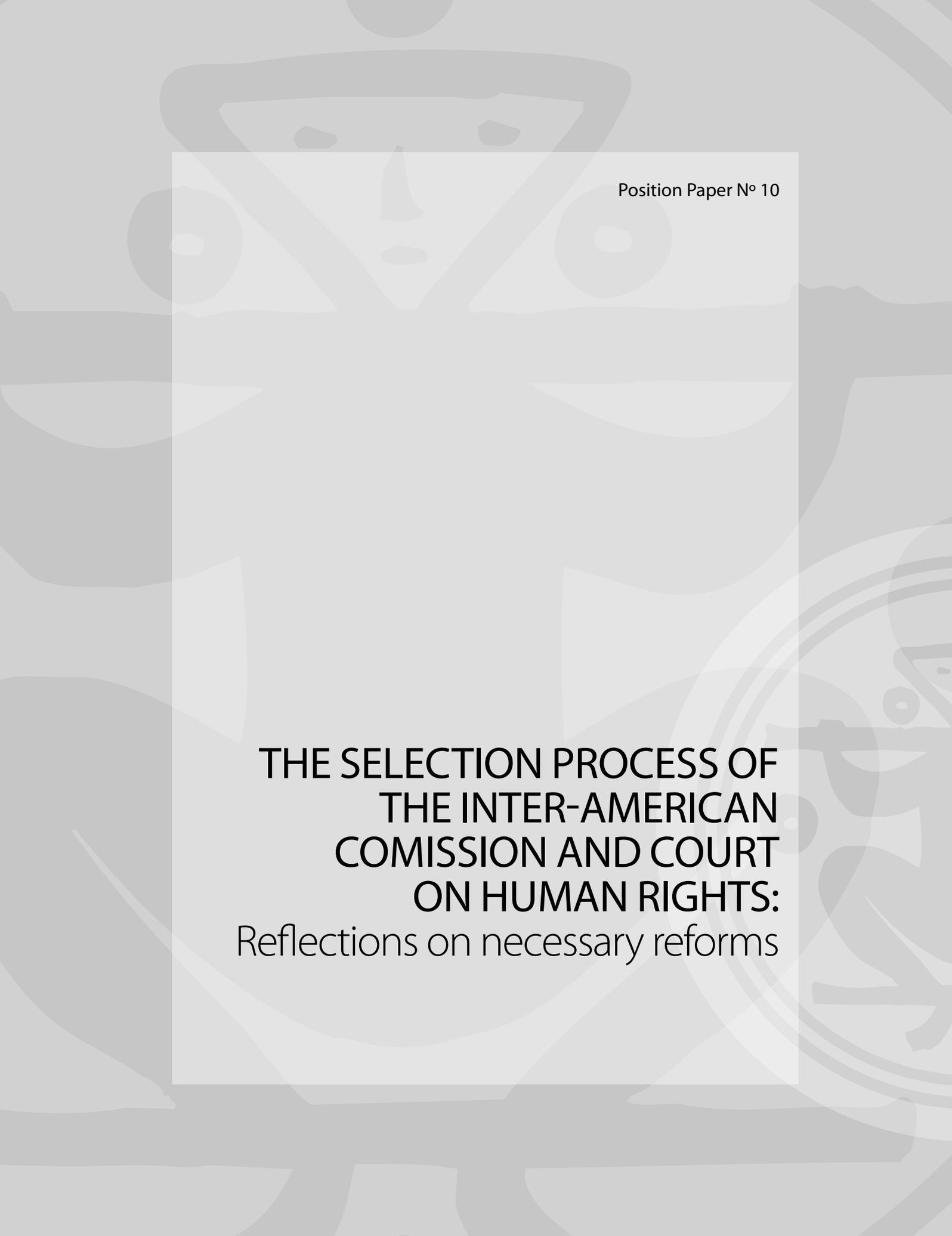


Position Paper

THE SELECTION PROCESS OF
THE INTER-AMERICAN
COMMISSION AND COURT
ON HUMAN RIGHTS:
Reflections on necessary reforms



Position Paper N° 10

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ON HUMAN RIGHTS: Reflections on necessary reforms

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Reflections on necessary reforms



Centro por la Justicia y el Derecho Internacional
Center for Justice and International Law
Centro pela Justiça e o Direito Internacional
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Introduction

The Center for Justice and International Law (CEJIL) is a regional non-governmental organization that protects human rights in the Americas through the strategic use of the tools provided by international human rights law. CEJIL's vision is that of a completely democratic hemisphere in which the rights and dignity of each individual are respected. CEJIL uses strategic litigation and conducts advocacy work, vis-à-vis the inter-American human rights system, to respond to several of the most urgent human rights problems in the region. Accordingly, CEJIL accords priority to paradigmatic cases of endemic human rights violations and works with the populations hardest hit by discrimination and exclusion in the hemisphere. Several of these efforts give impetus to systematic changes at the state level, and serve as case-law for the region.

The role of the victim is central to the work of CEJIL, as is working with human rights defenders and partner organizations with whom we litigate, coordinate efforts, and share gains. CEJIL also endeavors to awaken the interest of other human rights defenders and to give them tools for creating and sharing information, knowledge, and experiences. CEJIL works from four offices, which are located in Argentina, Brazil, Costa Rica, and the United States.

On this occasion CEJIL is pleased to present a new Position Paper on the process of selecting members of the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights. In our opinion, reforming the selection processes is one of the most important debts pending when it comes to strengthening our regional bodies for the protection of human rights.

Accordingly, in this paper we set forth proposals for improving the national and international selection mechanisms. Some of the analyses, such as those by authors Renzo Pomi, Tracy Robinson, and Alejandra Vicente, reflect the content of remarks made last June 2, 2014, at the event "Contributions for the Process of Selecting Members of the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights," organized by CEJIL and the International Coalition of Human Rights Organizations in the Americas, in the context of the OAS General Assembly held in Paraguay.

The analyses set forth herein are by each of the authors who has participated, yet all are aimed at improving the mechanisms that guarantee that the organs of protection are representative of the hemisphere, and are made up of persons who meet the highest standards of independence and suitability.

At the end of the document we have included three annexes. The first is a guide with the rules that currently govern the process of selecting members of the European Court of Human Rights and good practices implemented by the states in this respect. The second refers to the resolution recently approved by the United Nations General Assembly to strengthen the human rights treaty bodies, which incorporated important principles on the selection processes. And finally, we include the Addis Ababa Guidelines on the independence and impartiality of members of the human rights treaty bodies.

With the presentation of this position paper, our aspiration is that the reflections and proposals will promote a fruitful debate among the states, the political organs of the OAS, the Commission and Court, civil society, and others interested, that result in specific actions for change. It is a change that has been a persistent demand of persons using the inter-American human rights system that should be heard.

This document was edited by Viviana Krsticevic, Executive Director; Lilita Tojo, Director of the Bolivia and South Cone Program, and Alejandra Vicente, Senior Attorney.

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WHY DIVERSITY MATTERS *

Tracy Robinson **

Distinguished members of head table, distinguished guests,

I want to express my thanks to CEJIL and the International Coalition of Human Rights Organisations in the Americas to this discussion on the selection process for members of the Inter American Commission on Human Rights (IACHR) and the Inter-American Court of Human Rights. **Inclusion** is the theme of this General Assembly, and I can think of no better time for this conversation about the selection of candidates.

Selection for the Inter American Commission and Court is based on two main qualifications: they must be persons of high moral character and recognised competence in the field of human rights. In the case of the Court, persons selected must possess the qualifications required for the exercise of the highest judicial functions under the law of the State of which they are nationals or of the State that proposes them as candidates.

It has not escaped the attention of many of us that despite the criteria, primarily white men are selected from a handful of States are elected as judges and commissioners. Only eleven women from 66 have been elected to the Commission. Indeed few women are nominated. In 2012 the Commission had a majority of women. But the terms of the remaining women come to an end in 2014 and no women now sit on the Inter-American Court. The IACHR in various moments expressed this concern about the lack of sustainability of the presence of women in decision-making positions.¹ Despite two Caribbean commissioners sitting on the IACHR now, over the Commission's half century only nine have come from CARICOM states. Almost all of us are Afro-descendant, but the even larger numbers of Afro-descendants throughout Latin America have infrequently found their way to the Commission and never as commissioners. The same underrepresentation is true for indigenous peoples, LGBTI persons and persons with disabilities.

* The presentation was realized on June 2, 2014 in the discussion "Contributions for the selection process for members of the Inter-American Commission on Human Rights" carried out under the 44th Regular Session of the OAS General Assembly, Asunción, Paraguay.

** Tracy Robinson is a citizen of Jamaica, a lawyer. She graduated with a law degree from the University of West Indies and has a post-grad degree in law from Yale University. She teaches law at the University of West Indies, Mona, Jamaica. She was elected Commissioner in the 41st OAS General Assembly in June 2011 and President of the Inter-American Commission on Human Rights (IACHR) in the 150th Regular Session in March 2014.

1 See for example, IACHR, *The Road to Substantive Democracy: Women's Political Participation in the Americas*, OEA/Ser.L/V/II. Doc. 79, paras. 58, 72, 76-77.

In its 2007 Report on *Access to Justice for Women Victims of Violence*, the IACHR expressed its concern about the limited access of women to decision-making in the Americas and that ‘discrimination against women has curtailed women’s capacity to participate in public life at the national and international level.’² The Commission recommended the introduction of proper mechanisms to ensure women are nominated to countries superior courts to overcome gender prejudices still rooted in the countries’ judicial structures.³ This is a worthwhile recommendation for the international level too. At the international level, the IACHR urged the OAS Member States to nominate women to positions in the agencies of the inter-American system like the IACHR and the Inter-American Court, so that men and women are more evenly represented in these bodies.⁴ These types of concerns are repeated in the IACHR’s 2011 Report, *The Road to Substantive Democracy: Women’s Political Participation in the Americas*.

Without much more, the existing system for selecting judges and commissioners to the IAHRs does not produce diversity or demand inclusiveness. One reason for this is that the way we see judicial authority is gendered, and here I include the quasi-judicial authority of IACHR commissioners.⁵ We often associate authority with masculinity, and view ‘men in a suit’ as neutral and fair minded.⁶ Not just women, but those historically excluded from spaces of power, are often seen as the ‘other’, described routinely as too emotional, not authoritative, not impartial and less professional. To add another layer of complexity, many persons of ‘high moral character’ and ‘recognised competence in the field of human rights’ have been engaged in human rights work—sometimes in relation to specific groups—and they at times get dismissed as too biased.

I want to say a little about why diversity matters. In other words, what difference does difference or inclusion make?⁷ There is considerable research that shows the mere appointment of women to positions of authority does not necessarily advance the jurisprudence on gender equality produced by tribunals.⁸ Many caution against gender essentialism—the suggestion that women by their very nature or experience bring different elements to judging. Some argue that women improve the quality of justice by bringing new important perspectives, but the empirical evidence is inconclusive on this point.⁹ Another concern about inclusion is that it becomes a form of ‘showcasing’ rather than actually demonstrating a real commitment to diversity.¹⁰ Diversity—including women and underrepresented groups in decision making positions and highly visible positions—it is argued works like

2 IACHR, *Access to Justice for Women Victims of Violence in the Americas* (2007), para. 257.

3 *Ibid.*

4 *Ibid.*

5 Dermot Feenan, ‘Women judges: Gendering judging, justifying diversity.’ (2008) 35 *Journal of Law and Society* 490, 498.

6 *Ibid.*

7 Erica Rackley, ‘What a difference difference makes: gendered harms and judicial diversity.’ (2008) 15 *International Journal of the Legal Profession* 37.

8 Rosalind Dixon, ‘Female justices, feminism, and the politics of judicial appointment: A re-examination.’ (2009) 21 *Yale JL & Feminism* 297.

9 Kate Malleson, ‘Justifying Gender Equality on the Bench: Why Difference Won’t Do’ (2003) 11 *Feminist Studies* 1, 4, 8. See also See also Stephen Choi, Mitu Gulati, Mirya Holman, Eric Posner, ‘Judging Women’ (2011) 8 *Journal of Empirical Legal Studies* 504.

10 Patrick Shin, Mitu Gulati. ‘Showcasing Diversity’ (2010) 89 *North Carolina Law Review* 1017.

a signal that the body or institution is doing the right thing, is progressive and is promoting equality. The worry about 'showcasing' is that these may be trophy/token appointments that are not meaningful; and, further, that insisting on women in these high ranking positions can reinforce stereotypes that women are not really qualified for the top positions.¹¹

I see those risks but I still think *difference makes a difference* and here is why. Representation and full participation is an intrinsic part of equality. Women and all traditionally excluded groups have a right to equal participation in public life. The appointment of those traditionally excluded can also send a message to those excluded that the IAHR is open to their interests.¹² True, there is a cynical view that this may not mean there is real diversity; nevertheless, by reinforcing the principle of diversity we may produce more internalisation of it.¹³ Feminist scholar, Katharine Bartlett puts it this way: 'Showcasing diversity appointments expresses a pro-diversity point of view, and thereby, under the right conditions, enhances a pro-diversity norm.'¹⁴ There is also some evidence that more women in leadership can positively improve attitudes towards women's equal participation generally and send important signals to women in more junior positions in the organisation.¹⁵ That message can be especially powerful where there is pyramid participation, that is, the junior levels of an organisation are female but the leadership generally is not. Notably, even though women are in the minority as commissioners in the history of the IACHR, the Secretariat of the Commission is about 80 per female.

Yet another good reason for diversity is that research shows that exposing persons to an individual from excluded groups tends to reduce the display of bias by those persons.¹⁶ Pathways to power and decision-making at national and international levels are gendered, sexed, classed, and raced, among others. Discussions about diversity and inclusion present us with moments to talk about bias and stereotyping—structural features of inequality in our societies. Many of us are forced to rethink what we believe, what we say and do when placed in close proximity with persons we treated as 'other' and when we have to work with those traditionally excluded. This is an important reason to promote diversity, especially in human rights institutions. In addition, without essentialising women or other groups, we should also ask the question of whether inclusiveness can promote more critical thinking in relation to the development of human rights.¹⁷

11 *Ibid.*

12 Rosalind Dixon, 'Female justices, feminism, and the politics of judicial appointment: A re-examination.' (2009) 21 *Yale JL & Feminism* 297.

13 Katharine Bartlett, 'Showcasing: The Positive Spin' (2010) 89 *North Carolina Law Review* 1055.

14 *Ibid.*

15 Dermot Feenan, 'Editorial introduction: Women and judging' (2009) 17 *Feminist Legal Studies* 1.

16 Brian S. Lowery and Curtis D. Hardin, 'Social Influence Effects on Automatic Racial Prejudice,' (2001) 81 *J. Personality & Soc. Psych.* 842.

17 Shin, Patrick S., and Mitu Gulati. 'Cultivating Inclusion' (2014) 112 *Mich. L. Rev. First Impressions* 117.

In ending, I wish to encourage the acceptance of the principle of diversity as relevant to the selection exercise for members of the Inter-American Commission and Inter-American Court and to the work undertaken by the IAHRs. With that, I also wish to invite ongoing analyses of bias, stereotyping and structural discrimination, all of which have an impact on achieving a more inclusive IAHRs. I also wish to foreground the nomination process at the national level as the critical site for securing greater inclusiveness. Given the possibility that many very qualified persons may never be nominated by their own States, it is essential that Member States accept the responsibility for nominating qualified non-nationals. I also encourage discussions about structural considerations that may impact inclusiveness, such as the fact that members of the IACHR perform their duties part time. The field of those who can afford to be part time commissioners is already a narrow and privileged one. I welcome spaces that are developing to allow more open dialogue with candidates during the election period, though I would caution us to ensure that the framing and context of these discussions don't make it harder to elect well qualified and diverse judges and commissioners.

And finally, that we are talking as we are today is an important step forward.

PRESENTATION AT THE COLLOQUIUM ON “CONTRIBUTIONS TO THE PROCESS OF SELECTING MEMBERS OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS AND THE INTER-AMERICAN COURT OF HUMAN RIGHTS;”

held during the 42nd Regular Session of the OAS
General Assembly, Asunción, Paraguay, June 2014

Renzo Pomi *

I would like to thank CEJIL very much for organizing this event and for inviting me to participate.

While the process of reflection on the inter-American human rights system that concluded on March 22, 2013, was generally monopolized by the states and by the issues they sought to have discussed, this event with CEJIL brings us back to reality in terms of the issues that need to be improved for the inter-American system to be strengthened. Among those issues, it is essential to ensure the best possible composition of the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights. In other words, to have a good Inter-American Commission and Court, we need good commissioners and judges.

This is not the only way to strengthen the system. Of course there are others, such as truly endowing the organs of the system with the resources they need to act effectively, and not having to depend on voluntary contributions of OAS members and others; participating actively and constructively in the procedures before both organs; fully carrying out the judgments and decisions of the system; refraining from denigrating organs of the system and its officers every time a decision of the system is not in line with the actual or perceived interests of the states. Nonetheless, perhaps one of the best guarantees for attaining that strong and independent system that we want is to nominate and elect as members of the Inter-American Commission and Court men and women who meet the criteria established in the American Convention, and whose independence of action is guaranteed by means of a procedure at the national level that is open, transparent, and inclusive.

* Representative of Amnesty International to the United Nations.

The problem of the lack of transparency and clear criteria for selecting candidates and electing members of human rights organs is an issue not only in the inter-American system, but one that has also arisen in similar processes involving other regional and international organs. Indeed, during the process of strengthening the system of United Nations human rights treaty bodies, 21 non-governmental organizations that contribute to the work of those bodies made a series of recommendations with a view to strengthening them, some aimed at improving their composition. Most of those recommendations also apply to the inter-American system.

Based on those recommendations, and mindful of the particular situation in the inter-American system, we would like to take this opportunity to recommend the following:

- That when presenting candidates the states respect, at a minimum, the requirements established in the American Convention so as to ensure that the designated candidates are indeed jurists of the highest moral character, and recognized competence and experience in the area of human rights.
- That each state designate or create a standing body entrusted with coordinating the process of selecting candidates and, in particular, informing the public as to the existence of openings on the international human rights bodies so as to ensure the participation of qualified persons who may be interested. The states should establish an open process at the national level that is transparent and inclusive to identify and designate candidates for the organs of the system.
- The states should establish mechanisms for consulting civil society at all stages of identification, selection, and election of candidates. One of the latest human rights treaties adopted by the United Nations, the Convention on the Rights of Persons with Disabilities, establishes that the states must consult and collaborate actively with civil society organizations for the purpose of choosing those who come forward as candidates to serve on the Committee on the Rights of Persons with Disabilities.¹ This mechanism provides a useful model that the states of the region can draw on and thus facilitate – at every phase of the process of designating candidates – the participation of civil society organizations and legislative bodies with the necessary knowledge and experience. In particular, civil society may help attract highly qualified persons and offer information regarding the extent to which the aspirants meet the criteria.
- That each state publicize its candidacy or candidacies at the earliest possible moment, disseminate information on their qualifications, and thus show that the person meets the necessary criteria.
- That the states refrain from designating as candidates persons for whom occupying the position of “independent expert” in a treaty body entails a conflict of interest. In particular, the states should not designate any person with responsibility in the government, which may jeopardize his or her impartiality and independence.
- That before elections are held, the states should analyze whether there is a balance of knowledge, diversity, geographic distribution, and gender in the composition of the organ. When voting, the states should take these factors into account. In particular, it would be advisable for the states to support the candidacies for the organs of the system of individuals from groups with hardly any representation, such as persons with disabilities, minorities, and ethnic and indigenous groups.
- That the states ensure that the number of candidates is greater than the vacancies and that the array of candidates among which they must choose is as broad as possible.

1 Article 34(3) of the Convention on the Rights of Persons with Disabilities. Available at: <http://www.un.org/esa/socdev/enable/documents/tccconvs.pdf>

There are some examples of good practices internationally that should be taken into account and applied generally. For example, the government of the United Kingdom, in order to select persons to be candidates for election to the Subcommittee on the Prevention of Torture under the Optional Protocol to the United Nations Convention against Torture of 2006, implemented an open selection process that began with a notice published in national circulation daily newspapers so that those persons potentially interested could apply to be considered as candidates proposed by the United Kingdom. In the selection process the government took into account the qualifications required of each candidate as well as his or her independence in relation to any position of the government. Persons with the potential to become a candidate were interviewed, and those who strictly met the requirements were selected and presented by the United Kingdom as candidates for serving on the Subcommittee.

According to the information available, this type of open and transparent process is uncommon. What generally happens is that the state maintains absolute discretion in terms of the persons it selects as candidates in elections for international human rights posts, and that should change. The absolute lack of specific policies and processes is one of the main reasons for the undesired disparity among those who are put forward in elections of this type. The problem was recognized by the states themselves recently when, on April 21 of this year—in the context of the United Nations General Assembly—they approved a resolution on strengthening and improving the effective functioning of the system of organs created pursuant to human rights treaties encouraging States parties to continue their efforts to nominate experts of “high moral standing and recognized competence and experience in the field of human rights, in particular in the field covered by the relevant treaty, and, as appropriate, to consider adopting national policies or processes with respect to the nomination of experts as candidates for human rights treaty bodies.”²

It is no small success that despite a process marked by a negative predisposition on the part of certain states towards the human rights bodies, recognition has been given to the need to establish these national policies and procedures pre-established, to ensure the quality and independence of the experts who will serve on the international human rights bodies. All of the states gathered in the General Assembly of the OAS in Paraguay were of course part of the United Nations General Assembly that adopted that resolution. One would expect, then, that the recommendations mentioned in this presentation would be the basis for a frank debate, inside each state, with a view to approving, as soon as possible, policies and processes at the national level for identifying and designating candidates to hold positions in the Inter-American Commission and in the Inter-American Court.

Thank you very much.

2 United Nations, A/RES/68/268, “Strengthening and enhancing the effective functioning of the human rights treaty body system,” April 21, 2014. Available at http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/68/268&referer=http://www.un.org/en/ga/68/resolutions.shtml&Lang=S

THE DEBT OF THE INTER-AMERICAN HUMAN RIGHTS SYSTEM WHEN IT COMES TO IMPROVING THE PROCESS FOR SELECTING ITS MEMBERS

Alejandra Vicente *

In the view of the Center for Justice and International Law (“CEJIL”), the composition of the Inter-American Commission on Human Rights (“IACHR”) and the Inter-American Court of Human Rights (“Inter-American Court” or “Court”) is one of the fundamental pillars of the legitimacy and effectiveness of the Inter-American human rights system (“IAHRS”).

In that sense, analyzing and improving the processes for selecting the members of the IACHR and the Court has been one of the areas of focus of our sustained lobbying efforts¹ and an area of concern for many of the civil society organizations that we work with.

While in practice the organs of the IAHRS have been made up of renowned jurists who have moved case-law forward and created important standards on the protection of human rights, serious limitations persist in the processes for selecting the members of the Commission and the Court. These result in the IAHRS today not reflecting the diversity, legal systems, and cultures that live together in the Americas, which at the same time has an impact on the legitimacy of the decisions adopted by the Commission and the Court. The clearest example is the current all-male composition of the Court and the absence of members of indigenous peoples on both bodies.

In light of this situation, the Organization of American States (OAS) and the member states, which have the prerogative of electing the members of the Commission and the Court, should improve the selection processes nationally and internationally. These processes should be made more transparent and participatory, and ensure the suitability and independence of the persons elected.

There are several reasons why this issue requires immediate action by the states and political organs of the OAS. At the next General Assembly, to be held in June 2015, the states are to elect four members of the Commission and four members of the Court. As both organs are made up of seven members, this will be an election with

* Senior Attorney, CEJIL.

1 In 1997, CEJIL published a Gazette putting this issue to public opinion. In 2000, speaking before the Committee on Juridical and Political Affairs of the OAS, CEJIL urged “each state to review its system for choosing members domestically ensuring open and transparent selection processes ... [and aimed at] reviewing the methodology of the election process.” Finally, in 2005 CEJIL published a position paper under the title “Aportes para el proceso de selección de miembros de la Comisión y la Corte Interamericana de Derechos Humanos,” available at: <http://cejil.org/publicaciones/documentosdecoyuntura>

significant consequences for their composition. In addition, considering that at this time the states are debating how to strengthen the OAS and give it a more strategic role in the region, including the human rights pillar, it would be reasonable for the selection process to incorporate standards already adopted by other international courts and organs that are otherwise lacking in the IAHRs.

In the following paragraphs we will briefly address the criteria we consider the members of the IACHR and the Court should satisfy. Next, we will cast light on the shortcomings of the IAHRs in relation to an evaluation of these and the comparative analysis taking stock of other international courts and tribunals. And finally, by way of conclusion, we will set forth a series of recommendations.

1. Requirements that should be met by the members of the Commission and the Court

The foundational instruments of the IAHRs include minimal requirements for the appointment.

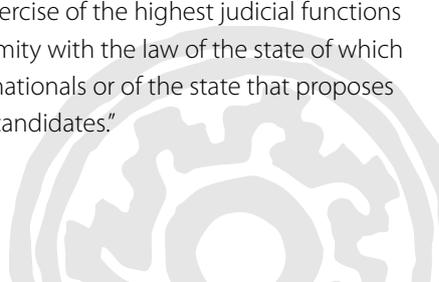
Article 34 American Convention

“The Inter-American Commission on Human Rights shall be composed of seven members, who shall be persons of high moral character and recognized competence in the field of human rights.”



Article 52 (1) American Convention

“The Court shall consist of seven judges, nationals of the member states of the Organization, elected in an individual capacity from among jurists of the highest moral authority and of recognized competence in the field of human rights, who possess the qualifications required for the exercise of the highest judicial functions in conformity with the law of the state of which they are nationals or of the state that proposes them as candidates.”



In the case of members of the IACHR, the person must be of “high moral character and recognized competence in the field of human rights.”² Commissioners are not required to be jurists, which is reasonable in a quasi-judicial organ.

2 Article 34 of the American Convention on Human Rights (“American Convention”), Article 2(1) of the Statute of the IACHR, and Article 1(3) of the IACHR’s Rules of Procedure.

In the case of the Inter-American Court, the candidates must be “jurists of the highest moral authority and of recognized competence in the field of human rights, who possess the qualifications required for the exercise of the highest judicial functions in conformity with the law of the state of which they are nationals or of the state that proposes them as candidates.”³

As for the process, the members of the IACHR are elected in their personal capacity by the OAS General Assembly from a list of candidates proposed by the governments of the member states.⁴ Each state may present up to three candidates, who may be a national of that state or another member state.⁵ The vote in the General Assembly is secret and those candidates who win the largest number of votes and an absolute majority of the votes of the member states are elected.⁶ The process for electing the judges of the Court is identical, except that only those states that have ratified the American Convention on Human Rights (“American Convention” or “Convention”) participate in the vote.⁷

In light of these minimal criteria, and in the absence of any more specific regulations, one notes a series of limitations in selection processes including a lack of transparency in the national mechanisms for nominating candidates; lack of publicity in the process; insufficient mechanisms for rigorous evaluation of the candidates’ merits; lack of civil society participation; and lack of more sophisticated criteria on what the composition of the organs should look like to be more representative.⁸

For that reason the IAHR needs a reform of the selection processes to ensure that all the members of the Commission and the Court meet three essential requirements for performing the function of Commissioner of the IACHR and Judge of the Court: *independence*, *representativity*, and *suitability*.

Independence is a condition of the credibility and effectiveness of the administration of justice and of the institutions for the protection and promotion of human rights, and should be maintained by the judges in both its personal and institutional dimensions.⁹ Representativity promotes the inclusion of members with different backgrounds, languages, and experiences, in addition to ensuring that the organs of protection are representative of the region in which they operate.¹⁰ Finally, suitability, the human and professional standing of the members of the organs of protection, is the basis of the authority of the organs for the protection of human rights.

3 Article 52 of the American Convention and Article 4 of the Court’s Statute.

4 Article 36 of the American Convention.

5 Article 3 of the IACHR’s Statute.

6 Article 5 of the IACHR’s Statute.

7 Article 9 of the Court’s Statute.

8 CEJIL, Position Paper No. 1, “Aportes para el proceso de selección de miembros de la Comisión y la Corte Interamericana de Derechos Humanos,” 2005, pp. 10 and 11, available at: <http://cejil.org/publicaciones/documentosdecoyuntura>

9 On this and other requirements that should be met by the members of international courts and tribunals, see the “Bangalore Principles on Judicial Conduct,” ECOSOC Resolution 2006/23, available at: http://www.unodc.org/pdf/corruption/corruption_judicial_res_s.pdf

10 For a more detailed analysis of each of the criteria, see the above-referenced position paper, pp. 11 to 14.

As regards *independence*, it is important to note that ensuring open announcements, publicity, and transparency in the national process of nominating persons as candidates helps identify candidates with greater independence with respect to the state that chooses them. In this regard, several human rights organs have recognized that the selection processes are crucial for ensuring the independence of judges.¹¹ While the Statutes of the IACHR and the Court contain minimum provisions on incompatibility, impediment, recusal, disqualification, resignation, and incapacity¹², they apply in the performance of the position, that is, once the persons are elected to serve on the organs. Therefore, a profound review is needed of the appointment mechanisms to ensure the independence of the persons who are candidates with respect to the states that nominate them, and the absence of any external pressures during the selection process. This is even more important in the IAHRs, as the members of the organs of protection do not serve full time. In many cases they maintain another professional activity that could result in an absence of functional impartiality vis-à-vis the state that nominated them, or an appearance thereof. In this regard, independence should be maintained in the selection process and in discharging one's responsibilities once elected.¹³

As regards *representativity*, it is recognized nationally and internationally that ensuring a diverse justice system is essential in any democracy.¹⁴ In this sense, there are very clear shortcomings in the IAHRs. From the establishment of the Commission in 1959, of the 66 persons who have served as commissioners, only 11 have been women; seven members have been Afrodescendants; and none has been a member of an indigenous people. As for the Court, since it was established in 1979 only four women have sat on the Court, only three Afrodescendants, and no members of any indigenous group. At this time, the Court does not have any jurist who represents the common law legal tradition; all the members have been trained in the civil law.

11 See IACHR, "Guarantees for the Independence of Justice Operators: Towards strengthening access to justice and the rule of law in the Americas," OEA/Ser.L/V/II Doc. 44, December 5, 2013, paras. 108 to 109. Similarly, the Human Rights Committee of the United Nations has noted, among other factors, that the absence of independent mechanisms for selecting judges and imposing disciplinary sanctions constitutes a limitation on judicial independence. *Concluding Observations of the Human Rights Committee on Georgia*, CCPR/CO/74/GEO para. 12; *Concluding Observations of the Human Rights Committee on Congo*, CCPR/C/79/Add.118, para. 14. The European Court of Human Rights has considered the importance of mechanisms for selecting judges, guarantees against external pressures, and the preservation of the appearance of independence. *Incal v. Turkey*, ECHR, judgment of June 9, 1998, Series 1998-IV, paras.67-73; *Findlay v. The United Kingdom*, ECHR, Judgment of February 25, 1997, Series 1997-I, paras.74-77. See also, I/A Court HR, *Case of the Constitutional Tribunal*. Judgment on the Merits, Reparations, and Costs. Judgment of January 31, 2001. Series C No. 71, para. 75.

12 See Articles 18, 19, and 21 of the Court's Statute and Article 21 of the Court's Rules of Procedure, and Articles 8 of the Commission's Statute and 4 of its Rules of Procedure.

13 In this respect, Article 4(1) of the Commission's Rules of Procedure establishes: "Upon taking office, members shall undertake not to represent victims or their relatives, or States, in precautionary measures, petitions and individual cases before the IACHR for a period of two years, counted from the date of the end of their term as members of the Commission." While there is no similar provision applicable to the members of the Court, a reasonable time should apply for the former members of the Court not to participate in representing or enforcement in specific situations that are or have been heard by the Court and the IACHR. See Héctor Faúndez Ledesma, "La Independencia e Imparcialidad de los Miembros de la Comisión y de la Corte: Paradojas y Desafíos", in "El Futuro del Sistema Interamericano de Protección de los Derechos Humanos." Inter-American Institute of Human Rights. San José, 1998, p. 204.

14 Lady Hale, "The Appointment and Removal of Judges: Independence and Diversity," *International Association of Women Judges, 8th Biennial Conference May 3-7, 2006, Sydney, Australia*, p. 2.

As regards *suitability*, the current system for selecting candidates does not guarantee that they have the qualifications, competence, and expertise required, or that they have the experience and specialization in areas of work that the IAHR needs in light of the current regional agenda in the area of human rights. Nor does the process allow the evaluation of the areas of expertise and skill of the members of an organ such that they complement one another. This happens since at the national level the states generally choose the candidates unilaterally, without publicizing the process, and without any open announcements or mechanisms for observation by or consultation with civil society. At the regional level the process is by secret vote, mainly based on the exchange of votes among the states and without prioritizing the merits of the persons nominated.

Minimum qualifications

- The highest moral authority
- Recognized competence in human rights
 - Academic training
 - Professional practice
 - Legal specializations
 - Technical skills
- Qualifications required for the serving in the highest judicial offices, in the case of members of the I/A Court HR
- Ability to work professionally in one of the working languages of the Court

In this regard, there's a positive precedent in the last election of members of the IACHR, as the candidates appeared publicly in a session of the OAS Permanent Council to state their positions with respect to the "goals and objectives" they would pursue if elected to the IACHR.¹⁵ Both the states and the civil society representatives had an opportunity to put questions to the candidates. We recommend that this practice be institutionalized.

In view of the foregoing, the current process for selecting members of the Commission and the Court lacks characteristics to ensure that the candidates meet the requirements of suitability, independence, and representativity necessary for serving in the position. By way of contrast, other international courts and tribunals have accorded greater attention to this question, developing more detailed guidelines, as we discuss in the next section.

15 OEA/Ser. G, CP/SA. 1917/13, May 1 2013.

2. Selection processes in other international courts

While all the mechanisms for selecting members of international courts are subject to criticism and could be improved upon,¹⁶ the IAHRs has lagged behind when it comes to improving the process of selecting its members, while other international courts and tribunals have developed more sophisticated guidelines and rules to promote a greater level of suitability, independence, and representativity.

In all cases the election of the members of the courts is a power of the states, through the different political organs (the General Assembly of the OAS, the Assembly of States Parties to the Rome Treaty, the Parliamentary Assembly of the Council of Europe, etc.), though the people elected hold the position in their personal capacity. As for the differences, the organs of the IAHRs and the African Court of Human and Peoples' Rights (the "African Court") do not operate on a permanent basis,¹⁷ whereas the European Court of Human Rights ("European Court") and the International Criminal Court are permanent courts. The European Court is the only one that has 47 judges, who are elected from slates presented by each state to the Parliamentary Assembly.¹⁸ The other courts have a composition representative of the region they serve.

In an effort to increase the degree of *transparency and publicity* in these processes, the different political organs have adopted rules either in their charters or in subsequent resolutions.

Accordingly, the Parliamentary Assembly of the Council of Europe, the political organ that elects the members of the European Court, adopted resolutions that recommend to the states that they make public announcements in their respective countries to seek candidates through the specialized press.¹⁹ These may include websites of government institutions, national and regional newspapers, the specialized legal press, dissemination through judicial organs and bar associations, among others.²⁰

In addition, the Assembly adopted a single model *curriculum vitae* that all the states must use when presenting their candidates, which facilitates comparison.²¹ In addition, the states must make those documents public, which is an incentive to choose those who have the qualifications required, given that in each case their résumé and record would be a matter of public knowledge.

16 *Center for International Courts and Tribunals, University College London, "Selecting International Judges: Principles, Process and Politics," Discussion Paper*, 2008. Available at: http://www.ucl.ac.uk/laws/cict/docs/Selecting_Int_Judges.pdf

17 In the case of the African Court, the President does hold the position on a permanent basis, unlike the other members.

18 Article 22 of the European Convention on Human Rights.

19 Parliamentary Assembly of the Council of Europe. Resolution 1429 (1999), available at: <http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta99/EREC1429.htm>

20 Council of Europe, "*Guidelines of the Committee of Ministers on the selection of candidates for the post of judge at the European Court of Human Rights*," March 29, 2002, available at: <https://wcd.coe.int/ViewDoc.jsp?id=1919201&Site=CM>

21 Parliamentary Assembly of the Council of Europe. Resolution 1646 (2009). Available at: <http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta09/ERES1646.htm>

Once the candidates are nominated, the shortlist of names must be presented to the Assembly in alphabetical order, without giving any preference to any candidate over another. It is recommended that the states consult their legislatures before filing the lists to ensure transparency in the national selection process.²²

Upon sending the list to the Assembly, the states must attach a note explaining the selection process. The Assembly has established that if states fail to put in place a fair and transparent national selection process it may reject the slate of candidates.²³

Similarly, the Assembly of States Parties to the International Criminal Court requires that states, when making their nominations, submit a note with the information showing that the candidate meets each of the requirements indicated in the Rome Statute, including specific experience and knowledge.²⁴ Once they are received, all candidacies with the notes from the states are published on the website of the International Criminal Court for international dissemination.²⁵

The Rome Statute also provides for the possibility of establishing an “advisory committee on nominations” that can operate as an independent organ to review the candidates résumés and monitor the election process.²⁶ This committee was finally established in 2013 and will be operational for the upcoming election of six new judges in December 2014,²⁷ establishing an important precedent in this area.

All courts examined had similar minimum requirements in relation to the *suitability* and *independence of persons presented as candidates*: “high moral authority” and “the conditions required for the exercise of the highest judicial functions in their countries.” Nonetheless, the International Criminal Court also requires that the candidate have experience in criminal and procedural law and as a judge, prosecutor, litigator, or the like, or have experience in the areas of international law relevant to the Court (international humanitarian law and human rights law).²⁸ In addition, the Rome Statute provides that the states must take into account “the need to include judges with legal expertise on specific issues, including, but not limited to, violence against women or children.”²⁹ In addition, the African Court requires that judges have “recognized practical, judicial or academic competence and experience in the field of human and peoples’ rights.”³⁰

22 Parliamentary Assembly of the Council of Europe. Resolution 1429 (1999).

23 Parliamentary Assembly of the Council of Europe, Resolution. Resolution 1646 (2009).

24 Assembly of States Parties to the International Criminal Court, “*Procedure for the nomination and election of judges of the International Criminal Court*,” Resolution ICC-ASP/3/Res.6, September 10, 2004, available at: http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/ICC-ASP-ASP3-Res-06-ENG.pdf

25 *Id.*

26 Article 36(4) of the Rome Statute.

27 See, http://www.icc-cpi.int/en_menus/asp/elections/judges/2014/Pages/default.aspx

28 Article 36(3)(a), (b), and (c) of the Rome Statute.

29 Article 36(8)(b) of the Rome Statute.

30 *Protocol to the African Charter on Human and People’s Rights on the Establishment of an African Court on Human and People’s Rights*, Article 11, Available at: <http://www.african-court.org/en/images/documents/Court/Court%20Establishment/africancourt-humanrights.pdf>

This requirement of specific knowledge could be very important for the organs of the IAHRs to decide on major issues on the regional agenda in the Americas.³¹

The Parliamentary Assembly of the Council of Europe established a procedure of personal interviews of the candidates with the political organs of the Assembly, specifically the Subcommittee on election of judges to the European Court of Human Rights, which constitutes a mechanism for verifying the merits and skills of the candidates in relation to the working languages of the Court.³² In this respect, the candidates must be fluent in one of the two working languages of the European Court and have passive knowledge of the other.³³ Moreover, the candidates must have experience in the field of human rights, either as lawyers (*practitioners*) or as activists in non-governmental organizations that work in the area.³⁴

The judges of the European Court can serve only one nine-year term, with no reelection,³⁵ which avoids any pressure that might exist over those who seek reelection to get the votes they need.³⁶ In addition, their term must end when they turn 70,³⁷ an age limit that could prevent disruption in the smooth functioning of the court due to members' health problems.³⁸ In this regard, studies indicate that the states impose age limits domestically for holding judicial positions, which should be carried over into the international realm.³⁹

As regards bolstering the *representativity* of the courts, since 1996 (Order No. 519) the Permanent Assembly of the Council of Europe has instructed the Committee on Legal Affairs and Human Rights to examine the selection process to obtain balanced gender representation in the Court. In 1999 the Assembly gave instructions to

31 For example, the Permanent Council could approve guidelines, encouraging the states to present candidates with experience in women's rights, the responsibility of the state for violations committed by non-state actors, the rights of LGBTI persons, economic, social, and cultural rights, or other relevant thematic areas.

32 *Sub-Committee on the Election of Judges to the European Court of Human Rights*, http://assembly.coe.int/CommitteeDocs/2010/20100504_ajdoc12rev.pdf

33 Parliamentary Assembly of the Council of Europe. Resolution 1646 (2009).

34 Parliamentary Assembly of the Council of Europe. Resolution 1429 (1999), available at: <http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta99/EREC1429.htm>

35 Article 23 of the European Convention on Human Rights.

36 Council of Europe, Parliamentary Assembly, Committee on Legal Affairs and Human Rights, *"Reinforcement of the Independence of the European Court of Human Rights,"* May 26, 2014, available at: <http://www.assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=20933&lang=en>

37 Article 23 of the European Convention on Human Rights.

38 Council of Europe, *"Guidelines of the Committee of Ministers on the selection of candidates for the post of judge at the European Court of Human Rights,"* March 29, 2002, available at: <https://wcd.coe.int/ViewDoc.jsp?id=1919201&Site=CM>

39 In this regard, an independent panel on judicial elections in the International Criminal Court found in 2011 that 80% of the countries consulted establish age limits for performing judicial functions, which range from 55 to 75 years. *Independent Panel on ICC Judicial Elections, "Independent Panel Report on ICC Judicial Nominations 2011"*, pp. 18-19. Available at: <http://www.iccindependentpanel.org/sites/default/files/Independent%20Panel%20on%20ICC%20Judicial%20Elections%20-%20Report%2026%20October%202011.pdf>

guarantee that persons of both genders be included in the slates presented by the states.⁴⁰ Subsequently, the Assembly determined that the states could not present slates with all candidates of the same gender unless that gender were underrepresented on the Court,⁴¹ or if the state had taken all possible measures to identify candidates of both genders who met the requirements and it wasn't possible to do so.⁴²

The African Court provides that the states parties nominate up to three candidates each, with due consideration for adequate gender representation,⁴³ in the election by secret ballot in the Assembly of Heads of State and Government of the African Union. In making its decision the Assembly must ensure that the Court has representation from the main regions of Africa and its legal traditions, as well as adequate gender representation.⁴⁴ At present, the 11 members of the African Court include three women, including the current President of the Court.

Finally, the Statute of the International Criminal Court demands that the states take into account the following considerations when electing its members: representation of the main legal systems in the world; equitable geographic distribution; and balanced representation as between men and women judges. In that regard, the Assembly has drawn up specific rules that instruct the States to vote for a minimum number of candidates from each regional group and gender.⁴⁵ At present, nine of the 18 judges on the Court are women.⁴⁶

3. Conclusion and recommendations

The foregoing shows that there is an ever more solid consensus in the international courts as to the need to improve the mechanisms for selecting their members and thereby to ensure a greater level of legitimacy and effectiveness of those organs, as well as the quality of their decisions. This is necessary considering that the courts analyzed are currently among the organs with the greatest degree of influence over human rights and international humanitarian law, with consequences for legislation in many countries worldwide.

40 Parliamentary Assembly of the Council of Europe, Order 558 (1999), available at: <http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta99/EDIR558.htm>

41 Parliamentary Assembly of the Council of Europe, Resolution 1426 (2005), available at: <http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta05/ERES1426.htm>

42 Parliamentary Assembly of the Council of Europe, Resolution 1627 (2008), available at: <http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta08/ERES1627.htm>

43 *Protocol to the African Charter on Human and People's Rights on the Establishment of an African Court on Human and People's Rights*, Article 12.

44 *Id.*, Article 14.

45 Assembly of States Parties to the International Criminal Court, "*Procedure for the nomination and election of judges of the International Criminal Court*," Resolution ICC-ASP/3/Res.6, September 10, 2004, available at: http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/ICC-ASP-ASP3-Res-06-ENG.pdf

46 See, http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/Pages/structure%20of%20the%20court.aspx#b

Yet while the different systems have adopted rules over time to enhance the mechanisms for electing their members, the organs of the IAHRs have lagged, with minimum rules that do not meet the standards of transparency and publicity required of such selection processes. Nor do these minimum rules promote the independence or suitability of candidates.

Accordingly, we consider that based on comparative experiences, the states, the organs of the OAS, and the Commission and the Court should begin to take concrete actions to improve the selection processes.

First, to ensure that the selection of candidates takes into account suitability, the **states** should establish processes at the national level that are transparent, based on the qualities of the candidates, and that guarantee their independence. To that end they should make open and public announcements, take actions that promote the participation of women and other social groups, publish the candidates' résumés, and foster spaces for dialogue and citizen observation. Similarly, the states should evaluate the candidates' experience in international human rights law, as well as their work history and how it is related to serving in the position.

Following those parameters, the states should forward information to the political organs of the OAS on how the selection process was conducted, as well as the justification showing that the candidate selected meets the requirements for holding the position.

The **political organs of the OAS** should publish the résumés of those who are nominated and other available information on the Internet, establish periods for other states or other persons interested to make observations, and create spaces for the candidates to be able to introduce themselves publicly, with the possibility of receiving questions from the states, civil society organizations, and other interested persons.

When it comes to the election, the OAS should encourage the states to vote taking into account the merits and qualities of the candidates, and considering that the composition of the organs of the IAHRs should reflect gender diversity and diversity of other social groups, and of the legal traditions one finds in the hemisphere. This could be done by means of resolutions that establish certain minimal criteria for ensuring independence, representativity, and suitability.

Finally, while the role of the **Commission and the Court** is more limited, it is in their interest to be made up of the persons with the highest qualities, and therefore they should make appeals to the political organs of the OAS to promote processes that ensure the optimal election of their members. This could be done, for example, by promoting an aspiration to gender parity, diversity of experience, and other criteria. Similarly, they could note, in different forums, the areas in which they require specialization based on their agendas, especially in the case of the Commission, which should guide the states when it comes to proposing candidates.

Adopting the kinds of reforms proposed would no doubt strengthen the organs of the IAHRs, bringing them closer to the minimal guidelines that apply to the election of members in other international courts. With that, the Court and the IACHR would increase their legitimacy regionally and internationally vis-à-vis the states, victims, and other actors.

DO WOMEN JUDGES MATTER TO THE LEGITIMACY OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS?

Nienke Grossman*

Few women have served as judges on the Inter-American Court of Human Rights. In August of 2014, no woman sat on the seven-member bench.¹ Only four of thirty-five judges since the Court's founding have been women; eighty-nine percent of the judges deciding cases involving the human rights of men, women and children in the Americas have been men.² The Inter-American Court of Human Rights is the only court, of thirteen courts surveyed in late 2013, to be composed entirely of male judges.³

The absence of women from the bench of the hemisphere's highest human rights body threatens to undermine its legitimacy in significant ways. Legitimacy, or justified authority,⁴ is essential to the effectiveness of international courts. Without legitimacy, the rulings of international courts are easily ignored. An all-male bench raises questions about the Court's impartiality – both actual and perceived – as well as its democratic legitimacy.⁵

If women and men bring different perspectives to bear on the facts of human rights cases or if they read the law in disparate ways, then having only one sex on the bench is inherently biased. Unbiased judges are a prerequisite for legitimate adjudication.⁶ There is little empirical research on whether gender balance makes a difference in international adjudication, in part because of the paucity of women judges on the benches of many international courts.⁷ Nonetheless, a study of sentencing practices at the International Criminal Tribunal for the former Yugoslavia (ICTY) determined that panels with female judges imposed more severe sanctions on defendants who assaulted women, while panels with male judges imposed more severe sanctions on defendants who as-

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1 I/A Court Composition, at <http://www.corteidh.or.cr/index.php/en/about-us/composicion> (last visited August 6, 2014).

2 Jueces que han integrado la Corte Interamericana de Derechos Humanos, provided to author by Pablo Saavedra, Secretary, Inter-American Court of Human Rights (June 14, 2014).

3 Nienke Grossman, *Shattering the Glass Ceiling in International Adjudication* (on file with author).

4 Allen Buchanan and Robert O. Keohane, *The Legitimacy of Global Governance Institutions*, 20.4 *Ethics & Int'l Affairs* 405, 405 (2006).

5 Many arguments in this essay are drawn from Nienke Grossman, *Sex on the Bench: Do Women Judges Matter to the Legitimacy of International Courts?*, 12 *Chi. J. Int'l L.* 647 (2012) and from Nienke Grossman, *Sex Representation on the Bench and the Legitimacy of International Criminal Courts*, 11 *Int'l Crim. L. Rev.* 643 (2011).

6 *See, e.g.*, Brian Barry, *Justice as Impartiality* 17-18 (1995).

7 Kimi L. King & Megan Greening, *Gender Justice or Just Gender? The Role of Gender in Sexual Assault Decisions at the International Criminal Tribunal for the Former Yugoslavia*, 88 *Soc. Sci. Q.* 1049, 1050 n.2 (2007).

saulted men.⁸ Studies on the gender effect of judging in United States domestic courts suggest women may make a difference in outcomes in some cases, such as those involving asylum and employment discrimination.⁹

Women judges on international human rights and international criminal courts have suggested that they bring a different set of life experiences to the courtroom than their male counterparts. For example, former Inter-American Court of Human Rights Judge Cecilia Medina Quiroga suggested that her presence made a difference in the elicitation of facts relevant to reparations in a Guatemalan massacre and rape case.¹⁰ Navinathem Pillay, former International Criminal Court Judge and International Criminal Tribunal for Rwanda President said "...I do think women come with a particular sensitivity about what happens to people who are raped. You know, we understand when we are told it's like getting a death sentence."¹¹ And former ICTY Judge Patricia M. Wald asserted that "life experiences will inevitably, and should, influence... judgment in many cases," and women have "unique experiences and insights" that "can and do make a difference. I have seen it on the courts at home and abroad, in which I have judged."¹²

Even if men and women do not bring different perspectives to the courtroom, or if they can educate each other about their differences, sex representative benches matter to legitimacy nonetheless. Although all the judges on the bench may be *experts* in women's human rights, stakeholders may wonder whether the Court's decisions are truly impartial if women are nowhere to be found among the judges. Victims and witnesses who have suffered sex crimes may feel less comfortable relating their experiences to an all-male bench. And some may question the authority of a *human* rights court that lacks half of humanity. Women do, after all, make up half the hemisphere's population and are equal beneficiaries of the Court's decisions on human rights. As Justice Ruth Bader Ginsburg said of the United States Supreme Court during a period when she was the sole woman on the nine-member bench: "it just doesn't look right."¹³

Legitimacy concerns have pushed other regional human rights courts and international criminal tribunals to take steps to improve representativeness on the bench. The Parliamentary Assembly of the Council of Europe requires states to nominate three candidates for European Court of Human Rights judgeships, and one must be of a different sex from the other two.¹⁴ The constitutive instrument of the African Court on Human and Peoples' Rights mandates "[d]ue consideration shall be given to adequate gender representation in the nomination pro-

8 *Id.* at 1065-66.

9 Jaya Ramji-Nogales, Andrew I. Schoenholtz, and Philip G. Schrag, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 Stan. L. Rev. 295, 342 (2007); Christina Boyd, Lee Epstein & Andrew Martin, *Untangling the Causal Effects of Sex on Judging*, 54 Am. J. Pol. Sci. 389, 406 (2010).

10 Daniel Terris, Cesare P.R. Romano, & Leigh Swigart, *The International Judge: An Introduction to the Men and Women Who Decide the World's Cases* 186-87 (2007).

11 *Id.* at 48.

12 Patricia M. Wald, *What do women want from international criminal justice? to help shape the law*, intlawggl.blogspot.com/2009/10/what-do-women-want-from-international.html (Dec. 2, 2010).

13 Emily Bazelon, *The Place of Women on the Court*, NY Times MM22 (July 12, 2009) (interviewing Justice Ruth Bader Ginsburg).

14 Parliamentary Assembly of the Council of Europe, Res. 1649, Candidates for the European Court of Human Rights (2004).

cess.”¹⁵ When voting on candidates, the Assembly of Heads of State and Government must ensure that “there is representation of the main regions of Africa and of their principal legal traditions,” as well as “adequate gender representation.”¹⁶ The International Criminal Court has elaborate judicial selection procedures which include a requirement that states vote for a certain number of female and male candidates, as well as candidates with expertise on violence against women or children.¹⁷ The Statutes of the International Criminal Tribunals for the Former Yugoslavia and Rwanda require states to take “into account the importance of a fair representation of female and male candidates” when nominating *ad litem* judges.¹⁸ (The International Criminal Court and the European Court of Human Rights also use advisory committees to vet potential nominees.¹⁹) In late 2013, the European Court of Human Rights, the African Court of Human and Peoples’ Rights, and the International Criminal Court were composed of 37%, 18%, and 59% women, respectively.²⁰

As States prepare to nominate new candidates to judgeships on the Inter-American Court, they may wish to consider the implications of their choices for the legitimacy of the institution. Fortunately, there are plenty of qualified women in North, South and Central America and the Caribbean available to serve as eminent judges on the Court. Interestingly, although women have made it to the highest political ranks in our hemisphere, serving as presidents in Argentina, Brazil, Chile, and various Caribbean countries, they have yet to break into the inter-American judiciary in an enduring way. States may also evaluate whether other groups deeply or disproportionately affected by human rights violations in the hemisphere lack representation on the bench, including children’s rights advocates, experts in sexual or gender-based violence, religious and racial minorities, and indigenous communities, among others. If current selection procedures fail to achieve a minimal degree of representativeness, and States are committed to ensuring a more representative bench to enhance the legitimacy of the Court, analysis of the procedures adopted by other courts may be instructive.

15 Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of an African Court on Human and Peoples’ Rights, June 10, 1998 (entered into force Jan. 25, 2004) art. 12, <http://www.african-court.org/en/images/documents/Court/Court%20Establishment/africancourt-humanrights.pdf> [hereinafter African Charter Protocol].

16 *Id.*, art. 14(2), (3).

17 Rome Statute of the International Criminal Court, art. 36(8).

18 S. C. Res. 1329, Annex I art. 13, UN Doc S/RES/1329 (2000); S. C. Res. 1431, Annex I, art. 12, UN Doc S/RES/1431 (2002).

19 Res. ICC-ASP-10-Res.5-ENG, paras. 19-20 (Dec. 21, 2011); Committee of Ministers of the Council of Europe, Resolution on the Establishment of an Advisory Panel of Experts on Candidates for Election as Judge to the European Court of Human Rights, CM/Res(2010)26 (Nov. 10, 2010).

20 Composition of the Court, Council of Europe: ECHR, http://www.echr.coe.int/Pages/home.aspx?p=court/judges&c=#n1368718271710_pointer (last visited Oct. 10, 2013); Judges of the Court, African Court on Human and Peoples’ Rights, <http://www.african-court.org/en/index.php/about-the-court/jurisdiction-3/judges#formerjudges> (last visited Oct. 11, 2013). Current Judges, International Criminal Court, http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/chambers/the%20judges/Pages/the%20judges%20%20%20biographical%20notes.aspx (last visited Oct. 10, 2013).

DE LEGE FERENDA:

Reflections and proposals for improving the selection of candidates and election of the members of the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights *

Laurence Burgorgue-Larsen **

When one dares enter the universe of human rights, Idealism and Realism are always at play.¹ If *Idealism* prevails political goals may be purely illusory; even worse, the drafting of any legislation may be totally perverse. To the contrary, if only *Realism* – even Realpolitik – is present in the analysis and implementation of public policies, it could appear harmfully cynical and damage normative progress.

The independence and impartiality of judicial bodies have always been issues discussed by scholarly legal writing (*la doctrine*). Numerous authors have tried to identify what ensures the independence of judges. Since the inception and proliferation of international judicial bodies scholars have explored these elements in international law.² Many factors (institutional, financial, procedural, legal, etc.) contribute to ensuring the independence as well as the impartiality of international judges. National and international processes to select and nominate candidates constitute one such factor.

With the growth of international judicial bodies, an extensive academic literature has been produced – including major reports by independent organs such as the *Institut de droit international*³ – and the idea has begun to emerge that the process of nominating and selecting the members of the judiciary is closely connected with the

* This article is an abbreviated version of a longer paper presented at *Notre Dame Law School* in March 2014 in response to the kind invitation of Paolo G. Carozza and Doug Cassel to talk about the “Future” of the inter-American human rights system. Publication of the longer article, written in English, is forthcoming in *The Notre Dame Journal of International and Comparative Law*.

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1 See, C. Tomushat, *Human Rights. Between Idealism and Realism* (Oxford, 2008).

2 L. R. Helfer, A-M. Slaughter, “*Toward a Theory of Effective Supranational Adjudication*,” *Yale Law Journal*, 1997, pp. 273-391; R. Mackenzie, P. Sands, “*International Courts and Tribunals and the Independence of the International Judge*,” *Harvard International Law Journal*, 2003, pp. 271-285; H. Ruiz-Fabri, J-M. Sorel (dir.), *Indépendance et impartialité des juges internationaux*, Paris, Pedone, 2010, 302 pp. (*Col. Contentieux international*); D. Shelton, “*Legal Norms to Promote the Independence and Accountability of International Tribunals*,” *The Law and Practice of International Courts and Tribunals: A Practitioners’ Journal*, Vol. 2, No.1, 2003, pp. 27-62.

3 See the report adopted during the Rhodes session in 2011, *The Position of International Judge, (9 September 2011, 6 RES EN FINAL)*, (Rapporteur G. Guillaume, former French Judge on the International Court of Justice).

independence of the judiciary.⁴ The same conclusions have already been reached in the inter-American human rights system (“IAHRS”).⁵ Today, even more than before, due to the serious crisis that the IAHRS faced in recent years⁶, sound practices must be developed in this regard so that public opinion, or parties to matters in general, can have more confidence in the two key organs of the system, the Inter-American Commission on Human Rights (“the Commission” or “the IACHR”) and the Inter-American Court of Human Rights (“the Court” or “the I/A Court HR”).

The brief ideas presented in the following pages are aimed at fostering a discussion (forward-looking and necessary) about the improvements that the IAHRS may promote for defining how the members of the IACHR and the I/A Court HR are chosen. The reader will realize that both *Idealism* and *Realism* are present in the analysis: Idealism has allowed me to present novel proposals, which may be extreme; whereas Realism constantly reminds me that very often “*perfect is the enemy of the good.*” In the end, I have tried to find a happy medium, hoping that it is effective.

With this in mind, my objective in this brief analysis is to present in a precise, technical, and clear fashion, with a comparative perspective, the improvements that can be incorporated in the IAHRS, both in the selection of candidates nationally (I), and in the elections at the international level (II).

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- 4 It is interesting to observe that the legal literature began to come together after a judge was not reelected to the ICJ in 1951, see G. Guillaume, “*De l’indépendance des membres de la Cour internationale de Justice*,” *Boutros Boutros-Ghali Amicorum. Paix, développement, démocratie*, Brussels, Bruylant, Vol. 1, 1998, p. 476. Subsequently, the “proliferation” of international courts and tribunals produced dense and rich studies, such as that of Mackenzie R., Malleson K., Martin P., Sands P., “*Selecting International Judges, Principles, Process and Politics*,” Oxford, OUP, 2010. Other relevant analyses that can be consulted: J. Malenovsky, “*L’indépendance des juges internationaux*,” *Recueil des Cours de l’Académie de droit international*, vol. 349, 2011, 276 pp.; A. Remiro Brotons, “*Nomination et élection des juges à la Cour internationale de justice*,” *Unité et Diversité du Droit international. Ecrits en l’honneur du professeur Pierre-Marie Dupuy/ Unity and Diversity of International Law. Essays in Honour of Professor Pierre-Marie Dupuy*, Brill, Martinus Nijhoff Publishers, 2014, pp. 639-660; A. Seibert-Fohr, “*International Judicial Ethics*,” *The Oxford Handbook of International Adjudication*, Oxford, 2014, pp. 757-778; S. Szurek, “*La composition des juridictions internationales permanentes: l’émergence de nouvelles exigences de représentativité*,” *Annuaire français de droit international*, 2010, pp. 41-78; C. Tomushat, “*National Representation of Judges and Legitimacy of International Jurisdictions: Lessons from ICJ to ECJ?*,” Pernice I. et al. (eds.), *The Future of the European Judicial System in a Comparative Perspective*, Baden-Baden, 2006, pp. 183-190.
- 5 H. Faúndez Ledesma, “*La independencia e imparcialidad de los miembros de la Comisión y de la Corte: paradojas y desafíos*,” J. Méndez and F. Cox (eds.), *El futuro del Sistema Interamericano de los Derechos Humanos*, IIDH, San José, 1998, pp.170-210 ; O. Ruiz-Chiriboga, “*The Independence of the Inter-American Judge*,” *The Law and Practice of International Courts and Tribunals*, 2012, pp. 111-135 ; J. Schönsteiner, “*Alternative Appointment Procedures for the Commissioners and Judges in the Inter-American System of Human Rights*,” 2007, 46 *Revista IIDH*, pp.196-205.
- 6 D. Cassel, “*Regional Human Rights Regime and State Pushback: The Case of the Inter-American Human Rights System (2011-2013)*,” *Human Rights Law Journal*, 2013, vol. 33, pp. 1-10; see also the special issue of *Human Rights Brief*, “*The Future of the Inter-American System of Human Rights*,” Vol. 20, No. 2, Winter 2013.

1. National Processes to Select Candidates

The issue at the national level is transparency: How can one avoid conflicts of interests – and even nepotism – when it comes to designating candidates suitable for competing for an international judicial post? For a long time (and to this day) this issue was understood by the states as falling within the scope of their internal affairs; moreover, the executive branch considered that it was within its discretion. This principle has become ever more difficult to maintain with the increasing need for transparency. Although an international system like the IAHR cannot *impose* new rules in this respect on the states, it can *foster* good practices, as the comparison with the European system shows.

In *Europe*, after a very important battle of the Parliamentary Assembly of the Council of Europe aimed at upgrading the competence of those who were candidates for the position of judge of the European Court⁷ – struggling against the Council of Ministers, which long considered that the issue was of the exclusive competence of the states – things improved. When many judges began to join from the countries of Eastern Europe, it highlighted a chronic problem of qualifications.⁸ In this context, Resolution No. 1646 of January 27, 2009, *Nomination of candidates and election of judges to the European Court of Human Rights*⁹, has been crucial for determining very precisely some key principles for upgrading the competence and independence of the members of the judiciary.

After many years, the Committee of Ministers, an intergovernmental organ made up of representatives of the national Executives, accepted the view of the Parliamentary Assembly and published, in 2012, a major report for improving the selection processes at the national level, of candidates. These are what have come to be called *Guidelines of the Committee of Ministers on the selection of candidates for the post of judge at the European Court of Human Rights*¹⁰ – which should be read together with the *Explanatory Memorandum*.¹¹ This document offers a very detailed array of good governance practices that the states have already implemented in this respect.

7 See the numerous recommendations of the Parliamentary Assembly, No. 1649 (2004) of January 30 2004; Resolution No. 1082 (1996) and Recommendation No. 1295 (1996), both adopted in April 1996; Resolution No. 1200 (1999) of September 1999 and Resolution No. 1646 (2009) of January 2009.

8 As was shown, without any concessions, by Professor J-F. Flauss, “*Radioscopie de l’élection de la nouvelle Cour européenne des droits de l’homme*,” *Revue Trimestrielle des droits de l’homme*, 1998, pp. 465 ff.; “*Le renouvellement triennal de la Cour européenne des droits de l’homme*,” *Revue Trimestrielle des droits de l’homme*, 2001, pp. 693-713; “*Brèves observations sur le second renouvellement triennal de la Cour européenne des droits de l’homme*,” *Revue Trimestrielle des droits de l’homme*, 2005, pp. 5-32 ; “*Les élections de juges à la Cour européenne des droits de l’homme (2005-2008)*,” *Revue Trimestrielle des droits de l’homme*, 2008, pp. 173 ff.

9 Resolution No. 1646 (2009) of the Parliamentary Assembly, January 27, 2009 (4th session), “Nomination of candidates and election of judges to the European Court of Human Rights.”

10 Committee of Ministers, CM (2012) 40 final, March 29, 2012.

11 Committee of Ministers, CM (2012) 40 addendum final, March 29, 2012, 1138 Meetings, Human Rights. 4.4. *Guidelines of the Committee of Ministers on the Selection of candidates for the post of judge at the European Court of Human Rights. Explanatory Memorandum.*

While in 2006 in *Latin America* timid pressure was brought to bear by the OAS General Assembly on the states, it wasn't enough.¹² The resolution adopted affirms that civil society needs to become more involved in the national processes of selecting candidates and that the CVs of the candidates must be published on the website of the OAS in light of the need for transparency. Nonetheless, the actual principles that the states would have to follow were not defined.

In this context, some very simple ideas can be defined, inspired by the European experience, to increase the level of transparency in selecting persons as candidates, which would automatically increase the trust of the parties before the IAHRs. There are two rules that could be implemented in each country over which the Commission has competence, and in each country that has accepted the jurisdiction of the Court. These rules would have to be applied uniformly to each candidacy presented seeking a position as commissioner or judge. Therefore, the standards should be equally demanding for the two organs.

Rule No. 1: Each national selection system would have to be based on pre-established rules that are public so that they are accessible to a significant number of persons. A time frame should be established for presenting candidacies (for example, at least three months). Here it is a question of establishing a classic *minimum* in any state under the rule of law: the accessibility and foreseeability that should be characteristics of any legal system. All persons interested in a position of "Commissioner" or "Judge" would have to have the correct information, ahead of time, of the "rules of the game."

If we take into account the European experience(s), the rules in question could be of constitutional rank (as in Slovakia), of statutory rank (Slovenia, Finland) or, as in most of the countries of Europe, adopted by the Executive (Russia, Rumania, Ukraine). The important thing, at the end of the day, is that they exist and are accessible. To that end, all media may be used: publication in official registries or gazettes, at websites of the relevant ministries (of Foreign Affairs or Justice), in national and/or regional daily newspapers, in specialized legal journals, by means of judicial bodies (the regional high courts, bar associations and judges' associations), specialized centers at universities, NGOs, etc. Along the same lines, websites such as those of the Inter-American Commission and the Inter-American Court could publish the national rules on selection for their dissemination throughout the hemisphere. That could be a way of encouraging the application of Article 53 of the American Convention on Human Rights, which has been used very little to date.¹³

Rule No. 2: The process of selecting persons as candidates could be conducted by an independent organ.

When it comes to spelling out this proposal one would have to consider several things, from designation of this independent body to its composition, methods of work, and scope of its decisions. We will examine each of these points next.

12 OAS, General Assembly, AG/RES. 2166 (XXXVI-O/06), June 6, 2006.

13 Article 53 of the American Convention on Human Rights: "When a slate of three is proposed, at least one of the candidates shall be a national of a state other than the one proposing the slate."

- The designation of an independent organ may take one of two paths: creating an *ad hoc* Committee or using already-existing organs in the justice system of many countries.

Many Latin American countries have bodies known as Consejo Superior de la Judicatura or Consejo Superior de la Magistratura (*Supreme Council of Magistracy*, or *Supreme Judicial Council*) – such as Ecuador, Colombia, El Salvador, Mexico, Paraguay, Peru, and Argentina – which could be suitable forums for organizing the selection process, avoiding any politicization. In those countries that do not have such bodies (such as Chile, Uruguay, Guatemala, Honduras, Nicaragua, the Dominican Republic, and Panama), the independent organs responsible for candidate selection could be the Supreme Courts which, in most of this second group of countries, designate the judges of the lower courts. In the countries in which judges are elected by the people (Bolivia), by the legislature (Haiti, Puerto Rico, and Costa Rica), or by the president of the republic (Brazil), *ad hoc* solutions should be found to avoid any risk of politicization. For example, one could imagine that the lawyers' associations and/or specialized university research centers on human rights would create the selection committees.

- The composition of these organs would have to "adapt" to the selection process. On this point one would have to avoid at any cost any type of "corporatism" of one profession over the other. The members of the independent organ would have to be as representative as possible. Accordingly, one could imagine an "ideal-type" composition that would be as follows: one representative of the judiciary, one from the world of activist lawyers or jurists, and one from academia. These three representatives are necessary and quite "classic," as we find them in many of the *ad hoc* committees created in Europe to select candidates for the position of judge of the European Court of Human Rights. Nonetheless, one would have to add that for the IAHRs one representative from civil society (NGOs)¹⁴ and one representative of the human rights ombudsperson offices (many known as *Defensor del pueblo*), a very common agency in the constitutional systems of Latin America¹⁵ that has proven capable, in some countries, of displaying genuine and actual independence.¹⁶ One can imagine that those countries that don't have such an institution could appoint a member of a national human rights commission or similar body. This composition, which has to reflect the variety of professional groups, must be added both ethnic and gender variety. Ultimately, the independent organ, with five members, should be truly representative both professionally and in terms of ethnic/gender considerations. The more the independent organ is representative of the society, the more it is likely to select, based on equal competence, women and members of ethnic minorities.

14 V. Krsticevic, "El papel de las ONG en el sistema interamericano de protección de los derechos humanos, El Sistema interamericano de protección de los derechos humanos en el umbral del siglo XXI," Inter-American Court of Human Rights, Tome I, 2nd edition, 2003, pp. 407-436; M. Pinto, *"NGOs and the Inter-American Court of Human Rights," Civil Society, International Courts and Compliance Bodies*, Tullio Treves et al. (dir.), Cambridge, Cambridge University Press, 2005, pp. 47-56; L. Rodriguez Brignardello, J. Hugo, "OEA y participación de la sociedad civil. Entre un modelo para armar y otra posibilidad perdida," Revista CEJIL, 2005, No.1, pp. 27 ff.

15 L. Gonzalez Volio, *"The Institution of the Ombudsman. The Latin American Experience,"* Revista IIDH, January-June 2003, No. 37, pp. 219 ff.; M-T. Rosales de Conrad, "El Defensor del pueblo. Un estudio con especial referencia al Ecuador," Montevideo, Konrad Adenauer Foundation, 2004, p. 327.

16 Here we must observe that the Offices of Human Rights Ombudsperson (Defensorías del Pueblo) have appeared on occasion before the Inter-American Court against their own states, which is indicative of their independence in those cases.

- Working methods are vital for ensuring an objective and in-depth examination of the relevance of the candidates. In order to more seriously examine the CVs of the persons interested, it would be essential to interview each of them to verify the extent of their legal qualifications, knowledge of human rights law, and their knowledge of English and Spanish. It would be ideal to have consensus to select the best person, but if that's not possible one could vote.

- One of the key questions in the national selection process surrounds the powers attributed to the independent body. The comparison with the experience in Europe shows that those bodies do not have the last word. In other words, they don't have decision-making power, which continues to be in the hands of the Executives (be it the Ministry of Justice, the Ministry of Foreign Affairs, or the Presidency of the Republic). These bodies only recommend. From my point of view, mindful of *Idealism* (as I presented it briefly in the introduction), it would be interesting for the states to agree to transfer that power to these independent bodies which, at the end of the day, would be able to select a quality candidate. Such an option would be difficult for the executive branches to consider acceptable. Another solution would be to give the executive the ability to oppose the selection made by the independent body, but the grounds for that disagreement would have to be sufficiently explained in order to be considered legitimate.

This proposal would imply major changes, especially bearing in mind that even though Article 53(2) of the American Convention gives the states the power to propose up to three candidates for the Court, in practice the states present only one candidate. In the European system, by way of contrast, Article 22 of the European Convention imposes an obligation to present a list of three candidates.¹⁷

Nowadays, in view of the major political crisis affecting the IAHRs, it would not be timely to propose a reform to the Convention to require that the states present more than one candidate. Opening up the "Pandora's box" would be dangerous. Nonetheless, the organs of the OAS, as well as the NGOs involved in the defense of human rights in the Americas, could implement actions to encourage the states to present at least three candidates. It would be an expression of political *Realism* which, at the end of the day, could generate good practices within the political process in each state.

2. International Procedures to Elect Candidates

After the *selection* at the national level is the international level, where the *election* of the candidates takes place. It is another crucial phase for ensuring the independence and suitability of the candidates.

In *Europe*, the experiences in both the European Union system (the "Europe" of the 28 member states) and the Council of Europe ("Greater Europe," with the 47 member states) illustrate two points: first, it is particularly difficult to create and implement a system beyond reproach, with no obvious or not-so-obvious flaws; and second, and above all, the system that *a priori* appeared to be the most convincing (that of the Council of Europe) has

¹⁷ Article 22 of the European Convention: "*The judges shall be elected by the Parliamentary Assembly with respect to each High Contracting Party by a majority of votes cast from a list of three candidates nominated by the High Contracting Party.*"

actually revealed many collateral defects. Both systems went forward with the establishment of a Committee of independent experts to select the judges. The famous “255 Panel” (established on the basis of Article 255 of the Treaty on the Functioning of the European Union) selects the candidates for the post of judge on the Court of Justice of the European Union (Luxembourg)¹⁸; the Advisory Panel of Experts of the Council of Europe, by way of contrast, examines the profiles of the candidates for the position of judge of the European Court of Human Rights (Strasbourg).¹⁹ The difference between the two is that the first directly transmits its opinion to the states, which is normally followed by the executive branches, that trust the expert and professional opinion of its members. None of its opinions (favorable or otherwise) has been rejected by the governments, who don't dare oppose the decision of the experts. At the Council of Europe things are very different, and, to put it undiplomatically, quite defective. The opinions of the Committee are not transmitted to the governments, but to the Parliamentary Assembly of the Council of Europe, which in turn studies the CVs and interviews the candidates. The practice reveals that the scientific and independent evaluation of the Advisory Panel is not followed by the political (and therefore politicized) organ, which is the Parliamentary Assembly (and within it, *the Committee on Legal Affairs and Human Rights*).²⁰ Therefore, it is a matter of public knowledge that persons were elected whose

18 Article 255 of the Treaty on the Functioning of the European Union: “1. *A panel shall be set up in order to give an opinion on candidates’ suitability to perform the duties of Judge and Advocate-General of the Court of Justice and the General Court before the governments of the Member States make the appointments referred to in Articles 253 and 254.* 2. *The panel shall comprise seven persons chosen from among former members of the Court of Justice and the General Court, members of national supreme courts and lawyers of recognised competence, one of whom shall be proposed by the European Parliament. The Council shall adopt a decision establishing the panel’s operating rules and a decision appointing its members. It shall act on the initiative of the President of the Court of Justice.*” See the report of the 255 Panel, “*Third Activity Report of the panel provided for by Article 255 of the Treaty on the Functioning of the European Union*,” released December 13, 2013, 32 pp. In addition, see the articles written by their members, outstanding jurists and judges in Europe: L. Mance L. “*The composition of the European Court of Justice*,” October 19, 2011, http://ukael.org/past_events_46_1935078262.pdf; J-M. Sauvé, “*Les juges européens désormais nommés après un avis d’un comité indépendant. Entretien*,” *Les Petites affiches*, March 16, 2011, No. 53, pp. 3-7; by the same author, “*Qu’est-ce qu’un bon juge européen ?*” *Dalloz*, May 10, 2011, No.19; “*Le rôle du Comité chargé de donner un avis sur l’aptitude à exercer les fonctions de juge de l’Union européenne*,” Remarks to the Committee on Legal Affairs of the European Parliament, May 30, 2013, http://www.conseil-etat.fr/media/document/261113_selection_juges_union_europeenne.pdf; “*La sélection des juges de l’Union européenne : la pratique du Comité de l’article 255*,” remarks at the colloquium *Selecting Europe’s Judges: A critical appraisal of appointment processes to the European courts*, Collège de Bruges, November 4, 2013, http://www.conseil-etat.fr/media/document/261113_selection_juges_union_europeenne.pdf. For an academic analysis see Bo Vesterdorf, “*La nomination des juges à la Cour de Justice de l’Union européenne. Le Comité Sauvé (article 255 TFUE)*,” *Cahiers de droit européen*, Vol. 47, 2011, pp. 601-608.

19 A. Drzemczewski, “*Election des juges à la Cour européenne de Strasbourg: un aperçu*,” *L’Europe des Libertés, Revue d’actualité juridique*, No. 33, 2010, Université de Strasbourg, pp.6-10; in English in *European Human Rights Law Review*, No. 4, 2010, pp. 380-382; N. P. Engel, “*More transparency and Governmental Loyalty for Maintaining Professional Quality in the Election of Judges to the European Court of Human Rights*,” *Human Rights Law Journal*, December 31, 2012, Vol. 32, No. 7-12, pp. 448-455; C-L. Popescu, “*La Cour européenne des droits de l’homme, Indépendance et impartialité des juges internationaux*,” Ruiz-Fabri H., Sorel J-M., (dir.), Paris, Pedone, 2010, pp. 39-135.

20 See Steering Committee of Human Rights (CDDH), *CDDH report on the review of the functioning of the Advisory Panel of experts on candidates for election as judge to the European Court of Human Rights*, Strasbourg, November 29, 2013, CDDH (2013) R79 Addendum II, para. 30.

qualifications were not worthy of a position on a court as important as the European Court of Human Rights.²¹ This is very devastating for the authority and legitimacy of an international court whose judgments transform – often profoundly – domestic legal systems.

In that context the European experience could be taken into account in *Latin America* so as to avoid falling into the same traps. Here I present some rules, mindful of what comparative law has taught us.

Rule No. 1: It would be necessary to create, within the OAS, an *ad hoc* committee made up of qualified and independent experts. It could be a task of the General Assembly, since in its intergovernmental capacity it would be a way for the states to maintain clear control (as in Europe, where the political organs that created the two advisory committees were intergovernmental). On establishing this committee, the General Assembly could be assisted by the Inter-American Juridical Committee, as allowed by Article 99 of the Charter of the OAS.²² On creating that Committee, once again one would have to bear in mind the criterion of representativity in geographic, professional, ethnic, and gender terms. Its members could be elected for four years, with the possibility of being reelected once. Following the good practices of the European experience, the Committee would be made up of seven persons, as follows: (a) three former members of the IACHR (for the position of Commissioner) and three former members of the I/A Court HR (for the position of judge at the Court); (b) two former members of the highest national courts; and (c) two representatives of civil society.

The task of such a committee would be to examine the candidates' CVs and – above all – organize an in-depth interview (not just a formal one) with the candidates and to evaluate their knowledge of the IAHRs as well as how they view it. One hour per person, in a public interview, would be suitable for establishing a genuine dialogue that makes it possible to assess whether they are excellent candidates. The committee could allow for participation by civil society and the states to ask the candidates follow-up questions.

Ideally the committee would be in charge of making the definitive selection of candidates. Their decision would, therefore, be binding on the states, which would have to place their trust in the oversight of the experts they selected (i.e. by the members of the General Assembly) (see *supra*). This option would make it possible to ensure the quality of the candidates (who would not be the result of any kind of exchange of political favors among

21 It suffices to read the chronicles of Professor Flaus or the recent article by N.P. Engel, "*More transparency and Governmental Loyalty for Maintaining Professional Quality in the Election of Judges to the European Court of Human Rights,*" Human Rights Law Journal, December 31, 2012, Vol. 32, No. 7-12, pp. 448-455.

22 "El The purpose of the Inter-American Juridical Committee is to serve the Organization as an advisory body on juridical matters," and Article 100 of the OAS Charter provides: "The Inter-American Juridical Committee shall undertake the studies and preparatory work assigned to it by the General Assembly, the Meeting of Consultation of Ministers of Foreign Affairs, or the Councils of the Organization. It may also, on its own initiative, undertake such studies and preparatory work as it considers advisable, and suggest the holding of specialized juridical conferences."

states, the famous case of vote-buying)²³ while at the same time allowing *very good candidates* from small countries – which thus far have never had a judge of their nationality on the Court, such as Bolivia, El Salvador, Paraguay, and Guatemala – to have possibilities of presenting candidates who may win the experts’ approval. It would be hard, obviously, for the states to agree to hand over decision-making power to the committee. Once again, one could include a *realist criterion* according to which it would be possible for states to oppose the decision of the committee, but only by unanimity.

It is obvious that this proposal, the result of an Idealist approach, would have more difficulty finding acceptance today among the Latin American states, marked more than ever by the importance of national sovereignty and the power this gives them. If one day the committee of independent experts were to see light, one could concede that the states should continue to vote for the candidates, for example through the General Assembly. They would be solely responsible for the decision and subject to the criticism of legal professionals and civil society associations. Nonetheless, the idea of creating that Committee has not even begun to circulate in political and legal circles in the hemisphere.

Another idea that would be simple to implement would be to use the new system for selecting members of the Commission that was adopted in 2013. According to well-informed observers,²⁴ the interview before the Permanent Council of the candidates was very instructive, and at the end of the day the General Assembly elected the best candidates, who were quickly identified. That process, without changing any of the texts, could be used to elect the members of the I/A Court HR. This precedent is one part of the rules of good governance that is easy to implement, so long as there is a minimum of political will.

Rule No. 2: It is important that it be possible to examine the candidates based on strict and precise criteria identified beforehand. This element is entirely independent of whether there is an independent committee, since the General Assembly itself could use this criterion when it comes to choosing and voting for candidates. Both the qualifications in the ambit of human rights and the rules of incompatibility and language proficiency would have to be checked with greater rigor to avoid coming to realize after the fact, for example, that a commissioner or judge elected is not sufficiently committed to the defense of human rights, does not have the necessary knowledge, or holds a position in his or her country that is totally incompatible with holding a position in the IAHRs, or who is not fluent (even minimally) in English or Spanish.

23 Strongly denounced by several authors of scholarly legal writings, H. Faúndez Ledesma, “*La independencia e imparcialidad de los miembros de la Comisión y de la Corte: paradojas y desafíos*,” J. Méndez and F. Cox (eds.), *El futuro del Sistema Interamericano de los Derechos Humanos*, IIDH, San José, 1998; in 2007, J. Schönsteiner, *Revista IIDH*, 2007; O. Ruiz-Chiriboga, “The Independence of the Inter-American Judge,” *The Law and Practice of International Courts and Tribunals*, op.cit., 2012.

24 Members of the diplomatic corps such as Ambassador Joél Antonio Hernández García (Mexico) and Ambassador Stephen Vasciannie (Jamaica), and representatives of NGOs (Viviana Krsticevic, Executive Director of CEJIL, and Katya Salazar, Executive Director of the *Due Process of Law Foundation*) found the interview of the candidates to serve as member of the Commission, on May 1, 2013, during a meeting of the Permanent Council, to be interesting and useful.

Last but not least, the other important criterion when it comes to choosing a candidate must be ethnic and gender representativity. This is a crucial aspect nowadays, for an international court must *absolutely* reflect the human diversity of the national societies in pursuit of the legal diversity of the Latin American civil law and the common law traditions of most English-speaking jurisdictions. It is unacceptable that in the 35 years of the I/A Court HR no indigenous jurist has been designated and elected, and only one black jurist (O. Jackman, Barbados) and only four women jurists [Cecilia Medina Quiroga (2004-2009, Chile), Sonia Picado Sotela (1988-1994, Costa Rica), Rhadys Iris Abreu Blondet (2007-2012, Dominican Republic), and Margaret May Macaulay (2007-2012, Jamaica)] have been elected. The largest and most politically important countries would have to “set an example” by proposing good candidates who are members of indigenous peoples and women, and from other social groups, so that a *spillover* phenomenon could be set in motion.

I cannot conclude the presentation of these proposals without mentioning the question of the length of the term served by commissioners and judges (though it is not an issue closely related to the question of the selection process). Their independence, in my view, would be much stronger and more real if their term were not renewable and slightly longer. First, harmonization of both terms would be welcome (for now the judges are elected for six years and commissioners only four). Second, their non-renewable nature would be well-advised to avoid any type of pressure that may arise around reelection time. The European experience here is key and shows that the latest solution that is in force (in the wake of Protocol 14)²⁵ – and which enshrines the single nine-year term – has been very well received both by observers and by the judges themselves.²⁶

One must keep this last idea in mind for more favorable political times that will allow for a reform of the American Convention without the risk of opening up a “Pandora’s box.”

25 *Explanatory Report to Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention*, para. 50: “The judge’s terms of office have been changed and increased to nine years. Judges may not, however, be reelected. These changes are intended to reinforce their independence and impartiality, as desired notably by the Parliamentary Assembly in its Recommendation 1649 (2004).”

26 Popescu C-L., “*La Cour européenne des droits de l’homme, l’indépendance et l’impartialité des juges internationaux*,” Ruiz-Fabri H., Sorel J-M., (dir.), Paris, Pedone, 2010, p.83.

ANNEXES

UN. RESOLUTION N° 68/268. STRENGTHENING AND ENHANCING THE EFFECTIVE FUNCTIONING OF THE HUMAN RIGHTS TREATY BODY SYSTEM.

adopted by the General Assembly on April 9, 2014

The General Assembly,

Reaffirming the purposes and principles of the Charter of the United Nations, and recalling the Universal Declaration of Human Rights¹ and relevant international human rights instruments,

Underlining the obligation that States have to promote and protect human rights and to carry out the responsibilities that they have undertaken under international law, especially the Charter, as well as various international instruments in the field of human rights, including under international human rights treaties,

Recalling Economic and Social Council resolution 1985/17 of 28 May 1985,

Recalling also its resolution 66/254 of 23 February 2012, by which it launched the intergovernmental process of the General Assembly on strengthening and enhancing the effective functioning of the human rights treaty body system, and its resolutions 66/295 of 17 September 2012 and 68/2 of 20 September 2013, by which it extended the intergovernmental process,

Recalling further its relevant resolutions on the human rights treaty bodies,

Reaffirming that the full and effective implementation of international human rights instruments by States parties is of major importance for the efforts of the United Nations to promote universal respect for and observance of human rights and fundamental freedoms and that the effective functioning of the human rights treaty body system is indispensable for the full and effective implementation of such instruments,

Recognizing the important, valuable and unique role and contribution of each of the human rights treaty bodies in the promotion and protection of human rights and fundamental freedoms, including through their examination of the progress made by States parties to the respective human rights treaties in fulfilling their relevant obligations and their provision of recommendations to States parties on the implementation of such treaties,

¹ Resolution 217 A (III).

Reaffirming the importance of the independence of the human rights treaty bodies,

Reaffirming also that the independence and impartiality of members of the human rights treaty bodies is essential for the performance of their duties and responsibilities in line with the respective treaties, and recalling the requirement that they be individuals of high moral standing serving in their personal capacity,

Recognizing that States have a legal obligation under the international human rights treaties to which they are party to periodically submit to the relevant human rights treaty bodies reports on the measures they have taken to give effect to the provisions of the relevant treaties, and noting the need to increase the level of compliance in this regard,

Recognizing also that the promotion and protection of human rights should be based on the principle of cooperation and genuine dialogue and be aimed at strengthening the capacity of Member States to comply with their human rights obligations for the benefit of all human beings,

Emphasizing the importance of multilingualism in the activities of the United Nations, including those linked to the promotion and protection of human rights, and reaffirming the paramount importance of the equality of the six official languages of the United Nations for the effective functioning of the human rights treaty bodies,

Recognizing that the current allocation of resources has not allowed the human rights treaty body system to work in a sustainable and effective manner, and in this regard also recognizing the importance of providing, under the existing procedures of the General Assembly, adequate funding to the human rights treaty body system from the regular budget of the United Nations,

Recognizing also the importance of continued efforts to improve the efficiency of the working methods of the human rights treaty body system,

Recognizing further the importance and added value of capacity-building and technical assistance provided in consultation with and with the consent of the States parties concerned to ensure the full and effective implementation of and compliance with the international human rights treaties,

Recalling that certain international human rights instruments include provisions regarding the venue of the meetings of the committees, and mindful of the importance of the full engagement of all States parties in the interactive dialogue with the human rights treaty bodies,

Taking note of the reports of the Secretary-General on measures to improve further the effectiveness, harmonization and reform of the human rights treaty body system,²

2 A/66/344 and A/HRC/19/28.

Noting with appreciation the initiative and efforts of the United Nations High Commissioner for Human Rights, in the form of a multi-stakeholder consultation approach for reflecting on how to streamline and strengthen the human rights treaty body system,

Noting that the multi-stakeholder approach consisted of a number of meetings involving representatives of Member States, human rights treaty bodies, national human rights institutions, non-governmental organizations and academia, including events hosted by a number of Member States,

Taking note of the report of the High Commissioner on strengthening the United Nations human rights treaty body system,³ which includes recommendations addressed to different stakeholders,

Taking note also of the report of the co-facilitators on the open-ended intergovernmental process on how to strengthen and enhance the effective functioning of the human rights treaty body system,⁴

Expressing its appreciation for the efforts of the President of the General Assembly and the co-facilitators in the framework of the intergovernmental process,

Noting the participation and contributions of Member States in the intergovernmental process, as well as experts of the human rights treaty bodies, national human rights institutions, the Office of the United Nations High Commissioner for Human Rights and non-governmental organizations,

Emphasizing that strengthening and enhancing the effective functioning of the human rights treaty body system is a common goal shared by stakeholders who have different legal competencies in accordance with the Charter and the international human rights instruments establishing treaty bodies, and recognizing in this regard the ongoing efforts of different treaty bodies towards strengthening and enhancing their effective functioning,

[...]

10. **Encourages** States parties to continue their efforts to nominate experts of high moral standing and recognized competence and experience in the field of human rights, in particular in the field covered by the relevant treaty, and, as appropriate, to consider adopting national policies or processes with respect to the nomination of experts as candidates for human rights treaty bodies;

[...]

12. **Requests** the Office of the United Nations High Commissioner for Human Rights to include in the documentation prepared for elections of members of human rights treaty bodies at meetings of States parties an information note on the current situation with respect to the composition of the treaty body, reflecting the

3 A/66/860.

4 A/68/832.

balance in terms of geographical distribution and gender representation, professional background and different legal systems, as well as the tenure of current members;

13. **Encourages** States parties, in the election of treaty body experts, to give due consideration, as stipulated in the relevant human rights instruments, to equitable geographical distribution, the representation of the different forms of civilization and the principal legal systems, balanced gender representation and the participation of experts with disabilities in the membership of the human rights treaty bodies;

[...]

36. **Notes** the adoption, at the twenty-fourth annual meeting of the Chairs of the human rights treaty bodies, held in Addis Ababa from 25 to 29 June 2012, of the guidelines on the independence and impartiality of members of the human rights treaty bodies (the Addis Ababa guidelines),⁵ which are aimed at ensuring objectivity, impartiality and accountability within the treaty body system, in full respect for the independence of the treaty bodies, and in this regard encourages the treaty bodies to implement the guidelines in accordance with their mandates;

[...]

81st plenary meeting
9 April 2014

5 A/67/222 and Corr.1, annex I.

COUNCIL OF EUROPE. GUIDELINES OF THE COMMITTEE OF MINISTERS ON THE SELECTION OF CANDIDATES FOR THE POST OF JUDGE AT THE EUROPEAN COURT OF HUMAN RIGHTS.

CM (2012)40 Addendum final. 29 march 2012

EXPLANATORY MEMORANDUM

A. General introduction

1. The human rights protection system based upon the European Convention on Human Rights (“the Convention”) is in large part distinguished and made effective by the judicial nature of its control mechanism, the European Court of Human Rights (“the Court”). The authority and credibility of that Court, and thus of the Convention system as a whole, depends upon the quality of its judges. Each judge of the Court is elected by the Parliamentary Assembly from a list of three candidates nominated by a High Contracting Party. It is therefore vital that these candidates are of the highest possible quality.

2. The Interlaken High Level Conference on the future of the Court (held by the Swiss chairmanship of the Committee of Ministers on 18-19 February 2010) reaffirmed “the need for maintaining the independence of the judges and preserving the impartiality and quality of the Court” and called upon States Parties and the Council of Europe to “ensure, if necessary by improving the transparency and quality of the selection procedure at both national and European levels, full satisfaction of the Convention’s criteria for office as a judge of the Court, including knowledge of public international law and of the national legal systems as well as proficiency in at least one official language. In addition, the Court’s composition should comprise the necessary practical legal experience”.¹

3. Likewise, the Izmir High Level Conference on the future of the Court (held by the Turkish chairmanship of the Committee of Ministers on 26-27 April 2011) invited the Committee of Ministers “to continue its reflection on the criteria for office as judge of the Court and on the selection procedures at national and international level, in order to encourage applications by good potential candidates and to ensure a sustainable recruitment of competent judges with relevant experience and the impartiality and quality of the Court”.²

4. The present Guidelines have been adopted further to these Conferences and the decisions taken by the Committee of Ministers subsequent to them, as part of the Interlaken Process of reform of the Convention system.

1 See the Preamble to the Interlaken Declaration, paragraph 8.a.

2 See the Izmir Declaration, paragraph 7.

B. Sources of standards and norms

5. The Convention deals with the issue of the Court's judges in Articles 20-23, which read as follows:

Article 20, Number of judges

The Court shall consist of a number of judges equal to that of the High Contracting Parties.

Article 21, Criteria for office

- 1 The judges shall be of high moral character and must either possess the qualifications required for appointment to high judicial office or be jurisconsults of recognised competence.
- 2 The judges shall sit on the Court in their individual capacity.
- 3 During their term of office the judges shall not engage in any activity which is incompatible with their independence, impartiality or with the demands of a full-time office; all questions arising from the application of this paragraph shall be decided by the Court.

Article 22, Election of judges

The judges shall be elected by the Parliamentary Assembly with respect to each High Contracting Party by a majority of votes cast from a list of three candidates nominated by the High Contracting Party.

Article 23, Terms of office and dismissal

- 1 The judges shall be elected for a period of nine years. They may not be re-elected.
- 2 The terms of office of judges shall expire when they reach the age of 70.
- 3 The judges shall hold office until replaced. They shall, however, continue to deal with such cases as they already have under consideration.
- 4 No judge may be dismissed from office unless the other judges decide by a majority of two-thirds that that judge has ceased to fulfil the required conditions.

6. As can be seen, the criteria of Article 21(1) are expressed in general terms. As this Explanatory Memorandum will make clear, these may be interpreted and applied in different ways in the context of different national legal systems, provided that their underlying purpose is fulfilled.

7. It is apparent from Article 22 of the Convention that the quality of the Court's judges depends in the first place on the quality of the candidates that are nominated by the High Contracting Parties. Article 22 of the Convention gives to the Parliamentary Assembly exclusive competence for electing a judge to the Court from the national lists. If a list is not composed of suitable candidates, all that the Assembly can do is reject it.

8. In order to clarify its expectations and thereby assist States in fulfilling their own responsibilities, the Parliamentary Assembly has over the years used its direct practical experience to develop a body of recommendations to States Parties concerning national procedures for the selection of candidates for judge at the Court. Many of these recommendations have been incorporated into the Committee of Ministers' Guidelines. The present Explanatory Memorandum indicates where this is the case.

9. The Court has in the past been asked to give an opinion on certain of the Assembly's practices.³ This opinion – which concerned the Assembly's requirement that the lists of candidates presented by States respect the principle of gender equality, despite this not being one of the criteria set out in the Convention – contains important clarification of the legal significance of the Assembly's approach.

³ See *Advisory opinion on certain questions concerning the lists of candidates submitted with a view to the election of judges to the European Court of Human Rights*, 12 February 2008.

10. The Court found that “the Assembly may take account of additional criteria [to those found in Article 21 of the Convention] for the purposes of choosing between candidates put forward by a Contracting Party and may, as it has done in a bid to ensure transparency and foreseeability, incorporate those criteria in its resolutions and recommendations. Indeed, neither Article 22 nor the Convention system sets any explicit limits on the criteria which can be employed by the Parliamentary Assembly in choosing between the candidates put forward. Hence, it is the Assembly’s custom to consider candidates also “with an eye to a harmonious composition of the Court, taking into account, for example, their professional backgrounds and a gender balance”... [The] Court notes that the inclusion of a member of the under-represented sex is not the only criterion applied by the Assembly which is not laid down by Article 21(1). The same is true of the criterion that candidates should have “sufficient knowledge at least one of the official languages” ... and of the criteria listed in the report of the Committee on Legal Affairs and Human Rights concerning Resolution 1366... In the Court’s view, however, the latter criteria can be legitimately considered to flow implicitly from Article 21(1) and, in a sense, explain it in greater detail... [Although] the aim of ensuring a certain mix in the composition of lists of candidates is legitimate and generally accepted, it may not be pursued without provision being made for some exceptions designed to enable each Contracting Party to choose national candidates who satisfy all the requirements of Article 21(1).”

11. In effect, the Court held that Article 22 of the Convention does not limit the Assembly to assessing candidates only against the criteria set out in Article 21(1) of the Convention; it may elaborate on Article 21(1) by introducing additional criteria that “flow” from them and “explain them in greater detail”; and it may apply other legitimate principles (such as gender balance), provided that in doing so, it does not impede satisfaction of the Article 21(1) criteria.

12. Given the Assembly’s decisive role in the election of judges, High Contracting Parties must therefore present lists of candidates that conform to all of the criteria applied by the Assembly, to avoid the risk that they are rejected.

13. Finally, it should be recalled that, on 10 November 2010, the Committee of Ministers adopted Resolution Res(2010)26 on the establishment of an Advisory Panel of Experts on Candidates for Election as Judge to the European Court of Human Rights. In this resolution, the Committee of Ministers, having recalled the Interlaken Declaration, stated its conviction that “the establishment of a Panel of Experts mandated to advise on the suitability of candidates that the member States intend to put forward for office as judges of the Court would constitute an adequate mechanism in this regard”. This new mechanism was explicitly framed in the context of “the responsibility of the High Contracting Parties to the Convention to ensure a fair and transparent national selection procedure”.

Definitions

14. For the purposes of the Guidelines and the present Explanatory Memorandum, “applicant” is taken to mean a person applying at national level to be a candidate for election as judge of the Court and “candidate” is taken to mean an applicant successful at national level whose candidature is transmitted by a State Party to the Parliamentary Assembly, in accordance with Article 22 of the Convention.

C. Explanation and examples of good practice

I. *Scope of the Guidelines*

15. The Guidelines apply to national procedures for the selection of candidates for judge at the European Court of Human Rights. They are intended to cover all stages of this procedure, including the establishment of the procedure, the identification of criteria applicable to the inclusion of candidates on a list, the composition and procedures of the selection body responsible for recommending candidates to the final decision-maker and the role of the final decision-maker. They apply prior to presentation of a proposed list of candidates to the Advisory Panel and thus also before submission of the list to the Parliamentary Assembly.

16. Fundamental principles of democracy and the rule of law underpin and inform the Guidelines, notably those of fairness, transparency and consistency. Where relevant, the Explanatory Memorandum clarifies the principles applicable to particular issues.

17. The Guidelines are addressed to member States and in particular to those authorities that are involved in the selection of candidates for judge at the Court. They contain both binding and non-binding standards, as reflected in the language used and made clear in the Explanatory Memorandum.

18. The Guidelines relate only to the selection by a High Contracting Party of a list of candidates for election to the Court; they do not relate to the selection of lists of potential ad hoc judges. The principles set out in the Guidelines may nevertheless also be applicable *mutatis mutandis* to the selection of potential ad hoc judges.

II. *Criteria for the establishment of lists of candidates*

1. *Candidates shall be of high moral character.*

20. The requirement that judges be of high moral character is contained in Article 21 of the Convention, which is binding on States as a matter of international treaty law. This implies that candidates must also be of high moral character. A candidate's behaviour and personal status must be compatible with holding judicial office.

21. As an example of good practice, applicants are asked to declare whether anything they have said, written or done, should it be made public, would be capable of bringing the Court into disrepute (United Kingdom). Written declarations to the same end are also required of candidates in Poland.

19. Section II sets out the requirements that apply to individual candidates and to lists of candidates. These requirements are either taken directly from the Convention – some of them being conditions that must implicitly be met if relevant Convention provisions are to be satisfied – or from recommendations of the Parliamentary Assembly or exhortations found in the Interlaken Declaration that flow from and elaborate upon Convention provisions. The only exception is the requirement relating to gender balance, whose status has been clarified by the Court in its advisory opinion (see para. 9 above).

2. *Candidates shall possess the qualifications required for appointment to high judicial office or be jurisconsults of recognised competence.*

22. The requirement relating to the qualifications and competence of judges of the Court is contained in Article 21 of the Convention, which is binding on States as a matter of international treaty law. This implies that candidates must also possess these attributes. They must be professionally qualified and competent to exercise the

office of judge at the Court. This may be reflected in requirements for specific qualifications or a certain length of experience, possibly fixed.

23. Examples of good practice include the following:

- Applicants must have at least a Master's degree in law and practical experience in legal affairs. They must fulfil the criteria for judges in Estonia as set out in art. 47 of the Court's Act (Estonia).
- Applicants must show a high level of achievement and experience (Ireland).
- Candidates must meet the requirements for election to judge of either the Constitutional or the Supreme Court (Slovenia).
- Candidates must meet the requirements for appointment to higher national courts or be of equivalent professional standing (Poland, United Kingdom).

3. *Candidates must, as an absolute minimum, be proficient in one official language of the Council of Europe (English or French) and should also possess at least a passive knowledge of the other, so as to be able to play a full part in the work of the Court.*

24. The first element ("absolute minimum") is taken from the paragraph 8.a. of the Interlaken Declaration, adopted by high representatives of the States Parties. The second element is taken from paragraph 4.4 of Parliamentary Assembly Resolution 1646(2009) on the nomination of candidates and election of judges to the European Court of Human Rights.⁴ In its Resolution 1366(2004) on candidates for the European Court of Human Rights, as amended, the Assembly has decided not to consider lists of candidates where the candidates "do not appear to possess an active knowledge of one and a passive knowledge of the other official language of the Council of Europe", although the Assembly may accept from candidates statements of an intention to follow intensive classes in the weaker language, if elected.

25. The Court's working methods involve many documents in either English or French only and relatively few in both. This requires that judges be able to read and assimilate technical, complex and nuanced documents in both languages. They must be able to direct and supervise the drafting of such documents in one of the official languages. Their language abilities must be such as to inspire confidence on the part of other courts, lawyers, applicants to the Court and the general public. Between otherwise equivalent candidates, States should therefore prefer those with the relevant levels of ability in both languages. Information on this requirement could be made public well in advance of the launching of the selection procedure, so as to allow the possibility to develop any required additional language skills in the meantime.⁵

26. Examples of good practice include the following:

- Applicants must be proficient in one of the official languages of the Council of Europe and possess a passive knowledge of the other (Bosnia and Herzegovina).
- Active knowledge of one official language of the Council of Europe and passive knowledge of the other (Croatia).
- Active knowledge of one official language is a basic criterion; knowledge of the other is a criterion of preference (Czech Republic).

4 See also Parliamentary Assembly Resolution 1366(2004) (as modified by Resolutions 1426(2005), 1627(2008) and 1841(2011)), para. 3(iii) (a); and Parliamentary Assembly doc. 11767 of 2008, paras. 11-12, 21 & 24-25.

5 Potential applicants may find it useful were the required level of language proficiency to be expressed by reference to the European Language Passport.

- Applicants must have advanced proficiency in one official language and at least passive knowledge of the other (Estonia).
- Operational working knowledge of French (Ireland, where English is one of the official languages).
- Applicants must have a good command of written and spoken English or French and, as a minimum, the ability to read and understand the other (Norway).
- Applicants must be fluent in at least one official language; fluency in both is an advantage (Serbia).

4. *Candidates need to have knowledge of the national legal system(s) and of public international law. Practical legal experience is also desirable.*

27. The requirement relating to candidates' legal knowledge derives from paragraph 8.a. of the Interlaken Declaration. Although this criterion does not supersede Article 21 of the Convention, a high level of knowledge in these fields should be taken as an implicit requirement for candidates for judge at the Court and relative levels of knowledge could be taken into account when choosing between applicants of otherwise equal merits. As the judges sit on an international court playing a subsidiary role in supervising national implementation of the Convention, it is important for them to have knowledge of both public international law and the national legal system(s). Although the Court's composition benefits from a range of legal expertise, it is generally advantageous that applicants have expertise in human rights, notably the Convention and the Court's case-law.

28. Examples of good practice include the following:

- Applicants must have knowledge of public international law and of the national legal system (Albania).
- Applicants must possess a good knowledge of national law and a solid training and practical experience in the field of European human rights protection (Monaco).
- Applicants should in principle have judicial experience and a thorough knowledge of the Convention (the Netherlands).

5. *If elected, candidates should in general be able to hold office for at least half of the nine-year term before reaching 70 years of age.*

29. The requirement relating to judges' age is contained in Article 23 of the Convention. High Contracting Parties should avoid proposing candidates who, in view of their age, would not be able to hold office for at least half the nine-year term before reaching the age of 70.⁶ This contributes to a Court of stable, experienced composition, avoiding the disruption that may be caused by more frequent election of new judges.

30. Examples of good practice include the following:

- Between applicants of equal merit, preference would be given to the applicant who would be able to serve all or at least more of the term of office (the Netherlands).
- Applicants who would be unable to serve a full term may be asked whether they feel they would nevertheless be able to make a significant contribution to the Court's activities (United Kingdom).

6. *Candidates should undertake not to engage, if elected and for the duration of their term of office, in any activity incompatible with their independence or impartiality or with the demands of a full-time office.*

31. The requirement relating to incompatible activities is contained in Article 21(3) of the Convention. Although this criterion does not relate to the quality of a candidate, it is relevant to determining whether they may fulfil

⁶ See the Explanatory Report to Protocol No. 14 to the Convention, para. 53.

the requirements to be a judge of the Court. The possibility of a candidate, if elected, then failing to satisfy this requirement may be reduced by their giving an appropriate undertaking during the national selection procedure. It should be recalled that the Court is the final authority to determine whether or not judges meet the requirements of Article 21(3).

32. Examples of good practice include the following:

- Applicants are asked to complete and sign a form including a provision stating that there are no obstacles to their taking office as judge at the Court (Poland, Russian Federation).
- Applicants make a declaration accepting nomination as candidate, implying inter alia a willingness to cease any incompatible activities (Slovakia).
- Applicants may be asked at interview whether they currently engage in any potentially incompatible activities and, if so, whether they would be willing to cease doing so should they be elected (United Kingdom).

7. *If a candidate is elected, this should not foreseeably result in a frequent and/or long-lasting need to appoint an ad hoc judge.*

33. This requirement is based upon Parliamentary Assembly Recommendation 1649(2004), which the Committee of Ministers, in its reply thereto, has invited member States' governments to make every effort to meet. Its purpose is to minimise the foreseeable recourse to ad hoc judges, whose appointment procedures are not subject to the same safeguards of independence and impartiality and whose presence would affect the stability of the Court's composition. This criterion may create a dilemma between attracting the largest possible number of applicants, on the one hand, and not appointing judges whom it will be often necessary to exempt, on the other.

8. *Lists of candidates should as a general rule contain at least one candidate of each sex, unless the sex of the candidates on the list is under-represented on the Court (under 40% of judges) or if exceptional circumstances exist to derogate from this rule.*

34. The first element ("general rule") is taken from the Committee of Ministers' reply to Parliamentary Assembly Recommendation 1649(2004). The second element ("unless") is taken from Parliamentary Assembly Resolution 1426(2005). The third element ("exceptional circumstances") is taken from Parliamentary Assembly Resolutions 1627(2008) and 1841(2011), adopted subsequent to the Court's Advisory Opinion.⁷

35. The Assembly's requirement sets the general rule that lists of candidates should contain persons of both sexes. There are two possible exceptions. The first exception arises if, when the list is presented, either of the sexes makes up less than 40% of judges on the Court, in which case the list of candidates may be composed only of persons of that sex. The second exception arises if there are exceptional circumstances which justify derogation from the general rule. The Assembly has defined "exceptional circumstances" as being "where a Contracting Party has taken all the necessary and appropriate steps to ensure that the list contains candidates of both sexes meeting the requirements of paragraph 1 of Article 21 of the European Convention on Human Rights."⁸

7 See *Advisory opinion on certain legal questions concerning the lists of candidates submitted with a view to the election of judges to the European Court of Human Rights*, 12 February 2008.

8 See Parliamentary Assembly Resolution 1366(2004), as modified by its Resolutions 1426(2005), 1627(2008) and 1841(2011).

36. Examples of good practice include the following:
- The selection is carried out respecting the principle of equity of genders (Albania).
 - The call for applicants specifically mentions women (Belgium).
 - This rule is followed in Bosnia and Herzegovina and Poland.
 - The selection commission must produce a long list including both sexes: if there are two possible candidates for third place on the list, the candidate of the otherwise unrepresented sex is preferred. If there is no candidate of the sex under-represented (<40%) on the Court, the list is accompanied by a note explaining the procedure and reasons for a single-sex list (Czech Republic).
 - Every list should contain candidates of both sexes (Denmark).
 - Lists of candidates should as a rule contain at least one candidate of each sex (Hungary).
 - The attention of the independent selection panel is brought to the Parliamentary Assembly's requirements (Ireland).
 - The call for applicants includes information on the Parliamentary Assembly's requirements for gender balance (Slovakia).
 - This requirement is observed in "the former Yugoslav Republic of Macedonia".
 - The call for applicants states that the list must contain at least one man and at least one woman; the selection panel is asked to bear the Parliamentary Assembly's requirement in mind (United Kingdom).

I. Procedure for eliciting applications

1. The procedure for eliciting applications should be stable and established in advance through codification or by settled administrative practice. This may be a standing procedure or a procedure established in the event of each selection process. Details of the procedure should be made public.

37. The need for a stable and established procedure reflects the rule of law principles of transparency and consistency, and thus also legal certainty. Applicants and the general public should be able to rely upon a certain procedure being followed, although that procedure need not be the same for every successive selection process. The need for accessibility of details of the procedure reflects the principle of transparency. Applicants and the general public should be able to know in advance the procedure that will be followed.

38. Examples of good practice include the following:
- The procedure is codified by Government Resolution no. 1063 of 26 August 2009 (Czech Republic).
 - The procedure is codified by Amendment No. 741/2010 to the Act on Judicial Appointments, No 205/2000 (Finland).
 - The procedure is described in a policy document signed by the Ministers of Foreign Affairs and of Justice (the Netherlands).
 - The procedure is governed by Order no. 1 of the Minister of Foreign Affairs of 13 January 2012 (Poland).
 - The legal framework is represented by Art. 5 of the Government Decree no. 94/1999 on the participation of Romania in proceedings taking place before the European Court of Human Rights and the Committee of Ministers (Romania).
 - The formal legal basis is set up by the acts of the Ministry of Justice, which outline the overall sequence of the selection procedure and define the bodies involved in it (Russian Federation).
 - The procedure is governed by Article 141a of the Constitution, which gives competence to the Judicial

Council to submit a list of candidates to the Government, coupled with the Law on the Judicial Council, which lays down the selection criteria and requirements to be met by candidates, names the authorities that are competent to nominate applicants and sets out the rules of procedure (Slovakia).

- The procedure for nominating candidates is extensively regulated by the Act on the Nomination of Candidates from the Republic of Slovenia to Judges at International Courts (Slovenia).
- The procedure is governed by decrees of the Government and President. The former regulates the composition of the selection body; the latter regulates the requirements for candidates (Ukraine).

39. As regards making public in advance the details of the procedure to be followed, examples of good practice include the following:

- details appear in the call for applications;⁹
- details appear on the government website;¹⁰
- details appear in the relevant legal text, which is publicly available.¹¹

2. *The call for applications should be widely publicly available, in such a manner that it could reasonably be expected to come to the attention of all or most potentially suitable candidates.*

40. The need for an effectively public call for applications reflects the principles of transparency and also fairness. The wider the variety of means of publication that are employed, as appropriate in national circumstances, the more fully these principles will be satisfied.

41. Examples of practices that may be employed, in combination, to achieve this result include the following:

- publication in the official journal/ other official publications;¹²
- publication on Government websites;¹³
- publication in national and, where appropriate, regional newspapers;¹⁴
- publication in the specialised legal press;¹⁵
- dissemination via judicial bodies (e.g. presidents of the highest courts, judicial council, association of judges);¹⁶
- dissemination via lawyers' professional associations;¹⁷
- dissemination via Ombudsmen/ national human rights institutions;¹⁸

9 As in e.g. Croatia, Finland, Portugal, Russian Federation, Serbia.

10 As in e.g. Croatia, the Netherlands, Portugal, Russian Federation, Serbia, Ukraine.

11 As in e.g. Republic of Moldova, Slovakia, Ukraine.

12 As in e.g. Belgium, Cyprus, Estonia, Finland, Lithuania, Republic of Moldova, Portugal, Russian Federation, Serbia, Slovenia, "the former Yugoslav Republic of Macedonia," Ukraine.

13 As in e.g. Czech Republic, Denmark, Estonia, Finland, Germany, Greece, Ireland, Norway, Portugal, Russian Federation, Serbia, Slovakia, Slovenia, Ukraine.

14 As in e.g. Estonia, Finland, Germany, Ireland, the Netherlands, Lithuania, Portugal, Bosnia and Herzegovina, Slovakia, Switzerland, "The former Yugoslav Republic of Macedonia".

15 As in e.g. Denmark, Germany, Ireland, the Netherlands, Norway, Russian Federation, Slovenia.

16 As in e.g. Belgium, Croatia, Cyprus, Czech Republic, Germany, Greece, Ireland, Norway, Poland, Portugal, Slovakia, Switzerland.

17 As in e.g. Croatia, Cyprus, Czech Republic, Denmark, Estonia, Germany, Ireland, Lithuania, Norway, Poland, Portugal, Slovakia, Sweden.

18 As in e.g. Cyprus, Germany, Ireland, Norway, Poland.

- dissemination via universities;¹⁹
- dissemination via human rights NGOs.²⁰

3. States should, if necessary, consider taking additional appropriate measures in order to ensure that a sufficient number of good applicants present themselves to allow the selection body to propose a satisfactory list of candidates.

42. Whether or not experience shows that there is difficulty in attracting a sufficient number of applications of the necessary quality to allow the selection body to propose a satisfactory list of candidates, it may nevertheless be considered advisable to take appropriate measures to raise awareness of the call for applicants and, for example, Court judges' working conditions. It may also be considered appropriate to take measures reflecting gender-related considerations and to encourage interest on the part of ethnic or other minorities historically less likely to produce applicants. Such steps would also have the advantage of reinforcing measures taken under Guideline III.2 (see above).

43. The following measures, if necessary, may be considered appropriate:

- maximum transparency in the selection procedure;
- awareness-raising on the work and life of a judge in Strasbourg, including with a view to correcting misconceptions about the conditions of employment:
 - public lectures;
 - articles in relevant journals;
 - interviews and articles in the wider media (e.g. legal sections of national newspapers);
 - speeches and interventions by the sitting/ former judge;
- transmitting information about the imminent call for applicants to legal networks, including the women's barristers' network, and/ or universities:
 - providing support to relevant events organised by such networks;
- particular measures aimed at increasing applications by persons from backgrounds that are historically less likely to produce applicants or, for example, to encourage applications from members of the sex under-represented on the Court;
- asking relevant independent persons/ organisations to encourage potentially suitable persons to apply;
- use of new media, including government websites;
- taking measures to ensure suitable professional opportunities for former judges upon leaving office.

4. If the national procedure allows or requires applicants to be proposed by third parties, safeguards should be put into place to ensure that all applicants are considered fairly and impartially, and that suitable applicants are not deterred or prevented from putting themselves forward.

44. In some countries, it is considered useful and appropriate to invite certain third parties, including public authorities, national human rights institutions and non-governmental organisations, either to invite suitable persons to apply or themselves to nominate such persons. Such a practice may be seen as helping to ensure that there are sufficient suitable applicants to allow a list of three candidates of the highest possible calibre to be presented to the Parliamentary Assembly. Should consideration be given to introducing such a practice, it should be accompanied by procedural safeguards ensuring that such applicants are not improperly advantaged,

¹⁹ As in e.g. Belgium, Croatia, Czech Republic, Greece, Hungary, Ireland, Lithuania, Norway, Poland, Slovenia.

²⁰ As in e.g. Hungary, Poland.

which would be inconsistent with the principles of fairness and impartiality and could deter other potentially suitable applicants from presenting themselves.

45. Examples of such practices include the following:

- Federal courts, the Office of the federal Public Prosecutor General, the Bar Association and the Institute for Human Rights are reminded that they are free to encourage persons to apply. All applicants are treated in the same way (Germany).
- The Supreme Court, the Office of the Attorney-General, the Norwegian Centre for Human Rights and the Norwegian Bar Association are encouraged to put forward the names of one woman and one man (Norway).
- The Supreme Judicial Council and the Supreme Council of the Administrative and Fiscal Courts are asked to nominate two potential candidates, one man and one woman, judges at the respective courts. Any such applicants are treated in the same way as any others (Portugal).
- Candidates must be proposed by members of the Judicial Council, the Ministry of Justice, the professional association of judges or other lawyers' professional associations (Slovakia).

5. *A reasonable period of time should be given for submission of applications.*

46. This requirement reflects the principle of fairness: potentially interested persons should not lose the opportunity of applying because of their circumstances at a particular moment in time (e.g. absence for personal or professional reasons, illness, etc.) and should have enough time to prepare and submit their applications properly.

47. In the Czech Republic, a minimum period of two months following the call for applications is allowed for applications.

IV. Procedure for drawing up the recommended list of candidates

1. The body responsible for recommending candidates should be of balanced composition. Its members should collectively have sufficient technical knowledge and command respect and confidence. They should come from a variety of backgrounds, be of similar professional standing and be free from undue influence, although they may seek relevant information from outside sources.

48. The composition of the selection body is an essential consideration. It is generally established under the authority of the government and contains members drawn from the administration, and thus cannot be considered independent in the strict sense of the word. It should nevertheless be free from undue influence since the composition of the final list of candidates must not be, and must not appear to be a result of political patronage or preference: all those eventually included on the list of candidates should be able to meet the requirements of independence and impartiality and to sit in an individual capacity, as set out in Article 21 of the Convention.

49. The selection body, taken as a whole, must have the technical knowledge necessary to be able to engage with applicants on matters of relevant substance and thereby to assess their relative merits. This expertise may be supplemented by that of outside experts for specific purposes, such as testing language abilities. It should also be pluralistic, representing a variety of backgrounds and institutional perspectives and avoiding any appearance of partiality. Its members should be of similar professional standing, so that their views may carry equal weight during deliberations.

50. Similarly, the standing of members of the selection body must be sufficient as to allow them to engage freely and effectively with applicants, without undue (and inappropriate) deference.

51. Depending on national circumstances, members of the selection body may be drawn from some of, for example, the following:

- Office of the Prime Minister;²¹
- Ministry of Justice;²²
- Ministry of Foreign Affairs;²³
- Office of the Attorney-General/ Prosecutor-General;²⁴
- Government Agent;²⁵
- parliamentarians (member of relevant parliamentary committee);²⁶
- highest national court(s), judicial council, other judiciary;²⁷
- academics or human rights experts;²⁸
- Ombudsmen;²⁹
- bar association or other professional legal association or senior practicing lawyer(s);³⁰
- non-governmental organisation(s).³¹

52. Relevant to this guideline is the practice in Estonia, where members of the selection body are required to act on the basis of the interests of the Republic of Estonia and their own convictions, in accordance with legal acts, ethical considerations and good practices.

53. In some countries, it may be considered useful and appropriate for the selection body to seek advice from an outside source. This may depend on the composition of the selection body, for example the extent of its technical knowledge. It is important that, should it have recourse to information or advice from an outside source, the selection body continues to act fairly and impartially and does not give any appearance of failing to do so.

54. Examples of such practices include the following:

- All members of the Committee are entitled to consult with the institution that they are representing and ask for an expert opinion (Estonia).
- The Committee may, if necessary, liaise with the relevant international bodies (Finland).

21 As in e.g. Finland, Lithuania, Poland.

22 As in e.g. Croatia, Cyprus, Czech Republic, Estonia, Finland, Greece, Lithuania, Republic of Moldova, Poland, Russian Federation, Sweden, "the former Yugoslav Republic of Macedonia," Ukraine.

23 Cyprus, Czech Republic, Estonia, Finland, Greece, Lithuania, Republic of Moldova, Poland, Russian Federation, Serbia, Sweden, "the former Yugoslav Republic of Macedonia," Ukraine.

24 As in e.g. Finland, Ireland, Republic of Moldova, Norway, Portugal.

25 As in e.g. Belgium, Czech Republic, Republic of Moldova, Poland, Russian Federation.

26 As in e.g. Belgium, Croatia, Lithuania, Switzerland, "the former Yugoslav Republic of Macedonia," Ukraine.

27 As in e.g. Belgium, Croatia, Cyprus, Czech Republic, Estonia, Finland, Greece, Lithuania, Republic of Moldova, the Netherlands, Norway, Portugal, Romania, Slovakia, Switzerland, "the former Yugoslav Republic of Macedonia," Ukraine.

28 As in e.g. Croatia, Finland, Republic of Moldova, the Netherlands, Russian Federation.

29 As in e.g. Czech Republic, Estonia, Norway, Ukraine.

30 As in e.g. Czech Republic, Finland, Ireland, Republic of Moldova, Norway, Portugal, Russian Federation.

31 As in e.g. Republic of Moldova, Russian Federation, Ukraine.

- The selection body may consult with whomsoever it sees fit; for example, the bar association (the Netherlands).
- The Committee may seek advice from relevant external actors and should seek advice from former Norwegian judges at the Court (Norway).

2. *All serious applicants should be interviewed unless impracticable on account of their number, in which case the body should draw up, based on the applications, a shortlist of the best candidates. Interviews should generally be based upon a standardised format.*

55. This requirement reflects the principles of fairness and consistency in the treatment of applicants. The preference should therefore be to interview all applicants. Should, however, there be so many that this becomes impracticable, or should certain applicants be so clearly unsuitable that their prospects of success may be immediately discounted, then it may be acceptable for the selection body to draw up a shortlist of applicants on paper, who would then be interviewed. In this case, there may be a need for procedural safeguards to ensure that this process is foreseeable and transparent.

56. Examples of good practice include the following:

- All applicants are interviewed (Belgium).
- Clearly unsuitable applications are excluded administratively; the selection body is then asked whether it wishes to interview all remaining applicants or prepare a shortlist of applicants for it to interview (United Kingdom).

57. The requirement that interviews should generally be based upon a standardised format reflects the principles of fairness and consistency. All applicants should be assessed against the same essential standards. They should be asked to give details of how their qualifications and experience satisfy the criteria for office. Questions should address both technical issues relating to, for example, legal or linguistic knowledge, and issues relating to professional ethics. This, of course, should not exclude further exploration of issues arising in answers given to standard questions or of issues specific to the qualifications, experience or other characteristics of a particular applicant.

58. Examples of good practice include those in Belgium; Croatia; and the Russian Federation, where the interview format and essential questions are standardised.

3. *There should be an assessment of applicants' linguistic abilities, preferably during interview.*

59. Given the particular nature of linguistic competence and its importance to the operational capacity of Court judges, it should be specifically assessed during the selection process. This should preferably occur during interview, by members of the selection body or otherwise; the alternative, of assessment on the basis of certificates, may not be sufficient.

60. Examples of good practice include the following:

- Applicants are asked at interview to translate an extract from a Court judgment within a certain time-limit and are subsequently interviewed in English or French on issues relating to their legal experience and knowledge of the Convention (Russian Federation).
- Language proficiency is usually tested by the members of the selection body during verbal interviews and written examination (Republic of Moldova).
- Language is also tested at interviews in countries such as Belgium, Germany and Hungary.

4. All members should be able to participate equally in the body's decision, subject to the requirement that its procedures ensure that it is always able to reach a decision.

61. The requirement that all members should be able to participate equally in the body's decision relates to the principles of fairness and impartiality. It is connected to the need for the selection body to be free from undue influence and sufficiently pluralistic to ensure a variety of backgrounds and institutional perspectives and to consist of individuals of equal status. Examples of good practice include Belgium, Croatia and the United Kingdom.

62. Given the importance of filling vacancies on the Court in good time, it is essential that procedural obstacles to the nomination of lists of candidates do not arise on account of the selection body being unable to reach a decision.

63. Examples of good practice include the following:

- In Croatia, the body seeks to decide by consensus but there may be majority vote if necessary.
- In Switzerland, members of the selection body rank applicants in order, with points being given in accordance with this order, the recommended list of candidates containing those applicants that have accumulated the lowest number of points (similar to the "Borda count" system).
- In Poland and Ukraine, decisions are taken by majority vote, with the Chairperson having a casting vote in case of a split decision.

V. Finalisation of the list of candidates

1. Any departure by the final decision-maker from the selection body's recommendation should be justified by reference to the criteria for the establishment of lists of candidates.

64. This requirement reflects the principles of fairness, transparency, consistency and impartiality. The final decision will be a matter for the government, as the State's representative in international affairs, which thus retains the possibility of departing from the selection body's proposal. Any departure from the selection body's recommendation should nevertheless be justified by reference to the same underlying criteria for the establishment of lists of candidates (see Guideline II), in order to avoid the final decision either being or appearing to be arbitrary.

65. Examples of good practice include the following:

- The government may only choose from amongst the first five on the selection body's ordered list of applicants (Belgium), on the basis of objective, relevant criteria.
- The Ministry of Justice takes the final decision on the list of candidates; if it considers deviating from the selection committee's proposal, it must ask the committee for an opinion on any applicants who were not on the committee's short-list (Norway).

2. Applicants should be able to obtain information concerning the examination of their application, where this is consistent with general principles of confidentiality in the context of the national legal system.

66. This requirement reflects the principle of transparency. Applicants should be able to obtain information on the treatment and outcome of their application (but not necessarily on that of other applicants, other than to know which were included on the final list of candidates), in accordance with national laws on confidentiality and data protection.

67. Examples of good practice include Belgium and the United Kingdom, where an applicant who is interviewed but not successful is usually able to obtain reasons, usually from the chair of the selection body.

3. *The final list of candidates to be presented to the Parliamentary Assembly should be made public by the High Contracting Party at national level.*

68. The need for making public the outcome of the procedure, i.e. the final list of candidates presented to the Parliamentary Assembly, reflects the principle of transparency.

69. Examples of good practice include:

- publication of the list via the government's website;³²
- publication of the list in the official journal;³³
- other means ensuring wide dissemination of the list.³⁴

32 As in e.g. Croatia, Estonia, Greece, Iceland, Latvia, the Netherlands, Poland, Portugal, Slovakia, Switzerland.

33 As in e.g. Estonia, Portugal.

34 As in e.g. Finland (publication in an appropriate manner), Lithuania (list finalised by a government decision), Republic of Moldova (wide dissemination), Ukraine (announcement and publication by the selection body on the final day of the competition).

GUIDELINES ON THE INDEPENDENCE AND IMPARTIALITY OF MEMBERS OF THE HUMAN RIGHTS TREATY BODIES (ADDIS ABABA GUIDELINES)*

I. Preamble

Recognizing the importance of the human rights treaties in ensuring the independence and impartiality of the treaty body members and stressing the common will of the Chairs, at their twenty-fourth meeting convened in Addis Ababa in June 2012, to clarify and reinforce the treaty body provisions in this regard,

Recalling that the Secretary-General has affirmed that the United Nations human rights treaty body system is “one of the greatest achievements in the history of the global struggle for human rights” and that these bodies “stand at the heart of the international human rights protection system,”

Noting that the June 2012 report of the High Commissioner for Human Rights on Strengthening the United Nations Human Rights Treaty Body System, which is the outcome of extensive consultations with all stakeholders, underlined “the powers of the treaty bodies to decide on their own working methods and rules of procedure, and guarantee their independence as defined in the respective treaties”,

Noting with appreciation that the General Assembly has also recognized the important, valuable and unique role and contribution of each of the human rights treaty bodies to the promotion and protection of human rights and fundamental freedoms,

Recalling the right and statutory competence of each treaty body to adopt its own rules of procedure,

1. The twenty-fourth meeting of Chairs, following their decision at the twenty-third meeting in 2011 and after consulting their respective committees, discussed and endorsed guidelines on the independence and impartiality of treaty body members (the “Addis Ababa guidelines”) which they strongly recommend for prompt adoption by the respective treaty bodies, inter alia through inclusion, in an appropriate manner, in their rules of procedure.

* UN A/67/222

II. General principles

2. The independence and impartiality of members of the human rights treaty bodies is essential for the performance of their duties and responsibilities and requires that they serve in their personal capacity. Treaty body members shall not only be independent and impartial, but shall also be seen by a reasonable observer to be so.

3. Real or perceived conflicts of interest and challenges to the requirements of independence and impartiality may be generated by many factors, such as a member's nationality, place of residence, current and past employment, membership of or affiliation with an organization, or family and social relations. In addition, conflicts of interest may also arise in relation to the interest of a State of which a member is a national or resident. Consequently, a treaty body member shall not be considered to have a real or perceived conflict of interest as a consequence of his or her race, ethnicity, religion, gender, disability, colour, descent or any other basis for discrimination as defined in the core international human rights treaties.

4. Treaty body members commit themselves to abide by the principles of independence and impartiality when making their solemn declaration under the relevant treaty.

5. The principle of independence requires that members not be removable during their term of office, except to the extent that the treaty in question so provides. They may not be subject to direction or influence of any kind, or to pressure from the State of their nationality or any other State or its agencies and they shall neither seek nor accept instructions from anyone concerning the performance of their duties. Consequently, members are accountable only to their own conscience and the relevant treaty body and not to their State or any other State.

6. Considering that within each treaty body, members are nationals of only a limited number of States parties, it is important that the election of one of its nationals to a given treaty body shall not result in, or be thought to result in, more favourable treatment for the State or States, as the case may be, of which the member is a national. In this regard, members holding multiple nationalities shall inform, on their own initiative, the Chairperson of the relevant treaty body and its Secretariat accordingly. Members holding multiple nationalities shall not participate in the consideration of reports, individual complaints, or take part in visits or inquiries relating to any of the States of which she or he is a national.

7. All members shall avoid any action in relation to the work of their treaty body which might lead to or might be seen by a reasonable observer to lead to bias against States. In particular, members shall avoid any action which might give the impression that their own or any given State was receiving treatment which was more favourable or less favourable than that accorded to other States.

III. Application of the general principles¹

A. *Participation in consideration of State party reports and other report-related procedures*

8. A member shall not participate or influence in any way the consideration of a State party report by the treaty body, or by any of its subsidiary bodies, if he or she may be seen by a reasonable observer to have a conflict of interest with that State party. The same principle shall apply to any other treaty body procedure, such as follow-up, early warning, or urgent action, which is not specifically mentioned in these guidelines.

9. In case of a real or perceived conflict of interest with a State party, a member:

- a) Shall not participate or influence in any way the preparation, course or outcome of dialogues, discussions, or any other public meetings of the treaty body but may be present as an observer;
- b) Shall not be present during any non-public consultations, briefings or meetings with a single country focus of his or her treaty body with other entities or partners, such as United Nations entities, national human rights institutions (NHRIs) and civil society organizations (CSOs). However, the member may receive the relevant documentation;
- c) Shall not be present during discussions, deliberations or any other non-public meetings of his or her treaty body, such as preparation, drafting, discussion and adoption of concluding observations or any other related treaty body documents.

B. *Participation in the consideration of the communications*

10. A member shall not participate in, be present during, or influence in any way the examination of a communication either at the admissibility or merits stage if:

- a) The member is (i) a national of the State whose acts are impugned by the communication; (ii) has any personal or professional conflict of interest in the case; or (iii) if any other real or perceived conflict of interest is present;
- b) The member has participated in any capacity, other than as a member of his or her treaty body, in the making of any decision on the case covered by the communication.

C. *Participation in country visits and inquiries*

11. A member shall not participate in the preparation or conduct of or follow-up to a country visit or inquiry or in the consideration of ensuing reports if any real or perceived conflict of interest is present.

¹ Section A and B on the application of the general principles do not apply to the Subcommittee on Prevention of Torture.

D. Relationship with States

12. The independence and impartiality of treaty body members is compromised by the political nature of their affiliation with the executive branch of the State. Members of treaty bodies shall consequently avoid functions or activities which are, or are seen by a reasonable observer to be, incompatible with the obligations and responsibilities of independent experts under the relevant treaties.

13. When acting as a consultant or as counsel for any State in connection with the process of reporting to the treaty body on which they serve or in any other matter that might come up for consideration before his or her treaty body, treaty body members shall take all necessary measures to ensure that they do not have, and are not seen by a reasonable observer as having, a conflict of interest.

E. Other situations which might entail a situation of a possible conflict of interest

14. Individuals holding or assuming decision-making positions in any organization or entity which may give rise to a real or perceived conflict of interest with the responsibilities inherent to the mandate as member of a treaty body, shall, whenever so required, not undertake any functions or activities that may appear not to be readily reconcilable with the perception of independence and impartiality. Such organizations or entities may include private corporations or entities, CSOs, academic institutions or State-related organizations.

F. Participation in other human rights activities

15. When treaty body members participate in other human rights activities of intergovernmental organizations, such as panels, training courses and seminars, they shall make it clear that the views they are expressing are their own and not those of the treaty body in question unless expressly mandated by the latter. The same applies to meetings organized by States, CSOs and NHRIs.

G. Accountability

16. Observance of the above guidelines falls first and foremost within the individual responsibility of each treaty body member and his or her own conscience. If for any reason a member considers that he or she is facing a potential conflict of interest, he or she shall promptly inform the Chairperson of the treaty body concerned. Furthermore, if and when necessary, it is the duty of the Chairperson of the relevant treaty body to remind individual members of the content of these guidelines if the situation so requires. Ultimately the relevant committee as a whole shall take any measures deemed necessary to safeguard the requirements of independence and impartiality of its members.



Position Paper N°10

**THE SELECTION PROCESS OF
THE INTER-AMERICAN
COMMISSION AND COURT
ON HUMAN RIGHTS:**
Reflections on necessary reforms