

## Norway

# Procedure for nomination of candidates for the office of judge at the International Criminal Court

## 1. Introduction

The International Criminal Court (ICC) was established under the Rome Statute of the International Criminal Court in 1998. The Court is located in The Hague in the Netherlands, and has jurisdiction over the crime of genocide, crimes against humanity, war crimes and the crime of aggression.

The Court has 18 judges, all of whom serve on a full-time basis. The judges are elected at a meeting of the Assembly of States Parties for a term of nine years, and the required qualifications and procedures for their nomination and election are set out in article 36 of the Rome Statute.

The procedures for the nomination and election of judges have been subject to criticism from several quarters. At the 18th Session of the Assembly of States Parties in December 2019, a Resolution amending the procedure was adopted.<sup>1</sup> With regard to national nomination procedures, the Resolution stresses the need for States Parties to follow one of the procedures set out in article 36 paragraph 4 of the Rome Statute, and encourages States Parties to submit information on their nomination and selection procedures to the Advisory Committee on Nominations of Judges, to enable the committee to draw up a compendium of practices.

Norway has a national procedure for the nomination of judges to the European Court of Human Rights (ECHR). There is no corresponding procedure for the nomination of judges to international criminal courts. Whereas each of the member states of the Council of Europe has one judge in the ECHR and is responsible for nominating candidates for this position, there is no obligation on the part of the Norwegian authorities to nominate a candidate to the ICC and the other international criminal courts.

To ensure transparency and equal treatment in case of nominations of Norwegian candidates to the ICC, the Ministry of Foreign Affairs has drawn up a national procedure for nominations which is described in section 3 below. The procedure is based on the similar procedure for the nomination of Norwegian candidates for the office of judge at the ECHR. However, as Norway is not required to nominate candidates to the ICC, and there is no permanent seat for a Norwegian judge in the ICC, certain elements of the procedure have been modified in relation to that used for nominations to the ECHR.

## 2. Rome Statute rules relating to qualifications, nomination and election of judges

Part 4 of the Rome Statute specifies the rules for the composition and administration of the Court. The qualifications, nomination and election of judges are stipulated under article 36 of the Rome Statute.

### 2.1 Qualifications and election of judges

The Court has 18 judges, all of whom serve on a full-time basis, as set out in article 35. The judges are elected at a meeting of the Assembly of States Parties for a term of nine years and are not eligible for re-election, see article 36 paragraph 9. To ensure continuity over time, six new judges are elected every three years.

According to article 36 paragraph 3 (a), judges are to be ‘chosen from among persons of high moral character, impartiality and integrity who possess the qualifications required in their respective States for

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<sup>1</sup> Resolution ICC-ASP/18/Res.4 on the review of the procedure for the nomination and election of judges.

appointment to the highest judicial offices.’ Article 36 paragraph 3 (b) specifies two alternative requirements for qualifications and experience. Every candidate 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.

In addition, judges are required to have ‘excellent knowledge of and be fluent in at least one of the working languages of the Court’, which are English and French.

Under article 36 paragraph 5, for the purposes of the election, there shall be two lists of candidates: 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).

Article 36 paragraph 8 states that the States Parties shall, in the selection of judges, take into account the need for representation of the principal legal systems of the world, equitable geographical representation and a fair representation of female and male judges. Beyond the reference to representation of the world’s principal legal systems, the Statute does not contain any specific requirements for the geographical distribution of the judges. However, the Assembly of States Parties has adopted minimum voting requirements which seek to ensure geographical representation up to a certain point in the election of judges.<sup>2</sup> The minimum voting requirements vary from election to election, depending on the background of the outgoing judges. The minimum voting requirements stipulate that the States Parties must vote in a way that ensures that the ICC bench meets the following requirements at all times: nine judges from list A and five judges from list B, at least six people of the under-represented gender, and two judges from each regional group (or three if the group contains more than 16 states, which is the case for all the regional groups today). Elections are carried out by secret ballot and, in order to be elected, candidates must receive a two-thirds majority of States Parties present and voting. It is often necessary to hold several rounds of balloting before a candidate receives the sufficient majority to enable them to fill a seat on the bench.

## **2.2 Nomination of candidates for the office of judge**

Candidates for the office of judge at the ICC may be nominated by all states that have ratified the Rome Statute. Under article 36 paragraph 4, States Parties should use one of the following procedures when nominating candidates:

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

Nominated candidates must be a national of one of the State Parties that has ratified the Rome Statute, but not necessarily of the State Party that has nominated them.

Under Article 36 paragraph 4 of the Rome Statute, States Parties may decide to establish an advisory committee on nominations. An *Advisory Committee on Nominations of Judges* was established in 2011.

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<sup>2</sup> Resolution ICC-ASP/3/Res.6, adopted at the 6th plenary meeting on 10 September 2004.

The Committee is mandated to facilitate that the highest-qualified individuals are appointed judges of the Court. The Committee evaluates the candidates based on interviews and the written material submitted by the nominating State Party, which usually consists of the candidate's statement of qualifications and curriculum vitae. The Committee has never found a candidate to be insufficiently qualified according to the criteria set out in article 36 paragraph 3 of the Statute. Starting in 2018, the Committee has begun classifying candidates as either 'formally qualified' or 'highly qualified'.

In December 2019, the Advisory Committee was given a stronger mandate on several points. This included expanding the advisory capacity of the Committee to provide, upon request by a State Party, a confidential, provisional assessment of the suitability of a potential candidate of that State Party. However, unlike the procedure for nominating candidates for the office of judge at the ECHR, State Parties are not required to obtain such an assessment of potential candidates to the ICC .

### **3. National procedure**

#### **3.1. Introduction**

The procedure for nomination of Norwegian candidates to the ICC is based on the procedure for appointing judges to national courts, see article 36 paragraph 4 of the Rome Statute, and on the procedure for nomination of Norwegian candidates for the office of judge at the ECHR. However, as the requirements relating to the nomination of candidates to the ICC differ somewhat from nominations to the ECHR, some aspects of the procedure have been modified.

The main elements in the procedure are as follows: the Ministry of Foreign Affairs issues a call for applications for vacant positions at the ICC, and appoints a selection committee to assess the applications and provide a recommendation on the candidates found to be best suited for the position. The Ministry then determines whether to submit a request for a provisional assessment of the suitability of the candidates to the Advisory Committee. The final decision on whether to nominate a Norwegian candidate is taken by the Ministry, which will submit any nominations to the Assembly of States Parties within the deadline and in accordance with the applicable procedures.

#### **3.2. Call for applications**

Ordinary judicial elections at the ICC are held every three years. The nomination period opens at the beginning of the year in which the election is to take place and lasts for 12 weeks.<sup>3</sup> The Ministry of Foreign Affairs will determine whether it is relevant to nominate a Norwegian candidate for the forthcoming election well in advance of the nomination deadline. As a general rule, a call for applications for the vacant positions is issued with an invitation to prospective candidates to indicate their interest by a specified deadline. It is not necessary to issue a call for applications when it is clear from the outset that it will not be relevant to nominate a Norwegian candidate in a specific election. This may be the case, for example, in elections where there is no outgoing judge from the regional group to which Norway belongs, or when a Norwegian judge is already serving on the ICC bench. A call for applications may also be omitted if other particular reasons suggest that Norway should not nominate a candidate, such as when another Nordic country has already decided to submit a nomination. There is close Nordic cooperation on matters concerning the ICC, and as a general rule steps will be taken to avoid nominating competing candidates from the Nordic region. Calls for applications may also be omitted if political priorities or capacity considerations dictate that the relevant resources must be used

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<sup>3</sup> Resolution ICC-ASP/3/Res.6, amended in Resolution ICC-ASP/18/Res.4 19. December 2019.

on other processes within or outside the UN system. For example, in spring 2020 it was not considered feasible to nominate and campaign for a Norwegian candidate alongside the ongoing campaign and election for a seat on the UN Security Council.

The Ministry of Foreign Affairs will announce the vacant positions on the Norwegian government website and through other appropriate channels as needed. In addition, the Ministry will inform the following institutions about the call for applications and ask them to inform their contacts/members, for example, by publishing information on their own websites:

- Office of the Director of Public Prosecutions
- Norwegian Courts Administration
- Norwegian National Human Rights Institution
- faculties of law at Norwegian universities
- Norwegian Association of Judges
- Norwegian Bar Association
- Norwegian Association of Lawyers

The call for applications is to include a description of the position and specification of the qualifications required as stated in article 36 of the Rome Statute (see also section 2.1 above) .

To be considered, applicants must have a law degree (cand.jur or Master's degree in law) and relevant legal professional experience. In line with the requirements in article 36 paragraph 3 (b) of the Rome Statute, candidates must have 'established competence in criminal law and procedure, and the necessary relevant experience, whether as judge, prosecutor, advocate or in other similar capacity, in criminal proceedings' (list A candidates), or 'established competence in relevant areas of international law such as international humanitarian law and the law of human rights, and extensive experience in a professional legal capacity which is of relevance to the judicial work of the Court' (list B candidates). In addition, judges are required to have 'excellent knowledge of and be fluent in at least one of the working languages of the Court', which are English and French, see article 36 paragraph 3 (c) of the Rome Statute.

Special weight will be given to applicants' professional competence, personal suitability and language qualifications, and to the requirements for high moral character and independence that follow from article 36 paragraph 3 (a) of the Rome Statute (and from section 55 of the Courts of Justice Act in the case of Norwegian judges). It is an advantage to have relevant experience in criminal proceedings, whether as judge, prosecutor, advocate or in other similar capacity, see article 36 paragraph 3 (b) (i) of the Rome Statute. Knowledge and experience in international criminal law and procedure will also be viewed in a positive light. Judges are elected for a term of nine years. Candidates should be able and willing to take up the position for the whole term of office.

The call for applications shall encourage applicants from the under-represented gender at the Court to apply, and shall include the deadline for applications, which is to be at least two weeks after the call is posted on the internet. It shall also contain information to the effect that the list of applicants will be made public, and should make it clear that a final decision has not necessarily been taken on whether or not a Norwegian candidate will ultimately be nominated.

### **3.3. Selection committee**

The Ministry of Foreign Affairs will appoint a selection committee consisting of seven members. The committee is headed by the chair of the Judicial Appointments Board (subject to this person's agreement). Five members will be appointed on the basis of proposals from the Supreme Court of Norway, the Office of the Director of Public Prosecutions, the Norwegian National Human Rights

Institution, the Norwegian Bar Association and the Norwegian Association of Judges. Each of these bodies will be encouraged to put forward the names of one woman and one man. In addition to the chair and the five members appointed on the basis of proposals from external institutions, the Ministry of Foreign Affairs will appoint one member.

The selection committee's task will be to evaluate the candidates for Norwegian nomination and to recommend up to three applicants ranked in relation to the qualifications for the office of judge at the ICC ("short list"). If possible, at least one of the candidates should be of the gender that at the time is under-represented at the Court. The committee is not required to draw up a short list if it finds that none of the applicants meet the qualifications stipulated for the position. The applicants are to be assessed on the basis of the qualifications specified in the call for applications, the applications received, interviews with potential candidates and the references obtained. The proficiency in English and French of those applicants who may be selected as candidates shall be documented or tested.

The selection committee may seek advice from relevant external actors, and may use external expertise to evaluate the language proficiency of relevant applicants.

The committee is to submit its short list, with the reasons for its recommendation, to the Ministry of Foreign Affairs. The short list will be public, but the committee's reasons will normally be exempted from public disclosure.

#### **3.4. Submission of candidates to the ICC Advisory Committee on Nominations of Judges and the decision to nominate a candidate**

After receiving the selection committee's short list, the Ministry of Foreign Affairs may submit one or more of the candidates to the ICC Advisory Committee on the Nominations of Judges for a provisional assessment of their suitability. The Ministry will determine whether this is necessary and expedient in the light of its experience with this type of assessment and any recommendations received from the Assembly of States Parties.

The Ministry of Foreign Affairs is not bound by the selection committee's assessment or ranking of the candidates. If the Ministry is considering nominating a candidate that has not been placed on the short list by the selection committee, it is to ask the committee for an opinion on the person(s) in question.

In determining whether to nominate a candidate, the Ministry of Foreign Affairs may, in addition to assessing the qualifications of the applicants, attach importance to the considerations mentioned in section 3.2 above, including coordination with the other Nordic countries on a possible nomination. If the Ministry wishes to nominate a Norwegian candidate, the proposal is to be submitted for comment to the various ministries involved and the Office of the Prime Minister.

The Ministry of Foreign Affairs will submit any Norwegian candidates to the ICC within the stipulated deadline and in accordance with ICC procedures.