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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/19/Res.6, 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 report” and requested “the Bureau to update the Assembly, at its twentieth session, on the progress of the review of the procedure for the nomination and election of judges”.¹

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. In its second meeting held on 8 April 2021, the Bureau appointed Mr. Luke Roughton (New Zealand) as the facilitator for the review of the procedure for the nomination and election of judges.²

4. The Working Group held two intersessional meetings on 22 June and 14 October to exchange general views on the programme of work for 2021 and R371-R380, the IER recommendations allocated to the facilitation per the Comprehensive Action Plan. The facilitation conducted further consultations on 2, 15, and 22 November with the aim of assessing the allocated recommendations based on the non-paper featuring possible options to assess each recommendation circulated by the facilitator on 22 October and updated in line with the progress made during the consultations. To mitigate the impact of the COVID-19 pandemic, the meeting was convened virtually via the Court’s WebEx platform.

5. The Working Group adopted the current report on 29 November 2021 via a silence procedure. The Working Group also adopted on 1 November via a silence procedure a report on the status of consideration of the allocated IER recommendations pursuant to paragraph 7 of resolution ICC-ASP/19/Res.7.³

II. Discussions in the New York Working Group

6. At its first meeting of the facilitation held on 22 June 2021, the Working Group engaged in an overview of the topics to be addressed in the of work of the facilitation for 2021, including the consideration of the relevant IER recommendations, being R371 to R380, allocated to the facilitation under the Comprehensive Action Plan.

7. At this meeting, delegations addressed the high importance of the procedure for the nomination and election of judges and pointed out that the Group of Independent Experts had prioritized those IER recommendations relating to this procedure. Delegations mentioned that the next judicial election was not far, in particular considering the timeline of its entire process with different stages.

8. Some delegations emphasized that a compendium of information and commentary on national nomination procedures to be presented by the Advisory Committee on nominations

¹ ICC-ASP/19/Res.6, annex I, paras. 6(a) and 6(b).

² Decisions of the Bureau of the Assembly of States Parties, 8 April 2021, available at https://asp.icc-cpi.int/iccdocs/asp_docs/ASP20/Bureau02.agenda%20and%20decisions%20-%2028Apr21.pdf.

³ ICC-ASP/19/Res.7, para. 7: “Requests the relevant Assembly Mandates designated as responsible for assessing and taking possible further action as appropriate on relevant recommendations to commence implementation in 2021 and to submit to the Bureau the outcome of its consideration, including on action already taken and proposals for next steps, by 1 November 2021[.]”

of judges (ACN) would become an important tool for the procedure of the nomination and election of judges.⁴ It was also expressed that the national nomination procedure was crucial given that it might increase the prospect of ensuring the election of judges of the highest quality, thus making it necessary that criteria for the procedure be established. A delegation pointed out that despite the lack of an IER recommendation directly addressing it, the Assembly should also continue working on eliminating the culture of vote-trading.

9. It was noted that there were no formal lessons learned process in the election of judges and thus it would be best to reflect upon the work of the ACN, including interviews and roundtables, when our memory was fresh. A delegation indicated that vetting should be prioritized, and while it was important to timely establish a mechanism for the election of the Deputy Prosecutor this year, the equivalent process would be needed for the election of judges. In this context, the mandates of the ACN might need to be reviewed. On the other hand, some delegations stated that the working methods of the ACN or issues related to its membership might better be addressed next year since the process to elect ACN members was underway.

10. Belgium reminded the Working Group of the two proposals of amendment to the procedure of the nomination and election of judges, which Belgium had first introduced in 2015 and had remained on the table since 2019. The delegation explained that the purpose of the proposals was to have the best qualified candidates in the election of judges. The first proposal was to add new OP16bis to the procedure for the nomination and election of judges to avoid an ‘automatic election’ when only one candidate remained 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 granted. Belgium further stated that the election should be postponed when the candidate does not acquire the two-third majority in the first ballot of that last round. The second proposal was to amend OP20 of the procedure related to the minimum voting requirements regarding gender and regional criteria as referenced in the ‘Informal guide and commentary to the procedure for the nomination and election of judges of the International Criminal Court’.⁵

11. At its second meeting of the facilitation held on 14 October, the Working Group exchanged general views to assess the IER recommendations allocated to the facilitation, being R371 to R380.

12. Regarding R371, delegations generally supported the recommendation to strengthen candidates’ participation in interviews and roundtable discussions. Some delegations noted that virtual participation should be considered as an option on an equal footing or at least in some circumstances.

13. Regarding R372, delegations supported the recommendation in general that the Working Group should have a particular regard to the assessments highlighted in the ACN report in designing the modalities of the roundtable discussions.

14. Regarding R373, generally delegations supported the recommendation to include in the ACN’s common questionnaire a provision for its accuracy to be certified by a senior national judiciary or nomination/appointment body. Some delegations raised questions about its feasibility, however, stating that it might not be possible to fully implement this recommendation as certain information, including subjective views or the aspects of personal history, might not be readily certifiable.

15. Regarding R374, delegations generally supported the recommendation requesting the ACN to assess the ability of the candidates’ ability to manage complex international criminal trials as well as their suitability as a presiding judge.

16. Regarding R375, delegations supported the recommendation in general, but some noted that a certificate setting the procedure followed leading to the nomination might not be the most appropriate form that the ACN should require the nominating state to submit.

17. Regarding R376, although questions were raised by some delegations as to whether the full harmonization of nomination procedures would be feasible, general support was

⁴ The note verale ICC-ASP/20/SP/40, dated 21 June 2021 set the deadline of submissions of information and commentary on the national nomination procedure as 30 September 2021 (Central European Time).

⁵ ICC-ASP/16/INF.2.

found for the steps that could lead to some harmonization as long as it is in conformity with the Rome Statute, including for example in minimum requirements, criteria or guidelines, to inform or supplement national nomination processes. A view was expressed that the harmonization of ‘process’ would be more difficult than that of ‘criteria’. It was also noted that the Assembly might not be able to initiate a process leading to some harmonization given the start of its twentieth session was nearer. In this regard, the existing process for submission of information and commentary on national nomination procedures and their compendium and reference documents that the ACN was requested to prepare by the twentieth session was also recalled.

18. Regarding R377, generally the recommendation mandating the facilitation to compile a set of criteria applicable to national nomination processes was supported with the caveat of the stated reactions to R376. A question was raised about whether this recommendation was feasible and in conformity with the Rome Statute.

19. Regarding R378, delegations agreed that the ACN report should be accorded utmost respect. However, questions were raised about the latter part that States Parties should not cast their votes in a way that is inconsistent with any aspect of the ACN’s assessment, because of the effects of the existing minimum voting requirements, for example.

20. Regarding R379, some delegations expressed general support for the recommendation, though with questions and caveats. Some had questions about whether this recommendation was aimed at amending the Rome Statute criteria. A view was also presented that elements of criteria should apply to both List A and List B candidates.

21. Regarding R380, some support was expressed about the recommendation calling for consideration whether it is now appropriate to review the qualifications for the membership of the ACN, while others noted that because of the upcoming election of the members of the ACN, any review should be taken up at a later time.

22. At this meeting, Belgium informed that while its amendment proposals remained on the table, the delegation would not pursue substantive discussion this year in consideration of other issues, leaving the proposals set for discussion at a later stage.

23. At its third meeting of the facilitation held on 2 November, the Working Group had before it a non-paper, presented by the facilitator, and which included a facilitator’s summary of the overall reactions to the recommendations, and non-exhaustive options for implementing the recommendations, should delegations wish to implement them. This non-paper (attached for reference purposes as annex II to the present report) was presented under the responsibility of the facilitator as an aid to focus discussions, and without prejudice to the positions of delegations.

24. At this meeting, delegations exchanged views on the options presented. Regarding the options presented for the implementation of R371, Some delegations stated that video conferencing might be a reasonable way to conduct interviews, alongside in-person interviews, considering the practice that the Assembly had adopted for the past 18 months and thus requested a flexible approach on this matter. Some delegations further stated that “exceptional circumstances” under *12bis* might not be clear or necessary as the same formulation contained in *12quarter*. An observation was presented that the last report of the ACN indicated that the ACN preferred in-person interviews based on their experience, including during the COVID-19 pandemic.

25. Regarding the options presented for the implementation of R372, delegations supported the options and expressed flexibility on which option to take up, but with preferences expressed for option (b).

26. Regarding the options presented for the implementation of R373, support was expressed for option (b), with a delegation suggesting that certification for accuracy be limited to those aspects of the statement that are verifiable.

27. Regarding the option presented for the implementation of R374, Delegations expressed support for amending to the terms of reference of the ACN. The facilitator noted that in the event of this amendment, the proposed paragraph would be inserted in the middle of the list under *5bis*, requiring the reordering of the list.

28. Regarding the options presented for the implementation of R375, one delegation expressed that it was not comfortable with the idea of requiring a certificate (as reflected in option (b)), while other delegations expressed either a preference for option (a) or for either option.
29. Regarding the options presented for the implementation of R376 and R377, the facilitator explained the suggestion for the Working Group to consider R377 in 2022 on the basis that the Assembly had already requested the ACN to provide documents in relation to national nomination procedures, that this facilitation of the Working Group was not in a position to be able to compile criteria and guidelines as recommended in R377 in time for the upcoming session of the Assembly, and that this work could be done during 2022, as the outcome of the work could be applied to the election of judges in 2023, given the nomination process for that election would be opened in early 2023.
30. Delegations preferred option (b) for R376, with a view to envisaging the implementation of the recommendation while respecting and being in compliance with the Rome Statute. A delegation supported R376 without indicating a preference for either option, and the facilitator mentioned that options (a) and (b) were not mutually exclusive.
31. One delegation expressed a preference for option (a) for R377, on the basis that this seemed closer to the intent of the recommendation, while another delegation stated that option (b) was acceptable as it took into account the question of compliance with the Rome Statute, given that unlike option (a), the language “whether to compile...” in option (b) left the door open to sharing “best practices”, for example, without imposing new criteria that were not provided for in the Statute.
32. Regarding the options presented for the implementation of R378, delegations expressed support for option (b).
33. Regarding the options presented for the implementation of R379, support was expressed for option (b), while one delegation expressed general support for implementing R379, pending the questions that had been raised by some delegations with respect to the recommendation in the second meeting.
34. Regarding the option presented for the implementation of R380, support was expressed for the option.
35. Following the third meeting, the facilitator circulated a revised version of the non-paper, reflecting a narrowing down of the options based on the discussions at the third meeting. This is attached for reference purposes as annex III to the present report.
36. At its fourth meeting of the facilitation held on 15 November, the Working Group exchanged views on the options presented in the revised non-paper.
37. Regarding the options presented for the implementation of R371, support was expressed for the proposed changes to paragraph 12*bis* of the procedure for the nomination and election of judges, with the inclusion of the word ‘preferably’ after ‘interviews’, with the addition of the words ‘as appropriate’ after ‘similar means’, and with the word ‘shall’ being replaced with ‘shall endeavor to’. One delegation placed a reservation on the proposed new paragraph 12*quater*.
38. Regarding the options presented for the implementation of R372, there was agreement to amend the paragraph 12*ter* as proposed.
39. Regarding the option presented for the implementation of R373, support was expressed for the proposal, and one delegation placed a reservation on it, on the basis that it was not sure if the benefit would justify the additional bureaucratic step it would impose.
40. Regarding the option presented to implement R374, there was general agreement on the option, while one delegation said that it could go along with the proposal, but had a question about the implications for the report of the ACN.
41. Regarding the option presented for the implementation of R375, there was general support, but one delegation placed a reservation on the option to allow it to further consider it.

42. Regarding the option presented to implement R376, different views were expressed about whether the recommendation should be implemented in 2022, and whether implementation of the recommendation should be sequenced to follow R377. Recalling the documents that were requested of the ACN (the compendium of submissions by States Parties and the reference document of practices), there was agreement that the facilitator would present language which would invite States Parties to review their national nomination procedures in light of the those documents.

43. Regarding the option presented for the implementation of R377, delegations expressed a willingness to go along with option (b), in light of the different views expressed. One delegation noted that the phrase “criteria to be applied”, could better reflect the IER recommendation if it read “criteria which should be applied”.

44. Regarding the option presented for the implementation of R378, there was agreement on the option, with one delegation suggesting that it could be strengthened by reading “Calls upon”, rather than “Encourages”.

45. Regarding the option presented for the implementation of R379, while support was expressed for option (a), some delegations indicated that they would not be in a position to support that option. Option (b) was supported by most, but one delegation placed a reservation on it, pending a further review. One delegation expressed its view that it was not generally in favor of recommendations which focused on only list B judges.

46. Regarding the option presented for the implementation of R380, the view was expressed that this recommendation could be considered in 2022.

47. Following the fourth meeting, the facilitator circulated a draft of the present report, which included a reflection of the options discussed in resolution format, with a proposal that the options upon which there was agreement be implemented through updates to the omnibus resolution.

48. At its fifth meeting of the facilitation held on 22 November, the Working Group considered the draft report. At that meeting, a delegation expressed that it was not in a position to agree to any changes to the procedure for the nomination and election of judges, or to the terms of reference of the ACN, on the basis that it wished to consider the IER recommendations in the context of an overall review of the procedure. This view was also echoed by some other delegations.

49. Views were exchanged on the draft updates to the language to be inserted in the omnibus resolution in the section on elections, and the annex on mandates. Following these discussions, a final set of updates were agreed upon ad referendum.

III. Conclusions and recommendations

50. Further to and based on the discussions held during the meetings of the Working Group, agreement was reached to submit language for inclusion in the omnibus resolution (annex I).

51. The Working Group recommends that meetings be held throughout 2022, including, if necessary, to discuss the issues involving the implementation of resolution ICC-ASP/19/Res.4, further discuss the remaining issues that could not be dealt with during the intersessional period covered by the current report as well as the report of 2019,⁶ consider any outstanding recommendations of the Advisory Committee on Nominations, and to report thereon to the twenty-first session of the Assembly in 2022.

52. The Working Group further recommends that IER recommendations 371, 372, 373, 374, 375, 376, 377, 378, 379, and 380 continue to be considered in 2022. As recommendation 377 contains references to work recommended before the election of judges in 2023, and because recommendation 376 is closely related, the Working Group further recommends that these two recommendations be the subject of consideration early in 2022.

⁶ ICC-ASP/18/31.

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 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;

~~*Takes note of the report of the Advisory Committee on Nominations of Judges¹ on the work of its seventh session, containing recommendations for the election of six judges during the nineteenth session of the Assembly;*~~

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;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,~~ ***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 ICC-ASP/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;

2. Paragraph 6 of annex I (Mandates) of the 2020 omnibus resolution (ICC-ASP/19/Res.6) 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;² and

“(b) *requests* 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;”

¹ As requested by the Assembly in ICC-ASP/18/Res.4

² Report to the Bureau on the review of the procedure for the nomination and election of judges (ICC-ASP/19/XX),

Annex II

IER recommendations R371 – R380: Facilitator’s non-paper on reactions and possible options		
Recommendations	Reactions	Options (not exhaustive)
<p>R371. The procedure for the nomination and election of Judges should be amended as follows:</p> <p>(i) States Parties should be required to ensure the attendance of candidates in person for interview by the ACN;</p> <p>(ii) the Interview should be an essential element of the process and any candidate not attending should be disqualified barring exceptional circumstances;</p> <p>(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.</p>	<p>Positive reactions overall. Some delegations noted that virtual participation should be possible in some circumstances.</p>	<p>Note: Relevant paragraph of the procedure for the nomination and election of judges currently reads:</p> <p>To implement R371(i):</p> <p><i>12bis</i> All nominated candidates shall be available for interviews [in-person], [or] including by videoconference or similar means [if required by exceptional circumstances], before the Advisory Committee on Nominations of Judges. Nominating States should endeavor to [shall] ensure that candidates make themselves available for interviews before the Advisory Committee on Nominations of Judges.</p> <p>To implement R371(ii)-(iii):</p> <p>12quater A candidate who refuses to participate in an interview before the Advisory Committee on Nomination of Judges or in the public roundtable discussions is required to provide, within one week of</p>

		<p>their non-participation, an explanation of how their participation was prevented by exceptional circumstances. Failure to provide this explanation will be considered a withdrawal of the nomination of that candidate.</p>
<p>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.</p>	<p>Supported.</p>	<p>Note: The relevant paragraph of the procedure for the nomination and election of judges is paragraph 12<i>ter</i>.</p> <p>Options to implement R372:</p> <ul style="list-style-type: none"> a) Through an ASP resolution, e.g.: <i>Decides</i> that the New York Working Group, when it determines the remaining modalities of the public roundtable discussions with judicial candidates, shall 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. b) By amending paragraph 12<i>ter</i> of the procedure, e.g. ...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 candidate assessments highlighted in the ACN report and include on the agenda topics aimed at supplementing the report in relation to these aspects.

<p>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.</p>	<p>Generally supported, but some need more time to consider and questions about feasibility. Some delegations expressed view that it might not be possible to implement this recommendation fully, as some information is not certifiable (for example, subjective views or aspects of personal history).</p>	<p>Options to implement R373:</p> <ul style="list-style-type: none"> a) Provide for only those verifiable aspects of the questionnaire to be certified for accuracy; b) Provide instead for the statement submitted with the nomination (as per paragraph 6 of the procedure for the nomination and election of judges) to be certified for accuracy by a senior member of the national-level judiciary or nominations/appointments body which oversaw the nomination process.
<p>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.</p>	<p>Supported.</p>	<p>Note: the relevant document is the Terms of reference of the Advisory Committee on nominations of judges of the International Criminal Court.</p> <p>Option to implement R374:</p> <p>Amend the terms of reference of the ACN, to add a new sub-paragraph under <i>5bis</i>, e.g: To that effect, the Committee shall:</p> <p>...</p> <p>(x) at the candidate interview, 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.</p>

<p>R375. The ACN should require the nominating state to submit along with the nomination a certificate setting the procedure followed leading to the nomination.</p>	<p>Generally supported, some need more time to consider. Noted by some that a certificate may not be most appropriate form.</p>	<p>Note: the nomination procedure is governed by the procedure for the nomination and election of judges, not the ACN. The procedure currently provides that:</p> <p>6. Every nomination should be accompanied by a statement: ...</p> <p>(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;</p> <p>Options to implement R375:</p> <ul style="list-style-type: none"> a) Amend paragraph 6(f) of the procedure for the nomination and election of judges, or b) Amend the terms of reference of the ACN to mandate it to request from nominating states a certificate or information setting out the procedure followed leading to the nomination.
<p>R376. The ASP should initiate a process leading to the harmonisation 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.</p>	<p>Questions from some as to whether full harmonisation of nomination procedures is feasible, but general support for steps that could lead to some harmonisation, including for example, minimum requirements, criteria or guidelines, to inform or supplement national nomination</p>	<p>Note that the ACN is mandated to provide, by the upcoming ASP session, a compendium of voluntary submissions from States Parties of information and commentary on existing or prospective nomination procedures and a reference document for States Parties of practices that could be taken into account when States Parties are establishing or utilizing national nomination procedures (see OPs 6-7 of ICC-ASP/18/Res.4).</p>

	<p>processes. A view was expressed that harmonisation of process would be more difficult than of criteria.</p> <p>It was noted that ASP cannot initiate a process for 2021 calendar year, as next ASP session will be December 2021. The existing process for submission of information and commentary, and the mandated compendium and reference documents from the ACN due by the 20th ASP was also recalled.</p>	<p>Options to implement R376:</p> <ul style="list-style-type: none"> a) Take up this recommendation (fully, or partially) in 2022 following receipt of the compendium and reference document (either by noting this intention in a report to the ASP or by mandating it in an ASP resolution at the 20th session); b) Sequence implementation of this recommendation to follow R377, noting that any steps towards harmonisation would be based on agreed criteria/guidelines.
<p>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.</p>	<p>General support, but see reactions for R376 above. Question about whether this is feasible and in conformity with the Rome Statute.</p>	<p>Options to implement R377:</p> <ul style="list-style-type: none"> a) Mandate the Review of the Procedure for the Nomination and Election of Judges to compile a set of criteria which should be applied in national-level nomination processes and guidelines on the conduct of the nomination process to be published in the intersessional period (i.e. at a date TBC in 2022). b) Mandate the Review of the Procedure for the Nomination and Election of Judges to consider in 2022, whether to compile a set of criteria to be applied in national-level nomination processes

		along with guidelines on the conduct of the nomination process, in light of the documents to be provided by the ACN before the 20 th session (compendium of information and reference document).
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.	Agreement that ACN report should be accorded utmost respect, but questions about whether latter part of recommendation is implementable (i.e. because of the effects of the minimum voting requirements).	Options to implement R378: a) Treat recommendation as one for States Parties to implement directly when they cast votes. b) Implement through an ASP resolution, e.g.: <i>Encourages States Parties to accord utmost respect to the assessments in the ACN report...</i>
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.	General support expressed, but with some questions and caveats. Some have questions about whether this recommendation is aimed at amending the Rome Statute criteria, or additional non-binding criteria. A view was also expressed that elements of criteria should apply to both list A and B.	Options to implement R379: a) Mandate, through an ASP resolution, the Review of the Procedure for the Nomination and Election of Judges to consider in 2022, the question of whether List B criteria should be reviewed; b) Mandate, through an ASP resolution, the Review of the Procedure for the Nomination and Election of Judges to consider in 2022 to consider ways of ensuring all judicial candidates can be proven competent to manage and preside over complex criminal trials.

<p>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.</p>	<p>Some support expressed. Some noted that because of the upcoming election for the ACN, any review should be taken up at a later time.</p>	<p>Option to implement R380: Mandate, through an ASP resolution, the Review of the Procedure for the Nomination and Election of Judges to review the qualifications for membership of the ACN during the course of 2022, and to report to the 21st session of the ASP.</p>
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Annex III

IER recommendations R371 – R380: Facilitator’s non-paper on reactions and possible options		
Recommendations	Reactions	Options (not exhaustive)
<p>R371. The procedure for the nomination and election of Judges should be amended as follows:</p> <p>(i) States Parties should be required to ensure the attendance of candidates in person for interview by the ACN;</p> <p>(ii) the Interview should be an essential element of the process and any candidate not attending should be disqualified barring exceptional circumstances;</p> <p>(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.</p>	<p>Positive reactions overall. Some delegations noted that virtual participation should be possible in some circumstances.</p>	<p>Note: Relevant paragraph of the procedure for the nomination and election of judges currently reads:</p> <p>To implement R371(i):</p> <p><i>12bis</i> All nominated candidates shall be available for interviews [in-person], [or] including by videoconference or similar means if required by exceptional circumstances, before the Advisory Committee on Nominations of Judges. Nominating States should endeavor to [shall] ensure that candidates make themselves available for interviews before the Advisory Committee on Nominations of Judges.</p> <p>To implement R371(ii)-(iii):</p> <p><i>12quater</i> A candidate who refuses to participate in an interview before the Advisory Committee on Nomination of Judges or in the public roundtable discussions is required to provide, within one week of</p>

		<p>their non-participation, an explanation of how their participation was prevented by exceptional circumstances. Failure to provide this explanation will be considered a withdrawal of the nomination of that candidate.</p>
<p>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.</p>	<p>Supported.</p>	<p>Note: The relevant paragraph of the procedure for the nomination and election of judges is paragraph 12<i>ter</i>.</p> <p>Options to implement R372:</p> <ul style="list-style-type: none"> e) Through an ASP resolution, e.g.: <i>Decides that the New York Working Group, when it determines the remaining modalities of the public roundtable discussions with judicial candidates, shall 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.</i> d) By amending paragraph 12<i>ter</i> of the procedure, e.g. ... 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 candidate assessments highlighted in the ACN report and include on the agenda topics aimed at supplementing the report in relation to these aspects.

<p>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.</p>	<p>Generally supported, but some need more time to consider and questions about feasibility. Some delegations expressed view that it might not be possible to implement this recommendation fully, as some information is not certifiable (for example, subjective views or aspects of personal history).</p>	<p>Options to implement R373:</p> <ul style="list-style-type: none"> e) Provide for only those verifiable aspects of the questionnaire to be certified for accuracy; d) Amend the procedure for the nomination and election of judges to provide for the [verifiable aspects of the] statement submitted with the nomination (as per paragraph 6 of the procedure for the nomination and election of judges) to be certified for accuracy by a senior member of the national-level judiciary or nominations/appointments body which oversaw the nomination process.
<p>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.</p>	<p>Supported.</p>	<p>Note: the relevant document is the Terms of reference of the Advisory Committee on nominations of judges of the International Criminal Court.</p> <p>Option to implement R374:</p> <p>Amend the terms of reference of the ACN, to add a new sub-paragraph under <i>5bis</i>, e.g: To that effect, the Committee shall:</p> <p>...</p> <p>(x) at the candidate interview, endeavour to assess the ability of the candidate to manage and conduct</p>

		<p>complex international criminal trials fairly and expeditiously and their suitability as a Presiding judge.</p>
<p>R375. The ACN should require the nominating state to submit along with the nomination a certificate setting the procedure followed leading to the nomination.</p>	<p>Generally supported, some need more time to consider. Noted by some that a certificate may not be most appropriate form.</p>	<p>Note: the nomination procedure is governed by the procedure for the nomination and election of judges, not the ACN. The procedure currently provides that:</p> <p>6. Every nomination should be accompanied by a statement:</p> <p>...</p> <p>(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;</p> <p>Options to implement R375:</p> <p>c) Amend paragraph 6(f) of the procedure for the nomination and election of judges:</p> <p>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, and of the procedure followed leading to the nomination;</p>

		<p>d) Amend the terms of reference of the ACN to mandate it to request from nominating states a certificate or information setting out the procedure followed leading to the nomination.</p>
<p>R376. The ASP should initiate a process leading to the harmonisation 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.</p>	<p>Questions from some as to whether full harmonisation of nomination procedures is feasible, but general support for steps that could lead to some harmonisation, including for example, minimum requirements, criteria or guidelines, to inform or supplement national nomination processes. A view was expressed that harmonisation of process would be more difficult than of criteria.</p> <p>It was noted that ASP cannot initiate a process for 2021 calendar year, as next ASP session will be December 2021. The existing process for submission of information and commentary, and the mandated compendium and reference documents from the ACN due by the 20th ASP was also recalled.</p>	<p>Note that the ACN is mandated to provide, by the upcoming ASP session, a compendium of voluntary submissions from States Parties of information and commentary on existing or prospective nomination procedures and a reference document for States Parties of practices that could be taken into account when States Parties are establishing or utilizing national nomination procedures (see OPs 6-7 of ICC-ASP/18/Res.4).</p> <p>Options to implement R376:</p> <p>e) Take up this recommendation (fully, or partially) in 2022 following receipt of the compendium and reference document (either by noting this intention in a report to the ASP or by mandating it in an ASP resolution at the 20th session);</p> <p>d) Sequence implementation of this recommendation to follow R377, noting that any steps towards harmonisation would be based on agreed criteria/guidelines.</p>

<p>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.</p>	<p>General support, but see reactions for R376 above. Question about whether this is feasible and in conformity with the Rome Statute.</p>	<p>Options to implement R377:</p> <ul style="list-style-type: none"> e) Mandate the Review of the Procedure for the Nomination and Election of Judges to compile a set of criteria which should be applied in national level nomination processes and guidelines on the conduct of the nomination process to be published in the intersessional period (i.e. at a date TBC in 2022). d) Mandate the Review of the Procedure for the Nomination and Election of Judges to consider in 2022, whether to compile a set of criteria to be applied in national-level nomination processes along with guidelines on the conduct of the nomination process, including for publication during the intersessional period before the 21st session, in light of the documents to be provided by the ACN before the 20th session (compendium of information and reference document).
<p>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.</p>	<p>Agreement that ACN report should be accorded utmost respect, but questions about whether latter part of recommendation is implementable (i.e. because of the effects of the minimum voting requirements).</p>	<p>Options to implement R378:</p> <ul style="list-style-type: none"> e) Treat recommendation as one for States Parties to implement directly when they cast votes. d) Implement through an ASP resolution, e.g.: Encourages States Parties to accord utmost

		respect to the assessments in the ACN report...
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.	General support expressed, but with some questions and caveats. Some have questions about whether this recommendation is aimed at amending the Rome Statute criteria, or additional non-binding criteria. A view was also expressed that elements of criteria should apply to both list A and B.	Options to implement R379: c) Mandate, through an ASP resolution, the Review of the Procedure for the Nomination and Election of Judges to consider in 2022, the question of whether List B criteria should be reviewed; and , d) Mandate, through an ASP resolution, the Review of the Procedure for the Nomination and Election of Judges to consider in 2022 ways of ensuring all judicial candidates can be proven competent to manage and preside over complex criminal trials.
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.	Some support expressed. Some noted that because of the upcoming election for the ACN, any review should be taken up at a later time.	Option to implement R380: Mandate, through an ASP resolution, the Review of the Procedure for the Nomination and Election of Judges to review the qualifications for membership of the ACN during the course of 2022, and to report to the 21 st session of the ASP.