NATIONAL REPRESENTATION OF JUDGES AND LEGITIMACY OF INTERNATIONAL JURISDICTIONS: LESSONS FROM ICJ TO ECJ?

by

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Courts must be able effectively to discharge their functions. This is the first proposition on which everyone will easily agree. Thus, a court entrusted with judicial responsibilities must be large enough to process all the cases brought before it. On the other hand, a court must keep a sufficient degree of internal cohesion. It cannot be blown up to the size of a parliamentary body. A court with hundreds of members, not controlled by a higher judicial body, would almost necessarily lose its unity and correspondingly its jurisprudence would end up in contradictions and inconsistencies. Consequently, even if it may be desirable at the international level to provide for one judge per each State participating in a scheme of judicial settlement of disputes,[1] this wish cannot be granted in all circumstances. Compromises are necessary. What is feasible in a regional organization cannot serve as a model at universal level.

As a first step, however, it should be clarified why States are generally keen on having a judge of their nationality on the bench if they are party to a dispute before an international judicial body, such as the International Court of Justice, the Court of Justice of the European Communities or the Strasbourg Court of Human Rights. No reasonable government would expect that "its" judge on the bench should act as a kind of defence lawyer for the protection of a presumed national interest. Judges who would be seen by their colleagues as blind followers of the policies of their governments would soon be discredited and could therefore hardly serve as a forceful champion of the legitimate aspirations of their home countries. Realistically speaking, a national judge is supposed to satisfy two needs:

First, even international disputes have generally a national background. Issues arise which are closely connected with the domestic legal order of one of the parties concerned. It must be ensured that an international jurisdiction understands that context well, without any possible errors. No one else can better guarantee a proper understanding of the national backdrop than a judge who has grown up in the legal system concerned. It is his/her task to provide objective information to his/her col-

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1 We are not dealing with the specific requirements applicable to judges of international criminal courts and tribunals.

leagues – who of course are not obligated to accept anything he/she says as incontrovertible truth. Generally, however, international judges will feel on safe ground after having heard the explanations given to them by the national member concerned.

Second, States – which means governments and their peoples – must be able to trust that their legitimate concerns are taken into account with the requisite care. To submit to international adjudication is not a decision which can be taken lightly. It is well known that the United States currently shies away from any such step which is deemed to seriously curtail the sovereign power of the nation.[2] In fact, confidence is necessary. If justice were meted out exclusively by foreigners, the perception would spread that the relevant scheme had a discriminatory character. It could even be viewed as some kind of neo-colonial usurpation of the basic political rights of the people. A national judge is suited to allay such fears. He or she demonstrates just by his presence that the relevant decision-making process is guided by the principle of international cooperation, any hegemonic aspirations being absent.

The considerations just expounded lead to fairly simple conclusions. First of all, in a relatively small setting of States, in particular within a regional framework, it is advisable to provide for one judge per participating State. Even then, however, it may be necessary to introduce special rules to ensure the presence of a national judge if the judicial body concerned splits into sections, chambers or committees. At the universal level, in any event, with its number of currently 191 States, other techniques must be resorted to in order to avoid the emergence of a mega-court that would be marred by internal disunity.

In fact, the drafters of the court statutes under review have all been inspired by the same considerations. Within the European Communities, it was originally, when the Coal and Steel Community was created in 1951,[3] a matter of self-evidence that the Court of Justice should be composed of one judge per member State. There was nothing anomalous with six judges. Yet, the applicable parameter was kept notwithstanding the growth of the Communities to ever larger numbers with 25 members at the current time, 27 in the foreseeable future and even more as soon as the Balkan States still absent from the European Union will have been admitted. According to the Treaty of Nice, the Court is indeed made up of one judge per member State (Art. 221 (1)), whereas the provision governing the Court of First Instance speaks of "at least" one judge per Member State (Art. 224 (1)). This is also the model adopted by

2 Just recently, by a letter of 7 March 2005, the United States attempted to withdraw from the Consular Convention's Optional Protocol Concerning the Compulsory Settlement of Disputes, which does not contain a denunciation clause, see http://www.asil.org/insights/2005/03/ insights050309a.html. This move is a reaction to the two cases where the ICJ found a violation of the Consular Convention by U.S. authorities: *LaGrand (Germany v. United States of America), ICJ Reports* 2001, p. 466; *Avena and other Mexican Nationals (Mexico v. United States of America)*, 31 March 2004.

3 The Treaty of 18 April 1951 came into force on 25 July 1952.

the Constitutional Treaty: it provides for at least one judge from every State (Art. I-29 (2)). The drafters have thus abstained from introducing the "reductionist" model which the Constitutional Treaty suggests for the Commission which, in the long run, should have a membership of only two thirds of the number of Member States (Art. I-26 (6)). Quite obviously, the argument that confidence is necessary has prevailed. This argument was buttressed by the simple consideration that with the expansion of the European Union the number of disputes will rise. More disputes require more judges. Consequently, it would have been unreasonable to go for a decrease of the number of judges, in any event as long as the overall dimensions still remain manageable. To avoid personal congestion, the current rules as set forth in the Statute of the Court provide that normally the Court shall sit in chambers of three or five judges, a Grand Chamber of 13 judges assuming the adjudicatory tasks only in exceptional circumstances (Art. 16).

The Strasbourg Court of Human Rights has followed the same pattern of adjusted stability. In accordance with the growth of the number of States Parties, it comprises now 46 judges. Obviously, these judges have to sit in chambers. With its full composition, the Court would be unworkable. It reaches its maximum size in the Grand Chamber (17 judges). The plenary is confined to administrative functions. According to Protocol No. 14,[4] which has not yet entered into force, the Court will also be able to act through single judges. It stands to reason that in such instances the nationality of the single judge cannot be that of the State against which the application is directed. Such configuration would give rise to internal structural tensions. Judges cannot be expected to observe perfect neutrality when adjudicating disputes in which their home State is involved.

The International Court of Justice, like its predecessor, the Permanent Court of International Justice, has never aimed exactly to reflect in its composition the community of States supporting it. The number of 15 judges, which had already been determined for the Permanent Court, has remained stable over the years. Apparently, the drafters found back in 1920 that 15 was an ideal number which permits everyone on the bench to present his views individually without any institutional need to form coalitions, which are the appropriate form of action in a parliamentary body. Up to the present time, this assessment has not changed. Thus, the ICJ is the only main organ of the United Nations which was not extended to reflect the growing importance of countries from the Third World. Of course, in its overall composition the Court must represent "the main forms of civilization and of the principal legal systems of the world", as explicitly provided by Article 9 of its Statute. This obligatory feature has never been particularized by a resolution of the General Assembly, contrary, for instance, to the practice regarding the composition of the International Law Commission. There exist only certain practices or patterns. On of the key characteristics

4 Of 13 May 2004, CETS No. 194. All States parties to the European Convention on Human Rights must have accepted the Protocol before it can enter into force. Currently (30 January 2006), the number of States having deposited their instrument of acceptance stands at 23.

of this configuration is the attribution of a seat to each one of the permanent members of the Security Council – hence a pure "constitutional custom", not a rule set in stone. It is not without anxiety that France and the United Kingdom insist on the necessity of keeping that practice.

However, from the very outset an additional device was present designed to win over the confidence of any litigant party. If in an actual dispute in which it is involved a State does not have a judge of its nationality on the bench, it has the right to appoint an *ad hoc* judge, precisely in order to safeguard that its interests as well as the specific factual background are duly taken into consideration (Art. 31 of the Statute of the ICJ). The drafting of the European Convention on Human Rights was guided by the same philosophy. Indeed, many elements of the Statute of the ICJ were copied or imitated in the Convention. Since from the very outset the Strasbourg Court was meant essentially to perform its adjudicatory work through chambers, the Convention set forth that the judge who is a national of any State party concerned shall sit as an *ex officio* member of the chamber (originally Art. 43, now Art. 27 (2)). This principle has been maintained notwithstanding the huge increase in the workload of the Court, which means that the judges from the larger countries have a tremendous burden to shoulder.[5]

It should also be noted that under the system of the American Convention on Human Rights (Art. 55), each State party to a case has the right to appoint an *ad hoc* judge to the Inter-American Court of Human Rights. This is a logical consequence of the determination made by the Convention that the number of judges should be confined to seven. In this regard, the American Convention has totally abstained from making any determinations on the desirable composition of the Court, although in practice care is constantly taken to reach a mix of judges of Hispanic and common law origin.

As far as the Court of Justice of the European Communities is concerned, there was orginally no need to make special arrangements guaranteeing the presence of a national judge in all disputes. Before 1974, the general rule was that all cases had to be heard by the plenary Court, with the sole exception for staff cases. Given the substantial increase in the case-load in the seventies, the Rules of Procedure were amended in October 1979 to permit the Court to assign to a chamber any reference for a preliminary ruling and any action brought by a private person unless the difficulty or importance of the case or particular circumstances were such as to require that the Court decide it in plenary session. As a further guarantee, any Member State

5 According to the latest figures published for 2005, Turkey was declared to be in breach of its obligations under the European Convention on Human Rights in not less than 270 cases. It has also been reported that from among the 80.000 cases pending before the Court not less than 10.000 are directed against Russia.

was entitled to request that a case be dealt with by the full Court.[6] On the whole, however, the new scheme introduced in 1979 distanced itself quite significantly from the principle of the national judge. This line has been continued. Currently, Art. 16 of the Statute of the Court provides that the Court shall normally sit in chambers of three or five judges. Member States may request that the Court sit in its formation as a Grand Chamber, made up of 13 judges. But no provision is made for a national judge among those 13 judges. To abandon a strict rule of the national judge was all the more more advisable in the European Community since, given the wide array of competences of the Court, it would be extremely difficult to determine with a sufficient degree of precision what is a case where the national interests of a specific State are significantly affected. Nobody here needs to be taught a lesson about the fact that proceedings in which a Member State is a party constitute solely a small percentage of the overall caseload of the Court. Apparently, in drafting the Statute of the Court governments proceeded from the assumption that the principle of the national judge had lost its *raison d'être*.

Increasingly, in fact, another question is raised, namely the question whether international judges enjoy a sufficient degree of legitimacy. Traditionally, judges of arbitral tribunals have been – and still are – individually appointed by the governments of the litigant parties. Regarding international courts, no such right of unilateral appointment exists in current practice. The lessons of the 1907 Central American Court of Justice have been learned.[7] And yet, in general the executive branch of government has had a strong influence on the nomination and appointment of international judges. Does this method meet the requirements of our time when international tribunals are called upon to deal ever more frequently with matters which formerly were placed under domestic jurisdiction? If an international judicial body makes determinations on the status of citizens, on their rights and obligations, does it not require some kind of democratic legitimacy?

In respect of the ICJ, these questions play a secondary role only. The disputes before the ICJ have mostly a typical inter-State character. Accordingly, the judges of the World Court are elected by the General Assembly and the Security Council. They need an absolute majority of votes in both houses, if one may say so. The important feature of this process is that the permanent members of the Security Council have been denied a veto right – a privilege that would have entailed unbearable consequences: the judges would have started their career with the stigma of being obedient servants of the interests of at least one of the permanent members. At world-

6 See Francis G. Jacobs, "The Member States, the Judges and the Procedure", in: Institut d'études européennes. Université Libre de Bruxelles (ed.), *La Cour de justice des Communautés européennes*, Bruxelles 1981, p. 11, 12.

7 See Christian Tomuschat, "International Courts and Tribunals with Regionally Restricted and/or Specialized Jurisdiction", in: Max Planck Institute for Comparative Public Law and International Law (ed.), *Judicial Settlement of International Disputes*, Berlin *et al*. 1974, p. 285, at 322, 407.

wide level, it would be factually impossible to supplement this scheme by elements of parliamentary participation. Given the necessity of obtaining an affirmative vote in both of the main organs of the United Nations, Governments are required to present only candidates with the highest qualification. It could even happen to a permanent member of the Security Council that a nominee presented by it is rejected. In practice, this has never happened,[8] but the Statute does not assign any reserved seats to the powerful and mighty P5.

Concerning the judges of the Strasbourg Court of Human Rights, the European Convention on Human Rights provided from the very beginning that the Member States of the Council of Europe enjoyed the right of nomination – each one had to present a list with three candidates -, but that the actual choice of the judges was to be effected by the Consultative Assembly (now: Parliamentary Assembly) of the Council. It is remarkable that the Convention does not require judges to have the nationality of the nominating State. The most striking consequence of that openness is the practice of Liechtenstein. Recognizing that because of the smallness of the country there was a lack of lawyers qualified in international human rights law, Liechtenstein chose to be "represented" on the Court by renown foreign jurists. For many years, the Canadian Ronald Macdonald served as the "Liechtenstein judge", and currently that judgeship is held by the Swiss citizen Lucius Caflisch, former legal counsel of the Swiss Department of Foreign Affairs.[9]

Initially a practice developed which gave almost absolute priority to the governmental proposals. Generally, the first name on the list was elected, the other names being considered to have no more than the quality of decoration. Yet, on paper at least some democratic element had been introduced inasmuch as the Consultative (Parliamentary) Assembly consists of members of national parliaments. More recently (since 1998, when Protocol No. 11 on the re-organization of the Court came into force), the selection process, which is committed to a Sub-Committee of the Committee on Legal Affairs and Human Rights,[10] has taken on features of a genuine vetting process. The Parliamentary Assembly has established a list of criteria which every nominee has to meet in order to be taken into account as a valid candidate.[11] Unfortunately, in a number of instances the selection process has been politicized on

8 However, it happened to the United Kingdom that its candidate for the ILC, Sir Ian Sinclair, was not re-elected in 1986 for reasons which had nothing to do with the person of the nominee. Thus, the United Kingdom was without a member on the ILC from 1987 to 1991.

9 As it appears, no other country has ever entrusted a foreign national with assuming the functions of its national judge.

10 Sub-Committee on the Election of Judges to the European Court of Human Rights of the Committee on Legal Affairs and Human Rights.

11 See Resolutions 1429 (1999) and 1366 (2004) of the Parliamentary Assembly of the Council of Europe.

grounds manifestly not serving the ideal of justice.[12] To date, the ECHR leaves the choice of the nominees entirely in the hands of governments. No State would be hindered, however, to introduce a preselection procedure. In Germany, upon an initiative launched by Baden-Württemberg, the Bundesrat recently introduced a bill that would require the Federal Government to establish the list of candidates for the Court in concertation with the Committee on the Election of Judges (*Richterwahlausschuss*),[13] the body which selects the judges of the highest federal tribunals outside the Federal Constitutional Court. Some other countries have indeed already established such procedures.[14] Whether this is advisable does not depend so much on democratic premises, but may rather be called a matter of political taste, depending on the modalities chosen.[15] The hearings organized by the US Senate with a view to examining the candidates for the Supreme Court have in some cases left deep scars.

Concerning the Court of Justice of the European Communities, the current rule is that the judges are appointed by common accord of the governments of the Member States (Art. 223 (1) EC). The simplicity of this procedure has aroused many criticisms. The Constitutional Treaty would therefore introduce a vetting procedure. Any candidate for the post of judge or Advocate-general will be examined by a panel of seven high-ranking lawyers entrusted with assessing the suitability of the candidates for their functions. Essentially, this is an expert body, a bureaucratic institution, although one of the members shall be proposed by the European Parliament. It would appear to be somewhat too topheavy to complement this new procedure additionally by a national preselection procedure. Nonetheless, a German law adopted in November 2005 on the Extension and Strengthening of the Rights of the Bundestag and the Bundesrat in Matters of the European Union[16] provides that the nomination of the German candidates for the Court of Justice of the European Communities will be dealt with in accordance with the provisions of the Act on the Election of Judges (*Richterwahlgesetz*) by the Committtee on the Election of Judges. This Law, however, was to take effect upon the coming into force of the Constitutional Treaty. Since that date now seems to have become fairly hypothetical, the bill already mentioned, which the Bundesrat adopted in February 2006, would provide that the

12 Jean-François Flauss, "Libres propos sur l'indépendance des juges à la Cour européenne des droits de l'homme », in : *Internationale Gemeinschaft und Menschenrechte. Festschrift für Georg Ress*, Köln *et al.* 2005, p. 949, 963.

13 Bundesrat document 915/05, 23 December 2005 (motion by Baden-Württemberg), and 10 February 2006 (resolution by Bundesrat).

14 See Flauss, *ibid*., p. 960-962.

15 An excellent report on the relevant issues was drafted by an expert group convened under the auspices of Interight: Judicial Independence: Law and Practice of Appointments to the European Court of Human Rights, May 2003, available at www.interights.org/doc/English%20-Report.pdf.

16 Gesetz über die Ausweitung und Stärkung der Rechte des Bundestages und des Bundesrates in Angelegenheiten der Europäischen Union, of 17 November 2005, *Bundesgesetzblatt* 2005 I, p. 3178.

judges and the advocates-general at the Court of Justice of the European Communities shall be selected according to the new procedure already now. It remains to be seen whether the bill will eventually be approved by both parliamentary bodies. It would not only curtail the decision-making power of the Federal Government, but would also give the German Laender for the first time an important role in the choice of the personalities called upon to serve as German members on the judicial bodies of the European Union.

In conclusion, it can be said that what in those "good old days" was a decision committed to the exclusive discretion of governments, has increasingly become a matter of general concern. Even the public at large has become aware of the fact that from time to time international judges render decision which deeply affect the daily life even of ordinary citizens. As a natural consequence, selection procedures are growing in complexity, carried by the consideration that judges entrusted with such extensive and deep-going responsibilities should enjoy a maximum of legitimacy. It is an open question, however, whether the choice of candidates should be entrusted to the expertise of lawyers or to parliamentary bodies with genuine democratic origins.