



**ELECTIONS TEAM**  
COALITION FOR THE INTERNATIONAL CRIMINAL COURT (CICC)

**COMMENTS AND RECOMMENDATIONS<sup>1</sup>**  
**TO THE TENTH SESSION OF THE ASSEMBLY OF STATES PARTIES**  
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The CICC Team on Elections (Team) views the tenth session of the Assembly of States Parties (ASP) as an important opportunity to emphasize the importance of promoting transparent and merit-based elections of all International Criminal Court (ICC) officials. At the tenth session the ASP will elect a new President and Vice-Presidents of the ASP, 18 members of the ASP Bureau, a new Prosecutor, 6 members of the Committee on Budget and Finance (CBF) and 6 Judges.<sup>2</sup> Bearing in mind that the credibility and effectiveness of the ICC depends on the professional qualifications and personal qualities of its elected officials, the Team is conscious of the need to ensure that qualification for office remains, especially as required by the Rome Statute, the highest priority for states parties. Recognising that ultimate responsibility for ensuring that these elections are fair, transparent and that candidates are elected on their merits in accordance with the Rome Statute, the Team wishes the ASP to remain vested of the issue of elections-governance and to build upon the important developments made in 2011.

The Team is convinced that more must be done to ensure that the ICC develops best-practice election processes capable of producing the nomination and election of the highest qualified officials. To this end, the Team makes the following observations:

**A) The Judicial Election**

In order to be a fair, independent and efficient institution, the ICC Chambers must be composed of Judges who are impartial, highly-qualified and representative, and who meet the stringent qualifications required by article 36 of the Rome Statute. While the election of the most highly qualified Judges will be of durable importance to the institution's success, the Team also notes that the Court is at a critical phase in its development. The Judges elected during the tenth ASP session will arrive at the Court at a time when Pre-Trial Chambers continue to set important procedural landmarks, Trial Chambers are dealing with the first trials, the first reparations are likely to be awarded to victims, and the Appeals Chamber is establishing jurisprudence for the future. This context underscores the importance of the nomination and election of individuals

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<sup>1</sup> 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 is 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 organised 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 apprised of the work of the teams.

<sup>2</sup> In the 2006 and 2009 elections for six judges, states parties nominated a total of 10 and 19 candidates respectively: see <http://iccnow.org/?mod=electionjudges2009> and <http://iccnow.org/?mod=electionjudges2006> (accessed 29 November 2011).

demonstrating the qualifications required for the continued and successful institutional development of the Court.

The Team notes that civil society made efforts to ensure heightened awareness of qualifications required for Judges in the lead up to the judicial election nomination process in 2011. In total, states parties nominated 19 candidates during the nomination period that was extended once. This number was comparable with number of nominations in previous elections for 6 Judges. It was disappointing that only two female candidates were nominated; an outcome which was likely influenced by the Minimum Voting Requirement (MVR) of 2 operating in favour of male candidates in the election. The Asian states also gained an MVR in the election due to additional ratifications of the Rome Statute by the Philippines and the Maldives in 2011, after the opening of the nomination period.<sup>3</sup>

The Team urges states parties to take a number of steps with regard to the 2011 judicial elections, as discussed below. In addition, they should take further steps to create and institutionalise a practice in which only highly qualified candidates are nominated, and where nominations that fall short are discouraged. They can do so *inter alia* through statements during the General Debate where the Team encourages expressions of commitment to elect the most highly qualified candidates and to support processes that seek to identify these candidates, including the Independent Panel on ICC Judicial Elections, discussed below.

#### **i) The Independent Panel on ICC Judicial Elections**

The 2011 judicial election will be the first to benefit from the assessments of nominations made by the Independent Panel on ICC Judicial Elections. The Panel is composed of experts from within the fields of criminal law and international law (in particular, international criminal law, international humanitarian law and international human rights law). The Panel was established without prejudice to any future body established by the ASP under article 36(4)(c) (see discussion on the Advisory Committee below).

While the Coalition established and provided administrative support to the Independent Panel, the Panel itself is independent and its views are its own. The purpose of the Panel is to raise awareness about the qualifications required for judicial candidates and to make public assessments to serve as a source of information for states parties and other election stakeholders. The Panel itself does not endorse or oppose individual candidates.

The Coalition strictly adheres to its longstanding principle that it does not endorse or oppose any individual candidate, although its individual members may choose to do so. The Coalition is committed to ensuring fair, transparent and merit-based election processes and to upholding the Rome Statute requirements, including competence, experience and regional and gender representation in all ICC judicial elections. The establishment of the Independent Panel and its assessments help to fulfil this commitment.

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<sup>3</sup> For an overview of the operation of the MVRs see CICC Memo on the 2011 Judicial and Prosecutorial Elections available at [http://iccnow.org/documents/CICC\\_Memo\\_on\\_the\\_2011\\_Judicial\\_and\\_Prosecutorial\\_Elections\\_22March2011\\_\(2\).pdf](http://iccnow.org/documents/CICC_Memo_on_the_2011_Judicial_and_Prosecutorial_Elections_22March2011_(2).pdf) (accessed 29 November 2011).

The Team welcomes the establishment and work of the Independent Panel on ICC Judicial Elections throughout 2011 as well as its first Report on the 19 nominated candidates issued on 26 October 2011.<sup>4</sup>

As part of its commitment to merit-based elections, the Team urges states parties to consider this Report, completed CICC questionnaires<sup>5</sup> and any other relevant information provided by candidates in the election. The Team also notes with appreciation that the report has highlighted the issue of qualifications for List A and List B Judges (discussed further below). Furthermore the Team encourages states parties to consider the observations made in the Report which highlights issues of ongoing concern relating to the ICC judicial elections including age and health of candidates, the possibility of having two Judges of the same nationality serve concurrently, the delay in Judges being called up for service, character during the election period and its support for the establishment by the ASP of an Advisory Committee on nominations.

## **ii) Requisite Expertise and Experience of Candidates**

The Team recalls that article 36, paragraph 3(b) RS 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].*

Additionally, 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) RS). The Team notes that all nominations must meet strict requirements set out in article 36(4)(a) RS and encourages states parties to take this into consideration when voting. Further, the Team recalls the judicial representation requirements in article 36, paragraph 8 (a) as well as those in paragraph (b) RS which 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, MVRs are in place for this election that favour candidates from List A. In light of this,

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<sup>4</sup> Independent Panel on ICC Judicial Elections Report available at <http://www.iccindependentpanel.org/documents> (accessed 30 November 2011).

<sup>5</sup> Coalition for the International Criminal Court “Sixth Election -2011” available at <http://www.iccnw.org/?mod=electionjudgessixth2011> (accessed 1 December 2011).

the Team emphasises the importance of the above criteria 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 with Judges elected during this session of the ASP sitting on the bench. Experience in the field of international criminal justice, in particular relating to crimes under the jurisdiction of the International Criminal Court, should be considered highly desirable.

### **iii) An ASP Advisory Committee on Nominations**

The Team welcomes actions by the ASP to establish an Advisory Committee on (judicial) nominations as envisaged in Article 36(4)(c) RS. The ASP at its tenth session is expected to consider adopting language in the omnibus resolution which would include terms of reference for an Advisory Committee. The Team strongly encourages states parties to draw on the experience and lessons learned of the Independent Panel in establishing the Advisory Committee.

Article 36, paragraph 4(c) RS provides that “The Assembly of states parties may decide to establish, if appropriate, an Advisory Committee on Nominations.” The Team welcomes draft reports from the facilitator indicating that the Advisory Committee would be composed of nine experts with established competence and experience in criminal or international law who would serve in their personal capacities and not take instructions “from states parties, States or any other organizations or persons.” The Team also welcomes the requirement that this group is regionally representative with an adequate gender balance.

The Team welcomes the mandate of the Advisory Committee enabling it to base its assessments on article 36 RS. However, the Team urges states parties to take full advantage of this standing committee of experts and consider a broader role for the Advisory Committee in providing advice to the Assembly on issues relating to judicial elections.

In this regard, in addition to its core mandate of providing technical assessments of the qualifications of judicial nominees based on article 36 RS, such a body could, for example:

- Ensure that the provisions of the 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 which is possible under Article 36(7) and Article 36(10) RS);
- Provide recommendations to the Bureau on improvements to the nomination process with a view to promoting best practice procedures;<sup>6</sup> and
- 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.

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<sup>6</sup> 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.

The Team notes that the current text does not specify whether the mandate of the Advisory Committee is strictly limited to article 36(a), (b) and (c) RS or whether the body would be able to address the above issues. The Team also notes that early drafts of the text provides the Advisory Committee with a mandate to only meet once candidates have been nominated by state 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 Assembly in 2012 to conduct a thorough review of election-related governance issues, including those highlighted by the Independent Panel.

The Team urges states parties to create clear guidelines regarding the Advisory Committee's mandate and to keep in mind the importance of including measures to guarantee transparency of the Advisory Committee's work. The Team welcomes the suggested provisions in the early drafts for the Committee to be able 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 establishment of the Advisory Committee. The Team also notes that, depending on the mandate finally given to the Advisory Committee, there may be a continued need, and thus a complementary role, for an Independent Panel.

## **B) The Election of the Prosecutor and the Search Committee for the Position of the Prosecutor of the International Criminal Court**

The Bureau announced the establishment of the Search Committee at the ninth session of the ASP in 2010 along with its Terms of Reference.<sup>7</sup> This body comprised of “one representative per regional group”<sup>8</sup> was given a mandate to “facilitate the nomination and election, by consensus, of the next Prosecutor.”<sup>9</sup> In fulfilling this function it was to “produce a shortlist of at least three suitable candidates, where possible for consideration by the Bureau”.<sup>10</sup>

Between 8 February and 9 September 2011 “the Search Committee was in receipt of, or otherwise identified, expressions of interest from or recommendations for consideration in respect of 52 individuals.”<sup>11</sup> This group contained disproportionate representation from the African and Western European and Others Groups and men.<sup>12</sup> After internal consultations, the Search Committee interviewed eight persons in New York, eventually recommending four individuals for the position in its Report dated 22 October 2011. Following the conclusion of

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<sup>7</sup> “Bureau of the Assembly of states parties Search Committee for the position of the Prosecutor of the International Criminal Court Terms of Reference” ICC-ASP/9/INF.2 (hereafter Search Committee Terms of Reference).

<sup>8</sup> Search Committee Terms of Reference, paragraph 3.

<sup>9</sup> Search Committee Terms of Reference, paragraph 5.

<sup>10</sup> Search Committee Terms of Reference, paragraph 6.

<sup>11</sup> Report of the Search Committee for the position of the Prosecutor of the International Criminal Court, paragraph 27 available at <http://www.icc-cpi.int/Menu/ASP/Elections/Prosecutor/> (accessed 1 December 2011 and hereafter Search Committee Report).

<sup>12</sup> *Ibid.*

informal consultations on 30 November in New York, an informal agreement had been reached amongst state parties that Ms. Fatou Bensouda (The Gambia) would be nominated and elected by consensus.

To the extent that was possible, NGOs remained involved throughout the Search Committee process. Some organizations made submissions to the Search Committee on the criteria to be applied in accordance with article 42(3) RS. NGOs also attended a briefing from the Coordinator of the Search Committee and meetings with each of the four individuals shortlisted by the Search Committee.<sup>13</sup> The CICC also actively encouraged expressions of interest from its global network of member NGOs.

The Team welcomes the report of the Search Committee, its efforts to publicise developments in its work and of its efforts to identify four highly qualified candidates recommended to the Bureau of the Assembly.

However, the Team also encourages states parties in 2012 to undertake a thorough review of the process in light of the potential for the Search Committee process to be a suitable model for the future ICC and other international elections processes.

For instance, the Team notes that there have been concerns regarding transparency of the Search Committee process. We acknowledge the various public briefings in New York, The Hague and in regions, which helped to increased transparency in a certain audience. However, other stakeholders in the process — such as NGOs and victims groups outside these locations — have expressed frustration concerning the lack of publicly available and easily accessible information about the process. The Team suggests that future processes could maintain a website with regular updates about activities. A “Questions and Answers” document about the process that is updated throughout the different phases would also assist in pre-empting criticisms that could otherwise emerge that such a process is too secretive. A review of the type and level of information made available, in consultation with various stakeholders and taking into account the practice of other international organisations would also help in this respect.

It is also a concern that there was no travel fund set aside for the individual candidates who were shortlisted for interviews/presentations before the New York Working Group. The Team understands that two candidates had to pay their own expenses, meaning they were effectively financially penalised for their success in the process. Rather than relying on the discretion of individual states to support their candidates (which they may or may not do), the Team suggests creating a modest travel fund to support candidates shortlisted in the process.

Some NGOs have also called for greater clarification in any future Terms of Reference that members of a relevant committee are appointed as independent experts in their personal capacity and must not take instructions from governments.

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<sup>13</sup> See the “CICC Elections Team Q and A” available at [http://iccnow.org/documents/CICC\\_Elections\\_Team\\_QandA\\_ICC\\_Prosecutor\\_Election\\_150911-1.pdf](http://iccnow.org/documents/CICC_Elections_Team_QandA_ICC_Prosecutor_Election_150911-1.pdf) (accessed on 1 December 2011) and Search Committee Report, paragraph 18.

### **C) The Committee on Budget and Finance**

The Team is disappointed that, at the closing of the nomination period for the six vacant positions of the Committee on Budget and Finance, states parties had only nominated only seven candidates. The Team notes the delay in nomination of a candidate from the Group of Latin American and Caribbean States required three extensions of the nomination period. The limited number of nominations effectively results in a “clean slate” pre-ordained by regional groups. As the election relates to regional vacancies, if no candidates withdraw the election would be limited to a choice between two African candidates. The other candidates will be elected uncontested. The practice of regions nominating the bare minimum number of candidates for the number of available positions means that there is very rarely an examination of the candidates’ qualifications and experience. Given the importance of this expert body, the Assembly should review its practice to ensure that it benefits from the best possible expert advice on budget and finance issues. The Team urge states to consider highlighting the importance of nominating more “experts of recognized standing and experience in financial matters at the international level”<sup>14</sup> for future elections who should also have a familiarity with the work of the ICC.

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<sup>14</sup> “Establishment of the Committee on Budget and Finance” Resolution ICC-ASP/1/Res.4, para 2.