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ORIGINAL ARTICLE

INTERNATIONAL COURTS AND TRIBUNALS: INTERNATIONAL COURT OF JUSTICE

Judges *ad hoc* of the International Court of Justice

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Abstract

Judges *ad hoc* of the International Court of Justice have been widely criticized for their supposed lack of impartiality. This criticism may seem all the more powerful if one takes into account that judges *ad hoc* were created as a means to avoid the Court's bias and appearance of bias. However, recent developments in the appointment of judges *ad hoc* indicate that, far from being a detriment to the states' perception of the Court's impartiality, judges *ad hoc* are a means to enhance the perception that the Court as a whole is impartial. Such developments include the increased frequency with which former elected judges are appointed judges *ad hoc*, the practice of electing judges from the ranks of former (or sitting) judges *ad hoc*, and the appointment of nationals or non-nationals as judges *ad hoc*. The institution of judges *ad hoc* has come full circle, and should be regarded as fulfilling the function for which it was created.

Keywords: impartiality; International Court of Justice; judges *ad hoc*; nationality

1. Introduction: Challenging established wisdom

Judges *ad hoc* are a staple of contentious proceedings before the International Court of Justice (ICJ or Court).[1] The Court hears very few cases in which no judge *ad hoc* sits alongside elected

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[1]Under Art. 31(1) of the Court's Statute, a state party to a case has the right to appoint a judge *ad hoc* if none of the Court's elected judges is a national of that state, including cases in which an elected judge cannot sit in a case due to conflict. Art. 31(2) confers this right on a state which is the only party no national of which is already serving as a titular judge, while Art. 31(3) provides the same right in cases in which no national of either state party is an elected judge. By virtue of Art. 31(4), judges *ad hoc* may also be appointed in cases heard by a Chamber of the Court and, under Art. 31(5), if there are 'several parties in the same interest', they are considered to be 'one party only' in appointing a single judge *ad hoc*. Under Art. 31(6), judges *ad hoc* are equated to elected judges in respect of qualifications, incompatibility, and impartiality, must make a solemn declaration in open court and, after appointment, 'shall take part in the decision on terms of complete equality with their colleagues'. The Court found states to be 'in the same interest' under Art. 31(5) in only two cases. See *South West Africa (Ethiopia v. South Africa; Liberia v. South Africa)*, Order of 20 May 1961, [1961] ICJ Rep. 13, at 14; *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)*, Judgment of 20 February 1969, [1969] ICJ Rep. 3, at 8. In the 1973 *Fisheries Jurisdiction* cases, the Court, although not consolidating the proceedings, found that Germany and the United Kingdom were in the same interest and, as a British elected judge was a member of the Court, Germany had no right to appoint a judge *ad hoc*. See *Fisheries Jurisdiction (Federal Republic of Germany v. Iceland)*, Judgment of 2 February 1973, [1973] ICJ Rep. 49, at 51, para. 7. Similarly, the Court found the United Kingdom and the United States to not be in the same interest in the 1992 *Lockerbie* cases. See *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libya v. United Kingdom)*, Judgment of 27 February 1998, [1998] ICJ Rep. 9, at 13,

judges,[2] and some of the most highly reputed international law jurists have served as judges *ad hoc*.[3] The drafters of the Statute of the Permanent Court of International Justice (PCIJ) intended judges *ad hoc* to be a means of preserving the Court's impartiality by altering its composition in individual cases.[4] Academic commentators, however, have criticized judges *ad hoc* widely, presuming their lack of impartiality.[5] On the basis of empirical observations, this article argues that developments since the turn of the millennium show that such criticism is now misplaced, and that the appointment of judges *ad hoc* in fact positively affects the Court's impartiality, which in this article is understood to embrace both subjective lack of bias, and objective lack of appearance of bias.[6] This article does not elaborate on the notion of impartiality, which, as was recently suggested, may not be clearly defined.[7]

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para. 9. In the 1974 *Nuclear Tests* cases, Australia and New Zealand separately appointed the same judge *ad hoc*, and Art. 31(5) was not expressly discussed. See *Nuclear Tests (Australia v. France)*, Judgment of 20 December 1974, [1974] ICJ Rep. 253, at 255, para. 3; *Nuclear Tests (New Zealand v. France)*, Judgment of 20 December 1974, [1974] ICJ Rep. 457, at 458, para. 3. In the 2016 *Nuclear Disarmament* cases, Pakistan, the only one of three respondents no national of which was an elected judge, did not appoint a judge *ad hoc*. See *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. Pakistan)*, Judgment of 5 October 2016, [2016] ICJ Rep. 552, at 556, para. 3. In the 2004 *Legality of Use of Force* judgments, the Court held, without explanation, that the judges *ad hoc* appointed by three of the respondent states, namely France, the Netherlands, and the United Kingdom, could not sit with the Court to hear preliminary objections, as the Court already included elected judges of British, Dutch, and French nationality. See *Legality of Use of Force (Yugoslavia v. Belgium)*, Judgment of 15 December 2004, [2004] ICJ Rep. 279, at 287, para. 18.

[2]In this article 'elected judge' and 'titular judge' are used interchangeably to denote 'members' of the Court elected through the procedure under Arts. 4–12 of the Court's Statute.

[3]This article does not discuss arbitration or individual complaints under human rights treaties. However, there is a parallel between judges *ad hoc* and party-appointed arbitrators. See M. Shaw, *Rosenne's Law and Practice of the International Court 1920–2015* (2015), vol. III, at 1112; J. G. Merrills, *International Dispute Settlement* (2017), at 145–6; G. I. Hernández, *The International Court of Justice and the Judicial Function* (2014), at 145–7; R. Kolb, *The International Court of Justice* (2013), at 119–20; S. Oda 'The International Court of Justice viewed from the Bench (1976–1993)', (1993) 244 *Recueil des Cours* 9, at 115–16.

[4]Section 2 below. See also Hernández, *supra* note 3, at 145.

[5]H. Charlesworth, 'Judge *ad hoc* of the International Court of Justice', in T. McCormack and C. Saunders (eds.), *Sir Ninian Stephen: A Tribute* (2007), 176; I. Scobbie, '"Une héresie en matière judiciaire"?: The role of the judge *ad hoc* in the International Court', (2005) 4 *Law and Practice of International Courts and Tribunals* 421; S. Rosenne, 'International Court of Justice: Practice directions on Judges *ad hoc*; Counsel and Advocates: and Submission of New Documents', (2002) 1 *Law and Practice of International Courts and Tribunals* 223; A. Oraison, 'Réflexions sur l'institution du juge *ad hoc* siégeant au tribunal du Palais de la Paix en séance plénière ou en Chambre *ad hoc*', (1998) 31 RBDI 272; S. K. Chatterjee, 'The role of the *ad-hoc* judge in the International Court of Justice', (1979) 19 *Indian JIL* 372; D. Mathy, 'Un juge *ad hoc* en procédure devant la Cour internationale de Justice', (1976) 12 RBDI 528; D. D. Ntanda Nsereko, 'The International Court, Impartiality and Judges *ad hoc*', (1973) 13 *Indian JIL* 207; M. Pomerance, 'The Admission of Judges *ad hoc* in Advisory Proceedings: Some Reflections in the light of the *Namibia* Case', (1973) 67 AJIL 446; E. Jiménez de Aréchaga, 'Judges *ad hoc* in Advisory Proceedings', (1971) 31 ZaöRV 697. Two elected judges have written on judges *ad hoc*, see P. H. Kooijmans and F. L. Bordin, 'Article 31', in A. Zimmermann and C. Tams (eds.), *The Statute of the International Court of Justice – A Commentary* (2019), 604; S. M. Schwebel, 'National Judges and Judges *ad hoc* of the International Court of Justice', (1999) 48 ICLQ 889. Four judges *ad hoc* have also written on the topic, see N. Valticos, 'Pratique et éthique d'un juge "*ad hoc*" à la Cour internationale de Justice', in N. Ando et al. (eds.), *Liber Amicorum Judge Shigeru Oda* (2002), Vol. I, 107; H. Thierry, 'Au sujet du juge "*ad hoc*"', in C. A. Armas Barea et al. (eds.), *Liber Amicorum 'In memoriam' of judge José Maria Ruda* (2000), 285; N. Valticos, 'L'évolution de la notion de juge *ad hoc*', (1997) 50 RHDI 1; E. Lauterpacht and K. Skubiszewski, 'The Role of *ad hoc* Judges', in *Increasing the Effectiveness of the International Court of Justice: Proceedings of the ICJ/UNITAR Colloquium to celebrate the 50th Anniversary of the Court* (1997), 370.

[6]This is the notion which the International Criminal Tribunal for the former Yugoslavia (ICTY) identified on the basis of a detailed analysis of international and domestic law and jurisprudence. See *Prosecutor v. Furundžija*, Appeals Judgement, Case No. IT-95-17/1-A, 21 July 2000, para. 189. The contours of the notion of impartiality have so far escaped a precise definition, which is the reason why the constitutive instruments of international courts and tribunals generally define impartiality by reference to activities incompatible with the judges' functions. In general, see G. Guillaume, 'The Position of the International Judge', (2011) 74 *Annuaire de l'Institut de Droit International – Session de Rhodes* 4; H. Ruiz Fabri and J. M. Sorel (eds.), *Indépendance et Impartialité des Juges Internationaux* (2010).

[7]See Hernández, *supra* note 3, at 130–2. Properly analysing the notion of impartiality would require a dedicated scholarly endeavour which transcends the scope of this article.

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Section 2 explores the reasons for creating the institution of judges *ad hoc* by reference to the drafting history of the PCIJ's Statute. In support of the argument of this article, Section 3 discusses recent developments in the appointment of judges *ad hoc*: the appointment of former elected judges as judges *ad hoc*, the election of former judges *ad hoc* as titular judges, and the appointment of judges *ad hoc* in the current crisis of multilateralism. Section 4 concludes by suggesting how such changes have re-shaped the role of judges *ad hoc* at the ICJ.

2. Why judges *ad hoc*? The drafting history of the ICJ's Statute

The *travaux préparatoires* of the Court's Statute are instructive as to the reasons for conferring on states a right to appoint judges *ad hoc*.

2.1 Drafting the PCIJ's Statute (1920–1921)

In the 1920 Advisory Committee of Jurists, tasked with preparing a draft Statute for the newly-created PCIJ, judges *ad hoc*, also called national judges, were the subject of lengthy discussions. The record of these discussions indicates that two main issues justifying the creation of the right to appoint judges *ad hoc* concerned the PCIJ's perceived impartiality resulting from the elected judges' nationality and equality between the parties.

The Committee's 'Draft of general agenda' queried whether the states parties to a dispute should have the right to influence the composition of the bench, and whether judges should be allowed to sit in cases to which their state of nationality was a party.[8] The comments received by the Committee from states and other entities mainly suggested that nationals of a litigant state should not sit in judgment over the dispute concerned,[9] with some states even proposing that the parties should have the right freely to choose two,[10] three[11] or five[12] judges to abstain from deciding their dispute. At the Sixth Session of the Committee, Mr. Adatci first proposed the creation of a right for a state 'to appoint one of it[s] own nationals to sit as [a] judge in the case', provided that no such a national was sitting on the Court.[13] The record of the debates indicates that the Committee was primarily concerned with avoiding inequality between litigating parties, in order to preserve the appearance of impartiality of the Court as a whole.[14]

The fundamentals of the rule in Article 31 of the ICJ's Statute first appeared as part of the Root-Phillimore plan, Article 27 of which provided that:

> [i]f, on the trial of a case, there is no judge upon the Court belonging to one of the litigating States, that State shall, for the purpose of the trial, appoint a judge who shall take part in the decision of the case on a footing of absolute equality with the other judges on the Bench.
>
> If neither of the parties in litigation before the Court had a judge, each shall appoint a judge to take part in the proceedings and the decision of the case.
>
> If two or more of the parties are in the same interest, they shall have but one judge, to be agreed upon between them.[15]

The mandatory language in this provision envisaged the appointment of judges *ad hoc* as an obligation rather than a right. Lord Phillimore argued that allowing states to appoint judges *ad hoc*

[8]Permanent Court of International Justice, Advisory Committee of Jurists, *Procès-verbaux of the Proceedings of the Committee (16 June–24 July 1920)* (1920), 37.
[9]Ibid., at 73 (International Law Union, Sweden).
[10]Ibid., (International Law Union, Austria).
[11]Ibid., (Denmark, Norway).
[12]Ibid., (Switzerland).
[13]Ibid., at 165.
[14]Ibid., at 198, 199, 305.
[15]Ibid., at 327.

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would, *inter alia*, 'enable the Court to understand certain questions which require highly specialised knowledge and relate to the differences between the various legal systems'.[16] While agreeing with Lord Phillimore,[17] Mr. de Lapradelle made a point about impartiality by noting that national judges would always record their disapproval of a decision against their state, which counselled for excluding the judge having the nationality of one of the parties.[18] Mr. Loder, with whom Baron Descamps[19] and Mr. de Lapradelle[20] agreed, 'was opposed to Article 27 of the Root-Phillimore plan, because [it] still involved the idea of arbitration instead of justice', and instead suggested that the parties should appoint assessors with advisory powers.[21] Mr. Adatci and Mr. Hagerup supported Article 27 of the Root-Phillimore plan, and further proposed that judges *ad hoc* be chosen from the list of unsuccessful candidates submitted earlier to the Assembly and Council of the League of Nations for consideration in electing judges.[22] Both the suggestion by Mr. Loder, and the suggestion by Mr. Adatci and Mr. Hagerup, would have affected the appearance of impartiality of the PCIJ: on one hand, assessors with advisory powers would have had little impact on how cases were decided; on the other hand, choosing judges *ad hoc* from among unsuccessful candidates for election as titular judges would have limited the states' choice to persons who, in principle, satisfied the requirement of impartiality under the Statute.

Article 28(2) of the Draft Scheme for the PCIJ's Statute transmitted to the Assembly and Council of the League provided that, if no elected judge having the nationality of a litigating state would be on the Court, that state could select a judge of its nationality from among the deputy-judges, and, in the absence of any such deputy-judge, it could appoint a judge 'preferably chosen among those persons who have been nominated as candidates by some national group in the [Permanent] Court of Arbitration'.[23] This system established a clear nationality link between the state party to a dispute appointing a judge *ad hoc* and the person so appointed.

Upon examination of the Committee's Draft Scheme, Norway and Sweden suggested that the institution of judges *ad hoc* be eliminated entirely.[24] In his report to the Council, Mr. Bourgeois stated that ensuring the equality of the parties could be achieved 'either by adding or by subtracting', and suggested that 'it appeared ... unnecessary to substitute, for purely theoretical reasons, a new system for that proposed unanimously by the Hague Jurists'.[25] The Council did not change Article 28 of the Draft Scheme.[26] Throughout its proceedings, the Assembly did not change the substance of that provision,[27] which was finally adopted and became Article 31 of the PCIJ's Statute.[28]

2.2 Amending the PCIJ's Statute (1929)

In 1929, a Committee of Jurists was established to consider possible amendments to the PCIJ's Statute. Discussions on judges *ad hoc* focused on their impartiality[29] and the meaning of 'nationality',[30] but

[16] Ibid., at 528–9.
[17] Ibid., at 535.
[18] Ibid., at 531.
[19] Ibid., at 533.
[20] Ibid., at 535.
[21] Ibid., at 531.
[22] Ibid., at 529–30.
[23] Ibid., at 678. For the Committee's commentary to Art. 28 of the Draft Scheme see ibid., at 720–2.
[24] League of Nations, Permanent Court of International Justice, *Documents concerning the Action taken by the Council of the League of Nations under Article 14 of the Covenant and the Adoption by the Assembly of the Statute of the Permanent Court of International Justice* (1920), 34, 36.
[25] Ibid., at 48.
[26] Ibid., at 57.
[27] Ibid., at 130–1 (Sub-committee of the Third Committee), 107–10 (Third Committee), 217–18.
[28] Ibid., at 256.
[29] Committee of Jurists on the Statute of the Permanent Court of International Justice, *Minutes of the Session held at Geneva, March 11th–19th, 1929*, League of Nations Document C.166.M.66.1929.V, at 50–2.
[30] Ibid., at 70, 84–7.

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also on their relationship with deputy-judges.[31] The Committee, however, 'considered that it was no part of its duty to deal with the institution of national judges, which is regarded by certain States as one of the essential principles of the organisation of the Court'.[32] Thus, the only amendment to Article 31 of the Statute was a by-product of the Committee's proposal to eliminate the category of deputy-judges. In its 1929 Report, the Committee proposed to 'increase the number of ordinary judges from eleven to fifteen and to omit all mention of deputy-judges',[33] and stated that '[t]he disappearance of the deputy-judges naturally involves consequential amendment of various articles in the Statute in which they are mentioned',[34] which included Article 31.

Article 31(2) of the Statute as adopted by Protocol of 14 September 1929[35] stated that:

> [i]f the Court includes upon the Bench a judge of the nationality of one of the parties, the other party may choose a person to sit as judge. Such person shall be chosen preferably from among those persons who have been nominated as candidates as provided in Articles 4 and 5.[36]

Following this amendment, Article 31 gave states full discretion in choosing judges *ad hoc* by removing the requirement that such judges be nationals of the appointing state. The record of the 1929 Committee of Jurists, however, does not express any reason for eliminating the nationality requirement, and does not seem to link this elimination to concerns relating to the PCIJ's impartiality. The 1929 amendments entered into force on 1 February 1936.[37] The PCIJ's practice relating to the new Article 31 was limited to four years, owing to the outbreak of the Second World War, during which time the PCIJ decided only eight cases in which judges *ad hoc* had been appointed.[38]

2.3 Adopting the ICJ's Statute (1944–1945)

The 1944 report of the Inter-allied Committee on the future of the PCIJ was in favour of retaining the institution of judges *ad hoc* for much the same reasons as the 1920 Advisory Committee of Jurists.[39] However, the report commented that:

> [t]he present position of an *ad hoc* judge is unsatisfactory; he has no regular or permanent status as a Judge of the Court, but is there for the particular case only on the *ad hoc* nomination of his own country.[40]

The report suggested that, in the process for electing judges:

> each party to the Statute ... should nominate one candidate ... Candidates so nominated should, by the fact of nomination, become members (though not Judges) of the Court. As

[31] Ibid., at 53–5.

[32] Committee of Jurists on the Statute of the Permanent Court of International Justice, *Reports adopted by the Committee at its Session held at Geneva from March 11th to 19th, 1929*, League of Nations Document C.142.M.52.1929.V, at 7.

[33] Ibid., at 3.

[34] Ibid.

[35] For the text of the Protocol, see PCIJ Series D, No. 1 (Third edition), at 10.

[36] *Acts relating to the Constitution of the Permanent Court of International Justice*, League of Nations Document C.80.M.28.1936.V, at 38.

[37] PCIJ Series D, No. 1 (Third edition), at 10, footnote 2.

[38] *Pajzs, Csáky, Esterházy*, PCIJ Series A/B, No. 66; *Losinger*, PCIJ Series A/B, No. 67; *Pajzs, Csáky, Esterházy*, PCIJ Series A/B, No. 68; *Lighthouses in Crete and Samos*, PCIJ Series A/B, No. 71; *Panevezys–Saldutiskis Railway*, PCIJ Series A/B, No. 75; *Panevezys–Saldutiskis Railway*, PCIJ Series A/B, No. 76; *Electricity Company of Sofia and Bulgaria*, PCIJ Series A/B, No. 77; *Société Commerciale de Belgique*, PCIJ Series A/B, No. 78.

[39] Report of the informal Inter-allied Committee on the future of the Permanent Court of International Justice (10 February 1944), (1945) 39 AJIL Supplement 1, at 11, para. 39.

[40] Ibid., at 13, para. 44(a).

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> such, they would, for a period of 9 years, automatically be the national judges of their respective countries . . .[41]

According to the report, this new system would ensure that 'national judges would not be specially appointed for a particular case; they would have a permanent status as members of the Court',[42] and the fact that all states would be 'represented by someone having the status of a member of the Court would of itself give all countries a greater stake in the Court and help to promote interest in it'.[43] Although the report does not refer directly to impartiality, its writers conceivably had considered that conferring on national judges the status of members of the Court also would have affected positively the perception of the Court's impartiality, thus incentivizing states to 'promote interest' in the new institution.

At the Dumbarton Oaks Conference, states spoke of judges *ad hoc* only in support of retaining them in the future court.[44] Subsequently, at the San Francisco Conference a UN Committee of Jurists drafted the text that became the ICJ's Statute. The initial text,[45] the states' comments on that text[46] and the subsequent drafts prepared by the Committee[47] all included a provision on the appointment of judges *ad hoc*. The draft provision on judges *ad hoc* was adopted unchanged by the relevant commissions of the San Francisco Conference,[48] and adopted as Article 31 of the ICJ's Statute.

3. Appointment of judges *ad hoc* in practice

The pattern in the appointment of judges *ad hoc* since 1946 shows that, far from reducing the perception of the Court's impartiality, the institution has developed in a way which increases it. This development results from certain recent trends discussed below.

3.1 Appointment of former titular judges as judges ad hoc

While appointing former elected judges as judges *ad hoc* is not a novelty, this practice has become more common since the turn of the millennium. The first such appointment was made in 1963, when Spain appointed former titular Judge Armand-Ugon to sit in *Barcelona Traction*.[49] His appointment, made 17 years after the Court's establishment, was followed 16 years later by Libya's

[41]Ibid., at 12, para. 41.

[42]Ibid., at 13, para. 44(a).

[43]Ibid., at 13, para. 44(b).

[44]Doc. 2, G/7(d)(1) (31 October 1944) (Venezuela), in *Documents of the United Nations Conference on International Organization (San Francisco, 1945)*, vol. III, at 227–8; Doc. 2, G/14(g)(2) (7 May 1945) (Cuba), in *Documents of the United Nations Conference on International Organization (San Francisco, 1945)*, vol. III, at 519.

[45]Doc. Jurist 5, G/5 (9 April 1945), in *Documents of the United Nations Conference on International Organization (San Francisco, 1945)*, vol. XIV, at 335–6.

[46]Doc. Jurist 14, DP/4 (10 April 1945) (United Kingdom), in *Documents of the United Nations Conference on International Organization (San Francisco, 1945)*, vol. XIV, at 317; Doc. Jurist 16, G/12 (10 April 1945) (Venezuela), in *Documents of the United Nations Conference on International Organization (San Francisco, 1945)*, vol. XIV, at 370–1; Doc. Jurist 18, DP/6 (11 April 1945) (Liberia), *Documents of the United Nations Conference on International Organization (San Francisco, 1945)*, vol. XIV, at 306; Doc. Jurist 21, DP/7 (11 April 1945) (Netherlands), in *Documents of the United Nations Conference on International Organization (San Francisco, 1945)*, vol. XIV, at 309.

[47]Doc. Jurist 47, G/36 (14 April 1945), in *Documents of the United Nations Conference on International Organization (San Francisco, 1945)*, vol. XIV, at 490; Doc. Jurist 49(47), G/38 (15 April 1945), in *Documents of the United Nations Conference on International Organization (San Francisco, 1945)*, vol. XIV, at 506; Doc. Jurist 59, G/47 (20 April 1945), in *Documents of the United Nations Conference on International Organization (San Francisco, 1945)*, vol. XIV, at 554–5; Doc. Jurist 75(Revised), G/62 (27 April 1945), in *Documents of the United Nations Conference on International Organization (San Francisco, 1945)*, vol. XIV, at 764–5.

[48]Doc. 240 IV/1/15 (10 May 1945), in *Documents of the United Nations Conference on International Organization (San Francisco, 1945)*, vol. XIII, at 163; Doc. 1171 IV/13 (23 June 1945), in *Documents of the United Nations Conference on International Organization (San Francisco, 1945)*, vol. XIII, at 126–7.

[49]*Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, Judgment of 24 July 1964, [1964] ICJ Rep. 6, at 9.

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appointment of the Court's former President, Judge Jiménez de Aréchaga, in *Continental Shelf (Tunisia/Libya)* and, after three more years, in *Continental Shelf (Libya/Malta)*. In the remaining 18 years until 1999, former titular Judges Ajibola, Bedjaoui, Jennings, Mbaye, Ruda, Sette-Camara, Shahabuddeen, Weeramantry and Zafrulla Khan were appointed as judges *ad hoc*.[50] Over 54 years, states appointed former elected judges as judges *ad hoc* 14 times. Since 2000,[51] however, in just 19 years, states have appointed former elected judges as judges *ad hoc* 22 times.[52]

This increase in appointments of former titular judges cannot be attributed simply to the expansion of the Court's docket since 2000. States filed 96 contentious cases between 1946 and 1999, and 52 such cases between 2000 and 2019. Thus, over one-third of the time, and approximately half the number of cases, former elected judges were chosen as judges *ad hoc* far more frequently than before. Nor could this trend necessarily stem from an increased number of judges recusing themselves from cases in which their state of nationality is a party. Since 2000, recusals by elected judges took place in six contentious cases,[53] and states appointed former titular judges as judges *ad hoc* in three of those cases.[54] In contentious cases before 2000, elected judges recused themselves for reasons of incompatibility on six occasions, but no judge *ad hoc* was appointed specifically to replace them, as none of such elected judges was a national of a litigating state.[55]

As stated above, certain writers have criticized judges *ad hoc* for lacking impartiality, as revealed by their voting record.[56] In his 1954 report to the Institut de Droit International, Max Huber wrote that judges *ad hoc* are 'contraire[s] à la conception de la magistrature telle qu'elle est conçue depuis Montesquieu'.[57] However, arguing that judges *ad hoc* are not impartial because of their votes seems overly simplistic. Hernández has written that consideration of instances in which judges *ad hoc* voted against their appointing states weakens the argument that their votes are automatically in favour of such states.[58] Nevertheless, there is more than the simple fact of how a judge *ad hoc*'s vote is cast. The Court's decisions ordinarily include numerous operative paragraphs, on which separate votes are taken. It is not uncommon for judges *ad hoc* to vote in favour of their appointing state as to some, but not all, operative paragraphs. In the 2007 *Nicaragua* v. *Colombia* judgment, both judges *ad hoc* voted partly to reject and partly to uphold the preliminary objections of the respective appointing states.[59] Similarly, in the 2015 *Certain*

[50]See Appendix.

[51]Appointments in cases in which the application was filed before 2000 are considered made before 2000.

[52]See Appendix.

[53]In addition to the cases to which note 54 below refers, elected judges recused themselves in: *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Judgment of 19 November 2012, [2012] ICJ Rep. 624, at 631, para. 3 (recusal of Judge Gaja); *Certain Iranian Assets (Islamic Republic of Iran v. United States of America)*, Judgment of 13 February 2019, para. 4 (recusal of Judge Donoghue); *Alleged violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Islamic Republic of Iran v. United States of America)*, Order of 3 October 2018, para. 4 (recusal of Judge Donoghue). In these three cases, states appointed as judges *ad hoc* persons who had not previously been titular judges.

[54]*Certain Property (Liechtenstein v. Germany)*, Judgment of 10 February 2005, [2005] ICJ Rep. 6, at 11, para. 7 (recusal of Judge Simma); *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, Judgment of 4 June 2008, [2008] ICJ Rep. 177, at 182, para. 6 (recusal of Judge Abraham); *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation)*, Order of 19 April 2017, [2017] ICJ Rep. 104, at 111, para. 10 (recusal of Judge Gevorgian).

[55]See the table in C. Giorgetti, 'The Challenge and Recusal of Judges of the International Court of Justice', in C. Giorgetti (ed.), *Challenges and Recusals of Judges and Arbitrators in International Courts and Tribunals* (2014), 3, at 18–20.

[56]H. Lauterpacht, *The Function of Law in the International Community* (1933), 230–2; Chatterjee, *supra* note 5, at 377; Kooijmans and Bordin, *supra* note 5, at 607–8; Scobbie, *supra* note 5, at 439–41; Shaw, *supra* note 3, at 1116; H. Thirlway, *The International Court of Justice* (2016), 14. *Contra*, see Charlesworth, *supra* note 5, at 187–8; Schwebel, *supra* note 5, at 893. According to Valticos, judges *ad hoc* accept their appointment only if 'dans l'ensenble, il[s] partage[nt] les vues du gouvernement intéressé'. See Valticos, 'L'évolution de la notion de juge *ad hoc*', *supra* note 5, at 10.

[57]*Annuaire de l'Institut de Droit International – Session d'Aix-en-Provence*, vol. 45–I (1954), at 429.

[58]Hernández, *supra* note 3, at 152.

[59]*Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Judgment of 13 December 2007, [2007] ICJ Rep. 832, at 875–6, para. 142(1) and (2).

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Activities/Construction of a Road judgment, the judge *ad hoc* appointed by Nicaragua voted to find his appointing state internationally responsible for the breaches alleged by Costa Rica,[60] and the judge *ad hoc* appointed by Costa Rica voted to hold that his appointing state had failed to carry out an environmental impact assessment for the construction of Route 1856.[61]

Moreover, for certain kinds of disputes it may be challenging to establish whether judges *ad hoc* vote in favour of, or against, their appointing states. For instance, delimiting maritime boundaries in the continental shelf and exclusive economic zone requires the Court, *inter alia*, to: identify the relevant coast; identify the relevant area; select base points; decide whether relevant circumstances exist, and their effect on a provisional equidistance line; and make a disproportionality assessment.[62] However, only one operative paragraph contains the Court's decision on the course of the boundary.[63] It is difficult precisely to determine the degree to which judges *ad hoc* voting on this one operative paragraph could be considered to have voted in favour of or against their appointing states. The argument that judges *ad hoc* are not entirely impartial merely because of their voting record is unconvincing. Votes should be read in the context of the written and oral submissions made by the contesting states, which are set forth in the judgment, as well as the Court's reasoning in the judgment, in order fully to evaluate whether, or the extent to which, judges *ad hoc* have voted in favour of, or against, their appointing states. Academic writers, however, so far have not endeavoured to do so, thereby painting a distorted picture of the performance of judges *ad hoc* based solely on the fact of their votes.

Conversely, it seems possible that the criticism made with respect to judges *ad hoc* could apply to elected judges. Judge Schwebel wrote that '[w]e are all prisoners of our own experience',[64] which also extends to one's national origin. Whether one sits as an elected judge or as a judge *ad hoc*, the same national subjectivities may affect a judge's decision-making.[65] Nothing guarantees that, once elected as judges, individuals become wholly detached from their national backgrounds. Judges' impartiality rather should be assessed based on their individual opinions, the content of which could suggest more than their mere vote. One cannot fault judges simply for voting in favour of the state of their nationality.[66]

What matters in this context is the states' perception of the Court's impartiality. The impartiality of the Court as an institution is linked to, although not wholly dependent on, the impartiality of individual judges.[67] It might be that, for whatever reason, a certain judge is not entirely devoid of bias in a given case, in which instance the collegial character of the Court counterbalances any potential bias of an individual judge. However, because of their appointment by states, judges *ad hoc* are subject to heightened scrutiny in relation to the impact that their presence has on the impartiality of the Court as an institution. Greater concerns seem to exist that one judge *ad hoc* may negatively affect the Court's impartiality than any of the elected judges doing so.

In this perspective, appointing former titular judges as judges *ad hoc* could be perceived as guaranteeing the Court's impartiality, owing to their personal stature and professional reputation

[60] *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua); Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, Judgment of 16 December 2015, [2015] ICJ Rep. 665, at 740, para. 229(2)–(4).

[61] Ibid., at 741, para. 229(6).

[62] *Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, Judgment of 3 February 2009, [2009] ICJ Rep. 61, at 101–3, paras. 115–22. See M. Lando, *Maritime Delimitation as a Judicial Process* (2019), at 21–3.

[63] *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica v. Nicaragua)*; *Land Boundary in the Northern Part of Isla Portillos (Costa Rica v. Nicaragua)*, Judgment of 2 February 2018, [2018] ICJ Rep. 139, at 226, para. 205(4) and (5); *Nicaragua v. Colombia*, *supra* note 53, at 719–20, para. 251(4); *Romania v. Ukraine*, *supra* note 62, at 131, para. 219; *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, Judgment of 8 October 2007, [2007] ICJ Rep. 659, at 760–3, para. 321(3).

[64] Schwebel, *supra* note 5, at 895.

[65] Charlesworth, *supra* note 5, at 188.

[66] For example, see the voting record in *Whaling in the Antarctic (Australia v. Japan; New Zealand intervening)*, Judgment of 31 March 2014, [2014] ICJ Rep. 226, at 298–300, para. 247(2)–(5) and (7).

[67] See Hernández, *supra* note 3, at 131–2.

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as former members of the Court. Relatedly, having been a titular judge entails knowledge of the Court's complex deliberation process[68] and likely enhances the weight that such a judge *ad hoc* is able to play in that process, which may lead to judges *ad hoc* having greater influence in the drafting of a judgment. In a judicial organ ordinarily composed of 15 to 17 members, the ability of judges *ad hoc* to persuade other judges of their position, including through their standing acquired while members of the Court, is likely to be beneficial to their appointing states. The value of personal and professional relationships established between judges therefore should not be underestimated, and may play a role in the appointing state's decision to appoint a former titular judge as judge *ad hoc*. The same consideration could apply to the appointment of the same individual as judge *ad hoc* in multiple cases.[69] In addition to benefits for appointing states, however, the fact that a judge *ad hoc* has been a titular judge is likely to have an indirect, though perceivable, positive effect on the impartiality of the Court as a whole.

3.2 *Election of former judges* ad hoc *as members of the Court*

Besides the appointment of former elected judges as judges *ad hoc*, former judges *ad hoc* have been elected to the Court. Hernández suggested that the progression from judge *ad hoc* to elected judge has been 'relatively common throughout the history of the [Court]'.[70] However, this view does not reflect the limited number of judges *ad hoc* elected to the Court. Judges Spiropoulos, Morelli, Ago, de Castro, Mosler, Nagendra Singh, Evensen, and Sepúlveda-Amor sat as judges *ad hoc* before being elected to the Court.[71] Four current titular judges have previously served as judges *ad hoc*.[72]

This practice could raise issues relating to the impartiality of elected judges chosen from among individuals who have been judges *ad hoc*. Under Article 2 of the Statute, candidates for election to the Court must be 'independent' and 'of high moral character'. If one takes the view that judges *ad hoc* cannot be considered to be wholly impartial,[73] one could doubt whether electing judges *ad hoc* to the Court fulfils the requirements of the Statute. A more cautious view, however, is advisable.

It could be perceived as problematic if an individual were elected to the Court very shortly after having served as judge *ad hoc*, or even during the pendency of a case in which such individual had been sitting as judge *ad hoc*. This concern, however, does not seem to have arisen in practice. In the 2012 *Nicaragua* v. *Colombia* proceedings, the newly-elected judge, whom Nicaragua previously had appointed judge *ad hoc*, recused himself after Nicaragua appointed another judge *ad hoc* in his stead.[74] Conversely, in *Navigational and Related Rights* when the judge *ad hoc* appointed by Costa Rica was elected to the Court, Costa Rica refrained from appointing a new judge *ad hoc*, which resulted in the newly-elected judge continuing to sit on the case.[75] These cases suggest that it is regarded as inappropriate for a judge elected while serving as judge *ad hoc* to keep sitting on the Court if the appointing state chooses a new judge *ad hoc*. The attitude of the state party to a case, presumably linked to its perception of the Court's impartiality, is decisive. Although, in the cases mentioned above, no state party raised impartiality issues publicly, it is plausible that the perceived impartiality of a newly-elected judge, who formerly was a judge *ad hoc*, was a reason for that judge to recuse himself in *Nicaragua* v. *Colombia*. Similarly, had Costa Rica

[68]See Resolution concerning the Internal Judicial Practice of the Court (12 April 1976), *Acts and Documents concerning the Organization of the Court No. 6*, at 174–83.

[69]However, multiple appointments might give rise to the appearance of bias, as argued in certain investor-state arbitrations. For example, see *Raffeisen Bank International A.G. & Raffeisenbank Austria D.D. v. Republic of Croatia*, ICSID Case ARB/17/34, Decision on the proposal to disqualify Stanimir Alexandrov (17 May 2018), paras. 29–31, 87–9.

[70]Hernández, *supra* note 3, at 147–8 (including footnote 131).

[71]See Appendix.

[72]President Yusuf and Judges Bennouna, Cançado Trindade, and Gaja.

[73]For criticism of this position, see Section 3.1 above.

[74]*Nicaragua v. Colombia*, *supra* note 53, at 631, para. 3. See also CR 2012/8, at 10.

[75]*Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*, Judgment of 13 July 2009, [2009] ICJ Rep. 213, at 219, para. 4.

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appointed a new judge *ad hoc* in *Navigational and Related Rights*, the newly-elected judge would likely have followed the same course.

Other judges *ad hoc* were elected to the Court after the conclusion of the cases in which they had been appointed, which did not raise issues concerning their impartiality.[76] Nevertheless, doubts about one's independence could arise if prospective candidates for election to the Court previously were appointed as judges *ad hoc* by their states of nationality. Theoretically, this might induce judges *ad hoc* to favour their state of nationality, in order to secure that state's support for their candidacy. Although this may be correct in theory, it does not appear to have occurred in practice. In *Ambatielos*, Judge *ad hoc* Spiropoulos agreed with the majority to reject Greece's argument that the Court had jurisdiction to decide on the merits of the Ambatielos claim.[77] Although finding for Mexico, Judge Sepúlveda-Amor joined the majority in *Avena*, thus raising no doubt as to his independence.[78] In *Jurisdictional Immunities of the State*, Judge Gaja voted to reject Italy's counterclaim.[79]

To the contrary, a state may have good reasons to appoint its potential future candidate to the Court to serve as judge *ad hoc*. That state can assess how somebody might perform if elected to the Court, for example, on the basis of that person's voting record as judge *ad hoc*, including any eventual declaration or individual opinion. From the point of view of other states, observing the conduct of a judge *ad hoc* who is a potential candidate for election to the Court may be a way of assessing that person's impartiality, which could be an element in deciding whether to support that particular candidate. Furthermore, and similar to the case of former elected judges chosen as judges *ad hoc*, exercising the functions of judges *ad hoc* allows potential candidates to become familiar with the Court's internal working methods, and establish personal and professional relationships with current titular judges.

In many respects, the election of judges from those who have been judges *ad hoc* does not appear to be much different from the established practice of electing judges from among individuals who have been members of the International Law Commission (ILC) or of other international tribunals. Since 1946, 42 out of 109 elected judges, seven of whom are currently sitting on the Court,[80] have been ILC members before taking up their judicial function. Before their election to the Court, Judges Buergenthal and Cançado Trindade were judges and Presidents of the Inter-American Court of Human Rights, Judges Mosler and Waldock were judges of the European Court of Human Rights, Judge Sebutinde served on the Special Court for Sierra Leone, Judge Bennouna sat on the International Criminal Tribunal for the former Yugoslavia (ICTY), and Judge Robinson was a member both of the ICTY and of the International Criminal Tribunal for Rwanda. Whether one has been a member of the ILC, of another international tribunal, or a judge *ad hoc* of the Court, states can always assess how that person has exercised those functions, based on positions taken, views expressed, votes cast and opinions written. This assessment seems likely to inform a state's decision as to whether or not to put forward one of its nationals as a candidate for election to the Court, or to support a candidate put forward by

[76]Judges Bennouna, Evensen, Nagendra Singh, Sepúlveda-Amor, and Yusuf were elected within three years of the disposal of the cases in which they had been judges *ad hoc*. Judges Ago, de Castro, Morelli, Mosler, and Spiropoulos were elected, respectively, 19, nine, seven, seven and five years from the completion of the cases in which they had been judges *ad hoc*.

[77]*Ambatielos (Greece v. United Kingdom)*, Judgment of 1 July 1952, [1952] ICJ Rep. 28, at 46. See also ibid., at 55–7 (Individual Opinion Spiropoulos). *Ambiatielos* was decided on the preliminary objections six years before the beginning of Judge Spiropoulos's term.

[78]*Avena and Other Mexican Nationals (Mexico v. United States of America)*, Judgment of 31 March 2004, [2004] ICJ Rep. 12, at 70–3, para. 153.

[79]*Jurisdictional Immunities of the State (Germany v. Italy)*, Order of 6 July 2010, [2010] ICJ Rep. 310, at 321, para. 35(A). Judge Gaja later agreed that Italy had violated Germany's immunity from execution, but did so after he had already been elected to the Court. See *Jurisdictional Immunities of the State (Germany v. Italy; Greece intervening)*, Judgment of 3 February 2012, [2012] ICJ Rep. 99, at 155, para. 139(2)–(3).

[80]Current judges who were ILC members are Judges Bennouna, Crawford, Gaja, Gevorgian, Robinson, Tomka, and Xue.

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another state, with impartiality being an important criterion which states are likely to consider in making that decision.

3.3 Judges ad hoc and the crisis of multilateralism

Judges *ad hoc* could be linked to states' evolving perception of the Court and its role in recent years, in which multilateral institutions and processes have been going through a time of crisis. Some examples of this crisis are the withdrawal of certain states from the Rome Statute (the International Criminal Court), the recent exit of the United Kingdom from the European Union, and the backlash against the World Trade Organization and investor-state dispute settlement.[81] Certain states recently have been implementing inward-looking policies, considering multilateralism as an obstacle to, rather than a potential instrument for, prosperity. In his 2018 address to the UN Security Council, ICJ President Yusuf stated that the Court owes its existence to multilateralism.[82] Despite the crisis of the multilateral model, the Court's docket is the heaviest it has ever been. This could be symptomatic of the maturity of the international legal order, or conversely indicate states' reduced readiness to settle their disputes through bilateral or multilateral non-adjudicative processes.[83] Either way, the issue is whether the current crisis of multilateralism has affected or may affect, the states' perception of the Court, to which the appointment of judges *ad hoc* could be said to contribute.

The rationale for judges *ad hoc* has long been that national susceptibilities may alter a state's perception of the Court's impartiality, and therefore must be acknowledged and addressed in the settlement of disputes by the Court.[84] This rationale is even more compelling at a time when several states openly reject particular aims and methods of the multilateral international legal order. At the time when the PCIJ's Statute was drafted, however, ensuring that states perceived the Court as impartial was necessary because no global international organization had ever existed, and states had to be persuaded to join this new organization. To the contrary, ensuring that states perceive the Court as impartial today aims to prevent states from mistrusting, and perhaps even leaving, this established multilateral dispute settlement system that exists under the auspices of the UN. Judges *ad hoc* could be a means of maintaining states' confidence in the Court in a time of crisis, and especially to avoid cases of non-appearance and non-compliance with the Court's decisions.

It has been suggested that there is a connection between appointing a judge *ad hoc* and compliance.[85] No state seems to have suggested openly that it would be more willing to comply with the Court's decisions owing to the presence of a judge *ad hoc* appointed by it. Nonetheless, willingness to comply has been linked to the independence and impartiality of the Court.[86] From a political standpoint, the presence of judges *ad hoc* has the potential to be a catalyst for compliance, especially insofar as a judge *ad hoc*'s individual opinions reveal that the positions before the Court have been duly considered. The lack of appointment of judges *ad hoc* could signal, from the outset of a case, the states' unwillingness to comply with any decision the Court may render. By not appointing a judge *ad hoc* while having the right to do so, states can show their intention not

[81]For reference, see C. McLachlan, 'The Assault on International Adjudication and the Limits of Withdrawal', (2019) 68 ICLQ 44; H. G. Cohen, 'Multilateralism's Life Cycle', (2018) 112 AJIL 47; J. Crawford, 'The Current Political Discourse concerning International Law', (2018) 81 *Modern Law Review* 1. Alvarez had already warned of multilateralism's limits. See J. E. Alvarez, 'Multilateralism and its Discontents', (2000) 11 EJIL 393. Recently, Criddle and Fox-Decent argued that, despite the challenges it faces, multilateralism is a necessary feature in certain fields of international law. See E. J. Criddle and E. Fox-Decent, 'Mandatory Multilateralism', (2019) 113 AJIL 272.

[82]*Multilateralism and the International Court of Justice*, Speech of the President of the International Court of Justice before the Security Council, 9 November 2018, para. 5, available at www.icj-cij.org/files/press-releases/0/000-20181109-PRE-01-00-EN.pdf.

[83]Certain treaties provide that states parties should or must settle their disputes using other means before filing an application with the Court. For example, see Art. 22 of the 1965 International Convention on the Elimination of All Forms of Racial Discrimination, 660 UNTS 295.

[84]Section 2 above.

[85]Scobbie, *supra* note 5, at 422, 456; Hernández, *supra* note 3, at 151.

[86]UN Doc. A/73/PV.24 (25 October 2018), at 12–13 (Cabo Verde).

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to engage with the judicial process before the Court. In both *Fisheries Jurisdiction* cases, Iceland did not appoint a judge *ad hoc*, and finally refused to comply with the Court's 1974 judgments.[87] Although judges *ad hoc* should not be the reason for complying with the Court's decisions, that judges *ad hoc* frequently sit on the Court suggests that certain states might regard their presence to have a positive effect on the Court's impartiality and, as a result, on compliance.

The Court's perceived impartiality is also linked to the nationality of judges *ad hoc*. In principle, appointing a non-national as a judge *ad hoc* is likely to be perceived as a guarantee of impartiality. In times when multilateralism faces a crisis, however, one may expect states to appoint their own nationals as judges *ad hoc*. Under the PCIJ's Statute, judges *ad hoc* were required to be nationals of the appointing state, and it was only following the 1929 amendments to the Statute, and the abolition of deputy-judges, that the nationality condition was removed from Article 31.[88] Although since 1946 it has not been uncommon for non-nationals to be appointed judges *ad hoc*, recently the number of such appointments has increased considerably. This trend is continuing despite the crisis of multilateralism, suggesting that, in selecting judges *ad hoc*, states may take into account the effect that certain appointments could have on the perception of the Court in the international community.

Across 96 cases until 1999, states appointed non-nationals 58 times (47.15%) and nationals 65 times (52.85%), while in the 53 cases since 2000 states chose non-nationals 74 times (74%) and nationals 26 times (26%) (see Figure 1 below).[89] There also appears to be a correlation between the increase in non-nationals appointed as judges *ad hoc* and the increase in former judges appointed as judges *ad hoc*.[90]

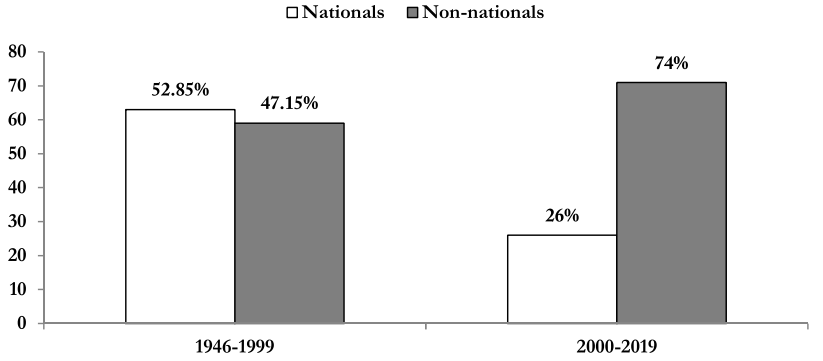

Figure 1. Number of nationals and non-nationals appointed judges *ad hoc* across all ICJ cases.

Appointing non-nationals as judges *ad hoc* can also result in the Court having more than one person of the same nationality, which could affect its perceived impartiality. Since judges *ad hoc* technically are not 'members' of the Court,[91] Article 3(1) of the Statute does not apply to them.

[87]*Fisheries Jurisdiction (United Kingdom v. Iceland)*, Judgment of 25 July 1974, [1974] ICJ Rep. 3; *Fisheries Jurisdiction (Federal Republic of Germany v. Iceland)*, Judgment of 25 July 1974, [1974] ICJ Rep. 175. Similar cases also took place in arbitral proceedings, see *South China Sea Arbitration (Philippines v. China)*, Award of 12 July 2016, 170 ILR 180. Generally, not appointing judges *ad hoc* is coupled with, and perhaps a result of, non-appearance. However, there have been cases in which states appointed a judge *ad hoc*, and later decided not to appear. See A. Sarmiento Lamus and W. Arévalo Ramírez, 'Non-appearance before the International Court of Justice and the Role and Function of Judges *ad hoc*', (2017) 16 *Law and Practice of International Courts and Tribunals* 398, at 406–11.

[88]Kooijmans and Bordin, *supra* note 5, at 606; Thirlway, *supra* note 56, at 14; Valticos, 'Pratique et éthique d'un juge "*ad hoc*" à la Cour internationale de Justice', *supra* note 5, at 108–9.

[89]See Appendix.

[90]Section 2 above.

[91]Rosenne, *supra* note 5, at 233. Art. 3(1) of the Statute provides that '[t]he Court shall consist of fifteen members', who are the 15 judges elected through the procedure under Arts. 4–12 of the Statute.

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Yet, the issue is one of optics.[92] For instance, three French judges sit in a case pending between Qatar and the United Arab Emirates,[93] while two Russian judges and two United States judges sit in the case pending between Nicaragua and Colombia on the delimitation of the maritime boundary beyond 200 nautical miles from the Nicaraguan coast.[94] Parties should be deemed nonetheless to have accepted this situation if they do not object to the choice of judge *ad hoc*, as permitted by Article 35(3) of the Rules of Court. In any event, this can occur only when neither party is the state of which multiple judges are nationals, and no state seems to have objected to the appointment of a judge *ad hoc* on this ground.[95]

Choosing non-nationals as judges *ad hoc* with increasing frequency seems inconsistent with multilateralism being in a crisis, and the same could be said for implicitly accepting that multiple judges having the same nationality may sit in a case. However, reality seems more complex. Cohen argues that '[c]urrent global institutions were founded against a backdrop of unipolarity, bipolarity, or even tripolarity'.[96] Limited polarity could make pursuing multilateralism easier,[97] as multipolarity would make agreement among states harder to reach, yet, if reached, that agreement would be more pluralistic than in a non-multipolar world.

One could see the choice of non-nationals as judges *ad hoc* as expressing limited polarity. Since 2000, 48 non-nationals appointed as judges *ad hoc* have come from states of the Western European and Others Group (WEOG) (64.87%), while 26 have been nationals of other states (35.13%). Until 1999, 26 non-nationals appointed as judges *ad hoc* had come from WEOG states (44.83%), while 32 were nationals of other states (55.17%) (see Figure 2 below).[98]

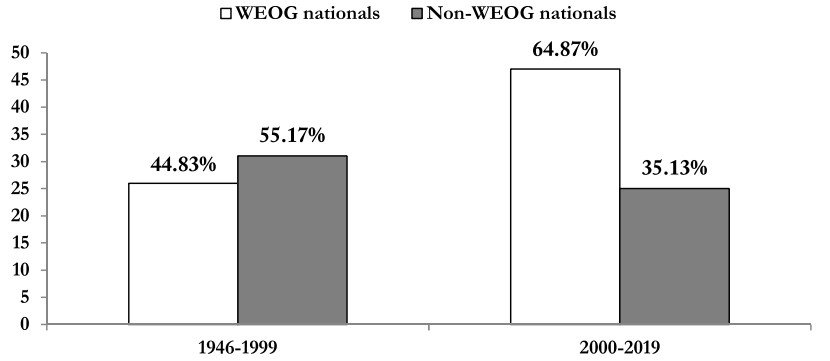

Figure 2. Number of non-nationals appointed judges *ad hoc* divided between WEOG nationals and non-WEOG nationals.

[92]According to Shaw, 'it would appear undesirable as a matter of principle for a judge *ad hoc* to possess a nationality already represented on the bench'. See Shaw, *supra* note 3, at 1125.

[93]*Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates)*, Order of 23 July 2018, [2018] ICJ Rep. 406 (Judge Abraham and Judges *ad hoc* Cot and Daudet.).

[94]*Question of the Delimitation of the Continental Shelf beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua v. Colombia)*, Judgment of 17 March 2016, [2016] ICJ Rep. 100 (Judges Donoghue and Gevorgian and Judges *ad hoc* Brower and Skotnikov).

[95]A broadly comparable issue could arise if states which were permitted to intervene under the Statute already had judges of their nationality on the bench. In *Whaling*, New Zealand intervened under Art. 63 of the Statute after Australia had appointed its judge *ad hoc*, but a New Zealand national was a sitting judge. The Court found that, since New Zealand did not intervene as a party, it could not be a party 'in the same interest' as Australia. See *Whaling in the Antarctic (Australia v. Japan)*, Order of 6 February 2013, [2013] ICJ Rep. 3, at 9, para. 21. Judge Owada expressed 'serious reservations' on the Court's approach. See ibid., at 11–13 (Declaration Owada).

[96]Cohen, *supra* note 81, at 49.

[97]Ibid., at 51. Cohen defined multilateralism as 'choice to include, involve, and gain the agreement of as many states as possible to solve global problems or produce global benefits'. See ibid., at 50.

[98]See Appendix.

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These numbers could be attributed to the multiple appointments, since 2000, of former elected judges who are nationals of WEOG states. Nonetheless, it remains that, in the twenty-first century, diversity in appointments has been more limited than before.[99] Furthermore, non-nationals are more often appointed by non-WEOG states. In the ICJ's history, non-WEOG states appointed 122 non-nationals as judges *ad hoc* (70.93%), while appointing their own nationals 50 times (29.07%), whereas WEOG states have appointed 10 non-nationals (19.61%) and 41 nationals as judges *ad hoc* (80.39%) (see Figure 3 below).[100]

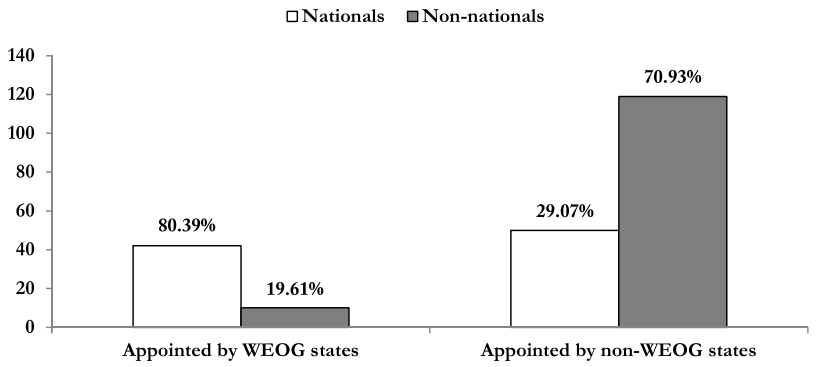

Figure 3. Number of nationals and non-nationals appointed judges *ad hoc* by WEOG and non-WEOG states since 1946.

As Cohen suggested, a group of states, such as the WEOG, may look like a single pole to other states.[101] This indicates that choosing non-nationals as judges *ad hoc* has not promoted multipolarity, and thus, following Cohen's analysis, might contribute to making multilateralism easier to achieve. Yet, if appointing non-nationals as judges *ad hoc* would promote multipolarity, it could in the future determine a more pluralistic approach to ICJ dispute settlement. The pattern of appointment of non-nationals as judges *ad hoc* also shows that states reportedly pursuing non-multilateral-oriented policies, such as the United States, choose their own nationals as judges *ad hoc*, which seems consistent with their policy orientation. The limited polarity emerging from appointments of non-nationals as judges *ad hoc* further suggests the existence of yet another juxtaposition of 'global north' and 'global south', with nationals of 'global north' states being appointed far more frequently than nationals of 'global south' states.

Appointing a state's own nationals as judges *ad hoc* could increase multipolarity, at least in international dispute settlement. If one were to agree that pluralistic multilateralism in settling international disputes is something to strive for, it might seem desirable to reinstate a nationality requirement for judges *ad hoc*. Nevertheless, overcoming national particularism is a sign of maturity of the international legal order, which could strengthen pluralist multilateralism in international dispute settlement. Whoever states appoint as judges *ad hoc*, there will continue to be forces pulling towards enhanced multilateralism and forces pulling in the opposite direction.

4. Conclusion: The role of judges *ad hoc* at the ICJ

Sir Elihu Lauterpacht wrote that judges *ad hoc* have a special obligation to ensure that the Court fully appreciates 'every relevant argument' made by their appointing states, and that such

[99]Even before 2000, diversity of appointments was not high. See ibid.
[100]Ibid.
[101]Cohen, *supra* note 81, at 55.

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arguments are reflected in an eventual individual opinion.[102] An issue could arise in cases in which only one state appoints a judge *ad hoc*: if the opposing party were entitled to make an appointment but did not do so, it could be considered to be at a disadvantage. This conception of the judge *ad hoc*'s role suggests that elected judges might not fully appreciate every relevant argument made before the Court, which would justify the presence of judges *ad hoc*. If one accepted this premise, the arguments of a state, the national of which is an elected judge, could possibly be appreciated less fully than those of an opposing state appointing a judge *ad hoc*. The Court's complex and collegial deliberation process should ensure that, in successive rounds over several months, elected judges assess all arguments made during the written and oral proceedings, irrespective of the presence of judges *ad hoc*. This seems to be confirmed by the decision of certain states not to appoint judges *ad hoc* despite being entitled to do so, as in *Cambodia* v. *Thailand*,[103] *Nauru* v. *Australia*,[104] and *Botswana/Namibia*.[105]

In cases heard by Chambers of the Court,[106] arguably somewhat comparable to arbitration,[107] the more limited number of decision-makers suggests that judges *ad hoc* might be more likely actively to ensure that their appointing states' arguments are fully considered. However, as both the Court and its Chambers must issue judgments which 'state the reasons on which [they are] based',[108] they have an interest in such reasons being cogent and persuasive, which also require fully addressing 'every relevant argument' made by the parties. Furthermore, in five of the six cases heard by Chambers to-date, one current titular judge having the nationality of one of the litigating states sat in the Chamber,[109] which meant that, in each of such cases, a judge *ad hoc* sat in that Chamber. However, no judge *ad hoc* was appointed in *Elettronica Sicula (ELSI)*, as elected judges having the nationalities of both parties were members of the Chamber.[110]

The increasingly common appointment of former titular judges as judges *ad hoc* suggests that states wish to select individuals who know the Court's procedures, and have established personal and professional relationships within the Court. In the Court's deliberation process, judges express and exchange views both orally and in writing, which makes it important for judges *ad hoc*, as well as elected judges, to be persuasive. In addition, judges *ad hoc* are chosen based on the influence which the appointing state expects them to have in the deliberations. Presumably, being authorities in their respective fields contributes to increasing this influence. In fact, with respect to appointments, practice also suggests that judges *ad hoc* have recently been chosen on a *ratione*

[102] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro))*, Order of 13 September 1993, [1993] ICJ Rep. 325, at 409, para. 6 (Separate Opinion Lauterpacht). Sir Elihu Lauterpacth's father, Sir Hersch Lauterpacht, held the exact opposite view, as according to him a 'level of unreality attaches to the argument, somewhat uncritically repeated with melancholy frequency, that the presence of national judges is essential in order that the bench may be properly informed of the legal and other views of the party to the dispute'. See Lauterpacht, *supra* note 56, at 236.

[103] *Temple of Preah Vihear (Cambodia v. Thailand)*, Judgment of 26 May 1961, [1961] ICJ Rep. 17; *Temple of Preah Vihear (Cambodia v. Thailand)*, Judgment of 15 June 1962, [1962] ICJ Rep. 6.

[104] CR 1991/15, at 8.

[105] CR 1999/1, at 10.

[106] Arts. 26–8 of the Statute.

[107] *Frontier Dispute (Benin/Niger)*, Order of 27 November 2002, [2002] ICJ Rep. 613, at 616 (Declaration Oda). See also S. Oda, 'Further Thoughts on the Chambers Procedure of the International Court of Justice', (1988) 82 AJIL 556, at 559; S. M. Schwebel, '*Ad Hoc* Chambers of the International Court of Justice', (1987) 81 AJIL 831, at 853–4; Merrills, *supra* note 3, at 146–51; Shaw, *supra* note 3, at 1104–10.

[108] Art. 56(1) of the Statute.

[109] *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America)*, Order of 20 January 1982, [1982] ICJ Rep. 3; *Frontier Dispute (Burkina Faso/Mali)*, Order of 3 April 1985, [1985] ICJ Rep. 6; *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras)*, Order of 8 May 1987, [1987] ICJ Rep. 10; *Frontier Dispute (Benin/Niger)*, Order of 27 November 2002, [2002] ICJ Rep. 613; *Application for Revision of the Judgment of 11 September 1992 in the Case concerning the* Land, Island and Maritime Frontier Dispute (El Salvador/Honduras; Nicaragua intervening) *(El Salvador v. Honduras)*, Order of 27 November 2002, [2002] ICJ Rep. 618.

[110] *Elettronica Sicula S.p.A. (ELSI) (United States of America v. Italy)*, Order of 2 March 1987, [1987] ICJ Rep. 3.

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materiae basis, irrespective of nationality. For example, states chose law of the sea specialists in *Peru* v. *Chile* and *Alleged Violations of Sovereign Rights and Maritime Spaces*,[111] and international humanitarian law experts in *Arrest Warrant* and *Ukraine* v. *Russian Federation*.[112] Similarly, a private international law authority was appointed in *Belgium* v. *Switzerland*.[113] States have appointed ITLOS judges in maritime delimitation disputes, such as *Nicaragua* v. *Colombia* and *Romania* v. *Ukraine*,[114] and re-appointed judges *ad hoc* who had sat on earlier maritime delimitation cases, as in *Qatar* v. *Bahrain* and *Nicaragua* v. *Honduras*.[115]

The personal stature and professional reputation of judges *ad hoc*, especially when chosen from among former elected judges, likely contribute to enhance the perception of the Court's impartiality. The same could be said for the choice of judges *ad hoc* from the ranks of experts in particular fields of international law, regardless of their nationality. Moreover, the clear pattern showing the increasingly common appointment of non-nationals as judges *ad hoc* heightens the appearance of impartiality of the Court as a whole. There might also be a correlation between legal counsel for a state and the judges *ad hoc* appointed by that state, which nonetheless appears to be speculative considering the lack of public records in this regard.

The recent practice in the appointment of judges *ad hoc*, especially appointment of former elected judges and the increasingly common appointments of non-nationals, suggests that the institution of judges *ad hoc* should not be viewed as damaging the states' perception of the Court's impartiality. While one could argue that, in the first few decades of the Court's existence, the states' choices of judges *ad hoc* would not have necessarily led to states perceiving the Court as being more impartial, recent developments should lead to a different conclusion. The institution of judges *ad hoc* has come full circle, back to the point at which it started in the early 1920s, when it was created as a means to limit the appearance that the PCIJ was less impartial owing to only one of the parties counting one member of the Court having its nationality. In this perspective, the institution of judges *ad hoc* seems finally to be achieving the aim for which it was created, as opposed to fulfilling the prophecies of those who, throughout the Court's history, have been advocating its demise.

[111]See Appendix.
[112]Ibid.
[113]Ibid.
[114]Ibid.
[115]Ibid.

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Appendix

ICJ cases in which judges *ad hoc* were appointed (in chronological order by date of commencement)

Case	Judge *ad hoc*	Appointing State	State of nationality	Notes
Corfu Channel (United Kingdom v. Albania) (Application: 22 May 1947)	Igor Daxner	Albania	Czech Republic	Resigned
	Bohuslav Ečer	Albania	Czech Republic	
Asylum (Colombia/Peru) (Notification: 15 October 1949)	Luis Alayza y Paz Soldán	Peru	Peru	
	José Joaquín Caicedo Castilla	Colombia	Colombia	
Request for Interpretation of the Judgment of 20 November 1950 in the Asylum Case (Colombia/Peru) *(Colombia v. Peru)* (Application: 20 November 1950)	Luis Alayza y Paz Soldán	Peru	Peru	
	José Joaquín Caicedo Castilla	Colombia	Colombia	
Haya de la Torre (Colombia v. Peru) (Application: 13 December 1950)	Luis Alayza y Paz Soldán	Peru	Peru	
	José Joaquín Caicedo Castilla	Colombia	Colombia	
Ambatielos (Greece v. United Kingdom) (Application: 9 April 1951)	Jean Spiropoulos	Greece	Greece	Later ICJ judge
Anglo-Iranian Oil Co. (United Kingdom v. Iran) (Application: 26 May 1951)	Karim Sandjabi	Iran	Iran	
Nottebohm (Liechtenstein v. Guatemala) (Application: 17 December 1951)	Paul Guggenheim	Liechtenstein	Switzerland	
	Carlos García Bauer	Guatemala	Guatemala	
Monetary Gold removed from Rome in 1943 (Italy v. France, United Kingdom and United States of America) (Application: 19 May 1953)	Gaetano Morelli	Italy	Italy	Later ICJ judge
Right of Passage over Indian Territory (Portugal v. India) (Application: 22 December 1955)	Mahomed Ali Currim Chagla	India	India	
	Manuel Fernandes	Portugal	Portugal	
Application of the Convention of 1902 governing the Guardianship of Infants (Netherlands v. Sweden) (Application: 10 July 1957)	Julius Christian Sterzel	Sweden	Sweden	
	Johannes Offerhaus	Netherlands	Netherlands	
Interhandel (Switzerland v. United States of America) (Application: 2 October 1957)	Paul Carry	Switzerland	Switzerland	
Aerial Incident of 27 July 1955 (Israel v. Bulgaria) (Application: 16 October 1957)	Justice Goiten	Israel	Israel	
	Jaroslav Zourek	Bulgaria	Czech Republic	
Arbitral Award made by the King of Spain on 23 December 1906 (Honduras v. Nicaragua) (Application: 1 July 1958)	Roberto Ago	Honduras	Italy	Later ICJ judge
	Francisco Urrutia Holguín	Nicaragua	Colombia	

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Case	Judge *ad hoc*	Appointing State	State of nationality	Notes
Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain) (Application: 23 September 1958)	Federico de Castro	Spain	Spain	Later ICJ judge
	W.J. Ganshof van der Meersch	Belgium	Belgium	
South West Africa (Ethiopia v. South Africa; Liberia v. South Africa) (Application: 6 November 1960)	Joseph Chesson	Ethiopia, Liberia	Liberia	Replaced
	Sir Adetokunbo A. Ademola	Ethiopia, Liberia	Nigeria	Replaced
	Sir Muhammad Zafrulla Khan	Ethiopia, Liberia	Pakistan	• Former ICJ judge • Replaced
	Mohamed Yaqub Ali Khan	Ethiopia, Liberia	Pakistan	Replaced
	Sir Louis Mbanefo	Ethiopia, Liberia	Nigeria	
	J.T. van Wyk	South Africa	South Africa	
Northern Cameroons (Cameroon v. United Kingdom) (Application: 30 May 1961)	Philémon Beb a Don	Cameroon	Cameroon	
Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain) (New Application: 1962) (Application: 19 June 1962)	W.J. Ganshof van der Meersch	Belgium	Belgium	Resigned
	Willem Riphagen	Belgium	Netherlands	
	Enrique C. Armand-Ugon	Spain	Uruguay	Former ICJ judge
North Sea Continental Shelf (Denmark/ Federal Republic of Germany) (Notification: 20 February 1967)	Max Sørensen	Denmark, Netherlands	Denmark	
	Hermann Mosler	FRG	FRG	Later ICJ judge
North Sea Continental Shelf (Netherlands/ Federal Republic of Germany)[116] (Notification: 20 February 1967)	Max Sørensen	Denmark, Netherlands	Denmark	
	Hermann Mosler	FRG	FRG	Later ICJ judge
Appeal relating to the Jurisdiction of the ICAO Council (India v. Pakistan) (Application: 30 August 1971)	Nagendra Singh	India	India	Later ICJ judge
Nuclear Tests (Australia v. France) (Application: 9 May 1973)	Sir Garfield Barwick	Australia	Australia	
Nuclear Tests (New Zealand v. France) (Application: 9 May 1973)	Sir Garfield Barwick	New Zealand	Australia	
Trial of Pakistani Prisoners of War (Pakistan v. India) (Application: 11 May 1973)	Sir Muhammad Zafrulla Khan	Pakistan	Pakistan	• Former ICJ judge • Resigned
	Mohamed Yaqub Ali Khan	Pakistan	Pakistan	
Western Sahara (Request of: 21 December 1974)	Alphonse Boni	Morocco	Côte d'Ivoire	Advisory opinion
Aegean Sea Continental Shelf (Greece v. Turkey) (Application: 10 August 1976)	Michel Stassinopoulos	Greece	Greece	

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Case	Judge *ad hoc*	Appointing State	State of nationality	Notes
Continental Shelf (Tunisia/Libya) (Notification: 1 December 1978)	Jens Evensen	Tunisia	Norway	Later ICJ judge
	Eduardo Jiménez de Aréchaga	Libya	Uruguay	Former ICJ judge
Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America) (Notification: 25 November 1981)	Maxwell Cohen	Canada	Canada	
Continental Shelf (Libya/Malta) (Notification: 26 July 1982)	Jorge Castañeda	Malta	Mexico	Resigned
	Nicolas Valticos	Malta	Greece	
	Eduardo Jiménez de Aréchaga	Libya	Uruguay	Former ICJ judge
Frontier Dispute (Burkina Faso/Mali) (Notification: 16 September 1983)	François Luchaire	Burkina Faso	France	
	Georges Abi-Saab	Mali	Egypt	
Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) (Application: 9 April 1984)	Claude-Albert Colliard	Nicaragua	France	
Application for Revision and Interpretation of the Judgment of 24 February 1982 in the Case concerning the Continental Shelf (Tunisia/Libya) *(Tunisia v. Libya)* (Application: 27 July 1984)	Suzanne Bastid	Tunisia	France	
	Eduardo Jiménez de Aréchaga	Libya	Uruguay	Former ICJ judge
Land, Island and Frontier Dispute (El Salvador/Honduras; Nicaragua intervening) (Notification: 11 December 1986)	Nicolas Valticos	El Salvador	Greece	
	Michel Virally	Honduras	France	Died in office
	Santiago Torres Bernárdez	Honduras	Spain	
Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway) (Application: 16 August 1988)	Paul Fischer	Denmark	Denmark	
Aerial Incident of 3 July 1988 (Iran v. United States of America) (Application: 17 May 1989)	Mohsen Aghahosseini	Iran	Iran	
Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal) (Application: 23 August 1989)	Hubert Thierry	Guinea-Bissau	France	
	Keba Mbaye	Senegal	Senegal	Former ICJ judge
Territorial Dispute (Libya/Chad) (Notification: 31 August 1990)	José Sette-Camara	Libya	Brazil	Former ICJ judge
	Georges Abi-Saab	Chad	Egypt	

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Case	Judge *ad hoc*	Appointing State	State of nationality	Notes
East Timor (Portugal v. Australia) (Application: 22 February 1991)	Sir Ninian Stephen	Australia	Australia	
	António de Arruda Ferrer-Correia	Portugal	Portugal	Resigned
	Krzyzstof Skubiszewski	Portugal	Poland	
Passage through the Great Belt (Finland v. Denmark) (Application: 17 May 1991)	Paul Fischer	Denmark	Denmark	
	Bengt Broms	Finland	Finland	
Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain) (Application: 8 July 1991)	Nicolas Valticos	Bahrain	Greece	Resigned
	Mohamed Shahabuddeen	Bahrain	Guyana	• Former ICJ judge • Resigned
	Yves Fortier	Bahrain	Canada	
	José María Ruda	Qatar	Argentina	• Former ICJ judge • Died in office
	Santiago Torres Bernárdez	Qatar	Spain	
Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libya v. United States of America) (Application: 3 March 1992)	Ahmed El-Kosheri	Libya	Egypt	
Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libya v. United Kingdom) (Application: 3 March 1992)	Ahmed El-Kosheri	Libya	Egypt	
	Sir Robert Jennings	United Kingdom	United Kingdom	Former ICJ judge
Oil Platforms (Iran v. United States of America) (Application: 2 November 1992)	François Rigaux	Iran	Belgium	
Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro)) (Application: 20 March 1993)	Milenko Kreća	Yugoslavia	Yugoslavia	
	Sir Elihu Lauterpacht	Bosnia and Herzegovina	United Kingdom	Resigned
	Ahmed Mahiou	Bosnia and Herzegovina	Algeria	
Gabcikovo-Nagymaros Project (Hungary/ Slovakia) (Notification: 2 July 1993)	Krzyzstof Skubiszewski	Slovakia	Poland	
Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria) (Application: 29 March 1994)	Keba Mbaye	Cameroon	Senegal	Former ICJ judge
	Bola Ajibola	Nigeria	Nigeria	Former ICJ judge
Fisheries Jurisdiction (Spain v. Canada) (Application: 28 March 1995)	Marc Lalonde	Canada	Canada	
	Santiago Torres Bernárdez	Spain	Spain	

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Case	Judge *ad hoc*	Appointing State	State of nationality	Notes
Request for an Examination of the Situation in accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the Nuclear Tests (New Zealand v. France) *Case* (Application: 21 August 1995)	Sir Geoffrey Palmer	New Zealand	New Zealand	
Request for Interpretation of the Judgment of 11 June 1998 in the Case concerning the Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria) *(Nigeria v. Cameroon)* (Application: 28 October 1998)	Keba Mbaye	Cameroon	Senegal	Former ICJ judge
	Bola Ajibola	Nigeria	Nigeria	Former ICJ judge
Sovereignty over Palau Ligitan and Palau Sipadan (Indonesia/Malaysia) (Notification: 2 November 1998)	Christopher Weeramantry	Malaysia	Sri Lanka	Former ICJ judge
	Mohamed Shahabuddeen	Indonesia	Guyana	• Former ICJ judge • Resigned
	Thomas Franck	Indonesia	USA	
Ahmadou Sadio Diallo (Guinea v. DRC) (Application: 28 December 1998)	Mohammed Bedjaoui	Guinea	Algeria	• Former ICJ judge • Resigned
	Ahmed Mahiou	Guinea	Algeria	
	Auguste Mampuya	DRC	DRC	
Legality of Use of Force (Yugoslavia v. United States of America) (Application: 29 April 1999)	Milenko Kreća	Yugoslavia	Yugoslavia	
Legality of Use of Force (Yugoslavia v. Spain) (Application: 29 April 1999)	Milenko Kreća	Yugoslavia	Yugoslavia	
	Santiago Torres Bernárdez	Spain	Spain	Disallowed
Legality of Use of Force (Yugoslavia v. Belgium) (Application: 29 April 1999)	Milenko Kreća	Yugoslavia	Yugoslavia	
	Patrick Duinslaeger	Belgium	Belgium	Disallowed
Legality of Use of Force (Yugoslavia v. Canada) (Application: 29 April 1999)	Milenko Kreća	Yugoslavia	Yugoslavia	
	Marc Lalonde	Canada	Canada	Disallowed
Legality of Use of Force (Yugoslavia v. France) (Application: 29 April 1999)	Milenko Kreća	Yugoslavia	Yugoslavia	
Legality of Use of Force (Yugoslavia v. Germany) (Application: 29 April 1999)	Milenko Kreća	Yugoslavia	Yugoslavia	
Legality of Use of Force (Yugoslavia v. Italy) (Application: 29 April 1999)	Milenko Kreća	Yugoslavia	Yugoslavia	
	Giorgio Gaja	Italy	Italy	• Later ICJ judge • Disallowed
Legality of Use of Force (Yugoslavia v. Netherlands) (Application: 29 April 1999)	Milenko Kreća	Yugoslavia	Yugoslavia	
Legality of Use of Force (Yugoslavia v. Portugal)[117] (Application: 29 April 1999)	Milenko Kreća	Yugoslavia	Yugoslavia	
Legality of Use of Force (Yugoslavia v. United Kingdom) (Application: 29 April 1999)	Milenko Kreća	Yugoslavia	Yugoslavia	

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Case	Judge *ad hoc*	Appointing State	State of nationality	Notes
Armed Activities on the Territory of the Congo (DRC v. Uganda) (Application: 23 June 1999)	Joe Verhoven	DRC	Belgium	
	James Kateka	Uganda	Tanzania	Later ITLOS judge
Armed Activities on the Territory of the Congo (DRC v. Burundi) (Application: 23 June 1999)	Joe Verhoven	DRC	Belgium	
	Jean Salmon	Burundi	Belgium	
Armed Activities on the Territory of the Congo (DRC v. Rwanda) (Application: 23 June 1999)	Joe Verhoven	DRC	Belgium	
	John Dugard	Rwanda	South Africa	
Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia) (Application: 2 July 1999)	Budislav Vukas	Croatia	Croatia	Former ITLOS judge
	Milenko Kreća	Serbia	Serbia	
Aerial Incident of 10 August 1999 (Pakistan v. India) (Application: 21 September 1999)	Syed Sharif Uddin Pirzada	Pakistan	Pakistan	
	B.P. Jeevan Reddy	India	India	
Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras) (Application: 8 December 1999)	Giorgio Gaja	Nicaragua	Italy	Later ICJ judge
	Julio Gonzáles Campos	Honduras	Spain	Resigned
	Santiago Torres Bernárdez	Honduras	Spain	
Arrest Warrant of 11 April 2000 (DRC v. Belgium) (Application: 17 October 2000)	Sayeman Bula-Bula	DRC	DRC	
	Christine Van den Wyngaert	Belgium	Belgium	
Application for Revision of the Judgment of 11 July 1996 in the case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia), Preliminary objections *(Yugoslavia v. Bosnia and Herzegovina)* (Application: 24 April 2001)	Vojin Dimitrijevic	Yugoslavia	Yugoslavia	
	Sead Hodžić	Bosnia and Herzegovina	Bosnia and Herzegovina	Resigned
	Ahmed Mahiou	Bosnia and Herzegovina	Algeria	
Certain Property (Liechtenstein v. Germany) (Application: 1 June 2001)	Carl-August Fleischhauer	Germany	Germany	Former ICJ judge
	Ian Brownlie	Liechtenstein	United Kingdom	Resigned
	Sir Franklin Berman	Liechtenstein	United Kingdom	

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Case	Judge *ad hoc*	Appointing State	State of nationality	Notes
Territorial and Maritime Dispute (Nicaragua v. Colombia) (Application: 6 December 2001)	Yves Fortier	Colombia	Canada	Resigned
	Jean-Pierre Cot	Colombia	France	Sitting ITLOS judge
	Mohammed Bedjaoui	Nicaragua	Algeria	• Former ICJ judge • Resigned
	Giorgio Gaja	Nicaragua	Italy	Elected judge during case
	Thomas Mensah	Nicaragua	Ghana	Former ITLOS judge
Frontier Dispute (Benin/Niger) (Notification: 3 May 2002)	Mohamed Bedjaoui	Niger	Algeria	Former ICJ judge
	Mohamed Bennouna	Benin	Morocco	Later ICJ judge
Armed Activities on the Territory of the Congo (New Application: 2002) (DRC v. Rwanda) (Application: 28 May 2002)	Auguste Mampuya	DRC	DRC	Resigned
	Jean-Pierre Mavungu	DRC	DRC	
	John Dugard	Rwanda	South Africa	
Application for Revision of the Judgment of 11 September 1992 in the Case concerning the Land, Island and Maritime Frontier Dispute (El Salvador/Honduras; Nicaragua intervening) *(El Salvador v. Honduras)* (Application: 10 September 2002)	Santiago Torres Bernárdez	Honduras	Spain	
	Felipe Paolillo	El Salvador	Uruguay	
Avena and Other Mexican Nationals (Mexico v. United States of America) (Application: 9 January 2003)	Bernardo Sepúlveda	Mexico	Mexico	Later ICJ judge
Certain Criminal Proceedings in France (DRC v. France) (Application: 11 April 2003)	Jean-Yves de Cara	DRC	France	
Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore) (Notification: 24 July 2003)	John Dugard	Malaysia	South Africa	
	P.S. Rao	Singapore	India	
Maritime Delimitation in the Black Sea (Romania v. Ukraine) (Application: 16 September 2004)	Jean-Pierre Cot	Romania	France	Sitting ITLOS judge
	Bernard H. Oxman	Ukraine	USA	
Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua) (Application: 29 September 2005)	Gilbert Guillaume	Nicaragua	France	Former ICJ judge
	Antônio Augusto Cançado Trindade	Costa Rica	Brazil	Elected judge during case
Pulp Mills on the River Uruguay (Argentina v. Uruguay) (Application: 4 May 2006)	Santiago Torres Bernárdez	Uruguay	Spain	
	Raul Emilio Vinuesa	Argentina	Argentina	

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Case	Judge *ad hoc*	Appointing State	State of nationality	Notes
Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France) (Application: 9 August 2006)	Gilbert Guillaume	France	France	Former ICJ judge
	Abdulqawi Ahmed Yusuf	Djibouti	Somalia	Later ICJ judge
Maritime Dispute (Peru v. Chile) (Application: 16 January 2008)	Gilbert Guillaume	Peru	France	Former ICJ judge
	Francisco Orrego-Vicuña	Chile	Chile	
Aerial Herbicide Spraying (Ecuador v. Colombia) (Application: 31 March 2008)	Jean-Pierre Cot	Colombia	France	Sitting ITLOS judge
	Raul Emilio Vinuesa	Ecuador	Argentina	
Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russia) (Application: 12 August 2008)	Giorgio Gaja	Georgia	Italy	Later ICJ judge
Application of the Interim Accord of 13 September 1995 (The Former Yugoslav Republic of Macedonia v. Greece) (Application: 17 November 2008)	Budislav Vukas	Macedonia	Croatia	Former ITLOS judge
	Emmanuel Roucounas	Greece	Greece	
Jurisdictional Immunities of the State (Germany v. Italy) (Application: 23 December 2008)	Giorgio Gaja	Italy	Italy	Later ICJ judge
Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal) (Application: 19 February 2009)	Serge Sur	Senegal	France	
	Philippe Kirsch	Belgium	Belgium	
Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters (Belgium v. Switzerland) (Application: 21 December 2009)	Andreas Bucher	Switzerland	Switzerland	
	Fausto Pocar	Belgium	Italy	
Whaling in the Antarctic (Australia v. Japan; New Zealand intervening) (Application: 31 May 2010)	Hilary Charlesworth	Australia	Australia	
Frontier Dispute (Burkina Faso/Niger) (Notification: 21 July 2010)	Jean-Pierre Cot	Burkina Faso	France	• Sitting ITLOS judge • Resigned
	Yves Daudet	Burkina Faso	France	
	Ahmed Mahiou	Niger	Algeria	
Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua) (Application: 18 November 2010)	John Dugard	Costa Rica	South Africa	
	Gilbert Guillaume	Nicaragua	France	Former ICJ judge
Request for Interpretation of the Judgment of 15 June 1962 in the Case concerning the Temple of Preah Vihear (Cambodia v. Thailand) *(Cambodia v. Thailand)* (Application: 28 April 2011)	Gilbert Guillaume	Cambodia	France	Former ICJ judge
	Jean-Pierre Cot	Thailand	France	Sitting ITLOS judge

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Case	Judge *ad hoc*	Appointing State	State of nationality	Notes
Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)[118] (Application: 21 December 2011)	Bruno Simma	Costa Rica	Germany	• Former ICJ judge • Resigned
	John Dugard	Costa Rica	South Africa	
	Gilbert Guillaume	Nicaragua	France	Former ICJ judge
Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile) (Application: 24 April 2013)	Yves Daudet	Bolivia	France	
	Louise Arbour	Chile	Canada	Resigned
	Donald McRae	Chile	Canada/ New Zealand	
Question of the Delimitation of the Continental Shelf beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua v. Colombia) (Application: 16 September 2013)	Leonid Skotnikov	Nicaragua	Russian Federation	Former ICJ judge
	Charles N. Brower	Colombia	USA	
Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia) (Application: 26 November 2013)	Gilbert Guillaume	Nicaragua	France	• Former ICJ judge • Resigned
	Yves Daudet	Nicaragua	France	
	David D. Caron	Colombia	USA	Died in office
Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v. Australia) (Application: 17 December 2013)	Jean-Pierre Cot	Timor-Leste	France	Sitting ITLOS judge
	Ian Callinan	Australia	Australia	
Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica v. Nicaragua) (Application: 25 February 2014)	Bruno Simma	Costa Rica	Germany	Former ICJ judge
	Awn Shawkat Al-Khasawneh	Nicaragua	Jordan	Former ICJ judge
Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. India) (Application: 24 April 2014)	Mohamed Bedjaoui	Marshall Islands	Algeria	Former ICJ judge
Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. Pakistan) (Application: 24 April 2014)	Mohamed Bedjaoui	Marshall Islands	Algeria	Former ICJ judge
Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. United Kingdom) (Application: 24 April 2014)	Mohamed Bedjaoui	Marshall Islands	Algeria	Former ICJ judge
Maritime Delimitation in the Indian Ocean (Somalia v. Kenya) (Application: 28 August 2014)	Gilbert Guillaume	Kenya	France	Former ICJ judge
Dispute over the Status and Waters of the Silala (Chile v. Bolivia) (Application: 6 June 2016)	Yves Daudet	Bolivia	France	
	Bruno Simma	Chile	Germany	Former ICJ judge
Immunities and Criminal Proceedings (Equatorial Guinea v. France) (Application: 13 June 2016)	James Kateka	Equatorial Guinea	Tanzania	Sitting ITLOS judge

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Case	Judge *ad hoc*	Appointing State	State of nationality	Notes
Certain Iranian Assets (Iran v. United States of America) (Application: 14 June 2016)	Djamchid Momtaz	Iran	Iran	
	David D. Caron	USA	USA	Died in office
	Charles N. Brower	USA	USA	
Land Boundary in the Northern Part of Isla Portillos (Costa Rica v. Nicaragua)[119] (Application: 16 January 2017)	Bruno Simma	Costa Rica	Germany	Former ICJ judge
	Awn Shawkat Al-Khasawneh	Nicaragua	Jordan	Former ICJ judge
Application of the International Convention on the Suppression of the Financing of Terrorism and of the International Convention for the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation) (Application: 16 January 2017)	Leonid Skotnikov	Russian Federation	Russian Federation	Former ICJ judge
	Fausto Pocar	Ukraine	Italy	
Application for Revision of the Judgment of 23 May 2008 in the case concerning Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore) *(Malaysia v. Singapore)* (Application: 2 February 2017)	John Dugard	Malaysia	South Africa	
	Gilbert Guillaume	Singapore	France	Former ICJ judge
Request for Interpretation of the Judgment of 23 May 2008 in the case concerning Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore) *(Malaysia v. Singapore)* (Application: 2 February 2017)	John Dugard	Malaysia	South Africa	
	Gilbert Guillaume	Singapore	France	Former ICJ judge
Jadhav (India v. Pakistan) (Application: 8 May 2017)	Tassaduq Hussain Jillani	Pakistan	Pakistan	
Arbitral Award of 3 October 1899 (Guyana v. Venezuela) (Application: 29 March 2018)	Hilary Charlesworth	Guyana	Australia	
Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates) (Application: 11 June 2018)	Yves Daudet	Qatar	France	
	Jean-Pierre Cot	UAE	France	Sitting ITLOS judge
Appeal Relating to the Jurisdiction of the ICAO Council under Article 84 of the Convention on International Civil Aviation (Bahrain, Egypt, Saudi Arabia and United Arab Emirates v. Qatar) (Application: 4 July 2018)	Nabil Elaraby	Bahrain, Egypt, Saudi Arabia, UAE	Egypt	• Former ICJ judge • Resigned
	Sir Franklin Berman	Bahrain, Egypt, Saudi Arabia, UAE	United Kingdom	
	Yves Daudet	Qatar	France	
Appeal Relating to the Jurisdiction of the ICAO Council under Article II, Section 2, of the 1944 International Air Services Transit Agreement (Bahrain, Egypt and United Arab Emirates v. Qatar) (Application: 4 July 2018)	Nabil Elaraby	Bahrain, Egypt, UAE	Egypt	• Former ICJ judge • Resigned
	Sir Franklin Berman	Bahrain, Egypt, UAE	United Kingdom	
	Yves Daudet	Qatar	France	

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Case	Judge *ad hoc*	Appointing State	State of nationality	Notes
Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Iran v. United States of America) (Application: 16 July 2018)	Djamchid Momtaz	Iran	Iran	
	Charles N. Brower	USA	USA	
Relocation of the United States Embassy to Jerusalem (Palestine v. United States of America) (Application: 28 September 2018)	Gilbert Guillaume	Palestine	France	Former ICJ judge
Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar) (Application: 11 November 2019)	Navanethem Pillay	The Gambia	South Africa	
	Claus Kress	Myanmar	Germany	

[116]Judges *ad hoc* were appointed before the joinder of proceedings. See *North Sea Continental Shelf (Denmark/Federal Republic of Germany; Netherlands/Federal Republic of Germany)*, Order of 26 April 1968, [1968] ICJ Rep. 9.

[117]Although Portugal appointed Mr. José Manuel Sérvulo Correia (a Portuguese national) after the provisional measures phase, the Court decided he could not sit, and thus he never was a judge *ad hoc* in the case. See *Legality of Use of Force (Yugoslavia v. Portugal)*, Judgment of 15 December 2004, [2004] ICJ Rep. 1160, at 1165–7, paras. 9, 16–17.

[118]Judges *ad hoc* were appointed before the joinder of proceedings with *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*. See *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, Order of 17 April 2013, [2013] ICJ Rep. 184.

[119]Judges *ad hoc* were appointed before the joinder of proceedings with *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica v. Nicaragua)*.

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