Moving the International Court of Justice from Bilateralism to Serving the Community Interest – A Proposal to Refrain from Being a 'National Judge'

Lando Kirchmair[*]

I. Introduction

International adjudication is of ever-increasing importance to the international community.[1] Questions of legitimacy, thus, are on the rise too.[2] This article

* Prof. Dr. iur. habil. Lando Kirchmair is Deputy Professor for National and International Public Law with a Focus on the Protection of Cultural Heritage, Department of Social Sciences and Public Affairs, Bundeswehr University Munich, Co-PI, EMERGENCY-VRD project at the same university as well as Co-PI, European Constitutional Court Network project, Law Faculty, University of Salzburg. Contact: lando.kirchmair@unibw.de.

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1 See, *e.g.*, Ruth Mackenzie and Philippe Sands, 'International Courts and Tribunals and the Independence of the International Judge' (2003) 44 Harvard International Law Journal 271, 272-274.

2 See, *e.g.*, Kenneth J Keith, 'Challenges to the Independence of the International Judiciary: Reflections on the International Court of Justice' (2016) 30 Leiden

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will briefly elaborate on the definition of independence and impartiality (II.), before reminding readers of Judge Bruno Simma's Hague lectures describing the shift '*From Bilateralism to Community Interest in International Law*' (III.). This is followed by an analysis of what independence and impartiality mean especially for judges at the International Court of Justice (ICJ) (IV.). This is of particular interest because a statistical analysis of the voting habits of those judges at the ICJ whose country of nationality is involved in a dispute before the court reveals a strong bias: Almost independently of the legal matter of the dispute, individual judges vote for their country of nationality (V.). This is a remarkable legitimacy issue for an independent judiciary. Yet, this bias is obvious even to the court itself. Although there was a controversial discussion about this already in 1920, when the Statute of the Permanent Court of International Justice (PCIJ) was drafted, the decision was taken to outweigh that imbalance. If a country involved in a dispute has a judge of its own nationality sitting on the bench (*the national judge*), the other party to the dispute is allowed to nominate an *ad hoc judge* who, most of the time, will also be a citizen of the nominating country (or somebody who feels closely related to this country through nomination) (VI.).

While this state-centered design of the international judiciary was adequate for a long time, this article argues that it is time to acknowledge the shift from 'bilateralism to community interest' at the ICJ as well (VII.). Therefore, a simple and, at the same time, unorthodox solution to this legitimacy deficit is proposed: the judge could protect herself from this threat to her impartiality and independence simply by refraining from her 'right to sit in the case before the Court' (Art 31 ICJ Statute) in accordance with Article 24 ICJ Statute (VIII.). This small step for a single judge would arguably be a significant improvement for the international community and the legitimacy of its legal system. This proposal would make the *ad hoc* judge not only unnecessary but also impossible (as Art 31(2) ICJ Statute only applies '[i]f the Court includes

Journal of International Law 137, 137. *Cf.* Armin von Bogdandy and Ingo Venzke, *In Whose Name? A Public Law Theory of International Adjudication* (2014). It is striking that such an important topic as the independence of the international judiciary (in contrast to the national judiciary) was under-researched for quite some time, see in this respect Mackenzie and Sands, *supra* note 1, 276 considering in 2003 that '[r]elatively little has been written on the subject of the independence of the international judiciary.' As of today, large scale and important research centers such as PluriCourts in Oslo or iCourts in Copenhagen exist alongside many other activities and research networks dealing with international courts and thus also, in some way or another, with the independence of the international judiciary.

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upon the Bench a judge of the nationality of one of the parties'). After briefly highlighting some potential consequences of a successful application of this proposal (IX.), the article concludes (X.) by arguing that such a move would render ICJ adjudication fit for serving the community interest.

II. The Ideal Judge. Or how to Define Independence and Impartiality?

In general, the literature differentiates between independence and impartiality.[3] For Anja Seibert-Fohr, '[i]ndependence addresses the external forms of influence on adjudication, including inducements, pressures, threats, and direct or indirect interference with the decision-making process.'[4] Hence, instead of 'absolute neutrality', it is more about staying open minded and 'exercis[ing] a certain degree of detachment' which is asked of judges concerning their independence.[5] Impartiality, in contrast, 'concerns the internal predispositions of the adjudicator with respect to the matter in dispute, the adjudicator's relationship to the parties, and the parties' positions.'[6] Understood in this way, impartiality 'forbids any bias, personal prejudice, and lop-sidedness.'[7] We will see that, in our case, we have to bear both notions of the ideal judge in mind while largely focusing on judicial impartiality, which rightly can be called 'one of the central pillars of legal culture, almost universally recognized at all times and in all legal systems'.[8]

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[3] See, for instance, albeit concerning the jurisprudence of the European Court of Human Rights on Article 6 of the European Convention on Human Rights, Martin Kuijer, *The Blindfold of Lady Justice: Judicial Independence and Impartiality in Light of the Requirements of Article 6 ECHR* (2004) 447.

[4] Anja Seibert-Fohr, 'International Judicial Ethics' in Cesare PR Romano, Karen J Alter and Yuval Shany (eds), *The Oxford Handbook of International Adjudication* (2013) 756, 756.

[5] *Ibid.*, 761 with further references.

[6] *Ibid.*, 756, also adding 'diligence' (771 *et seq.*), which together with impartiality, makes up, in her view, 'international judicial ethics'. For a definition of impartiality 'in the sense of judicial independence' with regard to the ICJ, see Gleider I Hernández, 'Impartiality and Bias at the International Court of Justice' (2012) 1 Cambridge Journal of International and Comparative Law 183, 188-190, especially at 189, fn 25.

[7] Seibert-Fohr, *supra* note 4, 766 with further references.

[8] Daniel-Erasmus Khan, 'Article 20' in Andreas Zimmermann, Christian J Tams, Karin Oellers-Frahm and Christian Tomuschat (eds), *The Statute of the Interna-*

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This list of requirements for judicial independence and impartiality is clearly an ideal. Judges are human beings and, therefore, are obviously prone to make mistakes.[9] Also their decisions can be flawed and shaped by (unconscious) individual and societal biases.[10] Precisely because independence and impartiality as such are illusions to some extent, or at least because the mental states of judges are hard to analyse and be held accountable,[11] it is of utmost importance that 'ascertainable facts […] as to the judge's interests and allegiances must not give rise to a reasonable concern that she is biased.'[12] If we identify, thus, a factor leading to bias, judicial independence and impartiality requires to eliminate this factor as effectively as possible. In this regard the understanding of a former judge at the ICJ, Thomas Buergenthal, is striking. For him 'judicial ethics' are 'matters of perception and of sensibility' and, thus, he doubts that judicial ethics 'can ever be exhaustively defined'.[13]

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tional Court of Justice (3rd edn, 2019) 475, para 18. *Cf.* also Karen J Alter, 'Agents or Trustees? International Courts in Their Political Context' (2008) 14 European Journal of International Relations 33; see also James Crawford and Joe McIntyre, 'The Independence and Impartiality of the "International Judiciary"' in Shimon Shetreet and Christopher Forsyth (eds), *The Culture of Judicial Independence* (2012) 187; Erik Voeten, 'International Judicial Independence' in Jeffrey L Dunoff and Mark Pollack (eds), *Interdisciplinary Perspectives on International Law and International Relations* (2013) 421; and Daniela Cardamone, 'Independence of International Courts' in Paulo Pinto de Albuquerque and Krzysztof Wojtyczek (eds), *Judicial Power in a Globalized World: Liber Amicorum Vincent De Gaetano* (2019) 91, 93 calling the notion of judicial independence 'an international law *acquis*'.

9 Compare, for instance, with a focus on the international stage, Thomas M Franck, 'Some Psychological Factors in International Third-Party Decision-Making' (1966) 19 Stanford Law Review 1217, especially 1220, 1247.

10 See, *e.g.*, Shai Danziger, Jonathan Levav and Liora Avnaim-Pesso, 'Extraneous Factors in Judicial Decisions' (2011) 108 Proceedings of the National Academy of Sciences 6889. For an important critique, however, see Andreas Glöckner, 'The Irrational Hungry Judge Effect Revisited: Simulations Reveal That the Magnitude of the Effect is Overestimated' (2016) 11 Judgment and Decision Making 601.

11 Lucius Caflisch, 'Independence and Impartiality of Judges: The European Court of Human Rights' (2003) 2 Law and Practice of International Courts and Tribunals 169, 169-170.

12 Tom Dannenbaum, 'Nationality and the International Judge: The Nationalist Presumption Governing the International Judiciary and Why It Must Be Reversed' (2012) 45 Cornell International Law Journal 77, 111 with further references.

13 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* [2004] ICJ 3, para 10 (Order of 30 January 2004, Dissenting Opinion of Judge Buergenthal). For more background information concerning Judge

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Moreover, rather sceptical voices hold that too much independence for international courts and tribunals might even pose a 'danger to international cooperation'.[14] That is why such voices suggest limiting tribunals as dependent and 'simple, problem-solving devices'.[15]

Yet, despite these sceptics and against all potential constraints to the ideal of judicial independence and impartiality, rather optimistic voices exist as well. Hersch Lauterpacht, who was a famous judge at the ICJ as well, thought that '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.'[16]

On a more fundamental level, the idea behind the ideal judge is that she decides a dispute between two parties which have exhausted the possibilities to settle a conflict by their own means. This is a very old concept. The institution of a judge in such a sense works because both parties to the dispute expect something extra from handing over their dispute, namely a solution to their dispute which they cannot provide themselves – otherwise they would not pass on the solution to their dispute into foreign hands. To this idea a certain independence, a distance from both parties, the impartiality of the judge, is necessarily linked. If one party to the dispute knew that the judge was closer to the other party, this would compromise the very idea of entrusting the judge with solving the dispute in the first place. Nevertheless, by handing over a dispute to a judge, a party concedes that the dispute between both parties will be mediated, potentially not in the interests of that party. Handing over a dispute involves the possibility of losing the case or accepting a substantial loss in the form of a compromise. How is this tension to be solved?

Handing over a case to a judge involves a similar trade off as in democracy. We act in our interests, hoping that our interests will be duly taken into account. Yet, at the same time, we are aware of the fact that our interests are not the only thing that matters. Or to put it differently, by handing over a dispute to a judge, and by participating with our vote in free elections, we

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Elaraby's participation in this advisory opinion (which was considered legal by the court), *cf.* Seibert-Fohr, *supra* note 4, 769-770.

[14] Eric A Posner and John C Yoo, 'Judicial Independence in International Tribunals' (2005) 93 California Law Review 1, 6-7.

[15] *Ibid.*, 6-7. For a critique, see, *e.g.*, Tom Ginsburg, 'Political Constraints on International Courts' in Cesare PR Romano, Karen J Alter and Yuval Shany (eds), *The Oxford Handbook of International Adjudication* (2013) 483, 486-487.

[16] Hersch Lauterpacht, *The Function of Law in the International Community* (first published 1933, reprinted 2011) 223.

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transform our interest into something like a (judicial) *volonté générale*.[17] When we entrust a third party with the settlement of our dispute, we do not only act in a bilateral interest between the parties to the dispute, but we envisage something greater, something like a community interest.[18] It is this feature which will be of central interest to the proposal in this article.

This is a very basic and ideal portrayal of a judge. Moreover, law does not usually work in a vacuum. Hence, modern law usually comes with a modern legal system. Such a legal system usually strives towards this ideal; yet, many caveats are well known to the legal community. The most important is that in a modern legal system, it is usually not up to us to decide who will judge our dispute. This decision is taken by the legal system according to a specific procedure. Typically related to this procedure are nomination procedures of judges that must balance various important features of judges such as competence, (democratic) legitimacy, independence, impartiality, etc.[19] How these and potentially more requirements are best defined depends to a large degree on the legal system.[20] The focus of this article is on the international legal system for which the ICJ is the main judicial authority as the principal

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17 See also Khan, *supra* note 8, para 18. For a public choice perspective, see, *e.g.*, Robert D Cooter, *The Strategic Constitution* (2000) 19-22, differentiating between the pure self-interest of voters and a 'mixed-motive theory of voting' also including a 'civic duty' as well as, interestingly, *ibid.*, 195, fn 35 recalling 'the discussion of expressive voting in chapter 2' when talking about the judiciary.

18 Note that it is still possible to understand this as a sort of intelligent self-interest, which takes into account that our self-interest, which actually led to the conflict we cannot deal with ourselves alone with the other party, does not suffice, but it is still in *our* interests to solve the conflict. However, the argument here is about understanding that our original self-interest, which led to the conflict, cannot be maintained and, thus, we need to envisage something greater. Whether we call this intelligent self-interest or something like a judicial *volonté générale* or a community interest is actually not decisive. What is decisive is that this interest is and must be different from our original self-interest and we ourselves alone are not able to fulfil this interest. We need a third party to do so.

19 See Cardamone, *supra* note 8, 96 pointing to the fact that '[j]udicial independence is recognized as a significant factor in maintaining the credibility and legitimacy of international courts and tribunals.'

20 See in this regard Dieter Simon, *Die Unabhängigkeit des Richters* (1975) 167. See also, for instance, William Lucy, 'The Possibility of Impartiality' (2005) 25 Oxford Journal of Legal Studies 3, 5; as well as Hernández, Impartiality and Bias, *supra* note 6, 188 referencing the famous Hart-Fuller debate and emphasizing their 'diverging views on the judicial function and the role impartiality could play within it'. Thus, the way in which we understand law also plays out in our understanding of judicial independence and impartiality.

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judicial organ of the United Nations.[21] Hence, in the following we will take a very brief look at the evolution of the international legal system in order to find out whether our current understanding of judicial independence and impartiality in an international context still lives up to the expectations of its legal system, whether the ideal of judicial independence and impartiality is pursued in the best possible way.[22]

III. From Bilateralism to Community Interest: The Evolution of the International Community According to Bruno Simma

Almost 20 years have passed since Bruno Simma prominently highlighted the shift '*From Bilateralism to Community Interest in International Law*'.[23] While a state-centered design of international law was adequate for a long time, Simma contributed to shifting the focus towards the 'community interest'.[24]

[21] For an overview of how to measure judicial independence in international law, see Georgios Dimitropoulos, 'Measuring Judicial Independence in International Law: Putting Together the Pieces of the Puzzle' (2017) 24 Maastricht Journal of European and Comparative Law 531. See generally the papers in this special issue of the Maastricht Journal of European and Comparative Law.

[22] See Machiko Kanetake, 'Blind Spots in International Law' (2018) Leiden Journal of International Law 1, 6 'steps can still be taken in order to reduce the influence of bias, should it be substantiated empirically.' *Cf.* also *Article 55 of the American Convention on Human Rights*, Advisory Opinion OC-20, Inter-American Court of Human Rights Series A No 20 (29 September 2009) para 85, stating that 'nationality of the judges is also related to the perception of the justice applied by the Court in the framework of controversies' and, therefore, a national judge of the respondent State 'must not participate in the hearing of individual cases'.

[23] See Bruno Simma, 'From Bilateralism to Community Interest in International Law' (1994) 250 RdC 221.

[24] For the purpose of this article, the understanding advanced by Bruno Simma seems to be the most viable. The concept 'community interest', however, has many facets and is understood differently by various authors. Compare, for instance, Giorgio Gaja, 'The Protection of General Interests in the International Community' (2011) 364 RdC 9; Wolfgang Benedek, Koen De Feyter, Matthias C Kettemann and Christina Voigt (eds), *The Common Interest in International Law* (2014); Eyal Benvenisti and Georg Nolte, *Community Interests across International Law* (2018); or most recently Sarah Thin, 'Community Interest and the International Public Legal Order' (2021) 68 Netherlands International Law Review 35.

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For him, the move to community interest (instead of state sovereignty centred reciprocal bilateralism) is the 'consensus according to which respect for certain fundamental values is not to be left to the free disposition of States individually or *inter se* but is recognized and sanctioned by international law as a matter of concern to all States'.[25]

Simma's Hague lectures, however, were not only a description of how the international community evolved. Beyond such a diagnosis, we can also find a normative statement about how the international community should be, namely the vision of 'true *public* international law',[26] which actually pays tribute to a long-standing desire to acknowledge the place of the individual within the realm of international law as well, as famously advocated by Simma's mentor[27] Alfred Verdross.[28]

The core idea behind Simma's Hague lecture which is of interest to us here is that for an international community, bilateral or reciprocal state interests have to be transcended to create something in common, namely a – potentially only thin, but nevertheless existing – layer of common (universal) interests which 'correspond to the needs, hopes and fears of all human beings, and attempt to cope with problems the solution of which may be decisive for the survival of entire humankind'.[29]

For Simma, the substance of community interests is 'international peace and security', 'solidarity between developed and developing countries', the

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25 Simma, From Bilateralism to Community Interest, *supra* note 23, 233.

26 See in this regard Benedict Kingsbury and Megan Donaldson, 'From Bilateralism to Publicness in International Law' in Ulrich Fastenrath *et al* (eds), *From Bilateralism to Community Interest. Essays in Honour of Judge Bruno Simma* (2011) 79, 79 referencing Bruno Simma, 'Universality in International Law from the Perspective of a Practitioner' (2009) 20 EJIL 265, 297.

27 See Bruno Simma, 'The Contribution of Alfred Verdross to the Theory of International Law' (1995) 6 EJIL 33. *Cf.* in this regard also their famous textbook' Alfred Verdross and Bruno Simma, *Universelles Völkerrecht: Theorie und Praxis* (3rd edn, 1984).

28 Alfred Verdross, 'Die normative Verknüpfung von Völkerrecht und staatlichem Recht' in Max Imboden *et al* (eds), *Festschrift für Adolf Julius Merkl zum 80. Geburtstag* (1970) 425, 431 where he argues that 'all legal norms may only be put into practice through human behavior' (translation by the author). See further on this Lando Kirchmair, *Die Theorie des Rechtserzeugerkreises: Eine rechtstheoretische Untersuchung des Verhältnisses von Völkerrecht und Staatsrecht am Beispiel der österreichischen Rechtsordnung* (2013) 130 with further references in fn 336.

29 Simma, From Bilateralism to Community Interest, *supra* note 23, 244.

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'protection of the environment' and 'the "common heritage" concept' as much as 'international concern with human rights'.[30] Moreover, in his seminal Hague lectures he also addresses the 'community interest and the constitution of international society' and thereby focuses on 'the institutionalization of the international community', most prominently highlighting its principal organs, the General Assembly as well as the Security Council.[31]

This article wishes to add that alongside this evolution of the international community, international dispute settlement did not stand still either. Thus, international adjudication today in general, like judgments by the ICJ in particular, goes far beyond mere dispute settlement between two parties.[32] Even though the judgments of the ICJ formally have only *inter partes* effects, it is undisputed that de facto they are of importance to the international community as a whole. International adjudication nowadays is also said to care about 'broader societal goals that such legal proceedings are believed to secure'.[33] Besides 'multifunctionality', including not only 'dispute settlement' but also the 'stabilization of normative expectations', Armin von Bogdandy and Ingo Venzke highlight 'law-making' as well as 'control and legitimation' as core functions of international adjudication, emphasizing that 'the exercise of public authority' and 'democracy' are also essential to international adjudication.[34] In the light of this development, it is argued that international adjudication at the ICJ is also a central community interest in international law, which connects very well to the judicial *volonté générale* discussed above.[35]

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30 *Ibid.*, Ch I.2(a).

31 *Ibid.*, Ch II.

32 For the argument 'that enforcing community interests by invoking international dispute settlement is not utopian', see Rüdiger Wolfrum, 'Enforcing Community Interests through International Dispute Settlement: Reality or Utopia?' in Ulrich Fastenrath *et al* (eds), *From Bilateralism to Community Interest. Essays in Honour of Judge Bruno Simma* (2011) 1132, 1145.

33 See in this regard José E Alvarez, 'What are International Judges for? The Main Functions of International Adjudication' in Cesare PR Romano, Karen J Alter and Yuval Shany (eds), *The Oxford Handbook of International Adjudication* (2013) 158, 160 with further references.

34 See von Bogdandy and Venzke, *supra* note 2, Ch 1.B. *Cf.* also David D Caron, 'Towards a Political Theory of International Courts and Tribunals' (2006) 24 Berkeley Journal of International Law 401, 408 *et seq*.

35 See, above, text at *supra* note 17.

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IV. Being a Judge at the ICJ. And how to Define Independence and Impartiality at the ICJ

The ICJ is a very special institution. It is *the* Court of the international community. According to Article 92 ICJ Statute it is the 'principal judicial organ of the United Nations'.[36] Thereby it fulfils an important role in the international community.[37] Thus, also Simma emphasized that 'the International Court of Justice is not an isolated arbitral tribunal or some regional institution but the principal judicial organ of the United Nations'.[38] Judges at the ICJ enjoy the highest reputation in the international community and they have to have high qualifications in the field of international law according to Article 2 ICJ Statute. Moreover, they have to be elected by the General Assembly after what is often a long-lasting election campaign.[39]

Especially in view of the importance of the ICJ for the international community and the still strong state centrism of the international legal system, the standard narrative is to find justifications for the institutional set up of the ICJ. This usually also pertains to the fact that 'national judges' should remain on the bench when 'their' national state is party to a dispute at the

[36] For details see Robert Y Jennings, Rosalyn Higgins and Peter Tomka, 'General Introduction' in Andreas Zimmermann *et al* (eds), *The Statute of the International Court of Justice* (3rd edn, 2019) 3.

[37] See Gleider I Hernández, *The International Court of Justice and the Judicial Function* (2014) 1, 197 *et seq*.

[38] *Oil Platforms* (*Iran v United States of America*) [2003] ICJ 161, para 6 (Judgment of 6 November, Separate Opinion of Judge Bruno Simma).

[39] For an overview, see Leigh Swigart and Daniel Terris, 'Who are International Judges?' in Cesare PR Romano, Karen J Alter and Yuval Shany (eds), *The Oxford Handbook of International Adjudication* (2013) 619, 630-631 with particular emphasis on the evolution of the bench at the ICJ in 1972, 1992, and 2012. For a critical view, see David R Robinson, 'The Role of Politics in the Election and the Work of Judges of the International Court of Justice' (2003) 97 ASIL Proceedings 277.

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ICJ.[40] Yet, there is strong empirical evidence that the 'nationality bias' in particular is of immense importance for the judicial behaviour of individual judges. The next Section explores this fact further.

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40 See in this regard, for instance, Hernández, Judicial Function, *supra* note 37, 1, 43, and Ch 5 pointing, among other arguments, towards the distinction 'between judge and judicial institution' (at 132). See also Khan, *supra* note 8, para 19 brushing skepticism to one side by saying that 'a careful and impartial scrutiny of the Court's record demonstrates that the "nationality" bias of judges on the Court was never as powerful as claimed by alarmists (and has become even less so at present)', unfortunately without providing such an analysis himself. Daniel Terris, Cesare PR Romano and Leigh Swigart, *The International Judge: An Introduction to the Men and Women Who Decide the World's Cases* (2007) 153 also refer to a study which holds 'that critics' concerns about "judicial nationalism" are by and large overblown, arguing that a long-term analysis of voting patterns at the ICJ has shown that nationality has traditionally been a poor predictor of how a judge will vote in a particular case, and that the trend has been toward even greater independence in recent decades.' It is very telling that both, Khan (at para 19, fn 42) and Terris, Romano and Swigart (at 153, fn 13 and 14), reference the work of Eric A Posner and Miguel FP de Figueiredo, 'Is the International Court of Justice Biased?' (2005) 34 Journal of Legal Studies 599 as well as the study by Adam M Smith, '"Judicial Nationalism" in International Law: National Identity and Judicial Autonomy at the ICJ' (2005) 40 Texas International Law Journal 197. The latter study, however, 'problematizes the assumption of national partiality on the ICJ bench and questions the veracity of its underlying rationale' (at 205). Instead of taking a closer look at the methodology of the studies (both of which claim to have conducted an empirical analysis of the data on the question of a potential nationality bias at the ICJ), Khan as well as Terris, Romano and Swigart simply go for the study which reassures the standard narrative. Thereby they arguably fall prey to confirmation bias, as a closer look at the methodology in the study conducted by Smith casts doubt on his results (see the analysis below, text at fn 54). However, to be fair, Terris, Romano and Swigart even point towards an instance of direct interference: 'One judge recounts the story of a phone call from the office of the president of a large country giving instructions on how to rule on a particular case. "It was combined with a blackmail", the judge recalls, "but I nevertheless said it was totally unacceptable."' (at 156). Judge Thomas Buergenthal further adds to such instances the doubt that 'judicial candidates wishing to be renominated are likely to experience [pressure] when they have to vote in a case in which their state of nationality is a party', see Thomas Buergenthal, 'The Proliferation of Disputes, Dispute Settlement Procedures and Respect for the Rule of Law' (2006) 22 Arbitration International 495, 499.

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V. Nationality Bias, Impartiality, and Independence at the ICJ. The Difference Between Individual Judicial Independence and Institutional Judicial Independence

Judicial independence is hard to grasp.[41] Empirical studies about 'judicial assertiveness' are a more straightforward tool in order to gain insights into judicial independence.[42] In this regard it is striking to learn that apparently

> judges, attitudes vary not only along a single left/right dimension but also in how they understand their function in a democratic system, that is, whether they believe their default approach should be to defer to or to question the decisions of state and government officials.[43]

This also has special importance for the international arena and the ICJ because in contrast to judges within a national legal order, the 'international judge […] faces at the very least a potential conflict between national loyalty and the application of the law. What if the interests of his country and the judge's interpretation of the law come into conflict?'[44]

Judge Kenneth J Keith describes the 'institutional autonomy' of the ICJ as follows:

> On the one side, the court or tribunal as an institution has to be free from improper interference or influence and, on the other, its individual judges, while retaining their individual independence, are subject to restrictions arising from the fact that they are one of 15, to take the case of the ICJ. The members of that Court have responsibilities as colleagues. They enter the Great Hall of Justice to the cry of '*La Cour*'. They constitute a bench

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[41] See, albeit only briefly, II. above.

[42] Lisa Hilbink, 'The Origins of Positive Judicial Independence' (2012) 64 World Politics 587.

[43] *Ibid.*, 589.

[44] Terris, Romano and Swigart, *supra* note 40, 151. *Cf.* Dannenbaum, *supra* note 12, 125 with further reference to Ronald Dworkin, 'Discussion: International Criminal Justice' in Robert Badinter and Stephen Breyer (eds), *Judges in Contemporary Democracy: An International Conversation* (2004) 189, 252-253.

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> of magistrates, not an academy of jurists, let alone 15 individual scholars each marching to their own drum.[45]

Thereby he emphasizes the institutional role and vision of individual judges. This is, of course, of immense importance. And surely the task of the judges at the ICJ is a challenging one. Moreover, Lisa Hilbink informs us 'that with judges as with other political actors the relationship between their motives and opportunities or between preferences and situations is complex and dynamic.'[46] For her, '[j]udges' "utility functions" are historically, socially, and sometimes institutionally constituted, in a dynamic process that itself can alter how individual judges perceive and weigh the costs and benefits of different possible actions.'[47] We shall keep such a nuanced picture in mind. Nevertheless, the voting behaviour of individual judges at the ICJ in relation to their home states is – to put it mildly – striking.[48]

A sophisticated statistical analysis of the voting habits of those judges at the ICJ whose country of nationality is involved in a dispute before the court shows an astonishingly strong bias.[49] Almost independently of the

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[45] Keith, *supra* note 2, 139-140. See in this regard also Bardo Fassbender, 'Article 9' in Andreas Zimmermann *et al* (eds), *The Statute of the International Court of Justice* (3rd edn, 2019) 355, para 47 quoting Robert Jennings, 'The Collegiate Responsibility and Authority of the International Court of Justice' in Yoram Dinstein and Mala Tabory (eds), *International Law at a Time of Perplexity: Essays in Honour of Shabtai Rosenne* (1989) 343, 345 *et seq*.

[46] Hilbink, *supra* note 42, 614.

[47] *Ibid.*, 614.

[48] For a different critique relating to 'extracurricular activities of judges' at the ICJ, see Philippe Sands, 'Reflections on International Judicialization' (2017) 27 EJIL 885, 895 *et seq.*; and esp Nathalie Bernasconi-Osterwalder and Martin Dietrich Brauch, 'Is "Moonlighting" a Problem? The Role of ICJ Judges in ISDS' (*IISD Commentary*, November 2017) <www.iisd.org/system/files/publications/icj-judges-isds-commentary.pdf> accessed 11 November 2021. See in this regard also 'Speech by H.E. Mr. Abulqawi A. Yusuf, President of the International Court of Justice, on the Occasion of the Seventy-Third Session of the United Nations General Assembly' (25 October 2018) 12 <www.icj-cij.org/public/files/press-releases/0/000-20181025-PRE-02-00-EN.pdf> accessed 11 November 2021, stating that 'Members of the Court have come to the decision last month that they will not normally accept to participate in international arbitration. In particular, they will not participate in investor-State arbitration or in commercial arbitration.'

[49] Posner and Figueiredo, *supra* note 40; *cf.* Hernández, Impartiality and Bias, *supra* note 6, 183 with further references in fn 2 and at 200, fn 82. Regarding the ICJ

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legal matter of the dispute, judges vote for their country of nationality.[50] The results of Eric Posner and Miguel Figueiredo reveal that '[w]hereas judges vote in favor of a party about 50 percent of the time when they have no relationship with it, that figure rises to 85–90 percent when one of the parties is the judge's home state.'[51]

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and the European Court of Human Rights, see Martin Kuijer, 'Voting Behaviour and National Bias in the European Court of Human Rights and the International Court of Justice' (1997) 10 Leiden Journal of International Law 49.

[50] See Posner and Figueiredo, *supra* note 40, 610 *et seq.* on their methodology. See *ibid*., 613-614 for further clarifications on selection effects as well as 624: 'We have not shown in a straightforward way that judges are consciously biased. All that we have shown is that the judges, on the margin, do not vote impartially in the manner prescribed by the null hypothesis. The motivation for their votes may be psychological or cultural'.

[51] Posner and Figueiredo, *supra* note 40, 601, 615. They also point to prior research (601, fn 4) indicating similar results: Il Ro Suh, 'Voting Behavior of National Judges in International Courts' (1969) 63 AJIL 224, 235, found that there is an 'inclination shown by some national judges, both regular and ad hoc, to take favorable attitudes toward the contentions of their states'; Thomas R Hensley, 'National Bias and the International Court of Justice' (1968) 12 Midwest Journal of Political Science 568, 585, argues too that 'it has been shown that national bias […] is an important element in the adjudication process' the influence of which 'was shown to operate upon both the permanent members and the ad hoc justices'. He goes on to say that '[t]his association was very strong for the ad hoc justices, but it was rather moderate for the permanent members of the Court'; *cf.* William Samore, 'National Origins v. Impartial Decisions: A Study of World Court Holdings' (1956) 34 Chicago-Kent Law Review 193; and Edith Brown Weiss, 'Judicial Independence and Impartiality: A Preliminary Inquiry' in Lori F Damrosch (ed), *The International Court of Justice at a Crossroads* (1987) 123. See also Kuijer, *supra* note 49, 66 concluding that '[n]ational bias is more than a hypothesis' at the ICJ (particularly pointing to the role of judges ad hoc having been 'the only judge, or one of a minority of two judges, to vote in favour of the position of his own government'. This bias is by far not that strong at the European Court of Human Rights (*ibid*). See in this regard also Erik Voeten, 'The Impartiality of International Judges: Evidence from the European Court of Human Rights' (2008) 102 American Political Science Review 417, 425 *et seq*. For an overview on nationality bias and policy suggestions for the multilateral investment court contending that 'the presence of national judges and judges ad hoc is inapposite to investor-state disputes', see Catharine Titi, 'Nationality and Representation in the Composition of the International Bench: Lessons from the Practice of International Courts and Tribunals and Policy

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The figures are as follows:

	In Favour of Applicant		In Favour of Respondent	
Judge	Ratio	%	Ratio	%
Party:				
National	15/18	83.3	34/38	89.5
Ad hoc	57/63	90.5	37/41	90.2
Total	72/81	88.9	71/79	89.9
Nonparty	648/1,277	50.7	629/1,277	49.3

Table 1[52]

Their finding and methods are very important, particularly as legal scholars mostly rely on qualitative legal analysis. In our case, this reluctance of legal scholars to take social science research into account is fuelled even further in the face of another study which also claims to have analysed the voting behaviour of judges in an empirical fashion, and comes to quite different results. Adam Smith asserts that 'while a continuing focus on nationality is understandable in the ICJ, the "nationality" bias of judges on the Court was never as powerful as claimed by alarmists and today seems to be breaking down even further.'[53] Who is right? Or how are these differing results to be explained?

First, it is important to explain the databases. Posner and Figueiredo included 76 cases in which the ICJ 'voted on substantive questions', leaving aside those of the 104 cases which were 'dropped before the ICJ was able to make a substantive decision,'[54] from all cases which had been filed with the ICJ since its inauguration on 18 April 1946 until 1 March 2004.[55]

Options for the Multilateral Investment Court' (2020) CERSA Working Papers on Law and Political Science 1/2020, 6, <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3519863> accessed 11 November 2021.

[52] This table is a reproduction of an illustration provided in Posner and Figueiredo, *supra* note 40, 615 'Table 1 Votes of Party and Nonparty Judges in Proceedings'.

[53] Smith, *supra* note 40, 199.

[54] Posner and Figueiredo, *supra* note 40, 604-605, fn 7. For a critique of this data set, see Rosalyn Higgins, 'Remarks: Alternative Perspectives on the Independence of International Courts' (2005) 99 ASIL Proceedings 135, 136.

[55] Posner and Figueiredo, *supra* note 40, 626. For another empirical investigation covering the period between 2005 until 2016 with very similar results, see Xuechan Ma and Shuai Guo, 'An Empirical Study of the Voting Pattern of Judges

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Posner and Figueiredo convincingly explain that

> [t]he ideal way to determine if a judge is unbiased is just to figure out the proper legal outcome of a dispute and then see if his or her vote matches that outcome, taking into account legitimate differences in the legal cultures in which judges are educated.[56]

Obviously, this is hard to tell, as all of us know that 'the proper legal outcome is rarely obvious and, further, judges may make mistakes and vote the wrong way even though they are unbiased.'[57] In order to conceptualize a meaningful statistical analysis which does justice to the object, they hypothesize that 'an unbiased judge from state X is no more likely to vote for state X than is an unbiased judge from state Y.'[58] That is their null hypothesis. They

> are thus not assuming that unbiased judges always vote the same way – as there can be legitimate, legally relevant grounds for disagreeing on the outcome of a dispute – but only that their disagreements are random (or correlated with relevant legal factors) and not correlated with political factors.[59]

This null hypothesis, in other words, holds

> that judges take their legal role seriously because they are ideologically committed to the development of international law, or think that they are more likely to be rewarded for impartiality than for bias, or are not selected on the basis of national bias.[60]

On this basis they go on to state that '[t]he simplest way to test this claim is to examine whether judges vote in favor of their home states when that

of the International Court of Justice (2005-2016)' [2017] Erasmus Law Review 163, 171: 'On the basis of the above results, we feel confident to conclude that the variable nationality does play a role in ICJ judges' decision-makings.' Note, however, due to the 18 selected cases in this period where the ICJ decided substantive issues, their results have 'more explanatory power on the voting pattern of ad hoc judges rather than permanent party judges' (at 168.)

56 Posner and Figueiredo, *supra* note 40, 601.

57 *Ibid*.

58 *Ibid*.

59 *Ibid*.

60 *Ibid*., 609.

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state appears as a party.'[61] While they reference previous studies, Posner and Figueiredo 'use more sophisticated empirical tests, as well as more data'[62] which somewhat distinguishes their results from previous work on this subject.

For the purpose of this article, which is interested in the voting behaviour of individual judges related to their home states, it is rather easy to see whether their methodology is convincing. Concerning their first hypothesis, the nationality bias of individual judges, they only had to test whether a judge voted in favour of her home country when her home country was a party to a case.[63] To find this out Posner and Figueiredo chose the approach to code

> judges as voting in favor of the applicant if they joined the majority or concurrence, but [they] would also code a judge as voting in favor of the applicant if he or she dissented because the majority opinion did not give everything that the applicant sought.[64]

This leads them to the conclusion that

> [j]udges favor their home states. They vote for nonhome parties about half of the time; they vote for home states about 90 percent of the time. There is thus substantial evidence that party judges vote in favor of their home state.[65]

Posner and Figueiredo speculate about the reasons for this bias; however, they refrain from stipulating any concrete reason as they say themselves that their 'data set is not rich enough' to do so.[66] This is not the topic of this article. For the motivation of the proposal advanced here, the appearance of biased judges due to dependence or partiality suffices.[67]

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61 *Ibid.*, 601.

62 *Ibid.*

63 *Ibid.*, 609.

64 *Ibid.*, 611, fn 15 explain that while a different approach would have been possible, it would face the following deficit: 'An alternative approach would be to treat the vote on each issue as an observation – some cases had several distinct issues, which the judges voted on separately. The problem is that many issues are of no importance, and often only a single issue matters, so an issue-by-issue approach would overweight trivial issues at the expense of important issues.'

65 *Ibid.*, 615.

66 *Ibid.*, 608, fn 12.

67 However, *cf.* also Posner and Figueiredo, *supra* note 40, 625-626, where they are critical of the solution tackling only 'national judges' as they hold that they

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Another study was conducted by Adam Smith, who describes his dataset as follows: 'To examine the judicial independence of the ICJ bench, a dataset was established covering nearly all of the eighty-three contentious cases heard by the body since its founding in 1949 [sic] until 2000.'[68] Smith did not 'distinguish between votes made on the merits of a case and those on procedural or preliminary measures' either.[69] His dataset, thus, includes '163 instances of voting.'[70]

He proceeds, then, to illustrate in 'Table I' 79 states which have been 'represented on the Court', of which 'only 40% of those states have voted in significant numbers (twenty-one or more times).'[71] This leads him to his 'first limitation of the claim about the importance of nationality' as 'the selectivity of the sample means that extrapolation would be highly uncertain' even though 'voting by those states [sic] with only minimal experience on the bench may or may not indicate a national bias'.[72] This, however, is problematic as it confuses states or individual judges with the voting pattern of a national judge. The analysis of nationality bias does not aim to analyse which of the

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have demonstrated a bias of the court as such. Yet this is much more difficult to prove. Consider only their finding that judges coming from democratic countries apparently favour democratic parties. We cannot tell whether non-democratic parties are more prone to lose cases at the ICJ because autocratic regimes tend to violate international law more than democratic countries. Consider further also Freya Baetens and Tim Kluwen, 'International Court of Justice' in Gordon Martel (ed), *The Encyclopedia of Diplomacy* (2018) 918, 928-929 pointing to the '*Marshall Islands cases* (2016) where the majority decided to dismiss the claims on the ground that no "dispute" existed between the Marshall Islands, on the one hand, and the United Kingdom, India, and Pakistan, on the other. Among the eight judges who found that there was no legal dispute, six were nationals of nuclear-weapon states.'

68 Smith, *supra* note 40, 216-217. He adds in fn 132 that '[s]ix of these cases are not included due to incomplete data or conflicting data from various sources.' In fn 133 he explains that '[o]nly contentious cases are examined for two reasons. First, in order to make the analysis comparable with those undertaken in other jurisdictions, a demand that the adjudication be made on ripe issues was critical. Second, though advisory opinions are inherently political, the ICJ's legal/judicial muscle is only supposed to be felt in its binding, contentious decisions.'

69 *Ibid.*, 217.

70 *Ibid.*, '992 independent votes by judges from seventy-nine countries.'

71 *Ibid.*

72 *Ibid.*

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individual judges[73] involved in proceedings at the ICJ are prone to favour their home country (and why they do so) but whether a national judge in general is prone to favour her home country. Hence, it is not accurate to exclude all those individual judges from the analysis who have participated in fewer than 21 votes at the ICJ.[74]

Smith continues by adding another doubt. He refers again to a potential 'selection bias within those states' whose judges did not participate in more than 21 votes.[75] This, he thinks, is the case because 'the majority of states [sic] who have voted infrequently received their few votes from the ad hoc judges they appointed for cases to which they were party.'[76] And – here comes another concern – '[a]s ad hoc judges often vote for the states that appoint them […], analysing the nationalism of judges representing these states may distort reality.'[77] It seems, therefore, that for Smith a nationality bias of ad hoc judges is apparent. However, first, it is inaccurate to identify them only concerning the sample of those – in his terminology – states which did not participate in more than 21 votes. Second, if he is of the opinion that nationality bias with ad hoc judges is clear, it would have been more accurate to exclude them altogether from his analysis. Finally, such an assumption is rather puzzling to find in a study which holds that alarmists exaggerate the nationality bias at the ICJ.[78]

On this basis, Smith comes to his 'macroresults' showing that '[e]ighty percent of the time in which they were able to do so, national judges voted with their countries when they were party to a case'.[79] Divided up, this leads to 89% of ad hoc judges voting in line with their home countries and 70% of

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73 It is somewhat peculiar that Smith speaks of 'states', although voting behaviour concerns individual judges rather than states. However, this is of only minor interest here.

74 Moreover, it remains unclear why 21 should be the magic number from which onwards we could say something statistically meaningful about the individual voting behaviour of judges. On the contrary, diminishing the data set reduces the reliability of results, which rather leads to an underestimation of the effect. Finally, it seems that Smith, despite having the expressed doubts, did, nevertheless, include all the data in his analysis.

75 Smith, *supra* note 40, 217.

76 *Ibid.*, 217-218.

77 *Ibid.*, 218.

78 Compare the quotation above in *supra* note 53.

79 Smith, *supra* note 40, 218.

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'term judges' voting in line with their home country.[80] He concludes that 70% is 'still substantial', but taking such a result for granted would be committing 'the post hoc ergo propter hoc fallacy', which means mistaking correlation for causation, because we cannot conclude 'what a vote in accord with a judge's national interest actually means.'[81] According to Smith

> [i]t is too easy to establish a causation argument from seeing such a vote when it is equally possible that a judge of a specific nationality voted in a certain manner not because of his citizenship but because of his detached judicial reasoning.[82]

To be fair to Smith, it is, indeed, not possible to say anything about the motivation of individual judges' votes from such an analysis. However, neither do Posner and Figueiredo, for instance, claim that this would be possible.[83] Moreover, the claim that 'detached judicial reasoning' could be the reason for these findings is not a case of the post hoc fallacy. Posner and Figueiredo use robust statistical methods to conduct their study. By providing several regression analyses with different groups of independent variables, they are able to show that the dependent variable, the nationality of the judge, has an influence on their voting behaviour.[84] As they state, it is not possible for us to determine the 'proper legal outcome of a dispute'[85], which would be necessary for an ideal analysis. However, by comparing the individual voting behaviour of national judges with the voting behaviour of other judges allows them to exclude such a possibility.[86] Yet, for Smith this seems to be enough to conclude that 'it is highly likely that the soaring percentages seen in the aggregated figures overstate the amount of national bias at work.'[87]

In the light of this comparison, this article holds that the statistically robust findings of Posner and Figueiredo do indeed show a significant national bias in judges at the ICJ, *i.e.* voting significantly more often for their home states

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[80] *Ibid*.

[81] *Ibid*.

[82] *Ibid*.

[83] In fact, they explicitly acknowledge that their data do not allow them to do so. See *supra* note 66 and the accompanying text above.

[84] Posner and Figueiredo, *supra* note 40, 618-619. Using a similar regression analysis Ma and Guo, *supra* note 55, 167.

[85] See *supra* note 56 and accompanying text.

[86] For details, see again *supra* note 56 and accompanying text.

[87] Smith, *supra* note 40, 218.

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than other judges. This is a significant legitimacy issue for an independent judiciary because it cannot be brought in line with the understanding of impartiality and independence in particular and the judicial *volonté générale* in general, which we briefly elaborated on before. This strong bias towards the own home state implies a lack of impartiality. Moreover, such a voting behaviour also suggests a severe lack of independence. This cannot be concealed by arguing for a differentiation between individual judges and the court as an institution. We have clearly seen in the description of judge Keith, that individual judges should not 'each march[] to their own drum' when entering the 'Great Hall of Justice to the cry of "*La Cour*".'[88] How can we talk about an independent and impartial court when we clearly cannot speak of independent and impartial individual judges? Without speculating about the reasons why national judges vote for their home states to such a high degree, it is hard to deny that some external – albeit potentially quite indirect – influence induces such a behaviour.

VI. Drafting the Statute of the Permanent Court of International Justice in 1920. The Discussion in the Advisory Committee of Jurists and What This Means for us Today

Leaving the empirical results aside, this bias, interestingly, is obvious even to the court itself and was so too while drafting the Statute for the PCIJ. For the ten highly respected men (literally only men at that time) who drafted the statute in 35 sessions between 16 June and 24 July 1920 at the Peace Palace in The Hague, two different suggestions were on the table to tame the 'nationality bias'. Either the national judge would not be allowed to remain on the bench when her home country was party to a case, or the other party, which had no permanent national judge at the ICJ, was allowed to nominate a national judge as well, a so-called judge ad hoc, to sit in this specific case. The discussion in the 1920s shows a considerable disagreement regarding both options and interesting assumptions about the potential future development of international justice which might have influenced the decision then and thus might impact the evaluation today.[89]

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[88] See above, quote at *supra* note 45.

[89] *Cf.* on this subject, Advisory Committee of Jurists, *Procès-verbaux of the Proceedings of the Committee, July 16th – July 24th 1920 with Annexes* (1920) 525,

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One of the decisive arguments in 1920 was made by Lord Robert Phillimore, who articulated that 'it would be preferable to give a national representative to both parties, not only to protect their interests, but to enable the Court to understand certain questions which require highly specialized knowledge and relate to the differences between the various legal systems.'[90] Mineichirō Adachi agreed with Lord Phillimore and added that a national judge would be helpful in drafting a sentence with regards to powerful states and people in the Far East, who are – due to their different cultural traditions such as Buddhism, Shintoism, or Confucianism – in particular need of an explanation of the sentence.[91] Raoul Fernandes also supported the option of keeping the national judge, which was the option then included in Article 27 of the Root-Phillimore plan.[92] In fact, most of the members of the Advisory Committee of Jurists drafting the Statute for the PCIJ in 1920 were in favour of a national judge sitting on the bench when her home state is party to a case.

However, already in 1920, doubts were raised as to whether such an organization of the PCIJ would be suitable. Albert de Lapradelle, for instance, asked whether a judge ad hoc would be able to publish a dissent. When Lord Phillimore confirmed that, de Lapradelle expressed his concern that 'a national judge would always record his disapproval of a sentence unfavourable to his country. For this reason, judges ad hoc should not be used except as a last resort.'[93] Moreover, even though this was a minority position, Bernard Loder – subsequently the first president of the PCIJ –, articulated a strong counter position:

> He was opposed to Article 27 of the Root-Phillimore plan, because this Article still involved the idea of arbitration instead of justice. He believed that the idea of giving the parties representatives upon the Court was wrong. If the right to choose such judges were given to the parties, this would give the proceedings a characteristic essentially belonging to arbitration. […] Loder desired to suppress the whole of Article 27 but if that was found

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which represents a summary (but unfortunately not an exact record) of what the members of the Committee said. See on this Jörg Kammerhofer, 'Introduction' in Permanent Court of International Justice (ed), *Advisory Committee of Jurists, Procès-verbaux of the Proceedings of the Committee June 16th-July 24th 1920 with Annexes* (first published 1920,reprinted 2006).

90 Advisory Committee of Jurists, *supra* note 89, 528-529.

91 *Ibid.*, 529.

92 *Ibid.*, 530.

93 *Ibid.*, 531.

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> impossible, he was prepared to agree to assessors with advisory powers appointed by the parties, but he could not in any case go further'.[94]

The solution to degrade judges to assessors was not considered practical by Lord Phillimore, however.[95] Besides that, the solution with a judge ad hoc was said to be necessary with regards to some decisive differences between the national and the international judiciary. In addition to that, a rather optimistic stance was taken, holding 'in the first place, that a national judge would not necessarily always vote in favour of his own country.'[96] Moreover, it would be 'inadmissible' to reduce a permanent national judge 'to the status of assessor in order to assure complete equality between the judge of its nationality and the assessor sent by the other party'.[97] Francis Hagerup explicitly agreed with this position.[98]

Baron Édouard Descamps, the president of the Advisory Committee, jumped in, however, pushing again towards Loder's proposal of national assessors instead of national judges, holding that a permanent national judge would not be degraded but 'replaced by an assessor appointed by that party.'[99] Yet, according to Elihu Root, such an assessor would, due to its inferiority, neither satisfy great nor small powers.[100]

What was advanced then is of particular interest for the present article. De Lapradelle acknowledged

> the difficult character of the question now before the Committee. He considered that, if international justice reached a high degree of perfection, it would not be necessary to meddle with the composition of the Court. The oath to be taken or the declaration to be made by the judges should of itself suffice to convey the notion of that complete impartiality on their part, which would induce the States to submit their disputes to the Court as a matter of course, without considering its composition. The judges would be not denationalised but super-nationalised.[101]

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94 *Ibid*.

95 *Ibid.*, 532.

96 *Ibid.*, 533.

97 *Ibid*.

98 *Ibid*.

99 *Ibid*.

100 *Ibid.*, 534.

101 *Ibid*. For an argument made based on such a position to which he refers as a 'cosmopolitan court', see Dannenbaum, *supra* note 12, 180-184.

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Importantly, he kept on going by admitting

> however, that international justice had not yet reached this pith of perfection. The solution applicable to the next lower stage of development would be to cause a judge of the nationality of one of the parties to give up his seat. The fact that a judge was of the nationality of one of the parties might be considered as a sufficient ground for challenging his right to sit. In practice, a judge would, in all probability, offer to withdraw.[102]

Finally, acknowledging the condition of international justice in 1920, he concluded that

> [t]he true solution, therefore, would seem to be that a judge of the nationality of one of the parties should withdraw and be replaced by an assessor. If the contrary solution were adopted, if the unrepresented party were allowed to send a judge ad hoc, theoretical equality might be attained, but not an exactly similar situation for both parties. The latter could be obtained only by the system of assessors.[103]

Hence, to sum things up, the danger of the nationality bias was clearly already apparent in 1920[104] and the decision was taken to outbalance the imbalance.[105] If a country involved in a dispute has a judge of its own nationality sitting on the bench (the national judge), the other party to the dispute is allowed to nominate a judge ad hoc who, in most instances, will also be a citizen of its

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[102] Advisory Committee of Jurists, *supra* note 89, 534-535.

[103] *Ibid.*, 535.

[104] See Hernández, Impartiality and Bias, *supra* note 6, 190 stating in reference to 'Report of the Committee appointed on September 2nd, 1927' in *Fourth Annual Report of the Permanent Court of International Justice* (1927-1928) PCIJ Series E No 4, 75: 'already during the time of the PCIJ, Moore, Loder and Anzilotti cautioned that "of all the influences to which men are subject, none is more powerful, more pervasive, or more subtle" than that of national bias'.

[105] Unfortunately, the final discussion was taken at a closed meeting of the Committee, of which no records exist. See on this, Shabtai Rosenne, *Essays on International Law and Practice* (2007) 107. On the debate see also Pieter H Kooijmans and Fernando L Bordin, 'Article 31' in Andreas Zimmermann *et al* (eds), *The Statute of the International Court of Justice* (3rd edn, 2019) para 2 with further references. See also Karl Doehring, 'Zur Befangenheit internationaler Richter' in Nisuke Ando, Edward McWhinney and Rüdiger Wolfrum (eds), *Liber Amicorum Judge Shigeru Oda* (2002) 23, 25 stating that the ad hoc judge was a '*Flucht nach vorne*' (a 'flight forward').

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nominating country (or somebody who feels deeply related to this country through nomination).[106]

However, the arguments advanced in 1920 should be contextualized. Lord Phillimore's argument that national judges could 'represent' to protect their interests and to enable the Court to understand intricate questions of their legal systems better[107] is interesting because it has often been referred to since then and is generally often used.[108] This even tipped the scale for nominating judges ad hoc if neither party had a national on the bench (instead of leaving the balanced bench as it is). Yet, already Hersch Lauterpacht rejected this argument. According to him, 'the Court has ample opportunity during – and, if need be, after – the written and oral proceedings to obtain such information.'[109] Lauterpacht is in good company. More recently, Judge

[106] Because this practice dates back to the Permanent Court of International Justice Dannenbaum, *supra* note 12, 89 calls this 'the original approach'.

[107] Lord Phillimore, a member of the Advisory Committee of Jurists drafting the Statute for the Permanent Court of International Justice in 1920 on Article 31 (which is – concerning paras 1 to 3 – virtually identical to Article 31 of the Statute of the PCIJ), see Advisory Committee of Jurists, *supra* note 89, 528-529.

[108] See on this issue Bruno Simma and Jan Ortgies, 'Ad Hoc Judge' in Anne Peters (ed), *Max Planck Encyclopedia of Public International Law* (January 2019) paras 123-124 listing it on the pro side for having judges ad hoc together with (para 125) making a party's argument heard with a shift of importance towards the latter (para 126). *Cf.* also Terris, Romano and Swigart, *supra* note 40, 151-152 with further references.

[109] Hersch Lauterpacht, 'The Revision of the Statute of the International Court of Justice' (2002) 1 Law and Practice of International Courts and Tribunals 55, 83 (quoted after Dannenbaum, *supra* note 12, 168 labelling this argument a 'fig leaf'). See also Stephen M Schwebel, 'National Judges and Judges Ad Hoc of the International Court of Justice' (1999) 48 ICLQ 889, 891 referring to 'trenchant criticism' by Lauterpacht; See in this regard also Simma and Ortgies, *supra* note 108, paras 128-130 stating that 'A Judge is not Counsel'. *Cf.* the scepticism in this regard of Ian Scobbie, 'Une Hérésie en Matière Judiciaire: The Role of the Judge ad hoc in the International Court' (2005) 4 The Law and Practice of International Courts and Tribunals 421, 458 who questions 'whether there is any solid basis for the continuation of the system of judges *ad hoc*' (at 421). In this regard see also Fassbender, *supra* note 45, para 32 'today a proper functioning of the Court depends much more on its judges having a strong competence in public international law (as emphasized in Article 2 of the Statute) than their coming from different domestic legal environments'. With further reference to Hersch Lauterpacht, 'The so-called Anglo-American and Continental Schools of Thought in International Law' (1931) 12 British Yearbook of International Law 31, 61. In fact, according to Fassbender, the exact meaning of the formulation

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Buergenthal added further doubts by pointing to the fact that it 'is worth noting here that in the case of the ICJ, for example, […] the tendency of states has been to name distinguished non-nationals rather than their own nationals as ad hoc judges.'[110] This is telling according to Buergenthal as

> [t]hat suggests to me that the real reason for the designation of the ad hoc judge is not to help the court understand some relevant aspect of national law. In the ICJ, moreover, national law is seldom a relevant issue. I also do not think that ad hoc judges are needed to ensure that the court fully understands the arguments made by counsel for the parties. That is the job of counsel.[111]

Beyond that, general scepticism about the role of ad hoc judges is also shared at the ICJ.[112] Judge Mohammed Shahabuddeen held that '[i]t 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.'[113] He is not alone with this opinion on the bench. Elihu Lauterpacht, himself a judge ad hoc, also argued that 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

'main forms of civilization' and 'principal legal systems of the world' 'has never been clear' and the combination of the two phrases in Article 9 of the ICJ Statute 'was meant to solve the problem of how the principle of equality of States could be reconciled with the wish of the Great Powers to be always represented on the Court' (para 28).

110 Buergenthal, *supra* note 40, 498. See, however, Charles N Brower and Massimo Lando, 'Judges ad hoc of the International Court of Justice' (2020) 33 Leiden Journal of International Law 467, taking this practice (besides other developments such as the appointment of former titular judges as judges ad hoc (at 472 *et seq.*)) as an indication that 'judges *ad hoc* are a means to enhance the perception that the Court as a whole is impartial.' (at 478 *et seq.*).

111 Buergenthal, *supra* note 40, 498.

112 See, for instance, the former President of the ICJ, Schwebel, *supra* note 109, 891.

113 *Land Island and Maritime Frontier Dispute* (*El Salvador v Honduras*) (Application to Intervene) [1990] ICJ 3, 45 (Order of 28 February, Dissenting Opinion of Judge Shahabuddeen). Scobbie, *supra* note 109, 428 is also very critical: 'On the face of it, the very idea that a litigant may appoint a judge of its own choice to the bench would appear to be in flagrant breach of the *nemo iudex in sua causa* principle and the general idea of judicial independence.'

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> nationality, is inevitably going to favour that country or is under strong emotional pressure to do so.[114]

These concerns do not only affect the voting behaviour of a judge ad hoc. Again, in the words of Judge Hersch Lauterpacht, 'the most important aspect of the problem of impartiality of international judges' is 'their attitude in their capacity as nationals of a State'.[115] Of course, there are exceptions[116] but hard statistical facts simply show that these clearly are exceptions and nothing more. Moreover, the mere fact that a judge ad hoc sits on the bench 'for' a party might even incline the permanent national judge to also lean towards her state of nationality.[117] Even though it might be 'convenient to refer to the question of personal integrity and probity of judges',[118] there are many (also very subtle) ways of impairing judicial integrity. Some examples are 'an official connexion with his Government, active participation in politics, appearing as counsel in international cases, or previous expression of opinion on disputed questions of law or fact.'[119]

Despite these doubts, which disappoint the hopes in the discussion of 1920, some voices hold that this bias is, as Mineichirō Adachi argued, necessary due

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[114] Remarks of Elihu Lauterpacht, 'General Discussion: The Role of Ad Hoc Judges' in Connie Peck and Roy S Lee (eds), *Increasing the Effectiveness of the International Court of Justice* (1997) 384, 388. While he stipulates it as an 'unarticulated premise', he adds that 'I fear it is [correct]'.

[115] H Lauterpacht, *supra* note 16, 219, see also 240 and 246. See on Lauterpacht's position regarding judicial impartiality, the national bias, and his 'sense of international solidarity resulting in clear individual consciousness of citizenship of the *civitas maxima*' (at 241), Shabtai Rosenne, 'Sir Hersch Lauterpacht's Concept of the Task of the International Judge' (1961) 55 AJIL 825, 855-857.

[116] Dannenbaum, *supra* note 12, 137 referring, for instance, to a statement by the erstwhile PCIJ President, Dionisio Anzilotti, about Lord Robert Finlay. For further examples see Kooijmans and Bordin, *supra* note 105, para 8, also stating that 'in practice a judge *ad hoc* normally casts his or her vote in favour of the appointing State'. For a treatment of individual opinions of judges ad hoc which 'encounter even more objections than those of "regular" national judges', see Rainer Hofmann and Linda Karl, 'Article 57' Andreas Zimmermann *et al* (eds), *The Statute of the International Court of Justice* (3rd edn, 2019) 1528, para 45 with further examples. For more recent exceptions, see Ma and Guo, *supra* note 55, 168.

[117] This is even more troublesome if we take into account (with Kooijmans and Bordin, *supra* note 105, para 6) 'that judges ad hoc are rarely, if ever, elected to the drafting committees set up to draft the Court's judgements.'

[118] H Lauterpacht, *supra* note 16, 219.

[119] *Ibid.*, 220.

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to compliance issues[120] or for the sake of understanding the legal order of the states involved in the case and therefore they accept the necessity of having two biased judges on the bench.[121] Yet other voices are heard arguing that this perceived bias, this 'anxiety about judicial nationalism [...] is unwarranted',[122]

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[120] See, *e.g.*, Yuval Shany, 'Squaring the Circle? Independence and Impartiality of Party-Appointed Adjudicators in International Legal Proceedings' (2008) 30 Loyola Los Angeles International and Comparative Law Review 473, 474; *cf.* Kooijmans and Bordin, *supra* note 105, para 2 particularly highlighting Article 31(3) ICJ Statute, the possibility for states to nominate judges ad hoc if neither of the parties has a permanent judge at the court, also providing further references in this regard.

[121] See, for instance, the debate about the judge ad hoc when drafting the PCIJ Statute. See in this regard also Fassbender, *supra* note 45, para 48: 'The underlying assumption (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 work of the Court than a State not so represented', with further reference in fn 176 to Elihu Lauterpacht, *Aspects of the Administration of International Justice* (1991) 79 saying 'the belief in the virtue of "having someone on the tribunal" [is] so deeply engrained in State thinking that the abolition of the system is unlikely'. Simma and Ortgies, *supra* note 108, para 138 also conclude that 'it seems that for the time being the practical advantages, together with the wish of States to keep the institution, as well as the fact that there are few practical downsides to it, outweigh the theoretical but valid concerns regarding the institution of judge ad hoc – at least for inter-State cases.' Maybe they (Bruno Simma and Jan Ortgies, 'Deliberation and Drafting: International Court of Justice (ICJ)' in Hélène Ruiz Fabri (ed), *Max Planck Encyclopedia of International Procedural Law* (January 2019) para 57) also argue so by having in mind that 'Judges ad hoc will not sit on the drafting committee'. However, this goes against the major idea of balancing the Court when they (Simma and Ortgies, *supra* note 108, para 3) state that 'Judges ad hoc were thought to give States a sense of influence and representation on the bench in cases that concerned them. It was also hoped that they would provide a sense of balancing out a perceived disadvantage, when one party had a judge of its nationality or choosing on the bench and the other did not'.

[122] Dannenbaum, *supra* note 12, 119. In his eyes 'Judges are subject to numerous competing personal preferences and affiliations, of which nationality is just one.' To me, this formulation seems to be a bit wanting and reminds me of the rhetorical question as to whether you would also follow others if they jumped from the bridge. The point is that further biases do not outweigh the nationalism bias and it is simply very hard to compete with empirical evidence such as that delivered by Posner and Figueiredo, *supra* note 40. However, compare also the critical response of Rosalyn Higgins to Eric Posner and Emmanuel de Figueiredo: Higgins, Remarks, *supra* note 54, 136 'For this approach to have any worth, the

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or that the Court 'is not immune from national influences' and '[i]t is not the institution of the ad hoc judge which constitutes the strongest expression of that fact.'[123] Furthermore, it is argued that many more influences, such as legal training, judicial ethics or 'function' would be missing if only the national bias were pointed to.[124] Some, finally, hold that it is simply a tradition.[125] Yet, it is hard to argue against the statistical data and the explicit discussions when designing the institutional setting of the bench in 1920.

Finally, another procedural rule at the ICJ 'admits' the 'nationality bias' and addresses it for the case that the President of the ICJ is a national of one of the parties. Article 32 of the Rules of the Court holds: 'If the President of the Court is a national of one of the parties in a case he [or she, one should

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reader must be sure that the data invoked is correct; that the statistical model is scientifically valid; and that in any event bias can be determined in a substantive void, merely by reference to a vote that has been cast. The approach fails on every one of these heads.' Compare, also, for further criticism of the bias accusation, Rosalyn Higgins, 'Reflections from the International Court' in Michael Evans (eds), *International Law* (2006) 3, 3: 'Certainly the international judge is not "responsible to" the particular States appearing before him/her. It is totally inappropriate for a State to assume, still less to say, that a particular Judge's vote in a case was due to his or her nationality (or race, or religion). Only those present in the Deliberation Chamber can know what views were held, by whom, and on what grounds. In fact, the dynamics of the legal exchanges between the Judges of the International Court in no way reflect tired stereotypes. Assumptions based on such ideas would be surprisingly wide of the mark.' See also Hernández, Impartiality and Bias, *supra* note 6, 207 with further reference to Theodor Meron, 'Judicial Independence and Impartiality in International Criminal Tribunals' (2005) 99 AJIL 359, 369. For a less optimistic view, however, with the argument that support for the ICJ 'rests on an usually unspoken assumption: states believe that national judges will view fellow countrymen with greater sympathy than foreigners', see Smith, *supra* note 40, 198.

[123] Krzysztof Skubiszewski, 'Commentary: The Role of Ad Hoc Judges' in Conny Peck and Roy S Lee (eds), *Increasing the Effectiveness of the International Court of Justice* (1997) 378, 381.

[124] See in this regard with further references Hernández, Impartiality and Bias, *supra* note 6, 185-189.

[125] See Shabtai Rosenne, 'International Court of Justice (ICJ)' in Anne Peters (ed), *Max Planck Encyclopedia of Public International Law* (June 2006) para 37 stating in relation to the judge ad hoc: 'While the institution of judges ad hoc may be seen as contradicting the fundamental legal principle that no one is judge in his own cause (*nemo judex in causa sua*), it is traditional in international arbitration practice that an arbitral tribunal should contain members with the nationality of the parties, leaving the decision in the hands of a third party or "neutral" arbitrator.'

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add in 2022 especially given that the current President is Judge Joan E. Donoghue] shall not exercise the functions of the presidency in respect of that case.' Hence, one of the main tasks of the President of the Court, namely to decide a case if the other judges' vote does not provide for a clear result, is prevented if the President has the nationality of one of the parties. This rule clearly mistrusts at least the appearance of an impartial and independent vote of the President of the Court in case she is a national judge.

In the light of these arguments, this article proposes to rethink the one-hundred-year-old decision. A century later, international justice, arguably, has reached another stage.[126] However, it has still not reached the necessary 'pith of perfection' referred to by Albert de Lapradelle in 1920. We are well informed by empirical analysis that the hope of the 1920s – namely that national judges would not always vote for their home countries – has largely been disappointed. Posner and Figueiredo showed convincingly that judges at the ICJ tend to vote in 85 to 90% of the cases for their country of nationality.[127]

Despite this clear data and institutional design, no one actually claims that judges at the ICJ are nationalists gone wild. It is obvious that they stick to judicial ethics and that they fulfil their function in a way which pays tribute to the diplomatic and judicial tradition on the international stage. The law applicable to a given cases in court, however, is rarely completely determined. For instance, states are very well aware of their chances of winning a case at the ICJ when initiating proceedings. They would not submit cases to the ICJ if they did not see much chance of winning – national legal counsels would arguably strongly advise against doing so. In other words, cases at the ICJ are usually complicated, the outcome is hard to predict. In such a situation, a judge needs not be a hard-core nationalist when putting arguments on the table which tend to support the state of her nationality. Nuances can be decisive. It is in this environment that empirical analysis shows that almost always (85 to 90%) judges stick to favouring their countries of nationality in the end. This bias is a hard fact which cannot be brushed away with some reference to legal culture and basic judicial ethics.

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126 See, however, Jane A Hofbauer, '1918 – The League of Nations as a "First Organized Expression of the International Community" and the Permanent Court of International Justice as its Guardian' (2020) 23 Austrian Review of International and European Law 3, diagnosing that '[t]he "public" character of international law thus saw its strengthening by the Court [PCIJ], despite its findings on community interests remaining at best tentative.'

127 See Section V.

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VII. The ICJ and its Role in the International Community. From Bilateralism to Community Interest.

I agree with Stephen Burbank, who holds 'that legal concepts are children of the contexts in which they are employed'. Thus in order to 'speak meaningfully about judicial independence', we need to be aware of the 'substantial measure of normative judgment' which underpins this understanding.[128] If we understand judicial independence against this background, we come to understand why the role of the judges at the ICJ developed as it did. However, this empowers us at the same time to question this understanding. This reading of the role of a judge at the ICJ is not chiselled in stone. Rather there is a need to constantly adapt legal concepts in line with the developments of their contexts. The international community has arguably transformed from bilateralism towards a greater focus on community interests. It is time that the most important judicial institution of the international community keeps pace with this evolution. While adaptations of legal concepts enshrined in positive law – and this is particularly true for such enigmatic documents as the UN Charta and the ICJ Statute – are very often hard to achieve, there is a surprisingly easy way for the judges at the ICJ to adapt the concept of judicial independence to serve the community interest as well. Georges Abi-Saab once famously stated that

> if we really want international law to take hold and be taken seriously by all, it has to be, both in its creation and in its interpretation and application, the product of [the international] community as a whole, reflecting, by synthesis or symbiosis, the legal visions, needs and aspirations of all the components of this community.[129]

Hersch Lauterpacht holds that impartiality 'presupposes the determination on the part of judges to regard the international community, which is still to a large extent a postulate, as an entity as real as any sovereign State, and

[128] Stephen B Burbank, 'The Architecture of Judicial Independence' (1999) 72 Southern California Law Review 315, 318 speaking about the US and 'fifty-one relevant contexts' alongside not talking about judicial independence as 'an operative legal concept but rather a way of describing the consequences of legal arrangements.'

[129] Georges Abi-Saab, 'Ensuring the Best Bench: Ways of Selecting Judges' in Connie Peck and Roy S Lee (eds), *Increasing the Effectiveness of the International Court of Justice* (Nijhoff 1997) 188, 171 as quoted in Fassbender, *supra* note 45, para 53.

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with an equal claim to allegiance.'[130] Dame Rosalyn Higgins also emphasizes the fact that international judges 'must through their work serve the entire international community'.[131] We can argue again with Hersch Lauterpacht that '[t]here 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.'[132] Hence, while the still predominant state-centered design of the international judiciary has been adequate for a long time, it is argued that it is time to acknowledge the shift from 'bilateralism to community interest' at the ICJ as well.[133]

VIII. The Proposal: Refraining From the 'Right to Sit in the Case Before the Court' (Art 31 ICJ Statute)

This article wishes to propose a simple and, at the same time, unorthodox solution to the legitimacy deficit posed by 'national judges' at the ICJ. Without any formal institutional modifications, the judge might protect herself against the described threat to her impartiality and independence.[134] She might simply refrain from her 'right to sit in the case before the Court' (Art 31 ICJ Statute) in accordance with Article 24(1) ICJ Statute, which enables self-recusals ' [i]f, for some special reason, a member of the Court considers that he [or she] should not take part in the decision of a particular case'.[135] This does not require any modification to the current Statute, or any other kind of treaty modification, but could be effected through a simple change in the habits of a single judge. The wording of Article 24 ICJ Statute explicitly allows so

[130] H Lauterpacht, *supra* note 16, 246.

[131] Higgins, Reflections, *supra* note 122, 4.

[132] H Lauterpacht, *supra* note 16, 224.

[133] See, fundamentally, Simma, From Bilateralism to Community Interest, *supra* note 23, 233.

[134] For a definition of impartiality 'in the sense of judicial independence' with regard to the ICJ, see Hernández, Impartiality and Bias, *supra* note 6, 188-190, especially at 189, fn 25.

[135] Robert Jennings and Philippe Couvreuer, 'Article 24' in Andreas Zimmermann *et al* (eds), *The Statute of the International Court of Justice* (3rd edn, 2019) 526, para 22 stating that taking part in the decision includes the hearings and deliberations as the difference in wording to para 2 was not intentional and any other meaning (*e.g.* recusing herself literally only for the decision but not the rest of the proceedings) 'would be absurd'.

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as the phrase 'for some special reason' has been chosen by the Committee of Jurists in order 'to empower the Court to exclude judges also for reasons other than those governing incompatibility.'[136] The legal justification of this step might be a systematic and teleological (reductive) interpretation of the ICJ Statute, which focuses on a core feature of the judge: impartiality and independence (Arts 2, 16, 17, 20 ICJ Statute). Thus, so goes the argument, it forces the judge to *refrain* from her right in Article 31(1) ICJ Statute, which would *allow* the judge to sit in even though their state of nationality is involved in the dispute.

There exists a regional precedent to this proposal. A self-recusal due to nationality bias has, in fact, been practiced by many judges at the Inter-American Court of Human Rights for decades.[137] Argentina submitted a request for an advisory opinion to the Inter-American Court to clarify the meaning of Article 55 American Convention on Human Rights (ACHR)[138]

> in relation to the 'institution of the Judge *ad hoc* and the equality of arms in the proceeding before the Inter-American Court within the context of a case arising from an individual petition,' as well as regarding the 'nationality of the judges and the right to an independent and impartial judge.'[139]

The Court expressed it

> believes that such provision [Art 55(3)] is restricted to contentious cases initiated by inter-state communications […]. Hence, the possibility of the States Parties to appoint a Judge *ad hoc* to integrate the Court when there is no judge of its nationality, established in Article 55(3) of the Convention, is limited to that type of cases. Therefore, it is not possible to derive from

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136 *Ibid*., paras 3 and 13 *et seq*.

137 For an overview, see Titi, *supra* note 51, 29 *et seq.*; as well as Oswaldo Ruiz-Chiriboga, 'The Independence of the Inter-American Judge' (2012) 11 Law and Practice of International Courts and Tribunals 111, 123 *et seq*. *Cf.* also for an early critique of the possibility to nominate ad hoc judges in individual complaint procedures Mónica Feria Tinta, '"Dinosaurs" in Human Rights Litigation: The Use of Ad Hoc Judges in Individual Complaints before the Inter-American Court of Human Rights' (2004) 3 Law and Practice of International Courts and Tribunals 79.

138 See Art 55 American Convention on Human Rights, 22 November 1969, 1144 UNTS 123 is largely modelled after Article 31 ICJ Statute.

139 IACtHR, *Article 55 of the American Convention on Human Rights*, *supra* note 22, para 1.

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> that norm a similar right in favor of States Parties to contentious cases originated in individual petitions […].[140]

While only inter-state communications at the IACtHR might potentially be comparable to cases before the ICJ, the practice shows that individual judges can start such a process by themselves. Second, in the Inter-American example this became 'a growing consensus in that national judges should not participate in the hearing of those cases'[141], which leaded to an Advisory Opinion of the Court and culminated, third, in New Rules of Procedure of the Court adopted on 1 January 2010 finally clarifying and confirming such practice.

The proposal submitted here would make the ad hoc judge not only unnecessary but also impossible (as Art 31(2) ICJ Statute only applies '[i]f the Court includes upon the Bench a judge of the nationality of one of the parties'). Admittedly, this relies on the understanding that para 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') only applies in case none of the parties has a judge sitting at the bench.[142] This is arguably different from the case when a judge of nationality declares her impartiality because her state of nationality is party to a case at the ICJ. This holds also true for Article 37(1) Rules of Court which provides, too, that

> [i]f a Member of the Court having the nationality of one of the parties is or becomes unable to sit in any phase of a case, that party shall thereupon

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[140] *Ibid.*, paras 66-67.

[141] *Ibid.*, para 82.

[142] For those who do not accept this interpretation, it might be interesting to learn that in several instances, states have already reciprocally waived their rights to appoint judges ad hoc as they were satisfied with a balanced and independent bench. *Cf.* Suh, *supra* note 51, 235, fn 27 pointing to *Interpretation of the Greco-Turkish Agreement of December 1st, 1926* (Advisory Opinion of 28 August) [1928] PCIJ Series C, Acts and Documents Relating to Judgments and Advisory Opinions, 165-166; and also *Interpretation of the Greco-Turkish Agreement of December 1st, 1926 (Final Protocol, Article IV)* [1928] PCIJ Series B No 16, 7-8 (Advisory Opinion of 28 August). See also *Nottebohm Case* (*Liechtenstein v Guatemala*) (Preliminary Objection) [1953] ICJ 111 (Judgment of 18 November); *Sovereignty over Certain Frontier Land* (*Belgium v Netherlands*) [1959] ICJ 209 (Judgment of 20 June); *Temple of Preah Vihear* (*Cambodia v Thailand*) (Preliminary Objections) [1961] ICJ 17 (Judgment of 26 May) and *ibid.* (Merits) [1962] ICJ 6 (Judgment of 15 June).

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> become entitled to choose a judge ad hoc within a time-limit to be fixed by the Court, or by the President if the Court is not sitting.

To the extent the argument is made that

> 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 unable to sit for health reasons, that state is entitled to appoint a replacement judge *ad hoc*[143]

The artivle counter this interpretation by insisting upon the formulation stating that this rule applies only if a judge 'becomes unable', which arguably does not include a judge recusing herself simply because of her 'nationality bias'.

As a consequence, there is no longer a need to deal with the question as to whether several parties do have the same interest in multi-party disputes and might therefore be allowed to nominate only one ad hoc judge together. According to Article 31(5) ICJ Statute: 'should there be several parties in the same interest, they shall [...] be reckoned as one party only.' Because neither the Statute nor the Rules of Court provide clarity as to what is exactly meant by parties in 'the same interest', we have to refer to the case law of the Court. Two understandings, namely a 'substantive' and a 'procedural' one, are conceivable.[144] The first approach refers to the conclusions submitted by the parties. The latter asks whether states are parties to the same case, i.e. if they initiate proceedings together and file a joint application or if the Court joins cases which were originally submitted separately under Article 47 Rules of Court.[145]

Needless to say, if the judge ad hoc is meant to outbalance the imbalance, this balancing becomes confused if more states are involved in a case, but according to an unclear 'same interest' rule only a single judge ad hoc is allowed. Consider the example of the former Federal Republic of Yugoslavia (FRY) in the Kosovo case. While five of the NATO states already had judges on the bench, which were not, however, found to be 'parties in the same interest',[146] five more NATO states were allowed to nominate judges ad hoc

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143 Dannenbaum, *supra* note 12, 89-90, fn 67.

144 Kooijmans and Bordin, *supra* note 105, para 24.

145 *Ibid*. with further references.

146 *Legality of the Use of Force* (*Yugoslavia v Belgium*) (Provisional Measures) [1999] ICJ 124, para 3 (Order of 2 June, Dissenting Opinion of Judge ad hoc Kréca).

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in 10 separate cases. Milenko Kréca, the judge ad hoc nominated by the FRY, ironically lamented that

> [t]he practical meaning of 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 the fundamental rule of equality of parties, means that the Federal Republic of Yugoslavia should have the right to choose five judges ad hoc, since even five out of ten respondent States (the United States of America, the United Kingdom, France, Germany and the Netherlands) have their national judges sitting on the Bench.[147]

Tom Dannenbaum correctly notes in this regard that '[t]he 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.'[148]

Finally, the 'same interest' rule shows that it is not about representing the legal culture and knowledge of a state party involved, nor is it about building up trust, confidence, and also compliance for every party involved in a case. This is even more relevant as Pieter Kooijmans, a former Judge, and Fernando Bordin conclude concerning the same interest jurisprudence of the Court 'that over time the practice of the Court on Article 31, para. 5 has become not only less transparent, with reasons no longer being given for its rulings, but also less consistent.'[149] Beyond this criticism, they generally highlight the limits of the same interest rule provided in Article 31(5) ICJ Statute, which must

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147 *Ibid*.

148 Dannenbaum, *supra* note 12, 149-150. See also Kooijmans and Bordin, *supra* note 105, para 26 pointing to the Lockerbie cases where another inequality was given because the Court did not consider the US and the UK to be parties in the same interest. Thus, the permanent judge of the US also sat on the bench in the case against the UK (*Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v United Kingdom)* (Preliminary Objections) [1998] ICJ 9 (Judgment of 27 February)), which was then allowed to nominate a judge ad hoc. The applicant, the Libyan Arab Jamahiriya, was confronted with a national judge of the US in its case against the US, and de facto two national judges from the UK and the US in its case against the UK.

149 Kooijmans and Bordin, *supra* note 105, para 29.

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pay tribute to its inspiration from international arbitration.[150] In multilateral disputes, the state-centered conception, which just has become one hundred years old, cannot serve the community interest.

Generally we know little about why judges recuse to sit on the bench.[151] Yet, we can safely assume that the simple fact of being a national of a party has never been the reason for a recusal. Moreover, the proposal suggested here is obviously no magic trick providing something like 'true independence and impartiality'[152] as that is impossible to achieve. However, the important insight is that, nevertheless, we should care about this ideal as a sort of inspiration. We should strive for ideal independence and impartiality even though we somehow know that we will most likely never achieve this ideal. Striving for this ideal in the international arena, where we can diagnose a steady evolution of the international legal system from bilateralism to community interest, should be the goal of the ICJ and its judges to keep up with this development. Arguably, the proposal made can be an important step to accomplishing this vision of judicial independence and impartiality in the international community as of today.

Last but surely not least, there is strong support in the sense that the proposal submitted here is not simply a theoretical and unrealistic academic idea. This support comes from no less a person than the former Judge Thomas Buergenthal, who appealed publicly for a system replacing national judges at the ICJ. In his own words:

> Next, I have serious doubts regarding the wisdom of perpetuating the system of ad hoc judges, which is the rule in the ICJ and some other international

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150 *Ibid.*, 105, para 30, where they refer to Judge Tomka's Separate Opinion in *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v United Kingdom)* (Preliminary Objections) [2016] ICJ 833, 899, para 40, holding that the 'limits of the Court's function', in multilateral disputes, 'resulting from the fact that it has evolved from international arbitration, which is traditionally focused on bilateral disputes'.

151 For a list of recusals, noting 'the factual instances of recusals and study[ing] the external facts which might explain these recusals', see Hernández, Impartiality and Bias, *supra* note 6, 205, fn 107. *Cf.* also Chiara Giorgetti, The Challenge and Recusal of Judges of the International Court of Justice' in Chiara Giorgetti (ed), *Challenges and Recusals of Judges and Arbitrators in International Courts and Tribunals* (2015) 3, 8 *et seq.* and 18 *et seq.*; and Detlev F Vagts, 'The International Legal Profession: A Need for More Governance?' (1996) 90 AJIL 250, 255-256.

152 See the paper by Danziger, Levav and Avnaim-Pesso, *supra* note 10, pointing our attention to some highly disturbing influences on judicial behaviour.

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> tribunals. If you look at the separate opinions of ad hoc judges, you will rarely find any of them voting against the state that designated them. A much fairer system, in my opinion, would be to require the sitting national judges not to participate in the proceedings in which their country is party to a case before the court, thus doing away with the need for ad hoc judges.[153]

IX. Potential Consequences of This Proposal

Finally, this article discusses some eventualities should the proposal be successful. Let us assume that the proposed recusal became a settled practice at the Court and, yet, some judges were still not willing to refrain from their right to sit in and to judge upon a case involving their home country. If the rest of the judges were convinced by the restraint, which might even be considered something like a statutory convention, the President of the Court could notify the unwilling judge that she 'considers […] for some special reason' that she 'should not sit in a particular case' (Art 24(2) ICJ Statute).[154] If the affected judge did not agree, 'the matter shall be settled by the decision of the Court' (Art 24(3) ICJ Statute). Finally, a rather strong protection of a convention based on this proposal could lead, for instance, to the dismissal of the unwilling judge (by a unanimous opinion of her colleagues according to Art 18 ICJ Statute; this applies if a judge 'has ceased to fulfil the required conditions', which would be the dominant understanding of independence and impartiality by then). Clearly, these reflections are a long time in the future as something like a statutory convention takes time to establish. Furthermore, the protection via Article 18 ICJ Statute in this case is doubtful as the wording

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[153] Buergenthal, *supra* note 40, 498. *Cf.* the laudatio by Judge Kenneth Keith, 'International Court of Justice. Thomas Buergenthal: Judge of the International Court of Justice (2000–10)' (2011) 24 Leiden Journal of International Law 163, 163, particularly emphasizing the 'commitment to the independence of judicial office, as demonstrated particularly in cases brought against his own country' (albeit without mentioning his public appeal for ceasing to be a national judge at the ICJ).

[154] For the only instance in history of such a notification (which nevertheless was not explicitly based upon Article 24 ICJ Statute), see Jennings and Couvreuer, *supra* note 135, paras 25 *et seq.* with further references pointing to the *South West Africa* cases and the announcement by president Sir Percy Spencer that judge Mohammed Zafrullah Khan would not participate in the case as 'he had at one time been nominated as an ad hoc judge by one of the parties, though he had not in fact acted in that capacity.'

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in Article 31 ICJ Statutes explicitly speaks of the *right* of judges to sit. In addition, '[t]here is no recorded instance of Article 18 being applied in order to dismiss a Judge, or even of the question being formally considered.'[155]

Until such a statutory convention eventually becomes reality or rather in case a judge simply would ignore the new convention, a slightly weaker option might protect against the possibility of a 'free rider judge' who does not feel like stepping back even though some of her colleagues did so. This preliminary potential protection is a reference to the fact that in such a case, the judge ad hoc would simply become available again. The Statute has never been amended for the proposal submitted here.[156]

Finally, the submitted proposal might, after quite some time has passed, finally transform Article 35(2) of the Rules of Court into standard practice – which provides that '[i]f a party proposes to abstain from choosing a judge *ad hoc*, on condition of a like abstention by the other party, it shall so notify the Court which shall inform the other party.'

I do not wish to say that, the empirically found nationality bias of judges at the ICJ is unavoidable or inextricably linked to the personality of a judge. It might well be that something like a 'cosmopolitan court' is possible one day. This argument, submitted by Tom Dannenbaum,[157] holds that we should abolish the limit that two judges with the same nationality might not sit on the bench, because a cosmopolitan court would not exhibit the nationality bias described here. Thus, we could also accept several judges of the same nationality to be permanent judges at the Court. In this vision, the judge ad hoc is also unnecessary. Yet, instead of appealing to judges to protect themselves from the perceived nationality bias, this proposal essentially holds that the nationality bias of judges can be overcome as soon as we do not consider it institutionally. Thereby judges would be freed from their perceived role as national judges while appealing to judicial integrity.[158] At the moment, it is hard to say whether this is mere speculation or actually a working vision. There is, at least, no guarantee that such a proposal would work. Another alternative would be to reconsider the re-election system at

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[155] David Anderson and Samuel Wordsworth, 'Article 18' in Andreas Zimmermann *et al* (eds), *The Statute of the International Court of Justice* (3rd edn, 2019) 458, para 18.

[156] And if the proposed recusal would become reality on the basis of a statutory amendment, which would of course be possible if the states were willing to do so, the so-called 'free rider judge' would violate the then new law.

[157] Dannenbaum, *supra* note 12.

[158] For such a proposal see Dannenbaum, *supra* note 12, 180-184.

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the ICJ, as a re-election campaign and the needed governmental support might put pressure on judges in terms of deciding in favour for their home country.[159] Such an alternative, however, would definitely be in need of a statutory amendment, which is unlikely. In the face of this insecurity, this article argues that it is much easier, and more straightforward, if the judge herself simply followed the proposal made here by refusing to sit in a case where her state of nationality is a party to the ICJ.

X. Conclusion

Bruno Simma once argued that 'governments are not only the makers but also the breakers of international human rights law; in this area they will always bear a similarity with foxes guarding the chicken.'[160] Against this background we have to see his argument that we must not rely only on states for upholding the community interest in international law. Rather, he suggested, we could also rely on independent institutions 'with no (or fewer) second thoughts standing in the way of true multilateralism'.[161] The ICJ itself arguably is also

[159] See instructively Jeffrey L Dunoff and Mark A Pollack, 'The Judicial Trilemma' (2017) 111 AJIL 225, describing an interrelated trilemma between judicial independence, transparency and accountability. Following this scheme the ICJ is a court with high transparency (*e.g.* due to clear count of the individual judges' decision and the possibility for dissenting opinions) and high accountability (*e.g.* its election system), and likely low on independence (*e.g.* the nationality bias; reelection possibility) stating, however, at 259: 'Trilemma is keenly felt in the lived experience of those who serve on the Court is *not* equivalent to stating that ICJ judges will necessarily change their votes or even shade their opinions to curry favor with those who control their renomination and reelection.' *Cf.* on the importance of how to organize the selection process of international judges for judicial independence giving the example of the Caribbean Court of Justice, Kate Malleson, 'Promoting Judicial Independence in the International Courts: Lessons from the Caribbean' (2009) 58 ICLQ 671. Similarly critiquing the process of nomination and election of judges at the Inter-American Court of Human Rights, see Ruiz-Chiriboga, *supra* note 137. See in this vein Paulo Pinto de Albuquerque and Hyun-Soo Lim, 'Protecting the Independence of International Judges: Current Practice and Recommendations' in Paulo Pinto de Albuquerque and Krzysztof Wojtyczek (eds), *Judicial Power in a Globalized World. Liber Amicorum Vincent De Gaetano* (2019) 413, 432-433.

[160] Bruno Simma, 'International Human Rights and General International Law: A Comparative Analysis' in Collected Courses of the Academy of European Law (eds), *The Protection of Human Rights in Europe*, vol IV/2 (1993) 153, 168.

[161] Simma, From Bilateralism to Community Interest, *supra* note 23, 340.

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such an institution which should reinforce true multilateralism by serving the community interest.

It may be untimely to suggest such seemingly progressive and, for dominant states, rather unpleasant steps. This particularly holds true in times when the judgments and advisory opinions of the ICJ are openly criticized and the will to disobey comes, among others, from no other country than the one which is said to have invented (modern) judicial independence, the United Kingdom, concerning the recent Advisory Opinion on the *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*.[162] Yet, sometimes it is precisely such a moment that is most suited for showing strength instead of beating a retreat. As we learn from David Flatto's historical analysis, '[a]pparently, judicial independence often begins as a countervoice, and always requires vigilant safeguarding.'[163] Hence, also,

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[162] See 'Statement made by Sir Alan Duncan, Minister of State for Europe and the Americas: British Indian Ocean Territory' (30 April 2019) Statement UIN HCWS1528 <https://questions-statements.parliament.uk/written-statements/detail/2019-04-30/HCWS1528> accessed 11 November 2021. For other instances of open disobedience, see, for instance, the Italian Constitutional Court's decision no 238 of 22 October 2014 in which the Italian Constitutional Court refuses to acknowledge the effect of the ICJ's judgment in *Jurisdictional Immunities of the State* (*Germany v Italy: Greece intervening*) [2012] ICJ 99 (Judgment of 3 February). For the literature, see *e.g.*, Anne Peters, Evelyne Lagrange, Stefan Oeter and Christian Tomuschat (eds), *Immunities in the Age of Global Constitutionalism* (2015). Compare also the US Supreme Court cases *Breard*, *LaGrand* and *Avena*, where basically the US Supreme Court ignored judgments by the ICJ on the right of criminal suspects to notify their consulate after being arrested as foreigners. See on this, *e.g.*, Sean D Murphy, 'The United States and the International Court of Justice: Coping with Antinomies' in Cesare PR Romano (eds), *The Sword and the Scales: The United States and International Courts and Tribunals* (2009) 46. In general, see Constanze Schulte, *Compliance with Decisions of the International Court of Justice* (2004). See, however, also David C Flatto, 'The Historical Origins of Judicial Independence and Their Modern Resonances' (2007) 117 Yale Law Journal Pocket Part 8 <www.yalelawjournal.org/forum/the-historical-origins-of-judicial-independence-and-their-modern-resonances> accessed 11 Novmeber 2021, who highlights traces of 'the etiology of an independent judiciary' back to antiquity – not even to Athens, but rather to Jerusalem. In his words: 'Despite the domineering presence of a Roman Emperor, rabbis in the first and second century CE announced their own juridical model that unmoored the judiciary from the king's dock. In the memorable words of the Mishnah, "A king may not judge, nor be judged." Justice is not for kings (not even Jewish ones) but rather for the Sanhedrin, the idyllic supreme court that stands alone atop Jerusalem's Temple Mount.'

[163] Flatto, *supra* note 162.

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or precisely, in ‘fragile’[164] times for judicial independence, it is important to demonstrate independence, impartiality, and strength. In this vein, the former President of the ICJ, Judge Abdulqawi Ahmed Yusuf, stated in his address to the UN General Assembly that ‘Members of the Court have come to the decision […] that they will not normally accept to participate in international arbitration’ as ‘[t]his is essential to place beyond reproach the impartiality and independence of Judges in the exercise of their judicial functions.’[165]

Against this background Lisa Hilbink proposes

> that we need to allow more room for the possibility of judges acting as imaginative and creative agents, that is, as political entrepreneurs who work to alter the structures and attitudes within and around the judiciary, rather than merely responding to the incentives inherent in the situations they confront.[166]

This article further add that we could inspire the imagination and creativity of the judges at the ICJ by submitting to move the ICJ from bilateralism to community interest. Or, in the words of its very first President, José Gustavo Guerrero: ‘On the consciences of the judges depends the justice of the Court’s decision.’[167]

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164 Tara L Grove, ‘The Origins (and Fragility) of Judicial Independence’ (2018) 71 Vanderbilt Law Review 465 speaking about the US context.

165 See ‘Speech by H.E. Mr. Abulqawi A. Yusuf, President of the International Court of Justice, on the Occasion of the Seventy-Third Session of the United Nations General Assembly’ (25 October 2018) 6 <www.icj-cij.org/public/files/press-releases/0/000-20181025-PRE-02-00-EN.pdf> accessed 11 November 2021.

166 Hilbink, *supra* note 42, 614-615.

167 Inaugural speech on 18 April 1946, ICJ Yearbook (1946–1947) 38 as quoted in Khan, *supra* note 8, para 2, fn 3.

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Abstract: Empirical analysis shows that judges at the International Court of Justice (ICJ) tend to vote (85 to 90%) for their country of nationality. In order to outweigh this imbalance – already predicted in 1920 when drafting the Statute of the Permanent Court of International Justice (PCIJ), the predecessor of the ICJ – the decision was taken to allow states which do not have a permanent judge of their nationality on the bench to nominate a judge ad hoc. The nationality bias is an important legitimacy issue for the Court. Inspired by Judge Thomas Buergenthal's public appeal and along the lines of Judge Bruno Simma's finding on the shift from 'bilateralism to community interest in international law', this article submits that a national judge at the ICJ should refrain from being a national judge by recusing herself when her home country is party to a case. In doing so she could protect herself from this nationality bias, which is a severe threat to (the appearance of) her impartiality and independence. Arguably, some one hundred years after the decision was taken against mandatory recusal on the basis of nationality when the Statute of the PCIJ was drafted, the international community is now demanding that individual judges of the principal judicial organ of the United Nations serve the community interest independently and impartially.

Keywords: International Court of Justice, judicial independence, national judges, community interest, empirical legal studies.

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