

SECRETARIAT OF THE ASSEMBLY OF STATES PARTIES

The Hague Working Group

5 October 2011

Briefing by Mr. Daniel Bethlehem on the work of the Search Committee for the position of Prosecutor

Summary

The meeting was chaired by the Coordinator of The Hague Working Group, Ambassador Jorge Lomonaco (Mexico).

Mr Bethlehem is a member of the Search Committee (“the Committee”) representing WEOG States. In representation of the Committee, Mr. Bethlehem indicated that the members of the Committee work in their individual capacity and that while each has an alternate, the latter do not participate in the decision-making. It is a technical Committee, comprised of two lawyers and three Permanent Representatives to the United Nations. It is not responsible for selecting the Prosecutor but, according to its terms of reference, will report to the Bureau and will “produce a short-list of at least three suitable candidates, where possible for consideration by the Bureau.”

Furthermore, he indicated that the Committee works by consensus and would present a consensus report to the Bureau. Its mandate was to facilitate the nomination and election of the Prosecutor by consensus. It had therefore not sought formal nominations from States. The process of securing a formal nomination by consensus would be taken forward by the Bureau and the Assembly once the Committee had reported.

For purposes of assisting it with its work, the Committee had been able to call on the advice of the President of the Assembly.

The two guiding principles in the Terms of Reference that informed the Committee’s work were: as much transparency as possible on the process; and confidentiality as regards candidates. As part of the wider process on transparency, the Chair of the Committee, H.R.H. Prince Zeid Ra’ad Zeid Al Hussein (Jordan), briefed the Bureau after each meeting. Furthermore, each member briefed his respective regional group. Mr. Bethlehem had also briefed the Western Europe and Others Group in New York, Brussels and Strasbourg, as well as the European Union Council of Legal Advisers (COJUR) professional associations, including the International Association of Prosecutors, and NGOs. The Committee had also received memoranda from NGOs, e.g. Human Rights Watch, and the International Association of Prosecutors, which were available on their respective websites.

The Committee had thus far received approximately 50 expressions of interest, from individual candidates or nominations from other persons. All regions were represented in the pool of candidates, although some more so than others, as well as all legal and linguistic traditions, and there was an adequate gender representation. The nominees had a range of experience, with some having much experience in international criminal tribunals, and others at the national level, either as a judge or prosecutor. In his view, the majority were strong, viable candidates, and whoever

emerged as the consensus candidate would be a highly credible candidate, having been judged against the international standard.

As regards timelines, in the past few weeks the Committee had reduced the list of approximately 50 candidates to a short-list of approximately eight, who would be interviewed in New York. It was expected that the Committee would report to the Bureau on or about 20 October, with the advice that the list of candidates should immediately be made public. All States would receive the report and the Assembly could then immediately begin to seek an emerging consensus around a candidate likely to engender support from all States Parties.

As regards an argument advanced by some that it was necessary to judge the future prosecutor by his/her record of achieving convictions, he noted that this was not in fact a yardstick that was generally applied when appointing prosecutors. Furthermore, pursuant to the Rome Statute, it was possible for a candidate with judicial experience to be elected Prosecutor. For the Committee, the provisions of article 42, paragraph 3, of the Statute, which related to expertise, personal integrity and language ability, were fundamental.

Mr Bethlehem stressed the importance of the Committee's mandate to facilitate the nomination and election of the next Prosecutor by consensus, noting that this would give the Prosecutor comfort that s/he had been elected with the support of the whole of the membership, as well as having been tested against his/her peers. He noted that the Court and the Office of the Prosecutor (OTP) would face challenges over the next period, and it would therefore be important for the Prosecutor to know that s/he was chosen by the membership as a whole.

Question and answer segment

In response to a query on how the Committee identified the most capable candidates for inclusion in the short-list, the representative of the Committee stated that there were a number of candidates whom the Committee would wish to see on the short-list, whose names had been submitted by other individuals. These candidates were considering whether they wished to go forward with their candidature.

As regards the profile of the candidates the Committee was guided by the provisions of article 42, paragraph 3, of the Statute which, he noted, required either prosecutorial or judicial experience. It could be assumed that each candidate to be interviewed by the Committee has very direct and relevant experience either as a judge or prosecutor, or both, and may also have had experience in government, e.g. as a minister.

As regards how the names were selected the representative of the Committee recalled that after the first Committee meeting, a press release had been issued, and the Chair of the Committee had held a press conference. Both the press release and the press conference had encouraged the presentation of additional names. Furthermore, the Committee, as a group and with the alternates, undertook its own research and compiled its own list, which was supplemented by other nominations.

In response to a query on how the Committee evaluated the managerial skills necessary for the Office of the Prosecutor, the representative recalled that the Prosecutor indeed performed many different roles, i.e. as Chief Prosecutor; exercised managerial functions; and s/he may also be the public face of the Court, e.g. in reports to the United Nations Security Council and meetings with the press. Managerial competence will be considered in the interviews. It would be

for the Assembly to decide whether the shortlist candidates had the necessary competence, as well as the balance of managerial and the other skills that it would prefer to see.

Clarification was sought on a view expressed regarding the presence of an observer in the interviews whose role was to assist the Committee and, in that regard, the query was posed as to the legal basis for any observer in the work of the Committee. The representative of the Committee indicated that there would be no outside observers in the interview process, the only question being whether the President of the Assembly should sit on the interviews, not as a decision maker, but as the one responsible for guiding the post-Committee process. He might be called upon to answer candidates' questions on future procedural steps. In his view, it was appropriate for the President to be present in the interviews, but indicated that, whether the Assembly President did indeed sit in on the interviews would be a matter for decision of the Committee in due course. He also reiterated that the decision of the Committee on its report will be that of the five members of the Committee alone.

In response to a question on how the Committee dealt with candidates "without a nationality", the representative of the Committee indicated that all candidates had a nationality, the only question being whether the Committee should rule out of consideration candidates with the nationality of a non-State Party. In that regard, it was the Committee's view that, at very senior levels of the Court, there were officials from non-States Parties, including in the OTP. The Committee acted consistently with the position that it was a technical Committee, and since the Rome Statute did not limit the position of Prosecutor to nationals of States Parties, the Committee was open to considering all candidates. He noted that States could, however, hold the view that a candidate from a non-State Party was not eligible for election, which would be a legitimate view, but a political, not a technical one.

Regarding the process beyond the Committee's report i.e. the next step for candidates not included in the short-list, and how the Committee would deal with this, the representative noted that it was part of the Committee's professional and human responsibilities to give feedback to nominees, and hoped that there would be the opportunity for feedback, which should come from the Chair.

Furthermore, the separate question existed of whether anything might be usefully done with the list of highly experienced lawyers, judges and prosecutors, who might be eligible for other positions in the field of international criminal law. He hoped that the Committee could communicate the list to the United Nations Secretary-General or the UN Legal Counsel, so that this expertise was not lost.

The Committee's representative was requested to expand on the content of the report and how each candidate would be described, including the extent to which it would assist States to discern the strengths/weaknesses of each candidate. He indicated that as the report would be a decision of the five members, he did not wish to pre-empt or prejudge it. The role of the Committee beyond the report was to assist the Assembly to identify a consensus candidate with the right expertise. It would therefore include sufficient information in the report to assist this process, while ensuring that it did not go beyond its mandate.

On the question of whether the Committee saw itself as competent to make recommendations concerning suitability for the position of Deputy Prosecutor/s, the representative of the Committee recalled that its mandate was to prepare a short-list of candidates for the post of Prosecutor only. The Statute provided that it was the responsibility of the Prosecutor to draw up a list of candidates for Deputy Prosecutor(s). However, it followed that the

shortlisted candidates for the post of Prosecutor would include candidates who would also be able to carry out the functions of Deputy Prosecutor. It would, however, be for the Prosecutor to make recommendations to fill the position of Deputy Prosecutor/s.

With respect to the possibility envisaged in article 42, paragraph 4, of the Statute for the Prosecutor to serve a term shorter than nine years, it was noted that this was not a matter for consideration by the Committee but would rather be for the Assembly. The question was posed whether the Committee would consider the criteria for determining a shorter term. In response, the representative indicated that this question fell within the remit of the Assembly.

As regards the Committee's consideration of the desirability of regional and gender spread in the preparation of the short list, or whether it would focus only on the merits, the representative indicated that while the gender spread was not as equal as the Committee would have liked, within the approximately 50 candidates there were very highly qualified candidates of both genders.

In response to a query on how the Committee proposed to conduct interviews and how many references would be contacted, the representative indicated that interviews must be fair to all nominees, so each would be allocated the same amount of time. The Committee would continue to do its own research from open sources on the persons it proposed to interview, and was following up on all references. The Committee was carrying out a due diligence process with respect to the interviews and aimed to do everything possible to identify serious and credible candidates.

The Committee representative enquired of the Working Group whether there was any issue or message which he could take back to the Committee.

A point was raised that, as regards the Independent Oversight Mechanism (IOM), strong views had been expressed by the Prosecutor at the ninth session of the Assembly with a view to having the issue of independence addressed in a particular way, as a result of which the Assembly had found a negotiated solution. It was suggested that the Committee might pose questions on matters of oversight, which was an issue related to management capabilities. The Committee member was familiar with the IOM debate, and imagined that there was much interest in this issue in the Committee and in the Assembly.

In response to the thanks and appreciation expressed for the detailed briefing, the representative noted that all the members of the Committee had been concerned to find the right balance of transparency.
