

1955

The World Court Statute and Impartiality of the Judges

William Samore

University of Nebraska College of Law

Follow this and additional works at: <https://digitalcommons.unl.edu/nlr>

Recommended Citation

William Samore, *The World Court Statute and Impartiality of the Judges*, 34 Neb. L. Rev. 618 (1954)

Available at: <https://digitalcommons.unl.edu/nlr/vol34/iss4/6>

This Article is brought to you for free and open access by the Law, College of at DigitalCommons@University of Nebraska - Lincoln. It has been accepted for inclusion in Nebraska Law Review by an authorized administrator of DigitalCommons@University of Nebraska - Lincoln.

THE WORLD COURT STATUTE AND IMPARTIALITY OF THE JUDGES

William Samore*

In any court system, national or international, judges should be impartial. Every judge of the fifteen-man International Court of Justice is required by the International Court of Justice Statute to make a "solemn declaration . . . that he will exercise his powers impartially and conscientiously."¹ But this provision is not the only safeguard in the statute to help insure a judge's impartiality. The framers of the statute believed that the national States would have greater confidence in the court if there were additional safeguards.² Which articles in the statute restrict judicial bias and which articles, if any, overlook its possible existence? For this purpose the statute is measured by two standards: (1) a method of appointing judges which places judicial qualifications above political considerations, and (2) methods of safeguards to impartiality after appointment.

* Instructor, College of Law, University of Nebraska.

¹ Stat. Int'l Ct. Just. art. 20.

² The Statute of the International Court of Justice is the product of three stages of drafting. In the first stage, the Advisory Committee of Jurists, the most influential of the drafters, met at The Hague between June 16 and July 24, 1920. *Proces-verbaux* of the Advisory Committee of Jurists (1920), hereinafter cited as 1920 Jurists. Their draft was studied by the League of Nations Council during its Eighth Session (San Sebastian, July 30 to August 5, 1920) and its Tenth Session (Brussels, October 20-28, 1920). *Proces Verbal* of 8th Session of Council of League, League Doc. 20/29/14; *Proces Verbal* of 10th Session of Council of League, League Doc. 20/20/16. Then the draft was considered by the Third Committee of the First League Assembly. Records of the First Assembly: Meetings of the 3d Committee (1920), pp. 273-318, 331-408. Two plenary meetings of the First Assembly completed the first stage. Records of the First Assembly: Plenary Meetings (1920), pp. 436-501.

In the second stage, the statute was revised. Another Committee of Jurists (Geneva, March 11-19, 1929) drafted the revisions. Minutes of the 1929 Committee of Jurists, League Doc. V. Legal 1929.V.5. Their proposals were reviewed by a Conference of Signatories to the Statute (Geneva, September 4-12, 1929). Minutes of Conference Regarding Revision of the Statute, League Doc. V. Legal 1929.V.18.

In the final stage, there was a third Committee of Jurists (Washington, April 25-June 26, 1945). 14 U.N. Conf. Int'l Org. Docs. At the 1945 San Francisco Conference, Committee I of Commission IV (May 4-June 14) was the last important group connected with the drafting of the statute. 13 U.N. Conf. Int'l Org. Docs.

I. APPOINTMENT OF JUDGES

A. *How Judges Are Appointed*

The most difficult problem facing the Advisory Committee of Jurists of 1920—the original drafters of the World Court Statute—was to decide upon a method of appointment. The great powers each insisted upon a national permanently seated on the court; the smaller nations were just as insistent upon “equality.” It was finally decided that appointment be entrusted concurrently to the League of Nations Assembly where the small nations would predominate and to the Council where the great powers would predominate.³

The merits of the dual election of judges were discussed again by the Committee of Jurists of 1945 and at the San Francisco conference of the same year. A subcommittee of the 1945 Committee of Jurists recommended retention of dual elections because “so serious a matter . . . should not be entrusted to any one body.”⁴ At the conference, arguments were presented for and against dual elections, some new, others a repetition of those first introduced by the 1920 Jurists. Proponents in favor of election by the United Nations General Assembly alone contended that Security Council members would vote twice in violation of the principle of equality. They further argued that dual elections would decrease the judges’ independence because the Security Council would give greater weight to political considerations.⁵ Supporters of the present system answered that the Security Council had the responsibility of maintaining peace and security, that dual elections were a check and balance, and that such elections were an additional guaranty of competent judges.⁶ To decrease the influence of political considerations within the Security Council, Canada suggested that the veto power should not apply. Serving as a concession by the permanent members of the Security Council, Canada’s “compromise” was effected, i.e., retention of dual elections without a veto in the Security Council.⁷

The General Assembly and the Security Council elect the judges “independently” of each other.⁸ However, “independently” has meant simultaneous elections with no comparison of candidates until the full number of judges to be appointed has been

³ 1920 Jurists, *op. cit.* supra note 1, at 201.

⁴ 14 U.N. Conf. Int’l Org. 278.

⁵ 13 U.N. Conf. Int’l Org. 180.

⁶ *Ibid.*

⁷ *Id.* at 186, 203. See Stat. Int’l Ct. Just. art. 10, ¶ 2.

⁸ Stat. Int’l Ct. Just. art. 8.

elected by each body. Of course, the two electoral bodies do not proceed "independently." For one thing, Council members also vote in the Assembly, and presumably both Council and Assembly delegations receive the same instructions from their government regarding candidates. And nothing prohibits various delegations from consulting each other. Indeed, at least on one occasion, consultations were encouraged.⁹ Strong evidence of such consultation is the consistency with which the same candidates have been elected by both the Assembly and the Council on the comparison of results of the initial separate elections.¹⁰

B. *Who May Be Appointed*

If the Assembly and Council were free to elect anyone, the possibility of political influence would be increased. But these bodies must appoint from a list of persons nominated by "national groups."¹¹ Each member of the United Nations selects not more than four persons competent in international law as its own national group.¹²

⁹ During the December, 1946 elections, President Spaak of the General Assembly said: "The third meeting for the purpose of elections will take place at 5:15 pm; this will give the delegations time to consult each other." U.N. General Assembly Off. Rec., 1st Sess., Plenary 345 (1st Part 1946).

¹⁰ In the 1921 general elections, with 11 judges to be appointed from 89 candidates, 9 successful candidates appeared on both lists. P.C.I.J., Ser. E, No. 1 at 28 (1925); Records of the 2d Assembly: Plenary 250 (1921). In the 1930 general elections, 15 judges were to be appointed from some 50 candidates; 14 succeeded on the first comparison. Records of 11th Assembly: Plenary 134-135, 136 (1920). In the 1946 general elections, the electors were to appoint 15 judges from 73 candidates. On the first ballot, 13 successful candidates appeared on both lists. I.C.J. Yearbook 1946-1947, 53; U.N. Doc. No. A/8/Rev. 1 (January 4, 1946); U.N. General Assembly Off. Rec., 1st Sess., Plenary 341 (1st Part 1946). In the 1948 general elections, 5 judges were to be appointed from 40 candidates, and 4 were appointed on the first comparison. U.N. Docs. No. A/623/Rev. 2 and S/991/Rev. 2 (October 15, 1948); U.N. General Assembly Off. Rec., 3d Sess., Plenary 370 (1st Part 1948); U.N. Security Council, Off. Rec. 3d year, 369th meeting, No. 119, 2-4 (1948). Finally, in the 1951 general elections, there were 34 candidates from which 5 appointments were to be made. On the first comparison, the same 5 successful candidates appeared on both lists. I.C.J. Yearbook 1951-1952, 20; U.N. Docs. No. A/1879 (September 19, 1951) and A/1879/Add. 2 (November 9, 1951); U.N. General Assembly Off. Rec. 6th Sess., Plenary 210 (1951).

¹¹ Stat. Int'l Ct. Just. art. 4.

¹² A sub-committee of the 1945 Jurists recommended nominations directly by the governments, each government nominating a national. It reported that this would "minimize the political intervention of the Chanceries which precede the designations made according to the present

The freedom of the national groups in selecting nominees is limited. In the first place, each national group, as stated in article 6,

...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.¹³

Each national group can nominate up to four persons, "not more than two of whom shall be of their own nationality."¹⁴

Since only those candidates nominated by the national groups are eligible for appointment (except for article 12, paragraph 2), the duty of seeing that successful candidates fulfill certain qualifications belongs to both the electors and the national groups. These qualifications, as stated in article 2, limit candidates to:

...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.¹⁵

Jurisconsults competent in national law without qualifying

method." 14 U.N. Conf. Int'l Org. Docs. 190, 260, 275. The question was settled when Committee 1 of Commission IV voted against government nominations. 13 U.N. Conf. Int'l Org. Docs. 180.

¹³ Consultation with learned groups in the English-speaking world is done, if at all, "covertly, not openly," but in Europe it is a "matter of course." Scott, *The Project of a Permanent Court of International Justice* 59 (1920). The Report of the 1920 Jurists seems to say that the national groups must invite suggestions, but that there is no obligation to accept any advice given. 1920 Jurists, *op. cit. supra* note 1, at 706. A proposal before the Committee of Jurists of 1945 to make the consultations obligatory met with disfavor. 14 U.N. Conf. Int'l Org. Docs. 180.

¹⁴ Stat. Int'l Ct. Just. art. 5. It should be noted that the nationality of the group is not necessarily its members' nationality, but is determined by the government which selects the members. Thus the members need not be of the nationality of the government selecting them. For example, the Ethiopian national group consists of two members, one American and one British. U.N. Doc. No. A/8, 67 (1946).

¹⁵ The 1929 Conference of Signatories adopted the statement submitted to it by the 1929 Jurists that it "considers it desirable that to the nominations there should be attached a statement of the careers of the candidates justifying their candidature." Revision Conference, *op. cit. supra* note 1, at 53. This recommendation was approved by the League Assembly. Records of the Tenth Assembly: Plenary 121 (1929). These "biographies" are mimeographed and distributed to the member States before the election of judges. See e.g., U.N. Doc. No. A/8 (1946).

for the highest judicial offices cannot be appointed.¹⁶ A further qualification was introduced by the 1929 Jurists who drafted a recommendation—not an amendment—that “candidates . . . should possess recognized practical experience in international law.” The Conference of Signatories of 1929 adopted this recommendation, which was later approved by the Tenth Assembly of the League of Nations.¹⁷

Article 3 of the present statute provides that “no two of the regular members of the Court may be nationals of the same state.”¹⁸ This rule of one judge per nation was adopted by the 1920 Jurists, apparently to enable as many states as possible to share in the court’s composition. Another reason appears formally in the statute:

... the electors shall bear in mind . . . 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.¹⁹

C. *Tenure of Judges*

World court judges are appointed for a term of nine years and may be re-elected. In rejecting life tenure, the 1920 Jurists said that a term of years would insure continuity and make it “possible for States to eliminate judges, who, though not . . . actu-

¹⁶ 1920 Jurists, *op. cit. supra* note 1, at 104, 298, 448, 449-450, 553, 561, 611, 698-699.

¹⁷ 1929 Jurists, *op. cit. supra* note 1, at 25; Revision Conference, *op. cit. supra* note 1 at 26, 27, 53; Records of the Tenth Assembly, *op. cit. supra* note 1, at 120. The recommendation seems to have been intended to apply not only to juriconsults, but to all the candidates. In this, the 1929 revisers have strayed from the 1920 Jurists’ idea of juriconsults and judges with national experience complementing each other.

¹⁸ Nothing prevents a party before the court from appointing an *ad hoc* judge (article 31) who is of the same nationality as a regular member of the court. In fact this has happened on two occasions: Access to Port of Danzig, P.C.I.J., Ser. A/B, No. 43 (1931), where Danzig appointed Judge *ad hoc* Bruns, a German national, while Schucking (German) was a regular member of the court; Treatment of Polish Nations, P.C.I.J., Ser. A/B, No. 44 (1932), where the same judges were involved.

¹⁹ Stat. Int’l Ct. Just. art. 9. 1920 Jurists, *op. cit. supra* note 1, at 713-714. There is little indication that the 1920 Jurists had a uniform conception of the meaning of “forms of civilization” and “legal systems.” Lord Phillimore (British) thought that systems of law would include Japanese, Italian, Scandinavian and German, Slav, Turkish and Eastern, British Overseas Dominions, Roman-Dutch, old French, Hindu, and Mohammedan. M. Altamira (Spanish) referred to the Iberian and English-speaking civilizations. M. Adatei (Japanese) declared that Japan was the principal representative of the far eastern civilization and that there was a Japanese legal system. *Id.* at 136, 152, 159, 369, 384.

ally unfit for their duties, no longer justify the confidence that the States at one time reposed in them."²⁰

II. SAFEGUARDS TO IMPARTIALITY AFTER APPOINTMENT

A. Judges' Compensation

At present the judges receive an annual salary of \$20,000 with the president receiving a special allowance of \$4,800.²¹ There are also provisions for travel expenses, subsistence allowance, and a liberal pension plan.²² Although no statute provision prohibits other remuneration, it is obvious that this is the only payment the judges are entitled to receive. The court further adopted a resolution forbidding judges to accept decorations without the court's consent.²³

B. Incompatibility, Disqualification, and Removal

A judge cannot engage in any political or administrative function, nor in any "other occupation of a professional nature."²⁴ Being a member of the national legislature is not incompatible, but holding a political office, or being a subordinate in such office, or serving as a diplomatic representative is incompatible. Also incompatible are any "international political duties," but "membership of an international tribunal, in particular, membership of the Court of Arbitration of the Hague" is not incompatible.²⁵

²⁰ 1920 Jurists, op. cit. supra note 1, at 714. But life tenure also insures continuity. The only time it would not is on the extremely unlikely occasion of all the judges retiring or dying together. The ambiguity of the second reason invites unpleasant conjecturing. If a judge is not "actually unfit" for duty, then for what reason are States justified in losing confidence?

²¹ I.C.J. Yearbook 1951-1952, 114.

²² I.C.J. Yearbook 1946-1947, 130-134.

²³ P.C.I.J., Ser. E, No. 3, 178 (1927). In 1927, the court authorized Judge Weiss (French) to accept a decoration from his government. Id. No. 4 at 270 (1928). And in 1928, Judge Loder (Dutch) with the court's consent received a decoration from a conference of which he served as president. Id. No. 5 at 246 (1929).

²⁴ Stat. Int'l Ct. Just. art. 16.

²⁵ 1920 Jurists, op. cit. supra note 1, at 190-193. 715, 716. By 1925, several administrative decisions were made by the court in applying article 16. Those functions approved were: Judge Loder acting as president of a Mixed Arbitral Tribunal; Judge Moore acting as president of the International Commission on the Rules of Warfare; Judge Nyholm acting as a member of a Mixed Arbitral Tribunal; Judge Huber acting as *rappor- teur* of an Anglo-Spanish dispute regarding Morocco; Judge Altamira's position as a Spanish senator; Judge Huber acting as president of a conciliation commission; a judge acting as a member of a government commission preparing copyright legislation or a government commission test-

A judge is disqualified from participating in any case in which he has previously been connected in any capacity; for example, as agent, counsel, or advocate, or as a judge of any court.²⁶ Previous membership on a conciliation commission would also disqualify a judge.²⁷ Article 16 permits a judge to exercise duties as a member of the Permanent Court of Arbitration, of a Mixed Arbitral Tribunal, or of a conciliation commission. But he would be disqualified under article 17 if the same case were later brought before the court. In order to prevent this occurrence, the court decided that a "certain effective incompatibility" existed if there was an agreement providing for judicial settlement by the court where the prior method of settlement failed.²⁸

If a judge feels that for "some special reason" he should be disqualified, he notifies the president of the court. Or if the president considers for "some special reason" that a judge should be disqualified, he notifies the judge. In both cases, when there is disagreement between the president and the judge, the court will settle the matter.²⁹ Several administrative decisions by the court reveal the scope of this article. It is not a license to the parties for suggesting to the court that a judge should be disqualified.³⁰ With the agreement of the president, a judge withdrew in 1931 from an advisory opinion because he was the *rap-*

ing diplomatic service candidates; a judge participating in an international conference concerned with the development of law. Those functions considered incompatible were: acting as member of an institution such as the *Conseil du Contentieux* of the Italian Foreign Office; participation in negotiations even of a non-political character, except in special cases decided by the court. P.C.I.J., Ser. E, No. 1, 247-248 (1925).

A more recent application of article 16 occurred in 1951 when the General Assembly established an ad hoc committee for the purpose of finding a solution to the problem of prisoners of war. After consultation with the court, Vice-President Guerrero accepted the Secretary-General's invitation to become a member of the committee. I.C.J. Yearbook 1950-1951, 103.

²⁶ Stat. Int'l Ct. Just. art. 17.

²⁷ 1929 Jurists, op. cit. supra note 1, at 120. In applying article 17, the court in 1928 decided that Judge Huber's functions as legal adviser to the Swiss government would not disqualify him from participating in a case in which Switzerland was a party. These functions did not fall within article 17 because they were exercised before the dispute had arisen. P.C.I.J., Ser. E, No. 4, 270 (1928); Id. No. 6, at 282 (1930).

²⁸ Following this principle, President Hurst in 1936 refused to participate in a permanent conciliation commission because the dispute might come before the court. P.C.I.J., Ser. E, No. 13, 145 (1937).

²⁹ Stat. Int'l Ct. Just. art. 24.

³⁰ P.C.I.J., Ser. E, No. 3, 186 (1927).

porteur to the Council of the League regarding a related question.³¹ In another decision the court decided that a judge who had participated in the drafting of a convention which was to be interpreted by the court was not legally required to withdraw; had the judge desired to withdraw, the court would have acquiesced.³²

Removal of a judge, if under the control of the Assembly and Council, would clearly invite political intervention. Article 18 places this removal in better hands:

...No member of the Court can be dismissed unless, in the unanimous opinion of the other members, he has ceased to fulfill the required conditions....

Thus far article 18 has not been used in removal proceedings, but should the occasion arise, article 6 of the Rules of the Court permits the judge concerned to justify his retention. A vote is then taken in his absence and if the "members present" find unanimously against him, he is dismissed.³³

C. Judges Who Are Nationals of Parties

A judge is not disqualified if his State is a party before the court.³⁴ A party unrepresented on the court has the right to appoint an ad hoc judge, a scheme approved by the 1920 Jurists as opposed to a plan permitting parties the use of advisory assessors only.³⁵ No new arguments were made by the 1945 Jurists supporting a litigant's right to have a national on the court; but the idea of assessors was revived, although one jurist was against having even an assessor on the court. A Dutch plan would have given parties the right to appoint by common agreement two more ad hoc judges. It was also proposed that ad hoc judges must be chosen from a standing list composed of one national from each state. And an Egyptian jurist thought that if one of the concerned judges chose not to vote, the other must likewise abstain. Eventually the 1945 Jurists rejected all these innovations and defeated a motion to eliminate ad hoc judges.³⁶

Ad hoc judges are to be chosen "preferably" from those per-

³¹ Id. No. 7 at 287-288 (1931).

³² Id. No. 8 at 251 (1932).

³³ Statute and Rules of Court and other Constitutional Rules and Regulations, P.C.I.J., Ser. D, No. 1, 56 (2d ed. 1931).

³⁴ Stat. Int'l Ct. Just. art. 31.

³⁵ 1920 Jurists, op. cit. supra note 1, at 168-170, 172, 198-199, 521, 527-538, 565, 575, 577, 601, 614, 648, 720-722.

³⁶ 14 U.N. Conf. Int'l Org. Docs. 113, 116, 128, 265, 267, 309, 317.

sons who have been nominated by the national groups for regular appointment.³⁷ By these standards the qualifications required of a regular judge are also required of an ad hoc judge. He must also make the solemn declaration that he will exercise his duties "impartially and conscientiously." He may be disqualified under articles 17 or 24, though he is not subject to article 16 (incompatibilities).

When in deciding a case the court is evenly divided, the president or acting president votes again.³⁸ But suppose that the president is a national of one of the litigants? This danger was eliminated in 1926 when the court amended its rules to provide that the president or acting president would not cast a second vote if his country was a party to the controversy before the court (Article 13 of the rules).³⁹ In such an instance the judge next in precedence would break the tie.

III. CONCLUSIONS

In practice, a national of each of the great powers has always been appointed to the court, but these nationals have never been a majority of either the Council of the League of Nations or the Security Council of the United Nations.⁴⁰ So demands by the great powers for individual court representation by a national do not require dual elections. Since political influence in the appointments should decrease as the political bodies participating decrease, it would seem logical to eliminate either the Council's or the Assembly's role in the appointments. However, while most of the smaller states would favor the elimination of the Security Council, none of the permanent members would agree.⁴¹

It is folly to expect States to consent to a complete severance

³⁷ Stat. Int'l Ct. Just. art. 31, ¶ 2.

³⁸ Stat. Int'l Ct. Just. art. 55. Only once has it been necessary for the president to cast a second vote. Case of the S.S. "Lotus," P.C.I.J., Ser. A, No. 10 (1927).

³⁹ Revision of the Rules of Court, P.C.I.J., Ser. D, No. 2 (Add.) 32-33 (1926); P.C.I.J., *supra* note 33, at 57.

⁴⁰ Originally, the League Council was to be composed of nine members, five great powers, including the United States, and four smaller powers. The United States failed to join the League and never became a Council member. In 1939, only four of the fifteen Council seats were held by great powers. Even in the Security Council, the five permanent members may be outvoted by the six non-permanent members; the veto does not apply.

⁴¹ At the 1945 San Francisco conference, several smaller States approved dual elections, e.g., Czechoslovakia, Haiti, The Netherlands, New Zealand, Norway, and Yugoslavia. None of the "big five" States favored election by the Assembly alone. 13 U.N. Conf. Int'l Org. Docs. 180.

of appointments and their participation. However proposals might be accepted which retain some connection and at the same time decrease political influence. For example, President Descamps of the 1920 Jurists proposed appointment by an electoral college composed of one member selected by each of the national groups.⁴² Admittedly, political influence is not completely eliminated, but it is reduced. Yet the connection is sufficiently close to create confidence since governments appoint the national groups.

If this method of appointment is so far in advance of opinion that its favorable reception must be postponed, there is consolation in the knowledge that the present method of appointments, although subject to criticism, has succeeded on the whole in producing praise-worthy judges. Probably not all the judges have been the best available, but all selected have met the qualifications required. It is true that the factor of nationality has been prominent during elections. But so long as a successful candidate is qualified, the fact that another candidate, because of his nationality, was unsuccessful would not justify strenuous criticism.⁴³ And if it should happen that nationality caused the appointment of a less qualified candidate, it must be remembered that a majority, if not all, of the other judges are eminently qualified.

As for safeguards to impartiality after appointment, the provisions for compensation, incompatibility, and disqualification are sound. But the provisions for ad hoc judges have been criticized.⁴⁴ Should a judge who is a national of a party be disqualified? Is this connection sufficiently dangerous to a judge's impartiality?⁴⁵ Statistics showing how often judges vote in favor of their governments have been used to support an affirmative answer. Professor Lauterpacht contends the results "cannot be regarded as a mere coincidence."⁴⁶ But Professor Hudson attributes little value to "a mere tabulation of votes" unless there is a "careful analysis of the substance of the views expressed by the majority

⁴² 1920 Jurists, *op. cit. supra* note 1, at 131-132, 142.

⁴³ See Hudson, *The New Bench of the World Court*, 32 A.B.A.J. 144 (1946).

⁴⁴ Notably, Lauterpacht, *The Function of Law in the International Community* 228-236 (1933).

⁴⁵ Nationality is not to be confused with a method of legal thought which a judge acquires through legal training and which is closely associated with each legal system.

⁴⁶ Lauterpacht, *op. cit. supra* note 44, at 230.

and by the minority." Nor does he place any value on the mere fact that an ad hoc judge is the only dissenter.⁴⁷

It is submitted that neither a vote tabulation nor a "careful analysis" is necessary. It is obvious that positive evidence is not required to disqualify judges of national courts whose personal interest or that of a close relative is involved. Nor did the 1920 Jurists consider it necessary to obtain such evidence to disqualify world court judges under articles 17 and 24. Their conclusions were based upon common knowledge that an exceptional connection between judge and party may endanger a judge's impartiality. That nationality is an exceptional connection was not denied by the 1920 Jurists, although their report alleged that the danger is overcome because of the judges' high moral character and because of their solemn declaration to be impartial.⁴⁸ However, such a declaration can only refer to conscious partiality; it overlooks the real possibility that judges may be influenced sub-consciously. The close connection of juriconsults to their State was attested by none other than some of these judges themselves:

Of all the influences to which men are subject, none is more powerful, more pervasive, or more subtle, than the tie of allegiance that binds them to the land of their homes and kindred and to the great sources of the honors and preferments for which they are so ready to spend their fortunes and to risk their lives.⁴⁹

Why then is a judge permitted to participate when his government is a party? Because States, which alone can be parties, would have it no other way. "States attach much importance to having one of their subjects on the Bench when they appear before a Court of Justice."⁵⁰ With a national on the court, States are said to become confident that their arguments will be duly considered in deliberations. The judge is to "put forward and explain the statements and arguments" of his State. Moreover,

⁴⁷ Hudson, *The Permanent Court of International Justice* 355 (2d ed. 1943). The United States Supreme Court has declared the fact that a juror, who was defendant's former employee, was the only one to vote acquittal to be some evidence of bias in favor of defendant. *Clark v. United States*, 289 U.S. 1, 18 (1933).

⁴⁸ 1920 Jurists, *op. cit. supra* note 1, at 720-721.

⁴⁹ Joint statement of Judge Loder, Moore, and Anzilotti. P.C.I.J. Ser. E, No. 4, 75. Also to be considered as collateral to the nationality influence is the relationship a judge may have had with his government before appointment. And not to be ignored is the possible effect upon a great power judge of the fact that his obtaining appointment owes much to his government's support; more so than for a judge from a smaller power.

⁵⁰ 1920 Jurists, *op. cit. supra* note 1, at 722.

there is assurance that the judgment, "however painful it may be in substance, will be drawn up so as to avoid ruffling national susceptibilities in any way."⁵¹

Little can be added to the arguments already presented by the parties' agents and counsel. True, they are not present during the judges' deliberations, but there is little substance to the fear that competent judges will overlook relevant arguments of both parties. Similarly, there should be no fear that they will write an opinion which will ruffle "national susceptibilities."

It has been argued, however, that to disqualify nationals of parties, would unduly diminish the court when several States are parties.⁵² But in the entire experience of the court, if regular judges had withdrawn, the required quorum of nine would not have been threatened. The largest number of judges who would have withdrawn in any one case was four.⁵³ In the case *Relating to the International Commission of the Oder*, seven States were involved, but only three had a judge on the court.⁵⁴ These multiple-State cases are the very ones in which equality can be obtained only by disqualification. In these cases, it has been several States on one side with a fewer number on the other. It would be absurd to suggest that the side consisting of a fewer number of States be permitted enough ad hoc judges to equal the number of regular judges. In such cases it is even more important that nationals of parties withdraw since their votes will have more influence upon the decision than in a two-State dispute. Of course, it can happen that over six States are parties with each having a national on the court, and to disqualify them all would destroy a quorum. To guard against this very unlikely possibility, the system of deputy-judges used in the old world court could be revived.⁵⁵

⁵¹ *Id.* at 721.

⁵² *Ibid.*

⁵³ *The S.S. Wimbledon*, P.C.I.J., Ser. A, No. 1 (1923); *Interpretation of the Statute of Memel*, P.C.I.J., Ser. A/B, No. 49 (1932).

⁵⁴ P.C.I.J., Ser. A, No. 23 (1929).

⁵⁵ Deputy-judges were elected in the same manner that regular judges were elected. If the full number of regular judges could not be present, the number was made up by calling on the deputy-judges to sit in the order of a list prepared by the court. Deputy-judges were eliminated in 1936. In 1930 the number of regular judges was raised from nine to fifteen, the present number.