Judges of the International Court of Justice – Election and Qualifications

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Abstract. The article reviews (i) the qualifications of judges of, and (ii) the distribution of seats in, the ICJ. (i) Since 1966 there has been only one judge elected who merely satisfied the requirement relating to highest national judicial office. It is clear that with the increase in the supply of competent public international 'jurists' from the developing countries and because of the increasingly complicated and specialized nature of international law national judicial office has become irrelevant and insufficient as a qualification. Recognized competence as a public international jurist should be the only valid criterion. On the other hand, the latter concept has been given an unwarranted and undesirable extension by the UN, especially in connection with candidates from developing countries. (ii) While, in keeping with Article 9 of the Statute, there is some agreed regional distribution of seats among the non-permanent members of the Security Council, equity seems to be disregarded, particularly among the non-Western European states, by rotation among states being ignored. This is not in keeping with the Statute.

1. INTRODUCTION

At this point in time, 55 years after the first election of judges to the International Court of Justice ('ICJ') in February 1946, I thought it may be useful to take stock of how Article 2 (and Article 9) of the Statute of the ICJ relating to the qualifications of candidates for seats on the court had been interpreted and how the provisions of the Statute in regard to the election of judges had, rightly or wrongly, been applied. It is in fact necessary to assess whether the selection of judges made in the modern context of international society is appropriate, in spite of what may appear to be inadequacies, or rather improprieties, in the statutory provisions relating to the qualifications required of judges. The manner in which the international community acting through the UN has recently been conducting itself in the selection of judges also indicates perhaps that there is a realization of deficiencies. The international community may appear instinctively to have responded to the needs of the modern situation (*la condition de la société international*) which again emphasizes why a hard

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look should be taken at the requirements of Article 2, in order to come to some viable conclusions about the nature of the qualifications which judges of the ICJ, the world's most important international court, should have. The implementation of Article 9 should also be examined carefully.

2. ARTICLE 2 – QUALIFICATIONS

To date there have been 86 judges elected to sit on the court. Article 2 states in English:

> The court shall be composed of a body of independent judges, elected regardless of their nationality from among persons of high moral character, who possess the qualifications required in their respective countries for appointment to the highest judicial offices, or are jurisconsults of recognized competence in international law.[1]

and in French:

> La Cour est un corps de magistrats indèpendants, elus, sans égard à leur nationalité, parmi les personnes jouissant de la plus haute considération morale, et qui réunissent les conditions requises pour l'exercice, dans leurs pays respectifs, des plus hautes fonctions judiciaires, ou qui sont des jurisconsultes possédant une compétence notoire en matière de droit international.[2]

The import is clear, whether the French or English text is considered. First, candidates must be independent. Second, they must be of high moral character. Third, they must fulfil one of two requirements. Either they must possess the qualifications required in their respective countries for appointment to the highest judicial offices or they must be jurisconsults of recognized competence in international law.

It seems pointless to ask whether any of the judges so far elected did not fulfil the first and second requirements of independence and having high moral character. No doubt when the UN elected the judges it was satisfied that they fulfilled these requirements. Independence as a pre-election qualification is difficult to verify. The requirement probably means that judges must act independently once elected. No doubt also that these judges satisfied one of the requirements stipulated in the third place.

It will be noted that in respect of the third requirement what the Article states is not that as one of two alternatives an elected candidate must have held or be holding high judicial office in his country but that he must only possess the qualifications required in his country for appointment to the highest judicial offices. It would thus seem that if a nominee is disqualified by reason of his/her age – being too young or too old according to the law of the country – for appointment to such offices, whatever other

1. ICJ Acts and Documents 5, at 61 (1989).
2. *Id.*, at 60.

qualifications he/she may have, he could not be eligible to sit on the Court. Again, the judge must be qualified for the highest judicial offices, not any judicial offices. Thus, while those who have not held the highest judicial offices are not disqualified, they must not be disqualified for any reason, such as age, or some other requirement such as length of practice or experience, from holding such office. It seems that qualifications must cover an age requirement, if such there is in the national state. This must imply that the issue is not whether the elected judge would have been appointed, if he/she had applied, to the highest judicial offices, or whether he/she had applied and not been appointed, but only whether he/she had the qualifications to be so appointed. Again the highest judicial offices can only cover, it would seem, the superior courts of the national state of the elected judge.

As far as this leg of the qualification goes, the only query that may be raised is whether the age restriction has been observed by the UN in electing judges and by governments (who act on the recommendation of the relevant national groups of the Permanent Court of Arbitration, where applicable) in making nominations. It would seem that there have been candidates who have retired from high judicial office at the limit of the age of retirement. For example, both H.N.G. Fernando and T.S. Fernando of Ceylon and Sri Lanka respectively, were candidates who had retired at the mandatory age from their positions as Chief Justice of their country and neither of them fell into the second category of international jurists. Weeramantry of Sri Lanka was above the age of retirement (65) for high court judges of Sri Lanka, when he was a candidate for re-election in 1999; he was 72.[3] On the other hand, none of the elected judges who were clearly elected on the basis that they were qualified to be national judges failed to satisfy the age qualification. These judges had little or no international legal experience which would have entitled them to be included in the second category of international jurists. There were apparently only five or six of the 86 elected who would on a liberal construction fall into this category – Azevedo (Brazil – 1946),[4] Armand-Ugon (Uruguay – 1951),[5] Forster (Senegal – 1963),[6] Bengzon (Philippines – 1966),[7] Onyeama (Nigeria – 1966).[8] Weeramantry (Sri Lanka – 1990)[9] is better regarded as belonging to this category. Azevedo had retired as a judge but was only 52 years of age and was, therefore, qualified to be a national judge age-wise. Armand-Ugon was still a national judge when elected, as was Forster. Bengzon was 71 but in his country was eligible to be a national judge.

3. But it is possible that *in* 1999 he could have been included under the second leg of the qualifications, as liberally interpreted by the UN.
4. *See* his biography *in* 1946–1947 ICJ Yearbook 52.
5. *See* his biography *in* 1951–1952 ICJ Yearbook 19–20.
6. *See* his biography *in* 1963–1964 ICJ Yearbook 16.
7. *See* his biography *in* 1966–1967 ICJ Yearbook 19–20.
8. *See* his biography *in id.*, at 22–23.
9. *See* his biography *in* 1990–1991 ICJ Yearbook 37–39.

However, he had some international legal experience and although not a legal author could have qualified in 1966 under a broad conception as an international jurist as well, particularly because from developing countries there were few well qualified internationalists at the time. Onyeama was still a national judge when elected. Weeramantry had been a national judge and had resigned but was eligible to be one when elected in 1991, because he was not over 65 years of age, the age of retirement for high court judges in Sri Lanka.

There are no restrictions of a similar nature, on the other hand, in the alternative requirement. No limitations of age, experience etc., although these may be relevant in deciding whether the requirement has been fulfilled. All that is demanded is that the elected judge be a jurisconsult of recognized competence in international law. International law presumably means public international law. It is international law that is relevant not any law. 'Jurisconsult' is defined in the Oxford English Dictionary as a "person learned in law" or a "jurist." The critical element is, however, the requirement that the person be of 'recognized competence.' Surely this must mean that he must have a reputation in the international legal community as being a jurist who is competent, not necessarily distinguished, in the field of public international law. That is to say, he must not only be a jurist learned in the law but have a recognized reputation. Merely being an international lawyer is inadequate, clearly. On the other hand, it is not required that he be a practitioner of international law, he may be an academic who is learned in the law. In this respect there may be a difference between the first and second alternatives of the third requirement, depending on what states require of those appointed to the highest judicial offices. In terms of age in respect of which there is no limit in the context of the second alternative there have been, indeed, elected judges who were international jurists and who were, *e.g.*, over 70, at the time of their election or re-election, such as Alvarez of Chile,[10] Jennings of the UK (second term),[11] Tanaka of Japan (first term),[12] Lachs of Poland (third term).[13] The point is that there is no stipulated age limit for candidates or judges who fall into the second category. The only requirement is that the judge (and candidate) must be an international jurist of recognized competence.

It is significant that since 1966 there have been no elected judges except perhaps one in 1990 (Weeramantry) who did not qualify under the second category on the interpretation apparently given to the statutory provision by the UN, whether they came from the developed world or the less developed world. Indeed none of the judges who have filled the seats allocated to the developed countries (now five but originally six in 1946)

10. *See supra* note 4, at 43–44.
11. *See supra* note 9, at 19.
12. *See* his biography *in* 1960–1961 ICJ Yearbook 5–6.
13. *See* his biography *in* 1984–1985 ICJ Yearbook 20–22.

have been other than international jurists belonging to the second category. Moreover, judges of the nationality of all the five permanent members of the UN have qualified under the second category. As the developing countries have trained and educated nationals in international law, developed their own international legal advisory services and acquired expertise in their nationals in international law, resorting to the first category of candidates has ostensibly waned and virtually disappeared.

It would seem clear now, with the growth in complexity and coverage of international law, a good knowledge of and training in the subject and its techniques which are very different from those of national legal systems, especially those deriving from the Anglo-American common law, is required in order to perform even satisfactorily on the bench of the ICJ. It was different in this regard in 1946 and perhaps in 1966 when the last but one judge to be elected purely under the first alternative – eligibility for the highest national judicial office – was elected. It is highly doubtful whether mere service in the highest national court or eligibility to do so because of practical professional or other experience in the national legal system, however brilliant and suitable for the highest national judicial offices the candidate may be, makes him or her suitable for service on the ICJ.[14] This may explain why since 1966 there have been no judges except one who merely satisfied the first alternative of the second requirement.[15] Another relevant factor for this change is the phenomenal increase in the number of competent international lawyers, if not 'jurists' in the substantive sense of the word, in the world, particularly in developing countries, who could fall into the second category under the second requirement.

There are several examples of judges who may have qualified under the first alternative but who were also international lawyers and had international legal experience so that they ostensibly qualified as 'jurists' under the second alternative, even though all of them may not have been 'international jurists of recognized competence' in the strict sense. Twelve such cases can be identified. Zoricic (Yugoslavia),[16] elected in 1946, was a national judge at the time of this election but had considerable international legal experience as well. Klaestad (Norway),[17] also elected in 1946, had participated in international arbitrations and had considerable international legal experience. Ammoun (Lebanon – elected in 1965),[18] Petren (Sweden – elected in 1966),[19] Morozov (USSR – elected in 1969),[20] Elias

14. On the other hand, the suitability of such persons for service on International War Crimes Tribunals or International Administrative Tribunals, provided they possess other qualifications cannot be gainsaid.
15. Jayawardene of Sri Lanka who was a candidate in 1981 and 1984.
16. *See supra* note 4, at 47–48.
17. *Id.*, at 49–50.
18. *See* his biography *in* 1965–1966 ICJ Yearbook 23–24.
19. *See supra* note 7, at 20–21.
20. *See* his biography *in* 1969–1970 ICJ Yearbook 24.

(Nigeria – elected in 1975),[21] Mbaye (Senegal – elected in 1982),[22] Pathak (India – elected in 1988),[23] Ajibola (Nigeria – elected in 1991),[24] Herczegh (Hungary – elected in 1993)[25] and Rezek (Brazil – elected in 1996)[26] were all at the time of election national judges in the highest courts or had been such national judges and were eligible still to be appointed to the highest national judicial offices (not being disqualified in terms of age, etc.) or were in a position so to be appointed because of their national legal experience. However, all of them had some ostensible claim to be qualified under the second alternative, as interpreted by the UN, because they had international legal experience such as being on the International Law Commission or participating in diplomatic conferences and performing diplomatic functions involving international law or had written on international law.[27] It is important that these judges seem to have been regarded as being qualified under the second alternative because it supports the view that they were not elected particularly because they were qualified under the first alternative, which alternative, it would seem, either has fallen into disuse or is rarely used. Clearly, it is in the interest of the international community that the first alternative be so treated, because, as already implied, mere expertise in national law and eligibility for high national judicial office, is not sufficient to discharge satisfactorily an international judicial function on the ICJ, on account of the increasing complexity and arcane nature of contemporary international law. Even though some of these judges may have not strictly been "international jurists of recognized competence" (indeed, some of them had merely written on public international law without being recognized as even competent international jurists, let alone having a distinguished reputation, as some judges have had before they were elected), they would appear to have been elected under the second alternative, as it has been broadly interpreted by the UN.

In regard to the second alternative – being an international jurist of recognized competence – the interpretation given by the UN to it has been admittedly liberal. At the very inception of the ICJ in 1946 at least nine of the 15 judges elected were respected academics who had more importantly acquired a reputation as international jurists by their scientific writings – Basdevant, Alvarez, Fabela, Winiarski, de Visscher, McNair, Badawi, Krylov, and Hsu Mo.[28] It is important to emphasize that all of

21. *See* his biography *in* 1975–1976 ICJ Yearbook 25–26.
22. *See* his biography *in* 1981–1982 ICJ Yearbook 32–33.
23. *See* his biography *in* 1988–1989 ICJ Yearbook 35–36.
24. *See* his biography *in* 1991–1992 ICJ Yearbook 38–39.
25. *See* his biography *in* 1993–1994 ICJ Yearbook 38.
26. *See* his biography *in* 1996–1997 ICJ Yearbook 44–45.
27. Weeramantry (*see* biography, *supra* note 9) does not really fall into this category because, having had no training in international law he had not written anything or done anything at the time of his candidacy which could be regarded as significantly connected with the science or practice of public international law.
28. *See supra* note 4, at 42 *et seq*.

them had become jurists by virtue of their scholarly writings. It was not the teaching qualification that enabled them to qualify as international jurists of recognized competence. Thus, very early on in the United Nations era the tone was set for the acceptance of international legal scholars who had established themselves as jurists by their contribution to the literature of international law to be the principal kind of subject for qualifying as international jurists of recognized competence. There may be less of a tendency to exclude other categories today but the scholar-international jurist is still probably the most important candidate for election under the second alternative. Of the other six original judges of the Court, Guerrero (El Salvador),[29] although not an academic, was a recognized scholar in his own right, which by itself would have qualified him for inclusion under the second alternative, and in addition had a great deal of experience in international legal affairs, among other things as an arbitrator, having also been a judge of the Permanent Court of International Justice ('PCIJ'). Hackworth (US)[30] had been his country's international legal advisor for almost his whole career and had acquired a reputation, among other things, through a monumental piece of documentary writing, which clearly brought him within the second alternative. Read (Canada) was an academic and a practitioner as international legal advisor of his country. His biography does not reflect any scholarly contribution.[31] Klaestad[32] and Zoricic[33] were regarded as qualified as international jurists, although they were judges of the highest courts of their countries at the time of election, because they had considerable experience in international legal practice in a variety of capacities, or had contributed significantly to international legal literature, or both. Azevedo[34] was the only judge who really qualified under the first alternative. Thus, of the original 15 judges at least 11 and possibly 14 were scholars who had acquired a reputation as international jurists. This point is being made in order to illustrate the importance attached from the beginning to *significant* scholarship and contribution to international legal literature in defining an international jurist of recognized competence.

It may also be noted that the tradition among the three western permanent members of the Security Council who virtually have permanent seats on the Court, namely the US, the UK, and France, has been generally to nominate and have elected international legal scholars who had by virtue of their contribution become recognized international jurists. Their 'appointees' have included renowned scholars such as Basdevant, Gros,[35]

29. *Id.*, at 42.
30. *Id.*, at 45–46.
31. *Id.*, at 50–51.
32. *See supra* note 17.
33. *See supra* note 16.
34. *See supra* note 4, at 52.
35. *See supra* note 6, at 16–17.

Guillaume[36] (all from France), Jessup, Baxter,[37] Schwebel[38] (all from the US), McNair, Lauterpacht,[39] Fitzmaurice,[40] Jennings,[41] and Higgins[42] (from the UK). Generally, judges from European countries, both western and eastern, have tended to be international legal scholars of some repute (*e.g.*, Morelli[43] and Ago[44] (Itlay), de Visscher (Belgium), Winiarski and Lachs[45] (Poland), Herczegh (Hungary), Kooijmans (The Netherlands),[46] Spiropoulus (Greece),[47] Krylov and Golunsky[48] (USSR)). The Latin American – Caribbean group has also tended to elect international legal scholars of repute (*e.g.*, Jiménez d'Arechaga (Uruguay),[49] Ruda (Argentina),[50] Bustamante (Peru)). Among the Asian judges there have been some who at the time of election could be called international legal scholars (*e.g.*, Ni (China),[51] Singh (India),[52] Tanaka and Oda[53] (Japan), Hsu Mo (China)) but there are many who do not fit this description. Among the African judges the absence of international legal scholars is more noticeable (as exceptions *see e.g.*, Badawi and El-Erian[54] (Egypt), Ranjeva (Madagascar),[55] Bedjaoui (Algeria)).[56] In short, among Asian and African judges there has been a mix of experience not limited to international legal scholarship. More recently however, there is evidence that even these two groups are electing judges who have claims to being jurists on account of their international legal scholarship. It may be noted that there are some judges such as Córdova (Mexico),[57] who were international legal scholars but were not, nor had ever been, established as proper teachers of international law. The bottom line is that it is not university teaching experience but international legal scholarship leading to recognition as a jurist that is the most common characteristic of judges who fit into the second alternative. Some of the judges belonging to the category of jurists discussed above had other characteristics which may also have contributed

36. *See* biography *in* 1987–1988 ICJ Yearbook 36–37.
37. *See supra* note 12, at 7–8.
38. *See* biography *in* 1978–1979 ICJ Yearbook 30–31.
39. *See supra* note 22, at 29–31.
40. *See* biography *in* 1954–1955 ICJ Yearbook 16.
41. *See supra* note 12, at 3–4.
42. *See supra* note 22, at 31.
43. *See* biography *in* 1994–1995 ICJ Yearbook 44–46.
44. *See supra* note 12, at 8–9.
45. *See supra* note 38, at 27–28.
46. *See supra* note 7, at 21–22.
47. *Id.*, at 43–44.
48. *See* biography *in* 1957–1958 ICJ Yearbook 15–16.
49. *See supra* note 5, at 20.
50. *See supra* note 20, at 24–25.
51. *See* biography *in* 1972–1973 ICJ Yearbook 28–29.
52. *See* biography *in* 1984–1985 ICJ Yearbook 35.
53. *See* biography *in* 1972–1973 ICJ Yearbook 27–28.
55. *See* biography *in* 1946–1947 ICJ Yearbook 58 *et seq*.
56. *See* biography *in* 1978–1979 ICJ Yearbook 28–29.
57. *See* biography *in* 1990–1991 ICJ Yearbook 39–41.

to their being considered jurists. They may have acted in some capacity as legal advisors to their countries (*e.g.*, Basdevant (France), Badawi (Egypt), Morelli (Italy), Lachs (Poland) or may have had some diplomatic (legal) experience, among other things, at international conferences (*e.g.*, Singh (India), Sette Camara (Brazil))[58] or held some international judicial or similar positions (Guerrero (El Salvador)). But these are factors merely adding lustre to their qualifications as international jurists. They are not strictly 'juristic' qualifications of the kind required.

There are categories of international lawyers other than international legal scholars who have been elected to the court. First, there are a handful who have been international legal advisors to their countries or to international organizations, and have had international experience in the field of international law. They do not generally have a claim to being international legal scholars or 'jurists' in the proper sense of the term, so that what is probably valued in them is the quality of their expertise as international legal advisors or practitioners. Fleischauer (Germany),[59] de Lacharrier (France),[60] Evensen (Norway),[61] Tarassov (USSR),[62] Aguilar (Venezuela)[63] belong in this category. Some legal advisors *per se* may also have held high political office in their countries, *e.g.*, Khan (Pakistan),[64] El Khani (Syria),[65] Shahabudeen (Guyana),[66] but political office by itself does not appear to be a qualification. Some importance has been attached to this category of 'jurist' under the second alternative, although it is not nearly as important, apparently, as the preceding category. A third category comprises judges who have had diplomatic (legal) experience in some capacity and have been members of the ILC, such as Ignacio Pinto (Dahomey),[67] Ajibola (Nigeria) and Koroma (Sierra Leone).[68] Finally, there are those who have been considered 'international jurists' primarily because of their diplomatic experience in the capacity of international lawyers as well, whether they have held high political office or not in their countries which some of them have done. Rau (India),[69] Koo (China),[70] Padilla Nervo (Mexico),[71] Forster (Senegal),[72] Ammoun (Lebanon),[73]

58. *See* biography *in* 1981–1982 ICJ Yearbook 33–34.
59. *See* biography *in* 1954–1955 ICJ Yearbook 17–18.
60. *See* biography *in* 1978–1979 ICJ Yearbook 30.
61. *See* biography *in* 1993–1994 ICJ Yearbook 41–42.
62. *See* biography *in* 1981–1982 ICJ Yearbook 32.
63. *See* biography *in* 1984–1985 ICJ Yearbook 35–36.
64. *See* biography *in* 1985–1986 ICJ Yearbook 35.
65. *See* biography *in* 1990–1991 ICJ Yearbook 35–37.
66. *See* biography *in* 1954–1955 ICJ Yearbook 15–16.
67. *See* biography *in* 1980–1981 ICJ Yearbook 31–32.
68. *See* biography *in* 1987–1988 ICJ Yearbook 38.
69. *See* biography *in* 1969–1970 ICJ Yearbook 22–23.
70. *See* biography *in* 1993–1994 ICJ Yearbook 42–44.
71. *See* biography *in* 1951–1952 ICJ Yearbook 19.
72. *See supra* note 18, at 16–17.
73. *See supra* note 6, at 14–16.

Bengzon (Philippines),[74] and Tarzi (Syria)[75] would fall into this category. Some may regard all these categories as suspect in terms of their relationship to the quality of being an international jurist of recognized competence. Objectively, it is not clear why diplomatic experience or election to the ILC or holding high political office in national states, all while being lawyers, necessarily qualifies lawyers as 'international jurists of recognized competence.' Surely there is something more required than legal ability in terms of reputation and experience as international lawyers and international jurists. That having been said, it is clear that the UN has never questioned the credentials of a nominee which means that since 1966 all elected judges except one have been regarded as qualified under the second alternative and nominees have been regarded as qualified under one of the two alternatives. It would seem that it is not a matter of science but one of politics how definitions have been developed, as indeed, election has come to be a matter of politics and not necessarily of merit.

The concept of 'international jurist of recognized competence' has clearly been given a liberal construction. The three categories identified other than that of the international legal scholar show that it covers qualities which go beyond scholarship and reputation as a scholar. It is easy to see why proficiency and experience in giving legal international advice should be included. While the remaining two categories have not been totally neglected, they clearly have not been given as much importance as the others. Significantly international law private practice, if such exists, has not been given any importance. It is experience in the public sector and scholarship (and published works) that have been emphasized in determining who qualifies to be an international jurist of recognized competence.

Clearly, scholarship resulting in published works and professional international legal advisory functions are the principal modes of acquiring stature as an international jurist. The UN and its members have, while concentrating on international legal scholars in determining the definitions of 'international jurists of recognized competence,' have, as the international community, included in the definition international legal advisors and, though less frequently, other persons with international legal experience. Exceptional achievement or experience in international private practice or a career in or involvement in international diplomacy *per se* does not qualify a person to be defined as an international jurist of recognized competence and the international community seems to have recognized this.

There is no order of priority in the drafting of Article 2 between the

74. *Id.*, at 16.
75. *See supra* note 7, at 19–20.

first alternative relating to judicial office and the second relating to competence as an international jurist. However, considering that the ICJ is an international court applying international law and rules (*see* Article 38 of the Statute), it could have been envisaged that the second alternative took precedence over the first. In the application of Article 2 in modern practice high priority seems to be given to the second alternative, even though the order in which the alternatives are placed in the drafting of the article seems illogical and *seems* to reverse the priorities, in the light of the fact, stated above, that the Court applies international law and therefore requires persons having a claim to competence in international law.

A matter of some interest is how many of the 86 judges so far elected to the Court were at the time of their election Members or Associés of the prestigious Institut de droit international, membership of which is an expert certification generally of achievement and proficiency as an international jurist and is the greatest compliment that can be paid to an international jurist, and membership of which is limited to 148 odd jurists (both public and private international). Of this number about 30 are private international jurists. Less than half (33) of the ICJ judges were so associated with the Institut at the time of their election. Those so associated were Ago, Aguilar-Mawdsley, Alfaro, Alvarez, Basdevant, Baxter, Bedjaoui, de Visscher, Elias, Evensen, Ferrari Bravo, Fitzmaurice, Forster, Gros, Guerrero, Higgins, Jennings, Jessup, Jiménez de Arechaga, Kooijmans, Lachs, Lauterpacht, McNair, Morelli, Mosler, Nagendra Singh, Oda, Parra Aranguren, Ruda, Sette-Camara, Spiropoulos, Waldock, and Winiarski. It may be noted that there were only three African, two Eastern European, one Asian and no Russian or Chinese judges who were associated with the Institut at the time of their election. There have been a few, *e.g.*, Guillaume and Higgins (in their two cases deservedly), who were elected to the Institut soon after their becoming judges. It is not acceptable that a judge be elected simply because he is a judge which happens sometimes. Hence, the importance of already having been elected before becoming a judge.

3. Article 9 – Distribution

A word may be added about rotation. While Article 2 apparently refers to the irrelevance of nationality in the election of candidates, Article 9 expressly states that in the Court "as a whole the representation of the main forms of civilization and of the principal legal systems of the world should be assured." There seems to be a contradiction in these two articles but it would seem that Article 2 must be interpreted in the light of the express statement in Article 9. The reference, then, in Article 2 is reasonably interpreted to mean that no one should be excluded on the basis of possessing a particular nationality, while Article 9 postulates in the context of the system of election as a whole the geographical and cultural

factors in the distribution of places on the Court.[76] While the possibility that non-international jurists who are eligible for appointment to the highest national judicial offices may be elected, in order to satisfy the requirement of geographical and cultural distribution, because international jurists are not to be found, it would appear that since 1966 at least, there has in general been no need to resort to this alternative because of the availability of international jurists world-wide. The practice of the UN thus gives clear priority to the qualification of recognized competence as an international jurist.

In the context of the requirements in Article 9, it must be pointed out that, first, there has become established a convention that the five permanent members of the Security Council should have five secure seats on the Court. It may be questioned whether permanent seats on the Court for whatever reason are compatible with the spirit of Articles 2 and 9. There is certainly no express or implied provision for them. A convention has grown up now that a certain number of seats is assigned to each of the regional groups that are utilized in the UN. At present the division of the ten remaining seats is as follows: Africa – three seats, Asia – two seats, Latin America and Caribbean – two seats, Eastern Europe – one seat, Western Europe and Others – two seats. When the permanent seats are accounted for this leaves Western Europe and Others with five seats, Asia with three seats, Africa with three seats, Latin America and the Caribbean with two seats and Eastern Europe with two seats. In this connection too the question may be asked whether resulting weightage in favour of Western European seats is in keeping with the spirit of Article 9.

Equitable distribution among signatories to the Statute of the ICJ would also require that there be some kind of rotation among the members of the groups and that no single judge or multiple judges of a particular nationality (of a non-permanent member of the Security Council now because of the convention referred to above) should have a seat for an inordinate length of time. In practice, equity in this regard has not been always respected. For example, as regards individual judges, Lachs (Poland) from the Eastern European group was on the Court for 26 years and if he had completed his last term would have been on the Court for 27, Oda (Japan) of the Asian group will have been on the Court for 27 years when his third term ends in 2003. Among the five permanent member nations on the Court the longest serving judge has been Schwebel (US) – 19 years, but in the case of these nations the issue of rotation does not arise under the currently accepted arrangement. In regard to rotation among nationalities, the non-permanent members of the Security Council have had several nationalities which have occupied seats on the Court for more

76. Judge Azevedo in his Separate Opinion in the *Reparation case* had a different, more idealistic interpretation of provisions requiring geographical and such distribution. On the application of Article 9 in regard to geographical and cultural distribution *see* S. Rosenne, The Law and Practice of the International Court (1920–1996), at 369 (1997).

than 18 years (two terms).[77] Italy has had a seat for 27 years (three terms) among the Europeans and Others, Nigeria and Senegal each for 27 years (three terms) and Algeria for 21 years (two and one third terms) already from among the African countries, Argentina for 27 years (three terms), Mexico for 24 years (two and two thirds terms) and Brazil for 21 years (two and one third terms) already from among the Latin American countries, Poland for 47 years (almost six and one third terms) from among the Eastern European countries and Japan for 33 years (three and two thirds terms) already and India for 19 years (just over two terms) from among the Asian countries. At the end of the current terms of their judges on the Court, Japan would have had a seat for 36 years (four terms) and Algeria and Brazil each for 27 years (three terms). There seem to be ten countries that have had more than "a fair share (two terms) of the pie"!

4. CONCLUSION

The conclusions to be reached from this survey of the practice in regard to the election of judges are manifold:

1. In the context of the complexity of and high degree of specialization required in modern international law, the international community acting through the UN has come to require as a condition for election to the ICJ under Article 2 being a "jurisconsult of recognized competence in international law."
2. It may be time, also because of the complexity of and specialization required in modern international law, to eliminate the first leg of the qualifications in Article 2, namely the competence and eligibility for appointment to the highest national judicial offices, particularly since it seems to be, in effect, ignored.
3. While it has become the practice to elect persons who have some training in law, but not necessarily in international law with an *acquaintance* with or *exposure* to public international law, it is not always clear that the selection has satisfied the requirement of being a "jurisconsult of recognized competence" in the subject. The area of competence is public (and not private) international law. Clearly, the criterion can now be strictly applied, particularly because African and Asian countries have produced many international lawyers who satisfy the strict requirements. It would be desirable that only if the strict criterion is not satisfied by any of the candidates vying for a particular seat that a somewhat lesser standard should be applied. But the insistence on the proper standard would induce states to

77. Over a period of 55 years, 18 years (or one third the period of existence of the Court) would seem to be a reasonable maximum length of time for a single nationality to have a seat on the Court.

propose as candidates only those who satisfy it. It is from African and Asian states that most of the judges who do not satisfy the proper criterion have come. There is no reason why the strict criterion should not be applied absolutely.

4. It may also be pointed out that political reasons for the nomination of a candidate or election of a judge who does not satisfy the strict criterion cannot be permitted in the context of modern international society. Article 2 does not leave room for that. Merit as a "jurisconsult of recognized competence" is the only relevant factor.
5. The political element, such as the size or economic importance of a state, *e.g.*, Germany, Japan or Brazil, seems in the past to have been a factor in the election or re-election of judges to the non-permanent seats on the Court. This again is an anomaly which impedes the integrity of the election system under Article 2. This Article contemplates and postulates no other element than merit in the nomination of candidates or their election. While horse-trading, arm-twisting, and other considerations, such as the one referred to above, do persist in the system, they are strictly not permitted by nor need be inherent in the system. They are certainly not conducive to the quality and efficiency of the Court and its reputation.
6. Article 9 requires geographical and cultural distribution. This raises the fundamental question whether there should be five permanent seats on the Court at all. In regard to the non-permanent seats on the court, at least, and tolerating the concept of division among groups as it is now, it would seem that some kind of rotation is required because of the cultural factor, at any rate, but also because of equity. In the context of the 55 or so years of the Court's existence terms for judges of any *single* state, whether the judge is the same or not, of, *e.g.*, 21, 24, 27, or 36 years, are decidedly excessive. It has been suggested here, again in the above context, that the limit should be two terms (18 years) for one state. In this connection the importance, in any respect, of the state in the group to which the seat 'belongs' is of no relevance at all. Rotation, on the other hand, certainly does not require nor implies that every state in the group should have a chance of having a judge on the Court. This would make nonsense of the system. It does mean that no state should hold a seat on the Court for too long (longer than 18 years at this time). It also does not mean that merit should be sacrificed *merely* at the altar of giving other states a chance.