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Election of judges, the Prosecutor and the Registrar of the International Criminal Court

Working paper by the Secretariat

Contents

	<i>Paragraphs</i>	<i>Page</i>
I. Introduction	1-6	3
II. Judges of the International Criminal Court	7-49	4
A. Points for consideration concerning the nomination of judges	9-20	4
1. Issuance of an invitation for nominations	10-13	5
2. Timing for issuance of an invitation for nominations and dates for opening and closing of nominations	14-16	5
3. Consideration of late nominations	17	6
4. Eligibility to make nominations	18-19	6
5. Role for an Advisory Committee on nominations	20	7
B. Points for consideration concerning the election of judges by the Assembly of States Parties	21-49	7
1. Establishment of lists of candidates for the purposes of the election ...	23-24	8
2. Choice of list	25-27	8
3. Order of appearance in the lists	28-29	9
4. Quorum required for the purposes of the election	30-32	10

5.	Question of more candidates receiving the required majority	33–34	10
6.	Question of more candidates from one list receiving the required majority than from the other list	35	11
7.	Question of whether successive ballots would be restricted or unrestricted	36–37	11
8.	Question whether successive balloting is indefinite	38	12
9.	Question of judges of same nationality receiving the required majority .	39–40	12
10.	Consideration of the criteria set forth in article 36, paragraph 8, of the Rome Statute	41–45	13
11.	Selection by lot of cadence of terms of office	46–47	14
12.	Rules applicable in the event of a vacancy	48–49	14
III.	The Prosecutor and the Deputy Prosecutors of the International Criminal Court .	50–65	15
	Points for consideration concerning the nomination and election of the Prosecutor	51–65	15
1.	Question of nomination of the Prosecutor	52–53	15
2.	Eligibility to make nominations	54–55	15
3.	Question of applicable procedure for nomination	56–60	16
4.	Preparation of list of candidates for the purposes of the election	61–62	16
5.	Rules applicable in the conduct of the election	63–65	17
IV.	The Registrar of the International Criminal Court	66–71	18
	Nature of recommendations concerning the appointment of the Registrar by the Assembly of States Parties	66–71	18
Annex			
	Points for consideration in relation to the procedures for election of judges, the Prosecutor and the Registrar of the International Criminal Court		20

I. Introduction

1. At the eighth session of the Preparatory Commission for the International Criminal Court, the Bureau circulated a “road map” leading to the early establishment of the International Criminal Court (PCNICC/2001/L.2 and Corr.1), which, noted, *inter alia*, the need to prepare a number of documents in advance in order to ensure a timely and efficient meeting of the Assembly of States Parties. At the request of the Coordinator of the Working Group on the Assembly of States Parties Preparatory Documents,¹ the Secretariat has prepared the present working paper, which focuses on issues relating to the nomination and election procedures for judges, the Prosecutor and the Registrar of the International Criminal Court (ICC), in accordance with the Rome Statute and taking into account, as appropriate, the practice of the United Nations in the election of judges of the International Court of Justice (ICJ), the International Tribunals for the Former Yugoslavia (ICTY) and for Rwanda (ICTR) as well as of the Meeting of States Parties in the election of judges of the International Tribunal for the Law of the Sea (ITLOS).

2. The election of the judges, the Prosecutor and the Registrar of the ICC shall take place in accordance with the following:

(a) The Rome Statute, particularly articles 36, 37, 42 and 43;

(b) The finalized draft text of the Rules of Procedure and Evidence, particularly rule 12 (PCNICC/2000/1/Add.1);

(c) The Rules of Procedure of the Assembly of States Parties, particularly draft rules 81 and 82 (PCNICC/2001/L.4/Add.4).

3. Pursuant to article 112, paragraph 7, of the Rome Statute, each State Party shall have one vote. Every effort, however, shall be taken to reach decisions by consensus in the Assembly and the Bureau. This general provision would be subject to the *lex specialis* clauses applicable in the election for the judges and the Prosecutor.

4. In the nomination and election of the judges, the Prosecutor and the Registrar, the relevant provisions of the Rome Statute suggest several practical and procedural considerations that may have to be addressed in order to assure a smooth and efficient conduct of the elections. These points of discussion include the issuance, as appropriate, of invitations for nominations, the timing of such issuance, including dates for the opening and closing of nominations, consideration of late nominations, eligibility to make nominations, the role, if any, of the Advisory Committee on nominations, the establishment of lists as required by article 36, paragraph 5, and other issues arising therefrom, aspects concerning choice of list, the order of appearance in the lists, the quorum required for the purposes of the election, the required majority and consequences of failure to reach such majority, the effect for the elections in the case of candidates of the same nationality obtaining the required majority, practical considerations arising from the criteria set forth in article 36, paragraph 8, the drawing of lots in respect of judges elected and the rules applicable in the event of a vacancy. Part II of the present working paper concerns these issues in relation to the nomination and election of the judges, while parts III and IV, respectively, deal with such aspects insofar as they have a bearing on the election of the Prosecutor and the Registrar. These issues are set out in tabular form in the annex to the working paper.

¹ See also General Assembly resolution 56/85.

5. The form to be taken by any arrangements reached on the procedure to be applied in the nomination and election of judges, and as appropriate of the Prosecutor and the Registrar of the International Criminal Court, is also a point that would have to be determined. For example, the Assembly of States Parties prior to the election could adopt a resolution outlining the points of agreement. The Meeting of States Parties to the United Nations Convention on the Law of the Sea² adopted a decision regarding the procedure for the first election of the 21 members of ITLOS, based on a proposal by the President.³ In certain instances, recommendations of the Preparatory Commission may be required in order for some preparatory arrangements to be made in advance of the election.

6. The present working paper merely attempts to offer examples of current practice within the United Nations and ITLOS that may be taken into account when addressing issues relevant to the election procedures for judges, the Prosecutor and the Registrar of the ICC. It does not establish positions, present any definitive proposals or draw any conclusions in relation to the considerations raised.

II. Judges of the International Criminal Court

7. In accordance with article 34 of the Rome Statute, the Presidency, an Appeals Division, a Trial Division and a Pre-trial Division, the Office of the Prosecutor, and the Registry comprise the organs of the Court. The President, the First and the Second Vice-President, who together constitute the Presidency, shall be elected by an absolute majority of the judges.⁴ The organization into the various divisions shall take place as soon as possible after the election of the judges.⁵

8. The Rome Statute also provides that there shall be 18 judges of the ICC,⁶ who shall be elected at a meeting of the Assembly of States Parties.⁷ All judges shall be elected as full-time members of the Court and shall be available to serve on that basis from the commencement of their terms of office.⁸ The Statute contemplates that the judges would be chosen from among persons of high moral character, impartiality and integrity who possess the qualifications required in their respective States for appointment to the highest judicial offices.⁹

A. Points for consideration concerning the nomination of judges

9. In appraising the nomination provisions attendant to the election of judges under the Rome Statute, a number of issues may require further consideration.

² SPLOS/14, para. 15.

³ SPLOS/L.3/Rev.1.

⁴ Art. 38 (1).

⁵ Art. 39 (1).

⁶ Art. 36 (1). In accordance with para. 2, the number of judges may be increased or reduced once it has been increased on a proposal of the Presidency.

⁷ Art. 36 (6) (a).

⁸ Art. 35 (1).

⁹ Art. 36 (3) (a).

1. Issuance of an invitation for nominations

10. The Rome Statute does not embody any provision designating the authority responsible for the issuance of an invitation for nomination of candidates. Under the Statute of the ICJ,¹⁰ the Statute of ICTY,¹¹ the Statute of ICTR¹² and the Statute of ITLOS,¹³ the Secretary-General of the United Nations invites such nominations.

11. Pursuant to General Assembly 56/85 of 12 December 2001, the Secretary-General has been requested to undertake preparations necessary to convene the meeting of the Assembly of States Parties to be held at United Nations Headquarters upon the entry into force of the Statute. One of the planned activities included in the statement of the programme budget implications (A/C.6/56/L.25) accompanying the resolution was the issuance by the Secretary-General of invitations for nominations, if the meeting of the Assembly of States Parties so decided.

12. Alternatively, and as indicated in the road map, the Assembly of States Parties would, through its Bureau, circulate letters inviting nominations, with sufficient time provided for the submission of such nominations.¹⁴

13. It is to be anticipated that the Secretariat for the Assembly of States Parties (PCNICC/2002/WGASP-PD/L.3) would be responsible for providing the required secretariat services for the smooth conduct of the elections and generally perform all other work which the Assembly or the Bureau might require.

2. Timing for issuance of an invitation for nominations and dates for opening and closing of nominations

14. Apart from dealing with the question of an authority to issue an invitation for nominations, it would be exigent to also consider the timing of such issuance, including the dates for opening and closing nominations. It may be useful to have specific timelines for the issuance of the request for nominations, the opening and closing of nominations, the issuance of the list of candidates and the holding of the elections. Article 5, paragraph 1, of the ICJ Statute requires the Secretary-General to address a written request for nominations at least three months before the date of the election. In this connection, recent practice has been to issue the invitation at the end of January of the year during which the election is being held. Usually, the date of the election is determined in the month of September or October following consultations between the Presidents of the General Assembly and the Security Council, and the elections have been held in November of the election year.

15. The ITLOS Statute is congruous and also enjoins the States parties to submit nominations within two months.¹⁵ For the first election of members of ITLOS, the Meeting of States Parties to the United Nations Convention on the Law of the Sea decided that nominations would open on 16 May 1995 and close on 17 June 1996. It

¹⁰ Art. 5 (1).

¹¹ Arts. 13 bis (1) (a) and 13 ter (1) (a).

¹² Art. 12 (2) (a).

¹³ Art. 4 (2). Only in the case of the first election. For subsequent elections the Registrar of ITLOS is the responsible authority.

¹⁴ PCNICC/2001/L.2, para. 4.

¹⁵ Art. 4 (2).

was also decided that the Secretary-General would circulate the list on 5 July 1996 and that the first election would be held on 1 August 1996.¹⁶

16. The ICTY and the ICTR statutes provide for nominations by eligible States to be made within 60 days of the date of the Secretary-General's invitation.¹⁷ In practical terms, the timing of initiation of the election process takes into account the date of expiration of the terms of office of the sitting judges as well as the possibility that the number of candidates nominated may fall short of the minimum number to be submitted to the General Assembly or the number of judges to be elected. In this connection, it may be noted that in one instance relating to ICTR, the number of nominations fell short of the number of posts to be filled. The Secretary-General in that case forwarded to the Security Council the list of candidates whose nomination had been received by the closure of the lawful dateline, drew the attention of the Council to the shortfall and suggested an extension of the period for nominations until a specified date. The Council decided to extend the deadline and subsequently the Secretary-General informed the eligible States of the extension.¹⁸

3. Consideration of late nominations

17. In the absence of explicit provisions of the Rome Statute, a secondary consideration relates to how a late submission of a nomination would be treated. In the case of the ICJ, there is no practice relating to late submissions. Article 5, paragraph 1, of the ICJ Statute requires national groups to undertake nominations "within a given time", and this provision has been consistently interpreted by the Secretariat as implying that national groups could be requested to send their nominations so as to reach the Secretary-General not later than the date defined in his letter of invitation, which typically sets the deadline for submission of nominations. Any nominations received thereafter are not included in the list submitted to the General Assembly or the Security Council. However, in some circumstances, multiple nominations have included national groups that may have nominated a candidate outside the time limit, but only on the basis that a nomination in respect of the same candidate had already been submitted within the prescribed timeline. ITLOS practice conforms to the strict statutory requirements of the ITLOS Statute and submissions received before the opening date and after the closing date for submissions are rendered invalid. For ICTY and ICTR, the Secretary-General forwards to the Security Council those nominations that he has received within the period stipulated in the two statutes. However, the Legal Counsel, while noting explicitly that they were out of time, has routinely transmitted late nominations to the Security Council, in case the Council might wish to consider them receivable.

4. Eligibility to make nominations

18. In accordance with the Rome Statute, nomination of candidates may be made by any State Party. It is envisaged that the procedure for nomination would be that for appointment to the highest judicial offices in the State in question or that provided for candidates to the International Court of Justice.¹⁹ Pursuant to article

¹⁶ SPLOS/3, para. 16. See also the working paper prepared by the secretariat of the Preparatory Commission on the election of the members of the Tribunal: review of alternatives (LOS/PCN/SCN.4/WP.16/Add.10).

¹⁷ Art. 12 (2) (b) of the ICTR Statute and arts. 13 bis (1) (b) and 13 ter (1) (b) of the ICTY Statute.

¹⁸ See S/1998/640, S/PV.3908 and S/1998/646.

¹⁹ Art. 36 (4) (a) (i) and (ii). See also art. 4 of the ICJ Statute.

36, paragraph 4 (b), each State Party may put forward one candidate for any given election and such a candidate need not be a national of the State Party concerned. However, such option is restricted to a national of another State Party. Thus a national of a non-State party is ineligible for nomination. Since a candidate may be nominated by a State Party or a national group in accordance with the ICJ Statute, and in order to avoid the possibility of receiving different nominations from a State Party and a national group in relation to a nomination of the one candidate in accordance with article 36, paragraph 4, it would be material to designate the diplomatic channel as an appropriate means for communicating the nomination of such a candidate put forward in respect of a given election. In the case of the ICJ, since the composition of national groups is not always known to the Secretariat, it has always insisted that nominations be forwarded to it by national groups through diplomatic channels and has considered communications received through a diplomatic mission as a confirmation that a nomination has been made by a duly established national group.

19. Deliberation may also have to be accorded to the question whether a State which was in the process of becoming a State Party would be eligible to nominate a candidate to participate in the election. At their first meeting convened ad hoc in accordance with article 319, paragraph 2 (e), of the United Nations Convention on the Law of the Sea held on 21 and 22 November 1994, the States Parties to the Convention, on the basis of the recommendation of the Preparatory Commission for the International Seabed Authority and for the International Tribunal for the Law of the Sea (LOS/PCN/L.115/Rev.1, para. 43), decided to open nominations to such States on the understanding that nominations received would remain provisional and would not be included in the list of candidates to be circulated prior to the election unless the State concerned had deposited its instrument of ratification or accession by 1 July 1996,²⁰ four days before the date of circulation of the list of candidates by the Secretary-General.

5. Role for an Advisory Committee on nominations

20. In accordance with article 36, paragraph 4 (c), of the Rome Statute, the Assembly of States Parties may decide to establish, if appropriate, an Advisory Committee on nominations, whose composition and mandate shall be established by the Assembly. It would be necessary to reflect on whether or not it is envisaged that there would be a role for the Advisory Committee on nominations during the first election of judges, in which case its composition and mandate would need to be determined in advance of the election.

B. Points for consideration concerning the election of judges by the Assembly of States Parties

21. For election as a judge to the ICC, every candidate shall have established competence (a) in criminal law and procedure, and the necessary relevant experience, whether as a judge, prosecutor, advocate or other similar capacity, in criminal proceedings, or (b) in relevant areas of international law, such as international humanitarian law and the law of human rights, and extensive experience in a professional legal capacity which is of relevance to the judicial work

²⁰ SPLOS/3, para. 16.

of the Court.²¹ In addition, each candidate shall have an excellent knowledge of and be fluent in at least one of the working languages of the Court.²² The nomination by a State Party should be accompanied by a statement specifying how the candidate fulfils these requirements.²³

22. From the election provisions concerning judges under the Rome Statute, several matters could entail further examination.

1. Establishment of lists of candidates for the purposes of the election

23. For the purposes of the election of judges, there shall be two lists of candidates, list A containing the names of candidates with qualifications specified in article 36, paragraph 3 (b) (i) of the Rome Statute (see para. 21 above) and list B containing the names of candidates with qualifications specified in article 36, paragraph 3 (b) (ii) (see para. 21 above).²⁴ The ICJ Statute²⁵ requires the Secretary-General to prepare the list, while under the ICTY and ICTR statutes, the Security Council establishes a list from the nominations received from the Secretary-General.²⁶ The ITLOS Statute authorizes the Secretary-General to prepare a list for the first election, and the Registrar for subsequent elections. It also provides that the list shall be submitted to the States Parties before the seventh day of the last month before the date of each election.²⁷

24. For the first election, the authority to prepare or establish the lists could depend on how the points for discussion raised in paragraphs 10 to 13 above are resolved. It could be the Secretary-General of the United Nations or the Assembly of States Parties, through its Bureau. The Secretariat for the Assembly of States Parties (PCNICC/2002/WGASP-PD/L.3) would be expected to provide the necessary substantive secretariat services, including the publication of the list of candidates, the curriculum vitae of each candidate and the accompanying statement in the necessary detail specifying how the candidate fulfils the requirements under article 36, paragraph 3 (b)²⁸ as well as the actual conduct of the election itself.

2. Choice of list

25. Although the Rome Statute is precise on the qualifications for lists A and B, it does not specify whether the nominating State and nominating national group or any other authority would be responsible for deciding on which list a candidate should be placed for the purposes of the election. It may be assumed that such a choice would be self-evident from the curriculum vitae of the candidate and the accompanying statement in the necessary detail specifying how the candidate fulfils the requirements under article 36, paragraph 3 (b)²⁹ and that the role of the authority assigned to prepare the lists would be of a routine nature. At the same time and for the avoidance of any doubt, it may be desirable in all cases for the nominating State or national group to indicate when nominating a candidate on which list such

²¹ Art. 36 (3) (b) (i) and (ii).

²² Art. 36 (3) (c).

²³ Art. 36 (4) (a).

²⁴ Art. 36 (5).

²⁵ Art. 7 (1).

²⁶ Art. 12 (2) (c) of the ICTR Statute and arts. 13 bis (1) (c) and 13 ter (1) (c) of the ICTY Statute.

²⁷ Art. 4 (2).

²⁸ Art. 36 (4) (a).

²⁹ Art. 36 (4) (a).

candidate should be placed. Consequently, the invitation for nominations could set forth this fact.

26. To obviate the possibility of a candidate who has sufficient qualifications for both lists from running on both lists, the Rome Statute expressly indicates that such a candidate may choose on which list to appear.³⁰ The weightiness of any failure to make such a choice is not clearly discernible. As in the preceding instance, it may be critical for the nominating State or national group to indicate the choice made by a nominated candidate.

27. In any event, it is to be expected that there would exist instances of failure to specify the choice or of an apparent conflict or inconsistency between the qualifications of the candidate and the list chosen in respect of a particular election. It is to be presumed that the Secretariat for the Assembly of States Parties (PCNICC/2002/WGASP-PD/L.3) would as appropriate seek any required clarification from the nominating State or national group through diplomatic channels. At the same time, it may be pertinent to ponder in such cases whether the Assembly itself, through the Bureau, the Advisory Committee on nominations or some other authority would make a final determination as to the list on which a candidate might appear, taking into account the qualifications and the accompanying statement in the necessary detail specifying how the candidate fulfilled the requirements under article 36, paragraph 3 (b).

3. Order of appearance in the lists

28. It would also be necessary to contemplate the order in which the names of the candidates would appear on the list. Article 7, paragraph 1, of the ICJ Statute requires the Secretary-General to prepare a list in alphabetical order of all the persons nominated in accordance with the Statute. In practice, the nominating national group is also specified in the list. The ITLOS Statute contains a similar provision. It also provides that the names of the nominating States parties should be indicated.³¹ The ICTY and the ICTR statutes oblige the Security Council to establish a list from the nominations received from the Secretary-General³² and the list is forwarded by the President of the Council to the President of the General Assembly.³³ In practice, the list submitted to the General Assembly contains names that appear in alphabetical order indicating the nationality of the candidates. In all four precedents, the election is held on the basis of a single list of candidates listed in the English alphabetical order.

29. For the election of the judges, it is to be surmised that the names of the candidates on the lists would appear in alphabetical order and that the nominating State(s) or the nominating national group would be indicated. It may also be supposed from the provisions of article 36, paragraph 5, that the ballot papers³⁴ would maintain the two lists of candidates, belonging to list A and list B, separate for the purposes of the election.

³⁰ Art. 36 (5).

³¹ Art. 4 (2).

³² Art. 12 (2) (c) of the ICTR Statute and arts. 13 bis (1) (c) and 13 ter (1) (c) of the ICTY Statute.

³³ Art. 12 (2) (d) of the ICTR Statute and arts. 13 bis (1) (d) and 13 ter (1) (d) of the ICTY Statute.

³⁴ The content and format of the ballot papers would depend on agreement reached on the election procedures.

4. Quorum required for the purposes of the election

30. Several other aspects require explication in connection with the election. The Rome Statute has no provision relating to the quorum applicable in respect of the election. However, article 112, paragraph 7 (a), provides that decisions on matters of substance must be approved by a two-thirds majority of those present and voting provided that an absolute majority of States Parties constitutes the quorum for voting. Rule 44 (2) of the Rules of Procedure of the Assembly of States Parties gives effect to this provision. Rule 44 (1) provides that the President may declare a meeting open and permit the debate to proceed when at least one third of the States Parties participating in the session are present.³⁵

31. It is not clear whether an election would proceed when at least one third of the States Parties participating in the session was present or additionally whether it might be contrived that an election of judges would *prima facie* be characterized as a decision on a matter of substance, and accordingly an absolute majority would be required to form a quorum. Proceeding on such a basis, it would be plausible that a judge might be duly elected by obtaining the highest number of votes and two thirds of the absolute majority present and voting, which would constitute a quorum.

32. To ensure certainty, it may be critical to consider specifying the quorum that would be applicable for the election of judges. It may also be apposite to evaluate the threshold required. Article 4, paragraph 4, of the ITLOS Statute provides that two thirds of the States Parties shall constitute a quorum for the purposes of the election.

5. Question of more candidates receiving the required majority

33. The Rome Statute states that, subject to article 36, paragraph 7, the persons elected shall be the 18 candidates attaining the highest number of votes and a two-thirds majority of the States Parties present and voting.³⁶ It is otherwise not unequivocal on the consequence for the election in the event more than the required number of candidates obtains the required majority — say, for example, there is a tie in respect of the eighteenth and nineteenth candidate.

34. When electing members of the ICJ, cases have arisen in the Security Council where more than the required number of candidates have obtained an absolute majority on the same ballot. The practice of the Council in such cases has been to hold a new vote on all candidates until only the required number of candidates and *no more* has obtained an absolute majority in the Council.³⁷ In the case of ICTY and

³⁵ The phrase “States Parties participating in the session” is not defined in the Rules of Procedure of the Assembly. Rule 56 (2) of the Rules of Procedure for Meetings of States Parties to the Law of the Sea Convention defines a similar phrase:

“Subject to the provisions of rules 12 to 16 and without prejudice to the powers and functions of the Credentials Committee, the term ‘States Parties participating in the meeting’ in relation to any particular Meeting means any State Party whose representatives have registered with the Secretariat as participating in that Meeting and which has not subsequently notified the Secretariat of its withdrawal from the Meeting or part of it. The Secretariat shall keep a register for this purpose.” (see SPLOS/2/Rev.3)

³⁶ Art. 36 (6). In accordance with rule 66 of the Rules of the Assembly of States Parties, the phrase “States Parties present and voting” means States Parties present and casting an affirmative or negative vote. States Parties which abstain from the voting shall be considered as not voting.

³⁷ See, for example, A/56/372-S/2001/881, para. 18. See, generally, *United Nations Juridical Yearbook 1984*, p. 173.

ICTR, although the two Statutes do not spell out the electoral procedure to be followed, the General Assembly has proceeded on the basis that if, following the first ballot, more than the required candidates obtain an absolute majority of votes, a second ballot would be held on all candidates, and balloting would continue at the same meeting, if and as necessary, until the required candidates, and no more, obtain an absolute majority.³⁸ To date, however, no case has arisen in elections relating to judges of ICTY or ICTR in which the number of candidates who have obtained the required majority of votes has exceeded the number of seats to be filled. Concerning the election of members of ITLOS, based on the proposal of the President made at the fifth Meeting of States Parties,³⁹ in case the number of candidates eligible receive the required majority for election exceeds the number of seats allocated, the candidates obtaining the largest number of votes shall be considered elected, while the others are considered not elected.⁴⁰ In the case of a tie for a remaining seat, a restricted ballot applies to those candidates who have obtained an equal number of votes.⁴¹

6. Question of more candidates from one list receiving the required majority than from the other list

35. In a conjoined question, from the requirement of 18 candidates first past the post provisions of article 36, paragraph 6 (a), of the Rome Statute, it would appear feasible that more candidates may obtain the highest number of votes and a two-thirds majority of States Parties present and voting from one list than from the other. To eschew such a result, the election may need to be organized in such a way that the election of at least nine judges from list A and at least five judges from list B is assured. Consequently, article 36, paragraph 6 (a), could be read together with the provisions of paragraph 5 of the same article, providing that at the first election at least nine judges shall be elected from list A and at least 5 judges from list B. Thus, for example, article 36, paragraph 6 (b), which provides that successive ballots shall be held in the event a sufficient number of judges is not elected on the first ballot, could be understood for the purposes of the first election as meaning that in the event a sufficient number of judges is not elected from list A or list B, successive ballots shall be held until the remaining *allotment* for each list is filled.

7. Question of whether successive ballots would be restricted or unrestricted

36. While the Rome Statute envisages successive ballots in the event a sufficient number of judges is not elected, it is silent on whether or not such ballots would be restricted. The General Assembly of the United Nations in its practice has consistently followed its decision made at its 915th plenary meeting, on 16 November 1960, that rule 94 of its rules of procedure does not apply to elections of members of the International Court of Justice, and has proceeded to elect the requisite number of judges by a series of unrestricted ballots.⁴² The General

³⁸ See, for example, A/47/1005, para. 13, and A/55/872, para. 19. See also A/47/PV.111 and A/55/PV.99.

³⁹ SPLOS/L.3/Rev.1.

⁴⁰ *Ibid.*, para. 9.

⁴¹ *Ibid.*, paras. 7 and 8.

⁴² *United Nations Juridical Yearbook 1984*, p. 173. See also rule 151 of the rules of procedure of the General Assembly, and A/56/372-S/2001/881, para. 16.

Assembly has followed a similar procedure in the election of judges of ICTY and ICTR.⁴³

37. Rule 79 of the draft Rules of Procedure of the Assembly of States Parties, which is comparable to rule 94 of the rules of procedure of the General Assembly of the United Nations, contemplates the possibility of restricted balloting taking place in the event there is only one elective place for a person or State Party. Rule 80 is concerned with restricted balloting for two or more elective places. These rules are without prejudice to rules 85 and 86, relating, respectively, to elections of the judges and elections of the Prosecutor and the Deputy Prosecutor. Rules 64 and 65 of the Rules of Procedure for Meetings of States Parties to the Convention on the Law of the Sea⁴⁴ are analogous and are also without prejudice to rules relating to, *inter alia*, the election of members of ITLOS. Thus, pursuant to the proposal of the President made at the fifth Meeting of States Parties, in the event that not all 21 judges of the Tribunal are elected in the first ballot, subsequent balloting would be unrestricted.

8. Question whether successive balloting is indefinite

38. It is also not explicit from the provisions of the Rome Statute whether the successive balloting would continue indefinitely in the event of several rounds of inconclusive results. Articles 11 and 12 of the ICJ Statute foresee the convening of a joint conference between the Security Council and the General Assembly after the third meeting held for the purpose of the election. The General Assembly, at its 24th meeting, on 6 February 1946, held a procedural discussion on the meaning of “meeting” for the purposes of Articles 11 and 12 of the ICJ Statute and, following the adoption of rule 151 of its rules of procedure by the General Assembly and of rule 61 of its provisional rules of procedure by the Security Council, “meeting” has been interpreted as meaning continuous balloting and not one single ballot, as had been contended by some delegates during the procedural debate.⁴⁵ The ICTY and ICTR statutes are silent on the question of whether successive balloting would be indefinite, as is the ITLOS Statute. In the former instance, continuous balloting at a meeting of the General Assembly has in practice been employed.⁴⁶ In the latter case, the proposal of the President made at the fifth Meeting of States Parties provides for a suspension of the balloting to allow for a moment of reflection and consultation, if after four ballots not all 21 judges are elected, in which case, before the suspension, the President of the Meeting would announce when balloting would resume.⁴⁷

9. Question of judges of same nationality receiving the required majority

39. Although persons of the same nationality may be nominated as candidates, the Rome Statute expressly bars the circumstance of two judges of the Court being nationals of the same State.⁴⁸ The Rome Statute does not offer any solution in the actual prospect of two candidates of the same nationality receiving the required majority. It may remotely be surmised, however, that by the terms of article 36,

⁴³ See, for example, A/55/872, paras. 17 and 18. See also A/47/PV.111 and A/55/PV.99.

⁴⁴ SPLOS/2/Rev.3.

⁴⁵ General Assembly resolution 88 (I). See also the 138th and 222nd meetings of the Security Council, on 4 June and 9 December 1947.

⁴⁶ See, for example, A/47/1005, paras. 12 and 13, A/47/PV.111, A/55/872, para. 17, and A/55/PV.99.

⁴⁷ SPLOS/L.3/Rev.1, para. 10.

⁴⁸ Art. 36 (7).

paragraph 7, a candidate considered to be a national of more than one State would probably have the option of availing himself or herself of the nationality of another State of which he or she ordinarily exercises civil and political rights.

40. Article 10, paragraph 3, of the ICJ Statute provides that the eldest of the nationals of the same State who have obtained an absolute majority of the votes would be considered elected. In the context of the ICTY and the ICTR statutes, the candidate who receives the higher number of votes shall be considered elected.⁴⁹

10. Consideration of the criteria set forth in article 36, paragraph 8, of the Rome Statute

41. Article 36, paragraph 8, of the Rome Statute provides that the States Parties in selecting judges shall take into account, within the membership of the Court, the need for the representation of the principal legal systems of the world, equitable geographical representation, and a fair representation of female and male judges, as well as the need to include judges with legal expertise on specific issues, including, but not limited to, violence against women and children. The Statute does not contain any procedure for assuring that these principles are met in a concrete situation. It may be presupposed that this is a matter within the reserved domain of the States Parties participating in the nomination and election processes.

42. The ICJ Statute prescribes for the electors, at every election, to bear in mind, *inter alia*, 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.⁵⁰

43. Under the ICTY Statute, the Security Council in establishing the list for the election of permanent judges to be submitted to the General Assembly shall do so taking due account of the adequate representation of the principal legal systems of the world.⁵¹ The ICTR Statute has a congruent provision.⁵² The same consideration, in addition to bearing in mind the importance of equitable geographical distribution,⁵³ is stipulated in the preparation of a list for the election of *ad litem* judges for ICTY.

44. According to the ITLOS Statute, in the Tribunal as a whole the representation of the principal legal systems of the world and equitable geographical distribution shall be assured.⁵⁴ Thus, with a view to reconciling the need for some certainty in geographical representation in the composition of the Tribunal and the need to provide all candidates an equal opportunity to contest in the election, the fifth Meeting of States Parties, on the proposal of the President, agreed upon, for the first election of the members of the Tribunal and without prejudice to the arrangements for any other election, a mechanism for the distribution of seats bearing in mind that article 3, paragraph 2, of the ITLOS Statute reserves no fewer than three seats for members from geographical groups established by the United Nations General

⁴⁹ Art. 13 bis (1) (d) of the ICTY Statute and art. 12 (2) (d) of the ICTR Statute. It should be noted that the ICTY Statute does not preclude the election of two or more *ad litem* judges of the same nationality. No equivalent provision accordingly appears in art. 13 ter (1) (d).

⁵⁰ Art. 9.

⁵¹ Art. 13 bis (1) (c). See also S/25704, para. 75.

⁵² Art. 12 (2) (c).

⁵³ Art. 13 ter (1) (c).

⁵⁴ Art. 2 (2).

Assembly,⁵⁵ Consequently, the African and Asian groups were each accorded two additional seats, the Latin American and Caribbean and the Western European and Other States groups received one additional seat each, while the Eastern European group retained the three guaranteed seats.⁵⁶

45. The clause concerning fair representation of female and male judges or of the need to include judges with legal expertise on specific issues, including but not limited to violence against women and children, seems to be peculiar to the Rome Statute. However, in respect of the election and appointment of ad litem judges of ICTY, the nominating State may nominate up to four candidates, taking into account the importance of a fair representation of female and male candidates.⁵⁷

11. Selection by lot of cadence of terms of office

46. Once elected, a judge of the ICC is entitled to hold office for a term of nine years.⁵⁸ However, at the first election, a third of the judges elected shall be selected by lot to serve a term of three years, another third also selected by lot for six years and the remaining third for nine years.⁵⁹ Article 13, paragraph 2 of the ICJ Statute requires the Secretary-General to draw lots immediately after the first election has been completed. The ITLOS Statute has a comparable provision.⁶⁰ The proposal of the President concerning the first election of members of ITLOS further provides that the Secretary-General shall draw lots by region.⁶¹

47. Regard may have to be given to devising a procedure for drawing lots, including designating the authority responsible for drawing the lots, the sequencing of the draw consistent with article 36, paragraph 9 (b), of the Rome Statute, as well as the need to assure the maintenance of the balance sought by article 36, paragraph 5.

12. Rules applicable in the event of a vacancy

48. Article 37, paragraph 1, of the Rome Statute stipulates that in the event of a vacancy, an election shall be held in accordance with article 36 to fill the vacancy. It may be expected that the procedures that will be agreed upon will also apply in an election to fill a vacancy. However, time would be of the essence in the holding of such an election. Thus, although the ICJ and ITLOS statutes have provisions of similar import, they further provide that the Secretary-General and the Registrar, respectively, may proceed to issue invitations for nominations within one month of the occurrence of the vacancy. The date of the election in the case of the ICJ shall be fixed by the Security Council, and, in the case of ITLOS, the President of the Tribunal after consultation with the States Parties.⁶²

49. The procedure provided for in the ICTY and ICTR statutes is different. In the event of a vacancy concerning a permanent judge of ICTY or a judge of ICTR, the Secretary-General, after consultation with the President of the Security Council and

⁵⁵ SPLOS/L.3/Rev.1.

⁵⁶ Ibid., para. 2 (a).

⁵⁷ Art. 13 ter (1) (a).

⁵⁸ Art. 36 (9) (a).

⁵⁹ Art. 36 (9) (b).

⁶⁰ Art. 5 (2).

⁶¹ SPLOS/L.3/Rev.1, para. 11.

⁶² Art. 14 of the ICJ Statute and art. 6 (1) of the ITLOS Statute.

the President of the General Assembly, appoints a person meeting the qualifications as set forth by the statutes to serve the remainder of the term.⁶³

III. The Prosecutor and the Deputy Prosecutors of the International Criminal Court

50. The Prosecutor and the Deputy Prosecutors of the ICC shall be elected by the Assembly of States Parties,⁶⁴ and shall be persons of high moral character, be highly competent in and have extensive practical experience in the prosecution or trial of criminal cases. In addition, they shall have an excellent knowledge of and be fluent in at least one of the working languages of the Court.⁶⁵ The Deputy Prosecutors are elected from a list of candidates provided by the Prosecutor. Three candidates shall be nominated by the Prosecutor for each position of Deputy Prosecutor.⁶⁶ It is supposed therefore that their election will be preceded by the election of the Prosecutor.

Points for consideration concerning the nomination and election of the Prosecutor

51. Contrary to the situation of judges of the ICC, the Rome Statute has no procedure for nomination of the Prosecutor. On this account, a number of additional points of detail may require clarification.

1. Question of nomination of the Prosecutor

52. For the Prosecutor, it is not evident who would be responsible for his or her nomination, how he or she would be nominated or whether any form of screening procedure is contemplated or whether any nomination procedure is envisaged at all. More specifically, it is not apparent whether any State, irrespective of its status as State Party, may present a candidate for consideration for the post of Prosecutor or Deputy Prosecutor or whether some body or authority would be responsible for establishing a list of candidates for the post of Prosecutor.

53. In the case of ICTY and ICTR, the Prosecutor is appointed by the Security Council on the nomination of the Secretary-General.⁶⁷ Typically, the Secretary-General has presented one nomination at a time for the consideration of the Security Council.⁶⁸

2. Eligibility to make nominations

54. Although the Rome Statute is explicit that the Prosecutor and the Deputy Prosecutor of the ICC shall be of different nationality,⁶⁹ compared to the situation of

⁶³ Art. 13 bis (2) of the ICTY Statute and art. 12 (4) of the ICTR Statute.

⁶⁴ Art. 42 (4).

⁶⁵ Art. 42 (3).

⁶⁶ Art. 42 (4).

⁶⁷ Art. 16 (3) of the ICTY Statute. Under art. 15 (3) of the ICTR Statute, the Prosecutor of ICTY also serves as the Prosecutor of ICTR.

⁶⁸ For example, see Security Council resolution 1259 (1999).

⁶⁹ Art. 42 (2).

judges, it lacks specificity concerning the nationality of the Prosecutor or the Deputy Prosecutor.

55. As in the case of judges, the question whether a State which was in the process of becoming a State Party would be eligible to present a candidate to participate in the election could be relevant in the consideration of electing the Prosecutor.

3. Question of applicable procedure for nomination

56. In the draft Statute for the ICC (A/CONF.183/2/Add.1, part one), the point was made that there ought to be a procedure for the Assembly of States Parties to have a list of candidates rather than to have nominations put to the election directly. At the same time, it was considered that such a matter was for the Rules of the Assembly of States Parties.⁷⁰ The current draft rules have no such provision.

57. The Bureau of the Assembly of States Parties or some other authority, such as the Advisory Committee on nominations, could be assigned to establish such a list.

58. On the other hand, any inclination for a detailed nomination procedure postulates a need to consider designating for the first election an authority responsible for the issuance of an invitation for nomination of candidates.

59. In an analogous example, it may be noted that in the election of judges of ICTR and ICTY, the Security Council establishes a list of candidates for election by the General Assembly from the nominations received by the Secretary-General and forwarded by him to the Council, following his issuance of an invitation to eligible States in accordance with the two statutes. In that connection, for the permanent judges of ICTY, elected under article 13 bis of its Statute, the Security Council establishes a list of not less than 28 and not more than 42 candidates from which 14 judges are elected and a list of not less than 54 candidates from which 27 ad litem judges are elected.⁷¹ In the case of judges of ICTR elected under article 12 of its Statute, the Security Council establishes a list of not less than 22 and not more than 33 candidates from which 11 judges shall be elected.⁷²

60. The Secretary-General of the United Nations or the Assembly of States Parties could, through its Bureau, circulate letters inviting nominations, with sufficient time being given for the submission of nominations, also indicating the opening and closing dates, taking into account aspects of late nominations. Consideration may also have to be given to whether an entire list of candidates received or only a limited list, including the suggested number of candidates for such a list, will be submitted for purposes of the election. In addition, the relevance of the Advisory Committee on nominations may have to be taken into account.

4. Preparation of list of candidates for the purposes of the election

61. The Rome Statute does not charge any authority with the responsibility of preparing a list of candidates for the post of Prosecutor for the purposes of the election. In the case of ICTY and ICTR, as pointed out above, the Secretary-General

⁷⁰ Art. 43 (4) of the draft Statute, footnote 19.

⁷¹ Arts. 13 bis (1) (c) and (d) and 13 ter (1) (c) and (d) of the ICTY Statute. It may be noted that the Security Council has on several occasions decided to establish and transmit to the General Assembly a list comprising fewer candidates than the minimum number stipulated in the relevant statute.

⁷² Art. 12 (2) (c) and (d) of the ICTR Statute.

submits nominations for the post of Prosecutor for consideration by the Security Council. In addition, the Prosecutor makes recommendations to the Secretary-General for the appointment of the Deputy Prosecutor.⁷³

62. A decision on the nomination procedures to be applied may assist in dealing with issues concerning the preparation of the list of candidates for the purposes of the election, including the order in which the names on such a list would appear. It would be envisaged that the Secretariat for the Assembly of States Parties (PCNICC/2002/WGASP-PD/L.3) would be responsible for providing the required secretariat services for the smooth conduct of the elections.

5. Rules applicable in the conduct of the election

63. The Rome Statute lacks detailed provisions concerning the conduct of the election of the Prosecutor. However, the Prosecutor shall be elected by secret ballot by an absolute majority of the members of the Assembly of States Parties.⁷⁴ The term “absolute majority” is not defined by the Rome Statute or the draft Rules of Procedure of the Assembly of States Parties.

64. However, it has been the consistent practice of the United Nations to interpret the term as meaning a majority of all electors whether or not they vote or are allowed to vote. Accordingly, for elections of judges of the International Court of Justice the electors in the General Assembly are all the States Members of the United Nations together with one non-member State, which is a party to the ICJ Statute invited to participate in electing members of the Court in the same manner as the Member States in accordance with General Assembly resolution 264 (III) of 8 October 1948.⁷⁵ A similar interpretation, taking into account the relevant eligibility provisions of the ICTY and ICTR Statute, has been applied in respect of elections of judges of the ICTY and the ICTR.⁷⁶

65. The issues that have been featured above in regard to the procedure for elections concerning judges of the ICC could be germane in respect of the election of the Prosecutor. In particular, a review could be considered of the rules to be applied if more than one candidate obtains an absolute majority, if in case no candidate obtains such a majority, in the event of a tie or where there is a tie between candidates of the same nationality, whether or not there would be any successive ballots and, if so, whether or not such balloting would be restricted, as well as rules applicable in a situation where a vacancy occurs.

⁷³ Art. 16 (3) and (5) of the ICTY Statute and art. 15 (3) of the ICTR Statute. See also rule 38 of the ICTY Rules and rule 38 of the ICTR Rules. It should be noted that, in contrast to the ICTR Statute, the ICTY Statute does not provide for the post of Deputy Prosecutor as such.

⁷⁴ Art. 42 (4).

⁷⁵ See, for example, A/56/372-S/2001/881, para. 13, and also *United Nations Juridical Yearbook 1984*, p. 173, and *Juridical Yearbook 1986*, p. 274.

⁷⁶ See, for example, A/55/872, para.15, and A/55/PV. 99.

IV. The Registrar of the International Criminal Court

Nature of recommendations concerning the appointment of the Registrar by the Assembly of States Parties

66. The Registrar and the Deputy Registrar of the ICC, who shall be persons of high moral character, highly competent and have an excellent knowledge of and be fluent in at least one of the working languages of the ICC,⁷⁷ shall be elected by secret ballot by an absolute majority of the judges, taking into account any recommendation by the Assembly of States Parties in the case of the Registrar and upon the recommendation of the Registrar in the case of a Deputy Registrar.⁷⁸

67. In the event that no candidate receives an absolute majority vote on the first ballot, successive ballots shall be held until one candidate obtains an absolute majority.⁷⁹

68. With respect to the ICJ, the Registrar is appointed by the Court.⁸⁰ According to Article 22 of the Rules of the International Court, such appointment is through an election by secret ballot from among candidates proposed by members of the Court. The President of the ICJ gives notice of a vacancy or impending vacancy, fixing a date for the closure of the list of candidates so as to enable nominations and information concerning the candidates to be received in sufficient time. Nominations are supposed to indicate relevant information concerning, in particular, the age, nationality and present occupation, university qualifications, knowledge of languages and any previous experience in law, diplomacy or the work of international organizations. The provisions of article 22 of the ICJ Rules also apply to the election of the Deputy Registrar.⁸¹ The ITLOS procedure is similar.⁸²

69. For ICTY and ICTR, the Registrar is appointed by the Secretary-General after consultation with the President of the Tribunal concerned.⁸³ In accordance with the rules of procedure of the Tribunal concerned, the President shall seek the opinion of the judges on the candidates for the post of Registrar before consulting with the Secretary-General.⁸⁴ Also under the applicable rules of procedure, the Registrar consults with the Bureau (the President, the Vice President and the Presiding Judges of the Trial Chambers) before making recommendations concerning the appointment of the Deputy Registrar.⁸⁵

70. Paragraph 1 of rule 12 of the finalized draft text of the Rules of Procedure and Evidence provides that the Presidency as soon as it is elected shall establish a list of candidates for the post of Registrar and shall transmit the list to the Assembly of States Parties with a request for any recommendations. Paragraph 2 of rule 12 states that upon receipt of any recommendations from the Assembly of States Parties, the

⁷⁷ Art. 43 (3).

⁷⁸ Art. 43 (4).

⁷⁹ Rule 12, para. 3, of the finalized draft text of the Rules of Procedure and Evidence.

⁸⁰ Art. 21.

⁸¹ Art. 23 of the ICJ Rules.

⁸² Art. 12 of the ITLOS Statute. See also arts. 32 and 33 of the ITLOS Rules.

⁸³ Art. 17 (3) of the ICTY Statute, art. 16 (3) of the ICTR Statute.

⁸⁴ Rule 30 of the ICTY Rules and rule 30 of the ICTR Rules.

⁸⁵ Rule 31 of the ICTY Rules and rule 31 of the ICTR Rules.

President shall, without delay, transmit the list together with the recommendations to the plenary session of all judges.

71. Appropriate attention may have to be given to the nature of recommendations, consistent with the Statute, which the Assembly of States Parties may wish to make in the election of the Registrar. In particular, it may be necessary to clarify whether the Assembly of States Parties would receive the list of names of candidates for the post of Registrar and establish, where appropriate, a shortlist from which the judges would elect the Registrar. In this regard, the issue of whether there is a role for the Advisory Committee on nominations, or any other body, such as the Bureau or the Assembly itself, seems relevant.