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## **ELECTION OF JUDGES OF THE INTERNATIONAL CRIMINAL COURT: TOWARDS INTEGRITY AND TRANSPARENCY OF THE NATIONAL NOMINATION PROCEDURES**

*Abstract: The election of judges to the International Criminal Court (ICC) is a critical process that shapes the Court's legitimacy and effectiveness. This paper delves into the normative framework governing the election of ICC judges, explores the challenges arising from the past election cycles, examines national nomination procedures in the State Parties, and discusses the efforts to enhance these procedures. By scrutinizing these aspects, the paper aims to contribute to the ongoing discourse on improving the democratic legitimacy of the ICC through the lens of the recent, ongoing and the forthcoming activities of the Advisory Committee for nomination of judges of the International Criminal Court (ACN), but also with respect of the role that in that plays the Assembly of ICC (ASP). Since ACN plays a pivotal role in enhancing the nomination procedures for ICC judges, it has been actively engaged in developing non-binding instruments aimed at improving the transparency, inclusivity, and integrity of the nomination process. These efforts were made in response to the challenges identified in past election cycles, including concerns regarding the quality of candidates and nomination process itself, gender and geographical representation, and overall fairness.*

**Keywords: International Criminal Court, election of judges, national nomination procedures, judicial independence, judicial integrity.**

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## 1. PROLEGOMENA ON IMPORTANCE OF ICC AND ITS JUDGES

The International Criminal Court (ICC) was established in 2002 with the Rome Statute,<sup>1</sup> aiming to prosecute individuals for genocide, war crimes, crimes against humanity, and aggression<sup>2</sup> (Art. 5) when national jurisdictions are unable or unwilling to do so. (Art. 17) Its primary goal is to end impunity for the perpetrators of these heinous crimes and bring justice to the victims.

The ICC's jurisdiction covers crimes committed after July 1, 2002, when the Rome Statute entered into force,<sup>3</sup> and its reach extends globally, regardless of where the crimes occurred. However, it can only prosecute individuals, not states, and operates on the principle of complementarity, meaning it steps in only when national courts are unable or unwilling to prosecute.

Since its establishment, the ICC has faced challenges, including criticism over its selectivity in cases, accusations of political bias, and difficulties in enforcing its arrest warrants. Nevertheless, it has made significant strides in holding individuals accountable for grave international crimes, fostering a culture of accountability, and contributing to the prevention of future atrocities. Despite its limitations, the ICC remains a crucial institution in the pursuit of global justice and the protection of human rights.

Considering such a vital role of the Court, the independence and integrity of ICC judges are paramount for the effectiveness and credibility of the court. As the ultimate arbiters of justice within the ICC, judges must remain impartial and free from external influences to ensure fair and unbiased proceedings.

Independence safeguards judges from political pressure, allowing them to interpret and apply the law objectively. It enables them to make decisions solely based on evidence and legal principles, without fear of reprisal or favouritism towards any party involved.

Integrity is equally crucial, as it upholds the trust of the international community in the ICC's ability to administer justice. Judges must demonstrate honesty, ethical conduct, and adherence to the highest standards of professionalism. Any compromise to their integrity undermines the legitimacy of the court and jeopardizes its ability to fulfil its mandate effectively.

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1 Rome Statute of the International Criminal Court, Done at Rome on 17 July 1998, in force on 1 July 2002, United Nations, Treaty Series, vol. 2187, No. 38544, <https://www.icc-cpi.int/sites/default/files/RS-Eng.pdf>, last accessed on March 7<sup>th</sup> 2024.

2 Inserted by resolution RC/Res.6 of 11 June 2010 based on Kampala amendments. See: <https://asp.icc-cpi.int/crime-of-aggression>, last accessed on March 7<sup>th</sup> 2024.

3 Except for the crime of aggression where the Court may exercise jurisdiction only with respect to crimes of aggression committed one year after the ratification or acceptance of the amendments by thirty States Parties. The Court shall exercise jurisdiction over the crime of aggression in accordance with this article, subject to a decision to be taken after 1 January 2017 by the same majority of States Parties as is required for the adoption of an amendment to the Statute. (Art. 15bis)

Furthermore, the independence and integrity of ICC judges contribute to the court's broader mission of combating impunity for the most serious international crimes. By upholding these principles, judges bolster confidence in the rule of law and demonstrate the ICC's commitment to fairness, accountability, and the protection of human rights on a global scale.

## 2. NORMATIVE AND INSTITUTIONAL FRAME WORK FOR NOMINATION AND ELECTION OF ICC JUDGES AND PRACTICES APPLIED BEFORE 2023 ELECTIONS

### 2.1. The conditions and qualifications required for ICC judges

The Rome Statute sets forth several conditions and qualifications required for individuals to serve as ICC judges. These conditions ensure that judges possess the necessary qualifications, integrity, impartiality, and independence to effectively fulfil their duties in administering international justice:

a) Personality:

Article 36(3)(a) of the Rome Statute stipulates that judges must be “persons of high moral character, impartiality, and integrity.”

b) Legal qualifications:

– He/she possess the qualifications required in their respective States for appointment to the highest judicial offices.

c) Experience and Expertise:

Article 36(3)(b) requires judges to have different professional background depending on the State Party preference to nominate them for the list “A” or “B” of candidates, where for the List A it requires of “established competence in criminal law and procedure, and the necessary relevant experience, whether as judge, prosecutor, advocate or in other similar capacity, in criminal proceedings“, while for the List B requires “established competence in relevant areas of international law such as international humanitarian law and the law of human rights, and extensive experience in a professional legal capacity which is of relevance to the judicial work of the Court“. Therefore, the List A is „reserved“ for legal professionals while List B involves legal experts.

A candidate with sufficient qualifications for both lists may choose on which list to appear. At the first election to the Court, at least nine judges shall be elected from list A and at least five judges from list B. Subsequent elections shall be so organized as to maintain the equivalent proportion on the Court of judges qualified on the two lists. (Art. 36(5)).

d) Language skills:

Article 36(3)(c) emphasizes the importance of judges possessing “an excellent knowledge of and be fluent in at least one of the working languages of the Court“, therefore either English or French.

e) Gender and Geographical Representation:

Article 36(8) of the Rome Statute emphasizes the importance of ensuring gender and geographical representation on the ICC bench. It states that “due account shall be taken of the importance of ensuring representation of the principal legal systems of the world, equitable geographical representation and a fair representation of female and male judges.”

No two judges may be nationals of the same State. A person who, for the purposes of membership of the Court, could be regarded as a national of more than one State shall be deemed to be a national of the State in which that person ordinarily exercises civil and political rights. (Art. 36(7))

Each State Party may put forward one candidate for any given election who need not necessarily be a national of that State Party but shall in any case be a national of a State Party. (Art. 36(4)b)

f) Tenure:

Article 36(9) specifies the tenure of ICC judges, stating that they shall be elected for terms of nine years and may be re-elected, provided they continue to meet the qualifications required for the office.

## 2.2. Nomination and election of ICC judges

The process of nomination and election of ICC judges can be divided in two, probably equally important stages of the process:

- a) The national nomination procedure
- b) The procedure before the ICC,

Where the procedure before ICC can be also divided in two stages:

- Evaluation of candidates by ACN
- Election of judges by ASP

### 2.2.1. National Nomination Procedures

Article 36(4)a rules the nomination procedures to be conducted by the State Parties and requires them to be made either:

- (i) By the procedure for the nomination of candidates for appointment to the highest judicial offices in the State in question;
- or (ii) By the procedure provided for the nomination of candidates for the International Court of Justice in the Statute of that Court.

Nominations shall be accompanied by a statement in the necessary detail specifying how the candidate fulfils the requirements of Article 36, paragraph 3.(b) of the Rome Statute.

Once the nomination period expires, the list of candidates disaggregated by all relevant criteria (list A or B, gender and geographical representation)<sup>4</sup> is published on the ICC ASP web page, together with a full biographical data and the statements elaborating how the candidate meets the criteria prescribed by the Rome Statute.

### 2.2.2. *Evaluation of candidates*

The evaluation of candidates is being done by ACN in the two/stages process. The ACN as expert body composed of 9 independent experts, nationals of States Parties, designated by the Assembly of States Parties by consensus on recommendation made by the Bureau of the Assembly also made by consensus, reflecting the principal legal systems of the world and an equitable geographical representation, as well as a fair representation of both genders, based on the number of States Parties to the Rome Statute. Members of the Committee are drawn from eminent interested and willing persons of a high moral character, who have established competence and experience in criminal or international law. Members of the Committee are not the representatives of States or other organizations and serve in their personal capacity. Therefore, they are not allowed to take instructions from States Parties, States or any other organizations or persons. Furthermore, any member who is a national of a State Party shall not participate in the assessment of candidates nominated by that State Party.<sup>5</sup>

In order to fulfil its mandate, according to the Terms of Reference (ToR)<sup>6</sup> ACN is in charge of the following tasks:

- (a) developing 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) asking nominees to demonstrate their legal knowledge by presenting relevant evidence;
- (c) checking candidates' references and any other information publicly available;

4 See e.g. [https://asp.icc-cpi.int/sites/default/files/asp\\_docs/ICC-ASP-EJ2023-AllCategories.pdf](https://asp.icc-cpi.int/sites/default/files/asp_docs/ICC-ASP-EJ2023-AllCategories.pdf), last accessed on March 7<sup>th</sup> 2024.

5 Consolidated Terms of Reference for the Advisory Committee for nomination of judges of the International Criminal Court, paras. 1-3.

6 These Terms of Reference were originally adopted by the Assembly of States Parties via resolution ICC-ASP/10/Res. 5, para. 19, and subsequently amended by resolutions ICC-ASP/13/Res. 5, annex III, and ICC-ASP/18/Res. 4, annex II.

- (d) creating 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) assessing 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) documenting the national-level nomination processes in the nominating State Parties; and
- (g) reporting on the above aspects.

It is important to mention that the ACN mandate initially didn't involve all the above-mentioned tasks. Namely, its mandate has been extended by ASP resolution in 2019<sup>7</sup> to include, in addition to those tasks, the mandate covered by par. 8 *bis*. which refers to the “confidential, provisional assessment” of candidates. Namely, the Committee shall also, upon request by a State Party, provide a confidential, provisional assessment of the suitability of a potential candidate of that State Party. Such a provisional assessment shall be based solely on information submitted to the Committee by the State Party concerned, and shall not require the Committee to communicate with the potential candidate. A request for a provisional assessment of a potential candidate shall be without prejudice to the decision of the State Party to nominate or not nominate that potential candidate. “Any provisional assessment shall also be without prejudice to the evaluation of that individual by the Committee, should they be nominated by a State Party. The number of Committee members responsible for conducting a provisional assessment of a potential candidate shall be limited to three. In the case of a candidate being nominated by a State Party after a provisional assessment, the Committee members that conducted the provisional assessment of the candidate shall recuse themselves from the formal evaluation of that candidate.”

In practice, ACN publishes the list of nominated candidates on the ICC website, along with their biographical information and statements outlining their vision and priorities as prospective judges.

This transparency allows State Parties, civil society organizations, and other stakeholders to review and assess the qualifications and suitability of the nominees.

The evaluation process starts with the development of the uniform questionnaires prepared by ACN to be answered by the candidates and made publicly available. The candidates should also sign a standard declaration for all candidates that clarifies whether they are aware of any allegations of misconduct, including sexual harassment, made against them.

At the second stage, the candidates are interviewed by ACN (closed for the public). In 2023 election cycle, each interview lasted 85 minutes.

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7 ICC-ASP/18/Res.4 Resolution on the review of the procedure for the nomination and election of judges, Adopted at the 9th plenary meeting, on 6 December 2019, [https://asp.icc-cpi.int/sites/asp/files/asp\\_docs/ASP18/ICC-ASP-18-Res4-ENG-PEJ-resolution-10Dec19-%20AM%201728.cln.pdf](https://asp.icc-cpi.int/sites/asp/files/asp_docs/ASP18/ICC-ASP-18-Res4-ENG-PEJ-resolution-10Dec19-%20AM%201728.cln.pdf), last accessed on March 12th 2024.

Based on the answers provided in the questionnaires and during the interview, ACN evaluates their knowledge and skills as required by the art. 36 of the Rome Statute and prepares the report to the ASP which at the final stage elects the ICC judges.

### 2.2.3. *Election of Judges*

The election of ICC judges takes place during sessions of the Assembly of States Parties, with each State Party casting votes for their preferred candidates.

Candidates are elected based on a two-thirds majority vote, with a minimum threshold for gender and geographical representation to ensure diversity on the ICC bench.

The election process may involve multiple rounds of voting until the required majority is achieved for all vacant positions.

The Bureau of the Assembly of States Parties shall fix the date of the election. The Secretariat of the Assembly of States Parties shall prepare, in accordance with article 36, paragraph 5, of the Statute, two lists of candidates in English alphabetical order. The election of judges shall be a matter of substance, and subject to the requirements of article 112, paragraph 7(a), of the Statute. The persons elected to the Court shall be the 6 candidates who obtain the highest number of votes and a two-thirds majority of States Parties present and voting, provided that an absolute majority of the States Parties constitutes the quorum for voting. When two or more candidates of the same nationality obtain the required majority, the candidate who receives the higher number of votes shall be considered elected.<sup>8</sup>

States Parties shall, in the election of judges, take into account the need for the representation of the principal legal systems of the world, equitable geographical representation and a fair representation of female and male judges. They shall take into account the need to include judges with legal expertise on specific issues, including, but not limited to, violence against women and children. During any given ballot, each State Party shall vote for no more candidates than seats to be filled, whereby it shall observe the minimum voting requirements regarding lists A and B, regional groups and gender.<sup>9</sup>

### 2.2.4. *Appointment and Swearing-In:*

Following the election, successful candidates are formally appointed as ICC judges by the ASP President in the official ceremony including taking an oath.<sup>10</sup>

8 ICC-ASP/16/INF.2, Informal guide and commentary to the procedure for the nomination and election of judges of the International Criminal Court\*, Sixteenth session New York, 4-14 December 2017, paras. 13-16.

9 ICC-ASP/16/INF.2, Informal guide and commentary to the procedure for the nomination and election of judges of the International Criminal Court, Sixteenth session New York, 4-14 December 2017, paras. 19-20.

10 The standardised text of the solemn declaration stating: "I solemnly undertake that I will perform my duties and exercise my powers as a judge of the International Criminal

### 3. OVERVIEW OF PREVIOUS ELECTION CYCLES AND THE CHALLENGES ENCOUNTERED DURING ELECTIONS

Above-described nomination, evaluation and election mechanism are being subject of criticism not only internally, in the Court itself. Even more, there has been some criticism of the existing system of nomination and election of ICC judges present in the public discourse, too, mostly in academic circles and NGO community. While the ICC's judicial selection process is designed to be transparent and merit-based, some stakeholders have raised concerns about certain aspects of the process.

Here are some common criticisms:

a) Lack of Diversity:

Critics argue that the current nomination and election process does not always result in a sufficiently diverse bench in terms of gender, geographical representation, and legal backgrounds. This lack of diversity may undermine the Court's legitimacy and effectiveness in addressing a wide range of international crimes.

b) Influence of Political Considerations:

Some observers raise concerns that political considerations, rather than merit and qualifications, may sometimes influence the nomination and election of ICC judges. This could lead to the appointment of judges who prioritize the interests of certain states over the impartial administration of justice.<sup>11</sup>

c) Limited Transparency:

The nomination and election process for ICC judges involves closed-door negotiations and voting among State Parties, which may limit transparency and public accountability. Critics argue that greater transparency in the selection process could enhance confidence in the integrity of the ICC judiciary.

d) Complexity and Length of Process:

The nomination and election process for ICC judges can be lengthy and complex, involving multiple rounds of voting and negotiations among State Parties. This complexity may impede the timely selection of qualified judges and delay the Court's judicial functions.<sup>12</sup>

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Court honourably, faithfully, impartially and conscientiously, and that I will respect the confidentiality of investigations and prosecutions and the secrecy of deliberations".

11 See e.g. A. Rass, M. E. Vingoli, *Elect the Best in Upcoming ICC Judicial Elections Member Countries' Votes Should be Exclusively Merit-Based*, November 29<sup>th</sup>, 2023, last accessed on March 11<sup>th</sup> 2024.

12 See e.g. S. Barriga, *Election Rules for ICC Judges: A Balanced Bench Through Quasi-Quotas*, <https://www.ejiltalk.org/election-rules-for-icc-judges-a-balanced-bench-through-quasi-quotas/>, last accessed on March 11<sup>th</sup> 2024.



e) Need for Reform:

Some stakeholders have called for reforms to the nomination and election process to address these criticisms and enhance the transparency, inclusivity, and effectiveness of the ICC judiciary. Proposed reforms may include changes to the nomination criteria, increased transparency in the selection process, and efforts to promote diversity on the ICC bench.

These highlights have been transformed into the official recommendation in the Report following the Review of the International Criminal Court and the Rome Statute system functioning (hereinafter: IER).<sup>13</sup>

## 4. HOW TO IMPROVE THE PROCESS OF NOMINATION AND ELECTION?

### 4.1. Independent Review and the Facilitation Process

In 2020 the ICC conducted IER of the functioning of the Court aimed at improvement of different aspects of the functioning of the court. The report produced within that process included a set of recommendations including those referring to the election of judges.

During the review, the Group of experts has conducted a number of interviews<sup>14</sup> as well as a comprehensive documentation review, prior to presenting the Final Report<sup>15</sup> presented on September 30<sup>th</sup> 2020.

The IER Report addressed also the processes of nomination, evaluation and election of judges, resulting in the list of recommendations. These recommendations fall under “Chapter XX: Improvement of the system of nomination of judges” (recommendations R371-R380) in the IER Experts’ 2020 report, including the two main recommendations:

13 Established by the ICC-ASP/18/Res.7, [https://asp.icc-cpi.int/sites/asp/files/asp\\_docs/ASP18/ICC-ASP-18-Res7-ENG.pdf](https://asp.icc-cpi.int/sites/asp/files/asp_docs/ASP18/ICC-ASP-18-Res7-ENG.pdf), last accessed on March 8<sup>th</sup> 2024. For more information on the Review of the International Criminal Court and the Rome Statute system functioning see: <https://asp.icc-cpi.int/Review-Court>, last accessed on March 8<sup>th</sup> 2024.

14 During the consultations phase (January – April), the IER held a total of 272 interviews and meetings with 243 current and former officials, staff and external defence and victims representatives. These took place alongside meetings with the Heads of Organs, the Staff Union Council, 9 States parties, 12 ASP bodies, 54 NGOs and 6 academics. Further details on the consultations held can be found in the appendix to the report. See: [https://asp.icc-cpi.int/sites/asp/files/asp\\_docs/ASP19/IER-Interim%20Report%20Chair%20Message-ENG.pdf](https://asp.icc-cpi.int/sites/asp/files/asp_docs/ASP19/IER-Interim%20Report%20Chair%20Message-ENG.pdf), last accessed on March 8<sup>th</sup> 2024.

15 Report of the Independent Expert Review of the International Criminal Court and the Rome Statute System, [https://asp.icc-cpi.int/sites/asp/files/asp\\_docs/ASP19/IER-Final-Report-ENG.pdf](https://asp.icc-cpi.int/sites/asp/files/asp_docs/ASP19/IER-Final-Report-ENG.pdf), last accessed on March 8<sup>th</sup> 2024.

**Recommendation 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.”

**Recommendation 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.”

“The relevant recommendations of the Independent Expert Review (IER) on the election processes 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’)<sup>16</sup>, which had been proposed by the Review Mechanism on 30 June 2021 and adopted by the Bureau on 28 July.”

The facilitation process and an intensive debate among State Parties were done in accordance with the ICC ASP 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”.<sup>17</sup>

The Facilitation process has resulted in the Report 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.”<sup>18</sup>

The main focus of the Working Group was on the future steps in improvement of the national nomination procedures, where there is a predominate question on how to balance the need to overcome identified challenges, but also to stay in line with the ACN mandate and the Rome Statute as well as to provide for the

16 Comprehensive action plan for the assessment of the recommendations of the Group of Independent Experts, including requirements for possible further action, in particular section XX, “Improvement of the system of nomination of judges” (see recommendations 371–380): [https://asp.icc-cpi.int/EN\\_Menu/asp/review-court/pages/action-plan.aspx](https://asp.icc-cpi.int/EN_Menu/asp/review-court/pages/action-plan.aspx), last accessed on March 11th 2024.

17 ICC-ASP/19/Res.7, [https://asp.icc-cpi.int/sites/asp/files/asp\\_docs/ASP19/ICC-ASP-19-Res7-ENG.pdf](https://asp.icc-cpi.int/sites/asp/files/asp_docs/ASP19/ICC-ASP-19-Res7-ENG.pdf), last accessed on March 8th 2024.

18 Report to the Bureau on the review of the procedure for the nomination and election of judges ICC-ASP/20/30

“politically acceptable solutions” for the State Parties not jeopardizing their sovereignty in governing national nomination procedures.

This attitude was already visible in the ASP in its Resolution ICC-ASP/20/Res.5<sup>19</sup> which refers to the resolution ICC-ASP/18/Res.4 and invited the 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. (par. 76)

Some States Parties at the time also recognised the capacity of the compendium of the national nomination procedures to be seen as a work in progress and updated two years before each election of judges.

The discussion resulted in the amended wording of the Recommendations 376 and 377 in the following way:

#### ***New Recommendation R376***

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.”

#### ***New Recommendation R377***

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.”

Such modification of the recommendations was reflected in the ASP resolution ICC-ASP/21/Res.2 (Annex III Amendment(s) to the resolution ICC-ASP/18/Res.4) adopted in December 2022<sup>20</sup> which brought the following novelties in ACN mandate:

- a) ASP requested 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 explaining the national nomination procedures for ICC judges.
- b) Further requests the Advisory Committee on Nomination of Judges, in consultation with States Parties and other relevant stakeholders, to prepare,

19 ICC-ASP/20/Res.5, *Adopted at the 8th plenary meeting, on 9 December 2021*, [https://asp.icc-cpi.int/sites/asp/files/asp\\_docs/ASP20/ICC-ASP-20-Res5-AV-ENG.pdf](https://asp.icc-cpi.int/sites/asp/files/asp_docs/ASP20/ICC-ASP-20-Res5-AV-ENG.pdf), last accessed on March 8th 2024.

20 ICC-ASP/21/Res.2 *Strengthening the International Criminal Court and the Assembly of States Parties (Annex III Amendment(s) to the resolution ICC-ASP/18/Res. 4) Adopted at the 9th plenary meeting, on 9 December 2022*, <https://asp.icc-cpi.int/sites/default/files/2022-12/ICC-ASP-21-Res2-ENG.pdf>, last accessed on March 12<sup>th</sup> 2024.

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.

## 4.2. Efforts made so far to improve national nomination procedures and evaluation procedures

The 2023 election process has also included the three important elements contributing to the quality and transparency of the procedure before the ACN and ACP:

### a) Steps towards improvement of the national nomination procedures

Following the ASP Resolution, the Committee has started its work on preparing the compendium of information on the national nomination procedures in 2022. However, this process has been challenged by the small number of received submissions by the States Parties. “Pursuant to notes verbales sent by the Secretariat in 2020, 2021 and 2022 requesting States Parties to submit information on their national nomination procedures, a total of 30 States Parties had submitted the information requested”.<sup>21</sup> Triggered by this, the Committee “was of the view that additional submissions were required in order for it to effectively carry out this mandate. The Committee called upon all States Parties to submit to the Secretariat “information and commentary on their own existing or prospective national nomination and selection procedures” as soon as possible, in order to facilitate its work on the preparation of the guidelines.” (para. 21)

As of March 2024, only 32 States Parties have submitted information on the national nomination procedures<sup>22</sup> which makes just a one third of the State Parties. Namely, 124 countries are States Parties to the Rome Statute of the International Criminal Court.<sup>23</sup> Therefore, the current version of Compendium<sup>24</sup> remains to be updated once additional information is available. However, this low number of submissions opens a fully a legitimate question:

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- 21 ICC-ASP/21/4, Report of the Advisory Committee on Nominations of Judges on the work of its eighth session, Par. 6, <https://asp.icc-cpi.int/sites/asp/files/2022-11/ICC-ASP-21-4-ENG.pdf>, last accessed on March 12<sup>th</sup> 2024
  - 22 Submissions from States Parties on national nomination procedures: <https://asp.icc-cpi.int/ACN/2020-National-Procedures>, last accessed on March 8<sup>th</sup> 2024.
  - 23 Out of them 33 are African States, 19 are Asia-Pacific States, 19 are from Eastern Europe, 28 are from Latin American and Caribbean States, and 25 are from Western European and other States.
  - 24 Advisory Committee on Nominations of Judges Compendium of national nomination procedures, <https://asp.icc-cpi.int/sites/asp/files/2022-10/ACN-NominationProcedures-ENG-14Oct22-1350.pdf>, last accessed on March 13<sup>th</sup> 2024.

Whether this low number of submissions can be explained by the absence or deficiency of the national nomination procedures that make the States Parties keep silent about them? It seems that answer is positive, which means that efforts need to be doubled to develop a non/binding instrument and to guide the States Parties to implement it in their own legislation and practice.

#### b) Language test

2023 election cycle has also brought an important novelty developed to address the issues recognised in the previous election cycles. Namely, ACN identified insufficient knowledge of the two working languages of ICC for some candidates. However, it was difficult to adequately reflect this in the reports since ACN members are not qualified to professionally assess the language skills.

This situation triggered the ANC decision to outsource this part of the assessment to the Registry's Language Services Section that prepared language test for candidates. In 2023 election cycle this test was on voluntary basis. It is interesting (and probably also worrying) that only 6 of 14 candidates accepted to be tested. It is worthy to think about two possible options:

- To make the language test obligatory for the upcoming election cycles, and/or
- To incorporate mandatory language test in the national nomination procedure.

#### c) Vetting process

Similarly, as for the language skills it is difficult for ACN to make an assessment of the Rome Statute requirement referring to "high moral character" of candidates for ICC judges. Therefore, ACN decided to delegate this part of assessment to the Independent oversight mechanism (IOM) resulting into the report on each candidate presented to the ASP.

This review process is designed to provide an additional layer of oversight and accountability to the ICC's judicial selection process, enhancing transparency and confidence in the Court itself. The IOM may conduct background checks, verify credentials, and review candidates' records to determine their suitability for appointment as ICC judges.

#### d) The roundtable discussions with candidates proposed by ACN

For the first time in 2023 election cycle the round tables were organised with the participation of the candidates, States Parties' representatives and NGOs where the participants were free to pose many questions to the candidates, as way to ensure more merit-based approach of the States Parties during the voting in the ASP. Those round tables were globally broadcasted via UN Web TV.

The primary objective of the roundtable discussions is to enhance transparency and accountability in the nomination process by fostering open dialogue and interaction between candidates, NGOs, and State Parties. These sessions aim

to provide stakeholders with insights into the candidates' qualifications, judicial philosophy, and commitment to the principles of international criminal law and human rights.

The roundtable discussions were organized as moderated panel sessions, with each candidate given an opportunity to present their background, experience, and vision for the ICC judiciary, but guided by the questions posed by participants, namely, representatives from NGOs specializing in international criminal law, human rights, and justice invited to participate in the roundtable discussions. These organizations play a crucial role in advocating for accountability and transparency in the ICC nomination process. Delegates from State Parties to the Rome Statute are also invited to attend the sessions, providing an opportunity for governments to engage directly with the candidates and assess their suitability for the ICC judiciary.

The roundtable discussions cover a wide range of topics relevant to the role of ICC judges, including their understanding of international criminal law, experience in legal practice, familiarity with the ICC's mandate and jurisprudence, and commitment to upholding the principles of justice and accountability. Participants may inquire about candidates' views on specific legal issues, their approach to decision-making, their understanding of the challenges facing the ICC, and their strategies for enhancing the Court's effectiveness and legitimacy.

By providing a platform for dialogue and engagement, these sessions contribute to the selection of highly qualified and credible candidates who are committed to the principles of international justice and the rule of law.

Moreover, the interactions between candidates, NGOs, and State Parties foster mutual understanding and collaboration, strengthening the partnership between civil society and governments in advancing the goals of the ICC. Overall, the roundtable discussions organized by the ACN serve as important mechanisms for promoting transparency, accountability, and stakeholder engagement in the nomination process for ICC judges, ultimately contributing to the integrity and effectiveness of the Court's judiciary.

## 5. THE FORTHCOMING STEPS: GUIDELINES TO IMPROVE NATIONAL NOMINATION PROCEDURES

As earlier elaborated, these guidelines should provide a solid base for the States Parties to either develop or improve national nomination procedure as a prerequisite of ensuring that the process is transparent, merit-based, and free from political interference.

Having in mind the variety of the existing national nomination procedures, but also a non-binding character of Guidelines, it seems that the starting point in their development should be found in the main international and/or regional

instruments on judicial independence and impartiality<sup>25</sup> as well as the best practices for the election of judges of international and regional courts.<sup>26</sup>

In addition to the relevant international standards on judicial independence and integrity, the baseline standards that could also be incorporated in this instrument is already well established in Guidelines on the independence and impartiality of members of the human rights treaty bodies (“the Addis Ababa guidelines”).<sup>27</sup>

When it comes to the process of development the Guidelines, in order to respond to the part of the recommendation referring to inclusiveness of the process of developing such an instrument, but also to make the process of the adoption efficient and transparent, ACN decided to proceed with the development of the “zero draft” Guidelines to be transferred to the State Parties to comment upon it and to make suggestions, but also to ensure that the Committee adopts the Guidelines in autumn 2024 and to submit them to the ASP for their information. Such an approach shall ensure that the States Parties feel of having a kind of ownership over this document, which should consequently motivate them to use it later in improving/developing their own national nomination procedures. However, in March 2024 this process is still on hold due to the ASP decision not to approve the budget for ACN in person meetings in 2024. In practice, this means that ASP requested ACN to develop the instrument, but not provided it with the necessary means to do that. Having in mind that an amount of this budget is minor comparing with other budget lines, it is difficult to find a reasonable explanation beyond the lack of political will on a side of the States Parties to support this process.

## 6. CONCLUSION

Whether development and/or existence of a non-binding instrument by ACN can motivate/push them to develop or improve those procedures more than

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- 25 For more info on applicable standards, see: M. Kolaković-Bojović, “Constitutional Provisions on Judicial Independence and EU Standards”, *Annals of the Faculty of Law in Belgrade: Journal of Legal and Social Sciences*, 3/2016, 192–204; M. Kolaković-Bojović, „Nezavisnost pravosuđa i efikasnost sudske zaštite kao međunarodni pravni standard i uslov članstva u EU“, *Organizacija pravosuđa i efikasnost sudske zaštite (Evropski standardi i stanje u Srbiji): krivičnopravni aspekti* (ur. S. Bejatović), Srpsko udruženje za krivičnopravnu teoriju i praksu, Intermex: Beograd, 95–116; M. Kolaković-Bojović, B. Petković, *Položaj pravosuđa u Srbiji - između vladavine prava i samovlašća*, Institut za kriminološka i sociološka istraživanja, Beograd, 2020; M. Kolaković-Bojović, *Organizacija pravosuđa u Republici Srbiji: reformski okvir i EU standardi.*, Institut za kriminološka i sociološka istraživanja, Beograd, 2018.
- 26 For more info. see: *Selecting International Judges: Principle, Process and Politics* (discussion paper), Centre for International Courts and Tribunals, University College London [https://www.ucl.ac.uk/international-courts/sites/international-courts/files/selecting\\_int\\_judges.pdf](https://www.ucl.ac.uk/international-courts/sites/international-courts/files/selecting_int_judges.pdf), Last accessed on March 11th 2024.
- 27 Guidelines on the independence and impartiality of members of the human rights treaty bodies (“the Addis Ababa guidelines”, <https://documents.un.org/doc/undoc/gen/n12/449/83/pdf/n1244983.pdf?token=41cBvTtUC8ofB24kVe&fe=true>, last accessed on March 11<sup>st</sup> 2024.

the Compendium and information available there in? Probably not. However, supported by several “side mechanisms”, the outcome could be completely different. Namely, even a small additional point in the questionnaire for candidates requesting elaboration on how the guidelines were introduced/followed in the process of nomination of that candidate can make a big difference. Similarly, these questions can be asked by NGOs during the round tables with candidates. Both mechanisms could foster implementation of such non-binding instrument in practice since no States Parties would like to be publicly disclose the nomination procedure which is non transparent and or politicised.

In addition to this, it could be useful if ACN supported by NGOs and academia actively disseminates best practices and lessons learned from previous nomination processes to State Parties and other stakeholders. By sharing experiences and insights, the ACN could seeks to facilitate peer learning and promote the adoption of effective nomination practices that contribute to the integrity and legitimacy of the ICC.

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**Dr Milica Kolaković-Bojović\***

## **IZBOR SUDIJA MEĐUNARODNOG KRIVICHNOG SUDA: U PRAVCU INTEGRITETA I TRANSPARENTNOSTI NACIONALNIH PROCEDURA ZA NOMINOVANJE**

### *Rezime*

*Apstrakt: Izbor sudija međunarodnog krivičnog suda (MKS) je veoma važan process koji utiče na legitimnost i efikasnost suda. Ovaj rad zadire u normativni okvir koji uređuje izbor sudija MKS, istražuje izazove proizaše iz poslednjih izbornih ciklusa, analizira nacionalne procedure nominovanja kandidata od strane Država članica i diskutuje napore koji su učinjeni na unapređenju tih procedura. Produbljujući ove aspekte, rad ima za cilj da doprinese tekućem diskursu o poboljšanju demokratskog legitimiteta MKS-a kroz lupu nedavnih, tekućih i predstojećih aktivnosti Savetodavnog komiteta za nominaciju sudija Međunarodnog krivičnog suda (ACN), ali i u pogledu uloge koju u tom procesu ima Skupština država članica MKS-a (ASP). Pošto ACN igra ključnu ulogu u unapređenju postupaka nominovanja kandidata za sudije MKS-a, aktivno je angažovan u razvoju neobvezujućih instrumenata koji imaju za cilj da poboljšanje transparentnosti, inkluzivnosti i integriteta procesa nominovanja. Ovi napori su napravljeni kao odgovor na izazove identifikovane u prošlim izbornim ciklusima, uključujući zabrinutost u pogledu kvaliteta kandidata i procesa nominacije, rodnu i geografsku zastupljenost i generalno legitimitet.*

**Ključne reči: Međunarodni krivični sud, izbor sudija, nacionalne procedure za nominovanje, sudska nezavisnost, sudijski integritet.**

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