

2012

An Overview of the Challenges Facing the International Court of Justice in the 21st Century

S. Gozie Ogbodo

Follow this and additional works at: <http://digitalcommons.law.ggu.edu/annlsurvey>



Part of the [International Law Commons](#)

Recommended Citation

Ogbodo, S. Gozie (2012) "An Overview of the Challenges Facing the International Court of Justice in the 21st Century," *Annual Survey of International & Comparative Law*: Vol. 18: Iss. 1, Article 7.

Available at: <http://digitalcommons.law.ggu.edu/annlsurvey/vol18/iss1/7>

This Article is brought to you for free and open access by the Academic Journals at GGU Law Digital Commons. It has been accepted for inclusion in Annual Survey of International & Comparative Law by an authorized administrator of GGU Law Digital Commons. For more information, please contact jfischer@ggu.edu.

AN OVERVIEW OF THE CHALLENGES FACING THE INTERNATIONAL COURT OF JUSTICE IN THE 21ST CENTURY

S. GOZIE OGBODO*

ABSTRACT

The effectiveness of the International Court of Justice (ICJ) is critical for global survival and progress in the 21st century. Unfortunately, after over six decades in existence, the Court's influence is declining. This work argues that to revitalize the influence and effectiveness of the Court, some vital reforms must be undertaken in the ICJ system. These reforms must address: (1) the process of election and re-election of ICJ judges; (2) the conflict of interest arising from the presence of permanent members of the United Nations Security Council on the Court; (3) the issue of the Court's compulsory jurisdiction; and (4) the appointment of *ad hoc* judges under Article 31 of the Statute of the Court.

INTRODUCTION

Under the United Nations system, the ICJ is the "principal judicial organ"¹ charged with two main functions, to wit; to assist in the resolution of disputes between states, and to provide advisory opinions to specified international organizations. Although established under the UN Charter, the Court is nevertheless governed by the Charter,² the Statute of

* LL.B. (Unizik), LL.M. (G.G.U., USA), S.J.D. (G.G.U., USA), B.L., Senior Lecturer, Faculty of Law, University of Benin, Benin City, Edo State, Nigeria. Formerly, Adjunct Professor, Golden Gate University, San Francisco, California. E-mail: gozieogbodo@yahoo.com

1. U.N. Charter art. 92. The Court is popularly referred to as the World Court.
2. *See id.* art. 92-96.

the ICJ,³ the Rules of Procedure adopted by the judges and amended from time to time,⁴ as well as the Practice Directions adopted in October 2001.⁵ Though many rules governing the ICJ strive to create an unbiased and honorable entity, the Court's legitimacy and impartiality have nevertheless been compromised by issues surrounding the election and re-election of its judges, the UN Security Council's permanent members' roles in the ICJ, the Court's compulsory jurisdiction, and the nomination of ad hoc judges by parties before the Court.

After six decades, the ICJ is at a crossroads as it braces to adjudicate the disputes arising in the 21st century. Modern issues concerning environmental protection, terrorism, and human trafficking—among many others—are global problems deserving of attention from a global court. This article argues that the ICJ is ill-equipped to tackle modern international disputes if the jurisdictional and compositional problems outlined above are not remedied, while also offering recommendations for reform.

Part I introduces the reader to the inner-workings of the ICJ by discussing the composition of the Court, beginning with an explanation of its roots. Next, Part II critically dissects the challenging preliminary issues of jurisdiction and admissibility. Part III provides an in-depth analysis of the different bases for the exercise of the Court's jurisdiction, with particular focus on contentious and advisory jurisdiction. Part IV highlights four main challenges facing the International Court of Justice, while Part V concludes by proffering recommendations for a more efficient ICJ in the 21st century.

I. THE COMPOSITION OF THE COURT

The International Court of Justice is an offshoot of the Permanent Court of International Justice (PCIJ).⁶ The latter was formed by virtue of Article 14 of the Covenant of the League of Nations which mandated the Council of the League to “formulate and submit to the Members of the League for adoption plans for the establishment of a Permanent Court of

3. Statute of the International Court of Justice, June 26, 1945, 59 Stat. 1055, 3 Bevans 1179 [hereinafter ICJ Statute].

4. Rules of Court of the International Court of Justice, 1978 I.C.J. Acts & Docs. 4 [hereinafter ICJ Rules].

5. International Court of Justice, *Practice Directions* (Jan. 20, 2009), available at <http://www.icj-cij.org/documents/index.php?p1=4&p2=4&p3=0&lang=en>.

6. The United Nations Organization (UNO)—the parent organization of the ICJ—is the successor of the League of Nations, which was the parent organization of the PCIJ. Further, the Court is located in the former headquarters of the PCIJ in The Hague, Netherlands.

International Justice.”⁷ In exercise of this power, the League appointed an advisory Committee of Jurists and legal publicists which formulated the Root-Phillimore plan,⁸ the bedrock for the establishment of the PCIJ. Twenty-four years after its inception, the PCIJ was succeeded by the ICJ in 1946. By the time of its dissolution, it had handled twenty-nine contentious cases and rendered twenty-seven advisory opinions.⁹

Currently, the ICJ consists of fifteen judges, out of which one seat is reserved for each of the five permanent members to the Security Council.¹⁰ Moreover, no single member state may have more than one representative on the court.¹¹ As a first step in the nomination process, the list of nominated candidates is drawn up by the UN Secretary-General for presentation to the General Assembly and subsequently to the Security Council for the election of the judges.¹² The election of a successful candidate is typically based on absolute majority.

For a candidate to be eligible for election, two main criteria must be taken into account. First, the candidates must be persons “of high moral character, who possess qualifications required in their respective countries for appointment to the highest judicial offices, or are jurisconsults of recognized competence in international law.”¹³ Secondly, the elected body of judges must reflect “. . . the main forms of civilization and [the] principal legal systems of the world. . . .”¹⁴ In other words, not only must the eligible candidate meet the minimum standard for election to the highest court of his/her country or be an internationally

7. League of Nations Covenant art. 14.

8. The Root-Phillimore committee was appointed by the League of Nations to formulate the procedure for the nomination and election of the judges of the Permanent Court of International Justice under the defunct League. It was the recommendation of the committee which gave rise to the establishment of the PCIJ in 1922.

9. See PHILIPPE SANDS & PIERRE KLEIN, *BOWETT’S LAW OF INTERNATIONAL INSTITUTIONS* 356 (6th ed. 2009). By 1986, however, the ICJ had been presented with seventy-three cases. From those cases, the court rendered forty-eight judgments, eighteen advisory opinions and 213 procedural orders. *Id.* See also International Court of Justice Website: Permanent Court of International Justice, <http://www.icj-cij.org/pcij/index> (last visited March 18, 2011).

10. The current President of the Court, Judge Hisashi Owada (Japan), was elected on February 6, 2009, to serve as President for three years. The Vice President is Judge Peter Tomka (Slovakia). The other judges include Joan E. Donoghue (America); Ronny Abraham (France); Xue Hanqin (China); Bruno Simma (Germany); Koroma (Sierra Leone); Leonid Skotnikov (Russia); Christopher Greenwood (Britain); Kenneth Keith (New Zealand); Bernardo Sepulveda-Amor (Mexico); Mohammed Bennouna (Morocco); Antonio Trindade (Brazil); Abdulqawi Yusuf (Somalia) and Awn Shawkat Al-Khasawneh (Jordan), whose term ended in 2011. His replacement had not been announced at the time of completing this work.

11. International Court of Justice Website: Members of the Court, <http://www.icj-cij.org/court/index.php?p1=1&p2=2> (last visited Apr. 23, 2012).

12. It is noteworthy that the use of veto power in the Security Council does not apply to the election of the ICJ judges. See ICJ Statute, *supra* note 3, art. 4, 8, & 10.

13. ICJ Statute, *supra* note 3, art. 2.

14. *Id.* art. 9.

recognized jurisconsult, but he/she must also represent one of the “principal legal systems of the world.” The goal in the composition of the court is both to ensure that eminently qualified persons are elected and to guarantee that the court is truly global in character.¹⁵

ICJ judges enjoy a high security of tenure because they are elected for nine years. They are also not subject to an official retirement age, and their dismissal is rare because it requires a unanimous decision of all the other members of the Court.¹⁶ A judge may, however, resign voluntarily for personal or health reasons if it would be impracticable for the judge to continue to discharge the duties of his/her office. The Security Council may also choose not to re-elect a judge after his/her nine-year term if the Council feels that the judge is of health too poor to continue serving on the bench.

In order to shield the judges from external influences, they are prohibited from engaging in “any political or administrative function or . . . any other occupation of a professional nature.”¹⁷ Further, a judge who has acted as agent or counsel or in some other capacity in a case prior to his/her election to the Court is excluded from presiding over that particular case.¹⁸ Even after retirement, judges, ad hoc judges, Registrars, and other Court officials are discouraged from acting as agents, counsels, and advocates in cases pending before the Court.¹⁹ An additional measure geared towards ensuring the independence of the Court is the remuneration of the judges and the ad hoc judges; their salary is tax-free and pensionable. The rules and guidelines governing the Court evince a clear concern for its impartiality and for judicial integrity.

Although the Court consists of fifteen judges, it may decide cases either by a full bench, or in a chamber of three or more judges. The President of the Court—who also serves as its administrative head—determines whether the Court will sit as a full bench or as a reduced chamber, and also chooses the number of judges to sit in a particular chamber. Regardless of the composition of the Court, the final decision in any given case is usually arrived at by a majority of the judges present. When there is a tie vote, the President of the court is entitled to cast the decisive

15. The attempt to globalize the Court has been institutionalized in practice. Thus, the ICJ is currently composed as follows: Africa (3), Latin America and the Caribbean (2), Asia (3), Western Europe and other States (5), and Eastern Europe (2).

16. ICJ Statute, *supra* note 3, art. 18.

17. *Id.* art. 16.

18. *Id.* art. 17, para. 2.

19. International Court of Justice, *Practice Directions* (Jan. 20, 2009), available at <http://www.icj-cij.org/documents/index.php?p1=4&p2=4&p3=0&lang=en> (scroll to Practice Direction VIII).

vote to break the tie.²⁰ The right to cast a decisive vote is denied the President if his State is a party in the dispute;²¹ his nationality should not influence his opinion. The rules pertaining to the decisions of the Court exist to uphold its candor and integrity.

II. ISSUES OF JURISDICTION AND ADMISSIBILITY

In order for the ICJ to ‘adjudicate’ a case, the court must as a preliminary matter determine both the issues of jurisdiction as well as the issues of admissibility. Jurisdiction issues “are those which ultimately derive from whether the Court has the right and power to consider the case brought by a state,” while issues of admissibility determine whether the case itself is one proper for determination when brought before the Court.²² Therefore, issues of jurisdiction must precede any issues of admissibility since issues of admissibility can only be raised when the Court’s jurisdiction has been settled.²³

Competence de la competence is a well-settled principle of law providing a court the power to determine whether it has the judicial right to exercise jurisdiction in a given matter. The ICJ is specifically empowered to exercise this right under Article 36(6) of the Statute of the Court which states that “[i]n the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court.”²⁴ The ICJ exercises this right both as a settled principle of judicial practice as well as under the enabling statute. Once a preliminary objection has been raised, either based upon jurisdiction or admissibility, the immediate implication is that the proceedings shall be suspended until the court makes a final determination on the objection.²⁵

A jurisdictional dispute may arise under a variety of grounds. For example, a respondent State may be objecting to the attempt by an applicant State to extend the scope of the jurisdiction under a treaty obligation, or in an extreme circumstance, the respondent State may be trying to frustrate the determination of the dispute in order to avoid political embarrassment. Whatever the justification, the respondent State must raise its jurisdictional objection as early as possible in the

20. See *South West Africa (Eth. v. S. Afr.; Liber. v. S. Afr.)*, 1966 I.C.J. 6, 51 (July 18).

21. ICJ Rules, *supra* note 4, art. 32, para. 1.

22. R.K. GARDINER, *INTERNATIONAL LAW* 488 (2003).

23. This makes both procedural and common sense because jurisdiction serves as the building block for further proceedings in any judicial hearing. It is the foundation of the judicial house and must be established first in order to accommodate further deliberations in the dispute.

24. ICJ Statute, *supra* note 3, art. 36, para. 6.

25. ICJ Rules, *supra* note 4, art. 79, para. 5.

proceedings by filing a ‘preliminary objection.’²⁶ By filing its objection, the respondent state automatically becomes the applicant state (*in excipiendo reus fit actor*) in a new and distinct proceeding specifically to determine the validity of the objection. After such a proceeding, the Court may uphold the objection, reject it, or it may “declare that the objection does not possess, in the circumstances of the case, an exclusively preliminary character.”²⁷ Each decision commands a great deal of importance to the dispute. If the objection is upheld, the matter is automatically dismissed. If the objection is rejected, or does not possess “an exclusively preliminary character,” the matter may proceed.

Objections premised upon admissibility are procedurally secondary to the objections premised upon jurisdiction. In order to raise issues premised upon admissibility, the respondent state must have consented to the Court’s jurisdiction *ab initio*, but objects to the determination of the dispute based on other grounds. Typically, the respondent’s objections on admissibility may be grounded upon one or more of the following grounds: lack of *locus standi* by the applicant,²⁸ the necessity to join a third party,²⁹ the mootness of the dispute,³⁰ the existence of local remedies that have not been exhausted,³¹ etc. Regardless of the basis for the objection premised upon admissibility, the Court may uphold it, reject it or make ‘curative’ orders.³² If the Court upholds the objection, the matter shall terminate permanently. Contrariwise, if the Court rejects the objection, the matter shall continue. But if the Court makes a ‘curative’ order, the matter shall be suspended temporarily until the defect has been cured.

26. *See id.* art. 79, para. 1. The rule defines a preliminary objection as “[a]ny objection by the respondent to the jurisdiction of the Court or to the admissibility of the application, or other objection the decision upon which is requested before any further proceedings on the merits”

27. *Id.* art. 79, para. 9.

28. In order for *locus standi* to exist, the party must have a legally protected right which it intends to protect through the court. Where there is an absence of a legally protected right, an applicant will be deemed to be a “busybody” or “meddlesome interloper.”

29. In such a situation, the respondent state may be claiming that a final resolution of the dispute is impracticable without the involvement of a third party whose interest in the dispute is indispensable.

30. Under this claim, the respondent state is alleging that the basis of the dispute has been completely surmounted by prevailing circumstances. Therefore, there is no legal dispute between the parties.

31. Here, the respondent state is asserting that the presentation of the dispute before the ICJ is premature since the matter could be resolved domestically.

32. A curative order serves as an opportunity for the applicant state to take further steps in order to cure a defect in the pleading. For example, the court may order the applicant state to join a third party in the dispute. When the defect is cured by the applicant state, the court may then admit the dispute for hearing.

2012] CHALLENGES FACING THE INTERNATIONAL COURT 99

From the foregoing, it is discernible that while objections premised upon admissibility are in extreme circumstances curable, objections premised upon jurisdiction cannot be cured if upheld. If the Court determines, upon a respondent's objection to jurisdiction, that it lacks jurisdiction to entertain the dispute, the Court will dismiss the case. To do otherwise would be tantamount to an exercise in futility since the judicial fruit of the proceeding would be worthless to all parties involved.

III. THE JURISDICTION OF THE COURT

The most important challenge facing the International Court of Justice borders on its jurisdiction. Jurisdiction is the *sine qua non* for the exercise of judicial powers. Where it is lacking, a judicial body can not exercise legally binding judicial power over a subject. The indispensability of jurisdiction can be traced to the earliest account of the judicial trial of Jesus Christ for treason.³³ According to Luke Chapter 23, verse 6, during the trial of Jesus before Pilate, the latter discovered that Jesus was a Galilean. Immediately realizing that he lacked jurisdiction to try a Galilean, Pilate most appropriately transferred the case to Herod's court in Jerusalem. The rest is history.

“Jurisdiction is the authority by which courts and judicial officers take cognizance of and decide cases.”³⁴ Where a court or judicial officer lacks the requisite authority, any attempt to take cognizance of, and decide upon any case, will be declared null and void. Indeed, just like a person, a court cannot give what it does not possess. *Nemo dat quod non habet*. Jurisdiction is simply “the legal right by which judges exercise their authority.”³⁵ The question which naturally arises is, from where then, does a court derive this legal right? In other words, from which fountain of legal waters does the court derive its jurisdictional source? The answer will depend inevitably on what kind of judicial body is under consideration, for different judicial bodies derive their jurisdictional authorities from different sources. For instance, in the national sphere all judicial bodies derive their jurisdictional authorities from the constitution of the country.³⁶ Contrariwise, in the international sphere the sources of the jurisdictional authorities differ according to the judicial body and the parent organization. Unlike a unified national system, governed by the

33. The treasonable charges against Jesus Christ can be deduced from the accusation leveled against him in Luke Chapter 23, verse 2: “And they began to accuse him, saying, ‘We have found this man subverting our nation. He opposes payment of taxes to Caesar and claims to be Christ, a king.’”

34. Board of Trustees v. Brooks, 67 P.2d 4, 7 (Okla. 1937).

35. Max Ams, Inc. v. Barker, 293 Ky. 698, 702 (Ky. 1943).

36. See, e.g., CONSTITUTION Art. 6 (1999) (Nigeria).

same *grundnorm*, the international sphere consists of a galaxy of international organizations charged with the pursuance of distinctively separate sets of objectives and goals. Just as their objectives and goals differ, so do their compositions and jurisdictional authorities. Therefore, the courts in the international sphere derive their jurisdictional authorities from the constitutive charter of their respective organizations, charged with a distinctive set of judicial goals and objectives.³⁷

The ICJ, in particular, exercises both original jurisdiction as well as a limited appellate jurisdiction.³⁸ The original jurisdiction of the Court can be exercised under two main grounds: (a) contentious jurisdiction³⁹ and (b) advisory jurisdiction.⁴⁰ According to Richard K. Gardiner, in the exercise of its jurisdiction, only the ICJ'S decisions in contentious cases are binding and only on the parties to each particular case.⁴¹ Therefore, they can create *res judicata* with respect to the parties. He further asserts that despite this fact, "the authority of the Court is such that both its judgments and advisory opinions effectively carry equal authority as indications of international law."⁴² Alternatively, an advisory opinion lacks such binding force and cannot create a *res judicata* bar since there are no 'parties,' strictly speaking, before the court.⁴³ Philippe Sands Q.C. and Pierre Klein contend that an advisory opinion can be classified as a "weaker" statement of the law than a judgment. Nevertheless, the moral and political potency of an advisory opinion is indisputable. Indeed, the court itself makes reference to earlier opinions when the need arises⁴⁴ while the judges of the court have exalted "all the moral consequences

37. For example, while the United Nations Organization (UNO) created the International Court of Justice (ICJ) as its principal judicial organ, the African Union (AU) created the African Court of Justice and Human Rights to serve as its judicial organ. In the same vein, the Economic Community of West African States (ECOWAS) created the ECOWAS Court to serve as its judicial organ.

38. The Convention on International Civil Aviation (1944) provides for appeals to the ICJ from the decisions of the Council of the International Civil Aviation Organization (ICAO). Convention on International Civil Aviation, Dec. 7, 1944, art. 84, 3 Bevens 944, 15 U.N.T.S. 295. Also, the International Air Services Transit Agreement (1944) provides for appeals to the Court. International Air Services Transit Agreement, Dec. 7, 1944, art. 2, para. 2, 3 Bevens 916, 84 U.N.T.S. 389. *See also* Jurisdiction of ICAO Council (India v. Pak.), 1972 I.C.J. 46, 52-57 (Aug. 18).

39. ICJ Statute, *supra* note 3, art. 34, para. 1.

40. *Id.* art. 65.

41. GARDINER, *supra* note 22, at 488.

42. *Id.*

43. *Id.*

44. *See* Case Concerning the Gabčíkovo-Nagymaros Project (Hung. v. Slov.), 1997 I.C.J. 7, 41 (Sept. 25) (referring to an earlier opinion on the respect for the environment expressed in Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. 226, 241-42 (July 8)).

2012] CHALLENGES FACING THE INTERNATIONAL COURT 101

which are inherent in the dignity of the organ delivering the opinion,”⁴⁵ or “the legal position as ascertained by the court.”⁴⁶

A. CONTENTIOUS JURISDICTION

The contentious jurisdiction of the ICJ can only be invoked where there exists a genuine dispute of a legal nature. Such “[a]n international legal dispute can be defined as a disagreement on a question of law or fact, a conflict, a clash of legal views or of interests.”⁴⁷ The jurisdictional basis can be found under Article 34(1) of the ICJ Statute, which explains that “only states may be parties in cases before the Court.”^{48, 49}

Another critical basis for the exercise of the Court’s jurisdiction in contentious cases is the consent of the parties. It is noteworthy that “the form in which this consent is expressed determines the manner in which a case may be brought before the Court.”⁵⁰ Article 36 of the Statute of the ICJ states, “[t]he jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force.”⁵¹ It is critical

45. Peace Treaties with Bulgaria, Hungary, and Romania, Advisory Opinion, 1950 I.C.J. 65, 80 (Mar. 30). The quote is attributed to Judge Azevedo.

46. Admissibility of Hearings of Petitioners by the South West Africa Committee, Advisory Opinion, 1956 I.C.J. 23, 47 (June 1) (separate opinion of Sir Hersch Lauterpacht).

47. International Court of Justice Website: Contentious Jurisdiction, <http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=1> See the official website of the ICJ at <http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=1> (accessed last visited on April 15, 2011). See also Bingbin Lu, *Reform of the International Court of Justice: A Jurisdictional Perspective*, 5 PERSPECTIVES Vol. 5, No. 23 (, 2004), 3, wherein he(citing article 36(1) of cited the Statute of the International Court of Justice, 1946 U.N.Y.B. 843 at 846, 3 T.I.A.S. 1179 art. 36(1)).

48. ICJ Statute, *supra* note 3, art. 34, para. 1. It is noteworthy that this provision relates only to sovereign states. Further, it can be explained on the basis that at the earliest development of international law, only sovereign states were recognized as the principal subjects of international law. However, presently, there are new and emerging subjects of international law, like international organizations. In fact, some commentators have argued that it is time to expand the contentious jurisdiction of the Court to permit international organizations to become parties. See D.W. Bowett, et al., *The International Court of Justice: Efficiency of the Procedures and Working Methods*, 45 INT’L & COMP. L. Q. 524 (1996).

49. There are three categories of states permitted to be parties in cases before the Court. The first category includes all 192 member states of the United Nations which are automatically parties to the Statute of the Court. U.N. Charter art. 93, para 1. The second category includes non-U.N. members which want to appear permanently before the Court on the special conditions laid out by the General Assembly on the recommendation of the Security Council. U.N. Charter art. 93, para 2. The third category includes non-U.N. members appearing before the Court in a particular case without acceding to the Statute of the Court. See U.N. Charter art. 35, para. 2.

50. International Court of Justice Website: Basis of the Court’s Jurisdiction, <http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=1&p3=2> (last visited Apr. 23, 2012).

51. ICJ Statute, *supra* note 3, art. 36, para. 1. See also *id.* art. 36, para. 2 (“The states parties to the present Statute may at any time declare that they recognize as compulsory ipso facto and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning: a.) the interpretation of a treaty; b.) any question of international law; c.) the existence of any fact which, if established, would constitute a breach of an

102 ANNUAL SURVEY OF INT'L & COMP. LAW [Vol. XVIII

to note that the consent of the parties “. . . may be made unconditionally or on condition of reciprocity on the part of several or certain states, or for a certain time.”⁵²

In essence, the consent of the parties may take a variety of forms ranging from unconditional consent to consent based upon reciprocity or consent limited in time. Whatever form the consent may take, it must still serve as a prerequisite for the exercise of the Court’s jurisdiction. The consent of the states parties may be explicit or implicit, and is derived from several areas: (i) by special agreement; (ii) in treaties or conventions; (iii) by compulsory jurisdiction; (iv) via *forum prorogatum*; (v) by the Court’s own determination of its jurisdiction; (vi) from interpretation of a judgment; and (vii) from the revision of a judgment.

1. Special Agreement

Where the parties conclude a special agreement to submit a legal dispute to the Court, the agreement can be said to be an express and unequivocal consent to the Court’s jurisdiction. Typically, the parties send such notification of special agreement or written application to the Court’s Registry, specifying the subject of the dispute as well as the parties to the dispute.⁵³

2. Treaties and Conventions

The state parties may also consent to the Court’s jurisdiction in bilateral or multi-lateral treaties by the inclusion of jurisdictional clauses in such treaties. Where a legal dispute arises from such treaty or convention, a party can unilaterally bring a written application instituting proceedings. Such application must state the parties, the subject of the dispute, as well as the treaty or convention provision upon which the issue arose.⁵⁴ Included under this category are treaties and conventions which were meant to be referred to a tribunal instituted under the League of Nations or the Permanent Court of International Justice, which were inherited by Article 37 of the ICJ Statute.

international obligation; d.) the nature or extent of the reparation to be made for the breach of an international obligation.”)

52. *Id.* art. 36, para. 3.

53. *Id.* art. 36, para. 1 & art. 40, para. 1. *See also* ICJ Rules, *supra* note 4, art. 39.

54. ICJ Statute, *supra* note 3, art. 36, para. 1 & 40, para. 1. *See also* ICJ Rules, *supra* note 4, art. 38.

3. Compulsory Jurisdiction

State parties may consent to the jurisdiction of the Court by recognizing as compulsory the jurisdiction of the Court. The focal point for such compulsory jurisdiction can be seen in Article 36, paragraph 2, which states as follows:

the State parties to the present Statute may at any time declare that they recognize as compulsory *ipso facto* and without special agreement, in relation to any other State accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning: a) the interpretation of a treaty; b) any question of international law; c) the existence of any fact which, if established, would constitute a breach of an international obligation; d) the nature or extent of the reparation to be made for the breach of an international obligation.⁵⁵

In other words, Article 36(2) is an optional clause which State parties may choose to adhere to.

If both parties have previously recognized such compulsory jurisdiction, consent is present and the Court has jurisdiction over the matter.

4. Forum Prorogatum

The rule of *forum prorogatum* enables a State which had, hitherto, not recognized the jurisdiction of the Court when a legal proceeding was filed against it to subsequently consent to the Court's jurisdiction.

5. Determination of Its Own Jurisdiction

Under Article 36(6), the Court is empowered to determine whether it has jurisdiction with respect to a legal dispute. As discussed above, in the

55. ICJ Statute, *supra* note 3, art. 36, para. 2. Other conditions are contained in paragraph three, which states that the declarations referred to above "may be made unconditionally or on condition of reciprocity on the part of several or certain States, or for a certain time." *Id.* art. 36, para. 3. Paragraph four states that "such declarations shall be deposited with the Secretary-General of the United Nations, who shall transmit copies thereof to the parties to the Statute to the Registrar of the Court." *Id.* art. 36, para. 4. Paragraph five explains that "declarations made under Article 36 of the Statute of the Permanent Court of International Justice and which are still in force shall be deemed, as between the parties to the present Statute, to be acceptances of the compulsory jurisdiction of the International Court of Justice for the period which they still have to run and in accordance with their terms." *Id.* art. 36, para. 5. In 1946, then-President of the United States Harry S. Truman signed a declaration accepting the Court's compulsory jurisdiction. In 1985, however, in protest over the ICJ's determination to entertain the case filed by Nicaragua against the United States, the latter terminated the 1946 Declaration. *See* Notice of Termination of the 1946 Declaration, signed by George P. Shultz, U.S. Secretary of State (October 7, 1985).

104 ANNUAL SURVEY OF INT'L & COMP. LAW [Vol. XVIII

event of a dispute over the Court's jurisdiction, the ICJ may resolve the issue of its own accord.

6. Interpretation of a Judgment

Where there is a legal dispute with respect to the meaning or scope of a judgment, the Court can construe it upon the request for interpretation. Such a request may be made by an agreement of all the parties or any party.⁵⁶

7. Revision of a Judgment

Any party may apply to the Court for revision of the judgment of the Court. Such a rare application may be entertained "upon the discovery of some fact of such a nature as to be a decisive factor."⁵⁷ Moreover, such a fact must be unknown to the Court and the party seeking revision when the judgment was rendered.

B. ADVISORY JURISDICTION

Advisory opinions are non-binding opinions of the Court that nevertheless carry great weight in the realm of international law and have the ability to strengthen "peaceful relations between States."⁵⁸ The advisory jurisdiction of the Court is guaranteed under Chapter IV of the ICJ Statute. Specifically, Article 65 contains the following guide:

The Court may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request.⁵⁹

56. ICJ Statute, *supra* note 3, art. 60. *See also* ICJ Rules, *supra* note 4, art. 98.

57. International Court of Justice Website: Basis of the Court's Jurisdiction, <http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=1&p3=2> (last visited Apr. 23, 2012). *See also* ICJ Statute, *supra* note 3, art. 61, para. 1; ICJ Rules, *supra* note 4, art. 99.

58. International Court of Justice Website: Advisory Jurisdiction, <http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=2> (last visited Apr. 23, 2012).

59. ICJ Statute, *supra* note 3, art. 65, para. 1. Article 65(2) states that "[q]uestions upon which the advisory opinion of the Court is asked shall be laid before the Court by means of a written request containing an exact statement of the question upon which an opinion is required, and accompanied by all documents likely to throw light upon the question." *Id.* art. 65, para. 2.

2012] CHALLENGES FACING THE INTERNATIONAL COURT 105

States are excluded from the Court's advisory jurisdiction; it is said that the advisory jurisdiction of the ICJ is an exclusive prerogative of any body other than the member states themselves.⁶⁰

This interpretation may be too simplistic. Although the Statute expressly omits states under Article 65, the interpretation of the term "whatever body" demands more scrutiny. Does it include any organization or only *international* organizations, in the strictest sense? Or is it limited to only the United Nations and its organs? Limiting 'whatever body' to the UN is attractive for its simplicity, but it would make little sense for the UN and its organs to be "...authorized by or in accordance with the Charter of the United Nations to make such a request."⁶¹

Furthermore, not every organization has the same type of right to the Court's advisory opinion; a right can be classified as original or derivative. By original, we imply that certain organs of the UN enjoy what has been classified as an "original right."⁶² Such organs are only the General Assembly and the Security Council. In other words—and in response to the clarification raised earlier in this section—it implies that both the General Assembly and the Security Council can directly seek the advisory opinion of the Court. To the contrary, the other organs and specialized agencies of the UN are subject to "derivative rights."⁶³ These rights must be expressly conferred by the General Assembly before they can be accessed by the agency. By implication, such other organs and specialized agencies of the UN lack the direct access to the Court. Instead, they must be authorized by the General Assembly as a condition precedent. Furthermore, other non-UN organizations are excluded from seeking the advisory jurisdiction of the Court.

IV. ISSUES FACING THE ICJ IN THE 21ST CENTURY

In order for the ICJ to creditably meet the challenges of the 21st century, it must begin to address some of the issues that have hindered its maximum performance since it began operation in 1946. Though most rules governing the ICJ strive to create an unbiased and honorable entity, the Court's legitimacy and impartiality have been compromised by issues surrounding: (A) the election and re-election of its judges; (B) the UN

60. However, some commentators have argued that the advisory jurisdiction should be expanded to include the U.N. Secretary-General and national courts. See Stephen M. Schwebel, *Preliminary Rulings by the International Court of Justice at the Instance of National Courts*, 28 VA. J. INT'L L. 495 (1988); S. Rosenne, *Preliminary Rulings by the International Court of Justice at the Instance of National Courts: A Reply*, 29 VA. J. INT'L L. 401 (1989).

61. ICJ Statute, *supra* note 3, art. 65, para. 1.

62. See SANDS & KLEIN, *supra* note 9, at 356.

63. *Id.*

Security Council's Permanent Members' roles in the ICJ; (C) the Court's compulsory jurisdiction, and; (D) the nomination of ad hoc judges by parties before the Court.

A. THE PROCESSES OF ELECTION AND RE-ELECTION OF JUDGES

The Security Council has a disproportionate influence over the composition of the ICJ. The Court's judges are selected by the General Assembly and elected by the Security Council. However, their re-election is mainly conducted by voting in the General Assembly. The prospect of re-election, which is typically funded and canvassed by the government of the judge's country, can become a mirage for a judge if the judge fails to secure the indispensable support of the home country's government. Such a process, no doubt, will negatively influence the independence of the judges bearing in mind that they will one day face their re-election voting in the General Assembly.

Any member of the Court desirous of re-election will, like a true politician, be unduly influenced by the prospect of winning the votes in the General Assembly and not by the merits of the case. Moreover, since there is no compulsory retirement age for the judges of the ICJ, the temptation to continue to serve on the court *ad infinitum* will understandably be very high. Such an undue influence is antithetical to the cherished goal of impartiality in any judicial process such that each case will be adjudicated based on the merits.

B. THE SECURITY COUNCIL'S PERMANENT MEMBERS' ROLES IN THE ICJ PRESENT A CONFLICT OF INTEREST

The five permanent members of the UN Security Council⁶⁴ wield great power in the ICJ just as they do in the UN Security Council, undermining the impartiality of the Court. Not only do the members all have a representative judge on the ICJ, they equally play a dominant role in the determination of the efficiency of the court. The Security Council is the chief enforcer of the decisions of the ICJ. Specifically, Article 94(2) of the UN Charter provides as follows:

If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council which may, if it

64. The permanent members of the UN Security Council who also enjoy the veto power are the United States, the United Kingdom, France, Russia and China.

2012] CHALLENGES FACING THE INTERNATIONAL COURT 107

deems necessary, make recommendations, or *decide upon measures to be taken to give effect to the judgment.*⁶⁵

Thus, as permanent members with the veto power, the influence of the permanent members in the Security Council can tremendously impact the enforcement of the ICJ decisions. It is *prima facie* untidy for the same ‘big five’ to wield enormous powers both in the Security Council and the ICJ. Such dominance perceptively impacts the ICJ’s image of impartiality.

It has been contended, and rightly so, that:

With the Great Powers assured of representation on the bench, it would be futile to urge smaller states to give up the right of naming *ad hoc* judges and thus attaining equality with more powerful opponents, unless the Statute of the Court be amended so as to enlarge the membership of the Court and enable the smaller states to be represented more equitably in the Court.⁶⁶

If the ‘big five’ retain their disproportionate influence, then the impartiality and integrity of the ICJ will remain compromised.

C. THE ISSUE OF THE COURT’S COMPULSORY JURISDICTION

Member parties to the ICJ are free to accept or reject the compulsory jurisdiction of the Court, which undermines the authority of the ICJ to adjudicate relevant international issues of fact and law.⁶⁷ Four out of the five permanent members of the Security Council have exercised this choice by rejecting the compulsory jurisdiction of the court.⁶⁸ By so doing, these powerful member parties have ‘watered down’ the influence of the Court and encouraged a continuous erosion of its powers and influence. This trend, no doubt, will continue to contribute to the decline of the influence of the Court as long as countries that have a powerful global presence continue to set a bad precedent by choosing not to adhere to the Court’s compulsory jurisdiction.

65. U.N. Charter art. 94, para. 2 (emphasis added).

66. *II Ro Suh, Voting Behavior of National Judges in International Courts*, 63 AM. J. INT’L L. 224, 236 (1969). For more on the issue, see W. Samore, *National Origins v. Impartiality Decisions: A Study of World Court Holdings*, 34 CHI.-KENT L. REV. 193 (1956).

67. For more on the acceptance of the Court’s compulsory jurisdiction, see *supra* note 51.

68. Britain is the only permanent member of the Security Council which still accepts the compulsory jurisdiction of the Court. France and the United States withdrew their acceptance in 1974 and 1984, respectively.

D. THE NOMINATION OF AD HOC JUDGES BY PARTIES

Article 31 of the ICJ Statute corrupts the integrity of the Court by allowing a party before it to nominate an *ad hoc* judge if none of the ICJ judges is a nationality of the party.⁶⁹ In other words, every party before the ICJ is entitled to either a judge of the same nationality on the Court or an *ad hoc* judge.⁷⁰ On the face of it, this practice may be geared towards ensuring fairness and democracy in the operation of the Court.⁷¹ However, a critical examination of this practice—as well as the outcome—portrays an abuse of the judicial process at the highest level.⁷² The records indicate that *ad hoc* judges typically vote for their country of nationality, irrespective of the majority decision of the Court.⁷³ Guaranteeing a contentious party the right to a representative judge does not augur well for the Court's image of impartiality.⁷⁴

The impression created by this practice is that a party can only be guaranteed a fair and impartial justice before the Court if, and only if, the party is represented by one of the judges – either one of the elected judges or an *ad hoc* judge. Moreover, the mere fact that a party before the court must have a representative judge does not only negate the impartial appearance of the Court, but speaks volumes about its ability to

69. ICJ Statute, *supra* note 3, art. 31, para. 1 (“Judges of the nationality of each of the parties shall retain their right to sit in the case before the Court”). The second paragraph explains that “[i]f the Court includes upon the Bench a judge of the nationality of one of the parties, any other party may choose a person to sit as judge. Such person shall be chosen preferably from among those persons who have been nominated as candidates as provided in Articles 4 and 5.” *Id.* art. 31, para. 2. Article 31(3), however, states that “[i]f the Court includes upon the Bench no judge of the nationality of the parties, each of these parties may proceed to choose a judge as provided in paragraph 2 of this Article.” *Id.* art. 31, para. 3.

70. ICJ Statute, *supra* note 3, art. 31.

71. In fact, it has been contended that “[t]his practice of employing national judges in international courts is deeply rooted in the history of arbitration and judicial settlement.” Suh, *supra* note 66, at 224.

72. Suh, *supra* note 66, at 224.

73. From the data collected in researching the voting pattern of the judges, both the regular and *ad hoc*, Suh categorically asserted that “the conclusion seems warranted that in the total voting behavior of national judges, the regular judges were less dominated by national interests than the *ad hoc* judges.” Suh, *supra* note 66, at 230.

74. The obvious benefit of appointing an *ad hoc* judge is re-enforced by the fact that rarely do states waive the right in a dispute. In fact, it has been stated that “[o]f 60 contentious cases and 40 advisory opinions, given by both the old and new Courts at The Hague from 1922 to the end of August, 1967, in one case, namely, *Interpretation of the Greco-Turkish Agreement of December 1, 1926*, between Greece and Turkey, given on August 28, 1928, did both parties waive their rights, although they were informed by the Court that they were entitled under Art. 31 of the Statute, to appoint *ad hoc* judges. This they did because they were satisfied with the equality of status derived from the fact that neither had a judge of its own nationality on the bench.” *Id.* at 235-36. In support, the author cited to Acts and Documents Relating to Judgments and Advisory Opinions, 1928 P.C.I.J (ser. C) No. 15-1, at 10 and Interpretation of Greco-Turkish Agreement of Dec. 1st, 1926, Advisory Opinion, 1928 P.C.I.J (ser. B) No. 16, at 7-8 (Aug. 28).

2012] CHALLENGES FACING THE INTERNATIONAL COURT 109

dispense States-blind justice to the parties before it.⁷⁵ This practice contravenes the claim that a member of the Court is not a delegate of the government of her/his own country. Since an *ad hoc* judge is an appointee of a state party before the Court, the likelihood of future appointment will definitely sway the judge to be sympathetic to the state party which typically is his home state.

V. CONCLUSIONS AND RECOMMENDATIONS

The ICJ continues to command the pre-eminent position as the “principal judicial organ” of the United Nations, but to renew the influence and efficacy of the Court, vital reforms concerning the problems outlined above must be undertaken. With membership consisting of almost all the countries of the world, the sphere of influence of the ICJ is wide and encompassing.⁷⁶ Such a court deserves to be most equipped to handle the increasingly evolving judicial disputes arising in the 21st century. As the world population continues to increase exponentially,⁷⁷ so do issues arising from an ever-changing world. Issues concerning environmental protection, terrorism, drug trafficking, human trafficking, globalization, etc., are global in nature and deserve attention from an influential international court.

Although the Court has managed to do reasonably well in the last six decades, there are still areas for improvement and efficiency in order to ensure maximum performance. This article proffers recommendations in the following subsections: (A) the removal of judges from the permanent member states; (B) the acceptance of the compulsory jurisdiction of the Court; (C) the abolishment of Article 31 of the ICJ statute, and; (D) an overhaul of the system of the election and re-election of judges.

A. THE REMOVAL OF JUDGES FROM THE PERMANENT MEMBER STATES

The UN Security Council permanent members’ place on the International Court of Justice conveys a poor impression of the Court. As it were, the

75. The tremendous amount of influence on the *ad hoc* judges to side with their state of origin—the state which, in most cases, nominated them to represent them in a dispute—can be illustrated with the following statement: “Of all influences to which men are subject, none is more powerful, more persuasive or more subtle than the tie of allegiance that binds them (judges) to the land of their homes and kindred and to the great sources of the honors and performances for which they are so ready to spend their fortune and to risk their lives.” Suh, *supra* note 66, at 225 (citing Fourth Annual Report of the Permanent Court of International Justice, 1928 P.C.I.J. (ser. E), No. 4, at 75).

76. Currently, all 192 member states of the United Nations are members of the ICJ.

77. According to the United States Census Bureau, the world’s population is currently estimated to be about 7 billion people.

actions of the five permanent members on the Security Council have been largely attributed to the disordered discharge of the onerous responsibilities of the Council. It is common knowledge that since the Cold War era,⁷⁸ the effectiveness of the Security Council had been hampered by the tendency of the 'big five' to defend ideological interests in the Council. Even in the post-Cold War era of the 21st century,⁷⁹ such ideological bias still persists.⁸⁰

The presence of the judges from those permanent member states on the ICJ does not add any shine to the judicial image of the Court. Rather, it is merely another extension of the dominance of the five permanent members of the Security Council. Moreover, the fact that the decisions of the ICJ are primarily enforced by the Security Council⁸¹ generates a conflict of interest that warrants a separation between the ICJ decisions and the Security Council. The likelihood that the enforcement of the ICJ decisions by the Security Council will be subject to the same political shenanigans as in the Council is likely. A classic case is the use of the veto power by the United States in 1986 to frustrate the resolution of the Security Council for full compliance with the ICJ's judgment in the case of *Nicaragua v. United States*.⁸²

A situation where four out of five permanent members of the Security Council and the ICJ have rejected the Court's compulsory jurisdiction while simultaneously acting as chief enforcers of its decisions, is not only hypocritical but morally wrong. In any case, what is the

78. The Cold War era is estimated to have been from 1945 – 1991, when the Soviet Union collapsed. It marked a period of high political and military tension between the U.S.-led Western allies and the Soviet Union-led communist allies. George Orwell, the English author and journalist, is credited as the first person to coin the phrase in a general term. However, the American presidential advisor, Bernard Baruch, is credited as the first person to use it in the specific context of describing the geopolitical tension between the United States and the Soviet Union. See MICHAEL KORT, *THE COLUMBIA GUIDE TO THE COLD WAR* 3 (2001).

79. The post-Cold War era is from 1991 to the present.

80. The current stalemate in the Security Council regarding the appropriate sanctions to impose against Iran for its nuclear weapon build-up is a clear testimony of how the two former super-powers (U.S. and the Russian Federation) are still hampering the effectiveness of the Council and by extension, the United Nations.

81. See U.N. Charter art. 94, para. 2.

82. In this case, the United States government raised a preliminary objection to the Court's jurisdiction. After the Court decided that it had jurisdiction to entertain the case pursuant to Article 36(6) of the Statute of the Court, the U.S. government withdrew from the case and reserved "its rights in respect of any decision by the Court regarding Nicaragua's claims." *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, 1986 I.C.J. 14, 23 (June 27). The final judgment was against the U.S., and when the matter came before the Security Council for enforcement, the U.S. vetoed the resolution, thereby rendering the judgment unenforceable. See U.N. Docs. S/18250 (1986) and S/PV. 2704 (1986). The General Assembly, however, remedied the situation by adopting a resolution calling for "full and immediate compliance" with the Court's judgment. See G.A. Res. 41/31, U.N. GAOR, 53rd mtg., U.N. Doc A/RES/41/31 (1986).

2012] CHALLENGES FACING THE INTERNATIONAL COURT 111

enforcement option if one of the ‘big five’ refuses to perform its obligation under a judgment of the ICJ in light of Article 94(2) of the UN Charter? For example, after the Court had made an interim order for restraint and was still deliberating on the final judgment in the *Case Concerning United States Diplomatic and Consular Staff in Tehran*, the US government made a futile attempt to rescue US citizens held as hostages in Iran.⁸³ The court appropriately expressed its displeasure at the action when it tersely condemned the action as one “of a kind calculated to undermine respect for the judicial process in international relations.”⁸⁴ This recommendation is in tandem with the practice at the national level where there is a clear distinction of roles between the judiciary and the chief enforcer of judicial decisions, i.e. the executive.

B. THE ACCEPTANCE OF THE COMPULSORY JURISDICTION OF THE COURT

The statute of the ICJ should be amended with a view toward making the jurisdiction of the court mandatory and compulsory to all parties. The present situation whereby the member states are entitled to cherry-pick the jurisdiction of the court has contributed in no small measure to the watering-down of the prestige of the Court’s jurisdiction. As discussed above, jurisdiction should be mandatory if the ICJ is to adjudicate pressing international issues. Of particular concern is the current situation whereby four of the five permanent members of the Security Council have rejected the compulsory jurisdiction of the court.⁸⁵ Such a practice, no doubt, sends a very strong and wrong precedence to other member states.

As the global apex court, the ICJ deserves to command compulsory jurisdiction in order to be better able to tackle an ever-evolving myriad of legal issues. As it stands, the court is not well-equipped to meet increasing global expectations in the 21st century.

C. THE ABOLISHMENT OF ARTICLE 31 OF THE ICJ STATUTE

Article 31 of the ICJ Statute should be abolished if the ICJ must begin to regain its full image of impartiality and fairness.⁸⁶ The current provision

83. *United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran)*, 1979 I.C.J. 7, 21 (Dec. 15).

84. *United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran)*, 1980 I.C.J. 3, 43 (May 24).

85. For more on the rejection of the Court’s compulsory jurisdiction by four of the five permanent members of the Security Council, see *supra* note 68.

86. In making this recommendation, this author acknowledges and respects the recommendations of other commentators, particularly that of Suh to the effect that the Statute of the

112 ANNUAL SURVEY OF INT'L & COMP. LAW [Vol. XVIII

of Article 31, which entitles a party before the Court to nominate an *ad hoc* judge if none of the judges of the court is a national of the party, immensely tarnishes the impartiality image of the apex court. The Court must command a universally accepted image of impartiality such that any party before it must have unqualified confidence in the ability and courage of the Court to dispense States-blind justice.⁸⁷ Moreover, the practice of 'globalizing' the court⁸⁸ which has taken firm root in the composition of the court with a view to ensuring representation from all the major global blocs should be encouraged.

If the original goals of Article 31 were intended to ensure fairness and reflect the reality inherent in international relations, the same goals could be well served by a truly globalized court as is presently composed. Perhaps, the ratio of the judges relative to the geographical bloc which they represent may be reviewed in light of the recent demographical changes in the world population. But the additional safety net of allowing every party to have a representative judge, particularly, an *ad hoc* judge, contravenes the spirit of impartiality in the court. In making this recommendation, however, the more compelling point is the proven case of abuse of judicial power by the *ad hoc* judges in the ICJ.⁸⁹

D. AN OVERHAUL OF THE SYSTEM OF ELECTION AND RE-ELECTION OF JUDGES

Political influences in the election and re-election of ICJ judges warrant an overhaul in order to restore integrity to the ICJ. By so doing, the ICJ judges will enjoy maximum independence which is a *sine qua non* for an effective administration of justice. Rather than continue the current system, it is recommended that the coordination of the process for the election and re-election of the judges should be the prerogative of the International Law Commission, which is an arm of the United Nations.⁹⁰ Since the ILC is composed of internationally acclaimed legal jurists and publicists, they will be in a better position to conduct the election and re-election of the ICJ judges without undue political influence.

Court be amended either (1) to provide for the selection of an *ad hoc* judge by the "national group" (referred to in Article 4 of the ICJ Statute) of the litigating state, or (2) to provide for his nomination by the "national group" and his election by the Security Council. See Suh, *supra* note 66, at 231.

87. In support of this proposition, author Edith Weiss noted that "[s]tates will be willing to submit disputes to the International Court of Justice, and certainly to accept its compulsory jurisdiction, only if they are confident that their grievances will be heard by a Court which acts independently and treats all states parties to a dispute equally." Edith B. Weiss, *Judicial Independence and Impartiality: A Preliminary Inquiry*, in *THE INTERNATIONAL COURT OF JUSTICE AT A CROSSROADS* 123, 124 (Lori Fisler Damrosch ed., 1987).

88. For more on the globalization of the Court see *supra* note 15.

89. See *supra* notes 73-75.

90. This recommendation will mirror the Root-Phillimore committee, *supra* note 8.

2012] CHALLENGES FACING THE INTERNATIONAL COURT 113

Practically speaking, the General Assembly can cede the functions with respect to the compilation and short-listing of nominated candidates for the ICJ to the ILC. By so doing, the ILC may be designated as the 'electoral body' for the ICJ.⁹¹ After the election and re-election process has been conducted by the ILC, the confirmation process may then be undertaken by the General Assembly. The election and re-election process will be professionally conducted by professional peers who will be guided primarily by the highest ethics and standards of the legal profession, while the confirmation process will be conducted by the General Assembly to ensure universal confirmation of such a judge's election or re-election.

The recommendations made by this article seek to restore the status of the ICJ, in both name and practice, as the world's apex court. Facing issues of jurisdiction and composition, the ICJ's legitimacy and impartiality have been compromised. The reforms proffered in this article are requisite if the Court is to be equipped to effectively handle the evolving myriad of legal issues confronting the global community in the 21st century.

91. In this instance, functions may include the coordination of the process for the selection of the candidates, the vetting of their qualifications, the interview of the short-listed candidates and the final selection of the most qualified candidates. Since the ILC is composed of eminently qualified legal experts and jurisconsults, the process will be less prone to political influence and will command enormous credibility.