

OPEN SOCIETY JUSTICE INITIATIVE



September 13, 2021

Dear Prosecutor Khan and Mr. Saklaine Hedaraly,

We write with reference to the proposal for a “Due Diligence Process for Candidates for Deputy Prosecutor.” Our organizations warmly welcome the Bureau’s approval of these due diligence measures and are grateful for your efforts to ensure that the incoming Deputy Prosecutor(s) meets the “high moral character” requirement of the Rome Statute. The importance of this development cannot be overstated. This experience will serve as a model for all future elected positions to the International Criminal Court (ICC).

We are aware that the proposal was developed within a limited timeframe and regret that there were no consultations with civil society and other experts before it was adopted. Notwithstanding the significant progress that the proposal represents, it is important to strengthen several elements of the proposed measures during their implementation phase. Below, we outline a few critical areas that require careful consideration:

- (1) Definition of “misconduct.”** The current proposal states that any allegations of misconduct for the purpose of this process “refer[s] to human rights violations, incidents of sexual harassment, bullying in the workplace and other ethical or legal breaches of a serious nature such as fraud or corruption.” This definition is comprehensive; however, we are concerned that it could potentially exclude other forms of workplace misconduct, including harassment of a non-sexual nature. We therefore urge you to consider revising the definition of misconduct to include “incidents of sexual harassment and other forms of harassment and discrimination,” as well as the additional behaviors listed in the proposal.
- (2) Reputational interviews.** While the proposal envisions an “in-depth background check of criminal, academic, and employment records of candidates” to be carried out by the Independent Oversight Mechanism (IOM), it is not clear at present whether the IOM would also conduct reputational interviews. Reputational interviews involve identifying and speaking with persons who know the candidates in their professional capacity and who the candidates have not listed as references. This includes current or former colleagues, supervisors, subordinates, and others who have interacted with the candidates in different capacities. These interviews could explore, for example, the candidates’ working methods, managerial style, collegiality, timeliness, and respect for diversity. We strongly recommend that reputational interviews be a part of the background check process, and that they be conducted by an independent body like the IOM. Doing so can help reveal information about a person’s character or past misconduct that might not otherwise be

uncovered. Many acts of misconduct, for instance, do not qualify as crimes (and therefore would not be uncovered as part of a criminal record check) and may not be independently surfaced or reported through the confidential enquiry procedure proposed by the IOM. Such interviews can also help identify leads about actions or patterns of behavior that might require further inquiries.

- (3) Burdens on reporting misconduct.** We are concerned that the 14-day period currently provided for people to submit allegations of misconduct, including “all relevant information and documentation available to the complainant,” is inadequate to allow individuals to consider and make an informed decision about coming forward, especially given the potential seriousness of violations. It will be important for future diligence processes to allocate more time for potential complainants to come forward. For now, however, the short notice period makes it even more important that these due diligence measures be made public immediately. We recommend widely disseminating a public-facing explanation of the proposed due diligence measures as early as practicable, so that individuals are aware of the existence of a confidential reporting channel once the list of candidates is publicly announced.
- (4) Need for a victim-centered approach.** As these measures are made public to a wider audience, care must be taken to ensure that the process is sensitive to the barriers many victims face in reporting misconduct. Some of the requirements in the current proposal fall short of this standard. For instance, the requirement that an allegation “be accompanied by all relevant information and documentation available to the complainant,” or that “failure to provide such additional information may lead to the allegation not being reviewed any further,” could serve to discourage individuals who have experienced misconduct from coming forward. Acts like sexual harassment, for example, are often difficult to document. More broadly, the principal goal at this stage of the process should be to encourage individuals to share information that may be pertinent to assessing a candidate’s high moral character. The procedure should therefore be designed—and explained—in ways that acknowledge the difficulties many victims face in disclosing painful or traumatic incidents. In particular, it should be made clear that any information of misconduct can be brought even in the absence of specific supporting documentation.
- (5) Data protection standards.** Finally, the current proposal makes no mention of data protection measures that would extend to both candidates and any individuals who submit allegations of misconduct. Given the sensitive nature of the information that may be collected during this process, we urge you to clarify to those concerned which data protections apply and ensure compliance with them throughout the process.

The Open Society Justice Initiative and Human Rights Watch remain available for further exchanges on this important initiative. We would also urge that, going forward, this procedure invites consultations with all stakeholders, including states parties as well as civil society. We look forward to further engagement with you and your office over the course of this important undertaking.

Very truly yours,



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cc President Silvia Fernandez de Gurmendi, The Assembly of States Parties
Sam Shoamanesh, Office of the Prosecutor