



ELECTIONS TEAM¹
COALITION FOR THE INTERNATIONAL CRIMINAL COURT (CICC)
COMMENTS AND RECOMMENDATIONS
TO THE NINTH SESSION OF THE ASSEMBLY OF STATES PARTIES
6 - 10 DECEMBER 2010, NEW YORK

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The CICC Team on Elections (Team) views the 9th session of the Assembly of States Parties (Assembly) as an important opportunity to prepare for the upcoming elections of six judges and a new prosecutor during the 10th session of the ASP. Bearing in mind that the credibility and effectiveness of the International Criminal Court (ICC) depends greatly on the professional and personal qualifications of its elected officials, the Team is concerned that not enough attention has been paid to the matter during the preparations for the upcoming ASP. The ASP is ultimately responsible for ensuring that these elections are fair, transparent and that candidates are elected on their merits in accordance with the Rome Statute.

The upcoming elections will have a significant impact on the future direction of the Court. Effort must be made to identify and nominate the highest qualified candidates for these positions. For this reason the Team urges the Assembly to begin discussions and preparations during the 9th ASP.

The Team is convinced that more must be done to ensure the success of these elections. To this purpose, the Team makes the following observations:

A) The Judicial Election

In order to be a fair, independent and effective institution, the ICC chambers must be composed of judges who are impartial, highly-qualified and representative, and who meet the other qualifications required by the Rome Statute. While the election of the most highly qualified judges will be of durable importance to the institution's success, the Team notes that the Court is at a critical phase in its development. The elected judges will arrive at the Court at a time when pre-trial chambers are setting important procedural landmarks, trial chambers are dealing with the first trials, and appeals chambers are establishing jurisprudence for the future. This also underscores the importance of the nomination and election of individuals demonstrating commitment to the continued and successful institutional development of the Court.

¹*The present paper has been produced by those Coalition members most active on the issue of elections and reviewed by the Coalition's wider membership, who are given the opportunity to comment and provide input. The present paper however, should not be construed to represent the views of all members of the CICC. Since the Rome Diplomatic Conference, Coalition members have organized themselves into thematic teams to follow issues addressed by the Assembly of States Parties or its subsidiary mechanisms and by the International Criminal Court. Teams provide a forum within which interested members discuss issues and follow ASP discussions and with a view to developing advocacy. All Coalition members are welcome to join any team and apprise of the work of the teams.*

In advance of the upcoming election, states parties should take a number of steps discussed below. In addition, they should seek to create a climate in which only highly qualified candidates are nominated, and nominations that fall short are discouraged. They can do so *inter alia* through statements during the General Debate of their commitment to elect the most highly qualified candidates and to processes that seek to identify these candidates, including by facilitating the work of the newly established Independent Panel on ICC Judicial Elections, discussed below.

i) A Transparent, Inclusive Nomination Process

The Team encourages all States Parties to nominate or support the nomination of candidates representing all regions and legal systems, including a fair representation of female and male candidates, through a transparent and vigorous process, and to conduct broad consultation with civil society, the legal profession and others to ensure that all qualified candidates have been considered and that the process benefits from an array of perspectives.

ii) Requisite Expertise of Candidates

Article 36, paragraph 3(b) requires that candidates “(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” [List A candidates]; 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” [List B candidates]. All “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” and must “have an excellent knowledge of and be fluent in at least one of the working languages of the Court.” (Article 36(3)(a) and (c)). All nominations must meet strict requirements set out in Article 36(4)(a). Further, article 36, paragraph 8 (b) also provides that “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.”

Of the six judges whose terms are ending, five are in either the trial or pre-trial chambers. In addition, minimum voting requirements are in place for this election that favour candidates from List A. In light of this, the Team emphasizes the importance of the above criterion that candidates have established competence in criminal law and procedure and extensive and relevant trial and court management experience, whether as senior judge, prosecutor, advocate, or in another similar capacity, in criminal proceedings. This is pertinent as the Court will be conducting the trial phase in many of its cases. Experience in the field of international criminal justice, in particular relating to crimes under the jurisdiction of the International Criminal Court, should be considered desirable but not essential.

iii) An ASP Advisory Committee on Nominations

Article 36, paragraph 4(c) provides that “The Assembly of States Parties may decide to establish, if appropriate, an Advisory Committee on Nominations.” This Advisory Committee could ensure that the provisions of the Statute and relevant ASP resolutions that govern the nomination of judges are followed, provide recommendations to the Bureau on improvements to the nomination process, carry out assessments of the judicial expertise needs of the Court, and provide assessments of the qualifications of judicial nominees,

among other functions. The ASP would decide the composition and mandate of the Committee. Regarding its composition, the Team recommends that the Committee be comprised of judicial experts. One of the most troubling characteristics of recent ICC elections has been the reported use of reciprocal agreements or vote trading, despite pleas from the ASP leadership not to do so. Through the functions described above, an Advisory Committee could help ensure the elections are fair and merit-based, and therefore should be established without further delay. To this end, the Team urges the ASP to mandate the Bureau to begin consideration of this matter with a view to reporting back to the 10th session of the ASP on progress made in this regard.

iv) The Independent Panel on ICC Judicial Elections

The next judicial election will be the first to benefit from a new Independent Panel on ICC Judicial Elections to evaluate nominations. The Panel will be composed of high-level and distinguished persons from within the fields of criminal law and international law (in particular, international criminal law, international humanitarian law and international human rights law). The mandate of the Panel is to produce expert assessments on nominees for judicial elections to the Court. The Coalition will serve as the host for the Panel, which is established without prejudice to any future body established by the ASP under article 36(4)(c). It will be launched at the upcoming 9th session of the ASP.

The Panel members have requested that the Coalition formally establish and support the body, however, the Panel will operate independently from the Coalition. The goal of the Panel is to facilitate and assist in the election of appropriately qualified judges, which will enhance the quality of the judiciary as well as the legitimacy of the Court. The Panel itself will not endorse or oppose any individual candidates.

The Coalition will continue to strictly adhere to its principle that it does not endorse or oppose any individual candidates, although its individual members may choose to do so. Notwithstanding its support for the Panel, the Coalition adheres to its goal that only the most qualified candidates are elected. The Coalition, for its part is focused on ensuring a fair, independent, transparent and merit-based election process and upholding the Rome Statute principles of competence and regional and gender representation in all ICC judicial elections.

The Team invites the Assembly to consider welcoming the establishment of the independent Panel within a resolution containing paragraphs on elections.

B) The Election of the Prosecutor

The term of the first Prosecutor will expire in June 2012. The election of a new Prosecutor will have a significant impact on the future development of the Court. The qualifications of the person elected and the procedures used by governments will be of the utmost importance.

Therefore, the Team believes that it is essential to establish transparent, effective and merit-based mechanisms for nominating and electing the next prosecutor. This should include deciding upon the best mechanism(s) to identify potential candidates, as well as the establishment of procedures to help the ASP agree upon, if possible, a consensus candidate, while at the same time not compromising the integrity of the process. In particular, the

search for consensus should not be a search for compromise to accommodate regional representation balance or other political factors, but be exclusively guided by the need to elect the most competent and capable candidate who meets the qualifications required by the Rome Statute. The next chief Prosecutor should have the ability to conduct sophisticated investigations and multiple complex prosecutions her or himself, and to effectively direct and control the daily activities of investigators and other prosecutors on the ground, on difficult and often remote crimes-scenes, as well as in courtrooms.

The Team believes that these issues must urgently be addressed in order to provide sufficient time to create mechanisms and procedures that are well-thought-out and that are widely supported by all States Parties.

Every effort should be made to elect the next Prosecutor at the 10th session of the ASP in 2011 or at the very latest at a resumed session early in 2012. This will ensure that there is no gap between the prosecutors and that the new prosecutor has sufficient time to familiarize themselves with the work and practices of the International Criminal Court.

i) The Proposed ASP Bureau Search Committee

In order to obtain the best prosecutorial candidates, it is necessary to conduct a global search for qualified candidates. The Coalition will be contributing to this search through its network in 150 countries throughout the world.

In this regard, the Team notes the proposal for the creation of an ASP Bureau Search Committee for the Position of ICC Prosecutor. In particular, the Team welcomes the consultative aspects of the proposed Committee's Terms of Reference. The Team believes that the ASP should seek to ensure that these Terms of Reference include clear guidelines relating to the extent of its remit and to ensure transparency in all of its actions - to do so will increase the legitimacy of all candidates proposed by the Committee.

ii) Establishing Transparent and Effective Procedures for Selecting a Consensus Candidate

Within paragraph 29 of the procedure for the election of the Prosecutor found in ICC-ASP/1/Res.2 is the requirement that "every effort shall be made to elect the Prosecutor by consensus." The Team calls on the Assembly to establish in advance a clear, transparent and effective procedure for selecting a consensus candidate.

Summary of Recommendations to the Ninth ASP:

1. The Assembly is urged to begin discussions and preparations for the judicial and prosecutorial elections.
2. The Assembly must ensure that the candidates for the **judicial elections are impartial, highly-qualified and representative.**
3. States Parties should implement a **transparent and inclusive nomination process** in which they nominate or support the nomination of judicial candidates representing all regions and legal systems, includes a fair representation of female and male candidates, and consults broadly with civil society, the legal profession and others.
4. The Assembly is urged to begin discussions on the **establishment of an Advisory Committee on Nominations** under Article 36(4)(c) to help ensure the elections are fair and merit-based, and therefore should be established without further delay.
5. The **Independent Panel on ICC Judicial Elections**, composed of experts, will be formally established by the CICC to facilitate and assist in the election of appropriately qualified judges, the Assembly is urged to **welcome the establishment of the Panel**, which will operate independently of all stakeholders, including the CICC.
6. A **new Prosecutor will be elected in 2012.** It is essential that the Assembly establish transparent, effective and merit-based mechanisms for nominating and electing the next Prosecutor. In particular, the Assembly must settle upon the **best mechanism(s) to identify potential candidates and to help the Assembly agree upon, if possible, a consensus candidate.**
7. The CICC welcomes the **proposal for an ASP Bureau Search Committee for the position of ICC Prosecutor.** However, the Assembly must ensure that the Committee's Terms of Reference include clear guidelines relating to its remit and transparency.