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# The Challenge and Recusal of Judges of the International Court of Justice

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# Challenges and Recusals of Judges and Arbitrators in International Courts and Tribunals

*Edited By*

Chiara Giorgetti



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*Per Charlotte e Alexander, semper*



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## Preface

This book builds on a panel I organized and chaired at the Annual Meeting of the American Society of International Law in April 2014. The panel sparked an important conversation among participants and highlighted the importance of issues related to challenges and recusals of judges and arbitrators for international dispute resolution. After the panel, Marie Sheldon, Publishing Director of International Law at Brill/Nijhoff Publishers, suggested I collect the presentations made at the panel in a book. I was intrigued by the idea and—so, this book was born.

I asked the panelists and other experts to join the dialogue on this key issue and I was gratified by the positive response I received. This book now combines expertise from academia as well as from all realms of practice, from law firm practitioners, to former judicial clerks, arbitrators and members of several secretariats. I am grateful to all contributors to this book for their excellent work. Of course, their contributions are made on a personal note only and do not represent the positions of any of the institutions to which they are or may have been affiliated.

My deep gratitude also goes to Sheherezade Malik, a Juris Doctor student from Richmond University School of Law, for her impeccable research and editorial assistance. She has done a great job.

I am also sincerely and profoundly grateful to my family, Andre, Alex and Charlotte, without whom nothing has meaning.

C.G.

Washington D.C.

These initial chapters provide an essential foundation for the analysis of challenges and recusal of judges and arbitrators. As such, they assess several specific issues, including the available procedures, reasons asserted to initiate a challenge procedure, who decides the challenges and results of the challenge procedures. Importantly, they also allow for a comparison among different forums.

The following three chapters analyze challenges from a different perspective. Namely, they examine specific issues that are often reasons for parties to begin a challenge procedure. In chapter eight, Romain Zamour considers issue conflicts and the reasonable expectation of an open mind, specifically in the context of the challenge decision in *Devas v. India*. Judith Levine, in chapter nine, examines the important issues of late-in-the game challenges and spurious challenges and resignations within the context of tactical challenges. In chapter ten, Luke Sobota assesses repeat arbitrator appointments in international investment disputes, a oft-cited reason to challenge arbitrators.

In the next three chapters, the analysis shifts to personal perspectives. In chapter eleven, Charles Brower, Sarah Melikian and Michael Daly recount tall and small tales of a challenged arbitrator from a first-hand experience. Next, in chapter twelve, Andrew Loewenstein describes the approach and consideration of counsel to challenges in international disputes. Finally, in chapter thirteen, Hansel Pham and Imad Khan examine challenges to party representatives and counsel before international courts and tribunals a unique mechanism at times used as an alternative to challenge the decision-maker.

The final two chapters analyze challenges from a geographical perspective and seek to determine whether there is a regional variation to challenges. In chapter fourteen, Lucy Reed, John Choong and Chan Yong Wei explain challenges to arbitrators in Asia, and especially the position before the Singapore and Hong Kong Courts. Finally, in chapter fifteen, Jonathan Hamilton, Francisco Jijon and Ernesto Corzo consider arbitrators challenges in Latin America.



# The Challenge and Recusal of Judges of the International Court of Justice

*Chiara Giorgetti*

## 1 Introduction

The rules and mechanisms to challenge and recuse a judge of the International Court of Justice (“ICJ”) are unique and pertain to the control mechanisms proper to permanent international dispute resolution bodies, characterized by a plurality of representative, elected judges.

Indeed, the Statute of the ICJ (“Statute”)<sup>1</sup> provides a series of control mechanisms aimed at ensuring the independence and impartiality of its judges.<sup>2</sup> The drafters of the Statute adopted a multi-tiered approach, relying first on self-control of each judge, and then envisaging a subsidiary control role for the President and the Court as a whole. Third-party requests for recusals are provided for in the Statute, but are extremely rare. The Court relies mostly on a self-regulation system, by which it is for a judge to recuse him or herself when the case so requires. The President of the Court and the Court as a whole only step in to provide a back-up and ensure that the framework is respected. Thus, should reasons exist for which a judge should be removed or not sit in a case, the President and the Court retain the power to take the final decision, *sua sponte* or as requested by a party, to remove the judge.

This approach is understandable, not only because it follows the tradition established by the predecessor of the ICJ, the Permanent Court of International Justice (“PCIJ”), but also because the situation at the ICJ is intrinsically

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\* I am grateful to Saud Aldawsari from Richmond University School of Law for his excellent research assistance for this chapter.

1 Statute of the International Court of Justice, *concluded* June 26, 1945, 3 Bevens 1179, 59 Stat. 1031, T.S. 993 [hereinafter ICJ Statute].

2 The applicable legal framework can be found in Arts. 2, 13–20, 24 of the Statute of the Court and in Arts. 1–14 and 34 of the Rules of the Court and Practice Directions VII and VIII. See ICJ Statute; The ICJ Rules of Procedure, *adopted* April 14, 1978, 17 I.L.M. 1286 (1978) [hereinafter ICJ Rules]; Practice Direction VII, *adopted* Oct. 2001, ICJ, <http://www.icj-cij.org/documents/index.php?p1=4&p2=4&p3=0>; Practice Direction VIII, *adopted* Oct. 2001, ICJ, <http://www.icj-cij.org/documents/index.php?p1=4&p2=4&p3=0>.

different from that of arbitration: the ICJ is a permanent court, which acts as the principal judicial organ of the United Nations in inter-states disputes, its the bench is composed of fifteen elected judges who serve for relatively long terms.<sup>3</sup> Thus, differently from arbitration, judges do not know what cases they will be called to decide and incompatibilities could arise after their election to the bench.

Though self regulation has to a large extent be sufficient, the existing control system calls for examination, especially in light of the increased caseload of the Court and the fact that the judges of the ICJ remain active members of the international legal community, including as international arbitrators.

This chapter first briefly explains how the ICJ judges are elected and nominated. It then explores the issues of relative and functional incompatibilities of judges. Next, it describes and assesses existing mechanisms of control, including resignation, self-recusal and disqualification of judges. Finally, it assesses the three publicly known cases of recusals. The chapter concludes with a brief assessment of the practice.

## 2 The Judges of the International Court of Justice

The bench of the ICJ, the principal judicial organ of the United Nations, comprises fifteen judges elected for a renewable term of nine years.<sup>4</sup> Article 3(1) of the Statute of the Court, the instrument that regulates the constitution and the function of the ICJ, provides that no two judges may be nationals of the same state.<sup>5</sup>

Article 2 of the Statute specifies the requirements that each member of the Court must fulfill in order to be elected. It provides that:

The Court shall be composed of a body of independent judges, elected regardless of their nationality from among persons of high moral character, who possess the qualifications required in their respective countries

<sup>3</sup> ICJ Statute Art.3

<sup>4</sup> ICJ Statute Arts. 3, 13. *See generally* Robert Kolb, *The International Court of Justice* 109–118 (2013); 1 Shabtai Rosanne, *The Law and Practice of the International Court of Justice 1920–2005*, at 408 (2nd ed., 2006); *Statute of the Court*, Int'l Ct. Just.[ICJ], <http://www.icj-cij.org/documents/?p1=4&p2=2> (last visited Apr. 5, 2015) (“Statute of the International Court of Justice is annexed to the United Nations, of which it forms an integral part.”).

<sup>5</sup> ICJ Statute Art. 3(1).

for appointment to the highest judicial offices, or are jurisconsults of recognized competence in international law.<sup>6</sup>

The Statute further specifies that members of the Court elected by the General Assembly and by the Security Council of the United Nations should come from a list of persons nominated by the national groups in the Permanent Court of Arbitration (“PCA”) or in cases of Members of the United Nations not represented in the PCA, by national groups appointed for this purpose by their governments under the same conditions as those prescribed for PCA members.<sup>7</sup> It is recommended that in making their nominations, national groups consult their highest court of justice, legal faculties and schools of law, and their national academies and national sections of international academies devoted to the study of law. Groups may not nominate more than four persons, not more than two of whom shall be of their own nationality.<sup>8</sup> The number of candidates nominated by a group should not be more than double the number of seats to be filled.<sup>9</sup>

In electing members, the General Assembly and the Security Council proceed independently of one another. Candidates are then elected when they obtain an absolute majority of votes in both the General Assembly and in the Security Council.<sup>10</sup> During the election, electors are required to bear in mind two considerations, and namely “not only that the persons to be elected should individually possess the qualifications required, but also that in the body as a

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6 ICJ Statute Art. 2. See generally Aznar-Gomez, *Article 2, in* The Statute of the International Court of Justice, A Commentary (Andreas Zimmermann, Karin Oellers-Frahm & Christian Tomuschat eds., 2nd ed., 2012).

7 ICJ Statute Art. 4.

8 *Id.* Art. 6.

9 *Id.* Art. 5.

10 *Id.* Arts. 8, 10. Article 10 provides that candidates who obtain an absolute majority of votes in both the General Assembly and the Council are elected. If no candidate receives an absolute majority on the first ballot in either the General Assembly or the Council, a second ballot is held. Balloting continues until a candidate has obtained the required majority in both bodies. Articles 11 and 12 of the Statute provide that if the General Assembly and the Council do not select the same candidate, they will proceed to a second meeting and, if necessary, a third meeting, following the same procedures. If by then the position is not filled, the Council and General Assembly may decide to convene a conference of six members (three from each body) to recommend a candidate for acceptance by both bodies. *Id.* Arts. 11–12.

whole the representation of the main forms of civilization and of the principal legal systems of the world should be assured.”<sup>11</sup>

### 2.1 *The Duties of Elected Judges*

Judges at the ICJ serve in their personal capacity and not on behalf of any government. Judges of the nationality of each of the parties in a case retain their rights to sit in the case before the Court, unless a specific incompatibility exist.<sup>12</sup>

All judges are required, upon taking up their duties, to make a solemn declaration in open court that they “will perform [their] duties and exercise [their] powers as judge honourably, faithfully, impartially and conscientiously.”<sup>13</sup> This declaration is along the lines of the declarations that judges make in other international courts.<sup>14</sup>

11 ICJ Statute Art. 9. In practice, this requirement is satisfied with the convention of equitable geographical distribution. The practice is to have one judge each from each of the permanent members of the Security Council (China, France, Russia, UK and the US) and the remaining ten seats distributed as following: five for Western Europe and Other States, three for Africa, three for Asia, two for Easter Europe and two for Latin America and Caribbean countries. See Ruth MacKenzie et al., *Selecting International Judges: Principle, Process and Politics* 28 (2010).

12 ICJ Statute Art. 31(1).

13 Article 4 of the Rules of the Court specifies the text of the declaration to be read in court. Judges are required to state that: “I solemnly declare that I will perform my duties and exercise my powers as judge honourably, faithfully, impartially and conscientiously.” ICJ Rules Art. 4. This declaration is to be made at the first public sitting at which the Member of the Court is present.

14 For example, judges at the International Criminal Court (ICC) take a public oath declaring: “I solemnly undertake that I will perform my duties and exercise my powers as a judge of the International Criminal Court honourably, faithfully, impartially and conscientiously, and that I will respect the confidentiality of investigations and prosecutions and the secrecy of deliberations”. ICC Rules of Procedure and Evidence, *adopted* Sept. 9, 2002, ICC Doc. ICC-ASP/1/3 (Part. II-A); see Press Release, Int’l Criminal Court, Six Newly Elected ICC Judges to be Sworn in on 10 March 2015 (Mar. 6, 2015), [http://www.icc-cpi.int/en\\_menus/icc/press%20and%20media/press%20releases/Pages/ma178.aspx](http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/ma178.aspx). At ICSID, arbitrators make a declaration that states, in the relevant part, that: “I shall keep confidential all information coming to my knowledge as a result of my participation in this proceeding, as well as the contents of any award made by the Tribunal. I shall judge fairly as between the parties, according to the applicable law, and shall not accept any instruction or compensation with regard to the proceeding from any source except as provided in the Convention on the Settlement of Investment Disputes between States and Nationals of Other States and in the Regulations and Rules made pursuant thereto.” ICSID Arbitration Rules of Procedure r. 6, *adopted* Apr. 2006, <https://icsid.worldbank.org/ICSID/StaticFiles/>

Members of the Court need to hold themselves permanently at the disposal of the Court, unless they are on leave or are prevented from doing so by illness or by another serious reason duly explained to the President.<sup>15</sup> Judges become international civil servants and are entitled to diplomatic privileges and immunities when engaged on the business of the Court.<sup>16</sup> Judges are remunerated as decided by the UN General Assembly.

Additionally, as explained below, the Statute provides for certain relative and absolute incompatibilities with the function of judge.

## 2.2 *Relative Incompatibility to Serve as Judge in the Court*

Under the Statute of the Court, judges must refrain from sitting in certain cases. Thus, Article 17(1) of the Statute provides that no member may act as agent, counsel, or advocate in any case.<sup>17</sup> Further, Article 17(2) also dictates that members may not participate in the decision of any case in which they have previously taken part “as agent, counsel, or advocate for one of the parties, or as a member of a national or international court, or of a commission of enquiry, or in any other capacity.”<sup>18</sup>

Relative incompatibility relates to the impartiality and independence of a judge in particularly cases, and is temporary.<sup>19</sup> Thus, a judge who acted as legal advisor to her government in a particular case before her election to the Bench, or was consulted and acted as an advocate when he was in academia before joining the Court is barred from serving as judges in the case on which they have worked. As a matter of legal policy, this is a fundamental guarantee for a fair process. Similar incompatibility guidelines are found in most provisions related to judicial independence.<sup>20</sup> Indeed, the provision should be interpreted

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basicdoc/partF-chap01.htm; see also Chapter 2 by Meg Kinnear and Chapter 7 by Makane Mbengue in this volume.

15 ICJ Statute Art. 23.

16 ICJ Statute Art. 19. See generally Gleider I. Hernández, *Impartiality and Bias at the International Court of Justice*, 3 Cambridge J. Int'l & Com. L. 183 (2012).

17 ICJ Statute Art. 17.

18 *Id.*

19 See JD Morely, *Relative Incompatibility of Function in the International Court*, 19 Int'l & Comp. L.Q. 316 (1970); Philippe Couvreur, *Article 17*, in *The Statute of the International Court of Justice*, A Commentary (Andreas Zimmermann et al. eds., 2nd ed., 2012); see also Shabti 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 Cts. & Tribunals 223 (2002).

20 See, e.g., Chapter 7 by Makene Mbengue in this volume (discussing challenges of judges in International Criminal Courts).

quite openly so as to include all situations that could create a reasonable doubt of lack of impartiality and of pre-judgment of a certain case.<sup>21</sup>

The Court, however, has historically accepted situations that would be seen as problematic in the present context of international litigation.<sup>22</sup> For example, Judge Helge Klaestad (Norway) continued to sit in the 1951 *Norwegian Fisheries* case (Norway v. UK) even though he had been a member of the Supreme Court of Norway that had given a decision invoked in the ICJ proceedings and relevant to them.<sup>23</sup> Similarly, Judges Jules Basdevant (France) and Green Hackworth (US) sat in the 1952 *Case Concerning the Rights of Nationals of the United States of America in Morocco* (France v. US), though they had been legal advisers to their respective ministers of foreign affairs at the time the case was under diplomatic discussion.<sup>24</sup> This tolerant interpretation of relative incompatibility appear to more prevalent in the initial days of the court, and followed closely the liberal practice adopted in this matter by the Permanent Court of International Justice.<sup>25</sup> Nowadays, ICJ judges are more likely to adopt a stricter interpretation of the incompatibility provision, and have in numerous occasions recused themselves in certain cases.<sup>26</sup> Indeed, of the thirty-six known cases of self-recusals, twenty-one occurred after the

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- 21 See, e.g., Chapter 8 by Romain Zamour in this volume (discussing prejudgment and open-minded requirements).
- 22 Kolb, *supra* note 4, at 136; see Couvreur, *Article 17, supra* note 17, at 379–81 (providing an overview of the practice of the PCIJ).
- 23 Kolb, *supra* note 4, at 136; see *Fisheries* (U.K. v. Nor.), Judgment, 1951 I.C.J. 116, 134 (Dec. 18) (referencing a Supreme Court case in which the Court relied to interpret the Decree that delimited the exclusive fishery zone at issue in the ICJ case).
- 24 Kolb, *supra* note 4, at 136. Green Haywood Hackworth served as the first U.S. judge on the International Court of Justice and was the longest running Legal Adviser to the US Department of State, serving from 1925 to his elevation to the bench in 1946. See *Rights of Nationals of the United States of America in Morocco* (Fr. v. U.S.), Judgment, 1952 I.C.J. 176 (Aug. 27).
- 25 See Kolb, *supra* note 4, at 136 (“As regards Article 17, paragraph 2 of the Statute, the PCIJ’s attitude was highly restrictive: normally it preferred to allow the judges in question to sit.”).
- 26 Couvreur, *Article 17, supra* note 17, at 382 (“Whenever a member of the Court, has, before taking office, acted as agent, counsel or advocate of one of the parties to a case, has had always disqualified himself from the case without this ever becoming an issue. The same has applied to any judge taking part in arbitration proceeding which have become the subject of proceedings before the Court.”); see, e.g., *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosn. & Herz. v. Serb. & Montenegro), Verbatim Record, 6 (Apr. 29, 1996, 10 a.m.), <http://www.icj-cij.org/docket/files/91/5105.pdf> (showing the self-recusals of Judge Higgins and Judge Fleischhauer by informing the

year 2000.<sup>27</sup> Thus, for example, Judge Rosalyn Higgins (UK) chose not to sit in the *Application of the Genocide Convention* case because she had been a member of the UN Committee of Human Rights and as such had previously dealt with certain matters likely to be material in the case.<sup>28</sup> Similarly, Judge Mohammed Bedjaoui (Algeria) recused himself from the bench in *Arbitral Award of 31 July 1989* case because he had been a member of the Arbitral tribunal in question.<sup>29</sup> Likewise, Judge Christopher Weeramantry (Sri Lanka) decided not to sit in the *Phosphate Lands in Nauru* case because he had previously acted as the Chair of a Commission of Enquiry that reported on the matters and could be pertinent in the case.<sup>30</sup>

This stricter approach to the relative incompatibility provision is preferable, and is better suited to the role and work of the Court. Indeed, in light of the increased workload of the Court, the important past professional experiences of each judge and the delicate balance ensuing from the right for judges of the nationality of the parties to sit in the case before the court,<sup>31</sup> the issue of relative incompatibility continues to be crucial. Moreover, while judges are barred from acting as counsel, advocate, or as members of a national or international court, they are routinely appointed as arbitrators in *ad hoc* investment and other international arbitrations which increases the possibility of the existence of relative incompatibility. A more detailed account of self-recusals in situations of relative incompatibility follows below, in section 3.3.

### 2.3 *Absolute (Functional) Incompatibility to Serve as Judge in the Court*

Article 16 of the Statute provides that members of the Court “may not exercise any political or administrative functions, or engage in any other occupation of a professional nature.”<sup>32</sup> Given the membership of the bench, which includes academics and high ranking international and national civil servants, this

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President that they have dealt in their previous capacities with certain matters likely to be material to that case).

27 See *infra*, table 1.

28 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, Verbatim Record, *supra* note 25, at 6; see also Rosanne, *supra* note 4, at 1064.

29 I.C.J. Yearbook 1989–1990, at 157 (1990); see also Rosanne, *supra* note 4, at 1064.

30 I.C.J. Yearbook 1991–1992, at 198 (1992); see also Rosanne, *supra* note 4, at 1064.

31 ICJ Statute Art. 31(1).

32 ICJ Statute Art. 16. See generally G. Guillaume, *De L'indépendance des Membres de la Cour Internationale de Justice*, in Boutros-Boutros-Ghali *Amicorum Discipulorumque Liber* 475 (1998); L.V. Prott, *The Role of the Judge in the International Court of Justice*, 10 *Revue Belge de Droit International* [RBDI] 473 (1974); G. Schwarzenberger, *The Problem of Functional Incompatibilities Before International Courts*, 27 *Y.B. World Aff.* 434 (1973).

functional incompatibility is at the core of the judicial function. Thus, once elected, Members of the Court routinely resign from all previous professional positions, including academic professorships and legal advisor or civil service positions, including with the United Nations.<sup>33</sup>

Because of its importance to guarantee a fair and independent process, all issues related to functional incompatibility and of the kind of activities that are allowed and prohibited by the Statute have retained the attention of the Court since its establishment, and have been analyzed by the Court in details. The Court established a three-member committee on the incompatibility of functions twice, in 1947 and 1967. The Committees' full reports are not published, though the ICJ Yearbooks confirmed similar guidelines to judges in four broad categories of possible professional activities, and namely: other forms of peaceful settlement of dispute (such as arbitration), scientific activities, public functions and occupation of a professional nature, and private activities. Judges retain a degree of discretion and in the event of a doubt should consult the President of the Court for guidance on acceptable and unacceptable activities.<sup>34</sup> A 1994 Report of the ICJ Advisory Committee on Administrative and Budgetary Questions delved deeper into functional incompatibility and concluded that, under Article 16, judges are prohibited from exercising any political or administrative function, irrespective to whether it is international, national or local ad commercial or not.<sup>35</sup> Judges are also barred from holding positions in any commercial concerns, engaging in the practice of law,

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- 33 For example, Judge James Crawford was Whewell Professor of International Law at Cambridge before joining the Court. Judge Bruno Simma was also Professor at the European University Institute. Judges Ronny Abrahams and Joan Donahue were civil servants, respectively with the French and US governments. Judge Abdulqawi Yusuf served for a long time with the United Nations. They all resigned from these posts upon taking office. See *Judge James Richard Crawford*, ICJ, <http://www.icj-cij.org/court/index.php?p1=1&p2=2&p3=1&judge=200> (last visited Apr. 4, 2015); *Judge Bruno Simma*, ICJ, <http://www.icj-cij.org/court/?p1=1&p2=2&p3=1&judge=14> (last visited Apr. 4, 2015); *President Ronny Abraham*, ICJ, <http://www.icj-cij.org/court/?p1=1&p2=2&p3=1&judge=136> (last visited Apr. 4, 2015); *Judge Joan E. Donoghue*, ICJ, <http://www.icj-cij.org/court/?p1=1&p2=2&p3=1&judge=171> (last visited Apr. 4, 2015); *Vice-President Abdulqawi Ahmed Yusuf*, ICJ, <http://www.icj-cij.org/court/index.php?p1=1&p2=2&p3=1&judge=168> (last visited Apr. 4, 2015).
- 34 Philippe Couvreur, *Article 16*, in *The Statute of the International Court of Justice*, A Commentary 365–366 (Andreas Zimmermann et al. eds., 2nd ed., 2012).
- 35 U.N. GAOR, 49th Sess., Supp. No. 7, Add.11, U.N. Doc. A/49/7/Add.11 (Mar. 8, 1995); see also Couvreur, *Article 16*, *supra* note 32, at 368.



maintaining membership in a law firm or rendering legal or expert opinions or holding any permanent teaching or administrative position.<sup>36</sup>

Interestingly, the 1994 Report also highlighted accepted practice, including the fact that judges could continue to “participate in other judicial or quasi-judicial activities of an occasional nature as well as scholarly pursuits in the sphere of international law as members of learned societies or as occasional lectures, provided that they give the fullest precedent to the duties of the court.”<sup>37</sup> The Court explicitly and definitively took up the question in its annual report to the General Assembly, where it confirmed that “the practice of the Court in permitting its members to engage in occasional activities outside of the Court that may be remunerated” included “acting as arbitrators in inter-State and private international arbitrations, serving in administrative tribunals or quasi-judicial organs of specialized agencies, lecturing, [and] writing.”<sup>38</sup> The Court observed that this kind of occasional practice went back to “the origins of the Permanent Court of International Justice” and observed that not only it was

in conformity with the Statute of the Court; the repeated endorsement by the international organs and by the States that appointed members of the Court as arbitrators shows their awareness of the contribution that the members of the Court may, by this function, make to the development of international law, and of the benefits deriving therefrom for all institutions concerned.<sup>39</sup>

The Court remarked that the practices involved a very limited number of judges for a very limited amount of time and that no adverse effect of the work of the court. In practice, several judges have served as arbitrators in *ad hoc* arbitrations, including in the *Eritrea/Yemen—Question of Territorial Sovereignty and Maritime Delimitation over a Group of Islands in the Red Sea* (Awards of 1998

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36 Couvreur, *Article 16*, *supra* note 32, at 367.

37 *Id.*

38 Annual Report to the General Assembly for the Period 1 August 1995 to 31 July 1996, U.N. GAOR, 51st Sess., Supp. No. 4, at 199, U.N. Doc. A/50/7/Add.11 (Dec. 12, 1995); *see also* Couvreur, *Article 16*, *supra* note 32, at 368.

39 Annual Report to the General Assembly, *supra* note 39; *see also* Couvreur, *Article 16*, *supra* note 32, at 368.

and December 17, 1999),<sup>40</sup> the *Abyei Arbitration*,<sup>41</sup> and the *Croatia/Slovenia* boundary disputes.<sup>42</sup> Moreover, a growing number of judges also act as arbitrators in international investment proceedings.<sup>43</sup>

Additionally, the President of the Court is also occasionally asked to serve as the appointing authority in *ad hoc* arbitrations.<sup>44</sup> Similarly, occasional invitations to deliver a speech or a class in a course or to address the public on the

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- 40 Former Judges Stephen Schwebel and Rosalyn Higgins were members of the arbitral tribunal in both phases of the Eritrea/Yemen dispute. See *Award of the Arbitral Tribunal in the First Stage of the Proceedings (Erti./Yemen), Territorial Sovereignty and Scope of the Dispute* (Oct. 9, 1998), [http://www.pca-cpa.org/showfile.asp?fil\\_id=458](http://www.pca-cpa.org/showfile.asp?fil_id=458); *Award of the Arbitral Tribunal in the Second Stage of the Proceedings (Erti./Yemen), Maritime Delimitation* (Dec. 17, 1999), [http://www.pca-cpa.org/showfile.asp?fil\\_id=459](http://www.pca-cpa.org/showfile.asp?fil_id=459).
- 41 Former Judges Shawkat Al-Khasawneh and Stephen Schwebel were members of the arbitration tribunal. See *The Government of Sudan / The Sudan People's Liberation Movement/Army (Abyei Arbitration), Final Award* (July 22, 2009), [http://www.pca-cpa.org/showfile.asp?fil\\_id=1240](http://www.pca-cpa.org/showfile.asp?fil_id=1240).
- 42 Former Judges Gilbert Guillaume and Bruno Simma are members of the arbitral tribunal for the currently pending Croatia/Slovenia arbitration. See *Arbitration Between the Republic of Croatia and the Republic of Slovenia*, Pending Case, [http://www.pca-cpa.org/showpage.asp?pag\\_id=1443](http://www.pca-cpa.org/showpage.asp?pag_id=1443) (last visited Apr. 4, 2015).
- 43 For example, current member, Judge Peter Tomka is a member of an investor-state arbitration tribunal related to a bilateral agreement between Germany and the Czech Republic. See *Antaris Solar GmbH (Germany) & Dr. Michael Göde (Germany) v. The Czech Republic*, Pending Case, [http://www.pca-cpa.org/showpage.asp?pag\\_id=1548](http://www.pca-cpa.org/showpage.asp?pag_id=1548) (last visited Apr. 19, 2015). Former member, Judge Bernardo Sepúlveda-Amor, is the presiding arbitrator in three investor-state proceedings related to bilateral agreements between the governments of Cyprus and Russia and the government of India. See (1) *Tenoch Holdings Limited (Cyprus) (2) Mr. Maxim Naumchenko (Russian Federation) (3) Mr. Andrey Poluektov (Russian Federation) v. The Republic of India*, Pending Cases, [http://www.pca-cpa.org/showpage.asp?pag\\_id=1552](http://www.pca-cpa.org/showpage.asp?pag_id=1552) (last visited Apr. 19, 2015). Former Judge Stephen Schwebel was a member of three investor-state arbitral tribunals between private companies and the Russia. See *Hulley Enterprises Limited (Cyprus) v. The Russian Federation*, Final Award (July 18, 2014), [http://www.pca-cpa.org/showfile.asp?fil\\_id=2722](http://www.pca-cpa.org/showfile.asp?fil_id=2722); *Yukos Universal Limited (Isle of Man) v. The Russian Federation*, Final Award (July 18, 2014), [http://www.pca-cpa.org/showfile.asp?fil\\_id=2723](http://www.pca-cpa.org/showfile.asp?fil_id=2723); *Veteran Petroleum Limited (Cyprus) v. The Russian Federation*, Final Award (July 18, 2014), [http://www.pca-cpa.org/showfile.asp?fil\\_id=2724](http://www.pca-cpa.org/showfile.asp?fil_id=2724).
- 44 See, e.g., *CC/Devas (Mauritius) Ltd., Devas Employees Mauritius Private Limited, and Telcom Devas Mauritius Limited v. Republic of India*, Decision on the Respondent's Challenge to the Hon. Marc Lalonde as Presiding Arbitrator and Prof. Francisco Orrego Vicuna as Co-Arbitrator, 1 (Sept. 30, 2013), <http://www.italaw.com/sites/default/files/case-documents/italaw3161.pdf.pdf> ("By the Appointing Authority: H.E. Judge Peter Tomka[,] President, International Court of Justice[.]").

activities of the Court are routinely accepted by judges and do not create any incompatibility.<sup>45</sup>

#### 2.4 *Ad Hoc Judges*

In addition to the elected Members of the Court, the Statute provides that if the Court does not include in the Bench a judge of the nationality of one of the parties, the other party may choose a person to sit as a judge.<sup>46</sup>

The presence of national and ad hoc judges originated in the PCIJ Statute and is not uncommon in international judicial proceedings by standing courts.<sup>47</sup> That said, *ad hoc* judges in international litigation are somehow an anomaly, as all judges are deemed to be independent and impartial and should by themselves be able to provide comfort to all parties that their case will be decided fairly. Further, elected judges are also elected partially because of their nationality, but are then required to forgo that link once elected. Once the Bench is constituted, it is peculiar that nationality should play a role again when specific cases enter the docket.

Judges *ad hoc* are required to make the solemn declaration required from elected members under Article 20. They take part in the decision on terms of complete equality with their colleagues.<sup>48</sup>

Several of the provisions applicable to elected members are also applicable to *ad hoc* judges. In particular, all conditions of independence, of high moral

45 Kolb, *supra* note 4, at 133–34; Couvrex, *Article. 16, supra* note 32, at 366.

46 ICJ Statute Art. 31 (“1. Judges of the nationality of each of the parties shall retain their right to sit in the case before the Court. 2. 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. Such person shall be chosen preferably from among those persons who have been nominated as candidates as provided in Articles 4 and 5. 3. If the Court includes upon the Bench no judge of the nationality of the parties, each of these parties may proceed to choose a judge as provided in paragraph 2 of this Article. . . . 5. Should there be several parties in the same interest, they shall, for the purpose of the preceding provisions, be reckoned as one party only. Any doubt upon this point shall be settled by the decision of the Court. . . .”).

47 European Convention for the Protection of Human Rights and Fundamental Freedoms Art. 26, *concluded* Nov. 4, 1950, 213 U.N.T.S. 221 (“(1) To consider cases brought before it, the Court shall sit in a single-judge formation, in committees of three judges, in Chambers of seven judges and in a Grand Chamber of seventeen judges. The Court’s Chambers shall set up committees for a fixed period of time. . . . (4) There shall sit as an *ex officio* member of the Chamber and the Grand Chamber the judge elected in respect of the High Contracting Party concerned. If there is none or if that judge is unable to sit, 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.”).

48 See ICJ Statute Arts. 20, 31(6).

character and of being either a juriconsults of recognized competence in international law or possessing the qualification required in their respective countries for appointments to the highest judicial offices must also be fulfilled by *ad hoc* judges.<sup>49</sup> Additionally, Article 17(2), prohibiting members to participate in any case in which they have previously participated as agent, counsel or advocate for one the parties or as a member of a national or international court, or of a commission of enquiry, or in any other capacity is also applicable.<sup>50</sup>

To reconcile the freedom of the parties to select *ad hoc* judges of their choosing with the requirement that all judges act independently, the Court addressed possible instances of functional incompatibility of judge in its two recent practice directions.<sup>51</sup> Specifically, Practice Direction VII provides that:

The Court considers that it is not in the interest of the sound administration of justice that a person sit as judge *ad hoc* in one case who is also acting or has recently acted as agent, counsel or advocate in another case before the Court. Accordingly, parties, when choosing a judge *ad hoc* pursuant to Article 31 of the Statute and Article 35 of the Rules of Court, should refrain from nominating persons who are acting as agent, counsel or advocate in another case before the Court or have acted in that capacity in the three years preceding the date of the nomination. Furthermore, parties should likewise refrain from designating as agent, counsel or advocate in a case before the Court a person who sits as judge *ad hoc* in another case before the Court.<sup>52</sup>

Additionally, Practice Direction VIII provides that:

The Court considers that it is not in the interest of the sound administration of justice that a person who until recently was a Member of the Court, judge *ad hoc*, Registrar, Deputy Registrar or higher official of the

49 ICJ Rules Art. 1; ICJ Statute Art. 2.

50 ICJ Statute Art. 31(6) ("Judges chosen as laid down in paragraphs 2, 3, and 4 of this Article shall fulfill the conditions required by Articles 2, 17 (paragraph 2), 20, and 24 of the present Statute. They shall take part in the decision on terms of complete equality with their colleagues.").

51 Loretta Malintoppi, *Independence, Impartiality, and Duty of Discloser of Arbitrators*, in *International Investment Law* 796, 813–14 (Peter Muchlinski, Federico Ortino & Christoph Schreuer eds., 2008).

52 Practice Direction VII, *supra* note 3.

Court (principal legal secretary, first secretary or secretary), appear as agent, counsel or advocate in a case before the Court. Accordingly, parties should refrain from designating as agent, counsel or advocate in a case before the Court a person who in the three years preceding the date of the designation was a Member of the Court, judge *ad hoc*, Registrar, Deputy Registrar or higher official of the Court.<sup>53</sup>

These directions are applicable for any choice or designation taking place after February 7, 2002, and they are meant to exclude any possible instance of functional incompatibility arising from prior or current service at the ICJ.<sup>54</sup>

### 3 Mechanisms of Control: Resignation, Self-Recusal and Disqualification of Judges

In an effort to maintain the independence and impartiality of its judges and the stature proper of the principal judicial organ of the United Nations and its role as the *primus inter pares* of the standing courts, the ICJ Statute adopts a tiered procedure to challenges and recusals of judges of the court.

Thus, as explained in details below, it is at first incumbent upon each judge to recuse him or herself if some reason exists to do so. When this does not happen and the reasons that preclude them to serve continue to exist, it is the role of the President of the Court, possibly informed by one of the parties, and of the entire Court to ensure that no functional or relative incompatibility exists in the course of proceedings.

#### 3.1 *Resignation from the Bench*

Once elected, the judges of the ICJ are irremovable and serve for renewable terms of nine years.<sup>55</sup> As detailed in the next section, only a unanimous vote of the other members of the Court can relieve a judge of his or her function in situation where he or she has ceased to fulfill the required conditions to serve.

It is relatively more common for judges to resign from the Bench before the end of their terms if a reason exists that precludes them to exercise their functions. Article 13 of the ICJ Statute does not require that judges provide reasons

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53 Practice Direction VIII, *supra* note 3.

54 For the limits of the practice directions see Chapter 13 by Hansel Pham and M. Imad Khan in this volume.

55 ICJ Statute Art. 13.

for their resignations, which are to be addressed to the President of the Court for transmission to the Secretary-General.

In general, however, such resignations occur either for serious health issues or because of the existence of a new superseding long-term incompatibility. Thus, for example, Judge Awn Shawkat Al-Khasawneh resigned from the Bench on December 31, 2011, after being appointed Prime Minister of Jordan.<sup>56</sup> Similarly, Judge Mohammed Bedjaoui resigned on September 30, 2001, when he was appointed President of the Constitutional Council of Algeria.<sup>57</sup> Vacancies created by resignation are filled in the same method used to fill in the first election.<sup>58</sup> Health related resignations are rarer, and judges may either wish to serve for the entire remainder of their term and then simply not seek re-election, or may just prefer not to disclose the reasons for their resignation. The newly elected judge serves for the remaining of the term of the judge he or she replaces.<sup>59</sup>

It has also become customary for judges of certain veto-holding powers that always have a judge of their nationality of the Bench to resign before the end of their terms, possibly to allow an easier election for their successors, who will run in a special election, and will then also have the time to prove themselves as judges before running in general elections.<sup>60</sup>

<sup>56</sup> See Press Release No. 2012/1, Int'l Court of Justice, The Security Council Has Fixed the Date for the Election of a Successor to Mr. Awn Shawkat Al-Khasawneh, Former judge and Vice-President of the International Court of Justice (Jan. 20, 2012), available at <http://www.icj-cij.org/presscom/files/1/16861.pdf>.

<sup>57</sup> See Press Release No. 2001/20, Int'l Court of Justice, Judge Mohammed Bedjaoui, Former President of the Court, Will resign as a Member of the Court as of 30 September 2001 (July 6, 2001), available at <http://www.icj-cij.org/presscom/index.php?pr=115&pt=1&p1=6&p2=1&PHPSESSID=5c407>. Kolb points out that other Judges that resigned from the Court or its predecessor the PCIJ include: Moore (1928), Hughes (1930), Kellogg (1935), Wang (1936), Urrutia (1942), Nagaoka (1942), Golunski (1953), Morozov (1985), Jennings (1995), (Schwebel) and Guillaume (2005). Kolb, *supra* note 4, at 133.

<sup>58</sup> ICJ Statute Art. 14.

<sup>59</sup> ICJ Statute Art. 15.

<sup>60</sup> See for example the resignations of the two most recent US judges: Stephen Schwebel, who was elected in 1981 and resigned in 2000, and Thomas Buergenthal, who was elected in March 2000 and resigned in September 2010. See *Judge Buergenthal Resigns; U.S. National Group Nominates Joan Donoghue for Election to International Court of Justice*, 104 Am. J. Int'l L. 489 (2010); Peter Kooijmans, *Two Remarkable Men Have Left the International Court of Justice*, Leiden J. Int'l L. 343 (2000) (discussing the resignation of President Stephen Schwebel and Judge Christopher G. Weeramantry in 2000).

### 3.2 *Removal of Judges from the Bench by the Court*

Article 18 of the Statute provides that judges can be removed by a unanimous vote of the other members of the Court in situation where he or she has ceased to fulfill the required conditions to serve.<sup>61</sup>

In such eventuality, Article 6 of the Rules of the Court provides that the President, or, if the circumstances so require, the Vice-President, informs the relevant member of the Court with a written statement that includes the grounds for the proposed removal and any relevant evidence.<sup>62</sup> At a private meeting of the Court specially convened for the purpose, the member of the Court is then afforded an opportunity of making a statement, of furnishing any information or explanations he wishes, and of supplying answers, orally or in writing, to any questions put to him. The matter will then be discussed in a private meeting, without the presence of the member of the Court concerned, at which each member of the Court shall state his or her opinion. A vote is taken if requested.<sup>63</sup>

Formal notification of the decision of removal that creates the vacancy is to be made to the UN Secretary General by the ICJ Registrar.<sup>64</sup>

The threshold for this procedure is high and would require some serious failings, in terms of either work-related or personal conflict or serious health issues that incapacitate the judge to exercise her functions.<sup>65</sup> Indeed, as it is to be expected, in the history of the Court, there is “no recorded instances of Article 18 being applied in order to dismiss a Judge” or even of the question of formal dismissal of a judge ever been formally entertained by the Court.<sup>66</sup>

### 3.3 *Voluntary (or Self) Recusals for a Specific Case*

Voluntary (or self) recusals are by far the most common method to control the composition of the ICJ bench and ensure its independence and impartiality.

61 ICJ Statute Art. 18 (“No member of the Court can be dismissed unless, in the unanimous opinion of the other members, he has ceased to fulfill the required conditions. 2. Formal notification thereof shall be made to the Secretary-General by the Registrar. 3. This notification makes the place vacant.”).

62 ICJ Rules Art. 6.

63 *Id.*

64 ICJ Statute Art. 18.

65 See Kolb, *supra* note 4, at 132 n. 76.

66 David Anderson & Samuel Wordsworth, *Article 18*, in *The Statute of the International Court of Justice, A Commentary* 392 (Andreas Zimmerman et al. eds., 2nd ed., 2006); see also Kolb, *supra* note 4, at 132–33.

Article 24 (1) provides that if a member of the Court considers that “for some special reasons” he should not take part in the decision of a particular case, he should inform the President. The language of the provision is very general so as to allow its application in a variety of circumstances and to ensure that any possible appearance of bias is voluntarily addressed by the judge.

This form of relative incompatibility relates to the impartiality of a judge for a particular case, and relates to the advisability for a judge to be part of the bench for a particular case only, which does not result in the necessity for the judge to resign and permanently leave the ICJ. In the history of the Court, a number of judges have recused themselves for a variety of reasons. For example, a judge who was involved as a legal adviser to a government which is now party to a case could be reasonably seen as biased, despite the judge’s best effort. Similarly, there may be personal relationship at issue that could create the appearance of a bias. Thus, Judge Benegal Rau recused himself in the *Anglo-Iranian Oil Co.* case because he was the Indian representative in the Security Council when the dispute was discussed.<sup>67</sup> Similarly, Judge Hersch Lauterpacht recused himself in the *Nottebohm* case noting that he had been consulted by one of the parties before joining the Court.<sup>68</sup> In another case, Judge Jules Basdevant recused himself in the advisory opinion on the *Judgments of the UNAT* because the President of the Tribunal whose judgments were to be reviewed by the Court was her daughter, Suzanne Bastid.<sup>69</sup>

Table 1.1 summarizes the instances of self-recusals at the ICJ and the reasons asserted by the judges in those situations.

TABLE 1.1 *Summary of Judges’ self-recusal at the ICJ and reasons asserted*<sup>70</sup>

Judge	Case	Reason
Sir Benegal Rau	<i>Anglo-Iranian Oil Co. (United Kingdom v. Iran)</i> (July 22, 1952)	Having regard to the fact the he had represented India in the Security Council in

67 I.C.J. Yearbook 1951–1952, at 89–90 (1952); see also Rosanne, *supra* note 4, at 1063.

68 I.C.J. Yearbook 1954–55, at 88 (1955); see also Rosanne, *supra* note 4, at 1064. Note also that his son, Elihu Lauterpacht acted as counsel to Liechtenstein in the preliminary objection phase.

69 *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal*, Oral Statements, 281 (June 10, 1954, 10:30 a.m.); see also Rosanne, *supra* note 4, at 1063.

70 Note that this table also include cases in which no reason was given for a judge’s absence in the decision.



Judge	Case	Reason
Judge Basdevant	<i>UNAT advisor opinion (July 13, 1954)</i>	1951 when it had dealt with the UK complaint against Iran for failure to comply with the interim measures indicated by the Court
Judge Sir Hersch Lauterpacht	<i>Second phase of Notterbohm case (Liechtenstein v. Guatemala) (Apr. 6, 1955)</i>	He was closely related to the President of the Tribunal Having previously advised one of the parties and felt that Article 17 applied
Judge Jessup	<i>Either phase of Temple of Preah Vihear case (Cambodia v. Thailand) (May 26, 1961 &amp; June 15, 1962)</i>	No reason given in Judgement. <sup>71</sup>
Judge Zafrulla Khan	<i>Barcelona Traction (Belgium v. Spain) (July 24, 1964 &amp; Feb. 5, 1970)</i>	No reason given in Judgement. <sup>72</sup>
Juges Petren and Ignacio-Pinto	<i>Review of UNAT Judgment No. 158 Advisory Opinion (July 12, 1973)</i>	Informed President (Zufrulla Khan) that having contributed as members of the Administrative Tribunal to the establishment of the jurisprudence of the Tribunal referred to in the case, they considered that they should not take part in the proceedings. The action was taken under Article 24 of the Statute and the President agreed with them. <sup>73</sup>

71 Rosanne, *supra* note 4, at 1064.

72 *Id.*

73 *Application for Review of Judgment No. 158 of the United Nations Administrative Tribunal, Reading of the Advisory Opinion, 179 (July 12, 1973)*, <http://www.icj-cij.org/docket/files/57/9435.pdf>; Rosanne, *supra* note 4, at 1064.

TABLE 1.1 *Summary of Judges' self-recusal (cont.)*

Judge	Case	Reason
Sir Robert Jennings and Judge Evensen	<i>Application for Revision and Interpretation of the Judgment of 24 February 1982 in the Case concerning the Continental Shelf (Tunisia/Libyan Arab Jamahiriya) (Dec. 10, 1985)</i>	They gave prior notice to the President (Nagendra Singh) that they would not take part in the case. <sup>74</sup>
Judge Bedjaoui	<i>Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal) (Nov. 12, 1991)</i>	Since he had been a member of the Arbitral Tribunal in question. <sup>75</sup>
Judge Weeramantry	<i>Phosphate Lands in Nauru (Nauru v. Australia) (June 26, 1992)</i>	Having previously been Chairman of a commission of Enquiry which had reported on matters which might be pertinent in the case. <sup>76</sup>
Judge Fleischhauer and Judge Higgins	<i>Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro) (July 11, 1996)</i>	Judge Fleischhauer and Judge Higgins informed the President that having previously dealt in their previous capacities with certain matters likely to be material to the case, they felt that they could not take part in the case, pursuant to the applicable provisions of the Statute. <sup>77</sup>

74 I.C.J. Yearbook 1984–1985, at 177 (1990); see also Rosanne, *supra* note 4, at 1064.

75 I.C.J. Yearbook 1989–1990, at 157 (1990); see also Rosanne, *supra* note 4, at 1064.

76 I.C.J. Yearbook 1991–1992, at 198 (1992); see also Rosanne, *supra* note 4, at 1064.

77 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosn. & Herz. v. Serb. & Montenegro), Verbatim Record, 6 (Apr. 29, 1996), <http://www.icj-cij.org/docket/files/91/5105.pdf>; see also Rosanne, *supra* note 4, at 1065 n. 22.

Judge	Case	Reason
Judge Tomka	<i>Gabčíkovo-Nagymaros Project (Hungary/Slovakia)</i> (Sept. 25, 1997)	"Judge Tomka . . . recused himself under Article 24 of the Statute of the Court." <sup>78</sup>
Judge Simma	<i>All of Legality of Use of Force (Preliminary Objections) cases</i> (June 2, 1999)	Considered that pursuant to Article 24(1) he should not take part in the cases. <sup>79</sup>
Judge Simma	<i>Certain Property (Liechtenstein v. Germany)</i> (Feb. 10, 2005)	Considered that pursuant to Article 17(2) he should not take part in the cases
Judge Abraham	<i>Certain Criminal Proceedings in France (Republic of the Congo v. France)</i> (June 17, 2003)	"Judge Abraham having recused . . . under Article 24 of the Statute of the Court." <sup>80</sup>
Judge Abraham	<i>Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)</i> (June 4, 2008)	"Judge Abraham . . . recused himself under Article 24 of the Statute of the Court," <sup>81</sup>
Judge Owada	<i>Pulp Mills on the River Uruguay (Argentina v. Uruguay)</i> (Apr. 20, 2010)	In 2006, the judges did not participate in the hearing "concerning Argentina's request for provisional measures for serious reasons they informed the Court of [ ]". Consequently the Judges did not participate in the final judgement. <sup>82</sup> "President Owada, who sat on previous phases of the case, informed Vice-President Tomka that, for compelling reasons, he was

78 Report of the International Court of Justice, 1 August 2006–31 July 2007, at 6 (2007), available at [http://www.icj-cij.org/court/en/reports/report\\_2006-2007.pdf](http://www.icj-cij.org/court/en/reports/report_2006-2007.pdf).

79 Rosanne, *supra* note 4, at 1064.

80 *Id.* at 7.

81 *Id.*

82 I.C.J. Yearbook 2005–2006, at 278 (2006).

TABLE 1.1 *Summary of Judges' self-recusal (cont.)*

Judge	Case	Reason
Judge Parra-Aranguren; Judge Buergenthal	<i>Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro) (Feb. 26, 2007)</i>	unable to attend the oral proceedings on the merits held between 14 September and 2 October 2009. He did not participate further in the case. <sup>83</sup> Note that Judges Shi and not Buergenthal did not sit in case for health reasons. Judge Parra-Aranguren "attended the hearings in the case and participated in some of the deliberations, but not the final stages, informed the President of the Court that, pursuant to Article 24, paragraph 1, of the Statute, he considered he should not take part in the decision of the case." <sup>84</sup> Moreover, Judge Buergenthal, under Article 24(1) of the Statute, "informed the President the he considered he should not take part in the case." <sup>85</sup>
Judge Jiuyong; Judge Parra-Aranguren; Judge Simma	<i>Request for Interpretation of the Judgment of 31 March 2004 in the Case concerning Avena and Other Mexican Nationals (Mexico v. United States of</i>	"Two Members of the Court informed the President that they considered that they should not take part in the case concerning Request

83 I.C.J. Yearbook 2009–2010, at 309 (2010).

84 I.C.J. Yearbook 2006–2007, at 277 (2007).

85 I.C.J. Yearbook 2005–2006, at 278 (2006); I.C.J. Yearbook 2006–2007, at 277 (2007).

Judge	Case	Reason
	<i>America) (Mexico v. United States of America) (Jan. 19, 2009)</i>	for Interpretation of the Judgment of 31 March 2004 in the Case concerning Avena and Other Mexican Nationals (Mexico v. United States of America) (Mexico v. United States of America). For serious reasons duly explained to the Court, another Member of the Court was unable to take part in the hearings on the request for the indication of provisional measures submitted by the Applicant in the case. Consequently, he did not take part in the drafting of the Court's decision on that request." <sup>86</sup>
Judge Simma; Judge Parra-Aranguren	<i>Maritime Delimitation in the Black Sea (Romania v. Ukraine) (Feb. 3, 2009)</i>	"One Member of the Court, for reasons duly explained to the President, was unable to sit in the case. . . . One other Member of the Court recused himself from participating in the case, referring to Article 17, paragraph 2, of the Statute." <sup>86</sup>
Judge Parra-Aranguren	<i>Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)</i>	Under Article 23(3) and Article 24(1) of the Statute, "[o]ne Member of the Court, for reasons duly explained to the President

86 I.C.J. Yearbook 2007–2008, at 328–2 (2008).

87 I.C.J. Yearbook 2008–2009, at 348 (2009).

TABLE 1.1 *Summary of Judges' self-recusal (cont.)*

Judge	Case	Reason
Judge Simma; Judge Tomka	<i>(Provisional Measures)</i> <i>(Oct. 15, 2008)</i> <i>Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)</i> (July 13, 2009)	of the Court, was unable to sit in the case. <sup>88</sup> "One Member of the Court, for reasons explained under Article 24, paragraph 1, of the Statute, informed the President that he would not sit in the case concerning the Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)." <sup>89</sup>
Judges Shi; Judge Buergenthal; Judge Koroma	<i>Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)</i> (Nov. 30, 2010)	On Monday 19 April 2010, at the start of the morning hearing on preliminary objections in the case, President Owada noted that, for reasons duly communicated to him, Judges Shi and Buergenthal, who had both sat in previous phases of the case, were unable to sit in that phase of the proceedings. They did not participate further in the case. <sup>90</sup> Additionally, "Judge Koroma had informed President Owada that he was recusing himself from the case. Judge Koroma did not participate further in the case." <sup>91</sup>

88 *Id.* at 348.89 *Id.* at 348–49.

90 I.C.J. Yearbook 2009–2010, at 309 (2010).

91 *Id.* at 309.

Judge	Case	Reason
Judge Higgins	<i>Sovereignty over Pedra Branca/ Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/ Singapore) (May 23, 2008)</i>	Prior to her election as President of the Court, Dame Higgins, referring to Article 17, paragraph 2, of the Statute, recused herself from participating in the case. <sup>92</sup>
Judge Hanqin	<i>Accordance with international law of the unilateral declaration of independence in respect of Kosovo (Request for Advisory Opinion) (July 22, 2010)</i>	Judge Hanqin was council for the Republic of China in the case. <sup>93</sup>
Judge Greenwood	<i>Maritime Dispute (Peru v. Chile) (Jan. 27, 2014)</i>	No reason given in judgement.
Judge Simma	<i>Judgment No. 2867 of the Administrative Tribunal of the International Labour Organization upon a Complaint Filed against the International Fund for Agricultural Development (Request for Advisory Opinion) (Feb. 1, 2012)</i>	No reason given in judgement.

As Shabtai Rosenne notes, the provisions of the Statute regarding self-recusation “are normally applied as a matters of routine”<sup>94</sup> and in fact self-recusals are quite common.

As a matter of legal policy, this provision makes sense. Judges are elected amongst persons qualified to serve in their country’s highest judicial offices and from among persons of high moral character. It is justified to have them decide, in the first instance, whether a conflict exists that should prevent them for sitting in a specific case. Moreover, with fifteen sitting judges, and a required quorum of nine judges, the ICJ’s Bench is sufficiently large to accommodate

92 I. C.J. Yearbook 2010–2011, at 234 n. 5 (2011).

93 *Id* at 411.

94 Rosenne, *supra* note 4, 1062.

the potential of one or two judges being unable to sit without impacting the final outcome of a thoughtfully decided judgment.<sup>95</sup>

Importantly, while it is primarily a decision of each judge whether to seek to recuse him or herself, further control mechanisms exist to ensure an independent bench should a judge be recalcitrant to opt for self-recusal.

### 3.4 *The Role of the Court's President*

The President of the Court plays a fundamental role in ensuring that the independence of the Court is maintained. Thus, Article 24 provides that “if the President considers that for some special reasons one of the Members of the Court should not sit in a particular case, he shall give him [or her] notice accordingly.”<sup>96</sup>

This power has been used rarely; indeed only one instance is known. In the *South West Africa* case (Ethiopia & Liberia v. South Africa), the President, Sir Percy Spender, announced in the opening of the substantive hearings that Sir Mohammed Zafrullah Khan would not participate in the case. Though there is no public record, it appeared from subsequent declarations by Judge Khan that the President himself had asked Judge Khan not to participate in the case, as he had at one point been nominated as an *ad hoc* judge by one of the parties, though he had not acted in that capacity.<sup>97</sup>

Article 34 of the Rules of the Court further provides that in case of any doubt arising as to the application of Article 17(2) of the Statute or in case of a disagreement as to the application of Article 24 of the Statute, the President shall inform the Members of the Court, who retain the final power of decision.<sup>98</sup>

### 3.5 *The Role of the Court*

The ultimate arbiter for all issues related to the composition of the Court remains the Court itself. Under Article 24, for example, it is for the Court to settle by decision on any disagreement between a member of the Court and the President on whether a special reason exists as a consequence of which a member should not sit in particular case.<sup>99</sup>

95 ICJ Statute, Art. 25.3 (“A quorum of nine judges shall suffice to constitute the Court”).

96 ICJ Statute Art. 24.

97 Sir Robert Jennings & Philippe Couvreur, *Article 24*, in *The Statute of the International Court of Justice, A Commentary* 461–62 (Andreas Zimmerman et al. eds., 2nd ed., 2006); see also Rosanne, *supra* note 4, at 1058.

98 ICJ Rules Art. 34.

99 ICJ Statute Art. 24.



The Court is also involved in all final decisions related to relative or functional incompatibility of a judge to hold office. Thus, under Article 16(2) of the Statute, the Court decides on any doubt related to the exercise of political or administrative functions or engagement in other professional occupation by the any of its Members.<sup>100</sup> Similarly, the Court is also the ultimate decision maker on any doubt related to a Member's acting as agent, counsel or advocate or past activities as agent, counsel, or advocate for one of the parties, or as a member of a national or international court; or of a commission of enquiry, or in any other capacity.<sup>101</sup> Article 34(1) of the Rules also provides that it is for the Court as a whole to decide any doubt about the application of Article 17(2) of the Statute.<sup>102</sup>

### 3.6 *Third Party Disqualification Requests*

Disqualification proceedings can also be initiated by one of the parties. Under Article 34(2) of the Rules, a party can communicate confidentially to the President in writing "any facts which it considers to be of possible relevance" to the application of Article 17 and Article 24 of the Statute, and which the parties believe may not be known to the Court.<sup>103</sup>

## 4 Grounds for Disqualification

Grounds for disqualifications of judges at the ICJ are not specified separately in the Statute. Rosenne points out that there "seem to be no standing grounds for recusation beyond the provisions of Articles 16 and 17 of the Statute. . . ."<sup>104</sup> These grounds, analyzed in details above, provide certain limited cases of relative and absolute (or functional) incompatibility.<sup>105</sup>

100 *Id.* Art. 16(2).

101 *Id.* Art. 17.

102 ICJ Rules Art. 34.

103 Article 34 of the Rules provides that "1. In case of any doubt arising as to the application of Article 17, paragraph 2, of the Statute or in case of a disagreement as to the application of Article 24 of the Statute, the President shall inform the Members of the Court, with whom the decision lies. a. If a party desires to bring to the attention of the Court facts which it considers to be of possible relevance to the application of the provisions of the Statute mentioned in the previous paragraph, but which it believes may not be known to the Court, that party shall communicate confidentially such facts to the President in writing." *Id.*

104 Rosenne, *supra* note 4, at 1062.

105 *See supra* Section 2.2 and Section 2.3.

Thus, under these provisions, there are three grounds for recusal that derive from the ICJ Statute:

- (1) *Judge exercising political or administrative function.* The restriction is derived from Article 16.
- (2) *Acting as agent, counsel, or advocate in any case.* The prohibition is derived from Article 17(1) and applies only to elected members.
- (3) *Past participation in a case as agent, counsel, or advocate for one of the parties, or as a member of a national or international court, or of a commission of enquiry, or in any other capacity.* This provision derives from Article 17(2), which applies to both elected and, by operation of Article 31(6), *ad hoc* judges.

#### 4.1 *Instances of Attempted Disqualification of Judges*

A party's attempts to disqualify judges of the ICJ are rare. Since its inception, the Court only dealt with three formal attempts to have the Court find members of the Court ineligible in a particular case in three different cases.<sup>106</sup> All three cases relate to alleged prejudgment of the case and relate to past diplomatic actions at the United Nations. In one case, one party also alleged that certain declarations made by one of the judges allegedly demonstrated possible bias. All three challenges were unsuccessful. Only in one case the motivations for rejecting the challenge are public. Interestingly, two of the three cases refer to instance of alleged bias in advisory opinions, which are not binding, and only one was brought during contentious proceedings.

##### 4.1.1 South West Africa Case (Ethiopia v. South Africa & Liberia v. South Africa)

In the second phase of the *South West Africa Cases* (Ethiopia & Liberia v. South Africa), South Africa notified the Court "of its intention to make an application to the Court relating to the composition of the Court relating to the composition of the Court."<sup>107</sup> The Court rejected the application after hearing the contentions in closed hearing. Both the members and the judge *ad hoc* took part in that decision.<sup>108</sup> The details of the recusal application by South Africa have never been revealed. However it was known to refer to Judge Luis Padilla Nervo (Mexico), who had been President to the 1951 session of the General

<sup>106</sup> Rosenne, *supra* note 4, at 1059.

<sup>107</sup> *South West Africa Cases* (Ethi & Liber. v. S. Afr.), Order Relating to Composition of the Court, 4 (Mar. 18, 1965), <http://www.icj-cij.org/docket/files/47/2718.pdf>.

<sup>108</sup> *Id.* at 5.

Assembly and had been a member of the Mexican delegation to the General Assembly from 1947 to 1963.<sup>109</sup> South Africa filed an application to the Court Relating to the Composition of the Court on March 14, 1965. The Court notified the Agents for the Applicants and heard the contentions of the Parties with regard to the application in closed hearings on March 15 and 16, 1965.<sup>110</sup> It rejected the challenge by eight votes to six by formal order made under Article 48 of the Statute.<sup>111</sup> Judge Padilla Nervo did not participate in the vote of the order, but then participated in the Judgment. Interestingly, the judges *ad hoc* also participated in that vote.<sup>112</sup>

4.1.2      Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)

In the related advisory opinion on *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)* [Namibia Advisory Opinion], South Africa attempted to disqualify three members of the Court.<sup>113</sup> The government of South Africa filed written statements on November 19, 1970 where it objected to the participation of certain members of the Court in the proceedings. The Court issued three separate orders on January 26, 1971. The Orders were made under Article 48 of the Statute and were unreasoned.

Order No. 1: In relation to President Sir Muhammad Zafrulla Khan—the court unanimously decided not to accede to the objection that had been raised. The vote was taken by all twelve non-challenged Judges. President Khan, Judge Padilla Nervo, Judge Morozov did not participate.<sup>114</sup>

Order No. 2: With regard to Judge Padilla Nervo. The Court unanimously decided not to accede to the objection that had been raised. Judges Padilla Nervo and Morozov did not participate in the vote.<sup>115</sup>

109    Rosenne, *supra* note 4, at 1059.

110    *Id.*

111    *Id.*

112    *Id.*

113    *Id.*

114    *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* [Namibia Advisory Opinion], Order No. 1, 1971 I.C.J. 3 (Jan. 26).

115    *Namibia Advisory Opinion*, Order No. 2, 1971 I.C.J. 6 (Jan. 26).

Order No. 3: With regard to Judge Morozov. The Court by ten votes to four decided not to accede to the objection that had been raised. Judge Morozov did not participate in the vote.<sup>116</sup>

On the same date, the Court also issued Order No. 4 denying South Africa's request to appoint a Judge *ad hoc*.<sup>117</sup> In its advisory opinion the Court explained that the objections were made under Article 17(2) of the Statute.<sup>118</sup> In the opinion, the Court also explained that South Africa's objections were based "on statements made or other participation by the Members concerned, in their former capacity as representatives of their Governments, in United Nations organs which were dealing with matters concerning South Africa."<sup>119</sup> The Court gave careful consideration to South Africa's objection but found no reason, for Order no. 2, to depart from the decision it had taken in its order of March 18, 1965 in the South West Africa cases.<sup>120</sup> In deciding the other two cases, the Court found that the Members' activities in the UN organs prior to their election to the Court did not "furnish grounds for treating these objections differently" from those raised in its 1965 decision.<sup>121</sup> The Court also specified that, as for Order no. 3, the participation of the Member, prior to his election to the Court, in the formulation of a Security Council resolution that took into consideration in its preamble GA Res. 2145 (XXI) did not justify a different conclusion.<sup>122</sup> In explaining its decision on the challenges, the Court also specifically refers to the precedents established by the PCIJ "wherein judges sat in certain cases even though they had taken part in the formulation of texts the Court was asked to interpret."<sup>123</sup>

#### 4.1.3 Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory

The challenge brought against Judge Nabil Elaraby (Egypt) by Israel in the *Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* [Wall Opinion] is the most recent case of a party requesting the recusal of a judge because of his past professional experience.

116 *Namibia* Advisory Opinion, Order No. 3, 1971 I.C.J. 9 (Jan. 26).

117 *Namibia* Advisory Opinion, Order, 1971 I.C.J. 12, 13 (Jan. 29).

118 *Namibia* Advisory Opinion, Advisory Opinion, 1971 I.C.J. 16, ¶ 9 (June 21).

119 *Id.*

120 *Id.*

121 Rosanne, *supra* note 4, at 1060.

122 GA Res. 2145(XXI) of 27 October 1966 (Question of South-West Africa).

123 *Id.*

It is also the first time that a party also uses public declarations by a judge as a ground for recusal.

In the *Wall Opinion*, Israel sent a confidential letter to the ICJ President to bring to his attention certain facts it considered possibly relevant to the participation of Judge Elaraby in the case.<sup>124</sup> Israel raised three issues. First, it claimed that Judge Elaraby should be recused because of his active, official and public role as an Egyptian diplomat. The Court rejected this claim and noted the experience of Judge Elaraby in the 1970s and 1980s as a legal adviser to the Egyptian Government, including his work at the Egyptian Ministry of Foreign Affairs and his involvement in the Camp David Middle East Peace Conference of 1978 and the Israel-Egypt Peace Treaty in 1979 “were performed in his capacity of a diplomatic representative of his country” and occurred “many years before the question of the construction of the wall in the occupied Palestinian territory, now submitted for advisory opinion, arose.”<sup>125</sup> Second, Israel also claimed that Judge Elaraby had been involved in decisions at the General Assembly that were relevant for the case. The ICJ again dismissed the claim and concluded the question for the Court “was not an issue in the Tenth Emergency Special Session of the General Assembly until after Judge Elaraby had ceased to participate in that Session as representative of Egypt.”<sup>126</sup> Finally, Israel complained that in an interview prior to his election to the Court, Judge Elaraby had made statements that could infer a prejudgment of some of the issues in the case.<sup>127</sup> The Court again dismissed the claim and concluded that Judge Elaraby’s

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124 *Legal Consequence of the Construction of the Wall in the Occupied Palestinian Territory*, Order of the Composition of the Court [Wall Opinion], 2004 I.C.J. 3 (Jan. 30).

125 *Id.* ¶ 8 (“Whereas however the activities of Judge Elaraby referred to in the letter of 15 January 2004 from the Government of Israel were performed in his capacity of a diplomatic representative of his country, most of them many years before the question of the construction of a wall in the occupied Palestinian territory, now submitted for advisory opinion, arose; whereas that question was not an issue in the Tenth Emergency Special Session of the General Assembly until after Judge Elaraby had ceased to participate in that Session as representative of Egypt; whereas in the newspaper interview of August 2001, Judge Elaraby expressed no opinion on the question put in the present case; whereas consequently Judge Elaraby could not be regarded as having ‘previously taken part’ in the case in any capacity.”).

126 *Id.*

127 Joseph R. Brubaker, *The Judge Who Knew Too Much: Issue Conflicts in International Adjudication*, 26 Berkeley J. Int’l L. 111, 119 (2008) (citing Wall Opinion, 2004 I.C.J. 3, ¶ 8 (Jan. 30) (dissenting opinion of Judge Buergenthal)) (“that ‘Israel is occupying Palestinian territory, and the occupation itself is against international law’ and that Israel’s territorial claims were fabricated to create ‘confusion and gain[] time.’”).

comments “expressed no opinion on the question put in the present case.”<sup>128</sup> The Court hence concluded that Judge Elaraby had not previously taken part in the case, as required by Article 17(2) of the Statute for a finding of relative incompatibility. Israel’s request was rejected thirteen to one (as it is customary, Judge Elaraby did not participate in the vote). Interestingly, Judge Buergenthal dissented on the last point and asserted that although this “formalistic and narrow” construction of Article 17(2) had not been violated, he was concerned that the interview created “an appearance of bias” that required the Court to preclude Judge Elaraby’s participation in the proceedings.<sup>129</sup>

In sum, this limited practice shows that the Court has found that prior diplomatic activities as government representatives or at the United Nations would not generally be considered tantamount to a prior participation in the case and would therefore not create a reason to disqualify a judge under the applicable rules. Judge Buergenthal’s dissent raises the important point of whether this application of the standard is too formalistic, and whether an “appearance of bias” standard, in line with other arbitral rules, is preferable. This is an important discussion to be had, especially because, on one side, judges are often selected among those who have significant experience as diplomats or as international law counsel, and, on the other side, the growing use of international dispute resolution mechanisms can result in increased instances of conflicts.

## 5 Conclusion

Requests for recusal and disqualification of judges of the ICJ are rare and none so far has been successful. The control mechanisms of the composition of the ICJ’s Bench rely mostly on the individual decision not to participate in a case by each judge (self-recusal). This system has been largely successful, and several judges have over the years decided not to participate in certain cases because of their previous professional experiences. The President of the ICJ has used his power to request a judge not to participate in a case only once.<sup>130</sup> When a request for disqualification was filed by a party, the Court has adopted a strict reading of the applicable rules, and generally refused to consider that prior diplomatic functions at the UN or in one’s Capital may create an

<sup>128</sup> Wall Opinion, 2004 I.C.J. 3, ¶ 8.

<sup>129</sup> *Id.* ¶ 14.

<sup>130</sup> Though it is difficult to know if some instances of self-recusals may have resulted from an informal discussion with the President.

incompatibility. With the increase use of binding dispute resolutions mechanisms, the higher scrutiny of judges' behavior, and the fact that many judges acted as counsel, arbitrators or diplomats in a variety of cases or continue to act as arbitrators in international disputes, the discussion over the standard to apply to assess a party's recusal requests will be an important one.