15 Regulation of the international bench

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1. Introduction

What are the contours of the supranational judge's legal and ethical duties? How should international courts be structured so as to enable her to discharge those obligations? These fundamental questions remain very much open almost a century after the Permanent Court of International Justice (PCIJ) held its first sitting in 1922. In contrast to elaborate domestic codes,[1] little is said on the matter in international courts' chartering statutes, and international codes of ethics remain few in number and limited in content.[2]

In a sense, this is to be expected. Despite the longevity of the International Court of Justice (ICJ) and the PCIJ before it, international courts have not traditionally been prominent in global affairs. Many international courts were not born until the thaw and aftermath of the Cold War and longer-standing institutions have only recently begun to garner a significant caseload.[3] The need for a comprehensive international judicial ethics has not been long felt.

Twenty-first century efforts to respond to that recent need have made important initial strides, but standards remain vague and incomplete, especially with respect to those ethical challenges peculiar to international courts. In assessing these efforts, this chapter proceeds in five parts additional to this introduction. Part two considers the purpose of codes of judicial ethics and defines the issues worthy of focus. Part three identifies three core ethical challenges peculiar to the international judiciary. Part four evaluates existing efforts to address those issues. Part five identifies priority areas for reform, and part six concludes by reflecting on the aspirational nature of such reforms.

2. The purpose of international judicial ethics and focusing on what matters

Some have debated whether codes of international judicial ethics are best viewed as a 'sword' (a tool to be used against courts and judges) or a 'shield' (a tool for judges and courts to protect themselves from outside influence).[4] The dichotomy is false; a well-formulated and relatively comprehensive code of ethics serves both functions. Understanding this is crucial to evaluating efforts to elaborate such a code.

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1 See Judiciary of England & Wales, Guide to Judicial Conduct (2013) 3, 7-8. On international codes on domestic ethics, see (n 29).

2 See for example, Jörg Philipp Terhechte, 'Judicial Ethics for a Global Judiciary' (2009) 10 GERMAN LJ 504, 505. On the few codes developed thus far see (n 30).

3 The flagship 'world court', the ICJ, averaged fewer than two cases per year from 1945 to 1991.

4 'Toward the Development of Ethics Guidelines for International Courts' [2003] Brandeis Inst Intl Judges Rep 16, 20.

Codified standards shield judges in two ways. First, they limit the scope of appropriate moral criticism of judges in the public sphere. When judicial ethics have been codified ex ante with a reasonably comprehensive scope, it is inappropriate for those who engage the court to hold judges publicly to moral standards other than those in the formal framework. In an uncodified context, on the other hand, public ethical criticisms of the bench can appeal quite reasonably to moral first principles, leaving judges vulnerable to evaluation on grounds other than those that they may have used in good faith to guide their conduct. Second, in delineating the contours of judicial independence, comprehensive ethics frameworks ban explicitly certain forms of external pressure on judges and provide them with significant institutional protections.

However, while a framework of judicial ethics shields the bench in these two ways, it also serves as a sword, providing the resources for holding noncompliant judges to account. Precisely because criticism is rooted in the agreed public reasons of a code, when a judge falls short in this respect, her failings are more unequivocally exposed. Moreover, although some codes are hortatory, more robust ethics regimes can and do underpin sanctions against deviant judges.

The two sides to codification are, of course, fundamentally intertwined. It is precisely because the code provides shared terms for criticism and sanction that it can be effective in precluding public criticism or sanction falling outside those agreed parameters.[5] The sword and shield are symbiotic complements.

To fulfill this dual function, a code or regulatory framework must be comprehensive in its coverage of at least the core ethical issues relating to the bench. Ideally, it would address also the more marginal issues in judicial ethics, such as off-bench 'moral lapses' in personal conduct and sleeping during trial. However, it is the three bedrocks of judicial ethics – independence, impartiality, and integrity in judging – that cannot go unaddressed if a code is to fulfill its purpose.[6] It is those core issues that are the focus of this chapter.

Each of impartiality, independence, and integrity has two dimensions (subjective and objective), which implicate different stakes, and which are related in opposite ways to judicial power and authority. The subjective dimension refers to the judge's internal mental processes and posture regarding the case. Does she deliberate impartially? Does she decide without feeling beholden to another actor? Does she act with integrity? These questions matter because, in Robert Cover's arresting turn of phrase, the judge's legal interpretation 'takes place in a field of pain and death.'[7] When judges are partial, dependent, or lacking integrity, they limit rights or impose obligations arbitrarily, wrongfully inflicting potentially severe harms on natural and legal persons.

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5 This is arguably the core value of legality itself. Scott J Shapiro, Legality (HUP 2013) 213.

6 See for example, William A Schabas, 'Judicial Ethics at the International Criminal Tribunals' in Vesselin Popovski (ed.), International Rule of Law and Professional Ethics (Ashgate 2014) 189, 198 (comparing marginal and core issues).

7 Robert M Cover, 'Violence and the Word′(1986) 95 Yale LJ 1601, 1601.

However, even if all is well on the subjective dimension and that wrongful treatment of persons is avoided, a second order worry arises if the judge or the bench *appears to the reasonable observer* to be partial, dependent, or bereft of integrity. The concern on this 'objective' dimension is not that the court wrongs a particular person; in the absence of a subjective failure, there is no wrongful treatment. Instead, the concern is that the reasonable appearance of such a wrong undermines the normative authority on which the court's efficacy depends.[8] The risk is not the arbitrary exercise of authority; it is the weakening of authority. If a subjective failure undermines the rule of *law*, the reasonable perception of that failure undermines the *rule* of law in the long run.

Ultimately, it is far easier to assess reasonable perceptions of a judge's internal posture in these respects than it is to evaluate the posture itself. In practice, therefore, the objective dimension becomes the lens through which to evaluate the subjective dimension, making the former important to both *rule* and *law*.[9] Nonetheless, the distinction is important in clarifying what is at stake in judicial ethics.

For the purposes of this chapter, threats to independence, impartiality, and integrity (subjective or objective) can be divided into threats common to international and domestic courts, and threats peculiarly pressing at the international level. The former – judges' personal biases, financial interests, personal or professional relationships to the parties, extra-judicial activities, past statements, equal treatment of the parties, and diligence – are dealt with only cursorily here. Transnational variance on these issues notwithstanding, the most plausible first steps to countering these threats at the international level exist already in the broad literatures, elaborate codes, and detailed jurisprudence at the domestic level.

Of greater interest are core challenges peculiar to the international level: judicial nationality, the weakness of international courts vis-à-vis their primary subjects (states), and diverse normative expectations regarding the international judicial role. From these arise obstacles that international courts must navigate without the guidance of clear domestic analogues.

3. The central ethical challenges facing international courts

Nationality has long been an obsession of international judicial ethics.[10] From the perspective of subjective impartiality, it has long been claimed that no allegiance is 'more powerful, more pervasive, or more subtle' than national loyalty,[11] and that systems of

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8 International Criminal Court, Code of Judicial Ethics ICC-BD/02-01-05 (09 March 2005) (ICC Code) preamble; Caribbean Court of Justice, Code of Judicial Conduct (25 July 2013) (CCJ Code) preamble. Canvassing national approaches to objective impartiality, see Prosecutor v *Furundžija* (Appeals Judgment) ICTY-95-17/1-A (21 July 2000) [179]–[188].

9 See for example, Lucius Caflisch, 'Independence and Impartiality of Judges' (2003) 2 Law & Practice Intl Courts & Tribunals 169, 170.

10 Tom Dannenbaum, 'Nationality and the International Judge', (2012) 45 Cornell Intl LJ 77, 88-119.

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education and culture ensure that judges' 'attitudes, proclivities, and intellectual tendencies' are shaped by and for her state.[12] On the objective dimension, it is argued that even if a particular judge is not nationally biased, these same factors underpin a reasonable appearance of partiality.[13]

In addition to these implications for impartiality, there is a further worry that international judges are (and appear to be) dependent on their home states in three ways. First, with very few exceptions, judges are elected to international courts. That election is preceded by a nomination and campaign that is almost invariably led by the judge's home government.[14] Thus installed, the judge may be expected to repay her state for her place on the bench with 'loyal' judgments.[15] Second, most international courts allow for re-election, and those that do not tend instead to provide for a single fixed term. Judges in the former situation depend on their home states for re-nomination and for a re-election campaign.[16] Judges in the latter depend on their home states for their (not atypical) nomination to another international court. Third, following their departure from the international judiciary, most judges return to their home states, and many take a public role of one form or another, again at the discretion of the government or the domestic electorate.[17] Judge Odio Benito, to take just one example, was appointed Vice President of Costa Rica between posts at the International Criminal Tribunal for the former Yugoslavia (ICTY) and International Criminal Court (ICC). Each of these three points of home state leverage has the potential to undermine judicial independence.[18]

 Fourth Annual Report of the Permanent Court of International Justice (15 June 1927–15 June 1928) PCIJ Series E No 4, 75. See also Eric A Posner and Miguel FP de Figueiredo, 'Is the International Court of Justice Biased?' (2005) 34 J Legal Stud 599, 608.

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 Thomas Franck, 'Some Psychological Factors in International Third Party Decision-Making′ (1967)19 Stan LR 1217, 1220; Frédéric Mégret, 'What is International Impartiality?′ in International Rule of Law and Professional Ethics (n 6) 101, 108.

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 Council of the League of Nations, Procès-Verbaux of the Proceedings of the Advisory Committee of Jurists, 24th Meeting (14 July 1920) 528–29, 720-22 ; RP Anand, Compulsory Jurisdiction of the International Court of Justice (Asia Publishing House 1961) 101-02 .

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 See, for example, Shimon Shetreet, 'Standards of Conduct of International Judges′ (2003) 2 Law & Practice Intl Courts & Tribunals 127, 156; Garry Sturgess and Philip Chubb, Judging the World (Butterworths 1988) 141-42.

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 Ofer Eldar, 'Vote-Trading in International Institutions′ (2008) 19 Eur J Intl L 3, 25.

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 Theodor Meron, 'Judicial Independence and Impartiality in International Criminal Tribunals′ (2005) 99 Am J Intl L 359, 362; Posner and de Figueiredo (n 11) 608.

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 ibid. Many join the international bench from public service. Daniel Terris, Cesare PR Romano and Leigh Swigart, The International Judge: An Introduction to the Men and Women Who Decide the World's Cases (OUP 2007) 21, 64.

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 ibid 152; Bardo Fassbender, 'Article 9' in Andreas Zimmermann, Karin Oellers-Frahm, Christian Tomuschat and Christian J Tams (eds),The Statute of the International Court of Justice (OUP 2006) 261, 282.

The multidimensional judicial nationality predicament is in several respects peculiar to international courts. National allegiance is often thought to be stronger than its domestic analogues, and the limited number of states in the international system ensures that the judge's state or its allies, unlike almost any domestic litigant, are likely to be regular parties before her court. Moreover, while her state's national ethos and its underpinning values can help to guide the domestic judge in overcoming lesser biases, there is, some argue, no corresponding global ethos to which international judges may turn.[19] This, it is claimed, can also affect litigants' sense of an international court's normative authority, because they lack the 'relatively confident [cultural and moral] interidentification' that obtains between parties and courts at the domestic level.[20]

A second and related set of challenges peculiarly acute at the international level is rooted in the power disparity between states and the international bench. Individually, for the reasons discussed above, the typical international appointments structure leaves the judge hugely vulnerable to the assessment of her national state. Institutionally, international courts' lack of automatic enforcement mechanisms renders them dependent on the acquiescence and cooperation of states. That cooperation can be denied in a range of lawful and unlawful ways: states can withdraw from the court's jurisdiction; they can refuse to fund the court; they can refuse to participate in proceedings; they can obstruct evidence gathering on their territories or refuse to provide evidence; they can refuse to arrest and transfer individual defendants; they can refuse to comply with the court's ultimate judgment; and they can decline to sanction or threaten other states when the latter refuse to comply with the court's judgment.[21] On every level, the court's efficacy is heavily dependent on the very states over which it exercises authority. Domestically, only constitutional courts face similar challenges.

To be clear, state decisions on whether to cooperate and comply are affected by a number of factors. Pressure from other states and the threat of losing the benefits of cooperation, the mobilization of domestic political movements around international law, the persuasion or transnational socialization of decision-makers, and the enforcement of international case law in domestic courts all motivate states' cooperation with well ordered international institutions.[22] Nonetheless, compared to the subjects of most domestic courts,

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19 See for example, Mégret (n 12) 107-17; Remarks of Ronald Dworkin, 'Discussion: International Criminal Justice' in Robert Badinter and Stephen Breyer (eds), Judges in Contemporary Democracy (NYU Press 2004) 189, 252-53. This is not how many international judges see the issue. Dannenbaum (n 10) 131-33.

20 Franck (n 12) 1220.

21 For example: the United States' withdrawal from the 1980s *Nicaragua* litigation and withdrawal of its article 36 declaration; the refusal of a number of ICC States Parties like Malawi, Chad, the DRC, Kenya, and others to arrest Omar al-Bashir; the UK's ongoing failure to comply with the ECtHR's 2005 *Hirst* judgment; and Kenyan obstruction of evidence gathering in the ICC's now withdrawn *Kenyatta* case.

22 See for example, Beth A Simmons, Mobilizing for Human Rights: International Law in Domestic Politics (CUP 2009); Abram Chayes and Antonia Handler Chayes, The New Sovereignty (HUP 1995); Thomas M Franck, Fairness in International Law and Institutions (Clarendon Press 1995); Andrew T Guzman, How International Law Works: A Rational Choice Theory (OUP 2008); Martha Finnemore and Katherine Sikkink, 'International Norm Dynamics and Political Change′(1998) 52 Intl Org 887 ; Ryan Goodman and Derek Jinks, 'How to Influence States′(2004) 54 Duke LJ 621; Harold Hongju Koh, 'Why

states have unusual discretion over whether to comply with the demands of international courts.[23]

In theory, this could forestall egregious international judicial overreach, removing international judging from the 'field of pain and death' that motivates the need for a robust judicial ethics.[24] States can diminish the core ethical dangers on the subjective dimension by threatening not to reappoint a misbehaving judge or by failing to comply with or to enforce a bad ruling. In practice, however, that benign result is dependent both on states having a roughly equal capacity to refuse cooperation and on state non-cooperation being driven primarily by a valid assessment that the court acted *ultra vires*. With neither of those conditions obtaining, states' power threatens, rather than bolsters, the rule of law.

A third and final set of challenges arises from the diversity of judges' and states' normative expectations regarding the judicial role.[25] A key factor here is the diversity of approaches to domestic judging in different states. The impact of this phenomenon is most obvious on, although not unique to, international criminal courts, which are staffed in part by former domestic criminal law judges, but which employ a *sui generis* approach to criminal judging.[26] In addition to distinct legal traditions, a further factor underpinning divergent normative expectations is the diversity of professional backgrounds among international judges. Typical prior postings include academia, diplomacy, international legal practice, and the domestic judiciary.[27] These backgrounds can underpin very different ethical preconceptions of international courts and the judicial role.[28]

When judges disagree on what it means to be an ethical judge, even those acting in good faith risk undermining the mutual respect necessary for collaborative adjudication. Similarly, when litigants and one or more judges differ on normative priors, this can undermine the court's authority and weaken the rule of law.

4. Disjointed and incomplete progress

Do Nations Obey International Law?′ (1997) 106 Yale LJ 2599; Robert M Axelrod, The Evolution of Cooperation (Basic Books 1984); Robert O Keohane, After Hegemony (PUP 1984); Oran R Young, Compliance and Public Authority (John Hopkins University Press 1979).

23 Individually, some domestic judges also face re-election and, institutionally, a constitutional court that rules against the government is dependent on cooperation from that very executive. However, such individual and institutional vulnerabilities are very rarely combined in domestic courts.

24 Compare Cover (n 7) 1609-18.

25 'Pre- and Post-Judicial Service Considerations for International Judges′ [2012] Brandeis Inst Intl Judges Rep 37, 39.

26 See for example, Kai Ambos, 'International Criminal Procedure: 'Adversarial,' 'Inquisitorial,' or Mixed?′ (2003) 3 Intl Crim L Rev 1.

27 Terris et al. (n 17) 223-24.

28 Erik Voeten, 'The Impartiality of International Judges′ (2008) 102 Am Pol Sci Rev 417, 428.

Thus far, efforts to address these and other challenges to international judicial ethics have been underwhelming. Existing global codes and court-specific regulatory frameworks provide only the most general guidance, eschewing detail and largely ignoring the pressing issues of nationality, power, and normative diversity.

Genealogically, the latter failing may be a consequence of the fact that for the last two decades of the twentieth century, international efforts to elaborate standards of ethical judging were focused almost exclusively on domestic courts and judges. Globally, such principles were articulated in the Minimum Standards of Judicial Independence (1982), the Basic Principles on the Independence of the Judiciary (1985), the Universal Charter of the Judge (1999), and the Bangalore Principles of Judicial Conduct (2002). Regionally, similar efforts were made in the Council Of Europe (COE) Recommendations on the Independence, Efficiency, and Role of Judges (1994), the Law Association for Asia and the Pacific (LAWASIA) Beijing Principles of the Independence of the Judiciary (1997), the Judges' Charter in Europe (1997) drafted by the European Association of Judges, the COE's European Charter on the Statute for Judges (1998), the Commonwealth Parliamentary Association's Latimer House Guidelines (1998), the Statute of Iberoamerican Judges (2001), the African Union (AU) Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa (2003), the Commonwealth Principles on the Accountability of, and the Relationship between, the Three Branches of Government (2003), and the COE Recommendation on Judges: Independence, Efficiency and Responsibilities (2010).[29]

With the exception of the World Trade Organization (WTO) Rules of Conduct for the Understanding on Rules and Procedures Governing the Settlement of Disputes (1996), which apply to both its arbitral panels and to the more judicial Appellate Body (WTO-AB), it was not until well into the twenty-first century that the focus turned to international judges, with the development of court-specific codes like the ICC Code of Judicial Ethics (2005), the Court of Justice of the European Union (CJEU or ECJ) Code of Conduct (2007), the European Court of Human Rights (ECtHR) Resolution on Judicial Ethics (2008), and the Caribbean Court of Justice (CCJ) Code of Judicial Conduct (2013), and global texts like the International Law Association (ILA) Burgh House Principles (2004) and the Institut de Droit

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29 International Bar Association, Minimum Standards of Judicial Independence (22 October 1982); UN Basic Principles on the Independence of the Judiciary, UNGA Res 40/32 (29 November 1985) UN Doc 08/26-09/06/1985 ; Commonwealth Parliamentary Association, Latimer House Guidelines (19 June 1998); Council of the International Association of Judges, Universal Charter of the Judge(17 November 1999); Judicial Group on Strengthening Integrity, Bangalore Principles of Judicial Conduct (26 November 2002); Council of Ministers (COE) Recommendation R(94)12 of the Committee of Ministers to Members States on the Independence, Efficiency, and Role of the Judge (13 October 1994); Law Association for Asia and the Pacific, 6th Conference of Chief Justices, Beijing Statement on Principles of the Independence of the Judiciary, (August 1997); European Association of Judges, Judges' Charter in Europe (4 November 1997), Council of Europe, European Charter on the Statute for Judges (10 July 1998), 6th Summit of Ibero-American Presidents of Supreme Courts of Justice, Statute of Iberoamerican Judges, (May 2001); African Union, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, AU DOC/OS(XXX)247 (04-12 July 2003) (AU Principles); Commonwealth Heads of Government, Commonwealth Principles on the Accountability of, and the Relationship between, the Three Branches of Government (2003); Committee of Ministers (COE), Recommendation CM/Rec(2010)12 of the Committee of Ministers to member states on Judges: Independence, Efficiency and Responsibilities (17 November 2010).

International (IDI) Resolution on The Position of the International Judge (2011).[30] Most international courts continue to rely instead on a narrow cluster of general principles enshrined in their chartering statutes or rules of procedure.

On the core elements of judicial ethics common to international and domestic courts, the major collective weakness of the instruments focused on international courts is a failure to provide actionable ethical guidance. The IDI Resolution has only six short substantive articles, none of which has the detail necessary to inform any but the most straightforward of ethical deliberations.[31] The CJEU Code is little better.[32] The seventeen articles of the Burgh House Principles appear more comprehensive, and they have been praised appropriately for identifying key issues in provisions on independence, nomination, compensation, immunities, links to the parties, interest in the outcome, and security of tenure, among others. However, both they and the court-specific codes are also guilty of failing to provide actionable ethical instruction.[33]

Exemplifying this tendency are requirements that judges: avoid conflicts of interest, refuse gifts that might call into question their independence or impartiality, exercise free speech and association only to the extent compatible with the judicial function, and decline to perform any function incompatible with their judicial duties and status.[34] Similarly abstract is the requirement limiting judicial appointments to individuals of high moral character, competence, impartiality, and integrity.[35]

None of these rules is morally misdirected. The problem is instead that each punts at the key juncture, defining the required behavior with reference to unelaborated master concepts like objective impartiality or the 'judicial function'. The core virtue of a code is in bringing specificity and content to those master concepts. Provisions that instead revert back to them are uncontroversial, but they leave the required conduct very much up in the air.

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30 World Trade Organization, Rules of Conduct for the Understanding on Rules and Procedures Governing the Settlement of Disputes, WT/DSB/RC1 (11 December 1996); ICC Code (n 8); Code of Conduct, 2007/C 223/01, 223 O J 2 (22 September 2007) (CJEU Code); European Court of Human Rights, Plenary Session, Resolution on Judicial Ethics (23 June 2008) (ECtHR Resolution); CCJ Code (n 8); International Law Association Study Group on the Practice and Procedure of International Courts and Tribunals, Burgh House Principles (23-24 April 2004) (Burgh House Principles); Institut de Droit International, 6th Commission, Rapporteur: Gilbert Guillaume, Resolution on The Position of the International Judge (09 September 2011) (IDI Resolution).

31 IDI Resolution (n 30) arts 1-6. A seventh article addresses part-time judges. ibid art 7.

32 CJEU Code (n 30).

33 Praising court-specific codes, see, for example, Chandra Lekha Sriram, 'International Rule of Law? Ethics and Impartiality of Legal Professionals in International Criminal Tribunals′ in Popovski (n 6) 171, 177; Schabas (n 6) 192.

34 See for example, Burgh House Principles (n 30) preamble, arts 7, 8, 11; ECtHR Resolution (n 30) arts I, II, IV, VI, VII, VIII; ICC Code (n 8) arts 3(2), 4(2), 5(2); CJEU Code (n 30) arts 2, 3; IDI Resolution (n 30) art 3(3).

35 This is a statutory requirement for most courts. It is also reflected also in the general ethics codes. IDI Resolution (n 30) art 1(4); Burgh House Principles (n 30) art 2(1).

Ambiguity of this kind can be mitigated by authoritative interpretation. However, there are no international ethics commissions charged with issuing commentaries or opinions, and full judicial review has thus far focused narrowly on the question of mandatory recusal.[36] Even on this issue, actionable guidance requires frequent iteration, and the existing patchwork case law leaves much to be decided.[37]

Of course, not all international judicial ethics provisions fall into this trap. Some do provide clear instruction, albeit while adding little to pre-existing international frameworks of domestic judicial ethics. In this category are requirements that judges swear an oath, bans on judges accepting payments from parties, requirements that they maintain deliberative confidentiality, disclose financial interests, and recuse themselves from cases in which they or family members have financial interests, and rules allocating authority for ethics code enforcement.[38] Although important, these provisions warrant little attention here precisely because they build straightforwardly on pre-existing international rules on domestic judging. More specific to the global level, but equally straightforward, is the Burgh House rule assigning host states the responsibility to protect judges' security.[39]

More interesting are the few provisions that progress judicial ethics. The CCJ Code is especially impressive in this respect, requiring, among other things, that the judge ensure that court staff, lawyers, and others subject to her influence, direction, or control refrain from

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36 See for example, Prosecutor v. *Sesay* (Decision on Defence Motion Seeking the Disqualification of Justice Robertson from the Appeals Chamber) SCSL-2004-15-AR15 (13 March 2004); Prosecutor v *Šešelj* (Motion for Disqualification) ICTY-03-67-PT (10 June 2003); Prosecutor v *Furundžija* (Appeals Judgment) ICTY-95-17/1-A (21 July 2000) [164-215]*; Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, (Order of 30 January 2004) [2004] 2004 ICJ Rep. 3. More summarily, see *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) not withstanding Security Council Resolution 276 (1970)* (Orders 1-3 of 26 January 1971) [1971] 1971 ICJ Rep. 3, 6, 9; *South West Africa* (Ethiopia v. South Africa; Liberia v. South Africa) (Order of 18 March 1965) [1965] 1965 ICJ Rep. 3.

37 See for example, Yuval Shany and Sigall Horovitz, 'Judicial independence in the Hague and Freetown′ (2008) Leiden J Intl L 113; Shabtai Rosenne, The Law and Practice of the International Court 1920-2005 (4th edn, Martinus Nijhoff 2006) 1057-65. Compare Frédéric Mégret, 'International Judges and Experts' Impartiality and the Problem of Past Declarations′ (2011) 10 Law & Practice of Intl Courts & Tribunals 31, 48-63.

38 See for example, Burgh House Principles (n 30) arts 1.4, 11; IDI Resolution, (n 30) arts 2(2), (5); CJEU Code (n 30),arts 4, 7; CCJ Code (n 8) arts 4.6.3, 7; ICC Code (n 8), art 6. Oath requirements are generally statutory and obtain even in courts with no ethics code. See for example, Statute of the International Court of Justice (1945) (concluded 26 June 1945, entered into force 24 October 1945) 15 UNCIO 355 (ICJ Statute) art 20; Rome Statute of the International Criminal Court (1998) (concluded 17 July 1998, entered into force 01 July 2002) 2187 UNTS 3 (ICC Statute or Rome Statute) art 45; United Nations Convention on the Law of the Sea (1982) (concluded 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3 (UNCLOS) annex VI, art 11; Protocol III to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (1998) (concluded 10 June 1998, entered into force 25 January 2004) OAU Doc OAU/LEG/EXP/AFCHPR/PROT III, art 16; Statute of the Inter-American Court of Human Rights (1979) OAS Res 448, 9th Sess October 1979 art 11.

39 Burgh House Principles (n 30) art 5.4.

discrimination in their treatment of persons concerned with a matter before the court, that judges recuse themselves from cases involving members of their fraternal organizations, and issuing targeted bans on judges engaging in various specific political and legal activities.[40] Also impressive are the ICC's provisions on diversity, which lay out a comprehensive system for ensuring gender, race, and regional diversity on the court, rather than merely issuing a hortatory demand for a diverse bench.[41]

Ultimately, however, these are the anomalies. The majority of the provisions dealing with core ethical principles lack the detail necessary to instruct judges. This general vagueness weakens both the codes' utility as tools for holding judges publicly accountable and their efficacy in narrowing appropriate criticism of judges to that rooted in a core of agreed public values. These are significant flaws that require remedy. However, they are put to one side in what remains of this chapter, because models for that reform can be found in existing instruments of domestic judicial ethics. More complicated, and thus more worthy of attention here, are the peculiarly international issues of nationality, power, and diversity.

To say that existing codes do not address the issue of judicial nationality is somewhat misleading. The codes ignore it because it is addressed head-on in the chartering statute of nearly every international court. The problem is rather that these statutory efforts to deal with judicial nationality are entirely counterproductive; the codes' failure is in neglecting to confront this error.

Built on the foundational presumption that judges cannot be trusted to decide cases involving their national states without bias, or at least that it is reasonable not to trust them to do so, the overwhelming majority of international courts have adopted one or both of two forms of regulation.[42] The first aims to dilute intractable national bias out of significance by requiring that no more than one national of any state sit on a multi-judge bench at any one time.[43] Mégret has called this the '"pot-pourri" vision of impartiality; the idea that even if individual impartiality is unachievable, or at any rate unverifiable, at least various forms of discreet partiality all cancel each other in each other's presence.'[44] This general nationality limit endures on almost all international courts, except the CCJ and WTO-AB.[45]

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40 CCJ Code (n 8) arts 1.8, 1.11, 1.15, 1.18, 4.5.1, 5. On political activity, compare the far less detailed Burgh House rule. Burgh House Principles (n 30) art 8.2.

41 Procedure for the Election of the Judges for the International Criminal Court (2002) ICC-ASP/1/Res.3 [3], [5], [8] . See also Burgh House Principles (n 30) arts 2.2-2.3. The ICC provisions built (and improved) on the ICJ's informal system. Christopher Harland, 'International Court of Justice Elections′ (1996) 34 Canad YB Intl L 303, 309–12.

42 Dannenbaum (n 10) 112-19.

43 ibid 116-17. See for example, Taslim Olawale Elias, 'Does the International Court of Justice, as it is Presently Shaped, Correspond to the Requirements Which Follow from its Functions as the Central Judicial Body of the International Community' in Hermann Mosler and Robert Bernard (eds), Judicial Settlement of International Disputes (Springer 1974) 18, 21; Zigurds L Zile, 'A Soviet Contribution to International Adjudication′ (1964) 58 Am J Intl L 359, 382.

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The second seeks to eliminate an imbalance of national biases on a case-by-case basis.[46] In its traditional form, this rule provides that when one of the judges in a given case is a national of one of the parties and the same is not true of the opposing party, the opposing party may appoint a 'judge ad hoc' to join the bench only for the case at hand. This rule obtains at the ICJ, the International Tribunal on the Law of the Sea (ITLOS), the ECtHR, and (in interstate cases) the Inter-American Court of Human Rights (IACtHR).[47] More recently, the African Court of Human and Peoples' Rights (ACtHPR) and the IACtHR (in cases between individuals and states) have adopted an alternative rule directed at the same end, requiring judges to recuse themselves from cases involving their states of nationality.[48]

General nationality limits seek to mitigate nationalist bias through dilution; case-specific nationality regulations aim to do the same through counter-balancing or elimination. However, not only are such rules unnecessary and misguided, they are counterproductive, exacerbating both the appearance and the actual threat of nationalist bias on international courts. The silence of the Burgh House Principles and the IDI Resolution tacitly endorses this wrongheaded approach.

Existing statutory approaches are unnecessary because nationality is not a trait of sufficient potency to impugn the impartiality of a judge. We expect judges to rise above similar allegiances, like religious or political affiliation, all the time, recognizing that they should have the professional tools and communal professional support to do so.[49]

Even if judicial nationalism *were* unavoidable, extant approaches to mitigating that perceived threat are misguided on their own terms. States sometimes band together on one side of a lawsuit, rendering both the nationality limit and the judge ad hoc inadequate to guarantee a dilution or balance of national partialities on the bench.[50] More commonly, and more damningly, many states have clear national interests at stake in disputes in which they are not formally engaged as litigants. Even when their rights are not implicated directly, these

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Mégret (n 12) 122. See also Gleider I Hernandez, 'Impartiality and bias at the International Court of Justice′(2012) 1 Cambridge J Intl & Comp L 183, 202; 'Integrity and Independence: The Shaping of the Judicial Persona′ [2007] Brandeis Inst Intl Judges Rep 23, 26.

45 On the prevalence of nationality limits, see Dannenbaum (n 10) 89-95.

46 Identifying this objective, see, for example, Council of the League of Nations Advisory Committee of Jurists (n 13) 528–29; Article 55 of the American Convention on Human Rights, Advisory Opinion OC- 20/2009, Inter-Am Ct HR Series A No 20 (08 September 2009); .ibid (García-Ramírez J concurring); Statement of Motives for the Reform of the Rules of Procedure (IACtHR, 16-28 November 2009) http://www.corteidh.or.cr/reglamento.cfm (editors to insert updated date of access).

47 Dannenbaum (n 10) 89-91, 94.

48 ibid 91, 94.

49 See for example, Prosecutor v *Furundžija* (Appeals Judgment) ICTY-95-17/1-A (21 July 2000) [189]-[215]; Ruiz-Mateos v Spain App. No 12952/87 (1990) 67 ECHR DR 175. On the process of overcoming loyalties as a judge, see Dannenbaum (n 10) 120-45.

50 This scenario arose in the PCIJ's very first case. *Case of the SS Wimbledon* (UK, France, Italy & Japan v Germany) (1923) PCIJ Series A No 1 fn 266.

states may have deep political or economic links to one of the litigants, or may simply stand to lose or benefit from a particular doctrinal precedent.[51] If judges were intractably partial to their national states, there is no reason to think that nationalism would distort their judgment any less in these situations than it would when their national states are litigants.[52] This, in turn, would entail a threat to bench impartiality from an imbalance of biases among nationals of *non*-parties, creating the possibility of a heavy skew towards one side, with a concentration that overwhelms efforts at dilution.[53] Nationality limits, judges ad hoc, and mandatory recusals would be impotent in the face of such a challenge.

Of course, if anxiety about judicial nationalism is anyway misplaced, one might think that nationality regulation of this kind is relatively harmless, albeit unnecessary. If this were true, codes like the Burgh House Principles could ignore that regulation without thereby committing any second order error. However, the extant regulatory structure is not harmless.

Nationality rules endorse implicitly the reasonableness of the view that judges are biased by nationality. Those who invoke the distribution of judicial nationalities to question the court's impartiality thereby condemn the institution on its own terms.[54] When courts respond by insisting that judicial nationality is 'irrelevant to [judges'] ability to hear the cases before them impartially', the claim rings false.[55] The court's statute itself suggests that the judge's nationality *is* highly relevant to her ability to hear cases impartially, indicating only that that bias will be balanced or diluted by countervailing tendencies among her colleagues. When such balance or dilution is clearly inapplicable, the posture implicit in the court's own structure undermines objective impartiality and weakens judicial authority.

Moreover, judicial nationality rules may distort judges' subjective posture. The judge's internal sense of her role and her desire to live up to the external expectations of her professional community are vital to underpinning her impartiality.[56] The shape of those communal expectations helps to determine how she overcomes personal proclivities to achieve that professional objective. By normalizing judicial nationalism, existing systems stunt that process for the international judge, undermining both the internal and external

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51 Dannenbaum (n 10) 151-55.

52 See, for example, Oliver J Lissitzyn, The International Court of Justice: Its Role in the Maintenance of International Peace and Security (Carnegie Endowment for International Peace 1951) 54-55.

53 The ICJ, for example, has at various times had five judges from Commonwealth states, five nationals of NATO states, and four judges from EU states on a bench of fifteen.

54 See, for example, *Legality of the Use of Force* (Yugoslavia v Belgium) (Provisional Measures) [1999] 1999 ICJ Rep 124 (Kreća, J dissenting) [2]-[3].

55 For the claim of irrelevance, see, for example, Prosecutor v *Šešelj* (Motion for Disqualification) ICTY-03-67-PT (10 June 2003) [3]; Case Concerning *Military and Paramilitary Activities In and Against Nicaragua* (Nicaragua v USA) (Merits) [1986] 1986 ICJ Rep 14, 160 (separate opinion of Lachs J); ibid 528 (Jennings J, dissenting); Certain Norwegian Loans (France v Norway) [1957] 1957 ICJ Rep 9, 45 (separate opinion of Lauterpacht J.).

56 Dannenbaum (n 10) 128-40, 158-59.

dimensions of role development.[57] Indeed, on courts with judges ad hoc, the prospect of being 'balanced' by a case-specific, party-appointed judge actively *encourages* permanent judges to see national representation as part of their role and strengthens states' incentives to nominate only those of their nationals that adopt that perspective.[58]

In this context, the silence of the IDI Resolution and the Burgh House Principles on nationality is a notable failing.[59] Not only does it endorse a system that weakens the international bench, it also masks the need to address the real nationality problem – the judge's *dependence* on her home state. This raises the second problem for international judicial ethics: state power over both individual judges and courts.

The Burgh House Principles recognize that judicial independence must include independence from the judge's national state, even in cases in which it is not a party.[60] Yet, there is little in the way of serious protection for the judge from the significant influence her national state exercises over her.[61] The most significant Burgh House protection for judges in this respect is to demand the robust non-removability of judges during each fixed term.[62] This broadly applied principle is undoubtedly worthy of affirmation, but it is not currently under threat. The real and present danger to the independence of the international judiciary arises instead at the start and end of each term.

The Burgh House Principles are silent on state domination of those processes, requiring vaguely that appointment processes include 'appropriate safeguards against nominations, elections and appointments motivated by improper considerations', and demanding transparency around elections, but little else.[63] The IDI Resolution does marginally better by stating a preference for single-term appointments, a position that is also reflected in the regulatory frameworks of a small minority of international courts.[64] However,

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57 ibid 155-66; Elias (n 43) 24, 27; Hernandez (n 44) 188.

58 See for example, Krzysztof Skubiszewski, 'Commentary: The Role of Ad Hoc Judges' in Connie Peck and Roy S Lee (eds), Increasing the Effectiveness of the International Court of Justice (Kluwer Law International 1997) 378-84; Remarks of Elihu Lauterpacht, 'Discussion: The Role of Ad Hoc Judges' in ibid 384, 388; Yuval Shany, 'Squaring The Circle?′ (2008) 30 Loy LA Intl & Comp L Rev 473, 482; Hernandez (n 43) 188. On states' practice of nominating partial candidates, see, for example, Posner and de Figueiredo (n 11) 608; Shetreet (n 14) 129

59 The latter acknowledge judges ad hoc without any censure or criticism. Burgh House Principles (n 30) preamble.

60 Burgh House Principles (n 30) preamble.

61 Compare International Commission of Jurists, International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors (2007) 51 (noting the 'particularly acute' challenge to domestic judicial independence 'where the executive plays a predominant role in the selection and appointment of judges').

62 Burgh House Principles (n 30) arts 3.1-3.2.

63 ibid arts 2.3-2.5.

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although single term appointments eliminate the re-appointment lever of state control, they neither weaken the indebtedness of a judge for her initial nomination, nor mitigate her home state's control over both her nomination to another court and her subsequent domestic career prospects. This poses a special threat to younger judges and those whose best post-bench prospects are in the public sector – traits both common at the ECtHR.[65]

The Burgh House Principles, the IDI Resolution, and most court-specific frameworks do nothing to weaken these lines of dependence. The few provisions on post-judicial careers focus exclusively on the responsibilities of the judge (not to seek or accept future benefits from a litigant or related entity) and the ex-judge (to 'exercise appropriate caution' in accepting employment from former litigants or related entities, to refrain from returning too soon as an advocate, and to avoid acting in relation to a former case).[66] This is all sensible enough, but there is nothing on the necessary *protection* from a home state that the judge did not favor on the bench.[67]

Of course, the failure to shield individual judges from the power of states and thereby preserve the former's independence is at least partly a consequence of states' power over courts. International courts are created by states, survive at the behest of states, and remain relevant because of state cooperation and acquiescence. Some have argued that state power over appointments is simply the price of institutional survival and efficacy.[68]

This is a mistake. When international law works, it works because states act together to enforce it through coercion or through socialization, because non-state actors mobilize domestically and transnationally, or because states (and leaders) that 'lose' are persuaded to accept the result.[69] States collectively are immensely more powerful than international courts, but the latter can be effective vis-à-vis states individually if they can generate normative buy-in among an effective (and shifting) coalition of states and non-state actors.

Seen in this light, international courts' lack of power militates in favor of 'the strictest standards of independence and impartiality in order to build confidence over time in the work of the international judiciary and to facilitate voluntary compliance with its decisions.'[70] A

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[64] IDI Resolution (n 30) art 2(1); Rome Statute of the International Criminal Court (1998) (concluded 17 July 2002, entered into force 01 July 2002) 2187 UNTS 3 (ICC Statute or Rome Statute) art 36(9)(a); Convention for the Protection of Human Rights and Fundamental Freedoms (1950) (concluded 04 November 1950, entered into force 03 September 1953, as amended, in force 01 November 1998) ETS No 5 (as amended by protocols 11 and 14) (European Convention on Human Rights or ECHR) art 23(1).

65 [65] 'Challenges to Judicial Independence′ [2010] Brandeis Inst Intl Judges Rep 36, 39.

66 [66] Burgh House Principles (n 30) arts 13.1-13.4; CJEU Code (n 30) art 6.

67 [67] Compare, in domestic judicial ethics, the Universal Charter of the Judge (n 29) art 13; the European Charter on the Statute for Judges (n 29) art 6.4.

68 [68] Manley O Hudson, The Permanent Court of International Justice: 1920–42, (Macmillan1943) 181; Remarks of Sir Ian Sinclair, 'Discussion: The Role of Ad Hoc Judges′ (n 58) 390.

69 [69] See (n 22).

70 [70] Shany and Horovitz (n 37) 120.

'losing' party before a dependent bench is *less* likely to be normatively persuaded of the court's decision and domestic groups are *less* likely to gain significant legitimacy from the endorsement of a court whose independence is in question.

Even if it were true that international courts survive only by allowing states to control the appointment and reappointment of judges, they would do so by sacrificing their very comparative value, thereby calling into question the point of survival in the first place. International arbitration offers a number of advantages over international adjudication in terms of generating state support: the parties can set the standards by which the dispute is to be resolved; proceedings can be made private; the parties agree on an arbitral bench in which they have confidence; and the tribunal need not worry about the implications of a particular settlement for future disputes.[71] International courts cannot accommodate state power in this way and a 'pot-pourri' approach fails to achieve bench independence or impartiality with the efficacy of arbitral balancing. The core advantage of courts is instead that when they resolve disputes, they do so in a way that is directed to establishing the rule of law. Rather than being appointed on a dispute-by-dispute basis, permanent judges hear whatever case comes before them. Their judgments are public, publicly reasoned, and rooted in law. Even if not technically bearing the status of binding precedent, international court judgments carry enormous authoritative weight in future cases. Their reasoning is directed not at the parties, but at all of the law's subjects. This is not random; it is fundamental to what it means for an institution to be an international *court*. When that character is sacrificed, the marginal benefit of courts is lost.

Ultimately, only states can change existing appointment processes. However, the Burgh House Principles and IDI Resolution silence represents a lost opportunity to identify the problem and articulate a superior path forward. As discussed below, the fact that state power over appointments has been eschewed at the CCJ indicates that such change is not infeasible.

The third core challenge to international judicial ethics is that of normative diversity. One significant measure adopted by court-specific frameworks and global codes to address this challenge is the requirement that the court have a diverse bench.[72] When successful, this gives voice to a broad range of perspectives in judicial deliberation, reducing the likelihood of judicial postures that are fundamentally alien to some portion of their subjects.

Alone, however, it is insufficient. Many issues of legal ethics are not about collective judicial behavior. An individual judge acting in good faith could offend both her fellow judges' and her courts' clients' senses of impartiality, independence, and integrity. Moreover, in the context of collective action, a happy compromise is not always available or particularly useful; sometimes, one ethical perspective must take priority. When this occurs on an ad hoc basis, it can unsettle both litigants and 'defeated' judges. Avoiding these harms requires settling expectations ex ante. Codes of ethics perform an essential function in that respect.

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71 Convention for the Pacific Settlement of International Disputes (29 July 1899) (Hague I) arts 20–29 ; Convention for the Pacific Settlement of International Disputes (18 October 1907) (Hague II) arts 41–50; Olivos Protocol for the Settlement of Disputes in MERCOSUR (2002) (concluded 18 February 2002, entered into force 10 February 2004) (2003) 42 ILM 2 (Protocol of Olivos), arts 9–16.

72 Terris et al. (n 17) 3.

However, as discussed above, existing codes lack the necessary detail to guide action. In a context of normative diversity, this is a dangerous flaw.

5. Looking forward

Both global instruments like the Burgh House Principles and court-specific frameworks like the ICC Code of Ethics must, in the first instance, be evaluated against the vacuum that came before. By that measure, major strides have been taken since the turn of the century. However, in that same period, international courts have grown from marginal dispute settlers to institutions charged with protecting global values, bolstering global governance, and developing international law.[73] Such institutions cry out for a more comprehensive judicial ethics. Progress on nationality, power, and diversity is especially urgent. To that end, four tranches of reform should be considered as international judicial ethics moves forward.

First, nationality should be eliminated from rules on bench composition. Existing nationality rules of most courts are internally coherent only in the extraordinary situation that no state other than the litigants has interests at stake in the legal dispute. As discussed above, if judges were irretrievably biased to their home states, as most regulatory frameworks imply, a bench structured under existing nationality rules could not be trusted to adjudicate impartially.

However, judges are *not* irretrievably biased to their home states. Domestically, we trust, and have no alternative but to trust, judges to overcome partialities to their own race, ethnicity, class, religion, gender, and age.[74] Nationality should be no different.[75] Rather than excluding the possibility of judging, the way forward on such issues has always been, and must be, to see judicial impartiality as a process, cultivated by systems of professionalization, deliberation, and transparency, rather than as a trait that individuals either possess or lack.[76]

Nationality rules undermine precisely that professionalization process, setting an expectation of partiality and undermining the most effective bulwark against bias, the judge's own sense of her role.[77] Similarly, by granting statutory imprimatur to the notion of inherent judicial nationalism, such rules feed the reasonableness of the perception of judicial nationalism and undermine their courts' legitimacy.[78]

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73 Armin Von Bogdandy and Ingo Venzke, 'On the Functions of International Courts′ (2013) Leiden J Intl L 49, 64-71.

74 Martha Minow, 'Stripped Down Like a Runner or Enriched by Experience′ (1992) 33 W&M L Rev 1201, 1207-8; Dannenbaum (n 10) 126.

75 Compare Locabail (UK) Ltd v Bayfield Properties [2000] I All ER 65, 77–78.

76 Mégret (n 12) 120; Mégret (n 37) 44; Hernandez (n 44) 207; Aharon Barak, 'The Role of a Supreme Court in a Democracy′ (2002) 53 Hastings LJ 1205, 1210.

77 See (n 57).

78 Hernandez (n 44) 203; Dannenbaum (n 10) 145-155;

Merely eliminating judicial nationality as an element of bench regulation would help to reverse these deleterious impacts, and the examples of the CCJ and the WTO-AB indicate that this can be done. The former has at times included two pairs of co-national judges simultaneously on a bench requiring just three judges to hear a case.[79] The latter is among the most successful international courts, despite regularly hearing cases with a putative imbalance of litigants' nationalities 'represented' on the bench.[80]

Eliminating nationality rules, however, would not be enough. As discussed above, the judge's national state has considerable power over her re-appointment and post-bench life, providing her a strong incentive to decide cases in a way that does not injure its interests, directly or indirectly. The elimination of existing nationality provisions would not exacerbate this nationality-based dependence, but nor would it remedy that genuine institutional harm. What is needed is reform of judicial appointments and better protection of post-bench judicial independence. These are the second and third steps forward for international judicial ethics.

One obvious reform would be to transfer nomination and election from states to an independent, professional body. International instruments insist already that states appoint domestic judges through transparent means, using strict criteria focused on their legal skills and not their political views.[81] Although the International Commission of Jurists finds 'no agreement in international law as to the method' or body in charge of appointing judges, it argues that it is 'preferable for [domestic] judges to be elected by their peers or by a body independent from the executive and the legislature.'[82] Similarly, the AU Guidelines 'encourage' the 'establishment of an independent body' for domestic appointments.[83] The European Charter on the Statute for Judges, the Universal Charter of the Judge, the Latimer House Guidelines, the Beijing Statement, and the COE Recommendation adopt similar positions – identifying an independent professional authority as the ideal, but allowing for deviations as long as there are alternative protective mechanisms.[84] The UN Human Rights Committee, for its part, urges states to 'establish an independent body to safeguard the independence of the judiciary and to supervise [judicial] appointment.'[85]

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79 Dannenbaum (n 10) 102.

80 Eric A Posner and John C Yoo, 'Judicial Independence in International Tribunals′ (2005) 93 Cal L Rev 1, 44-54.

81 UN Basic Principles (n 29) art 10; Universal Charter of the Judge (n 29) art 9; European Charter on the Statute for Judges (n 29) art 2.2; COE Recommendation No R(94)12 (n 29) art I(2); AU Principles (n 29) art A(4)(i-k).

82 International Commission of Jurists (n 61) 41, 45.

83 AU Principles (n 29) art A(4)(h).

84 European Charter on the Statute for Judges (n 29) arts 1.3-1.4, 3.1, 5.1, 7.1-7.2; COE Recommendation No R(94)12 (n 29) art I(2)(c); Universal Charter of the Judge (n 29) art 9; Latimer House Guidelines (n 29) art II(1); Beijing Statement (n 29) arts 18-26.

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There are already multiple relevant organizations that could perform this kind of role for international or regional courts. Global examples include the IDI, the International Law Commission, the International Law Association, and the International Bar Association.[86] Alternatively, the treaty underpinning the court in question could provide for a court-specific body along these lines. The CCJ, for example, is staffed by a nationality-blind Regional and Legal Services Commission.[87]

Ideally, the switch to appointment by independent commission would be combined with a transition to life appointments (with a mandatory retirement age).[88] The IDI Resolution, the ECtHR, and the ICC already provide for single fixed terms.[89] However, appointment to a life term with a mandatory retirement age would quell not just re-appointment pressures, but also pressures associated with appointment to another international court or a domestic career. The CCJ is exemplary in this respect, too, providing life tenure, with a mandatory retirement age of 72, extendable to 75.[90] A preference for life appointments in the Universal Charter of the Judge suggests this is not beyond the reaches of global consensus.[91]

Life appointments can, of course, enable a bad judge to stay in place for a long period. However, the combination of a professionalized appointments process and a credible system of internal sanctions, including re-assignment of tasks, salary reductions, suspension, and, ultimately, impeachment for ethical breaches would protect against this.[92] Alternatively, or in addition, appointments could be structured to allow a judicial appointments committee to confirm life appointments after a short judicial probation of three to five years.[93]

 Concluding Observations of the Human Rights Committee on Honduras UN Doc CCPR/C/HNd/CO/1 (13 December 2006) [16]. See also Concluding Observations of the Human Rights Committee on the United States of America UN Doc CCPR/C/79/Add.50; A/50/40 [288], [301].

86 Georges Abi-Saab, 'Presentation: Ensuring the Best Bench' in Peck and Lee (n 58) 166, 181 (advocating appointment by the IDI).

87 Agreement Establishing the Caribbean Court of Justice (14 February 2001) (CCJ Agreement) arts 5(1) and(3).

88 Dinah Shelton, 'Legal Norms to Promote the Independence and Accountability of International Tribunals' (2003) 2 Law & Practice Intl Courts & Tribunals 27, 38-39; Abi-Saab (n 86) 185; Meron (n 16) 362–63.

89 See (n 64).

90 CCJ Agreement (n 87) art 9; Protocol to the Agreement Establishing the Caribbean Court of Justice Relating to the Tenure of Office of Judges of the Court (2007). See also Kate Malleson, 'Promoting Judicial Independence in the International Courts' (2009) 58 Int'l & Comp L Q 671.

91 Universal Charter of the Judge (n 29) art 8.

92 The COE Recommendation, for example, suggests appointing 'a special competent body' to hold judges accountable for rule violations in any of these ways. COE Recommendation No R(94)12 (n 29) art VI(3). The ICC's Statute authorizes the Court to punish judges guilty of misconduct of a 'less serious nature' and of 'serious misconduct' with varying degrees of severity. ICC Statute (n 64) art 47.

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Combining the mandatory retirement with a minimum age for appointees would protect against bench ossification and the stunting of jurisprudential progress.

A third tranche of reform would limit the post-bench power of states over judges of their nationality by granting all international judges the right to permanent residency in any state party to the treaty or organization to which the court is attached. This 'global citizenship' would enable former international judges to live, work, and retire anywhere within the geographic reach of their erstwhile courts. Personal reasons would still draw many international judges home, but the security of a wide range of alternatives would empower judges to rule against their home states without taking on personal risk.

In the past, it has been suggested that judges be required to renounce their citizenship as part of the process of internationalizing their commitments and perspectives.[94] However the problem is one of independence, not impartiality. The solution is not to deny the judge's history or background, or to strip her of her nationality; it is instead to shield the judge from state power. By creating a multiplicity of possible post-bench destinations, 'global citizenship' would dilute the power of any one state or entity to threaten (explicitly or implicitly) any particular judge's post-bench career or the security of her retirement.

A fourth and final tranche of reforms would focus on accountability and redefining the judge's role vis-à-vis her peers. Currently, that role is framed as one of balancing and diluting her colleagues' national partialities with her own. Instead, judges should be holding one another professionally accountable for overcoming bias.

Accountability is a tricky thing in judicial ethics. Reappointment elections hold judges accountable externally, but, as discussed above, they threaten judicial independence. Internal accountability among peers on the bench avoids that threat, but it requires structure and direction if it is to serve as one of the primary means of holding judges to their ethical obligations.[95]

The duty of courts to issue publicly reasoned judgments and the check of publicly reasoned dissents already provide important elements of this structure on most courts, leveraging the importance to judges of their standing in the legal community, and empowering other members of the bench to affect that standing by exposing flawed or poorly argued positions.[96] Transnational networks of domestic judges have developed some basic

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 Although questioning probation under executive branch discretion in Concluding Observations of the Human Rights Committee on Peru, UN Doc. CCPR/C/79/Add.67 (25 July 1996) [14], the UN Human Rights Committee has endorsed it when run by an independent body. Concluding Observations of the Human Rights Committee on Lithuania, UN Doc. CCPR/C/79/Add.87 (18 November 1997) [16]. *See also* European Charter on the Statute for Judges (n 29) art 3.3.

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 Eberhard Paul Deutsch, An International Rule of Law (UP Virginia 1977) 30.

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 Distinguishing dimensions of accountability, see Arghya Sengupta, 'Judicial Accountability′ [2014] Public Law 245.

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 Hersch Lauterpacht, The Development of International Law by the International Court of Justice (2nd rev edn, Praeger 1958) 69; Meron (n 16) 360; Hernandez (n 44) 207; Brandeis Institute for International Judging, 'Integrity and Independence′ (n 44) 26.

standards by which judges might evaluate one another in this regard,[97] and others are instilled during the globalized professional legal education through which many international judges pass on the way to the bench.[98] These mechanisms notwithstanding, international judges' efficacy in holding one another accountable for ethical performance could be augmented by structuring the deliberative process, elaborating codes of ethics, providing for continuing legal and ethical education, and empowering professional judicial organizations.

Communal deliberation and drafting can create a sense of professional loyalty among members of the bench, with each seeking to meet the expectations of the others and to uphold collectively the professional standards of the institution.[99] Commendably in this respect, the ICJ has promulgated a formal deliberative structure that involves each judge drawing up, presenting, and defending her notes on the key questions prior to the assignment of a drafting committee, whose drafts are then subject to further individual and collective review.[100] This system of internal public reasoning within the court ensures that each judge is held to account and provided an incentive to reflect on and overcome her own biases, so as not to disappoint her peers in this forum.[101] Although the ICJ process is not without its critics, it has the virtue of recognizing and exploiting judges' capacity to serve as the guardians of one another's ethical accountability.[102]

Normative diversity, however, means that merely empowering judges through such processes would be inadequate. To hold one another to account, judges need rich, common standards on which to ground the interaction. This militates in favor of more specific codes and a more robust system of ethical development.

The prior difficulty of reaching agreement in a context of diversity cannot provide a complete explanation of the vagueness of contemporary international judicial ethics. The

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97 Terhechte (n 2) 502.

98 Terris, Romano, and Swigart found that around one third of the international judges serving in 2006 had received legal education from *both* a home institution *and* one of a handful of globally dominant institutions in the United Kingdom and the United States. Daniel Terris, Cesare P.R. Romano, and Leigh Swigart, 'Toward a Community of International Judges,' (2008) 30 Loyola LA Intl & Comp LR 419, 426. , Along these lines, former ICJ and IACtHR judge Thomas Buergenthal reported in an interview, 'most of my colleagues have studied international law not only in their countries but also in the major teaching centers of our field in the world.' See also Terris et al. (n 17) 17–18.

99 EW Thomas, The Judicial Process: Realism, Pragmatism, Practical Reasoning and Principles (CUP 2005) 246-47; Hernandez (n 44) 193; Robert Jennings, 'The Collegiate Responsibility and the Authority of the International Court of Justice' in Yoram Dinstein (ed.), International Law at a Time of Perplexity (Martinus Nijhofff 1989) 343, 345-46; Gilbert Guillaume, 'Some Thoughts on the Independence of Judges vis-à-vis States′(2003) 2 J L & Practice of Intl Courts & Tribunals 163, 168.

100 International Court of Justice, Resolution Concerning the Internal Judicial Practice of the Court (adopted 12 April 1976); Robert Y Jennings, 'The Role of the International Court of Justice′(1997) 68 Brit YB Intl L 1, 22-28.

101 Thomas (n 99) 244; Jennings (n 99) 24 (on judges changing their mind after the exchange of notes).

102 On criticism of the ICJ process, see, for example, Terris et al. (n 17) 35, 37, 58.

Bangalore Principles go into significantly more detail than does any international judicial code, despite being agreed by a globally diverse range of domestic judges.[103] Moreover, the function of the *details* of many rules of judicial ethics is often to set the expectations of the parties, counsel, and judges, rather than to instantiate a deeper moral truth. As such, there may well be more room for agreement in this respect than might be expected.

Part of the mission, then, for the next stage of development in this realm must be to augment existing rules so that they provide greater practical guidance. In addition to drafting more detailed texts, this would entail establishing advisory international judicial ethics commissions to elaborate on vague textual provisions and developing systems of continuing legal education in which judges would have a chance to develop and strengthen their mutual expectations.[104] International instruments of domestic judicial ethics are again instructive. The AU Principles and Guidelines urge states to establish 'specialised institutions for the education and training of judicial officials and encourage collaboration amongst such institutions in countries in the region and throughout Africa.'[105] The Bangalore Principles, COE Recommendation, European Charter on the Statute for Judges, and the Latimer House Guidelines take similar positions.[106] Codes for international judges lag behind. The ECtHR, ICJ, and CCJ texts require only that judges should continually develop their professional skills, but provide no guidance or institutional context for that endeavor.[107] The CJEU Code provides for a Consultative Committee composed of the three longest-serving CJEU judges to ensure the proper application of the code (supplementing enforcement by the Court itself), but does not tie this to legal education or a system of advisory opinions.[108]

A final element of empowering judges to hold one another accountable would be to bolster judicial professional organizations.[109] Most codes on domestic judicial ethics recognize professional organizations only as advocates for judicial rights, not as potential guardians of ethical accountability.[110] Codes focused on international judges say even less on

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103 Among other things, the Bangalore Principles regulate the use of judges' residences, judicial appearances at public hearings, and judges' service as members of government commissions. Bangalore Principles (n 29) art 4.

104 Louise Arbour, '*Education, Ethics, and Governance for an International Judge'* Keynote address of the North American Judicial Colloquium (6 November 2008); Hernandez (n 44) 192.

105 AU Principles (n 29) art B(b).

106 Bangalore Principles, (n 29) art 6.3; COE Recommendation No R(94)12 (n 29) art III(1)(a); European Charter on the Statute for Judges (n 29) art 2.3, 4.4; Latimer House Guidelines (n 29) art II(3); Recommendation CM/Rec (2010) 12 (n 8) arts 56-57 (please clarify which source in note 8 this citation pertains to).

107 ECtHR Resolution (n 30) art IV. See also ICC Code (n 8) art 7(2); CCJ Code (n 8) art 6.3-6.4.

108 CJEU Code (n 30) art 7.

109 See Terhechte (n 2) 513.

110 European Charter on the Statute for Judges (n 29) arts 1.7-1.8; COE Recommendation No R(94)12 (n 29) art IV; Universal Charter of the Judge (n 29) art 12; CCJ Code (n 8) art. 1.20; UN Basic Principles (n 29) art 9; AU Principles (n 29) art A(4)(t); Beijing Statement (n 29) art 9.

this matter, since no such organizations exist at that level.[111] This is a missed opportunity. Professional organizations for international judges should be encouraged as fora for the development of collective professional consciousness.[112] Moreover, codes should seek to harness such organizations by encouraging them to honor ethical excellence and to host continuing education.

6. Realism and aspiration

Ultimately, both global codes and court-specific instruments have made commendable strides forward in the early twenty-first century. However, there is much still to be done. Most urgent among those tasks are: eliminating nationality rules, professionalizing the appointments process including through independent appointments commissions, introducing life tenure, globalizing the judge's post-bench options, and empowering judges to hold one another accountable by providing more detailed codes, creating advisory commissions, structuring deliberation, developing continuing education, and empowering professional organizations.

Looming in the background is the worry that such an aspirational agenda cannot gain state assent. However, existing courts, most notably the CCJ and the WTO-AB, show that these proposals are not utopian. Eschewing nationality regulation, and at times hosting two pairs of co-nationals on its seven-judge bench, the CCJ uses an impressively independent and professional system to appoint judges to life terms. The WTO-AB, meanwhile, is among the most effective international courts despite having heard numerous high profile cases with a national of only one of the parties on the bench. CJEU judges (like all EU citizens) already have residency rights in all states of their region.

Immediate practicality aside, the shape of codes of judicial ethics should be determined ultimately by their function. Codes like the Burgh House Principles are largely unenforceable. Their role is to set the standard against which court structures and judicial behavior can be assessed. They can identify second- and third-best alternatives for situations in which political factors preclude the optimal approach.[113] They do a disservice if they set as the gold standard an apologetic threshold that has already been compromised to accommodate powerful interests.

Ultimately, state buy-in can be pursued either by inviting state influence over the judicial function, or by insulating courts sufficiently to generate trust in their independence, impartiality, and integrity. The former sacrifices the court's function and plays to its comparative weaknesses. The latter plays to the court's strengths by seeking to motivate compliance through subjects' respect for the rule of law. Neither grants international courts the automatic efficacy enjoyed by many domestic courts, but the latter has the virtues of being true to the international judicial project and of exposing non-compliance for what it is,

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111 Schabas (n 6) 197.

112 Arbour (n 104).

113 Compare (n 84).

rather than gifting non-compliant states the tools needed to dismiss the court's normative authority. Codes of ethics ought to demand the latter path, even while recognizing that it is a long-term process.