

International Criminal Court: Concerns at the first meeting of the Assembly of States Parties - 3-10 September 2002

The first session of the Assembly of States Parties will take place at the United Nations (UN) Headquarters in New York from 3-10 September 2002. Taking place only four years after the adoption of the Rome Statute of the International Criminal Court (Rome Statute), the first session of the Assembly of States Parties is an historic event and a testament to the commitment of those states that have ratified and those that are in the process of ratifying to end impunity for the worst crimes known to humanity. Amnesty International will continue to work for universal ratification of the Rome Statute and effective implementing legislation. It hopes that the Assembly of States Parties collectively and individually will continue to strive towards these goals.

The first session of the Assembly of States Parties takes place at a time when one state, the United States of America (USA), is conducting a worldwide campaign to undermine the International Criminal Court and to ensure impunity for its nationals should they commit genocide, crimes against humanity or war crimes on the territory of a state party to the Rome Statute. It cannot be ignored that the US campaign represents significant threats to the credibility and work of the Court. Amnesty International, like many states parties, believes that US fears of politically motivated prosecutions are unfounded and expects that an International Criminal Court that functions justly, fairly and effectively will be the greatest incentive for the USA to halt this campaign and to ensure that the USA cooperates with the Court and one day ratifies the Rome Statute. In the meantime, the Assembly of States Parties must stand united against US initiatives that threaten the Court. This paper, together with Amnesty International's *International Criminal Court: The US effort to obtain impunity for genocide, crimes against humanity and war crimes* (AI Index: IOR 40/025/2002), addresses many of the issues relating to the US campaign and makes recommendations for the Assembly of States Parties, states parties and all states to take action against the campaign.

This paper looks at a range of other issues that the Assembly of States Parties will be working on at its first meeting and makes recommendations on many issues. Amnesty International will have a delegation present throughout the first session of the Assembly of States Parties and its representatives are available to discuss any of these issues with government delegations.

I. Adoption of Preparatory Commission for the International Criminal Court instruments

The most significant tasks of the Assembly of States Parties at its first session will be to adopt the draft instruments that have been prepared by the Preparatory Commission. These draft instruments are the result of detailed and careful negotiations over a significant amount of time. Although it is fair to say that many governments and NGOs involved in the process would like to make changes to certain drafts, Amnesty International would urge all members of the Assembly not to re-open these issues at this first, very short session of the Assembly, but to defer them to a future session when the Court has had some practical experience in working with the supplementary instruments. Amnesty International believes that the Assembly in its first session should focus resolving any outstanding issues, in particular the election procedure of judges, and should develop an effective plan of action for its work in the next year.

II. Adoption of Election of Judges Procedures that would ensure the criteria set out in Article 36 is met

This is one of the few issues which remains unresolved at the end of the Preparatory Commission and is probably the most complex issue that the Assembly of States Parties will consider at its first meeting. Developments have been rapidly unfolding, particularly in the last week before the first session of the Assembly of States Parties, so this paper focuses primarily on the main proposal for resolving this problem since the end of the Preparatory Commission and reiterates the fundamental principles that Amnesty International believes that should be followed by the Assembly of States Parties when it adopts the procedure which were set forth in our paper, *The International Criminal Court: Amnesty International's concerns at the tenth session of the Preparatory Commission (1 to 12 July 2002)*, AI Index: IOR 40/010/2002, June 2002 (obtainable from: <http://www.amnesty.org/icc>). As that paper makes clear, Amnesty International believes it is essential that a progressive election procedure is adopted that will ensure those elected meet the criteria set out in Article 36. In particular, the organization is concerned that if procedures applied to other international courts are applied to the International Criminal Court it will fail to meet the criteria, in particular a fair representation of female and male judges. It is essential for the Assembly of States Parties to adopt at its first session an effective election procedure that is acceptable to all states parties and satisfies the requirements of the Statute. A failure to do could severely damage the credibility of the International Criminal Court before it even gets started and at a time when it is under increasing attack.

The guiding principles. Amnesty International believes any proposal or mechanism devised during the tenth session should comply with the following principles:

- **Transparency:** election procedures should be transparent and allow for interested organizations to observe and comment the process.
- **Qualifications:** The first consideration in determining qualifications of candidates is professional competence as described in Article 36 (3) (b) of the Statute, taking into account the need to ensure the presence of certain areas of expertise in the Court (Article 36 (8) (b) of the Statute).
- **Representation:** As stated above, the Assembly should be expressly directed first to address the need for fair representation of female and male judges (Article 36 (8) (a) (iii)). Although the other representation criteria (equitable geographical representation and representation of the principal legal systems of the world) are usually adequately addressed in international judicial institutions, fair representation of male and female judges has not been achieved in a single international court. For instance, in the International Criminal Tribunal for Yugoslavia, there is only one woman out of 16 judges. The International Court of Justice, composed of 15 judges, comprises only one woman.

Second, the need to include judges with legal expertise on specific issues (Article 36 (8) (b)) should then be taken into account.

Third, attention should also be paid to the need for equitable geographic representation (Article 36 (8) (a) (ii)) in order to reflect the increasing universality of the states parties to the Rome Statute. Fair representation among geographical regions will serve to encourage non-states parties to accede to the Rome Statute.

Finally, to the extent that addressing the need for equitable geographic representation has not met the need for the representation of the principal legal systems of the world (Article 36 (8) (a) (i)), then this requirement should be taken into account.

Burden on the sponsors: The sponsors of proposed mechanisms should clearly explain how their proposal will implement the Rome Statute's requirements better than any other proposal.

The draft resolution adopted at the Preparatory Commission. At the tenth session of the Preparatory Commission, the Commission adopted a Draft resolution of the Assembly of States Parties relating to the procedure for the nomination and election of judges, the Prosecutor and Deputy Prosecutors of the International Criminal Court, U.N. Doc. PCNICC/2002/2, Annex XII of the Report of the Preparatory Commission (*obtainable from: <http://www.un.org>*). The draft resolution covers procedures for submitting and publicizing nominations for judges, procedures regarding judicial vacancies and nomination and election of the Prosecutor and the Deputy Prosecutor. However, the procedure for election of judges from the candidates nominated by states parties was left unresolved.

Subsequent developments. The Preparatory Commission and since then the focal point, Prince Zeid Ra'ad Zeid al Hussein of Jordan has been trying to devise a procedure that would ensure, as much as possible, that the first 18 judges meet the important criteria set out in Article 36, in particular geographical representation, representation from all legal systems and a fair representation of female and male judges. The proposal by Hungary and Liechtenstein (the text of that proposal is in the Amnesty International paper for the tenth session), although it was not acceptable to all states, remains in broad outline, the basis for discussion. However, there remain a number of contentious points that will have to be resolved, including the minimum number of candidates from each region which each state must vote for, whether abstentions should be allowed and whether the procedure should be abandoned after four ballots if it does not result in the election of the required number of judges.

The Costa Rica/Mexico proposal. In the final week before the first session, Costa Rica and Mexico put forward a proposal in a Non-paper on the election of judges for the ICC, based on doc. PCNICC/2002/WGASP-PD/DP.9 (Costa Rica/Mexico proposal) (annexed to this paper), building upon the Hungary and Liechtenstein proposal. The Costa Rica and Mexico proposal appears to have the support of most states participating in the negotiations in Asia, except China and Japan, neither of whom has signed or ratified the Rome Statute, which were concerned that Asia would not be adequately represented, given the limited number of ratifications from that region so far), and in Africa. It is not yet certain what the reaction will be of other regions. Amnesty International and a number of other NGOs in the CICC believe, given the failure of states to agree a procedure at the Preparatory Commission and the limited time available to reach an agreement, that the Costa Rica/Mexico proposal is a workable compromise, provided that certain changes are made, unless a significantly improved proposal is submitted by other countries that would be likely to garner sufficient support. France is understood to be considering submitting a proposal, but it has not yet circulated a draft, so Amnesty International is not in a position to determine whether it will be an improvement over the Costa Rica/Mexico proposal or acceptable to other states. The following analysis of the Costa Rica/Mexico proposal was developed by the CICC in consultation with Amnesty International and other member organizations.

The Costa Rica/Mexico proposal largely facilitates the fulfilment of the Rome Statute requirements related to geographical representation, the representation of the principal legal systems of the world, and the representation of women and men judges on the Court. At the same time, by retaining a limited right of abstention the proposal is sufficiently flexible to

ensure that states parties need only vote for the most qualified candidates. Combined with the additional safeguards agreed to during the last Preparatory Commission (especially the suggested paragraph 10 *bis* in PCNICC/WGASP-PD/L6/Corr.1), the new proposal minimizes any risk of “automatic election”. The concern expressed by China and Japan about the possibility that there might not be an adequate number of Asian judges can easily be addressed if they and other Asian states join the other 78 states that have done so already and ratify the Rome Statute before the 30 November 2002 deadline.

Amnesty International believes that the last sentence of paragraph 5 of the Costa Rica/Mexico proposal (“If following four ballots 18 judges still have not yet been elected, these minimum voting requirements shall be discontinued”) should be deleted. This provision seriously undermines the proposed procedure. Based on previous elections, it can be expected that it will take more than four ballots to elect the required number of judges. Indeed, in November 1999, it took five ballots to elect nine judges to the International Criminal Tribunal for Rwanda, and in March 2001, it took seven ballots to elect 14 permanent judges for the International Criminal Tribunal for the former Yugoslavia. Amnesty International believes that there is no valid reason to forego the minimum voting requirements before all the judges have been elected. The adjustment of the minimum voting requirements, provided for in the first part of paragraph 5, is a sufficient safeguard against a possible deadlock. If all delegations agree on the need for a procedure and for minimum voting requirements to fulfil the provisions of the Rome Statute, there should be no limit to their use and there is no reason to go to a mechanism-free election after only a few ballots. Amnesty International continues to believe that there are better procedures that could be devised, but it is willing to support the Costa Rica/Mexico proposal, with the suggested amendments.

Of course, Amnesty International believes that the best way to avoid the possible problem of only a limited number of candidates in a particular category, some of whom do not satisfy the high standards required to be a judge of the International Criminal Court, which is the argument made in favour of permitting abstentions, is to ensure that each state party nominate a candidate and that the national nomination process in each state is transparent and involves consultation with a broad range of civil society. *See Amnesty International, International Criminal Court: Checklist to ensure the nomination of the highest qualified candidates for judges*, AI Index: IOR 40/023/2002, August 2002. Amnesty International remains deeply concerned that not all states parties are nominating candidates (whether from their own state or from another state party) and that states parties are not nominating candidates in transparent procedures with the broadest possible consultation with civil society and, in at least one case, may not have even followed the procedure required by the Rome Statute.

III. Establishing the Trust Fund for Victims

At the final session of the Preparatory Commission, the Working Group on Financial Issues – the Trust Fund for Victims (Trust Fund), agreed the management structure of the Trust Fund for its initial period. A Board of Directors, made up of experts of providing assistance to victims of serious crime, will be elected to manage the Trust Fund. The Board of Directors first tasks will be to develop draft criteria – for approval by the Assembly - that will determine how the Trust Fund will work, including the scope of beneficiaries and the forms and modalities of assistance and reparation. To ensure the prompt and effective establishment of the Trust Fund Amnesty International recommends:

The Assembly of States Parties should create the Trust Fund in order that it can receive voluntary contributions. Amnesty International believes that the start-up of the Court will receive international attention and during this time governments (including non-states parties), organizations and individuals may want to contribute to the Court and its work. These governments, organizations and individuals should be given the opportunity to

contribute voluntary contributions to the Trust Fund. The fund itself should be established by the Assembly of States Parties at its first session and should be managed by the Director of Common Services or temporary Registrar until the Registrar is appointed and the Board of Directors is elected. Until the Board of Directors is elected there will be no means to determine whether ear-marked voluntary contributions are consistent with the spirit and purpose of the Trust Fund, therefore until the Directors are elected, the Trust Fund should only receive non ear-marked voluntary contributions.

The Assembly of States Parties should schedule the election of the Board of Directors as soon as possible. As stated above, the Board of Directors' first tasks will be to make recommendations to the Assembly to adopt criteria and procedures for the functioning of the Trust Fund. It is important that this essential work is completed promptly to ensure the Trust Fund is fully operational as soon as possible. It is also important that the Board of Directors is elected promptly so that they can work with other organs of the Court and consult civil society to develop criteria for reparations in accordance with Article 75 (1). Under Rule 98, the Court may refer an award for reparations under Article 75 to the Board of Directors to determine the forms and modalities of reparations, it is therefore essential that the Board of Directors are involved in the process of determining the Article 75 (1) criteria.

IV. Prompt payment of Assessed Contributions

The Preparatory Commission has submitted a draft resolution to the Assembly of States Parties which provides that states parties must pay 25% of their assessed contribution within 30 days of receiving the request which will be sent to all states parties following the first session of the Assembly – states parties have already reportedly been informed of the provisional amount. The remaining 75% should be paid on 1 January 2003. Amnesty International urges all states parties to take immediate steps to ensure that they can pay their assessed contributions within these deadlines. It is particularly important that the Court at the important start-up phase has sufficient funds to ensure the Court will be effective and operational as soon as possible.

V. Ratification of the Agreement on Privileges and Immunities for the International Criminal Court

The Agreement on Privileges and Immunities will be open for signature and ratification from 10 September 2002 all states, in particular states parties, are urged to sign the Agreement on this date and ratify it without delay. Those states parties that are able to sign, but not ratify, the Agreement on 10 September should take immediate steps to ratify it as soon as possible. As the Court moves towards establishment it will require the protections offered by the Agreement.

VI. Responding to US impunity agreements

As the Assembly of States Parties is aware, the USA has taken further steps to guarantee its nationals have impunity from investigations and prosecutions for genocide, crimes against humanity and war crimes since the Security Council adopted Resolution 1422 on 12 July 2002. That resolution, adopted at the insistence of the USA over the overwhelming objections of UN member states not on the Security Council, purports to invoke Article 16 of the Rome Statute to request deferral of investigations and prosecutions of nationals of non-states parties for crimes related to a UN established or authorized operation, initially for one year, with the intention of endless renewals.

Since that date, the USA has approached many states around the world to enter into impunity agreements which include provisions that governments will not surrender or transfer US nationals (and in some cases the USA will not surrender or transfer the other state's

nationals) to the International Criminal Court. In its document *International Criminal Court: The US effort to obtain impunity for genocide, crimes against humanity and war crimes* (AI Index: IOR 40/017/2002) – available to all states at the Assembly - Amnesty International argues that such agreements do not fall under Article 98 (2) as the US claims and that states parties, signatories or any state that enters into such agreement would violate their obligations under the Rome Statute and/or international law.

Amnesty International calls upon the Bureau of the Assembly of States Parties in its document to issue a statement making clear that US impunity agreements are contrary to the Rome Statute, that states parties and signatories should not enter into such agreements and that any state party or signatory that has signed such an agreement should not ratify it or implement it.

**ANNEX I – COSTA RICA AND MEXICO PROPOSAL ON ELECTION OF JUDGES
(Non-paper on the election of judges for the ICC, based on doc. PCNICC/2002/WGASP-
PD/DP.9)**

1. The persons elected to the Court shall be the 18 candidates who obtain the highest number of votes and a two-thirds majority of the States Parties present and voting. However, no more than 13 candidates from list A and no more than 9 candidates from list B shall be considered elected.
2. States Parties shall, in the election of judges, take into account the need for the representation of the principal legal systems of the world, equitable geographical representation and a fair representation of female and male judges. They shall take into account the need to include judges with legal expertise on specific issues, including but not limited to, violence against women and children.
3. Each State Party shall vote for a maximum number of 18 candidates, whereby it shall observe the following minimum voting requirements:
 - a. Each State Party shall vote for at least 9 candidates from list A and at least 5 candidates from list B;
 - b. Each State Party shall vote for at least:
 - 3 candidates from the African Group,
 - 3 candidates from the Latin American and Caribbean Group,
 - 3 candidates from the Western European and Other States Group,
 - 3 candidates from the Asian Group, and
 - 3 candidates from the Eastern European Group.

For the purposes of the first election and on an exceptional basis, if the number of states parties of any given regional group is less than 3/18 of the total number of States Parties to the Rome Statute at that moment, the minimum voting requirement for that group shall be adjusted by subtracting one.

If the number of candidates from a regional group is not at least one more than the respective minimum voting requirement, this requirement shall be equal to one less than the number of candidates from that region;

(c) Each State Party shall vote for at least six candidates from each gender. If the number of candidates from one gender is less than eight, the minimum voting requirement for that gender shall be equal to two less than the number of candidates for that gender.

3. bis. If, after the first ballot, fewer than 18 candidates are elected, the maximum number of votes by a State Party, which is 18 for the first ballot, shall be reduced, for each subsequent ballot, by subtracting the number of elected candidates.

4. If, after the first ballot, fewer than 18 candidates are elected, the following adjustments shall apply to subsequent ballots:

(a) The minimum voting requirement referred to in lists A and B shall be adjusted, list by list, by subtracting the number of elected candidates;

(b) The minimum regional voting requirement shall be adjusted, group by group, by subtracting the number of elected candidates;

(c) The minimum gender voting requirement shall be adjusted, gender by gender, by subtracting the number of elected candidates.

5. Each minimum voting requirement shall be adjusted until that requirement can no longer be met, whereupon the use that requirement shall be discontinued. If an adjusted voting requirement can be met individually, but not jointly, the use of all regional and gender voting requirements shall be discontinued. If following four ballots 18 judges still have not yet been elected, these minimum voting requirements shall be discontinued.

5. bis Only ballot papers observing the minimum voting requirements shall be valid. If a State fulfills the minimum requirements using less than 18 votes, or the maximum of number of votes for that ballot, it may abstain in voting for the remaining [candidates].

6. Ballot papers shall be organized in a manner facilitating such an election process, and minimum voting requirements, adjusted requirements, as well as the discontinuation of any requirements shall be clearly indicated on the ballot papers. Clear instructions and sufficient time shall be given for each ballot.

7. The President of the Assembly of States Parties shall be responsible for the election procedure, including the determination, adjustment or discontinuation of the minimum voting requirements.

Explanatory note

- (1) The proposal seeks to implement the requirements of the Rome Statute set forth in article 36 (8) (a).
- (2) The numbers in paragraph 3 (b) recognize the principle of equitable geographic representation in the election of judges. The new language in paragraph 3 establishes an objective and non-discriminatory criterion to link the regional minimum requirements to the actual number of state parties.
- (3) New paragraph 5 bis ensures that states parties comply with the minimum voting requirements while allowing for a partial abstention once those requirements have been fulfilled.