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The Election of Thomas Buergenthal to the International Court of Justice

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CURRENT DEVELOPMENTS

THE ELECTION OF THOMAS BUERGENTHAL TO THE INTERNATIONAL COURT OF JUSTICE

For the first time since 1981, a new judge of United States nationality has taken office at the International Court of Justice. As the method for selection of this important judicial post is little known even within the international law profession, a brief note on how that process unfolded in 1999–2000 should be of interest to the Court's constituency.

As specified in the ICJ Statute (Art. 2), judges of the Court are to be elected "from among persons of high moral character, who possess the qualifications required in their respective countries for appointment to the highest judicial offices, or are jurisconsults of recognized competence in international law." Nominations are made not by governments, but by "the national groups in the Permanent Court of Arbitration" (Art. 4, para. 1), that is, by groups of four persons designated by their respective governments pursuant to the 1907 Hague Convention for the Pacific Settlement of International Disputes. The framers of the ICJ Statute (following the path charted for the Permanent Court of International Justice a generation earlier) deliberately located the nomination function "at one remove" from governments so as to enhance the professional caliber and independence of the judges of the Court.¹

By tradition in the United States, the national group to carry out the nominating function has been constituted on a bipartisan basis.² It is chaired by the incumbent legal adviser of the Department of State, and its other three members have typically included one or two former legal advisers and a representative of the academic community. In the period relevant to this note, the members were David Andrews, legal adviser; Conrad Harper, immediate past legal adviser; Edwin Williamson, legal adviser in the previous (Bush) administration; and the undersigned (Lori Fisler Damrosch, Henry L. Moses Professor of Law and International Organization at Columbia University).³

On November 19, 1999, Judge Stephen M. Schwebel, president of the ICJ, notified the United Nations Secretary-General of his intention to resign as a member of the Court with effect from February 29, 2000.⁴ Judge Schwebel had been a member of the Court since January 15, 1981 (having initially been elected to fill the unexpired portion of the term of Judge Richard Baxter, who had died); he was reelected to successive terms, most recently for a term that began on February 6, 1997, and was due to expire on February 5, 2006. He had become president of the Court for a three-year term running from February 6, 1997, to February 5, 2000. Judge Schwebel's notice of resignation pursuant to Article 13 of the Statute set in motion the process under Articles 5 and 14 for the Secretary-General to invite national groups to submit nominations within a given time. Thereafter, the election took

¹ See Georges Abi-Saab, *Ensuring the Best Bench: Ways of Selecting Judges*, in INCREASING THE EFFECTIVENESS OF THE INTERNATIONAL COURT OF JUSTICE 165, 175–76, 180–81 (Connie Peck & Roy S. Lee eds., 1997).

² See Lori Fisler Damrosch, *Commentary*, in *id.* at 188.

³ The membership of national groups is published in the annual reports of the Permanent Court of Arbitration (Annex 6, List of Members of the PCA).

⁴ See ICJ Communiqué No. 99/54 (Dec. 15, 1999) and documents cited in note 5 *infra*.

place pursuant to Articles 8–10 of the Statute, by independent ballots cast by the General Assembly and the Security Council. In accordance with Articles 5(1) and 14, the Secretary-General set February 7, 2000, as the date for receipt of nominations by national groups;⁵ and the Security Council set March 2, 2000, as the date for the parallel election to take place.⁶

The sequence of events took account of the requirements of the ICJ Statute that the invitation for nominations to fill vacancies is to be issued “within one month of the occurrence of the vacancy” (Art. 14) and “[a]t least three months before the date of the election” (Art. 5). Practically speaking, interpretation of the term “occurrence” to mean notification of a prospective vacancy has allowed for an election to take place immediately after the effective date of a resignation notified more than three months in advance, so that there would be no substantial discontinuity in the office. The practice with respect to the Schwebel resignation followed the precedent set in 1995, when Judge Sir Robert Yewdall Jennings gave several months’ advance notice of his intent to resign.⁷ In the case of Judge Schwebel, who was president of the Court at the time of notifying his prospective resignation, the timing allowed for the ordinary course of his term as president to be completed and an election to be held within days of the effective date of his resignation.

The ICJ Statute does not require that a vacancy occurring in the midst of a term be filled with a candidate of the same nationality as the judge who has vacated the post.⁸ Nonetheless, in several recent special elections to fill such vacancies, the electors (the General Assembly and the Security Council) have acted favorably on the nomination coming from the national group of the state whose judge had died or resigned.⁹ This practice was followed in due course in the election to fill the vacancy created by Judge Schwebel’s resignation. The election of a judge of U.S. nationality to succeed a U.S. judge who had resigned coheres with the long-standing tradition and firm expectation of maintaining the permanent members of the UN Security Council on the ICJ bench.¹⁰

Before making its nomination, the U.S. National Group followed the course of action suggested in Article 6 of the Statute, whereby “each national group is recommended to consult its highest court of justice, its legal faculties and schools of law, and its national academies and national sections of international academies devoted to the study of law.” Indeed, having regard to the triennial cycle for regular elections of five members of the Court and occasional midterm vacancies, the U.S. National Group had previously established consultative relationships with various professional organizations in the United States to advise on both foreign and U.S. nominations.¹¹ When Judge Schwebel’s resignation was announced

⁵ See UN Doc. A/54/750-S/2000/105 (2000) (citing Secretary-General’s note of Nov. 24, 1999, to Security Council, UN Doc. S/1999/1197); UN Doc. A/54/751-S/2000/106 (2000) (citing Secretary-General’s note of Nov. 30, 1999, to states parties to ICJ Statute, inviting national groups to submit nominations by Feb. 7, 2000).

⁶ See SC Res. 1278 (Nov. 30, 1999).

⁷ Judge Jennings’s resignation became effective on July 10, 1995, and the election was held on July 12, 1995. See 1994–1995 ICJ Y.B. 9.

⁸ Cf. ICJ STATUTE Arts. 2–3 (providing that judges be elected “regardless of their nationality,” and that no two judges be nationals of the same state).

⁹ E.g., Judge Gonzalo Parra-Aranguren of Venezuela was elected in 1996 to fill the unexpired portion of the term of Judge Andrés Aguilar Mawdsley (deceased); Judge Luigi Ferrari Bravo of Italy was elected in 1995 to fill the unexpired portion of the term of Judge Roberto Ago (deceased); Judge Vladlen S. Vereshchetin of the Russian Federation was elected in 1995 to fill the unexpired portion of the term of Judge Nikolai Tarassov (deceased); and Judge Rosalyn Higgins of the United Kingdom was elected in 1995 to fill the unexpired portion of the term of Judge Sir Robert Yewdall Jennings (resigned).

¹⁰ This well-established practice resonates with the special role of the Security Council in the election of ICJ judges under the ICJ Statute (Arts. 8, 10, 12). Judges from permanent member states have consistently been elected not only to fill vacancies (as in the cases of Judges Vereshchetin and Higgins referred to in note 9 *supra*), but also to serve the nine-year terms of the regular elections.

¹¹ The U.S. National Group, as permitted by the Statute (Art. 5(2)), has typically entered nominations for up to four candidates for election or reelection, whether or not a candidate of U.S. nationality was involved. In the regular elections of November 1996, the U.S. National Group (in parallel with a number of other national groups) nominated Judge Schwebel, as well as Judge Vereshchetin of the Russian Federation. Most recently, for the November 1999 regular elections, the U.S. National Group nominated (in parallel with other national groups) Judges Gilbert Guillaume and Rosalyn Higgins for reelection. See List of Candidates Nominated by National Groups: Note by the

in November 1999, the U.S. National Group invited recommendations from the American Society of International Law; the American Bar Association (Section of International Law and Practice, and Standing Committee on Law and National Security); the American Branch of the International Law Association; the Association of American Law Schools; the Association of the Bar of the City of New York; the Federalist Society; and the Chief Justice of the United States. Since 1996 the American Society of International Law has had in place a set of guidelines for advising on international judicial nominations and elections and a committee to carry out this function.¹² Other organizations responded to the national group's request for recommendations or comments in accordance with their own procedures.

This consultative process elicited more than fifteen suitable candidates who would be willing and able to serve and would meet either or both of the standards under Article 2 of the Statute (of qualifying for high national judicial office or being "jurisconsults of recognized competence in international law"). Most, but not all, of these persons were members of the "invisible college" of international law.¹³ The professional organizations that responded to the U.S. National Group's request for recommendations endorsed several of these candidacies; some of the organizations indicated support for more than one candidate and/or articulated their views on the criteria that the national group should apply in making its selection. In parallel with these formal consultations (which took place between November 1999 and January 2000), members of the U.S. National Group informally canvassed a wide range of persons with expertise in international judicial and arbitral institutions.

Several years ago, the present author (then as now a member of the U.S. National Group) wrote:

Our US National Group by tradition is bipartisan—a rare phenomenon these days, when most other issues in US foreign policy are plagued with antagonisms across party lines. . . . We take seriously the duty under the Statute of the ICJ to consult widely among the knowledgeable professional societies and associations of lawyers and judges with respect to [the] nominations which we are permitted to make in any nominating cycle. Those professional groups, in turn, generally are able to gather together the views of those of their members who are in a position to contribute to the evaluation of potential candidacies, so that the information base for the nomination process is as high as possible. . . .

Whether the output of the US National Group did or could differ from nominations which the US Government itself might have made is difficult to assess. In the absence of such a process, nominations could well have been more politicized and less professional. The discipline of requiring the nominations to be made by the national group has surely contributed, in no small measure, to the quality of the nominations made.¹⁴

Those comments aptly characterize the process that produced the U.S. National Group's nomination of Thomas Buergenthal. The choice of a single nominee out of an impressive group of highly qualified candidates, to succeed a distinguished judge who had served for almost two decades, required the national group to act as a collegial body exercising professional judgment. In that regard, the fact that Judge Buergenthal received wide and deep support from our profession—endorsement by the American Society of International Law, other professional societies, and many individual participants in the consultative process—testified to his eminent suitability for the demands of the position.

Judge Buergenthal brings to the ICJ invaluable understanding of the workings of international tribunals and the UN system, as well as a long record of scholarly distinction.

Secretary-General, UN Doc. A/51/334-S/1996/723 (1996); UN Doc. A/54/306-S/1999/940 (1999); Consolidated List of Candidates Nominated by National Groups, UN Doc. A/54/306/Rev.1-S/1999/940/Rev.1 (1999).

¹² ASIL Committee on ICJ Nominations, *Principles Concerning ASIL Advice on Nomination and Election of ICJ Judges and of Other Internationally Elected Jurists*, reprinted in ASIL NEWSL., Jan.–Feb. 1997, at 3; see also Charles N. Brower, *Notes from the President*, ASIL NEWSL., Sept.–Oct. 1996, at 1.

¹³ Oscar Schachter, *The Invisible College of International Lawyers*, 72 NW. U. L. REV. 217 (1977).

¹⁴ Damrosch, *supra* note 2, at 193–94 (footnotes omitted).

He served from 1979 to 1991 as a judge of the Inter-American Court of Human Rights, as its vice president from 1983 to 1985, and as its president from 1985 to 1987. He made path-breaking contributions as chair of the Truth Commission for El Salvador, which operated under UN auspices. He has participated broadly in a wide range of international dispute settlement institutions: as an arbitrator under the auspices of the International Centre for Settlement of Investment Disputes, as a member of the UN Human Rights Committee, and as vice chair of the Claims Settlement Tribunal for Dormant Accounts in Switzerland.

The U.S. National Group's nomination of Judge Buergenthal was notified to the UN Secretary-General in January 2000, and before nominations closed on February 7, 2000, many other national groups joined in supporting it.¹⁵ In the parallel secret ballots cast on March 2, 2000, Judge Buergenthal received all fifteen votes in the Security Council and an absolute majority (with no dissents) in the General Assembly.¹⁶ He made the solemn declaration required by Article 20 of the Court's Statute in open court on April 3, 2000.¹⁷

LORI FISLER DAMROSCH*

THE WORK OF THE SIXTH COMMITTEE AT THE FIFTY-FOURTH SESSION OF THE UN GENERAL ASSEMBLY

At the fifty-fourth session of the United Nations General Assembly, the Sixth (Legal) Committee¹ reviewed the annual reports of the International Law Commission (ILC), the United Nations Commission on International Trade Law (UNCITRAL), the Special Committee on the Charter of the United Nations and on the Strengthening of the Role of the Organization, and the Committee on Relations with the Host Country. The Sixth Committee also considered proposals for three new legal instruments relating to nationality of natural persons in relation to the succession of states, international terrorism, and jurisdictional immunities of states and their property, as well as other topics concerning the establishment of the international criminal court, the United Nations internal justice system, the United Nations Decade of International Law, and the UN Programme of Assistance in the Teaching, Study, Dissemination and Wider Appreciation of International Law. The committee adopted, without a vote, the draft resolutions on the items mentioned above—with the exception of international terrorism.²

¹⁵ See UN Docs. A/54/751-S/2000/106 & Add. 1, 2 (2000) (recording nominations of Buergenthal by 17 national groups). No other names were submitted by any national group.

¹⁶ The recorded vote in the General Assembly was 117 in favor, 7 abstentions, and 0 against. See UN Press Release GA/9700 (Mar. 2, 2000). The electors in the General Assembly are all 188 UN member states together with the one non-member state (Switzerland) that is a party to the Statute of the Court. *Id.*; see also ICJ STATUTE Art. 4(3). Procedures for the conduct of the parallel ballots are set forth in UN Doc. A/54/750-S/2000/105, at 3-5 (2000).

¹⁷ See Verbatim Record at Opening of Hearing in Aerial Incident of 10 August 1999 (Pak. v. India), obtainable from <<http://www.icj-cij.org>> (Apr. 3, 2000).

* Of the Board of Editors. The author wishes to thank the members of the United States National Group; William Kissinger of the Office of the Legal Adviser, U.S. Department of State; and Carolyn Willson of the U.S. Mission to the United Nations.

¹ For a general description of the Sixth Committee and its role in the progressive development and codification of international law, see Virginia Morris & M.-Christiane Bourloyannis, *The Work of the Sixth Committee at the Forty-seventh Session of the UN General Assembly*, 87 AJIL 306, 306 nn.1, 2 (1993).

² As discussed below, there was a vote on one of the draft resolutions concerning international terrorism and on a paragraph of the draft resolution on the ILC topic. For an extensive summary of the debate and the action taken by the committee with respect to the various items, see UN Docs. A/C.6/54/SR.1-37 (1999-2000). For the draft resolutions recommended by the Sixth Committee after the debate, all of which were adopted by the General Assembly without change, see the Sixth Committee's reports to the General Assembly on the various items, UN Docs. A/54/607-16 (1999) (also containing information on relevant documentation, including summary records, for each item); see also GA Res. 54/27-28 (Nov. 17, 1999), GA Res. 54/101-12, GA Dec. 54/429 (Dec. 9, 1999), obtainable from <<http://www.un.org/law/cod/sixth/54/sixth54.htm>>. For further information and documentation on the committee's work at the 54th session, see *id.*