

Report of the Search Committee for the Position of the Prosecutor of the International Criminal Court

A. Introduction and Summary

1. This is the consensus report to the Bureau of the Assembly of States Parties (Bureau and ASP, respectively) of the International Criminal Court (ICC) by the Search Committee for the position of the Prosecutor of the ICC (Search Committee). The Terms of Reference of the Search Committee (TOR) adopted by the Bureau are set out in document ICC-ASP/9/INF.2 of 6 December 2010 (**Annex 1**). These provide *inter alia* that the Search Committee shall “produce a shortlist of at least three suitable candidates, where possible for consideration by the Bureau” (TOR, para.6).

2. The approach adopted by, working methods of, and eligibility criteria guiding, the Search Committee are addressed in the following parts of this Report. In fulfilment of its mandate, the Search Committee hereby commends the following 4 persons for consideration as suitable shortlist candidates for the position of the next Prosecutor of the ICC:

- **Fatou B. Bensouda**, currently Deputy Prosecutor (Prosecutions), International Criminal Court;
- **Andrew T. Cayley**, currently International Co-Prosecutor, Extraordinary Chambers in the Courts of Cambodia;
- **Mohamed Chande Othman**, currently Chief Justice of Tanzania;
- **Robert Petit**, currently Counsel, Crimes Against Humanity and War Crimes Section, Department of Justice, Canada.

3. A summary of the expertise and qualities of these candidates is provided in paragraph 34 below and in **Annexes 6 to 9**. More detailed biographical information will be made available to the Bureau by the candidates as appropriate.

4. In commending this shortlist, the Search Committee does not differentiate between the candidates in terms of suitability or make any preferential recommendation concerning any candidate. Consistent with its TOR, the Search Committee considers its function to be that of a technical committee of the Bureau, to assist the Bureau and the ASP in their endeavours to secure the election of the Prosecutor by consensus (see Resolution ICC-ASP/1/Res.2). In the light of the Search Committee’s Report, it will properly be a matter for the Bureau and the ASP to consider how best to proceed to secure the formal nomination and election by consensus of the next Prosecutor.

5. Consistent with the Search Committee’s function, this Report is submitted to the Bureau. The Search Committee recommends that the Bureau place this Report in the public domain. This would facilitate a transparent discussion of the Search Committee’s work and Report as well as appropriate wider public discussion of the shortlisted candidates’ suitability for the position of Prosecutor. In making this recommendation, the Search Committee hopes that further consideration of these matters will take place within the framework of an emerging consensus of the required expertise, role and profile of the next Prosecutor appropriate to the next phase of the work of the ICC.

B. The Search Committee and its Mandate

6. ASP resolution ICC-ASP/3/Res.6 on *Procedure for the nomination and election of judges, the Prosecutor and Deputy Prosecutors of the International Criminal Court* (resolution 6) addresses *inter alia* the procedure applicable to the nomination and election of the Prosecutor. The relevant provisions of this resolution concerning the nomination and election of the Prosecutor replicate the text of resolution ICC-ASP/1/Res.2.

7. The nomination of candidates for the Prosecutor and the election of the Prosecutor are addressed, respectively, in sections D (paragraphs 28-30) and E (paragraphs 31-35) of resolution 6. These paragraphs are set out in full in **Annex 2**. Of particular importance are paragraphs 29 and 33, which provide, respectively:

Paragraph 29: “Nominations for the post of the Prosecutor should preferably be made with the support of multiple States Parties.”

Paragraph 33: “Every effort shall be made to elect the Prosecutor by consensus.”

8. Recalling these provisions, the Bureau noted that the nomination and election of the next Prosecutor “should be undertaken in a structured and transparent manner as outlined below” (TOR, para.3) and proceeded to establish the Search Committee and set its Terms of Reference.

9. Pursuant to its TOR, the composition of the Search Committee was by designation by the Bureau of one member per regional group. In accordance with this procedure, and after consultation with the regional groups, the Bureau designated the following as members of the Search Committee:

African Group – H.E. Ambassador Baso Sangqu, Permanent Representative of the Republic of South Africa to the United Nations;

Asian Group – H.R.H. Prince Zeid Ra'ad Zeid Al Hussein, Permanent Representative and Plenipotentiary of the Hashemite Kingdom of Jordan to the United Nations;

East European Group – H.E. Ambassador Milos Koterec, Permanent Representative of the Republic of Slovakia to the United Nations;

Latin American and Caribbean Group – H.E. Ambassador Joel Hernandez, Legal Advisor of the Ministry of Foreign Affairs of Mexico;¹

Western European and Other Group – Sir Daniel Bethlehem QC, Legal Adviser of the Foreign & Commonwealth Office of the United Kingdom of Great Britain and Northern Ireland.²

10. The members of the Search Committee served in their personal capacities, not as representatives of their States. Administrative support was provided by the ASP Secretariat. All decisions of the Search Committee, including as regards its working methods and this Report, were taken by a consensus of its members.

11. At its first meeting, pursuant to paragraph 4 of its TOR, the members of the Search Committee designated Prince Zeid Ra'ad Zeid Al Hussein as Coordinator of the Search Committee and Ambassador Koterec as Deputy Coordinator.

12. The Mandate of the Search Committee, set out in paragraph 5 of its TOR, is “to facilitate the nomination and election, by consensus, of the next Prosecutor”. Along with the applicable provisions of the Rome Statute, in particular article 42, as well as the procedure for the nomination and election of the Prosecutor set out in the resolutions of the ASP noted above, the Search Committee has been guided in its work by the importance of facilitating the consensual nomination and election by the ASP of the next Prosecutor.

C. Working Methods

13. The Search Committee’s TOR address four issues relevant to its working methods:

- the manner in which the Search Committee is to go about receiving and identifying expressions of interest from and in respect of individuals who may satisfy the applicable criteria, in particular those contained in article 42 of the Rome Statute (TOR, para.6);

¹ Ambassador Hernandez was subsequently appointed Mexican Ambassador to the Organisation of American States.

² Sir Daniel’s tenure as Legal Adviser of the Foreign & Commonwealth Office ended on 13 May 2011. This having been considered at the time of his designation to the Search Committee, Sir Daniel continued as a member of the Search Committee in his personal capacity.

- the requirement that the Search Committee keep the Bureau informed of its activities, as well as other consultation and progress reporting requirements (TOR, para.7);
- the requirement of confidentiality as regards the public disclosure of information concerning individuals whose names were submitted to the Search Committee for further consideration. Of importance, however, it is also provided that “[t]hese confidentiality requirements do not apply to individuals who are shortlisted for consideration by the Bureau” (TOR, para.8); and
- that the election of the next Prosecutor should “ideally take place at the tenth session of the [ASP]” (TOR, para.9).

14. The work of the Search Committee has been guided throughout by these requirements, as described further in section E below.

15. In addition to these requirements in its TOR, the Search Committee has also had close regard to the terms of article 42 of the Rome Statute of the ICC which *inter alia* affirms and requires the independence of the Office of the Prosecutor (OTP; para.1), provides that the Prosecutor shall head the OTP and have full authority over the management and administration of the OTP (para.2), and provides that the Prosecutor may not engage in any other professional occupation (para.5). Of particular importance to the qualities required of the Prosecutor, article 42(3) of the Rome Statute provides:

“The Prosecutor and the Deputy Prosecutors shall be persons of high moral character, be highly competent in and have extensive practical experience in the prosecution or trial of criminal cases. They shall have an excellent knowledge of and be fluent in at least one of the working languages of the Court.”

16. The Search Committee’s appreciation of the requirements of article 42(3) is addressed in the following sections.

D. Eligibility Criteria

17. As is described more fully in section E below, the Search Committee has had the advantage of extensive engagement throughout its process with a wide range of interested parties, including States Parties, non-States Parties, international and non-governmental organisations, both professional associations and NGOs, and individuals. It is grateful to all concerned for the time and effort they have devoted to assisting the Search Committee in its work.

18. Of relevance to the interpretation of article 42(3) of the Rome Statute, the Search Committee notes in particular two memoranda that were submitted to it at the outset of its work in March 2011.³ The first memorandum was submitted by a coalition of NGOs, including the Fédération Internationale des Ligues Droits de l’Homme, Human Rights Watch, the International Centre for Transitional Justice, the International Crisis Group, the Institute for Security Studies, and the Open Society Initiative, with the active participation of the Coalition for the International Criminal Court (**Annex 3**). The second memorandum was submitted by the General Counsel of the International Association of Prosecutors (IAP) following extensive consultation with current and former members of the IAP Executive Committee, and with the endorsement of the IAP Secretary General and the IAP President (**Annex 4**). The IAP memorandum also attached for the Search Committee’s consideration ECOSOC document E/CN.15/2008/L.10/Rev.2 of 17 April 2008, a resolution of the Commission on Crime Prevention and Criminal Justice on “strengthening the rule of law through improved integrity and capacity of prosecution services” which in turn annexed the IAP *Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors* (**Annex 5**). The Search Committee had careful regard to these memoranda and documents, as well as to other publicly available material relevant to the role and position of the Prosecutor.

³ In addition to these memoranda, the Search Committee also received other correspondence addressing its work. The two memoranda in question are highlighted as they address the interpretation of article 42(3) of the Rome Statute.

19. The controlling provisions regarding the criteria relevant to the professional and personal qualities required of the Prosecutor are those set out in the Rome Statute, notably those in article 42(3) of the Statute requiring (a) high moral character, (b) high competence and extensive practical experience in the prosecution or trial of criminal cases, and (c) excellent knowledge of and fluency in at least one of the working languages of the Court. The Search Committee has had careful regard to each of these criteria, as well as those going to other elements addressed in article 42 of the Rome Statute, notably, evidence demonstrating a candidate's track record of independence, managerial and administrative experience, and commitment to full-time professional engagement as Prosecutor. In the course of its work, both for purposes of compiling an initial list of candidates for purposes of interview and thereafter during the interview process, the Search Committee looked for evidence of, and expressly enquired into, each of these elements. The Search Committee considers that each of the shortlisted candidates meets these Rome Statute eligibility criteria.

20. In highlighting these statutory requirements, it is appropriate to note that article 42(3) requires high competence and extensive practical experience in the trial or prosecution of criminal cases. The Search Committee considers that this mandates consideration of candidates with either prosecutorial experience or judicial experience of criminal cases, or indeed experience in both roles.

21. Having regard to the statutory requirements, the Search Committee notes that these do not impose a requirement that candidates must have the nationality of a State Party, that candidates should come from any particular regional group, or any other requirements, such as, for example, previous working experience in the field of international criminal law.

E. The Search Committee Process

22. Following its constitution, the Search Committee met in New York on 4 occasions for purposes of considering steps to be taken to identify candidates for consideration and to solicit and review expressions of interest. Following these initial meetings, the Search Committee met in New York from 10–13 October 2011 for purposes of conducting interviews with candidates under consideration for inclusion on the shortlist to be transmitted to the Bureau. In addition to these meetings, the Search Committee also conducted its work through inter-sessional discussions by telephone and by email. For the purposes of its administrative meetings, the Search Committee was joined by 5 alternates, assisting each member of the Search Committee, by H.E. Ambassador Christian Wenaweser, the President of the ASP (and Permanent Representative of the Principality of Liechtenstein to the United Nations), and by a member of the ASP Secretariat. The Search Committee is grateful to all concerned for their assistance in this matter.

23. Only members of the Search Committee, accompanied by a member of the ASP Secretariat for purposes of administrative support, participated in the interview meetings and the discussions that followed in respect of the candidates. In respect of interviews in which a candidate had the same nationality as a member of the Search Committee, the member of the Search Committee recused himself from the interview process and discussion regarding the merits of the particular candidate.

24. In keeping with the requirements of paragraph 7 of its TOR, the Search Committee provided regular briefings to the Bureau on its activities. It also issued a number of press statements to inform the wider ASP membership and other interested parties of its work. Briefings were also given to the New York and Hague Working Groups on the ICC. In addition to these briefings, members of the Search Committee individually provided briefings to their regional groups, to representatives of interested delegations, to representatives of interested sections of civil society, including both professional associations and non-governmental associations, and to others who expressed an interest in the Search Committee's work.

F. Expressions of Interest, Recommendations for Consideration and the Shortlisting Process

25. Paragraph 6 of its TOR provides that the Search Committee “will informally receive expressions of interest from individuals, States, regional and international organisations, civil society, professional associations and other sources”. The Search Committee was also mandated to “actively identify and informally approach individuals who may satisfy the applicable criteria ... and who may subsequently express their interest to be considered”.

26. In keeping with these requirements, the Search Committee, through its public outreach, both invited expressions of interest and actively engaged in a search process of its own to identify suitably qualified individuals. Amongst these engagements, Prince Zeid travelled to Seoul, South Korea at the end of June at the invitation of the IAP to participate in the IAP Annual Conference and World Summit to explain the Committee’s mandate and invite expressions of interest. Other members of the Search Committee met with representatives of States, civil society and individuals with an interest in the work of the ICC for the same purpose. The Search Committee is grateful to all concerned for their assistance in this matter.

27. Through this process, the Search Committee was in receipt of, or otherwise identified, expressions of interest from or recommendations for consideration in respect of 52 individuals. Of these, the overwhelming majority satisfied the Rome Statute eligibility criteria and included very many of the highest calibre, experience and expertise. All geographic regions and legal and linguistic traditions were represented amongst this group, even if the broader representation came from candidates from the African and the Western European and Other Groups. Although the gender diversity was not as great as the Search Committee would have hoped, there were amongst the 52 a number of highly qualified female candidates. The candidates’ list also included a number of highly qualified individuals having the nationality of a non-State Party.

28. The candidates’ list also exhibited a wide range of expertise, including many with considerable experience of international criminal law, the ICC and the *ad hoc* international and hybrid criminal tribunals. Others came with experience of national prosecution services, as Directors of Public Prosecution, Investigating Judges or Magistrates, and other prosecutorial roles. Others still came with extensive judicial experience. In many cases, candidates combined experience of all three roles.

29. Faced with a candidates’ list of this quality, the task of drawing up an interview list was not easy, with many who might otherwise have been worthy of further consideration not being included. In drawing up the interview list, the Search Committee had close regard to all the information available to it at that point on the candidates, including curriculum vitae, academic articles and other commentaries on their work, press and other reports, such references as were then available, and other material. Where appropriate, the Search Committee also undertook its own further extensive review of publicly available information on the candidates. The Search Committee was heartened and gratified by the response to its work and by the quality of the names that were brought to its attention.

30. Amongst those who might have merited inclusion on an interview list, there were a number of highly qualified candidates who, upon further enquiry by the Search Committee, indicated that they did not wish their names to go forward for further consideration, whether for personal or professional reasons.

31. From the 52 names on the candidates list, the Search Committee interviewed 8 candidates. For purposes of the interview process, the Search Committee requested, and was provided with, a personal statement from each candidate, a detailed curriculum vita, a list of referees and such other relevant documentation as the candidate considered appropriate. References were in each case sought and obtained. The Search Committee also undertook its own open sources research into each candidate, in the end amassing well over 1,000 pages of documentation on the interview candidates. Each interview was conducted by the members of the Search Committee on the basis of a standard format that had the objective of assessing the candidates’ suitability for the post of Prosecutor against the eligibility criteria in the Rome Statute. Amongst the issues explored with each candidate were his or her familiarity with the work of the ICC; managerial experience; the appropriate

balance between OTP management, hands-on prosecutorial work and public engagement; perceptions of the strengths and weaknesses of the OTP; appreciation of the interaction between the OTP, other ICC organs and the ASP; language proficiency; and previous prosecutorial experience and/or judicial experience in the handling of criminal cases.

32. It merits emphasis that the Search Committee is grateful to each of the candidates it saw for purposes of interview, as it is also to all the other candidates whose names were submitted to it for consideration. Amongst those not included on the shortlist for consideration by the Bureau are many of outstanding professional ability and personal qualities who would be worthy of consideration for other positions in the field of international criminal law. With a view to ensuring that this expertise is not lost from sight, the Search Committee will explore whether, subject to appropriate confidentiality arrangements, it would be appropriate to forward the names of a number of non-shortlisted candidates to the Legal Counsel of the United Nations, and perhaps others, for possible consideration in due course as and when other international criminal law positions arise.

G. Shortlist Recommendations

33. The Search Committee's mandate is not to pick the next Prosecutor of the ICC. It is to facilitate the consensual nomination and election of the next Prosecutor by the ASP. To this end, the Search Committee is required to produce a "shortlist of at least three suitable candidates, where possible for consideration by the Bureau". To this end, a list of 4 candidates follows below. In presenting this shortlist, the Search Committee is confident that each of the candidates identified below not only meets the formal eligibility criteria of the Rome Statute but also has the professional experience and expertise, and the necessary personal qualities, to perform the role of the next ICC Prosecutor to the highest standard.

34. The shortlisted candidates proposed to the Bureau and the ASP for further consideration are:

Fatou B. Bensouda (The Gambia)

Fatou Bensouda is currently the Deputy Prosecutor (Prosecutions) of the ICC, having been in this position since 1 November 2004. Amongst the posts she occupied before assuming her current position are Senior Legal Adviser at the International Criminal Tribunal for Rwanda (ICTR); Legal Adviser and Trial Attorney at the ICTR; Attorney General and Minister of Justice of the Republic of The Gambia; Solicitor General and Legal Secretary of the Republic of The Gambia; and Deputy Director of Public Prosecutions of the Republic of the Gambia.

Andrew T. Cayley (United Kingdom)

Andrew Cayley is currently the International Co-Prosecutor of the Extraordinary Chambers in the Courts of Cambodia (ECCC). Amongst the posts he occupied before assuming his current position are Senior Prosecuting Counsel, ICC; defence counsel in proceedings before the Special Court for Sierra Leone (SCSL) and the International Criminal Tribunal for the former Yugoslavia (ICTY); Senior Prosecuting Counsel, ICTY; Prosecuting Counsel, ICTY; Commissioned Officer, Adjutant General's Corps, Army Legal Services, British Army.

Mohamed Chande Othman (Tanzania)

Mohamed Othman is currently Chief Justice of Tanzania. Amongst the posts he occupied before assuming his current position are Justice of Appeal, Court of Appeal, Tanzania; Senior Legal and Justice Sector Reform Adviser, United Nations Development Program, Cambodia; Prosecutor General, United Nations Transitional Administration in East Timor (UNTAET); Chief of Prosecutions, ICTR; Independent Expert on the Human Rights Situation in the Sudan; Commissioner, High-Level Commission of Inquiry on Lebanon; Member of the Advisory Committee on the Archives of the ICTR and ICTY.

Robert Petit (Canada)

Robert Petit is currently Counsel to the Crimes Against Humanity and War Crimes Sections of the Department of Justice, Canada. Amongst the posts he occupied before assuming his current position are International Co-Prosecutor of the ECCC; Senior Prosecuting Trial Attorney, SCSL; Prosecutor, Serious Crimes Unit, UNTAET; Crown Attorney, Federal Prosecution Service, Department of Justice, Canada; Regional Legal Adviser, United Nations Mission in Kosovo; Legal Officer, ICTR; Prosecutor, Integrated Proceeds of Crimes Task Force, Department of Justice, Canada.

H. Concluding observations

35. In commending the preceding shortlist for consideration by the Bureau, the ASP and the wider community interested in the work of the ICC, the Search Committee does not differentiate between the shortlisted candidates in terms of suitability or make any preferential recommendation concerning any candidate. Each of the candidates is meritorious. It will now properly be a matter for the Bureau and the ASP to consider how best to proceed to secure the formal nomination and election by consensus of the next Prosecutor. The Search Committee hopes that further consideration of this matter will take place within the framework of an emerging consensus of the required expertise, role and profile of the next Prosecutor appropriate to the next phase of the work of the ICC.

H.R.H Prince Zeid Ra'ad Zeid Al Hussein

Sir Daniel Bethlehem QC

H.E. Ambassador Joel Hernandez

H.E. Ambassador Milos Koterec

H.E. Ambassador Baso Sangqu

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