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## BOOK REVIEW

### International Courts and Their Judges

#### *Reviewing:*

Ruth Mackenzie, Kate Malleson, Penny Martin and Philippe Sands, *Selecting International Judges: Principle, Process, and Politics* (Oxford: OUP, 2010), 300 pp., ISBN: 978-0199580569.

Courts are only as good as the people sitting on the bench. This is true for national as well as international courts, with the *caveat* that the legal officers/clerks of national supreme or international courts may to some extent compensate for the limited competence of the judges they work for. This does not mean, though, that the qualification of the judges should in any way be compromised by political considerations. Unfortunately, as everyone with some experience in the national or international judiciary knows, the reality is different. Take for example the case of Germany, a consolidated democracy with a high regard for its judiciary and jurisprudence, where, however, party affiliation is an important, sometimes indispensable requirement to become a supreme or constitutional court judge or Federal Prosecutor-General.<sup>1</sup> As the Spanish example shows, at least formal party affiliation could be

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<sup>1</sup> For an empirical study see M. Bohlander and C. Latour, *The German Judiciary in the Nineties – A Study of the Recruitment, Promotion and Remuneration of German Judges* (Shaker Aachen, 1998) 45, concluding that there exists a rather sinister picture of the influence political parties exert over the elections to the BGH [German Supreme Court]...”.

prohibited for judges.<sup>2</sup> In any case, if (party) politics influences the election of judges to the supreme courts on the national level, what then what can we realistically expect from the international judiciary?

The present study provides a quite disillusioning answer to this question. The book starts with a presentation of the historic context of the ICJ and ICC,<sup>3</sup> then explains their composition (24 et seq.), the domestic process of nomination (63 et seq.), the electoral process (100 et seq.) and it finally explains some trends and develops reform proposals (137 et seq.). The results of the study are based on an innovative quantitative and qualitative analysis of the nomination and election processes of international courts, focusing on the International Court of Justice (ICJ) and the International Criminal Court (ICC). The qualitative and quantitative data was gathered in a three-step process: (1) a questionnaire on national nomination processes distributed to a wide range of international judicial, legal and governmental actors; (2) interviews with staff members of the Permanent Missions to the UN in New York; (3) nine country case studies in different regions of the world, including interviews with key actors. With this approach the study provides, for the first time solid empirical, albeit not completely representative, data on the important question of the selection of international judges.

The disillusioning conclusions of the study can be summarized in one sentence: the nomination and election processes of the international courts, especially the ICJ and ICC, are characterized by a high degree of politicization, a lack of transparency and a lack of minimum standards which would guarantee a minimum qualification of the judges so elected. Professor Cesare Romano, the general editor of the series, refers quite bluntly in his preface to a “troubling lack of transparency and the absence of common or minimum standards in the process (...) the endemic and almost total absence of public scrutiny or political accountability that raises alarm bells.”<sup>4</sup> In the words of the authors the criticism sounds like this:

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<sup>2</sup> Article 395 of the Spanish Law of the Organization of the Judiciary (*Ley Orgánica del Poder Judicial*) provides that judges must not belong to political parties or trade unions or work for these (‘No podrán los jueces o magistrados pertenecer a partidos políticos o sindicatos o tener empleo al servicio de los mismos ...’). Some criticize, however, that this rule is partly undermined by the Associations of Judges which are close to the political parties (‘Asociación Profesional de la Magistratura’ of a conservative tendency and ‘Jueces para la Democracia’ of a left-wing orientation).

<sup>3</sup> Ruth Mackenzie, Kate Malleson, Penny Martin, and Phillipe Sands, *Selecting International Judges. Principle, Process, and Politics* (Oxford: OUP, 2010), 7ff.

<sup>4</sup> *Ibid.*, Section 9

Evidence of politicization is apparent at both the nomination and election stages. For both courts, nomination practices are fragmented, lacking in transparency, and highly varied. At one end of the spectrum, a few candidates emerge following a transparent and formal consultative process that focuses on merit; at the other end, it is not unusual for individuals to be selected as a result of overtly political considerations or even nepotism. Whatever form of nomination process is adopted, all nominated candidates must work their way through a highly politicized election process.<sup>5</sup>

With these results, the study generally backs up critical views in the literature on the issue at hand.<sup>6</sup>

The study's results are equally disappointing for all those (including this author) who had believed or hoped that the formally stricter ICC selection rules would ensure a better selection. After all, the ICC Statute does not only require, as does the ICJ Statute, that the candidates shall be of "high moral character, impartiality and integrity" and "possess the qualifications of their national law for appointment to the highest judicial offices" (Article 36 (3)(a) ICC-Statute; Article 2 ICJ Statute). It demands further that they "have established competence in criminal law and procedure, and the necessary relevant experience, whether as judge, prosecutor, advocate or in other similar capacity, in criminal proceedings" (Article 36 (3)(b)(i) ICC Statute) or "competence in relevant areas of international law such as international humanitarian law and the law of human rights, and extensive experience in a professional legal capacity which is of relevance to the judicial work of the Court" (Article 36 (3)(b)(ii) ICC Statute) and "have an excellent knowledge of and be fluent in at least one of the working languages of the Court", i.e., English or French (Article 36 (3)(c) ICC Statute). In addition, the Assembly of States Parties (see

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<sup>5</sup> *Ibid.*, 173.

<sup>6</sup> D. Terris, C. P. R. Romano and L. Swigart, *The International Judge: An Introduction to the Man and Woman Who Decide the World's Cases* (Oxford, OUP, 2007); M. Bohlander, 'Pride and Prejudice or Sense and Sensibility? A Pragmatic Proposal for the Recruitment of Judges at the ICC and Other International Criminal Courts,' (2009) 12 *New Criminal Law Review* 4, 529, arguing in particular that diplomats, government official and academics are not suited for judicial tasks since they lack practical experience which, in turn, should be the main reason to recruit practitioners (on the merits of "academia", cf. Mackenzie et al., (n. 3), 52–53). The former US Federal and ICTY Judge P.M. Wald also calls for better qualified judges, 'Women on International Courts: Some Lessons Learned,' (2011) 11 *International Criminal Law Review* 3, 401–408, criticizing that "judges were appointed who had neither any prior experience nor even much knowledge about the criminal law process."

Article 112 ICC Statute) on 10 September 2004 adopted a resolution on the “Procedure for the Nomination and Election of Judges of the International Criminal Court”<sup>7</sup> which contains quite precise rules for the nomination and election of the judges.

Yet, notwithstanding these formal differences between the ICJ and ICC selection procedures explicitly acknowledged in the study,<sup>8</sup> the authors reach the conclusion that the selection procedures of both courts are “in very broad terms the same”<sup>9</sup> and they doubt “whether the ICC approach has led to any overall improvement in the make-up of the bench”.<sup>10</sup> As to the nomination procedure, the authors criticize with respect to the ICJ that “most states studied do not act in accordance with the spirit, and at times not even the letter, of the ICJ Statute”.<sup>11</sup> This also applies to the ICC nomination practice, as far as it follows the ICJ model, via the national groups of the Permanent Court of Arbitration (Article 4 (1) ICJ Statute). With regard to ICC nominations through national procedures however,

(...) the picture is even more confused and it is often unclear what, if any, process is being followed. The result is a fragmented, inconsistent and highly variable approach to ICJ and ICC nominations. Some candidates may be selected through a transparent and consultative process that focuses on merit, whilst their competitors may have emerged because they were the best friend of the minister, or they were the minister him or herself.<sup>12</sup>

At the end of the day, this means that the candidates’ merit is often a secondary factor and that States Parties have not succeeded in reaching a more objective, rational and less politicized ICC nomination and election procedure. To be sure, “soft factors” such as a more or less equal geographical representation of all parts of the world on the bench<sup>13</sup> and the gender aspect, must certainly be taken into account in international courts. Yet the qualification of the

<sup>7</sup> Mackenzie et al., (n. 3), 197ff.

<sup>8</sup> See 187 et seq. and especially at 174: “In form (...) these requirements appear to be strikingly different.”

<sup>9</sup> Mackenzie et al., (n. 3), 23.

<sup>10</sup> *Ibid.*, 174–175.

<sup>11</sup> *Ibid.*, 98.

<sup>12</sup> *Ibid.*

<sup>13</sup> *Ibid.*, 175, although this may entail a particularly strong link to specific state interests (“selecting ambassadors” at 60). See further, P. McAuliffe, ‘Review,’ (2011) 11 International Criminal Law Review 359, 361 “(...) universal acceptance of the utility of the general principle of geographical representation”.

candidates should never be compromised and “talented outsiders” should also have the possibility of getting nominated and elected. After all, the world courts (ICJ and ICC), unlike the European regional courts<sup>14</sup> are under no obligation to have judges from all states parties on the bench.<sup>15</sup>

In sum, the study clearly demonstrates that improvements in the selection procedures and practice are indispensable. The authors quote the ‘Burgh House Principles on the Independence of the International Judiciary’ which provide for certain minimum conditions which should form the basis of the selection of international judges.<sup>16</sup> Furthermore, the transparency and accountability of the nomination and election procedure is of the utmost importance. In this regard the NGO, Coalition for the ICC, makes an important contribution presenting and screening the ICC candidates.<sup>17</sup> In addition, a presentation and examination of the candidates in a more formal setting, similar to the procedure used with regard to candidates to the US Supreme Court, would be desirable. This could occur for example before the (still not established!) ‘Advisory Committee on Nominations’ of the ASP (Article 36 (4)(c) ICC Statute). Given the strong politicization of the national nomination procedures a quality control can occur only at the

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<sup>14</sup> European Court of Human Rights, Article. 20, 22 Eur. Conve. of Human Rights; EU–Court, Article 19(2) cl. 1 EU–Treaty.

<sup>15</sup> On the contrary, the Inter-American Court of Human Rights is only composed of seven judges (Article 52 American Convention of Human Rights) to be selected from the 25 state parties, <http://www.oas.org/juridico/english/sigs/b-32.html>, accessed 5 March 2012.

<sup>16</sup> The principles, reprinted in Mackenzie et al., (n. 3), 178, deserve to be quoted: “2.1 In accordance with the governing instruments, judges shall be chosen from among persons of high moral character, integrity and conscientiousness, who possess the appropriate professional qualifications, competence and experience required for the court concerned. 2.2 While procedures for nomination, election and appointment should consider fair representation of different geographic regions and the principal legal systems, as appropriate, as well as of female and male judges, appropriate personal and professional qualifications must be overriding considerations in the nomination, election and appointment of judges. 2.3 Procedures for the nomination, election and appointment of judges should be transparent and provide appropriate safeguards against nominations, elections and appointments motivated by improper considerations. 2.4 Information regarding the nomination, election and appointment process and information about candidates for judicial office should be made public, in due time and in an effective manner, by the international organization or other body responsible for the nomination, election and appointment process.”

<sup>17</sup> <http://www.iccnw.org/?mod=electionjudges>, accessed 5 March 2012 referring to <http://www.icc-cpi.int/Menus/ASP/Elections/Judges/2011/Alphabetical+listing-2011.htm>, accessed 5 March 2012.

international level via the nomination and election procedures of the international courts themselves. Such hearings can be most helpful since they might at least prevent the least qualified candidates from becoming judges. In any event, it is clear that the legitimacy of the international courts depends to a large degree on the legitimacy of the selection procedure and the quality of their judges.<sup>18</sup> For this reason one can only wholeheartedly support the authors when they demand “urgent steps (...) to limit the growing and pervasive role of extraneous political factors in order to ensure that politics does not overwhelm the prospects for selecting the very best judges for the international courts”.<sup>19</sup>

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<sup>18</sup> See the foreword of Lord Woolf, at Ch. VIII in Mackenzie et al., n. 3.; “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”; M. Swart, ‘Review,’ (2011) 24 *Leiden Journal of International Law* 789, 792, “The importance of judicial selection cannot be overestimated. It could be said that the legitimacy of the entire system of international justice is at stake”; From a gender-perspective. N. Grossman, ‘Sex Representation on the Bench and the Legitimacy of International Criminal Courts,’ (2011) 11 *International Criminal Law Review* 643 argues that the under-representation of women judges undercuts the legitimacy of the courts “because men and women bring different perspectives to judging. Consequently, without both sexes, adjudication is inherently biased”.

<sup>19</sup> Mackenzie et al., n. 3, 179.