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International Criminal Court Concerns at the second resumed first session of the Assembly of States Parties (21 to 23 April 2003)

The second resumed first session of the Assembly of States Parties (Assembly) will take place at the United Nations (UN) Headquarters in New York from 21 to 23 April 2003 (the first part of the session took place from 3 to 10 September 2002 and the first resumed session on 3 to 7 February 2003). The main focus of the second resumed session will be to elect the Prosecutor and the Committee on Budget and Finance. The Assembly will also need to consider other issues relating to the effective establishment of the Court.

Taking place less than five years after the adoption of the Rome Statute of the International Criminal Court (Rome Statute) and a year after the 60th ratification of the Rome Statute, the election of the Prosecutor is a major step towards the Court becoming fully operational this year.

The Prosecutor will be one of the most visible and high profile members of the Court. When he takes office, he will already have a substantial amount of information, deposited at the Court since 1 July 2002, to examine and may need to respond to a state or UN Security Council referral at an early stage. Amnesty International remains concerned that the lack of states parties who have enacted effective implementing legislation and signed and ratified the Agreement on Privileges and Immunities which could present unwelcome obstacles for the Prosecutor to carry out his duties effectively. In this paper, the organization urges the Assembly, individually and collectively, to take immediate steps to address this issue.

Following the election, the Committee on Budget and Finance will meet in August to examine the 2004 programme budget prepared by the Court, in order to make recommendations to the Assembly. Amnesty International is concerned that Eastern European States have not nominated candidates for the Committee, which if not addressed could result in 10 instead of 12 members being elected. The organization calls on Eastern European States and the Bureau to continue working to identify highly qualified candidates in advance of the election.

The Assembly will also consider scheduling the election of the Board of

Directors of the Trust Fund for Victims. In this paper Amnesty International calls on the Assembly to schedule the election for September 2003, in order that the Board of Directors can start work on suggesting criteria for management of the Trust Fund so that it can become fully operational and start fundraising as soon as possible.

Amnesty International takes no position on individual candidates that have been considered or nominated for the Prosecutor, the Committee on Budget and Finance, the Board of Directors of the Trust Fund or any other appointment to the Court and limits its recommendations to process and information states parties should take into account in determining their votes in order to nominate and elect the highest qualified candidates.

The fact that the Court will be fully operational in the very near future raises challenges that states parties, collectively and individually must address to ensure that the Court functions effectively in its first years, including the need to work for universal ratification of the Rome Statute; the urgent need for effective implementation of the Rome Statute by all states parties and new states parties; the urgent need for all states parties and new states parties to sign, ratify and implement the Agreement on Privileges and Immunities; the need to ensure that states parties (or any other states) do not enter into impunity agreements with the United States of America (USA) or any other state, thereby violating the Rome Statute and obstructing the work of the Court; and the need for states parties to consider how to represent their concerns to the United Nations (UN) Security Council regarding efforts by the USA to have the Security Council renew Resolution 1422. This paper looks at these issues and makes recommendations for the Assembly.

Amnesty International will have a delegation present throughout the second resumed first session of the Assembly and its representatives are available to discuss any of these issues with government delegations.

I. Election of the International Criminal Court Prosecutor

On 4 April 2003, the nomination period for candidates for Prosecutor was closed. One consensus candidate – Mr Luis Moreno Ocampo – was nominated for the position of Prosecutor. Amnesty International welcomes the efforts of states parties to identify a highly qualified candidate who could be nominated and elected by consensus.

States parties must be aware that an initial task of the Prosecutor will be to undertake an examination of the large amount of information that has been submitted to the Court since 1 July 2002 and may receive a state or Security Council referral at an early stage. He is almost certain to start conducting preliminary examinations with regard to some of this information shortly after taking office and may seek approval of the Pre-Trial Chamber before the second session of the Assembly in September 2003 to open one or more investigations. For each of these steps, the Prosecutor will need the cooperation of states parties and other states. Investigators will need to be able to operate freely outside the seat of the Court, to interview victims and witnesses in confidence and security and to gather evidence, including court-authorized searches. In some cases, it will be necessary to search for, seize and freeze assets of a person to ensure that, if convicted, these assets can be used for reparations. Such possibilities make the need for implementing legislation and ratification of the Agreement on Privileges and Immunities even more urgent. In part VII and VIII of this paper Amnesty International makes recommendations to the Assembly on these issues.

II. Election of the members of the Committee of Budget and Finance

The Committee of Budget and Finance (Committee) was established by the Assembly¹ to examine technically “any document submitted to the Assembly of States Parties that contains financial or budgetary implications or any other matter of a financial, budgetary or administrative nature, as may be entrusted to it by the Assembly...”² In particular, the Committee will review and make recommendations on the programme budget of the Court prepared by the Registrar and shall also consider reports of the Auditor. The Committee is scheduled to meet on 4-8 August 2003 to consider the programme budget prepared by the Registrar for 2004.

The Committee, which is composed of 12 members, will be elected at the second resumed session. However, on 21 March, the nomination period for the Committee – which had already been extended due to lack of nominations - was closed with only 11 nominations.

¹ Resolution ICC-ASP/1/Res.4.

² *Ibid.*, paragraph 3.

The Procedure for the nomination and election of members of the Committee of Budget and Finance³ sets out that the members of the Committee shall consist of members from the following regions:

- “- African States, two seats;
- Asian States, two seats;
- Eastern European States, two seats,
- Group of Latin American and Caribbean States, two seats;
- Western European and Other States, four seats.”⁴

Furthermore, the procedure provides:

“Every effort shall be made to elect the members of the Committee by consensus, on the basis of a recommendation by the Bureau. In making its recommendation, the Bureau shall consult the regional groups. In the absence of agreement within the concerned regional group, the Bureau shall abstain from making a recommendation regarding that group.”

Of the 11 candidates nominated, three are from Africa, two are from Asia, none are from Eastern Europe, two are from the group of Latin American and Caribbean States and four are from Western Europe and Other States. If the election proceeds in such circumstances a maximum of 10 members could be elected to the Committee.

Amnesty International is concerned that Eastern European states have to date been unable to nominate any candidates for the Committee. In order to ensure that the Committee is at full strength to carry out its tasks this year, Amnesty International urges Eastern European States and the Bureau to continue working to identify candidates in advance of the Assembly. In the event that agreement is obtained on candidates in advance of the resumed session, the Assembly should allow the re-opening of the nomination period during the session, in advance of the election, so that those candidates can be considered. However, in the event that Eastern European States are unable to nominate two candidates before the resumed session, the election should proceed so that the Committee can be established and those seats that are not filled should remain vacant with the intention to elect members at the next session of the Assembly in September.

³ Resolution ICC-ASP/1/Res.5.

⁴ *Ibid.*, paragraph 8.

A review of the nomination process should also be made by the Assembly to identify obstacles to nomination that could be addressed in future elections. In particular, the Assembly should consider whether, pursuant to Article 114, it should pay for the services or expenses of the members of the Committee members.

As the first meeting of the Committee is taking place only months following the election, efforts should be made to provide all elected members with the background information relevant to their task. In particular, elected members should have the opportunity to discuss the drafting of the Budget for the First Financial Period with the Coordinator of the Preparatory Commission Working Group on the First Year Budget. Furthermore, the Registrar and other International Criminal Court experts should be invited to participate in the Committee's meeting to assist the Committee and answer relevant questions.

III. Scheduling the election of the Board of Directors of the Trust Fund for Victims

The Trust Fund for Victims is being created, pursuant to Article 79 of the Rome Statute "for the benefit of victims of crimes within the jurisdiction of the Court, and of the families of such victims." The Resolution establishing the Trust Fund,⁵ provides for the election of a Board of Directors for the Trust Fund who should be of "high moral character, impartiality and integrity and shall have competence in the assistance to victims of serious crimes."⁶ They shall serve voluntarily in their individual capacities and are elected for a three-year term.

At the September session of the Assembly, it was decided to postpone "taking a decision concerning opening the nomination period for the members of the Board of Directors of the Trust Fund for the benefit of victims until the second resumption of its first session in April 2003."⁷

Amnesty International strongly urges the Assembly to proceed with electing the Board of Directors as soon as possible to ensure the prompt establishment and operation of the fund and to enable the Board to start work on developing

⁵ Resolution ICC-ASP/1/Res.6.

⁶ Ibid, Annex, Paragraph 3.

⁷ Paragraph 28, Page 7, Part 1 of the Report of the Assembly of States Parties (ICC –ASP/1/3).

"suggestions for further criteria for the management of the Trust Fund for consideration and adoption by the Assembly as soon as possible."⁸ Amnesty International believes the Trust Fund should become operational as soon as possible to ensure that it is connected to the work of the Court from the very beginning and to start fundraising at the earliest opportunity for the benefit of victims.

If the Board of Directors is elected in September, the Board could meet (as provided in the Budget for the First Financial Period)⁹ soon after (i) to make recommendations for the appointment of the Trust Fund staff person in the Victims Participation and Reparations Unit,¹⁰ (ii) to determine its work plan in order to make the Trust Fund fully operational, (iii) to consider its suggestions for the management criteria for the Trust Fund and (iv) to deal with any existing oversight of the Trust Fund.¹¹

Furthermore, the Board of Directors should also be elected promptly so that the Board can work with the various organs of the Court and consult civil society as the Court develops principles for reparations in accordance with Article 75 (1). Under Rule 98 of the Rules of Procedure and Evidence, 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 is involved in the process of determining the Article 75 (1) principles.

Amnesty International recommends opening the nomination period as soon as possible to allow sufficient time for states to consult civil society before putting forward candidates and a sufficient period to permit evaluation by states and civil society of the candidates once they have been nominated. Amnesty International calls on the Bureau to ensure that, as with the election of the judges and the prosecutor, information about nominees, including their curriculum vitae should be included on the UN website in their original languages as soon as the nominations are received

⁸ Paragraph 3 of Resolution ICC-ASP/1/Res.6: Establishment of a fund for the benefit of victims of crimes within the jurisdiction of the Court, and of families of such victims.

⁹ Paragraph 33 of the Budget of the First Financial Period.

¹⁰ Paragraph 91 of the Budget of the First Financial Period states: "...it is proposed that the a post at the P-3 level dealing exclusively with matters related to the Victims Trust Fund be created within the Victims Participation and Reparation Unit of the Registry. The person will be appointed by the Registrar for a six-month period upon the recommendation of the Board of Directors of the Victims Trust Fund."

¹¹ Reportedly, voluntary contributions have already been received for the Trust Fund. A series of initiatives by civil society are underway or being planned to ensure voluntary contributions to the Trust Fund.

pending translation to ensure transparency and access to information for members of the Assembly.

The nomination and election procedure for the Board of Directors¹² requires that each region will have a member of the Board of Directors and it is therefore essential that each region nominate a candidate. Amnesty International urges all states parties, individually and regionally to consider nominating candidates, after consulting civil society, to the Board of Directors who meet the following criteria:

"The members of the Board shall be of high moral character, impartiality and integrity and shall have competence in the assistance to victims of serious crimes."¹³

IV. Payment of assessed contributions

Amnesty International was very concerned by a statement of the President of the Assembly at the close of the first resumed session on 7 February 2003 regarding the status of payments of assessed contributions which if not resolved promptly, could threaten the ability of the Court to perform its functions in 2003.

The President reported that 23,959,800 Euros of the total budget of 30,893,500 Euros had not been paid by states parties. The deadline agreed by the Assembly for full payment of assessed contributions for the first financial period was 1 January 2003.

It is likely that the overdue payments result from states parties' lack of preparation to ensure that their assessed contributions could be paid within the deadlines. Many states do not work on the same financial year as the Court (1 January to 31 December) and, therefore, have had to wait for the beginning of their new financial year to pay their contributions (for example, a number of states begin their financial year on 1 April).

Amnesty International hopes that when the President reports again to the Assembly at the April session that all states will have paid their contributions in full and that the Assembly will take effective measures to call on any states that have not

¹² Resolution ICC-ASP/1/Res.7.

¹³ Paragraph 3 of Resolution ICC-ASP/1/Res.6: Establishment of a fund for the benefit of victims of crimes within the jurisdiction of the Court, and of families of such victims.

done so, to pay their contribution promptly. If, however, by April, there are still a significant amount of overdue contributions, the Assembly should take more urgent measures to address the matter.

All states parties, should take all measures to ensure that they will pay their assessed contributions for 2004 on time.

V. The role of the Assembly in working for universal ratification of the Rome Statute

Amnesty International recommends that the Assembly take steps to ensure universal ratification of the Rome Statute of the International Criminal Court. It hopes that the Assembly will call upon all states that have signed the Rome Statute to ratify it promptly. Of the 139 states that signed the Rome Statute, 85 have ratified it and four states that did not sign the Rome Statute by 31 December 2000 have acceded to it. The 54 signatories that have not yet ratified it (including the USA, which repudiated its signature on 6 May 2002, and Israel which repudiated its signature on 28 August 2002) should be urged to ratify the Rome Statute promptly. The Assembly should also urge all other states that have neither signed nor ratified the Rome Statute to ratify it as soon as possible to increase the effectiveness of the fight against impunity.

VI. The urgent need for all members of the Assembly to enact effective implementing legislation for the Rome Statute promptly

It is a matter of concern that of the 89 states that have ratified the Rome Statute, only ten are known to have enacted implementing legislation that provides both for national prosecutions and for cooperation with the International Criminal Court.¹⁴ Seven have only partially implemented their obligations under the Statute by providing solely for cooperation.¹⁵ One, Mali, has incorporated the crimes in the Rome Statute as crimes under national law. The Assembly should urge all states

¹⁴ According to information provided to the Coalition for the International Criminal Court, Australia, Canada, Estonia, Finland, Germany, Iceland, Malta, New Zealand, South Africa, and the United Kingdom have completed their implementing legislation.

¹⁵ According to information supplied by the Coalition for the International Criminal Court, Austria, France, Netherlands, Norway, Slovenia, Sweden and Switzerland have enacted implementing legislation concerning only their cooperation obligations.

parties that have not fully implemented their obligations under the Rome Statute in national law to do so as soon as possible.

Although Amnesty International welcomes reports that some states have published draft legislation¹⁶ and many others have begun their national process to develop national implementing legislation,¹⁷ the organization remains concerned that when the Prosecutor takes office and commences a full review of all information submitted to the Office of the Prosecutor (OTP) since 1 July 2002, that the lack of implementing legislation could prove a serious barrier to carrying out the OTP's duties effectively.

All states parties that have not yet fully implemented the Rome Statute in national law should promptly address this urgent situation. States that have not started their implementing process should begin it immediately, and states that are currently working on implementation should aim to complete the process as soon as possible. New states that ratify the Rome Statute should complete their implementation process before the Statute enters into force for them. All implementation processes should provide for consultation with civil society.

The Assembly should also adopt a resolution as soon as possible calling on:

- States parties to make it a priority to enact effective implementing legislation, in consultation with civil society;
- States parties that have enacted implementing legislation to consider providing technical assistance to other states, in a transparent manner.

The Assembly should also ensure the allocation of sufficient resources to the Assembly's permanent secretariat, so that once it is established, it can be asked to work with the International Criminal Court, intergovernmental organizations, including the UN, the International Criminal Tribunals for the former Yugoslavia and for Rwanda, non-governmental organizations and independent experts to assist states parties in drafting implementing legislation for the Rome Statute. The Assembly should also consider providing assistance to states parties and new states parties to review their current law to determine how it needs to be amended to ensure effective

¹⁶ Argentina, Belgium, Botswana, Brazil, Democratic Republic of Congo, Ecuador, Lesotho, Liechtenstein, Spain, Sweden, Uruguay and Venezuela are among the states parties that have published draft legislation.

¹⁷ Benin, Bolivia, Cambodia, Gambia, Ireland, Italy, Mongolia, Niger, Panama, Paraguay, Peru, Portugal, Republic of Korea, Romania, Senegal, Tajikistan and Trinidad and Tobago are among the states parties that have begun the process of drafting legislation.

implementation, as well as states that make declarations under Article 12 (3) or otherwise cooperate with the International Criminal Court under Article 87 (5) of the Statute. The Secretariat should monitor the status of implementing legislation and compliance in all states parties and report to the Assembly every year on the status of implementation.

Amnesty International will continue to distribute its document *International Criminal Court: Checklist for effective implementation* (AI Index: IOR 40/011/2000) to the Assembly in Arabic, English, French, Portuguese, Russian and Spanish.¹⁸ The organization aims to comment on draft implementing legislation during national consultation processes and plans to issue a commentary on enacted legislation in the second half of 2003.

VII. The urgent need for all members of the Assembly and other states to sign, ratify and implement the Agreement on Privileges and Immunities of the Court.

Amnesty International is concerned that as of 1 April 2003, only two states (Norway and Trinidad and Tobago) have ratified the Agreement on Privileges and Immunities and only 23 other states¹⁹ have signed it. As the Court moves towards becoming fully operational it will require the protections offered by the Agreement (which are not covered by any other international agreement) and it is, therefore, essential that all states parties and states in the process of ratifying the Rome Statute take immediate steps to sign and ratify the Agreement and enact effective implementing legislation.

Amnesty International believes that given the current status of signature and ratification, the Assembly should review the status of signature, ratification and implementation of the Agreement on Privileges and Immunities and should adopt a resolution calling on:

- All states parties to sign the Agreement immediately;
- All states parties to ratify the Agreement as soon as possible;
- All states parties to make it a priority to enact effective national legislation implementing the Agreement, in consultation with civil society;

¹⁸ Also available on Amnesty International's International Justice website: www.amnesty.org/icc/.

¹⁹ Argentina, Austria, Belgium, Benin, Costa Rica, Denmark, Ecuador, Finland, France, Hungary, Iceland, Italy, Luxembourg, Madagascar, Mali, Mongolia, Namibia, New Zealand, Peru, Portugal, Senegal, Switzerland and United Kingdom.

- States parties that enact implementing legislation to consider providing technical assistance to other states, in a transparent manner.

The Assembly should also ensure the allocation of sufficient resources to the Assembly's permanent secretariat, so that once it is established, it can be asked to work with the International Criminal Court, intergovernmental organizations, including the UN, the International Criminal Tribunals for the former Yugoslavia and for Rwanda, non-governmental organizations and independent experts to assist states parties in drafting implementing legislation for the Agreement. The Assembly should also consider providing assistance to states to review their current law to determine how it needs to be amended when the state either ratifies the Agreement, makes declarations under Article 12 (3) or otherwise cooperates with the International Criminal Court under Article 87 (5) of the Statute. The Secretariat should monitor the status of signatures, ratifications, implementation of the Agreement and compliance in all states parties and report to the Assembly every year.

XIII. The role of the permanent secretariat of the Assembly

In September 2002, the Assembly, for reasons of efficiency, continuity and experience, adopted a resolution,²⁰ calling for the United Nations "to continue to carry out the secretariat functions of the Assembly of States Parties on a provisional basis".²¹ The resolution does not specify a time limit for provisional use of the UN as the Assembly's secretariat. Amnesty International believes that this arrangement should not extend beyond the first financial period and the Assembly should now start making preparations to establish a permanent independent Secretariat. It is important that discussions of this issue start now to ensure that the establishment of any permanent secretariat is reflected in the 2004 budget.

During the Preparatory Commission, a majority of delegations indicated that they favoured an independent permanent Secretariat for the Court, leaving open the type of connection that might be established to the United Nations and Amnesty International agrees that it would be inappropriate for the UN to perform this function after the initial phase of establishing the Court.²²

²⁰ Resolution ICC-ASP/1/Res.8.

²¹ *Ibid.*, para. 1.

²² Many of the tasks of the Assembly of States Parties are closely related to the core functions of the Court and may engender actual or perceived conflicts of interest between the UN and the Court which

Rule 37 of the Rules of the Assembly of States Parties provides:

"The Secretariat shall receive, translate, reproduce and distribute documents, reports and decisions of the Assembly, the Bureau and any subsidiary bodies that may be established by the Assembly; interpret speeches made at the meetings; prepare, print and circulate, if so decided by the Assembly or the Bureau, the records of the session; have the custody and proper preservation of the documents in the archives of the Assembly; distribute all documents of the Assembly and the Bureau; and, generally, perform all other work which the Assembly or the Bureau may require."

Thus, it is clear that the Secretariat will perform not only traditional administrative conference services, but also "all other work that the Assembly or Bureau may require", which will necessarily include substantive tasks. Given the substantive responsibilities the Assembly assumed from the first day of its existence and given the fact that the Assembly meets at best a few times a year, the Assembly will need continuous and expert assistance in the fulfilment of these responsibilities.

The functions of the independent permanent Secretariat. The mandate of an independent Secretariat must be derived from the necessary functions of the Assembly and the Bureau, as spelled out in Article 112 of the Rome Statute. It can be anticipated that the Assembly, including its Bureau, will need assistance with many of the substantive tasks assigned to it. Among the functions of the Assembly that will be crucial in the beginning years of the Court's operation are the following:

The work of the Bureau (Article 112 (3), (6));

The work of the Board of Directors of the Trust Fund for Victims; and

The work of the Committee on Budget and Finance.

may render such tasks inappropriate for the UN Secretariat to undertake. The perceived and actual independence of the Court and its integrity will require that it relies on its own lines of authority, within the Court and between the Court and the Assembly, to fulfil its mandate.

Specific areas of work of the Assembly needing assistance by the Secretariat.

The specific areas of work that the Assembly will take up and for which it will likely require support by an independent permanent Secretariat include the following:

- ***Management of the budget process*** in respect of the Assembly's own budget but also in overseeing the entire budget approval process (including regular and supplementary budgets); this relates particularly to the regular work of the Committee on Budget and Finance, the management of the annual audit and the provision of internal oversight services, the latter for which there is as yet no provision.
- ***Establishment of funds for the Court*** (see Article 115).
- ***Management of protocol and the mechanics of Member and Observer State participation in Assembly meetings*** (see Article 112 (1) and (8)).
- ***Management of the participation of non-governmental organizations in open meetings.***
- ***Management of the elections*** and the voting process system in general.
- ***Management of communications with states*** - ranging from notification of meetings and distribution of reports to encourage State cooperation with the Court.
- ***Management of communications with the Court*** - ranging from review and approval of the relationship agreement with the UN and the host State agreement, gratis personnel guidelines, the codes of conduct, staff regulations and other internal provisional regulations, and of any amendments to subsidiary instruments to the Rome Statute (such as the Rules of Procedure and Evidence) to communications with the Court about situations of state non-cooperation and consultation on the preparation of the budget.
- ***Management of procedures for dispute settlement*** among states parties regarding disagreement about application of the Rome Statute.
- ***Administration of solemn undertakings*** for the judges, Prosecutor and Registrar.
- ***Encouraging ratifications.*** The Assembly could play an active role in encouraging further ratifications of the Rome Statute.
- ***Assisting in drafting legislation that fully implements the Rome Statute.*** The Assembly could play an important role in encouraging states that have ratified to develop and adopt effective implementing legislation (see Part VII for more details).

- ***Encouraging ratifications of the Agreement on Privileges and Immunities.*** The Assembly will probably undertake the role of encouraging states to ratify the Agreement on Privileges and Immunities (see Part VII for more details).
- ***Undertaking outreach efforts.*** To strengthen the effectiveness of the Court and the broader framework of international justice, the Assembly may wish to ask the Secretariat to conduct outreach efforts modelled on the outreach programs of the International Criminal Tribunals for the former Yugoslavia and for Rwanda, to ensure greater worldwide understanding of the Court's mission and mandate.

Traditional provision of conference services. The tasks listed above deliberately exclude the provision of basic conference services such as document duplication distribution in the course of meetings and interpretation and translation services. It is arguable that these services can be provided by the UN Secretariat, when the Assembly meets at UN Headquarters, as they are basic technical services without any political implications.

It is imperative that the Assembly clearly assesses as soon as possible what is the most cost-efficient and rational approach to adopt for the long-term, given the fact that the Court will be based in The Hague and the UN Secretariat is based in New York. The Assembly should assess what would be the best source of conference services after the second session of the Assembly meeting in September 2003, presuming that eventually it will be more advantageous for the Assembly to meet in The Hague. The Assembly must be prepared to make a change in services in time for the third meeting, should it prove to be more rational and cost-efficient to do so.

IX. Responding to the US campaign against the International Criminal Court

The second resumed first session of the Assembly takes place at a time when one state, the United States of America (USA), continues 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 denied that the US campaign represents a significant threat to the credibility and work of the Court. Amnesty International shares the view of many states parties 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 has an important role to play in protecting the ICC from unwarranted attacks.

US impunity agreements. Reports indicate that the US efforts to obtain impunity agreements has intensified greatly in recent months. In particular, the USA has been exerting very strong pressure on states to sign agreements in advance of 1 July 2003 – a deadline included in the American Servicemembers Protection Act. As of 2 April 2003, it is reported that 27 states²³ – ten of them²⁴ members of the Assembly and five others²⁵ that are signatories to the Rome Statute - have signed impunity agreements, although not a single parliament of any of these states has yet ratified such an agreement.²⁶

Renewal of Security Council Resolution 1422. Amnesty International was dismayed by the UN Security Council's adoption of Resolution 1422 on 12 July 2002. The Resolution, which was opposed by the vast majority of states that spoke during the tenth session of the Preparatory Commission for the International Criminal Court and addressed the Security Council directly on 10 and 11 July 2002, is both contrary to the Rome Statute and to international law.

Amnesty International plans to issue a legal analysis of Resolution 1422, on 1 May 2003, including new and expanded arguments why the resolution is unlawful.

²³ Afghanistan, Azerbaijan, Bahrain, Djibouti, the Democratic Republic of Congo, the Dominican Republic, East Timor, El Salvador, the Gambia, Georgia, Honduras, India, Israel, the Marshall Islands, Mauritania, Micronesia, Nauru, Nepal, Palau, Romania, Rwanda, Sierra Leone, Sri Lanka, Tajikistan, Tonga, Tuvalu and Uzbekistan.

²⁴ Afghanistan, Djibouti, the Democratic Republic of Congo, East Timor, the Gambia, Honduras, the Marshall Islands, Nauru, Romania and Tajikistan.

²⁵ Bahrain, Dominican Republic, Georgia, Israel (which rescinded its signature in 2002) and Uzbekistan.

²⁶ For further information on why the US impunity agreements are contrary to the Rome Statute, see: Amnesty International, *International Criminal Court: The US effort to obtain impunity for genocide, crimes against humanity and war crimes* (AI Index: IOR 40/025/2002), and *International Criminal Court: The need for the EU to take more effective steps to prevent members from signing US impunity agreements* (AI Index: IOR 40/30/2002) (both are available on Amnesty International's International Justice Project website: www.amnesty.org/icc).

The organization's one million members will be campaigning for the Security Council not to renew the resolution.

It is essential that the Assembly stand united against US initiatives that threaten the Court. In particular:

- States parties must uphold their obligations under the Rome Statute and international law by refusing to enter into impunity agreements with any state;
- States parties that have signed impunity agreements with the USA must uphold their obligations under the Rome Statute and international law by not ratifying the such agreements; and
- States that are members of the Security Council should not renew Resolution 1422 and all other states should take every available opportunity, including in statements in the Assembly, to urge them not to do so.

X. Review of national nomination procedures for judges

In August 2002, Amnesty International issued *International Criminal Court: Checklist to ensure the nomination of the highest qualified candidates for judges* (AI Index: IOR 40/023/2002) to all states parties. The document made recommendations on holding fair and transparent nomination processes open to both highly qualified female and male applicants, in order to nominate the highest qualified candidate from their country and ultimately for the Assembly collectively, to meet the criteria for judges set out in Article 36 of the Rome Statute.

In October 2002, following on from this paper, Amnesty International issued a questionnaire to all states that nominated a judge to the International Criminal Court. The questionnaire focussed solely on the national nomination process for selecting a national candidate.

Unfortunately, even when the organization extended the deadlines for reply until after the election had been completed, only eight of the 45 states parties that nominated candidates replied to the questionnaire. Amnesty International is grateful to the governments of Canada, Colombia, Finland, Hungary, Republic of Korea,

Mongolia, Slovenia and the United Kingdom for their replies. All replies are included in full in Appendix 1.²⁷

Amnesty International is concerned that the lack of replies represents non-transparency of most nomination processes. The organization remains concerned that many nominating states:

- Made no public announcement or advertisement of the process, denying highly qualified candidates, including women, the opportunity to apply or be considered;
- Failed to take adequate measures to inform highly qualified women about the process and to inform potential candidates of the criteria in the Rome Statute for a "fair representation of female and male candidates." As a result less than a quarter of the nominees were women.
- Failed to take adequate measures to inform highly qualified candidates with "legal expertise on specific issues, including, but not limited to, violence against women or children" of the process and the criteria in the Rome Statute requiring such expertise.
- Excluded civil society, fully or partially, from the nomination process, failing to take advantage of the important role that such groups can play in identifying qualified candidates, contributing to the drafting of an advertisement and criteria for selection and commenting on applicants.
- Failed to make known the names of persons being considered during the period before the nomination was made, thus preventing comment on the scope of persons being considered, such as the absence of persons from certain ethnic groups or of women, at a time when this imbalance could be rectified, and preventing comment on the qualifications of particular persons under consideration at a time when it could affect the nomination.

Amnesty International's concerns do not reflect on the judges who were ultimately elected, who include some of the highest qualified candidates from the international community.

The organization, however, believes that the Assembly should take steps in advance of the future election of judges to encourage all states parties to conduct

²⁷ Except for Hungary's reply, which was given during a telephone conversation with an Amnesty International representative.

transparent processes, with broad consultation with civil society. In addition, the Assembly should establish an Advisory Committee to assist it in considering nominees.

Appendix 1: Replies to Amnesty International's Questionnaire on the nomination of judges

Canada

(letter from John T. Holmes, Director United Nations, Human Rights and Economic Law Division)

On September 9, 2002, at the first meeting of the ICC's Assembly of States Parties, the Minister of Foreign Affairs announced Canada's judicial candidate for the International Criminal Court, Ambassador Philippe Kirsch, Q.C. A copy of this speech is attached. Ambassador Kirsch is a recognized expert on the International Criminal Court. He served as the Chair of the ICC's Preparatory Commission from 1999-2002 and as Chair of the Committee of the Whole at the 1998 Rome Diplomatic Conference. As such, he has an intimate knowledge of the ICC, including the Court's detailed instruments and mechanisms. He has written many chapters and articles on the Court, and has given many speeches and interviews on this subject, both nationally and internationally.

Ambassador Kirsch also has demonstrated expertise in international humanitarian law and extensive experience in international criminal law as well as other areas of public international law, as demonstrated in the attached curriculum vitae. In addition, Ambassador Kirsch has appeared as Agent for Canada before the International Court of Justice in the Legality of Use of Force and Fisheries Jurisdiction cases. In both cases, he addressed the issue of jurisdiction, an issue which is likely to arise in the early years of the International Criminal Court.

Ambassador Kirsch is fluent in both English and French and has extensive experience in technical and legal drafting in both languages. Ambassador Kirsch is also fluent in Spanish. Ambassador Kirsch is a member of the Bar of Quebec, and as such has knowledge of the common law and civil law systems.

Ambassador Kirsch was nominated according to the procedure provided for in article 36(4)(a)(ii) of the Rome Statute, having been recommended by the Canadian National Group of the Permanent Court of Arbitration (Canadian National Group) and approved by the Minister of Foreign Affairs. The Canadian National Group is composed of representatives from Canada's highest court, legal academia, the practising bar and the Department of Foreign Affairs and International Trade. The members of the Canadian National Group involved were the Honourable Mr. Justice

Frank Iacobucci of the Supreme Court of Canada, Professor Don McRae of the University of Ottawa, Mr. Simon Potter of Ogilvy Renault and Mr. Michael R. Leir, Legal Adviser, Department of Foreign Affairs and International Trade.

In February 2002, the Canadian National Group sent out letters in English and French to 58 organizations and individuals, requesting views concerning individuals who might possess the necessary qualifications for election to the ICC. The relevant provisions of the Rome Statute were attached to the letter. Copies of the text of the letter in English and French are attached. The letters inviting nominations were sent to 22 law schools, 19 Supreme Court Justices and Chief Justices of provinces, 15 institutions, nongovernmental organizations and professional organizations and 2 Government of Canada Departments other than the Department of Foreign Affairs and International Trade. In response to the request, the Canadian National Group received 23 nominations, as well as considered 15 unsolicited nomination letters. After considering all of the nominations, the Canadian National Group forwarded its views to the Minister of Foreign Affairs. The Minister approved Ambassador Kirsch's nomination, which was officially submitted to the United Nations on October 9, 2002.

Canada takes the nomination and election of the ICC's judges very seriously, and it is for this reason that it is putting forward a candidate with the experience, background and practical knowledge necessary to ensure that the Court has the confidence of the international community from the very beginning of its operation.

Colombia

(Letter from Carolina Barco, Foreign Office Minister – translation by Amnesty International)

I am writing in response to your kind note AMR 23.59.02 regarding the nomination procedures for ICC judges, to be elected by the Assembly of States Parties at its session on 3 to 7 February of the present year in New York.

As you pointed out in your letter, Colombia has participated actively for the establishment of the ICC. Colombia participation started when in a Diplomatic Conference in July 1998 the Rome Statute was adopted, and has continued during the Preparatory Commissions. In a national level this effort was verified in the internal procedure that ended with the ratification of this international instrument.

Concerning the procedure followed for the nomination of Judges for the ICC, the Government of Colombia selected one candidate of high qualification and wide

experience in Criminal and International Law: Dr. Rafael Nleto Navia, who at the moment is judge *ad litem* in the International Criminal Tribunal for the former Yugoslavia, and who has been developing his functions, with recognized merit, as a member of the Court of Appeal in this Court and in the Court of Appeal of the International Criminal Tribunal for Rwanda. Judge and President of the Inter-American Commission of Human Rights, judge and President of the Argentinean-Chilean Arbitral Tribunal for the establishment of the boundary between Hito 62 and Fitz-Roy mountain, member of the Colombia Foreign Relations Advice Commission and co-judge of the Constitutional Court in the High Court of Justice. Se also imparts lessons in national and foreign Universities. Dr. Navia is author of several works in International Law.

According the article 36 paragraph 4,ii) the candidate was nominated by the national group of the Permanent Court of Arbitration and, as we have already expressed, fulfilled the aptitude requirements required; qualities for the exercise of judicial functions, recognised experience in Criminal procedures, experience in International Law and in Human Rights and International Humanitarian Law.

His nomination was the result of an informal consultation process with members of the Highest Judicial Institutions in the Republic of Colombia.

Finland

1.(a) Which procedure has the government used to select their candidate?

- The procedure for the nomination of candidates for appointment to the highest judicial offices in the State in question (*Article 36 (4) (a) (i) of the Rome Statute*);

Or

- The procedure provided for the nomination of candidates for the International Court of Justice in the Statute of that Court (*Article 36 (4) (a) (ii) of the Rome Statute*)

Or

- By using both procedures

The candidate was selected on 23 May 2002 by the National Group of Finland in the Permanent Court of Arbitration in accordance with Article 36(4)(a)(ii) of the Rome Statute and with due regard to the procedure provided for nomination of candidates

for the International Court of Justice in the Statute of that Court. This procedure was chosen as it provides for a broader consultation process than the procedure for the appointment to the highest judicial offices in Finland, i.e. to the offices of members (justices) of the Supreme Court and the Supreme Administrative Court.

Article 6 of the Statute of the International Court of Justice recommends that before making a nomination, a national group consults its highest court of justice, its legal faculties and schools of law, and its national academies and national sections of international academies devoted to the study of law.

In accordance with the Finnish Act on Judicial Appointments (No. 205/2000), candidates must apply in writing to the Supreme Court or Supreme Administrative Court respectively within a time limit and it is for the Supreme Courts to make a reasoned proposal of a candidate's appointment to the office of justice of one or other Supreme Court respectively. The reasoned proposal is delivered to the Council of State to be brought before the President of the Republic for the decision on the appointment.

(b) Please provide a summary of the procedure used, including a copy of the relevant legislation or regulations governing the procedure used.

See 1.(a) above. The National Group of Finland in the Permanent Court of Arbitration consists of persons affiliated with the Ministry for Foreign Affairs, with the Ministry of Justice, with the law faculties at the Finnish universities as well as with the Supreme Courts. The Group held both closed meetings and open meetings to which it had invited representatives of the Supreme Courts as well as the law faculties. In order to ensure that all potential candidates who meet the criteria set out in the Rome Statute were taken into account, the Group considered several candidates who had either expressed their interest at their own initiative or given their permission to be considered as a candidate at the proposal of a third party.

2. What steps did the government take to encourage applications from both:

- Applicants with 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 (**Article 36 (3) (a) (i) of the Rome Statute**),

And;

- Applicants with 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 (*Article 36 (3) (a) (ii) of the Rome Statute*).

Please provide copies of the letters (or the standard text with a list of the recipients and the dates sent) and announcements, press releases and advertisements, together with the dates and places of publication. Please also indicate which organizations of civil society were consulted in preparing the letters, announcements, press releases and advertisements and in determining whom to inform about the procedure.

See 1.(b) above. The Ministry for Foreign Affairs provided the members of the National Group with a summary of all the criteria set out in the Rome Statute for the ICC judges as well as with the text of the relevant provisions of the Statute both in English and as a Finnish translation.

3. What steps did the government take to encourage applications from women?

Including:

- was the need for a fair representation of female and male judges included in the letters, announcements, press releases and advertisements and were women encouraged to apply?
- was information about the nomination process sent to particular groups or individuals?
- was civil society asked to assist in identifying qualified women candidates? If so, which organizations were contacted?
- was the need for a fair representation of female and male ICC judges included in the criteria for selecting the candidate?

See 2. above. Among other things, the issue of fair representation of female and male judges was highlighted in the background information prepared by the Ministry for Foreign Affairs..

4. What steps did the government take to encourage applications from applicants with legal expertise on specific issues, including, but not limited to, violence against women or children?

Including:

- was the need for applicants with this experience included in the letters, announcements, press releases and advertisements and were such experts encouraged to apply?
- were steps taken to identify experts on specific issues, including violence against women and children and was information about the nomination process sent to them?
- was civil society asked to assist in identifying such experts? ? If so, which organizations were contacted?
- was the need for experts on issues, including violence against women or children included in the criteria for selecting the candidate?

See 2. above. Also the need to include judges with legal expertise on specific issues, including, but not limited to, violence against women or children was highlighted in the background information.

5. (a) Were individuals allowed to apply for nomination?

(b) Was the position advertised publicly? If so, where? Please provide us with a copy of the advertisement.

(c) How much time was given to receive applications?

See 1.(b) above. The National Group did consider several candidates who had either expressed their interest at their own initiative or given their permission to be considered at the proposal of a third party but the position was not advertised publicly.

6. What steps did the government take to engage civil society in the nominations process, including:

(a) To comment and make suggestions on the text of the advertisement of the nomination process?

(b) To identifying highly qualified applicants?

(c) To comment on the skills and experience of the applicants and to provide information on how they meet the criteria?

(d) To comment and make suggestions on the criteria for selecting a candidate used by the selection panel?

No specific steps beyond the procedure referred to in 1.(a) and described in 1.(b) were taken to engage civil society in the nomination process.

7. What steps did the government take to ensure transparency of the process? Including did the government:

- (a) Publicly announce the nomination process and how it would work?**
- (b) Encourage participation from civil society groups?**
- (c) Make public who was a member of the selection panel before the candidate was selected?**
- (d) Make public the names of the applicants and allow for comments from civil society groups?**
- (e) Make public the applicant selected for nomination and the reasons for choosing that candidate?**

The government made a deliberate choice between the procedures set out in the Rome Statute and used the one which was considered to provide for more transparency. In addition, the National Group held considerably broader consultations that has been customary with regard to the International Court of Justice. Members of the national group serve for 6-year terms and their membership is publicly announced at the time of their nomination.

Mongolia

The government of Mongolia did not provide written answers to the questionnaire, however, returned the questionnaire marking the example answers provided by Amnesty International. These answers provided by the Government are indicated by against the questionnaire below.

1.(a) Which procedure has the government used to select their candidate?

- The procedure for the nomination of candidates for appointment to the highest judicial offices in the State in question (*Article 36 (4) (a) (i) of the Rome Statute*);

Or

- The procedure provided for the nomination of candidates for the International Court of Justice in the Statute of that Court (*Article 36 (4) (a) (ii) of the Rome Statute*)

Or

- By using both procedures

(b) Please provide a summary of the procedure used, including a copy of the relevant legislation or regulations governing the procedure used.

2. What steps did the government take to encourage applications from both:

- Applicants with 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 (*Article 36 (3) (a) (i) of the Rome Statute*),

And;

- Applicants with 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 (*Article 36 (3) (a) (ii) of the Rome Statute*).

Please provide copies of the letters (or the standard text with a list of the recipients and the dates sent) and announcements, press releases and advertisements, together with the dates and places of publication. Please also indicate which organizations of civil society were consulted in preparing the letters, announcements, press releases and advertisements and in determining whom to inform about the procedure.

3. What steps did the government take to encourage applications from women?

Including:

- was the need for a fair representation of female and male judges included the letters, announcements, press releases and advertisements and were women encouraged to apply?
- was information about the nomination process sent to particular groups or individuals?
- was civil society asked to assist in identifying qualified women candidates? If so, which organizations were contacted?
- was the need for a fair representation of female and male ICC judges included in the criteria for selecting the candidate?

4. What steps did the government take to encourage applications from applicants with legal expertise on specific issues, including, but not limited to, violence against women or children?

Including:

- was the need for applicants with this experience included in the letters, announcements, press releases and advertisements and were such experts encouraged to apply?
- were steps taken to identify experts on specific issues, including violence against women and children and was information about the nomination process sent to them?
- was civil society asked to assist in identifying such experts? ? If so, which organizations were contacted?
- was the need for experts on issues, including violence against women or children included in the criteria for selecting the candidate?

5. (a) Were individuals allowed to apply for nomination?

(b) Was the position advertised publicly? If so, where? Please provide us with a copy of the advertisement.

(c) How much time was given to receive applications?

6. What steps did the government take to engage civil society in the nominations process, including:

- (a) To comment and make suggestions on the text of the advertisement of the nomination process?**
- (b) To identifying highly qualified applicants?**
- (c) To comment on the skills and experience of the applicants and to provide information on how they meet the criteria?**
- (d) To comment and make suggestions on the criteria for selecting a candidate used by the selection panel?**

7. What steps did the government take to ensure transparency of the process? Including did the government:

- (a) Publicly announce the nomination process and how it would work?**
- (b) Encourage participation from civil society groups?**
- (c) Make public who was a member of the selection panel before the candidate was selected?**

- (d) **Make public the names of the applicants and allow for comments from civil society groups?**
- (e) **Make public the applicant selected for nomination and the reasons for choosing that candidate?**

Republic of Korea

The procedure taken by the Republic of Korea to nominate its candidate for election to the position of judge of the International Criminal Court (ICC) is outlined below.

The procedure taken for the nomination of Dr. Sang-hyun Song was that provided for the nomination of candidates to the International Court of Justice, in accordance with Article 36(4)(a)(ii) of the Rome Statute. A selection committee consisting of the four members of the Korean National Group of the Permanent Court of Arbitration, was set up on 8 November 2002, and it was decided that this selection committee would choose a candidate from among those recommended by relevant bodies and those who applied directly to the committee. The members of the Korean National Group collectively have established competence and experience in criminal law and procedure and the relevant areas of international law.

Letters to solicit qualified candidates were sent to the Supreme Court, the Ministry of Justice and the Korean Association of International Law. Individuals were also allowed to apply directly to the selection committee for nomination.

The Government did not directly involve itself in the selection process, while the selection committee considered all applications. Since the selection committee was completely in charge of the nomination process, the Government took no steps to encourage applications from either gender or from those with legal expertise on specific issues, including violence against women and children. Despite the restraints by the Government in the process of selection, however, expertise in the area of violence against women and children was an important factor in the nomination process by the selection committee.

On 25 November 2002, the selection committee informed the Korean Government that it had, after careful deliberation, decided to nominate Dr. Sang-hyun Song as a candidate. Accordingly on 29 November 2002, the Korean Government informed the United Nations of its decision to present the candidate Dr. Song for the post of judge of the ICC.

Slovenia (translation by Amnesty International)

1.(a) Procedure of nominations of candidates is extensively regulated by the Law on Nominations of Candidates From the Republic of Slovenia to Judges of International Courts/Tribunals (Official Gazette of the RS, no. 64/01 and 59/02; hereinafter: the Law)

It is a *sui generis* procedure, which differentiates from the procedure of election of a judge within the Republic of Slovenia.

(b) Summary of the procedure:

- Ministry competent for justice invites for applications for a vacant judicial position at an international court
- Invitation for applications shall be published in the Official Gazette of the Republic of Slovenia.
- Deadline for applications shall not be shorter than fifteen days.
- The ministry shall transfer the applications to the President of the Republic of Slovenia.
- After he had obtained opinions of the Government of the Republic of Slovenia and of the Judicial Council of the Republic of Slovenia on the applied candidates the President of the Republic of Slovenia shall transfer his proposals on required number of candidates to the Parliament of the Republic of Slovenia.
- A candidate for international court judge shall be elected by the Parliament of the Republic of Slovenia by secret ballot by the majority of all members of the parliament.

2. In view of the fact that the call for applications for a vacant judicial position is published in the Official Gazette and the procedure is extensively dealt with the Law, the Government is not competent for additional publication of notices and invitations of the candidates.

3. For the same reasons put under 2. there are no grounds for special treatment of women.

4. Same as 2. and 3.

5. (a) Only an individual can be a candidate for a nomination.

(b) Call for applications was published in the Official Gazette of the RS, no. 64-66/02.

(c) Deadline for applications was 38 days.

6. Same as for 2., 3. and 4.

7. Same as for 2., 3., 4. and 6.

United Kingdom²⁸

The United Kingdom has taken great care in selecting the very best candidate for election as judge to the International Criminal Court. The UK candidate, Adrian Fulford QC, exceeds the professional standards and other criteria set out in the ICC Statute.

The Foreign and Commonwealth Office, the Lord Chancellor's Department and the Scottish Executive consulted widely in considering the selection process to be adopted. Consultations included relevant local legal organisations and concerned NGOs, in order to ensure as inclusive, open and transparent a procedure as possible.

The procedure used was based upon that for nomination of candidates for high judicial office in the United Kingdom, referred to in Article 36(4)(a)(i) of the Rome Statute. Lessons were also drawn from the experience of this country in advertising for judicial candidates for the European Court of Human Rights. Advertisements were placed in both *The Times* and *The Scotsman* newspapers, thus offering access to a wide and relevant audience. The advertisement, which is attached, made explicit reference to the various criteria set out in the Statute and emphasised the high professional standard required of a potential candidate. Papers sent separately to the applicants set out in detail the requirements of the Statute. The Government encouraged those with an interest in the Court to bring the position to the notice of any persons qualified to apply. Because the first advertisement did not attract very many applicants, the post was re-advertised in the same terms.

As is clear from the advertisement, the Government invited application from persons with established competence in criminal law and procedure and the necessary relevant

²⁸ Amnesty International regrets that at the time of writing it is only able to include this summary version of the United Kingdom's reply. The organization hopes to include the full version in the appendix of the version of this paper on the organization's website (www.amnesty.org) as soon as possible.

experience (Article 36 (3)(a)(i)), in line with the Government's well-known view that the majority of the judges should be drawn from this category.

The application period remained open for seven (7) weeks, following which all applications were examined in accordance with the standards and criteria mentioned above. Shortlisted candidates were then invited for interview by a selection panel comprising senior legal officials, as well as an independent member from civil society. A press release was issued stating the composition of the panel and describing the process.