

Information and comments from Switzerland on its prospective procedure for the nomination of judicial candidates to the International Criminal Court pursuant to resolution ICC-ASP/18/Res. 4

30 September 2021

The Federal Department of Foreign Affairs of the Swiss Confederation presents its compliments to the Secretariat of the Assembly of States Parties to the Rome Statute of the International Criminal Court and has the honor to refer to the Secretariat's note, dated 21 June 2021, regarding the submission of information and comments from the States Parties on their existing or prospective nomination and selection procedures pursuant to resolution ICC-ASP/18/Res. 4.

Switzerland presents the below information pursuant to resolution ICC-ASP/18/Res. 4 paragraph 6, which encourages States Parties to submit information and commentary on their own existing or prospective nomination and selection procedures. Moreover, the Independent Expert Review addressed the improvement of the system of nomination of judges in its Final Report, dated 30 September 2020. In their Recommendation 376, the Experts also encouraged States to submit information as requested in resolution ICC-ASP/18/Res. 4 paragraph 6. With this submission, Switzerland wishes to contribute to this endeavor.

Switzerland welcomes the efforts by the Assembly of States Parties to improve the effectiveness and efficiency of the Court system, including through ensuring a merit-based election of highly qualified candidates as judges. Strengthening the process for judicial nomination is one important element.

In its foreign policy strategy for 2020-23, the Swiss government made supporting an effective International Criminal Court a priority. Within this context, Switzerland is focusing on ensuring that only the most qualified individuals are nominated and elected to high offices of the Court. For example, in February 2020, together with Uruguay and Open Society Justice Initiative, Switzerland organized a workshop on national nomination procedures for judicial candidates. One outcome was a practical Tool-Kit, which serves States Parties in establishing or improving their respective nomination procedures. Switzerland has already supported and participated in exchanges between States Parties that aimed at sharing experiences and good practices, for example by organizing a side event during the 19th Assembly of States Parties.

By submitting its draft procedure, Switzerland hopes to actively contribute to the exchange on national procedures including to the compendium to be prepared by the Advisory Committee on Nominations of Judges (ACN) as a reference document. Switzerland has full confidence in the ACN mandate and the respective facilitation.

Today, information is provided with regards to the draft prospective Swiss procedure for the nomination of judicial candidates to the Court. In the drafting process, due consideration was given to the encouragement of States Parties in paragraph 5 of ICC-ASP/18/Res.4 'to also take into account good practices at the national and international levels when conducting their national procedures for the nomination of candidates to the Court'. The Swiss draft procedure will be finalized once the ACN's compendium is available, further exchange among States has taken place and learnings have been identified. Switzerland is indeed convinced that learning from each other will help States improve their national procedures.

Directive on the nomination of judicial candidates by Switzerland to the International Criminal Court

1 Principles

- 11 The Federal Department of Foreign Affairs (FDFA) shall decide on the nomination of a judicial candidate to the International Criminal Court (ICC), taking into account in particular:
 - a. whether there is a foreign policy interest in the nomination and;
 - b. whether there is a prospect of a judicial candidate nominated by Switzerland being elected.
- 12 The Federal personnel legislation (Bundespersonalrecht) is not applicable.
- 13 The principles applying to the nomination are those laid down in relevant international law and Swiss constitutional and administrative law. These include:
 - a. principles of equality before the law and non-discrimination (Art. 8(1) and (2) Federal Constitution of the Swiss Confederation);
 - b. protection against arbitrary conduct (Art. 9 Federal Constitution of the Swiss Confederation);
 - c. principle of good faith (Art. 5(3) and Art. 9 Federal Constitution of the Swiss Confederation);
 - d. transparency.

Commentary:

- (1) Under this directive, Switzerland has established a formal procedure for the nomination of judicial candidates to the ICC. The purpose of formalising the procedure was to ensure transparency and accountability.
- (2) In accordance with article 36(4)(a) of the Rome Statute, two procedures are available to States Parties for the nomination of judicial candidates: i) the procedure used by the State for the appointment to its highest domestic judicial offices; or ii) the procedure used by the State for the nomination of candidates to the International Court of Justice (ICJ), i.e. through the Permanent Court of Arbitration (PCA) national group. Under this directive Switzerland has opted for the second procedure, with enhancements aimed at meeting the requirements for an impartial body.
- (3) Switzerland nominates judicial candidates in a competitive procedure and based strictly on merit.
- (4) In accordance with the Rome Statute, Switzerland may nominate judicial candidates who are nationals of other States Parties.

- (5) It is in Switzerland's foreign policy interest to advance the efficiency and effectiveness of the ICC. Switzerland is, in particular, committed to preserving the integrity and independence of the Court. Switzerland will nominate judicial candidates who will contribute to this commitment.
- (6) While the decision to nominate a judicial candidate is a prerogative of individual States Parties to the Rome Statute, the actual election of judges is for the Assembly of States Parties (ASP). The assessment of the prospect of a judicial candidate actually being elected will include inter alia the expected minimal voting requirements (MVRs) for the election at hand. The Rome Statute and the ASP have established MVRs as a way to ensure adequate gender, geographical and expertise-based representation.
- (7) The list of principles applying to the administrative procedure in paragraph 13 is not intended to be exhaustive.

2 Public call for applications

- 21 The Directorate of International Law (DIL) of the FDFA shall publicly announce the launch of the nomination procedure. The notice shall include in particular:
 - a. information about the procedure and time frame for nomination and election;
 - b. the nomination criteria (section 3 below);
 - c. applicable rules concerning the incompatibility with the exercise of any other occupation of a professional nature (Art. 40 Rome Statute);
 - d. the information that there is no entitlement to a position and that the nominated person must undergo a competitive election process;
 - e. the time schedule for assuming office (Art. 35 Rome Statute, including all available information relating to Art. 35(3) Rome Statute) and the existing terms of office (Art. 36 and 37 Rome Statute).
- 22 The DIL shall ensure that the call for applications reaches a wide and relevant audience. The target audience includes concerned national and international professional associations, universities, non-governmental organisations and judicial institutions.
- 23 The DIL shall set a reasonable period for the submission of applications and provide details of a point of contact for questions.

Commentary:

- (1) The DIL is responsible for dealing with legal questions pertaining to international law and Switzerland's foreign relations in general (Art. 8(1) of the Organisation Ordinance for the FDFA, OrgO-FDFA). It has primary responsibility within the Swiss government for the field of international criminal justice (Art. 8(3)(g)(1) OrgO-FDFA). Among other things, the DIL provides legal advice to the Federal Council in the conduct of its foreign policy and is involved in the development of public international law, in particular in the negotiation, conclusion and implementation of international treaties (Art. 8(3)(a) and (b) OrgO-FDFA).

- (2) Switzerland uses an open and transparent selection process by inviting applications through a public call for applications. The call for applications outlines the process, as well as the nomination criteria.
- (3) The call for applications is widely disseminated in Switzerland and abroad. This enlarges the pool for the nomination of the most qualified Swiss or foreign candidates.
- (4) Switzerland encourages gender parity and representation of diverse geographic regions.
- (5) The time schedule for assuming office and all relevant information must be communicated clearly and transparently. This must also refer to the fact that a judicial candidate is not necessarily immediately appointed to the ICC after a successful election, as ICC judges cannot be replaced during ongoing proceedings. Applicants must be made aware of article 35(3) of the Rome Statute and should not therefore resign from their current employment before being called to full-time service by the Presidency.

3 Nomination criteria

31 The statutory election criteria shall be made clear. These are:

- a. independence (Art. 40 Rome Statute);
- b. high moral character (Art. 36(3)(a) Rome Statute);
- c. impartiality (Art. 36(3)(a) Rome Statute);
- d. integrity (Art. 36(3)(a) Rome Statute);
- e. possession of the qualifications required in applicants' respective States for appointment to the highest judicial offices (Art. 36(3)(a) Rome Statute);
- f. established competence in criminal law and procedure, and relevant experience, whether as judge, prosecutor, advocate or in other similar capacity, in criminal proceedings; or established competence in relevant areas of international law such as international humanitarian law and the law of human rights, and extensive experience in a professional legal capacity which is of relevance to the judicial work of the Court (Art. 36(3)(b) Rome Statute);
- g. excellent knowledge of and fluency in at least one of the working languages of the Court (Art. 36(3)(c) Rome Statute).

32 Any further specification of criteria or additional criteria shall also be made clear, in particular:

- h. no criminal record and no substantiated evidence of misconduct relevant to the exercise of the function;
- i. competitiveness (e.g. profile with a prospect of gaining a sufficient number of votes, availability and competency to run a successful campaign);
- j. law degree or equivalent legal qualification(s);
- k. at least ten years of relevant experience;
- l. knowledge of the ICC and its working methods;
- m. experience with the ICC and experience in international relations are an asset

- n. Swiss national or foreign national of a State Party to the Rome Statute whose State is not yet represented by a judge at the ICC (Art. 36(4) in conjunction with 36(7) Rome Statute);
- o. availability for effective completion of the 9-year mandate (Art. 35 Rome Statute), including travel, and availability for a pre-election campaign of approximately 1 year;
- p. interpersonal skills including ability to work in a team.

Commentary:

- (1) This provision sets out clear and detailed nomination criteria based on the general election criteria of the Rome Statute (Art. 36(3)).
- (2) Applicants must present evidence of their compliance with these criteria to allow the panel to assess their qualifications.
- (3) Applicants shall demonstrate their legal knowledge by presenting evidence of relevant judicial opinions, scholarship and/or legal practice in the field of criminal law and/or international criminal law, and by taking a written test.
- (4) The following criteria are explained in more detail below:
 - a. Impartiality and independence. Judicial candidates must have a proven track record of independence and impartiality. Lack of previous independent positions, a history of long-standing service for the government, or a recent posting to an influential government position should raise questions regarding the candidate's ability to serve independently as a judge.
 - b. High moral character. Judicial candidates must possess high moral character and demonstrate the highest level of integrity, respect for diversity, and a commitment to gender equality. Judicial candidates must have a clean record in terms of committing, tolerating, or overlooking sexual harassment or other misconduct and unethical behaviour.
 - c. Possession of the qualifications required in applicants' respective States for appointment to the highest judicial offices. In Switzerland, the only constitutional requirement for the highest judicial office is to possess Swiss nationality. In practice, however, legal qualifications are also required. In the event that Switzerland nominated nationals of other ICC States Parties, the requirements of the relevant States would apply.
 - d. Knowledge of and experience in criminal law and procedure. The nature of cases at the ICC requires judicial candidates to possess extensive experience in criminal law and procedure. In particular, judicial candidates must hold a law degree or other advanced legal qualification. They should have at least 10 years of experience in the relevant field of law. While not specifically required by the Rome Statute, knowledge and experience in criminal law and procedure are essential for ICC judges. Judicial candidates at the ICC

should be experienced in managing trials and ensuring the integrity of proceedings, including efficiently managing the parties and participants in a politically charged working environment. Mass atrocity cases also require experience in dealing with witnesses and assessing large quantities of evidence in a fair and efficient way. While not specifically required by the Rome Statute, experience in managing or conducting complex criminal trials is essential for judicial service.

- e. No criminal record and no substantiated evidence of misconduct relevant to the exercise of the function. A criminal records excerpt (Strafregisterauszug) must be submitted as part of the application.
 - f. Competitiveness. MVRs vary from election to election as they are established to maintain diversity, giving due consideration to the backgrounds of the remaining and departing judges. The MVRs compel States Parties to cast their votes in such a way as to ensure that, at any given moment, the ICC bench is composed of at least: 1) nine judges from List A and five from List B; 2) six women and six men; and 3) two judges from each regional group (or three if the regional group has more than 16 States). States Parties must vote in accordance with the MVRs for their ballots to be valid. Candidates are more competitive if their profile corresponds to the best extent possible to the MVRs.
 - g. Interpersonal skills including ability to work in a team. Judicial candidates should demonstrate their ability and interest to work in a collegial body with peers of different nationalities and from diverse legal systems, their capacity to learn new law and jurisprudence quickly, and an openness to working within a legal framework that is different from their own national system.
 - h. Nationality. Although the Rome Statute does not require judicial candidates to be nationals of their nominating State, they must be nationals of a State Party.
 - i. Availability for effective completion of the 9-year mandate and for a pre-election campaign. In order to ensure that judges continue to perform their role effectively, it would be advisable that they leave office at the end of the year in which they reach the age of 68. In such case, judicial candidates may not be older than 59 at the time of nomination. This requirement corresponds to the domestic rule relating to judges of the Federal Supreme Court, the highest court in Switzerland (cf. Art. 9(2) Federal Supreme Court Act, FSCA)).
- 4 Information on employment conditions at the International Criminal Court
- 41 The DIL shall refer all applicants to the available information on employment conditions.

Commentary:

- (1) This information includes, for example, the salary paid, the assistance available to judges, pensions, other social security benefits, including health insurance coverage and entitlement to home leave. The information is conveyed to applicants in cooperation with the entity of the ASP, which is responsible for laying down the conditions of service applying to judges. The purpose of this provision is to ensure that judicial candidates accept the employment conditions by agreeing to be nominated by Switzerland. While in office, judges' attention should be free from such considerations to enable them to focus fully on their judicial work.

5 General rules for the assessment of applicants

- 51 The applications received shall be assessed according to the nomination criteria.

Commentary:

- (1) This provision aims to ensure that all applicants are considered fairly and impartially. Switzerland ensures a merit-based and competitive selection process through a fair, equitable and transparent evaluation of applicants' skills.

6 Pre-evaluation

- 61 The DIL shall examine whether the applicants meet the nomination criteria and conduct a clear and comprehensible initial evaluation.

- 62 The DIL shall submit the applications received and its assessment (para. 61) for pre-evaluation purposes in the form of a consultation to the following:

- a. the panel members (para. 73);
- b. United Nations and International Organisations Division (UNIOD), FDFA;
- c. Federal Office of Personnel (FOPER), Federal Department of Finance (FDF);
- d. Office of the Attorney General of Switzerland (OAG);
- e. Office of the Armed Forces Attorney General, Federal Department of Defence, Civil Protection and Sport (DDPS);
- f. in the case of foreign applicants, the relevant geographical division of the FDFA.

Commentary:

- (1) An initial specialist evaluation is carried out to take account of the broad-based expertise of the various federal entities involved in the nomination of judicial candidates to the ICC.

7 Panel

- 71 A formal panel with the requisite expertise shall be set up to ensure accountability and objectivity with regard to the internal selection of judicial candidates.
- 72 The DIL shall chair the panel.
- 73 The panel shall be composed of, whenever possible, an uneven number of members of the main Federal Administration offices concerned with the ICC (function-specific appointment) and independent actors, in particular:
- a. a Directorate member of the DIL;
 - b. a Directorate member of the Federal Office of Justice (FOJ), Federal Department of Justice and Police (FDJP);
 - c. the members of the national group of the Permanent Court of Arbitration (PCA), unless the member is an acting Directorate member of the DIL (cf. Art. 4 ICJ Statute in conjunction with Art. 36(4)(a) Rome Statute);
 - d. at least two representatives from outside the Federal Administration with relevant expertise and experience in international law or criminal and international law, for example from the judiciary, academia or non-governmental organisations.
- 74 Persons who may be biased shall be disqualified or shall withdraw from the panel.
- 75 The panel aims to reach decisions by consensus. If all efforts to reach a consensus fail, decisions must be taken by majority vote.

Commentary:

- (1) This provision establishes a formal body for assessing applicants and selecting candidates objectively and impartially. Through its composition, Switzerland ensures that the panel is diverse and balanced and has the requisite specialist knowledge. Switzerland ensures that the panel is independent and non-political as it is composed of at least seven panellists, at least five of whom are not part of the Federal Administration and only one of whom is a representative of the FDFA.
- (2) One member of the DIL is represented on the panel (para. 73 (a)). A DIL member who is also a member of the PCA national group, is not entitled to serve on the panel.
- (3) The external panellists may be Swiss or foreign nationals. For example, they may be former judges to the ICC.
- (4) All members participate equally in the panel's decision. The role of the chair in terms of decision-making is thus equal to the other panel members. Decisions are to be reached by consensus. In the exceptional case of a majority vote, the chair is treated equally to the other panel members. Shall however a majority vote not be possible (8 members, 4 vs 4 votes), the Chair shall take the final decision.

8 Function of the chair

81 The chair of the panel shall lead the selection process.

82 The chair of the panel shall propose external panellists to serve on the panel (para. 73(d)). The panel shall seek to achieve gender parity in the selection of panellists.

83 On the basis of the pre-evaluation, the chair shall make a recommendation to the panel as to which applicants should be invited for interviews.

9 Function of the panel

91 The panel members listed in paragraph 73(a), (b) and (c) shall decide which representatives from outside the Federal Administration (para. 73(d)) will sit on the panel.

92 The panel shall decide which applicants will be invited for interviews and written tests.

93 The panel shall conduct interviews and written tests to assess the expertise and language skills of the most promising applicants.

94 The panel may use additional evaluation methods to ensure that the applicants have 'high moral character' and the required skills.

95 The panel shall evaluate the applicants on the basis of the nomination criteria using all available assessment elements, in particular:

- a. the application file;
- b. the interviews;
- c. the written tests;
- d. any additional evaluation measures.

96 The panel shall submit a shortlist of the most qualified applicants to the head of the FDFA.

97 The panel shall submit a substantiated nomination proposal to the head of the FDFA.

Commentary:

- (1) All serious applicants are interviewed unless this is impracticable on account of their number, in which case the panel draws up, based on the applications, a shortlist of the best applicants.
- (2) There is an assessment of applicants' language proficiency during the interview.
- (3) In assessing the applicants' 'high moral character', the panel checks the applicants' references and any other publicly available information, with due regard to the credibility of sources. The panel creates a standard declaration for all applicants to sign that clarifies whether they are aware of any allegations of misconduct, including sexual harassment. Where such allegations have been made, the panel should weigh the applicants' declaration against other available information and reports.
- (4) The additional evaluation measures referred to in paragraph 94 may include where appropriate, subject to the applicants' consent:

- a. obtaining comments from outside bodies, including civil society;
- b. using an existing procedure or mechanism within the Swiss system;
- c. consulting a specialised company.

10 Final decision

101 The head of the FDFA shall make the final decision on the nomination of a judicial candidate.

102 If the decision of the head of the FDFA deviates from the panel's nomination proposal, grounds for the decision must be provided.

Commentary:

- (1) Decisions must be substantiated in order to ensure transparency and avoid any deviation from the panel's recommendations without good reason.

DRAFT