

# ***Selecting International Judges: Principle, Process and Politics***

## **DISCUSSION PAPER**

**Centre for International Courts and Tribunals, University College London**

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## EXECUTIVE SUMMARY

The composition rules of the ICJ and ICC require that judges have high moral character and outstanding professional merit and that the bench as a whole equitably represents the different regions of the world (and in the case of the ICC, gender and relevant expertise). In principle, candidates who meet the individual criteria are to be nominated at the national level and then elected on the basis of merit by international political bodies.

In practice, although there is a wide degree of variation in the processes adopted by different states, a common feature running through the system for nominating and electing judges to the ICJ and ICC is that it is strongly influenced by domestic and international political considerations and controlled by a small group of diplomats, civil servants, lawyers and academics. This raises issues as to transparency and introduces considerations into the decision-making process that may distract from the selection of the most highly qualified candidates. This politicisation was identified as a weakness by many of the key actors in the process. Some interviewees suggested that the current system could be improved by adopting best practice drawn from developments at the international and national levels, adapted as necessary for different states and legal systems.

Four possible proposals for change emerge from these preliminary findings. First, states should ensure that their nomination processes are independent, transparent and merit-based. Second, regional groups should refrain from proposing clean slates or otherwise reducing competition for seats. Third, states should ensure that they have primary regard to merit in their voting decisions. Fourth, states should provide more and better quality information about candidates prior to the election.

## BACKGROUND AND AIMS

This paper summarises the key findings and preliminary conclusions of the research project *Process and Legitimacy in the Nomination, Election and Appointment of International Judges* ('the project'). It will form the basis of the discussion at a joint University College London (UCL) and New York University (NYU) seminar *Selecting International Judges: Principle, Process and Politics* to be held in New York on 9 September 2008.

The project is being conducted by the Centre for International Courts and Tribunals (CICT) in the Faculty of Laws of University College London (UCL). CICT is the London home of the Project on International Courts and Tribunals (PICT), which was established in 1997 by FIELD in London and the Center on International Cooperation at NYU. Further information can be found at <http://www.ucl.ac.uk/laws/cict/index.shtml?judicial-selection> and <http://www.pict-pcti.org/>.

The Principal Investigators of the project are Professor Philippe Sands QC (UCL) and Professor Kate Malleson (Queen Mary, University of London), working with Ms. Ruth Mackenzie (CICT Deputy Director and Principal Research Fellow) and Ms. Penny Martin (CICT Research Fellow). The project is guided by an Advisory Committee, comprised of

pre-eminent experts on international law chaired by Lord Woolf, former Lord Chief Justice of England and Wales.

The project is funded by the United Kingdom Arts and Humanities Research Council. It commenced in February 2006 and will run until the end of February 2009. The final project results will be available later in 2009.

### ***Focus of project and research strategy***

Given financial and time limitations, an early decision was taken to focus on two courts, the International Court of Justice (ICJ) and the International Criminal Court (ICC) as both are 'international' courts, open to all states and both have broad membership, so that not every participating state can have its 'own' national judge on the bench. Yet, they represent two quite different models for the nomination and election of judges.

The key research questions for the project are:

- (a) How do states nominate candidates for the ICJ and ICC?
- (b) How do the election procedures for those courts operate in practice?
- (c) What changes, if any, are needed to the nomination and election procedures?

To investigate these questions, the research team conducted three main areas of research: first, a questionnaire on national nomination processes that was distributed to a wide range of international judicial, legal and governmental actors; second, interviews with staff members of the Permanent Missions to the United Nations of a range of countries in New York to elicit information on lobbying and election procedures; and third, nine country case studies covering the five UN regional groups to conduct interviews with key actors at the national level to gather more in depth information about how candidates are selected for the ICJ and ICC. Detailed information regarding the research questions and research methods used in the project can be found in the Appendix.

The following sections set out the preliminary analysis of the project's findings in three key areas: the nomination process, the election process and the composition of the bench. These findings are based on responses to questionnaires and interviews carried out with more than 100 individuals who have been associated with the nomination and election of judges to the ICJ and ICC, both in case study countries and in New York. Interviewees included diplomats, government legal advisors, members of the Permanent Court of Arbitration national groups, international and domestic judges, UN staff, practising lawyers and academics. Further information on group of interviewees and how they were selected can also be found in the Appendix.

## **HOW ARE CANDIDATES NOMINATED?**

***"These institutions, although they are judicial in nature, are also political. States attach political importance to the institutions and to the...persons***

***who are...working there. Therefore, I agree that...we cannot cut the political considerations from the procedures.” (Interview T34, 11)***

***“... the ICJ system works well, where it’s given the conditions to work well, but given that these are national prerogatives, you have no way of safeguarding them against being subverted by less honourable processes within the individual country”. (Interview T35, 17-18)***

The provisions regarding the nomination procedures for the ICJ and ICC are as follows:

## **1. ICJ nominations**

- 1.1. The ICJ Statute provides that the competent body to nominate candidates for election to the ICJ is the Permanent Court of Arbitration National Group (‘PCA national group’) or an equivalent body.<sup>1</sup> PCA national groups may nominate up to four candidates.<sup>2</sup> A maximum of two nominees may be of the same nationality as the group.<sup>3</sup>
- 1.2. Before nominations are returned, ‘each national group is recommended to consult with its highest court of justice, its legal faculties and schools of law, and its national academies and national sections of international academies devoted to the study of law’.<sup>4</sup>

## **2. ICC nominations**

- 2.1. Nominations of candidates can be made by any State Party to the Rome Statute by either of two procedures:
  - The procedure for nominations to the highest judicial offices of that state;<sup>5</sup> OR
  - The procedure set down in the Statute of the ICJ for nominations to the ICJ (i.e. nomination by the PCA national group).<sup>6</sup>
- 2.2. Each State Party may nominate one candidate for election to the Court. The candidate need not be a national of the nominating state, but must be a national of a State Party.<sup>7</sup> Nominations must be accompanied by a statement setting out how the candidate fulfils the criteria for either List A or List B.<sup>8</sup>

## **3. Factors determining whether a nomination is made**

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<sup>1</sup> Article 4, paras. (1) and (2), ICJ Statute.

<sup>2</sup> Article 5(2), *Ibid.*

<sup>3</sup> Article 5(2), *Ibid.*

<sup>4</sup> Article 6, *Ibid.*

<sup>5</sup> Article 36(4)(a)(i), Rome Statute.

<sup>6</sup> Article 36(4)(a)(ii), *Ibid.*

<sup>7</sup> Article 36(4)(b), *Ibid.*

<sup>8</sup> Article 36(4)(a), *Ibid.* See also Procedure for the nomination and election of judges of the International Criminal Court ICC-ASP/3/Res.6 (‘Resolution ICC-ASP/3/Res.6’ in following).

- 3.1. Interviewees gave a range of reasons why a state would seek to have a judge on the ICJ or the ICC. These included: the prestige of having a judge on the court; the ability of a state to exercise its entitlement to be represented on the Court; and a desire to contribute to the international rule of law: “It shows...we believe in the court...we believe in law.”<sup>9</sup> Nomination is also motivated by the state having a case before the court or more generally increasing its engagement with the international courts and a desire to demonstrate its commitment to the UN system. Where states are emerging from a period of turmoil, having a judge on the court can be a way of demonstrating their stability. For the ICC, a number of states also wanted to be represented on the Court because they had been closely involved in the establishment of the Court.
- 3.2. The decision to make a nomination for a particular election is usually determined by the international political position of the state, rather than an isolated assessment of the criteria of the statute and whether there are potential candidates that meet those criteria, although in some cases nominations have been motivated by the existence of an exceptional candidate. Factors such as regional considerations (discussed below), ‘winability’, the political suitability intended candidate him or herself, whether there are other competing candidatures of the state at the international level are often determinative such that “if you have a candidate for the International Court of Justice, you’ve generally got to sacrifice some other aspirations to other organs”.<sup>10</sup> Some states also use international judicial posts as either a reward or a punishment for candidates. For example, there is considerable evidence that the process of nomination is often intended to provide pay-back for long service or political contribution, to reward those who have been “loyal to a government, especially one that has been in power for a long time, to be able to reward that person by nominating them”<sup>11</sup> or may be used as a means to remove politically controversial figures from the domestic landscape: “[The country] will... nominate people [it] wants to get rid from the government in a nice way because they are part of the political establishment, and they are [able] to move out in a decent way.”<sup>12</sup>

#### **4. Regional groups and ‘clean slates’**

***“It...has advantages and disadvantages. Its advantage is that you will be able to spare the effort of going through several ballots. But the disadvantages are that groups might...for their own reasons...not get the best. This is also a possibility.” (Interview T47, 8)***

- 4.1. Whether a state nominates a candidate is sometimes influenced by the regional group of which that state is a member. As one interviewee noted “when we act as a sub-region and then afterwards as a region, we decide who will nominate, and this is partially bound by certain agreements, even gentlemen’s agreements, that what we agreed on before [we] will continue”.<sup>13</sup> In some cases, regional

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<sup>9</sup> Interview T58, 7.

<sup>10</sup> Interview T58, 4.

<sup>11</sup> Interview T29, 3.

<sup>12</sup> Interview T56, 4.

<sup>13</sup> Interview T8, 5.

groups (e.g. Africa and Latin America and the Caribbean ('GRULAC')) have put the equitable geographical representation convention in the ICJ<sup>14</sup> into practice by nominating the same number of candidates as there are available regional seats, known as a 'clean slate'. Which state will make a nomination may be determined by whose 'turn' it is or on *ad hoc* political grounds. Some states may also assert that they have a right to a clean slate when their national judge has retired or died before the end of his or her term. Some interviewees said that clean slates are an effective way to reduce the uncertainty of elections, ensure all states have a chance to be represented, and avoid wasted campaign costs and potentially embarrassing competition between members of the regional group.

- 4.2. The findings indicate that within most regional groups there is vigorous competition for ICJ seats and that the practice of putting forward 'clean slates' is becoming less prevalent. It appears that regional groups are now more inclined to endorse a preferred candidate, which does not prevent other candidates from running, although it is an advantage in the election. Many interviewees said that endorsements were rarely based on the merit of the candidate, but rather on what they described as regional political considerations. Some regional groups do not endorse candidates at all.
- 4.3. Clean slates raise a number of problems. In effect, they allow the states concerned to directly appoint judges to the Court, circumventing any possible screening function of a contested election and excluding other good candidates. As one interviewee commented: "in order to ensure quality you must have a choice".<sup>15</sup> Clean slates place the entire responsibility of ensuring the candidate meets the individual criteria on the nominating state, especially if a clean slate is agreed before the candidates are selected. If this is the only way to ensure that states are fairly represented on the Court, those states must ensure that their nomination procedures are of the highest quality and that regional groups take an active role in vetting regional candidates. Alternatively, clean slates should be decided at the latest possible point, and always after the nomination process, as this would ensure that states nominate candidates in a context where it is still a possibility that the candidate will have to compete in a contested election. It would also ensure that other states outside the regional group can assess the relative merits of candidates nominated from that region, which may influence the eventual decision of the regional group as to which candidate it will endorse.
- 4.4. Sometimes, what is in effect a clean slate can also come about by self-selection rather than consensus within a regional group, one interviewee describing that "[i]n every regional group, if somebody comes forward with a good, credible candidature for the ICJ, every other country will really think twice whether they also want to put forward a candidate, because it's not considered an extremely friendly act to do so".<sup>16</sup>
- 4.5. Agreements made between states at a sub-regional group level can also reduce the number of candidates running for a particular seat or seats. A sub-regional group is an informal sub-grouping within a regional group that may be based on

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<sup>14</sup> The equitable geographical representation convention is discussed in sub-section 22.4.

<sup>15</sup> Interview T3, 5.

<sup>16</sup> Interview T3, 5.

geographical or linguistic lines.<sup>17</sup> A sub-regional group of states may decide not to compete among themselves and agree to only put forward one candidate for an election. They might also assert that a seat is a sub-regional seat and although that may be contested across a regional group and may not result in a clean slate overall, it can be the basis on which states outside the sub-regional group decide not to put forward a candidate. Furthermore, particular states within a regional group may agree to take turns across a succession of elections on a bilateral basis. This may restrict the number of candidates nominated for each regional group, although it does not prevent nominations by states that are not bound by those arrangements. In these circumstances, it is also crucial that merit be the first consideration in the selection of candidates.

- 4.6. Clean slates cannot be put forward for ICC elections because the Rome Statute requires that a minimum number of candidates are nominated in relation to each voting requirement, i.e. gender, geographical region, expertise.<sup>18</sup> This mechanism avoids the possibility of direct appointment by clean slates but of course still requires that each candidate nominated meets the criteria. Such a rule could possibly be adopted for ICJ nominations with regard to equitable geographical representation to ensure there is a minimum level of competition for seats.

## **5. *Nomination processes in general***

- 5.1. The primary focus of national nomination processes should be on selecting candidates with the highest levels of professional competence. This is particularly important in the light of the central role played by political considerations in the election process. If selection on merit is to be the guiding principle of the ICC and ICJ selection processes then the nomination stage is the most critical stage of the system. An effective nomination process can ensure that the most competent pool of candidates is put forward into the political market place.
- 5.2. The most striking aspect of this part of the findings was the very wide degree of variation in the national processes for the nomination of candidates to the ICJ and ICC. The approach of each state is influenced by its domestic political culture and the structure of its domestic institutions, yet at the same time the processes for nomination of candidates for international courts are often hermetically sealed from the domestic judicial appointments system. From the data gathered, there does not appear to be any clear patterns in the nomination procedures adopted in particular categories of legal cultures or political systems. Furthermore, within most case study countries there were inconsistent accounts given of the nomination procedures used in that state. In general, there is no consistent view on how nominations should be made, nor is there widespread knowledge within states as to how candidates are actually nominated.

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<sup>17</sup> Sub-regional groups are discussed in sub-section 22.5.

<sup>18</sup> Regional and gender voting requirements must be matched by at least double the number of candidates who meet those requirements, the number of candidates must exceed the number of vacant seats and the number of candidates meeting the requirements for List A and B be at least equivalent to the voting requirement for each of those categories: Resolution ICC-ASP/3/Res.6, paras. 10 and 11.

## 6. *ICJ nomination practice*

- 6.1. It can be said, however, that in most states ICJ nominations take place outside established political or legal institutional structures and are often made on the basis of personal relationships. Nominations are often made *ad hoc*, on the basis of a suggestion by a high ranking civil servant in the Ministry of Foreign Affairs ('MFA'), generally without pre-planning, a structured process or decision-making on the basis of established criteria. The circle of decision-makers is extremely small in the majority of states, perhaps only up to five people (including MFA officials and, to varying extents as discussed below, the PCA national group members). Outside this inner circle, only a handful of outside legal and political elites (for example, the Permanent Representative to the United Nations in New York, some academics, some lawyers) are even aware of the process.
- 6.2. There may be a nomination body, usually the PCA national group, which is involved in the process of selecting a candidate but often its involvement is largely formalistic or at best, loosely consultative. In many cases, it was difficult to precisely define the nature of its involvement and there was a wide range of disagreement as to the role and impact of the PCA national group on nominations within particular states. The Ministry of Foreign Affairs ('MFA') usually proposes the name of the potential candidate and makes the final decision (if this is not the same thing), sometimes in collaboration with the Ministry of Justice. The PCA national group is consulted as to the name/s but this is usually seen as a 'box-ticking' exercise, rather than a decision-making process in itself, as one PCA national group member commented: "We were a little bit annoyed with the government because it indicated to us that we should propose [a particular candidate]. In our view the procedure was to have previous consultations, not to be given the proposal."<sup>19</sup> Some interviewees were scathing about the situation in some countries:

"I have no doubt whatsoever it's a sham, really. It is actually the government and their friends and they've just been clothed in the garment of membership of the National Group, for the PCA for the purposes of making a politically convenient nomination."<sup>20</sup>

In some states, there are also overarching accountability structures, e.g. a requirement for Ministerial support, or supervision by a parliamentary committee.

- 6.3. In a minority of states, the PCA national group takes a more proactive and independent role in proposing names although it appears to be very rare that a national group would challenge the government that appointed it and consultation with the MFA is normally close, hence there is a "permanent, constant and very fluid dialogue between the members of the national group and the government".<sup>21</sup> There have been cases where governments have rejected the candidate proposed by the PCA national group and replaced the candidate with their preferred candidate. There also appear to be some states, an even

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<sup>19</sup> Interview T39, 7.

<sup>20</sup> Interview T35, 7.

<sup>21</sup> Interview T58, 3.

smaller minority, in which the PCA national group acts more independently and is left to take a decision on the nomination on its own, as one interviewee noted: “The National Group is left entirely independent in the choice it makes.”<sup>22</sup>

- 6.4. Very few states consult more broadly, for example, the higher courts or bar associations as recommended by the ICJ Statute. Those who did consult outside the Ministry and PCA national group usually did it on an individual, rather than institutional, basis. This type of consultation appeared to be mainly limited to seeking initial suggestions, rather than obtaining views on identified potential candidates. However, at least one PCA national group engages in a more formalised and detailed institutional consultation process and also interviews candidates.
- 6.5. The nature of the PCA national group’s involvement often appears to depend upon the composition of the group, which is normally decided by the MFA. Some states have conventions as to who is represented on the PCA national group. Frequently, the members of the group are current or ex-MFA legal advisors or other high ranking civil servants and diplomats; one interviewee commented in relation to one country that there is a “revolving door”<sup>23</sup> between the MFA and the PCA national group. In these cases, it may be difficult to distinguish PCA national group decisions from MFA decisions. Some PCA national groups are composed of a higher proportion of current or former domestic judges, academics and other experts in international law. It appears that such groups may operate more independently and effectively encapsulate the concept of wider consultation recommended by the ICJ Statute. Interestingly, although it is generally the case that the members are appointed by their Ministry of Foreign Affairs, the exact procedure by which PCA national group members are chosen and the criteria for their selection are almost unknown in some states, even to the members themselves. Whatever the specific composition is though, in general, “we are talking about very high level people who are very well known, and all these people are part of the community and in this community everybody knows them”.<sup>24</sup> The members of the PCA national groups and the people likely to be nominated are part of the same professional, and often social, group. Indeed, sometimes PCA national group members are themselves nominated.
- 6.6. Overall, there was a surprising lack of awareness that the ICJ Statute designates the PCA national group as the competent nominating authority. Some PCA national group members said that they had nothing to do with the nomination of international judges and appeared to be unaware of the role of the PCA national group under the ICJ Statute.

## **7. *ICC nomination practice***

- 7.1. For ICC nominations, states are split between those who adopt the procedure used for the appointment of the judges of the highest domestic courts and those who use the ICJ procedure (i.e. the PCA national group or other similar body). In

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<sup>22</sup> Interview T35, 3.

<sup>23</sup> Interview T58, 4.

<sup>24</sup> Interview T58, 2.

a number of states, whilst formally it is asserted they are using one particular method, a third method is developed that resembles neither option set out in the Rome Statute (e.g. an *ad hoc* committee) or the decision is simply made by the MFA and/or the MOJ in a manner similar to the process for making ICJ nominations described above.

- 7.2. It appears that very few, if any, states have used their national judicial appointment procedures, although in some cases the *ad hoc* bodies established drew heavily on national judicial criteria and appointments procedures and involved features such as predominantly independent selection committees and public advertising. The use of national judicial criteria would appear to be a useful and necessary development, whichever of the two processes adopted, as all ICC judges must have the qualifications necessary for them to be eligible for appointment to the highest judicial offices, which is an optional criterion for ICJ candidates.
- 7.3. Perhaps ironically, it appears that decisions on ICC nominations are often more closely controlled by government than ICJ nominations. The Ministry of Justice (MOJ) is also more often involved. Anecdotally, from the ICC elections to date, it appears that ICC nominations emerge more often from inside government circles than ICJ nominations do: one interviewee closely involved in the process noted:

“I think that a lot of other countries selected a candidate who they say would have been appropriate as a judge in their country, but who was simply selected, for instance, by the Minister of Justice or someone else without there having been any kind of competition leading up to that. And that...I would like to see change, over the years.”<sup>25</sup>

## **8. Political factors in the nomination process**

***“[A]lthough [these are] strict rules that should be implemented, some of the things are superseded by politics.” (Interview T8, 4)***

- 8.1. The reasons for the close involvement of the MFA and/or MOJ in ICJ and ICC nominations are perhaps evident. The election of an international judge, although he or she sits in an individual capacity, is of intimate interest to the sovereign state. Holding such an important position at the international level may make it more difficult win other political ‘country’ candidatures (for example, a non-permanent seat in the Security Council), because other states will consider that the state already has an important international post and the state will have fewer votes to trade<sup>26</sup> for subsequent elections. From a practical point of view, the current election processes for the ICJ and ICC also demand a significant campaigning commitment so candidates who do not have the strong support of their governments will not win. This necessitates a close relationship between the MFA and PCA national group (or other selection body) such that “prior to the nomination we have consultations with the government because without the support of the government it is not possible to succeed”.<sup>27</sup> Furthermore,

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<sup>25</sup> Interview T45, 7-8.

<sup>26</sup> Vote trading is discussed in section 17.

<sup>27</sup> Interview T39, 1.

campaigns are becoming extremely expensive to run so states must be fully committed to the candidate and the process.

- 8.2. Whilst the nomination process is a crucial filter to ensure that the most meritorious candidates are nominated, for most states the politicised nature of the election procedure is all the more reason to retain close control over the nomination process, and may influence how they conduct the process. This necessitates a “sort of political negotiation, somewhere in the Ministry of Foreign Affairs”.<sup>28</sup> Because the election process is politicised, it does not always appear to be possible to insulate the nomination process from outside political factors, for example, whether the candidate is likely to win in a politicised election environment, whether it will be possible to obtain sufficient support for the candidate and other factors such as external pressure from friendly states in other regional groups to drop a candidate or nominate a certain candidate. Indeed, all the “ducks [must be] in a row”<sup>29</sup> and governments must consider all of these issues before making a nomination to the ICJ or ICC.
- 8.3. Timing issues may also have an impact on the process, as ICJ candidates in particular are usually identified by governments some years before the election and formal nominations only close a matter of months before the election. In order to win an election for the ICJ, a state must generally start lobbying as soon as possible, often two or more years before the election. In many cases, it appears that the PCA national group is sounded out in the pre-nomination phase, but often the reaction of the regional group and the broader international electorate can have greater ultimate impact on the decision as to who to nominate than the views of the PCA national group.
- 8.4. As a result, states often select candidates for the ICJ and ICC with one eye on the electorate and the likelihood of obtaining votes and mutual supports, and the other eye on domestic political concerns. However, it would seem that states are also motivated to nominate decent candidates because the risk of losing political capital, to avoid ‘wasting’ an opportunity to have a judge on the ICJ or ICC and to ensure that the Courts have the best possible judges.

## **9. *The ‘pool’ of candidates***

- 9.1. As high ranking civil servants in the MFA are the centre of gravity in nominations, it is often individuals who have proximity to the government who are most likely to be nominated to the ICJ and ICC. Candidates themselves often push for their own nomination and need access to decision-makers to be able to do this, for example, through holding a number of important political and government positions at the national level. In this way a candidate “ha[s] the advantage of being able to approach all the people and get them together to [make] the nomination”.<sup>30</sup> There is a rarely a ‘pool’ of candidates that is considered (i.e an identifiable group of potential candidates or a more general class of individuals who in principle fulfil the criteria) or an open competition and very few states

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<sup>28</sup> Interview T53, 1.

<sup>29</sup> Interview T19, 2.

<sup>30</sup> Interview T59, 2.

advertise international judicial vacancies. Once a possible candidate is named and identified by decision-makers, that person is often seen as the 'only' option, to the exclusion of all others. Hence, identification, consideration and decision may be rolled into one.

- 9.2. The reason often given for this is that are few individuals in most states (particularly small states) who are qualified for the ICJ or ICC, and that qualified individuals will already be known to the relevant decision-makers. In some cases, there may be two or three candidates, but these have usually been identified by the MFA, other parts of government or the PCA national group, rather than through an open process. Interestingly, in a number of cases PCA national group members, Permanent Representatives in New York and MFA legal advisors have themselves been nominated, a practice which attracted some critical comment from some interviewees:

"In my opinion one of the most peculiar features of today is the role played by the civil servants in the ministries as the men who use these international positions in judicial bodies or similar to promote their own careers. In fact the professionals are progressively being excluded from this game."<sup>31</sup>

- 9.3. Few states appear to have a clear idea of the profile they are seeking for either an ICJ or ICC candidate. The assessment of requisite skills and experience is determined by those who are deemed to 'know': the Ministry of Foreign Affairs legal advisor and, where relevant, the PCA National Group members. In some states, there appears to be some attempt made to follow the criteria set down in the Statute and apply it objectively to potential candidates, however in other states it appears that the candidate is first identified and it is then deemed that the candidate meets the criteria and that the required nomination procedure has been followed, without further justification. Outsiders can also influence the result as "those who have friends in the Ministry [can] press for a candidate or on the contrary [if you want] to veto a candidate, you can".<sup>32</sup> The types of candidates who are often nominated are discussed below, in the section 'How should the bench be composed?'
- 9.4. For the ICJ, candidates usually have a good measure of international exposure, for example, as Permanent Representative to the United Nations in New York, a member of a state's delegation to an international conference or the Sixth Committee of the UN General Assembly, or as an independent expert in a UN body: "He must have a background. This is part of the non-written rules."<sup>33</sup> Membership of the International Law Commission (ILC) "serves as a conduit"<sup>34</sup> to the ICJ, many seeing it as the preparing ground for the ICJ and as a way to test the merit of the candidate. In relation to the ICC, a number of candidates were on their states' delegates to the Rome Conference or had been otherwise involved in broader discussions on international criminal law at the international level and the efforts to obtain wider ratification of the Rome Statute. Such

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<sup>31</sup> Interview T40, 4.

<sup>32</sup> Interview T40, 1.

<sup>33</sup> Interview T58, 6.

<sup>34</sup> Interview T51, 3.

international exposure makes it more likely that an individual will be nominated because it greatly increases a candidate's prospects of success at election, mainly because the candidate is personally known to the electors. Conversely, as one interviewee commented: "If you get someone who is not known internationally, even if he is the best lawyer in the world, he will not get the votes. It's very unlikely."<sup>35</sup>

- 9.5. Yet, particularly in relation to the ICJ, the balance between the candidate's exposure at the national and international levels must be right. For example, a person that has developed a profile outside his or her own country may not have the requisite domestic profile to convince national decision-makers and conversely, a potential candidate without international exposure may not be deemed to have sufficient international presence to win. This can be difficult for candidates from smaller countries or language groups who may leave their countries of origin in order to pursue a career in international law as, by doing so, they could exclude themselves from nomination by their own states. Thus a particular aspect of the selection process - the need to be known both domestically and internationally - indirectly impacts upon the qualifications which are required to be eligible, in practice, for appointment. Without a certain mix of experiences which have exposed him or her to the right level and degree of contact with the right range of people both at home and abroad, a potentially well-qualified candidate will not be likely to be nominated for either the ICC or ICJ.
- 9.6. In the five countries that are permanent members of the Security Council ('P5'), and that hence in practice always have a judge on the Court, it might be said that there is something closer to a 'pool' for the ICJ as vacancies open at regular intervals and there is a long practice of selecting candidates for the Court. However, the pool may not be any larger than in non-P5 states, and indeed may not lead to more choice or a more open procedure.

## **10. *Nomination of non-nationals***

- 10.1. As indicated above, in the both the ICJ and ICC nomination procedures, non-nationals can be formally nominated by a national nominating body. For the ICJ, this could be up to four nominations and for the ICC a state can use its single nomination to propose a non-national from another State Party to the Rome Statute. The discussion below in sub-sections 10.2-10.6 relates to nominations of non-national to the ICJ. Sub-section 10.7 discusses nominations of non-nationals to the ICC.
- 10.2. This procedure has two functions: first, to facilitate the proposal of candidates who have not been nominated by their own states and who would not otherwise be nominated (a 'direct non-national nomination'), and second, to allow a state or nominating body to show its support for a candidate who has been nominated by their own or a third state, which may be of value in the election process (a 'supporting nomination').

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<sup>35</sup> Interview T47, 7.

- 10.3. It appears that in most states, the MFA is not greatly concerned about who is nominated under non-national nominations because these types of nominations do not require the state to do anything in particular. The state is not obliged to lobby for the candidate (although they sometimes do) or even vote for the candidate, although in most states it would be expected that a vote would follow a non-national nomination. PCA national groups seem to operate more independently in this regard, receiving requests for nominations directly or via the MFA, making decisions on the competing candidates and then conveying their views to the MFA, which normally accepts them. However, practice, again, varies widely, as some interviewees indicated that an essential element of making non-national nominations is the consideration of the surrounding political aspects, which suggests that the government might direct or at least closely consult with the PCA national group as to its choices. PCA national groups are also involved in seeking supporting nominations for their own national candidates, often in parallel with the MFA.
- 10.4. Many PCA national group members said that these non-national nominations are often based on direct personal knowledge of the candidates and personal relationships. It could be said that the focus appears to be more clearly on the merit of the candidate in this process than for national nominations, but, equally, it could be seen as even more affected by personal politics or established conventions as to who the PCA national group supports. Some ministries suggested that this is an area where PCA national group members may have significant expertise due to their personal contacts in the international law field, and often they are willing to give the group free rein.
- 10.5. Supporting nominations are often made on the basis of bilateral relationships and can form part of a vote trade. Practice varies widely, some states nominate four ICJ candidates at each triennial election, while others only exceptionally make supporting nominations or never make any. These nominations are seen as a show of support and an indication of the quality of the candidate and the number and source of supporting nominations are often used in lobbying efforts. It is not clear whether a large number of supporting nominations make a significant impact in terms of the votes received and whether states that make such nominations in fact vote for those candidates. Indeed, some interviewees said that the process does not have a lot of worth and does not really indicate anything about the merit of the candidate.
- 10.6. A direct non-national nomination provides a mechanism through which greater competition can be injected into the election process and overlooked but meritorious candidates can be nominated “for the good health of the court and international law”.<sup>36</sup> This could help to increase competition in the case that a regional group has put forward a clean slate. It appears that states are sometimes directly involved in these nominations, but some are also driven by the PCA national group through personal connections with the proposed candidate. It was suggested by some interviewees, and apparent from UN documents setting out the nominating countries for each candidate (although these documents do not state which country first nominated a candidate), that this type of nomination is becoming less frequent, and states are increasingly

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<sup>36</sup> Interview T35, 6.

only either nominating their own candidates or making supporting nominations of non-nationals. This has perhaps been driven by the increasing demands of the election process, so a candidate without the support of a government is unlikely to win and PCA national groups or their governments would be unlikely to nominate a person who would not have any prospect of success. It may also be that PCA national groups and their governments are now more sensitive to the political consequences of direct non-national nominations.

- 10.7. For the ICC, a non-national nomination would be most likely to be a direct rather than a supporting nomination, as there would be little value in a supporting nomination in the ICC context. If a non-national was to be nominated (as has happened once to date), it would be expected that this decision would be made in close consultation with the government as a state can only nominate one candidate and such a decision would block any possibility of nominating a national candidate. It would presumably take place when the state does not feel it has a national who is electable.

## **11. Transparency**

- 11.1. A transparent selection process can be defined as one that clearly identifies the potential candidate pool, is accessible to potential applications through advertising, publishes criteria and a procedure for its decision-making, accepts applications in a set format, assesses candidates consistently against the criteria, consults with a set range of outside institutions (if appropriate), makes a decision based on an objective assessment of whether the criteria have been met and, where appropriate, provides reasons for the decision. Review processes may also provide another level of transparency. A transparent process seeks to ensure merit and diversity through accessibility, independence and competition.
- 11.2. When measured against this definition the findings make clear that there are grounds for serious concern over the lack of transparency in both the ICJ and ICC nomination processes. In practice, the nomination processes for the ICJ and ICC in most states are almost entirely unknown to individuals who are not in the relevant government or legal circles. Even people integrally involved in the process give inconsistent accounts of the procedure and how it operates. Very few states announce that a selection procedure is underway, advertise for candidates or publicly announce the procedure that will be used. In the vast majority of states, a 'tap on the shoulder' system operates. In some states, this may be attenuated by informal consultations with outside bodies that may slightly expand the pool of potential candidates. However, as noted above, in most states, there is no external consultation beyond the primary decision makers and decisions are made behind closed doors without following any procedure or criteria. Hence "[there] can be excellent candidates, but the procedure of...consultation is not open".<sup>37</sup> When a candidate emerges, it is not apparent why or how he or she was chosen.

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<sup>37</sup> Interview T52, 25.

- 11.3. More generally, in relation to the ICJ the informality of PCA national group decisions was another issue raised by the research. In many cases, it appeared that information on the decision-making process was only held in the corporate memory of the individual group members as most interactions are by telephone or in person and records are not made. One PCA national group member said “[w]e don't have any kind of institutionalised relations or procedures. For instance, if one day I am replaced in the national group, I don't know how my successor will behave”.<sup>38</sup>
- 11.4. Even in a system where close political involvement is a necessary reality and the specialised nature of the post restricts the number of potential applicants, an almost entirely closed system risks overlooking meritorious candidates who lack connections. It also makes it more likely that inappropriate candidates will be selected due to bias or personal agenda. In some systems, this could be seen as desirable by those who benefit from it. However, as election procedures become more competitive and public awareness of the processes increases, this lack of transparency could be a hindrance to having a candidate elected. In this context, it may be that states will need to demonstrate the transparency of their national nomination processes for their candidate to be considered to be credible.
- 11.5. The findings show that views on transparency differ widely across political and legal cultures. Particularly problematic is the question of what is required by the principle of transparency and how it might be achieved in practice through the adoption of concrete procedures and institutions. One possible starting point for identifying possible changes which could improve the degree of transparency is to look at recent developments in judicial selection procedures at the national level as well in other international courts which have established some guidelines as to procedures for selection of judges that balance the needs for independence and accountability in judicial appointments.
- 11.6. At the national level, in most common law countries judges of the highest courts are still selected by the executive. However the trend has been towards the greater use of judicial appointments commissions and open selection systems. In appointments to the highest courts, there has also been an increasing pressure to incorporate public interviews and parliamentary confirmation hearings into the selection procedure. In the lower courts, a number of states have adopted judicial selection committees that operate on the basis of open selection procedures. In civil law countries, the career aspect of the judiciary means that, at least ostensibly, progression is generally transparent and based on clear established criteria applied by a judicial council or committee.
- 11.7. At the international level, the creation of the Regional Judicial and Legal Services Commission which selects the judges of the Caribbean Court of Justice (CCJ) is the first example of the use of a judicial appointments commission outside of purely domestic courts. This new system has instituted transparent and merit based selection procedures, including advertisements and interviews for judges of that regional court. The approach has also attracted some political criticism from governments. Developing guidelines for European Court of Human Rights

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<sup>38</sup> Interview T44, 22.

(ECHR) and the European Court of Justice (ECJ) nomination procedures suggest that demands for transparency are being made across of range of courts, particularly those courts where each state has a judge (which has parallels with the situation where regional groups propose clean slates). As mentioned above, some states have also started to develop practice regarding advertisements for international posts, particularly for the ICC, the ECHR and ECJ.

- 11.8. The majority of interviewees rejected any suggestion that national judicial selection bodies might become involved in international nominations to the ICJ or ICC. Paradoxically, considering the politicisation of the nomination and election processes for the ICJ and ICC, some interviewees considered that national judicial nomination processes are overly politicised and that their involvement would introduce partisan considerations into a process which many believe operates outside national party politics. In some cases, the constitutional and legal framework set out the powers and functions of the national judicial appointments body and would need to be amended if the body was to become involved in international nominations. Some also said that it would not be appropriate for the national judicial selection body to be involved in international nominations as candidates are often not national judges. In any case, in a small number of countries legislative reform programmes are underway to place international nominations on a legislative footing and harmonise national and international nomination procedures and improve transparency.
- 11.9. Most interviewees also rejected the possibility of states conferring responsibility for making nominations or appointments on a committee at the regional or international levels (to be distinguished from screening bodies, discussed below) as likely to be viewed as an unacceptable incursion on state sovereignty. One interviewee was of the view, referring to the ICJ, that states would most likely prefer to “continue existing practice of lobbying governments and entering into reciprocal support arrangements to ensure the success of their individual candidates”.<sup>39</sup>
- 11.10. Short of these more drastic changes, a number of interviewees acknowledged that the processes for ICJ and ICC nominations must be made more transparent. They acknowledged shortcomings in terms of the lack of consultation, procedures and criteria for the selection of candidates, for example: “as concerned the internal selection process...it’s certainly not proper, it should be much more open. It should be, I think, more competitive [and] transparent”.<sup>40</sup> They acknowledged that these shortcomings may cause problems for the perception of the process and the international courts in general, particularly in the case of the ICC which is established to try individuals for crimes. Some were amenable to the development of guidelines for nominations that could be adopted by states to improve their nomination processes. On the other hand, some interviewees believe that the nomination process for the ICJ and ICC works well at present and do not think the system can, or should, be changed.

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<sup>39</sup> Interview T27, 3.

<sup>40</sup> Interview T32, 14.

- 11.11. It may be that PCA national groups (or other selection committees) could adopt some more structured procedures for international nominations, but this would necessitate that most operate on a more independent basis than they do at present. At very least, selection procedures could be publicly announced and PCA national groups (or other selection committees) could set down criteria for selecting candidates. Where appropriate, the PCA national group (or other selection committees) or MFA could announce the names of the potential candidate(s). A formal structure for consultation with key bodies, e.g. the senior judiciary, bar associations and academics could be established, and even combined with a mechanism for public consultation.
- 11.12. The ICC requirements that the nomination be accompanied by a statement setting out the grounds on which the candidate meets the individual criteria could also be usefully adopted in the ICJ nomination process, to supplement the current approach of simply providing curriculum vitae (CV) to the Secretary-General. This could operate as a type of statement of 'written reasons' for the decision to nominate in accordance with the criteria in the ICJ Statute. However, it might be questioned how much these statements add to the transparency of the ICC process as they are normally drawn in very general terms. Their usefulness may be improved if states included detailed information about the method by which the candidate was selected.
- 11.13. Clearly, whether guidelines including any of these elements would be effective in a given state will depend on the political and legal culture in that state. Guidelines would be simply that, and states would adopt and adapt the procedures they believe would be most effective in their particular national context. At very least, guidelines could start a dialogue as to the appropriate standards for transparency and decision-making for international nominations.

## **12. *Issues to discuss - nominations***

- **Are there other considerations not mentioned here that are important in this part of the process?**
- **Would proposing best practice guidelines for national nomination processes be a worthwhile outcome of the research?**
- **If so, what should these guidelines cover and what examples should they draw on? For example, should states be required to indicate the procedure they have used for selecting nominated candidates, when they put forward their nominations?**
- **What lessons, if any, can we learn from national judicial appointments processes and more recently established international judicial selection procedures?**
- **To what extent (if at all) does the existing system of nominations impact upon the legitimacy and effectiveness of the international courts?**

## HOW ARE CANDIDATES ELECTED?

*“the election has to happen inevitably, in some kind of body representing the states parties or the sponsoring organisation, and therefore you know that it will be an election by a political body, and likely to turn into a political election. There just is no way around it, unpleasant as the situation is”. (Interview T35, 11)*

*“In the end, basically if you get the electorate properly enfranchised, the electorate can sometimes solve the structural anti-democratic elements that were set up above it.” (Interview, T17, 10)*

The provisions regarding the election procedures for the ICJ and ICC are as follows:

### **13. ICJ elections**

- 13.1. The judges of the ICJ are elected by the General Assembly and the Security Council voting ‘independently of one another’.<sup>41</sup> A candidate is elected when he or she obtains an absolute majority of votes in both the General Assembly and the Security Council.<sup>42</sup> If seats remain to be filled, a second and, if necessary, a third round of elections may be held.<sup>43</sup>
- 13.2. The Statute provides that ‘[a]t every election, the electors shall bear in mind not only that the persons to be elected should individually possess the qualifications required, but also that in the body as a whole the representation of the main forms of civilization and of the principal legal systems of the world should be assured’.<sup>44</sup> This requirement is deemed to be met by states by voting in accordance with the convention of equitable geographical representation (discussed further in sub-section 22.4).

### **14. ICC elections**

- 14.1. The Rome Statute incorporates more detailed and complex voting rules to govern the election of ICC judges. The judges are elected by secret ballot during a meeting of the ASP. The candidates that obtain the highest number of votes and a two-thirds majority of the States Parties present and voting are elected.<sup>45</sup> The quorum is an absolute majority of States Parties.<sup>46</sup> Successive ballots may be held if there are seats that remain vacant.<sup>47</sup>

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<sup>41</sup> Article 8, ICJ Statute.

<sup>42</sup> Article 10(1), *Ibid.* An absolute majority is 96 votes in the General Assembly and eight votes in the Security Council, respectively: United Nations General Assembly and Security Council *Election of five members of the International Court of Justice. Memorandum by the Secretary-General* UN Doc. A/60/186-S/2005/446 (26 July 2005), paras. 8-9.

<sup>43</sup> Article 11, *Ibid.* Article 12 establishes a procedure that is to be used if all seats are not filled after the third round.

<sup>44</sup> Article 9, *Ibid.*

<sup>45</sup> Article 36(6)(a), Rome Statute; Resolution ICC-ASP/3/Res.6, para. 16.

<sup>46</sup> Article 112(7)(a), *Ibid.*; Resolution ICC-ASP/3/Res.6, paras. 15 and 16.

<sup>47</sup> Article 36(6)(b), *Ibid.*

- 14.2. In electing judges, States Parties must take into account the need for the representation of the principal legal systems of the world, equitable geographical representation and fair representation of female and male judges, and the need to include judges with particular legal expertise, including in relation to the issues of violence against women and children.<sup>48</sup>
- 14.3. In accordance with the minimum voting requirements, States Parties must cast the number of votes required to ensure that there are at least nine judges from List A and at least five judges from List B, at least three judges from the Western European and Other States group ('WEOG'), Africa, GRULAC and Eastern Europe and two from Asia and six judges of each gender, reduced by the number of continuing judges who fulfil each of those criteria, adjusted also in accordance with the number of candidates fulfilling each of the criteria.<sup>49</sup>
- 14.4. The minimum voting requirements are adjusted between ballots (if there are multiple voting rounds) until they cannot be met. When a voting requirement can no longer be met jointly, all regional and gender voting requirements no longer apply. Furthermore, after a fourth ballot, all regional and gender voting requirements no longer apply. The voting requirements regarding List A and B must be applied until they are fulfilled.<sup>50</sup>

## **15. Key aspects of the campaigning and election process**

- 15.1. Judges of the ICJ and ICC are elected by the political bodies that consist of the states parties of those two courts, the General Assembly and Security Council for the ICJ and the Assembly of States Parties (ASP) for the ICC. Election is a political reality in the case of international courts, as each state wishes to retain a degree of control over the selection of judges. However, a process of election by political bodies raises questions as to the relative importance accorded to the criteria for election to the court in question and extraneous political considerations.
- 15.2. Interviewees with longer experience generally said that ICJ elections have become increasingly politicised, particularly over the last ten years. There have been attempts to discourage states from vote trading and prioritising political considerations in the ICC elections, but the practice of ICC elections indicate that it operates in substantially the same way as elections in the United Nations system, as adapted by the minimum voting requirements.
- 15.3. To win an election, states must engage in a demanding process of campaigning, vote trading and negotiations both within and outside their regional group. Amongst states, there is a sense that if you do not lobby, trade votes and negotiate, someone else will. Some states have started their campaigns more two years before the election. As the election nears, they often deploy staff full-time to run the campaign. Many interviewees said that an excellent

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<sup>48</sup> Article 36(8)(a) and (b), *Ibid*.

<sup>49</sup> Article 36(5), *Ibid*.

<sup>50</sup> Resolution ICC-ASP/1/Res.3, para. 21.

candidate may not win without a strong campaign, and a less meritorious candidate can succeed if his or her state campaigns long and hard. Campaigning also involves an element of screening, as some states use it as an opportunity to find out more about the candidate and assess his or her merit, to compensate for the lack of objective information available about candidates.

- 15.4. Most states secure the votes they need to reach the requisite majority by engaging in vote trading. The extent to which merit is a consideration in vote trading, and what votes are traded for varies greatly between states. However, as the ballot is secret, these measures can only hope to reduce uncertainty, they do not guarantee success. Negotiations within the regional group can also secure the withdrawal of other candidates and regional endorsement and support that can be crucial to success.
- 15.5. For the ICJ, the influential role of Security Council and the P5 members in the voting process constitutes an advantage for candidates who have their support. A favourable vote in the Security Council can sway the General Assembly vote, even though it is intended that the two bodies vote independently of one another.
- 15.6. Overall, although practice varies, the way the election process operates can mean that states vote for candidates for reasons other than merit. Clearly, some states do choose candidates primarily on merit, but these are in the minority and it is unclear what impact any assessments of merit made in New York may have on the final voting decision. In general, although judicial posts are seen to be of greater importance than some other candidatures at the international level, they are not treated significantly differently to other political posts.

## **16. Campaigning**

***“He was the merchandise we were selling.” (Interview T18, 12)***

- 16.1. It was almost universally acknowledged by the interviewees that to win an ICJ or ICC election, a state must run a strong and effective campaign. The states that can wage the most effective campaigns are those that have significant political and financial resources, wide diplomatic representation in a number of states, extensive bilateral relations and a strong commitment to obtaining a seat on the court. Therefore, there is a structural disadvantage for states that lack such resources, regardless of the merit of their candidates. There is some evidence that candidates who already have significant international exposure also have a much greater likelihood of success as they are already known to the electorate.
- 16.2. Furthermore, according to a number of interviewees, over the last five to ten years for ICJ elections, there has been a marked ‘professionalisation’ in campaigning. For example, there has been the development of the post of ‘elections’ or ‘candidatures’ officers in the Permanent Missions in New York and the formation of campaign teams between capital, New York and also The Hague to lead and manage campaigns. In some cases, staff have been employed on a full time basis for months to manage strategy and organise campaign activities. Campaigns also now often include the distribution of professionally prepared materials.

- 16.3. Campaigning can include a wide range of different strategies, including; visits to embassies in the campaigning state, visits to governments in capitals where the campaigning state has embassies including direct high level visits to capitals, visits through UN representations in various countries and campaigning through the Permanent Mission to the United Nations in New York. Some states “pick candidates, groom a candidate [then] take this candidate round the world lobbying”.<sup>51</sup> Campaigning may also take place through regional or other political organisations or even non-government fora such as lawyer’s organisations. A flurry of *notes verbales* are sent from campaigning states to target states via their respective diplomatic representatives. Campaigning states also use contacts to write to PCA national group members to ask them to seek the support of their governments and, in the case of the ICJ, make supporting nominations.
- 16.4. The scope and level of government support for the campaign are important. Usually, high level diplomats are closely involved in campaigning, but in some cases the Minister of Foreign Affairs or even the Head of State is involved in seeking support and presenting the candidate. A number of unsuccessful candidates said that they believed they did not win because they did not have a sufficiently high level of government support, compared to other candidates. According to a number of interviewees, candidates who are able to undertake a campaign on an international scale and personally visit capitals have an advantage and appear to be more likely to obtain a higher number of votes.
- 16.5. Campaigns might also be supported by sub-regional or other bilateral partners (for example, states that have made a supporting nomination for the candidate) that may expand the reach of the campaign and tap new ‘markets’ for votes. This support can be bilateral or unilateral. It appears that supports of this nature have often been based on an assessment by the second state of the merits of the candidate.
- 16.6. Timing is also absolutely crucial. Campaigns must start as early as possible, often two or more years in advance in the case of the ICJ, hence before formal nominations are made. An early candidate can secure vote trades and other pledges of support and effectively secure the support of the electorate before competitors arrive, although some states make mutual support agreements only when all candidates are on the table. A late campaign sends a message that the state is not serious about the campaign and hence tarnishes the candidate by implication.
- 16.7. Lobbying activities in New York in the months prior to the elections are the most important part of the campaigning process. A range of strategies are used in New York. Candidates, particularly those for the ICJ, are now normally brought to New York for periods from around a week up to a couple of months, a practice that was quite rare only up to five years ago. Candidates “who do not come [to New York]...have fewer chances in general”<sup>52</sup> and “it’s very important how you present here”.<sup>53</sup> Candidates usually visit Permanent Missions, accompanied by

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<sup>51</sup> Interview T37, 14.

<sup>52</sup> Interview T13, 7.

<sup>53</sup> Interview T15, 6.

the Permanent Representative or other highly ranked diplomat to meet with Permanent Mission staff. Meetings usually last for around 30 minutes and usually include a presentation by the candidate of his or her experience and a general discussion about the candidate's views about the future for the court and international law. In recent elections, the majority of candidates have exhaustively visited Permanent Missions.

- 16.8. How the lobbying process is conducted on the receiving side varies greatly. Some Permanent Missions use senior staff with legal backgrounds to meet with candidates, whereas others may send more junior staff or even interns to meet with candidates. Some Missions use the meeting as an opportunity to pose structured and detailed questions to candidates whilst others appear to consider them to be simply courtesy visits. States may sometimes change their voting decisions based on how a candidate presents and how this compares to his or her CV.
- 16.9. The campaigning Permanent Mission also usually hosts functions to introduce the candidate. The candidate normally makes a short presentation regarding general issues related to his or her background and international law. These functions can be lavish events. Some campaigning states host a range of functions for different groups, for example, members of the regional group, members of various political groups of which it is a member, and functions to which all Permanent Missions are invited.
- 16.10. Candidates also campaign at UN headquarters, mainly through meeting delegates in the Indonesian Lounge or in the hallways. One former candidate said: "I would not have organised it like in these ugly, unfriendly UN lounge where there was no heating and so on. It was... like a poor quality fair...with brochures and so on."<sup>54</sup> MFA staff described the experience of "sitting next to those rickety old escalators and meeting people on an all day basis, we became one of the regular inhabitants".<sup>55</sup> Another former candidate described the constant stream of mission staff "and people coming along. I don't know whether they were checking my teeth, whether they... [believed I was] cattle, or slave, I don't know what it was".<sup>56</sup> Other former candidates were more sanguine about the process, one describing it as "really worthwhile"<sup>57</sup> if candidates are not subjected to inappropriate questioning.
- 16.11. These *ad hoc* meetings are usually conducted closer to the elections and provide another opportunity for mission staff to ask the candidate questions and discuss voting arrangements with the candidate's mission staff. Again, the way receiving states use these opportunities varies greatly. Usually, these exchanges involve the candidate talking about his or her experience and why he or she is qualified to be on the court. Then the candidate leaves and the diplomats take over to discuss voting arrangements. Lobbying is also conducted with various other groups such as regional groups and the members of the Security Council.

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<sup>54</sup> Interview T32, 14.

<sup>55</sup> Interview T18, 9.

<sup>56</sup> Interview T27, 6.

<sup>57</sup> Interview T45, 4.

- 16.12. Campaigning continues until the day of the election. A number of delegations now publish pamphlets and flyers promoting the merits of their candidate. This material can include items written by the candidate, statements of support from prominent persons and information about the candidates endorsements and representation elements (for example, whether the candidate considers that he or she is representing a particular sub-regional or linguistic group, etc), as well as outlines of the candidate's experience and lists of publications, if relevant. Some interviewees criticised these developments, one former candidate said it made the process like "an election for a local council ... I was shocked...to go into the General Assembly during the election and to find out that [some] had brochures or pamphlets with their photos".<sup>58</sup>
- 16.13. It is interesting to note that some P5 members feel that they too now need to engage more actively in campaigning to ensure that their candidates are elected, even for the ICJ. Even though some states are starting to question the P5 convention in the ICJ, the central role of the Security Council in the voting process still provides assurance to the P5 that their candidates will be elected. However, in other contexts, the P5 convention has been challenged, as suggested by the unsuccessful campaigns of two P5 member candidates for seats on the ILC and International Tribunal for the Law of the Sea. Although some P5 members still do not engage in campaigning for the ICJ to any great extent, others are actively visiting Permanent Missions and holding functions in order to demonstrate the quality of their candidate and ensure support.
- 16.14. More generally, the opportunity costs for the candidate are significant, both in terms of time and the potential damage to his or her reputation in the case of failure. Candidates must balance their concerns as to their reputation with the fact that it is generally acknowledged that results of elections are not necessarily an indication of merit. Furthermore, for many candidates, especially those who have been judges in domestic legal systems, it can be a strange and stressful experience. Former candidates and observers variously described the experience of being involved in the campaigning process as "completely bizarre...[but also] an immensely interesting experience,"<sup>59</sup> "quite an affronting experience"<sup>60</sup> and "the most humiliating experience"<sup>61</sup> even though, as mentioned, candidates are apparently not directly involved in vote trading or discussions of this nature. The increasing demands placed on the candidate by this system may filter the types of candidates willing to participate. It also makes a close and supportive relationship with one's government even more important.
- 16.15. A number of interviewees cited the nature of the campaigning system to be one of the reasons why re-election of ICJ judges should not be permitted. Many believe that ICJ judges should have single term of 12 years because the possibility of re-election can affect actual or perceived independence. Some interviewees said that sitting judges do not campaign in the same way as other candidates as they mainly rely on their Permanent Missions to conduct the campaign, whilst others said that sitting judges take an active role. In any case,

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<sup>58</sup> Interview T47, 12.

<sup>59</sup> Interview T45, 3.

<sup>60</sup> Interview T11, 7.

<sup>61</sup> Interview T27, 6-7.

many interviewees believed that whatever level of campaigning sitting ICJ judges engage in, they should not be able to stand for re-election.

## **17. Vote trading and ‘mutual support’**

***“[Campaigning] involves not just getting a candidate out in the field, but securing as many pledges of support as they possibly can, in advance. And that is not a dignified process. It’s a cattle market sort of process, and states who don’t have a great deal to trade in for a particular election may be looking for cross-pledges to some other electoral issue, or even some other foreign policy issue. So what do you do? You can’t sit back and do nothing [because] you might find that your own candidate’s chances have been diminished because states whose votes you might otherwise think you could rely on have actually pledged themselves as part of this process in advance. So you’ve got to be out in the field, but you’ve got to behave in a decent way, and it’s a very difficult balance to strike. And it is undoubtedly exacerbated by the fact that the campaign has begun so early for the serious elections.” (Interview T35, 14-15)***

***“[Vote trading] has got to proportions which are undermining of the effectiveness of the organisation and are potentially damaging, seriously damaging, to its long-term reputation.” (Interview T19, 13)***

***“So it’s not the personal qualifications of the candidates [that matter] but in the end it’s how many reciprocal supports you have...that’s what counts.” (Interview T15, 4)***

- 17.1. Votes for judicial candidates to the ICJ and ICC are normally secured through vote trades (sometimes referred to as ‘exchanges of mutual support’ or ‘reciprocals’). A vote trade is a reciprocal voting agreement between two states that state A will vote for a candidature of state B and vice versa. Vote trades are primarily a means to reduce uncertainty in elections by tying a vote to another vote that is politically valuable to the other state. They may be agreed verbally or in writing. They are concluded between states in the same regional group and also with outside states, and provide a valuable means to build blocs of support. Timing is again crucial. States seek to obtain vote trades as early as possible in the campaigning process and states that are late starting will be unlikely to obtain sufficient votes. However, some states will only consider vote trade proposals when all nominations are on the table. Conversely, some states may trade votes up to a decade in advance, in effect binding their vote for a number of elections to come.
- 17.2. One of the key issues is the types of votes that can be traded in what one interviewee described as the “multilateral bazaar, the multilateral souk”.<sup>62</sup> There is a hierarchy that has been developed as part of the increasing professionalisation of campaigning across the UN system, assisted by developments such as CandiWeb that provides a digest of election information across the system. Practice varies greatly between states. Judicial posts are

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<sup>62</sup> Interview T12, 7.

generally considered to be high in the hierarchy as “[t]hey’re perceived as something more serious than business as usual”.<sup>63</sup> Some states will trade judicial seats for other judicial seats or for high level expert positions, e.g. the Human Rights Committee. Some interviewees said that some states would trade judicial seats with country candidatures such as non-permanent membership of the Security Council. In some states, blocs of votes can be agreed to balance the vote trade and trades can be concluded before the candidates are decided:

“We may offer support to...other candidates to other organs which are not so important as the International Court of Justice.”<sup>64</sup>

“It’s case by case. And there’s always the option if the first reciprocal offer we might get is a for b, and we don’t consider that b is equivalent to a, well maybe we go back with, okay, well, a for b and c. And there are all sorts of combinations and so on that you can put together.”<sup>65</sup>

- 17.3. Vote trades are also agreed in alternatives, i.e. if a state’s first choice candidate does not get sufficient votes, that state will vote for another candidate under a different vote trade agreement.
- 17.4. The trading of votes is not universal and some other states draw a distinction between individual and country candidatures and maintain that they cannot be traded for one another, as it is inappropriate to trade a vote when the candidate is unknown and cannot be assessed. These states trade votes but only when they would have voted for the candidate in any case, on the basis of merit. Some states that take this approach apparently engage in independent research on the qualifications and experience of the candidate to assist in the decision-making process. It appears that some states also consult their PCA national groups to gather views on the merit of particular candidates or ask their peers in international legal and diplomatic circles.
- 17.5. Some states say that they do not trade votes in any circumstances and they only vote on the basis of the merit of the candidate. Some of those states consider that judicial posts, particularly the ICJ and ICC are of such high importance that they should not be traded or that in general it is inappropriate to trade votes for individual seats for votes for country seats. Further, some states do not trade votes for judicial posts as they do not want to create a suggestion that the judge they vote for may be particularly disposed to them when sitting on the court. Some other states which do not trade votes adopt this stance because they have insufficient ties with other states to obtain enough votes to win an election. Some states that trade votes also give votes unilaterally because they consider a candidate to be meritorious. In any of these circumstances (except whether a state wishes to exercise its vote entirely confidentially), a state may make a ‘vote pledge’, undertaking to vote for a particular candidate.
- 17.6. Mutual supports can also extend to a range of other arrangements even outside the UN election system. For example, votes may be secured by tying them to

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<sup>63</sup> Interview T6, 12.

<sup>64</sup> Interview T58, 3.

<sup>65</sup> Interview T11, 10.

the provision of international development aid and other bilateral agreements, as some countries “have huge connections in both trade and aid terms with a large number of countries and when they’re going in and lobbying for support, the people...whom they are asking for support, are not unconscious of the wide range of connections”.<sup>66</sup> Some interviewees referred to unconfirmed anecdotes about states paying for votes, but it does not appear from the data gathered in the project that that these practices have been used in ICJ or ICC elections.

- 17.7. Obtaining votes through vote trades and vote pledges is not an exact science, however. Most states expect a failure rate of around 15-20% on agreed votes, although apparently this rate is perceived by some to have “dramatically reduced in the last few years”.<sup>67</sup> Vote trades and pledges can only decrease uncertainty. As ballots are secret, agreements can be broken quite easily. Sometimes, according to interviewees, vote trades in particular might be broken because the Permanent Mission meets the candidate and finds that he or she does not meet the criteria for the court. Even if there is uncertainty, vote trades and pledges are still considered to be extremely important and sometimes candidates withdraw when they learn they have not obtained sufficient numbers.
- 17.8. In any event, the majority of states engage in vote trading, therefore the states most likely to succeed in their candidatures may be those that can offer the most vote trades or other benefits to the electorate. Those states with greater political clout have a natural and convincing advantage. Furthermore, those states willing to trade votes on any basis, without regard to merit, will be more likely to get votes. Even though there are states that prioritise merit in the vote trading process or refuse to trade votes, the majority of states must engage in this process at some level if they want to win elections in the UN system.
- 17.9. In relation to the ICC, there was an attempt to discourage the practice of vote trading in the election of judges. At the 3<sup>rd</sup> meeting of the First Session of the ASP to the Rome Statute on 9 September 2002, the President of the Bureau H.R.H. Prince Zeid Ra.ad Zeid Al-Hussein announced the opening of the nomination period for the first election of judges to the ICC and “[i]n order to ensure the integrity of the electoral process, the Bureau also appealed to States Parties to refrain from entering into reciprocal agreements of exchange of support in respect of the election of judges of the Court”.<sup>68</sup>
- 17.10. The practice of ICC elections indicates that states have actively engaged in vote trading and have not responded to the appeal of the Bureau. This suggests that the practice of vote trading is considered by states to be integral to elections in political bodies. In general, it appears that most states are not willing to consider judicial posts to be qualitatively different to other expert and political posts.

## **18. Regional groups**

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<sup>66</sup> Interview T19, 12.

<sup>67</sup> Interview T11, 10

<sup>68</sup> Assembly of States Parties to the Rome Statute of the International Criminal Court, First session, New York, 3-10 September 2002, *Official Records*, ICC-ASP/1/3, para. 27.

- 18.1. Regional groups can also have a significant impact on the election process. Regional support can reduce competition and uncertainty for campaigning states and can often be decisive in elections. In general, it appears that decisions as to regional support are often made without primary regard to merit.
- 18.2. Regional groups vary widely in the degree to which they will support regional candidates. Some regional groups will endorse their own regional candidates. This may involve negotiating for the withdrawal of other regional candidates, resulting in a clean slate. States may withdraw due to regional agreements or may simply decide unilaterally to withdraw if it becomes apparent that sufficient support has not been attained. Endorsement does not necessarily mean that other candidates cannot compete for a seat (indeed, in the ICC context it cannot have this effect due to the minimum number of candidates that must be nominated), but it constitutes a significant competitive advantage for the endorsed candidate as it is taken by some to be an indication of merit.
- 18.3. Some other regional groups do not provide any regional level support and do not prefer one candidate over another. However, even in these groups, it would appear that there are negotiations on a bilateral level between individual regional group members seeking the withdrawal of candidates and vote trades.
- 18.4. Interviewees said that in most regional groups that endorse candidates, submit clean slates or otherwise support candidates, decisions as to endorsement and support are not usually based on merit. They usually flow from the reciprocal political arrangements and “bilateral agreements”<sup>69</sup> that exist within the group. Therefore, a candidate may obtain direct access to a seat (in the case of the ICJ), or at least less competition to obtain it and the imprimatur of his or her country’s regional partners which can have an impact on the voting decisions of other states, without any assessment having been made of his or her merit. On the other hand, some regional groups undertake a more rigorous assessment of the merit of the candidate and effectively make candidates compete to obtain the support of the group. It appears that which of these two approaches to merit are taken depends on the political clout of the state seeking regional support and the effectiveness of its negotiations within the group.
- 18.5. States can also secure support and agreements not to compete from their sub-regional partners. Due to the resources required to win an election, sub-regional groups sometimes band together to support a candidate, campaign, and make mutual support agreements with other states. In some cases, states virtually adopt the candidate as their own. This operates as an “enormous force multiplier”<sup>70</sup> for smaller countries. Clearly, as there may still be other competitors within the regional group, this strategy does not ensure success, but it may be the most effective campaigning strategy available to states in regional groups that do not coordinate at a group level. It may also be particularly valuable for smaller states and work to reduce some of the competitive disadvantage in the campaigning and vote trading process. It can also ensure that candidates from within the sub-regional group do not end up ‘splitting the vote’ by competing. It is

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<sup>69</sup> Interview T5, 6.

<sup>70</sup> Interview T11, 6.

not clear whether merit is more of an important factor at the sub-regional level than the regional level.

- 18.6. Agreements to support at the regional or sub-regional levels may be tied to agreements to support candidates in future elections, or at least not to propose candidates that would compete with them.
- 18.7. Candidates can also obtain support through other groupings, such as political organisations and regional organisations. This may be a way for a state to obtain an endorsement from members of that organisation which may make it more likely, but not certain, that those states will vote for its candidate.
- 18.8. As states will always vote in accordance with regional representation conventions (or in the case of the ICC, minimum voting requirements), to the extent that regional groups can work to reduce competition or focus support, those candidates are all the more likely to be elected. At least in the ICJ experience, sub-regional co-ordination appears to have a greater impact in elections arising from casual vacancies between triennial elections.

## **19. *Voting process***

- 19.1. Decisions on final voting instructions for elections to the ICJ or ICC are usually taken in capital by the legal advisor or similar high ranked MFA civil servant, or in some cases, by the Foreign Affairs Minister. Normally, this decision is made on the basis of information and views provided by the Permanent Mission. It is not clear, to the extent to which this information includes views on merit, that this has an impact on the voting decision over considerations of bilateral and regional relations. It seems that in some cases there is a disconnection between the people who have the relevant information regarding merit, and the ultimate decision-maker. This would appear to differ across different states depending on their approach to assessing candidates and their views on how this information should be used in the decision-making process.
- 19.2. Before the election, the MFA usually provides detailed voting instructions. These instructions usually only relate to the first round of voting. However, some voting instructions cover multiple rounds and alternative voting scenarios. In states that provide voting instructions for only the first round, Permanent Mission staff have autonomy to make voting decisions between voting rounds. This, it might be said, may lead to a greater influence of political considerations and vote trading on elections that run to multiple rounds because the decision-makers are present in the voting chamber and the state's vote is not committed to any particular candidate.
- 19.3. In some states, particularly smaller states, voting decisions are taken by the Permanent Representative in New York. This may enable the Mission to take a coherent view on the relative merits of candidates, but, as indicated above, it also may result in a greater politicisation of the voting process as Missions may be more inclined to engage in vote trading and campaigning states have direct access to the decision-maker.

- 19.4. States vote for judges in the General Assembly and Security Council for the ICJ and in the ASP in New York for the ICC. Interestingly, the ICJ elections take place shortly after the Informal Meetings of Legal Advisors of Ministries of Foreign Affairs held on the margins of the meeting of the Sixth Committee of the General Assembly. Some interviewees said that the legal advisors meeting can be an important forum for seeking support and lobbying for the ICJ, as legal advisors often help each other to be elected to the courts.
- 19.5. With regard to the ICJ election process, some interviewees criticized the influence that the vote of the Security Council can have on the vote in the General Assembly. The Statute requires that the two bodies vote independently, but in practice there is communication between the two organs. If electors in the General Assembly know that a candidate has reached the requisite majority in the Security Council, this can work in his or her favour in the General Assembly. Therefore, the P5 and powerful non-permanent members can, to some degree, effectively determine the outcome of the election. This of course means that they can ensure that the P5 convention is not threatened.
- 19.6. In casting votes for ICJ judges, there is no minimum number of votes and states can abstain. Some interviewees complained that states often do not use the full number of votes available to them, causing the election to run to multiple rounds until candidates reach the required absolute majority.
- 19.7. For the ICC, states are required to cast votes in accordance with the minimum voting requirements and can only abstain if their ballot meets the minimum voting requirements by using fewer votes. Similarly, in the ICC elections, a number of interviewees criticized the two thirds majority threshold. Some thought that the high threshold was the reason why there were an extremely high number of voting rounds in the first elections. When an election runs to multiple rounds, this can increase the influence of political considerations on the final result, as states lobby and trade votes between each round. Candidates can be pressured to withdraw, reducing the competition for seats. In the ICC, the withdrawal of candidates can result in the regional or gender minimum voting requirements no longer applying.
- 19.8. Some interviewees said that the ICC voting process is too complicated:
- “We have not come to anything definitive yet, but I think the method has to be simplified. I would 100% prefer the ICJ procedure, because it’s simple and straightforward. You come, boom, boom, boom, boom, and you vote.”<sup>71</sup>
- 19.9. There was some discussion by interviewees as to whether states should be permitted to cast ‘negative’ votes against ICJ or ICC candidates they do not consider to be adequate quality. In the ICJ election process, this may be a way to enable states to take a stand against clean slate candidates. This approach would necessitate a change to ICJ and ICC voting rules.

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<sup>71</sup> Interview T5, 11.

## 20. Screening mechanisms

***“I think it was not because I was bad [that I lost], and had I won, the reason would have not have been that I’m so good.” (Interview T32, 14)***

***“I would like merit to be given a higher priority than I fear it is.” (Interview T36, 4)***

- 20.1. One of the most striking aspects of the research findings was that although interviewees recognised the need for merit in the selection of ICJ and ICC judges, they acknowledged and accepted that other extraneous factors are likely to play a significant, if not decisive, role. Some states were very focussed on this issue of merit, but for the vast majority of states, it was just one of several general considerations to be taken into account. Amongst people involved in the system there were quite low expectations in this regard, some interviewees considering it to be sufficient if the judges are “not necessarily the best lawyers in the world [but] good enough to go ahead with the work”.<sup>72</sup> There is a general consensus, however, that the system for elections of judges to the ICJ has, on the whole, fortuitously produced candidates of extremely high quality, probably due to “national pride, to come up with good candidates”<sup>73</sup> even though the system is not particularly well adapted to ensuring that those candidates are nominated and elected. Views on the outcomes of the ICC elections were more mixed.
- 20.2. A number of interviewees expressed concern at the low importance accorded to merit and said that they would welcome proposals to ensure merit is taken more seriously in the election process. Others said that proposals to change dominance of politics in the elections are in the realm of the “will of the angels”.<sup>74</sup> However, seeking to increase the importance of merit would ensure that there is reduced margin for error in election choices and that the election system would be best adapted to ensuring the most meritorious candidates are selected. This is all the more important to correct the effects of a politicised national nomination process if it has led to the nomination of an inappropriate candidate.
- 20.3. However, most acknowledged that this would take a fundamental value shift at the international level that would swim against the tide of international practice. Yet, if the international electorate is to perform its role in vetting the suitability of candidates for judicial office against the statutory criteria, it would appear that this shift must take place, even if it is incremental.
- 20.4. As mentioned above, some states do use the opportunities available to them in the campaigning and election process to assess the merit of candidates and use this information to guide their voting decisions. However, states need to be motivated to do this. Many interviewees said that there was a lack of reliable and easily accessible information about candidates, and little time to engage in independent investigations. For the ICJ, states must submit a CV of the

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<sup>72</sup> Interview T44, 15.

<sup>73</sup> Interview T3, 8.

<sup>74</sup> Interview T58, 13.

candidate. For the ICC, states must submit a CV accompanied by a statement setting out the candidate's compliance with the criteria in the Statute. However, usually these statements lack detail and are not terribly informative.

- 20.5. The information available to the ICJ and ICC electorates could be developed to include a CV based on a set format, a detailed and fully substantiated statement as to the candidate's compliance with the individual criteria, and, as discussed earlier, a detailed statement of the process by which he or she was nominated. If possible, it may be a useful part of this process if states defined the professional experience and competencies they consider to constitute 'merit'. This could be useful in developing both nomination and election processes. It may be a point for further discussion whether definitions of the criteria should emanate from international political bodies or be defined by states in accordance with the particular legal culture.
- 20.6. If states could be encouraged to provide detailed information on their candidates, perhaps this could be a way to increase the importance of merit in the election process. Clearly, states will be free to ignore it. But if the information is released into the public domain it may begin to have a greater impact on voting decisions.
- 20.7. Another way to bolster this process could be to establish an independent international body to provide information on candidates and possibly assess their relative merit. Some interviewees were in favour of such a proposal, although they acknowledged that there would be range of consequential questions regarding the membership, selection and mandate of such a committee. The majority of interviewees, however, were either not in favour of any type of screening body, as they considered it to be entirely unfeasible or unacceptable in practice or they had never given it any thought. The Rome Statute provides for the possible establishment of an 'Advisory Committee on Nominations', but does not state what its mandate might be.<sup>75</sup> It might be asked whether it would be useful for states to re-open discussions on this issue in the ICC context, and perhaps also consider the utility of such a mechanism for other judicial elections. However, it would appear that in the current context, it would be unlikely that states would support such a proposal. One interviewee commented that:

"[s]tates don't want to have their candidatures scrutinised before they go to the election, it's just a matter of national sovereignty that you can submit your candidature...that's just the spirit and the attitude. So I don't really think that's ever going to happen".<sup>76</sup>

- 20.8. In relation to the ICC, some international NGOs have taken a role in screening ICC candidates by inviting candidates to participate in discussion panels and answer written questionnaires. The aim of these activities has been to elicit and publish more information about candidates. Some interviewees expressed concerns about NGOs being involved in this manner, because they could not be considered to be objective and for this reason they cannot produce "completely

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<sup>75</sup> 'The Assembly of States Parties may decide to establish, if appropriate, an Advisory Committee on nominations. In that event, the Committee's composition and mandate shall be established by the Assembly of States Parties': Article 36(4)(c), Rome Statute.

<sup>76</sup> Interview T3, 15.

dispassionate and neutral information”<sup>77</sup> whilst others were strongly supportive of these activities because they carry out the type of critical assessment that states cannot due to political sensitivities. A number of interviewees said, however, that they believe NGOs should refrain from lobbying for candidates.

## **21. Issues to discuss - elections**

- **Are there other considerations not mentioned here that are important in this part of the process?**
- **Is it possible to increase the emphasis on merit and competition in the election process?**
- **If so, how could these issues be addressed with regard to vote trading and regional groups?**
- **Would the screening process envisaged in the ICC Statute be welcome in some form or another, and if so in which form? Could a similar process be used in other courts?**
- **Would requiring states to provide more information on candidates be a useful development?**
- **To what extent is it realistic to expect that there could be significant changes in these decision-making processes?**
- **To what extent can, or should, the views of non-state actors (bar and professional associations, NGOs, judges associations etc) be integrated into the decision-making process?**

## **HOW SHOULD THE BENCH BE COMPOSED?**

*“[I]n the end, it's really difficult to say objectively who's a good candidate and who is not. It's always a judgement-call based on fairly subjective criteria. It's just like recruiting in the world of private corporations or otherwise for civil service. There are no really hard criteria in the end, in the end it's a judgement-call...” (Interview T3, 13)*

*“...of some concern to me, on the issue of selection in the nomination appointment of judges, is a lack of a fair representation of female judges international courts and tribunals”. (Interview T27, 5)*

A number of rules and conventions govern the composition of the ICJ and ICC, both the individual criteria for judges and the overall composition of the bench.

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<sup>77</sup> Interview T45, 6.

## 22. *ICJ composition*

- 22.1. The ICJ is composed of 15 independent judges.<sup>78</sup>
- 22.2. Judges must:
- Be of high moral character;
  - Possess the qualifications required in their respective states for appointment to the highest judicial offices; OR
  - Be jurisconsults of recognized competence in international law.<sup>79</sup>
- 22.3. Each judge must be of a different nationality.<sup>80</sup> The Statute recommends that states elect a body of judges that is representative of the main forms of civilization and the principal legal systems of the world.<sup>81</sup>
- 22.4. The latter recommendation is met through the convention of equitable geographical representation. This distributes the fifteen seats of the court in accordance with the five UN General Assembly geographical groups, which follow the distribution of membership of the Security Council. As a result, Africa has 3 seats, GRULAC 2 seats, Asia 3 seats, WEOG 5 seats and Eastern Europe 2 seats. Although there is no formal requirement that they form part of the bench, judges from the five permanent members of the Security Council are always elected to the Court, in what is known as the 'P5 convention', reducing the seats available to WEOG and Asia respectively to 2 and Eastern Europe to 1. Some states are almost continuously represented on the Court, notably Germany and Japan, notionally leaving only one seat available for other candidates from WEOG and Asia.
- 22.5. Within the seats available to each regional group, there are 'sub-regional' conventions e.g. the distribution of WEOG seats between Southern and Northern Europe states in WEOG and African seats between Arabophone, Francophone and Anglophone candidates. However, these sub-regional conventions are often vigorously contested and can apparently be overturned by lobbying.
- 22.6. A number of interviewees criticised the current geographical distribution conventions in the Court and asserted that particular regional groups are under-represented. A number of interviewees also criticised the P5 convention, whilst others variously said that it is not feasible to change it, that it does not cause any particular difficulties or that it is in fact beneficial to the international system. The broader discussion about Security Council reform and any possible increase in the number of judges is outside the scope of the research, which has critically considered the system as it operates within the framework of the current composition rules. The research outcomes on these issues may be relevant to the wider debates regarding representation within the United Nations system.

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<sup>78</sup> Articles 2 and 3, ICJ Statute.

<sup>79</sup> Article 2, *Ibid.*

<sup>80</sup> Article 3, *Ibid.*

<sup>81</sup> Article 9, *Ibid.*

- 22.7. In practice, there are a range of views as to the appropriate professional background for ICJ judges. The ICJ Statute provides very little guidance. The different views often depend on the relative position in the domestic context of the various groups from which candidates may emerge, in particular their access to and proximity to government. There is a general view that diplomats are not necessarily the most effective judges, as they may be inclined to seek compromises which may be less practical as the case load of the Court increases and more efficient adversarial case management skills are needed. One interviewee said that often ex-diplomats are chosen because it is seen as a natural part of their career progression “without necessarily having much of a mind to the skills that you pick up along the way, and how they might equip you to be a judge as opposed to a political legal advisor”.<sup>82</sup> Another noted that states often like to choose diplomats “because they can manage them and they look all right. They know their stuff, they speak the language, they have good morals and so on, they’re very civilized...”.<sup>83</sup> Academics are often said to lack the ability to manage litigation: “[E]verybody has had experience of lots of people with brilliant academic careers who’d be appalling judges.”<sup>84</sup> National judges are perceived to lack the requisite knowledge of international law, hence the category of persons who ‘possess the qualifications required in their respective states for appointment to the highest judicial offices’ in Article 2 of the ICJ Statute is apparently not often used. As one interviewee said: “I prefer a known lawyer to an unknown judge, because an unknown judge maybe knows very, very little about international law.”<sup>85</sup> On the whole, the candidates who are selected usually have a range of different professional experiences in international law which may span the diplomatic service, private legal practice, the judiciary, academia and government.
- 22.8. ICJ candidates have until relatively recently been individuals nearing the end of their professional careers. The ICJ was seen as a final distinction in a distinguished career. This practice appears to be changing as younger candidates are nominated. Very few women have been nominated to the ICJ and there has only been one female judge to date (apart from ad hoc nominations). A number of interviewees expressed concern about gender representation, but few, if any, states have adopted concrete steps to ensure that potential female candidates are identified. The developments as to gender representation in the ICC appear to be starting to focus the minds of at least some decision-makers on gender issues in the ICJ.

### **23. ICC composition**

23.1. The ICC is composed of 18 judges.<sup>86</sup>

23.2. Judges must:

- Be of high moral character, impartiality and integrity;<sup>87</sup>

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<sup>82</sup> Interview T11, 9.

<sup>83</sup> Interview T56, 4

<sup>84</sup> Interview T19, 3.

<sup>85</sup> Interview T41, 13.

<sup>86</sup> Article 36(1), Rome Statute.

- Possess the qualifications required in their respective states for appointment to the highest judicial offices;<sup>88</sup>
  - Have expertise in:
    - criminal law and procedure and the necessary relevant experience in criminal proceedings as a judge, prosecutor, advocate or similar (List A);<sup>89</sup> OR
    - relevant areas of international law (such as international humanitarian law and human rights law) and extensive experience in a professional legal capacity that is relevant to the work of the ICC (List B);<sup>90</sup> AND
  - Have an excellent knowledge of and be fluent in at least one of the working languages of the Court.<sup>91</sup>
- 23.3. Each judge of the Court must be of a different nationality.<sup>92</sup> The Rome Statute requires that states, when electing judges, ‘take into account’ the need for the representation of the principal legal systems of the world, equitable geographical representation and fair gender representation,<sup>93</sup> and the need for judges with particular legal expertise on specific issues, for example, violence against women or children.<sup>94</sup>
- 23.4. For the first elections, the Statute required that at least nine judges be elected from List A and at least five judges from List B and that subsequent elections maintain the same proportion of judges on the bench.<sup>95</sup> The Statute does not set quotas for geographical representation and fair gender representation; although, as discussed above, resolutions of the ASP that set down minimum voting requirements for the election of judges effectively constitute rules that dictate the composition of the bench.<sup>96</sup>
- 23.5. In practice, the candidates in the first elections were a mix of diplomats who had been members of their states’ delegations to the Preparatory Committees, academics with involvement in the drafting or ratification of the Rome Statute and national criminal judges. There remain questions as to whether the balance struck between List A and List B is the right one: “[N]ow whether this list A and B requirement really is conducive to having better candidates, I’m not so sure. To some extent, I would question the wisdom of having such a high number of international lawyers required.”<sup>97</sup> Apparently, “more than 50% had no prior experience or knowledge of a judicial process”.<sup>98</sup> One interviewee said that the ICC judges who did not have a judicial background were “completely at sixes and sevens. They didn’t know what a warrant was or what the originating procedure

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<sup>87</sup> Article 36(3)(a), *Ibid.*

<sup>88</sup> *Ibid.*

<sup>89</sup> Article 36(3)(b)(i), *Ibid.*

<sup>90</sup> Article 36(3)(b)(ii), *Ibid.*

<sup>91</sup> Article 36(3)(c), *Ibid.*

<sup>92</sup> Article 36(7), *Ibid.*

<sup>93</sup> Article 36(8)(a), *Ibid.*

<sup>94</sup> Article 36(8)(b), *Ibid.*

<sup>95</sup> Article 36(5), *Ibid.*

<sup>96</sup> Resolution ICC-ASP/3/Res.6.

<sup>97</sup> Interview T3, 11.

<sup>98</sup> Interview T24, 10.

should be, or how you handle a trial...”.<sup>99</sup> As with the ICJ, most candidates have a complement of different professional experiences spanning practice, academic, the diplomatic corps and civil service and also had some degree of international exposure. ICC candidates have generally been mid-late career, around 40-50 years old. In many cases, women candidates were apparently preferred as it was considered to be easier for them to be elected, due to the minimum voting requirements.

## 24. Diversity

- 24.1. It is now widely accepted both at domestic and international level that ‘a diverse judiciary is an indispensable requirement of any democracy’.<sup>100</sup> What is meant by diversity is not, however, necessarily the same in the domestic and international courts. The need for fair geographical representation is particularly important at the international level and much of the focus of attention is on which different regions and states are represented on the courts. Other aspects of diversity such as gender, ethnicity and experience tend to attract less attention. The lack of gender balance, in particular, is a cause for concern in many international courts.
- 24.2. The provisions of the ICJ Statute provide very little guidance on the overall composition of the Court. They leave any decisions as to appropriate gender, linguistic and expertise representation to the discretion of states. Some interviewees expressed views on the types of factors they consider it would be desirable for states to take into account in nominating and election judges to the Court, i.e. fair gender representation, representation of a range of languages and ethnic diversity. Furthermore, although a number of interviewees expressed views on the relative merits of having academics, national judges or diplomats as judges as discussed above, there does not seem to be support for a List A and List B approach in an inter-state court such as the ICJ as there is in an international criminal court.
- 24.3. The Rome Statute and subsequent ASP resolutions address some of these aspects of composition. They establish certain minimum requirements, retaining some flexibility for the selection of other candidates who also meet the individual criteria. Generally, the composition rules relating to the ICC are considered to be a positive development. Some interviewees expressed concern that the rules may encourage a lowest common denominator approach and exclude good candidates who do not fit the desired profile. There still remain views that to ensure particularly gender diversity may require a compromise in quality which would seem to be at odds with the fact that there are a large number of qualified potential candidates who are women: “The second best [candidate] will work too, if they represent another legal system completely different from the first, and if the candidate is a woman, is that going to achieve a greater good than having the absolutely top best?”<sup>101</sup> However, if all candidates meet the individual criteria

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<sup>99</sup> Interview T24, 11.

<sup>100</sup> Lady Hale, *The Appointment and Removal of Judges: Independence and Diversity*, International Association of Women Judges 8<sup>th</sup> Biennial Conference 3-7 May 2006 Sydney, Australia. p. 2.

<sup>101</sup> Interview T10, 24.

and there is sufficient competition for seats, which it appears that international system is more than capable of producing, such composition requirements can be an effective way to ensure a diverse and representative bench.

## **25. *Issues to discuss - composition***

- **What forms of diversity need to be encouraged on the ICJ and ICC?**
- **Are the current rules sufficient to promote a diverse and representative bench?**
- **Is the way in which the rules are interpreted and applied in need of change? If so, how can such changes be brought about?**

## APPENDIX: PROJECT METHODOLOGY

In order to examine the procedures for the nomination and election of judges to the international courts, it was decided that the project should focus on two of the major international courts whilst also having regard to the nomination and election procedures for judges of other international and regional courts and tribunals. This would provide sufficient depth of information regarding two institutions, but also allow this information to be placed in the broader context of international judicial appointments processes and developments at the national and international levels.

The two courts chosen to be the focus of the study were the International Court of Justice, the only international court of general jurisdiction and primary judicial organ of the United Nations system and the International Criminal Court, established under the Rome Statute that entered into force in 2002. Both are 'international' courts, open to all states; both have broad membership, so that not every participating state can have its 'own' national judge on the bench.

These courts were chosen because they can be seen to represent two different models of international judicial nomination and election procedures. As the older model, the International Court of Justice uses rules and procedures based on those of its predecessor, the Permanent Court of International Justice. These rules provide only minimum individual selection criteria and requirements for the overall composition of the bench while the guidance for the conduct of elections is purely advisory. In contrast, the International Criminal Court represents a newer and more formalised judicial selection model. It applies a complex procedure for the nomination and election of judges and formal rules which are designed to ensure a balance in the composition of the court based on geographical representation, gender and legal expertise.

The literature search and background paper prepared at the beginning of the project indicated that there were few academic writings on this subject and even less information available in the general public domain. This project would be one of the first attempts to gather detailed information on the nomination and election processes for international judges. The key to this subject appeared to be practice, rather than formal legal rules, so the project team focussed the research on gathering baseline empirical qualitative and quantitative data.

The project was guided by an Advisory Committee, comprised of pre-eminent experts on international law, chaired by Lord Woolf, former Lord Chief Justice of England and Wales. The Advisory Committee was consulted on an ongoing basis as to the focus, structure and conduct of the research. However, it was clear that all responsibility for the research would rest with the project team.

The main objective of the project was to enhance the legitimacy and credibility of the international courts. As a result, methodological issues arose as to whether the project should consider individual candidates and/or elections. In conjunction with the Advisory Committee, it was decided that in light of the project objectives it would not be appropriate or desirable to focus on individual cases. Rather the project should focus, as the first sustained study in this field, on the broader processes and issues raised by the nomination and election of international judges, accented by individual cases,

presented in an appropriate manner. To meet the objective of the project, it was felt that it would be sufficient to bring these procedures and issues to light. This would be done by studying a sufficient sample of previous nominations and elections through the questionnaire and interviews. No particular number was decided, information was simply gathered on as many nominations and elections as practicable.

Based on the information gathered, the project would also aim to make recommendations and proposals for reform as appropriate, with a view to contributing to the international policy debate on the nomination and election of international judges for the two main courts under study and also other existing and future international courts and tribunals.

On this basis, the key research questions identified were:

- (a) How do states nominate candidates for the ICJ and ICC?
- (b) How do the election procedures for those courts operate in practice?
- (c) What changes, if any, are needed to the nomination and election procedures?

To investigate these questions, the empirical research involved three main phases: first, an international questionnaire on national nomination processes that was distributed to a wide range of international judicial, legal and governmental actors; second, interviews with staff members of the Permanent Missions to the United Nations of a range of countries in New York to elicit information on lobbying and election procedures; and third, nine country case studies covering the five UN regional groups to conduct interviews with key actors at the national level to gather more in depth information about how candidates are selected for the ICJ and ICC.

The project research was based on qualitative research methods, therefore it did not seek to adopt quantitative sampling methods to create a statistically representative sample. Instead, in order to ensure that the data gathered was as balanced and unbiased as possible, covering a wide spread of different perspectives and experiences, the project team surveyed and/or interviewed a broad range of individuals, covering countries in the five UN regional groups and the range of professional groups involved in judicial elections (i.e. diplomats, government legal advisors, members of the Permanent Court of Arbitration national groups, international and domestic judges, UN staff, practising lawyers and academics). In particular:

- In January and February 2007, the questionnaire was distributed in both hardcopy and electronic formats to approximately 200 recipients, including: at least one or two staff members of all of the Permanent Missions in New York focussing on legal advisors and elections officers where possible, selected members of the Permanent Court of Arbitration National Groups (based on the contacts of the project team, augmented by a selection of other countries based on geography, language, legal culture and previous nominations), selected Ministry of Foreign Affairs and Ministry of Justice Legal Advisers (based again on the contacts of the project team, augmented by a selection of other countries based on geography, language, legal culture and previous nominations), academics, contacts from Fifth Session of the Assembly of States Parties to the Rome Statute of the International Criminal Court in The Hague in November 2006 and other relevant individuals identified by contacts of the project team. The questionnaire was also distributed on an ad hoc basis to interviewees and

- other persons met by the project team and posted on the internet, accessible by the use of a password that was emailed to recipients. Forty-six responses were received, spread across the different professional groups to which it was addressed, with lower number of responses received from African and Asian countries than other regional groups.
- In early 2007, interview invitations were sent to 182 interview invitees from the Permanent Missions in New York. This list was constructed based on the frequency of previous nominations and successful campaigns, previous cases before the ICJ and regional, sub-regional and linguistic spread. In March 2007, interviews were conducted with 19 staff from Permanent Missions to the United Nations from 17 countries (representing all UN regional groups except Asia). The Permanent Mission staff interviewed ranged from Permanent Representatives to Third Secretaries and, where possible, included the legal advisers and the elections officers for those missions that have these posts. Subsequent attempts were made to interview staff from Asian Permanent Missions but no responses were received.
  - In mid-2007, a final list of nine case study countries was selected based on the following criteria (not in any particular order):
    - Countries from all UN regional groups, and where funding allows, sub-regional groups.
    - One or two Permanent Members of the Security Council.
    - Countries that represent the range legal systems and legal cultures.
    - Countries that represent different linguistic groupings (at least francophone, anglophone and hispanophone countries).
    - Developed and developing countries.
    - Countries with a previous record of nominations and perhaps also a record of successful campaigns to either ICJ or ICC or, ideally, both.
    - Countries with different national judicial appointment processes (ranging from strong executive involvement, judicial appointment commissions, parliamentary involvement etc), which may or may not be applied to international judicial nominations and different international judicial nomination procedures (i.e. in those countries where there is no Permanent Court of Arbitration National Group to make ICJ nominations).
    - Countries of interest from recent elections.

A list was constructed for each country of approximately 20-25 potential interviewees composed of individuals directly involved in nominations and elections of judges to the ICJ and ICC and other outside commentators or observers. Potential interviewees were identified through research of United Nations documents, Permanent Court of Arbitration documents, documents from organisations such as the International Law Association and the *Institut du droit international* and the internet and advice given by the Advisory Committee and contacts of the project team in the case study countries. Potential interviewees were also identified by personal recommendations of other interviewees. In many cases, a 'snowball' effect developed, with interviewees recommending other potential interviewees and so on. The criterion for selection was individuals who would be likely to have detailed knowledge of the nomination process at the

national level. Approximately 8-10 interviews were conducted in each case study country, interviewees generally including at least one government representative, PCA national group member, current or former international judge or candidate and academic.