



RAISING THE BAR

IMPROVING THE NOMINATION
AND ELECTION OF JUDGES TO THE
INTERNATIONAL CRIMINAL COURT

OPEN SOCIETY
JUSTICE INITIATIVE

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ABBREVIATIONS

AU	African Union
CNG	Canadian National Group
CoE	Council of Europe
CV	Curriculum vitae
FCO	Foreign and Commonwealth Office
ICC	International Criminal Court
MVR	Minimum voting requirements
WEOG	Western European and Others Group
GRULAC	Latin America and the Caribbean Group
PCA	Permanent Court of Arbitration
NGO	Non-governmental organization

EXECUTIVE SUMMARY AND RECOMMENDATIONS

A credible process for judicial nominations and elections is critical to having a strong and legitimate judiciary; it is a basic pillar of any effective court, whether national or international. As concerns increase regarding the conduct of International Criminal Court judges on and off the bench, more attention is falling on how ICC judges are selected, and how that process can be improved. ICC judges have a critical role to play in securing the institution's long-term health: managing its proceedings well, authoring timely and authoritative jurisprudence, and providing an overall sense of mission and purpose. Without a proper process for nominating and electing judges, the ICC as an institution will suffer.

Raising the Bar examines—through ten country profiles—the process of how potential ICC judges are nominated at the national level. It also sheds light on ICC judicial election campaigns, the practice of vote trading, and the role of the ICC Advisory Committee on Nominations of Judges. In so doing, it seeks to contribute to ongoing reform efforts at the Court, help the ICC reach its full potential, and set a high bar for other criminal courts and tribunals.

The report draws on a combination of desk-based research and primary source interviews, principally conducted by the Open Society Justice Initiative between January and May 2019. The Justice Initiative conducted 25 interviews with current or former ICC judges, ICC staff, international civil society organizations that have a history of engagement with the Court, representatives of government ministries or diplomatic delegations, and two former members of the Advisory Committee. The ten states the report focuses on (Argentina, Canada, Costa Rica, Germany, Italy, Republic of Korea, South Africa, Uganda, United Kingdom, Uruguay) were chosen based on a range of factors, including a sufficient amount of reliable information, a desire to include states from as many of the ICC's five regional groupings as possible, and prioritization of those states that have nominated multiple candidates to the bench.

RAISING THE BAR DRAWS FIVE BROAD CONCLUSIONS:

First, too few ICC States Parties nominate candidates to the bench. A close review of all ICC nominations to date reveals that while slightly more than half of all ICC States Parties (72 out of 122) have nominated at least one candidate for election to the Court, only one-third (38 of 122) have ever nominated more than one candidate. Remarkably, just ten states have nominated nearly half of all the ICC judges to serve to date (24 judges of a total of 49). Those ten states account for less than one percent of the ASP's overall membership. These figures suggest an alarming concentration of the ICC's judiciary in only a handful of states, as well as scant engagement of the majority of States Parties in the judicial selection process. To ensure a broader pool of qualified, competitive candidates that more fully reflects the breadth of the ICC's membership, more states should participate in the nomination process.

Second, while the standards and procedures enunciated in international law—and the Rome Statute—governing the nomination of judicial officials are among the cornerstones on which the ICC's independence should be built, in practice there is a lack of open, transparent, and merit-based processes at the national level. Most States Parties do not have a framework in place that governs nominations of judicial candidates to the ICC. Rather, it appears that they select candidates in a largely ad hoc manner, frequently privileging personal or political connections at the expense of transparency, competitive opportunity, and merit. Information on judicial vacancies in the ICC—including the existence of open positions, as well as criteria and procedure for nomination—is seldom made accessible to the general public. The Justice Initiative's research confirms several instances of nominees being approached privately by their government, rather than nominated through open, competitive processes.

Third, the expertise requirements established in the Rome Statute are failing to ensure that elected judges possess the experience required to manage complex criminal litigation. Knowledge and experience in criminal law and procedure, as well as substantial experience in managing complex trials, are key to the effective exercise of judicial functions at the ICC and should be required of all judges elected to the ICC bench—not just some of them. In particular, so-called “List B candidates” (those candidates nominated for having “established competence in relevant areas of international law ... and extensive experience in a professional legal capacity”) often lack that experience. Our research also shows that the Rome Statute's Article 36(b)(i) requirement of “established competence in criminal law and procedure” has at times been treated too lightly. Similarly, the fact that so many government officials, including career diplomats, have previously been elected to ICC judgeships is a cause for concern.

Fourth, vote trading and a toxic campaigning culture further corrupt the ICC’s judicial election processes. The report reveals that campaigning dynamics often override merit-based considerations: candidates with the strongest campaign, rather than those most qualified, are most likely to be elected. Similarly, the practice of vote trading discounts candidates’ qualifications. The pressure to campaign and the costs involved effectively discourage many states from nominating a candidate to the ICC.

Finally, as it currently functions, the ICC’s Advisory Committee on Nominations of Judges does little to either correct or mitigate these defects in state nomination and voting practices. The Committee currently suffers from a restrictive interpretation of the scope of its mandate, preventing it from rigorously scrutinizing and reporting on a candidate’s suitability for judicial service. It also operates within a timeframe that is out of sync with the current election calendar. As such, the Committee’s report often comes too late to have any impact on how states actually vote.

States have not been consistently good stewards of their duty to responsibly nominate and elect ICC judges. The impact of inadequate nomination and election practices cannot be underestimated. In an effort to ensure more effective, transparent, and merit-based nomination and election processes—and ultimately, to ensure a more credible and legitimate ICC—the Justice Initiative makes the following recommendations:

TO ICC STATES PARTIES:

1. Increase the number of qualified judicial nominees and create the conditions needed to enable more states to nominate qualified candidates.

Only ten States Parties to the Rome Statute (less than one percent of the ICC’s membership) have nominated half of all ICC judges elected to serve to date (24 of 49). To ensure a broader pool of qualified, competitive candidates that more fully reflects the breadth of the ICC’s membership, more states should participate in the nomination process. In so doing, states should consider the following recommendations:

- a. Seek out applicants through a transparent procedure, including a public call for applications that is accessible, widely disseminated, and shared across legal and civil society networks.
- b. Work with domestic bar associations and universities to ensure that international criminal law is part of the national curriculum for law studies.
- c. Consider nominating qualified candidates who are nationals of other States Parties, particularly people from states that may have refrained from putting candidates forward due to the prohibitive costs of campaigning, or for political reasons.
- d. Establish structures that provide sufficient security and incentives to encourage applications from highly qualified candidates. These structures could include steps to ensure job security for after an elected ICC judge completes their term.

2. Develop a national legal framework or, at a minimum, publish a set of fixed rules, for nominating judges to the ICC. These should include a transparent and fair process for shortlisting, interviewing, and selecting candidates.

This legal framework need not be exclusive to ICC nominations, but should at least be applicable to them. Important components of a more transparent process include:

- a. Advertising calls for applications widely with a view to reaching qualified candidates among the national judiciary and legal profession.
- b. Engaging professional associations, NGOs, and other civil society bodies to help disseminate the call for applications and ensure the transparency of the process.
- c. Ensuring that a public comment period exists to afford individuals, associations, and civil society organizations reasonable time to submit views about candidates.
- d. Taking affirmative steps to ensure gender parity in the nomination of candidates, including by taking steps to disseminate calls for application to underrepresented groups, communities, and professional associations.

3. Establish an independent assessment body at the national level that includes members of the national judiciary, legal profession, and civil society, as appropriate, to carry out the national selection procedure and scrutinize applicants' qualifications.

Several countries surveyed in this report have established panels or committees to handle the selection of judicial nominees to international courts, either as part of their domestic nomination process or on an ad hoc basis; however, this is not common practice. States should further ensure that:

- a. The panel or review body is empowered to conduct a thorough assessment of candidates, including by interviewing applicants.
- b. Panel composition should include a diverse set of members with relevant backgrounds, and should be gender balanced. To the extent possible, at least some members should have experience in international criminal law. Where such experience is lacking, states could consider inviting an international expert to be involved.

4. Abstain from nominating candidates who have served as a government official, including in a diplomatic capacity, for at least the last five years preceding the nomination.

In particular, and through the procedures described above, states should ensure that qualified candidates who may lack political or government connections stand an equal chance of being nominated. Requiring abstention from government service (other than in the judiciary) for a sufficient number of years prior to judicial nomination would further ensure independence and impartiality, as well as the perception thereof.

5. Publicly pledge to elect candidates based strictly on merit and to refrain from engaging in vote trading for ICC judicial elections.

**TO THE ADVISORY COMMITTEE ON
NOMINATIONS OF JUDGES:**

1. Conduct a more rigorous assessment of candidates' qualifications beginning with the 2020 election, including:

- a. Developing a common questionnaire for all nominees that asks them to explain:
 - i) their experience in managing complex criminal proceedings; ii) their experience in public international law; iii) specific experience in gender and children matters; iv) track record of impartiality and integrity; and v) fluency in one of the working languages of the Court.
- b. Asking nominees to demonstrate their legal knowledge by presenting evidence of relevant judicial opinions, scholarship, and/or legal practice demonstrating competence in the field of criminal law and/or international criminal law. Administering a written exam to assess these skills should also be considered.
- c. Checking the candidates' references and any other information publicly available (with due regard to the credibility of sources).
- d. As part of its assessment of the candidates' "high moral character," creating a standard declaration for all candidates to sign that clarifies whether they are aware of any allegations of misconduct, including sexual harassment, made against them. Where such allegations exist, the Advisory Committee should weigh the candidates' declaration together with other available information and reporting.
- e. Assessing practical skills such as the ability to work collegially; knowledge of different legal systems; and exposure to and understanding of regional and sub-regional political, social, and cultural environments.

2. For each candidate, document and assess the rigor of the national-level nomination practices as part of the Committee's overall report.

The Committee should include in its report to the Assembly an assessment of the information received regarding the national nomination process and, where necessary, request additional information from the relevant state in order to make that assessment.

3. Develop a framework that clearly communicates which nominees meet the qualifications for judicial service and which nominees do not.

The Advisory Committee should develop a more meaningful way to communicate a nominee's overall fitness for service. The Committee's effort in 2017 to distinguish between "particularly well qualified" and "formally qualified" candidates was a step in this direction but needs further development. In those cases where a candidate is not considered qualified by the Committee, states should not vote for that individual.

4. Prepare a more thorough and detailed report evaluating the candidates' background and fitness for judicial office.

Advisory Committee assessments of each candidate should consider not only their CV, but also other material presented (writing, opinions, decisions, questionnaire, as noted above). They should flag any relevant considerations regarding potential lack of independence or perception thereof (e.g., in cases of recently held government positions). In addition, the assessments should analyze any relevant considerations regarding allegations of workplace misconduct. The questionnaire developed by the 2015-2019 independent panels that have assessed candidates nominated to the Inter-American Commission and Court provides a useful model in this regard.¹

TO THE ASSEMBLY OF STATES PARTIES:

1. In advance of the 2020 judicial elections, amend the Advisory Committee's terms of reference to strengthen its mandate and refine its composition. This includes:

- a. Conducting a more rigorous assessment of candidates' qualifications and the nominating states' national-level processes.
- b. Extending the duration of the Committee's sessions in order to allow it to carry out an expanded mandate.
- c. Excluding any current government officials from service on the Committee, insisting that members must have criminal law or judicial experience, and limiting its membership to no more than three former ICC judges at any given time.

2. Move up the calendar for the 2020 election cycle and subsequent cycles (for judicial nominations and elections) by a minimum of 3 months.

The judicial nomination period for states currently ends approximately five months before the Assembly elections, which is an insufficient amount of time for the Advisory Committee to complete its work and meaningfully influence states' voting decisions. The Assembly should require that the deadline for nominations be at least eight months before elections. The Advisory Committee should meet soon after the period for nominations has been closed and issue its report promptly.

3. Refrain from electing more List B candidates than the minimum required.

Because the minimum voting requirements for 2020 will only require the election of one List B candidate—and because, ultimately, the dual-list system of judges should be eliminated—Assembly members should refrain from electing more than one List B candidate in the coming election cycle.² For future election cycles, and until such a time as List B is eliminated, the number of candidates elected from List B should not exceed the minimum number required.

4. In advance of the 2020 election, issue a resolution that advises states on how to ensure the nomination of highly qualified candidates through independent, transparent, and merit-based procedures.

While national nominations are a matter for states to improve, the Assembly should issue guidelines on how ICC States Parties can improve their national-level nomination processes. The Council of Europe Committee of Ministers' 2012 guidelines for nominating judicial candidates to the European Court of Human Rights offer an illustrative example for such a resolution.³

5. Discourage states from engaging in vote trading.

The Assembly should renew its call to states not to engage in vote trading and to elect candidates based solely on merit.

6. Amend Article 36(3) of the Rome Statute to remove the dual-list system of judicial election and specify that all judicial candidates must have established competence in criminal law and procedure, and that competence in relevant areas of international law is important.

Pending such amendment, the requirements for all judicial candidates should be spelled out such that, while List B still exists, states should be urged to consider expanded competences for candidates nominated in that category. Specifically, the Assembly should:

- a. Interpret the Article 36(3) requirement of “established competence” to mean that candidates should have at least ten years of relevant experience in criminal law and procedure (equal to the number of years of experience required for counsel appearing before the ICC).
- b. Clarify that such “established competence” requires the possession of a law degree.

7. Organize public forums for all judicial candidates in New York and The Hague prior to elections, create a trust fund to finance travel by all nominees, and invite States Parties to contribute to such fund.

Acknowledging the prohibitive costs of campaigning—and in order to ensure greater equality among candidates and elections based on merit—states should be invited to contribute to a trust fund to facilitate the travel of all judicial nominees to public forums to be organized prior to elections.

INTRODUCTION

The establishment of the International Criminal Court (ICC)

was rightly welcomed as a watershed moment in international justice’s long and winding path. Building on important precedents established by the ad hoc tribunals for the former Yugoslavia and Rwanda, the Court’s creation remains one of the 20th century’s outstanding achievements. The Rome Statute, the ICC’s founding treaty, was another such achievement. From a nascent yet growing focus on sexual and gender-based crimes, to a pioneering victim participation regime and detailed provisions for due process rights, the Statute was an invitation to the ICC’s future judges to bring international criminal law and procedure into the 21st century.

Despite the triumph of its creation, the way the ICC has operated to date has failed to meet the expectations of many. From a string of acquittals, dismissed charges, and lengthy proceedings to a continued lack of prosecutions outside the African continent—and concerns about its limited impact in countries where it has been active—the Court has struggled to meet the promise that attended its creation. To be sure, its task was never easy: prosecuting those most responsible for the worst atrocities—in highly charged political environments—was always going to be challenging. But in the two decades since the Rome Statute’s adoption, and the 17 years since its entry into force, a growing concern has emerged among ICC stakeholders—States Parties, jurists, non-governmental organizations (NGOs), and affected communities—that the Court is not performing at the level it should. Now, following a series of legal and political setbacks, a robust discussion is underway about how to review the ICC’s performance and develop a meaningful reform agenda.⁴

Those leading the ICC—including its judges—have a critical role to play in securing the institution’s long-term health: managing it well, steering its trajectory wisely, and providing an overall sense of mission and purpose. Any review of the ICC must therefore consider its leadership: who those individuals are, and how they are chosen. The importance of good judicial leadership, in particular, was underscored at last year’s Assembly of States Parties (“Assembly”), where numerous States Parties emphasized the need for an impartial and independent judiciary.⁵ A number of States Parties also stressed the importance of a transparent and merit-based process for the selection of Court officials, including its judges, and for ICC leadership to follow the highest professional and ethical standards.⁶

The Open Society Justice Initiative has worked on the challenge of strengthening international judicial institutions for many years, both in the context of criminal justice bodies like the ICC, as well as regional human rights courts and commissions in Europe, Africa, and the Americas. In 2017, the Justice Initiative jointly published with the International Commission of Jurists a report titled *Strengthening from Within: Law and Practice in the Selection of Human Rights Judges and Commissioners*, which, for the first time, closely examined the nomination practices of 22 countries from across the three regional human rights systems. The report concluded that, while states employ a wide range of practices in their nomination and selection procedures, “in almost all countries it is clear that the standards for nominations that are set out in a growing body of international norms and jurisprudence have yet to be met domestically.” It also made a series of recommendations for how to strengthen these procedures.⁷

This report goes further. Animated by a range of concerns that have emerged about the conduct of ICC judges on and off the bench, it similarly examines the process of nominations at the national level, and also sheds light on ICC judicial election campaigns, allegations of vote trading, and the role of the Advisory Committee on Nominations of Judges (“Advisory Committee”). In so doing, it seeks to contribute to ongoing reform efforts, help the ICC reach its full potential, and set a high bar for other criminal courts and tribunals.

What has the recent turmoil at the ICC looked like? First, a growing number of controversial judicial decisions have underscored what appears to be a bench caught up in infighting and mutual distrust. The Appeals Chamber’s acquittal of Jean Pierre-Bemba, with its two separate opinions and a dissent,⁸ is perhaps the most notable example of this phenomenon, but it extends as well to what should be relatively simple procedural matters such as the appointment of presiding judges.⁹ These developments have led several commentators who follow the Court closely to highlight “worrying signs of a lack of collegiality within the ICC [j]udiciary itself,”¹⁰ a “climate of rivalry between the judges,”¹¹ and, put more bluntly, a “judicial meltdown” at the Court.¹²

Similarly, our interviews with former and current ICC judges, as well as ICC staff in chambers and a number of state diplomats, found dissatisfaction and frustration among many about the state of the bench. A chambers’ staff member, for instance, criticized the careerist agenda of many judges, stating that, “[they] use the ICC as a trampoline

A growing number of controversial judicial decisions have underscored what appears to be a bench caught up in infighting and mutual distrust.

for their careers, to propel them to other positions in the future.”¹³ A diplomat described what he considered to be “a lack of common mission among many judges,” and the fact that there is “no sense of institution.”¹⁴ A former ICC judge criticized the “behavior and manner of speaking” of some judges, describing them as “[not] a role model for young lawyers.”¹⁵ Particularly disturbing was an instance in which, during his interview with the Justice Initiative, a sitting male judge casually used a sexist slur when referring to a female judge.¹⁶ Other interviewees, including state representatives and ICC staff, noted more generally a lack of collegiality and dialogue among judges.¹⁷

To be sure, disagreement and dissent are necessary and ordinary elements of any court of law. At the ICC, however, what might otherwise be healthy signs of a robust and functioning bench appear instead to be signals of judicial disharmony.¹⁸ The significant delays that have characterized many of the Court’s recent written opinions—from the controversial decision not to authorize the Prosecutor’s request to initiate an investigation in Afghanistan in the “interests of justice,” to the reasoning behind the acquittal of former Ivory Coast President Laurent Gbagbo—are also of particular concern.¹⁹

Second, several ICC judges have filed suit before the International Labor Organization seeking higher pay, a decision that many observers see as a sign of misplaced priorities.²⁰ Although they are amongst the highest paid of the Court’s staff (currently, ICC judges earn an annual salary of €180,000 tax-free and a comprehensive benefits package, including pension benefits),²¹ the petitioners allege that their salaries have not been raised in a significant period of time and that they are not paid as much as their colleagues at other international courts, such as the International Court of Justice.²² As noted by William Pace, convener of the Coalition for the International Criminal Court, “The prosecutor needs funds for more investigators, the trust fund asked for more help to handle reparations for victims. And the president of the Court is suing his own court, that’s how crazy this is.”²³

The concern that animates this report stems from the Justice Initiative’s continued commitment to the ICC and the broader project of international justice that it embodies. The Court’s actual and symbolic importance should not be diminished by the fact that, as an institution, its overall performance has yet to meet the critical challenges before it.

Third, there have been multiple incidents in which the independence and impartiality of sitting ICC judges were called into question. Perhaps most notable was the controversy surrounding Judge Kuniko Ozaki's accepting the position of Japan's ambassador to Estonia, with approval from the majority of her judicial colleagues.²⁴ While Judge Ozaki later resigned from the ambassador post following substantial criticism, the incident raised questions about judicial integrity and threatened to force a costly mistrial in the criminal proceedings then underway against former rebel leader from the Democratic Republic of Congo, Bosco Ntaganda, on whose trial chamber she then sat.²⁵ Similar controversy followed remarks made by Judge Marc Perrin de Brichambaut at a public conference in May 2017, which led to the filing of motions, including for disqualification, in more than one case.²⁶ Although several of those motions were ultimately rejected by the plenary of judges, the incidents that occasioned them raise further questions about judicial propriety and independence, as well as due process and financial concerns given the delays and cost imposed by such litigation.²⁷

In order to better address the roots of these problems, it is critical to consider how ICC judges come to the bench in the first place: how they are nominated by States Parties, and how they are elected by the Assembly of States Parties. Our interviews revealed troubling insights into both stages of this process, which appears to rely predominantly on personal political connections, patronage, and a worrisome culture of vote trading. Rather than using transparent, merit-based procedures, the process is often, as described by the authors of a leading text on international judges, "shrouded in mystery," further noting that "as in any political matter, the heart of the story often lies in handshakes and conversations that are off the official record."²⁸ This report seeks to penetrate this mystery and suggests that the dysfunctions described above are symptomatic of an inadequate process at both the national level and within the Assembly. Improving the ICC must begin with a more rigorous, transparent, and merit-based process for electing its leaders.

The concern that animates this report stems from the Justice Initiative's continued commitment to the ICC and the broader project of international justice that it embodies. The Court's actual and symbolic importance should not be diminished by the fact that, as an institution, its overall performance has yet to meet the critical challenges before it. Indeed, it is the essential importance of the Court's mission—to pursue justice and accountability in the face of atrocity—that compel us to address the ICC's challenges honestly and to offer recommendations for improvement.

Each of the chapters that follows tracks a critical aspect of ICC judicial appointment: the statutory criteria for election, how states nominate candidates, judicial campaigning and elections, and the vetting of judicial nominees. Chapter II outlines the statutory and legal framework for electing ICC judges. In particular, it assesses the qualifications required for judicial election, as well as the requirements for the bench's composition as a whole—including gender and geographical representation, as well as technical expertise. The chapter then distills a series of findings and conclusions, based on the Justice Initiative's interviews and desk research, that highlight how certain statutory provisions fail to ensure that the most qualified and capable individuals

are elected. Chapter III details the nomination practice of ten ICC States Parties and offers related conclusions about state practice more broadly. Chapter IV details the political dimensions of the election process, focusing in particular on three interrelated phenomena: judicial campaigns, vote trading, and regional voting dynamics. These realities illustrate how election to the ICC bench is too often motivated by politics, thereby increasing the likelihood that unqualified or less qualified candidates might be elected. Chapter V examines the Advisory Committee on Nominations of Judges, detailing its membership, mandate, practice, and the reasons it currently does not effectively fulfill its mandate.

METHODOLOGY

This report draws on a combination of desk research and primary source interviews, principally conducted by the Justice Initiative between January and May 2019.²⁹ Because limited written sources of information are available and because, as detailed herein, the ICC's Advisory Committee does not include documentation or analysis in its reports, much of the information gathered here was drawn from primary sources.

In-person interviews with key stakeholders primarily took place from April through May 2019 either in The Hague or in New York City. In some instances, interviews were also conducted by telephone or information was exchanged through e-mail correspondence. The Justice Initiative conducted 25 interviews in all, including with current and former ICC judges, ICC staff who work in chambers, international civil society organizations that have a history of long-term engagement with the Court, representatives of government ministries or diplomatic delegations, and two former members of the Advisory Committee. A model questionnaire was used to guide semi-structured interviews, although questions were tailored as appropriate to the particular subject and expertise of the interviewee.³⁰ Desk research further encompassed a review of relevant academic texts and journals, the Rome Statute and its travaux préparatoires, Assembly resolutions, reports of the Advisory Committee, and materials provided by non-governmental organizations.

The secrecy that surrounds international judicial appointments is notorious, making it a difficult subject to shed light on.

As noted, the secrecy that surrounds international judicial appointments is notorious, making it a difficult subject to shed light on. The Justice Initiative faced this challenge with *Strengthening from Within* as well. While many interlocutors were eager to discuss this subject and agreed it was of great importance, most preferred to do so off the record or without attribution. Consequently, all interviews have been anonymized using a unique code developed by the Justice Initiative. In certain instances, where an individual made multiple comments that could reasonably be traced back to him or her, two or more codes were assigned.³¹

Difficulties in obtaining information about national nomination processes for ICC judges had an impact on the list of countries profiled in Chapter III. States whose candidates were successfully elected to the ICC bench were initially prioritized, but several did not respond to requests for information.³² In total, the Justice Initiative contacted 23 of the 34 countries that have successfully elected a judge to date. However, insufficient information—or, in some cases, no information—was received to merit the inclusion of all of them. The decision to include the ten states that appear in the report (Argentina, Canada, Costa Rica, Germany, Italy, Republic of Korea, South Africa, Uganda, United Kingdom, Uruguay) was based on a range of factors, including having received a sufficient amount of reliable information; a desire to include states from as many of the ICC's five regional groupings as possible, to demonstrate the variety of current approaches to the process; and a degree of prioritization of states that have either successfully nominated a candidate to the ICC's bench or unsuccessfully nominated multiple candidates. Together these criteria ensured that the states selected had a sufficient body of illustrative practice to merit their inclusion.³³

II CRITERIA: THE STATUTORY AND LEGAL FRAMEWORK FOR ELECTING ICC JUDGES

Judges on the ICC serve nine-year tenures.³⁴ They perform their functions independently, which requires them not to engage in activities that could “interfere with their judicial functions or [...] affect confidence in their independence.”³⁵ The Rome Statute further provides that ICC judges be drawn from the principal legal systems of the world, with equitable gender and geographic representation.³⁶ The process for electing ICC judges consists of three broad phases: nominations of candidates by states, a review of candidates by the Advisory Committee on Nominations of Judges, and their election by the Assembly of States Parties. This chapter describes the international legal framework that governs judicial appointments, as well as the Rome Statute criteria and procedural rules developed by the ICC. It then offers a critical assessment of the statutory criteria set forth for ICC judgeships.

A. INTERNATIONAL LEGAL STANDARDS

International law affirms that the process by which judges are selected and appointed, as well as their qualifications, are important elements of judicial independence.³⁷ The European Court of Human Rights (ECtHR) has identified a number of factors to assess the independence of the judiciary, namely “the manner of appointment of its members and the duration of their term of office, the existence of guarantees against outside pressures and the question whether the body presents an appearance of independence.”³⁸ Similarly, the Inter-American Court of Human Rights (IACtHR) has emphasized that, “the independence of any judge presumes that there is an appropriate appointment process, a fixed term in the position and a guarantee against external pressures.”³⁹

International standards on the independence of the judiciary elaborate on these legal principles, emphasizing that the selection of judges should be based on objective, impartial criteria. These standards are described, notably, in the United Nations Basic Principles on the Independence of the Judiciary (endorsed by the UN General Assembly in 1985);⁴⁰ the Universal Charter of the Judge (1999);⁴¹ the Bangalore Principles of Judicial Conduct (2002)⁴² and their Implementation Measures (2010);⁴³ the Burgh House Principles on the International Judiciary of the International Law Association (2004);⁴⁴ and the Rhodes Resolution of the Institut de Droit International on the Position of the International Judge (2011).⁴⁵ These global instruments are complemented by additional standards adopted at the regional level. Collectively, these instruments form the bedrock of normative standards for judicial qualifications on the international bench, including election and nomination procedures and appropriate judicial conduct once judges are in office. They include:

- a prohibition on “discrimination against a person on the grounds of race, color, sex, religion, political or other opinion, national or social origin, property, birth or status, [or other] irrelevant grounds”⁴⁶
- a condition that appointment of judges should be made by law, and that information on the nomination process, election, and appointment be accessible and the process be performed in a timely and effective manner⁴⁷
- a requirement that all decisions affecting the selection, recruitment, and appointment of a judge should be “independent of the executive and legislative powers.”⁴⁸

The rationale behind these requirements, as noted by the UN Special Rapporteur on the Independence of Judges and Lawyers, is that if a selection body is composed primarily of political representatives, there is a risk that these “independent bodies” might become “merely formal or legal rubber-stamping organs behind which the Government exerts its influence indirectly.”⁴⁹

B. ROME STATUTE REQUIREMENTS FOR JUDICIAL ELECTION

Article 36 of the Rome Statute governs judicial appointment to the ICC. It provides that candidates must be nationals of States Parties and must be elected “from among persons of high moral character, impartiality and integrity who are also eligible for appointment for the highest judicial offices in their respective states.”⁵⁰ According to the Statute, candidates can be nominated under one of the following lists: List A, for candidates with competence and experience in criminal law and criminal proceedings, or List B, for candidates with competence and experience in relevant areas of international law such as international humanitarian law or human rights law.⁵¹ Judges must also have excellent knowledge of, and be fluent in, at least one of the working languages of the ICC: English or French.⁵²

Significantly, the Rome Statute does not specify a minimum number of years of professional experience required to qualify for judicial service at the ICC. Rather, Article 36(3)(b)(i) simply requires “necessary relevant experience” or “extensive experience” in one of the fields relevant to the Court. By contrast, counsel who appear before the ICC, as well as senior ICC staff (P-5 level), are required to have a minimum of ten years of relevant professional experience.⁵³

In addition to requirements pertaining to judges as individuals, there are also statutory requirements for the bench as a whole. The Rome Statute requires states to take into account the need for “a fair representation of female and male judges,”⁵⁴ which is ensured through minimum voting requirements (MVRs), as discussed below. Equitable geographical representation is also required amongst the 18 ICC judges and equally regulated through MVRs. The regional groups for this purpose are: African states, Asia-Pacific states, Eastern European states, Latin American and Caribbean (GRULAC) states, and the Western Europe and Others Group (WEOG) of states. There may not be more than one judge of the same nationality on the Court at any one time.⁵⁵ Diversity in the bench with respect to legal expertise is also regulated by Statute. In addition to the criteria established by requirements relevant to List A and List B candidates, judicial elections “shall take into account the need to include judges with legal expertise on specific issues, including—but not limited to—violence against women or children.”⁵⁶

C. ICC VOTING PROCESS AND MINIMUM VOTING REQUIREMENTS

Each ICC State Party has the right to nominate one candidate for each judicial election (with the caveat that if a State Party already has a judge on the ICC bench it cannot nominate another candidate until that judge finishes his/her term). The Rome Statute provides two possible procedures states can use to nominate judicial candidates: i) the process used by the state for the appointment of judges to its highest domestic courts; or ii) the process used by the state for the nomination of candidates to the International Court of Justice (ICJ), i.e., the Permanent Court of Arbitration (PCA) national group.⁵⁷ The period for states to nominate candidates currently lasts 12 weeks, starting 32 weeks before the election itself.⁵⁸ Although the Rome Statute does not require candidates to be nationals of their nominating state, they must be nationals of a State Party.⁵⁹

The ICC’s Assembly of States Parties then elects judges from the pool of nominated candidates.⁶⁰ Ordinarily, judicial elections take place every three years, when the Assembly elects six new judges for nine-year, non-renewable terms.⁶¹ If a judge resigns or dies mid-tenure, the Assembly holds a special election to fill the vacancy.⁶² A judge elected in a special election is eligible for re-election if the remainder of his or her predecessor’s term is of three years or less.⁶³ Otherwise, judges are not eligible for re-election.

As explained further in Chapter V, the Assembly created an Advisory Committee on Nominations of Judges in 2011, which succeeded a review panel formerly convened under the auspices of the Coalition for the International Criminal Court. The Advisory

Committee compiles a non-binding report assessing the qualifications of the judicial candidates' standing for election.⁶⁴

Following the Advisory Committee's review, candidates are elected by the highest number of votes obtained from Assembly members and by a two-thirds majority of voting States Parties.⁶⁵ In most states, the Ministry of Foreign Affairs has the final say in determining which candidates the state will vote for.⁶⁶ The quorum required to hold an election is an absolute majority of States Parties (currently, 62).⁶⁷ All votes are cast by secret ballot.⁶⁸ At the beginning of each election, a State Party has the same number of votes as there are judicial vacancies. This means that, in the case of ordinary elections, each State Party has six votes. If seats remain vacant after the first round of elections, successive rounds of voting take place under the same majority requirements until all of the remaining seats are filled.⁶⁹ In the first judicial elections in 2003, it took 33 rounds of voting to elect 18 judges from among 44 candidates. In the most recent elections in 2017, it took nine rounds to elect six judges from among 12 candidates.⁷⁰ Each successive round is carried out in observance of the minimum voting requirements, described further below.

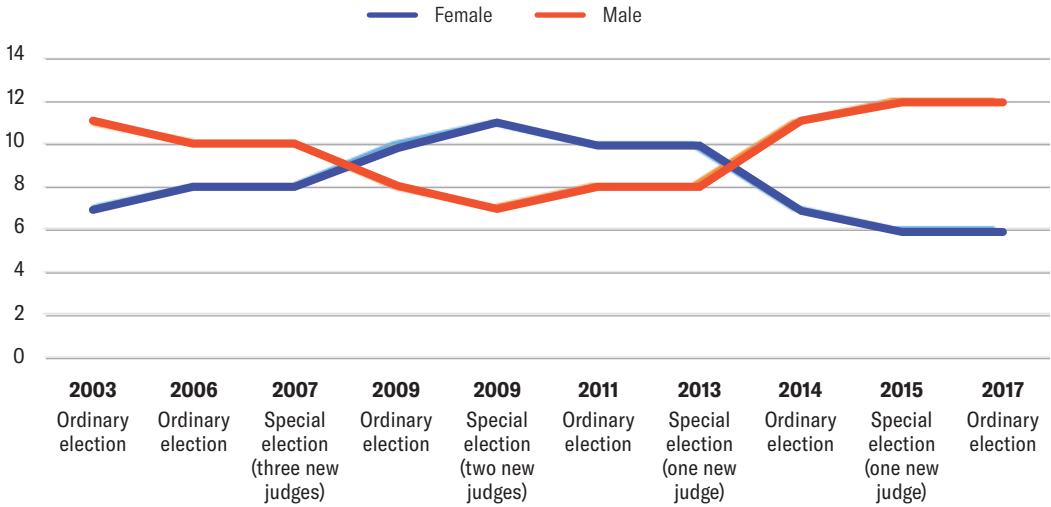
MINIMUM VOTING REQUIREMENTS

Although the Rome Statute does not set quotas for gender and geographical representation, the Assembly has established minimum voting requirements as a way to ensure adequate representation in these areas.⁷¹ Voting requirements vary from election to election as they are established to maintain diversity considering the remaining and departing judges' backgrounds. The requirements compel states to direct their votes in such a way as to guarantee that, at any given moment, the ICC bench is composed of at least: 1) nine judges from List A and five from List B;⁷² 2) six women and six men; and 3) two judges from each regional group (or three if the regional group has more than 16 states).⁷³

States Parties must vote in accordance with the MVRs for their ballots to be valid. As the election progresses, they are adjusted before each round of voting, thus reflecting the updated composition of the bench in light of previous voting rounds. Once an MVR category is met, it is discontinued for the next rounds. Regional and gender requirements cease to apply if they are not fulfilled by the fourth ballot.⁷⁴ Candidates who qualify for both List A and List B may choose on which list to appear.⁷⁵ In practice, candidates who qualify for both lists sometimes run under the one that is most favorable under the MVRs.⁷⁶

Several people interviewed for this report called into question the wisdom of MVRs, in part because they potentially prevent elections "purely on the basis of merit."⁷⁷ By definition, MVRs consider factors other than merit alone, as they also serve an important function in seeking equitable representation, particularly in relation to gender and geography. In addition, regardless of the applicability of MVRs, the Rome Statute's requirements apply to all candidates, regardless of nationality or gender. The larger problem, then, lies with the nomination of unqualified candidates. If states consistently

GENDER COMPOSITION OF THE ICC BENCH AFTER EACH ELECTION



nominated individuals who met the Rome Statute's criteria, candidates' gender and nationality would merely be *additional* factors to consider alongside their qualifications, rather than being perceived as obstructive of merit-based considerations.

As of 2019, six of the 18 judges at the ICC are female, the precise minimum prescribed by the MVRs.⁷⁸ The ICC nevertheless achieved a unique feat among international judiciaries, when, in 2010, over 60 percent of its serving judges were female.⁷⁹ Moreover, when comparing the ICC to a court like the ICJ, which has recently attained its peak in gender parity (three of its 15 judges are women), the relevance of MVRs to secure gender parity becomes clear. Indeed, while international and regional courts have seen an increase in the number of female judges in recent years, the median percentage is quite low, ranging from 20 to 30 percent at most.⁸⁰

By definition, MVRs consider factors other than merit alone, as they also serve an important function in seeking equitable representation, particularly in relation to gender and geography.

D. LIMITATIONS OF THE STATUTORY FRAMEWORK

A number of commentators and interviewees expressed concern that the requirements of Article 36(3) alone are insufficient to ensure the election of qualified judges at the ICC. As described below, interlocutors often emphasized that it is paramount for judges to have competence in criminal law and procedure, as well as experience in managing and conducting complex trials. The adequacy of “appointment to the highest judicial offices,” by itself, for a criminal body like the ICC, is also a matter of concern.

KNOWLEDGE AND EXPERIENCE IN CRIMINAL LAW AND PROCEDURE ARE ESSENTIAL FOR ICC JUDGESHIP, BUT NOT SPECIFICALLY REQUIRED BY THE ROME STATUTE.

As a criminal court, the ICC requires a specific skill-set equal to the nature and complexity of its cases and function. In the words of one sitting judge, “We are a criminal court. We need to understand practice and management of cases.”⁸¹ An ICC staff member expressed the view that, “Criminal law and procedure is the bread and butter of the ICC. Judges arrive [in The Hague] to a hostile environment of unknown procedural law, so we need people that can adapt to this new reality, and that know criminal law and procedure.”⁸²

However, while candidates presented from List A of the Rome Statute are required to possess this set of skills, List B candidates are not. Notably, the distinction between these two lists was the subject of significant discussion during the Rome Statute’s drafting. The International Law Commission’s (ILC) draft statute required candidates, for instance, to have criminal trial experience as well as recognized competence in international law.⁸³ Similarly, the United Kingdom argued in favor of “criminal trial experience and, where possible, recognized competence in international law.”⁸⁴ During the 1996 preparatory committee discussions, however, a group of states commented that “experience in criminal matters is, in part, necessary, but not to the exclusion of other expertise.”⁸⁵ In particular, expertise in international law was thought to be important for a court that would engage, among other matters, in adjudicating the nature of international armed conflicts and violations of the Geneva Conventions, and in the interpretation of international treaties.

Reflecting on this history, a number of interviewees focused on the role that List B judges have played at the Court so far, and questioned whether List B judges should be included at all. For example, according to one member of chambers, some List B judges “bring a human rights agenda to the ICC, which is very different in terms of methodology.”⁸⁶ A diplomat also opined that several ICC judges without a criminal law background have struggled to understand critical concepts.⁸⁷ The diplomat noted that one of the judges previously elected under List B did not have any kind of legal training, and did not possess a law degree.

Other interviewees rejected the need for expertise in international law entirely. Although one judge mentioned that expertise in international law could play a role when

interpreting the Rome Statute as a treaty, another judge noted that, when questions of international law arise, judges do not generally consult List B colleagues. Other options available to judges include requesting amicus curiae briefs or assigning research to support staff.⁸⁸ A state official further opined that, “experts in human rights and humanitarian law are a fit for human rights courts or the ICJ. Criminal lawyers should deal with the criminal trials.”⁸⁹ Thus, while competence in international law is important for the role of ICC judges, knowledge and experience in criminal law and procedure is imperative.

A further problem is that states sometimes disregard the competence requirements in order to increase their candidates’ chances of election. According to a former Advisory Committee member, in one election a candidate was presented under List B due to that year’s favorable MVRs, but “should have been a List A candidate.” As a result, when interviewed by the Committee, “she was unable to answer List B-relevant questions.”⁹⁰ The opposite is also possible: a state can present a candidate with extensive international law experience and limited criminal law experience under List A, if doing so would be more favorable under MVRs.

Overall, our interviews pointed to the need to fundamentally reconsider allowing the election of judges who do not have sufficient criminal law knowledge and procedural experience. While many noted that some judges elected under List B were considered to have exercised their duties competently—and noted that some List A judges were insufficiently qualified for election—their relevant expertise should be considered in relation to the ICC judiciary as a whole, rather than the specific experience of particular individuals. As discussed later, the fact that states have nominated numerous diplomats as List B candidates has further exacerbated the problem.

EXPERIENCE IN MANAGING OR CONDUCTING COMPLEX CRIMINAL TRIALS IS ESSENTIAL FOR JUDICIAL SERVICE, BUT NOT REQUIRED BY THE ROME STATUTE.

In addition to understanding criminal law and procedure, many interviewees argued that candidates must also possess experience in managing or conducting complex criminal trials, a requirement that the Rome Statute does not make explicit. In other words, judicial candidates at the ICC should be experienced judges—technical knowledge of criminal law and procedure is not enough.⁹¹ Judges must have been trained or experienced in managing trials and ensuring the integrity of proceedings, including efficiently managing the parties and participants in what is often a politically charged working environment.⁹² They must also have experience dealing with witnesses, assessing evidence, and managing complex litigation with massive amounts of evidence, in a fair and efficient way.⁹³ As one interviewee put it, “only a trained judge can do this.”⁹⁴ In particular, the complexities of mass-atrocity cases make this experience even more essential but, as one diplomat noted, some judges arrive at the ICC having never managed a trial before.⁹⁵

Our research also indicated that some judges were nominated and subsequently elected under List A with limited experience as a judge, which is arguably insufficient given the scale and complexity of the ICC's cases. Perhaps in anticipation of this problem, a late draft submitted to the 1998 conference in Rome specifically proposed ten years of experience as a minimum requirement for judicial appointment; however, that proposal was subsequently abandoned.⁹⁶ This, again, is in contrast to the ten years of experience that ICC regulations currently require for counsel appearing before the Court, and for other senior staff.⁹⁷ When it was active, the Independent Panel on ICC Judicial Elections (a predecessor body to the Advisory Committee) also assessed candidates against a ten-year experience threshold.⁹⁸

Ultimately, experience in managing complex trials appears paramount for judicial service at the ICC. As Judge Michael Bohlander has put it, "Even after 20 years of modern international criminal justice [...] a domestic judge can learn most of what needs to be known about the development of international humanitarian/criminal law [...] However, 20 years of criminal judicial and case management experience can only be gained through undergoing 20 years of criminal justice and case management experience."⁹⁹

“APPOINTMENT TO THE HIGHEST JUDICIAL OFFICE” IS, BY ITSELF, AN INADEQUATE CRITERION FOR JUDICIAL SERVICE AT THE ICC.

Eligibility for “appointment to the highest judicial offices” of a country’s national court, as the Rome Statute requires, does not per se guarantee that a judicial candidate will possess necessary competence in criminal law and procedure. As one interviewee noted, a country’s highest court may deal with matters of administrative and constitutional law, rather than criminal law and procedure.¹⁰⁰ In such cases, fulfilling the requirements to sit in such national judicial offices would not by itself be relevant for judicial service at the ICC. For instance, in some jurisdictions, higher courts are composed of retired politicians and academics, not judges. Some national systems do not even require a law degree for appointment to judicial office.¹⁰¹ In short, sitting (or being eligible to sit) on a country’s highest court does not ensure that an individual is able to manage complex litigation at the ICC.¹⁰²



NOMINATIONS: COUNTRY PROFILES AND STATE PRACTICE

Many factors can influence a state’s decision to nominate a candidate to be a judge at the ICC, including the prestige of having a judge serving at the ICC, a desire to contribute to international justice, and the furtherance of a historical practice of cooperation with the Court. The decision to nominate a candidate will often depend on the availability of resources to run a campaign, the state’s political and diplomatic leverage at a given moment, and the candidate’s prospect of success. Candidates’ international experience and recognition, as well as their ability to carry out effective election campaigns, may also influence whether they are considered “viable” to nominate. As several commentators have noted, governments sometimes use these posts to reward long-term service to a government or former head of state, or as a means to “remove” controversial political personalities without causing internal uproar.¹⁰³

This chapter summarizes the national nomination practices of ten countries (presented in alphabetical order) that are ICC States Parties, followed by general findings that draw from the interviews conducted for this report, as well as further research and the Justice Initiative’s previous publication, *Strengthening from Within*.

A. COUNTRY PROFILES

The Justice Initiative conducted several interviews with members of state delegations and civil society to gather information about individual countries’ ICC nomination processes. The profiles below illustrate some of the different national systems employed by ICC States Parties. They are not meant to capture—nor are they necessarily representative of—all nomination methods currently used by ICC States Parties. For details on how the following countries were selected, see the Methodology section above.

ARGENTINA

Argentina has had one judge elected to the ICC: Judge Silvia Fernández de Gurmendi, who served from 2010 to 2018. In 2006, Argentina adopted a law implementing the Rome Statute, which establishes that ICC judicial candidates are nominated under the same process used to appoint Argentina's Supreme Court judges.¹⁰⁴ Judges are appointed to the Supreme Court by the country's President, with the approval of the Senate.¹⁰⁵ According to the relevant legislation, the Ministry of Justice and Human Rights must publish the names and background of the person or persons considered for the position¹⁰⁶ on its website, in the Official Gazette, and in two national newspapers. It is unclear how those persons are selected and whether there is a competitive process. The Council of Magistrates, which selects lower level judges through a competitive process, has no role in the selection of judges appointed to the Supreme Court.¹⁰⁷

Candidates must submit a sworn statement on their finances and fulfillment of tax obligations (in accordance with legislation on public service ethics), and disclose any associations they have belonged to in the eight years prior to their application, as well as any employers, clients, or contractors they have engaged with over the same period of time. They must also provide information on any potential commitment that could affect their impartiality.¹⁰⁸ Following publication of the names of the candidates being considered, private citizens and civil society may submit written observations and objections about them. During this time, the Ministry of Justice and Human Rights can also seek information about the candidates from different types of organizations (professional associations, judicial entities, academic institutions, human rights organizations, etc.) and the federal tax office.¹⁰⁹ Based on the information sought and received, the Ministry of Justice and Human Rights (the same government entity that puts forward the candidate) decides whether to submit the candidate to the President. The President then nominates the candidate for Senate approval in open session; senators must formally approve the nomination by a two-thirds majority.

CANADA

Canada has had two judges successfully elected to the ICC. Judge Philip Kirsch, who was also the first serving president of the Court, was elected in 2003 and served until 2009. Judge Kimberly Prost was elected in 2017 to a full nine-year term. While there is no legal requirement to do so, in 2017, leading up to the nomination of Judge Prost, there was a public call for applications.¹¹⁰

Key actors in the nomination process are generally the Department of Global Affairs and the Canadian National Group (CNG), an independent body appointed by the Department of Global Affairs and the Department of Justice. The CNG consists of a Legal Advisor of the Department of Global Affairs, a serving Supreme Court justice, an academic, and a member of the private bar. Open positions for this group are publicly advertised.¹¹¹

When applications are collected, the Department of Global Affairs screens them to ensure that applicants meet the qualifications for the position, and then forwards the

names of qualified individuals to the CNG. The group then reviews all applications and selects the nominee. Significantly, the review and decision is at the group's sole discretion; the Department of Global Affairs is not involved at this point.¹¹² It is unclear whether this process is established by law or based on practice.

Once the CNG chooses a nominee, the Minister of Global Affairs decides whether the government endorses the nominee and assists in the campaign process. If the Minister decides not to endorse the candidate, the CNG's nomination is still filed with the Assembly's Secretariat, but the nominee would not enjoy the financial and political support of the government.¹¹³

COSTA RICA

Costa Rica has never nominated a judge to the ICC. Uniquely, however, a Costa Rican national, Judge Elizabeth Odio Benito, was nominated by another State Party to the Rome Statute (Panama) and elected in 2003.

Costa Rica has developed a legal framework for cooperating with the ICC, which includes provisions on how to nominate judicial candidates.¹¹⁴ Candidates can be nominated by the government, the judiciary, the Legislative Assembly, the national bar association, or any non-governmental organization working on the promotion, protection, and study of human rights.¹¹⁵ The law establishes that an individual is formally nominated following the approval of the Legislative Assembly in an open session and by a simple majority of votes.¹¹⁶

Costa Rica's eligibility criteria require candidates to fulfill the criteria of the Rome Statute, as well as, *inter alia*, be a Costa Rican national, be aged 35 years or older, hold a law degree, and have at least ten years of professional experience as a lawyer or five years of experience as a judge.¹¹⁷

GERMANY

Germany has had two judges elected to the ICC. Judge Hans-Peter Kaul was elected in 2003 and re-elected in 2006 (he served until his resignation for health reasons in 2014), while Judge Bertram Schmitt, who took office in 2015, is serving his term until 2024.

The German government's Guidelines for the Deployment of Federal Employees to a public inter-governmental organization or international institution deal with nominations of civil servants to international organizations.¹¹⁸ The guidelines address, *inter alia*, how German civil servants obtain leave from the German system for international civil service.¹¹⁹ This framework is applicable to judges, military personnel, and other civil servants who, in agreement with the government, accept a position in an international organization.¹²⁰ But they do not cover every element of the nomination process, leaving certain aspects unregulated by a legal framework.¹²¹ Key actors in the nomination process are generally an inter-ministerial panel composed of state secretaries of each ministry, with the Ministry of Foreign Affairs leading and acting in coordination with the Ministry of Justice and the Ministry of the Interior.¹²²

Potential candidates are approached by the Ministry of Foreign Affairs in coordination with the Ministry of Justice; there does not appear to be a public call for applications. Information about vacancies is disseminated through the Judges' Association.¹²³ The inter-ministerial panel discusses and assesses the applications under the coordination of the Ministry of Foreign Affairs. It is unclear whether interviews or other assessments take place. The panel then recommends a candidate to the Ministry of Foreign Affairs, which in turn recommends the candidate to the cabinet. The cabinet ultimately confirms the endorsement of the candidate.¹²⁴ According to the Ministry of Foreign Affairs' report, the German government favors nomination of highly qualified women to high-level positions in international organizations, including the ICC (although both German judges to date have been male).¹²⁵

ITALY

Italy has successfully nominated three judges to the ICC: Judge Mauro Politi served from 2003 to 2006. Judge Cuno Tarfusser was elected in 2009 and served through the end of the Gbagbo trial in 2019. Judge Rosario Aitala was elected in 2017 and is currently serving a nine-year term. Individuals familiar with the Italian nomination process who spoke to the Justice Initiative described the Italian nomination process as lacking transparency.¹²⁶ There is no legal framework that guides the process, nor an established, transparent procedure. There is no public call for applications, candidates are not interviewed, and their competencies are not assessed. The general public is not informed of the nomination process or of the candidates. According to one interviewee, the government instead approaches a small circle of people; indeed, most judges “do not even know about the ICC at all, much less that Italy seeks to appoint judges.”¹²⁷ Formally, the Minister of Foreign Affairs nominates the candidate.

Despite having one of the poorer selection processes, Italy is among those countries with the highest number of judges elected to the ICC.

REPUBLIC OF KOREA

South Korea has successfully nominated two judges to the ICC. Judge Song Sang-Hyun was first elected in 2003 and re-elected in 2006; he served until 2015. Judge Chung Chang-ho took office in 2015 and is currently serving a nine-year term.

South Korea does not have an established legal framework governing the nomination of ICC judges, but broadly follows the process used for nominating judges to the ICJ. There is no open call for applications; instead, candidates are directly approached by the Ministry of Foreign Affairs. The process is thus initiated by the ministry, which then requires that the PCA national group coordinate the nomination under the close scrutiny of the Treaties Division of the Ministry of Foreign Affairs. The PCA national group is composed of five members: a representative of the judiciary, the public prosecution, two international law academics, and a former ambassador who chairs the group.¹²⁸

Nominees must fulfill the requirements of the Rome Statute, and are required to, *inter alia*, have passed the national judicial service exam and completed practical judicial trainings. Candidates who already have international judicial experience enjoy strong preference. Potential candidates do not undergo interviews or exams to assess their qualifications. After the PCA national group decides on a candidate, he or she is approved by the Minister of Foreign Affairs. The decision cannot be appealed.¹²⁹

SOUTH AFRICA

To date, South Africa has nominated two candidates and had one judge elected to the ICC. Judge Navanethem Pillay was elected in 2003 to serve for six years but resigned in 2008, when she was appointed UN High Commissioner for Human Rights. Professor John Dugard was nominated in 2009 but was not elected.

South Africa applies the same process for ICC nominations as it does for appointments to its Constitutional Court. This process has, however, never been used in the context of the ICC, as it was not yet in effect at the time of the Pillay or Dugard nominations. Under the new system, in line with the procedures used for domestic judicial appointments, public advertisements will call for nominations to be forwarded to the Judicial Services Commission (JSC). Candidates are required to fulfill the Rome Statute criteria, and the position is open for application by solicitors, barristers, academics, judges, and other suitably qualified persons.¹³⁰ Candidates would then be nominated by the JSC.¹³¹ The JSC is composed of the Chief Justice, the President of Supreme Court of Appeals, academics, representatives of Parliament (governing party and opposition), representatives of the judiciary, members of the legal profession, and representatives of the executive.¹³² The JSC screens the candidates by reviewing CVs and written statements, and conducting interviews. The JSC's internal meetings are not public, but interviews are televised.¹³³ Interviewees predict that, in the absence of prescribed procedures, the executive branch's cabinet may at this stage be involved in formally endorsing the candidate.¹³⁴ While the process thus reflects good practice on paper, its recent introduction means it has not yet been assessed in practice.

UGANDA

Uganda has successfully nominated two judges to the ICC. Judge Daniel Nsereko took office in 2008 and ended his term in 2012, while Judge Salomy Bossa was elected in 2017. The country does not have a formalized process regulating domestic nominations.¹³⁵ Applications are open and interested and qualified candidates must express readiness to contest the available positions. However, it appears that Ugandan jurists who are not involved in the international legal community are generally not aware when an ICC election cycle is nearing.¹³⁶ Interested candidates must seek clearance from the Ministry of Justice and Constitutional Affairs and where a candidate is already a serving judge, he or she must also get clearance from the Chief Justice of the Supreme Court. A candidate from academia must first seek clearance from the Uganda Law Society and the Ministry of Justice and Constitutional Affairs.¹³⁷

The Department of International Law and Social Affairs within the Ministry of Foreign Affairs lobbies for Ugandan placements in international organizations dealing with legal issues, vets candidates for suitability, and reviews their documents for compliance with the Rome Statute's criteria.¹³⁸ It is unclear whether the department interviews the selected candidate. According to our interviews, only one candidate applied every time Uganda nominated a judge, so there is no history of competitive selection processes to report.¹³⁹

UNITED KINGDOM

Two judges from the United Kingdom (UK) have been elected to the ICC. Judge Adrian Fulford was elected in 2003 and served until 2012; Judge Howard Morrison took office in 2012 and is serving a full term until 2021.

According to interviewees, although the UK does not have a law or regulation governing nominations to the ICC, its practice is similar to that for recruitment to the UK civil service.¹⁴⁰ Vacancies are publicly advertised through the Judicial Appointments Commission, similar to the process for UK judicial appointments.¹⁴¹ In order to assess whether candidates fulfill the eligibility criteria of the Rome Statute, the UK requires candidates to meet the eligibility requirements for a High Court judge, to undergo a character check used by the Judicial Appointments Commission, to be able to understand and learn about other legal systems quickly, and to be able to communicate effectively orally and in writing, while working well with judges of other nationalities.¹⁴²

The Foreign Affairs and Commonwealth Office (FCO) and the Ministry of Justice coordinate the application process. A selection panel considers the applications submitted.¹⁴³ The panel is ordinarily composed of five members, including representatives of the FCO, the Ministry of Justice, and members from the judiciary or Government Legal Services of England and Wales, Scotland and Northern Ireland. Candidates are required to submit a CV and a cover letter. Having reviewed all applications, the selection panel selects the top candidates for interviews, which are not conducted publicly. Following these interviews, the panel selects a candidate to recommend to the FCO and Ministry of Justice, which then decide whether to nominate the candidate to the ICC.¹⁴⁴

URUGUAY

Uruguay has twice unsuccessfully nominated candidates to the ICC bench: in 2013 and 2017. Uruguay adopted legislation in September 2006 specifically aimed at regulating cooperation with the ICC, including provisions on national nomination processes for ICC judges and prosecutor.¹⁴⁵ To date, national nomination processes have always resulted in single candidacies and, on both occasions, the nominees were reported to be well known and respected in their field.¹⁴⁶ The last candidate was the president of the National Human Rights Institute, while the first was the president of the Supreme Court. While the Uruguayan system does not have any explicit requirement for gender balance in judicial nominations, to date it has nominated one male and one female candidate.

The Uruguayan process has been commended for its level of independence. Candidates can be nominated by the executive, the judiciary, the legislature, universities, the national bar association, or any human rights non-governmental organization with legal status.¹⁴⁷ Once nominated, candidates must be approved by Parliament with simple majority of votes.¹⁴⁸ On the two occasions in which Uruguay nominated a candidate to the ICC, the government nominated the candidates and Parliament unanimously approved them.

In terms of service requirements, candidates are required to fulfill the criteria in Article 36(3) of the Rome Statute, as well as be of Uruguayan nationality, be at least 40 years of age, and have at least ten years of experience as a lawyer or eight years of experience as a judge.¹⁴⁹ Interviews are not required and so far none have taken place. Candidates' nominations are discussed and approved in open parliamentary sessions. Prior to these sessions, the agenda and information on the candidate is made publicly available. Informally, NGOs may submit opinions on the candidates to the government or to parliamentary groups.¹⁵⁰

B. DOMESTIC NOMINATION PRACTICES: FINDINGS AND CHALLENGES

The analysis below draws from the above profiles, as well as additional sources. This analysis draws the following main conclusions: (1) relatively few States Parties nominate candidates to the ICC bench; (2) states seldom publicize ICC judicial vacancies; (3) many states lack a legal framework for ICC nominations, and/or rarely apply the procedures envisioned in the Rome Statute; and (4) nominations rarely take place under the coordination of an independent selection body, and candidates seldom undergo interviews or assessments. It is also common practice in several states to nominate former government officials for ICC judgeships.

ONLY A SMALL—AND DIMINISHING—NUMBER OF ICC STATES PARTIES HAVE NOMINATED CANDIDATES FOR JUDICIAL SERVICE.

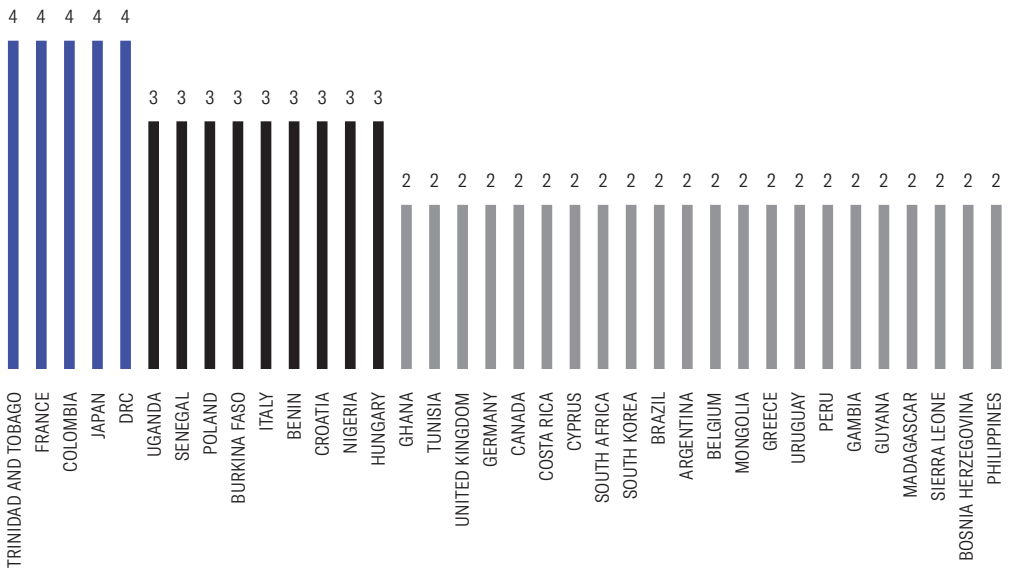
A close review of all ICC nominations to date reveals that, since the first judicial election in 2003, a relatively small number of States Parties have ever nominated candidates to the ICC bench and an even smaller number have had their nominees elected. Specifically, while slightly more than half of all ICC States Parties (72 out of 122) have nominated at least one candidate for election to the Court, only one-third (38 of 122) have ever nominated more than one candidate. These numbers dwindle even further after 2003, when an all-time high of 43 States Parties nominated candidates to fill the 18 inaugural vacancies. Since then, 37 judicial vacancies have been filled—stretching over five ordinary elections and four special elections—but only 57 states nominated candidates for these spots.

These figures suggest an alarming concentration of the ICC's judiciary in only a small handful of states, as well as a decline in the engagement of States Parties in the judicial selection process over time. Remarkably, only ten states have nominated nearly half of

NUMBER OF JUDGES ELECTED TO THE ICC PER COUNTRY

3	2	1		
Japan	United Kingdom	Nigeria	Costa Rica	Belgium
Italy	Canada	Dominican Republic	Mali	Argentina
France	Germany	Benin	Finland	Czech Republic
Trinidad and Tobago	Uganda	Samoa	Ghana	Poland
	South Korea	Ireland	Bulgaria	Hungary
	Philippines	South Africa	Guyana	DRC
		Cyprus	Brazil	Peru
		Bolivia	Botswana	Latvia
			Kenya	

JUDGES NOMINATED PER COUNTRY (WITH 2/+ NOMINATIONS)



all the ICC judges to serve to date (24 judges out of a total of 49).¹⁵¹ This accounts for less than one percent of the ASP’s overall membership. Furthermore, in the last two ordinary elections alone, only 27 States Parties put forward candidates, as compared to 36 states that did so in the two preceding ordinary elections of 2009 and 2011.

JUDICIAL VACANCIES IN THE ICC ARE RARELY PUBLICLY ANNOUNCED OR CIRCULATED.

It does not appear to be common practice for states to make public calls when seeking to fill an ICC vacancy. Indeed, in most cases, legal and academic communities appear to be barely aware of ICC judicial vacancies. One former ICC judge noted that, in his estimation, very few people outside the Foreign Ministry are aware of the nomination

process.¹⁵² Several of the ICC judges interviewed were not even aware if an application process took place in their nominating countries.¹⁵³ Many of them were either directly contacted or lobbied for their own nomination.¹⁵⁴

For both this publication and *Strengthening from Within*, the Justice Initiative's research found that, typically, international judicial postings are only accessible to individuals within certain elite social and political circles. There were numerous anecdotal illustrations of this. One ICC judge, who had neither applied nor been interviewed by their government, was nominated after receiving a phone call from a personal friend at the Ministry of Foreign Affairs.¹⁵⁵ Another was a senior advisor to the President of the country's Senate, who reportedly made a request to be nominated by the Foreign Ministry.¹⁵⁶ Several interlocutors also noted an instance wherein a sitting ICC judge, who was the head of their country's search committee to recruit a judicial candidate, instead nominated himself for the position.¹⁵⁷

STATES INFREQUENTLY USE THE DOMESTIC NOMINATION PROCEDURES THAT THE ROME STATUTE REQUIRES.

Interviews showed that states infrequently nominate judicial candidates to the ICC through the methods prescribed in the Rome Statute, but instead used "informal" methods that, as detailed above, encompass varying degrees of transparency and independence.¹⁵⁸ Furthermore, as a leading text on ICC elections has noted, "[nomination processes] in most states [have] signs of overt politicization," particularly in cases that use informal procedures.¹⁵⁹ Some states (e.g., United Kingdom, South Africa, and Argentina) do nominate judges to the ICC under the same process used for domestic judicial appointments, as the Rome Statute provides, but this practice appears to be relatively exceptional (and in South Africa, the process has not yet actually been used for ICC nominations). Moreover, while this is generally a good practice, it presumes that the nomination processes for national judicial service are themselves transparent and merit-based.

Furthermore, while most countries do not appear to apply the procedure foreseen for nominating candidates to the International Court of Justice (ICJ), it is worth noting that this procedure is itself problematic. For such nominations, states do not propose candidates through their governments, but rather through a group consisting of the members of the Permanent Court of Arbitration (PCA), i.e., by the four jurists of that state who can be called upon to serve as members of an arbitral tribunal under the Hague Conventions of 1899 and 1907.¹⁶⁰ While ostensibly a more "independent" body, it has been noted that many PCA members are themselves government representatives, which hinders independent, merit-based appointments. Although their precise role, nature, and involvement in the judicial selection process varies from state to state, they are often seen as engaging in a "box-ticking" exercise, rather than in a decision-making process.¹⁶¹ As one diplomat noted, "I am unsure if any state actually uses the PCA system as it should. [...] Even at the ICJ-level, national groups are not periodically updated and countries often lose membership because they do not pay contribution."¹⁶² Moreover, several interlocutors noted that, in the context of the ICC, states often claim

to have selected a nominee through their PCA national group, when in reality they followed only part of that process or even used a different method altogether.¹⁶³

MANY STATES LACK A LEGAL FRAMEWORK FOR NOMINATING JUDICIAL CANDIDATES TO THE ICC OR LACK AN INDEPENDENT SELECTION BODY AT THE NATIONAL LEVEL.

Overall, a number of states lack legislation regulating how judges are nominated for ICC elections; rather, nominations are often carried out on an ad hoc basis. This includes cases in which: government ministers have directly contacted personal acquaintances to become candidates; nomination processes have not been open or public; and interviews were not conducted, or other assessment of technical or linguistic qualifications was lacking. The lack of a legal framework—or even an established practice—for nominations, in turn, makes the process less transparent and more vulnerable to political interference, as there is no independent mechanism to ensure impartiality and objectivity. Generally speaking, a transparent process is one that abides by international standards: it identifies candidates through an open and public call for applications and selects the most qualified candidate according to established criteria and a decision-making procedure.¹⁶⁴ In practice, however, these three phases are often merged into one, undifferentiated, political decision.

The provision for involvement of the PCA national group was, in principle, intended to constitute an independent selection body but, as noted, such groups rarely operate independently from the government. Indeed, as academic observers of the ICC nomination process have noted, “establishing independent national nomination bodies that have a real, determinative role in the selection procedure requires political will that has only been seen in a handful of states.”¹⁶⁵ Although some of the countries assessed in this report have established some kind of entity to coordinate applications for ICC judicial elections, interlocutors noted that even when they exist, these bodies often operate as branches of foreign ministries, rather than as effectively independent entities.¹⁶⁶ Notably, in an effort to enhance the domestic nominations processes to another international court—the European Court of Human Rights—the Council of Europe’s (CoE) Committee of Ministers in 2012 adopted guidelines on the national selection of judicial candidates (included in the Annex). These guidelines state, *inter alia*, that the procedure for eliciting applications “should be established in advance” and that information on the process, as well as calls for applications, should be made public.¹⁶⁷

A number of states lack legislation regulating how judges are nominated for ICC elections.

Some states have nevertheless developed their own independent nomination bodies. These few instances include national judicial service commissions that operate as coordinating bodies for ICC judicial nominations. For instance:

- In the United Kingdom, a selection panel receives applications, screens out unqualified individuals, interviews applicants, and selects a candidate to recommend to the FCO. It is composed of five members representing the FCO, the Ministry of Justice, and members of the judiciary.¹⁶⁸
- In South Africa, the current system involves the JSC, which screens candidates' applications and recommends one for appointment by the President. The JSC's role is applicable to all courts—domestic, regional, and international.¹⁶⁹
- Similarly, in Canada, the Canadian National Group, which is composed of members of the executive, the judiciary, academia, and the private bar, selects the nominee, who is formally appointed by the Ministry of Global Affairs.
- In Paraguay, an ad hoc committee composed of members of the executive (including the Justice Ministry), the judiciary, the legislature, and academia directly nominates the judicial candidate to the ICC.¹⁷⁰

These countries illustrate selection bodies that operate with considerable independence from the government, restricting the influence of political considerations.¹⁷¹

A state's legislative branch can also play a positive role in ensuring independence and transparency in the nomination process. Indeed, some states such as Uruguay, Costa Rica, and Argentina, require parliamentary approval of nominees.¹⁷² This can be a positive practice as it ensures checks and balances, provided the parliamentary approval is not simply a rubberstamp. In the cases of Uruguay and Costa Rica, the executive, judicial, or legislative branches of government, as well as universities, bar associations, and human rights organizations, can all nominate candidates for parliamentary approval.¹⁷³ Notably, parliamentary sessions to discuss and approve candidates are open to the public, and information on the candidates is made available prior to the relevant session.¹⁷⁴

STATES RARELY CONDUCT INTERVIEWS OR ADEQUATELY ASSESS CANDIDATES' QUALIFICATIONS.

Of the states profiled above, only the UK and South Africa appear to conduct interviews or otherwise independently examine candidates' qualifications for judicial appointment.¹⁷⁵ These assessments can be key in evaluating a candidate's qualifications, as experience from both the ICC's Advisory Committee and the European Court of Human Rights' election process makes clear. Interviews increase transparency and the likelihood of merit-based selection; they test the suitability of candidates for the position based on their knowledge and experience. Where interviews or other forms of personal examination do not take place, candidates lacking connections to the political elite are put at a disadvantage, since factors like reputation or political influence then become more relevant.

STATES HAVE NOMINATED A LARGE NUMBER OF CANDIDATES WHO PREVIOUSLY SERVED AS GOVERNMENT OFFICIALS.

A review of all ICC judicial nominees since 2003 found that many of the successful candidates previously served as government officials, particularly in a diplomatic capacity. For example, about 15 individuals out of 48 who have served on the ICC bench held some form of diplomatic position for their country, notably during the Rome Conference.¹⁷⁶ Research also indicates that recent affiliation with a government can be a boon for a nominee.¹⁷⁷ An overwhelming majority of interlocutors criticized this practice. “Diplomats often lack relevant legal knowledge and put basic principles like impartiality into question,” said one state official.¹⁷⁸ Reflecting on the recent, controversial acceptance by Judge Ozaki of an ambassadorship while serving on the bench, an ICC chambers staff observed that, “Diplomats tend to take on judgeship at the ICC as just another position in their international careers.”¹⁷⁹

Just as opaque nomination processes or those relying on personal connections raise questions about candidates’ independence and impartiality, so does the presence of former government officials and diplomats on the bench. One of the pillars of judicial independence is a judge’s freedom from external pressures, while impartiality implies the absence of actual or perceived bias in a judge’s mindset in relation to an issue or party.¹⁸⁰ A judge’s former engagement as a government official (including in a diplomatic capacity) may at the very least give rise to a perceived, if not an actual, lack of independence or impartiality.¹⁸¹ It may also raise questions about fitness for judicial service. As one experienced ICC staffer noted, “[Judges who are former diplomats] take on issues with a diplomatic mindset. They enter meetings with a specific outcome in mind, and try to argue for that outcome, regardless of what an impartial reading of the law would lead to.”¹⁸² One particular problem also noted by several interlocutors, at least in the ICC’s early years, was the election of several judges who had formerly served as diplomats during the negotiation of the Rome Statute. As one put it, “In [the] Rome [conference], many of them were in committees trying to get their own proposals through. Then, when they arrived on the bench, they used their [judicial] role to ... push for the agenda they had there.”¹⁸³ Over time, the tendency to nominate former members of government delegations that took part in the negotiation of the Rome Statute has receded. However, states have continued to nominate candidates who previously served as government officials, including diplomats. Nearly all of those candidates ran under List B.¹⁸⁴

A review of all ICC judicial nominees since 2003 found that many of the successful candidates previously served as government officials.

IV

ELECTIONS: PRACTICE, POLITICS, AND JUDICIAL CAMPAIGNS

The political considerations and opaque processes that generally characterize domestic nominations continue onto the international stage in the shape of election campaigns, vote trading and regional endorsements around the actual election of ICC judges by the ASP. These factors play a major role in the election process and often overwhelm merit-based considerations. Their dynamics in the context of the ICC are explored further below.

A. JUDICIAL ELECTION CAMPAIGNS

It may seem perverse that the procedure for selecting impartial and independent judges to serve on one of the most important international courts is characterized as a “campaign,” but that reflects the practice to date. Pragmatically, governmental support is fundamental for a successful ICC judicial candidacy. Judicial campaigns demand significant political and financial commitment. Such campaigns are increasingly expensive to run, and states often spend financial and diplomatic capital in securing support for their candidate. As part of this process, nominees engage in an intense vote-harvesting competition in the capitals of select States Parties and the UN headquarters in New York City. Vote trading is a common practice in the international arena, one that is principally inherited from the UN system, where all major state-endorsed positions are decided through political arrangements.¹⁸⁵ Successful election campaigns are contingent upon a government’s support, the financial and political investment behind the candidate, and the timeliness of these activities.¹⁸⁶ An early start to a campaign can secure voting commitments at the initial stages of the process.¹⁸⁷

One sitting ICC judge described campaigning as an “exhausting process,” and in which candidates and their campaign staff labor for voting commitments from States Parties.¹⁸⁸ Many candidates start their campaign over a year in advance of the election and nominating states often deploy full-time dedicated staff. In some cases, the Minister of Foreign Affairs or even head of state can get involved in the process to secure support for a nomination.¹⁸⁹

Strategies may vary from state to state; however, certain traits are common to most judicial campaigns. In order to seek support, the nominating state's Foreign Ministry typically sends notes verbales to other states and conducts visits to embassies in their respective capitals. Candidates themselves often visit embassies and capitals in pursuit of votes. In addition, they almost invariably travel to New York City, where they lobby in the Indonesia Lounge and other locations at UN headquarters and meet with delegations from various permanent missions. It is not uncommon for candidates to hold up to six meetings in a single day, with the sole objective of seeking states' endorsements. Activities in the UN hallways and in the lounge include distribution of pamphlets and meet-and-greets to introduce candidates and engage with state officials. On occasion, a nominating state's permanent mission also holds events—meals, seminars, or receptions—for other delegations to meet their nominee.¹⁹⁰ One sitting judge described it as “a circus.”¹⁹¹ Another said that the experience itself could discourage qualified candidates from running.¹⁹²

When meeting with foreign delegations, nominees are often briefed on the best strategy to secure a vote from a given state. Some states assign senior legal and policy staff to meet candidates, while others send junior staff or interns.¹⁹³ Some delegations ask questions, including technical ones, while others do not ask questions, considering the encounter rather as a courtesy visit.¹⁹⁴ One judge explained that his campaign team provided a document with instructions on how to convince each state to vote for him, as well as the likelihood of obtaining their vote. Each day, the campaign staff would update the document and brief the nominee on new directions in their strategy.¹⁹⁵ Another judge described the experience as “bizarre,” comparable to “acting like a politician.”¹⁹⁶ Not all interlocutors rejected the value of these campaigns, however. Illustrating the extent to which political considerations frequently outweigh merit-based considerations, a diplomat explained that campaigns can serve as a “screening function.” They facilitate meeting the candidates and can help state officials decide not to vote for a candidate “if they are absolutely terrible.”¹⁹⁷

Campaigns are expensive and lengthy. They require a high degree of financial and logistical support from the nominating state, which is often a deterrent for states (typically smaller ones) that cannot justify the cost-to-opportunity ratio.¹⁹⁸ States that are able to invest time and resources into a judicial election campaign, maintain wide diplomatic representation, and enjoy strong bilateral relations with other influential states undoubtedly have an inside track in the road to the ICC bench. Countries with fewer resources are in a disadvantaged position, regardless of the merit of their candidates. For example, smaller states with limited overseas representation are highly dependent on New York-based campaigning.¹⁹⁹

There are no official opportunities for candidates to be presented on an equal footing to all States Parties. Instead, this burden has largely fallen to NGOs, in particular the Coalition for the ICC (CICC), which has for several years run an unofficial program to enhance transparency around nominations. This campaign has involved distributing and collecting questionnaires from all (participating) candidates, which are then made public on the CICC's website. The intended aim is to increase knowledge about

the candidates and promote greater transparency in the process. For the first time, interviews with candidates for the 2017 election were made public and broadcast live (a recording was also made available thereafter).²⁰⁰ The costs for participation in such interviews are normally borne by the nominating state or the candidates themselves. This, in turn, further conditions candidates' participation on the availability of funds.

B. VOTE TRADING, WITHDRAWALS, AND SHIFTING VOTING DIRECTIONS

Vote trading is a reciprocal arrangement made between two or more states in which one state commits to voting for the candidate of another state in exchange for a similar courtesy in the same or a different forum. In 2003, at the time of the first ever round of elections for ICC judges, the Assembly's Bureau took pains to expressly discourage the practice, urging "States Parties to refrain from entering into reciprocal agreements of exchange of support in respect of the election of judges of the Court."²⁰¹ Yet vote trading has persisted. (One diplomat noted that, since an ICC judgeship is generally a highly valued position, the "cost" for nominating states that seek to have their candidate elected is that they have to lower their political ambitions in other fora when entering into similar vote-trading arrangements elsewhere.²⁰²) Vote trading and campaigning are typically interconnected: they often occur simultaneously, their methodology and incentives are similar, and both can begin a year before the actual election.

As a result of vote trading, states often overlook candidates' qualifications or merit and focus instead on the political and diplomatic capital that their vote may generate. "In most cases, qualifications are irrelevant," said an official of one ICC State Party. "It presents an opportunity for an advantage down the road and everyone does it—so why not take it?"²⁰³ "Every state does it; it is a given," said another representative of a State Party.²⁰⁴ Another delegate noted that "states engage in vote trading because they do not see the ICC as a court in the traditional sense." Rather, "they want a weak ICC, which is easier to control."²⁰⁵ Other interviewees, including other state officials, judges, and civil society representatives, expressed similar views.²⁰⁶ Some states make voting commitments for specific election rounds (meaning they pledge their votes to a candidate for a set number of ballots only), while other states pledge support throughout the entire election. One sitting ICC judge explained that, during a campaign visit to a capital, she was told that, although she was considered the most qualified candidate, the state could not support her because it "had already committed [its] votes for the first four rounds of the election."²⁰⁷

Despite being a common practice, securing votes via vote trading is not a reliable science. Considering that states in the Assembly cast their votes by secret ballot, it is almost impossible to monitor voting.²⁰⁸ Freed from scrutiny, states may not adhere to their voting commitments. As a result of the unreliable nature of the practice, nominating states also typically gather more vote commitments than those mathematically required for judicial election.²⁰⁹ Under these conditions, there is little disincentive for states to engage in vote trading, especially if they believe others will do it anyway. The negative impact of vote trading compounds the poor quality of national-

level nomination processes, which often fail to guarantee a pool of highly qualified candidates from which to choose.

Much like campaigning, judicial elections themselves are highly politicized. One state official explained that the requirement to be elected by a two-thirds majority leads to an excessive number of voting rounds, which increases the risk of heavy politicization.²¹⁰ This is because states often use intervals between rounds to engage in new trade-offs and seek to politically influence the voting process. States may also pressure candidates to withdraw in order to reduce the number of contestants for available vacancies.²¹¹ This unfolds according to the progress made by candidates and the likelihood of their election. As elections progress, it becomes increasingly apparent which individuals actually stand a chance of being elected. Voting states' commitment to a candidate usually holds until it is clear that they are unlikely to be elected. Nominating states usually withdraw their candidates on their own initiative at that point; however, if not withdrawn, states typically start shifting their votes towards other candidates as the process continues.²¹²

Pressure to withdraw and other political considerations during election rounds usually come into play when a voting state's preferred candidates are no longer in the race. States normally have six preferred candidates, one for each judicial vacancy. According to a state official, they rarely plan alternatives for when one or more of those preferred candidates withdraws.²¹³ This is fertile ground for ad hoc campaigning and vote trading in the midst of election rounds.

Political considerations and pressure to withdraw come into play in three different principal scenarios. The first is when states try to directly influence others in favor of their nominee between election rounds. "This is normally frowned upon, especially by states that do not engage in this practice for their own nominees," said a state official.²¹⁴

The second situation occurs in the context of regional dynamics. As noted above, after the fourth round of voting, MVRs for geographical representation no longer apply. In these situations, when there are two or more candidates from the same regional group, states of the same region tend to "band together" for one of the candidates,

As a result of vote trading, states often overlook candidates' qualifications or merit and focus instead on the political and diplomatic capital that their vote may generate.

withdrawing the other(s). This occurs in particular with regional groups with fewer voting states, as they want to ensure that they have at least one judge elected.²¹⁵

The third scenario occurs almost invariably during the last rounds of voting, when there is often only one judicial vacancy to fill and very few candidates. In these situations, informal suggestions are made for one or more candidates to withdraw. The withdrawing candidates are usually the ones with the fewest votes; however, as explained by a diplomat, some candidates with a higher number of votes may be seen as “clearly unqualified,” and thus some states may still refuse to vote for them on that basis.²¹⁶

C. REGIONAL AND SUB-REGIONAL CONSIDERATIONS

Regional voting blocs, pre-established vote-trading agreements, and sub-regional endorsements play a major role in both national nominations and elections by the Assembly. This is particularly relevant in the context of the Africa regional group of ICC States Parties, all of which are also states members of the African Union (AU) (currently, 33 out of the ICC’s 122 States Parties are African). Indeed, the Africa regional group appears to have the most notable vote coordination scheme, according to several interlocutors. “The African Union always votes as a bloc,” said one state delegate, noting this is especially pronounced when it comes to African candidates.²¹⁷ Gathering the support of such a major voting bloc can go a long way in securing a judicial seat, but banding together is also seen as important for the furtherance of African states’ priorities at the ICC, especially in the face of the prominent influence of major donor states. “The strength of African states in the ICC is in numbers,” said an African state delegate.²¹⁸

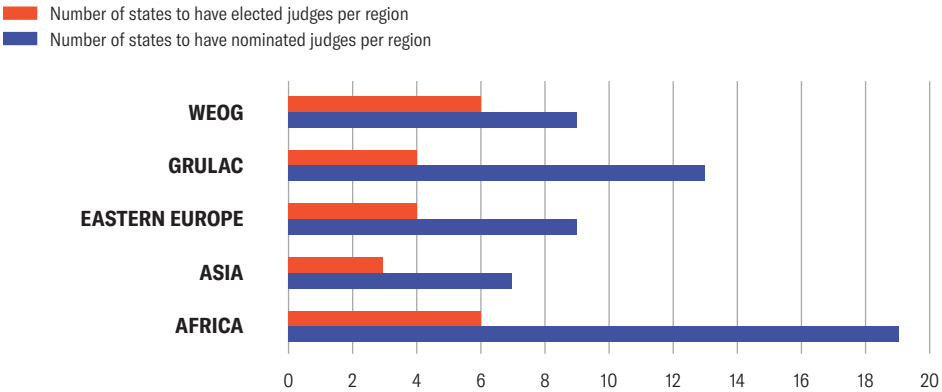
It is common practice for African states to require the AU’s prior approval of a candidate before formally nominating them. This also occurs at the sub-regional level where, when one state nominates a candidate, others tend to refrain from doing so. A representative from an African country explained, “When there are two or three candidates, it can get very political and complicated.”²¹⁹ Despite such coordination at the AU level, another

Much like campaigning, judicial elections themselves are highly politicized. One state official explained that the requirement to be elected by a two-thirds majority leads to an excessive number of voting rounds, which increases the risk of heavy politicization.

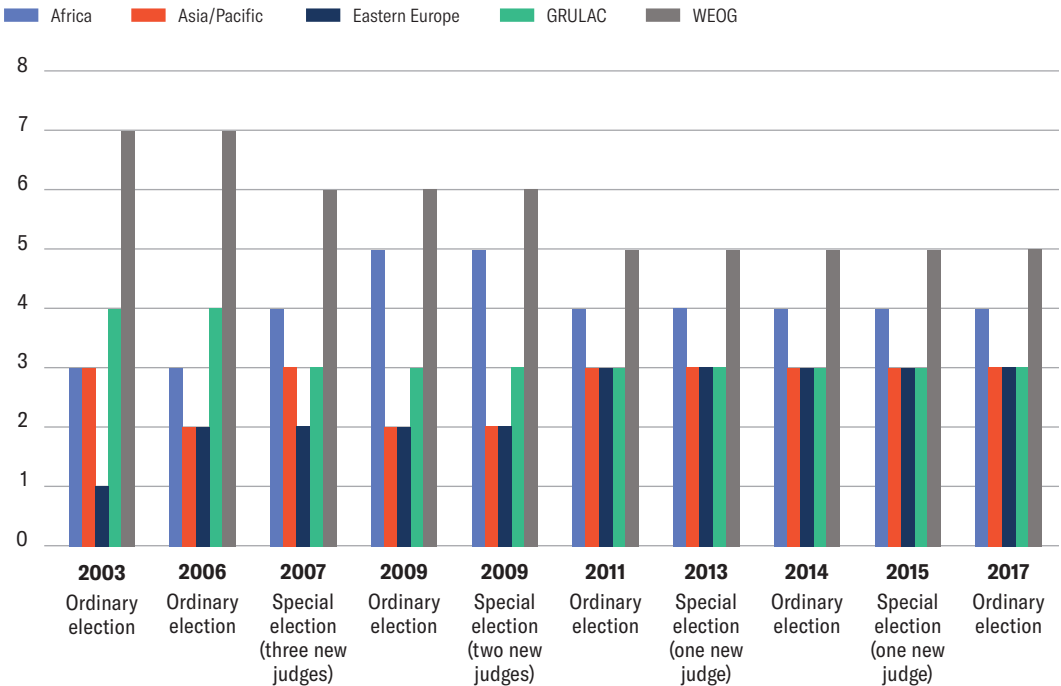
state official noted that one or two states sometimes “go rogue and publicly endorse someone else.”²²⁰

To a lesser extent, regional voting dynamics also take place among GRULAC and European (including WEOG and Eastern Europe) states. Although not a formalized or openly discussed policy, one diplomat noted that, “EU countries tend to vote for EU candidates.”²²¹ Another interviewee opined that GRULAC states try to vote as a

NUMBER OF STATES TO HAVE ELECTED vs TO HAVE NOMINATED JUDGES TO THE ICC (SINCE THE 2003 ELECTIONS)



REGIONAL COMPOSITION OF THE ICC BENCH AFTER EACH ELECTION



block, “but always end up disagreeing.”²²² This may be partly explained by the lack of a formalized process to build consensus amongst regional candidates at either the level of GRULAC or by the Organization of American States. Still, “unwritten rules” often guide certain aspects of the election process. For instance, it is said to be “common understanding” that at least one of the GRULAC slots belongs to the Caribbean group and the other to a Latin American state.²²³

Several interviewees also referred to the “relative advantage” held by Caribbean states over Latin American states, given that the former have English as a national language. This naturally leads to a larger pool of native speakers of one of the ICC’s official languages (a requirement for ICC judges). Several interlocutors also noted that African states and Commonwealth countries tend to prefer Caribbean candidates for GRULAC vacancies. Interlocutors mentioned that African states support Caribbean states due to their common historical heritage, while Commonwealth countries endorse them because of their shared legal systems (some Caribbean countries are also still part of the Commonwealth).²²⁴ Since African states tend to vote as a bloc, candidates benefiting from their support generally enjoy a considerable advantage.

Clearly, political factors play a prominent role in the judicial nomination process, often at the expense of merit-based considerations. This politicization extends into the election process at the Assembly level as well, particularly given the Advisory Committee’s limited influence. Indeed, while the Advisory Committee has never found a candidate not qualified for judicial service, a number of our interlocutors opined that, in fact, several judges who have been elected to the Court fell short of the Rome Statute’s criteria. “We are supposed to be choosing the best judges, but merit is irrelevant,” said one diplomat.²²⁵ Another former ICC judge noted that several successful candidates had insufficient experience in the relevant fields of law, including the remarkable instance of a judge who did not even possess a law degree.²²⁶ Similarly, interviewees observed that some judges’ language skills have been below working-level fluency.²²⁷ The next chapter addresses the role of the Advisory Committee, and how its work can be improved, in greater detail.

V | VETTING: THE ADVISORY COMMITTEE ON NOMINATIONS OF JUDGES

The Rome Statute granted the Assembly of States Parties discretionary authority to create an Advisory Committee on Nominations of Judges. This chapter offers a brief history of the Committee's creation. Efforts to create such a body were only launched in December 2010—eight years after the ICC had been operational—when the Assembly requested that its Bureau prepare a report on the creation of such a committee.²²⁸ The Bureau did so in November 2011, in addition to drafting a proposed terms of reference.²²⁹

Prior to 2010, the Coalition for the International Criminal Court coordinated an Independent Panel on ICC Judicial Elections that aimed to raise awareness about judicial candidates and assess their qualifications in the absence of an Assembly-sanctioned body.²³⁰ This panel set important precedents for election monitoring in other regional human rights system. It was established as a civil society initiative to remedy the Assembly's failure to create an independent review body. Following the Advisory Committee's creation, the Independent Panel discontinued its work.

A. MEMBERSHIP, MANDATE, AND PRACTICE

The Advisory Committee is currently composed of nine members designated by the Assembly. This designation is done by consensus and upon recommendation of the Bureau.²³¹ In practice, the nomination of Committee members operates much like the nomination of judges, with states putting forward nominees for the position. Members serve in their personal capacity for a three-year term, with the possibility of being re-elected once. Among other requirements, Committee members must be nationals of States Parties and have competence and experience in criminal law or international law. The Committee's membership should also collectively reflect the principal legal systems of the world, as well as fair and equitable gender and geographical representation.²³² Despite the latter requirement, only one woman had served on the Advisory Committee prior to 2018. Currently, the Committee's membership includes four former ICC judges (a fifth former judge, Judge Song Sang-hyun, has recently been nominated to fill a vacancy).²³³ Other members include a serving ambassador to The Netherlands,

an attorney general with extensive criminal law experience, and a judge primarily experienced in commercial arbitration who previously served on the European Court of Human Rights.²³⁴ Overall, it is important that the Advisory Committee has a diverse composition and that the members, who serve in their personal capacity, are fully independent from governments. Given the practices highlighted in this report, former ICC judges should not to be heavily represented on the Committee.

The work of the Advisory Committee is regulated by its terms of reference and rules of procedure,²³⁵ which mandate it to “facilitate that the highest-qualified individuals are appointed as judges of the International Criminal Court.”²³⁶ The Committee’s assessments are non-binding; States Parties are not obliged to consider them. The terms of reference construe the Committee’s role narrowly, providing that its work “is based on the applicable provisions of the Rome Statute and [that] its assessment of the candidates [is] based strictly on the requirements of article 36, paragraphs (3)(a), (b) and (c).” So candidates are assessed by the Committee solely on the following criteria:

- a) “high moral character, independence and impartiality,” and whether they meet the “qualifications required in their respective States for appointment to the highest judicial offices”;
- b) established competence required to be included in List A or List B; and
- c) excellent knowledge of and fluency in either English or French.

According to a former Committee member, the mandate is intentionally restrictive because it was the result of a compromise among states.²³⁷ The Advisory Committee is not, in principle, mandated to assess matters such as a candidate’s intellectual rigor and legal reasoning skills, work ethic, or mental and emotional capacity.

In practice, the Advisory Committee’s work involves drawing up individual assessments of each candidate according to the Article 36(3) criteria and making recommendations to the Assembly. The Committee evaluates the materials submitted by states regarding the candidates they put forward, which typically include only a statement of their qualifications and a copy of their CV. The Committee’s current practice is not to explore any potential inconsistencies or inaccuracies in a candidate’s record, nor does it check for further information.

The Advisory Committee conducts an interview with each candidate. The Committee has noted the limitations of the information provided in writing and has highlighted the importance of these face-to-face interviews, expressing that they reveal “important elements relating to how [candidates] fulfill the requirements of [...] the Rome Statute and to the relevance of their professional experience to the work of the Court.”²³⁸ One elected judge recalled, for instance, that his interview started with questions aimed at ensuring fulfillment of the requirements of Article 36(3), before moving on to questions about the candidate’s professional experience, including in trials and conflict of interest management. The final part of the judge’s interview discussed challenges relevant to the work of the ICC, namely, how to address the length of proceedings, witness intimidation, and case management. The judge recalled the process as “intimidating”

but said that the questions seemed relevant to the work and that the interview was “overall, a good process.”²³⁹

Upon completing the interviews, the Advisory Committee drafts a report in which it briefly summarizes the candidates’ profiles against the criteria set out in Article 36(3).²⁴⁰ The report is then made available to States Parties in advance of the elections. The report also includes a short description of the candidates’ professional experience, but does not critically assess his or her adequacy for judicial service, although the Committee introduced a basic measure of assessment in its latest report (2017) (see below). Prior to that, the Committee had simply included a short account of the candidates’ background without any conclusion or determination of their suitability for the position. Notably, the Committee has never found a judicial candidate to be unqualified for service.

In its 2015 report, the Committee noted that some states wanted it to further develop its observations concerning candidates, namely by ranking or evaluating them beyond the Rome Statute’s strict requirements. The Committee pointed out, however, that its strict mandate would not allow it to develop its working methods as such. It therefore invited the Assembly to grant it a more robust mandate.²⁴¹ To date, the Assembly has not done so. An overwhelming majority of state representatives interviewed by the Justice Initiative were critical of the work of the Advisory Committee and commented that they found it of little value. However, to date, the Assembly has not responded to the Committee’s call to grant it a more robust mandate. This presents a situation in need of urgent remedy: each side blames the other.

Although not granted a more robust mandate by the Assembly, the Committee nevertheless took some measures within the limited scope of its existing mandate.²⁴² Those included: guidance on CV format and the content of the statements of qualification provided by the nominating state, a request to extend the duration of the Committee’s sessions so as to allow for sufficient time for interviews and evaluations, and amendments to its terms of reference and rules of procedure and evidence.²⁴³ In addition, in its 2017 report, the Committee started designating candidates as “formally qualified” or “particularly well qualified.”²⁴⁴

B. CHALLENGES AND LIMITATIONS TO THE COMMITTEE’S WORK

Overall, the Advisory Committee’s assessments have lacked rigor and the Committee’s impact on the voting process has been minimal to date. Although a number of interlocutors expressed support for the Committee’s purpose in principle, they noted that, in practice, it suffers from significant limitations. In the words of one state representative, “It is a great idea, but it is not helpful as it stands.”²⁴⁵ One sitting judge had an even more negative assessment, considering it “useless” as it currently operates.²⁴⁶ There is little evidence therefore to suggest that the Committee’s current practice has an appreciable influence on vote trading or political interference in the election of unqualified judges.

THE ADVISORY COMMITTEE'S WORK DOES NOT LEAD TO AN ADEQUATE ASSESSMENT OF CANDIDATES' QUALIFICATIONS.

Currently, a review of basic nomination materials and an interview are the full extent of the Advisory Committee's assessment of judicial nominees. Most interviewees told the Justice Initiative that these steps alone do not go far enough in assessing candidates' competencies. One key problem is that the Committee's terms of reference do not expressly empower it (though they also do not prohibit it) to differentiate between those candidates who are qualified and those who are not. In the words of one diplomat, "[t]he Committee's work does not give a comprehensive outlook on candidates."²⁴⁷ An ICC staffer also expressed concern about the Committee's methods: "Candidates' skills are not examined. There is no way of understanding who is qualified and who is not."²⁴⁸ Another staff member from ICC chambers noted that, unlike for ordinary staff, "there are no exams [for judicial candidates]; [they] are not tested on their language skills. How are we supposed to figure out who is good and who is not?"²⁴⁹

Other assessments of the Committee's were more nuanced, particularly as the Committee has gradually introduced additional procedures that were able to circumvent the otherwise strict limitations of its mandate.²⁵⁰ These include requesting a standard format for candidate CVs, as well as succinct statements of qualifications.²⁵¹ A former Committee member noted that, "this led to a more efficient submission of dossiers by candidates."²⁵² Committee members have suggested further guidelines on the statements of qualifications, namely requesting a brief description of the hierarchy of the highest judicial institutions in a candidate's nominating state, as well as of the requirements for appointment to the highest judicial offices in the country. Additionally, as of 2015, an explanation of the national procedures for judicial nomination is requested,²⁵³ although the Committee's report does not scrutinize or independently verify the content of these statements.

Notwithstanding these gradual improvements, important gaps in the Advisory Committee's assessment methodology remain. These weaknesses include:

- Not making requests for additional information or materials concerning the experience or prior work of the candidates. Its assessment is limited to the materials received from the nominating state. This is despite the fact that the Committee's terms of reference do not prevent it from requesting additional information.²⁵⁴
- Not assessing practical skills such as the ability to work collegially; knowledge of different legal systems; or exposure to and understanding of regional and sub-regional political, social, and cultural environments.²⁵⁵
- Not thoroughly reviewing the nominee's record of professional achievement, for example by crosschecking or verifying the veracity of candidate applications, including reading decisions or articles that candidates have written on issues of required expertise, or consulting professional references.

- Not appearing to inquire into any evidence that a candidate does not meet the requirement of “high moral character” such as instances of past professional misconduct.²⁵⁶ Nor does the Committee provide an assessment of the candidate’s record of “impartiality and integrity.”

Although a plain reading of the Committee’s terms of reference suggests a narrow remit for assessment, it is also true that the Committee has conservatively interpreted its mandate. In particular, the Advisory Committee could implement a stricter methodology to assess candidates’ technical competencies and language abilities, proactively solicit additional materials as to their qualifications and fitness for office, and undertake steps to independently verify the veracity of candidates’ credentials. It is not entirely clear whether the Committee’s current terms of reference empower it to undertake more extensive efforts, or if that would require an extension of its mandate. Regardless, the Committee’s approach to enhancing its mandate has so far been cautious and the Committee itself has identified the need to receive further guidance or a more robust mandate from the Assembly.²⁵⁷

THE ADVISORY COMMITTEE’S REPORTS FAIL TO PROVIDE A SUFFICIENTLY COMPREHENSIVE ACCOUNT OF CANDIDATES’ SUITABILITY FOR JUDICIAL SERVICE.

Our research found scant evidence that the reports of the Advisory Committee play a substantial role in “facilitat[ing] that the highest-qualified individuals are appointed as judges of the [ICC].”²⁵⁸ One significant impediment in this regard is the Committee’s failure to identify candidates, where appropriate, as “unqualified” or “not formally qualified.” This stands in notable contrast to the Independent Panel of the Coalition for the ICC, which, when it was functional, did designate candidates as unqualified where warranted. (The Panel did this with respect to four candidates; none of them were elected.²⁵⁹) Several interlocutors noted that if it designated unqualified candidates as such, the Committee’s evaluation would be more useful. “If candidates could be expressly labeled as unqualified, states would be ashamed of nominating bad candidates,” said a delegate from a State Party.²⁶⁰ Similarly, publicly designating candidates as unqualified could better deter states from voting for them.²⁶¹

The Committee’s effectiveness is also limited by an excessively cautious approach to its final report. In the words of one ICC staff member, “The language in the report is so diplomatic; it is unable to have any influence. We [cannot distinguish] those who are qualified and those who are not.”²⁶² A review of the Advisory Committee’s reports to date confirms this perception: each one resembles a summary of candidates’ CVs, rather than a comprehensive and critical evaluation of their qualifications against the Rome Statute’s criteria. Indeed, it is apparent that candidates considered less qualified (as suggested by the Committee’s polite distinction, introduced in 2017, between “formally” and “particularly well” qualified) are just as likely to be elected by the Assembly.²⁶³ The work of the Advisory Committee has not appeared to curb the practice of vote trading. In the words of one ICC judge, “The Committee has no teeth; states will [still] vote based on voting agreements and political considerations.”²⁶⁴

The Committee's practice stands in contrast to the methodology adopted by an independent panel of experts that the Justice Initiative has convened, together with other regional NGOs in the Americas, since 2015 to assess those candidates seeking election to either the Inter-American Court on Human Rights or the Inter-American Commission. In its assessment, the Independent Panel—which has thus far been convened in 2015, 2017, 2018, and 2019—has considered such factors as the number and quality of candidates' judicial decisions, academic papers, blog posts, and any other information provided by the candidates or made publicly available.²⁶⁵ The reports of the Panel (all of which are available online) also provide useful examples of a more comprehensive and nuanced description of candidates' qualifications. They specifically assess over a number of years the candidates' "background and recognized competence," their "moral character, independence and impartiality," their contribution to a "balanced composition" of the Court or Commission, and the national "selection procedure" leading to their nomination. The Independent Panel also states if and when, in its assessment, candidates do not fulfill the qualifications for service on either body.²⁶⁶

THE LATE RELEASE OF THE ADVISORY COMMITTEE'S REPORT MAKES IT LESS USEFUL THAN IT COULD BE.

Currently, the judicial nomination period for states ends approximately 20 weeks before the Assembly elections, around early August of each election year.²⁶⁷ Only after that can the Advisory Committee meet to assess the candidates (which currently occurs in early September) and issue its report in late September or early October.²⁶⁸ This timing is inadequate to have a meaningful effect on the voting process. As noted by a state official, "By the time the report is made available, it is too late. Most of the votes are already committed due to vote trading."²⁶⁹ In order for the report to be more timely and effective, the Committee must convene earlier in the year and the Assembly would have to expedite the nomination period for states to nominate judicial candidates.

To make its report available sooner and have more impact on the election process, the Advisory Committee would have to convene earlier in the year; this, in turn, would require the states' judicial nomination period to be moved forward. To do this, the Assembly would need to amend resolution ICC-ASP/3/Res.6 (which it did on one occasion, in 2013). If the judicial nomination period were to be moved forward by three or four months, the Committee would have sufficient time to complete its review and issue its report at a time when it could actually influence the election process.

THE ADVISORY COMMITTEE'S MANDATE DOES NOT ALLOW IT TO APPROPRIATELY SUPPORT STATES PARTIES TO NOMINATE QUALIFIED CANDIDATES.

The Advisory Committee is currently precluded from providing states with informal feedback or advice during the nomination phase. This arguably limits the quality of domestic nominations since, at present, states often nominate candidates who may not be formally qualified for judicial appointment, especially in countries where the national nomination process does not seek to ensure this. To that end, several interviewees

suggested that extending the Committee’s mandate by giving it an early, informal advisory function—to provide advice and counsel to states at their request—would likely enhance the quality of national nominations.²⁷⁰

Other international and regional judicial bodies provide a helpful model.²⁷¹ In the European Court of Human Rights, for example, an advisory panel exists to advise governments during the nomination process, particularly on whether selected candidates meet the legal requirements for judicial service.²⁷² The panel examines written materials submitted by states and privately provides the state with an assessment of whether candidates formally fulfill the criteria. Although states are free to disregard the panel’s recommendations, the panel’s role as informal advisor allows a state to seek external, expert advice about its proposed candidates in advance.²⁷³ This early channel of communication has enhanced the nomination process and helped encourage states to develop more rigorous national-level selection procedures.²⁷⁴ Extending the ICC Advisory Committee’s mandate in a similar manner could enhance the quality of nominations, without infringing on state sovereignty. One state delegate noted that a having such a “pre-advisory” function for the committee “could incentivize smaller, under-represented states to invest financial and logistical resources ... to elect a candidate deemed electable by the Committee.”²⁷⁵ Potential conflicts of interest may arise under such an arrangement, however, given the Advisory Committee’s mandate to provide a neutral assessment on national nominations processes. An alternative would be to assign such a pre-advisory function to a different body.

VI | CONCLUSION

A qualified and independent judiciary is a basic pillar of an effective court, and a credible elections process is a critical contributor to that pillar. For the ICC, the standards and procedures enunciated in international law and the Rome Statute for the selection and appointment of judicial officials are among the cornerstones on which its independence is built, but these norms have been insufficiently realized in practice. Such standards should be reflected throughout the various stages of selecting judges, from domestic nominations, to the exercise of the Advisory Committee's mandate, to the election of judicial candidates by ICC States Parties. However, political factors too often favor political connections and expediency over transparency and merit. This practice damages the ICC bench, and as a consequence, the Court as a whole.

The findings of this report reveal that states have not been consistently good stewards of their duty to responsibly nominate and elect ICC judges. First, too many states fail to nominate candidates at all, raising serious questions about whether the ICC bench to date has been adequately representative of its community of states. Second, most states do not have a framework in place that governs nominations of judicial candidates to the ICC. Rather, they select candidates in an ad hoc manner, frequently privileging personal or political connections at the expense of transparency, competitive opportunity, and merit. Information on judicial vacancies in the ICC, including the existence of open positions and criteria and procedures for nomination, are seldom made accessible to the general public. Rather, our research confirms several instances of nominees merely being approached privately by their governments, rather than nominated through open, competitive processes.

Too many states fail to nominate candidates at all, raising serious questions about whether the ICC bench to date has been adequately representative of its community of states.

This practice continues at the international level, where vote trading and a toxic campaigning culture further taint the judicial election process. Our research reveals that campaigning dynamics often override merit: it is the candidates with the strongest campaign and not the most qualified who are more likely to be elected. The way vote trading is undertaken equally disregards candidates' qualifications. The pressure to campaign and the costs involved effectively discourage many states from nominating a candidate.

As it currently functions, the Advisory Committee on Nominations of Judges does little to either correct or mitigate these defects in state nomination and voting practices. The Committee's effectiveness currently suffers from: (1) a restrictive interpretation of the scope of its mandate, preventing it from rigorously scrutinizing both a candidate's suitability for judicial service and a state's nomination practices; (2) an unwillingness to indicate when candidates are not qualified for judicial office; (3) a timeframe that prohibits it from carrying out its work in a timely manner that would allow it to have a meaningful effect on how states vote.

Finally, too many ICC judges are being elected based on criteria that fail to ensure the expertise required for an effective bench. Knowledge and experience in criminal law and procedure, as well as substantial experience in managing complex trials, are key to the effective exercise of judicial functions at the ICC and should be required of all judges elected to the ICC bench, not only some of them. In particular, the inclusion of List B candidates in Article 36 does not reflect this requirement, nor does mere eligibility "for appointment to the highest judicial offices" of a given member state. Our research also shows that the Article 36(b)(i) requirement of "established competence in criminal law and procedure" has at times been treated lightly. The possibility to appoint judges without experience in criminal trials, in particular, raises serious problems. Similarly, the fact that so many government officials, including career diplomats, have previously been elected to ICC judgeships is a cause for concern.

Current practices in nominating and electing judges are far from ideal. Improvements can and should be made at the national level in the way states nominate candidates, and during the assessment and election processes. Introducing or reforming domestic legal frameworks regulating nominations, as well as re-thinking the Advisory Committee's role and the requirements of Article 36(3) of the Rome Statute are positive steps that States Parties and the Assembly could take. Equally critical is the need to curtail or mitigate the influence of political factors during all stages of this process. In all credible justice systems, a judge's role requires independence, integrity, and the perception that an individual can serve as an impartial custodian of the rule of law. This should be no different at the ICC.

ANNEX

GUIDELINES OF THE COMMITTEE OF MINISTERS ON THE SELECTION OF CANDIDATES FOR THE POST OF JUDGE AT THE EUROPEAN COURT OF HUMAN RIGHTS²⁷⁶

Guidelines of the Committee of Ministers on the selection of candidates for the post of judge at the European Court of Human Rights (Adopted by the Committee of Ministers on 28 March 2012 at the 1138th meeting of the Ministers' Deputies)

(Adopted by the Committee of Ministers on 28 March 2012 at the 1138th meeting of the Ministers' Deputies)

The Committee of Ministers,

Underlining the fundamental importance of the High Contracting Parties' role in proposing candidates of the highest possible quality for election as judges of the European Court of Human Rights (hereinafter "the Court"), so as to preserve the impartiality and quality of the Court, thereby reinforcing its authority and credibility;

Recalling Articles 21 and 22 of the European Convention on Human Rights (hereinafter "the Convention", ETS No. 5), which, respectively, set out the criteria for office and entrust the Parliamentary Assembly with the task of electing judges from a list of three candidates nominated by each High Contracting Party;

Recalling the Declaration adopted at the High Level Conference on the Future of the European Court of Human Rights (Interlaken, Switzerland, 18 and 19 February 2010), which stressed the importance of maintaining the independence of the judges and of preserving the impartiality and quality of the Court;

Recalling also the Declaration adopted at the High Level Conference on the Future of the European Court of Human Rights (Izmir, Turkey, 26 and 27 April 2011), which cited the need to encourage applications by good potential candidates for the post of judge at the Court, and to ensure a sustainable recruitment of competent judges, with relevant experience, and the impartiality and quality of the Court;

Recalling Committee of Ministers Resolution CM/Res(2010)26 on the establishment of an Advisory Panel of Experts on Candidates for Election as Judge to the European Court of Human Rights (hereinafter the "Advisory Panel"), which reiterated the responsibility of the High Contracting Parties to the Convention to ensure a fair and transparent national selection procedure;

Recalling Recommendation 1649 (2004) of the Parliamentary Assembly on candidates for the European Court of Human Rights and the Committee of Ministers' reply thereto;

Taking note of the various resolutions of the Parliamentary Assembly on the matter, including Resolution 1646 (2009) on the nomination of candidates and election of judges to the European Court of Human Rights,

Adopts the following guidelines and encourages High Contracting Parties to implement them and ensure that they are widely disseminated, along with their explanatory memorandum, in particular among all authorities involved in the selection of candidates for the post of judge at the Court, and, if necessary, translated into the official language(s) of the country.

I. SCOPE OF THE GUIDELINES

The present guidelines address selection procedures at national level for candidates for the post of judge at the Court, before a High Contracting Party's list of candidates is transmitted to the Advisory Panel and thereafter to the Parliamentary Assembly of the Council of Europe.

II. CRITERIA FOR THE ESTABLISHMENT OF LISTS OF CANDIDATES

1. Candidates shall be of high moral character.
2. Candidates shall possess the qualifications required for appointment to high judicial office or be jurisconsults of recognised competence.
3. Candidates must, as an absolute minimum, be proficient in one official language of the Council of Europe (English or French) and should also possess at least a passive knowledge of the other, so as to be able to play a full part in the work of the Court.
4. Candidates need to have knowledge of the national legal system(s) and of public international law. Practical legal experience is also desirable.
5. If elected, candidates should in general be able to hold office for at least half of the nine-year term before reaching 70 years of age.
6. Candidates should undertake not to engage, if elected and for the duration of their term of office, in any activity incompatible with their independence or impartiality or with the demands of a full-time office.
7. If a candidate is elected, this should not foreseeably result in a frequent and/or long-lasting need to appoint an ad hoc judge.
8. Lists of candidates should as a general rule contain at least one candidate of each sex, unless the sex of the candidates on the list is under-represented on the Court (under 40% of judges) or if exceptional circumstances exist to derogate from this rule.

III. PROCEDURE FOR ELICITING APPLICATIONS

1. The procedure for eliciting applications should be stable and established in advance through codification or by settled administrative practice. This may be a standing procedure or a procedure established in the event of each selection process. Details of the procedure should be made public.
2. The call for applications should be made widely available to the public, in such a manner that it could reasonably be expected to come to the attention of all or most of the potentially suitable candidates.
3. States should, if necessary, consider taking additional appropriate measures in order to ensure that a sufficient number of good applicants present themselves to allow the selection body to propose a satisfactory list of candidates.
4. If the national procedure allows or requires applicants to be proposed by third parties, safeguards should be put into place to ensure that all applicants are considered fairly and impartially, and that suitable applicants are not deterred or prevented from putting themselves forward.
5. A reasonable period of time should be given for the submission of applications.

IV. PROCEDURE FOR DRAWING UP THE RECOMMENDED LIST OF CANDIDATES

1. The body responsible for recommending candidates should be of balanced composition. Its members should collectively have sufficient technical knowledge and command respect and confidence. They should come from a variety of backgrounds, be of similar professional standing and be free from undue influence, although they may seek relevant information from outside sources.
2. All serious applicants should be interviewed unless this is impracticable on account of their number, in which case the body should draw up, based on the applications, a shortlist of the best candidates. Interviews should generally be based upon a standardised format.
3. There should be an assessment of applicants' linguistic abilities, preferably during the interview.
4. All members should be able to participate equally in the body's decision, subject to the requirement that its procedures ensure that it is always able to reach a decision.

V. FINALISATION OF THE LIST OF CANDIDATES

1. Any departure by the final decision-maker from the selection body's recommendation should be justified by reference to the criteria for the establishment of lists of candidates.
2. Applicants should be able to obtain information concerning the examination of their application, where this is consistent with general principles of confidentiality in the context of the national legal system.
3. The final list of candidates to be presented to the Parliamentary Assembly should be made public by the High Contracting Party at national level.

VI. CONSULTATION OF THE ADVISORY PANEL OF EXPERTS ON CANDIDATES FOR ELECTION AS JUDGE TO THE EUROPEAN COURT OF HUMAN RIGHTS²⁷⁷

1. High Contracting Parties should submit their list of candidates to the Parliamentary Assembly after having obtained the Advisory Panel's opinion on the candidates' suitability to fulfil the requirements under the Convention.
2. The High Contracting Parties are requested to submit information about the national selection procedures to the Panel when transmitting the names and curricula vitae of the candidates.

ENDNOTES

- 1 Examples of these questionnaires can be found in previous reports of the independent panels at “The Initiative on Transparency and Election Monitoring in the Inter-American Human Rights System,” available at <https://www.wcl.american.edu/impact/initiatives-programs/center/programs/human-rights-education/independent-panel-for-election-of-judges/>.
- 2 Of the five sitting judges elected under List B, four will remain on the bench after the 2020 elections. These judges are Judges Perrin de Brichambaut, Mindua, and Kovács, who will serve until 2024; and Judge Alapini-Gansou, who will serve until 2027. Judge Pangalangan, also elected under List B, will end his term shortly after the 2020 elections.
- 3 See “Guidelines of the Committee of Ministers on the selection of candidates for the post of judge at the European Court of Human Rights,” CM(2012)40-final (29 March 2012).
- 4 In April 2019, four former presidents of the Assembly of States Parties took the extraordinary step of publicly calling for an independent expert review, one that could provide a blueprint for meaningful institutional reform. See Prince Zeid Raad Al Huseein, Bruno Stagno Ugarte, Christian Wenaweser, and Tiina Intelman, “The International Criminal Court Needs Fixing,” Atlantic Council (24 April 2019), at <https://www.atlanticcouncil.org/blogs/new-atlanticist/the-international-criminal-court-needs-fixing>.
- 5 See, e.g., statements by Austria (on behalf of the European Union), Bolivia, Bulgaria, Canada, Cyprus, Estonia, France, Italy, Lesotho, Romania, Palestine, and Uruguay, https://asp.icc-cpi.int/en_menus/asp/sessions/general%20debate/pages/generaldebate_17th_session.aspx.
- 6 On selection process, see, e.g., statements by Australia, Bulgaria, Canada, Hungary, Japan, Nigeria, Norway, Sierra Leone, Slovakia, and Uruguay, https://asp.icc-cpi.int/en_menus/asp/sessions/general%20debate/pages/generaldebate_17th_session.aspx; on the need for high standards, see statements by Austria (on behalf of the European Union), Bolivia, France, and Hungary, https://asp.icc-cpi.int/en_menus/asp/sessions/general%20debate/pages/generaldebate_17th_session.aspx.
- 7 *Strengthening from Within: Law and Practice in the Selection of Human Rights Judges and Commissioners* (Open Society Justice Initiative and International Commission of Jurists, 2017), at <https://www.opensocietyfoundations.org/reports/strengthening-within-law-and-practice-selection-human-rights-judges-and-commissioners>.
- 8 *Prosecutor v Bemba*, Dissenting Opinion of Judge Sanji Mmasenono Monageng and Judge Piotr Hofmański, ICC-01/05-01/08-3636-Anx1-Red; Separate Opinion of Judge Van den Wyngaert and Judge Morrison, ICC-01/05-01/08-3636-Anx2; and Concurring Separate Opinion of Judge Eboe-Osuji, ICC-01/05-01/08-3636-Anx3.
- 9 See *Prosecutor v Gbagbo & Blé Goudé*, Dissenting Opinion of Judge Luz del Carmen Ibáñez Carranza, ICC-02/11-01/15-1242-Anx1; Joint Declaration of Judge Eboe-Osuji and Judge Hofmanski on the Procedure on the Election of Presiding Judges, ICC-02/11-01/15-1242-Anx2; and Statement of Judge Ibáñez Carranza with respect to the joint declaration of the President of the Court and the President of the Appeals Division on the procedure on the election of presiding judges, in relation to her dissenting vote, ICC-02/11-01/15-1242-Anx3.
- 10 Douglas Guilfoyle, “Part II- This is not fine: The International Criminal Court in Trouble,” *EJIL Talk!*, see: <https://www.ejiltalk.org/part-ii-this-is-not-fine-the-international-criminal-court-in-trouble/>;
- 11 Kai Ambos, “Interests of Justice: The ICC urgently needs reforms,” at <https://www.ejiltalk.org/interests-of-justice-the-icc-urgently-needs-reforms/>.
- 12 Kevin Jon Heller, at <https://twitter.com/kevinjonheller/status/1139566116530003971>.
- 13 Interview I-ICC-3330. As explained further below, all interviewees have been anonymized.
- 14 Interview I-ICC-3477.
- 15 Interview I-ICC-8977.
- 16 Interview I-ICC-2323.
- 17 Interview I-ICC-6561; I-ICC-1516.
- 18 Amongst the decisions that have drawn significant criticism, Pre-Trial Chamber X’s decision not to grant the Prosecutor’s request to proceed with an investigation in Afghanistan looms particularly large. See *Situation in the Islamic Republic of Afghanistan*, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan, ICC-02/17-33, including Concurring and Separate Opinion of Judge Antoine Kesia-Mbe, ICC-02/17-33-Anx-Corr. For criticism, see, e.g., Christian De Vos, “No ICC Investigation in Afghanistan: A Bad Decision with Big Implications,” International Justice Monitor (15 April 2019), at <https://www.ijmonitor.org/2019/04/no-icc-investigation-in-afghanistan-a-bad-decision-with-big-implications/>; Gabor Rona, “More on What’s Wrong with the ICCs Decision on Afghanistan,” *Opinio Juris* (15 April 2019), at <http://opiniojuris.org/2019/04/15/more-on-whats-wrong-with-the-iccs-decision-on-afghanistan/>; Dov Jacobs, “ICC Pre-Trial Chamber rejects OTP request to open an investigation in Afghanistan: some preliminary thoughts on an ultra vires decision,” *Spreading the Jam*, (12 April 2019), at <https://dovjacobs.com/2019/04/12/icc-pre-trial-chamber-rejects-otp-request-to-open-an-investigation-in-afghanistan-some-preliminary-thoughts-on-an-ultra-vires-decision/>; Kevin Jon Heller, “Can the PTC Review the Interests of Justice?,” *Opinio Juris* (12 April

- 2019), at <http://opiniojuris.org/2019/04/12/can-the-ptc-review-the-interests-of-justice/>. The acquittal of Jean-Pierre Bemba by the Appeals Chamber has also been the subject of fierce criticism. See, e.g., Joseph Powderly and Niamh Hayes, "The Bemba Appeal: A Fragmented Appeals Chamber Destabilises the Law and Practice of the ICC," PhD Studies in Human Rights (26 June 2018), at <http://humanrightsdoctorate.blogspot.com/2018/06/the-bemba-appeal-fragmented-appeals.html>.
- 19 Pre-Trial Chamber II took 17 months to rule on the Prosecutor's request to open an investigation. Trial Chamber I took six months to issue its written reasoning for the oral decision to acquit Laurent Gbagbo and Charles Blé Goudé. Deferring the issuing of a final judgements' legal reasoning is contrary to the letter of the Statute, see Rome Statute, Article 74(5), Article 21(1)(a) and 21(1)(c).
- 20 Marlise Simons, "In The Hague Lofty Judicial Halls, Judges Wrangle Over Pay," *New York Times* (20 January 2019), at <https://www.nytimes.com/2019/01/20/world/europe/hague-judges-pay.html>.
- 21 Title A, Part III, Conditions of service and compensation and staff regulations, ICC-ASP/2/10. See: http://legal.un.org/icc/asp/2ndsession/report/english/part_iii_e.pdf. See also, ICC-ASP/17/10, ICC Proposed Program Budget for 2019, Annex VI (a), and ICC-ASP/17/15, Report of the Committee of Budget and Finance on the work of its thirty-first session, paras. 44-47.
- 22 If approved, the raise would bring each judge's annual salary alone (i.e. without benefits) to € 206,270, and the pension payment would need to be increased accordingly. See Report of the Committee of Budget and Finance on the work of its thirty-first session, para. 45; ICC-ASP/18/10, ICC Proposed Program Budget for 2020, Annex VI (a).
- 23 Simons, "In The Hague Lofty Judicial Halls, Judges Wrangle Over Pay."
- 24 *Prosecutor v Ntaganda*, Notification of the Decision of the Plenary of Judges pursuant to article 40 of the Rome Statute, ICC-01/04-02/06-2326, including Annex ICC-01/04-02/06-2326-Anx1.
- 25 *Prosecutor v Ntaganda*, Notification concerning Judge Kuniko Ozaki, ICC-01/04-02/06-2338; see e.g. Kevin Jon Heller, "Judge Ozaki Must Resign—or Be Removed," *Opinio Juris* (29 March 2019), at <http://opiniojuris.org/2019/03/29/judge-ozaki-must-resign-or-be-removed/>.
- 26 *Prosecutor v Lubanga*, Version publique expurgée de la "Requête urgente de la Défense aux fins de récusation de M. le Juge Marc Perrin de Brichambaut" déposée le 10 avril 2019, ICC-01/04-01/06-3451-Red; *Prosecutor v Bemba et al*, Request to admit additional evidence, ICC-01/05-01/13-2319.
- 27 *Prosecutor v Lubanga*, Notification of the Decision of the Plenary of Judges on the 'Requête urgente de la Défense aux fins de récusation de M. le Juge Marc Perrin de Brichambaut' dated 10 April 2019, ICC-01/04-01/06-3459, including Annex ICC-01/04-01/06-3459-Anx; *Prosecutor v Al Hassan*, Notification concerning the 'Request for the disqualification of Judge Marc Perrin de Brichambaut' dated 14 June 2019, ICC-01/12-01/18-393.
- 28 Cesare P.R. Romano, Daniel Terris, and Leigh Swigart, *The International Judge: An Introduction to the Men and Women who Decide the World's Cases* (Brandeis University Press, 2007), p. 15.
- 29 All country profiles and practices described in the report are current as of August 2019.
- 30 While the model questionnaire provided a general sense of areas for discussion, the interviews were "semi-structured" insofar as they followed a more open-ended approach, allowing for a discussion with interviewees rather than a strict question/answer format. Many discussions also evolved to accommodate unexpected insights or new lines of inquiry.
- 31 All interview notes are on file with the Justice Initiative.
- 32 It is worth noting that, in at least two instances, states have had their nominees elected to the bench and then either subsequently withdrawn from the ICC or threatened to do so (e.g., the Philippines, which successfully nominated two ICC judges prior to its withdrawal, and Kenya, which has had one candidate elected to date).
- 33 Six of these states were also previously profiled in *Strengthening from Within*, with respect to their nomination practice to regional human rights court and commissions. These states are Argentina, Costa Rica, South Africa, Uganda, United Kingdom, and Uruguay. See *Strengthening from Within*, pp. 48-68.
- 34 Rome Statute, Article 35 and Article 36(9).
- 35 Rome Statute, Article 40(1)-(2).
- 36 Rome Statute, Article 36(8)(a).
- 37 See Basic Principles on the Independence of the Judiciary, adopted by the 7th United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from August 26 to September 6, 1985, and endorsed by General Assembly resolutions 40/32 of November 29, 1985, and 40/146 of December 13, 1985; Recommendation CM/Rec(2010)12 of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities, adopted on November 17, 2010, at the 1,098th meeting of the Ministers' Deputies, CoE Doc. CM/Rec(2010)12 ("CoE Recommendation on Judges"); Magna Carta of Judges, adopted by the Consultative Council of European Judges (CCJE-MC) at its 11th plenary meeting, Strasbourg, November 17-19, 2010 ("Magna Carta of Judges"), Article 3 ("judicial independence shall be statutory, functional and financial"); CCJE, Opinion No. 10(2007) of the Consultative Council of European Judges to the attention of the Committee of Ministers of the Council of Europe on the Council for the Judiciary at the Service of Society, adopted at its eighth meeting, Strasbourg, November 21-23, 2007 ("Opinion No. 10"), para. 9. See further Principle 1 of the UN Basic Principles on the Independence of the Judiciary; European Charter on the statute for judges, Council of Europe, Strasbourg, July 8-10, 1998, article 1.3.

38 European Court of Human Rights, *Campbell and Fell v. The United Kingdom* (Application No. 7819/77; 7878/77),
Judgement, June 28, 1984, para. 78.

39 Inter-American Court of Human Rights, *Case of the Constitutional Court v. Peru*, para. 75 (emphasis added).

40 Basic Principles on the Independence of the Judiciary (1985).

41 Universal Charter of the Judge, adopted by the International Association of Judges (1999).

42 Bangalore Principles of Judicial Conduct, adopted at the Round Table Meeting of Chief Justices held in The
Hague (Judicial Group on Strengthening Judicial Integrity) (2002), and annexed to ECOSOC resolution 2006/23,
repeatedly cited by the UN Human Rights Council (for example, in resolution 35/12 [2007] on Independence and
impartiality of the judiciary, jurors and assessors, and the independence of lawyers).

43 Measures for the Effective Implementation of the Bangalore Principles of Judicial Conduct (“The Implementation
Measures”), adopted by the Judicial Integrity Group (Lusaka, Zambia, 2010).

44 Burgh House Principles on the International Judiciary, adopted by the Study Group of the International Law
Association on the Practice and Procedure of International Courts and Tribunals, in association with the Project
on International Courts and Tribunals (2004).

45 Resolution of the Institut de Droit International on the Position of the International Judge adopted at Rhodes
(2011).

46 UN Basic Principles on the Independence of the Judiciary, Principles 10 and 13; see also Draft Universal
Declaration on the Independence of Justice (Singhvi Declaration), para. 10; Implementation Measures of the
Bangalore Principles of Judicial Conduct, 5.1.

47 Burgh House Principles, para. 2.4.

48 European Charter on the Statute for Judges, DAJ/DOC (98) 23, Principle 1.3. See also CoE Recommendation on
Judges, para. 46. The UN Special Rapporteur on the independence of judges and lawyers has similarly indicated
that there should be an independent authority in charge of selecting judges. Report of the Special Rapporteur on
the independence of judges and lawyers, UN Doc. A/HRC/11/41 (2009), para. 27.

49 Report of the Special Rapporteur on the independence of judges and lawyers, UN Doc. A/HRC/11/41 (2009), para.
28.

50 Rome Statute, Article 36(3)(a).

51 Rome Statute, Article 36(3)(b).

52 Rome Statute, Article 36(3)(c).

53 Regulation 67 of the Regulations of the Court. Under the United Nations Common System, which was adopted by
the ICC, staff at the P-5 level are required to have 10 years of work experience. See: Staff Regulations Adopted
by the Assembly of States Parties, Second Session, New York, 8-12 September 2003, ICC-ASP/2/10. See: [https://
www.icc-cpi.int/NR/rdonlyres/3119BD70-DFB6-4B8C-BC17-3019CC1D0E21/140182/Staff_Regulations_120704EN.
pdf](https://www.icc-cpi.int/NR/rdonlyres/3119BD70-DFB6-4B8C-BC17-3019CC1D0E21/140182/Staff_Regulations_120704EN.pdf); <https://careers.un.org/lbw/home.aspx?viewtype=SC>.

54 Rome Statute, Article 36(8)(a)(iii).

55 Rome Statute, Article 36(7).

56 Rome Statute, Article 36(8)(b).

57 Rome Statute, Article 36(4)(a)(i) and (ii). For ICJ nominations, states do not propose candidates through their
governments, but rather through a group consisting of the members of the Permanent Court of Arbitration, i.e., by
the four jurists of that state who can be called upon to serve as members of an arbitral tribunal under the Hague
Conventions of 1899 and 1907. This body is discussed further below.

58 The President of the Assembly must extend the nomination period for two weeks if the MVRs concerning gender
or regional representation are not met “with at least twice the number of candidates fulfilling that requirement”,
or if the number of candidates from List A or B is less than the respective MVRs. See Resolution ICC-ASP/3/Res.6,
paras. 3, 11 and 12, as amended by resolution ICC-ASP/12/Res.8, annex II.

59 Rome Statute, Article 36(4)(b).

60 Rome Statute, Article 36(6)(a).

61 Rome Statute, Article 36(9)(b).

62 Rome Statute, Article 37(1).

63 Rome Statute, Article 37(2).

64 See Rome Statute, Article 36(4)(c); Terms of Reference for the Establishment of an Advisory Committee on
Nominations of Judges of the International Criminal Court, ICC-ASP/10/36 Annex, 30 November 2011 (“Terms of
Reference”).

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

66 See Ruth Mackenzie, Kate Malleson, Penny Martin, Philippe Sands, *Selecting International Judges: Principle,
Process, and Politics* (Oxford University Press, 2010), p. 129.

67 Rome Statute, Article 112(7)(a).

68 Rome Statute, Article 36(6)(a).

69 Rome Statute, Article 36(6)(b); Resolution ICC-ASP/3/Res.6, paras. 15 and 16.

70 For information on judicial elections at the ASP, see: [https://asp.icc-cpi.int/en_menus/asp/sessions/
documentation/16th-session/Pages/default.aspx](https://asp.icc-cpi.int/en_menus/asp/sessions/documentation/16th-session/Pages/default.aspx).

- 71 Resolution ICC-ASP/3/Res.6; see also Rome Statute, Article 36(5) and Article 36(8).
- 72 The expertise-based MVRs are established in Article 36(5) of the Rome Statute.
- 73 At the time of writing, all regional groups are composed of 16 or more states.
- 74 Resolution ICC-ASP/3/Res.6, paras. 20-21.
- 75 Rome Statute, Article 36(5).
- 76 Interview I-ICC-7788.
- 77 Interviews I-ICC-9100; I-ICC-1897; I-ICC-9714. One WEOG diplomat opined that “appointing unqualified people just because they are from a certain region or gender brings incompetent judges to the Court.” A diplomat mentioned that one of the judges elected in 2017 was only chosen because “she was simultaneously a woman, a List B candidate, and fulfilled the informal balance preference between Anglophone and Francophone speakers.”
- 78 The current list is available online, see: <https://www.icc-cpi.int/bios-2>.
- 79 This achievement was in sharp contrast with the ICJ, where, during its first 65 years, only one woman served on the bench. See Dapo Akande, “Two Women Nominated to Replace Retiring US and Chinese Judges on the International Court of Justice (Updated),” EJIL: Talk! (22 June 2010), at <http://www.ejiltalk.org/two-women-nominated-to-replace-retiring-us-and-chinese-judges-on-the-international-court-of-justice/>.
- 80 See Nienke Grossmann, “Shattering the Class Ceiling in International Adjudication,” *Virginia Journal of International Law* 56(2) (2017).
- 81 Interview I-ICC-7640.
- 82 Interview I-ICC-8277.
- 83 Article 6 ILC draft; see also Otto Triffterer, *Commentary on the Rome Statute of the International Criminal Court: observers’ notes, article by article* (Third Edition / München: Beck), p. 1220.
- 84 Triffterer, p. 1220.
- 85 The states rejecting the prevalence of criminal law and procedure were Algeria, Egypt, Jordan, Kuwait, Libya, and Qatar. Amongst these dissenters, only Jordan is currently a State Party to the Rome Statute.
- 86 Interview I-ICC-1516.
- 87 Interview I-ICC-8855.
- 88 Interview I-ICC-9078.
- 89 Interview I-ICC-6561.
- 90 Interview I-ICC-7788.
- 91 Interviews I-ICC-9714; I-ICC-4644; I-ICC-7842; I-ICC-3477.
- 92 Interview I-ICC-1516.
- 93 Ibid.
- 94 Ibid.
- 95 Interview I-ICC-1897.
- 96 See A/CONF.183/2/Add.1; Triffterer, p. 1220.
- 97 Regulations of the Court, Regulation 67.
- 98 See Independent Panel on ICC Judicial Elections, Report (26 October 2011).
- 99 Michael Bohlander commentary on Article 36 in Triffterer, p. 1220.
- 100 Interview I-ICC-3477.
- 101 Interview I-ICC-0340.
- 102 Interview I-ICC-3287.
- 103 *Selecting International Judges*, p. 75.
- 104 Ley 26200—“Ley de implementación del Estatuto de Roma, aprobado por la Ley N° 25390 y ratificado el 16 de enero de 2001, de la Corte Penal Internacional”, <http://servicios.infoleg.gob.ar/infolegInternet/anexos/120000-124999/123921/norma.htm>, Article 28.
- 105 Argentine Constitution, Article 99(4).
- 106 When Judge Fernández was nominated, she was the only person under consideration.
- 107 Argentina Constitution, Article 114.
- 108 Decreto N° 222/2003, <http://servicios.infoleg.gob.ar/infolegInternet/anexos/85000-89999/86247/norma.htm>, Article 5.
- 109 Ibid., Articles 7-8.
- 110 Interview I-ICC-7478.
- 111 Ibid.
- 112 Ibid.
- 113 Ibid.
- 114 Ley N° 9570—“Promoción De La Cooperación y Asistencia Judicial con la Corte Penal Internacional” (adopted in 2018), http://www.pgrweb.go.cr/scij/Busqueda/Normativa/Normas/nrm_texto_completo.aspx?param1=NRTC&nValor1=1&nValor2=88180&nValor3=0&strTipM=TC.
- 115 Ley N° 9570—“Promoción De La Cooperación y Asistencia Judicial con la Corte Penal Internacional,” Article 108.
- 116 Ibid.
- 117 Costa Rica Constitution (requirements for magistrates), Article 159; Ley N° 9570—“Promoción De La Cooperación y

Asistencia Judicial con la Corte Penal Internacional,” Article 107.

118 Guidelines for the Deployment of Federal Employees to a public inter-governmental or international institution (<https://www.auswaertiges-amt.de/blob/215538/bd0a7104b13de7f492661d1b3484719a/entsenderichtlinien-data.pdf>) (Deployment Guidelines).

119 Ibid, Article 2.

120 Ibid, Articles 1(1) and 3(1). The ICC is listed as international organization in the Deployment Guidelines’ Annex.

121 Interview I-ICC-1462. Article 1(5) of the Deployment Guidelines state that in view of the importance of the tasks of international institutions, including the ICC, only persons who are particularly qualified for the required tasks should be deployed. Other than this requirement, there are other references to specific skills.

122 I-ICC-1462. Deployment Guidelines’ Annex.

123 Ministry of Foreign Affairs’ 6th Report of the Federal Government on German Representation in International Organizations (2019), <https://www.auswaertiges-amt.de/blob/215550/3bd619914d3c4c511dd92a5798265872/berichtbregpersonalio-data.pdf> (“MoFA Report”).

124 Interview I-ICC-1462.

125 Ministry of Foreign Affairs’ 6th Report of the Federal Government on German Representation in International Organizations (2019), <https://www.auswaertiges-amt.de/blob/215550/3bd619914d3c4c511dd92a5798265872/berichtbregpersonalio-data.pdf>.

126 Interviews I-ICC-1534; I-ICC-9100.

127 Interview I-ICC-1534. Also I-ICC-9100.

128 Interview I-ICC-4280.

129 Ibid.

130 I-ICC-6366.

131 Constitution of South Africa, Articles 175 and 178(5).

132 Constitution of South Africa, Article 178(1).

133 The JSC is entitled to advise the national government on any matters relating to the Judiciary or administration of justice. Additionally it performs the following functions: a) interviewing candidates for judicial posts and making recommendations for appointment to the bench; and b) dealing with complaints brought against judges See: <https://www.judiciary.org.za/index.php/judicial-service-commission/about-the-jsc>.

134 I-ICC-6366.

135 I-ICC-6728.

136 Ibid.

137 Ibid.

138 See <https://www.mofa.go.ug/data/smenu/143/International%20Law%20And%20Social%20Affairs.html>

139 I-ICC-6728.

140 I-ICC-5333.

141 The UK’s announcement for the 2021 ICC judicial elections is available at <https://www.judicialappointments.gov.uk/sites/default/files/sync/news-documents/icc-judge-advert-fco.pdf>. Importantly, the job advertisement encourages diversity by expressly stating that, “Applications are encouraged from all candidates regardless of ethnicity, religion or belief, gender, sexual orientation, age, disability, gender identity. We particularly welcome applications from women, those with a disability and those from a black or ethnic minority background. We want to explore the widest possible pool of talent for these important appointments.”

142 The UK’s announcement for the 2021 ICC judicial elections is available at <https://www.judicialappointments.gov.uk/sites/default/files/sync/news-documents/icc-judge-advert-fco.pdf>.

143 I-ICC-5333.

144 Ibid. Interviewees confirmed that information concerning the exact number of applicants for the United Kingdom’s judicial nomination is no longer available in the records.

145 Ley n° 18.026—cooperación con la corte penal internacional en materia de lucha contra el genocidio, los crímenes de guerra y de lesa humanidad (Uruguay), <https://legislativo.parlamento.gub.uy/temporales/leytemp5884197.htm>.

146 Interview I-ICC-1756.

147 Ley n° 18.026 Article 75(2) (Uruguay).

148 Ibid.

149 Uruguay Constitution, Article 235; Ley 18.026, Article 75.

150 Interview I-ICC-1756.

151 Four states have had three candidates elected as judges (Japan, Italy, France, Trinidad and Tobago), while six states have elected two (United Kingdom, Canada, Germany, Uganda, South Korea, and the Philippines). Furthermore, of the eight judges to have been elected from the 18 states that comprises the Asia-Pacific regional group overall, all but two were nationals of either Japan, South Korea, or the Philippines (which is no longer even a State Party). The other states are Samoa and Cyprus, which is in fact a member of the European Union but is considered part of the Asia-Pacific group for the ICC’s purposes. For further reflection on the import of these figures, see Anthea Roberts, *Is International Law International?* (Oxford University Press, 2017) (arguing that how international law is constructed is “shaped by certain forms of national and regional dominance that betray some

- of the field's claims to universality").
- 152 Interview I-ICC-1111.
- 153 Interviews I-ICC-9063; I-ICC-3313; I-ICC-1111.
- 154 Interviews I-ICC-9063; I-ICC-2012; I-ICC-1111; I-ICC-3313.
- 155 Interviews I-ICC-9876; I-ICC-0321.
- 156 Ibid. In that case, questions were also raised in the media about the relevant candidate not having been in judicial service for a particularly long period of time. See, e.g., <https://www.ilfattoquotidiano.it/2016/02/08/magistrati-fuori-ruolo-grasso-rischia-di-perdere-il-consigliere-aitala-csm-discute-ritorno-alla-toga/2442220/>.
- 157 I-ICC-3287; I-ICC-0321; I-ICC-7842; I-ICC-9482; I-ICC-4644.
- 158 For a similar conclusion, and related analysis see *Selecting International Judges*, 84-85 ("In the absence of any obligation to declare which procedure is being used, and the option of using national judicial nomination procedures, many different procedures have been used, some of which may barely be said to amount to a 'procedure' at all.>").
- 159 Ibid., pp. 73, 85.
- 160 Statute of the International Court of Justice, Article 4(2).
- 161 See further *Selecting International Judges*, p. 85 ("In some cases the [PCA] group is functioning but automatically validates the nomination decision of the foreign ministry.>").
- 162 Interview I-ICC-8855.
- 163 Interviews I-ICC-6561; I-ICC-1244; I-ICC-3287; I-ICC-8855.
- 164 See Chapter 2, International legal standards (above).
- 165 *Selecting International Judges*, p. 147.
- 166 Interviews I-ICC-3287; I-ICC-3477; I-ICC-8277.
- 167 Guidelines of the Committee of Ministers on the selection of candidates for the post of judge at the European Court of Human Rights, adopted on March 28, 2012, at the 1138th meeting of the Ministers' Deputies, CM (2012) 40-final, section II, paras. III and IV. They further urge states to "put into place [safeguards] to ensure that all applicants are considered fairly and impartially, and that suitable applicants are not deterred or prevented from putting themselves forward." They also refer to the importance of an independent body to adequately assesses candidates' qualifications.
- 168 Interview I-ICC-5333.
- 169 Interview I-ICC-6366.
- 170 Ley número. 5877, de 28 de setiembre de 2017, que implementa el Estatuto de Roma que crea la Corte Penal Internacional, Article 78 (Paraguay). Of note from a regional perspective as well is that at least four GRULAC states (Uruguay, Paraguay, Costa Rica, and Argentina) have developed legislation regulating the nomination of judicial candidates to the ICC. Ley número. 5877, de 28 de setiembre de 2017, que implementa el Estatuto de Roma que crea la Corte Penal Internacional (Paraguay); Ley 26200—"Ley de implementación del Estatuto de Roma, aprobado por la Ley N° 25390 y ratificado el 16 de enero de 2001, de la Corte Penal Internacional" (Argentina); Ley n° 9570—"promoción de la cooperación y asistencia judicial con la corte penal internacional" (Costa Rica); Ley n° 18.026 Uruguay).
- 171 Interview I-ICC-4545. Although the Slovak Republic has never nominated a judge to the ICC, it was revealed in interviews that, should this process take place in the future, it would be carried out through the same process as that used for the European Court of Justice and the European Court of Human Rights, procedures which are enshrined in law. See *Strengthening from Within*, pp. 61-63.
- 172 Article 28, Ley 26200—"Ley de implementación del Estatuto de Roma, aprobado por la Ley N° 25390 y ratificado el 16 de enero de 2001, de la Corte Penal Internacional" (Argentina); Art. 108 Ley n° 9570—"promoción de la cooperación y asistencia judicial con la corte penal internacional" (Costa Rica); Art. 75(1), Ley n° 18.026 (Uruguay).
- 173 Article 75(2), Ley n° 18.026—"cooperación con la corte penal internacional en materia de lucha contra el genocidio, los crímenes de guerra y de lesa humanidad" (Uruguay); Art. 108 Ley n° 9570—"promoción de la cooperación y asistencia judicial con la corte penal internacional" (Costa Rica).
- 174 Interview I-ICC-1756.
- 175 Slovakia conducts interviews as well. I-ICC-4545.
- 176 Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, A/CONF.183/13 (Vol. II), 15-17 July 1998; *Curriculum Vitae*, Judge Kovács: https://asp.icc-cpi.int/iccdocs/asp_docs/Elections/EJ2014/ICC-ASP-EJ2014-HUN-CV-ENG.pdf (accessed 8 June 2019). Judge Kovács worked as a diplomat at the Hungarian Embassy in Paris; *Curriculum Vitae*, Judge Mindua: https://asp.icc-cpi.int/iccdocs/asp_docs/Elections/EJ2011/ICC-ASP-EJ2011-DC-CV-ENG.pdf (accessed 8 June 2019). Judge Mindua was Ambassador of the Democratic Republic of Congo to Switzerland, and to the United Nations Office and other International Organizations in Geneva and Vienna; *Curriculum Vitae*, Judge Ozaki: <https://asp.icc-cpi.int/NR/rdonlyres/20D73DDA-3900-48E9-A73A-695D420DAD18/0/ICCASPEJ22009JPNVCVENG.pdf> (accessed 8 June 2019). Judge Ozaki had a long career at the Japanese Ministry of Foreign Affairs and has held several diplomatic positions; *Curriculum Vitae*, Judge Perrin de Brichambaut: https://asp.icc-cpi.int/iccdocs/asp_docs/Elections/EJ2014/ICC-ASP-EJ2014-FRA-CV-ENG.pdf (accessed 8 June 2019); *Curriculum Vitae*, Judge Politi:

- https://asp.icc-cpi.int/iccdocs/asp_docs/Elections/ACN2012/ICC-ASP-ACN2012-ITA-CV-ENG.pdf (accessed 8 June 2019); *Curriculum Vitae*, Judge Slade: https://www.icc-cpi.int/NR/rdonlyres/4D2CF519-584A-4D4C-BA38-5C3D9EAE66F/141536/ICCASP_ej2_samcv.pdf (accessed 8 June 2019); *Curriculum Vitae*, Judge Kirsch: https://asp.icc-cpi.int/iccdocs/asp_docs/Elections/ACN2012/ICC-ASP-ACN2012-CAN-CV-ENG.pdf (accessed 8 June 2019); *Curriculum Vitae*, Judge Fernández de Gurmendi: <https://asp.icc-cpi.int/NR/rdonlyres/4D226D8D-6045-4B3D-8CB2-6855DD1D3C80/O/ICCASPEJ22009ARGCVENG.pdf> (accessed 8 June 2019); *Curriculum Vitae*, Judge Kaul: https://www.icc-cpi.int/NR/rdonlyres/C50AA5FD-A78B-4C91-950D-5EE3A9759A18/141522/ICCASP_ej2_gercv.pdf (accessed 8 June 2019); Statement for the nomination as Judge to the ICC: [http://legal.un.org/icc/elections/judges/kourula/statement\(e\).pdf](http://legal.un.org/icc/elections/judges/kourula/statement(e).pdf) (accessed 8 June 2019); *Curriculum Vitae*, Judge Fumiko: <https://asp.icc-cpi.int/NR/rdonlyres/2E1AC84C-799A-4806-97DB-B6C9D4E722F9/278364/ICCASPEJ2009CVJENG.pdf> (accessed 8 June 2019); *Curriculum Vitae*: <https://asp.icc-cpi.int/NR/rdonlyres/C5A5C788-039A-466F-8DB3-1CC17698C223/278370/ICCASPEJ2009CVGENG.pdf> (accessed 8 June 2019).
- 177 For example, five candidates ran in the November 2009 Special Election to fill two judicial vacancies. Two of those candidates had been government officials for over 10 years including until the time of election. States elected those two candidates. Similarly, all candidates who had held government positions over the last decade preceding elections (including for some until the time of nomination) were successfully elected during the 2014 and 2017 ordinary elections.
- 178 Interview I-ICC-6561.
- 179 Interview I-ICC-8277.
- 180 Leandro Despouy (Special Rapporteur on the independence of judges and lawyers), ¶¶ 23, U.N. Doc., A/HRC/11/41 (March 24, 2009), paras. 35, 36, 41; Commentary on the Bangalore Principles of Judicial Conduct (Judicial Group on Strengthening Judicial Integrity, 2007), at https://www.unodc.org/documents/corruption/publications_unodc_commentary-e.pdf.
- 181 Article 40(2) of the Rome Statute; Article 3(3) and 4(2) of the ICC Code of Judicial Ethics, ICC-BD/02-01-05.
- 182 Interview I-ICC-3287.
- 183 *Ibid.*; also expressed in interviews I-ICC-6561 and I-ICC-8992.
- 184 Exceptions include Judge Elizabeth Odio Benito, Judge Silvia Fernandez de Gurmendi and Judge Rosario Aitala, all of whom ran under List A.
- 185 Interview I-ICC-9997. To be sure, vote trading is also a common practice in other international judicial institutions. As noted by an independent panel of experts who have reviewed candidates to the Inter-American human rights system, “In order to obtain more firm commitments, States engage in an exchange of votes, as in most cases there is more than one vacancy for the respective organ. But the exchange of votes is by no means limited to the same election and the same organ. States exchange a vote for a judge for a vote for a commissioner, and not infrequently for votes in elections for positions in organs not related to the [same system].” See *Strengthening from Within*, p. 72.
- 186 *Selecting International Judges*, p. 110.
- 187 *Ibid.*, p. 112.
- 188 Interview I-ICC-9078.
- 189 *Selecting International Judges*, p. 113.
- 190 Interview I-ICC-9100.
- 191 *Ibid.*
- 192 I-ICC-9078
- 193 *Selecting International Judges*, p. 118.
- 194 Interview I-ICC-9100.
- 195 Interview I-ICC-3133.
- 196 Interview I-ICC-7640.
- 197 Interview I-ICC-9667.
- 198 *Ibid.*
- 199 *Ibid.*
- 200 The recording can be accessed at <http://www.coalitionfortheicc.org/webcast-ICC-judicial-elections-panel-2017>. The questionnaires for the candidates to the last judicial election can be accessed at <http://www.coalitionfortheicc.org/icc-judicial-elections>.
- 201 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/Part.I, para. 27.
- 202 Interview I-ICC-1897.
- 203 *Ibid.*
- 204 Interview I-ICC-7842.
- 205 Interview I-ICC-1897.
- 206 Interviews I-ICC-3477; I-ICC-1897; I-ICC-9667; I-ICC-8992; I-ICC-9997; I-ICC-9100.
- 207 Interview I-ICC-6166.
- 208 Rome Statute, Article 36(6)(a).

- 209 Interview I-ICC-8855.
- 210 Interview I-ICC-3477.
- 211 Interview I-ICC-0111.
- 212 Interview I-ICC-7842.
- 213 Interview I-ICC-6561.
- 214 Ibid.
- 215 Interview I-ICC-0111.
- 216 Interview I-ICC-6561.
- 217 Interview I-ICC-8855.
- 218 Interview I-ICC-9714.
- 219 Ibid.
- 220 Interview I-ICC-8855.
- 221 Interviews I-ICC-8855; I-ICC-9667.
- 222 Interview I-ICC-9667.
- 223 Interview I-ICC-0583.
- 224 Interviews I-ICC-8855; I-ICC-7700.
- 225 Interview I-ICC-1244.
- 226 Interview I-ICC-0340 (noting that I-ICC-7700; I-ICC-0340. In certain countries, appointment to the highest judicial office does not require possession of a law degree. A state official noted that the candidate's election could be explained because the nominating state is one of the main contributors to the Court's budget, interview I-ICC-7700.
- 227 Interviews I-ICC-8992; I-ICC-9667; I-ICC-0340. Notably, in its most recent report, the Advisory Committee noted that two candidates failed to meet the required level of (oral) proficiency in one of the working languages of the Court. The Advisory Committee, nevertheless, marked them as "formally qualified" "apart from language." See ICC-ASP/16/7, Report of the Advisory Committee on Nominations of Judges on the work of its sixth session (2017), assessments for candidates KHOSBAYAR, Chagdaa (Mongolia) and VUKOJE, Dragomir (Bosnia and Herzegovina).
- 228 ICC-ASP/9/Res.3, para. 25.
- 229 ICC-ASP/10/36; ICC-ASP/10/Res.5.
- 230 Coalition for the International Criminal Court, Election of ICC and ASP Officials: Judges, at <http://iccnow.org/?mod=electionjudges>.
- 231 Terms of reference for the establishment of an Advisory Committee on Nominations of Judges of the International Criminal Court, para 1.
- 232 Ibid., paras. 1-2. Currently, four Committee members are former ICC judges, and three are women.
- 233 Song Statement of Qualifications for the Advisory Committee, at https://asp.icc-cpi.int/iccdocs/asp_docs/Elections/ACN2019/ICC-ASP-EACN-ROK-ST.ENG.pdf.
- 234 The current composition of the Advisory Committee can be consulted on the ASP website, at https://asp.icc-cpi.int/en_menus/asp/ACN/Pages/default.aspx.
- 235 The latest version of the Advisory Committee's rules of procedure and evidence are available as Annex III to its report on the work of its sixth session, ICC-ASP/16/7.
- 236 Advisory Committee Report 4th meeting, para 16.
- 237 Interview I-ICC-1144.
- 238 Advisory Committee Report (2017).
- 239 Interview I-ICC-7640.
- 240 Terms of reference for the establishment of an Advisory Committee on nominations of judges of the International Criminal Court, paras. 11-12.
- 241 Report of the Advisory Committee on Nominations of Judges on the work of its 4th session, ICC-ASP/13/46, paras. 15-19.
- 242 Report on the Advisory Committee on Nominations of Judges on the work of its 2nd meeting (2013), ICC-ASP/12/47, Annex III; Report on the Advisory Committee on Nominations of Judges on the work of its third meeting (2014), ICC-ASP/13/22, Annexes II and III; Report on the Advisory Committee on Nominations of Judges on the work of its sixth meeting, ICC-ASP/16/7, Appendix III and Annex III.
- 243 In 2014, the committee recommended the following amendment to its terms of reference (which was adopted by the Assembly, see ICC-ASP/13/Res.5, Annex III): "6 bis. For a period of three years after the end of the mandate of a member of the Committee, that person shall not be nominated as a candidate for election to the Court." In 2017, it added the following rules to its rules of procedure and evidence: Rule 5 "When a candidate has the same nationality as a member of the Advisory Committee, that member shall not be present during the interview and shall not participate in the evaluation of the candidate;" and Rule 6 "A candidate shall refrain from reading prepared materials during the interview."
- 244 Report of the Advisory Committee on Nominations of Judges on the work of its 6th session, ICC-ASP/16/7.
- 245 Interview I-ICC-1244.
- 246 Interview I-ICC-3313.

247 Interview I-ICC-0111.

248 Interview I-ICC-3287.

249 Interview I-ICC-4644. It is worth noting that the Advisory Committee does make findings on candidates' language skills; however, it is unclear how the current methods employed enable the committee to properly assess them.

250 Interview I-ICC-1144.

251 See Advisory Committee Report 2nd meeting (2013), Annex III para. 2; Advisory Committee Report 3rd meeting (2014), Annex III, para. 1.

252 Interview I-ICC-7788.

253 Advisory Committee Report (2015), ICC-ASP/13/22, Appendix III, para. 1(d).

254 As a parallel observation, the ICC Registry is empowered to request additional materials and information from individuals applying for Counsel or Assistant to Counsel on matters relevant to their recruitment. Regulation 121 *bis* of the Regulations of the Registry.

255 Such additional criteria were, for instance, developed and considered by the independent panel of experts that has been convened, since 2015, to assess the qualification of candidates nominated to the Inter-American Commission on Human Rights and the Court as well. See, e.g. Final Report of the Independent Panel for the Election of Judges to the Inter-American Court of Human Rights, <https://www.wcl.american.edu/impact/initiatives-programs/center/documents/independent-panel-final-report-2018/>.

256 It is noteworthy that candidates applying for ICC staff positions are subject to verification of the information provided in their applications by the ICC's Personnel Security Clearance.

257 Report of the Advisory Committee on Nominations of Judges on the work of its fourth session, ICC-ASP/13/46, paras. 15-19.

258 Terms of Reference of the Advisory Committee, para. 5.

259 Independent Panel on International Criminal Court Judicial Elections, Report on International Criminal Court Judicial Nominations 2011 (26 October 2011).

260 Interview I-ICC-9714.

261 Interview I-ICC-6561.

262 Interview I-ICC-3287. By contrast, two different state officials argued that a careful reading of the report's wording does make clear which judges are more qualified than others. Both, however, agreed that this does not prevent states from voting for less-qualified candidates [I-ICC-7700; I-ICC-6561].

263 Interviews I-ICC-7842; I-ICC-1244; I-ICC-1516. In the 2017 elections, of the List B candidates, one "formally qualified" candidate was elected, while two "particularly well qualified" candidates were not.

264 Interview I-ICC-3133.

265 See, e.g., "Final Report of the Independent Panel for the Election of Commissioners to the Inter-American Commission on Human Rights," (5 June 2017), at <https://www.opensocietyfoundations.org/sites/default/files/iahcr-panel-2017-report-eng-20170622.pdf>.

266 *Ibid.*, pp. 8-36.

267 Resolution ICC-ASP/3/Res.6, para. 3, as amended by resolution ICC-ASP/12/Res.8, annex II. Elections are held on the first day of the ASP. The ASP generally takes place in the first week of December. Given that the nomination period generally starts 32 weeks before the election, they typically end by early August.

268 AC Reports of 3rd session (2014) and 6th session (2017).

269 Interview I-ICC-885.

270 Interview I-ICC-0111.

271 In the Kosovo Specialist Chambers, a Selection Panel conducts interviews, assesses and recommends suitable candidates to the appointing authority (Head of EULEX Mission), which designates members from the Selection Panel's list of recommendations. See: Law on the Specialist Chamber.

272 Resolution CM/Res(2010)26 on the establishment of an Advisory Panel of Experts on Candidates for Election as Judge to the European Court of Human Rights, para. 1. In the context of the ECtHR, each High Contracting Party nominates three candidates.


273 *Ibid.* See also Procedure for the election of judges of the European Court of Human Rights, Memorandum prepared by the Secretary-General of the Assembly, SG-AS (20 19) 05, 15 April 2019, Para. 5

274 *Strengthening from Within*, p. 81.

275 Interview I-ICC-6561.

276 As amended at the 1213th meeting (26 November 2014, decision CM/Del/Dec(2014)1213/1.5).

277 *Ibid.*



The International Criminal Court represents a signal milestone in the long quest for international justice. Yet today, 17 years after the ICC's founding, the Court is struggling to live up to its promise, dogged by delays, troubled prosecutions, and a string of controversial judicial decisions. Reform is needed if the Court is to fulfill its potential.

Raising the Bar seeks to contribute to ICC reform efforts by focusing on the process through which ICC judges are nominated and elected. The report first looks at how judges are nominated at the national level, including a detailed examination of how 10 representative States Parties conduct nominations. It finds that, too often, states lack established, transparent processes, and focus more on personal connections than professional merit when nominating candidates. The report further confirms a pattern of vote trading among countries and regional blocs, as well as political campaigning, which can result in the election of less-qualified candidates and a bench dominated by a handful of states. Finally, *Raising the Bar* urges reforms to the role and mandate of the Advisory Committee on Nominations of Judges, which has not performed as it should.

Based on interviews with dozens of current and former ICC judges and staff, *Raising the Bar* makes a compelling case that the Court's judicial selection process needs to be reformed. The report also offers simple, practicable recommendations that can improve the nomination and election of ICC judges and, ultimately, the Court's performance and effectiveness.