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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/14/Res.4, in which the Assembly decided “to continue to review the procedure for the nomination and election of judges as set forth in resolution ICC-ASP/3/Res.6 as amended, including by the present resolution, on the occasion of future elections with a view to making any improvements as may be necessary, taking into account the work conducted so far as reflected in the facilitator’s discussion paper”.

II. Discussions in the New York Working Group

2. The facilitator held several rounds of informal consultations in the inter-sessional period. These were focused on past proposals, since no new proposals were made in 2016. These proposals and the discussions thereon are reflected in the facilitator’s discussion paper (annex I).

III. Conclusions and recommendations

3. Since no agreement was found on any of the proposals for changes to the procedure, the only outcome of the facilitation is the informal guide to the election procedure prepared by the Facilitator (annex II). It is recommended that the informal guide be distributed to all delegations.

4. In keeping with past practice, the review of the procedure for the nomination and election of judges will not continue in the period leading up to the 16th session of the Assembly, since elections will be held during that session. The question whether to resume the facilitation will therefore have to be decided in the context of the omnibus resolution to be adopted at the 16th session.

Annex I

Facilitator's discussion paper

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 of proposals and discussions after informal consultations held on 1 April and 29 June 2016 and after the expiration of a silence procedure on 27 July 2016. It does not include amendments to the procedure adopted during previous Assembly sessions. Since no new proposals were introduced in 2016, the paper contains only proposals that were carried over from (and not agreed to during) the last inter-sessional period. The discussions on these proposals remained inconclusive. Proposal 2.1 was submitted to a silence procedure, which was broken by several delegations.

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

2. In 2015, Belgium submitted a revised proposal aimed at addressing the 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).

1.1 Belgian proposal: a) counting abstentions, b) proceeding to one last ballot

3. Belgium proposed that once the minimum voting requirements are discontinued, States that abstain from voting (i.e. by submitting an empty ballot paper) should also be considered as “States Parties present and voting”, as an exception to rule 66 of the Rules of Procedure of the Assembly of States Parties.¹ Accordingly, **empty ballot papers would be taken into account when calculating the majority required** for election.

4. Furthermore, once only one candidate remained for one position, the Assembly should vote only one last time. If the candidate does not get the two-thirds majority of States Parties submitting a ballot paper, then the **election would be postponed** and the nomination re-opened.

5. Some delegations expressed support for this proposal and in particular the notion that abstentions should be counted. Others considered it rather complicated, and the point was made that it could jeopardize the States Parties’ right to abstain. The point was also made that any candidate that made it so far in the elections must already have received very significant support, therefore the proposal may possibly not address a real problem.

6. In light of the discussion, Belgium withdrew its proposal on paragraph 16 (counting abstentions). Instead, and based on suggestions made by delegations, Belgium proposes to add a sentence to paragraph 16 bis (which applies only to the “one candidate, one seat” situation), which would read in its entirety:

“16 *bis*. If there is no more than one candidate for one single position, the Assembly shall proceed to a last ballot. If the candidate does not obtain a two-thirds majority of States Parties present and voting, the election shall be postponed until a resumed session of the Assembly of States Parties. In such case, the procedure for the nomination of candidates shall restart. **In accordance with rule 66 of the Rules of Procedure of the Assembly of States Parties, the ballot paper must permit to the States Parties present and voting to cast an affirmative or negative vote.**”

¹ “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.”

7. Some delegations supported the revised proposal, but some others expressed serious concern, including about the possibility that the position might not be filled at the election, leading to a judicial vacancy. Belgium further indicated that instead of proceeding to one last ballot, two such ballots could be held.

TOPIC 2. Providing greater choice for States Parties

8. In 2015, Belgium also re-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

9. 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 candidates as vacant positions:

“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 requirement 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.**”

10. Some support was expressed for this proposal, and a preference was expressed for one single extension of the nomination period, rather than up to three. Some concern was expressed as to the effect of this proposal on the work of the Advisory Committee on Nominations. The proposal was submitted to a silence procedure expiring on 27 July 2016, but it was not adopted as several delegations broke the silence.

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

11. 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).

12. Some delegations supported the proposal, but others raised serious concerns, as the proposal would have a disproportionate impact on smaller regional groups. Also, the concern was raised that this rule could entice groups to submit less qualified candidates just for the purpose of fulfilling this requirement.

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

13. 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 *Some delegations supported the proposal, but others expressed caution as to its potential effects.*

TOPIC 5. Making the process simpler – or at least easier to understand

14. Some delegations expressed an interest in simplifying the procedure, as well as in avoiding confusion and invalid ballots. A number of suggestions were made:

(a) Sample ballot papers including the actual names of the candidates should be made available prior to the election. *It was pointed out that this is indeed already the current practice.*

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

(b) Disseminating an easy-to-understand guide to election procedures. *The Secretariat noted that such guides are currently produced with simple instructions for concrete elections, see e.g. doc ICC-ASP/12/46. However, no generic guide to the election procedure as such exists, which would help representatives better understand the resolution. **The facilitator drafted such a generic guide and made it available to all delegations.***

(c) Making the ballot papers available in additional languages. *It was pointed out that this may delay the printing of ballot papers between rounds. The suggestion was made instead to have the President's notes containing the voting instructions translated and printed for delegations.*

(d) Hold mock elections during and not prior to the Assembly.

(e) Consider electronic means for voting; or Apps to give delegations instant information as to whether their ballot paper is valid; *these ideas were considered as interesting but not realistic.*

(f) Consider ways of speeding up the counting of votes, which currently was done in an entirely manual way.

(g) It was also suggested to make the balloting accessible to persons with disabilities (e.g. through Braille); *this proposal was not discussed further.*

Annex II

Informal guide and commentary to the procedure for the nomination and election of judges of the International Criminal Court

This informal document has been prepared by the Facilitator for the review of the procedure for the nomination and election of judges, Mr. Stefan Barriga (Liechtenstein), under his sole responsibility. It is provided as a courtesy for States Parties and does not bind them in any way. The primary purpose of this document is to give an easy-to-understand overview of the procedure, and to comment on a number of select provisions. It does not attempt to give a comprehensive analysis of the procedure in all its aspects.

I. Informal Guide

A. The goal: a balanced bench of highly qualified judges

1. Every three years, the ASP proceeds to replace one third the 18 judges of the Court, electing 6 new judges for non-renewable terms of 9 years. The nomination and election of judges is governed by a unique procedure that aims to ensure, as much as possible, that the bench of judges be balanced with respect to **three criteria**:

- (a) legal expertise (list A/B);
- (b) region; and
- (c) gender.

B. The tool: affirmative action through minimum voting requirements (MVRs)

2. The primary tool to achieve this goal is the use of the so-called minimum voting requirements (MVRs). The MVRs are brief, binding instructions that States Parties must follow when filling out ballot papers. They could for example read as follows:

- (a) vote for at least 2 candidates from Group X;
- (b) vote for at least 1 male candidate; and
- (c) vote for at least 1 candidate from list A.

3. The MVRs make it more likely that candidates that fulfill underrepresented criteria are elected, but – different from outcome quotas – they do not guarantee such an outcome. This is because the MVRs channel some of the votes to certain underrepresented criteria, but that in itself does not guarantee that any particular candidate receives the required two-thirds majority.

4. This is in keeping with the negotiation history of the MVRs, which were proposed as a compromise between those delegations that preferred fixed quotas (especially for regions, as is the case in many other elections) and those that preferred unrestricted elections.

C. The flipside: no clean slate

5. The MVRs have built-in rules that generally make sure that States Parties, when instructed to vote for candidates from a certain region or gender, are not forced to vote for a specific candidate. For example, the instruction “vote for at least 1 candidate from region X” only applies if there are at least 2 candidates from that region. In other words, underrepresented regions only benefit from affirmative action if they provide a real choice by nominating a certain minimum number of candidates. The same principle applies to any underrepresented gender.

D. The special one: even stricter rules for list A/B criterion

6. As mentioned above, the MVR system also applies to the two types of **legal expertise** that should be represented on the bench (list A: criminal law; list B: international law). The MVRs make it more likely that a sufficient number of candidates belonging to any underrepresented list be elected – but it does not guarantee so. This could lead to problematic results, since Article 36(5) of the Rome Statute requires that at least 9 judges shall be elected from list A, and at least 5 from list B. Therefore, the procedure contains an “emergency brake” that guarantees that any election is not tilted too far toward either list A or list B. No such minimum quotas are proscribed in the Rome Statute for region and gender, making the list A/B criterion stand out.

E. The catch: MVRs for region and gender only during the first four rounds

7. The MVRs for region and gender apply only during the first four rounds. This number is not derived from any particular mathematical logic, but is simply a compromise that was struck to accommodate those delegations that preferred a less restricted election procedure. The MVRs for list A/B, however, are not limited to the first four rounds. They apply until the requirement of Article 36(5) is fulfilled.

F. The fast track: judicial vacancies

8. The rules also determine how to proceed in case a **judicial vacancy** arises. This procedure is designed to be faster: Generally within about five months, a special election is organized to help the Court cope with the unexpected vacancy. The MVR system fully applies to such elections, with even stricter requirements: only candidates that fulfill underrepresented criteria, if any, may appear on the ballot paper. This may seem restrictive at first sight, but was also a compromise considering the practice in some other international bodies (which is often to keep the position with the same country that lost “its” member). Should the vacancy occur at a time when regular elections are being prepared, then the vacancy election can be held at the same ASP, thus benefitting from the existing pool of candidates running for election.

G. The problem: it’s complicated (primarily for the President)

9. The main drawback of the MRV system is that it can be complicated. The MVRs need to be **calculated** at various stages of the procedure: at the opening of the nomination period (to alert States Parties to underrepresented criteria, thus encouraging them to nominate candidates accordingly), at the end of the nomination period (in order to decide whether the period should be extended to encourage further nominations), and before each round of balloting (in order to print instructions for States Parties on the ballot papers). This calculation can be complex, given that the relevant rules are formulated in very generic terms and address a number of hypothetical scenarios. To make this determination is the responsibility of the ASP President, with the assistance of the Secretariat.

H. The solution (primarily for States Parties): follow instructions

10. While the MVR system is somewhat complicated, this primarily poses a challenge for the ASP President (supported by the Secretariat), as she or he is in charge of calculating the MVRs.

11. States Parties, in turn, mainly have the responsibility of following the instructions on the ballot paper itself. These instructions are not nearly as complicated as the rules themselves; in fact, they are typically rather **straightforward** (see the example above).

12. Ballot papers that do not follow all the instructions will be declared **invalid**. This is why the ASP President, during each round of balloting, gives enough time to delegations to check if they cast their vote accurately.

I. The frustration: the duration

13. Elections of judges have in the past often required **many rounds of balloting**. The main reason for this is the fact that candidates must reach a two-thirds majority to be elected. This can be a very high threshold to reach in a field of multiple candidates. This requirement stems directly from the Rome Statute (Article 36(6)) and could only be changed through an amendment to the Statute (to be ratified by at least seven eighths of States Parties), which could in itself be an extremely lengthy process.

14. The MVRs actually speed up the process to some extent, since they channel votes to certain groups of candidates – but they generally only apply during the first four rounds. After the fourth round,¹ a cut-off mechanism kicks in: The candidate having received the lowest number of votes is automatically removed from the subsequent ballot.

II. Commentary

15. Reprinted below is the relevant excerpt of the resolution governing the nomination and election of judges, with *comments in italics* under specific paragraphs that could benefit from further explanation.

Procedure for the nomination and election of judges, the Prosecutor and Deputy Prosecutors of the International Criminal Court (ICC-ASP/3/Res.6)²

The Assembly of States Parties,

Bearing in mind the provisions of the Rome Statute of the International Criminal Court,

Mindful of the Rules of Procedure of the Assembly of States Parties,

Convinced of the need to fully implement the provisions of article 36 of the Rome Statute,

Noting that in its resolution ICC-ASP/1/Res.3 the Assembly of States Parties agreed that it would review the procedure for the election of judges on the occasion of future elections with a view to making any improvements as may be necessary,

Approves the following procedure for the nomination and election of judges of the International Criminal Court, replacing resolution ICC-ASP/1/Res.3 and parts A, B and C of resolution ICC-ASP/1/Res.2:

A. Nomination of candidates for judges

1.³ The Secretariat of the Assembly of States Parties shall circulate through the diplomatic channel the invitations for nominations of judges of the International Criminal Court. The communication shall reproduce paragraph 6 of this resolution and remind Governments of the importance of elected judges who have made their solemn undertaking being available to take up their full-time service when the Court's workload so requires.

2. The invitations for nominations of judges will include the text of article 36, paragraphs 3, 4 and 8, of the Statute, the present resolution as well as specific information regarding the application of all minimum voting requirements in the elections.

3.⁴ The nomination period shall open 32 weeks before the elections and shall last 12 weeks.

¹ Exceptions may apply, see the Commentary to OP 23.

² The preamble and sections A, B and C, as well as the annexes, replicate the text of resolution ICC-ASP/3/Res.6. Sections D, E, F and G replicate the text of resolution ICC-ASP/1/Res.2. The amendments are reflected via footnotes.

³ As amended by resolution ICC-ASP/14/Res.4, annex II.

⁴ As amended by resolution ICC-ASP/12/Res.8, annex II.

4. Nominations submitted before or after the nomination period shall not be considered.
5. States Parties to the Statute shall communicate nominations for the election of judges of the International Criminal Court through the diplomatic channel to the Secretariat of the Assembly of States Parties.
- 6.⁵ Every nomination should be accompanied by a statement:
 - (a) Specifying in the necessary detail how the candidate fulfils each of the requirements in article 36, paragraph 3(a), (b) and (c), of the Statute, in accordance with article 36, paragraph 4(a), of the Statute;
 - (b) Indicating whether the candidate is being nominated for inclusion in list A or list B for the purposes of article 36, paragraph 5, of the Statute;
 - (c) Containing information relating to article 36, paragraph 8(a)(i) to (iii), of the Statute;
 - (d) Indicating whether the candidate has any expertise under article 36, paragraph 8(b), of the Statute;
 - (e) Indicating under which nationality the candidate is being nominated for the purposes of article 36, paragraph 7, of the Statute, where a candidate is a national of two or more States;
 - (f) Indicating the commitment of the candidate to be available to take up full-time service when the Court's workload so requires.
7. States that have started the process of ratification, acceptance or approval of or accession to the Statute may nominate candidates for the elections of judges of the International Criminal Court. Such nominations shall remain provisional and shall not be included in the list of candidates unless the State concerned has deposited its instrument of ratification, acceptance, approval or accession with the Secretary-General of the United Nations before the end of the nomination period and provided that that State is a party to the Statute in accordance with article 126, paragraph 2, of the Statute on the date of the election.
8. The Secretariat of the Assembly of States Parties shall place the nominations of candidates for judges, the accompanying statements referred to in article 36 of the Statute and other supporting documentation on the Internet web site of the International Criminal Court, in any of the official languages of the Court, as soon as possible after receiving them.
9. The Secretariat of the Assembly of States Parties shall prepare a list in English alphabetical order of all persons thus nominated, with accompanying documents, and shall circulate it through the diplomatic channel.
10. Six weeks after the opening of the nomination period, the President of the Assembly of States Parties shall inform all States Parties through diplomatic channels and through specific information on the web site of the International Criminal Court on the number of candidates nominated with respect to each minimum voting requirement.
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 requirement⁶ is not matched with at least twice the number of candidates fulfilling that requirement.
12. The President of the Assembly of States Parties shall extend the nomination period for two weeks at a time, if at the end of the nomination period the number of candidates remains less than the number of seats, or the number of candidates from list A or B remains less than the respective minimum voting requirement.

⁵ As amended by resolution ICC-ASP/14/Res.4, annex II.

⁶ To be calculated in accordance with paragraph 20(b), second sentence, and paragraph 20(c), second sentence, only.

B. Election of judges

13. The Bureau of the Assembly of States Parties shall fix the date of the election.
14. The Secretariat of the Assembly of States Parties shall prepare, in accordance with article 36, paragraph 5, of the Statute, two lists of candidates in English alphabetical order.
15. The election of judges shall be a matter of substance, and subject to the requirements of article 112, paragraph 7(a), of the Statute.
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.
17. When two or more candidates of the same nationality obtain the required majority, the candidate who receives the higher number of votes shall be considered elected.
18. No more than 13 candidates from list A and no more than 9 candidates from list B shall be considered elected, taking into account the number of judges remaining in office.

OP18: According to Art. 36(5) of the Rome Statute, at least 9 judges from list A, and at least 5 judges from list B shall be elected at the first elections (held in 2003), and the "equivalent proportion" shall be kept afterwards – meaning that the number of A-list judges must not drop below 9, and the number of B-list judges must not drop below 5. There is in fact not just one single permissible proportion: These minimum numbers only add up to 14, but there are 18 judges in total. The following proportions of list A to list B judges would therefore be permissible: 13:5; 12:6; 11:7; 10:8; 9:9. The rule in OP 23 ensures that the election result remains within this range.

19. States Parties shall, in the election of judges, take into account the need for the representation of the principal legal systems of the world, equitable geographical representation and a fair representation of female and male judges. They shall take into account the need to include judges with legal expertise on specific issues, including, but not limited to, violence against women and children.
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.

OP20(chapeau): This paragraph contains the general rule according to which States Parties must observe the MVRs while voting.

- (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.

OP20(a): This paragraph sets out how to calculate the list A/B MVRs. The rule is based on the logic of Art. 36(5) of the Rome Statute, which requires that at least 9 judges must be elected from list A, and at least 5 judges from list B.

An example: At the time of the first round of elections, 12 judges remain in office, and 6 judges are to be elected (for a total of 18). If among the 12 remaining judges 6 belong to list A, and 6 belong to list B, then the MVR for the first round of elections is calculated as follows: For list A: 9 minus 6 = 3. For list B: 5 minus 6 = -1. Accordingly, States Parties must vote for at least 3 judges from list A in the first round, and there is no requirement to vote for list B judges (there are no "negative" MVRs). Or in other words: If we have only 6 list A judges remaining on the bench, and the Rome Statute says we need at least 9, then States Parties must vote for at least 3 during the elections.

- (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 to the nearest whole number where applicable). If there is only one candidate from a regional group, there shall be no minimum voting requirement for that group.

*OP20(b) sets out how to calculate the regional MVRs. **The regional MVRs are designed to make it more likely that each regional group has at least 3 judges on the bench** (though such an outcome is not guaranteed due to the nature of the MVRs, which are not outcome quotas). The number 3 is the starting point for the calculation (this follows from the first and second paragraph, which were drafted at a time when some groups did not yet have more than 16 States Parties). When calculating the MVRs for a certain regional group for the first round of elections, the number 3 must be reduced by the number judges from that group remaining in office. In subsequent rounds, that number may have to be further reduced by the number of candidates from that region already elected.*

An example: A regional group has a total of 3 judges on the bench of the ICC, of which 2 are outgoing at the upcoming election, and one is remaining. The MVR for the first round of elections is thus 3 minus 1 = 2. If one of the region’s candidates is elected during the first round, then the MVR for the second round is reduced to 1.

*There is, however, one more important twist to this calculation. Regional groups only get to enjoy the benefits of the MRVs if they present a certain **minimum number of candidates**, thereby providing States Parties with a certain level of choice. The generic formula for calculating the required number of candidates is somewhat complicated, but there is a very limited number of concrete scenarios, which are the following:*

If the MVR is 1, then the region should nominate at least 2 candidates (otherwise there will be no MVR).

If the MVR is 2 (as in the example above), then the region should nominate at least 3 candidates (if it nominates only 2, then the MVR will be reduced to 1; if it nominates only 1, then there will be no MVR).

If the MVR is 3, then the region should nominate at least 6 candidates (if it nominates only 5, or 4, or 3, then the MVR will be reduced to 2; if it nominates only 2, then the MVR will be reduced to 1; if nominates only 1, then there will be no MVR).

(c) Each State Party shall vote for a minimum number of candidates of each gender. This number shall be 6 minus the number of judges of that gender remaining in office or elected in previous ballots. However, if the number of candidates of one gender is 10 or less, the minimum voting requirement for that gender shall be adjusted in accordance with the following formula:

<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	1
1	0

*OP20(c) sets out how to calculate the gender MVRs. **The gender MVRs are designed to make it more likely that each gender has at least 6 judges on the bench** (though such an outcome is not guaranteed due to the nature of the MVRs, which are not outcome quotas).*

When calculating the MVRs for either the male or female gender for the first round of elections, the number 6 must be reduced by the number judges of that gender remaining in office. In subsequent rounds, that number may have to be further reduced by the number of candidates of that gender already elected.

*Similar to regional MVRs, the gender MVRs only apply to the extent that a certain **minimum number of candidates** of the respective gender are available. The formula for calculating the required number of candidates is contained in the table in OP20(c). This formula translates to the following concrete scenarios:*

If the MVR for a certain gender is 1, then there should be at least 2 candidates from that gender (otherwise there will be no MVR).

If the MVR is 2, then there should be at least 4 candidates from that gender (if there are only 3 or 2, then the MVR will be reduced to 1; if there is only 1, then there will be no MVR).

If the MVR is 3, then there should be at least 5 candidates from that gender (if there are only 4, then the MVR will be reduced to 2; if there are only 3 or 2, then the MVR will be reduced to 1; if there is only 1, then there will be no MVR).

If the MVR is 4, then there should be at least 6 candidates from that gender (if there are only 5, then the MVR will be reduced to 3; etc. as in previous scenarios).

If the MVR is 5, then there should be at least 7 candidates from that gender (if there are only 6, then the MVR will be reduced to 4; if there are only 5, then the MVR will be reduced to 3; etc. as in previous scenarios).

If the MVR is 6, then there should be at least 9 candidates from that gender (if there are only 8 or 7, then the MVR will be reduced to 5; if there are only 6, then the MVR will be reduced to 4; if there are only 5, then the MVR will be reduced to 3; etc. as in previous scenarios).

21. Each minimum voting requirement shall be adjusted until that requirement can no longer be met, whereupon the use of that requirement shall be discontinued. If an adjusted voting requirement can be met individually, but not jointly, the use of all regional and gender voting requirements shall be discontinued. If, following four ballots, there still remain seats to be filled, these minimum voting requirements shall be discontinued. The minimum voting requirements regarding lists A and B shall be applied until they are fulfilled.

OP21 contains four very important rules for the practical application of the MVRs.

(a) Before each round of balloting, each MVR needs to be adjusted, i.e. calculated anew to reflect the results of the previous round (for example the successful election of a candidate of an underrepresented region or gender; or the withdrawal of a candidate that may reduce a certain MVR). A specific MVR that is impossible to fulfil (e.g. “vote for at least 1 male candidate”, while there are no male candidates left on the ballot paper) will be discontinued. (This also follows from the rules requiring a certain minimum number of candidates for gender and regional MVRs, see paras. 20(b) and (c) above.)

(b) The situation may arise where the pool of candidates may make it impossible for States Parties to respect two or more specific MVRs at the same time. For example, with only one seat left in the election, Region X remains under-represented, but also the female gender. Normally, the ballot paper would state “vote for at least 1 candidate from Region X” and also “vote for at least one female candidate”. If four candidates remain, with two of them being male candidates from Region X, and two female candidates from other regions, then the two MVRs cannot possibly be respected at the same time. In such a situation, all regional and gender MVRs are discontinued. Such a scenario is rather unlikely to materialize, since the regional and gender MVRs only apply during the first four rounds.

(c) The regional and gender MVRs only apply during the first four rounds.

(d) The MVRs regarding list A/B apply even after the first rounds – simply until they are fulfilled.

22. Only ballot papers observing the minimum voting requirements shall be valid. If a State Party fulfils the minimum requirements using less than the maximum number of votes allowed for that ballot, it may abstain from voting for the remaining candidates.

OP 22 reinforces the point that States Parties must strictly respect the MVRs, otherwise the ballot paper will be declared invalid (OP 20 essentially says the same thing). This does not mean that States Parties must use all of their votes – but they must use as many votes as are necessary to respect the MVRs.

23.⁷ Once regional and gender voting requirements are discontinued and provided that the number of remaining candidates allows the minimum voting requirements regarding lists A and B to be fulfilled, each further ballot shall be restricted to the most successful candidates of the previous ballot. Before each ballot, the candidate (or, in the event of a tie, the candidates) having obtained the lowest number of votes in the previous ballot shall thus be excluded, provided that the number of candidates remains at least twice the number of seats to be filled.

OP 23 aims to speed up the process by removing those candidates having obtained the lowest number of votes in the previous round. This cut-off mechanism only kicks in after the fourth round (or earlier if regional and gender MVRs are fulfilled before that). The cut-off mechanism may however not go too far in reducing the pool of candidates: on the one hand, the number of candidates must remain twice the number of seats; on the other hand, the mechanism must not undermine any list A/B MVR that may apply.

24. The President of the Assembly of States Parties shall be responsible for the election procedure, including the determination, adjustment or discontinuation of the minimum voting requirements.

25. Ballot papers shall be organized in a manner facilitating such an election process. The minimum voting requirements, the adjusted requirements and the discontinuation of any requirements shall be clearly indicated on the ballot papers. Before the day of the election, the President shall distribute to all States Parties copies of the instructions and samples of the ballot papers. On the day of the election, clear instructions and sufficient time shall be given for each ballot. In each ballot, before the voting process is concluded, the President shall repeat the instructions and the minimum requirements to allow each delegation to verify that its vote meets those requirements.

26. The Assembly of States Parties shall review the procedure for the election of judges on the occasion of future elections with a view to making such improvements as may be necessary.

C. Judicial vacancies⁸

27. In the event of a judicial vacancy in accordance with article 37 of the Rome Statute, the procedures for the nomination and election of judges shall apply *mutatis mutandis*, subject to the following provisions:

(a) Within one month of the occurrence of the judicial vacancy, the Bureau of the Assembly of States Parties shall fix the venue and date of the election, which should not be later than 20 weeks after the occurrence of the vacancy unless the Bureau decides otherwise after consulting the Court.

(b) The nomination period shall open 18 weeks before the elections and shall last 6 weeks.⁹

(c) If the judicial vacancy reduces the number of judges from list A to below 9 or the number of judges from list B to below 5, only candidates from the underrepresented list can be nominated.

(d) If at the time of the election a regional or gender minimum voting requirement is not fulfilled, only candidates that can satisfy any of the underrepresented

⁷ As amended by resolution ICC-ASP/14/Res.4, annex II.

⁸ As amended by resolution ICC-ASP/5/Res.5.

⁹ As amended by resolution ICC-ASP/13/Res.5, annex II.

regional minimum voting requirements as well as the underrepresented gender minimum voting requirement can be nominated.

(e) A judge elected to fill a vacancy shall serve for the remainder of the predecessor's term and, if that period is three years or less, shall be eligible for re-election for a full term under article 36 of the Statute.

OP 27 contains a fast-track procedure to fill judicial vacancies. The main goal of the shorter timelines is to ensure that the unexpected gap on the bench be filled as quickly as possible. But vacancy elections are also used as an opportunity to counter any imbalance that may have been caused by the vacancy, or that may have existed even before the vacancy occurred. To achieve this goal, the affirmative action for underrepresented criteria is applied even more strongly than in regular elections: Only candidates that fulfil all of the underrepresented criteria can be nominated. The candidates must belong to the right list, if either list A or B becomes underrepresented, and they must belong to one of the underrepresented regions, if any, and they must belong to the underrepresented gender, if any. (It is however unlikely that so many criteria would accumulate in one vacancy election.) In addition, the MVR system applies during for the balloting, as it would during regular elections.

27 bis.¹⁰ 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.

27 ter.¹¹ If the judicial vacancy occurs during the intersessional period prior to a regular election of six judges, the election to fill that vacancy shall take place at that same session, unless the Bureau decides otherwise after consulting the Court. If the Bureau decides to hold the vacancy election at that same session, the procedures for the nomination and election of judges shall apply *mutatis mutandis*, subject to the following provisions:

(a) Candidates nominated for the regular election shall also be considered as nominated for the vacancy election, unless the nominating State Party decides otherwise. States Parties may also nominate candidates for the vacancy election only, without restriction to any region, gender or list. No separate nomination period is required for the vacancy election.

(b) The judicial vacancy shall not affect the calculation of the minimum voting requirements for the regular election (paragraphs, 11, 20, 21 and 22).

(c) The election to fill the judicial vacancy shall take place after the regular election of six judges has concluded, and at least one day later to allow the early distribution of instructions and sample ballot papers in accordance with paragraph 25.

(d) Those candidates that have not been elected in the regular elections shall be included on the ballot paper for the vacancy election, unless the nominating State Party decides otherwise, and subject to paragraphs (e) and (f) below.

(e) If after the regular election the number of judges from list A remains below 9 or the number of judges from list B below 5, only candidates from the underrepresented list shall be included on the ballot paper; others shall no longer be considered as nominated.

(f) If after the regular election a regional or gender minimum voting requirement is not fulfilled, only candidates that can satisfy any of the underrepresented regional minimum voting requirements as well as the underrepresented gender minimum voting requirement shall be included on the ballot paper; others shall no longer be considered as nominated.

(g) A judge elected to fill a vacancy shall serve for the remainder of the predecessor's term and, if that period is three years or less, shall be eligible for re-election for a full term under article 36 of the Statute.

OP 27 ter addresses the situation where a vacancy occurs in proximity to a regularly scheduled election. In this case, OP 27ter foresees that the vacancy election should take

¹⁰ As amended by resolution ICC-ASP/12/Res.8, annex II.

¹¹ As amended by resolution ICC-ASP/14/Res.4, annex II.

place at the same session as the regular election (but allows the Bureau to decide otherwise). Holding vacancy elections and regular elections at the same ASP is an efficient way of going about business, but it raises some questions as to how the two election processes interact. OP 27ter aims to address these questions comprehensively (and therefore supersedes OP 27).

The basic idea is that the ASP should use synergy effects when confronted with an unexpected vacancy at a time when regular elections are being prepared anyway. The elections cannot, however, simply be merged: This is because the regular election is for 9-year terms, while the vacancy election is for the remainder of the term of the outgoing judge. But the vacancy election should benefit from the fact that there is already a pool of candidates for the regular election – and tap into the same pool.

Both elections will be held at the same ASP, with the regular election held first. Those candidates that are not elected during the regular election then get a second chance: they will automatically participate in the vacancy election. (Of course, no candidate is forced to figure on the ballot and can at any time declare to opt-out; and conversely, candidates can declare to run for the vacancy election only instead of for both elections).

An important question is how to a sudden vacancy affects the calculation of MVRs in a regular election process, and vice versa. The solution can best be illustrated by an example:

Region X has three judges on the bench, one of whom is approaching the end of the 9-year term and will be replaced at an upcoming regular election. As the nomination period opens for the regular election, Region X therefore has an MVR of 1 (the normal calculation under OP20(b)). One week after the nomination period is opened, one of the two other judges belonging to Region X resigns, with more than 6 years remaining on the term. **This vacancy, however, does not change the calculation of the MVR for the regular election**, which will proceed with MVR 1 for Region X. At the ASP, the regular election will be held first. Then there are broadly two possible outcomes:

(a) Region X has one of its candidates elected, and thus two in total. In this case, Region X remains underrepresented after the regular election. At the vacancy election the next day, only candidates from Region X will be on the ballot paper. (the same would be true if Region X had none of its candidates elected)

(b) Region X has two (or more) of its candidates elected. In this case, Region X would have used the opportunity of the regular election to fix the underrepresentation caused by the vacancy. Consequently, the ballot paper for the vacancy election will not be restricted to candidates from Region X, but will feature all the candidates who were not elected in the regular election (plus any candidates that may be running for the vacancy election only).

In other words, the regular elections will be used as a de facto opportunity to fix any underrepresentation that may exist at the time of the vacancy (without, however, adjusting the MVRs for this purpose). Only if any region, gender or list remains underrepresented after the regular election will the vacancy election be restricted to these criteria. In an ideal scenario, the regular elections would thus address any and all existing underrepresentations, and the vacancy elections would have a larger pool of candidates than usual – namely all the candidates remaining from the regular election, plus any candidates who may have chosen to run for the vacancy only. Those “vacancy only” nominations are not limited to candidates fulfilling underrepresented criteria (as is otherwise the rule under OP27), because at the time of nomination it will not yet be known whether the vacancy elections will be restricted or not (as the outcome of the regular election will not yet be known).

To sum up: Op 27ter clarifies that an unexpected vacancy occurring in the run-up to a regular election will not affect the MVR calculations for the regular elections. The vacancy election should be held right after the regular elections and benefit from the same pool of candidates. Ideally, the regular elections will then address all existing

underrepresentations, otherwise the vacancy elections will be restricted to candidates fulfilling criteria that remain under-represented after the regular election.¹²

Appendix I

Illustrative tables of minimum voting requirements

The following tables are included for illustration purposes only.

Table 1: Minimum voting requirements for list A

<i>If the number of judges from list A remaining in office or elected in previous ballots is:</i>	<i>... then the minimum voting requirement for list A is:</i>
9 or more	fulfilled
8	1
7	2
6	3
5	4
4	5
3	6
2	7
1	8
0	9

Table 2: Minimum voting requirements for list B

<i>If the number of judges from list B remaining in office or elected in previous ballots is:</i>	<i>... then the minimum voting requirement for list B:</i>
5 or more	fulfilled
4	1
3	2
2	3
1	4
0	5

Table 3: Regional minimum voting requirements

<i>If the number of judges from a given region remaining in office or elected in previous ballots is:</i>	<i>... then the minimum voting requirement for that region is:</i>
<i>Number of judges in office and candidates elected from one region</i>	<i>Number of States Parties from this region compared to the total number of States Parties</i>
3 or more	fulfilled
2	1
1	2
0	3

(Further adjustments might be necessary in accordance with para. 20 (b) of the resolution.)

¹² For specifics, see OP27ter (e) and (f), which are modelled after OP27 (c) and (d). See also the Commentary to OP27

Table 4: Gender minimum voting requirements

If the number of judges from one gender remaining in office or elected in previous ballots is: ... then the minimum voting requirement for that gender is:

<i>Number of judges in office and candidates elected from one region</i>	<i>Number of States Parties from this region compared to the total number of States Parties</i>
6 or more	fulfilled
5	1
4	2
3	3
2	4
1	5
0	6

(Further adjustments may be necessary in accordance with para. 20 (c) of the resolution.)

Appendix II

Sample ballot paper: Election of six judges of the International Criminal Court

This sample ballot paper is included for illustration purposes only.

VOTE FOR A MAXIMUM OF 6 CANDIDATES				
REGIONAL GROUPS	LIST A VOTE FOR AT LEAST X FROM LIST A		LIST B VOTE FOR AT LEAST X FROM LIST B	
GENDER DISTRIBUTION: VOTE FOR AT LEAST X MALES AND X FEMALES				
	MALE	FEMALE	MALE	FEMALE
AFRICA VOTE FOR AT LEAST X CANDIDATES FROM THIS REGION	<input type="checkbox"/> Name (Country) <input type="checkbox"/> Name (Country)	<input type="checkbox"/> Name (Country)	<input type="checkbox"/> Name (Country)	<input type="checkbox"/> Name (Country) <input type="checkbox"/> Name (Country)
ASIA VOTE FOR AT LEAST X CANDIDATES FROM THIS REGION	<input type="checkbox"/> Name (Country) <input type="checkbox"/> Name (Country)	<input type="checkbox"/> Name (Country)	<input type="checkbox"/> Name (Country)	
EASTERN EUROPE VOTE FOR AT LEAST X CANDIDATES FROM THIS REGION	<input type="checkbox"/> Name (Country)	<input type="checkbox"/> Name (Country)	<input type="checkbox"/> Name (Country) <input type="checkbox"/> Name (Country)	<input type="checkbox"/> Name (Country)
LATIN AMERICA/ CARIBBEAN VOTE FOR AT LEAST X CANDIDATES FROM THIS REGION	<input type="checkbox"/> Name (Country)	<input type="checkbox"/> Name (Country) <input type="checkbox"/> Name (Country)	<input type="checkbox"/> Name (Country) <input type="checkbox"/> Name (Country)	<input type="checkbox"/> Name (Country)
WESTERN EUROPE AND OTHER VOTE FOR AT LEAST X CANDIDATES FROM THIS REGION	<input type="checkbox"/> Name (Country) <input type="checkbox"/> Name (Country)	<input type="checkbox"/> Name (Country) <input type="checkbox"/> Name (Country)	<input type="checkbox"/> Name (Country) <input type="checkbox"/> Name (Country)	<input type="checkbox"/> Name (Country)