

Coalition for the International Criminal Court (CICC) Elections Team Paper

At a crossroads: Recommendations to States Parties on developing a permanent vetting process that is purpose-built

19 June 2023

The '[ICC Leadership Framework](#)' advises senior ICC leaders to: "Promote personal and team responsibility for the realisation of a healthy and safe workplace. Build trust. Be a role model of this behaviour" and to "Intentionally build an organisational culture of ethics and integrity."

Only 42% of respondents in a 2022 ICC staff survey replied positively to: "The ICC takes allegations of discrimination, harassment, sexual harassment or abuse of authority seriously," while a 24% agreed with the statement: "The ICC has an open and honest culture."

The Coalition for the International Criminal Court (CICC) Elections Team¹ recognizes the significant progress States Parties have made to establish a permanent due diligence ("vetting") process for all International Criminal Court (ICC) elections. The first three *ad hoc* vetting processes – for the Deputy Prosecutors, Registrar, and judicial elections at the Court – have progressively advanced the Independent Oversight Mechanism's (IOM) ability to assess candidates' high moral character as required by the Rome Statute.

The ASP Presidency's initial draft terms of reference ('draft ToR') for the ICC's permanent vetting process, dated 5 April 2023 and circulated ahead of the 6 July 2023 meeting on the establishment of a permanent due diligence process for elected officials, provides a solid framework which we believe can be further strengthened and developed, including through additional elements and details. This will enable States Parties to adopt a process at the 22nd session of the ASP (ASP22) that is robust and purpose-built – to ultimately ensure it is set up for success and can deliver on its core objective to effectively assess candidates' high moral character. In the wake of the worrying 2021 and 2022 ICC staff survey results² that follow recent reports and independent evaluations detailing the Court's problematic workplace culture,³ the need for impeccable leadership at the Court has never been more strongly felt. Changing workplace culture starts at the top of an organisation and as the ICC's most senior leaders, elected officials have a responsibility to chart the way and lead by example. We are now at a crossroads in our collective efforts to see this change happen and we believe that establishing a robust permanent vetting process will be a crucial step in that direction.

¹ This paper has been prepared by Coalition members following most closely ICC and ASP election processes. It does not represent the views of all Coalition members. Since the Rome Diplomatic Conference, Coalition members have organised themselves into thematic teams to follow issues addressed by the ASP or its subsidiary mechanisms and by the ICC. Teams are a forum to discuss and follow issues and with a view to developing advocacy. All Coalition members can join CICC issue teams.

² 'ICC Staff Engagement Survey - Your Voice Matters 2021 - Multiple Demographic Report for Whole Organisation by Organ / Programme'; 'ICC Staff Pulse Engagement Survey - Your Voice Matters 2022 - Whole Organisation Report.'

³ See the 'Independent Expert Review of the ICC and the Rome Statute System, [Final Report](#)', 30 September 2020, at paras 62, 63, 138, 209, 210, 229, and 302; See also the '[Annual Reports of the Head of the IOM](#)', particularly the [2022](#) report at paras 14-22 regarding "allegations of "Serious Misconduct" against 12 current and former staff members of the Office of the Prosecutor (OTP), the vast majority of them senior staff", and paras 46-52 regarding "a perceived atmosphere of impunity created over many years with regard to harassing and bullying behaviour from judges" and that "there was reluctance to formally report matters to the IOM for fear of retaliation"; See also 'Non paper Regarding Recommendations 108-109 of Report of Independent Expert Review', April 2023, at page 4, which notes that the "IOM Evaluation of the Workplace Culture in the Judiciary has highlighted the lack of trust of staff members in the accountability framework for Judges."

To ensure the process is equipped to meaningfully assess candidates' high moral character across ICC elections, the Coalition makes the following recommendations on ways to enhance the draft ToR during the consultations and development of the process by States Parties led by the facilitators in the coming months.

The Coalition recommends that the scope of consultations be enhanced in the following ways:

- States Parties, through the newly appointed facilitators, continue to engage in two-way dialogue with civil society organisations and experts which have been [actively promoting vetting](#) in ICC and ASP elections since 2020.
- Similar to drafting processes for other [ICC policies](#), the ASP Bureau should issue a public call for comments on the next draft of the ToR for the permanent vetting process which will result in a more inclusive and credible final ToR.
- Since vetting is novel for international institutions, parallels and best practices can be gleaned from domestic processes which the Coalition has reviewed and consulted with, most notably the federal judicial appointment process in [Canada](#), and the pre-vetting process for judges and prosecutors in [Moldova](#) supported by international partners, including the [European Union](#). The co-facilitators should consider carrying out this type of research and outreach, with the support of States Parties and civil society.

The Coalition recommends that the permanent vetting process is:

Safe

- Anonymous complaints should be permitted in the first instance, just as they are for complaints of prohibited conduct at the ICC. This enables the IOM to begin their review, and if there is insufficient corroborative information, then their identity may be required in order for the review to proceed. At that point, the complainant can decide whether to share their identity or not.
- At least 60 days is needed for submissions of allegations to the confidential reporting channel due to the many barriers to reporting, including a justified fear of retaliation and/or re-traumatization.
- In addition to the express warning for candidates not to retaliate against complainants, a further notification should indicate that if retaliation is reported and it is credible, this may impact the IOM's assessment of the candidate's high moral character.
- There must be explicit compliance with data protection laws, for example the General Data Protection Regulation (GDPR), including that candidates are given access to all of their personal data which has been collected.
- Complainants should be granted access to the ICC Ombuds to discuss their potential concerns.

Transparent

- The draft ToR should include the general vetting terms which apply to all elections and annexes which set out the specific process for the different types of elections, including the IOM's interaction with and reporting to the bodies tasked for the overall assessment of candidates (e.g., ACN).
- A communications strategy should be developed by the ASP Presidency, ASP Secretariat, and the Court with activities that ensure widespread visibility and dissemination (especially of the confidential reporting channel). This strategy should include coordination with civil society and States Parties, and assurances that the vetting process is widely distributed together with information on the names of the shortlisted candidates and the election process, and translated into all languages of states where candidates are nominated/apply from (States Parties can assist with this).
- The judicial nomination process should include a built-in requirement for States Parties to disseminate the confidential reporting channel and provide names of previous/current workplaces and colleagues for reputational interviews when they nominate candidates.
- The vetting process needs to be more visible on a standalone web page on the ASP and ICC websites including further details for candidates, akin to websites for the [Canadian](#) and [Moldovan](#) processes.
- The final stage of the vetting process needs to be more clearly spelt out, including the fact that the IOM does not make findings (this is not clear to all stakeholders), and rather that the IOM presents preliminary findings of potential concerns if a candidate's high moral character is in doubt.
- The draft ToR should specify what occurs after negative preliminary findings are reported to the relevant decision-making body. Will the decision-making body decide whether to disqualify the candidate based on the IOM's report, and if yes, what will be the modalities? By consensus, vote, or other? In the alternative, will there be an investigation? The Moldovan pre-vetting process specifies: 'The decision on failing the integrity evaluation constitutes a legal basis not to allow the candidate to the elections or competition.' (Article 13(6), [No 26 of 10.03.2022](#)). In the Canadian federal judicial appointment process, the Judicial Advisory Committee may choose (based on their independent and confidential assessment) not to recommend individual candidates for appointment to the Minister of Justice.

Comprehensive

- The permanent vetting process applies to 'all elected ICC officials' which should include applicable ASP elections requiring officials to have a high moral character, including elections for the [Advisory Committee on nominations of judges of the ICC](#) and the [Trust Fund for Victims Board of Directors](#).
- Vetting is being introduced chiefly to ensure candidates have a 'high moral character', yet this terminology is not defined in the Rome Statute, and it takes on a variety of meanings. A definition should be developed, to provide clarity and certainty for all stakeholders, as recommended at

paras 90-91 of the [Report by the facilitators on the third election of the Prosecutor of the ICC – Lessons learnt](#).

- The definition of ‘misconduct’ should not be limited to conduct which occurred ‘in the workplace’ and should be expanded to include allegations which occurred ‘at or away from the workplace, and during or outside working hours,’ akin to the [ICC’s Administrative Instruction addressing Discrimination, Harassment, including Sexual Harassment, and Abuse of Authority](#). Misconduct often occurs in work-related events, which may not be considered ‘in the workplace’ per se.
- At least one mandatory reputational interview should be conducted with a non-referee per candidate. The ToR draft indicates that ‘where feasible’ in-depth background checks shall include contacts with employees who may have worked with the candidates. It would be unfair for the IOM to conduct reputational interviews for some, but not all candidates. Moreover, interviews with non-referees are often the only avenue to receive honest views about candidates.
- While fairness to candidates is fundamental, further consultations are required regarding whether ‘due process rights’ is the appropriate terminology as this is disputed among experts (e.g., no due process rights are granted to candidates in the Canadian judicial appointment process, but they are in the Moldovan pre-vetting process). If they are owed due process rights, other potential rights should be included such as the right to counsel and the right to appeal.
- The draft ToR should clarify whether the IOM applies a specific standard of review of information (e.g. no standard of review is applied in the Canadian judicial appointment process, but the Moldovan pre-vetting process applies a ‘serious doubt’ standard: ‘A candidate shall be deemed not to meet the integrity criteria if serious doubts have been found as to the candidate’s compliance with the requirements [...] which have not been mitigated by the evaluated person’ (Article 13(5), [No 26 of 10.03.2022](#)).
- Periodic evaluations should be required to assess the impact of vetting, including the visibility and use of the confidential reporting channel.
- To ensure that the IOM is able to perform these additional vetting duties, adequate resources need to be allocated to the permanent vetting process from the regular ICC budget.
