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# NATIONALITY AS A FACTOR IN THE ELECTION OF THE MEMBERS OF THE INTERNATIONAL COURT OF JUSTICE, WITH PARTICULAR REFERENCE TO OCCASIONAL ELECTIONS

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THE OPINIONS EXPRESSED HERE ARE, HOWEVER, PURELY PERSONAL

In accordance with Article 2 of the Statute of the International Court of Justice, its 15 members are to be elected « regardless of their nationality » (1), a rule qualified by the proviso in paragraph 3 of article 3 of the statute that no two members of the Court may be of the same nationality (2).

The rule is further qualified by another rule of the Statute that indirectly gives relevance to nationality in the election of members of the Court. This other rule, contained in article 9 of the Statute, is that, without prejudice to ensuring that persons elected to serve on the Court are duly qualified (3), the electors should see to it that in the Court « as a whole the representation of the main forms of civilization and of the principal legal systems of the world should be asssured. » (4)

It appears, in practice, that such difficulties as there might be in harmonizing the provisions cited are of little practical interest. For the principles that actually guide the determination of the nationality mix of the

(1) No judge has ever been elected who was not a national of a state that was a member of the United Nations at the time of his or her election. There would, however, be no legal impediment to the electionof a judge who is a national of a state which, like Switzerland, is a party to the Statute but not a member of the United Nations or of a state that has neither status. Nor is there any reason why a stateless person could not be elected.

(2) The observance of this proviso is assured by paragraph 3 of article 10 of the Statute.

(3) The qualifications are set forth in article 2 of the Statute.

(4) The reference to « the main forms of civilization » might nowadays be regarded as objectionable in that it suggests cultural elitism if not outright racism. (Cf. the even more objectionable reference, in article 38 (1) (c) of the Statute, to « civilized nations. ») Thus, the drafters of the Statute of the International Tribunal for the law of the Sea (Annex VI to the United Nations Convention on the law of the Sea) have left any such reference out of the provisions on the composition of the Tribunal. (Cf. article 2 of the statute of the Tribunal.)

bench appear to be based, *mutatis mutandis*, not on those provisions but on the manner in which those of article 23 of the Charter on the composition of the Security Council are applied in practice (5). This, of course, was not and could not have been the case when the Security Council had only eleven members (the five permanent ones plus six elected members), i.e. prior to january 1, 1966. Moreover, whereas nationals of the four other permanent members of the Security Council have always been on its bench (6), Chinese nationals, for reasons reflecting the particularities of the representation of China within the United Nations, ceased to figure on the bench of the Court from 1967 to 1985. But, if allowance is made for the *sui generis* case of Chinese nationals, the variations of the nationality mix of the bench of the Court prior to January 1, 1966 no doubt matched the way in which the composition of the Security Council by national groups would have evolved had the Council always had 15 members.

At any rate, ever since the five members of the Court elected (or re-elected) at the 1984 triennial election entered upon office, i.e. since 6 February 1985, when a Chinese national became a member of the Court for the first time since 1967, the nationality mix of the judges has matched exactly the composition by national groups of the Security Council (7) : the bench has invariably included five members with the nationality of the permanent members of the Security Council, three Africans, two nationals of states of the Latin American and Caribbean Group, two nationals of states of the Western European and others Group not permanent members of the Security Council, one national of a state of the Eastern European Group other than the Russian Federation or its predecessor, the USSR, and two nationals of Asian States other than China (8).

A less striking but nonetheless interesting aspect of the role of nationality in the election of members of the Court is the way in which this factor appears to have influenced occasional elections to fill vacancies due to the death during their terms of office or resignation of members of the Court.

An obvious corollary of the unwritten rule allowing each permanent member of the Security Council to have a national on the bench at all times is that whenever a member of the Court who is a national of one of those states leaves the bench prematurely the successor is invariably of the same nationality (9).

(5) Needless to say the incidental phrase between commas in the second sentence of paragraph 1 of article 23 cannot apply to the composition of the Court ; it appears, however, that this does not create a disparity, since this phrase does not appear to have been taken seriously in determining the composition of the Security Council, of which Cape Verde and Djibouti have recently been members.

(6) The text disregards the breaks in continuity resulting from the time required to fill occasional vacancies (which since 1988 averages about four months).

(7) Cf. General Assembly resolution 1991 A (XVIII), of December 17, 1963.

(8) Cf. note 6 *supra*.

(9) It has occurred nine times that a judge having the nationality of a permanent member of the Security Council prematurely leaves the bench. (However, in one such case, i.e. the one resulting from the death of Sir Humphrey Waldock on August 15, 1981, the Security Council decided that, given the proximity of a regular triennal election, there was no need for an occa-

A more interesting situation is that where the judge whose departure has left a vacancy on the bench is *not* a national of a permanent member of the Security Council. There have thus far been eleven cases of this type, of which the last three took place in 1993, 1995 and 1996.

The following table provides the essential data in respect of each of these eleven cases, all of which have arisen from judges passing away :

| *Deceased judge* | *Died on* | *Successor* | *Date of election* |
|---|---|---|---|
| 1) Ph. Azevedo (Brazil) | May 7, 1951 | L.F. Carneiro (Brazil) | Dec. 12, 1951 |
| 2) B. Rau (India) | Nov. 30, 1953 | M. Zafrulla Khan (Pakistan) | Oct. 7, 1954 |
| 3) J.G. Guerrero (El Salvador) | Oct. 25, 1958 | R.J. Alfaro (Panama) | Sept. 29, 1959 |
| 4) A.H. Badawi (Egypt) | Aug. 4, 1965 | F. Ammoun (Lebanon) | Nov. 16, 1965 |
| 5) S. Tarazi (Syria) | Oct. 4, 1980 | A. El-Khani (Syria) | Jan. 15, 1981 |
| 6) A.A. El-Erian (Egypt) | Dec. 12, 1981 | M. Bedjaoui (Algeria) | March. 19, 1982 |
| 7) Nagendra Singh (India) | Dec. 11, 1988 | R.S. Pathak (India) | Ap. 18, 1989 |
| 8) T.O. Elias (Nigeria) | Aug. 14, 1991 | B.A. Ajibola (Nigeria) | Dec. 5, 1991 |
| 9) M. Lachs (Poland) | Jan. 14, 1993 | G. Herczegh (Hungary) | May 10, 1993 |
| 10) R. Ago (Italy) | Feb. 24, 1995 | L. Ferrari Bravo (Italy) | June 21, 1995 |
| 11) A. Aguilar M. (Venezuela) | Oct. 24, 1995 | G.Parra Aranguren (Venezuela) | Feb. 28, 1996 |

sional election to fill the vacancy.) In the 1981 election of Judge Schwebel to succeed Judge Baxter the former ran unopposed. In each of the three cases that have occurred since then the successful candidate has also run unopposed. (They arose from the resignation and death, respectively, of Judge Morozov and Judge Tarassov, both USSR nationals, in 1985 and 1994, and the resignation of Sir Robert Jennings in 1995.)

In two of the three cases that arose prior to the succession to Judge Baxter, and were due to the resignation of a USSR jugge in 1953 and the death of Sir Hersch Lauterpacht in 1960, the successor, F.I. Kojevnikov and Sir Gerald Fitzmaurice, met with only token opposition (not preventing them from being elected unanimously by the Security Council). Things were otherwise, however, in the third case, where, in 1957, a Chinese judge succeeded to one of the same nationality (V.K. Wellington Koo). (In this case a Japanese contender received three votes in the Security Council.).

As will be noted, in six of these eleven cases, the successor has been of the same nationality as his predecessor (10).

In three of the other five cases, i.e. those where the predecessor and the successor were of different nationalities, this could not have been otherwise, since no candidate of the nationality of the deceased judge was a contender (11).

This was not so in the other two diversityof nationality cases. They arose from the the deaths of Judge Rau, of India, and Judge El-Erian, of Egypt, who passed away in November 1953 and December 1981, respectively. Judge Rau was succeeded by Sir Muhammad Zafrulla Khan, of Pakistan, and Judge El-Erian by Mohammed Bedjaoui, of Algeria.

It appears that in these two cases altogether extraneous political factors might well have determinated the results.

With regard to the former case, it should be noted that in May 1954, that is, five months before the election of judge Rau's successor, Pakistan had concluded with the United States a mutual Defense Assistance Agreement (12), whereas India had strengthened its ties to the USSR. These developments had no doubt indisposed the majority of the members of the United Nations, in which the United States and its allies held sway at the time, towards India and produced the contrary effect so far as Pakistan was concerned. Thus the facts that judge Rau was the first Indian to sit on the bench of the Court and that he had been on it only less than two years when he passed away were inadequate to assure the election of the Indian candidate who contended for the seat he had left vacant (13).

The second case was most likely also influenced by extraneous political factors. In 1982 Egypt was in bad odor with the third world as a result of the conclusion of the Camp David agreements in 1979, while Algeria had distinguished itself by assisting in the resolution of the hostage crisis that developed that year between the United States and Iran. To this it should be added that on the death of Judge El-Erian he and another Egyptian, Judge Badawi, had served on the Court for a total of 22 years.

It is also of interest to note that in the ballots taken to elect successors to Judges Rau and El-Erian, the Indian candidate and the Egyptian

(10) These six cases arose from the deaths of Judge Azevedo, Judge Tarazi, Judge Nagendra Singh, Judge Elias, Judge Ago, and Judge Aguilar Mawdsley.

(11) These three cases arose from the deaths of Judge Guerrero, Judge Badawi, and Judge Lachs.

(12) Text in 202 UNTS 301.

(13) The view that politics played a role in the election of Judge Zafrulla Khan to succeed Judge Rau is also that of Norman J. Padeldorf. (See, in *The Relevance of International Law* (Karl DEUTSCH and Stanley HOFFMAN eds.), the article by PADELDORF entitled « The Composition of the International Court of Justice : Background and Practice », at 315).

one (14), respectively, who in each case competed with only one other candidate, made a good showing. Thus, in both cases, each of which required more than one ballot in the General Assembly, the candidate of the nationality of the deceased judge won the first (inconclusive) ballot in that body (15).

It is likewise interesting to note that, with two exceptions (16), in all six cases where predecessor and successor were of the same nationality the successful candidate won the election either hands down or by comfortable margins in both electoral colleges (17).

If the 11 occasional elections that have been dealt with are viewed as a whole, it would appear that one could fairly confidently conjecture that, in normal circumstances (meaning, in particular, that the State of which the judge who has prematurely left the bench was a national has not taken heavy political flak), the feeling is widespread among electors that a candidate of the nationality of the deceased judge should, on account of his or her nationality, be favored and that this will assure the success of the candidate with the nationality of the deceased judge (18).

(14) Radhabinod Pal and Ahmed Esmat Abdel Meguid, respectively.

(15) On the first (inconclusive) ballot in the General Assembly the Indian candidate received 32 votes to his Pakistani opponent's 30. On the second and final ballot in that body the latter received 33 votes and the former 29. In the Security Council, where only one ballot was taken, the Pakistani candidate received 6 votes and the Indian one 5. As regards the succession to Judge El-Erian, on the first ballot in the General Assembly the Egyptian candidate received 79 votes to his Algerian opponent's 74. In the second, also inconclusive, ballot in that body, the Algerian candidate led his opponent by 79 to 77 votes and in the final ballot by 87 to 69. In the Security Council, where only one ballot was taken, the Algerian candidate received 10 votes to his opponent's 4.

(16) The two exceptions are those arising from the deaths of Judge Elias, who was succeeded by B.A. Ajibola, and of Judge Tarazi, whose successor was A. El-Khani. With respect to the former case, two ballots were taken in the Security Council. On the first Ajibola received 7 votes and the runner-up, K.B. Asante, 6. On the second and final ballot these figures changed to 8 and 7, respectively. In the General Assembly Ajibola bested his opponent on the first of the two ballots held.

With respect to the succession to Judge Tarazi, only one ballot was taken in the Security Council, with El-Khani receiving 8 votes and the runner-up, M.K. Yasseen, 6. Four ballots were reguired in the General Assembly, with El-Khani and Yasseen each receiving 65 votes on the first.

(Cf., in respect of the election of Judge Ajibola, S/PV.3021, at 11-20, and A/46/PV.63, at 11 ; and, in respect of the election of Judge El-Khani, S/PV.2262, at 3, and A/35/PV.100, at 1759-60).

(17) The successor to judge Azevedo was elected unanimously in the Security Council, where only one ballot was taken, and by a landslides in the General Assembly. (Cf. S/PV.567, at 3, and A/PV.350, at 208.). The successors to judges Nagendra Singh, Ago and Aguilar won handily, in both the Security Council, where in each case only one ballot was taken, and the General Assembly. (Cf. S/PV.2854, at 6-10, and A/43/PV.91, at 101, S/PV.3546, at 2-4, A/49/PV.104, at 3 and S/PV.3636, at 3, and A/50/PV.101, at 7-8.)

(18) As regards the practice of the Permanent Court of International Justice, it should be noted that in nine of the eleven cases where a vacancy occurred as a result of the death or the resignation of judge, the successor and the predecessor were of the same nationality. In one of the two cases where the contrary happened, there was no candidate of the nationality of the judge whose seat had become vacant. (The case was one where a Swedish judge who had passed away was succeeded by a Finn). In the second case, which arose from the death, in 1935, of a member of the Court of German nationality, a candidate of the same nationality was nominated,

Does this « continuity of nationality rule » cease to apply when the deceased judge and his predecessor(s) of the same nationality have been on the bench for a long period of time ? Is there, in other words, an exception to the rule in cases of what could be called « longtime occupancy ? ».

The three cases referred to above in which no candidate of the nationality of the deceased judge ran for the vacancy he had left behind seem to point to the existence of this exception, since they were « longtime occupancy » cases (19).

There are, however, two cases which differed from the ones just mentioned in that the successor and the predecessor were of the same nationality but which can also be regarded as « longtime occupancy » cases. They arose from the deaths, in December 1988 and February 1995, respectively, of Judge Nagendra Singh, of India, and Judge Ago, of Italy. Each of these judges had been preceded on the bench by a judge of the same nationality (20). In the former case the lenghts of service of the predecessor and the successor added up to 17 years and six months ; in the latter to 25 years. Nevertheless in each of the two cases the successor and the predecessor were, as has been pointed out, of the same nationality. These cases, particularly the second one, militate against the existence of the possible exception in question to the continuity of nationality rule (21).

It is therefore debatable whether there is a « longtime occupancy » exception to the continuity of nationality rule.

Another factor that may limit the application of the rule may also be noted. The electors' inclination to apply the rule in any future case of succession to a judge not a national of a permanent member of the Security Council will probably be weaker than it has been in the past if the vacancy

but his candidature was unsuccessful. It is most likely that this was due to the special situation in which Germany found itself at the time of the election, i.e. in 1936, and on which it is hardly necessary to elaborate.

(19) Judge Guerrero had served as a member of the Court since its establishment and had also been a member of the Permanent Court from 1936 until its dissolution (having also served as president of both Courts) ; Judge Badawi had served on the Court slightly over 19 years ; and Judge Lachs, who had been a member of the Court since 1967, had been preceded on its bench by another Pole, Judge Winiarski, who had been a member of the Court since its establishment.

(20) The Indian national who preceded Judge Nagendra Singh on the bench was Judge Rau, already mentioned in the text. The Italian national who preceded Judge Ago on the bench was Judge Morelli.

(21) It should be noted, however, that just before the election Italy informed United Nations members that if the Italian candidate, Luigi Ferrari Bravo, was elected, he would not run for re-election. This, together with the fact that the unexpired portion of Judge Ago's term of office amounted to no more than about one and two thirds of a year, probably smoothed the way for the Italian candidate, who had to contend with three others. (In the Security Council the race was tight between Ferrari Bravo and his runner-up, P.H. Kooijmans, a Dutch national, with the two running neck and neck in the first three of the four ballots taken ; but Ferrari Bravo won handily in the General Assembly, where only two ballots were taken, on the first of which he garnered 72 votes to Kooijmans's 36, the results on the second ballot being 102 and 28, respectively. [Cf. S/PV.3546, at 2-4, and A/49/PV.104, at 3.]).

arises not from the death but from the resignation of that judge and the latter has resigned for reasons other than serious illness.

It should be observed that, even though it most likely exists, the continuity of nationality rule is, strictly speaking, only a matter of conjecture. For it is not normal for a state to reveal the reasons that have led it to vote for a certain candidate and it can never be automatically assumed that states whose votes confirm the existence of the rule have not been motivated exclusively by the conviction that they were supporting the best candidate or by other considerations altogether unrelated to nationality. Moreover the continuity of nationality rule is in all cases only one of the many factors influencing the outcome of the election in question and several of these factors are absolutely imponderable.

It is clear that, assuming its existence, which, despite what has just been said, appears very likely, the continuity of nationality rule has nothing to do with law. The reasons for this are not far to seek. If the rule were a legal one, then it would have bo be of a customary character. But there is no room here for customary law, since, in the nature of things, it cannot but be absurd for any kind of legal impropriety to attach to a vote in favor of a candidate running on the basis of a lawful nomination : to say that a person is a legitimate candidate for an elective office is exactly the same as saying that it is perfectly lawful and proper for any elector to vote for that person.

One final consideration of a legal nature is that if a vote for a candidate to fill an occasional (or any other) vacancy in the Court is motivated by considerations that conflict with article 2 or article 9 of the Statute, the vote can be regarded as improperly motivated. The motivation of a vote is, however, legally irrelevant. For the only conceivable ground for annuling a vote is a finding that it is formally defective.

It does not seem that anything can be said in favor of the continuity of nationality rule. For one thing the national group of the country from which the departed judge hailed may, particularly if that country is a small and poor one, be unable to come up with a worthy successor, for which reason the rule may, to a certain extent, have a negative effect on the qualifications of the members of the Court (22). Moreover, since the rule reflects the idea that in voting for a candidate electors vote not only for the candidate but also for the state of which the candidate is a national and do so because they are under some kind of obligation to act in this manner, the beneficiaries of the observance of the rule may well feel, to a possibly

(22) In a note he published on the occasional elections held in 1981 to replace two members of the Court who had died, Shabtai Rosenne expressed the view that one of the successful candidates, Judge El-Khani, a Syrian national who succeeded to Judge Tarazi, of the same nationality, did not, on the basis of a comparison of his curriculum vith the curricula of his three opponents, appear to have been as qualified as they. (75 AJIL 349 (1981), at 360.).

greater degree than their colleagues who are not nationals of permanent members of the Security Council, that in electing them the electors have voted for the states of which they are nationals as much as for them personally. This may, obviously, be seen to have a negative effect on the impartiality of the judge in question.

The idea, inherent in the continuity of nationality rule, that the state of which a judge is a national is, as it were, guaranteed that the seat filled by that judge will be occupied by its nationals for the whole duration of that judge's term of office is apt to make *any* judge (i.e. not only one from a country with a permanent seat on the Security Council) feel, even if only subliminally, that there is some link between his or her membership in the Court and his or her nationality.

Clearly the continuity of nationality rule reflects the feeling that a vote for a candidate for election to the Court is, to a certain extent, a vote for that candidate's country. Since it is inconceivable that such a feeling should exist in occasional elections but not in regular ones, the « rule » seems to be the symptom of a less apparent but more harmful phenomenon, i.e. the possibility that it is not only through the principle of equitable geographical distribution that the nationality of candidates influences the results of *regular* elections of members of the Court other than the perennially present nationals of permanent members of the Security Coucil. This article should thus conclude on the sad note very little, if any, regard appears to be had, at every election, occasional or regular, of members of the Court, whatever their nationalities, to the rule laid down in Article 2 of the Statute that judges are to be elected « regardless of their nationality ».