Election process of the third Prosecutor of the ICC

Observations from the former Presidency

This paper is submitted, pursuant to the request by the President of the Assembly, with a view to informing the deliberations mandated by para. 78 of the *omnibus* resolution adopted in December 2020.[1] The paper does not aim to provide a comprehensive analysis of the process employed for the election of the third Prosecutor of the ICC. Rather, it addresses some select aspects of importance.

The creation of the Committee on the Election of the Prosecutor (CEP) had two main, inter-related purposes, namely de-politicizing the election process by employing a merit-based assessment of the candidates, and eventually electing by consensus the candidate who best fulfils the criteria stipulated by article 42 of the Rome Statute.

However, immediately after the release of the shortlist, several States Parties questioned the outcome of the assessment by the CEP. The more politicized nature of the process resulted, in the end, in the election by secret ballot.

Double-tracked process

The CEP process was introduced in addition to, and not replacing, the relevant provisions of the Rome Statute and of the resolution on nominations and elections.[2] Therefore, not presenting nominations before the consultations produced an outcome was always a matter of goodwill of States Parties rather than the result of the application of a formal rule.

Similarly, States Parties never agreed to unconditionally accept the outcome of the independent assessment. The right to nominate a candidate was not formally limited or waived – this can be viewed as an ultimate guarantee for States Parties to avoid an unacceptable result. However, at the same time, it weakens the status and potential general acceptance of the independent assessment.

While we do not believe that limiting the right to nominate a candidate would be acceptable for the broad membership, at least better clarifying and explaining the double-tracked nature of the process may be desirable, together with a strong political pledge to act within the framework of the established process.

Reactions to the report of the CEP

The shortlist received criticism from some States Parties. The criticisms included the absence of candidates from a civil law background, and the lack of managerial experience of the selected candidates. In more informal settings, some States Parties expressed their surprise over the fact that some well-known persons with long experience in the field of international criminal law had not been – contrary to expectations – included in the shortlist.

Such a situation could be best avoided by specifying in more detail the requirements which the shortlist (and, by extension, the candidates included on the shortlist) should fulfil. We are, of

[1] See resolution ICC-ASP/19/Res.6.
[2] See resolution ICC-ASP/3/Res.6 Consolidated version.

course, aware that reaching agreement on more detailed and specific conditions may render the initial negotiations more challenging.

It is also worth considering whether any of the following points contributed to the lack of universal acceptance of the shortlist: composition of the CEP, including the Panel of Experts; method of appointment of the members of the CEP; working methods of the CEP (division of labour between the diplomatic and expert elements of the CEP and Panel of Experts; internal decision-making processes).

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 CEP 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 (see the para. above).

The terms of reference should also 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.

Expert element in the assessment

The creation of the Panel of Experts was a welcome improvement in the process. Further strengthening the role of the experts, *eg* by introducing a conditionality or sequencing between the assessment of the experts and the (final) report of the Committee composed of diplomats, might be considered. The possibility of publishing the report of the experts could also be considered.

Vetting

If vetting is to be introduced, it must be viewed as an integral part of the assessment of candidates. Therefore, its feasibility and specific terms must be discussed and agreed when the assessment process as a whole is being conceived. As such, the proper time for a discussion on vetting was in early 2019 when the terms of reference for the CEP were being negotiated (calls for more profound vetting first appeared in November 2019). Trying to introduce vetting in later stages would necessarily lead to the politicization of such a discussion and to questioning its real aims.

The issue of vetting arose in at least three specific stages during the process, whereby the specific instances could be traced to some rumours pertaining to specific candidates surfacing at those instances. The response to the first stage of the discussion was a proposal by the CEP, endorsed by the Bureau, to utilize the Security Section of the Court for background checks. After the expansion of the list, the Bureau approved the text of a declaration which all candidates under consideration duly signed; some candidates even included specific details and clarifications.

Should vetting be included in a future process, the following aspects, *inter alia*, should be duly considered (these questions were, in fact, the subject of internal deliberations of the Presidency at various stages of the process):

- Who to entrust with the mission of vetting. Composition of the vetting mechanism.
- Potential need for specifying the requirement of *high moral character,* it being a vague legal term.
- How the fairness of the vetting is ensured, both *vis-à-vis* the candidates and the persons making allegations.
- Possibility for the vetting mechanism to establish facts (power to subpoena persons or documents).
- Outcome of the vetting process: only collection and verification of facts, or a legal determination on a specific conduct.

Notwithstanding the above considerations, the longlisted candidates for the position of Prosecutor were subject to more stringent scrutiny than any other candidates to any comparable international judicial or prosecutorial position.

Consultations

This is the diplomatic and most political phase of the process, incorporating all information and outcomes produced by the independent assessment. The process was based on informal bilateral discussions with States Parties, as such a format is the most facilitative one for eliciting the positions of States Parties on a decision of that magnitude. In light of the need for repeated intense interaction with States Parties, the establishment of a group of focal points seems to have been a particularly beneficial approach at the later stage of the process.

It must be noted that a significant part of the earlier stages of the consultations was consumed by efforts to deal with the criticism levelled at the shortlist and its implications for the eventual goal of reaching consensus. In the situation that emerged after the release of the shortlist, States Parties had three main alternative paths: 1. continue the consultation process on the basis of the shortlist, although this was strongly dismissed as unacceptable by some States Parties; 2. expand the list of candidates under consideration by including new candidates from the longlist; 3. revert to nominations in line with the Rome Statute. Considering the purpose and spirit of the establishment of the CEP, the Presidency considered option 2 to be the most reasonable and closest to the originally conceived process, while fully building on the outcomes of the work of the CEP. This approach was eventually endorsed and approved by the Bureau in November 2020, thus starting the final stage of consultations.

Turning to some formal aspects of the consultations, the informal nature of the process had to be reconciled with legitimate calls for transparency. This was ensured by regular briefings by the members of the Presidency and later, after the appointment of the group of focal points, by the presentation of written reports. These reports ensured clarity and transparency. However, we were concerned by the efforts of some States Parties that tried to engage in re-drafting some parts of the written reports. Furthermore, the written nature of the reports of the focal points – which had been drafted very meticulously – led some States Parties to work selectively with those parts of the reports that had been favourable to their preferred candidate. This, in turn, encouraged stiffening of positions rather than incentivizing flexibility, which is much needed in such a consultation process.

In the end, the lack of flexibility – which persisted in spite of clear trends emerging from several rounds of consultations – contributed more than any other conceivable factor to the eventual lack of consensus, leading to the full application of the procedure set out in article 42 (4) of the Rome Statute of the International Criminal Court.

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