THE INTERNATIONAL CRIMINAL COURT
NOMINATION AND ELECTION OF JUDGES

A Discussion Paper

BY:

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CONTENTS

FOREWORD

This paper has been prepared by the Center on International Cooperation under the auspices of the Project on International Courts and Tribunals (PICT) to provide the Preparatory Commission for the International Criminal Court and the future Assembly of States Parties with issues for consideration.

Aware that international law is the linchpin of a burgeoning international public sector, and that courts, tribunals and other dispute settlement bodies have emerged in virtually every area of international activity, in 1996 the Center on International Cooperation (New York University) and the Foundation for International Environmental Law and Development - FIELD (School of Oriental and African Studies, University of London) launched PICT.

PICT's mission is to address the legal, institutional and financial issues arising from the multiplication of international courts and tribunals and other dispute settlement bodies, as well as from the increased willingness of members of the international community to have recourse to them.

PICT addresses legal, institutional and financial issues arising out of the proliferation of international courts and dispute settlement bodies and the growing number of cases which these bodies are called upon to address. The overall objective is to promote research, training and public education activities that will contribute to the more effective, equitable and efficient delivery of international justice.

- *Effectiveness*: reinforcing the role of international courts and bodies in the administration and development of the international legal system; strengthening their credibility as convenient and efficient dispute settlement bodies; ensuring the implementation of their rulings;

- *Equity*: reducing financial and structural barriers that limit the ability of less well-endowed actors to use international courts and dispute settlement bodies; providing practical know-how and legal skills to their actual and potential users;

- *Efficiency*: ensuring the availability of adequate financial means and the use of the best management practices; decreasing costs and length of proceedings by streamlining statutes and rules of procedure.

To achieve these general objectives PICT promotes and undertakes research on legal, financial, procedural and access issues which affect the delivery of international justice, with the intent of identifying potential solutions.

This discussion paper on the Nomination and Election of Judges is the fourth prepared by PICT on the International Criminal Court. The three previous papers were on the Victims and Witnesses Unit (article 43.6 of the Rome Statute), the Financing of the International Criminal Court, and the Trust Fund for Victims (article 79 of the Rome Statute).

PICT itself takes no position on the legal questions involved but believes that the views of the papers' author can help to both clarify provisions in the Rome Statute and inform decisions on the nomination and election of judges. We invite readers to comment on the paper directly to the author or to PICT staff at <cr28@acf2.nyu.edu>.

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Nomination and Election of Judges – A Discussion Paper

1. Introduction

The Rome Statute on the International Criminal Court has become a reality. The necessary sixty ratifications for its entry into force were reached on April 11, 2002.[1] That event set in motion a string of actions: the Rome Statute will officially enter into force on July 1, 2002; the first meeting of the Assembly of States Parties will commence on September 1, 2002; and the election of the prosecutor and the judges will take place at a resumed meeting in January 2003.

The election of judges is of utmost importance for the Court. The judges will carry the weight of the Court and their work will ultimately decide its success or failure. The Rome Statute sets out detailed requirements regarding their qualifications, and at the same time gives them enormous responsibility. Their judgments will deal with procedural matters, witness protection, individuals' guilt or innocence, sentencing, and reparations to victims. Their decisions will affect individual freedom, redress to victims and communities, and in many instances states' interest. The judges will make these decisions in small chambers, in some instances by a single judge, giving each judge a crucial role in the process. On top of this, for the first time, the judges have been given the responsibility for the administration of an international court.

The first judges of the Court will have a unique responsibility. Their interpretation of the Rome Statute, and their decisions on issues such as the authorization for the Prosecutor to investigate and the jurisdiction of the Court, will shape the Court for times to come - as will their election of the Registrar of the Court and adoption of the Regulations of the Court. Similarly, the first election of judges will be closely watched. Unlike its predecessors, the International Court of Justice (ICJ), the International Criminal Tribunal for the former Yugoslavia (ICTY), and the International Criminal Tribunal for Rwanda (ICTR), which are sub-organs of the United Nations and as such binding for all UN member states, the ICC is a treaty organ, and more states must therefore ratify the Rome Statute to make the Court truly international. To achieve this

[1] According to article 126 of the Statute "[the] Statute shall enter into force on the first day of the month after the 60th day following the date of the deposit of the 60th instrument of ratification, acceptance, approval or accession with the Secretary-General of the United Nations. For each State ratifying, accepting, approving or acceding to this Statute after the deposit of the 60th instrument of ratification, acceptance, approval or accession, the Statute shall enter into force on the first day of the month after the 60th day following the deposit by such State of its instrument of ratification, acceptance, approval or accession.

goal, the Court must win – and keep – the confidence of the world. The nomination and election of the judges will play a crucial role in this effort; the process will have to be transparent, and result in an independent, competent, and representative bench.[2]

The Rome Statute already sets out the basic principles for the nomination and election process (arts. 36 and 37).[3] But how some of these principles will be implemented and enforced remains to be decided. At its ninth session in April 2002, the Preparatory Commission for the International Criminal Court began negotiations on the procedures for the nomination and election for the judges and the prosecutor.[4] Some consensus was reached on the nominations procedures, but the main issue left outstanding was the election process.[5] Inevitably, state delegations are veterans on election issues; this year alone they will elect judges to the International Tribunal for the Law of the Sea, the International Court of Justice, and the International Criminal Tribunal for Rwanda. However, while statutes of other international tribunals have general qualification requirements, and one or two requirements for the bench as a whole, (i.e., equal geographical representation and/or representation of the principal legal systems of the world), the Rome Statute has additional requirements: certain criteria on the number of judges with experience in criminal procedure, and on those with experience in international law (art. 36.5); a fair representation of female and male judges (art. 36.8(a)(iii)); and inclusion of judges with legal expertise on specific issues, including violence against women and children (art. 36.8(b)). As delegates at the ninth session soon realized the complexity of the issue, no decisions were taken on the matter, and further discussion was left for the up-coming session in July.

2. Judges - Presidency and Chambers

[2] The first attempt to establish a permanent international court failed because states could not agree on how judges should be elected; on the Proposed Court of Arbitral Justice (1907), see Arthur Eyffinger, The International Court of Justice, 1946-1996 (1996), at 64-65.

[3] See also rule 85 of the Draft Rules of Procedure of the Assembly of States Parties; UN Doc. PCNICC, 2001/Add.4, 8 January 2002.

[4] The issue is dealt with by the Working Group on the Assembly of States Parties Preparatory Documents, chaired by Saeid Mirzaee-vengejeh of the Islamic Republic of Iran. To facilitate its work, the Secretariat of the United Nations was requested to prepare a working paper; see Election of Judges, the Prosecutor and the Registrar of the International Criminal Court, Preparatory Commission for the International Criminal Court, UN Doc. PCNICC/2002/WGASP-PD/L.1, 26 February 2002.

[5] On the basis of the discussion in the Working Group during the ninth session, its coordinator prepared a Rolling Text: Draft resolution of the Assembly of States Parties on the procedure for the nomination and election of judges, the Prosecutor and the Deputy Prosecutors of the International Criminal Court, UN Doc. PCNICC/2002/WGASP-PD/RT.2, 26 April 2002, [hereinafter the Rolling Text].

According to article 36.1 of the Rome Statute, there shall be eighteen judges of the Court.[6] The number is close to that of other international tribunals (fifteen at the International Court of Justice, twenty-one at the International Tribunal for the Law of the Sea, sixteen at the ICTY, which in addition has nine *ad litem* judges, and sixteen at the ICTR. Judges shall hold office for a term of nine years, and shall not be eligible for re-election (art. 36.9(b)). The Rome Statute foresees the possibility that some of the eighteen judges will only serve part time (art. 35.3). This results from the special nature of the court; being a permanent court, it is not known when it will have its first case or what its future caseload will be. ITLOS is in a similar situation: its caseload has been unsteady, and its judges work part time and are paid accordingly. The draft budget for the first financial year of the ICC foresees that nine judges will be on full-time salaries.[7] To protect their independence, and the integrity of the Court, the arrangement requires clear criteria on what activities judges can engage in outside the Court and from whom they can receive their income.[8]

To protect their independence, and the integrity of the Court, the arrangement requires clear criteria on what activities judges can engage in outside the Court and from whom they can receive their income.

The judges elect their president and the first and second vice-presidents, which together shall constitute "*the Presidency*." The Presidency is a new organ among international courts and the Rome Statute assigns it a major administrative role, as it is responsible for the "proper administration of the Court, with the exception of the Office of the Prosecutor" (art. 38.3). Correspondingly, the judges elect the Registrar of the Court.[9] This added responsibility changes the traditional role of judges, which has so far been

[6] Article 36.2 of the Rome Statute provides for the election of additional judges.

[7] Revised draft budget for the first financial period of the court, Text of Part One proposed by the Coordinator, UN Doc. PCNICC/2002/WGFYB/RT.2, 17 April 2002, p. 39.

[8] During the meetings of the Preparatory Committee for the International Criminal Court the view was expressed that "judges should not engage in any activities that would prejudice their judicial functions. In this connection, activities such as part-time teaching and writing for publication were considered compatible with such functions"; Report of the Preparatory Committee on the Establishment of an International Criminal Court, Volume I, Proceedings of the Preparatory Committee during March-April and August 1996, UN Doc. A/51/22, Supp. No 22 (1996), at 13.

[9] At the ICTY and ICTR, the Registrar is responsible for the administration of the tribunals and has been directly accountable to the General Assembly of the United Nations. His ultimate authority has caused disagreements, and the tribunals' judges have been requesting more administrative authority in order to be in full control of their resources; see Report of the Expert Group to Conduct a Review of the Effective Operation and Functioning of the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda, UN Doc. A/54634, 22 January 2000, para. 245-252.

limited to judicial responsibilities.[10] Inevitably, the administrative responsibility of the judges has to be one of the criteria taken into account in their selection.

The Court will have three types of chambers: an Appeals Chamber, a Trial Chamber, and a Pre-trial Chamber. According to article 39.1 of the Rome Statute, five judges shall serve in the Appeals Chamber (including the President), at least six judges shall serve in the Trial Chamber, and at least six in the Pre-Trial Chamber. How the judges will be designated to each division is unclear. According to article 39.1, "the Court shall organize itself into the divisions." At the ICTY and ICTR the President assigns judges to chambers after consultations with the permanent judges of the tribunal.[11] Equipped with a Presidency, the ICC should use that organ to make the arrangements, after consultations with the judges of the Court. The arrangement would be coherent with other duties of the Presidency such as deciding which judges shall serve on a full-time basis (art. 35. 3), and the rotation of judges between trial and pre-trial chambers (art. 39.4). The assignment of judges to chambers has to follow the direction of the Statute, which states that "[t]he Trial and Pre-Trial Divisions shall be composed predominantly of judges with criminal trial experience" (art. 39.1).

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3. Qualifications of Judges

The Rome Statute sets out detailed requirements for the qualifications of judges– both individually and for the bench as a whole. The judges shall be chosen from among persons of high moral character, impartiality, and integrity, who possess the qualifications required in their respective states for appointment to the highest judicial offices (art. 36.3(a)). Furthermore a certain number of judges shall have established competence in criminal law and procedure (at least nine), while others shall have

[10] The administrative responsibility raises some serious questions; in particular about the judges' ultimate accountability for the actions of the Registrar and any consequences thereof. The structure of having the Presidency responsible for the overall administration of the Court, and having no link between the Registrar and the Assembly of States Parties, was harshly criticized by the former Registrar of the ICTY. She commented that "[t]he independence and effectiveness of an international court would be seriously hampered if the judicial organ and individual judges would be made subject to administrative accountability"; see Address of the Registrar of the International Criminal Tribunal for the former Yugoslavia, Mrs. Dorothee de Sampayo Garrido-Nijgh to the Preparatory Committee on the Establishment of an International Criminal Court, March/April Session, 16 March – 3 April 1998, New York.

The Rome Statute sets out detailed requirements for the qualifications of judges– both individually and for the bench as a whole. One of the major tasks of the Assembly of States Parties is to decide how these requirements will be implemented and enforced.

established competence in international law (at least five). As for the composition of the bench as a whole, there shall be representation of the principal legal systems of the world, equitable geographical representation, and a fair representation of female and male judges (art. 36.8(a)). Some judges shall have expertise on specific issues, including violence against women and children (art. 36.8(b)). One of the major tasks of the Assembly of States Parties is to decide how these requirements will be implemented and enforced.

3.1 Qualifications of the individual Judge

3.1.1 National of a state party

A judge on the ICC has to be a national of a state party to the Rome Statute (art. 36.4(b)). This requirement is unique among international courts,[12] but it is common among the human rights committees.[13] Without doubt, the requirement is an incentive for ratification, as many states are currently trying to finish their ratification process before the first election. Importantly, no two judges may be nationals of the same state (art. 36.7).[14]

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[11] See the ICTY statute, art. 14.3 -14.5.

[12] The UN Charter-based courts, ICJ, ICTY, ICTR, do not require that judges have to be of the nationality of UN member states. Furthermore, as for the ICJ, its judges come from states irrespective of whether they have accepted the Court's compulsory jurisdiction or not (see by comparison the requirements for the members of the Security Council of the United Nations, art. 23.1 of the UN Charter.) The ITLOS does not have the requirement either. Among its first elected judges was a judge of British nationality (nominated by France), while the United Kingdom became a party shortly thereafter. Until April 2001, two of the 42 judges at the European Court of Human Rights (the seats of Azerbaijan and Armenia being vacant) were of a nationality different than their nominating state. The Judge of Liechtenstein was Swiss (Judge Lucius Caflisch) and the Judge of San Marino was Italian (Judge Ferrari Bravo). Again, a judge of U.S. nationality has served on the Inter-American Court of Human Rights (judge Thomas Buergenthal) for several years although the United States has not accepted the IACHR's jurisdiction. Notably, at the Serious Crimes Panel in East Timor a certain number of judges shall be East Timorese; see UNTAET Regulation No. 2000/15 on the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences (6 June 2000), sect. 22.1.

[13] See for instance article 28 of the International Covenant on Civil and Political Rights, article 17 of the Convention on the Elimination of All Forms of Discrimination Against Women, art. 17 of the Convention Against Torture, art. 43 of the Convention on the Rights of the Child.

[14] In May 2002 the Security Council amended the statutes of the ICTY and ICTR to address the issue of judges holding dual nationalities. By resolution 1411 (2002), a person who for the purposes of membership of the Chambers of the tribunals, could be regarded as a national of more than one state shall be deemed to be a national of the state in which that person ordinarily exercises civil and political rights; see article 12.4 of the ICTY Statute.

3.1.2 Moral character, impartiality, and integrity

The requirement that judges shall be chosen from among persons of high moral character, impartiality and integrity, is analogous to articles 40 and 41, which set out the principles of judges' independence while in office, and article 45 on solemn undertakings by the judges before taking up their duties. Article 67 of the Rome Statute stipulates that the accused has the right "to a fair hearing conducted impartially".

The requirements demonstrate the high standard demanded of candidates, and the high reputation they must enjoy; reflected through their work as well as private activities. In order to evaluate this, and for the purpose of assessing a judge's competence to handle each case later on, detailed information has to be given on each candidate's background, affiliation with organizations, etc. … The requirement of impartiality should not preclude candidates who have expressed their views on issues which relate to the work of the Court.

The terms "high moral character, impartiality and integrity" are intertwined; for instance, the ICJ statute refers only to the term "high moral character" and does not add the terms "impartiality and integrity" as the ICC, ICTY and ICTR do.[15] The requirements demonstrate the high standard demanded of candidates, and the high reputation they must enjoy; reflected through their work as well as private activities.[16] In order to evaluate this, and for the purpose of assessing a judge's competence to handle each case later on, detailed information has to be given on each candidate's background, affiliation with organizations, etc.[17] Importantly the requirement has a broad bearing as it establishes a presumption of impartiality, which attaches to a judge, and establishes a high threshold for any later challenge.[18]

The requirement of impartiality should not preclude candidates who have expressed their views on issues which relate to the work of the Court. This requirement must be read in conjunction with the requirements set out in article 36.3(b)

[15] See article 2 of the Statute of the ICJ, article 13 of the ICTY statute, and article 12 of the ICTR statute.
[16] For purposes of selecting successful candidates for nomination, the United Kingdom considers the provision to require the following personal qualities: integrity, fairness, understanding of people and society, maturity and sound temperament, courtesy and humanity, and commitment; see The selection of candidates for election to the International Criminal Court, United Nations Department Foreign and Commonwealth Office, 15 April 2002.
[17] In the *Furundzija* case before the Appeals Chamber of the ICTY, the chamber observed that the affiliation of a judge to an organization was provided in the biography of the judge, which was a public document of the Court, and therefore the claimant should have raised the issue of disqualification at a earlier stage; see *Prosecutor v. Anto Furundzija*, Case No. IT-95-17/1-A, Judgement, 21 July 2000, para. 173-174.
[18] See the *Prosecutor v. Anto Furundzija*, *ibid*., para. 196-197.

requiring candidates to have established competence in criminal law and procedure, or in international law. Inevitably, by virtue of their expertise, the candidates may have expressed views on some issues which might relate to work of the court.[19] Furthermore, the Rules of Procedure and Evidence of the Court acknowledge this possibility, for if a conflict arises due to a judge's *performance of function, prior to taking office*, the judge is required to disqualify him or herself from that particular case (rule 34.1.c).

3.1.3 Qualifications required in judges' home states for appointment to the highest judicial offices

The requirement that candidates shall possess the qualifications required in their respective states for appointment to the highest judicial office was incorporated into the Rome Statute to strengthen further the requisite qualifications of the candidates.

National requirements for appointment to the highest judicial office differ widely among states.[20] Some states have very few requirements for the qualifications of judges, and some states have none at all.[21] In Canada a candidate must have been a judge of the superior court of a province or must have been entitled to practice law in a province for at least ten years; in Norway the candidate must be Norwegian citizen, have the right to vote, be reliable, have law degree, and be at least 30 years old; in Australia the candidate must have been entitled to practice law in Australia for at least five years. Overall, this requirement should strengthen the list of candidates for the ICC, as it goes beyond more open ended criteria applied by other international courts. [22]

[19] The issue arose in the *Furundzija* case before the ICTY. The defendant in the case argued that the presiding judge should have been disqualified because of her former involvement with the United Nations Commission of the Status of Women, an organization whose primary function is promoting women's rights in political, economic, social and educational fields. During the judge's membership, the organization condemned the mass and systematic rape in former Yugoslavia and urged the tribunal to give those issues priority by prosecuting those allegedly responsible. The claim was denied and the judge's affiliation was not considered to meet the Chamber's set out test. The Chamber noted that "[I]ndeed, even if judge Mumba sought to implement the relevant objectives of the UNCSW, those goals merely reflected the objectives of the United Nations, and were contemplated by the Security Council resolutions leading to the establishment of the Tribunal"; see *Prosecutor v. Anto Furundzija*, *supra* note 17, para. 201.

[20] For a review of some of national practices, see Selection of Judges, Procedures, Criteria and Politcal Influence on national selection of judges for the highest judicial offices, ed. Daniel ten Brinke and Hans-Michael Deml, ELSA, 2001.

[21] In the USA, the Constitution does not list any threshold standards for federal judges. See USA Constitution, art. II and III.

[22] The ICTY (art. 13), ICTR (art. 12) , IACHR (art. 4.1) have the same requirement. The ICJ (art. 2), ECJ, and ECHR (art. 21(1)) do as well, although with the option that candidates are jurisconsults of recognized competence in international law. ITLOS does not have this requirement.

3.1.4 Competence in criminal law and procedure or competence in relevant areas of international law

According to article 36.3(b) of the statute:

> Every candidate for election to the Court shall:
>
> (i) Have established competence in criminal law and procedure, and the necessary relevant experience, whether as a judge, prosecutor, advocate or in other similar capacity, in criminal proceedings; or
>
> (ii) Have established competence in relevant areas of international law such as international humanitarian law and the law of human rights, and extensive experience in a professional legal capacity which is of relevance to the judicial work of the court.

The requirement of judges having competence in criminal law and procedure reflects the nature of an international criminal court. At the ICTY and ICTR judges are running trials with uncooperative defendants, thousands of documents in each case, hundreds of witnesses, and legal counsel from various states, with varying experience. The number of procedural orders can be close to two hundred in each case. The judges of the ICC will work in a similar environment. Experience in criminal procedure and in running complicated trials is absolutely necessary for fair and effective trials and paramount for the success of the court. [23]

Experience in criminal procedure and in running complicated trials is absolutely necessary for fair and effective trials and paramount for the success of the court.

[23] The need for qualified judges in criminal procedures at the ICTY and ICTR has been stressed recently. Commenting on the slowness of trials at the ICTR, the International Crisis Group notes that: "…the judges are held responsible to a large extent for this unjustifiable situation. The poor output of the Tribunal is linked to the mediocre productivity of judges, some of whom are incapable of running criminal trials…the selection of judges should be more rigorously organized and that candidates who have not had solid experience as a judge in criminal affairs should be rejected"; see International Criminal Tribunal for Rwanda: Justice Delayed, An International Crisis Group Report, 7 June 2001, at 11. In the election of judges to the ICTY in March 2001, an official at the Office of the Prosecutor at the ICTY, criticized the list of candidates as having too many academics. In an interview with the New York Times, the former judge at the ICTY, Patricia Wald, stated "[o]f course we need a mix, but you wouldn't put a judge who has never been in a court in charge of a big conspiracy case…You wouldn't take a professor of anatomy and put him into an operating theater and say, 'Now perform this brain surgery.'"; See The New York Times, An American with opinions steps down vocally at War Crimes Court, January 24, 2002, Section A, Page 12, Column 1. See also her

The requirement that at least five judges have competence in international law – such as international humanitarian law and law of human rights – reflects the role of judges in deciding on international legal issues. The judges are deciding individual criminal responsibility under international law as set out in the Rome Statute, in particular under international humanitarian law. Notably, the Statute requires that these candidates also have "*extensive experience in a professional legal capacity which is of relevance to the judicial work of the tribunal*." This goes beyond the requirements before the ICTY and ICTR.

The Statute stresses expertise in international humanitarian law and the law of human rights. Other areas can also be of major importance, such as the laws of wars. For instance, judges will be determining whether a conflict is of international or national character and in the future dealing with the crime of aggression. Judges with expertise on related issues, such as military operations, would thus also be valuable. [24]

As each judicial division shall contain an "*appropriate combination*" of expertise in criminal law and procedure, and in international law (art. 39.1), it can be construed that there has to be at least one judge with international law qualifications in each chamber. If only five judges with the qualification are elected, and if more than one Trial Chamber or Pre-Trial Chamber are constituted at the same time (art. 39.2(c)), the distribution of judges among the chambers would have to be as follows: one judge in the Appeal Chamber, one in each of the two Trial Chambers, and one in each of the two Pre-Trial Chambers.

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3.2 Balanced Representation within the Membership of the Court

According to article 36.8:

> (a) The States Parties shall, in the selection of judges, take into account the need, within the membership of the Court, for:

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critique in The International Criminal Tribunal for the Former Yugoslavia Comes of Age: Some Observations on Day-To-Day Dilemmas of an International Court; Journal of Law and Policy, Vol. 5:87, 87, at 95.

[24] See discussion on judges with legal expertise on specific issues, *infra* p. 24. An example of issues the judges might be confronted with, are those dealt with in the Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, available at http://www.un.org/icty/pressreal/nato061300.htm [site last visited March 2002].

(i) The representation of the principal legal systems of the world;
(ii) Equitable geographical representation; and
(iii) A fair representation of female and male judges.

(b) States Parties shall also take into account the need to include judges with legal expertise on specific issues, including, but not limited to, violence against women and children.

The requirement of balanced representation within the Court is also reflected in article 44 of the Rome Statute, which stipulates that in employment of staff, the Prosecutor and the Registrar shall have regard, *mutatis mutandis*, to the criteria set forth in article 36.8. Furthermore, the Bureau of the Assembly of States Parties "shall have representative character, taking into account, in particular, equitable geographical distribution and the adequate representation of the principal legal systems of the world (art. 112.3(b)).[25]

The requirement of balanced representation within the Court is also reflected in article 44 of the Rome Statute, which stipulates that in employment of staff, the Prosecutor and the Registrar shall have regard, *mutatis mutandis*, to the criteria set forth in article 36.8.

All international courts and tribunals make requirements for representation within the bench as a whole. However, the requirements differ among the institutions. The ICJ and ITLOS require the representation of the principal legal systems of the world and equitable geographical distribution. The ICTY and ICTR only require representation of the principal legal systems of the world.[26] Uniquely, in addition to the two previous requirements, the International Criminal Court also requires fair representation of female and male judges, and inclusion of judges with legal expertise on specific issues, including violence against women and children.[27]

All international courts and tribunals make requirements for representation within the bench as a whole. However, the requirements differ among the institutions.

[25] Similarly, the Assembly shall elect the members of the proposed Committee on Budget and Finance, "who should not be of the same nationality, on the basis of equitable geographical distribution"; see Draft Resolution of the Assembly of States Parties on the establishment of the Committee on Budget and Finance, UN Doc. PCNICC/2001/1/Add.2, 8 January 2002.

[26] As for the election and appointment of *ad litem* judges to the ICTY, the Security Council of the UN shall establish a list of candidates, "taking due account of the adequate representation of the principal legal systems of the world and bearing in mind the importance of equitable geographical distribution"; see the ICTY statute, art. 13 ter 1©.

[27] The Draft Statute for an International Criminal Court, prepared by the International Law Commission, required only representation of the principal legal systems of the world; see Report of the International Law Commission on the Work of its forty-sixth session, Draft Statute for and International Criminal Court, UN. Doc. A/49/10, 1994, art. 6.5. During proceedings of the Preparatory Committee in 1995, it was suggested that the Statute should also provide for equitable geographical representation; Report of the Ad Hoc Committee on the Establishment of an International Criminal Court, UN Doc. A/50/22, Supp. No. 22 (1995),

It is not clear to which stage the term "selection of judges" refers.[28] At the ICTY and ICTR, the requirement only refers to part of the nomination stage: *from nominations received* the Security Council shall establish a list of candidates, taking due account of the adequate representation of the principal legal systems of the world. At the International Court of Justice, the requirement applies at the election stage: at *every election the electors* shall bear in mind that in the body as a whole the representation of the main forms of civilization, and of the principal legal systems of the world, should be assured. As for the ITLOS, *in the tribunal as a whole* the representation of the principal legal systems of the world and equitable geographical distribution shall be assured. As the goal of article 36.8 is to have in the end a representative court (…membership of the Court…), inevitably, it would have to apply both to the nomination and election stages.

It is not clear to which stage the term "selection of judges" refers. … As the goal of article 36.8 is to have in the end a representative court (…membership of the Court…), inevitably, it would have to apply both to the nomination and election stages.

According to article 36.8(a) of the Rome Statute, the States Parties shall, in the selection of judges, *take into account* the need, within the membership of the court, for the various forms of representation. Similar reference at the International Court of Justice (…electors shall bear in mind…) has been considered compulsory and has been fully enforced in practice, rather than leaving it to the discretion of electors when casting their ballots. Similarly, ITLOS (…shall be assured…) has fully implemented its requirement.

Similar reference at the International Court of Justice (…electors shall bear in mind…) has been considered compulsory and has been fully enforced in practice, rather than leaving it to the discretion of electors when casting their ballots. Similarly, ITLOS (…shall be assured…) has fully implemented its requirement.

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at 5. During the Committee's proceedings in 1996, it was emphasized that the Court's composition should also ensure gender balance, "particularly in the light of the fact that some of the crimes to be considered by the Court related to sexual assault of women and crimes against children"; Report of the Preparatory Committee on the Establishment of an International Criminal Court, Volume I, Proceedings of the Preparatory Committee during March-April and August 1996, *supra* note 8, at 11. The Draft Statute, prepared by the Preparatory Committee, included also "the need,…, for expertise on issues related to sexual and gender violence, violence against children and other similar matters". Furthermore, it provided for the representation of the main forms of civilization; Report of the Preparatory Committee on the Establishment of an International Criminal Court, Draft Statute and Draft Final Act, UN Doc. A/Conf.183/2/Add.1 (1998), art. 37.8.

[28] Prior to the Rome Conference, the criteria was to be applied either *in compiling the nominations*, or in the *election* of the judges; see Report of the International Law Commission on the Work of its forty-sixth session, Draft Statute for an International Criminal Court, ibid., art. 6.5; Report of the Preparatory Committee on the Establishment of an International Criminal Court, Volume II (Compilation of Proposals), at 10 and 14;

3.2.1 The representation of the principal legal systems of the world

The Rome Statute's requirement of representation of the principal legal systems of the world is similar to those of the ICJ, ITLOS, ICTY and ICTR.[29] The requirement is in harmony with the Statute's other requirements ensuring the universality and international nature of the Court.

There is no definitive definition of what constitutes principal legal systems of the world. In constituting the *legal systems of the world*, a differentiation has been made between Common Law, Roman Law, Germanic Law, the legal systems of Slavic nations, the legal systems of post socialist nations, Muslim Law, Talmudic Law, Hindu, Japanese, and Chinese legal systems, and indigenous legal systems.[30] A broader definition has been made: Common Law, Civil Law, Muslim law, Customary Law, Talmudic Law, and Mixed Law systems.[31]

Because of the difficulties in defining the principal legal systems of the world, and of categorizing states along those lines, the requirement has not been implemented per se at the other international courts and tribunals. Rather, the requirement has been considered fulfilled through geographical and political arrangements. Originally, at the ICJ, allocation of seats to the permanent members of the Security Council was considered representative of the principal legal systems and main forms of civilization. ITLOS considers its requirement implemented through its equitable geographical distribution. As for the ICTY and ICTR,

There is no definitive definition of what constitutes principal legal systems of the world. … Because of the difficulties in defining the principal legal systems of the world, and of categorizing states along those lines, the requirement has not been implemented per se at the other international courts and tribunals. Rather, the requirement has been considered fulfilled through geographical and political arrangements.

Report of the Preparatory Committee on the Establishment of an International Criminal Court, Draft Statute and Draft Final Act, ibid., art. 37.8.

[29] The requirement goes back to the Permanent Court of International Justice (1919-1945). The initial intention was "to provide a variety of countries of origin but also to create a good reason for the permanent membership of a national of each of the Great Powers, as representing a principal legal systems and a main form of civilization"; see the Charter of the United Nations, A Commentary (Bruno Zimma ed., 1994), at 994.

[30] See for instance, J.H. Wigmore, A Panorama of World's Legal Systems, 1928.

[31] See such classification by the Faculty of Law at the University of Ottawa, available at www.uottawa.ca/world-legal-systems [site last visited June, 2002].

the Security Council has not disclosed how they implement the requirement when establishing the list of candidates for election. In the first election to the ICTY, the list of nominees prepared by the Security Council included twenty-three candidates, including candidates from all the permanent members of the Security Council. Notably, the Russian candidate was not elected (while candidates from all the other permanent members were elected),

Even if an agreement could be reached on the definition of the principal legal systems, in light of the current membership at the Court, not all the legal systems could be represented. For instance, no current state party has a Hindu or Chinese legal system. Furthermore, it is difficult to classify states along these lines. Many states have a combination of different legal systems. For some, it is a blend, like Jordan, which has a mixed system of civil law, common law, and Muslim law. For others, a legal system has been super-imposed on a traditional or an indigenous system. In other cases, because of the federal structure of the state, different sub-statal entities might have different legal systems. For instance, while the dominant legal system in Canada is the common law, Quebec is based on civil law.[32]

Even if an agreement could be reached on the definition of the principal legal systems, in light of the current membership at the Court, not all the legal systems could be represented. … Furthermore, it is difficult to classify states along these lines.

It is difficult to predict to what degree the principal legal systems of the world will have on ICC. Surely, the Rome Statute, the draft Rules of Procedure and Evidence, and the draft Elements of Crimes, are full of compromises between various systems. Furthermore, when those laws fail, the Court is to apply "the general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime" (art. 21(c)). While the jurisprudence from the international criminal tribunals grows, as well as its procedural rules and profession, the future impact of various systems on them may dwindle.

[32] Applying the broader definition above, the legal systems of seventy-three states parties to the Rome Statute would be the following: Civil Law systems (42); Common Law systems (11); Mixed systems of Civil Law and Customary Law (6); Mixed systems of Civil Law and Common Law (5); Mixed systems of Common Law and Customary Law (3); Customary Law systems (2); Mixed systems of Civil Law, Common Law, and Muslim Law (2); Mixed systems of Common Law, Muslim Law and Customary Law (1); Mixed system of Common Law, Civil Law and Customary Law (1); *ibid*.

However, the need for a better understanding of the national law and customs of a place, where a situation before a court arises, has also become evident. The need is reflected in the recent creation of the hybrid or internationalized criminal tribunals in East Timor, Kosovo, and Sierra Leone, which shall apply both national and international law, applied by both national and international judges.[33] Notably, the ICTY has still not had any permanent judge from Eastern Europe, while the ICTR has five judges from Africa.[34]

However, the need for a better understanding of the national law and customs of a place, where a situation before a court arises, has also become evident.

Article 36.8(i) of the Rome Statute requires *representation* of the principal legal systems of the world, while Article 38(ii)and (iii) refers to *equitable* geographical representation, and a *fair* representation of female and male judges. By analogy, this implies minimum – rather than proportional – representation. Inevitably, the representation will change depending on the membership of the Court, and should change, depending on where situations before the Court originate.

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3.2.2 Equitable geographical representation

For the ICC to be embraced and accepted as *an international court*, equitable geographical representation will play a crucial role. The continuing ratification process will depend on fair distribution, as well as whether states will refer cases to the Court.[35]

The requirement of equitable geographical representation is usual among international courts and tribunals, as well in other quasi-judicial bodies (i.e., ICJ, ITLOS, ECHR, SC, ECOSOC, and human rights committees).[36] In implementing geographical representation, for election purposes, the regional groups established by the General

[33] In addition, in nominating judges to the Special Court of Sierra Leone, nominations from the member States of the Economic Community of West African States and the Commonwealth are encouraged; see Agreement between the United Nations and the Government of the Sierra Leone on the Establishment of a Special Court for Sierra Leone, art. 2.2(a), Freetown, 16 January 2002, available at http://www.sierra-leone.org/specialcourtagreement.html [site last visited May, 2002].

[34] In imposing penalties, the ICTY and ICTR shall have recourse to the general practice regarding prison sentences in the local courts in former Yugoslavia and Rwanda, respectively; see article 24.1 of the ICTY statute, and article 23.1 of the ICTR statute.

[35] Some argue that the ICJ distribution is not fair, resulting in under-utilization of the Court. See Arthur Eyffinger, *supra* note 2, at 154.

Assembly of the United Nations, has been used as a basis to include: African States, Asian States, Eastern European States, Latin American and Caribbean States, and Western European and Other States.[37] As for the ICC, for election purposes, the geographical grouping of its first seventy-four member states would be as follows:

The requirement of equitable geographical representation is usual among international courts and tribunals, as well in other quasi-judicial bodies In implementing geographical representation, for election purposes, the regional groups established by the General Assembly of the United Nations, has been used as a basis.

Western Europe and Others States:	23 states parties
African States	17 states parties
Latin American and Caribbean States	14 states parties
Eastern European States	11 states parties
Asian States	8 states parties

Estonia is not a member of any regional group.

The requirement of equitable representation has been implemented by the allocation of a certain number of seats to each regional group. The Statute of the ITLOS stipulates that "equitable geographical distribution shall be assured" (art. 2.2) and that "there shall be no fewer than three members from each geographical group as established by the General Assembly of the United Nations" (art. 3.2). For each election, the additional seats are designated by a decision by the states parties, and the Court's twenty-one judges have been elected as follows: five judges from the African Group, five judges from the Asian Group, four judges from the Latin American and Caribbean Group, four judges from the Western European and Other States Group, and three judges from the

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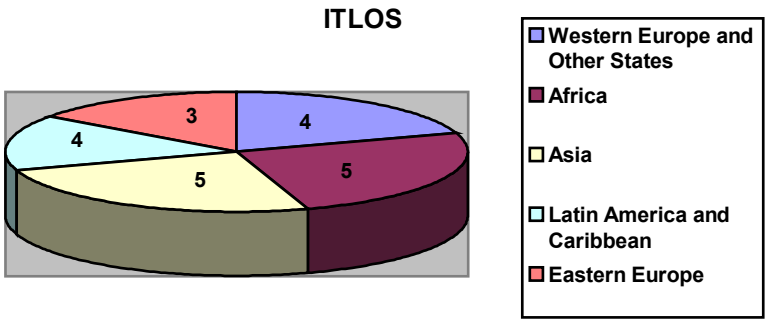
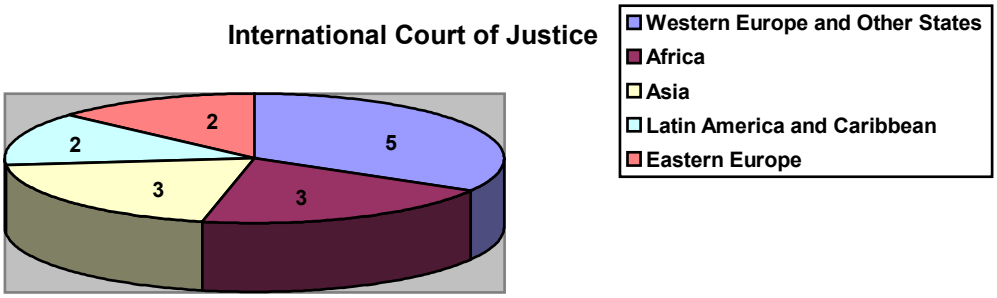
[36] Article 101.3 of the UN Charter stipulates that "[d]ue regard shall be paid to the importance of recruiting the staff on as wide a geographical basis as possible".

[37] For a list of the members of the General Assembly arranged in regional groups, see United Nations Handbook 2001, New Zealand Ministry of Foreign Affairs & Trade (2001), at 18. The grouping is unofficial and has been developed to take account of the purposes of GA res. 1991 (1963), 33/138 (1978) and 2847 (1971); *ibid*.

Eastern European Group.[38] In three elections, a regional group did not have enough candidates to fill its group, and "lent" its seat to another group.

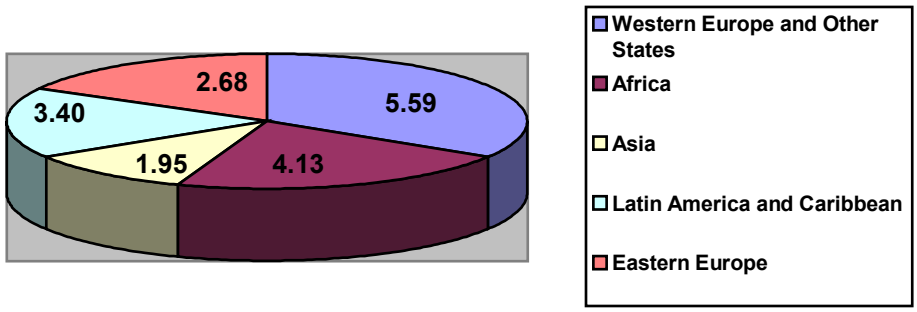


For quite a long time the fifteen seats at the International Court of Justice have been allotted as follows: five judges to the Western Europe and Others States; three judges to Africa, three seats to Asia, two seats to Latin America and the Caribbean, and two seats to Eastern Europe. Judges come from states irrespective of whether the states have accepted the Court's compulsory jurisdiction or not.



Based on the ratio of the first seventy-four states parties of the International Criminal Court, the eighteen seats would be distributed as follows: six seats to the Western Europe and Other States, four seats to Africa, two seats to Asia, three seats to Latin American and Caribbean, and three seats to Eastern Europe.

[38] See United Nations Convention on the Law of the Sea, Report of the fifth meeting of States Parties, UN. Doc. SPLOS/14, 20 September 1996; United Nations Convention on the Law of the Sea, First Election of the members of the International Tribunal for the Law of the Sea, UN Doc. SPLOS/L.3/Rev.1, 31 July 1996.



3.2.3 A fair representation of female and male judges[39]

The Rome Statute's requirement for fair representation of female and male judges is consistent with developments at the international level; for example, the Beijing Declaration and Platform for Action calls on governments and international institutions to "aim for gender balance when nominating or promoting candidates for judicial and other positions in all relevant international bodies, such as the [ICTY] and [ICTR] and the International Court of Justice".[40] The UN Security Council has also, "urg[ed] member states to ensure increased representation of women at all decision-making levels in … international institutions and mechanism for the prevention, management and resolution of conflict".[41] The General Assembly of the United Nations "[s]trongly encourages Member States:…To identify and nominate more women candidates for appointment or election as judges or other senior officials in international

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[39] For an in depth study on women's representation on international courts and tribunals see Women and Public International Litigation, Background Paper prepared for the seminar held by the Project on International Courts and Tribunals and Matrix Chambers, 13 July 2001, London, by Jan Linehan, available at http://www.pict-pcti.org/news/archive/07.13.2001.background.htm [site last visited June, 2002].

[40] Report of the fourth world conference on women, Beijing 4-15 September 1995, UN. Doc. A/CONF.177/20, 17 October 1995, para. 142(b).

[41] Security Council Resolution 1325(2000), 31 October 2000.

courts and tribunals";[42] as well as setting the goal of achieving 50/50 gender distribution within the UN system, especially at the senior and policy-making levels, including through full implementation of special measures for the achievement of that goal.[43] The experience of the ICTY and ICTR, and the nature of the crimes within the jurisdiction of the ICC, was also a motivation for the requirement.[44] The role of Judge Pillay at the ICTR in prompting the inclusion of allegations of rape and sexual assault in the Akayesu case prooved the importance of including female judges.[45]

The General Assembly of the United Nations "[s]trongly encourages Member States:…To identify and nominate more women candidates for appointment or election as judges or other senior officials in international courts and tribunals"; as well as setting the goal of achieving 50/50 gender distribution within the UN system, especially at the senior and policy-making levels, including through full implementation of special measures for the achievement of that goal.

In addition to the ICC, two other international courts have gender requirements in the nomination and election process: the African Court on Human and Peoples' Rights, and the International Criminal Tribunal for the former Yugoslavia.[46] Similar to the Rome Statute, the Protocol on the establishment of the ACHPR requires that "[d]ue consideration shall be given to adequate gender representation in the nomination process" and furthermore that "[in] the election of judges, the Assembly shall ensure that there is adequate gender representation."[47] When the Protocol will enter into force, and the relevant requirement will be enforced, the ICC' adopted process might become an important precedent. The ICTY statute requires a fair gender representation among nominated candidates, but the requirement only applies to candidates for *ad litem* judges

[42] Resolution adopted by the General Assembly, Improvement of the status of women in the United Nations system, UN Doc. A/RES/56/127, 30 January 2002.
[43] Resolution adopted by the General Assembly, Improvement of the status of women in the United Nations system, UN Doc. A/RES/55/69, 8 February 2001. See also Administrative instruction, Special measures for the achievement of gender equality, UN Doc. ST/AI/1999/9, 21 September 1999. As of 30 November 2001, 40.4 per cent of professional and higher-level staff on geographical appointments in the Secretariat were women, and 34.6 per cent of professional and higher-level staff in the larger population of its staff. As for the Office of Legal Affairs this number is 45.6 per cent, and 47.1 per cent, respectively; see Improvement of the status of women in the United Nations system, Report of the Secretary-General, UN Doc. E/CN.6/2002/7, 7 February 2002. See also Convention on the Elimination of All Forms of Discrimination against Women, Adopted and opened for signature, ratification and accession by General Assembly resolution 34/180 of 18 December 1979, entry into force 3 September 1981, art. 8.
[44] See Cate Steains, Gender Issues, *in The International Criminal Court, The Making of the Rome Statute, Issues, Negotiations, Results* (Roy S. Lee ed., 1999), 357, at 376-377.
[45] See Linehan, *supra* note 39, at 2.
[46] Related, the Rules of the European Court of Human Rights stipulate that "the Court shall pursue a policy aimed at securing a balanced representation of the sexes" in its election of Presidents and Vice-Presidents, Registrars and Deputy Registrars, Rule 14.
[47] See Protocol on the Establishment of an African Court on Human and Peoples' Right (June 1998), article 12 and 14.

and not the permanent judges, and it is limited to the nomination process. In nominating *ad litem* judges, a state may nominate up to four candidates and shall take "into account the importance of a fair representation of female and male candidates". However, the Security Council is not to take these criteria into account when preparing its final list of candidates; only the adequate representation of the principal legal systems of the world and the importance of equitable geographical distribution.[48]

Women's representation among judges of international courts has been minimal. Currently, among the seventy-five judges at the WTO, ICJ, ITLOS, ICTY, and ICTR, only five are women. Only one female permanent judge is at the ICTY (from an African state), and three at the ICTR (all from African states). The low number of female judges at the ad hoc tribunals contrasts with their professional category. Currently, thirty-seven percent of the professional category at the ICTR are female, and forty-one at the ICTY.[49]

The problem seems to exist both in the nomination process as well as in the election process; too few women are nominated and too few are elected. A study prepared for PICT suggests that this is a systemic problem not based on the lack of qualified female candidates but rather the lack of commitment of states to find female candidates, and a bias in favor of particular kinds of professional backgrounds, that women are less likely to have.[50] In the first election to the ICTY, the Security Council submitted a list of twenty-one candidates to the General Assembly for election, including nineteen male candidates and two women. Nine male judges were elected and two women. Seven years later, the division was similar. In the election to the tribunal in February 2001, the list of candidates submitted to the General Assembly had twenty-six candidates; twenty-four male and two female. Thirteen male judges were elected and one female. The imbalance in the election is notable for various reasons. First, by this time the importance of having

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[48] See Security Council Resolution 1329(2000) of 30 November 2000, and article 13 ter of the ICTY Statute.
[49] The Registry at the ICTR has a Gender and Victims Assistance Unit, which seeks to promote gender balance in the tribunal's recruitment process.
[50] See Linehan, *supra* note 39, at 3.

female judges at the ad hoc tribunals had proved to be crucial for their work. Secondly, a few months earlier, the Security Council had raised the issue of the importance of fair representation of female and male candidates at the same tribunal in its provision on the election and appointment of *ad litem* judges. In subsequent elections of *ad litem* judges to the tribunal, despite the new provision and a special memo sent to states from the Secretary-General to highlight it, there were only fourteen female candidates among the sixty-four nominations for *ad litem* judges. Eight female judges were elected and nineteen male.

The fundamental question remains how the requirement of fair representation of female and male judges will be ensured. The issue is unprecedented before an international tribunal, as it is a legal requirement and not merely a policy matter. The low number of female judges at international tribunals, despite calls on states to raise it, shows the need for an effective system. International tribunals requiring equitable geographical representation have considered it necessary to enforce the principle through allocation of seats for each regional group. The same system could work for ensuring fair representation of female and male judges. It would have to be clarified what constitutes "fair representation". While the term does not necessarily call for equal distribution – nine female judges and nine male judges – one could argue that it requires a result close to that. The definition of "fair" as being "just; equitable; even handed"[51] supports such a conclusion, as does states parties' implementation of "gender equality" in similar forums as a 50/50 distribution.[52]

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[51] See definition in Black's Law Dictionary, sixth edition (1990), at 595.
[52] *Supra* note 43. This was also the understanding of some delegations in Rome. One representative noted in the discussion, that "fair representation" indicates that states should strive towards "as balanced a representation of female and male judges as possible; cited in Cate Steains, *supra* note 44, at 379.

3.2.4 States Parties shall also take into account the need to include judges with legal expertise on specific issues, including, but not limited to, violence against women and children.

The requirement of inclusion of judges with legal expertise on specific issues, beyond the general requirements, is new among international criminal tribunals. The rationale for the inclusion of the requirement was to have judges with legal expertise on matters related to sexual and gender violence, and the requirement was considered distinct from the need to appoint female judges.[53]

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The emphasis on legal expertise on violence against women and children corresponds with the recognition given to sexual and gender crimes in the Rome Statute. Far surpassing its predecessors, the Rome Statute gives serious attention to these acts, criminalizing them both as crimes against humanity and as war crimes. Moreover, the Rome Statute stipulates the need for relevant experts in all organs of the Court, as well as protection of this group of victims.[54]

The experience at the ICTY and ICTR illustrates the need for judges with expertise on such issues, as well as expert staff in other organs. At the outset, neither tribunal had the necessary qualifications to address the horrific sexual violence committed, where sexual violence was a weapon of war and instrument in the genocide.

[53] The Draft Statute prepared by the Preparatory Committee did only refer to "expertise on issues related to sexual and gender violence, violence against children and other similar matters", see Draft Statute and Draft Final Act, *supra* note 27, art. 37.8. See also Medard R. Rwelamira, Composition and Administration of the Court, *in The International Criminal Court, The Making of the Rome Statute, Issues, Negotiations, Results* (Roy S. Lee ed., 1999), 153, at 167.

[54] The Victims and Witnesses Unit must include staff with expertise in trauma, including trauma related to crimes of sexual violence (art. 43.6); the Prosecutor and the Registrar must include staff with legal expertise on specific issues, including violence against women and children (art. 44.2); the Prosecutor must appoint advisers with legal expertise on sexual and gender violence and violence against children (art. 42.9); the Court shall take protective measures to protect victims and witnesses and in so doing shall have regard to all relevant factors including the nature of the crime, in particular, but not limited to, where the crimes involves sexual or gender violence or violence against children (art. 68.1); the Prosecutor shall in his or her investigation respect the interests and personal circumstances of victims and witnesses and take into account the nature of the crime, in particular where it involves sexual violence, gender violence or violence against children (art. 54.1.b); and in the proceedings before the Court there is a presumption for in camera proceedings or presentation by other special means in cases of victims of sexual violence or when children are victims or witnesses (art. 68.2); see T. Ingadottir, F. Ngendahayo, P. Sellers, The International Criminal Court, The Victims and Witnesses Unit (art. 43.6 of the Rome Statute), A Discussion Paper, The Project on International Courts and Tribunals (2001), at 16.

Through the crucial efforts of a few individuals, NGOs and outside experts on the issue, the tribunals proved equal to the task, issuing landmark judgments on the issue. Today, the tribunals have judges who are experts on these issues, as well as special units and experts in other organs of the tribunals dedicated to the issue. For instance, the Office of the Prosecutor at the ICTY and ICTR, has a position on legal officer on gender crimes.

The experience at the ICTY and ICTR illustrates the need for judges with expertise on such issues, as well as expert staff in other organs.

Unlike the requirement stipulated in Article 36.8(a) on *representation* of the principal legal systems of the world, *equitable* geographical *representatio*n, and *fair representation* of female and male judges, art. 36.8(b) does not refer to *representation*; it only refers to the *need to include* judges with expertise on specific issues. Inevitably, the inclusion of various experts will depend on the matters before the Court. Judges with expertise on certain issues, such as military operations and laws of war, might become crucial in some cases. [55]

However, the article's stipulation of inclusion of judges with legal expertise on violence against women and children requires such appointments at the outset. For the provision to have any practical meaning, and for the success of the work of the Court, several judges will need to have this expertise. First of all, in light of the extensive role of sexual crimes in past and ongoing conflicts, these crimes will inevitably come before the Court. Secondly, in light of the prohibition on the rotation of judges between chambers, at least two experts are needed.

However, the article's stipulation of inclusion of judges with legal expertise on violence against women and children requires such appointments at the outset.

[55] Simultaneously, at any stage in the proceedings, the judges can invite or grant leave to a state, organization or person to submit, in writing or orally, any observation on any issue that the chamber deems appropriate; see rule 103 of the Draft Rules of Procedure and Evidence. In the *Blaskic* case at ICTY, thirteen *amicus* briefs were submitted; eleven from individual jurists and two from NGOs; see Christine Chinkin and Ruth Mckenzie, International Organizations as "Friends of the Court", *in International Organizations and International Dispute Settlement: Trends and Prospects* (Laurence Boisson de Chazournes, Cesare Romano, Ruth Mckenzie eds., 2002), at 149.

4. Nominations Procedure

The nomination process of candidates for election truly decides the quality of the judges. The Assembly of States Parties is dependent on the nominations made by its states parties. In light of the nature of the Court and the interest which many non-state parties have in the process, states parties should consult those interested in their local nomination process. The Rome Statute's requirements of judges' qualification fosters, but does not necessarily ensure, qualified candidates. Independent verification and review of the nominees could ensure that the set requirements are met. Transparency of the whole process is fundamental for its success.

4.1 Who will issue the invitation of nominations and when

According to the current Rolling Text, the Secretariat of the Assembly of States Parties shall issue the invitations for nomination of judges.[56] For the first election of the Court, this entails that the Secretariat of the United Nations will issue the invitation, as a consensus was reached at the last session of the Preparatory Commission on using the Secretariat of the United Nations as the Secretariat for the Assembly during the initial period.[57] Bearing in mind the importance of the nomination and election process for the Court, and its relation to the independence and stature of the Court, it would have been more preferable to have the Assembly issue the invitation. Its President or Bureau could have been assigned the task, like originally proposed. [58] The process and its meaning for the establishment of the Court go beyond the secretarial services otherwise requested from the United Nations. The arrangement would also be in harmony with other proposed procedures. For instance, the rolling text proposes that the President of the Assembly of States Parties shall have the authority to extend the nomination period (provision A.4); that the nominations shall

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[56] See the Rolling Text, *supra* note 5, provision A.1.
[57] See Draft resolution on the Assembly of States Parties concerning the provisional arrangements for the Secretariat of the Assembly of States Parties, Discussion paper proposed by the Coordinator, UN Doc. PCNICC/2002/WGASP-PD/L.4, 17 April 2002.
[58] See Road map leading to the early establishment of the International Court, Preparatory Commission for the International Criminal Court, UN Doc. PCNICC/2001/L.2, 26 September 2001, para. 4.

open, by a decision of the Bureau, during the first meeting of the Assembly of States Parties (provision A.10); and that the Bureau of the Assembly of States Parties shall fix the date of the election (provision B.11).

The invitations for nomination of judges should be made public. Various parties have an interest in the process and a transparent process is crucial for their observations.

4.2 Who can nominate a candidate

According to Article 36.4(a), nominations may be made by "any State Party to this Statute". A state becomes a party to the Statute from the day it deposits an instrument of ratification to the Secretary-General of the United Nations.[59] An incomplete national implementation process does not affect this determination. For the first elections, the first sixty states parties will obviously be able to submit nominations. Subsequent states parties would be able to submit nominations so long as they are within the time period given for acceptance of nominations, and provided that the state is a party to the statute in accordance with Article 126.2 on the day of the election (…the Statute shall enter into force on the first day of the month after the 60th day following the deposit by such State of its instrument of ratification…). As the first elections are scheduled in January 2003, a state would have to submit its instrument of ratification by November 1 at the latest, provided that the nomination period is still open at that day, in order for the Statute to enter into force for that state before the January elections. A possibility has been made for states that have started the process of ratification to nominate candidates (provisional nominations), provided that the state is a party to the Statute in accordance with Article 126.2 on the day of the election.[60]

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The question can be raised whether article 36.4(a) is exclusive, i.e., whether nominations can be made only by states parties. The view has been expressed that it is

[59] See e.g., UN Charter, article 110.4.
[60] See the Rolling Text, *supra* note 5, provision A.7.

not necessarily so.[61] However, while the Rome Statute does not stipulate that the Assembly of States Parties and participants such as observers, United Nations, victims' groups, NGOs and international law/bar associations, have an authority to submit nominations,[62] nothing prevents these parties from suggesting nominations to states. Furthermore, as they have a major interest in the process, and drawing from article six of the ICJ statute, such collaboration should become an integral part of the nomination process.[63]

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Currently, it is foreseen that the Assembly will simply prepare a list of *all* received nominations and will have no role in developing or changing that list, similar to what the Security Council does at the ICTY and ICTR.

4.3 National nomination process

States parties must nominate their candidates either:

- By the procedure for the nomination of candidates for appointment to the highest judicial offices in the State in question; or
- By the procedure provided for the nomination of candidates for the International Court of Justice in the Statute of that Court.

Both procedures differ considerably among states. The procedure for the nomination of candidates for appointment to the highest judicial office can entail an appointment by the government/executive branch, as in Australia, UK and Canada, or by the parliament/legislative branch, as in Germany and the Netherlands.[64]

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[61] The UN Special Rapporteur on the Independence of Judges and Lawyers has expressed, "as the Statute gives the Assembly of States Parties the power to determine the mandate of the Advisory Committee on nominations, the State Parties can, if they so decide, entrust such a power to the Committee consistent with the requirements of the Statute"; see Param Cumaraswamy, "Towards Global Justice: Accountability and the International Criminal Court", Wilton Park Conference, February 4-8, 2002, on file with author.

[62] Non-member states maintaining permanent observer missions at the United Nations Headquarters can nominate and elect judges to the ICTY and ICTR; see ICTY statute, art. 13 bis 1(a), and ICTR statute, art. 12.3.

[63] On criticism of close state control over nomination process to bodies which are not solely to serve states interest, see Damrosch, Ensuring the best bench: Ways of selecting judges, Commentary, *in Increasing the Effectiveness of the ICJ* (C Peck and R S Lee eds., 1997), at 197.

[64] An overview of various national nomination processes is given in Selection of Judges, Procedures, Criteria and Political Influence on national selection of judges for the highest judicial offices, ed. Daniel ten

Nominations of candidates for the International Court of Justice are made by the national groups of the Permanent Court of Arbitration (PCA).[65] The nomination process at the ICJ and the sole power of the PCA national groups to nominate candidates to that Court was meant to ensure the qualifications of candidates and keep the nomination process at arms length from governments. Each party to the 1899 and 1907 Hague Conventions may nominate up to four persons of "*known competency in questions of international law* and *of the highest moral reputation*," to serve as arbitrators to the PCA; those four persons constitute the designating state's national group.[66] As of now, of its 97 states parties 83 have used their right to nominate a national group, 44 of those states are parties to the ICC.[67] Importantly, according to Article 6 of the ICJ Statute, before making nominations, each national group is *recommended* to consult its country's highest court of justice, its legal faculties and schools of law, and its national academies and national sections of international academies to the study of law.[68] The consultation role of civil society can be extremely important to minimize selections made for purely political reasons, and ensure the quality of candidates. However, consultation is *recommended*, not mandatory, so not all national groups might follow that suggestion.

Importantly, according to Article 6 of the ICJ Statute, before making nominations, each national group is *recommended* to consult its country's highest court of justice, its legal faculties and schools of law, and its national academies and national sections of international academies to the study of law. The consultation role of civil society can be extremely important to minimize selections made for purely political reasons, and ensure the quality of candidates.

There is no requirement for states parties to the ICC to declare which procedure they will adhere to. Some states are not members of the PCA, and of those who are members, not all have nominated a national group, nor have they established one for the

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Brinke and Hans-Michael Deml, 2001. A Report on National Procedures for nominating candidates for election to the European court of Human Rights, "concludes that in general, national governments have complete discretion in the nomination process with only 2 out of the 20 countries surveyed having the final decision on nomination being made by Parliament", Doc. 8505, 8 September 1999, see also discussion by Cumaraswamy, Towards Global Justice: Accountability and the International Criminal Court, *supra* note 61.

[65] See ICJ statute, art. 4.

[66] 1899 Hague Convention, art. 23; 1907 Hague Convention, art. 44. There are no requirements on how states parties select their members to the national groups. The members are appointed for a term of six years. Nominated candidates by the national groups for the ICJ are elected by the General Assembly and the Security Council of the United Nations. The national groups may also propose candidates for the Nobel Peace Prize.

[67] A list of the national groups and its members is available at http://pca-cpa.org/POA (site last visited February 28, 2002). On the US national group and its procedures see The Election of Thomas Buergenthal to the International Court of Justice, The American Journal of International Law, Vol 94., at 579.

[68] See Principles Concerning ASIL Advice on Nomination and Election of ICJ Judges and of Other Internationally Elected Jurists, reprinted in ASIL NEWSL., Jan.-Feb. 1997, at 3.

purpose of making a nomination to the ICJ. To increase transparency, attract prospective candidates, and make it possible for interested parties to follow and participate in the process, states parties should announce which procedure they will follow for the up-coming election. [69]

There is no requirement for states parties to the ICC to declare which procedure they will adhere to. … To increase transparency, attract prospective candidates, and make it possible for interested parties to follow and participate in the process, states parties should announce which procedure they will follow for the up-coming election.

4.4 Number of nominations

Nomination of judges is optional. In the first election of judges to the ICTY the Security Council received forty-one nominations,[70] resulting in a circulated list of twenty-three candidates (for eleven seats). Thirty-three candidates were nominated in the first election of judges to the ITLOS (for twenty-one seats). Nothing precludes a combined nomination – i.e., more than one state nominating a candidate – so long as the candidate is a national of a state party. Such coalition is frequent at the ICJ. [71] A grouping for a nomination can be very counterproductive as it can seriously limit the number of candidates and actual choices presented to the Assembly of States Parties.[72] Nominations by as many states parties as possible is also very important as each state party is only allowed to nominate one candidate--fewer than at other international tribunals, which are still facing the problem of insufficient numbers of candidates.[73] Furthermore, the Rome Statute places unprecedented requirements on the different expertise and representation of the judges, requiring a broad group of

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[69] Notably, no requirement exists for the nomination process of judges to the ICTY and ICTR. In those cases states have full discretion as to how they will reach their decision on whom to nominate to the tribunals.
[70] The number was not made official and the number given is based on information in Virgina Morris and Michael Scharf, An Insider's Guide to the International Criminal Tribunal for the Former Yugoslavia, Volume 1 (1995), at 144.
[71] Nine national groups nominated three candidates in the last election at the ICJ. See UN Doc. A/56/372-S/2001/881, 19 September 2001, UN Doc. A/56/373-S/2001/882, 17 September 2001, UN Doc. A/56/374-S/2001/883, 17 September 2001, UN Doc. A/56/373/Add.1-S/2001/882/Add.1, 8 October 2001.
[72] On the problem of lack of sufficient number of nominations to the ICJ, see Georges Abi-Saab, Ensuring the Best Bench: Ways of Selecting Judges, *in Increasing the Effectiveness of the ICJ* (C Peck and R S Lee eds., 1997), at 181.

candidates. To ensure that the Assembly of States Parties will have a real choice, and to ensure the quality and representation of the judges, states parties will have to shoulder its responsibility and submit separate nominations. A significant number of nominations is particularly important for the first election of the Court, when eighteen seats need to be filled.

The possibility exists that the Court will not receive a sufficient number of nominations. Because of the specific requirements made by the Rome Statute, this could also happen for specific categories. For instance, at least nine candidates with competence in criminal law and procedure are needed to fulfill the requirement of Article 36.5, and similarly five candidates have to have competence in international law. The Court might also not receive enough nominations of candidates to implement the Rome Statute's requirements of representation of the principal legal systems of the world, equitable geographical representation, fair representation of female and male judges, and inclusion of judges with legal expertise on specific issues, such as violence against women and children; making it impossible for the states parties to fulfill the mandate of Article 36.8. As discussed above, nomination of women candidates has been very low before international courts and tribunals. In the election to the ICTY in March 2001, only one woman was among the twenty-five nominees. If the ICC were to face the same situation, and as the Rome Statue explicitly requires fair representation of female and male judges, it can be argued that the nominations process would have to be reopened in order to receive more nominations of female candidates.[74]

The Rome Statute does not stipulate a minimum number of nominations, as do the statutes of the ICTY and ICTR.[75] In light of the importance of the Court receiving a sufficient number of nominations, and in order to implement the Rome Statute's judicial requirements, the Assembly of States Parties

> In light of the importance of the Court receiving a sufficient number of nominations, and in order to implement the Rome Statute's judicial requirements, the Assembly of States Parties should adopt such minimum number, both generally and for each of the specific criteria.

[73] States can nominate up to two candidates at the ICTY and ICTR, three candidates at the ECHR, four candidates at the ICJ (the number of candidates nominated by a group can though not be more than double the number of seats to be filled).

[74] In the March 2001 election to the ICTY, NGO's and Women's groups called upon UN Secretary-General to seek to reopen the nomination process due to inadequate female representation; See press release by the Women's Caucus for Gender Justice, 13 March 2001.

[75] At the ICTY, from the nominations received, the Security-Council shall establish a list of not less than twenty-eight and not more than forty-two candidates; see ICTY statute, art. 13 *bis*, 1.

should adopt such minimum number, both generally and for each of the specific criteria. Based on the procedure at the ICTY and ICTR, having a minimum number double the elected seats, the Assembly of States Parties could consider setting the minimum number at thirty-six candidates. Inevitably, to implement article 36.5 on minimum number of judges with expertise in criminal procedure and international law, there would have to be a least nine candidates from the former category and five from the latter.

4.5 Statement specifying how the candidate fulfils requirements of paragraph 3

According to Article 36.4(a) of the Rome Statute:

> Nominations shall be accompanied by a statement in the necessary detail specifying how the candidate fulfils the requirements of paragraph 3.

This provision was meant to strengthen the nomination process by having each state party stipulate exactly how its candidate fulfils the qualifying criteria.

To nominate candidates, states parties would normally send a statement of nomination, along with the curriculum vitae of the candidate. In practice, the CVs have been prepared by the nominating state party or by the candidate herself. For the first election of judges to the single European Court of Human Rights, it was considered important that the information provided by the candidates would be "presented systematically and on broadly similar lines to facilitate comparison amongst the candidates". To facilitate this, the Council of Europe developed a model curriculum vitae which candidates were requested to fill out.[76] The model has been further developed and has been used in subsequent elections before that court.[77] Similarly, the Assembly of States Parties should draft a model curriculum vitae and a model statement.

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According to Article 36.4(a) of the Rome Statute, the statement shall only specify how the candidate fulfils the criteria set out in Article 36.3. Wisely, the current Rolling Text expands this and calls also for information relating to Article 36.8 on representation (see provision A.6). Similarly, according to the Rolling Text, the Secretariat shall place

[76] See Doc 7439, 20 December 1995.
[77] *Ibid*.

the nominations for judges, the accompanying statements and other supporting documents, on the Internet web site of the Court in any of the official languages of the Court, as soon as possible after receiving them (provision A.8).

4.6 Advisory Committee on Nominations

According to article 36.4(c) of the Rome Statute:

> The Assembly of States Parties may decide to establish, if appropriate, an Advisory Committee on nominations. In that event, the Committee's composition and mandate shall be established by the Assembly of States Parties.

It was thought that the use of an Advisory Committee might strengthen the nomination process, in particular by ensuring selection based on the merits of candidates, rather than on political considerations. [78] Some considerations were given to the success of a similar process at the European Court of Human Rights. However, the establishment of the Advisory Committee remains optional; it could become a standing committee, called upon in every election; it could be set up ad hoc for some election; or it could not be set up at all. Similarly, its composition and mandate was left for the Assembly of States Parties to decide.

At the last session of the Preparatory Commission, some delegations expressed skepticism about the establishment and use of an Advisory Committee. Some had doubts regarding the necessity, competence, and composition of such a committee, while others thought time constraints would preclude its establishment for the first elections of the Court.

There are many reasons in favor of establishing an Advisory Committee to be called up on in every election. The Rome Statute stipulates various requirements for individual judges and for the bench as a whole. At the least, a review is needed to

[78] See Medard Rwelamira, Composition and Administration of the Court, *supra* note 53, at 163-164. See Zhu Wen-qi, Qualifications, Nominations and Election of Judges, *in Commentary on the Rome Statute of the International Criminal Court* (Otto Triffterer ed., 1999), 599, at 604. Recently, the UN Special Rapporteur on the Independence of Judges and Lawyers expressed the importance of the establishment of the Advisory Committee, in order to " [improve] the independent and impartial operation of the current framework"; see

determine whether received nominations reflect all the requirements. Furthermore, an examination of nominations and interviews with candidates would illuminate their curricula vitae and experiences. For states parties to be able to elect judges properly, they need a clear and comprehensive picture of every candidate and of the field of candidates as a whole. The need for such a picture is compounded by several factors: nominations from states parties are coming from two avenues, each of which differs considerably among states;[79] and states parties have very different means and sources to prepare nominations and present their nominees. Furthermore, in many instances nominations from states parties will come directly from their governments, without any open examination at the national level.[80] An open examination at the Court itself would not only encourage nominations based on the merits of candidates, but also prevent any misgivings about the nominees' qualifications. An open evaluation process will be very important for the individuals who are parties before the Court, defendants and victims, and for participating non-states parties, such as NGOs, whose rights and recognition are demonstrated in the Rome Statute itself (e.g., art. 67, 68, 75 and 79), the draft rules of procedure and evidence (e.g., art. 16-18, and art. 89-98), and in the draft rules of the Assembly of States Parties (e.g., chapter XX).

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The competence given to the Advisory Committee would have to respect the inherent power given to states parties in article 36 to nominate and elect the judges. Its role should therefore be purely advisory, as its given name reflects. For instance, given that all required documents have been handed in, a power to eliminate candidates off the list would be questionable. That process would be in accordance with recent

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Param Cumaraswamy, "Toward Global Justice: Accountability and the International Criminal Court", *supra* note 61.

[79] *Supra* p. 7 and 25.

[80] *Ibid.*

development at the ICTY and ICTR.[81] However, the Advisory Committee could serve an important role in the preparation work of nomination and election. As stated above, the Rome Statute makes unprecedented requirements as to the content of nominations. The Advisory Committee could implement those requirements, suggest formats, etc., similar to what the Committee on Legal Affairs and Human Rights of the Council of Europe has done with respect to nominating procedures before the European Court of Human Rights.[82] The Advisory Committee should be able to request additional information and interview candidates. The interview process adopted for the election of judges to the new single European Court of Human Rights has now being adopted for all subsequent elections.[83] Based on its experience, the Advisory Committee could give an evaluation of each candidate and whether he or she fulfills the qualification set out in the Rome Statute. Notably, since 1947 the American Bar Association has played an important role in the process of federal judicial appointments in the US, evaluating federal judicial candidates by request of the Department of Justice.[84]

… the Advisory Committee could serve an important role in the preparation work of nomination and election.

The Advisory Committee could also serve an important role in the fulfillment of Articles 36.5 and 36.8 and, for each election, suggest implementation thereof. Delegations are already experiencing the complexity of those criteria, so examinations and suggestions by the Advisory Committee on their implementation could become very valuable. The needs of the Court for certain representation and expertise are also bound to fluctuate,

The Advisory Committee could also serve an important role in the fulfillment of Articles 36.5 and 36.8 and, for each election, suggest implementation thereof.

[81] At the ICTY and ICTR, the Secretary-General forwards states' nominations to the Security Council, which shall submit a list to the General Assembly for election. In the early years of the tribunals, the Security Council did trim the list of received nominations before its transmission to the General Assembly. In recent years, the Security Council has submitted all received nominations to the General Assembly.

[82] *Supra* p. 29.

[83] See Election of judges to the European Court of Human Rights, Council of Europe, Parliamentary Assembly, Resolution 1200 (1999).

[84] The ABA Standing Committee on Federal Judiciary evaluates candidates and ranks them from "not qualified" to "exceptionally qualified". The investigation centers on a candidate's prior trial experience and judicial temperament, and it surveys fellow attorneys in the local area over which the judge will preside The Department of Justice requested informal reports from the ABA on candidates under consideration before final decision were made. A formal report was then requested for the actual nominee. While the ABA recommendations are not binding, they are highly influential. The Bush Administration decided in March 2001 not to utilize the committee in the pre-nomination process. Its evaluation is now conducted post-nomination. See Committee on Federal Judiciary: What It Is and How It Works, American Bar Association, 1999; Neil D. McFeeley, Appointment of Judges: the Johnson Presidency 19-21 (1987); and the committee's website at www.abanet.org/scfedjud/home.html [last visited March 2002].

depending on its states parties and the nature of the cases before it, and the Advisory Committee could evaluate and report on such needs.

The composition of the Advisory Committee should reflect its tasks. It should be composed of independent experts of recognized standing and experience in judicial matters, having similar qualifications to those required of the judges of the Court. In the original proposal submitted in Rome, it was suggested that the committee would consist of Chief Justices of each state party.[85] Importantly, the Rome Statute does not limit the Advisory Committee to states representatives. In light of the substantive tasks of the Committee and its purely advisory mandate, a large state representative committee is hardly desirable. While a Chief Justice from each region could serve an important role, the Advisory Committee could additionally include judges from other international courts, experts from International Bar Associations, experts from international non-governmental organizations, and academic institutions. On certain matters, the Advisory Committee should consult closely with the Presidency of the Court.

It should be composed of independent experts of recognized standing and experience in judicial matters.

In order for the Advisory Committee to function in the first elections, it would need to be established at the first meeting of states parties. As is the case with the foreseen Committee on Budget and Finance, the Preparatory Commission should adopt a draft resolution of the Assembly of States Parties on the establishment of the Advisory Committee,[86] and elect its members at the first meeting of Assembly of States Parties. The Advisory Committee should meet when required and otherwise use available technical communications to facilitate its work. As for the first election of the Court, the Committee could organize interviews with candidates in December 2002.

5. Election

The judges shall be elected at a meeting of the Assembly of States Parties convened for that purpose only. In the first election, eighteen judges will be elected to the Court. Selected by lot, six of these judges will serve for nine years, six judges will serve for six

[85] See Medard Rwelamira, Composition and Administration of the Court, *supra* note 53, at 163.
[86] See Draft resolution of the Assembly of States Parties on the establishment of the Committee on Budget and Finance, UN Doc. PCNICC/2001/1/Add.2, 8 January 2002.

years, and six for three years only (art. 36.9). Overall, the Court will hold an election of six judges every three years; with the next two elections in 2006 and 2009.[87]

5.1 Voting requirements

In an election of judges each state party will have one vote (art. 112.7). A state party which is in arrears in the payment of its financial contributions towards the costs of the Court will loose its right to vote.[88] As the arrears must equal or exceed the amount of the contributions due from a state for the preceding two full years, this will not have relevance in the first election to the court.

Article 36.5 stipulates that there shall be two lists of candidates: list A containing candidates qualified in criminal procedure, and list B containing candidates qualified in international law. The Statute indicates one combined ballot and the persons elected "shall be the 18 candidates who obtain the highest number of votes and a two-thirds majority of the States Parties present and voting" (art. 36.6). In the event that a sufficient number of judges is not elected on the first ballot, successive ballots shall be held … until the remaining places have been filled (art. 36.6(b)).

The provisions resolve various scenarios. First, if more than eighteen judges obtain two-thirds majority votes of the states parties there is no need for another round of voting, as would be in the case of the ICJ; the eighteen persons with the highest number of votes would be elected. Second, if eighteen judges do not attain sufficient number of votes, successive ballots will be held until the number is reached. The persons who gained enough votes in the first ballot would be considered elected, and the remaining seats would be for the subject of the subsequent round. With a two-thirds majority voting requirement this might very well happen. For instance, in the last election to the ICTY, seven ballots were necessary to fill fourteen seats.

[87] This might fluctuate, as a judge assigned to a Trial or Appeals Chambers Chamber shall continue in office to complete any trial or appeal the hearing of which has already commenced before that Chamber.
[88] See article 112.8 of the Rome Statute and further discussion in Cesare Romano and Thordis Ingadottir, Financing of the International Criminal Court, Discussion Paper, Project on International Courts and Tribunals (2000).

5.2 Election of Judges from lists A and B – Article 36.5

The implementation of the proportionality requirement between judges with competence in criminal procedure and competence in international law seems straightforward as the candidates shall be presented on different lists and the statute does set a minimum number from each list – at least nine judges shall be elected from list A and five judges from list B. However, an additional procedure is needed to ensure such a result. It has been proposed that in a first phase of the election fourteen judges will be elected, leaving the remaining seats to be filled in the second phase.[89] Each elector would be required to vote for at least nine candidates from list A and five candidates from list B. However, if judges were to be elected by two-thirds majority and the highest number of votes only (as could be understood from reading Article 36.6(a) alone), the situation could easily arise where, for instance, ten candidates from list B would be among the 14 candidates with the highest number of votes, and only four from list A – resulting that in an insufficient number of judges from list A could be elected. In the first election of judges for the ITLOS, the member states agreed beforehand that in case the number of candidates obtaining the required majority exceeded the number of seats allocated to each region, the candidates obtaining the largest number of votes to fill the number of seats so allocated shall be elected while the others will be considered not elected.[90] The Assembly of States Parties could adopt a similar procedure.

The implementation of the proportionality requirement between judges with competence in criminal procedure and competence in international law seems straightforward … However, an additional procedure is needed to ensure such a result.

5.3 Implementation of Article 36.8

5.3.1 Decision concerning the implementation of article 36.8

The Rome Statute does not stipulate how Article 36.8 shall be implemented. As the Assembly of States Parties will have to adopt a mechanism to ensure compliance

[89] The Rolling text includes a proposal on the first election of judges. The proposal is subject to further discussion; see Rolling text, supra note 5, Annex.
[90] See First Election of the Members of the International Tribunal for the Law of the Sea, Proposal by the President, UN Doc. SPLOS/L.3/Rev.1, 31 July 1996, provision 9.

with article 36.5, they should do the same with implementation of article 36.8. This could be done through its proposed Resolution on the procedure for the nomination and election of judges, the Prosecutor and the Deputy Prosecutors (i.e., the current Rolling text), or separately for each election, similar to what the Meeting of States Parties of the United Nations Convention on the Law of the Sea adopts prior to each election to the ITLOS.[91]

The Rome Statute does not stipulate how Article 36.8 shall be implemented. As the Assembly of States Parties will have to adopt a mechanism to ensure compliance with article 36.5, they should do the same with implementation of article 36.8.

The Assembly's decision should decide implementation of each requirement, although each one could be treated in a different manner. The decision could leave the matter entirely to the electors, individually and collectively, to take the requirements into account. However, such option would not guarantee the required representation and might result in a bench that contradicts the Rome Statute.

Generally, in elections before other international tribunals, up to two-thirds of available seats are decided in the first round of balloting.[92] The possibility of some "adjustment" is therefore minimal. One way to avoid this, is to divide the election in phases; e.g., elect only six seats in each phase. Even when such an opportunity would be given, past experience shows that it might not be used. The open election of judges to the ICTY last year illustrates the potential risks. In the first round of balloting, twelve of fourteen seats were designated: eight to Western Europe and Others; two to Asia; two to Latin American and Caribbean states; while the African states and the Eastern European states did not get any of their candidates elected. The remaining two seats were decided in subsequent six rounds of balloting; both going to the African States, and the last judge to be elected is the only permanent female judge at the tribunal.

Another option would be to pre-arrange the election where the list of nominations would be reviewed and delegates would negotiate a consolidated list of eighteen judges

[91] See for instance First Election of the member of the International Tribunal for the Law of the Sea, *ibid*.
[92] In the first election to the ITLOS, thirteen of twenty-one seats were decided in the first round of balloting; in the first election to the ICTY seven of eleven seats were decided in the first round of balloting and in its election last year twelve of fourteen seats were decided in the first round of balloting.

which would meet all the requirements.[93] Such a process is however hardly suitable as it prevents transparency and increases political compromises.

Another option is to require electors to cast their votes in a certain manner, e.g., vote for a minimum number of candidates from each region and a minimum number of female and male candidates.[94] This method would encourage electors to vote for candidates from each category, but as for an "open" election it would not guarantee a result that conforms with the requirement of the Statute. In some cases, it might lead to fewer nominations, restricting the options of the electors. For example, if region A has ten candidates and the electors are required to vote for two candidates in that regional group, this method would not have any meaning for that group. The votes would be diluted and the group might not have any candidate elected. On the other hand, if that regional group has only two candidates, the requirement would entail a minimum quota for that group.

Similarly, if electors are required to vote for at least six female and six male candidates, and there are ten female candidates, there is no guarantee that a single female judge would be elected. In a worst case scenario, not one of them might get the necessary two-thirds of the votes to be able to be elected. Again, using the election at the ICTY last year as an example; the group of candidates from the African states ranked second in votes received in the first ballot. However, because of the high number of candidates from that group and because of how diluted the votes became, the African states did not get anyone elected in that round.

The most secure way to implement the representation requirement would be through the adoption of a distribution formula. This is what ICJ and ITLOS have done to implement their representation requirements, and what the General Assembly has done in respect of election to the Security Council and ECOSOC, and many subsidiary organs. … However, in light of the number of requirements, and in order to increase flexibility, the Assembly of States Parties might want to opt for a partial distribution formula, leaving some seats for an open election.

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[93] This would resemble the US proposal in Rome on a Nominating Committee, which was to develop a list of candidates, equal in number to the number of positions to be filled; see Draft Statute and Draft Final Act, supra note 27, art. 37.4, Option 2.

[94] Such mechanism was introduced informally by Hungary and Liechtenstein at the last session of the Preparatory Commission for the International Criminal Court.

representation requirements, and what the General Assembly has done in respect of election to the Security Council and ECOSOC, and many subsidiary organs. However, in light of the number of requirements, and in order to increase flexibility, the Assembly of States Parties might want to opt for a partial distribution formula, leaving some seats for an open election. That would also be analogous to the requirement in Article 36.5 (… *at least* nine judges shall be elected from list A and *at least* five judges from list B…). The distribution for the first election could be as follows:

- Equitable geographical distribution: e.g., at least [3] from Africa, at least [2] from Asia, at least [3] from Latin America, at least [2] from Eastern Europe, and at least [5] from Western Europe;
- A fair representation of female and male judges: at least [7] female judges and at least [7] male judges;
- At least [2] judges with legal expertise on violence against women and children.

As for the representation of the principal legal systems of the world, the Assembly might follow the practice of other courts and tribunals and consider the requirement implemented through equitable geographical representation.

5.3.2 Conduct of the elections

To ensure the fulfillment of the requirement set out in articles 36.5 and 36.7 of the Rome Statute and Article 36.8, as implemented in the Assembly of States Parties' decision, the following procedure could be adopted:

- Take a first ballot using a ballot form on which all candidates from lists A and B are listed, with each representative being allowed to mark up to 18 names;
- After the ballots are counted, list those candidates who have received a two thirds majority in order of the numbers of votes received;
- Declare elected as many of the candidates from the top of that list as can be done without violating any of the requirements; if a candidate is reached whose election would necessary cause a violation (e.g. if there are to be at least seven

female and seven male judges, the eleventh male could be declared elected but not the twelfth. Similarly no more than nine judges can be elected from list B.

Option 1: the twelfth would have to be passed over and the next candidate considered.

Option 2: the eleven candidates would be considered elected and an additional ballot would be taken for the remaining seats

- If eighteen judges cannot be elected on the first ballot, then additional ballots should be taken and counted according to the paragraphs above, with each ballot listing all the remaining nominees (i.e., excepting those already elected) and each representative allowed to vote for as many places as remain to be filled, until there are eighteen elected judges.

The above procedure should eventually result in eighteen judges who, as a group, meet all the requirements set out in Articles 36.5, 36.7 and 36.8 of the Rome Statute.

6. CONCLUSIONS

The Rome Statute's detailed requirements regarding the qualification of judges hold the promise that the Court will be equipped with experienced and competent judges, indispensable to a successful court. The requirement of including judges with competence in criminal procedure and relevant experience in criminal proceedings should enhance proceedings before the Court, leading to an effective and fair institution. At the same time judges with competence in international humanitarian law, human rights law, and with legal expertise on specific issues, such as violence against women and children, will be crucial for the work of the Court given its intended subject matter.

However, the promise of qualified judges is partly contingent on the nomination process; a process that is somewhat secluded in the domain of each state party. States parties will have to shoulder the responsibility and act on the invitation of putting forward candidates. In particular, a high number of nominations are needed for the first election of the Court. Building on the nomination process for the International Court of Justice, and the various provisions of the Rome Statue giving individuals and organization status before the Court , states parties should consider it inherent to include the civil society in

the national nomination process and seek their suggestions and comments on candidates. In selecting candidates for nominations, states parties will have to be guided by the unique nature of the Court, its complicated proceedings, and the immense requirements and responsibility given to each judge.

The Assembly of States Parties shall administer and monitor the nomination process. The Rome Statute makes detailed requirements to the content of nominations, and to the qualifications of judges. Therefore, it is an inherent duty of the Assembly of States Parties to ensure that the nominations and candidates fulfill these requirements. In addition to circulating and promptly posting received nominations and accompanying documents, the Assembly of States Parties should verify that received nominations actually fulfill the set requirements, and that candidates have the qualifications stipulated in the statute. Such review and synchronization is essential for a thorough and successful process: encouraging nominations of competent candidates, and simultaneously, giving electors a clear picture of each candidate as well as of the group as a whole, making easier their difficult task of electing the right bench. The Rome Statute's vision of an Advisory Committee on Nomination could play a key role in the process.

The representation among judges will have a major impact on the perceived independence and international nature of the Court. The Rome statute requirement of various representations has to be incorporated in both the nomination and election process. The Assembly of States Parties has to ensure that the pool of candidates fulfill the criteria, making it possible for states parties to elect accordingly. The election itself will have to be so organized that the elected bench meets the requirements set in the Rome Statute. States parties have for years implemented representation requirement at other international institutions, including of other international courts. Based on that experience, the adhered quotas systems of the ICJ and ITLOS are most likely to guarantee compliance with the Rome Statute. Such mechanism would also be coherent with other provisions of the statute, which already require minimum quota for certain type of judges.