

OXFORD

SELECTING INTERNATIONAL JUDGES

PRINCIPLE, PROCESS, AND POLITICS



Ruth Mackenzie, Kate Malleson,
Penny Martin, and Philippe Sands

INTERNATIONAL COURTS AND TRIBUNALS SERIES

Selecting International Judges: Principle, Process, and Politics

RUTH MACKENZIE, KATE MALLESON,
PENNY MARTIN, AND
PHILIPPE SANDS

OXFORD
UNIVERSITY PRESS

OXFORD

UNIVERSITY PRESS

Great Clarendon Street, Oxford OX2 6DP

Oxford University Press is a department of the University of Oxford.
It furthers the University's objective of excellence in research, scholarship,
and education by publishing worldwide in

Oxford New York

Auckland Bangkok Buenos Aires Cape Town Chennai
Dar es Salaam Delhi Hong Kong Istanbul Karachi Kolkata
Kuala Lumpur Madrid Melbourne Mexico City Mumbai Nairobi
São Paulo Shanghai Taipei Tokyo Toronto

Oxford is a registered trade mark of Oxford University Press
in the UK and in certain other countries

Published in the United States
by Oxford University Press Inc., New York

© Ruth Mackenzie, Kate Malleson, Penny Martin and Philippe Sands, 2010

The moral rights of the author have been asserted
Crown copyright material is reproduced under Class Licence
Number C01P0000148 with the permission of OPSI
and the Queen's Printer for Scotland

Database right Oxford University Press (maker)

First published 2010

All rights reserved. No part of this publication may be reproduced,
stored in a retrieval system, or transmitted, in any form or by any means,
without the prior permission in writing of Oxford University Press,
or as expressly permitted by law, or under terms agreed with the appropriate
reprographics rights organizations. Enquiries concerning reproduction
outside the scope of the above should be sent to the Rights Department,
Oxford University Press, at the address above

You must not circulate this book in any other binding or cover
and you must impose the same condition on any acquirer

British Library Cataloguing in Publication Data

Data available

Library of Congress Cataloging in Publication Data

Selecting international judges : principle, process, and politics / Ruth Mackenzie ... [et al].
p. cm.

ISBN 978-0-19-958056-9 (hardback)

1. International courts. 2. Judges—Selection and appointment. I. Mackenzie, Ruth.
KZ6250.S45 2010
341.5'5—dc22

2010018306

Typeset by Newgen Imaging Systems (P) Ltd., Chennai, India

Printed in Great Britain

on acid-free paper by

CPI Antony Rowe, Chippenham and Eastbourne

ISBN 978-0-19-958056-9

3 5 7 9 10 8 6 4 2

Foreword

I regard it as being extraordinary that so little attention has been given to the issues that arise from the manner in which the judges of international courts and tribunals are appointed. The task is obviously more complex and difficult than appointing judges to domestic courts.

Just as the state of the rule of law is of critical importance to the wellbeing of a nation, so in the world today is the health of the international rule of law critical to the wellbeing of the global society in which we live. Both nationally and internationally the quality of the rule of law is in turn dependent upon the quality of the judiciary who have the responsibility of upholding the rule of law. Yet very little attention has been given by academics or others as to how international judges are nominated and appointed, though this obviously would have an immense influence on the quality of the decisions of the courts and tribunals to which they are appointed.

Before my retirement as Lord Chief Justice, I had been intimately involved with the appointment system in England and Wales for over 10 years and had been a party to the negotiations which resulted in the new appointment system for that jurisdiction which was enacted in the Constitutional Reform Act of 2005. This experience gave me a shrewd idea of how difficult it must be to devise a system for appointments to an international court. But I have had no direct experience of a process of that nature. I was, however, aware that the process could be highly political and even demeaning to those applying for an appointment. Wanting to learn more about the process, I was naturally delighted when Professor Philippe Sands, QC and Professor Kate Malleson approached me to chair an Advisory Committee they were setting up in conjunction with the research project into the 'Process and Legitimacy in the Nomination, Election and Appointment of International Judges'. The project is now complete and has resulted in the work to which this Foreword relates. I have no doubt the project has produced results which are of very great value and I congratulate the Arts and Humanities Research Council on having the insight to recognize that the project deserved the funding which they provided, without which the project could not have gone ahead.

While not ignoring the general picture, Professor Malleson and Professor Sands, with Ruth Mackenzie and Penny Martin, have wisely concentrated on two of the most significant international courts, the International Court of Justice (ICJ) and the International Criminal Court (ICC). This enabled the research to provide a detailed account of the manner in which appointments are made to what are probably the two most important international courts. The examination of the process in relation to these two courts demonstrates that

the process of nomination and appointment leaves ample scope for reform and improvement. Even where the judge appointed is of the required calibre, the process by which the appointment takes place can undermine the credibility of the appointment and the authority and integrity of the tribunal.

What is true of the ICJ and ICC is almost certainly true of most, if not all, other international judicial bodies. Wisely, this highly authoritative team have not sought to produce a blueprint as to the nature of the reforms which are needed. They acknowledge that this is not a situation where one size fits all. However, what they have done is to provide the information which is needed to enable the process of reform to take place. Their description of this process makes apparent shortcomings which can only be described as obvious.

Attention has to be given to the problems that inevitably occur because of the need to ensure adequate representation of the widely different interests that properly have to be reflected in the judiciary appointed to an international court. Merit alone cannot be the sole criteria for appointment. Allowances have to be made for the widely different character of the countries that are subject to the jurisdiction of the international courts. However, in making those allowances a proper balance must be maintained between the need to accommodate the different characteristics of the countries subject to the jurisdiction and the need to create an appointment process and a judiciary which will command respect among those that are subject to the jurisdiction of the international court. The legitimacy of the court will be damaged or even destroyed if it is perceived that the court's membership is largely the product of political bargaining between the states which are subject to the jurisdiction of the court.

I hope their report will therefore be a catalyst for reform and that it will provide a base for further research. The report, together with its helpful appendices needs to be carefully considered by anyone involved or interested in justice at the international level. I very much hope that the past neglect of the subject will be alleviated by the report's clear account of the situation. The team will earn the gratitude of all those who read its report. It is non-doctrinaire, practical and realistic. It is all the more powerful because of its moderation.

The Rt Hon the Lord Woolf

17 December 2009

Series Editor's Preface

In contrast to the extensive literature about national judicial selection processes, particularly in North America and Europe, the selection and nomination of international judges has received minimal attention beyond the narrow group of legal scholars, officials, and judges who are directly involved in those processes. This is surprising, given the growing role that international courts play in international law and relations, and considering the impact of international decisions on domestic legal practice. The fact is that our international judiciary remains the least studied or understood branch of international governance.¹

This book fills an important gap in the literature, taking the reader to the very heart of the decision-making processes, at all stages. Insiders will find much material that is familiar and some which is controversial. Outsiders will find it instructive, illuminating and often surprising. The preparation of this book has been a massive undertaking, involving large numbers of people over several years. Its findings are based on more than 100 interviews with a wide range of players and key actors in the system. It is their voice, more than that of the authors, that comes through.

This rich and sensitive material is treated in a sober and balanced way. To gain depth, the authors have privileged a narrow focus, addressing two major international courts: the International Court of Justice (ICJ) and the International Criminal Court (ICC). Yet, the research has not unearthed the obvious. While on a number of issues there is a degree of consensus amongst those interviewed, in other areas, there are sharp divergences, both in terms of factual understandings about the way judicial selection processes currently work and the manner in which they ought to work. Such divergences indicate a troubling lack of transparency and the absence of common or minimum standards in the process. This is the crux of the matter.

The authors are careful not to overstate the dangers of political influences on the international judicial selection process. Indeed, few are more overtly political than the process of nomination of the judges of the US Supreme Court, and yet, no one can dispute that it has produced many excellent justices. It is not the presence of politics per se in the international judicial process that is a cause of concern. Rather, it is the endemic and almost total absence of public scrutiny or political accountability that raises alarm bells. The combination of politics and lack of public scrutiny is a toxic mix that threatens the long-term stability,

¹ For a previous study in this series of the international judiciary, see D. Terris, C.P.R. Romano, and L. Swigart, *The International Judge: An Introduction to the Men and Women who Decide the World's Cases*, International Courts and Tribunals Series (Oxford University Press, 2007) in the US University Press of New England, 2007.

effectiveness, and credibility of international courts. It dims prospects for selecting the very best judges for the international courts. That in turn threatens to undermine legitimacy.

Normatively, the authors are careful not to advocate a one-size-fits-all approach to judicial selection. There is considerable scope for a diversity of models at the international level as much as there is between national systems or, as in the case of the US, within a nation itself. The systems for selecting judges of the ICJ and ICC are the product of the particular time and context in which the two courts were created. Also, while certain international courts, like the ICJ, have proven impervious to significant reform, it is the newest courts where changes are most likely. Far from advocating unlikely radical reform, the authors seek greater transparency as a means to tempering overt or crude politicization of the process. They lament the fact that the election systems for two key international courts, the ICJ and ICC, have become part of the broader landscape of international elections, without due regard to the special, judicial nature of the vacancies they need to fill.

The fact that judicial elections are part of the wider international governance structure should not mean that selection, nomination and election processes have to be shrouded in mystery, or applied in a way that results in talented outsiders having no realistic prospect of being nominated. If international courts are to become permanent and meaningful fixtures of the international governance structure, international judges must be able to command widespread respect and authority, including before their peers in national courts. Getting the selection process right should be a central objective of international decision-making.

Cesare P.R. Romano

*January 2010,
Santa Monica, CA*

Preface and Acknowledgements

This book records the findings of a three-year project entitled 'Process and Legitimacy in the Nomination, Election and Appointment of International Judges', funded by the Arts and Humanities Research Council, to whom we express our gratitude for their support. The aim of the project was to identify the processes that states use to nominate and elect international judges, and the formal criteria and other considerations that play a role in the nomination and election process. Our aims in producing this book are modest—we seek to set out the formal rules for the appointment of judges to the International Court of Justice and the International Criminal Court and to explore how those rules are actually applied in practice, both at national and international levels. Although some anecdotal material has been available, the lack of properly researched and published material on national processes for the nomination of candidates to international judicial office justified the effort to focus our research on this important issue. To this end, we undertook a series of 'case studies' through which we sought to examine in depth the nomination process in nine countries. Most of the information that was of interest to us was not on public record, and thus our research has been based on more than one hundred interviews, conducted over an eighteen-month period between 2006 and 2008.

Many individuals have assisted us in the course of our research. Our thanks go foremost to Lord Woolf who chaired the advisory committee that was established at the outset of the project, and to the members of the advisory committee, including Florentino Feliciano, Gilbert Guillaume, Kamal Hossain, Djamchid Momtaz, Beverley McLachlin, Sir Shridath Surendranath Ramphal, P. S. Rao, Peter Russell, Tuiloma Neroni Slade, William Taft IV, Eduardo Valencia-Ospina, and Elizabeth Wilmschurst. The committee members acted in their personal capacity. We sought advice from them on various aspects of our work at the beginning of the project and several members gave us further input as the work progressed. We are deeply indebted to them for their advice, but stress that the material in this book is solely the responsibility of the authors.

As part of the project, in September 2008, we co-organized a seminar held at New York University to present and discuss our interim findings. We are extremely grateful to the Institute for International Law and Justice at NYU, particularly to Benedict Kingsbury and Richard Stewart, for collaborating in and hosting this seminar, and to all the seminar participants who gave us much food for thought as we sought to finalize our work.

A number of students on the UCL LL.M and related programmes provided invaluable research assistance over the course of the project and we thank Sa'adetu Yahaya, Ijeamaka Elizabeth Nnaji, Sarah Steele, Osvaldo Andres Urrutia Silva,

Gauthier Vannieuwenhuyse, Audrey Bourlon, Fiaz Hussain, Sabina Appelt, Michael Freitas Mohallem, Pasquale Annicchino, and Remi Reichold. We are also grateful to Jo Braithwaite who assisted with the analysis of the interview materials. The project could not have been completed without Kate Barber, administrator of the Centre for International Courts and Tribunals (CICT) until January 2009, who provided a huge amount of assistance throughout the design and implementation of the project and her successor, Kimberlee Moran, who has done a great job in helping us to finalize the text. We also express our gratitude to Jane Robertson, who copy-edited the lengthy and sometimes tangled text that we originally made available to her.

Thanks are due, as always, to our colleagues in the Project on International Courts and Tribunals, especially Thordis Ingadottir, Cesare Romano, and Yuval Shany for their support for this and other work. At Oxford University Press, John Louth and Merel Alstein have been wonderfully supportive.

Given that we have sought to avoid identifying individuals for the most part in this book, we must of necessity refrain from mentioning by name many of those who have assisted most in our research. Numerous individuals—judges, candidates, legal advisers, diplomats, academics, civil servants—gave us advice and assistance as we sought to identify and contact potential interviewees around the globe. Without them this book would not have been written. Finally, of course, we must thank the many individuals who agreed to take part in interviews, for giving us their time and insight, and for entrusting us with the responsibility of drawing our own conclusions from their comments.

Ruth Mackenzie
Kate Malleson
Penny Martin
Philippe Sands

London
1 December 2009

List of Abbreviations

AAA	American Arbitration Association
ABA	American Bar Association
ACHPR	African Court on Human and Peoples' Rights
ACJHR	African Court of Justice and Human Rights
ASIL	American Society of International Law
ASP	Assembly of States Parties (International Criminal Court)
AU	African Union
CANZ	Canada, Australia and New Zealand
CARICOM	Caribbean Community
CCJ	Caribbean Court of Justice
CFI	Court of First Instance (European Union)
CICC	Coalition for the International Criminal Court
CST	Civil Service Tribunal (European Union)
DSB	Dispute Settlement Body (World Trade Organization)
EC	European Community
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
ECtHR	European Court of Human Rights
EU	European Union
GA	General Assembly (United Nations)
GRULAC	Group of Latin American and Caribbean States
IACHR	Inter-American Court on Human Rights
IAWJ	International Association of Women Judges
ICC	International Criminal Court
ICJ	International Court of Justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
ILA	International Law Association
ILC	International Law Commission
ITLOS	International Tribunal for the Law of the Sea
NG	National Group
NGO	Non-governmental Organization
P5	Permanent Members of the UN Security Council
PCA	Permanent Court of Arbitration
PCIJ	Permanent Court of International Justice
RJLSC	Regional Judicial and Legal Services Commission (Caribbean Court of Justice)
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights

UN	United Nations
UNAT	United Nations Appeals Tribunal
UNCLOS	United Nations Convention on the Law of the Sea
UNDT	United Nations Dispute Tribunal
UNITAR	United Nations Institute for Training and Research
WEOG	Group of Western European and other States
WIGJ	Women's Initiatives for Gender Justice
WTO	World Trade Organization
WTO AB	World Trade Organization Appellate Body

INTERNATIONAL COURTS AND
TRIBUNALS SERIES

General Editors: RUTH MACKENZIE,
CESARE P.R. ROMANO, AND PHILIPPE SANDS

Selecting International Judges:
Principle, Process, and Politics

INTERNATIONAL COURTS AND TRIBUNALS SERIES

A distinctive feature of modern international society is the increase in the number of international judicial bodies and dispute settlement and implementation control bodies; in their case loads; and in the range and importance of the issues that they are called upon to address. These factors reflect a new state in the delivery of international justice. The International Courts and Tribunals series has been established to encourage the publication of independent and scholarly works which address, in critical and analytical fashion, the legal and policy aspects of the functioning of international courts and tribunals, including the institutional, substantive, and procedural aspects.

Contents

<i>Foreword</i>	vii
<i>Series Editor's Preface</i>	ix
<i>Preface and Acknowledgements</i>	xi
<i>List of Abbreviations</i>	xiii
Introduction	1
1. The International Court of Justice and the International Criminal Court in Historical Context	7
A. Introduction	7
B. From ad hoc arbitration to permanent courts of justice	10
C. The International Court of Justice	17
D. The International Criminal Court	19
E. Conclusion	22
2. The Composition of the International Courts	24
A. Introduction	24
B. General selection criteria for the bench	26
C. Individual selection criteria for the ICJ and ICC	49
D. Conclusion	60
3. The Nomination Process	63
A. Introduction	63
B. ICJ and ICC nomination rules	66
C. Nomination bodies	69
D. ICJ and ICC nominations in action	73
E. Conclusion	98
4. The Election Process	100
A. Introduction	100
B. ICJ and ICC election rules	102
C. The role of the UN regional groups	105
D. Campaigning	110
E. Vote-trading	122
F. The voting process	128

5. Trends and Reforms	137
A. Introduction	137
B. Transparency	137
C. Independence and non-politicization	144
D. Competence and merit	152
E. Diversity and representation	161
F. Conclusion	171
6. Conclusions	173
A. Summary of findings on the ICC and ICJ	173
B. The broader relevance of the findings—trends and reforms	175
Appendix 1 Research Methodology	180
A. Background	180
B. Questionnaires	181
C. Interviews in New York	181
D. Case studies	182
Appendix 2 The Jurisdiction and the Judicial Selection Procedures of the ICJ and ICC	186
A. The jurisdiction of the International Court of Justice	186
B. The nomination and election of ICJ judges	187
C. The jurisdiction of the International Criminal Court	191
D. The nomination and election of ICC judges	192
Appendix 3 International Criminal Court Assembly of States Parties: Resolution ICC-ASP/3/Res. 6	197
A. Nomination of candidates for judges	197
B. Election of judges	199
C. Judicial vacancies	201
Annex I Illustrative tables of minimum voting requirements	202
Annex II Sample ballot paper: election of 6 judges of the ICC	204
<i>Bibliography</i>	205
<i>Index</i>	219

Introduction

The international judiciary is probably the least well-known branch of international governance. International courts and tribunals are required to decide upon an increasingly wide range of issues of global importance—from the environment to human rights, from trade and other economic obligations to national border disputes—yet public knowledge of these judicial decision-makers is limited. Even less familiar is the process by which international judges are appointed.¹ This lack of public awareness of international judicial selection processes is mirrored by an almost complete absence of academic research on the subject. In contrast to the extensive literature in many national jurisdictions, particularly in North America and Europe, the international selection and appointment processes have attracted almost no attention outside a narrow circle of lawyers, officials and judges who are directly involved,² raising profound issues as to the legitimacy and likely effectiveness of the international courts.

Given the expansion in the number and role of the international courts and tribunals, this widespread lack of knowledge should be of concern to anyone interested in the future of international law and rules-based global dispute resolution. Without meaningful public awareness of, and involvement in, the framing and assessment of the qualities of the men and women who sit on these courts, doubts are more likely to arise as to whether we are selecting the best judges for this increasingly important work. Moreover, even if the judges selected are unimpeachable in terms of their personal qualities, the legitimacy of the international courts is inevitably undermined if there is no minimum level of public knowledge of the process of selection. The importance of the relationship between the processes of judicial selection and the success of the international courts has been highlighted by the human rights group, Interights:

The process for appointment of judges to these judicial bodies ensuring judicial independence and diverse representation by candidates of the highest merit will be instrumental in determining the future success and legitimacy of these important institutions.³

¹ D. Terris, C. P. R. Romano, and L. Swigart, *The International Judge: An Introduction to the Men and Women Who Decide the World's Cases*, International Courts and Tribunals Series (Oxford: Oxford University Press, 2007).

² M. Wood, 'The Selection of Candidates for International Judicial Office: Recent Practice' in T. M. Ndiaye and R. Wolfrum (eds), *Law of the Sea, Environmental Law and Settlement of Disputes: Liber Amicorum Judge Thomas A. Mensah* (The Hague: Martinus Nijhoff Publishers, 2007) 358; D. Terris, C. P. R. Romano, and L. Swigart, *The International Judge: An Introduction to the Men and Women Who Decide the World's Cases*, op. cit.

³ J. Limbach et al, *Judicial Independence: Law and Practice of Appointments to the European Court of Human Rights* (London: INTERIGHTS, May 2003) 7.

The process by which judges are chosen for the international courts generally comprises two distinct phases: (1) the nomination of candidates by states (or in the case of the International Court of Justice, by a state's Permanent Court of Arbitration national group); and (2) the election of judges by intergovernmental political bodies from amongst the candidates nominated. Governing instruments of international courts typically establish criteria to be fulfilled by individual judges, as well as criteria regarding the composition of the bench as a whole (eg geographic representation). However, it is not clear how these criteria are monitored or applied in practice, at either the nomination or election stage. While some mechanisms to review international judicial nominations against objective criteria have been envisaged (such as the Advisory Committee provided for in the Rome Statute of the International Criminal Court), they have rarely been used in practice. Similarly, the use of newer judicial selection models, such as appointments commissions, is rare in the context of international courts, although such a development has occurred in relation to the Caribbean Court of Justice.

The limited, largely anecdotal evidence that exists about the way judges are appointed to international courts rarely raises serious concerns about the integrity and ability of the judges who are appointed. What is less clear is whether able and independent judges have been appointed because of, or in spite of, the selection processes through which the appointments take place. Research by Erik Voeten on the decision-making of national governments in relation to international judicial appointments has identified a range of motivations for the selection of different candidates: 'Governments are neither simply picking the best qualified candidate nor are they singularly obsessed with limiting sovereignty costs, although both motivations are sometimes important.'⁴ Voeten's research highlights the importance of other factors, such as the desire on the part of states to signal a credible commitment to the international legal order and the role of political patronage. Similarly, Karen J. Alter's work in the 1990s on the European Court of Justice found that national nominations to the Court were governed by a variety of political considerations 'including party affiliation and political connections'.⁵ It is this political element in the system which has more recently attracted the attention of judges, practitioners and academics who are familiar with the international selection processes. A key criticism concerns the potentially distorting effects that political influence can have on the goal of selecting meritorious and independent candidates. In 2007, for example, Senator Miriam Defensor Santiago, the candidate of the Philippines for the International Court of Justice, gave this assessment of the relative importance of merit and politics in the election process to the court:

I will be representing not myself but a developing country. Generally, in this international voting, it is the candidates of developed countries who are certain of victory.

⁴ E. Voeten, 'The Politics of International Judicial Appointments', *Chicago Journal of International Law* 9(2) (Winter 2009) 389.

⁵ K. Alter, 'Who are the "Masters of the Treaty"? European Governments and the European Court of Justice' *International Organization* 52(1) (1998) 121.