

CICC RECOMMENDED CRITERIA FOR STATES PARTIES TO NOMINATE AND ELECT JUDGES TO THE ICC



1. In February 2003, during the first resumed session of the Assembly of States Parties (ASP), the first 18 judges of the International Criminal Court (ICC) were elected. In accordance with the Rome Statute, the President of the ASP drew lots and selected six judges for a term of three years, six judges for a term of six years, and six judges for a term of nine years to allow varying termination dates.¹
2. The term of office of six judges selected for six-year terms will end in March 2009. **From 21 July to 13 October 2008**, the nomination period for electing six judges to the International Criminal Court will be open. Only one current judge, Fumiko Saiga of Japan, will be eligible for re-election since she filled a judicial vacancy term of less than three years.²
3. The election will take place at the first resumed seventh session of the ASP to be held at the United Nations Headquarters on **19 to 23 January 2009**. The elected judges will serve nine-year terms expiring in 2018 and not be eligible for reelection.
4. The CICC believes that in order to be a fair, independent and effective institution, the ICC chambers must be composed of impartial, highly qualified and representative judges. The elected judges will arrive at the Court at a crucial time in history, where pre-trial chambers are setting important procedural landmarks, trial chambers are dealing with the first trials and appeals chambers are establishing jurisprudence for the future.
5. To guide States Parties in nominating³ candidates for the forthcoming and future elections of ICC judges, the CICC has prepared the following criteria based on Rome Statute requirements and resolutions governing the nomination and election of judges. **The criteria highlight what is relevant both for the nomination period and the election process.**
6. In preparing the recommended criteria, the CICC recognized that there should not be a single rigid set of criteria that States Parties should apply. We encourage all States Parties to nominate or support the nomination of candidates through a transparent and vigorous process, and involve broad consultation with parliaments, the legal profession

¹ Article 36(9)(b) of the Rome Statute: “At the first election, one third of the judges elected shall be selected by lot to serve for a term of three years; one third of the judges elected shall be selected by lot to serve for a term of six year; and the remainder shall serve for a term of nine years.”

² Article 37(2): “A judge elected to fill a vacancy shall serve for the remainder of the predecessor’s term and, if that period is three years or less, shall be eligible for re-election for a full term under article 36.”

³ The procedures for nominations of candidates, elections and filling judicial vacancies are outlined in Articles 36 and 37 of the Rome Statute and Resolution ICC-ASP/3/Res.6. Under Article 36(4)(a), “[n]ominations of candidates for election to the Court may be made by any State Party to this Statute, and shall be made either: (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. Nominations shall be accompanied by a statement in the necessary detail specifying how the candidate fulfils the requirements of paragraph 3.” Under Article 36(4)(b), “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.”

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and civil society to ensure that all qualified candidates have been considered and that the process takes into account an array of perspectives.

7. As we have in previous and will in all future ICC elections, the CICC will not take a position on any individual candidates but is committed to upholding the Rome Statute principles of competence and fair regional and gender representation.

I. Recommendation to create an ASP Advisory Committee

The Assembly of States Parties should establish an Advisory Committee on nominations.

8. Article 36, paragraph 4(c) provides this possibility to the ASP, which decides on its composition and mandate. One of the most questionable characteristics in recent ICC elections has been the use of reciprocal agreements or vote trading. To ensure the best qualified judicial candidates are chosen by the ASP for the ICC's future work, a committee along the lines suggested by the Statute should be implemented to provide objective assessments on the nominated candidates.

II. Nominations Criteria

States Parties must ensure transparency and sufficient consultations in the nomination process.

9. We believe that whichever nomination procedure your government chooses, it should be transparent and involve broad consultation with parliaments, the legal profession and civil society, to ensure that all qualified candidates have been considered and that the process takes into account an array of perspectives. Such a nomination can be used for awareness raising opportunities at the national level.

States Parties must ensure that candidates have established competence and experience in criminal law and procedure or competence in international law.

10. Article 36, paragraph 3(b) requires that candidates "(i) Have established competence in criminal law and procedure, and the necessary relevant experience, whether as judge, prosecutor, advocate or in other similar capacity, in criminal proceedings [List A]; or (ii) Have established competence in relevant areas of international law such as international humanitarian law and the law of human rights, and extensive experience in a professional legal capacity which is of relevance to the judicial work of the Court" [List B].
11. Article 36, paragraph 5 clarifies the two lists and states that a "candidate with sufficient qualifications for both lists may choose on which list to appear. At the first election to the Court, **at least nine judges shall be elected from list A and at least five judges from list B.** Subsequent elections shall be so organized as to maintain the equivalent proportion on the Court of judges qualified on the two lists."



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12. Many CICC members feel it is particularly important that candidates have established competence in criminal law and procedure and extensive and relevant trial and court management experience, whether as senior judge, prosecutor, advocate, or in another similar capacity, in criminal proceedings. This is extremely pertinent as the Court moves into the trial phase in many of its cases. Such experience should be relevant to the subject matter and crimes under the Court’s jurisdiction, be recent and extensive in scope.

13. With the upcoming elections, 5 list B judges and 1 list A will leave the bench. CICC members feel that due to the reasons previously outlined, we hope that the **proportion of list A vis-à-vis list B judges will increase.**

In the selection of judges, States Parties shall 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.

14. Under Article 36, paragraph 8(a) provides these 3 requirements on States Parties when selecting judges. Diversity on the ICC bench with regards to legal systems, geographic representation and gender is important to ensure objectivity and balance in the Court’s decisions.

In the selection of judges, States Parties shall take “into account the need to include judges with legal expertise on specific issues, including, but not limited to, violence against women or children.”

15. Article 36, paragraph 8(b) provides that judges should be selected with such legal expertise. The Coalition urges States Parties to nominate candidates after following a thorough examination of nominees’ expertise, backgrounds and qualifications.

States Parties must ensure that all candidates “have an excellent knowledge of and be fluent in at least one of the working languages of the Court.”

16. Article 36, paragraph 3(c) requires that nominated candidates should be fluent in either English or French, the two working languages of the Court, with knowledge of both languages ideal.

States Parties should ensure that “[n]o two judges may be nationals of the same State.”

17. Article 36, paragraph 7 clarifies that “[a] person who, for the purposes of membership of the Court, could be regarded as a national of more than one State shall be deemed to be a national of the State in which that person ordinarily exercises civil and political rights.”

III. Election Criteria

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18. The CICC campaigned during the first election of ICC judges for significantly improved international election procedures, that would promote the election of highly qualified and widely representative candidates. One aspect of our campaign was to ask each candidate to reply to a questionnaire, in order to promote transparency in the process by making candidates' qualifications more accessible and by giving each candidate an opportunity to expand on his or her curriculum vitae and statement. Such questionnaires provide States Parties with useful additional information when choosing among highly qualified candidates.

States Parties must ensure that judges chosen be “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.”

19. Article 36, paragraph 3(a) provides this requirement for ICC judges. States Parties must ensure that the nomination pool includes individuals who have these important character traits and qualifications.

States Parties should refrain from using reciprocal agreements in ICC elections.

20. Among the most objectionable is the practice of making reciprocal agreements between governments in exchange for votes. The CICC strenuously appeals to State Parties of the Rome Statute of the ICC to renounce this practice in ICC elections.

States Parties should elect judges with extensive, recent and relevant trial experience.

21. The departure of 6 judges include 3 appeals, 2 pre-trial and 1 trial judge and 5 list B and 1 list A judge. As mentioned previously, as the Court moves into the trial phase in many of its cases, relevant trial and court management experience will be crucial. Judges chosen should have relevant, recent and extensive trial experience in the subject matter and crimes under the Court's jurisdiction.

IV. Relevant Minimum Voting Requirements in the 2009 Elections

22. States Parties will follow a procedure called 'Procedure for the nomination and election of judges of the International Criminal Court' laid out in ICC-ASP/3/Res.6. Each State Party to the Rome Statute will have one vote. Voting will take place by secret ballot. To be elected, candidates must receive a two-thirds majority of the States Parties present and voting.⁴

23. This procedure, used at the first election in 2003 and revised for future elections, **requires States Parties to vote for a minimum number of candidates from each**

⁴ Article 36(6)(a) of the Rome Statute: 'The judges shall be elected by secret ballot at a meeting of the Assembly of States Parties convened for that purpose under article 112. Subject to paragraph 7, 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'.

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regional group, legal expertise and gender. Minimum voting requirements do not affect the possibility to nominate a candidate – it only impacts the actual voting.

24. These minimum voting requirements facilitate the fulfillment of the Rome Statute requirements as votes cannot be concentrated on one region, list or gender. However, the procedure is not a quota system and does not guarantee that each regional group or gender will get the same number of seats stipulated by the minimum voting requirements.

25. During the current elections, several minimum voting requirements will come into play:

- **List A & B:** The current judges on the bench by category are: list A: 9 and list B: 9. List A includes candidates with criminal law and criminal trial experience. List B are candidates with expertise in the field of international law. When the term of the six judges expires in March 2009, the remaining judges will be: list A: 8 and list B: 4.⁵
- **Regional Distribution:** The current judges on the bench by category are: African states: 4; Asian states: 3; Eastern European states: 2; Latin America and the Caribbean states (GRULAC): 3; and Western European and other states (WEOG): 6. After 2009, the 12 judges remaining will be: Africa: 3; Asia: 1; Eastern Europe: 2; GRULAC: 2; and WEOG: 4.
- **Gender:** The current judges on the bench by category are: female: 8 and male: 10. After 2009, the 12 judges remaining will be: female: 6 and male: 6.

26. Given the composition of the bench after the departures, **the minimum voting requirements at the upcoming elections are:**

- **List A: 1 & List B: 1**⁶
- **Regional Groups:** 1 for Asian States and 1 for GRULAC; none for others⁷
- **Gender:** None⁸

⁵ List A includes candidates with criminal law and criminal trial experience. List B are candidates with expertise in the field of international law.

⁶ ICC-ASP/3/Res.6, paragraph 20(a) provides that “[e]ach State Party shall vote for a minimum number of candidates from Lists A and B. For List A, this number shall be 9 minus the number of judges from List A remaining in office or elected in previous ballots. For List B, this number shall be 5 minus the number of judges from List B remaining in office or elected in previous ballots.”

⁷ ICC-ASP/3/Res.6, paragraph 20(b) provides that “[e]ach Party shall vote for a minimum number of candidates from each regional group. This number shall be 2 minus the number of judges from that regional group remaining in office or elected in previous ballots. If the number of States Parties of any given regional group is higher than 16 at that moment, the minimum voting requirement for that group shall be adjusted by adding 1.”

⁸ ICC-ASP/3/Res.6, paragraph 20(c) provides that “[e]ach State Party shall vote for a minimum number of candidates of each gender. This number shall be 6 minus the number of judges of that gender remaining in office or elected in previous ballots.”

