

**OPEN SOCIETY  
JUSTICE INITIATIVE**

# **2020–2021 International Criminal Court Prosecutor Election Process**

**Insights and Recommendations for Future Elections**

November 2021

## Acknowledgements

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The Open Society Justice Initiative is grateful to the individuals who agreed to be interviewed and who provided valuable first-hand insights into the election process.

The Open Society Justice Initiative uses the law to promote and defend justice and human rights through litigation, advocacy, research, and technical assistance. Working as part of the Open Society Foundations, our staff are based in Abuja, Berlin, Brussels, The Hague, London, Mexico City, New York, Paris, Santo Domingo, and Washington, D.C.  
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# Contents

- Introduction ..... 4
- Recommendations..... 5
- 1. Procedure and Legal Framework for the Nomination and Election of the  
Prosecutor ..... 10
- 2. Analysis ..... 12
  - 2.1.The Committee and the Panel..... 12
    - 2.1.1. *Appointment Procedure and Composition* ..... 13
    - 2.1.2. *Vacancy Announcement and Pool of Candidates* ..... 15
    - 2.1.3. *Mandates of the Committee and the Panel*..... 17
    - 2.1.4. *The Committee’s Working Methods*..... 18
  - 2.2.Expanding the Shortlist and Consultations..... 20
    - 2.2.1. *Expanding the Shortlist* ..... 20
    - 2.2.2. *Consultations*..... 21
  - 2.3.Vetting..... 24
  - 2.4.Public Hearings..... 26
  - 2.5.Failure to Reach Consensus and Vote..... 27
- 3. Conclusion ..... 28
  
- Annex: Factual Background ..... 30
  - The Committee and the Panel..... 30
  - Mandates of the Committee and the Panel..... 30
  - Vacancy Announcement and Pool of Candidates..... 31
  - The Committee’s Working Methods..... 31
  - Vetting ..... 33
  - Expanding the Shortlist and Consultations ..... 33
    - First Round of Consultations*..... 33
    - Expanding the Shortlist*..... 34
    - Second round of Consultations*..... 34
  - Public Hearings..... 35
  - Failure to Reach Consensus and Vote ..... 35

## Introduction

The election of its third prosecutor marked a critical moment for the International Criminal Court (ICC), significantly affecting the institution’s leadership and direction. The Justice Initiative, which was an active observer of the process for the third prosecutor’s election, has produced this paper providing insights and recommendations for future elections. This paper makes no judgement about the elected prosecutor nor any of the other candidates; the focus here is on process.

The process by which ICC prosecutors have been appointed has differed since the court’s inception in 2002. The election of the ICC’s first prosecutor, Luis Moreno Ocampo, by consensus, was informally facilitated by then President of the Assembly of States Parties (Assembly) Prince Zeid Ra’ad Zeid Al-Hussein.<sup>1</sup> Toward the end of his term, the president and other experts indicated their desire to develop a more transparent and structured process. Fatou Bensouda, Ocampo’s deputy prosecutor, was elected as the second prosecutor after the Assembly appointed a five-member search committee mandated to seek qualified candidates. While this process showed improvement over the first election, civil society organizations and states parties criticized the working methods, the composition of the search committee, and a continued lack of transparency.<sup>2</sup>

The most recently concluded process promised to be significantly improved, with the creation of a Committee on the Election of the Prosecutor (Committee) and a Panel of Experts (Panel) mandated to assess individual applicants and produce a shortlist of the most qualified candidates. The process faced several challenges, including the Covid-19 pandemic, which resulted in most activities being conducted online or telephonically. This had negative and positive effects.

Overall, while the process marked progress over the previous two elections, significant room for improvement remains. Building on the Justice Initiative’s advocacy efforts to improve election and nomination procedures throughout the ICC<sup>3</sup> and drawing on a range of interviews conducted with individuals engaged in

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<sup>1</sup> Center for Development of International Law, Report on the Strengthening of the Nomination and Election Procedure for the ICC Prosecutor (2015), on file with the), p.1.

<sup>2</sup> Ibid., p.2.

<sup>3</sup> See, e.g., *Raising the Bar: Improving the Nomination and Election of Judges to the International Criminal Court* (2019), <https://www.justiceinitiative.org/publications/raising-the-bar-improving-the-nomination-and-election-of-judges-to-the-international-criminal-court>.

the process, this paper reflects on the prosecutor’s election and offers guidance on how it can be improved.<sup>4</sup>

## Recommendations

Overall, respondents interviewed by the Justice Initiative had mixed views as to whether the 2020-2021 election process was fully merit-based. Some respondents indicated that the existence of the Committee and the Panel went a long way towards fair treatment of applications. Others could not see why some candidates made the shortlist while others did not, and this influenced their perception of the process’s fairness. Yet others commented that the expansion of the list of candidates represented politics taking over what they considered to be, up until that point, a merit-based process. The latter group, however, considered that the focus on merit had been preserved because all candidates in the running had been evaluated by the Committee.

Based on our interviews and research, the Justice Initiative makes the following recommendations:

I. Adequate planning and the role of the Assembly presidency

Within the framework developed by the Assembly, the presidency plays a critical role in ensuring that the election process is well planned, inclusive of multiple stakeholders, and led with integrity. For future elections, the Justice Initiative recommends:

A. Agree on a process sufficiently in advance

More time needs to be allocated in advance of the election. A two-year timeframe is advisable to ensure adequate time to develop a vacancy

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<sup>4</sup>This paper is based on desk research and primary source interviews with key stakeholders including states parties from all regions, Assembly bodies, international civil society organizations, and election commentators. The Justice Initiative requested interviews with 39 individuals, 27 of whom agreed to be interviewed. Interviews were conducted between April and June 2021 under strict terms of confidentiality and respondents were informed of the Open Society Justice Initiative’s intention to produce a public report without attribution. A standard questionnaire guided semi-structured interviews. Documents reviewed included academic articles, interview transcripts, the Rome Statute, all reports of the Committee including the July 2021 Lessons Learned from the Process of the Committee on the Election of the Prosecutor (hereinafter Committee’s Lessons Learned Report) and the July 2021 Observations from the Former Presidency on the Election Process of the third Prosecutor of the ICC (hereinafter Observations from the Former Presidency). While the Panel of Experts had also been invited to provide views on the election, its report was not available at the time of writing.

announcement and all relevant terms of reference, solicit applications, assess and vet candidates, and conduct genuine consultations. Negotiations for a process need to start early enough to allow for thorough consultations, including with civil society, and agreement on the way forward at the Assembly two years before the election.

B. Independent, proactive leadership from the Assembly presidency

Consultations to reach consensus are resource-intensive and require active political leadership to succeed. The president, assisted by the vice-presidents and any appointed focal points, should actively engage in consultations on prosecutorial candidates. The presidency should act independently at all times.

C. Increased transparency and greater communication

The Bureau of the Assembly (Bureau) and the presidency must be more transparent in future elections and communicate in a timelier fashion with all relevant stakeholders regarding any updates on the process and decision-making.

II. A diverse, qualified applicant pool

Accepting individual applications for the position of ICC prosecutor is a positive feature that the Assembly should retain. However, the Justice Initiative recommends that the following improvements be made to the process:

A. Engage a human resources professional

A human resources expert should be engaged to assist in developing the vacancy announcement (to ensure, for example, that the language used is gender-neutral and accommodates everyone including those with disabilities).

B. Advance noticing on vetting

All applicants for the position of prosecutor should, at the time of their application, be informed that they are required to submit to a vetting process in the event they are longlisted.

C. Convene an outreach team

More should be done to reach qualified candidates, including more female applicants and applicants from under-represented regions. To that end, a separate outreach team (gender-balanced, geographically representative,

and transparently selected) should be appointed with a mandate to engage local bar associations, professional associations, civil society groups, etc. and to encourage qualified applicants to apply. This team would disband after the application deadline passes; its function would remain separate from the selection body tasked with assessing and evaluating applications.

### III. Independent scrutiny and vetting

Having an independent selection body comprised of experts and governed by clear rules will advance a merit-based process and ensure that all candidates are appropriately evaluated prior to state consultations and voting. Building on the experience of the Committee and the Panel, the Justice Initiative recommends the following:

#### A. Design and composition

The combination of a panel of independent experts and state representatives should be retained; however, the members should serve on one integrated selection body. At a minimum, if a two-body model is retained, each body should have equal standing. In addition:

- i. The body should have the following experience among its members: in international and/or transnational criminal investigations and prosecutions; in working with affected communities and victims; in managing complex organizations; and of the environment in which the Office of the Prosecutor (OTP) and ICC operate. Greater human resources expertise should also be included to ensure a balanced and unbiased selection.
- ii. The body's composition should be geographically balanced.
- iii. More proactive and creative efforts should be made to increase female representation.

#### B. More detailed terms of reference

The drafting and adoption of the selection body's terms of reference should:

- i. Seek input from the entire Assembly (not only members of the Bureau) and civil society organizations.
- ii. Clearly state the selection body's mandate and authority.
- iii. Include provisions for the body to engage with civil society and oversee the vetting of longlisted candidates.

- iv. Provide sufficient leeway for the selection body to develop its own working methods.

C. Enhanced interview format

Candidates should either be interviewed for longer than one hour or there should be a series of interviews, tests, or questionnaires to provide further material to ensure a more fulsome evaluation of all candidates. States parties should allocate sufficient funds to enable such comprehensive scrutiny.

D. Vetting

Vetting is an indispensable part of the process and must respect confidentiality, be conducted fairly, and be compliant with data protection laws. It should include:

- i. Background checks, social media checks, civil litigation checks, criminal record checks, and government independence checks;
- ii. Confidential reputational interviews with several people who know the candidate in a professional capacity including former and current supervisors, colleagues and supervisees; and
- iii. A confidential channel for people to send information about a candidate and an opportunity for candidates to respond to any such allegations.

E. Make top candidates' names public

To improve transparency, the names of those candidates who are considered at an advanced stage in the process (e.g., at the interview stage) should be made public as soon as they are longlisted. All candidates should be made aware of this practice at the outset of the selection process.

IV. Fair, transparent, and dynamic public engagement

Public hearings and other forms of engagement are an important measure of transparency and a vital opportunity to learn more about the candidates. Hearings should allow for more in-depth discussions with each candidate and for a wider range of questioners and challenging questions. The Justice Initiative recommends that this critical component of the process be improved in the following ways:

A. More interactive, tailored questions



The format for hearings should be dynamic and allow for follow-up questions or an online forum to receive questions from the public, sessions with different themes, and sufficient time for each candidate to answer a question. Equal time should be allocated to states parties and civil society representatives.

B. Equitable treatment

All candidates must participate on an equal footing. If all hearings are remote, organizers must ensure that candidates can engage equally in real time. If hearings are conducted in person instead, states parties should provide financial support to all shortlisted candidates (as necessary) so that they can attend hearings and engage with interested delegations at the designated location.

C. Encourage additional sessions and other opportunities for public engagement

In addition to a joint session, there should be separate sessions. For example, there could be in-depth sessions with each candidate or run-off debates.

V. Inclusive and meaningful state consultations

Consultations should be transparent and inclusive, and sufficient time must be allocated to ensure they are meaningful. All states parties should be consulted. To achieve that, the Justice Initiative recommends to:

A. Establish focal points

The presidency should consider appointing focal points as soon as practicable, and while their instructions should be clear, focal points should have discretion to address consensus-building dynamically as consultations progress. The focal points' reports should be detailed enough to ensure transparency and facilitate decision-making.

B. Seek genuine consensus

Assembly efforts to build consensus should continue, as this may ensure more political support for the next prosecutor. In the absence of genuine consensus, it is appropriate to proceed to a vote. Genuine consensus implies that the decision to agree to a candidate should not be forced.

C. Denounce and abstain from vote trading

Vote trading is incompatible with a merit-based election. States should pledge not to engage in vote trading for the position of ICC Prosecutor, as

well as all other elected positions. The Assembly should establish a public platform for states to voluntarily pledge to forgo vote trading. The Assembly president should encourage states to pledge.

## 1. Procedure and Legal Framework for the Nomination and Election of the Prosecutor

The nomination and election of the prosecutor are governed by a framework provided by the Rome Statute, resolutions and procedural rules developed by the Assembly. Article 42 of the Rome Statute is the bedrock text and Resolution ICC-ASP/1/Res.2, as amended by resolution ICC-ASP/3/Res.6 (the Nomination and Election Resolution), contains additional rules governing the process. To encourage a merit-based election, the Assembly included an additional element to this most recent cycle: the establishment of the Committee, assisted by the Panel. The Committee was mandated to “facilitate the nomination and election of the next Prosecutor”<sup>5</sup> and the Panel was tasked to “assist the Committee in carrying out its mandate.”<sup>6</sup>

Article 42(3) of the Rome Statute sets out the relevant criteria: “The Prosecutor and the Deputy Prosecutors shall be persons of high moral character, be highly competent in and have extensive practical experience in the prosecution or trial of criminal cases. They shall have an excellent knowledge of and be fluent in at least one of the working languages of the Court.”

The Nomination and Election Resolution adds detail on finding appropriate candidates through two phases: a nomination and an election process. Typically, in accordance with legislation and practice, states are permitted to nominate candidates and a nominated candidate should preferably have the support of at least several states. For example, by the time Fatou Bensouda was nominated on

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<sup>5</sup> ICC-ASP/19/Inf.2, Report of the Committee on the Election of the Prosecutor (June 30, 2020) at [https://asp.icc-cpi.int/iccdocs/asp\\_docs/ASP19/ICC-ASP-19-INF2-ENG-CEP.pdf](https://asp.icc-cpi.int/iccdocs/asp_docs/ASP19/ICC-ASP-19-INF2-ENG-CEP.pdf) (hereinafter ICC-ASP/19/Inf.2), para. 5.

<sup>6</sup> ICC-ASP/18/Inf.2, Election of the Prosecutor – Terms of Reference (April 11, 2019) at [https://asp.icc-cpi.int/iccdocs/asp\\_docs/ASP18/ICC-ASP-18-INF2-ENG-11Apr19-1600.pdf](https://asp.icc-cpi.int/iccdocs/asp_docs/ASP18/ICC-ASP-18-INF2-ENG-11Apr19-1600.pdf) (hereinafter ICC-ASP/18/Inf.2), para 7.

December 12, 2011 by 67 states,<sup>7</sup> she was already the consensus candidate. The Nomination and Election Resolution states that “every effort shall be made to elect the Prosecutor by consensus.”<sup>8</sup> Barring this, the prosecutor is elected by secret ballot by an absolute majority of states as per Article 42 (2) of the Rome Statute.

For the 2020 election, the Assembly charged the Committee with accepting applications, conducting a competency-based assessment, and providing a shortlist of three to six individuals from which states were to identify a consensus candidate, then formally nominate and elect them. States were “strongly encouraged to refrain from making nominations until the process set out in the [Committee’s] Terms of Reference ha[d] been completed.”<sup>9</sup>

After conducting a competency-based assessment, the Committee provided states parties with a shortlist of four candidates. Each candidate answered questions from states parties and civil society in a public hearing. After the hearings and a period of consultation, the Bureau decided to expand the list and received an additional five names from the Committee. All nine candidates participated in another round of public hearings and states conducted another round of consultations. After failing to reach consensus, the Assembly proceeded to a vote, by which 72 of 122 states parties elected Karim Khan as prosecutor on February 12, 2021.<sup>10</sup> The fact that the prosecutor got elected with 59% of votes is indicative of how polarized and contentious the election process was. For a more detailed chronology of the election procedure, see the Annex.

The 2020 process made important innovations on which future prosecutor elections could build. However, problems arose at all stages of the 2020 process, and future elections should not simply keep the same features with minor fixes. A crucial requirement of any election process is that it be fair, transparent, and merit-based—and that it be perceived as such.

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<sup>7</sup> ICC-ASP/10/38, Election of the Prosecutor of the International Criminal Court, Note by the Secretariat (December 9, 2011) at [https://asp.icc-cpi.int/iccdocs/asp\\_docs/ASP10/ICC-ASP-10-38-ENG.pdf](https://asp.icc-cpi.int/iccdocs/asp_docs/ASP10/ICC-ASP-10-38-ENG.pdf).

<sup>8</sup> Resolution ICC-ASP/1/Res.2 (September 9, 2002) at [https://asp.icc-cpi.int/iccdocs/asp\\_docs/Resolutions/ICC-ASP-ASP1-Res-02-ENG.pdf](https://asp.icc-cpi.int/iccdocs/asp_docs/Resolutions/ICC-ASP-ASP1-Res-02-ENG.pdf), para. 29.

<sup>9</sup> Secretariat of the Assembly of States Parties, Election of the Prosecutor: Background Note (July 6, 2020) at [https://asp.icc-cpi.int/iccdocs/asp\\_docs/ASP19/Prosecutor%20election%20-%20BN.pdf](https://asp.icc-cpi.int/iccdocs/asp_docs/ASP19/Prosecutor%20election%20-%20BN.pdf).

<sup>10</sup> The other candidates received the following number of votes: Fergal Gaynor 42, Carlos Castresana 5, and Francesco Lo Voi 3. See [https://asp.icc-cpi.int/en\\_menus/asp/elections/prosecutor/pages/2021results.aspx](https://asp.icc-cpi.int/en_menus/asp/elections/prosecutor/pages/2021results.aspx).

## 2. Analysis

### 2.1. The Committee and the Panel

Assembly discussions on how to ensure a competency-based process began in July 2018.<sup>11</sup> However, the presidency made no specific preparations to discuss the prosecutor election at its annual session in December 2018. Early in 2019, it became apparent that the adoption of a framework for the election could not await that year's Assembly session (usually held in November-December). The presidency proposed—and the Bureau adopted—terms of reference for the election process.<sup>12</sup> The Bureau then appointed members of the Committee<sup>13</sup> and the Panel.<sup>14</sup> Both groups' members were nominated by regional groups after a consultation process within each.

The innovation of an independent committee to assess individual applications is a practice that should be retained.<sup>15</sup> Respondents overwhelmingly preferred this process over going directly to state nominations because it prioritizes merit, transparency, and fair treatment of all candidates. A few respondents felt it best to keep state nominations as a backup, as permitted by the Rome Statute, but still favored an independent selection committee as the main component of the process.

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<sup>11</sup> Bureau of the Assembly of States Parties' Eleventh Meeting (New York, July 9, 2018), at [https://asp.icc-cpi.int/iccdocs/asp\\_docs/Bureau/ICC-ASP-2018-Bureau-11.pdf](https://asp.icc-cpi.int/iccdocs/asp_docs/Bureau/ICC-ASP-2018-Bureau-11.pdf), para. 5.

<sup>12</sup> ICC-ASP/18/Inf.2.

<sup>13</sup> The Committee comprised five representatives from the diplomatic community. Designated on June 7, 2019, the following served in their independent capacity on a pro bono basis: H.E. Marcin Czepelak (Poland); H.E. Lamin Faati (Gambia); H.E. Andreas Mavroyiannis (Cyprus); H.E. Mario Oyarzábal (Argentina) and H.E. Sabine Nölke (Canada). Ambassador Nölke served as the Committee's chair.

<sup>14</sup> The Panel consisted of Mr. Francisco Cox Vial (Chile); Ms. Aurélie Devos (France); Mr. Motoo Noguchi (Japan); Ms. Anna Richterova (Czech Republic); and Prof. Charles C. Jalloh (Sierra Leone), who served as the chair. See Taegin Reisman, *Electing the Next ICC Prosecutor: Who are the Committee Members?*, International Justice Monitor (July 22, 2019) at <https://www.ijmonitor.org/2019/07/electing-the-next-icc-prosecutor-who-are-the-committee-members/>.

<sup>15</sup> Contrary to the Committee's suggestions about state nominations (see Committee's Lessons Learned Report, paras. 5, 10, and 13), a process that encourages individual applications first will go a long way towards merit-based elections that provide an equal opportunity to all applicants. Allowing state nominations from the beginning would immediately encourage the damaging practice of vote trading.

Despite adopting the terms of reference in April 2019 (over 18 months before the election), states began negotiations on actual candidates only a few weeks before the election. The deadline to reach consensus on a final candidate was postponed numerous times, up to the last minute.

This experience poses the question whether the timeline should be any different in future elections. Many respondents indicated that there was sufficient time for the entire election process but that it was not used wisely. Certain phases were unnecessarily delayed while others, such as the last round of consultations, were rushed. Respondents had mixed views as to whether it would be helpful to start the election process earlier. One respondent suggested that the search and election process should coincide with the presidency's term. This would mean that as soon as the presidency leading the next prosecutor election is appointed, it should start devising a process.

### **2.1.1. Appointment Procedure and Composition**

Notwithstanding the support for an independent committee, several respondents felt that the appointment procedures for both the Committee and the Panel lacked transparency. They also considered that the process for drafting the terms of reference was opaque. Representatives of states parties not on the Bureau said they had little or no opportunity to provide input.

Despite an opportunity to devise the selection process earlier and seek broader Assembly engagement, the presidency failed to do so. The presidency later conceded this point.<sup>16</sup>

Many respondents underscored the importance of geographical representation in the two bodies, although some respondents questioned the use of regional groups to achieve more equitable representation. They noted that regional representation can lend itself to potential attempts to influence the Committee and Panel through the nomination of a state's own nationals. Furthermore, within some regional

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<sup>16</sup> “In retrospect, and compared to the total length of the process (from January 2019 to February 2021), the discussions and negotiations on the terms of reference of the [Committee] had been relatively short (from January 2019 to the adoption of the terms of reference on 3 April 2019). As this initial phase is the most appropriate for deliberations on some pertinent matters that define the whole process, more consideration should have been devoted to issues like the composition of the mechanism, its working methods, modalities of the assessment to be carried out (including vetting), or some specific expectations from the assessment” in Observations from the Former Presidency (July 2021), on file with the Open Society Justice Initiative, p. 2.

groups, there was reportedly no proper consultation and the appointment process lacked structure. Although civil society was invited to make recommendations for Panel members<sup>17</sup>—and did so—in practice, only candidates put forward by states parties were accepted.

Respondents raised concerns about the skillsets of both groups’ members. According to the terms of reference, the Panel was required to “have extensive national or international criminal investigation, prosecution or judicial experience.”<sup>18</sup> There was no further elaboration of these criteria, and even less was said with regard to criteria for the selection of Committee members. Overall, Panel members had a firm background in investigations and prosecutions, which was appropriately prioritized. However, respondents criticized the lack of attention to other areas of expertise, including the management of large organizations.

Several respondents remarked that the Committee and Panel should have included human resources experts, or that the bodies should have received human resources experts’ advice. This could have ensured greater sensitivity to proper hiring techniques, including gender-neutral vacancy announcements,<sup>19</sup> as well as advice on assessing candidates (to determine, for example, what weight to accord the interviews in relation to other application materials). A human resources expert or someone with expertise in hiring of senior officials could also have advised the Committee and Panel on the question of vetting for high moral character, which became crucial later in the process. Some respondents felt that members of civil society should have been represented on the selection body or bodies.

Gender balance was inadequate on both the Committee and the Panel. The Panel had three men and two women. Although a woman chaired the Committee, the remaining four members were men. One state representative pointed out that the diplomatic community is largely composed of men, especially at ambassadorial level, making it more challenging to ensure balance in committees of this sort. Respondents said that regional groups often neglect to consider gender balance in their consultations and discussions, resulting in male-dominated panels and Assembly committees. Regardless of the reasons, state and civil society respondents found the overall lack of gender balance unacceptable. Among other

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<sup>17</sup> ICC-ASP/18/Inf.2, para. 7.

<sup>18</sup> Ibid.

<sup>19</sup> See section on the vacancy announcement at p. 15.

benefits, equal representation of men and women helps ensure that selection processes are inclusive and fair, overcome unconscious bias, and provide equal opportunities to all genders.

From the beginning of the process, and reaffirmed through interviews by several state representatives, some states held the firm view that the selection must be state-driven, given states' statutory rights and responsibilities. However, some respondents suggested there should only have been a panel of experts and felt that having a committee composed entirely of state representatives was unnecessary. In this view, the Panel compensated for state representatives' lack of expertise. States' exclusive representation on the Committee risks politicizing the selection process. However, some respondents argued that state representation in the Committee was important to depoliticize the process; in their view, that was meant to ensure that the views of states were taken into account from the beginning and facilitate political negotiations later in the process. Another formulation suggested two equal bodies (instead of the Panel playing a supporting role) to ensure that the state representatives do not ignore or override the experts' views, or to create only one selection body with mixed composition. Some were under the impression that the Committee's preferences prevailed over the Panel's recommendations, which many questioned when comparing the expertise brought by each respective group.

### **2.1.2. Vacancy Announcement and Pool of Candidates**

With the approval of the Bureau and the Committee, the Panel developed a six-page vacancy announcement.<sup>20</sup> Most respondents felt that the announcement was comprehensive, sufficiently detailed, and clear, though some expressed reservations. One respondent commented that it described an unrealistic candidate and that it should have denoted the weight accorded to each competency rather than listing them in a manner that suggested equal importance. The announcement also suffered from gender bias. A human resources software analysis of the text run by the Justice Initiative marked 90 percent of its terminology as "masculine." It also did not explicitly invite those with disabilities to apply.

Perhaps reflecting the limitations of the vacancy announcements and efforts to disseminate it, the pool of applicants was limited, particularly with regard to

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<sup>20</sup> On file with the Open Society Justice Initiative.

gender and geographical representation. There were 26 female and 63 male applicants. The regional distribution was as follows:

**Table 1- Regional Distribution of Applicants for ICC Prosecutor**

Regional Group	States Parties	Non-States Parties	Total
<b>Africa Group</b>	20	9	29
<b>Asia-Pacific Group</b>	2	5	7
<b>Eastern European Group</b>	4	1	5
<b>Latin American and Caribbean Group</b>	7	1	8
<b>Western European and Others Group</b>	36	4	40

During public interviews, the Committee reported that the pool of applicants was “shallow”<sup>21</sup> and recommended in its final report that further efforts be made by the Bureau and by states parties to “encourage applications from women and candidates from the Asia Pacific Group, Eastern European Group and Latin American and Caribbean Group” in future election processes.<sup>22</sup> Several respondents agreed with the Committee, indicating that states should have done more to distribute the vacancy within their countries, including to underrepresented groups, particularly women.

Further, some respondents indicated that the “unwritten rule” of geographical rotation<sup>23</sup>—meaning that a candidate from the GRULAC or African groups could

<sup>21</sup> Asymmetrical Haircuts Podcast, Justice Update (July 3, 2020) at <https://www.asymmetricalhaircuts.com/episodes/justice-update-the-heat-is-on/> and Committee’s Lessons Learned Report (July 31, 2021), on file with the Open Society Justice Initiative, para. 5.

<sup>22</sup> ICC-ASP/19/Inf.2, para. 42.

<sup>23</sup> A number of respondents reported that a widespread rumor that it was Western Europe and Other Groups (WEOG)’s “turn” after having an African prosecutor and a Latin American prosecutor. As highlighted in



not be elected because previous prosecutors had come from those regions—may have deterred non-western European applicants.

The “unwritten rule” even led to baseless complaints that the Committee tried to rig the election by only shortlisting two “viable” candidates, one from Canada and one from Ireland. Electing either one would satisfy the unwritten rule, making the rest of the candidates placeholders rather than real contenders.

Some respondents suggested that an outreach component should have been built into the process to ensure a wider pool of applicants.

### **2.1.3. Mandates of the Committee and Panel**

The terms of reference mandated the Committee to facilitate the nomination and election of the prosecutor and the Panel to assist in an advisory capacity.

Several respondents stated that there was a lack of clarity about the Panel’s exact role in relation to the Committee, with ambiguity surrounding the extent of the Panel’s participation in competency-based interviews and the consideration given to its longlist. The Committee itself came to the same view in its report on lessons learned.<sup>24</sup>

Respondents also cited a lack of transparency in how applications were reviewed. Some thought the Panel’s internal report to the Committee ought to be separate and made public.

Other inadequacies mentioned with respect to the mandate and the terms of reference included the lack of a provision formalizing civil society engagement, the lack of a dispute resolution mechanism in case of disagreements, the failure to include vetting for high moral character (covered below, see pages 24-26), and the lack of gender quotas requiring the Committee to shortlist an equal number of women and men.

Some respondents commented on the tension between transparency and confidentiality. That the list of 14 candidates who were interviewed remained largely confidential was problematic as it prevented transparency and led to

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the above table, of the 89 completed applications received by the Committee, there were 40 western European applicants.

<sup>24</sup> “The [terms of reference] provided little clarity with regard to the roles of the [Panel] and [Committee] in respect of a number of critical points, in particular on the formation of the long and shortlists and the role of the Panel at the interview stage” in Committee’s Lessons Learned Report, para. 8.

harmful speculation.<sup>25</sup> At the same time, the names of some on the longlist were circulated within the international justice community early on, which meant their applications were neither secret nor officially confirmed. As discussed below, keeping the candidates' names confidential until a late stage in the process also made the prospect of vetting far more difficult. For this reason, the names of candidates under consideration should be made public at an earlier stage (for example, as soon as a longlist is drawn).

Some respondents questioned consensus as a decision-making tool for the Committee, preferring decisions by simple majority. It is unclear whether this criticism was motivated by genuine objections to consensus as a decision-making process, or rather arose out of frustration that the Committee only reached consensus on four candidates rather than the six they were entitled to shortlist. However, consensus ensured that the Committee was united with regard to the shortlist and could, as a group, defend all of their shortlisted choices.

#### 2.1.4. The Committee's Working Methods

The Committee whittled down the Panel's list of reviewed applicants and held competency-based interviews with 14 applicants<sup>26</sup> whose names were kept confidential. It then released a shortlist of four candidates on June 30, 2020.<sup>27</sup> Several respondents said they found the Committee's methodology clear through the release of its report and shortlist. However, many criticized the process after seeing the shortlist. In other words, questions about the results led stakeholders to doubt the process and retrospectively bemoan a lack of clarity and transparency.

Some respondents suggested that the Committee should have first released its shortlist to the Bureau in order to gain political support before releasing it publicly. However, introducing the list to the Bureau first would add an additional step vulnerable to politicization and manipulation.

Respondents criticized the Committee's shortlist for a perceived lack of well-known international criminal justice figures, a lack of civil law candidates, and

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<sup>25</sup> Ibid., para 7: "The confidentiality requirement in paragraphs 23 and 24 of the [Terms of Reference] created an inherent conflict with the requirement for transparency in paragraph 25, and risked bringing the deliberative process into disrepute."

<sup>26</sup> 16 candidates were on the longlist, two withdrew for personal reasons prior to being interviewed. See ICC-ASP/19/Inf.2, para. 19.

<sup>27</sup> The four candidates were, Morris A. Anyah (Nigeria), Fergal Gaynor (Ireland), Susan Okalany (Uganda), Richard Roy (Canada).

poor gender balance. In the view of many, the Committee did not adequately justify the inclusion of shortlisted candidates and exclusion of other, well-known figures in international criminal justice.

Furthermore, while the Committee’s interviews were a welcome and necessary component, most respondents thought a one-hour interview insufficient. As an additional means of assessment, one respondent suggested that candidates should have to fill out a Committee-designed questionnaire, similar to the one prepared by civil society organizations.<sup>28</sup> Another respondent felt the Committee may have assigned too much value to the competency-based interview, providing perhaps unfair advantage to those who had studied competency-based interview techniques.

Some also questioned the Committee report’s reference to what they considered to be subjective elements such as “demeanor”, pointing out that cultural differences could result in a misinterpretation of one’s demeanor. Some respondents criticized the Committee’s apparent favoring of candidates who would bring “fresh blood” as they were not specifically mandated to do so. And while the terms of reference empowered the Committee to put forward three to six candidates, the Committee selected four. Some respondents felt the Committee should have shortlisted six. However, given the flexibility accorded in the terms of reference, the Committee put forward the candidates on which it could reach consensus.

There were positive remarks as well. Many respondents found the Committee’s provision of candidates’ application documents useful, and they also appreciated the blog written by the Committee and Panel chairs, as part of a series hosted by *Opinio Juris*.<sup>29</sup> The Committee chair was also found to be accessible (she provided interviews and contributed to the blog) while maintaining her independence and all the rules of confidentiality.

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<sup>28</sup> 2020 civil society questionnaires for prosecutorial candidates at <https://www.coalitionfortheicc.org/prosecutorial-candidates-questionnaires-2020>.

<sup>29</sup> Charles Jalloh and Sabine Nolke, *ICC Prosecutor Symposium: The ICC Assembly of States Parties’ Selection Process for the Third ICC Prosecutor*, *Opinio Juris* (February 24, 2020) at <http://opiniojuris.org/2020/04/24/icc-prosecutor-symposium-the-icc-assembly-of-states-parties-selection-process-for-the-third-icc-prosecutor/>.

## 2.2. Expanding the Shortlist and Consultations

### 2.2.1. Expanding the Shortlist

The criticisms described above led to the shortlist’s rejection by a number of states parties.<sup>30</sup> After an initial period of consultations, consensus could not be reached and the Bureau decided to expand the shortlist on November 13, 2020<sup>31</sup> by going back to the Committee and asking it to submit additional names and appraisals. The Committee sought consent from candidates before adding them to the list and releasing its appraisals.

Most respondents believed that the Committee’s shortlist was rejected by a small number of powerful and vocal states. A minority (mostly those who did not like the shortlist) expressed the view that a larger number of states questioned the shortlist. According to many respondents, the presidency capitulated to pressure from powerful states and failed to demonstrate independent leadership throughout the process. Some respondents also thought that presidency members did not like the shortlist and thus made minimal efforts to have constructive consultations with states about it. For example, a respondent indicated that the presidency said it would send candidates’ contact information to states parties and upload a transcript of the first round of hearings on to the Assembly website; neither of those tasks were completed.

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<sup>30</sup> According to the Committee’s Lessons Learned Report (para. 6), the outcome of their work was “subject to fierce criticism and second-guessing on a number of fronts:

- Several States – in particular those whose nationals had not been placed on the shortlist questioned the competence of the shortlisted candidates;
- There was concern about the lack of well-known candidates and “familiar names”;
- States complained that the shortlist contained only four names, not six;
- The [Committee] was accused of bias against civil law and/or French-speaking candidates;
- Certain State representatives intimated that the Chair had manipulated the process so as to ensure the selection of a Canadian candidate;
- Civil society questioned throughout why the process did not include a formal vetting process, in which complaints of misconduct could be made against individual candidates, despite the lack of a legal or administrative framework to that end.”

<sup>31</sup> Bureau of the Assembly of States Parties, Election of the Prosecutor – Way Forward (November 13, 2020) at [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) (hereinafter Way Forward Document).

At the time, the Justice Initiative criticized the decision to expand the list as inconsistent with the terms of reference,<sup>32</sup> a view many respondents shared. Others suggested that civil society’s emphasis on adhering to the agreed process may have come at the expense of substantively assessing and considering the shortlist.<sup>33</sup> The expansion of the list had a significant impact on the timeline and atmosphere surrounding the election: it was a contentious, polarizing, and time-consuming decision. Many respondents agreed that the way the issue was addressed (i.e., going back to the Committee and its “longlist”) was the best way to avoid state nominations, which could have been damaging given the efforts directed at electing a candidate by consensus.

Many respondents believed that a vast majority of states opposed the shortlist because it omitted their desired candidate, whether a national of their country or another candidate they supported. This raises questions about whether the Assembly should have the ability to overturn a result when dissatisfied with the outcome of an independent assessment. It also suggests that some states expected the Committee to reach a certain conclusion and were disappointed and critical of its work when it did not.

A number of respondents indicated that, in their view, the shortlisted candidates were neither treated fairly nor given a fair opportunity to prove themselves, raising doubts about equal treatment. Concerns were also raised about the “disrespectful” treatment of the Committee’s and the Panel’s work, noting that it could make it difficult to convince state representatives and experts to take part in similar selection bodies in the future.

### 2.2.2. Consultations

On August 7, the presidency sent a letter to all state parties announcing that the “entry point” for consultations would be in New York, where all states have representation, and that consultations (led by Vice President Michal Mlynár, and Vice President Jens-Otto Horslund in close consultation with President O-Gon Kwon) would take place in regional groups.<sup>34</sup>

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<sup>32</sup> Joint Civil Society Statement: Electing the Next ICC Prosecutor - States Should Respect the Process they Established (July 20, 2020) at <https://www.justiceinitiative.org/newsroom/groups-urge-state-parties-to-icc-to-follow-transparent-process-for-electing-new-prosecutor>.

<sup>33</sup> The Justice Initiative does not take a position on individual candidates.

<sup>34</sup> ASP/2020/31, Letter from the President of the Assembly of States Parties (August 7, 2020) at [https://asp.icc-cpi.int/iccdocs/asp\\_docs/](https://asp.icc-cpi.int/iccdocs/asp_docs/)

State representatives interviewed by the Justice Initiative indicated that not all states were consulted during this initial endeavor. Other state representatives said that instead of seeking views on the candidates themselves, the presidency’s main question was whether to expand the shortlist, suggesting that its efforts were not directed at reaching consensus. A majority of state party representatives stated that consultations around the shortlist lacked transparency and structure. Some state party representatives criticized the presidency’s rejection of suggestions to appoint focal points and noted that it was unrealistic to expect the vice presidents to lead the consultation process alone.

While there was overall satisfaction with the decision to mandate the Committee to provide appraisals for the additional five candidates added to the list, some respondents were disappointed with the brevity of those appraisals. Some observed that the appraisals did not provide an explanation about the reasons for certain candidates’ omission from the shortlist. Others noted that, while the appraisals may have been written in overly diplomatic language, they still were clear and straightforward as to the Committee’s reasoning.

Some respondents noted that the Bureau took a long time to decide whether to expand the shortlist. While the negotiations were delicate including because they involved decisions on steps necessary in the event of a list expansion, in practice the delay meant that only a few weeks were left for actual consultations on the merits of each candidate before the election date.<sup>35</sup>

Respondents gave the second round of consultations more positive reviews. After the list was expanded to nine candidates, the presidency appointed New York-based focal points<sup>36</sup> from each region to lead bilateral consultations. Focal points were instructed to “solicit views on and support for the candidates under consideration,”<sup>37</sup> and were not confined to consulting only within their group. The focal points received instructions to initiate consultations by asking specific

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[ASP19/PASP%20letter%20SPs%20Prosecutor%20consultations%20-%20ENG.pdf](#).

<sup>35</sup> The election was originally scheduled for December 2020 but was postponed to the February 2021 while attempts to find consensus continued.

<sup>36</sup> Bureau of the Assembly of States Parties, Modalities for Consultations and Focal Points (December 11, 2020) at [https://asp.icc-cpi.int/iccdocs/asp\\_docs/ASP19/Prosecutor%20consultation%20modalities%2011Dec2020.1600.pdf](https://asp.icc-cpi.int/iccdocs/asp_docs/ASP19/Prosecutor%20consultation%20modalities%2011Dec2020.1600.pdf) (hereinafter Modalities for Consultations and Focal Points).

<sup>37</sup> Way Forward Document, para 4(c)i.

questions.<sup>38</sup> A number of respondents welcomed the appointment of focal points who received clear instructions and wrote fairly detailed reports. Some respondents said there could have been greater clarity about what to expect from the focal points and a clearer sense of who was empowered to make decisions as the consultations progressed.

The focal points themselves observed that they would have welcomed more clarity about their role. For example, the first report from the focal points did not contain any straw-poll statistics while the second report did, after the Bureau requested the inclusion of numbers. Some perceived the lack of numbers in the first report as an attempt to prevent lobbying, while others felt that the Bureau micromanaged the focal points with negative effect. For example, the questions the focal points received from the Bureau set the tone for the consultations and left them with limited discretion to manage consensus-building.

Many state and civil society representatives were disturbed by an overall lack of transparency in decision-making from the Bureau, particularly the presidency, throughout the consultation process, including both the first and second rounds of consultation and during the interim period.<sup>39</sup> Some believed that members of the presidency prioritized their respective national interests over their role as members of the presidency, citing the conduct of the first round of consultations as a clear indicator of this prioritization.

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<sup>38</sup> The questions included the following: 1. Would your country like to express your national position about the candidates for the post of the Prosecutor of the ICC?; 2. Who is the best candidate for the post of Prosecutor of the ICC?; 3. Are there particular reasons you prefer that candidate?; 4. Which candidate is your second preference?; 5. Are there particular reasons you prefer that candidate?; 6. Do you see a significant distinction between your first and second preferences?; 7. Who are the other candidates whom you are ready to support?; 8. Is there any candidate that is unacceptable/problematic to you? What is the reason?; 9. How would you rank the remaining candidates?; 10: Are there any other comments you wish to make? See *Modalities for Consultations and Focal Points*, p.1.

<sup>39</sup> Observations from the Former Presidency suggest that the terms of reference include “the framework for the conduct of the ensuing consultations, in order to provide clarity for all stakeholders already before the start of the consultations. However, any framework should provide the necessary level of flexibility that is required in a process predominantly comprised of informal bilateral exchanges.” See p.2.

## 2.3. Vetting

The Rome Statute requires that the prosecutor have high moral character, which is essential for any leading role at the ICC or elsewhere.<sup>40</sup> This requires a thorough vetting process which was not a feature of the election. Respondents were near unanimous that the failure to vet all candidates under consideration was deeply regrettable. Despite the repeated call by the Justice Initiative and many other civil society organizations (including advocacy that began as early as November 2019 and continued throughout the election period with multiple letters<sup>41</sup> and interventions<sup>42</sup> in public and private forums), there was no full and thorough vetting.

The terms of reference should have devised a mechanism for thorough vetting and mandated the Committee to either lead or consider the outcome of a vetting process.<sup>43</sup> Given that this did not happen, it should have been rectified as soon as practicable.

To partially compensate for the omission of vetting, in May 2020, after the Justice Initiative and a number of others raised concerns about the absence of vetting, the Committee, with the presidency's approval, engaged the services of the ICC Security and Safety Section (SSS) which, for the first time, conducted background checks and security screening of the 14 candidates interviewed. The Committee's interviews also included questions on the topic of workplace harassment and it assessed the candidates' demeanor and substantive responses. The Committee felt that it did not have the legal framework to go any further.<sup>44</sup>

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<sup>40</sup> The ICC Independent Expert Review report reached disturbing conclusions on workplace misconduct, including bullying and harassment. at the ICC. Verifying compliance with the high moral character requirement is crucial to fight misconduct, among other reasons. See Mariana Pena, *IER Blog Series: The Shocking Findings on Bullying and Harassment*, International Justice Monitor (September 30, 2020) at <https://www.ijmonitor.org/2021/02/ier-blog-series-the-shocking-findings-on-bullying-and-harassment/>.

<sup>41</sup> Ibid.

<sup>42</sup> See, e.g., Angela Mudukuti, *Continued Concerns About the ICC Prosecutor Election: No Election Without Vetting*, International Justice Monitor (February 3, 2021) at <https://www.ijmonitor.org/2021/02/continued-concerns-about-the-icc-prosecutor-election-no-election-without-vetting>.

<sup>43</sup> The presidency observed that the appropriate time for a discussion on vetting was early 2019. See Observations from the Former Presidency, p. 2.

<sup>44</sup> ICC-ASP/19/Inf.2, para. 26.



The Committee’s efforts and the inclusion of the ICC SSS were a welcome first step but did not constitute full and proper vetting, as the Committee noted in its report.<sup>45</sup> According to one candidate, the reference checks and background checks were done very quickly, which raised questions about how thorough they were. The same candidate indicated that while their references were contacted in writing, there was no conversation. References (including supervisors and supervisees) were asked to complete a form that was only tailored to supervisors and not supervisees.

It was not clear if the process introduced by the SSS adhered to data protection regulations.<sup>46</sup>

In the Justice Initiative’s view, once the Committee handed over its report, there was still sufficient time to conduct vetting, but the presidency and certain members of the Bureau refused to undertake it. Some respondents pointed out that states’ strong views following the release of the shortlist negatively impacted discussions on vetting –states who rejected the Committee’s list did not want to rely on another external process to check candidates.

Candidates were later asked to sign a declaration,<sup>47</sup> which was wholly inadequate. As pointed out by most respondents, it is easy to sign a document and attest to one’s own moral character, but such a document neither proves moral character nor constitutes a true inquiry. Another respondent pointed out that the declaration was limited because it did not cover the important factor of temperament.

The lack of vetting cast a shadow over the election process. While states refused to implement vetting for a long period of time, the need to certify the candidates’ moral character became increasingly clear toward the end, including in the two-three weeks preceding the election. The absence of vetting allowed rumors about the candidates’ moral character to spread, leaving states with no tool to have any allegations independently verified.

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<sup>45</sup> The Committee also added that it was “aware that a vetting process set in motion ex post facto and with limited scope, cannot lay claim to comprehensiveness, nor will it offer all desirable guarantees.” Ibid, para 31.

<sup>46</sup> One candidate, for instance, requested to access the data collected about them, but the request was denied on the basis of confidentiality. The merits of this request and subsequent refusal are not for the Justice Initiative to decide but due consideration should be given to the rights of all parties involved and to data protection regulations.

<sup>47</sup> Available at [https://asp.icc-cpi.int/en\\_menus/asp/elections/prosecutor/Pages/2020Declarations.aspx](https://asp.icc-cpi.int/en_menus/asp/elections/prosecutor/Pages/2020Declarations.aspx).

The Committee has recommended that future selection processes include a provision for vetting.<sup>48</sup>

## 2.4. Public Hearings

There were two rounds of public hearings with candidates. Round one was held in July 2020 with the four shortlisted candidates only, and round two, which included the entire expanded list of nine candidates, was held in December 2020. The virtual hearings were simultaneously conducted in English and French. They were co-moderated by state and civil society representatives who had received and selected questions from states parties and civil society respectively.

All respondents noted that having public hearings and co-moderation were significant improvements and that these elements should be maintained in future processes. Generally, most state representatives interviewed by the Justice Initiative found that the two rounds of hearings (one round with the shortlisted candidates only and the other with the expanded list) were sufficient and that the format was adequate to get to know the candidates. They also noted that they were able to meet the candidates bilaterally if they needed more information. Observers and some of the candidates themselves, however, said the format was inadequate to elicit sufficient substantive information about the candidates and their vision for the Office of the Prosecutor. One candidate observed that the format—two or three-minute answers to the same questions put to all candidates—favored public speaking abilities over substantive content.

While states sought to be fair to all candidates by putting the exact same questions to each candidate, there could be other, more dynamic ways to ensure equal treatment. Hearings with up to nine candidates answering the same question became tedious to watch and did not allow candidates to elaborate on complex matters. Similarly, although states and civil society had an opportunity to ask follow-up questions, this was only possible at the end of each hearing. This foreclosed opportunities for a genuine exchange with candidates and for interrogating some of their assertions.

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<sup>48</sup> The Committee’s Lessons Learned Report recommends that “[f]uture selection processes – for all elected officers, not just the Prosecutor – should include a clear process for determining the ‘high moral character’ qualification of candidates, which should be made known to and agreed by all applicants, and include parameters for potential ‘deep dives’ in the event of serious allegations of misconduct.” See para. 10. See also ICC-ASP/19/Inf.2, para 32.

One respondent indicated that different states and different civil society organizations should be able to put their own questions to a candidate. In their view, having a single set of questions read by one state representative and one civil society representative raised transparency concerns. While that was difficult to do with remote hearings and the current technology, future in-person hearings or remote hearings through other platforms should allow for that possibility.

The connection difficulties faced by the Ugandan candidate in particular were deeply unfortunate and put her at a disadvantage as the hearings briefly continued in her absence instead of being suspended immediately.<sup>49</sup> Finally, the online platform used by the Court was complicated for the candidates to use despite the added benefit of simultaneous interpretation.

## 2.5. Failure to Reach Consensus and Vote

The Assembly failed to reach consensus after the two rounds of consultations, leading to a vote. Some respondents doubted any possibility of reaching consensus during the 2020-2021 consultation process. Some observed that polarized views of the shortlist from the outset meant that a vote was inevitable.

Several state respondents indicated that they felt pressured to reach consensus when it was clear that there could be none. Some wished there could have been more time to consult, though they were not confident it would have changed the outcome. Others indicated that the pandemic prevented the in-person meetings and bilateral discussions that usually contribute to finding common ground.

Some interviewees concluded that going to a vote in this election makes achieving consensus in the future unlikely, given the high stakes in the election of the ICC prosecutor. They suggested that the Assembly should consider moving away from consensus. Others disagreed, saying that an attempt to secure consensus helps to ensure that consultations focus on merit rather than vote trading, at least until late in the process.

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<sup>49</sup> In an attempt to ease the tension caused by connectivity issues, the moderator asked the only female candidate to “give [him] a smile.” The casual comment was widely perceived as sexist by commentators and others in the international justice community. See, e.g., Başak Etkin, *Give Me a Smile: The Sexism at Play During ICC Prosecutor Proceedings*, Justice in Conflict (August 5, 2020) at <https://justiceinconflict.org/2020/08/05/give-me-a-smile-the-sexism-at-play-during-icc-prosecutor-proceedings/>.

Many respondents confirmed that state campaigning took place even before it was decided to proceed to a vote. Furthermore, once that decision was made, campaigning intensified significantly. Some respondents said there was vote trading.

### 3. Conclusion

The election of an impartial and highly qualified prosecutor of high moral character is essential for the court’s success and the 2020-2021 election process produced a combination of good practices to be built upon and valuable lessons about pitfalls to avoid next time.

As this briefing paper shows, the role of the presidency and the Bureau are particularly important. They have an opportunity to plan well in advance, draft sufficiently detailed and clear terms of reference, and ensure that every step of the process is effectively and timely communicated and guided by the principles of inclusivity and transparency. Members of the presidency are called to act impartially and for the good of the Assembly and the Court, not on behalf of national interests. The responsibility of the presidency to guide such an important election is substantial. That is why leadership and vision are required.

The use of a carefully selected, duly qualified, gender- and geographically-balanced selection body is a practice that should be retained as should the acceptance of individual applications. Both these practices go a long way towards ensuring the process is merit-based and that all candidates are treated equally. State nominations should be secondary and only used as a last resort. Allowing individuals to apply increases the diversity of the pool of applicants, which is essential for both the elected candidate and for the credibility of the election process. But putting out a vacancy announcement alone is not enough. More must be done to reach out to qualified candidates and ensure a sufficiently diverse pool.

Once suitable candidates are found, vetting for high moral character and impartial scrutiny of their credentials are crucial. This past election has shown the negative consequences of failing to fully and thoroughly vet candidates. The same mistake must not be repeated.

While the Assembly has the undisputed formal authority to select the prosecutor, and thus the ability to disregard or overturn the decisions of advisory bodies, it must recognize that doing so could undermine the legitimacy of the successful candidate and that of the court itself.

Tools to assess candidates such as interviews and public hearings are critical as they allow states and civil society to learn more about the candidates and add a measure of transparency. Further improvements aimed at creating fair, transparent and dynamic public engagement are necessary.

Inclusive and meaningful state consultations are also vital. All states must be consulted in a process that allows adequate time for genuine engagement. This past election has shown that appointing focal points as soon as practicable is a good practice. Seeking genuine consensus should be the goal (even if it will not always be attained), and focal points are best placed to facilitate this process. Lastly, denouncing and refraining from vote trading is fundamental to a merit-based election.

As the chief representative of the court to the world, the prosecutor must be a deeply qualified individual of high moral character. It is up to states to ensure that politics, backdoor deals, or lack of proper vetting do not lead to a contrary outcome. States now have the information and experience to design and implement a fair, merit-based, inclusive selection process for the next prosecutor. The ICC's credibility and effectiveness depends on it.

## Annex: Factual Background

### The Committee and the Panel

Assembly discussions on how to ensure a competency-based process began in July 2018. However, no specific preparations were made to discuss the election of the prosecutor at the Assembly annual session in December 2018. In the beginning of 2019, it became apparent that it was not possible to wait until the following Assembly session (usually held in November–December) to adopt a framework for the election. The presidency then proposed—and the Bureau adopted—terms of reference for the election process, and the Committee and the Panel members were appointed. Both groups’ members were nominated by regional groups after a consultation process within each group.

### Mandates of the Committee and the Panel

The Committee was mandated to “facilitate the nomination and election of the next Prosecutor” and the Panel was mandated “to assist the Committee in carrying out its mandate” in an advisory capacity.

The terms of reference stated that the Panel would recommend a draft vacancy announcement for approval by the Committee and the Bureau, review the applications, recommend a longlist of candidates, and prepare and participate in competency-based interviews of the candidates. Lastly, the Panel was required to share their assessment of the candidates with the Committee prior to the finalization of the shortlist.

The Committee was expected to receive applications from individuals and review the applications with regard to article 42(3) of the Rome Statute and the vacancy announcement. They were tasked with deciding on a longlist of candidates and undertaking competency-based interviews. The terms of reference stated that the Committee had to establish, by consensus, an unranked shortlist of three to six (numbers reached as a compromise within the Bureau) of the most qualified candidates and produce a report detailing how the shortlisted candidates met the requirements. According to the terms of reference, only the names of the shortlisted candidates were made public.

## Vacancy Announcement and Pool of Candidates

The Panel developed a vacancy announcement approved by the Committee and Bureau. The six-page announcement detailed the criteria for the post and other information including minimum salary and the application procedure. It was split into two parts, the first concerning the details of Article 42 of the Rome Statute, and the second emphasizing the key competencies required for the position.

The vacancy announcement was published on the ICC website on August 2, 2019 with a deadline of October 31, 2019. It was sent to civil society groups and states parties and they were requested to disseminate it nationally to all the appropriate professional bodies. The deadline was extended to November 25, 2019 and the announcement recirculated on November 1. By November 25, the Committee had 144 applications and as part of the process, additional documentation was requested from the applicants with November 29, 2019 as the new deadline to upload supporting documentation to a secure website. By November 29, the Committee was in possession of 89 complete applications.

According to the Committee's report, there were 26 female applicants and 63 male applicants. There were 21 common law applicants, 50 civil law applicants, and 18 who were from mixed or other legal systems. The regional distribution was as displayed on page 16 of this paper.

## The Committee's Working Methods

After the extended application deadline lapsed, the Panel convened in The Hague from December 2-3, 2019 and reviewed the applications producing a longlist and candidate assessments for the Committee's consideration. The Panel also submitted a proposal for interview questions and modalities. The Committee met in New York on February 20-21 and, after reviewing the Panel's recommendations, decided on a confidential shortlist of 16 candidates who would advance to the interview stage of the process. Two candidates withdrew their applications prior to the interviews, leaving 14 candidates who were each interviewed for one hour.

Due to pandemic-related travel restrictions, interviews took place via video conference. To accommodate different time zones, the interviews were conducted between May 12 and June 5, 2020. Prior to the Covid-19 outbreak, the Committee and Panel were meant to interview each candidates for only 30

minutes due to budget limitations. They were able to expand that to an hour after they decided to do the interviews virtually.

According to the Committee’s report, the interviews consisted of “a series of predetermined questions based on the requirements of the Rome Statute and the competencies set out in the vacancy announcement.” The Committee also included questions on the candidates’ high moral character and there was a set of questions reserved for the Panel.

Whenever there was a real or perceived conflict of interest, including a candidate having the same nationality as a member of the Committee or the Panel, the member would recuse themselves from the interview and subsequent assessment of that candidate.

In all its deliberations and as per the terms of reference, the Committee considered gender balance, geographical representation, and adequate representation of the principal legal systems of the world “to the extent possible.”

The Committee assessed the candidates using the Rome Statute requirements, the additional competencies set out in the Committee’s terms of reference, and the vacancy announcement. The Committee paid specific attention to:

- “(a) qualifications and experiences set out in candidates’ applications and supporting materials and documentation provided therewith;
- (b) their performance in the interview; and
- (c) the outcome of the vetting process and reference check.”

The Committee asked candidates to “respond substantively and clearly to the competency-based questions posed by the Committee and Panel, so as to demonstrate the expected competencies and to provide the Committee and Panel members with an appreciation of their understanding and vision for the work of the Office of the Prosecutor and the Court, as well as their suitability for the role by virtue of personality, clarity of communication, character, and overall demeanor.” The Committee also conducted a process they referred to as “vetting.”

Using consensus as a decision-making tool as per the terms of reference, on June 30, 2020 the Committee produced its report and a shortlist of four candidates: Morris A. Anyah (Nigeria), Fergal Gaynor (Ireland), Susan Okalany (Uganda), Richard Roy (Canada). It stated the following,

“[t]he Committee, taking into account also the views of the Panel of Experts, unanimously agreed and is confident that each of the candidates proposed herein not only meets the formal eligibility criteria of the Rome Statute, but also has the



professional experience and expertise and the necessary personal qualities to perform the role of Prosecutor.”

## Vetting

The Rome Statute requires the prosecutor to be of high moral character. In November 2019 the Justice Initiative raised the need for vetting for high moral character, which had not been included in the terms of reference. Civil society advocacy on the issue continued and the Committee sent a “vetting proposal” to the presidency which was endorsed on May 23, 2020. This allowed the Committee to engage the services of the ICC SSS who, for the first time, conducted background checks and security screening of prosecutorial candidates. All 14 interviewed candidates underwent those checks. In addition, the Committee asked questions on the topic of workplace harassment in the interviews and observed the candidates’ demeanor and substantive responses. The Committee felt that it lacked the legal framework, mandate, and capacity to “receive complaints, carry out investigations, or conduct inquiries into allegations of misconduct against candidates with a view to ensuring that those with a history of workplace and/or sexual harassment would not advance to the shortlist.” The Committee added that it was “aware that a vetting process set in motion ex post facto and with limited scope, cannot lay claim to comprehensiveness, nor will it offer all desirable guarantees.”

Rumors about candidates began to surface and civil society pressure for full and thorough vetting continued, but the presidency decided not to create additional vetting measures.

## Expanding the Shortlist and Consultations

### First Round of Consultations

According to the Nomination and Election Resolution, every effort must be made to elect a prosecutor by consensus and consultations with states are part of the consensus-building process. After the list was released on June 30, 2020, the presidency sent a letter to all states parties on August 7, 2020 announcing that the “entry point” for consultations would be in New York (rather than The Hague), where all states have representation and that consultations, (led by Vice President Michal Mlynár, and Vice President Jens-Otto Horslund in close consultation with President O-Gon Kwon) would take place in regional groups. The aim was to

conclude the first round of consultations by early September. Some states rejected the shortlist, citing various problems, including the lack of civil law representation, the exclusion of well-known international justice figures, and the lack of gender and language diversity. On November 13, 2020, the Bureau decided to expand the list of candidates.

## Expanding the Shortlist

The Bureau produced a “Way Forward” document on November 13, 2020, stating that the list would be expanded to include other candidates interviewed by the Committee who wish to remain in the running on condition that they consent to the publication of their Committee appraisal, CV, and motivation letter. The list was expanded to a total of nine candidates and a second round of consultations was held after a second round of public hearings.

The expanded list included the following candidates: Carlos Castresana Fernández (Spain), Karim A. A. Khan (United Kingdom of Great Britain and Northern Ireland), Francesco Lo Voi (Italy), Robert Petit (Canada), Brigitte Raynaud (France), Morris A. Anyah (Nigeria), Fergal Gaynor (Ireland), Susan Okalany (Uganda), and Richard Roy (Canada).

## Second Round of Consultations

Following the second round of hearings, the presidency appointed New York-based focal points from each region, who led bilateral consultations. Focal points were not restricted to consultation within their groups, and were instructed to, “solicit views on and support for the candidates under consideration.” The focal points received instructions to initiate consultations by asking specific questions.

The focal points held four consultation cycles using the expanded list and provided a summary after each round of consultations. The first summary did not include figures, while the subsequent summaries did. After extending the deadline several times, the presidency concluded that consensus was impossible to reach. At the end of the extended nomination period, four nominations had been received: Carlos Castresana (Spain), Fergal Gaynor (Ireland), Karim Khan (United Kingdom), and Francesco Lo Voi (Italy).

## Public Hearings

There were two rounds of hearings. Round one was held on July 29-30, 2020, with the four shortlisted candidates and round two on December 9-10, 2020, with the entire expanded list of nine candidates. Hearings were held virtually with simultaneous translation in English and French and were co-moderated by state and civil society representatives who had received and selected questions from among those sent states and civil society respectively. States asked the same questions during each round (though each time in a different order), while civil society opted to avoid duplication and ask different questions in each round. Candidates had two to three minutes to respond to each question.

## Failure to Reach Consensus and Vote

The Assembly failed to reach consensus after the two main rounds of consultations and on February 12, 2021, states parties elected Karim A. Khan as the new ICC Prosecutor with 72 votes in favor.