



University College London/New York University Seminar
Selecting International Judges: Principle, Process and Politics

Report of a Seminar at NYU Law School, September 9, 2008

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Note:

* This seminar was convened to discuss the background paper prepared by Penny Martin and Ruth Mackenzie, under the supervision of Professors Kate Malleson and Philippe Sands. Sessions were chaired by Profs Kingsbury, Malleson, Sands, and Stewart. A list of participants at the seminar appears as Annex I.

** This report reflects the Rapporteur's own selection of themes and ideas; it is not an agreed document. Participants spoke under the Chatham House Rule, which provides for the free use of ideas expressed in the course of discussion on condition that speakers' identities and institutional affiliations are not revealed.

PRESENTATION OF THE PROJECT AND SEMINAR OBJECTIVES

A joint seminar co-organized by the Centre for International Courts and Tribunals (“CICT”) at the University College London and the Institute for International Law and Justice (“IILJ”) at New York University School of Law (“NYU Law”) was held at NYU Law on September 9, 2008 to discuss previously circulated findings and preliminary conclusions of the *Process and Legitimacy in the Nomination, Election and Appointment of International Judges* research project (“the project”) conducted by the CICT. Seminar participants included academics and practitioners with a wide range of backgrounds and experience.

The seminar began by situating itself in reference to a prior symposium, entitled *The Proliferation of International Tribunals: Piecing Together the Puzzle*—co-organized by NYU Law’s Journal of International Law and Politics (“JILP”), the N.Y.U. Center on International Cooperation, and the CICT’s Project on International Courts and Tribunals, and held at N.Y.U. Law on October 1-2, 1998—which was said to continue to provide energy and organization for the current project. The upcoming IILJ-JILP Symposium on *The Routinization of Adjudication in Complex International Governance Regimes: Patterns, Possibilities, and Problems*, to be held at N.Y.U. Law on October 28-29, 2008, was also referenced.

The conversation was initiated by reflecting on the proliferation of international courts and tribunals, noting that questions regarding the actual and desired impact of these institutions have taken a pressing character as they continue to yield an increasing amount of decisions in international affairs. The seminar was presented as fitting within this broader context. The importance of the topic to the IILJ’s Global Administrative Law (“GAL”) Project, which investigates global governance as administration, was also stressed, noting that the role of international courts and tribunals in enforcing or acting upon international regulatory decisions makes them an important element of global administrative structures. In this regard, it was pointed out that courts often fulfill administrative functions, such as assigning defense counsel or witness protection schemes, and that more study is needed with respect to these aspects. It was noted that the seminar topic was also relevant to the international constitutionalism school of thought.

Linking international courts and tribunals with international governance was presented as raising questions of legitimacy with respect to the exercise of power, and in this regard it was suggested to reflect on Max Weber’s three concepts of legitimacy: legitimacy from tradition, whereby some amount of international justice flows from the fact of long-standing establishment; charismatic legitimacy, whereby tribunals acquire some trust and acceptance in virtue of trust in the judges’ personal ability to make good judgments; and legitimacy flowing from bureaucratic rationality, where procedural values like transparency and reason-giving play a role in legitimating international institutions.

The project was then introduced by its Principal Investigators as being two and half years into a three year undertaking, having finished all empirical research. The project’s principal aim was said to have been an information gathering process, driven by the awareness that very little systematic knowledge with respect to the selection of international judges exists outside of very narrow circles. The Investigators invited discussion, noting that although the empirical focus of the project was primarily on the International Court of Justice (“ICJ”) and the International Criminal Court (“ICC”), the hope was that the project’s findings will nevertheless provide information generalizable to international courts more widely.

CANDIDATE SELECTION PROCESS

The nomination process

General

The first round of discussion focused on the nomination of judges to the ICJ and ICC. Following an overview of the statutory nomination procedures for each court, it was reported that actual practice significantly diverges from the formal statutory provisions, and that, in a majority of countries, nominations are conducted in a non-transparent, exclusive, and politically-guided process within the Ministry of Foreign Affairs (“MFA”).

One state’s ICJ nomination procedure was described as a bi-partisan and highly consultative process, and it was suggested that it would be desirable to widely institutionalize consultations with national highest courts of justice, legal faculties, associations, and academies, as recommended by Article 6 of the ICJ Statute.

It was also pointed out that lack of open and accessible candidate pools was an alarming finding of the report, and should be further considered and addressed.

Clean slates

Discussants were also invited to consider the practice of presenting a ‘clean slate’—where regional groups nominate exactly as many candidates as there are geographical seats available, and so leave the remaining membership no choice but to elect the proposed candidates. On the subject of clean slates more generally, it was reported that this practice varies among states—sometimes clean slates are announced before candidates are nominated and sometime afterwards—but that these decisions are often based on political issues rather than candidates’ merit. Clean slates are an option only for ICJ nominations, as the Rome Statute of the ICC requires a minimum number of nominations under each criterion, and lays out criteria for the constitution of the court that cannot be geographically carved up, such as appropriate gender distribution.

Some discussants thought the practice of presenting clean slates to be problematic, arguing that it should not be for regional group members to definitively decide which particular individuals should represent the various regions. Further, it was noted that the voting procedures for ICJ elections do not allow a vote *against* a candidate—states may either vote in favor or abstain—and that this procedure prevents states from explicitly rejecting a clean slate candidature. Others noted that more and more states have increasingly been voting to abstain.

Some believed the practice of clean slates to be incompatible with the purpose of selecting the best candidate for the job, and some doubted that clean slates were within the intent of the ICJ Statute. It was noted that an effort was made to discourage the practice in other important international institutions, such as the Human Rights Council.

On the other hand, others pointed to the need to consider clean slates in context, arguing that the practice may at times be useful. It was noted that within the African Union, for example, some find the practice to be a necessary tool for avoiding preventable internal conflict.

The election process

General

The discussion began with an overview of key findings and questions. The campaigning and election processes for the ICJ and ICC were described, and discussants were asked to reflect upon the extent to which states do or should treat judicial elections differently from other elections.

Vote trading

The practice of vote trading, where states pledge to vote a certain way for various considerations from other states, was introduced—mentioning in particular the finding that some states refrain from vote trading in judicial elections while continuing to trade votes in other types of elections, and that there had been an unsuccessful attempt to curb vote trading at the ICC.

Practitioners confirmed that vote trading is often an important element in the selection process, at times involving a service within the MFA that centralizes the trading, while some academics wondered why some states participate in vote trading and others do not, and whether the difference in practice can be connected to national culture.

Politicization of selection process vs. merit-based selection criteria

It was noted that there has been an increasing politicization of the selection process over the course of the last ten years, and that the process has increasingly been dominated by the five permanent members of the United Nations Security Council (“P5”). It was then asked to what extent a relationship may exist between the level of politicization and changes in the internal dynamics of the P5, speculating that perhaps the P5 was less able to determine the election of international judges during the cold war than at present, in which case returning inflexibility to the P5 would decrease politicization. On the other hand, it was acknowledged that the increased politicization could simply be due to the increase in the number of states.

Politicization of the selection process was presented as potentially problematic with respect to ensuring that meritorious candidates are selected. Some discussants suggested, however, that the politicization of the selection process is not necessarily undesirable, given that a politically-astute process is likely to result in politically-astute judges, which may be both appropriate and useful in international judges. It was further suggested that the idea that politics and merit are somehow in conflict may be mistaken, pointing to the fact that the political nature of judicial selection in the United States (“U.S.”) tends to add to the legitimacy of the process, rather than detract from it.

It was noted that the political aspects are more present in nominations to institutions that have a more limited number of judges.

It was also suggested that although the notion of merit was not explicitly defined in the background paper, the researchers in fact operated with an implicit conception of merit that saw the ideal judge as one that holds a permanent post, and is probably appointed (or at least not directly elected), on the basis of certain expertise. It was further suggested that this implicit conception of merit prefers a judge who is not primarily selected to represent constituencies, but rather to serve as a neutral decision-maker, and that this may not be the best understanding of merit in international judges.

The researchers noted the existence of a perception that there was a diminishing independence in the candidates emerging for international office—that candidates were increasingly likely to be legal advisors, ambassadors, or professionals otherwise closely associated with their governments. However, it was then suggested that these backgrounds do not necessitate that the judges will lack independence in a political sense.

Nevertheless, it was suggested that candidates’ backgrounds may be relevant in terms of the culture from which they are chosen—candidates from the ministry of foreign affairs, for example, will tend to decide the issue as narrowly as possible, having come from a culture oriented exclusively toward safeguarding state sovereignty. The ICJ’s decision-making in *Bosnia v. Serbia*, where the court responded to a party’s refusal to surrender requested evidence

with relative complacency, was compared with an arbitration involving Guyana and Surinam, where a similar situation was met with a unanimously delivered threat to make an adverse deduction from non-production, incentivizing the party to produce the requested evidence. It was suggested that these examples serve to illustrate that a tribunal consisting predominantly of personnel from ministries of foreign affairs will tend to be more concerned with state sovereignty than one constituted by former judges or professors, which will more likely tend to be concerned with the institutional integrity of the court.

Still others did not find it at all desirable to statically define a single metric for the merit of a judge, given that the quality of international adjudication is by nature dynamic and that it is often desirable to have the selection process result in a pluralistic bench.

Procedural criteria

It was suggested that there has been an increasing perception that the outcome and the process of selecting international judges is beginning to lose some of its legitimacy. Some thought that candidates may be imbued with legitimacy if they were selected in accordance with a process which is rigorous and transparent.

The views of project interviewees regarding lack of transparency were reported to range from those who thought that the system should not or could not be changed to increase transparency; those who favored more transparency but could not propose how to achieve it; and those who adamantly supported reform toward greater transparency, emphasizing the need for objectivity within and accessibility to the selection process.

Some suggested that it is important not to approach the issue of transparency in isolation, keeping in mind the relationship between transparency and confidence in the selection process, pointing out that greater transparency that is not also complemented by clear and definite institutionalized procedures to ensure equal opportunity may be counter-productive, deterring qualified candidates who may not like to expose themselves in a fully transparent process that they do not trust to be fair. Nevertheless, others stressed the importance of transparency as a value in itself, expressing concerns that qualified candidates are likely to be deterred from a non-transparent process.

It was also thought to be important to unpack the transparency idea, and to ask: transparency to whom, and under what criteria?

Outcome-driven criteria

A proposal was made that the data be analyzed to reveal patterns in the relationship between the specifics of the selection process and the quality of decision-making by the judges ultimately selected. In this regard, some suggested that, in addition to addressing issues of fair representation, the normative pull of an appropriate gender distribution derives its importance from the effect of such distribution on outcomes, arguing that the resulting law of the ICC, for example, is superior to what would have otherwise been rendered. Others suggested that connections may be made between the relative success of a court's decision-making (measured by its case-load and perceived legitimacy) and the scope of its jurisdiction, possession of remedial powers, or length of experience—thus correlating preferred outcomes with particular design features.

Some noted the lack of express criteria for assessing the quality of election outcomes, suggesting that a working hypothesis in this respect would provide the project with theoretical basis. On the other hand, some discussants expressed their doubts with respect to the possibility

of widespread agreement in this regard, while others doubted the desirability of a static conception of the good outcome.

Independent screening bodies

Discussants were also asked to consider the process by which states evaluate the merits of candidates prior to participating in the election. In this regard, it was reported that no independent screening mechanism exists to verify the qualifications of candidates for either the ICJ or ICC, although the Rome Statute does provide for the general possibility of establishing an advisory body for this purpose. A discussant reminded the room that a vetting process had been proposed by the United Kingdom for the ICJ, and was flatly rejected on considerations of state sovereignty. It was noted, however, that a judicial appointments committee was successfully established by the Caribbean Court of Justice, and that the World Trade Organization (“WTO”) also has a committee that interviews candidates and makes recommendations to the wider membership.

A number of discussants expressed a preference for involving consultative bodies in the nominating process, as experience has shown instances of qualification falsification, whether by governments or by candidates themselves. Some practitioners, however, were concerned with the details of operationalizing such screening mechanisms, given that nomination and vote trading negotiations take place within the relatively small timeframe of a few months.

Others wondered how the proposed screening bodies would be constituted, and especially to what extent its members would act independently of their home governments. Questions also arose with respect to how and by whom screening body members would be selected, as well as with regard to the precise timing of the body’s intervention in the chronology of the election process, noting that such bodies could become involved right at the beginning—identifying the relevant candidate pool or broadening it—or else after the states had already finalized their nominations. Others posed questions with respect to the legal effect of a proposed screening body’s determination that a particular candidate was unqualified, particularly with regard to the question of whether such a candidate would automatically be disqualified from the race.

It was also mentioned that some non-governmental organizations (“NGOs”) may seek to fulfill this screening function by investigating and publicly disseminating information about candidates and arranging for public interviews, as some have done with respect to candidates for the ICC. Discussants were asked to consider whether this type of involvement by NGOs was desirable, and to what extent it was possible that such NGO involvement simply operates as lobbying for preferred candidates.

- Some thought that, without existing criteria regarding the constitution of NGOs permitted to play this role—to ensure that they would effectively, fairly and legitimately serve as screeners—involving NGOs in this way was less than desirable.
- There was also a suggestion that an application packet should be provided for each candidate, and that this may be a role for NGOs.

Next upcoming ICJ election

It was noted that there is a striking lack of diversity and competition among the candidates in the upcoming ICJ election, speculating on the extent to which this was a reflection of international agreement. Others warned that it is still premature to draw conclusions in this regard, but speculated that there will be increasing pressure to open up the candidature as the election approaches.

THE CONSTITUTION OF THE BENCH

General

Discussants were also asked to balance fulfillment of the individual criteria for candidacy with fulfillment of requirements regarding the composition of the bench as a whole.

Many thought that it was important to consider some specific considerations of overall composition, including having a sensible number of law specialists and appropriate gender representation. On the question of whether international judges should be required to have prior judicial experience, it was suggested that such requirements may have significantly negative effects, given divergent cultures in different states with respect to the propriety of various vetting processes, as well as the fact that in some states, judges are least likely to have substantial knowledge of international law. Some practitioners noted, however, that having at least one former judge on the bench has been helpful in their experience.

Regional geographical distribution requirements

The Project investigators gave a background on the required regional distribution within the ICJ—three seats reserved for African States, three seats for Asian States, two seats for Eastern European States, two seats for Latin American and the Caribbean States (“GRULAC”), and five seats for the Western European and Other States (“WEOG”)—noting that China and Japan always have a seat, leaving one seat for all other Asian States; that Russia always has a seat, leaving one seat for all other Eastern European States; and that Germany and the western P5 members always have a set, leaving one seat for all other WEOG States.

It was also reported that regional practice with respect to nominations and campaigns varies greatly across different regional groups, noting that there are varying levels of coordination between states.

It was noted that regional geographical distribution requirements exist to guarantee universal participation in the United Nations (“U.N.”), which is a universal organization, but that it was important to keep in mind other groupings within the U.N. that cut across these formal regional groupings, such as the European Union (“E.U.”) or the Group of 77. It was suggested that although these other groups do not affect the regional distribution of available seats, they do create a dynamic that affects the electability of candidates and the kind of regional cooperation that is possible in courting endorsement. Others noted that grouping along political lines often overtakes strictly regional grouping within the U.N.—the E.U., for example, encompasses three regional groups: WEOG, Eastern Europe, and Asia (Cyprus).

Some questioned whether the present system of geographical distribution was the best available approach to ensuring global participation, noting the rivalries and power disparity within regional groups themselves. It was then suggested that perhaps some form of formal rotation among states and among the various international institutions might be a better alternative. Discussants were also reminded that it is important to remember the systemic view.

Others believed, however, that the present regional distribution at the U.N. was for the moment the only available solution, arguing that states are not ready to move away from the more or less objective geographical distribution to more opaque political groupings. On the other hand, it was pointed out that although the regional distribution at the ICJ was a time-honored tradition, there is no provision in either the U.N. Charter or the ICJ Statute mandating this distribution, noting that the Statute requires only that the main forms of civilization and main legal systems of the world be represented on the court. It was therefore suggested that perhaps ICJ bench constitution requirements should be reconceived to reflect the world’s various legal

systems and civilizations, rather than maintaining the present distinction between geographical regions. It was noted that the suggestion was relevant only for the ICJ, and not, for example, for the ICC or ILC, which have explicit statutory geographical distribution requirements.

Other practitioners noted, however, that regional groups have been at the center of the success of the U.N. in ensuring geographical distribution, and that it is thus unlikely that they will lose their influence, suggesting that it would perhaps be better to focus on assessing ways to improve the present system of regional distribution. It was noted in this regard that a coalition of African and Asian states have already made demands for a redistribution of seats at the International Tribunal on the Law of the Sea, and suggested that a similar process may be attempted at the ICJ. It was countered, however, that a redistribution at the ICJ would be particularly contentious, given the effect of the P5 and Germany conventions in reducing the remaining available WEOG seats to one.

With respect to the proposal to better reflect the spectrum of existing legal systems, it was also noted that while this may be a worthwhile aspiration, there does not exist an agreed list of different legal systems nor a complete categorization of states along these lines, and that this is reflected in the absence of this type of criteria on the ICC ballot.

Still others reminded the group that the existence of regional distribution requirements is part of the buy-in package for states entering the institution—that is, its perceived legitimacy—stating that there is reason to suspect that but for these requirements, some smaller groups would not have representation at all, and that any proposed alternative would thus need to address this concern. This was met by some with questioning the connection between geographical representation and legitimacy, suggesting that legitimacy can take different forms, and questioning why geographical representation should be an obvious basis for legitimacy to the exclusion of other bases. Still others suggested that legitimacy derives in important respects from institutional design structures such as rules with respect to conflict of interest, corruption, and qualification requirements with respect to the necessary specialized skills.

The P5 Convention

Some discussants pointed out that the background discussion paper seemed to question the wisdom of the so-called P5 convention—whereby judges from the P5 countries are always elected to the ICJ—and defended the tradition, arguing that the ICJ's status as principle judicial organ of the U.N., and particularly its role in advising on internal constitutional issues, demands that the P5's special role within the U.N. system be recognized in selecting judges to the court. It was also argued that the presence of judges from the P5 countries on the court will make it more likely that P5 states would bring their disputes to the ICJ in the long-run, although others pointed to the dearth of cases brought to the ICJ by P5 members in the last twenty years.

Other participants expressed doubts about taking the P5 convention for granted, noting that as the number of states continues to rise, the convention increasingly places excessive restrictions on the number of seats that can be distributed among the rest of the world.

Reelection vs. fixed terms; pensions

It was also pointed out that although the discussion had been framed as a concern with the merit of selected candidates, the projected independence of would-be international judges was also an important consideration, and that the age of the candidates is an important indicator in that regard. Referencing paragraph 22.8 of the pre-circulated discussion paper, which reports that candidates have been increasingly younger, it was suggested that younger candidates may be

less independent as judges, being potentially more susceptible to influence as a result of interests in continuing their careers after their terms. A call was then made for more information with respect to the subsequent career paths of past international judges. In this regard, it was noted that design elements with respect to a judge's possibility of reelection are also important.

Some expressed support for reelection rather than fixed terms, arguing that a judge without the possibility of reelection is dependent on her own state, to the extent that her state continues to provide options for future employment, whereas a judge facing reelection is dependent on *all* other states, to the extent that they can punish and reward actual decision-making, and that this type of accountability to the system as a whole may be more desirable in international judges. It was also noted that the possibility of reelection tends to serve the international system by building expertise.

Further, it was noted that the question of pension benefits following a judge's term on the bench is also important. Recalling the case of an international judge who had refused to follow instructions from his state while on the bench and had become a refugee with no pension following his subsequent failure at reelection, it was suggested that the lack of post-term benefits may impact upon judges' willingness to stand up to pressure from their home governments.

On the other hand, others pointed to the International Center for Settlement of Investment Disputes ("ICSID")—where arbitrators sit on an ad hoc basis and are party-appointed—as evidence that the permanence or impermanence of a post does not necessarily have bearing on the independence of judges, pointing out that ICSID opinions are not demonstratively inferior to those rendered by the ICJ. Still others suggested that a combination of permanent bodies and ad hoc panels may be desirable.

PROPOSALS FOR REFORM

In the case of the ICJ, it was pointed out that any proposal to change the process would necessitate an amendment to the U.N. Charter, which is very difficult, suggesting that improvements to the existing regime are preferable to proposals involving large structural changes.

Others argued that accountability is owed to the entire international community of interested citizens, and that the world will decide over time whether there should be any changes, on the basis of the information provided by the project.

It was also suggested that reform may also have a *negative* impact upon the legitimacy of time-honored international institutions, noting the feeling conveyed by the report that its interviewees were *less* satisfied with the ICC than the ICJ, despite the conscious effort in designing the ICC to improve on the design of the ICJ.

REFERENCE TO OTHER COURTS

It was noted that a judicial appointments committee was successfully established by the Caribbean Court of Justice, and that the WTO also has a committee that interviews candidates and makes recommendations to the membership.

It was also noted that the ICSID allows parties to appoint their own arbitrators on an ad hoc basis, and that this may be useful to consider as well.

Additionally, it was noted that the WTO's Appellate Body ("AB") is composed of members who work on a part-time basis, and that, although the EU and Japan have so far always had a member on the Body, the EU's practice is generally to propose a large number of candidates, from which the larger membership then chooses the EU representative, rather than

proposing a clean slate candidate. It was remembered, however, that there is still controversy regarding the extent to which the WTO's AB is or should be a quasi-judicial body, and that the U.S. in particular has expressed discontent over its judicialization.

SUGGESTIONS FOR FINAL WORK PRODUCT

A suggestion was made that the problem meant to be addressed by the project be better formulated and presented at the outset of the final work product.

It was also suggested that the study of politicization could be facilitated if the final work product were made to include a review of past nominations and their successes or failures, including statistics regarding the relative of success of candidates with different professional backgrounds—professors, judges, civil servants, legal advisers, etc.—and information linking past nominations with the names of their nominating states.

An investigation into the history of Permanent Court of Arbitration (“PCA”) national group membership was proposed, to throw light on the degree of their independence from national government, noting the number of present and former government legal advisors within some PCA national groups.

It was further suggested that more information about the selection of international judges before the end of the cold war was desirable to allow for necessary comparisons, and that it would be helpful to systematically evaluate the actual quality of past and present international judges, which could be measured either by comparing their qualifications and resumes, or by interviewing others regarding the quality of their opinions. A comparison of nomination practices could then be made against the quality of the candidates, to see which produce better or worse results. Others pointed out, however, that in most cases opinions of the ICJ are presented in a common point of view, and that only the dissenters are known, which presents difficulties for assessing the contribution of each judge.

The desire was expressed that there be a chapter devoted entirely to gender politics.

It was also noted that the citations to dates of interviews of unknown persons are unnecessary, explaining that such citations do not lend any more credence to the report than simply un-cited quotations.

Additionally, it was pointed out that those who are in the best place to comment on a courts performance are the individuals who advocate before it, and hence that it would be best to consult with them and to compare their experiences in different international courts and tribunals.

With respect to regional groups, it was suggested that alternatives to guaranteeing universal U.N. participation through the present geographical distribution system should be assessed.

It was noted also that the present version of the discussion paper appears slightly paradoxical in seeming to undermine its stated objective—to increase the legitimacy of international courts—by exposing the failure of the courts in satisfying the researchers' legitimacy criteria. It was further suggested that perhaps the legitimacy of these courts is not based on the type of criteria identified in the background paper, and that other bases which may support the legitimacy of the courts should be explored, noting that there does not appear to be a general decline in compliance with the outcomes rendered in these courts.

It was also suggested that the final project should address the ICJ's increasing tendency to use procedures in many ways similar to those found in international arbitration, in order to evaluate its effect on the quality of outcomes.

CONCLUSION

The timeliness and importance of the project was unanimously emphasized. The imperative of assessing and addressing concerns surrounding the process of selecting international judges, at a time when their decisions increasingly affect a wider range of interests as the world continues on a path of globalization and proliferation of international courts and tribunals, was accordingly underscored.

ANNEX I

List of participants:

Professor Benedict Kingsbury
Professor Philippe Sands
Professor Kate Malleson
Penny Martin
Professor Eyal Benvenisti
Professor Richard Stewart
Ruth Mackenzie
Eric Posner
Professor Philippe Sands
Professor José Alvarez