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PRIDE AND PREJUDICE OR SENSE AND SENSIBILITY? A PRAGMATIC PROPOSAL FOR THE RECRUITMENT OF JUDGES AT THE ICC AND OTHER INTERNATIONAL CRIMINAL COURTS

Michael Bohlander*

Empirical research has shown that the selection and recruitment of judges at the international criminal courts may not always conform with the criteria set out in the courts' statutes, and that the requirements can differ from court to court. There is concern that judicial positions are handed out on the basis of membership in informal political networks, also called nepotism. This paper summarizes the previous findings and looks at the question of how an adequate standard of judicial candidates can be maintained across the entire system.

I. INTRODUCTION

A court is only as good as the judges who staff it. It has been said that “[t]he calibre and experience of the judges of the Court is essential for the success of the ICC.”¹ In previous publications² I have voiced doubts and

*Professor of Law, Durham Law School, U.K. The author held life tenure (1991–2004) in the German judiciary and served as the senior legal officer of a Trial Chamber at the ICTY from 1999 to 2001. I would like to thank Holly Cullen, Reader in Law, Durham Law School; Professor Dawn L Rothe, Old Dominion University, Norfolk (VA); and Stefan Kirsch, Rechtsanwalt, Frankfurt a.M., Germany, for helpful comments on earlier drafts. All views expressed and mistakes are mine.

1. Zhu Wen-qi & Sureta Chana, Article 36: Qualifications, Nomination and Election of Judges, in *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, n.1 (Otto Triffterer ed., 2d ed. 2008) [hereinafter Triffterer].

2. See Michael Bohlander, *The International Criminal Judiciary: Problems of Judicial Selection, Independence and Ethics*, in *International Criminal Justice: A Critical Analysis*

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added my own to those of others about whether the current procedure for selecting the judges of the international and hybrid criminal tribunals measures up to the required standard. The 2001 report on the ICTR by the International Crisis Group would appear to prove that I am not alone.³ Leaving aside recurrent charges of nepotism—i.e., political nominations for loyal and trusted party members or government officials, etc. by the government of the day—or package deals between states for high U.N. offices, the issue that this paper is meant to address and that at the end of the day is the crucial one is the following: How can we make sure that only those with the highest qualifications and the most relevant experience will be appointed to be judges at the ICC, or international criminal courts in general? In theory, even the beneficiaries of nepotism can be highly qualified, although research at the national level would appear to cast some doubt on this,⁴ so while nepotism is deplorable, it may not be a sufficient reason to doubt a candidate's aptitude for the job. However, comparisons⁵ with advertisements for judicial offices at the local level within the U.N. system, such as, for example, in Kosovo, have shown that many of the judges at the three great international criminal courts, the ICTY, ICTR, and ICC, would have stood no chance of obtaining a judgeship at a district

of Institutions and Procedures 325 (Michael Bohlander ed., 2007), with references to earlier articles.

3. "Beyond the official explanations and arguments about procedure or bad legal administration which are given ample space in the 1999 expert report, the judges are held responsible to a large extent for this unjustifiable situation. The poor output of the Tribunal is linked to the mediocre productivity of judges, some of whom are incapable of running criminal trials and to their often-prolonged absences. Moreover, in their work, the tribunal chambers, which deal with the most serious crimes in cases that are often dense and complex, have relied to an abnormal extent on young legal assistants, even on interns. Given this assessment, judges should be held accountable for their work. International Crisis Group recommends, in the first instance, that the selection of judges should be more rigorously organised and that candidates who have not had solid experience as a judge in criminal affairs should be rejected." International Crisis Group, *International Criminal Tribunal for Rwanda: Justice Delayed II* (June 7, 2001), available at <http://www.crisis-group.org/home/index.cfm?id=1649&l=1>.

4. See Michael Bohlander & Christian Latour, *The German Judiciary in the Nineties* (1998). The study found that on average judges at the German Federal Court of Justice (Bundesgerichtshof) who were members of a political party were less qualified than their brethren who had no party membership, but were promoted faster to the Federal Court than the non-party members.

5. Bohlander, *supra* note 2, at 354–55.

court in Kosovo because they require a minimum of ten years' practice in criminal cases and at least five years as a criminal trial judge. In other words, there is a huge discrepancy between the qualifications required for the grunt-work in a district court and the lofty heights of international justice in The Hague and elsewhere, which is after all setting the pace on a global scale and has a trickle-down effect as states adapt their systems to the emerging international standards. If anything, we cannot afford judicial amateurs at that level. Apparently, the people who negotiated the law on the qualifications of judges were overly guided by the way proceedings are run in the International Court of Justice, where speed is rarely of the essence and where none of the parties are held in detention pending trial.⁶ Coupled with the adoption of a cumbersome adversarial mode of procedure not required by the nature of the tribunals but imposed nonetheless by the overbearing influence of the common law countries, the lack of real criminal trial and case management experience of many of the judges at the ad hoc tribunals and the extensive use of young and inexperienced legal assistants have, among other factors such as less than perfect preparation of the prosecution case, led to a backlog of cases and resulted in the prolonged detention of accused, raising human rights challenges from the first days of the tribunals' operation.

I think it is fair to say that a lot will depend on the individual judge's attitude that determines how much control he will have and/or exercise over a case before him. Combine this with the fact that new judges are not given any training before they start in their new post and one has a recipe for trouble. This paper argues that the States Parties should do all they can to ensure that this danger born of the reliance on individual abilities and proclivities is rooted out to the extent possible and that all judges are enabled to hit the ground running the day they take office. It progresses from the assumption, explained in my previous work,⁷ that the present state of affairs does not come near such a standard. I make no bones, either, about my conviction that I consider diplomats, government officials, and academics ill-suited for such an important and complex judicial office, unless

6. In her recent Ph.D. thesis on lawmaking at the international tribunals, Nicole Ruth Schlesinger, Melbourne University, has found interesting evidence about state interaction and perceived conditions for interaction by the judges. The as yet unpublished thesis is on file with the author.

7. See Bohlander, *supra* note 2.

they have also had substantial judicial experience in complex criminal cases. I will try to set out proposals for achieving a state where all candidates for vacancies start from a similar position and are already fully conversant with the status quo of international criminal law when they or their governments declare their candidacy. International criminal justice is no place for on-the-job-training.

II. THE DEVELOPMENT AND STATE OF THE LAW AT THE ICC

Let us take a look at the law under the ICC Statute⁸ which is after all the main focus of this special issue; the situation at other courts is, however, not that different. There have so far been no rules or regulations made with respect to the qualifications of judicial candidates. The law is set out in Article 36:

Article 36

Qualifications, nomination and election of judges

....

3. (a) The judges shall be chosen from among persons of high moral character, impartiality and integrity who possess the qualifications required in their respective States for appointment to the highest judicial offices.

(b) Every candidate for election to the Court shall:

(i) Have established competence in criminal law and procedure, and the necessary relevant experience, whether as judge, prosecutor, advocate or in other similar capacity, in criminal proceedings; or

(ii) Have established competence in relevant areas of international law such as international humanitarian law and the law of human rights, and extensive experience in a professional legal capacity which is of relevance to the judicial work of the Court;

....

4.

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

....

8. U.N. Doc. A/CONF.183/9 (July 1, 2002), available at <http://www.icc-cpi.int/Menus/ICC/Legal+Texts+and+Tools/Official+Journal/Rome+Statute.htm>.

To date, there exists no advisory committee as envisaged by Article 36. The history of the ICC law on the issue of qualifications is far from uniform.⁹ Based on the experience of the ICTY, some countries in the Assembly of State Parties (ASP) wanted to introduce more practice-oriented criteria, but this met with little success. The *travaux préparatoires* to the ICC Statute are a testament to the power of diplomacy over practitioners' experience and concerns. Article 6 of the ILC Draft stated that candidates should have "in addition: (a) criminal trial experience; (b) recognized competence in international law" which under traditional interpretation rules would be read as a cumulative requirement. The ad hoc committee of the 1996 Preparatory Committee, under paragraph 20 of its report, stated that "concerning the appointment of the prosecutor, expertise in the investigation and prosecution of criminal cases was considered to be an important requirement," but that insisting on criminal or international law experience with the judges was seen by some as "unduly restricting the sources of expertise on which the court should be able to rely." Given that the Prosecutor as the head of the prosecution service at the ICC will hardly do much investigation and prosecution himself, that difference in approach appears doubtful. What the "sources of expertise" might be becomes evident from the comments by Algeria, Egypt, Jordan, Kuwait, Libya, and Qatar at the 1996 Prep Comm: "Experience in criminal matters (judicial prosecutorial or defense advocacy) is, in part, necessary, but not to the exclusion of other expertise. The words of Article 6 ' . . . for appointment to the highest judicial offices . . . ' are too limiting since most legal systems do not have judicial appointments by career judges. The present formulation means that only career judges are eligible, and therefore, this formulation should be changed." The United Kingdom argued for a phrase containing the words "criminal trial experience *and*, where possible, recognized competence in international law." This shows a commonsense approach to the necessities of judging, whether in a domestic context or in the international arena. Many delegates of the 1998 Diplomatic Conference thought that trial experience should at least be required for the judges of the Pre-Trial and Trial chambers. The insistence on previous practical experience together with or as an alternative to competence in international law can be found in the proposals of Switzerland, Portugal,

9. The following section is a modified excerpt of Bohlander, *supra* note 2, at 355–57. References have been omitted.

Singapore, Trinidad and Tobago, the United States, and France at the 1996 Prep Comm. Article 30[6] of the 1998 Zutphen Draft was an expression of the confusion and range of opinions that afflicted the negotiations, and the draft Article 37 put before the Rome Conference by the 1998 Prep Comm in A/CONF.183/2/ Add.1 was not much of an improvement either:

3. The judges of the Court shall:
 - (a) be persons of high moral character and impartiality [who possess all the qualifications required in their respective States for appointment to the highest judicial offices]; [and]
 - (b) have:
 - (i) [at least ten years'] [extensive] criminal [law] [trial] experience [as a judge, prosecutor or defending counsel]; [or] [and, where possible]
 - (ii) recognized competence in international law [in particular international criminal law, international humanitarian law and human rights law] ; and (c) possess an excellent knowledge of and be fluent in at least one of the working languages referred to in article 51].

The text of Article 37 transmitted by the Drafting Committee to the Committee of the Whole contains a reference to competence in criminal law and procedure gained through judicial or prosecutorial as well as defense experience or a similar capacity, and to competence in international law with reference to extensive professional legal capacity of relevance to the judicial work of the court. Any doubt as to whether these were meant to be cumulative or alternative requirements were dispelled by the final version of Article 36 of the Rome Statute, which inserted the word “or” between them—a regrettable move owed to diplomatic comity rather than common sense.

The Statute now reads “established” competence—yet one must be allowed to ask: Established by what method, on what grounds? Citation frequency index? Peer review? Membership of national or U.N. committees, government office, etc.? Equivalence to the jurists mentioned in Article 38 of the ICJ Statute? Neither the Statute nor the Rules or Regulations provide any further explanations. The two main commentaries on the ICC are silent on the matter.¹⁰ I have been both a judge and an academic and

10. Zhu Wen-qi & Sureta Chana, Article 36, in Triffterer, *supra* note 1, at nn.4–5; John R.W.D. Jones, Composition of the Court, in 1 *The Rome Statute of the International*

have seen both categories of people poaching in the domain of the other. I have no hesitation in saying that in my experience, (professional) judges usually do a better job at academic work than academics at judging. That should come as no surprise: Any domestic criminal judge can learn what there needs to be known about the development of international humanitarian and criminal law over the last 200 years in an eight-week intensive crash course and fill any remaining lacunae by reading the relevant materials. However, twenty years of criminal judicial and case management experience can only be gained through undergoing twenty years of criminal judicial and case management experience. Experience as an advocate or prosecutor alone will not provide the same experience. Countries with career judiciaries usually start new judges off in areas where their lack of experience will do the least damage, or they put them in collegiate panels where they can learn from more experienced colleagues. Countries without a career judiciary normally require a certain minimum professional experience in the law before they appoint to the bench, although the picture becomes a little bit more blurred there,¹¹ and I will not even dwell on the vast differences of experience that national systems require for someone to become a judge in the first place, and in order to be appointed to the highest judicial office.¹² Why should this sensible approach suddenly stop only because the office we appoint to is outside—and in fact often above—the national judiciary? Is it acceptable that new judges without any prior experience as a judge or even prosecutor or defense counsel in national or international trials are immediately appointed to the immensely influential ICTY/ICTR Appeals Chamber, as happened with a currently serving judge, without having to earn their spurs in trial work?¹³ Do undisputed achievements as an academic and expertise in humanitarian law really qualify one for such a stellar career in the international judiciary? What about candidates who have no legal education or professional training as

Criminal Court: A Commentary 242–44 (Antonio Cassese, Paola Gaeta & John R.W.D. Jones eds., 2002). In the chapter “Transnational,” in *The International Criminal Court: Recommendations on Policy and Practice* 153–55 (2003), Thordis Ingadottir gives a slightly more detailed picture but nothing expounding on the substance of the qualifications.

11. See Bohlander, *supra* note 2, at 357–62.

12. See *supra* note 10 and *infra* note 13.

13. See Press Release CVO/P.I.S./639e, ICTY (Nov. 23, 2001), available at <http://www.icty.org/sid/7931>.

a lawyer at all?¹⁴ Judge Patricia Wald has rightly said that judgment writing is not primarily about creating a historical record or developing international

14. See www.icc-cpi.int/asp/election_2007/cand_3.html. On the Japanese judicial career paths, see the paper by John O. Haley, *The Japanese Judiciary: Maintaining Integrity, Autonomy and the Public Trust*, available at <http://law.wustl.edu/higs/papers/lectures/2003-3HaleyJapaneseJudiciary.html>, where he states that the judges of the Japanese Supreme Court do not all have to be career judges, yet the law on Supreme Court judges requires the following:

Article 41 of the 1947 Court Organization Law

Justices of the Supreme Court shall be appointed from among persons of broad vision and extensive knowledge of law, who are not less than forty years of age. At least ten of them shall be persons who have held one or two of the positions mentioned in item (i) or (ii) for not less than ten years, or one or more positions mentioned in the following items for a total period of twenty years or more:

- (i) President (*chōkan*) of a high court
- (ii) Judge
- (iii) Summary court judge
- (iv) Public prosecutor
- (v) Lawyer
- (vi) Professor or assistant professor (*jōkyōju*) in law in universities as determined separately by statute.

“Extensive knowledge of the law” with a degree in English and a career in administration and foreign politics as an ambassador? The interpretation given for that term on the Web site of the Supreme Court of Japan at www.courts.go.jp/english/system/system.html#07 is:

Justices of the Supreme Court shall be appointed from among persons with a broad vision and extensive knowledge of law. At least ten Justices must be selected from among those who distinguish themselves as judges, public prosecutors, attorneys, and professors or assistant professors of legal science at universities; *the rest do not need to be jurists*. [emphasis added].

How one can obtain extensive knowledge of the law without being a jurist of some sort is open to question. Haley goes on to describe the procedure for appointing the Chief Justice:

Illustrative is the *Mainichi Shinbun* Social Affairs Bureau account of the appointment of Ryōhachi Kusaba as Japan’s twelfth Chief Justice in February 1990. Two months before the appointment, soon-to-retire Chief Justice Kyōichi Yaguchi visited the official residence of then Prime Minister Kaifu. The purpose was to inform the prime minister of the judiciary’s choice for his replacement; a choice made with the participation of the principal administrators of the judicial branch—all career judges themselves. Kaifu did not object. As one official is quoted to have said (translated into idiomatic English): “*We wouldn’t have the vaguest idea who anyone they might suggest was, and we wouldn’t have any way of finding out whether they would be suitable*.” The Supreme Court people have researched this. We trust their judgment.” A similar procedure has been followed in the appointment of every Chief Justice since 1962 [emphasis added].

In an e-mail of October 23, 2008 to the author, Professor Haley explained the following:

Until a couple of years ago even a practicing lawyer, judge or prosecutor need not have a law degree (undergraduate) as long as he or she had an undergraduate degree in some field and passed the entrance exam for admission to the Legal Training and Research Institute, formerly a two year training program that involved internships with a court (civil and criminal divisions), a prosecutors’ office, and a law firm, each with [sic] for three months. As the number

law,¹⁵ but about writing a ruling in the individual case. That is what judges are trained to do, in addition to their academic education. Had the wisdom behind her words been heeded from the beginning, I am sure that the judgments at the ICTY and ICTR would not have been nearly half as long as they turned out to be and still are. But I digress.

III. WHERE DO WE GO FROM HERE?

It seems likely that we are stuck with the substance of Article 36. Amending it to go back to a preponderance of criminal judicial experience to the exclusion of advocates, prosecutors, or criminal law academics or a separate category based on “established competence” in international humanitarian and human rights law is not really a realistic option. We need to get around the existing law in a way that no one can legitimately object to, namely by *de facto* combining the two categories. Although the current nominations for the 2009 judicial elections show that there is still a process of cross-fertilization going on between the *ad hocs* and the ICC—and the same applies to other international courts—this period will eventually pass. We must make provision for that time. If we had a pool of national judges that have solid experience in criminal trials and are fully conversant and up-to-date with the status quo and the developments in international criminal justice, what legitimate argument could be made by anyone to prefer to them instead an academic, a diplomat, or a government

of persons passing the entrance exam without a law degree (but almost always with extensive preparation for the exam) increased, a new Law School system was instituted. Although one could enter the now greatly curtailed (6 month) LTRI training program without having either an undergraduate or postgraduate law degree though a qualifying examination, few if any are anticipated.

Another example of the limited usefulness of the reference in Article 36 and similar provisions to the national laws on judiciaries.

15. Cited in Bohlander, *supra* note 2, at 326–27. In my eyes it is also a fallacy to believe that one could seriously attempt to build an accurate historical record based on the selected evidence presented by both prosecution and defense in the politically highly charged adversarial settings, with the judges not knowing what exculpatory evidence the prosecution may withhold and the defense being under no obligation to disclose any incriminating evidence. An experienced trial judge should have been far less likely to fall for that misapprehension than those who are used to walking the corridors of diplomatic and political power with their sweeping statements of intent and policy that are by necessity devoid of substantial declarations to which those who utter them could later be held.

official with no judicial experience, no matter how many books they have written, how many conferences they have attended and spoken at, or how many committees they have sat on? We all know what these conferences and committees are like. We all have been to and sat on some of them at one stage or another in our careers. We all have written articles and books. If that is what is meant by “extensive experience in a professional legal capacity which is of relevance to the judicial work of the Court,” does anyone honestly think that sort of work even begins to replace the experience of many years of learning to deal with victims and witnesses, assessing credibility, sifting through evidence, distinguishing relevant facts from irrelevant ones, balancing the interests of prosecution and defense against each other, acquiring case management skills, cooperating and deliberating on a collegiate panel as well as honing the craft of judgment writing to a fine art? Or does it not rather teach the art of compromise, some may say, that was employed by the Appeals Chamber in *Barayagwiza No. 2*,¹⁶

16. Prosecutor v. Barayagwiza, No. ICTR-97-19-AR72, Decision on Prosecutor’s Request for Review or Reconsideration (Mar. 31, 2000). That spirit of compromise appears to be alive and well in 2008: The ICC Appeals Chamber on October 21, 2008 overturned a decision by a Trial Chamber in the *Lubanga* case that had ordered the release of the accused because the proceedings had been stayed. See Prosecutor v. Lubanga, No. ICC-01/04-01/06 OA 12, Judgment on the Appeal of the Prosecutor Against the Decision of Trial Chamber I Entitled “Decision on the Release of Thomas Lubanga Dyilo” (Oct. 21, 2008) [hereinafter OA 12], with a dissenting opinion by Judge Pikis. On the same day, it affirmed the stay ordered by the Trial Chamber because in the view of the Trial Chamber the disclosure practice of the Prosecutor made a fair trial impossible. See *id.*, No. ICC-01/04-01/06 OA 13, Judgment on the Appeal of the Prosecutor Against the Decision of Trial Chamber I Entitled “Decision on the Consequences of Non-disclosure etc.” (Oct. 21, 2008) [hereinafter OA 13]. The stay was treated as conditional in OA 12 and 13, an interpretation that was justifiable on the basis of the wording of the Trial Chamber’s decision. However, the Appeals Chamber ordered the continued detention of Lubanga and referred the case back to the Trial Chamber for reconsideration under those “sailing orders.” The Appeals Chamber in all seriousness appeared to ask the Trial Chamber to consider the offers made by the U.N. to allow the judges to see the material in a room in the Peace Palace, but where they would not be allowed to make notes; they could make notes outside the room and a representative of the U.N. would at all times have to be present in the room, thus perhaps being privy to deliberating conversations of the judges; full documents would not be made available, but only summaries. This approach, if that was indeed the Appeals Chamber’s attitude, would betray a fundamental lack of understanding of and disrespect for the judicial process by the U.N. and is a prime example of diplomatic interference. The unfairness extant at the time of the Trial Chamber decision, moreover, would thus have continued in all likelihood. See OA 12, ¶ 41. How the Appeals Chamber thought that this

when it reversed its previous decision because Rwanda threatened to cease its cooperation after the accused had been ordered to be released based on prosecutorial misconduct—compromise being an art that belongs in the poison garden of judicial activity in criminal proceedings?

What we therefore need to do is to arrive at a state of affairs where the choice between the two categories is one of theory only, not of practice, because the selecting bodies would be presented with a pool of judicial candidates who have the necessary experience and have been thoroughly

unworthy procedure could alleviate the concerns of the defense is open to question. Only Judge Pikis, who treated the stay as permanent despite the ambiguous language of the Trial Chamber, actually realized the consequence of the stay for the liberty of the accused: The proceedings are unfair and cannot proceed at the moment, based on the conduct of the Prosecutor. The trial is therefore over unless the Prosecutor can remedy the defects. Combined with the presumption in favor of the liberty of the accused, who is after all still protected by the presumption of innocence, the inevitable conclusion was indeed the immediate release. Anything else would mean, as Judge Pikis—who has a substantial judicial background—rightly said, a preventative detention on the off-chance that the Prosecutor would get it right some day—see OA 12 Dissenting Opinion, ¶¶ 13, 16–17. That the Appeals Chamber thought that, after two years and six months of custody and a lamentable performance over many months by the Prosecution and the U.N., the human rights limit for a violation of the right to a speedy trial as a permanent bar on custody had not been reached, is difficult to accept. The Appeals Chamber had a chance to say “The buck stops here!”; instead, they passed it back to the Trial Chamber.

Does it have to do with the background of the majority? It is, of course, difficult to establish a monocausal connection, but the following can be said: The other judges in this case had mostly little experience as practitioners, let alone as judges, and although they have professional legal qualifications, much of their actual careers appear to have been spent in government-related work, academia, or diplomacy. Judge Kourula’s CV lists him as having served as a district judge in 1979 (www.icc-cpi.int/library/asp/ICC-ASP_ej2_fin_cv_En.pdf); Judge Kirsch has no judicial experience although he is a member of the Quebec bar and was made a QC in 1988 (www.icc-cpi.int/presidency/president.html, accessed on 23 October 2008); Judge Song was a Judge Advocate in the Korean Army from 1964 to 1967, i.e., a military prosecutor for the first six months and a military judge for two and a half years (www.icc-cpi.int/library/asp/ICC-ASP_ej2_kor-cv.pdf); Judge Nsereko has been an advocate in criminal cases since 1972, but has no judicial experience, either (www.icc-cpi.int/library/asp/CV_English.Uganda.19_july_2007.pdf). It is, however, surprising to see that the judges who had experience as advocates subscribed to the majority view. One would have thought that they of all people would understand the point of view of the defense.

The stay has been lifted in the meantime after an admirable and gargantuan effort by the Trial Chamber, presided over by British High Court Judge Adrian Fulford, to make the Prosecution (and the information providers) comply to the extent possible with the duties toward the court and the defense. See *Lubanga*, No. ICC-01/04-01/06-1644, Reasons for Oral Decision Lifting the Stay of Proceedings (Jan. 23, 2009).

trained in the international law aspects of their work. We also need to establish trans-systemic minimum quality levels. To achieve this end, I propose the following:

- *Establishment of an international pool of candidates—a judicial task force*

UNMIK has led the way in showing how, for a regional and local court system with an international element, the creation of a pool of adequate international candidates is necessary and feasible in order to ensure maximum efficiency in recruiting new judges when necessary. This is evidence of prudent planning. However, the strictures and requirements of a national operation such as UNMIK are not the same as those for an international criminal court. The training aspect must receive a much greater emphasis in the selection process. Given that the number of candidates required at any given time is not that high, the membership of the pool need not be very large, but it should be continuously replenished as necessary. A smaller pool would also guarantee that the body electing candidates to the pool would be able to pick only those with the highest qualifications. To the extent possible within the quality requirements, the pool selectors should strive for ethnic and gender balance.

- *A U.N.- or ASP-based administration*

The administration of the pool of candidates should be in the hands of an international body to ensure uniformity of training. There should be no automatic right of states to nominate candidates to the pool, but selection should be made by the administering office on merits alone. This could be the U.N. if the pool was to be used for all international/ized courts, or a subcommittee of the ASP, for example, the Advisory Committee mentioned in Article 36 if it was only to be done for the ICC. I prefer the former, which would still leave the ASP enough room for cooperation. It would also allow for the inclusion of any other international criminal tribunals. The actual training could be performed by internationally qualified trainers at the national judicial academies of the States Parties, so there would be no need to create a new institution at the international level.

- *Selection from judiciaries of states*

Candidates for the pool would be selected from the national professional judiciaries only. Depending on the system, public prosecutors might also be included, but that would need careful consideration of

their status with respect to the national judiciaries, e.g., what degree of independence do they enjoy. The experience as a prosecutor—or defense counsel at that—alone does not normally equate fully to the responsibilities and skills required of a judge.

- *Minimum experience as criminal trial judges before inclusion in pool*
All candidates would have to show a minimum period of practical experience in judicial criminal trial work, to which to some extent experience as a defense counsel or public prosecutor could be credited as an added value. Again, as in the previous paragraph, this would need very careful consideration. The fact that some systems do not use career judiciaries and that consequently their candidates might not be considered as sufficiently experienced is not a justifiable argument for reducing the quality of the personnel staffing the courts. If their candidates need to be older than those of other countries in order to gain comparable experience, so be it.
- *Minimum and maximum age requirements*
Although this may irritate proponents of age equality, I feel that common sense dictates that candidates for international courts should have seen enough of the world and have the necessary maturity for the complex and intellectually as well as emotionally draining work in criminal trials dealing with atrocities of the kind we are talking about. They should also still be physically and mentally fit for the job. As a first suggestion, nobody should be appointed under the age of 45 or above the age of 60. National retirement ages are there for a reason; there is no cause to think that people who have to retire from their national judicial posts because of their age will not face similar if not more serious burdens in an international setting. If pool members cross the maximum age limit without having been appointed to an international judgeship, they should automatically lose their pool member status.
- *Command of languages*
It goes without saying that those elected to the pool would already have to have an excellent command of English as the main *lingua franca* in international law. They should be examined formally on that. To the extent possible, pool members with a sufficient command of another language likely to be used as a working language should receive further training in it. All pool members should be rigorously trained in legal terminology and the attendant substantive and procedural concepts connected to it.

- *Regular continuing professional development (CPD) of the members of the pool*

The training of the pool members in the international law aspects of criminal justice should occur on a regular basis, at previously set intervals recognized by their national justice administration as part of their judicial duties, and should be considered as performance capable of leading to national promotion, to give people an incentive to apply for the pool. After an initial intensive and longer training period there should be at least two courses per year to keep the pool members updated. Training should not only cover the international law proper, but also the understanding of common law and civil law approaches, of different procedural models and the consequences for the proceedings in practice, such as, for example, drafting of decisions and judgments. It should also include some kind of moot court training in the models used in international criminal courts. Participation in the training should be mandatory and be monitored, as with national CPD programmes, by certification of CPD points. Nonattendance should lead to a loss of pool membership.

IV. CONCLUSION

This short paper can, of course, only scratch the surface of the problems of judicial qualifications. Yet, I hope to have shown that it is no longer acceptable, and indeed no longer necessary, to rely on the haphazard method of allowing national governments or even obscurely constituted “selection committees”¹⁷ to nominate candidates who may or may not be qualified for these demanding posts. We should strive to attain a state of affairs where all the candidates are equally qualified in the international law aspects and have comparable judicial experience. In this manner, as far as the ICC is concerned, we could formally keep the questionable “or” in Article 36 ICC Statute and surreptitiously let it transmogrify into a reasonable “and.”

17. As, for example, with regard to the international judges for the Lebanese Tribunal; see the interview with Nicola Michel at www.globalpolicy.org/intljustice/tribunals/lebanon/2007/0612nicolamichel.htm: “As to the international ones, the member states will submit proposals after we open the way for nominations. All these applications have to be subject to the advice of the selection committee which will present its recommendations to the U.N. secretary general.”