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Report of the Bureau on the establishment of a permanent due diligence process for elected officials

I. Introduction and mandate

1. The mandate for the establishment of a permanent due diligence process for elected officials was contained in paragraph 83 of resolution ICC-ASP/21/Res.2, adopted by the Assembly of States Parties at its twenty-first session on 9 December 2022:

83. *Tasks* the Bureau to continue consultations with States Parties, the Court and civil society for the development of a vetting process for all elected ICC officials, and to report to the Assembly with a view to adoption of a vetting process as soon as feasible and no later than its twenty-second session, taking into account the ongoing consideration of the relevant IER recommendations, the outcomes of the lessons learnt exercise of the Prosecutor's selection process including by liaising with its co-facilitators and the Bureau's review of the due diligence process for candidates for Deputy Prosecutor;

2. At the fourth meeting of the Bureau, on 12 April 2023, the President of the Assembly presented an initial draft proposal for a due diligence process for candidates for elected officials of the International Criminal Court. The proposal had been prepared on the basis of the ad hoc due diligence processes adopted by the Bureau for the elections of the Deputy Prosecutor,¹ the Registrar² and the judges.³ The Bureau agreed that it would be necessary to appoint a facilitator to coordinate the consultations on the topic with all States Parties, the Court and civil society, as required by the Assembly mandate, and to prepare an updated proposal taking into account the views expressed.

3. On 31 May 2023, pursuant to nominations from the New York and Hague Working Groups, respectively, the Bureau appointed the following co-facilitators on the establishment of a permanent due diligence process for elected officials:

- a) Mr. José Juan Hernández Chávez (Chile); and
- b) Mr. Nicolás E. Ortiz Marín (Ecuador).

II. Informal consultations

4. The co-facilitators convened informal consultations on 6 July, 5 September, 31 October and 10 November 2023, in order to take forward the work on the initial proposal

¹ See agenda and decisions of the fifth meeting of the Bureau (7 July 2021), annex, available at: https://asp.icc-cpi.int/sites/asp/files/asp_docs/ASP20/Bureau05_agenda%20and%20decisions.pdf.

² See agenda and decisions of the fifth meeting of the Bureau (8 June 2022), annex, available at: <https://asp.icc-cpi.int/sites/asp/files/2022-07/2022-Bureau5-agenda-decisions.pdf>.

³ See agenda and decisions of the third meeting of the Bureau (10 March 2023), annex, available at: https://asp.icc-cpi.int/sites/default/files/asp_docs/Bureau3-Agenda-Decisions.pdf.pdf.

for a permanent due diligence process for elected officials. The meetings were convened via remote link, to enable participation of representatives in both The Hague and New York, and were open to States Parties, non-States Parties, the Court, and non-governmental organizations.

5. At the meeting on 6 July 2023, the co-facilitators outlined the evolution of the ad hoc due diligence processes and the mandate to establish a permanent due diligence process, and introduced the initial draft proposal. They noted that the process set out in the proposal was quite similar to the ad hoc processes, including the most recently adopted due diligence process for judges. As with the ad hoc processes, it was proposed that the permanent process would have two main elements: an in-depth background check, and a confidential channel for the receipt of allegations of misconduct. It was envisaged that the Independent Oversight Mechanism (IOM) would have a significant role, as it had in the ad hoc due diligence processes.

6. Support was expressed for the development of a permanent due diligence mechanism, recognizing the important role such a mechanism played in strengthening the election processes. The initial draft was welcomed as a good basis for further discussion and there was agreement that the procedure, at least in its initial form, should be limited to those elected officials of the Court to whom the Rome Statute applied the criterion of “high moral character”.⁴ At the same time, some suggestions were made regarding elements of the draft on which further clarity or elaboration might be useful. The co-facilitators subsequently invited written comments on the draft proposal, and a compilation of comments received was circulated on 4 August 2023.

7. At the meeting on 5 September 2023, views were exchanged on the written proposals received and potential adjustments to the draft proposal. The co-facilitators indicated that they would prepare a revised draft proposal, taking into account the written proposals received and the comments made during the meeting. On 25 October 2023, the co-facilitators circulated a revised draft proposal. The revised proposal was discussed at the meeting on 31 October 2023. The co-facilitators circulated a further revised draft on 7 November 2023, which was discussed at the meeting on 10 November 2023. A final revised draft, dated 14 November 2023, was circulated and agreed on 16 November 2023.

8. Different views were expressed on whether or not the procedure should seek to define the concept of “high moral character”. Some States Parties wished to see a clear and explicit definition in the procedure. Other States Parties had some concerns about the difficulty of reaching a conclusion on such a definition, and noted the implications such a definition might have for similar concepts in other legal regimes. While the procedure, and particularly the confidential channel, was focused on allegations of “misconduct”, the point was made that high moral character was a broader concept.

9. Additionally, the point was made by some States Parties that the scope of “misconduct” should not be interpreted narrowly or in a limited manner, in order to reconcile it with the broad conception of “high moral character”. In that sense, the need for the IOM to capture as much potential misconduct as possible was strongly advocated for, including outside the workplace. The co-facilitators expressed that the procedure sought to strike a careful balance and provide a workable mechanism, and that the provision for criminal records would also capture relevant conduct outside the workplace.

10. Some States Parties wished to see a mechanism by which anonymous complaints could be received though the confidential channel, at least initially. However, it was also acknowledged that it would be difficult to have a robust system for anonymous complaints without significantly changing the resourcing and mandate of the IOM. The point was made that anonymous complaints were permitted in the context of the IOM’s mandate as regards staff and elected officials of the Court. At the same time, it was also noted that the IOM had specific modalities to enforce its investigations internally, which would allow it to mitigate the additional risks associated with anonymous complaints.

11. Some concerns were expressed during the consultations about the need to prevent, to the extent possible, retaliation against complainants. To address this concern, additional language was introduced in the draft to clarify that retaliation was to be considered a form of

⁴ See Rome Statute, article 36, paragraph 3(a); article 42, paragraph 3; and article 43, paragraph 3.

misconduct, and that it would be subject to the same assessment and treatment by the IOM under the procedure as other forms of misconduct.

12. The importance of equal treatment of candidates was noted, and it was emphasized that the IOM should ensure fair treatment when implementing the procedure.

13. Different views were exchanged on the desirability of establishing a clear timeline for the different steps in the procedure. At the same time, it was noted that the procedure would have to apply across various different election processes, with some quite different elements, including elements which may be subject to change in future elections. For this reason, the draft provided some flexibility for the development of a precise timeline by the IOM for each procedure as it arises.

14. During the informal consultations, the point was made that there may be a need for further consideration of the interaction between the due diligence process and other mandates and procedures, including the Terms of Reference of the Advisory Committee on Nominations,⁵ the Procedure for the nomination and election of judges, the Prosecutor and Deputy Prosecutors of the International Criminal Court,⁶ and the operational mandate of the IOM. While the co-facilitators considered these elements beyond the scope of their mandate, it was agreed that it would be appropriate for the Bureau to consider the matter further in order to facilitate the implementation of the due diligence procedure. It was also noted that any future decisions regarding the process for the election of the respective elected officials would need to take the due diligence process into account.

15. As regards the impact of the due diligence procedure on the future resourcing of the IOM, the point was made that it was difficult to estimate precisely the level of funding that would be required for the IOM to implement the procedure in a given year. The Assembly would need to consider any resource implications in future years in the context of the proposed programme budget for that year..

16. As concerns the future implementation of this due diligence procedure, the co-facilitators consider it pertinent to increase the visibility of the work of the IOM in this regard, in order to make sure that relevant stakeholders are informed of the relevant procedure.

III. Conclusion and recommendation

17. On the basis of the informal consultations, it is recommended that the Assembly adopt the draft due diligence procedure for elected officials contained in annex I to this report, and the draft resolution text contained in annex II to this report.

⁵ ICC-ASP/10/36, annex, as amended by resolutions ICC-ASP/18/Res.4 and ICC-ASP/21/Res.2.

⁶ Resolution ICC-ASP/3/Res.6, as amended.

Annex I

[Draft] Due diligence procedure for candidates for elected officials of the International Criminal Court

Introduction

1. The following due diligence procedure for elected officials of the International Criminal Court (hereafter “due diligence procedure”) shall apply to all candidates for Judges, Prosecutor, Deputy Prosecutor, Registrar and Deputy Registrar of the International Criminal Court (“the Court”).
2. The due diligence procedure shall be conducted by the Independent Oversight Mechanism (“IOM”) with the assistance of the Registry of the Court and the Secretariat of the Assembly of States Parties, as appropriate.
3. The due diligence procedure is intended only to assist States Parties and/or the authority in charge of the election process,¹ as appropriate, to assess whether there might be relevant concerns as to whether such candidates possess “high moral character” as required by the Rome Statute. It is without prejudice to other efforts or mechanisms to assess the professional skills and competencies of such candidates.

Background check

4. The opening of the nomination process for candidates for judges or any vacancy announcement for an elected official shall provide information on this due diligence procedure and include a requirement for the candidates to complete a detailed questionnaire to be provided to them by the IOM, providing consent to contact former employers and employees, State authorities, or academic institutions, as appropriate.
5. The Secretariat of the Assembly, or the authority in charge of the election process, as appropriate, shall provide to the IOM the nominations by States or list of names of candidates with all accompanying supporting documentation.
6. The IOM shall contact the candidates and require them to complete a detailed questionnaire, and provide consent to contact former employers and employees, State authorities, or academic institutions.
7. When sending the questionnaire and request for consent to candidates in accordance with paragraph 6, the IOM shall provide the candidates with an appropriate deadline for submission and advise of the consequences of non-compliance set out in paragraph 8. This communication from the IOM shall also be copied to the nominating States Parties (where relevant).
8. The IOM shall inform the Presidency of the Assembly of any failure of a candidate to submit a completed questionnaire, or provide the required consent, within the deadline. The IOM shall also include information in its report to the Presidency of the Assembly on the impact of that failure on its ability to assess the candidate in accordance with paragraph 23 and, on that basis, may recommend that the candidate not be considered further for election.
9. The IOM shall conduct an in-depth background check of criminal, academic and employment records of the candidates with the assistance of relevant sections of the Registry, as appropriate. The check shall include a review and analysis of open-source information and contacts with former employers and, where feasible, employees who may have worked with the candidates.
10. States Parties commit to assisting the IOM fully in any inquiries regarding this review, and to respond to any IOM request in a timely manner.

¹ Without prejudice to future decisions of the Assembly, the “authority in charge of the election process” means: the Advisory Committee on Nominations of Judges, for the election of Judges; a Committee that may be established, for the election of the Prosecutor; the Prosecutor, for the election of the Deputy Prosecutor; and the Presidency of the Court, for the election of the Registrar and Deputy Registrar.

Confidential channel for the receipt of allegations of misconduct

11. For the purposes of this due diligence procedure, “misconduct” refers to human rights violations; incidents in the workplace or in connection with work of harassment, including sexual harassment, abuse of authority, discrimination and bullying; as well as other ethical or legal breaches of a serious nature such as fraud or corruption.²

12. As soon as the IOM has received the nominations or list of names, the IOM shall open a confidential channel for the receipt of allegations of misconduct against any of the candidates nominated by States or included in a public list provided to the Assembly of States Parties.

13. The opening of the confidential channel shall be communicated to all States Parties by the Secretariat of the Assembly of States Parties and shall be disseminated through the Court’s website and social media accounts, as well as through efforts by States Parties and civil society to provide information thereon to relevant agencies and professional associations. In particular, States Parties that have nominated candidates for judges shall ensure that the process for submitting information to the channel, including how allegations received will be treated, is provided to the organizations where the candidate has previously worked or is currently working, noting that they are being considered as judicial candidates at the Court.

14. The confidential channel for the receipt of allegations shall remain open for a time determined by the IOM for each election, which shall in no case be less than sixty (60) days. In the event of an extension of a nomination period, where relevant, the IOM shall ensure equal treatment between candidates.

Review of allegations of misconduct

15. Any allegation made shall be accompanied by relevant information and documentation to the extent that it is available to the complainant.

16. The IOM shall acknowledge receipt of any allegation received, and explain the process of review, and how the information received will be treated. The complainant shall also be informed that they may be contacted by the IOM to provide additional details of their allegations, and that failure to provide such additional information may lead to the allegation not being reviewed any further. Anonymous allegations shall not be accepted.

17. The allegation and its review by the IOM shall be confidential and always remain so. Under no circumstances shall the identity of the complainants be disclosed without their prior consent. Only when the allegation cannot be reviewed and assessed based on available corroborative evidence, and disclosure is necessary to ensure fairness, may the IOM seek the consent of the complainant to any such disclosure. When such conditions are met and the IOM does not obtain the required consent from the complainant, the IOM shall set aside the allegation and discontinue its review.

18. The IOM shall first review the allegation and consider whether it relates to misconduct. If it does not, the review of the allegation shall be discontinued. If the allegation relates rather to concerns about the candidate’s qualifications, abilities, or past performance, the IOM shall convey the relevant information, taking into consideration any confidentiality concerns expressed by the complainant, to the Chair of the Advisory Committee on Nominations of Judges (“ACN”), or the authority in charge of the election process, as appropriate.

19. When the allegation relates to misconduct, the IOM shall review the credibility of the allegation, including by obtaining further information and details from the complainant, either in writing or through an interview, and corroborating, to the extent possible, the information obtained.

20. The IOM shall also assess the materiality of the allegation, determining the type of misconduct at issue and its seriousness.

² In this context, the definitions of harassment, sexual harassment, abuse of authority, and discrimination shall be those found in the International Criminal Court’s Administrative Instruction *Addressing Harassment, Including Sexual Harassment, and Abuse of Authority* (Ref. ICC/AI/2022/003), 6 April 2022, available online.

21. Any allegation found to be credible and material by the IOM shall be put to the candidate, to allow them a full and fair opportunity to respond to the allegation, either in writing or through an interview. Any candidate contacted by the IOM in this context shall be warned not to retaliate against any complainant and shall be informed of the consequences of retaliation as set out in paragraph 22.

22. If the IOM receives any allegations of retaliation against the complainant by the candidate, it shall assess the credibility and materiality of those allegations as a form of misconduct as set out in this procedure. If any allegation of retaliation is found to be credible and material, the IOM shall inform the nominating State Party (where relevant) and the ACN Chair or other relevant authority in charge of the election process. The IOM shall further include this information in its report to the Presidency of the Assembly.

Reporting

23. At the conclusion of the review process and within the time period to be established for each election process, the IOM shall submit to the Presidency of the Assembly a report regarding any concerns it may have identified that it considers could affect the assessment of high moral character of any of the candidates for elected officials pursuant to paragraph 1. In particular, it shall include an assessment as to whether, on the basis of all the information before it, there is sufficient credible and material evidence, in the IOM's view, to raise concerns about the candidate's high moral character. A copy of this report shall be transmitted to the Chair of the ACN, or the authority in charge of the election process, as appropriate.

24. The IOM report to the Presidency of the Assembly shall also include information on the overall number of allegations received that lacked sufficient credibility or materiality to be put to the candidates, or that otherwise were not reviewed by the IOM such as anonymous allegations, allegations for which there was lack of consent to disclose identity when necessary, or performance-related allegations. In order to preserve the confidentiality of the process, only general information on the reasons to set aside the allegation shall be provided.

25. If an allegation was presented to a candidate, a short summary of that allegation and the response provided by the candidate shall be included in the report to the Presidency of the Assembly in a manner that ensures that the complainant's identity is not disclosed and no identifying details are provided.

26. Should the IOM be unable to reach a definite conclusion on the allegation by the time of its report to the Presidency of the Assembly, it shall identify whether it would be possible to take further investigative steps to confirm or refute the allegation, and what these steps would entail in terms of time and resources, including any impact these steps may have on the overall process.

27. The IOM shall provide any candidate who was notified of an allegation against them the IOM's assessment of the allegation, at the same time as the report is submitted to the Presidency of the Assembly. The IOM shall also inform the complainant and the nominating State Party (where relevant) of its assessment in such cases.

28. The IOM shall also submit a report to the Assembly containing a general overview of the procedure undertaken, as well as any insights on lessons learned for the future.

Decision on the way forward

29. If the IOM report contains any matters that, in the IOM's view, based on its assessment of sufficient levels of evidence, credibility and materiality in accordance with paragraph 23, may raise concerns about the high moral character of any of the candidates, the Presidency of the Assembly shall request written observations on such matters from the authority in charge of the election process, as appropriate. The Presidency shall transmit the IOM report and written observations received to the Bureau. The Presidency shall also recommend a course of action to be adopted by the Bureau or the Assembly, as appropriate, including, *inter alia*, briefing States Parties on the information contained in the IOM report.

Annex II

Draft resolution language for the omnibus resolution

The following paragraph is recommended for inclusion in the omnibus resolution, to replace paragraph 83 of the resolution adopted by the Assembly at its twenty-first session (ICC-ASP/21/Res.2):

The Assembly of States Parties,

Recalling its decision¹ to task the Bureau with the development of a vetting process for all elected officials of the Court, *welcomes* the report of the Bureau on the establishment of a permanent due diligence process for elected officials,² *adopts* the due diligence procedure for elected officials of the International Criminal Court (“due diligence procedure”) contained in annex [...] to this resolution, *requests* the Bureau to consider any amendments to other mandates and procedures which may be necessary to implement the due diligence procedure in the future, and *emphasizes* that the due diligence procedure will need to be taken into account in any future decisions on the process for the election of the Judges, Prosecutor, Deputy Prosecutor(s), Registrar and Deputy Registrar;

In addition, the following paragraph is recommended for inclusion in annex I to the omnibus resolution:

6. With regard to **elections**,

(a)bis *requests* the Bureau to report to the Assembly at its twenty-third session on possible amendments to other mandates and procedures which may be necessary in order to implement the due diligence procedure for elected officials;

¹ ICC-ASP/21/Res.2, para. 83.

² ICC-ASP/22/36.