
Electoral Success at the ICC: A State-Level Analysis

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Abstract

This article seeks to understand why some candidates are elected to the International Criminal Court (ICC) bench, while others are not, using a state-level analysis between the years 2003 to 2020. Two interrelated analyses are used. The first measures the levels of judicial representativeness based on geography, gender, and expertise. This provides a conceptualization of ‘electoral success’ that is then situated within state-level judicial nomination processes to better understand the level of judicial representation on the ICC bench by state. The overall argument is that three types of states have had the most judicial electoral success at the ICC: (i) states that have contributed the most financially to the Court; (ii) states that have allocated the necessary amount of human resources to ensure that their candidates were successfully elected, especially in the form of vote trading and diplomatic lobbying; and (iii) states where the ICC is, or has been, involved in an investigation. The problem of politicization at both the domestic and international level(s) permeates the analysis herein.

1 Introduction

It is generally accepted that the performance of judges will affect the institutional legitimacy and credibility of an international court, and this is especially the case where a tribunal faces the degree of scrutiny that the International Criminal Court (ICC) does.¹ In the Court’s nascency, scholars and observers have identified serious

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¹ See, e.g., Y. Shany, *Assessing the Effectiveness of International Courts* (2014); Open Society Justice Initiative, *Raising the Bar: Improving the Nomination and Election of Judges to the International Criminal Court*, 28 October 2019, available at www.justiceinitiative.org/publications/raising-the-bar-improving-the-nomination-and-election-of-judges-to-the-international-criminal-court; Y. Al-Khudayri, ‘Raising the Bar Further: Professional Development for ICC Judges’, *International Justice Monitor*, 10 June 2020, available at www.ijmonitor.org/2020/06/raising-the-bar-further-professional-development-for-icc-judges/; K. Jon Heller,

problems with national nomination procedures for selecting judicial candidates and with the collective practices that have been normalized at the international level by the Assembly of States Parties (ASP) when electing ICC judges.² To be sure, the politicization of these state-based processes has directly affected the makeup of the bench in discernible ways. The construction of the bench can only be partially explained by the institutional design of the ICC – that is, the relevant sections of the Rome Statute that encourage states parties to consider fair and equitable judicial representation based on gender, geography and expertise.³ While the notion of wholesale judicial ‘representativeness’ on the bench ebbs and flows with each election cycle to mixed degrees, a state-level analysis reveals some patterned consistencies with respect to the electoral success of some candidates.

The primary aim of this article is to better understand why some ICC judicial candidates are elected while others are not. To do so, it is necessary to situate the election process within the political context in which it operates – that is, to evaluate how national nomination processes and/or international election practices might influence the likelihood of a candidate’s success in an ICC judicial election. To this end, this analysis first measures levels of judicial representativeness on the ICC bench based on geography, gender and expertise from the years 2003 to 2020. This consideration offers a conceptualization of ‘electoral success’ that can then be situated in relation to state engagement with ICC judicial nomination processes, which reveals

‘Judge Ozaki Must Resign – or Be Removed’, *Opinio Juris*, 29 March 2019, available at <http://opiniojuris.org/2019/03/29/judge-ozaki-must-resign-or-be-removed/>, accessed 24 June 2021; D. Guilfoyle, ‘Part II – This Is Not Fine: The International Criminal Court in Trouble’, *EJIL Talk!*, 22 March 2019, available at www.ejiltalk.org/part-ii-this-is-not-fine-the-international-criminal-court-in-trouble/; D. Robinson, ‘The Other Poisoned Chalice: Unprecedented Evidentiary Standards in the Gbagbo Case? Part 1’, *EJIL Talk!*, 5 November 2019, available at www.ejiltalk.org/the-other-poisoned-chalice-unprecedented-evidentiary-standards-in-the-gbagbo-case-part-1/; T. Lingsma, ‘ICC Judges at Centre of Controversy’, *Justice Info*, 16 May 2019, available at www.justiceinfo.net/en/tribunals/icc/41447-icc-judges-at-centre-of-controversy.html; O. Owiso, ‘Remuneration Debacle at the International Criminal Court: Should ICC Judges Get a Pay Rise? Part I’, *Opinio Juris*, 23 December 2020, available at <http://opiniojuris.org/2020/12/23/remuneration-debacle-at-the-international-criminal-court-should-icc-judges-get-a-pay-rise-part-i/>; O. Owiso, ‘Remuneration Debacle at the International Criminal Court: Should ICC Judges Get a Pay Rise? Part II’, *Opinio Juris*, 23 December 2020, available at <http://opiniojuris.org/2020/12/23/remuneration-debacle-at-the-international-criminal-court-should-icc-judges-get-a-pay-rise-part-ii/>; K.J. Heller, ‘Problematic Statements by the French Judge at the ICC’, *Opinio Juris*, 5 March 2019, available at <http://opiniojuris.org/2019/05/03/problematic-statements-by-the-french-judge-at-the-icc/>.

² See generally Y. Al-Khudayri and C. de Vos, ‘Excellence, not Politics, should Choose the Judges at the ICC’, *Justice Initiative*, 28 October 2019, available at www.justiceinitiative.org/voices/excellence-not-politics-should-choose-the-judges-at-the-icc ([n]ominations and elections of judicial candidates often overlook merit-based considerations in favor of political interests). See also A. Trigoso, ‘The Politics of Electing ICC Judges: Some Unpopular Thoughts’, *Justice in Conflict*, 22 October 2020, available at <https://justiceinconflict.org/2020/10/22/the-politics-of-electing-icc-judges-some-unpopular-thoughts/>; A. Mudukuti, ‘A Look at OSJI’s Raising the Bar: Improving the Nomination and Selection of Judges at the International Criminal Court’, *Opinio Juris*, 24 November 2019, available at <http://opiniojuris.org/2019/11/24/a-look-at-osjis-raising-the-bar-improving-the-nomination-and-selection-of-judges-at-the-international-criminal-court/>; Carcano, ‘On the Exercise of the Judicial Function at the International Criminal Court: Issues of Credibility and Structural Design’, *67 Questions of International Law* (2020) 3.

³ Rome Statute of the International Criminal Court (Rome Statute) 1998, 2187 UNTS 90, Art. 36.

the correlative success rate of judicial representation on the ICC bench by state. The overall conclusion is that, between the years 2003 and 2020, three types of states have had the most judicial electoral success at the ICC: (i) states that have contributed the most financially to the Court; (ii) states that have allocated the necessary amount of human resources to ensure that their candidate was successfully elected, especially in the form of vote trading and diplomatic lobbying; and (iii) states where the ICC is, or has been, involved in an investigation. The point is not to criticize the ICC judges as individuals but, rather, to challenge how and why the states parties have nominated and elected some candidates over others, which illuminates deeper-seated political problems that have, at times, hampered perceptions of the Court's institutional credibility and legitimacy.

2 Institutional Design: Judicial Election Processes Enumerated in the Rome Statute

Article 36 of the Rome Statute sets out criteria for the qualification, nomination and election of judges. Judges are to be 'persons of high moral character, impartiality and integrity who possess the qualifications required in their respective States for appointment to the highest judicial offices'.⁴ Judges are nominated by states parties and are elected by secret ballot by the ASP for a non-renewable (maximum) nine-year term. The ICC bench is comprised of eighteen judges, elected by the ASP. For electoral votes to count, a two-thirds majority of the states parties must be present and actively participating at the meeting.⁵ All states parties to the Rome Statute are able to nominate one candidate per election cycle. The candidate need not be a national of the nominating state but must be a national of a state that is a signatory to the Rome Statute.

The Rome Statute breaks down specific representativeness requirements that directly influence the makeup of the bench. Candidates are required to be fluent in at least one of the working languages of the Court – namely, English and/or French.⁶ Member states are required to consider nominating and electing candidates who will provide a fair representation of the various legal systems of the world, equitable geographic representation and a fair representation of female and male judges, and no two judges can be nationals of the same state.⁷ As a matter of practice, the ASP has implemented minimum voting requirements to achieve the representation and inclusion described in the Rome Statute based on expertise, geography and gender.⁸ Geographic representation is based on the five regions defined by the United Nations (UN) – that is, the

⁴ *Ibid.*, Art. 36.3(a).

⁵ International Criminal Court (ICC), 'The Judges of the Court', available at www.icc-cpi.int/Publications/JudgesENG.pdf.

⁶ Rome Statute, *supra* note 3, Art. 36(3)(c).

⁷ *Ibid.*, Arts 36(7), 8(a).

⁸ Assembly of States Parties (ASP) to the Rome Statute, Procedure for the Nomination and Election of Judges, the Prosecutor and the Deputy Prosecutors of the International Criminal Court, Doc. ICC-ASP/3/Res.6, 10 September 2004.

Western European and Other States Group (WEOG), the Group of Eastern European States (EESG), the African States Group (ASG), the Asia-Pacific States Group (APSG) and the Group of Latin American and Caribbean States (GRULAC). The Rome Statute also specifies the need to include judges with legal expertise on issues such as violence against women and children.⁹ In terms of judicial competence, candidates are elected from either ‘List A’ if the candidate has competence and experience in criminal law and procedure or ‘List B’ if the candidate has competence and experience in international law, such as international humanitarian law or international human rights law.¹⁰ The Rome Statute enumerates that at least nine candidates must be elected from List A and at least five candidates must be elected from List B.¹¹

In combination, the representativeness requirements outlined in the Rome Statute that have been implemented by the ASP provide diplomats with a clear framework to elect a diverse and equitable bench. Nevertheless, it is up to the states parties to nominate and elect the best possible candidates while remaining mindful of the representativeness requirements specified within the institutional design of the Rome Statute. From a more practical standpoint, there have been 61 judicial vacancies at the ICC that have been filled by ASP elections since 2003.¹² The results of the judicial elections from 2003 to 2020 indicate the ASP’s prioritization of the representative requirements enumerated in the Rome Statute when electing ICC judges, and has been illustrated in the tables provided in this article. It is important to note that the first election in 2003 set up the first bench with 18 judges serving either three-, six- or nine-year terms. As a result of this initial setup, the usual election cycle is staggered and fills six vacancies per election. From 2003 to 2020, there were six usual elections to fill six vacancies (2006, 2009, 2011, 2014, 2017, 2020) and four special elections to fill vacancies resulting from the resignation or death of a sitting judge mid-term (2007 – three vacancies; 2009 – two vacancies; 2013 – one vacancy; 2015 – one vacancy) (see [Tables 1, 2, 3](#)).¹³

What is perhaps most striking based on the representativeness factors illustrated by [Tables 1, 2](#) and [3](#) is the EESG’s recurrent under-representation on the bench throughout the Court’s history.¹⁴ It is instructive to point out that the first nomination period for the election of judges took place from 9 September 2002 to

⁹ Rome Statute, *supra* note 3, Art. 36(8)(b).

¹⁰ *Ibid.*, Arts 36(3)(i), 36(3)(ii).

¹¹ *Ibid.*, Art. 36(5).

¹² Note that this includes the elections conducted to fill judicial vacancies created by the resignation and/or death of previously elected judges during their tenure. Election years include 2003 (18 vacancies); 2006 (six vacancies); 2007 (three vacancies); 2009 (six vacancies); 2011 (six vacancies); 2013 (1 vacancy); 2014 (six vacancies); 2015 (one vacancy); 2017 (six vacancies); and 2020 (six vacancies).

¹³ Note that the number of overall candidates per election cycle has varied. More specifically, the number of candidates nominated by state parties per election cycle were as follows: 2003, 43 candidates; 2006, 10 candidates; 2007, 5 candidates; 2009, 19 candidates; 2009(b), 5 candidates; 2011, 19 candidates; 2013, 2 candidates; 2014, 17 candidates; 2015, 2 candidates; 2017, 12 candidates; 2020, 18 candidates. This analysis does not include candidates that were nominated by state parties but withdrawn prior to the election.

¹⁴ It is important to note that the Group of Eastern European States (EESG) has the smallest number of states parties (per region) – 18 states. Yet the EESG has consistently nominated an equitable number of candidates to the judiciary to the other regions. Therefore, the EESG can be treated equitably in the analysis since it is not the relative number of state parties that is explanatory but, rather, the relative value that the ASP places on those candidates, as significant for the purposes of this work.

Table 1: Gender representation on the ICC bench 2003–2020

Election year	Male	Female
2003	11	7
2006	3	3
2007 (3 vacancies)	2	1
2009(a)	2	4
2009(b) ^a (2 vacancies)	0	2
2011	4	2
2013 (1 vacancy)	1	0
2014	6	0
2015 (1 vacancy)	1	0
2017	1	5
2020	2	4
Total	33	28

Notes: ^a In 2009 there were two elections to fill judicial vacancies. The first was a regular election in January. The second was a special election to fill two vacancies in November, which was created by the inability of Mr. Mohamed Shahabuddeen (Guyana) to assume his duties as judge, and the passing away of Judge Fumiko Saiga (Japan).

Table 2: Representation based on expertise on the ICC bench, 2003–2020

Election year	List A	List B
2003	10	8
2006	2	4
2007 (3 vacancies)	2	1
2009(a)	3	3
2009(b) ^a (2 vacancies)	1	1
2011	5	1
2013 (1 vacancy)	1	0
2014	3	3
2015 (1 vacancy)	0	1
2017	5	1
2020	3	3
Total	35	26

Notes: ^a In 2009 there were two elections to fill judicial vacancies. The first was a regular election in January. The second was a special election to fill two vacancies in November, which was created by the inability of Mr. Mohamed Shahabuddeen (Guyana) to assume his duties as judge, and the passing away of Judge Fumiko Saiga (Japan).

30 November 2002. During that time, the EESG had 12 states parties to the Rome Statute.¹⁵ Seven of those states nominated a judicial candidate in the 2003 election, which constituted a 58 per cent engagement rate on the part of the EESG parties

¹⁵ These states included, in chronological order of Rome Statute ratification: Croatia, Serbia, Poland, Hungary, Slovenia, Estonia, North Macedonia, Bosnia and Herzegovina, Bulgaria, Romania, Slovakia and Latvia. For the purposes of comparison, the Western European and Other States Group (WEOG) had 25 states parties to the Rome Statute (indeed, all the states parties at the time of writing from WEOG had ratified by 29 November 2002); 21 from the African States Group (ASG); 16 from the Group of Latin American and Caribbean States (GRULAC) states; and 11 from the Asia-Pacific States Group (APSG).

Table 3: Geographic representation on the ICC bench 2003–2020

Election year	WEOG	GRULAC	EESG	ASG	APSG
2003	7	4	1	3	3
2006	2	0	2	1	1
2007 (3 vacancies)	1	0	0	1	1
2009(a)	2	1	0	2	1
2009(b) ^a (2 vacancies)	0	1	0	0	1
2011	1	2	1	1	1
2013 (1 vacancy)	0	1	0	0	0
2014	2	0	2	1	1
2015 (1 vacancy)	0	0	0	0	1
2017	2	1	0	2	1
2020	1	3	1	1	0
Total	18	13	7	12	11

Notes: ^a In 2009 there were two elections to fill judicial vacancies. The first was a regular election in January. The second was a special election to fill two vacancies in November, which was created by the inability of Mr. Mohamed Shahabuddeen (Guyana) to assume his duties as judge, and the passing away of Judge Fumiko Saiga (Japan).

in the first ICC judicial election. Therefore, the subsequent lack of representation cannot be explained by regional apathy.¹⁶ Yet only one candidate from the EESG was ultimately elected by the ASP to the ICC bench in 2003 in the ninth round of voting (of 33 rounds).¹⁷ The EESG's representation on the bench increased by one judge in 2006, replacing a judge from the APSG, which effectively reduced the overall representation of the APSG to two judges (from three). This indicates that the ASP attempted to somewhat self-correct the representative issue at its first electoral opportunity. Indeed, this shifted regional representation to seven judges from WEOG, four judges from GRULAC, three judges from the ASG, two judges from the APSG and two judges from the EESG. The EESG's under-representation remained constant until 2011, when the judge from Czech Republic was successfully elected and joined the remaining previously elected judges from Bulgaria and Latvia. The EESG maintained three judges on the bench from 2011 to the time of writing: seven ICC judges had been successfully elected to the ICC bench from the EESG, comprising only 11 per cent of total judgeships between the years 2003 to 2020.¹⁸ To be sure, the EESG

¹⁶ These states included: Bulgaria (List B, male); Croatia (List B, male); Hungary (List A, male); Latvia (List B, female); Poland (List A, female); Romania (List B, male); and Slovenia (List A, male). For the purposes of comparison, at the first judicial election, WEOG nominated 12 candidates, the ASG nominated 10 candidates, GRULAC nominated eight candidates and the APSG nominated six candidates. This suggests a correlative relationship between the number of state parties per region and the number of total nominations from that region.

¹⁷ Anita Ušacka, a female judge from Hungary, was elected from List B in 2003. Her initial three-year term was renewed for an additional six years at the ASP election in 2006.

¹⁸ See Table 1. This can be compared to 18 total judges from WEOG (30 per cent of total judgeships from 2003 to 2020); 11 judgeships from the APSG (18 per cent of total judgeships from 2003 to 2020); 12 judges from the ASG (20 per cent of total judgeships from 2003 to 2020); and 13 judges from GRULAC (21 per cent of total judgeships from 2003 to 2020).

has had the least number of states and judgeships represented on the ICC bench, as compared to the other regions of the world. The EESG's under-representation may be a consequence of the comparatively low financial contributions made by its state parties to the Court or else the lack of direct involvement that the EESG member states have had with the ICC to date.¹⁹

The APSG has been under-represented by having only two judges on the bench following two ICC judicial elections. First, in 2006, the judge from Samoa was not successfully re-elected, reducing the APSG's representation by one. Similarly, in 2020, the only nominee from the region (Khosbayar Chagdaa from Mongolia) dropped out after the fourth round and therefore was not elected by the ASP. In 2007, the APSG regained three judges on the bench when Japan filled one of the vacancies created by the resignation of three judges. Japan has maintained a seat on the ICC bench ever since that election. Indeed, the APSG as a collective had maintained three judges on the bench until the 2020 election, which resulted in an additional judge being elected from GRULAC and reducing the APSG's representation to only two judges.²⁰

The other geographic regions of the world have never had fewer than three judges on the bench at any time from 2003 to 2020. Judges from WEOG had claimed most of the seats throughout the Court's history. The WEOG had as many as seven judges elected during the first election in 2003, which was maintained until 2007. From 2007 to 2011, WEOG had six judges on the bench, and, from 2011 to 2020, five judges at the ICC came from WEOG. The reality is such that WEOG has maintained at least five seats on the ICC bench at the time of writing, which indicates that there is a significantly high number of judgeships that have been occupied by candidates from WEOG. Referring to [Table 3](#), 18 ICC judges have been elected from WEOG, comprising 30 per cent of the total judgeships between the years 2003 and 2020 – more than double the representation from the EESG states, for example.

The ASG began with three judgeships in 2003, which increased quickly. In 2007, the ASG had four judgeships. In 2009, there were five judges from the ASG at the ICC. In 2011, the bench was restructured to increase the representation of both the EESG and the APSG to three judges, reducing the ASG's representation to four judges and WEOG representation to five judges. The ASG have typically held four seats on the ICC bench, which was maintained from 2011 to 2020. The GRULAC states have had either three or four judges on the bench at any given time (three judges in 2007, 2009, 2011, 2014 and 2017; four judges in 2003, 2006 and 2020). On this basis, there were most often three judges from GRULAC at the ICC from 2003 to 2020.

¹⁹ Georgia is the notable exception to this pattern since it has been subject to an ICC investigation and successfully nominated a judicial candidate to the bench in 2020. It is worth noting that Georgia had nominated a candidate in 2014 before the then prosecutor opened her investigation there in 2016, which was unsuccessful.

²⁰ After the 2020 election, the geographic representation on the bench was as follows: five judges from WEOG, four judges from the ASG, four judges from GRULAC, three judges from the EESG and two judges from the APSG.

The representativeness of the ICC bench in terms of gender and expertise can similarly be measured and is illustrated in Tables 1 and 2. With respect to gender, the Rome Statute enumerates the need for '[a] fair representation of female and male judges'.²¹ In order to implement this, the ASP has established, as a matter of practice and procedure, a minimum voting requirement to ensure that there are at least six male or female judges on the bench at a given time. The ICC has been lauded by scholars and observers as being a comparatively progressive international court in terms of its gender balance, which is a fair assertion throughout most of its history.²² Notwithstanding this, the gender balance on the bench can shift progressively or regressively over time, based upon the ASP's willingness to remain mindful of the need for equitable representation on the basis of gender when nominating and electing candidates.²³ As illustrated in Table 1, there have been elections where only males or only females are selected by the ASP (for example, in the election to fill two vacancies in 2009, the ASP selected two female judges; in 2014, six male judges were elected and no females; in 2017, five female judges were elected and only one male). It is also important to note that, as a matter of practice, some states nominated only male candidates from 2003 to 2020, including Colombia, Costa Rica, Cyprus, France, Georgia, Germany, Hungary, Italy, Korea, Mongolia, Niger, Nigeria and Tunisia, while other states nominated only female candidates.²⁴ Similarly, some states have only nominated candidates with particular expertise, illustrated by Table 2.²⁵ On this basis, the overall construction of the ICC bench by election year according to geography, gender and expertise based on the combination of the remaining judges and new elects is illustrated by Table 4.

It is apparent that the overall makeup of the bench in terms of the representativeness requirements enumerated by the Rome Statute has a degree of flexibility depending on the decision-making of the states parties to nominate and elect particular candidates

²¹ Rome Statute, *supra* note 3, Art. 36(8)(iii).

²² See Jarpa Dawuni, 'Akua Kuenyehia: Leaving a Mark along the Journey for Human Rights', in J. Dawuni and A. Kuenyehia (eds), *International Courts and the African Woman Judge* (2018) 58, at 63 ('[d]espite the progress made by the Rome Statute in achieving gender parity on the bench, the outcome of women's access to other international benches remains uneven'). However, when the analysis is expanded to consider the total number of ICC judgeships, the gender balance appears to improve (27 total men, 20 total women). It is important to recall that there was a time when the ICC bench had a female majority.

²³ See Grossman, 'Achieving Sex-Representative International Court Benches', 110 *American Journal of International Law* (2016) 1, at 82. In surveying the gender balance of international court benches in 2015, Grossman argued: 'For courts where states were required by statute to take sex into account when nominating and voting for judges, a higher percentage of women sat on the bench in mid 2015.' She concludes that, among those courts (including the ICC, the European Court of Human Rights, the African Court on Human Peoples' Rights and the *ad litem* benches of the International Criminal Tribunals for Rwanda and the Former Yugoslavia), 32 percent of the judges were women as opposed to 15 percent among courts that did not require a 'fair representation' of women and men judges.

²⁴ The states that nominated only female candidates included Benin, Japan, Latvia, Madagascar and Panama. Note that this analysis only includes states that had nominated more than one candidate, as this is a more accurate (and fair) gauge of a state's overall nomination policy with respect to gender.

²⁵ States that had only nominated candidates from List A from 2003 to 2020 included Bosnia and Herzegovina, Cyprus, Korea, Niger, Nigeria, Panama, Sierra Leone, Trinidad and Tobago, Uganda and the United Kingdom. States that had only nominated candidates from List B from 2003 to 2020 included Costa Rica, Croatia, Ecuador, Finland, Guyana, Latvia, Philippines and South Africa. Note that this analysis only includes states that had nominated more than one candidate, as this is a more accurate (and fair) gauge of a states' overall nomination policy with respect to expertise.

Table 4: Overall composition of ICC bench per election year

Year	M	F	A	B	WEOG	GRULAC	ASG	APSG	EESG
2003	11	7	10	8	7	4	3	3	1
2006	10	8	10	8	7	4	3	2	2
2007	10	8	9	9	6	3	4	3	2
2009(a)	8	10	11	7	6	3	5	2	2
2009(b) ^a	7	11	12	6	6	3	5	2	2
2011	8	10	11	7	5	3	4	3	3
2013	8	10	11	7	5	3	4	3	3
2014	11	7	12	6	5	3	4	3	3
2015	12	6	12	6	5	3	4	3	3
2017	12	6	13	5	5	3	4	3	3
2020	9	9	11	7	5	4	4	2	3

Notes: ^a In 2009 there were two elections to fill judicial vacancies. The first was a regular election in January. The second was a special election to fill two vacancies in November, which was created by the inability of Mr. Mohamed Shahabuddeen (Guyana) to assume his duties as judge, and the passing away of Judge Fumiko Saiga (Japan).

rather than others. However, the procedural processes adopted by the ASP bind states to elect a generally inclusive bench. While the institutional design of the ICC explains the makeup of the judiciary in part, it fails to explain how political undercurrents affect judicial nominations and elections within the ASP and individual states. It is instructive to deconstruct regional representation to better understand the intra-regional dynamics in the ICC's election outcomes, illustrated by [Appendix 1](#). [Appendix 1](#) references which states have been represented on the ICC bench per election year. The most important point of observation is with respect to the states that have always had a judge on the bench from 2003 to 2020. These states include Germany, Italy, Korea and the United Kingdom. At the time of writing, Japan has had a judge on the bench ever since it nominated its first candidate in 2007. Trinidad and Tobago has also usually occupied a seat (2007–2011 being the exception). Patterns in the allocation of judgeships by states in the ASG and the EESG are less clear, which suggests that a more nuanced analysis of the success of particular states within these regions is required. To this end, the influence of the ICC's involvement in states and/or a state's allocation of human resources to ensure the success of judicial candidates at the ICC are explored as explanatory factors in states that are not leading financial contributors to the Court in due course.

A Other Political Considerations: Mid-Term Vacancies

From 2003 to 2020, there have been seven vacancies created by either the resignation or death of sitting judges at the ICC. According to Ruth Mackenzie and colleagues, 'there is evidence of a "right" to replace a judge who has resigned or died before his or her term was completed with another judge of the same nationality'.²⁶ It is worth considering the validity of this assertion in the context of the ICC. A comparison of outgoing and incoming judges in the context of judicial vacancy at the ICC from 2003 to 2020 is illustrated in [Table 5](#).

²⁶ R. Mackenzie *et al.*, *Selecting International Judges: Principle, Process, and Politics* (2010), at 35.

Table 5: Judicial vacancies and electoral replacements at the ICC: 2003–2020

Year	Outgoing	State	List	Gender	Incoming	State	List	Gender
2007	Claude Jorda	France	A	M	Bruno Cotte	France	A	M
	Maureen Harding Clark	Ireland	A	F	Fumiko Saiga	Japan	B	F
	Karl T. Hudson-Phillips	Trinidad and Tobago	A	M	Daniel David Ntanda Nsereko	Uganda	A	M
2009	Mohamed Shahabuddeen	Guyana	B	M	Silvia Fernandez de Gurmendi	Argentina	A	F
2013	Fumiko Saiga	Japan	B	F	Kuniko Ozaki	Japan	B	F
	Anthony Thomas Aquinas Carmona	Trinidad and Tobago	A	M	Geoffrey A. Henderson	Trinidad and Tobago	A	M
2015	Miriam Defensor-Santiago	Philippines	B	F	Raul Cano Pangalangan	Philippines	B	M

Table 5 indicates that four out of the seven vacancies created by resignation or death were filled by a national of the same state and that three of the four were statistically identical to the original electee in terms of gender and expertise. In 2007, the French judge was replaced by a statistically identical candidate (List A, male). The judges from Ireland and Trinidad and Tobago were replaced by judges from other geographic regions (Japan and Uganda, respectively).²⁷ It is important to note that Japan is a leading financial contributor to the ICC and that Uganda had an open ICC investigation (by self-referral) at the time that Judge Daniel David Ntanda Nsereko was elected to the bench to replace the judge from Trinidad and Tobago in 2007, even though Trinidad and Tobago had nominated a replacement judge in this election.²⁸

The two examples above are the two notable exceptions, at the time of writing, to a state's 'right to replace' a national judge that has resigned or died mid-term at the ICC. To expand upon this point, Trinidad and Tobago did nominate a replacement candidate in 2007 – Jean Angela Permanand (List A). She was not elected even though one of the vacancies was opened by the retirement of a judge from her country, which challenges the assertion of a state's 'right to replace'. Further strengthening this point, this was the only nomination out of five made by Trinidad and Tobago from 2003 to 2020 that did not result in a successful election. The other clear exception to the 'right to replace' was in 2009, when the Guyanese male judge elected from List B was replaced by the female Argentinian judge elected from List A. To be sure, Guyana nominated a statistically identical candidate to replace Mohamed Shahabuddeen – Duke E.E. Pollard. Since this candidate was not elected by the ASP, this challenges the claim that vacancies are necessarily filled by replacements of the same nationality, gender and/or experience. There were already more female than male judges on the bench at the time of the 2009 special election, and the bench was well above its minimum requirement of nine judges from List A.²⁹ Yet, in 2009, Japan replaced its judge with a statistically identical candidate. The other candidates were each from a GRULAC state – namely, Argentina, Chile, Colombia and Guyana. Since the Argentinian candidate was elected, this problematizes the notion of a state's right to replace if it is not a leading financial contributor to the Court or is the subject of an ICC investigation. However, **Table 5** indicates that the ASP has typically elected replacement judges of the same nationality, if not gender and/or experience, as the original electee during the specified time period.

3 Financial Contributions, Electoral Success and ICC Judgeships

It remains the ultimate responsibility of states parties to nominate and elect judicial candidates that fulfil the representativeness requirements outlined by the Rome

²⁷ Note that the states that nominated a judge in the 2007 special election included France, Japan, Panama, Trinidad and Tobago and Uganda.

²⁸ It is useful to highlight that representation on the basis of gender remained consistent with the original judges (two male, one female), and expertise increased List B representation by one judge and decreased List A by the same.

²⁹ See Table 2.

Table 6: Top 10 ICC budget contributors and judgeships

Country	2020 assessed dues (in Euros)	Judge on bench (as of March 2021)	Previous number of total judgeship(s)	Total number of nominations (2003–2020)	Success rate (per cent)
Japan	24,311,100	Yes	3	4	100
Germany	16,193,649	Yes	2	3	100
France	12,566,339	Yes	2	4	75
United Kingdom	12,143,931	Yes	2	3	100
Italy	8,793,501	Yes	2	3	100
Brazil ^a	8,255,791	No	1	3	33
Canada	7,269,812	Yes	1	2	100
Korea	6,258,761	Yes	2	3	100
Australia	5,876,461	No	0	0	N/A
Spain	5,706,356	No	0	1	0

Source: ASP, 20th Session, Financial Statements of the International Criminal Court for the Year Ended 31 December 2020, Doc. ICC-ASP/20/12, 6–11 December 2021, at 44–46.

Notes: ^a ASP, Report of the Committee on Budget and Finance on the Work of Its Thirty-fourth Session, Doc. ICC-ASP/20/12, 7–17 December 2020, at 45. Note: Brazil currently owes 16,543,356 euro. The outstanding period is 2018–2020.

Statute while also meeting the merit- and attitude-based qualifications that will best achieve the institutional goals of the ICC. However, since states parties nominate candidates, there is reasonable concern about the politicization of the process. Most significant of these concerns are the arbitrary appointment of judicial candidates – that is, candidates who are nominated to the ICC without a competitive national nomination process – the so-called ‘horse-trading’ or ‘vote trading’ of candidates as a result of diplomatic lobbying throughout the electoral process and the contention that financial contributions by states to the Court are correlated with judgeships (see Table 6).³⁰

Table 6 illustrates that 39 per cent of the bench at the time of writing had been nominated by states that were among the leading financial contributors of the Court. The overarching reality is that the top 10 assessments comprise 72 per cent of the Court’s total budget. While the UN assessment scale is largely responsible for this, the very construct provides circumstantial support to embolden arguments that pit the ICC and financially powerful states against those in the global

³⁰ See D. Bosco, *Rough Justice: The International Criminal Court in a World of Power Politics* (2014), at 82 (‘[m]ajor powers with large military, development, and aid budgets have significant leverage, and there is evidence that they used it during the first round of ICC elections. “Votes can be traded against promises of development assistance,” one delegate reported to researchers. While the Jordanian diplomat chairing the Assembly asked states to refrain from the bargaining and horse-trading that had become typical in elections for other international judgeships, it appears the practice endured’). Note also that the assessed contributions by states parties are based on the scale of assessments used by the United Nations (UN) for its regular budget.

South.³¹ This is further strengthened by the reality that WEOG have won the most judgeships of any region and that the leading financial contributors from WEOG have had a disproportionately high success rate for judicial candidates. This matters inasmuch as it supports the claim that geopolitics and financial contributions to the Court influence judgeships. Such financial contributions provide comparatively powerful states with a reasonable degree of assurance that their candidate(s) will be successfully elected to the Court by the ASP. Indeed, there appears to be an implicit *quid pro quo* that links the financial contributions of states with judicial representation at the ICC. It is fundamentally important to acknowledge that the correlation between financial contributions to the ICC and electoral success for judicial candidates can be demonstrably linked to the amount of resources that a state puts into a candidate's success both in terms of its campaign strategies and its comparative leverage when brokering vote-trading deals with other states. This suggests that a state's relative position in the global hierarchy influences how it might be able to campaign and leverage a judicial candidate at the international level.

4 State Participation in Judicial Nomination Processes at the ICC

To conceptualize a state's level of judicial electoral success, it is necessary to measure state engagement in the process – that is, the number of nominations made by states in relation to the number of judges ultimately elected to the bench. For a broad overview of engagement, it is useful to first break down the total number of judicial nominations by region from 2003 to 2020. This breakdown is important for any analysis of the ICC judiciary since it demonstrates the level of active regional engagement by states to contribute to the makeup of the bench. Considering [Table 7](#), it is logical that states within the ASG have contributed the greatest number of nominations to the bench since it is comparatively more likely for the Court to be involved in those contexts.³² It is important to note that the EESG had the greatest percentage of regional engagement in judicial nomination processes at the ICC from 2003 to 2020 (12 of the 18 states parties in the EESG had nominated at least one candidate, comprising 67 per cent of the region – the highest of the five geographic regions), yet it has had

³¹ The UN Assessment Scale is based upon Rule 160 of the Rules of Procedure of the UN General Assembly. See UN General Assembly Rules of Procedure, 14 February 1946, Rule 160, at xvi. It is summarized as the amount of money that the General Assembly determines that a state is able to pay to cover the expenses of the organization based on the recommendation from the Committee on Contributions. This scale is also used to structure the funding of the ICC.

³² This is based on the number of open investigations at the time of writing (10 in the ASG, 4 in the APSG, 1 in the EESG and 1 in GRULAC) as well as the number of situations under preliminary examination by the Office of the Prosecutor at the time of writing (2 in the ASG, 2 in GRULAC and 1 in the EESG). In combination, the ASG, the APSG and GRULAC are comparatively most likely to be the subject of ICC intervention in the foreseeable future. If nomination patterns continue, an increase in judicial nominations from the APSG region could be reasonably expected in forthcoming elections – for example, 2022 – based on the Court's relatively newfound willingness to get involved in situations within the region, including in the situations in Afghanistan, Bangladesh/Myanmar, Philippines and the state of Palestine.

Table 7: Nominations of ICC judges and correlative success rates by region, 2003–2020

Region	Number of states parties in the region	Number of states that nominated one candidate	Number of states that nominated two candidates	Number of states that nominated three (+) candidates	Total number of regional nominations	Number of candidates elected	Regional success rate(per cent)
WEOG	25	6	2	6	29	18	62
APSG ³³	20	4	3	3	20	11	55
GRULAC	28	4	6	4	33	13	39
EESG	18	5	3	4	23	7	30
ASG	33	8	4	9	47	12	26

³³ This analysis includes the Philippines because it successfully nominated two candidates (one in 2011 and one in 2015), prior to its withdrawal from the Rome Statute on 17 March 2018.

the fewest number of judges elected to the bench. GRULAC, the ASG and the EESG have had significant first-hand experience with the types of crimes covered by the Rome Statute, which might create a greater normative valuation to the work of the Court and could explain increased support and engagement from those regions and the states that comprise them. Alternatively, some states may simply seek the prestige of having a judge on the ICC bench and seek to proliferate their global influence, thus contributing to a greater amount of engagement in judicial nomination procedures.

High levels of regional engagement in judicial nomination processes at the ICC are reflective of general institutional commitment. Such engagement also provides a strong counterweight to the influence of powerful states in WEOG throughout the judicial nomination and election processes, which is an important objective for weak and middle-power states operating within international institutions such as the ICC. The fact that WEOG has the highest percentage of electoral success (with a fairly limited number of overall nominations) demonstrates the need for engagement and involvement in judicial nomination and election processes from states in the other regions in order to counter uneven power and influence. The Rome Statute recommends a representative bench, but it remains the responsibility of member states to continue to engage actively in nomination and electoral processes to ensure that the representativeness requirements can be met.

The level of apathy across regions to nominate judicial candidates is concerning. From a practical standpoint, it is curious that 52 states parties were willing to subject their nationals to the jurisdiction of the Court but that they did not seek representation on the bench from 2003 to 2020. In other words, at the time of writing, 42 per cent of all ICC member states had not nominated a single judicial candidate to the bench. Across regions, it is apparent that between 2003 and 2020 there had been a core group of states that had done most of the nominating, evidenced by the number of states that had nominated more than two candidates. To further illustrate this point, the states that had nominated three or more candidates to the ICC judiciary from 2003 to 2020 are summarized in [Table 8](#), organized by region.

The relevance of *realpolitik* in the allocation of ICC judgeships is particularly evident in WEOG and the APSG. These are the only two regions where some states have had a 100 per cent success rate in the nomination of judicial candidates at the ICC. What is perhaps most interesting is the intra-regional dynamics that seem to favour the states that contribute the most financially to the Court within WEOG and the APSG, specifically as it relates to a measure of judicial electoral success. Using the examples of Greece and Mongolia, high participation in the ICC's judicial nominations has resulted in zero judgeships from either state. However, the relative financial contributions to the Court between the states with a high rate of electoral success and those with zero electoral success, particularly in WEOG and the APSG, has been significant.³⁴

³⁴ See generally ASP, Twentieth Session, International Criminal Court – Status of Contributions as at 31 December 2020, Doc. ICC-ASP/20/12, 6–11 December 2021, at 45–46, Annexes, Schedule 1. To illustrate this point, Greece contributed €973,169, and Mongolia contributed €13,353. This can be compared to Germany, which contributed €16,193,649, and Japan, which contributed €24,311,100, for example.

Table 8: States with three or more nominations to the ICC judiciary by region, 2003–2020

Region	States with 3+ nominations	Total number of nominations	Number of elects	Success rate(%)	
WEOG	France	4	3	75	
	Belgium	3	1	33	
	Germany	3	3	100	
	Greece	3	0	0	
	Italy	3	3	100	
	United Kingdom	3	3	100	
APSG	Japan	4	4	100	
	Korea	3	3	100	
	Mongolia	3	0	0	
ASG	Benin	3	1	33	
	Burkina Faso	4	0	0	
	Democratic Republic of Congo (DRC)	4	1	25	
	Congo (DRC)	4	2	50	
	Ghana	4	1	25	
	Nigeria	3	0	0	
	Senegal				
	Sierra Leone	3	1	33	
	Tunisia	3	0	0	
	Uganda	3	2	67	
GRULAC	Brazil	3	1	33	
	Colombia	4	0	0	
	Trinidad and Tobago	5	4	80	
	Uruguay	3	0	0	
EESG	Bosnia and Herzegovina	3	0	0	
	Croatia	3	0	0	
	Hungary	3	1	33	
	Poland	3	1	33	

5 The Role of Norms in State Identity, Interest Formation and the Allocation of Human Resources to Ensure Electoral Success for Judicial Candidates at the ICC

Based on [Tables 7](#) and [8](#), increased engagement by states in judicial nomination processes at the ICC has not led to increased and/or de facto electoral success. This suggests that factors other than engagement in nomination processes influence a state's ability to successfully elect a judicial candidate to the ICC.³⁵ Indeed, a state's long-standing

³⁵ Note that, in many cases, the inverse is true – that is, many of the states that had nominated the greatest number of candidates to the ICC bench had the least amount of electoral success. This can be explained in part by the fact that, if a state is unsuccessful, it will be able to nominate another candidate in an upcoming election(s). However, one might expect that a disproportionately high amount of state engagement in the nomination process would eventually result in some amount of electoral success. See, for example, that Burkina Faso and Colombia nominated four candidates unsuccessfully; the following

normative commitment to the ICC could offer explanatory insight into comparatively high levels of electoral success among some states if normative commitment informs constructions of state identity and/or preferences and interests. This might be because such commitment fosters a culture of more robust diplomatic engagement, which increases the chance of state representatives to the UN brokering deals that will ensure the electoral success of their candidates. While material resources in the form of financial contributions to a candidate's campaign can increase the chance of electoral success, so too can human resources in the form of deal making and political posturing throughout the entirety of the election cycle. In short, some states care more than others about being represented on the ICC bench, which directly affects the level of support that a candidate will receive from states and diplomats in the form of campaign and election bargaining.

It has been explained that 'many individuals who participate in the ICC process believe it to be even more politicized than other international judicial elections'.³⁶ It is obvious that some states have the resources to engage in aggressive campaign strategies for judicial candidates, while others almost certainly do not.³⁷ This is another correlative link that ties the financial power of states to judgeships at the ICC. Indeed, it is argued that 'too often it is the candidates with the strongest campaigns, rather than those with the highest qualifications, who are most likely to get elected. ... It also affects the equality of opportunity among candidates, particularly disadvantaging those with limited capacity and resources to campaign'.³⁸ This practice is particularly problematic, mostly because not every state can afford to engage in such aggressive lobbying efforts at the international level. Nevertheless, campaigning for judgeships at the ICC is a well-established practice that will require the political will of states to change.

Perhaps even more egregious than political campaigning is the interrelated practice of vote trading. More specifically, vote trading implies that 'a state will vote for a

states nominated three candidates unsuccessfully: Bosnia and Herzegovina, Croatia, Greece, Mongolia, Senegal, Tunisia and Uruguay; and the following states nominated two candidates unsuccessfully: Costa Rica, Ecuador, Gambia, Madagascar and Niger.

³⁶ Mackenzie et al., *supra* note 26, at 101.

³⁷ For example, in the 2020 election, the United Kingdom engaged in a sophisticated and expensive judicial campaign strategy. See the election brochure for Judge Joanna Korner, which was distributed in English, French and Spanish and is available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/927986/Judge-Korner-campaign-brochure-for-International-Criminal-Court-judicial-elections.pdf. See also 'Judge Korner's Campaign Video for the ICC Judicial Elections,' *YouTube*, 23 September 2020, available at www.youtube.com/watch?v=Q133DchwoE.

³⁸ 'ICC Judicial Elections Reform: Some Progress but Still a Long Way to Go', *International Justice Monitor*, 15 January 2021, available at www.ijmonitor.org/2021/01/icc-judicial-elections-reform-some-progress-but-still-a-long-way-to-go/. Note that this was especially relevant during the 2020 judicial elections since the coronavirus pandemic required campaigning to be done primarily on the Internet. It is well understood that access to technology is not equal. This was especially obvious during live-streamed interviews for the incoming prosecutor of the ICC, though it is argued here that this certainly impacted the ability of some states to effectively campaign for judicial candidates as well. See Kersten, 'This Is a Circus': Technical Difficulties Undermine ICC Prosecutor Interviews', *Justice in Conflict*, 30 July 2020, available at <https://justiceinconflict.org/2020/07/30/this-is-a-circus-technical-difficulties-undermine-icc-prosecutor-interviews/>.

candidate in exchange for a vote in the same or another election (for the same or another body), or in exchange for other benefits or inducements'.³⁹ The 'other benefits or inducements' could include development aid. As Mackenzie and colleagues explains, 'one interviewee who was part of a delegation in the first ICC elections told us that the practice of vote-trading in exchange for aid was more prevalent in the ICC than the ICJ [International Court of Justice] elections'.⁴⁰ This is particularly problematic since such deals reinforce political power structures rooted in *realpolitik*. These sorts of 'deals' are fundamentally incompatible with the objectives of the ICC and severely bind less powerful states to the political goals of more powerful states. This reality could further explain why WEOG states have had the highest rates of electoral success for their judicial nominees at the ICC since it is these states that often provide aid and development assistance to weak and/or developing states in the global South. Although this practice has been discouraged by the ASP Bureau, evidence suggests that it continues to take place.⁴¹

The prevalence of this practice was made clear by Judge Miriam Defensor-Santiago following her successful election to the bench in 2011. In a news briefing, Judge Defensor-Santiago credited the ambassador of the Philippines to the UN for brokering a 'mutual exchange of favours or quid pro quo' with states parties, which got her elected in the first round.⁴² This statement suggests that, if a candidate does not have savvy political backing by their state representatives at the UN, electoral success will be highly unlikely. Flippant acknowledgement of vote-trading practices in exchange for judgeships at the ICC presents a serious challenge to the legitimacy and credibility of judicial elections. Addressing this complex problem will require widespread culture

³⁹ Mackenzie et al., *supra* note 26, at 122.

⁴⁰ *Ibid.*, at 124. It is important to note that this is likely symptomatic of the nature of the elections at the ICC versus the International Court of Justice (ICJ). At the ICJ, judges are elected by both the General Assembly and the Security Council voting independently from one another. A candidate must obtain the absolute majority in both the General Assembly and the Security Council to be elected. Judges in the ICC, on the other hand, are elected by the states parties that comprise the ASP by secret ballot, according to the requirements previously discussed. The candidates with the highest number of votes are elected, assuming that a two-thirds majority of the states parties are present and voting. Thus, deals can be brokered with any state party at the ICC, while the ICJ still requires support from the most powerful states for a candidate to be successfully elected.

⁴¹ Open Society Justice Initiative, *supra* note 1, at 38 ('[y]et vote trading has persisted. (One diplomat noted that, since an ICC judgeship is generally a highly valued position, the "cost" for nominating states that seek to have their candidate elected is that they have to lower their political ambitions in other fora when entering into similar vote-trading arrangements elsewhere)').

⁴² CAN 24/7, 'Sen. Miriam Santiago on Her Winning a Seat in ICC', *YouTube*, 12 December 2011, available at www.youtube.com/watch?v=EVddljMZUE0; see also MoveDotPH, 'Miriam on ICC Election: I Feel Like a Blushing Bride', *YouTube*, 13 December 2011, available at www.youtube.com/watch?v=2Mf00afUzhM. The role of permanent representatives to the United Nations in the campaign and election strategy of judicial candidates at the ICC is openly discussed. See, for example, in the context of the 2020 election, Alie Kabba, Sierra Leone's permanent representative to the UN posted the following personal tweet on 21 December 2020, available at https://twitter.com/aliekabba_SL/status/1341097521356152838 ('[m]ission accomplished. Judge Miatta Samba elected to serve as ICC Judge (2021-2030). Successful campaign strategy. Historic victory for #SierraLeone. Victory for #Africa. Proud achievement. Strong African voice on the Court. Thanks @PresidentBio @AfricanUnionUN') (emphasis added).

Table 9: Nominations by state parties after the initiation of an ICC investigation

Situation	Date that the investigation was opened	Mode of jurisdiction	Candidate name	Year of relevant nomination(s)	Elected to bench
Uganda	July 2004	Self-referral	Daniel David Ntanda Nsereko	2007 2017	Yes Yes
DRC	June 2004	Self-referral	Solomy Balungi Bossa Angelique Sita Akele Muila Antoine Kesia-Mbe Mindua	2009 2011; 2014	No No; Yes
CAR I	May 2007	Self-referral	Modeste-Martineau Bria	2011	No
Georgia	January 2016	Proprio Motu	Gocha Lordkipanidze	2020	Yes

change within and among the ICC's states parties, which points to a much bigger issue: the indifference on the part of states parties with respect to the ICC's posterity and credible development and the overarching and contradictory influence of power politics in the operationalization of the Court, which privileges developed states and binds the less powerful. These are problems at the international level that ought to be addressed in future elections.

6 The Relationship between Past or Present Investigations and ICC Judgeships

Aside from financial contributions and human resources that a state commits to the ICC, other explanations for increased electoral success and judgeships among certain states ought to be considered. An evaluation of electoral success indicates a marginal uptick in judicial representation among states where the prosecutor has opened an investigation into a situation. Of the 14 situations under investigation by the ICC, six were in states parties that had nominated at least one candidate to the bench.⁴³ The most relevant judicial nominations for the purpose of this analysis are the ones that came after an investigation had been authorized and opened beyond the preliminary examination stage. There have been seven judicial nominations from states parties after an investigation was opened by the ICC into the situation(s) within the territory of those states from 2003 to 2020 (summarized in [Table 9](#)).

⁴³ At the time of writing, the ICC had opened an investigation into the situation(s) in the following states: Afghanistan, Bangladesh/Myanmar, Burundi, Central African Republic (I) and (II), Côte d'Ivoire, Darfur (Sudan), Democratic Republic of the Congo (DRC), Georgia, Kenya, Libya, Mali, Palestine, Uganda and Ukraine. The following states parties had nominated at least one judicial candidate between 2003 and 2020: Central African Republic, DRC, Kenya, Georgia, Mali and Uganda.

Table 9 indicates that four of the seven nominations made by states parties after the prosecutor had opened an investigation into the situation(s) within that state had resulted in a successful electoral outcome. Sometimes, though less often, this pattern has also applied with respect to the opening of a preliminary examination. For example, in Kenya, the Office of the Prosecutor opened a preliminary examination in 2007 but did not move to the investigation stage until March 2010. Kenya nominated its one and only judicial candidate in 2009 – Joyce Aluoch – who was successfully elected to the bench. In a similar vein, the Office of the Prosecutor opened its preliminary examination into the situation in Nigeria in November 2010. Nigeria successfully nominated Chile Eboe-Osuji in 2011. However, it also nominated a candidate in 2020, which was unsuccessful. The preliminary examination into the situation in Colombia was opened by the prosecutor in June 2004. Colombia had nominated a judicial candidate in 2009, 2011 and 2020 with no success. On this basis, there were six judicial nominations made after the prosecutor opened a preliminary examination into the situation(s) in relevant states parties, but only two resulted in a successful electoral outcome, which indicates less of a correlative relationship. However, this evidence does suggest that states are more interested in nominating judicial candidates if there is ICC activity in their territory.

While electoral success is marginally higher among states parties that are subject to investigation by the ICC, engagement in the nomination of candidates among the group of states where ICC investigations were or are taking place has been mixed. However, the most apparent similarity among the states that have nominated a judicial candidate after an investigation had been opened by the Office of the Prosecutor is that three of those four investigations were the result of the state's own self-referral to the Court. Georgia is an exception to this finding since the prosecutor opened the investigation there *proprio motu* and the state did nominate a candidate in a subsequent election. The situation in Mali was brought to the ICC by self-referral in January 2013, but Mali has not nominated a judicial candidate since 2003. Kenya did not need to nominate a judicial candidate following the opening of an investigation there since it was already represented on the bench by the time that the prosecutor opened her investigation in March 2010. The opening of an investigation in Bangladesh/Myanmar in 2019 and Afghanistan in 2020, both *proprio motu*, did not lead to the nomination of a judicial candidate in the 2020 election from either state.⁴⁴ The situation in the

⁴⁴ There are some common-sense explanations for this. The political climate in both Bangladesh and Afghanistan leading up to the 2020 judicial election was undoubtedly turbulent. The prioritization of judicial representation at the ICC was most likely not a pressing issue given the strain placed on national institutions and resources. In many respects, the willingness of states to nominate a judicial candidate where the situation was brought by self-referral is logical. In those cases, the government had clearly prioritized international criminal justice and emphasized the ICC as the necessary vehicle to assist the government to achieve this end. In this respect, seeking representation on the bench is in a self-referring state's interest since its nationals will undoubtedly appear before the Court. This would ensure that at least one member of the judiciary would have the necessary context and cultural sensitivity when hearing the cases before them. Least of all, self-referring states acknowledge the merit and utility of the ICC, which would facilitate the construction of national identity and interests that value seats at the ICC and therefore seek to occupy one.

state of Palestine moved from preliminary examination to the investigation stage in March 2021, and there has not yet been a judicial election following the opening of the investigation there at the time of writing.

Nevertheless, among the group of states where financial contributions cannot readily explain levels of judicial electoral success, consideration as to whether there is an ongoing investigation into the situation in that state can offer some explanatory insight. This is especially relevant in Uganda since it has had the most electoral success of the entire ASG region. The first elected candidate from Uganda – Daniel David Ntanda Nsereko – was first nominated in 2003 but was not elected. He was re-nominated in 2007 after the situation in Uganda was being investigated by the prosecutor and was ultimately elected at that time. Uganda has had a 100 per cent success rate for its judicial candidates after an investigation has been opened (Solomy Balungi Bossa was also elected to the bench in 2017). Uganda's political and strategic ties to the ICC might help to explain its comparatively high level of judicial electoral success, particularly within the ASG. The ICC has a mutually shared interest in preserving Ugandan representation on the bench since such representation can foster a greater sense of legitimacy in the states most affected by its behaviour.

Similar arguments can be made with respect to the situation in Georgia. To be sure, Judge Gocha Lordkipanidze was elected in 2020, but his nomination was highly contentious among civil society due to a lack of transparency in national nomination processes.⁴⁵ Further, the Advisory Committee on Nominations of Judges (ACN) determined that he was 'qualified' to serve as an ICC judge but not 'highly qualified'.⁴⁶ Yet he was successfully elected, even though the ASP could have elected a different candidate from the EESG that was deemed 'highly qualified'.⁴⁷ It has been argued that Georgia has had an interest in nominating a judicial candidate because the 'election of a Georgian judge could contribute to enhancing general knowledge about the ICC among affected communities and society'.⁴⁸ It is apparent that the construction of the bench has a special relevance to states that are subject to Court intervention, which could influence political engagement and interest formation throughout nomination and election processes and simultaneously bolster perceptions of the Court's legitimacy, especially in the contexts in which it operates. Moreover, such states appear

⁴⁵ See, e.g., Georgian Young Lawyers Association, 'The Process of Selection of Judge for Nomination to International Criminal Court Lacks Transparency and Includes Flaws', 20 March 2020, available at <https://gyla.ge/en/post/haagis-sasamartloshi-tsarsadgeni-mosamartleobis-kandidatis-shesarchevi-procesi-gaumtchvirvalde-da-kharvezebit-tsarimarta#sthash.kP3ORHVZ.qN4c4ZBx.dpbs>.

⁴⁶ ASP, Report of the Advisory Committee on Nominations of Judges on the Work of Its Seventh Session, Doc. ICC-ASP/19/11, 30 September 2020, at 22. See also the concerns raised by civil society about the nomination of Gocha Lordkipanidze (at 25).

⁴⁷ For example, Jasmina Cosic Dedovic from Bosnia and Herzegovina was determined to be 'highly qualified'. While Jasmina Cosic Dedovic was nominated from List A, and Gocha Lordkipanidze was nominated from List B, there were enough candidates elected from either list to afford this change if the ASP decided to do so.

⁴⁸ N. Jomarjidge, 'Electing the 2020 ICC Judges: Challenges Related to Nomination of Georgian Judicial Candidate', *International Justice Monitor*, 15 September 2020, available at www.ijmonitor.org/2020/09/electing-the-2020-icc-judges-challenges-related-to-nomination-of-georgian-judicial-candidate/.

to have had increased electoral success at the ICC for their judicial candidates, even when candidates that have been determined to be better qualified for the position by the Advisory Committee are available for election.

7 Politicization throughout Judicial Nomination and Election Processes at the ICC: National Nomination Procedures

The explanations considered thus far have only partly explained why states nominate and elect particular candidates to the ICC. Scholars and observers have pointed out several substantive problems with the politicization of national nomination processes. For example, William Pace from the Coalition for the International Criminal Court has explained that ‘unfortunately, governments don’t always nominate the best people ... often for political reasons’.⁴⁹ This sentiment was echoed by Stef Blok, the minister of foreign affairs from the Netherlands, who said that ‘many states ... frequently put mediocre judges up for election’.⁵⁰ There is a general acknowledgement by the ASP that this problem exists, evidenced by the steps taken to bolster the role of the ACN and to thoroughly vet judicial candidates put forth for nomination by governments. Even still, members of civil society and a small group of governments have continued to prioritize the need to solve this problem.⁵¹ The optics are bad, and the stakes are high, which makes the depoliticization of the bench a fundamentally important concern for any supporter of the ICC and international criminal justice more broadly. The intersecting need for states to nominate and elect representative and qualified judges is a practical concern that continues to loom over the ICC and directly affect the Court’s legitimacy and institutional credibility. This is a problem that begins and ends with states and the ASP as a collective and will require institutional and domestic political reform to overcome.

The ICC has provided institutional guidance on judicial nomination procedures and has advised foreign ministers of the ICC’s states parties to place a particular emphasis on those candidates who possess substantial practical experience in criminal trials, who can meet the many demands associated with adjudicating complex and time-intensive cases and who demonstrate a willingness to learn, including through ongoing training. We believe that candidates who possess these qualities, in addition

⁴⁹ S. van Leeuwen, ‘Election: We Might Not Get the Best ICC Judges’, *Justice Hub*, 15 September 2014, available at <https://justicehub.org/article/election-we-might-not-get-the-best-icc-judges/>.

⁵⁰ S. Blok, ‘The International Criminal Court Must Do Better. Reforms Are Urgently Needed’, *Washington Post*, 2 December 2019, available at <https://www.washingtonpost.com/opinions/2019/12/02/international-criminal-court-must-do-better-reforms-are-urgently-needed/>.

⁵¹ For example, consider the ASP 20 side-event hosted by Parliamentarians for Global Action and co-hosted by the governments of Switzerland, Liechtenstein and New Zealand. See ‘Reforming National Nomination Procedures for ICC Judicial Candidates: From the Independent Expert’s Review (IER) Report to Action by the ASP’, *YouTube*, 31 December 2021, available at www.youtube.com/watch?v=imsLXdSOR8M&t=688s.

to satisfying the criteria of the Rome Statute, will be best equipped to meet the challenges ahead.⁵² These institutional recommendations are general and provide minimal guidance to governments in the nomination process. General assertions about a 'willingness to learn' fail to adequately address the importance of assembling a bench of individuals with the right personality. According to one current ICC trial judge, the right personality would be someone with the need to understand colleagues, which requires a genuine curiosity about other systems and backgrounds and a commitment to learning about different approaches to law and to life.⁵³ Another ICC judge 'highlighted the need for a general awareness of different legal cultures and the ability to work in cross-cultural legal environments as useful skills in the ICC context'.⁵⁴ These are personality and character traits that are difficult to discern in the absence of a thorough screening and vetting process at the national level, subject to crosschecks by the ACN prior to election.⁵⁵

It is likewise problematic that there is an overarching theme of secrecy surrounding national nomination processes that has been well documented in the literature. For example, career academic and women's rights activist Judge Akua Kuenyehia from Ghana has described her inaugural 2003 nomination and election in detail. In the context of her experience with the government of Ghana, she described: 'I did not hear about the vacancy [for ICC judge]; I had a call from the Attorney-General. I went to see him, and he told me "the President has asked us to nominate you for the ICC." I told him I was not interested and he said "well, that means you are turning the President down." That made me take the matter seriously, and I decided to accept the President's nomination.'⁵⁶ Judge Kuenyehia was nominated under List B. She did not have any judicial experience but had taught international law at the University of Ghana and had worked on international committees relating to women's human rights issues throughout her career. In this context, it is relevant to note that Article 36(8)(b) of the Rome Statute states: 'States Parties shall also take into account the need to include judges with legal expertise on specific issues, including, but not limited to, violence against women or children.'⁵⁷

⁵² 'ICC: Recommendations for Nominating and Electing Candidates to Serve as Judges', Letter to Foreign Ministers of ICC States Parties, 18 May 2011, available at www.hrw.org/news/2011/05/18/icc-recommendations-nominating-and-electing-candidates-serve-judges.

⁵³ Personal interview conducted under the promise of anonymity.

⁵⁴ Mackenzie et al., *supra* note 26, at 59.

⁵⁵ For a more in-depth discussion of the importance of character, see Mistry, 'The Significance of Institutional Culture in Enhancing the Validity of International Criminal Tribunals', in J. Nicholson (ed.), *Strengthening the Validity of International Criminal Tribunals* (2018) 201.

⁵⁶ Dawuni, *supra* note 22, at 63–64.

⁵⁷ Rome Statute, *supra* note 3, Art. 36(8)(b). Note that Judge Joyce Aluoch (Kenya, elected in 2009 by List A) had experience at the Court of Appeals in Kenya but had also chaired the African Union Committee of Experts on the Rights of the Child (2001–2005) and was a member and vice-chair of the UN Committee on the Rights and Welfare of the Child (2003–2008). Judge Adelaide Sophie Alapini-Gansou (Benin, elected in 2017 by List B) was a founding member of WILDAF-Benin Network (Women's Rights and Development in Africa), working as legal counsel to women victims of violence for the Women's Rights and Development Centre. Judge Navanethem Pillay (South Africa, elected in 2003 by List B) advocated for women's rights throughout her career, including co-founding the international women's rights group Equality Now in

Thus, Judge Kuenyehia was a particularly attractive candidate based on her career-long experience with promoting women's human rights and might have been viewed as highly electable by the Ghanaian government. However, regardless of her objective suitability as a candidate for ICC judge, the unilateral and unsolicited decision-making on the part of the government is striking. In the absence of a broad dissemination of the *note verbale*, other potential candidates could never have known that the position was available, which inherently limits the prospects for a competitive and rigorous nomination process among those with a genuine desire to fill the position.⁵⁸ Such an approach to the ICC's judicial appointments re-emphasizes the deeply political nature of the process as a whole and places an emphasis on political nepotism and/or power and influence.

The lack of transparency within domestic nomination procedures has been a topic of concern for scholars of international courts and the ICC, in particular. For example, Nienke Grossman has explained: 'One interviewee described the process of nominating judges to the ICJ and ICC as "not very institutional-like, [more] a friendship thing." Others wrote that "one cannot apply to become an international judge" but rather must be "called" and that perhaps the most important factor is "being on the radar screen of, and appreciated by, one's own government, particularly by some key civil servants".'⁵⁹ This response is very much in line with the described experience of Judge Kuenyehia. The shrouded judicial nomination processes at the national level problematize the legitimacy of the bench before it is ever constructed. Elaborating on this point, Mackenzie and colleagues explain, 'ICC nomination rules are meant to insulate nominations from political influence. In practice, a recurring theme across the interviews was the strong vested interest of governments in strictly controlling the nomination process in order to influence the composition of international courts. ... Personal relationships and alliances frequently come into play'.⁶⁰ This has been referenced in the literature as a form of cronyism and symptomatic of political corruption.⁶¹ In

1985; Judge Fatoumata Dembèlè Diarra (Mali, elected in 2003 by List A) is the founding president of the Office on Relief for Impoverished Women and Children and Observation of the Rights of Children and Women and also participated in several sessions of the UN Commission on the Status of Women. Judge Sanji Mmasenono Monageng (Botswana, elected in 2009 by List B) was a long-time women's rights activist. Judge Solomy Balungi Bossa (Uganda, elected in 2017 by List A) had experience representing indigent women and children in Uganda. In combination, this suggests that candidates from the ASG with demonstrative experience with women's and/or children's rights have had a particularly good chance of being elected to the ICC's bench. This applies similarly to male judges from the ASG, each of whom cite a demonstrable commitment to women and/or children throughout their scholarly works or civil service.

⁵⁸ Dawuni, *supra* note 22, at 64 (note that the government of Ghana did consider three candidates for evaluation and Kuenyehia was selected based on assessments by the Chief Justice in consultation with the attorney-general and minister of justice and the Judicial Council. The attorney-general and a bipartisan Parliamentary Committee on Legal and Constitutional Issues made the final decision on which candidate to select.

⁵⁹ Grossman, *supra* note 23, at 90.

⁶⁰ Mackenzie et al., *supra* note 26, at 65.

⁶¹ A. Emakpe (pseudonym), 'Justice Ishaq Bello's Nomination Is a Poor Choice for ICC Job', *International Justice Monitor*, 30 September 2020, available at www.ijmonitor.org/2020/09/justice-ishaq-bellos-nomination-is-a-poor-choice-for-icc-job/; see also N. Jomarjidge, 'Electing the 2020 ICC Judges: Challenges

combination, this observed reality supports the notion that states guide nomination processes for reasons of self-interest and not for the broader (normative) interests of the ICC, as such. It is evident that the problem does not stem from the institutional design of the Court, as enumerated by the Rome Statute *per se*, but, rather, from the fact that many states have politicized the existing framework to suit their respective interests.

In the context of the ICC's judicial nominations, it makes sense that governments would want to nominate a predictable and familiar candidate to the bench. It is likely for this reason that many judicial nominees have experience working in the Ministry of Foreign Affairs or other similar senior government posts. These candidates provide a modest degree of political influence since former government employees carry particular knowledge and experience about national preferences. This is a unique vulnerability of the ICC since the Rome Statute allows for the election of career politicians and diplomats under List B, which requires no criminal law or trial experience whatsoever, raising concerns about judicial neutrality, which further subjects the bench to targeted scrutiny. While the ASP has attempted to combat this problem by bolstering the role of the ACN to safeguard national nomination processes, it remains up to the states parties to genuinely commit to fixing the problem.⁶² Even still, this is a multi-layered problem since diplomats have continued to engage in vote trading and aggressive lobbying strategies leading up to and during judicial elections. The counterbalance and influence of the ACN is limited in the sense that it can only provide guidance to the ASP and does not directly bind states to vote for any candidate over another, regardless of their respective qualifications.

8 Conclusion

The substantive and widespread criticisms of the ICC's judicial nomination and election processes are well founded and complex. However, state-based processes are inherently political. The identity of the bench can be explained in part by the institutional design of the Court – that is, by the Rome Statute itself (specifically the representativeness requirements enumerated in Article 36) and, perhaps even more so, in political terms – that is, the way in which states operationalize the Rome Statute *vis-à-vis* the ASP to maximize interests throughout national nomination and international election processes. This analysis has drawn attention to some of the most relevant factors

Related to Nomination of Georgian Judicial Candidate', *International Justice Monitor*, 15 September 2020, available at www.ijmonitor.org/2020/09/electing-the-2020-icc-judges-challenges-related-to-nomination-of-georgian-judicial-candidate/. Jomarjidge argued that the Georgian nomination procedure 'was indeed a step forward. However, the identified flaws raise concerns that the process as a whole may have been tailored to fit a specific person. These weaknesses further confirm that more should be done at the national and international levels to encourage credible national nomination processes and to enhance the quality of judicial nominees'.

⁶² Note that the 2019 expansion of the Advisory Committee on the Nominations of Judges's mandate was heavily influenced by civil society advocacy efforts in light of the observed problems at the national level. See ASP, Resolution on the Review of the Procedure for the Nomination and Election of Judges, Doc. ICC-ASP/18/Res.4, 6 December 2019.

that influence a state's ability to successfully nominate a judicial candidate to the ICC bench: (i) a state's financial contributions to the Court and its relative regional power; (ii) a state's normative commitment to the ICC that informs its identity, preferences and interests and leads to high levels of engagement and the allocation of human resources in judicial electoral processes; and (iii) whether or not the state has been subject to investigation at the Court.

Despite these explanations, under the auspice of constructive reform at the Court, there is an essential need to depoliticize both national and international electoral processes. This is a goal that can only be achieved through the credible commitment of states parties to nominate and elect the best candidates for the job, aside from the political factors that have informed electoral success at the Court from 2003 to 2020 mentioned herein. Consideration of how states engage within the nomination and election processes at the ICC reveals a significant degree of politicization from a national, intra-regional and international standpoint, which continues to hamper perceptions of the Court's institutional legitimacy and credibility. The grossly uneven political landscape that affects the relative probability of success for a judicial candidate at the ICC is inherently problematic. Looking to the future, a fundamental restructuring of the inequalities that influence a candidate's prospects for success in judicial elections at the ICC is required.

Appendix 1: State representation on the ICC bench per election year

Year	WEOG	GRULAC	ASG	APSG	EESG
2003	Canada	Bolivia	Ghana	Cyprus	Latvia
	Finland	Brazil	Mali	Korea	
	France	Panama ^a	South Africa	Samoa	
	Germany	Trinidad and Tobago			
	Ireland				
	Italy				
	United Kingdom				
2006 ^b	Canada	Bolivia	<i>Ghana</i>	Cyprus	<i>Bulgaria</i>
	<i>Finland</i>	Brazil	Mali	<i>Korea</i>	<i>Latvia</i>
	France	Panama	South Africa		
	<i>Germany</i>	Trinidad and Tobago			
	Ireland				
	Italy				
	United Kingdom				
2007	Canada	Bolivia	Ghana	Cyprus	Bulgaria
	Finland	Brazil	Mali	<i>Japan</i>	Latvia
	<i>France</i>	Panama	South Africa	Korea	
	Germany		<i>Uganda</i>		
	Italy				
	United Kingdom				
2009	<i>Belgium</i>	Brazil	<i>Botswana</i>	<i>Japan</i> ^c	Bulgaria
	Finland	<i>Guyana</i>	Ghana	Korea	Latvia
	France	Panama	<i>Kenya</i>		
	Germany		Mali		
	<i>Italy</i>		Uganda		
	United Kingdom				
2009(b) ^d	Belgium	<i>Argentina</i>	Botswana	<i>Japan</i> ^e	Bulgaria
	Finland	Brazil	Ghana	Korea	Latvia
	France	Panama	Kenya		
	Germany		Mali		
	Italy		Uganda		
	United Kingdom				
2011	Belgium	Argentina	Botswana	Japan	Bulgaria
	Finland	<i>Dominican Republic</i>	Ghana	Korea	<i>Czech Republic</i>
	Germany	<i>Trinidad and Tobago</i>	Kenya	<i>Philippines</i>	Latvia
	Italy		<i>Nigeria</i>		
	<i>United Kingdom</i>				
2013	Belgium	Argentina	Botswana	Japan	Bulgaria
	Finland	Dominican Republic	Ghana	Korea	Czech Republic
	Germany	<i>Trinidad and Tobago</i> ^f	Kenya	Philippines	Latvia
	Italy		Nigeria		
	United Kingdom				

Appendix 1: Continued

Year	WEOG	GRULAC	ASG	APSG	EESG
2014	Belgium	Argentina	Botswana	Japan	Czech Republic
	<i>France</i>	Dominican Republic	<i>DRC</i>	<i>Korea</i>	<i>Hungary</i>
	<i>Germany</i>	Trinidad and Tobago	Kenya	Philippines	<i>Poland</i>
	Italy		Nigeria		
	United Kingdom				
2015	Belgium	Argentina	Botswana	Japan	Czech Republic
	France	Dominican Republic	DRC	Korea	Hungary
	Germany	Trinidad and Tobago	Kenya	<i>Philippines</i> ⁸	Poland
	Italy		Nigeria		
	United Kingdom				
2017	<i>Canada</i>	Dominican Republic	<i>Benin</i>	<i>Japan</i>	Czech Republic
	France	<i>Peru</i>	DRC	Korea	Hungary
	Germany	Trinidad and Tobago	Nigeria	Philippines	Poland
	<i>Italy</i>		<i>Uganda</i>		
	United Kingdom				
2020	Canada	<i>Costa Rica</i>	Benin	Japan	<i>Georgia</i>
	France	<i>Mexico</i>	Democratic	Korea	Hungary
	Germany	Peru	Republic of the		Poland
	Italy	<i>Trinidad and Tobago</i>	Congo		
	<i>United Kingdom</i>		<i>Sierra Leone</i>		
		Uganda			

Notes: States in italics indicate a new elect per election cycle.

^a Note that Panama successfully nominated Elizabeth Odio Benito, a Costa Rican national.

^b Five of the judges that won the 2006 election ran for re-election to extend their term beyond the three or six years initially assigned to them following the 2003 election. These were Akua Kuenyehia (List B, female, Ghana); Anita Ušacka (List B, female, Latvia); Erkki Kourula (List B, male, Finland); Hans-Peter Kaul (List B, male, Germany); and Sang-hyun Song (List A, male, Korea). The only judge that was not successfully re-elected to extend his term was Tuiloma Neroni Slade, a male nominated from List A, from Samoa. He was replaced by Ekaterina Trendafilova, a female elected from List A, from Bulgaria. Other nominees that were not successfully elected in 2006 included Károly Bard (List B, male, Hungary); Cheikh Tidiane Thiam (List B, male, Senegal); and Haridiata Dakoure (List A, female, Burkina Faso).

^c Note that Judge Fumiko Saiga replaced Judge Claude Jorda (by drawing of lot) in 2007. Jorda's term expired in March 2009. Therefore, she was eligible for re-election in 2009 to serve a complete term.

^d In 2009 there were two elections to fill judicial vacancies. The first was a regular election in January. The second was a special election to fill two vacancies in November, which was created by the inability of Mr. Mohamed Shahabuddeen (Guyana) to assume his duties as judge, and the passing away of Judge Fumiko Saiga (Japan).

^e Note that Judge Fumiko Saiga passed away on 24 April 2009. Her vacancy was filled by Kuniko Ozaki from Japan.

^f Note that Judge Anthony Thomas Aquinas Carmona from Trinidad and Tobago was elected but never assumed office. His vacancy was filled by Judge Geoffrey A. Henderson from Trinidad and Tobago in 2013.

⁸ Note that Judge Miriam Defensor-Santiago from Philippines was elected in 2011 but never assumed office. She was replaced by Raul Cano Pangalangan from Philippines in 2015.