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**Procedure for the nomination and election of judges, the
Prosecutor and the Deputy Prosecutors of the International
Criminal Court**

**Proposal by Austria, Hungary and Liechtenstein on an
alternative procedure for the first election of the judges to the
International Criminal Court to the proposal contained in
PCNICC/2002/WGASP-PD/RT.2, annex**

For the first election of judges the following system shall be utilized:

1. In the first round of elections, each State Party shall vote for a maximum number of 18 candidates, whereby it shall vote for at least 9 candidates from list A and at least 5 candidates from list B.
2. Ballots cast that do not observe the rules set forth in paragraph 1 shall be invalidated.
3. If fewer than 18 candidates are elected, successive ballots shall be held until all seats are filled. The voting requirements concerning list A and list B, with necessary adjustments, shall be utilized during subsequent balloting.
4. The adjusted requirements for subsequent ballots shall be determined by subtracting the number of elected candidates on each list from the minimum number of judges to be elected.
5. Subject to the rules set forth in paragraph 6, the candidates having obtained a two-thirds majority and the highest number of votes shall be considered elected.
6. No more than 13 candidates from list A shall be considered elected, and no more than 9 candidates from list B shall be considered elected. When the number of elected candidates reaches the established maximum number on one of the lists,

subsequent ballots to fill the remaining seats shall be organized only on the other list.

Explanatory note

(1) The above proposal offers an alternative to the proposal in the annex to document PCNICC/2002/WGASP-PD/RT.2. Both proposals aim to solve the problem of two competing requirements on the election of the ICC judges: According to article 36 (5), the Assembly of States Parties shall elect a minimum of 9 judges from list A and a minimum of 5 judges from list B, while article 36 (6) (a) mandates that the 18 candidates obtaining a two-thirds majority with the highest number of votes shall be elected.

(2) The proposal in the annex to document PCNICC/2002/WGASP-PD/RT.2 creates a two-phase system, first electing 9 judges from list A and 5 judges from list B, followed by electing the remaining four judges in a second phase. However, the problem of the competing requirements of article 36 (5) and article 36 (6) (a) is not avoided. The problem persists because mathematically up to 13 judges on list A and up to 7 judges on list B may achieve a two-thirds majority of votes in the first phase.

(3) Paragraph 4 of the proposal in the annex to document PCNICC/2002/WGASP-PD/RT.2 states: "If more than nine candidates from list A or more than five from list B obtain a two-thirds majority, those having obtained the highest number of votes in each list will be elected." Such a solution is, however, contrary to article 36 (6) (a). Under the proposed rule, the tenth candidate on list A will not be considered elected even if he/she has obtained the required two-thirds majority and more votes than candidates on list B. Such non-election of a candidate who has achieved a two-thirds majority with the highest number of votes should only be acceptable if it would be absolutely necessary in order to ensure the requirement in article 36 (5). This is, however, not the case. The requirement in article 36 (5) mandates only that there must be *at least* 5 judges elected from list B. This rule, however, would not be jeopardized by the election of the tenth candidate from list A, since there still would be open seats in order to fulfil the requirement in article 36 (5). The proposed non-election of judges obtaining a two-thirds majority with the highest number of votes, therefore, should be permitted only if the requirement in article 36 (5) were to be violated.

(4) The two-phase election system does not solve the above-mentioned problem. Rather, it distorts the election process by limiting the first phase of elections to 14 seats without real need, whereby the proposed safeguard in paragraph 4 is contrary to article 36 (6) (a) of the Statute. Therefore, other alternatives with adequate safeguards, such as the "one-phase" election system proposed above, should be further discussed.
