

THE UNITED KINGDOM'S VIEWS ON ELECTIONS TO THE INTERNATIONAL COURT OF JUSTICE DURING THE COLD WAR

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This article considers the process of nominating and electing candidates to the International Court of Justice ('ICJ') during the Cold War by focusing on a specific national encounter: the views of the United Kingdom government during elections to the ICJ between 1946 and 1963. With this aim in mind, it examines internal (archival) correspondence between the UK national group and the Foreign Office, the Colonial Office and the Commonwealth Relations Office, as well as communications with other Commonwealth governments and the government of the United States. This internal correspondence reveals how the UK considered the suitability of candidates for nomination to the ICJ and how it sought to reconcile its choices with arts 2 and 9 of the Statute of the International Court of Justice. The focus of the study is on the specific attributes and experiences that British officials considered essential for candidates to obtain the support of the UK government amidst a changing global legal order, when new candidates emerged from the former European colonies in Africa and Asia. It suggests that British officials were informed by a 'Cold War mindset' that distrusted candidates from countries that were considered too strongly associated with the Soviet Union.

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To put it at its lowest, we want people on the Court who really are sound and sensible and likely to take the same sort of view about international law questions as we do.

— Sir Patrick Dean, Permanent Representative of the United Kingdom to the United Nations 1960–64¹

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¹ Letter from PH Dean, 26 June 1963 (The National Archives, FO 371/172615) [4] ('26 June 1963 Letter').

I INTRODUCTION

The election of judges to the International Court of Justice ('ICJ') is based on diversity as well as excellence, and the responsibility for upholding these twin aims rests with states. Article 9 of the *Statute of the International Court of Justice* ('*ICJ Statute*') provides that the states electing judges should

bear in mind not only that the persons to be elected should individually possess the qualifications required, but also that in the body as a whole the representation of the main forms of civilization and of the principal legal systems of the world should be assured.²

This article considers the ways in which art 9 has been applied in practice and how it has been reconciled with the requirements in art 2 of the *ICJ Statute* that judges should also be independent, be of high moral character, possess the qualifications required in their respective countries for appointment to the highest judicial offices or be jurisconsults of recognised competence in international law. It does so by considering the practice of the United Kingdom in the process of nominating and electing candidates to become judges of the ICJ during the early stages of the Cold War from 1946 to 1963.

The process of nominating and electing candidates to the ICJ has produced a good amount of commentary over the years,³ but much less attention has been devoted to national encounters with the Court and the extent to which these encounters have affected nominations and elections to the Court. As Judge Sir Kenneth Keith has observed, '[v]ery little is known about the way [the national groups] operate'.⁴ Little has been written on the process of nomination to the ICJ, 'in part no doubt because of the sensitivity and secrecy surrounding [it]', explained Sir Michael Wood, a former Legal Adviser to the UK's Foreign and Commonwealth Office ('FCO').⁵ This article seeks to shed light on the sensitivity and secrecy surrounding the nomination process through a review of documents dating from the Cold War and disclosed in The National Archives (UK), which demonstrate the politics at play in British attitudes towards the candidates under review, when there was a concern over the nomination and election of candidates

² *Statute of the International Court of Justice* art 9.

³ See, eg, Norman J Padelford, 'The Composition of the International Court of Justice: Background and Practice' in Karl W Deutsch and Stanley Hoffmann (eds), *The Relevance of International Law: Essays in Honor of Leo Gross* (Schenkman Publishing Company, 1968) 219; Jeffrey Golden, 'National Groups and the Nomination of Judges of the International Court of Justice: A Preliminary Report' (1975) 9(2) *International Lawyer* 333; Christopher Harland, 'International Court of Justice Elections: A Report on the First Fifty Years' (1997) 34 *Canadian Yearbook of International Law* 303; Sir Kenneth Keith, 'Member of the Permanent Court of Arbitration' in Timothy LH McCormack and Cheryl Saunders (eds), *Sir Ninian Stephen: A Tribute* (Miegunyah Press, 2007) 155, 161–7; Kenneth J Keith, 'International Court of Justice: Reflections on the Electoral Process' (2010) 9(1) *Chinese Journal of International Law* 49.

⁴ Kenneth J Keith, 'Challenges to the Independence of the International Judiciary: Reflections on the International Court of Justice' (2017) 30(1) *Leiden Journal of International Law* 137, 145.

⁵ Michael Wood, 'The Selection of Candidates for International Judicial Office: Recent Practice' in Tafsir Malick Ndiaye and Rüdiger Wolfrum (eds), *Law of the Sea, Environmental Law and Settlement of Disputes: Liber Amicorum Judge Thomas A Mensah* (Martinus Nijhoff Publishers, 2007) 357, 358.

from countries in Africa and Asia that were considered sympathetic to the Soviet Union's policy of hastening the process of decolonisation.

While scholars have recently turned their attention to the impact of the Cold War on a number of international law topics, they have not considered the extent to which the nomination and election of candidates to the ICJ was affected by the politics of the Cold War.⁶ The only scholars who have examined elections to the ICJ during this period are Philippe Sands and Ksenia Polonskaya.⁷ Sands' scholarship considered the internal workings of the British national group in the process of nominating British candidates for election to the ICJ, including Sir Arnold McNair (1946), Hersch Lauterpacht (1954) and Gerald Fitzmaurice (1960), based on declassified government documents in the Public Records Office (now The National Archives). Polonskaya studied United States Department of State cables disclosed by WikiLeaks on US views of the candidates running for the elections to the ICJ in 1975 and 1978.

This article extends the existing scholarship on British nominations to the ICJ. While I cover similar grounds to Sands' work in that I also review government documents held in The National Archives on the nomination and election process in the early stages of the Cold War, my article has a different focus. I specifically examine the role of the UK's national group in nominating foreign candidates for election to the ICJ, with a special focus on the elections of Sir Muhammad Zafrulla Khan to the ICJ in 1954 and 1963 and the election of Sir Percy Spender in 1957, which were not covered by Sands.⁸ Although I have written about these individuals before in connection with their roles in the *South West Africa* cases (1960–66),⁹ I have not addressed the issues that arose during the debates about their nominations and elections to the ICJ in as much detail.

The elections of Zafrulla Khan and Spender remain important, not only because of the light they shed on the interactions between some of the judges who were involved in the controversial *South West Africa* cases,¹⁰ but also because they

⁶ By way of example, not one of the chapters in a recent book published on international law during the Cold War addresses the issue of elections to the ICJ: see Matthew Craven, Sundhya Pahuja and Gerry Simpson (eds), *International Law and the Cold War* (Cambridge University Press, 2020).

⁷ Philippe Sands, 'Global Governance and the International Judiciary: Choosing Our Judges' (2003) 56 *Current Legal Problems* 481 ('Global Governance and the International Judiciary'); Philippe Sands, 'Choosing Our International Judges, Past and Present' in Laurence Boisson de Chazournes and Marcelo Kohen (eds), *International Law and the Quest for Its Implementation* (Brill, 2010) 445 ('Choosing Our International Judges'); Ksenia Polonskaya, 'Selecting Candidates to the Bench of the World Court: (Inevitable) Politicization and Its Consequences' (2020) 33(2) *Leiden Journal of International Law* 409.

⁸ However, Sands did touch on Zafrulla Khan's failed candidacy for the Court in 1960 and opposition to his anti-colonial views amongst Foreign Office legal advisers: see Sands, 'Global Governance and the International Judiciary' (n 7) 494; Sands, 'Choosing our International Judges' (n 7) 458–60.

⁹ See Victor Kattan, 'Decolonizing the International Court of Justice: The Experience of Judge Sir Muhammad Zafrulla Khan in the *South West Africa* Cases' (2015) 5(2) *Asian Journal of International Law* 310 ('Decolonizing the International Court of Justice'); Victor Kattan, "'There Was an Elephant in the Court Room': Reflections on the Role of Judge Sir Percy Spender (1897–1985) in the *South West Africa* Cases (1960–1966) after Half a Century' (2018) 31(1) *Leiden Journal of International Law* 147 ('There Was an Elephant in the Court Room').

¹⁰ *South West Africa (Ethiopia v South Africa) (Preliminary Objections)* [1962] ICJ Rep 319 ('*South West Africa (Preliminary Objections)*'); *South West Africa (Ethiopia v South Africa) (Second Phase)* [1966] ICJ Rep 6 ('*South West Africa (Second Phase)*').

illuminate resistance to attempts to change the composition of the ICJ in the 1950s, when the old Commonwealth states sought to ensure the election of sympathetic judges to the ICJ. These attempts are worth studying, as they demonstrate the UK's encounter with the ICJ at a particularly sensitive moment in international politics and the tensions in the minds of British officials between the qualifications and the independence of candidates from the former colonies in Africa and Asia. An examination of British policy towards elections to the ICJ during the early phase of the Cold War reveals that British officials viewed the Court as an important and influential body in world affairs, and one that they wanted to influence. Yet, at the same time, the ways in which these officials viewed the Court was based on their own image of what the principal judicial organ of the United Nations should look like: an international court that was comprised of seasoned judges who had some understanding of the common law and who were sympathetic to British interests in world affairs. The UK took a close interest in the elections of candidates to the ICJ, as it wanted to ensure that the successful candidates held similar views to the UK about legal disputes that came before the Court. As Philippa Webb explains in her contribution to this Special Issue, the UK has been proud of the number of appearances that it has made before the ICJ and the number of cases that it has won — an image that appears to have been shattered following the *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* advisory opinion and the loss of the British judge on the ICJ.¹¹

This article revisits the process of nominating and electing candidates to the ICJ during the early Cold War period, when the process of decolonisation was still being contested by the colonial powers. It does so through a close reading of correspondence between the UK national group, the Foreign Office, the Colonial Office and the Commonwealth Relations Office, as well as communications with other Commonwealth governments and the US government that have been preserved at The National Archives in the UK.¹² It will be seen that although the UK national group was supposed to act independently of the British government, invariably it was influenced by the government of the day. It was also apparent that British officials were highly suspicious of candidates from Warsaw Pact countries and that there were differences of opinion about candidates from Africa and Asia, especially if they were from countries that were considered close to the Soviet Union. This was because Moscow had succeeded in forming a strategic alliance with independence movements in many of the countries of

¹¹ Philippa Webb, 'The United Kingdom and the *Chagos Archipelago* Advisory Opinion: Engagement and Resistance' (2021) 21(3) *Melbourne Journal of International Law* 726.

¹² These include an analysis of the following files: *Permanent Court of International Justice: Election of Judges, February 1946* (The National Archives, DO 35/1216/20, 1946); *Election of Judges to the International Court of Justice* (The National Archives, DO 35/7124, 1954–56) ('*Election of Judges, 1954–56*'); *International Court of Justice* (The National Archives, FO 371/129893, 1957); *Elections to the International Court of Justice* (The National Archives, FO 371/172614, 1963). The old Court's name appears on the first file name, obviously in error.

Africa and Asia, sharply accelerating the decolonisation process in the 1950s.¹³ These developments caused much concern at the Foreign Office, especially when colonial and race-related disputes reached the ICJ, which is explored in Parts V and VII of this article. Inevitably, the UK national group and the Foreign Office preferred candidates from what would become known in UN practice as ‘the Western European and Others Group’ and, failing that, Latin American candidates, although it was understood that this preference had to be reconciled with art 9 of the *ICJ Statute*, which aimed to ensure representation of the main forms of civilisation and of the principal legal systems of the world.

II THE ROLE OF THE UNITED KINGDOM NATIONAL GROUP DURING THE COLD WAR

Before we explore how the UK national group operated during the Cold War, it is helpful to remind ourselves of the nomination process. Candidates are elected to the ICJ following nomination by four independent individuals that comprise a standing ‘national group’. Article 4 of the *ICJ Statute* provides that candidates are nominated by national groups in the Permanent Court of Arbitration (‘PCA’) or comparable groups appointed by the governments of UN members not represented in the PCA. These groups in the PCA are to consist of ‘four persons at the most, of known competency in questions of international law, of the highest moral reputation, and disposed to accept the duties of Arbitrators’.¹⁴

These national groups may nominate up to four candidates for ordinary (triennial) elections. This includes a maximum of two nominees of the same nationality as the national group — as such, there is no expectation that the national group nominate only its nationals for elections.¹⁵ If a judge has resigned or died and only one seat is available, the national group may only nominate a maximum of two candidates.¹⁶ Before nominations are returned, ‘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’.¹⁷ The nominations are then submitted to the UN Secretary-General who produces an alphabetical list of candidates¹⁸ and the national groups that nominated them.¹⁹ The Secretary-General then submits the list of candidates to the General Assembly and the Security Council,²⁰ along with the candidates’ curricula vitae.²¹

¹³ I have explored this issue in detail in my other work: see Victor Kattan, ‘Self-Determination as Ideology: The Cold War, the End of Empire, and the Making of UN General Assembly Resolution 1514 (14 December 1960)’ in Klara Van der Ploeg, Luca Pasquet and Léon Castellanos Jankiewicz (eds), *International Law and Time: Narratives and Techniques* (Springer, forthcoming).

¹⁴ *International Convention for the Pacific Settlement of International Disputes*, opened for signature 29 July 1899, 187 ConTS 410 (entered into force 4 September 1900) art 23.

¹⁵ *Statute of the International Court of Justice* art 5(2).

¹⁶ *Ibid.*

¹⁷ *Ibid* art 6.

¹⁸ *Ibid* art 7(1).

¹⁹ See, eg, *Election of Five Members of the International Court of Justice*, UN GAOR, 9th sess; UN SCOR, 9th sess, UN Docs A/2695 and S/3281 (20 August 1954).

²⁰ *Statute of the International Court of Justice* art 7(2).

²¹ Ruth Mackenzie et al, *Selecting International Judges: Principle, Process, and Politics* (Oxford University Press, 2010) 67, 130.

Understanding how the national groups operate is important, as the nomination process is crucial to the success of a candidate's prospects in the run up to elections at the UN and governmental support is necessary during the campaign process. As Cosette Creamer and Zuzanna Godzimirska have demonstrated, 'the amount of support a candidate receives [from governments] during the nomination stage is strongly correlated with vote share'.²² Elected candidates, on average, receive more nominations than unelected candidates.²³

As the candidates nominated by the national groups need to be approved by government, much of the lobbying takes place in intergovernmental organisations such as UN headquarters, at various capital cities around the world and in governmental correspondence exchanged between foreign ministries and members of national groups.²⁴ These meetings may involve 'vote trade agreement with other states and manoeuvring for regional endorsement of [a] candidate'.²⁵ Due to the sensitivity of such information, which often includes frank and private exchanges on the merits (and deficiencies) of individual candidates, these documents are a closely held government secret and only come to light years after the events. As a result, the only way to have access to them is by searching various national archives long after the elections have taken place.

In the UK, membership of the national group has fluctuated over time, but it appears to have usually been comprised of the former and/or sitting British member of the ICJ; a senior Law Lord or two, usually, but not always, with expertise or interest in the field of public international law; and the incumbent Legal Adviser to the Foreign Office (now the Foreign, Commonwealth and Development Office).²⁶ While the UK national group's membership has varied, it appears that the ICJ judge of British nationality has always been a member, along with the Foreign Office Legal Adviser, probably because of their familiarity with the Court. Writing in 1975, Jeffrey Golden explained that every British judge elected to either the Permanent Court of International Justice ('PCIJ') or the ICJ had served as a member of the British national group, and that every British judge elected to the PCIJ had been nominated by the national group of which he had been the sole member.²⁷

The Legal Adviser to the Foreign Office plays an important role in deciding which candidates to support for election to the ICJ. For example, in the first elections to the ICJ in 1946, Sir Eric Beckett, the Legal Adviser to the Foreign Office, played a central role in the selection process when it came to deciding which candidates the government would support beyond the UK's own choice of candidate.²⁸ Beckett, after consulting the Dominions (Australia, Canada,

²² Cosette Creamer and Zuzanna Godzimirska, 'The Job Market for Justice: Screening and Selecting Candidates for the International Court of Justice' (2017) 30(4) *Leiden Journal of International Law* 947, 949.

²³ *Ibid* 961.

²⁴ Mackenzie et al (n 21) 73–8.

²⁵ *Ibid* 74.

²⁶ When Wood was the FCO Legal Adviser, the national group comprised Dame Rosalyn Higgins, Sir Elihu Lauterpacht, Lord Bingham of Cornhill and Sir Arthur Watts: see Wood (n 5) 363–4.

²⁷ Golden (n 3) 341–2.

²⁸ Sands, 'Global Governance and the International Judiciary' (n 7) 488–91. Although Sands' article examined Beckett's role in nominating British candidates, it is clear from what follows that he also played an important role in nominating foreign candidates for elections to the ICJ.

New Zealand and South Africa) and India, met with Green Hackworth, the Legal Adviser to the US State Department, and together they drew up a list.²⁹ A further meeting was subsequently arranged in South Africa House in Trafalgar Square, where the views of the South African, Canadian and Australian governments were canvassed.³⁰ The list was subsequently presented to the UK Attorney-General, who agreed to it.³¹ The British objective was to secure the election of four British Commonwealth judges: Arnold McNair (UK), Muhammad Zafrulla Khan (who was described as a *British Commonwealth judge*), John Erskine Read (Canada) and RPB Davis (Union of South Africa).³² Ultimately, however, only McNair and Read were elected.³³

As the Cold War was in its infancy,³⁴ the candidates under consideration were described according to their personal abilities and reputations. They were not described, as they would later be, by their perceived ideological support for a specific bloc or cause. Thus, Serge Krylov of the Soviet Union was assessed by his record at the San Francisco Conference, and although Milovan Zoričić of Yugoslavia was described as coming from one of the Soviet satellites, he was nonetheless considered ‘a very good man’.³⁵ Zafrulla Khan, then of undivided British India, was described as

from the point of view of mere qualifications and ability, almost certainly ahead and shoulders above any candidate [from West Asia]. He has training in English law as well as in the Moslem law of India, where he is at present a judge of the Federal Court.³⁶

Egypt’s Abdel Hamid Badawi Pasha was described as the second most suitable candidate in this group and was considered ‘intellectually ... an able man and an able lawyer’, although ‘[m]orally his record’ was ‘not impeccable’ (no explanation was provided for what was meant by this).³⁷ As for Judge Bohdan Winiarski of Poland, Beckett expressed his view that, although he was an honest man,

²⁹ Letter from WE Beckett, 19 January 1946 (The National Archives, DO 35/1216/20) (‘19 January 1946 Letter’).

³⁰ Letter from John Stevenson to WE Beckett, 29 January 1946 (The National Archives, DO 35/1216/20) (‘29 January 1946 Letter’).

³¹ It included Hackworth of the US (who nominated himself), Serge Krylov of the Soviet Union, Jules Basdevant of France, Hsu Mo of China, Arnold McNair of the UK, Charles de Visscher of Belgium, Helge Klæstad of Norway, Milovan Zoričić of Yugoslavia, Abdel Hamid Badawi Pasha of Egypt, Muhammad Zafrulla Khan of India and José Gustavo Guerrero of El Salvador: 19 January 1946 Letter (n 29).

³² 29 January 1946 Letter (n 30).

³³ *Election of the Judges of the International Court of Justice*, 23rd plen mtg, UN Doc A/32 (6 February 1946).

³⁴ Russian historians of the Cold War usually date its beginning to former British Prime Minister Winston Churchill’s Iron Curtain speech in Fulton, Missouri on March 1946: see generally Winston Churchill, ‘The Sinews of Peace (‘Iron Curtain Speech’)' (Speech, Westminster College, 5 March 1946) <<https://winstonchurchill.org/resources/speeches/1946-1963-elder-statesman/the-sinews-of-peace/>>, archived at <<https://perma.cc/HBE2-YDN4>>.

³⁵ 19 January 1946 Letter (n 29).

³⁶ *Ibid.*

³⁷ *Ibid.*

Winiarski was ‘really the type of academic lawyer who always gets every legal point wrong’.³⁸

Once candidates have been nominated and approved by government, the rules for electing candidates to the ICJ are relatively straightforward.³⁹ Candidates are elected by the UN General Assembly and the Security Council voting simultaneously but ‘independently of one another’.⁴⁰ Candidates are elected for a nine-year term and can stand for re-election.⁴¹ Elections are staggered, with five judges being elected every three years,⁴² although ‘casual’ vacancies can arise at any time because of the death or resignation of a judge.⁴³ Candidates are elected when they obtain an absolute majority of votes in both the General Assembly and the Security Council.⁴⁴ If seats remain to be filled, a second and third round of elections may be held, and failing that, a joint conference may be formed,⁴⁵ although this procedure has never been used and elections have continued until one candidate withdraws.⁴⁶

The process of nominating and electing candidates for the ICJ was especially sensitive during the Cold War, when, as explained below, assumptions were often made about the background of a candidate, especially if he or she — invariably he — was from a Warsaw Pact country or a country that was thought to have friendly relations with the Soviet Union. Revisiting the early Cold War period is crucial to understanding how candidates were nominated and elected to the ICJ because it sheds light on how British officials interpreted the rules, which were open to conflicting interpretations. For example, the rules did not prohibit a member of a national group from being nominated for election to the ICJ, and there were no guidelines on how judges could announce their resignation. Nor was agreement ever reached on which states constituted ‘the main forms of civilisation’ and ‘the principal legal systems of the world’ in art 9 of the *ICJ Statute*.⁴⁷

While the documents disclosed here reflect the system and values that prevailed in their time, they remain relevant because they confirm, in the words of Sands, ‘the steps to which governments will go to safeguard their interests and ensure that the right candidates emerge’.⁴⁸ This is buttressed by the three elections examined

³⁸ WE Beckett, ‘Election of Judges to the International Court of Justice: Brief for Those Who Vote on Behalf of the United Kingdom in the Assembly and Security Council’ (Brief, 5 February 1946) (The National Archives, DO 35/1216/20).

³⁹ See *Statute of the International Court of Justice* arts 8–14.

⁴⁰ *Ibid* art 8.

⁴¹ *Ibid* art 13(1).

⁴² *Ibid*.

⁴³ *Ibid* art 14.

⁴⁴ *Ibid* art 10(1).

⁴⁵ *Ibid* arts 11–12.

⁴⁶ See, eg, Foreign Affairs Committee, *2017 Elections to the International Court of Justice: Fourth Report of Session 2017–19* (House of Commons Paper No 860, 28 February 2018) 7 [11].

⁴⁷ This was a problem that went back to the establishment of the PCIJ in 1920, where no agreement could be reached on the meaning of these words in the Advisory Committee of Jurists: see Ole Spiermann, “‘Who Attempts Too Much Does Nothing Well’: The 1920 Advisory Committee of Jurists and the Statute of the Permanent Court of International Justice” (2003) 73 *British Year Book of International Law* 187, 240. See also Bardo Fassbender, ‘Article 9’ in Andreas Zimmermann et al (eds), *The Statute of the International Court of Justice: A Commentary* (Oxford University Press, 3rd ed, 2019) 355, 371–7 [28]–[37].

⁴⁸ Sands, ‘Choosing Our International Judges’ (n 7) 461.

here involving Zafrulla Khan and Spender, which indicate that elections to the ICJ are primarily political affairs and that candidates who are not willing to campaign are unlikely to get elected. Both Zafrulla Khan and Spender were veteran officials accustomed to the tumult of UN politics: both men had served as foreign ministers and had led delegations to the UN, and, of course, Spender was a seasoned politician used to electioneering. He had been an elected official in Australia, where he was the Member for Warringah in the Australian Parliament for 14 years, having campaigned in five elections.⁴⁹

III THE FIRST ELECTION OF SIR MUHAMMAD ZAFRULLA KHAN IN 1954

We begin with the first election of Zafrulla Khan, who had also been nominated in 1946 but who, along with Sir Kenneth Bailey of Australia, narrowly failed to get elected to the ICJ.⁵⁰ Zafrulla Khan would succeed on his second attempt. Two issues came up in 1954: the regular triennial election, and a casual election to replace Judge Sir Benegal Rau of India who had died.⁵¹ Significantly, Zafrulla Khan was nominated by Pakistan both for the vacancy arising out of Rau's death and for one of the seats arising out of the retirement of five of the judges: Arnold McNair (UK), José Gustavo Guerrero (El Salvador), Manuel Alejandro Álvarez Jofré (Chile), Jules Basdevant (France) and Levi Carneiro (Brazil).⁵²

British officials generally agreed that a South Asian should replace Rau on the bench.⁵³ This included Zafrulla Khan, who had been an Indian national before partition in 1947, had sat on the Federal Court of India and had been nominated for the ICJ by the UK when an undivided India was a Dominion of the British Empire in 1946.⁵⁴

The election to replace Rau consequently became a two-way contest between Zafrulla Khan and Justice Radhabinod Pal, the Indian candidate.⁵⁵ Unfortunately for Pal, he had upset the US government with his dissenting judgment at the International Military Tribunal for the Far East,⁵⁶ in which he questioned the right of the Allies to establish the Tribunal. Pal had argued that the Tribunal amounted to victor's justice and questioned whether the law prohibited acts of aggression

⁴⁹ For the account of his first election campaign for the seat of Warringah in 1937, see David Lowe, *Australian between Empires: The Life of Percy Spender* (Routledge, 2016) 41–5.

⁵⁰ The statistics published in Table 37 of Harland (n 3) for the year 1946 show that Zafrulla Khan and Kenneth Bailey narrowly missed out on getting elected to the ICJ: at 350.

⁵¹ For Rau's obituary, see 'The Court and the Registry' (1953–54) 8 *International Court of Justice Yearbook* 15, 17–18.

⁵² Letter to Smedley, 16 July 1954 (The National Archives, DO 35/7124).

⁵³ Inward Telegram from UK High Commissioner for India to Commonwealth Relations Office, 3 September 1954, reproduced in *Election of Sir Zafrullah Khan to Succeed the Late Sir Benegal Rau as Judge at the International Court of Justice* (The National Archives, DO 35/7123) ('*Election of Sir Zafrullah Khan*'). See *ibid* [6]; Commonwealth Relations Office, 'Candidature of Sir Zafrullah Khan for the International Court of Justice' (Memorandum, 9 July 1954) (The National Archives, DO 35/7124) 4 [6(iii)(d)].

⁵⁴ Kattan, 'Decolonizing the International Court of Justice' (n 9) 314, 317, quoting Commonwealth Relations Office (n 53) 5 [6(iv)].

⁵⁵ See Letter from United Kingdom Delegation to the United Nations to United Nations Political Department, Foreign Office, 9 October 1954 (The National Archives, DO 35/7124) [2] ('9 October 1954 Letter').

⁵⁶ Gilbert Laithwaite, 'Note for Record' (Note, 29 July 1954) (The National Archives, DO 35/7134) [4].

before 1939.⁵⁷ The US government explained to the British Embassy in Washington in May 1954 that, although it was aware that the UK national group was likely to nominate Pal, ‘the more they looked at his past (Tokyo) record, the less they seem[ed] to like him’.⁵⁸ In the event, the US national group decided to nominate both Pal and Zafrulla Khan as candidates for the election. This combination was selected ‘so as to avoid giving offence either to the Pakistanis or the Indians’.⁵⁹ When it came to the actual vote, however, the American delegation decided to vote for Zafrulla Khan.⁶⁰

On the first ballot in the UN General Assembly, Zafrulla Khan received 30 votes to Pal’s 32. Because an absolute majority was required — meaning that one of the candidates had to receive at least 33 votes, as there were 64 states eligible to vote — and because Israel was absent, due to the Jewish holiday of Yom Kippur, a further vote was taken. On the second ballot, Zafrulla Khan received 33 votes and Pal 29. In the Security Council, Zafrulla Khan received six votes and Pal five.⁶¹ The British delegation voted for Pal throughout.

This was not the whole story. It will be recalled that Zafrulla Khan was nominated both for the regular triennial election and for the election to replace Judge Rau. The UK national group refused to support Zafrulla Khan even as the fifth candidate for the regular triennial election. In explaining why Zafrulla Khan was not selected for the fifth vacancy, Gerald Fitzmaurice, the UK Legal Adviser to the Foreign Office, explained that he preferred a European candidate.⁶² This preference raised eyebrows in the Commonwealth Relations Office, where one official explained that

while it would not be too difficult to give a reasonable explanation for preferring a European to Zafrullah, it would be much more difficult to explain a vote for a Latin-American in preference to Zafrullah if it appeared that Zafrullah has a reasonable chance for the 5th vacancy.⁶³

After Zafrulla Khan’s election to the ICJ in 1954 to replace Judge Rau, a letter to the Foreign Office from the UK delegation in New York claimed that the election of Zafrulla Khan, instead of Pal, was probably not to the UK’s advantage. In the delegation’s view, it was ‘difficult to believe that anyone who has been plunged in United Nations politics for as long as he has can now revert to taking a purely judicial view of things’.⁶⁴

⁵⁷ Radhabinod Pal, *International Military Tribunal for the Far East: Dissident Judgment of Justice RB Pal* (Sanyal & Co, 1953) 61–4, where he compared the actions of the Americans in dropping the atom bombs to those of the Nazi leaders before observing that nothing like this could be attributed to the Japanese war leaders.

⁵⁸ Copy of letter addressed to CLS Cope (Foreign Office), dated 27 May 1954, forwarded with the compliments of DJC Crawley of the British Embassy, Washington, DC, in *Election of Sir Zafrullah Khan* (n 53) 2.

⁵⁹ Confidential letter sent by air bag of a conversation with someone from the United States Delegation to AJH Ross, Commonwealth Relations Office from the United Kingdom Delegation to the United Nations, 8 March 1954: *ibid.*

⁶⁰ 9 October 1954 Letter (n 55) [2].

⁶¹ United Nations General Assembly, *Report on Debate*, 9th sess (No 37, By Bag, 8 October 1954); Harland (n 3) 343.

⁶² Letter from CLS Cope to MS Williams, 23 September 1954 (The National Archives, DO 35/7124) [3].

⁶³ *Ibid.*

⁶⁴ 9 October 1954 Letter (n 55) [8].

It would appear that some British officials had taken umbrage at Zafrulla Khan's UN record. As head of Pakistan's UN delegation and later as Foreign Minister of Pakistan, Zafrulla Khan had vocally criticised colonialism at the UN, praised the Eastern Bloc countries for supporting self-determination in the European colonies in Africa and Asia, and supported the independence of Kashmir, Indonesia, Libya, Somalia, Sudan, Algeria, Morocco and Tunisia.⁶⁵

The aversion expressed by the Foreign Office legal advisers towards Zafrulla Khan was curious in light of the UK's support for his nomination to the ICJ in 1946 and his candidacy to become President of the UN General Assembly in 1950.⁶⁶ Indeed, a Foreign Office brief prepared for the 1954 election had explained that 'Sir Zafrullah Kahn's [sic] legal and personal qualifications outweigh those of Dr Pal'.⁶⁷ The British delegation in Karachi was also surprised at the tone of the Foreign Office legal advisers:

'Anti-Colonialist' though [Zafrulla Khan] may be, in principle, he is by no means anti-British, and has great respect and understanding for our Colonial policy and problems. ... I should not think that a man of his character, intellectual stature, and training at the Bar and on the Bench in India, would fail to take as judicial a view as may reasonably be expected from any Asian judge of the Hague Court, Hindu, Buddhist [sic] or Muslim.⁶⁸

The reason that the Foreign Office legal advisers opposed Zafrulla Khan's candidacy was because they realised that he would be more difficult to influence. A cable from the Foreign Office in London to the UK delegation to the UN in New York explained that 'Zafrullah would not be amenable to anyone's influence'.⁶⁹ 'In fact', they wrote, 'we should think that he will be extremely difficult to influence'.⁷⁰

It appears that the Foreign Office legal advisers preferred a weaker, more insipid character on the ICJ. From their view, a judge's independence was not necessarily considered a positive attribute unless they could be certain of their pro-British credentials, which meant that the candidates under review could not be too critical of Britain's colonial record, in which case the judge concerned could not really be described as independent. This view of a judge's role at the ICJ was,

⁶⁵ See Kattan, 'Decolonizing the International Court of Justice' (n 9) 315. On Zafrulla Khan's recollection of these events, see Muhammad Zafrulla Khan, *Servant of God: A Personal Narrative* (Unwin Brothers, 1983) chs 12–13; Sir Muhammad Zafrulla Khan, *Tehdise Nemat: Recollection of Divine Favours*, tr Kunwar Idris (Zafar & Sons, 2014) 548–614.

⁶⁶ On Britain's support for Sir Zafrulla Khan's candidacy for Presidency of the UN General Assembly in 1950, see 'United Nations Elections: Brief for Discussion with Mr Spender': 'We should ask for Australia's support for Sir Zafrulla Khan as President of the Assembly'. This document can be found in *Government of Pakistan: Visit to London 7–10 September 1950, of Sir Zafrullah Khan, Pakistan's Minister for Foreign Affairs* (The National Archive, DO 35/2987).

⁶⁷ Letter from H Smedley to Cleary, 25 October 1954, archived at *Election of Judges, 1954–56* (n 12).

⁶⁸ Letter from JD Murray to WAW Clark, 20 October 1954, archived at *Election of Judges, 1954–56* (n 12).

⁶⁹ See the confidential telegram sent from the Foreign Office in London to the United Kingdom Delegation to the United Nations in New York, dated 19 November 1954, signed by Kelvin White on behalf of PE Ramsbotham in *Election of Sir Zafrullah Khan* (n 53).

⁷⁰ *Ibid.*

of course, at odds with art 2 of the *ICJ Statute*, which provides that the Court should be ‘composed of a body of independent judges’.⁷¹

IV THE ELECTION OF SIR PERCY SPENDER IN 1957

The election of Sir Percy Spender to the ICJ in 1957 was also controversial. This was because Spender had announced his candidacy for the old Commonwealth seat before Judge Read of Canada had announced his retirement.⁷² Spender was Australia’s Ambassador to the US when he nominated himself, and in that position he chaired Australia’s delegation to the UN. Although Spender had been Australia’s Minister for External Affairs for only a short period (1949–51), ‘he regarded himself less as an ambassador than a second Minister of External Affairs’.⁷³ The UK national group would have preferred to support Sir Kenneth Bailey,⁷⁴ the then Solicitor-General of Australia, who had represented Australia as a legal adviser at the United Nations Conference on International Organization that established the UN in 1945.⁷⁵ Surprisingly, given their close friendship in later years, Fitzmaurice did not think highly of Spender’s nomination, at least when he announced his candidature, although for Fitzmaurice an Anglo-Saxon was always better than a Soviet, African or Asian judge.⁷⁶

In a letter that Fitzmaurice sent to Sir Vincent Evans, the Legal Counsellor for the UK delegation in New York in April 1957, Fitzmaurice complained that Australia was not putting up its best candidate. ‘Professor Bailey would have been much better, both as a man and as a lawyer’, he wrote.⁷⁷ Fitzmaurice complained that what the Australians were doing was ‘to put forward Sir Percy as an Australian Government nominee’.⁷⁸ This, he explained, was ‘contrary to the spirit of the Statute, according to which nominations are supposed to come from national groups, who are supposed to act independently of Governments, though they may of course consult them’.⁷⁹ He added: ‘It would, I think, have been better tactics to wait until the Australian national group had actually nominated Sir Percy.’⁸⁰

Fitzmaurice was responding to a letter from Evans, who explained that he had met with Sir Pierson Dixon, Permanent Representative of the United Kingdom to the United Nations, and the Canadian ambassador, who told Evans that Judge Read was unwilling to let the Australians announce his retirement.⁸¹ In the event,

⁷¹ *Statute of the International Court of Justice* art 2.

⁷² See, eg, Letter from GG Fitzmaurice to WVJ Evans, 10 April 1957 (The National Archives, FO 371/129890) [3] (‘10 April 1957 Letter’).

⁷³ David Lowe, ‘Australia at the United Nations in the 1950s: The Paradox of Empire’ (1997) 51(2) *Australian Journal of International Affairs* 174, 174.

⁷⁴ 10 April 1957 Letter (n 72) [2].

⁷⁵ Jack E Richardson, ‘Bailey, Sir Kenneth Hamilton (1898–1972)’, *Australian Dictionary of Biography* (Web Page) <<http://adb.anu.edu.au/biography/bailey-sir-kenneth-hamilton-9404>>, archived at <<https://perma.cc/YE58-LN7Z>>.

⁷⁶ See 10 April 1957 Letter (n 72) [7].

⁷⁷ *Ibid* [2].

⁷⁸ *Ibid* [3].

⁷⁹ *Ibid*.

⁸⁰ *Ibid*.

⁸¹ Letter from WVJ Evans to Sir Gerald Fitzmaurice, 5 April 1957 (The National Archives, FO 371/129890) [5] (‘5 April 1957 Letter’).

Judge Read did announce his retirement,⁸² and Canada did support Sir Percy's nomination for the 'Old Commonwealth seat'.⁸³

Accordingly, it appears that Spender pre-empted the national group by announcing his candidacy before they had an opportunity to consider anybody else. As Henry Burmester explains, this meant that the Australian national group (comprised of the Attorney-General, the Acting Solicitor-General and the Dean of the Faculty of Law at the University of Sydney) had in essence no choice but to support Spender's candidature for the ICJ rather than Bailey.⁸⁴ This was probably why Sir Owen Dixon, the Chief Justice of the High Court of Australia, and a then member of the national group, did not participate in the decision of the group, as he did not see the group as acting independently of government.⁸⁵ No other candidate was nominated.⁸⁶ James Crawford suggests that Spender was only nominated following pressure by Robert Menzies, the Australian Prime Minister.⁸⁷ This would make sense, given their close professional relationship.⁸⁸ Spender campaigned assiduously for the ICJ as though he were running for a parliamentary election. He went so far as to seek the support of Johannes Strijdom, the Prime Minister of South Africa, who agreed to support Spender, even though South Africa was boycotting the UN at the time for its criticism of apartheid.⁸⁹

Sir Percy was duly elected in a landslide victory, receiving 58 votes in the UN General Assembly and 10 votes in the Security Council.⁹⁰ The candidates who failed to get elected in 1957 included international legal luminaries such as Henri Rolin, Alfred Verdross, Georges Sauser-Hall, Paul Guggenheim, Roberto Ago and Jan Hendrik Willem Verzijl⁹¹ — not to mention Bailey, who would apparently have been the Australian national group's first choice.⁹²

⁸² See Table 29 of Harland (n 3), for the year 1957, which shows that Judge Read withdrew prior to the ballot: at 339.

⁸³ Although the Canadian government announced its support for Spender's nomination rather belatedly: see *Election of Five Members of the International Court of Justice: List of Candidates Nominated by the National Groups: Addendum*, UN GAOR, 12th sess; UN SCOR, 12th sess, UN Docs A/3653/Add.1 and S/3879/Add.1 (20 September 1957). For an explanation of the 'Old Commonwealth seat', see below nn 93–5 and accompanying text.

⁸⁴ Henry Burmester, 'Australia and the International Court of Justice' (1997) 17 *Australian Year Book of International Law* 19, 27.

⁸⁵ *Ibid.*

⁸⁶ Keith, 'Member of the Permanent Court of Arbitration' (n 3) 166.

⁸⁷ James Crawford, "'Dreamers of the Day": Australia and the International Court of Justice' (2013) 14(2) *Melbourne Journal of International Law* 520, 531 ('Dreamers of the Day'). Spender was given 'ministerial positions in the Menzies government of 1939–41 and re-emerged as one of Menzies' most senior colleagues in the coalition government elected in December 1949': Lowe (n 49) 1.

⁸⁸ Crawford, 'Dreamers of the Day' (n 87) 531. See also Percy Spender, *Politics and a Man* (Collins, 1972) 13, 301: 'He [Menzies] and I were on the most friendly terms.'

⁸⁹ See Telegram from Acting UK High Commissioner in South Africa to Commonwealth Relations Office, 27 July 1957 (The National Archives, FO 371/129893). See also Kattan, 'There Was an Elephant in the Court Room' (n 9) 158.

⁹⁰ The statistics published in Table 29 of Harland (n 3) for the year 1957 show that Spender came first, ahead of Badawi, Vi Kuiyuan Wellington Koo, Winiarski and Jean Spiropoulos, who were also elected: at 339.

⁹¹ *Ibid.*

⁹² See Burmester (n 84) 27.

V 'THE THREAT FROM THE ASIANS'

The reference to the 'Old Commonwealth seat' in the correspondence between Evans and Fitzmaurice⁹³ was a reference to the seat 'reserved' at the ICJ for Commonwealth judges from the 'old' British Commonwealth Dominions (Australia, Canada, the Irish Free State, New Zealand, Newfoundland and South Africa).⁹⁴ This expression was used to distinguish the original members of the Commonwealth from those states in Africa and Asia that had joined the Commonwealth after 1949, when the so-called 'new' Commonwealth's membership expanded.⁹⁵ During the exchange between Fitzmaurice and Evans on Spender's nomination, concern was expressed by Evans that 'Asia may try to capture one of the available seats at the election or ... the Asian members of the Commonwealth may put up a candidate for Judge Read's seat as a "Commonwealth" or "common law" seat'.⁹⁶ The difficulty in countering this move, Evans conceded, was that the Asians could 'claim to be under-represented, especially when compared with the Latin Americans who have four seats'.⁹⁷ Evans suggested that 'in case the threat from the Asians develops [sic], we ought to consider how we should meet it'.⁹⁸

In his reply, Fitzmaurice disputed Evans' claim that Asia was under-represented on the ICJ by insisting that it was necessary to take the five Great Powers convention⁹⁹ out of the equation:

If one eliminates the five Great Powers as having by convention a sort of entrenched right to a seat, then one finds that out of the remaining ten seats, the position is as follows. There are four Latin Americans, two satellites and/or Eastern Europeans (Winiarski and Zoricic), two Afro-Asians (Badawi and Sir Zafrullah Khan), one Old Commonwealth (Read) and one Western European (Klaestad). On this basis therefore it is Western Europe which is badly under-represented, and not either the Afro-Asians or the Soviet bloc.¹⁰⁰

⁹³ See, eg, 10 April 1957 Letter (n 72) [7].

⁹⁴ Ibid. Bardo Fassbender refers to a "gentlemen's agreement" concluded between the permanent members in 1946', in which 'two of the six non-permanent seats would be given to Latin America and one each to the British Commonwealth, Western Europe, Eastern Europe and the Middle East'. According to Fassbender, this arrangement became ineffective in 1955, although British diplomats continued to refer to it: Fassbender (n 47) 367 n 71.

⁹⁵ For background on the Commonwealth's membership, see generally 'Our History', *The Commonwealth* (Web Page) <<https://thecommonwealth.org/about-us/history/>>, archived at <<https://perma.cc/MV2N-8RRS>>. On the status of the British Dominions in international law, see generally James Crawford, *The Creation of States in International Law* (Clarendon Press, 2nd ed, 2006) 358–66.

⁹⁶ 5 April 1957 Letter (n 81) 1 [4].

⁹⁷ Ibid.

⁹⁸ Ibid 2 [4].

⁹⁹ This was a reference to the Permanent 5 'seats' on the ICJ, whereby the permanent members of the Security Council were entitled to a seat each on the Court based on the practice of the ICJ's predecessor. The 'convention' that the permanent members of the Security Council should be entitled to a seat at the ICJ emanated from discussions at the Advisory Committee of Jurists in 1920 and the practice of the PCIJ in the interwar period, when seats were reserved for the great powers: Fassbender (n 47) 360–1 [8]–[9], 363–4 [17]–[18]. However, it appears that this practice is no longer recognised, as the General Assembly has played a bigger role in the election of judges in recent years, especially following the failure to re-elect the British judge, Sir Christopher Greenwood, to the ICJ in 2017: at 364–7 [19]–[21].

¹⁰⁰ 10 April 1957 Letter (n 72) [7].

Given the lack of Western European representation on the ICJ, as Fitzmaurice saw it, he explained to Evans that ‘we should firmly resist any idea that the Afro-Asians are under-represented on the Court according to its present numbers’.¹⁰¹ Fitzmaurice complained that the pretensions of the Afro-Asians to be under-represented was not justified and that

[w]hether they like it or not, Sir Zafrullah Khan is new Commonwealth, and therefore there is already a new Commonwealth candidate on the Court with another six years ahead of him. In these circumstances there is no sort of case at all for an additional new Commonwealth candidate.¹⁰²

Fitzmaurice’s description of Zafrulla Khan as ‘new Commonwealth’ may be contrasted with the way Beckett had described Zafrulla Khan as a ‘*British Commonwealth candidate*’ when he was the candidate for an undivided India in 1946, when it was still a part of the British Empire.¹⁰³ Fast forward 11 years and Fitzmaurice was now complaining about the danger of ‘the Indians’ who had become too powerful at the UN: ‘there is a certain danger there’, he cautioned Evans, ‘given the degree of Indian influence in United Nations circles, since an Indian (or a Sinhalese) candidate would be on the way to increasing Afro-Asian representation while ostensibly preserving the Commonwealth position’.¹⁰⁴

Fitzmaurice’s argument that *Western* Europeans were under-represented on the ICJ could only be sustained by formulating a very narrow conception of ‘the West’ and by discounting the Permanent 5 (‘P5’) ‘convention’. But there was a reason for doing this, as Fitzmaurice may have thought that increasing Afro-Asian representation risked imperilling the influence of the Europeans on the Court. When reading Fitzmaurice’s expression of concern about Indian influence at the UN, we must remember that under Prime Minister Jawaharlal Nehru, the Republic of India had become a champion of decolonisation in Asia and Africa and was a leading opponent of racial discrimination — including in British Kenya and Rhodesia, as well as in South Africa and South West Africa (Namibia).¹⁰⁵ Under Nehru, India had also formed a close strategic partnership with Moscow following its participation in the 1955 Afro–Asian conference in Bandung, Indonesia, with exchanges of state visits.¹⁰⁶ These associations would have undoubtedly coloured Fitzmaurice’s perception of candidates from Africa and Asia.

¹⁰¹ Ibid.

¹⁰² Ibid [11].

¹⁰³ See 19 January 1946 Letter (n 29) [2] (emphasis added).

¹⁰⁴ 10 April 1957 Letter (n 72) [11].

¹⁰⁵ See, eg, B Pachai, *The International Aspects of the South African Indian Question 1860 — 1971* (C Struik, 1971) 192, 199, 209, 247–9, 261; Mark Mazower, *No Enchanted Palace: The End of Empire and the Ideological Origins of the United Nations* (Princeton University Press, 2009) ch 4; Ali A Mazrui, ‘Africa between Gandhi and Nehru: An Afro–Asian Interaction’ (2017) 16(1–2) *African and Asian Studies* 14.

¹⁰⁶ Christopher Andrew and Vasili Mitrokhin, *The World Was Going Our Way: The KGB and the Battle for the Third World* (Basic Books, 2005) 314. On Nehru’s communist sympathies, see Benjamin Zachariah, *Nehru* (Routledge, 2004) 59–60, 111, 182, 199–201. See also Judith M Brown, *Nehru: A Political Life* (Yale University Press, 2003) 16–17. On the Bandung Conference’s influence on the decolonisation movement, see generally Luis Eslava, Michael Fakhri and Vasuki Nesiiah (eds), *Bandung, Global History, and International Law: Critical Pasts and Pending Futures* (Cambridge University Press, 2017).

When Evans and Fitzmaurice were corresponding in 1957, we must also remember that the UN had yet to agree on a demarcation of its membership into geographical regions, which was only agreed to in 1963, when its membership was divided into four regional groups.¹⁰⁷ Bardo Fassbender explained that while the regional groups did not play a direct role in the nomination and election of judges, it was

generally recognized that the Court should include judges representing the respective regions, and that the regional distribution of seats on the Court should roughly parallel the distribution of the (non-permanent) seats on the Security Council.¹⁰⁸

While one can understand Fitzmaurice's concern about judges from Eastern Europe and countries aligned with the Soviet Union given the Cold War context, Fitzmaurice's argument about a lack of Western European representation was striking in that his conception of 'the West' appeared to be limited to the geography of Western Europe.¹⁰⁹ However, scholars writing in the 1950s did not construe the West so narrowly in either geopolitical or spatial terms, with the Western world being understood to include the whole of Europe, North America, Latin America and Australasia.¹¹⁰ In this sense, 'the West' was as much a cultural expression as it was a geographical one. During the Cold War, 'the West' appeared to mean any country that was not under the influence of the Soviet Union or any other totalitarian state. It was another way of referring to 'free societies'.¹¹¹

Bearing this in mind, of the judges elected and sitting in 1957, three of them, by Fitzmaurice's standards, could be described as either Western European or members of the Commonwealth: Helge Klaestad (Norway), Jean Spiropoulos (Greece) and Spender (Australia). If we consider Latin America as part of the

¹⁰⁷ See *Question of the Composition of the General Committee of the General Assembly: Amendments to Rules 31 and 38 of the Assembly's Rules of Procedure*, GA Res 1990 (XVIII), UN GAOR, 18th sess, 1283rd plen mtg, Supp No 15, UN Doc A/RES/1990(XVIII) (17 December 1963) annex; *Question of Equitable Representation on the Security Council and the Economic and Social Council*, GA Res 1991 (XVIII), UN GAOR, 18th sess, 1285th plen mtg, Supp No 15, UN Doc A/RES/1990(XVIII) (17 December 1963) pt A para 3, pt B para 3. After 1972, this became five regional groups: the Group of African States, the Group of Asian States, the Group of Latin American and Caribbean States, the Group of Eastern European States and the Group of Western European and Other States: see *Enlargement of the Economic and Social Council*, GA Res 2847 (XXVI), UN GAOR, 26th sess, 2026th plen mtg, Supp No 29, UN Doc A/RES/2847(XXVI) (20 December 1971) para 4; *Question on the Composition of the Relevant Organs of the United Nations: Amendments to Rules 31 and 38 of the Rules of Procedure of the General Assembly*, GA Res 33/138, 33rd sess, 89th plen mtg, Supp No 45, UN Doc A/RES/33/138 (19 December 1979) annex. For commentary, see Fassbender (n 47) 367–8 [22]; Mackenzie et al (n 21) 105–6.

¹⁰⁸ Fassbender (n 47) 367 [22].

¹⁰⁹ Some support for this narrow conception of Western Europe appears in Foreign Office documents drafted in the 1940s, although there is a certain hesitancy in some of the documents as to whether to include the Dominions and even the colonies: AW Brian Simpson, *Human Rights and the End of Empire: Britain and the Genesis of the European Convention* (Oxford University Press, 2004) ch 11.

¹¹⁰ See, eg, Arnold Toynbee, *The World and the West* (Oxford University Press, 1953); PD Marchant, 'What Is the West?' (1956) 28(3) *Australian Quarterly* 48; William H McNeill, *The Rise of the West: A History of the Human Community* (University of Chicago Press, 1963) pt III.

¹¹¹ The German diplomat Wilhelm Grewe, for example, referred to the East–West confrontation in his magnum opus: Wilhelm G Grewe, *The Epochs of International Law*, tr Michael Byers (Walter de Gruyter, 2000) 702–3.

Western world, given the continent's cultural, religious and linguistic links with Western Europe and its continental legal system, the number would be higher, as this would have included an additional three: Enrique Armand-Ugón (Uruguay), Lucio Manuel Moreno Quintana (Argentina) and Roberto Córdova (Mexico). And if the judges from France, the UK and the US were included in the equation, which they should have been, given that they were sitting judges as members of the Security Council, there were a further three 'Western judges' on the Court: Basdevant, Lauterpacht and Hackworth. In other words, there were at least *nine* judges who could be described as 'Western'. By way of contrast, there were only *three* judges from Africa and Asia on the bench: Vi Kuyin Wellington Koo, Zafrulla Khan and Badawi, and four if we view Fyodor Kojevnikov, the Soviet judge, as non-Western. Whatever Fitzmaurice may have thought about Winiarski, he should have also been described as a Western European judge, even though Poland was behind the Iron Curtain, given his education, residence and pro-Western outlook.¹¹²

As regards the UK's support for nominating and electing judges from the Soviet Union to the ICJ, this could be explained on account of self-interest, as the British government wanted to preserve the so-called five Great Powers convention.¹¹³ The real battle concerned the other judges, outside the P5, who might be placed in a position where they could determine the outcome of a judgment.

It would appear that the politics of the Cold War had scarred Fitzmaurice's outlook. Mere suspicion was enough to block a candidate from a Warsaw Pact country or a government thought to have close connections to Moscow. Fitzmaurice's belief that South Asians had become too powerful at the UN would come to a head when he attempted, and failed, to oppose Zafrulla Khan's re-election to the ICJ in 1963.¹¹⁴ This was to have ominous consequences for the reputation of the Court following the decision of the ICJ in the second phase of the *South West Africa* cases, when Zafrulla Khan was told by the President of the Court, Sir Percy Spender, that he could not participate in the hearing or drafting of the judgment because the government of Pakistan had allegedly been too critical of South Africa's racial policies at the UN.¹¹⁵ We should also recall that when Fitzmaurice was corresponding with Evans, there was not a single black African judge on the ICJ.¹¹⁶

¹¹² Winiarski read law in Cracow, Paris and Heidelberg. He was a legal adviser to the Polish Delegation to the Paris Peace Conference in 1919 and was thereafter appointed professor of international law at the newly created university at Poznań. He fled the German invasion of Poland for the UK, where he was a member of the Informal Inter-Allied Committee of Experts set up on British initiative in 1943 to study the future of the World Court: Krzysztof Skubiszewski, 'Sir Hersch Lauterpacht and Poland's Judges at the International Court: Judge Bohdan Winiarski' (2011) 13(1–2) *International Community Law Review* 87, 88, 91.

¹¹³ Sands, 'Global Governance and the International Judiciary' (n 7) 498. On the Great Powers convention, see above n 94.

¹¹⁴ Kattan, 'Decolonizing the International Court of Justice' (n 9) 342–3.

¹¹⁵ *Ibid* 337–44. On Fitzmaurice's aversion to Zafrulla Khan, see at 316–17, 342–3.

¹¹⁶ See below Part VII.

VI THE SECOND ELECTION OF SIR MUHAMMAD ZAFRULLA KHAN IN 1963

Zafrulla Khan was a judge at the ICJ from 1954–61, when he was elected by his colleagues as Vice President of the Court in 1958, and then again from 1964–73, when he was elected President of the Court in 1970 (in a run-off with Fitzmaurice whom he defeated).¹¹⁷ As in 1954, Fitzmaurice continued to oppose Zafrulla Khan's election to the ICJ when Zafrulla Khan was nominated again in 1963.¹¹⁸ Fitzmaurice was playing to form, as he had opposed Zafrulla Khan's nomination to sit as a judge ad hoc in the first phase of the *South West Africa* cases in 1962 by questioning Zafrulla Khan's impartiality on the subject of apartheid. In a meeting of the judges, Fitzmaurice thought that it would 'be morally and humanly impossible that Zafrulla Khan could be other than against South Africa'.¹¹⁹

As the judge of British nationality on the ICJ, Fitzmaurice was now a member of the British national group, along with Sir Arnold McNair, President of the European Court of Human Rights; Lord Raymond Evershed, Master of the Rolls; and Lord Charles Hodson, Lord of Appeal in Ordinary. In a replay of the events of 1954, the Foreign Office and the Commonwealth Relations Office were surprised that Zafrulla Khan had not been nominated by the national group; but, on this occasion, rather than accept the national group's prerogative, they put their foot down and insisted that the group include Zafrulla Khan as their third nominee.¹²⁰ This stance put Francis Vallat, who replaced Fitzmaurice as the Legal Adviser to the Foreign Office, in an awkward position, and he felt obliged to defend the choices made by the national group. These included Fitzmaurice (who was also a member of the national group that nominated him), André Gros of France, Luis Padilla Nervo of Mexico and Sir Edward Okyere Asafu-Adjaye of Ghana.¹²¹ In relation to Zafrulla Khan, Vallat explained, echoing an earlier complaint of the Foreign Office legal advisers, that it was 'not a very good thing for a Judge to leave the Court, go back into the hurly-burly of the General Assembly and political life and become its President, and then go back again as a Judge of the Court'.¹²² Vallat admonished the Foreign Office for trying to influence the views of the national group and explained that no useful purpose would be served by any attempt to persuade them to nominate Zafrulla Khan.

Vallat's admonishment of the Foreign Office's political branch proved to be in vain. Eleven days after the national group made their nominations known to the policymakers in the Foreign Office, Sir Patrick Dean, Permanent Representative of the United Kingdom to the United Nations, wrote a stern rebuke in the form of a minute that was sent to Vallat. Dean explained that the more he thought about

¹¹⁷ Kattan, 'Decolonizing the International Court of Justice' (n 9) 350.

¹¹⁸ Ibid 342–3.

¹¹⁹ Ibid 335.

¹²⁰ Letter from David le Breton to JF Wearing, 29 May 1963 (The National Archives, FO 371/172614); Letter from JF Wearing to BG Smallman, 18 June 1963 (The National Archives, FO 371/172614).

¹²¹ The nominations were included in a handwritten note that McNair sent Vallat on 13 June 1963. McNair had not been able to consult Lord Hodson before making the decision but wanted to wait for his signature before making the decision known to the government: Draft Letter from Lord McNair to HEU Thant, June 1963 (The National Archives, FO 371/172615), enclosed in Letter from Arnold McNair to Francis Vallat, 13 June 1963 (The National Archives, FO 371/172615) ('13 June 1963 Letter').

¹²² Letter from Francis Vallat to JFW, 9 May 1963 (The National Archives, FO 371/172614) [2].

the national group's list of nominees, the more convinced he was that the British delegation had to vote for Zafrulla Khan. Dean was not impressed with the argument that Zafrulla Khan had switched his career from law to politics and back again:

Surely, if a man is a good lawyer, and Sir Zafrullah is undoubtedly a very good lawyer and a very eloquent one ... it is a great additional advantage that he should have had wide political experience and be a highly respected figure as a statesman as well as a lawyer. To put it at its lowest, we want people on the Court who really are sound and sensible and likely to take the same sort of view about international law questions as we do.¹²³

Dean explained that he had no problem voting for Asafu-Adjaye, the Ghanaian candidate, who had been nominated by the UK national group, even though the Ghanaian delegation had told Dean that they were not voting for Asafu-Adjaye because they did not regard him highly.¹²⁴ In Dean's view, it was more important to vote for Zafrulla Khan than to vote for an African just 'for the sake of having one'.¹²⁵

Dean told Vallat that he would be happy to speak to one or more members of the national group if Vallat thought it would help. Dean warned that if the national group continued to persist in refusing to nominate Zafrulla Khan, he would recommend to the Secretary of State that he instruct Dean to disregard the national group's advice and vote for Zafrulla Khan.¹²⁶ Three months later, in an abrupt turn, the national group nominated Zafrulla Khan as their third candidate. A draft brief dated 26 September 1963 explained that the national group 'made their nomination after consultation with the Foreign Office, the Commonwealth Relations Office and the Lord Chancellor'.¹²⁷

VII SEARCHING FOR A 'GOOD BLACK AFRICAN'

The main difficulty that now faced the UK's national group in 1963 was what to do with the fifth vote.¹²⁸ In view of the requirement in art 9 of the *ICJ Statute* that candidates represent the main forms of civilisation and the principal legal systems of the world, and given that the subject of racial discrimination in South Africa was under consideration at the ICJ, the government wanted to vote for a black African candidate. Unfortunately, in the view of the UK national group, only

¹²³ 26 June 1963 Letter (n 1) [4].

¹²⁴ Ibid [3].

¹²⁵ Ibid [4].

¹²⁶ Ibid [5]. In response, Vallat explained that the process of nomination and election were distinct. The national group was responsible for its own decision and acted independently of the government. Any advice that may be given from government circles could only be informal. Accordingly, the government was not responsible for nominations and was not bound to vote for candidates nominated by the national group: Letter from Francis Vallat to Sir Patrick Dean, 27 June 1963 (The National Archives, FO 371/172615) [2].

¹²⁷ 'Provisional Agenda Item 15: Elections to the International Court of Justice' (Draft Brief, 26 September 1963) (The National Archives, FO 371/172615) [6] ('Provisional Agenda Item 15').

¹²⁸ There were five vacant seats in 1963, as Ricardo Alfaro (Panama), Jules Basdevant (France), Lucio Manuel Moreno Quintana (Argentina), Roberto Córdova (Mexico) and Sir Gerald Fitzmaurice (UK) had reached the end of their terms: *ibid* [2]. Although states may only nominate four candidates for election, they vote for five candidates during triennial elections: *Statute of the International Court of Justice* art 5(2).

two candidates from Africa (Sir Louis Mbanefo of Nigeria and M Isaac Forster of Senegal) had the qualifications necessary for election to the ICJ, but they had not been nominated by their governments. The British government now accepted that Sir Edward Asafu-Adjaye of Ghana, who had originally been nominated by the UK national group instead of Zafrulla Khan, was not qualified for the position.¹²⁹ This raises the question as to why he was nominated in the first place. The government was also of the view that the Latin American judges were over-represented on the ICJ, and that there was ‘a sound case for their losing a second seat in order to make room for a good black African’.¹³⁰

To appreciate why the UK national group wanted to nominate a good black African candidate for election to the ICJ, some context is necessary. As decolonisation moved to Africa in the 1960s, following the independence of Ghana (1957) and Guinea (1958), Western foreign policy underwent a dramatic shift, which was captured in British Prime Minister Harold MacMillan’s ‘The Wind of Change’ speech in Pretoria, South Africa, when 16 new states from Africa joined the UN.¹³¹ In his speech, MacMillan explained that the great issue of the second half of the 20th century was not how the West would reinvigorate colonialism but whether supporters of African nationalism would swing towards the East or the West.¹³² The British government had good reason to question its continued support for South Africa, as it had come under much criticism at the UN, where many of the independence leaders in Africa appeared to closely identify with Moscow.¹³³

The British Foreign Office had long been concerned about Soviet influence at the UN, where it viewed the Soviet Union’s role in championing human rights in the colonies with deep suspicion.¹³⁴ The Foreign Office was also concerned by India’s role in the adoption of *Resolution 1761 (XVIII)* by the UN General Assembly, which it pushed through the Special Committee in November 1962.¹³⁵ The resolution called on states to break their economic, diplomatic and cultural

¹²⁹ ‘Provisional Agenda Item 15’ (n 127) [5].

¹³⁰ Ibid [6].

¹³¹ Phillippe-Joseph Salazar, ‘The Wind of Change (The Original Text)’ (2015) 6(2) *African Yearbook of Rhetoric* 5. For an excellent account of American and British relations with South Africa in the 1960s amidst a changing global political order, see Ryan M Irwin, *Gordian Knot: Apartheid and the Unmaking of the Liberal World Order* (Oxford University Press, 2012). The 16 African states that joined the UN in 1960 were Cameroun, Central African Republic, Chad, Congo (Brazzaville), Congo (Leopoldville), Dahomey, Gabon, Ivory Coast, Malagasy Republic, Mali, Niger, Nigeria, Senegal, Somalia, Togo and Upper Volta: ‘Growth in United Nations Membership’, *United Nations* (Web Page) <<https://www.un.org/en/about-us/growth-in-un-membership>>, archived at <<https://perma.cc/8ETC-BEVN>>.

¹³² Salazar (n 131) 20–1. See also Irwin (n 131) 18.

¹³³ Some of these leaders like Kwame Nkrumah and Jomo Kenyatta had become radicalised while studying at universities in the UK, where they were known to the security services: Christopher Andrew, *The Defence of the Realm: The Authorized History of MI5* (Allen Lane, 2009), 451–8. For a brilliant account of this period, written by Haile Selassie’s former legal adviser who became an Eritrean revolutionary leader, see generally Bereket Habte Selassie, *The Crown and the Pen: The Memoirs of a Lawyer Turned Rebel* (Red Sea Press, 2007). See especially at 173–8.

¹³⁴ Simpson (n 109) 304–5.

¹³⁵ Irwin (n 131) 56.

ties to South Africa.¹³⁶ The voting record for the resolution split the UN, with the US, the UK and most West European countries voting against the resolution, while the Soviet Union, the Eastern Bloc countries, and most Asian and African governments voted in favour of it. The states of Latin America and the Caribbean abstained (except for Cuba and Mexico, which voted in favour of the resolution).¹³⁷

Another reason for supporting 'a good black African', in addition to the changing composition of the UN and the alignment of many of the newly independent African states with Moscow, was the fear that Fitzmaurice's re-election might be under threat. This was due to his 99-page joint dissenting opinion in the first phase of *South West Africa* cases in December 1962, which he wrote with Spender, insisting that the ICJ was not competent to determine the merits of the case.¹³⁸ Rumours were circulating of complaints about Fitzmaurice by a number of African delegations at the UN. Constantin Stavropoulos, the UN Under-Secretary-General for Legal Affairs, told the Foreign Office that they wanted to 'punish' Fitzmaurice for supporting South Africa.¹³⁹ In response to the rumours, Joyce Gutteridge, a Foreign Office Legal Adviser, sent a letter to Vallat, dated 21 May 1963, in which she admitted that 'if this childish and irresponsible line is persisted in it may cause Sir Gerald to lose some votes, although it is most unlikely that he would not still get the absolute majority of votes in the General Assembly and the Security Council'.¹⁴⁰

Gutteridge's analysis proved on mark, as Fitzmaurice was re-elected. Nevertheless, it appears that Fitzmaurice lost votes in the General Assembly, coming in at third place, after Gros and Padilla Nervo. Zafrulla Khan came fourth, with 58 votes in the General Assembly and seven votes in the Security Council, and Forster, the 'good black African', who was nominated by the UK but not by his own government, came fifth, with 42 votes in the General Assembly and six votes in the Security Council.¹⁴¹

VIII CONCLUSION

The three elections surveyed here indicate that political considerations were foremost in the minds of British officials as they considered the qualifications of candidates for nomination and election to the ICJ during the Cold War. This is not to say that qualifications were not considered important. They were, and a candidate who did not have the necessary academic qualifications or professional experience had little chance of getting nominated or elected. But equally as important was being acquainted with British officials. A candidate who was not sufficiently well known outside academia or his home country's judiciary was

¹³⁶ *The Policies of Apartheid of the Government of the Republic of South Africa*, GA Res 1761 (XVII), UN GAOR, 17th sess, 1165th plen mg, Agenda Item 87, Supp No 17, UN Doc A/RES/1761(XVIII) (6 November 1962).

¹³⁷ For the voting record, see UN GAOR, 17th sess, 1165th plen mtg, Agenda Item 87, UN Doc A/PV.1165 (6 November 1962) 679 [33].

¹³⁸ *South West Africa (Preliminary Objections)* (n 10) 465–563 (Judges Spender and Fitzmaurice).

¹³⁹ Letter from JAC Gutteridge to Francis Vallat, 21 May 1963 (The National Archives, FO 371/172614).

¹⁴⁰ *Ibid.*

¹⁴¹ The statistics are provided in Table 25: Harland (n 3) 335.

unlikely to get elected no matter how good they were. It all came down to trust. Government officials wanted to be sure that the candidates that they nominated would articulate a view of international law that was consistent with British interests or Western European values. They desired, in the words of Sir Patrick Dean, people who were not just sound and sensible, but who were also 'likely to take the same sort of view about international law questions as we do'.¹⁴²

This was not just a British view, of course. American officials also refused to vote for candidates who did not take a similar view towards international law questions as they did. This explains why Pal was not elected to the ICJ after his criticism of the American government in the Tokyo War Crimes Tribunal. While Zafrulla Khan's anticolonial views upset some British officials like Fitzmaurice, this was not so much of a concern for US or British officials who were trying to make amends with the Third World during decolonisation. Having said this, a candidate who expressed too much independence or was too critical of the UK government's foreign policy would have difficulty getting support. This could explain why Fitzmaurice opposed Zafrulla Khan's candidacy, as the latter was, in Fitzmaurice's view, obstinate and difficult to influence.

When it came to the tension between a candidate's qualifications and ensuring representation of the main forms of civilisation and the principal legal systems of the world, there emerged a difference of views between the members of the UK national group, who emphasised their professional and specialist assessments of the qualifications of candidates and their familiarity with the ICJ, and the policymakers, who preferred candidates with wide political experience. When these views clashed, the views that prevailed depended on the influence that a senior Whitehall official commanded with the Lord Chancellor of the day. The most influential members of the national group in the 1950s were McNair, the former ICJ Judge, and Fitzmaurice, the Foreign Office legal adviser, who acted like gatekeepers and who appeared to take decisions before consulting other members of the national group.¹⁴³ Candidates who were not favoured by this 'old boys' club' had little prospects of success. However, the UK national group's views did not always prevail when their choice of candidate clashed with the national interest. In this regard, what was particularly noteworthy about the UK's encounter with the ICJ during the early Cold War period was the influence of powerful civil servants who determined what the national interest would be. A candidate who had a good working relationship with a senior political figure mattered when there was disagreement between the national group's nominees and the Foreign Office.

What was also significant about the historical period under review was the UK's influence with other Commonwealth governments whose civil servants turned to the British Foreign Office for advice. Sensitive and candid views were often exchanged between British civil servants and those serving the governments of the 'old Commonwealth' as to the prospects of candidates who were campaigning for election to the ICJ and whether they would be able to reach agreement as to who they would support. This also included candid and frank

¹⁴² 26 June 1963 Letter (n 1) [4].

¹⁴³ See, eg, 13 June 1963 Letter (n 121), where McNair explains that he and Fitzmaurice decided on the nominations before consulting anybody else. The other members' signatures were requested after the important decisions had been taken and appeared to be pro forma.

exchanges between the Foreign Office and the US government, although they did not always see eye to eye on colonial issues.

The survey is also informative about the historic composition of the ICJ. Although many British officials agreed that there were too many Latin American judges on the Court in the 1950s and that the time had come to elect a 'good black African' during the *South West Africa* cases, they were not prepared to lose one of their own judges from the Commonwealth to achieve this. Even judges from what Fitzmaurice described as the 'new' Commonwealth were considered suspect. Loyalty in the minds of many British officials serving the government in the 1950s was still associated with nationality and a country's foreign policy. Even if an Asian or Eastern European judge had been educated in the UK or Western Europe, it was assumed they would follow orders from Moscow.¹⁴⁴

Perhaps it was this 'Cold War mindset' that was the most distinctive feature of elections to the ICJ during the period studied here. There was a perception that candidates from countries behind the Iron Curtain or from countries in Africa and Asia that had taken sides with the Soviet Union during the Cold War confrontation with the West over the issue of decolonisation were not to be trusted. This dim view of the independence of candidates from the former colonies would be tested during second phase of the *South West Africa* cases when Spender, the President of the ICJ, used his casting vote to throw his support behind South Africa, effectively reversing the decision of the 1962 Court, which alienated the Court from the new nations in Africa and Asia.¹⁴⁵ It was only after the furore caused by the 1966 decision that the ICJ could truly be described as a 'World Court', when its composition was modified with the election of additional judges from Africa and Asia so as to better reflect 'the main forms of civilization' and 'the principal legal systems of the world'.¹⁴⁶

¹⁴⁴ But see *South West Africa (Preliminary Objections)* (n 10) 449 (President Winiarski); *South West Africa (Second Phase)* (n 10). Judge Winiarski (see above n 112), despite coming from a country that was behind the Iron Curtain, sided with South Africa in both judgments.

¹⁴⁵ On Spender's Cold War mindset, see Kattan, 'There Was an Elephant in the Court Room' (n 9) 152–61.

¹⁴⁶ *Statute of the International Court of Justice* art 9. After the elections in 1966, there were two African judges on the ICJ (Isaac Forster of Senegal and Charles Onyeama of Nigeria), along with judges from Lebanon, the Philippines and Pakistan. Sir Kenneth Bailey narrowly failed to get elected as a result: Harland (n 3) 331–4 (Tables 23 and 24).