



ELECTIONS TEAM

COALITION FOR THE INTERNATIONAL CRIMINAL COURT (CICC)

COMMENTS AND RECOMMENDATIONS¹ TO THE 11TH SESSION OF THE ASSEMBLY OF STATES PARTIES

14-22 NOVEMBER 2012, THE HAGUE

8 NOVEMBER 2012

The CICC Team on Elections (Team) views the 11th session of the Assembly of States Parties (ASP) as an important opportunity to conduct and promote transparent and merit-based elections of all International Criminal Court (ICC) officials and members of ASP bodies. At the 11th session the ASP will elect a new Deputy Prosecutor (Prosecutions), five members of the Board of Directors of the Trust Fund for Victims (TFV) and nine members of the newly-established Advisory Committee on Nominations (ACN); the Assembly may additionally make recommendations, as anticipated under the Rome Statute, to ICC Judges on the election of the next Registrar of the Court. Bearing in mind that the credibility and effectiveness of the Court and ASP bodies depends on the performance of those elected, the Team is conscious of the need to ensure that electing the most highly qualified candidates and ensuring gender and geographic balance are the primary priorities for states parties. Given that ultimate responsibility for ensuring that these elections are fair, transparent and merit-based lies with the ASP, the Team urges it to remain vested of the issue of elections-governance and to build upon the important advances it has made in recent years. That being said, the Team wishes to reiterate that the Coalition does not take a position or endorse any candidates for election.

The Team is convinced that more can and must be done to ensure that the ASP develops best-practice election processes capable of producing the nomination and election of the most highly-qualified officials and members of ASP bodies. To this end, the Team makes the following observations and recommendations.

A) THE ELECTION OF THE DEPUTY PROSECUTOR (PROSECUTIONS)

The Team urges the Assembly to elect the candidate for Deputy Prosecutor (Prosecutions) who is the most highly-qualified according to the Rome Statute, not on the basis of vote trading. The Office of the Prosecutor (OTP) published the vacancy announcement for this position on 24 January 2012 following the election of then-Deputy Prosecutor Fatou Bensouda to the position of Prosecutor of the ICC.²

The Team recognizes the overall qualifications of the three candidates shortlisted by the Prosecutor in accordance with the procedure provided for in the Rome Statute. The Team notes with concern,

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however, that of the 120 applications received, the overwhelming majority were from male candidates (92, or 77%), with only 23% (28) from female applicants. Further still only some 23 applications received were from female applicants from states parties out of a total of 78 applicants from states parties overall.³ The Team is cognisant of the fact that the application process for the present position was through open competition and the Coalition for its part circulated the vacancy announcement through its various networks in order to draw as much attention as possible and with a view to encouraging as many applications as possible. Nevertheless the ASP and its individual members must do more to encourage applications from women and applications representative of the ASP's own geographic diversity. The ASP and states parties should also ensure distribution of vacancy announcements through its national bar associations, and those of non-states parties, and any other networks coupled with information about the work of the Court that would encourage greater interest in such vacancies.

The Coalition is of the firm belief that having in place the most qualified and experienced leadership of the Court is key to ensuring a fair, effective and independent ICC. In order to promote this and to inform the electorate at the 11th ASP session, the Coalition requested the three candidates under consideration to respond to a questionnaire that sought to gauge their suitability for the position, probing them on their skills and experience as well vision for the ICC. All three candidates responded to the questionnaire, which were circulated to states parties and published on the Coalition website in the interests of transparency.⁴ While the Coalition does not endorse or take a position on specific candidates, the Team urges states parties to carefully review the responses to the questionnaires, in addition to the materials submitted to the ASP, in determining which candidate to support. Particular attention should be paid to the qualifications and experience that the questionnaire sought to emphasise the importance of, including *inter alia* demonstrated professional excellence in complex criminal cases; demonstrated ability to act with independence and impartiality in the exercise of professional duties; demonstrated managerial skills; experience dealing with victims of gender and sexual violence; and sensitivity towards the role and participation of victims in litigious matters.

B) THE ASP ADVISORY COMMITTEE ON NOMINATIONS

The Team welcomed the establishment at its 10th session of an Advisory Committee on Nominations (ACN), as envisaged by article 36(4)(c) of the Rome Statute, including the adoption of its terms of reference.⁵ The Team is pleased that the ASP sought to establish the ACN in light of the Coalition's own experience convening the Independent Panel on ICC Judicial Elections, which in its report recommended the establishment of the ACN. The Team welcomes this action by the ASP, which represents an additional step toward ensuring meaningful and substantive expert advice in carrying out its management oversight functions.

As the ASP is poised to elect the first members of the ACN, the Team would urge it elect those experts who most closely match the qualifications set out in the ACN's terms of reference and possess the expertise and independence required to carry out the important function of ensuring that states parties nominate and elect individuals who meet the strict requirements to sit on the Court's judicial bench. The Team is dismayed that, despite an express requirement in the terms of reference that the ACN be composed of a "fair representation of both genders," only two of the 11 nominated candidates are women. This has the potential to undermine the legitimacy of the ACN and its recommendations. The

³ 'Election of the Deputy Prosecutor', Appendix 1 http://www.icc-cpi.int/iccdocs/asp_docs/ASP11/ICC-ASP-11-17-ENG-AV.pdf

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⁵ ICC-ASP/10/36, Annex.

ASP should take additional measures to ensure that states parties nominate and elect highly qualified women and men to all ASP bodies.

The Team also urges states parties to take full advantage of this committee of experts and consider a broader role for the ACN in providing advice to the Assembly on issues relating to judicial elections. In this regard and in addition to its core mandate of providing technical assessments of the qualifications of judicial nominees based on article 36 of the Rome Statute, such a body could, for example:

- Ensure that the provisions of the Rome Statute and relevant ASP resolutions that govern the nomination of judges are adhered to (for example, it could make recommendations in relation to the possibility of more than one judge from the same country serving at the ICC, a scenario which is possible under article 36(7) and article 36(10) of the Rome Statute);
- Provide recommendations to the ASP Bureau on improvements to the nomination process with a view to promoting best practice procedures;⁶
- Provide advice to the ASP on the judicial expertise needs of the Court, including specific needs when they arise (such as the need for candidates suitable for the Appeals Chamber) and on general issues such as candidates with experience in trial management and courtroom efficiency.

The Team notes that the current text does not specify whether the mandate of the ACN is strictly limited to articles 36(a), (b) and (c) of the Rome Statute or whether the body would be able to address the above issues. The Team also notes that its terms of reference provide the ACN with a mandate to meet only once candidates have been nominated by states parties, leaving a very short period to conduct assessments.

If the mandate of the expert body on judicial elections is so limited, then the Team would encourage the ASP to conduct a thorough review of election-related governance issues, including those highlighted by the report of the Independent Panel, including the nomination procedures and the service of judges.⁷

The Team urges states parties to create clear guidelines regarding the ACN's working methods and to keep in mind the importance of including measures to guarantee transparency of the ACN's work. The Team would welcome the ability of the ACN to communicate directly with candidates. The Team also encourages states parties to consider affording candidates a formal right of reply and comment with respect to any assessment of their qualifications.

The Team stresses the importance of civil society involvement in the work of the ACN, aside from any confidential deliberations of the committee. The Coalition has suspended the work of the Independent Panel on the recommendation of its members, in order "for the ACN to develop the kind of independence and expertise the Panel enjoyed." As the Chair of the Independent Panel stated, "[the] ACN should be given this opportunity and that the CICC should closely monitor its development. If, in the future, the ACN is not able to achieve its high purpose, the CICC could reactivate the Independent Panel."⁸

⁶ For example, the Team notes that one state party identified its candidate in 2011 by establishing a domestic committee of high-level legal experts including members of the judiciary to evaluate applications for the position.

⁷Independent Panel on ICC Judicial Elections, Report on International Criminal Court Judicial Nominations 2011, pp. 16-17, 26 October 2011, available at:

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⁸ The Honorable Richard Goldstone, Letter to CICC Convener William Pace, 28 April 2012, available at:

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C) THE ELECTION OF THE REGISTRAR

The term of the current Registrar is due to expire in April 2013. In January the plenary of judges will elect, taking into account any recommendation by the ASP, the next Registrar who will serve a term of five years as per article 43 of the Rome Statute. On 22 June 2012, the ICC circulated a vacancy announcement for the position of Registrar on its website. From the 67 applications received, 11 candidates were shortlisted by the Presidency. As was the case with the Deputy Prosecutor vacancy, the Team notes that female candidates were underrepresented in the applications received as well as the final 11 shortlisted. There is also little geographic diversity among those shortlisted.

The Registry has a critically important role to play. It is the largest of the Court's organs, employing well over 400 staff members with varying responsibilities and mandates and provides key services to the other organs. The Registry is also an important point of contact with the Court for victims and victim communities and is responsible *inter alia* for ensuring fair trial rights and the meaningful representation and participation of victims through its administration of the Court's legal aid system as well as protection of victims and witnesses, cooperation and outreach and public information, amongst a host of other varied responsibilities. The Registry is responsible for preparing the Court's budget. The Registrar, therefore, as head of this organ has significant responsibilities in ensuring that these functions are carried out with sufficient competency, sensitivity, and vision.

The Team notes that draft recommendations are to be approved by the ASP that the plenary of judges should take into account in electing the next Registrar, pursuant to article 43(4) of the Rome Statute. Unfortunately NGOs were not privy to discussions on the recommendations, but understands that they include *inter alia* proven managerial skills; familiarity with governmental and intergovernmental processes and diplomatic skills; and the ability to cooperate with others. The Team welcomes in particular reference to the importance of "legal expertise on specific issues, including, but not limited to, violence against women."

Nevertheless the Team is disappointed that the recommendations did not go further in reiterating the importance of skills and qualifications detailed in the vacancy announcement, as was the case with its recommendations adopted in 2007, or make any recommendations that went further in articulating additional skills and qualifications specific to this role.⁹ The Team believes therefore, that the ASP should consider expanding the present recommendations before endorsing them. While the plenary of judges are not bound by the ASP recommendations, they do set an important bench mark and constitute a declaration by the ASP of the skills and expertise it believes are of importance for a Registrar to possess.

In this respect, the Coalition has circulated questionnaires to the candidates.¹⁰ While the responses are primarily to inform the plenary of judges and to encourage an informed choice of Registrar, the questions themselves provide an indication of the skills most needed in the Registrar of the Court, which the ASP should take note of. These include, but are not limited to:

- Vision for the Court and the Registry;
- Experience in court administration, particularly management at a senior level of a large number of staff and large scale budget;
- Expertise in gender equality;
- Experience managing staff in a multi-cultural and international environment;
- Sensitivity towards victims of gender and sexual violence and child victims;

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- Experience engaging with various stakeholders, including *inter alia* the diplomatic community; civil society organisations; and victims and victim communities;
- Sound administrative, policy and human resource experience, and
- Experience in managing and developing effective legal aid systems, managing outreach initiatives and victims support functions would also be considered highly desirable.

For future Registrar elections, the Team suggests that the ICC Presidency – which is responsible for reviewing the applications – indicate the basis on which they shortlist candidates, and whether importance was placed on ensuring adequate gender and geographic diversity. The Presidency may also wish to use its good offices to encourage the recruitment of more highly qualified female candidates and those from underrepresented states.

D) CLEAN SLATE ELECTIONS

The Team notes that the nomination and election process for the Board of Directors of the Trust Fund for Victims and for the Committee on Budget and Finance (CBF) have been characterised by a process whereby states identify candidates through regional consensus and a number of candidates corresponding to the number of vacancies. For example, in the upcoming election of the Board of Directors, just five candidates have been nominated for five vacancies. Similarly, in recent elections for members of the CBF, states parties have nominated the bare minimum number of candidates required, an exception being the 10th session of the ASP in December 2011, which saw the nomination of 2 candidates competing for the single seat reserved for a member from Africa. While the Team does not seek to comment on the qualifications of the candidates put forward in these elections and notes that the relevant ASP resolutions governing these elections do not prohibit these practices, it is nevertheless concerned that such practices may not be conducive to encouraging the most qualified persons and adequate competition and choice in elections. Indeed, the practice of identifying single or consensus candidates can lend itself to candidates being identified on political grounds as opposed to qualification. The ASP as a governing body would benefit from having more choice of highly qualified candidates in all its elections.

In order to respond to this state of affairs and ensure that candidates nominated are suitable, the ASP should encourage, by way of formal resolution, that regional blocs identify more than one candidate per region in order to increase the choice of candidates. The ASP could also consider adopting some of the mechanisms employed in the election of judges, such as minimum voting [and nomination] requirements which ensure a greater choice of candidates for election.¹¹ Such resolutions or mechanisms would encourage the identification of multiple candidates and avoid vote trading based on geographic consensus, which is not always conducive to ensuring the identification of the most suitable and highly-qualified persons.

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² The vacancy announcement is available from the CICC webpage:
<http://coalitionfortheicc.org/?mod=electiondeputyprosecutors>.

however, that of the 120 applications received, the overwhelming majority were from male candidates (92, or 77%), with only 23% (28) from female applicants. Further still only some 23 applications received were from female applicants from states parties out of a total of 78 applicants from states parties overall.³ The Team is cognisant of the fact that the application process for the present position was through open competition and the Coalition for its part circulated the vacancy announcement through its various networks in order to draw as much attention as possible and with a view to encouraging as many applications as possible. Nevertheless the ASP and its individual members must do more to encourage applications from women and applications representative of the ASP's own geographic diversity. The ASP and states parties should also ensure distribution of vacancy announcements through its national bar associations, and those of non-states parties, and any other networks coupled with information about the work of the Court that would encourage greater interest in such vacancies.

The Coalition is of the firm belief that having in place the most qualified and experienced leadership of the Court is key to ensuring a fair, effective and independent ICC. In order to promote this and to inform the electorate at the 11th ASP session, the Coalition requested the three candidates under consideration to respond to a questionnaire that sought to gauge their suitability for the position, probing them on their skills and experience as well vision for the ICC. All three candidates responded to the questionnaire, which were circulated to states parties and published on the Coalition website in the interests of transparency.⁴ While the Coalition does not endorse or take a position on specific candidates, the Team urges states parties to carefully review the responses to the questionnaires, in addition to the materials submitted to the ASP, in determining which candidate to support. Particular attention should be paid to the qualifications and experience that the questionnaire sought to emphasise the importance of, including *inter alia* demonstrated professional excellence in complex criminal cases; demonstrated ability to act with independence and impartiality in the exercise of professional duties; demonstrated managerial skills; experience dealing with victims of gender and sexual violence; and sensitivity towards the role and participation of victims in litigious matters.

B) THE ASP ADVISORY COMMITTEE ON NOMINATIONS

The Team welcomed the establishment at its 10th session of an Advisory Committee on Nominations (ACN), as envisaged by article 36(4)(c) of the Rome Statute, including the adoption of its terms of reference.⁵ The Team is pleased that the ASP sought to establish the ACN in light of the Coalition's own experience convening the Independent Panel on ICC Judicial Elections, which in its report recommended the establishment of the ACN. The Team welcomes this action by the ASP, which represents an additional step toward ensuring meaningful and substantive expert advice in carrying out its management oversight functions.

As the ASP is poised to elect the first members of the ACN, the Team would urge it elect those experts who most closely match the qualifications set out in the ACN's terms of reference and possess the expertise and independence required to carry out the important function of ensuring that states parties nominate and elect individuals who meet the strict requirements to sit on the Court's judicial bench. The Team is dismayed that, despite an express requirement in the terms of reference that the ACN be composed of a "fair representation of both genders," only two of the 11 nominated candidates are women. This has the potential to undermine the legitimacy of the ACN and its recommendations. The

³ 'Election of the Deputy Prosecutor', Appendix 1 http://www.icc-cpi.int/iccdocs/asp_docs/ASP11/ICC-ASP-11-17-ENG-AV.pdf

⁴ <http://www.iccnw.org/?mod=electiondeputyprosecutors>

⁵ ICC-ASP/10/36, Annex.

ASP should take additional measures to ensure that states parties nominate and elect highly qualified women and men to all ASP bodies.

The Team also urges states parties to take full advantage of this committee of experts and consider a broader role for the ACN in providing advice to the Assembly on issues relating to judicial elections. In this regard and in addition to its core mandate of providing technical assessments of the qualifications of judicial nominees based on article 36 of the Rome Statute, such a body could, for example:

- Ensure that the provisions of the Rome Statute and relevant ASP resolutions that govern the nomination of judges are adhered to (for example, it could make recommendations in relation to the possibility of more than one judge from the same country serving at the ICC, a scenario which is possible under article 36(7) and article 36(10) of the Rome Statute);
- Provide recommendations to the ASP Bureau on improvements to the nomination process with a view to promoting best practice procedures;⁶
- Provide advice to the ASP on the judicial expertise needs of the Court, including specific needs when they arise (such as the need for candidates suitable for the Appeals Chamber) and on general issues such as candidates with experience in trial management and courtroom efficiency.

The Team notes that the current text does not specify whether the mandate of the ACN is strictly limited to articles 36(a), (b) and (c) of the Rome Statute or whether the body would be able to address the above issues. The Team also notes that its terms of reference provide the ACN with a mandate to meet only once candidates have been nominated by states parties, leaving a very short period to conduct assessments.

If the mandate of the expert body on judicial elections is so limited, then the Team would encourage the ASP to conduct a thorough review of election-related governance issues, including those highlighted by the report of the Independent Panel, including the nomination procedures and the service of judges.⁷

The Team urges states parties to create clear guidelines regarding the ACN's working methods and to keep in mind the importance of including measures to guarantee transparency of the ACN's work. The Team would welcome the ability of the ACN to communicate directly with candidates. The Team also encourages states parties to consider affording candidates a formal right of reply and comment with respect to any assessment of their qualifications.

The Team stresses the importance of civil society involvement in the work of the ACN, aside from any confidential deliberations of the committee. The Coalition has suspended the work of the Independent Panel on the recommendation of its members, in order "for the ACN to develop the kind of independence and expertise the Panel enjoyed." As the Chair of the Independent Panel stated, "[the] ACN should be given this opportunity and that the CICC should closely monitor its development. If, in the future, the ACN is not able to achieve its high purpose, the CICC could reactivate the Independent Panel."⁸

⁶ For example, the Team notes that one state party identified its candidate in 2011 by establishing a domestic committee of high-level legal experts including members of the judiciary to evaluate applications for the position.

⁷Independent Panel on ICC Judicial Elections, Report on International Criminal Court Judicial Nominations 2011, pp. 16-17, 26 October 2011, available at:

<http://www.iccindependentpanel.org/sites/default/files/Independent%20Panel%20on%20ICC%20Judicial%20Elections%20-%20Report%2026%20October%202011.pdf>

⁸ The Honorable Richard Goldstone, Letter to CICC Convener William Pace, 28 April 2012, available at:

[http://www.iccnw.org/documents/28_April_2012_goldstone_IP_letter_\(2\).pdf](http://www.iccnw.org/documents/28_April_2012_goldstone_IP_letter_(2).pdf)

C) THE ELECTION OF THE REGISTRAR

The term of the current Registrar is due to expire in April 2013. In January the plenary of judges will elect, taking into account any recommendation by the ASP, the next Registrar who will serve a term of five years as per article 43 of the Rome Statute. On 22 June 2012, the ICC circulated a vacancy announcement for the position of Registrar on its website. From the 67 applications received, 11 candidates were shortlisted by the Presidency. As was the case with the Deputy Prosecutor vacancy, the Team notes that female candidates were underrepresented in the applications received as well as the final 11 shortlisted. There is also little geographic diversity among those shortlisted.

The Registry has a critically important role to play. It is the largest of the Court's organs, employing well over 400 staff members with varying responsibilities and mandates and provides key services to the other organs. The Registry is also an important point of contact with the Court for victims and victim communities and is responsible *inter alia* for ensuring fair trial rights and the meaningful representation and participation of victims through its administration of the Court's legal aid system as well as protection of victims and witnesses, cooperation and outreach and public information, amongst a host of other varied responsibilities. The Registry is responsible for preparing the Court's budget. The Registrar, therefore, as head of this organ has significant responsibilities in ensuring that these functions are carried out with sufficient competency, sensitivity, and vision.

The Team notes that draft recommendations are to be approved by the ASP that the plenary of judges should take into account in electing the next Registrar, pursuant to article 43(4) of the Rome Statute. Unfortunately NGOs were not privy to discussions on the recommendations, but understands that they include *inter alia* proven managerial skills; familiarity with governmental and intergovernmental processes and diplomatic skills; and the ability to cooperate with others. The Team welcomes in particular reference to the importance of "legal expertise on specific issues, including, but not limited to, violence against women."

Nevertheless the Team is disappointed that the recommendations did not go further in reiterating the importance of skills and qualifications detailed in the vacancy announcement, as was the case with its recommendations adopted in 2007, or make any recommendations that went further in articulating additional skills and qualifications specific to this role.⁹ The Team believes therefore, that the ASP should consider expanding the present recommendations before endorsing them. While the plenary of judges are not bound by the ASP recommendations, they do set an important bench mark and constitute a declaration by the ASP of the skills and expertise it believes are of importance for a Registrar to possess.

In this respect, the Coalition has circulated questionnaires to the candidates.¹⁰ While the responses are primarily to inform the plenary of judges and to encourage an informed choice of Registrar, the questions themselves provide an indication of the skills most needed in the Registrar of the Court, which the ASP should take note of. These include, but are not limited to:

- Vision for the Court and the Registry;
- Experience in court administration, particularly management at a senior level of a large number of staff and large scale budget;
- Expertise in gender equality;
- Experience managing staff in a multi-cultural and international environment;
- Sensitivity towards victims of gender and sexual violence and child victims;

⁹ http://www.icc-cpi.int/iccdocs/asp_docs/Elections/ER2012/ICC-ASP-6-Recomm1-ENG.pdf

¹⁰ http://www.iccnw.org/documents/CICC_Registrar_Questionnaire_2012.pdf

- Experience engaging with various stakeholders, including *inter alia* the diplomatic community; civil society organisations; and victims and victim communities;
- Sound administrative, policy and human resource experience, and
- Experience in managing and developing effective legal aid systems, managing outreach initiatives and victims support functions would also be considered highly desirable.

For future Registrar elections, the Team suggests that the ICC Presidency – which is responsible for reviewing the applications – indicate the basis on which they shortlist candidates, and whether importance was placed on ensuring adequate gender and geographic diversity. The Presidency may also wish to use its good offices to encourage the recruitment of more highly qualified female candidates and those from underrepresented states.

D) CLEAN SLATE ELECTIONS

The Team notes that the nomination and election process for the Board of Directors of the Trust Fund for Victims and for the Committee on Budget and Finance (CBF) have been characterised by a process whereby states identify candidates through regional consensus and a number of candidates corresponding to the number of vacancies. For example, in the upcoming election of the Board of Directors, just five candidates have been nominated for five vacancies. Similarly, in recent elections for members of the CBF, states parties have nominated the bare minimum number of candidates required, an exception being the 10th session of the ASP in December 2011, which saw the nomination of 2 candidates competing for the single seat reserved for a member from Africa. While the Team does not seek to comment on the qualifications of the candidates put forward in these elections and notes that the relevant ASP resolutions governing these elections do not prohibit these practices, it is nevertheless concerned that such practices may not be conducive to encouraging the most qualified persons and adequate competition and choice in elections. Indeed, the practice of identifying single or consensus candidates can lend itself to candidates being identified on political grounds as opposed to qualification. The ASP as a governing body would benefit from having more choice of highly qualified candidates in all its elections.

In order to respond to this state of affairs and ensure that candidates nominated are suitable, the ASP should encourage, by way of formal resolution, that regional blocs identify more than one candidate per region in order to increase the choice of candidates. The ASP could also consider adopting some of the mechanisms employed in the election of judges, such as minimum voting [and nomination] requirements which ensure a greater choice of candidates for election.¹¹ Such resolutions or mechanisms would encourage the identification of multiple candidates and avoid vote trading based on geographic consensus, which is not always conducive to ensuring the identification of the most suitable and highly-qualified persons.

¹¹ Procedure for the nomination and election of judges, the Prosecutor and Deputy Prosecutors of the International Criminal Court, ICC-ASP/3/Res.6