

**Assembly of States Parties**Distr.: General  
15 November 2013

Original: English

**Twelfth session**

The Hague, 20-28 November 2013

**Report on the evaluation of the process on the election of the Prosecutor**

1. At its tenth session, the Assembly of States Parties (hereinafter “the Assembly”) requested the Bureau, through open-ended consultations with States Parties, to examine ways of strengthening future election of the Prosecutor, including an evaluation of such a process.<sup>1</sup> At its eleventh session, the Assembly requested the Bureau to finalize its evaluation of the process and present recommendations with regard to how the process to elect the Prosecutor could be strengthened in the future.<sup>2</sup>

2. The Bureau appointed Ambassador Duncan Muhumuza Laki (Uganda) and Ms. Urska Kramberger-Mendek (Slovenia) as co-facilitators for the topic “Process on the election of the Prosecutor”. The present report is accordingly being submitted pursuant to the mandate given to the co-facilitators.

3. Several meetings, both formal and informal, as well as bilateral meetings were held in order to gather views from the States Parties on the possibilities for the future work of the Committee for election of the Prosecutor. In the course of these meetings it became clear that different States Parties had divergent views on how to strengthen the process on the election of the Prosecutor in the future. On the basis of the discussions the co-facilitators, in addition to the report, also prepared a co-facilitators’ paper summarizing possible options for strengthening the process of electing the Prosecutor that could be used in the future. The options-paper, annexed to the present report, is a co-facilitators’ compilation of views of different States Parties.

Short overview of the process:

4. The term of Mr. Luis Moreno-Ocampo, the first Prosecutor, expired in June 2012. Rules regarding the nomination and election of the next Prosecutor are contained in the Resolution ICC-ASP/1/Res.2. Inter alia, the resolution states that “*Nominations for the post of the Prosecutor should preferably be made with the support of multiple States Parties*” and that “*Every effort shall be made to elect the Prosecutor by consensus.*”

5. The ICC Bureau was of the view that efforts to elect the Prosecutor by consensus should be undertaken in a structured and transparent manner. On 6 December 2010 the Bureau established a Search Committee for the position of the Prosecutor of the International Criminal Court and adopted its Terms of reference. States Parties were encouraged to make use of this process with a view to arriving at a consensus candidate, ideally both for nomination and election.

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<sup>1</sup> Resolution ICC-ASP/10/Res.5

<sup>2</sup> Resolution ICC-ASP/11/Res.8

6. The Search Committee consisted of representatives of all regional groups and was mandated to facilitate the nomination and election, by consensus, of the next Prosecutor.

7. The Search Committee held several meetings and evaluated 51 candidates. In October 2011 the Committee proposed a short list of four candidates to the States Parties. All candidates introduced themselves to States Parties and consultations were held in the regional groups. A single candidate, Ms. Fatou Bensouda emerged, was nominated by 67 States and elected by consensus.

Views of States Parties:

8. The States agreed that the role of the Prosecutor is one of the most important ones. Although not sharing the views regarding the work of the Search Committee, all States emphasized that the new Prosecutor is a highly competent person, with high moral character and extensive practical experience; and they extended their full support to her.

9. Throughout the process leading to the election of the current Prosecutor, there was strong support among States Parties for a consensus candidate.

10. Some States Parties were of the view that the process was successful and could be used as basis for future electoral processes, but agreed that there was always room for improvement. The process avoided competitive elections with all the negative aspects pertinent thereto (including trading of votes) and set path for a technical, merit-based evaluation of candidates and a search that went beyond those persons who happened to be nominated by governments. A view was expressed that the Committee should have been trusted enough to come up with a single candidate.

11. On the other hand some States Parties were of the view that the process should have involved all States Parties so as to be more transparent, rather than being limited to only the Bureau. It was also stated that this process should not to be a model for future elections.

12. Some States were of the opinion that the process was not in line with the provisions of the Rome Statute since the Statute required for the elections to be held by secret ballot by an absolute majority of the members of the Assembly of States Parties, along the same lines as the election of the judges. It was emphasized that the Committee should have strictly adhered to the Rome Statute and relevant resolutions pertaining to the nomination and election of the Prosecutor; it should not have added new criteria to the process. Some views were also expressed that the Search Committee had not only strictly adhered to the Rome Statute, but made a meaningful contribution to the implementation of relevant provisions.

13. It was stated several times that the Committee was not established far enough in advance of the election of the Prosecutor and had no clear criteria for selecting candidates when it started working. It was agreed that a certain level of confidentiality was welcome but some argued that the confidentiality should have been lifted at some point earlier in the process.

14. Some States stressed that the Committee should desist from any attempt to oust provisions of the Rome Statute to the extent that it precludes States from nominating candidates for the position of Prosecutor which is a statutory mandate of States Parties, and called the Committee to adhere to operative paragraph 28 of the resolution ICC-ASP/3/Res.6.

15. Some concerns were raised that there was no gender balance in the Search Committee. Concerns were also raised regarding the last stages of the selection process (i.e. looking for a consensual candidate with regional groups).

16. Some were of the view that the early endorsement of one candidate by states might have been unfortunate and could in their opinion possibly harm the future process by implying that the position should be filled in accordance with regional rotation. Others were of the view that such endorsements were in line with the agreed rules.

17. Some States Parties were of the view that the Terms of Reference should not have permitted the Committee to carry out an active search, and that the Committee should have

limited itself to an advisory role, and not more. Other delegations emphasized the benefits of an active search by the Committee for possible candidates.

18. Some States Parties suggested the Advisory Committee for nomination of Judges could be utilized for future Prosecutor elections, while others expressed concerns.

#### Recommendations

19. The Bureau recommends that the Assembly, in its omnibus resolution, take note of the present report and the annexed Option Paper.

20. Considering the diverging views of States Parties on this topic, the Bureau acknowledges that it is not in a position to present conclusive recommendations with regard to how the process to elect the Prosecutor could be strengthened in the future. The Bureau therefore recommends that the Report and Option Paper serve as one of the points of reference for States Parties in the future when considering how to elect the next Prosecutor.

21. These recommendations are presented in accordance with operative paragraph 25 of resolution ICC-ASP/11/Res.8, which requests the Bureau to finalize, through open-ended consultations, its evaluation of the process followed, and present recommendations with regard to how the process to elect the Prosecutor could be strengthened in the future, by the start of the twelfth session of the Assembly of States Parties.

## Co-facilitator's paper summarizing possible options for strengthening the future process of electing the Prosecutor

The co-facilitators have identified two initial options for the election of the Prosecutor:

1. Go to vote right away, without search for consensus pursuant to art. 42 of the Rome Statute which provides that "*The Prosecutor shall be elected by secret ballot by an absolute majority of the members of the Assembly of States Parties*". This would require a new Assembly resolution to supersede resolution ICC-ASP/1/Res.2 (para. 33).

2. Make every effort to find consensus and go to vote only if these efforts fail pursuant to resolution ICC-ASP/1/Res.2 which states that "*Every effort shall be made to elect the Prosecutor by consensus*". The search for consensus could be conducted:

(a) Without any further guidance as to how these efforts should look like, thus leaving the issue to the future Bureau;

(b) On the basis of further guidance given by the Assembly in an appropriate format (e.g. amendment to the Assembly resolution, "guidelines" adopted by the Assembly), on the basis of lessons learned from the past.

Although there was no consensus among the States Parties, it was clear that in case of option 2 (b) several issues will need to be decided beforehand.

The pertinent issue is the constitution of the nomination process. There are two possibilities on this work: (a) States Parties wait for official nominations by States Parties, then embark upon the search for a consensus candidate; or (b) States Parties search for a consensus candidate with the aim of ensuring that the consensus candidate will be the only candidate nominated, thus avoiding the need for withdrawal of nominations.

If it is decided that the States Parties will search for a consensus candidate the most feasible option is a creation of a Committee for election of Prosecutor.<sup>3</sup> The co-facilitators propose the following possibilities for the mandate and composition of the Committee:

1. *The committee for election of prosecutor stays as is:* Committee receives informal expressions of interest and prepares a short-list. New York Working Group meets all candidates, holds consultations, proposes only one candidate to States Parties for election.

2. *The committee for election of prosecutor is modified as outlined below*

### Possible modified Committee for election of Prosecutor

#### *Role of the Committee:*

It is still open what the role and tasks of such a committee should be. Some ideas for its work were discussed, but no agreement was reached. Therefore, the co-facilitators believe that the following models of a modified Committee for election of prosecutor might be possible:

(a) A Committee that actively searches for potential candidates and receives informal nominations, but with provisions for increased transparency vis-à-vis States Parties, resulting in a shortlist of candidates.

(b) A Committee that only looks at informal nominations, resulting in a shortlist of candidates.<sup>4</sup>

(c) A Committee that only considers formal nominations upon the expiration of the nomination period, resulting in a shortlist of candidates.

<sup>3</sup> Provisional name – it stresses that the Committee should be properly designated so as to avoid confusion or mixing up of roles that might arise from inappropriate reference to the name.

<sup>4</sup> The question of which persons or entities would be entitled to make such an informal nomination remains open for discussion.

(d) A Committee that only considers formal nominations upon the expiration of the nomination period, and declares each of the candidates to be either qualified or unqualified.

(e) Tasking the Advisory Committee on Nominations of Judges to also consider the issue of the election of the Prosecutor.

*Composition of the Committee:*

Since the composition of the Committee raised some concerns, the co-facilitators looked into some possibilities of constituting the Committee:

- It should include representatives from all regional groups (as previously done and outlined in ICC-ASP/9/INF.2);
- It should be gender balanced;
- There could be two representatives from each regional group (possibly one male, one female);
- It should be composed of technical/professional people which allows for decision making based upon competence and not political considerations (e.g. There should be at least one technical expert and at least one diplomat on the Committee.);
- The Committee should elect one chair and one vice-chair.

*Criteria for selection of candidates:*

Clear criteria for selection of candidates should be agreed well in advance. A check-list of the competences could be provided and candidates should be informed if they fulfill the criteria and reasons why they are not on the short list.

Basic criteria for selection could be defined by the Assembly, which should also further clarify the criteria in article 42 of the Rome Statute (including defining what is meant under extensive practical experience in the prosecution or trial of criminal cases). Possible additional criteria could be defined by the Committee and approved by the Bureau. Some criteria are already defined in the report of the Committee. The Assembly could also decide upon the level of confidentiality of the process.

*Start of Committee's work:*

Since it was expressed that the Committee should start its work early in the process, the co-facilitators propose that in case of regular elections the Committee should start its work as early as 12 months before the possible date for election. In case of bi-election, the Committee should start working immediately after the vacancy is announced.

*Cooperation with States Parties:*

It is the view of the co-facilitators that some general issues need to be clarified:

- Cooperation of the Committee with States Parties: it should be understood that the members of the Committee shall brief their respective regional groups after each substantial meeting. Regular briefings to the Bureau should be made.
- The shortlist of the Committee should be respected. The Committee should brief the regional groups about the final list. The bureau should name regional coordinators to collect views regarding the candidates on the list. Consultations should also be held in the New York Working Group with all States Parties and the civil society.

*Funding:*

Before the Committee starts its work the question of funding the work of the Committee as well as the expenses of the final candidates should be agreed in advance. The Committee should

strive to hold meetings and initial interviews by means of modern technology. If necessary a small amount could be provided for travel expenses of the chair or other designated member of the Committee in order to attend international meetings or conferences of prosecutors. The candidates should bear their own expenses that would arise from their application and interview except if they are traveling to New York/The Hague upon invitation of the New York or The Hague Working Group.

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