THE OXFORD HANDBOOK OF
INTERNATIONAL
ADJUDICATION
1 Conceptualizing Judicial Ethics in International Adjudication

Judicial ethics—or the rules that seek to ensure the personal independence, impartiality, and diligence of adjudicators by guiding their judicial and extra-judicial

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conduct—in international adjudication is a relatively young and still evolving field. While standards of judicial ethics at the national and transnational levels are old and well established, their applicability at the international level is not automatic because of fundamental differences in context. Although it may be tempting to draw from domestic rules on judicial conduct in order to fill this gap, there are structural differences between domestic and international adjudication to consider. The standards developed for the domestic sphere can hardly be transferred lock, stock, and barrel to international adjudication, which is different in nature, composition and function. Thus, international courts and tribunals are confronted with the challenge of developing their own judicial culture. This culture must satisfy universal expectations of fairness and propriety.

International judges are a broad array of different—and not exclusively legal—professionals, such as academics, legal advisers, diplomats, judges, counsels, civil servants, and others, who, unlike most of their domestic counterparts, have only a limited term of office that either ends on or has to be renewed after expiry. This makes it more difficult to establish a common culture of independence among judges. For most, being a member of an international court is a parenthesis in a different career. Previous and subsequent professional activities may affect the individual’s appearance of independence. Many might have expressed opinions on controversial issues before they were appointed judges. The fact that the pool of qualified candidates for judicial office is rather limited further aggravates the problem.

1 For a discussion of the evolving ethical standards for counsel in international adjudication, see, in this handbook, Shoeger and Wood, Ch. 29, at section 2.
3 The need to modify principles applicable to national tribunals for use in international courts was stressed as early as during the drafting of the Statute of the Permanent Court of Justice. A Fachiri, The Permanent Court of International Justice (2nd edn, Oxford University Press 1932) 56, cited by C Brown, “The Evolution and Application of Rules concerning Independence of the International Judiciary” (2003) 2 LPICT 63, 82.
5 See, in this handbook, Swigart and Terris, Ch. 28, at section 2.4.
7 Some international judges are even appointed only part-time, ad hoc, or ad litem. For more on this issue, see R. Mackenzie and P. Sands, “International Courts and Tribunals and the Independence of the International Judge” (2003) 44 Harv. Int’l. L. J. 271, 283.
8 For a discussion of the impact of professional backgrounds on judicial behavior see, in this handbook, Voeten, Ch. 25, at section 3.3.
Another difference from domestic courts is that in international adjudication, sovereign states retain control over the establishment and the scope of jurisdiction of international courts and judicial selection.\footnote{Mégret, note 9, at 32; See, in this handbook, Ginsburg, Ch. 22, at section 3.} In a legal system in which judges are selected by those same states that might later become parties to a dispute, independence and impartiality might have a different meaning.\footnote{This issue is particularly relevant in international arbitration. It has repeatedly arisen before the Iran–US Claims Tribunal. Brown, note 3, at 93.} This is even more so with respect to ad hoc judges.\footnote{See ICJ, Practice Direction VII (2009); N Valticos, “Pratique et Étique d’un Juge ‘ad hoc’ à la Court International de Justice” in N Ando, E Mc Whinney, and R Wolfrum (eds), Liber Amicorum Judge Shigeru Oda (The Hague: Kluwer Law International 2002) 107.}

Not only is it difficult to develop a common standard for judges from various jurisdictions with different legal training and diverse cultural and professional understandings and habits,\footnote{For a discussion of the different national and cultural backgrounds of international judges and their impact on perceptions of impartiality and independence, see L Swigart, “The ‘National Judge’: Some Reflections on Diversity in International Courts and Tribunals” (2011–2012) 42 McGeorge L. Rev. 223; Terris, note 6, at 192. According to Detlev Vagts, the more countries and cultures that are involved, the more disputes about standards of behavior arise. D Vagts, “The International Legal Profession” (1996) 90 AJIL 250.} it is all the more difficult to articulate standards that are globally acceptable. Can ethical standards be developed for the entire range of international courts and tribunals?\footnote{Y Shany, “Squaring the Circle? Independence and Impartiality of Party-Appointed Adjudicators in International Legal Proceedings” (2008) 30 LoyLA Int'l & Comp. L. Rev. 473.} Is it possible to articulate uniform rules that are valid for inter-state litigation, international criminal prosecution, human rights litigation, trade disputes, and inter-state and mixed arbitration?

This chapter gives an overview of the relevant legal rules that have been developed over time in various fields of international adjudication. The analysis will focus on the three key values that must guide judicial conduct: independence, impartiality, and diligence.

\section*{2 Normative Standards: An Overview}

Early rules of judicial ethics date back to the origins of international adjudication.\footnote{For more on the historical developments since 1899, see Brown, note 3, at 66–86.} The 1907 Convention on the Pacific Settlement of International Disputes provided that members of the Permanent Court of Arbitration (PCA) were prevented from acting as agents, counsel, or advocates except on behalf of the power...
which appointed them.\textsuperscript{17} Twelve years later, the Statute of the Permanent Court of International Justice (PCIJ) stipulated that the court was to be composed of independent judges.\textsuperscript{18} These judges had to make solemn declarations in open court that they would exercise their powers “impartially and conscientiously.”\textsuperscript{19} However, what was specifically required of them was largely left undefined. Only provisions on dismissal, recusal, and the prohibition of incompatible functions were articulated.\textsuperscript{20}

These scant provisions were cut and pasted into the Statute of the ICJ,\textsuperscript{21} which was later complemented by the Rules of Court.\textsuperscript{22} The provisions of the PCIJ and ICJ were eventually ported to the relevant conventions, statutes, and rules of procedure of other international courts, including the ITLOS,\textsuperscript{23} the dispute settlement system of the World Trade Organization (WTO),\textsuperscript{24} ICSID tribunals,\textsuperscript{25} Iran–US Claims Tribunal,\textsuperscript{26} European Court of Human Rights (ECtHR),\textsuperscript{27} Inter-American Court of Human Rights (IACtHR),\textsuperscript{28} and Court of Justice of the European Union (CJEU).\textsuperscript{29}

As Dinah Shelton noted in her study on legal norms on the independence of international tribunals, in recent decades there has been an increasing trend to further specify the rules governing judicial ethics in international adjudication.\textsuperscript{30} Some institutions, such as the International Criminal Court (ICC), ECtHR, European Court of Justice (ECJ), Caribbean Court of Justice (CCJ), and WTO, have complemented their founding documents by adopting codes of ethics.\textsuperscript{31} The codes seek to specify the obligations inherent in judicial office, improve transparency, and promote public confidence in adjudication,\textsuperscript{32} thus reducing the need for outside

\textsuperscript{17} Convention on the Pacific Settlement of International Dispute of 1907, Art. 62.
\textsuperscript{18} PCIJ Statute, Art. 2.
\textsuperscript{19} PCIJ Statute, Art. 20.
\textsuperscript{20} PCIJ Statute, Arts 16, 17, 18, 24. For a discussion of the interpretation of these provisions by the PCIJ, see Brown, note 3, at 78–81.
\textsuperscript{21} ICJ Statute, Arts 16.1, 17.1/2, 18.1.
\textsuperscript{22} ICJ Rules of Court, Art. 24; ICJ Practice Direction VII; compare to, for after office conduct, ICJ Practice Direction VIII (for ad hoc judges only). See also Brown, note 3, at 83–4.
\textsuperscript{23} ITLOS Statute, Arts 2.1, 5.1, 7.8.1, 9, 11, 27 (Annex VI UNCLOS); ITLOS Rules of Court, Art. 5.1.
\textsuperscript{24} WTO Dispute Settlement Understanding, Art. 8.2, 17–18; WTO DSU Preamble Rules of Conduct; WTO DSU Rules of Conduct, II.1, VII.1/2, VIII; Working Procedures for Appellate Review (2010), Arts 2.2, 8–11, 13, 19; Rules of conduct for the understanding on rules and procedures governing the settlement of disputes, Governing Principle II.
\textsuperscript{25} Washington Convention, Arts 14.1, 40, 57, 63.a.
\textsuperscript{27} ECHR, Arts 21.3, 23.4, 40.1/2, ECtHR Rules of Court, Rules 3.1, 7, 28.2.d/e, 33.1–5, 63.1–3; ECHR Resolution on Judicial Ethics (June 23, 2008) Principles I, III–VI.
\textsuperscript{28} American Convention on Human Rights (ACHR), Arts 52, 71; IACtHR Statute, Arts 4, 11, 18, 19; IACtHR Rules of Procedure, Art. 21.
\textsuperscript{32} N Vajic, “Some Remarks Linked to the Independence of International Judges and the Observance of Ethical Rules in the European Court of Human Rights” in C Hohmann-Dennhardt, P Masuch,
control that might be detrimental to judicial independence. On the other hand, ethical guidelines have been criticized as vague and leaving enforcement largely to the judges themselves.\textsuperscript{33} Most ethics rules are not binding but are mere guidelines. Certain areas are still left largely unregulated.\textsuperscript{34} Be that as it may, ultimately codification can only go so far. Ethics transcend normative rules and codes.\textsuperscript{35} They are a matter of judicial culture and character, which is equally significant for the purpose of nurturing integrity and fairness.\textsuperscript{36} As Judge Buergenthal of the ICJ put it:

Judicial ethics are not matters strictly for hard and fast rules—I doubt that they can ever be exhaustively defined—they are matters of perception and of sensibility to appearances that courts must continuously keep in mind to preserve their legitimacy.\textsuperscript{37}

3 Basic Values of Judicial Ethics and their Design

Judicial ethics are concerned with various aspects of judicial behavior, the most salient of which are independence, impartiality, and diligence.

3.1 Independence

Judicial independence does not mandate absolute neutrality. Judges’ personal backgrounds cannot be ignored.\textsuperscript{38} All that is asked from judges is that they maintain an

and M Villinger (eds), Grundrechte und Solidarität, Durchsetzung und Verfahren, Festschrift für Renate Jaeger (Kehl am Rhein: N. P. Engel Verlag 2011) 183.


\textsuperscript{34} Among the open issues is for example the conduct of judges vis-à-vis counsel. Terris, note 6, at 194.

\textsuperscript{35} Terris, note 6, at 207.


\textsuperscript{37} Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Dissenting Opinion of Judge Buergenthal) [2004] ICJ Rep. 3, at 9.

\textsuperscript{38} K Llewellyn, “A Realistic Jurisprudence—The Next Step” (1930) 30 Colum. L. Rev. 431. For more on the question of to what degree international judges are and may be influenced by their own perceptions, see, Terris, note 6 at 207.
open mind and exercise a certain degree of detachment. This applies to individual judges and to the court as a whole.

Almost all founding documents of international courts either require judges to be independent or demand that judges perform their duties independently. Judges are requested not to engage in activities incompatible with their independence. The CCJ Code is most elaborate in defining the meaning of independence. It specifies that judges "shall exercise the judicial function independently on the basis of the judge's assessment of the facts and in accordance with a conscientious understanding of the law, free of any extraneous influences, inducements, pressures, threats or interference, direct or indirect, from any quarter or for any reason." For this purpose judges shall also be independent of their colleagues and preserve the institutional and operational independence of the court.

The question of whether and to what extent international adjudicators may engage in extra-judicial activities has been a thorny issue, especially in the case of those international courts where judges serve only part-time. On the one hand, it is necessary to recruit judges who are part of and have a solid understanding of society and the international community. On the other hand, their involvement in extra-judicial activities should limit neither their working capacity nor their independence and impartiality.

Usually rules of conduct distinguish between outside occupation and other extra-judicial activities that may or may not be remunerated. Some statutes provide that members of the court may not exercise any political or administrative function, or engage in any other occupation of a professional nature. Yet, outside activities that are not permanent in nature tend to be less regulated. For example, whether or not...
not judges of the ICJ should be able to serve as arbitrators has been discussed for some time now, without reaching a firm consensus.\textsuperscript{48} It is not a moot discussion. Not only has the case load of the ICJ increased in recent years so that additional activities outside the court may have a detrimental effect on the court’s ability to deal with cases within a reasonable time, but the party appointing a judge as an arbitrator might someday become a party to a dispute before the court.\textsuperscript{49}

The question of to what extent extra-judicial activities might affect international judges is more complex in the case of international criminal courts and human rights litigation. There, pressure comes not only from states but also from a range of other actors. Therefore, the incompatibility provision of the Rome Statute of the ICC is more comprehensive than those of courts hearing inter-state disputes. It prohibits any activity—not just occupation—that is likely to interfere with the judicial functions or to affect confidence in the judges’ independence.\textsuperscript{50} This includes the exercise of political functions. Likewise, IACtHR judges are not allowed to take other positions if those activities would affect their independence or impartiality.\textsuperscript{51} Judicial office is incompatible with executive office and office in international organizations.\textsuperscript{52} ECtHR judges may not engage “in any activity which is incompatible with their independence, impartiality or with the demands of a full-time office.”\textsuperscript{53} Moreover, they shall refrain from “any activity or membership of an association, and avoid any situation, that may affect confidence in their independence.” Arguably this comprises political and administrative functions that are explicitly ruled out for judges of the ICJ and the ITLOS.

The concrete scope of incompatibility for extra-judicial activities varies among international adjudicative bodies, reflecting the different composition of the courts. While some courts are composed of full-time judges, others are not. For example, while judges of the ICJ and full-time judges of the ICC shall not engage during their terms of office in any other occupations,\textsuperscript{54} ITLOS judges, who are only occupied part-time, may continue any professorships. The ECtHR, whose judges are full-time, also does not entirely rule out other professional activities. The judges

\textsuperscript{48} Terris, note 6, at 201; Couvreur, note 47, at 368–9.
\textsuperscript{49} Mackenzie and Sands, note 7, at 282–3.
\textsuperscript{50} Rome Statute, Art. 40.2. See also ICC Code of Judicial Ethics, Art. 3.2. The ICC’s provision has been criticized as too vague, leaving room for errors. Shetreet, note 46, at 160.
\textsuperscript{51} ACHR, Art. 71; IACtHR Statute, Art. 18.1.
\textsuperscript{52} IACtHR Statute, Art. 18.1.
\textsuperscript{53} ECtHR, Art. 21.3. For a discussion of the court’s practice see Caflisch, note 46, at 172.
\textsuperscript{54} ICJ Statute, Art. 16.1; Rome Statute, Art. 40.3.
are merely prevented from extra-judicial activities that are incompatible with the demands of their judicial duties.\textsuperscript{55}

Members of the ECJ may also undertake activities that are not considered detrimental to their independence, such as academic work, teaching activities, conferences, seminars, or symposia.\textsuperscript{56} But the remuneration for these activities may not be out of the ordinary.\textsuperscript{57} Moreover such external activities may not interfere with the judges’ obligation to devote themselves fully to the performance of their judicial duties.\textsuperscript{58} They may also be authorized to engage in non-profit-making associations in cultural, artistic, social, sporting, or charitable fields—unless they compromise their independence.\textsuperscript{59}

In most courts, the court itself decides on the compatibility of its judges’ extra-judicial activities and judicial functions.\textsuperscript{60} The “Burgh House Principles On The Independence Of The International Judiciary,” which were articulated by the Study Group of the International Law Association (ILA) on the Practice and Procedure of International Courts and Tribunals in association with the Project on International Courts and Tribunals, call for each court to establish an appropriate mechanism to guide judges on the issue of extra-judicial activities.\textsuperscript{61} Outright prohibitions on specific extra-judicial activities are exceptional. Most courts set independence, impartiality, and diligence as the relevant general standards, and leave the application of these standards to the particular situation at hand. Though such a case-by-case approach may be detrimental to legal certainty, it is ultimately preferable to sweeping limitations that insulate judges from public life and are thus not in the interest of meaningful international adjudication.\textsuperscript{62}

Finally, in order to avoid later commitments affecting judges during their term of office, there has been a trend to provide also for post-service limitations.\textsuperscript{63} These provisions are aimed at preventing serving judges from being influenced by their former peers. Special knowledge regarding pending cases could give former judges an unwarranted benefit if they become counsel after the expiration of their terms of

\textsuperscript{55} ECHR, Art. 31.3. For the rule governing ad hoc judges, see Rules of the Court, Rule 28.2.c.

\textsuperscript{56} ECJ Code of Conduct, Art. 5.2, 5.3. See also CCJ Code of Conduct, Principle I.

\textsuperscript{57} ECJ Code of Conduct, Art. 5.2.


\textsuperscript{59} ECJ Code of Conduct, Art. 5.3.

\textsuperscript{60} See e.g., ICJ Statute, Art. 16.2; ITLOS Statute, Art. 7.3; ECHR, Art. 21.3. The main exception is the ECJ, where extra-judicial occupation, whether gainful or not, is impermissible for ECJ judges unless exemption is exceptionally granted by the European Council, acting by a simple majority. Statute of the ECJ, Protocol 3 TFEU, Art. 4. For observations on the lack of practice concerning this provision, see, Brown, note 3, at 88.

\textsuperscript{61} Burgh House Principles on The Independence of The International Judiciary, Principle 8.3.

\textsuperscript{62} Brubaker, note 10, at 145–6.

\textsuperscript{63} See also Terris, note 6, at 202.
office. Practice Direction VIII of the ICJ asks parties to refrain from designating as agent, counsel, or advocate a person who in the preceding three years was a judge of the court, including an ad hoc judge.\textsuperscript{64} Though the direction is not addressed to the judges but to parties to a dispute, it is nevertheless relevant for judicial ethics. In a similar vein, the ECJ’s Code provides that judges cannot act as representatives of parties before the European courts for a period of three years after the end of their terms of office.\textsuperscript{65} In the case of the ECtHR, the cooling-off period for judges is only two years.\textsuperscript{66}

These provisions are the outcome of a balancing approach that weighs judicial independence against judges’ legitimate interest in continuing their professional lives after the end of their judicial tenures. The Burgh House Principles, which were intended to set out a minimum standard generally applicable to international judges, go even further in establishing post-office limitations. They also regulate other forms of involvement with prior parties to a dispute. While in office, judges are called upon not to seek or accept any future employment or benefit from any of the parties to a case on which they sit,\textsuperscript{67} and to exercise appropriate caution when accepting employment, appointment, or benefit after the end of their judicial terms.\textsuperscript{68}

### 3.2 Impartiality

Judicial independence and impartiality are closely related and cannot easily be distinguished. They are often mentioned in the same breath.\textsuperscript{69} Most provisions requiring international judges to be independent also provide for their impartiality.\textsuperscript{70} This is also true of arbitral tribunals.\textsuperscript{71} However, there is a crucial difference between the two standards. Independence addresses external forms of influence on adjudication, including inducements, pressures, threats, and direct or indirect interference with the decision-making process.\textsuperscript{72} Impartiality concerns the internal predispositions of the adjudicator, with respect to the matter in dispute, the adjudicator’s relationship to the parties, and the parties’ positions.

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\textsuperscript{64} See also Burgh House Principles, Principle 13.3.
\textsuperscript{65} ECJ Code of Conduct, Art. 6.2. See also ECJ Statute, Art. 4; ECJ Rules of Procedure, Art. 3.2.
\textsuperscript{66} Rules of the Court, Rule 4.2. \textsuperscript{67} Burgh House Principles, Principle 13.1.
\textsuperscript{68} Burgh House Principles, Principle 13.4.
\textsuperscript{69} See e.g., ICTY, Art. 13; ECHR, Art. 21.3; WTO DSU Rules of Conduct II.1; CCJ Code of Conduct, Principle II.2.2.
\textsuperscript{70} ICTY, Art. 13; ECHR, Art. 21.3; WTO DSU Rules of Conduct II.1; CCJ Code of Conduct, Principle II.2.2.
\textsuperscript{71} International Chamber of Commerce Rules, Art. 22.4, UNCITRAL Rules, Art. 6.7; SCC Rules, § 19.2, LCIA Rules, § 5.2.
\textsuperscript{72} See e.g., CCJ Code of Conduct, Principle II.2.1; The Burgh House Principles, Principle 1.1.
Impartiality forbids any bias, personal prejudice, and lopsidedness. Typically, *ex parte* communications are impermissible. Pursuant to Principle 12.1 of the Burgh House Principles, judges must exercise appropriate caution in their personal contacts with parties and all other persons associated with a pending case in order to avoid jeopardizing their impartiality. The WTO Dispute Settlement Understanding Rules and Procedures Art. 18.1 restricts *ex parte* communications to other bodies and forbids such communications between a panel and the Appellate Body.

Most international courts and tribunals require their judges to avoid conflicts of interest. If conflicts arise, judges are expected to recuse themselves. Not only conflicts of interest should be avoided, but also the mere perception of a conflict of interest. At the ECtHR, a judge may not take part in the consideration of a case if his or her independence or impartiality may *legitimately* be called into doubt.

In an effort to specify situations giving rise to a conflict of interest, or perception of conflict, most courts provide, for example, that judges may not act as agent, counsel, or advocate in any case. Nor may they participate in the decision of a case in which they have previously taken part. The ICC Rules of Procedure and Evidence go to greater lengths. So does the CCJ.

The problem is approached in rather general terms in arbitration. The IBA Guidelines specify situations giving rise to justifiable doubts regarding an arbitrator’s impartiality, including financial or personal interests in the matter at stake. They also take into consideration prior relations between an arbitrator and a party to a dispute beyond the particular case at issue. However, it is controversial whether these guidelines are applicable only in commercial arbitration or also in inter-state arbitration. Their applicability in disputes between states was denied by...
the UNCLOS Arbitral Tribunal in *Mauritius v. UK*. In that case, the court considered the prior engagement of one of the arbitrators as counsel for one of the parties to the dispute. It eventually found that this prior engagement did not undermine the arbitrator’s perceived or actual impartiality.

Whenever a conflict of interest and/or perceived bias exists, judges are called upon to seek advice from their peers and from the president of the court in order to smooth out differences among national standards on impartiality. External advice from the bar may also be beneficial. While several decisions by international courts on disqualification have further elaborated the meaning of impartiality, in the end a need remains for generally framed statutory provisions that are open for non-standard situations. Their meaning should be specified and regularly updated in the code of ethics.

Impartiality might also be impinged whenever judges hold or express opinions. But this raises the question of to what extent judges should be limited in the exercise of the fundamental human right to freedom of speech and association. The ECJ’s Code of Conduct, Art. 1.3 provides that judges shall generally refrain from making statements outside the court that might harm the reputation of the court, or that might be interpreted as “the adoption of a position by the Court on issues falling outside its institutional role.” The Resolution on Judicial Ethics of the ECtHR (Art. VI) asks judges to exercise their freedom of expression “in a manner compatible with the dignity of their office.” Judges are to refrain from making public statements or remarks undermining the authority of the court or giving reasonable doubt as to their impartiality. Similar wording can be found in the Code of Judicial Ethics of the ICC and in the Burgh House Principles.

Most standards distinguish between comments on pending cases, which are generally impermissible, and participation in general public debate. The latter

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88 Brubaker advocates a case-by-case determination of a conflict of interest instead of framing general rules on outside activities. Brubaker, note 10, at 145.


90 Brandeis University, note 88.


92 ICC Code of Judicial Ethics, Art. 9.2; CCJ Code of Conduct, Principle IV.4.4. For a more general rule on extrajudicial comments on judgments and subjects likely to come before the court, see Burgh House Principles, Principle 7.3.
is permissible in principle because it often does not jeopardize the impartiality of the court. Thus, a judge is disqualified if an expression of opinion could objectively, adversely affect that judge’s impartiality.\textsuperscript{92} To determine the appearance of bias, the standard is the perspective of a reasonable, fair-minded, and informed person.\textsuperscript{93} While public speech on non-legal issues and engagement in historical, educational, cultural, sporting, or similar social and recreational activities are usually not thought to affect judicial impartiality, the situation is different with respect to political issues.\textsuperscript{94} Most courts prohibit judges from exercising political functions. The Caribbean Code even asks judges to refrain from membership in political parties, attendance at political gatherings, and contributions to political campaigns.\textsuperscript{95} Judges are generally prevented from engaging in political activity.\textsuperscript{96}

With respect to judges’ freedom of association, the most far-reaching limitation might be at the ECtHR, where judges are barred from “any activity or membership of an association.”\textsuperscript{97} It is not clear whether this also includes associations representing the interests of judges in promoting judicial independence. At the CCJ, an exception is made for professional organizations.\textsuperscript{98} The court only asks judges to refrain from such membership if confidence in the judge’s impartiality is actually jeopardized.\textsuperscript{99}

Somewhat related is the issue of judges’ public visibility. Observers disagree whether judges should seek to attract public attention to their work and how they should interact with the media.\textsuperscript{100} Some judges have argued that they should speak only through judgments, while others recognize a judicial role in educating the public.\textsuperscript{101} Public visibility, however, may give rise to public pressure, which can be detrimental to the independence and impartiality of international courts.\textsuperscript{102} Daniel Terris, Cesare Romano, and Leigh Swigart have argued that international judges, unlike their national counterparts, should seek more public attention and explain the principles of international justice in order to enhance transparency and attain public confidence in—and recognition for—international adjudication.\textsuperscript{103} International judges, they say, carry a responsibility to the long-term success of their courts and thus should cautiously promote their institutions.\textsuperscript{104} How this can be done without jeopardizing the independence and impartiality of the court, as well as its ability to

\textsuperscript{92} ICC Rules of Procedure and Evidence, Rule 34.1.d. Similar terminology is used by the ECtHR Rules of Court, see Rule 28.2.d.
\textsuperscript{93} See CCJ Code of Conduct, Principles I.1.6, I.1.7.
\textsuperscript{94} See e.g., CCJ Code of Conduct, Principle I.1.13.
\textsuperscript{95} CCJ Code of Conduct, Principle I.1.8.  \textsuperscript{96} CCJ Code of Conduct, Principle I.1.7.
\textsuperscript{97} ECtHR’s Resolution on Judicial Ethics, Principle I.
\textsuperscript{98} CCJ Code of Conduct, Principle I.1.20.
\textsuperscript{99} CCJ Code of Conduct, Principle I.1.6.  \textsuperscript{100} Brandeis University, note 2, at 245.
\textsuperscript{101} Brandeis University, note 88, at 22–3; Brandeis University, note 2, at 241. See also Terris, note 6, at 200; Terris, Romano, and Swigart, note 36, at 459–61.
\textsuperscript{102} Terris, Romano, and Swigart, note 36, at 457.
\textsuperscript{103} Terris, note 6, at 210; see also Shetreet, note 46, at 132.
cope with its case load is still an unsettled matter that will require further attention in the future.105

All in all, the standards for impartial behavior are rather broad in scope and affect judges not only in their professional but also in their private lives. While judges are called upon to recuse themselves from a case if impartiality is at issue, it is debatable whether perception of lack of impartiality should necessarily give rise to a judge's disqualification—especially if he or she refuses to resign.106

The requirements for disqualification vary among international courts, as evidenced by Joseph R. Brubaker's study on issue conflicts.107 The ICJ has been reluctant to disqualify judges on the basis of prior activities and general statements. An exception occurs when a judge has previously taken part as counsel, judge, or in any other capacity in the case. The court has given a narrow reading to this provision, requiring involvement in the particular legal dispute for disqualification.108 For example, in its Advisory Opinion on *Legal Consequences for States of the Continued Presence of South Africa in Namibia*, the court considered the former capacity of three judges as representatives of their government in UN organs. They had been generally dealing with matters concerning South West Africa. The court held that this involvement did not amount to a participation in the case at issue and therefore did not accede to the objections raised by South Africa.109

A similar decision was taken by the majority of the court in 2004 when Israel challenged Judge Elaraby's participation in the advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*. Neither his earlier capacity as a diplomatic representative of his country, nor a controversial newspaper interview about his views on Israel, was considered a sufficient basis for excluding him from participating in the case.110 According to the court's interpretation, former counsels are disqualified only if their service relates to the case in dispute. Judge Elaraby's statements in the interview were considered general in nature as opposed to directly related to the specific question posed in the Wall opinion.111 Judge Buergenthal dissented and criticized the narrow approach of the court.112 He pleaded for a broader basis for disqualification, arguing that all courts, including the ICJ, must be guided by the goal of avoiding the impression

105 Brandeis University, note 2, at 245.
106 Compare the majority opinion in *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, note 86, with the dissenting opinion by Judge Buergenthal, at 9 et seq.
107 Brubaker, note 10.
108 Couvreur, note 47, at 385.
110 *Legal Consequences of the Construction of a Wall*, note 86, at para. 5.
111 *Legal Consequences of the Construction of a Wall*, note 86, at para. 5.
that a judge will not be able to consider a case in a fair and impartial manner. In his view, Judge Elaraby’s interview had created an “appearance of bias” that required the court to preclude his participation in the proceedings.\textsuperscript{113} Regrettably, the majority did not agree with him. A few years later, the UNCLOS Arbitral Tribunal concurred with the ICJ majority’s narrow construction of the grounds of disqualification.\textsuperscript{114}

International human rights courts and international criminal courts have adopted a stricter approach.\textsuperscript{115} Article 41.2 of the Rome Statute provides that a judge of the ICC shall not participate in any case in which his or her impartiality might reasonably be doubted on any ground. One of the grounds specified is if a judge has previously been involved in the case before the court. However, there may also be other instances that lack impartiality and therefore preclude a judge from participating in a case.\textsuperscript{116} For example, a judge may not take part in the consideration of a case if he or she has publicly expressed opinions that are “objectively capable of adversely affecting his or her impartiality.”\textsuperscript{117}

The ICTY elaborated on the standards of impartiality in international criminal proceedings in \textit{Prosecutor v. Furundzija}. The Tribunal’s Rules of Procedure and Evidence provide for disqualification if a judge has a personal interest in the case, or if he or she has or has had any association that might affect his or her impartiality.\textsuperscript{118} The Appeals Chamber interpreted this provision as covering actual bias and “unacceptable appearance of bias.”\textsuperscript{119} A judge would be disqualified if he or she was a party to the case or had a financial interest in the outcome of a case, or if the decision would lead to “the promotion of a cause in which he or she is involved, together with one of the parties” or “the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias.”\textsuperscript{120} A reasonable observer, according to the Appeals Chamber, is “an informed person with knowledge of all the relevant circumstances, including the traditions of integrity and impartiality that form a part of the background and apprised also of the fact that impartiality is one of the duties that Judges swear to uphold.”\textsuperscript{121}

The Special Court for Sierra Leone (SCSL) adopted a similar standard in \textit{Prosecutor v. Sesay}. The court considered the impartiality of Judge Robertson, who, in a book published before he was appointed to the court, had described the atrocities committed by one of the rebel groups in Sierra Leone as “crimes against humanity” and had called for the prosecution of its leaders.\textsuperscript{122} The court concluded that he

\textsuperscript{113} \textit{Legal Consequences of the Construction of a Wall}, note 86, at 9–10.
\textsuperscript{114} \textit{Mauritius v. UK}, note 83, at para. 166.
\textsuperscript{115} ECtHR’s Rules of Court, Rule 28.2.e, provides that a judge is disqualified if his or her impartiality may legitimately be questioned.
\textsuperscript{116} See ICC Rules of Procedure and Evidence, Rule 34.1. \textsuperscript{117} ECtHR Rules of Court, Rule 28.2.
\textsuperscript{118} ECtHR Rules of Court, Rule 15.1.
\textsuperscript{119} \textit{Prosecutor v. Furundzija} (Judgment) ICTY-95-17/1-A (July 21, 2000) para. 189.
\textsuperscript{120} \textit{Prosecutor v. Furundzija}, note 119.
\textsuperscript{121} \textit{Prosecutor v. Furundzija}, note 119, at para. 190.
was disqualified in any case involving members of that group, since a reasonable person reading these statements would have a “legitimate reason to fear that Justice Robertson lacks impartiality.”

In sum, it is apparent that the standard governing impartiality is different in inter-state adjudication compared to other forms of international adjudication. But it is a difference that is hard to explain or justify. The same standard should apply in inter-state, human rights, and international criminal adjudication. It is difficult to see why disqualification should be limited to prior participation in a case and not apply to other kinds of involvement that carry an equal risk of jeopardizing the impartiality of a judge. That being said, whether an earlier comment or engagement compromises impartiality needs to be determined on the basis of each individual case. According to Joseph Brubaker, it is important to consider the proximity, depth, and timing of the adjudicator’s statements or commitments in order to determine whether there is an actual conflict of interest requiring disqualification.

3.3 Diligence

Apart from being independent and impartial, adjudicators are required to act with reasonable diligence. When swearing in, judges take an oath to exercise their powers conscientiously. Whereas some codes of ethics distinguish between integrity, confidentiality, propriety, equality, competence, and diligence, the term “diligence” is used in this chapter as an overall concept of the faithful fulfillment of duties in general.

125 Brandeis University, note 2, at 244. For relevant decisions by the WTO dispute settlement, see, Brubaker, note 10, at 124–6. For the relevant standards of the Iran–US Claims Tribunal, see, Brown, note 3, at 90–3. For the issue of whether statements made in an official capacity are less likely to prompt impartiality, see Prosecutor v. Furundzija, note 119, at para. 199.
126 Brubaker, note 10, at 123. For further criteria, namely the specificity of the comment, the strength of opinion, the mode of expression, see Mégret, note 9, at 49–63. According to Mégret, legal writing is insufficient to challenge a judge’s impartiality, note 9, at 56–7. Statements made in an official capacity and expert opinions are treated differently from private and activist opinions. The latter are more likely to give rise to bias. Note 9, at 58–62.
127 ICC Code of Judicial Ethics, Art. 6; ECtHR Resolution on Judicial Ethics, Principle IV; CCJ Code of Conduct, Principle VI; LCIA Rules, Art. 10.2. The Rules of the ICJ, ITLOS, and the ICC specify that judges solemnly undertake to perform their duties “honourably, faithfully, impartially and conscientiously,” ICJ Statute, Art. 20; Rome Statute, Art. 45; ITLOS Statute, Art. 11.
128 Rules of the ICJ, Art. 4.1; Rules of Procedure and Evidence, Rule 5.1.a; ITLOS Rules, Art. 5.1. See also ICTY Rules of Procedure and Evidence, Rule 14.A.
129 ICC Code of Judicial Ethics, CCJ Code of Conduct; Rules of conduct for the understanding on rules and procedures governing the settlement of disputes; ECtHR Resolution on Judicial Ethics.
130 See e.g., the oath provided for in Appendix I to the Agreement establishing the CCJ.
Diligence, above all, requires attendance and attention. At the ICC, judges are required to devote their professional activities to their judicial duties. The CCJ Code requires that judicial duties must take precedence over all other activities. Judicial decision-making may not be delegated to court staff. Diligence also requires judges to be prepared in each individual case. Furthermore, as a matter of efficiency, the case load must be completed with “reasonable promptness,” without undue delay or unwarranted expense. The Rome Statute expects trials at the ICC to be expeditious so that the rights of defendants are guaranteed.

Most statutory provisions require the selection of persons of high moral character and integrity for judicial office. Accordingly, judicial conduct must be consistent with this high moral character. Once appointed, judges are required to behave with integrity. This is particularly relevant for courtroom behavior. Not only are judges obliged to act with fairness, requiring equal treatment and sensitivity to different arguments, they must also maintain order and decorum in the course of proceedings. Propriety requires respectful conduct vis-à-vis the parties, witnesses, attorneys, prosecutors, and others involved in the proceedings. At the ICC, judges are required to maintain order, act in accordance with commonly accepted decorum, and remain patient and courteous towards all participants and members of the public present in judicial proceedings. Judges of the court must be vigilant in controlling the manner of questioning of witnesses or victims, and must give special attention to equal protection of the law. Propriety also calls for honesty and punctuality.

Even off the bench, judges are obliged to act consistently with the dignity of judicial office and not to engage in conduct incompatible with the diligent discharge of judicial duties. Apart from the obvious prohibition against corruption, judges must ensure that their conduct is above reproach. Again, the relevant standard is the view of a reasonable, fair-minded, and informed person. Judges must accept restrictions that might seem burdensome to ordinary citizens. The obligation to

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131 For this issue and other cases in which diligence has been challenged, see Brown, note 3, at 92–3.
133 CCJ Code of Conduct, Principle VI.6.5.
134 ICC Code of Judicial Ethics, Art. 7.4.
135 ICC Rules of Procedure and Evidence, Rule 24.2.b; LCIA Rules, Art. 10.2.
136 Rome Statute, Art. 64.2; ICC Code of Judicial Ethics, Art. 7.3. See also ICTY Statute, Art. 20.1.
137 ITLOS Statute, Art. 2.1; Rome Statute, Art. 36.3; ICTY Statute, Art. 13; ECHR, Art. 21.1; Agreement establishing the CCJ, Art. 4.11.
138 ECtHR Resolution on Judicial Ethics, Principle III.
139 ICC Code of Judicial Ethics, Art. 5.1; ECJ Statute Title I, Art. 4; Agreement establishing the CCJ, Art. 4.11; CCJ Code of Conduct, Principle III.
140 LCIA Rules, Art. 10.2. For the duty to act in a fair manner, see also, Rome Statute, Art. 64.2; ICTY Statute, Art. 20.1; CCJ Code of Conduct, Principle VI.6.5.
143 CCJ Code of Conduct, Principle I.1.2.
144 CCJ Code of Conduct, Principle VI.6.7.
behave with integrity\(^{147}\) continues even after the end of judicial office.\(^{148}\) Judges cannot directly or indirectly accept any gift, advantage, privilege, or reward that can be reasonably perceived as intended to influence the performance of their duties.\(^{149}\)

Almost all judicial ethics instruments provide for confidentiality. Adjudicators are asked to maintain the secrecy of their deliberations, and not to disclose information accessed during the course of their judicial work.\(^{150}\) They also cannot make any statements about pending proceedings,\(^{151}\) or use confidential information for financial or other purposes unrelated to the judicial function of a judge.\(^{152}\) Even after the completion of their judicial office, former judges are required to behave with discretion.\(^{153}\)

Finally, the obligation to uphold judicial competence is another dimension of diligence. This involves the maintenance and, if need be, the development of professional skills by means of continuing education. For example, judges of the ICC are asked to take reasonable steps to maintain and improve their knowledge, skills, and personal qualities necessary for judicial office.\(^{154}\) Judges of the ECtHR are called upon to continue to develop their professional skills in order to maintain a high level of competence.\(^{155}\)

### 4 Universality of Judicial Ethics?

#### 4.1 Unity in diversity

This survey of judicial ethics shows that there is a broad range of regulations.\(^{156}\) Yet, despite variations between different international jurisdictions, there are overarching principles that are applicable to all forms of international adjudication.\(^{157}\)

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\(^{147}\) ICC Code of Judicial Ethics, Art. 5.1; ECJ Statute, Title I, Art. 4; Agreement establishing the CCJ, Art. 4.11; CCJ Code of Conduct, Principle III.

\(^{148}\) Statute of the ECJ, Art. 4.

\(^{149}\) Pursuant to the ICC Code of Judicial Ethics, Art. 5.1 and 5.2, CCJ Code of Conduct, Principle III.3.2; ECJ Resolution on Judicial Ethics, Principle III.

\(^{150}\) Rome Statute, Art. 64.4.c; ICC Rules for Procedure and Evidence, Rule 5.1.a; ICC Code of Judicial Ethics, Art. 6; ECJ Resolution on Judicial Ethics, Principle V; WTO DSU Rules of Conduct VII.1; ECJ Statute, Title I, Art. 2; CCJ Code of Conduct, Principle I.1.17. See also Burgh House Principles 1.4 and 7.2.

\(^{151}\) WTO DSU Rules of Conduct VII.2; Burgh House Principles, Principle 7.2.

\(^{152}\) CCJ Code of Conduct, Principle I.

\(^{153}\) ECJ Statute, Title I, Art. 4. See also, the declaration pursuant to Rules of Procedure ECJ, Art. 3.2.

\(^{154}\) In the ICC Code of Judicial Ethics, Art. 7.2.

\(^{155}\) ECJ Resolution on Judicial Ethics, Principle VI.

\(^{156}\) To observe the lack of homogeneity among international courts and tribunals, see Brandeis University, note 33, at 19–21.

\(^{157}\) See also Mackenzie and Sands, note 7; Brown, note 3, at 66, 96. Terhechte has identified values that are common to different international codes of conduct. Terhechte, note 2. According to Vagts,
In the Burgh House Principles, the ILA Study group attempted to distil a core set of guiding principles.\textsuperscript{158} However, the implementation of such general standards requires that the specifics of each tribunal be taken into account.\textsuperscript{159} For example, at international criminal tribunals, the due process rights of the accused require special consideration.\textsuperscript{160} Other courts are confronted with different threats to judicial independence and impartiality. In investment disputes, for example, judges might have financial interests that give rise to conflicts of interest. Another factor is the particular composition of a court, that is, whether judges serve on a full- or part-time basis, ad hoc or \textit{ad litem}.\textsuperscript{161} A different set of interests might be involved, including functional considerations, which seek to preserve the existence, functioning, and integrity of the relevant courts.\textsuperscript{162} After all, judicial independence is not an absolute value. It needs to be weighed against other, sometimes competing principles.

Arbitration might be one of those areas of international adjudication that requires adjusted standards,\textsuperscript{163} particularly in regard to impartiality. Yuval Shany, for example, has pointed out that the Burgh House Principles apply to party-appointed adjudicators only insofar as they are appropriate.\textsuperscript{164} He argued for differentiating between party-appointed and ad hoc judges in international courts and other international judges because the increased party control in arbitration requires a lesser degree of judicial independence and impartiality.\textsuperscript{165} This “functional approach,” which Catherine Rogers has also subscribed to,\textsuperscript{166} seeks to differentiate between different adjudicative functions, and to tailor specific ethical standards to party-appointed allowance should be made for differences, and international tribunals and arbitral institutions should be able to adapt the universal standards for their use. Vagts, note 14.


\textsuperscript{159} Vajic, note 32, at 182.

\textsuperscript{160} Shany and Horovitz, note 112.

\textsuperscript{161} Sands, McLachlan, and Mackenzie, note 158.


\textsuperscript{164} According to Shany, the provisions on security of tenure, extra-judicial activity, past links to a party, and post-service limitations are inappropriate for party-appointed adjudicators. Shany, note 15, at 485–6. See also Burgh House Principles, Preamble, para. 5. For recognition that there is a difference between the standards of independence of permanent courts and international arbitration, see also Shelton, note 30, at 58.

\textsuperscript{165} Shany, note 15, at 474, 487–90.

\textsuperscript{166} Catherine Rogers, however, does not advocate a lower standard of impartiality, but one that is genuine to the specific role of each arbitrator. She calls for an understanding of the term “impartiality” that is defined specifically for the international arbitration context. C Rogers, “Regulating International Arbitrators: A Functional Approach to Developing Standards of Conduct” (2005) 41 Stan. J. Int’l L. 53, 57, 106.
adjudicators. She favors, in the interests of more flexibility, a lower “manifest lack of independence” standard for party-appointed adjudicators. This standard tolerates, for instance, past relations as well as peripheral or indirect ongoing relations with the appointing party.

As we mentioned above, the UNCLOS Arbitral Tribunal concluded that the standard of independence and impartiality for inter-state disputes was different from the one for international commercial arbitration and investment arbitration. However, the tribunal also suggested that there is a uniform standard for all inter-state disputes under the UN Law of the Sea Convention, regardless of whether a dispute is submitted to a court (ITLOS or ICJ) or to an arbitral tribunal pursuant to Annex VII. Since all three institutions may decide similar issues, they should conform to a similar standard of impartiality, according to the Arbitral Tribunal.

The decision in *Mauritius v. UK* reflects the general growing convergence among the different modes of adjudication in public international law. Though arbitral tribunals have traditionally been considered different from international courts in that they are more closely related to the parties, the significance of their decisions goes far beyond the *inter-partes* relationship. Like their judicial counterparts, they do not just settle disputes between the parties. Their decisions have important effects *erga omnes* by stating and advancing international law more generally. Accordingly, it is not only in the interest of the parties involved in the dispute, but in the interest of all entities subject to international law, that the independence, impartiality, and diligence of arbitral tribunals should be ensured.

Arguably, this is the reason for the growing demand for judicial independence and impartiality in international arbitration as well. Several rules regulating international commercial arbitration provide that arbitrators may be challenged if there are “justifiable doubts to their impartiality or independence.” A similar rule has been adopted for the Iran–US Claims Tribunal. These and similar provisions have led Joseph Brubaker to discern a trend of subjecting all adjudicators to the same standard of impartiality. The expectations for the independence and impartiality of arbitrators seem to be changing. Some arbitrators no longer act as counsel to

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168 Shany, note 15, at 487.

169 *Mauritius v. UK*, note 83.


173 Tribunal Rules of Procedure (May 3, 1983), Art. 10. For the interpretation of this rule see Brown, note 3, at 91–3.

174 Brubaker, note 10, at 145.
avoid conflicts of interest. This may even serve as a model for the future of international adjudication more generally.

5 Conclusion

In 1967, Thomas Franck called for a community of international judges “with its own norms, roles, symbols and administrative practices working to generate a loyalty with precedence over all others.” He advocated for the development of an international judicial ethos in order to foster judicial impartiality despite ideological and cultural differences in the world, and for a generally recognized code of conduct. Almost half a century later, there are indications that such a common ethos has emerged. In their study on the international judge, Terris, Romano, and Swigart hailed the beginning of a shared judicial culture, interactions, and common legal thinking among international judges. This is also reflected in the growing regulation of judicial ethics. Nevertheless, ensuring independent, impartial, and diligent international adjudication is no less important today than it was 50 years ago, and the multiplication of international adjudicative fora has only intensified the problem.

Judicial independence, impartiality, and diligence are the core values of judicial ethics. In their very essence, these values are transnational principles that apply to all forms of adjudication, be they domestic, transnational, or international dispute settlement mechanisms. Transnational rules have been a point of departure for spelling out analogous standards for international courts. However, transplant is useful only as far as core standards are concerned. Beyond them, on more concrete issues, the specific nature of international adjudication calls for some idiosyncrasy. The specific structure of international governance has to be considered when specifying the particular exigencies of judicial ethics in international adjudication. Within the broad range of international dispute settlement, the specific implementation of independence, impartiality, and diligence may vary according to the function, composition, and structure of each body.

175 See also Burgh House Principles, Principle 10. See, in this handbook, Swigart and Terris, Ch. 28, at section 5.
177 Terris, Romano, and Swigart, note 36, at 432.
178 Terris, note 6.
179 For a detailed comparative analysis of judicial independence in national courts and the transnationality of this principle, see, Seibert-Fohr, note 162.
Nevertheless, common denominators exist. There is a growing consensus among international judges on the necessary standards of behavior both on and off the bench. Empirical research attributes this, among other factors, to common legal education.\textsuperscript{180} Judges who have trained at the same universities tend to share similar perceptions, and they are more likely to develop a common professional ethos.\textsuperscript{181} Although such a shared understanding is an important foundation for independence, impartiality, and diligence, there is a growing demand for codifying and specifying international judicial ethics.\textsuperscript{182} This is reflected in the rising number of documents regulating judicial conduct.

Judicial ethics is still an evolving area of international adjudication—one with flaws and shortcomings. While disqualification has attracted considerable attention, other areas of judicial behavior remain somewhat neglected. There is little guidance, for instance, on such matters as courtroom and off-bench behavior.\textsuperscript{183} Some issues are dealt with on an ad hoc basis, sometimes lacking the necessary transparency\textsuperscript{184} and formal procedure.\textsuperscript{185} Though judicial ethics can never be regulated exhaustively, it seems advisable to further specify existing standards to prevent misbehavior—and enhance transparency and predictability—thereby improving the overall legitimacy of international adjudication. While most norm-setting in recent years has been done by international judges themselves, it is essential to advance a broader dialogue among all international legal professions to avoid allegations of judicial corporatism and to increase transparency and legitimacy.\textsuperscript{186} This will also help make the standards for judicial ethics in international adjudication truly universal.

**Research Questions**

1. Is there a shared universal understanding of judicial ethics? How can it be identified?
2. Should the elaboration of judicial ethics rules be left to international courts themselves? To what extent should they be legally binding?
3. What is the proper role for court presidents in international judicial ethics?

\textsuperscript{180} Shany, note 15.
\textsuperscript{181} For a discussion of the training of international judges, see, in this handbook, Swigart and Terris, Ch. 28, at section 2.4.1.
\textsuperscript{182} Vagts, note 14, at 260.
\textsuperscript{183} Vagts, note 14, at 260. See also Brandeis University, note 33, at 21–3.
\textsuperscript{184} Mackenzie and Sands, note 7, at 285.
\textsuperscript{185} Vagts criticized that disqualification at the ICJ is difficult to rationalize in the absence of reasoned decisions. Vagts, note 14, at 255–6. For more on the informality of current procedures, see also, Terris, note 6.
\textsuperscript{186} Shelton suggested the formation of a professional association of international judges. Shelton, note 30, at 62.
4. Is there a need to increase the accountability of the international judiciary? What means of accountability can be reconciled with the imperatives of judicial independence? Which additional actors could be involved in judicial oversight?

Suggested Reading