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An Introduction to Foreign Judges on Domestic Courts

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I INTRODUCTION

Foreign judges sit on domestic courts in over 50 jurisdictions across the world. They serve on ordinary courts in smaller jurisdictions in Africa, the Caribbean, the Pacific, Europe and the Middle East. They sit on the courts of final appeal in Hong Kong and Macau, distinguishing those subnational jurisdictions from mainland China. Foreign judges have served on the constitutional courts of Bosnia-Herzegovina and Kosovo, as mandated by internationalised constitutions designed in response to ethnic conflict. They feature in the new international commercial courts established in Asia and the Middle East. The United Nations and other international bodies have supported the use of foreign judges on hybrid criminal tribunals as well as ordinary courts as part of post-conflict transitional justice. In an emerging trend, internationalised anti-corruption mechanisms in Central America have included foreign judges.

The use of foreign judges runs counter to an assumption that often goes unquestioned: that judges on domestic courts are and should be recruited from and belong to the jurisdiction in which they serve. The practice of foreign judging raises a range of questions. Why do some jurisdictions recruit judges from outside their borders? Do foreign judges perform a distinctive role *vis-à-vis* local domestic judges? Who serves as a foreign judge? How are the ties of nationality, or alternatively the distance of foreignness, significant to adjudication? How does the use of foreign judges affect the accountability and independence of the domestic judiciary and its role in the eyes of other branches of government and the wider community? Does the fact that some or all judges are foreign affect how courts reason, conduct proceedings, and interpret and develop the law? Is the internationalisation of law and judging blurring the boundaries between national and foreign judges, eroding assumptions about the significance of judges' nationality?

This Handbook generates new insights on these questions through a jurisdiction-based comparative approach.[1] Together, the chapters cover most of the 50 jurisdictions in which foreign

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[1] In this it builds on foundational comparative work focusing on courts of constitutional jurisdiction: Rosalind Dixon and Vicki Jackson, 'Hybrid Constitutional Courts: Foreign Judges on National Constitutional Courts' (2019) 57 *Columbia Journal of Transnational Law* 283; Constance Grewe, 'Constitutional and Supreme Courts with

judges serve, through the examination of particular countries and regions, specialised courts and categories of judges. Two chapters place the contemporary practice of foreign judging in historical context by exploring colonial precedents. Academic analyses by scholars from a range of disciplines are complemented by reflections on the motivations, nature and challenges of foreign judging by judges and officials writing from personal experience. Each chapter provides contextual information about the jurisdiction or region, its legal system(s), and the courts on which foreign judges sit, as well as data on the composition of the courts, details on how foreign judges are appointed and by whom, and the terms and conditions of their service. In addition to rich descriptive detail, the chapters critically examine issues such as the relevance of a judge's nationality and background; different degrees of foreignness; the impetus and rationales for the use of foreign judges; the effect on adjudication and judicial politics; the issues of accountability, independence and legitimacy that can arise; and judicial diversity and representativeness.

Together, the chapters provide the context and analysis necessary to understand foreign judging and its variants and to ground meaningful comparison of this practice across the globe. There are several reasons to engage in comparison of this kind. The first is to open up an understudied phenomenon in comparative judicial studies and comparative law. The prevalence of foreign judging may come as a surprise to some, especially those in jurisdictions where the appointment of a foreign judge is legally not permitted or practically inconceivable. Although the use of foreign judges on domestic courts is often framed as exceptional, this Handbook shows that it is a widespread and evolving practice. A second, functional, purpose of comparison is to support law reform: mutual sharing and understanding of different instances of foreign judging can promote self-reflection and change. For this, understanding the different rationales for foreign judges and the potential effects – intended and unintended – of their presence, is critical. A third, conceptual, purpose of comparison is to understand the significance of foreignness to judging. While there is no single model of foreign judging, understanding the similarities and differences in the practice can build a picture of *how* and *why* the foreignness of a judge matters, and indeed the degree to which it matters at all.

Jurisdictional comparison is not the only way to understand the phenomenon of foreign judging. The movement of judges across national boundaries disrupts 'methodological nationalism'[2] and directs our attention to globalisation in its colonial and contemporary forms, regionalism and transnational mobility. Individual chapters illustrate how perspectives from different disciplines can shed light on diverse aspects of foreign judging. These include examinations of the effect of foreign judging on law, politics and governance from the disciplines of law and politics; socio-legal studies drawing on interviews and surveys; historical inquiries; mobility studies; and personal reflections and biographical accounts of the experiences of judges themselves. Foreign judging is also ripe for social scientific inquiries into judicial behaviour.[3] The information, perspectives and critical analysis presented in this Handbook provide essential background, context and insight into the phenomenon of foreign judging, offering a strong basis for hypothesis formation and future cross-disciplinary research.

International Participation', in *Max Planck Encyclopedia of International Procedural Law* (Oxford: Oxford University Press, 2020); Anna Dziedzic, *Foreign Judges in the Pacific* (Oxford: Hart Publishing, 2021).

[2] The assumption that 'the nation-state is the natural social and political form of the modern world': Andreas Wimmer and Nina Glick Schiller, 'Methodological Nationalism and Beyond: Nation-State Building, Migration and the Social Sciences' (2002) 2(4) *Global Networks* 301.

[3] See, e.g., Peter VonDoepp, 'Politics and Judicial Decision-Making in Namibia: Separate or Connected Realms?', in Nico Horn and Anton Bösl (eds.), *The Independence of the Judiciary in Namibia* (Namibia: Macmillan Education Namibia, 2008), p. 177; Nuno Garoupa, 'Does Being a Foreigner Shape Judicial Behaviour? Evidence from the Constitutional Court of Andorra, 1993–2016' (2018) 14(1) *Journal of Institutional Economics* 181.

This introductory chapter draws on the chapters to set out a framework for analysing and comparing foreign judges and their institutional contexts. It defines 'foreign judges on domestic courts' as the object of comparison (Section II) and presents a global overview of the practice (Section III). The chapter then disaggregates the range of rationales for the use of foreign judges and shows how each rationale configures the foreign judge in a particular way by valuing different qualities attributed to foreignness and to judges (Section IV). Recognising that rationale alone cannot wholly explain why foreign judges are used in some jurisdictions but not others, Section V considers three features which, while not necessarily causal factors, appear to make some jurisdictions more receptive than others to foreign judges and which shape the role of foreign judges. Section VI turns to examine the implications of foreign judging, focusing on three areas: the identity and role of the judge, judicial independence and accountability, and adjudication. Section VII concludes by forecasting trends in the future evolution of foreign judging.

This analytical framework informs the organisation of the chapters. The Handbook has two tables of contents: one thematic and the other geographic. The thematic table of contents has two main sections. The first, entitled 'Rationales, Motivations and Design', consists of chapters which illustrate the range of rationales and contexts for the use of foreign judges, including as a transitional measure while local judges are unavailable; where the impartiality or distance of foreignness is valued; in post-conflict institution-building; and to enhance the expertise and reputation of the domestic court and/or jurisdiction. Although the recruitment of judges from outside the jurisdiction itself blurs the boundaries between the domestic and international, the organisation of this section makes a broad distinction between domestic drivers for the appointment of foreign judges and international interventions and influences. The second thematic section, entitled 'Implications and Impact', explores the effect of foreign judging in law, politics and society within jurisdictions and across national and regional boundaries. The chapters are grouped into three sub-categories. The first group presents distinctive first-hand accounts from judges and officials, drawing on internal perspectives and personal experiences gained from working within courts that use foreign judges and organisations which support them. The second group of chapters focuses on judicial identity and examines how the foreignness and mobility of judges generate distinctive judicial identities and communities, in the eyes of judges themselves, the legal profession, and the general public at home and abroad. The third group of chapters explores the implications of foreign judging for judicial accountability and independence in authoritarian, democratic and transitional contexts; and the adjudication and the development of the law, with a particular focus on the challenges in pluralist legal systems. The geographic table of contents is intended to assist readers interested in particular jurisdictions.

II DEFINITIONS

A *Foreign Judges*

At first glance, it might be thought that foreignness is a straightforward category or identity attribute, denoting someone from outside. Scratching the surface, however, shows that foreignness is relative, complex and changeable. If the foreigner is someone from the outside, much then depends on how the inside – the internal or the domestic – is defined and understood. In the case of judges, what exactly does the foreign judge stand 'outside' of: the nation-state, the region, the profession or the legal system? Foreignness is also a matter of standpoint and

perception: after all, 'a foreigner in one place is at home in another'.[4] While it is important to give foreignness some content, particularly to support data collection and typologies for the purposes of study and analysis, it is also important to understand that foreignness is relational and often a matter of degree. Rosalind Dixon and Vicki Jackson have shown how foreign judges have a hybrid quality as insiders and outsiders, with the capacity 'to bridge rather than operate on one side of the outsider–insider divide'.[5] In Chapter 20, Tracy Robinson describes foreign judging in the Caribbean as 'intrinsically protean, and as capturing more than the quality of being an outsider'. Robinson's chapter, along with Anna Dziedzic's study of 'travelling' judges of the Pacific in Chapter 19, suggest that the hybrid quality identified by Dixon and Jackson is, in part, a consequence of the *mobility* of foreign judges, as judges cross jurisdictional and national borders and navigate the outsider–insider divide, creating connections and communities that reduce sharp distinctions between home and abroad.

The foreignness of a judge tends to be defined against two qualities: citizenship and place of professional qualifications. In practice, a foreign judge will often be both a non-citizen and hold legal qualifications and experience in a different jurisdiction. It is worth disentangling the two dimensions, however, as definitional choice and emphasis can indicate different understandings of foreignness.

In some contexts, foreign judges are defined as non-citizens. For example, the foreign judges of the Constitutional Court of Bosnia-Herzegovina must 'not be citizens of Bosnia and Herzegovina or of any neighbouring state'.[6] Meanwhile, laws in Fiji, Marshall Islands, Namibia, Papua New Guinea and Seychelles use citizenship as the criterion to differentiate between local and foreign judges in relation to tenure.[7] Citizenship is a legal status conferred on an individual by the state, and so provides a definitive legal criterion for differentiating between local and foreign judges. Citizenship also emphasises qualities of membership and belonging, which are more often associated with the thicker concept of nationality. However, because membership, belonging and the polity itself can be defined in different ways, so can foreignness. For example, a broad distinction is sometimes made between ethnic forms of nationality in which national membership derives primarily from a common ethnic or cultural group, and civic forms of nationality in which national membership flows from participation in the civic life of the state.[8] The preference for one approach over the other will affect who is considered to belong and who is considered foreign. Bosnia-Herzegovina again provides an instructive example, in that citizens of neighbouring states, in a context where national identity is not contained by state borders, are not eligible to be foreign judges. Taking the opposite approach, legislation in Kuwait, Qatar and the United Arab Emirates permits the appointment of non-citizen judges as long as they are nationals of another Arab state,[9] indicating a preference for non-citizen judges who nonetheless share a regional identity shaped by shared language, religion and legal tradition.

A focus on citizenship leads to a focus on states and state borders. However, several jurisdictions can exist within a state such that judges might share a citizenship but still be considered

[4] Rebecca Saunders, *The Concept of the Foreign: An Interdisciplinary Dialogue* (Lanham: Lexington Books, 2003), p. 3.
[5] Dixon and Jackson (n 1) 291.
[6] Constitution of Bosnia-Herzegovina 1995, art. VI s. 1(b).
[7] Constitution of the Republic of Fiji 2013, s. 110(1), (2); Constitution of the Republic of the Marshall Islands 1979, art. VI s. 1(4); Constitution of the Republic of Namibia 1990, art. 82; Organic Law on the Terms and Conditions of Employment of Judges (PNG), s. 2; Constitution of the Republic of Seychelles 1993, art. 131.
[8] Lynn Jamieson, 'Theorising Identity, Nationality and Citizenship: Implications for European Citizenship Identity' (2002) 34(6) *Sociologia* 507.
[9] Law No. 23 of 1990 on the Organisation of the Judiciary (Kuwait), art. 19; Law No. 10 of 2003 on Judicial Authority (Qatar), art. 27; Federal Law No. 10 of 1973 on the Federal Supreme Court (UAE), art. 4(1). See further Siraj Khan, Chapter 22 in this volume.

outsiders. For example, judges from the United Kingdom serving on the courts of a British Overseas Territory may share the same citizenship as those in the territory, but they are in effect serving in a jurisdiction with a distinctive legal system and identity. Colonial judges of the past and present are in a similar position.[10] For this reason, several authors in this Handbook define foreign judges not by citizenship, but as judicial officers who come from elsewhere.[11] A degree of foreignness can also arise within a state or territory, for example when judges move across jurisdictional boundaries between subnational units in a federal system (especially when subnational units have a different legal system, such as Quebec within Canada or Scotland within the United Kingdom) or when non-indigenous judges serve on tribal courts.[12] This Handbook focuses on the transnational movement of judges across the borders of nation-states, but in doing so also provides insights into these other dimensions of foreignness.

Foreign judges may also be defined by reference to their professional qualifications and experience from a different jurisdiction. For example, the foreign judges of the Hong Kong Court of Final Appeal are defined as non-resident 'judges from other common law jurisdictions'.[13] Here too, foreignness may also be a matter of degree. Many jurisdictions permit the appointment of foreign judges only from countries with similar legal systems, suggesting that a shared legal tradition might attenuate the foreignness of different legal systems.[14] That said, a shared legal tradition is unlikely to remove all points of difference. As Laurence Burgorgue-Larsen observes in Chapter 12, Andorra's foreign judges are recruited from France and Spain, and while they share in the same European civil law tradition, the different national legal cultures of the judges have a material effect on judicial deliberations and judgment writing.

Conditions of globalisation complicate the categorisation of individuals as foreign and the presumptions that flow from foreignness. People move across borders to live, study and work. Those who move away from their home state might consider themselves members of a diaspora, who retain ties of membership and belonging to their home state but hold formal citizenship in another. They might be dual citizens or become naturalised citizens (as is the case with several judges in Seychelles[15]). Students might go to other countries to study law;[16] indeed for those coming from smaller states this might be the only way to gain legal qualifications. Even those students who study at 'home' in a small state will find their legal education conducted and populated by external actors and sources.[17] Lawyers increasingly travel to work for global law firms and provide legal services across national borders.[18]

[10] See further Mathilde Cohen, 'Judicial Colonialism Today: The French Overseas Courts' (2020) 8(2) *Journal of Law and Courts* 247.

[11] See Tracy Robinson, Chapter 19 and Bal Kama, Chapter 25, both in this volume.

[12] I am grateful to N. Bruce Duthu for pointing out this instance of foreign judging in the United States.

[13] Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, arts. 82 and 92; Hong Kong Court of Final Appeal Ordinance (Cap. 484), s. 12(4).

[14] It is rare for someone from a common law jurisdiction to sit as a judge in a civil law jurisdiction and *vice versa*. Exceptional examples include David Feldman, a Professor of Law from the United Kingdom who served as a judge of the Constitutional Court of Bosnia-Herzegovina, and Jacob Wit, a national of the Netherlands with extensive experience in the Caribbean, who serves as a judge of the Caribbean Court of Justice.

[15] Mathilda Twomey, Chapter 11 in this volume.

[16] Anthea Roberts, 'Cross-Border Student Flows and the Construction of International Law as a Transnational Legal Field', in Bryant Garth and Gregory Shaffer (eds.), *The Globalization of Legal Education: A Critical Perspective* (Oxford: Oxford University Press, 2022), p. 428.

[17] E.g., Gonzaga Puas, Chapter 26 in this volume writes of the continued dominance of United States law in the qualifications to practice law in the Federated States of Micronesia; see also Seán Patrick Donlan, David Marrani, Mathilda Twomey and David Edward Zammit, 'Legal Education and the Profession in Three Mixed/Micro Jurisdictions: Malta, Jersey, and Seychelles', in Petra Butler and Caroline Morris (eds.), *Small States in a Legal World* (Cham: Springer, 2017), p. 191.

[18] Kate Galloway, Melissa Castan and John Flood, *The Global Lawyer* (Chatswood: LexisNexis, 2020).

Regionalism also creates conditions in which foreignness can become a matter of degree. For example, in the Caribbean there is a high degree of regional integration of the legal profession, shaped by regional law schools, the mutual recognition of legal qualifications across national borders and two regional courts which exercise domestic jurisdiction. One result is an understanding, described by Sir Dennis Byron in Chapter 13, that Caribbean judges, although from other states, are not 'foreign' judges.

Cross-border interactions between courts, judges and lawyers work to create what Anne-Marie Slaughter describes as a 'global community of courts' and an emerging sense that judges are not only representatives of a particular polity but also fellow professionals engaged in a 'common judicial enterprise'.[19] The practice of foreign judging is thus one of many legal phenomena that test the borderlines between domestic and foreign, national and international. This is demonstrated vividly in hybrid criminal tribunals established in states that have experienced conflicts and mass atrocities. These tribunals are created under domestic law and/or by international treaty and are constituted by a mixed bench of local and foreign judges who apply both domestic and international criminal law. In Chapter 10, Harry Hobbs describes how hybrid criminal tribunals serve two political communities – the international community and the people of the state affected – which both have an interest in holding those who commit serious crimes to account, further collapsing clear distinctions between local and foreign judges.

Although there is diversity and change, the category of foreign judge nevertheless continues to have purchase. Despite the mobility associated with globalisation and regionalisation, jurisdictional and state borders still matter, and laws and judges are still closely tied to domestic polities. As long as citizen judges are the norm and foreign judges the exception on domestic courts, it is worth asking why the nationality of adjudicators matters. The study of the exception – foreign judges – is one way to interrogate this question.

B *Domestic Courts*

Domestic courts include ordinary courts in the jurisdiction as well as specialist or ad hoc courts or tribunals created for a particular purpose, for example to try specific crimes or determine transnational commercial disputes. These courts are domestic in two senses: they are established by domestic law and they apply domestic laws. In this, the position of foreign judges on domestic courts differs from that of international judges. International courts are created by agreement between states and resolve disputes according to international or regional law, making it difficult to conceive of international judges as drawn from outside the jurisdiction in the way that foreign judges are. It is fitting that international courts, as institutions of a community of states, be composed of judges of different nationalities. While the nationality of the judges of international courts has received scholarly attention[20] and provides some relevant parallels, foreign judges on domestic courts raise distinctive issues and require separate study.

In many cases, domestic courts are readily identifiable as such. However, as with foreign judges, some courts sit on the margins between the domestic and the international. Some supranational courts, such as the Judicial Committee of the Privy Council, the Caribbean Court of Justice and the Eastern Caribbean Supreme Court, apply domestic law but exist beyond the

[19] Anne-Marie Slaughter, 'A Global Community of Courts' (2003) 44(1) *Harvard International Law Journal* 191, 193.
[20] Freya Baetens (ed.), *Identity and Diversity on the International Bench: Who Is the Judge?* (Oxford: Oxford University Press, 2020); Tom Dannenbaum, 'Nationality and the International Judge: The Nationalist Presumption Governing the International Judiciary and Why It Must Be Reversed' (2012) 45(1) *Cornell International Law Journal* 77.

territory and serve more than a single state. Hybrid criminal tribunals deliberately combine international and domestic law, judges and legal professionals; while colonial mixed courts provided a different kind of halfway house between the domestic and international legal orders. Regional, hybrid and mixed courts have been included in this collection as judicial institutions that feature judges who, to at least some degree, are foreign, and thus are another incidence of the wider phenomenon of foreign judging.

III A WIDESPREAD PHENOMENON

The use of judges from outside the domestic jurisdiction is not new. Ancient Greek cities imported judges from other regions to determine disputes.[21] Medieval Italian city-states appointed *podestà* recruited from other regions to lead their judiciaries.[22] More recent historical precedents arose as a consequence of European colonisation in the nineteenth and twentieth centuries, with the 'mixed courts' established in non-western nations subject to imperial influence.[23] Today, decolonisation and changing forms of globalisation have created the conditions for new forms of foreign judging to emerge. This section presents a survey of the jurisdictions in which foreign judges serve. It is organised regionally and reflects current and recent practices to 2020.[24]

A *Africa*

Prior to independence, colonial courts in Africa were staffed by Belgian, British, French, German, Italian, Portuguese and Spanish judges appointed by their respective imperial powers. Upon independence, many states lacked legally qualified citizens to fill positions on their courts and so continued to rely on foreign judges.[25] The pace and manner of localisation varied across the continent. In West Africa, where greater numbers of Africans had been admitted as lawyers prior to independence, there was less reliance on foreign judges than in Eastern African states like Kenya.[26]

Today, foreign judges in Africa predominantly sit on ordinary courts in smaller Commonwealth states. In the southern African states of Botswana, Eswatini, Lesotho and Namibia, foreign judges (mostly from South Africa) serve as part-time visiting judges on courts of appeal and as judges in the superior trial courts. In Seychelles, the smallest state in Africa, judges from Botswana, Mauritius, Sri Lanka, Uganda and the United Kingdom sit alongside a growing number of Seychellois judges on the Supreme Court and Court of Appeal. Foreign judges have been a constant in The Gambia throughout authoritarian rule and transition to democracy.

[21] Adele Scafuro, 'Decrees for Foreign Judges: Judging Conventions – Or Epigraphic Habits?', in Michael Gagarin and Adriaan Lanni (eds.), *Symposion 2013* (Vienna: Austrian Academy of Sciences Press, 2014), p. 365. See also Paulo Cardinal, Chapter 6 in this volume, for a historical overview.

[22] Emanuel Wardi, 'The Doge and the Podestà: The Executive and the Judiciary in Late Fourteenth-century Genoa' (2000) 15(2) *Mediterranean Historical Review* 67.

[23] Michel Erpelding, Chapter 16 in this volume; Willem Theus, 'International Commercial Courts: A New Frontier in International Commercial Dispute Resolution? Lessons from the Mixed Courts of the Colonial Era', in Jelena Bäumler et al. (eds.), *European Yearbook of International Economic Law 2021* (Cham: Springer, 2022), p. 275.

[24] Most of these jurisdictions are the subject of chapters of this Handbook and can be identified by reference to the regional table of contents. Further references are cited in the footnotes for those examples not covered by this Handbook.

[25] Rachel L. Ellett, *Pathways to Judicial Power in Transitional States: Perspectives from African Courts* (Abingdon: Routledge, 2013), p. 32.

[26] Rhoda E. Howard, 'Legitimacy and Class Rule in Commonwealth Africa: Constitutionalism and the Rule of Law' (1985) 7(2) *Third World Quarterly* 323, 330.

In countries where foreign judges no longer sit on ordinary courts, they are sometimes sought for specialist courts. Kenya's Interim Independent Constitutional Dispute Resolution Court, established to hear disputes arising from the constitution making process in 2010, included three foreign judges on its nine-member bench.[27] Rwanda, which had rejected the use of foreign judges to try genocide and conflict-related cases as a 'breach of the sovereignty of the Rwandese people',[28] changed its laws in 2008 to allow two foreign judges to sit on its newly established commercial court.[29] Several African states have established hybrid courts with special jurisdiction to hear conflict-related crimes, including the Special Criminal Court in the Central African Republic and the Extraordinary African Chambers in Chad. The Special Court of Sierra Leone included a majority of foreign judges and, since its dissolution in 2013, a panel of international judges remains available to hear conflict-related cases under a residual mechanism.[30]

B *Caribbean*

Foreign judges sit on the domestic courts of some independent states and overseas territories in the Caribbean. As in Africa, the practice has colonial antecedents but has evolved through economic integration, which has created a mobile legal profession, such that jurisdictions draw readily on regional lawyers and judges. The independent states of Bahamas and Belize appoint foreign judges to their domestic courts. Some jurisdictions have empowered regional courts to adjudicate domestic law. The Caribbean Court of Justice and the Judicial Committee of the Privy Council serve as extraterritorial courts of appeal, with the Caribbean Court of Justice being much closer, institutionally and geographically, to the jurisdictions it serves. The Eastern Caribbean Supreme Court functions as the apex court of six states (Antigua and Barbuda, Dominica, Grenada, Saint Kitts and Nevis, Saint Lucia, and Saint Vincent and the Grenadines) and three territories (Anguilla, British Virgin Islands and Montserrat). Its judges are drawn from these jurisdictions as well as the United Kingdom and from foreign non-member states. The courts of the British Overseas Territories of Turks and Caicos Islands and Cayman Islands include judges from Britain and other Commonwealth countries.

C *Pacific*

The Pacific region, like the Caribbean, encompasses independent states as well as territories with varying degrees of self-government and dependency. Foreign judges sit on ordinary courts in the independent states of Cook Islands, Federated States of Micronesia, Fiji, Kiribati, Marshall Islands, Nauru, Palau, Papua New Guinea, Samoa, Solomon Islands, Tonga, Tuvalu and Vanuatu. In the smallest jurisdictions, all of the judges who sit on the superior courts are foreign; in others foreign judges serve alongside local judges, mainly on the superior trial courts

[27] Constitution of Kenya (Amendment) Act 2008. Laurence Juma and Chuks Okpaluba, 'Judicial Intervention in Kenya's Constitutional Review Process' (2012) 11(2) *Washington University Global Studies Law Review* 287.
[28] Gérard Prunier, *Africa's World War: Congo, the Rwandan Genocide, and the Making of a Continental Catastrophe* (Oxford: Oxford University Press, 2009) 12.
[29] World Bank, *Doing Business 2011: Making a Difference for Entrepreneurs* (Washington, DC: World Bank Publications, 2010) 74.
[30] Tiyanjana Mphepo, 'The Residual Special Court for Sierra Leone. Rationale and Challenges' (2014) 14(1) *International Criminal Law Review* 177.

and courts of appeal. Some foreign judges reside in the state and serve full time, while others visit periodically for court sittings. The legacies of colonialism continue to be reflected in the cohort of foreign judges, with many of them recruited from former colonial administrators: the United States in the cases of Federated States of Micronesia, Marshall Islands and Palau; and Australia, New Zealand and the United Kingdom in the other Pacific states. There is, however, increasing diversity in the cohort of foreign judges, with the appointment of foreign judges from a range of other Commonwealth jurisdictions.

D *Asia*

In Asia, foreign judges sit in only a few jurisdictions and the practice takes diverse forms. Foreign judges sit on the Courts of Final Appeal in Hong Kong and Macau, Special Administrative Regions of the People's Republic of China. Both are former colonies – of Britain in the case of Hong Kong and Portugal in the case of Macau – that were transferred to Chinese sovereignty in the late 1990s. Hong Kong's common law system and Macau's civil law system are distinct from China's socialist legal system, and foreign judges are a mark of this distinction. In Hong Kong, the five-member bench of the Court of Final Appeal will in most cases include one foreign judge, usually a retired judge from Australia, Canada, New Zealand or the United Kingdom. Portuguese judges have sat on all levels of courts in Macau, although as Paulo Cardinal explains in Chapter 6, their use is declining. Foreign judges also sit in Brunei Darussalam. It has a dual legal system, with Sharia courts presided over by citizen judges and common law courts for civil and commercial matters on which foreign judges (typically from Britain, Hong Kong and Singapore) may sit.

East Timor presents a different context for the use of foreign judges. It became an independent state in 2000, following colonial rule by Portugal and occupation by Indonesia. Its vote for independence sparked extensive violence and a United Nations-led peacekeeping mission assumed responsibility for transitional governance. Between 2000 and 2005, hybrid tribunals comprised of two foreign judges and one Timorese judge were formed to adjudicate serious crimes arising from the conflict. In addition, the United Nations administration worked with the new Timorese government to recruit foreign judges for the ordinary courts. Portuguese judges sat on these courts until 2014, when the Parliament resolved to terminate the contracts of all foreign judges, prosecutors and advisers in the justice sector. Foreign judges also serve in post-conflict Cambodia on a hybrid criminal tribunal established to try serious crimes committed during the Khmer Rouge period.

Three states in Asia – Kazakhstan, Singapore and China – have established international commercial courts. The Astana International Financial Centre Court is a common law court, separate from Kazakhstan's civil law system, with judges from the United Kingdom. The Singapore International Commercial Court has 22 Singaporean judges and 12 foreign judges, recruited from common law and civil law jurisdictions. In contrast, the Chinese International Commercial Court has only Chinese judges, who are assisted by a standing panel of foreign advisers, some of whom are former judges from foreign jurisdictions.

E Middle East

Foreign judges sit on ordinary courts in Bahrain, Kuwait, Qatar and the United Arab Emirates. These foreign judges are recruited from within the Arab region, in particular from Egypt, Jordan, Morocco and Sudan. As in Asia, several jurisdictions have established international

commercial courts, separate from other domestic courts. The Qatar Civil and Commercial Court, the Dubai International Financial Centre Courts and the Abu Dhabi Global Market Courts provide dispute resolution in transnational commercial and civil matters and foreign judges from a range of common law jurisdictions have been appointed to these courts. Foreign judges also serve on the Special Tribunal for Lebanon, a hybrid criminal tribunal established to prosecute terrorism crimes.

F *Europe*

Courts in the small states of Andorra, Liechtenstein, Monaco and San Marino draw on judges from neighbouring European states. Citizens of France and Spain sit on the Constitutional Court of Andorra. In Liechtenstein, judges from Austria and Switzerland sit with local judges on ordinary courts and the Constitutional Court. Judges of the Supreme Court of Monaco are 'selected from among particularly competent jurists'[31] from France. The judges on San Marino's *Collegio Garante della Costituzionalità delle Norme* are Italian citizens, selected from professors and experienced magistrates.[32]

Foreign judges sit on the Constitutional Courts of Bosnia-Herzegovina and, until 2017, Kosovo, jurisdictions both marred by past conflict. The use of foreign judges in these two jurisdictions is distinctive in several ways: it is mandatory that three of the nine Constitutional Court judges are foreign judges appointed by or in consultation with the President of the European Court of Human Rights.[33] Foreign judges also served on hybrid criminal tribunals in each jurisdiction. United Nations and European Union missions to Kosovo made extensive use of foreign legal personnel, including judges, to deal with war crimes, organised crime, inter-ethnic violence and corruption.[34] In Bosnia-Herzegovina, foreign judges, mostly from western Europe and the United States, served on a specialist court to try serious crimes from 2005 until their mandate ended in 2009.[35]

G *Latin America*

Foreign judges are a rarity in Latin America. In the few instances where foreign judges have been proposed, the idea has been met with strong resistance. For example, in 2016 Colombia established a 'Special Jurisdiction for Peace' to investigate and prosecute those responsible for human rights violations during the internal armed conflict. A proposal that this special procedure involve foreign judges was abandoned in the face of criticism and foreign jurists were given an advisory role only.[36] A more successful, but still limited, role for foreign judges arose in Honduras, which in 2016 established a mission against corruption with foreign personnel including judges whose role included overseeing institutional reform and supervising the prosecution process and other judges.

[31] Sovereign Ordinance No. 2.984 of 16 April 1963, art. 2.
[32] Declaration of Citizens' Rights and Fundamental Principles of San Marino Constitutional Order 1974, art. 16.
[33] Constitution of Bosnia-Herzegovina 1995, art. VI(1); Constitution of the Republic of Kosovo 2008, art. 152.
[34] Michael E. Hartmann, *International Judges and Prosecutors in Kosovo: A New Model for Post-Conflict Peacekeeping* (Washington, DC: United States Institute of Peace, 2003).
[35] Bogdan Ivanišević, *The War Crimes Chamber in Bosnia and Herzegovina: From Hybrid to Domestic Court* (New York: International Center for Transitional Justice, 2008).
[36] Kai Ambos and Susann Aboueldahab, 'Foreign Jurists in the Colombian Special Jurisdiction for Peace: A New Concept of Amicus Curiae?' (*EJIL Talk: Blog of the European Journal of International Law*, 19 December 2017).