Articles

The Judicial Self-Government at the International Level – A New Research Agenda

By Nino Tsereteli & Hubert Smekal***

Abstract

The phenomenon of judicial self-government at international courts has thus far been vastly understudied. Our article fills this gap and systematically explores its personal dimension, both from formal and informal perspectives. Specifically, we focus on the selection, promotion, and removal of international judges. We build our analysis on studying legal instruments, such as constitutive treaties, statutes, and rules of procedure, which we subsequently supplement by anecdotal evidence of how they work in practice. We show that each international court is unique in terms of the forms and extent of participation of its judges in deciding on international judicial careers. There is a variation as regards the forms and degree of judicial self-government across international courts and across the relevant areas of decision-making for each court. However, some broader patterns and trends emerge from our examination of relevant provisions and practices. First, some courts display consistently low degrees of judicial self-government across all these areas of decision-making, while other courts display relatively higher degrees. Second, judicial self-government does not manifest itself at the international level in entirely the same way as it does at the national level. We found that while judicial self-government manifests itself relatively strongly in the areas of *promotions* and *removals* of international judges, it is limited in the area of *selection* of international judges. International courts are not, strictly speaking, self-governing in the latter area, because the sitting judges of these courts are rarely members of the bodies that decide or advise on selecting new judges. However, sitting judges of some international courts have become involved in the formation of the bodies screening candidates and/or in selecting the members of such bodies. Hence, judicial self-government has started manifesting itself in selection processes internationally, albeit in a limited fashion, with only indirect involvement of sitting international judges.

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A. Introduction

The research on international courts (ICs) acquired breadth and depth with their proliferation and empowerment.[1] Scholars focused on the diversification of their functions through the move beyond dispute settlement[2] and on the diversification of their beneficiaries, through the involvement of non-state actors.[3] They observed the resulting quantitative and qualitative changes, manifested in the increased number of judgments and the expansion of their reach into areas previously within the exclusive domain of states.[4] Apart from ICs as institutions, scholars have taken interest in judges as members of those institutions and more broadly, of the community of knowledge-based experts.[5] They pointed to the emergence of a global judicial community, bound together by shared values and beliefs,[6] due to their similar professional experiences and increased opportunities for interaction.[7] The recent backlash towards certain ICs, which culminated in withdrawals from the jurisdiction of these courts[8] or in the initiation of reforms arguably meant to weaken them,[9] shifted scholarly attention to ascertaining patterns of governmental

[1] Yuval Shany, *No Longer a Weak Department of Power? Reflections on the Emergence of a New International Judiciary*, 20 EUR. J. INT. LAW 73–91 (2009); THE OXFORD HANDBOOK OF INTERNATIONAL ADJUDICATION, (Cesare Romano, Karen J. Alter, & Yuval Shany eds., 2014); KAREN J. ALTER, THE NEW TERRAIN OF INTERNATIONAL LAW: COURTS, POLITICS, RIGHTS (2014).

[2] Armin Von Bogdandy & Ingo Venzke, *On the Functions of International Courts: An Appraisal in Light of Their Burgeoning Public Authority*, 26 LEIDEN J. INT. LAW 49–72 (2013) (identifying three more functions beyond dispute settlement: the stabilization of normative expectations, law-making, and the control as well as legitimation of authority exercised by others); YUVAL SHANY, ASSESSING THE EFFECTIVENESS OF INTERNATIONAL COURTS 37–45 (2014) (identifying four generic goals of ICs: norm support, dispute settlement, regime support and legitimizing public authority).

[3] See Robert Howse, *Moving the WTO Forward - One Case at a Time*, 42 CORNELL INT'L L.J. 223 (2009) (focusing on the reorientation of international law toward the interests, values, and rights of persons and peoples, not just states, through the evolution of human rights law, the law of war, and humanitarian law).

[4] Jenny S. Martinez, *Towards an International Judicial System*, 56 STAN L. REV. 429, 439 (2003).

[5] DANIEL TERRIS, CESARE ROMANO & LEIGH SWIGART, THE INTERNATIONAL JUDGE: AN INTRODUCTION TO THE MEN AND WOMEN WHO DECIDE THE WORLD'S CASES xix (2007).

[6] Daniel Terris, Cesare P. R. Romano & Leigh Swigart, *Toward a Community of International Judges*, 30 LOYOLA LOS ANGEL. INT. COMP. LAW REV. 419–472 (2008); Anne-Marie Slaughter, *A Global Community of Courts*, 44 HARV. INT. LAW J. 191 (2003).

[7] Terris, Romano, and Swigart, *supra* note 6.

[8] Burundi withdrew from the Rome Statute (see https://treaties.un.org/doc/Publication/CN/2016/CN.805.2016-Eng.pdf); Venezuela withdrew from the jurisdiction of the Inter-American Court of Human Rights (IACtHR).

[9] Particularly, the attempts of the UK government at the Brighton Conference in 2012 and of the Danish government at the Copenhagen Conference in 2018 to advance initiatives weakening the Court. *See* Philip Leach & Alice Donald, *A Wolf in Sheep's Clothing: Why the Draft Copenhagen Declaration Must be Rewritten*, Feb. 21,

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resistance and resilience techniques adopted by judges in response.[10] The regulation of judicial careers and administration of courts emerged as a source of fragility, or strength, of these courts, depending on the institutional set-up chosen. Judges claimed a greater role in decision-making on judicial careers and in administering their respective courts, while governments sought to retain control over these areas and through them, over jurisprudential outputs,[11] or reluctantly gave up control to an extent required to secure the credibility of these courts. Structuring the decision-making processes in these areas raises complex questions about the role of different actors and the impact of their involvement on *inter alia* the independence, accountability, and legitimacy of ICs.

Scholars have examined decision-making processes through which international judges are selected/removed and ICs are administered[12] as well as consequences of implementing those processes *inter alia* for the independence, accountability, social legitimacy and effectiveness of these courts.[13] Scholars have observed the trade-offs between some of these values, faced by states that design ICs and by judges that serve on them,[14] as well as the motivations behind the choices made.[15] To better understand these decision-making

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2018, https://www.ejiltalk.org/a-wolf-in-sheeps-clothing-why-the-draft-copenhagen-declaration-must-be-rewritten/.

[10] Mikael Rask Madsen, Pola Cebulak & Micha Wiebusch, *Backlash against international courts: explaining the forms and patterns of resistance to international courts*, 14 INT. J. LAW CONTEXT 197–220 (2018).

[11] The selection of new judges has been viewed as a mechanism for controlling judges. Laurence Helfer and Anne-Marie Slaughter, *Why States Create International Tribunals: A Response to Professors Posner and Yoo* 93 CAL. L. REV 899 (2005). For a comment on the implications of the politicization of selection processes for the independence of ICs in general and on the US Government blocking the reappointment of a South Korean judge due to its disagreement with the decisions made by that judge, see Manfred Elsig, Mark Pollack & Gregory Shaffer, *The U.S. is causing a major controversy in the World Trade Organization. Here's what's happening.*, WASHINGTON POST, June 6, 2016, https://www.washingtonpost.com/news/monkey-cage/wp/2016/06/06/the-u-s-is-trying-to-block-the-reappointment-of-a-wto-judge-here-are-3-things-to-know/).

[12] Concerning the selection of international judges, see RUTH MACKENZIE ET AL., SELECTING INTERNATIONAL JUDGES: PRINCIPLE, PROCESS, AND POLITICS (2010); SELECTING EUROPE'S JUDGES: A CRITICAL REVIEW OF THE APPOINTMENT PROCEDURES TO THE EUROPEAN COURTS, (Michal Bobek ed., 2015); Kate Malleson, *Promoting Judicial Independence in the International Courts: Lessons from the Caribbean*, 58 INT. COMP. LAW Q. 671 (2009); De Baere et al. partially dealt with these issues, but their particular focus has been on the rule of law. See Geert De Baere, Anna-Luise Chann & Jan Wouters, *Assessing the Contribution of the International Judiciary to the Rule of Law: Elements of a Roadmap*, SSRN ELECTRON. J. (2015), http://www.ssrn.com/abstract=2704266.

[13] Paul Mahoney, *The International Judiciary – Independence and Accountability*, 7 LAW PRACT. INT. COURTS TRIB. 313–349 (2008); Başak Cali, Anne Koch & Nicole Bruch, *The Legitimacy of Human Rights Courts: A Grounded Interpretivist Analysis of the European Court of Human Rights*, 35 HUM. RIGHTS Q. 955–984 (2013); SHANY, *supra* note 2; SELECTING EUROPE'S JUDGES: A CRITICAL REVIEW OF THE APPOINTMENT PROCEDURES TO THE EUROPEAN COURTS, *supra* note 12.

[14] Jeffrey L. Dunoff & Mark A. Pollack, *The Judicial Trilemma*, 111 AM. J. INT. LAW 225–276 (2017).

[15] Erik Voeten, *The Politics of International Judicial Appointments*, 9 CHI. J. INT'L L. 387 (2008-2009).

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processes, it is essential to discern specific roles of political and judicial actors within these processes and trace any transfers of powers between them. To our knowledge, the participation of international judges in forming and operating their respective courts, which is an indication that the ICs are self-governing, has not been systematically and exhaustively examined to identify the relevant developments within each court and variations across courts.[16] Scholars have occasionally referred to judicial empowerment in specific areas. As an example, Mahoney has usefully pointed out that, as regards the removals of judges by judges, "there is no alternative to direct self-regulation by each international court or tribunal, given the absence of an international "judicial council" of the kind found in many national legal systems."[17] Another decision-making process, which recently attracted scholarly attention due to increased judicial engagement, is the selection of judges.[18] The establishment of expert bodies for screening governmental nominees was a move towards not only de-politicization and professionalization of judicial selection processes [19] but also towards their judicialization, in the sense of allowing or increasing the involvement of judges. The election of senior national judges to such a panel prompted labeling it as "a germ of a council of judiciary."[20] Direct involvement of the two European Courts' Presidents in selecting members of such panels made one commentator suggest that "some embryonic form" of judicial self-government was emerging.[21] However, the exact character and extent of judicialization of the process of selecting international judges have not so far been explored.

Our paper seeks to fill in the gaps in scholarship by systematically exploring relevant legal instruments, such as constitutive treaties, statutes, and rules of procedure, to identify the forms and degree of judicial self-government (JSG) allowed/tolerated by states at the international level.[22] We use the definition of JSG Kosař proposes in the introduction to this

[16] Even in case of one of the most studied ICs – the CJEU – the phenomenon of JSG remains "largely under-studied" (Alberto Alemanno & Laurent Pech, *Thinking justice outside the docket: A critical assessment of the reform of the EU's court system*, 54 COMMON MARK. LAW REV. 129, 130 (2017)).

[17] Mahoney, *supra* note 13 at 342.

[18] SELECTING EUROPE'S JUDGES, *supra* note 12.

[19] MACKENZIE ET AL., *supra* note 12 at 5.

[20] SELECTING EUROPE'S JUDGES, *supra* note 12 at 287. Sauvé has used the term in relation to the "Article 255 panel" (CJEU). See Jean-Marc Sauvé, *Selecting the European Union's Judges, The Practice of the Article 255 Panel*, *in* SELECTING EUROPE'S JUDGES, 84 (Michal Bobek ed., 2015).

[21] Alberto Alemanno, *How Transparent is Transparent Enough? in* SELECTING EUROPE'S JUDGES 202, 204 (Michal Bobek ed., 2015); See also Dumbrovský et al., *Judicial appointments: The Article 255 TFEU Advisory Panel and selection procedures in the Member States*, 51 COMMON MARK. LAW REV. 455–482 (2014) (noting that if the majority of the Panel members are chosen at the will of the Court of Justice's President, as has happened so far, one might foresee a subtle move into the direction of judicial self-government).

[22] Our approach resembles the one taken by Squatrito (Theresa Squatrito, *Conceptualizing, Measuring and Mapping the Formal Judicial Independence of International Courts*, SSRN ELECTRON. J. (2018),

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special issue.[23] For the purposes of this study, the JSG bodies are the ones on which a judge or judges sit and which have some powers regarding court administration and/or the careers of judges. The research is of an exploratory nature. We have examined 24 ICs, in existence after 1948.[24] We seek to discern the variation as regards forms and degree of JSG across ICs and across the relevant areas of decision-making, i.e. selection, promotion and removal of judges, for each IC. This is to provide some context to the developments in Europe, covered in depth by two contributions in this special issue,[25] and to show how these developments fit in the broader narrative of the evolution of JSG.

Based on a careful examination of relevant norms and practices, two sets of observations will be made: one addressing the similarities and differences between how JSG manifests itself at the national and international levels and the other one addressing variations across ICs in terms of how much power international judges are given in forming and operating their respective courts. Along with these variations, we map emerging trends and patterns in the evolution of JSG at the international level.

It emerges that JSG does not manifest itself at the international level in entirely the same way as it does at the national level. National judiciaries are self-governing in the sense that judges are selected either by judicial councils with some participation of sitting judges or by court presidents. As regards the selection of international judges, most ICs are not, strictly speaking, self-governing, since sitting judges of those courts are rarely members of the bodies that decide or advise on selecting new judges. Given the fact that sitting judges

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https://www.ssrn.com/abstract=3131557), since we also examine the relevant treaties, statutes and rules of procedures of selected ICs. However, our criteria for identifying the relevant formal provisions differ from hers. We are specifically concerned with the element of judicial participation, and its effects on a number of values, including but not limited to judicial independence. She focuses specifically on the rules, which she considers to be institutional safeguards of judicial independence. Moreover, she employs a static approach when comparing courts at one point in time, while we try to look at the issue from a dynamic perspective, analyzing recent trends and highlighting critical junctures in development. The two papers thus complement each other.

[23] See David Kosař, Beyond Judicial Councils: Forms, Rationales and Impact of Judicial Self-Governance in Europe, in this special issue.

[24] For the list of the studied ICs, see the Annex. The literature under the term international adjudicative bodies most often understands that these are "1. international governmental organizations, or bodies and procedures of international governmental organizations, that . . . 2. hear cases where one of the parties is, or could be, a state or an international organization, and that . . . 3. are composed of independent adjudicators, who . . . 4. decide the question(s) brought before them on the basis of international law . . . 5. following pre-determined rules of procedure, and . . . 6. issue binding decisions." Cesare PR Romano, Karen J Alter & Yuval Shany, *Mapping International Adjudicative Bodies, the Issues and Players*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL ADJUDICATION 3, 6 (Cesare Romano, Karen J. Alter, & Yuval Shany eds., 2014). Our selection of ICs matches the selection of Karen Alter (ALTER, *supra* note 1), Kuyper and Squatrito (Jonathan W. Kuyper & Theresa Squatrito, *International courts and global democratic values: Participation, accountability, and justification*, 43 REV. INT. STUD. LOND. 152, 159-160, 175-176 (2017)) and Squatrito (Squatrito, *supra* note 22).

[25] See the articles by Christoph Krenn and by Başak Cali and Stewart Cunningham in this special issue.

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of some ICs have been instrumental in the formation of the bodies screening governmental nominees and a few of them have served as members of such bodies after leaving their respective courts, it is fair to say that JSG has started manifesting itself in selection processes internationally. However, the role of sitting international judges has so far been limited and indirect in this area. JSG manifests itself relatively strongly in other areas of decision-making, such as promotions of international judges to the positions of court presidents as well as removals of international judges.

This study reveals that the degree of JSG varies across ICs. Not surprisingly, each IC is unique in terms of the forms and extent of judicial participation, but some broader patterns and trends emerge from the examination of relevant provisions and practices. Some ICs display consistently low degrees of JSG across the relevant areas of decision-making, namely selection, promotion and removal of international judges. Other ICs display relatively higher degrees of JSG across the same areas. This means that if one places these courts along a continuum, the former group of ICs will be concentrated somewhere towards the extreme end standing for governmental control, i.e. minimal JSG. The latter group of ICs will be concentrated somewhere towards the extreme end standing for judicial control, i.e. maximal JSG. In practice, it is rare for an IC to be either entirely government-controlled or entirely judge-controlled. Importantly, it is possible for ICs to move slowly from one extreme end to another. This is what has arguably been happening in the recent decade or so, with the gradual transformation of the process of selecting international judges.

The article is structured as follows: Part B briefly explains the framework for studying JSG at the international level and identifies the parameters of this specific study. Part C focuses on personal self-government of international judges. It seeks to identify the forms and extent of participation of international judges in decision-making on their careers, namely selection, promotion and removal of judges. Part D summarizes our findings, highlighting variations across ICs as well as the emerging trends and patterns we have observed. While there is some limited discussion on normative implications, we do not extensively reflect on whether it is appropriate for international judges to claim power, i.e. greater degree of JSG and how to best divide responsibilities between political and judicial actors or balance various values when designing ICs. Part E looks at the dimensions of JSG other than its personal dimension. Part F concludes.

B. How to Study JSG at the International Level?

As explained above, our purpose is to capture the nature and extent of JSG at the international level. The definition of JSG introduced by Kosař in the introductory chapter guides our study. We focus on one out of many possible dimensions of JSG[26] – personal

[26] See David Kosař, Beyond Judicial Councils: Forms, Rationales and Impact of Judicial Self-Governance in Europe, in this special issue.

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self-government. It covers participation of judges in decision-making on judicial careers, i.e. on becoming a judge, on being promoted or being removed from the bench. We chose this dimension for two reasons: first, this area has developed dynamically in the past decade. The states are increasingly establishing expert bodies, with some judicial participation in their creation and operation. Second, according to the literature, these areas display struggles for power between judicial and political elites.[27] This is because the idea of judicial participation challenged the monopoly political elites had.

Our interest is not limited to the entities composed exclusively of judges[28] or the ones in which judges are in the majority. We take the presence of at least one judge deciding or advising on the issues affecting the careers of judges as an indicator of the existence of some degree of JSG. Expert bodies selecting or screening candidates for judicial positions at ICs that have no current judges of these courts among their members cannot be seen as manifestations of judicial *self*-government *sensu stricto*. However, the inclusion of former judges of these ICs as members of such bodies alongside national judges and/or the involvement of sitting judges of these ICs in the selection of members of such bodies illustrates the expansion of the role of the judicial community in this area of decision-making. It is fair to say that the trend of establishing selection/screening bodies of this kind indicates increased openness towards the engagement of judges in areas previously monopolized by the governments/political organs of international organizations.

The study focuses on JSG at the level of specific ICs. In case of national judicial systems, in addition to separate courts, JSG can manifest itself at the level of the judiciary as a whole. This is not the case with ICs, as they arguably do not form part of a consolidated, hierarchical system. As highlighted by a number of scholars, an international judicial community may be emerging, thanks to the increased judicial dialogue and face-to-face communications between international judges.[29] However, the way in which judicial selection or other relevant areas of decision-making are organized is largely court-specific. In this sense, ICs can be likened to national constitutional courts. ICs, like constitutional courts, usually perform specific functions and are created and regulated by a special law. The selection process differs from regular courts, typically permitting only more senior judges to sit on the bench, who resolve highly political cases more often than regular judges. Sitting on international or constitutional courts can be perceived as a highlight of a legal career and those comparatively few performing these functions form specific communities.

[27] Michal Bobek, *Epilogue*, *in* SELECTING EUROPE'S JUDGES 279, 288 (Michal Bobek ed., 2015) (arguing that the Parliamentary Assembly of the Council of Europe jealously guarded its leading role in the area of judicial selections, leaving the Advisory Panel established to screen the candidates in a precarious position).

[28] Examples include judges sitting as a plenary to elect court officials, discipline or remove judges; bureaus, through which judges organize the day-to-day activities of their courts; *ad hoc* committees examining complaints about judicial misconduct; court presidents; vice presidents and section presidents.

[29] *See supra* notes 6–7.

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A key distinction to be kept in mind is the one between *de jure* and *de facto* JSG. The former can be ascertained from constitutive treaties, statutes, and rules of procedure. The latter requires taking a closer look at actual practices. In this article, we primarily aim at discerning a formal spectrum of JSG from the relevant legal instruments. We search for commonalities and differences in the degree of delegation from states to judges in selected issues. It is possible that judges acquire greater informal influence over the selection or other decision-making processes over time, going beyond what the formal framework governing their activities envisages. Such influence cannot be captured by the study of the relevant legal instruments. Therefore, where possible, we complement our examination of the rules with reflections from scholarly literature about the practical implementation of these provisions to approximate the description to the "real" functioning of JSG on the ground.

When designing international agreements, states make important decisions along three dimensions: the binding force of norms (obligation), the level of precision and the delegation of authority to resolve disputes and interpret norms.[30] All these elements of legalization are closely related and can be freely combined.[31] States may delegate authority to ICs, which then act as agents on their behalf.[32] Sometimes, if states have an interest in demonstrating their credibility to individuals as beneficiaries of the treaties, they may give courts greater latitude. In such instances, judges are "trustees" selected for their personal and/or professional reputation to make meaningful decisions on behalf of beneficiaries, rather than agents of states.[33] States make important choices not only when deciding on the extent of the delegation of powers to the ICs, but also when deciding on the level of precision in formulating the relevant treaties and statutes. The more precise and detailed the provisions of the treaties or statutes are, the less space the courts then have to shape their own rules and practices.[34] Conversely, vague provisions on courts in

[30] Kenneth W. Abbott et al., *The Concept of Legalization*, 54 INT. ORGAN. 401–419 (2000).

[31] *Id.* at 404–408.

[32] Darren Hawkins et al., States, International Organizations and Principal–Agent Theory, in DELEGATION UNDER ANARCHY: PRINCIPALS, AGENTS AND INTERNATIONAL ORGANIZATIONS 3, 7 (D. Hawkins, et al. eds., 2006).

[33] Karen J. Alter, *Agents or Trustees? International Courts in their Political Context*, 14 EUR. J. INT. RELAT. 33–63 (2008).

[34] Most courts formulate their own rules of procedure. See, for example, Statute of the International Court of Justice (ICJ), 26 June 1945, Art. 30; Statute of the International Tribunal for the Law of the Sea (ITLOS), Art. 16; Statute of the International Criminal Tribunal for the Former Yugoslavia (ICTY), Art. 15; Statute of the International Criminal Tribunal for Rwanda (ICTR), Art. 14; World Trade Organization, Understanding on Rules and Procedures Governing the Settlement of Disputes, Art. 17.9 (for the Appellate Body); European Convention of Human Rights (ECHR), Art. 25 (d); American Convention, Art. 60 and Statute of the Inter-American Court of Human Rights (IACtHR), Art. 25 (1); The Agreement Establishing the Caribbean Court of Justice (CCJ), Art. XXI (with the states inviting the President, in consultation with five other judges of the Court selected by him, to establish the Rules of the Court). The Rules of Procedure and Evidence of the International Criminal Court (ICC) has been

the treaties and statutes leave judges ample space to decide important issues for themselves.

C. Personal Self-Government: Identifying Patterns and Trends

Personal self-government covers participation of judges in making decisions that affect judicial careers, including the selection of judges, promotion to official positions within the court, and removals. This section seeks to identify trends and patterns in terms of judicial engagement in each of the above-mentioned areas.

I. Selection of International Judges[35]

We provisionally identify three stages of the process of selecting international judges: (1) nominating candidates for judicial posts, (2) screening them/advising on their suitability and, finally, (3) electing or appointing international judges. As regards the screening of governmental nominees, this idea is not entirely new [36] but took some time to materialize. The bodies composed of parliament members[37] or government representatives[38] have been in charge of scrutinizing nominees for some international judicial positions. However, there is an emerging trend of establishing expert bodies to fulfill that function. These bodies can be considered as bodies of JSG, if they involve sitting international judges as members or if international judges are otherwise involved with the establishment and operation of such bodies.

Governments typically control nominations for international judicial positions. There is a variation across courts as to how many candidates a government may or must nominate[39]

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adopted by the Assembly of State Parties. The Rome Statute of the International Criminal Court, in force since 1 July 2002, Art. 51.

[35] See also the article of Shai Dothan in this special issue, particularly the Introduction and section A.I.

[36] Jeffrey Golden, *National Groups and the Nomination of Judges of the International Court of Justice: A Preliminary Report*, 9 INT. LAWYER 333–349, 347 (1975) (suggesting the establishment of a UN Judicial Committee to rate or simply approve/disapprove in a non-binding manner the nominations by national groups for the ICJ).

[37] The Committee established by the Parliamentary Assembly of the Council of Europe scrutinizes candidates and ranks them. See Resolution 2002 (2014) of the Parliamentary Assembly of the Council of Europe, para 9.

[38] As an example, the UN Security Council screened nominees for the ICTY and the ICTR. The Council was to select between 28 and 42 candidates out of those nominated for the posts at the ICTY and between 22 and 33 candidates for the ICTR. TERRIS, ROMANO, AND SWIGART, *supra* note 5 at 31 (arguing that this gives the permanent members of the Security Council an enhanced role when it comes to vetting candidates for ad hoc tribunals).

[39] For the CJEU, governments *must* submit one candidate. For the ECtHR, governments *must* submit a three-person list, see Art. 22 of the ECHR. For the ICC, a state party *may* nominate one candidate for any given election, see Art. 36 (4) of the Rome Statute.

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and as to whether states have a guaranteed seat on the bench.[40] Even where governments do not nominate directly, irrespective of who does so on their behalf, the chance of picking candidates whom governments disfavor is limited. As an example, national groups choosing the nominees for the International Court of Justice (ICJ) were supposed to act independently of their governments.[41] They were supposed to consult national judicial and academic communities.[42] However, in practice, governments reportedly controlled the process by means of unofficial consultations.[43] The same problem of politicization of nominations emerged with the ECtHR.[44] The ECHR does not contain requirements as to the process through which governments should pick candidates. In recent years, the concern about the quality of nominees generated pressure for making national selection procedures more fair, transparent and inclusive.[45] This led to the increased judicialization of the national selection processes, through the inclusion of judges from apex courts in national selection committees advising governments.[46] Even former judges of the ECtHR and other ICs have become members of the bodies that screen candidates and advise the governments who to pick.[47] In the end, however, even if the governments consult national judges or other actors, in most instances, it is ultimately up to them to decide whom to nominate. Only a very limited number of legal texts regulating ICs have allowed candidates for judicial posts to apply directly for an appointment, thus sidestepping the governments in the nomination phase. Open competition in which states have limited control over who

[40] The ECtHR and the CJEU are full representation courts, as their nominees have a guaranteed seat on the bench. This is not the case for most other courts.

[41] Clyde Eagleton, *Choice of Judges for the International Court of Justice*, 47 AM. J. INT. LAW 462 (1953). See also Golden, *supra* note 36 at 337 (noting that the intention of this method is clearly to diminish the control of the individual governments).

[42] See ICJ Statute, Art. 6.

[43] Golden, *supra* note 36 at 338.

[44] See David Kosař, *Selecting Strasbourg Judges*, *in* SELECTING EUROPE'S JUDGES 120–161 (Michal Bobek ed., 2015); Koen Lemmens, *(S)electing Judges for Strasbourg*, *in* SELECTING EUROPE'S JUDGES 95–119 (Michal Bobek ed., 2015); Norbert Paul Engel, *More Transparency and Governmental Loyalty for Maintaining Professional Quality in the Election of Judges to the European Court of Human Rights,* 32 *HRLJ* 448 (2012).

[45] See Guidelines of the Committee of Ministers of the Council of Europe on the Selection of Candidates for the Post of Judge, CM(2012)40-final, 29 March 2012.

[46] Council of Europe. Steering Committee for Human Rights (CDDH), SELECTION OF CANDIDATES FOR ELECTION AS JUDGE TO THE EUROPEAN COURT OF HUMAN RIGHTS: PROCEDURE AND SELECTION CRITERIA IN MEMBER STATES (2017), https://rm.coe.int/selection-of-candidates-for-election-as-judge-to-the-court-procedure-a/168075ad58.

[47] See for example, the Report submitted by Albania to the PACE Committee, Doc. 14133, 12 September 2016, and Doc. 14279, 28 March 2017) (about inclusion of the President of the Constitutional Court and of the former ECtHR judge in the national selection commission). According to the UK Report (Doc. 14050, 28 April 2016), the selection panel was chaired by Dame Rosalyn Higgins, the former President of the ICJ.

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applies was organized at the Civil Service Tribunal of the EU.[48] Its merger with the EU General Court, however, led to the discontinuation of this procedure. The candidates seeking appointments at the Caribbean Court of Justice can apply for posts directly, in response to an open call.[49] There are no signs however that this model will be replicated at other ICs.

The recent developments at supranational courts in Europe as regards increased engagement of the judicial community in selecting new judges resemble the trajectory of developments at the national level. Judges at both national and international levels slowly claim greater control on the composition of the bench. In the context of both the ECtHR and the CJEU, the idea of putting expert panels in charge of screening candidates was voiced by former international and national judges at least from the early 2000s.[50] Under the 2009 Lisbon Treaty, a judge-dominated seven-member expert panel was established to screen the candidates for the posts of judges (at the Court of Justice and General Court)[51] and Advocates Generals. In 2010, ECtHR President Costa followed suit and proposed the establishment of a similar panel.[52] Ultimately, the Panel was established, even though it does not feature in the Convention.[53] This development did not establish JSG at the two

[48] 2004/752/EC, Euratom: Council Decision of 2 November 2004 establishing the European Union Civil Service Tribunal. Annex 1 The European Union Civil Service Tribunal. Art. 3 (2) (https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32004D0752).

[49] Andrew N Maharajh, *Caribbean Court of Justice: A Horizontally and Vertically Comparative Study of the Caribbean's First Independent and Interdependent Court*, 47 CORNELL INT. LAW J. 735, 760 (2014).

[50] For the CJEU, see the Report produced by a working party composed largely of former judges of the ECJ and the then-Court of First Instance on behest of the Commission, named after Ole Due, former president of the ECJ, 2000, p. 51 (suggesting that an advisory committee consisting of highly-qualified independent lawyers should be set up to verify the legal competence of candidates, thereby assisting the member states in their deliberations). As regards the ECtHR, see Judicial Independence: Law and Practice of Appointments to the European Court of Human Rights, Interights (2003), 34-35. This Report was produced by a group of sitting and former judges of national courts. See also Report of the Group of Wise Persons to the Committee of Ministers, CM Documents, CM(2006)203, 979bis Meeting, 15 November 2006, para 118; Secretary General's contribution: http://www.astrid-online.it/static/upload/protected/Secr/Secretary-General---18-December.pdf, para 18 ("we should examine the idea of a mixed screening panel composed of prominent former high level national or international judges before transmitting the list of candidates to the Parliamentary Assembly for election").

[51] The Court of Justice of the EU consists of the Court of Justice (CJ) and the General Court (GC).

[52] For Judge Costa's proposal see, Doc. 12391 06 October 2010, National procedures for the selection of candidates for the European Court of Human Rights; Committee on Legal Affairs and Human Rights Rapporteur: Ms Renate WOHLWEND, Liechtenstein, Group of the European People's Party.

[53] Resolution CM/Res(2010)26 on the establishment of an Advisory Panel of Experts on Candidates for Election as Judge to the European Court of Human Rights (Adopted by the Committee of Ministers on 10 November 2010 at the 1097bis meeting of the Ministers' Deputies).

courts in the sense that these courts chose their own members,[54] but to some limited extent increased the influence of the judicial community on the process of judicial selection,[55] at the expense of political elites. The regulations of these two panels specifically refer to the judicial background as a criterion for membership.[56] The members of the ECtHR Advisory Panel included a number of former ECtHR judges.[57] While the CJEU panel has been dominated by national judges from top courts, it has had at least one former CJEU judge as its member.[58] The Presidents of the two European Courts are directly involved in selecting the members of the respective panels. The President of the Court of Justice presents the proposals for the Panel's Composition.[59] The Committee of Ministers consults the ECtHR President when appointing the panel members.[60] Importantly, despite the fact that the two bodies were seemingly established with similar goals, they have developed into completely different creatures, with the ECtHR panel emerging as the weaker of the two, as it was not given the same tools and powers.[61]

Similar developments are noticeable in several other ICs. The Rome Statute of the International Criminal Court (ICC) envisaged the establishment by the Assembly of State

[54] See Christoph Krenn, Self-Government at the Court of Justice of the European Union: A Bedrock for Institutional Success, in this special issue.

[55] Dumbrovský et al., *supra* note 21.

[56] See for the ECtHR panel, Resolution CM (2010)26, part 2 (noting that the panel members should be chosen from among members of the highest national courts, former judges of the ICs, including the ECtHR and other lawyers of recognized competence); for the CJEU, TFEU Art. 255, para. 2 ("The panel shall comprise seven persons chosen from among former members of the Court of Justice and the General Court, members of national supreme courts and lawyers of recognised competence").

[57] The ECtHR panel included former ECtHR judges: Wildhaber, Jaeger, Pellonpää, Costa, Mahoney, Vajic.

[58] Fifth Activity Report of the panel provided for by Article 255 of the Treaty on the Functioning of the European Union, 28 February 2018, available at https://curia.europa.eu/jcms/upload/docs/application/pdf/2018-05/5eme_rapport_dactivite_du_c255_-_en_final_-_public.pdf (listing Mr. Christiaan Timmermans, the former President of the Chamber of the Court of Justice of the European Union, alongside a number of prominent national judges).

[59] TFEU Art. 255, para. 2.

[60] Resolution CM/Res(2010)26, part 3.

[61] Bobek, *supra* note 27 at 281; Sauve, *supra* note 20 at 83 (pointing out that while neither of these panels issues binding opinions, Art. 255 is in a better position, taking into account that the CJEU judges are appointed by a common accord of states – all states have to agree to overcome an unfavorable opinion of the panel. The PACE can appoint judges, irrespective of the unfavorable opinion of the panel, by a majority of votes); Engel, *supra* note 44 at 449 (pointing out that the ECtHR panel was "vested with less than real power" and that "all these disabling restrictions were introduced despite the existence of a convincing blueprint of a panel solution established by the European Union."); Lord Mance, THE COMPOSITION OF THE EUROPEAN COURT OF JUSTICE (2011), 24–27, https://www.supremecourt.uk/docs/speech_111019.pdf.

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Parties (ASP) of an Advisory Committee for screening governmental nominees.[62] This Committee materialized only in 2012.[63] A few former ICC judges have been elected by the ASP as members of the Committee, alongside other eminent lawyers.[64] These developments inspired calls to create a similar screening body within the Organization of American States (OAS).[65] At this point, the candidates for posts at the IACtHR are scrutinized by an independent panel, convened by the Open Society Justice Initiative.[66] It is composed of jurists who served at ICs as well as academics and legal professionals.[67]

Interestingly, the idea of de-politicizing judicial selection processes and of involving judicial communities materialized outside Europe as early as 2006 when a Judicial Council was created for the ECOWAS Court of Justice. The job of this Council was to interview candidates and recommend the best-qualified persons, selecting three per country and forwarding them to the ECOWAS Authority to decide which candidate to appoint to the Court.[68] The Council consisted of the Chief Justices from member states not then represented on the seven-member Court,[69] thereby increasing the influence of national judges in the selection process.[70] Its creation had been preceded by the Court's direct conflict with the Nigerian judiciary and political establishment.[71] As one community official

[62] The Rome Statute of the International Criminal Court, Art. 36 (4) (c).

[63] For the terms of reference for the Committee, see Resolution ICC-ASP/10/Res.5 Strengthening the International Criminal Court and the Assembly of States Parties, Adopted at the 9th plenary meeting, on 21 December 2011.

[64] The former ICC judges that became members of the Advisory Committee included Philippe Kirsch, Daniel David Ntanda Nsereko, Adrian Fulford and Bruno Cotte. The Committee also included former judges from other ICs: Bruno Simma (the ICJ) and Manuel Ventura Robles (the IACtHR).

[65] See Laurence Burgorgue-Larsen, *Between Idealism and Realism: A Few Comparative Reflections and Proposals on the Appointment Process of the Inter-American Commission and Court of Human Rights Members*, 5 NOTRE DAME J. OF INT & COMP. LAW (2015).

[66] Similar panel functioned for the ICC (established by the Coalition for the International Criminal Court), prior to the establishment of the Advisory Committee.

[67] The panel included Cecilia Medina, who prior to becoming the member of this panel was a member (1995-2002) and President of the UN Human Rights Committee (1999-2001) and subsequently a judge (2004-2007) and President of the IACtHR (2008-2009).

[68] Karen J. Alter, Laurence R. Helfer & Jacqueline R. McAllister, *A New International Human Rights Court For West Africa: The ECOWAS Community Court of Justice*, 107 AM. J. INT'L L. 737, 759-760 (2013); Karen J. Alter, James T. Gathii & Laurence R. Helfer, *Backlash against International Courts in West, East and Southern Africa: Causes and Consequences,* 27 EUR. J. OF INT'L L. 293–328 (2016).

[69] Decision A/Dec.2/06/06 Establishing the Judicial Council of the Community (adopted June 14, 2006), ECOWAS Official Journal, Vol. 49 (2006).

[70] Karen J. Alter, Laurence R. Helfer & Jacqueline R. McAllister, *supra* note 68 at 759-760.

[71] *Id.*

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observed, national high court judges were upset that the ECOWAS judges with fewer qualifications and experience could issue rulings that were binding upon them.[72] This model vesting the power of vetting candidates into Chief Justices of member states was not replicated. The establishment of the Committee consisting of Chief Justices of state parties was proposed for the ICC but was not ultimately supported.[73] It was thought at the time that, taking into account the substantive tasks of the Committee, it would be appropriate to have experts with diverse backgrounds as its members, rather than exclusively Chief Justices, who, while authoritative, were perceived as state representatives.[74]

Even though international judges are increasingly involved in selecting new judges through membership in screening bodies or otherwise, they do not have the final word. Political branches of international organizations consisting of the representatives of national governments[75] or legislatures[76] elect judges. The other solution is that governments collectively approve judges, acting outside a strictly delineated organizational structure.[77] Where governments have a guaranteed seat on the IC, there is a relatively smaller need for engagement in political bargaining. Where the number of seats is lower than the number of governments and nominees, governments have less control over the outcomes of an election and a greater need to consolidate support among other governments for the candidates they favor. There is one court, the Economic Court of the Commonwealth of Independent States, in which individual states directly choose judges without any collective approval.[78]

One departure from these government-dominated systems of judicial selection is the model of the Caribbean Court of Justice (CCJ). It manifests some degree of JSG, even at the

[72] *Id*.

[73] Medard R. Rwelamira, *Composition and Administration of the Court*, *in* THE INTERNATIONAL CRIMINAL COURT, THE MAKING OF THE ROME STATUTE, ISSUES, NEGOTIATIONS, RESULTS (Roy S. Lee ed., 1999), 153, at 163.

[74] Thordis Ingadottir, The International Criminal Court, Nomination and Election of Judges, PICT Discussion paper, 2002, 33.

[75] As an example, the UN General Assembly elected permanent judges for the ICTY. See ICTY Statute, Art. 13 bis (1) (d). The judges of the ICJ are elected by the UN General Assembly and Security Council. See ICJ Statute, Art. 4.

[76] This is the case with the ECtHR, see ECHR, Art. 22.

[77] For example, judges of the Court of Justice and General Court of the EU "shall be appointed by common accord of the governments of the Member States" (TFEU, Arts. 253 and 254).

[78] See Economic Court of the Commonwealth of Independent States (http://courtcis.org/index.php/2013-05-14-08-49-44/judges).

level of appointment of judges.[79] The Regional Judicial and Legal Services Commission appoints all judges with the exception of the President, who is appointed by the governments upon the recommendation of the Commission.[80] In contrast to the two European panels that have no sitting judges of the respective courts among their members, the Commission has the CCJ President as its chairperson.[81] Other members include bar representatives, academics, chairpersons of national judicial and public services commissions, and civil society representatives. [82] Hence, its composition is more diverse than that of the two European panels. Interestingly from our perspective, where any person or body required to nominate a candidate for appointment to the Commission fails to make a nomination, the heads of judiciaries of contracting parties make the nomination jointly.[83] This means that national judges can indirectly influence the concluding part of the selection process through nominations to the appointing authority. Another noteworthy system for electing international judges also comes from the Americas. Members of the Central American Court of Justice "shall be elected by the supreme courts of justice of the Member States."[84]

One may argue that ICs are not self-governing in the domain of selecting new judges because sitting judges of these courts are rarely members of the bodies that decide or advise on this matter. While sitting judges of some ICs have been involved in forming the bodies screening governmental nominees and in picking the members of such bodies, their role in selecting new judges remains largely limited and indirect. Hence, it may be premature at this point to argue that recent selection procedure reforms indicate a significant rise in JSG at the international level, i.e. the empowerment of judges at the expense of political elites. However, the engagement of senior national judges and former international judges in the selection and screening processes signifies the growing role of the judicial community in areas previously monopolized by governments. This tendency arguably challenges traditional views about the relationships between governments and ICs. It seemingly contradicts the expectation that the governments will be reluctant to accept any development that constrains them and prevents them from appointing judges that best fit their preferences or from blocking the candidates that they dislike. Whether this development amounts to a genuine transfer of power from political to judicial elites or

[79] Malleson, *supra* note 12 at 686 (noting that the Caribbean model of judicial selection offers an important comparative model to other ICs when considering possible methods for strengthening the institutional protection of judicial independence).

[80] The Agreement Establishing the Caribbean Court of Justice, Art. IV (6) (7).

[81] *Id*. at Art. V (1) (a).

[82] *Id*. at Art. V (1) (b)-(g).

[83] *Id*. at Art. V (2).

[84] The Statute of the Central American Court of Justice, Art. 10.

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whether it is only a symbolic change intended to create the appearance of objectivity of selection processes is a separate question that can only be answered through in-depth scrutiny of how each institutional arrangement functions in practice.

II. Promoting Judges to Official Positions within the ICs

International judicial careers differ from careers in ordinary national judiciaries. Unlike hierarchical national judicial systems in which judges move up the career ladder, international judges are elected for limited terms and can only be promoted within their respective courts[85] by being elected to the position of President, Vice President or section president. Presidents of ICs fulfill manifold functions, both internally within the court as well as externally in relation to court principals (states), other international and national courts, potential users of the court, the academic community, and the public.[86] Terris *et al* point out that the presidents of ICs typically serve four distinct functions: judge, administrator, public spokesperson, and diplomat. The last involves the president in direct and frequent contact with governments: reporting on the work of the courts, securing funds and other resources, etc. His role requires a more delicate balance between the judicial and political functions of the Court.[87] Who selects the president therefore indirectly influences how the court performs.

Given the potentially powerful actors heading ICs, states had some alternatives to consider when designing the courts. They could have exerted control and named the presidents, or they could have left the task to the judges themselves. The latter option emerges as the predominant one. Most ICs have presidents elected by the judges among themselves.[88] JSG thus manifests itself very strongly in this important feature. Nevertheless, it can be attenuated by short periods of office and limited possibilities for re-election,[89] which prevent the presidents from building their own power base.

States deprive international judges of the possibility to fully decide on their own president in the following three ways: first, by rotating the office among the states;[90] second, by approving the judges' choice of the president; or, third, by directly selecting her. For

[85] Arguably, in the EU, a judge can rise from the GC to the CJ.

[86] See also Blisa – Kosař in this special issue.

[87] TERRIS, ROMANO, AND SWIGART, *supra* note 5 at 159.

[88] ICJ Statute, Art. 21 (1); ITLOS Statute, Art. 12 (1); ECHR, Art. 25 (a), IACtHR Statute, Art. 12 (1), ICC Statute, Art. 38 (1); ICTY Statute, Art. 14 (1); ICTR Statute, Art. 13 (1).

[89] For example, the ICC President and Vice Presidents are eligible for re-election only once. ICC Statute, Art. 38 (1).

[90] "The Presidency will be held successively by one of the Magistrates in alphabetical order according to the names of their respective states." (Statute of the Central American Court of Justice, Art. 16).

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example, the President of the Caribbean Court of Justice "shall be appointed or removed by the qualified majority vote of three-quarters of the Contracting Parties on the recommendation of the Commission."[91] Similarly, at some African ICs, states dominate the election of the president of the court.[92] At the Economic Court of the Commonwealth of Independent States, judges elect the chairperson by a simple majority for a relatively long term of five years, but the successful candidate needs the subsequent approval of the Council of Heads of State.[93]

To sum up, when designing systems for choosing the dignitaries of ICs, states have opted for differing levels of JSG. Typically, international judges themselves choose their president, although this latitude can be limited by a rather short period in office, or by a cap on the number of possible renewals of the mandate. In some cases, predominantly outside Europe, states keep the level of JSG low by dictating the selection of court presidents, whose loyalty then does not lie primarily with their peers, but with their principals.

III. Removal of Judges

The last dimension of personal self-government covers involuntarily and prematurely terminating the mandate of judges. How states regulate the removal of judges in international treaties or court statutes, i.e. the choice they make between retaining control over this issue and letting judges decide, is bound to have considerable implications on the interplay between the independence and accountability of international judges.[94] The governments' power to end judicial careers can motivate judges to exercise self-restraint in their decision-making in order not to antagonize governments. While such a setup can make judges externally accountable, it is arguably capable of undermining judicial independence, as judges may be guided by the fear of removal when deciding cases. Conversely, when judicial peers decide on a removal, considerations of judicial values and ethics come to the forefront. It is a good way of insulating judges from political pressure.

[91] The Agreement Establishing the Caribbean Court of Justice, Art. IV (6).

[92] The Authority, i.e. the Heads of State or Government, "shall designate one of the Judges of the Appellate Division as the President" of the Common Market for Eastern and Southern Africa Court of Justice (the Treaty Establishing the Common Market for Eastern and Southern Africa, Art. 20 (4)). The same holds also for the East African Court of Justice (the Treaty for the Establishment of the East African Community, Art. 24 (4)) and the Tribunal in the Southern African Development Community (the Protocol on the Tribunal in the Southern African Development Community, Art. 5 (1)).

[93] Gennady M. Danilenko, *The Economic Court of the Commonwealth of Independent States*, 31 N. Y. UNIV. J. INT. LAW POLIT. 893 (1998).

[94] Recently Jeffrey L. Dunoff & Mark A. Pollack, *The Judicial Trilemma*, 111 AM. J. INT. LAW 225–276 (2017); Paul Mahoney, *The International Judiciary – Independence and Accountability*, 7 LAW PRACT. INT. COURTS TRIB. 313–349 (2008).

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However, such a setup can make judges unaccountable, due to the high level of corporate solidarity among them.[95] Thus, the settings of the removal process are important for judicial decision-making and subsequently for the overall functioning of the court.[96]

There is a variation across courts as regards the three parameters: (1) who can request a removal, (2) on what grounds, and (3) who decides on removing a judge. With regard to each of the three parameters, states may choose to retain control and use the fear of removal to secure the loyalty of judges or somehow factor their preferences into judicial decision-making or they may choose to delegate these issues to the judges, thereby reinforcing JSG.

The degree of judicial involvement differs significantly as regards the initiation of the removal procedure of judges from the ICs. It can either be judge-dominated, as in the case of the ECtHR, where any judge of that court may set in motion the procedure for dismissal from office,[97] or states-dominated, such as in the Andean Community where a government requests the removal of an international judge.[98]

There are some differences as to the grounds for removing judges and the degree of specificity in formulating them. Judges of some courts can be removed if they have ceased to fulfill the required conditions.[99] In other instances, grounds for removal include misconduct or inability to perform functions.[100] The vaguer the grounds, the easier it is to remove judges, other things being equal.

There is considerable variation in terms of who decides on the removal of judges. At one extreme end of the spectrum, removals are within the exclusive competence of judges. Hence, the degree of JSG is high. Examples of these include the ECtHR[101] and the CJEU.[102]

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[95] The citations are in the footnotes *infra* 120–122.

[96] Another important component of judicial independence might be the extent of immunities – see Helen Keller & Severin Meier, *Independence and Impartiality in The Judicial Trilemma*, 111 AJIL UNBOUND 344–348 (2017).

[97] The Rules of Procedure of the ECtHR, Rule 7.

[98] Treaty Creating the Court of Justice of the Cartagena Agreement (Amended by the Cochabamba Protocol), Art. 10.

[99] See, for example, ECHR, Art. 23 (4).

[100] See, for example, ICC Statute, Art. 46-47; The Rules of Procedure and Evidence, Rules 24 and 25, 29 (4), 32.

[101] See the ECHR, Art. 23 (4) (specifying that a judge will not be dismissed from office unless the other judges decide by a majority of two-thirds).

[102] See CJEU Statute, Art. 6: **"**A Judge may be deprived of his office or of his right to a pension or other benefits in its stead only if, *in the unanimous opinion of the Judges and Advocates-General of the Court of Justice*, he no longer fulfils the requisite conditions or meets the obligations arising from his office."

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For the decision to be made, a qualified majority or all judges have to support it.[103] At another end of the spectrum, governments themselves directly remove their judges[104] or the bodies consisting of the heads of states or governments[105] are in charge of removals. Hence, the degree of JSG in this specific area is low. In the middle of the spectrum are the solutions that engage both judicial and political decision-makers. The General Assembly of the Organization of American States (OAS) has disciplinary authority over the judges but may exercise that authority only at the request of the Court itself.[106] The African Court on Human and Peoples' Rights decide unanimously on removal, but the Assembly of Heads of States can set the decision aside at its next session.[107] As regards the ICC, the Presidency may initiate the process based on a complaint or act on its own motion.[108] It consults a three-judge panel (appointed based on automatic rotation)[109] but is not bound by the recommendation of that panel.[110] The judges sitting in a plenary can recommend removal of a judge by a two-thirds majority.[111] The Assembly of State Parties will then decide on the removal by a two-thirds majority of the State Parties.[112]

While in all the courts that have adopted a mixed solution, judges and political decision-makers are part of a single process, the model of the Caribbean Court of Justice divides responsibilities in a rather distinct manner. The heads of government can remove the President of the CCJ, while the Commission can remove its regular judges.[113] Since this Commission is composed neither of sitting judges nor of government representatives, the above-described solution leads to de-politicization to some extent, but at the same time does not secure a high level of JSG.

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[103] CJEU Statute, Art. 6 (unanimously). ECHR, Art. 23 (4) (by 2/3 majority).

[104] The Economic Court of the Commonwealth of Independent States, see Danilenko, *supra* note 93, at 898.

[105] The Summit (of heads of states or government) in case of the East African Court of (Treaty for the Establishment of the East African Community, Art. 26 (1)) and the Authority (of heads of states or governments) in case of the Common Market for Eastern and Southern Africa Court of Justice (Treaty Establishing the Common Market for Eastern and Southern Africa, Art. 22).

[106] IACtHR Statute, Art. 20 (2).

[107] The Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights, Art. 19.

[108] ICC Rules of Procedure and Evidence, Rule 26 (2).

[109] ICC Rules of Procedure and Evidence, Rule 26 (2).

[110] ICC Regulations, Regulation 120 (3).

[111] ICC Rules of Procedure and Evidence, Rule 29 ICC ROPE, Rule 37 (2) of the ROPE; ICC Statute, Art. 46 (2)(a).

[112] ICC (Rome) Statute, Art. 46 (2)(a).

[113] The Agreement Establishing the Caribbean Court of Justice, Art. 4 (6 and 7).

The model of the South African Development Community Tribunal (SADC) exemplifies another distinct solution: a judge can be removed based on the recommendation of an ad hoc independent tribunal established for this purpose.[114] As regards ECOWAS Court of Justice, disciplinary matters fall under the competence of the Judicial Council, which is also responsible for screening candidates for judicial posts.[115] As noted above, the Judicial Council is generally composed of the Chief Justices of the Supreme Courts from the Member States that have no judges at the Court.[116] For disciplinary matters, the Council additionally includes one representative of the judges of the ECOWAS Court of Justice, elected by his peers for one year.[117] Upon completion of disciplinary proceedings, the Council forwards disciplinary recommendations to the Authority of Heads of State and Government.[118] This solution has been thought to be helpful in terms of insulating judges from attempts by governments to remove them from office.[119]

As demonstrated above, the degree of JSG allowed by states in the area of removing judges varies. In some instances, judges of ICs are fully in charge of removals and hence the degree of JSG is high. In other instances, governments or the bodies composed of government representatives decide and judges of ICs are not given any role in this regard. In mixed models, governments or political bodies can remove a judge, but only if the removal is requested or recommended by national and/or international judges.

There are few, if any, known instances of judges being removed or even disciplined through the above-described procedures. The empirical study by Terris *et al* suggests that

[114] Protocol on the Tribunal in the Southern African Development Community, Art. 11. This tribunal was de facto suspended.

[115] Decision A/Dec.2/06/06 Establishing the Judicial Council of the Community (adopted June 14, 2006), ECOWAS Official Journal, Vol. 49 (2006), Art. 1; Regulation C/Reg.23/12/07, Adopting the Rules of Procedure of the Community Judicial Council, 15 December 2007, ECOWAS Official Journal, Vol. 52 (December 2007-January 2008), Rule 5 (1) (2).

[116] The Chief Justices may be represented by the Judges of the respective Supreme Courts. Regulation C/Reg.23/12/07, Adopting the Rules of Procedure of the Community Judicial Council, 15 December 2007, ECOWAS Official Journal, Vol. 52 (December 2007-January 2008), Rule 6 (3).

[117] Decision A/Dec.2/06/06 Establishing the Judicial Council of the Community (adopted June 14, 2006), ECOWAS Official Journal, Vol. 49 (2006), Art. 2 (2); Regulation C/Reg.23/12/07, Adopting the Rules of Procedure of the Community Judicial Council, 15 December 2007, ECOWAS Official Journal, Vol. 52 (December 2007-January 2008), Rule 6 (1) (2).

[118] Regulation C/Reg.23/12/07, Adopting the Rules of Procedure of the Community Judicial Council, 15 December 2007, ECOWAS Official Journal, Vol. 52 (December 2007-January 2008), Rule 35 (2) (3).

[119] Karen J. Alter, Laurence R. Helfer & Jacqueline R. McAllister, *supra* note 68 at 759-760 (noting that the judicial council creates misconduct review procedures that insulate judges from attempts by governments to remove them from office).

JSG in this regard is largely informal. Even if the provisions are in place, there is a tendency not to publicize internal affairs, including disciplinary matters.[120] Terris *et al* further indicate: "These examples suggest how large a premium many judges place on keeping disciplinary matters internal and quiet. This is a matter of not only shielding individual colleagues from the glare of the public spotlight but also protecting the reputations of the institutions."[121] The risk of "corporate solidarity" is high[122] when disciplinary matters are left to judges. At the international level, this risk is even higher than it is at the national level because the power is vested in the specific IC, rather than a separate, external body, similar to national judicial councils that are normally composed of judges from different courts as well as non-judge members. Such a weak system of accountability is still defensible internationally since strong methods of oversight by external monitors would be vulnerable to abuse and lead to interference with judicial independence.[123]

D. Are International Courts Self-Governing? Variation across Courts/Areas of Decision-making and Emerging Trends and Patterns

Our study shows that each IC has a unique way of combining political and judicial elements in its procedures for selecting, promoting and removing judges, informed by its distinct legal framework and the political context in which it operates. There is considerable variation across ICs in terms of the degree of JSG that states provide them with. This is the case even with ICs in the same area of law. Several human rights[124] and criminal courts,[125] as well as economic integration courts,[126] have judicialized their procedures for selecting judges by establishing selection or screening bodies with senior national judges and former international judges among their members.[127] While these developments have been characteristically similar, we have observed differences in not only the composition and powers of the newly established selection/screening bodies under respective legal norms,

[120] TERRIS, ROMANO, AND SWIGART, *supra* note 5 at 205.

[121] *Id*.

[122] For such concern with regard to the ECJ, see JUDGES IN CONTEMPORARY DEMOCRACY: AN INTERNATIONAL CONVERSATION, 284 (Robert Badinter & Stephen G. Breyer eds., 2004).

[123] TERRIS, ROMANO, AND SWIGART, *supra* note 5 at 207.

[124] The ECtHR Advisory Panel, established by the Committee of Ministers Resolution CM/Res(2010)26.

[125] The ICC's Advisory Committee on Nominations, envisaged by Art. 36 (4) (c) of the Rome Statute.

[126] ECOWAS Court's Judicial Council and CJEU's Advisory Panel.

[127] The CCJ allows the Commission to appoint judges, but the President of the Commission is appointed by the states. Members of the Central American Court of Justice shall be elected by the Supreme Courts justices of member states.

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but also in their actual standing vis-à-vis political bodies and the influence they exert.[128] Other ICs operating in the same areas of law have been lagging behind in terms of engaging national and international judges[129] or have opted for a political screening body.[130] One commonality all ICs have is, however, that almost none of them can claim to be self-governing in this area of decision-making, based on our definition of JSG.[131] Normally, governments or organs of international organizations are the ones electing the judges of ICs, irrespective of the territorial reach of these courts and the area of law they operate in. Judges of all human rights and criminal courts and of most economic courts can elect their presidents among themselves. Judges of human rights and criminal courts and judges of European economic courts are vested with the power to remove their peers exclusively[132] or in conjunction with political organs.[133] Judges of a few courts can be removed by their states[134] or organs of international organizations.[135]

The above overview shows that there is variation in terms of the character and extent of judicial engagement across areas of decision-making within each court, with relatively limited participation of judges in the selection process, but greater judicial control over promotions, for example, to the position of court president, or over the removal of judges.

Since governments/political bodies maintain a strong grip over the selection of international judges, the level of JSG remains limited in starting international judicial careers.[136] Notwithstanding de-politicization and judicialization of procedures for selecting international judges in recent years, it is still fair to say that in this area, ICs are not, strictly speaking, *self*-governing, since sitting judges of these courts are not typically members of

[128] Even the two European Advisory Panels, one of which seems to have inspired the other, are considerably different.

[129] The IACtHR does not have a panel similar to the one established for the ECtHR, but the Open Society Justice Initiative convened a panel of independent experts to offer assessments of candidates. This Panel was modelled on a similar initiative pioneered by the Coalition for the ICC.

[130] As an example, the UN Security Council screened nominees for the ICTY and ICTR. The Council was to select between 28 to 42 candidates out of those nominated for the posts at the ICTY and between 22 to 33 candidates for the ICTR. The ECtHR is unique as it has both expert and political screening bodies.

[131] See Part B of this article.

[132] The ECtHR, the CJEU, the EFTA Court.

[133] The ICC, the IACtHR.

[134] The Economic Court of the Commonwealth of Independent States and the Court of the Eurasian Economic Community.

[135] The Court of Justice of the Common Market for Eastern and Southern Africa; the East African Court of Justice.

[136] Cali and Cunningham in this issue label JSG in this area as “constrained”.

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the bodies selecting new judges or screening candidates.[137] Sitting judges of the two European courts, particularly court presidents, are involved in selecting members of the expert bodies that assess the suitability of candidates, but cannot themselves be members of such bodies. Such bodies can only count as bodies of judicial *self-government*, if the meaning of *self* is stretched to cover the engagement of former judges of these ICs or if the meaning of *government* is expanded to incorporate the indirect involvement of sitting judges, for example, through helping select the members of screening bodies. Hence, JSG does not manifest itself at the international level in the same way it does at the national level, where judges are selected by judicial councils or by court presidents.[138] While national judges are elected to judicial councils by their peers to represent them, the members of the screening bodies are selected because of their expertise and therefore, they have no such representative function. Importantly, even if the establishment of screening bodies does not amount to the dramatic rise of JSG, the involvement of national judges as members of such bodies, which has become commonplace in and beyond Europe, still indicates judicialization of the process of selecting international judges. Overall, the development of selection procedures at each IC appears to be inspired by similar experiences of other ICs.[139] However, despite the similarity of purposes for which various selection or screening procedures have been established, each model emerges as unique, as a product of a specific political context.

The degree of JSG is overall higher in other areas of decision-making, such as promotions and removals of international judges, than it is in the area of selection. Judges of most ICs are able to elect presidents among themselves and also decide on the removals of their peers. This is not the case for all ICs, however. Governments are involved in selecting court presidents and in the processes of removing judges of some ICs. This means that some ICs display consistently low degrees of judicial self-government across all these areas of decision-making, while other ICs display relatively higher degrees.

To make sense of the current state of JSG at the international level, we identify two ideal types of ICs, in terms of the degree of JSG they enjoy. Minimal JSG entails complete governmental control over judicial careers and the operation of courts. Maximal JSG manifests itself in complete judicial control over the mentioned areas of decision-making:

[137] The CCJ is a rare exception since its President is the Chairperson of the selection commission.

[138] It can be inferred from the limited presence of sitting judges that the screening bodies were clearly not modelled on judge-dominated national judicial councils. However, scholars have argued that states that established some form of judicial councils at the national level may be more inclined to accept de-politicization and judicialization of selection processes at the international level. Malleson, *supra* note 12.

[139] There is a direct reference to the CJEU panel in Judge Costa's letter to the member states' ambassadors, in which he proposed the establishment of the ECtHR panel. See Doc. 12391 6 October 2010, National procedures for the selection of candidates for the European Court of Human Rights; Committee on Legal Affairs and Human Rights Rapporteur: Ms Renate WOHLWEND, Liechtenstein, Group of the European People's Party.

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candidates answer calls issued by the court and compete for judicial posts; judges select and remove their peers and elect their own presidents, sitting either in plenary or in other configurations. If we placed actual ICs on the continuum between these two poles based on our examination of relevant rules and practices in all dimensions, they would be spread across the continuum. If we focused specifically on the selection of judges, the spread would be skewed towards the ideal type of minimal JSG, indicating that states seek to maintain control over the entry into an international judicial career. The recent judicialization of screening processes presents an interesting trend but does not dramatically change the overall picture of JSG.

The motivations of governments that design ICs, including the procedures governing the selection, promotion, and removal of judges, can be complex and varied. Governments may choose to transform highly politicized selection procedures, which, while guaranteeing the democratic legitimacy of judges, often raise questions about the qualifications of at least some of these judges and their capacity to make decisions independently.[140] By engaging senior national judges and former international judges and drawing on their expertise, governments may seek to reinforce the social legitimacy of ICs, re-assuring the court's audiences of the quality of its judges.[141] Even where governments de-politicize and judicialize these procedures at the level of formal rules,[142] they may still seek to control courts through informal channels. They may seek symbolic rather than substantive change in the procedures, only to create an appearance of objectivity and assure critics of the courts of the quality and independence of their judges. It is then highly probable that the bodies engaging judges will have limited formal powers and, even if supported rhetorically, their views will frequently be disregarded in practice. Differences in the motivations of governments may explain why the two expert panels established to serve the same goals of improving the quality of judges and of enhancing authority and legitimacy of these courts are so different in terms of their status and their position vis-à-vis governments/political organs.

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[140] Andreas Follesdal, *Independent yet accountable: Stress test lessons for the European Court of Human Rights*, 24 MAASTRICHT J. EUR. COMP. LAW 484–510, 507 (2017) (pointing out that while "democratic states must have enough influence in the selection process to ensure indirect democratic accountability," "democratic control is problematic insofar as it reduces the credibility of the ECtHR's independence"); Engel, *supra* note 44 at 453 (pointing out that democratic legitimation through the Parliamentary Assembly is "no reliable guarantee of the candidates' professional quality.").

[141] One study showed that the quality of judges is one of the major concerns (Başak Çalı, Anne Koch & Nicola Bruch, *The Legitimacy of Human Rights Courts: A Grounded Interpretivist Analysis of the European Court of Human Rights*, 35 HUM. RIGHTS Q. 955, 967-968 (2013)).

[142] One recent study on delegation to independent regulatory agencies in the field of competition found that formal independence (whose many elements overlap with self-government) boost regulatory quality, while the formal political accountability does not have the same effect, see Christel Koop & Chris Hanretty, *Political Independence, Accountability, and the Quality of Regulatory Decision-Making*, 51 COMP. POLIT. STUD. 38–75 (2018).

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The likelihood that governments will take the task of shaping the selection procedure seriously arguably increases when a) the court in question processes a large number of cases and issues demanding judgments, which governments cannot afford to ignore, b) withdrawal from the court's jurisdiction or non-compliance are too difficult or costly,[143] and c) the judges do not participate in deciding cases involving their states. The concern about the quality of judges may serve as a motivation for supporting additional filters, such as screening procedures, especially where it is thought that some governments are unwilling and/or do not make efforts to put forward sufficiently qualified candidates.

State control over the composition of the court (through appointments and re-appointments) appears to be the most crucial means for controlling judicial output. As far as the court has control over composition, influence through disciplinary measures, including removals, appears secondary. This explains the relatively limited degree of judicial engagement at the stage of selecting judges and greater willingness on the part of governments to relinquish control of promotions and removals.

We believe that JSG involves a particular way of structuring decision-making processes that can help insulate courts/judges from political influence[144] and create an institutional environment reinforcing decisional independence.[145] De-politicization and judicialization of selection processes, through engagement of screening bodies with national and former international judges as members, can help block manifestly incompetent candidates. Reputational costs associated with negative evaluations of candidates can discourage governments from making a choice based on loyalty rather than qualifications.[146] The establishment of such bodies can raise the bar over time in terms of the qualifications international judges are required/expected to have.[147] This could lead to prioritizing

[143] Compare Weiler's version of exit (J. H. H. Weiler, *The Transformation of Europe*, 100 YALE LAW J. 2403,2423 (1991)).

[144] Paul Mahoney has viewed the introduction of an element of independent assessment of the eligibility and suitability of candidates at both national and international levels as an independence-enhancing measure. Mahoney, *supra* note 13 at 423.

[145] For the definition of decisional independence, see MARIA POPOVA, POLITICIZED JUSTICE IN EMERGING DEMOCRACIES: A STUDY OF COURTS IN RUSSIA AND UKRAINE 18 (2012).

[146] The Art. 255 Panel had already issued several negative opinions of CJEU candidates which nominating states respected, and many states even strengthened the procedural guarantees of screening candidates at the national level (Dumbrovský *et al.*, *supra* note 21), however, it has not prevented them from repeatedly proposing candidates found later unsuitable by the Panel again (see Slovakia which recently received a negative opinion by the Art. 255 Panel on three candidates for the EU General Court in a row).

[147] See detailed instructions on what kind of candidates they expect in the Activity Reports of the ECtHR Advisory Panel (https://www.coe.int/en/web/dlapil/advisory-panel) or the Art. 255 (CJEU) Panel (Panel Provided for by Article 255 of TFEU, THIRD ACTIVITY REPORT (2013), 17-21, https://curia.europa.eu/jcms/upload/docs/application/pdf/2014-02/rapport-c-255-en.pdf).

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professional backgrounds that are associated with greater independence or greater efficiency, depending on the needs of the specific court. It needs to be kept in mind, however, that depending on what the governments' intentions are and how these intentions shape the relevant rules, the actual role of the JSG bodies may be more or less significant. Their effects on the quality or independence of judges should not automatically be assumed based on the formal transfer of powers.

E. Looking beyond Personal Self-Government

Our contribution covers only one dimension of judicial JSG – personal self-government. As explained by Kosař in the introductory chapter, JSG may manifest itself in a number of other areas of decision-making: administration of courts, handling financial issues or information, setting up educational programs, etc. While some of these dimensions, such as court administration or financial management,[148] are relevant at the international level in the same way as they are at the national level, others, such as the educational aspect are largely irrelevant, since international judges should already be sufficiently competent at the time of being elected. In this respect, among others, ICs resemble constitutional courts, as they are both supposed to serve specific functions that presuppose already highly qualified judges.

One interesting area to be explored in the context of ICs is what we label "implementation self-government", i.e. the participation of ICs in the execution of their judgments. Scholars have acknowledged limited enforcement powers and capabilities of ICs.[149] Forced by the failure of governments to implement non-monetary measures in response to its findings of violations, the ECtHR started specifying measures of implementation in its judgments. Such judicialization of implementation occurred, notwithstanding the alleged incompatibility of such interventions with the supervisory powers of the Committee of Ministers.[150] The IACtHR went even further than the ECtHR. It started issuing specific orders that it could subsequently use to follow up on a state's behavior and issue compliance reports (or supervisory rulings) carefully examining the steps taken.[151] As regards the implementation of CJEU judgments, the founding treaties were formally toothless, but the Treaty of Maastricht introduced possible penalty payments in the event of noncompliance, on which

[148] Theresa Squatrito, *Resourcing Global Justice: The Resource Management Design of International Courts*, 8 GLOB. POLICY 62–74 (2017).

[149] Shany, *supra* note 1 at 84.

[150] Under the ECHR, Art. 46 (2), the Committee of Ministers 'shall supervise the execution' of judgments. See for example, Markus Fyrnys, Expanding Competences by Judicial Lawmaking: The Pilot Judgment Procedure of the European Court of Human Rights, 12 GERMAN L. J. 1231 (2011).

[151] See for example, Alexandra Huneeus, *Courts Resisting Courts: Lessons from the Inter-American Court's Struggle to Enforce Human Rights*, 44 CORNELL INT'L L.J 494, 500-502 (2011).

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the CJEU itself decides, and the Lisbon Treaty further simplified the procedure for prompting states to comply with the CJEU judgments.[152]

F. Conclusion

Our research shows that each court is unique in terms of the forms and extent of participation of its judges in decision-making on judicial careers. There is a variation even across ICs operating in the same regions and fields of law. However, some broader patterns and trends emerge from the examination of relevant provisions and practices.

One key finding of our study is that while JSG manifests itself relatively strongly in the area of removal of international judges and that of promoting international judges, for example, to the position of court presidents, it is considerably limited in the area of selecting international judges. ICs are not, strictly speaking, self-governing in the latter area, since sitting judges are rarely members of the bodies that decide or advise on selecting new judges. Importantly, sitting judges of the CJEU and the ECtHR have been involved in establishing expert bodies that screen governmental nominees and/or in selecting the members of such bodies. Some of these judges have become members of screening bodies themselves, after leaving the respective ICs. These modalities of participation can count as manifestations of JSG at the international level, if the meaning of self is stretched to cover the engagement of former judges of these ICs or if the meaning of government is expanded to include the indirect involvement of sitting judges, for example, through helping select the members of the bodies that assess the suitability of governmental nominees.

The second finding of our research is that some ICs display consistently low degrees of JSG across the relevant areas of decision-making, namely, the selection, promotion and removal of judges, while other ICs display relatively higher degrees of JSG across the same areas. This means that if one places these ICs along the continuum, the former group of ICs will be concentrated somewhere towards the extreme end standing for political control, i.e. minimal JSG. The latter group of ICs will be concentrated somewhere towards the extreme end standing for judicial control, i.e. maximal JSG. It is possible for courts to move slowly from one extreme end to another. This is what has arguably been happening in the recent decade or so, with increased but still limited judicial involvement in the process of selecting international judges.

[152] Steve Peers, *Sanctions for Infringement of EU Law after the Treaty of Lisbon*, 18 EUR. PUBLIC LAW 33–64 (2012).

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Annex: List of the international courts under study

African Court on Human and Peoples' Rights

Caribbean Court of Justice

Central African Economic and Monetary Community Court of Justice

Central American Court of Justice

Court of Justice of the Andean Community

Court of Justice of the Benelux Economic Union

Court of Justice of the Common Market for Eastern and Southern Africa

Court of Justice of the EU

East African Court of Justice

Economic Court of the Commonwealth of Independent States and the Court of the Eurasian Economic Community

ECOWAS Court of Justice

EFTA Court

European Court of Human Rights

Inter-American Court of Human Rights

International Court of Justice

International Criminal Court

International Tribunal for Former Yugoslavia

International Tribunal for Rwanda

International Tribunal for the Law of the Sea

Mercosur Permanent Review Tribunal

Organization for the Harmonization of Corporate Law in Africa Common Court of Justice and Arbitration

Southern African Development Community Tribunal

West African Economic and Monetary Union Court of Justice

WTO Appellate Body.

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