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Report to the Bureau on the review of the procedure for the nomination and election of judges

I.	Background	2
II.	Discussions in the New York Working Group	2
III.	Conclusions and Recommendations	5
Annex I:	Comments and proposals received in response to announcements, dated 7 and 30 August and 5 September	6
Annex II:	Draft resolution on the review of the procedure for the nomination and election of judges	14
Annex III:	Draft text for the omnibus resolution	19

I. Background

1. This report is submitted pursuant to the mandate given to the facilitation of the New York Working Group of the Bureau (“Working Group”) on the review of the procedure for the nomination and election of judges based on resolution ICC-ASP/17/Res.5, in which the Assembly of States Parties (“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, on the occasion of future elections after the sixteenth session 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” and requested “the Bureau to update the Assembly, at its eighteenth session, on the progress of the review of the procedure for the nomination and election of judges”.¹
2. On 7 February 2019, the Bureau appointed Ambassador Christian Guillermet-Fernández (Costa Rica) as the facilitator for the review of the procedure for the nomination and election of judges.²
3. On 23 October 2019, the Bureau appointed via a silence procedure Mr. Luke Roughton (New Zealand) as the facilitator for the review of the procedure for the nomination and election of judges, upon the resignation of Ambassador Christian Guillermet-Fernández (Costa Rica) on 10 October 2019.
4. The Working Group held three intersessional meetings to exchange views on the review of the procedure for the nomination and election of judges, on 1 July, 2 October and 8 November, before commencing its negotiations on the zero draft resolution proposed by the facilitator on 28 October, which were held on 8, 13, 15, 19, 21, 25, and 26 November.

II. Discussions in the New York Working Group

5. At the first meeting of the Working Group, held on 1 July 2019, delegations expressed a general desire to make improvements to the procedure for the nomination and election of judges. In particular, delegations emphasized the need to improve national nomination processes, and to strengthen the role of the Advisory Committee on nominations of judges of the International Criminal Court (“ACN”). Some indicated that in order to ensure a high quality of judicial candidates, both the processes for national nomination and intergovernmental election should be improved. Others preferred to focus on enhancing national processes, because of the political elements which persist in every intergovernmental election.
6. Several more specific suggestions and views were also raised at the first meeting. A suggestion was made that criminal trial experience should be a non-binding eligibility criterion for candidates. Views were further expressed that the requirements of lists A and B in the Rome Statute should be revisited. In response to those views, some stated that diverse backgrounds were important for coping with complex international criminal cases, and that touching upon the issues of lists A and B would require amendments to the Statute. Delegations also presented ways of strengthening the role of the ACN in relation to national nomination processes. The need to share best practices for national practices was also addressed. During this meeting, Belgium also expressed its willingness to resubmit some of the proposals that it had presented in 2015. Delegations expressed a preference for a stand-alone ASP resolution to be the outcome of this facilitation. The facilitator called for proposals on the review of the procedure for the nomination and election of judges and the Working Group decided to continue its consideration at the next meeting.
7. At its second meeting held on 2 October 2019, the Working Group had before it written proposals and comments on the review of the procedure for the nomination and election of judges, in response to calls for submissions made on 7 August, 4 September and 10 September (annex I). The desirability of immediate action in the facilitation on this topic

¹ ICC-ASP/17/Res.4, annex I, paras. 6(a) and 6(b).

² Decision of the Bureau of the Assembly of States Parties, 7 February 2019, available at https://asp.icc-cpi.int/iccdocs/asp_docs/ASP18/ICC-ASP-2019-Bureau-1-b.pdf.

was mentioned during the course of meetings of the Bureau and the Working Group in the context of discussions on the review of the Court.

8. At its second meeting, the Working Group received presentations on how to improve the procedure for the nomination and election of judges from Mr. Carlos Ayala from the American University Washington College of Law, Mr. James Goldston from the Open Society Justice Initiative and Ms. Yasmina Gourchane from the Coalition for the International Criminal Court. These presentations were followed by an interactive discussion, which responded to the presentations and also some of the written proposals and comments which had been submitted.

9. During the course of this interactive discussion, delegations commented on the various aspects of the eligibility requirements of judicial candidates for the Court, the role of the ACN, and national nomination processes. Delegations also voiced concern about the practice of vote swapping, while also recognizing the political nature of intergovernmental elections. Some delegations stressed the importance of ensuring candidates have practical competency in criminal justice. Others did not see merit in substantive changes to the current criteria relating to the qualification of candidates. While delegations recognized the importance of ensuring the implementation of article 36 of the Rome Statute, views were expressed that additional non-binding criteria beyond article 36 could be taken into account when considering candidates' competence, experience, and other relevant requirements. In this context, some delegations expressed a preference to limit the number of list B judges by selecting no more than the minimum required. Others preferred not to limit the number of list B candidates, because of the value of adding wider perspectives and diverse backgrounds to the bench. Most delegations were of the view that amending the Rome Statute for the purpose of ensuring the best qualified judicial candidates would not be desirable at this point in time. Some delegations also emphasized that fair geographical representation, the representation of different legal systems, and gender balance, were also important to consider, alongside the quality of judicial candidates. In response to the written proposals relating to minimum voting requirements submitted by Belgium, some delegations expressed support for those proposals, while others expressed opposition to them.

10. Delegations stressed the need to reinforce the role of the ACN. Some suggested that the ACN could be mandated to provide more rigorous assessments of candidates to assist governments to choose the best qualified candidates. A view was expressed that a grading system might be introduced to this effect. Suggestions were also made that the ACN could facilitate the sharing of best practices on national nomination processes, in order to assist governments to enhance their national processes. It was also emphasized that the nomination and election of judges was a governmental process, and considering the primacy of the Rome Statute, the role of the ACN should remain recommendatory in nature. A suggestion was also made that civil society could present a roster of qualified candidates to all States Parties.

11. Wide support was again expressed for a stand-alone resolution to update and supplement resolution ICC-ASP/3/Res.6, considering the impact and importance of the procedure for the nomination and election of judges. Some however, suggested focusing first on what elements of substance could be agreed upon, and a view was also expressed that negotiation on a resolution could be burdensome. A point was also raised that the Working Group could continue discussion of the issues that could not be resolved in the eighteenth session of the Assembly. The facilitator announced that he would present a zero draft resolution text for the consideration of delegations. The Working Group decided to continue its consideration at the next meeting.

12. At its third meeting held on 8 November, the facilitator introduced the zero draft resolution, explaining that it was an attempt to reflect the proposals and comments submitted, and discussions held during the previous meetings, in resolution language. The facilitator commended the text to delegations as a basis on which to continue the work of the facilitation in the current intersessional period, and invited general comments, with the intention to convene further meetings for negotiations on the text of the draft resolution.³ In

³ The outcome of the negotiations is attached as the draft resolution that is presented to the eighteenth session of the Assembly. The process of the textual negotiations is not included in the current report, considering of the

response, delegations expressed their support for working on the basis of the draft text and some delegations also gave initial views on its substance.

13. The rest of the meetings were dedicated to negotiations on the draft resolution. After seven rounds of negotiation on the draft resolution, consensus was achieved on the text to be submitted to the Assembly of States Parties for adoption. The draft resolution seeks to do, *inter alia*, the following: to recall the various obligations of States Parties as they relate to the nomination and election of judges; to encourage States Parties to take into account good national and international practice when undertaking national nomination procedures; to encourage States Parties to submit information on their nomination and selection procedures; to request the ACN to present a compendium of submitted information and a reference document for States Parties to use on an optional basis and which includes practices that could be taken into account when States Parties are establishing or utilizing national nomination procedures; to encourage States Parties to refrain from vote trading; to encourage candidates to deepen their knowledge of the Rome Statue; and to amend the procedure for the nomination and election of judges, and the terms of reference of the ACN.

14. The proposed amendments to the procedure for the nomination and election of judges bring the nomination period forward; mandate the facilitation of public roundtable discussions with candidates; provide that candidates shall be available for interviews, including by videoconference as necessary; and requires States to indicate which nomination procedure is used when submitting a nomination.

15. The proposed amendments to the terms of reference of the ACN provide that any ACN member who is a national of a State Party shall not participate in the assessment of candidates nominated by that State Party; provide for the ACN to request and report on specific types of information relating to candidates in fulfillment of its mandate; mandate the ACN provide, upon request, confidential, provisional assessments of potential candidates to States Parties; provide a deadline of 16 weeks before the elections for the ACN to submit its work before elections; provide the ACN with the ability to request further information about candidates if necessary; and clarify that the Committee should indicate where it regards a candidate as not suitable for a judicial role.

16. Proposals which would benefit from further consideration in subsequent reviews, include those made in the meetings of the working group, and those made in response to the announcements dated 7 and 30 August and 5 September and which are not reflected in the draft resolution.

17. In particular, some of the issues identified as requiring further discussion during the course of negotiations on the resolution included: the proposals relating to minimum voting requirements submitted by Belgium; the elaboration of practices States Parties could take into account when undertaking national nomination procedures, such as open and transparent procedures for nomination, including through public and open calls for candidates who may fulfil the criteria, clear, pre-established, merit-based criteria for the assessment of nominees, due regard for equitable gender representation, independent assessments of candidates by appropriate bodies, including government, judicial, and professional representatives, forwarding judicial posting announcements to relevant civil society organisations and groups to identify qualified candidates, engaging in consultation, as appropriate, with legal and academic institutions, and establishing and utilising national panels of experts to assess and endorse candidates; the question of the composition of the ACN as it relates to former judges and officials of the Court, and current government officials, bearing in mind questions of independence and diversity; the idea of a written exam to be utilized by the ACN when assessing the legal knowledge of candidates, and the implementation of paragraph 8bis of appendix II of the draft resolution (in annex II);

general nature of a report that would reflect factual records as well as following the practice of the previous meetings of the same facilitation.

III. Conclusions and recommendations

18. Further to and based on the discussions held during the meetings of the Working Group, agreement was reached in the course of subsequent negotiations to submit the draft resolution to the eighteenth session of the Assembly for adoption (annex II).

19. The Working Group recommends to the Assembly the adoption of the draft resolution on the review of the procedure for the nomination and election of judges (annex II).

20. The Working Group recommends that meetings be held throughout 2020, including, if necessary, in the New York Working Group to discuss the issues involving the implementation of the draft resolution, further discuss the remaining issues that could not be dealt with during the intersessional period covered by the current report, and to report thereon to the nineteenth session of the Assembly in 2020.

21. The Working Group concludes its intersessional work by recommending to the Assembly the inclusion of language in the omnibus resolution (annex III).

Annex I

Comments and proposals received in response to announcements, dated 7 and 30 August and 5 September

Table of contents

I.	Comments	6
A.	Argentina	6
B.	Australia.....	6
C.	Brazil	8
II.	Proposals.....	8
A.	Belgium	8
B.	Liechtenstein.....	9
C.	New Zealand.....	10
D.	United Kingdom	13

I. Comments

A. Argentina

1. It is important to enhance the internal nomination process of States Parties.
2. The main responsibility for ensuring that judges are selected with the highest criteria of quality and professionalism relies on the State Parties.
3. These high requirements should not be at expense of geographical balance, legal systems or against the gender parity goal.
4. The elimination of judges from the “List B” it is not considered appropriate due to the fact that the degree of professionalism which they can undertake their judicial tasks does not necessarily depend on having previous judicial experience and would also lead to an amendment to the Statute.
5. The review of the nomination process of judges should be forward looking and not to amend the Statute.

B. Australia

1. In addition to minimum voting requirements (gender, geographical distribution), the Rome Statute of the International Criminal Court (ICC) provides that judges shall be chosen from persons who possess the qualifications required in their respective States for appointment to the highest judicial offices. Candidates must have established competence in criminal law and procedure and experience as a judge, prosecutor or advocate in criminal proceedings (List A), or established competence in relevant areas of international law (international humanitarian law and international human rights law) *and* extensive experience in a professional legal capacity which is of relevance to the judicial work of the ICC (List B).
2. Australia offers the following preliminary suggestions for consideration in strengthening the process for the nomination and election of judges, and welcomes the continued consideration of initiatives in this regard.

1. Nomination process

3. States should be encouraged to run **open, transparent processes** for the selection of nominees to ensure that the best candidates are identified and nominated. This could include encouraging States to:

(a) forward judicial posting announcements to States' Parties relevant civil society organisations to identify and promote a host of qualified candidates.

(b) look to building wide-reaching consultation into domestic nomination procedures such that consultation with legal institutions and legal academics would feature in procedures under either Art 36(4)(a)(i) or (ii).

(c) establish a national 'expert panel' to assess and endorse candidates. This could include representatives from the abovementioned groups to assess and endorse candidates and consultation with the president of the national bar association.

4. We recommend the following steps be taken to encourage States to adopt best-practice on this front:

(a) The Advisory Committee on Nominations (ACN) could be tasked to prepare a compilation of best practices for the **national nomination** of ICC judges, which Australia submits may be more effective than a State-driven compilation.

(b) States could share and discuss best practices for the **national nomination** of ICC judges with the ACN to assist them in preparing the compilation.

(c) The ACN could propose non-binding recommendations for best practice national nomination procedures.

5. States Parties could explore **bolstering the ACN's mandate within the election cycle**, as a mechanism for screening candidates nominated by States and recommending the best qualified candidates for States Parties' consideration. This could include providing States Parties with the opportunity to participate in the interview process currently run by the ACN.

6. Should there be appetite for the ASP to consider a standalone resolution on the nomination and election of judges at its 18th Session (December 2019), consideration should be given to bolstering the mandate of the ACN and encouraging State Parties to run an open and transparent process for the selection of nominees. Additional initiatives could be considered at future ASP sessions.

7. States Parties should consider **refining the parameters that guide the nomination and election of judges**, within the scope of the Rome Statute as it currently stands. In particular, Australia sees merit in building on the focus in List B from "relevant areas of international law" (including IHL and IHRL) to encourage States Parties to nominate and elect judges with particular expertise in international criminal law and practice.

2. Election process

8. States Parties should promote best practice to help identify the most meritorious nominated candidates. States could consider what role a **national 'expert panel'** could play in assessing other States' judicial candidates, prior to election, in order to inform a State's own voting position.

9. Australia would welcome further engagement on the issue of **vote swaps**, which has at times caused the most meritorious candidates to be excluded during the election process.

C. Brazil

1. Brazil considers that the discussion about the procedure for the nomination and election of judges is of crucial importance to the review process of the Rome Statute system. The prospects for a credible and effective Court depend, to a great extent, on the quality and diversity of its bench.
2. Given the importance of the topic, there might be added value in adopting a standalone resolution that could build upon the documents previously adopted by the Assembly on the nomination and election of judges. While changes in the current procedures might be warranted, Brazil would caution against amendments to the Rome Statute. Article 36 strikes a wise balance among a variety of goals, aimed at selecting the most qualified and diverse group of judges. Its text should guide further discussions on the procedure for the nomination and election of judges.
3. State parties have the responsibility to implement art. 36 of the Rome Statute to the best extent possible, and should not shy away from this task. Measures to strengthen the Advisory Committee on Nominations (ACN) should reinforce its role in assisting state parties to fulfill this responsibility.
4. States could benefit from the exchange of best practices on the national procedures for the nomination of candidates. Currently, there is no forum for states parties to exchange their experiences on this matter. There is merit in exploring the possibility of creating a space for states to share information about their national nomination procedures in a voluntary manner.
5. Any review to the procedure for the nomination and election of judges must take into consideration the need to ensure that the International Criminal Court has a well balanced bench. Hence, in line with art. 36 (8) of the Rome Statute, it is instrumental to guarantee equitable geographical representation, the representation of the principal legal systems of the world, and a fair representation of female and male judges.

II. Proposals

A. Belgium

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

[...]

OP16 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.

This rule aims at changing the existing system which organizes an automatic election when there is only one remaining candidate for the last seat to be filled. The new procedure avoids a voting procedure with an indefinite number of ballots during which the last candidate would not obtain the required majority to be elected. See also ICC-ASP/14/41 of 12 November 2015, Part IV, Topic 1 and annex as well as ICC-ASP/15/23 of 10 November 2016, annex 1, topic 1

OP20. 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.

(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 <u>shall not exceed</u> :</i>
[...]	[...]
2	± 0
[...]	[...]

See also annex of ICC-ASP/14/41 of 12 November 2015. In the table following OP20 (c), when the number of candidates equals 2, the minimum voting requirement will be amended and equals 0 in this case.

B. Liechtenstein

1. Improving the nomination process for judges at the ICC

One of the priority areas in the framework of the ongoing discussions on ICC review is the need to ensure the highest qualifications of persons in leadership positions. As it is States who nominate and elect the judges, it is their responsibility to ensure the best possible outcomes of these elections, in the interest of a highly performing ICC. Past work has focused on the process of elections and State Parties have agreed on significant measures that have had a strong positive impact: States negotiated extensive provisions contained in article 36 of the Rome Statute, the Advisory Committee on Nominations (ACN) was developed, and the system of Minimum Voting Requirements (MVR) have ensured a diverse bench. There is ongoing dissatisfaction with aspects of the elections themselves, in particular on the custom of vote trading which often takes place at the expense of decisions based on considerations on quality. Public commitments from States to refrain from such practice would be helpful, but will unlikely lead to an elimination of the practice altogether. It is timely and necessary therefore to focus on the nomination process. Ensuring consistently high qualifications of the persons nominated for office will automatically lead to a high-quality bench and make the voting process itself less decisive for the quality of the work of the Court. Helpful measures in this respect can include exploring best practices applied by States, as well as practices in place in other international courts and institutions.

2. Proposals

1. **The role of the ACN should be further expanded:**

(a) The ACN should **provide States Parties with examples of best practices of national nomination processes** to help States Parties nominate the most qualified candidates for the ICC bench.

(b) The ACN should propose **non-binding recommendations for national nomination procedures**, for example, that States Parties' governments should be encouraged to consult with or at least report to their legislatures on judicial nominations to ensure procedural transparency.

(c) A first, **confidential round of nominee reviews should be conducted by the ACN**, in which states can receive confidential advice on their possible candidates before their final nomination is made public. This assessment could include a written examination in one of the working languages of the Court. The ACN should be able to invite a State Party to provide a new nomination should the candidate not meet the recommended qualifications. After the formal nomination, a secondary, public review would continue to be conducted by the ACN to report out to the ASP on candidates' qualifications.

(d) **The ACN's 'grading' system should be improved.**

2. Relevant **civil society organizations should be invited to produce a roster of the most qualified candidates from all regions to serve as ICC judges** to help inform the nomination decisions of States Parties.

3. **Judicial posting announcements should be forwarded to States Parties' relevant civil society organizations** (e.g., bar association, legal institutes, etc.) so they can activate their memberships to identify and promote a host of qualified candidates domestically.

4. States committed to ensuring the highest possible quality of the bench, could put forward **joint nominations**. Joint nominations may be of particular interest to smaller States who rarely nominate their own nationals to serve as judge on the ICC, but have a direct interest in ensuring the highest quality on the bench.

5. **The ASP should host interactive hearings between States Parties and all judicial candidates in New York** in order to access their qualifications to serve as judge on the ICC.

6. Finally, all judicial candidates should be provided the opportunity to take part in a **Rome Statute training course** ahead of the elections.

C. New Zealand

1. Introduction

Over the last 20 years, the ICC has made significant contributions to international criminal justice and international criminal law jurisprudence, through the quality and nature of its judicial functions and decisions.

At the same time, we acknowledge that the Court is experiencing a number of challenges in this area.

We consider that States Parties should support the Court by implementing practical measures to ensure the Court's bench is best equipped to exercise its role. Ensuring the most qualified candidates are nominated and elected to the Court's bench is therefore an appropriate priority issue for the Assembly of States Parties (ASP), and will help ensure the Court can effectively fulfil its mandate.

While improvements to the nomination and election process have been made in the past, we see the upcoming ASP, in December 2019, as a critical juncture that States Parties must utilise to put in place specific measures ahead of the next round of judicial elections in December 2020. Implementing such measures will enable the Court to be equipped with high quality judicial members to carry the Court's work for the next 20 years.

Our specific proposals to strengthen the nomination and election process are outlined below.

2. Specific proposals

1. **ASP to elaborate on additional non-binding eligibility criteria for judicial candidates**

Given the Court is primarily a judicial decision-making body, its judicial candidates must possess the necessary experience, qualities, and attributes for filling judicial roles that oversee large, complex criminal trials that arise before the Court.

The Rome Statute provides for minimum eligibility criteria for judicial candidates. These criteria represent a floor which candidates must meet, rather than a ceiling, and it is within the ASP's ability to elaborate or set additional, non-binding, criteria for judicial candidates, as long as they are not inconsistent with the Rome Statute.

We propose that the ASP decide on a set of additional, non-binding, eligibility criteria which emphasise competence and experience in criminal law, procedure, and trial proceedings. Such criteria should include the qualities and experience necessary for strong judicial candidates; knowledge of and practical experience in criminal law and procedure, such as substantial experience in managing complex criminal trials; and a minimum number of years of relevant work experience.

In addition, States Parties, through the ASP, could resolve, or be encouraged, to only nominate candidates under List B, who also fulfil the requirements under List A.

2. **In addition to (1) above, mandate the Advisory Committee on Nominations of Judges (ACN) to propose additional eligibility criteria for judicial candidates**

The ACN, as an existing body established by the ASP, is already mandated to "facilitate that the highest-qualified candidates are appointed as judges of the International Criminal Court", and the information and analysis provided by the Committee is to "inform the decision-making of States Parties".¹ Its composition, character, and unique mandate means it is well placed to further assist States Parties through the provision of direct guidance and discussion of the eligibility criteria of judicial candidates in Article 36(3)(b) of the Rome Statute.

We therefore propose that the ASP amend the Terms of Reference of the ACN to provide greater autonomy for the ACN to propose, for consideration by the ASP, additional, non-binding eligibility criteria or "ideal qualities", i.e. practical experience that would not require amendments to the Rome Statute.

3. **ASP to encourage States Parties to establish robust national nomination processes**

Robust, credible, transparent and merit-based national nomination processes within States Parties are essential for producing strong, qualified, and equitably-represented candidates. The specific details of such processes will vary between States Parties, as they need to take into account different domestic contexts, judicial systems and existing frameworks.

We propose that the ASP encourage States Parties to establish and/or strengthen national nomination processes based on international best practice, and which promote transparency surrounding the nomination criteria and procedure, inclusivity and merit-based decision-making. Such processes could include, for example, independent national search committees.

¹ Terms of Reference for the establishment of an Advisory Committee on nominations of judges of the International Criminal Court, ICC-ASP/10/36, annex.

4. Task the ACN to provide specific guidance and best practices on national nomination processes, with a view to assisting States Parties to strengthen their national nomination process

In order to assist States Parties to establish national nomination processes based on international best practice, we propose that the ASP task the ACN to compile and provide guidance to States Parties on national nomination processes, including where available, examples of best practices.

We see this proposal as enabling the ACN to complement the ASP's direction in (3) above, by providing more detailed guidance and examples to assist States Parties to establish or amend their national nomination processes.

5. Strengthen the mandate of the ACN to play a greater role in the assessment of judicial candidates, once nominated.

We consider it a priority to achieve a minimum threshold of suitably qualified candidates available for election, who have been independently assessed against the criteria and qualifications for judicial roles at the ICC.

To do this, we consider that the ASP should strengthen and empower the ACN to conduct more robust assessments of judicial candidates.

In this regard, the ACN's Terms of Reference should be amended:

(a) To enable the ACN to conduct, and ultimately provide to States Parties more detailed assessments of candidates against the criteria contained in the Rome Statute and the additional non-binding criteria decided by the ASP (see Proposal (1) above), including any additional criteria proposed by the ACN (see Proposal (2) above). In its assessments, the ACN should evaluate all relevant material (including a candidate's CV, previous published writing and opinions);

(b) To require that the ACN conduct face-to-face interviews with judicial candidates;

(c) To mandate the ACN to create a (non-binding) shortlist of nominees (rather than providing recommendations on such).

Such a process would bring some consistency between the judicial nominations procedure and that of the election procedure for the Prosecutor. It would also encourage States Parties to nominate credible candidates.

After this process, we suggest that open roundtables with the short listed candidates are convened for States, civil society, and the wider public, similar to ones hosted by the Coalition for the International Criminal Court (CICC) in 2017.

We remain open to discussing this proposal further. We are also open to an additional, confidential, and optional preliminary screening stage so that a State Party may withdraw a candidate where the ACN determines that candidate unsuitable for judicial election/appointment.

3. Stand-alone ASP resolution

Given this is a high priority issue, we consider that measures relating to the improvement of the nomination and election of judges should be agreed through a standalone resolution at this year's ASP.

A standalone resolution would reinforce the importance of nominating and electing high quality judges, highlight the ASP's interests and views on this issue, and reinforce the ASP's expectations to States Parties on nominating qualified candidates.

New Zealand remains committed to working with all delegations to achieve these outcomes.

D. United Kingdom

<i>Proposal</i>	<i>Detail</i>	<i>Requirements</i>
Review Eligibility Requirements	<p>Non-binding criteria could be included in an ASP resolution, providing they do not conflict with the Rome Statute. For example:</p> <ul style="list-style-type: none"> – Requirement of law degree. – Minimum number of years of experience (e.g. 10 years for Counsel). – Encourage States to only nominate List B candidates with experience in criminal law and procedure (List A qualities). – States Parties refrain from electing more than <i>x</i> number of List B candidates. 	<p>Non-binding options included in ASP resolution.</p> <p>Review Minimum Voting Requirements (resolution on conduct of judicial elections).</p>
	<p><i>Long-term reform proposal:</i></p> <ul style="list-style-type: none"> – Imposing more specific eligibility requirements in the Rome Statute. – Review the use of List B for election of judges. – Removal of List A/List B and development of common criteria. 	<p>Statutory amendment.</p>
Strengthen State Nomination Process	<p>Invite/encourage States to develop a thorough and independent national process for selection and nomination of candidates, drawing on best international practice. This could include:</p> <ul style="list-style-type: none"> – Public and open call for candidates who fulfil the criteria. – Pre-established merit-based criteria for selecting candidates. – Use of independent assessment body to vet/evaluate candidates (government, judicial and professional representatives). – Develop national legal framework/set of fixed rules for nominating judges to the ICC. 	<p>Non-binding options included in an ASP resolution.</p>
Empower the Advisory Committee on Nominations	<p>Increased role and responsibility for the ACN, to empower the ACN to provide rigorous assessments of candidates through adopting non-binding criteria.</p> <ul style="list-style-type: none"> – ACN mandated to assess, and make findings and recommendations on, the rigour of domestic nomination processes (to increase pressure on States to reform their processes). – ACN able to request States to provide further information about candidates (e.g. relevant information to assess “high moral character” requirement). – ACN establish a more definitive framework for evaluating and qualifying candidates, using more expansive categories than currently utilised to give States parties a more qualitative assessment of candidates. – ACN able to turn away candidates that do not meet criteria/have not had meaningful domestic evaluation. – Introduce limits on the number of previous ICC judges and government officials sitting on ACN. – ACN issue their report on candidates earlier to have more influence on the process. 	<p>Amendment of ASP resolution and Terms of Reference governing ACN.</p> <p><i>(Would probably require transitional arrangements for elections in 2020).</i></p>
	<p><i>Long-term reform proposal:</i> creation of a judicial appointment commission.</p>	<p>Statutory amendment.</p>
Nomination Period	<p>Extend/bring forward nomination period to allow ACN process to take place earlier.</p>	
Best Practice	<p>Pledge by States to vote strictly based on merit or statement in resolution encouraging States to elect candidates based strictly on merit, and refrain from vote trading.</p>	<p>Statement could be included in an ASP resolution.</p>

Annex II

[Draft] Resolution on the review of the procedure for the nomination and election of judges

The Assembly of States Parties,

PP1. *Bearing* in mind the provisions of the Rome Statute of the International Criminal Court (“the Court”),

PP2. *Emphasizing* that the Court is a permanent international criminal court with the power to exercise its jurisdiction under the Rome Statute over persons for the most serious crimes of concern to the international community as a whole, and as such it must ensure that it maintains the highest standards in its proceedings,

PP3. *Welcoming* the contribution the Court has made to accountability and lasting respect for international justice, and *determined* to continue efforts to strengthen the Court and assist the effective exercise of its mandate,

PP4. *Recalling* that in its resolution ICC-ASP/1/Res.3 the Assembly 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,

PP5. *Affirming* that it is the responsibility of States Parties to nominate and elect judicial candidates in accordance with article 36 of the Rome Statute,

PP6. *Recognizing* the need to amend the terms of reference for the establishment of an Advisory Committee on Nominations of Judges of the International Criminal Court in accordance with article 36 of the Rome Statute,

PP7. *Emphasizing* the importance of equitable geographical representation and gender balance in the organs of the Court,

1. *Stresses* the importance of nominating and electing as judges, qualified, competent and experienced persons of the highest quality and of high moral character, impartiality and integrity who possess the qualifications required in their respective States for appointment to the highest judicial offices, in accordance with article 36 of the Rome Statute, and *decides* to strengthen the Advisory Committee on Nominations of Judges, so that it can further assist States Parties to that end

2. *Reaffirms the need for* States Parties to assess the competencies of candidates in accordance with article 36, paragraph 3 of the Rome Statute;

3. *Requests* the Advisory Committee on Nominations of Judges to provide information and analysis to States Parties on assessing the qualities of candidates in accordance with article 36(3)(b), in advance of the nineteenth session of the Assembly;

4. *Recalls* that, under article 36(4)(a) of the Statute, nominations of candidates for election to the Court may be made by any State Party to the Statute, and shall be made either by the procedure for the nomination of candidates for appointment to the highest judicial offices in the State in question, or by the procedure provided for the nomination of candidates for the International Court of Justice in the Statute of that Court, and in this regard, *stresses* the need for States Parties to be consistent with their obligations under the Rome Statute;

5. *Encourages* States Parties to also take into account good practices at the national and international levels when conducting their national procedures for the nomination of candidates to the Court;

6. *Encourages* States Parties to submit information and commentary on their own existing or prospective nomination and selection procedures to the Secretariat of the Assembly, and requests the Secretariat to make those submissions available to the Advisory Committee on Nominations of Judges, and further requests the Secretariat to make those submissions publicly available where the submitting State Party has not objected to this;

7. *Requests* the Advisory Committee on Nominations of Judges, in consultation with States and other relevant stakeholders, to prepare and present at the earliest possible date, but no later than the twentieth session of the Assembly of States Parties, a compendium of submissions from States Parties, and to prepare a reference document for States Parties to use on an optional basis, which includes practices that could be taken into account when States Parties are establishing or utilizing national nomination procedures;
8. *Notes with appreciation* the work of the Advisory Committee on Nomination of Judges, and *recalls* that information and analysis presented by the Committee is to inform the decision-making of States Parties and enhance their evaluation of candidates, and is not in any way binding on them or on the Assembly of States Parties;
9. *Recalls* that States Parties should exercise their votes in accordance with Article 36;
10. *Encourages* States Parties to refrain from the trading of votes;
11. *Encourages* candidates to deepen their knowledge of the Rome Statute and *welcomes* efforts undertaken by candidates, including relevant training, as appropriate;
12. *Decides* to adopt the amendments to the procedure for the nomination and election of judges, and the amendments to the Terms of Reference of the Advisory Committee on Nominations of Judges, contained in appendixes I and II, respectively, to the present resolution.

Appendix I

Draft amendments to the resolution ICC-ASP/3/Res.6, regarding the procedure for the nomination and election of judges

A. Paragraph 3

Delete the phrase “shall open 32 weeks before the elections” so that it reads: “The nomination period shall open on the first Monday of the calendar year when an election should take place, and shall last 12 weeks. Any extension of the nomination period shall take into account the need for the Advisory Committee on Nominations of Judges to produce its report at least 16 weeks before the elections.”

B. Insert the following as a new paragraph 12 *ter*

Once the Advisory Committee on Nominations has made its assessments of candidates, and as early as possible prior to elections, the Bureau will facilitate public roundtable discussions to be held with all candidates. The roundtable discussions shall be open to States Parties and other relevant stakeholders, and conducted in both working languages of the Court. Candidates shall participate in either of the working languages of the Court and may participate by videoconference. The roundtable discussions shall be recorded on video to be made available on the ASP’s website. The remaining modalities for the roundtable discussions will be determined by the New York Working Group.

C. Insert the following as a new paragraph 12 *bis*

All nominated candidates shall be available for interviews, including by videoconference or similar means, before the Advisory Committee on Nominations. Nominating States should endeavor to ensure that candidates make themselves available for interviews before the Advisory Committee on Nominations.

D. Insert the following as a new paragraph 6 (f)

Indicating whether the nomination is made under article 36, paragraph 4(a)(i) or paragraph 4(a)(ii), and specifying in the necessary detail the elements of that procedure.

Appendix II

Draft amendments to the terms of reference of the Advisory Committee on Nominations, contained in the annex to document ICC-ASP/10/36

A. Paragraph 3

At the end of paragraph 3 insert: “any member who is a national of a State Party shall not participate in the assessment of candidates nominated by that State Party”

B. Insert the following as a new paragraph 5 bis

To that effect, the Committee shall:

(a) develop a common questionnaire for all nominees that asks them to explain: i) their experience in managing complex criminal proceedings; ii) their experience in public international law; iii) specific experience in gender and children matters; iv) track record of impartiality and integrity; and v) fluency in one of the working languages of the Court, and provide all nominees the option to make their answers to the questionnaire public.

(b) ask nominees to demonstrate their legal knowledge by presenting relevant evidence;

(c) check candidates’ references and any other information publicly available;

(d) create a standard declaration for all candidates to sign that clarifies whether they are aware of any allegations of misconduct, including sexual harassment, made against them;

(e) assess practical skills such as the ability to work collegially; knowledge of different legal systems; and exposure to and understanding of regional and sub-regional political, social, and cultural environments;

(f) document the national-level nomination processes in the nominating State Parties; and

(g) report on the above aspects.

C. Insert the following as a new paragraph 8 bis:

The Committee shall also, upon request by a State Party, provide a confidential, provisional assessment of the suitability of a potential candidate of that State Party. Such a provisional assessment shall be based solely on information submitted to the Committee by the State Party concerned, and shall not require the Committee to communicate with the potential candidate. A request for a provisional assessment of a potential candidate shall be without prejudice to the decision of the State Party to nominate or not nominate that potential candidate. Any provisional assessment shall also be without prejudice to the evaluation of that individual by the Committee, should they be nominated by a State Party. The number of ACN members responsible for conducting a provisional assessment of a potential candidate shall be limited to 3. In the case of a candidate being nominated by a State Party after a provisional assessment, the ACN members that conducted the provisional assessment of the candidate shall recuse themselves from the formal evaluation of that candidate.

D. Insert the following as a new paragraph 10 *bis*:

Once the Committee has completed its work, it shall prepare a thorough and detailed report, of a technical character, that will include for each candidate:

- (a) information collected in accordance with paragraph 5 *bis*;
- (b) qualitative evaluation, information, and analysis, strictly on the suitability or unsuitability of each candidate for a judicial role in light of the requirements of article 36, including detailed reasons for the Committee's evaluation; and
- (c) indication of the national nomination procedure used, including if it was followed in each specific case;

E. Amend para 11:

The report of the Committee shall be made available to States Parties and observers by submission to the Bureau, at least 16 weeks before the elections for thorough subsequent consideration by the Assembly of States Parties.

F. Insert as new para 10ter

The Committee may request States to provide further information about candidates that it requires to consider and evaluate the candidate's suitability as a judicial appointee.

Annex III

Draft text for the omnibus resolution

1. The following paragraphs to be inserted in the section for elections:

Refers to resolution ICC-ASP/18/Res.X, which, inter alia, adopted amendments to the procedure set out in ICC-ASP/3/Res.6 for the nomination and election of judges, and amendments to the terms of reference of the Advisory Committee on Nominations of Judges of the International Criminal Court adopted by the Assembly via resolution ICC-ASP/10/Res.5, paragraph 19;

Stresses the importance of nominating and electing as judges, qualified, competent and experienced persons of the highest quality and of high moral character, impartiality and integrity who possess the qualifications required in their respective States for appointment to the highest judicial offices, in accordance with article 36 of the Rome Statute, and for this purpose encourages States Parties to conduct thorough and transparent processes to identify the best candidates;

Stresses 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;

Welcomes the report of the Bureau on the Advisory Committee on Nominations;¹

Recalls its decision that the Advisory Committee on Nominations hold its sessions in The Hague or in New York, depending on the cost effectiveness of the particular venue;

Reiterates the importance of interviews with candidates, including by videoconference or similar means, to the effective discharge of its mandate and stresses the responsibility of the nominating States to ensure that candidates attend an interview with the Advisory Committee on Nominations;

Recalls the terms of reference of the Advisory Committee on Nominations of Judges of the International Criminal Court adopted by the Assembly via resolution ICC-ASP/10/Res.5, paragraph 19, as amended via resolution ICC-ASP/18/Res.X, and requests States Parties which may be considering nominations of their nationals as members of the Advisory Committee to bear in mind that the composition of the Committee should reflect, inter alia, "a fair representation of both genders";"

2. Paragraph 6 of annex I (mandates) of the 2018 omnibus resolution (ICC-ASP/17/Res.5) is replaced by the following:

"(a) *decides* 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, 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 report²; and"

"(b) *requests* the Bureau to update the Assembly, at its nineteenth session, on the progress of the review of the procedure for the nomination and election of judges;"

¹ ICC-ACP/18/19

² Report to the Bureau on the review of the procedure for the nomination and election of judges (ICC-ASP/18/XX),