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National Origins v. Impartial Decisions: A Study of World Court Holdings

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A STUDY OF WORLD COURT HOLDINGS

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AN EMINENT AUTHORITY in the field of international law once adverted to the fact that the awards of international tribunals afforded "impressive evidence" of the requirements of international law, emphasizing that the "impartiality and learning and acumen" of the members of bodies of this character had "oftentimes been productive of decisions entitled to the respect of States generally" and citing the work of the Permanent Court of Arbitration at The Hague as particularly affording "conspicuous examples" of impartiality of interest.¹ By contrast, statements in the public press would lead one to believe that, except in the most isolated of instances, it would be unrealistic to expect that a judge of an international tribunal would ever vote against the country of his origin or nationality. Thus, one New York paper reports that while, officially, such a judge is independent and does not act as a representative of his government, "this is obviously a fiction in Russia's case."² In an earlier report, however, the same paper had noted that Judge McNair's participation in the majority decision of a case pending before the International

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Court of Justice "marked the first time in the history of the post-war court that a judge had voted against his own Government."

It further asserted, on the authority of certain alleged "court historians," that the only earlier instance of such marked impartiality had occurred in the early 1920's when another British judge had done the same thing.

The American lawyer of today, accustomed to the high degree of impartiality shown by judges sitting in national courts, particularly when such judges are hedged around with common law concepts on the point, with canons bespeaking proper standards of judicial ethics, and by statutes designed to insure impartiality through provisions for disqualification or change of venue, has seldom been bothered, at the state level, with more than a passing reflection on the subject. He could, nevertheless, acquire from the foregoing reports a cynical viewpoint as to the impartial competence of judges serving at the international level, hence this investigation to determine the relationship, if any, between nationality on the one hand and partiality, or impartiality, on the other of those who have served on the Permanent Court of International Justice, as it existed under the League of Nations, or on the present International Court of Justice organized pursuant to a statute adopted by the United Nations. It will then, perhaps, be seen that, sweeping allegations or "historical" statements to the contrary, the scales of justice at the international level have

3 Ibid., July 23, 1952, p. 3.
5 See, in particular, Canons of Judicial Ethics of the American Bar Association (1937), Canons 13, 28, 29 and 34.
6 28 U. S. C. A. § 455 and III. Rev. Stat. 1965, Vol. 2, Ch. 146, § 1 et seq., are typical of the many statutes designed to insure the litigant of an impartial tribunal.
7 Frank, "Disqualification of Judges," 56 Yale L. J. 605 (1947), discusses the general subject as well as the most recent flare-up in this area at the national level in the United States.
8 While, in a technical sense, the two courts could be said to be separate and independent organizations, the first having been organized in 1921 and the other having been created in 1945, the general continuity of a World Court, regardless of its name, has been such that, except for minor matters not here important, there is no reason to draw distinctions between the two. In the balance of this paper, therefore, no attempt has been made to discuss the holdings of these tribunals separately, nor to note that any particular judge served upon one or the other, or upon both, of the courts.
generally been balanced with as pleasing a degree of impartiality as ever graced an American courthouse.

It might be proper, at this point, to add one word of caution. Partiality, whether on the part of a judge or anyone else, may be conscious or sub-conscious. In either event, there is usually no record of the person’s mental processes and seldom is there concrete evidence of bias. For that matter, the sentiment of nationality is itself subjective, hence not as demonstrable a cause for disqualification as would be the case with respect to pecuniary interest in the outcome or blood relationship to the parties litigant. Further, there has been no publication of communications, if any, between the judge at the international level and his government. These difficulties, although not insurmountable, are bound to make any conclusions indecisive, yet there is enough in the record from which conclusions may be drawn and by which discussion of the point may be implemented.

I. Qualifications for Judgeship

The bench of the present International Court of Justice is composed of fifteen members, all from different countries, who have been elected for nine-year terms by the concurrent action of the General Assembly and the Security Council of the United Nations. In addition, it is possible for a party before the court, if it lacks a regular judge of its nationality, to appoint an ad hoc judge subject to the requirement that, where a number of such states possess a similar interest, they are to be considered as one party for this purpose.9 The Statute of the Court expressly permits “judges of the nationality of each of the parties” to retain their “right to sit,”10 but every judge, whether regular or ad hoc, must make a solemn declaration that “he will exercise his powers impartially and conscientiously.”11 The quality of the

9 In doubtful cases of common interest, the Court decides whether, and how many, ad hoc judges may be appointed. The Court made such a decision in the Advisory Opinion concerning the Customs Regime Between Germany and Austria. See order of July 29, 1931: P.C.I.J., Ser. A/B, No. 41, p. 88.
10 See Article 31 thereof.
11 Statute, Art. 20 and Art. 31, para. 6.
bench is further reinforced by the statement that the Court should be composed of "independent" judges of "high moral character," competent in international law or possessing the qualifications for highest judicial office in their respective states.\textsuperscript{1}

The present method of electing the regular judges of the Court has succeeded on the whole in the appointment of praiseworthy judges. Probably not all the regular judges have been the best available, but they all seem to have met the qualifications required of them.\textsuperscript{2} It is true that the factor of nationality has been prominent at times during the course of elections but, so long as the successful candidate was qualified, the fact that another candidate, because of his nationality, was unsuccessful should not be ground for strenuous criticism.\textsuperscript{3} And if it should have happened that nationality caused the election of a less-qualified candidate, it must be remembered that a majority, if not all, of the other judges were eminently qualified.

\textit{Ad hoc} judges are also required to meet the qualifications aforementioned, with the designating states being asked to give preference to those who have been nominated for a regular position on the Court.\textsuperscript{4} This preference provision is not obligatory nor, for that matter, has it been persuasive since it would appear that most of the \textit{ad hoc} judges were not candidates at the time they were so designated. Nationals of a state have usually been designated but the designating state has often by-passed the candidate list, even at times when it had at least one national thereon and sometimes when it had as many as five.\textsuperscript{5} Exceptions

\textsuperscript{12} Ibid., Art. 2.
\textsuperscript{13} The qualifications of the judges are set forth in biographies published in P.C.I.J., Ser. E, Nos. 1, 5, 6, 7, 12, 15 and 15, and in I. C. J. Yearbook, 1946-47 to date.
\textsuperscript{15} Statute, Art. 31, para. 2.
\textsuperscript{16} The appointment of Rostworowski (P.C.I.J., Ser. E, No. 2, p. 16), Fromageot (ibid., No. 5, p. 27), Papazoff (ibid., No. 6, p. 24), Seferlades (ibid., No. 9, p. 21), Hermann-Otavsky (ibid., No. 9, p. 19), and Spiropoulos (I.C.J. Yearbook 1951-52, p. 23), as judges \textit{ad hoc} occurred after they had been nominated for regular positions. In contrast, the following have served without being so nominated: Schucking (no Germans nominated), Calcyanni (one Greek nominated), Rabel (no Germans nominated), Ehrlich (two Polish nationals nominated), Felzt Daim Bey (no Turkish nationals nominated), Bruns (a German appointed by Danzig at a
exist in that Danzig twice selected M. Bruns, a German, as ad hoc judge and Albania, in the Corfu Channel cases, designated M. Ecer and M. Daxner, Czechoslovaks, to serve in a similar capacity although neither had been nominated, at the time of their appointment as ad hoc judges, as candidates for regular positions on the Court.

At the time of the San Francisco Conference in 1945, there was some effort to substitute the word "impartial" for the word "independent" in Article 2 of the Statute, but the proposal was not accepted. The presence of such a movement may or may not indicate that there is a difference between the two words. It has been said that the independence of judges is a means toward insuring impartiality. But what, then, is meant by partiality? A judge could be said to be partial if he were predisposed to favor one side because of extra-legal considerations rather than being willing to apply those considerations enumerated in Article 38 of the Statute. A special relationship between judge and party may cause such predisposition. But this relationship can be dangerous to impartiality without showing that all judges with that relationship will be partial. It is dangerous if, from experi-

17 P.C.I.J., Ser. A/B, Nos. 43 (1931) and 44 (1932).
21 That article provides that, in contentious cases, the Court shall apply (1) international conventions, (2) international custom, (3) the general principles of law, and (4) judicial decisions and teachings of highly qualified publicists. The Court may decide ex aequo et bono if the parties agree. In connection with advisory opinions, according to Art. 68, the Court is to be guided, to the extent it deems applicable, by the provisions of Art. 38.
ence and general knowledge, it is reasonable to believe that partial conduct may occur on the part of some judges.\(^{22}\)

How broad or restricted the role of the Court may be in the international community could be said to be a matter unrelated to the judges' impartiality. The principal function of the Court, of course, is to decide cases which states consent to bring before it. In this function, there can be no doubt that the judges should be impartial. Other functions, such as the development of international law\(^{23}\) or the giving of preference to the "long-range policy of the community . . . over the conflicting interests of the members of the community,"\(^{24}\) may be proper subjects of influence on the decisions of the Court and its judges but these functions can still be performed without display of partiality in favor of a party in a particular case.

II. The Judicial Voting Record

A judge's nationality relates him to a party either directly, when his state is a party, or indirectly, as when there is something in common between his government and a party. Probably the closest-knit group of states, politically speaking, in international relations today is the Communist bloc. But the voting records of the judges from these states show no corresponding solidarity. In the preliminary jurisdictional aspects of the Corfu Channel case,\(^{25}\) one involving the United Kingdom and Albania, Polish judge Winiarski, Yugoslav judge Zoricic, and Judge Krylov, a Soviet national, concurred with the majority in rejecting Albania's preliminary objection, while Albania's ad hoc judge Daxner, a Czechoslovak, dissented. All this occurred at a time when the U. S. S. R. and Poland, in the Security Council, were claiming that

\(^{22}\) See American Communications Ass'n v. Douds, 339 U. S. 382, 70 S. Ct. 674, 94 L. Ed. 925 (1950).
\(^{24}\) Lissitzyn, op. cit., pp. 57-8.
\(^{25}\) I.C.J. Reports 1948, p. 20.
Albania was not responsible for damage to British ships and seamen caused by mines in Albanian waters.\textsuperscript{26} When the Court reached the merits of the case,\textsuperscript{27} however, and found Albania responsible, Albania's \textit{ad hoc} judge Ecer, a Czechoslovak, and Judges Zoricic and Krylov dissented. But Judge Winiarski, despite the position which his government had previously taken, voted as one of the majority. It could also be pointed out that the Court unanimously found a violation of Albanian waters by the United Kingdom on November 12th and 13th, 1946, but at least a majority of the judges held there was no violation on October 22nd. Judge Krylov, a Soviet national, was the only judge from a Communist state who dissented on this point whereas the U. S. S. R., in the Council debate, had charged that the United Kingdom had violated Albanian waters on all three occasions.\textsuperscript{28}

Another illustration may be found in connection with the Advisory Opinion on the Admission of a State to the United Nations,\textsuperscript{29} where the Court declared that the conditions for admission, as set forth in Article 4 of the Charter, were exhaustive. Polish judge Winiarski and Yugoslav judge Zoricic dissented in favor of the contentions advanced by their governments that the conditions were, at best, only a minimum requirement.\textsuperscript{30} Judge Krylov, in his dissent, expressed the thought that the Court should have refused to give an opinion because the question was a political one, but did say that the conditions for admission were not exhaustive. The Soviet representative, in General Assembly debate, by contrast, had admitted that the conditions were exhaustive, yet ended by arguing against the request for an opinion because it was a political matter.\textsuperscript{31} Judge Zoricic, on the other

\textsuperscript{26} Off. Rec. of Sec. Coun., 2d year (1947), pp. 369 and 725, for the views of the U. S. S. R., and ibid., pp. 374 and 554 for the views of Poland.
\textsuperscript{27} I.C.J. Reports 1949, p. 4.
\textsuperscript{28} Off. Rec. of Sec. Coun., 2d year (1947) p. 369.
\textsuperscript{29} I.C.J. Reports 1948, p. 57.
\textsuperscript{30} See I.C.J. Pleadings, Conditions of Admission (1948), p. 99, for the contentions of Poland, and ibid., p. 79, for those of Yugoslavia.
\textsuperscript{31} Gen. Assembly Off. Rec., 2d Sess. (1947) : Plenary, pp. 1048-51. It is interesting to note that after the opinion was given, the same Soviet representative, in attempting to prove that the majority was a minority because of the concurring opinions of Judges Azevedo and Alvarez, stated that the conditions of Article 4 were not exhaustive. See Gen. Assembly Off. Rec., 3d Sess., 1st Pt. (1948) : \textit{Ad hoc} Political Committee, pp. 65-71.
hand, agreed with the political objection advanced by his government but disagreed on the competence of the Court to interpret the Charter. 82

In still another instance, that relating to the Advisory Opinion on the Interpretation of Peace Treaties, 83 the Court declared that a dispute existed which required Bulgaria, Hungary, and Rumania to appoint representatives. Judges Krylov, Winiarski and Zoricic dissented, taking the same view as that taken by the Soviet Government. 84 The Court rejected the argument that a domestic question was involved with Judge Krylov dissenting to agree with the Soviet Government's views. 85 The Polish Government had also contended that this was a domestic question, 86 but its national, Judge Winiarski, disagreed although he dissented on the ground that, since an actual dispute existed, the consent of Bulgaria, Hungary, and Rumania was required. Judge Zoricic, having likewise voted to reject the domestic argument, did dissent from the final opinion for much the same reasons as those advanced by Judge Winiarski.

It is true, as noted above, that Judge McNair was the first post-war judge to vote against his own government, but he had done this before the advent of the Anglo-Iranian Oil Company case for, in the earlier Corfu Channel case, he had joined with a unanimous court in holding that the United Kingdom had violated Albanian sovereignty. 87 It is to the credit of Italian judge Anziliotti that, in the first judgment rendered by the old World Court, he too had dissented against his own government. 88 Moreover, there are at least nine other occasions when a judge of the old World Court voted, in whole or in part, against his government's contentions. 89

82 I.C.J. Pleadings, Conditions to Admission (1948), pp. 22, 84 and 90.
87 I.C.J. Reports 1948, pp. 4 and 36. For Judge McNair's vote in the Anglo-Iranian Oil Company case, see I.C.J. Reports 1952, p. 93.
88 This occurred in the S. S. "Wimbledon" case, P.C.I.J., Ser. A, No. 1 (1923).
89 For a survey of votes by judges, as compared with the contentions of their several governments, see Appendix to this article.
In addition to the Communist and anti-Communist blocs, there are other common interests which may be affected by a Court decision as, for example, big powers and small powers, European states and Far-Eastern states, maritime states and non-maritime states, three-mile-limit states and more-than-three-mile-limit states, Latin American states and non-Latin American states, Allied and Associated Powers and Central Powers. More could be added. The cynic might say that some of these interests are not vital enough to disturb solidarity on the Court. How does one decide what interests are so vital and which interests are not? Although it is not denied that indirect national interests may influence a judge’s vote, still the difficulty remains of separating the amorphous from the real, or from the less amorphous.

Certainly, less conjectural is the sentiment of nationality when a judge’s government is a party before the Court. Is this connection sufficiently dangerous to a judge’s impartiality? Statistics showing how often judges voted in favor of their government’s contentions have been utilized to support an affirmative answer. Out of 156 questions presented to the Court in contentious cases or advisory opinions on a pending legal dispute between states, a combination of regular judges and ad hoc judges voted for their government a total of 123 times. Fifty-nine times out of 85, regular judges voted for their governments while dissenting only 17 times. Ad hoc judges, considered as a separate class, voted for the state appointing them 64 times out of 72, dissenting 31 times. No ad hoc judge has ever dissented against the government appointing him, but a regular judge has twice dissented from a judgment in favor of his home state.40

Similar conclusions were reached statistically by Professor (now Judge) Lauterpacht, who has suggested that this “cannot be regarded as a mere coincidence.”41 On the other hand, Pro-

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40 Details appear in the Appendix. There have not been 156 contentious cases and advisory opinions to date but, in many of the matters coming before the Court, it was asked to decide more than one question, thereby producing the total number of determinations noted.

fessor Hudson, at one time, attributed little value to "a mere tabulation of votes" unless there was also a "careful analysis of the substance of the views expressed by the majority and by the minority." For that matter, he placed little value on the mere fact that an ad hoc judge or a regular judge was the only dissenter in favor of his government. On the other hand, it would seem that when a judge votes against his government, this should be considered as convincing evidence that he was not partial to his government.

It is not difficult to discover language in the opinions of some lone dissenters indicating that the opportunity afforded by a dissent was used more to expound political rather than judicial reasoning. In the jurisdictional aspects of the Corfu Channel case, for example, ad hoc Judge Daxner, designated by Albania, was the only one to dissent from a fifteen-judge majority judgment rejecting Albania's preliminary objection. After endorsing Albania's contention that it was entitled to ignore the United Kingdom's application, he continued:

Let us examine why Albania, in spite of its right to ignore the application, agreed to appear before the Court. As a small country of scarcely a million inhabitants, Albania could not, by its refusal, adopt a position which might have been easily adopted by a great Power, such as England for instance, in a similar case. Moreover, in the eyes of the world, Albania has hitherto been considered (wrongly of course) as one of the countries of the Balkans, so often described as the "powder-keg" of Europe. Its refusal to appear before the Court would have contributed to confirm this unfounded reputation as a backward country which refused to recognize

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43 The United States Supreme Court once stated that the fact that a juror, who was defendant's former employee, was the only one to vote for acquittal was evidence of bias in favor of defendant: Clark v. United States, 289 U. S. 1 at 18, 53 S. Ct. 465 at 471, 77 L. Ed. 993 at 1002 (1932).

44 In Nelson v. Dodge, 76 R. I. 1, 68 A. (2d) 51 (1949), for example, the court said that lack of bias was proven because the judge voted in favor of the party accusing him of bias.
the institutions of the civilized world by an act which might have been interpreted as involving contempt of Court. In such circumstances, therefore, Albania chose not to invoke its right, as a great Power might easily have done without incurring the criticism of the world, and agreed to appear before the Court.

Another illustration may be found in the Colombian-Peruvian Asylum case, where ad hoc Judge Caicedo Castilla, appointed by Colombia, in his dissent, declared:

Colombia has not sought to defend a particular interest, but rather the legal principles which are generally accepted in Latin America. Colombia has considered that, as a member of the American community, she is bound to work for the integrity of these principles which, along with many others, are effectively in force on the American continent, thus ensuring that international relations in that part of the world develop on the basis of noble doctrines and not on grounds which are purely utilitarian or materialistic. In this case Colombia has remained faithful to her own traditions as well as to the juridical traditions of the continent. In stating resolutely and unselfishly the tendencies which are common to the other American Republics, Colombia actually becomes the spokesman of the free peoples of America.

III. CONSIDERATIONS INSURING IMPARTIALITY

Is it really necessary to make a careful comparative analysis of dissenting and majority opinions, or to compile even more elaborate statistics than those presented here? No one would think similar evidence necessary to disqualify judges of national courts whose personal advantage, or that of a close relative, might be involved. Extensive research was not thought necessary when the group designated as the 1920 Jurists, the original framers of

45 I.C.J. Reports 1948, p. 41.
46 Ibid., 1950, p. 881.
the Statute, provided for disqualification if the judge was previously connected with the case in any capacity. In that connection, they did no more than follow state tradition.

That nationality was such a connection was not denied by these jurists, but they believed the danger would be overcome because the judges were to be of the highest moral character and were to make a solemn declaration to exercise their powers impartially and conscientiously. A like statement of admirable faith would have been equally applicable to the situations where a prior connection with the case had existed, as covered by Article 17, but it was not made. Such a statement, then, can only have reference to conscious partiality. It overlooks the real possibility that even a highly moral judge may be influenced subconsciously as to which some of the judges themselves have noted the close connection of national to state by saying:

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 preferences for which they are so ready to spend their fortunes and to risk their lives.

It is true that a regular judge should possess a greater sense of responsibility toward his judicial duties than a judge who is specially appointed. For this reason, the case against ad hoc judges is stronger. However, the sentiment of nationality may

48 See Proces-verbaux of the Advisory Committee of Jurists (1920), pp. 376, 459, 460-1, 574 and 646. This work is hereafter cited as "1920 Jurists". See also Scott, The Project of the Permanent Court of International Justice (Washington, 1920), p. 75, and note Article 17 of the Statute of the Court.


51 Joint statement of Judges Loder, Moore and Anzilotti in P.C.I.J., Ser. E. No. 4 (1927-8), p. 75. Some judges may fear the results upon their "own fortunes" if they vote against their governments: Ralston, International Arbitration from Athens to Locarno (Stanford University Press, 1929), p. 29. See also 1920 Jurists, pp. 591-2 and 742; Minutes of the 1929 Committee of Jurists, League Doc. V. Legal 1949, V.5, p. 50.
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sub-consciously influence a regular judge as well as an \textit{ad hoc} judge. Also to be considered, as collateral to the nationality influence, is the relationship the 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 he owes his appointment, in a large degree, to the support provided by his government, more so than would be the case for a judge from a smaller power.

In those instances where both parties would have a regular national on the Court, the 1920 jurists admitted that it would be logical if both were to withdraw. Withdrawal, however, was not considered acceptable because the Court might then lack a quorum as well because differing legal systems and civilizations might not be sufficiently represented.\textsuperscript{52} But it might be noted that, in the entire experience of the Court to date, if regular judges had withdrawn, the required quorum of nine would not have been threatened. For example, the largest number of regular judges who, had this principle been in effect, would have withdrawn in any one case to date would have been four.\textsuperscript{53} It could, of course, happen that more than six states might be parties and that each would have a regular judge. Nevertheless, up to this point, as in the case relating to the International Commission of the Oder, where seven states were before the Court, only one of the parties had a regular judge on the bench\textsuperscript{54} so the theoretical problem is not likely to occur. To guard against this unlikely possibility that disqualification might cause a lack of quorum, there is reason to believe that the scheme for deputy-judges, as used in the old World Court,\textsuperscript{55} could be revived.

As to the risk that legal systems and civilizations would not be sufficiently represented, is it not pertinent to inquire why they

\textsuperscript{52}1920 Jurists, p. 721.
\textsuperscript{54}Ibid., Ser. A, No. 28 (1929).
\textsuperscript{55}Deputy-judges were elected in the same manner as regular judges. If the full number of regular judges could not be present, the number was made up by calling on the deputy-judges, who sat in order according to a list prepared by the Court. Deputy-judges were eliminated in 1936. Before then, in 1930, the number of regular judges had been increased from nine to fifteen, the number presently prevailing.
should be represented in the first place. The primary reason given by the earlier jurists was that, no matter what points of national law arose, all would be comprehended. It is doubtful that competent judges would be incapable of understanding points of national law on the rare occasions when they might arise so, if this difficulty should arise, it would still be possible to resort to the services of expert assessors, pursuant to Article 30 of the Statute.

One of the reasons given by the 1920 jurists in support of the appointment and use of ad hoc judges was to establish equality between the parties in the event one of the parties had a national on the Court and the other did not. It was suggested that this fact was "no reason for the judge already appointed to withdraw" as, in this respect, the Court was said to resemble "a national tribunal." How it resembled a national tribunal was not explained, nor could it be for the exact opposite is the practice with respect to national tribunals where judges too closely connected with the parties are deemed disqualified. These jurists were not alone in the facile use of the term "equality" to support the practice of appointing ad hoc judges. For example, Judges Loder, Anzilotti, and Moore once referred to the appointment of ad hoc judges as "placing the parties on an even footing" although they must have been aware that equality, in national courts, is obtained through the process of disqualification. Even so, they stated that "the Statute merely recognized a principle that is enforced in municipal courts."

If equality by addition is a valid explanation, then it should be applied with full logical force in those multiple-state cases

56 1920 Jurists, p. 710.
57 Ibid., pp. 721-2.
58 Disqualification for blood relationship or pecuniary interest is universal in state courts in the United States. But, strangely enough, the common law did not disqualify a judge for bias and prejudice and this is still the law in a number of states although there is a developing tendency toward disqualification by statute. In the United States Supreme Court and the several Courts of Appeal, disqualification is left to the discretion of the individual judge. Federal district court judges may be disqualified provided a party files an affidavit stating facts and reasons to support a belief as to bias or prejudice: 28 U.S.C.A. § 455, and Frank, "Disqualification of Judges," 56 Yale L. J. 605 (1947), particularly pp. 619-30.
where there are several states on one side and a lesser number on the other. Take, as an illustration, a case wherein a dispute exists between States A, B, C and D on the one hand against States E and F on the other, with States A, B, and C each having a regular judge but States E and F not being so represented. Because of the similarity of interest provision, States E and F are permitted to have one, but only one, ad hoc judge. If the principle of equality by addition were to be logically applied, States E and F should be permitted to appoint not one but three ad hoc judges for, if this were not done, the votes of the regular judges would have more weight in the decision of the case than would be true in a two-state dispute where the votes of the parties' judges, regular or otherwise, would serve to cancel each other.

It is true that, in national judicial systems, a judge appointed by the government is not disqualified when the government is a party. But there is an obvious difference between such a judge deciding a case between the government appointing him and a party who is a fellow citizen and one who is called upon to decide a case between his government and that of another government. Beside, if the judge in the national system were to be deemed disqualified, the case could not be decided since, presumably, all other judges would have been appointed by the government. If the World Court has an undesirable feature, it is not to be excused because national systems have the same feature, whatever that feature might be. Conversely, if a feature of a national system would be desirable for the World Court, its adoption should be considered, not merely because the national system possesses that feature but because the feature itself is a desirable one. A standard for the World Court should be formulated; whether or not a national court fulfills that standard is immaterial. The standard here is not one of unattainable absolute impartiality, desirable though that would be, but every effort should be made to eliminate dangers in order to bring a world order closer to that goal.

60 See Statute, Art. 31, para. 5.
Whether or not the disqualification of judges because of nationality would be practical at the present time depends, to some extent, upon the real reason for the adoption of Article 31 in the first instance. It has been said that the reason lies in the fact that "States attach much importance to having one of their subjects on the Bench when they appear before a Court of Justice." The presence of a national on the Court has also been said to inspire confidence in a state that its arguments will be duly considered in the course of the deliberations as the national judge will be able to explain the arguments of his state and help in preventing the judgment from "ruffling national susceptibilities." There should be no fear that competent, albeit non-national, judges would overlook relevant arguments or be inclined to draft an insensitive opinion.

Nevertheless, this absence of confidence in a tribunal which would be composed of judges where a national of a party would be lacking does, in fact, exist. One of the principal reasons for the failure to create the Arbitral Court at the Hague Conference of 1907 was that each state insisted on appointing its own judge. Similarly, in the Central American Court of Justice, existing between 1908 and 1918, the legislature of each of the Central American states appointed a judge and he was allowed to remain if his state was a party. The question of national judges on the World Court was again discussed at the 1945 San Francisco Conference where the plan for advisory assessors, first introduced before but rejected by the 1920 jurists, was revived. At that

61 1920 Jurists, p. 722. Judges Loder, Anzilotti and Moore, in their joint report, stated: "In the attempt to establish courts of justice, the fundamental problem always has been, and probably always will be, that of representation of the litigants in the constitution of the tribunal." See P.C.I.J., Ser. E, No. 4 (1927-8), p. 75.
63 Lauterpacht, op. cit., p. 235.
conference, M. Abbass of Iraq was against the idea of a national, whether as judge or assessor, serving on the bench while his state was a party. A Dutch proposal planned to give the parties the right to appoint, by common agreement, two \textit{ad hoc} judges in addition to the regular judges or to those \textit{ad hoc} judges appointed pursuant to Article 31. A British proposal that \textit{ad hoc} judges should be chosen from a standing list composed of one national from each state was rejected. It was the recommendation of an Egyptian jurist that, if one of the judges concerned chose not to vote, the other should likewise abstain. But the 1945 group of jurists rejected all these innovations and, seconding the views of their 1920 predecessors, they voted overwhelmingly to defeat a motion designed to eliminate \textit{ad hoc} judges.\footnote{An examination of the minutes of the framers of the Statute would show that, in all probability, most of them were opposed to the idea that the nationals of the parties should sit on the Court. Nevertheless, aware of the demand by states for representation and desirous of progressing from arbitration to an international court, they sacrificed an ideal for a plan. While they undoubtedly knew that plan was not the best one, they realized that if it was not offered they would have been left empty-handed.}

A seemingly forward step would appear to have been taken in connection with the Protocol on the Code of the Court of Justice of the European Coal and Steel Community. Article 19 of that Protocol provides: "A party may not invoke the nationality of a judge, or the absence from the bench of a judge of its own nationality, in order to ask for a change in the composition of the Court." This admirable provision, however, seems to be weakened by the fact that the seven judges of that Court are appointed by agreement among the member state governments\footnote{See Article 32 of the Treaty Constituting the European Coal and Steel Community.} and, since there are only six member states, it is very likely that each member will have at least one judge of its nationality on the Court.\footnote{The member states in the European Coal and Steel Community are France, Italy, Luxembourg, the Netherlands, the German Federal Republic and Belgium. The judges appointed to the court thereof are MM. Pilotti, Delvaux, Hammes, Riese, Rueff, Serrarens, and Van Kleffens: \textit{Rapport Sur L'application du Traite instituant la Communaute Europeenne du Charbon et de L'acier} (Luxembourg, Jan. 4, 1954), p. 9. This report does not give the nationalities of the judges but the New York Times, October 29, 1954, p. 2, reports that the court is composed of an Italian, a Frenchman, a German, a Belgian, a Luxembourger, and two Dutchmen.}
As a practical proposition, therefore, it would seem, in the light of this experience, that most states would refuse to bring a case before a World Court which lacked a judge of its nationality; hence, by permitting the appointment of ad hoc judges, the Court resembles, in some respects, the familiar arbitral tribunal. It is not, of course, a true arbitral tribunal since all of the judges are not, either directly or indirectly, appointed by the parties. Nevertheless, any proposal to alter the scheme of ad hoc judges does not mean that a choice must be made between exclusive alternatives. Clearly, states may prefer to take some disputes before arbitral tribunals but even arbitration, if it is to be successful, should result in an impartial award. Because the parties to arbitration exercise a degree of control in the selection of the arbitrators, there has often been doubt as to the impartiality of the persons so selected. Furthermore, because of the small number of arbitrators, the umpire or "neutral" arbitrator may be influenced by non-judicial considerations, thereby diminishing the judicial authority of the award. There is ample reason, therefore, if the determinations of the World Court are to be accepted as representing a truly impartial holding on the point, for the avoidance of any, even a seeming, appearance that the decision was a negotiated one.

Does the fact that a national is permitted to sit when his state is a party endanger the impartiality of World Court judgments? This danger is not present when only two states are parties for, "if the opposing views are both represented . . . they counter-balance one another." This has been true, to date, in most cases but it may not apply in the multiple-state cases. If none of the states to such a dispute has a regular judge of its nationality, there will be a counter-balancing since each side will appoint one ad hoc judge. But if one side already has several regular judges and the other side has a lesser number or none at all, there would be no counter-balancing. This is no hypothetical

71 1920 Jurists, p. 721.
possibility for, in forty-six contentious cases decided by the Court, an absence of counter-balancing has happened four times and a similar number of instances may be noted in connection with thirteen of the advisory opinions rendered on pending legal disputes between states.\textsuperscript{72}

One guarantee of impartiality does exist in the form of a recognition of the principle that a national of a party should not have the deciding vote. While the President, or acting President, of the Court votes again to break a tie,\textsuperscript{73} he is denied the right to exercise this presidential function when his state is a party.\textsuperscript{74} This much disqualification may be of minor significance when compared with the suggestion that, to insure impartiality, every national judge should be disqualified. This last is of such magnitude that it would probably wreck the Court since most states would then refuse to submit their disputes to it. But, in those cases where the judges’ votes do not counter-balance each other, states might be willing to disqualify nationals and have each side appoint an \textit{ad hoc} judge. In this way, each state could gain a degree of confidence that its arguments would be duly considered in the course of the deliberations yet be assured that the nationals of an opposing party would be unable to cast the deciding vote. In that way, justice would not only appear just but be so.\textsuperscript{75}

\textsuperscript{72} The four contentious cases are (1) the S. S. “Wimbledon” case, P.C.I.J., Ser. A, No. 1, (1929-30); (2) the Statute of Memel (jurisdictional aspects), P.C.I.J., Ser. A/B, No. 47 (1932); (3) the same case on the merits, ibid., No. 49 (1932); and (4) the case entitled Monetary Gold Removed from Rome (jurisdictional aspects), I.C.J. Reports 1954, p. 19. In the case of the Jurisdiction of the International Commission of the River Oder, P.C.I.J., Ser. A, No. 23 (1929), the situation did not arise because there were no judges of French or British nationality present on the Court. The four advisory opinions referred to are those designated (1) European Commission of the Danube, P.C.I.J., Ser. B, No. 14 (1927); (2) Customs Regime, P.C.I.J., Ser. A/B, No. 41 (1931); (3) Interpretation of Peace Treaties, I.C.J. Reports 1950, p. 65; and (4) the same matter on its second phase, ibid., p. 221.

\textsuperscript{73} Statute, Art 55.


\textsuperscript{75} It was the 1920 Jurists who said: “Justice . . . must not only be just, but appear so.” See op. cit., note 48 ante, p. 721.
APPENDIX

VOTING RECORD COMPARED WITH GOVERNMENTAL VIEWS*

A. Contentious Cases

Case and Parties


How Judges Voted
1. Nine to 4 in favor of plaintiff states. The British, French and Japanese judges voted for their governments. The Italian judge dissented against his government. The German ad hoc judge dissented.

2. By a 7 to 6 vote, the British preliminary objection concerning the Jaffa concessions was upheld, but the one concerning the Jerusalem concessions was rejected. The British judge dissented to the holding on the Jerusalem concessions. The Greek ad hoc judge did not dissent.

3. Although the Court decided the legal question in Greece's favor, its claim for indemnity was dismissed since no loss was suffered. Neither the British nor the Greek ad hoc judge dissented.

4. Twelve to 1 against Poland's preliminary objection. The German ad hoc judge voted with the majority. The only dissent was by the Polish ad hoc judge.

5. Nine to 3 in favor of Germany, the German ad hoc judge voting for Germany and the Polish ad hoc judge dissenting.

6. Ten to 3 against Poland's preliminary objection. The Polish ad hoc judge was one of the dissenters.

* It is not possible, in some cases, to tell how a particular judge voted because all of the dissenters were not identified.
Case and Parties


How Judges Voted

7. Nine to 3 for Germany, the German ad hoc judge voting for Germany, the Polish ad hoc judge dissenting.

8. Judgment for Turkey after the President, a Swiss national, voted again to break a tie. The Turkish ad hoc judge voted for Turkey, while the French judge dissented.

9. Seven to 4 in favor of Great Britain’s preliminary objection. The Greek ad hoc judge dissented.

10. Eight to 4 in favor of Germany. The German ad hoc judge voted for Germany and the Polish ad hoc judge dissented.

11. Nine to 3 for France. The French ad hoc judge voted for France and the Yugoslav ad hoc judge dissented.

12. Nine to 2 for France. The French ad hoc judge voted for France while the Brazilian judge dissented.

13. Nine to 2 against Poland. The Danish judge voted for Denmark while the Polish ad hoc judge dissented.

14. Six to 4 in favor of Switzerland. The Swiss judge voted for Switzerland and the French ad hoc judge dissented.

15. Thirteen to 3 against Lithuania’s preliminary objection. All the judges of the plaintiff states voted for their governments. The Lithuanian ad hoc judge dissented.
Case and Parties


How Judges Voted

16. The Court decided three questions in favor of Lithuania and three against it. The Italian judge dissented on the ground that the application of the plaintiff states was inadmissible. The Japanese, British and French judges expressed no dissent. The Lithuanian ad hoc judge dissented on only one of the answers unfavorable to Lithuania.

17. Twelve to 2 for Denmark. The Danish ad hoc judge voted for Denmark while the Norwegian ad hoc judge dissented.

18. Twelve to 1 against Czechoslovakia. The Hungarian ad hoc judge voted for Hungary. The Czechoslovak ad hoc judge was the lone dissenter.

19. Ten to 2 for France. The French judge voted for France. The Greek ad hoc judge was one of the dissenters.

20. Six to 5 for Belgium. The Belgian judge voted in his country's favor and the British judge dissented.

21. Eight to 6 for Yugoslavia. The Yugoslav ad hoc judge voted for Yugoslavia and the Hungarian ad hoc judge dissented.

22. By 10 to 3, the Court rejected The Netherlands' claim, the Dutch judge dissenting. By the same vote, the Belgian counterclaim was also rejected with the Belgian judge dissenting.
Case and Parties


How Judges Voted

23. Ten to 3 against Greece. The French judge voted for France while the Greek ad hoc judge dissented.

24. Spain’s preliminary objection was unanimously rejected, the Spanish judge not dissenting to this action.

25. Eleven to 1 upholding the French preliminary objection. The French judge voted with the majority. The Italian judge did not dissent.

26. Ten to 4 in Lithuania’s favor, the Lithuanian ad hoc judge voting for Lithuania; the Estonian ad hoc judge did not dissent.

27. Belgium asked the Court to hold that Bulgaria had failed on three occasions to perform its international duties. On Bulgaria’s preliminary objection, the Court, voting 9 to 5, held it had jurisdiction over two of the actions. The Belgian judge agreed with the majority but the Bulgarian ad hoc judge dissented on the points unfavorable to Bulgaria.

28. The decision was by a vote of 13 to 2. Neither the Belgian judge nor the Greek ad hoc judge dissented. It is difficult to determine in whose favor the judgment was given. Throughout the oral proceedings, the parties seem to have been settling the dispute on their own initiative. An important question was whether a prior arbitral award was res judicata, but this

29. By a vote of 15 to 1, the Court rejected Albania's preliminary objection. The British judge voted for the United Kingdom. The ad hoc judge designated by Albania was the lone dissenter.


30. The Court, by a vote of 11 to 5, found Albania responsible, with the British judge voting for his government and the ad hoc judge named by Albania dissenting. By a vote of 10 to 6, the Court held it had jurisdiction to determine the amount of compensation due to the United Kingdom, with Albania’s ad hoc judge voting with the dissenters. The Court unanimously found that the United Kingdom had violated Albanian waters on Nov. 12 and 13, 1946, and, on this question, the British judge voted against his government. By a vote of 14 to 2, the Court held there was no violation on Oct. 22nd. Albania’s ad hoc judge did not dissent hence, on this point, he voted against Albania.


31. Twelve judges, including the British judge, fixed the amount. Albania’s ad hoc judge was one of two dissenters.


32. Fourteen to 2 against Colombia’s submission that Peru was bound by Colombia’s determination of Haya de la Torre’s offense as
Case and Parties


How Judges Voted

being a political one. The Peruvian \textit{ad hoc} judge voted for Peru while the Colombian \textit{ad hoc} judge dis- sented. The Court rejected Colombia's submission that Peru was bound to grant safe-conduct, the Colombian \textit{ad hoc} judge being the sole dissenter. The Court accepted, 10 to 6, Peru's contention that Colombia had violated the Havana Convention. The Peruvian \textit{ad hoc} judge voted for Peru in this respect, with the Colombian \textit{ad hoc} judge dissenting.

33. Colombia's request for interpretation was rejected by a unanimous Court, which included the Peruvian \textit{ad hoc} judge, except for the dissent of the \textit{ad hoc} judge appointed by Colombia.

34. Thirteen to 1 for Colombia. The Colombian \textit{ad hoc} judge voted for Colombia. The Peruvian \textit{ad hoc} judge was the lone dissenter.

35. By votes of 10 to 2 and 8 to 4, both questions before the Court were decided in Norway's favor. The British judge dissented on both questions. The Norwegian judge clearly voted for Norway on one of the questions but it is not clear how he voted on the other.

36. On the jurisdictional point, the Court voted 9 to 5 to uphold Iran's preliminary objection. The British judge voted against his government.

37. The Court decided 10 to 5 against the United Kingdom on one question but 13 to 2 in its favor on


38. Ten to 4 in favor of Greece. The Greek ad hoc judge voted for Greece and the British judge dissented.

39. The French judge did not dissent from those questions decided unfavorably to France. The American judge dissented on some points decided, by votes of 6 to 5 and 7 to 4, unfavorably to the United States, but he appears to have agreed with the unanimous or nearly unanimous determination of the Court on other matters unfavorable to the United States.

40. Unanimous decision for the United Kingdom, with the British judge voting in its favor and the French judge voting against France.

41. Decision for Italy's preliminary objection by a unanimous vote on one question and on a 13-to-1 vote as to the other. The Italian ad hoc judge voted for his government in both instances. The British, American and French judges did not dissent.

42. Decision in favor of Guatemala by a vote of 11 to 3. The Guatemalan ad hoc judge voted for Guatemala while the ad hoc judge appointed by Liechtenstein dissented.
B. Advisory Opinions*

Case and Parties


How Judges Voted

1. The British contentions were accepted by a unanimous Court which included both a British judge and a French judge. The contentions of the latter’s government were rejected.

2. The British judge joined in a unanimous opinion in favor of Great Britain. Turkey had no national on the Court.

3. The British and Italian judges voted in favor of their governments. The Court was unanimous except for a lone dissent by the Rumanian judge. The contentions of his government were not accepted.

4. Danzig’s ad hoc judge joined a unanimous Court accepting Danzig’s contention; the Polish ad hoc judge did not dissent.

5. Neither the Greek ad hoc judge nor the Bulgarian ad hoc judge dissented from the unanimous opinion. Of four questions involved, it would seem that the first, the third, and the fourth were answered with equal favor since both states held misconceptions, which the Court endeavored to untangle, regarding the relevant convention. The answer to the second question favored Greece.

6. Each judge voted in favor of his government; the German judge with the majority and the Polish judge in a lone dissent.

* Only advisory opinions on pending legal disputes between states have been included in this survey.
Case and Parties


12. Interpretation of Peace Treaties, I.C.J. Reports 1950, p. 65. United Kingdom, United States and Bulgaria, Hungary, Rumania. See also I.C.J. Pleadings 1950, pp. 131 and 257, for the pleadings of the United States, and ibid., pp. 169 and 296, for the pleadings of the United Kingdom.

How Judges Voted

7. The Italian and French judges were included in a majority of 8 which accepted the positions of their governments. The German judge was one of seven dissenters. The contentions of his government were rejected.

8. The Lithuanian ad hoc judge joined in a unanimous opinion in favor of Lithuania. The Polish judge did not dissent.

9. The Polish judge dissented with two others from an opinion rejecting Poland’s position. Danzig’s ad hoc judge voted as one of the majority of eleven.

10. The Court’s answer to the first question was primarily unfavorable to the Polish contention, but there was no dissent. Also unfavorable to Poland was the answer to the second question, but on this there were four dissenters, including the Polish judge. Danzig’s ad hoc judge voted with the majority in both instances.

11. An eight-judge majority opinion favored Greece, with the Greek ad hoc judge voting as one of the majority. The Bulgarian ad hoc judge was one of the six dissenters.

12. Bulgaria, Hungary and Rumania refused to make an appearance before the Court. By a vote of 11 to 3, the Court declared that a dispute existed which required these states to appoint representatives. The British and American judges voted with the majority, agreeing with views expressed by their governments.
Case and Parties

13. Interpretation of Peace Treaties (second phase), I.C.J. Reports 1950, p. 221. Same parties as in preceding paragraph. See also ibid., pp. 213 and 338, for the contentions of the United States, and ibid., pp. 185 and 362, for those of the United Kingdom.

How Judges Voted

13. The British and American judges, voting with the majority, disagreed with the views expressed by their governments.