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Report to the Bureau on the review of the procedure for the nomination and election of judges**I. Background**

1. This report is submitted pursuant to the mandate given to the facilitator, Mr. Stefan Barriga (Liechtenstein), on the review of the procedure for the nomination and election of judges. The mandate is based on resolution ICC-ASP/11/Res.8, in which the Assembly decided “to continue to review the procedure for the election of judges as set forth in section B of the resolution ICC-ASP/3/Res.6 on the occasion of future elections with a view to making any improvements as may be necessary” and requested the Bureau to “report thereon to the Assembly at its twelfth session”.

II. Discussions in the New York Working Group of the Bureau

2. The facilitator held several rounds of informal consultations in the inter-sessional period. The proposals made and the discussions thereon are reflected in the facilitator’s discussion paper (annex).

III. Conclusions and recommendations

3. On the basis of these consultations, the Bureau recommends that the following language be included in the omnibus resolution to be adopted at the twelfth session of the Assembly:

“23. ... *decides to adopt the amendments to the procedure for the nomination and election of judges*¹ contained in the annex, and *decides to consider, at its thirteenth session, the continuation of the review of said procedure, taking into account the work conducted so far as reflected in the facilitator’s discussion paper;*²”

...

¹ ICC-ASP/3/Res.6.

² [add reference]

Annex I

Amendments to Resolution ICC-ASP/3/Res.6 regarding the procedure for the nomination and election of judges

Note: The amendments below do not have retroactive effect and will therefore only apply to future elections.

“3. The nomination period shall open 32 weeks before the elections and shall last 12 weeks.”

“27 bis. A judicial vacancy will be declared in accordance with article 37 of the Rome Statute if an elected judge does not make his or her solemn undertaking in accordance with article 45 of the Rome Statute within six months of his or her election.”

Annex II

Facilitator's discussion paper

Final Version (15 November 2013)

1. The present paper is submitted by the facilitator, Mr. Stefan Barriga (Liechtenstein), to help steer the consultations and to reflect their outcomes, also with a view to facilitating possible future discussions. The present version of the paper reflects the status quo after the last informal consultations, held on 6 November 2013 in New York. The proposals under Topics 3 and 4 below were forwarded to the Assembly for adoption in the context of the omnibus resolution. No further action was taken with regard to Topics 1 and 2 as there was no agreement on the respective proposals.

TOPIC 1. One candidate, one seat (avoiding “forced” or “automatic” election)

2. Belgium submitted a proposal aimed at avoiding a situation (that has occurred in the past) where only one candidate remains for one seat. In this situation, the candidate is practically guaranteed to be elected with 100% of the votes. The reason is that States Parties submitting an empty ballot paper are not considered to be “present and voting” and, therefore, not considered at all. Theoretically, one single vote could thus be enough for the candidate to be elected by a “two-thirds majority of the States Parties “present and voting” in accordance with art. 36(6)(a) of the Rome Statute (namely in case all other State Parties hand in empty ballot papers).

3. Delegations expressed interest in addressing this issue. In addition to the concrete proposal by Belgium, a suggestion by the facilitator is also under consideration.¹

1.1 Belgian proposal: postponing election

4. Belgium proposed that in a situation where only one candidate remains for one seat, the “election shall be suspended and postponed until the next session of the Assembly. In such a case, the procedure for the nomination of candidates shall “restart” (see enclosure).

Positions: Some delegations cautioned that the fact that only one candidate was left for one seat did not automatically imply that that candidate was not suitable, and that postponing the election might not be the ideal solution.

1.2 Facilitator's suggestion: counting all ballot papers

5. The Facilitator indicated that the root cause for the problem was the current interpretation of the phrase “present and voting”. States Parties that submitted an empty ballot paper were currently not considered to be voting, even though they might actually wish to participate in the process and express their wish that a certain candidate *not* be elected. Where e.g. two seats remain to be filled, a State Party may vote for only one candidate and abstain from using its second vote if it is not satisfied with the second candidate. That ballot paper is counted as one of a State Party “present and voting”. Where only one seat remains to be filled however, a State Party that is not satisfied with the remaining candidate can only submit an empty ballot paper to express its preference, which is then *not* counted.

6. The facilitator therefore suggested that a solution to the problem could be to count all ballot papers once an election has reached the stage where only one candidate remains for one seat.

¹ A second suggestion by the facilitator, namely to consider introducing an absolute majority requirement, is no longer under consideration, as this would require an amendment to the Rome Statute as well as ratifications by 7/8 of States Parties for its entry into force.

7. In response to a question by a delegation, the facilitator stated that he was not aware of a precedent for such a solution, though the relative majority requirement (of those present and voting) was a common standard, and the problem therefore could also arise in other contexts.

Positions: Several delegations expressed interest in exploring this suggestion further. Belgium indicated that if such a change was made, the number of balloting rounds during which only one candidate was available should be restricted to a total of three. Another delegation pointed out that if such a change was made, it should apply in all rounds (and not only in case one candidate was left for one seat).

8. During the discussion, it was pointed out that the issue might have to be looked at in the context of Rule 66 of the Rules of Procedure of the Assembly, which reads:

Rule 66

Meaning of the phrase “States Parties present and voting”.

9. For the purposes of these Rules, the phrase “States Parties present and voting” means States Parties present and casting an affirmative or negative vote. States Parties which abstain from the voting shall be considered as not voting.

10. The facilitator submits that Rule 66 is indeed at the core of the issue, as it not only applies to regular “up-or-down” votes on individual decisions (e.g. draft resolutions), but also to elections in the context of the Assembly. Ballot papers are currently not designed to let States Parties clearly indicate a “no” vote or an “abstention”. Under the current practice, an empty ballot paper is interpreted as an “abstention”. In reality though, an empty ballot paper typically reflects the wish of the State Party that the candidates on the ballot **not** be elected, i.e. a negative vote. Under the current practice, the wish of a State Party to cast a negative vote cannot be clearly expressed and does not count. This seems at odds with the statement contained in Rule 66 that States Parties casting a negative vote shall be considered as voting (and therefore counted).

11. A relatively simple solution would be to recognize that Rule 66 was formulated mainly with single “up-or-down” votes in mind. The logic of the rule does not fully apply to elections, which are in essence a combination of several votes on one ballot paper. Instead, a slightly different rule could be applied in the context of the election of judges (or generally in the context of elections in the Assembly):

12. “For the purpose of elections [of judges] in the Assembly of States Parties, the phrase “States Parties present and voting” means States Parties present and submitting a ballot paper.”

Positions: Several delegations expressed reservations about this proposal, noting in particular that the same practice also existed in other organizations, and that therefore a change in the context of the Assembly could have broader implications.

TOPIC 2. Providing greater choice for States Parties

13. Belgium also submitted several proposals aimed at, generally speaking, increasing the number of candidates for States Parties to choose from.

2.1. Belgian proposal: extending the nomination period to allow for more candidates

14. Under the current rules, the President of the Assembly is already required to extend the nomination period to ensure at least two candidatures for each minimum voting requirement (MVR) that may apply. Usually, however, not all seats are subject to minimum voting requirements. Belgium proposes that the nomination period should be extended to ensure that overall there are at least twice as many seats as vacant positions.

Positions: Some delegations expressed interest in this proposal. The point was however also made that this would not change much in practice.

2.2. Belgian proposal: At least three candidates for regional MVR's needed

15. Belgium proposes that a regional group that has an **MVR of one** should submit **at least three candidatures** and thus provide greater choice (under current rules, two candidatures would suffice). A regional group that enjoys an **MVR of two** should submit **at least four candidatures** (no change to current rules). A regional group that enjoys an **MVR of three** should submit **at least six candidatures** (under current rules, five candidatures would suffice).

Positions: Some delegations expressed interest in this proposal, which would provide greater choice for States Parties and therefore would help improve the quality of the judges elected. Other delegations cautioned that this proposal would make it more difficult for underrepresented regional groups to have candidates elected. The point was also made that regional groups could nominate weak candidates simply for the purpose of complying with such a rule.

2.3. Belgian proposal: At least three candidates for gender MVR's needed

16. Along similar lines to the proposal under 2.2., Belgium proposes that a **gender MVR of one** should only apply provided that **at least three candidatures of that gender** are submitted (under current rules, two candidatures would suffice). For an election with a **gender MVR of two or more**, the existing rules would stay in place.²

Positions: Some delegations expressed interest in this proposal, while others cautioned that the change suggested may not be the best way to improve the quality of candidatures.

TOPIC 3. Declaring a vacancy in case solemn undertaking is not made

17. Belgium proposes that the resolution address the situation in which an elected judge does not make the solemn undertaking within six months of his or her election. In such a situation, a vacancy should be declared, leading to new elections. Belgium added that the timeframe could be extended to up to eight months.

Positions: There was considerable interest in addressing this situation. Some delegations cautioned that the proposal might be too rigid, as there may be valid reasons for the judge not traveling to The Hague within that time frame. The opposite view was also expressed, namely that the proposal was not rigid enough and that three to four months would suffice. The facilitator suggested that a role could be given to the Assembly's Bureau in taking the decision on the vacancy, thereby allowing for a margin of appreciation. Some delegations expressed hesitation whether such a role for the Bureau would be practical.

18. The facilitator further indicated that he had contacted the Office of the ICC President on this proposal, and that the Office had not raised any particular concerns. In this context, however, the question was raised as to how to deal with an elected judge who would make the solemn undertaking, but subsequently – once called by the Court to work – not take up his or her function in The Hague. This question would not fall into the review of the procedures for the nomination and election of judges, but rather in the area of disciplinary rules. It might be necessary to address this question in an appropriate forum, for example the Study Group on Governance.

19. At the last informal consultations, held on 6 November 2013, delegations agreed that the proposal made by Belgium could be submitted to a silence procedure, with a view to forwarding the proposal to the Assembly. On 15 November 2013, the silence procedure expired without any objection. The amendment thus agreed reads:

² Table in paragraph 20(c) of the resolution.

“27 bis. A judicial vacancy will be declared in accordance with article 37 of the Rome Statute if an elected judge does not make his or her solemn undertaking in accordance with article 45 of the Rome Statute within six months of his or her election.”

TOPIC 4. Adjusting the nomination period to allow more time to consider the Advisory Committee on Nominations report

20. The facilitator raised the question of the interplay of the current nomination period and the work of the Advisory Committee on Nominations (ACN). Under current rules, the regular nomination period ends fourteen weeks before the election takes place, and is in practice frequently extended up to three times, i.e., up to eight weeks before the election takes place. Eight weeks would be very little time for the ACN to consider the candidatures, write its report, and for States Parties to actually take the ACN findings into account. He suggested that the nomination period could, therefore, be moved up, e.g. by four or six weeks, so as to ensure that the ACN report will have greater effect.

Positions: Several delegations expressed interest in this suggestion. No particular concerns were raised. The Advisory Committee on Nominations also welcomed the proposal.

21. Accordingly, the facilitator suggested the following concrete change to resolution ICC-ASP/3/Res.6:

“3. The nomination period shall open ~~26~~ 32 weeks before the elections and shall last 12 weeks.”

22. At the last informal consultations, held on 6 November 2013, delegations agreed that the proposal could be submitted to a silence procedure, with a view to forwarding the proposal to the Assembly. On 15 November 2013, the silence procedure expired without any objection.

Annex III

Proposals submitted by Belgium regarding the procedure for election of judges

Indicative translation

1) Avoiding an election with only one candidate for one seat (“forced” election)

“16. The persons elected to the Court shall be the 6 candidates who obtain the highest number of votes and a two-thirds majority of States Parties present and voting, provided that an absolute majority of the States Parties constitutes the quorum for voting.

If there is no more than one candidate for one single position, the election shall be suspended and postponed until the next session of the Assembly of States Parties. In such case, the procedure for the nomination of candidates shall restart.”

2) Having a real choice, with at least three candidates for one position or two candidates in addition to the amount of vacant seats

2.1)

“11. The President of the Assembly of States Parties shall extend the nomination period for two weeks, but no more than three times, if at the end of the nomination period any regional or gender minimum voting requirement¹ is not matched with at least twice the number of candidates fulfilling that requirement, ***and if there are not at least twice as many candidates as vacant seats.***”

2.2.)

“20. During any given ballot, each State Party shall vote for no more candidates than seats to be filled, whereby it shall observe the minimum voting requirements regarding lists A and B, regional groups and gender. At the outset of each ballot, each minimum voting requirement shall be determined or discontinued in accordance with paragraphs 21 and 22.

(a) Each State Party shall vote for a minimum number of candidates from lists A and B. For list A, this number shall be 9 minus the number of judges from list A remaining in office or elected in previous ballots. For list B, this number shall be 5 minus the number of judges from list B remaining in office or elected in previous ballots.

(b) Each Party shall vote for a minimum number of candidates from each regional group. This number shall be 2 minus the number of judges from that regional group remaining in office or elected in previous ballots.

If the number of States Parties of any given regional group is higher than 16 at that moment, the minimum voting requirement for that group shall be adjusted by adding 1.

If the number of candidates from a regional group is not at least double the respective minimum voting requirement, the minimum voting requirement shall be half the number of candidates from that regional group (rounded ~~up~~ down to the nearest whole number where applicable). If there ~~is only one candidate~~ ***are only two candidates*** from a regional group, there shall be no minimum voting requirement for that group.

2.3)

In the table included in paragraph 20, c), replace number « 1 » by « 0 » in the column « Minimum voting requirement shall not exceed », facing number « 2 » in the column « Number of candidates ».,.

<i>Number of candidates</i>	<i>Minimum voting requirement shall not exceed:</i>
10	6
9	6
8	5
7	5
6	4
5	3
4	2
3	1
2	(delete: "1") 0
1	0

3) Avoiding that an elected judge refuses to take the oath and therefore deprives the Court of a judge for a period of potentially nine years

28. A judicial vacancy will be declared in accordance with article 37 of the Rome Statute if an elected judge does not make his or her solemn undertaking in accordance with article 45 of the Rome Statute within six months of his or her election.
