

Lauterpacht's duty of recognition, which, as Patrick Capps has pointed out, was Lauterpacht's great attempt to create a stable and predictable structure for this most political of international law problems.³ Even if Fabry disagrees with this position, some attempt should have been made to engage with the argument. As is, it looks like the reification of political judgment and state-centred positivism, of which Lauterpacht was famously critical.⁴ What is more, the constitutive frame is underdeveloped; Fabry simply refers to the Anglo-American model of *de facto* statehood as it appeared in the early nineteenth century without any attempt to update the concept in light of modern notions of independence and self-sufficiency, about which international law has much to say.

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Selecting International Judges: Principle, Process, and Politics. By Ruth Mackenzie, Kate Malleson, Penny Martin, and Philippe Sands. Oxford, New York: Oxford University Press, 2010. Pp. xiv, 239. Index. \$125.

Books about apparently fundamental concepts like *judges* and *courts* in the international legal system are prone to fall victim to what Harold D. Lasswell, former president of the American Society of International Law, and Abraham Kaplan called "index instability."

The chemist using the term "carbon" knows that his spectroscope will record certain wave bands whether he uses the instrument in New England or Mexico. But the social scientist studying anger cannot specify for it a simple index applicable in both places. Not only are the patterns on the basis of which anger is inferable different in the two cultures; there are also variations among income groups and other social stratifications. More-

over, the indices may acquire different significance with time¹

Lasswell and Kaplan cautioned that this "index instability" contributes "significantly to the futility in the present state of research of many attempts at metricizing (quantifying) political hypotheses."² One cannot but be struck by the problem of index instability, especially for terms like *judges* and *courts* in domestic and international settings, in reading this refreshingly ambitious and idealistic book about the selection of judges for the International Court of Justice (ICJ) and the International Criminal Court (ICC). Certainly, the United Nations is not comparable to a national government so it would be surprising were the United Nations' "principal judicial organ" (p. 18) to function just like a national court and its judges like their national counterparts. Why then should we be surprised that the ideal—and sometimes idealized—judicial selection practices of a well-run—and sometimes idealized—democratic system are not replicated in international judicial selection?

That is not to say, however, that even if international judges perform different functions and even if distinctly different international selection procedures for judges might be justified that they are necessarily working satisfactorily. Part of the selection process is reportedly not working to secure enough qualified candidates to fill the vacancies on at least one of those courts on which *Selecting International Judges* focuses. Last September, the *Financial Times* reported:

The International Criminal Court is struggling to find enough candidates to take up positions as judges.

The news casts doubt on how the world's highest criminal court is run as it prepares for cases against ousted dictators such as Colonel Muammer Gaddafi.

A lack of candidates made the court extend a nomination deadline for six new judges by two weeks until this Friday and could still force another extension, said court officials.

³ Patrick Capps, *Lauterpacht's Method*, 2012 BRIT. Y.B. INT'L L. (forthcoming).

⁴ MARTTI KOSKENNIEMI, *THE GENTLE CIVILIZER OF NATIONS: THE RISE AND FALL OF INTERNATIONAL LAW (1870–1960)*, at 363 (2002).

¹ HAROLD D. LASSWELL & ABRAHAM KAPLAN, *POWER AND SOCIETY: A FRAMEWORK FOR POLITICAL INQUIRY*, at xx (1950).

² *Id.* at xx–xxi.

But that delay has come amid bigger questions about the competence of the court's judges, their pay and how they conduct their work.³

The *Financial Times* went on to observe delicately:

Nobody has yet raised questions about the quality of the current candidates. But previous polls have been criticised for being too political and including candidates with insufficient qualifications. Japan, which contributed a fifth of this year's annual budget of €103.6m (\$142.7m), previously successfully nominated two judges who were not qualified lawyers.⁴

Selecting International Judges addresses this issue more directly. The authors are Ruth Mackenzie, the deputy director of the Centre for International Courts and Tribunals at University College London (CICT); Kate Malleson, a professor of law at Queen Mary, University of London; Penny Martin, a research fellow at the CICT; and Philippe Sands, a professor of law and the director of the CICT. Few readers of *Selecting International Judges* will be surprised by the political process by which judges for these international institutions are selected. Nor will the readers be surprised that the authors are unhappy about the selection processes and, by implication given the authors' recommendations, that they are unhappy with the quality of some of the judges who are selected. Apparently, the elite levels of government that over time have designed these processes and make those selections seem to be content with the way the process is working, a point that might have been worth exploring.

In analyzing the processes by which judges are nominated and elected to international courts, *Selecting International Judges* focuses on the ICJ and the ICC, describing the factors that influence whether a state nominates a candidate to the international court; the procedures by which candidates for the international tribunals are identified and vetted at the national level and then at the

international level; the considerations that influence a candidate's success or failure at the international level; and the respective roles of merit, politics, and other features in the nomination and election of judges to these courts. The authors conclude that although a great deal of variability exists in the judicial nomination and election processes, political considerations often detract from the selection as international court judges of those whom they deem to be the most highly qualified candidates. These political considerations may include whether a candidate's country delegation in New York was able to lobby support among other UN delegations or whether a country was able to trade votes in other contexts in return for votes for a particular judicial candidate. The book suggests some reforms that the authors believe can promote transparency and accountability in national and international selection procedures.

The book's individual chapters provide valuable details about the courts and the selection processes used for each court. The first chapter traces the key stages in the discussions regarding the provisions for the selection process for judges in the negotiations of the ICJ and ICC statutes. While state participants at the Rome Conference for the ICC comprehensively debated the appointment procedure for judges—which resulted in the creation of detailed provisions in the Rome Statute governing this process—those drafting the statutes of the ICJ and its predecessor the Permanent Court of International Justice did not go into similar depth in creating procedures for judicial selection.⁵

The second chapter describes the composition of the ICJ and ICC, including the rules that govern the appointment of judges. Irrespective of these rules, the authors emphasize that the most important factors in national nominations and international judicial elections are geography and member states' desire to secure nominees who will favorably represent a given state's interest. (One is reminded of Wiley Rutledge questioning President Franklin Roosevelt as to why he had been

³ Caroline Binham, *The Hague Struggles to Find Judges*, FIN. TIMES, Sept. 14, 2011, at <http://www.ft.com/intl/cms/s/0/ecbbe978-dede-11e0-9130-00144feabdc0.html>.

⁴ *Id.*

⁵ MANLEY O. HUDSON, *THE PERMANENT COURT OF INTERNATIONAL JUSTICE AND THE QUESTION OF AMERICAN PARTICIPATION* 8–9 (1925).

selected for the Supreme Court. “Wiley,” the president said, “you have geography.”⁶) The authors also point out, however, that some secondary factors may play a role in nominations and elections, including domestic and international legal knowledge, political and negotiating experience, and academic expertise.

The third chapter carefully examines the national-level nomination processes for the ICJ and ICC judges. Despite differences in rules, similarities exist in nominations to these two international tribunals. Most countries have panels overseeing the process, which are either national groups from the Permanent Court of Arbitration (PCA) or ad hoc groups created exclusively for the nomination process. Countries have adopted various procedures governing the national groups, with the level of formalization of rules inversely related to the extent to which the nominating group is supposed to be independent and transparent and is supposed to use merit-based criteria. Even in the most independent national panels, however, the authors state that the selection of nominees by states is often based on political calculations, including the state’s interest in having a judge of its nationality; the acceptability of putting forward a candidate at the domestic political level and the availability of sufficient resources to run an election campaign; the likelihood of success at the international level; and the political capital considerations related to other international campaigns that the state plans to undertake.

The fourth chapter turns to the international election of judges after countries nominate candidates. The authors argue that, because various political factors influence the selection of judges, merit plays a secondary role in the election process. The authors describe the intense negotiations, campaigning, and vote trading that precede international judicial elections in the United Nations or in meetings of the Assembly of States Parties to the ICC; the international election of judges is similar to the process that occurs in elections for other international posts. Candidates and their

state parties campaign vigorously, with campaigning occurring in capitals, at embassies, and in New York. In addition, regional groups, such as those in Africa or the Latin American and Caribbean Group (GRULAC), may play a significant role in endorsing or opposing candidates, and vote trading may be common among state parties.

The fifth chapter is prescriptive, summarizing recent trends in improving judicial selection processes to international tribunals and describing policy measures that may be taken. The authors note the strong rhetorical support in the international community—or, at least, in that portion that responded to their inquiries—to improve transparency in judicial selection, with some efforts to encourage states to explain their reasons for nominating certain judges and to consult with knowledgeable individuals and institutions prior to making nominations. The authors recommend reforming nomination and election procedures so that merit plays a greater role in judicial selection. Yet the authors also endorse the need for promoting linguistic, gender, regional, and cultural diversity among international judges, criteria that may come at the cost of the very merit considerations that they endorse. In this vein, the authors laud the ICC system, which allocates a minimum number of seats to each of the five UN regional groups and eighteen “floating” seats, which can be won by any of the regional groups. The authors seem oblivious, however, to the actual quality problems noted above that the ICC is reportedly experiencing.

While many of the authors’ conclusions seem entirely plausible, the social science methodology that they deploy is less rigorous than it appears. The authors used a three-step research methodology to describe empirically the selection process for the ICJ and ICC. In pursuing this methodology, they relied on the guidance of an advisory committee composed of experts chaired by Lord Henry Woolf, former lord chief justice of England and Wales. First, the authors distributed a questionnaire comprised of twenty-three multiple-choice and free-text questions to members of the delegations of the Permanent Missions to the United Nations, academics, national groups in the PCA, legal advisers from the Ministry of Foreign Affairs and Ministry of Justice, and contacts from

⁶ HENRY J. ABRAHAM, *JUSTICES, PRESIDENTS, AND SENATORS: A HISTORY OF U.S. SUPREME COURT APPOINTMENTS FROM WASHINGTON TO BUSH II*, at 186 (5th ed. 2008).

the Fifth Session of the Assembly of States Parties to the Rome Statute. This questionnaire attempted to establish what is known as a “snowball” sample of interviewees—a nonprobability sampling technique in which existing interviewees recruit more interview subjects from among their colleagues and acquaintances—who could comment on the national nomination processes for ICJ and ICC judges (p. 181). The authors ultimately received forty-six responses, spread over different groups. To preserve anonymity, the respondents were neither identified nor were their positions and niches in the judicial selection process revealed.

Second, to gain a greater sense of the lobbying and election procedures used to promote judicial nominees at the international level, the authors sent interview invitations to 182 delegations and staff members from the Permanent Missions of countries in New York and conducted detailed interviews with 19 from 17 countries and a number of United Nations staff members. The interviewees ranged from permanent representatives to third secretaries and also included the legal advisers and the election offices for those missions that have these posts. The interviews themselves were open-ended, focusing on discussions of the campaign and election efforts for nominees to international courts. Third, to shed light on the national process of judicial nominations, after looking at preliminary research and consulting with the advisory committee, the authors selected 9 countries that had nominated judges. The authors then sent invitation letters to a range of representatives from these countries and interviewed those who responded and others to whom the respondents referred the authors.

Several methodological problems arise with their ambitious social-scientific effort. The authors’ discussion of research methodology is located at the end of the book in an appendix, seemingly as an afterthought, rather than as the first chapter. This placement has the effect of obscuring some of the less scientific methodologies actually involved. In addition, as previously noted, *Selecting International Judges* makes use of the snowball technique described above. Although this technique may have been necessary to secure

additional interviewees, it detracts from the generalizability of the book’s conclusions and recommendations. The authors cannot ultimately determine to what extent the sample populations consulted can testify to the actual practice in selection procedures to international courts and, even more damaging to their thesis, to the views held by the actual decision makers with respect to the acceptability of current practices.⁷ The study methodology used in the book also confronts non-response bias, which compounds some of the challenges posed by the use of nonprobability sampling. At different stages of the process, the authors communicated with potential interviewees and interviewed only those who responded affirmatively to interview requests. Those who responded may represent only a subset of the study population that does not speak for a larger majority that may have been unable or unwilling to express their opinions or may have held very different views.⁸

More troubling than their methodology is the authors’ willingness to imply dissatisfaction with the current selection process, yet their reluctance to expressly delineate a set of substantive criteria that ought to guide the decision. Their process-based focus leaves the reader at a loss in conceptualizing the central problem that the book postulates and seeks to address: the assumption that the most highly qualified candidates—whatever the criteria may be for determining that factor—are not being chosen as candidates for these international courts. If the attentive reader pieces together different threads of the analysis, the authors emphasize a broader universe of qualities necessary for international courts, including judges’ foreign-language abilities, region-specific competence, diverse legal-system proficiency,⁹ trial procedure knowledge, domestic-level trial experience, and international law expertise. Are these qualities

⁷ See, e.g., ZINA O’LEARY, *THE ESSENTIAL GUIDE TO DOING RESEARCH* 109–12 (2004) (discussing nonrandom sampling techniques and their limitations).

⁸ See J. Scott Armstrong & Terry S. Overton, *Estimating Nonresponse Bias in Mail Surveys*, 14 J. MARKETING RES. 396 (1977).

⁹ For example, the authors discuss the need to have a group of judges with backgrounds in civil law, common law, and Islamic law.

actually the best gauges of “merit” for an international judge? Certainly much of the ICJ’s advisory role benefits from precisely the type of nonjudicial experience that seasoned diplomats and national politicians bring to the bench.

Is the judge selection process a central international legal problem for governments? For major states, trust that a judicial candidate will reflect and protect the interests of the state seems to continue to be the key factor in selection. For other states, considerations apart from legal qualifications may get priority. As for the ICJ, the bicameral election procedure established by Elihu Root and Lord Phillimore for the Permanent Court of International Justice effectively ensures that the candidate of each permanent member of the Security Council will be elected. Can one imagine a government, having installed an international procedure that assures a place on the ICJ for one of its nationals, nominating someone who is not tried and trusted but who is confirmed by the authors as an appropriately certified international legal scholar?

Legal regimes are tools that are designed and maintained by political actors to serve their purposes. It would appear that the government officials who designed the judicial selection system are less concerned about the issues that trouble the authors and prefer a system over which they have more control. If so, the process here simply reflects certain unyielding realities of contemporary international politics. In that respect, the index instability of which Lasswell and Kaplan spoke may indicate that there are reasons for selecting international judges differently than selecting domestic judges.

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The International Criminal Court: A Commentary on the Rome Statute. By William Schabas. Oxford, New York: Oxford University Press, 2010. Pp. lxx, 1259. Index. \$387, £155.

In the summer of 1998, 165 countries and at least 250 nongovernmental organizations convened in Rome to negotiate a treaty to establish a permanent international criminal court. Against

all odds, they did so, and the Statute for the International Criminal Court¹ (Rome Statute) was adopted.² Less than four years later, that treaty had acquired the necessary 60 ratifications to enter into force, and the International Criminal Court (ICC) could begin its work. As of this writing, this fledgling international institution has 121 states parties and is addressing crimes committed in 7 countries, with the prosecutor closely following situations in 8 others. The ICC has faced many major challenges in its early years, including punishment from the United States, anger from many African leaders, and indifference from many of those that it counted as supporters. Yet at the most recent meeting of the ICC’s Assembly of States Parties in New York, at which it elected the second chief prosecutor and six new judges in December 2011, one could be cautiously optimistic that this new and controversial institution is becoming part of the international landscape, slowly finding its footing in a difficult world and gaining the respect of the constituencies that it was created to serve.

Such, at least, is the thesis of *The International Criminal Court: A Commentary on the Rome Statute*, the latest book on the ICC written by William Schabas, and it is one with which this reviewer agrees. Examining a work of this magnitude is both an honor and a challenge. Schabas’s extraordinary treatise on the ICC is a 1210-page tome that takes some time to peruse. It represents an exceptional compendium of his experiences over the years, not only as a delegate to the Rome Conference but also as an observer and participant in the system of international criminal justice that has evolved since the 1990s, as a professor of international law at Middlesex University, and as the director of the Irish Centre for Human Rights at the National University of Ireland, Galway. At the same time, the opportunity to plunge into such a detailed work is nearly irresistible given the author’s stature as one of the world’s preeminent scholars of international criminal law and human

¹ Rome Statute of the International Criminal Court, July 17, 1998, 2187 UNTS 90.

² Leila Nadya Sadat & S. Richard Carden, *The New International Criminal Court: An Uneasy Revolution*, 88 GEO. L.J. 381, 383–84 (2000).