CHAPTER TWENTY-SIX

THE REPRESENTATION OF THE "MAIN FORMS OF CIVILIZATION" AND OF THE "PRINCIPAL LEGAL SYSTEMS OF THE WORLD" IN THE INTERNATIONAL COURT OF JUSTICE

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1. INTRODUCTION

Two provisions of the Statute of the International Court of Justice (ICJ Statute) deal with the qualifications of judges of the Court. In Article 2, individual qualifications are spelt out which relate both to the moral or ethical quality of a person and to his or her professional competence: The judges shall be "persons of high moral character, who possess the qualifications required in their respective countries for appointment to the highest judicial offices, or are jurisconsults of recognized competence in international law". Article 9, on the other hand, is concerned with the composition of the entire Court—"the body as a whole"—resulting from the election of persons each of whom has the qualifications mentioned in Article 2: "[T]he electors", Article 9 explains, "shall bear in mind not only that the persons to be elected should individually possess the qualifications required", i.e., the qualifications set out in Article 2 of the ICJ Statute, "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". In the French version of the text, the respective term is "la représentation des grandes formes de civilisation et des principaux systèmes juridiques du monde".

While Article 2 is mainly addressed to the national groups which nominate the candidates in accordance with the procedure provided for in Articles 4 to 6, Article 9 is mainly directed to "the electors", i.e. the members of the General Assembly and the Security Council who elect the members of the Court. Having before them a list of persons who all possess the individual qualifications specified in Article 2, the electors are called upon to make their choices in a way that in the end the Court as a whole is representing "the main forms of civilization" and "the principal legal systems of the world". In other words, the drafters of the

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Statute expected that the national groups would nominate candidates from "their respective countries" (Article 2), that is candidates usually shaped by a particular "civilization" and educated in a particular "legal system". In comparison, the General Assembly and the Security Council are supposed to take into consideration the universal vocation and responsibility of the ICJ, and its quality as a principal organ of the United Nations (Article 7, para. 1 of the UN Charter) which shall contribute to the pacific settlement of international disputes wherever they arise (see Article 33 of the UN Charter). The members of the General Assembly and the Security Council are thus meant to vote in favour of or against individual candidates with a view to the final outcome—a composition of the Court ensuring the best possible performance of the Court.

2. ARTICLE 9 AS A MANIFESTATION OF POWER POLITICS

Since they were introduced into the Statute of the Permanent Court of International Justice (PCIJ Statute) in 1920,¹ the exact meaning of the two terms used in Article 9, "the main forms of civilization [...] of the world" ("les grandes formes de civilisation [...] du monde") and "the principal legal systems of the world" ("les principaux systèmes juridiques du monde"), has never been clear.² The formula used in the PCIJ Statute can be traced to Article 1 of the Draft Convention Relative to the Creation of a Judicial Arbitration Court of 1907, according to which this court should be composed of "judges representing the various juridical systems of the world" ("des juges représentant les divers systèmes juridiques du monde").³

In 1920, the combination of the two phrases "main forms of civilization" and "principal legal systems of the world" was meant to solve the problem of how the principle of equality of States could be reconciled with the wish of the "Great Powers" to be always represented on the Court. It was understood that this phrase, in combination with the system of elections (Article 10), would naturally

¹ As proposed by the Committee of Jurists, the San Francisco Conference decided in 1945 to retain, in the ICJ Statute, Art. 9 of the PCIJ Statute—some minor changes of the formulation notwithstanding. See Statute of the Permanent Court of International Justice with Draft Statute proposed by Committee of Jurists, 20 April 1945, *Documents of the United Nations Conference on International Organization, San Francisco, 1945*, vol. XIV, Londres/New York, United Nations Information Organizations, 801.

² See also "Etude des amendements à apporter au Statut de la Cour internationale de Justice, Rapport présenté par M. Max Huber", *Annuaire de l'Institut de Droit International*, 45, 1954-I, 413ff.

³ See B. Fassbender, "Commentary on Article 9", in A. Zimmermann *et al.* (eds.), *The Statute of the International Court of Justice: A Commentary*, 2nd edn., Oxford, Oxford University Press, 2012, 295ff.

give a permanent seat to the States recognized as Great Powers after World War I, i.e., France, Great Britain, Italy, Japan, and the United States of America. As "Principal Allied and Associated Powers", the same States had been granted permanent seats in the Council of the League of Nations a year earlier. While the difficulty of interpreting the phrases was admitted, no effort was made to agree on a definition. Such a definition was also deemed undesirable because it would have reduced the flexibility inherent in the combined phrases, and unnecessary because the rule expressed in Article 9 of the Statute was not meant to be enforceable by legal means.

At the time of its formulation in 1920, Article 9 of the Statute was the outcome of power politics. It was a compromise between the "Great Powers" and the smaller States of the time about how the judges of a permanent international court with a broad jurisdiction should be chosen. The underlying assumption (which, by the way, is still today shared by most governments) was that a State which had one of its own nationals on the Court would be in a better position to see its interests protected in the future work of the Court than a State not so represented.⁴ It was also assumed that a presence of judges nominated by the "Great Powers" would guarantee those Powers collectively a decisive influence on the Court and, thus, on its decisions in the postwar era.

The "Great Powers" read Article 9 as an acknowledgement of their claim to a (permanent) representation, through their nationals, on the Court. Such a representation could not be justified on the basis of the principle of equality of States, a principle which was not only the generally accepted foundation of the international legal order but by necessity also had to be the fundamental working principle of any international court. For that reason, the claim of the "Great Powers" could only find expression in a phrase as cautious and open to different interpretations as that used in Article 9. In the view of the Great Powers, Article 9 constituted an exception to the principle of equality, similar to Article 4 of the Covenant of the League of Nations which, more openly and directly, assured a permanent membership of the "Principal Allied and Associated Powers" in the Council of the League. On the other hand, the smaller States could read the article as aiming at a world court with a bench as inclusive and representative as possible—in other words, a court which would not be a sort of judicial directorate of the most powerful States. In addition, Article 31, paras. 2 and 3 of the

⁴ As an expression of this rationale, see also Art. 31 of the Statute on the judges *ad hoc*. In that context, E. Lauterpacht remarked that "the belief in the virtue of 'having someone on the tribunal' [is] so deeply engrained in State thinking that the abolition of the system is unlikely". E. Lauterpacht, *Aspects of the Administration of International Justice*, Cambridge, Grotius Publications, 1991, 79.

Statute, entitling a party to a case before the Court to choose a judge *ad hoc*, was a concession to the smaller States reaffirming their equal status.

The interpretation which Article 9 originally was given by the "Great Powers" has governed the application of the article until today. As was true for the permanent members of the League of Nations Council at the time of the PCIJ, the five permanent members of the Security Council have always been represented in the ICJ by a judge of their nationality.⁵

3. "PRINCIPAL LEGAL SYSTEMS OF THE WORLD"

Of the two terms, the second is easier to explain than the first. In 1920, the "principal legal systems of the world" were the common law systems, based fundamentally on English common law, on the one hand, and the civil law systems, based on Roman civil law, on the other. The first group comprised the laws of most of the English-speaking parts of the world originally colonized by Great Britain, including notably the United States of America, Canada, Australia, and New Zealand.⁶ The laws of various other British dominions and dependent territories of the time, notably South Africa and Rhodesia, had been influenced by English common law but were not common law systems in the full sense. The second group, the civil law systems, consisted of those legal orders which developed mainly in Western Europe in the countries in which concepts and principles drawn from Roman law have had powerful influence.⁷ Most of continental Europe adhering to the civil law system, that system spread with colonization from Europe to Latin America, Asia and Africa, and to countries which remodelled their law in the nineteenth and twentieth centuries on Western lines, such as Thailand, Turkey, Ethiopia, and Japan.

By 1945, in addition to these two principal legal systems possibly a third one had arisen in Soviet Russia and the countries dependent on it, namely Marxist or socialist law.⁸ In 1946, nationals of the USSR, Poland and Yugoslavia were elected as judges of the ICJ.

Later in the twentieth century, Islamic law gained, or rather regained, universal importance as a result of a process sometimes referred to as "Islamic reassertion".⁹

⁵ With the exception of China. See note 41 below.

⁶ See D.M. Walker, "Common law systems", in D.M. Walker, *The Oxford Companion to Law*, Oxford, Clarendon Press, 1980, 253ff.

⁷ See Walker, "Common Law Systems", 222ff., and J.H. Merryman, *The Civil Law Tradition: An Introduction to the Legal Systems of Western Europe and Latin America*, 2nd ed., Stanford, Stanford University Press, 1985.

⁸ See R. David & C. Jauffret-Spinozi, *Les grands systèmes de droit contemporains*, 10th edn., Paris, Dalloz, 1992, Partie 2: "Les droits socialistes".

⁹ See P. Mansfield, *A History of the Middle East*, New York, Viking, 1991, 322ff., and A. Hourani, *A History of the Arab Peoples*, Cambridge, MA, Belknap Press of Harvard University Press, 1991, 434ff., and 447ff.

A branch of Muslim theology, Islamic law has a wider application than any secular system of law because it claims to regulate all aspects of a Muslim's life, his or her duties to God, to neighbours and to him- or herself.¹⁰ A number of States affirm in their constitutions adherence to Islamic law, but in most of these countries bodies of secular law exist as well, some of them belonging to the civil law family, others to the socialist legal system. In 1969, the Organization of the Islamic Conference (OIC) was founded in Rabat as an inter-governmental organization of Islamic States.¹¹ Today, it has 57 members.

In the UN General Assembly, it was occasionally suggested that it would be preferable to speak of "legal cultures" instead of the "principal legal systems", since the old dichotomy of the Anglo-Saxon and Roman systems had been superseded in a part of the Western hemisphere with the emergence of an independent Latin American culture which had made far-reaching contributions to international law.¹² In academic writing, "legal traditions" also has become a common notion.¹³

The representation of the 'principal legal systems of the world' envisaged by the drafters of the PCIJ Statute was not an end in itself. Its purpose was to ensure that the Court would be equipped with the legal expertise necessary for the performance of its functions. In particular, it was felt that the jurisprudence of the new international court should be inspired by ideas and concepts developed in the various domestic legal orders of the individual members of the community of States. One important avenue on which these ideas and concepts were meant to enter public international law was the third source of international law to be applied by the Court listed in Article 38, para. 1 of the Statute, the "general principles of law recognized by civilized nations". However, with the rapid growth of the body of treaty law, especially so-called law-making treaties, and the rise of international law produced by the organs of international organizations in the decades since 1945, the importance of domestic law for the construction and interpretation of international law has decreased. In addition, the common and the civil law systems have come closer to one another in recent times (a development which can be expected to accelerate in an intensified process of globalization), and the socialist system of law has virtually disappeared with the fall of the Soviet Union and the gradual transition of the People's Republic of China towards a free market economy. Accordingly, today a proper functioning of the Court depends much more on its judges having a strong competence in public international

¹⁰ See D.M. Walker, "Islamic law", in Walker, *The Oxford Companion to Law*, 650ff., and David & Jauffret-Spinozi, *Les grands systèmes de droit contemporains*, 367–392 ("Le droit musulman").

¹¹ See Y. Ben Achour, *Le rôle des civilisations dans le système international: droit et relations internationales*, Bruxelles, Bruylant, 2003, 175–184.

¹² See S. Rosenne, "The Composition of the Court", in L. Gross (ed.), *The Future of the International Court of Justice*, vol. 1, Dobbs Ferry, Oceana Publications, 1976, 384ff.

¹³ See, e.g., H.P. Glenn, *Legal Traditions of the World: Sustainable Diversity in Law*, 4th edn., Oxford, Oxford University Press, 2010.

law (as emphasized in Article 2 of the Statute) than their coming from different domestic legal environments.¹⁴ It is certainly true that every judge "retain[s] some trace of his legal education and his former legal activities in his country of origin", as Judge Carneiro said in his dissenting opinion in the *Anglo-Iranian Oil Co* case,¹⁵ but the influence of that education on the application of international law by a member of an international court is, and should be, limited.

4. "MAIN FORMS OF CIVILIZATION OF THE WORLD"

The word "civilization" is defined by the *Oxford English Dictionary* as "civilized condition or state; a developed or advanced state of human society; a particular stage or a particular type of this".¹⁶ "Civilization" is contrasted with "barbarity" or "barbarism". Characteristic usages include the following: "ancient civilizations", "Christian civilization", "Western civilization", "Egyptian civilization". It is difficult enough to say what exactly constitutes a "civilization" in the contemporary world,¹⁷ but it is impossible objectively to determine which of these belong to the "main forms of civilization of the world" ("*les grandes formes de civilisation du monde*"),¹⁸ as such a classification inevitably follows from a judgment based on personal values and beliefs.¹⁹ In 1920, the reference to "the main forms of civilization" was probably introduced into the PCIJ Statute as an addition to the 1907 expression of the "various juridical systems of the world"²⁰ in order to ensure that there would be, for instance, a French *and* an Italian judge on the bench, and not just one person representing the civil law systems, or an English *and* an American judge, instead of only one judge representing the common law systems.

In 1920, and perhaps also still in 1945, there was agreement about the existence of a "*civilisation française*", or a "*civiltà italiana*". But in the culturally diverse and pluralist international society of today, with its many overlapping influences, one can no longer distinguish particular civilizations in the way it was possible in the past on the basis of a fundamentally Eurocentric view of the world.

¹⁴ In contrast, it can be argued that in the present state of international criminal law it is necessary to ensure the presence of judges in the ICC representing the principal systems of criminal law of the world. For the text of Art. 36, para. 8 of the ICC Statute, see text below at note 31.

¹⁵ ICJ, *Anglo-Iranian Oil Co. (United Kingdom/Iran)*, Diss. Op. Carneiro, ICJ Reports 1952, para. 14.

¹⁶ *The Oxford English Dictionary*, 2nd edn., vol. 3, Oxford, Clarendon Press, 1989, 257. See also *The Columbia Encyclopedia*, 5th ed., New York, Columbia University Press, 1993, 565: "culture with a relatively high degree of elaboration and technical development".

¹⁷ For a discussion of different concepts, see Achour, *Le rôle des civilisations*, 1–13.

¹⁸ Emphasis added.

¹⁹ The possibility of a "hierarchy of civilizations" is also rejected by Ben Achour, *Le rôle des civilisations*, 13–18.

²⁰ See text accompanying note 3 above.

In his article "The Clash of Civilizations?" of 1993,²¹ later published in an extended version as a book,²² Professor Huntington distinguished the following eight civilizations: the Western civilization (mainly sustained by Europe and the United States), the Confucian civilization (mainly represented by China), the Japanese civilization, the Islamic civilization, the civilization of Hinduism, the Slavic-orthodox civilization, the Latin American civilization and, albeit with a question mark, the African civilization. Huntington's antagonistic scheme of a world divided in hostile cultural and ethnic groups is at variance with the UN Charter's belief in the possibility of a peaceful coexistence and cooperation of the peoples constituting humankind.²³ His grand design is also not free from arbitrariness. The distinguishing feature which is most clearly recognizable is that of religion—a criterion that cannot decisively determine the composition of the ICJ as a secular international court. As a principal organ of the United Nations, the Court is committed to tolerance (preamble of the Charter) and "respect for human rights [...] for all without distinction as to [...] religion" (Article 1, para. 3 UN Charter). Therefore, a consideration of religious beliefs of candidates for a judgeship would require a candidate's readiness, to use the words of the preamble of the Charter, "to practise tolerance and live together in peace with one another" in a spirit of sincere respect for other religions and also agnostic convictions.

In his thoughtful study of the role of civilizations in the international system, Professor Ben Achour has drawn attention to the importance of language for the organization of international relations on the basis of "civilisational criteria".²⁴ A commonality of language is reflected in organizations and institutions:²⁵

Les langues jouent un rôle important dans la structuration des relations internationales, c'est-à-dire dans la constitution des groupes ou réseaux de solidarité linguistique, exerçant des fonctions qui dépassent largement le cadre linguistique et culturel, pour se transporter sur le terrain politique et diplomatique.²⁶

As such groups, the author names the Commonwealth, the Organization of Ibero-American States for Education, Science and Culture (OEI), the Community of the Countries of Portuguese Language (CPLP), the *Organisation internationale de la francophonie* (OIF), the Latin Union (*l'Union latine*) founded by the Madrid Convention of 1954, and the League of Arab States.

What makes the notion of civilization particularly problematic in the contemporary international legal order is the implied idea of a grading, or classification,

²¹ S.P. Huntington, "The Clash of Civilizations?", *Foreign Affairs*, 72, 1993, 22–49.

²² S.P. Huntington, *The Clash of Civilizations and the Remaking of World Order*, New York, Simon & Schuster, 1996.

²³ For a more balanced view of conflict and friction between civilizations, see Achour, *Le rôle des civilisations*, 51ff. and 221ff.

²⁴ See Achour, *Le rôle des civilisations*, 165ff.

²⁵ *Ibid.*, 184ff.

²⁶ *Ibid.*, 184.

of cultures, which finds expression in the term "the *main* forms of civilization" ("les *grandes* formes de civilisation"). Such an idea cannot be reconciled with the principle of legal equality of nations and States, which is a cornerstone of the UN Charter (see, in particular, the preamble and Art. 1, para. 2, Art. 2, para. 1, and Art. 55).²⁷ For these reasons, the phrase "main forms of civilization of the world" today has significance (only) as a metaphor for cultural diversity broadly understood.²⁸

The phrase "the representation of the main forms of civilization" was not included in the provision of the ICC Statute on the selection of judges adopted by the Rome Conference of 1998. Instead, the Conference expressly mentioned the criterion of an "equitable geographical representation",²⁹ which in practice also governs the choice of judges of the ICJ.³⁰ In doing so, it followed the example of the UN Conference on the Law of the Sea which determined, in 1982, that in the International Tribunal for the Law of the Sea as a whole "the representation of the principal legal systems of the world *and equitable geographical distribution* shall be assured".³¹ By necessity, such a geographical representation also means that diverse cultures are represented. Article 36, para. 8 of the Rome Statute of the ICC reads as follows:

- (a) The States Parties shall, in the selection of judges, take into account the need, within the membership of the Court, for:
 - (i) The representation of the principal legal systems of the world;
 - (ii) Equitable geographical representation; and
 - (iii) A fair representation of female and male judges.
- (b) States Parties shall also take into account the need to include judges with legal expertise on special issues, including, but not limited to, violence against women or children.

In contrast, a reference to a representation of civilizations was retained not only in the Statute of the International Law Commission (Article 8 of the ILC Statute being virtually identical to Article 9 of the ICJ Statute) but also in provisions of universal human rights treaties on the composition of the respective expert bodies ("committees"). Article 8, para. 1 of the International Convention on the Elimination of Racial Discrimination, for instance, provides that, when electing

²⁷ For a commentary on Art. 2, para. 1 of the UN Charter, see B. Fassbender, in B. Simma *et al.* (eds.), *The Charter of the United Nations: A Commentary*, 3rd edn., Oxford, Oxford University Press, 2012, vol. 1, 133ff.

²⁸ See sec. 7 below.

²⁹ For an analysis of the application of the principle of equitable distribution in the Rome Statute, see W.J. Aceves, "Critical Jurisprudence and International Legal Scholarship: A Study of Equitable Distribution", *Columbia Journal of Transnational Law*, 39, 2001, 374ff.

³⁰ See Fassbender, "Commentary on Article 9", 302ff.

³¹ See Art. 2, para. 2 of the Statute of the International Tribunal for the Law of the Sea, Annex VI to the UN Convention on the Law of the Sea (emphasis added).

the members of the Committee, States Parties shall give consideration "to equitable geographical distribution and to the representation of the *different forms of civilization* as well as of the principal legal systems".³²

5. OTHER CRITERIA RELEVANT TO THE COMPOSITION OF THE COURT AS A WHOLE

For the composition of the Court as a whole, Article 9 of the ICJ Statute only mentions the two criteria of a "representation of the main forms of civilization and of the principal legal systems of the world". However, Article 9 does not prevent the electors from bearing in mind, or taking into consideration, other criteria. The provision does not establish a *numerus clausus* of facts or concerns which the electors may keep in mind in deciding about the composition of the Court, provided that those facts or concerns can reasonably be said to promote the best possible performance of the Court's functions. Indeed, this author understands Article 9 as an appeal for a broad representativeness of the Court, of which the criteria mentioned in Article 9 are only elements or aspects.³³

Accordingly, the electors may apply, as they do in practice, the criterion of an equitable representation of regions along the lines of the regional groups in the United Nations.³⁴ They may also consider the desirability of having on the Court nationals of certain powerful States or States which, as permanent members of the Security Council, bear special responsibility for the maintenance of international peace and security.³⁵

According to Article 8 UN Charter, the United Nations "shall place no restrictions on the eligibility of men and women to participate in any capacity and under conditions of equality in its principal and subsidiary organs". Having regard to that provision, and also to the preamble and Art. 1, para. 3, Art. 13, para. 1 (b) and Art. 55 of the Charter, the electors are called upon to bear in mind that in the Court as a whole a fair representation of men and women is assured.³⁶

³² Emphasis added. See also Art. 17, para. 1 of the Convention on the Elimination of All Forms of Discrimination Against Women. But see Art. 28, para. 2 of the International Covenant on Civil and Political Rights, Art. 17, para. 1 of the 1984 Convention against Torture, and Art. 43, para. 2 of the 1989 Convention on the Rights of the Child.

³³ See sec. 7 below.

³⁴ See Fassbender, "Commentary on Article 9", 303ff.

³⁵ For the respective practice, see *ibid.*, 302. For a critical assessment, see C.F. Amerasinghe, "Judges of the International Court of Justice—Election and Qualifications", *Leiden Journal of International Law*, 14, 2001, 346 and 348.

³⁶ In December 2006, the Committee on Intergovernmental Settlement of Disputes of the International Law Association (American Branch) recommended, *inter alia*, that "the number of female Members of the Court should be increased. States should nominate an adequate number of women, and, when voting for candidates in elections, they should take into consideration the need to ensure that the Court does not represent

Quasi-universal support of this proposition is expressed in Article 36, para. 8 (a) (iii) of the Rome Statute of the ICC.

It goes without saying that the mentioned provisions of the UN Charter prohibit the electors making discriminatory distinctions as to race, sex, language or religion.

6. THE SUBSTANCE OF THE OBLIGATION EXPRESSED IN ARTICLE 9 OF THE ICJ STATUTE

Article 9 of the ICJ Statute imposes on the electors the obligation to 'bear in mind' ('avoir en vue') first that the persons to be elected individually possess the qualifications stated in Article 2, and secondly, that the Court as a whole should represent the main forms of civilization and the principal legal systems of the world. The provision expresses a reminder, or admonition, of the members of the electoral organs. It demands that the mentioned criteria or concerns (but not necessarily only those) are duly taken into consideration by the members of the General Assembly and the Security Council when they elect the judges. The provision does not require or guarantee a particular result of those elections. In other words, Article 9 does not restrict the electoral freedom of the Assembly and the Council.³⁷ It may be added that the 1998 Rome Statute of the ICC followed the example of the ICJ Statute when it determined, in Article 36, para. 8 (a), that "[t]he States Parties shall, in the selection of judges, *take into account*" certain criteria or concerns.³⁸ For the reasons set out above (sec. 3), the criterion of the "main forms of civilization" today must be read as "cultural diversity".

The electors would only contravene the provision if they decidedly and clearly ignored the goals stated in Article 9. But even in that unlikely case, an election of judges cannot be challenged in a legal procedure. Neither the UN Charter nor the Statute provide for a procedure in which a member of the UN or a party to the Statute could claim that a person was elected as a judge in violation of Articles 2 or 9 of the Statute. Indeed, violations of the procedural rules of Articles 4–8 and 10–14 of the Statute also cannot be challenged by means of judicial proceedings. According to Article 18, para. 1 of the Statute, a member of the Court

only the main forms of civilization and legal systems, but also that it represents both genders. [...] This 'reform' can be achieved through declarations by the General Assembly and the Security Council to be issued at the time of elections. Alternatively, a stricter requirement might be introduced by modifying Article 9 of the Statute." See ABILA Committee on Intergovernmental Settlement of Disputes, "Reforming the United Nations: What About the International Court of Justice?", *Chinese Journal of International Law*, 5, 2006, 40.

³⁷ For an interpretation of Art. 9 of the PCIJ Statute to this effect ('une obligation morale'), see Fassbender, "Commentary on Article 9", 298.

³⁸ Emphasis added.

can only be dismissed if, in the unanimous opinion of the other members, he or she "has ceased to fulfil the required conditions". The conditions referred to by Article 18 are the individual qualifications of a judge stated in Articles 2 and 16 of the Statute.³⁹ It is clear that an individual member of the Court cannot cease to fulfil the goal expressed in Article 9 that the Court *as a whole* represents the main forms of civilization and the principal legal systems of the world. From this it follows that the procedure of Article 18 of the Statute is not available in order to assure the representative character of the Court called for in Article 9. Accordingly, Professor Rosenne's interpretation of Article 2 also applies to Article 9:

[The article] neither imposes nor does it intend to impose any enforceable bar or disqualification upon persons once elected. If and to the extent that this provision is executory, it is addressed to the nominators and to the electors, and it is usual for the President of the General Assembly to bring it to the attention of the representatives when they are proceeding to the election of members of the Court. No person duly elected can subsequently be disqualified as a member of the Court because of not complying with the terms of this Article.⁴⁰

On the other hand, Article 9 does not confer on any particular State or region a right that one of its nationals be elected as a judge. It is a custom or tradition, reflecting the interpretation of Article 9 by the Great Powers at the time of its inception in 1920 and the application of the article in the era of the League of Nations, that ever since 1946 nationals of the five permanent members of the UN Security Council have been members of the Court,⁴¹ but as a matter of law the electors could abandon that practice any time.⁴²

Professor Rosenne has taken the view that Articles 2 and 9 of the Statute establish "a double general criterion" for the election of judges, namely "professional qualification (Article 2) and political qualification, included in the conception of representation of the principal legal systems of the world (Article 9)", and that in the case of inconsistent results of an application of the two criteria, "the

³⁹ In the French version, Arts. 9 and 18, para. 1 both use the same phrase "conditions requises".

⁴⁰ S. Rosenne, *The Law and Practice of the International Court of Justice, 1920–2005*, vol. I, Leiden/Boston, Martinus Nijhoff Publishers, 2006, 358.

⁴¹ With the exception regarding China. From 1967 to 1985 there was no member of the Court of Chinese nationality. This was due to the political struggle about the recognition of the People's Republic of China and China's representation in the United Nations. See Fassbender, "Commentary on Article 9", 302.

⁴² See also H. Kelsen, *The Law of the United Nations: A Critical Analysis of its Fundamental Problems*, New York, F.A. Praeger, 1950, 473 ('political claim'); E. McWhinney, "Law, Politics and 'Regionalism' in the Nomination and Election of World Court Judges", *Syracuse Journal of International Law & Commerce*, 13, 1986, 17; and H. Mosler & K. Oellers-Frahm, "Commentary on Article 92", in B. Simma *et al.* (eds.), *The Charter of the United Nations: A Commentary*, 2nd ed., Oxford, Oxford University Press, 2002, 1161 ("no legal rule to this effect [election of a national of each of the five permanent members] exists").

desideratum of Article 9 appears as the postulated primary objective".⁴³ The present author cannot agree with this interpretation. Apart from the fact that the term 'political qualification' misrepresents the meaning of Article 9, there is no indication in the Statute that it attaches greater importance to the criteria mentioned in Article 9 than to those stated in Article 2. On the contrary, the prominent place of the latter rule in the Statute suggests that the parties to the Statute wanted to assure, in the first place, that the judges as individuals are persons of "high moral character" and "recognized legal competence".⁴⁴ The ICJ is the "principal judicial organ of the United Nations" (Article 92 UN Charter). It constitutes, for the international community, the embodiment of the judicial function.⁴⁵ The judges of the ICJ hold an international office. They owe allegiance only to the international community and its values and goals as expressed in the UN Charter. Accordingly, in the exercise of their functions, the personal qualification of judges matters more than their cultural or geographical background.⁴⁶ *Mutatis mutandis*, Article 101, para. 3 of the UN Charter, regulating the employment of the staff of the United Nations, also applies to the election of judges of the ICJ: "The paramount consideration [...] shall be the necessity of securing the highest standards of efficiency, competence, and integrity", while "due regard shall be paid" to the importance of recruiting the persons in question "on as wide a geographical basis as possible".

⁴³ Rosenne, *Law and Practice*, vol. I, 361.

⁴⁴ This is also the view taken by the *Institut de droit international* in its resolution "Study of the amendments to be made in the Statute of the ICJ" of 26 April 1954. Art. 1 of the resolution reads as follows: "Without prejudice to the need for maintaining a certain geographical representation within the International Court of Justice, as provided for in Article 9 of the Statute, judges of the Court should be elected *primarily* on the basis of their personal qualifications in accordance with Article 2. In the event of the Statute being revised, a clarification covering this point could usefully be added to Article 9." *Annuaire de l'Institut de Droit International*, 45, 1954-II, 296-297 (emphasis added). See also G. Abi-Saab, "Substantive Requirements, or The Portrait of the Jurist as an International Judge", in C. Peck/R.S. Lee (eds.), *Increasing the Effectiveness of the International Court of Justice: Proceedings of the ICJ/UNITAR Colloquium to Celebrate the 50th Anniversary of the Court*, The Hague/Boston, Martinus Nijhoff Publishers, 1997, 182ff.

⁴⁵ C. Tomuschat, "International Law: Ensuring the Survival of Mankind on the Eve of a New Century", *Recueil des cours de l'Académie de droit international*, 281, 1999, 413.

⁴⁶ To that end, Art. 2 of the ICJ Statute also requires that there is a sufficient number of candidates from which to choose judges according to their personal merits and qualities. But the system of geographical distribution of seats on the Court, with the regional groups trying to agree on a common candidate, "reduces enormously the number of candidates, [...] eliminating, in some cases, all possibilities of choice". Abi-Saab, "Substantive Requirements", 178. See also Rosenne, "The Composition of the Court", 427: the General Assembly "now has little more to do than endorse decisions reached by the 'groups' through their own processes".

In the eyes of an eminent observer, reality confirms this precedence of personality over geographical origins:

The Court is a collegial body of strong personalities, usually with high academic and professional legal qualifications, and, on all the empirical evidence, they interact among each other with the cross-currents in their legal education and professional formation operating to produce collegial decision-making that transcends conventional political-ideological, ethno-cultural, and legal-systemic divisions.⁴⁷

Professor McWhinney also pointed to an "increasing homogenisation of the legal élite across the old national frontiers" in an era characterized by "the exchange of culture and ideas on a trans-national basis through vastly facilitated personal contacts and access to the printed and spoken word".

The concept of the 'Global Village', applied to legal learning and legal culture [...] operates as an internationalising, universalising force, and as a corrective to any exaggerated deference to the cultural-ideological particularity of legal institutions, processes, and substantive rules, too literally or too rigidly applied in an era of widespread interaction and interchange between different peoples and different cultures.⁴⁸

Moreover, electing persons from different regions, or persons educated in different legal systems, along the rigid lines of the distribution of seats in the Security Council is not the only, and perhaps not even the best, way to assure the representativeness of the Court which Article 9 is aiming at.⁴⁹ Without a doubt, a Court made up of individuals narrow-mindedly thinking and deciding only in terms of their respective geographical or legal background, and regarding it as their principal responsibility to defend the interests of their particular "constituency", would run counter to the objective of the article. For the Court to be representative, it is not so important to ask from which particular place judges come, but from where they come mentally or intellectually. This is even more true in the contemporary world in which educational and professional biographies are much more varied than in the past. The purpose of Article 9 can only be achieved if each judge sitting on the Court is herself or himself aware of the cultural and "civilizational" diversity of the international community in the twenty-first century, and the different legal perspectives on contentious issues arising therefrom.

⁴⁷ E. McWhinney, *The International Court of Justice and the Western Tradition of International Law: The Paul Martin Lectures in International Relations and Law*, Dordrecht/Boston/Hingham, MA, Martinus Nijhoff Publishers, 1987, 138.

⁴⁸ *Ibid.*, 151ff.

⁴⁹ See also L. Gross, "Compulsory Jurisdiction Under the Optional Clause: History and Practice", in L. Fisler Damrosch (ed.), *The International Court of Justice at a Crossroads*, Dobbs Ferry, Transnational Publishers, 1987, 35: "It is no recommendation for the impartiality and integrity of the Court that it should be composed in the same fashion as the most politicized of the political organs of the United Nations". Gross suggested linking the election of judges with acceptance of the Optional Clause (Art. 36, para. 2 of the ICJ Statute) by their respective States.

As Professor McWhinney remarked, we live "in an era of transition in international society"

from an original, ethnoculturally and ideologically more-or-less homogeneous, largely Western European... legal 'special community', from which the older, 'classical' international law largely stemmed and whose interests it so largely reflected, to a far more genuinely inclusive, world community based on a plurality of different cultures and ideologies.⁵⁰

The judges of the ICJ need to recognize, and give practical importance to, this new reality if the Court is to retain its significance in the international order. To use an expression coined by Professor Onuma, the judges must be able to see and apply international law and its context in a "transcivilizational perspective":

A transcivilizational perspective is a perspective from which we see, sense, recognize, interpret, assess, and seek to propose solutions to ideas, activities, phenomena and problems transcending national boundaries, by developing a cognitive and evaluative framework based on the recognition of a plurality of civilizations and cultures that have long existed in human history.⁵¹

The "directive" of Article 9 is not only addressed to the electors, but indirectly also to "those responsible for nominating candidates"⁵² (see Articles 4–6) because "the efficacy of the electoral system to achieve that end [of Article 9] depends not solely, or even primarily, upon the method by which the balloting is conducted, but upon the supply of duly qualified candidates".⁵³ The personal qualification of candidates for a seat on the Court as set forth in Article 2 of the Statute, which must already be taken into consideration at the stage of nominations by the national groups, includes their ability duly to take into account considerations of cultural diversity, broadly understood, as outlined above.

Sir Robert Jennings directed our attention to the fact that the importance of Article 9 reaches beyond the question of how the Court is composed to its working methods:

The rules of its internal methods of work in fact are based on an assumption that all judges have a collegiate responsibility to the Court as a whole; and that each judge is responsible for the Court's judgment, whether or not he proposes to make a separate or dissenting opinion.... That this collegiate responsibility involving every member of the Court is clearly an important enhancement of the judgment's authority is obvious.⁵⁴

⁵⁰ McWhinney, *The ICJ and the Western Tradition*, 26.

⁵¹ Y. Onuma, *A Transcivilizational Perspective on International Law*, Leiden/Boston, Martinus Nijhoff Publishers, 2010, 81.

⁵² Rosenne, *Law and Practice*, vol. I, 360.

⁵³ *Ibid.*, 362.

⁵⁴ Sir R.Y. Jennings, "The Collegiate Responsibility and Authority of the International Court of Justice", in Y. Dinstein & M. Tabor (eds.), *International Law at a Time of Perplexity: Essays in Honour of Shabtai Rosenne*, Dordrecht/Boston, Martinus Nijhoff

It is therefore justified to say that the provisions of Article 9 must be taken into consideration whenever the ICJ's working methods are assessed. While the traditional procedure, which ensures that all members of the Court work together at all stages of the Court's work, is certainly time-consuming, it is in correspondence with the representativeness of the Court aimed at by Article 9.

7. THE 'HIGHER MEANING' OF ARTICLE 9

Although rooted in power politics, Article 9 has a "higher meaning" which can be captured with the two notions of legitimacy and authority. To turn to the first, as a legal, political and philosophical concept, "legitimacy" has many faces.⁵⁵ It is often difficult to establish in which sense the concept is used. Political perceptions that a process is "illegitimate" tend to reflect, as Professor Caron remarked, "subjective conclusions, perhaps based on unarticulated notions about what is fair and just, or perhaps on a conscious utilitarian assessment of what the process means for oneself".⁵⁶ In an effort to explain "what it is about rules and the rule process that conduces to uncoerced compliance",⁵⁷ Thomas Franck defined legitimacy as those "factors that affect our willingness to comply voluntarily with commands"⁵⁸—a willingness which is particularly relevant in the case of the ICJ which has no means of its own to enforce its decisions.⁵⁹ A more comprehensive definition, again by Thomas Franck, goes as follows:

Legitimacy is a property of a rule or *rule-making institution* which itself exerts a pull toward compliance on those addressed normatively because those addressed believe that the rule or *institution* has come into being and operates in accordance with generally accepted principles of right process.⁶⁰

Publishers, 1989, 345ff. For "procedures and disciplines of collegiate responsibility", see *ibid.*, 348ff.

⁵⁵ For an evaluation of the concept with regard to the UN Security Council, see B. Fassbender, *UN Security Council Reform and the Right of Veto: A Constitutional Perspective*, The Hague/Boston, Kluwer Law International, 1998, 315ff. and from the same author, "Uncertain Steps into a Post-Cold War World: The Role and Functioning of the UN Security Council after a Decade of Measures against Iraq", *European Journal of International Law*, 13, 2002, 292–295.

⁵⁶ See D.D. Caron, "The Legitimacy of the Collective Authority of the Security Council", *American Journal of International Law*, 87, 1993, 557.

⁵⁷ T.M. Franck, *The Power of Legitimacy Among Nations*, New York, Oxford University Press, 1990, 50.

⁵⁸ *Ibid.*, 150.

⁵⁹ See Art. 94 of the UN Charter.

⁶⁰ Franck, *Power of Legitimacy*, 24 (emphasis added). In a later book, Professor Franck described legitimacy as the procedural aspect of fairness: T.M. Franck, *Fairness in International Law and Institutions*, Oxford, Clarendon Press, 1995, 7ff.

One may add that if this "pull toward compliance" is sufficiently strong, the rule or institution has authority, that is persuasive force.

To the extent that not only legal standards (i.e. in the case of the ICJ the rules of international law) but also other criteria (like the composition of a decision-making body) are considered to be such a property of an institution, a conflict between lawfulness (legality) and legitimacy can arise.⁶¹ A legal act, for instance a decision made by the ICJ, may be legal in the sense that it is in accordance with the written and customary norms of international law, and yet be challenged as illegitimate, for instance as going against "the promise and spirit" of the United Nations.⁶² A decision which is not complied with because it is perceived as not legitimate lacks authority, and can compromise the authority of the Court as such.

In the case of the ICJ, the problem of legitimacy arises not only in the context of compliance with the Court's decisions but, even more importantly, with regard to the Court's jurisdiction. States are only subject to the jurisdiction of the ICJ if they voluntarily accept that jurisdiction,⁶³ and they will only do so if they regard the Court as legitimate.⁶⁴

An opinion in that regard will be formed based on an assessment of the work of the Court, i.e. its judicial decisions of the past, and a prognosis of the Court's future performance. An important aspect of such an assessment is the Court's composition. A government assessing the Court will ask whether this composition affords sufficient ground for the expectation that the Court will perform its duties "honourably, faithfully, impartially and conscientiously".⁶⁵ The Court's legitimacy essentially depends on how the judges sitting on it are appraised, personally and as authors of the decisions rendered by the Court in the past, and this legitimacy in turn is a precondition for the Court's authority as the principal judicial organ of the international community.

Seen in this light, Article 9 of the Statute is an appeal to the member States of the international community (members of the United Nations and parties to the Statute) to uphold the legitimacy and authority of the Court when deciding about its composition. Governments are urged to make sure that the judges possess the necessary personal qualification (Article 2) and that the Court as a whole is as representative of the existing international community as possible.

⁶¹ A classical study distinguishing the two concepts with a view to the German Constitution of 1919 is C. Schmitt's *Legalität und Legitimität*, Berlin, Duncker & Humblot, 1932.

⁶² See Caron, "Legitimacy of the Collective Authority", 559ff.

⁶³ See Art. 36 of the ICJ Statute.

⁶⁴ In essence, the same thought was expressed by saying that States must have "confidence in the Court as an impartial forum for the resolution of legal disputes": M. Leigh & S.D. Ramsey, "Confidence in the Court: It Need Not Be a 'Hollow Chamber'", in F. Damrosch, *The International Court of Justice at a Crossroads*, 108.

⁶⁵ See Art. 20 of the ICJ Statute and Art. 4, para. 1 of the Rules of Court.

What matters is representativeness in a broad sense. The two criteria expressly mentioned in Article 9, the "main forms of civilization" and the "principal legal systems of the world", must be understood as elements or aspects of such a general representative character of the Court. Characteristic of the time in which they were formulated, they do not exhaust, in the constitutional framework of the UN Charter, the content and meaning of representativeness.⁶⁶ In this context, and in consideration of the Court's quality as the principal judicial organ of the United Nations, the phrase "main forms of civilization of the world" gains new significance as a metaphor for cultural diversity broadly understood. In the words of Georges Abi-Saab:

[I]f we really want international law to take hold and be taken seriously by all, it has to be, both in its creation and in its interpretation and application, the product of [the international] community as a whole, reflecting, by synthesis or symbiosis, the legal visions, needs and aspirations of all the components of this community.⁶⁷

⁶⁶ For other elements of representativeness, see sec. 5 above.

⁶⁷ Abi-Saab, "Substantive Requirements", 171.

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