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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 'the Court'). The sum of all individuals in National Groups constitute a pool of individuals, available to act as arbitrators when appointed by States who wish to submit their disputes to arbitration under the auspices of the PCA. Furthermore, National Groups have an exclusive right to nominate candidates for election as judge at the International Court of Justice ('ICJ') (Article 4 ICJ Statute). Finally, National Groups from States party to the Rome Statute may play a role in the nomination of candidates for election as judge at the International Criminal Court ('ICC') (Article 36 (4) (a) (ii) ICC Statute).

B. The Formation and Composition of National Groups

2 The rules on the formation of National Groups, as well as the qualifications that the individuals therein must possess, are laid down in the two constituent instruments of the PCA: the 1899 Hague Convention for the Pacific Settlement of International Disputes (Article 23) and the 1907 Hague Convention for the Pacific Settlement of International Disputes (Article 44). These articles provide that each State Party shall select as 'Members of the Court' ('Members') up to four persons, not necessarily of that State's nationality, 'of known competency in questions of international law, of the highest moral reputation, and disposed to accept the duties of Arbitrator.' The same person can be selected simultaneously or in common by two or more States. In case of death or resignation the vacancy is filled by resorting to the same method of appointment as was followed for the original Member. The 1907 Convention specifies that in such case the newly appointed individual shall serve for a full term of six years. The names of these persons are put on a list which is maintained by the PCA International Bureau and transmitted periodically to PCA Member States. The current list is also available on the PCA website. The majority of National Groups has a full membership of four, with the total number of Members of the Court currently standing at approximately 250.

3 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, in some cases, the head of government (Mackenzie, 2010, 70). In terms of composition, National Groups tend to have on board 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 universities, supreme courts, law firms and bar associations,.

4 The specific composition 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. Some National Groups are balanced in terms of professional background. For example, the Australian National Group typically includes the Chief-Justice, the Solicitor-General and an academic lawyer (Burmester, 1996, 26), while the United Kingdom National Group usually consists of two practicing or formerly practicing international lawyers and two members of a body such as the International Law Association (Golden, 1975, 343). Other National Groups are composed so as to reconcile domestic political party lines (eg the National Group of the United States 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, which traditionally does not have any governmental officials among its members: see Mackenzie, 2010, 70, fn 40).

5 The 1899 and 1907 Hague Conventions stipulate that the individual Members of the Court are appointed for a term of six years. Nevertheless, a comparison of consecutive Annual Reports reveals instances in which a government withdrew or replaced some or all Members of its National Group prior to the expiration of their mandate. The PCA International Bureau accepts the premature ending of a Member's mandate since there is no explicit rule in the Conventions excluding this possibility. At least one National Group has spoken out against this practice, pointing out the risk of an 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 PCA 1993, 87; see also National Group of Luxembourg, in PCA 2000, 150). The mandate can be renewed without limitation as to the number of consecutive terms and the current list includes some Members whose appointments date back to the 1990s (twenty-three Members) and the 1980s (eight: including one appointed by France in 1980, re-appointed ever since, and currently the longest serving Member on the list). A Member is removed from the list once their mandate expires and is not renewed by the State concerned.

6 Throughout the period 1999-2013 the share of PCA Member States with a formally constituted National Group was approximately 85 percent. This share decreased considerably during the subsequent years; 66 percent in 2014 (ie 77 National Groups

out of 116 Member States), and 62 percent in 2015 (ie 73 National Groups out of 117 Member States). These numbers vary significantly between the various geopolitical regions. For example, about one-third of the Member States from Africa and two-fifths from the Latin American and Caribbean region has a formal National Group, compared with nine out of ten States from the Western European and Others region. These figures show that a large minority of PCA Member States find it unnecessary or inexpedient, or simply overlook, to create a National Group with a formal mandate or reappoint its Members, despite the call in the PCA's constituent instruments to do so. In a resolution on the position of international judges, the *Institut de Droit International* points out that:

[I]t seems that the national groups of the Permanent Court of Arbitration 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, para 3)

7 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 International Bureau may be subjected to the loss of certain rights, including the right to nominate and maintain Members of the Court. At the end of 2014 the Administrative Council started to enforce these measures, which could be an additional explanation for a decrease in the share of Member States with a formally constituted National Group.

8 So far, the Members have convened twice in an institutional setting to discuss the work of the PCA. At the First Conference of Members of the Court, held in The Hague on 10 and 11 September 1993, the Members adopted two resolutions containing suggestions relating to the improvement of the functioning and visibility of the PCA (PCA 1993, 15, 21). The Second Conference of Members of the Court was held in The Hague on 17 May 1999, right before the conference marking the 100th anniversary of the PCA. It resulted in the adoption of one resolution, including a call for the PCA Secretary-General and the International Bureau to further pursue initiatives to expand the Court's role, and for National Groups – as a group and individually – to support the activities of the PCA and the implementation of suggestions put forward in the Members' Conference (PCA 2000, 237).

C. Pool of Potential Arbitrators

9 The PCA's organizational structure allows for disputing States to move away from *ad hoc* arbitration, and instead make use of a standing organization that facilitates an immediate recourse to arbitration if disputing parties 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 (Article 28 1899 Convention; Article 49 1907 Convention), while the International Bureau, headed by its Secretary-General, acts as a registry and secretariat (Article 22 1899 Convention; Article 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.

10 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' (Article 24 1899 Convention; Article 45 1907 Convention, emphasis added). However, this obligation is qualified by provisions in both Conventions which express the hallmarks of arbitration – party autonomy and procedural flexibility. These fallback provisions allow disputing parties to agree on a departure from the procedural rules as laid down in these treaties (Articles 20 and 30 1899 Convention; Articles 41 and 51 1907 Convention), or to have recourse to a so-called special board of arbitration (Articles 21 and 26 1899 Convention; Articles 42 and 47 1907 Convention), thus giving 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 as early as 1908, in the *Grisbådarna* arbitration concerning the demarcation of a maritime boundary between Norway and Sweden. In this case the tribunal's president, JA Loeff, was not a Member of the PCA. Additional flexibility is offered by the various sets of Optional Rules for specific types of disputes. From 1992 onwards the Administrative Council has adopted these Optional Rules with a view to revitalizing the PCA and bringing it more in line with the standards of modern-day arbitral practice. If the Optional Rules form the applicable framework governing the arbitral procedure the, disputing parties are free to designate as arbitrator persons who are not Members of the PCA. The parties to a dispute are equally free to draw up their own arbitration agreement which imposes restrictions when it comes to the choice of arbitrators. In the *Abyei* arbitration agreement, for example, the disputing parties – 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' (Article 5 (2)) *Abyei* Arbitration Agreement).

11 In practice, the flexibility offered by the 1899 Convention, the 1907 Convention, and the increased resort to Optional Rules contribute to a situation in which arbitration under the auspices of the PCA is rarely carried out by its listed Members (Keith, 2007, 160). Furthermore, many of these individuals take up prominent positions in a State's judiciary or government. 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. With the function of acting as potential arbitrator increasingly relegated to the background, one can say that nowadays 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 PCA 1991, 10-11).

D. National Groups as Nominating Body

1. Early Attempts to Set Up a Permanent Judicial Institution

12 The experiences with *ad hoc* arbitration in the 19th century provided an incentive to create a more permanent institution to have international disputes resolved by professional judges and in accordance with a predetermined procedural framework, but the problem of determining the composition of the bench proved a hard one to overcome. 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, 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.

13 A more concrete initiative appeared at the second Hague Conference of 1907 in the form of a draft convention on the creation of a permanent Court of Arbitral Justice, but the draft did not contain any provisions on the method of electing the judges (reproduced in Rosenne, 2001, 216-221). In the Final Act 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 (reproduced in Rosenne, 2001, 401). 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).

14 The failure to reach a generally acceptable solution to the problem of selecting judges was in large part or in whole also the reason as to why other proposed tribunals never came into being (eg the International Prize Court, proposed in 1907) or were discontinued after the expiration of an initial mandate (eg the Central American Court of Justice, in operation from 1908 to 1918). 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 in the statutes of the Permanent Court of International Justice ('PCIJ') and the ICJ. In both of these courts National Groups were given a privileged role that would dissipate many concerns in relation to the selection of their judges.

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

15 Article 14 Covenant of the League of Nations gave the League Council the responsibility to formulate plans for the establishment of a permanent court of international justice, and to present these to the League Assembly. The Council commissioned this task to the Advisory Committee of Jurists. It spent a considerable amount of its 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 be able to reconcile the requirements of State equality (demanded by the League Assembly), with those of the 'Great Powers' (having a majority in the League Council) who wished to see a system which guaranteed their permanent representation in the Court. During its deliberations the Committee also acknowledged and took into account a number of schemes which by that time had already been drafted by various governments, academic organizations and individuals (for a tabular synopsis of the different existing schemes, see Advisory Committee of Jurists, 1920, 51).

16 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.' (ibid 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 select the men who, in their opinion, are best qualified to be summoned by the

League of Nations 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. (ibid 706)

17 The proposed solution which was later to become 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, while the power of elections rests in the Council League and Council Assembly acting concurrently and independently. The distribution of power between the Council and Assembly, inspired by the bicameral system of the United States legislator, was proposed by the American and English members of the Committee, Elihu Root and Lord Phillimore (ibid 108-09, 133-35, 144, 150-52), while the role of the National Groups was advanced by the Dutch member Bernard Loder who pointed out the 'moral weakness of all political bodies' (ibid 163). Apart from reducing the influence of politics on the choice of judges, the institutional link between the PCA and the PCIJ would thus provide for their institutional co-existence and allow the newly established PCIJ to be composed by building on the expertise and experience gathered by Members of the PCA.

18 The Second World War and the resulting demise of the League of Nations and PCIJ paved the way for the establishment of a new general international organization, the United Nations, including its own court of justice, the ICJ. One of the main questions under consideration 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 eleven experts from Allied countries acting in a personal capacity, 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).

19 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 thus 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

(a) The Nomination Stage

20 The selection procedure for the ICJ is governed by Articles 4 to 14 ICJ Statute. The ICJ is composed of fifteen judges of different nationality, elected for nine years. Regular elections are staggered in such a way that every three years five seats are up for election. An occasional vacancy occurs when a place becomes available as a result of the death, resignation or dismissal of a judge. The selection of ICJ judges takes place in a two-stage process in the form of nomination by the PCA National Groups (→ nomination of adjudicators) and election by absolute majority in the General Assembly and the Security Council (→ election of adjudicators).

21 At least three months before the date of the regular elections – and 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 persons who are nominated to stand for election as judge at the ICJ. UN Member States not being PCA Member States make nominations through *ad hoc* National Groups set up for this purpose. The system of *ad hoc* National Groups is also resorted to by UN Member States being PCA Member States that, despite the mandatory language in Article 23 1899 Convention and Article 44 1907 Convention, have no formally constituted National Group. States which are party to the ICJ Statute without being party to the UN Charter make nominations on equal footing with UN Member States (Article 93 (2) UN Charter read in conjunction with GA Res. 264 (III) of 8 October 1948), so through a formally constituted or *ad hoc* National Group. The latter situation applied to Liechtenstein, San Marino, Switzerland, Japan and Nauru, which became party to the ICJ Statute before joining the UN as a Member State.

22 National Groups – whether formally constituted or formed on an *ad hoc* basis for this specific purpose – thus have the exclusive right to nominate persons as candidates for election as ICJ judge and, subject to one exception (see para 30, below), a candidate cannot be elected without prior nomination by at least one National Group.

23 For regular triennial elections each National Group may nominate up to four (or, for single casual vacancies, two) candidates, with a maximum of two candidates having the group's own nationality. The number of nominees is greater than in the original draft, so as to give National Groups more opportunity to propose competent candidates of a nationality other than that of the nominating group (Golden, 1975,

339). National Groups may also not make any nominations at all, or nominate one of their own Members as candidate. 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.

24 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' (Article 6 ICJ Statute). Upon revision the Informal Inter-Allied Committee decided against elevating this suggestion into a definite obligation. In the view of the Committee such an obligation 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, or the weight to be accorded to the views of the various external authorities (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 often consulted by individual Members of the National Group, rather than by the group as a whole.

25 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 United Nations. 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 note outlining the current ICJ composition and the election procedure, is then submitted to the General Assembly and the Security Council for election (for the 2014 regular elections, see UN Doc. S/2014/520 on election procedure, UN Doc. S/2014/521 on nominated candidates and UN Doc. S/2014/522 on candidates' CVs,).

(b) Late Nomination and Withdrawal of Candidates

26 The ICJ Statute provides that the UN Secretary-General invites National Groups to submit their nominations 'within a given time' (Article 5 (1) ICJ Statute), though it does not specify what effect, if any, should be given if nominations are submitted after the given deadline, even right up to the election. 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, 2012, 276). As one nomination suffices to stand for election, this particular practice does not bring about a formal change in terms of 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). This solution has attracted criticism in the literature on the ground that, in view of its effects, applying the practice of accepting late courtesy co-nominations to new candidacies is difficult to justify on the basis of analogy (see Zimmermann, 2012, 277 fn. 31).

27 It seems logical to deduce from the language of the ICJ Statute, which speaks of the nomination of candidates 'in a position to accept the duties of a member of the [ICJ] Court' (Article 5 (1) ICJ Statute), that a nominee who is unwilling or unable to stand for election can have his or her name withdrawn from the list of candidates, and consequently from the ballot paper. In addition, it has been submitted that the UN Secretary-General allows nominations to be withdrawn by the National Group which made the nomination but not by the State itself, although practice in both electoral bodies is not fully consistent in this regard (Rosenne, 1976, 548-49). If permissible, a withdrawal of candidacy should occur before the elections take place or during the elections between ballots, but not while a ballot is in progress (Zimmermann, 2012, 287).

28 During the 1960 regular election the General Assembly discussed whether the number of candidates appearing on the ballot list could be reduced by applying Rule 96 (now Rule 94) of the Assembly's Rules of Procedure. This rule provides for a 'restricted ballot' – ie a ballot on which the number of candidates is reduced to twice the number of vacancies – if after the first voting round the number of candidates receiving the required majority is less than the number of seats to be filled. At the first election meeting of the General Assembly the representative of India raised a point of order and objected to the application of this rule to elections to the ICJ, relying on the argument that the ICJ Statute (to which Rule 151 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 General Assembly 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.

(c) Inclusion on the List of Candidates pursuant to a Decision by a Joint Conference

29 There is one, as 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 General Assembly and the Security Council one or more seats remain unfilled, a joint conference consisting of three members from each body may be organized to break the voting deadlock. This joint conference may, by absolute majority, choose one name for each seat still vacant and submit the name or names to the General Assembly and Security Council for their acceptance, and by a unanimous decision the joint conference is entitled to propose a candidate who was not nominated by a National Group, as long as this candidate fulfils the required conditions and qualifications (Article 12 ICJ Statute). To date such a joint conference has never taken place, the General Assembly and the Security Council instead preferring to continue with the elections until all seats are filled.

(d) Other Relations between National Groups and the International Court of Justice: Compatibility of Office and the Selection of ad hoc Judges

30 The positions of Member of the Court and ICJ judge are not deemed incompatible with each other and may overlap in individual cases. Members of the Court may continue their mandate when elected as ICJ judge, and vice versa. Many current or former ICJ judges are or have been Members of the PCA and, in fact, the 2015-2018 bench of the ICJ includes six judges who are at the same time a Member of their State's National Group (Brazil, Japan, Morocco, Russia, Slovakia and the United Kingdom). In addition, 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, 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* deemed to be 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' (Article 16 ICJ Statute) (→ Conflict of Interest).

31 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' (Article 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, 2012, 535).

4. Nomination of candidates for election to the International Criminal Court

(a) Discussion of the Role of National Groups in the Preparatory Stages of the Statute of the International Criminal Court

32 One of the many contentious issues during the preparation and negotiation of the ICC Statute related to the method of selecting its judges. The 1994 ILC Draft Statute on the Establishment of an International Criminal Court proposed direct nominations by ICC Member States (Article 6 (2) ILC Draft Statute). A 1995 preparatory committee introduced an additional possibility, namely (indirect) nominations by a nominating committee established by the Assembly of States Parties ('ASP'), or by the National Groups of the PCA. This option, it was suggested, would 'ensure that merit would be a paramount consideration in the election of judges' (Proceedings of the Preparatory Committee 12, para 37). As seen below, the ICC Statute eventually provided a compromise by offering States a choice between direct and indirect nominations.

(b) The Nomination Stage

33 The ICC 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. The selection of ICC judges takes place in a two-staged process consisting of nominations, followed by the election of candidates who obtain the highest number of votes and a two-thirds majority of Member States present and voting in the ASP (Article 36 ICC Statute read in conjunction with ICC-ASP/3/Res. 6 as amended, or 'ASP Resolution') (→ Election of judges (ICC)). Judicial vacancies are filled by applying *mutatis mutandis* the procedure as is used for regular elections (Article 37 ICC Statute read in conjunction with ASP Resolution, para 27).

34 Article 36 of the ICC Statute leaves the Member States the choice to nominate candidates either by following the procedure as laid down in the ICJ Statute in respect of ICJ judges (ie nominations by formally constituted or *ad hoc* National Groups), or by resorting to the domestic procedure for the nomination of candidates for appointment to that State's highest judicial offices. 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. There is no legal obligation for States to disclose which option they make use of (Mackenzie, 2010, 67). 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), and each nomination must be accompanied by a statement indicating how the candidate fulfils the requirements for judicial office as laid down in the ICC Statute and the ASP Resolution (ibid, para 6). Non-Member States which have started the process of joining the ICC have a conditional right to nominate candidates (ibid, para 7). The ASP Resolution further 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 (ibid, paras 10-12, 18-23, 27(c)-(d)).

35 Following the close of the nomination period the ASP secretariat sends an alphabetical list of candidates and supporting documentation (incl. the names of States who made the nomination) to the Member States (see eg ICC-ASP/13/3 for the 2014 regular elections, and ICC-ASP/13/44 for the 2015 election to fill a judicial vacancy). This information is also made available on the ICC website.

(c) Scrutiny of Nominated Candidates by the Advisory Committee on Nominations

36 The ICC system presupposes that Member States making a nomination bear the primary responsibility for checking whether the candidate in fact meets the requirements and qualifications for a judicial post. To guide States in this regard, the ASP decided in 2011 to establish the Advisory Committee on Nominations ('ACN') (Article 36 (4) (c) ICC Statute read in conjunction with ICC-ASP/10/Res. 5, para 19). Its task is one of 'of mere technical assessment' (ICC-ASP/10/36, Annex), and the resulting analysis on the fulfilment of judicial qualifications by nominated candidates is not binding on the ICC Member States (for the 2014 regular elections, see ICC-ASP/13/22, Annex I; for the 2015 election to fill a judicial vacancy, see ICC-ASP/13/46, Annex). In its report on the work of the third meeting, the ACN suggested that States explain in greater detail the procedure followed at the national level for nominating candidates for judge at the ICC (ICC-ASP/13/22, Annex II, Appendix III). This suggestion, if acted upon, will over time enable more insight into the number of States making nominations through their National Groups.

E. Additional Functions Carried Out by National Groups

37 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 undertaking given 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.

38 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* commends such wider involvement, noting 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, para 4).

39 A little known role of Members of National Groups is their authority, on account of their membership of an 'international court', to nominate candidates eligible for the Nobel Peace Prize (Special Regulations for the Award of the Nobel Peace Prize, para 3). Due to the so-called '50 years secrecy rule' the contemporary role of National Groups in making nominations is difficult to assess. This 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 any 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).

F. The Special Cases of Palestine and Kosovo

40 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, by a vote of 54 in favour and 25 abstentions that Palestine had indeed become a PCA

Member State. 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 cases are unique for at least two reasons. First, these have been the only cases in the history of the PCA where a decision to confirm the accession of a single contracting party is taken by way of voting in the Administrative Council. And second, at present Palestine and Kosovo are the only PCA Member State which are not at the same time a party to the UN Charter or the ICJ Statute. For both States, the institutional or procedural impact of this development is rather limited. The principle *pacta tertiis* (reflected in the Vienna Convention on the Law of Treaties) means that 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 which is not party to the ICJ Statute. Furthermore, membership of the PCA is not necessary for Palestine or Kosovo to be able to resort to arbitration under the aegis of the PCA (Article 26 1899 Convention; Article 47 1907 Convention). Their membership of the PCA is thus largely symbolical, apart from the right to form a National Group (thereby contributing to the pool of potential arbitrators who States may wish to appoint) and to participate with voting rights in the meetings of the PCA Administrative Council.

G. Evaluation

41 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 the emphasis has shifted. Whereas National Groups at the beginning of the twentieth century had only one prerogative (ie as lists of potential arbitrators), their subsequent complementary role in the selection of PCIJ, ICJ and ICC judges meant that the role of these groups is now primarily perceived as a nominating body.

42 The role accorded to National Groups in the nomination of international judges is based on the argument that in this way the direct influence of politics is excluded, or at least minimized. However, the foregoing shows that there are various factors, based on law and practice, which explain why (the potential for) governmental control or interference is still very much present. First and foremost, Members of National Groups are appointed by their State's government, and it is open for a State to appoint Members who may be more inclined than others to echo their State's preferences when making nominations. A second, often overlooked 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. 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 a Member State to the PCA's constituent instruments or because, even if they are, they have not created such a group). When these States appoint one or more individuals to form an *ad hoc* National Groups, they do so for the specific purpose of making nominations in an upcoming election.

43 Depending on the attitude of the State concerned, these factors may render nominations being 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). The potential difficulties arising out of the last two factors – ie premature withdrawals or replacements, and single-purpose *ad hoc* National Groups – could be mitigated by insisting that 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.

44 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 very much by the grace of their governments, and it appears that National Groups operate autonomously only to the extent that their government indeed allows them to exercise such an attitude independent from political considerations and influence.

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