. ECtHR Rules, *supra* note 146, rule 13.

149. *Id.* rule 24, para. 5(c).

150. Guillaume, *supra* note 101, at 164 (noting the similarity between the ICJ and ITLOS judge *ad hoc* and the ECtHR judge elected “with respect to” a High Contracting Party).

151. TEU, *supra* note 35, art. 19.

152. It is suggested instead that the ECJ is best designated a “quasi-cosmopolitan” court. See *infra* notes 637–640 and accompanying text.

With respect to case-specific regulation, the ECJ diverges completely from the original approach. Twenty-seven ECJ judges are organized into chambers of three or five judges and a Grand Chamber of thirteen judges.¹⁵³ Judicial nationality plays no role in the assignment of cases to specific chambers.¹⁵⁴ Moreover, in a direct rejection of both the judge *ad hoc* model¹⁵⁵ and the nationality-based recusal model,¹⁵⁶ Article 18 of the ECJ Statute provides, “A party may not apply for a change in the composition of the Court or of one of its chambers on the grounds of either the nationality of a Judge or the absence from the Court or from the chamber of a Judge of the nationality of that party.”¹⁵⁷ Thus, if a chamber hearing a dispute between Belgium and Poland were to have a Polish judge, but not a Belgian, Belgium would have neither the right to demand the Pole’s recusal nor the right to demand that the Belgian judge be appointed to the chamber. The case would proceed with the bench as constituted. Similarly, although each of the chambers has an internally elected judge President,¹⁵⁸ there is no provision annulling a judge’s presidential authority within a chamber when she is a national of one of the parties before her.

Finally, the ECJ is assisted in each case by one of its eight advocates-general.¹⁵⁹ An advocate-general participates in the oral proceedings and (in cases raising new points of law) submits a public written opinion on each case brought before the Court.¹⁶⁰ Although advocates-general are not judges and their opinions are not binding on the Court, they have “the same status as the Judges”¹⁶¹ and the judges often follow the opinion of the advocate-general in a given case.¹⁶² Nationality-based restrictions with respect to advocates-general are limited. Each of Germany, France, Italy, Spain and the United Kingdom appoints an advocate-general of its nation-

153. ECJ Statute, *supra* note 31, art. 16. Cases are transferred from a chamber to the Grand Chamber at the request of a Member State or E.U. institution party to the case, *id.*, and in cases of “exceptional importance.” *Court of Justice: Presentation*, CURIA, http://curia.europa.eu/jcms/jcms/Jo2_7024/#avantpropos (last visited Feb. 12, 2012).

154. See Rules of Procedure of the Court of Justice of the European Communities arts. 11a-11c, June 19, 1991, 1991 O.J. (L 176) 7 (consolidated version 2008); TERRIS ET AL., *supra* note 5, at 152 (stating that “the assignment system is random, so judges may happen to serve on cases involving their own nations, but not systematically”).

155. As adopted by the PCJ, the ICJ, the ITLOS, the ECtHR, and, in cases between states, the IACtHR. See *supra* notes 66-71, 76, 79, 101, 131-147 and accompanying text.

156. As adopted by the ACtHPR and, in cases initiated by parties other than a state, the IACtHR. See *supra* notes 87-88, 96 and accompanying text.

157. ECJ Statute, *supra* note 31, art. 18.

158. *Id.* art. 16. The presiding judge of the Grand Chamber is the ECJ President. *Id.*

159. TFEU, *supra* note 28, art. 252.

160. *Id.* art. 252; see also ECJ Statute, *supra* note 31, arts. 20, 49, 53, 62.

161. Case C-17/98, *Emesa Sugar v. Aruba*, ¶ 11, 2000 E.C.R. I-665. The Court also described the advocate general as “a Member of the Court of Justice itself.” *Id.* ¶ 14. Advocates generally are subject to the same appointments process and the same independence and impartiality regulations as the judges. TFEU, *supra* note 28, arts. 253, 255; ECJ Statute, *supra* note 31, arts. 8, 9, 18.

162. See, e.g., NOREEN BURROWS & ROSA GREAVES, *THE ADVOCATE GENERAL AND EC LAW* (2007); Cyril Ritter, *A New Look at the Role and Impact of Advocates-General Collectively and Individually*, 12 COLUM. J. EUR. L. 751 (2006); Kamiel Mortelmans, *The Court Under the Influence of its Advocates General*, 24 Y.B. EUR. L. 127 (2005).

ality, with the other three positions rotating among the remaining states; if the number of advocates general is expanded to eleven, Poland, too, will have a permanent advocate general, with the remaining five rotating.¹⁶³ As a matter of practice, advocates-general are typically not assigned to cases involving their states of nationality, however there is no formal rule prohibiting such an assignment, and in 2003 Advocate-General Dámaso Ruiz-Jarabo Colomer was assigned a case involving his home state of Spain.¹⁶⁴

For all of the above reasons, if one were to endorse its classification among this group of courts, the ECJ would be the “derivative” furthest from the original approach.

C. The Cosmopolitan Approach

Each of the courts examined above places significant statutory importance on judicial nationality.¹⁶⁵ These courts include classic international courts, criminal courts, regional human rights courts, and courts of regional integration. Almost universally, they limit the number of nationals that may be appointed as judges. Additionally, many provide for the manipulation of the specific composition of judicial nationalities on the bench in each case.

Such provisions are not inevitable. The statutory regimes of some international courts instead adopt a “cosmopolitan approach” that largely ignores judicial nationality.

The Caribbean Court of Justice, a court of regional integration, is the most impressively forceful in its rejection of the original approach. The text governing the CCJ does not regulate judicial nationality at all, whether on the Court’s judicial roster, or on the specific benches assigned to individual cases.¹⁶⁶ This permissive stance in the text is reflected in the Court’s current and historical judicial composition. Twelve of the Caribbean Community (Caricom) Member States are signatories to the Agreement Estab-

163. Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, Dec. 13, 2007, 2007 O.J. (C 306) 262, Ann. A., Decl. 38; Joint Declaration on the Court of Justice annexed to the Final Act of the Treaty Concerning Accession, 2003 O.J. (L 236) 971; Joint Declaration on Article 31 of Decision 95/1/EC, Euratom, ECSC of 1 January 1995 Adjusting the Instruments Concerning the Accession of New Member States to the European Union, 1995 O.J. (L 1) 221.

164. Opinion of AG Colomer, Case C-463/00, *Commission v. Spain*, 2003 E.C.R. I-4581. On the typical practice, see Takis Tridimas, *The Role of the Advocate General in the Development of Community Law: Some Reflections*, 34 *COMMON MKT. L. REV.* 1349, 1356 (1997) (“The first advocate general [who is in charge of assigning cases to the other advocates general] enjoys discretion and in exercising it, he is guided by considerations of ensuring pluralism, efficiency and collegiality. It is prevailing practice not to allocate a direct action to the advocate general of the applicant or the defendant Member State. Similarly, a reference for a preliminary ruling is not usually allocated to the advocate general of the Member State from whose court the reference came but that rule is not strictly followed.”).

165. Or, in the case of the ECtHR, the statutory focus is on the judge’s status as a judge “in respect of” her nominating state. See *supra* notes 126–150 and accompanying text.

166. CCJ Agreement, *supra* note 33.

lishing the CCJ,¹⁶⁷ and seven judges are currently members of the Court.¹⁶⁸ As recently as 2010, the seven judges included two from Trinidad & Tobago¹⁶⁹ and two from Guyana.¹⁷⁰ In the exercise of its jurisdiction over international legal disputes, the Court “shall be duly constituted if it consists of not less than three judges being an uneven number of judges.”¹⁷¹ In 2010, therefore, it was possible for a majority composed of judges from the same state to render a judgment on an inter-state dispute involving any of the twelve member states.¹⁷² Moreover, such a judgment would be “legally binding precedent[]”¹⁷³ and appeal would be available only in limited circumstances.¹⁷⁴

It is also worth noting that Justice David Hayton, who shared the bench with the four judges from Guyana and Trinidad & Tobago, and who remains on the bench today, is a national of the United Kingdom, a state that is neither a member of Caricom, nor a signatory to the Court.¹⁷⁵ Similarly, Justice Jacob Wit, who also served with those four judges, and who also remains on the bench today, is a national of the Netherlands Antilles, another state that is neither a member of Caricom, nor a signatory to the Court.¹⁷⁶ The CCJ’s open-mindedness with respect to appointing numerous judges of the same nationality and judges from outside Caricom can hardly be said to be due to a dearth of qualified candidates from states subject to the Court’s jurisdiction. Three nationals of CCJ signatories currently sit on the bench of the ICTY¹⁷⁷ and two are judges on the ITLOS.¹⁷⁸ The ICTR judiciary recently included Judge Dennis Byron (St. Kitts &

167. *About the Caribbean Court of Justice*, *supra* note 27.

168. *Judges of the Caribbean Court of Justice*, CARIBBEAN COURT OF JUSTICE, <http://www.caribbeancourtjustice.org/judges.html> (last visited Dec. 11, 2011). The Agreement allows for up to ten judges. CCJ Agreement, *supra* note 33, art. 4.

169. *Judges of the Caribbean Court of Justice: The Right Honourable Mr. Justice Michael de la Bastide*, CARIBBEAN COURT OF JUSTICE, http://www.caribbeancourtjustice.org/judges_pages/delabastide.html (last visited Dec. 11, 2011); *Judges of the Caribbean Court of Justice: The Honourable Mr. Justice Rolston Nelson*, CARIBBEAN COURT OF JUSTICE, http://www.caribbeancourtjustice.org/judges_pages/nelson.html (last visited Dec. 11, 2011).

170. *Judges of the Caribbean Court of Justice: The Honourable Mr. Justice Duke E.E. Pollard*, CARIBBEAN COURT OF JUSTICE, http://www.caribbeancourtjustice.org/judges_pages/pollard.html (last visited Dec. 11, 2011); *Judges of the Caribbean Court of Justice: The Honourable Mme. Justice Désirée Bernard*, CARIBBEAN COURT OF JUSTICE, http://www.caribbeancourtjustice.org/judges_pages/bernard.html (last visited Dec. 11, 2011).

171. CCJ Agreement, *supra* note 33, art. 11, ¶ 1.

172. *Id.* art. 12.

173. *Id.* art. 22.

174. *Id.* art. 20, ¶ 1.

175. *Judges of the Caribbean Court of Justice: The Honourable Mr. Justice David Hayton*, CARIBBEAN COURT OF JUSTICE, http://www.caribbeancourtjustice.org/judges_pages/hayton.html (last visited Dec. 11, 2011).

176. *Judges of the Caribbean Court of Justice: The Honourable Mr. Justice Jacob Wit*, CARIBBEAN COURT OF JUSTICE, http://www.caribbeancourtjustice.org/judges_pages/wit.html (last visited Dec. 11, 2011).

177. Judge President Patrick Robinson (Jamaica), Judge Burton Hall (Bahamas), and Judge Melville Baird (Trinidad & Tobago). ICTY - TPIY: *The Judges*, INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA, <http://www.icty.org/sid/151> (last visited Dec. 11, 2011).

Nevis),¹⁷⁹ now President of the CCJ,¹⁸⁰ and Anthony Carmona (Trinidad & Tobago) was recently elected to the bench of the ICC.¹⁸¹ Finally, Judge Mohamed Shahabuddeen (Guyana) recently left the Appeals Chamber of the ICTY and ICTR,¹⁸² where he sat for almost twelve years after a serving full term on the bench of the ICJ.¹⁸³ He was also elected to the ICC in 2009, but resigned before starting.¹⁸⁴

A second court that pays little statutory notice to judicial nationality is the WTO Appellate Body, a classic international court. The rules governing the quasi-arbitral panels from which the WTO AB hears appeals stipulate certain strict requirements regarding nationality.¹⁸⁵ The rules governing the Appellate Body itself, however, take a more cosmopolitan approach. The only relevant regulation in this regard stipulates that the “Appellate Body membership shall be broadly representative of membership in the WTO.”¹⁸⁶ Although thus far no more than one member of a given nationality has sat on the WTO AB at any one time,¹⁸⁷ this is not for want of regulatory permission.

The WTO AB’s cosmopolitanism can also be seen in its approach to individual cases. The Appellate Body is composed of seven members (the judges), three of whom serve on the “division” hearing any one case.¹⁸⁸ The Working Procedures provide that “[t]he Members constituting a division shall be selected on the basis of rotation, while taking into account the principles of random selection, unpredictability and opportunity for all

178. Judge Dolliver Nelson (Grenada) and Judge Anthony Lucky (Trinidad & Tobago). *Members*, International Tribunal for the Law of the Sea, <http://www.itlos.org/index.php?id=96> (last visited Dec. 11, 2011).

179. Sixteenth Annual Report of the International Criminal Tribunal for Rwanda, *supra* note 106, ¶ 17.

180. *Judges of the Caribbean Court of Justice: Sir Charles Michael Dennis Byron*, CARIBBEAN CRT. OF JUST., http://www.caribbeancourtsofjustice.org/judges_pages/byron.html (last visited Dec. 11, 2011).

181. *Final Results: Election of the Judges of the International Criminal Court*, INT’L CRIM. CRT., <http://www.icc-cpi.int/Menus/ASP/Elections/Judges/2011/Results/Final+Results.htm> (last visited Dec. 15, 2011).

182. Sixteenth Annual Report of the International Criminal Tribunal for Rwanda, *supra* note 106.

183. *The Court: All Members*, INT’L CRT. OF JUST., <http://www.icj-cij.org/court/index.php?p1=1&p2=2&p3=2> (last visited Nov. 25, 2011).

184. Press Release, Assembly of States Parties, International Criminal Court, Resignation of Mr. Mohamed Shahabuddeen (Feb. 18, 2009), *available at* http://www.icc-cpi.int/Menus/ASP/Press+Releases/Press+Releases+2009/Resignation+of+Mr_+Mohamed+Shahabuddeen.htm.

185. The governing regulations require panel members who are nationals of one of the parties to a dispute to recuse themselves from the panel hearing that dispute. WTO Understanding, *supra* note 9, art. 8, para. 3. They also provide that when a developing country and a developed country are in dispute with one another, the developing country has a right to at least one national of a developing country on the panel. *Id.* art. 8, para. 10.

186. *Id.* art. 17, para. 3.

187. *See Appellate Body Members*, WORLD TRADE ORG., http://www.wto.org/english/tratop_e/dispu_e/ab_members_bio_e.htm#unterhalter (last visited Dec. 1, 2011).

188. WTO Understanding, *supra* note 9, art. 7, para. 1.

Members to serve regardless of their national origin.”¹⁸⁹ There are no judges *ad hoc* and no rules requiring or even permitting a member to recuse herself when she is a national of one of the parties before her.¹⁹⁰ As Terris et al. observe, “judges may happen to serve on cases involving their own nations, but not systematically.”¹⁹¹

The European Free Trade Association Court of Justice (EFTACJ) is a third cosmopolitan court. The EFTACJ is a court of regional integration that rules on disputes between any two or among all three of Norway, Iceland, and Liechtenstein¹⁹² arising under the Agreement on the European Economic Area¹⁹³ and associated treaties.¹⁹⁴ It also hears cases brought by the EFTA Surveillance Authority against member states,¹⁹⁵ appeals by states against Surveillance Authority decisions,¹⁹⁶ and disputes between private parties and the Surveillance Authority.¹⁹⁷

The Agreement establishing the EFTACJ provides that the bench is to consist of three judges,¹⁹⁸ all of whom must sit in deliberations on each case before the Court.¹⁹⁹ There are no provisions regulating judicial nationality.²⁰⁰ The current bench includes one judge from each of Norway, Iceland, and Switzerland.²⁰¹ Although Switzerland is a member of the EFTA,²⁰² it is not party to the Agreement on the European Economic Area and is not subject to the jurisdiction of the EFTACJ. Moreover, Article 15 stipulates, “A party may not apply for a change in the composition of the

189. Appellate Body Report, *Working Procedures for Appellate Review*, art. 6, para. 2, WT/AB/WP/3 (Feb. 28, 1997) [hereinafter WTO AB Working Procedures].

190. *Id.* art. 6, para. 3.

191. TERRIS ET AL., *supra* note 5, at 152.

192. EFTACJ Agreement, *supra* note 27, art. 1.

193. Agreement on the European Economic Area, Jan. 3, 1994, 1994 O.J. (L 1) 3 [hereinafter Agreement on the European Economic Area].

194. EFTACJ Agreement, *supra* note 27, art. 32.

195. Agreement on the European Economic Area, *supra* note 193, art. 108, para. 2; EFTACJ Agreement, *supra* note 27, art. 33.

196. Agreement on the European Economic Area, *supra* note 193, art. 108, para. 2.

197. EFTACJ Agreement, *supra* note 27, arts. 36-37; *see also* Agreement on the European Economic Area, *supra* note 193, art. 110.

198. EFTACJ Agreement, *supra* note 27, art. 28.

199. *Id.* art. 29. The only exception to this is when one is disqualified, in which case, she is to be replaced from a list established by the governments of the EFTA States. *Id.* art. 30.

200. Contrast this with the associated EFTA Surveillance Authority. As provided in the same Agreement establishing the Court, “at least two of the three members [of the Surveillance Authority] shall be nationals of the EFTA States.” Agreement Between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice, Protocol 5 [EFTA Court Statute] art. 7, May 2, 1992, 1998 O.J. (L 344) 3 [hereinafter Protocol 5 is cited as EFTACJ Statute]. Clearly, then, the absence of a nationality regulation with respect to the Court was not due to a feeling that such regulations need not be explicitly codified in the governing documents.

201. *Judges & Staff*, EFTA COURT, http://www.eftacourt.int/index.php/court/members/judges_staff (last visited Dec. 11, 2011).

202. Convention Establishing the European Free Trade Association, Jan. 4, 1960, available at <http://www.efta.int/-/media/Documents/legal-texts/fta-convention/fta-convention-texts/fta-convention-consolidated.pdf>; *see also* *The EFTA States*, EFTA: EUR. FREE TRADE ASS'N, <http://www.efta.int/about-efat/the-efat-states.aspx> (last visited Dec. 11, 2011).

Court on the grounds of either nationality of a Judge or the absence from the Court of a Judge of the nationality of that party.”²⁰³ As such, Liechtenstein cannot object to the lack of a judge from Liechtenstein when it appears before the Court, nor would it have any grounds for objecting to the presence of the Norwegian or Icelandic judges if it were to face Norway or Iceland in a dispute before the EFTACJ.

A final court adopts something close to the cosmopolitan approach. The Court of Justice of the Andean Community shares several relevant characteristics with the EFTACJ. The CJAC may nullify decisions of the regional quasi-legislative Commission,²⁰⁴ rule on member state compliance with Community law,²⁰⁵ render binding interpretations of Community law at the request of domestic judges,²⁰⁶ and rule on complaints regarding an Andean Community Organ’s failure to fulfill its obligations under Community law.²⁰⁷ Bolivia, Colombia, Ecuador, and Peru are the states currently subject to CJAC jurisdiction.²⁰⁸ Until recently they were joined by Venezuela in this regard.²⁰⁹ Much like the EFTACJ, the CJAC has the same number of judicial seats as it does member states. Article 7 of the CJAC Treaty, drafted when Venezuela was still a member state, stipulates, “The Court shall consist of five magistrates who must be natives of Member Countries.”²¹⁰ Since Venezuela’s withdrawal from the Andean Community, the Court has been staffed with just four judges.²¹¹

Although the latter part of Article 7 places an important restriction on judicial nationality, there is neither an explicit requirement that each of the five member states must have a national on the Court, nor a proscription on the appointment of more than one judge of any given nationality. Thus, there would be no firm legal proscription on the appointment to CJAC of two Colombians (say, one from the coast and one from the mountains) and two Ecuadorians (say, one from the mainland and one from the Galapagos Islands). This may be unlikely to occur in practice;²¹² however, the mere

203. EFTACJ Statute, *supra* note 200, art. 15.

204. CJAC Treaty, *supra* note 27, arts. 17–22.

205. *Id.* arts. 23–31.

206. *Id.* arts. 32–36.

207. *Id.* art. 37.

208. Cartagena Agreement, *supra* note 27, art. 5.

209. This includes Venezuela among the member states. *See Id.* For the announcement of Venezuela’s renunciation of the Cartagena Accord and withdrawal from the Andean Community, see Letter from Ali Rodríguez Araque, Minister of Foreign Affairs of Venezuela, to the Andean Community of Nations (Apr. 22, 2006), available at <http://www.aporra.org/tecnologia/n76531.html> (announcing Venezuela’s renunciation of the Cartagena Accord and withdrawal from the Andean Community of Nations).

210. CJAC Treaty, *supra* note 27, art. 7.

211. *Quienes Somos?* [Who are we?], TRIBUNAL DE JUSTICIA DE LA COMUNIDAD ANDINA [COURT OF JUSTICE OF THE ANDEAN COMMUNITY], http://www.tribunalandino.org.ec/joomla/index.php?option=com_content&view=article&id=46&Itemid=54 (last visited Dec. 1, 2011).

212. *See* CJAC Treaty, *supra* note 27, art. 8 (“The magistrates shall be appointed from three-members lists submitted by each Member Country and by the unanimous decision of the Plenipotentiary Representatives entitled to do so. The Government of the host country shall assemble the Plenipotentiary Representatives.” (emphasis added)).

legal feasibility of such a scenario diverges clearly from the original approach.²¹³

These four examples of cosmopolitanism are important because they demonstrate the possibility of an alternative to the original approach and its derivatives. Indeed, despite their collective abstention from nationality limits, judges *ad hoc*, and nationality-based recusals, each of these institutions is one of what Terris et al. term the “most active and consequential” international courts.²¹⁴ The WTO AB and the CCJ are particularly noteworthy. The former demonstrates that global classic international courts can function effectively without adopting any of the core features of the original approach or its derivatives. The latter demonstrates that eschewing nationality limits need not be a purely formal gesture—a court with jurisdiction over the internal and international affairs of twelve independent states can function effectively even when four judges from just two states form a majority on the bench.

This Part has outlined the various approaches to judicial nationality taken by each of the major international courts currently in operation. Part III connects this to the core judicial imperatives of impartiality and independence.

III. Independence, Impartiality, and Nationality

The independence and impartiality of the bench are fundamental to the legitimacy of any court, domestic or international.²¹⁵ As Daniel ten Brinke and Hans-Michael Del comment, “If a court cannot attain both [independence and impartiality], it cannot be recognized as a court by

213. As a supplemental point, it is also worth noting that the Treaty creating the Court furnishes the Commission of the Cartagena Agreement with the authority to adjust the number of magistrates, opening the possibility of the appointment of multiple nationals of a given state at some point in the future. *Id.* art. 7. Of course, as a matter of practice, the opposite has happened—Venezuela’s withdrawal from the Community prompted a reduction in the number of judges from 5 to 4, so as to match the new number of member states.

214. TERRIS ET AL., *supra* note 5, at 5.

215. Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Milan, Aug. 26–Sep. 6, 1985, *Basic Principles on the Independence of the Judiciary*, at 59, U.N. Doc. A/CONF.121/22/Rev.1 [hereinafter *Basic Principles on the Independence of the Judiciary*]; COUNCIL OF EUROPE, INDEPENDENCE, EFFICIENCY AND ROLE OF JUDGES: RECOMMENDATION NO. R (94) AND EXPLANATORY MEMORANDUM (1995); EUROPEAN ASSOCIATION OF JUDGES, JUDGES’ CHARTER IN EUROPE (Mar. 20, 1993); LAWASIA: THE LAW ASSOCIATION FOR ASIAN AND THE PACIFIC, BEIJING STATEMENT OF PRINCIPLES OF THE INDEPENDENCE OF THE JUDICIARY IN THE LAWASIA REGION (1995), available at <http://law.asia.asn.au/objectlibrary/147?filename=Beijing%20Statement.pdf> (released following the 6th Biennial Conference of Chief Justices of Asia and the Pacific) [hereinafter Beijing Statement]; Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, 158 (June 27) (Lachs, J., sep. op.) (“A judge—as needs no emphasis—is bound to be impartial, objective, detached, disinterested and unbiased.”); Mackenzie & Sands, *supra* note 1, at 271; Caroline Binham, *The Hague Struggles to Find Judges*, FIN. TIMES (Sept. 14, 2011), <http://www.ft.com/cms/s/0/ecbbe978-dede-11e0-9130-00144feabdc0.html#axzz1mVm1rygR> (quoting Richard Goldstone).

those affected by its rulings and the community as such.”²¹⁶ Similarly, the Council of Europe declares, “The independence of judges is one of the central pillars of the rule of law”;²¹⁷ and the Human Rights Committee holds, “the right to be tried by an independent and impartial tribunal is an absolute right that may suffer no exception.”²¹⁸ This right is codified in the major human rights treaties²¹⁹ and humanitarian law conventions,²²⁰ and has been recognized in the jurisprudence of international criminal tribunals.²²¹

A. Defining Concepts

As exemplified by these sources, independence and impartiality are often considered in tandem. This is natural; as Hermann Mosler explains, “the independence of the judges serves to ensure [their] impartiality.”²²² To clarify the terms of the discussion below, however, it is important to distinguish independence from impartiality and, further, to distinguish

216. Daniel ten Brinke & Hans-Michael Del, *Introduction*, in *JUDGES IN THE SERVICE OF THE STATE?* 1, 1 (Daniel ten Brinke & Hans-Michael Del eds., 2002).

217. Council of Europe, *Explanatory Memorandum*, in COUNCIL OF EUROPE, *supra* note 215, at 11; see also MARTIN KUIJER, *THE BLINDFOLD OF LADY JUSTICE: JUDICIAL INDEPENDENCE AND IMPARTIALITY IN LIGHT OF THE REQUIREMENTS OF ARTICLE 6 ECHR* 204 (2004); Theodor Meron, *Judicial Independence and Impartiality in International Criminal Tribunals*, 99 AM. J. INT'L L. 359, 359-60 (2005).

218. Human Rights Committee, *Miguel Gonzales del Rio v. Peru*, Communication No. 263/1987, ¶ 5.2, U.N. Doc. CCPR/C/46/D/263/1987 (Oct. 28, 1992); see also Human Rights Committee, General Comment No. 13, *Equality Before the Courts and the Right to a Fair and Public Hearing by an Independent Court Established by Law (Article 14)*, ¶ 3, U.N. Doc. HRI/GEN/1/Rev.9 (Apr. 14, 1984); INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, SEVENTH REPORT ON THE SITUATION OF HUMAN RIGHTS IN CUBA, ¶ 2 (1983) (“the Commission considers that the independence of the judiciary is an essential requisite for the practical observance of human rights.”).

219. See, e.g., ECHR, *supra* note 40, art. 6, para. 1; International Covenant on Civil and Political Rights, *supra* note 4, art. 14, para. 1; Universal Declaration of Human Rights, G.A. Res. 217 (III) A, art. 10, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/RES/217(III), (Dec. 10, 1948); Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment arts. 12, 13, Feb. 4, 1985, 1465 U.N.T.S. 85; American CHR, *supra* note 43, art. 8, para. 1; African CHPR, *supra* note 43, art. 7, para. 1.

220. See, e.g., Geneva Convention [III] Relative to the Treatment of Prisoners of War art. 84, Aug. 12, 1949, 75 U.N.T.S. 135; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts [Protocol I] art. 75, para. 4, June 8, 1977, 1125 U.N.T.S. 3.

221. See, e.g., Prosecutor v. Furundžija, Case No. IT-95-17/1A, Judgment, ¶ 177 (Int'l Crim. Trib. for the Former Yugoslavia July 21, 2000).

222. Hermann Mosler, *Problems and Tasks of International Judicial and Arbitral Settlement of Disputes Fifty Years After the Founding of the World Court*, in *JUDICIAL SETTLEMENT OF INTERNATIONAL DISPUTES* 3, 9 (Max Planck Institute for Comparative Public Law and International Law ed., 1974); see also Archibald Cox, *The Independence of the Judiciary: History and Purposes*, 21 U. DAYTON L. REV. 565 (1996) (defending the principle of independence on the grounds that it provides assurance of impartial justice); Pasquale Pasquino, *Prolegomena to a Theory of Judicial Power: The Concept of Judicial Independence in Theory and History*, 2 L. & PRAC. INT'L CRTS. & TRIBS. 11, 25 (2003) (“I do not want to offer here a conclusion to the first genealogical exploration, but perhaps only stress that independence of the judicial power has always to be understood as an instrument to achieve the goal of impartiality.”).

subjective from objective impartiality.²²³

A judge (or court) should be considered “independent” to the extent that her (or its) judicial decisions are not subject to any other agent’s control or direct and improper influence.²²⁴ “Improper” influence here means influence other than that achieved through persuasive legal argumentation, whether by counsel presenting before the court, by the judges alongside whom the judge in question is hearing a given case, by amici curiae, or by any appropriate legal authority. “Direct” influence refers to specific influence over particular decisional outcomes, rather than diffuse or historical influence over a judge’s general approach to legal or moral reasoning, as might have been achieved by her parents, former law professors, or erst-while colleagues and peers.²²⁵ Overall, as Aharon Barak writes, independence “means, first and foremost, that in judging, the judge is subject to nothing other than the law.”²²⁶

The two archetypal agents that might exert undue sway over judges are the government²²⁷ and the parties before the court in a particular case,²²⁸ although there are, of course, other potential sources of illegitimate influence.²²⁹ Governmental influence is less of a concern in the clas-

223. Despite much reference to independence and impartiality, the concepts are not always separated or defined. See, e.g., Ben Olbourne, *Independence and Impartiality: International Standards for National Judges and Courts*, 2 L. & PRAC. INT’L CRTS. & TRIBS. 97, 113 (2003) (noting that, despite its strong stance, the Human Rights Committee’s “jurisprudence on the meaning of these terms . . . remains relatively limited”).

224. For similar formulations, see, for example, *Basic Principles on the Independence of the Judiciary*, *supra* note 215, ¶ 2; Beijing Statement, *supra* note 215, ¶ 3; COUNCIL OF EUROPE, JUDICIAL ORGANISATION IN EUROPE 162 (2000); Sramek v. Austria, App. No. 8790/79, 84 Eur. Ct. H.R. (ser. A) at ¶ 38 (1984); ten Brinke & Del, *supra* note 216, at 1; Chester Brown, *The Evolution and Application of Rules Concerning Independence of the “International Judiciary”*, 2 L. & PRAC. INT’L CRTS. & TRIBS. 63, 75 (2003); Zigurds L Zile, *A Soviet Contribution to International Adjudication: Professor Krylov’s Jurisprudential Legacy*, 58 AM. J. INT’L L. 359, 382 (1964).

225. If every influence by an outside agent endangered judicial independence, the concept would become a myth. As Theodor Meron notes, “judges are not empty vessels that the litigants fill with content.” Meron, *supra* note 217, at 365.

226. Aharon Barak, *Foreword: A Judge on Judging*, 116 HARV. L. REV. 18, 54 (2002); see also KUIJER, *supra* note 217, at 299.

227. See, e.g., Ringeisen v. Austria (Merits), App. No. 2614/65, 13 Eur. Ct. H.R. (ser. A) at ¶ 95 (1971); Campbell & Fell v. U.K., App. Nos. 7819/77, 7878/77, 80 Eur. Ct. H.R. (Ser. A) at ¶ 78 (1984); Lord Tom Bingham, *Judicial Independence, in THE BUSINESS OF JUDGING: SELECTED ESSAYS AND SPEECHES* 55, 61 (2000) (“Any mention of judicial independence must eventually prompt the question: independent of what? The most obvious answer is, of course, independent of government.”); Paul W. Kahn, *Independence and Responsibility in the Judicial Role, in TRANSITION TO DEMOCRACY IN LATIN AMERICA: THE ROLE OF THE JUDICIARY, 77-79* (Irwin P. Stotzky ed., 1993); Barak, *supra* note 226, at 54.

228. See, e.g., Ringeisen, 13 Eur. Ct. H.R. (ser. A) at ¶ 95; Campbell & Fell, 80 Eur. Ct. H.R. (Ser. A) at ¶ 78; Kahn, *supra* note 227, at 75-76; KUIJER, *supra* note 217, at 261.

229. Barcelona Traction, Light & Power Co., Ltd. (Belg. v. Spain), 1970 I.C.J. Rep. 3, 154 (Tanaka, J. sep. op.) (“the judicial independence of courts and judges must be safeguarded not only from other branches of the government, that is to say, the political and administrative power, but also from any other external power, for instance, political parties, trade unions, mass media and public opinion”); Bingham, *supra* note 227, at 61 (noting that judges must also be independent from “any other association, whether professional, commercial, personal, or whatever”); KUIJER, *supra* note 217, at 208 (noting

sic international court because each state before the court lacks governmental authority vis-à-vis the other states before the court and vis-à-vis the court itself. However, as courts have expanded to consider claims made by individuals against governments and claims by states against supra-national governing institutions, the full range of threats to independence have become increasingly relevant to the international judiciary.

Because it is critical to legitimacy and functionality, court framers often seek to protect independence through institutional design. As Kuijer observes, independence “can be secured by way of provisions concerning appointment, promotion, incompatibilities, duration of term of office, irremovability, transferrals, the exercise of disciplinary powers, payment, et cetera.”²³⁰

A judge is “impartial” to the extent that in her judicial decision-making she is personally free of bias,²³¹ both with respect to the parties before the court and, equally importantly, with respect to interested others

that judges must be independent from pressures “from within the judiciary . . . for example hierarchical relations, ambitions concerning judicial career, the pursuit of efficiency, the existence of internal guidelines”); Mariano Aznar-Gómez, *Article 2*, in *THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE: A COMMENTARY*, *supra* note 64, at 205, 209 (“judicial independence means that . . . judges are protected from any kind of pressure (political, media and public, financial, or any other personal pressure or lobbying).”).

230. KUIJER, *supra* note 217, at 209. The Inter-American Commission on Human Rights, the European Commission of Human Rights, and the ECtHR all list similar institutional protections as fundamental to the establishment of judicial independence. See, e.g., INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, ANNUAL REPORT 1992-1993, Doc. No. OEA/Ser.L/V/II.83, at 207 (1993) (providing a list of necessary protections including, *inter alia*, freedom from interference by the other branches of government, the necessary political support for the performance of judicial actions, and security of tenure for judges); *Campbell & Fell*, 80 Eur. Ct. H.R. (Ser. A) at ¶ 78 (“In determining whether a body can be considered to be ‘independent’—notably of the executive and of the parties to the case, the Court has had regard to the manner of appointment of its members and the duration of their term of office, the existence of guarantees against outside pressures and the question whether the body presents an appearance of independence.”) (internal citations omitted); *Holm v. Sweden*, App. No. 14191/88, Eur. Comm’n H.R. Ser. A-279-A, ¶ 54 (Oct. 13, 1992) (“In determining whether a body can be considered to be an independent tribunal, i.e. in particular independent of the executive and of the parties to the case, regard must be had to the manner of appointment of its members and the duration of their term of office, the existence of regulations governing their removal or guarantees against their removability, laws prohibiting their being given instructions by the executive in their adjudicatory role, the existence of legal guarantees against outside pressures, the question whether the body presents an appearance of independence and the attendance of members of the judiciary in the proceedings.”); see also *Judges in the Service of the State?* (Daniel ten Brinke & Hans-Michael Del eds., 2002) (a volume of essays on the various procedural protections of judicial independence in a range of countries, including the United Kingdom, Australia, Canada, Finland, Norway, Malta, Germany, Ukraine, Serbia, the United States, Israel, Lithuania, France, Greece, and the Netherlands.).

231. Emphasizing the absence of bias as the definitional characteristic of impartial judicial decision-making. See, e.g., *Hauschildt v. Denmark*, App. No. 10486/83, 154 Eur. Ct. H.R. (ser. A) at ¶ 47 (1989); *Piersack v. Belgium*, 53 Eur. Ct. H.R. (ser. A) at ¶ 30 (1982); KUIJER, *supra* note 217, at 303; Aznar-Gómez, *supra* note 64, at 211; ten Brinke & Del, *supra* note 216, at 1; Brown, *supra* note 224, at 75.

beyond the courtroom.²³² “Bias” here means the inclusion as a factor in the judge’s decision-making of her preference for an interested party, or her preference for an outcome favorable to one or more interested parties, except to the extent that that preference is grounded in the legal merits of that outcome.²³³ To re-emphasize the link between independence and impartiality, if a judge is subject to direct and improper influence by external agents, her ability to decide the case before her without bias is fundamentally undermined. If such influence causes the judge to bias her decision-making calculation towards one of the parties or an interested other, she fails to act impartially precisely *because* she lacks independence.

This is not to collapse the distinction. An impartial judge is not only protected from, or able to ignore, the pressures of outside agents. She must also overcome her own subjective preferences for a given outcome, so as to make decisions based on the legal merits of the case.²³⁴ At a minimum, to the extent law does not provide a definitive answer to a question crucial to the case before the court, impartiality requires that judges endeavor to make determinations on the basis of justice, rather than personal preference.²³⁵ What this entails is discussed further below.²³⁶

This notion of impartiality as the absence of *actual* bias has been termed “subjective” impartiality because of its focus on the mental state of

232. Despite the natural focus on neutrality between the parties, it is crucial to recall that impartiality is “not simply or essentially the neutrality vis-à-vis the two parties of a trial . . .” Pasquino, *supra* note 222, at 15–16. See also Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 *YALE L.J.* 273, 312 (1997) (stating that “neutrality [is] here defined not only in terms of equidistance between litigants but also with regard to a tribunal’s ability to explicate a decision based on generally applicable legal principles”); ROSALYN HIGGINS, *Policy Considerations and the International Judicial Process*, in 2 *THEMES AND THEORIES: SELECTED ESSAYS, SPEECHES, AND WRITINGS IN INTERNATIONAL LAW* 19, 20 (2009) (“The claimants are all seeking to attain various objectives, and it is the task of the judge to decide the distribution as between them of values at stake, but taking into account not only the interests of the parties, but the interests of the world community as a whole.”).

233. As Ofer Raban notes, “a judge is to treat both sides equally—but in what way? Surely the resolution can hardly treat equally both sides. But then impartiality resides not in the resolution but in the decision-making process.” OFER RABAN, *MODERN LEGAL THEORY AND JUDICIAL IMPARTIALITY* 1 (2003); *Fey v. Austria*, App. No. 14396/88, 255-A Eur. Ct. H.R. (ser. A) at ¶ 34 (Feb. 23, 1993) (stating that the key is for a judge to approach the case without a “pre-conceived view on the merits”).

234. KUIJER, *supra* note 217, at 303; OLIVER JAMES LISSITZYN, *THE INTERNATIONAL COURT OF JUSTICE: ITS ROLE IN THE MAINTENANCE OF INTERNATIONAL PEACE AND SECURITY* 58 (1951); Barak, *supra* note 226, at 55 (“Impartiality means the judge has no personal stake in the outcome.”); Kahn, *supra* note 227, at 81 (The judge “must make clear his or her own ideological commitment to the law, to the idea that the law can decide cases.”)

235. KUIJER, *supra* note 217, at 299 (“A judge may not be subjected to any authority, except the law . . . and his own conscience and sense of justice, as far as the law leaves room for interpretation.”); Universal Declaration on the Independence of Justice § 1.05, Adopted by First World Conference on the Independence of Justice Convened in Montreal, Canada (1983) [hereinafter Universal Declaration on the Independence of Justice] (international judges “shall avoid being influenced by any consideration other than those of international justice”); see also Kahn, *supra* note 227, at 81 (arguing that there is “not a great deal” of room for this kind of decision-making beyond the law).

236. See *infra* section IV.A.

the judge.²³⁷ However, Lord Chief Justice Hewart's famous dictum that "justice should not only be done, but should manifestly and undoubtedly be seen to be done"²³⁸ identifies a second, so-called "objective," aspect of impartiality.²³⁹ Pursuant to this standard, the "ascertainable facts"²⁴⁰ as to the judge's interests and allegiances must not give rise to a reasonable concern that she is biased.²⁴¹ As ECtHR judge Lucius Caflisch notes, the difficulty of ascertaining a judge's mental state means that the objective standard "takes pride of place" in the jurisprudence on impartiality.²⁴² As noted in that jurisprudence, the value of this standard is that it preserves confidence in, and respect for, the court among those subject to its authority.²⁴³ Typical facts about a judge that may be indicative of objective bias include having made prior public statements prejudicial to the case at bar, holding a financial stake in the outcome of the case, or having a strong personal connection to one of the parties.²⁴⁴

Considering the three concepts together—*independence*, *subjective impartiality*, and *objective impartiality*—the ECtHR in *Findlay v. U.K.* summarized:

[I]n order to establish whether a tribunal can be considered as "independent," regard must be had *inter alia* to the manner of appointment of its members and their term of office, the existence of guarantees against outside

237. *Piersack v. Belgium*, App. No. 8692/79, 53 Eur. Ct. H.R. (ser. A) at ¶ 30 (1982); *De Cubber v. Belgium*, Judgment, 86 Eur. Ct. H.R. (ser. A) at ¶ 24 (1984); *Hauschildt v. Denmark*, App. No. 10486/83, 154 Eur. Ct. H.R. (ser. A) at ¶ 46 (1989); *Bulut v. Austria*, 5 Eur. Ct. H.R. (ser. A) at ¶ 31 (1996); *Castillo Algar v. Spain*, 95 Eur. Ct. H.R. (ser. A) at ¶ 43 (1998); *Incal v. Turkey*, 78 Eur. Ct. H.R. (ser. A) at ¶ 65 (1998); *Meron*, *supra* note 217, at 366.

238. *R. v. Sussex Justices, ex parte McCarthy*, 1 K.B. 256, 259 (1924).

239. See sources cited *supra* note 237.

240. *Hauschildt v. Denmark*, App. No. 10486/83, 154 Eur. Ct. H.R. (ser. A) at ¶ 44 (1989); *Wettstein v. Switzerland*, App. No. 33958/96, 2000-XII Eur. Ct. H.R. at ¶ 44 (2000).

241. *Campbell & Fell v. U.K.*, App. Nos. 7819/77, 7878/77, 80 Eur. Ct. H.R. (Ser. A) at ¶ 80 (1984); International Bar Association, *Code of Minimum Standards of Judicial Independence*, Adopted in the Plenary Session of the 19th IBA Biennial Conference, held on Friday, 22nd October 1982, in New Delhi, India, § 45 (adopted 1982); Universal Declaration on the Independence of Justice, *supra* note 235, § 2.31.

242. Lucius Caflisch, *Independence and Impartiality of Judges: The European Court of Human Rights*, 2 L. & PRAC. INT'L CRTS. & TRIBS. 169, 170 (2003). Indeed, the importance of an objective standard of impartiality is widely recognized, although the precise contours of that standard vary from legal system to legal system. *Prosecutor v. Furundžija*, Case No. IT-95-17/1A, Judgment, ¶¶ 179-88 (Int'l Crim. Trib. for the Former Yugoslavia July 21, 2000) (providing a useful comparative overview of different standards of objective impartiality in different legal systems).

243. *Piersack v. Belgium*, App. No. 8692/79, 53 Eur. Ct. H.R. (Ser. A) at ¶ 30 (1982) (stating that objective impartiality preserves "the confidence which the courts in a democratic society must inspire in the public"); *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, 1986 I.C.J. Rep. 14, 158 (Lachs, J. sep. op.) (states "must have the certainty that their jural relationship will be properly defined and that no partiality will result in injustice towards them"); *Land Island and Maritime Frontier Dispute (El Sal. v. Hond.)*, Application to Intervene, 1990 I.C.J. 18 (Feb. 28, 1990) (Shahabuddeen, J. dissenting).

244. *Meron*, *supra* note 217, at 366.

pressures and the question whether the body presents an appearance of independence

As to the question of “impartiality,” there are two aspects to this requirement. First, the tribunal must be subjectively free of personal prejudice or bias. Secondly, it must also be impartial from an objective viewpoint, that is, it must offer sufficient guarantees to exclude any legitimate doubt in this respect²⁴⁵

Because the appearance of impartiality is dependent on strong institutional protections against outside influence, the *Findlay* Court found the link between independence and impartiality to be tightest with respect to independence and objective impartiality, and even considered those requirements in unison.²⁴⁶

B. The “Original Approach” as a Manifestation of Anxiety over Judicial Nationalism

Part II, *supra*, details international courts’ various approaches to judicial nationality. Section III.A explains the concepts of independence and impartiality. Tying these together, this Section argues that the two pillars of the original approach are grounded in a deep-seated anxiety about the capacity of the international judge to be impartial towards, and independent from, her state of nationality.²⁴⁷

During drafting of the PCIJ’s seminal judge *ad hoc* provisions, the Advisory Committee of Jurists worried about the potential scenario in which “there is upon the bench a judge of the nationality of only one of the parties to the case.”²⁴⁸ Framing the concern in the language of objective impartiality, the Committee Report noted that “[s]uch inequality between the parties . . . might easily be perceived as an impediment to impartiality”²⁴⁹ and reasoned that even though there was “no danger” of actual bias, justice “must not only be just, but appear so.”²⁵⁰ Ultimately, it was felt that “if the composition of the Court underwent no change [in such a scenario], . . . public opinion in the State without a judge on the Bench might

245. *Findlay v. United Kingdom*, Judgement, App. No. 22107/93, 1997-I Eur. Ct. H.R. Rep. ¶ 73 (Feb 25).

246. *Id.*; see also Cox, *supra* note 222 (defending the principle of independence on the grounds that it provides assurance of impartial justice).

247. As former ICJ judge Hersch Lauterpacht comments, “the most important aspect of the problem of impartiality of international judges [is] their attitude in their capacity as nationals of a State,” HERSCH LAUTERPACHT, *THE FUNCTION OF LAW IN THE INTERNATIONAL COMMUNITY* 211 (1933). Similarly, Lyndel Prott observes that “[t]he impartiality of the ICJ-judge is a significant theme of all important writers on the International Court.” LYNDEL V. PROTT, *THE LATENT POWER OF CULTURE AND THE INTERNATIONAL JUDGE* 27 (1979). Considering international criminal judges, Meron comments that “the performance of the international judge as an independent and impartial arbiter is constantly under scrutiny.” Meron, *supra* note 217, at 361.

248. PROCÈS-VERBAUX OF THE PROCEEDINGS OF THE ADVISORY COMMITTEE OF JURISTS, 24TH MEETING, at 528–29 (July 14, 1920).

249. *Id.*

250. *Id.* at 720–22. For a contemporary restatement of this same point, see TERRIS ET AL., *supra* note 5, at 152.

consider that this inequality would affect it adversely”²⁵¹ One of the principal drafters, Elihu Root, argued that the Statute of the Court had to provide assurances so as to overcome the “instinctive mistrust felt by nations for a Court composed of foreign judges.”²⁵²

Despite the Advisory Committee Report’s focus on objective impartiality and suggestion that there was “no danger” of subjective partiality, the latter issue also provoked concern. The PCIJ’s *Fourth Annual Report* included another committee report stating:

Of all the influences to which men are subject, none is more powerful, more pervasive, or more subtle, than the tie of allegiance that binds them to the land of their homes and kindred and to the great sources of the honors and preferments for which they are so ready to spend their fortunes and to risk their lives. This *fact*, known to all the world, the [PCIJ] Statute frankly recognises and deals with.²⁵³

Hersch Lauterpacht terms this “[t]he conviction that international judges in their capacity as members of their national communities may not always be capable of the required detachment”²⁵⁴ This worry is not parasitic on concerns about inadequate judicial independence (discussed *infra*). On the contrary, on this view, “even without overt pressure [from their national governments], judges may consciously or unconsciously compromise their own judicial values in favor of national loyalty.”²⁵⁵

The institution of the judge *ad hoc* was designed to ameliorate both forms of impartiality anxiety (subjective and objective). The Advisory Committee reasoned that the inequality that occurs when only one of two parties has a national on the bench could “be redressed in either of two ways: by providing that the judge who has the nationality of one of the parties will not sit in that particular case, or by allowing a party who has no national on the bench to select a judge *ad hoc* for that specific case.”²⁵⁶

251. PROCÈS-VERBAUX OF THE PROCEEDINGS OF THE ADVISORY COMMITTEE OF JURISTS, 34TH MEETING, Annex 1, at 722 (July 24, 1920); see also ALEXANDER FACHIRI, *THE PERMANENT COURT OF INTERNATIONAL JUSTICE* 56 (2d ed. 1932).

252. PROCÈS-VERBAUX OF THE PROCEEDINGS OF THE ADVISORY COMMITTEE OF JURISTS, 24TH MEETING, *supra* note 248, at 538.

253. PERMANENT COURT OF INTERNATIONAL JUSTICE, *FOURTH ANNUAL REPORT OF THE PERMANENT COURT OF INTERNATIONAL JUSTICE (JUNE 15TH, 1927–JUNE 15TH, 1928)*, P.C.I.J. (ser. E) No. 4, at 75. Similarly, in the failed attempt to create a permanent international court of sorts in 1907, it was felt that “[i]t would be ridiculous and impossible . . . to wish to ‘denationalize’ the judges.” Bardo Fassbender, *Article 9, in THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE: A COMMENTARY*, *supra* note 64, at 261, 264.

254. LAUTERPACHT, *supra* note 247, at 204.

255. TERRIS ET AL., *supra* note 5, at 152 (noting this view, not endorsing it as their own); see also Eric A. Posner & Miguel F.P. de Figueiredo, *Is the International Court of Justice Biased?*, 34 J. LEGAL STUD. 599, 608 (2005) (“Psychologically, if judges identify with their countries, they may find it difficult to maintain impartiality. International Court of Justice judges are not only nationals who would normally have strong emotional ties with their countries; they also have spent their careers in national service as diplomats, legal advisors, administrators, and politicians. Even with the best intentions, they may have trouble seeing the dispute from the perspective of any country but that of their native land.”).

256. PROCÈS-VERBAUX OF THE PROCEEDINGS OF THE ADVISORY COMMITTEE OF JURISTS, 24TH MEETING, *supra* note 248, at 528–29 (emphasis added).

The Committee chose the second option. Either policy, however, would have expressed the same root anxiety, because both operate on the premise that a permanent judge who is a national of one of the parties would be, or would appear to be, partial to her state of nationality.²⁵⁷ After all, it was on precisely this basis that the third option—retaining the permanent national judge without adding a judge *ad hoc*—was rejected out of hand.²⁵⁸ Explaining the choice of the judge *ad hoc* system, the Advisory Committee argued that “if the opposing views are both represented on the Bench, they counter-balance one another.”²⁵⁹ Thus was imported into international courts a quasi-arbitral model of impartiality,²⁶⁰ whereby a tribunal member of suspect partiality is acceptable as long as he is balanced by another with the opposite putative bias.²⁶¹

Concerns about objective impartiality survived the transition from the PCIJ to the ICJ; judges *ad hoc* were retained in part to garner confidence in court decisions.²⁶² Similarly, subjective partiality worries remain important to contemporary support for the judge *ad hoc* system.²⁶³

The IACtHR’s recent shift in its rules on judges *ad hoc* further emphasizes the durability of the balancing-of-partialities argument. In a forthright turn of phrase, the Court found that the institution of the judge *ad hoc* “is

257. In this sense, the calls of recently retired ICJ judge, Thomas Buergenthal, to replace the judge *ad hoc* rule with a rule of mandatory nationality-based recusal, TERRIS ET AL., *supra* note 5, at 153, do not represent a shift in the underlying assumptions or premises, but merely a shift in the policy solution.

258. On the consideration of this option during drafting, see, for example, FACHIRI, *supra* note 251, at 48.

259. PROCÈS-VERBAUX OF THE PROCEEDINGS OF THE ADVISORY COMMITTEE OF JURISTS, 34TH MEETING, *supra* note 251, at 720–722; see also Kooijmans, *supra* note 69, at 501 (the judge *ad hoc*’s purpose is to create “equality” between the parties); SHABTAI ROSENNE, 3 LAW AND PRACTICE OF THE INTERNATIONAL COURT, 1920–1996, at 124–25 (noting that the judge *ad hoc* is designed to “equalize the situation when the Bench already includes a Member of the Court having the nationality of one of the parties”); Krzysztof Skubiszewski, *Commentary: The Role of Ad Hoc Judges, in INCREASING THE EFFECTIVENESS OF THE INTERNATIONAL COURT OF JUSTICE* 378, 382 (Connie Peck & Roy S. Lee eds., 1997) (“If only one party’s national sits on the Bench, the appointment of an ad hoc judge by the other party simply meets the requirement of equality.”).

260. PROCÈS-VERBAUX OF THE PROCEEDINGS OF THE ADVISORY COMMITTEE OF JURISTS, 34TH MEETING, *supra* note 251, at 720–22 (“In this particular, our Court more nearly resembles a Court of Arbitration than a national Court of Justice.”). Land, Island and Maritime Frontier Dispute (El Sal. v. Hond.), Composition of the Chamber, 1989 I.C.J. 172 (Dec. 13) (Shahabuddeen, J. sep. op.); Elihu Lauterpacht, *Presentation: The Role of Ad Hoc Judges, in INCREASING THE EFFECTIVENESS OF THE INTERNATIONAL COURT OF JUSTICE, supra* note 259, at 371, 373.

261. Yuval Shany, *Squaring the Circle? Independence and Impartiality of Party-Appointed Adjudicators in International Legal Proceedings*, 30 LOY. L.A. INT’L & COMP. L. REV. 473, 490 (2008) (in arbitration or elsewhere, the idea is that “party-appointed adjudicators ultimately neutralize one another.”).

262. Report of the Informal Inter-Allied Committee on the Future of the Permanent Court of International Justice, ¶¶ 38–39, Misc. No. 2 (Feb. 10, 1944).

263. Adam Smith, “Judicial Nationalism” in *International Law: National Identity and Judicial Autonomy at the ICJ*, 40 TEX. INT’L L.J. 197, 204 (2005) (arguing that support for the institution “rests on an usually unspoken assumption: states believe that national judges will view fellow countrymen with greater sympathy than foreigners”).

grounded on the principle of equality of arms.”²⁶⁴ Therefore, the Court reasoned, the rule should be retained for cases brought by states against other states, but not for cases brought by individuals against states via the intermediary of the Inter-American Commission.²⁶⁵ Moreover, the Court ruled that any *permanent* “judge of the nationality of the respondent State shall not participate in hearing contentious cases originated on individual petitions.”²⁶⁶ Explaining this nationality-based recusal rule, the Court reasoned that, given the individual petitioner’s inability to appoint a judge *ad hoc*, keeping the national judge on the bench would create precisely the (apparent) inequality of arms the judge *ad hoc* institution seeks to prevent in state-versus-state cases.²⁶⁷ The IACtHR’s holding exhibits both the enduring importance of the balance-of-partialities rationale and the fact that nationality-based recusal rules and judge *ad hoc* rules are born of the same fundamental anxiety.

Crucially, the partiality-balancing function of the judge *ad hoc* is not merely a severable motive of the PCIJ Statute’s authors or an unfortunate mistake of interpretation by a contemporary human rights court. It is more fundamentally woven into the very essence of the judge *ad hoc*. Each original-approach court’s statute contains a stipulation virtually identical to the following: “[S]hould there be several parties in the same interest, they shall, for the purposes of [determining rights to appoint a judge *ad hoc*] be reckoned as one party only.”²⁶⁸ The original approach does not, then, guarantee to any state that might come before the court the right to a national (or appointee) on the bench. Rather, the provision guarantees either a judge *ad hoc* or a national judge to each *side* of the dispute.²⁶⁹ Thus, if Japan and the

264. *Advisory Opinion OC-20/09 requested by the Argentine Republic*, ASOCIACIÓN POR LOS DERECHOS CIVILES (Sept. 29, 2009), <http://www.adc-sidh.org/usentencias-detalle.php?idsec=6&ridsub=439&myAdmin=3ae97a8513f60521c9d9c9c8e605b08f&lng=en&myAdmin=3ae97a8513f60521c9d9c9c8e605b08f> (summarizing Article 55 of the American Convention on Human Rights, *Advisory Opinion OC-20/2009*, Inter-Am. Ct. H.R. (ser. A) No. 20 (Sept. 8, 2009)).

265. Article 55 of the American Convention on Human Rights, *Advisory Opinion OC-20/2009*, Inter-Am. Ct. H.R. (ser. A) No. 20, ¶ 1 (Sept. 8, 2009).

266. *Id.* ¶ 42 (García-Ramírez, J. concurring).

267. *Id.* In his concurring opinion, Judge García Ramírez quoted his previous statements on why he had chosen to recuse himself from such cases even prior to the rule change: “Even though it is possible that the judge may be impartial and neutral, and keep absolute distance from the subject and the parties involved in the conflict, it is not always possible for those observing the dispute and awaiting the decision to consider that there is—in the judge’s true conscience—a complete neutrality, which is a condition of impartiality. In this sense, it is important to recall, however, that good performance of jurisdictional duties is not only based on the integrity and capacity of the judge—which are necessary, of course—but also on the assessment made of them. To be and also to seem.” *Id.* ¶ 60 (García-Ramírez, J. concurring).

268. PCIJ Statute, *supra* note 9, art. 31; ICJ Statute, *supra* note 9, art. 31, para. 5; see ITLOS Statute, *supra* note 9, art. 17, para. 5 (“Should there be several parties in the same interest, they shall, for the purpose of the preceding provisions, be considered as one party only.”); IACtHR Statute, *supra* note 41, art. 10, para. 3 (“Should several States have the same interest in the case, they shall be regarded as a single party for purposes of the above provisions.”).

269. The precise meaning of “parties in the same interest” has not always been interpreted consistently by the PCIJ and ICJ over the years, with the Courts fluctuating

UK were parties in the “same interest” before an original-approach court and there were a British judge on the court, but no Japanese judge, Japan would have no right to appoint a judge *ad hoc*.²⁷⁰ The British judge would be presumed to satisfy that role for Japan. The *only* link between Japan and the British judge in such a scenario is that Japan seeks the same judgment as the UK, such that any partiality advantage the UK might gain, or appear to gain, from having a national on the court would equally be gained, or apparently gained, by Japan. Such a provision is unintelligible unless the fundamental purpose of the judge *ad hoc* is to balance partialities (real or apparent).

Anxiety about judicial nationalism also underpins the second pillar of the original approach—the nationality limit. As former ICJ judge Taslim Olawale Elias comments, the World Court’s statutory nationality limit “is intended to prevent any one nationality being over-represented on the Court, possibly on the ground that that nationality has a better claim [to a judge’s partiality] than any other.”²⁷¹ Zigurds Zile likewise describes the nationality limit and the judge *ad hoc* as two parts of the same project of combating judicial nationalism.²⁷² The underlying theory is that where such a limit is in place, no individual state will have a dominant group of sympathizers on the court.²⁷³ This theory of collective judicial decision-making has parallels in domestic legal theory. Benjamin Cardozo argues that a judge’s “eccentricities” can be neutralized by the different eccentricities of his colleagues on the bench.²⁷⁴

This logic is apparent in Protocol 14 to the European Convention on Human Rights. As discussed above, pursuant to the Convention, the ECtHR has long incorporated something akin to the judge *ad hoc* for all chamber and Grand Chamber decisions.²⁷⁵ Protocol 14, however, authorizes a single judge to make decisions on the admissibility of applications to the Court. In such single-judge admissibility hearings, the rule requiring the participation of the judge serving “in respect of” the impugned state reverses: “When sitting as a single judge, a judge shall not examine any

between a standard requiring that the cases be joined to count as “in the same interest” and a standard holding that—regardless of joinder—the parties are “in the same interest” if they make the same basic submissions, seeking the same conclusion. Kooijmans, *supra* note 69, at 501–02.

270. Japan and the United Kingdom (together with France and Italy) were in fact “parties in the same interest” in the PCIJ’s *SS Wimbledon* case; although in that instance, all four states happened to have permanent judges on the Court, so the above scenario did not arise. *Case of the S.S. Wimbledon (U.K., Fr., It. & Japan v. Ger.)*, 1923 P.C.I.J. (ser. A) No. 1 (Aug. 17).

271. Taslim Olawale Elias, *Report: Does the International Court of Justice, as it is Presently Shaped, Correspond to the Requirements Which Follow from its Functions as the Central Judicial Body of the International Community*, in *JUDICIAL SETTLEMENT OF INTERNATIONAL DISPUTES*, *supra* note 222, at 19, 21.

272. Zile, *supra* note 224, at 382.

273. *Id.* (“the single-judge rule . . . ought to guarantee against the perversion of the Court into an instrument of the policies of any one state . . .”).

274. BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 177 (Gaunt 1998) (1921).

275. See *supra* notes 132–149 and accompanying text.

application against the High Contracting Party in respect of which that judge has been elected.”²⁷⁶

The Convention thus codifies the following standard: Judges serving “in respect of” an impugned state *must* sit on panels making substantive determinations on the merits of the case involving that state; however such judges *may not* sit as the panelist making procedural determinations on admissibility. Although chambers have far greater authority to issue impactful rulings than do single judge formations, the judge’s participation on a relatively populous chamber is deemed far less threatening to the Court’s impartiality than would be her appointment as a narrowly constrained, but lone, admissibility umpire.

The same logic underlies presidential recusal rules. As noted above, in a number of courts, the court president casts the tie-breaking vote when the bench is deadlocked,²⁷⁷ but must cede her presidential functions in any case in which her national state is a party.²⁷⁸ As an ordinary member of a large judicial panel, it is thought, her (real or apparent) partiality is diluted by the other judges or balanced by the ‘opposing’ national judge or judge *ad hoc*. As president, however, if the court is deadlocked, she in effect becomes the sole decision-maker, her influence undiluted by the other voices on the court. In such a scenario, anxiety over judicial nationalism entails that the impartiality of the court, subjective or objective, is possible only if the president is not a national of one of the parties.

These more specific rules help to illuminate the function of the nationality limit. Grounded in trepidation about real or apparent judicial nationalism, the limit is designed to dilute the impact of each national interest so as to preserve the overall impartiality of the institution.

In sum, nationality limits, nationality-based recusal rules, and judge *ad hoc* systems are rooted in deep concern about partiality (whether objective or subjective). In addition to the bases for that anxiety discussed above, some have also raised concerns about nationality-based judicial dependence as a cause of partiality. Such worries are often expressed most directly with respect to judges from authoritarian regimes.²⁷⁹ In its starkest form, the concern is that international judges might function much like members of the Human Rights Committee, who—in the words of former Committee Member, Antonio Cassese—receive “instructions from our capital city [stating] ‘You vote like this.’”²⁸⁰ However, even tacit influence over decision-making would impugn independence, and those anxious about judicial nationalism point to a number of ways in which this might occur.

276. Protocol 14, *supra* note 139, art. 6; ECHR, *supra* note 40, art. 26, para. 3.

277. See *supra* notes 72, 81, 82 and accompanying text.

278. See *supra* notes 73, 81, 82 and accompanying text.

279. See, e.g., Shimon Shetreet, *Standards of Conduct of International Judges: Outside Activities*, 2 L. & PRAC. INT’L CRTS. & TRIBS. 127, 154 (2003).

280. Remarks of Antonio Cassese, in *Discussion: International Criminal Justice*, *supra* note 11, at 194.

First, states often have a statutory role in nominating candidates of their nationalities, and can therefore put forward candidates who toe the government line.²⁸¹ Second, even absent such statutory mandate, underlying norms often preclude the appointment of a judicial candidate without the support of her state.²⁸² Third, a judge's national government often has considerable influence over most of her preferred future career options (re-appointment to her current judgeship, appointment to a new international or domestic judicial post, or appointment to a high-status government or diplomatic post).²⁸³ In response to these concerns, it has long been suggested that international judges should have life tenure,²⁸⁴ or, to the extent re-appointment is the real problem, that they should be restricted to one term of service.²⁸⁵ However, none of the original-approach or derivative courts has adopted such an independence-bolstering strategy, possibly because the original-approach provisions are considered sufficient safeguards.

281. Posner & de Figueiredo, *supra* note 255, at 608; Shetreet, *supra* note 279, at 129. There is also a concern that having been appointed by their states, "candidates may be expected to maintain loyalty to their countries' interests." Ofer Eldar, *Vote-Trading in International Institutions*, 19 EUR. J. INT'L L. 3, 25 (2008). Particular concern is raised by the appointment of former diplomats. Georges Abi-Saab, *Presentation: Ensuring the Best Bench— Ways of Selecting Judges*, in INCREASING THE EFFECTIVENESS OF THE INTERNATIONAL COURT OF JUSTICE, *supra* note 259, at 166, 173.

282. At the ECJ, "[i]n practice, a person nominated for office by one of the Member States is commonly accepted by the others." Shetreet, *supra* note 279, at 156. The ICJ is also less protected against state influence than the textual rules would suggest. Clyde Eagleton, *Choice of Judges for the International Court of Justice*, 47 AM. J. INT'L L. 462, 463 (1953) ("[I]t appears that votes are cast for that one of the [up to four] nominees [put forth by a national group] who is favored by his government. There is no obligation upon Members to make such an inquiry; quite the contrary was originally intended."); Niels Blokker & Sam Muller, *The 1996 Elections to the International Court of Justice: New Tendencies in the Post-Cold War Era*, 47 INT'L & COMP. L.Q. 211, 213-14 (1998) ("[I]t is also clear that in practice governments are omnipresent even in this nomination stage of the procedure: members of national groups are appointed as such by their national governments, these governments are often in one way or another involved in the nomination process, and a nominee who lacks sufficient governmental support is unlikely to receive the vote of his country in the General Assembly . . ."); W. Michael Reisman, *Redesigning the United Nations*, 1 SING. J. INT'L & COMP. L. 1, 24 (1997); Mackenzie & Sands, *supra* note 1, at 278; Davis R. Robinson, *The Role of Politics in the Election and the Work of Judges of the International Court of Justice*, 97 AM. SOC. INT'L L. PROC. 277, 278-79 (2003); STURGESS & CHUBB, *supra* note 132, at 141-42; Eldar, *supra* note 281, at 24.

283. Meron, *supra* note 217, at 362 ("Concern is often expressed that a judge on an international court who is apprehensive about the prospects of renomination by his government or reelection may decide cases so as not to antagonize powerful UN member states, and especially his own state."); Posner & de Figueiredo, *supra* note 255, at 608 ("Judges who defy the wills of their governments by holding against it may be penalized. The government may refuse to support them for reappointment and also refuse to give them any other desirable government position after the expiration of their term."). Relatedly, it has been suggested that judges are motivated by the goal of reaching "no decision which would not be approved by the elite of his own country." PROT, *supra* note 247, at 46.

284. ANTONIO SANCHES DE BUSTAMANTE, *THE WORLD COURT* 135 (1925).

285. Institut de Droit Int'l, Resolution of the 1954 Aix-en-Provence Session art. 4 (1954); see *infra* notes 653-656 and accompanying text.

To summarize the above, the original approach and its derivatives are founded on the premise that judges are unable to act (or to appear to act) impartially vis-à-vis their states of nationality. The cause of this real or apparent partiality may be the natural—or apparently natural—allegiance a judge feels towards “her” state.²⁸⁶ Alternatively, it may be a function of a real or apparent lack of judicial independence.²⁸⁷

IV. Is the Anxiety Justified and Does the Original Approach Help?

Part III argues that the original approach and its derivatives are grounded in anxiety about judicial nationalism. This Part contends in Section IV.A that this anxiety is unwarranted. Judges are subject to numerous competing personal preferences and affiliations, of which nationality is just one. A judge is duty-bound to master such affiliations in order to achieve impartiality, and two phenomena facilitate this process. First, the judge is a trained expert who operates in a professional culture in which a premium is placed on reaching decisions through legal analysis. Second, when the law is ambiguous, the court on which a judge sits and the community that that court serves provides a normative resource upon which she may rely to guide her decisionmaking. The efficacy of both of these phenomena is bolstered by the professional socialization of the judge and its reinforcement by her colleagues and the broader international legal fellowship. National allegiance is no more immune to these socializing forces toward impartiality than is any other individual preference or affiliation. Indeed, extant jurisprudence recognizes the judge’s duty *and* capacity to achieve this impartial perspective, despite her pre-existing affiliations and preferences. Only ties of a particular form and intensity have led courts to find even an appearance of judicial partiality. Nationality is not an affiliation of that form or intensity. This renders the effort to subdue judicial nationalism through the original approach and its derivatives a conspicuous anomaly, demanding of more robust justification than it has thus far received.

Perhaps most importantly, Section IV.B argues that even if anxiety about judicial nationalism were justified, the tools used by the original approach and its derivatives to combat that threat are fundamentally self-defeating. Indeed, they undermine the strongest mechanism for the promotion of judicial impartiality. Adopting a cosmopolitan approach would in fact be more effective in achieving the end sought.

286. See *supra* notes 248–255 and accompanying text.

287. Fassbender, *supra* note 253, at 282 (“The underlying assumption [at the time of the PCIJ Statute’s drafting] (which, by the way, is still today shared by most governments) was that a State which had one of its own nationals on the Court would be in a better position to see its interests protected in the future work of the Court than a State not so represented.”); TERRIS ET AL., *supra* note 5, at 152 (“[J]udges may feel direct pressure from their own states.”); Aznar-Gómez, *supra* note 64, at 210 (“Independence in the ICJ seems to relate directly (though not exclusively) to the nationality of the judge.”).

A. Is the Anxiety Justified?

1. Nationality in Perspective

There is little doubt among national judges,²⁸⁸ international judges,²⁸⁹ and eminent international jurists²⁹⁰ that the personal history and the individual disposition of a judge are important facets of her general worldview and, moreover, inevitable features of her perspective as a judge. As former ICJ judge Rosalyn Higgins states, “Judges cannot be expected to arrive at the Court as *tabulae rasae*.”²⁹¹ Similarly, her erstwhile colleague on the World Court, Manfred Lachs, endorses Jerome Frank’s assertion that “[m]uch harm is done by the myth that, merely by putting on a black robe and taking the oath of office as a judge, a man ceases to be human and strips himself of all predilections, becomes a passionless thinking machine.”²⁹² ECtHR judge Lucius Caflisch admits that judges are “conditioned, up to a point, by their upbringing, their former activities and their personal circumstances.”²⁹³

288. See, e.g., AHARON BARAK, JUDICIAL DISCRETION 121 (1987) (“Every judge has a complex human experience that influences his approach to life and therefore also his approach to law. . . . [T]hese considerations—and many others—determine the judge’s personality and his human experience. One cannot ignore this factor. It seems that we would not want to operate in a system in which this factor did not carry substantial weight.”); CARDOZO, *supra* note 274, at 13 (“We may try to see things as objectively as we please. None the less, we can never see them with any eyes except our own.”); *Id.* 174–75 (“The spirit of the age, as it is revealed to each of us, is too often only the spirit of the group in which the accident of birth or education or occupation or fellowship have given us place. No effort or revolution of the mind will overthrow utterly and at all times the empire of these subconscious loyalties.”); see also *Hearings Before the Committee on the Judiciary on The Nomination of Clarence Thomas to be Associate Justice of the Supreme Court of the United States*, 102nd Cong. 110 (1991) (Thomas found it helpful in his testimony before the U.S. Senate during the hearings on his nomination to be a Justice of the U.S. Supreme Court to assert “I have always carried in my heart the world, the life, the people, the values of my youth, the values of my grandparents and my neighbors . . .”).

289. See, e.g., Anglo-Iranian Oil Co. Case (U.K. v. Iran), Preliminary Objections, 1952 I.C.J. 93, 161 (Carneiro, J. sep. op.) (“It is inevitable that every one of us in this Court should retain some trace of his legal education and his former legal activities in his country of origin.”); Stephen M. Schwebel, *National Judges and Judges Ad Hoc of the International Court of Justice*, 48 INT’L AND COMP. L.Q. 899 (1999) (“We are all prisoners of our own experience. Such measure of objectivity as may be humanly possible may come more easily to some than others, depending in part on that experience, in which the legal and political culture that conditioned it is important.”).

290. Michael Reisman, *Metamorphoses: Judge Shigeru Oda and the International Court of Justice*, 33 CAN. Y.B. INT’L L. 185, 192 (1995) (book review) (criticizing a volume on ICJ judge Shigeru Oda on the grounds that it “tells us nothing about Oda’s parents, his class origins, his childhood, his adolescence, his faith and religious struggles, the formation of his sexuality, his relation to those closest to him and his family, his culture, and, in particular (and one would have thought indispensably) how he dealt with the collective trauma of Japan that ripped the country during his formative years.”).

291. HIGGINS, *Introduction to Part 9*, in 2 THEMES AND THEORIES, *supra* note 232, at 1037, 1037.

292. JEROME FRANK, LAW AND THE MODERN MIND (1930), *quoted in* Manfred Lachs, *Some Reflections on the Nationality of Judges of the International Court of Justice*, 4 PACE Y.B. INT’L L. 49, 58 (1992).

293. Caflisch, *supra* note 242, at 169.

An international judge's nationality is one of many relevant formative characteristics in this respect, including, for example, her gender, religion, socio-economic background, and education.²⁹⁴ The state in which a judge is legally trained, and in which she first practices (often her state of nationality) can have an important impact on her approach to legal procedure, her legal methodology, and her legal style.²⁹⁵ In addition, a judge's national background exposes her to a particular socio-political history. Aharon Barak observes, "A judge who experienced the Weimar Republic will not have the same attitude toward the activity of undemocratic political parties as someone who did not experience it."²⁹⁶ A judge's state's history can also form her perspective on international relations.²⁹⁷

However, its relevance to the personal perspective of a judge hardly makes nationality unique among a judge's personal attributes. Every judge is the product of a unique combination of experiences and character traits, many of which are relevant to her perspective on law and society.²⁹⁸ More-

294. STURGESS & CHUBB, *supra* note 132, at 471 (quoting Stephen Schwebel: "I think the national differences, philosophical differences, ideological differences and purely chance differences of personality are important.").

295. PROTT, *supra* note 247, at 191 (noting that ICJ judges "have learned their role very largely within the ambit of a national legal system. This training influences their views in many ways, such as how much effort should be made to write a unitary judgment, whether dissent should be suppressed, how much individuality and how much collective spirit a judge may properly feel. The methods which a judge considers to be possible for the solution of a case, the style of the written judgment, the nature of remedies he considers to be available—all these have been to some extent programmed by his initial legal and professional training."). Similarly, former ECJ judge, Thijmen Koopmans, comments: "One of my colleagues was a member of the French Conseil d'Etat. They have a kind of apparatus of notions and concepts into which they are ready to fit any problem. I have the feeling—now I am generalizing and not speaking about particular persons—that, in general, German lawyers are much more concerned about the question of whether the result is a just result, where as others are much more technical or practical in their approach." STURGESS & CHUBB, *supra* note 132, at 501; *see also* Anglo-Iranian Oil Co. Case (U.K. v. Iran), Preliminary Objections, 1952 I.C.J. 63, 161 (Carneiro, J. sep. op.).

296. BARAK, *supra* note 288, at 121; *see also* Reisman, *supra* note 290, at 192 (noting the relevance to Judge Shigeru Oda of the collective trauma of Japan that ripped the country during his formative years).

297. EDWARD McWHINNEY, JUDGE MANFRED LACHS AND JUDICIAL LAW-MAKING: OPINIONS ON THE INTERNATIONAL COURT OF JUSTICE, 1967-1993, at 1-2, 10 (1995) (describing Judge Manfred Lachs's cultural heritage as a Pole and its influence over his perspective and noting that "the political constraints of being a national of, in his own term 'a nation on wheels,' squeezed between Germany and Russia and with the continuing Soviet political and military presence, may be evident in certain aspects of his approach to decision-making").

298. *Id.* at 10 (describing alongside Lachs's Polish traits, his "eclectic legal education and professional training and experience and the cosmopolitanism of [his] intellectual outlook"); PROTT, *supra* note 247, at 12-13 (noting that judges' perspectives are influenced by a wide range of persons with whom they interact and work); Aznar-Gómez, *supra* note 64, at 211 ("Judges . . . arrive at The Hague with a legal, social, and historical background as they arrive loaded with such different sensitivities."); BARAK, *supra* note 288, at 121 ("A decisive component in the determination of the reasonableness of the choice is the judge's personal experience: his education, his personality, and his emotional makeup. There are judges who are more cautious and judges who are less cautious. There are judges whom a certain argument influences more than other judges.

over, as Cardozo argues, the determinative environment is typically smaller than the nation: “The spirit of the age, as it is revealed to each of us, is too often only the spirit of the group in which the accident of birth or education or occupation or fellowship have given us place.”²⁹⁹ Highlighting the relevance of traits other than nationality, Thomas Buerghenthal recalls of his time as an IACtHR judge, “[O]n . . . the first court that we established, four of us had been political prisoners of one type or another. So on our skin we experienced what it means to be deprived of civil liberties. That has an impact on judges.”³⁰⁰

Indeed, precisely because all judges at every level are products of their experiences and personalities in ways relevant to the cases before them, unless one wants to discard the notion of impartial judging altogether, the mere existence of those individual idiosyncrasies cannot itself be sufficient to impugn the judge’s professional impartiality. As Terris et al. argue, “Every judge faces some sort of competing loyalties. When these loyalties are direct or personal, then recusal is in order. In other circumstances, objectivity is simply a matter of being a good judge.”³⁰¹

In choosing to act impartially and uphold this duty, the judge does not shed her personality or her history. On the contrary, these features are essential to her capacity to understand situations, to process information, to imagine alternative perspectives, and to make judgments. As Barak writes of judging on a national supreme court, “The purpose of objectivity is not to rid a judge of his past, his education, his experience, his belief, or his values. Its purpose is to encourage the judge to make use of all of these personal characteristics to reflect the fundamental values of the society as faithfully as possible.”³⁰² Cardozo expresses a similar sentiment: “If you ask how [the judge] is to know when one interest outweighs another, I can only answer that he must get his knowledge . . . from experience and study and reflection; in brief, from life itself.”³⁰³

Obviously, although she strives for the professional ideal, the judge can never reach a truly objective perspective. As the judges surveyed above admit, their human histories and personalities matter. Nevertheless, achieving judicial purpose through the interpretive tools provided by personal experience is fundamentally different from systematically favoring parties with whom one shares certain experiences, attitudes, or perspectives.³⁰⁴ While personal experiences can help the judge to appreciate the

There are judges who insist on a heavy burden of proof before they will deviate from the existing law, and judges who are satisfied with a light burden of proof in deviating from existing law. There are judges who are more impressed by the writings of authors, scholars, and other judges, and there are judges whom these impress less. Every judge has a complex human experience that influences his approach to life and therefore also his approach to law.”).

299. CARDOZO, *supra* note 274, at 174-75.

300. STURGESS & CHUBB, *supra* note 132, at 534 (quoting Thomas Buerghenthal).

301. TERRIS ET AL., *supra* note 5, at 153.

302. Barak, *supra* note 226, at 56-57.

303. CARDOZO, *supra* note 274, at 113.

304. *Id.* at 120-21. Martha Minow, although more skeptical of the possibility of impartial judging than is Cardozo, suggests that it is through drawing on their own

interaction between the law and society and to develop a sense for the communal mores necessary to resolve legal ambiguity, the judge must understand that it is only in this limited sense that her history and experiences are relevant.³⁰⁵ The ethic of the judicial role demands this of a judge with respect to any personal affiliation, association, or characteristic; nationality is no exception.

2. *Legal Reasoning and Justice in Gap-Filling*

The first mechanism the judge uses to facilitate the impartial resolution of disputes is the discipline of legal analysis. Her judicial decisions must be rooted as strongly as possible in the law, reached by a process of legal reasoning, and explicable in legal terms. Engaging in this process helps to insulate the judge from the influence of personal preferences or allegiances, facilitating her struggle to approach the ideal of impartiality.

Of course, realist analysts of the American judiciary have long argued that the ambiguity of law renders this a relatively meaningless constraint. They insist that a passable legal argument can be made for deciding any case in either direction.³⁰⁶

This claim is too strong.³⁰⁷ First, courts do rule on cases in which the correct legal outcome is clear.³⁰⁸ Second, as Lawrence Baum argues, “Even when the state of the law does not dictate a particular result, often (perhaps usually) it provides more support for one litigant than for the other, more support for one legal rule than for an alternative rule.”³⁰⁹ In this second scenario, while a judge *could* craft an argument in favor of the weaker alternative, she would do so in breach of her fundamental duty to grant determinative weight to her legal analysis. As discussed below, there are good reasons why judges adhere to that duty even when doing so

experiences that judges can connect with those of different perspectives and experiences, reimagining themselves approaching the question at hand from an alternative view and better understanding the relevant plurality of partialities. Good judging, in other words, is a matter of *how* one engages one’s own history and personality. Martha Minow, *Foreword: Justice Engendered*, 101 HARV. L. REV. 10, 89-90 (1987) (“It may seem paradoxical to urge those who judge to bring their own experiences to the problems before them, after identifying the dangerous ways in which we all confuse our own perceptions and interests for reality. In the process of personal reflection, however, the judge may stretch faculties for connection, while engaging in dialogue with the parties over their legal arguments and analogies.”).

305. As Barak argues: “The judge must develop sensitivity to the dignity of his office and to the restraints that it imposes.” Barak, *supra* note 226, at 56-57.

306. See, e.g., WILFRED E. RUMBLE, JR., *AMERICAN LEGAL REALISM: SKEPTICISM, REFORM, AND THE JUDICIAL PROCESS* (1968), at 48-106; *AMERICAN LEGAL REALISM* (William W. Fisher III, Morton J. Horwitz & Thomas A. Reed eds., 1993). For some, the legal ambiguity critique is particularly powerful when leveled against the U.S. Supreme Court. See, e.g., JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL* (1993).

307. For some responses to the realist critique, see, for example, Ken Kress, *Legal Indeterminacy*, 77 CAL. L. REV. 283 (1989); Frederick Schauer, *Easy Cases*, 58 S. CAL. L. REV. 399 (1985); Lawrence B. Solum, *On the Indeterminacy Crisis: Critiquing Critical Dogma*, 54 U. CHI. L. REV. 462 (1987).

308. See, e.g., Schauer, *supra* note 307.

309. LAWRENCE BAUM, *THE PUZZLE OF JUDICIAL BEHAVIOR* 64 (1997).

means reaching a decision that they would disfavor on a personal level.³¹⁰

Nevertheless, once these first two scenarios are accounted for, cases remain in which the legal arguments on either side are close to equally plausible and there is no clear answer. As Cardozo acknowledges, “There are gaps to be filled. There are doubts and ambiguities to be cleared.”³¹¹ When the law is unclear, an impartial judge does not exploit the ambiguity to impose her own preferences on the interested parties. She must, therefore, do more than merely adhere to legal methodology if she is to “fill the gaps” without abandoning impartiality.

That means striving for an (admittedly idealized) “objective standard” of justice³¹² by adopting the position of the community, rather than that of herself as an individual. For Cardozo, this means turning to the “method of sociology,” through which, he argues, the judge is to discover the “good of the collective body.”³¹³ Barak describes “objectivity” as “an intellectual process by which the judge reaches beyond himself to understand, from the perspective of his or her community, the social values that he is to weigh and balance. . . . Objectivity means reflecting the deep consensus and the shared values of the society.”³¹⁴ He elaborates: “The goal of objectivity is not to cut [the judge] off from his surroundings, but the opposite: to enable him to formulate properly the fundamental principles of his period.”³¹⁵

For Cardozo, in cases in which the established law is truly ambivalent, the judge’s “duty to declare the law in accordance with reason and justice is seen to be a phase of his duty to declare it in accordance with custom. It is the customary morality of right-minded men and women which he is to enforce by his decree.”³¹⁶ What is critical for both Barak and Cardozo is that the jurisprudence is “constantly brought into relation to objective or external standards.”³¹⁷

Barak explains:

The judge learns about those basic values [of his or her society] from the fundamental documents . . . of his or her legal system. But those documents are not the only source. The judge learns about the basic values of his or her legal system from the aggregate national experience, from the nature of the political system as a democracy, and from understanding the basic concepts of the nation. The movement of his legal system through history, its social,

310. See *infra* Section IV.A.3.

311. CARDOZO, *supra* note 274, at 14; see also Remarks of Dieter Grimm, *Discussion: The Secular Papacy*, in *JUDGES IN CONTEMPORARY DEMOCRACY*, *supra* note 11, at 79, 91 (noting that at a certain point legal methodology and reasoning will no longer provide the answer, and the judge must make a decision); Remarks of Gil Carlos Rodríguez Iglesias, *Discussion: The Secular Papacy*, in *JUDGES IN CONTEMPORARY DEMOCRACY*, *supra* note 11, at 94 (agreeing, but stipulating that this is only the case in a narrow range of cases).

312. CARDOZO, *supra* note 274, at 106.

313. *Id.* at 71.

314. Aharon Barak, *The Role of a Supreme Court in a Democracy*, 53 *HASTINGS L.J.* 1205, 1210 (2002).

315. *Id.* at 1211.

316. CARDOZO, *supra* note 274, at 106.

317. *Id.*

political and religious roots are the sources from which a judge learns about those basic values. And ultimately, he learns about those basic values “from reading life.”³¹⁸

These values “are not the outcomes of public-opinion surveys; they are not populism carrying away the masses. . . . They reflect history, not hysteria.”³¹⁹ Ultimately, Barak argues, “both normatively and descriptively—the judge gives expression not to his or her own beliefs but to the deep, underlying beliefs of society. The key concept is judicial objectivity.”³²⁰

Reflecting the importance of a judge’s ability to take on the fundamental values of her society, many states require that those appointed to the state’s highest judgeships be nationals.³²¹ The Basic Principles on the Independence of the Judiciary state that such requirements are not discriminatory.³²²

One might interject here that the posture advocated by Barak and Cardozo seems to pose a problem for the impartiality of the international judge. After all, rather than providing the foundation for her impartiality, national allegiance is potentially in *conflict* with the impartiality of the international judge.³²³ Articulating this concern, Dworkin argues:

Within a national culture, judges can draw on a history and tradition. They can say with sense, even if only controversially in particular cases, that they are applying principles embedded in a common history and practice. That claim is much more problematic when you move from a particular nation to a region and, of course, still more so when you try to make claims about the jurisprudence of the world.³²⁴

Expressed in these terms, the objection is overstated. The world’s population is arranged into numerous overlapping normative communities.

318. Barak, *supra* note 314, at 1207. Later, he explains “I am conscious of what is taking place in my country. It is my duty to study my country’s problems, to read its literature, to listen to its music.” *Id.* at 1215.

319. *Id.* at 1207–08.

320. Barak, *supra* note 226, at 51.

321. See, e.g., Taru Kuosmanen, *Finland*, in *JUDGES IN THE SERVICE OF THE STATE?*, *supra* note 216, at 23, 24; Jonathan Garrett Wagner Sunnarvik, *Norway*, in *JUDGES IN THE SERVICE OF THE STATE?*, *supra* note 216, at 27, 27; Michael Zammit Maempel, *Malta*, in *JUDGES IN THE SERVICE OF THE STATE?*, *supra* note 216, at 31, 34; Oleg Veremienko, *Ukraine*, in *JUDGES IN THE SERVICE OF THE STATE?*, *supra* note 216, at 47, 47; Daniel ten Brinke, *Israel*, in *JUDGES IN THE SERVICE OF THE STATE?*, *supra* note 216, at 67, 69. *But see* TERRIS ET AL., *supra* note 5, at 28 (2007) (noting that “in Africa it is not uncommon for judges qualified to sit on the highest courts to serve in multiple countries during their career. Emmanuel Ayoola, a Nigerian national who now serves on the Special Court for Sierra Leone, had previously served as a justice of the Supreme Court of Nigeria, chief justice of the Supreme Court of The Gambia, and president of the Republic of Seychelles Court of Appeal.”).

322. *Basic Principles on the Independence of the Judiciary*, *supra* note 215, ¶ 10.

323. TERRIS ET AL., *supra* note 5, at 151 (“In a domestic court, the judge serves as a citizen of his country. He swears to uphold the law of the land, and his personal allegiance to nation is aligned with his professional allegiance to serving as a guardian of the nation’s laws. The international judge, however, faces at the very least a potential conflict between national loyalty and the application of the law.”).

324. Remarks of Ronald Dworkin, *Discussion: International Criminal Justice*, in *JUDGES IN CONTEMPORARY DEMOCRACY*, *supra* note 11, at 189, 252–53.

The nation state is doubtless an important one, but there have always been others and they continue to grow in number, reach, and depth. They include, *inter alia*, local communities, religious groups, ethnic groups and kinship communities, racial groups, political parties and movements, professional or labor associations, and social networks. For many, these other communities are as or more important in providing the foundations for their normative perceptions and deliberations than is the nation state. When the domestic judge is asked in her professional capacity to take on the perspective of the national community—to adopt its history and its mores—she is asked *qua* judge to adopt above centrally important others the perspective of one of the many overlapping normative communities of which she is part.

But a judge's conscious decision and endeavor towards that end can equally be directed at the adoption of the perspective of a different community, at a different scale, and under different conditions. The intellectual and emotional challenge is fundamentally the same. Just as her peers on national courts are asked in their professional capacities to put aside various other normative allegiances (including even fundamental religious commitments) in order to focus on the national community, the international judge is asked to do the same thing in order to focus on a broader normative community.

Of course, the community norms are thinner at the continental level than at the national level, and thinner still at the global level.³²⁵ However, this itself does not make the judge's job impossible. If it did, the problem would not be unique to international courts. Particularly in multicultural societies, community norms at the national level are typically thinner than are the diverse local community norms, kinship group moralities, religious standards, moral and ethical commitments, and socio-political group mores under which many individuals in those societies operate. And yet national judges regularly rule on cases that impact those thicker norms.³²⁶

325. *Id.* at 253.

326. Indeed, there is a long history of national courts ruling on domestic political, social, and even military conflicts that reveal severe dissension about fundamental values and that, in some circumstances, may even constitute an existential threat to the state and the social order within it. Consider, for example, the following historical cases: Conseil Constitutionnel [CC] [Constitutional Council] decision No. 2010-613DC, Oct. 7, 2010 (Fr.) (upholding a ban on Islamic veils); *Albutt v. President of the Republic* 2010 CCT 54/09 ZACC 4 (CC) (S. Afr.) (holding that victims of apartheid crimes have a right to be heard before the President makes a decision on pardoning the perpetrator); H CJ 769/02 Public Comm. Against Torture in Israel v. Gov't of Israel [2006] IsrSC (Isr.) (permitting, under certain circumstances, the practice of the "targeted killing" of terrorist suspects); *Minister of Home Affairs v. Fourie and Lesbian & Gay Equality Project v. Minister of Home Affairs* 2005 CCT 60/04 & CCT 10/05 (CC) (S. Afr.) (upholding a constitutional right to same-sex marriage and requiring implementing legislation within one year); H CJ 5100/94 Public Comm. Against Torture in Israel v. Israel [1999] IsrSC (Isr.) (holding that several types of physical interrogation methods used by the Israeli General Security Services were illegal under current Israeli law); Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] May 28, 1993, 88 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 203 (Ger.) (softening its 1975 decision, immediately *infra*, to hold that if means other than penal law are provided to protect pre-natal

Moreover, the thinner normative content at the global level is reflected in more limited law and more constrained court action than is accepted and expected at the national level.³²⁷ International law develops within this narrower scope of global communal norms. Operating within this constrained space, the international judge does not need access to a historical and normative scheme as thick as that available to her domestic counterparts. Moreover, the thinner transnational normative framework that she must adopt is accessible to her via multiple avenues, including the internationalized professional process through which she passes en route to the bench³²⁸ and the collegial deliberation in which she engages with her fellow judges.³²⁹

Exemplifying the parallels between these global norms and those governing the domestic system, Barak highlights the importance to the domestic judge of the fundamental value of “the protection of constitutional, statutory, and common law human rights.”³³⁰ He argues that human rights are at “the center of [the scheme of] fundamental values” that a national judge must understand and adopt.³³¹ Barak’s scheme also

life in an adequate way (such as mandatory counseling), it is not unconstitutional to refrain from the criminal punishment of abortion under certain conditions); BVerfG, Feb. 25, 1975, 39 BVERFGE 1 (Ger.) (striking down as unconstitutional and inconsistent with respect for human dignity a law decriminalizing abortion during the first 12 weeks of pregnancy); CC decision No. 74-54DC, Jan. 15, 1975 (Fr.) (upholding as consistent with respect for human dignity and the constitution a statute permitting abortions within a narrow range of circumstances); *Roe v. Wade*, 410 U.S. 113, 164-65 (1973) (invalidating laws limiting women’s access to abortions during the first trimester of pregnancy as unconstitutional); *Brown v. Bd. of Ed. of Topeka*, 347 U.S. 483, 493-94 (1954) (overturning *Plessy v. Ferguson* and holding that state laws establishing separate public schools for black and white students are unconstitutional); *Plessy v. Ferguson*, 163 U.S. 537, 540-42, 550-51 (1896) (holding that a Louisiana law mandating separate but equal accommodations for blacks and whites on intrastate railroads was constitutional); *Ex parte Milligan*, 71 U.S. 2, 121, 127 (1866) (holding that civilians may not be tried before military tribunals when civilian courts are operational); *Ex Parte Merryman*, 17 F. Cas. 144, 148-49 (C.C.D. Md. 1861) (holding that the President does not have the authority to suspend the writ of habeas corpus, even during war); *Dred Scott v. Sandford*, 60 U.S. 393 (1857) (holding, *inter alia*, that the federal government did not have the authority to prohibit slavery in federal territories and that all people of African ancestry—slaves as well as those who were free—could never become citizens of the United States, and therefore could not sue in federal court); *see also* Barak, *supra* note 226, at 148-56.

327. The ICJ, the ITLOS, and the WTO AB have extremely small caseloads when compared to national courts; the treaties and customs that comprise the body of international law that these global courts apply is tiny in comparison to the body of law applied by a national court. Moreover, unlike national courts, these global courts have no authority to impose their judgments on non-consenting parties. Caseloads and legal provisions are denser at the regional level, particularly in Europe, than at the global level, but this is entirely consistent with the view that the scope of international judicial action is shaped by the thickness of the normative community on behalf of which her court acts.

328. *See infra* notes 342-393 and accompanying text.

329. *See infra* notes 626-628 and accompanying text.

330. Barak, *supra* note 226, at 42.

331. Barak, *supra* note 314, at 1208.

includes “social order” and “justice.”³³² These values, though with narrower meanings, are also fundamental to the global and regional normative frameworks.³³³

One example of a scheme of core values at the international level is that proposed by members of the New Haven School of international law, who advocate an international jurisprudence based on an “overriding goal” of “a world public order of human dignity.”³³⁴ In addition to this central tenet, New Haven scholars suggest a list of eight other fundamental values upon which global jurisprudence should be based.³³⁵ Different—and thicker—fundamental values have been articulated with respect to regional courts and the proper development of their jurisprudence.³³⁶ Whether or not the New Haven School correctly identifies the core international values, it shows that the elaboration of such values is possible at the global level. Seeking to identify such values is an essential feature of the international judge’s effort to adopt the position of the global community and approximate the impartiality demanded of her.

In sum, to impartially adjudicate the cases before her, the judge must first endeavor to reach a decision based on legal analysis, adopting the better legal argument even when a passable alternative presents itself. Second, where the law is incomplete or ambiguous, the judge *qua* judge must adopt a perspective that prioritizes her commitment to the normative community in which her court is situated over and above her other normative allegiances. Given the limited scope of international law, there is no reason to believe that international judges would be any less capable in this effort with respect to overcoming national allegiance than are their domestic counterparts with respect to overcoming their panoply of other personal commitments and allegiances.

Of course, addressing the anxiety of original-approach proponents, just like addressing realist skeptics at the domestic level, requires more than articulating the possibility of impartial judging. It demands an account of *why* the judge would adhere to this standard, particularly when other interests, such as the interests of her state, are at stake.

3. *The Power of the Judicial Ethic*

There are several reasons that judges will often strive to abide by their duty to adopt a legal approach to judging and to adopt an approach to gap-filling rooted in the standards of justice of the relevant normative commu-

332. *Id.* at 1215–16. For a fuller range of the values that Barak argues are fundamental to the domestic judicial perspective, see, for example, Barak, *supra* note 226, at 39–45, 85–91.

333. See sources cited *supra* notes 334–335, 359–360 and accompanying text.

334. Siegfried Wiessner & Andrew R. Willard, *Policy-Oriented Jurisprudence*, 44 GERMAN Y.B. INT’L L. 96, 112 (2001); see also W. Michael Reisman, Siegfried Wiessner & Andrew R. Willard, *The New Haven School: A Brief Introduction*, 32 YALE J. INT’L L. 575, 575–76 (2007).

335. Wiessner & Willard, *supra* note 334, at 107; see also Reisman, Wiessner & Willard, *supra* note 334, at 580.

336. See, e.g., *infra* notes 359–360 and accompanying text.

nity, even when doing so does not produce the outcome that they may prefer for personal reasons.

First, lawyers are socialized—starting in law school³³⁷ and continuing throughout their legal careers³³⁸—to consider it the judge’s fundamental professional responsibility to pursue this approach to adjudication. Moreover, this socialization is not confined to the domestic legal profession. On the contrary, as Smith describes, recent decades have witnessed “the growth of an international legal ethic and the creation of a larger, increasingly homogenous epistemic community of international jurists. . . .”³³⁹ As early as 1987, McWhinney observed among international lawyers “the exchange of culture and ideas on a trans-national basis through vastly facilitated personal contacts and access to the printed and spoken word.”³⁴⁰ Oscar Schachter describes an “Invisible College of International Lawyers.”³⁴¹

Law schools and law firms in well-resourced states such as the U.S. and the U.K. have become the common sites of advanced legal education and development for many future international judges from around the world, thus providing the fora and establishing the networks necessary for the development of a global professional ethic.³⁴² In these transnational

337. LAWRENCE BAUM, *JUDGES AND THEIR AUDIENCES: A PERSPECTIVE ON JUDICIAL BEHAVIOR* 97 (2006); MARK C. MILLER, *THE HIGH PRIESTS OF AMERICAN POLITICS: THE ROLE OF LAWYERS IN AMERICAN POLITICAL INSTITUTIONS* 17–28 (1995); J. WOODFORD HOWARD, JR., *COURTS OF APPEALS IN THE FEDERAL JUDICIAL SYSTEM: A STUDY OF THE SECOND, FIFTH, AND DISTRICT OF COLUMBIA CIRCUITS* 115–124 (1981).

338. Immersion in the legal career prior to joining the bench may in fact have a greater impact than does law school training in defining the judge’s expectations for and understanding of judicial responsibilities. James L. Gibson, *From Simplicity to Complexity: The Development of Theory in the Study of Judicial Behavior*, 5 *POL. BEHAV.* 7, 21 (1983). Noting the phenomenon of post-law school socialization, see, for example, Dan Lortie, *Laymen to Lawmen: Law School, Careers, and Professional Socialization*, 29 *HARV. EDUC. REV.* 352 (1959).

339. Smith, *supra* note 263, at 224; see also TERRIS ET AL., *supra* note 5, at xix (“International judges, taken collectively, comprise a community of knowledge-based experts where similarities across the group are more important than differences. It is true, of course, that international judges are a diverse lot, coming from many countries around the globe, a variety of professional backgrounds, and legal systems with different rules and traditions. Nevertheless, the judges tend to share similar backgrounds in terms of education and experience in the international community, which lead to considerable harmony in matters of judicial temperament, outlook, and style. A shared understanding of the judicial function, and what it entails, binds them together.”); *id.* at 230 (“international judges . . . share a great deal in terms of background, education, and faith in universal principles of law, even if they come from very different societies and legal traditions. These common elements of background make the prospect of a worldwide community of law . . . an imaginable enterprise.”).

340. EDWARD MCWHINNEY, *THE INTERNATIONAL COURT OF JUSTICE AND THE WESTERN TRADITION* 138 (1987).

341. Oscar Schachter, *The Invisible College of International Lawyers*, 72 *Nw. U. L. REV.* 217 (1977).

342. TERRIS ET AL., *supra* note 5, at 17–18. Such centralization has obvious risks. *Id.* at 18. However, the influence it grants the U.S. and the U.K. over the international legal community is not absolute. Students converging from around the world create a transnational classroom dialogue and influence the development of their collective professionalization just as do the professors from whom they learn, some of whom will themselves

legal communities future international judges develop skills of legal analysis and simultaneously adopt and create the legal culture within which the duty of impartial judging is articulated and emphasized.³⁴³ This prepares them for the moment when they are asked to undergo the “personal change” necessary to adopt the judicial perspective.³⁴⁴

That change begins with the ritual professionalizing moment of the judicial oath. Much like their domestic counterparts, international courts universally require judges to pledge formally to perform their judicial duties impartially and conscientiously.³⁴⁵ Furthermore, a number of statutory provisions stipulate general requirements of independence, impartiality, and high moral character;³⁴⁶ expertise requirements;³⁴⁷ restrictions on extra-judicial activities;³⁴⁸ bases for recusal;³⁴⁹ standards for removal;³⁵⁰

be expatriates. The students may also be important resources for the development of professors’ understanding of transnational legal culture.

343. Former German Constitutional Court Judge Dieter Grimm emphasizes the influence of the “legal context and the legal culture in which you handle legal matters . . . [and] the professionalization of the legal field” in constraining the judge’s freedom to impose her own moral perspective on the parties to a case. Grimm, *supra* note 311, at 91.

344. On the general notion of personal change as part of the socialization of the new adult role participant, see, for example, BRUCE J. BIDDLE, *ROLE THEORY: EXPECTATIONS, IDENTITIES, AND BEHAVIORS* 317-18 (1979). *But see* Lenore Alpert, Burton M. Atkins & Robert C. Ziller, *Becoming a Judge: The Transition from Advocate to Arbiter*, 62 *JUDICATURE* 325, 328-30 (1979) (reporting on the domestic American judge that he experiences some difficulty in the transition to the bench and only “changes his self identity to fit the new role” over the ensuing two years or so).

345. See, e.g., ECJ Statute, *supra* note 31, arts. 2, 4; ACtHPR Protocol, *supra* note 42, art. 16; CCJ Agreement, *supra* note 33, art. 10, appendix 1; Rome Statute, *supra* note 52, art. 45; EFTACJ Agreement, *supra* note 27, art. 2; ITLOS Statute, *supra* note 9, art. 11; IACtHR Statute, *supra* note 41, art. 11; ICJ Statute, *supra* note 9, art. 20.

346. See, e.g., Consolidated Version of the Treaty Establishing the European Community art. 223, Dec. 29, 2006, 2006 O.J. (C 321) E/1; ACtHPR Protocol, *supra* note 42, art. 11; CCJ Agreement, *supra* note 33, art. 4, para. 11; Rome Statute, *supra* note 52, art. 40; EFTACJ Statute, *supra* note 200, art. 30; ITLOS Statute, *supra* note 9, art. 2; IACtHR Statute, *supra* note 41, art. 4, para. 1; ICJ Statute, *supra* note 9, art. 2; *Rules of Conduct for the Understanding on Rules and Procedures Governing the Settlement of Disputes*, art. 2, para. 1, WT/DSB/RC/1 (Dec. 11, 1996) [hereinafter *WTO Rules of Conduct*]; ECHR, *supra* note 40, art. 21; ICTR Statute, *supra* note 51, art. 12; ICTY Statute, *supra* note 51, art. 13; CJAC Treaty, *supra* note 27, art. 7.

347. See, e.g., Consolidated Version of the Treaty Establishing the European Community, *supra* note 346, art. 223; ACtHPR Protocol, *supra* note 42, art. 11; CCJ Agreement, *supra* note 33, art. 4, ¶¶ 1, 10, 11; Rome Statute, *supra* note 52, arts. 36, 39; EFTACJ Statute, *supra* note 200, art. 30; ITLOS Statute, *supra* note 9, art. 2; IACtHR Statute, *supra* note 41, art. 4, para. 1; ICJ Statute, *supra* note 9, art. 2; WTO Understanding, *supra* note 9, art. 17; ECHR, *supra* note 40, art. 21; ICTR Statute, *supra* note 51, art. 12; ICTY Statute, *supra* note 51, art. 13; CJAC Treaty, *supra* note 27, art. 7.

348. See, e.g., ECJ Statute, *supra* note 31, art. 4; ACtHPR Protocol, *supra* note 42 art. 18; Rome Statute, *supra* note 52, art. 40; EFTACJ Statute, *supra* note 200, art. 4; ITLOS Statute, *supra* note 9, art. 7; IACtHR Statute, *supra* note 41, art. 18; ICJ Statute, *supra* note 9, art. 16; *WTO Rules of Conduct*, *supra* note 346, art. 2, para. 1; WTO AB Working Procedures, *supra* note 189, art. 2, paras. 2-3; ECHR, *supra* note 40, art. 21; CJAC Treaty, *supra* note 27, art. 7.

349. See, e.g., ACtHPR Protocol, *supra* note 42, art. 17; Rome Statute, *supra* note 52, art. 41; *Rules of Procedure and Evidence*, INT’L CRIMINAL COURT, Rules 33-34 (Sept. 3-10, 2002), <http://www.icc-cpi.int/NR/rdonlyres/F1E0AC1C-A3F3-4A3C-B9A7-B3E8B115E>

and judicial privileges and immunities.³⁵¹ These formal standards concretize the ethic of which the judge is already well aware.

The combination of professional skills development, long-term normative understanding, and codified requirements defines in the mind of the individual the standard for what it means to be a good judge. McWhinney and Kawano argue that, as an empirical matter, judges, international and domestic, accept it as “part of the obligations of the office” to engage with cases in an impartial manner.³⁵² Hersch Lauterpacht explains his understanding of the applicability of this obligation to the issue of nationality as follows:

An oath of judicial impartiality is an oath the deliberate disregard of which is morally as reprehensible [in the international sphere] as within the State. Conscious bias in favour of his own State on the part of an international judge constitutes a dereliction of duties and an abuse of powers. . . . [A]lthough the subconscious factor cannot be entirely eliminated, it is to a large extent a function of the human will, of the individual sense of moral duty, and of the enlightened consideration of the paramount interest of peace and justice entrusted to the care of judges. . . . This ideal of moral excellence has reference . . . to the capacity to combat . . . judicial bias There is no reason why a breach of the judicial duty of impartiality in the international sphere should be regarded differently from similar conduct on the part of the judge within the State [T]he danger of judicial bias is not a problem confined to international tribunals.³⁵³

Indeed, like their counterparts in the domestic context, international judges and commentators alike insist that crucial to the impartial functioning of the judge is her adoption of the perspective of the community that she serves. Lauterpacht elaborates: “[I]mpartiality . . . presupposes the determination on the part of judges to regard the international community . . . as an entity as real as any sovereign State, and with an equal claim

886/140164/Rules_of_procedure_and_Evidence_English.pdf; EFTACJ Statute, *supra* note 200, art. 15; ITLOS Statute, *supra* note 9, art. 8; IACtHR Statute, *supra* note 41, art. 19; ICJ Statute, *supra* note 9, arts. 17, 24; WTO Understanding, *supra* note 9, art. 17, ¶ 3; ECtHR Rules, *supra* note 146, Rule 28; *Rules of Procedure and Evidence*, INT’L CRIM. TRIB. FOR RWANDA, rule 15 (Mar. 14, 2008), <http://unictr.org/Portals/0/English%5C%20Legal%5CEvidence%5CEnglish%5C080314.pdf>; ICTY Rules, *supra* note 58, Rule 15; CJAC Treaty, *supra* note 27, art. 7.

350. See, e.g., ACtHPR Protocol, *supra* note 42, art. 19; CCJ Agreement, *supra* note 33, art. 4, paras. 6-7; Rome Statute, *supra* note 52, art. 46; EFTACJ Statute, *supra* note 200, art. 6; ITLOS Statute, *supra* note 9, art. 9; ICJ Statute, *supra* note 9, art. 18; *WTO Rules of Conduct*, *supra* note 346, art. 8, paras. 14-20; ECHR, *supra* note 40, art. 23; CJAC Treaty, *supra* note 27, art. 11.

351. See, e.g., ACtHPR Protocol, *supra* note 42, art. 17; CCJ Agreement, *supra* note 33, art. 30; Rome Statute, *supra* note 52, art. 48; ITLOS Statute, *supra* note 9, art. 10; IACtHR Statute, *supra* note 41, arts. 12, 19, 70; ICJ Statute, *supra* note 9, art. 19; ICTY Statute, *supra* note 51, art. 30; CJAC Treaty, *supra* note 27, arts. 13, 48.

352. EDWARD MCWHINNEY & MARIKO KAWANO, *JUDGE SHIGERU ODA AND THE PATH TO JUDICIAL WISDOM: OPINIONS ON THE INTERNATIONAL COURT OF JUSTICE, 1993-2003*, at xi (2006); see also Meron, *supra* note 217, at 360.

353. LAUTERPACHT, *supra* note 247, at 215-16.

to allegiance.”³⁵⁴ Rosalyn Higgins agrees, arguing that international judges “must through their work serve the entire international community”³⁵⁵ Oliver Lissitzyn asserts that an ICJ judge “is impartial if, undeterred by . . . considerations [such as personal advantage or partisan sympathy], he administers and develops the law in a way designed to accomplish its fundamental objectives, among which the preservation of the community is usually the supreme one.”³⁵⁶ Highlighting an exemplar, McWhinney describes Manfred Lachs as “above all, a ‘United Nations’ thinker and jurist”³⁵⁷ Cassese suggests a similar commitment on the part of international criminal judges.³⁵⁸

Judges on regional courts express a parallel ethic. ECJ judge Gil Carlos Rodríguez Iglesias emphasizes three core values guiding his court: “first, guaranteeing fundamental economic liberty; next, developing fundamental principles of the Community’s legal order [including the principle of direct effect, the principle of primacy, and the principle of Member State responsibility for damages caused by violations of Community law];³⁵⁹ and, finally, the protection of fundamental rights.”³⁶⁰ Justice Duke Pollard of the CCJ argues that the laws applied by his court “should mirror the collective social ethos of our peoples and . . . should be interpreted and applied by Judges who would have internalised the values informing the content of that collective social ethos.”³⁶¹

Similarly, judges on human rights courts focus on the broader community under their jurisdiction. Buergenthal, speaking while President of the IACtHR, described the situations in the various countries under the

354. *Id.* at 239. This, he contends, is “a problem of the creation in the minds of judges of a sense of international solidarity resulting in a clear individual consciousness of citizenship of the *civitas maxima*.” *Id.*

355. HIGGINS, *Reflections from the International Court*, in 2 THEUMES AND THEORIES, *supra* note 232, at 1124.

356. LISSITZYN, *supra* note 234, at 58; *see also* TERRIS ET AL., *supra* note 5, at 100 (“In their professional capacity, their allegiance is to a body of international law that has developed through treaties, custom, and the evolution of general legal principles.”); Fassbender, *supra* note 253, at 280 (“The judges of the ICJ hold an international office. They owe allegiance only to the international community and its values and goals as expressed in the UN Charter.”).

357. McWHINNEY, *supra* note 297, at 87.

358. Antonio Cassese, *Presentation: International Criminal Justice*, in JUDGES IN CONTEMPORARY DEMOCRACY, *supra* note 11, at 175, 185 (“international criminal courts act *on behalf of the whole international community*”).

359. Remarks of Gil Carlos Rodríguez Iglesias, *Discussion: International Criminal Justice*, in JUDGES IN CONTEMPORARY DEMOCRACY, *supra* note 11, at 189, 238. Former ECJ judge Constantinos Kakouris has spoken of “set[ting] aside one’s own beliefs and one’s own sentiments, in order to reconstruct oneself as a constitutional Community” Gil Carlos Rodríguez Iglesias, *Presentation: The Judge Confronts Himself as Judge*, in JUDGES IN CONTEMPORARY DEMOCRACY: *supra* note 11, at 275, 285 (emphasis added) (quoting Constantinos Kakouris).

360. *Id.* at 237.

361. *About the Caribbean Court of Justice*, *supra* note 27. Elaborating on this point, he asserts that “persons interpreting and applying the law should be attuned to the relevant dynamics of social interaction, which determine the quality and intensity of human intercourse, and the values conditioning such dynamics.” *Id.*

Court's jurisdiction as "our human rights problems . . ." ³⁶² A judge at the European Court of Human Rights reported, "The way of thinking is different to all other multicultural institutions that I [have] worked in: we all share a common approach and a mutual understanding [grounded in] the deeper values" shared across nationalities. ³⁶³

Supporting this rhetoric, Cassese gives a powerful example of the ECtHR adapting to the shifting of fundamental regional community norms:

There is a very terse provision regarding torture in the European Convention [on Human Rights]. It is just one line and a half saying that no one may be subjected to torture or inhuman or degrading treatment. . . . [Historically, the ECtHR had] stopped short of saying that to beat up somebody in a police station and to subject him to degrading treatment may be so serious as to amount to torture. But a different body within the Council of Europe—the Committee Against Torture (a committee consisting of inspectors visiting police stations, prisons, and so on) . . . adopted a different view. The Committee [issued] a lot of reports about [torture in] Turkey, Spain, Cyprus, and Greece, among others. Under this scheme, a new and broader notion of torture has been developed. The European Court of Human Rights has now said, in effect, "After twenty years developing our case law, we have to take a much broader view of torture and expand the concept and say that, in this particular French case [*Selmouni v. France* ³⁶⁴], the French police officers committed an act of torture." ³⁶⁵

This looks much like the kind of slow but responsive normative development one might expect to see under the theories of judicial responsiveness to communal norms articulated by Cardozo and Barak.

That international judges understand this to be their fundamental duty is a significant step towards creating the conditions for judicial impartiality. Social psychologist Shalom Schwartz has argued that "conformity to a self-expectation results in pride, enhanced self-esteem, security, or other favorable self-evaluations; violation or its anticipation produce guilt, self-deprecation, loss of self-esteem, or other negative self-evaluations." ³⁶⁶ Thus, to the extent judges internalize the norms of independence and impartiality, they will strive to reach decisions based on strong legal analysis and fair and impartial clarification of ambiguity. ³⁶⁷ Put simply, judges

362. STURGESS & CHUBB, *supra* note 132, at 118 (quoting Thomas Buergenthal). Fellow IACtHR judge Cecilia Medina Quiroga adopts a similar outlook. TERRIS ET AL., *supra* note 5, at 185 (2007) ("Medina feels . . . the comfort of doing this for Latin America, which she considers 'her' world."). Of former ECtHR judge John Hedigan, Terris et al. comment that "Hedigan has always been what he calls 'an internationalist,' someone deeply interested in what is happening in the world and a believer in the community of nations." *Id.* at 212.

363. Nina-Louisa Arold, *The European Court of Human Rights as an Example of Convergence*, 76 NORDIC J. INT'L L. 305, 320 (2007).

364. *Selmouni v. France*, 1999-V Eur. Ct. H.R. ¶ 101.

365. Remarks of Antonio Cassese, *Discussion: The Secular Papacy*, in JUDGES IN CONTEMPORARY DEMOCRACY, *supra* note 11, at 103-04.

366. Shalom H. Schwartz, *Normative Influences on Altruism*, in 10 ADVANCES IN EXPERIMENTAL SOC. PSYCHOL. 221, 231 (Leonard Berkowitz ed., 1977).

367. See, e.g., RICHARD A. POSNER, *OVERCOMING LAW* 131 (1995) ("The pleasure of judging is bound up with compliance with certain self-limiting rules that define the

want to see themselves as professionals who are “doing their assigned job well.”³⁶⁸

The connection between the judge’s sense of self-worth and her adherence to the judicial role can have powerful effects.³⁶⁹ Cesare Romano argues that “international judges understand” that they are appointed “because they have moral authority that comes from embodying or serving some shared higher ideals, and rational-legal authority that comes from their impartiality and loyalty to the law. If they neglect those ideals and start applying law in a way that might be perceived as biased, or as a cave-in to states’ pressure, they undermine their own rationale.”³⁷⁰ To fail in this way would be to create the conditions for the guilt and loss of self-esteem of which Schwartz warns. It is because of the urge to avoid that outcome that internalized norms are “self-reinforcing.”³⁷¹ Thus, consistent with the demands of the judicial role, international judges “tend to attribute their relative success or failure, according to their own measures, to the quality of their legal reasoning.”³⁷²

In addition to the judge’s self-assessment, two other factors drive her towards a standard of impartiality: her standing among her fellow judges on the court, and her standing in the professional community more broadly.

‘game’ of judging”); Christopher R. Drahozal, *Judicial Incentives and the Appeals Process*, 51 SMU L. REV. 469, 475 (1998) (“Judges derive reasoning utility by using standard means of legal reasoning to decide the case in accord with precedent.”); Harry T. Edwards, *The Effects of Collegiality on Judicial Decision Making*, 151 U. PA. L. REV. 1639, 1663 n.80 (2003) (“Judges gain satisfaction from playing by the ‘institutional rules of judging’ and become invested in playing the judge role according to the rules.”); Kathleen M. Sullivan, *Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 120 (1992) (“Most judges hold deeply internalized role constraints and believe that judgment is not politics.”); WALTER MURPHY, *ELEMENTS OF JUDICIAL STRATEGY* 39 (1964) (judges are internally motivated by their belief that they have a duty to decide as the law directs); CHARLES P. CURTIS, *LAW AS LARGE AS LIFE* 156–57 (1959).

368. Thomas W. Merrill, *Institutional Choice and Political Faith*, 22 L. & SOC. INQUIRY 959, 975 (1997).

369. Indeed, in the wrong legal or social context, it can produce troubling results. Robert Cover, for example, argues that anti-slavery judges in the antebellum northern United States were able to enforce laws they found morally repugnant because their fundamental commitment to the judicial role enabled them to insulate themselves from personal moral preference and instead be guided by “fidelity to the law.” ROBERT M. COVER, *JUSTICE ACCUSED* 229–32 (1975). It is also in terms of such allegiance that we can understand Felix Frankfurter’s position in his dissent from the U.S. Supreme Court’s decision in *Board of Education v. Barnette*. Frankfurter explained: “Were my purely personal attitude relevant I should *wholeheartedly* associate myself with the general libertarian views in the Court’s opinion, *representing as they do the thought and action of a lifetime*. . . . It can never be emphasized too much that one’s own opinion about the wisdom or evil of a law should be excluded altogether when one is doing one’s duty on the bench.” *Board of Education v. Barnette*, 319 U.S. 624, 646–47 (1943) (Frankfurter, J. dissenting) (emphasis added).

370. Cesare P.R. Romano, *The United States and International Courts: Getting the Cost-Benefit Analysis Right*, in *THE SWORD AND THE SCALES: THE UNITED STATES AND INTERNATIONAL COURTS AND TRIBUNALS* 419, 441–42 (Cesare P.R. Romano ed., 2009).

371. Schwartz, *supra* note 366, at 231.

372. Helfer & Slaughter, *supra* note 232, at 318.

With rare exceptions, international courts require judges to sit on the bench together with multiple colleagues and thus demand collective decisionmaking. This augments the normative force of the judicial ethic. Patricia Wald, who would later serve on the ICTY, explained: "A judge's world is inbred and cloistered. Most of what we do passes unnoticed The only genuine reassurances we get that we are up to the job are expressions of approval from our colleagues. Disapproval, in contrast, can be a bitter pill. Our ultimate obligation may indeed be to our own personal sense of integrity . . . but our colleagues' reactions are a fine screen through which our actions are filtered."³⁷³

Evidence for the theory that people conform to the normative expectations of others is strongest in the context of small groups.³⁷⁴ As Timothy Stein reports, the social psychology of small groups is such that esteem is granted to those who exemplify their group's normative ideal.³⁷⁵ The standard by which judges can gain the respect of their colleagues is by exemplifying the normative ideal they all share, irrespective of background or perspective, namely skilled and impartial legal analysis and judicial reasoning.³⁷⁶

Interpersonal respect aside, judges are most likely to convince their colleagues and influence the court's ultimate decision by exemplifying the judicial ideal in their deliberative communications.³⁷⁷ The iterative process of collective judgment drafting requires that this conformity to the judicial ethic be maintained throughout the decisionmaking process and helps to weed out arguments that fail to meet the common standard.³⁷⁸ Ultimately, judges "reinforce each other in thinking about cases largely in legal terms."³⁷⁹

It is also through working together in this context that judges develop a sense of collective endeavor, which further motivates them to reach decisions collectively via the agreed common standards of analysis. Observing international courts in general, Terris et al. report that "[j]udges necessarily become part of personal and professional networks within their institutions, which must, in turn, shape the way they perform their work. . . .

373. Patricia M. Wald, *Some Thoughts on Judging as Gleaned from One Hundred Years of the Harvard Law Review and Other Great Books*, 100 HARV. L. REV. 887, 906 (1987).

374. Bruce J. Biddle, *Recent Developments in Role Theory*, 12 ANN. REV. SOCIOLOGY 67, 79 (1986).

375. R. Timothy Stein, *High-Status Group Members as Exemplars: A Summary of Field Research on the Relationship of Status to Congruence Conformity*, 13 SMALL GROUP BEHAVIOR 3, 14-15 (1982); see also Roland J. Pellegriin, *The Achievement of High Statuses and Leadership in the Small Group*, 32 SOC. FORCES 10 (1953).

376. Alex Kozinski, *What I Ate for Breakfast and Other Mysteries of Judicial Decision Making*, 26 LOY. L.A. L. REV. 993, 994-95 (1993).

377. BAUM, *supra* note 337, at 55 ("An argument will be more persuasive to court colleagues if it is legally strong. And justices will best gain the respect of their colleagues if they make effective legal arguments within the Court.")

378. Wald describes the process of "careful research, arduous rewriting, and open dialogue that inhibits idiosyncratic or overadventurous rulings." Wald, *supra* note 373, at 904.

379. BAUM, *supra* note 337, at 55.

[Courts] tend to be animated by a strong collective identity on the part of their judges”³⁸⁰ The WTO AB is unusual in seeking actively to foster such an internal professional culture among its judges through formal rules,³⁸¹ but such a culture tends to develop even absent explicit regulation. As former ICJ judge Robert Jennings writes, there is an “assumption that all judges have a collegiate responsibility to the [ICJ] as a whole.”³⁸²

The professional ethic and the phenomenon of professional collaboration on the court thus impose a measure of impartiality onto the judge’s decision-making process. Supplementing this, the public presentation of judicial reasoning provides the judge’s broader professional community with a system for monitoring her adherence to that norm. Ultimately, it is the strength and integrity of her legal reasoning that gains the judge the respect of her peers and garners her influence in her professional community.³⁸³ As Baum observes, “Lawyers are the most regular and most expert critics of judges’ work, a role that enhances the importance of their esteem to judges.”³⁸⁴ In general, of course, in appraising the judicial writings of an international judge, lawyers examine primarily their *legal* strengths and weaknesses. Secondarily, they may be influenced by policy considerations,³⁸⁵ but if lawyers’ views are to carry significant weight with judges, they cannot be based on raw state interest.³⁸⁶

Judges are also particularly keen that their decisions garner the

380. TERRIS ET AL., *supra* note 5, at 49–50.

381. See WTO AB Working Procedures, *supra* note 189, art. 4, para. 1 (“To ensure consistency and coherence in decision-making, and to draw on the individual and collective expertise of the Members, the Members shall convene on a regular basis to discuss matters of policy, practice and procedure.”).

382. Sir Robert Y. Jennings, *The Collegiate Responsibility and Authority of the International Court of Justice*, in *INTERNATIONAL LAW AT A TIME OF PERPLEXITY: ESSAYS IN HONOUR OF SHABTAI ROSENNE* (Yoram Dinstein & M. Tabory eds., 1989); see also PROTTE, *supra* note 247, at 35 (emphasizing the importance of the professional socialization that occurs through working on the World Court); HIGGINS, *Reflections from the International Court*, in 2 *THEMES AND THEORIES*, *supra* note 232, at 1122, 1124 (arguing that it is through the involvement of the entire Court in the decision-making process that the judges’ focus is directed to the international community, rather than specific states or regions).

383. This phenomenon is perhaps even stronger with respect to a judge’s long-term legacy. Lon L. Fuller, *An Afterword: Science and the Judicial Process*, 79 *HARV. L. REV.* 1604, 1619 (1966) (“The great judges of the past are not celebrated because they displayed in their judicial ‘votes’ dispositions congenial to later generations. Rather their fame rests on their ability to devise apt, just, and understandable rules of law; they are held up as models because they were able to bring to clear expression thoughts that in lesser minds would have remained too vague and confused to serve as adequate guideposts for human conduct.”).

384. BAUM, *supra* note 337, at 98 (“When judges on the federal courts of appeals were asked to cite the group whose approval gave them the ‘greatest personal satisfaction,’ lawyers and judges dominated their responses.”).

385. *Id.* at 62 (“most lawyers care a good deal about both law and policy”).

386. After all, while Baum is correct to note the value judges place on lawyers’ appraisals of their judging, that value is itself dependent on the “expert” professional caliber of those appraisals. *Id.* at 98. In that sense, a lawyer’s assessment loses value to the extent it departs meaningfully from the professional standards of legal analysis.

approval of their peers (namely, the broader community of judges).³⁸⁷ This too encourages conformity to the judicial ethic, because “legal criteria are probably the most important basis” for judges’ appraisals of their peers’ work.³⁸⁸

The knowledge that the bases for a given decision will be subject to external scrutiny by their professional peers is thus a further important motive for the judge to adopt the norms of appropriate judicial decision-making. As Askin notes, “Nobody likes to be a pariah. Faced with disapproval from close associates and disdain from others, only the hardiest ideologue remains true to the faith.”³⁸⁹ Partly for this reason Meron argues that “judicial impartiality cannot be ensured without a reasoned decision.”³⁹⁰ Hersch Lauterpacht contends that the system is particularly effective in courts that allow dissenting opinions, because the prospect of a persuasive dissent pointedly challenges judges in the majority to engage in a carefully reasoned defense of the decision.³⁹¹ The efficacy of this mechanism is bolstered by the development of an “epistemic community” of judges, “that is to say, a group of people who, while different in many regards, are animated by common ideas, sets of values, or aims.”³⁹²

Exemplifying the professional culture in which impartiality is expected, respected, and socially rewarded, erstwhile PCIJ President, Dionisio Anzilotti, said in his short panegyric to fellow judge Lord Robert Finlay, “I am paying the *greatest tribute* to our lamented colleague . . . by saying here publicly that Lord Finlay did not hesitate to vote against the views put forward by his Government’s representatives when he was convinced that right lay on the other side.”³⁹³

In sum, the professional training of the judge, the socializing influence of the judicial ethic, and the influence of her peer group contribute to the judge’s personal willingness, ability, and sense of duty to reason publicly and in legal terms, and to adopt the normative perspective of the community that she serves. These, in turn, are critical and intertwined factors in enabling the judge to act impartially with respect to her personal affiliations and normative commitments, including national allegiance.

Nonetheless, as Meron cautions, ultimately “it is primarily the culture of judicial integrity that we must rely on.”³⁹⁴ This may be of some concern, since there are factors other than those described above affecting judges when they deliberate and make decisions. Some non-legal audiences may

387. *Id.* at 102–03; see also Stephen M. Bainbridge & G. Mitu Gulati, *How do Judges Maximize? (The Same Way Everyone Else Does—Boundedly): Rules of Thumb in Securities Fraud Opinions*, 51 EMORY L. J. 83, 108 (2002).

388. BAUM, *supra* note 337, at 107.

389. FRANK ASKIN, *DEFENDING RIGHTS: A LIFE IN LAW AND POLITICS* 202 (1997).

390. Meron, *supra* note 217, at 360.

391. HERSCH LAUTERPACHT, *THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT OF JUSTICE* 69 (1958).

392. TERRIS ET AL., *supra* note 5, at 63.

393. Fifth Annual Report of the Permanent Court of International Justice, 1929 P.C.I.J. (ser. E) No. 5, at 22 (May 15) (emphasis added).

394. Meron, *supra* note 217, at 363.

pull them in directions opposite to that of the judicial ethic (perhaps without the judges even realizing it);³⁹⁵ judges' personal backgrounds will inevitably impact which of two plausible understandings of the communal norms appropriate to filling a legal gap is best;³⁹⁶ and on occasion, some cynical judges may simply violate their professional oath and decide based on personal preference, with little regard for legal method or impartial adjudication.

On these grounds, one might argue that the original approach and its derivatives are simply realistic provisions designed to combat the problems of judging in a non-ideal world. Since subjective partialities (including national partialities) cannot be eliminated completely, the argument goes, it makes sense to protect against them using regulatory tools like nationality limits, judges *ad hoc*, and nationality-based recusals. There are several reasons to resist this argument.

First, there is no reason why this logic should apply solely to international judges, or, indeed, solely to the trait of nationality. International judges are faced with the same basic challenges and furnished with the same tools and methods for overcoming those challenges as are their domestic counterparts. It behooves those beset by anxiety about judicial nationalism to explain why nationality is peculiarly immune to the culture of judicial integrity. Why does such anxiety not apply equally, for example, to the devout Catholic judge's impartiality with respect to family planning controversies or school prayer; or to a Virginian U.S. Supreme Court Justice's impartiality with respect to a dispute between Maryland and Virginia over riparian rights regarding the Potomac? What of a white judge's impartiality with respect to a dispute over the constitutionality of affirmative action? The list of such questions is endless. However—as discussed in Section IV.A.4, *infra*—the answer is consistent: Such affiliations are not taken to impugn a judge's impartiality.

One response to this comparison might be to argue that, regardless of the failure to regulate domestic judges in such circumstances, the fact is that in the international context we have an extant and straightforward prophylactic against the national bias of international judges, namely the original approach. Given the availability of that prophylactic, why put international courts at risk of judicial nationalism with nothing more than the professional culture of judicial integrity to keep it at bay? The fact that we cannot or will not do something similar in domestic courts is so much the worse for domestic judicial impartiality; it provides no reason for us to tie our hands in guarding against national bias in international courts. Moreover, the argument might continue, even if one were to accept the argument that judges will rise above national allegiance to vote impartially on inter-

395. BAUM, *supra* note 337, at 88-97, 118-135.

396. See *supra* Section IV.A.1 (discussing how judges' backgrounds inevitably shape their judicial approach to some extent). Ultimately, even when the judge honestly endeavors to reach the impartial perspective, it is impossible to achieve true objectivity. Her best interpretation of the law or the communal standard of justice will always be her interpretation, not the illusory objective truth.

national courts, why not use the original approach to bolster objective impartiality, protecting international courts from even the appearance of national bias?

Section IV.B, *infra*, answers this response by demonstrating that the original approach and its derivatives are counterproductive on their own terms and by contending that they in fact weaken the core mechanisms on which we rely for judicial impartiality. This is the second (and conclusive) reason to reject the realist objection.

A third reason is that even if judicial adherence to the role ethic cannot produce perfect impartiality, there is good reason to believe that it provides for a *more* impartial judiciary than would a system that is more focused on the fact that perfect impartiality will never be achieved. Scott Altman argues that a range of psychological factors mean that if judges stop believing in the possibility of conforming to the judicial role, they are likely to drop further from that ideal than they are when believing in it and striving to attain it (but not quite reaching it).³⁹⁷ For example, he argues:

If judges who believe wrongly in 90% determinacy came correctly to understand that only 70% of cases are governed by law, this discovery could itself further reduce law's determinacy. . . . [Judges] might become increasingly willing to consider and to look for indeterminacies in the law. Although this willingness could decrease some false constraint, it might reduce law's real constraint as well. The existence of legal rules depends on consensus about meaning. Such consensus could deteriorate as willingness to look for gaps, conflicts, and ambiguities increased. As the consensus decreased, the real constraint of law would decrease as well.³⁹⁸

This argument is closely related to some of the themes elaborated in Section IV.B.4, *infra*.

Ultimately, if courts are to function as judicial bodies, they must be furnished with the tools and independence they need to fulfil that goal. In short, judges must be allowed the space to judge. As Hersch Lauterpacht argues,

If judges . . . are susceptible to the claims of their private interests or those of their group, they are no less susceptible to the categorical imperative of duty and to the powerful voice of justice. This applies both to the municipal and the international judge. There is no warrant, in either sphere, to doubt the faculty of man to lift himself above his own interests or those of his group, and to serve the cause of justice—a cause whose identity with the ideal of peace is in the society of States certainly not less than among individuals within the State. . . . There is in international judges a deep and ever-growing consciousness that they are the trustees of the best and most urgent hopes of humanity³⁹⁹

The grounds for trusting the judge to approximate Lauterpacht's ideal and serve the cause of justice, rather than her own preferences, are fundamentally no different with respect to the trait of nationality than with respect to

397. Scott Altman, *Beyond Candor*, 89 MICH. L. REV. 296, 307–26 (1990).

398. *Id.* at 324.

399. LAUTERPACHT, *supra* note 247, at 217–18.

many other traits that are ignored in judicial regulation at the domestic and international levels.

4. *The Impartiality of the Judge in Jurisprudential Perspective*

There is, of course, a limit to what judges can reasonably be expected to overcome. Extant jurisprudence, however, contradicts the constitutional anxiety of many international courts and does not support the view that nationality is a characteristic of the kind a judge cannot surmount.

The ECtHR and the ICTY have held consistently that the burden of proof with respect to subjective impartiality falls on the party challenging a judge; the latter is presumed subjectively impartial absent proof to the contrary.⁴⁰⁰ The difficulty of reaching this threshold means that applicants and courts almost exclusively raise and examine complaints of objective impartiality,⁴⁰¹ for which it is sufficient to demonstrate a *reasonable impression of bias*.⁴⁰² Even under this lower standard, however, the inference of bias required is far stronger than that suggested by being a national of one of the parties.

400. Prosecutor v. Furundžija, Case No. IT-95-17/1A, Judgment, ¶ 182 (Int'l Crim. Trib. for the Former Yugoslavia July 21, 2000); Le Compte, Van Leuven and de Meyere, App. Nos. 6878/75, 7238/75, Judgment, Eur. Ct. H.R. (ser. A), No. 43 at ¶ 58 (May 27, 1981); Piersack v. Belgium, App. No. 8692/79, 53 Eur. Ct. H.R. (ser. A) at ¶ 30 (1982); De Cubber v. Belgium, Judgment, 86 Eur. Ct. H. R. (Ser. A) at ¶ 25 (Oct. 26, 1984); Hauschildt v. Denmark, App. No. 10486/83, 154 Eur. Ct. H.R. (ser. A) at ¶¶ 25, 46 (May 24, 1989); Bulut v. Austria, 5 Eur. Ct. H. R. (ser. A) at ¶ 31 (Feb. 22, 1996); Castillo Algar v. Spain, 95 Eur. Ct. H. R. (ser. A) at ¶ 43 (Oct. 28, 1998); Incal v. Turkey, 78 Eur. Ct. H. R. (ser. A) at ¶ 65 (June 9, 1998); Campbell & Fell v. U.K., App. Nos. 7819/77, 7878/77, 80 Eur. Ct. H.R. (ser. A) at ¶ 84 (1984).

401. See, e.g., Prosecutor v. Sesay, Case No. SCSL-2004-AR15-15, Decision on Defense Motion Seeking the Disqualification of Justice Robertson from the Appeals Chamber (Special Ct. for Sierra Leone Mar. 13, 2004) (even in a clear-cut case of pre-judgment by one of the judges, the Special Court for Sierra Leone Appeals Chamber limited its finding to one of objective partiality, presumably aware of the difficulty involved in reaching a finding of subjective partiality); In re Pinochet, [1999] A.C. (H.L.) (appeal taken from Eng.), available at <http://www.parliament.the-stationery-office.co.uk/pa/ld199899/ldjudgmt/jd990115/pino01.htm> ("Senator Pinochet makes no allegation of actual bias against Lord Hoffmann; his claim is based on the requirement that justice should be seen to be done as well as actually being done.").

402. See, e.g., *Campbell & Fell*, 80 Eur. Ct. H.R. at ¶ 81 (holding that the actual perception of bias on the part of one or more of the parties to disputes before the body in question was not sufficient, but that if they were "reasonably entitled" to such an impression, there would be a breach of objective impartiality); *Sesay*, Decision on Defense Motion Seeking the Disqualification of Justice Robertson from the Appeals Chamber at ¶ 15 (adopting the standard of whether a "reasonable man will apprehend bias"); *Furundžija*, Case No. IT-95-17/1A at ¶ 189 (testing whether "the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias"); *Webb v. The Queen* (1994) 181 CLR 41 (Austl.) (considering the position of an "ordinary reasonable member of the public"); 28 U.S.C. § 455 (2000) (a judge must recuse himself "in any proceeding in which his impartiality might reasonably be questioned"); *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 860 (1988) ("The goal of [28 U.S.C. § 455] is to avoid even the appearance of partiality."). Some jurisdictions have imposed a stricter test. See, e.g., *R. v. Gough*, [1993] A.C. 646 (appeal taken from Eng.) (requiring that there be a "real danger of bias" to reach a finding of objective partiality).

In a landmark domestic ruling on this issue, Lord Browne-Wilkinson held in *In re Pinochet* that there are two ways in which a judge may be deemed objectively partial:

First . . . if a judge is in fact a party to the litigation or has a financial or proprietary interest in its outcome then he is indeed sitting as a judge in his own cause. In that case, the mere fact that he is a party to the action or has a financial or proprietary interest in its outcome is sufficient to cause his automatic disqualification. The second application of the principle is where a judge is not a party to the suit and does not have a financial interest in its outcome, but in some other way his conduct or behaviour may give rise to a suspicion that he is not impartial, for example because of his friendship with a party.⁴⁰³

A national *qua* national does not have a direct financial or proprietary interest in the success of her state before international courts.⁴⁰⁴ The theoretical interest she might have as a citizen who benefits from government spending is surely far too uncertain and remote to surpass the objective partiality threshold.⁴⁰⁵ Similarly, an individual's relationship to her state is not of the intimacy of a "friend." The link is instead one of patriotism—a phenomenon closer to ideological commitment than to personal friendship or financial or proprietary interest.⁴⁰⁶

Such a link has generally not been recognized as relevant in existing jurisprudence on judicial impartiality. In *In re Pinochet*, the Lords found that Lord Hoffman's appointment as a judge in the earlier appeal of the case against General Augusto Pinochet violated the first prong of Lord Browne-Wilkinson's test because Lord Hoffman was, at the time of the appeal, Director and Chairperson of Amnesty International Charity Ltd.,

403. *In re Pinochet*, [1999] A.C. (H.L.) (appeal taken from Eng.) (Browne-Wilkinson, J.).

404. It is, of course, possible that a case might arise in which a judge has a financial or proprietary interest that is linked to the success of her state before the international court on which she sits. In that case, however, it would be the financial or proprietary interest that would be relevant, not the fact that the judge happened to be a national of the state with which her financial or proprietary interest was linked.

405. Indeed, the report of the Sub-Committee of the Preparatory Committee for the World Trade Organization, goes further, stipulating that "Members of the Appellate Body should not . . . have any attachment to a government that would compromise their independence of judgment. This requirement would not necessarily rule out persons who, although paid by a government, serve in a function rigorously and demonstrably independent from that government." Preparatory Committee for the World Trade Organization, Sub-Committee on Institutional Procedural and Legal Matters, *Recommendations*, ¶ 7, PC/IPL/13 (Dec. 8, 1994).

406. This appears to be the implication of the above-cited PCIJ Committee Report. See *supra* note 253 and accompanying text. Other statements by adherents to the original approach do not always clarify this matter in great detail. See, e.g., Article 55 of the American Convention on Human Rights, Advisory Opinion OC-20/2009, Inter-Am. Ct. H.R. (ser. A) No. 20, ¶ 63 (Sept. 8, 2009) (García Ramírez, J., concurring) ("Would it be excessive to say that this final vision involves a classic principle of the due process of law: 'nobody should be a judge of his own case.' The national judge is not a judge in 'his own' dispute, but he is a judge in a controversy that in some way concerns him as a member of a specific country. In this sense—and only in this sense—it is not alien to him.").

an organization that undertakes the charitable aspects of Amnesty International's work in the U.K.⁴⁰⁷ This was relevant for two reasons. First, Amnesty International had successfully intervened opposing General Pinochet in the appeal that Lord Hoffman heard as a member of the judicial panel.⁴⁰⁸ Second, Amnesty International Charity Ltd. had produced a publication on Amnesty International's behalf, advocating that those responsible for human rights violations in Chile during Pinochet's reign be "brought to justice" and highlighting a "lack of accountability" in this regard.⁴⁰⁹ Lord Browne-Wilkinson reasoned that "there must be a rule which automatically disqualifies a judge who is involved, whether personally or as a Director of a company, in *promoting the same causes in the same organisation* as is a party to the suit."⁴¹⁰

Lord Hoffman's link to a party to the case was a combination of shared ideological commitment and broad institutional connection. He had no financial or proprietary interest; nor was he impugned for his friendship with one of the parties.⁴¹¹ However, Browne-Wilkinson was careful to clarify the implications of the ruling:

It was suggested [that this decision] would lead to a position where judges would be unable to sit on cases involving charities in whose work they are involved. . . . That is not correct. The facts of this present case are exceptional. The critical elements are (1) that AI [Amnesty International] was a party to the appeal; (2) that AI was joined in order to argue for a particular result; (3) the judge was a Director of a charity closely allied to AI and *sharing, in this respect, AI's objects*. Only in cases where a judge is taking *an active role as trustee or Director* of a charity which is closely allied to and *acting with a party to the litigation* should a judge normally be concerned either to recuse himself or disclose the position to the parties.⁴¹²

Under such a standard, the mere link of nationality between judge and party in an international court would clearly not establish objective partiality. The Lords required an *active* role in advancing the party's cause with respect to the *specific issue* on which it found itself before the court.⁴¹³

In *Prosecutor v. Furundžija*, the Appeals Chamber of the ICTY pronounced a modified description of the Browne-Wilkinson test, incorporat-

407. In re Pinochet, [1999] A.C. (H.L.) (appeal taken from Eng.).

408. *Id.*

409. *Id.* (Browne-Wilkinson, J.).

410. *Id.* (Browne-Wilkinson, J.) (emphasis added).

411. *Id.* (Browne-Wilkinson, J.).

412. *Id.* (Browne-Wilkinson, J.) (emphasis added).

413. The Special Court for Sierra Leone also had cause to examine the activist commitments of a judge. It found a violation of objective impartiality by Justice Geoffrey Robertson on the grounds that passages in his book, *Crimes Against Humanity—The Struggle for Global Justice*, specifically accused one of the persons before the court on whose appeals chamber Robertson sat of some of the crimes for which he was on trial and denied the validity of any amnesty for those acts. *Prosecutor v. Sesay*, Case No. SCSL-2004-AR15-15, Decision on Defense Motion Seeking the Disqualification of Justice Robertson from the Appeals Chamber, ¶ 2 (Special Ct. for Sierra Leone Mar. 13, 2004). Again the connection was specific to the case and was far tighter than one of nationality.

ing into the first prong the basic holding in *In re Pinochet*. The Appeals Chamber held that objective impartiality is violated if:

- i) a Judge is a party to the case, or has a financial or proprietary interest in the outcome of a case, or if the Judge's decision will lead to the *promotion of a cause in which he or she is involved, together with one of the parties*. Under these circumstances, a Judge's disqualification from the case is automatic; or
- ii) the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias.⁴¹⁴

The Appeals Chamber was seized of a complaint against Judge Florence Mumba, who was presiding over the trial of Anto Furundžija.⁴¹⁵ Mumba's objective impartiality was queried on the grounds that she had been a representative of her government on the U.N. Commission on the Status of Women (UNCSW) prior to her appointment to the ICTY.⁴¹⁶ The UNCSW had been involved in drafting a 1995 report, which specifically covered issues of relevance to the ongoing Balkan conflict, including the reaffirmation of rape as a war crime.⁴¹⁷ Three of the amici curiae and one of the prosecutors in *Furundžija* had been involved in an Expert Group meeting tasked with achieving certain of the goals of the 1995 report.⁴¹⁸ The Group had proposed a definition of rape under international law.⁴¹⁹

The ICTY Appeals Chamber rejected the argument that Judge Mumba's ideological interest in the outcome of the case was akin to Lord Hoffman's in *In re Pinochet*. It held that:

[T]here is no evidence that [Judge Mumba] was closely allied to and acting with the Prosecution lawyer and the three authors of one of the amici curiae briefs in the present case. The link here is tenuous, and does not compare to that existing between Amnesty International and Lord Hoffmann in the Pinochet case. Nor may this link be established simply by asserting that Judge Mumba and the Prosecution lawyer and the three amici authors shared the goals of the UNCSW in general.⁴²⁰

Moreover, the Appeals Chamber emphasized that even with respect to the objective impartiality test, "there is a presumption of impartiality which attaches to a Judge."⁴²¹ The Chamber cited the Canadian Supreme Court's finding that the hypothetical "reasonable person [against whose view the objective impartiality of the judge is tested] must be an informed person, with knowledge of all the relevant circumstances, *including the traditions of integrity and impartiality that form a part of the background and apprised also of the fact that impartiality is one of the duties that Judges swear to*

414. Prosecutor v. Furundžija, Case No. IT-95-17/1A, Judgment, ¶ 189 (Int'l Crim. Trib. for the Former Yugoslavia July 21, 2000).

415. *Id.* ¶ 164.

416. *Id.* ¶¶ 166-68.

417. The report in question was the "Platform for Action" that came out of the 1995 U.N. Fourth World Conference on Women in Beijing. *Id.* ¶ 167.

418. *Id.*

419. *Id.*

420. *Id.* ¶ 193.

421. *Id.* ¶ 195.

uphold.”⁴²² Similarly, the Chamber pointed to the South African Supreme Court’s determination that

the reasonableness of the apprehension [of bias] must be assessed in the light of the oath of office taken by the Judges to administer justice without fear or favour; and their ability to carry out that oath by reason of their training and experience. It must be assumed that they can disabuse their minds of any irrelevant personal beliefs or predispositions.⁴²³

The Appeals Chamber then held:

[E]ven if it were established that Judge Mumba expressly shared the goals and objectives of the UNCSW and the Platform for Action, in promoting and protecting the human rights of women, that inclination, being of a general nature, is distinguishable from an inclination to implement those goals and objectives as a Judge in a particular case. It follows that she could still sit on a case and impartially decide upon issues affecting women.⁴²⁴

The Chamber went on to reject the complaint against Judge Mumba in its entirety.⁴²⁵

While in operation, the European Commission on Human Rights also heard a number of impartiality complaints based on judges’ ideological commitments, finding repeatedly that “political sympathies . . . do not in themselves imply a lack of impartiality towards the parties before the court.”⁴²⁶ In *Ruiz-Mateos v. Spain*, for example, the Commission found there to be no objective impartiality violation when a judge presiding over proceedings against state authorities had been a candidate for the political party that was governing at the time of the violation.⁴²⁷

Finally, ruling on a claim that a judge’s race impugned his impartiality (and referencing similar decisions regarding judicial gender and religion), the U.S. Second Circuit held in *MacDraw v. CIT*:

Courts have repeatedly held that matters such as race or ethnicity are improper bases for challenging a judge’s impartiality. See *United States v. El-Gabrowni*, 844 F.Supp. 955, 961-62 (S.D.N.Y.1994) (refusing to answer questions posed regarding judge’s religious affiliation and connection, if any, to Israel); *Blank v. Sullivan & Cromwell*, 418 F.Supp. 1, 4 (S.D.N.Y.1975) (sex or race is improper basis for recusal); see also *Pennsylvania v. Local Union 542, Int’l Union of Operating Eng’rs*, 388 F.Supp. 155, 163 (E.D.Pa.1974). A suggestion that a judge cannot administer the law fairly because of the judge’s racial and ethnic heritage is extremely serious and should not be made without a factual foundation going well beyond the judge’s membership in a particular racial or ethnic group. Such an accusa-

422. *Id.* ¶ 190 (quoting *R.D.S. v. The Queen*, [1997] 3 S.C.R. 484 (Can.)) (emphasis added).

423. *Id.* ¶ 196 (quoting *President of the Republic of S. Afr. v. S. Afr. Rugby Football Union 1999* (7) BCLR 725 (CC) at 58 para. 48 (S. Afr.)).

424. *Id.* ¶ 200.

425. *Id.* ¶ 215.

426. *Crociani v. Italy*, App. Nos. 8603/79, 8722/79, 8723/79, 8729/79, 24 Y.B. Eur. Conv. On H.R. 222, 266 (Eur. Comm’n on H.R. 1980); see also *X v. Germany*, App. No. 2038/63, 13 Eur. Comm’n. H.R. Dec. & Rep. 111 (1964).

427. *Ruiz-Mateos v. Spain*, App. No. 12952/87, 67 Eur. Comm’n. H.R. Dec. & Rep. 175 (1990).

tion is a charge that the judge is racially or ethnically biased and is violating the judge's oath of office.⁴²⁸

In sum, extant jurisprudence on impartiality puts great faith in the judge's capacity to overcome ideological pre-commitments or group allegiances and realize her professional duty. For two reasons, nationality is not an affiliation of the sort that ought to fall beyond the scope of that faith. First, a given citizen is less likely to be fundamentally nationalist (or even patriotic) in outlook than is a member of an advocacy institution likely to be fundamentally committed to that institution's goals.⁴²⁹ Second, even if all judges were assumed to be committed patriots of their home states, that ideological commitment alone would not be sufficient, under the jurisprudence outlined above, for a finding of impartiality, subjective or objective.

As noted above, the proponent of the original approach or its derivatives might respond to this analysis by arguing that failures to guard effectively against judicial bias in other respects provide no reason not to adopt the prophylactic of nationality limits, judges *ad hoc*, and nationality-based recusals. Such a response would be misplaced. The next Section contends that the tenets of the original approach are counterproductive on their own terms.

B. Anxiety Fulfilled - How the Original Approach Undermines its Own Ends

In direct contradiction to their very purpose, nationality limits, judges *ad hoc*, and mandatory nationality-based recusals undermine the objective impartiality of both international judges and their courts, fail to alleviate concerns about judicial dependence, and exacerbate the threat of subjective impartiality by normalizing nationality-based judicial bias.

1. *The Implications of the Original Approach*

As elaborated in Part III, *supra*, the original approach is fundamentally connected to anxiety about judicial nationalism or the appearance thereof. Most notably, the judge *ad hoc* system aims to balance partialities (real or perceived), particularly when a national of only one party to a case has a permanent seat on the court.⁴³⁰ Implicit in this system are two premises: (1) the permanent "national judge" is in need of counterbalancing, and (2) such counterbalancing is achieved by allowing the party without a national on the court to appoint directly a judge for the specific case at hand.

428. *MacDraw, Inc. v. CIT Group Equip. Fin., Inc.*, 138 F.3d 33, 37 (2d Cir. 1998) (internal citation omitted).

429. It is worth noting here that those who are appointed to international judicial positions are perhaps less likely than average to feel an overriding patriotic commitment to any particular state since many have led cosmopolitan existences—learning, practicing, and living in a variety of countries—and others are nationals of more than one state. See *supra* note 298.

430. See *supra* notes 256–261 and accompanying text.

The second premise is worth unpacking. While permanent international judges at all original-approach and derivative courts are appointed via a process involving the participation of all states subject to the court in question,⁴³¹ the judge *ad hoc* is appointed directly by a party to the case with minimal oversight.⁴³² As Mohammed Shahabuddeen argued in his dissent from the ICJ's ruling on Nicaragua's application to intervene in *Land Island and Maritime Frontier Dispute*, "It is not easy to think of any concept of judicial independence which is consonant with particular judges being named to sit in a particular case practically at the behest of the parties."⁴³³ Similarly, Martin Kuijer finds the system "unacceptable" from the perspective of judicial independence,⁴³⁴ and Iain Scobbe terms it a "flagrant breach" of the principle.⁴³⁵ Using a fitting sobriquet, Michael Reisman calls the judge *ad hoc* the "judge-advocate."⁴³⁶

This dependence of the judge *ad hoc* is in stark contrast to the judicial ideal presented with respect to the permanent judge. Indeed, in the aforementioned dissent, Judge Shahabuddeen wrote: "the Statute . . . does not regard a [permanent] judge as representing his country or his nationality as relevant to his independence."⁴³⁷ Lachs,⁴³⁸ Jennings,⁴³⁹ and Hersch

431. On the nomination and election procedures, see, ICJ Statute, *supra* note 9, arts. 4-8, 10-15; ITLOS Statute, *supra* note 9, art. 4; IACtHR Statute, *supra* note 41, arts. 6-9; American CHR, *supra* note 43, arts. 53, 81-82.

432. Rosenne, *supra* note 71, at 229 ("A party wishing to exercise its right under Article 31 is to notify the Court of its intention as soon as possible. It is to inform the Court of the name and nationality of the person chosen and supply brief biographical details. A copy of this notification is communicated to the other party which is requested to furnish such observations as it may wish to make. . . . In the event of objection or doubt, the matter shall be decided by the Court, if necessary after hearing the parties."); see also Edward McWhinney, *Law, Politics, and "Regionalism" in the Nomination and Election of World Court Judges*, 13 SYR. J. INT'L L & COM. 1, 8 (1986) ("The relevant article of the Court Statute does suggest that such *ad hoc* national judges be 'chosen preferably from among those persons who have been nominated as candidates,' under the regular nomination procedures, by National Groups in the Permanent Court of Arbitration or by *ad hoc* National Groups, but this provision is in the nature, legally, of a precatory wish only, and state parties seem to have taken this as a *carte blanche* invitation to go ahead without consulting, or where necessary forming, National Groups for purposes of nomination."). Some recent marginal changes to the ICJ's rules do little to change this. See *Practice Directions*, INT'L CRT OF JUST., Nos. VII-VIII (Jan. 20, 2009), <http://www.icj-cij.org/documents/index.php?p1=4&p2=4&p3=0>; Rosenne, *supra* note 71.

433. *Land Island and Maritime Frontier Dispute* (El Sal. v. Hond.), Application to Intervene, Order, 1990 I.C.J. 18, 45 (Feb. 28) (Shahabuddeen, J. dissenting). One pair of analysts has even used the right of a party to appoint a judge *ad hoc* as a statistical proxy for non-independence in their analysis of independence in international courts. Eric A. Posner & John C. Yoo, *Judicial Independence in International Tribunals*, 93 CAL. L. REV. 1, 51 (2005).

434. KUIJER, *supra* note 217, at 262 (2004).

435. Iain Scobbe, *Une Hérésie en Matière Judiciaire: The Role of the Judge ad hoc in the International Court*, 4 L. & PRAC. INT'L CTS. & TRIBS. 421, 428 (2005).

436. W. MICHAEL REISMAN, NULLITY AND REVISION: THE REVIEW AND ENFORCEMENT OF INTERNATIONAL JUDGEMENTS AND AWARDS 479 (1971).

437. *Land Island and Maritime Frontier Dispute*, 1990 I.C.J. at 18.

438. *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), Merits, 1986 I.C.J. 14, 160 (separate opinion of Lachs, J.).

439. *Id.* at 528 (Jennings, J., dissenting).

Lauterpacht have expressed much the same sentiment.⁴⁴⁰ This position, however, is difficult to maintain. The judge *ad hoc* is appointed specifically to *balance* the real or apparent partiality of the permanent “national judge.”⁴⁴¹ Given this balancing relationship, the former’s fundamental lack of structural independence implies clearly the partiality of the latter. As recurrent ICJ judge *ad hoc* Elihu Lauterpacht observes, it “is an unarticulated premise . . . that a person appointed by a country as an *ad hoc* judge or a person sitting as a titular judge with a particular nationality, is inevitably going to favour that country or is under strong emotional pressure to do so.”⁴⁴²

In this foundational assumption lies the contradiction at the heart of the “original approach.” Rather than rectifying an imbalance of real or apparent partialities, the judge *ad hoc* system introduces a fundamentally dependent judge and thus maligns implicitly the impartiality of the permanent national judge. The objective is to preserve impartiality by sacrificing independence. Instead, the structure impugns the impartiality of the *entire* court. If a permanent judge is assumed partial to her national state simply in virtue of her nationality, then all international judges must be assumed partial to their respective states. Rather than a bench of impartial judges, then, the *ad hoc* system implies a bench composed wholly of partial individuals. In this sense, the premises on which the judge *ad hoc* system is founded have implications far more insidious than “[t]he mere presence on the Bench of one or two *ad hoc* judges,”⁴⁴³ which Krzysztof Skubiszewski terms “probably the mildest form of the presence of the national element.”⁴⁴⁴

Ordinarily, most of the “partial individuals” on the bench for a given case are nationals of states not party to the case. Therefore, one seeking to defend the original approach might argue that the only partialities of consequence would be those of judges whose states are engaged in the dispute before the court. Those partialities, to continue the line of argument, are resolved by the original approach and its derivatives in one or more of three ways. First, the judge *ad hoc* system adopted by some courts balances out adverse partialities so that no one party is advantaged over another. Second, the mandatory nationality-based recusal system adopted by some other courts⁴⁴⁵ removes “interested” judges from the bench.⁴⁴⁶ Third, the nationality limit adopted by most international courts prevents any one

440. Certain Norwegian Loans (Fr. V. Nor.), 1957 I.C.J. 9, 45 (July 6) (separate opinion of Lauterpacht, J.).

441. See *supra* Section III.B.

442. Remarks of Elihu Lauterpacht, *Discussion: The Role of Ad Hoc Judges*, in INCREASING THE EFFECTIVENESS OF THE INTERNATIONAL COURT OF JUSTICE, *supra* note 259, at 384, 388 (emphasis added).

443. Skubiszewski, *supra* note 259, at 381.

444. *Id.* at 384.

445. Adopted by the ACtHPR (see *supra* note 96 and accompanying text) and, in partial form, by the IACtHR (see *supra* notes 87–88 and accompanying text).

446. Some, including current ICJ judge Thomas Buergenthal, have suggested that the ICJ system be reformed in such a manner. TERRIS ET AL., *supra* note 5, at 153.

state from having a significant influence over the court's decision.⁴⁴⁷

Each of these proffered remedies, however, is ineffective. The judge *ad hoc* system, the recusal system, and the nationality limit system impugn the impartiality of the permanent judge and in so doing condemn the impartiality of the entire bench. As Lachs argues, once it is accepted that a judge may be partial to a given state in a given case, the logical upshot is that "he would be unfit to sit not only in [that case] but in any other case."⁴⁴⁸ As elaborated below, three scenarios in particular emphasize the counter-productivity of the original approach and its derivatives: (1) more than two states may be party to a given dispute; (2) states apart from those before the court may have a keen interest in the outcome; and (3) the impugning of the judge's professional impartiality when her state is before the court has deleterious feedback effects on her broader professional self-conception.

2. When More than One State is on Either or Both Sides of a Dispute

It has long been recognized that the system of the judge *ad hoc* is best suited to a bilateral dispute.⁴⁴⁹ As noted above, the statutes of the World Court, the ITLOS, and the IACtHR attempt to address the question of disputes involving three or more parties by providing that for determining the right to appoint a judge *ad hoc*, "parties in the same interest" are to be considered as "one party only."⁴⁵⁰ However, this caveat resolves only that scenario in which multiple parties in the same interest do not already have nationals on the court.⁴⁵¹ More problematic is that in which a number of parties with the same interest in a case already have permanent judges of their nationalities on the court while the opposing party does not. Pursuant to the relevant statutory provision of each original-approach court, the permanent judges whose states are before the court would not be recused.⁴⁵² And yet the appointment of a single *ad hoc* judge is expected to

447. See *supra* notes 271-278 and accompanying text.

448. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Merits, 1986 I.C.J. 14, 158 (separate opinion of Lachs J.); see also Manfred Lachs, *Letter on the World Court—Inconsistency in Judging Judges*, N.Y. TIMES, July 26, 1986 (pointing to the inconsistency inherent in a position that supports the ICJ as an institution, but with a taint of anxiety over judicial nationalism, Lachs responded to a *New York Times* Editorial supporting the U.S. withdrawal from the Court's jurisdiction during the *Nicaragua* case by stating: "It would surely be appropriate . . . to be consistent, [for you to make clear] that you will regret the election to the International Court of Justice of any national of a country whose 'ideology' is 'incompatible' with your own notion of rational adjudication. But if that is really your view, I am at a loss to understand how you can—so laudably—defend the universality of the Court's vocation.").

449. PROCÈS-VERBAUX OF THE PROCEEDINGS OF THE ADVISORY COMMITTEE OF JURISTS, 24TH MEETING, *supra* note 248, at 534.

450. See *supra* note 268 and accompanying text.

451. Even with respect to such a situation, there has been some inconsistency in the jurisprudence on what precisely is meant by "in the same interest." Kooijmans, *supra* note 69, at 501-03.

452. PCIJ Statute, *supra* note 9, art. 31; ICJ Statute, *supra* note 9, art. 31, para. 1; ITLOS Statute, *supra* note 9, art. 17, para. 1; IACtHR Statute, *supra* note 41, art. 10, para. 1.

“balance” the assumed collective partialities of these national judges. Similarly, whether or not the court employs a judge *ad hoc* system, nationality limits fail to provide the “eclectic mix” necessary for the “strong corrective” against the putative national bias of a number of judges whose states are in the same interest.⁴⁵³

Precisely such a scenario unfolded in the PCIJ’s very first contentious case, the *Case of the S.S. Wimbledon*.⁴⁵⁴ France, Italy, Japan, and the U.K. filed suit against Germany. All four of the complainants had nationals who were permanent judges on the bench. Germany, which did not, was permitted to appoint a single judge *ad hoc* in response. With eleven judges in total, this was a significant departure from the desired “balance” or “eclectic mix.”⁴⁵⁵

More recently, and with more vociferous protest from the outnumbered party, a similar situation came before the ICJ. The former Federal Republic of Yugoslavia (FRY) brought suit against ten members of NATO with respect to the organization’s use of force in Kosovo.⁴⁵⁶ Five of the ten NATO states had permanent judges on the ICJ bench at the time—the U.S., the U.K, France, Germany, and the Netherlands.⁴⁵⁷ Rather implausibly, the Court avoided confronting directly the problem inherent to the statutory balancing scheme by finding that the NATO states were not, in fact, “parties in the same interest.”⁴⁵⁸ In his dissent, the FRY’s judge *ad hoc*, Milenko Kreća highlighted the incongruity of the Court’s holding on this matter, noting, first, that the “Application[s] which the Federal Republic of Yugoslavia has submitted against [all of the] ten NATO member States” were “identical” and, further, that in their responses “the respondent States came to the identical conclusion resting on the foundation of practically identical argumentation”⁴⁵⁹ Considered in light of the Court’s prior jurisprudence, these facts do not support the Court’s holding that the NATO states were not “parties in the same interest.”⁴⁶⁰

453. TERRIS ET AL., *supra* note 5, at 208 (2007).

454. *Case of the S.S. Wimbledon* (U.K., Fr., It. & Japan v. Ger.), 1923 P.C.I.J. (ser. A) No. 1, n.266 (Aug. 17).

455. That said, it should be noted that the Italian judge, Dionisio Anzilotti, defied the original approach’s nationalist expectation by voting against the complainants, joining Swiss judge Max Huber in dissent alongside German judge *ad hoc* Walther Schücking. *Id.* ¶¶ 65–85 (Anzilotti, J., Huber, J., dissenting); *Id.* ¶¶ 86–93 (Schücking, J. dissenting).

456. *Legality of Use of Force* (Yugo. v. U.S.), 1999 I.C.J. (June 2); *Legality of Use of Force* (Serb. & Mont. v. U.K.), 1999 I.C.J. (June 2); *Legality of Use of Force* (Yugo. v. Spain), 1999 I.C.J. (June 2); *Legality of Use of Force* (Serb. & Mont. v. Port.), 1999 I.C.J. (June 2); *Legality of Use of Force* (Serb. & Mont. v. Neth.), 1999 I.C.J. (June 2); *Legality of Use of Force* (Serb. & Mont. v. It.), 1999 I.C.J. (June 2); *Legality of Use of Force* (Serb. & Mont. v. Ger.), 1999 I.C.J. (June 2); *Legality of Use of Force* (Serb. & Mont. v. Fr.), 1999 I.C.J. (June 2); *Legality of Use of Force* (Serb. & Mont. v. Can.), 1999 I.C.J. (June 2); *Legality of Use of Force* (Serb. and Mont. v. Belg.), 1999 I.C.J. (June 2).

457. *Legality of the Use of Force* (Yugo. v. Belg.), Provisional Measures, 1999 I.C.J. 216, ¶ 3 (Kreća, J., dissenting).

458. *Id.*

459. *Id.* ¶ 2 (Kreća, J., dissenting).

460. Kooijmans, *supra* note 69, at 501–03.

Having decided that the NATO states were not parties in the same interest, the ICJ permitted each of those NATO states that did not have nationals on the Court to appoint a judge *ad hoc* in its dispute with the former FRY.⁴⁶¹ Thus, in its dispute with Belgium, for example, the former FRY faced a bench composed of nationals of the UK, the US, France, Germany, and the Netherlands, and a judge *ad hoc* from Belgium in addition to ten other permanent judges and the FRY's judge *ad hoc*.⁴⁶² The important point, however, is that even if the ICJ had recognized the identical nature of the NATO states' interests in the litigation, there would still have been an enormous imbalance. One FRY-appointed judge *ad hoc* would not have counterbalanced the five permanent judges whose states were opposed to the FRY.

The apparent "imbalance" created by such a situation violates the very basis for the judge *ad hoc* system and thus undermines the legitimacy of the Court on its own terms. In his dissent from the Decision on Provisional Measures in the case against Belgium, judge *ad hoc* Kreća wrote,

The practical meaning of [the principle underlying the judge *ad hoc* system] applied *in casum* would imply the right of the Applicant to choose as many judges *ad hoc* to sit on the Bench as is necessary to equalize the position of the Applicant and that of those respondent States which have judges of their nationality on the Bench and which share the same interest. *In concreto*, the inherent right to equalization in the composition of the Bench, as an expression of fundamental rule of equality of parties, means that the Federal Republic of Yugoslavia should have the right to choose five judges *ad hoc*.⁴⁶³

As Kreća emphasizes, the very protections against the influence of judicial nationalism grant statutory imprimatur to the expectation of judicial nationalism. Consequently, in cases in which a number of states have a clearly aligned litigation interest and happen to have nationals on the bench hearing the case, the impartiality of the entire court is fundamentally undermined. This problem impacts not only courts that apply the judge *ad hoc*, but also those courts that rely solely on the nationality limit to protect against judicial nationalism. The plausibility of the theory of diluted judicial nationalism depends on the assumption that only a very small number of states are party to any given dispute.

One might respond to this problem with one of two remedies internal to the philosophy of the original approach. First, the relevant court could adopt Kreća's proposal that the number of judges *ad hoc* allocated to a party be sufficient to balance the assumedly partial permanent judges. Second, it could require nationality-based recusal.⁴⁶⁴ However, despite their superficial appeal, such solutions cannot resolve the broader self-undermining tendencies of the original approach.

461. Legality of the Use of Force (Yugo. v. Belg.), Provisional Measures, 1999 I.C.J. 1 (June 2).

462. *Id.*

463. *Id.* ¶ 3 (Kreća, J. dissenting).

464. It is not unimaginable, however, that such a rule could lead to situations in which the remaining judges would be insufficient to meet the *quorum* requirement.

3. *The Interests of States Not Party to the Dispute Before the Court*

A more insidious problem is that the states formally party to a given dispute are not the only states interested in the outcome.⁴⁶⁵ First, a state is typically party to alliances and agreements with other states and may consider the success of its allies and partners to be integral to its own national interest. Second, alliances aside, a third state may stand to be impacted directly by an injunctive ruling even if unable to intervene as a third party to the dispute.⁴⁶⁶ Third, a state not party to the dispute may stand to benefit in the longer term from the development of international law in a particular direction.

Although the issue of close, and even hierarchical, international alliances was acknowledged during the drafting of the PCIJ Statute, its implications were given minimal consideration. Indeed, the chairman of the Australian delegation to the drafting conference was unchallenged when stating that “both an Australian and a citizen of the United Kingdom [could] be members of the Court at the same time.”⁴⁶⁷ As it happens, there have as many as five judges from Commonwealth states on the bench simultaneously,⁴⁶⁸ and, as noted above, the Court was recently staffed with five nationals of NATO states, four of which were also member states of the European Union.⁴⁶⁹

The problem of alliances was raised with greatest force during the Cold War. Zile describes the early attitude of the USSR to the International Court of Justice:

The Soviets . . . do not disparage the idea behind [the judge *ad hoc* and nationality limit] safeguards but, instead, deplore their inadequacy. . . . The alleged reason is that a whole line of Western states completely subordinate their foreign policy to the directives of the Anglo-American bloc.⁴⁷⁰

This emphasizes the inherence of the problems with the original approach. The Soviet assessment that the judge *ad hoc* and the nationality limit are deplorably inadequate is based on the very premise underlying those provisions—namely, anxiety about judicial nationalism.

This attitude was not unique to the USSR. In its rejection of the Court during the *Nicaragua* litigation, the United States expressed particular perturbation with the presence on the Court of “two judges from Warsaw Pact

465. As Judge Shahabuddeen acknowledges, “Legal disputes between States are rarely purely bilateral.” *Certain Phosphate Lands in Nauru (Nauru v Australia)*, Preliminary Objections, 1992 I.C.J. 240, 298 (separate opinion of Shahabuddeen, J.); see also REISMAN, *supra* note 436, at 331–32 (“as interaction increases, more bilateral disputes will have peripheral effects”).

466. See, e.g., ICJ Statute, *supra* note 9, art. 62, para. 1 (it is for the Court to decide whether to admit an applicant state as an intervening party to the case).

467. Aznar-Gómez, *supra* note 64, at 220.

468. *Id.*

469. See *supra* note 457 and accompanying text.

470. Zile, *supra* note 224, at 382 (1964); see also *id.* (quoting MEZHDUNARODNOE PRAVO [INTERNATIONAL LAW] 488 (E.A. Korovin ed., 1951)) (“The present [1951] membership of the International Court of Justice does not, in the least, guarantee to the U.S.S.R. and the people’s democracies objective examination of questions regarding them.”).

Nations.”⁴⁷¹ The judges implicated by the United States were not nationals of parties to the case. Their states were allegedly connected to the case solely by alliance.⁴⁷² However, U.S. skepticism about those judges’ partialities—and of the failure of the nationality limit or judge *ad hoc* provision to address the issue—was based on anxiety about judicial nationalism. The logic of the original approach was thus the crux of the argument for its failure.

The above U.S. and Soviet concerns are about subjective impartiality. However, the provisions of the original approach are no more effective in preserving objective impartiality. By adopting the original approach, a court statute implicitly endorses the notion that judges reasonably appear partial to their states. The ICJ Statute, therefore, fundamentally compromises arguments such as those offered by judges Lachs⁴⁷³ and Jennings⁴⁷⁴ against the American attack on the *Nicaragua* Court’s impartiality and legitimacy.

Although the starkest examples of the negative interaction between the original approach and international alliances come from the Cold War era, the issue persists. Perhaps the most obvious contemporary example of an alliance whose members will often have an interest in the success of their partners over non-alliance-members is the European Union, within which economic, legal, social, and political integration has created a system of twenty-seven states with profound interdependences, seventeen of which are members of a single currency and are progressing imminently with even deeper political and fiscal integration.⁴⁷⁵

471. U.S. Department of State, Statement on the U.S withdrawal from the Proceedings Initiated by Nicaragua in the International Court of Justice, 24 I.L.M. 246, 248 (1985). Washington also felt that the proceedings were “blatantly biased,” and that this was representative of a broader shift in the composition of international organizations against Western democracies. Thomas Franck, *Icy Day at the ICJ*, 79 AM. J. INT’L L. 379, 379–80 (1985).

472. One of the impugned *Nicaragua* judges, Manfred Lachs, noted in his separate opinion in the case: “An allusion was made to the alliance whose members include the countries of which certain Judges were nationals. In brief, it was suggested that *in view of this alliance* these Judges, or rather the Judge in question—for only one is now involved—may be ‘more’ than a judge or ‘less’ than a judge. In either case he would be unfit to sit on the bench.” Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Merits, 1986 I.C.J. 14, 158 (separate opinion of Lachs, J.) (emphasis added).

473. *Id.* at 160 (separate opinion of Lachs, J.).

474. *Id.* at 528 (Jennings, J., dissenting).

475. As an example of the extent of these interdependences, consider the Union-wide sense of crisis provoked by the economic problems in Greece and the EU’s (reluctant) decisions to extend successive large aid packages to Greece in an effort to prevent its financial collapse. These efforts have been followed, ultimately, by a deal for far tighter fiscal integration (without the United Kingdom). On the greek bailouts, see, for example, Press Release, Council of the European Union, Statement by the Heads of State or Government of the Euro Area and EU Institutions (July 21, 2011), available at <http://europa.eu/rapid/pressReleasesAction.do?reference=DOC/11/5&type=HTML>; Peter Spiegel, Quentin Peel, Patrick Jenkins & Richard Milne, *EU Leaders Agree €109bn Greek Bail-out*, FIN. TIMES (July 21, 2011), <http://www.ft.com/cms/s/0/952e0326-b3af-11e0-855b-00144feabdc0.html#axzz1msAGgwj9>; Press Release, Council of the European Union, Statement on the support to Greece by Euro area Members State (Apr. 11, 2010), available at

Moreover, even when a state has no ally in the dispute before a court, it will often have good reason to prefer one outcome to its alternative. As Hersch Lauterpacht observes,

Frequently . . . a neutral State is vitally interested in the outcome of the dispute. The permanent identity of interests of small States as opposed to Great Powers; the abiding community of interests of States bound by ties of common race, culture, and language; the less immutable but equally strong solidarity of interests of States bound by political alliances, by transient agreements for ad hoc purposes, or by jealousies against neighbours richer and more powerful than themselves; and even the accidental identity of interests in particular claims and policies—all this renders the impartiality of neutral judges a problem which is not to be lightly dismissed.⁴⁷⁶

A recent example of clear third-state interest arose in *Hirst v. UK*, in which the ECtHR ruled a blanket denial of voting rights for prisoners contrary to article 3 of the First Protocol to the European Convention.⁴⁷⁷ In their dissent, Judges Wildhaber, Costa, Lorenzen, Kovler, and Jebens noted,

According to the information available to the Court, . . . in some thirteen States prisoners are not able to vote either because of a ban in their legislation or de facto because appropriate arrangements have not been made. It is essential to note that in at least four of those States the disenfranchisement has its basis in a recently adopted Constitution (Russia, Armenia, Hungary and Georgia). In at least thirteen other countries more or less far-reaching restrictions on prisoners' right to vote are prescribed in domestic legislation, and in four of those States the restrictions have a constitutional basis (Luxembourg, Austria, Turkey and Malta). *The finding of the majority will create legislative problems not only for States with a general ban such as exists in the United Kingdom.* As the majority have considered that it is not the role of the Court to indicate what, if any, restrictions on the right of serving prisoners to vote would be compatible with the Convention (see paragraph 83), *the judgment in the present case implies that all States with such restrictions will face difficult assessments as to whether their legislation complies with the requirements of the Convention.*⁴⁷⁸

http://www.consilium.europa.eu//uedocs/cms_data/docs/pressdata/en/ec/113686.pdf; Joshua Chaffin & Stanley Pignal, *Eurozone Makes €30bn Greek Promise*, FIN. TIMES (Apr. 11, 2010), <http://www.ft.com/intl/cms/s/0/91ee3adc-458d-11df-9e46-00144feab49a.html#axzz1msAGgwj9>. On the agreement to pursue much tighter fiscal integration, see, for example, Press Release, Council of the European Union, Statement by the Euro Area Heads of State or Government (Dec. 9, 2011), *available at* http://consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/126658.pdf. Britain's rejection of the latter deal has led to a clear divide between different groups of countries even within the European Union (further instantiating the so-called "two-speed Europe" model of integration). George Parker & Alex Barker, *Cameron Triggers Two-Speed Europe*, FIN. TIMES (Dec. 9, 2011), <http://www.ft.com/intl/cms/s/0/6c7c569e-2286-11e1-8404-00144feabdc0.html#axzz1msAGgwj9>. This latter phenomenon only emphasizes the fact that even the ECJ will adjudicate interstate disputes in which one party has a strong case-relevant interdependence with a number of other member states, but not with its adversary in the dispute.

476. LAUTERPACHT, *supra* note 247, at 225.

477. *Hirst v. United Kingdom* (No. 2), App. No. 74025/01, Eur. Ct. H.R. (Oct. 6, 2005).

478. *Id.* ¶ 6 (Wildhaber, J., Costa, J., Lorenzen, J., Kovler, J., and Jebens, J. dissenting) (emphasis added).

The concern in such cases, Davis Robinson explains, is “whether a particular third-state judge may, in voting in a given case, worry more about the effects of the judgment on the interests of his or her nation of origin than on the merits of the case between the two party states.”⁴⁷⁹ Rising to the bait,⁴⁸⁰ Rosalyn Higgins retorts, “I really have no idea where the United Kingdom’s ‘strategic interests’ can be said to lie in, e.g., the dispute between Niger and Benin, or between Namibia and Botswana, or Qatar and Bahrain,”⁴⁸¹ implying that she is therefore well placed to adjudicate those disputes impartially. Setting aside the specifics of those disputes, this argument is not a generally plausible response. The geopolitical interests of states are clearly deeply interconnected and international judges will often be aware of the ways in which their national states’ interests are likely to be affected by any given decision.⁴⁸² Even when a judge does not know whether or how her state’s strategic interests might be affected by the specific outcome of a dispute, she is very likely to be aware of how her state would suffer or benefit in the long run from one or another construction of the legal rule relevant to the case—that much was made abundantly clear by the *Hirst* dissenters.⁴⁸³ Given the role of international courts in developing international law,⁴⁸⁴ this itself is often a powerful state interest.⁴⁸⁵

For these reasons a plea of ignorance along the lines of Higgins’s is an ineffective response to the charge of third-state judicial nationalism. The only cogent response is instead to argue that, as committed professionals, judges’ awareness of their states’ interests would not affect their judicial decision-making, even if those state interests pointed clearly in one direc-

479. Robinson, *supra* note 282, at 280.

480. As set by Posner & de Figueiredo, *supra* note 255.

481. HIGGINS, *Alternative Perspectives on the Independence of International Courts: Remarks*, in 2 THEMES AND THEORIES, *supra* note 232, at 1118, 1120.

482. This is particularly true for the many international judges that have foreign relations expertise. McWHINNEY, *supra* note 297, at 4–6, 12 (1995) (describing Judge Lachs’s background in foreign affairs); McWHINNEY & KAWANO, *supra* note 352, at 24 (describing Judge Oda’s background in foreign affairs); JG MERRILLS, JUDGE SIR GERALD FITZMAURICE AND THE DISCIPLINE OF INTERNATIONAL LAW: OPINIONS ON THE INTERNATIONAL COURT OF JUSTICE, 1961–1973, at 1–4 (1998) (describing Judge Fitzmaurice’s background in foreign affairs); Aznar-Gómez, *supra* note 229, at 216–18 (charting the different career histories (including diplomacy) of ICJ judges); TERRIS ET AL., *supra* note 5, at 21, 64 (discussing the foreign and international affairs expertise of international judges).

483. See *supra* note 478 and accompanying text.

484. See, e.g., STURGESS & CHUBB, *supra* note 132, at 452 (quoting Nagendra Singh); *id.* at 465 (quoting Manfred Lachs); *id.* at 513 (quoting Rolv Ryssdal); TERRIS ET AL., *supra* note 5, at 118; Remarks of Antonio Cassese, *Discussion: Judicial Activism*, in JUDGES IN CONTEMPORARY DEMOCRACY, *supra* note 11, at 26, 32–33; LAUTERPACHT, *supra* note 247, at 156; Sir Gerald Fitzmaurice, *Judicial Innovation—Its Uses and its Perils*, in CAMBRIDGE ESSAYS IN INTERNATIONAL LAW: ESSAYS IN HONOUR OF LORD MCNAIR 24–25 (1965). See generally SHAHABUDDIN, *supra* note 15 (discussing the precedential effect of PCIJ and ICJ rulings).

485. See, e.g., Robinson, *supra* note 282, at 280 (noting that lawyers arguing a boundary controversy before the ICJ review the boundary situations of the states whose nationals sit on the court so as to avoid arguing for a rule or legal interpretation that would threaten the interests of those states if applied universally).

tion.⁴⁸⁶ This response, however, cannot be made from within the statutory framework of a court that accepts the original approach or a derivative. That approach holds as one of its very premises precisely the opposite—namely, that judges are (or at least appear to be) fundamentally partial to their national states. That is why courts use the judge *ad hoc* system; it is why they enforce mandatory nationality-based recusals; and it is why they impose nationality limits. Under such a system, it is difficult, if not impossible, to respond cogently to a charge of bias by arguing that judges' nationalities are irrelevant to their judicial praxis.

For the reasons above, if the original approach's underlying premise is accepted, the implications for the impartiality of the entire court are devastating. This is clearest with respect to the courts that employ the original approach or a very close derivative, namely the ICJ, the ITLOS, the IACtHR, and the ACtHPR. However, also fundamentally impugned is the partiality of those "derivative" courts that employ only nationality limits in an effort to dilute each individual state's interests. The statutory endorsement of the anxiety about judicial nationalism manifest in such provisions ultimately deteriorates into a statutory endorsement of the view that the court as a whole is not impartial.

4. *The Original Approach Creates, or at Least Exacerbates, the Worry of Subjective Partiality*

Section IV.A, *supra*, argues that there is not an inevitable danger of subjective nationalist partiality on international courts. This Section suggests that the provisions of the original approach can help to *create* such a danger. Moreover, even if one assumes that some risk of subjective nationalist partiality exists *ex ante*, the original approach and its derivatives are likely to exacerbate that problem by establishing a culture in which actual bias becomes much more likely.

It is no accident that many of the most stinging critiques of the partiality of international courts focus not on the shared nationality of a judge and one of the parties, but instead on the nationalities of judges whose states are not directly involved in the litigation.⁴⁸⁷ The statutes of original-

486. To be fair, Higgins also makes this argument, stating: "We give no thought to such things, being busy grappling with the complex and difficult points of law before us. That is why you have seen successive American judges (Judges Schwebel and Buergenthal) sometimes voting for the United States, and sometimes not—they are led by the issues to the conclusions they reach." HIGGINS, *Reflections from the International Court*, in 2 THEMES AND THEORIES, *supra* note 232, at 1120.

487. See *supra* notes 463, 470–472 and accompanying text; see also Prosecutor v. Vojislav Šešelj, Case No. IT-03-67-PT, Decision on Motion for Disqualification (June 10, 2003) (Alleged war criminal Vojislav Šešelj appealed for the disqualification on the grounds of actual bias of the three judges that were to hear his case. With respect to one of those judges, Šešelj—a trained lawyer representing himself—"claimed that Germany, of which Judge Schomburg is a national, has 'traditionally been hostile towards Serbia and the Serbian people' and explored its history, starting from the Middle Ages. In [Šešelj's] view the fact that Germany is a member of the North Atlantic Treaty Alliance ('NATO'), whose people 'committed aggression against Serbia,' should prevent Judge Schomburg from hearing his case."); *Russian Parliament Ratifies European Court Reform*,

approach and derivative courts grant official imprimatur to the anxiety about judicial nationalism undergirding such critiques. Therefore, when judges respond to such attacks by emphasizing their professional integrity,⁴⁸⁸ the crux of their argument is undermined by the implicit message of their own courts' fundamental texts.

Social psychologists have long established the potential for expectations about human behavior to be self-fulfilling in a wide range of contexts.⁴⁸⁹ Given the importance of the judge's commitment to the judicial role ethic in fostering and maintaining judicial impartiality, and the susceptibility of that ethic to disruption, the original approach and its derivatives are potentially prone to this phenomenon with respect to judicial nationalism. Nationality limits, judge *ad hoc* provisions, and nationality-

INT'L JUST. TRIBUNE—RADIO NETH. WORLDWIDE (Jan. 27, 2010), <http://www.rnw.nl/int-justice/article/russian-parliament-ratifies-european-court-reform> (Justifying their long-standing opposition to Protocol 14 of the European Convention on Human Rights. Members of the Duma—perhaps concerned by Russia's status as the biggest source of pending cases before the Court—claimed that the ECtHR was anti-Russian. It was not until 2010 that Russian intransigence over Protocol 14 was finally broken when “the Council of Europe agreed to a provision stating that a Russian judge would participate in any decisions concerning Russia”).

488. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Merits, 1986 I.C.J. 14, 158 (separate opinion of Lachs, J.) (“In brief, it was suggested that . . . the Judge in question . . . may be ‘more’ than a judge or ‘less’ than a judge.”); *id.* at 160 (“[I]t appears unseemly to doubt a Judge on account of the place where he was born or the passport he may carry. And [in] this case . . . these are by implication claimed to impair a Judge's status, standing, wisdom, discretion and impartiality, and to warrant the limitation of the knowledge made available to him for the discharge of his trust.”); HIGGINS, *Reflections from the International Court*, in 2 THEMES AND THEORIES, *supra* note 232, at 1122 (“It is totally inappropriate . . . to assume . . . that a particular Judge's vote in a case was due to his or her nationality (or race, or religion). . . . In fact, the dynamics of the legal exchanges between the Judge of the International Court in no way reflect tired stereotypes. Assumptions based on such ideas would be surprisingly wide of the mark.”); Elias, *supra* note 271, at 21 (“The judges must stand on their own merit as professional men of the law, and not as Englishmen, Frenchmen, Nigerians or Swedes.”); see also *Nicaragua*, 1986 I.C.J. at 528 (Jennings, J., dissenting); *Case of Certain Norwegian Loans (Fr. v. Nor.)*, 1957 I.C.J. Rep. 9, 45 (June 6) (separate opinion of Lauterpacht, J.) (indicating the absurdity of the notion that a state might make its participation before the ICJ contingent on the recusal of judges of a certain nationality or nationalities).

489. See, e.g., Mark Snyder, *When Belief Creates Reality*, in 18 ADVANCES IN EXPERIMENTAL SOC. PSYCHOL. 248 (Leonard Berkowitz ed., 1984) (providing a review of the empirical literature); A. Farina et al., *Mental Illness and the Impact of Believing Others Know About It*, 77 J. OF ABNORMAL PSYCHOL. 1 (1971) (showing that when a sample of psychiatric patients believed that an interlocutor knew that they were psychiatric patients they exhibited greater tension, anxiety, and maladjustment than when they believed that the interlocutor did not know of their status); R. ROSENTHAL & L. JACOBSON, *PYGMALION IN THE CLASSROOM* (1968) (a seminal study of the impact of teachers' expectations (based on fictitious information) on primary school students' performance on a test designed to measure intelligence); Albert Sidney King, *Self-Fulfilling Prophecies in Training the Hard-Core*, 52 SOC. SCI. Q. 369 (1971) (finding that when supervisors were told (based on fictitious information) that certain workers were of a higher aptitude than others, those workers started to perform better, even though the workers were never told of their higher-aptitude status); Robert K. Merton, *The Self-Fulfilling Prophecy*, 8 ANTIOCH REV. 193 (1948) (reviewing several examples of self-fulfilling prophecies); RUSSELL A. JONES, *SELF-FULFILLING PROPHECIES* (1977).

based recusal rules help to constitute perceptions of what an international judge stands for and how she functions. They influence the factors that are considered by those making judicial appointments, the expectations of relevant audiences, and the judge's own sense of what constitutes proper judicial decision-making.

With respect to appointments, the system encourages each state to ensure that any of its nationals appointed to a permanent position on an international court is loyal (i.e. partial) to the state. With respect to audiences, the system implies that judges will struggle to adhere to the judicial role ethic when the interests of their states of nationality are at issue and thus suggests that audiences should set their expectations accordingly. With respect to judicial self-understanding, the system makes it more likely that judges will begin to see such national partiality as appropriate, or at least excusable.⁴⁹⁰

Consider, first, the effect on judicial appointments. Among original-approach rules, the judge *ad hoc* provision is most impactful in this regard. As noted above, the provision is fundamentally incompatible with the principle of judicial independence.⁴⁹¹ States understand this. As Shany argues, "parties afforded the power to appoint an adjudicator [in a specific case] do hope to impact the final outcome of the adjudicatory process through appointing a person sympathetic to them or their case."⁴⁹² Indeed, Skubiszewski suggests an implicit understanding between the appointing state and the judge *ad hoc*, whereby the concordance of views between the two is a precondition for accepting the role.⁴⁹³ This is itself problematic, but the implications of the judge *ad hoc* extend beyond the role itself.⁴⁹⁴

The system encourages any state considering nominating one of its citizens as a candidate for a permanent judgeship to prefer strongly those persons that are committed above all to protecting the national interest. If instead a state were to nominate (and have appointed) a citizen committed fundamentally to the judicial role ethic, it might later find itself in litigation against a state with no national on the permanent bench, facing "an inequality much more real than that which would exist without the participation of the Judge *ad hoc*"⁴⁹⁵—namely, the opponent's right to appoint with little oversight a special judge for the duration of the case. The judge *ad hoc* provision thus ensures that even states committed merely to protecting themselves from an imbalanced bench have an incentive to nominate nationalist candidates for permanent positions.

490. Although, this enhanced likelihood may well be overwhelmed by a counter-vailing commitment to professional integrity for any given judge, and perhaps for most judges.

491. See *supra* notes 431–436 and accompanying text.

492. Shany, *supra* note 261, at 482.

493. Skubiszewski, *supra* note 259, at 378–79.

494. See *supra* notes 437–442 and accompanying text (noting a related sense in which the judge *ad hoc* infects the entire court).

495. Judge Sir Hersch Lauterpacht, *The Revision of the Statute of the International Court of Justice*, 1 L. & PRAC. INT'L CRTS. & TRIBS. 55, 82 (2002) (published posthumously as a gift from the author's son, Elihu Lauterpacht).

There are, of course, checks on the appointment of “advocates” to permanent judicial posts,⁴⁹⁶ and a number of norms are at work in the appointment process.⁴⁹⁷ However, whether or not these countervailing factors overwhelm the incentive to appoint a nationalist in most cases, the original approach encourages any given state to prefer for nomination to a permanent judgeship those of its nationals that would counterbalance a more overtly partisan judge *ad hoc* when necessary. At a minimum, the system provides an incentive for states to nominate candidates that are as loyal as possible given the constraining objective of surviving the appointment process.

More broadly, the original approach and its derivatives color the state’s sense of the judge’s role on the court in question. This is reflected in how states conceive of the purpose of the judge. For example, Christopher Weeramantry, a one-time candidate for election to the ICJ, argues that the relative lack of World Court judges from the Caribbean and in the Pacific Islands causes frustration to officials in those regions, who “feel that *the point of view of those countries* just does not get *represented on the International Court*.”⁴⁹⁸ Interestingly, there seems to have been no such dismay among Caribbean states with respect to the “representation” of just three of twelve signatory states on the seven-judge bench of the cosmopolitan CCJ, whose statute clearly rejects the very assumption of judicial nationalism.⁴⁹⁹

Leaving aside states’ understanding of the judicial role (and the implications for nominee selection), the original approach and its derivatives may affect the judge’s own “self-perception as independent and impartial.”⁵⁰⁰ In a number of studies of domestic American judges, social scientists have found that how a judge conceives of her role—defined variously as her “beliefs about the kind of behavior proper for a judge”⁵⁰¹ and as the “normative expectations shared by judges and related actors regarding how a given judicial office should be performed”⁵⁰²—significantly influences the factors and stimuli she incorporates into her decision-making calculus.⁵⁰³ As James Gibson articulates, the judge’s role orientation “spec-

496. See ICJ Statute, *supra* note 9, arts. 4-8, 10-15; ITLOS Statute, *supra* note 9, art. 4; IACtHR Statute, *supra* note 41, arts. 6-9; American CHR, *supra* note 43, arts. 53, 81-82.

497. TERRIS ET AL., *supra* note 5, at 36 (“[M]ost governments make a good faith effort to put forward the best nominees, since international judges, though independent and serving in their own capacity, still somehow represent their national country in a highly visible context. Pushing unfit individuals onto an international bench might have serious costs to the reputation of a country, as it might signal lack of commitment toward the institution or be interpreted as an outright attempt at sabotage.”).

498. STURGES & CHUBB, *supra* note 132, at 484 (quoting Christopher Weeramantry).

499. On the cosmopolitanism of the CCJ, see *supra* notes 166-184 and accompanying text.

500. Meron, *supra* note 217, at 360.

501. James L. Gibson, *Judges’ Role Orientations, Attitudes, and Decisions: An Interactive Model*, 72 AM. POL. SCI. REV. 911, 918 (1978).

502. J. Woodford Howard, Jr., *Role Perceptions and Behavior in Three U.S. Courts of Appeals*, 39 J. POL. 916, 916 (1977).

503. Gibson, *supra* note 501, at 919 (“Role orientations do significantly predict the criteria, but not the policy content of decision-making behavior.”); James L. Gibson,

ifies which criterion . . . is allowed to determine the decision.”⁵⁰⁴ Thus, if an international judge adopts a role orientation that stipulates that her state’s national interest ought not be considered in judicial decision-making, she is unlikely to make decisions taking that as a criterion. If however, she adopts a role orientation that includes her state’s national interest as an appropriate (or even acceptable) factor, she is likely to consider it in her decision-making.

The problem with the original approach and its derivatives is that by institutionalizing an expectation of judicial nationalism, they potentially alter the role orientations of the judges on the courts in question. Gibson explains: “A role orientation is a psychological construct which is the combination of the occupant’s perception of the role expectations of significant others and his or her own norms and expectations of proper behavior for a judge.”⁵⁰⁵ Primary among the expectations of ‘significant others,’ are those others associated with the institution within which the judge works.⁵⁰⁶

Relevant in this regard are the “formal expectations . . . derived from the formal charter of the institution.”⁵⁰⁷ Also important are informal institutional norms and expectations, particularly those of other role occupants (i.e. judges).⁵⁰⁸ Not all judges will adapt to the institution in the same

Discriminant Functions, Role Orientations and Judicial Behavior: Theoretical and Methodological Linkages, 39 J. POL. 984, 1005-07 (1977) [hereinafter Gibson, *Discriminant Functions*] (finding that while role orientations do not predict the leniency of judges’ sentencing behavior, they do predict “reliance on non-legal stimuli in sentencing”); John M. Scheb, II, Thomas D. Unga & Allison L. Hayes, *Judicial Role Orientations, Attitudes and Decision Making: A Research Note*, 42 W. POL. Q. 427 (1989) (adding further empirical support to Gibson’s “interactive model”); John M. Scheb, II, Terry Bowen & Gary Anderson, *Ideology, Role Orientations, and Behavior in the State Courts of Last Resort*, 19 AM. POL. RES. 324, 334 (1991) (again confirming Gibson’s interactive model, and concluding that “judicial role orientation appears to be a significant element in any comprehensive theory of judicial behavior”); Theodore L. Becker, *A Survey Study of Hawaiian Judges: The Effect on Decisions of Judicial Role Variation*, 60 AM POL. SCI. REV. 677 (1966) (finding that judges who expressed strong role conceptions regarding the centrality of precedence relied more on precedent); THEODORE L. BECKER, *POLITICAL BEHAVIORALISM AND MODERN JURISPRUDENCE* 88-146 (1964) (finding that judges who believe in a constrained role are more likely to vote against their preferences); Anthony Champagne & Stuart S. Nagle, *The Psychology of Judging*, in *THE PSYCHOLOGY OF THE COURTROOM* 258, 269 (Norbert L. Kerr & Robert M. Bray eds., 1982); David J. Danelski, *Causes and Consequences of Conflict and Its Resolution in the Supreme Court*, in *JUDICIAL CONFLICT AND CONSENSUS* 21, 26, 44 (S. Goldman & C. Lamb eds. 1986); Howard, *supra* note 502.

504. Gibson, *Discriminant Functions*, *supra* note 503, at 1005.

505. Gibson, *supra* note 501, at 917.

506. Rogers M. Smith, *Political Jurisprudence, the “New Institutionalism,” and the Future of Public Law*, 82 AM. POL. SCI. REV. 89, 95 (1988) (Institutions “influence the self-conception of those who occupy roles defined by them in ways that can give those persons distinctively ‘institutional’ perspectives.”); Edwards, *supra* note 367, at 1663-64 (emphasizing the institutional norms of the broader judiciary on the judge’s self-conception, but accepting that specific courts also have an impact on their judges); Gibson, *supra* note 338, at 17 (arguing that the value of role theory is that it helps us move beyond a focus on individual attitudes “to consider the influence of institutional constraints on [judicial] decision-making”).

507. Gibson, *supra* note 338, at 17.

508. Gibson emphasizes the “expectations emanating from others who share the context.” *Id.* Indeed, he suggests that informal norms and expectations are likely more

way.⁵⁰⁹ Each judge “must synthesize . . . expectations, accepting some, rejecting others, to form a role orientation, a belief about proper behavior within the institutional position.”⁵¹⁰

The codification of anxiety about judicial nationalism could directly affect the role ethic of some judges, while making little impact on others. However, if some judges on a given bench were to incorporate the codified expectation of judicial nationalism into their role orientations, this could then influence some of the others who were not affected by the formal provisions alone.

As Scott Altman observes, “Judges follow laws that they dislike in part because they value a system in which all judges will do the same. They suspend their own moral views to some extent in order to be part of a system in which other judges will suspend their moral views to some extent. The perception that the other judges are breaching that agreement removes one incentive to continue putting aside their own moral views.”⁵¹¹ In this sense, a judge’s immediate colleagues are perhaps her most important audience with respect to expectations and role definition.

The incentive to “breach the agreement” is strongest for the permanent judge when she is being “balanced” by a judge *ad hoc*. However, adjusting her role conception in that context may have lasting consequences in future cases. Moreover, her role shift may influence those of her colleagues whose states are not party to the dispute, again with potentially lasting effects. Thus, in the domestic context, Patricia Wald rejected a proposal to formally designate the political party of American judges on the grounds that it would “significantly affect the way panel members view each other” and that the “formal labeling of judges is the antithesis of collegial decisionmaking, which depends heavily on open and honest dialogue among judges.”⁵¹² A lack of collegiality in turn undermines the judicial role ethic.⁵¹³

In addition to the influences of formally codified expectations on judges, and of judges on each other, a critical factor in strengthening the status of the judicial role ethic within the international judge’s self-concept is what Meron terms “public respect for the courts and the judge’s con-

important in determining role orientations than are formally codified standards. *Id.* at 28-29.

509. Gibson, *supra* note 501, at 917 n.11 (1978) (“Role orientations reflect what individuals think they ought to do, tempered by what they think others think they should do.”).

510. Gibson, *supra* note 338, at 17.

511. Altman, *supra* note 397, at 317-18.

512. Patricia M. Wald, *A Response to Tiller and Cross*, 99 COLUM. L. REV. 235, 255 (1999). The proposal to which Wald responds was presented in Emerson H. Tiller & Frank B. Cross, *A Modest Proposal for Improving American Justice*, 99 COLUM. L. REV. 215 (1999).

513. Edwards, *supra* note 367, at 1645-46 (“In an uncollegial environment [j]udges who initially hold different views tend not to think hard about the quality of the arguments made by those with whom they disagree, so no serious attempt is made to find common ground. [This gives] rise to ‘ideological camps’ among judges”).

duct.”⁵¹⁴ To the extent the original approach normalizes the idea of judicial nationalism among key actors outside the courtroom, it may indirectly move judges to incorporate nationalism into their role orientations. It is therefore damaging to the prospects for impartiality that the original approach’s expectation—and tacit acceptance—of judicial nationalism, “deprive[s] [the judge’s failure to overcome bias to her national state] of the moral opprobrium justly attaching to it.”⁵¹⁵

The normalization of the relevance of judicial nationality in public discussions manifests in both superficial and deep ways. Introductory references to international judges include as standard the judge’s nationality alongside her name.⁵¹⁶ Thomas Buergenthal even said of his period on the ICJ bench, “I am here as an American on this court.”⁵¹⁷

More substantively, the normalization of judicial nationalism is reflected in litigation strategy. As Robinson reports, “in any boundary controversy before the [ICJ], learned counsel for both parties will advise thorough review of the outstanding boundary controversies of other states whose nationals sit on the Court so as to determine how best to present the case without posing a threat to the boundary interests of those other states.”⁵¹⁸

Of course, working against the normalization of nationalism among international judges, the states that nominate them, and key audiences, is the core judicial role ethic and all of the statutory provisions and informal judicial norms that express role expectations affirming impartiality, integrity, and independence.⁵¹⁹ The danger posed by the provisions of the original approach and its derivatives is not, then, that they create a fundamentally nationalist role conception. Rather, it is that they under-

514. Meron, *supra* note 217, at 360.

515. LAUTERPACHT, *supra* note 247, at 216.

516. See, e.g., STURGESS & CHUBB, *supra* note 132, at 84–85 (“Indian judge Nagendra Singh The court’s French judge and Vice-President is Judge Guy Ladreit de Lacharrière.”).

517. TERRIS ET AL., *supra* note 5, at 100 (quoting Thomas Buergenthal). If Stephen Breyer, for example, were to say, “I am here as a Californian on this Court,” this might raise some eyebrows, particularly with respect to cases before the Court involving California as one of the parties. It is less unlikely that a member of a systematically underrepresented group might highlight her group identity. Justice Ruth Bader Ginsburg and former Justice Sandra Day O’Connor, for example, have spoken regularly about being women on the Court. See, e.g., Bradley Blackburn, *Justices Ruth Bader Ginsburg and Sandra Day O’Connor on Life and the Supreme Court*, ABC NEWS (Oct. 26, 2010), <http://abcnews.go.com/WN/diane-sawyer-interviews-maria-shriver-sandra-day-oconnor/story?id=11977195>. However, it seems likely that such examples are a function of the systematic underrepresentation in question. Certainly, it would be more questionable if Justice Breyer were to respond by speaking of being a man on the Court. None of this is to question Thomas Buergenthal’s impartiality. The point is to highlight the linguistic norms governing descriptions of the international judge. Indeed, Buergenthal has voted directly against the United States in key cases before the ICJ. See, e.g., LaGrand (Ger. v. U.S.) 2001 I.C.J. 466, ¶ 128 (June 27) (separate opinion of Buergenthal, J.); Avena and other Mexican Nationals (Mex. v. U.S.) 2004 I.C.J. 12, ¶ 153 (Mar. 31) (separate opinion of Buergenthal, J.).

518. Robinson, *supra* note 282, at 280.

519. See *supra* Sections III.A and IV.A.3.

mine the norms that tend towards impartiality and independence.⁵²⁰ Richard Videbeck and Alan Bates found that role expectations have the greatest impact on role occupant performance when those expectations are held with greatest intensity.⁵²¹ Similarly, Gibson observes, "institutionalized role expectations" are most salient when they are "relatively unambiguous."⁵²² The expectations implied by the original approach and its derivatives undermine the clarity and force of the expectation of impartiality, potentially weakening the impact of the judicial role ethic.

The effect of this role conflict will not be uniform across individual judges.⁵²³ Some judges will have been relatively unmoved by the institutional endorsement of judicial nationalism expressed by the original approach and its derivatives and, equally, would not alter their role orientations if that statutory imprimatur were withdrawn.⁵²⁴ Those who have most deeply internalized the judicial ethic in their professional careers prior to joining the bench may be particularly robust in resisting conflicting institutional norms upon joining the bench.⁵²⁵ On the other hand, some of the judges most strongly influenced by institutional expectations (including the expectation that they should uphold the judicial ethic), are also more potentially susceptible to extra-legal expectations (against which ambiguous, or conflicted, institutional expectations offer weakened protection).⁵²⁶

520. The original approach does not *prescribe* nationalism like the judicial ethic prescribes impartiality, but it does express a pragmatic expectation. Biddle notes the importance of the distinction between prescriptive expectations and belief expectations. However, both feature in role theory and both can contribute to, and cause ambiguity or conflict in, a role occupant's role orientation. On the different kinds of role expectations, see generally BIDDLE, *supra* note 344, ch. 5. Biddle explains that role conflict occurs "when someone is subjected to two or more contradictory expectations whose stipulations the person cannot simultaneously meet in behavior." *Id.* at 160.

521. Richard Videbeck & Alan P. Bates, *An Experimental Study of Conformity to Role Expectations*, 22 *SOCIOMETRY* 1 (1959).

522. Gibson, *supra* note 501, at 917.

523. On the notion that role conflict is tolerated and addressed differently by different persons, see BIDDLE, *supra* note 344, at 323; Robert L. Kahn et al., *Adjustment to Role Conflict and Ambiguity in Organizations*, in *ROLE THEORY: CONCEPTS AND RESEARCH* 277, 278, 280 (Bruce J. Biddle & Edwin J. Thomas eds., 1979); Neal Gross, Alexander W. McEachern & Ward S. Mason, *Role Conflict and its Resolution*, in *ROLE THEORY: CONCEPTS AND RESEARCH* 287.

524. For example, in a study of California judges, Gibson finds that judges' levels of self-esteem affect the degree to which they adhere to or ignore the institutional role expectations to which they are subject. James L. Gibson, *Personality and Elite Political Behavior: The Influence of Self-Esteem on Judicial Decisionmaking*, 43 *J. POL.* 104, 117 (1981) ("For high esteem judges, role orientations are minimally dependent upon role expectations . . . while low esteem judges are strongly influenced by role expectations."). Daniel Levinson observes that while organizational norms influence the individual role-definitions of its members, individual personality also has an effect, such that "[p]ersonal role definition [is] a linking concept between personality and social structure." Daniel J. Levinson, *Role, Personality, and Social Structure in the Organizational Setting*, 58 *J. ABNORMAL & SOC. PSYCHOL.* 179 (1959).

525. See *supra* notes 337-344 and accompanying text.

526. Gibson, *supra* note 524, at 120, 123-24.

It is difficult to know precisely how this conflict plays out in the mind of any given judge. Some, however, have voiced concern about role conflict. Hersch Lauterpacht observes that impartiality “is a problem of the creation in the minds of judges of a sense of international solidarity,” and confirms that this process is “impeded by the continuance of formal institutions [such as the judge *ad hoc*] perpetuating the idea of representation of national interests.”⁵²⁷ Taslim Elias favorably compares the International Law Commission to the ICJ in this regard, noting,

It is well-known that members of the International Law Commission, once elected, represent only themselves as legal scientists and not as individual representatives of [their national] Governments The result has been to make the Commission behave more often as a group of jurists than as a bunch of statesmen intent on [advancing national interests].⁵²⁸

Elias worries that the World Court may normalize judicial nationalism to such an extent that “each judge would tend more often than not to see his task primarily as that of the protector and defender of his country’s interests.”⁵²⁹

Unsurprisingly, among all judges on an original-approach court, the judges *ad hoc* feel the role conflict most severely.⁵³⁰ Georges Abi-Saab, who twice served as judge *ad hoc* before the ICJ, describes listening to a talk by Mohamed Ali Currim Chagla, shortly after the latter had served as judge *ad hoc* in *Right of Passage Over Indian Territory*.⁵³¹ As Abi-Saab recalls, Chagla “made a passionate argument against the institution of the *ad hoc* judge, saying that he felt rather uncomfortable playing that role. This influenced my opinion, and as I studied the Court further, I thought that the institution of judge *ad hoc* detracts from the judicial character of the Court.”⁵³² Although efforts have been made to professionalize the judge *ad hoc* somewhat in recent years, the role conflict remains.⁵³³

To be clear, this Section does not assert that the normalization of judicial nationalism will always overcome the powerful professional norms of

527. LAUTERPACHT, *supra* note 247, at 233.

528. Elias, *supra* note 271, at 27.

529. *Id.* at 24.

530. PROTT, *supra* note 247, at 13. As Shabtai Rosenne observes, it is commonly expected that judges *ad hoc* will vote in favor of their appointing state. Shabtai Rosenne, *The Composition of the Court*, 1 *THE FUTURE OF THE INTERNATIONAL COURT OF JUSTICE* 377, 405 (Leo Gross ed., 1976).

531. *Case Concerning Right of Passage over Indian Territory (Port. v India)*, Merits, 1960 I.C.J. 6 (Apr. 12).

532. Remarks of Georges Abi-Saab, *Discussion: The Role of Ad Hoc Judges*, in *INCREASING THE EFFECTIVENESS OF THE INTERNATIONAL COURT OF JUSTICE*, *supra* note 259, at 384, 393.

533. Changes were enacted through two recent Practice Directions. These amendments are, however, relatively limited. Perhaps most notably, one of the Practice Directions proscribes the appointment as judges *ad hoc* of lawyers who at the time they are chosen are already appearing or have recently appeared before the Court. See *Practice Directions*, *supra* note 432, Nos. VII–VIII; Rosenne, *supra* note 71; Sir Arthur Watts, *New Practice Directions of the International Court of Justice*, 1 *L. & PRAC. INT’L CRTS. & TRIBS.* 247 (2002).

the judiciary. Indeed, there is reason to believe the opposite.⁵³⁴ Instead the argument presented suggests that to best facilitate judicial impartiality, international courts should be constituted so as to affirm the judicial role ethic, rather than exacerbate potential “tension between national loyalty and professional responsibility.”⁵³⁵ Contrary to their purpose, the original approach and its derivatives fail in this regard.

C. Preliminary and Tentative Empirical Support for the Theory

Section IV.A, *supra*, argues that the judicial role ethic and its reinforcement by colleagues and other key audiences provide a basis for faith in the international judge’s capacity to act impartiality with respect to nationality, just as she is widely expected to act with respect to a wide range of traits of similar or greater emotional force. Section IV.B.4, *supra*, contends that the original approach and its derivatives might undermine the work of the judicial role ethic in this regard by fostering judicial role conflict and potentially creating (or exacerbating) the conditions for subjective national partiality. It might be objected that this makes the theory advanced here unfalsifiable since any vote against a judge’s home state can be hailed as exemplary of a robust judicial ethic, and any apparent national bias can be explained away as the product of role conflict. This objection is misplaced. If the theory of international judging articulated above is correct, we should expect to see several patterns in judicial voting.

First, because they experience starker role conflict than their permanent counterparts, we would expect to see a higher proportion of judges *ad hoc* voting for their appointing states than we see permanent judges voting for their state of nationality. That said, as discussed above, the original approach and its derivatives also create role conflict for the permanent judge (and nationalist incentives for nominating states), so we would expect to see some national-interest voting by permanent judges on original-approach or derivative courts. Within the class of permanent judges on such courts, the role conflict is likely to be strongest when the judge’s state is involved in the litigation, because it is in those contexts that she is expected to ‘balance’ a judge *ad hoc* or an ‘opposing’ permanent judge. Therefore, we would expect to see higher proportions of judges on original-approach or derivative courts voting in their home state’s interest when it is a party to the litigation than do so when it is a non-party with an interest in the outcome. Finally, since cosmopolitan courts subject their judges to no institutionalized expectation of judicial nationalism, we would expect to see a higher proportion of judges on original-approach or derivative courts voting for their states than we see judges on cosmopolitan courts voting for their states.

534. See *supra* Section IV.A. The prioritization of professional norms ought to be praised. As Prott argues, “The judicial role must have priority above all the other roles which the judge concurrently plays, insofar as he is not already protected from a role conflict.” PROT, *supra* note 247, at 29.

535. TERRIS ET AL., *supra* note 5, at xxi.

This is not statistical study and it is not within the remit of this Article to perform a comprehensive empirical analysis of judicial voting. However, the work of others offers tentative preliminary support for the above hypotheses. This suggests that the theory is plausible and sounds the call for further study to provide more robust empirical support.

Extant data supports the first hypothesis—permanent judges at the ICJ vote against their national states with significantly greater regularity than judges *ad hoc*.⁵³⁶ The ECtHR has as many judges as states, so the term “judge *ad hoc*” holds a different meaning in that institution—it refers to the judge who would be appointed to replace the permanent national judge in cases in which the latter is unable to sit.⁵³⁷ Nonetheless, one would expect the ECtHR judge *ad hoc* to experience greater role conflict than the permanent judge, since she is appointed for a single case for the sole purpose of providing representation on the bench for a party to the litigation. Thus, it is supportive of the first hypothesis that Erik Voeten’s study of ECtHR decisions found that judges *ad hoc* voted with the state in respect of which they sat more often than did permanent judges.⁵³⁸

There is also support for the second hypothesis. The statistics suggest that permanent ICJ judges are more likely to vote with their national states than against them.⁵³⁹ Voeten finds that ECtHR judges also tended to vote in favor of their home states in cases in which the state in question was a party to the case.⁵⁴⁰

The third hypothesis also seems to be well founded. Posner and de Figueiredo find that permanent ICJ judges do tend to vote in their states’ national interests on some issues even when the state in question is not a party before the Court.⁵⁴¹ However, they find this tendency to be weaker than that of permanent judges to vote in favor of their states when the latter are litigants.⁵⁴² Voeten’s findings suggest that ECtHR judges do not

536. See, e.g., Posner & de Figueiredo, *supra* note 255, at 615. This trend has been apparent for decades. See, e.g., Il Ro Suh, *Voting Behaviour of National Judges in International Law*, 63 AM. J. INT’L L. 224 (1969) (chronicling a number of cases in which judges voted against “their” states, occasionally even dissenting against a majority in favor of that state); T. Hensley, *National Bias and the International Court of Justice*, 12 MIDWEST J. POL. SCI. 568 (1966) (Permanent judges much more than judges *ad hoc* are willing to vote against their states. French judge, Jules Basdevant ruled in favor of France’s position in just one third of the decisions examined. Indeed, the Chinese judge was more favorable to France.). Examples of permanent judges voting against “their” states include: LaGrand (Ger. v. U.S.) 2001 I.C.J. 466, ¶ 128 (June 27) (Burgenthal, sep. op.); Avena and other Mexican Nationals (Mex. v. U.S.) 2004 I.C.J. 12, ¶ 153 (Mar. 31) (Burgenthal, sep. op.); Anglo-Iranian Oil Co case (U.K. v. Iran), Preliminary Objections, 1952 I.C.J. 116 (McNair, J. sep. op); Minquiers and Ecrehos, 1953 I.C.J. 74 (Basdevant J., sep. op.).

537. ECHR, *supra* note 40, art. 26, para. 4; ECtHR Rules, *supra* note 146, rule 29.

538. Erik Voeten, *The Impartiality of International Judges: Evidence from the European Court of Human Rights*, 102 AM. POL. SCI. REV. 417 (2008).

539. Posner & de Figueiredo, *supra* note 255, at 615; Skubiszewski, *supra* note 259, at 379; Smith, *supra* note 263, at 218–19.

540. Voeten, *supra* note 538.

541. Posner & de Figueiredo, *supra* note 255, at 615–24.

542. *Id.*; see also Smith, *supra* note 263, at 220–22 (arguing that there is not strong evidence that judges at the ICJ vote in their states’ interest).

vote in their states' interests when the latter are not before the Court.⁵⁴³ This too is consistent with the hypothesis and may suggest a stronger judicial role ethic at the ECtHR than at the ICJ.

Finally, although the fourth hypothesis is that in need of greatest additional empirical attention, what data is available provides preliminary support for the hypothesis. While ICJ judges tend to vote in accord with national interest,⁵⁴⁴ members of the cosmopolitan WTO AB appear to be unswayed by the nationalities of the litigants.⁵⁴⁵ Likewise, the ECJ, which largely eschews the original approach⁵⁴⁶ and is marked by far less role conflict with respect to the judicial mindset than is the World Court⁵⁴⁷ exhibits little evidence of judicial nationalism. As Shetreet notes, ECJ judges frequently rule against their states, demonstrating "that their concern is not to foster the national interest of their States, but to make sure all the Member States (including their own) abide by the law."⁵⁴⁸

Ultimately, the empirical information described in this Section is incomplete. Without a more sophisticated and comprehensive empirical study, it is difficult to know whether the patterns described are a consequence of role conflict created by the original approach and its derivatives. However, what is clear is that the findings described are consistent with what one would expect if the theory of judging described in Sections IV.A and IV.B were correct.

This Part has argued that the original approach and its derivatives are unnecessary, anomalous, ineffective on their own terms, and potentially counterproductive. The question that remains is whether they can be justified on other grounds.

V. Apologias: Diversity, Cooperation, Expertise, and Nationality

Some commentators and practitioners have argued in favor of nationality limits and the judge *ad hoc* without relying on anxiety about judicial nationalism. It would be hasty to recommend the disposal of either provision without first considering these alternative justifications. This Part performs that task, but concludes that neither the judge *ad hoc* nor the nationality limit is salvaged by these efforts at resuscitation. No such alternative justification has been offered for the IACtHR's and ACtHPR's nation-

543. Voeten, *supra* note 538.

544. See *supra* notes 539, 541-542 and accompanying text.

545. Juscelino F. Colares, *A Theory of WTO Adjudication: From Empirical Analysis to Biased Rule Development*, 42 VAND. J. TRANSNAT'L L. 383, 403-06 (2009). Although Colares argues that the WTO AB systematically favors plaintiffs over defendants, this is no less true for states that had a national on the Appellate Body during the period of analysis (such as, for example, the United States) than for states that did not.

546. See *supra* notes 153-158 and accompanying text. Ultimately, the ECJ is better considered a "quasi-cosmopolitan" court. See *infra* notes 637-640 and accompanying text.

547. PROTTE, *supra* note 247, at 142 ("Little evidence is found at [the ECJ] of the expectation expressed by certain ICJ-judges that they should represent their national legal systems.").

548. Shetreet, *supra* note 279, at 157.

ality-based recusals, no doubt because these are quintessentially impartiality-based provisions.⁵⁴⁹

A. Apologias for the Judge Ad Hoc

1. *Local Expertise on an International Bench*

In 1920, the drafters of the PCIJ Statute debated the value of the judge *ad hoc* as compared to nationality-based recusal as the two alternative ways of dealing with anxiety about judicial nationalism.⁵⁵⁰ In advocating the former, Lord Phillimore argued that a judge *ad hoc* could “enable the Court to understand certain questions which require highly specialised knowledge and relate to the differences between the various legal systems.”⁵⁵¹ Alongside the more fundamental worry about judicial nationalism, this argument remained relevant in justifying the retention of the judge *ad hoc* in the ICJ Statute.⁵⁵² Judge *ad hoc* Sir Geoffrey Palmer wrote in his dissent from *Nuclear Tests II* (1995), “In this case I feel the institution [of the judge *ad hoc*] served a useful purpose of bringing to the Court a perspective of one who lives in the region of the world with which the application deals.”⁵⁵³ The rationale continues to be advanced today.⁵⁵⁴

Despite its enduring popularity, this rationale for the judge *ad hoc* is beset by a series of debilitating flaws. First, in the specific case of the IACtHR, the current governing rules require that judges recuse themselves from cases involving their national states whenever an individual complaint is brought via the Commission.⁵⁵⁵ This system is incomprehensible if the purpose of the judge *ad hoc* is to provide specialized or local knowledge with respect to the state(s) involved.

Second, the “expertise” function allegedly served by the judge *ad hoc* is both superfluous and potentially unfair to the parties. As Hersch Lauter-

549. Because no apologia has been offered for these provisions, they are not discussed at length in this Part. Indeed, in its recent opinion on the scope of the judge *ad hoc* provisions with respect to its own proceedings, the IACtHR itself rejected the apologias discussed below. See generally Article 55 of the American Convention on Human Rights, Advisory Opinion OC-20/2009, Inter-Am. Ct. H.R. (ser. A) No. 20 (Sept. 8, 2009).

550. See *supra* notes 256–261 and accompanying text.

551. Comments of Lord Phillimore, Procès-Verbaux of the Proceedings of the Advisory Committee of Jurists 528–29 (1920). In addition to resolving the debate between using judges *ad hoc* and using nationality-based recusals, Lord Phillimore’s argument was also relevant to the decision to provide in the PCIJ Statute that when neither state has a national on the bench, both have a right to appoint a judge *ad hoc*. Kooijmans, *supra* note 69, at 497.

552. REPORT OF THE INFORMAL INTER-ALLIED COMMITTEE ON THE FUTURE OF THE PERMANENT COURT OF INTERNATIONAL JUSTICE ¶¶ 38–39 (Feb. 10, 1944).

553. Request for an Examination of the Situation in Accordance with para. 63 of the Court’s Judgement of 20 December 1974 in the Nuclear Tests case (N.Z. v. Fr.), 1995 I.C.J. 381, ¶ 118 (Sept. 22) (Palmer, J. dissenting).

554. TERRIS ET AL., *supra* note 5, at 151 (noting the view that the judge *ad hoc* would “have a kind of special knowledge and openness to his nation’s perspective, and could convey this in discussions with his colleagues”).

555. See *supra* notes 87–88 and accompanying text.

pacht argues,⁵⁵⁶

[T]he Court has ample opportunity during—and, if need be, after—the written and oral proceedings to obtain such [specialized] information. . . . [Furthermore,] it is contrary to elementary principles of evidence and procedure for the Court to obtain such information from ad hoc Judges in the course of its private deliberations seeing that such information cannot be contradicted by the other party and that the Court is therefore in real danger of being misled.⁵⁵⁷

Third, the expertise rationale was a fig leaf from the very beginning. As Scwhebel reports of the PCIJ Statute drafting conference, “Mr. Loder suggested that judges of the parties take part in only an advisory capacity Lord Phillimore appreciated this ‘admirable’ idea ‘but it was not practicable.’”⁵⁵⁸ If the judge *ad hoc* institution can be justified over Loder’s alternative, it must be on grounds other than those provided by the local expertise argument. Moreover, even if a judge with regional legal specialization and decision-making authority were necessary under the local expertise rationale, the Court could itself appoint an expert on local law and logistics to sit on the bench. There is no plausible reason why the party should have control over the appointment.

Fourth, the expertise rationale is at odds with the rule—applied by each of the ITLOS, the ICJ, and the IACtHR—that when two parties are parties in the same interest, they are considered one party for the purposes of the right to appoint a judge *ad hoc*.⁵⁵⁹ To continue an example initiated above,⁵⁶⁰ suppose Japan and the United Kingdom were parties in the same interest and the latter (but not the former) had a national on the permanent bench. In such a scenario, Japan would have no right to appoint a judge *ad hoc* despite the fact that the British judge would have no special knowledge of Japan or Japanese law.

Fifth, at none of the ITLOS, the ICJ, the IACtHR, or the ECtHR must the judge *ad hoc*⁵⁶¹ be a national of that state or an expert in any particular

556. Here referencing the ICJ, but the point is also applicable to the ITLOS, the IACtHR, and the ECtHR.

557. Lauterpacht, *supra* note 495, at 83; *see also* Scobbie, *supra* note 435, at 458 (“Pleadings before the International Court are, notoriously, long and exhaustive. They must be taken as presenting the entire case the party wishes to make; to allow the judge ad hoc to augment its representations pose dangers not merely for the integrity of the judicial process, but also for the State concerned.” Moreover, the presence of an ‘opposing’ judge would not necessarily balance things out: “If the decision revolved around the interpretation or effect of one party’s municipal law, that party’s judge could well have a predominant voice in this matter. His direct contribution during the deliberations as an advocate for his State could result in procedural inequality, and his assertions could not be countered in open court by the opposing State.”).

558. Stephen M. Schwebel, *National Judges and Judges Ad Hoc*, in *MÉLANGES EN L'HONNEUR DE NICOLAS VALTICOS: DROIT ET JUSTICE* 319, 321 (René-Jean Dupuy ed., 1999).

559. *See supra* notes 70, 268 and accompanying text.

560. *See supra* note 270 and accompanying text.

561. Or, in the ECtHR’s case, the judge serving “in respect of” the state.

aspect of that state's law or local circumstance.⁵⁶² Indeed, by 1999, about half of the ICJ's sixty-two judges *ad hoc* had not been nationals of the appointing State.⁵⁶³ Although this may run against the original statutory intent,⁵⁶⁴ under today's understanding of the judge *ad hoc* institution, any rationale based on the coincidence of the nationalities of the judge *ad hoc* and her appointing state cannot hold.

Finally, the ITLOS and the ICJ apply public international law and rarely engage in detailed analysis of domestic law.⁵⁶⁵ For these courts, then, knowledge regarding "differences between the legal systems" is generally not required. Indeed, as the International Law Commission notes, "There is a very strong presumption among international lawyers that . . . the law itself should be read in a universal fashion."⁵⁶⁶

A counter-argument might be offered here on behalf of the quasi-judge-*ad-hoc* rule used by the ECtHR. As a regional human rights court, the ECtHR is required to examine issues internal to the state, both in terms of the facts and in terms of the law.⁵⁶⁷ Moreover, the ECtHR exercises a degree of deference to the domestic government, and particularly the domestic legislature, granting the national government a "margin of appreciation" when considering whether a human right has been violated.⁵⁶⁸ It has therefore been asserted that "national Governments are legitimate in demanding that a person possessing their confidence and who intimately knows their domestic legal order, sit on the bench . . ."⁵⁶⁹ ECtHR judge Lucius Caflisch has claimed that judges serving "in respect of" their states make an important contribution in this regard without undermining the Court's impartiality.⁵⁷⁰

562. IACtHR Statute, *supra* note 41, art. 10, paras. 2-3; ECHR, *supra* note 40, art. 22; ECtHR Rules, *supra* note 146, rules 13, 24, para. 5(c) (distinguishing a judge's national state from the state that she serves "in respect of"); ITLOS Statute, *supra* note 9, art. 17, paras. 2-3; ICJ Statute, *supra* note 9, art. 31, paras. 2-3.

563. Schwebel, *supra* note 558, at 329.

564. Kooijmans, *supra* note 69, at 497.

565. Fassbender, *supra* note 253, at 275 (stating that "today a proper functioning of the Court depends much more on its judges having a strong competence in public international law (as emphasized in Art. 2 of the [ICJ] Statute) than their coming from different domestic legal environments").

566. INTERNATIONAL LAW COMMISSION, REPORT OF THE STUDY GROUP ON FRAGMENTATION OF INTERNATIONAL LAW: DIFFICULTIES ARISING FROM DIVERSIFICATION AND EXPANSION OF INTERNATIONAL LAW, U.N. Doc. A/CN.4/L.676, ¶ 13 (July 29, 2005); see also STURGESS & CHUBB, *supra* note 132, at 459 (quoting Guy de Lacharrière).

567. At least in examining domestic law's compatibility with the European Convention on Human Rights.

568. See, e.g., Jeroen Schokkenbroek, *The Basis, Nature and Application of the Margin-of-Appreciation Doctrine in the Case-Law of the European Court of Human Rights*, 19 HUM. RTS. L.J. 30, 30-36 (1998).

569. Christian Tomuschat, *International Courts and Tribunals with Regionally Restricted and/or Specialized Jurisdiction*, in JUDICIAL SETTLEMENT OF INTERNATIONAL DISPUTES, *supra* note 222, at 310, 409.

570. ECtHR Judge Lucius Caflisch argues "[T]he national judge of the defendant State will always be present for any decision in a case involving that State. More often than not, the national judge also serves as judge rapporteur. This system may seem to hark back to the past and to introduce unnecessary bias. In fact the contrary is true. Not only does the national member offer knowledge about local law and conditions. He or she

Even taking these peculiarities of the ECtHR into consideration, the Court would surely be equally well served by an advisory expert. Moreover, the argument that the parties should cover all areas of local expertise in their presentations to the Court still holds. Additionally, five of the six other courts that are regularly called upon to adjudicate intra-state disputes—the ECJ, EFTA CJ, CCJ, IACtHR, and ACtHPR—all provide clearly in their statutes for scenarios in which a state would come before the court with no national on the bench, and with respect to the sixth (the CJAC) it is at least theoretically possible under the Statute.⁵⁷¹

For these reasons, the expertise rationale, despite having been propped up since the institution's origins, fails as a justification for the judge *ad hoc*.

2. Fair Consideration of the Parties' Arguments

An alternative theory in support of the judge *ad hoc* was articulated by judge *ad hoc* Elihu Lauterpacht in his separate opinion in the *Bosnian Genocide* case.⁵⁷² Lauterpacht argues that the function of such a judge is

to endeavour to ensure that, so far as is reasonable, every relevant argument in favour of the party that has appointed him has been fully appreciated in the course of collegial consideration and, ultimately, is reflected—though not necessarily accepted—in any separate or dissenting opinion that he may write.⁵⁷³

This position has gained approval in recent years from a number of judges *ad hoc*, permanent judges, and jurists.⁵⁷⁴ During the PCIJ era, a similar, although more ambitious, account was proposed; namely, that the judge *ad hoc*'s role is to help to “shape the form of the *judgement* so that it

also is sure—and those primarily familiar with the ICJ will be surprised—not to have any qualms to find a violation committed by his or her own State if there are good reasons for doing so. In other words, so far as the Strasbourg Court is concerned, national judges have proved remarkably independent, i.e., immune to possible pressure.” Callisch, *supra* note 242, at 173.

571. See *supra* Sections II.B and II.C.

572. Application of the Convention on the Prevention and Punishment of the Crime of Genocide case (Bosn. & Herz. v. Serb. & Mont.), Further Request for Provisional Measures, 1993 I.C.J. 407 (separate opinion of Lauterpacht, J.).

573. *Id.* at 409 (Lauterpacht, J.).

574. See, e.g., Request for an Examination of the Situation in Accordance with para. 63 of the Court's Judgment of 20 December 1974 in the Nuclear Tests case (N.Z. v. Fr.), 1995 I.C.J. 381, ¶ 118 (Sept. 22) (Palmer, J. dissenting) (citing Lauterpacht with approval); Schwebel, *supra* note 558, at 327 (agreeing with Lauterpacht's position); Sovereignty over Pulau Ligitan and Pulau Sipadan (Indon. v. Malay.), Judgment, 2002 I.C.J. Rep. 691, ¶¶ 9-12 (Dec. 17) (Franck, J., dissenting) (offering a similar account); Certain Property (Liech. v. Ger.), Preliminary Objections, Judgment, 2005 I.C.J. 70, ¶ 1 (Feb. 10) (Berman, J., dissenting) (endorsing the accounts of Franck and Lauterpacht); Skubiszewski, *supra* note 259, (stating that he followed Lauterpacht's precept as a judge *ad hoc* in the *East Timor* case); Remarks of Sir Ian Sinclair, *Discussion: The Role of Ad Hoc Judges, in INCREASING THE EFFECTIVENESS OF THE INTERNATIONAL COURT OF JUSTICE*, *supra* note 259, at 389 (“I agree entirely with Judge *ad hoc* Lauterpacht's definition or description of what the role of the *ad hoc* judge should be, once appointed.”); Aznar-Gómez, *supra* note 64, at 210 (calling Lauterpacht's view “true”).

may avoid, as far as possible, wounding national susceptibilities.”⁵⁷⁵ Although clearly inspired by this more ambitious rationale, Elihu Lauterpacht seems to be unconvinced of its feasibility, particularly if the judge *ad hoc* is not well respected by the permanent judges.⁵⁷⁶ Ultimately, however, both the modest and the ambitious versions of this argument are unpersuasive.

First, both of these rationales are again incompatible with the IACtHR judge *ad hoc* system, due to its incorporation of the recusal requirement. Second, the suggestion that professional judges would not perform their core task of considering carefully each of the arguments put before them by the parties to the case impugns either the competence or the judicial integrity of those on the bench.

Indeed, if it is to be assumed that the permanent bench either cannot or will not perform this task, reasons must be articulated as to why that is the case, and why the task *would* be performed by a permanent judge who is a national of the party making the arguments.⁵⁷⁷ To put this in stark terms, Elihu Lauterpacht’s account of the role of the judge *ad hoc* depends on the following two things both being true: (1) fifteen professional judges,⁵⁷⁸ none of whom is a national of one of the parties before the court, are, at least occasionally, unable or unwilling to consider diligently all of the arguments put before them by the parties to a case;⁵⁷⁹ and (2) a single permanent judge who is a national of one of the parties would more often be able and willing to ensure that those same arguments *are* fully and carefully considered. This position relies on the assumption of judicial nationalism that is rebutted in Part IV, *supra*.

With respect to the older idea that the judge *ad hoc* would help to draft the judgment, competent judges already write judgments in a way that is sensitive to both sides of the dispute, insofar as doing so is compatible with

575. FACHIRI, *supra* note 251, at 48–49 (emphasis added); see also PROCÈS-VERBAUX OF THE PROCEEDINGS OF THE ADVISORY COMMITTEE OF JURISTS, 24TH MEETING, *supra* note 248, at 529 (quoting Adatci) (“He would be of great assistance, especially in the drafting of the sentence, a sufficiently delicate question It is essential that the explanatory statement . . . should be so drawn up as to remove the possibility of obstacles which national susceptibilities would be inclined to put in the way of execution of the sentence . . . the psychology of the various peoples must be understood.”).

576. Lauterpacht, *supra* note 260, at 376.

577. After all, if such a judge is on the bench, no judge *ad hoc* is necessary under the statutes of the ITLOS, ICJ, and IACtHR. IACtHR Statute, *supra* note 41, art. 10; ITLOS Statute, *supra* note 9, art. 17; ICJ Statute, *supra* note 9, art. 31. Therefore, it is not sufficient to argue that a judge *ad hoc* selected by the party in question for the specific case at hand would be particularly well placed to fulfill this function (although that too is a questionable contention).

578. The ICJ—the target of Lauterpacht’s analysis—has fifteen permanent judges. ICJ Statute, *supra* note 9, art. 3. The numbers would be different if this argument were applied to the ITLOS or the IACtHR. The former has twenty-one judges. ITLOS Statute, *supra* note 9, art. 2. The IACtHR has seven judges. IACtHR Statute, *supra* note 41, art. 4.

579. This leaves aside the scenario in which the parties themselves do not make the full range of arguments to the Court. As noted above, the notion that a judge might augment the pleadings of one of the parties during judicial deliberations is fundamentally incompatible with the integrity of the court in question. See *supra* notes 556–557 and accompanying text.

a clearly reasoned decision.⁵⁸⁰ Moreover, as Elihu Lauterpacht acknowledges, there is no guarantee that the judge *ad hoc* would have any influence over the judgment draft at all.⁵⁸¹ Even if the judge *ad hoc* could exercise such influence, tailoring judgments to specific states has its own problems. As Scobbie remarks, given the role of international courts in developing international law, there could arise doctrinal “instability if individuated factors are locked into the reasoning of the majority opinion.”⁵⁸² Indeed, he argues, the ICJ’s role as an authoritative interpreter of international law is “degraded when it pays undue attention to factors peculiar to one litigant.”⁵⁸³

Finally, it is unclear what additional benefit the judge *ad hoc* brings by producing a dissent that acknowledges each of “her” party’s arguments, without necessarily endorsing them. The record of the party’s arguments exists regardless of the presence of a judge *ad hoc* on the bench, and the party can anyway choose to repeat them and publicize them as much as it finds useful.

3. Institutional Survival

The third alternative rationale for the judge *ad hoc* system is pragmatic. If the efficacy of international courts is fundamentally dependent on state consent and if states want to have a national or an appointee on any international court they face, then the survival of these courts depends on the *ad hoc* system. Schwebel contends that the ICJ “is fundamentally dependent on the willingness of states to bring cases to it”⁵⁸⁴ Broadening the scope of analysis, Terris et al. add, “With no military or police force at their disposal, and given the uncertainties of funding in the international arena, international judges must rely on the goodwill and cooperation of states both to enforce their orders, and for their livelihoods.”⁵⁸⁵ Given international courts’ dependence on state cooperation, the argument goes, if judges *ad hoc* are what states want, judges *ad hoc* are what states shall get.

The effort that states devote to advancing their nationals during the judicial election and nomination processes demonstrates the value they place on having their nationals on the bench.⁵⁸⁶ Many jurists argue further that national judicial presence is *essential* to state participation and compliance. Sir Ian Sinclair asserts boldly, “States would not be prepared to consent to adjudication, unless they had what they regarded as the benefit

580. MERRILLS, *supra* note 482, at 22 (1998) (noting Sir Gerald Fitzmaurice’s skill at performing precisely this task).

581. *See supra* note 576 and accompanying text.

582. Scobbie, *supra* note 435, at 450. Scobbie contends that the Court created precisely this kind of instability with its ruling in the *Nottebohm* case and its advisory opinion on the *Constitution of the Maritime Safety Committee of the Intergovernmental Maritime Consultative Organization (IMCO)*. *Id.* at 451–55.

583. *Id.* at 456.

584. STURGESS & CHUBB, *supra* note 132, at 212 (quoting Stephen Schwebel).

585. TERRIS ET AL., *supra* note 5, at 149.

586. *Id.* at 29 (2007); Blokker & Muller, *supra* note 282, at 212.

of a nationally-appointed judge taking part in the collegiate process of preparing the judgment.”⁵⁸⁷ Michael Reisman concurs, accepting this as a necessary cost of having an effective court.⁵⁸⁸ Former ICJ President Gilbert Guillaume argues that the judge *ad hoc* system “encourages States to refer cases to the Court.”⁵⁸⁹

Whether or not these claims were valid in earlier eras of international judging, it is clearly no longer necessary for an international court to guarantee states their ‘representation’ on the bench in order to generate business or promote compliance. The WTO AB, the ECJ, the EFTACJ, the CCJ, the IACtHR, and the ACtHPR all provide in their statutes for scenarios in which a state may face a bench on which it has no national; and this is at least theoretically possible for the CJAC.⁵⁹⁰ Among these, the WTO AB stands out as a classic international court that is in many respects, including case-generation, *more* successful than either the ICJ or the ITLOS, both of which employ a judge *ad hoc* system.⁵⁹¹ In any event, the ICJ’s need to generate a caseload, so acute in the 1970s,⁵⁹² is no longer a major concern,⁵⁹³ rendering this rationale somewhat anachronistic in its case.

587. Remarks of Sir Ian Sinclair, *Discussion: The Role of Ad Hoc Judges*, in INCREASING THE EFFECTIVENESS OF THE INTERNATIONAL COURT OF JUSTICE, *supra* note 259, at 390; see also MANLEY HUDSON, THE PERMANENT COURT OF INTERNATIONAL JUSTICE:1920-42, at 181 (1943) (noting that “the scheme for electing the judges would probably never have been adopted without it”).

588. REISMAN, *supra* note 436, at 479 (“The utility of [the judge *ad hoc*] device would appear to outweigh its defects in a decision process of low institutionalization to which participants are hesitant to resort and which is not tied to organized enforcement machinery.”); see also Scobbie, *supra* note 435, at 463 (“If the continued existence of the judge *ad hoc* is the price to be paid for continued litigation before the Court, then contrary arguments based on strict legal principle cannot avail. Ultimately the question is political, not legal.”).

589. Guillaume, *supra* note 101, at 164.

590. See *supra* Part II. But see Russia’s recent decision to “drop[] [its] opposition after the Council of Europe agreed to a provision stating that a Russian judge would participate in any decisions concerning Russia.” *Russian Parliament Ratifies European Court Reform*, INT’L JUST. TRIBUNE—RADIO NETH. WORLDWIDE (Jan. 27, 2010), <http://www.rnw.nl/int-justice/article/russian-parliament-ratifies-european-court-reform>.

591. See, e.g., Posner & Yoo, *supra* note 433, at 53. On the general success of the WTO AB in this regard, see, for example, Robert E. Hudec, *The New WTO Dispute Settlement Procedure: An Overview of the First Three Years*, 8 MINN. J. GLOBAL TRADE 1 (1999); TERRIS ET AL., *supra* note 5, at 107. Moreover, this has not been for want of tackling difficult or controversial matters. As Steinberg observes, “WTO judicial decisions have created an expansive body of new law . . . filling gaps and clarifying ambiguities, sometimes in areas that had been the subject of diplomatic deadlock.” Steinberg, *supra* note 22, at 251. These decisions are particularly impactful given the Appellate Body’s adherence to precedent. See, e.g., van Damme, *supra* note 21, at 614-615; Steinberg, *supra* note 22, at 254.

592. Arthur W. Rovine, *The National Interest and the World Court*, in 1 THE FUTURE OF THE INTERNATIONAL COURT OF JUSTICE, *supra* note 530, at 313 (Leo Gross ed., 1976).

593. McWHINNEY & KAWANO, *supra* note 352, at 5-6; Valencia-Ospina, *supra* note 71, at 11 (“The International Court of Justice has regained the confidence of the vast majority of the States constituting the organized international community. This fact was made only too evident in 1999, when an all-time record of seventeen new cases were brought to the Court, in contrast to the period preceding the early eighties, during which the Court often found itself without a single case on its docket.”). But see Eric A. Posner, *The International Court of Justice: Voting and Usage Statistics*, 99 PROC. ANN. MTG. AM. SOC’Y

Moreover, the plausibility of the argument depends on a credible theory explaining why states want to face international courts with their nationals or appointees on the bench. At the time of the PCIJ drafting it seemed that states wanted such representation “to protect their interests.”⁵⁹⁴ Quite apart from being incompatible with the notion of a court, the idea that national judges (permanent or *ad hoc*) would perform that function relies on the rejected premise of judicial-nationalism,⁵⁹⁵ and implausibly assumes that one judge would be able to influence fundamentally the rest of the court on substantive decisions.

A second possible explanation is that having a national or appointee on the bench “is so bound up with national sentiment and considerations of national prestige that its removal may do more harm than good.”⁵⁹⁶ This claim, however, assumes implausibly that states gain prestige from having nationals as judges *ad hoc*. While states may gain prestige from having nationals on the permanent bench,⁵⁹⁷ they surely gain little prestige from appointing a national as a judge *ad hoc*. Indeed, as noted above, half of all ICJ judge *ad hoc* appointees are not nationals of the state that appointed them.⁵⁹⁸

B. A Possible Apologia for the Nationality Limit - The Imperative of Diversity

Unlike the judge *ad hoc*, nationality limits generate little academic ferment. Indeed, commentators have not done very much at all to justify, or examine the potential justifications for, nationality limits on international courts.⁵⁹⁹ The theory suggested above is that the purpose of such limits is to combat judicial nationalism by preventing the interests of any one state from dominating the court. As argued in Part IV, *supra*, this effort is ultimately self-defeating. There is, however, one obvious alternative explanation. One might argue that nationality limits are instituted not to dilute national interests on the court, but rather to ensure the diversity of the bench.

Many international courts include some sort of diversity provision.⁶⁰⁰

INT'L L. 130, 132 (2005) (arguing that the growth in case filings is misleading because the number of states in the international system has increased significantly during the course of the ICJ's existence).

594. Comments of Lord Phillimore, Procès-Verbaux of the Proceedings of the Advisory Committee of Jurists (1920) 528-529; see also Skubiszewski, *supra* note 259, at 383 (“Where the functioning of the judicial organ depends on consent, there is room for protection, through the composition of that organ, of at least some interests of the State party to the proceedings.”).

595. See Part IV *supra*.

596. Lauterpacht, *supra* note 495, at 79.

597. Thus explaining the effort they invest to achieve that end. TERRIS ET AL., *supra* note 5, at 29; Blokker & Muller, *supra* note 282, at 212.

598. Schwebel, *supra* note 558, at 329.

599. See, for example, the cursory attention devoted to the ICJ nationality limit in the leading commentary on the ICJ Statute. Aznar-Gómez, *supra* note 64.

600. See, e.g., Lori Fisler Damrosch, *Commentary: Ensuring the Best Bench—Ways of Selecting Judges*, in INCREASING THE EFFECTIVENESS OF THE INTERNATIONAL COURT OF JUS-

One might contend that the nationality limit contributes to this body of regulation by ensuring that any given bench has the maximum number of different nationalities for the number of seats available.

There are several reasons to reject this re-interpretation. The international courts that openly seek to create a diverse bench focus not on national diversity, but primarily on regional and legal systemic diversity.⁶⁰¹ Among the institutions considered here, the ICC is regulated by the most detailed and stringent set of diversity requirements. None of those requirements, however, mentions the value of national diversity. The Statute provides, “States Parties shall, in the selection of judges, take into account the need, within the membership of the Court, for: (i) The representation of the principal legal systems of the world; (ii) Equitable geographical representation; and (iii) A fair representation of female and male judges.”⁶⁰² The Assembly of States Parties has augmented these rules, requiring that each State Party vote for minimum numbers of candidates from each gender and for minimum numbers of candidates from each of five geographic regions.⁶⁰³ The latter rule builds on ICJ practice.

At the ICJ, states have formed basic voting arrangements to ensure regional diversity. The current division of the ten judges other than those traditionally taken by the five permanent members of the Security Council is as follows: Africa 3, Asia 2, Latin America and Caribbean 2, Eastern Europe 1, Western Europe and Others 2.⁶⁰⁴ Lachs notes that this composition has developed “almost *pari passu* with the expansion of United Nations membership.”⁶⁰⁵ Ensuring a diversity of judges trained in different traditions has also been important in ICJ practice,⁶⁰⁶ although no firm numerical limits have been set.

If nationality diversity were prioritized, one would expect to see a system of rotation within regional blocs so as to maximize the range of different nationalities to be represented on the bench. This is not the norm. Some judges have remained on a bench for several consecutive terms, mak-

TICE, *supra* note 259, at 188, 192 (many international courts “embody some variation of a diversity formulation, typically in similar language to . . . the ICJ Statute, and sometimes with additional explicit language”); TERRIS ET AL., *supra* note 5, at 3 (“The idea that the bench of an international court should be representative of the membership of the organization of which the court is an organ is . . . a fundamental feature of all contemporary international courts.”).

601. See, e.g., Preparatory Committee for the World Trade Organization, Sub-Committee on Institutional Procedural and Legal Matters, *Recommendations*, ¶ 6, PC/IPL/13 (Dec. 8, 1994); Fassbender, *supra* note 253, at 261.

602. Rome Statute, *supra* note 52, art. 36, para. 8.

603. Assembly of States Parties Resolution ICC-ASP/1/Res.3, Procedure for the election of the judges for the International Criminal Court, Doc. ICC-ASP/1/Res.3, ¶¶ 3, 5, 8 (2002).

604. Chittharanjan F. Amerasinghe, *Judges of the International Court of Justice: Election and Qualifications*, 14 LEIDEN J. INT’L L. 335, 346 (2001); see also Rosenne, *supra* note 530, at 377–86 (discussing the development of voting arrangements and regional distribution); Christopher Harland, *International Court of Justice Elections: A Report on the First Fifty Years*, 34 CANAD. Y.B. INT’L L. 303, 309–12 (1996).

605. Lachs, *supra* note 292, at 54.

606. Fassbender, *supra* note 253, at 273.

ing the appointment of a national of another state from their regions essentially impossible.⁶⁰⁷ Even if one supposes that in such cases experience trumps diversity, one would expect that when an incumbent judge retires, her replacement would not be a co-national. However, this occurs regularly.⁶⁰⁸ Advocacy for greater rotation has yet to be heeded.⁶⁰⁹

Extant practice aside, it is unclear what benefit nationality diversity would bring. Both regional and legal systemic diversity provide international courts with genuine value. Legal-systemic diversity helps to preserve “the unicity and intellectual autonomy of international law, which should not be identified with any single legal system or tradition.”⁶¹⁰ The danger legal-systemic diversity seeks to avoid is the scenario in which one legal tradition comes to dominate an international court, affecting international law in a way that would make it more accessible to some parts of the international community, but less accessible to others. Systemic diversity enables international courts to build on, merge, or depart from domestic legal traditions so as to develop “a general [international] legal culture.”⁶¹¹ It is a prerequisite for the development of a unitary international legal methodology.⁶¹²

Illustrating this process, Nina-Louise Arold reports that, rather than considering the diversity of legal traditions an obstacle to decisionmaking, ECtHR judges consider their collective deliberative process “a free exchange of . . . all meanings” and “a synthesis of . . . differences.”⁶¹³ She finds that a judge’s legal background mattered very little during decision-making, indicating a trend “towards European convergence.”⁶¹⁴ Noting the twin influences of common and civil law, she concludes that the ECtHR

607. Amerasinghe, *supra* note 604, at 346-47 (“[A]s regards individual judges, Lachs (Poland) from the Eastern European group was on the Court for 26 years and if he had completed his last term would have been on the Court for 27, Oda (Japan) of the Asian group will have been on the Court for 27 years when his third term ends in 2003.”).

608. *Id.* (considering multiple judges of a single nationality: “Italy has had a seat for 27 years (three terms) . . . Nigeria and Senegal each for 27 years (three terms) and Algeria for 21 years (two and one third terms) . . . Argentina for 27 years (three terms), Mexico for 24 years (two and two third terms) and Brazil for 21 years (two and one third terms) . . . Poland for 47 years (almost six and one third terms) . . . and India for 19 years (just over two terms) At the end of the current terms of their judges on the Court, Japan would have had a seat for 36 years (four terms) and Algeria and Brazil each for 27 years (three terms).”).

609. McWHINNEY, *supra* note 297, at 15; McWHINNEY & KAWANO, *supra* note 352, at xi (2006); Fassbender, *supra* note 253, at 273; Amerasinghe, *supra* note 604, at 347 (“Equitable distribution among signatories to the Statute of the ICJ would also require that there be some kind of rotation among the members of the groups and that no single judge or multiple judges of a particular nationality (of a non-permanent member of the Security Council now because of the convention referred to above) should have a seat for an inordinate length of time.”).

610. Abi-Saab, *supra* note 281, at 169; see PROT, *supra* note 247, at 32-33.

611. PROT, *supra* note 247, at 169.

612. Abi-Saab, *supra* note 281, at 169-70; see also STURGESS & CHUBB, *supra* note 132, at 459 (quoting Guy de Lacharrière).

613. Nina-Louisa Arold, *The European Court of Human Rights as an Example of Convergence*, 76 *NORDIC J. INT'L L.* 305, 315 (2007).

614. *Id.* at 320.

has developed over the past half century a “novel” legal system and legal culture.⁶¹⁵

Similarly, international judges have played a key role in the ongoing development of a hybrid international criminal procedure, charting a path between the adversarial and inquisitorial models of criminal trial practice.⁶¹⁶ Such developments have also occurred in substantive international criminal law. A memorable clash between judges from different systems occurred in the ICTY case of *Prosecutor v. Dražen Erdemović*.⁶¹⁷ Judges debated how to rule on charges against Dražen Erdemović, who had killed seventy people while acting under considerable duress.⁶¹⁸ The judges trained in the common law tradition argued for conviction with a minimal sentence, whereas the judge trained in the civil tradition argued for acquittal.⁶¹⁹ Although only one decision could be reached,⁶²⁰ the engagement of judges from different traditions ensured that the various methodological perspectives were considered in the decision-making process. Meernik et al.’s finding that there is no significant correlation between native legal tradition and judges’ sentencing decisions at the international criminal tribunals suggests that this kind of interaction is indeed creating a hybrid standard.⁶²¹ This in turn helps to explain the basis for the strong standard of legal systemic diversity at the ICC.⁶²²

Although nationality plays an important role in determining the legal tradition in which a judge is trained, the two are not perfect correlates. A number of states, particularly in the post-colonial world, have mixed legal systems. Both Somalia and Bahrain have customary law, civil law, common law, and Islamic law systems all within the same state.⁶²³ Similarly, Egypt has civil law and Islamic law; Sudan has common law and Islamic law; Ghana has common law and customary law; and India has common law, Islamic law, and customary law.⁶²⁴ By contrast, almost all of the countries in Europe and South America are pure civil law systems, while Britain (except Scotland), Ireland, Australia, New Zealand, the U.S. (except Louisi-

615. *Id.* at 321.

616. Remarks of Cassese, *supra* note 280, at 206-08.

617. *Prosecutor v. Dražen Erdemović*, Case No. IT-96-22-A (Oct. 7, 1997).

618. *Id.* at 6.

619. Remarks of Cassese, *supra* note 365, at 92-94.

620. Erdemović was convicted. *Prosecutor v. Dražen Erdemović*, Case No. IT-96-22-A (Oct. 7, 1997).

621. James Meernik, Kimi King & Geoff Dancy, *Judicial Decision Making and International Tribunals: Assessing the Impact of Individual, National and International Factors*, 86 SOC. SCI. Q. 683 (2005) (finding that variation in sentencing at the ICTY and the ICTR could not be explained by variation in the legal traditions in which the judges trained and practiced).

622. As ten Brinke and Del observe, “mere interpretation of law can lead to very different results when judges have their origins in different legal cultures. So adequate [legal] cultural representation is also very important for the credibility of the ICC.” Daniel ten Brinke & Hans-Michael Del, *Summary*, in *JUDGES IN THE SERVICE OF THE STATE?*, *supra* note 216, at 93, 100.

623. JURIGLOBE, <http://www.juriglobe.ca/eng/index.php> (last visited Feb. 22, 2011).

624. *Id.*

ana), and Canada (except Quebec) are all pure common law systems.⁶²⁵ Given these complexities, it would be possible to appoint a bench composed of fifteen judges of fifteen different nationalities, each of whom had been trained in the same legal tradition. Equally, it would be possible to appoint a bench including four judges of the same nationality, each of whom had been trained in a different legal tradition.

Regional diversity is valuable in a different way. Jonathan Sunnarvik argues diversity on domestic courts ensures “that the judges are able to evaluate questions at hand from the point of view of various sectors of society.”⁶²⁶ Similarly, Harry Edwards argues of his own court that “diversity has improved our decision making” due in part to the “rich range of information and perspectives” it injects into the deliberative process.⁶²⁷ This is a question of developing in the judiciary a grasp of the community whose perspective it must adopt in order to achieve impartially. Diversity helps each judge to understand through collegial deliberation the “prevailing values of the society in which [she] operate[s].”⁶²⁸

In many ways the most important social divisions in the international community are regional, not national. Traditionally, this has been most notable with respect to the division between wealthy, industrial, ex-colonist states and developing post-colonial states, although this distinction seems increasingly outdated. The ICJ came under heavy criticism for not having sufficient understanding of the post-colonial world in the wake of its decision in *South West Africa II*.⁶²⁹ The perceived failure was the Court’s lack of judges with life experiences that gave them an appreciation for the importance of self-determination and post-colonialism in the international community at large.⁶³⁰ This led Lachs to write that the ICJ’s diversity requirement “should secure the ‘representation’ of *groups of states* which originally did not constitute a part of the *European* system of the law of nations but have since been drawn within or acceded to it and at the same time have been affecting its development. In brief, it should include ‘representatives’ of many races, colors of skin and *continents*.”⁶³¹ Similarly, Georget et al. argue that “the single most important understanding [of diversity] concerns regional representation, with the concept of ‘region’ involving not only geographical considerations, but also political-ideological, ethno-cultural, religious and linguistic elements.”⁶³²

625. *Id.*

626. Sunnarvik, *supra* note 321, at 28.

627. Edwards, *supra* note 367, at 1667-68.

628. STURGESS & CHUBB, *supra* note 132, at 148 (quoting Lionel Murphy).

629. *South West Africa, Second Phase (Ethiopia & Liberia v. S. Afr.)*, Judgment, 1966 I.C.J. 6 (July 18).

630. Edward McWhinney, *Internationalizing the International Court: The Quest for Ethno-Cultural and Legal-Systemic Representativeness*, in 1 *ESSAYS IN HONOUR OF JUDGE TASLIM OLAWALE ELIAS* 277, 287-89 (Emmanuel G. Bello & Prince Bola A. Ajibola eds., 1992).

631. Lachs, *supra* note 292, at 53-54 (emphasis added).

632. Patricia Georget, Vladimir Golitsyn, Ralph Zacklin, *Article 4*, in *THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE: A COMMENTARY*, *supra* note 64, at 225, 234.

Finally, a number of international judges had meaningful professional experiences in a diverse array of countries prior to ascension to the bench,⁶³³ many trained in mixed systems arrive at the international bench experts in two or more legal methodologies,⁶³⁴ and still others experienced their home states from unique socio-political perspectives.⁶³⁵ Increasingly, “[f]or the Court to be representative, it is not so important to ask from which particular place judges come, but from where they come mentally or intellectually.”⁶³⁶

In sum, while regional, legal-systemic, and individual internal diversity each benefits international courts, nationality diversity has no obvious additional value. Ultimately, it is difficult to escape the original-approach justification for the nationality limit—namely that it dilutes the influence of any one state on the court. As argued above, that function is unnecessary, ineffective, and self-defeating.

A final word on nationality diversity must go to the ECJ. The ECJ is unusual in requiring that one national of each member state be appointed to the Court, rather than imposing a limit on the number of judges of any nationality.⁶³⁷ Unlike the relevant provisions of other courts, this rule seems tailored to promoting diversity, rather than alleviating anxiety about judicial nationalism. Moreover, a diversity-based reading is bolstered by the fact that the ECJ panel adjudicating an inter-state dispute could include a national of one party, but no national of the other, and neither party would have any basis for challenging the panel’s composition.⁶³⁸ Finally, historically the ECJ had seven judges for six member states, and would appoint two judges of the same nationality,⁶³⁹ suggesting that the updated provi-

633. HIGGINS, *The International Court of Justice and Africa*, in 2 THEMES AND THEORIES, *supra* note 232, at 1056, 1058 (“Judge [Isaac] Forster (Senegal) had had a judicial career in a variety of African countries before being elected to the Court, where he was a Member from 1964-1982.”); McWHINNEY & KAWANO, *supra* note 352, at 24 (chronicling Oda’s legal research in Germany and Latin America); V.C. GOVINDARAJ, JUDGE NAGENDRA SINGH OF THE WORLD COURT, at vii (1999) (“Judge Nagendra Singh’s personality was a harmonious blend of the East and the West, in that he combined in him on the one hand a commendable knowledge of Western legal systems and, on the other, a grasp of the quintessential principles and norms that the Vedic and Upanishadic texts offer to mankind. His study of law at Cambridge early in life gave him an opportunity to be initiated into, and gradually gain mastery over, the pre-1945 Law of Nations, which may aptly be described as the European Law of Nations.”).

634. Consider, for example, the personal history of former ICJ judge Taslim Elias, who was an expert on customary law in addition to common law and international law. Indeed, writes Philip Nnaemeka, Elias “never stopped for a moment from writing on, preaching, teaching, and, indeed, living customary laws.” Philip Nnaemeka, *The Contribution of His Excellency Judge Taslim Olawale Elias to African Customary Law*, in 2 ESSAYS IN HONOUR OF JUDGE TASLIM OLAWALE ELIAS, *supra* note 630, at 515, 519-25, 539.

635. Remarks of Cassese, *supra* note 280, at 210 (Antonio Cassese recalls of the ICTY during his tenure, “The Judge from Egypt is a Catholic, the one from Malaysia is a Hindu, the one from Nigeria was a Protestant, and the Judge from Pakistan was a Zoroastrian (only 20,000 Zoroastrians live in Pakistan, out of 150 million people).”).

636. Fassbender, *supra* note 253, at 281.

637. See *supra* notes 103, 151 and accompanying text.

638. See *supra* notes 155-158 and accompanying text.

639. Tomuschat, *supra* note 569, at 354. Consider also that the current E.U. General Court [formerly the Court of First Instance], from which the Court of Justice hears

sion is intended not to limit the number of nationals, but to ensure that every state has a national on the Court. As argued above, nationality-diversity is not a particularly valuable end in itself. However, in contrast to those of its peers, the ECJ's provision on this issue does seem to rest on a commitment to nationality diversity, not anxiety about judicial nationalism. In that sense the above tentative classification of the ECJ as an original-approach derivative should be rejected.⁶⁴⁰ The ECJ is essentially a quasi-cosmopolitan court.

VI. The Cosmopolitan Solution

The arguments presented above lead to the conclusion that the original approach is at best ineffectual and at worst counterproductive. The implications of this conclusion are different for different audiences, but for none can the original approach or its derivatives be defended.

For those who accept the above argument that judicial nationality ought not provoke concerns about objective or subjective impartiality, the original approach is clearly unnecessary. However, even for those who take seriously nationality-based concerns about objective impartiality or independence, the original approach exacerbates the problem. Put simply, objective impartiality would be bolstered by a constitutional framework that expresses trust in judicial professionalism by discarding nationality limits, nationality-based recusals, and judge *ad hoc* provisions.

The World Trade Organization Appellate Body, the Caribbean Court of Justice, and the European Free Trade Association Court of Justice are important practical exemplars of this cosmopolitan alternative.⁶⁴¹ I focus here on the WTO AB and the CCJ. The WTO AB establishes that a well-functioning and well-respected classic international court need not adopt the original approach or any derivative provisions.⁶⁴² Indeed, even the strongest critics of international courts are unable to seriously challenge the efficacy of the WTO AB.⁶⁴³ The CCJ is also of particular interest,

appeals, is required, under the same provision, to include "at least one judge per Member State." TEU, *supra* note 35, art. 19.

640. See *supra* note 152 and accompanying text.

641. See *supra* Section II.C. As noted in that Section, the EFTACJ is also a cosmopolitan court, and the CJAC is at least theoretically cosmopolitan. I focus here on the CCJ and the WTO AB rather than the EFTACJ, because the WTO AB demonstrates the feasibility of the model on the global stage, while the CCJ has a particularly interesting history and practice that exemplifies in stark relief the flexibility of the cosmopolitan approach with respect to judicial nationality.

642. Terris et al. count the WTO AB among the "most active and consequential" international courts. TERRIS ET AL., *supra* note 5, at 5.

643. Posner & Yoo, *supra* note 433, at 44-54. Posner and Yoo present empirical evidence that they claim shows that independent tribunals are less effective than dependent tribunals, which include the right of parties to appoint judges *ad hoc* or at least have a national on the bench. However, they admit that to allow them to reach this conclusion, the WTO AB must be "put aside." *Id.* at 54. Indeed, their numbers show that states use the WTO AB and comply with WTO AB decisions at a higher rate than they tend to use other international courts or comply with the decisions of other international, apart from the ECJ and ECtHR. *Id.* at 48, 53.

because its cosmopolitan statute has allowed two pairs of co-nationals and two nationals of non-members to sit simultaneously on the seven-judge bench.⁶⁴⁴ This has not prevented the CCJ from being an effective court of regional integration,⁶⁴⁵ nor has the Court suffered any noticeable legitimacy fallout from those who might allege objective partiality.

If proponents of the original approach are concerned about judicial independence, they endorse a palliative that violates the principle it seeks to protect. Instead, as John R.W.D. Jones argues, “Judicial independence may be ensured through: (1) the election procedure; (2) length of terms; (3) security of tenure; and (4) appropriate remuneration.”⁶⁴⁶ Concerns are often raised regarding international courts on each of the first two of these dimensions⁶⁴⁷ and many suggestions for reform have been offered.

With respect to election procedures, for example, Georges Abi-Saab argues that ICJ judges should be appointed by a body like the International Law Commission or the Institut de Droit International.⁶⁴⁸ The CCJ provides an example of such a model at the regional level. Appointments to the Caribbean Court of Justice are made directly by an eleven-person Regional Judicial and Legal Services Commission composed of members of regional and national bar associations, a member from one of the signatories’ judicial service commissions, members of civil society nominated by the Organization of Eastern Caribbean States, leading academics, and the President of the Court.⁶⁴⁹ The President is the only judge not appointed directly by the Commission. Instead, he is appointed by a 75% supermajority of the Contracting Parties on the recommendation of the Commis-

644. See *supra* notes 169-170, 175-176 and accompanying text.

645. Terris et al. count the CCJ among the “most active and consequential” international courts. TERRIS ET AL., *supra* note 5, at 5. The Court is in its early stages of development. Nonetheless, several landmark original jurisdiction decisions have already been handed down, including: *Trinidad Cement Ltd. (TCL) & TCL Guyana Inc. (TGI) v. Guyana* [2008] C.C.J. No. 1 (OJ) (establishing that a private entity may file suit against a member state, including its own state, before the CCJ); *Trinidad Cement Ltd v The Caribbean Community* [2009] C.C.J. 2 (OJ) (establishing that a private entity may file suit before the CCJ against the Caribbean Community for the actions of the latter’s organs); *Doreen Johnson v. Caribbean Center for Development Administration* [2009] C.C.J. 3 (OJ) (establishing that suits may not be brought against Community institutions, but affirming that suit could be brought against the Community itself, since the latter has full juridical personality and since Community organs and bodies are an integral part of the Community). For a recent landmark appellate jurisdiction decision, see *Florencio Marin & Jose Coye v. Attorney General of Belize* [2011] CCJ 9 (AJ) (ruling in favor of the Attorney General in Belize taking legal action against two former government ministers for losses suffered by the state as a result of misfeasance).

646. Jones, *supra* note 105, at 255.

647. On the problem of the election procedure, see, for example, STURGESS & CHUBB, *supra* note 132, at 136-43; Abi-Saab, *supra* note 281, at 176; TERRIS ET AL., *supra* note 5, at 23-25; Georget et al., *supra* note 632, at 231-33. On the problem of short renewable terms, see, for example, Shelton, *supra* note 104, at 38-39; Aznar-Gómez, *supra* note 64, at 214; Comments of Antonio Cassese, Ronald Dworkin, and Dieter Grimm, *Discussion: Judicial Activism*, in *JUDGES IN CONTEMPORARY DEMOCRACY*, *supra* note 11, at 26, 55-56; J. Read, *The World Court and the Years to Come*, 2 CANAD. Y.B. INT’L L. 164 (1964).

648. Abi-Saab, *supra* note 281, at 181.

649. CCJ Agreement, *supra* note 33, art. 5, paras. 1, 3.

sion.⁶⁵⁰ Focusing on the ICJ, Reisman proposes a procedure whereby prior to election by the U.N. bodies, judicial nominees would be publicly rated as to their competence and expertise by a committee of legal experts and NGOs.⁶⁵¹ Such proposals may well lead to a greater professionalization of the international judiciary, strengthening the judicial role ethic and augmenting impartiality.⁶⁵²

With respect to length of terms, Dinah Shelton's comparative study of a number of international courts leads her to conclude "a lengthy term coupled with a mandatory retirement age seems to provide appropriate guarantees while avoiding some of the negative consequences of life tenure."⁶⁵³ A number of jurists and practitioners have made similar suggestions.⁶⁵⁴ Again, the CCJ provides a practical example of such an approach. Once appointed, CCJ judges have life tenure, with a mandatory retirement age of 72, extendable to 75 at the discretion of the Regional Judicial and Legal Services Commission.⁶⁵⁵ Overall, Kate Malleson has hailed the Caribbean Court as a model international court with respect to judicial independence.⁶⁵⁶

In sum, for those concerned about the impact of nationality on the objective impartiality of international judges, or about the independence of international judges from their national states, the original approach is a wrongheaded response. It does not solve the putative dangers and is likely to exacerbate them. Other independence-bolstering mechanisms are of greater utility.⁶⁵⁷ The cosmopolitan model exemplified by the CCJ and the

650. *Id.* art. 4, paras. 6.

651. Reisman, *supra* note 282, at 25-26.

652. Interestingly, Voeten found in his study of ECtHR voting behavior that "[J]udges who were diplomats in their previous careers were about 20% more likely to favor their national governments than were judges who came from different career tracks." Voeten, *supra* note 538, at 428. Given the importance of participation in the legal community in developing the role ethic appropriate to judging (*see supra* notes 337-344 and accompanying text), this should come as no surprise. Whereas the legal career, and to a lesser extent the legal academic career, emphasizes the central importance of impartiality in judging, the diplomatic career prioritizes national interest above all else. It should be expected, then, that the diplomat will face a far greater challenge in adapting to the judicial role ethic upon her ascension to the bench. On the parallel domestic situation, *see*, for example, BAUM, *supra* note 337, at 115 ("For the 'political' lawyer who becomes a judge, the legal profession and its ways of thinking may be quite peripheral and reputation among lawyers a matter of little concern. For the judge who was immersed in the law as a profession, the values of the bar have much greater relevance.").

653. Shelton, *supra* note 104, at 38-39.

654. Resolution of the Institut de Droit International, 1954, Aix-en Provence session, art. 4; Abi-Saab, *supra* note 281, at 185; Meron, *supra* note 217, at 362-63.

655. CCJ Agreement, *supra* note 33, art. 9; Protocol to the Agreement Establishing the Caribbean Court of Justice Relating to the Tenure of Office of Judges of the Court (2007), <http://www.caribbeancourtsofjustice.org/courtinstruments/Protocol%20relating%20to%20the%20Tenure%20of%20Judges,%20CCJ%20with%20signatures%20June%202007.pdf>.

656. Kate Malleson, *Promoting Judicial Independence in the International Courts: Lessons from the Caribbean*, 58 INT'L & COMP. L.Q. 671 (2009).

657. *But see* Smith, *supra* note 263, at 230-31 (arguing that increasing the independence of ICJ judges would be of little value and would "strip the ICJ of significant legitimacy in the eyes of many of its state supporters").

WTO AB is a more appropriate approach to judicial nationality.

Of course, for those convinced that judges are irredeemably subjectively biased towards their states as a matter of natural human emotion, the cosmopolitan approach is no solution. However, even for this audience, the original approach fails. For the reasons articulated in Part IV it does not remedy, and indeed exacerbates, the very problem it aims to counteract. The only plausible solution for this audience is a wholesale rejection of international adjudication and an insistence that international disputes should instead be resolved via conciliation, mediation, or the longstanding system of international arbitration.⁶⁵⁸ Under such a system, the party (or parties) on each side of the dispute selects a number of arbitrators equal to that selected by the party (or parties) on the other side of the dispute. These arbitrators together agree on a presiding arbitrator.⁶⁵⁹ Such a model provides a form of aggregate impartiality even if one assumes the subjective partiality of the individuals selected by each side.

This, of course, only provides a plausible alternative to international courts' role in adjudicating inter-state disputes or disputes between states and major organizations. Thus, many functions provided by regional courts of integration and regional human rights courts, such as hearing complaints brought by individual citizens against their states, hearing disputes between private parties and regional community organs, or issuing opinions in response to the requests of domestic courts,⁶⁶⁰ could not be replaced in this way.⁶⁶¹ If one accepts the premise of subjective judicial nationalism, those functions would presumably need to be discarded altogether.⁶⁶²

Even with respect to inter-state disputes, the replacement of the existing system of courts with a system of arbitration would not be costless. Most notably, international courts are better positioned to contribute to

658. For an argument generally in favor of such a wholesale change, see Posner & Yoo, *supra* note 433.

659. See generally Convention for the Pacific Settlement of International Disputes [Hague I] arts. 20–29, July 29, 1899, available at <http://www.pca-cpa.org/upload/files/1899ENG.pdf>; Convention for the Pacific Settlement of International Disputes [Hague II] arts. 41–50, Oct. 18, 1907, available at <http://www.pca-cpa.org/upload/files/1930conventionPD.pdf>; PERMANENT CRT. OF ARB., http://www.pca-cpa.org/showpage.asp?pag_id=363 (last visited Feb. 20, 2012); Olivios Protocol for the Settlement of Disputes in Mercosur arts. 9–16, Feb. 18, 2002, 2251 U.N.T.S. 288.

660. See sources cited *supra* notes 35, 58 and accompanying text.

661. Indeed, even supposedly 'inter-state' disputes under such regimes would not be addressed adequately by arbitration. Tomuschat, *supra* note 569, at 404 ("The composition of the arbitration tribunal is primarily based on the idea of parity between the disputing parties, that is, between the aggrieved party and the one allegedly causing the injury. In an economic community such purely bilateral legal relationships have practically come to an end. If a country does not live up to its treaty obligations, it automatically places all other Member States at a disadvantage, so that there is no other institutional alternative open except for all Member States to participate in the composition of the tribunal without regard to the formal arrangement of the parties.").

662. There may be an exception for regional courts of integration that monitor regions so tightly integrated that they are closer to states than international alliances. See, e.g., Posner & Yoo, *supra* note 433, at 54–67 (2005).

the development of international law than are arbitral tribunals. First, unlike many arbitral decisions, international court decisions are made public and substantiated by reasons.⁶⁶³ Second, international courts can plausibly speak for the international (or regional) community, rather than merely the parties to the specific dispute. And third, the relative consistency in international courts' bench composition facilitates a more consistent elaboration of legal principles over time.⁶⁶⁴

Conclusion

Ultimately, the original approach is based on a premise contrary to standard conceptions of independence and impartiality. Moreover, even on their own terms, the use of nationality limits, nationality-based recusals, and judges *ad hoc* do not stand the test of rationality. International judges must be trusted to act as judges. This is not to say that there is not room for improving judicial professionalism at the international level. Shelton, for example, argues for the formation of a professional association of international judges⁶⁶⁵ and echoes Reisman's earlier call for a code of international judicial ethics.⁶⁶⁶ Abi-Saab advocates the appointment of judges by a professional body rather than a political assembly or council.⁶⁶⁷ Those seeking to improve international judging should follow these examples by focusing on augmenting the professionalism of the international judiciary and implementing independence-bolstering mechanisms such as those described in Part VI, *supra*. The continued focus of so many courts on judicial nationality is anachronistic and self-defeating.

The CCJ and the WTO AB exemplify a cosmopolitan approach to judicial nationality, demonstrating that international courts can extract themselves from the mire of anxiety about judicial nationalism and function effectively at both the global and the regional levels. The legitimacy of the institutions of international justice would benefit if this cosmopolitan paradigm were to become the guiding model as new international courts are created and existing courts are reformed.

663. See, e.g., Remarks of Shabtai Rosenne, *Discussion, To which Extent and for which Questions is it Advisable to Provide for the Settlement of International Legal Disputes by other Organs than Permanent Courts?*, in JUDICIAL SETTLEMENT OF INTERNATIONAL DISPUTES, *supra* note 222, at 147, 155.

664. For more on the law development function of international courts as compared to arbitral tribunals, see, SHAHABUDEEN, *supra* note 15, at 35-44; Rudolf L. Bindschedler, *Report: To which Extent and for which Questions is it Advisable to Provide for the Settlement of International Legal Disputes by other Organs than Permanent Courts?*, in JUDICIAL SETTLEMENT OF INTERNATIONAL DISPUTES, *supra* note 222, at 133, 139-41; Comments of Louis B. Sohn, Shabtai Rosenne, Ulrich Scheuner, and Denise Bindschedler-Robert, in JUDICIAL SETTLEMENT OF INTERNATIONAL DISPUTES, *supra* note 222, at 147, 155-56, 159, 163.

665. Shelton, *supra* note 104, at 62.

666. *Id.*; REISMAN, *supra* note 436, at 116-17.

667. Abi-Saab, *supra* note 281, at 181.