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National Groups and the Nomination of Judges of the International Court of Justice: A Preliminary Report

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Earlier in the year, the Legal Counsel of the United Nations, acting on behalf of the Secretary-General, addressed a letter to the foreign ministers of the member states of the United Nations and of Liechtenstein, San Marino, and Switzerland, drawing their attention to the fact that the terms of the following five members of the International Court of Justice will expire on 5 February 1976:

Fouad Ammoun (Lebanon)
Cesar Bengzon (Philippines)
Manfred Lachs (Poland)
Charles D. Onyeama (Nigeria)
Sture Petren (Sweden)

Thus, in accordance with Article 4 of the Statute of the Court, the General Assembly and the Security Council, during the thirtieth regular session of the General Assembly, will elect five judges for a period of nine years, beginning on 6 February 1976. Every three years, one-third of the fifteen judges of the International Court are elected in this way.

To be elected, candidates must obtain an absolute majority of votes in both the General Assembly and the Security Council. They are selected from a list of nominees submitted by the National Groups of the Permanent Court of Arbitration[1] or, for those states which are not represented in the Permanent Court of Arbitration, by National Groups which are appointed for this purpose

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[1]A state which is party to either the 1899 or 1907 Hague Convention for the Pacific Settlement of Disputes may appoint up to four members of the Permanent Court of Arbitration and these appointments are collectively referred to as its National Group. The expression "National Group" does not appear in the Hague Conventions which set up the Permanent Court of Arbitration although it is used throughout the statutes of both the Permanent Court of International Justice (1922-1946) and the International Court of Justice (1946-). *See* MANLEY O. HUDSON, THE PERMANENT COURT OF INTERNATIONAL JUSTICE (New York: The MacMillan Company, 1934), p. 131.

by their governments under the same conditions as those prescribed for members of the Permanent Court of Arbitration.[2] For this reason, the Legal Counsel, in his letter, asks each foreign minister to transmit communications addressed to the National Group in the minister's country, inviting them to nominate candidates for this year's elections.

These nominations are important because it is only in the most unusual, and so far unprecedented, circumstances that a judge can be elected without the prior nomination of a National Group.[3] Moreover, in the last regular election, held in 1972, only eight candidates contested the five places available and, when allowances are made for the "gentlemen's agreements" reached at the UN which help to ensure the representation of the major powers and the different geographical regions, receiving the nomination of a particular National Group may be tantamount to being elected. Yet despite the importance of these judicial appointments, little academic interest has focused on the matter of who gets nominated and how.

In what follows, I propose to take a closer look at the way in which the procedure for nominating candidates works—both in theory and in practice. But first it may be helpful to review briefly how the present system came to be accepted.

Section I

The successful arbitrations of the 19th century provided an incentive for exploring the possibility of tribunals of a less temporary nature. With the turn of the century came various plans for courts of an international character; unfortunately, the problem of composition was omnipresent. This problem was avoided by the 1899 Conference at the Hague; the Permanent Court of Arbitration[4] which was created there merely provided a list of names from which arbitration panels could be appointed *ad hoc.* It remained for the parties in each case to find a suitable method for choosing the arbitrators. The problem of composition was taken up—again unsuccessfully—at the second Hague Conference (1907) with respect to a proposed Court of Arbitral Justice. At this conference, all the essential features of the court were agreed upon except the method for selecting the judges and the following resolution was adopted:

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[2]The relevant articles of the Statute of the International Court of Justice which set out the rules governing these nominations are discussed in greater detail below and listed in an appendix to this paper. The procedure is the same as that employed by the Permanent Court of International Justice.

[3]*See* Article 12 of the statute and discussion below.

[4]Professor Hudson has pointed out that the name of the Permanent Court of Arbitration is in fact a misnomer since the institution is not strictly speaking a court and only its administrative facilities are permanent. HUDSON, *op. cit.*, p. 10.

> The Conference recommends to the signatory powers the adoption of the annexed draft convention for a court of arbitral justice and the bringing it into force as soon as agreement can be reached respecting the selection of judges and the constitution of the court.[5]

In 1910, American, British, French, and German jurists held informal negotiations on this matter and the subject was to merit priority at what was to be the third Hague Conference. Planned for 1915, the conference was unfortunately never convened, the outbreak of war making the scheme impractical.

Also submitted at the Hague Conference of 1907 were plans for an International Prize Court. However, there were two obstacles to the implementation of these plans: first, a consensus was lacking about which law the court should apply; and second, again there was not sufficient agreement as to how the judges should be elected. Codification of the relevant law at the 1908-9 London Naval Conference went some way toward solving the first problem but a satisfactory solution to the problem of composition was missing and the convention never received the ratifications necessary to bring it into force.

Endeavours to establish an International Criminal Court have met with similar problems.[6]

Five Latin American states did succeed in organizing an international tribunal. The Central American Court of Justice[7] functioned for ten years from 1908 until its initial mandate expired. The court's commission was not renewed. Again, an inadequate method for manning the court seems to have contributed to its failure. Judges were directly appointed by and under oath to their national governments. Their salaries were paid by their respective governments and, as it turned out, they could be recalled. In 1923, an attempt was made to revive the court along the less ambitious lines of the Permanent Court of Arbitration but a list of eligible judges was never completed.

For the above reasons, the effectuation of the Permanent Court of International Justice (and its successor the International Court of Justice) is all the more remarkable. Indeed, the method of resolving the problem of composition is the real achievement of the Committee of Jurists which drew up

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[5]THE WORLD COURT, 9th edition (New York: The American Foundation, 1931), pp. 5-6.

[6]For a discussion of several early proposals for an International Criminal Court, *see* HUDSON, INTERNATIONAL TRIBUNALS (Washington: Carnegie Endowment, 1944), pp. 180-6; for a more recent attempt *see* "The Establishment of an International Criminal Court," The Johnson Foundation, 1973.

[7]For a review of the Central American Court of Justice, *see* Hudson, *The Central American Court of Justice*, 26 AJIL 1932, pp. 759-86.

the plans for the new court.[8] The court could neither be set up nor survive without the support of the so-called "Great Powers" and that support would only be given if each power felt assured that one of its nationals would always sit on the bench. The problem had been one of reconciling the fact with the principle of state equality. The answer was provided by the organization of the League of Nations: to be elected a judge would require majority approval by *both* the council and the assembly of the League. But to be eligible for election, each candidate needed first the nomination of a nongovernmental agency, the National Group.

Section II

The 1920 Committee of Jurists which drafted the Statute of the Court had before it the following memorandum prepared by the Legal Section of the League Secretariat:

> Mention may be made of a principle which has been utilised alike in ancient and modern politics and which might also, in certain circumstances, be utilised in the appointment of members of the international Court. It is the principle whereby one body nominates officials while another body selects or appoints them. Resort to this principle for the purpose mentioned might make it easier to differentiate between States on grounds of political power or on geographical considerations, if it were so desired.[9]

The principle was indeed adopted but not for the reasons suggested. Power differentials and geographical considerations were to be protected by separate voting in the council and the assembly of the League. Instead, here was seen to be an opportunity to strengthen, in theory, the independence and impartiality of the court. In its final report, the committee "unanimously agreed that the choice of the judges . . . should not be left entirely to the discretion of Governments, but that public opinion, or at any rate the opinions of the enlightened few who are qualified to gauge the merits of persons to be selected for nomination should have a great influence."[10]

Before discussing contemporary practice, it is worth taking a closer look at the theory of the statute. First, it should be noted that the situations of the Permanent Court of International Justice and the International Court of Justice differ little with regard to the subject of composition. The details of the election procedure need not concern us here. It is sufficient to observe that an election for judges of the International Court of Justice is very much an international

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[8]Little else was original in their draft; "the *project* was continually referred to during the deliberations of the Committee, and it was precisely the question left open by that *project*, as to the method of electing judges, which caused the greatest difficulty and to which a large proportion of the Committee's time was given." HUDSON, THE PERMANENT COURT OF INTERNATIONAL JUSTICE, p. 109.

[9]League of Nations Document. V. 1920.1, p. 89.

[10]LN Doc. V. 1920.2, p. 701.

relations phenomenon. Thus the separate votes by the General Assembly and the Security Council bring into play the political bargaining to which United Nations elections are customarily subject.[11]

The nominating groups, on the other hand, although they are entrusted with international responsibilities, function almost entirely within a domestic context. The procedure for nominating candidates for the court is stipulated in Articles 4 - 7 of the statute and is governed to a lesser extent by Articles 2, 9, 12, 14, 31, and 39.

Article 4 identifies the "enlightened few" from whom the nominations are to come. These are to be the National Groups[12] comprising the Permanent Court of Arbitration[13] or, for states not represented in the court, groups especially appointed for the purpose of these nominations.[14] The intention of this method is clearly to diminish the control of the individual governments.[15] The question of who should nominate was much debated in the 1920 Committee of Jurists, several schemes calling for more direct nomination by governments being proffered.[16] An Informal Inter-Allied Committee of Experts meeting in London during the Second World War concluded that the system had not worked as intended,[17] but in 1945, a proposal that would have permitted the direct nomination of candidates by states was again rejected. Championed by the British delegation, the arguments for change were that:

> (a) the system of 'national groups' should be abolished because it is too complicated; (b) it may have had a *raison d'etre* in the past but has ceased to be either indispensable or advisable; (c) the simpler method of direct nomination by the government will reduce the possibility of making 'political nominations.'[18]

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[11]For the results of the ICJ elections until 1965, *see* SHABTAI ROSENNE, THE LAW AND PRACTICE OF THE INTERNATIONAL COURT (Leyden: A.W. Sijthoff, 1965), pp. 924-31. The results of each election are listed in the relevant volume of the *ICJ Yearbook*. For an appreciation of the election procedure of the ICJ, *see* ROSENNE, *op. cit.*, pp. 184-190; for an appreciation of the election procedure of the PCIJ, *see* HUDSON, THE PERMANENT COURT OF INTERNATIONAL JUSTICE, pp. 256-7; for a discussion of UN voting in ICJ elections, *see* A.W. Rudzinski, *Election Procedure in the United Nations*, 53 AMERICAN JOURNAL OF INTERNATIONAL LAW 1959, pp. 81-111.

[12]*See* fn. 1, *supra*.

[13]It was often emphasized that one advantage of the nomination procedure was that it linked the PCIJ with the PCA and provided for their co-existence. *See, e.g.*, M. de Lapradelle's remarks to the Committee of Jurists in LN Doc. V. 1920.2, p. 148.

[14]It is interesting to note that at the time when this method was adopted by the 1920 Committee of Jurists, the number of affected states which were not members of the Permanent Court of Arbitration was very small (*e.g.*, the British Dominions). However, at the last election of the ICJ nearly half of the voting States were non-members of the PCA.

[15]"These provisions—especially the fact that the nominations are made by the national groups in the Hague Court—remove the possibility of nomination by any nation or group of nations." WORLD COURT, p. 16.

[16]*See, e.g.*, the Norwegian scheme, LN Doc. V. 1920.1, p. 229.

[17]*Report of the Informal Inter-Allied Committee on the Future of the Permanent Court of International Justice*, 10 February 1944, in Supplement to 39 AJIL 1945, p. 14.

[18]Documents of the United Nations Conference on International Organization, San Francisco, 1945, vol. 14, p. 275.

The voting had been very close: 5-4 in favour of direct nomination by governments in the subcommittee of the 1945 Committee of Jurists;[19] 16-16 in the full committee;[20] but at San Francisco where the matter was resolved, delegates voted 32-8 to retain the National Group system.[21] The view dating back to the Hague Conference of 1907 that in fact direct nomination would add a political element prevailed.[22]

In practice, governments retain some control over the nominations. They appoint the members of the National Groups and, in the nominating process itself, an unofficial method of consultation has developed.[23] Also, it must be added that in the final analysis, it is the governments which elect the judges. Still, "the International Court of Justice is the only principal organ of the United Nations which is composed of individuals not directly representing States."[24]

According to Article 5, paragraph 1, of the statute, it is the Secretary-General's responsibility to invite the National Groups to submit their nominations at least three months before the date of the election. The paragraph gives rise to certain problems of interpretation. First, the nominations must be returned "within a given time"[25] but although the Secretary-General sets a date for their submission, in practice nominations received after that date and indeed right up to the election are accepted. Second, the fact that the National Groups are called upon to nominate "persons in a position to accept the duties of a member of the Court" would seem to impose on the group an obligation to ascertain the willingness of any proposed candidate to stand for election. It is understood that such enquiries often are not made[26] and many nominees frequently ask that their names be withdrawn from the Secretary-General's list.

Article 5, paragraph 2, limits the number of nationals that a nominating group may propose to not more than two, but encourages the naming of at least an equal number of non-nationals by allowing for a total of up to four

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[19]N.J. Padelford, *The Composition of the International Court of Justice: Background and Practice*, in K. DEUTSCH and S. HOFFMAN, (eds.), THE RELEVANCE OF INTERNATIONAL LAW (Cambridge, Mass: Schenkman Publishing Company, 1968), p. 226.

[20]*Papers Relating to the Foreign Relations of the United States*, 1945, vol. 1, p. 496.

[21]UNCIO, vol. 13, p. 180.

[22]*See* Elihu Root's statement cited in UNCIO, Vol. 14, p. 193. *Compare* American objections to British proposals, US FOREIGN RELATIONS PAPERS, 1945, vol. 1, p. 270.

[23]"It is a matter of common knowledge that the process of nominations is accompanied by a considerable amount of unofficial consultation between the various national groups, and also between different Governments." ROSENNE, THE WORLD COURT (New York: Oceana Publication, 1952), p. 125.

[24]*Ibid.*, p. 56. Professor Rosenne is obviously excluding the Secretariat.

[25]These words were added as an afterthought on a suggestion by the Roumanian delegate to the League of Nations Third Committee. LN Doc. V. 1920.3, p. 100.

[26]Private sources.

nominations.[27] The number of nominees allowed is greater than was originally proposed. The increase was effected "in order to give the different groups a larger opportunity to propose candidates of universally known competence but of a nationality other than that of the nominating group."[28]

Article 6 recommends that suggestions for nominees be solicited from non-political sources. It is clear from the *travaux préparatoires* that the National Group should take an initiative in collecting this information.[29] But it is equally clear that the obligations created by Article 6 are moral and not legal ones.[30] Nevertheless, a motion in subcommittee to suppress the article on grounds of its impracticality failed by a single vote.[31] When the subject came under review in 1944, it was advised that the article be retained. It was felt, however, that to make these obligations more definite "would lead to insuperable difficulties, since the conditions in different countries vary considerably and it is not possible to lay down precise universal rules as to what bodies are to be consulted, what method is to be adopted, or what weight is to be given to the view of different legal authorities."[32]

In keeping with the view that the judges are to be selected as individuals and not as representatives, Article 7 requires that for the elections the candidates be listed alphabetically and *not* by governments. In practice, after the name of each nominee the Secretary-General indicates which National Groups have submitted the nomination.[33]

The professional qualifications of the judges (Article 2) and the fact that the court as a whole is expected to "represent the main forms of civilization and the principal legal systems of the world" (Article 9) are considerations which must be taken into account at the time of elections. However, since the electors can only choose from among the candidates nominated, it may be argued that these articles create obligations for the National Groups as well.

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[27]The National Group of the Dominican Republic submitted six names for the 1948 election. All six candidates were listed initially on the Secretary-General's list. However, the Secretary-General informed the National Group of the error which was subsequently corrected in time for the election. *See* UN Doc. A/623.

[28]LN Doc. V. 1920.3, p. 172.

[29]*See* the *Report of the Committee of Jurists* - 1920: "[the National Group] will be assisted in these nominations by suggestions, *which they must not only receive but invite.*" (emphasis added). LN Doc. V. 1920.2, p. 706.

[30]*Ibid.*, p. 707: "the nomination is not rendered void if one of these bodies is not consulted; and even if they are all consulted there is no definite obligation to choose the name of the person who has received most support from them; if any State's national group of the Court of Arbitration should decide upon another name it is quite free to do so."

[31]LN Doc. V. 1920.3, p. 118.

[32]Report of the Informal Inter-Allied Committee on the Future of the Permanent Court of International Justice, 10 February 1944, *op. cit.*, p. 15.

[33]In the 1920 Committee of Jurists, this practice was justified on the dubious grounds that the "nominations of Haiti could not have the same value as those of England." LN Doc. V. 1920.2, p. 432.

Article 12, on the other hand, stipulates a possible exception to the rule that candidates must be nominated by National Groups: if as provided, a joint conference of the General Assembly and the Security Council fails to break a voting deadlock on a particular seat, and if the joint conference is unanimously in favour of a candidate whose name does not appear on the list of nominees, then that person's name may be submitted to the General Assembly and the Security Council for their respective acceptance. To date it has not been necessary to resort to such a procedure. Indeed, it was the opinion of one member of the 1920 Committee of Jurists that "when we drew up the Statute of the Court, we were all of the opinion that necessity would never arise to have recourse to Article 12."[34]

Article 14 implies that in the case of vacancies, the nominating procedure shall be the same as in a regular election.

Article 31 introduces the somewhat novel provision that if a party before the court is not represented by a national[35] on the court's bench then that party may appoint a judge ad hoc to hear that particular case. These judges ad hoc are not subject to the same selection procedure as titular judges. It is recommended (paragraph 2) that they be chosen from among persons who have previously been nominated as candidates but in practice this recommendation is observed infrequently. Various proposals have been advanced for bringing the appointment of these judges more in line with that of the titular judges but none successfully.[36]

Finally, Article 39 provides that the official languages of the court shall be French and English. Presumably, each judge must be versed in at least one of these languages. However, the question has never been answered whether there is thus an obligation on the part of the National Group to satisfy itself of its nominee's ability in this respect.

Section III

To what extent does the contemporary practice of the National Groups in arriving at their nominations conform to the theory of the statute? Research on this subject is handicapped in several ways. Most of the National Groups lack a formal structure of any kind. It is difficult to contact the groups since they have neither a secretariat nor a common address. Often members never meet as a

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[34]Cited in HUDSON, *op. cit.*, p. 138.

[35]A judge with the same nationality as a party before the court continues to sit in that case. This provision would appear consistent with the emphasis in the statute on the independence of the judges. Judges are meant to be nominated and elected on the basis of their personal qualifications without regard to nationality. They are paid and protected by the United Nations organization as a whole. A situation can arise in which a judge may be disqualified from hearing a case, but a decision in this instance will be based on a judge's personal and not national relation to the facts of the case.

[36]For a discussion of these proposals *see* ROSENNE, THE INTERNATIONAL COURT OF JUSTICE (Leyden: A.W. Sijthoff, 1957), pp. 148-9.

group[37] and little documentation exists on the activity of individual members in this capacity. Frequently, in the case of states not members of the Permanent Court of Arbitration, the composition of the National Group is unknown. Even in countries where appointments to municipal courts are matters of public concern, little attention is directed toward the proceedings of the National Group. Many international lawyers content themselves with the view that these groups operate as "closed shops."

What research has been possible would suggest that the way in which a given National Group interprets its task and operates in practice very much reflects national traditions. It is believed, for example, that in contrast to many countries, the National Groups in Great Britain and the United States function quite independently from their respective governments.[38] This is not to suggest that these National Groups would knowingly put forward the name of a candidate who was persona non grata in the eyes of the national government; on the contrary, the National Group (or National Group member) is very likely to see that the nominees proposed are acceptable to the government.[39] Nor should such an initiative be deplored for at least two reasons, albeit political ones: first, it is the states through their representatives at the United Nations which must elect the judges and there is no record of a judge being elected, no matter by whom he was nominated, without the support of his own government;[40] second, in the last analysis, the effectiveness of the court depends on the attitude of the states party to it: no state is likely to use the court unless it feels that its legal position, though not championed, will at least be appreciated. Hence, the institution of the ad hoc judge, an option which is not open to a state when one of its nationals sits on the bench.[41] Returning to the practice of the British and American National Groups, their independence is nevertheless discernible in terms of initiative and decision-making which remain the prerogatives of the National Group members.

Yet even in countries possessing such closely linked legal traditions as Great Britain and the United States, profound differences in the practice of the National Groups can be distinguished. For example, every British judge elected

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[37]*See, e.g.*, the practice of the British National Group discussed below. This is clearly antipathetic to the intention expressed in the meetings of the 1920 Committee of Jurists. At the time, it was felt that problems of transportation would make it difficult for all the National Groups to assemble in one place but that *each* National Group would convene in its own state for the purpose of these nominations. *See* LN Doc. V. 1920.2, p. 706.

[38]Private sources.

[39]It is interesting, therefore, that the one interest group which the National Groups are *not* recommended to consult in Article 6 of the statute is the government.

[40]*See, e.g.*, the discussion below of the fate of the American candidates in the 1946 election. On the other hand, a judge has been elected *without the nomination of his National Group* although this situation is exceptional. In the 1930 general election, Jonkheer van Eysinga of the Netherlands was elected judge without the nomination of the Dutch National Group. For an account of this election *see* HUDSON, *op. cit.*, pp. 244-247.

[41]*See* Article 31 of the statute.

to either the Permanent Court of International Justice or the International Court of Justice has himself served as a member of the British National Group.[42] This practice is perhaps lamentable from the point of view that justice must not only be done but that it must appear to have been done; the record has led one eminent jurist to conclude in a confidential interview that it appears "British National Group members take turns nominating each other."[43] The situation with respect to nominations for the Permanent Court of International Justice was particularly blatant. Each British judge elected to that court was nominated by a National Group of which he had been the sole member![44] On the other hand, it would be unfair to criticize the British judges thus selected, each of whom contributed significantly to the development of international law while sitting on the court.

It should also be pointed out that the British National Group has generally maintained a full membership of four in dealing with nominations for the International Court of Justice although no formal structure as such has been imposed on the group for this purpose. It is understood, for example, that it has never been the practice of the group acting as a group to carry out the consultations recommended in Article 6.[45] The practice is to leave it to each member of the group to carry out consultations as he thinks necessary or desirable in that branch of the profession to which he belongs. Of course any member of the group may suggest to the others that a particular consultation would be desirable, but it would still normally be left to one or the other of the members of the National Group to carry it out.

The reasons for this approach are largely practical and very much those which were raised by the Italians originally when the Statute of the Permanent Court of International Justice was being discussed by the Advisory Committee of Jurists.[46] There is invariably a shortage of time for making these nominations

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[42]For the members of the National Groups of the Permanent Court of Arbitration *see* the current *Rapport du Conseil Administratif de la Cour Permanente d'Arbitrage.*

[43]Private source.

[44]For appointment in such circumstances, *see* HUDSON, *op. cit.*, p. 245, n. 38. Lord Finlay, the first British judge elected to the court, was so self-conscious of the difficulty of nominating himself that he had Lord Sterndale co-sign the letter announcing his nomination. The British government then hastily appointed Lord Sterndale for the Permanent Court of Arbitration. *See* FO/371/7034.

[45]*See* above for a discussion of these recommendations. All information concerning the recent practice of the United Kingdom National Group, unless otherwise indicated, comes from confidential sources.

[46]*See* above. In the course of the League Assembly of 1920, the British and Italian Governments proposed the elimination of Article 6. The reasons given by the Italians were that this provision did not have an obligatory character and that to carry it out literally would give rise to considerable embarrasment and difficulty. *See* B.S.V. STAUFFENBERG, STATUT ET REGLEMENT (Berlin: C. Heymanns Verlag, 1934), p. 34. The reservations were summarized by the Italian representative at a private meeting of the Committee of Jurists at the Hague on July 8th, 1920: "M. Ricci-Busatti said that he would vote against this Article [subsequently Article 6], as it seemed to him to be useless and even harmful. The members of the Court of Arbitration would certainly consult those persons whose

and it is already by no means easy to stage the necessary meetings of the members of the group. It would be invidious to consult one university and not another, but if the group were to consult a whole number of universities, as well as a considerable number of other personalities, and to weigh their answers, which might not come until after they themselves had consulted yet other persons, the whole thing would become unmanageable.

There is another point: the chief importance of the role played by the United Kingdom National Group *as seen by members of that group* is in connection with the "British seat"[47] on the court, but this only comes up once in nine years. Even so, the statute provides that of the four nominations which every National Group has a right to make, only two may be their own nationals.[48] This means that in most years, and even in years when the British seat is involved, the National Group will be nominating up to two, three, or four foreign jurists. If the consultations recommended in Article 6 were to be carried out in their case, it would have to be with foreign universities and other bodies, and this would add still more to the difficulties. Moreover, it is believed by the members of the British National Group that such consultations are not really necessary because at least two members of the group are, or have been, practicing international lawyers or jurisconsults, while the other two are usually active members of some body such as the International Law Association.[49] Thus the members of the group already have a considerable personal knowledge of the foreign jurists who are possible candidates, or they have individual means of finding out, and so it is believed that formal consultation on the part of the group as such would not add anything of substance.

Notwithstanding all of the above considerations, the United States National Group, at least in recent years, has attempted to formalize the pattern of consultations involved in the process of nominating persons for the ICJ elections. In part, the "systematic basis" of the functioning of the United States National Group, in contrast to its United Kingdom counterpart, can be seen in the American Group's effort to give effect to the recommendations set out in Article 6 of the statute. For example, Professor R.R. Baxter reports:

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advice they thought would be most useful. If this advice were adopted they would be under a moral obligation to consult certain bodies; if they did not take the advice offered, offence might be given, and difficulties would follow. It was a complication which would lead to endless negotiations, which would mostly be quite useless. In Italy there were five Supreme Courts, twenty Universities, several Academies and associations which must be consulted. M. Ricci-Busatti was not opposed to the idea itself, but he wanted the members of the Court of Arbitration to be free to consult whomsoever they might wish." LN Doc. V. 1920.2, p. 436.

[47] *See* below.

[48] Article 5 (2).

[49] The present members of the United Kingdom National Group are: Lord Hodson, former Lord of Appeal in Ordinary and Past President of the International Law Association; Lord Wilberforce, Lord of Appeal in Ordinary and Chairman of the Executive Council of the International Law Association; Sir Gerald Fitzmaurice, former judge of the International Court of Justice and former Legal Adviser to H.M. Foreign Office; and Sir Humphrey Waldock, judge of the International Court of Justice and former Professor of International Law, Oxford University.

> In May, 1960, the National Group sent a circular letter soliciting 'advice and suggestions' to the Chief Justice of the United States; the President of the American Society of International Law; the Chairman of the Section of International and Comparative Law of the American Bar Association; the President of the American Branch of the International Law Association; the President of the Association of the Bar of the City of New York; the President of the Bar Association of the District of Columbia; the President of the American Arbitration Association; and to the Deans of sixteen principal American law schools.[50]

In response to the request of the National Group, the President of the American Society of International Law made his own requests for advice from "members of the [ASIL] Executive Council, the five immediate past Presidents of the Society, and the Vice Presidents of the Society, as well as from a selected group of persons qualified to advise on foreign nominations."[51] In addition, the society set up a small committee in Washington to co-ordinate recommendations received and to forward them to the National Group. Having communicated in the past by correspondence, the United States National Group facilitated matters somewhat by convening in New York in late August of that year "to consider the advice received by it and to exercise its responsibility of making nominations."[52]

It may be that in the view of the United States National Group the benefit of the advice thus solicited far outweighs the practical disadvantages of such a procedure as they are envisaged by the British Group. More than likely, however, it is even greater "practical" difficulties which recommend the systematic approach of the Americans. Members of the United States National Group often live hundreds of miles apart and have infrequent personal contact—members of the National Group described above were separated by as much as 3,000 miles—while those in the United Kingdom National Group inevitably live in the London-Oxford-Cambridge area, belong to the same clubs and societies, and enjoy informal opportunities for consultation which their American congeners can only envy.[53]

Like the British example, the earlier procedure of the United States National Group varied considerably from its contemporary practice. In the past, the number of persons engaged in the selection process had been less although the chance of controversy was not necessarily thereby reduced. This was illustrated by the nominations of the American Group for the 1946 general election, the

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[50]R.R. Baxter, *The Procedures Employed in Connection with the United States Nominations for the International Court in 1960*, 55 AJIL 1961, p. 445. Professor Baxter's report is one of the few published accounts of the contemporary practice of any National Group.

[51]*Ibid.*, p. 446.

[52]*Ibid.*

[53]In the present United Kingdom Group, three members list addresses in London and one in Oxford. Of the four present members of the United States National Group, on the other hand, one lives in Massachusetts, one in Washington, D.C., another in California, and the fourth in New York.

first to be held for the International Court of Justice.[54] Manley O. Hudson, an American National who had been a judge of the Permanent Court of International Justice, actively campaigned for election. There were few judges from the old court with either the health or the will to stand for election and Hudson's candidacy had wide support especially by those who wished to see the continuity between the courts enhanced. Moreover, Hudson had himself been a member for some years of the United States National Group. When Hudson's term as member of the group expired just prior to the nominations, however, President Truman surprisingly replaced him with former Secretary of State Cordell Hull. The rest of the National Group remained as it had been: Henry L. Stimson, Secretary of War; Michael F. Doyle, of the Philadelphia Bar; and Green H. Hackworth, of the United States Department of State. Hull sponsored the nomination of Hackworth whom he had supervised in the State Department and the motion was seconded by Stimson. Doyle, who apparently supported Hudson, suddenly found himself in the minority and was even unable to persuade the group to nominate two national candidates as permitted by the statute. Hudson was in fact nominated by seven National Groups but Hackworth, proposed initially only by the Americans,[55] won the election.

Section IV

How important are these nominations? The American delegate to the 1920 Committee of Jurists, Elihu Root, had predicted that multiple nominations would virtually decide the elections.[56] But does the number of nominations that a candidate receives affect the chances or reflect the likelihood of his subsequently being elected? Professor Rosenne also has observed: "it is obvious that the primary responsibility for attaining the desired standards rests with those who *nominate* candidates, especially when they have reasonable prospects of seeing their candidates elected."[57] It is possible to assess the prospects of election for each nominee on the basis of who has nominated him?

To take again the 1946 elections, Judge Fabela Alfaro of Mexico had received the most nominations and he was duly elected.[58] Senor C. Lozana y Lozana, on the other hand, who received more nominations than any candidate other than Fabela Alfaro, failed to collect a majority of votes in either the General Assembly or the Security Council. Again, Green H. Hackworth of the United

[54]For a preview of this election, *see* W.L. Ransom, *Further as to the Nomination and Elections to the World Court*, ABAJ, 1946, January, pp. 1-4. The election results are reported in UN Doc. A/25.

[55]The National Groups of Nicaragua and Turkey later supported Hackworth's nomination.

[56]LN Doc. V. 1920.2, p. 409.

[57]ROSENNE, THE WORLD COURT, p. 55.

[58]Judge Fabela did not receive the most *votes*, however. Judge Hsu Mo led the balloting in both the General Assembly and the Security Council although his name had been put forward by only two National Groups. UN Doc. A/8; A/25.

States was elected and Manley O. Hudson was not although the latter had more than twice as many nominations.

Generally speaking, the candidate with the most nominations is assured a place on the court.[59] Four of the fifteen seats are held unofficially by nationals of France, Great Britain, the United States, and the USSR. When one of these seats is involved in an election, the national nominated by the National Group of the state concerned is invariably elected. A fifth seat had been held by a Nationalist Chinese for twenty years, though, in 1966, the incumbent declined to stand for re-election in favour of a Filipino. The seat comes up for election again in 1975 and it will be itneresting to see what happens now that the People's Republic of China has replaced Nationalist China in the United Nations. Several seats usually are controlled by the various geographical regions but there is frequently heavy in-fighting for these.[60]

In the 1946 general election, 76 candidates were nominated for 15 seats. Thereafter, regular elections for five seats have been held every three years. The number of nominees for these regular elections seems to be decreasing: an average of 35 nominees were proposed for each of the first three elections, 25 for the next three, and only 17 for the last three. The occasional elections to fill vacancies for seats normally held by nationals of the "Great Powers" are rarely fought by more than three or four candidates but as many as a dozen nominees have been put forward for other vacancies.

If the number of candidates is decreasing, the number of National Groups participating in the nomination procedure is increasing. In part, this trend reflects the united stand which many African states have taken with respect to recent elections. For the 1969 election, the nomination of Mr. Louis Ignacio-Pinto of Dahomy was made by a joint statement on behalf of the National Groups of 39 African states.[61]

The proliferation of new states may be a potential threat to the composition of the International Court. In an interview conducted as a part of this research, a former judge confided that it is now much easier to get nominated because among all the National Groups currently eligible to nominate, it is always possible to find one willing to sponsor any candidacy. Moreover, certainly in the General Assembly, the new states have the sufficient majority to elect whom they please. Even in the Security Council, it may only be a question of "trading" for a single vote in order to gain a majority.

[59]The results of the 1969 election provide an exception to this rule. Negendra Singh of India with the support of the Afro-Asian bloc had more nominations (48) than any other candidate and was not elected (Both the Soviet and Amerian judges who were elected that year each had had the single nomination of their own National Group). UN Doc. A/7570. Singh was elected to the Court in 1972.

[60]For the vacancy created by the death of Sir Benegal Rau, 12 candidates were nominated, one of whom withdrew. In a very close vote, Sir Zafrulla Khan was elected with a minimum majority in both the General Assembly and the Security Council. *See* ROSENNE, LAW AND PRACTICE OF THE INTERNATIONAL COURT, p. 927.

[61]UN Doc. A/7570/Add.1/Rev.1.

Though it may be somewhat of a contradiction to conclude a descriptive account with a recommendation, the present situation would seem to indicate that some method for screening the candidates is desirable. It might be possible (and without the difficulty of amending the statute), for example, to set up a United Nations Judicial Committee to rate or simply approve/disapprove in a non-binding way the nominations of each National Group.[62] Committee approval might even promote interest and confidence in the workings of the court. Since it is unlikely that we shall know a great deal about the procedures employed by many of the National Groups, such a safeguard might be the most efficient way to tackle the persistent problem of judicial composition at the international level.

The Statute of the International Court of Justice (Articles Relevant to the Nomination Procedure)

Article 2

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

Article 4

1. The members of the Court shall be elected by the General Assembly and by the Security Council from a list of persons nominated by the Security Council from a list of persons nominated by the national groups in the Permanent Court of Arbitration, in accordance with the following provisions.

2. In the case of Members of the United Nations not represented in the Permanent Court of Arbitration, candidates shall be nominated by national groups appointed for this purpose by their governments under the same conditions as those prescribed for members of the Permanent Court of Arbitration by Article 44 of the Convention of the Hague of 1907 for the pacific settlement of international disputes.

3. The conditions under which a State which is a party to the present Statute but is not a Member of the United Nations may participate in electing the members of the Court shall, in the absence of a special agreement, be laid down by the General Assembly upon recommendation of the Security Council.

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[62]For a more ambitious proposal, *see* Eberhard P. Deutsch, Jr., *A Plan for Reconstituting the International Court of Justice*, ABAJ, Vol. 49, No. 6, pp. 537-544. Mr. Deutsch would replace the present statute with a "complete new text" requiring, *inter alia*, that judges be appointed for life and that on appointment they renounce their nationalities for United Nations citizenship.

Article 5

1. At least three months before the date of the election, the Secretary-General of the United Nations shall address a written request to the members of the Permanent Court of Arbitration belonging to the States which are parties to the present Statute, and to the members of the national groups appointed under Article 4, paragraph 2, inviting them to undertake, within a given time, by national groups, the nomination of persons in a position to accept the duties of a member of the Court.

2. No group may nominate more than four persons, not more than two of whom shall be of their own nationality. In no case may the number of candidates nominated by a group be more than double the number of seats to be filled.

Article 6

Before making these nominations, each national group is recommended to consult its highest court of justice, its legal faculties and schools of law, and its national academies and national sections of international academies devoted to the study of law.

Article 7

1. The Secretary-General shall prepare a list in alphabetical order of all the persons thus nominated. Save as provided in Article 12, paragraph 2, these shall be the only persons eligible.

2. The Secretary-General shall submit this list to the General Assembly and to the Security Council.

Article 9

At every election, the electors shall bear in mind not only that the persons to be elected should individually possess the qualifications required, but also that in the body as a whole the representation of the main forms of civilization and of the principal legal systems of the world should be assured.

Article 12

1. If, after the third meeting, one or more seats still remain unfilled, a joint conference consisting of six members, three appointed by the General Assembly and three by the Security Council, may be formed at any time at the request of either the General Assembly or the Security Council, for the purpose of choosing by the vote of an absolute majority one name for each seat still vacant, to submit to the General Assembly and the Security Council for their respective acceptance.

2. If the joint conference is unanimously agreed upon any person who fulfils

the required conditions, he may be included in its list, even though he was not included in the list of nominations referred to in Article 7.

Article 14

Vacancies shall be filled by the same method as that laid down for the first election, subject to the following provision: the Secretary-General shall, within one month of the occurrence of the vacancy, proceed to issue the invitations provided for in Article 5, and the date of the election shall be fixed by the Security Council.

Article 31

1. Judges of the nationality of each of the parties shall retain their right to sit in the case before the Court.
2. If the Court includes upon the Bench a judge of the nationality of one of the parties, any other party may choose a person to sit as judge. Such person shall be chosen preferably from among those persons who have been nominated as candidates as provided in Articles 4 and 5.
3. If the Court includes upon the Bench no judge of the nationality of the parties, each of these parties may proceed to choose a judge as provided in paragraph 2 or this Article.

Article 39

1. The official languages of the Court shall be French and English. If the parties agree that the case shall be conducted in French, the judgment shall be delivered in French. If the parties agree that the case shall be conducted in English, the judgment shall be delivered in English.