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Trends and Reforms

A. Introduction

Proposals for reform of the selection processes of the international judiciary command considerable support in certain quarters, but face real political hurdles. For this reason, reforms to date have been uneven, making it difficult to identify clear trends. In some courts, such as the ICJ, very little change has occurred. In others, such as the European Court of Human Rights (ECtHR), considerable efforts have been made in recent years to improve the processes. Some of the most notable developments have arisen in the new courts, in particular the Caribbean Court of Justice (CCJ), the African Court on Human and Peoples' Rights (ACHPR) and the new UN administrative justice tribunals. Despite the very disparate nature of the developments, it is possible to discern two tiers of principles at play, which underpin—explicitly or implicitly—recent trends. The first tier concerns the higher-level concepts of independence, professional competence and integrity that are constant across all international courts. Below this layer is an emerging second tier that seeks to operationalize these requirements, including principles of transparency, non-politicization, merit, diversity, and representation. The second tier is highly contextual, depending on the function, institutional framework and political context of the particular court.

In order to place developments in the ICJ and ICC in the wider context of the international judiciary, interviewees were asked for their views on the merits of recent changes and potential future reforms in other courts. The following analysis reviews their responses in the light of developments in judicial selection processes in different parts of the international court system. Responses tended to fall into the following four main categories: (1) transparency; (2) independence and non-politicization; (3) competence and merit; and (4) diversity and representation.

B. Transparency

The need for greater transparency in international judicial selection procedures has been a common refrain for some years. This key concept is generally regarded

as playing a role in bolstering the independence and non-politicization of selection procedures, and in promoting the prioritization of merit as well as greater diversity and representation. In 2003, for example, the human rights group Interights commented in a report on the selection process to the ECtHR that:

> Without the effective implementation of 'objective and transparent criteria based on proper professional qualification' there is the very real possibility that the judges selected will not have the requisite skills and abilities to discharge their mandate.[1]

In addition to enhancing the qualities of the judges selected, transparency is also seen as a means of widening the pool of potential candidates and opening the process to a range of outside institutions and the broader public, facilitating awareness of the courts and dialogue on potential reform. Yet despite the strong rhetorical support for transparency in judicial selection amongst political and legal actors alike, in practice there is considerable resistance to reforms which might open up the selection processes to greater scrutiny. Inevitably, such increased transparency would threaten the closed world of nominations and elections described in the previous chapters by opening the process to institutions and individuals who would otherwise be seen as outsiders. While this might widen the candidate pool and so increase competition for posts and the potential quality of those selected, it is also seen as posing a threat to those vested interests which currently exert a strong hold on the selection processes.

This tension between transparency and support for the status quo was evident in the interviews. In relation to the ICJ and ICC, interviewees generally recognized that states 'now need to be very transparent about nominations'.[2] The importance of transparency was linked to the first tier principle of independence, since the process 'must be open to public scrutiny'[3] because in the 'absence of a clearly independent nomination process, one remains vulnerable to the lurking question of judicial independence'.[4] Openness was felt to be essential to ensure that 'all people of competence have an equal chance'[5] and to eradicate 'arbitrariness'.[6] One PCA national group member thought that transparency required the advertising of posts, the use of more effective consultation and setting out clear procedures in advance.[7] However, several of those interviewed took the approach that 'if it ain't broke don't fix it', arguing that 'so far, the process hasn't appointed the wrong people, so that's an argument in its favour, even though it's not transparent'.[8] There was concern that increasing democratization would not necessarily lead to the appointment of better judges. One interviewee recognized the potential political barriers to change, noting that it was a question of 'selling governments the idea that a transparent process means an independent candidate which is good thing for them'.[9]

[1] J. Limbach et al, *Judicial Independence: Law and Practice of Appointments to the European Court of Human Rights* (London: INTERIGHTS, May 2003). [2] T23, 9.
[3] T27, 5. [4] T28, 5. [5] T29, 7. [6] T65, 14. [7] T39, 11.
[8] T73–75, 10. [9] T56, 8.

Despite these reservations, the evidence from other international courts indicates a growing recognition in recent years of the need for more openness. References to the importance of transparency are found in most recent proposals for reform and in the governing rules or guidelines for newly established courts. ECtHR nominations, for example, must now be made through a 'fair, transparent and consistent national selection procedure'[10] in order 'to maintain the efficiency and authority of the Court'.[11] Similarly, the African Union has endorsed guidelines for the ACHPR that recommend that states '[e]mploy a transparent and impartial national selection procedure in order to create public trust in the integrity of the nomination process'.[12] In courts other than the ICJ and ICC, requirements have been introduced to advertise judicial vacancies, consult with particular individuals or institutions during the nomination process, produce template curricula vitae for candidates and publish information about the nomination procedure. Uniquely, the Council of Europe Parliamentary Assembly requires states nominating candidates to the ECtHR to 'describe the manner in which they were selected'.[13] Similarly, nominations to the ICC must be accompanied by a supporting statement setting out how the candidate meets the individual criteria.[14]

There is no requirement, however, that this statement include details of the nomination process used,[15] nor is it mandatory to publish reasons for the selection of the particular candidate or the rejection of others. This last issue is particularly controversial, and has been the subject of criticism in relation to some courts.[16] Yet in practice the publication of reasons would be a radical step, and one which has not been adopted at national level in even the most

[10] 'In the absence of a real choice among the candidates submitted by a state party to the Convention, the Assembly shall reject lists submitted to it. In addition, in the absence of a fair, transparent and consistent national selection procedure, the Assembly may reject such lists': Council of Europe Parliamentary Assembly, Recommendation 1646 (2009), *Nomination of candidates and election of judges to the European Court of Human Rights*, available at: <http://www.assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta09/ERES1646.htm> (accessed 26 April 2009), para 2. See the section on gender below, in particular the rejection of lists that do not include a female candidate.

[11] Parliamentary Assembly of the Council of Europe, Committee on Legal Affairs and Human Rights, 'Report: Nomination of candidates and election of judges to the European Court of Human Rights', 1 December 2008, Doc. 11767, available at: <http://www.assembly.coe.int/Main.asp?link=/Documents/WorkingDocs/Doc08/EDOC11767.htm> (accessed 18 September 2009), summary.

[12] Note Verbale, Commission of the African Union, 5 April 2004, Reference BC/OLC/66.5/8/Vol.V, ('ACHPR Guidelines'), para 5.

[13] Council of Europe Parliamentary Assembly, Recommendation 1646 (2009), *Nomination of candidates and election of judges to the European Court of Human Rights*, op. cit., para 4.2. Transparency could also be improved by states publishing in advance the procedure that will be followed in selecting candidates.

[14] See Chapter 3.

[15] Rome Statute, Article 36(4)(a). Paragraph 6 of ASP Resolution 6 further elaborates on the required content of this statement: Assembly of States Parties, *Procedure for the nomination and election of judges of the International Criminal Court*, ICC-ASP/3/Res.6 (ASP Resolution 6).

[16] J. Limbach et al, *Judicial Independence: Law and Practice of Appointments to the European Court of Human Rights*, op.cit.

forward-looking processes. The appointment of judges to the South African Constitutional Court, for example, includes interviews before the Judicial and Legal Services Commission which are held in public and widely covered in the media. Yet it was decided when the new system was established that the need for confidentiality, both to protect the candidates' privacy and to guarantee the commission's freedom to discuss candidates frankly, meant that their deliberations would not be published and no reasons for the selection or rejection of candidates would be given.[17] It is also likely that a requirement to provide reasons for a nomination could be circumvented by states by producing anodyne statements, as has sometimes been the case with ICC supporting statements.

There is acknowledged potential for international courts to make more use of the national selection systems as a way of increasing transparency. Some interviewees felt that the incorporation of nomination processes into the national system might be beneficial where a more open system was used to select national judges; for example, where a judicial appointment commission has been established to select judges on the basis of merit in accordance with set selection criteria. Such commissions have been deliberately established to ensure greater openness, increase diversity and prioritize selection on merit,[18] and in some cases the interviewing of candidates by the commission is held in public.[19] Other developments include the use of parliamentary selection or screening procedures for appointments to the higher courts.[20] Even if not adopted wholesale, elements of these national systems could be applied by states in developing their nomination processes for the international courts. Some interviewees, however, had concerns about the use of national processes, commenting that if a national selection procedure was more public, this could discourage potential applicants.[21]

Advertising

Only a handful of states publicly advertise international judicial vacancies,[22] although the interview data indicated that more states are considering taking this step. Only the Parliamentary Assembly of the Council of the Europe, the body that elects judges to the ECtHR, has imposed a requirement that states

[17] See K. Malleson, 'Assessing the Performance of the South African Judicial Service Commission' *South African Law Journal* 116 (1)(1999) part 1.

[18] See K. Malleson, 'Creating a Judicial Appointments Commission: Which Model Works Best?' *Public Law* (Spring 2004)102–21.

[19] See n 17 above.

[20] See K. Malleson, 'Parliamentary scrutiny of Supreme Court nominees: A view from the UK' *Osgoode Hall Law Journal* 44(3), (Fall 2006)557–64.

[21] T36, 9.

[22] For example, the UK has advertised for candidates for judicial vacancies at the ICC, ECtHR and ECJ.

'issue public and open calls for candidatures'[23] through the 'specialized press'[24] because it 'helps contribute in particular to the fairness and transparency of the selection procedure, making all potential candidates aware of this vacancy'.[25] Advertisements are also used by selection committees, such as those for the CCJ and the UN and European administrative tribunals.

Some interviewees were surprised to learn that international judicial vacancies were open to application in certain states and expressed mixed views as to whether advertising would be a useful practice for the ICJ and ICC. One interviewee, referring to the International Tribunal for the Law of the Sea (ITLOS), said: 'It is not the kind of position for which one would invite nominations by advertisement. There are not many persons out there who would be qualified, and so the ministry felt competent to identify those nationals who can meet and satisfy the criteria for appointment.'[26]

For some senior appointments, such as for the ICJ, 'the virtues of advertisement can be exaggerated, because the chances of anybody cropping up in response to an advertisement that one wouldn't have thought of would be absolutely absurd'.[27] However, in cases where there was not a clearly defined group who would be appropriate for the position in question, advertising for senior roles could make sense: 'What you want is an international criminal lawyer, and I wouldn't really recognize a breed of international criminal lawyer. There are various people who participate in international tribunals, but I just don't regard that as a genus. Whereas I certainly do regard an international lawyer as a genus.'[28]

[23] Council of Europe Parliamentary Assembly, Recommendation 1646 (2009), *Nomination of candidates and election of judges to the European Court of Human Rights*, op. cit., para 4.1.

[24] Council of Europe Parliamentary Assembly, Recommendation 1649 (2004), *Candidates for the European Court of Human Rights*, available at: <http://www.assembly.coe.int//main.asp?link=http://assembly.coe.int/Documents/AdoptedText/TA04/EREC1649.htm> (accessed 20 November 2008), para 19. The Parliamentary Assembly requested the Committee of Ministers to invite states to advertise (and also comply with other nomination procedural requirements in addition to the individual criteria in Article 21(1) of the European Convention on Human Rights). The Committee of Ministers refused because it considered that advertising is merely one of a number of ways of ensuring transparency and fairness: Council of Europe Committee of Ministers, *Candidates for the European Court of Human Rights Parliamentary Assembly Recommendation (Reply adopted by the Committee of Ministers on 20 April 2005 at the 924th meeting of the Ministers' Deputies)* 1649 (2004), CM/AS(2005)Rec.1649 (22 April 2005), available at: <http://www.wcd.coe.int/ViewDoc.jsp?id=849699&BackColorInternet=9999CC&BackColorIntranet=FFBB55&BackColorLogged=FFAC75> (accessed 26 April 2009). See also Council of Europe Parliamentary Assembly, Recommendation 1429 (1999), *National procedures for nominating candidates for election to the European Court of Human Rights*, available at: <http://www.assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta99/EREC1429.htm> (accessed 26 April 2009), para 6.

[25] Parliamentary Assembly of the Council of Europe, Committee on Legal Affairs and Human Rights, 'Report: Nomination of candidates and election of judges to the European Court of Human Rights', op. cit., para 18.

[26] T25, 9.

[27] T73–5, 3.

[28] ibid, 4.

Advertising could also increase the prevalence of candidates 'lobbying'[29] to be nominated. However, some interviewees felt that in most circumstances, advertising could be valuable:

> You may be on a selection panel and have a sense of who you would like to see make the applications, is it then sufficient that the members of a selection panel go out and invite people? Because while it maybe a small society, one cannot expect that five, six people on a selection panel have full knowledge of all the potential candidates.[30]

A related suggestion was that states should 'advertise' the reasons for a nomination decision in the print media as a useful way of making the nomination process more transparent and promoting merit.[31] An alternative approach to open advertising could be for professional organizations, such as the International Bar Association, to distribute information to potential candidates, asking them to make direct contact with their national authorities.[32]

Consultation

For nominations to the ICJ, ECtHR and ACHPR, states are recommended to consult with a range of individuals and institutions at the national level. As noted, Article 6 of the ICJ Statute provides that:

> Before making these nominations, each national group is recommended to consult its highest court of justice, its legal faculties and schools of law, and its national academies and national sections of international academies devoted to the study of law.

In relation to the ECtHR, the Parliamentary Assembly recommends that states 'consult their national parliaments when drawing up the lists so as to ensure the transparency of the national selection procedure'.[33] The guidelines of the ACHPR recommend that: 'State Parties should encourage the participation of civil society, including Judicial and other State bodies, bar associations, academic and human rights organizations and women's groups, in the process of selection of nominees.'[34]

From the interview data it is clear that few PCA national groups consult as recommended by Article 6 of the ICJ Statute,[35] although there was agreement that they and other selection bodies should consult more effectively and widely

[29] T65, 13. [30] T28, 15. [31] T56, 7. [32] T3, 15–16.

[33] Council of Europe Parliamentary Assembly, Recommendation 1429 (1999), *National procedures for nominating candidates for election to the European Court of Human Rights*, op.cit., para 7. See also the recommendation: 'the Assembly also urges the governments of member states to notify their parliaments and their appropriate committees of their procedures and timetables when drawing up lists of candidates for the Court': Council of Europe Parliamentary Assembly, Recommendation 1649 (2004), *Candidates for the European Court of Human Rights*, op. cit., para 20.

[34] ACHPR Guidelines, para 5.

[35] See Chapter 3.

with outside experts.[36] Some suggested that greater consultation would open up the pool of potential candidates[37] and ensure wider and more informed discussion of the relative merits of different candidates. It would also ensure a greater sense of 'ownership' over the nomination process. In some states there is already a strong recognition that this is important, according to an ICC judge: 'serious governments like European governments are now fully aware that they cannot adopt purely political decisions but that they have to be open to listening to ideas coming from different bodies and organs within their countries'.[38]

A WEOG interviewee felt the time had come to open up the nomination process: 'I think that there is scope for the national group to be less tightly private, and secretive about its operations, and if they had asked me during my time, would it be a good thing to start a process of discreet, wider consultation, I would have said, yes, why not?'[39] Others believed that consultation should include the bodies mentioned in Article 6 of the ICJ Statute, as well as bar associations, law societies and lower judges working in fields related to the particular court. Some PCA national groups, notably those of the USA, are known to consult in this manner. In relation to human rights courts and the ICC, consultation might also be opened to non-governmental organizations, as is recommended for nominations to the ACHPR.[40]

Other interviewees felt that consultation was neither desirable nor feasible, and that the absence of consultation was accepted as a 'fact of life' in the process.[41] In some states where the PCA national group is comprised of a range of individuals from different branches of law and politics it was thought that wider consultation would be superfluous because the process was already taking place inside the national group. Concerns were expressed that introducing new people and processes into the system would promote new, unwanted political influences into the nomination process,[42] or that there would be government opposition to demands for wider consultation because 'it is not practised in our part of the world. It is only centralized at a very high level and they don't care about what the people would say.'[43]

The frequency of references to the presence of political barriers to greater openness highlights the fact that significant political will is required to enhance transparency. In the ECtHR, the fact that the Parliamentary Assembly is a cross-partisan body consisting of national parliamentarians has meant that it has been possible to criticize and impose requirements on the nomination process. At the ACHPR, the court is politically significant as the first African regional human rights court. Indeed, that both are human rights courts may also partly

[36] T39, 12. [37] T52, 25. [38] T76, 9. [39] T35, 17.
[40] T76, 3–4. See also ACHPR Guidelines, 3. [41] T77–80, 4.
[42] As one interviewee noted, it may not be a good idea to remove the nomination process entirely from the political sphere, because if academics, for example, are to be the ones who select candidates, 'academic life is really full of jealousies and hierarchies. So, I'm not convinced that better people would just come out at the top of all that'. (T77–80, 8) [43] T48, 9.

explain these developments, as there are likely to be higher expectations for such courts that the selection processes will be transparent.

There are also questions as how effective these developments have been in improving transparency: ten years of calls to states to improve the transparency of their ECtHR nomination processes have resulted in some positive change, but 'there is still significant variance as concerns fairness, transparency and consistency'.[44] Similarly, the first nominations to the ACHPR were criticized by non-governmental organizations for lacking transparency and failing to produce a sufficiently large pool of adequately qualified candidates.[45] Across the international courts, there appears to be significant resistance to measures that would increase transparency. In the ICJ and ICC contexts, apart from a few states that have adopted more open procedures, there appears to be little appetite for addressing transparency at an institutional level.

C. Independence and non-politicization

Overt politicization of international nominations is seen as a concern in relation to several international courts; consequently, some developments across the international court system have sought to reduce politicization by increasing the independence of judicial selection procedures. An independent selection procedure does not necessarily guarantee transparency, proper regard for merit, or an entirely apolitical decision, although it diminishes the government monopoly of control. As independence increases, more institutional and procedural constraints are often imposed on selection bodies which may help to make the selection process more consistent and transparent, enhancing merit-based selection. In many court systems, the link between independence in the selection process and independence of the bench is regarded as a given. In the ECtHR context, it has been said that selection procedures

'have a direct impact on the independence and impartiality of the judges, which is required in order to ensure public confidence in the independence of any judicial

[44] Parliamentary Assembly of the Council of Europe, Committee on Legal Affairs and Human Rights, 'Report: Nomination of candidates and election of judges to the European Court of Human Rights', op. cit., para 40.

[45] C. A. Odinkalu, 'How the Judges of the African Court Emerged', 30 January 2006, available at: <http://www.allafrica.com/stories/200601310508.html> (accessed 12 July 2006) and Coalition for an Effective African Court on Human and Peoples' Rights, 'The Election of Judges to the African Court on Human and Peoples' Rights', document submitted to the Assembly of Heads of State and Government, the Executive Council and the Permanent Representatives Committee of the African Union Mid-term Summit in Khartoum, the Sudan, from 16–25 January 2006 (n.d.), on file with authors.

institution. Nomination procedures must be and be seen to be in conformity with international standards guaranteeing judicial independence.'[46]

A number of interviewees agreed that independent selection procedures are essential to ensure that the best candidates are selected. However, given that such independence may erode governmental control over nominations, many states will only be willing to countenance more independent processes when there is strong external political pressure and/or an incentive to do so. Selection procedures which are decoupled from the member states, such those used in the CCJ, emerge only in very specific political contexts.

The three main developments with regard to independence have been (1) a movement toward greater independence of PCA national groups; (2) calls to states to establish other independent nomination bodies; and (3), more radically, the establishment of fully-fledged independent selection committees that take the selection process out of state hands completely.

Reinforcing the independence of national nomination bodies

One way to increase the independence of the selection process is to establish independent bodies at the national level which are given the task of making nominations. These bodies would be responsible for identifying and assessing potential candidates and would be able to designate a candidate without governmental interference. The requirement that ICJ nominations should be made by PCA national groups was intended to provide this element of independence.[47] Although it is not clearly stated in the ICJ Statute that PCA national groups must be independent of government, this can be inferred from the fact that the groups were established to act as independent arbitrators in disputes under the auspices of the PCA. Yet it is clear from the interview data that the majority of PCA national groups do not function independently of governmental control.[48]

Many of the interviewees agreed that the PCA groups need greater operating independence in order to properly perform their central role under the ICJ Statute, as the group's independence could be 'a very useful protective hedge against the influence of a government which has a strongly politicized attitude towards international courts'.[49]

> What needs to be done is for the national groups to be given the authority that they are given in the ICJ Statute. Because they are supposed to be an independent group that makes the nomination. The whole purpose, as I understand it, is to remove the political factor from the nomination procedure. But what has happened is that the political factor has got back into the procedure.[50]

[46] Parliamentary Assembly of the Council of Europe, Committee on Legal Affairs and Human Rights, 'Report: Nomination of candidates and election of judges to the European Court of Human Rights', op. cit., para 3. See also para 20.

[47] See Chapter 1.

[48] See Chapter 3.

[49] T35, 6–7.

[50] T82, 8.

Some argued that one means of bolstering the independence of PCA national groups might be to 'publicize the role of the PCA national group amongst judges and lawyers so that their role is better understood and supported'.[51] Independence could also be supported by appointing non-government members and taking steps to ensure that national groups operate within clearer procedures, as is the case with some more 'structured' PCA national groups. Interaction between groups and discussions of their role could also be encouraged. Most important, however, would be a change of attitude on the part of governments to recognize the legal role of the national group under the ICJ and ICC Statutes. There does not currently appear to be widespread interest on the part of states to increase the independence of PCA national groups; general practice errs towards a light-touch advisory role at best, with final decisions taken by government.

Independent national nominations procedures might also be established through the use of the highest national courts nomination procedure in the ICC Statute, or by employing national judicial selection procedures and institutions. In general, the independent national selection committees have a statutory basis, clear procedures and accountability structures, and operate with a high level of independence. One interviewee thought that these procedures could introduce 'ideological issues and interests groups'[52] into international nominations. On the other hand, some national selection procedures can be even more politicized than international selection procedures.

The ECtHR is the only other international court for which independent national selection procedures have been discussed in detail. The Parliamentary Assembly of the Council of Europe has stated that, as a minimum requirement, member states should 'set up—without delay—appropriate national selection procedures to ensure that the authority and credibility of the Court are not put at risk by ad hoc and politicized processes in the nomination of candidates'.[53] This proposal follows an earlier, detailed recommendation by Interights which argued that the Council of Europe should require states to establish an independent body to devise the state's list of candidates:

> The independent body would consist of independent persons including judges and individuals with academic and other experience of international law and human rights.
>
> The independent body would *consult* with interested civil society such as judicial and other State bodies and where possible human rights organizations and national bar associations. It would then shortlist and interview candidates, and forward the names of three nominees to the national government, for transmission to the Council of Europe.

[51] T39, 13. [52] F27, 1.

[53] Council of Europe Parliamentary Assembly, Recommendation 1646 (2009), *Nomination of candidates and election of judges to the European Court of Human*, op. cit., para 5. See also M. O'Boyle, 'On Reforming the Operation of the European Court of Human Rights' *European Human Rights Law Review* 1 (2008) 1–11.

Where, as a result of a thorough procedure, three suitable candidates emerge but there is a hierarchy between them, the independent body should be free to rank the candidates.[54]

Establishing independent national nomination bodies that have a real, determinative role in the selection procedure requires political will that has only been seen in a handful of states. However, the increasing focus on reinforcing the statutory role of the PCA national groups and developments in bolstering independence in national judicial selection procedures is encouraging and might point the way to possible future changes which could increase the level of independence in the selection processes of the ICJ, ICC and other international courts.

International judicial selection committees

For a small number of international courts and tribunals there has been a more far-reaching shift towards independent judicial selection procedures in which the role of governments in nominating or electing judges has been removed or strictly limited. Most notably, the judges of the CCJ are appointed by an independent non-state selection committee; the only committee of its kind at the international level. The staff administrative tribunals of the EU and UN have also recently been established with procedures for the nomination of candidates by international, independent committees. These procedures were established from the inception of the courts and are a product of their particular political contexts and functions.

The Regional Judicial and Legal Services Commission (Caribbean Court of Justice) (RJLSC) of the CCJ is the only non-governmental international judicial selection body. The CCJ is a regional court that has original and appellate jurisdiction,[55] and the Commission was established in response to concerns that the CCJ was intended to replace the Judicial Committee of the Privy Council as the court of final appeal for Commonwealth states in the region. It was felt that there would be doubts about the independence of Caribbean judges appointed by governments,[56] and so an eleven-member Commission was established to

[54] J. Limbach et al, *Judicial Independence: Law and Practice of Appointments to the European Court of Human Rights*, op. cit., 27.

[55] Under its original jurisdiction, the court has the power to interpret and apply the Revised Treaty of Chaguaramas Establishing the Caribbean Community, Including the CARICOM Single Market and Economy (the Treaty) and in its appellate jurisdiction it can act as the final court of appeal from certain decisions (including decisions on domestic constitutional matters) of the Courts of Appeal of the Contracting Parties that have accepted the appellate jurisdiction of the Court: see the Agreement Establishing the Caribbean Court of Justice of 2001, available at: <http://www.caricom.org/jsp/secretariat/legal_instruments/agreement_ccj.pdf> (Accessed 28 April 2010) (CCJ Agreement), Parts II and III.

[56] See K. Malleson, 'Promoting Judicial independence in the International Courts: Lessons from the Caribbean' *International and Comparative Law Quarterly* 58(3) (July 2009), 671–97.

make the appointments. It comprises the President of the Court (as Chair), academics, representatives from judicial and public services commissions of member states and representatives from civil society who were appointed by a range of non-governmental bodies.[57]

The RJLSC determines its own procedure for the appointment of judges to the court. In February 2004 it published advertisements in the regional and international media seeking applications for the first judicial posts. It then conducted interviews with shortlisted candidates, assessing them against the criteria set out in the agreement establishing the court.[58] The first judges were appointed to the court on 19 November 2004. Controversially, the Commission did not appoint a judge from Jamaica, one of the largest member states of CARICOM. Although this attracted some criticism from the legal and political community in Jamaica, it was seen more generally as evidence of the independent nature of the process and the priority given by the Commission to selecting the best candidates irrespective of their origins.[59]

It is also worth noting a second unique feature of the CCJ in relation to its source of funding. The court is financed by a trust fund established originally from funds borrowed on the international money markets by the Caribbean Central Bank, to be repaid by the governments of the region. This means that neither the court nor the RJLSC is dependent on contributions from the member states, and this has contributed significantly to the perceived and actual independence of the court and its selection procedures. It is also interesting to consider the potential value of such a funding structure in election-based courts, as it might reduce pressure on states to elect judges from states that contribute significant amounts to the courts' costs (because of fears that the contributions might be withdrawn).[60]

In addition to the RJLSC, two committees have also recently been established that nominate judges for three specialized staff administrative tribunals: the European Union Civil Service Tribunal (CST), the United Nations Dispute Tribunal (UNDT), and the United Nations Appeals Tribunal (UNAT). These committees seek candidatures and compile a shortlist of candidates. Judges are then appointed or elected by political bodies.

[57] CCJ Agreement, Article 5(1). It should also be noted that in the Caribbean region, particularly in common law countries, the appointment of national judges by a legal services commission is a common model. This has meant a good level of familiarity with making judicial appointments by independent committee, helping the transition of this concept to the international environment. It could be imagined that a similar trajectory could be possible at the international level. If states increasingly adopt national judicial selection committees for national judicial appointments, this may potentially ease the way towards the establishment of international judicial selection committees.

[58] CCJ Agreement, Article IV(10) and Article IV(11).

[59] Interviews conducted by the authors in 2008 with a range of legal, political and civil stakeholders revealed a high degree of confidence in the Commission as having undertaken its tasks in an effective and appropriate manner and appointed competent and independent judges (see n 56 above).

[60] See Chapter 4.

The CST is a judicial body that determines EU staff disputes.[61] Article 3 of the Annex I to the Protocol on the Statute of the Court of Justice provides for the establishment of a committee that the Council of the European Union must consult when appointing judges to the CST, consisting of:

> seven persons chosen from among former members of the Court of Justice and the Court of First Instance and lawyers of recognized competence. The committee's membership and operating rules shall be determined by the Council, acting by a qualified majority on a recommendation by the President of the Court of Justice.[62]

The role of the committee is to seek and vet potential candidates who are then forwarded to the Council of the European Union for appointment by that body 'acting unanimously'.[63] In 2005, the Council made a public call for applications for the first appointments to the tribunal and, in the course of a number of meetings on the papers, decided on a list of fourteen candidates.[64] Article 3(4) of the Annex provides that:

> The committee shall give an opinion on candidates' suitability to perform the duties of judge at the Civil Service Tribunal. The committee shall append to its opinion a list of candidates having the most suitable high-level experience. Such list shall contain the names of at least twice as many candidates as there are judges to be appointed by the Council.

The seven judges of the tribunal were appointed from this list by the Council, having regard to balanced geographical representation and representation of national legal systems.[65]

The UNDT and UNAT, which began work in July 2009, comprise the United Nation's new two-tier formal system for the administration of justice.[66]

[61] See also H. Cameron, 'Establishment of the European Union Civil Service Tribunal' *The Law and Practice of International Courts and Tribunals* 5 (2)(2006) 273–83.

[62] EC Treaty, Article 225a, Annex I to the Protocol on the Statute of the Court of Justice: Consolidated Versions of the Treaty on European Union and of the Treaty Establishing the European Community, Article 3(2), *Official Journal* C 321E of 29 December 2006 (EC Treaty and Annex).

[63] EC Treaty, Article 225a, Annex, Article 3(2).

[64] Council Decision 2005/151/EC, Euratom, OJ C 47 A, 23.2.2005, 1. The text of the call is in Council Decision 2005/150/EC, Euratom, OJ L 50, 23.2.2005, 8 and states that in addition to the minimum conditions set down in Article 225a of the EC Treaty and the relevant part of Annex 1, 'the committee will be prompted to take into particular consideration candidates' ability to work within a collegiate structure in a multinational, multilingual environment, and also the nature, extent and duration of their experience suitable for the duties to be performed'. Two hundred and forty-three applications were received in response to this call. The committee then met on a number of occasions and presented a list of fourteen candidates to the Council for consideration, from which the Council selected seven judges: Council Decision 2005/557/EC, Euratom, OJ L 197, 28.7.2005, paras 6 and 7.

[65] As required by Article 3(1) of Annex I to the Statute of the Court of Justice: see Council Decision 2005/557/EC, Euratom, OJ L 197, 28.7.2005, para 9.

[66] United Nations General Assembly Resolution 62/228. Administration of justice at the United Nations, UN Doc. A/RES/62/228, para 39.

The tribunals decide internal UN administrative disputes relating to staffing, pensions, and related matters. In terms of composition, the governing statute states that 'no two judges should be of the same nationality, and due regard should be given to geographical distribution and gender balance'.[67] The selection criteria state that: 'A person shall be of high moral character and possess at least ten years of judicial experience in the field of administrative law, or the equivalent, within one or more national jurisdictions'.[68]

The first twelve judges of the UNDT and the UNAT were elected in March 2009 by the General Assembly, on the recommendation of the Internal Justice Council (IJC).[69] The IJC consists of a staff representative, a management representative and two distinguished external jurists, one nominated by the staff and one by management, and is chaired by a distinguished jurist chosen by consensus by the four other members.[70] The IJC made recommendations following a public advertising process, seeking applications from interested individuals. The Council shortlisted the applicants based on established criteria and 'with due regard to geographical distribution'.[71] Shortlisted candidates underwent a two-hour written exam and a 30–45 minute interview. For each shortlisted candidate two referees were asked to provide written references. The Council then consulted with the local bar association of each candidate and the International Bar Association to seek views on their suitability. The Council recommended two candidates for each UNDT vacancy and fifteen candidates for the seven UNAT vacancies.[72] Only the recommended candidates were eligible for election by the General Assembly.

Nomination issues have also been considered in the context of the World Trade Organization (WTO), specifically in relation to the review of the Dispute Settlement Understanding. In relation to the first tier of adjudication in the WTO dispute settlement process, the panels, questions have been raised about the nomination of persons to the panel roster. A Consultative Board reporting to the WTO Director-General in 2004 noted that:

> One serious question regarding the roster idea for first level panels, however, addresses the procedures by which the roster persons will be appointed. There exists considerable worry that the usual diplomatic and political processes might not produce the best calibre individuals the tasks require. Thus, thought is needed about a small apolitical body of experts who would examine applications and produce a list of nominees who meet

[67] Dispute Tribunals Statute, Article 4(2). [68] Dispute Tribunals Statute, Article 4(3).

[69] United Nations General Assembly Resolution 62/228, op. cit., para 37(a), (b) and 40. See also United Nations General Assembly, *Appointment of the full-time and half-time judges of the United Nations Dispute Tribunal, Memorandum by the Secretary-General*, UN Doc. A/63/700, (3 February 2009).

[70] United Nations General Assembly Resolution 62/228, op. cit., para 36.

[71] ibid, para 37(b).

[72] See also United Nations General Assembly, Report of the Internal Justice Council, UN Doc. A/63/489 (16 October 2008). The report includes the curricula vitae of the shortlisted candidates.

carefully set out criteria. This body could then work with the [Dispute Settlement Body] in finalizing the roster.[73]

These new developments suggest that there are circumstances in which governments may be willing to relinquish some direct control over nominations and elections. However, these cases have arisen in particular circumstances. As one might expect, any proposal for removing the ICJ and ICC nomination and elections from the control of states was not generally supported by interviewees. For some the objections were principled, for others they were pragmatic. A number of interviewees felt that significant reforms were unlikely to succeed, given that they would require amendments to the Statutes of the two courts and changes in state practice. Others were unable to conceive of an international judicial appointment system other than by process of nomination and election by political bodies. As one former legal adviser said:

It would be lovely to conjure one out of one's fertile imagination, but it has to be election in some kind of body representing the states party or the sponsoring organization. Therefore, it will be an election by a political body, and is likely to turn into a political election. There is just no way around it, unpleasant as the situation is.[74]

In relation to the ICC, it was hypothesized that 'the ASP could introduce some kind of voting machine but opposition to it is huge'.[75] One diplomat said that 'the best way to deal with all of these concerns is to leave it up to states parties',[76] because, according to another interviewee, 'they are accountable'.[77] An interviewee from the Caribbean region commented on the applicability of the CCJ model of selection: 'Although it is a clear-cut and transparent appointment procedure that should be effectively adopted for other international courts, I can see that the wider international community may not be willing to give up their sovereignty to an impartial third party.'[78]

These views are in line with the rejection of the original US proposal for a Nominating Committee 'composed by the Assembly of States Parties' that could be convened at each election to draw up a list of candidates.[79] Nevertheless, the benefits of such a mechanism could be significant. To take away the selection process from direct governmental control would remove the politicking

[73] P. Sutherland et al, *Future of the WTO: Addressing Institutional Challenges in the New Millennium*, Report by the Consultative Board to the Director-General Supachai Panitchpakdi (Geneva: World Trade Organization, 2004) 57. See V. Hughes, 'The WTO Dispute Settlement System—from initiating proceedings to ensuring implementation: what needs improvement?' in G. Sacerdoti, A. Yanovich and J. Bohanes, *The WTO at Ten: The Contribution of the Dispute Settlement System* (Cambridge: WTO/Cambridge University Press, 2006) 193–234, 209. Hughes notes that while the idea of an apolitical body coming up with a list of nominees is 'an interesting one... I wonder whether the process for selecting who will be on that body will be any less problematic than choosing who eventually should be on the roster'.

[74] T35, 11.

[75] T35, 12.

[76] T2, 15.

[77] T44, 15.

[78] T27, 3.

[79] M. Rwelamira, 'Composition and Administration of the Court' in R. Lee (ed), *The International Criminal Court: The Making of the Rome Statute: Issues, Negotiations, Results* (The Hague: Kluwer Law International/UNITAR, 1999) 162–3.

and vote-trading which currently plays such a significant role in the electoral processes. Although no committee will be completely apolitical, the move to a more independent system would be likely to enhance the role of merit as the main focus in selection decisions. As has been shown with the selection process for the administrative tribunals, selection committees can take into account representational issues such as geography and gender whilst also focusing on merit.

A number of interviewees could see the value of more independent selection procedures for the ICJ and ICC, while not envisaging a shift from the status quo of state control in the near future, particularly in the ICJ, the jurisdiction of which is dependent upon consent of states parties to disputes. Nonetheless, the trends observed in other courts towards more independent national selection procedures and international selection committees suggest that the tension between independence and political control in the selection processes to the ICJ and ICC may well grow in the near future.

D. Competence and merit

Reforms designed to promote greater transparency and independence in judicial selection processes are not ends in themselves but are intended to increase the likelihood of selecting only the highest quality candidates. In the absence of an independent assessment of candidates' suitability it is more likely that political considerations will prevail. To address this concern, a number of international courts have established or considered procedures aimed at assessing, or facilitating assessment by states of the merit of candidates. The expectation is that procedures which focus on merit are more likely to be transparent and independent and will limit crude political considerations.

A number of courts explicitly recognize that the selection of the highest quality candidates is the determining feature of the selection process. The ACHPR guidelines remind state parties that 'the effective functioning of the Court will... require judges with irreproachable integrity, established competence and experience in the area of human rights'.[80] In relation to the ECtHR, the Parliamentary Assembly has noted that 'shortcomings in the national selection and international nomination procedures can engender the risk that judges are not properly qualified to carry out their mandates, to the detriment of the legitimacy and authority of the Strasbourg Court'.[81] This conclusion was shared by the Interights report on the selection process to the ECtHR, which argued that in order to promote selection on merit all candidates should be formally

[80] ACHPR Guidelines, 1.

[81] Parliamentary Assembly of the Council of Europe, Committee on Legal Affairs and Human Rights, 'Report: Nomination of candidates and election of judges to the European Court of Human Rights', op. cit., para 3.

interviewed by the nominating states and that the Council of Europe should provide states with an interview template.[82] The template would require interview panels to:

A. abide by the criteria for judicial appointments in the Convention and Council of Europe recommendations concerning candidates
B. agree in advance what areas should be covered in the questions
C. ensure that these are relevant to the criteria and do not carry built-in advantages for some candidates (especially in relation to gender, eg family commitments)
D. cover the same areas with each candidate, and
E. mark the candidates' performances on an agreed scale under agreed (and relevant) heads.

These sorts of initiatives were supported by a number of the interviewees in discussing possible improvements to the ICC and ICJ selection processes. Most felt that greater importance should be placed on individual merit.[83] A former international judge said 'I would like merit to be given a higher priority than I fear it is.'[84] Many felt that there is insufficient focus on the selection criteria in national nomination processes, a failure to provide adequate information about candidates to facilitate assessment of their relative merits, and an absence of independent input on the qualities of candidates. In this context, merit was often felt to be sidelined and overshadowed by political considerations.

However, it is clear that, as with transparency and independence, increasing focus on merit might threaten the primacy of state control in the selection process. It is to be expected, therefore, that there will be resistance from many states to changes which seek to reinforce merit-based decision-making. Nevertheless, in a number of international courts, there have been initiatives which seek to do just this, including (1) calls to improve the consistency and rigour of nomination processes; (2) requirements to provide detailed and uniform information about candidates and their eligibility; and (3) the establishment of international screening mechanisms to assess the merit of candidates and either make recommendations or exclude certain candidates from the process. Although each of these developments has arisen in the particular political and institutional circumstances of each court, taken together they indicate an emerging trend towards greater consideration of questions of merit. The following sections consider whether similar developments could be introduced in the context of the ICJ and ICC.

[82] J. Limbach et al, *Judicial Independence: Law and Practice of Appointments to the European Court of Human Rights*, op. cit., 28.

[83] The Institut de Droit International also made recommendations on this issue—suggesting an amendment to the Statute to clarify that in Article 9 primacy should be given to the individual criteria: (from the French) Institut de Droit International, *La Composition de la Cour Internationale de Justice, Session d'Aix-en-Provence—1954*, Resolution 26 avril 1954, para 1.

[84] T36, 4.

Consistency in nomination processes

Consistent nomination and election processes based on pre-determined and rigorous selection methods are generally regarded as being more likely to produce meritorious candidates, improve the independence and transparency of the selection processes, and reduce the likelihood of bias against under-represented groups. In the ECtHR context, the Parliamentary Assembly has argued that established procedures with a formal legal basis are preferable to ad hoc arrangements. Although an established formal procedure 'does not in itself guarantee its substantive fairness, it does help ensure a certain level of consistency and transparency',[85] and a number of interviewees believed that broadly common nomination procedures would be desirable for the ICJ and ICC to ensure internal consistency and allow greater comparability of candidates from different states. Such procedures could include interviews, written examinations, and the taking of written references, drawing on examples from some of the non-state independent selection committee processes.[86] The functioning of PCA national groups could also be more effectively regulated by the creation of uniform selection criteria and methods, which might in turn bolster their independence.

The use of national procedures for selecting judges to the domestic courts, as provided for in the ICC and the ACHPR guidelines, is increasingly regarded as one method for producing a more formal system for the nomination of candidates to the international courts.[87] Drawing on national systems does not, however, ensure greater consistency. The range of processes used to select judges at national level varies a great deal, both between civil law and common law systems and within them. This diversity is not, however, necessarily problematic and could be seen as a strength in that it allows the international courts to reflect the different cultures and procedures of the legal systems and judiciaries of the member states. Provided the national systems each comply with basic standards of openness, fairness and the objective consideration of merit-based qualities, there is no reason for consistency to be taken to require homogeneity.

However, some interviewees questioned whether national judicial selection processes were always best placed to identify the most qualified candidates as the higher courts will tend to select from the cohort of the judiciary or a limited group of senior practitioners, which would exclude the wider pool of candidates who might otherwise be considered eligible to sit on the international courts. Furthermore, national selection institutions will often lack knowledge about international law and may be ill-equipped to select the best candidate for this particular role. An alternative approach to the wholesale adoption of national

[85] Parliamentary Assembly of the Council of Europe, Committee on Legal Affairs and Human Rights, 'Report: Nomination of candidates and election of judges to the European Court of Human Rights', op. cit., para 17.

[86] For example, the IJC used written examinations, interviews and references to assess candidates for the UNDT and UNAT, as discussed above.

[87] See n 34 above.

procedures might therefore be to draw on best practices from the national level in developing and adapting the international selection systems.

Information about candidates

The creation of more independent, structured and consistent selection procedures could help to produce more and improved information about candidates and so facilitate the assessment of the merit of candidates on a comparable basis. Recently, there have been calls for information about candidates to be set out in more standardized formats, an example being the requirement that in making nominations to the ECtHR member states must set out the process by which the candidate was nominated and submit a model curriculum vitae.[88] Similarly, nominations to the ICC must be accompanied by a supporting statement setting out how the candidate meets the individual criteria and 'other supporting documentation', which normally includes a curriculum vitae. These are then posted on the website of the ASP.[89] In the ICJ, curricula vitae are, by convention, submitted with nominations and circulated by the UN prior to the elections.[90] The ACHPR requires states making nominations to provide 'detailed information on the information on political and other associations [of the candidate] relevant to determining questions of both eligibility and incompatibility. In addition, nominees should submit statements indicating how they fulfill the criteria for eligibility contained in the Protocol'.[91]

There appears to be a general trend towards requiring more detailed and uniform information to be provided about candidates. This is evident in both the ICJ and ICC, although it is as yet unclear whether states will agree to increase the scope of the information provided to include information about the nomination process, model curriculum vitae formats and information about prior political activities.

[88] Council of Europe Parliamentary Assembly, Recommendation 1646 (2009) *Nomination of candidates and election of judges to the European Court of Human*, op. cit., para 4.2 and Appendix. However, it has been noted that there are problems with the distribution of this information: 'Members of the Parliamentary Assembly may seek information on the candidates, which is kept in the library, but neither the curricula vitae, nor the report of the Sub-Committee is distributed to voters': J. Limbach et al, *Judicial Independence: Law and Practice of Appointments to the European Court of Human Rights*, op. cit., 24.

[89] Rome Statute, Article 36(4)(a) and ASP Resolution 6, para 8.

[90] See for example United Nations General Assembly, *Curricula vitae of candidates nominated by national groups*, Note by the Secretary-General, UN Doc. A/63/188-S/2008/504.

[91] ACHPR Protocol, Article 18; ACHPR Guidelines, 2. The Guidelines also suggest that states parties should consider the positions of '[A] member of government, a Minister or under-secretary of State, a diplomatic representative, a director of a ministry, or one of his subordinates, or the legal adviser to a foreign office' to be incompatible, drawing on the proposals of the Advisory Committee of Jurists made in relation to the Permanent Court of International Justice: at 2.

Screening mechanisms

Four main screening mechanisms have been established or contemplated for the international courts. The two mechanisms currently in operation are the Sub-Committee on the Election of Judges to the European Court of Human Rights that screens ECtHR candidates and the selection committee for members of the World Trade Organization Appellate Body (WTO AB). The Treaty of Lisbon provides for a screening mechanism for nominations to the ECJ and the Court of First Instance (CFI) to be created. As noted, the Rome Statute makes provision for the establishment of an advisory committee on nominations to the ICC, but the proposal remains dormant and appears to have little support.

The ECtHR Sub-Committee is the longest-standing and most developed of these screening mechanisms.[92] It interviews the three candidates nominated by each member state and ranks them in order of merit. One candidate from the list (often the first ranked candidate) is then elected by the Parliamentary Assembly.[93] Uniquely, the Sub-Committee can also decide to reject lists of candidates if it considers that there is 'no real choice' between the candidates, there is an absence of a 'fair, transparent and consistent national selection procedure', or that the list has failed to meet the gender requirements.[94]

The Sub-Committee has been criticized in the past for being 'at best limited, at worst... fundamentally flawed' because of the lack of human rights and international law expertise of the Sub-Committee members, the cursory nature of the assessment of candidates, the secretiveness of deliberations and the failure to state reasons, and the apparent influence of party politics over ranking decisions.[95] Even though it is considered 'an improvement on the previous system as it guards against the Parliamentary Assembly simply rubber-stamping [rankings by states]... it risks adding an additional level of arbitrariness to the appointments' procedure'.[96] Lord Hoffmann, a former UK Law Lord, has recently criticized the composition of the Sub-Committee in strong terms:

> [it] consists of eighteen members chaired by a Latvian politician, on which the UK representatives are a Labour politician with a trade union background and no legal

[92] It was established in 1997: see Council of Europe Parliamentary Assembly, *Resolution 1082 (1996) on the procedure for examining candidatures for the election of judges to the European Court of Human Rights*, available at: <http://www.assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta96/ERES1082.htm> (accessed 26 April 2009). It is comprised of eighteen members of the Parliamentary Assembly's Committee on Legal Affairs and Human Rights, appointed by the five political groups of the Parliamentary Assembly, and there is no requirement of legal expertise: J. Limbach et al, *Judicial Independence: Law and Practice of Appointments to the European Court of Human Rights*, op. cit., 21.

[93] J. Limbach et al, *Judicial Independence: Law and Practice of Appointments to the European Court of Human Rights*, op. cit., 24.

[94] Council of Europe Parliamentary Assembly, Recommendation 1646 (2009), *Nomination of candidates and election of judges to the European Court of Human Rights*, op. cit., para 2.

[95] J. Limbach et al, *Judicial Independence: Law and Practice of Appointments to the European Court of Human Rights*, op. cit., 9.

[96] ibid, 21.

qualifications and a Conservative politician who was called to the Bar in 1972 but so far as I know has never practised. They choose from lists of three drawn by the governments of the forty-seven members in a manner which is totally opaque.[97]

Such criticisms are arguably less valid in the light of the very public and rigorous review of the selection process which the Parliamentary Assembly carried out in 2008–9 in an attempt to formalize and improve the procedures. One consequence of the review and subsequent report is that the process by which the names of candidates are scrutinized by the Committee and forwarded to the Parliamentary Assembly has been set out:

> The Sub-Committee considers the candidates not only as individuals but also with an eye to a harmonious composition of the Court, taking into account, for example, their professional backgrounds and a gender balance. It formulates a recommendation to the Bureau of the Assembly, which the Bureau forwards to the Assembly members and may decide to declassify (make public).[98]

While it is true that reasons are not given for the Committee's decision in individual cases, the disclosure of such deliberations is not the practice in other judicial selection processes either at national or international level. The need for frank discussion by judicial screening or selecting committees and the fear that if such deliberations were made public candidates would be deterred from applying for judicial office has meant that very little information of this kind is ever revealed.

Criticisms have also been made of the screening committee of the WTO AB, the seven-member dispute resolution body of the WTO.[99] The role of the Selection Committee is to assess candidates nominated by WTO member states,[100] consult with member states as to the candidates who would be politically acceptable

[97] Lord Hoffman, 'The Universality of Human Rights', Judicial Studies Board Annual Lecture, (19 March 2009), available at: <http://www.jsboard.co.uk/downloads/Hoffmann_2009_JSB_Annual_ Lecture_Universality_of_Human_Rights.doc> (accessed 26 April 2009), para 39.

[98] Sub-Committee on the election of Judges to the European Court of Human Rights, *Procedure for electing judges to the European Court of Human Rights*, AS/Jur (2009) 34 (1 July 2009), para 13.

[99] Agreement Establishing the World Trade Organization, available at: <http://www.wto.org/english/docs_e/legal_e/04-wto.pdf> and Annex 2 'Understanding on Rules and Procedures Governing the Settlement of Disputes' available at: <http://www.wto.org/english/docs_e/legal_e/28-dsu.pdf> (DSU). See WT/DSB/1, 19 June 1995, Establishment of the Appellate Body, Recommendations by the Preparatory Committee for the WTO, approved by the Dispute Settlement Body on 10 February 1995. The Committee comprises 'the Director-General, and the Chairpersons of the General Council, the DSB, the Council for Trade in Goods, the Council for Trade in Services and the TRIPS Council': World Trade Organization, press release 'WTO appoints four new Appellate Body members', 27 November 2007, available at: <http://www.wto.int/english/news_e/pres07_e/pr501_e.htm> (accessed 12 December 2008). They are all government representatives: J. Pauwelyn, 'La sélection des juges à l'OMC, et peut-être celle d'un Chinois, mérite plus d'attention' *Le Temps, Economie & Finance* 16 November 2007, available at: <http://www.letemps.ch/Page/Uuid/d4952ece-ac44–11dd-bf59-ad3d6140ad87%7C2> (accessed 22 April 2009).

[100] Note that this includes both a written examination and an interview: J. Pauwelyn, 'La sélection des juges à l'OMC, et peut-être celle d'un Chinois, mérite plus d'attention', op. cit.

and also 'broadly representative'[101] of the WTO membership, and then submit the names of the candidates for appointment by consensus of the WTO Dispute Settlement Body. The main criticism is that the Selection Committee takes an overtly political role in 'consensus building',[102] which may have the effect of distorting considerations of merit. The process is also said to lack transparency.[103]

The Treaty of Lisbon provides for the establishment of a screening panel 'to give an opinion on candidates' suitability to perform the duties of Judge and Advocate-General of the Court of Justice and the General Court [currently named the Court of First Instance] before the governments of the Member States make... appointments'.[104] The ECJ and CFI are both full representation courts for which a single candidate is nominated by each member state for appointment by 'common accord of the governments of the Member States'.[105] The screening panel will comprise 'seven persons chosen from among former members of the Court of Justice and the General Court, members of national supreme courts and lawyers of recognized competence, one of whom shall be proposed by the European Parliament'. The role of the panel will be to discourage the nomination of unqualified candidates: if an unqualified candidate is nominated and an adverse opinion is provided, member states are encouraged to refuse to appoint the candidate.[106] Full details of the operation of the panel will be determined by the European Council.[107]

It is perhaps not surprising that the most developed and credible mechanisms (both instituted and proposed) for screening judicial candidates are found in the

[101] Dispute Settlement Understanding, Annex 2, Agreement Establishing World Trade Organization, Article 17(3).

[102] 'In other words, the selection committee will ultimately select and present to the Dispute Settlement Body those candidates who stand the best chance of being appointed by consensus in the Dispute Settlement Body, having been "pre-approved" by WTO Members': T. Broude, '"Judges Shalt Thou Make Thee in All Thy Gates": Reforming Judicial Office in the WTO Dispute Settlement System' Free University of Amsterdam Journal of International and Comparative Law (The Griffin's View) 6(2) (2005) 45.

[103] J. Pauwelyn, 'La sélection des juges à l'OMC, et peut-être celle d'un Chinois, mérite plus d'attention', op. cit.

[104] Treaty of Lisbon, amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007, Official Journal C 306 of 17 December 2007 (Treaty of Lisbon). See also consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, *Official Journal* C 115 of 9 May 2008.

[105] See Articles 221 and 224 of the EC Treaty: Consolidated Versions of the Treaty on European Union and of the Treaty Establishing the European Community, *Official Journal* C 321E of 29 December 2006.

[106] T. Tridimas, 'The European Court of Justice and the Draft Constitution: A Supreme Court for the Union?' in T. Tridimas and P. Nebbia (eds), *European Union Law for the Twenty-First Century: Rethinking the New Legal Order* (Oxford: Hart Publishing; 2004 118).

[107] 'The Council shall adopt a decision establishing the panel's operating rules and a decision appointing its members. It shall act on the initiative of the President of the Court of Justice': Treaty of Lisbon, Article 2, para 209. An identical provision was also found in the unsuccessful Treaty establishing a Constitution for Europe, *Official Journal* C 310 of 16 December 2004.

context of full representation courts, the ECtHR and, prospectively, the ECJ.[108] In these courts, it might be expected that there would be a greater appetite for screening of the nomination decisions of states because each state is entitled to be represented. It should also be noted that the more robust screening mechanism for the ECtHR has emerged within an institutional framework which includes a body independent of member states, the Parliamentary Assembly, which can impose additional requirements on the election of candidates. A former international judge noted that 'screening procedures make more sense in courts like the European Court of Justice where every country is guaranteed a seat, but they are more controversial when there is competition for seats'.[109]

This point may explain why there has been resistance to the establishment of the ICC Advisory Committee on Nominations, which was provided for in the Rome Statute but has not yet been established.[110] The proposal for a committee was put forward by the United Kingdom, which 'wanted to have a better machinery for ICC elections borrowing from what was happening in Strasbourg [for the European Court of Human Rights]'.[111] One interviewee involved in the proposals said it was intended to 'filter out the duds',[112] suggesting that the committee could declare certain candidates unqualified and exclude them from the elections. It appears that the proposal failed because states did not want anyone 'looking over their shoulders'[113] and questioning nominations. Nonetheless, a number of interviewees thought the idea of the committee should be revived and reconsidered, but with a more 'light-touch' recommendatory or ranking role. One former ICC candidate thought it would be more 'important and effective than strengthened consultation at the national level'.[114] However, others were less enthusiastic: 'It would be wrong to have some kind of filtering mechanism, however informal, that separated the candidates from the body of electors. I do believe that the voters should have good information on candidates that they should be receiving without some kind of body deflecting attention away from some candidates and focusing attention on others.'[115] And others foresaw difficulties with the composition of the committee and its establishment.[116]

It was suggested that the ICC Advisory Committee on nominations could perform a range of functions, short of excluding or ranking candidates, such as checking and standardizing information about candidates to facilitate comparisons between them: one former Permanent Representative noted that 'there can be quite a bit of subjectivity in how qualifications are recognized and presented'.[117] It was also proposed that it could gather peer reviews of the candidates to supplement state (and in the ICC context, NGO) investigations as to

[108] With the exception of the Caribbean Court of Justice, which has a full appointments commission and is not a full representation court. [109] T37, 15.
[110] Rome Statute, Article 36(4)(c). [111] T35, 12. [112] F32, 2. [113] T14, 18.
[114] T32, 18. [115] T45, 7.
[116] T44, 15. A key issue here is how a committee can be seen to have a mandate or political legitimacy to perform a screening role, but also be independent of states. [117] T20, 2.

their merit and information provided by states about their candidates. It remains to be seen whether the body of opinion evident from the interviews and elsewhere supporting the idea of some form of screening mechanism will be strong enough to overcome the political resistance from states which, to date, has prevented the institution of such a mechanism.

Although proposals for an equivalent screening process for the ICJ are less developed than for the ICC, similar arguments have been made as to how such a system could help improve the quality of candidates appointed. A report by the Commission on Global Governance in 1995 argued that:

> We would like to see introduced a system of screening of potential members of the Court for both jurisprudential skills and proven objectivity. This practice is already followed in many countries, which have processes for consultation with or even approval by independent national bodies before a person is elevated to high judicial office. Such a system would not affect the involvement of all states through the General Assembly or displace the role of the Security Council in the political act of selection. It would mean judges were chosen from a slate of candidates who all have the required experience, skills, and independence of mind. Both the General Assembly and the Security Council would be free to ask for a further set of candidates.[118]

Asked about the merits of such a proposal, many interviewees felt that a screening mechanism for the ICJ would not be appropriate. One former international judge argued that it would be 'quite invidious because people are known, it's a smaller court and states come before the Court'.[119] There was a sense that there is already sufficient information available about ICJ candidates, who are generally well known to the electorate. In addition, the fact that candidates have been vetted by their PCA national groups made any further scrutiny superfluous. On the other hand, there is in reality a complete absence of objective assessment of candidates, suggesting that some form of screening is needed.

This brief overview of the use of screening mechanisms in the international court system shows that their use to date has been limited and has not been without controversy. Nevertheless, they do add another layer of scrutiny and at least the possibility of some independent assessment of the merit of candidates. This may result in more objective information about candidates being provided to states, which in turn may encourage states to prioritize merit in the election process. It may also lead to the exclusion of poorly qualified candidates. Given that in recent years there have been publicly expressed concerns as to whether certain elected candidates have in fact fulfilled the selection criteria, this issue is not purely academic.

[118] Commission on Global Governance, *Our Global Neighbourhood: The Report of the Commission on Global Governance* (Oxford: Oxford University Press, 1995) 315.
[119] T35, 18.

E. Diversity and representation

Across international courts, in common with developments at national level, concerns have increasingly been raised about the lack of diversity in the composition of the courts and the potential impact this might have on perceptions of legitimacy in the eyes of court users and the wider public. Of particular concern have been gender diversity, geographical representation, and the representation of different legal systems and languages. This section considers developments across international courts aimed at improving diversity and the representation of certain groups through composition, nomination and election requirements. It also looks at how such measures might interact with considerations of selection on merit.

Gender balance

The lack of gender balance in the international judiciary has been the subject of growing criticism over the last decade,[120] and has been linked to issues of legitimacy and public confidence in the courts. In 2003, an Interights report on the selection process to the ECtHR noted that: 'To command public confidence, the Court should be diverse in its composition. This includes ensuring a visible equality of opportunity for women to be nominated and elected to the bench in Strasbourg.'[121] Academics have also begun to argue that gender representation is as pressing an issue as geographical representation. Sally Kenney's 2002 study of the appointment of women to the European Court of Justice argued, for example, that: 'It is not a big leap from the unquestioned position that someone

[120] See 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). 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; Security Council Resolution 1325(2000), 31 October 2000. The activities of the International Association of Women Judges (IAWJ) (<http://www.iawj.org/>) are evidence of the widespread and growing commitment to gender equality on the bench at national, and increasingly, international levels. Academic work on women judges and gender representation at the national level include the special issue, 'Women of the Courts Symposium' in the University of Toledo Law Review 35(4) (2005) and the special issue, 'Gender and Judges' in the International Journal of the Legal Profession 15(1/2) (2008). In relation to the international courts, see H. Charlesworth and C. Chinkin, *The Boundaries of International Law: A feminist analysis* (Manchester: Manchester University Press, 2000); J. Linehan, 'Women and Public International Litigation: Background Paper Prepared for the Project on International Courts and Tribunals' (2001), available at: <http://www.pict-pcti.org/publications/PICT_articles/Women1.pdf> (accessed 20 August 2006); and the work of PICT referred to at <http://www.pict-pcti.org/activities/meetings.html> (Accessed 28 April 2010).

[121] J. Limbach et al, *Judicial Independence: Law and Practice of Appointments to the European Court of Human Rights*, op. cit., 17.

from the UK must be on the Court, to the position that there must be women on the Court.'[122]

Despite growing awareness of the problems created by a lack of gender balance in the courts, the participation of women on 'general' international courts is still low and in some cases non-existent.[123] For example, there have been no female ITLOS judges appointed and only one woman has ever been elected to the ICJ (apart from two ad hoc judges). The retirement of the President of the Court, Rosalyn Higgins, in 2009 left the court without a single female judge. If expressed in terms of female and male 'court years', over the period of the ICJ history, there have been a mere fifteen female years compared to 945 male years. Women have been slightly better represented on regional courts, human rights courts and as *ad litem* judges on the ad hoc criminal tribunals.[124] As at December 2008, there were 236 judges on the main international courts, of which 57 were female (24 per cent).[125]

Across the international court system, a raft of measures have been introduced to try to increase the number of women judges.[126] These range from requirements in the court's governing statute that the need for gender balance be considered to the more radical gender requirements of the ICC, which is the only court that currently has a minimum gender quota.[127] More proactive and formal provisions, such as those of the ICC, tend, not surprisingly, to be found in the more recently created courts which generally have a better gender balance. It is notable, for example, that the ICC is the first international court in which there is now a majority of women on the bench. Similarly, the first twelve judges of the UNDT and the UNAT, elected in March 2009, were made up of seven men and five women.

Relatively formal provisions in relation to gender equality are also found in the ECtHR, enforced through the screening mechanism for nominations to

[122] S. Kenney, 'Breaking the Silence: Gender Mainstreaming and the Composition of the European Court of Justice' *Feminist Legal Studies* 2004, 10(3–4), 269.

[123] D. Terris, C. P. R. Romano and L. Swigart, *The International Judge: An Introduction to the Men and Women Who Decide the World's Cases*, International Courts and Tribunals Series (Oxford: Oxford University Press, 2007) 18–19.

[124] See also J. Linehan, 'Women and Public International Litigation: Background Paper Prepared for the Project on International Courts and Tribunals', op. cit.

[125] The international courts and tribunals included in this survey were ICJ, ICC, ITLOS, European Court of Justice, Court of First Instance, ECHR, Inter-American Court of Human Rights, ICTY, ICTR, WTO Appellate Body and the African Court of Human and Peoples' Rights.

[126] See also the efforts made through the Fourth World Conference on Women in Beijing op.cit., paras 13, 36, 79 and 190; General Assembly, Follow-up to the Fourth World Conference on Women and full implementation of the Beijing Declaration and Platform for Action, UN Doc A/RES/51/69, 12 December 1996, para 27 (promoting women candidates); and also para 74(e) of the Report: J. Linehan, 'Women and Public International Litigation: Background Paper Prepared for the Project on International Courts and Tribunals', op.cit.

[127] See Chapter 2 for details.

the court. These requirements provide that each list of three names nominated by a state should include at least one member of the 'under-represented sex' (defined as the sex which constitutes less than 40 per cent of the bench).[128] The Sub-Committee of the Parliamentary Assembly can reject lists of candidates submitted by member states if they do not include a female candidate, unless the member state can show that it has 'taken all the necessary and appropriate steps to ensure that the list contains a candidate of the under-represented sex, but has not been able to find a candidate of that sex who satisfies the requirements of Article 21 § 1 of the European Convention on Human Rights'.[129] The gender requirement therefore applies unless it would mean that an unqualified candidate would need to be nominated, in which case a state can avail itself of the exception. The Sub-Committee then ranks the lists of three candidates with regard to the overall 'harmonious composition of the Court'.[130]

Significantly, the Parliamentary Assembly has recognized the importance of gender balance in the bodies at national level which nominate or advise the government on nomination and has stated that 'it invites the governments of member states to ensure that the selection bodies/panels (and those advising on selection) are themselves as gender-balanced as possible'.[131] The relatively weak nature of this guidance raises questions about its likely effectiveness. Nevertheless, it at least represents an acknowledgement that gender equality is unlikely to be promoted seriously if the bodies responsible at national level for nomination themselves have very few women amongst their members.

Many of the more recently created courts include in their governing statutes or guidelines some wording which encourages or requires the selection process to

[128] Although the under-represented sex is currently female, it is worth remembering that in a number of European judiciaries there is considerable 'feminization' of the bench and the under-represented sex, at least in the lower ranks, is male.

[129] The Sub-Committee had previously rejected lists simply because they did not have candidates of both genders. Malta sought an Advisory Opinion from the Court regarding this practice: *Advisory Opinion on certain legal questions concerning the lists of candidates submitted with a view to the election of judges to the European Court of Human Rights*, 12 February 2008, available at: <http://www.cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=828910&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649> (accessed 23 November 2008). The Advisory Opinion prompted the inclusion of the exception: Council of Europe Parliamentary Assembly, Resolution 1627 (2008), *Candidates for the European Court of Human Rights*, available at: <http://www.assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta08/ERES1627.htm> (accessed 20 November 2008), para 4. See also A. Mowbray, 'The Consideration of Gender in the Process of Appointing Judges to the European Court of Human Rights' *Human Rights Law Review* 8(3) (2008) 549–59.

[130] Parliamentary Assembly of the Council of Europe, Committee on Legal Affairs and Human Rights, 'Report: Nomination of candidates and election of judges to the European Court of Human Rights', op. cit., para 7.

[131] Council of Europe Parliamentary Assembly, Recommendation 1646 (2009), *Nomination of candidates and election of judges to the European Court of Human Rights*, op.cit. para 5.

take account of the need for gender equality or to promote gender balance on the court.[132] The Protocol of the ACHPR, for example, provides that: 'Due consideration shall be given to adequate gender representation in nomination process' and 'in the election of the judges, the Assembly shall ensure that there is adequate gender representation'.[133] The ACHPR guidelines also require that in the slate of up to three candidates which each state can nominate, it 'should ensure that at least one (1) of the candidates they nominate is a female'.[134] This relatively 'light-touch' approach resulted in just two female judges out of eleven on the first bench of the court.[135] The Protocol of the African Court of Justice and Human Rights (ACJHR), the court into which the ACHPR will eventually be merged, also has provisions requiring states to 'take into account gender representation in the nomination process' and, in the election of judges, to 'ensure that there is equitable gender representation'.[136]

Despite the strikingly poor record of gender balance in the ICJ, there is little sense of urgency to institute new rules or practices to promote the appointment of more women to the court.[137] The absence at the ICJ of the equivalent of the Women's Initiatives for Gender Justice, which played such a significant part in securing gender balance in the ICC, is likely to be one reason for the lack of women on the bench. It is clear that without sustained political pressure from NGOs and other civil society groups, gender equality is generally marginalized as an issue in the selection processes of the international courts.[138] It is only through the activities of these groups that the barriers for female candidates, such as assumptions about the desired career path an individual must have pursued, are highlighted. One such barrier is the fact that women have less access

[132] With the exception of the Caribbean Court of Justice, which has no reference to gender balance in its judicial selection provisions.

[133] ACHPR Protocol, Articles 12(2) and 14(3). Also note the provisions relating to nomination of ICTY and ICTR *ad litem* judges that states and permanent observers must nominate candidates 'taking into account the importance of a fair representation of female and male candidates': Article 13 ter(1)(b), Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, UN. Doc. S/25704 at 36, annex (1993) and S/25704/Add.1 (1993), adopted by Security Council on 25 May 1993, UN. Doc. S/RES/827 (1993); Article 12 ter(1)(b), Statute of the International Tribunal for Rwanda, adopted by S/RES/955, (1994).

[134] ACHPR Guidelines, 2.

[135] C. A. Odinkalu, 'How the Judges of the African Court Emerged', op.cit.

[136] ACJHR Protocol, Articles 5(2) and 7(5).

[137] See Chapter 2. For a review of the political process by which the gender requirements were established in the ICC, see also C. Steains, 'Gender Issues' in R. S. Lee, (ed), *The International Criminal Court: The Making of the Rome Statute: Issues, Negotiations, Results* (The Hague: Kluwer Law International, 1999) 357–90 and L. Chappell, 'The International Criminal Court: A New Arena for Transforming Gender Justice' in S. M. Rai and G. Waylen (eds), *Global Governance: Feminist Perspectives* (Basingstoke: Palgrave Macmillan, 2008) 160–84.

[138] For a review of the role played by the WIGJ in shaping the ICC, see P. Spees, 'Women's Advocacy in the Creation of the International Criminal Court: Changing the Landscape of Justice and Power' *Signs* 28(4) (Summer 2003) 1233–54.

to the 'conduits' to the court, such as the International Law Commission (ILC) and the PCA national groups. Critics of proactive gender initiatives have generally argued that the low number of women in the courts is simply a reflection of the fact that the selection pool of potential female candidates is small because of women's limited access to the higher ranks of the legal profession, the diplomatic corps, academia and the benches of the national courts, and that these factors are changing over time.[139] However, it is also clear that women are often not *seen* to be in the pool because of exclusionary nomination processes that favour male candidates from more traditional international law backgrounds or make assumptions about career paths and candidates' motivations.[140]

In the end, the achievement of a greater gender balance in the international courts—as in all institutions of power—is dependent on the presence of political will to seek out qualified female candidates and nominate them, and for voting states to prioritize gender in choosing between qualified candidates. Reasonable numbers of female judges currently sit on the Inter-American Court of Human Rights and as members of the WTO AB (three out of seven members in each case) even though there are no gender requirements for those courts. The reasons why female candidates are nominated and elected in particular circumstances are complex, but these examples demonstrate that gender balance can be achieved where states choose to nominate female candidates.

Geographical and political representation

In selective representation courts, concerns have been raised about the adequacy of the distribution of seats on a geographical basis. Geographical representation is one important means by which selective representation courts acquire and retain their legitimacy, therefore states expect that they will have the opportunity to have a judge of their nationality on the bench, and, as we have seen from the interview data on nomination and election, they will often fight to get it. Despite the commitment to the notion of judicial independence in government rhetoric on the international courts, there is an equally strong attachment to the concept of 'representation'. This need to ensure that states or regions are guaranteed an adequate presence on the courts is effected through a range of different mechanisms. In the ICJ, the principal judicial organ of the UN, the convention of equitable geographical distribution has led to the allocation of a set number of seats to each of the five UN regional groups. In ITLOS, geographical distribution is determined by a decision of the Meeting of States

[139] See J. Limbach et al, *Judicial Independence: Law and Practice of Appointments to the European Court of Human Rights*, op. cit., 17.

[140] J. Linehan, 'Women and Public International Litigation', Background Paper prepared for the Project on International Courts and Tribunals, op. cit., 4–5.

Parties. In the proposed ACJHR, seats are allocated to the various sub-regional groups in Africa.[141]

In the ICC, another approach has been adopted: the allocation of a minimum number of seats to each of the five UN regional groups. However, in addition, a number of 'floating seats' are allowed for that can be won by candidates from any of the regional groups, with an additional requirement that a minimum number of candidates are nominated from each regional group. The strength of this system is that it increases competition for seats and avoids 'clean slates' whereby only one candidate from a geographical area is put forward. For selection to some other selective representation courts, for example, *ad litem* judges of the ad hoc criminal tribunals, and the ACHPR, there are broader requirements to '[bear] in mind the importance of equitable geographical distribution', or 'ensure that in the Court as a whole there is representation of the main regions of Africa'.[142] The WTO Appellate Body is to be 'broadly representative of the membership of the WTO'.[143] However, some selective representation courts, such as the CCJ and the IACHR, have no geographical representation requirements.

Concerns have been raised about three aspects of geographical representation: (1) the organization of states into regional groups for the purposes of elections; (2) the distribution of seats between those regional groups; and (3), the practices within regional groups, in particular the politicization of the 'allocation' of seats and the dominance of large or wealthy states.[144] In relation to the ICJ, there are also doubts about the fairness or relevance of the P5 convention. Underlying these concerns is a belief by many less powerful states that they are not properly represented on the courts, or that they have little real chance of having a candidate elected. A number of interviewees felt that the five UN regional groups were arbitrary and outdated and work to the disadvantage of smaller and developing states. To address this problem, it was suggested that the UN regional groups should be reorganized into 'more closely knit groups'.[145]

The distribution of seats across regional groups has also been criticized.[146] It has been argued that the allocation of seats does not take into account the increased numbers of African and Asian states with large populations that have joined international courts in recent years, as a result of which Europe is over-represented. This issue has come to a head in relation to ITLOS, where African and Asian states made a joint proposal to the Meeting of States Parties to the

[141] ACJHR Protocol, Article 3(3).

[142] ICTY Statute, Article 13 ter(1)(c); ICTR Statute, Article 12 ter(1)(c)ACHPR Protocol, Article 4(2).

[143] DSU, Article 17(3). Note, however, that since the entry into effect of the WTO dispute settlement system, there have always been Appellate Body members from the US and from the European Communities and, for almost the entire period, a member from Japan. Thus representation in this context does not seem to be limited to a geographical concept.

[144] Note the general criticisms of the adequacy of geographical representation, as discussed in Chapter 2.

[145] F25, 1.

[146] Note the shifts in the regional allocation of seats in the ICJ and ICC over time, as discussed in Chapter 2.

UN Convention on the Law of the Sea, seeking the allocation of a seat held by Western Europe to be rotated between Africa and Asia to reflect the increased number of states from those regions that had joined the tribunal.[147] This development suggests that the issue of geographical distribution of seats is very much a live issue and that states are increasingly willing to challenge the rules on the allocation of seats.

It was also suggested that the existing seats on the ICJ could be reallocated to reflect the size of regional groups (based on population): 'There could be redistribution among the regions, because the Asian group is the biggest group in the UN, and that is not reflected in the number of seats that we have.'[148] As in ITLOS and the ILC,[149] certain seats could be rotated between regions, or 'one of the seats should become our shared seat between Europe and Asia'.[150] Some interviewees suggested that one solution to the problem of representation on the ICJ could be to increase the number of judges on the court. Opinions on the desirability of such a change were divided, with one former ICJ judge arguing against it.[151] Another interviewee objected to the proposal for increasing the seats so as to secure greater representation for Asia on the grounds that the court would become 'unmanageable'. He saw 'an inverse relationship between quantity and quality'.[152]

Conversely, a WEOG diplomat said: 'I have felt for a long time that the ICJ should be totally reorganized. There should be something like twenty-one judges which would provide for better representation of different regional groups and legal systems, because at present we are strained.'[153] Such a reform would require amendment of the Charter, and the approval of the P5 members.[154] As this would open debate as to the legitimacy of the P5 convention and whether, for example, other permanent or non-permanent members should be admitted, it was generally recognized that such reforms are unlikely in the near future. Many noted that any changes to the P5 convention or any structural change to the UN regional groups will depend on wider reform of the UN, particularly the reform of the Security Council, and would require an amendment of the ICJ Statute. Issues of ICJ representation are therefore inextricably tied to fundamental issues of change in the organization as a whole. Those who advocate reform at an institutional level recognize that it would be a long and complicated process. It is acknowledged that the P5 convention could not be reformed at any institutional level without also reopening the question of the number and distribution of seats

[147] In 2009, the states parties to the UNCLOS decided upon a new arrangement for the allocation of seats on the tribunal as follows: five members each from the Group of African States and Group of Asian States, four members from the Group of Latin American and Caribbean States, and three members each from the Group of East European States and Group of Western European and other States (WEOG), and the one remaining seat elected from among the African and Asian Groups and WEOG. Press release, SEA/1920, UN Department of Public Information, 29 June 2009.

[148] T59, 12–13. [149] T59, 13. [150] T81, 11. [151] T31, 9. [152] T81, 11. [153] T9, 8.

[154] ICJ Statute, Article 69; UN Charter, Article 108.

on the Security Council: 'it would be ideal not to have it but it is part of wider UN reform which starts with the position of the P5 in the Security Council'.[155]

It is also not clear that all P5 members would be treated the same if there was to be a serious challenge to the convention through reform of the election system or other structural reform. One interviewee suggested that France and the United Kingdom would be the most exposed states if the P5 convention came under threat: 'Britain and France will struggle to hold their places with all these things in time, but I think people will always want to make sure that China and Russia and America are on the Court.'[156]

In the broader context of UN reform, questions have been raised as to whether states will change the status of the P5 on the Security Council and the court or simply increase the number of permanent members and non-permanent members of the Security Council, a move that might have some repercussions for the composition of the ICJ. These proposals prompt a number of political questions as to which states should be accorded permanent membership and institutional questions such as how the ICJ might operate in such changed circumstances. One interviewee expressed his perspective on the likelihood and scope of possible Security Council reform:

> The main problem we are facing now, politically, when we discuss the reform of the UN system is the composition of the Security Council and whether or not there will be more permanent members of the Security Council, and whether those permanent members will have political power. That is why the reform of the Security Council has stopped because there is no agreement, and I don't think there will be an agreement. From the very first day we discussed the question in 1993, my personal opinion was that if there is a reform, it will be in line with the reform of 1965. More non-permanent members, changes in rules, method, procedures, more accountability, but no reforms of the hard structure, the hard core of the Security Council.[157]

If the P5 convention were to be set aside, many interviewees suggested there may be potential consequences for the court. Some felt that to strip members of the P5 of their position on the court might result in a 'downgrading of their engagement in international law'[158] and represent a 'financial risk to the organization'.[159] As a result, altering this aspect of the composition of the court could have far-reaching consequences. The P5 convention may be secure at present, but the interview data suggest that challenges will continue and intensify.

With regard to the practices within some regional groups, in particular, the use of clean slates and the political negotiations surrounding who will nominate a candidate, endorsements and withdrawals, some interviewees argued for a 'rotation of seats within the regional group'.[160] One interviewee also suggested a system of rotation between states in their regional groups, placing 'a limit on the number of terms one country could have' so that 'after maybe two terms,

[155] F18, 1. [156] T18, 7. [157] T58, 12. [158] F48, 3–4. [159] F29, 2.
[160] T13, 10.

then that seat should rotate to another country'.[161] Although this approach might result in greater representation, it might also be at the expense of merit as it would effectively allow the state to appoint a judge even if there was a more highly qualified candidate from the region.

Drawing together the different views expressed in the interviews, it appears that the best way to ensure fair geographical representation combined with the highest quality of judges is to remove the politicized aspects of the election process and encourage open competition within regional groups. The expectation is that this would ensure a more natural rotation of seats within regional groups based on merit, rather than the distorting effects of state power and prestige that plays such a considerable part in intra-regional representation at present.

Legal systems, language and expertise

Across the international courts there have also been attempts to ensure diversity in terms of language, legal system or culture and expertise, so that each particular bench is well equipped to undertake its task and also represents the full range of domestic legal systems. In the contexts of both the ICJ and ICC, it was noted that both have requirements that electors 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' and 'take into account the need... for the representation of the principal legal systems of the world'.[162] These requirements and similar ones in ITLOS[163] are generally understood to be satisfied by equitable geographical distribution or representation. However, some courts have taken the concept of representation of legal systems further; for example, the ACHPR guidelines required that states, in making nominations, 'give preference to candidates with experience in more than one of the principal legal traditions of Africa (Civil Law, Common Law, Islamic Law and Custom and African Customary Law)'.[164]

The appointment of judges to the CCJ by the RJLSC apparently took into account the need for representation of different legal systems by appointing a

[161] T59, 13. Amerasinghe also notes that some judges have spent long periods on the bench, and advocates a rotation system: C. F. Amerasinghe, 'Judges of the International Court of Justice—Election and Qualifications' *Leiden Journal of International Law* 14(2) (2001) 346–7.

[162] ICJ Statute, Article 9 and Rome Statute, Article 36(8)(a)(i).

[163] Articles 2(2) and 3(1) of ITLOS Statute that provide that when electing judges, states must ensure the representation of the principal legal systems of the world and equitable geographical distribution in the composition of the Tribunal as a whole. A. Yankov, 'The International Tribunal for the Law of the Sea and the Comprehensive Dispute Settlement System of the Law of the Sea' in P. C. Rao and R. Khan (eds), *The International Tribunal for the Law of the Sea: Law and Practice* (The Hague: Kluwer Law International, 2001) 42–3.

[164] ACHPR Guidelines, 2. See also ACHPR Protocol, Article 14(3) and ACJHR Protocol, Article 7(4).

judge from a state with a Roman-Dutch legal system.[165] However, this could be accounted for by the fact that the CCJ has a small membership and that one of its functions is to act as an appeal court (hence requiring an understanding of domestic law). It is also relevant that the judges were appointed by a selection committee that was not constrained by geographical representation rules.

A number of interviewees expressed concerns about the under-representation of certain legal cultures on the ICJ and ICC, though this issue has not exercised states as much as geographical representation. States could perhaps be encouraged, in making decisions on candidates from particular regions, to consider the overall diversity of legal systems on the bench.

Language diversity can be an extremely important issue with regard to the competence and effectiveness of the judges, particularly where the court has more than one official language.[166] An example of this is the ECtHR where the language skills of the judges have become a particularly problematic and controversial issue. In response to concerns that some recently appointed judges have not had adequate command of both French and English (and in some cases neither), the Parliamentary Assembly has imposed a requirement that 'candidates should possess an active knowledge of one official language of the Council of Europe and a passive knowledge of the other'.[167] At a purely practical level, the need for sufficient language skills in an international court is vital for judges to participate effectively in discussions and reading documents.[168] In more representational terms, the presence of language diversity is also a reflection of the broader diversity of the bench. Put another way, the dominance of one language on an international court suggests that the full range of cultural backgrounds does not have a voice (quite literally) amongst the judges.

Diversity of expertise is another emerging issue in the courts. The ICC has provided for the representation of judges with criminal law and international humanitarian law/human rights experience. This development has been picked up in the ACJHR Protocol that provides for the selection of judges with recognized competence and experience in international law and human rights law. Eight candidates from each of the two categories must be elected to the bench of sixteen judges.[169] Interviewees did not consider this type of requirement to

[165] The Honourable Mr Justice Jacob Wit, a Netherlands-trained judge from the Netherlands Antilles, a legal system based on Roman-Dutch law. Note that the Netherlands Antilles is not a contracting party to the court nor a member of CARICOM. The CCJ Agreement does not impose any requirement that the bench be comprised of judges from different legal systems.

[166] See Chapter 2 for a discussion of the importance of linguistic diversity on the ICJ and ICC and the efforts made by states to ensure that different languages are represented on the courts.

[167] Council of Europe Parliamentary Assembly, Recommendation 1646 (2009), *Nomination of candidates and election of judges to the European Court of Human Rights,* op.cit., para 4.4.

[168] Brandeis Institute for International Judges, *International Justice: past, present and future* (Brandeis University, 2009): <http://www.brandeis.edu/ethics/pdfs/internationaljustice/biij/BIIJ2009.pdf> (Accessed 28 April 2010).

[169] ACJHR Protocol, Article 6.

be useful in the ICJ context, but it is possible these developments may influence other courts in the future as international law develops as a discipline.

At the outer edges of the debate on diversity are nascent discussions on ethnic diversity and the representation of minorities. The Committee on Legal Affairs and Human Rights of the Council of Europe Parliamentary Assembly has said that: 'Given the Court's mandate for the protection of the rights of all, the Assembly may wish to consider introducing other representation criteria (eg belonging to a visible minority) in the future'.[170] Such requirements may find a foothold in human rights courts and then be applied more widely.

Although many of the developments on diversity and representation are at an early stage, they demonstrate that there is increasing interest in the skills and attributes that are required to make up an effective international court. There is also more acceptance of the idea that legitimacy and diversity are closely connected.

F. Conclusion

Reforms to the processes for selecting the international judiciary, like those for the international court system itself, have been ad hoc, shaped by and responding to the particular functions and context of each court. This is particularly evident in relation to the two courts that are the subject of this study. The ICJ occupies a unique position as the principal judicial body of the United Nations. It depends upon the consent of parties to its jurisdiction over any particular case and by its nature must deal with issues which are inherently political and concerned with inter-governmental relations. These factors place real constraints on potential reforms. The ICC, in contrast, was established relatively recently, with much wider involvement and participation of practitioners, academics, NGOs and interest groups in the debate about its composition and selection process. Its specialized and less explicitly political criminal jurisdiction also focused greater attention on the professional experience and qualities needed on the bench. This context opened space in the debate on judicial selection for considerations of transparency and merit-based processes which are likely to be evident in future discussion about possible reforms. On the other hand, the fact that the ICC is a young court may make states hesitant to accept further limitations on their control over judicial appointments. Given the ICC's remit, there is significant interest in seeing how it functions in practice, and a period of confidence-building and the development of an ICC 'culture' and approach may be required before further reforms are contemplated.

[170] Parliamentary Assembly of the Council of Europe, Committee on Legal Affairs and Human Rights, 'Report: Nomination of candidates and election of judges to the European Court of Human Rights', op. cit., para 39.

Innovations in the ICC selection process, such as the gender balance requirements, are also a reflection of the fact that it is generally much easier to introduce forward-looking and more radical provisions at the point when a court is created than to institute such changes in established courts. Because the international court system is relatively new, and many courts have been created in the last two or three decades, novel developments in judicial selection are generally found in these younger courts. The result is that the lack of uniformity of practice, which has been identified throughout this work as a feature of the international judicial selection system, is likely to become more marked over time as new courts are created with selection systems which reflect contemporary concerns and may diverge quite notably from those of established courts. The creation of the first fully independent judicial appointments commission in the Caribbean Court of Justice is an example of this trend.

Nonetheless, despite this increasing diversity in the mechanisms, rules and practices of selecting international judges, there appears to be an emerging consensus in the various reform agendas as to the common challenges currently faced by those selection processes. In particular, the lack of openness, the excess of politicization, and the need for greater regard for issues of merit, diversity and representation have been key drivers of many recent changes or proposals for change. Although interviewees generally identified these problems as being of equal relevance in the ICJ and ICC, and most supported the reforms that have occurred in other courts, there was significant scepticism about the scope for root and branch reform in relation to either court, but most particularly the ICJ. It was generally thought unlikely that changes would be made in the near future to the formal nomination provisions set out in the ICJ Statute or the Rome Statute and most felt that it would be more realistic to look towards 'light-touch' reform. This conclusion was driven by the view that states prefer an unstructured process that allows room for political influence, and 'are very reluctant to being told how they should choose their candidates'.[171]

The degree of acceptance, and sometimes resignation, expressed by interviewees about the power of the status quo may, however, underestimate the longer-term influence of the newer courts. Moreover, the establishment of newer courts has tended to be marked by greater involvement of civil society and NGOs who have argued for transparency, fair processes and systems which ensure representation of certain sections of society such as women.[172] If this trend continues, and the gap between the processes of the older and newer courts widens, it is possible that the established courts will appear increasingly outmoded and may ultimately be compelled to introduce reforms if they are to retain credibility and legitimacy.

[171] T3, 16.

[172] See J. Limbach et al, *Judicial Independence: Law and Practice of Appointments to the European Court of Human Rights*, op. cit., 28.