



National groups: Permanent Court of Arbitration (PCA)

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A. Introduction

- 1 A National Group is a group of up to four persons appointed by a Member State of the Permanent Court of Arbitration ('PCA' or 'Court'). The term 'National Group' does not appear in the treaties which set up the PCA, although it is used in the Statutes of the International Court of Justice ('ICJ') and its predecessor, the Permanent Court of International Justice ('PCIJ').
- 2 National Groups, or the individuals belonging to them, are given a special role within the realm of the legal settlement of international disputes. The sum of all individuals in National Groups constitutes a list of persons available to act as arbitrators when appointed by States in arbitration procedures under the auspices of the PCA. Moreover, each National Group has the exclusive right to nominate candidates for the election of judges to the ICJ (Art 4 Statute International Court of Justice ('ICJ Statute')). Finally, National Groups from States party to the Rome Statute may be tasked with the nomination of candidates for election as judge to the



International Criminal Court ('ICC') (Art 36 (4) (a) (ii) Rome Statute of the International Criminal Court ('ICC Statute')) (→ *International Courts and Tribunals, Judges and Arbitrators* [MPEPIL]).

B. The Formation and Composition of National Groups

- 3 The rules on the formation of National Groups and the qualifications of the individuals therein are laid down in the two constituent instruments of the PCA: the 1899 Hague Convention for the Pacific Settlement of International Disputes (in Art 23) and the 1907 Hague Convention that goes by the same name (in Art 44). The Conventions provide that each State Party selects up to four persons 'of known competency in questions of international law, of the highest moral reputation, and disposed to accept the duties of Arbitrator'. Each group of persons constituted accordingly forms a so-called National Group. The PCA International Bureau maintains a list of the names of persons 'thus elected' as Members of the Court. The list is periodically communicated to PCA Member States and available on the PCA website.
- 4 National Groups are entrusted with international responsibilities but operate essentially in a national context, given that the procedure for appointment and consequently the specific composition of a State's National Group is a domestic matter. The Members are generally appointed by the Ministry of Foreign Affairs or the head of government (Mackenzie and others, 2010, 70).
- 5 The specific arrangement of National Groups is often the result of applying domestic traditions and unwritten rules, and the lack of publicly available information makes it difficult to offer in this respect anything other than generalizations based on prior practice. National Groups tend to be composed of individuals from the Ministry of Foreign Affairs (eg current or former ministers, vice-ministers, legal advisers, or diplomats) or other parts of the executive branch of government such as the Ministry of Justice, as well as individuals from supreme courts, universities, law firms, and bar associations. Many National Groups, such as those from Australia, Canada, and the United Kingdom, are balanced in terms of professional background and typically include members representing the bench, the academic community, the public service, and the practising bar (see respectively Burmester, 1996, 26; Copithorne, 1978, 317; and Golden, 1975, 343). Other National Groups are composed so as to reconcile domestic political party lines (eg the United States National Group includes incumbent and former State department legal advisers and is bipartisan in nature: see Damrosch, 1997, 193)—and yet others are set up in a way that seeks to minimize the risk of actual or potential governmental



interference (eg the Belgian National Group, traditionally not having any governmental officials among its members: see Mackenzie and others, 2010, 70, fn 40).

- 6 The 1899 and 1907 Hague Conventions stipulate that the Members of the Court are 'appointed for a term of six years' (Art 23 1899 Convention; Art 44 1907 Convention). In case of death or resignation the vacancy is to be filled by resorting to the same method of appointment as was followed for the original Member of the National Group. While the 1899 Convention is silent on the matter, Article 44 1907 Convention specifies that in such case the newly appointed individual shall serve 'for a fresh period of six years'.
- 7 In practice, however, it may happen that the statutory term of six years comes to an end earlier. Even prior to the expiration of their mandate, States are free to withdraw or replace some or all Members of its National Group. The PCA International Bureau accepts this since there is no explicit rule in the Conventions excluding this possibility. At least one National Group has publicly spoken out against this, referring to the abrupt replacement of (Members of) National Groups 'in order to promote or prevent the presentation of certain nominations' for election to the ICJ (National Group of Luxembourg, in International Bureau of the PCA, 1993, 87; see also National Group of Luxembourg, in International Bureau of the PCA, 2000, 150).
- 8 The majority of constituted National Groups has a full membership of four, with the total number of Members of the Court currently standing at approximately 250. The mandate can be renewed without limitation as to the number of consecutive terms. The list of January 2018 includes some Members whose appointment dates back to the 1990s (18 Members), the 1980s (six), and even one from 1978, Mr Arun Panupong, from the National Group of Thailand. There is no practice of tacit renewal; a Member is removed from the list once their mandate expires and is not renewed by the State concerned.
- 9 Despite the call in the PCA's constituent instruments to do so, a large minority of PCA Member States finds it unnecessary or inexpedient—or simply overlooks—to create a National Group with a formal mandate or (re)appoint its Members. Throughout the period 1999–2013, a formally constituted National Group was maintained by more than 80 per cent of the PCA Member States. As from 2014, this number has dropped below 67 per cent (in January 2018, 77 National Groups from 121 Member States). In this respect, great differences can be observed among the various geopolitical regional blocs. A majority of Member States from Western Europe (approximately 90 per cent), Eastern Europe (80 per cent), and the Asia-Pacific region (70 per cent) has a National Group, whereas these numbers are far lower among the Member States



from Latin America and the Caribbean (50 per cent) and Africa (30 per cent). In a resolution on the position of international judges, the *Institut de Droit International* points out that

[N]ational Groups ... do not always play the role accorded to them by the relevant texts. In this respect, all States Parties to the 1899 and 1907 Hague Conventions, in compliance with their obligations, should establish a permanent National Group, notify its composition to the Bureau of the Court and make sure that the group's membership is periodically renewed (Institut de Droit International, Resolution on the Position of the International Judge, Art 1, para 3).

- 10 Pursuant to the PCA Financial Regulations and Rules (not publicly available), adopted by the Administrative Council at its 184th meeting held on 6 December 2011, a Member State in arrears with the payment of their financial contributions towards the expenses of the PCA International Bureau may be subjected to the loss of certain rights, including the right to nominate and maintain Members of the Court. The Administrative Council started to enforce these measures at the end of 2014.
- 11 The Members have convened twice in an institutional setting to discuss the work of the PCA. The first conference of Members of the Court, held in The Hague on 10 and 11 September 1993, produced two resolutions containing suggestions relating to the improvement of the functioning and visibility of the PCA (see International Bureau of the PCA, 1993, 15, 21). The second conference took place on 17 May 1999, a day before the conference marking the 100th anniversary of the PCA. It resulted in a resolution that calls on National Groups to support the activities of the PCA and the implementation of suggestions put forward at the conference (see International Bureau of the PCA, 2000, 237). Both conferences were chaired by Sir Ninian Stephen, who sat in the Australian National Group from 1989 to 2002.
- 12 The Members of the Court enjoy diplomatic privileges and immunities from legal process when they are functioning as arbitrator in proceedings administered by or under the auspices of the PCA (Art 24 1899 Convention; Art 46 (4) 1907 Convention). This is further worked out in a number of host country agreements, such as the Agreement concerning the Headquarters of the Permanent Court of Arbitration, concluded between the PCA and the Netherlands.

C. Pool of Potential Arbitrators

- 13 The organizational structure of the → *Permanent Court of Arbitration* [MPEPIL] enables States to make use of a standing organization that facilitates an immediate recourse to arbitration if they are unable to settle their differences through diplomatic means. The Administrative Council is



responsible for shaping the general policy of the PCA and supervising its administration and budget (Art 28 1899 Convention; Art 49 1907 Convention), while the International Bureau, headed by its Secretary-General, acts as a registry and secretariat (Art 22 1899 Convention; Art 43 1907 Convention). The sum of all Members of the Court organized into National Groups offers a pool of individuals who are in principle available to act as arbitrators.

- 14 The procedural rules governing arbitration as laid down in the 1899 Convention and the 1907 Convention provide that all arbitrators who are to form the tribunal '*must* be chosen from the general list of Members of the Court' (Art 24 1899 Convention; Art 45 1907 Convention; emphasis added). However, this obligation is not absolute. Both Conventions express the hallmarks of arbitration—party autonomy and procedural flexibility—through certain fall-back provisions. These provisions allow disputing parties to agree on a departure from the procedural rules as laid down in these treaties (Arts 20 and 30 1899 Convention; Arts 41 and 51 1907 Convention), or to have recourse to a so-called special board of arbitration (Arts 21 and 26 1899 Convention; Arts 42 and 47 1907 Convention). This gives disputing parties the freedom to request the establishment of an arbitral tribunal which includes one or more arbitrators not belonging to the Court. Such a tribunal was set up for the first time in the *Grisbådarna* arbitration (*Grisbådarna Case, Norway v Sweden, 1909*). Additional flexibility is offered by various sets of optional rules that have been adopted by the Administrative Council from 1992 onwards (now consolidated in the PCA Arbitration Rules 2012) in order to revitalize the PCA and bringing it more in line with the standards of modern-day arbitral practice. The disputing parties are free to designate persons who are not Members of the PCA as arbitrator if these optional rules form the applicable framework governing the arbitral procedure. The parties can equally draw up an *ad hoc* arbitration agreement that imposes specific criteria for the choice of arbitrators. For example, the disputing parties in the *Abyei* arbitration—the government of Sudan and the Sudan People's Liberation Movement/Army—agreed that all arbitrators who were to form the tribunal had to be 'current or former members of the PCA or members of tribunals for which the PCA acted as registry' (Art 5 (2) *Abyei* Arbitration Agreement).
- 15 The flexibility offered by the 1899 Convention, the 1907 Convention, and the increased resort to optional rules of procedure explain why arbitration under the auspices of the PCA nowadays is rarely carried out by its listed Members (Keith, 2007, 160). It must also be borne in mind that many Members of the Court occupy prominent positions in their State's government or judiciary. These everyday occupations could take up too much time to allow for additional work as an arbitrator, or prevent a prospective arbitrator from being or appearing independent and impartial for the purposes of settling a particular dispute. A PCA working group chaired by



Manfred Lachs has noted that the Members 'are selected more with a view to their function in a National Group for nominating candidates to the International Court of Justice, than to their serving as arbitrators' (Working Group on Improving the Functioning of the Court, in International Bureau of the PCA, 1991, 10–11).

D. National Groups as Nominating Body

1. Early Attempts to Set Up a Permanent Judicial Institution

- 16 The *ad hoc* arbitrations in the nineteenth century incentivized the creation of a more permanent institution for the resolution of international disputes by professional judges and in accordance with a predetermined procedural framework (for a comparative constitutional account of the function and selection of domestic judges, see → *The Judiciary* [MPECCoL]). The first Hague Conference of 1899 discussed the possibility of setting up such a permanent adjudicatory body, but disagreement on the procedure for electing judges prevented the participating States from seriously pursuing these proposals (Mackenzie and others, 2010, 10). Instead, as noted above, the PCA was created, offering disputing parties a ready-made yet adaptable set of procedural rules, secretarial and administrative support, and a list of names from which arbitrators could be drawn.
- 17 At the second Hague Conference of 1907, a more concrete initiative appeared in the form of a draft convention on the creation of a → *Permanent Court of Arbitral Justice*, but the draft (reproduced in Rosenne, 2001, 216–21) was silent on the method of electing the judges. In the Final Act (reproduced in Rosenne, 2001, 401), the conference recommended States to adopt the draft and bring it into force as soon as agreement could be reached in respect of the selection of judges and the constitution of the court. The draft was eventually abandoned as it became clear at the conference and in subsequent informal negotiations that States could not agree on the method of how judges were to be chosen (Hudson, 1943, 82).
- 18 The failure to reach a generally acceptable solution to the problem of selecting judges was in large part also the reason as to why other proposed tribunals never came into being (eg the → *International Prize Court* [MPEPIL], proposed in 1907) or were discontinued after the expiration of an initial mandate (eg the → *Central American Court of Justice* [MPEPIL], in operation from 1908 to 1918; see also → *Failed international courts and tribunals*). Nevertheless, these efforts provided inspiration for the realization of a truly permanent mechanism of international dispute settlement, and many of the provisions from the 1907 draft on a permanent Court of Arbitral Justice were later carried over into the statutes of the → *Permanent Court of International Justice*



[MPEPIL] and the → *International Court of Justice* [MPEPIL]. In both of these courts, National Groups were given a privileged role in the process of the selection of judges.

2. The Role of National Groups in the League of Nations (1920–1946) and the United Nations

- 19 Article 14 Covenant of the League of Nations mandated the League Council to formulate plans for the establishment of a permanent court of international justice and present these to the League Assembly. The Council commissioned this task to the Advisory Committee of Jurists. The Committee spent a considerable amount of time on the question as to which system of selecting judges was the most appropriate to meet the demands of judicial independence. At the same time, the Committee was conscious of the fact that the system had to reconcile the interests of the League Assembly (demanding State equality) with those of the League Council (where the Great Powers having a majority wished to see a system which guaranteed their permanent representation on the bench). During its deliberations, the Committee drew on a memorandum prepared by the Legal Section of the League Secretariat, as well as a number of election schemes drafted by various governments, academic organizations, and individuals (for a tabular synopsis of the different schemes, see Advisory Committee of Jurists, 1920, 51–99).
- 20 In its discussions, the Advisory Committee of Jurists unanimously agreed that ‘the choice of judges ... should not be left entirely to the discretion of governments, but that public opinion, or at any rate the opinions of the enlightened few who are qualified to gauge the merits of persons to be selected for nomination, should have a great influence’ (Advisory Committee of Jurists, 1920, 701). Adding, in more detail with respect to the body authorized to make nominations:
- It will fall to the body of [PCA] arbitrators ... and not to the States themselves, to [nominate] the men who, in their opinion, are best qualified to ... sit upon the Permanent Court of International Justice. In this way, the Governments will not be entirely excluded, as they will have appointed the members of the [PCA] taking part in the nominations on their behalf, but, on the other hand, it will be to these arbitrators, men of proved ability in international affairs and chosen by governments, that the task will be left of selecting those candidates in whose moral and scientific qualifications for the bench they have most confidence (Advisory Committee of Jurists, 1920, 706).
- 21 The solution as eventually laid down Article 4 (1) PCIJ Statute, took the form of a two-stage selection procedure in which PCA National Groups as the ‘enlightened few’ hold the power to nominate candidates, with the power of electing candidates belonging to the Council League



and Council Assembly. The role of the National Groups was advanced by the Dutch member of the Committee, Bernard Loder, who pointed out the 'moral weakness of all political bodies' (Advisory Committee of Jurists, 1920, 163). The distribution of power between the Council and Assembly was inspired by the bicameral system of the United States legislator and proposed by the American and English members Elihu Root and Lord Phillimore (Advisory Committee of Jurists, 1920, 108–9, 133–35, 144, 150–52). Apart from reducing the influence of politics on the choice of judges, the institutional link between the PCA and the PCIJ would provide for their institutional coexistence and allow the newly established PCIJ to be composed by building on the expertise and experience gathered by Members of the PCA.

- 22 The Second World War and the resulting demise of the League of Nations and the PCIJ paved the way for the establishment of a new general international organization, the United Nations ('UN'), including its own court of justice, the ICJ. One of the main issues was whether in such a new court the system of nominations by National Groups was to be maintained. The Informal Inter-Allied Committee, consisting of 11 experts from Allied countries, was of the opinion that this system had not succeeded in serving the purpose of diminishing political considerations in the electoral process. Instead, the Committee held that the only satisfactory method was one in which governments themselves nominate candidates for election (Informal Inter-Allied Committee, 1945, 14). In the end, however, the San Francisco Conference decided to retain the system of nominations by National Groups in the belief that this was the most suitable method to keep politics at arms' length. The current Article 4 ICJ Statute is almost an exact replica of Article 4 PCIJ Statute, with only minor amendments such as replacing references to 'Assembly', 'Council' and 'League of Nations', by 'General Assembly', 'Security Council', and 'United Nations' respectively.

3. Nomination of Candidates for Election to the International Court of Justice

- 23 The ICJ is composed of 15 judges of different nationality, sitting for a term of nine years. Articles 4–14 ICJ Statute govern the procedure for their selection, which is a two-stage process in the form of nomination by the PCA National Groups (→ *Nomination of adjudicators*) and election by the General Assembly ('UNGA'; → *United Nations, General Assembly* [MPEPIL]) and the Security Council ('UNSC'; → *United Nations, Security Council* [MPEPIL]) (→ *Election of adjudicators*; → *Election of judges: International Court of Justice (ICJ)*). Regular elections are staggered in such a way that every three years (2017, 2020, etc) five seats are up for election. It is usual practice for regular elections to take place in the month of November, with elected judges starting their term in February in the year that follows. A seat that becomes available as a result of the death,



resignation, or dismissal of a judge, is filled by way of a special election, subject to the same two-stage process of nominations followed by election.

- 24 National Groups from States party to the ICJ Statute have the exclusive right to nominate persons as candidates for election as ICJ judge and, subject to one exception (see below para 35), a candidate cannot be elected unless nominated by at least one National Group.
- 25 At least three months (in practice: eight or nine months) before the date of the regular elections—or, in case of special elections, within one month after an occasional vacancy occurs—the Secretary-General sends a letter to the foreign ministries of UN Member States, inviting them to submit, through their National Groups, the names of the nominated candidates. UN Member States not being PCA Member States make nominations through *ad hoc* National Groups specifically set up for this purpose. The system of *ad hoc* National Groups is also resorted to by UN Member States that are PCA Member States without a formally constituted National Group (see above para 9). Finally, States party to the ICJ Statute without being party to the UN Charter make nominations on equal footing with UN Member States (Art 93 (2) UN Charter read in conjunction with UNGA Res 264 (III) (1948)), so through a formally constituted or *ad hoc* National Group, as the case may be. The latter situation applied to Liechtenstein, San Marino, Switzerland, Japan, and Nauru, all of which became party to the ICJ Statute before joining the UN as a Member State. There is no public record of the names of individuals in *ad hoc* National Groups.
- 26 For regular triennial elections, each National Group may nominate up to four (or, for special elections, two) candidates, with a maximum of two candidates having the group's own nationality. National Groups may also put forward a nomination on a collective basis (see in particular the collective—and successful—nomination of Louis Ignacio-Pinto by the National Groups of 39 African States, in UN Doc A/7570/Add.1/Rev.1).
- 27 Before making nominations, each National Group is recommended to actively consult its State's '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' (Art 6 ICJ Statute). Upon revision, the Informal Inter-Allied Committee decided against elevating this suggestion into a definite obligation as this would have created overwhelming practical difficulties in light of the differences between various countries and the impossibility of prescribing concrete rules on the method to be adopted (Informal Inter-Allied Committee, 1945, 15). The external academic and judicial bodies can also make suggestions to the National Group on their own initiative. In



practice these outside bodies are also consulted by individual Members, rather than by the group as a whole.

- 28 Nominations are to be signed by all Members of a State's National Group and subsequently sent to the UN Secretary-General through the Permanent Missions to the UN. Once the time for making nominations has lapsed the UN Secretary-General prepares an alphabetical list with the names and nationalities of candidates for election, indicating for each candidate which National Group has made the nomination. This list of candidates, together with their *curricula vitae* and a memorandum outlining the election procedure, is then submitted to the UNGA and the UNSC for election (for the 2017 regular elections, see the list of nominated candidates in UN Doc S/2017/620; the candidates' CVs in UN Doc S/2017/621; and the Secretary-General's memorandum in UN Doc S/2017/619).
- 29 At the international level, there is no formal procedure in place to assess whether the nominated candidates in fact possess the qualifications required for judicial office at the ICJ. This is all left to the National Group's own judgment (cf the ICC's Advisory Committee on Nominations, para 41 below).
- 30 When the full bench of 15 judges was elected in February 1946, States could choose from an overwhelming amount of 75 candidates on the ballot paper. Over time, the number of candidates nominated by National Groups has been on the decline, and since the regular election of 1999, States never had more than eight candidates to choose from in order to fill five vacant seats. The number of candidate-judges nominated by National Groups and appearing on the ballot paper for regular elections in the period 1948–2017 is set out in Chart 1.

[Insert Chart 1]

Caption: Number of ICJ judge-candidates nominated by National Groups and appearing on the ballot paper (regular elections 1948–2017). Data for 1948–1996 taken from Harland, 1996, Annex, 313–52. Data for 1996–2017 taken from the election records as found on the website of the UNSC.

- 31 The UN Secretary-General invites National Groups to submit their nominations 'within a given time' (Art 5 (1) ICJ Statute), following which the Secretary-General is to prepare a list of nominated persons and send it to the UNGA and the UNSC. These persons are 'the only persons eligible' (Art 5 (2)). The ICJ Statute is silent as to whether any effect should be given to nominations that are submitted after the given deadline. It is generally accepted that the late nomination of a candidate who has already been nominated before the deadline by another National Group (so-



called 'honorific' or 'courtesy co-nomination'), is permitted (Zimmermann and others, 2012, 276). This practice is relatively uncontroversial, since one nomination suffices to stand for election and the acceptance of late honorific nominations does not result in a formal change in terms of the names who appear on the ballot. Of course, this is not the case when it comes to belated nominations of new candidates. Nevertheless, the late nomination of a new candidate was accepted during the 1975 regular elections (Rosenne, 1976, 546). The candidate in question, Taslim Olawale Elias, was in fact elected (serving from 1976–1991), and became the first African judge to hold the presidency of the ICJ (1982–1985). The acceptance of late nominations of new candidates has attracted criticism in the literature (see eg Zimmermann and others, 2012, 277 fn 31).

- 32 Art 5 (1) ICJ Statute speaks of the nomination of candidates 'in a position to accept the duties of a member of the [ICJ]', without addressing if, when, and by whom candidacies can be withdrawn. A candidacy can be withdrawn before the elections take place, or during the elections in between ballots. Although there is no formal procedure for withdrawing after voting has begun, it is now common practice to ask delegates prior to each vote if there are any statements to make, thereby giving them an opportunity to withdraw candidates. National Groups have on occasion nominated candidates who were unwilling or unable to stand for election and had their name withdrawn from the list of candidates, and consequently from the ballot paper. It has been submitted that the UN Secretary-General allows nominations to be withdrawn by the National Group which made the nomination (or by the nominated candidates themselves) but not by the State itself, although practice in both electoral bodies is not fully consistent in this regard (Rosenne, 1976, 548–49).
- 33 During the 1960 regular election, the UNGA discussed whether any of the candidates put forward could be excluded from the ballot by applying Rule 96 (now Rule 94) of the Assembly's Rules of Procedure. Rule 96 is a general rule dealing with the conduct of business during plenary meetings when at once two or more elective places, of any kind, are to be filled. It provides for a 'restricted ballot'—ie a ballot on which the number of candidates is reduced—if seats remain to be filled after the first round of voting. At the first election meeting in the UNGA, the representative of India objected to the application of this rule to elections to the ICJ, relying on the argument that the ICJ Statute (to which Rule 150 of the Assembly's Rules of Procedure defers when it comes to elections of ICJ judges) does not provide any authority for excluding any of the candidates. By a decision of 47 votes to 27, with 25 abstentions, the UNGA decided that Rule 96 did not apply to elections to the ICJ, with the result that no nominated candidate could be struck from the ballot list in this way (see discussion in UN Doc A/PV.915). This approach properly



subordinates the Assembly's Rules of Procedure to the ICJ Statute as far as nominations and elections are concerned, while recognizing the weight attached to nominations duly made by National Groups.

- 34 National Groups have a formal role in the nomination of regular ICJ judges only. They are not involved in the selection of *ad hoc* judges who may be appointed by a disputing party not having a judge of its own nationality on the bench. In this respect, the ICJ Statute merely provides that an *ad hoc* judge 'is chosen preferably from among those persons who have been nominated as candidates' (Art 31 (2) ICJ Statute). In the great majority of cases, however, States have chosen *ad hoc* judges from outside the list of candidates nominated by National Groups (Zimmermann and others, 2012, 535).
- 35 There is one, as of yet theoretical, exception to the rule that a candidate cannot be elected without the prior nomination by a National Group. If after the third election meeting in the UNGA and the UNSC one or more seats remain unfilled, a joint conference consisting of three members from each body may be organized to break the voting deadlock. By absolute majority this joint conference may suggest to the UNGA and the UNSC one name for each vacant seat. By a unanimous decision it is entitled to propose a candidate who was not earlier nominated by a National Group, as long as this candidate fulfils the required conditions and qualifications (Art 12 ICJ Statute). To date such a joint conference has never taken place, the UNGA and the UNSC instead preferring to continue with the elections until all seats are filled.

4. Nomination of Candidates for Election to the International Criminal Court

- 36 The → *International Criminal Court* [MPEPIL] is composed of 18 judges of different nationalities, elected for a period of nine years, with one-third of the seats being up for election every three years (2017, 2020, etc). The selection of ICC judges takes place in a two-staged process consisting of national-level nominations, followed by the election (→ *Election of judges: International Criminal Court (ICC)*) by Member States present and voting in the Assembly of States Parties ('ASP') (Art 36 ICC Statute read in conjunction with ICC-ASP/3/Res. 6 as amended, or 'ASP Resolution'). Judicial vacancies are filled by applying *mutatis mutandis* the procedure as is used for regular elections (Art 37 ICC Statute read in conjunction with ASP Resolution, para 27).
- 37 One of the many contentious issues during the preparation and negotiation of the Statute of the ICC related to the method of selecting its judges. The 1994 ILC Draft Statute on the Establishment of an International Criminal Court called for direct nominations by ICC Member States (Art 6 (2) ILC Draft Statute). A 1995 preparatory committee introduced an additional



possibility, namely (indirect) nominations by the National Groups of the PCA, or a nominating committee established by the ASP. This option, it was suggested, would 'ensure that merit would be a paramount consideration in the election of judges (Report of the Preparatory Committee, para 37). The ICC Statute would eventually provide a compromise by offering States a choice between two methods: direct and indirect nominations.

- 38 Article 36 of the ICC Statute allows Member States to submit their candidates either (directly) through the domestic procedure for the nomination of candidates for appointment to that State's highest judicial offices (Art 36 (4) (a) (i) ICC Statute), *or* (indirectly) by following the procedure as laid down in the ICJ Statute in respect of ICJ judges (Art 36 (4) (a) (ii) ICC Statute), ie nominations by formally constituted or *ad hoc* National Groups. The requirements pertaining to nominations as found in the ICC Statute and the ASP Resolution are thus relevant for, and need to be taken into account by, National Groups only if the State concerned has opted to resort to this particular procedure.
- 39 In the last three regular elections (in 2011, 2014, and 2017), the combined 18 vacant seats attracted a total of 48 nominations. States are invited to explain which of the two procedures for nominating candidates is used at the national level (ICC-ASP/13/22, Annex II, Appendix III). Of the 22 States that have done so, 17 indicated National Groups as the preferred method for putting forward nominations.
- 40 For each election a State may nominate one candidate, who must be a national of one of the Member States. Nominations submitted before or after the nomination period are invalid and will not be considered (ASP Resolution, para 5). The ASP Resolution provides for detailed rules on the nomination stage (eg minimum voting requirements and extended deadlines for making nominations) aimed at offering a sufficiently diverse choice of candidates and a fair representation on the bench with respect to competences, gender, and regional distribution (see paras 10–12, 18–23, 27 (c)–(d)). Following the close of the nomination period, the ASP secretariat sends an alphabetical list of candidates and supporting documentation (including the names of States who made the nomination) to the Member States (for the 2017 regular elections, see ICC-ASP/16/3). This information is also made available on the ICC website.
- 41 The ICC Member States making nominations bear the primary responsibility for checking whether the candidate in fact meets the requirements and qualifications for a judicial post. In 2011, the ASP decided to establish the Advisory Committee on Nominations as an independent body to perform a non-binding technical assessment of the fulfilment of the requirements for



office (see Art 36 (4) (c) ICC Statute and ICC-ASP/10/Res. 5, para 19; see further ICC-ASP/10/36, Annex).

E. Simultaneous Membership of the PCA and Other International Courts and Tribunals

- 42 The positions of Member of the PCA and judge at the ICJ or the ICC are not deemed incompatible with each other and may overlap in individual cases. Members of the PCA may continue their mandate when elected as judge at the ICJ or the ICC, and vice versa. There is a particularly strong correlation between membership of the PCA and membership of the ICJ. In fact, of the 103 ICJ judges elected between February 1946 and December 2013, 42 judges were or had been members of the PCA (ICJ Handbook, 2014, 23). The current list of Members of the Court includes six ICJ judges (from Brazil, China, Japan, Morocco, Russia, and Slovakia), one ICC judge (from the Philippines), as well as sitting and former judges from other international courts and tribunals.
- 43 ICJ judges are free to act on occasion as arbitrators, as long as there is no *prima facie* risk that the case will later arise before the ICJ and to the extent that this is permitted in view of the workload of the latter (Zimmermann and others, 2012, 366–68). In case of doubt, a judge who intends to accept the function of arbitrator can consult the ICJ President or the full ICJ court, the latter being entitled to decide on the question of incompatibility. Membership of the Court and the actual exercise of the role of arbitrator is thus not *per se* in contravention of the ICJ Statute, which provides that the judges may not exercise 'any political or administrative function, or engage in any other occupation of a professional nature' (Art 16 ICJ Statute) (→ *Conflict of interests*). Similar considerations apply to extra-judicial activities by ICC judges (cf Art 40 ICC Statute; Art 10 ICC Code of Judicial Ethics).

F. Additional Functions Carried Out by National Groups

- 44 Given the recognized expertise of Members of National Groups, it should be no surprise that they are often given additional prerogatives or responsibilities pertaining to international adjudication, or even beyond. Another role assigned to National Groups relates to the position of the ICC prosecutor. The ASP Resolution provides that the procedure for the nomination of candidates for the judges shall apply *mutatis mutandis* to the nomination of the Prosecutor (ASP Resolution, para 28). This means that, if it chooses to make use of this option, a Member State can nominate candidates for this post by resorting to the procedure as laid down in the ICJ Statute in respect of ICJ judges and thus allow this right to be exercised through its National Group.



- 45 National Groups may also play a role with respect to courts other than the ICJ or the ICC. France, for example, has expanded the role of its National Group by allowing it to participate in the selection of candidates for election as judge to the European Court of Human Rights (see PACE Doc No 12527 (2011)). The *Institut de Droit International* has noted that the practice of National Groups 'playing a role in the selection of candidates to other international courts and tribunals ... deserves to be applied more broadly' (Institut de Droit International, Resolution on the Position of the International Judge, para 4).
- 46 On account of their membership of an 'international court' all Members of National Groups are entitled to nominate candidates eligible for the Nobel Peace Prize (Special Regulations for the Award of the Nobel Peace Prize, para 3). The so-called '50 years secrecy rule', introduced in 1974, provides that any material which formed the basis for the evaluation and decision concerning a prize—including the names of candidates nominated for a Nobel Prize, as well as the names of the person(s) or organization(s) who submitted the nomination—may be revealed by the Nobel Committee only 50 years after the awarding of the prize (Statutes of the Nobel Foundation, para 10).

G. The Special Cases of Palestine and Kosovo

- 47 An interesting development concerns the position of Palestine and Kosovo. By the end of 2015, both States had submitted to the depositary (the Netherlands) an instrument of accession to the 1907 Convention. Not being UN Member States, it was rather unclear, however, whether Palestine and Kosovo were at all entitled to become party to this instrument. On 14 March 2016, the PCA Administrative Council decided that Palestine had indeed become a PCA Member State (by a vote of 54 in favour and 25 abstentions). The accession of Kosovo was similarly confirmed by a decision taken by the Administrative Council on 13 June 2016 (by a vote of 41 in favour, 24 against, and 13 abstentions). These are the only cases in the history of the PCA where a decision to confirm the accession of a contracting party is taken by way of voting in the Administrative Council.
- 48 At present, Palestine and Kosovo are the only PCA Member States which are not at the same time a party to the UN Charter or the ICJ Statute. This entails that they have the right to form a National Group—as Kosovo did in December 2016—and to participate with voting rights in the meetings of the PCA Administrative Council. However, their National Groups are not entitled to nominate candidates for election as an ICJ judge, as this right cannot be relied on by a State not



party to the ICJ Statute. This follows from the principle of *pacta tertiis*, reflected in the Vienna Convention on the Law of Treaties.

H. Evaluation

- 49 The National Groups of the PCA offer a collection of individuals with proven knowledge, competence, and experience in the field of international law and international dispute settlement, making the individuals therein potentially suitable candidates to act as arbitrators. However, over time their predominant function has changed. Whereas National Groups at the beginning of the twentieth century had only one prerogative (ie to form a list of potential arbitrators), their subsequent complementary role in the selection of PCIJ, ICJ, and ICC judges has taken on such an importance that their primary function nowadays is that of a nominating body.
- 50 Various international instruments stress the need for a nominating body to operate independently from the body that carries out the actual election of international judges, and emphasize that the relevant procedures should provide adequate safeguards against nominations (and elections) motivated by improper considerations (see in particular the International Bar Association's Resolution on the Values pertaining to Judicial Appointments to International Courts and Tribunals, sec III.B.2; the International Law Association's Burgh House Principles on the Independence of the International Judiciary, sec 2.3). The role accorded to National Groups in the nomination of international judges is based on the argument that it excludes, or at least minimizes, direct influence of politics. However, the foregoing shows that there are various factors, grounded in institutional-procedural law and practice, that give rise to (the potential for) governmental control or interference. Depending on the attitude of the State concerned, these factors may render nominations more politicized than was originally foreseen when this system was introduced, with the risk of National Groups acting as 'mere catalysts of the opinions by those who appoint [them]' (Zimmermann, 2014, 155).
- 51 First and foremost, Members of National Groups are appointed by their State's government, and it is open for a State to appoint individuals who may be more inclined than others to echo their State's preferences when making nominations.
- 52 A second factor is the practice by the International Bureau of allowing States to prematurely withdraw or replace individual Members of their National Group from the list (ie during the six-year mandate), or reconstitute the group with an entirely new composition. The possibility of such a premature withdrawal or replacement effectively renders the statutory term of six years



illusory, since any Member (or the whole National Group) can be withdrawn or replaced at any time at the whim of their government. The justification for this practice offered by the International Bureau—ie the lack of a provision which prohibits this practice—is legally speaking unconvincing, especially in light of the intended aim of allowing nominations to be made at an arm's length of politics.

- 53 A final source for actual or potential governmental interference resides in the practice of the majority of UN Member States to have no formal National Group at all (either because they are not PCA Member States or because, even if they are, they have not created such a group). At present there are 193 States party to the UN and the ICJ Statute, whereas membership of the PCA stands at 121, with 77 created National Groups. Accordingly, 60 per cent of States entitled to make nominations for election to the ICJ are not in a position to do so through a formally constituted National Group. When these States appoint one or more individuals to form *ad hoc* National Groups, they do so for the specific purpose of making nominations in an upcoming election. The potential difficulties arising out of the last two factors—ie premature withdrawals or replacements, and single-purpose *ad hoc* National Groups—could be avoided by requiring that, once appointed, individuals in *ad hoc* National Groups equally enjoy a six-year mandate, and by banning the premature withdrawal by the State concerned of any Member from their National Group.
- 54 Whether and to what extent the ideal of separating nominations from politics has been realized in practice is difficult to say. States and National Groups are generally reluctant to provide transparency when it comes to the way in which choices are made, and the literature tells a mixed story. There are documented examples of National Groups acting independently from their government (see eg Keith, 2007, 164), but there have also been instances in which various degrees of governmental influence were discernible (see eg Burmester, 1996, 27; Golden, 1975, 345; Sands, 2003, 502). It is questionable, therefore, whether in all cases National Groups are truly independent of the body that elects the candidate to international judicial office. The rules on National Groups and the practice of the International Bureau suggest that National Groups operate autonomously only to the extent that their government in fact allows them to exercise an independent attitude detached from political influence.

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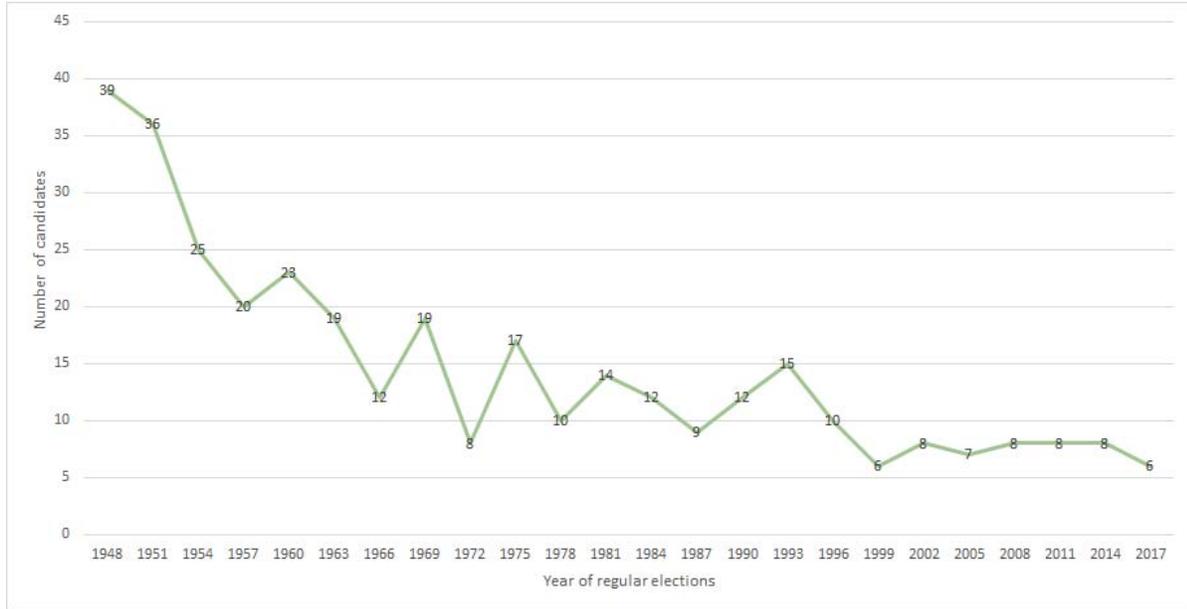
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Chart 1



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