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

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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/20/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, 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 report¹” and requested “the Bureau to update the Assembly, at its twenty-first session, on the progress of the review of the procedure for the nomination and election of judges”.

2. The Working Group takes note of resolution ICC-ASP/19/Res.7 that “welcome[d] the report and recommendations of the Independent Expert Review contained in the document entitled ‘Independent Expert Review of the International Criminal Court and the Rome Statute System - Final Report’, dated 30 September 2021”, and “decide[d] to establish a Review Mechanism, under the auspices of the Assembly” The Working Group also takes note that R371-R380, the relevant recommendations of the Independent Expert Review (IER) were allocated to the facilitation per the ‘Comprehensive action plan for the assessment of the recommendations of the Group of Independent Experts, including requirements for possible further action’ (“Comprehensive Action Plan”), which had been proposed by the Review Mechanism on 30 June 2021 and adopted by the Bureau on 28 July.

3. The Working Group further takes note of the resolution ICC-ASP/20/Res.3 that “request[ed] the relevant Assembly mandates designated as responsible for assessing and taking possible further action as appropriate on relevant recommendations to continue with the assessment, and where appropriate, implementation in 2022 and to submit to the Bureau the outcome of its consideration, including on action already taken and proposals for next steps, by 15 November 2022”.

4. In its second meeting held on 9 March 2022, the Bureau appointed Mr. Matúš Košuth (Slovakia) as the facilitator for the review of the procedure for the nomination and election of judges.²

5. The Working Group held one intersessional meeting on 20 April to exchange general views on the programme of work for 2022 and on R371-R380, the IER recommendations allocated to the facilitation per the Comprehensive Action Plan. The facilitation conducted further consultations on 27 May, 10 June, 27 October, 8 and 23 November to assess, and where appropriate, agree on action to implement the allocated IER recommendations as well as to discuss two proposals made by the delegation of Belgium to amend the Procedure of nomination and election of judges. To mitigate the impact of the ongoing COVID-19 pandemic, the first and second meetings were convened virtually via the Court’s WebEx platform.

6. The Working Group adopted the current report on 29 November via a silence procedure. The Working Group also adopted on 17 June and 18 November respectively via a silence procedure a report on the progress of the assessment, and where appropriate, implementation of the allocated IER Recommendations pursuant to paragraph 11 of resolution ICC-ASP/20/Res.3³ and its updated version, reflecting agreed assessment of the allocated recommendations and in relation to R371-378 and R380 also agreed action to be taken at the twenty-first session of the Assembly of States Parties to implement them.

¹ Report of the Bureau on the review of the procedure for the nomination and election of judges (ICC-ASP/20/30).

² Decisions of the Bureau of the Assembly of States Parties, 9 March 2022, available at <https://asp.icc-cpi.int/sites/asp/files/2022-09/2022-Bureau-2-Agenda-Decisions.pdf>

³ ICC-ASP/20/Res.3 para 11: “Requests the Review Mechanism, in close coordination with the Court focal points and relevant Assembly mandates, to provide regular updates to all States Parties through the Bureau Working Groups, on the review process [...]”

II. Discussions in the New York Working Group

7. At its first meeting of the facilitation held on 20 April 2022, the facilitator provided an overview of the work done in 2021 and presented a proposed programme of work for 2022 focused primarily on the consideration of the allocated IER Recommendations.

8. Belgium expressed its intention to put on the table the two proposals to amend the procedure of the nomination and election of judges, which Belgium had first introduced in 2012 and later revised in 2015. These proposals have remained on the table since 2019, but their consideration was deferred thereafter given the pandemic situation and the priority given to the review process. The Working Group agreed to add the item in its agenda for consideration in 2022, with primary focus on the consideration of the IER recommendations at the next meeting.

9. The Working Group also exchanged general comments on the allocated IER Recommendations. A reference to the paragraph 961 of the final report of the IER was made, together with a view that issues relating to nomination and election of judges should be decided by States Parties and the activities of the facilitation should not be limited by the recommendations. Some delegations emphasized that the work of the facilitation should be done as quickly as possible, based on the work undertaken last year. The facilitator then proceeded to summarize the substance of the allocated recommendations individually with a summary of their consideration in 2021. For these purposes, the facilitator prepared and circulated before the meeting a non-paper, based on the latest non-paper from 2021, containing a new element of assessment of the allocated recommendations and guiding questions related to the certain recommendations aimed to foster discussions.

10. Regarding R376-377 some delegations agreed with the recommendations as long as any criteria anticipated therein would be of a non-binding character. A view was expressed that otherwise it would go beyond the Rome Statute. Another view was expressed that although the term “criteria” in R377 was strong, the issue was minor considering that States Parties would eventually decide their national processes. It was also indicated that the first step in relation to the recommendations was to publish national nomination procedures, and that the compendium and the reference document based on submissions to be prepared by the Advisory Committee on Nominations (“ACN”) might be useful. It was pointed out that the compendium and the reference document could be seen as a work in progress and updated two years before each election of judges. It was thus suggested that the facilitator’s guiding question 1(a) was good and 3(a)/(b) could be supported, while solutions should be found this year and documents be published in the 1st half of the year considering the timing of the next judicial elections in 2023.

11. Regarding R378 support was expressed for this recommendation.

12. Regarding R379 some delegations reiterated that the Rome Statute was clear about the balance between List A and B where additional requirements were not necessary, and they did not support amending the Statute. A view was expressed that the ACN had already a prerogative to indicate in their report whether certain candidates meet the criteria needed to be appointed as judges. Another view was presented that the Assembly needed to ensure that the criteria of Lists A and B would fit purpose.

13. Regarding R380 a view was presented that the review of the qualification of the ACN members might be useful but was not a priority since the ACN had done their job excellently previously.

14. Regarding R371-375 delegations expressed their support for the recommendations.

15. At its second meeting of the facilitation held on 27 May, delegations had before it a revised non-paper with a proposed assessment of the allocated recommendations, except for R379, as well as new options of action in relation to certain recommendations to streamline discussions and further progress. Delegations agreed with the proposed assessment of R372-378 and R380, and in principles R371, and expressed their preference on proposed options for action to be taken to implement the recommendations. The facilitation also agreed on the action to be taken to implement the R372. Regarding R379, a concern regarding the recommendation was reiterated about its implications on the list B candidates, and in general, the imbalance it might create between the lists A and B. Belgium also prepared a non-paper

explaining the rationale of their two proposals, which was circulated before the second meeting with a view to discuss them at the third meeting of the facilitation to allow delegations sufficient time to study the proposals.

16. Following the second meeting, the facilitator circulated second revised non-paper reflecting the preferences expressed on the proposed action to be taken to implement the allocated recommendations and containing also a proposed assessment of R379. Together with it, a revised non-paper prepared by Belgium was circulated further clarifying aspects of its second proposal to amend the procedure of nomination and election of judges.

17. At the third meeting of the facilitation held on 10 June, the Working Group continued its consideration of the allocated recommendations and began considering the two proposals to amend the procedure of nomination and election of judges made by Belgium. One delegation expressed its general understanding that the assessment and implementation of the recommendations should, inter alia, help strengthening the procedure of nomination and election of judges in a way to ensure higher geographical and gender balance among candidates and judges.

18. Regarding R371 one delegation expressed a view that pandemics proved the effectiveness of using virtual means, and thus in-person attendance should not be the only option for the interviews before the ACN and the public roundtables. Accordingly, failure to participate at these meetings in such format should not lead to automatic disqualification of a candidate. For these reasons, the recommendations should not be assessed positively. Other delegations supported the proposed assessment, agreed in principle at the previous meeting, as well as proposed action while expressing their preferences on the remaining alternative language.

19. Regarding R374 some delegations expressed concerns about the recommendation tilting the balance between the candidates from lists A and B and its positive assessment, meanwhile other delegations expressed support for the positive assessment, agreed at the previous meeting, as well as for the proposed action to implement the recommendation.

20. Regarding R373, 375-377 and 380 delegations expressed their preferences on the alternative options as proposed by the facilitator's second revised non-paper. Some delegations raised questions about different assessment of R376 and R377 and various elements of the action to be taken to implement these recommendations, which the facilitator responded to.

21. Regarding R378 one delegation requested more time to consider the proposed action to be taken to implement the recommendation before agreeing thereon.

22. Regarding R379 some delegations expressed difficulties with the proposed modified assessment of the recommendations, meanwhile other delegations expressed their preferences on the three options of proposed action to be taken on this recommendation.

23. At this meeting, Belgium reintroduced its two proposals and the revised non-paper prepared for this purpose. The delegation explained that the purpose of the proposals was to have the best qualified candidates in the election of judges and ensure greater choice of candidates. The first proposal was to add new OP16*bis* to the procedure for the nomination and election of judges to avoid an 'automatic' or 'forced' election when only one candidate remained for one remaining seat to be filled, and a significant number of delegations would not want to vote for the candidate, in which case Belgium suggested that casting either affirmative or negative votes should be allowed. Belgium further stated that if the candidate does not acquire the two-third majority in such last round of ballot, the election should be postponed until a resumed session of the Assembly to avoid vacancy. The second proposal was to amend OP20 of the procedure related to the minimum voting requirements regarding regional criteria. The delegation of Belgium explained that the proposal does not aim to change the minimum voting requirements set for regional groups, but intends to ensure that States Parties have a greater pool of candidates to choose from. No views, comments or questions were raised at this meeting in relation to the two proposals made by Belgium.

24. Following the third meeting, the facilitator held further consultations with interested delegations, which resulted in an agreement on the assessment of all the allocated recommendations as reflected in the report to the Review Mechanism on the progress of

assessment, and where appropriate, implementation of the allocated IER recommendations adopted via silence procedure on 17 June, which is attached as annex II to the present report.

25. Before the fourth meeting on 27 October, the facilitator circulated a third revised non-paper focusing only on the proposed action to be taken to implement the recommendations R371, 373-378 and 380 as well as a zero draft report of the facilitation to the Bureau elaborated only in conclusions and annex for information purposes to demonstrate how the relevant action to implement the allocated recommendations would be eventually taken - through the omnibus resolution and its annexes.

26. The Working Group agreed at that meeting on the proposed action to be taken to implement recommendations R373, 375, 378 and 380 as reflected in the facilitator's third revised non-paper, which was further reconfirmed on 2 November via a silence procedure.

27. Regarding action to be taken to implement R371 and R374, the facilitator explained the proposed compromise language to alleviate concerns previously raised by some delegations. Delegations expressed support for the rationale of the compromise language on R371 and presented comments with a view to further clarify the language related to the time periods and process related to the presumption of a withdrawal of the nomination of the candidate in case of their non-participation at an interview before the ACN or at the public roundtable discussions. A question was raised about the implications of the proposed action on consideration by the ACN of the recommendation of candidates by regional groups, which the facilitator responded to. One delegation expressed on one hand a preference for the action on R374 without the compromise language, on the other hand flexibility in case such language would lead to a final agreement in the room.

28. Regarding R376-377, which were merged together for the purposes of implementation, the facilitator informed about the meeting of the ACN in September 2022, which concluded that it had not received sufficient number of submissions from States Parties on their existing or prospective national nominations procedures to draw up a reference document containing best practices. The facilitator explained that the second of the revised two options of action proposed on R376-377 take this development into account. A view was expressed about the importance of these two recommendations and the proposed action to be taken to implement them as well as about the urgency to have the guidelines ready in a due time to allow States Parties to use them already for the judicial elections in 2023. One delegation expressed a preference for the second proposed action, meanwhile other delegation preferred the first proposed option with flexibility on the second one. Due to time constraints, the Working Group did not manage to discuss the two proposals made by Belgium at this meeting.

29. At the fifth meeting of the facilitation convened on 8 November, delegations had in front of them the fourth revised facilitator's non-paper with a revised proposal of the action to be taken to implement R371, reflecting the comments made at the previous meeting. Delegations agreed on the action to be taken to implement R371 and 374. Regarding R376-377 one delegation requested additional time to consider the proposed action as reflected in option B of the fourth revised facilitator's non-paper with the alternative of guidelines.

30. In relation to the two proposals made by Belgium to amend the procedure of the nomination and election of judges, the delegation of Belgium provided an overview of the proposals. The Working Group was also briefed about the practical aspects and implications of the proposals by a representative of Secretariat of the Assembly of State Parties.

31. Regarding the first proposal related to the "automatic" or "forced" election in situations of one remaining candidate for one remaining seat to be filled, the Secretariat raised questions about the situations to which the proposed OP16bis would apply as well as if the minimum voting requirements would continue to apply in a postponed election provided that a candidate was not elected by a two-third majority in the last ballot, which the delegation of Belgium together with the facilitator responded to. The Secretariat further informed that the current sample of ballot paper was modeled after the UN General Assembly practice and that it would need to be adjusted for the last ballot anticipated by the proposed OP16bis to allow affirmative and negative votes. She also pointed at the potential judicial vacancy in cases when the last remaining candidate would not be elected in the last ballot.

32. Regarding the second proposal, the Secretariat explained the minimum voting requirements for regional groups and the rules on their adjustments governed by Procedure of the nomination and election of judges. She informed that the proposed amendment to the OP20 would have implications on these adjustments requiring greater number of candidates to retain initial minimum voting requirements.

33. Following the briefing by the Secretariat, Belgium further explained that the proposals were put forth in light of the practical experience from the previous elections. The first proposal aims to ensure that there is sufficient support for the candidate, meanwhile second proposal aims to increase the pool of candidates in order to maximize the chances of electing the best judges. Delegations expressed general support for the rationale of the proposals. One delegation raised a question about a potential judicial vacancy in relation to the first proposal. A view was also expressed that having one remaining candidate for one remaining seat to be filled does not necessarily mean that the candidate is bad. In relation to the second proposal, some delegations expressed caution towards the implications for smaller regional groups drawing experience from previous elections.

34. After the fifth meeting, the facilitator held further bilateral exchanges related to R376-377. As a result an agreement was reached on the action to be taken as proposed at the fifth meeting. The Working group thus agreed on the assessment of all the allocated recommendations as well as the action to be taken at the twenty-first session of the Assembly to implement recommendations R371-378 and 380 as reflected in the updated report to the Review Mechanism adopted on 18 November via a silence procedure, which is attached as annex III to the present report.

35. Before the sixth and last meeting of the facilitation in 2022 convened on 23 November, the delegation of Belgium decided to withdraw its second proposal for this year and revised its first proposal. The facilitator also circulated a proposal for the draft language to be introduced in the operative part of the omnibus resolution and the part related to the mandates.

36. At the sixth meeting, Belgium informed of its decision to withdraw their second proposal for this year as a signal of flexibility and constructive spirit taking into account the views expressed at the fifth meeting. The delegation also explained the revised version of its first proposal envisioning now either a resumed session or a next regular session in case when one remaining candidate for the last remaining seat to be filled is not elected by the two-thirds majority and the election is postponed. Belgium further clarified that the proposal does not aim to change practice regarding the alternation between the Assembly session in New York and The Hague, nor does it envisage to change the rules governing the term of office of judges in case of the postponed election. In this context, the delegation recalled the practice of proxy voting in case of postponed election were to be held in The Hague and eight-years term of office of the judges elected in November 2009, both from the eighth session of the Assembly held in The Hague, which included also election to fill two judicial vacancies. Lastly, the delegation clarified that the situation of one remaining candidate for one last seat to be filled has never occurred so far during elections. The facilitator informed the Working Group of its meeting with the Secretariat and the Court, including the implications of potential vacancy on the functioning of the Court in case such vacancy would happen now. Several delegations reserved their positions on the proposal pending further study of the proposal. A question was raised about the possible impacts of negative votes on a judge's mandate. No further concerns, comments or reservations were made. The respective delegations were encouraged to consult further bilaterally and inform the facilitator of the outcome of such consultations by 26 November.

37. At this meeting, the Working Group agreed on the draft language for the operative part of the omnibus resolution and the part related to mandates, as proposed by the facilitator.

38. On 26 November, the facilitator was informed by the respective delegations that after further bilateral exchanges with Belgium the reservations have been withdrawn and a question responded. The proposal of Belgium, with technical changes made in its final version based on the meeting with the Secretariat, was thus introduced in the present report and approved together with the present report on 29 November via a silence procedure.

III. Conclusions and recommendations

39. 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 language for inclusion in the omnibus resolution (annex I).

40. The Working Group recommends that meetings be held throughout 2023, including, if necessary, to discuss the issues involving the implementation of resolution ICC-ASP/18/Res.4 as amended, further discuss the remaining issues that could not be dealt with during the intersessional period covered by the current report as well as previous reports, consider any outstanding recommendations of the Advisory Committee on Nominations, and to report thereon to the twenty-second session of the Assembly in 2023.

41. The Working Group further recommends to consider reviewing the qualifications for the membership of the Advisory Committee on Nominations in line with the IER Recommendation 380 after the election of the Committee's members in 2024.

Annex I

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.4, 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 ICCASP/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;

~~*Invites* States Parties to consider the compendium of submissions from States Parties, and the reference document of practices that could be taken into account when States Parties are establishing or utilizing national nomination procedures, as prepared by the Advisory Committee on Nominations;~~

~~*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, preferably in person, or by videoconference or similar means if appropriate, 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 ICCASP/10/Res.5, paragraph 19, as amended via resolution ICC ASP/18/Res.4, 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”;~~

Recalls paragraph 6 of resolution ICC-ASP/18/Res.4 encouraging States Parties to submit information and commentary on their own existing or prospective nomination and selection procedures to the Secretariat of the Assembly;

Decides to adopt the amendments to the procedure for the nomination and election and judges, the amendment to the resolution ICC-ASP/18/Res.4, and the amendment to the Terms of Reference of the Advisory Committee on Nominations of Judges, contained in annexes II, III and IV, respectively, to the present resolution;”

2. Paragraph 6 of annex I (Mandates) of the 2021 omnibus resolution (ICC-ASP/20/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 report;

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

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

A. Amend 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 the procedure leading to the nomination.

B. Insert the following as a new paragraph 6(g)

Containing an acknowledgement of information provided under sub-paragraph (a) by a senior member of the national-level judiciary or the authority of the Nominating State overseeing the nomination process.

C. Amend paragraph 12*bis*

All nominated candidates shall be available for interviews preferably in-person, or by videoconference or similar means if appropriate, before the Advisory Committee on Nominations of Judges. Nominating States shall, to the extent possible, ensure that candidates make themselves available for interviews before the Advisory Committee on Nominations of Judges.

D. Amend paragraph 12*ter*

Once the Advisory Committee on Nominations of Judges 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 website of the Assembly of States Parties. The remaining modalities for the roundtable discussions will be determined by the New York Working Group, which will have particular regard to aspects of the assessments of the candidates highlighted in the report of the

Advisory Committee on Nominations of Judges and include on the agenda topics aimed at supplementing the report in relation to these aspects.

E. Insert the following as a new paragraph 12^{quater}

A candidate who fails to participate in an interview before the Advisory Committee on Nomination of Judges or in public roundtable discussions shall be required to provide an explanation of the exceptional circumstance that prevented their participation within one week of non-participation. Failure to provide such explanation shall be considered a withdrawal of the nomination of that candidate, unless the Nominating State communicates otherwise within additional one week, provided that such communication also includes the required explanation of non-participation of the candidate.

F. Insert the following as a new paragraph 16^{bis}

If there is no more than one candidate for one single position, the Assembly shall proceed to a last ballot. In accordance with rule 66 of the Rules of Procedure of the Assembly of States Parties, the ballot paper must permit the States Parties present and voting to cast an affirmative or negative vote at such 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 next session of the Assembly of States Parties. In such case, the procedure for the nomination of candidates shall restart. The provisions of this resolution, including any remaining minimum voting requirements which have not been fulfilled, shall continue to apply.

II. Amendment(s) to the resolution ICC-ASP/18/Res.4

A. Amend paragraph 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.

B. Insert new paragraph 7^{bis}

Further requests the Advisory Committee on Nomination of Judges, in consultation with States Parties and other relevant stakeholders, to prepare, in light of the compendium presented under paragraph 7 as well as additional submissions of States Parties under paragraph 6, guidelines for the national-level nomination procedures and bring them to the attention of States Parties at the earliest possible date, but no later than twenty-third session of the Assembly.

C. Amend paragraph 10

Encourages States Parties to continue according utmost respect to the evaluation of candidates by the Advisory Committee on Nomination of Judges, and to refrain from casting

their votes in an inconsistent way with this evaluation to the extent possible as well as from the trading of votes.

III. Amendment to the Terms of Reference of the Advisory Committee on Nominations of Judges

A. Amend paragraph 5bis

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) at the candidate interview, endeavour to assess, without prejudice to the qualifications specified in Article 36 paragraph 3 (b)(i) and (ii) of the Rome Statute, the ability of the candidates to manage and conduct complex international criminal trials fairly and expeditiously and their suitability as a Presiding judge;
- (g) document the national-level nomination processes in the nominating State Parties; and
- (h) report on the above aspects.

Annex II

Report of the Review of the Procedure for the Nomination and Election of Judges pursuant to paragraph 11 of the resolution ICC-ASP/20/Res.3, dated 16 June 2022

A. Introduction

1. This report to the Review Mechanism on the progress of the assessment, and where appropriate, implementation of the relevant Independent Expert Recommendations (IER) is submitted pursuant to resolution ICC-ASP/20/Res.3, paragraph 11, which: “Requests the Review Mechanism, in close coordination with the Court focal points and relevant Assembly mandates, to provide regular updates to all States Parties through the Bureau working Groups, on the review process including on any impediments to progress identified, to brief the Assembly in writing on the overall progress of its work, before 30 June 2022, and [...]”

2. The comprehensive action plan for the assessment of the recommendations of the group of independent experts, including requirements for possible further action, which was proposed by the Review Mechanism on 30 June 2021 and adopted by the Bureau on 28 July 2021, has allocated ten IER recommendations to the facilitation on the review of the procedure for the nomination and election of judges (“the facilitation”), being R371 to R380.

B. Consideration of IER recommendations

3. The facilitation continued the process of considering the allocated recommendations on the basis of discussions held in 2021. Three meetings of the facilitation have been convened so far in 2022, which led to the finalization of the assessment of all the allocated recommendations, and to the agreement on the action to be taken in 2022 to implement the recommendation R372, as reflected in the Annex to this report.

4. Further meetings of the facilitation are planned before the twenty-first session of the Assembly of States Parties starts, to agree on the action to be taken in 2022 to implement the recommendations R371, R373-378 and R380 in accordance with their assessment.

Annex

Matrix

Progress in the assessment of the IER recommendations

Recommendation	Result of assessment (plus date)	Implementation date	Comments
R371	positive with modifications	2022	Modifications concern parts of the recommendation related to in-person attendance of candidates at interview before the ACN and disqualification of candidates.
R372	positive	2022	Agreed action: To amend OP12 ^{ter} of the

			Procedure of nomination and election of judges.
R373	positive with modifications	2022	Modifications concern different feasible form of supporting verifiable information about the candidate instead of a certificate of accuracy of replies to the questionnaire.
R374	positive	2022	
R375	positive with modifications	2022	Modifications concern different form of providing information on the procedure followed leading to the nomination instead of a certificate.
R376	modified	2022	Instead of the process leading to harmonization of national nomination procedures, preparation of a non-binding document for the attention of States Parties when forming or amending the rules governing their national nomination procedures was agreed. Implementation being considered together with R377. Recommended timeline in the course of 2021 was not possible.
R377	positive with modifications	2022	Modifications concern preparation of a non-binding document for the attention of States Parties when forming or amending the rules governing their national nomination procedures instead of a set of criteria which should be applied in national nomination procedures along with guidelines on their conduct. Implementation being considered together with R376.

R378	positive	2022	Implementation of the recommendation in its part related to casting of votes might not be fully feasible due to minimum voting requirements.
R379	not positive ¹		
R380	modified	2022	Recommendation to be included in the mandate of the review of procedure for nomination and election of judges for future consideration.

Annex III

Updated report of the Review of the Procedure for the Nomination and Election of Judges pursuant to paragraph 11 of the resolution ICC-ASP/20/Res.3, dated 16 November 2022

A. Introduction

1. This report to the Review Mechanism on the progress of the assessment, and where appropriate, implementation of the relevant Independent Expert Recommendations (IER) is submitted pursuant to resolution ICC-ASP/20/Res.3, paragraph 11.
2. The comprehensive action plan for the assessment of the recommendations of the group of independent experts, proposed by the Review Mechanism on 30 June 2021 and adopted by the Bureau on 28 July 2021, has allocated IER recommendations R371 to R380 to the facilitation on the review of the procedure for the nomination and election of judges (“facilitation”).

B. Consideration of IER recommendations

3. In 2022, the facilitation continued the process of considering the allocated recommendations on the basis of discussions held in 2021. Three meetings of the facilitation were convened in the first half of 2022 and two additional meetings have been convened in the second half of 2022. As a result, all allocated recommendations have been assessed, and the agreement has been reached on the action to be taken at the twenty-first session of the Assembly of States Parties to implement recommendations R371-378 and R380 in line with their respective assessment.
4. Further information on the assessment, and where appropriate, implementation of the allocated recommendations is attached as Annex I of this report. Updated matrix on the progress in the assessment of the IER recommendations is attached as Annex II of this report.

¹ None of positive, modified or negative assessment was agreeable.

Annex I

RECOMMENDATION R371

R371. The procedure for the nomination and election of Judges should be amended as follows: (i) States Parties should be required to ensure the attendance of candidates in person for interview by the ACN; (ii) the interview should be an essential element of the process and any candidate not attending should be disqualified barring exceptional circumstances; (iii) similarly, participation in the roundtable discussions before the election should also be mandatory with failure to participate also resulting in disqualification barring exceptional circumstances.

Assessment: Positive with modifications.

Comments related to the assessment: Modifications concerned parts of the recommendation related to in-person attendance of candidates at interview before the ACN and disqualification of candidates.

Implementation:

In relation to R371 (i): Amendment to paragraph 12bis of the resolution on Procedure of nomination and election of judges ICC-ASP/3/Res.6, as amended by the resolution ICC-ASP/18/Res.4, will be introduced through annex of the *omnibus* resolution, as follows:

*All nominated candidates shall be available for interviews **preferably in-person, or by videoconference or similar means if appropriate**, before the Advisory Committee on Nominations of Judges. Nominating States **shall, to the extent possible**, ensure that candidates make themselves available for interviews before the Advisory Committee on Nominations of Judges.*

In relation to R371 (ii)-(iii): A new paragraph 12quater will be introduced in the Procedure of nomination and election of judges through annex of the *omnibus* resolution as follows:

A candidate who fails to participate in an interview before the Advisory Committee on Nomination of Judges or in the public roundtable discussions shall be required to provide an explanation of the exceptional circumstances that prevented their participation within one week of non-participation. Failure to provide such explanation shall be considered a withdrawal of the nomination of that candidate, unless the Nominating State communicates otherwise within additional one week, provided that such communication also includes the required explanation of non-participation of the candidate.

Implementation date: Twenty-first session of the Assembly (2022)

RECOMMENDATION R372

R372. In designing the modalities of the roundtable discussions, the NYWG should have particular regard to aspects of the candidate assessments highlighted in the ACN report and include on the agenda topics aimed at supplementing the report in relation to these aspects.

Assessment: Positive.

Implementation: Amendment to paragraph 12ter of the Procedure of nomination and election of judges will be introduced through annex of the *omnibus* resolution, as follows:

Once the Advisory Committee [...]. The remaining modalities for the roundtable discussions will be determined by the New York Working Group, which will have particular regard to aspects of the assessments of the candidates highlighted in the report of the Advisory Committee on Nominations of Judges and include on the agenda topics aimed at supplementing the report in relation to these aspects.

Implementation date: Twenty-first session of the Assembly (2022)

RECOMMENDATION R373

R373. The ACN should include in the common questionnaire to be completed by all nominees provision for its accuracy to be certified by a senior member of the national-level Judiciary or of the nominations/appointments body which oversaw the nomination process.

Assessment: Positive with modifications.

Comments related to the assessment: Modifications concerned different feasible form of supporting verifiable information about the candidate instead of a certificate of accuracy of replies to the questionnaire.

5.

Implementation: A new paragraph 6 (g) will be introduced in the Procedure of nomination and election of judges through annex of the *omnibus* resolution as follows:

Containing an acknowledgement of information provided under sub-paragraph (a) by a senior member of the national-level judiciary or the authority of the Nominating State overseeing the nomination process.

Implementation date: Twenty-first session of the Assembly (2022)

RECOMMENDATION R374

R374. The ACN at the candidate interview should endeavour to assess the ability of the candidate to manage and conduct complex international criminal trials fairly and expeditiously and their suitability as a Presiding judge.

Assessment: Positive.

Implementation: Amendment to paragraph 5bis of the Terms of Reference of the Advisory Committee on Nominations of Judges will be introduced through annex of the *omnibus* resolution as follows:

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) at the candidate interview, endeavour to assess, without prejudice to the qualifications specified in Article 36 paragraph 3 (b) (i) and (ii) of the Rome Statute, the ability of the candidates to manage and conduct complex international criminal trials fairly and expeditiously and their suitability as a Presiding judge;
- (g) document the national-level nomination processes in the nominating State Parties; and
- (h) report on the above aspects.

Implementation date: Twenty-first session of the Assembly (2022)

RECOMMENDATION R375

R375. The ACN should require the nominating state to submit along with the nomination a certificate setting the procedure followed leading to the nomination.

Assessment: Positive with modifications.

Comments related to the assessment: Modifications concerned different form of providing information on the procedure followed leading to the nomination instead of a certificate. Also note that the requirements of the nomination are governed by the Procedure for the nomination and election of judges, not by the ACN.

Implementation: Amendment to paragraph 6 (f) of the Procedure of nomination and election of judges will be introduced through annex of the *omnibus* resolution, as follows:

*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 **the procedure leading to the nomination.***

Implementation date: Twenty-first session of the Assembly (2022)

RECOMMENDATION R376

R376. The ASP should initiate a process leading to the harmonization of the nomination procedures followed by States Parties. That should include requiring States Parties providing in the course of 2021 information and commentary on their own existing or prospective procedures for nomination of candidates to the Court.

Assessment: Modified.

Comments related to the assessment: Instead of a process leading to the harmonization of national nomination procedures, preparation of a non-binding document for the attention of States Parties when forming or amending the rules governing their national nomination procedures was agreed.

Implementation: Implementation considered together with R377. In relation to the second sentence of the recommendation, a new paragraph will be introduced in the *omnibus* resolution as follows:

Recalls paragraph 6 of the resolution ICC-ASP/18/Res.4 encouraging States Parties to submit information and commentary on their own existing or prospective nomination and selection procedures to the Secretariat of the Assembly;

Implementation date: Twenty-first session of the Assembly (2022)

RECOMMENDATION R377

R377. In time for the election of Judges in 2023, the Working Group on Nomination and election of Judges should compile a set of criteria, which should be applied in national-level nomination processes along with guidelines on the conduct of the nomination process.

Assessment: Positive with modifications.

Comments related to the assessment: Modifications concerned preparation of a non-binding document for the attention of States Parties when forming or amending the rules governing their national nomination procedures instead of a set of criteria, which should be applied in national nomination procedures along with guidelines on their conduct.

Implementation: 1) Amendment to paragraph 7 of the resolution ICC-ASP/18/Res.4 will be introduced, through annex of the *omnibus* resolution, in order to delete the last part of the sentence related to the “reference document”, as follows:

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;

2) A new paragraph 7bis will be introduced in the resolution ICC-ASP/18/Res.4, through annex of the *omnibus* resolution, as follows:

Further requests the Advisory Committee on Nomination of Judges, in consultation with States Parties and other relevant stakeholders, to prepare, in light of the compendium presented under paragraph 7 as well as additional submissions of States Parties under paragraph 6, guidelines for the national-level nomination procedures and bring them to the attention of States Parties at the earliest possible date, but no later than twenty-third session of the Assembly.

Implementation date: By twenty-third session of the Assembly (2024). As a first step in the implementation, mandate of the ACN to prepare guidelines to be adopted at the twenty-first session of the Assembly (2022).

Further comments: Guidelines to be prepared are without prejudice to the provisions of Article 36 paragraph 4 (a) of the Rome Statute.

RECOMMENDATION R378

R378. States Parties should accord utmost respect to the assessments in the ACN report and should not cast their votes in a way that is inconsistent with any aspect of an assessment.

Assessment: Positive.

Comments related to the assessment: Part of the recommendation related to casting of votes might not be fully feasible due to minimum voting requirements. Also note that full implementation is in hands of individual States Parties when casting their votes. Due to secret ballot, monitoring of implementation will not be possible.

Implementation: Amendment to paragraph 10 of the resolution ICC-ASP/18/Res.4 will be introduced through annex of the *omnibus* resolution, as follows:

Encourages States Parties to continue according utmost respect to the evaluation of candidates by the Advisory Committee on Nomination of Judges, and to refrain from casting their votes in an inconsistent way with this evaluation to the extent possible as well as from the trading of votes.

Implementation date: Twenty-first session of the Assembly (2022)

RECOMMENDATION R379

R379. The Working Group on Nomination and Election of Judges should consider whether it is now appropriate to review the criteria applicable to and the profiles of candidates from List B, having regard to the significance of criminal trial experience to the work of the Court.

Assessment: Not positive².

RECOMMENDATION R380

R380. The Working Group on Nomination and Election of Judges should consider whether it is now appropriate to review the qualifications for membership of the ACN.

Assessment: Modified.

Comments related to the assessment: Facilitation considered the recommendation and decided that it is not appropriate now to review the qualifications for membership of the ACN. However, it also decided to consider the issue again after the ACN election in 2024.

Implementation: The 2022 report of the facilitation will include a recommendation to consider reviewing the qualifications for the membership of the ACN in line with the IER Recommendation 380 after the ACN election in 2024.

Implementation date: By twenty-first session of the Assembly (2022)

² The Review Mechanism has adjusted this assessment to “negative” in order to conform to its categories of assessment (positive, negative, modified).

Annex II

Matrix

Progress in the assessment of the IER recommendations

Recommendation	Result of assessment (plus date)	Implementation date	Comments
R371	positive with modifications	2022	Action to be taken at the twenty-first session of the Assembly.
R372	positive	2022	Action to be taken at the twenty-first session of the Assembly.
R373	positive with modifications	2022	Action to be taken at the twenty-first session of the Assembly.
R374	positive	2022	Action to be taken at the twenty-first session of the Assembly.
R375	positive with modifications	2022	Action to be taken at the twenty-first session of the Assembly.
R376	modified	2022	Implementation considered together with R377. Additional action to be taken at the twenty-first session of the Assembly.
R377	positive with modifications	By 2024	As a first step in the implementation, action to be taken at the twenty-first session of the Assembly.
R378	positive	2022	Action to be taken at the twenty-first session of the Assembly.
R379	negative ³		
R380	modified	2022	Recommendation to be included in the mandate of the review of procedure for nomination and election of judges for future consideration.

³ Report of the respective Assembly mandate indicated an assessment of “not positive” since there was no consensus on the RM assessment categories of positive, negative or modified. The RM has adjusted this assessment to conform to its categories of assessment.

