Chapter 22

Choosing Our International Judges, Past and Present

Philippe Sands*

1. Introduction

In February 1960 the United Kingdom Foreign Office received an informal enquiry as to its views on a potential Belgian candidate for the forthcoming elections to the International Court of Justice. The enquiry made its way to Sir Gerald Fitzmaurice, the Legal Adviser. In an internal memorandum he provided the following response:

M. Nisot has a very difficult personality and I should imagine he is somewhat of a problem child from the point of view of the Belgian Government, as he must be almost unplaceable in any normal Foreign Service post, and this probably accounts for the fact that he has been with the Belgian Permanent Mission in New York pretty well since the foundation of the United Nations in one capacity or another.

Nevertheless, despite his cantankerous nature and the jaundiced view that he takes of most things, there are a number of points in his favour. He is completely honest; he is also a man of considerable intellectual ability and a very sound lawyer. Furthermore, although he has strong prejudices, these would mostly operate in our favour and he would bring to the Court a conservative element which, in view of its present general bias, it could well do with.1

---

* I would like to thank Jimmy Kirby for his meticulous and enterprising efforts in assisting in the preparation of this Inaugural Lecture. I express also my profound thanks to Sir Elihu Lauterpacht for directing me to the results of the researches of others, and to Daniel Bethlehem and (via Sir Elihu Lauterpacht) to Frances Meadows for making available to me the results of their earlier researches at the Public Records Office. I also thank my students in the LLM course on The Law and Policy of International Courts and Tribunals – and over the years my co-teachers Professor Christine Chinkin, Professor Matt Craven and Ruth Mackenzie – for their energy, ideas and critiques.

1 Minutes of Sir Gerald Fitzmaurice on the Possible Candidacy of M. Nisot for the International Court of Justice, 1 February 1960 [FO 371/153556/1645/6].
The Legal Advisor’s memorandum throws some light on the internal workings of what has traditionally been a shrouded process: the manner in which individual candidates emerge for election to international courts. It suggests the way in which informal soundings could make or break a possible candidature. It shows the role of the senior civil service. And it indicates some of the factors that might be taken into consideration in weighing up the pros and cons of a particular candidate, including personality and political disposition.

The document tends to confirm assumptions about some of the factors that might inform the selection and election of candidates to international judicial office. The subject is of increasing importance, and subject to critical scrutiny. In a recent lecture Lord Hoffmann has raised the issue of “constitutional legitimacy” in regard to the European Court of Human Rights. “The judges are elected by a sub-Committee of the Council of Europe’s Parliamentary Assembly, which consists of 18 members chaired by a Latvian politician, on which the UK representatives are a Labour politician with a trade union background and no legal qualifications and a Conservative politician who was called to the Bar in 1972 but so far as I know has never practised”, he said, bemoaning a decision-making process that he describes as “totally opaque”.2 It was hardly surprising, he added, that to the people of the United Kingdom the European Court of Human Rights “does not enjoy the constitutional legitimacy which the people of the United States accord to their Supreme Court.”

Over the past two decades States have created more than thirty international courts and tribunals, and there are now some 250 international judges. The courts and the judiciary have emerged as important international actors, with the potential to place significant constraints on traditional State freedoms. The existence of these bodies signals a desire to strengthen the rule of law in international relations. The extent to which that desire will be achieved turns, in part, on the process by which the judges are appointed.

Some of these judicial bodies have a potentially global reach, others operate within regions, yet others operate amongst only a small group of countries. They address a wide range of subject matters, and they can deal with cases of great practical and political significance. In this country the European Court of Justice (ECJ) and the European Court of Human Rights (ECHR) are already well known, their effects being felt almost on a daily basis. There are many others, which may be less well known:

---