Summary of Amnesty International's

International Criminal Court: Checklist to ensure the nomination of the highest qualified candidates for judges

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Principle 11 - In the event that a candidate who meets the criteria cannot be found, the state party should make a nomination of a candidate from another state party under Article 36 (4) (b).

International Criminal Court:

Checklist to ensure the nomination of the highest qualified candidates for judges

The election of six judges of the International Criminal Court is scheduled to take place on 26 and 27 January 2006 at the United Nations Headquarters in New York. The nomination for candidates closes on 9 October 2005. States that have ratified the Rome Statute or other states that ratify the Rome Statute by 9 October are eligible to nominate their nationals or nationals from other states parties for judges. This checklist has been issued by Amnesty International recommending measures states should take to nominate the most highly qualified candidates for these positions.

The first 18 judges of the new International Criminal Court were elected in February 2003 and inaugurated at a special ceremony in The Hague in March of that year. At the end of that election, lots were drawn assigning the 18 elected judges three-, six- or nine-year terms. The terms of the six judges who were assigned three-year terms expire in 2006. The forthcoming election will focus on electing six judges for full nine-year terms. The six judges whose term expires in 2006 are eligible for re-election.

The judges, along with the Prosecutor, are the most visible representatives of the Court. Those elected are subject to the intense scrutiny of their skills and experience and their work throughout their time at the Court. In particular, opponents of the Court and those states that are waiting to see how the Court operates before committing to ratification will pay close attention to the work of the judges. It is, therefore, essential for the credibility and effective operation of the Court that judges of the highest quality, with a fair representation of men and women from all regions of the world and legal systems, who meet the criteria set out in the Statute, are elected.

The nomination process is, of course, a critical stage of the election process. States parties will decide the final pool of nominees that will be put forward for election. States parties that intend to nominate candidates must take all necessary measures to ensure that they nominate the most qualified candidates from their country who meet the criteria set out in the Statute.

Amnesty International is calling on each state party to nominate a candidate - whether a national of the state party or of another state party - and to do so in a transparent selection procedure, which includes consultation at all stages of the process with all sections of civil society. Although time is short, it should not be difficult to ensure that such a transparent selection procedure and consultation with civil society is implemented.

Amnesty International has consistently called for the procedure for nominating judges to be as open as possible and to involve the broadest possible consultation at the national level, including consultation with the highest courts, law faculties, bar associations and other non-governmental organizations concerned with criminal justice and human rights, including organizations working for women's rights. A transparent process with the broadest possible consultation with civil society will ensure that the best criteria are devised, that an effective method is devised to attract the best possible candidates, including women, and that the criteria are applied effectively.

This Checklist sets out Amnesty International's recommendations for states to conduct a transparent and effective nomination process.

Principle 1 - All states parties should nominate a candidate - whether a national of the state party or of another state party.

In order for the Assembly of States Parties to have the broadest possible pool of qualified candidates, including nominees from all regions and women, it is essential for each state party to nominate highly qualified candidates.

Since the process of electing judges is supposed to be based solely on the statutory criteria and not, as has all too often happened in elections to international bodies, based on political considerations, such as the balance of nationalities in other international judicial institutions, traditional considerations in whether to make a nomination, such as the cost of an election campaign, should not be a factor. Indeed, Amnesty International strongly opposes traditional government lobbying campaigns, which are often based on unseemly secret agreements to trade support for candidates for other political goals. Instead, the nominees' credentials should speak for themselves.

In particular, states should not restrict the pool of qualified candidates nor deny qualified candidates from their national legal community the opportunity to apply for nomination, by deciding not to nominate a candidate in favour of supporting a candidate nominated by another state party.

States should be particularly alert to the need for a fair balance between men and women judges, as mandated in the Rome Statute. To implement this, it is important that there should be a fair balance of men and women candidates nominated for election. The failure to elect a fair representation of female and male judges to other international institutions, in particular the International Criminal Tribunals for the former Yugoslavia and Rwanda , the International Court of Justice and other international courts, as well as the International Law Commission and other international expert bodies, is very disturbing and states parties must ensure that such a practice is not adopted by states parties to the International Criminal Court. The election of seven of the highest qualified women candidates in the world to the International Criminal Court at the first election was an important step towards achieving such a balance. However, it is important that states continue to seek a fair balance at each election.

Principle 2 - States should make a decision on which process of nomination they will follow and make a public announcement.

Article 36 (4) expressly requires that States Parties shall nominate a judge by one of the following processes:

> "(i) By the procedure for the nomination of candidates for appointment to the highest judicial offices in the State in question; or
> (ii)By the procedure provided for the nomination of candidates for the International Court of Justice in the Statute of that Court."

States parties should conduct open consultation with those that would be involved in both

processes and relevant members of civil society to decide which would be most appropriate. Amnesty International does not take a position on which system is adopted, but urges states to ensure that whichever system is adopted is made as transparent as possible and involves the broadest possible consultation with civil society.

In situations where there may need to be amendments to the chosen procedure, for example, if the existing process would take too long to meet the nomination deadline, states should consult with those involved in the process and civil society regarding the proposed changes.

Those states that fail to take a decision on which of the procedures set out in the Rome Statute to adopt and to follow them, or fail to follow one of these two statutorily required procedures, will risk having the nomination disqualified by the Assembly of State Parties.

Principle 3 - States should ensure that the nomination process if open to all potential candidates who meet the criteria set out in Article 36 (3) of the Rome Statute.

Article 36 (3) sets out criteria that all nominees must meet. It provides:

> "(a) The judges shall be chosen from among persons of high moral character, impartiality and integrity who possess the qualifications required in their respective States for appointment to the highest judicial offices.
>
> (b) Every candidate for election to the Court shall:
>
> (i) Have established competence in criminal law and procedure, and the necessary relevant experience, whether as judge, prosecutor, advocate or in other similar capacity, in criminal proceedings; or
>
> (ii) Have established competence in relevant areas of international law such as international humanitarian law and the law of human rights, and extensive experience in a professional legal capacity which is of relevance to the judicial work of the Court;
>
> (c) Every candidate for election to the Court shall have an excellent knowledge of and be fluent in at least one of the working languages of the Court."

These qualifications must be read together with the criteria used by the Assembly of States Parties in Article 36 (8) (see Principle 4 below).

In particular, states should take measures to ensure that candidates who meet the criteria in both Articles 36 (3) (b) (i) and (ii) are encouraged to apply. States which decide to only seek candidates meeting one of the criteria risk unfairly excluding a highly qualified candidate who has competency in the other area of law. Such a decision not only limits the nomination process at the national level but, ultimately, also threatens to create an imbalance in the number of qualified candidates from both competencies for the election process set out in Article 36 (5):

> "For the purposes of the election, there shall be two lists of candidates:
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> List A containing the names of candidates with the qualifications specified in paragraph 3 (b) (i); and

List B containing the names of candidates with the qualifications specified in paragraph 3 (b) (ii).

A candidate with sufficient qualifications for both lists may choose on which list to appear."

Principle 4 - The advertisement should be drafted to include all the criteria set out in the Rome Statute and to encourage applicants from all groups.

In order to obtain a broad range of applications from qualified candidates, states must advertise the process by the most speedy and effective means, including e-mail and fax. The advertisement should clearly set out the criteria for judges set out in Article 36. In particular, the advertisement should state that the nominated candidate must meet the criteria set out in Article 36 (3) (see Principle 3). Furthermore, the advertisement should include the criteria set out in Article 36 (8):

- ***Equitable geographical representation of judges -*** candidates from all regions within the state should be encouraged to apply;

- ***A fair representation of female and male judges -*** specific reference should be made to this statutory requirement and the advertisement should encourage female judges to apply.

- ***Legal expertise on specific issues, including, but not limited to, violence against women or children*** - the advertisement should indicate that these are highly desirable criteria and candidates with such expertise are encouraged to apply.

Before issuing the advertisement, states should seek comments and input on the content of the advertisement by the most speedy and effective means, including e-mail and fax and the organizations from members of civil society, including representatives from all parts of the legal community, victims' organizations, organizations working for women's rights, organizations working on behalf of children and other organizations that have been working actively for the establishment of the International Criminal Court.

Principle 5 - States should ensure that the nomination process is advertised in publications aimed both at the general public and in publications chosen to target those who may meet the criteria.

To ensure transparency and a broad range of applications from people who meet the criteria, the nomination process must be public.

The description of the required competency set out in Article 36 (3) will apply to persons in many areas of the legal profession, including judges, prosecutors, advocates, academics, legal advisers and others. It is important that the nomination process is advertised so that it reaches all potential applicants, including advertisements in legal publications and through professional legal bodies.

The nomination process should also be advertised with sufficient time for news of the procedure to circulate and for applicants to apply.

The process will of course be of interest to many members and organizations of civil society who will want to follow and, where appropriate, participate in the process. It is also a matter of public interest. States should take steps to ensure that the nomination process is public knowledge, including, advertising the nomination process in a national newspaper as well as issuing a press release announcing it and sending requests to all relevant sectors of civil society to encourage applications of qualified persons (see Principle 6).

Principle 6 - States should encourage civil society to assist them in obtaining applications from highly qualified candidates who meet the criteria.

Civil society could be essential in helping to identify and to encourage applications from highly qualified candidates. States should encourage civil society to circulate the advertisement as widely as possible and to request persons who meet the criteria to apply. In particular, the state should encourage civil society to help obtain applications from a fair representation of female and male candidates. Professional legal bodies, organizations working for women's rights, organizations working on behalf of children, victims' organizations, organizations who have been working for the establishment of the International Criminal Court and others should be asked to take part in this process.

Principle 7 - States should ensure that there is transparency regarding the applicants.

The nomination of a candidate to the International Criminal Court is a matter of public importance. Following the closing date for applications, the state should make available for public inspection information provided by applicants that relate to their skills, experience and how they meet the criteria set out in the Statute to permit comments to be made and carefully considered before making the nomination. If current national law or regulations do not make this possible, they should be promptly amended.

Principle 8 - States should provide mechanisms for civil society and others to comment on applicant's skills and experience and to provide information on how they meet the criteria.

Although Amnesty International takes no position on individual applicants for nomination, a number of organizations and individuals will be able to provide important information regarding applicants that those selecting the candidate should consider. Appropriate mechanisms should be put in place whereby civil society and others can provide substantive comments and information about an applicant and their application. This information should be public and provided to the applicant in advance of selection or interview so that they are able to reply or provide further information.

Principle 9 - States should ensure that there is transparency in the nomination process.

States are urged to take all measures to ensure that the selection process is as transparent as possible. In particular, the names and qualifications of those making the selection should be public in advance of the selection. Furthermore, the criteria for selecting the candidates should be developed in consultation with civil society and made public.

Principle 10 - States should issue a detailed statement on how the selected nominee meets the criteria set out in Article 36.

Article 36 (4) (a) requires that for the purposes of the election:

> "Nominations shall be accompanied by a statement in the necessary detail specifying how the candidate fulfils the requirements of paragraph 3."

In the interests of transparency, immediately after a state has selected their nominee for the judge at the International Criminal Court the government should issue a public statement announcing the nomination and providing detailed information about how the candidate meets the criteria set out the whole of Article 36, including the criteria in Article 36 (8). The statement should be made available on the state's internet site.

Principle 11 - In the event that a candidate who meets the criteria cannot be found, the state party should make a nomination of a candidate from another state party under Article 36 (4) (b).

Article 36 (4) (b) provides that:

> "Each State Party may put forward one candidate for any given election who need not necessarily be a national of that State Party but shall in any case be a national of a State Party."

To ensure that the Assembly of States Parties has the widest choice of qualified candidates, including both men and women, who meet the criteria for judges set out in Article 36, if a state party is unable to nominate a candidate who meets the requirements, that state party should consider nominating a candidate from another state party, particularly if the other state party does not intend to make a nomination. While there may be some practical obstacles in nominating a candidate from another state party, this should not dissuade a state from following this process provided for in the Statute. The nominating state party should take all possible measures, including those listed in this Checklist to ensure that such candidate is of the highest quality and meets the criteria set out in Article 36.