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Continuity by Consensus: Keeping the Choice with the States Parties *A civil-society response to the ASP President's Options Paper on the election of the fourth Prosecutor*

Executive Summary

On 26 August 2026 the ASP President, Ambassador Päivi Kaukoranta, submitted to the Bureau an Options Paper setting out three routes for the nomination and election of the fourth Prosecutor, and invited written comments [ref: Options Paper, para 2].

In response to that invitation, this paper is issued jointly by the undersigned civil society organisations, Members of the Coalition for the International Criminal Court, with vast collective experience and sustained engagement on countering external threats to the international criminal justice system, and on preserving the integrity of the Court's electoral processes.

The Options Paper outlines three core routes for Assembly consideration:

- **Option A:** Re-establishes a dedicated Committee on the Election of the Prosecutor and Panel of Experts to pre-screen, interview, and shortlist candidates behind closed doors.
- **Option B:** Focuses on achieving consensus among States Parties, including an open agreement on a serving Deputy Prosecutor.
- **Option C:** Establishes an open nomination and election process directly led by States Parties, accompanied by an expert panel restricted to a strictly advisory, non-binding role.

Assembly Resolution ICC-ASP/1/Res.2 calls for every effort to be made to elect the Prosecutor by consensus [ref: ICC-ASP/1/Res.2, as amended, para 33]. With the Court under a declared United States campaign to dismantle it "brick by brick" [ref: M. Rubio, "Why We're Dismantling the International Criminal Court", Wall Street Journal, 14 July 2026], States Parties could converge, in the open, on one of the serving Deputy Prosecutors: not as a stop-gap measure, but as a deliberate choice to preserve continuity and independence. Such a consensus can form within whichever process the Bureau adopts, and for a full term.

Should consensus prove beyond reach, only an open and transparent election, in strict compliance with the Rome Statute, would grant the legitimacy the next Prosecutor needs to exercise their functions. That means the States Parties openly nominating their candidates, the candidates publicly setting out their prosecutorial vision, and, in the end, the States Parties deciding by secret ballot. The election of the third Prosecutor showed that opaque committee proceedings and back-room understandings do not build confidence or legitimacy. An advisory panel, on the judicial-election model, can sit alongside such an election, but only if it has a strict advisory role, absent any power to preselect or prescreen candidates behind closed doors. In the Rome Statute, the Prosecutor's independence is protected by keeping the choice with the States Parties, who remain publicly answerable

through the nominations they author, the hearings they conduct, and the collective political cost of any process seen to have been captured.

What is at stake: choosing independence

On 13 July 2026 the United States announced a whole-of-government campaign to “systematically disable” the Court [ref: US Department of State, media note, 13 July 2026]. It has since induced States to withdraw, conditioned aid and security cooperation on their doing so, and widened its sanctions until they reach the Court’s own people. Under Executive Order 14203 it had already designated judges and both Deputy Prosecutors, Nazhat Shameem Khan and Mame Mandiaye Niang, the two officials now running the Office of the Prosecutor in rotation [ref: US Department of State, designations of 20 August 2025]; and on 18 August 2026 it designated the President of the Court, Judge Tomoko Akane, and a candidate in this year’s judicial elections, Abdoulaye Seye, who may as a result be shut out of the very rooms in which the elections are held [ref: OFAC, 18 August 2026; Coercion of Justice and Sovereignty, September 2026]. None of this is a forecast: the pressure is already working on the individuals who serve the Court.

The question the Assembly faces is therefore not which candidate is ablest. It is whether the choice of the fourth Prosecutor will be the States Parties’ own, or will be made for them by the pressure now trained on the Court by non-State Parties. That pressure reaches an election from two sides. It can press States on how to vote, and it can reach the candidates themselves: the designation of a sitting candidate in this year’s judicial elections has already struck at “equality between candidates and the independence of the elections” [ref: Coercion of Justice and Sovereignty, September 2026], and the election of the Prosecutor is open to the same reach. A coerced selection can thus be captured either by installing a Prosecutor acceptable to the US campaign to dismantle the Court, or by shutting an independent one out of contention in the false hope that compliance with US demands will soften the pressure. The campaign has pledged to demolish the Court “brick by brick” [ref: Rubio, Wall Street Journal, 14 July 2026]; its aim is the Court’s end, which no concession on a single election can satisfy. The threat does not fall on merit, which Article 42(3) of the Statute secures by other means; it falls on the independence of the choice. What the Court needs from this selection is a Prosecutor whose mandate no one can question: chosen in the open, by the States Parties’ own judgment, with every eligible candidate free to take part, and sealed by a ballot no external power can audit.

The treaty’s own method already provides this, and a closed selection takes it away. An election contested in the open before the States Parties and decided by their ballot makes it their choice. The secrecy of that ballot protects them from pressure: no government can be called to account by any outside power for how it voted. Conversely, a selection resolved behind a confidential filter offers the opposite: it cannot be distinguished from an accommodation reached under pressure, and it gives those who would yield to the pressure a room in which to do so unseen. Nor does yielding buy protection; the US campaign has pressed States Parties regardless of whether they have accommodated it [ref: Coercion of Justice and Sovereignty, September 2026].

This pressure can be met only if States Parties act together. No single government can safely absorb it alone, so the protection has to be collective: States Parties need to hold the line for the openness of the process and the participation of every candidate in it.

The statutory framework

The governing method is fixed by treaty. Under Article 42(4) of the Rome Statute, the Prosecutor “shall be elected by secret ballot by an absolute majority of the members of the Assembly of States Parties.” The election is the baseline. The Committee on the Election of the Prosecutor and its Panel of Experts, created for the 2021 election, were an addition to that baseline, adopted for a single occasion by decision of the Bureau.

The value of the treaty’s method becomes clear once the work of a selection is separated into its parts. Four distinct tasks must occur:

- **Eligibility:** Confirmed as a formal administrative process.
- **Integrity:** Established through the Court’s permanent due-diligence procedure.
- **Competence and prosecutorial vision:** Evaluated in the open, before the electors.
- **The Choice:** Belongs where the Statute placed it, with the States Parties in the secret ballot reserved to them.

The 2021 model gathered three of these tasks into a single confidential body, while the final voting ballot remained exclusively with the States Parties. The question the Options Paper really puts is whether any reason survives for a body that sits between the States Parties and the ballot the treaty assigns to them. We do not think one does.

The Assembly's best outcome: continuity by consensus

Assembly Resolution ICC-ASP/1/Res.2 asks the Assembly to make “every effort” to elect the Prosecutor by consensus [ref: ICC-ASP/1/Res.2, as amended, para 33]. That aspiration is best met by agreement among the States Parties on a candidate who can command consensus on the merits. The Options Paper outlines that choice, in Option B, and the two serving Deputy Prosecutors are both such candidates. Both of the Deputies have already been elected by the States Parties under Article 42(4), by secret ballot and absolute majority, from the three candidates for each post that the Statute requires the Prosecutor to nominate; the Options Paper itself affirms that this makes the States Parties “the ultimate decision-maker on who the Deputy Prosecutors should be” [ref: Options Paper, paras 8, 10]. A Deputy has already been vetted. And a Deputy is already leading the Office: on the Options Paper’s own account, the Deputies serve as acting Prosecutor in rotation until the vacancy is filled [ref: Options Paper, para 1 and note 1]. To elect a serving Deputy in open consensus would give the Court continuity of leadership at the moment it most needs it, carrying full legitimacy because the choice would be made by consensus of the Assembly, in the open, and confirmed by its vote.

Both serving Deputies are already under United States sanctions. To elect one exposes no new person to coercion and creates no fresh target. The record of their performance in leading the Office under that pressure is before the States Parties, for them to assess.

The ASP President’s Options Paper undersells Option B by framing it only as “an interim measure” and a possible “stop-gap measure, with election for a shorter term of office”, worrying that it might “suggest an element of crisis” [ref: Options Paper, paras 17(b), 26]. Consensus is the outcome the Assembly has said it prefers. There is nothing irregular in a consensus forming around the person already carrying the office. A Deputy elected by the Assembly in open consensus is a Prosecutor with full authority of the office for the full term of nine years, or whatever term the Assembly fixes under Article 42(4).

Framed as a stop-gap, Option B invites the objections any interim measure deserves: a rushed election in place of a full process, a return to the 2021 shortlist, and a shorter term

that would bring forward another transition. None of these features belongs to a consensus on a serving Deputy. Such a consensus can form within whichever process the Bureau adopts: a Deputy stands alongside every other candidate, undergoes the same vetting and the same open hearings, and, if chosen, serves the full term. Continuity is an outcome the States Parties may reach by any route that keeps the choice with them.

While the choice of one of the Deputy Prosecutors is one possible focus for such a consensus, it is not the only one. If the Assembly were to converge, openly and on the merits, on another candidate ready to assume the office and to bear the sanctions that will fall on whoever holds it, that outcome would also be valid and welcome. States may bargain and persuade one another on the way to a consensus, as they do in any negotiation. The Assembly should refuse a committee that secretly pre-screens and eliminates candidates out of view of States, whose responsibility is to make the choice.

Failing consensus: an open and protected election

If no such consensus can be reached, the Assembly should proceed to the election prescribed by Article 42(4), a secret ballot by absolute majority, and should protect that election rather than replace it. That means nominations made publicly under the names of the States that make them, with co-nominations encouraged [ref: ICC-ASP/1/Res.2, as amended, para 29]; candidates setting out their prosecutorial vision openly before electors; the Court's permanent vetting applied to every candidate alike; and the choice made by secret ballot. Proceedings should ensure every candidate, including any who has been sanctioned, can take part [ref: Coercion of Justice and Sovereignty, September 2026, Recommendation 3]. That field includes serving Deputies: a Deputy who has not drawn a consensus is not thereby set aside and remains free to stand. States Parties should carry pressure collectively, treating attempts to punish any government for its vote, or any candidate for standing, as a common concern.

Why not an expert committee

The case for an expert committee must overcome the record of the failed 2021 process. The 2021 Committee reviewed 89 applications, interviewed 14 candidates, and delivered a shortlist of four [ref: ICC-ASP/21/16, para 6]. States Parties rejected the list, reopened nominations, and added five further candidates [ref: ICC-ASP/21/16, para 7]. Three of the four candidates formally nominated, including the one elected, had never appeared on the Committee's shortlist [ref: ICC-ASP/21/16, para 9]. The facilitators' report conceded the process "did not function as it was intended" and "did not circumvent an element of politicization" [ref: ICC-ASP/21/16, para 18].

Option A seeks to correct these faults through clearer terms of reference, distinct roles for the Committee and the Panel, and mandatory vetting. Those corrections improve how such a body works and leave its function untouched: a committee that ranks, shortlists or filters candidates still stands between the States Parties and their ballot, however well it is run.

More to the point, the committee was built to "circumvent" politicisation [ref: ICC-ASP/21/16, paras 17–18], which fundamentally mistakes the office. The Prosecutor is not a judge. Judges apply law impartially; the Prosecutor exercises wide discretion under Article 15 in selecting situations, cases, and prosecutorial policies. When candidates set out how they would exercise discretion, and States prefer one vision to another, the election functions as intended for a policy principal. The real hazard is coercion, or vote-trading across unrelated files. Driving choices into confidential rooms gives coercion somewhere to hide.

Against coercion, Article 42(4) supplies the secret ballot. The resolution's call for every effort towards consensus cannot harden into a bar that keeps duly nominated candidates off the ballot. Character screening belongs to standing procedures: permanent vetting drawing on the Independent Oversight Mechanism (IOM) screens integrity for every official on equal terms, with due process and right of reply [ref: ICC-ASP/21/16, para 134; ICC-ASP/22/Res.3]. Integrity is screened through permanent due diligence, while vision is evaluated in open public hearings. The precise weight of an IOM finding of credible allegations, and the extent to which States Parties receive the underlying material, remains a practical question that the Assembly should clarify. The permanent procedure provides due process and a right of reply; it does not, and should not, operate as a confidential filter that removes candidates from the ballot without an Assembly decision.

The 2026 removal of the third Prosecutor does not prove committee experts were right. The 2021 Committee omitted Mr. Khan due to five-member cross-vetoes, not foresight of future conduct [ref: ICC-ASP/21/16, para 37]. The lesson is "vet rigorously", not "trust expert gatekeepers".

A confidential filter remains the instrument through which selection could be captured. Resolved out of sight, a choice reached under pressure cannot be distinguished from one reached on merit.

Recommendations

The choice before the Bureau is not between a flawless process and a flawed one. It is between a flaw that can be answered for in the open and one that hides behind closed doors. Every open process carries faults the Assembly can see and correct: nominations invite lobbying, and an open field does not guarantee balance. A confidential committee's faults are unseen by virtue of the secrecy that defines it, and in the present environment that concealment is not a small fault: it is where a captured choice would hide. Option A rebuilds the body that failed in 2021. Options B and C keep the choice within the method the Statute prescribes. The Assembly should choose the Rome Statute, and, if it can, it should choose continuity within it by elevating one of the Deputies to the full power of the office.

In practice, to protect the process and give effect to Article 42, the Assembly should pursue the following actions:

- **a.** Pursue continuity of leadership through the open, consensual election of a serving Deputy Prosecutor, already elected, vetted and leading the Office, for a full term and within whichever process the Bureau adopts.
- **b.** Set from the outset a fixed end-date for consensus consultations and, failing consensus by that date, hold direct elections under Article 42 via public nominations and secret ballot by absolute majority, without gatekeeping bodies.
- **c.** Strongly decline Option A, vesting no committee with power to produce binding or filtering shortlists [ref: ICC-ASP/21/16, para 62].
- **d.** Under Option C, remove "suitability/unsuitability" verdicts [ref: Annex, draft Terms of Reference, para 14(b)] and confidential advice channels [ref: Annex, draft Terms of Reference, para 11], confining advice to reasoned, on-the-record assessments.
- **e.** Make nominations public and authored, encouraging co-nominations [ref: ICC-ASP/1/Res.2, as amended, para 29].
- **f.** Apply the permanent vetting mechanism universally through the Independent Oversight Mechanism with due process and right of reply.



- **g.** Retain open public hearings, including CICC-led processes, ensuring all candidates, including sanctioned officials, participate on equal terms [ref: Coercion of Justice and Sovereignty, September 2026, Recommendation 3].
- **h.** Fix firm deadlines in advance and resist mid-course improvisation [ref: ICC-ASP/21/16, paras 40–46, 128].
- **i.** Protect choices collectively, treating attempts to punish States or candidates as a common concern [ref: Coercion of Justice and Sovereignty, September 2026, Recommendations 5 and 8].
- **j.** Pursue geographical, gender, and legal-system diversity through early, open encouragement of nominations.

Annex: anticipated objections

- **“An open contest exposes the process to great-power pressure and vote-trading.”**

The Statute’s answer is the secret ballot. A State cannot be called to account by an outside power for a vote no one sees. Pressure is better resisted by a secret ballot of the full membership than by confidential deliberation among five.

- **“If campaigning is legitimate, so is vote-buying.”**

No. Contesting prosecutorial vision is legitimate persuasion. Coercion and vote-trading across unrelated files condition votes on extraneous factors. The secret ballot and anti-vote-trading pledges make a coerced or traded vote impossible to verify, and therefore harder to enforce [ref: ICC-ASP/21/16, para 104].

- **“The secret ballot lets a State defect quietly while professing loyalty.”**

Secrecy shields both conscientious and evasive votes. The Statute trades vote-level transparency to protect electors from external coercion. Accountability is placed at public, authored nominations and campaigning.

- **“Consensus can itself be an artificial compromise.”**

Consensus among States Parties is an exercise of their statutory choice. Consensus becomes improper only when delegated to a small, unelected body operating behind closed doors to dictate eligible candidates.

- **“The removal of the third Prosecutor shows experts were right.”**

The 2021 Committee omitted Mr. Khan due to five-member cross-vetoes, not foresight of future allegations. Rigorous due diligence, independent of any panel, is the appropriate safeguard.

- **“Civil society wanted a stronger selection committee.”**

Article 42 assigns electoral responsibility to States Parties. Scrutiny and public hearings strengthen the process without displacing state responsibility.

- **“Only an expert body can secure geographical, gender, and legal diversity.”**

The 2021 shortlist failed to deliver balance or meet rotation expectations. Diversity is better pursued through early, open outreach.

- **“Recommending a serving Deputy is pre-selection.”**

No. A consensus on a Deputy forms within the same process and among the same candidates as any other; it excludes no one.

- **“A serving Deputy was elected against a lower threshold than the Prosecutor.”**

Article 42(3) sets the same qualifications for the Prosecutor and the Deputy Prosecutors. A Deputy who stands is assessed on the same terms as every other candidate, and brings a record of leading the Office under sanctions that no other candidate can offer.

- **“An acting Prosecutor cannot stand on equal terms with other candidates.”**

Any candidate holding office raises this question, and the answer is the ordinary one: official resources and communications kept separate from candidate activity, and a protected, independent channel for staff to provide references or other information. Article 42(2)



requires the Prosecutor and the Deputy Prosecutors to be of different nationalities; the nomination rules should state how that requirement applies if a Deputy is elected.

- **“Nominations by States at the outset politicise the process.”**

In 2021, nominations followed expert assessment, and political judgment entered regardless: three of the four candidates formally nominated came from outside the Committee’s shortlist [ref: ICC-ASP/21/16, para 9]. Deferring nominations does not remove that judgment from the election; it moves it out of view. Authored nominations keep it visible and answerable.

- **“Abandoning the committee means abandoning merit.”**

No. Integrity is screened through permanent vetting, while competence and vision are tested in open public hearings. Merit does not require a gatekeeper standing between States Parties and the ballot.