

Call for ICC to Learn ICTY Election Lessons

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Campaigners want the ICC's system for electing judges to be more open than that of the Hague tribunal.

A number of tribunal watchers and non-governmental organisations are calling for the newly-formed International Criminal Court, or ICC, to learn from the Hague's experiences and allow for greater transparency in the election of judges.

The call came after the General Assembly of the United Nations held its final elections to select fourteen judges for what is expected to be the last five years of the International Criminal Tribunal for the former Yugoslavia in The Hague.

On November 19, the assembly re-elected all but one of the tribunal's existing permanent judges, with Judge Christine Van Den Wyngaert of Belgium replacing the outgoing judge Mohamed Amin El-Abbassi El Mahdi of Egypt.

While the experience and quality of the Hague tribunal judges elected last week is not being questioned, there have been allegations that some of the appointments are the result of excessive lobbying and political pressure from UN member states. As a result, there has been a call for greater transparency in the nomination and election processes of future war crimes proceedings – specifically those held for the ICC.

The Coalition for the International Criminal Court, CICC – an umbrella organisation for tens of NGOs worldwide who had campaigned for the establishment of the new court – is proposing that a reformed nomination and election process be put in place for the latter, to discourage what it sees as “deal brokering” during the Hague elections.

“NGOs really think that there is something very wrong with [the Hague election procedure], especially the nomination process,” said the CICC's Caroline Baudot.

“ [Some] people are [being put forward] without any transparency, procedure or evaluation of qualifications. It is based on political deals and vote trading. We don't want this to happen at the ICC.”

This criticism was echoed by some tribunal observers and former judges alike.

“It is a very ugly process,” said William Schabas, the executive director of the Irish Centre for Human Rights and the co-author of the book *Slobodan Milosevic on Trial: A Companion*. “States campaign ferociously for their candidates. They can be quite aggressive and very competitive. There is a lot of horse-trading going on.”

The first generation of judges did not need to campaign for their re-election, but the process changed over the years and turned into a complex social and political exercise.

Observers, court insiders and members of various UN representations in New York told IWPR that the would-be Hague judges have to spend anywhere from a few days to a few weeks in New York, attending luncheons and meetings with the representatives of their states and other countries whose votes are being sought.

“The election process itself is an excruciating one,” said a former Hague tribunal judge who spoke under the condition of anonymity.

The judge – who was re-elected on that occasion – said that the bulk of the bargaining went on in a room called the “Malaysian Room, which is “large enough to seat hundreds of people”.

“I was introduced to diplomats, and then sat in a chair while my minders wheeled and dealt over my head, [saying things such as] ‘If you vote for our candidate in this election we will vote for yours in the Committee for the Rights of the Child’, or some such UN body.

“Of the thirty or more diplomats to whom I spoke, only one asked me a question that was even remotely relevant to my capacity or suitability to be a judge of an international criminal tribunal. Suitability just did not figure in the vote.”

Another former tribunal judge, Gabrielle Kirk MacDonald of the United States, said that many judges “aren’t political animals, shaking hands and patting people on the back” and may feel out of their place campaigning for themselves. “But that’s the way it is done now,” she said. “Everyone does it.”

But others do not see such campaigns as a real problem.

While the Hague tribunal and the UN would not respond directly to the criticism, Marco Suazo, the deputy ambassador of the permanent representative of Honduras to the UN told IWPR he had “no problems” with the trading process because “normally we get pretty well qualified candidates” for the Hague tribunal posts.

David Donat-Kattin, legal advisor for the NGO Parliamentarians For Global Action, said that the alleged “trading” was not necessarily a problem.

“It is just part of the negotiation process,” he said. “And it’s fine as long as this leads to good results and the best judges are elected.”

There are no hard and fast rules as to how an individual member country selects its candidates. Some countries have strict requirements, while others do not appear to have any official criteria at all.

Suazo of Honduras explained that his country’s foreign affairs ministry asked for nominations from the country’s key judicial institutions, and then chose which candidate to put forward.

The representatives in the UN missions of the United States told IWPR there was no formal nomination process in place. “We never advertise, but we certainly consult with people. However there is no formal process,” said Judith Osborn in the legal department of the State Department’s UN relations office.

A spokesperson for the German mission in the UN said the nomination of its potential Hague tribunal judges took place in Berlin and was a “complex process, based mostly on judges’ qualifications” and involving several different ministries.

The CICC believes that aside from the state-level nomination process, the ICC can also improve on the Hague tribunal's campaigning process and the elections themselves.

William Pace, convener of the CICC, believes that greater public scrutiny is the best way forward for the new international court. Over time, he hopes that his NGO can create "something like an elections committee so that any improper nomination process is corrected before the [ballot is] allowed".

A detailed web page with information about proposed candidates, including full curriculum vitae and transcripts of interviews conducted by the CICC, was deemed to be effective in the last round of elections to the Hague tribunal.

"We identified a number of very under-qualified candidates, including [some] that had not even read the Rome Statute," Pace claimed, adding that none of these allegedly under-prepared judges had been elected.

Observers note that some perceived flaws in the Hague tribunal's system have already been rectified in the ICC's statute.

For example, while the Hague election system merely "recommended" that judges be elected on equal gender and geographical terms, the ICC ballot makes it mandatory. Voters must choose equal numbers of male and female candidates – at least six of each – and a wide geographical area must be reflected in the final choice. In addition, candidates must have expertise in either criminal or international law. Ballots which do not satisfy these strict criteria will be declared invalid.

Longer terms of service have now been incorporated into the ICC. One-third of the judges are elected for a three-years, a further third for six, and the remainder nine.

The different lengths of service are supposed to provide for a staggered election system to avoid the tribunal problem of having all judges up for election or re-election at once. In addition this staggered system allows people to give each candidate closer scrutiny.

The judges who were elected for the three-year term will be allowed to stand for re-election only once, after which they will be deemed ineligible. The judges elected for six or nine years will not be considered for re-election at all.

Another reason why the ICC electoral process is seen to be an improvement over that used for Hague judges is that as the former is not a part of the United Nations, there is less scope for one member state to put political pressure on another.

"You will still have political involvement - that won't end completely," warned Pace, adding that, in time, the fact that the ICC is a permanent rather than ad hoc court should lead to greater levels of professionalism and commitment.

"You will have a growing body of individuals who have served in international judicial bodies and there [will be an increased] effort to identify who will be [best] qualified," he said.

Former Hague tribunal judge MacDonald agrees that the best way to take the judges' qualifications and experience into consideration is to assess their performance in court.

“I can understand that countries may want to meet the judges, and that is important,” she said.

“But I would say they need to come to the court and see them in action, rather than to relate to them over coffee or dinner. The way to gauge a judge's performance is to see him in courtroom and not over hors d'oeuvres.”

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