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Edward McWhinney, Law, Politics and Regionalism in the Nomination and Election of World Court Judges, 13 SYRACUSE J. INT'L L & COM. 1 (1986).

ALWD 7th ed.

Edward McWhinney, Law, Politics and Regionalism in the Nomination and Election of World Court Judges, 13 Syracuse J. Int'l L & Com. 1 (1986).

APA 7th ed.

McWhinney, Edward. (1986). Law, politics and regionalism in the nomination and election of world court judges. Syracuse Journal of International Law and Commerce, 13(1), 1-28.

Chicago 17th ed.

Edward McWhinney, "Law, Politics and Regionalism in the Nomination and Election of World Court Judges," Syracuse Journal of International Law and Commerce 13, no. 1 (Fall 1986): 1-28

McGill Guide 9th ed.

Edward McWhinney, "Law, Politics and Regionalism in the Nomination and Election of World Court Judges" (1986) 13:1 Syracuse J Int'l L & Com 1.

AGLC 4th ed.

Edward McWhinney, 'Law, Politics and Regionalism in the Nomination and Election of World Court Judges' (1986) 13(1) Syracuse Journal of International Law and Commerce 1

MLA 9th ed.

McWhinney, Edward. "Law, Politics and Regionalism in the Nomination and Election of World Court Judges." Syracuse Journal of International Law and Commerce, vol. 13, no. 1, Fall 1986, pp. 1-28. HeinOnline.

OSCOLA 4th ed.

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LAW, POLITICS AND "REGIONALISM" IN THE NOMINATION AND ELECTION OF WORLD COURT JUDGES

Edward McWhinney*

I. THE POSITIVE LAW, AS WRITTEN: CHARTER, COURT STATUTE, COURT RULES

The law, as written, is clear enough. The International Court of Justice is to be "the principal judicial organ of the United Nations."¹ The Court is to 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 recognised competence in international law."² The Court is to consist of "fifteen members, no two of whom may be nationals of the same state."³ The members of the Court are to be elected by the U.N. General Assembly and by the Security Council from a list of persons "nominated by the National Groups in the Permanent Court of Arbitration";⁴ or, in the case of U.N. member-states that do not have such formally constituted National Groups, by *ad hoc* National Groups specially appointed by those U.N. member-states for that purpose.⁵ No National Group may nominate more than four persons, and not more than two of these shall be of the particular National Group's own nationality.⁶ Before making these nominations, each National Group is "recommended to consult its highest court of justice, its legal faculties and schools of law, and its national academies and national sections of international academies devoted to the study of law."⁷

On the actual conduct of the elections, the U.N. General Assembly and the Security Council are to proceed independently of

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1. U.N. CHARTER art. 92.

2. I.C.J. STATUTE art. 2.

3. *Id.* art. 3, para. 1.

4. *Id.* art. 4, para. 1.

5. *See id.* art. 4, para. 2.

6. *See id.* art. 5, para. 2.

7. *Id.* art. 6

one another to elect the members of the Court;⁸ and are 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."⁹ Candidates are elected when they obtain an absolute majority of votes in the General Assembly and in the Security Council; and the vote in the Security Council is to be "taken without any distinction between permanent and non-permanent members of the Security Council."¹⁰ There are provisions for a second and, if necessary, a third ballot, if one or more seats on the Court remain to be filled after the first General Assembly and Security Council votes;¹¹ and then more elaborate procedures for resolving the deadlock if those further ballots are also inconclusive and one or more seats still remain unfilled.¹² But these procedures are complicated and, in constitutional terms, indirect, and have yielded, over the years, to constitutional custom recognizing plenary powers on the part of the two U.N. political organs, the General Assembly and the Security Council, to determine the issue directly by still further ballots until candidates with absolute majorities should emerge in each of them—the spirit, certainly, if not the exact letter, of the Court Statute stipulations read as a collectivity. The only other provisions that need concern us here are, first, the specification of a nine year term of judicial office, with eligibility for re-election, and the system of staggered judicial elections, with a third of the Court's seats thus being balloted upon at each three year period;¹³ and, second, the stipulation that casual vacancies (caused by the death or resignation or retirement of judges whose term had not yet expired) should be filled by the same procedures (separate votes of the General Assembly and Security Council, with absolute majorities required in each) as for the regular, periodical elections,¹⁴ with any judge so elected holding office for the remainder of the predecessor's term.¹⁵ The Rules of Court¹⁶ do not go beyond the Court Statute provisions already indicated.

8. *See id.* art. 8.

9. *Id.* art. 9.

10. *Id.* art. 10.

11. *See id.* art. 11.

12. *See id.* art. 12.

13. *See id.* art. 13.

14. *See id.* art. 14.

15. *See id.* art. 15.

16. *See id.* at arts. 1-13 (Rules of Court, Constitution, and Working of the Court).

II. THE NATIONAL GROUPS AS ELECTORAL COLLEGES FOR THE NOMINATION OF JUDICIAL CANDIDATES

Under the Court Statute provisions already referred to,¹⁷ the rôle of the various National Groups—whether the formally constituted National Groups of states that are represented in the Permanent Court of Arbitration—or the *ad hoc* National Groups, specially appointed for the purpose by U.N. member-states not so represented in the Permanent Court of Arbitration—is preemptive, in so far as the National Groups have the legal monopoly on the nomination of candidates for election to the Court. The Permanent Court of Arbitration itself, as has been remarked often enough, is neither Permanent nor a Court *stricto sensu*; but, rather, a panel of jurists, from which states may draw if they decide to constitute a special arbitral tribunal for purposes of the Convention of The Hague of 1907 for the Pacific Settlement of International Disputes.¹⁸ The Convention of The Hague of 1899 requires each state party to the Convention to “select four persons at the most of known competency in questions of international law, of the highest moral reputation and disposed to accept the duties of arbitrators.”¹⁹ The members of the National Groups so appointed hold office for a six-year period, (which can be renewed, indefinitely) and draw no salary or allowances unless they should actually serve on an arbitral panel, in which case any honorarium and expenses would be paid by the states’ party to the particular arbitration involved. As of May 1985, there were seventy-five states formally listed as participating in the Arbitration Court’s activities.²⁰ Although this includes all principal legal systems, and most major states (among these, four of the five permanent members of the Security Council, with the People’s Republic of China reportedly still “studying” a request made to it, in June 1972, after its seating in the U.N. General Assembly, to advise as to its position on the two Hague Conventions of 1899 and 1907),²¹ it is still less than half the current membership of the United Nations. Further, among these seventy-five states, only sixty-one have actually constituted a National Group for purposes of the Permanent Court of Arbitra-

17. *See id.*

18. Pacific Settlement of International Disputes, Convention, Oct. 18, 1907, 36 Stat. 2199, T.S. No. 536, 1 Bevens 577.

19. Pacific Settlement of International Disputes, Convention, July 29, 1899, 32 Stat. 1779, T.S. No. 392, 1 Bevens 230.

20. RAPPORT DU CONSEIL ADMINISTRATIF DE LA COUR PERMANENTE D'ARBITRAGE 4 (1985).

21. *See id.*

tion.²² All other states are presumably content, for purposes of the periodic and casual World Court elections, to appoint special *ad hoc* National Groups limited to the making of nominations for the one particular election involved.

An examination of the actual patterns of appointment to the National Groups, by the sixty-one states that have actually constituted such groups on a formal and continuing basis, indicates a certain conservatism of approach, with members of the National Groups being fairly consistently reappointed on expiry of their initial six-year term. As of the 1985 reporting date, for example, the West German National Group contained three members first appointed in 1954, with the fourth appointed in 1961.²³ There were the occasional examples of National Groups with members first appointed in the 1940s who were still serving in 1985—Dominican Republic, Ecuador, Paraguay, Switzerland; while appointments dating from the 1950s were quite frequent (Austria (two), Brazil, El Salvador, Ecuador, France, Hungary, Italy, Japan, Poland, and Spain) and appointments from the 1960s were common-place and extended to almost half the states with formal National Groups, with the Soviet Union and the United Kingdom among these.²⁴ What this indicates, it may be suggested, is not merely a certain administrative inertia in National Foreign Ministries, in regard to posts that tend to be honorific and, in any case, largely inactive except at the times of the periodic renewal, at the regular three year intervals, of one-third of the World Court's membership, but also a certain recognition of the advantages of familiarity with the dossiers of potential candidates for the World Court, domestic and foreign, and with the long-range political trends in election of "regional" candidates (cultural-ideological, as well as legal-systemic). The conservatism already referred to shows up also in the cross-sectional "profile" of the members of the various National Groups. While the stipulations in the 1899 Hague Convention as to the qualities to be sought in making appointments to National Groups are open-ended enough, and while some countries appear to have made the effort to secure a professionally-balanced group, drawing

22. See *id.* at 8.

23. Professor E. von Caemmerer (appointed 1954, retired 1986); Ambassador W. Grewe (appointed 1954); Hermann Mosler (sometime Judge of the International Court of Justice, and sometime professor) (appointed 1954, retired 1986); and Professor H. J. Schlochauer (appointed 1961). See *id.* Professor Del Brück and Professor Randelchofer were appointed in 1986.

24. See *id.*

variously upon the Foreign Ministry legal division, national supreme courts, the universities, the practising legal profession in its various national forms, and (sometimes) the political arm of government (Foreign Ministers and Law Ministers themselves), there is an evident strong bias towards choosing present or former Legal Advisors to the National Foreign Ministry; and this influence of the career civil service is accentuated by the fact that, on examination, the representatives from other professional-skill groups turn out, very often, to wear a number of hats and to have had substantial ties with their National Foreign Ministries through long-time service as salaried Legal Consultants, *ad hoc* Legal Advisors or counsel pleading in particular cases. The strong "Foreign Ministry" flavour, understood in this wider, more comprehensive sense, of the National Groups, is readily apparent in the case of the permanent members of the Security Council—the Soviet Union, the United States, France and Great Britain²⁵—but it extends to all legal systems, transcending conventional East-West, North-South ideological divisions. There is, to be sure, the danger, detected by Georges Scelle in the increasingly close professional associations of the post-World War II era between the university law professors and their National Foreign Ministries, of a resultant *dédoublement fonctionnel* (or bias) in the advice then rendered by the "lay" (non-Foreign Ministry) members of such National Groups. But there is also the larger political reality that, with the changing character of the World Court in recent years as it has acquired a more nearly representative, universal character (in cultural-ideological and legal-systemic terms) and with the assumption by the Court majority, as direct consequence, of a more consciously pol-

25. While the professional character of the Soviet National Group is complicated by the Soviet practice of cumulation of titles and also of active professional functions, all four members of the Soviet National Group hold academic-legal posts (Ushakov, Institute of State and Law; Avakov, Academy of Diplomacy; Veretschetin, Institute of State and Law; Zadorozhnyi Institute of State of International Relations) and, at the same time, list Foreign Ministry status. The United States National Group is composed of Roberts B. Owen (State Department); David R. Robinson, (then Legal Advisor to the State Department); Lloyd N. Cutler; and John R. Stevenson (former Legal Advisor to the State Department), Mr. Owen being appointed by the Carter Administration and the other three by the Reagan Administration. The French National Group lists Professor Paul Reuter (also Member, and President, of the International Law Commission); G. Guillaume (Director of the Legal Division of the Foreign Ministry); M. Barbet (Vice-President of the *Conseil d'Etat*); and R. Schmelck (First President of the Court of Cassation). The British delegation listed Lord Wilberforce (a Law Lord); Mr. Justice Scarman; Sir F. Vallat (former legal adviser to the Foreign Ministry, and former Member (and President) of the International Law Commission; and Judge R.Y. Jennings (of the International Court of Justice, and sometime professor).

icy-making, legislative *rôle*, the business of nominating and then electing judges to the Court is deemed as too important to be left to legal "laymen," unconstrained by the larger political information and fact-gathering residing in the National Foreign Ministries. On this particular interpretation, the new political *rôle* of the Court, complimenting that of the General Assembly and other more directly political organs of the United Nations, and as strikingly demonstrated in the Court's intellectual progression to *Namibia* (1971),²⁶ after the judicial step backwards in history of the single-vote-majority decision in *South West Africa, Second Phase* (1966),²⁷ renders necessary, and also desirable, a politically sophisticated and realistic approach to the selection of World Court judges—the actual judicial elections themselves, in the General Assembly/Security Council, of course, but also the crucial, pre-election ballot, nominating stage. In United Nations institutional-machinery terms, however, it does raise the issue whether the Permanent Court of Arbitration-based National Groups, with their purportedly independent, technical-scientific character, are not a somewhat unnecessary, ceremonial survivor from an earlier halcyon era in international relations when the world community was far smaller and more homogeneous in cultural-ideological, legal-systemic terms; and when the International Court of Justice, could afford to confine themselves to logical, "black letter law" interpretations that were always, in stated intent if not necessarily in end result, divorced from policy considerations in law.²⁸

Several further points which seem to confirm the new realism, and frankness, in regard to the political *rôle* of the World Court today: there is no legal bar to individual members of the National Groups of states participating in the Permanent Court of Arbitration themselves being candidates for election to the World Court, or themselves taking part in the legal processes of nomination of candidates, involving the screening of their own personal candidacies; and actual practice, over the years, amply evidence this, as to both counts. Various suggestions to the contrary stem from the strict, and perhaps unnecessarily exaggerated, conventions as to

26. See *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, 1971 I.C.J. 16 (Advisory Opinion).

27. See *South West Africa, Second Phase, (Ethiopia v. S. Afr.; Liberia v. S. Afr.)* 1966 I.C.J. 6 (Judgment of July 18).

28. See generally E. McWHINNEY, *UNITED NATIONS LAW MAKING* 105 (1984); E. McWHINNEY, *SUPREME COURTS AND JUDICIAL LAW-MAKING* 91 (1986).

disqualification on the ground of interest, which are to be found in some particular national legal systems, but certainly not in all, and which are not automatically transferable to an international legal environment. Again, there is absolutely no legal bar to judges of the World Court themselves continuing, at the same time, to be members of their own National Groups of the Permanent Court of Arbitration. In mid-1985, for example, of the fifteen members of the World Court, the World Court judges from seven countries—Argentina, Brazil, India, Italy, Norway, Poland, and Great Britain, were also, at the same time, designated members of their respective National Groups in the Permanent Court of Arbitration.²⁹ The World Court judges from three other countries, having their own formal National Groups in the Permanent Court of Arbitration—France, the Soviet Union, and the United States—were not. (Four other countries with judges on the World Court—Algeria, the People's Republic of China, Nigeria, and Senegal—did not have formal National Groups in the Permanent Court of Arbitration.) As for the alleged bar against candidates from individual members of the National Groups in the Permanent Court of Arbitration for election to the World Court, on examination of the actual practice, no such convention can be said to exist, even in the case of the "Anglo-Saxon," common law countries in which it is supposed to have originated. In fact, the careers of successful candidates for nomination for election to the World Court have tended to evolve in common patterns, as if National Foreign Ministries were consciously preparing and grooming national candidacies on a longer term basis in advance of actual nominations and elections: membership in the national delegation to the Annual Sessions of the U.N. General Assembly, and service on the General Assembly's Sixth (Legal) Committee; election to the International Law Commission; and membership in the National Group in the Permanent Court of Arbitration. (It is a matter worthy of re-examination, whether such particularised qualifications and experience—service on the International Law Commission, as an example³⁰—continue to be as relevant today, as they once were, in terms of predicting intellectually useful and creative service on the World Court, in its contemporary policy-making rôle).

One other point in connection with the formal National

29. RAPPORT DU CONSEIL ADMINISTRATIF DE LA COUR PERMANENTE D'ARBITRAGE 8 (1985).

30. UNITED NATIONS LAW MAKING, *supra* note 28, at 96 (1984).

Groups within the Permanent Court of Arbitration: they only function as nominating committees, for purposes of screening and formally presenting candidates for the Court, in the case of actual elections through the General Assembly/Security Council elections procedures stipulated in article 4 and article 14 of the Court Statute.³¹ These formal National Groups have no legal *rôle* in regard to the selection of *ad hoc* national judges to sit on the World Court, in cases where the World Court Bench already includes a judge of the nationality of one of the parties but not of the other, or where the World Court Bench includes no judges of the nationality of either party.³² The relevant article of the Court Statute does suggest that such *ad hoc* national judges be "chosen preferably from among those persons who have been nominated as candidates," under the regular nomination procedures, by National Groups in the Permanent Court of Arbitration or by *ad hoc* National Groups,³³ but this provision is in the nature, legally, of a precatory wish only, and state parties seem to have taken this as a *carte blanche* invitation to go ahead without consulting, or where necessary forming, National Groups for purposes of nomination. In the *Gulf of Maine* litigation between Canada and the United States,³⁴ for example, the relevant Canadian National Group was not consulted by the Canadian government, either formally or informally, as to the designation of an *ad hoc* Canadian judge for the Special Chamber involved; and absence of any such consultation, whether formal or informal, seems to be the general international practice.

III. GENERAL POLITICAL TRENDS IN THE PERIODIC (TRIENNIAL) ELECTIONS OF WORLD COURT JUDGES

As already noted, the judges of the World Court are, in accord with the Court Statute, elected by a double majority—in the U.N. General Assembly and in the Security Council, voting separately. The first elections for the new Court were held in February, 1946, and were limited to the original fifty-one members of the United Nations, both as to the actual votes in the General Assembly and in the original (eleven member) Security Council, and also as to the actual nominations of which no less than seventy-six were re-

31. I.C.J. STATUTE arts. 4, 14.

32. *Id.* art. 31.

33. *Id.* art. 31, para. 2 (referring to I.C.J. STATUTE arts. 4, 5).

34. *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Can. v. U.S.)*, 1982 I.C.J. 3 (Constitution of Chamber Order of Jan. 20).

ceived for the fifteen seats on the Court. The membership of the first bench of the Court, reflected the political facts of the original deliberately restricted membership of the United Nations itself (only those states that had taken part in the so-called Wartime Alliance against Fascism, by declaring war against the Axis powers, having been invited to the San Francisco founding conference in 1945). Apart from the then Big Powers, the Permanent Members of the Security Council—the U.S., Soviet Union, China, Great Britain and France—there were two other Western European states, Belgium and Norway; two other Eastern European states, Yugoslavia and Poland; one British Commonwealth state, Canada; one Arab state, Egypt; and four Latin American states, El Salvador, Chile, Mexico and Brazil.³⁵ No change in state membership on the Court occurred in the next, 1948, regular triennial elections; and it was not until the 1951 elections that, reflecting expansion of United Nations membership and the entry of more Asian states, one European seat (in fact De Visscher of Belgium) was lost in the balloting in favour of a further Asian seat, (Sir Benegal Rau of India). The significant changes in Court membership and in what we might call the “regional” balance within the Court’s ranks do not really occur until the elections of the 1960s, and correspond, then, to the waves of decolonisation and consequent admission of “new” states from Asia, Africa and the Caribbean to the United Nations, which saw United Nation’s membership pushed, in the one year, 1955, from sixty to seventy-six, and then, in leaps and bounds to one hundred in 1960 and one hundred and twenty-seven by 1970. In the 1963 regular elections, Latin American seats were reduced from four to two, with these places going, now, to Senegal and to Pakistan. The Court, at that stage, had, apart from the five Permanent Members of the Security Council, (with, among these, Nationalist China continuing to hold the Chinese seat), two other Western European seats (Greece and Italy), one Eastern European seat (Poland), one Arab seat (UAR-Egypt), one British Commonwealth seat (Australia), two other Asian seats (Japan, Pakistan), one African seat (Senegal), and the two Latin American seats already mentioned (Peru and Mexico). The changes, thereafter, in strictly “regional” terms, tend to be marginal, apart from the addition of a second African seat (Nigeria) in the 1966 regular elections to balance the existing African seat (Senegal) in linguistic and le-

35. See generally DOCUMENTS ON THE INTERNATIONAL COURT OF JUSTICE, 337 (S. Rosenne ed. 1974) [hereinafter DOCUMENTS].

gal-systemic terms (English, Common Law, now, in addition to French, Civil Law), the "old" British Commonwealth seat (Canada, followed by Australia) having been displaced for this purpose. These basic regional patterns have persisted to the present day, through the last, 1986, regular elections, and it is difficult to imagine their being seriously challenged or altered, (unless conceivably the Court's numbers should be increased). One anomaly, directly resulting from the United Nation's own long-sustained failure politically to accept and recognise the downfall of the Nationalist Government of China in 1948 and the emergence of the People's Republic of China—the persistence of a Nationalist Chinese judge in a Chinese seat on the Court—was eventually corrected in two, separated stages, by the non-presentation of any Chinese Nationalist candidate in the 1966 periodical elections or thereafter, and by the eventual presentation, and election, of a People's Republic of China candidate in the 1984 regular elections. All the other changes, from the 1966 elections onwards, tend to occur within the confines of the, by that time, well-defined "regional" blocs which include, variously, political-ideological, ethno-cultural, religious, linguistic and legal-systemic elements as well as the more obvious, geographical identifications. We may identify such "regional" patterns of representation, within the Court's ranks, as they appear, now, to have jelled by the mid-1980s, as follows:

- Four Western European seats (France and Great Britain; plus one other Northern European (Nordic) seat, and one other Southern European (Mediterranean) seat;
- two Latin American seats;
- two (sub-Sahara) African seats (one francophonic, Civil Law seat, and one anglophonic, Common Law seat);
- three Asian seats (the People's Republic of China; plus India and Japan);
- two Soviet and Soviet bloc seats (the Soviet Union, and one Socialist, Eastern European seat);
- one Arab seat;
- one North American seat (the United States).

Such a break-down by "region" reveals certain obvious, long-range, political problems, apart from the dangers inherent in any attempt, by custom or convention, artificially to jell the political balance of power of the present day. If we think in terms of the conventional *tri-bloc* classification of the dominant political forces in the contemporary United Nations and its main political arenas (including, of necessity now, the World Court)—Western bloc, So-

viet bloc, and the Third World—the Western bloc is politically over-represented with at least five seats (the United States and the four Western European states) and probably seven (if the two Latin American seats are included); the Soviet bloc clearly under-represented with two seats only; and the Third World more or less adequately represented with six seats. Breaking down the representation on the Court in linguistic-cultural terms, however, Latin America with only two seats and the Arab countries with only one seat are, clearly, shabbily dealt with, in comparison, for example, to Western Europe; and one might make the same suggestion in regard to Asia, which, with its huge population resources, can manage only three seats against four for Western Europe. The case for the disproportionate (in population terms, at least) Western European representation has to be made on a basis of special factors, such as the historical contribution of Western Europe to the evolution of the principles, and also the processes and institutions, of “classical” International Law; though these arguments are somewhat in political disfavour today with the current reaction against what is characterised as the “blight of Eurocentrism”³⁶ in the corpus of inherited International Law.

A more serious objection, however, to the current “regional” patterns of representation on the Court lies in the emergence of what might be called special “reserved” seats that are, by seeming common consent,³⁷ earmarked for the new, *de facto* Big Powers of today (India and Japan, as examples), balancing the seats that have always been conceded, by tradition since 1945, to four at least of the erstwhile Big Five of World War II who constitute the Permanent Members of the Security Council (France and Great Britain, as well as the still current superpowers, the United States and the Soviet Union). It means, of course, that there will be no seats available for competition, in the future, among “middle” or lesser

36. W.G. Grewe, *Vom Europäischen zum Universellen Völkerrecht. Zur Frage der Revision des 'Europazentrischen' Bildes der Völkerrechtsgeschichte*, 42 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 449 (1982); UNITED NATIONS LAW MAKING, *supra* note 28, at 106-09, 187-88.

37. Thereby correcting a much-remarked earlier gap in the Court's “regional” representativeness. “On the Bench of the International Court neither India nor (the People's Republic of) China has a representative; in the absence of representatives of these countries, can it possibly be said that the main forms of civilisation and the principal legal systems of the world are represented?” M.C. CHAGLA, *THE INTERNATIONAL COURT, THE INDIVIDUAL AND THE STATE* 21 (1958) (comments by former Indian Foreign Minister, M.C. Chagla, on the Right of Passage over Indian Territory case (*Port. v. India*), 1957 I.C.J. 166 (Judgment of Nov. 26, 1957) (Dissenting opinion); R.P. Aanad, *STUDIES IN INTERNATIONAL ADJUDICATION* 111 (1969).

Asian states, unless the Asian states should succeed, in combination, in capturing a fourth or even fifth seat from some other "regional" group or groups. The situation of the newly-decolonised (formally British and French) states of the Caribbean is no better, unless they should persuade the Latin American states to allow them to compete within the Latin American "regional" group for the two seats there open; and the result, in such case, would almost certainly be to compel the Latin American states to try to expand beyond their present members and capture, perhaps, one of the Western European seats. Another suggestion for these Caribbean states might be to have them directly compete, as cultural vestiges of their former Western European Imperial masters, within the regular Western European "regional" group of four seats. The former "old" (or "white") British Commonwealth states—Canada, Australia and New Zealand—might be able to do just this, building on the already-existing United Nations General Assembly caucus group—one among many, often mutually overlapping, caucus groups,—of the W.E.O. (Western Europeans and Others); unless, of course, they were to bid directly for the conventionally "reserved" British seat on the Court, in competition with a British candidate. On the other hand, with two of the four Western European seats already pre-empted, by practice, by France and Great Britain, only two remain for distribution to all the rest, with the further complication of one being conventionally considered as "northern," and the other as "southern" European. What is a candidate from Belgium, Luxembourg, or The Netherlands to do? There are already suggestions that these two (non-"permanent") seats be "reserved" as European Communities seats, for those countries that have adhered to the Treaty of Rome; and that they be rotated among the European Communities countries by internal, "Gentleman's Agreement" among them. The political strains created by having a finite number of seats inferior to the number of "regionally"-based demands being made upon it today is demonstrated in several recent elections:

—in 1978, for example, when two excellent candidates from lesser Asian states, Sri Lanka and Madagascar, competed with a Western European candidate for the last (fifth) seat in the elections, matching each other virtually vote for vote in the first ballots in the Security Council and General Assembly, and forcing the matter to fourteen ballots in the Security Council and four in the General Assembly before the Western European finally won out;

—in 1984, when retiring Judge El-Khani (Syria), who was a candi-

date for re-election, lost out in the political squeeze created by the People's Republic of China's wish to regain the conventional (and long-vacant) "Chinese" seat on the Court. The other seats up for election were from Africa (anglophonic, Common Law, Nigeria), Asia (Japan), Socialist Eastern European Europe (Poland), and Western European (Northern Europe, the incumbent West German judge not being a candidate for re-election). In the result, the Chinese candidate was elected, as were the candidates from the other four, numerically stronger "regions"; while the Syrian candidate lost, and Arab "regional" representation on the Court was reduced, thereby, from two to one.

IV. CASUAL, IDIOSYNCRATIC FACTORS IN THE COURT ELECTIONS

Casual elements—the care with which individual candidates are selected with an eye to the particular "regional" and other factors present in any election; the timing of a particular national candidacy; even actual campaign tactics on the floor of the Security Council and General Assembly and the mastery of their respective intricate procedural rules—become important when the competition between different "regional" blocs, or combinations of blocs, reduces to a few or even a single marginal seat.

A. *THE PREMIUM ON INCUMBENCY*

In the 1984 regular triennial elections to the Court there were five seats open, however, there were in fact six conventionally-recognized "regional" claims on those seats—two Asian, one African, one Soviet bloc, one Arab, and one West European. In the certainty that one such "regional" claim would have to be rejected, three sitting members of the Court presented themselves for re-election and were, in fact, successful. It is considered that the extra "recognition" attached to incumbency, and also the personal prestige of the candidate concerned, aided their re-elections.

B. *SOLIDARITY AND COOPERATION WITHIN A "REGIONAL" BLOC*

Again, in the 1978 triennial elections, in the strong contest between two Asian and two Western European candidates for the last seat on the Court, "regional" solidarity and the timely desistance of one of the two Western European candidates (Manner of Finland) is thought to have aided the election of the other Western European candidate (Ago of Italy).

C. *THE TIMING OF A CANDIDACY*

For the 1975 triennial elections, a split within the Nordic bloc, with the incumbent Swedish judge, Judge Petrén presenting himself for re-election and a strong Norwegian candidate, Edvard Hambro, a former U.N. General Assembly President, contesting the election, allowed a delayed West German entry (with an attractive candidate and a former *ad hoc* judge in *North Sea Continental Shelf* in 1969, Mosler), to move into the middle and win. A "premature" West German campaign might have united the two Nordic countries around a single candidate.

D. *TACTICAL-POLITICAL SKILLS IN THE FLOOR CAMPAIGN*

In the 1966 triennial elections, the tactical-political skills of the Swedish delegation in securing the suspension of the vote in the General Assembly between the crucial ninth and tenth ballots, after the very strong Spanish candidate, de Luna, had received the necessary Security Council majority on the first ballot and his main rival, the Swedish candidate, Petrén, could not gain a Security Council majority, is generally thought to have secured the Swedish candidate's election. The delay, and the effective lobbying that it permitted in the interval, resulted in the Swedish candidate's obtaining the necessary General Assembly majority on the tenth ballot: the Swedish candidate finally obtained the necessary Security Council majority on the twentieth ballot.³⁸

E. *MASTERY OF SECURITY COUNCIL/GENERAL ASSEMBLY PROCEDURAL RULES*

In the 1954 Special Election to fill the casual vacancy on the Court created by the death of Judge Sir Benegal Rau of India, two strong candidates from Pakistan and India were in direct competition. On the first ballot in the General Assembly, the Indian candidate, Judge Pal, was one vote short of the necessary majority which, the President of the General Assembly ruled, must be an absolute majority of those entitled to vote, (sixty-four votes) and not simply a majority of those present and voting (sixty-two votes). Judge Pal had obtained thirty-two out of sixty-two votes on the first ballot in the General Assembly. The President of the General Assembly, in ruling that an absolute majority was necessary and in

38. The tangled procedural moves in the U.N. General Assembly election stage are well dissected by Ambassador Rosenne. DOCUMENTS, *supra* note 35, at 347-48.

also fixing the date of the election for a Jewish religious holiday on which the Israeli delegation, which had decided to vote for Pal, would not be present, effectively determined the issue against the Indian candidate and in favour of the Pakistan candidate who was elected on the second ballot.³⁹

V. SOME MYTHS AND REALITIES IN THE ELECTION OF WORLD COURT JUDGES

A. THE ALLEGED ANTI-WESTERN MAJORITY ON THE COURT

Contrary to some contemporary criticisms of the World Court that are repeated from time to time in certain Western political circles, there is no automatic, anti-Western voting majority on the Court today. Allowing that there is a certain open-endedness in the conventional tri-bloc regional classifications—Western, Soviet, and Third World—applied to the U.N. General Assembly and other main U.N. arenas after the successive waves of admission of new states from the late 1950s onwards, the fact remains that no one group or bloc, even if it succeeded in imposing a national unity and marshalling all its votes on a particular issue, could command a judicial majority without engaging in major bridge-building and forming a coalition with other regional group's members. Since the judges are endowed, by the law of the Court Statute, with a nine-year term and are to all intents and purposes irremovable even if they fall out of favour with their own national government, then unless they happen to aspire to re-election they are completely independent of political pressures and free to vote according to their own consciences and policy preferences. The actual judicial voting patterns on politically strongly contested issues—*French Nuclear Tests* in the early 1970s,⁴⁰ *Nicaragua v. United States* in the early 1980s,⁴¹ even the Court's "great self-inflicted wound" in its eight-to-seven majority decision in *South West Africa, Second Phase* in 1966,⁴² cut across conventional political-ideological blocs or "regional" classifications. The judges being, for the most part, able jurists, of rich academic training and professional experience, apart from their particular legal-systemic and cultural-linguistic and po-

39. *But see id.* at 341-42; Rosenne, *THE INTERNATIONAL COURT OF JUSTICE, AN ESSAY IN POLITICAL AND LEGAL THEORY* 136 (1961).

40. *Nuclear Tests (Austl. v. Fr.)*, 1974 I.C.J. 253 (Judgment of Dec. 20).

41. *Military and Paramilitary Activities in and Against Nicaragua (Nic. v. U.S.)*, 1984 I.C.J. 392 (Judgment on Jurisdiction and Admissibility of Nov. 26).

42. 1966 I.C.J. 6.

litical affiliations, how could it really be otherwise?

B. THE ALLEGED ABUSE OF A THIRD WORLD VOTING MAJORITY IN COURT ELECTION VOTES IN THE U.N. GENERAL ASSEMBLY

Again, when the dry light of reason and empirically-based study is applied to the detailed record of judicial elections, since the United Nations expanded to near universal membership from the late 1950s onwards, any suggestion of an organized and systematic "ganging-up" against Western candidates by the new Third World majority in the U.N. General Assembly is demonstrated as without factual foundation. In only two cases in the last forty years have exceptionally well-qualified Western candidates gone down to defeat before Third World candidates, and these were both in the earlier years. In the 1951 elections, the distinguished Belgian incumbent judge, Charles De Visscher, was defeated for re-election, under the special circumstances of the need to find a second Asian seat on the Court (in addition to China)—in this case for newly-decolonised India and an equally outstanding candidate, Sir Benegal Rau. In the 1966 elections, the distinguished Australian jurist, Sir Kenneth Bailey, who had been an unsuccessful candidate in the first post-War elections of 1946 against the Canadian candidate, J.E. Read, for the then conventional "old" Commonwealth seat, was a candidate to succeed his co-national, the retiring President of the Court, Sir Percy Spender, who had cast the second tie-breaking vote and thus made the Court majority in the eight-to-seven decision in *South West Africa, Second Phase* which had been rendered only three months before the Court elections. It is generally agreed that Sir Kenneth Bailey, an experienced and respected "United Nations" jurist, was defeated in the political back-lash against the Court's *South West Africa* holding⁴³ which was widely interpreted, in the U.N. General Assembly, as legally sanctioning the continuance and extension of the *régime* of *Apartheid* in Southern Africa and thus as applying a form of "White Man's" law. On the other hand, by 1966 a second African seat on the Court was timely for the newly decolonised, formerly British, anglophonic, Common Law nations of Africa, to balance the seat already accorded, in the earlier, 1963 elections, to the newly decolonised, formerly French, francophonic, Civil Law nations of Africa; and this Commonwealth seat, first held by the Ca-

43. *Id.*

nadian judge, Read, and then succeeded to by the Australian judge, Spender, passed on in the 1966 elections to a Nigerian candidate, Onyeama.⁴⁴ All the other shifts and changes in Western representation on the Court tend to be of a marginal character, and, in any case, Western European representation, as such, is in no way reduced in the 1966 elections or thereafter.

C. *THE "PERMANENCE" OF THE PERMANENT MEMBERS OF THE SECURITY COUNCIL IN ELECTIONS TO THE COURT*

Except for the special situation of China, whose representation on the Court lapsed in 1967 with the retirement of the Nationalist Chinese (Taiwan) judge, Wellington Koo, and was not resumed until the 1984 elections with the successful candidacy of the People's Republic of China jurist, Ni Zhengyu, all the Permanent Members of the Security Council have managed to be elected and re-elected without any very serious challenge, in spite of the Cold War, Decolonisation sometimes by *force majeure* and similar casual inter-bloc, inter-regional conflicts. The "rules of the game," sensibly interpreted by all main parties, have enjoined maintenance of a Court that is representative in basic political-ideological terms, though, as already noted, the rule, in this case, is conventional only since nothing in the U.N. Charter or in the Court Statute requires waving the Permanent Members of the Security Council into the Court by acclamation. The only mild surprises in all this are represented in relatively low votes, in the Security Council, in the 1978 triennial elections, for both the Soviet Union and the United States, perhaps reflecting the revived World War tensions of that period,⁴⁵ and a diminished British vote, in the General Assembly,

44. Compare the wise and balanced, deliberately understated comments by Judge (and sometimes President) of the International Court of Justice, T.O. Elias:

There does not appear to be any likelihood of a return to the old order in which Europe dominated the Bench Western European candidates in the future would stand a far better chance of being elected if they had or were thought to have liberal or progressive views vis-a-vis the problems of the Third World.

T.O. ELIAS, *NEW HORIZONS IN INTERNATIONAL LAW* 78 (1979).

45. With eight votes out of fifteen as the absolute majority required in the Security Council, the U.S. candidate (Baxter) and the Soviet candidate (incumbent judge, Morozov, running for re-election) each polled nine votes, running behind both Sette Camara (Brazil), fourteen votes and also El-Erian (Egypt), twelve votes; and each running well behind Sette Camara in the General Assembly election (where seventy-seven was the requisite majority: Sette Camara, one hundred twenty-five; Baxter one hundred and three; Morozov ninety-two). 33 U.N. SCOR (2093rd mtg.) at 1, U.N. Doc. S/12828 (1978); 33 U.N. GAOR (40th plen. mtg.) at 751, U.N. Doc. A/33/PV.40 (1978).

in the 1981 triennial elections, even with an excellent candidate.⁴⁶

D. THE EMERGENCE OF THE "NEW" WORLD POWERS AS "PERMANENT" MEMBERS OF THE COURT

The voting patterns of recent years tend to confirm the emergence of a new convention according election to the Court to the candidates of the "new" powers that have, by reason of their population or their economic-industrial base, emerged from military defeat or decolonisation in the immediate post-War years to world prominence by the 1970s and 1980s. Japan, after an unsuccessful attempt, in the Occasional Election of 1956, for the seat left vacant by the death of the Nationalist Chinese judge, Hso Mo, succeeded in electing its national Supreme Court Chief Justice, Kotaro Tanaka, in 1960. After Judge Tanaka's term from 1961-1970, Shigeru Oda was elected in the 1975 triennial elections, and re-elected in 1984 to a second term. India had first presented Sir Benegal Rau—unsuccessfully—in the 1951 triennial elections. The Indian seat was lost, after Sir Benegal Rau's death in 1953, in the Occasional Election of 1954, under the special circumstances already described above, with an outstanding Indian candidate, Justice Pal, rightly renowned for his erudite and eloquent Dissenting Opinion in the Tokyo War Crimes Tribunal. In the 1972 triennial elections, India presented another excellent candidate, Nagendra Singh, who was re-elected in 1981 to a second term, and was elected Court President in 1985. The establishment of a *de facto* claim to permanent membership on the Court on the part of "new" World powers like Japan and India seems to require a combination of excellent candidates, with some unusual professional or academic qualifications or standing beyond those to be found in the normal World Court candidate, and also some extra tactical skills or judgment on the part of the sponsoring Foreign Ministry. The Japanese Government, in both the unsuccessful bid of 1956 and then the successful bid in 1960, ran two distinguished National Supreme Court Justices; and then in the further successful campaign of 1975, a distinguished academic and Law of the Sea expert nego-

46. The comparison of the vote of the two "permanent" candidates, French and British, is instructive: in the General Assembly vote, the successful French candidate, de Lacharrière, received one hundred twenty-seven votes out of the one hundred fifty-five ballots; the successful British candidate, Jennings, one hundred and seven votes. In the Security Council vote, de Lacharrière received eleven votes and Jennings ten votes. 36 U.N. GAOR (48th plen. mtg.) at 6, U.N. Doc. A/36/PV.48 (1981); 36 U.N. SCOR (2306th Mtg.) at 1, U.N. Doc. S/36/PV.2306 (1981).

tiator. The Indian Government, in successfully contesting the 1951 elections, ran a "Founding Father" of the post-decolonisation Constitution; and then, in the 1972 elections, successfully presented a distinguished scholar and juriconsult. It is to be noted that both the Japanese Government and the Indian Government, in approaching, in 1984 and in 1981 respectively, the end of their incumbent judges' nine-year terms, made the decision to present those same judges for re-election, and in each case they were successful. It is argued from this, as a general proposition, that there is an electoral premium for incumbent judges' presenting themselves once again, as opposed to other candidates of the same nationality who are not already serving on the Court at the time of the elections. This may have been marginally significant in the case of Judge Oda and Judge Singh, though the voting data indicates very comfortable victories for the two incumbents, in any case, in their re-election bids—the combination no doubt of strong individual candidates and strong national, "regional" claims to a seat on the Court. What is clear, however, from the general practice of Court elections over the years, is that incumbents do not present themselves very often for re-election, in part because of the age factor at the end of a regular nine-year term, and in part because of the fierce competition for the nomination within each of the main "regional" groupings (outside the conventionally "permanent" seats). The triennial elections of 1984 showed three incumbent judges being re-elected, and re-elected easily (on the first ballots in the Security Council and in the General Assembly)—Judge Elias (Nigeria), Judge Oda (Japan), and Judge Lachs (Poland); while a fourth incumbent judge, Judge El-Khani (Syria) was defeated (being replaced by the candidate of the People's Republic of China). It is unnecessary to reiterate the obvious lesson in all this that the three incumbents re-elected presented the combination of impressive personal intellectual-academic and professional-legal qualifications, and of strong national "regional" claims to representation of the Court. Where the particular national "regional" claim is not so well established or recognised conventionally, as perhaps with Judge El-Khani, or with Judge De Visscher (Belgium) in 1951, or Judge Petrén (Sweden) in 1975, personal merits, by themselves, will not be enough to counter-balance that political weakness.

E. THE PROFESSIONAL CHARACTER OF CANDIDATES FOR ELECTION TO THE COURT

A survey of the members of the Court, from the Court's earliest origins in the old, pre-World War II, Permanent Court of International Justice, in terms of the professional-scientific training and practical experience of the judges prior to their election to the Court, reveals certain main alternative career patterns with, sometimes, an overlap between them. The main career categories may be identified, easily, as political leader-statesman; National Supreme Court Justice or Chief Justice; university professors; and Foreign Ministry Legal Advisors. There are the rare—the very rare—cases of judges whose professional careers successfully straddled one or more of these categories on a *bona fide* full time basis: Charles Evans Hughes, who was the U.S. judge on the old P.C.I.J. in the late 1920s, had been, prior to his election to the Court, successively Governor of New York State, Justice of the U.S. Supreme Court, unsuccessful Republican candidate for President against Woodrow Wilson in 1916, and U.S. Secretary of State; and Hughes stepped down from the World Court to become Chief Justice of the U.S. Supreme Court in 1930. Such a cumulation, and effective exercise, of a number of different professional-legal careers is hardly replicated thereafter, except perhaps in the immediate post-decolonisation era when a number of the “new” countries drafted their ablest jurists into service on a number of different fronts. Prime examples were post-independence constitutional founding father, Sir Benegal Rau of India, who was elected to the World Court in 1951; and political leader and statesman, Sir Zafrullah Khan of Pakistan, who was first elected to the Court in 1954 and who served two different, non-successive terms in which he was elected Vice-President and President of the Court; and Elias of Nigeria who was successively university professor, Civil Servant and National Attorney-General. Tables *in extenso* that purport to list a proliferation of different professional hats by the same judge—as, for example, career diplomat, university professor, political leader, even national judge⁴⁷—may be misleading insofar as they do not also verify, in depth and detail, the length of such different service and whether it was more or less full-time or tran-

47. As, for example, the appendix, listing “qualifications of judges” to Leo Gross’ thoughtful study, L. Gross, *The International Court of Justice: Consideration of requirements for enhancing its rôle in the International Legal Order*, 65 AM. J. INT’L. L. 253, 325-26 (1971).

sitory or even purely honorific (as with some of the listings as university professor). Judges like Jiménez de Aréchaga of Uruguay, who was President of the Court in the mid-1970s, fall predominantly into the category of university professor, even though serving for several years, as Jiménez did, as Minister of the Interior in his own national government. Judges like Lauterpacht of Great Britain should surely, also, be categorised as university professors, though serving as long-time consultants or *ad hoc* Advisers to their own National Foreign Ministries. On this basis of classification according to predominant professional-legal skill and its active practice, we have some leading examples:

i. *Political leader-statesman*: Hughes (U.S.); Kellogg (U.S.) (former U.S. Secretary of State); Spender (Australia) (Foreign Minister); Zafrullah Khan (Pakistan) (Foreign Minister).

ii. *National Supreme Court Justices*: Hughes (U.S.); Tanaka (Japan); Petrén (Sweden).

iii. *University professors*: McNair, Lauterpacht, Waldock, Jennings (Great Britain); De Visscher (Belgium); Lachs (Poland); Mosler (West Germany); Oda (Japan); Elias (Nigeria); Bedjaoui (Algeria); and Manley, Hudson, Jessup, Dillard and Baxter (U.S.).

iv. *Foreign Ministry Legal Advisers*: The list is almost inexhaustible. Suffice it to say that the main trend in selection of judicial candidates, today, is clearly toward candidates chosen from the full-time, professional civil service—usually, the General Counsel or head of the Legal Division of the National Foreign Ministry. There are several obvious reasons for this trend today—some that tend to negate the full relevance of the other professional categories and others that maximise the qualities and opportunities of the Foreign Ministry specialist lawyers. The prestige (and also the financial emoluments and attractions, in the case, at least, of candidates from the post industrialist societies) are no longer quite what they were in the era of the old pre-World War II, P.C.I.J., and so the political leader-statesmen candidates do not emerge as frequently as they once did. Again, the challenge to the erstwhile image of a single, overarching, “classical” International Law posed by the emergence of a number of different, often directly competing, “regional” systems of International Law, has created severe intellectual demands upon the university professors to rationalise and synthesise the new abundance of disparate legal documents and sources: in the result, the magnificent, single author, *magnum opus*-style, International Law texts of yesterday that attempted to straddle the whole field, are no longer written, and the professors

themselves are too often swept into continuing professional-advisory relationships with their National Foreign Ministries and thus become infected with that form of *dédoublement fonctionnel* (bias) derided by the late great Professor Georges Scelle. Why go to the universities if you can find the same professional talent in the Foreign Ministry Legal Divisions? As for the National Supreme Court Justices, they may have served a temporary, much-needed purpose in the case of recently-defeated countries like Japan seeking political legitimacy by running a prestigious national jurist as the most effective way of breaking into the post-World War II Court, but the attractions, beyond this, are not obvious and the attractions at home seem at least equivalent.

The emergence of the National Foreign Ministry Legal Advisor—the most dominant element in contemporary Court elections—reflects the obvious political reality that such people, with their regular dealings with their homonyms in the other National Foreign Ministries and their presence, year after year, in the Sixth (Legal) Committee of the General Assembly, are constantly exposed to what is, after all, the effective membership of the main electoral college for the Court. The selection of the Foreign Ministry Legal Advisors as judicial candidates also responds to the political fact-of-life of the contemporary World Court that, in the political reaction to the *South West Africa, Second Phase* decision of 1966⁴⁸ and the emergence of the new legislative, policy-making rôle for the Court, the practical business of the Court today has become too important, in its political implications, to be left to legal laymen and must be entrusted instead, (or so it is argued), to a new professional skill-group with proper technical training and also sophistication as to the necessary and inevitable relation between Law and Politics. It must be recognised, immediately, that the new breed of Foreign Ministry Legal Advisor has not merely high intelligence and practical training, but also, very often, superb academic-legal qualifications as demonstrated in the flow of learned articles and monographs appearing in the scientific-legal journals and series under the names of Foreign Ministry officials. It would be invidious to cite some, rather than others, as examples of the new class of Foreign Ministry Legal Advisors, but the succession in France is noteworthy for the fruitful combination of quiet diplomacy and academic-scientific publication.

One further point of comment in relation to legal career pat-

terns and career tracks! Once a state has made the decision to present a candidacy for the World Court elections—and the decision, at least in the case of the regular, non-“permanent” candidacies, is often planned several years ahead—a certain pre-arranged or contrived career track seems common: naming as a delegate to the U.N. General Assembly, preferably with assignment to the Sixth (Legal) Committee and, ideally, service as Chairman or Vice-Chairman of that Committee; election to the International Law Commission, if possible; and, finally, (and this is less possible to arrange), election to the ancient and honorific (and fully private and non-governmental) *Institut de Droit International*. Being named as an *ad hoc* judge in a case coming to the Court, will be an extra blessing upon a candidacy: it was true with Judge Mosler (W. Germany) who had earlier served as a national *ad hoc* judge, in *North Sea Continental Shelf* in 1969;⁴⁹ but it would hardly have been enough, by itself, unless, as in Judge Mosler’s case, other substantial qualifications were not also present.

VI. CONCLUSIONS: THE CONSTANTS IN THE TRENDS IN ELECTION OF WORLD COURT JUDGES

A. RECOGNITION OF THE POLITICAL, POLICY-MAKING RÔLE OF THE COURT

The one long-range, constant element in the elections for the World Court, following on, and in direct reaction to, the watershed, eight-to-seven single vote majority decision of the Court, in 1966, in *South West Africa, Second Phase*,⁵⁰ is the recognition by the members of the twin electoral colleges—Security Council and General Assembly—charged with the legal responsibility of electing the judges, of the legislative, policy-making *rôle* of the Court and its judges in fulfilling the U.N. Charter mandate for the “progressive development of International Law”: that the judges’ mission is not simply passively to restate an old, static body of legal doctrine, but actively to participate in changing that doctrine in response to rapidly changing societal needs and objectives. This has meant, inevitably, that the regular, triennial elections to the Court are actively contested, and the occasional vacancies (resulting from death or retirement of an incumbent member) perhaps even more so. The

49. *North Sea Continental Shelf* (Fed. Rep. Ger. v. Den.; Fed. Rep. Ger. v. Neth.), 1969 I.C.J. 18 (Judgment of Feb. 20).

50. 1966 I.C.J. 6.

elections to the Court thus become not merely an exercise in law, but in law and power, on the same general basis as the elections to the U.N. Security Council or other main U.N. arenas where the decision-making group is limited in numbers and access thereto is achieved through the electoral processes.

B. CODIFICATION OF "REGIONALISM" IN THE ELECTORAL PROCESSES FOR THE COURT

Just as the process of election to the U.N. Security Council are hemmed in and disciplined by a series of unwritten, informal "Gentleman's Agreements" or polite understandings between the different "regional" and other political-ideological, cultural and social and economic blocs, that have come to acquire, through constant respect and deference, over the years, all the qualities of normative-legal obligations—a form of United Nation's "conventions of the Constitution"—so electoral practice in regard to the World Court appears to rest, today, on a series of understandings or tolerances between the different blocs whose main sanction is reciprocity and mutuality of benefit. While the numbers involved—fifteen seats, in all, on the Court—are hardly large enough to warrant attempting to concretise the new practice and its "conventions" in a formal amendment of the Court Statute or, *a fortiori*, of the U.N. Charter itself, comparison with the International Law Commission and the 1981, formal amendment of the Statute of the Commission, is instructive.⁵¹ When, in 1981, the Commission, by inter-bloc political consensus, decided to increase its numbers from twenty-five to thirty-four, the already-existing "conventions" as to "regional" allocation of seats on the Commission in the periodic elections, were finally reduced to written binding constitutional form. The compromise formulae, now formally embodied in the Commission Statute, allocates the thirty-four seats, as follows: eight for nationals of the African states; seven for Asian states; three for Eastern Europe; six for Latin America; eight for "Western European or other States"; plus one further seat to rotate between Africa and Eastern Europe, and one final seat to rotate between Asia and Latin America.⁵²

51. *Enlargement of the International Law Commission: Amendments to Articles 2 and 9 of the Statute of the Commission*, G.A. Res. 39, 36 U.N. GAOR at 18, U.N. Doc. A/36/Res.39 (1981).

52. *Id.*

C. *EQUITIES AND INEQUITIES IN THE CURRENT "CONVENTIONS" AS TO COURT ELECTIONS*

The current "Gentleman's Agreement" consensus as to allocation of seats on the present, fifteen-member World Court seems unfair to at least two accepted "regions"—the Latin Americans, surely under-valued at two seats, and the Arab states, under-valued at one seat. It is difficult, however, to see how this condition could be corrected, within present numbers, except by imposing a perhaps unacceptable sacrifice upon some other "regional" group,—for example, and as an illustration of the political difficulties, upon the Western European group as to either its "permanent" or presently floating members of the Court. Rotation of one or more seats between the different "regions", either in successive regular elections (as with the 1981 Amendment to the I.L.C. Statute), or else (by Gentleman's Agreement) splitting a regular nine-year term into different segments with the understanding that the segments be held successively by different "regions" (as has been done, on occasion, with Security Council seats) is a possible political palliative. While, within particular "regions"—Latin America and Africa, as examples—there remain evident problems for certain categories of states in securing representation on the Court, for example, the lesser or middle powers in Asia, and also the Caribbean states who do not fit easily into their (geographically-based) Latin American region.

D. *RELATION OF "REGIONAL" REPRESENTATION ON THE COURT TO GENERAL COURT REFORMS*

The obvious, and easy, solution to some of these problems of too many competing "regional" demands for too few seats, would be simply to increase the Court's numbers as was done, in 1981, and had also been done several times to overcome a similar impasse, with the International Law Commission. But all the empirical records of the experience of the International Law Commission suggest that this would be a false reform which would contribute nothing, *per se*, to the working capacity of efficiency of the Court, and create extra burdens of expense and internal administration. In any case, after all the criticisms of the World Court's "conservatism" in the 1960s and the 1970s, and the resultant successful initiatives, in the United Nations, to by-pass the Court altogether by creating new specialised Court jurisdictions which would be autonomous and independent in their own rights—as with the proposed

new United Nations Law of the Sea Tribunal—political support is hardly likely to be forthcoming in the United Nations at the present time for any increase in the World Court's existing numbers. The World Court itself, in self-defense and no doubt in reaction to these criticisms, has shown a constructive interest in recent years in broadening its own representativeness in political-ideological and legal-systemic terms as a means of encouraging new business. After the politically contested step of *Gulf of Maine*⁵³ where the Court, by majority, deferred absolutely to the two parties' wishes as to constitution of a Special Chamber and ratified, in accordance with the two parties' wishes, their choice of a wholly Western European-North American panel for the five-member Special Chamber, the Court, in the recent *Burkina Faso-Mali* dispute, was at pains to widen its ranks so as to secure full inter-systemic representativeness, choosing, for the five-member Special Chamber therein involved, Judge Lachs of Poland, Judge Ruda of Argentina, and Judge Bedjaoui of Algeria, plus two *ad hoc* judges, Luchaire (France) and Abi-Saab (Egypt).⁵⁴

E. EMERGENCE AND DOMINANCE OF THE FOREIGN MINISTRY LEGAL ADVISER AS CANDIDATE FOR THE WORLD COURT

The trend towards presenting one's Foreign Ministry Legal Adviser as candidate for election to the Court—most noticeable on the part of the "permanent" members of the Court—is no doubt inevitable, having regard to the new political realities of the Court's *rôle* today, and the nature of the electoral processes themselves. Such Foreign Ministry Legal Advisers, in accord with the new electoral trends, however, will invariably be, today, people of broad general legal culture and often with rich records, in their own right, as legal scholars in scientific-legal publication. On this reasoning, the Foreign Ministry's own part in the prior screening, and then the presentation of judicial candidates necessarily becomes dominant, reducing the "independent," arms-length *rôle* envisaged by the Court Statute for the National Groups in the Permanent Court of Arbitration or similar, specially appointed, *ad hoc*

53. Delimitation of the Maritime Boundary in the Gulf of Maine Area (Can. v. U.S.), 1982 I.C.J. 3 (Constitution of Chamber Order of Jan. 20). Read, especially, the Declaration by Judge Oda, (*id.* at 10), and the Dissenting Opinions by Judge Morozov, (*id.* at 11), and Judge El-Khani, (*id.* at 12-13). See generally McWhinney, *Special Chambers Within the International Court of Justice: The Preliminary, Procedural Aspect of the Gulf of Maine Case*, 12 SYR. J. INT'L L. & COM. 1, 7-11 (1985).

54. See United Nations, New York, Press Release, WS/1228, 19 April 1985.

National Groups, to largely formal or honorific one, a proposition that seems amply confirmed by the practice of recent years and the actual public record of interface between National Group in the Permanent Court of Arbitration and National Foreign Ministry Legal Division. While it is, of course—as a matter of the positive law of the Court Statute, as written—the National Group in the Permanent Court of Arbitration which legally nominates candidates for election to the Court and with which the Secretary-General of the United Nations communicates for these purposes, it is the National Foreign Ministry that, in the reality of the ultimate legal and political control, determines which candidates to vote for in the elections themselves and actually casts the national vote in the twin, Security Council and General Assembly, elections.⁵⁵

55. The occasional seeming lack of political coordination between National Groups in the Permanent Court of Arbitration (which are legally charged with the making of nominations), and the national Foreign Ministries which actually cast the votes in the Security Council/General Assembly elections and also conduct the crucial, pre-balloting negotiations and horse-trading with other national Foreign Ministries, are evidenced, variously:

-in the 1981 regular, triennial elections to the Court, five National Groups in the Permanent Court of Arbitration - Austria, Belgium, Brazil, Italy and Luxembourg - formally nominated Professor Paul Reuter (France), though the official French candidate was always Guy de Lacharrière, the long-time Director of the Legal Affairs Division of the French Foreign Ministry, and in fact Professor Reuter withdrew his candidacy for the Court before the actual balloting. See 36 U.N. GAOR A/302, U.N. Doc. A/36/302 (1981); 36 U.N. SCOR S/14502, U.N. Doc. S/14502 (1981); 36 U.N. GAOR A/303, U.N. Doc. A/36/303 (1981); 36 U.N. SCOR S/14503, U.N. Doc. S/14503 (1981); 36 U.N. GAOR A/302 add. 1, U.N. Doc. A/36/302 add. 1 (1981); 36 U.N. SCOR S/14502 add. 1, U.N. Doc. S/14502 add. 1.

-in the 1978 regular, triennial elections to the Court, three National Groups in the Permanent Court of Arbitration nominated *both* Ago (Italy) and Manner (Finland), apparently unaware that these were two mutually incompatible candidacies for a single, postulated Western European seat on the Court, *viz.* Austria, Norway, Sweden.

-in the 1978 regular, triennial elections, one national group in the Permanent Court of Arbitration, Panama, nominated Professor M.S. McDougal (United States), though Professor R. Baxter was the official U.S. candidate. In the actual ballots, Professor McDougal received eight votes in the General Assembly, and one in the Security Council. Such essentially complimentary nominations, and the ensuing complimentary votes if the candidacy is not withdrawn, in timely fashion, before the actual balloting by the individual jurist so nominated, may, indeed, reflect a gesture of self-assertion on the part of National Groups in the Permanent Court of Arbitration whose *rôle*, today, has been effectively reduced to an honorific one because of the overriding political realities. In the 1960 regular, triennial elections, there were a number of such "complimentary" nominations, all of them distinguished jurists (including two incumbent judges, Hackworth (U.S.) and Kozhevnikov (Soviet Union), who were not being presented by their own states for re-election): Professor Paul Guggenheim (Switzerland), ten votes in the General Assembly; Milan Bartos (Yugoslavia), seven votes; Judge F.I. Kozhevnikov (Soviet Union), six votes; Judge Hackworth (U.S.), three votes; Professor Gregory Tunkin (Soviet Union); three

votes. Judge Hackworth and Judge Kozhevnikov, and also Professor Tunkin, had all withdrawn their candidacies before the actual balloting, but were voted on, nevertheless. 15 U.N. GAOR (915th plen. mtg.) at 861, U.N. Doc. A/15/PV/915 (1960).