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## Report by the facilitators on the third election of the Prosecutor of the ICC – Lessons learnt

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## 1. Introduction

1. On 12 February 2021, the Assembly of States Parties elected the Prosecutor of the International Criminal Court (“ICC”) for a term of nine years. It was the third time the Assembly had elected a Prosecutor.<sup>1</sup> The mandate for the lessons learnt on the election of the Prosecutor process is derived from the resolution adopted at the nineteenth session of the Assembly of States Parties.<sup>2</sup> It was envisaged that the fulfilment of the mandate would entail, *inter alia*, analysis of the Terms of Reference of the Committee (“Terms of Reference”) and other governing provisions, the reports produced by the former Presidency of the Assembly of States Parties,<sup>3</sup> the Committee on the Election of the Prosecutor (“the Committee”) and the Panel of Experts, as well as the information and reflections resulting from other relevant written material and interviews with States Parties representatives, representatives of non-governmental organizations (NGOs) and key persons involved at the various phases of the process.

2. Tasked by the Bureau to conduct an objective, impartial and independent assessment of the selection process of the third Prosecutor of the ICC, the facilitators would like to thank the Bureau for their trust and cooperation throughout this process. Over the past months, the facilitators conducted consultations with representatives from States Parties and NGOs, and key individuals involved in the process. These meetings were held in The Hague and New York, in-person and virtually. During the consultations, the facilitators received valuable input which is comprehensively reflected in this report.

3. The goal of the facilitators was to provide a report which will assist in future processes leading to the election of the Prosecutor. The aim was to present a comprehensive report which would cover all the topics raised during or after the last selection process. Having in mind that every ICC Prosecutor selection process takes place under different circumstances, the facilitators still wish that this reflection on the past process can generate added value for the future. The facilitators hope that this report, as part of a constructive and future-oriented exercise, will contribute to further strengthening the Prosecutor selection process to ensure that the ICC remains well-equipped and effective for the performance of its important role.

4. The facilitators wish to extend their full appreciation to everyone involved for their constructive engagement during the consultations. It goes without saying that fulfilling the task would not have been possible without the valuable support of the Secretariat of the Assembly of States Parties throughout the process. The facilitators express their gratitude to the Secretariat and to the external assistant (Ms. Gabriele Chlevickaite), for the technical support.

### 1.1 Brief summary of process

5. The normative regime for the nomination and election of the Prosecutor is contained in the Rome Statute (article 42) and in Assembly resolution ICC-ASP/1/Res.2, as amended by resolution ICC-ASP/3/Res.6 (“the nomination resolution”). Paragraph 28 of the nomination resolution provides that the procedures for the nomination of candidates for judges shall apply *mutatis mutandis* to the nomination of the Prosecutor. In addition, the resolution provides that nominations should preferably be made with the support of multiple States Parties (paragraph 29), and that every effort shall be made to elect the Prosecutor by consensus (paragraph 33).

6. In order to facilitate the nomination and election of the third Prosecutor, the Bureau decided to establish a Committee on the Election of the Prosecutor comprised of five members and assisted by a panel of five independent experts. The Committee’s mandate was set out in the Terms of Reference adopted by the Bureau on 3 April 2019.<sup>4</sup> With the assistance of the Panel of Experts, the Committee prepared a vacancy announcement for the position of Prosecutor, reviewed 89 completed applications, and interviewed 14 candidates. As part of its work the Committee engaged the Security and Safety Section of the Court to

<sup>1</sup> The first election was held on 21 April 2003. The second election took place on 12 December 2011.

<sup>2</sup> ICC-ASP/19/Res.6, para.78.

<sup>3</sup> 2017-2021.

<sup>4</sup> ICC-ASP/18/INF.2.

independently vet all of the interviewed candidates.<sup>5</sup> The Committee submitted a report on 30 June 2020 containing an unranked shortlist of four candidates.<sup>6</sup>

7. The Terms of Reference provided that a consultation process would be undertaken thereafter, led by the President in consultation with the Bureau, to identify a consensus candidate. Hearings for the four shortlisted candidates were held with States Parties and NGOs on 29 and 30 July 2020. On 13 November 2020, the Bureau adopted the “Election of the Prosecutor: Way forward”,<sup>7</sup> which supplemented the process contained in the Terms of Reference. Pursuant to the “Way forward”, the Committee submitted an addendum to its report containing appraisals of five additional candidates.<sup>8</sup> Hearings with the expanded list of nine candidates were held on 9 and 10 December 2020, and four rounds of informal consultations were held with the support of five focal points.

8. Throughout this process, the formal procedure set out in the nomination resolution continued to apply. Accordingly, the Bureau decided on 30 June 2020 to open a formal nomination period which ran for 12 weeks and expired on 22 September 2020. Any State Party was entitled to submit a nomination during the nomination period. However, States Parties were strongly encouraged to refrain from making nominations until the process set out in the Terms of Reference had been completed. The nomination period was extended on multiple occasions in order to allow the consultation process to reach a conclusion.

9. On 8 February 2021, the President informed States Parties that, despite the best efforts of the President, the Vice-Presidents and the focal points, it had not been possible to achieve consensus. The nomination period was therefore extended for a final time, until 10 February 2021, to allow for nominations. At the end of the extended nomination period, the Secretariat had received formal nominations of four candidates.<sup>9</sup> On 12 February 2021, the Assembly of States Parties proceeded to a secret ballot and elected Mr. Karim Khan (United Kingdom) as the Prosecutor of the International Criminal Court for a nine-year term commencing 16 June 2021.

## 1.2 Mandate

10. On 12 May 2021, the Bureau decided to request reports from the former Presidency of the Assembly, the Committee on the Election of the Prosecutor and the Panel of Experts.<sup>10</sup> The reports from the former Presidency of the Assembly and the Committee on the Election of the Prosecutor were received by the Bureau on 5 August 2021, while the report from the Panel of Experts was received on 3 October 2021. On 6 October 2021, the Bureau decided to appoint two facilitators for the lessons learnt process, one facilitator in The Hague and one in New York. With regard to the timing of the report, it was agreed that the facilitators would submit their report in advance of the twenty-first session of the Assembly, and that the facilitators would be requested to provide regular updates on their work to the Bureau. The Bureau also agreed that the mandate of the facilitators would be based on the text of resolution ICC-ASP/19/Res.6, paragraph 78, as included in the discussion paper, with the three reports previously mentioned to help guide the process.

11. On 2 November 2021, the Bureau appointed H.E. Mr. Alexander Marschik, Permanent Representative of Austria to the United Nations in New York, and H.E. Ms. Ksenija Milenković, Ambassador of Serbia to the Netherlands, as facilitators for the lessons learnt on the election of the Prosecutor process.

<sup>5</sup> The vetting process consisted *inter alia* of detailed reference checks, checks of publicly sourced information (including candidates’ own social media accounts), and security and criminal record checks. For details see ICC-ASP/19/INF.2, paras 24 to 32.

<sup>6</sup> ICC-ASP/19/INF.2, Add.1 and Add.2.

<sup>7</sup> [https://asp.icc-cpi.int/iccdocs/asp\\_docs/ASP19/Election%20of%20the%20Prosecutor%20-%20Way%20Forward%20-%20ENG.pdf](https://asp.icc-cpi.int/iccdocs/asp_docs/ASP19/Election%20of%20the%20Prosecutor%20-%20Way%20Forward%20-%20ENG.pdf).

<sup>8</sup> ICC-ASP/19/INF.2/Add.3 and Add.4.

<sup>9</sup> See ICC-ASP/19/19 and Add.1.

<sup>10</sup> [https://asp.icc-cpi.int/sites/asp/files/asp\\_docs/ASP20/Bureau03-agenda%20and%20decisions-27May21.pdf](https://asp.icc-cpi.int/sites/asp/files/asp_docs/ASP20/Bureau03-agenda%20and%20decisions-27May21.pdf).

### 1.3 Facilitation

12. Four meetings were held on the topic of the election of the Prosecutor with States Parties and NGOs.<sup>11</sup> The meetings with States Parties were held in-person, both in New York and The Hague, with the presence of both facilitators, while the meeting with NGO representatives was held virtually by remote-link. The facilitators also held a number of bilateral meetings with interested States Parties and other relevant actors. A technical questionnaire was sent to States Parties on 11 February 2022.

13. In addition, the facilitators held meetings with the former members of the Committee on the Election of the Prosecutor, the Chair of the Panel of Experts and the members of the previous Presidency of the Assembly.

14. The meetings provided an opportunity for States Parties and NGO representatives to share their views and considerations on the process for the election of the third Prosecutor.

## 2. Information shared with the facilitators

### 2.1 Methodology

15. This analysis is based on the consultations held with representatives of States Parties, NGOs and key individuals involved in the selection process, as well as on the responses to the questionnaire sent to States Parties, and additional submissions by some States Parties, NGOs, and other individuals involved in the process. Additionally, documentation produced by the Committee, the Panel of Experts and the former Assembly Presidency was consulted, and is referenced accordingly.

16. Throughout the report, quantitative references (e.g. “majority of”, “many”, etc.) refer to the comments or submissions, not to the absolute number of States Parties or other entities.

### 2.2 Process in general

17. The process for the election of the third Prosecutor of the International Criminal Court introduced several procedural innovations. In addition to a Committee on the Election of the Prosecutor, the Bureau of the Assembly established, for the first time, a Panel of Experts (“the Panel”) tasked with assisting the Committee in conducting its tasks and aimed at ensuring a merit-based selection. At the same time, the process as laid out in article 42(4) of the Rome Statute was maintained, resulting in a double-track process of both selection by the Committee, and provision for State Party nominations.

18. Many States Parties recognized and appreciated the aim of a merit-oriented process and supported its continuation in the future. However, they also acknowledged that the process did not function as it was intended, and did not circumvent an element of politicization. Several States Parties pointed to a lack of procedural clarity, a lack of transparency regarding decision-making within the Committee and the Panel, and political interference as some of the reasons why the process did not function optimally. Additionally, several States Parties recognized the tensions between the merit-, expert-based approach, and one that would favour a process led by States Parties. According to those States Parties, this might have led to lack of agreement amongst States Parties and should be addressed in the future.

19. Key persons involved in the process agreed that the reasons for the creation of the Committee were positive, aiming to de-politicize the election by employing a merit-based assessment. That said, they also acknowledged that these innovations were not entirely successful and might have been experienced by some States Parties as limiting their rights to present candidates in line with the Rome Statute. This reflected a tension mentioned by some States Parties as well, between the merit-based selection conducted in this instance, and the requirements of article 42(4) of the Rome Statute.

20. NGO representatives stressed the important innovations introduced in the election process, especially the establishment of the Committee and the Panel, but noted that the process had significant shortcomings as well. The dual-track nature of the process was

<sup>11</sup> The meetings were held on 22 February, 2 March, and 5 and 6 April 2022.

experienced by some as disorganized and unclear, with several NGO representatives stressing a lack of transparency and the inability of the Committee to reduce the political character of the process.

### 2.3 Normative framework

21. The election of the third ICC Prosecutor was governed by the provisions of article 42 of the Rome Statute and Assembly resolutions.<sup>12</sup> The Committee and the Panel were established by the Bureau of the Assembly on 3 April 2019, upon adoption of the Terms of Reference which set out the format and mandates of both bodies.<sup>13</sup>

22. Two concerns were raised by many States Parties regarding the normative framework, particularly the Terms of Reference: a lack of transparency and ambiguity, or areas not addressed by the Terms of Reference.

23. Many States suggested that increasing transparency by *inter alia* communicating procedures, timelines, roles, and participation of all stakeholders, would improve the legitimacy and credibility of the process. Several States Parties noted that a further improvement to legitimacy could be achieved by involving States Parties more deeply in the development of the Terms of Reference, and extending the time provided for their preparation. This was also suggested as a remedy to contestations of the process, as States Parties' views would have been reflected in the Terms of Reference in advance.

24. Several States Parties suggested that the ambiguities in the Terms of Reference led to particularly unfavourable consequences as the election bodies had to improvise and adjust an ongoing selection process. This was singled out as creating opportunities for politicization and as critically damaging its credibility. Several States Parties suggested all efforts should have been taken to avoid having to change the process during the selection exercise.

25. The issues raised most frequently by States Parties concerned the delineation of the roles and mandates of the Committee and the Panel, including the sequencing of their processes, detailed instructions on how the two bodies should assess the competence of the candidates, including the requirements to be listed in the vacancy announcement, mechanisms to ensure representation and diversity, vetting processes, the procedure for consultations, and timelines for key stages of the election. Each of these areas is addressed further in this report.

26. Finally, a few States Parties noted an apparent contradiction between the requirement for States Parties to elect the Prosecutor and the objective to identify a candidate through a non-political process, suggesting the two frameworks (the Terms of Reference and the resolution) could be merged or at least clarified in future Terms of Reference.

27. The reports of the Committee and the Panel mentioned similar areas of possible improvement to those raised by States Parties: clarifying the roles and mandates of the Committee and the Panel, introducing timelines, clarifying the process of the assessment of the candidates and the role of each body therein, as well as assessment criteria.<sup>14</sup> They also noted the need for a vetting mechanism, a definition of high moral character, delineation of the procedure for States Parties' consultations, relations with NGOs, and approach towards third-party communications.<sup>15</sup>

28. NGO representatives likewise noted several gaps in the Terms of Reference, and recommended first seeking input from all States Parties and NGOs when drafting the Terms of Reference for the next election. Several NGO representatives stressed the importance of clearly delineating the mandates of the Committee and the Panel, determining the qualifications for membership of these bodies, and including provisions for engagement with NGOs. A recommendation was also made for any future Terms of Reference to be kept sufficiently open to allow the Committee the necessary flexibility to determine its own working methods.

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<sup>12</sup> ICC-ASP/1/Res.2 as amended by ICC-ASP/3/Res.6.

<sup>13</sup> ICC-ASP/18/INF.2.

<sup>14</sup> Panel report, para. 75, 75-80, 87-90, Committee report, para. 8, para. 10.

<sup>15</sup> Panel report, paras. 87-90, Committee report, para. 10.

## 2.4 Ensuring fairness and balance

29. Fair and balanced representation in terms of geographic regions, gender, and legal systems was a commonly expressed concern, in conjunction with the importance of attracting highly qualified applicants.

### 2.4.1 Regional, gender and legal systems' representation

30. A majority of States Parties acknowledged the need for better modalities to attract a more diverse applicant pool. With regard to the importance of wider dissemination of the vacancy announcement, it was stressed by several States Parties that they should have a more active role in this. The role of the Assembly Presidency was also acknowledged in this respect, including a suggestion for the Presidency to develop strategic partnerships with stakeholders to raise awareness, especially in under-represented States Parties. Several States Parties supported a more active and prominent role for the Committee, mandating it with a search function and requiring the Committee and the Panel to produce a balanced longlist and shortlist. A few States Parties suggested considering the engagement of a recruitment company, or seeking guidance from external human resources specialists, in this respect. Finally, a suggestion was made to introduce a rotation scheme to diversify the position, while retaining the importance of merit-based criteria, though this was also opposed by a few States Parties.

31. Apart from these specific suggestions, many States Parties suggested that the Terms of Reference should be adjusted to provide for mechanisms or specific guidance to improve representation and diversity.

32. Key persons involved also supported the view that more needed to be done to increase balanced participation, including a consideration to compose a search committee. The Committee and the Panel reports shared States Parties' understanding that more efforts could have been undertaken to share the vacancy announcement, especially among under-represented States Parties.<sup>16</sup> The Panel report suggested that the Committee should have been entrusted with a more active role in the search for candidates.<sup>17</sup> An additional concern was raised as to whether the sequencing of the process (State Party nominations following the Committee process) may have contributed to a lack of State Party engagement, and whether this could be improved by following a hybrid process (see Section 4.3. of this report).<sup>18</sup>

33. NGO representatives reiterated the position that more effort should have been invested in attracting a sufficiently deep pool of applicants, and in considering how to support those individuals who might not enjoy political backing. A recommendation was made to convene an outreach team with a mandate to engage local organizations and associations.

34. In regard to ensuring a fair and balanced candidate pool, several NGO representatives stressed the technical difficulties relating to internet connection that were experienced by at least one of the candidates, which might have prejudiced their candidacy, and recommended technical provisions be set up in advance to avoid such situations in the future.

### 2.4.2 Shortlist-related considerations

35. The Terms of Reference tasked the Committee with establishing an unranked shortlist of three to six candidates.<sup>19</sup> The Committee, in its Final Report, presented four shortlisted candidates.<sup>20</sup>

36. Many proposals regarding the number of shortlisted candidates were raised. Many States Parties suggested increasing the number of candidates on the shortlist, raising the number to six or ten, to enable a more balanced and diverse representation. Several States Parties expressed the view that the Terms of Reference should include a precise number of candidates for the purposes of certainty and predictability of the process. A few States Parties suggested that the shortlist should be ranked, including three top candidates and three

<sup>16</sup> Committee report, para.5.

<sup>17</sup> Panel report, para. 85.

<sup>18</sup> Committee report, para. 5.

<sup>19</sup> ICC-ASP/18/INF.2, para. 16.

<sup>20</sup> ICC-ASP/19/INF.2.

runners-up, to ease the selection process. Finally, a few States Parties suggested that the distinction between the longlist and the shortlist should be eliminated, and the Committee should be tasked with producing a single, longer, list. It was expected that this change would simplify the procedure and reduce its length.

37. Key persons involved in the process supported the view that the shortlist included too few candidates. The Panel report suggested a longer shortlist as an improvement to fair and balanced representation, though noting that the number should be determined by the quality and not the quantity of the candidates, to maintain a merit-based approach.<sup>21</sup> The Committee outlined that it was required, under its Terms of Reference, to make all decisions by consensus, and that only four candidates had attracted the necessary consensus. It was further noted that views within the Committee differed on this point, which suggested that the matter could usefully be considered further by the Bureau and States Parties.<sup>22</sup>

38. NGO representatives also supported expanding the shortlist to include six candidates.

## **2.5 Temporal process aspects**

39. The temporal aspects of the election concern both the general timeline of the proceedings and the sequencing of the different steps in the process: the assessments conducted by the Committee and the Panel, the publication of the shortlist, States Parties' nominations, consensus-seeking, and voting.

### **2.5.1 Timeline**

40. As a primary concern, many States Parties raised the issue of a certain lack of clarity and consistency regarding the timelines.

41. Several States Parties found the process to be lengthy and cumbersome, especially between the publication of the original shortlist and the expanded shortlist. Several States Parties noted that the time limits appeared to be imbalanced; relatively little time was provided for the development and approval of the Terms of Reference and, later, to the Panel for the evaluation of the candidates, including vetting. A few States Parties considered the time between the publication of the shortlist and the commencement of consensus-building to be insufficient; however, a few others noted that the initial timeline and time limits were appropriate and suggested that the delays were the result of a disagreement regarding the shortlist, which could be improved by adjusting the Terms of Reference.

42. Several deadlines appeared not to have been set ahead of time, e.g., timelines for conducting consultations, for reaching consensus, and for the time period between consensus seeking and voting.

43. In this regard, several States Parties suggested that the process should have started earlier, beginning two years ahead of the (s)election. This would have allowed for greater consultation with the Bureau on the preparation of the vacancy announcement, and for the negotiation process.

44. A key individual involved expressed a view that strict, immovable deadlines ought to be introduced, without possibilities for extension.

45. The Panel report supported the view that agreeing to timelines in advance could be beneficial, including timelines for consultations, and highlighted the time constraints in conducting candidate assessments for the longlist procedure as well as during the interviews, considering the allocated time to have been insufficient.<sup>23</sup>

46. NGO representatives shared the dissatisfaction with the timelines, considering certain phases to be unnecessarily delayed, while others appeared to be rushed. A recommendation was made to set up a realistic timeline that would accommodate comprehensive vetting and assessment of candidates, including a suggestion to begin the selection process two years ahead of the (s)election.

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<sup>21</sup> Panel report, para. 21.

<sup>22</sup> Committee report, para. 12.

<sup>23</sup> Panel report, paras. 14-15, para. 26, para. 82, para. 94.



### 2.5.2 Double-track process

47. As mentioned in Section 2, the Committee process was introduced in parallel to the existing Rome Statute provisions and the relevant Assembly resolution. This resulted in a “double-track” process, whereby the Committee was conducting assessments of individual applications while States Parties maintained their rights to nominate candidates as well.

48. A majority of States Parties supported the double-track process, whereby an independent technical assessment preceded the consensus-building and States Parties’ nominations. Many considered this procedure to be less politicized. Several States Parties expressed dissatisfaction with trying to avoid nominations, considering it to be an important part of the process.

49. Several other States Parties, however, were not in favour of a process whereby States Parties could nominate candidates at any stage, and recommended that only the list produced by the independent experts should be used. They suggested a clear provision in the Terms of Reference, establishing that the list proposed by the Committee would not be modified. This would effectively eliminate the nomination part of the process, which other States Parties considered to be an unalienable right enshrined in the Rome Statute.

50. Regarding the process, many States Parties raised the issue of timelines, recommending a deadline for the end of consultations which would lead to the submission of nominations. As mentioned above, several States Parties noted a general lack of clarity in the Terms of Reference regarding the way in which the two parallel processes should be conducted. They also noted a discrepancy between the two processes, and suggested establishing consecutive and distinct deadlines for the nomination period and for the moment of reaching consensus.

51. Key individuals involved in the process considered the double-track process to have played a positive role in the election, even though there were some difficulties with running the process smoothly, as well as ensuring that States Parties acted within the established framework. A suggestion was made to clarify and explain the double-track nature of the process, together with a political pledge to act within the framework of the process.

52. The Panel report echoed the concerns of some States Parties, stressing that all candidates, notwithstanding their status (individual- or State Party-nominated), should be vetted and assessed equally.<sup>24</sup>

53. NGO representatives noted the apparent confusion about the nature of the process, and suggested further clarification. Furthermore, NGO representatives stressed the importance of States Parties adhering to a transparent and merit-based process, and supported equal assessment of all candidates, whether State-nominated or not.

### 2.5.3 Sequencing (sequenced or hybrid)

54. In terms of sequencing the processes, the Committee assessments and States Parties’ nominations were formally conducted in parallel. However, in practice, State Party nominations were discouraged prior to the release of the shortlist and the seeking of consensus on the shortlist candidates.

55. The relative benefits and drawbacks of early versus late nominations were considered by States Parties. A majority of States Parties were against early nominations (a hybrid process). Many States Parties stressed the negative consequences of early nomination, including their effect on fair competition, impartial and merit-based assessment, and the potential to politicize the process by inducing early campaigning. They were of the view that nominations should only be allowed in a situation where no consensus candidate emerges from the Committee shortlist. Furthermore, several States Parties were concerned that early nominations could limit the number of candidates, or discourage potential candidates without political support from applying. Several States Parties suggested that early-nominated, State-supported candidates would have an advantage over independent candidates of the same nationality. A few States Parties raised the concern that simultaneous application and nomination processes might result in politically complicated situations for States Parties. On

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<sup>24</sup> Panel report, para. 90.

the other hand, several States Parties suggested that early nominations could result in a deeper pool of candidates and could further depoliticize the process.

56. Notwithstanding the sequence of processes, many States Parties stressed the importance of all candidates being subject to the same independent assessment and vetting processes. To ensure that this is possible, there should be sufficient time and clear timelines.

57. The Committee and the Panel reports outlined a hybrid process of individual and State Party-based nominations, considering both simultaneous and sequenced processes to be viable.<sup>25</sup> The Committee report suggested that, in a sequenced process, States Parties' nominations could be conducted first, and could then become a *de facto* longlist. Alternatively, the Committee suggested State Party nominations and public advertisements could be conducted in parallel, with the shortlist compiled by a selection Committee.<sup>26</sup>

58. Whichever sequencing would be selected, both the Panel and the Committee reports suggested a clear mandate for these bodies to conduct the merit-based assessment of all candidates and compile a shortlist.<sup>27</sup>

## 2.6 Institutional aspects of the process

59. As mentioned in the introduction, the election of the third ICC Prosecutor contained important institutional innovations: the constitution of the Committee, mandated to provide a shortlist of candidates to States Parties, and a Panel of Experts, tasked with conducting an independent assessment of the candidates and providing advice to the Committee.

### 2.6.1 The Committee and the Panel of Experts: decision making and relationship

60. Many States Parties suggested the mandates of the Committee and of the Panel should be better delineated in the Terms of Reference, by including their respective roles and the sequencing of their processes. A few States Parties requested that the Terms of Reference clarify whether the Committee could overrule the findings of the Panel. This could be seen, though, as undermining the Panel's authority and purpose. A suggestion was also made to include provision for a situation where the Panel and the Committee disagree on the longlist. Finally, a few States Parties suggested that the Terms of Reference should expressly provide that the Panel select a chair and vice-chair.

61. Regarding the overall institutional set-up, many States Parties suggested considering merging the Committee and the Panel into one organ, taking inspiration from the format of the Advisory Committee on Nominations of Judges of the ICC ("ACN").<sup>28</sup> Besides changing the format, several States Parties suggested increasing or further delineating the role of the Panel. A suggestion was made to assign the Panel an exclusive mandate for the evaluation and the objective, technical assessment of the candidates, and to allow the Panel to directly communicate with States Parties as well as to present separate reports, as opposed to the Panel's views being reflected in the Committee's reports.

62. Regarding decision-making, many States Parties suggested the consensus approach should be replaced by decisions by a majority of votes, though a few States Parties supported consensus decision-making.

63. Key individuals involved, as well as the Committee and Panel reports, noted the lack of clarity in the Terms of Reference regarding the roles of the two bodies, leadership, and division of labour, and expressed the concern that this could result in confusion, overlap, and possible attempts by one body to interfere in the work of the other.<sup>29</sup> The importance of clarifying whether the role of the Panel is advisory, or whether they should have a role in decision-making, was stressed. The Panel report considered that a division of labour whereby the Panel focused on the competencies' assessment, and the Committee focused on competencies and additional considerations, appeared to strike the right balance.<sup>30</sup> Overall,

<sup>25</sup> Panel report, para. 85.

<sup>26</sup> Committee report, para. 13.

<sup>27</sup> Panel report, para. 85; Committee report, para. 13.

<sup>28</sup> ICC-ASP/10/Res.5, para. 19.

<sup>29</sup> Panel report, para. 75; Committee report, para. 8.

<sup>30</sup> Panel report, para. 18.

key individuals involved, as well as the reports, suggested that the two bodies should be able to work independently.

64. Key individuals involved suggested that decision-making should be by special majority (two-thirds of the votes). This was supported by the Committee report.<sup>31</sup> The Panel, though not mandated by the Terms of Reference to take consensus-based decisions, reported that in practice it attempted to achieve consensus, which resulted in considerable challenges.<sup>32</sup>

65. NGO representatives suggested that the Panel should be given a more prominent role, considering its apolitical nature. A suggestion to merge the two bodies into one was also made, short of which, both the Committee and the Panel should be given equal standing. Regarding decision-making within the selection body(-ies), deciding by simple majority instead of consensus was suggested.

### **2.6.2 Composition of the Committee and the Panel of Experts**

66. The importance of ensuring the appropriate type and level of expertise among members of the Committee and the Panel was stressed by many States Parties. In terms of expertise, several States Parties noted the importance of practical experience, e.g., as former prosecutors or judges, including a suggestion to require twenty years of experience for the Committee members, and ten years for members of the Panel. A certain lack of expertise in human resources and management was noted, and a few States Parties stressed that the Committee and the Panel should reflect balance in terms of gender, language, geographical regions, and legal systems. Appointing an NGO representative, possibly as an observer, was also proposed.

67. Several States Parties suggested that all States Parties should be consulted in the appointments of the members of the Committee and the Panel, or that they should be appointed by the Assembly, not just the Bureau, in line with the ACN practice.

68. Key individuals acknowledged that the selection of individuals to serve on the Committee and the Panel was challenging, considering the broad type of skills and experiences required for the job. A preference towards highly professionally experienced experts was expressed, with the view of expanding the role of experts in the future. A suggestion was also made to involve an expert in human resources, recruitment, or an expert in civil service personnel management.

69. NGO representatives suggested that the expert panel should be comprised of independent experts or practitioners, rather than diplomats, to ensure their independence and to further depoliticize the process.

70. NGO representatives also noted a lack of transparency regarding selection criteria for members of the Committee and the Panel. It was suggested that the experts should have expertise in not only (international) investigations and prosecutions, but also in working with affected communities, management, and the ICC's operational environment. The appropriateness of appointing solely diplomats to the Committee was raised, and a review of this practice encouraged. Finally, the proposal was made that the Assembly Presidency should be responsible for appointing experts, and that a representative of NGOs could also be appointed to the Committee or the Panel as an observer.

### **2.6.3 Criteria used by the Panel and the Committee during the selection process**

71. Many States Parties noted a lack of clarity in the shortlist selection process, and the need for well-defined guidance for the Committee to weigh the selection criteria. Several States Parties identified a lack of clarity as a reason for speculation, low trust among States Parties, and lower legitimacy of the process. Here, several States Parties suggested the Committee should be more transparent, providing detailed explanations of their findings concerning individuals who were included in the longlist and the shortlist.

72. Several States Parties suggested providing guidance to the Committee by agreeing upon the interpretation of the Rome Statute article 42 requirements, in the form of a resolution, declaration, or a policy document. A suggestion was also made to provide definitive guidance to the Panel regarding requirements set out in the vacancy announcement,

<sup>31</sup> Committee report, para. 12.

<sup>32</sup> Panel report, para. 84.

focusing on *inter alia* proven professional experience and competence, high moral character, leadership, communication, and management skills. Furthermore, attention to the balance of legal systems' knowledge, problem solving, and a strong vision for the future of the ICC was proposed. In line with a ranked shortlist, several States Parties suggested scoring applicants on these core attributes.

73. In terms of the assessment process, many States Parties supported the technical, expert-led assessment of the candidates. Several States Parties suggested conducting enhanced competency-based interviews. The need to take into consideration the relative advantage of native English or French speakers during the interview stage was also raised. A few States Parties suggested involving an external recruitment company, potentially at later stages of the assessments.

74. Finally, the Terms of Reference required the Committee, but not the Panel, to take geographical, gender, and legal systems' balance into account. Several States Parties suggested requiring the Panel to consider these criteria as well.

75. Key individuals involved in the process supported an advance interpretation of the article 42 requirements, to better assist the Panel and the Committee in conducting the assessment and the selection of candidates.

76. The Panel report supported this view, suggesting that the Assembly could agree on the interpretation in advance.<sup>33</sup> Additionally, the Panel report suggested a document or a checklist of criteria could be used to provide feedback on the reasons for inclusion, or not, of each candidate in the shortlist. Finally, the Panel, similarly to the suggestions made by some States Parties, reported that it had followed the evaluative practice of the ACN, including categories of assessments. The Panel suggested following this approach and further considering the criteria drawn from recent ACN processes.<sup>34</sup>

77. NGO representatives made several suggestions regarding the assessment process. First, they suggested increasing the length of interviews, or requiring additional interviews, tests, or questionnaires to provide sufficient material for the evaluation of candidates. Second, clear ranking or scoring of the competences of candidates was recommended to allow for a comparative analysis. Like the views expressed above, some NGO representatives supported engaging a human resources professional to develop the vacancy announcement.

## **2.7 Due diligence**

78. Due diligence, especially the requirement to assess the "high moral character" criterion in the Rome Statute,<sup>35</sup> was a particular concern shared by almost all actors in the facilitation process.

### **2.7.1 Vetting mechanism**

79. A large majority of States Parties considered vetting to be central to the election process, and considered that there should be clear rules, covered in the Terms of Reference, from the start. Several States Parties considered vetting to have been the weakest component of the election in question.

80. Many States Parties supported the development of a permanent vetting mechanism that would be used for all Assembly elections. In terms of the format, many States Parties noted the recent experience of vetting conducted for the Deputy Prosecutor elections as positive, and as a potential model for future Prosecutor (s)elections. Several States Parties suggested consulting other organizations, including the United Nations and the International Court of Justice, as well as human resources experts, to determine the most appropriate methodology and mechanisms. Several other States Parties considered the practices of the ICC's Safety and Security Section and the Independent Oversight Mechanism ("IOM") to be sufficient, and suggested seeking IOM input as to its capabilities to conduct the vetting process. The benefits of using the IOM were reported to be its expertise, keeping the process in-house, and using existing structures.

<sup>33</sup> Panel report, paras. 80-81.

<sup>34</sup> Panel report, para. 73, para. 86.

<sup>35</sup> Rome Statute, article 42(3).

81. Regarding the format of the vetting, several States Parties suggested that any vetting process should at least include background and character checks, reputational interviews, and establishment of a mechanism to receive third party communications and assess any potential allegations in a fair and transparent manner. Here, several States Parties stressed the importance of protecting the due process rights of the candidates, including their right to a full defence, and the importance of the vetting process itself being credible and objective. Any such processes should also ensure the anonymity of the reporter.

82. Some challenges to the vetting process were raised. Several States Parties suggested that accepting third party communications would increase the length of the election process, since they would have to be duly processed to establish the facts. Furthermore, limitations to gathering information in the nation states of the candidates were also noted.

83. States Parties expressed contradictory views regarding the stage at which the vetting should be performed. Several States Parties suggested all longlisted candidates should be vetted, which would be facilitated by having a public longlist. Several other States Parties suggested that only shortlisted candidates should be vetted, especially considering the confidentiality of the longlist as established in the Terms of Reference.

84. Key individuals noted the difficulty of the vetting process as experienced in the election, and suggested considering the process followed by the ACN or the process employed in the election of the Deputy Prosecutor as potentially useful frameworks. Support was also expressed for relying on the IOM and/or the ICC Safety and Security Section, as it would ensure control over the process and enable consideration of ICC-specific risks. It was considered important to provide the Safety and Security Section with sufficient time and information to conduct effective vetting.

85. The Panel and the Committee reports also highlighted the necessity of an institutional mechanism, advocating a permanent vetting process for all Assembly elections.<sup>36</sup> The Panel report suggested the IOM would be an appropriate venue, though the Safety and Security Section might also be involved.<sup>37</sup> Both reports suggested that the vetting process was hampered by confidentiality requirements and would be assisted if candidacies were made public,<sup>38</sup> while the Panel noted the importance of protecting the candidates' privacy and confidentiality of the process.<sup>39</sup> Regarding the timing, the Panel report suggested conducting vetting at an early stage, preferably prior to drawing up the longlist, in order to ensure that the Committee and the Panel consider all the relevant information in assessing the candidates.<sup>40</sup>

86. Similarly to States Parties, the reports noted the lack of guidance in the Terms of Reference regarding vetting, and suggested appropriate mechanisms be set up ahead of time, and clearly delineated in the Terms of Reference.<sup>41</sup>

87. Overall, NGO representatives stressed the need for a permanent, clear, and in-advance vetting process, included in the Terms of Reference and listed in the vacancy announcement. Regarding the mechanism to conduct the vetting, some NGO representatives supported the role of the IOM, but also did not disregard the option of outsourcing the process. Like others, NGO representatives suggested including background and character checks, reputational interviews, a confidential channel for third parties to send information to, and a mechanism to provide candidates with the opportunity to respond to any such allegations. The importance of reputational interviews was particularly highlighted by NGO representatives.

88. NGO representatives also stressed that any vetting mechanisms should respect confidentiality, be conducted fairly, and be compliant with data protection laws.

89. In terms of the stage at which candidates should be vetted, a view was expressed to vet the longlist rather than just the shortlist.

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<sup>36</sup> Panel report, paras. 87, 90; Committee report, para. 10.

<sup>37</sup> Panel report, para. 87.

<sup>38</sup> Panel report, para. 37, Committee report, para. 10.

<sup>39</sup> Panel report, para. 87.

<sup>40</sup> Panel report, para. 41.

<sup>41</sup> Panel report, para. 90; Committee report, para. 10.

### **2.7.2 High moral character criterion**

90. A majority of States Parties expressed the need for more clarity and a precise definition of the “high moral character” criterion. Several States Parties suggested developing a resolution or another type of agreement on the meaning of “high moral character”, which would provide guidance to future Committees. A consideration of multiple criteria was proposed by a few States Parties, including integrity, respect for diversity, zero tolerance towards harassment, prior arrests or convictions, and misconduct (while it was stressed that the list is non-exhaustive).

91. Key individuals involved in the process agreed with the need to define the “high moral character” criterion, with clear measures or indicators introduced at the outset of the process. The Panel report also noted the difficulty of not having a definition of “high moral character”, which required the Panel to spend considerable time on developing the criteria on the basis of other sources.<sup>42</sup> Related to the vetting mechanism discussion above, the report also noted the lack of an express mandate as to how the Committee should have tested candidates on this requirement.<sup>43</sup>

92. Returning to the question of the development of the vacancy announcement, NGO representatives suggested that involving a human resources specialist in developing the announcement would help in determining the modalities of measuring high moral character. Furthermore, NGO representatives suggested further refining the “misconduct” criterion, as used in the Deputy Prosecutor elections, by including non-sexual forms of harassment and discrimination.

## **2.8 Communication, transparency, and confidentiality**

93. The Terms of Reference instructed the Committee and the Panel to conduct their assessments confidentially, with only the names of the shortlisted candidates to be made public.<sup>44</sup> Furthermore, as discussed above, the Terms of Reference did not provide for modalities of communication with third parties.

### **2.8.1 Confidentiality of candidates and Committee’s work**

94. Many States Parties raised a concern that confidentiality rules complicated the process and hampered States Parties’ access to valuable information, suggesting transparency should outweigh confidentiality. They suggested that the findings of the Committee and the Panel should be made available to all States Parties, including the longlist and the reasoning for selecting the candidates on the shortlist. Several States Parties suggested that the excessive confidentiality of the Committee’s process was one of the reasons States Parties questioned the outcome of its work. A suggestion to share the longlist with NGOs was also made.

95. On the other hand, several other States Parties suggested that confidentiality was helpful at the outset and helped to attract high profile individuals to apply. They also suggested that consultations with States Parties were a sensitive matter and required confidentiality to progress.

96. Many States Parties suggested improving communication with the Committee and the Panel overall, stating that the progress and methodology of the two bodies was not always known by stakeholders. Several States Parties suggested holding town hall or progress meetings and producing interim reports to address this.

97. Key individuals involved in the process considered confidentiality to have been a challenge during the election process. The Committee report noted that the confidentiality rules as set out in the Terms of Reference were inconsistent with the requirements for transparency, and made the Committee vulnerable to questions regarding its decision-making.<sup>45</sup> The report considered a public assessment to be preferable to confidential one, as it would reduce rumours and speculation regarding the Committee’s and the Panel’s work.

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<sup>42</sup> Panel report, paras. 33-50.

<sup>43</sup> Panel report, para. 37.

<sup>44</sup> ICC-ASP/18/INF.2.

<sup>45</sup> Committee report, para. 14.

98. Other key individuals noted, however, that not all information received during interviews should be made public to ensure that sensitive information can be gathered during the interview process. A suggestion was also made to keep the Committee's assessments confidential, but to communicate their findings to the applicants.

99. NGO representatives suggested increased transparency by the Bureau and the Presidency to inform relevant stakeholders on the progress of the proceedings and decision-making. Several NGO representatives noted the tension between transparency and confidentiality, and the challenges that confidentiality created for the vetting of the candidates. Making public the longlisted candidates' names, as well as their appraisals by the Committee and the Panel, was proposed. NGO representatives further suggested conducting more public hearings and other types of communications to improve public engagement.

### **2.8.2 Third-party communications**

100. The issue of third-party communications to the Committee and the Panel was raised by many States Parties. Several proposed establishing a procedure and safe channels for third-party communications *ex ante*, as such information could be useful in assessing the candidates. However, several other States Parties supported restrictive measures: discouraging third-party communications at initial stages, barring direct contact with the Panel and the Committee, or barring anonymous complaints entirely in order not to unfairly influence the merit-based assessment. A few States Parties noted that the candidates should not be allowed to communicate with the Committee and the Panel at all.

101. In terms of communication channels, several States Parties suggested referring all communications to the IOM or another vetting mechanism, or the Assembly Secretariat. A few States Parties suggested that all such communications, except those of a sensitive nature or deemed to be unfairly prejudicial, should be made available to States Parties, so they could be considered in assessing the candidates.

102. The Committee and the Panel reports also raised the issue of third party-communications, noting that the Terms of Reference did not provide any guidance on this matter.<sup>46</sup> The Committee report suggested establishing a clear process for any subsequent elections, including discouraging third-party communications directly to the Committee and the Panel, and instructing these bodies to disregard such communications.<sup>47</sup> However, if confidentiality rules were changed and the names of candidates were public, such communications could be integrated into the Committee's assessment.<sup>48</sup> Relatedly, the Committee report suggested prohibiting communications between candidates and members of the Committee or the Panel.<sup>49</sup>

103. NGO representatives suggested a victim-centred approach towards designing the procedures for receiving third-party communications, which would allow allegations to be brought forward even in the absence of additional documentation. The process of reporting misconduct should be made as clear as possible, and disseminated widely and ahead of time. NGO representatives also suggested clarifying data protection processes and ensuring compliance with data protection standards.

## **2.9 Inclusivity and the role of different actors**

### **2.9.1 Depoliticization and State-driven process**

104. One of the aims in introducing the Committee and the Panel as part of the election process was to reduce the political aspects of the election and encourage a merit-based process. Many States Parties considered this process to have successfully achieved depoliticization and supported maintaining this system for the future. However, many other States Parties noted that in practice, politics, and lobbying, still played an influential role, and suggested working further towards reducing it. A proposal was made to prohibit lobbying, for instance, by encouraging States Parties to join a common pledge to refrain from vote-swapping agreements. On the other hand, several States Parties were of the view that

<sup>46</sup> Panel report, paras. 87-90; para. 98.; Committee report, para. 11.

<sup>47</sup> Committee report, para. 11.

<sup>48</sup> Committee report, para. 11.

<sup>49</sup> Committee report, para. 11.

States Parties own the process, and aiming to remove the political element was impossible or undesirable.

105. Key individuals involved in the process similarly noted that the political aspects of the election were not reduced, even though the aim of the Committee was to depoliticize the process. The Panel report noted that the return to longlisted candidates could be seen as political interference in the credibility of the Panel's and the Committee's work. The report suggested that the process can only succeed if States Parties fully agree to cooperate in ensuring respect for its outcome, which can never be guaranteed.<sup>50</sup>

106. NGO representatives considered the Committee process to have been heavily politicized. A key issue noted in this respect was the expansion of the candidates' shortlist, which deviated from the Terms of Reference, was not justified by consultations, and was not transparent. NGO representatives criticized the heavy campaigning after the final rounds of consultations as very problematic. As part of a possible solution, the Assembly was encouraged to establish a public platform for States Parties to voluntarily forgo vote trading.

### **2.9.2 NGO involvement**

107. Many States Parties noted the important role of NGOs during the process, in order to improve openness and transparency. Several States Parties suggested that the Terms of Reference could expressly establish the role of NGOs, though views on the role itself differed. A few States Parties noted that some NGOs appeared to engage in lobbying, and their involvement led to anonymous allegations which were harmful to the process. Here, a few States Parties suggested the role of NGOs should begin after the publication of the shortlist, and involve public meetings with the candidates and an active role in roundtables. A few States Parties also suggested that NGOs should be able to provide information to the Committee and the Panel, and to provide information relevant to vetting candidates to a future vetting mechanism, e.g., the IOM. Additionally, NGOs should have the possibility to provide any other helpful information to guide States Parties' decision-making.

108. As mentioned above, a proposal was also made to appoint an NGO representative to the Panel or the Committee.

109. Key individuals involved likewise acknowledged the role NGOs played in the (s)election process, supporting the view that NGOs should be given a platform to express their views. This included a consideration to give NGOs a seat at the Committee. At the same time, respect for the State Party-driven process should be maintained.

110. The Committee and the Panel reports noted the absence of any guidance regarding NGO engagement in the Terms of Reference, and suggested this be amended.<sup>51</sup> The Panel report suggested an NGO representative could be named as a non-voting observer, and the further involvement of NGOs at a post-shortlist stage should be provided for, while simultaneously discouraging advocacy and attempts to influence the process at an early stage.<sup>52</sup>

111. NGO representatives underlined their crucial role in the (s)election process in order to avoid politicization and increase the objectivity of the process. Like the above, NGO representatives suggested establishing a clear role for NGOs in the Terms of Reference for future (s)elections. In terms of modalities of engagement, an increased number of meetings between States Parties, the Assembly, and NGOs, was suggested, supporting the use of digital meetings to lead to broader engagement. A suggestion was also made to involve an NGO representative as an observer in the Committee.

### **2.10 Consensus building**

112. A majority of States Parties, key individuals, and NGO representatives supported the aim of reaching consensus, even if it is not stipulated in the Rome Statute. Many States Parties considered elections to be a last resort. Several States Parties noted that a definition of consensus could be agreed upon ahead of the election, to avoid interpreting consensus as unanimity. However, several States Parties suggested that voting is no worse than

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<sup>50</sup> Panel report, paras. 92-93.

<sup>51</sup> Committee report, para. 9, Panel report, para. 97.

<sup>52</sup> Panel report, paras. 97-98.



consensus-seeking, and since consensus is difficult to achieve, there should be a smooth transition from seeking consensus to voting. An NGO representative also suggested that voting might be a more honest or accurate reflection of States Parties' positions.

### **2.10.1 Timeline for consensus-building**

113. A majority of States Parties suggested a deadline for reaching consensus should be agreed ahead of the election. Key individuals involved in the process, including the views expressed in the Panel report,<sup>53</sup> shared this position.

### **2.10.2 Structured consensus-building exercise**

114. A majority of States Parties agreed that the consensus-building exercise should be led by the Presidency of the Assembly, with several States Parties noting the beneficial role played by the focal points. A view was also expressed by a few States Parties that the Committee should lead the process of consensus-building.

115. A lack of procedural clarity regarding consensus-building was noted by many States Parties. Several suggested developing a structured process in the Terms of Reference, including methodology and timelines for conducting the consultations and briefings.

116. In terms of the timeline, several States Parties suggested that consensus-building should begin right after the shortlist has been released by the Committee, or after completion of the vetting of candidates. Several States Parties suggested starting consultations after public hearings had taken place.

117. Several States Parties considered the public hearings and roundtables to have been useful in the consensus-building exercise, and suggested, additionally, to introduce straw polls into the Terms of Reference to allow low-ranked candidates to withdraw.

118. Key individuals involved similarly suggested that the Terms of Reference should be updated to include a framework for consultations, in order to provide procedural clarity ahead of time. Any such framework should leave sufficient flexibility for effective consultations. This view was supported by the Committee report.<sup>54</sup> Similarly to States Parties, key individuals also noted the beneficial role played by the focal points in this respect.

119. The Panel and the Committee reports supported the Assembly Presidency and the Bureau taking a leading role in consultations.<sup>55</sup> The consultations should start before the final Committee report is released, or immediately thereafter, and the same approach should be taken towards consultations regarding all candidates.<sup>56</sup> The role of regional representatives and focal points was also noted.<sup>57</sup> The Committee report also suggested considering introducing straw polls of the shortlisted candidates to allow low-ranked candidates to withdraw.<sup>58</sup>

120. NGO representatives were critical of the transparency and structure of the consultation process. An NGO representative suggested including NGOs in relevant meetings of the Assembly's working groups and Assembly sessions, and providing more information in the focal points' reports. NGO representatives also raised a concern regarding public consultations on the candidates' fulfilment of the Rome Statute criteria with NGOs. Several NGO representatives considered that too little time was allocated to the first round of the consultations, although this had improved during the second round, after the focal points were appointed. They suggested reviewing the roundtable format to ensure multiple opportunities for both States Parties and NGOs to engage transparently with the candidates.

121. NGO representatives noted the positive role played by the focal points, and their importance, but suggested that their role should be clarified. According to one representative, the role of the Presidency throughout the election process should be reviewed, including the level of transparency with which the Presidency undertook its activities.

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<sup>53</sup> Panel report, para. 94.

<sup>54</sup> Committee report, para. 14.

<sup>55</sup> Committee report, para. 14, Panel report, para. 94.

<sup>56</sup> Panel report, para. 94, Committee report, para. 14.

<sup>57</sup> Panel report, para. 94, Committee report, para. 14.

<sup>58</sup> Committee report, para. 14.

### **3. Analysis and conclusion**

122. As outlined in the introduction, this lessons learnt exercise was designed as a constructive and future-oriented process. From the many reactions and comments received during the past months, some points stood out, either because they appeared particularly pertinent to the goal of achieving a satisfactory process in the future or because they were raised frequently by many interlocutors, reflecting the opinion of a majority of comments received. The facilitators decided to list these points, not as an exhaustive set of recommendations for a selection process, but as a list of some elements that the lessons learnt process distilled as points worthy of consideration for the selection of the ICC Prosecutor in the future. We hope that consideration of these points will be helpful to future generations of diplomats, ICC officers and NGO representatives.

123. As a point of departure that was often emphasized, it is useful to recall that the selection process is enshrined in the Rome Statute and thus, in principle, a State-driven process. Regardless of any procedure agreed, there is always the option of an election as foreseen in article 42 of the Rome Statute. However, in the interests of achieving consensus and strengthening the selection process, the input provided in the course of the lessons learnt exercise suggested that the following points could be considered in preparation of a future process:

#### **3.1 Process in general**

124. Much support was expressed for a merit-oriented process. Although there always remains the possibility of holding an election, every attempt should be made to respect the process established and adhere to it. With regard to future processes, there should be a decision if a double-track process with both a selection by the Committee and space for State Party nominations is desirable.

#### **3.2 Normative framework**

125. While an amendment of the Rome Statute was not deemed necessary, a specific normative document should be established with regard to the process of selection of the Prosecutor. This document should be developed well ahead of time and in a transparent, open and inclusive manner to ensure awareness of all relevant stakeholders. All stakeholders should have the possibility to contribute to it, and the framework, in order to increase the legitimacy and acceptance of the process. The provisions should build on past experience and be as precise and prescriptive as possible in order to avoid any misperceptions or ambiguities. The normative framework could *inter alia* include the delineation of the roles and mandates of all bodies involved, sequencing of their processes, requirements to be listed in the vacancy announcement, and procedures for consultations.

#### **3.3 Ensuring Fairness and balance**

126. The results of the lessons learnt exercise indicate that the shortlist of candidates should be the result of a merit-based assessment. Fair and balanced representation in terms of geographic regions, gender and legal systems was a frequently expressed wish in conjunction with the importance of attracting highly qualified applicants.

127. In order to facilitate the broadest possible pool of candidates and create awareness, enough time should be allowed to enable a thorough search for potential candidates. In this regard, the possibility should be explored of creating a Search Committee to ensure that all States Parties and other relevant actors are sufficiently informed and have advance knowledge of the upcoming vacancy and the need to find a suitable candidate. Efforts should be made towards a diverse pool of candidates representing different legal systems and allowing for geographical inclusivity and gender balance. It seems advisable that a pre-determined number of applicants be shortlisted. The shortlist should take into account the desired diversity of candidates with regard to gender, geographical groups and legal systems, and should thus be long enough to be able to adequately reflect these factors. To allow for a truly inclusive process, efforts should also be made to ensure that the mechanisms (e.g. search and/or selection committee) reflect, through the individuals involved, gender and regional balance as well as different legal systems.

### 3.4 Temporal process aspects

128. To meet the desire for clarity, consistency and predictability, a clearly defined timetable and sequence should be established well in advance and efforts should be made by all stakeholders to adhere to it. The timetable should include considerations for the consensus-finding process and clear provisions for a situation where establishment of consensus fails.

129. While the system of self-applications/self-nominations should be maintained, clear guidance should be established regarding the process of nominations by States, as foreseen by the Rome Statute, especially with regards to timing and sequencing. Equally, the practice of public hearings should be maintained.

### 3.5 Institutional aspects of the process

130. The process for the election of the third Prosecutor contained important institutional innovations (e.g. with regard to the framework) which were considered useful and should be taken into consideration for future selection processes.

131. One of the main questions to be considered is whether a future process should also provide for a Committee on the Election of the Prosecutor and a Panel of Experts.

132. If a decision were to be made to create two bodies, there should be a clear separation with regard to mandate, tasks and timeline in order to avoid overlapping responsibilities. Alternatively, it could be considered to establish one joint body with a broader mandate.

133. In any case, the composition of the body/ies should be such as to ensure diversity, especially with regard to regional and gender balance. If the decision is made to have one body, it would be desirable to have expertise in different relevant fields (such as management experience or experience in human resources matters). The possibility to include outside experts for specific expertise could be explored. The Committee should carry out its work on the basis of majority decisions.

### 3.6 Due diligence

134. In light of the “high moral character” criterion in the Rome Statute, there was overall consensus that due diligence of some sort needs to be conducted. While it will be for the Assembly to decide on the details, the consultations showed great support for the establishment of a permanent vetting mechanism for all elected officials of the Court. The due diligence processes applied on an *ad hoc* basis in the recent election of the Deputy Prosecutors, as well as the currently ongoing procedure to elect the next Registrar of the Court, are considered positive examples.

135. It would be useful to continue building on these experiences in order to improve due diligence for future elections. In this regard a stronger role for the Security and Safety Section and Independent Oversight Mechanism could be foreseen. The option to have the vetting/due diligence apply to all longlisted candidates should be explored in order to increase transparency and confidence in the process. The due diligence process could include a number of activities, such as background checks, reputational interviews, and a channel to receive third party communications in order to assess any potential allegations in a fair and transparent manner.

### 3.7 Communication, transparency and confidentiality

136. As in every election process for a public position, the right balance between sufficient transparency and confidentiality to protect privacy needs to be established well ahead of the process. The importance of having a clear, inclusive and transparent process which enables everyone to be involved was repeatedly underlined. Furthermore, the need for the process to be clearly communicated to all States Parties, as well as other stakeholders, was emphasized.

137. Equally, candidates must be fully made aware of all aspects of the process and what is expected from them from the outset. This is especially true concerning the confidentiality regime regarding information gathered about candidates; here measures have to be taken to ensure that private data are protected. The vacancy announcement should clearly set out which information given by candidates would be made public and at what point in the process. The option of including a guideline for candidates and third parties advising about

expected and (not) adequate behaviour (e.g. discouraging campaigning or direct contact with Committee members or members of the press) should be contemplated.

138. In order to increase the transparency of the process and to keep all actors informed, it is advisable for the Committee to meet with the Assembly through the Working Groups early on, to give members of the Committee an opportunity to present themselves and their work and give stakeholders the possibility to ask questions and share their views. Once a shortlist of candidates has been decided, Committee members should meet again with the Working Groups to present their report and considerations and explain their assessments. Any communication regarding a longlist or shortlist of candidates should be made by the Committee directly to States Parties in an appropriate format, so as to avoid the situation that any information might become public before States Parties were informed.

### **3.8 Inclusivity and the role of different actors**

139. While the election of the Prosecutor remains a State-driven process, depoliticization and the recourse to a merit-based process received broad support. In this respect, efforts undertaken by States Parties, NGOs and other actors in the field of international accountability need to be taken into account and deserve recognition. While it is clear from the provisions of the Rome Statute that the elections are for States Parties, the process should nevertheless seek to be as inclusive as possible and efforts to avoid politicization should be further strengthened in order to provide the successful candidate additional legitimacy. To achieve this, everyone involved has to commit to self-restraint. All stakeholders should be aware that lobbying efforts for or against individual candidates could be detrimental to the perception of the candidates as impartial, and harmful to the process.

### **3.9 Consensus-building**

140. Even though not stipulated in the Rome Statute, the advantage of a consensus decision was a key point raised by all stakeholders in the consultations. It was also often stressed, however, that the absence of consensus leads to an equally legitimate result. In this respect, it is of paramount importance to provide for clearly structured consensus-building mechanisms and an advance agreement on the expectations, goals and strict timelines. The consensus-building process should be coordinated by the Assembly Presidency in cooperation with focal points representing regional groups. It could start after publication of the shortlist (and a respective vetting process) and include public hearings and roundtables. States Parties and other stakeholders should respect efforts to find consensus by refraining from any acts that could counter these endeavours.

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