



the global voice of
the legal profession®

INTERNATIONAL BAR ASSOCIATION'S HUMAN RIGHTS INSTITUTE

BACKGROUND PAPER TO THE INSTITUTE'S RESOLUTION ON THE VALUES PERTAINING TO JUDICIAL APPOINTMENTS TO INTERNATIONAL COURTS AND TRIBUNALS

Adopted on 31 October 2011¹

Background

1. The Charter of the United Nations (1945) (or the 'Charter') established the International Court of Justice (ICJ) as the 'principal judicial organ of the United Nations' (Article 92). The use of the adjective 'principal' implies that other judicial organs might be created, in addition to the ICJ, within the United Nations (UN). At the time of the adoption of the Charter, some of its authors contemplated the establishment of an international court or tribunal for the protection and enforcement of universal human rights. Although such a court has not been established, other relevant tribunals have been created. Some of these are regional courts with jurisdiction over disputes concerning human rights, such as the European Court of Human Rights, the Inter-American Court of Human Rights and the African Court of Human and Peoples' Rights. Additional courts or tribunals have been created, designed to address particular national problems where it has been concluded that a purely national court might not have the resources and independence necessary to perform functions deemed essential to the sense of justice of the international community. Among such tribunals are: The International Criminal Tribunal for the Former Yugoslavia with its seat at The Hague, the Netherlands; the International Criminal Tribunal for Rwanda with its seat at Arusha, Tanzania; and the International Criminal Court (ICC) created by the Rome Statute of the ICC, with its seat at The Hague, the Netherlands.²
2. In addition to these tribunals, other bodies have been created to provide effective and independent decision-making in disputes involving the worldwide employees, independent contractors and other officers of the UN and its agencies. In 2007–2008, the United Nations General Assembly (UNGA) established new tribunals in the place of the previous United Nations Administrative Tribunal, abolished as from 31 December 2008.³

The new tribunals were created to provide first instance and appellate jurisdiction in disputes over staffing matters which inevitably arise in a large organisation employing thousands of officers worldwide:

¹ The Council of the IBAHRI expresses its gratitude to its Member, the Hon Michael Kirby AC CMG, who performed the basic research and wrote the initial version of this Background Paper.

² M Bohlander, 'Pride and Prejudice or Sense and Sensibility? A Pragmatic Proposal for the Recruitment of Judges at the ICC and other International Criminal Courts', (2009) 12(4) *New Criminal Law Review* 529.

³ UNGA Resolutions 61/261 of 4 April 2007; 62/228 of 22 December 2007; and 63/253 of 24 December 2008.

- The United Nations Dispute Tribunal (UNDT) (first instance); and
 - The United Nations Appeals Tribunal (UNAT) (appellate instance).
3. In the case of some tribunals, such as the ICC, specific qualifications for appointment as judges are stated in the constituting statute. Thus, Article 36 of the Rome Statute of the ICC, Article 36.3 provides:
- ‘(a) The judges shall be chosen from among persons of high moral character, impartiality and integrity who possess the qualifications required in their respective States for appointment to the highest judicial offices.
- (b) Every candidate for election to the Court shall:
- (i) Have established competence in criminal law and procedure, and the necessary relevant experience, whether as judge, prosecutor, advocate or in other similar capacity, in criminal proceedings; or
 - (ii) Have established competence in relevant areas of international law such as international humanitarian law and the law of human rights, and extensive experience in a professional legal capacity which is of relevance to the judicial work of the Court ...’

And at Article 36.4:

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

4. Nonetheless, some who have served as judges in UN or other international tribunals have expressed reservations about the suitability of some candidates elected to the office.⁴

Similar views have been stated by respected international observers.⁵

For instance, Judge Bohlander has expressed strong criticisms of the present situation:⁶

‘... diplomats, government officials and academics ill-suited for such an important and complex judicial office [have been appointed without]... substantial judicial experience in complex criminal cases.’

5. To improve the standards and the process and appointment of the judges of the UNDT and the UNAT, the UNGA created the United Nations Internal Justice Council (or the ‘Internal Justice Council’). This body, constituted by the Secretary-General, was to include lawyers of high repute and a small secretariat. The Internal Justice Council was created with a view to ensuring that candidates for election to judicial posts in the tribunals:
- (a) would possess at least minimum requirements of competence and suitability for the positions in question;
 - (b) would have relevant academic and professional experience, training, linguistic and writing skills, as well as the temperament and character appropriate to such appointment; and

4 M Bohlander, ‘The International Criminal Judiciary: Problems of Judicial Selection, Independence and Ethics’ in M Bohlander et al, *International Criminal Justice: A Critical Analysis of Institutions and Procedures* (London: Cameron May, 2007).

5 International Crisis Group, *International Criminal Tribunal for Rwanda: Justice Delayed* (7 June 2001): www.crisisgroup.org/en/regions/africa/central-africa/rwanda/030-international-criminal-tribunal-for-rwanda-justice-delayed.aspx.

6 See, n 4 above: Bohlander, p 335.

(c) would be suitable for recommendation to the UNGA for election, the last word belonging, under the Charter, to the Member States of the UN, but those States selecting such appointees from a list already narrowed by the Internal Justice Council to appointable candidates.

6. So far, similar requirements have not been extended to elections for the ICJ, nor for pre-existing international ad hoc tribunals, nor earlier or later established independent tribunals of joint national and international members (such as the Extraordinary Chambers in the Courts of Cambodia for the trial of Khmer Rouge).⁷

In such circumstances, there is no prior consideration of whether candidates for appointment to international judicial office conform to the requirements for appointment according to any stated criteria. The process of selection and appointment is thus traditionally telescoped in a procedure that attaches great importance to the fact of election by the UNGA.

7. With respect to the ICJ, a system applies that was introduced in 1920 regarding the election process of its predecessor, the Permanent Court of International Justice, in an attempt to introduce an independent and professional element into the process. The system requires that nominations for election to the ICJ are made by national groups and not by Member States of the UN. Such national groups are either the members of the Permanent Court of Arbitration belonging to the States which are parties to the Statute of the International Court of Justice ('Statute of the ICJ') or members of the national groups appointed for this purpose under the same conditions as those prescribed for the members of the Permanent Court of Arbitration. It has been suggested that, while some of these national groups operate with apparent independence, little is known about others. In the case of nominations made by the groups from the countries of the five permanent members of the United Nations Security Council, the process of nomination is effectively determinative of the process of election by the Security Council.⁸
8. While developments, including the creation of the Internal Justice Council, have improved the previously highly politicised process of selection and appointment of UN judges, at the final point of election by the UNGA, the process remains substantially political. In the context of the UNGA, this means a geopolitical process; with nation states tending to select candidates on the basis of agreements between each other to exchange votes between geographical groupings of nations without necessary regard to the individual talents, experience or character of the respective candidates.
9. It is against the foregoing background that the Council of the International Bar Association's Human Rights Institute (IBAHRI) resolved to identify: (1) the qualities necessary and appropriate for selection of candidates by the UNGA or other international organs for appointment or election to office of a judge of an international court or tribunal of the UN or similar international judicial office; (2) the appropriate criteria and necessary procedures to be applied by the selection body; and (3) the appropriate criteria and necessary procedures to be applied by the body with the responsibility of electing or appointing to, or removing from, the office of a judge of an international court or tribunal. The present Background Paper therefore focuses on three subjects:
 - (a) *Eligibility*: the basic qualifications and experience required for judicial appointments;
 - (b) *Personal qualities*: the qualities derived from UN human rights instruments, being the necessary and essential qualities of all persons to be appointed to judicial office within a court or tribunal of the UN; and

⁷ S Linton, 'Safeguarding the Independence and Impartiality of the Cambodian Extraordinary Chambers', (May 2006) Vol 4(2) J Int Criminal Justice 327. The Chambers were constituted following rejection by the Government of Cambodia of an earlier proposal by a Group of Experts appointed by the Secretary-General of the UN to establish an international tribunal. See, UN 'Report of the Secretary-General on Khmer Rouge trials', UNGA Official Record, 57th Session, Agenda Item 109(b), UN Doc A/57/769 (2003).

⁸ See, K Keith, 'The Independence of the International Judge', unpublished, address to Inner Temple, London, UK, 10 October 2011, pp 4-5.

- (c) *Selection of candidates and appointment or election of judges*: the process by which candidates should be selected and then appointed or elected so as to ensure that not only do international courts and tribunals reflect, in a proper and relevant way, the geopolitical divisions of the world, but also that they reflect, and appear to reflect, the relevant talents and personal qualities of the candidates under consideration for appointment, avoiding immaterial considerations and inappropriate political and like influences.

Eligibility

10. A candidate for appointment or election as a judge to an international court or tribunal should possess the relevant **legal qualifications** for holding high judicial office in a domestic court. The Rome Statute of the ICC, for example, requires that a candidate should possess ‘the qualifications required in their respective States for appointment to the highest judicial offices’ (Rome Statute of the ICC, Article 36.3(a)).
11. In addition to possessing legal qualifications, a candidate may also be required to possess specific **competences**, particularly if the proposed appointment is to a specialised court or tribunal. Thus, the ICC requires that judges should have expertise in criminal law and procedure (Rome Statute of the ICC Statute, Article 36.3(b)(i)) or alternatively, have expertise in international humanitarian law and human rights law (Rome Statute of the ICC, Article 36.3(b)(ii)).
12. A candidate for international judicial office should have extensive **experience** in a professional capacity, relevant to the proposed judicial duties. This might be as a judge in a domestic court, or as a prosecutor or advocate. Many of the judges of the ICJ have had earlier careers as legal academics and some have had earlier careers in the civil service (as their Foreign Ministry’s legal adviser) and as diplomats (such as being a Permanent Representative to the UN). In any event, the type of experience should be relevant to the proposed judicial duties so that the judges, once elected, have sufficient and necessary skills to carry out their key functions.
13. A candidate for judicial appointment or election should be fluent in at least one of the working **languages** of the court or tribunal in which service is proposed. A lack of such fluency will undermine the ability of a judge to participate adequately and effectively in the work of the court. Even if simultaneous interpretation of proceedings is available, linguistic competence has a direct impact on a judge’s ability to play an active and influential role in both the public and internal deliberations of the court.
14. **Diversity** of judges on the bench of an international court or tribunal is sometimes a requirement. The Statute of the ICJ stipulates that its judges must be of different nationalities (Statute of the ICJ, Article 3) and ought to be representative of the principal legal systems of the world (Statute of the ICJ, Article 9). Diversity can take forms other than those relating to geography. Gender may also be an appropriate consideration. The Rome Statute of the ICC provides that, in addition to geographical distribution and representation of the world’s principal legal systems on the court, there should also be ‘a fair representation of female and male judges’ (Rome Statute of the ICC, Article 36.8(a)(i)–(iii)). Representation of other forms of diversity might also be considered to be advantageous, such as ethnic background, culture or religion. The issue of diversity on the bench in domestic courts now attracts considerable attention. At the international level, these questions have only recently begun to find their way onto the agenda.⁹
15. Typically, international statutes providing for the appointment or election of qualified candidates to international judicial office make no express provision in relation to considerations of the age or state of health of the candidates.¹⁰

⁹ See, R Mackenzie, K Malleon, P Martin and P Sands QC, *Selecting International Judges: Principle, Process and Politics* (Oxford: Oxford University Press, 2010), Chapter 2.

¹⁰ Thus, there is no such provision in the Charter of the United Nations with respect to service as a judge of the ICJ. Nor does the Rome Statute of the ICC place any limit on the age of candidates or impose any mandatory retirement age upon a judge elected to the ICC.

This may be contrasted, in the matter of age, with the constitutional or other provisions applicable in most member countries of the UN, with respect to the appointment and continued service of domestic judges.¹¹

With respect to age and state of health of candidates for international judicial office, there is an implied assumption that the candidate, if elected, will be able to complete the entirety of the term applicable (plus any extension available to complete proceedings). This assumption emanates from a desire both to maintain the continuity of the operations of the court or tribunal in question and to avoid costly international procedures necessary to replace judges who die in office, or otherwise are unable or unwilling to complete their elected terms.

16. Whilst age and health are not certain indicators of future eventualities, experience to date suggests that such considerations (which apply to most appointments to service within the UN) are potentially material considerations for the appointment, election or continued service of international judges. To date, three judges, elected to serve the nine-year term of a judge of the ICC, have resigned on grounds of ill health and one such judge has died in office. There is therefore good sense in the conclusions expressed by the Independent Panel on International Criminal Court Judicial Elections (26 October 2011):¹²

- a practice be developed whereby States Parties would not nominate candidates who would reach a certain maximum age during the course of their elected terms; and
- a practice be developed whereby nominating governments or candidates themselves disclose the state of their health, or to require successful candidates to undergo medical examinations before assuming office, so that unfavourable results would vacate the candidature of the judge concerned.

Personal Qualities

17. The qualities necessary for appointment or election as a judge, whether in an international court or tribunal or one operating in a domestic jurisdiction, may be found, in part, in universal human rights law and, in part, in local tradition and practice in municipal courts and tribunals. National codes have been adopted in many jurisdictions to express the qualities essential to judicial appointment and to the performance by appointed or elected judges of their duties of office.

18. The essential qualities of a judge in the UN system derive from the universal values expressed in Article 10 of the Universal Declaration of Human Rights (1948) (UDHR):¹³

‘Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.’

19. This statement of fundamental principle, whilst addressed to the rights of persons who come before a tribunal for the determination of rights and obligations or criminal charges, necessarily also express the qualities required of the members of such tribunals. The principle in Article 10 UDHR was expressed and further elaborated in Article 14(1) of the International Covenant on Civil and Political Rights (1966) (ICCPR):¹⁴

‘All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.’

11 See the survey contained in the report of the Independent Panel on ICC Judicial Elections, ‘Independent Panel Report on International Criminal Court Judicial Nominations 2011’, (26 October 2011), pp 18–19 revealed that about 80 per cent of countries surveyed impose age limits or retirement ages, ranging from 55 to 75 years.

12 *Ibid.*, pp 18–19 (age); p 19 (health).

13 UNGA Resolution 217 A (III) of 10 December 1948.

14 UNGA Resolution 2200A (XXI) of 16 December 1966, 999 UNTS 171, *entered into force* 23 March 1976.

20. The independence and impartiality of the court or tribunal (and hence of its judges) are qualities common to each statement of the relevant universal principles. In the ICCPR, the additional quality of ‘competence’ is expressed as well as the requirement that the tribunal should be ‘established by law’ and hence not be ad hoc or otherwise dependent for its creation, existence and continuance on the will of those who exercise political, economic or other power over others.
21. Various attempts have been made to elaborate the qualities that are expressed or implied in the foregoing statements of international law. The Basic Principles on the Independence of the Judiciary of the United Nations, adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders in September 1983 in Milan, Italy and endorsed by the UNGA in its Resolution 40/32 of 29 November 1985, provide in Principle 10 for the qualifications, selection and training of judges:
- ‘Persons selected for judicial office shall be individuals of integrity and ability with appropriate training or qualifications in law. Any method of judicial selection shall safeguard against judicial appointments for improper motives. In the selection of judges, there shall be no discrimination against a person on the grounds of race, colour, sex, religion, political or other opinion, national or social origin, property, birth or status, except that a requirement that a candidate for judicial office must be a national of the country concerned, shall not be considered discriminatory.’
22. Amongst the most influential of the attempts to express the governing criteria was that made by the Judicial Group on Strengthening Judicial Integrity (the ‘Judicial Integrity Group’) operating since 2000. That Group, at its meeting held in Bangalore, India in February 2001, adopted the Bangalore Draft Code of Judicial Conduct (the ‘Bangalore Code’).¹⁵ The Bangalore Code was considered by a working party of the Consultative Council of European Judges in 2002. This led to revisions of the Bangalore Code and to its further consideration by a high-level meeting held at the Peace Palace in The Hague, the Netherlands, in November 2002. That meeting was convened to secure the scrutiny of the draft, so as to ensure that it contained concepts and values equally acceptable to judges from the common law, civil law and other traditions of law.
23. From these judicial meetings emerged the final form of the Bangalore Principles of Judicial Conduct (‘Bangalore Principles’), as presented to the 59th session of the UN Commission on Human Rights in April 2003 by the then UN Special Rapporteur on the Independence of Judges and Lawyers, Dato’ Param Cumaraswamy (Malaysia). On 29 April 2003, that Commission unanimously adopted Resolution 2003/43, which noted the Bangalore Principles. It brought those principles to ‘the attention of member states, the relevant United Nations organs and inter-governmental and non-governmental organisations for their consideration’.
24. In April 2006, the Fifteenth Session of the Commission on Crime Prevention and Criminal Justice, meeting in Vienna, unanimously recommended to the Economic and Social Council of the UN, the adoption of a draft resolution co-sponsored by the governments of Egypt, France, Germany, Nigeria and the Philippines entitled ‘Strengthening Basic Principles of Judicial Conduct’. The draft resolution invited Member States, consistent with their domestic legal systems, to encourage their judiciaries to take the Bangalore Principles into consideration. It noted that these principles are complementary to the earlier Basic Principles on the Independence of the Judiciary of the United Nations. It requested the United Nations Office on Drugs and Crime (UNODC) continue to support the work of the Judicial Integrity Group. On 27 July 2006, the Economic and Social Council of the UN adopted Resolution 2006/23 entitled ‘Strengthening basic principles of judicial conduct’. The Resolution was adopted by consensus without requiring a vote.
25. Against the foregoing background, it may be concluded that an emerging international consensus of basic principles is appearing within the organs of the UN, influenced by the Bangalore Principles of the Judicial Integrity Group. The principles have also been treated as authoritative in important

¹⁵ UNODC, *Commentary on the Bangalore Principles of Judicial Conduct* (September 2007): www.unodc.org/documents/corruption/publications_unodc_commentary-e.pdf.

courts of high authority.¹⁶ It is therefore appropriate to note the principles and values expressed by this Group.

26. The principles governing judicial values expressed by the Judicial Integrity Group are the values which the Council of the IBAHRI also endorses, namely:

Value 1: Independence

‘Judicial independence is a pre-requisite to the rule of law and a fundamental guarantee of a fair trial. A judge shall therefore uphold and exemplify judicial independence in both its individual and institutional aspects.’

Value 2: Impartiality

‘Impartiality is essential to the proper discharge of the judicial office. It applies not only to the decision itself but also to the process by which the decision is made.’

Value 3: Integrity

‘Integrity is essential to the proper discharge of the judicial office.’

Value 4: Propriety

‘Propriety, and the appearance of propriety, are essential to the performance of all of the activities of a judge.’

Value 5: Equality

‘Ensuring equality of treatment to all before the courts is essential to the due performance of the judicial office.’

Value 6: Competence and diligence

‘Competence and diligence are prerequisites to the due performance of judicial office.’

27. The Council of the IBAHRI endorses the Bangalore Principles, as refined by the Judicial Integrity Group and as accepted by the foregoing successive decisions of organs of the UN. The values that should be taken to apply to the appointment and performance of persons serving in international judicial office are those expressed in the Bangalore Principles:

- (a) *In nominating candidates* for consideration for appointment or election to international judicial office, regard should be had by Member States of the extent to which the proposed candidate conforms to the foregoing values and would be likely to do so if appointed or elected to such office;

¹⁶ See, for example, Hearing on the Report of the Chief Justice of Gibraltar (Gibraltar) [2009] UKPC 43 (12 November 2009) (*Schofield v The Queen*), paragraph 28, available at: www.bailii.org/uk/cases/UKPC/2009/43.html.

- (b) *In recommending candidates* as suitable and appropriate for appointment or election to international judicial office, the recommending body (including the Internal Justice Council) should assess the extent to which the candidate complies with the foregoing values and would be likely to conform to them in the discharge of an international judicial office, if appointed or elected to that office; and
- (c) *In appointing or electing such candidates* to international judicial office, the Member States of the electing body should be obliged to take into consideration the respective qualities and experience of the candidate and the extent to which the candidate has in the past conformed, and would in the discharge of their office, if appointed or elected, be likely to conform to the values stated in the Bangalore Principles.

28. Whilst geographical and other diversity is a relevant consideration for the selection of candidates, and appointment or election of judges to office within the UN, the primary considerations reflected in international human rights law are not geographical, racial, cultural or social but concern the personal qualities of competence, independence and integrity expressed in international law. Those qualities transcend geographical, racial, cultural or social characteristics. They should enjoy priority in the process of selection of candidates, and appointment or election of judges to judicial office in international courts or tribunals.

Selection of Candidates and Appointment or Election of Judges

29. Many (perhaps most) candidates for selection, appointment or election to international judicial office will, or ought to, be accustomed to the procedures for appointment to office as a judge of municipal courts and tribunals. Most will be unaccustomed to procedures of election. In particular, most candidates will be unaware of, and inexperienced in, the extensive bloc voting that exists within the UNGA and other multi-national assemblies and which generally determines the outcome of most votes conducted by such bodies. Whereas preliminary procedures of selection of candidates are designed to ensure that only electable candidates are placed before the UNGA or other electing or appointing bodies – for example the Assembly of States Parties to the Rome Statute of the ICC – the ultimate decision, made under current arrangements, remains political. Geopolitical considerations – rather than objective merits, experience, qualifications and personal qualities of the candidates – predominate in the final process. To some extent, the identity of the nation state proposing the candidate; its own size and significance within the UN; its power to collect and exchange votes, rather than the personal qualities; and experience and devotion to the foregoing values, influence the election, as presently conducted.
30. A procedure has evolved by which candidates for election to judicial office within the UN are escorted by the Permanent Representative of their country to see key geopolitical representatives, in the hope of securing support for their candidacy. Such arrangements are alien to the experience of judges in most countries of the world. They are likely to be uncomfortable for most judicial candidates. The willingness of judges and their countries to engage in such activities will vary. Yet it may influence, or even help to determine, the election of those judges who succeed. In the opinion of some candidates and even of some national delegations, such conduct is inappropriate or unworthy behaviour on the part of those offering themselves for election to judicial office.¹⁷

¹⁷ A vivid description of the process of election to the ICJ is given in the paper by Judge Keith (see, n 8 above). He was accompanied by an official of his country's Ministry of Foreign Affairs during a 'campaign' that involved a large national commitment of time and money. At one interview, his qualifications were pronounced 'outstanding' but the foreign official demanded to know what was in it for his country, were it to vote favourably. This produced discussion of contemporary voting intentions. The International Law Association (ILA) Burgh House Principles and the Institut de Droit International (IDI) Resolution on the Position of the International Judge call for greater transparency in this process. Plainly, this is needed.

31. The defects of the present geopolitical voting practice in the UNGA are well-known. They are unlikely to change in the immediate future. Whilst the initial *application* to the Internal Justice Council, where applicable, is a personal proposal of a candidate, the *election* process in the UNGA (once engaged) is an international political act. That act is performed by the judge's own country's political representatives in the UNGA and by the political representatives of other countries. It is therefore made in conformity with an assessment of wider political and other considerations deemed important to the country in the UN context. Over such considerations, individual judicial candidates will ordinarily have no influence – and in the view of the Council of the IBAHRI, they should have no influence in a matter affecting directly their own accession to (or continuance in) international judicial office.
32. While steps taken to improve the selection of candidates for international judicial office should be applauded (and are a contribution to improving the outcome of the election process), continuing attention needs to be paid to the UN election process itself. The office of a judge is not simply another official position to be bartered by the exchange of national votes. It is an office that demands the highest integrity if it is to conform to the universal principles of international human rights law, amongst others, referred to in the foregoing instruments. Considerations of sex, race and culture are relevant.¹⁸ However, considerations of competence, independence and impartiality are mandatory and should always predominate. This is not institutionally guaranteed in the UN system at present because the ultimate deciding factor is geopolitical, rather than determined by universal human rights law. The purpose of the Resolution on the Values Pertaining to Judicial Appointments to International Courts and Tribunals, adopted by the Council of the IBAHRI on 31 October 2011, is to contribute to ensuring that the universal principles of human rights law, and the values that this law enshrines, are reflected and predominate in the selection of candidates and their appointment or election to international judicial offices.
33. What has been said above in relation to the qualifications and qualities essential to the selection of candidates and the appointment or election of a judge in a UN court or tribunal applies with equal force to the selection, appointment or election of judges to courts or international tribunals established with the support of the UN or outside the UN system,¹⁹ when established to fulfil international purposes, including:
- the ICC, where judges are elected by the Assembly of States Parties to the Rome Statute of the ICC, referred to in paragraph 3 above;
 - the Special Court for Sierra Leone 2002;
 - the Extraordinary Chambers in the Courts of Cambodia, constituted in 2003 to try senior leaders of Democratic Kampuchea and those who were most responsible for the crimes and serious violations of Cambodian penal law, international humanitarian law and custom and international conventions recognised by Cambodia, that were committed during the period from 17 April 1975 to 6 January 1979;²⁰ and
 - other tribunals that have operated in East Timor and elsewhere, where the international community has a limited ancillary role.²¹

18 Judge Keith points out that only three of the 100 judges elected to the ICJ in the last 65 years have been women, a fact that reproaches the world community for neglect of the entire range of talent available to it. See, n 8 above: Keith, at p 6.

19 For example, see generally: R Mackenzie, K Malleson, P Martin and P Sands QC, *Selecting International Judges: Principle, Process and Politics*, (Oxford: Oxford University Press, 2010).

20 'Agreement between the United Nations and the Royal Government of Cambodia concerning the prosecution under Cambodian law of crimes committed during the period of Democratic Kampuchea', signed 6 June 2003, 2329 UNTS 117 (*entered into force* 29 April 2005). See, L O'Neill and G Sluiter, 'The Right to Appeal a Judgment of the Extraordinary Chambers in the Courts of Cambodia', (2009) Vol 10 MJIL 596. For concerns over the appointment process and about some appointees to the Chambers, see C Son and G Niemann, 'Cambodian Extraordinary Chambers: A Mixed Tribunal Destined to Fail' (April 2009) Vol 33(2) Criminal LJ (Aust) 105, at pp 109–110.

21 O Swaak-Goldman, 'Recent Developments in International Criminal Law: Trying to Stay Afloat Between Scylla and Charybdis' (July 2005) Vol 54(3) ICLQ 691.

Tenure, Suspension and Removal from Office

34. A hallmark of the independence required for the discharge of international judicial office is protection for the tenure of a judge, once duly appointed or elected to office. Without such tenure, and without a measure of protection from personal liability for acts done in the discharge of the judicial office, a judge's independence will be at risk and dependent on third parties who thereby may secure the actuality, or appearance of, influence over the decisions of the judge. Judicial independence, which is for the protection of parties and the community affected by judicial decisions, also includes a proper measure of independence from other judges on the court or tribunal. It is for these reasons that statutes and other constituting instruments providing for international judicial office, like national constitutions creating or providing for domestic courts, generally include provisions limiting interference with judicial tenure in office. In domestic jurisdictions, securing constitutional provisions protective of the tenure in office of appointed judges has often been the product of national revolutions.²²

35. Because of the importance attached to tenure, a power to suspend or remove judges who have been duly appointed to office should be express and cannot ordinarily be inferred or implied.²³ To authorise suspension or removal from office, explicit provisions of law are required. Occasionally these are afforded in the case of international judicial office. Thus, the Charter of the United Nations provides that the ICJ 'shall function in accordance with the annexed Statute...'.²⁴ The Statute of the ICJ provides a procedure, designedly strict, for removal from office of a judge of the Court. Article 18 of the Statute states:

'1. No member of the Court can be dismissed unless, in the unanimous opinion of the other members, he has ceased to fulfill the required conditions.

2. Formal notification thereof shall be made to the Secretary-General by the Registrar.

3. This notification makes the place vacant.'

There is no express provision for suspension of a member of the ICJ and, in the absence of such a provision, it would be erroneous for a presiding judge or plurality of judges to purport to suspend or remove an appointed judge.

36. It would be inconsistent with the independent discharge of international judicial office for a judge to be removed for pronouncing unpopular decision(s) or disagreeing with a majority of other judges. Strict and convincing decisions for removal will normally be required, such as the establishment of 'proved incapacity', 'incompetence' or 'misconduct'. It would not be every breach of criminal or other law (for example traffic or regulatory offences) that would warrant removal of an appointed international judge from office on such grounds. So exceptional is removal from judicial office that the kind of 'misconduct' denoted must be sufficiently grave, and the 'incapacity' or 'incompetence' sufficiently debilitating, to make continued service as a judge impossible, thereby endangering the authority and respect to be accorded to the judge's determinations. Although these approaches to suspension or removal of an international judge from office may very occasionally protect office holders who are unworthy, this is a price that must be paid to secure judicial tenure; guarantee judicial independence; and assure parties and the community of resolute adherence to the rule of law in international courts and tribunals.

²² In the case of Great Britain, the Act of Settlement 1701 and in the US, the Declaration of Independence, 1776, charging that, in relation to the American settlements, King George III had 'made Judges dependent on his Will alone, for the tenure of their offices, and the amount of payment of their salaries.' See also the United States Constitution, Article 3, section 1.

²³ See, *Rees v Richard Crane* [1994] 1 LRC 57, PC.

²⁴ The Charter of the United Nations, Article 92, describes the annexed Statute as 'based upon the Statute of the Permanent Court of International Justice [which] forms an integral part of the present Charter.'

Transmittal

37. The foregoing principles deal with the considerations that appear to the Council of the IBAHRI to be most important and urgent at this time. Various other considerations may be deserving of future attention, including the proper funding and resources afforded to international courts and tribunals;²⁵ the avoidance amongst such judges of professional or other activities incompatible with the proper discharge of international judicial office;²⁶ and the particular question of the appointment of ad hoc judges to participate in the ICJ.²⁷
38. These principles are commended to the bar associations, law societies and individual members of the IBA, and to the UN and other international bodies, for action and implementation as appropriate, as expeditiously as possible.

25 See, n 8 above: Keith, p10.

26 See, n 8 above: Keith, pp 9–10. See also, ILA, Burgh House Principles 1.3; IDI Resolution on the Position of the International Judge; Statute of the International Court of Justice, Article 31(1).

27 See, n 8 above: Keith, p 6. Compare with the Charter of the United Nations, Article 92; the Statute of the ICJ, Article 31(1).

List of Abbreviations

Bangalore Principles of Judicial Conduct – the ‘Bangalore Principles’

Charter of the United Nations – or the ‘Charter’

Judicial Group on Strengthening Judicial Integrity – the ‘Judicial Integrity Group’

United Nations Internal Justice Council – or the ‘Internal Justice Council’

List of Acronyms

IBAHRI – International Bar Association’s Human Rights Institute

ICC – International Criminal Court

ICCPR – International Covenant on Civil and Political Rights

ICJ – International Court of Justice

IDI – Institut de Droit International

ILA – International Law Association

UDHR – Universal Declaration of Human Rights

UN – United Nations

UNAT – United Nations Appeals Tribunal

UNDT – United Nations Dispute Tribunal

UNGA – United Nations General Assembly

UNODC – United Nations Office on Drugs and Crime

International Bar Association

4th Floor, 10 St Bride Street

London EC4A 4AD

United Kingdom

Tel: +44 (0)20 7842 0090

Fax: +44 (0)20 7842 0091

www.ibanet.org