ELECTION OF JUDGES TO THE INTERNATIONAL COURT OF JUSTICE: PROPOSALS FOR REFORM WITHOUT AMENDING THE STATUTE

MARIO JA OYARZABAL

Institut de Droit International, The Hague, the Netherlands
Email: moyarzabal@post.harvard.edu

Abstract In November 2023 the United Nations (UN) General Assembly and Security Council elected (in one case, re-elected) five judges to the International Court of Justice. The electoral system is considered to be overly politicized and to pay lip service to the requirements that judges must be elected on the basis of their qualifications, regardless of their nationality, and that in the body as a whole, the representation of the main forms of civilization and the principal legal systems of the world should be assured. Several amendments to the system of nominations and elections have been proposed that would require a reform of the Court's Statute. This article proposes four measures that could be adopted without amending the Statute or encroaching on the prerogatives of national groups, UN organs or Member States: (1) ensure the representation of the principal legal systems, in part by promoting regional diversity on the bench; (2) remove the use of nationality as a factor in casual elections; (3) establish a vetting process and public hearings; and (4) promote a single vote for Security Council members. It argues that the measures proposed would lead to a change in the present culture of nominations and elections towards one that favours the qualification of the judges over political considerations.

Keywords: International Court of Justice, elections, judges, qualifications, United Nations General Assembly, United Nations Security Council, nationality, Permanent Court of Arbitration, regional representation.

I. INTRODUCTION

The latest election of judges to the International Court of Justice (ICJ) in November 2023 provides an opportunity for reflection on the ICJ electoral system.

At a recent colloquium at Université Paris Nanterre, it was debated whether the system for the election of judges, which stems from the Statute of the ICJ[1]

[1] United Nations (UN), 'Charter of the United Nations and Statute of the International Court of Justice' (signed 26 June 1945, entered into force 24 October 1945) available at <https://treaties.un.org/doc/publication/ctc/uncharter.pdf> (UN Charter) (ICJ Statute).

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(the Statute) and has developed through practice, has led to a Court composed of independent judges who possess the required qualifications. Articles 2 and 9 of the ICJ Statute require that judges are elected regardless of their nationality, and as a whole ensure the representation of the main forms of civilizations and the principal legal systems of the world. The proceedings of the colloquium include this author's contribution on whether trading of votes in ICJ elections is avoidable.[2] This article has a wider focus and discusses how to ensure the candidates have the required competences despite the obscure system of election and arguably unavoidable trading of votes, and how to guarantee that, in a Court made up of a *numerus clausus* of 15 judges, the main forms of civilization and the principal legal systems (amounting to a far larger number) are represented.

Admittedly, criticism of the ICJ electoral system is not new, and proposals for reform have been made in the past by the Institut de Droit International (IDI)[3] and others.[4] Some entail amendments to the ICJ Statute, which is subject to the same procedure and requirements as the amendment of the Charter of the United Nations (UN)[5] which includes ratification by all permanent members of the Security Council.[6] These proposals have included changing the current system of nomination by national groups, removing the Security Council as an electoral organ, reducing the frequency of elections, increasing the number

[2] MJA Oyarzabal, 'Les tractations électorales sont-elles évitables?' in JM Thouvenin and J Joly Hébert (eds), *La Cour internationale de Justice à 75 ans* (Pedone 2023) 57–72.

[3] 'IDI Resolution on the Composition of the International Court of Justice' (1952) 44(2) Annuaire de l'Institut de Droit International 474–5; 'IDI Resolution on the Study of the Amendments to be Made in the Statute of the International Court of Justice' (1954) 45(2) Annuaire de l'Institut de Droit International 296–9. See, also, 'IDI Resolution on the Position of the International Judge' (2011) 74 Annuaire de l'Institut de Droit International 124–7.

[4] For an appraisal of the electoral system and main reform proposals, see generally MN Shaw (ed), *Rosenne's Law and Practice of the International Court 1920–2015* (Brill Nijhoff 2016) 363–99; P Georget, 'Article 4' in A Zimmermann and C Tams (eds), *The Statute of the International Court of Justice: A Commentary* (Brill/Nijhoff 2019) 314; MO Hudson, *The Permanent Court of International Justice 1920–1942* (Garland Publishing 1974) 265–9. See also G Abi-Saab, 'Ensuring the Best Bench: Ways of Selecting Judges' in C Peck and RS Lee (eds), *Increasing the Effectiveness of the International Court of Justice: Proceedings of the ICJ/UNITAR Colloquium to Celebrate the 50th Anniversary of the Court* (Martinus Nijhoff Publishers/UNITAR 1997) 166; CF Amerasinghe, 'Judges of the International Court of Justice—Election and Qualifications' (2001) 14 LJIL 335; KJ Keith, 'International Court of Justice: Reflections on the Electoral Process' (2010) 9 ChineseJIL 49; E McWhinney, 'Law, Politics and "Regionalism" in the Nomination and Election of World Court Judges' (1986) 13 SyracuseJIntlL&Com 1; A Remiro Brotóns, 'Nominación y elección de los jueces de la Corte Internacional de Justicia' in EM Vázquez Gómez, MD Adam Muñoz and N Cornago Prieto (eds), *El arreglo pacífico de controversias internacionales* (Tirant lo Blanch 2013) 45; DS Robinson, 'The Role of Politics in the Election and the Work of Judges of the International Court of Justice' (2003) 97 ASILPROC 277; R MacKenzie, K Malleson, P Martin and P Sands, *Selecting International Judges: Principle, Process, and Politics* (OUP 2010).

[5] UN Charter (n 1).

[6] ICJ Statute (n 1) art 69. Pursuant to art 108 of the UN Charter, ibid, amendments shall come into force for all members of the UN when they have been adopted by a vote of two thirds of the members of the General Assembly and ratified in accordance with their respective constitutional processes by two thirds of the members of the UN, including all the permanent members of the Security Council.

of judges, extending the nine-year judicial term and prohibiting re-election, along with establishing age limits for a judge's appointment and retirement. Other changes could be undertaken without treaty reform, such as separating ICJ elections from those for appointments to other principal or legal UN bodies, casting successive ballots for each seat to be filled, avoiding informal communications between the General Assembly and the Security Council while the election is in process, and maintaining an adequate salary for judges. The proposals in this article would not require treaty reform, although they would admittedly still require political will and voluntary restraint on the part of the five permanent members of the UN Security Council: China, France, Russia, the United Kingdom (UK) and the United States (USA) (the P5).[7]

The starting point for considering any reform should be Articles 2, 4(1), 6, 8 and 9 of the ICJ Statute which have been taken almost without modification from the Statute of the Permanent Court of International Justice (PCIJ), the ICJ's predecessor under the League of Nations, as they establish the requirements and modality for the nomination and election of judges. Political factors which are related to the nature of the electoral organs[8] and the requirement for geographical representation in the Court do not negate the overarching function of the Court as a 'judicial organ' (Article 92 of the UN Charter; Article 1 of the ICJ Statute) to decide disputes 'in accordance with international law' (Article 38(1) of the ICJ Statute). It is therefore appropriate that the utmost care is taken to secure and promote the election of judges who individually possess the qualifications required and that, as a body, represent the principal legal systems of the world.

The following sections outline four measures which could be adopted by the UN Secretary-General and General Assembly and undertaken by Member States without the need for ICJ Statute reform. These measures are broadly directed at ensuring the representation of the principal legal systems, implementing the 'regardless of nationality' requirement, putting in place a vetting and public hearing system and eliminating Security Council members' double vote. Taken collectively or individually, these measures would make a positive impact on the method of judicial selection and reduce politization without encroaching on the prerogatives of national groups, UN organs or Member States.

II. ENSURING THE REPRESENTATION OF THE PRINCIPAL LEGAL SYSTEMS

Article 9 of the ICJ Statute states: 'At every election, the electors shall bear in mind not only that the persons to be elected should individually possess the

[7] The current intergovernmental negotiations on the reform of the Security Council (officially on the 'Question of Equitable Representation on and Increase in the Membership of the Security Council and Other Matters related to the Security Council') have been ongoing in the UN General Assembly since at least 2007. The history and latest developments of the intergovernmental negotiations are available at <https://www.un.org/en/ga/screform/>.

[8] See Shaw (n 4) 363–4.

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qualifications required, but also that in the body as a whole the representation of the main forms of civilization and of the principal legal systems of the world should be assured'.[9] The legal requirement of Article 9 has been translated into practice through the adoption of the system of 'equitable geographical representation' also used for the composition of other UN organs.[10] While other criteria for the representation of the 'main forms of civilization' and the different 'principal legal traditions' may be envisaged,[11] the ICJ seats have long been allocated on a loose geographical basis for lack of (or perhaps in spite of) a better, workable and agreeable system.

The system of 'equitable geographical representation' involves organizing UN Member States into five geopolitical regional groups (the Group of African States (GAFS), the Asia and the Pacific Group (APG), the Eastern European Group (EEG), the Group of Latin American and Caribbean Countries (GRULAC) and the Western European and Others Group (WEOG)) as an informal means of sharing the distribution of posts for General Assembly committees and filling other top leadership positions. Having originated during the Cold War, this regional distribution took account of prevalent political factors, with the WEOG representing the Western capitalist countries and the EEG the then Soviet Bloc. If it is considered that the permanent members of the Security Council occupy a seat in the region to which they belong, the regional distribution of vacancies in the ICJ broadly corresponds to the proportion of States in the Security Council itself, ie three seats for the GAFS, three seats for the APG, two seats for the EEG, two seats for the GRULAC and five seats for the WEOG.[12]

The composition of the Court has changed over the years as a reflection of changes in the international community, particularly following the decolonization process of the 1960s and 1970s. As the international community of nations has become larger and more diverse, it is natural that the representation of European countries and the two main legal traditions—civil law and common law—has given way to the representation of other regions and legal traditions, such as the African region and the Islamic legal philosophy.[13] In terms of inter-regional fluctuation, the change has come

[9] ICJ Statute (n 1).

[10] See, however, B Fassbender, 'Article 9' in Zimmermann and Tams (n 4) 378–85, arguing that art 9 contains an 'appeal' to the Member States to uphold the legitimacy and authority of the Court when deciding about its composition, rather than a 'legal' obligation.

[11] For example, diverse traditions within or transcending legal systems—conservative/liberal/post-modern, positivist/naturalist, secular/religious, etc. See ibid 367–78.

[12] Different arrangements have been made for the distribution of seats of other UN organs, not following the pattern of the Security Council, based on the nature of the organ, its function and other considerations; for example, for the Economic and Social Council (ECOSOC), another main organ of the UN like the ICJ, and for the Advisory Committee on Administrative and Budgetary Questions (ACABQ), a subsidiary body of the General Assembly. Also, the composition of the regional groups may occasionally vary; for example, Malta is considered to be a member of the WEOG for elections to the Security Council but a member of the APG for elections to the International Law Commission.

[13] Shaw (n 4) 395–7; Fassbender (n 10) 369–70.

mostly at the expense of Latin America which has lost two seats in favour of Africa since 1946,[14]—and Western Europe whose number of seats was similarly reduced from four to two after two seats shifted to Asia in 2006 and 2018,[15] leaving it far from the predominant position it held in the PCIJ where 17 of the 31 judges were European. Another notable development is that, since 1964, one to three of the African and Asian regions' seats have been held by nationals of Islamic States (currently two, as in the last election a seat long held by North African countries was passed to South Africa).

Arguably, this reduced homogeneity of the Court has not had a negative effect on the willingness of Member States to submit disputes to the Court,[16] at least as far as Latin American States are concerned, as these have become the Court's best clients (with more than 20 cases, half of which were initiated by Nicaragua and Costa Rica) during the same period that saw the number of seats corresponding to GRULAC countries being reduced by half. The proportion of disputes submitted by Western European States has diminished over time, particularly since 1979;[17] however, it is not apparent whether this is tied to its decreased representation in the Court. Moreover, Eastern European countries other than Russia have brought 15 cases despite holding only one rotating seat (although eight were similar cases brought by Serbia). Furthermore, more than half the cases filed with the Court since 1949 (93 out of 162) have been brought by countries that have never had a sitting judge. The same is true of the countries that recognize the jurisdiction of the Court as compulsory; 43 out of the 74 States that have made declarations pursuant to Article 36(2) of the Statute have never had one of their nationals as ICJ judge.

'Equitable geographical representation' among regions conceals the fact that there has been little actual rotation within regions. Apart from the judges with the nationality of a permanent member of the Security Council (France, the USA and the UK (until 2018)) the remaining two seats of the WEOG have historically been occupied mainly by nationals of Italy and Germany (four each), Australia (three), Norway (two) and Belgium, Canada, Greece, the Netherlands, Spain and Sweden (one each), all before 2006 when a European seat swung towards the 'Others' and was occupied by a national of New Zealand

[14] The representation of Latin America changed from four members in 1946 to one in 1993 and two in 1997; the representation of Africa increased from one member in 1946 to three in 1970.

[15] The representation of Western Europe fluctuated from four members in 1946 to three in 2006 (as one seat swung to a non-European WEOG member) and two in 2018 (when a seat was lost to the APG).

[16] See, however, Shaw (n 4) 397.

[17] From 25 out of 46 cases filed with the ICJ between 1949 and 1978, six out of 52 cases between 1979 and 2005 (while the Court still had four Western European judges), three out of 42 cases between 2006 and 2018 (when Western European representation decreased to three judges), to four (one discontinued) out of 22 cases since 2019 (after the number of Western European judges was reduced to the current two)—although Western European countries have intervened in large numbers in the case of *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v Russian Federation: 32 States intervening)* currently pending before the Court. See ICJ, 'Contentious Cases' <https://www.icj-cij.org/contentious-cases> (including terminated and pending cases).

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before being passed on to Australia. The two EEG seats have been occupied as follows: one by nationals of Russia (another P5 State) until 2024 before passing on to a national of Romania, and the other by two nationals of Poland and one national of Hungary and Slovakia each. The three APG seats have been occupied as follows: one by nationals of China (also a P5 State) and the other two by three nationals of Japan and India, two nationals of Lebanon and Syria, and one national of Jordan, Pakistan and Sri Lanka. The three seats belonging to the GAFS—a group which, like the GRULAC, does not have permanent seats on the Security Council—have been occupied by three nationals of Egypt and Nigeria, two nationals of Senegal, and one national of Algeria, Benin, Madagascar, Morocco, Sierra Leone, Somalia, South Africa and Uganda. Finally, the two seats from the GRULAC have been occupied by six nationals of Brazil, five nationals of Mexico, two nationals of Argentina and Uruguay, and one national of Chile, El Salvador, Guyana, Jamaica, Panama, Peru and Venezuela.

In terms of intra-regional dynamics, this means that the two 'non-permanent' WEOG's seats have rotated either between Northern and Southern Europe (Germany and Italy) since 1994, or between New Zealand and Australia since 2006. The 'non-permanent' EEG seat has always been held by the same three countries (Poland, Hungary and Slovakia). The GAFS's three seats have been occupied broadly by one national of a Northern (Arab) country, one national of a Western (civil law-inspired French-speaking) country, and one national of an Eastern (common law-inspired English-speaking) country, no Central or Southern African national having been elected until 2023 (when the Northern African seat swung to Southern African when passing from Morocco to South Africa). The GRULAC's two seats have been held mostly by Latin American civil law judges—one Portuguese-speaking (Brazilian) and one Spanish-speaking—except when one of the seats was held temporarily by an English-speaking, common law-inspired country national (Guyana and Jamaica). Of the APG's two 'non-permanent' seats, one has been held almost permanently by Japan and the other has rotated between an Islamic country and India.

When the nationality of the members of the ICJ is looked at more closely, one can observe that at any given time in the last quarter of a century, seven or eight out of 15 judges have been American, Brazilian, British, Chinese, French, German, Japanese, Italian or Russian. If re-elections are counted, nationals of certain Member States have occupied seats in the Court for extraordinary periods of time: Poland from 1946 to 1993, Senegal from 1964 to 1991 and Nigeria from 1967 to 1994. There has been a Japanese judge since 1976 without interruption, and nationals of Brazil and Slovakia since 2003. One interesting observation is that while permanent members of the Security Council are losing their 'permanence' in the Court, countries aspiring to become permanent members in a future Security Council reform —Brazil, Germany, India and Japan (the Group of Four or G4)—are

gaining traction; in the current Court there are only three P5 nationals (from China, France and the USA) but nationals of all G4 States. Conversely, 144 out of the 193 current UN Member States—and *ipso facto* parties to the ICJ Statute as per Article 93 of the UN Charter—have never had a national elected to the ICJ. This number includes Iran and Israel, two main forms of civilization with distinctive legal systems, which Antonio Remiro Brotóns calls the unofficial 'blacklist', effectively rendering their nationals ineligible for political reasons.[18] The same applied to Korea, Thailand, Türkiye and South Africa (until now). Truly equitable distribution would require more alternance and that no single judge or multiple judges of a particular nationality, whether of a P5 State or not, should have a seat for an inordinate period of time.[19]

In a Court composed of 15 members, as per Article 3(1) of the Statute, the fact that half the seats have not 'changed nationality' at all and the remaining seats have rotated among only a small number of States presents a serious problem, as it effectively denies jurisconsults of recognized competence in international law who do not have the right nationality the opportunity to serve in the Court.[20] Most significantly, the rotation deficit hinders the development of truly universal international jurisprudence, the only solution to this being to allow the election of persons from different regions and educated in different legal systems. As was compellingly argued by Georges Abi-Saab, 'If we really want international law to take hold and be taken seriously by all, it has to be, and be seen to be, both in its creation and 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.'[21]

The above problems indicate that 'equitable geographic representation', in its current form at least, must be revisited because it does not reflect the geopolitical developments that have occurred since the Court's establishment. While the war in Ukraine suggests that the East–West conflict is not over, the configuration of the EEG has changed fundamentally over recent decades. Politically, 19 of the 23 EEG members are now members or candidate members of the European Union (EU) or the North Atlantic Treaty Organization (NATO). Moreover, from a legal viewpoint, the EU has undertaken a process (which has accelerated since the 1990s) of legislative development aimed at standardizing legislation and/or narrowing the normative gaps among its members. This has led to the legal systems of several Eastern European countries being less influenced by the Soviet legal system and more by the continental (Western) legal tradition. The result has been that the ICJ

[18] Remiro Brotóns (n 4) 50. See also M Lachs, 'Some Reflections on the Nationality of Judges of the International Court of Justice' (1992) 4 PaceYBIntlL 49, 62–7.
[19] Amerasinghe (n 4) 346–8.
[20] McWhinney (n 4) 11–13, 18–19.
[21] Abi-Saab (n 4) 171.

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currently has four judges who are nationals of EU countries (Germany, France, Romania and Slovakia) which, when added to the two judges who are nationals of other WEOG countries (Australia and the USA), brings the number of 'Western' judges to six (out of 15). In this context, the representation of the EEG and the WEOG—if not the very composition of those groups—must be reformed to ensure that geographic representation remains 'equitable'.

Most importantly, based upon the allocation of seats for Security Council members (which also number 15), the seat distribution for the ICJ has failed to give consideration to the particular nature and function of the Court as a 'legal' institution in which the 'principal legal systems of the world' should be represented pursuant to Article 9 of its Statute. Unless 'regional' representation is replaced by an entirely different system (such as one based on the principal legal cultures and traditions *regardless* of the region where countries are located), the ICJ seats should be distributed among regions in such a manner as to allow the widest possible representation of the principal legal systems of the world.

In order to achieve this, the method used for the distribution of the seats of the International Law Commission (ILC)—another 'legal' institution whose composition was updated relatively recently—could be used. Adopted in 1981 when the General Assembly decided to increase the number of ILC members to 34, the seats are distributed as follows: eight for African nationals, seven for Asian-Pacific nationals, three for Eastern European nationals, six for Latin American and Caribbean nationals, eight for Western European and other nationals, one seat rotating between African and Eastern European nationals, and one seat rotating between GRULAC and APG nationals.[22] Transposed to a 15-member Court, and subject to political arrangements, an equitable distribution of the ICJ seats between nationals of the regional groups could take the following form: three seats each for WEOG, GAFS and APG nationals, two seats each for GRULAC and EEG nationals, plus two seats rotating among GAFS, APG, GRULAC and WEOG nationals every nine years, with the exclusion of the EEG from the rotating seats being justified by the fact that it is the group composed of the fewest members, the majority of which are from the Western world. It is suggested that this rearrangement of the ICJ seats would provide a better chance of 'representation of the principal legal systems, not only the two dominant ones, but also all the subsystems, as well as the older systems which may have been partly or totally replaced, on the formal level, by one or the other of the dominant systems'[23] in the Court, while taking account of the world's new geopolitical realities.

As with other UN organs, a new distribution of ICJ seats among regional groups could be undertaken via the adoption of a resolution of the General

[22] UN General Assembly Res 36/39 (18 November 1981) UN Doc A/RES/36/39, para 3.
[23] Abi-Saab (n 4) 170.

Assembly. Such a resolution should further encourage the national groups in the Permanent Court of Arbitration (PCA) (who pursuant to Article 4(1) of the ICJ Statute draw up the list of nominees from which the Security Council and General Assembly elect the judges) to nominate more candidates, in particular from less-represented States. As powerful States are unlikely to refrain from seeking a seat in the Court, equitable access to the judicial function can only be achieved through an institutional procedure that places emphasis on the quality of the judges and reduces politization by promoting transparency and accountability of candidates (an issue elaborated upon in Section IV). There is no conflict between the 'qualifications' and the 'representation' requirements as has been suggested.[24] Only if the pool of candidates is expanded among and within the different regions and legal traditions can the shared goal of having the best possible ICJ judges be achieved.[25]

III. IMPLEMENTING THE 'REGARDLESS OF NATIONALITY' REQUIREMENT

Article 2 of the ICJ Statute states: 'The Court shall be composed of a body of independent judges, elected *regardless of their nationality* from among persons of high moral character, who possess the qualifications required in their respective countries for appointment to the highest judicial offices, or are jurisconsults of recognized competence in international law'.[26] Originating in Article 2 of the Statute of the PCIJ, the expression 'regardless of their nationality' was qualified by Article 3, which until 1945 simply stated that '[t]he Court shall consist of 15 members'. The Washington Committee of Jurists—charged with preparing a draft of the ICJ Statute—proposed to clarify this with the caveat: 'no two of whom may be nationals of the same state', which was added to the text of Article 3(1) of the ICJ Statute. The object was to establish directly in Article 3 the rule derived indirectly from Article 10 of the PCIJ Statute which provided that in the event of more than one national of the same Member State of the League of Nations being elected by the votes of both the Assembly and the Council, only the elder would be considered as elected. At the San Francisco Conference, the draft was further revised to take account of the problem of dual nationality (predominantly affecting members of the Court from British Commonwealth States) by providing in Article 3(2) that '[a] person who for the purposes of membership in the Court could be regarded as a national of more than one State shall be deemed to be a national of the one in which he ordinarily exercises civil and political rights'.[27]

[24] Fassbender (n 10) 378–83. There are qualified international jurists in all five regional groups, so it is unjustified to presume that the allocation of ICJ seats by regions could lead to a lower quality of elected judges. [25] MacKenzie et al (n 4) 169. [26] ICJ Statute (n 1) (emphasis added). [27] Shaw (n 4) 367–8.

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Regardless of the origin of the expression, which is also to be read in relation to the requirements of Articles 3 and 9,[28] if Article 2 is to be interpreted in accordance with the ordinary meaning to be given to the terms of the treaty—pursuant to the general rule of interpretation reflected in Article 31 of the 1969 Vienna Convention on the Law of Treaties[29] which reflects customary law—it must be concluded that nationality should not be considered a factor, let alone a determinant factor, in the nomination and election of ICJ judges. Yet, arguably, the nationality of the candidates has played a not insignificant role in ICJ elections in two ways. First, it has been evident from the fact that until 2018 the permanent members of the Security Council always had one of their nationals sitting as judge, and more recently the change in this practice. Two examples of the latter are Judge Christopher Greenwood's 2017 election loss and Judge Kirill Gevorgian's 2023 election loss, which could not be explained separately from the British and Russian nationalities of the candidates and the changing geopolitical position of the UK[30] and the Russian Federation.[31] Second, nationality has been a key factor in casual elections, even though the issue has mostly remained under the radar of scholarship to date.[32] Casual elections are triggered by an occasional vacancy (hence the alternative term 'occasional election') caused by the resignation or death of a judge.

The deaths of Judge James Crawford in 2021 and Judge Antonio Cançado Trindade in 2022 reignited a debate that had arisen over the resignation of Judge Hisashi Owada of Japan in 2018,[33] as in the campaigns of the candidates to replace them—Judge Hilary Charlesworth and Judge Leonardo Nemer Caldeira Brant, respectively—two States as different as Australia and

[28] Keith (n 4) 50; Shaw (n 4) 368–9.

[29] Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331.

[30] Factors that may have determined the result include the UK's decision in 2016 to leave the EU (Brexit) which affected its solidarity with its future former partner, and the British position in relation to the request for an advisory opinion from the ICJ on the Chagos Archipelago in 2017 which deprived the UK of the African vote. See UN General Assembly Res 71/292 (22 June 2017) UN Doc A/RES/71/292; *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* (Advisory Opinion) [2019] ICJ Rep 95. However, some trace it back to the then Professor Greenwood's 2002 Memorandum which provided the basis for the UK's main justification for the use of force against Iraq in 2003. See UK House of Commons, Committee on Foreign Affairs, Memorandum by Professor Christopher Greenwood, CMG, QC, 'The Legality of Using Force Against Iraq' <https://publications.parliament.uk/pa/cm200203/cmselect/cmfaff/196/2102406.htm>, although the Memorandum was already public when he was elected judge in 2009.

[31] The invasion by Russia of Ukraine in 2022 and the ongoing war in Europe has undoubtedly played a role in determining the election result, causing Russia to lose support in the UN General Assembly and Security Council where P5 solidarity—which is manifested in mutual nomination by P5 States' respective national groups and also, potentially, in reciprocal votes—had traditionally prevailed.

[32] However, see R Lavalle, 'Nationality as a Factor in the Election of the Members of the International Court of Justice with Particular Reference to Occasional Elections' (1996) 29 RBDI 625. See also Lachs (n 18) 49–68.

[33] See J Dugard, 'Article 13' in Zimmermann and Tams (n 4) 409, 418.

Brazil (from the point of view of their civilization and legal systems) relied significantly on the fact that the proposed candidates had the same nationality as the deceased judges. The existence of a special 'practice' or 'understanding' which would entitle a candidate of the same nationality to complete the term of office of their predecessor was liberally invoked.

The existence of such a practice has recently been contested.[34] Upon reviewing the cases of casual elections to the ICJ and the PCIJ, Facundo Pérez Aznar concluded that: (a) with one exception, all 20 occasional vacancies caused by the death or resignation of a judge of a non-P5 State were contested by a significant number of nominees from other nationalities; (b) in roughly half the cases (nine), the successor judge has been of a different nationality from that of his predecessor; and (c) in four of these nine cases, no candidate of the nationality of the judge to be replaced was a contender.

The survey reveals, however, that the habit of nominating and electing a candidate of the same nationality in casual elections to the ICJ, in the absence of extraneous political factors, is well enshrined. This is apparent from the fact that in only two out of ten cases (including the 2022 casual election) was a judge replaced by a candidate of a different nationality: Judge Benegal Rau of India, who died in 1953, was succeeded by Judge Muhammad Zafrulla Khan of Pakistan; and Judge Abdullah El-Erian of Egypt, who died in 1981, was succeeded by Judge Mohammed Bedjaoui of Algeria.[35] The survey also reveals that national groups understand that casual elections can be contested by candidates of other nationalities,[36] as do Member States who have

[34] See F Pérez Aznar, 'Casual Vacancies in the ICJ: Law, Practice, and Policy' (*EJIL:Talk!*, 7 September 2022) <https://www.ejiltalk.org/casual-vacancies-in-the-icj-law-practice-and-policy/>.

[35] On the political factors that may have determined the results, see Lavalle (n 32) 628–9. In the other eight cases, the candidate of the same nationality as the deceased judge prevailed over the candidate(s) of a different nationality—Judge José Philadelpho de Barros e Azevedo of Brazil, who died in 1951, was succeeded by Judge Levi Fernandes Carneiro, Judge Salah El Dine Tarazi of Syria who died in 1980 was succeeded by Judge Abdallah Fikri El-Khani, Judge Nagendra Singh of India, who died in 1988, was succeeded by Judge Raghunandan Swarup Pathak, Judge Taslim Olawale Elias of Nigeria, who died in 1991, was succeeded by Judge Prince Bola Adesumbo Ajibola, Judge Roberto Ago of Italy, who died in 1995, was succeeded by Judge Luigi Ferrari Bravo, Judge Andrés Aguilar-Mawdsley of Venezuela, who died in 1995, was succeeded by Judge Gonzalo Parra Aranguren, Judge James Crawford of Australia, who died in 2021, was succeeded by Judge Hilary Charlesworth, and Judge Antonio Cançado Trindade of Brazil, who died in 2022, was succeeded by Judge Leonardo Nemer Caldeira Brant. In the remaining six of the 16 casual elections in ICJ's history, either no candidate of the nationality of the deceased or resigned judge was a contender—Judge José Gustavo Guerrero of El Salvador, who died in 1958, was succeeded by Judge Ricardo Joaquin Alfaro of Panama, Judge Abdel Hamid Badawi of Egypt, who died in 1965, was succeeded by Judge Fouad Ammoun of Lebanon, Judge Manfred Lachs of Poland, who died in 1993, was succeeded by Judge Géza Herczegh of Hungary, Judge Mohammed Bedjaoui of Algeria, who resigned in 2001, was succeeded by Judge Nabil Elaraby of Egypt, and Judge Awn Shawkat Al-Khasawneh of Jordan, who resigned in 2011, was succeeded by Judge Dalveer Bhandari of India—or the candidate of the same nationality ran uncontested—Judge Hisashi Owada of Japan, who resigned in 2018, was succeeded by Judge Yuji Iwasawa.

[36] Judge Iwasawa's was the only casual election not involving a permanent member with no candidates of other nationalities in the ICJ's—and PCIJ's—history. See Pérez Aznar (n 34).

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supported and voted for candidates of a different nationality in large numbers.[37] It is very likely that in casual elections 'nationality appears to be just an additional element' and that 'it cannot be automatically assumed that Member States that voted for a judge of the same nationality as the previous one have not been motivated by other reasons unrelated to nationality'.[38]

However, the question is not so much whether a convention exists, but rather whether or not it is consistent with the ICJ Statute to vote for a candidate of the nationality of the deceased (or resigned) judge on account of their nationality. Besides excluding the nationality factor, Article 2 requires that the election of judges be based on their 'high moral character' and 'recognized legal competence', and that they must be 'independent'. Furthermore, Article 20 lays down the requirement that judges will 'exercise their powers impartially' once elected. Although a candidate of the same nationality may—and often does—have the necessary qualifications, the current convention weighs heavily in their favour, rendering it very difficult for capable candidates of a different nationality to succeed. It also creates an incentive for judges to resign before the end of their mandate with the aim of facilitating the election of their successor from the same nationality. Moreover, the continuity of nationality engenders the idea of a vote for the candidate's country, ie that countries vote not only for the candidate but also for the Member State of which the candidate is a national. This calls into question the impartiality of the future judge.[39] Furthermore, while helping them to win an election, the convention may cast an unjustified and unfair shadow over the candidate's qualifications, and whether they would still have succeeded on the basis of their own merits regardless of nationality.

In summary, for reasons both legal and systemic, the current convention must be discouraged. While this practice may be difficult to eradicate, an exhortation from the UN General Assembly that judges must be elected 'regardless of their nationality' may deter national groups and Member States from such behaviour and serve as an 'interpretative declaration' regarding the meaning and scope of Article 2 of the ICJ Statute.

IV. VETTING PROCESS AND PUBLIC HEARING

Article 4(1) of the ICJ Statute states: 'The members of the Court shall be elected by the General Assembly and by the Security Council from a list of persons

[37] For example, Professor Linos-Alexandre Sicilianos from Greece obtained 71 votes against the Australian candidate holding the same nationality as the judge who died in 2021 (see 'General Assembly Elects Judge to International Court of Justice', UN General Assembly Press Release (5 November 2021) GA/12379 <https://press.un.org/en/2021/ga12379.doc.htm>), while Professor Marcelo Kohen from Argentina obtained 67 votes against the Brazilian candidate holding the same nationality as the judge who died the following year (see 'General Assembly Elects Judge to International Court of Justice', UN General Assembly Press Release (4 November 2022) GA/12466 <https://press.un.org/en/2022/ga12466.doc.htm>).

[38] See Pérez Aznar (n 34). See also Lavalle (n 32) 631–2.

[39] Lavalle (n 32), 631–2.

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nominated by the national groups in the Permanent Court of Arbitration …'.[40] This provision should be read in conjunction with Article 2 which states: 'The Court shall be composed of a body of independent judges, elected regardless of their nationality from among persons of high moral character, who possess the qualifications required in their respective countries for appointment to the highest judicial offices, or are jurisconsults of recognized competence in international law'.[41] The national groups in the PCA[42]—or in the case of UN Members not represented in the PCA, the national groups appointed for this purpose pursuant to Article 4(2)—are thus bound to nominate candidates who possess the required qualifications.

The system of nominations—to be made by formally independent national groups rather than by governments—was thought to minimize political considerations and ensure a certain vetting of the potential candidates, as well as to limit the Member States' influence in the election by the UN General Assembly and the Security Council. Yet it is often argued that the system has done little to achieve its goals as the members of national groups may be influenced in their choice of candidate by the government who appointed them and may remove them at will. Furthermore, little is known about the workings of the different national groups with very few seemingly consulting their judicial and academic bodies as recommended by Article 6.[43] Against this background, it is suggested that an independent vetting process and public hearings would complement the competency evaluation by the national groups while ensuring collective scrutiny of the candidates.

Systems of vetting and hearings are in place, for example, for the election of judges of the International Criminal Court (ICC) and the European Court of Human Rights (ECtHR). In both courts, candidates are nominated and elected by the States Parties of the respective constituent treaties—the 1998 Rome Statute of the International Criminal Court,[44] and the 1950 European Convention on Human Rights and Fundamental Freedoms[45] (ECHR), both as amended—but independent expert advice is sought to assist States and ensure accountability.

In 2011, the Assembly of States Parties (ASP) to the Rome Statute decided to establish an Advisory Committee on nominations of judges to the ICC, to implement Article 36(4)(c) of the Rome Statute which conferred upon the ASP the authority to establish such a Committee and decide on its

[40] ICJ Statute (n 1). [41] ibid.

[42] The national groups are composed of a maximum of four members of the PCA, selected by the States Parties of the Hague Convention (I) for the Pacific Settlement of International Disputes, art 44 (adopted 18 October 1907, entered into force 26 January 1910) (1907) UKTS 6, 1 Bevans 577, (1908) 2 AJIL Supp 43.

[43] See McWhinney (n 4) 3–8; Georget (n 4) 321–8; MacKenzie et al (n 4) 84–98.

[44] Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3.

[45] Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953, as amended) 213 UNTS 221, CETS 2013.

composition and mandate.[46] It was acknowledged that the establishment of an Advisory Committee, whilst introducing an independent organism into the structure of the Assembly, did not deprive States Parties of their role in the nomination of the candidates, its function being mere technical assessment and not the duplication of the Assembly's role of election or the alteration of the process of decision-making by the ASP and the States Parties.[47] The Terms of reference of the Advisory Committee on nominations of judges of the ICC, as amended,[48] mandate the Committee to develop a common questionnaire which all nominees must complete, detailing their experience in public international law, track record of impartiality and integrity and fluency in one of the working languages of the Court (English or French). They further task the Committee with checking candidates' references and any other relevant information publicly available, clarifying whether they are aware of any allegations of misconduct (including sexual harassment) made against them, assessing knowledge of different legal systems, documenting the national-level nomination and reporting on the above aspects to the Assembly (through its Bureau).[49] All nominated candidates should be available for interview before the Committee, and nominating States should ensure that candidates make themselves available for such interviews.[50] Once the Committee has made its assessments of candidates, roundtable discussions are held with all candidates, open to States Parties and other relevant stakeholders and conducted in both working languages of the Court.[51] The premise of the procedure is the importance of nominating and electing judges who are qualified, competent and experienced persons of 'high moral character, impartiality and integrity who possess the qualifications required', as stipulated in Article 36(3)(a) of the Rome Statute.[52]

In December 2023, the ASP further adopted a 'due diligence procedure' applicable to all candidates for the role of judge, prosecutor, deputy prosecutor, registrar and deputy registrar of the ICC.[53] The procedure is intended to assist State Parties and the Advisory Committee in assessing

[46] See ICC, 'Report of the Bureau on the Establishment of an Advisory Committee on Nominations of Judges of the International Criminal Court' (30 November 2011) Doc ICC-ASP/10/36, paras 1–4 <https://asp.icc-cpi.int/sites/asp/files/asp_docs/ASP10/ICC-ASP-10-36-ENG.pdf>.

[47] ibid, para 12.

[48] ICC ASP, 'Terms of Reference of the Advisory Committee on Nominations of Judges of the International Criminal Court' (6 March 2020) adopted by Res ICC-ASP/10/Res.5, and amended by Res ICC-ASP/13/Res.5, Annex III and Res ICC-ASP/18/Res.4, Annex II <https://asp.icc-cpi.int/sites/asp/files/asp_docs/ASP19/ASP.TOR.ACN.ENG.pdf>.

[49] ibid, para 5 bis.

[50] ICC ASP Res ICC-ASP/3/Res.6 'regarding the procedure for the nomination and election of judges' para 12 bis, inserted by Res ICC-ASP/18/Res.4 on the review of the procedure for the nomination and election of judges (6 December 2019) Annex I <https://asp.icc-cpi.int/sites/asp/files/asp_docs/ASP18/ICC-ASP-18-Res4-ENG.pdf>.

[51] ibid, para 12 ter.

[52] Res ICC-ASP/18/Res 4, ibid, para. 1.

[53] ICC ASP Res ICC-ASP/22/Res.3 'Strengthening the International Criminal Court and the Assembly of States Parties' (13 December 2023) para 81 and Annex II <https://asp.icc-cpi.int/sites/default/files/asp_docs/ICC-ASP-22-Res3-AV-ENG.pdf>.

whether there are concerns as to whether candidates possess 'high moral character' as required by the Rome Statute, and is without prejudice to other efforts or mechanisms to assess the professional skills and competences of such candidates.[54] To be conducted by the Independent Oversight Mechanism (IOM), the procedure encompasses background checks of candidates and a confidential channel for the receipt of allegations of misconduct, together with a process for the review of any allegations received and an obligation to report any credible concerns about the candidate's high moral character to the nominating State Party and the Presidency of the Assembly.

Similarly, the Committee of Ministers of the Council of Europe decided in 2010 to set up an Advisory Panel of Experts, to provide advice to governments on the qualification of the selected candidates for the post of Judge at the ECtHR. In accordance with the Guidelines of the Committee of Ministers on the selection of candidates adopted in 2012 and amended in 2014,[55] governments are invited to submit the curricula vitae (CV) of three candidates they envisage presenting to the Parliamentary Assembly (charged with electing the judges pursuant to Article 22 of the ECHR) to the Panel which, in a confidential procedure, examines the CVs. In deciding whether candidates fulfil the requirements of Article 21 of the ECHR, ie, are 'of high moral character and must either possess the qualifications required for appointment to high judicial office or be jurisconsults of recognized competence', the Panel can ask questions to the nominating governments. Governments are expected to follow the Panel's recommendations, though formally speaking they remain free to present their candidates to the Assembly regardless of the expert view.

One important distinction from the procedure for the nomination and election of ICC judges lies in the Committee of Ministers' function of exercising oversight of the fairness and transparency of the national selection procedure followed when establishing the list of candidates to be transmitted to the Assembly. This includes ensuring that there have been public and open calls for candidatures, interviews have been carried out and that members of the selection body (and those advising on selection) have sufficient technical knowledge, command respect and confidence and are free from undue influence. The quality of the national selection procedure is deemed crucial

[54] ibid, Annex II, para 3.

[55] Council of Europe (COE) Committee of Ministers, 'Guidelines of the Committee of Ministers on the selection of candidates for the post of judge at the European Court of Human Rights' adopted 28 March 2012 at the 1138th meeting of the Ministers' Deputies, CM Doc CM(2012) 40-final (29 March 2012) as amended at the 1213th meeting (26 November 2014) by Decision CM/Del/Dec(2014)1213/1.5 <https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016805cb1ac>. See also COE Parliamentary Assembly, Memorandum prepared by the Secretary-General of the Assembly 'Procedure for the Election of Judges to the European Court of Human Rights' (26 April 2023) Doc SG-AS (2023) 01Rev6 <https://rm.coe.int/procedure-for-the-election-of-judges-to-the-european-court-of-human-ri/1680aa8ddf>.

for the outcome of the whole process, the rationale being that when all candidates presented to the Assembly are of high quality, from an institutional point of view, it does not matter who is elected as they will be an excellent judge who will enjoy the democratic legitimacy conferred by the election.[56]

While many comparisons may be drawn between the systems for election of judges to the ICC and the ECtHR, one difference is that in the case of the ECtHR, the expert advice primarily assists the nominating States before the candidatures are submitted to the electoral body, thus placing emphasis on the functioning of the national selection procedure,[57] while in the case of the ICC, this procedure takes place once the candidatures have been formally presented to the electoral body by the States, and thus the expert advice and hearings are designed to assist the voting States. Despite the occasional criticism attracted by both systems,[58] and the fact that they may not be easily transposed to ICJ elections—in particular the ECtHR process where campaigning takes place among the candidates of the same State and not between candidates of different nationalities—they have reduced politization and improved the quality of judicial appointments over time.

The election of ICJ judges would thus similarly benefit from an institutional procedure aimed at the selection of the most qualified candidates and the reduction of the political factors currently influencing both nominations and elections. The starting point should be the ICJ Statute, as it entrusts national groups with the task of evaluating the nominees. Focus should be on improving nominations by national groups, rather than sidelining them.[59] Although nominating potential judges for the ICJ is only one function of the members of the PCA, in accordance with the PCA founding conventions, States are bound to select persons 'of known competency in questions of

[56] Memorandum, ibid, para 4.

[57] Emphasis on the national selection procedure is explained by the fact that the ECtHR is composed of one judge per contracting party (ECHR, art 22), every State drawing up a list of three candidates for the post of judge (which must include at least one woman) from which the Assembly makes its selection.

[58] See eg M Pena, 'ICC Judicial Elections Reform: Some Progress but Still a Long Way to Go' (*International Justice Monitor*, 15 January 2021) <https://www.ijmonitor.org/2021/01/icc-judicial-elections-reform-some-progress-but-still-a-long-way-to-go/>; K Lemmens, '(S)electing Judges for Strasbourg: A (Dis)appointing Process?' in M Bobek (ed), *Selecting Europe's Judges: A Critical Review of the Appointment Procedures to the European Courts* (OUP 2015) 95.

[59] Proposals have been made to replace the current system of indirect nominations with nominations made directly by governments (E McWhinney, 'The International Court as Constitutional Court and the Blurring of the Arbitral/Judicial Processes' in S Muller and W Mijs (eds), *The Flame Rekindled: New Hopes for International Arbitration* (OUP 1994) 81, 83–4), by the PCA as a whole (A de Geouffre de La Pradelle (1954) 45(1) Annuaire de l'Institut de Droit International 471), by the ICJ (J López Oliván (1954) 45(1) Annuaire de l'Institut de Droit International 484) or by a procedure similar to that in place for nominations to the French Cour de Cassation which are entrusted to an advisory body of 12 members with diverse backgrounds (N Blokker and S Muller, 'The 1996 Elections to the International Court of Justice: New Tendencies in the Post-Cold War Era' (1998) 47 ICLQ 211, 215).

international law [and] of the highest moral reputation' as members of the PCA (Article 23 of the 1899 Convention for the Pacific Settlement of International Disputes;[60] Article 44 of the 1907 Convention for the Pacific Settlement of International Disputes[61]). Selecting competent persons of integrity as members of the PCA is, thus, a crucial first step in ensuring integrity in ICJ judicial nominations.

While an institutional procedure for the election of ICJ judges should not interfere in the selection of the members of the national groups,[62] it could give attention to the manner in which ICJ nominations are made in two meaningful ways. First, national groups could be freed from the control of States in the process of submitting nominations. At least three months before the date of the election, the UN Secretary-General addresses a written request to the members of the PCA from the States which are parties to the Statute and members of the national groups of States not represented in the PCA, inviting them to undertake, within a given time, the nomination of persons eligible to accept the duties of a member of the ICJ (Article 5(1) of the ICJ Statute).

In practice, the Secretary-General's request letter is sent to the ministries of Foreign Affairs which are asked to transmit nominations to the respective national groups. The letter, which is signed by the UN Legal Counsel on behalf of the Secretary-General, requests that nominations be submitted via the permanent missions of the State of the national group to the UN in New York. Whilst failure to submit a nomination would constitute an undue interference by the State in the responsibility to nominate entrusted to national groups by Article 4(1) of the Statute, the current system *de facto* allows States not to submit nominations with which they do not agree and, at a minimum, may create an incentive for national groups to hold government preferences in high regard. However, this indirect system does not stem from the Statute whose Article 5(1) simply states that the Secretary-General 'shall address a written request to the members of the Permanent Court of Arbitration' without indicating how this should be sent. Moreover, the implementation of a direct channel of communication between the UN Secretariat and the members of the PCA would not pose any practical difficulties, as the PCA keeps the list of members of the Court permanently

[60] Convention for the Pacific Settlement of International Disputes (adopted 29 July 1899, entered into force 4 September 1900) (1901) UKTS 9, 1 Bevans 230.

[61] Convention for the Pacific Settlement of International Disputes (n 42).

[62] While governments may, when nominating members of the PCA, have the nomination of candidates in the ICJ elections in mind, the members of the PCA may be called—and often are—to sit as arbitrators and conciliators in inter-State, investor–State and other 'mixed' proceedings. However, all these functions would be better served by members who are independent from governments, and even the appointment of a representative of the government—such as the Foreign Ministry's legal adviser—would be an acceptable compromise to ensure that the government position is heard in decisions of the national group. On the composition of national groups, see MacKenzie et al (n 4) 69–73.

updated. Direct submission of nominations would ensure that national groups enjoyed the maximum autonomy in the last part of the nomination process, if not necessarily in the decision-making process itself.[63] It could also encourage the practice of national groups nominating non-nationals, including candidates not nominated by their own national group or supported by their governments, without this being considered a hostile act[64] (which may be the case when the government acts as intermediary and can abstain from submitting the nomination).

Second, national groups, in particular those nominating their own nationals, could be requested to append a written assessment to the nomination, providing evidence demonstrating that the nominated persons possess the qualifications required in their respective country for appointment to the highest judicial offices, or are jurisconsults of recognized competence in international law as required in Article 2 of the ICJ Statute.[65] The assessment should also show whether the national group has followed the recommendation of Article 6 that judicial, professional and academic bodies have been consulted before making nominations, and whether publicity was given to the Secretary-General's call for nominations and whether interviews of the candidates were conducted. A questionnaire could also be developed in keeping with the example of the ICC, requiring nominees to explain their track record of impartiality and integrity, and whether they are aware of any allegations of misconduct, including sexual harassment, made against them. A vetting process may also be entrusted to the UN Secretariat, or a committee specially tasked with performing a background check. While a State-driven process leading to a resolution by the UN General Assembly could add legitimacy and weight to the processes and information thought to be significant for nominations, the above-mentioned information could be requested by the Secretary-General on his own initiative (currently national groups are requested only to attach CVs to the nomination letters), leaving it to the States to decide what they should make of the information received or the lack thereof.

Moreover, emphasis can and should be placed on facilitating the nomination of women. That only six of the 115 judges of the ICJ have been women[66] is symptomatic of a fundamental problem. Article 8 of the UN Charter provides that '[t]he United Nations shall place no restrictions on the eligibility of men and women to participate in any capacity and under conditions of equality in its

[63] Lack of independence of national groups from the governments who appoint them and have the power to remove their members, and other problems arising from the inconsistent and obscure manner in which national groups operate, have been highlighted inter alia by Keith (n 4) 52–7, and McWhinney (n 4) 6.

[64] Abi-Saab (n 4) 181. See also Remiro Brotóns (n 4) 51–2.

[65] cf 'IDI Resolution on the Position of the International Judge' (n 3) art 1(3). See also MacKenzie et al (n 4) 139–40.

[66] Rosalyn Higgins (1995, President 2006–2009), Joan E Donoghue (2010–2024, President 2021–2024), Hanqin Xue (2010–, Vice-President 2018–2021), Julia Sebutinde (2021–, Vice-President 2024–), Hilary Charlesworth (2021–) and Sarah H Cleveland (2024–).

principal and subsidiary organs'. The gender inequality in the ICJ—a principal UN organ—reveals the 'almost complete failure of the electoral process to comply with Article 8 of the UN Charter'.[67] Moreover, it may deprive the Court of a different perspective, especially in relation to criminal and human rights issues, which could lead to better judgments.[68] National groups could be called upon to include women in their nominations, by means of the letter sent by the Secretary-General pursuant to Article 5(1).

Additionally, public hearings or roundtable discussions should be organized at the UN Headquarters, during which candidates may be questioned by representatives of States and other stakeholders, and their knowledge of one or both languages of the Court may be assessed as required by Article 39.[69] By making information about candidates available to non-governmental organizations and the public in general, the process of nomination and selection of ICJ judges would be made more transparent and effective, resulting in national groups nominating and States electing the most appropriate candidates.[70] In the words of Antonio Remiro Brotóns, '[t]he transparency of the procedure, by making arbitrariness difficult, ends up favoring merit as a decisive value, limiting politicking; without this making merit, at least scientific or academic merit, an absolute and one hundred percent objectifiable value'.[71]

In summary, it is essential that governments are excluded from the nomination process and that nominations are sent directly to the UN Secretary-General by national groups in order to comply with the text and purpose of Articles 4 and 6. Also, it is vital that national groups declare whether they have observed Article 6 (which few national groups currently do). Article 6 could easily be enforced by the Secretary-General. In turn, public hearings would ensure the integrity of the process. While fully respecting the nominating authority of national groups, these measures would considerably curtail government interference with the nomination process, encouraging national groups to nominate a sufficient number of highly qualified candidates and providing States with the information required to make an educated voting decision.

V. SINGLE VOTE FOR SECURITY COUNCIL MEMBERS

Article 8 of the ICJ Statute confers electoral authority to appoint judges upon the UN General Assembly and the Security Council, which 'shall proceed independently of one another to elect the members of the Court'. Pursuant to

[67] Keith (n 4) 50, fn 3.

[68] C Kessedjian, 'Gender Equality in the Judiciary—With an Emphasis on International Judiciary' in Elisa Fornalé (ed), *Gender Equality in the Mirror* (Brill/Nijhoff 2022) 195.

[69] M Kohen, 'Article 39' in Zimmermann and Tams (n 4) 1007, 1013–15.

[70] R MacKenzie and P Sands, 'Judicial Selection for International Courts: Towards Common Principles and Practices' in K Malleson and PH Russell (eds), *Appointing Judges in an Age of Judicial Power: Critical Perspectives from around the World* (University of Toronto Press 2006) 213, 230–1.

[71] Remiro Brotóns (n 4) 75 (translation from Spanish by the author).

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Article 10(1), those candidates who obtain an absolute majority of votes in both organs shall be considered as elected.[72] No distinction is made between permanent and non-permanent members of the Security Council for the purposes of the vote.

As the General Assembly consists of all the members of the UN, of which 15 are also members of the Security Council,[73] the members of the Security Council vote for judges of the ICJ in both electoral organs: they effectively have a right to a double vote.

Since a candidate requires eight votes to obtain an absolute majority in the Security Council, the support of at least some P5 States is crucial. Moreover, P5 and non-permanent members of the Security Council have an advantage in securing the election of their own candidates to the ICJ, as well as in negotiating arrangements of reciprocal support for other candidatures to other organs or bodies of similar importance in which they have an interest. If Security Council members are also able to vote in the General Assembly, the system places them in a highly advantageous position, compounded by the possibility of trading votes separately in each organ, and even voting for different candidates for the same ICJ judicial appointment in the General Assembly and in the Security Council: morally, if not legally, reprehensible behaviour.

The system of dual election was designed in 1920 to protect the interests of the great powers, which dominated in the Council of the League of Nations, and were therefore in a position to exert influence over the larger and more representative Assembly.[74] Other than facilitating the election of the nationals of the permanent members of the UN Security Council, the value of the system is doubtful,[75] as it is not entirely clear that the absence of judges of P5 nationalities would compromise the effectiveness of the Court, as has sometimes been argued.[76] It must be remembered that there was no Chinese judge at the ICJ between 1967 and 1985, and that there has been no British judge since 2018, the busiest period in the Court's history. Also, for the first time, from 2024 two of the five permanent members of the Security Council, the UK and Russia, have no national sitting in the Court. Permanent representation has also not translated into greater use or support for the Court by these powers[77] and yet it puts a great strain on the representation of other

[72] ICJ Statute (n 1). [73] UN Charter (n 1) arts 9, 23. [74] Shaw (n 4) 393.
[75] Abi-Saab (n 4) 174, 182.
[76] See League of Nations Advisory Committee of Jurists, *Procès-verbaux of the Proceedings of the Committee: June 16th–July 24th, 1920, with Annexes* (Van Langenhuysen Brothers 1920) and the arguments made by M. Adatci ('If one of the five great powers seated on the Council were excluded, the new institution [the PCIJ] would still be born' at 118) and Lord Phillimore ('If the Court did not include representatives of these [great powers] among its member, it would lack what in English is called "back bone"' at 105).
[77] The USA has been party to 25 ICJ contentious proceedings (nine as claimant and 16 as defendant), the UK to 15 cases (seven as claimant and eight as defendant), France to 16 cases (six as claimant and ten as defendant), the Soviet Union/Russia to nine cases (all as defendant)

'forms of civilizations and principal legal systems of the world' within the remaining ten seats.[78]

Moreover, on the few occasions when one candidate has won a majority in the General Assembly and another in the Security Council, almost without exception since 1967 the candidate or candidates elected by the Assembly were eventually elected by the Council.[79] Some have attributed this to a 'democratic tendency' of the plenary organ eventually prevailing,[80] but it may also be attributable the fact that, with the increase of Security Council members over the years, the great powers have lost their dominance.[81] Additionally, in 2017 (for the first time) and again in 2023, a national of a P5 State was unseated from the Court, heralding a new era in which P5 States cannot assume that their nationals will be elected. Occasionally, the result may be the *de facto* transfer of the P5 seat to a different regional group.[82]

The system of dual election is therefore a controversial issue when considering future reform of the ICJ Statute, and a feature that may eventually be retained through the power of the P5 members to veto any amendment of the Statute.[83] Thus, relinquishing the vote in the General Assembly may well be all that P5 States are willing to concede.

Nevertheless, as voting rights emanate from the ICJ Statute, no member of the General Assembly or the Security Council may be deprived of them without their consent except as provided for in the UN Charter. UN members can lose the vote in the General Assembly if preventive or enforcement action

and China to none. The list is available at <https://www.icj-cij.org/list-of-all-cases>. Moreover, of the P5 States, only the UK has recognized the compulsory jurisdiction of the Court pursuant to art 36 (2) of the ICJ Statute. See Declarations filed with the UN Secretary-General to that effect at <https://www.icj-cij.org/declarations>.

[78] Abi-Saab (n 4) 174.

[79] In the elections of 1987 (Judge Mohamed Shahabuddeen of Guyana), 1990 (Judge Raymond Ranjeva of Madagascar), 1993 (Judge Abdul G Koroma of Sierra Leone), 2011 (Judge Julia Sebutinde of Uganda) and 2014 (Judge Patrick Robinson of Jamaica), the candidates elected by the General Assembly were eventually elected by the Security Council except in the election of 2008 when Judge Abdulqawi Yusuf of Somalia received an absolute majority on the Council and succeeded in the Assembly. Before 1967, of the seven elections where a disagreement occurred between the General Assembly and the Security Council, in three the candidates elected by the Council prevailed (1946, 1956 and 1963), in another three the candidates elected by the Assembly prevailed (1957, 1960 and 1966), and in the final one a third candidate was elected by both organs (1948).

[80] Keith (n 4) 59. See also C Espósito, 'Elección de jueces e independencia judicial en la Corte Internacional de Justicia' in J Díez-Hochleitner Rodríguez, C Espósito, C Izquierdo Sans and S Torrecuadrada (eds), *Principios y justicia en el derecho internacional – Libro homenaje al profesor Antonio Remiro Brotóns* (Dykinson 2018) 315, 319–21.

[81] See Hudson (n 4) 267. In 1920, the so-called great powers held four permanent seats in the Council of the League of Nations (with the possibility that a fifth great power would accept a permanent seat) which was then composed of representatives of eight States. The number of non-permanent members was first increased to six in 1922 and to nine in 1926. The members of the UN Security Council, of which five States are permanent members, also increased from 11 members in 1945 to 15 members in 1965.

[82] In the 2017 election the seat occupied by Judge Greenwood—a national of a WEOG State—swung to the APG with the re-election of Judge Bhandari of India. See n 15.

[83] Abi-Saab (n 4) 182.

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has been taken against them by the Security Council (Article 5 of the UN Charter) or they have been in arrears with payment of financial contributions to the UN during the preceding two years (Article 19 of the UN Charter). No such withdrawal of the right to vote can occur in the Security Council, except as may be decided upon by the Security Council pursuant to Article 41 of the UN Charter (measures not involving the use of armed force). In practice, States would be more likely to relinquish their vote in the General Assembly than in the Security Council. Moreover, choosing not to vote in the Security Council could endanger the acquisition of the absolute majority required by Article 10 (1). Conversely, some or all of the members of the Security Council abstaining from voting in the General Assembly would not present a similar risk for its absolute majority (97 votes), *de facto* empowering the plenary organ in matters pertaining to ICJ elections.

In conclusion, UN Member States could abstain from casting votes for judges of the ICJ in the General Assembly during their membership of the Security Council. They could do so voluntarily without losing much of the advantage that they currently have—and will continue to have—as a result of possessing one of the eight votes required to win an election in the Security Council. This would be aligned with and strengthen the principle of sovereign equality of all UN members which is codified in Article 2(1) of the Charter, while avoiding some of the negative consequences of the double vote. It may also be politically astute for P5 and aspiring permanent members to reduce the increasingly denounced democratic deficit in the Security Council which, among other considerations, has driven the process for Security Council reform.[84]

VI. CONCLUSIONS

A meaningful reform of the method of election of the judges of the ICJ would require an amendment of its Statute. While such a reform is not impossible, it may only be feasible as part of the wider reform of the UN—the Security Council in particular—including its membership and veto rights. As negotiations for Security Council reform have stalled, changing political circumstances have prompted practical changes such as self-limitation in the use of the veto by some permanent members[85] and an increased rotation for

[84] See, inter alia, A Damianou, 'Three Necessary Reforms for UN Security Council Legitimacy' (*Global Risks Inside*, 23 October 2015) <https://globalriskinsights.com/2015/10/three-necessary-reforms-for-un-security-council-legitimacy/>. See above (n 7).

[85] For example, in 2013 France pledged not to use its veto in cases of mass atrocities. See Ministère de l'Europe et des Affairs Étrangères, France Diplomatie, Presse, 'Pourquoi la France veut encadrer le recours au veto au Conseil de sécurité des Nations unies' (updated February 2021) <https://www.diplomatie.gouv.fr/fr/politique-etrangere-de-la-france/la-france-et-les-nations-unies/pourquoi-la-france-veut-encadrer-le-recours-au-veto-au-conseil-de-securite-des/>; Permanent Mission of France to the United Nations in New York, Press Room, '5 Things to Know about France and the Veto Power' (last modified 28 March 2023) <https://onu.delegfrance.org/5-things-to-know-about-France-and-the-veto-power>.

its non-permanent members.[86] This may serve as inspiration for the adoption by the General Assembly, the UN Secretary-General and Member States of practical measures aimed at improving the system of election of ICJ judges.

From the above discussion, several measures which a General Assembly resolution applicable to future ICJ elections should put in place can be identified. First, the seats among the five UN regional groups should be re-allocated commensurate with the legal nature of the ICJ and with the significant developments that have taken place in the international community since the Cold War. The pattern adopted to distribute the seats for membership of the ILC could constitute an acceptable and achievable model for ICJ membership.

Next, national groups could be called upon to nominate candidates from under-represented regions and countries that fulfil the requirement established in Article 2 of the ICJ Statute in furtherance of the objective established in Article 9 that the representation of the main forms of civilization and principal legal systems of the world in the Court should be assured. The resolution should also call on national groups to include, whenever possible, an equal number of men and women among the nominated persons.

Third, the Secretary-General should invite nominations from national groups to be sent directly to him or her and contain information on how the candidate(s) fulfil the requirements for the position of ICJ judge in accordance with Article 2 and related Articles of the ICJ Statute, and whether judicial and professional bodies have been consulted as recommended by Article 6. Nominations should include an affidavit by the candidate(s) confirming their integrity and propriety. Moreover, the UN Secretary-General should be required to organize public hearings during which questions relating to competency in international law and integrity may be put to the candidates by representatives of States and other stakeholders, and their knowledge of the official languages of the Court may be ascertained, as required by Articles 2 and 39 of the ICJ Statute, respectively. Candidates should be formally invited to and commit to being available for such hearings.

Fourth, States should be reminded of their obligation to campaign and cast their vote based only on the requirements established in Articles 2 and 9 of

[86] For example, in the last 20 years some countries that had never before served in the Security Council have announced their intention to apply for future Security Council membership: Qatar and Slovakia (2006–2007), Croatia (2008–2009), Bosnia and Herzegovina (2010–2011), Azerbaijan and Guatemala (2012–2013), Luxembourg (2013–2014), Lithuania (2014–2015), Kazakhstan (2017–2018), Equatorial Guinea (2018–2019), Dominican Republic (2019–2020), Saint Vincent and the Grenadines and Estonia (2020–2021), Albania (2022–2023), Mozambique and Switzerland (2023–2024), Mauritius (2024–2025), Latvia and Montenegro (2025–26), Kyrgyzstan (2026–2027), Tajikistan (2027–2028), Uzbekistan (2028–2029) and Armenia (2031–2032). However, membership of the Security Council and of the ICJ differs, eg membership of the Council runs for two years while that of the Court runs for nine, and, of 193 UN Member States, 61 have never been in the Council as opposed to 144 that have never had one of their nationals in the Court.

the ICJ Statute, ie, the candidates' individual qualifications, 'regardless of their nationality'.

Finally, the resolution should invite members of the Security Council to abstain from also exercising their right to vote for ICJ judges in elections in the General Assembly.

While these measures may not be binding on States, they would carry significant weight and could lead to a change in the present culture of nominations and elections towards one that favours the qualification of the judges over political considerations.

As has been affirmed elsewhere, '[t]he efficiency and authority of the Court are to a large extent determined by its composition, hence the decisive character of the procedure governing the election of judges'.[87] In view of the difficulty in amending the Statute of the ICJ, changes to procedure that can be made without an amendment of the Statute should be undertaken to ensure that the Court continues to enjoy the legitimacy and the centrality attributed to it as the principal judicial organ of the UN.

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[87] Georget (n 4) 320.