

January 1992

Some Reflections on the Nationality of Judges of the International Court of Justice

Manfred Lachs

Follow this and additional works at: <https://digitalcommons.pace.edu/pilr>

Recommended Citation

Manfred Lachs, *Some Reflections on the Nationality of Judges of the International Court of Justice*, 4 Pace Y.B. Int'l L. 49 (1992)

DOI: <https://doi.org/10.58948/2331-3536.1099>

Available at: <https://digitalcommons.pace.edu/pilr/vol4/iss1/2>

This Article is brought to you for free and open access by the School of Law at DigitalCommons@Pace. It has been accepted for inclusion in Pace International Law Review by an authorized administrator of DigitalCommons@Pace. For more information, please contact dheller2@law.pace.edu.

ARTICLE

SOME REFLECTIONS ON THE NATIONALITY OF JUDGES OF THE INTERNATIONAL COURT OF JUSTICE

Manfred Lachs†

It is a truism to repeat that courts constitute a very important institution in all societies. They have been part and parcel of them from time immemorial, from the individual judge to the bench. Hence, whatever stage of history we look at, we find that courts were under the protection of the rulers and, with the passage of time, acquired the confidence, approval and support of

† Manfred Lachs was a member of the International Court of Justice from 1967 until his death earlier this year. He was born in Poland in 1914 and received *Juris Doctor* and *Master of Laws* degrees from the University of Cracow, a *Docteur en Droit* degree from the University of Nancy, France, and a *DSC (Law)* from the University of Moscow. He also received nineteen honorary degrees, four of them from universities in the United States.

During World War II, Judge Lachs served in the Polish Forces in the United Kingdom. He was later attached to the United Nations War Crimes Commission, and he prepared the Polish indictment for the Nuremburg Trials. He was legal adviser to Poland's Minister of Foreign Affairs, and was one of the designers of the plan for a nuclear free zone in Europe.

With the United Nations, Judge Lachs represented Poland in the General Assembly. He was elected Chairman of the Legal Committee an unprecedented three times in 1949, 1951 and 1955, and he was chairman of the United Nations Legal Sub-committee for the Peaceful Uses of Outer Space from 1961 to 1966. On the International Court of Justice, Judge Lachs was President from 1973 to 1976, and he was serving in an unprecedented third term at the time of his death on January 14, 1993.

Judge Lachs' publications include more than one hundred articles and books in seven languages. They include *WAR CRIMES: AN ATTEMPT TO DEFINE THE ISSUES* (1945); *THE LAW OF OUTER SPACE: AN EXPERIENCE IN CONTEMPORARY LAW MAKING* (1972); and *THE TEACHER IN INTERNATIONAL LAW* (1982). Among his awards were the Andrew G. Haley Award of the International Astronautical Federation and the International Institute of Space Law (1963) and the organizations' Gold Medal (1966); the World Jurist Award (1975); the Grotius Medal (1984); the Copernicus Medal (1984); and the Encyclopædia Britannica Laureate Award (1987).

the people. Once courts appeared in the international arena the problem of acceptance became more complex, for then the issue arose of courts being entrusted with disputes between states. Thus the composition of international courts became of paramount importance. In view of the fragility of the international judiciary in the early stages of its development, this has been true especially of the International Court of Justice. The law in this respect is articulated by Articles 2 and 9 of the Statute of that Court. There is no need to recall that these articles are mutually complementary: while Article 2 speaks of the individual in question, Article 9 speaks of the Court as a whole. In view of the topicality of the issue and frequent references to it in recent years, I think some observations may be timely.

It may perhaps be useful to begin with an analysis of the provisions concerning the Court as a whole. Article 9 calls upon the electors to "bear in mind not only that the persons to be elected should individually possess the qualifications required, but also that in the body as a whole the representation of the main forms of civilization and of the principal legal systems of the world should be assured." Comments on this provision vary. Some have taken the line that "its 'real' effect is to postulate the political factor in the distribution of places on the Court, and in particular that the permanent members of the Security Council will have judges of their nationality on the Court."¹ It has also been suggested that the provisions of Article 2 concerning individual qualifications and Article 9 "might be found to be contradictory"²; I wonder whether this, as a general proposition, is really so. One has of course to bear in mind that if provisions concerning the individual qualifications of candidates remained the exclusive criterion one might, in some circumstances, arrive at results in which some "legal systems," in view of their high level of development of international law in both theory and practice, became predominant on the bench. Thus some groups of states which are also very much advanced in science, technol-

¹ SHABTAI ROSENNE, 1 *THE LAW AND PRACTICE OF THE INTERNATIONAL COURT* 168 (1965). Rosenne likewise describes it as "a more refined version of other provisions of the Charter concerning the principle of what is called 'equitable geographical distribution' as a guide to the composition of various other organs of the United Nations." *Id.*

² *Id.*

ogy and other spheres would displace other nations. Should this happen, the Court would not be representative of the international community at the given stage of history. Now the other condition concerning the Court as a whole is "representation of the main forms of civilization." An important issue arises as to the meaning of that term. It would seem to require the identification of certain states as representing these main forms of civilization. Broadly speaking, one could include "Western" civilization; one could also include some civilizations of the East which have a very long and glorious history, from the Mediterranean to the Pacific. Some civilizations are said to have existed in Africa for centuries until they disappeared. As to Africa, it is difficult to expunge from one's mind the claim of some writers that it would not — in the words of one of them — be useful to study "the unrewarding gyrations of barbarous tribes in picturesque but irrelevant corners of the globe."³ In the western hemisphere, also, some elaborate civilizations have disappeared as a consequence of European conquest, while the nations that supplanted them have become representative of European civilization, as reflected in their society and development. There are of course also civilizations, some in the Middle and Far East, which have retained their impact on the lives of the peoples concerned and, though having changed considerably, retain a pronounced identity. One need not necessarily follow Arnold Toynbee to discuss them in historical perspectives and seek to establish a dialogue between them. We certainly live in a world of many civilizations and an advocate of this plurality claims: "qu'on ne peut pas plus enfermer le monde dans un système qu'expliquer Bach par les mots."

The notion of "civilization" in the Statute has to be linked with the other notion: "the principal legal systems of the world." Here again we face a serious problem. It has been suggested by an authority on the subject that the idea of the representation of the principal legal systems of the world is equivocal and was included as the result of a misunderstanding.⁴ Certainly there may

³ MANFRED LACHS, *THE TEACHER IN INTERNATIONAL LAW* 31 (2d ed. 1987).

⁴ L'idée de représentation des 'principaux systèmes de droit' semble reposer sur une équivoque ou sur un malentendu. Il est sans doute très utile que les juges, ou au moins quelques-uns d'entre eux en litige. En rédigeant l'art. 9 original, on a

be some difficulties in identifying these institutions if one is to concentrate on the contemporary scene. However, it should not be forgotten that, in a historical perspective, there have been many legal systems. Here the easiest approach is to call on the evidence of an authority like John Henry Wigmore.⁵ A historical analysis of legal systems is a fascinating enterprise.⁶ It remains a fact that Roman law has survived and has been incorporated into a series of legal systems.⁷ However, if we turn to our contemporary world, we find in it two dominant systems, the so called "continental" and the "Anglo-Saxon" — in brief, the law derived from principles of the Roman system and the Common Law. These two systems more or less dominate the landscape. However, sight should not be lost of some other systems influencing the situation in many parts of the world, like Islamic law or tribal law in Africa, Buddhist law in Asia, some traces of

probablement pense a la coexistence p.ex. du droit anglo-saxon et du droit continental europeen, mais la Cour doit juger d'apres le droit international que est le meme pour toutes les parties. . . .

M. Huber, *Etude des amendements à apporter au Statut de la Cour internationale de Justice (Vingt-deuxième Commission)*, 1 ANNUAIRE DE L'INSTITUT DE DROIT INTERNATIONAL 407, 414 (1954), quoting Sir ALFRED ZIMMERN, *THE AMERICAN ROAD TO WORLD PEACE* 95-96 (1953).

⁵ JOHN HENRY WIGMORE, *A PANORAMA OF THE WORLD'S LEGAL SYSTEMS*, (1936). Relying on his testimony one has to admit that "the oldest have long disappeared." However, some remain:

[T]he Anglican, the Romanesque and the Mohammedan, which are amongst the most youthful, today cover the greater part of the world's population. The Egyptian and the Mesopotamian, the oldest, have long disappeared. The Hindu survives tolerance under another dominant political system. . . . And the story of Europe since the Christian era can best be told by describing first the Keltic, Slavic and Germanic systems, and then turning back to the beginning of the maritime and Church systems, whose records far antedate those of the other three.

Id. at 4-6.

⁶ As Wigmore describes, proceedings in Egyptian courts were conducted "without any speeches from advocates . . . For they believe that from speeches of advocates much clouding of the legal issues would result; the cleverness of the speakers, the spell of their delivery, the tears of the accused, influence many persons to ignore the strict rules of law and the standards of truth." *Id.* at 31-32. He adds: "But today the Pyramids and the pictographs and the papyri are the only sure symbols of the native Egyptian institutions of six thousand years ago." *Id.* at 50.

⁷ A reference may also be made to the Japanese legal system, to Mohammedan law, or to the Slavic system. *Id.* at 461-483, 535-639, and 735. Wigmore would have us conclude that there have been sixteen legal systems in world history, and he asks: "What gives rise to a legal system, what controls its destiny? What becomes of the specific institutions: property, contract, testament within each system?" *Id.* at 1119.

which are still to be found. However, the essential question which touches us here is: To what extent have these systems an influence on international law — in particular, an influence on the decision-making functions of the International Court of Justice? For this is surely the touchstone. Under the circumstances, I would not go so far as to find that these criteria may be considered equivocal or “contradictory”.⁸

It would be useful to ascertain to what extent systems other than those mentioned have had an influence on the development of international law and its contemporary institutions. For the purposes of our analysis I think it may suffice to say that peoples of Africa and Asia, while sharing the generally recognized principles of international law and its development and having taken part in its recent codification, have accepted international law as a whole. However they have influenced it, so their acceptance is not merely passive. Whether their influence has a specific origin, such as a particular legal system, remains to be seen. If we look at the development or birth of many new states, we will find that their internal legal systems have retained some features of their native cultures and development, but that in international relations they have in fact accepted those principles of law which have been generally recognized. Thus, to give due attention to the provisions of Article 9, adequate consideration of this phenomenon is required. It is suggested that the concept may be close or similar to what was called “equitable geographical distribution” but is not identical with it. Nor could I possibly agree with the claim that the retention of the provision in 1945-46 was intended to assure a seat on the Court to all permanent members of the Security Council in the new Organization.⁹

However that may be, in its practical application, the provision in question should secure the “representation” of groups of states which originally did not constitute a part of the European system of the law of nations but have since been drawn within or acceded to it and at the same time have been affecting its development. In brief, it should include “representatives” of many

⁸ SHAHTAI ROSENNE, 1 *THE LAW AND PRACTICE OF THE INTERNATIONAL COURT* 168 n.1-2 (1965).

⁹ *Id.* at 168.

racess, colors of skin and continents.¹⁰

This has been reflected in the composition of the Court since 1946, in the sense that the "mix" of nationalities has changed almost *pari passu* with the expansion of United Nations membership. In its cradle, when there were but fifty-one of the United Nations, Europe had in fact six seats (France, the United Kingdom, Belgium, Norway, Poland and Yugoslavia). In addition, there was a judge from the Soviet Union. As a result of formal understandings followed from the outset, nationals of the five "great powers" have been sitting on the bench ever since, with an intermission of eighteen years (1967-1985) in the case of China.¹¹ (Now the seat formerly reserved for the Soviet Union is occupied by a judge from Russia). With the expansion of United Nations membership, the representation of Europe has declined: when Europe lost one seat, the Court was unfortunately deprived of one of its most outstanding jurists, Charles De Vischer, who failed to gain re-election in 1951.

Originally, within the framework of fifty-one United Nations members, Asia had only one seat, and that was the seat of a judge of the nationality of a great power, China. Later there were judges from India, Pakistan, or, as now, Sri Lanka, joined by Japan. Thus today one can say that the legal systems and civilizations of Asia (excluding Arab countries) have three seats, including one national of a great power. The Court has always had one Arab judge, whether from Egypt, Lebanon, Syria or — as now — Algeria. The last-mentioned judge may rightly also be viewed as coming from Africa, like the Egyptian judge in earlier times. In fact the first Egyptian judge was for some years the only Member of the Court from Africa. Successive judges from Senegal and Nigeria have sat on the bench since the mid-1960's with, for some time, one from Benin, but last year a judge from Madagascar replaced the Senegalese. One may say that the present situation symbolizes the idea that Africa, like Asia, ought not to have less than three seats, though one of them may over-

¹⁰ I put derivatives of "represent" in quotes because, of course, there can be no valid argument to suggest that these "independent magistrates" are elected to "represent" the political interests of any group.

¹¹ Following the change in China's representation at the United Nations (1971), no Chinese candidature was presented until the 1984 elections to the bench.

lap with representation of the Arab world. The fruitful divide between anglophone (Common Law) and francophone (Continental Law) African countries is also reflected in the composition of the Court. On the other side of the Atlantic, North and South America, the Western Hemisphere, had in 1946 six seats: one was occupied by a national of the United States, which has retained a seat ever since; another by a Canadian and four by Latin Americans. This figure of four was gradually reduced when seats were taken by nationals of Asia and Africa, and today South America and Central America have together two seats. One can no longer say Latin America because, while one of them is that of a judge from Venezuela, the other is occupied by a judge from Guyana, which, as a former British colony, certainly represents a different legal system.

Reverting to the text which has given rise to this geographical excursion, "the principal legal systems of the world," one may note that many distinguished jurists who served on the Court in the course of the last forty-six years and originated from Asia and Africa — at least to a large extent — were educated in Common Law countries. This was the case for Judges Zafrullah Khan, A. El-Erian, Nagendra Singh, C.D. Onyeama, R.S. Pathak, Sir Benegal Rau, V.K. Wellington Koo, S. Oda, M. Shahabuddeen, Ni Zhengyu, C.G. Weeramantry and T.O. Elias. Others from those continents were educated under the continental system, mostly in France: e.g., F. Ammoun, A.H. Badawi, A. El-Khani, L. Ignacio-Pinto, K. Mbaye, R. Ranjeva, and M. Bedjaoui. Some, like Judge K. Tanaka, were under the influence of the German school of law. All judges originating from Latin America were certainly under the influence of the Roman and civil law system, having a very old tradition dating back to the days of the school of Salamanca.

I turn now to the requirements laid down by Article 2 of the Statute. This refers to the composition of the Court as "a body of independent judges, elected regardless of their nationality," the further requirements consisting of "high moral character" and possession of "qualifications required in their respective countries for appointment to the highest judicial offices" or of being "jurisconsults of recognized competence in international law."

I deal first with the personal qualifications. "High moral

character" — this is a qualification which obviously may be present everywhere; no country could be held not to produce persons possessing this attribute. One writer has suggested that the terms "high moral character" and "qualifications required . . . for appointment to the highest judicial offices" were "probably the equivalent of an unimpeachable conduct as a public figure; in other words the candidate need not be an angel, though he must not be only a little better than a rascal."¹² It is very difficult to agree with this qualification in view of its equivocal character. "High moral character" is "a high" requirement; one need not go any further. It certainly implies "moral virtues" defined, following Aristotle, as "the habitual control of conduct by rational principle; as distinct from the intellectual virtues whose end is the knowledge of principles."¹³ Obviously no knowledge is involved, and no intellectual criteria but such as frequently are viewed as equivalent to "ethics". Thus the office would be inaccessible to persons whose objectivity or impartiality is likely to be influenced by the prospect of material gain or other personal advantages. The message the words convey is quite clear.

The second element concerns the qualifications required for the highest judicial offices. This is a clear reference to the bench of supreme courts, high courts of appeal, constitutional courts and the like. In fact the Court has counted among its Members personalities having actually held such offices.¹⁴ The alternative qualification provided for is that of being jurisconsults "of recognized competence in international law." The term jurisconsults is frequently understood as indicating legal advisers in ministries of foreign affairs, and this has been the understanding throughout the years, resulting in the election of many former legal advisers, to mention only A.H. Badawi, J. Basdevant, Sir Gerald Fitzmaurice, A. Gros, G.H. Hackworth, G. Ladreit de Lacharrière, S. Petrén, and J.E. Read. But the term is also allowed to cover distinguished teachers of international law. It has

¹² Taslim O. Elias, *Does the International Court of Justice, as It is Presently Shaped, Correspond to the Requirements which Follow from Its Functions as the Central Judicial body of the International Community? Judicial Settlement of International Disputes* 21-22 (1974).

¹³ DAGOBERT D. RUNES, *DICTIONARY OF PHILOSOPHY* 202 (1983).

¹⁴ E.g., Judges L. Ignacio-Pinto, H. Klaestad, K. Mbaye, C.D. Onyeama, R.S. Pathak, K. Tanaka, I. Forster and T.O. Elias.

been suggested that "the use of the term is something of an anachronism, we can only understand it in this context and not in the pristine Roman law usage, but in the general sense of a jurist, specialist in international law."¹⁵ It is rather difficult to accept the first part of this suggestion. The term is not an "anachronism," as advisers to the French foreign ministry have the title of *jurisconsultes*, and the English word in the Statute must be deemed equivalent to the no-less-official French homonym. But one can read it as conveying in either language the much more extensive definition which enables the Court to draw on leading talents in the academic world: outstanding teachers of international law, persons who have an important record both in university activity and in writings.¹⁶ Thus eminent teachers of international law have adorned the bench of the International Court of Justice, for example, Charles De Visscher, P.C. Jessup, E. Jiménez de Aréchaga, V.M. Koretsky, Sir Hersch Lauterpacht, Sir Arnold McNair, H. Mosler, Sir Humphrey Waldock or B. Winarski, not to mention the outstanding teachers at present on the bench. In some cases, e.g., J. Basdevant, R.R. Baxter, and J. Spiropoulos, they have combined both careers, having been both teachers and legal advisers. Others who were outstanding teachers, such as A. Alvarez, F. Ammoun, J.M. Ruda, had diplomatic careers as well. Others held high offices and in their own countries. Some, like R.J. Alfaro or J.L. Bustamante y Rivero, were presidents of the nation, others members of government, such as L. Padilla Nervo or V.K. Wellington Koo. Neither must one overlook the important fact that several members of the Court, as specialists or professors of international law, have ac-

¹⁵ Elias, *supra* note 12, at 22.

¹⁶ As I pointed out elsewhere:

Even more significant has been the frequent elevation to the bench of those "most highly qualified publicists." It has now become a long-established practice to elect them as members of Commissions of Inquiry, Conciliation Commissions, or as arbitrators or members of international courts. Many of them have passed through all stages. This is an important transition, for as advisers and counsel they remain within the bounds of their "persuasive" role. However, as judges they acquire decision-making powers if even only *ad causum*. They assist in the making of case law. Thus many members of the two International Courts have had behind them distinguished careers as teachers and writers. This 'personal union' — as it were — raises a series of interesting issues.

MANFRED LACHS, *THE TEACHER IN INTERNATIONAL LAW* 205-06 (2d ed., 1987).

quired extensive experience as advocates before the Court itself prior to their election to its bench. The enrichment this brings to the fund of experience available on the bench needs no emphasizing. Thus the composition of the Court is a multicolored picture reflecting a wealth of personalities.

One could say that the fact of becoming a judge certainly has a bearing upon one's thinking. Hence the distinction between the two approaches, as I would call them, tends to narrow.¹⁷ "[A]n increasing number of judicial decisions [are] handed down by courts with many former 'teachers' on the bench, which are quoted and in time relied upon by other 'teachers'."¹⁸ This interplay is certainly a fascinating phenomenon but obviously belongs to another theme, and I mention it only incidentally in order to show the mutual interaction between teaching and the judicial function. Some have referred to what is called "a personal union" between the two.

I turn now to what is the most delicate aspect in the selecting of judges; that is the issue of their "nationality". According to Article 2, nationality is neither an asset nor a liability, for the judges have to be elected "regardless of their nationality." The freedom provided by Article 2 in this respect is subject to the simple limitation that no two of the fifteen members of the Court "may be nationals of the same State."¹⁹

Now the important question is the relationship between Articles 2 and 9. While nationality is of itself no criterion, it has cast its shadow upon application of Article 9 and thus had an

¹⁷ Cf. JEROME FRANK, *LAW AND THE MODERN MIND* xx (1949), "Much harm is done by the myth that, merely by putting on a black robe and taking the oath of office as a judge, a man ceases to be human and strips himself of all predilections, becomes a passionless thinking machine."

¹⁸ LACHS, *supra* note 3, at 207.

¹⁹ Statute of the International Court of Justice [I.C.J. Statute] art. 3, para. 1. The Statute of the Permanent Court of International Justice dealt with the issue in a different way and admitted the possibility of more than two Members being nationals of States which were Members of the League of Nations. However once this happened the elder kept his seat and the younger disappeared. Statute of the Permanent Court of International Justice [P.C.I.J. Statute] art. 4, para. 3. Moreover, according to the present Statute, nationals of States which are not Members of the United Nations but are parties to the Statute of the Court could be elected. This virtually belongs to the past because we can say that membership of the organization now covers practically all states on the globe (however it is worth recalling that a distinguished teacher from Switzerland, P. Guggenheim, was once a candidate to the Court).

impact on the composition of the Court as a whole.

In this context the first observation to be made concerns membership on the Court by nationals of those powers which are permanent members of the Security Council. It is a fact that such nationals were expected from the outset to be elected to the Court, so that the powers in question were presumed to permanently have a national on the bench, thus mirroring the situation in the other organ.²⁰ Undoubtedly this ostensible parallelism, accentuated when, by virtue of the General Assembly Resolution 1991 (XVII), the members of the Council came to equal in number that of the Court, tends to blur in the public perception the vital distinction between an organ of which the members are States, speaking through their mouthpieces, and another whose members are individuals deciding in accordance with their private consciences. It nevertheless gives no ground for supposing *a priori* that the judges, nationals of the States concerned, are, any more than their colleagues, delegates of their countries' governments. If they differ from the latter in any respect, it is simply in the greater assurance of election which they possessed as candidates.

That said, it is in the second place necessary, before dealing with the issue of nationality in more specific terms, to confront the general view that the present system of elections, based on the mutual impact of Articles 2 and 9 of the Statute, is dominated by "political considerations."²¹ One writer has claimed that "So long as political organs are charged with the conduct of elections, political considerations will prevail" and that the "proper synthesis between those political considerations and a duly qualified Court . . . can only be achieved by adjustments in the nominating organs, so that the electing bodies can make their political choice from a panel of duly qualified candidates."²² Another has proposed that a distribution of seats be effected by "means of informal allocation among the various regional and basic legal systems of the world prior to the triennial

²⁰ Cf. ROSENNE, *supra* note 1, at 185.

²¹ Cf. ROSENNE, *supra* note 1, at 190. Cf. in particular reports and debates on the subject by the Institut de Droit International, *Annuaire* 44, Vol. 2, 1952 and *Annuaire* 45, Vol. 1, 1954, p. 407. Cf. also Vol. 2 (1954), pp. 60-107 and p. 296.

²² ROSENNE, *supra* note 1, at 190.

elections.”²³ Such a system would not appeal to those scholars — themselves declining in number — who believe that a further whittling down of the number of judges from western countries would affect the professional level of the Court and the judicial value of its decisions, not to mention the respect accorded to the latter. Here, as in other spheres, a dual antithesis has appeared over the years: East and West, North and South.²⁴ But an analysis of the participation of judges from Africa and Asia leads to the conclusion that they themselves have reasoned under the influence of the two leading world legal systems, both phenomena of the West. As to Judges of Eastern Europe (the former socialist countries), both Judges from Poland studied in the West, one in France, the other in Austria and England; here too is a mixture of education which reflects the main legal systems of the world.

The metamorphosis of the Court's membership has been inevitable. It was the consequence of the growth of the United Nations membership from fifty-one to 178. As indicated earlier, this deprived the Court of some outstanding jurists, from Europe for instance. It also affected some no less outstanding in other parts of the world. In fact Sir Kenneth Bailey, an eminent Australian jurist, twice failed to be elected. In the first election, in 1946, his place was taken by Judge Read of Canada. But the late Judge Elias made a serious mistake in claiming that the failure of Sir Kenneth Bailey “to secure election in 1966” was “partly on the ground that he was considered to be narrow and conservative and partly because he was of the same Australian nationality as Sir Percy Spender, who had given the decisive

²³ Cf. H. Steinberger: The International Court of Justice Report, International Symposium, Max Planck Institute, at 278. However, he is right in recalling that “to exclude all political considerations from the nomination and election procedure, however, would be an idle undertaking. This is not even the rule with national supreme courts in States where the independence and impartiality of judges and courts are deemed of great value.” *Id.* at 280.

²⁴ As Professor Robert Jennings (as he then was) stated:
We used to be told, for instance, that it was because there was a lack of sufficient common basis between ‘East’ and ‘West’. Now much the same people tell us the reason is to be found in the divide between ‘North’ and ‘South’ but it is the function and the claim of international law precisely to provide legal framework and with these differences can be comprehended. If we have to wait until the world is a single like-minded region we shall wait forever.
Cf. Heidelberg Symposium, 1974, *Id.* at 36.

casting vote against the complainants [in the *South-West Africa* case].”²⁵ It should be recalled that the seat of the Australian judge was taken by Judge Onyeama, a Judge from another Commonwealth country, Nigeria, and a colleague of Judge Elias, and that since Judge Elias announced his candidacy to succeed his colleague and was elected, it was he who benefited from this change.

As to the three-year election rule, it has been pointed out that it contributes to a lack of stability in the Court and has an undue impact on the elections in that candidates may be selected with a view to individual judges participating in concrete cases.²⁶ It has also been alleged that these elections “involve a good deal of horsetrading at the best of times.”²⁷ According to that view, certain Western-European candidates stood “a far better chance of being elected as they had or were thought to have liberal or progressive views vis-à-vis the problems of ‘the third world’.”²⁸ Several elections demonstrate that this has not been the case. The differing orientation of some of the candidates was no bar to their election or re-election. What is more, instability has in practice been avoided by the phenomenon of re-election, so that every three years there tends to be struck a rough balance between “experience” and “fresh blood”. The apprehensions of twenty years ago have fortunately proved to be, on the whole, unfounded.

Following that parenthesis on the subject of the system of election, I now return to the more specific issue of nationality as a political attribute which only the stateless can disclaim.

It is a matter of historical record that nationality was never raised as an issue during the lifetime of the Permanent Court of International Justice. A few Judges of European origin were na-

²⁵ Elias, *supra* note 12, at 26-27. Nobody regrets more than I do, having known Sir Kenneth for over twenty years and admired his legal standing, that he failed to be elected.

²⁶ Sir Gerald Fitzmaurice: “The Future of International Law”, report to *L’Institut de Droit International*, 1973, Vol. I.

²⁷ See Elias, then-Attorney-General of Nigeria in his report to the Symposium at Heidelberg 1974, *Id.* at 27. This was an observation made much of by the late Professor Georg Schwarzenberger drawing conclusions which scarcely require refutation, so ill-founded was their basis. GEORG SCHWARZENBERGER, *IV INTERNATIONAL LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS* (1986).

²⁸ Elias, *supra* note 27, at 26.

tionals of countries which were far from democratic; there were some from Latin America to whom democracy also was a strange phenomenon. Then there were a few Judges from Asia as well. The European judges indeed included some from totalitarian countries; one of the most distinguished Judges and Presidents of the Court, Dionisio Anzilotti, was a citizen of fascist Italy and served at the Court while Italy was allied to Hitler's Germany. But no one dared to raise the question of impartiality or independence on the basis of nationality, until in 1986 Professor Georg Schwarzenberger had the following to say: "If [the French and German] judges had not been prepared to perform acts of conscious or sub-conscious self-co-ordination with the expectations in their own countries, they would have been liable to be branded as traitors and treated as social outcasts."²⁹

Now it is a matter of fact that Judge Weiss in the 1927 *Lotus* case, while expressing views similar to those of his country's government, invoked in his dissenting opinion his "conscience as a jurist and judge . . ."³⁰ As to Judge Anzilotti, one could say that he voted in accordance with the Italian political position and not only in the *Custom Régime case*.³¹ But this in no way detracts from their reputation as outstanding Judges on the bench.

It is only during the lifetime of the present Court that the issue has acquired new and unexpected dimensions.³² Judges originating from specific countries have been singled out for spe-

²⁹ See SCHWARZENBERGER, *supra* note 27, at 246. One may wonder how anyone can be prepared to perform a sub-conscious act.

³⁰ The Case of the S.S. *Lotus*, 1927 P.C.I.J. (Ser. A), No.9 49 (dissenting opinion of Judge Weiss) reprinted in II WORLD COURT REPORTS 1927-1932 20, 57 (Manley O. Hudson ed., 1969). [hereinafter WORLD COURT REPORTS]. See also MANLEY O. HUDSON, THE PERMANENT COURT OF INTERNATIONAL JUSTICE 1920-1942, 359 (1972).

³¹ Advisory Opinion No. 20, Customs Régime Between Austria and Germany, 1931 P.C.I.J. (ser. A/B) No. 41, at 55, 70 (individual opinion of Judge Anzilotti) (concerning Protocol of March 19, 1931), reprinted in WORLD COURT REPORTS, *supra* note 30, at 725, 733.

³² It is worth recalling that another formula was suggested earlier to the effect that judges be elected "on the exclusive basis of their technical qualifications and their high moral character". 13 U.N. Doc. 151, IV/1/7, 13 U.N.C.I.O. Docs. 470 (1945). See also 14 U.N.C.I.O. at

Jurist 28, G/20, 14 U.N.C.I.O. Docs. 249, 252 (1945)

Jurist 25, G/19, 14 U.N.C.I.O. Docs. 253 (1945)

Jurist 86, G/73, 14 U.N.C.I.O. Docs. 821, 823 (1945).

cial criticism. Those from newly independent countries were exposed to criticism as they "seemed not to share European values." Well, in some respect that may be true.³³ However, it is clear that "[n]o international judges from any civilized legal system could be presumed to believe that the kidnapping of diplomats is, or ought to be, legal."³⁴ Special criticism was levelled at Judges from Eastern Europe; to be more precise, in the first stages of the Court's history, to Judges from Poland, the Soviet Union and Yugoslavia. And later, after the expiration of the term of office of the Judge from Yugoslavia, to the two remaining Judges from Eastern Europe. It was suggested that the so-called "Socialist" Judges constituted a group detached from "their colleagues on the Court."³⁵ However critical as these views may have been, it was admitted that the so-called "Socialist Judges", despite "differences with the majority," had been prepared to make accommodations to the sensibilities of their colleagues. Such concessions, it was reasoned, were necessary in order for there to be any useful participation by the Socialist Judges in the Court's work.³⁶

Before proceeding further, I think a general comment would be in order. One Member of the Court once stated: "It is inevitable that every one of us in this Court should retain some trace of his legal education and his former legal activities in his country of origin."³⁷ However, Judges of the same nationality and of the same legal or cultural dimension frequently arrive at opposing views. One illustration may suffice: The Judgment of the Court in 1966, in which the Judge from the United States (the late Philip Jessup) voted with the Judge from the Soviet Union (Koretsky) against the Judges from the United Kingdom and France.³⁸ One might wonder, moreover, whether Judges originat-

³³ Professor Thomas M. Franck rightly suggested that no one could claim that judges "from China and Egypt reflected West European values." THOMAS M. FRANCK, *JUDGING THE WORLD COURT* 36 (1986).

³⁴ *Id.* at 38.

³⁵ K. Grzybowski, *Socialist Judges in the International Court of Justice*, 1964 *DUKE L.J.*, 536 ff.

³⁶ *Id.* at 548.

³⁷ Judge Levi Carneiro in the *Anglo-Iranian Oil Co. Case* (U.K. v. Iran), 1952 *I.C.J.* 161 (Preliminary Objections).

³⁸ The *South West Africa Cases*, 1966 *I.C.J.* at 323 (Eth. v. S. Afr.; Liber. v. S. Afr.) (July 18) (dissenting opinion of Judge Jessup).

ing from the same country could in any event be expected regularly to hold similar views, on points of law which would scarcely have been laid before the Court had they not offered scope for divergence even between persons of similar training and origin.³⁹ It has been asserted that "one basic principle upon which the socialist Judges have continually insisted is that of national sovereignty, as both a legal and a political principle."⁴⁰ This is not exact and had certainly not proved true so far as the most recent twenty years are concerned. It is worth recalling that in the *Certain Expenses* case Judge Winiarski and Judge Basdevant voted in the same way.⁴¹ It may also be pointed out that Judges Basdevant, Alvarez, Winiarski, Zoricic, De Visscher, Badawi, Pasha and Krylov appended a joint opinion in the *Corfu Channel* case.⁴² But the "mix" of authors of that separate opinion dictates how varied their legal education had been and that nationality played not the slightest role in their views.⁴³ As indicated above, "[A] judge may share the point of view of his government. This does not, however, necessarily mean that the Judge votes for his government or for the policy pursued by that government."⁴⁴ On the other hand, it is well known that the Judges sometimes vote contrary to the views held by their governments.⁴⁵ Other strange reasons have been advanced against the Judges of certain nationalities.

³⁹ Since no two Members can have the same nationality, one can only speculate whether, for example, Judges Hackworth, Jessup and Dillar would all have voted the same way in a number of cases.

⁴⁰ See *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, 1950 I.C.J. 96. Grzybowski, *supra* note 35, at 537.

⁴¹ *Certain Expenses of the United Nations*, 1962 I.C.J. 151 (July 20).

⁴² *The Corfu Channel Case*, 1947-1948 I.C.J. 31 (Mar. 25).

⁴³ The same author insisted that the views of what were called "socialist Judges" have been subjected to serious criticism. "[T]heir doctrines seem highly unrealistic." Grzybowski, *supra* note 35, at 549.

⁴⁴ Cf. Edvard Hambro, *Some Observations on the I.C.J. After Thirty Years*, STUDI IN ONORE DI GIORGIO BALLADORE PALLIERI, MILANO 306, 321 (1978).

⁴⁵ See Judge Basdevant in *The Minquiers and Ecrehos case*, 1953 I.C.J. 74; Judge McNair in the *Anglo-Iranian Oil Co. case*, 1952 I.C.J. 116; Judges McNair, Basdevant and Hackworth in the *Monetary Gold case*, 1954 I.C.J. 34-35.

1. *Their birthplaces*

A Judge of Polish nationality was born in that part of Poland which now belongs to the Ukraine (previously the U.S.S.R.). He was suspected to be of U.S.S.R. nationality.⁴⁶ The absurdity of that claim calls for no comment.⁴⁷ Arthur Frank Burns (Adviser to the President of the United States 1969, President of the Federal Reserve Board 1970-1978, later U.S. Ambassador to the Federal Republic of Germany) was born at the same place.

2. *Friendliness of judges towards their countries of origin and countries actually or potentially involved in cases before the Court*

An American professor once testified that Judges coming "from countries allied to the United States [are] friendly to our country and perform their judicial functions with competence and independence."⁴⁸ Is "friendliness" towards his or another country any test of a Judge's "independence"?⁴⁹ "Right or wrong, my country" is not a judicial principle and can never be accepted as such. A Judge, as I have insisted in my writings, should be "impartial, objective, detached, disinterested and unbiased." An interesting illustration could be developed from recent practice. The relationship between Argentina and the United Kingdom had suffered serious setbacks a few years ago,

⁴⁶ SCHWARZENBERGER, *supra* note 27, at 295.

⁴⁷ His birthplace was situated not very far from that of the late Sir Hersch Lauterpacht and Sir Louis Namier, the famous British historian.

⁴⁸ Cf. Richard N. Gardner, *U.S. Termination of the Compulsory Jurisdiction of the International Court of Justice*, 24 COLUM. J. TRANS. L. 421 (1986). The article is a reproduction of his testimony before the Committee on Foreign Relations, U.S. Senate, December 4, 1985.

⁴⁹ Gardner questioned the independence of three Judges, including the Judges from Poland. *Id.* at 424. It will be of interest to note that following my request I received the following clarification:

[A]ny testimony given before a Congressional Committee remains nothing more than the opinion of the witness. The fact of its presentation before the Committee should in no way be interpreted to mean that the Committee or any member of the Committee shares that opinion . . . I had understood that the Professor was a scholar of some note. He apparently is ignorant of your professional work, both on and off Court as well as your reputation among your colleagues. Had he known these things, he surely would not have said what he did.

the Falkland conflict having left the two countries on an almost hostile footing. Could this have had an impact on the capacity of the Judge from Argentina to sit in a case in which the United Kingdom was involved? There have been and are still disputes or less than friendly relations between States whose nationals sit together on the bench of the International Court of Justice. There is obviously no relationship between the position of a government vis-a-vis judgments or decisions of the Court and the position of the Judges as such.⁵⁰

3. *Judges as nationals of States which have not accepted the compulsory jurisdiction of the Court*

Today, seven Judges are nationals of States which have not accepted the compulsory jurisdiction of the Court. In the past, this number was much higher and Poland was in fact one of those countries. But, as I pointed out elsewhere, Article 36, paragraph 2 of the Statute is not the only means whereby States may refer disputes to the Court or be sued before it. There are other possibilities, such as bilateral agreements.⁵¹

4. *"Demanding expectations of Governments"*⁵²

As to Judges from Poland this has not been true. At no time even after 1946 were nominations by the Polish National Group

⁵⁰ Cf. Andre Gros, *La Cour Internationale de Justice 1946-1986: Les reflexions d'un juge*, in *INTERNATIONAL LAW AT A TIME OF PERPLEXITY, ESSAYS IN HONOUR OF SHABTAI ROSENNE* 289 ff. (Professor Yoram Dinstein, ed. 1989). Cf. The criticism by the French Government of the Judgment in the Nuclear Tests cases. Judge Gros himself warmly congratulated the Polish candidate to the Court in a letter of April 1966, and later on his election which he described as "brilliant" (November 14, 1966). I would only add that contrary to his claim the reasons for Sir Gerald Fitzmaurice and Philip Jessup not having been elected to the presidency of the Court in 1967 and 1970 were not identical but were entirely different. *Id.* at 297.

⁵¹ Poland never accepted the compulsory jurisdiction in the inter-war period, yet it was the most frequent client of the Court. See my comments in *Correspondence*, 84 AM. J. INT. L. 23 (1989).

⁵² Schwarzenberger referred to "the demanding expectations of the U.S.S.R. Government regarding the behaviour of nationals in its client-States whom it has decided not to veto for nomination for appointment to significant posts in the United Nations system . . ." SCHWARZENBERGER, *supra* note 27, at 323. He failed to mention that in 1961 the future judge from Poland was offered the post of Under-Secretary-General for Legal Affairs by the then Secretary-General. However, the existing government in power blocked the appointment.

subject to outside approval.

All in all, it may too be pointed out that suppositions as to the political dependence of Judges under the guise of all sorts of suspicions concerning their personalities, their alleged ties, and particularly their nationalities are ill-founded. It is obvious that some cases arise where a Judge does not live up to legitimate expectations. As with every important post, mistakes can be made. However, those mistakes should not be raised to the level of generalization, whereby underlying principles are stood on their heads.

Thus it remains particularly improper to disqualify candidates or Judges on account of their nationality. One should judge the individual on his merits, and on some occasions attacks against the integrity of a Judge have amounted to baseless insinuations.⁵³ The claim concerning the composition of the Court as reflecting the national interest of States has never been substantiated. Among the many Judgments and Advisory Opinions handed down there are certainly some of which invite criticism. But these decisions never reflected national interests related to the nationality of Judges.

The present electoral system, notwithstanding its weaknesses, works relatively well and the composition of the Court is

⁵³ Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 158-60 (June 27) (separate opinion of Judge Lachs). Reply to the Statement of Mr. A. Sofaer. Need I recall that the Judge from Poland was considered by the *NEW YORK TIMES* "the strongest new candidate." (*N.Y. TIMES*, Nov. 4, 1966). While the *WASHINGTON POST* wrote "among the five judges who were chosen (one third of the total membership) the candidate from Poland appears to be the best qualified." "The other four new judges chosen are not well known in the field of international law, but only have attained distinction in the legal or diplomatic circles of their own country." (*WASH. POST*, Nov. 7, 1966). One of the claims, particularly by G. Schwarzenberger, is absurd. As evidence of "subservience" he referred to the congratulations offered by the then President of the Security Council who was a representative of the then USSR. He admitted later that he failed to mention that the first to be congratulated was the Ambassador of Japan, in view of the election of a judge from Japan.

It may be of interest to recall that in the Hostages in Tehran case the Agent of the Applicant Government did not object to the presence of "the Warsaw Pact judge" but relied on his views. He stated: "Perhaps the best way for me to conclude my discussion of the commission is to quote from Judge Lachs' opinion in the Aegean Sea Continental Shelf case . . . [he] used language which to my mind precisely fits the crisis in the United States-Iranian relations since 4 November. . ." *Cf.* Pleadings, Oral Arguments, Documents, Case Concerning United States Diplomatic and Consular Staff in Tehran, at 272.

well-balanced. The notion of "communist" or "Warsaw Pact" Judges is a product of a certain stage of history. It was artificial and harmful and it has done a lot of damage. Now it belongs to history. That "species" has never existed; its invention was an attempt at an all-too-easy explanation of certain phenomena which had a much deeper source. Now, with the Pact having been dissolved and the demise of communism, this question has disappeared from the agenda. And, as I have pointed out in the past, the independence of a Judge is a quality of his personality. Lack of it is an accusation that can be raised against an individual whatever his nationality. For the existence of Judges who are politically biased, or even corrupt, is not a feature of one State or of one political system only; one may find them everywhere. To quote Justice Frankfurter, "[B]y working together, by sharing in a common effort, men of different minds and tempers reach agreement, acquire understanding and thereby tolerance of their differences."⁵⁴ The situation in the International Court of Justice is perhaps more complex, for it brings together men of different races, cultures and philosophies. They have to find a common intellectual language, though it is true that the universality of the discipline in which all of them are versed aids them greatly in that quest. No seat on the bench should be occupied by a man who is not worthy of it. And that worth is to be estimated in terms of character and competence, irrespective of color, religion, or primitive prejudices concerning the conditioning power of nationality. The proper implementation of Articles 2 and 9 of the Court's Statute offers a good solution for the problems which may arise in the process of selecting members of the International Court of Justice.

⁵⁴ Cf. concurring opinion in the famous Little Rock School case, *Cooper v. Aaron*, 78 S. Ct. 1401 (1958).