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## **Designing for the Best Composition of International Courts: The Value of Diverse and Specialised International Law Expertise on the Bench**

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### **Abstract**

The book chapter discusses the appropriate types of expertise that should be available in the composition of international courts. The main argument is that the international bench needs to include judges with diverse and specialised expertise. For this reason, the concept ‘competence in international law’ as a statutory requirement for nomination and election of judges, can be construed broadly seeking out individuals who not only have recognised competence in international law *stricto sensu* but also strong complementary knowledge in specialised area(s) of international law relevant to a given court’s judicial work. Judges who are conversant with both general and special aspects *and* areas of international law are well placed to navigate the complexity and density of international law entrenched in disputes submitted for international adjudication. The first part of the discussion engages with the idea that general international courts value expertise of judges in specialised areas of international law and that specialised international courts value judges with competence in international law. Existing statutory election requirements can accommodate this suggestion. The second part of the discussion explores the detailed expertise requirements incorporated in the statutes of certain, new international courts. Novel developments suggest a turn towards favouring and quantifying required expertise in different areas of international law when deciding the overall composition of a court.

### **1. Introduction**

Despite growing legal scholarship on various aspects of judicial dispute settlement,<sup>1</sup> the issue of the expertise of judges sitting on the international bench is under-studied. When nominating and electing judges, the appropriate level and type of expertise of the women and men serving on international courts is an individual election requirement. In contrast, statutory requirements about the composition of a court involve the consideration of other criteria, such as the representation of the main forms of civilisation, principal legal systems and genders.<sup>2</sup> An

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<sup>1</sup> See, e.g., P. Sands, ‘Global Governance and the International Judiciary: Choosing Our Judges’ (2003) 56 *Current Legal Problems* 481, at 484; M. Bobek (ed.), *Selecting Europe’s Judges: A Critical Review of the Appointment Procedures to the European Courts* (2015); F. Baetens (ed.), *Legitimacy of Unseen Actors in International Adjudication* (2019); R. Howse and others (eds.), *The Legitimacy of International Trade Courts and Tribunals* (2018). See also The Burgh House Principles on the Independence of the International Judiciary, adopted by the Study Group of the International Law Association on the Practice and Procedure of International Courts and Tribunals, in association with the Project on International Courts and Tribunals, 2004.

<sup>2</sup> See, e.g., 1946 Statute of the International Court of Justice (‘ICJ’), 33 UNTS 993, Art. 9; Statute of the International Tribunal for the Law of the Sea (‘ITLOS’) (Annex VI of the 1982 United Nations Convention on the Law of the Sea, 1833 UNTS 3), Art. 2(2); and 1998 Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of an African Court on Human and Peoples’ Rights, OAU/LEG/EXP/AFCHPRIPROT(III), Art. 14(2).

interesting development is that the competence of judges in (specific areas of) international law is becoming a key criterion and, in certain instances, states are willing to formalise specific expertise considerations by introducing statutory requirements when deciding the overall composition of a court.

The main argument of this chapter is that international courts need to include in their composition judges with diverse and specialised expertise. International courts are equipped to fulfil their jurisdiction *ratione materiae* when judges are not only highly competent in the specific subject matter entrusted to a given court (e.g. law of the sea, human rights) but also well conversant with general issues of international law *and* specialised areas of international law. Such diverse and specialised expertise is indispensable for addressing adequately the increasing diversification of disputes brought before courts and the recurring concerns pertaining to the so-called fragmentation of international law. Consequently, the concept ‘competence in international law’ as a statutory requirement for election of judges, should be construed broadly. The chapter explains why and in what ways the overall composition of expertise on the bench can and should be shaped. It may not be realistic or desirable for all members of the bench to have specific expertise, but it is valid to specify criteria relating to expertise that needs to be present in the overall composition of a court.<sup>3</sup>

Following the Introduction, Section 2 of the chapter examines how existing statutory election requirements across international courts can accommodate the idea of electing judges with mixed and specialised expertise. The discussion starts with the distinction between general and specialised international courts and their respective judges’ expertise in (areas) of international law. I argue, somehow counterintuitively, that the composition of courts of general jurisdiction (e.g. the International Court of Justice) should also include judges who have a strong background in specialised areas of international law. The analysis gives examples of how this is incorporated in practice when electing judges and briefly explores the statutory tools available for developing specialised expertise.

Conversely, the bench of specialised international courts should include not only judges with specialised expertise relevant to a court’s material jurisdiction but also judges with competence in international law. The discussion first explains why international law expertise

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<sup>3</sup> Institut de Droit International, Sixth Commission, Resolution on *The Position of the International Judge*, 9 September 2011 (Rapporteur: G. Guillaume; Membership: M. Bernhardt, Dame R. Higgins, M. Kirsch, Sir E. Lauterpacht, M. M. Makarczyk, M. Rangel, T. Meron, O. Vicuña, R. Ranjeva, G. Ress, S. M. Schwebel, C. Tomuschat, T. Treves and L. Wildhaber), deliberations in *Annuaire de l’Institut de Droit International*, Séssion de Rhodes, volume 74, at 88–89, available at [www.idi-iil.org/en/sessions/rhodes-2011/?post\\_type=publication](http://www.idi-iil.org/en/sessions/rhodes-2011/?post_type=publication); R. Mackenzie et al., *Selecting International Judges: Principle, Process, and Politics* (2010), at 46–47.

is relevant on the bench of specialised courts and it then critically unpacks the meaning of *competence in international law*. I submit that we need to interpret *competence in international law* broadly by way of thinking beyond the orthodoxy of so-called ‘general’ international law and valuing the presence of expertise in diverse specialisms. Specialised courts need judges who have expert knowledge of general issues of international law *and* a strong background in the specialised area falling under the court’s jurisdiction. This mixed background is also indispensable for forging connections across different branches of international law.

Section 3 of the chapter proceeds to discuss how the idea of including judges with diverse and specialised expertise in the composition of an international court starts to gain traction. There is a trend towards designing novel and detailed expertise requirements when creating new international courts. On certain occasions, states set quantitative requirements for the presence of expertise in international law, and areas thereof, on the bench. As it will be discussed, the International Criminal Court, the future African Court of Justice and Human Rights and the Caribbean Court of Justice are prominent examples. The analysis finds that *international law* expertise is used by states as a ‘shorthand’ and, subject to the details of each statute, should be construed as being inclusive of different areas of international law. Caution is, however, advised when drafting the statute of a new international court: once cemented into a statutory requirement, detailed quantification schemes become difficult to amend in the future and are at risk of becoming redundant. Section 4 concludes.

## **2. The distinction between general and specialised international courts and judges’ expertise in (areas) of international law**

What type of expertise in international law is required and expected from judges sitting on an international court? The simple answer is that the necessary expertise depends on the material jurisdiction of a given court. This section argues that material jurisdiction is a determinative but not sufficient indicator of the expertise needed on the bench.<sup>4</sup> The growing diversification and complexity of disputes, observed across all international courts, has an impact on the expertise that should be available in the composition of a court.<sup>5</sup> Subsection 2.1 discusses

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<sup>4</sup> Mackenzie et al., *supra* note 3, at 51; W. A. Schabas, ‘Introduction’, in W. A. Schabas and S. Murphy (eds.), *Research Handbook on International Courts and Tribunals* (2017), 1, at 13. See also P. Bodeau-Livinec and C. Giorgetti, ‘Developing International Law at the Bar’ (2016) 15 *The Law & Practice of International Courts and Tribunals* 177.

<sup>5</sup> On the changing roles, functions and expected conduct of international courts, see B. Kingsbury, ‘International Courts: Uneven Judicialisation in Global Order’, in J. Crawford, M. Koskenniemi and S. Ranganathan (eds.), *The Cambridge Companion to International Law* (2012), 203, at 215–222.

whether a court of general jurisdiction — the International Court of Justice — needs and has the capacity to develop specialised expertise on its bench. Subsection 2.2 addresses the requirement for specialised international courts to include judges with competence in international law and stresses the value of diverse backgrounds within this competence.

### ***2.1 The International Court of Justice and the specialised subject matter of disputes***

The ICJ may hear any dispute concerning international law.<sup>6</sup> A notable development is that the subject matter of disputes brought before the ICJ is now much more diverse compared to those decided in the early and mid-twentieth century. During this period, judges in The Hague were mostly presented with cases regarding aspects of the law of treaties. In contrast, the recent docket of the ICJ has a different scope, including the use of armed force and international humanitarian law, the prohibition of genocide, self-determination, immunities, human rights, jurisdiction over international crimes, environmental issues and diplomatic protection, to name a few.<sup>7</sup> A concurrent trend reinforcing the diversification of cases heard by the ICJ is that disputes that can be framed as relating to *specialised subject matters* (e.g. environmental law or human rights) are increasingly seen as relevant candidates for the adjudication by the ICJ. Higgins underlines the fact that, although the creation of specialised international courts initially led to the decentralisation of cases with a subject matter that the ICJ could, in principle, deal with, what is now perceived as specialised subject matter is being brought back into the ICJ's docket.<sup>8</sup>

Disputes with specialised subject matter raise the question of whether a court of general jurisdiction needs judges who are at least conversant with certain specialised areas of international law. The expertise election requirements under Article 2 ICJ Statute ('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') accord room for such consideration. In practice, it is difficult to discern whether states attach any particular weight to competence in specialised fields of international law when nominating and electing judges. That being said, one may speculate that, for example, the elections to the bench of Judges Higgins (1995–2009), Kooijmans (1997–2006), Buergenthal (2000–2010), Simma (2003–2012) and Cançado Trindade (2009–present) were not fortuitous. All these judges have

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<sup>6</sup> Art. 36 ICJ Statute.

<sup>7</sup> K. J. Keith, 'International Court of Justice: Reflections on the Electoral Process' (2010) 9 *Chinese JIL* 49, at 66–67.

<sup>8</sup> R. Higgins, 'A Babel of Judicial Voices - Ruminations from the Bench' (2006) 55 *ICLQ* 791, at 799.

a well-established competence in international human rights law and this arguably paved the way towards a new approach to human rights issues within the ICJ.<sup>9</sup> Judges Simma and Higgins explain, when writing extrajudicially, how the background and expertise of certain judges on the ICJ bench changed the court's judicial culture.<sup>10</sup> Consequently, this testifies to the willingness of states to include – either purposefully or as a matter of circumstance – such expertise in a court of general jurisdiction.

In addition to states' choices when nominating and electing judges, the ICJ has certain institutional capacity to consolidate specialised expertise within its corpus. Particularly relevant in this regard is Article 26(1) of the ICJ Statute, which envisages the ICJ's specialisation *ratione materiae* by providing for the formation of chambers to deal with particular categories of cases.<sup>11</sup> This provision is 'a tool to develop a special expertise in relation to disputes arising in specific fields of international law'.<sup>12</sup> Suggestions have been made in the past that chambers be formed for disputes concerning labour issues, transit and communications, space law, environmental law and the law of the sea.<sup>13</sup> The ICJ made use of this power for the first time in 1993. In view of developments in the field of environmental law and considering that the ICJ 'should be prepared to the fullest possible extent to deal with any environmental case falling within its jurisdiction',<sup>14</sup> the court deemed it appropriate to establish a chamber for environmental matters. The members of the chamber were Judges Schwebel, Bedjaoui, Evensen, Shahabuddeen, Weeramantry, Ranjeva and Herczegh.<sup>15</sup> The initial composition of the chamber suggests that the ICJ was attempting to consolidate 'in-house' expertise on environmental disputes by drawing from the existing judges on the ICJ bench. Of the seven members of the chamber, Judge Weeramantry was well conversant with

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<sup>9</sup> See, e.g., *Armed Activities on the Territory of the Congo, (Democratic Republic of the Congo v Uganda)*, Judgment, ICJ Reports 2005, p. 168, at paras. 190, 219–220; *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo) Compensation*, Judgment, ICJ Reports 2012, 324, paras. 13, 18, 24, 33, 40, 56, 66–68; *Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal) Merits*, Judgment, ICJ Reports 2012, 422, at paras. 100–102.

<sup>10</sup> B. Simma, 'Mainstreaming Human Rights: The Contribution of the International Court of Justice' (2012) 3 *Journal International Dispute Settlement* 1, at 12–14; R. Higgins, 'Human Rights in the International Court of Justice' (2007) 20 *LJIL* 745, at 746.

<sup>11</sup> The provision reads: 'The Court may from time to time form one or more chambers, composed of three or more judges as the Court may determine, for dealing with particular categories of cases; for example, labour cases and cases relating to transit and communications.'

<sup>12</sup> P. Palchetti, 'Article 26', in A. Zimmermann et al. (eds.), *The Statute of the International Court of Justice: A Commentary* (2012), 474, at 490.

<sup>13</sup> E. McWhinney, 'Special Chambers within the International Court of Justice: The Preliminary: Procedural Aspect of the Gulf of Maine Case' (1985) 12 *Syracuse J. Int'l L. & Com.* 1, at 4–7.

<sup>14</sup> ICJ Annual Report 1992–1993, at 1, available at [www.icj-cij.org/en/annual-reports](http://www.icj-cij.org/en/annual-reports).

<sup>15</sup> *Ibid.*, at 2.

environmental matters,<sup>16</sup> Judge Ranjeva<sup>17</sup> was familiar with such matters in connection to the law of the sea and Judge Schwebel could cover potential investment-related aspects of environmental disputes.<sup>18</sup> After no cases had arisen in 13 years, the ICJ did not hold elections for a bench for this chamber in 2006.<sup>19</sup> It remains an open question whether states considered the existing ICJ expertise somehow unsatisfactory and, consequently, whether this was one of their reasons for not submitting any disputes to the chamber.<sup>20</sup>

To summarise, there may be certain willingness on behalf of States and the ICJ bench to enrich the composition of the court with judges with diverse expertise and/or consolidate existing specialised expertise. Such efforts would align with the currently diversified and specialised subject matter disputes brought before the ICJ.

## ***2.2. Specialised international courts: the role of international law expertise on the bench***

The specialisation of international law led to the emergence of *ratione materiae* specialised courts and, accordingly, to the demand for judges competent in the specialised area of international law falling under a court's jurisdiction. In certain instances, the need for specialised expertise is clearly stipulated in the statutory requirements for the nomination and election of judges. In others, the statutory requirements for the qualifications of candidates for judicial office are rudimentary and do not venture beyond general qualities that judges must possess, such as being recognised jurisconsults (in international law).<sup>21</sup> One may argue that the need for judges with specialised expertise leads to the marginalisation of international law expertise<sup>22</sup> or compromises between specialised and international law expertise.<sup>23</sup> However, at

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<sup>16</sup> Judge Weeramantry helped to establish environmental law as an independent branch of international law and contributed substantially to issues concerning development. For a list of publications see [web.archive.org/web/20070727134951/http://www.wicper.org/Judge%27s%20CV.htm](http://www.wicper.org/Judge%27s%20CV.htm).

<sup>17</sup> For his bio see [web.archive.org/web/20080412043655/http://www.icj-cij.org/court/?p1=1&p2=2&p3=1&judge=2](http://www.icj-cij.org/court/?p1=1&p2=2&p3=1&judge=2).

<sup>18</sup> Judge Schwebel, among other topics, had written extensively on inter-State, investor-State and arbitration; see *Justice in International Law - Selected Writings of Stephen M. Schwebel* (1994), chapters 10-14, 23-28.

<sup>19</sup> Speech by H. E. Judge Rosalyn Higgins, President of the International Court of Justice, to the General Assembly of the United Nations, 26 October 2006, available at [www.icj-cij.org/files/press-releases/9/13149.pdf](http://www.icj-cij.org/files/press-releases/9/13149.pdf); Palchetti, *supra* note 12, at 490.

<sup>20</sup> C. Qiong Wu, 'A Unified Forum - The New Arbitration Rules for Environmental Disputes under the Permanent Court of Arbitration' (2002) 3 *Chinese JIL* 263, at 265.

<sup>21</sup> For instance, there is no specific legal expertise requirement for judges to be elected to the European Court of Human Rights; see *infra* note 23. The general formula of 'jurisconsults of recognized competence in international law', which was established in 1920 with the Statute of the PCIJ and left intact in the ICJ Statute, forms the basis of the individual requirements for nominated judges across many international courts and other bodies; see 1920 Statute of the Permanent Court of International Justice, 6 LNTS 379, Art. 2.

<sup>22</sup> M. Prost, 'The Division of Expert Labor in the International Law Discipline: Genealogies of Fragmentation' (2011) 105 *ASIL Proc* 127, at 128.

<sup>23</sup> G. Ulfstein, 'The International Judiciary', in J. Klabbers, A. Peters and G. Ulfstein, *The Constitutionalization of International Law* (2009), 126, at 130.

the same time, specialised expertise does not necessarily exclude the need for competence in international law; in fact it highlights it. This section briefly explains why, even if a court's material jurisdiction is restricted to the interpretation and application of a treaty, *other* areas of international law and, thus, an associated competence, are very relevant to a court's judicial work. The analysis proceeds to unpack the main rationale for including judges with competence in international law in a specialised court's composition. It is argued that we need to see beyond the outdated orthodoxy of the so-called 'generalist' international lawyer and elaborate on the concrete knowledge and skills required in connection to international law expertise.

### 2.2.1 *Why international law expertise is relevant on the bench of specialised courts*

Judges with competence in international law are needed in the composition of a specialised court for at least three reasons. First, competence in international law may be taken as an implicit and necessary condition for having acquired recognised competence in a specialised area of international law. This is the case with judges sitting on the ITLOS.<sup>24</sup> Article 2(1) of the Statute of the ITLOS — a tribunal of geographically universal scope endowed with specialised jurisdiction on matters of the law of the sea — prescribes that 'recognised competence in the field of the law of the sea' is the only expertise requirement for members to be elected to the tribunal. The absence of a reference to an explicit requirement for recognised competence in international law raised certain concerns.<sup>25</sup> Yet, in practice, state parties elect judges who also have demonstrable recognised competence and practical experience in international law.<sup>26</sup> A similar example comes from the European Court of Human Rights ('ECtHR') — a regional and specialised international court. Article 21(1) of the European Convention on Human Rights ('ECHR') does not provide for any required or desirable competence in international law (or in any area in law, for that matter) as a consideration in

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<sup>24</sup> P. Chandrasekhara Rao, 'ITLOS: The Conception of the Judicial Function', in H. P. Hestermeyer et al. (eds.), *Coexistence, Cooperation and Solidarity: Liber Amicorum Rüdiger Wolfrum* (2012), 1725, at 1727–1728. Chandrasekhara Rao is a former president (1999–2002) and one of the longest-serving judges of the ITLOS.

<sup>25</sup> I. Brownlie, 'Problems of Specialisation', in B. Cheng (ed.), *International Law: Teaching and Practice* (1982), 109, at 112; S. Oda, 'The International Court of Justice from the Bench' (1993) 244 RCADI 9, at 144–145. Cf. H. Caminos, 'The Growth of Specialised International Tribunals and the Fears of Fragmentation of International Law', in N. Boschiero et al. (eds.), *International Courts and the Development of International Law – Essays in Honour of Tullio Treves* (2013), 55.

<sup>26</sup> M. Wood, 'The International Tribunal for the Law of the Sea and General International Law' (2007) 22 Int'l J. Marine & Coastal L. 351, at 367; A. Yankov, 'The International Tribunal for the Law of the Sea and the Comprehensive Dispute Settlement System of the Law of the Sea', in P. Chandrasekhara Rao and R. Khan (eds.), *The International Tribunal for the Law of the Sea* (2001), 33, at 43.

nominating/electing judges.<sup>27</sup> Still, in 2010, state parties expressly stressed that knowledge of public international law is an implicit requirement under Article 21(1) of the ECHR for prospective candidates.<sup>28</sup>

A second argument for the relevance of competence in international law on the bench of a specialised court is that international law may be part of that court's applicable law. For instance, pursuant to Article 293(1) of the UNCLOS, the ITLOS applies not only the UNCLOS but also 'other rules of international law not incompatible with [the UNCLOS]'.<sup>29</sup> The International Criminal Court ('ICC') may apply 'where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict'.<sup>30</sup> The African Court on Human and Peoples' Rights enjoys a distinctive contentious jurisdiction extending to the interpretation and application of any relevant human rights instrument ratified by the states concerned.<sup>31</sup>

Third, many specialised and/or regional courts are regularly seized with questions pertaining to international law which need to be addressed in deciding a dispute.<sup>32</sup> In this regard, the material jurisdiction of international courts arguably falls short of accommodating the gradual diversification and complexity of disputes brought before them today. These developments have led to the expansion of specialised courts' domain into so-called 'general international law'<sup>33</sup> and other areas of international law. Two characteristic examples are, first, the increasing involvement of courts in applying secondary rules of international law, including treaty law or the rules on state responsibility, and, second, the need for courts to be capable of

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<sup>27</sup> According to Art. 21(1) of the ECHR, judges nominated for election to the ECtHR must either possess the qualifications required for appointment to high judicial office or be jurisconsults of recognised competence. 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms, ETS 5.

<sup>28</sup> High Level Conference on the Future of the European Court of Human Rights, Interlaken Declaration, 19 February 2010, point 8(a); Guidelines of the Committee of Ministers on the Selection of Candidates for the Post of Judge at the European Court of Human Rights, CM(2012)40 Final, 29 Mar 2012, at para. II.4.

<sup>29</sup> See Chandrasekhara Rao, *supra* note 24, at 1727–1728; T. A. Mensah, 'The Place of the International Tribunal for the Law of the Sea in the International System for the Peaceful Settlement of Disputes', in Chandrasekhara Rao and Khan, *supra* note 26, 21, at 30.

<sup>30</sup> 1998 Rome Statute of the International Criminal Court, 2187 UNTS 3, Art. 21(1)(b).

<sup>31</sup> Arts. 3(1) and 7 of the Protocol to the African Charter on Human and Peoples' Rights. See A. Rachovitsa, 'On New "Judicial Animals": The Curious Case of an African Court with Material Jurisdiction of Global Scope' (2019) 19 HRLR 255.

<sup>32</sup> A. Pellet, 'Should We (Still) Worry about Fragmentation?', in A. Follesdal and G. Ulfstein (eds.), *The Judicialization of International Law: A Mixed Blessing?* (2018), 228, at 239.

<sup>33</sup> Although most scholars and international courts do not define *general international law*, there are different approaches in conceptualising the term. See International Law Commission, 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law', Report of the Study Group of the International Law Commission finalised by M. Koskenniemi, UN Doc A/CN.4/L.682, 13 April 2006, at paras. 34–37; R. Wolfrum, 'General International Law (Principles, Rules and Standards)' *Max Planck Encyclopedia of Public International Law* (last updated December 2010); C. Tomuschat, 'General International Law: A New Source of International Law?', in R. Pisillo Mazzeschi and P. De Sena (eds.), *Global Justice, Human Rights and the Modernisation of International Law* (2018), 185.

adequately addressing questions of international law that are incidental to resolving a particular dispute. For instance, the ECtHR and the ICC have to decide issues concerning jurisdiction, state immunity and the implementation of UN Security Council resolutions.<sup>34</sup> The docket of the Court of Justice of the European Union,<sup>35</sup> the increased case load and complexity of disputes brought before the panels and the Appellate Body of the World Trade Organisation<sup>36</sup> and disputes brought before the ITLOS<sup>37</sup> point towards the same direction.

### 2.2.2 Unpacking the knowledge and skills required in connection to international law expertise: seeing beyond the outdated orthodoxy of the 'generalist' international lawyer

The diversity and complexity of disputes submitted to specialised international courts has a direct impact on the international law expertise required in the composition of the bench.<sup>38</sup> Nonetheless, the discussion on the presence of international lawyers on the bench revolves almost exclusively around the idea that their expertise is needed only with respect to general international law.<sup>39</sup> The first draft of the sixth commission of the Institute of International Law suggested that international law expertise is required in order to avoid 'excessive specialisation'.<sup>40</sup> Although the term *excessive specialisation* was not embraced by all members of the commission,<sup>41</sup> it was generally accepted that '[states] shall also ensure that judges possess the required competence and that the court or tribunal is in a position effectively to deal with issues of *general international law*' (emphasis added).<sup>42</sup> The singular focus on

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<sup>34</sup> See, e.g., P. Webb, *International Judicial Integration and Fragmentation* (2013), at 62–102 (discussing immunities before the ECtHR); M. Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (2011) (discussing jurisdiction matters before the ECtHR); L.-A. Sicilianos, 'The European Court of Human Rights Facing the Security Council: Towards Systemic Harmonization' 66 (2017) ICLQ 783 (discussing UN Security Council Resolutions).

<sup>35</sup> See, e.g., *European Commission and Others v Yassin Abdullah Kadi*, Joined Cases C-584/10 P, C-593/10 P and C-595/10 P, Judgment of the Court (Grand Chamber), 18 July 2013; *Council of the European Union v Front populaire pour la libération de la saquia-el-hamra et du rio de oro (Front Polisario)*, Case C-104/16 P, Judgment of the Court (Grand Chamber) of 21 December 2016; P. Sands, 'Introduction and Acknowledgments', in Mackenzie et al., *supra* note 3, at xii–xiii.

<sup>36</sup> V. Hughes, 'The Role of the Legal Adviser in the WTO', in A. Zidar and J. P. Gauci (eds.), *The Role of Legal Advisers in International Law* (2017), 237, at 244.

<sup>37</sup> I. Papanicolopulu, 'International Judges and the Protection of Human Rights at Sea', in Boschiero et al., *supra* note 25, 535.

<sup>38</sup> Keith, *supra* note 7, at 66–67; Sands, *supra* note 35, at xii–xiii.

<sup>39</sup> Resolution on *The Position of the International Judge*, *supra* note 3, at 87–89, 104–105.

<sup>40</sup> *Ibid.*, at 41.

<sup>41</sup> Arsanjani did not share this concern. Treves found the term rather excessive. See Resolution on *The Position of the International Judge*, *supra* note 3, at 63 and 65, respectively.

<sup>42</sup> Institut de Droit International, Sixth Commission, Resolution on *The Position of the International Judge*, 9 September 2011 (Rapporteur: G. Guillaume; Membership: M. Bernhardt, Dame R. Higgins, M. Kirsch, Sir E. Lauterpacht, M. M. Makarczyk, M. Rangel, T. Meron, O. Vicuña, R. Ranjeva, G. Ress, S. M. Schwebel, C. Tomuschat, T. Treves and L. Wildhaber), Art. 1(1) (emphases added), available at [www.idi-ii.org/en/sessions/rhodes-2011/?post\\_type=publication](http://www.idi-ii.org/en/sessions/rhodes-2011/?post_type=publication).

general international law overlooks the fact that the need for the presence of individuals with competence in international law on the bench is not limited to their knowledge of general international law. Furthermore, the division of judges into experts on general international law ('generalists') and experts on the specialised treaty/area falling under a court's material jurisdiction ('specialists') is counterproductive and reproduces silos between different areas of expertise.

The main rationale for having international lawyers in the composition of a court is that ideally they bring 'onboard' knowledge of international law *and* a fundamental skillset that helps avoid or mitigate what is commonly known as 'tunnel-vision' or 'category blindness'.<sup>43</sup> Judges are expected to have a fundamental sensitivity in drawing connections, justified by principle and by policy,<sup>44</sup> across different rules and areas of international law. The presumption is that someone with competence in international law brings the right skills and background to avoid 'tunnel vision'.<sup>45</sup> This presumption is not, however, appropriate in all cases. A lawyer with recognised competence in international law does not necessarily always have these skills, or a good knowledge of the specialised area relevant to the material jurisdiction of a court.<sup>46</sup> In the present author's view, and as will be further discussed below, it is highly desirable, if not indispensable, that international lawyers have a specialisation in the substantive area(s) of international law relevant to the court's judicial work or, at least, are able to demonstrate a real engagement with this area.<sup>47</sup> The following points support this argument.

First, as far as the relationship between general and special international law is concerned, the so-called 'generalists' 'attempt to define international law in terms that privilege the skills and attributes of [...] themselves'.<sup>48</sup> D' Argent describes generalists as

those who usually conduct research like butterflies going from one flower to another: from one topic to another one, interested only in the general structure and rules of the international legal order and not in the detailed account of any specialised sub-discipline.<sup>49</sup>

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<sup>43</sup> Brownlie, *supra* note 25, at 111.

<sup>44</sup> *Ibid.*

<sup>45</sup> Pellet, *supra* note 28, at 240.

<sup>46</sup> S. R. Ratner, 'International Investment Law through the Lens of Global Justice' (2017) 20 *Journal of International Economic Law* 747, at 775.

<sup>47</sup> Moreover, the ability to contribute expert knowledge in international law is not a prerogative of the 'generalist' international lawyer. A specialist in a given area of international law may also have a demonstrable background/expertise in (general issues of) international law.

<sup>48</sup> Prost, *supra* note 22, at 127.

<sup>49</sup> P. D' Argent, 'Teachers of International Law', in J. d'Aspremont et al. (eds.), *International Law as a Profession* (2017), 412, at 421.

Accounting for the edifice of international law is valuable in itself, but is it always sufficient to conceptualise the relationship between general and special areas of law? Judges' everyday tasks are arguably too nuanced and demanding for us to simply accept that public international law expertise on the bench automatically resolves tensions between specialised and general law.<sup>50</sup> Higgins brings this nuance to the fore by asking, 'Are the particular and the general so easy to distinguish and slice up?'<sup>51</sup> The answer is in the negative: special and general law constantly re-inform one another and all international courts inevitably address and develop aspects of both 'general' and 'special' international law. General and special international law cannot be clearly demarcated in the abstract, since their content is by definition relative. Only those well versed in both general and special international law can analyse their relationship in view of a particular legal question. Furthermore, the presence of a 'generalist' and a 'specialist' sitting next to each other on the bench does not necessarily entail that they can adequately communicate and solve the equation of general–special law. We also need trained and experienced legal minds capable of bridging the *general* and the *special*.

The second important point is that mitigating 'tunnel-vision' and forging connections between different rules and areas of international law does not depend solely on the relationship between general and special international law. In many cases, the judge needs to construe the applicable law falling under a specialised court's jurisdiction within the framework of a given (specialised) body of law. Take the example of specialised courts on human rights: judges are being increasingly challenged to place *regional* treaties on human rights in the context of *international* human rights law and to discern how one informs the other.<sup>52</sup> Moreover, judges have to address questions incidental to the main dispute which pertain to different specialised areas of international law.<sup>53</sup> This task may include the interpretation of rules and their relevance (and even application, subject to the court's jurisdiction) to a case. For instance, the ITLOS is presented with questions on human rights and the ECtHR is faced regularly with matters regarding international humanitarian law, the law of armed conflict or the law of the sea.<sup>54</sup>

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<sup>50</sup> Cf. Pellet, *supra* note 28, at 228.

<sup>51</sup> Higgins, *supra* note 8, at 799.

<sup>52</sup> See, e.g., E. Brems, We Need to Look at International Human Rights Law (Also) as a Whole, *EJIL: Talk!*, 17 October 2014, available at [www.ejiltalk.org/we-need-to-look-at-international-human-rights-law-also-as-a-whole/](http://www.ejiltalk.org/we-need-to-look-at-international-human-rights-law-also-as-a-whole/) (discussion from the point of view of the ECHR).

<sup>53</sup> For a critical and useful discussion of the issue of incidental questions, see L. Marotti, 'Between Consent and Effectiveness: Incidental Determinations and the Expansion of the Jurisdiction of UNCLOS Tribunals', in A. Del Vecchio and R. Virzo (eds.), *Interpretations of the United Nations Convention on the Law of the Sea by International Courts and Tribunals* (2019), 383.

<sup>54</sup> See, e.g., A. van Aaken and I. Motoc (eds.), *The European Convention on Human Rights and General International Law* (2018); A. Caligiuri, 'Les Liens entre la CEDH et le Droit de la Mer dans la Jurisprudence de la Cour Européenne des Droits de l'Homme', in Del Vecchio and Virzo, *supra* note 49, 269.

Consequently, there is a specific need for, first, the proven ability to employ interpretative tools to identify contextual differences and make connections across different areas of international law and, second, a strong background relevant to the material jurisdiction of a given court. Klabbers makes a similar point albeit in a different context: when discussing inter-legality across national legal systems and the role of judges he underlines ‘the craft, skill, and learning to work across legal spaces. It is hypothetically possible that a judge who is very good in his or her own jurisdiction might lack the necessary skill or craft to accommodate a multitude of legal spaces’.<sup>55</sup> Seasoned practitioners and scholars with a uniquely placed grasp of, and experience in, law, policy and dispute settlement underscore the importance of a diverse representation of specialisations in international law and mixed expertise on the bench.<sup>56</sup> In the field of arbitration, Crawford stresses that a single ‘species’ of international lawyer offers no diversity within the corpus of public international lawyers,<sup>57</sup> meaning that the international lawyer should offer a combination of backgrounds and expertise. Ratner and Roberts underline the need for mixed expertise in the field of investment arbitration.<sup>58</sup> Sands and Stephens emphasise that for environment-related disputes a body of judges/arbitrators should ideally combine general and specialised expertise, since environmental law arguments involve different areas of international law (e.g. trade agreements, human rights and environmental instruments) and issues of general international law.<sup>59</sup> Diverse expertise includes not only experts in different areas coming together but also experts with a good knowledge of public international law who are particularly well versed in a specialised area of international law. Thus, the relevance of a generalist is limited, unless he or she has a specialised background too. The significance of a good knowledge of the *special* should not be underestimated. This is reinforced by the example discussed earlier, of judges who are elected to the ITLOS having to show competence in both public international law and the law of the sea. A number of judges who have served on the ECtHR also stand out for having a ‘dual track record’ in both international law and human rights law.<sup>60</sup> Interestingly, the Advisory Panel of Experts on

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<sup>55</sup> J. Klabbbers, ‘Judging Inter-Legality’, in J. Klabbbers and G. Palimbella (eds.), *The Challenge of Inter-Legality* (2019), 339, at 357.

<sup>56</sup> ‘Presentation by Professor Georges Abi-Saab – Ensuring the Best Bench: Ways of Selecting Judges’, in C. Peck and 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* (1997), 66, at 172–173.

<sup>57</sup> J. Crawford, ‘The Ideal Arbitrator: Does One Size Fit All?’ (2017) 32 *Am. U. Int’l L. Rev.* 1003, at 1017.

<sup>58</sup> A. Roberts, ‘Incremental, Systemic and Paradigmatic Reform of Investor-State Arbitration’ (2018) 112 *AJIL* at 410; Ratner, *supra* note 42.

<sup>59</sup> P. Sands, ‘International Environmental Litigation and Its Future’ (1999) 32 *U. Rich. L. Rev.* 1619, 1638; T. Stephens, *International Courts and Environmental Protection* (2009) 58.

<sup>60</sup> See, e.g., Sicilianos who is currently president of the ECtHR; Rozakis (formerly first vice-president); or Ziemele (formerly president of the first section).

Candidates for Election as Judge to the ECtHR<sup>61</sup> adopts the working presumption that a professor of European and/or public international law and constitutional law is to be regarded as having competence in the field covered by the jurisdiction of the court, even if he/she has not specialised in human rights. Nonetheless, the panel introduces the caveat that professors in these and other fields are expected to demonstrate a real engagement during their career with questions of human rights related to their own main field of expertise.<sup>62</sup>

By way of concluding this section, the expertise available in the composition of an international court can and should be responsive both to the material jurisdiction of that court and the growing diversification of the court's docket. This is possible by ensuring that the composition of a court encompasses a diverse international law expertise. Existing statutory requirements when nominating and electing judges at specialised international courts, such as for example the ITLOS or the ECtHR, are open-ended and, therefore, can accommodate the idea of electing judges with diverse types of specialised expertise.<sup>63</sup> As far as specialised international courts are concerned their bench should incorporate not only judges with specialised expertise relevant to a court's material jurisdiction but also judges with competence in international law, including knowledge of general issues of international law *and* a strong background in the specialised area(s). Turning to courts of general jurisdiction, such as the ICJ, a broad interpretation of *competence in international law* would be welcome so as to include also judges who are additionally very well versed with certain specialised areas of international law.

### **3. Designing detailed statutory requirements concerning the presence of expertise in international law in the composition of the bench**

The statutory designs of recently established international courts — including specialised courts of a universal scope (e.g. the ICC) and regional specialised courts (e.g. the future African

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<sup>61</sup> The Advisory Panel is the independent body created in 2010 to advise the Council of Europe Parliamentary Assembly general committee on the suitability of nominated candidates to be elected as judges to the ECtHR; Committee of Ministers, Resolution 26/2010, CM/Res(2010)26, 10 November 2010 on the establishment of an Advisory Panel of Experts on Candidates for Election as Judge to the European Court of Human Rights.

<sup>62</sup> See Advisory Panel of Experts on Candidates for Election as Judge to the European Court of Human Rights, Second Activity Report for the Attention of the Committee of Ministers (2014–2015), Advisory Panel(2016)1, 25 February 2016, para. 45, available at [www.coe.int/en/web/dlapil/advisory-panel](http://www.coe.int/en/web/dlapil/advisory-panel). The approach of the ICC Advisory Committee seems to be very similar; see *infra* section 3.1.

<sup>63</sup> For example, Art. 21 (1) ECHR provides that 'The judges shall be of high moral character and must either possess the qualifications required for appointment to high judicial office or be jurisconsults of recognised competence'; Art. 2 (1) ITLOS Statute reads: 'The Tribunal shall be composed of a body of 21 independent members, elected from among persons enjoying the highest reputation for fairness and integrity and of recognized competence in the field of the law of the sea'.

Court of Justice and Human Rights and the Caribbean Court of Justice) — reveal a trend towards specifying and quantifying the recognised competence in international law required in the composition of the bench. The creation of separate lists for distinct expertise (in international law) and the introduction of quantitative requirements for these lists are appealing to states. In this way, the overall composition of expertise on the bench may be shaped without having to impose such expertise requirements on all judges.<sup>64</sup> However, caution is advised with very detailed schemes that specifically quantify the number of judges who must demonstrate competence in international law. Such schemes run the risk of being inflexible and becoming redundant in the future. Moreover, it is not clear whether the number of judges on the bench who must have competence in international law is appropriate or excessive — unless it is accepted that competence in international law is inclusive of specialised areas of international law too.

### ***3.1 The International Criminal Court***

For the purposes of electing judges to the ICC, state parties place a high value on the expertise requirement of established competence in international law. The Rome Statute of the ICC ('ICC Statute') introduces a specific track for candidates with competence in international law and sets out a concrete, mandatory quantitative scheme. More specifically, the ICC Statute creates two lists of candidates. List A contains candidates with established competence in criminal law and procedure and the necessary relevant experience, whether as a judge, prosecutor, advocate or in another, similar capacity, in criminal proceedings.<sup>65</sup> List B includes candidates with established competence in relevant areas of international law, such as international humanitarian law and the law of human rights, and extensive experience in a professional legal capacity of relevance to the judicial work of the ICC.<sup>66</sup> At the first election to the ICC, it was stipulated that at least nine judges must be elected from list A and at least five from list B. Subsequent elections were organised in such a way as to maintain these proportions.<sup>67</sup> The importance that ICC state parties place on the presence of international law expertise on the ICC bench is further illustrated by comparing it to the statutes of the International Criminal Tribunals for the Former Yugoslavia (ICTY) and for Rwanda (ICTR),

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<sup>64</sup> Mackenzie et al., *supra* note 3, at 46–47.

<sup>65</sup> Art. 36(3)(b)(i) and (5) ICC Statute.

<sup>66</sup> Art. 36(3)(b)(ii) and (5) ICC Statute.

<sup>67</sup> Art. 36(5) ICC Statute.

according to which established experience in international law was only one factor to consider when deciding the composition of chambers and sections of trial chambers.<sup>68</sup>

The fairly detailed expertise arrangements in the ICC Statute can be explained by the challenges of ensuring a fair trial, and the politicisation of the election of ICC judges.<sup>69</sup> The two separate lists of candidates served the aim of striking a balance between the need for judges with criminal law experience for the pretrial and trial divisions of the ICC, on the one hand, and the need for international law experience in the appeals division, on the other.<sup>70</sup> The presence of international law expertise was deemed necessary for various reasons. When the ICC began functioning, judges with organisational and diplomatic skills (e.g. concluding bilateral agreements) were required; individuals with competence and experience in international law very often have such skills and experience.<sup>71</sup> It was also expected that certain cases would require a solid knowledge of general issues of international law (e.g. state responsibility and treaty law).

However, the requirement for international law expertise is contentious and it is not clear whether these reasons justify a separate list of candidates and the fixed number of five judges from list B on the ICC bench.<sup>72</sup> Schabas casts doubt on the necessity of this statutory requirement, stating that it was exaggerated in the drafting stage given the influence of Antonio Cassese and that international law expertise is called for only infrequently.<sup>73</sup> Recently, Jacobs, Ambos and a report by Open Society Justice Initiative submit that knowledge of international law should become a subsidiary criterion for the selection of judges to the ICC — with no need for a separate candidate track<sup>74</sup> (or only for a separately elected Appeals Chamber, according to Guilfoyle).<sup>75</sup> In light of the ICC's increasing judicial and trial activity, experts exposed to

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<sup>68</sup> 'In the overall composition of the Chambers and sections of the Trial Chambers, due account shall be taken of the experience of the judges in criminal law, international law, including international humanitarian law and human rights law'; see Art. 13 Statute ICTY; Art. 12 Statute ICTR.

<sup>69</sup> Wood, *supra* note 26, at 362–363.

<sup>70</sup> M. Bohlander, 'Article 36: Qualifications, Nomination and Election of Judges', in O. Triffterer and K. Ambos (eds.), *Rome Statute of the International Criminal Court: A Commentary* (2016), 1216, at 1220; Mackenzie et al., *supra* note 3, at 46–47.

<sup>71</sup> Kai Ambos, 'Interests of Justice? The ICC Urgently needs reforms', *EJIL:Talk!*, 11 June 2019, available at [www.ejiltalk.org/interests-of-justice-the-icc-urgently-needs-reforms/](http://www.ejiltalk.org/interests-of-justice-the-icc-urgently-needs-reforms/).

<sup>72</sup> MacKenzie et al., *supra* note 3, at 46–47.

<sup>73</sup> W. A. Schabas, *The International Criminal Court – A Commentary on the Rome Statute* (2016), at 531–532.

<sup>74</sup> Ambos, *supra* note 71; D. Jacobs, 'Some Reactions to Douglas Guilfoyle's Posts on the Troubles of the ICC', *EJIL:Talk!*, 1 April 2019, available at [www.ejiltalk.org/some-reactions-to-douglas-guilfoyles-posts-on-the-troubles-of-the-icc/](http://www.ejiltalk.org/some-reactions-to-douglas-guilfoyles-posts-on-the-troubles-of-the-icc/); Open Society Justice Initiative, Report, *Raising the Bar: Improving the Nomination and Election of Judges to the International Criminal Court*, 2019, at 9.

<sup>75</sup> D. Guilfoyle, 'Of Babies, Bathwater, and List B Judges at the International Criminal Court', *EJILTalk!*, 13 November 2019, available at [www.ejiltalk.org/of-babies-bathwater-and-list-b-judges-at-the-international-criminal-court/](http://www.ejiltalk.org/of-babies-bathwater-and-list-b-judges-at-the-international-criminal-court/).

its inner workings suggest that increasing the number of judges with criminal law experience and a good familiarity with international criminal law should be prioritised instead.<sup>76</sup> Curiously, we might say that international criminal law expertise has been neglected in favour of public international law expertise.

It also appears that, in practice, the requirement for international law expertise is (ab)used as a pretext by states and judges alike. State parties present candidates who have no practical judicial experience but are former diplomats and, therefore, close to the executive power.<sup>77</sup> In other instances, like the public spat over who would preside over the *Gbagbo* appeal, the issue of judges' competence in international law seems to have been used as a pretext for serving judges' internal politics rather than being a genuine concern.<sup>78</sup> Ironically enough, when public international law competence was indeed required in *Jordan Referral re Al-Bashir*,<sup>79</sup> none of the judges sitting on the appeals chamber were drawn from list B candidates with recognised competence in international law.<sup>80</sup> In addition to this, it appears that, when questions of international law arise, judges from list A do not generally consult List B colleagues.<sup>81</sup>

Yet, the meaning of international law expertise needs to be further clarified with reference to the ICC Statute and the insights of the ICC Advisory Committee on Nominations

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<sup>76</sup> Ambos, *supra* note 71; Jacobs, *supra* note 74.

<sup>77</sup> Ambos, *supra* note 71.

<sup>78</sup> The President of the Appeals Division appointed the judge and president of the ICC Chile Eboe-Osuji as the presiding judge in the *Gbagbo* appeal case, even though Eboe-Osuji was already the presiding judge in Jordan's appeal concerning its failure to arrest Omar al-Bashir. Judge Luz del Carmen Ibañez Carranza, who is yet to be assigned to an appeal as a presiding judge, dissented from the decision to assign Judge Eboe-Osuji as a presiding judge to the case. Judge Luz del Carmen Ibañez Carranza underlined that the decision about who should preside the *Gbagbo* appeal case was adopted not on the basis of rotation or seniority but 'on the basis of the alleged expertise of one of the judges on "no case to answer" matters'. See Situation in the Republic of Côte d'Ivoire in the Case of the Prosecutor v Laurent Gbagbo and Charles Blé Goudé (Appeals Chamber), Decision on the Presiding Judge of the Appeals Chamber in the appeal of the Prosecutor against the oral decision of Trial Chamber I taken pursuant to article 81(3)(c)(i) of the Statute, ICC-02/11-01/15 OA14, 18 January 2019, available at [www.legal-tools.org/doc/a97417/pdf](http://www.legal-tools.org/doc/a97417/pdf); *ibid.*, Dissenting Opinion of Judge Luz del Carmen Ibañez Carranza, para. 6, available at [www.legal-tools.org/doc/558552/pdf](http://www.legal-tools.org/doc/558552/pdf). See K. J. Heller, 'The ICC and Appeals Division Presidents Defend the Presiding Judge Decision', *Opinion Juris*, 22 January 2019, available at [opiniojuris.org/2019/01/22/the-icc-and-appeals-division-presidents-defend-the-presiding-judge-decision/](http://opiniojuris.org/2019/01/22/the-icc-and-appeals-division-presidents-defend-the-presiding-judge-decision/).

<sup>79</sup> Appeals Chamber, Judgment in the Jordan Referral re Al-Bashir Appeal, ICC-02/05-01/09-397-Corr, 6 May 2019, available at [www.icc-cpi.int/Pages/record.aspx?docNo=ICC-02/05-01/09-397](http://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-02/05-01/09-397).

<sup>80</sup> Presiding Judge Chile Eboe-Osuji and Judges Solomy Balungi Bossa and Howard Morrison seem to have certain knowledge of international law. For their CVs see [www.icc-cpi.int/CourtStructure/Pages/judge.aspx?name=Judge%20Chile%20Eboe-Osuji](http://www.icc-cpi.int/CourtStructure/Pages/judge.aspx?name=Judge%20Chile%20Eboe-Osuji); [www.icc-cpi.int/CourtStructure/Pages/judge.aspx?name=Judge%20Howard%20Morrison](http://www.icc-cpi.int/CourtStructure/Pages/judge.aspx?name=Judge%20Howard%20Morrison); and [asp.icc-cpi.int/en\\_menus/asp/elections/judges/2017/Nominations/Pages/BOSSA.aspx](http://asp.icc-cpi.int/en_menus/asp/elections/judges/2017/Nominations/Pages/BOSSA.aspx).

<sup>81</sup> *Raising the Bar: Improving the Nomination and Election of Judges to the International Criminal Court*, *supra* note 74, at 21-22.

of ICC Judges.<sup>82</sup> The singular focus on general issues of international law, as mentioned earlier, and the potential for abuse of the expertise requirements, are not helpful in understanding the expertise needs of the ICC bench. The ICC Statute is strongly oriented towards expertise in specialised areas of international law which are informative to the bench.<sup>83</sup> Article 36 of the ICC Statute is geared towards the fields of human rights and international humanitarian law.<sup>84</sup> The emphasis on specialised expertise is also evident when the ICC Statute requires state parties to ‘take into account the need to include judges with legal expertise on specific issues, including, but not limited to, violence against women or children’.<sup>85</sup>

The assessments of the ICC Advisory Committee from 2012 to 2017 furnish insights into how the requirement of ‘established competence in relevant areas of international law such as international humanitarian law and the law of human rights’ is construed by nominating states and the ICC Advisory Committee itself. Public international law expertise is significant, but it is considered sufficient as long as it is complemented with a specialisation in an area of international law and extensive professional legal experience of relevance to the judicial work of the ICC. The expertise of nominees relates to international law, in general, but the defining criteria for nomination/election seem to be expertise and experience in international human rights law, coupled with considerable knowledge in international criminal law and international humanitarian law.<sup>86</sup> For instance, significant research experience in human rights relating to the criminal justice system, fair trial rights and rights of the defence is also a weighty consideration.<sup>87</sup> With regard to ‘extensive experience in a professional legal capacity which is of relevance to the judicial work of the Court’, state parties and the advisory committee prefer candidates who have the following types of experience: litigating experience in human rights

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<sup>82</sup> In 2012, the Assembly of state parties created the Advisory Committee on Nominations of ICC Judges. The Committee’s role is advisory. See International Criminal Court - Assembly of States Parties, Report of the Bureau Working Group on the Advisory Committee on Nominations, ICC-ASP/11/47, 8 November 2012. All reports of the Advisory Committee are available at [asp.icc-cpi.int/en\\_menus/asp/ACN/Pages/default.aspx](http://asp.icc-cpi.int/en_menus/asp/ACN/Pages/default.aspx). For a critical assessment of the work of the ICC Advisory Committee see *Raising the Bar: Improving the Nomination and Election of Judges to the International Criminal Court*, *supra* note 74, at 43-47.

<sup>83</sup> Schabas, *supra* note 73.

<sup>84</sup> International humanitarian law and human rights law were also among the examples mentioned in the ICTY and ICTR Statutes when referring to the need for judges to have experience in international law. See Art. 13 Statute ICTY; Art. 12 Statute ICTR.

<sup>85</sup> Art. 36(8)(b) ICC Statute.

<sup>86</sup> International Criminal Court - Assembly of States Parties, Report of the Advisory Committee on Nominations of Judges on the work of its third meeting, ICC-ASP/13/22, 29 September 2014, at 10–12; International Criminal Court - Assembly of States Parties, Report of the Advisory Committee on Nominations of Judges on the work of its sixth meeting, ICC-ASP/16/7, 10 October 2017, at 11, 12.

<sup>87</sup> 2014 ICC Advisory Committee, *supra* note 86, at 11.

law or international criminal law;<sup>88</sup> field experience in human rights;<sup>89</sup> having served as a legal officer at international courts<sup>90</sup> or the Ministry of Foreign Affairs;<sup>91</sup> experience presiding expert committees or implementing human rights and criminal law standards at the national level;<sup>92</sup> and having engaged in relevant policymaking and lawmaking activities.<sup>93</sup>

The previous points strongly suggest that the *relevant areas of* international law anchor the meaning of international law expertise. Candidates with diverse competence and experience in specialised areas of international law, especially (international) criminal law, should be prioritised when nominating and/or electing judges from list B. That being said, as emphasised in Section 2.2.2, at least certain of these candidates are expected to have a recognised competence in general issues of international law so that the ICC is able to navigate the crosscuts between general and special areas of international law. Notwithstanding the rigid quantification scheme of the judges elected from lists A and B, the ICC expertise statutory requirements do not seem to be problematic per se since the requirements accord considerable leeway. Rather, issues of concern are attached to how states construe the statutory requirements in practice when nominating and electing judges.

### **3.2 The African Court of Justice and Human Rights**

The African Court of Justice and Human Rights is expected to merge the Court of Justice of the African Union and the African Court on Human and Peoples' Rights (ACtHPR) into a single court.<sup>94</sup> The Statute of the African Court of Justice and Human Rights differs from the Statute of the ACtHPR concerning the qualifications for prospective judges. According to the

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<sup>88</sup> 2017 ICC Advisory Committee, *supra* note 86, at 12 (litigating complex criminal cases before the Inter-American Commission on Human Rights as counsel, focusing *inter alia* on the rights of women, children, prisoners and enforced disappearances); 2014 ICC Advisory Committee, *supra* note 86, at 11 (having been listed as counsel qualified for appointment to represent accused and victims before the ICC); 2014 ICC Advisory Committee, *supra* note 86, at 11 (having gained experience in working on victims' rights in the criminal process).

<sup>89</sup> 2017 ICC Advisory Committee, *supra* note 86, at 11.

<sup>90</sup> For instance, having worked as a legal officer at the ICJ or the ICTR; see 2014 ICC Advisory Committee, *supra* note 86, at 10 and 11–12, respectively.

<sup>91</sup> *Ibid.*, at 12 (working as the director of Legal Affairs at the Ministry of Foreign Affairs); *ibid.*, at 11 (working in relevant areas in said Ministry).

<sup>92</sup> *Ibid.*, at 11 (presiding and providing several legal opinions on human rights and criminal matters at the national level); *ibid.*, at 12 (presiding the National Institution of Human Rights and Ombudsman).

<sup>93</sup> *Ibid.*, at 11–12 (e.g. participating in the negotiations leading up to the Rome Statute, serving as the ambassador to the UN or heading a national delegation at the UN Human Rights Commission).

<sup>94</sup> Protocol on the Statute of the African Court of Justice and Human Rights, adopted by the eleventh ordinary session of the African Union Assembly, 1 July 2008 (not in force), available at [au.int/sites/default/files/treaties/7792-treaty-0035 -](http://au.int/sites/default/files/treaties/7792-treaty-0035_-_protocol_on_the_statute_of_the_african_court_of_justice_and_human_rights_e.pdf)

[\\_protocol\\_on\\_the\\_statute\\_of\\_the\\_african\\_court\\_of\\_justice\\_and\\_human\\_rights\\_e.pdf](http://au.int/sites/default/files/treaties/7792-treaty-0035_-_protocol_on_the_statute_of_the_african_court_of_justice_and_human_rights_e.pdf). As of 6 February 2019, seven instruments of ratification have been deposited. The Protocol and the Statute annexed to it will enter into force 30 days after the deposit of the instruments of ratification by 15 member states.

Statute of the ACtHPR, nominated judges can be individuals of recognised practical, judicial or academic competence and experience in the field of human and peoples' rights.<sup>95</sup> In contrast, the Statute of the African Court of Justice and Human Rights follows the ICC Statute by creating two separate lists of candidates: list A concerns candidates who have recognised competence and experience in international law and list B relates to candidates who possess recognised competence and experience in human rights law.<sup>96</sup> At the first election, eight judges will be elected from list A and eight from list B; the same proportion of judges elected from the two lists should be maintained in subsequent elections.<sup>97</sup>

These new individual requirements for electing judges to the future African Court of Justice and Human Rights can be explained by the court's broad jurisdiction, which extends to disputes concerning, among others, any question of international law.<sup>98</sup> This wide jurisdiction *ratione materiae* explains why the drafters specifically provided for the requirement for international law expertise in addition to competence in human rights. Nonetheless, it is unclear whether the specified quota of judges with competence in international law (half of the judges on the bench) is excessive. It remains to be seen whether the processes of nomination and election will construe competence in international law as also including specialised areas of international law which can be of relevance to the court's work (e.g. international criminal law).

### ***3.3 The Caribbean Court of Justice***

Finally, the Statute of the Caribbean Court of Justice also presents certain interesting features compared to other international courts.<sup>99</sup> Elected judges need to have served as judges for at least five years and distinguished themselves in that office or to have taught law for a period of at least 15 years and distinguished themselves in the legal profession.<sup>100</sup> The CCJ is

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<sup>95</sup> Art. 11(1) Protocol to the African Charter on Human and People's Rights on the Establishment of an African Court on Human and People's Rights.

<sup>96</sup> Art. 4 Protocol on the Statute of the African Court of Justice and Human Rights (Qualifications of Judges) reads: 'The Court shall be composed of impartial and independent Judges elected 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 juris-consults of recognised competence and experience in international law, international human rights law, international humanitarian law or international criminal law.'

<sup>97</sup> *Ibid.*, Art. 6.

<sup>98</sup> *Ibid.*, Art. 28.

<sup>99</sup> The Caribbean Court of Justice is both the highest municipal court in the region and an international court with compulsory and exclusive jurisdiction in respect of the interpretation and application of the Treaty of Chaguaramas. See K. Malleon, 'Promoting Judicial Independence in the International Courts: Lessons from the Caribbean' (2009) 58 ICLQ 671, at 674.

<sup>100</sup> 2011 Agreement Establishing the Caribbean Court of Justice, available at [www.ccj.org/court-instruments/the-agreement-establishing-the-ccj/](http://www.ccj.org/court-instruments/the-agreement-establishing-the-ccj/), Art. 4(10)(a) and (b).

composed of the president and not more than nine other judges, of whom at least three (including the president) need to possess expertise in international law, including international trade law.<sup>101</sup> Presently, the CCJ comprises seven judges (including the president),<sup>102</sup> two with expertise in international human rights law (Judge Winston Anderson and Justice Denys Barrow)<sup>103</sup> and one with expertise in international trade law (Judge Andrew Burgess).<sup>104</sup>

To conclude Section 3, states are keen on adopting detailed statutory requirements in order to specify and quantify the presence of judges with recognised competence in international law and relevant areas thereof on the bench. Such areas include international law, international humanitarian law and human rights law (ICC); international trade law and human rights law (CCJ); or international law and human rights law (future African Court of Justice and Human Rights). In the case of the ICC the meaning of international law expertise in the composition of the court is currently highly debatable and gives rise to underlying politics. It is premature to draw any conclusions with regard to the statutes of the CCJ and the future African Court of Justice and Human Rights. Given the ongoing experimentation in state practice, envisaging the presence of different types of expertise in the composition of a court is welcome but caution is advised with setting up overly detailed schemes.

#### 4 Conclusion

Deciding who will sit on the court as a judge is one of the ways that states control international courts.<sup>105</sup> Therefore, the composition of an international court is shaped by the role states expect it to play in international affairs.<sup>106</sup> The jurisdiction of existing international courts may not alter, but courts engage with changing functions, which can be seen in the current density of international law and the complex and diversified disputes brought by states and other actors to be judicially adjudicated.

It is difficult to ascertain whether states attach any particular weight to expertise requirements and, in particular, to competence in (specialised fields of) international law, when nominating and electing judges. This chapter, however, has shown that there is certain evidence to support the view that states do attach significance to these requirements. This may be inferred from the choices made by states when, for instance, they systematically elect

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<sup>101</sup> Art. 4(1) Agreement Establishing the Caribbean Court of Justice.

<sup>102</sup> See [www.ccj.org/about-the-ccj/judges](http://www.ccj.org/about-the-ccj/judges).

<sup>103</sup> Their bios are available at [www.caribbeancourtsofjustice.org/about-the-ccj/judges/anderson](http://www.caribbeancourtsofjustice.org/about-the-ccj/judges/anderson) and [www.caribbeancourtsofjustice.org/about-the-ccj/judges/the-honourable-mr-justice-denys-barrow](http://www.caribbeancourtsofjustice.org/about-the-ccj/judges/the-honourable-mr-justice-denys-barrow) respectively.

<sup>104</sup> His bio is available at [www.ccj.org/about-the-ccj/judges/the-honourable-mr-justice-andrew-burgess](http://www.ccj.org/about-the-ccj/judges/the-honourable-mr-justice-andrew-burgess).

<sup>105</sup> Sands, *supra* note 1, at 485.

<sup>106</sup> Kingsbury, *supra* note 5, at 215–222; Keith, *supra* note 7, at 66–67.

individuals with a strong background in international human rights law to the ICJ bench, or from express statements to the effect that competence in international law is implicit in the statutory requirements for judges sitting on the ITLOS and the ECtHR respectively or practice that points to this assumption.

The chapter argued that, subject to the specifics of each court, the meaning of the statutory requirement *competence in international law* should be read in a broad fashion, seeking out individuals who not only have recognised competence in international law *stricto sensu* but also strong complementary knowledge in specialised area(s) of international law relevant to a given court's judicial work. Judges who are conversant with both general and special aspects *and* areas of international law are well placed to construe, when needed in a given dispute, the specific subject matter entrusted to a court *vis-à-vis* general issues of international law and *vis-à-vis* other specialised areas of international law. The expertise-related criteria for office in the statutes of both general and specialised international courts discussed previously are open-ended enough to accord room for many types of expertise to be incorporated on the bench. The detailed expertise requirements included in the statutes of new international courts strongly suggest a turn towards favouring and quantifying different types of expertise in international law on the bench. In practice, state parties motivated by various considerations may apply these requirements in order to favour particular kinds of expertise, as was discussed in the case of the ICC. It remains to be seen whether the detailed quotas for the number of judges will be flexible enough to accommodate different priorities and the real needs of the bench.