

# STRENGTHENING from WITHIN

Law and Practice in the Selection  
of Human Rights Judges  
and Commissioners



OPEN SOCIETY JUSTICE INITIATIVE

 **icj** International  
Commission  
of Jurists



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Rights Judges and Commissioners



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**A report of the Open Society Justice Initiative  
and the International Commission of Jurists**



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# Abbreviations

ACHR	American Convention on Human Rights
ACHPR	African Commission on Human and Peoples' Rights
ACtHPR	African Court on Human and Peoples' Rights
AU	African Union
AUC	African Union Commission
CDDH	Council of Europe Steering Committee on Human Rights
CELS	Centro de Estudios Legales y Sociales
CoE	Council of Europe
CoM	Committee of Ministers
CRC	UN Committee on the Rights of the Child
DIRCO	Department of International Relations and Co-operation
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
IACHR	Inter-American Commission on Human Rights
IACtHR	Inter-American Court of Human Rights
IAHRS	Inter-American Human Rights System
ICC	International Criminal Court
ICJ	International Commission of Jurists
JAC	Judicial Appointments Commission
MFA	Ministry of/for Foreign Affairs
MJR	Ministry of Justice and Religion
MoJ	Ministry of Justice
NGO	Non-governmental organization

NHRI	National Human Rights Institutions
OAS	Organization of American States
OLC	Office of Legal Counsel
PACE	Parliamentary Assembly of the Council of Europe

# Executive Summary and Recommendations

An independent judiciary is a core principle of the rule of law. In national systems, the standards and procedures for the selection and appointment of judges are among the cornerstones on which judicial independence is built, and on which public confidence in the judiciary depends. International law and jurisprudence on the right to a fair hearing, and international standards on the independence of the judiciary, establish and affirm similar requirements for the regional human rights systems in Africa, the Americas, and Europe. The courts and commissions of these regions have played pivotal roles in establishing and enforcing today's international human rights regime, yet despite their significance, the processes by which judges and commissioners are nominated remain largely unknown and shrouded in secrecy.

In response to such secrecy, this report—a joint publication of the Open Society Justice Initiative and the International Commission of Jurists (ICJ)—fills an important gap. It focuses on nominations at the national level as a critical point of entry for improving the selection process for regional human rights judges and commissioners. In so doing, it provides detailed country profiles of 22 countries that span the three regional human rights systems: Africa (Algeria, Ethiopia, Ivory Coast, Mozambique, South Africa, Uganda, Uruguay); the Americas (Argentina, Brazil, Chile, Costa Rica, Jamaica, Panama, United States of America); and the Council of Europe (Armenia, Austria, Greece, Liechtenstein, Moldova, Norway, Slovak Republic, United Kingdom).

Nominations constitute the first in two broad but distinct phases of the appointment process, the second being election by intergovernmental political bodies from among the pool of candidates that states have nominated. In the regional human rights

context, these bodies encompass the Parliamentary Assembly of the Council of Europe (PACE), the General Assembly of the Organization of American States, and the African Union Assembly. Before examining the nomination practices of the 22 countries that are the focus here, the report addresses the international legal framework that governs judicial selections and appointments. This framework is rooted in the international right to a fair trial, which includes not only judicial freedom from political interference, but also “the procedure and qualifications for the appointment of judges,” as well as the fundamental principle of the rule of law. International standards on the independence of the judiciary—including the UN Basic Principles on the Independence of the Judiciary (endorsed by the UN General Assembly in 1985), the Bangalore Principles of Judicial Conduct (2002) and their Implementation Measures (2010), and the International Law Association’s Burgh House Principles on the International Judiciary (2004)—further detail normative standards relevant to the international bench, including as regards election and nomination procedures.

To the extent that they exist, regional standards and procedures that guide nominations are also examined in the report. Of the three, the European human rights system offers the most detailed criteria governing national selection processes. As the only “full panel” court, with one judge represented from each of the 47 member states, PACE and the Committee of Ministers of the Council of Europe have issued a series of directives and guidelines that are meant to ensure common nominations procedures across all CoE member states. While the AU and OAS have recently issued welcome resolutions meant to promote gender parity in the national nomination process, neither body has issued guidelines that set out minimum criteria for member states to follow when selecting candidates for their respective human rights courts and commissions. Only the broad language of the American Convention on Human Rights (ACHR) and the African Charter on Human and Peoples’ Rights (ACHPR), (as well as the Protocol to the African Charter) guides these processes.

From the 22 country profiles detailed herein, it is clear that the nomination practices of many states, across all regions, fall short of their legal obligations. Additional shortcomings in terms of the review and oversight exercised at the regional level are also a problem. The report’s conclusions and recommendations in both of these regards are summarized below (for full analysis and recommendations, see chapter 5).

1. *There is a lack of criteria to guide the nomination of qualified, merit-based candidates at the national level, particularly among member states of the African and Inter-American human rights systems.*

As affirmed by international standards and jurisprudence, the “overriding consideration” for service on an international bench should be merit-based. A candidate must



satisfy the professional qualifications for the position of commissioner or judge, and should meet high standards of professionalism, integrity, and independence. An essential first step is defining what these qualifications should be for the candidates who are nominated, and what standards they are expected to meet. Among those countries profiled here, member states of the Council of Europe have more consistently elaborated such criteria, following earlier directives from the CoE Parliamentary Assembly and guidelines issued by the Committee of Ministers, but among the member states of the African and Inter-American regional systems, the United States is the only country to have done so (and it has done so only sporadically). Furthermore, to date, neither the AU nor the OAS has issued any directives or guidelines on the nomination of candidates to their regional commissions and courts. In determining what national criteria should guide candidates, some countries surveyed in the report (e.g., Norway, United Kingdom) adopted a useful general rule for nominating international judges: applying the same criteria for appointment as those for appointment to the country's highest national court. Such practice is the exception rather than the norm, however, even in countries that have legal frameworks in place to guide the appointment process for national justices.

*In light of these findings, the Justice Initiative and ICJ make the following recommendations:*

- **Develop merit-based criteria.** States should develop criteria to ensure all nominated candidates are qualified and suitable to serve as a regional human rights judge or commissioner.
- **National-level requirements.** Provided that a country's requirements for eligibility in national judicial office are in accordance with international laws and standards, an advisable practice is that candidates for regional human rights courts should, at a minimum, meet the requirements for appointment to their country's higher national courts or be of equal professional standing.
- **Demonstrated competence.** The presentation of writings, opinions, and/or evidence of legal practice or advocacy that demonstrate competency in the field of international human rights law should be specifically required and requested of candidates to regional human rights courts. Candidates for regional human rights commissions should be asked to demonstrate their knowledge of international human rights law and standards, methods and challenges for human rights advocacy, the role and protection of human rights defenders, and other aspects related to the promotion and protection of human rights.
- **Regional guidance.** Regional human rights bodies should ensure that minimal standards exist to guide member states on the substantive criteria required for service.

2. *States do not nominate enough national candidates to ensure competitive elections at the regional level.*

The country profiles detailed in this report confirm a consistent practice: Outside of the Council of Europe (where states are required to nominate three candidates), states almost never nominate more than one candidate to a regional human rights commission or court. Although both the African Court Protocol and the American Convention on Human Rights grant state the right to nominate up to three candidates to the African Court and the Inter-American Commission and Court, respectively, states almost never exercise this right. The dearth of nominees contributes, in turn, to limited competition at the regional level and to a lack of gender parity on the international bench, as well under-representation among other social groups and geographic regions. There is also little evidence to indicate that states have seriously considered how to incentivize or encourage greater numbers of qualified individuals to apply for judicial posts.

*In light of these findings, the Justice Initiative and ICJ make the following recommendations:*

- **Rule of two.** Where not required otherwise, states should endeavor to nominate at least two qualified candidates of equivalent professional standing to vacancies on regional human rights courts and commissions. Where permitted, states should be encouraged to nominate candidates who are nationals of their own country as well as nationals of other member states.
  - **Notice and access.** Candidates should have unrestricted access to information necessary to allow them to prepare and compete fairly. Calls for application should include a description of the position(s), the criteria to be applied, and information on the selection process.
  - **Measures to encourage applications.** States should provide sufficient guarantees, for instance of job security, and incentives to encourage applications from the greatest possible number of qualified candidates.
3. *Most states lack a national legal framework or a transparent procedure for nominating regional human rights commissioners and judges.*

Just as states should ensure that they nominate qualified candidates, they must also ensure that the procedures by which candidates are selected are accessible and transparent. Several countries reviewed in this report follow nominations processes that are notable for their relatively transparent and consultative nature (e.g., Liechtenstein, Mozambique, Uruguay) but only one, the Slovak Republic, has an actual legal framework in place. Furthermore, European countries have a practice of publicly circulating

calls for applications; however, the degree to which CoE member states ensure effective, timely dissemination of such calls varies widely. Among countries surveyed in the African and Inter-American regions, almost none have issued open calls for applications and none have a written procedure to guide the nomination process. These findings confirm a broader, enduring criticism that nominations have too often been treated as opportunities to reward political connections. Indeed, in more than half of the countries surveyed in this report, candidates were nominated as a result of having been personally approached by the government, rather than through a transparent and competitive process. Importantly, greater transparency in the nomination process would also help ensure that qualified candidates are not deterred from applying.

*In light of these findings, the Justice Initiative and ICJ make the following recommendations:*

- **Legal framework.** To ensure fairness and transparency, states should develop a legal framework to govern the selection procedure or, at the very minimum, a fixed set of rules in advance of the nomination process. These should include a transparent and fair process for shortlisting, interview, and selection.
  - **Public application calls.** Calls for application should be made public and accessible, and widely disseminated through social media and across academic/legal/civil society networks.
  - **Appropriate disclosure.** Once a decision on the nomination(s) has been adopted, states should make public this information by issuing a press release or other form of formal notice. The degree of disclosure of the reasons for the selection, particularly as concerns personal data, interviews with, and assessment of candidates, should be reasonable considering the right of the public to such information and the privacy interests of the individual candidates.
4. *Lack of engagement with professional associations and other civil society organizations in the nomination process inhibits transparency and constructive opportunities for consultation.*

Another important element of transparency in the nomination process is the engagement of civil society organizations: ensuring that they are aware when recruitment processes are underway, encouraging them to circulate vacancy notices to their networks, affording them the opportunity to submit information on prospective candidates, and providing them (and other interested citizens) with periodic updates on the selection process. States outlined in this report adhered to these norms to greater or lesser degrees, but the practice was often inconsistent (e.g., the US engaged civil society heavily for the nomination of its candidate in 2013 but did not similarly engage in

2017; similarly, the Argentine government says that it maintains an “informal process of consultation,” but interviews with civil society actors conflicted with that account). And in many cases there was simply no effort to involve or engage most national civil society organizations. Bar associations or academic institutions were most often consulted but practice was inconsistent and sporadic. Several interlocutors noted that this exclusion again reinforced the view that nominations are largely meant to reward political connections, or indeed that the exclusion of non-state actors from the nomination and election process was one way for states to indirectly exert control over the regional human rights institutions.

*In light of these findings, the Justice Initiative and ICJ make the following recommendations:*

- **Encourage civil society participation.** National civil society engagement in the nomination process should be encouraged by ensuring civil society is made aware when nominations are sought, inviting them to circulate vacancy notices, and consulting with them as appropriate in the review and assessment process.
  - **Invite public comments.** States should ensure that a public comment period exists to afford individuals, associations, and civil society organizations reasonable time to submit views about candidates.
  - **Provide information about the process.** With due regard for the privacy interests of candidates, information on the status of the nomination process should be made publicly available and shared with civil society organizations.
5. *Across member states of all regional human rights systems, a lack of gender parity and inclusivity in national selection procedures contributes to a low percentage of women serving as human rights commissioners and judges, and to under-representation among other social groups and geographic regions.*

The value of a diverse bench—one that represents women equally, and also reflects geographical balance and inclusion of various minority groups—also affirms the need for a greater number of national candidates and a more transparent, inclusive nomination process. The countries highlighted in the report evidence some important efforts at the regional level—notably in the African and European systems—to increase gender parity and equitable geographic representation in regional courts and commissions; however, few to none have made affirmative efforts to ensure that their national selection procedures are sex-representative. Indeed, only eight of the 22 countries surveyed herein (approximately one third) have a woman serving on a regional human rights commission or court. This statistic is broadly consistent with the low number of women

serving on a range of international courts and tribunals, a phenomenon that the recent GQUAL campaign for gender parity starkly illustrated. Indeed, sub-optimal nomination practices contribute to these deficiencies at the regional and international levels, and underscore the need to develop national-level nomination bodies and practices that are themselves sex-representative and gender-conscious.

*In light of these findings, the Justice Initiative and ICJ make the following recommendations:*

- **Parity.** States should take affirmative steps to ensure gender parity in the nomination of candidates, including equal representation among national decision-makers in the process and among those candidates nominated.
  - **Affirmative action.** Calls for applications should explicitly encourage members of the underrepresented sex to apply, and should be disseminated widely among underrepresented groups and communities.
  - **Outreach.** Member states should identify groups underrepresented on the international bench and provide information to relevant groups and associations that may assist with outreach to qualified individuals.
6. *There appears to be no consistent practice involving an independent body in the nomination process to help ensure that the selection process is transparent, impartial, free from discrimination, and based on merit.*

In a welcome development, several countries surveyed in the report have established a dedicated working group or focal points at the national level to handle the review of applications for regional human rights courts and commissions. A crucial function that a formal nomination or review body can serve is the practice of interviewing candidates and/or administering written tests. All CoE states considered in this report carried out interviews with prospective nominees as they are required to do, but this practice was only occasional among the other countries profiled herein, with the notable exception of Mozambique (e.g., the United States in 2012, South Africa in 2006, Costa Rica for UN treaty body nominees but not IACtHR or IACHR candidates). Furthermore, in most cases, these interview panels are not standing entities but created on an ad hoc basis. Also, the independence of several of these bodies (or their members) is not always clear. Panels with members appointed solely by the executive, or who are themselves servants of that institution (e.g., Austria, Greece), have raised questions about sufficient independence. These concerns underscore the value of establishing a legal framework for nominations, and of clarifying both procedural and substantive requirements for service as a human rights judge or commissioner.

*In light of these findings, the Justice Initiative and ICJ make the following recommendations:*

- **Independent selection body.** A demonstrably independent body, including members of the national judiciary and legal profession (preferably including individuals with specialist expertise in human rights), should conduct the national selection procedure. Where the membership of, for instance, a standing general-mandate national appointing body does not include specific human rights expertise, and is responsible for nominating candidates to the regional human rights system, the body should invite external actors with appropriate competence to be involved.
  - **Limited discretion.** Where the government can reject the recommendation of the selection body, its scope for doing so should be limited and reasons must be given for the rejection.
  - **Interviews.** The panel or review body should be empowered to interview candidates. Interview questions should test the suitability of candidates for the position, including their professional expertise and knowledge, as well as their personal suitability and language proficiency.
7. *There is currently insufficient and/or ineffective regional review and oversight to ensure that candidates are independently vetted and to detect and correct deficient selection procedures at the national level.*

PACE's Committee on the Election of Judges has served on several occasions as an essential check on deficient selection procedures among CoE member states; recent examples include Hungary, the Slovak Republic, Azerbaijan, and Albania. The committee's assessment, informed by its ability to interview the candidates directly—and by a membership that includes parliamentarians with some legal background—has also helped ensure that state lists include candidates of relatively equal qualifications and comply with gender representative requirements. Notably, neither of the regional human rights systems in Africa or the Americas exercises any similar review function. While there has been some modest progress in terms of guidelines or resolutions issued by these bodies, such as by the OAS in 2016 on gender equality, and the AU Assembly on the value of encouraging civil society participation in the domestic selection process, the regrettable lack of any such mechanisms means that there is effectively no oversight beyond that exercised at the national level.

*In light of these findings, the Justice Initiative and ICJ make the following recommendations:*

- **Establish regional review/advisory committees.** Within each regional human rights system, an independent advisory committee/group of experts should exist

to evaluate the suitability of candidates for service as a commissioner or judge, and to assess the national selection procedure undertaken.

- **Authority to reject.** The advisory committee should be empowered to reject national candidates who are manifestly unqualified for service as a judge or commissioner.
- **Interviews and written submissions.** Regional advisory committees should be empowered to receive and consider outside written submissions—including from civil society groups at the national, regional, and international levels, as well as National Human Rights Institutions (NHRIs) and other international institutions—on the qualifications (or lack thereof) of nominated candidates. Interviews should also comprise a part of the committee’s review.
- **Guidelines for member states.** All regional human rights bodies should develop directives or guidelines to guide member states on the criteria for qualified human commissioners and judges, including the need for equitable geographic representation, gender parity, and other forms of diversity on the bench. Prior to a new election cycle, member states should also be provided with information as to the current gender composition of the relevant regional court or commission, as well as the professional background and nationalities of currently serving members.

In providing a detailed analysis of the nomination practices of 22 countries from across the three human rights systems, this report seeks to pierce the secrecy that has long surrounded national-level nomination processes. While there is no perfect national model, the country profiles included herein confirm that, in almost all cases, the standards for nominations that have been set out in a growing body of international norms and jurisprudence have yet to be met. Furthermore, the selection of candidates at the national level predetermines, to a large extent, the quality and breadth of candidacies running for election at the regional level.





# I. Introduction

International courts and tribunals increasingly decide a wide range of issues of global importance, ranging from human rights to trade, the environment, and penal sanction. Within this international community of adjudicators, regional human rights courts and commissions have emerged as particularly influential institutions. Since their establishment in the latter half of the twentieth century, they have played an essential role in defining the legal architecture of the modern human rights system and have helped contribute to significant, structural changes in state policies and institutions. Moreover, regional commissions in the African and Inter-American systems have played vital roles in protecting and promoting human rights, including through a range of quasi-judicial activities that include *in situ* visits, specialized investigative bodies, thematic rapporteurships, and regional standard setting.

Yet despite the significance of these tribunals, the processes by which judges and commissioners are nominated and elected to serve in such bodies remain largely unknown and often shrouded in secrecy. As the authors of an early treatise on the subject have noted, “[T]he international selection and appointments processes have attracted almost no attention outside a narrow circle of lawyers, officials, and judges who are directly involved.”<sup>1</sup>

In some ways, this lack of attention is not surprising. Having relinquished a degree of sovereign control by submitting to international adjudication, states might be expected to try to maximize their control over who the adjudicators are and how they are elected.<sup>2</sup> But the secrecy that has historically surrounded the process, and the control that states are able to exert over it, present a key challenge: how to ensure the integrity and independence of these systems in a time when international judicial institutions—and the rule of law itself—are under attack.

While criticism of these bodies has always existed, attacks on their integrity and independence have been felt most acutely in recent years, as various member states have launched intensive and controversial “reform” processes in relation to the European and Inter-American human rights systems, in particular.<sup>3</sup> These efforts have included challenges to the propriety of the bodies’ decision-making intruding on the democratic sphere of national legislators, as well as allegations of overreach, inconsistency, or poor reasoning in their judgments.<sup>4</sup> In many cases, these criticisms reflect politically motivated opposition to the application of international human rights laws within the states concerned and, more specifically, by an international, independent judiciary.

Increasingly, it would appear that this trend also extends to the nominating practice for judges and commissioners, where a general lack of procedural transparency and, in certain cases, the promotion of ill-qualified candidates threaten to weaken the regional human rights courts and commissions. For example, in July 2016, a group of 15 Hungarian human rights NGOs urged the PACE Committee on Election of Judges to recommend that the government’s nominee to the European Court of Human Rights be rejected. In a public letter, they criticized the secretive process by which the government’s candidates had been identified, including the lack of a publicized selection procedure, the absence of an open call for applications, a refusal to explain whom the government had consulted in the nomination process, and whether interviews with the candidates were even conducted.<sup>5</sup> Notably, the PACE Committee rejected Hungary’s initial list, as it has the lists of three other CoE countries in as many years.

Elsewhere, Argentina’s 2017 candidate for election to the Inter-American Commission was criticized not only for his qualifications, but also for the lack of transparency that attended his nomination; no public consultations were conducted before his nomination was announced, leading more than 45 national civil society groups and academics from throughout the region to express their concerns about his candidacy (in the end, he was not elected).<sup>6</sup> Similar controversies also surrounded the 2017 candidates from Brazil and Mexico to the commission, while in Africa almost no information was made publicly available about the four commissioners who were elected (and re-elected) to the African Commission on Human and Peoples’ Rights (ACHPR) in July 2017, at the African Union’s annual summit in Addis Ababa.<sup>7</sup>

These are warning signs for the regional human rights systems and their defenders. Coupled with broader political efforts to erode international judicial institutions, they underscore the pressing need to focus on strengthening these systems from within. Electing qualified individuals through fair, inclusive, and transparent selection procedures is an essential part of this task. Indeed, as the Inter-American Courts of Human Rights has affirmed, the “independence of any judge presumes that there is an appropriate appointment process.”<sup>8</sup> Equally, the independence from governments (and other powerful interests) of the judges and commissioners elected to serve is a neces-

sary precondition for trust in the regional human rights systems. It goes to the heart of their effectiveness, their credibility, and, ultimately, their legitimacy.

National officials treat processes for nominating candidates to the regional human rights bodies, and to other international courts and tribunals, almost exclusively as matters internal to the government. Until recently, there has been little to no statutory or other guidance for selecting regional or international judicial candidates at the national level. As two scholars on this subject have noted, it is “extremely difficult to obtain information on any formal basis about national nomination processes and about the considerations that influence countries’ votes in international judicial elections. Few, if any, in depth studies on these issues have been conducted.”<sup>9</sup> Moreover, notwithstanding the criteria that the governing instruments of international courts may establish, “it is not clear how these criteria are monitored or applied in practice, at either the nomination or election stage.”<sup>10</sup> Yet it is arguably the character and quality of national selection procedures that have the biggest bearing on the elections that follow.

Similarly, while such procedures should aim to reflect a broad range of individuals—ensuring gender parity, as well as a more equitable representation of other underrepresented groups and geographic regions—a lack of transparency and the closed nature of many national selections processes means that, as one scholar has summarized, “international judgeships are often used to reward political loyalty or to advance political agendas.”<sup>11</sup> They also contribute, she notes, to troubling statistics about the representation of women and other underrepresented groups on the international bench. In her words, “when selection procedures are closed and opaque, and there is no quota or aspirational target for a sex-balanced bench, women obtain international judgeships in disproportionately low numbers.”<sup>12</sup>

To that end, this report fills an important gap. It focuses on nominations at the national level as a critical point of entry for understanding and improving the selection process for judicial and quasi-judicial offices in regional human rights courts and commissions. These courts and commissions have largely escaped the already limited attention paid to judicial selection procedures, and this report is the first to consider them from a cross-regional perspective, cognizant that the concerns raised across these systems underscore the need to look at them comparatively.<sup>13</sup> It is also the first to offer detailed information about the actual nomination procedures of states and how they unfold in practice, drawing upon interviews with state officials at the national level, diplomats, regional court and commission staff, former and current judges and commissioners, and civil society.<sup>14</sup> In so doing, it highlights the laws, procedures, and regulations that govern the three regional human rights systems—European, African, and Inter-American—as well as the nomination practices of 22 of these systems’ member states.<sup>15</sup> By surveying the practice of a diverse array of countries—reflecting a range of geographies, sizes, and political systems—as they relate to these regional bodies in par-

ticular, the report seeks to document the ways in which many nomination procedures fall short of the legal framework and international standards that should guide them, while also highlighting examples of good practice that can guide and inform practice elsewhere.

The report is structured in four parts. The first chapter outlines the international laws and standards related to the selection and appointment of judges. Although these standards have principally been developed with national systems in mind, they provide the principled framework within which appointments to regional judicial and quasi-judicial human rights bodies can be considered. The following chapter outlines the laws, standards, and procedures that guide each of the regional courts and commissions, highlighting for each system the (1) required qualifications for judges and commissioners; (2) criteria (where they exist) relating to national selections procedures; (3) procedures pertaining to the election of candidates by the relevant regional intergovernmental body; and (4) measures the regions have taken to promote greater gender parity in particular, but also more equitable representation from other underrepresented groups and geographic regions. Chapter 4 details the nomination policies and practices of the 22 countries that were selected for the report—eight each from the Americas and Europe and six from the African continent. The final chapter distills seven conclusions from these country studies and makes a series of recommendations for reform.

At the outset, several points should be emphasized. First, while this report highlights deficiencies at the national level in the nomination of regional human rights candidates, it is important to highlight the many judges and commissioners who have made major and lasting contributions to regional human rights systems, and to the rule of law more broadly. Indeed, imperfect processes can still yield able and qualified candidates. But what is less clear, as many commentators have noted, “is whether able and independent judges have been appointed because of, or in spite of, the selection processes through which the appointments take place.”<sup>16</sup> The intention of this report is thus neither to prescribe a uniform process that all states must follow, nor to cast doubt on the integrity or qualifications of particular judges and commissioners who have served, but to identify ways in which the nomination process can be made more open and transparent in the future.

Second, while the report addresses the regional courts and commissions together wherever possible, it should be recognized that these institutions do serve different functions. The Inter-American Court of Human Rights (IACtHR), for instance, is “an autonomous judicial institution whose purpose is the application and interpretation of the American Convention on Human Rights,” whereas the Inter-American Commission is an “organ of the Organization of the American States, created to promote the observance and defense of human rights and to serve as a consultative organ of the Organization in this matter.”<sup>17</sup> A similar distinction animates the African Court and

Commission. However, particularly in systems where part of the job of a commissioner is quasi-judicial, regional and international laws and standards on the independence of judges from state authorities may also provide useful guidance for the nomination of commissioners. Where appropriate, therefore, the report treats the roles of human rights commissioners and judges analogously, while in other respects distinct recommendations may be made for the different types of bodies, reflecting their different institutional functions.

Thirdly, as noted above, this report focuses on national nomination processes to the regional human rights courts and commissions, and addresses its recommendations principally to states in that regard. Although it sets out the election processes at the regional level, as part of the framework within which national nomination processes take place, it does not evaluate these regional-level procedures in detail. Moreover, insofar as the report makes recommendations for their reform, they are limited to how the regional systems could exercise better oversight of national level nominations procedures. While other recommendations with respect to regional election procedures could undoubtedly be made, the aim of the report is to identify how national processes can best ensure the nomination of high quality candidates through a fair and transparent process, within the framework of the current procedures under the relevant treaties and regulations of regional human rights bodies.

Finally, it is essential for the rule of law that tribunals and commissions established by regional intergovernmental organizations are able to carry out their functions free from improper interference by and independent of the organs of such international organizations that are analogous to legislative or executive bodies at the national level. At the same time, the international intergovernmental character of such institutions may in practice yield arrangements for selection of judges or commissioners that would be inappropriate in relation to judiciaries at the national level. As such, the analysis in this report in relation to national selection processes for judges or commissioners in regional institutions should not be seen as necessarily appropriate for the selection of judges for a national judiciary.

## Methodology

Interviews with key stakeholders were primarily conducted over the course of two three-month periods: September-November 2015 with respect to the European and Inter-American systems, and August-October 2016 for the African system. Interviewees included government ministries and delegations; staff from the regional human rights commissions and courts; former and current judges and commissioners; academics; and regional and national civil society organizations. Model questionnaires (annexed at

the end of the report) were used to guide the interviews, although they followed a semi-structured format so as to permit variation where necessary and appropriate. While a number of interviews were conducted with state representatives, in a number of cases officials proved unwilling to speak or would only speak off the record; to that end, only those interviews that had the interlocutor's explicit consent are referenced herein.

The country studies were carried out alongside desk-based research, which further surveyed a number of academic texts and previous NGO reports, as well as communications from selected states and regional or international bodies, regional and statutory norms, and relevant jurisprudence. Reports and resolutions produced by both the Council of Europe's Parliamentary Assembly and its Committee of Ministers were further consulted, as were resolutions issued by the Organization of American States and the African Union. The findings of two independent panels of experts convened by the Open Society Justice Initiative and other regional NGOs in the Americas in 2015 and 2017 to assess the candidates then running for appointment to the Inter-American Court and Commission on Human Rights were also instructive.<sup>18</sup>

Country selection varied based on the system in question. As the only "full panel" court, with one judge represented from each of the 47 Council of Europe states, particular attention was paid to highlighting a range of national selection mechanisms for candidates to the European Court of Human Rights, and to selecting states that represented a broad cross-section of the CoE's geographic territory. This cross-section included such considerations as the size of the member states (including micro-states like Liechtenstein), membership period in the council (from early ratifiers of the European Convention on Human Rights to more recent, post-Soviet states), and the national legal framework (including parliamentary and presidential systems). For member states of the African and Inter-American systems, countries were primarily selected with a view to whether and how much previous practice they had in successfully nominating judges or commissioners, how recent this practice was, and whether they had pre-existing national mechanisms or processes that merited further exploration. Additionally, attention was paid to the geographical distribution of the states throughout the AU and OAS regions.

## II. Judicial Selections and Appointments: The International Legal Framework

An independent judiciary is a foundation of the rule of law and a guarantee of fair procedures in any legal system.<sup>19</sup> International law and jurisprudence on the right to a fair hearing, and international standards on the independence of the judiciary, recognize this, and identify institutional as well as personal dimensions to judicial independence. The first aspect relates to the governing structures and procedures in place to protect the judiciary from inappropriate influence; the second aspect relates to the independence of the individual judge in his or her decision-making.<sup>20</sup> International standards affirm that the process by which judges are selected and appointed is an important element of judicial independence.<sup>21</sup>

The UN Human Rights Committee has emphasized that the requirement of judicial independence inherent in the right to a fair trial refers not only to actual freedom from political interference but also to “the procedure and qualifications for the appointment of judges, and guarantees relating to their security of tenure until a mandatory retirement age or the expiry of their term of office, where such exist, the conditions governing promotion, transfer, suspension and cessation of their functions.”<sup>22</sup> The European Court of Human Rights, in interpreting and applying the right to a fair hearing, has similarly specified a number of factors to take into account when assessing the independence of the judiciary, including “the manner of appointment of its members and the duration of their term of office, the existence of guarantees against outside pressures and the question whether the body presents an appearance of independence.”<sup>23</sup>

Building on this jurisprudence, the Inter-American Court has held that “the independence of any judge presumes that there is an appropriate appointment process, a fixed term in the position and a guarantee against external pressures.”<sup>24</sup>

International standards on the independence of the judiciary elaborate these legal principles, emphasizing that selection of judges should be based on objective, impartial criteria.<sup>25</sup> These standards include, notably, the United Nation’s Basic Principles on the Independence of the Judiciary (endorsed by the UN General Assembly in 1985);<sup>26</sup> the Universal Charter of the Judge (1999);<sup>27</sup> the Bangalore Principles of Judicial Conduct (2002)<sup>28</sup> and their Implementation Measures (2010);<sup>29</sup> the Burgh House Principles on the International Judiciary of the International Law Association (2004);<sup>30</sup> and the Rhodes Resolution of the *Institut de Droit International* on the Position of the International Judge (2011).<sup>31</sup> These global instruments are complemented by additional standards adopted at the regional level. Collectively, these instruments set forth normative standards for judicial qualifications on the international bench, including election and nomination procedures and appropriate judicial conduct once judges are in office.

The UN Basic Principles were established to assist states to secure and promote the independence of the judiciary. Although they do not prescribe the particular method of selection or appointment to be applied, recognizing the diversity of national systems in this regard,<sup>32</sup> they do contain rules and standards to be taken into account during the judicial appointment and nomination procedures. They require that “[a]ny method of judicial selection shall safeguard against judicial appointments for improper motives” and that promotions “should be based on objective factors, in particular ability, integrity and experience.”<sup>33</sup> In particular, individuals selected for judicial office must be of “integrity and ability with appropriate training or qualifications in law.”<sup>34</sup> They also prohibit “discrimination against a person on the grounds of race, color, sex, religion, political or other opinion, national or social origin, property, birth or status[.]”<sup>35</sup>

The Bangalore Principles of Judicial Conduct detail further standards for ethical judicial conduct.<sup>36</sup> The principles set forth six “values” to be possessed by the judiciary: independence, impartiality, integrity, propriety, equality, and competence and diligence, together with detailed guidance on the application of the values in practice.<sup>37</sup> The Implementation Measures for the Bangalore Principles state among other criteria that:

“Persons selected for judicial office should be individuals of ability, integrity and efficiency with appropriate training or qualifications in law.”

The assessment of a candidate for judicial office should involve consideration not only of his or her legal expertise and general professional abilities, but also of his or her social awareness and sensitivity, and other personal qualities (including a sense of ethics, patience, courtesy, honesty, commonsense, tact, humility and punctuality) and communication skills. The political, religious or other beliefs



or allegiances of a candidate, except where they are proved to intrude upon the judge's performance of judicial duties, should not be relevant.

In the selection of judges, there should be no discrimination on irrelevant grounds. A requirement that a candidate for judicial office must be a national of the country concerned shall not be considered discriminatory on irrelevant grounds. Due consideration should be given to ensuring a fair reflection by the judiciary of society in all its aspects.<sup>38</sup>

Provision for the appointment of judges should be made by law.

Members of the judiciary and members of the community should each play appropriately defined roles in the selection of candidates suitable for judicial office.

In order to ensure transparency and accountability in the process, the appointment and selection criteria should be made accessible to the general public, including the qualities required from candidates for high judicial office. All judicial vacancies should be advertised in such a way as to invite applications by, or nominations of, suitable candidates for appointment.”

“Where an independent council or commission is constituted for the appointment of judges, its members should be selected on the basis of their competence, experience, understanding of judicial life, capacity for appropriate discussion and appreciation of the importance of a culture of independence. Its non-judge members may be selected from among outstanding jurists or citizens of acknowledged reputation and experience chosen by an appropriate appointment mechanism.”<sup>39</sup>

The Burgh House Principles on the International Judiciary provide that judges are to be chosen from “persons with high moral character, integrity and conscientiousness who possess appropriate professional qualifications, competence and experience required for the court concerned.”<sup>40</sup> They also provide that nomination procedures should be transparent and safeguard against nomination or election of judges for improper reasons.<sup>41</sup> To facilitate such transparency, the principles suggest information regarding the process of nomination, election, and appointment as well as information on the candidates themselves be made public, and in a timely and effective manner, by the relevant international body responsible for the nomination, election, and appointment.<sup>42</sup>

Most recently, the Rhodes Resolution states that the selection of international judges should be “carried out with the greatest care” and with respect to “adequate geographical representation,” at both the national and international levels.<sup>43</sup> It further advises that the selection of judges be carried out by taking into consideration, “first and

foremost,” the qualifications of the candidates, and not be subject to “prior bargaining which would make voting in such elections dependent on votes in other elections.”<sup>44</sup>

The European Commission for Democracy through Law—an advisory body to the Council of Europe, also known as the Venice Commission—has further affirmed the principle that “all decisions concerning appointment and the professional career of judges should be based on merit, applying objective criteria within the framework of the law.”<sup>45</sup> This is also reflected in the 2010 recommendation of the Committee of Ministers (the executive body of the Council of Europe), which notes that “decisions concerning the selection and career of judges should be based on objective criteria pre-established by law or by the competent authorities. Such decisions should be based on merit, having regard to the qualifications, skills and capacity required to adjudicate cases by applying the law while respecting human dignity.”<sup>46</sup> Likewise, the Inter-American Court has said that judges must be “selected exclusively based on their personal merits and professional qualifications, through objective selection and continuance mechanisms that take into account the peculiarity and specific nature of the duties to be fulfilled.”<sup>47</sup>

In order to uphold the institutional independence of the judiciary through a fair appointment process, international standards establish that domestic judicial bodies in charge of selection and appointment of judges should be independent of the executive and legislative powers. In addition to the provisions of the Bangalore Principles Implementation Measures mentioned above, the European Charter on the Statute for Judges envisages an authority “independent of the executive and legislative powers” for every decision “affecting the selection, recruitment, appointment, career progress or termination of office of a judge.”<sup>48</sup> The UN Special Rapporteur on the independence of judges and lawyers has similarly indicated that there should be an independent authority in charge of the selection of judges.<sup>49</sup>

As regards judicial appointment procedures at the national level, a number of international bodies further stipulate that a majority of those on the selection panel should be judges.<sup>50</sup> The rationale behind these requirements, as noted by one UN Special Rapporteur, is that “if the body is composed primarily of political representatives there is always a risk that these ‘independent bodies’ might become merely formal or legal rubber-stamping organs behind which the Government exerts its influence indirectly.”<sup>51</sup>

International standards on the judiciary consistently provide that in the selection and appointment process there must be no discrimination on any ground.<sup>52</sup> Ensuring that the judicial bench is broadly representative of national and/or regional diversity is also recognized as a compelling interest of states. The Draft Universal Declaration on the Independence of Justice (also known as the Singhvi Declaration after its author, former UN Special Rapporteur L.M. Singhvi), for instance, states that selection processes should “give due consideration to ensuring a fair reflection by the judiciary of the society

in all its aspects.”<sup>53</sup> Notwithstanding these considerations, it is equally clear that “appropriate personal and professional qualifications must be the overriding consideration in the nomination, election and appointment of judges.”<sup>54</sup>



### III. Law, Standards, and Procedures for Regional Courts and Commissions

In the cases examined for this report, the process for electing regional human rights commissioners and judges consists of two broad but distinct phases: (1) the nomination of candidates by states, and (2) their election by intergovernmental political bodies. In the regional human rights context, relevant intergovernmental bodies include, for instance, the PACE, the OAS, and the AU. The following section describes the legal frameworks and procedures of each of these regional systems in turn.

#### A. European Court of Human Rights

Forty-seven judges currently sit on the European Court, a number equal to the Council of Europe's member states. One judge is elected in respect of each contracting party to the convention, and each acts in his or her individual capacity.<sup>55</sup> Judges are elected for a period of nine years, and cannot be re-elected; their term ends automatically when they reach the age of 70.<sup>56</sup> The convention assigns competence for the election of the judges to PACE, whose members elect judges by a majority vote, on the basis of a list of three nominations submitted by the nominating state.<sup>57</sup> Over the past 20 years, this process has been gradually elaborated and supplemented by standards and guidance by PACE itself but also, more recently, from the Committee of Ministers as well.

Declarations from successive high-level conferences on the reform of the European Court, from the 2010 Interlaken Declaration through to the 2012 Brighton Declaration, have consistently highlighted the importance of maintaining the quality of its judges.<sup>58</sup> While these declarations have emphasized “improving the transparency and quality of the selection procedure at both national and European levels,” the Council of Europe began taking progressive steps in this regard as early as 1996, when PACE first introduced—and called upon states to use—a model curriculum vitae for judicial nominees.<sup>59</sup> The 1996 resolution further introduced personal interviews at the CoE level, a duty that was then carried out by PACE’s ad hoc Sub-Committee of the Committee on Legal Affairs and Human Rights.<sup>60</sup> A specialized Committee on the Election of Judges to the European Court of Human Rights, established in 2015, now conducts such interviews.<sup>61</sup> As a further safeguard for the quality of nominations, the Committee of Ministers established in 2010 an Advisory Panel of Experts on Candidates for Election as Judge to the European Court of Human Rights, with a mandate to advise member states on whether their nominated candidates satisfy the criteria set out in the convention.<sup>62</sup> Composed of seven independent members, the advisory panel includes judges and lawyers who serve in their individual capacity.

The importance of national selection processes for judges to the court was also affirmed by the December 2015 report of the Council of Europe Steering Committee on Human Rights (CDDH) on the longer-term future of the European Court of Human Rights, which noted that “concerns have been expressed regarding the national selection procedures and the ability to attract persons of the highest quality to serve a nine-year term in Strasbourg, and difficulties have been put forward regarding the election procedure.”<sup>63</sup> The report concluded that “a central challenge for the long-term effectiveness of the system is to ensure that the judges of the Court enjoy the highest authority in national and international law.”<sup>64</sup> It recommended that a further study should be made, which, as of the time of publication, was still being finalized in the framework of the CDDH.<sup>65</sup>

## **Required qualifications**

Article 21 of the European Convention requires candidates to be “of high moral character” and to “either possess the qualifications required for appointment to high judicial office or be jurisconsults of recognized competence.”<sup>66</sup> These requirements have since been supplemented by PACE recommendations, which were first issued in 1999; guidelines from the Committee of Ministers subsequently followed, although not until 2012. The PACE recommendations specify that states should “ensure that the candidates have experience in the field of human rights, either as practitioners or as activists in non-

governmental organizations working in this area.”<sup>67</sup> The CoM Guidelines, published in 2012, further state that candidates should have knowledge of national legal system(s) as well as of public international law, and that “practical legal experience” is also “desirable.”<sup>68</sup>

With respect to language proficiency, candidates should, “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.”<sup>69</sup> Applicants’ language proficiency should be tested during interviews, where possible by panel members or otherwise.<sup>70</sup> As regards activities incompatible with either judicial independence or impartiality or “the demands of a full-time office,” CoM Guidelines require that candidates not undertake any such activities.<sup>71</sup> Finally, candidates should be able to serve at least half of their term before reaching the age of retirement.<sup>72</sup>

### **Criteria relating to national selection processes**

Beyond the requirement that a list of three candidates be submitted to PACE, the European Convention is silent on national selection procedures. Collectively, however, PACE recommendations and the CoM Guidelines have set forth a number of recommended practices for member states to adopt. Indeed, in 1999, having found national nomination practices “not always satisfactory,” PACE recommendation 1429 first recommended that the Committee of Ministers invite contracting parties to “issue a call for candidatures through the specialised press.”<sup>73</sup> States are thus now expected to issue a public and open call for applications that is widely available to the public “in such a manner that it could reasonably be expected to come to the attention of all or most of the potentially suitable candidates.”<sup>74</sup> Candidates should further be given a “reasonable period of time” to allow for the submission of applications.

Significantly, both PACE and the CoM further advise that member states establish a national body to carry out the selection of judicial candidates.<sup>75</sup> The body should have a balanced composition, ensuring gender parity and representing a variety of professional backgrounds.<sup>76</sup> Moreover, “members should collectively have sufficient technical knowledge and command respect and confidence,” and should be able to participate in the decision-making process in an equal manner.<sup>77</sup> PACE also advises governments to “consult their national parliaments when drawing up the lists so as to ensure the transparency of the national selection procedure.”<sup>78</sup>

In order to ensure the selection of qualified individuals at the national level, CoE member states should also carry out interviews with candidates, following a standardized format. According to the Committee of Ministers, the questions asked should

“give details of how [the candidate’s] qualifications and experience satisfy the criteria for office,” as well as their “legal or linguistic knowledge, and issues relating to professional ethics.”<sup>79</sup> Throughout the process, however, all candidates should be able to receive information with respect to their application and its examination.<sup>80</sup> Following the final decision at national level, CoM Guidelines note that the list of candidates should be made public.<sup>81</sup>

## Criteria and procedure for the election of candidates

Prior to submitting their list of candidates to PACE, member states are strongly urged to forward to the Advisory Panel the candidates’ CVs, as well as information on the national selection process undertaken.<sup>82</sup> If the panel considers that one or more candidates are not suitable for election, it informs the state on a confidential basis. The panel also provides confidential information to PACE regarding its views on whether any of the candidates are unqualified for office.<sup>83</sup> While the panel’s advice is not binding on CoE states or on PACE, in practice it is generally followed. Andrew Drzemczewski, the former head of PACE’s Legal Affairs and Human Rights Department, has noted, for instance, that the “Committee always seriously takes into account advice the panel provides to a given state.”<sup>84</sup> At the same, the panel has regretted that in a small number of cases, “Some High Contracting Parties appear to have purposely set out to bring their lists to the PACE irrespective of the Panel’s views and the PACE seem to readily accept those lists, in particular if only one of the candidates is considered by the Panel not to fulfil the requirements of Article 21 (1) ECHR.”<sup>85</sup>

Following the panel’s review, the PACE Committee on the Election of Judges (composed of 20 parliamentarians with legal experience, as well as two *ex officio* parliamentarians) interviews each candidate in person and scrutinizes their curriculum vitae to assess their qualifications.<sup>86</sup> Interviews last for approximately 30 minutes, and are typically prepared by the holding of a “briefing session during which a number of issues are discussed, including the ‘position’ taken by the Advisory Panel.”<sup>87</sup> Following all interviews, the committee deliberates, votes by secret ballot, and issues a report to the Parliamentary Assembly that should include reasoned recommendations.

Provided all three candidates are sufficiently well qualified for the position, the committee will recommend acceptance of the list, including indications as to the strongest candidate. When the rejection of a list of candidates is recommended, the committee must provide reasons for doing so.<sup>88</sup> A recommendation to reject requires the nominating state to submit a new list of candidates within a specified time frame. Recently rejected lists include submissions made by the Slovak Republic (with two rejections in June 2013 and October 2014), Azerbaijan (whose list was rejected twice in 2015),



and Albania and Hungary (both of whose lists were rejected in October 2016 due to defective national selection procedures).<sup>89</sup> Official rejections have been relatively infrequent, however, due to parallel, non-public communications between member states and the CoE. Indeed, when faced with the likely rejection of their list, states may seek ways to alter it. For example, a specific candidate who has been deemed insufficiently qualified may “volunteer” to withdraw his or her name and be replaced by another candidate. This approach avoids prejudicing otherwise qualified colleagues’ candidacies through the official rejection of the entire list.<sup>90</sup>

Provided a state’s list is not rejected, the Parliamentary Assembly elects one of the three proposed candidates. Election is by secret ballot and requires a majority of votes cast by PACE parliamentarians in the first round of voting. If no majority is reached, a second round of voting follows, in which only a relative majority is required.<sup>91</sup> Election results are publicly announced by the PACE president, and subsequently published on the assembly’s website.

### **Measures to promote equitable representation**

As the only “full panel” court among the regional human rights systems, the European Court by definition has equitable geographic representation: one judge serves from each of the 47 Council of Europe member states. PACE recommendations stipulate, however, that member states should also, in drawing up the list of three nominated candidates, “select candidates of both sexes in every case.”<sup>92</sup> A subsequent resolution sought to establish that so-called “single-sex lists” of the sex overrepresented at the court should not be accepted by PACE, irrespective of whether the candidates’ qualifications and the state’s nominations procedures would otherwise meet the assembly’s standards.<sup>93</sup> This rule was later softened, however, following an advisory opinion by the Grand Chamber, which noted:

where a Contracting Party has taken all the necessary and appropriate steps with a view to ensuring that the list contains a candidate of the under-represented sex, but without success, and especially where it has followed the Assembly’s recommendations advocating an open and transparent procedure involving a call for candidatures [...], the Assembly may not reject the list in question on the sole ground that no such candidate features on it.<sup>94</sup>

Currently, then, “single-sex” lists are considered only if they consist of persons of the underrepresented sex (female), or if exceptional circumstances exist that permit derogation from this rule.<sup>95</sup> The existence of such exceptional circumstances must

be determined by a two-thirds majority of the Committee on the Election of Judges, whose position subsequently must be endorsed by PACE.<sup>96</sup> Notably, PACE guidance also stipulates that national selection panels as well as those advising on the selection should reflect a balanced gender composition.<sup>97</sup> These efforts to improve the European Court's gender balance have resulted in some progress over time, although, presently, only approximately one-third of the judges serving on the court are women.<sup>98</sup>

## B. Inter-American Court of Human Rights and Inter-American Commission on Human Rights

The American Convention on Human Rights governs elections to the Inter-American Court of Human Rights (Articles 52-53) and the Inter-American Commission on Human Rights (Articles 36-37).<sup>99</sup> Additional relevant provisions are found in the Statute of the Inter-American Court of Human Rights and the Statute of the Inter-American Commission on Human Rights.

The OAS General Assembly elects both judges and commissioners in their personal capacities from a list of candidates proposed by the governments of the member states.<sup>100</sup> While IACtHR judges' term of service is six years, commissioners' terms of office last four years. Re-election is possible for both judges and commissioners, for a maximum of two terms.<sup>101</sup> Both are seven-member bodies.

### Required qualifications

Both judges and commissioners should be individuals of "high moral authority" and "recognized competence." The American Convention and the Statute of the Court set out the minimum qualifications for judges: They should 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 under the law of the State of which they are nationals or of the State that proposes them as candidates."<sup>102</sup>

In addition, "[T]he position of judge of the Court or member of the Commission is incompatible with any other activity that might affect the independence or impartiality of such judge or member, as determined in the respective statutes" (art. 7I, ACHR). The statute adds that the position of judge is incompatible with activities "that might affect their independence or impartiality, or the dignity and prestige of the office." Article 16 of the statute also establishes that "The judges shall remain at the disposal of the Court, and shall travel to the seat of the Court or to the place where the Court is

holding its sessions as often and for as long a time as may be necessary, as established in the Regulations.”

In the case of the commission, the American Convention and the Statute of the Inter-American Commission on Human Rights similarly set out the minimum qualifications for members of the commission. Article 34 of the convention and Article 2 (1) of the statute state that the members “shall be persons of high moral character and recognized competence in the field of human rights.” In addition, Article 8 (1) provides that “Membership on the Inter-American Commission on Human Rights is incompatible with any other activity that might affect the independence or impartiality of the member or the dignity or prestige of his post on the Commission.”

### **Criteria relating to national selection processes**

There are currently no OAS guidelines setting out minimum standards or requirements for member states to consider when selecting candidates for the court or the commission, nor is any OAS body empowered to review the process or qualification of candidates once states submit their candidates.<sup>103</sup> The convention, as well as the statutes of the court and commission, is silent on national nomination procedures, although it permits governments to propose up to three candidates for consideration to each body (with the proviso that when a slate of three candidates is proposed, at least one candidate must be a national of another OAS member state.) As discussed further below, however, states rarely, if ever, nominate more than one candidate.<sup>104</sup>

### **Criteria and procedure for the election of candidates**

Six months prior to the expiration of an IACHR judge or commissioner’s term of office, the OAS secretary general addresses a written request to each state party, informing them of the possibility to nominate candidates; they have until 90 days before the date of the election to do so.<sup>105</sup> Following the submission of states’ nominations to the secretary general, an alphabetical list of candidates is distributed at least thirty days before the General Assembly’s next session.<sup>106</sup> Votes are cast by secret ballot during the General Assembly; candidates obtaining the largest number of votes and an absolute majority are elected.<sup>107</sup>

Leading up to elections at the OAS General Assembly, candidates and their respective states undergo an active campaigning process. Depending on the resources available this may include travel to other OAS member states, the printing of a candidate portfolio, and meetings with foreign diplomats or members of civil society. While this

serves the purpose of presenting the candidate and his or her qualifications for the position, such diplomatic efforts again reflect the fact that states almost always propose only one candidate for either the court or the commission. Elections are then held by secret ballot and by absolute majority at the OAS General Assembly.<sup>108</sup> Only states that recognize the jurisdiction of the court (currently 25) may propose and vote on IACtHR candidates, whereas all member countries of the OAS may propose candidates for the commission.

## **Measures to promote equitable representation**

In an important development, the OAS adopted a resolution in June 2017 that “underscore[ed] the importance” that the Inter-American Commission and Court “be composed of impartial, independent individuals of recognized competence in the field of human rights, in keeping with the principles of nondiscrimination, gender equity, and geographic representation.”<sup>109</sup> The resolution first called upon states

in selecting judges of the Inter-American Court of Human Rights and commissioners of the Inter-American Commission on Human Rights, to nominate and elect persons that would ensure a membership that provides balance in terms of gender, representation of the different regions, population groups, and legal systems of the Hemisphere, while guaranteeing the requirements of independence, impartiality, and recognized competence in the field of human rights.<sup>110</sup>

The resolution also instructed the Permanent Council to “invite” candidates proposed by member states to either the court or the commission “to deliver a public presentation to the Council prior to the elections, if possible, in order to describe in greater detail their vision, proposals, and the initiatives that they would undertake if elected.”

This represents an important step forward for the OAS. Although previous presentations of candidates have taken place on an ad hoc basis (as they did in 2013), there was no established, formal practice of publicly presenting candidates.<sup>111</sup>

## **C. African Court on Human and Peoples’ Rights and African Commission on Human and Peoples’ Rights**

The African Charter on Human and Peoples’ Rights is the primary regional human rights treaty in Africa, ratified by almost all of the African Union’s member states (only Morocco and South Sudan have not yet ratified). Among other things, the charter

regulates the election of commissioners to the African Commission on Human and Peoples' Rights.<sup>112</sup> Established in 1986, when the charter came into force, the commission reports to the African Union Assembly and is headquartered in Banjul, The Gambia. It is comprised of 11 part-time members who serve in their independent capacity.

The African Court on Human and Peoples' Rights, which first began operating in January 2006, is intended to complement the commission's protective mandate. It has both compulsory and advisory jurisdiction over cases and disputes submitted to it concerning the interpretation and application of the African Charter, the Protocol to the African Charter on the Establishment of an African Court on Human and Peoples' Rights (African Court Protocol), and other relevant, ratified human rights instruments. Like the commission, the court is comprised of 11 part-time members. The nomination and election of the court's judges is governed by the African Court Protocol, which 30 AU member states have ratified to date.<sup>113</sup>

### Required qualifications

The terms of office for judges and commissioners are identical: six years, with eligibility for reelection.<sup>114</sup> Qualifications for nomination to the office of judge are set forth in Article 11 of the African Court Protocol, which states that the court is to be made up of "nationals of Member States of the OAU (Organization of African Unity), elected in an individual capacity from among jurists of high moral character and of recognized practical, judicial or academic competence and experience in the field of human and peoples' rights." Only states parties to the protocol may nominate candidates.<sup>115</sup> As additional criteria, the African Union Commission (AUC), through the Office of Legal Counsel (OLC), issues a *note verbale* whenever the term of a commissioner or judge is coming to an end. The note includes guidelines reminding states parties that the court's "effective functioning" requires judges "with irreproachable integrity, established competence and experience in the area of human rights."<sup>116</sup>

Article 31(1) of the African Charter, read together with Rule 4 of the commission's rules of procedure, addresses the requisite qualifications for commissioners.<sup>117</sup> It provides that commissioners shall be drawn from "amongst African personalities of the highest reputation, known for their high morality, integrity, impartiality and competence in matters of human and peoples' rights; particular consideration being given to persons having legal experience." As in the Inter-American system, the African Charter takes a broader approach to qualifications for commissioners than it does to those for judges. Whereas the protocol stipulates that only "jurists," that is, nominees with legal training and knowledge, may serve on the court, the charter does not similarly restrict membership in the commission to persons with legal qualifications. The commission's

guidelines further instruct that states parties “should request nominees to complete biographical information indicating judicial, practical, academic, activist, professional and other relevant experience in the field of human and peoples’ rights.”<sup>118</sup>

Both the African Charter and the Court Protocol provide that judges and commissioners serve in their individual, personal capacities and not as representatives of their respective countries.<sup>119</sup> Article 18 of the protocol specifies that “The position of judge of the court is incompatible with any activity that might interfere with the independence or impartiality of such a judge or the demands of the office as determined in the Rules of Procedure of the Court.”<sup>120</sup> Rule 5 elaborates on incompatibility by stating that “Members of the Court may not hold political, diplomatic or administrative positions or function as government legal advisers at the national level.”<sup>121</sup> In order to assess ineligibility or incompatibility, the AUC guidelines further require that candidate resumes be as detailed as possible in order to capture all relevant biographical information, including “political and other associations,” as well as “activism.” The latter category—a broadly defined term—does not appear in the African Court Protocol.

In a similar manner, Rule 7 of the ACHPR’s rules of procedure enumerates categories of office-holders that are incompatible with the office, including “a member of government, a minister or under-secretary of State, a diplomatic representative, a director of a ministry, or one of his subordinates, or the legal adviser to a foreign office or any other political binding function.”<sup>122</sup> As incompatibility for office was a particular problem in the early years of the commission coming into operation, Rule 7(2) now mandates the Bureau of the Commission to enforce these incompatibility provisions, which is typically done through vetting the biographical information that candidates are required to provide.<sup>123</sup>

### **Criteria relating to national selection processes**

The AU Charter does not prescribe national selection procedures for candidates, and there is no legal framework adopted by the AU Assembly that regulates the procedures for the nomination of candidates to either the court or the ACHPR at the national level. Indeed, the national process for nomination was considered to be an exclusively state-orchestrated matter until the AUC instituted a practice of circulating guidelines together with a *note verbale* in the run-up to elections. As explained above, the note serves to alert member states to vacancies arising on either the commission or the court, and stipulates the deadline by which states should submit the sealed resumes of their nominated candidates to the OLC. It also includes a model CV format for states to submit.

The guidelines largely restate the criteria provided for in the African Court Protocol, the charter, and the rules of procedure, though it is worth noting that, since at

least 2005, they include three additional criteria that civil society organizations have proposed to the AU Commission, which states that parties are “invited to consider whether or not to apply.”<sup>124</sup> They are as follows:

1. That the nomination of candidates meets the minimum standards for appointment to the member state’s highest judicial office.
2. That the participation of “civil society, including judicial and other State bodies, bar associations, academic and human organizations and women’s groups” be encouraged in the nominee selection process.
3. That states employ “transparent and impartial national selection procedures in order to create public trust in the integrity of the nomination process.”

### **Criteria and procedure for the election of candidates**

Following the African Court Protocol’s coming into effect in 2004, the first panel of judges was elected in January 2006. Article 13(1) set forth the procedural requirements upon its entry into force: the secretary general of the AU (now the AUC chairperson) was to invite states parties to submit nominees within 90 days of the entry into force of the protocol. Although this provision was not complied with for the election of the court’s inaugural bench, the issuance of the AUC’s *note verbale* alerting states about court vacancies has helped ensure compliance with the 90-day time limit for subsequent vacancies. Article 12(1) of the protocol permits states parties to nominate up to three candidates, provided that at least two of those are nationals of the nominating state.<sup>125</sup>

Upon receiving nominations, the OLC processes candidates’ documentation primarily to ensure they accord with the protocol’s criteria, and to vet for incompatibility. (Incompatibility at this stage includes non-compliance with gender and regional balance quotas, discussed further below.) An alphabetical list of names of shortlisted candidates is then prepared and sent to all member states at least 30 days prior to the upcoming elective session of the AU Assembly.<sup>126</sup> At this point, the process reverts to individual states, which typically campaign for their nominee(s). Their missions in Addis Ababa take charge of the “campaign” by contacting other diplomatic missions and requesting them to support their candidate. Interviewees indicated that in some cases formal dinners or breakfast meetings are convened by the sponsoring states, during which time the candidate’s profile is shared. As in the other regional systems, voting for judges takes place through a “secret ballot” from a list distributed to member states.<sup>127</sup>

Commissioners are nominated according to Articles 35 and 34 of the African Charter, which set forth a similar procedure: The AUC chairperson is required to call

for nominations from member states at least four months before elections are to be held, whereupon an alphabetical list is prepared and sent to member states at least one month before an elective session.<sup>128</sup> Upon being validly nominated, commissioners, like judges, are elected through secret ballot during the AU Commission's election session.

Two differences distinguish the ACHPR process from that of the court. First, contrary to the three candidates states parties may nominate under the African Court Protocol, the charter permits only two nominations; furthermore, when two candidates are nominated, only one of them may not be a national of the nominating state.<sup>129</sup> Second, while respondents indicated that ACHPR candidates invariably travel to the seat of the AU Assembly's elective session to take part in the campaigning process, judicial candidates are rarely called upon to do the same. Indeed, from the time of nomination to election, they take no active part in campaigning for votes.

### **Measures to promote equitable representation**

There are several direct assurances for gender mainstreaming in the nomination process. The African Court Protocol itself mandates that “[d]ue consideration shall be given to adequate gender representation in the nomination process.”<sup>130</sup> Furthermore, Article 14(2) stipulates that “the Assembly shall ensure that in the Court there is representation of the main regions of Africa and of their principal legal traditions.”<sup>131</sup> The AUC guidelines typically include provisos reminding states of these requirements; indeed, although the charter itself contains no explicit reference to gender representation, calls for ACHPR candidates also remind states to “ensure adequate gender representation in their nominations.” The guidelines reference various declaratory instruments supportive of general parity as well, including the 2003 Kigali Declaration, which called upon AU policy organs to “review the operation and composition of the African Commission on Peoples' Rights with a view to strengthening its independence and operational integrity and ensuring appropriate gender representativity.”<sup>132</sup>

More recently, in January 2016, the AU Executive Council also passed the “Decision on the Modalities on the Implementation of the Criteria of Equitable Geographical and Gender Representation in the AU Organs and Institutions.”<sup>133</sup> The decision further led to the adoption of “Modalities on Implementation of the Criteria of Equitable Geographical and Gender Representation in AU Organs and Institutions,” a document that was a culmination of a protracted drafting process by the AUC and reflects a desire to achieve full implementation of criteria for equitable representation that had previously not been strictly enforced (for instance, as of July 2014, there were only two female judges on the court, compared to nine male judges).<sup>134</sup> As AU organs, both the court and the commission were affected by it.



## IV. Country Profiles: Africa, the Americas, and Europe

This chapter summarizes the national selection practices of 22 countries for nominating international human rights judges and commissioners. Countries are presented in alphabetical order.

### Algeria

Algeria has had previous candidates elected to both the African Commission and the Court. Currently, Sahli Fadel Maya serves on the ACHPR; she was first elected in 2011, and reelected in July 2017. However, no national legal framework exists for the nomination of Algerian candidates.<sup>135</sup> Instead, the Ministry of Foreign Affairs (MFA) plays a leading role in initiating nominations, and it effectively manages the entire process. Within the MFA, the Nominations Commission has divisions that focus on different regions. Although its composition is not well known, the Africa Division is responsible for managing the nomination process for regional human rights organs. According to former African Court Judge Fatsah Ouguergouz, the commission takes into account the suitability of the candidate by vetting his or her knowledge of the subject matter and relevant experience.<sup>136</sup> There is no indication that the commission consults with other stakeholders—civil society, bar associations, faculties of law—when considering candidates to nominate. The process is also largely closed to the public; there is no evidence of public calls for applications or nominations, nor any indication that interviews are conducted as part of the assessment.

## Argentina

Argentina does not have a national legal framework for nominating candidates to the Inter-American Court or Commission; selection is managed by the executive's Ministry of Foreign Affairs and Worship. The government has stated that it maintains an informal process of consultation with civil society to ensure that candidates have a solid legal background and a strong commitment to the promotion of human rights. However, one leading human rights NGO, Centro de Estudios Legales y Sociales (CELS), could not confirm this practice.<sup>137</sup> Rather than being involved in consultation, instead CELS might on occasion voice its concerns when a candidate who is not suitable for the position is put forward.<sup>138</sup> In fact, civil society concerns about Argentina's recent candidates suggest that consultation does not take place or is quite limited. Most recently, civil society organizations expressed concerns about Carlos Horacio de Casas' nomination for a seat at the commission in 2017. De Casas, a lawyer, was nominated but not elected. NGOs pointed out that he lacked the necessary qualifications and noted that the nomination process was not transparent.<sup>139</sup> The 2017 Independent Panel confirmed this, noting that de Casas had reported his nomination was "through an internal procedure" and "that there was no consultation with civil society before the Government's announcement of his candidacy."<sup>140</sup> The panel also "expresse[d] its concern about the candidate's fulfillment of the requirement of recognized competence in the field of human rights."

## Armenia

Armenia made ECtHR judicial nominations in 2003 and 2009, both times without a detailed national procedure; instead, candidates were nominated by presidential decision.<sup>141</sup> There is still no permanent legal basis for nominations in Armenian legislation, but in advance of the 2015 nomination process, a presidential decree was adopted in August 2014 that established a selection committee responsible for evaluating candidates' eligibility and qualifications. It set as a general benchmark the requirements laid down in Article 21 of the convention: Candidates are considered eligible provided they are Armenian citizens under the age of 65 with a degree in law and the necessary professional experience (either three years of judgeship, five years of human rights experience, five years of teaching in the field of human rights, seven years working in a public legal office, advocacy experience, or a doctoral degree in law). Judicial experience is not considered a strict requirement, in order to enable members of other legal professions (e.g., prosecutors, lawyers, academics) to be considered. Knowledge of the

working languages of the court is, however, required.<sup>142</sup> The decree further specified the principles that should govern the process—equality, transparency, and publicity.<sup>143</sup>

In January 2015, Armenia recalled its initial list of nominees following the opinion of the CoE's Advisory Panel of Experts.<sup>144</sup> A commission composed of nine members subsequently carried out a second review of candidates beginning in January 2015.<sup>145</sup> (Notably, some in Armenian civil society criticized the composition of this commission on the grounds that it was not known to what extent the members had any knowledge of human rights law and public international law.)<sup>146</sup> A call for applications was published in the *Official Gazette of the Republic of Armenia (Hayastani Hanrapetutyun)* and posted on several websites, including those of the Ministry of Justice and the judiciary, as well as a website designated for public announcements. The call specified information on the application procedure, necessary qualifications and linguistic requirements, a list of documents to be submitted, the criteria for evaluation, and the deadline for submission.<sup>147</sup>

By February 2015, a total of 15 applications had been received and recorded in a “registration book,” a copy of which was updated daily on the Ministry of Justice’s website.<sup>148</sup> After an initial screening of applications by the committee, 14 of the candidates who met the eligibility criteria were invited to interview. The list of candidates was published on February 20, and a public announcement was issued indicating the time and location where interviews were to be held. NGOs and media representatives were also invited to attend the interviews.<sup>149</sup> Interviews comprised three stages: (1) up to 10 minutes of self-presentation and up to 20 minutes of questions/answers in order to determine the candidate’s personal character; (2) 45-minute long interviews in a question-and-answer format, aimed at scrutinizing professional qualities; and (3) 45-minute evaluation of candidates’ language proficiency. The latter was supported through the involvement of two English and two French language specialists nominated by the Ministry of Education and Science.<sup>150</sup>

Candidates were ranked according to a pre-determined grid of points, which resulted in the male candidates ranked 1-6. Adhering to paragraph 27 of the presidential decree, which established that the highest evaluated representative of the under-represented sex was to be included in the list, the commission unanimously decided to nominate Liana Hakobyan (ranked 7) as the third candidate on the country’s list. The final list was subsequently presented to the president via the Ministry of Justice, and approved by presidential decree on March 7, 2015.<sup>151</sup> The CoE’s Committee on the Election of Judges subsequently recommended, by a narrow majority, the candidature of Armen Harutyunyan over that of Hakobyan.<sup>152</sup> The PACE subsequently elected Judge Harutyunyan, whose term runs until September 2024.

# Austria

The Republic of Austria last underwent the national nomination process for its ECtHR judge in 2014 and 2015, submitting its list of candidates to the PACE in February 2015. There is no legal framework in place for the Austrian nomination procedure; however, the European Convention constitutes national constitutional law in Austria. Accordingly, no subordinate laws or state practice may contradict the convention's provisions on judicial appointments.

During the 2014–2015 procedure, a selection panel composed of four members was established. All members (three men, one woman) were senior state officials: two held positions at the Federal Chancellery; the third at the Federal Ministry for Europe, Integration and Foreign Affairs; and the last worked for the Federal Ministry for Science, Research and the Economy. Notably, the fact that the panel was composed only of persons closely affiliated to the respective ministries and chancellery, and thus formally subjected to ministerial direction, raised questions about its independence.<sup>153</sup> A public call for applications was issued on one occasion in the daily, specialized newspaper *Amtsblatt der Wiener Zeitung* on July 17, 2014. The government's submission to the CoE specifies that the supreme courts and universities were informed of the call; however, it is unclear whether other national stakeholders, such as lawyers' and judges' associations and human rights NGOs, were similarly informed.<sup>154</sup>

The call specified that the successful candidate would be able to ensure his or her independence and impartiality and either meet the requirements for high judicial office nationally, or be a jurisconsult of high reputation. It further mentioned the requirement of having professional experience in the field of human rights as well as active knowledge of one of the court's working languages and passive knowledge of the other. In the call, the Ministry for Foreign Affairs and the Federal Chancellery invited persons who possessed the necessary qualifications to apply by September 15, 2014 (a deadline about eight weeks away). The call for applications required candidates to submit their applications via a specialized online system, access to which had to be requested to enable electronic signatures.<sup>155</sup>

The panel received six applications, although one applicant subsequently withdrew in advance of the interviews. According to one of the candidates interviewed by the panel, the form and content of the interview suggested that there was uniformity as to the questions posed to all candidates. Questions revolved around candidates' experience and also included material questions on subjects such as the reform of the court's mandate and procedure.<sup>156</sup> After its assessment, the panel agreed unanimously to propose three candidates. The list of these three candidates was subsequently submitted to the Austrian Federal Government, which endorsed the list and submitted it to the CoE.<sup>157</sup> Following interviews in March 2015, the Committee on the Election of Judges

considered two of the candidates—Gabriele Kucsko-Stadlmayer and Katharina Pabel—to be equally well qualified. The PACE subsequently elected Judge Kucsko-Stadlmayer, whose term runs until October 2024.

## Brazil

Currently, Judge Roberto Caldas of Brazil serves as president of the Inter-American Court; he was elected in 2013. Brazil now also has two commissioners on the IACHR: Paulo Vannuchi has been a commissioner since January 2014, and Flavia Piovesan, whose term will commence in January 2018, was elected in 2017. Brazil does not have a specific legal framework for the nomination of candidates to the Inter-American Commission or Court. Nominations to those bodies are discretionary in nature and based on the criteria established by the statutes and rules of procedure of each body.<sup>158</sup> While there is no formal procedure for nominations, the executive is responsible for foreign policy matters, including national policy regarding the Inter-American human rights system. The Ministry of Foreign Affairs advises the president in this area, in coordination with the Ministry of Women, Racial Equality and Human Rights and other competent federal government bodies.<sup>159</sup> Brazil's nomination of candidates is informed by input received from a variety of stakeholders, including civil society, academia, and the legal community.<sup>160</sup>

There are no public calls for applications for the post of judge or commissioner. According to a written statement submitted by the government, any person wishing to put his or her name forward is free to seek political support from the Brazilian government to do so, or from other relevant stakeholders such as professional interest groups or NGOs.<sup>161</sup> No information was available as to which criteria are applied for a successful nomination, whether interviews or language proficiency testing is put in place, or how the final decision is made. The Brazilian government is formally bound by policies on racial and gender identity; they are aspects “taken into account in the decision-making process in the context of defining national candidates and the consideration of candidates from other Member States.”<sup>162</sup> No information as to how this principle is applied in practice was available.

## Chile

Despite having numerous recent experiences in nominating candidates to the court and the commission, Chile has neither a national legal framework for nominations in place, nor any formal procedure for the nomination of candidates at the national

level.<sup>163</sup> According to the permanent mission of Chile to the OAS, it is “difficult to find relevant people.”<sup>164</sup> Interviewees suggested that a partial explanation for this might be that Chile does not have a public call for applications, nor are official interviews conducted with prospective candidates.<sup>165</sup> Decisions on nominations are generally made by the executive; former judges and commissioners confirmed that the decision is entirely in the hands of the Ministry of Foreign Affairs, and that those interested in the position must proactively approach the ministry to present themselves as potential candidates.<sup>166</sup> Notably, Antonia Urrejola, who was elected to the commission earlier this year (her term commences in January 2018), informed the 2017 Independent Panel that “she had no knowledge of any public or private process [for her selection]; rather, the president’s cabinet “had proposed her as a candidate.”<sup>167</sup>

## Costa Rica

Costa Rica does not have a national legal framework applicable or applied *mutatis mutandis* when selecting candidates to be nominated to the Inter-American Commission or Court.<sup>168</sup> A successful nomination will frequently depend on a candidate’s proactive request to the executive or relevant ministers in charge of the decision-making process. Illustrative of this process is the nomination of Judge Elizabeth Odio-Benito, who approached the vice president to put herself forward as a candidate.<sup>169</sup> No general information was available as to the criteria applied when choosing candidates for nomination. Judge Odio-Benito (a former judge of the International Criminal Court) was promoted as a candidate, however, as she was considered to have the necessary professional expertise and independence.

Notably, while Costa Rica has not conducted interviews for IACtHR or IACHR candidates, a committee of experts acting as external advisors to its MFA did interview candidates during the 2006 national nominations process for election to the UN Subcommittee on the Prevention of Torture. During these interviews, candidates were asked a set of general questions regarding personal skills, qualities, and experience.<sup>170</sup>

## Ethiopia

Ethiopia has had few candidates elected to either the African Commission or the Court, although Dr. Solomon Ayele Dersso was elected to serve on the former in 2015.<sup>171</sup> It does not have a written procedure regulating the nomination process. In practice, however, the MFA is the responsible ministry. Upon receiving notice of vacancies from the AUC,

the Department of International Organizations Directorate serves as the ministry's focal point.<sup>172</sup> The directorate has desks or sub-departments responsible for particular international engagement, such as the African Union or the UN. When a notice of a vacancy is received, the directorate is responsible for looking for suitable candidates and advises the prime minister on the issue. In the words of one official, it was "imperative" that the head of government endorses a nominee, under the advisement of the directorate.<sup>173</sup> There is no indication that other stakeholders inside or outside of government are consulted or participate in the process, or that the government issues a public call for nominations or applications.<sup>174</sup>

According to Commissioner Dersso, as someone who works generally in the area of human rights in Africa he had become aware of the opening on the commission from AU colleagues. They approached him to ask if he would consider seeking a nomination, and he obliged. He sought and obtained recommendations from institutions with which he was affiliated and then submitted his application to the sub-directorate for AU Affairs; it eventually made its way to the MFA.<sup>175</sup> Once the ministry took over, it assumed the responsibility for engaging other missions as diplomatic level. Commissioner Dersso was not required to do anything other than make a few appearances during the AU elective session to meet select ambassadors for publicity purposes. The majority of these meetings were reportedly personal engagements between him and diplomats and ministers.

## Greece

There is "no regulation, or any other kind of legal text, that sets the rules and functioning of the [nomination] process" in place in Greece.<sup>176</sup> Responsible for the selection of candidates in 2009-2010 was a committee composed of three members: the secretary general of the Ministry of Foreign Affairs; the secretary general of the Ministry of Justice, Transparency and Human Rights; and the president of the Legal Council of State.<sup>177</sup> The MFA's legal department, which is under the political control of the minister, coordinated the process.<sup>178</sup>

During the 2009-2010 process, the MFA and MoJ issued a joint public call for expressions of interest in December 2009, which was published on the MFA's website and transmitted to the presidents of Greece's supreme courts as well as to the deans of the country's law schools. In addition, the call was published in two different editions of two widely circulated newspapers. The call referred, *inter alia*, to the criteria for the election of judges to the ECtHR as set out in both the convention and relevant PACE recommendations. The MFA's website also provided the documents that were sent to

Greece with the request to nominate candidates by the Council of Europe. The call also provided information on the selection panel.<sup>179</sup>

A total of 13 applications were received, following which the committee examined the candidates' applications based on the relevant criteria. After screening the applications—but without conducting interviews or separate testing of linguistic abilities—the secretary general of the MFA, as a member of the selection committee, made recommendations to the ministers of Justice and Foreign Affairs, the latter of whom made the final decision on the list of nominees.<sup>180</sup> Following this, the ministers formally issued a joint decision in January 2010, selecting the three candidates recommended to be included on the list submitted to the PACE.<sup>181</sup> The PACE subsequently elected Judge Linos-Alexandre Sicilianos, whose term runs until May 2020.

## Ivory Coast

There are no written regulations or guidelines that govern the nomination process in the Ivory Coast, and the country has a relatively scant record of nominating candidates for international judicial office. Judge Sylvain Ore, the current president of the ACtHPR, is the first Ivorian to occupy a judicial office at the court. He was elected in 2010 for a four-year term and was re-elected in 2014.<sup>182</sup> The country's nominations procedure is notable, however, in that the Ministries of Foreign Affairs and Justice are involved: they are the key state actors in identifying possible candidates to fill vacancies and vetting their legal qualifications. The MFA is the recipient of all vacancy notifications from the AUC; thereafter, it may disseminate them to other relevant stakeholders in academia, bar associations, and civil society organizations. There is no public call, however, and such direct dissemination is typically done only when the government does not already have someone in mind for a post. For instance, in some cases the government might directly approach a high-profile personality it thinks satisfies the necessary criteria.

The dissemination of vacancies is accompanied by a call for nominations or applications from the stakeholders contacted by the state. Due to increasing competition in regional and international elections, emphasis is increasingly placed on meeting the objective criteria of the African instruments so as to build on the chances for a successful election. Upon receiving the applications, the ministries constitute a joint team to assess the suitability of the candidates; however, neither the selection process for the team's members or its composition is transparent. Based on the documents assembled, the team decides which candidates to nominate and support. Once a candidate is nominated, all financial costs associated with the nomination and those related to the election campaign are borne by the state. Unless requested otherwise, the candidate is not



expected to do anything beyond providing the information required by the AUC in its guidelines.

## Jamaica

Jamaica does not have a legal framework in place for the process of nominations, although several individuals from Jamaica have served on both the court and the commission.<sup>183</sup> One possible way for individuals to be nominated appears to be (or has been) the proactive engagement of interested individuals with the national authorities responsible for carrying out the process.<sup>184</sup> For instance, former Commissioner Tracy Robinson, who served from 2012 to 2015, submitted a letter of interest to the Jamaican executive in 2009 and another in 2011.<sup>185</sup> Formal criteria for selection do not appear to be available and civil society is not directly involved in the process of nomination or decision-making; however, according to Jamaican officials, candidates are encouraged to not be “too closely linked” to either the government or civil society to ensure their independence.<sup>186</sup> The final decision on whom to nominate is made by the political directorate of Jamaica, and the preference is for an “unequivocal” decision.<sup>187</sup>

For the elections of June 2015, the Jamaican Mission to the OAS issued a formal recommendation to the government asking it to identify a suitable candidate for the position of commissioner to the IACHR (Robinson herself did not run for re-election). Following this, the MFA’s Department for International Organizations, serving as coordinator, carried out consultations with the Ministry of Justice and the Office of the Attorney General in order to identify a candidate. During the process, the MFA also reached out to relevant ministries and respective departments, as well as individuals personally known to the ministry who could have an immediate interest in candidature as commissioner. The OAS mission also recommended suitable candidates.<sup>188</sup> Candidates who consented to being considered were then screened and ranked as to their qualifications. No interviews were conducted with prospective candidates.<sup>189</sup> The current commissioner, Margarette May Macaulay, was subsequently presented and elected in 2015.<sup>190</sup>

## Liechtenstein

The Fürstentum Liechtenstein last underwent the process for national nomination of judges to the ECtHR in 2014, submitting its list of candidates to the PACE in January 2015.<sup>191</sup> Liechtenstein does not have a national legal framework for the nomination of

judges to international tribunals; the process takes place on an ad hoc basis. In January 2014, the process was initiated by a formal decision of the government (*Regierungsentcheidung*), which included details on the composition of a selection commission, as well as guidelines for its working methods. The decision was based on requirements that were reportedly distilled from different CoE guidelines and other relevant instruments.<sup>192</sup> The government subsequently appointed a selection commission comprised of five members: the director of the Office for Foreign Affairs (which also chaired the commission), the director of the Office for Justice, the president of the Constitutional Court, a representative from the Office of Human Resources and Organization, and one external expert (Frank Schürmann, professor of European law and Swiss agent before the ECtHR).<sup>193</sup> The commission was asked to propose three candidates to the government.

A call for applications was published in March 2014 and widely circulated in newspapers in Liechtenstein, as well as daily press in Switzerland and Austria.<sup>194</sup> The call was further circulated to all faculties of law in Austria and Switzerland, all high courts and constitutional courts in Liechtenstein, and the Bar Association of Liechtenstein; it was also published on Twitter. It stated that “the Government considers this position as important international nomination and is looking for exceptional candidacies.”<sup>195</sup> The call replicated the ECHR’s Article 21 requirements, with a special emphasis on personal and professional capacities, as well as judicial independence and impartiality. In addition, the call specified that candidates must have proven knowledge of international law and “longstanding professional experience” relevant to the post. In terms of language requirements, candidates were required to speak German, have active knowledge of either English or French, and have passive knowledge of the court’s second working language. Liechtenstein nationality was not required.<sup>196</sup> The call also specified the term of office and age of retirement of judges, and outlined the selection procedure at the Council of Europe level.<sup>197</sup>

Of the 17 applications received, 10 candidates were invited to take part in an interview in September 2014. Interview questions were prepared in advance, and were divided into thematic sections: the national legal system, the international legal system (including areas of European law), and ECHR law.<sup>198</sup> To assess candidates’ language proficiency, questions were asked in English and French (answers were allowed in either language.)<sup>199</sup> After two days of interviews, the committee ranked the candidates and submitted a selection of three candidates—two male and one female, none of whom were of Liechtenstein origin—to the government, which made the final decision. The government communicated its final decision to all of the candidates in person. (Notably, had the government opted to deviate from the committee’s suggested list, it would have been obliged to address and consult the committee on its preferred candidate.) While the names of those candidates not submitted to the PACE were not published, the government did, in the interest of transparency, inform parliament of the process.<sup>200</sup>

Following the recommendation of the Sub-Committee on the Election of Judges, the PACE subsequently elected Judge Carlo Ranzoni in September 2015.<sup>201</sup>

## Moldova

The Republic of Moldova last underwent the process for national nomination of judges to the ECtHR in 2012; its current judge, Valeriu Gri co, was elected in December of that year, following a four-month selection process.<sup>202</sup> The government's Decision No. 276/02.05.2012 provided the formal legal basis for the nomination process. It set up an ad hoc commission with the mandate to select candidates, as well as a regulation detailing the procedure, competences, and deadlines.<sup>203</sup> Both the commission's composition and the regulation were gazetted and also placed on the website of the Ministry of Justice.<sup>204</sup> Its members included various members of the government and parliament, as well as the secretary general of the President's Office, the president of the Supreme Court (also a former ECtHR judge), a member of the Supreme Council of Magistrates (and Supreme Court justice), and the deputy general prosecutor.<sup>205</sup> In addition, it included the Moldovan ombudsman, the president of the country's bar association, a law professor (also director of a local NGO working on judicial reform), and the director of a local NGO. According to the regulation, all members carried out the role independently, were equal in voting power, and had the right to issue a dissenting opinion.<sup>206</sup>

The commission issued a public call for applications, accompanied by a description of the nomination procedure and eligibility criteria as well as required documents. The call was disseminated via the official gazette and the national media, as well as the official websites of Moldovan diplomatic missions and the Ministry of Justice.<sup>207</sup> The regulation required that there be a minimum of 30 days for candidates to apply from the date the public call was issued.<sup>208</sup> In total, the commission received nine applications. All candidates were deemed eligible, shortlisted, and admitted to the next stage, which included a written test and an oral interview (in which eight candidates took part.) The written test consisted of three questions on ECtHR law and practice, as well as a practical example based on an anonymized judgment previously decided by the court.<sup>209</sup> For the oral interviews, questions posed by commission members were entirely at their discretion. This led to a dissenting opinion by the commission member representing civil society, who criticized the absence of objective criteria.<sup>210</sup> The interviews were not public; however, media representatives had access to portions of the commission's sessions, and were able to broadcast the meeting when the shortlisted candidates were decided upon.<sup>211</sup> Interviews themselves were not open to the media following a decision by the commission as well as requests by shortlisted candidates.<sup>212</sup> In addition, two translators and two university professors tested the candidates' language proficiency during the

interviews, consisting of a reading comprehension exercise and short conversations in English and French.<sup>213</sup>

Once complete, average grades of all shortlisted candidates were published on the website of the Ministry of Justice with the CVs of the three candidates selected, after those obtaining the highest scores were formally nominated on July 18, 2012.<sup>214</sup> (As the final decision-maker, the government, in theory, has the power to override the commission's decision of the selection commission.)<sup>215</sup> Along with a description of the national nominations process and the candidates' CVs, the government submitted to PACE its justification for presenting a list of only male candidates. The government specified that female candidates had been offered equal opportunities to apply and be considered (including an amendment of the date of the exams and interview to accommodate the sole female candidate), but took the position that the three candidates selected were those who best fulfilled the criteria of Article 21.<sup>216</sup>

## Mozambique

Mozambique has nominated several officials to the African regional human rights system, but there is no national legal framework that governs the nomination process.<sup>217</sup> There is no written procedure that guides the process, although there is reportedly an ongoing discussion between the Ministries of Justice and Foreign Affairs to jointly develop guidelines that would regulate the process, and to provide greater information to interested applicants in advance.<sup>218</sup>

Procedurally, after receiving notice of vacancies from the MFA, the Ministry of Justice and Religion (MJR) manages the nomination process (it handles all law or law-related vacancies that have to be filled.) Thereafter, the MJR distributes the announcement to different stakeholders, including its various departments, the Attorney General's Office, the judiciary, the country's bar association, and faculties of law. MJR also forms what authorities call a "jury," or panel of selectors, to manage the process. Its composition depends on the nature of qualifications required. As regards AU human rights institutions, the composition includes a judge, an MJR official, an official from the Attorney General's Office, a representative from civil society, and an academic. Interviewees indicated that the jury is generally seen as independent.

Once the jury is constituted, it then issues a "public bid" calling for nominations or applications from qualified and interested people, setting forth specific deadlines. After all applications are submitted, a two-pronged selection process ensues. First, the jury creates a shortlists based on its satisfaction with documentary proof provided by the applicants. Documents are vetted according to the requirements set forth by the AUC

Guidelines that accompany the notices of election. Once the shortlist (which can in fact be quite long) is prepared, the jury proceeds to set up dates for interviews.

In advance of interviews, the jury members prepare a list of possible questions to ask the candidates during the interview. Each member asks his or her own questions. The interviews usually take place in the MJR's offices and are not public; only the applicants are expected to attend. The identities of the candidates are not disclosed, and often the number of individuals under consideration for one post is not known. Based on the candidates' answers to the questions posed, the jury then selects its preferred nominee. The names of the participants and the jury's decision are then posted on a notice board within the MFA; they are not published more widely and there is no public announcement.<sup>219</sup> Once the process moves to the election stage, the MFA allocates an election officer from its mission in Addis Ababa to manage the proceedings.

## Norway

The Ministry of Justice establishes Norway's national nomination procedure. For its most recent election (which led to the 2011 election of Erik Møse, a Norwegian judge and former judge of the International Criminal Tribunal for Rwanda), the ministry addressed a letter to a variety of ministries, judicial offices, legal academics, and national NGOs, as well as the Office of the Attorney General and the Office of the Director of Public Prosecutions, inviting them to a consultation meeting in September 2009.<sup>220</sup> The invitation included proposed rules for procedure for the nomination process, and enabled invitees to put forward their views on the proposed framework. Subsequently, the Ministry of Justice appointed members to a selection committee composed of five members; the chair of the Judicial Appointments Board chaired it. The other four members were appointed upon proposals submitted by the Supreme Court, the Office of the Attorney General, the Norwegian Centre for Human Rights, and the Norwegian Bar Association. Each institution was encouraged to put forward the names of one male and one female candidate.<sup>221</sup>

A public call for applications was then issued by the Ministry of Justice and published on its website (due to time constraints, the call for 2010 applications was apparently not published in specialist legal journals).<sup>222</sup> In addition, the MoJ informed the following institutions of the call for applications: the director of Public Prosecutions, the National Courts Administration, the Norwegian Centre for Human Rights, the faculties of law at Norwegian universities, the Norwegian Association of Judges, the Norwegian Bar Association, and the Norwegian Association of Lawyers. As required, the call for applications included a description of the position and a specification of the qualifica-

tions required to carry out the duties of an ECtHR judge: to be eligible, candidates had to have a law degree as well as relevant legal experience. Applicants were also to have a thorough knowledge of the Norwegian legal system and the human rights field, as well as a good command of written and oral English or French. Special weight was given to the requirement that the applicant be a person of “high moral character,” as stipulated in Article 21 of the convention and section 55 of the Court of Justice Act for Norwegian judges. Candidates should further be able and willing to take up the position for the length of the nine-year term, and “preferably not have been involved in so many individual cases that are likely to be brought before the Court that an ad hoc judge will have to be appointed other than in exceptional cases.”<sup>223</sup> The call for applications also specified that the list of candidates would ideally include at least one candidate from the underrepresented sex.<sup>224</sup> The initial deadline for submitting applications was in fact extended from three weeks to six, due in part to the fact that no female candidates initially applied.<sup>225</sup>

The selection committee conducted interviews with the shortlisted applicants, as well as language proficiency testing. The government said it could not provide detailed information on the interviewing process as the committee had operated independently; however, it is known that the committee was asked to ensure consistency among individual interviews.<sup>226</sup> According to the Norwegian section of the ICJ, interview questions were not based on a strict questionnaire but were prepared in advance. They focused on the candidates’ curricula vitae and personal qualities, putting an emphasis on practice in the legal system as either a judge or an advocate. With respect to language testing, there was no separate testing of candidates’ language proficiency, and the interview was not held in different languages.<sup>227</sup> Once completed, the selection committee submitted a proposed list of candidates to the Ministry of Justice, which then made the formal decision. (In the event the ministry considers a different candidate from the ones proposed, the selection committee must also be asked for an opinion on that candidate’s fitness.) The final list was then submitted to PACE by the MFA, and published as a decision of the King of Norway.

## Panama

No specific legal framework or established process exists for national nominations in Panama, which nominated its first candidate to an Inter-American human rights body in the June 2015 election. It was reportedly moved to do so out of desire to have a presence on the IACHR Commission and, specifically, to promote a female candidate.<sup>228</sup> To initiate the national nomination process, the Permanent Mission of Panama to the OAS submitted information on the opening of positions to the Ministry of Foreign

Affairs.<sup>229</sup> The MFA subsequently established an ad hoc task force composed of the Foreign Affairs minister, the director of the Directorate of International Organizations and Conferences, the director of the Diplomatic Academy, and other vice ministers from the Panamanian government. The task force reportedly included someone from the civil society sector, but no details were available on this point and it is unclear what background and competences this person had. No detailed information on the gender ratio of the task force was available; however, both the Foreign Affairs minister and the Diplomatic Academy director are female. The Directorate of International Organizations and Conferences coordinated the task force's work.<sup>230</sup>

The mandate of the task force was threefold: first, to identify if Panama had suitable candidates to nominate; second, to make recommendations about any potential candidates; and, finally, to select the most suitable candidate. No formal requirements or procedural rules applied to the task force's work, nor was a public call for applications issued.<sup>231</sup> Rather, task force members reportedly reached out to individuals they considered might be viable candidates and subsequently carried out interviews with those interested in the position. Following the suggestion made by the task force, the Foreign Affairs minister made the final decision: Esmeralda Arosemena de Troitiño, who was elected to serve her first term as a commissioner from January 2016 to December 2019. Her nomination was followed by a formal press release in Panama and included some coverage in the national press.<sup>232</sup>

## Slovak Republic

The Slovak Republic's last ECtHR nomination process stretched from 2013 to 2015, in part because its list was twice rejected by PACE's Sub-Committee on the Election of Judges, first in June 2013 and again in October 2014 (it was finally accepted in September 2015).<sup>233</sup> In the government's view, the main reason for the rejections was closely linked to its status as an emerging democracy and the fact that suitable candidates with the necessary experience and seniority frequently do not possess the language abilities required of an ECtHR judge. Conversely, candidates who do possess such language requirements usually do not have the required professional profile due to their being relatively junior.<sup>234</sup> After interviewing Slovakia's third list of candidates in September 2015, the PACE Committee recommended Alena Poláková as the most qualified candidate. She was later elected; her term runs until December 2024.<sup>235</sup>

Notwithstanding the earlier rejections, the nominations procedure remained the same throughout. Uniquely, Slovakia's procedure for the national nomination of ECtHR judges is enshrined in law: Article 141a §4d of the constitution specifies as one of the competencies of the Judicial Council the proposal of candidates "who should act for the

Slovak Republic in international judicial bodies.”<sup>236</sup> Bound by this constitutional provision, the government may act only upon proposals submitted to it by the council.<sup>237</sup> The Judicial Council is the Slovak judiciary’s highest body, and is independent from the legislative and executive powers. As a permanent institution, it consists of a total of 18 members who are nominated for a term of five years, unless dismissed.<sup>238</sup> Judges elect nine of the 18 members, while the president, parliament, and government nominate three members each.<sup>239</sup> As of December 2015, five of the Judicial Council members were women (including its current president, Lenka Praženková).<sup>240</sup>

The Judicial Council organized the public calls for applications, which must be issued a minimum of 15 days before the submission deadline and 40 days before the council nominates its candidates for nomination.<sup>241</sup> Act 185/2002, which regulates further jurisdiction of the council, stipulates that nominations of candidates to international judicial bodies can be submitted to the Judicial Council by a member of the council, the minister of Justice, or any of Slovakia’s professional legal associations, such as the judges’ association or the bar association.<sup>242</sup> The act further specifies that candidates must fulfill the following requirements: (1) have acquired a legal education through the successful completion of a master’s degree at a Slovak law faculty, or be in the possession of a recognized comparable degree at a foreign university; (2) have integrity and be “a credible personality in the field of law and his [or] her moral qualities give a guarantee that he [or] she will duly perform [their] mandate”;<sup>243</sup> (3) be permanent residents in Slovakia, with “full legal capacity and health conditions” allowing them to perform the judicial mandate; and (4) have passed an exam admitting them into judicial office, prosecutor’s office, notary, or bar exam, as well as a minimum of five years’ practical experience.<sup>244</sup>

Following the release of the call for applications, the Judicial Council holds a public, recorded meeting to set a date for the election. During the time leading up to the council’s selection of the three nominees, applications are received and interviews held with eligible candidates. Interviews are open to the public and accessible online via recordings on the website of the Judicial Council.<sup>245</sup> The format of the interviews requires that all candidates be present at the same time, while they are asked questions in the drawn order. Chaired by the council’s president, candidates first provide a presentation including their motivation for applying. Following the presentations, council members may ask questions that are within their discretion and have not been prepared in advance.<sup>246</sup> Language assessment is a matter of dispute. According to the government, interviews include questions in English as well as French; however, civil society observers of the process say that language testing took place on a single occasion in December 2013, at the initiative of the council’s former president, and without previous agreement with the other members.<sup>247</sup>



Following the interviews, each member of the Judicial Council can choose up to three candidates by secret ballot—for a successful nomination, candidates have to obtain a minimum of 10 votes.<sup>248</sup> Following the vote, the Judicial Council approves the three candidates with the most votes and submits the nominations to the government for endorsement.<sup>249</sup> The final decision as to which names are forwarded to the PACE is made by the government, however, which has the power to approve or reject the list in its entirety.<sup>250</sup> In the case that the government disapproves of the list, the Judicial Council would have to call for new elections and repeat the process.<sup>251</sup>

## South Africa

South Africa is one of the countries with a high number of successful campaigns for election to the African Commission and Court, as well other intergovernmental organizations (e.g., UN treaty bodies, the African Committee of Experts on the Rights and Welfare of the Child).<sup>252</sup> It remains, however, a state with an ad hoc approach to the nomination of candidates to human rights organs, and there are no written procedures or guidelines that govern the process.<sup>253</sup>

Key actors in the nomination process are generally the Department of International Relations and Co-operation (DIRCO) and the Department of Justice and Constitutional Development. DIRCO is typically the recipient of outside communication on AUC-related vacancies. However, depending on the thematic area of the organ where a seat needs to be filled, another department could be involved in the nomination process as deemed necessary. There is no evidence of a public call for nominations or applications from interested candidates being issued by the government; rather, candidates have had to approach DIRCO and/or the Department of Justice directly to express their interest in being nominated. Those efforts reportedly often required several follow-up inquiries and “nudging” of the appropriate offices. There is also nothing to suggest that DIRCO or any other government department undertakes public consultations in relation to the process. Judge Bernard Ngoepe, for instance, who was elected to the African Court in 2006 and re-elected in 2010, was approached on account of his contribution to the democratization processes in South Africa as well as having served as a president of the High Court.

Interviews with candidates for international judicial office are rare in South Africa but have taken place. Judge Ngoepe, for instance, was shortlisted with another candidate, a situation that necessitated an interview with both individuals. Such interviews are conducted by the Judicial Services Commission, and typically center on the requirements of the African Court Protocol and knowledge about the African Court in particu-

lar. Notably, the support provided to nominated candidates by the state appears to vary from one candidate to the other. For instance, as between the African Commission and Court and UN treaty bodies, the perception among several interviewees was that election to the latter is generally considered to be the more competitive, with greater political support allocated accordingly. Indeed, in some cases, candidates paid for expenses out of their own pockets for campaigning purposes (such as printing stationery), while others had their costs fully met by the state.<sup>254</sup>

## Uganda

Uganda has had several candidates successfully elected to both the African Commission and the Court, following national nominations processes that remain largely *ad hoc*.<sup>255</sup> For both institutions, the MFA, acting in consultation with the Ministry of Justice, is responsible for the nomination process.<sup>256</sup> It receives notice for vacancies from the AUC, and either initiates nominations or entertains requests from prospective candidates to be nominated for vacancies of their interest. The ministries do not make a public call for applications or nominations. Moreover, once the state identifies a candidate it does not open the opportunity to others; it is a closed process. A review of the candidate's documents is then undertaken to ensure that he or she meets the state's criteria to serve. Reportedly, the Ugandan parliament has begun mooting the possibility of adopting a law or regulation that would establish criteria and procedure for the nomination of candidates, in the interest of ensuring a more transparent and competitive process.<sup>257</sup>

Currently, two Ugandans serve on the regional human rights systems: Judge Solomy Balungi Bossa was elected to the African Court in 2014, and Commissioner Med Kaggwa was elected to the ACHPR in 2011.<sup>258</sup> Personal interviews with both of these candidates reflect the informal nature of Uganda's process. In Commissioner Kaggwa's case, his nomination was reportedly initiated when the MFA contacted his office, asking for a copy of his CV. He had little engagement in any aspect of the national nomination process. By contrast, Judge Bossa was more closely engaged in the process, having first approached the government to express her interest in a seat on the International Criminal Court (ICC). Though unsuccessful, she was appointed to the East African Court of Justice in 2001 and, later, to the International Criminal Tribunal for Rwanda.<sup>259</sup> In 2014, the MFA approached her again about the possibility of serving on the African Court. Her selection by the MFA appeared to represent, in part, a positive example of growing efforts to enforce gender equality requirements on the African human rights bench.

## United Kingdom

The United Kingdom initiated its most recent national nomination for the ECtHR bench in December 2015, with London barrister Tim Eicke elected in June 2016 by the PACE to succeed former Judge Paul Mahoney. The UK does not have a specific legal framework in place when nominating its ECtHR candidates; however, the government applies *mutatis mutandis* to its guidelines for national public and judicial appointments to the Strasbourg process.<sup>260</sup> To that end, the Judicial Appointments Commission (JAC) serves as the national focal point for the nominations and an independent panel carries out the selection of candidates. Most recently, the seven-member panel that reviewed the UK's candidates included Dame Rosalyn Higgins (former president of the International Court of Justice and chair of the panel), Lord Reed (Supreme Court) and Lord Dyson (Master of the Rolls) as judicial members; Baroness Onora O'Neill (House of Lords, chair Equality and Human Rights Commission) and Professor Graham Gee (University of Sheffield) and Richard Heaton (permanent secretary Ministry of Justice) as lay members; and Iain Macleod (legal advisor Foreign and Commonwealth Office) as its legal member.<sup>261</sup> The UK's lord chancellor, who is also secretary of state for Justice, makes the final decision (at the time of the 2016 selection, Michael Gove served in this role.)

Prior to opening a call for applications, JAC posts on its website a notice that the application procedure will soon commence. In addition, it initiates an "outreach exercise" to people whom the commission thinks might be interested in applying.<sup>262</sup> For the most recent process, a form allowing candidates to register their interest in applying was posted in early December 2015; the website of the JAC further outlined the general procedure, including the January 4, 2016 deadline to submit a full application. A full application pack was available for download online, including information on eligibility and language requirements, as well as the job description, a detailed timetable, a description of the application and selection processes, and full terms and conditions. As regards eligibility criteria, the application specified that in addition to the criteria set out in Article 21, the UK expected candidates to "have a proven and consistently high level of expertise, with at least seven years' experience in the areas of law in which they have been engaged. Candidates will normally be expected to have experience in criminal or civil fields, with demonstrable knowledge of the UK's national legal systems, public international law, public law, Strasbourg law and human rights."<sup>263</sup> The call for applications was circulated widely by the JAC, which cooperated with its Northern Irish and Scottish counterparts to ensure wide dissemination throughout the UK. The secretary of state also sent communications to all national heads of court, as well as the justice ministers of Northern Ireland and Scotland. In addition, the call for application was tweeted and permanently available on the website of the JAC.<sup>264</sup>

Acting as secretary to the selection process, the JAC received and collected all of the applications that were submitted to the selection panel.<sup>265</sup> The selection process then carried out by the panel included a number of consultations to develop a long list of candidates with the senior judiciary of England and Wales, Scotland, and Northern Ireland, as well as senior lay figures and senior officials. Candidates were asked to issue a Declaration of Character in accordance with the requirement laid out in Article 21 of the European Convention, explaining “whether anything they have said, written or done, should it be made public, would be capable of bringing the Court into disrepute.”<sup>266</sup> Those selected for interview by the panel were also contacted directly by the Institut Français, an independent institution, to carry out language assessments in French.

Subsequently, the selection panel provided a list of up to 10 of the most meritorious candidates to the lord chancellor, who in turn sent a shortlist of three to Strasbourg.<sup>267</sup> (Before deciding on the final three, the lord chancellor may also carry out consultations with external actors not involved in the immediate process.<sup>268</sup>) Once this takes place, shortlisted and unsuccessful candidates who participated in interviews were simultaneously sent their results via e-mail.<sup>269</sup> Unsuccessful candidates who advanced to the interview stage also have the right to request written feedback. This request has to be made within six weeks of the date of the letter informing them of the outcome of the selection process. In addition to the opportunity to request feedback, candidates may also initiate a complaint procedure before the JAC.<sup>270</sup>

## United States of America

Although the United States has had 10 commissioners serve on the IACHR (more than any other country), there is no domestic legal framework that governs the nomination process. Rather, in the recent past, the national nomination process has been initiated by the establishment of an ad hoc working group within the State Department, comprising individuals from the Bureau of Democracy, Human Rights and Labor, the Office of the Secretary of State, the Legal Advisor’s Office, and the Bureau of Western Hemisphere Affairs, including representatives from the US Mission to the OAS. The membership of the working group is not fixed. Generally, there is a core group of people strongly involved in the process (approximately 10), but other members also participate on an ad hoc basis.<sup>271</sup>

The working group’s general practice is to first reach out to relevant national stakeholders including other government agencies, past US commissioners, and civil society actors to ask for suggestions on suitable candidates. Civil society organizations are also consulted as to the criteria that should be used to evaluate received candidatures

and are able to request information about the process, such as the names of candidates under consideration.

The 2012 search process resulted in approximately 15 to 20 individuals being identified as potential candidates for commissioner. Following the initial process of identifying suitable candidates, the working group carried out a pre-selection based on the following criteria: knowledge of the Inter-American Human Rights System (IAHRS), knowledge of human rights, demonstrated independence, language proficiency, interpersonal and diplomatic skills, and availability given that commissioners serve on a part-time basis.<sup>272</sup> In addition, candidates' professional and academic backgrounds were evaluated. Another matter that is also taken into account is electability, that is, whether given the voting dynamics within the OAS General Assembly, a candidate could realistically be voted into office.

After the pre-selection, the core members of the working group generate a shortlist of candidates, confirm their interest in serving on the IACHR, and interview the candidates. In 2012, interview questions were prepared in advance in order to allow all candidates to be asked the same questions. One panel member was in charge of asking at least one question per candidate in Spanish to assess Spanish language proficiency. While knowledge of either Spanish or Portuguese is not considered indispensable for the position, language proficiency reflecting the working languages of the commission is a highly desired feature. In a final step, the working group ranks candidates and liaises with them to ensure that whoever is nominated could commit to the position. Working group members also held informal consultations with civil society representatives regarding the qualifications of shortlisted candidacies. A formal recommendation is then made to the secretary of state, indicating the recommended candidate and, in some cases, possible alternatives. The secretary makes the final decision and can theoretically disregard the group's recommendation.<sup>273</sup> Once the formal decision is made, a public press release is written. In February 2013, James L. Cavallaro was announced as the US nominee and was elected to his first term later that year.

Notably, after Cavallaro announced he would not run for reelection, the United States put forward Douglas Cassel, a professor of law at University of Notre Dame as its 2017 candidate to the commission. In a departure from the outcome of previous IACHR elections, Cassel was not elected. Furthermore, it would appear that the approach taken by the State Department in 2012 was not repeated in 2017. For instance, in response to questions posed by the 2017 independent panel, Professor Cassel indicated that, to his knowledge, the State Department had "engaged in informal consultation with civil society and perhaps with academic experts [in 2017], but he [was] not aware of any formal or pre-established process" for his selection.<sup>274</sup>

## Uruguay

Uruguay's national procedure for nominations to the Inter-American human rights system is not formalized and until 2009, when Judge Alberto Perez Perez was nominated to the Inter-American Court, Uruguay's previous candidates to the IAHRs date back 30 years or more.<sup>275</sup> In 2017, Uruguay nominated a candidate to the Inter-American Commission, Gianella Bardazano Gradin; however, her nomination was unsuccessful.

As a general matter, relevant bodies inform the Department on Human Rights and Humanitarian Affairs of Uruguay's MFA if positions at international courts and quasi-judicial bodies within the IAHRs or UN committees are open. The department then distributes the relevant information to stakeholders working on related topics, for example relevant governmental institutions (including the Human Rights secretary), universities, and civil society organizations, as well as Uruguay's national human rights institution.<sup>276</sup> Should interested individuals express their interest in being nominated for a specific position, the MFA considers their application and may invite them for a conversation. The candidates' CVs are then analyzed and a decision on their nomination is made.<sup>277</sup>

## V. Findings and Recommendations

The findings below are based on the practices of the 22 states described in the previous chapter, as well as the regional laws and procedures highlighted in chapter 3 and the international standards set out in chapter 2. They also reflect the broader experience of the Justice Initiative and ICJ in relation to issues of judicial independence and the effectiveness of regional human rights bodies in various contexts around the world. The findings highlight areas of progress and good practice, and identify a series of related recommendations that states should consider implementing in relation to their national procedures for nominations to regional judicial and quasi-judicial offices.

1. *There is a lack of defined criteria to guide the nomination of qualified, merit-based candidates at the national level.*

As affirmed by international standards and jurisprudence, the “overriding consideration” for service on an international bench should be merit-based. A candidate must satisfy the professional qualifications for the position of commissioner or judge, and should meet high standards of professionalism, integrity, and independence.<sup>278</sup> An essential first step is defining what these qualifications should be for candidates nominated to the regional human rights courts and commissions, and what standards they are expected to meet.

Based on our research, it appears that several states have taken steps to define what qualifications would satisfy the broad provisions that the regional conventions and protocols set out for service as a judge or commissioner, but many have not.

- Member states of the Council of Europe appear to have more consistently elaborated criteria that national candidates must satisfy, providing broad benchmarks in terms of the years of professional service required, minimum educational qualifications, language proficiency, and experience working in the field of human rights. Most of these criteria were elaborated and made public following earlier directives from the CoE Parliamentary Assembly as well as guidelines issued by the Committee of Ministers.
- On the African continent, Mozambique is notable for disseminating notice of a judicial/commissioner vacancy and its relevant qualifications to government institutions such as the Attorney General’s Office, civil society organizations, faculties of law, and bar associations.
- Similarly, for the Inter-American Commission elections in 2013, the US Department of State’s Working Group carried out a pre-selection process based on publicly defined criteria. In addition, candidates’ professional and academic backgrounds were evaluated, including vetting CVs and publications.
- Notably, neither the African Union nor the Organization of American States has issued any directives or guidelines on the nomination of candidates to their regional commissions and courts.

In determining what national criteria should guide candidates, some countries surveyed in the report adopted a useful general rule for nominating international judges: applying the same criteria for appointment as those for appointment to the country’s highest national court. Norway is one example in this regard. In the absence of a legal framework, its nominations process for Strasbourg is designed to be similar to that of the appointment of Supreme Court justices, where an independent selection panel also puts recommendations before the Ministry of Justice.<sup>279</sup> Elsewhere, rules applicable to the nominations for the highest national judicial office are applied *mutatis mutandis* for those to the ECtHR.<sup>280</sup>

Such practice is the exception rather than the norm, however, even in countries that have legal frameworks in place to guide the appointment process for national justices.<sup>281</sup> Furthermore, the absence of such criteria for national-level nominations is owed in large part to the informal process of recruiting candidates, as discussed further below.

*In light of these findings, the Justice Initiative and ICJ make the following recommendations:*

- States should develop reasoned criteria to ensure that all candidates meet the minimum qualifications for service as a judge or commissioner, and against which they can be assessed.



- Provided that a country’s requirement for eligibility in national judicial office accords with international law and standards, an advisable practice is that candidates for regional human rights courts should, at a minimum, meet the requirements for appointment to their country’s higher national courts (including the constitutional court, if any) or be of equal professional standing (e.g., senior academics, professors of law, or practicing lawyers).
  - The presentation of writings, opinions, and/or evidence of legal practice or advocacy demonstrating competency in the field of international human rights law—with some knowledge of general public international law being an additional asset—should be specifically required and requested of candidates to regional human rights courts.
  - Candidates for regional human rights commissions should be asked to demonstrate their knowledge of international human rights law and standards, methods and challenges for human rights advocacy, the role and protection of human rights defenders, and other aspects related to the promotion and protection of human rights, whether through relevant legal practice or other means.
  - Regional bodies should ensure that minimum standards exist to guide member states on the substantive criteria required for service as a human rights judge or commissioner.
2. *States do not nominate enough national candidates to ensure competitive elections at the regional level.*

The country studies confirm a consistent practice: Outside of the Council of Europe, states almost never nominate more than one candidate to a regional human rights commission or court. Although both the African Court Protocol and the American Convention on Human Rights grant states the right to nominate up to three candidates to the African Court and the Inter-American Commission and Court, respectively, states do not exercise this right.<sup>282</sup> The lack of nominees at the national level contributes, in turn, to limited competition among candidates at the regional stage of selection. It also, as the African Union’s recent directive suggests, leads to an insufficient number of candidates who, if elected, can satisfy a region’s equitable geographic and gender representation requirements.<sup>283</sup>

This limited competition among candidates also abets the common practice of vote trading among states. As noted by the 2015 Independent Panel for the Election of Inter-American Commissioners and Judges:

What happens ... is the States engage in securing promises from other States that the latter will vote for [their] candidate. These promises are deals made in confidence and not publicized, although rumors generally spread about how many votes the candidates is already counting on or whether a State is leaning towards voting in favor of a certain candidate. In order to obtain more firm commitments, States engage in an exchange of votes, as in most cases there is more than one vacancy for the respective organ. But the exchange of votes is by no means limited to the same election and the same organ. States exchange a vote for a judge for a vote for a commissioner, and not infrequently for votes in elections for positions in organs not related to the IAHRs, but also for other elected positions, and not even solely within the OAS.<sup>284</sup>

The country studies further affirm that states expend significant political and diplomatic capital trying to secure the election of their nominees. Indeed, it would appear that greater capital is expended here than in ensuring a thorough national-level selection process. Even in the Council of Europe, where the guarantee of each country having one seat on the bench was meant to reduce the practice of electioneering, “it is not uncommon for a government to campaign ... to select the government’s own favorite nominee, to the detriment of the two candidates whose names it is required to submit.”<sup>285</sup> Efforts to distort such lists in order to ensure a state’s preferred candidate has been the basis on several occasions for the PACE Sub-Committee to reject a list of candidates.

Finally, there is little evidence to indicate that states have seriously considered how to incentivize or encourage greater numbers of qualified individuals to apply for judicial posts. This is a particular concern in the case of the ECtHR, whose judges are the only ones to serve in a full-time capacity, although it raises concerns for part-time judges in the Inter-American and African human rights systems as well.<sup>286</sup> The introduction of a compulsory pension scheme to which all newly elected judges in Strasbourg are required to contribute marks a step forward in this regard (initially, ECtHR judges were expected to make their own private provisions for a pension); however, states should also implement affirmative measures to ensure job security when elected individuals complete their terms. As one former ECtHR judge notes, “Many attempts have been made to encourage states to make proper provision for judges at the end of their term but there remain recent examples where judges have left the Court at the end of their term without any prospect of judicial or other public employment at home.”<sup>287</sup>

To that end, measures to encourage applications from the greatest number of qualified applicants should also be considered. This may include adopting measures to ensure that candidates can retain their seniority on the national bench and/or retain their pension rights during their years of service on a regional human rights body.<sup>288</sup> It could also encompass improved recruitment strategies. For instance, in an effort to

increase the number of potential candidates during the 2016 nominating process, the UK Ministry of Justice opted to recruit for High Court justices at the same time as the ECtHR post. Candidates who succeeded in both competitions were then assured that their position on the High Court would be held for them during the time they served in Strasbourg, if they were so chosen.<sup>289</sup> Finally, the practice of small and micro-states within the Council of Europe are instructive to consider, as they have often sought creative methods to put forward multiple candidates for election, including their own country nationals as well as candidates beyond their borders.<sup>290</sup>

*In light of these findings, the Justice Initiative and ICJ make the following recommendations:*

- Where not required otherwise, states should endeavor to nominate a minimum of two qualified candidates of equivalent professional standing to vacancies on regional human rights courts and commissions.
  - Where permitted, states should consider nominating candidates who are nationals of other member states, as well as nationals of their own country.
  - Candidates should have equal access to all information necessary to allow them to prepare and compete fairly. Calls for applications should include a description of the position(s), applicable terms and conditions, the selection criteria to be applied, and information on the selection process.
  - States should establish structures that provide sufficient security and incentives to encourage applications from the greatest possible number of qualified candidates. These structures could include taking affirmative steps to ensure job security when elected individuals complete their terms, and assistance with pension arrangements.
3. ***Most states lack a national legal framework or a transparent procedure for nominating regional human rights commissioners and judges.***

Just as states should ensure that the candidates they nominate to the regional human rights courts and commissions are qualified, they should also ensure that the procedures by which candidates are selected are accessible and transparent, including so that the general public, the candidates, and other stakeholders can scrutinize whether the process has been conducted in a non-discriminatory and impartial manner, while applying objective, merit-based criteria. (A further guarantee for these elements is the independence of the process, which is discussed further below.)

As detailed in the country studies, almost none of the states reviewed in the report have an established legal framework in place that governs the nomination and selection process for human rights judges or commissioners.<sup>291</sup>

- Of the 22 countries surveyed in this report, only one (Slovak Republic) has a codified nominations procedure.<sup>292</sup>
- Of the countries surveyed, several in Europe (Armenia, Liechtenstein) had established an ad hoc procedure for nominations based on governmental decree, or applied a process similar to that for national judicial candidates (Norway, United Kingdom).
- European countries surveyed have a practice of publicly circulating calls for applications; however, even with this most basic step, the degree to which states ensure effective, timely dissemination of such calls varies widely.<sup>293</sup>
- Among countries surveyed in the African and Inter-American regions, almost none issue open calls for application (exceptions include Mozambique and the United States) and none have a written procedure to guide the nomination process.

These findings confirm the broader criticism that nominations have too often been treated (or perceived to be treated) as opportunities to reward political connections. Indeed, in more than half of the countries surveyed in this report, candidates were nominated as a result of having been personally approached by the government, rather than through a transparent and competitive process. Furthermore, when procedures are set on an ad hoc basis, there is a greater risk of lack of accessibility and transparency, of discrimination and/or favoritism, as well as other improper practices. While such an approach does not necessarily mean that nominated candidates are unqualified to serve, it does make it much more likely that other, equally (or more) qualified candidates will be deprived of the opportunity to receive equal and fair consideration.<sup>294</sup>

*In light of these findings, the Justice Initiative and ICJ make the following recommendations:*

- To ensure fairness and transparency, states should develop a national legal framework to govern the nomination procedure or, at the very minimum, publish a set of fixed rules in advance of the nomination process. These should include a transparent and fair process for shortlisting, interview, and selection.
- Calls for applications should be made public, accessible, and widely disseminated through social media and across academic/legal/civil society networks.
- Once a decision on the nomination(s) has been adopted, states should make public this information by issuing a press release or other form of formal notice. The degree of disclosure of the reasons for the selection, particularly as concerns personal data, interviews with, and assessment of candidates, should be reasonable considering the right of the public to such information but also the privacy

interests of individual candidates. The objective should be to ensure that qualified candidates are not unduly deterred from putting their names forward by reason of eventual disproportionate disclosure of their personal information.

4. *Lack of engagement with professional associations and other civil society organizations in the nomination process inhibits transparency and constructive opportunities for consultation.*

Another important element of transparency in the nomination process is the engagement of legal professional associations and other civil society organizations: ensuring that they are aware when recruitment processes are underway, encouraging them to circulate vacancy notices to their members and networks, affording them the opportunity to submit information on prospective candidates, and providing them (and other interested citizens) with periodic updates on the selection process.

- States outlined in this report adhered to these practices to greater or lesser degrees (and generally to a greater degree among CoE member states), but in many cases there has been little to no effort to involve or engage national civil society organizations. Bar associations or academic institutions were most often consulted, but such practice was inconsistent and sporadic.
- Several respondents made the point that governments typically solicit and choose individuals with whom they feel “comfortable.” Thus, even though commissioners and judges are meant to serve in their individual capacity, it is rarely the case that “activists”—even those with appropriate experience—are nominated (even though the AUC Guidelines, for instance, include “activism” as a desirable background for candidates).
- Positive examples from the Americas included the practice of the United States in 2012, prior to the nomination of James Cavallaro to the IACHR. The Department of State’s Working Group reached out to civil society actors to seek suggestions for suitable nominees, which led to several candidates’ names being put forward. In Uruguay, the Department on Human Rights and Humanitarian Affairs distributes information of available positions to universities, civil society organizations, and its NHRI.
- Efforts to convene in 2015 and 2017 an independent panel of experts to review the candidates nominated to the Inter-American Commission and Court also represented an important opportunity to engage with the process. This exercise was endorsed by more than 70 civil society organizations from across the region.

Several interlocutors nevertheless noted that the exclusion of civil society from the nomination and election process reinforced the view that nominations are largely meant to reward political connections, or indeed that this exclusion was one way for states to indirectly exert control over the regional human rights institutions. This conclusion is reflected in earlier, academic, studies as well. As scholars of the judicial appointment process to the ICC and International Court of Justice have noted, “In practice, a recurring theme ... was the strong vested interest of governments in strictly controlling the nominations process in order to influence the composition of international courts.”<sup>295</sup> Similarly, Nienke Grossman of the University of Baltimore School of Law concludes, “The lack of a transparent procedure for selecting judges on most courts makes it easier for selectors to define the pool of acceptable candidates narrowly and in a way that may benefit them personally.”<sup>296</sup>

*In light of these findings, the Justice Initiative and ICJ make the following recommendations:*

- Engagement of professional associations and other civil society bodies in the nomination process should be encouraged by ensuring they are aware when nominations are sought, inviting them to circulate vacancy notices, and consulting with them as appropriate in the review and assessment process.
  - States should ensure that a public comment period exists to afford individuals, associations, and civil society organizations reasonable time to submit views about shortlisted candidates.
  - With due regard for the privacy interests of candidates, information on the status of the nomination process should be made publicly available and shared with civil society organizations.
5. ***Lack of gender parity and inclusivity in national selection procedures contribute to a low percentage of women serving as human rights commissioners and judges, and to underrepresentation among other social groups and geographic regions.***

The value of a diverse bench also affirms the need for a greater number of national candidates and a more transparent, inclusive nomination process.<sup>297</sup> Enlarging the pool of nominees from which judges and commissioners are elected is also likely to better guard against the selection of underqualified or otherwise unsuitable candidates, while still creating greater potential for achieving better diversity on the bench. The country studies highlighted in this report evidence some important efforts at the regional level—notably in the African and European systems—to increase gender parity and geographic representation in regional courts and commissions; however, few have made affirmative efforts to ensure that their national selection procedures are sex-representative.

These practices underscore larger deficiencies at the regional and international levels. For example, with particular respect to gender disparities on the bench:

- Of the 22 countries surveyed in this report, eight have a woman currently serving on a regional human rights commission or court. Three of these countries are from the African region (Algeria, South Africa, Uganda) and three from the Inter-American region (Costa Rica, Jamaica, Panama).<sup>298</sup> Two serve on the European Court of Human Rights (Austria, Slovak Republic).
- At present, only two women serve on the African Court on Human and Peoples' Rights (18 percent) and one serves on the Inter-American Court of Human Rights (14 percent).
- Notwithstanding the representativeness requirements for national judicial lists in the Council of Europe, currently only 15 women serve on the European Court of Human Rights (33 percent).<sup>299</sup>

Such statistics underscore the need to develop national-level nomination bodies and practices that are themselves representative of and sensitive to sex and gender equality. For instance, the Norwegian Ministry of Justice encourages the four institutions from which it appoints members to its national selection committee—the Supreme Court, the Office of the Attorney General, the Norwegian Centre for Human Rights, and the Norwegian Bar Association—to put forward the names of one woman and one man each.<sup>300</sup> Norway's call for applications also encourages candidates from the underrepresented sex to apply (most recently, the deadline for applications was extended a further three weeks to ensure that applications were received from both female and male candidates).<sup>301</sup>

Several respondents also made the point that gender is a subconscious factor: When it is men who look for candidates to nominate, they invariably look for other male candidates. Judge Bossa of Uganda noted an important counter-example to this unfortunate bias in her own nomination to the African Court on Human and Peoples' Rights. She became aware of the vacancy through the Association of Female Judges, which then supported her candidacy alongside the government's efforts. Such examples underscore the importance of ensuring that calls for application are widely circulated to national bar and civic associations, who may be better positioned to reach out to underrepresented groups. Other efforts on a global scale, notably the GQUAL campaign for "gender parity in international representation," are also working with states from different regions to adopt pledges to nominate and vote in a manner that would promote women's equal representation.<sup>302</sup>

It would appear that concerns about gender disparity have begun to gain some traction at the regional level. The Council of Europe has gender representativeness requirements for its national judicial lists, as do other international courts like the ICC.<sup>303</sup> Furthermore, as noted, the OAS resolution passed in 2016 emphasizes the importance of “the principles of nondiscrimination, gender equity, and geographic representation.” The African Union has gone the furthest of the three systems: Gender quotas are now a requirement for election to the commission and the court. However, while these provisions are welcome in principle, it is worth noting that their implementation—which has been interpreted by the AUC as requiring immediate, 50/50 representation—has not been without controversy. For instance, the July 2016 elective session in Rwanda saw otherwise qualified male candidates either withdrawn or not considered solely because they did not meet representation requirements; as a result, it appears that the two female judges who were elected faced no competition for the two open seats.<sup>304</sup> This lack of competition underscores the point that regional-level representativeness requirements depend upon meritorious, sex-representative practices at the national level. Without such practices, regional quotas could result in non-competitive elections. As one scholar has put it, “nonmeritorious selection procedures are the main problem, and the gender imbalance that we see across international courts and tribunals is a manifestation of it.”<sup>305</sup>

Finally, it is important to note that, if judiciaries are to be a reflection of society at large, the need to ensure diversity on the bench extends to characteristics beyond gender. While some states surveyed herein undertook gender-sensitive recruitment practices, there was little to no evidence of efforts to reach out to disadvantaged minorities or collectives, including racial/ethnic minorities, people with a disability, and LGBTI individuals. As Grossman notes, “[T]he percentage of international court judges from indigenous or poor backgrounds, minority groups within their own countries, or having disability status appears virtually unquestioned and unknown.”<sup>306</sup>

*In light of these findings, the Justice Initiative and ICJ make the following recommendations:*

- States should take affirmative steps to ensure gender parity in the nomination of candidates, including through equal representation among national decision-makers in the process (e.g., nominating bodies or review panels), and among the candidates nominated to commissions and courts.
- Calls for applications should explicitly encourage members of the underrepresented sex to apply. States should affirmatively seek to ensure that public calls for application are disseminated widely among underrepresented groups and communities.



- Member states should take active steps to identify groups underrepresented at the bench of the regional judicial or quasi-judicial body, and to actively encourage their application, including by providing information to relevant groups and associations who may assist with outreach.

6. *There appears to be no consistent practice involving an independent body in the nomination process to help ensure that the selection process is transparent, impartial, free from discrimination, and based on merit.*

Several countries surveyed in this report have established a dedicated working group or focal points at the national level to handle the review of applications for regional human rights courts and commissions. This is a welcome development and, where such bodies have existed, they have often (though not always) led to greater transparency about the selection process. More broadly, they can help ensure an objective, rigorous, and fair review of candidates based on their qualifications. The practice of nominations to the International Court of Justice is instructive in this regard, as candidates are nominated not by national governments but by specially constituted national groups. In theory, such groups are intended “to provide [an] element of independence” from government; however, as commentators have noted, “Establishing independent national nomination bodies that have a real, determinative role in the selection procedure requires political will that has only been seen in a handful of states.”<sup>307</sup>

For regional human rights nominations, such national nominating groups rarely exist outside of CoE member states; moreover, to the extent they do, they are not standing entities but created on ad hoc basis. Exceptions of note in this regard include several national judicial service commissions that have doubled as coordinating bodies for regional human rights nominations. For instance:

- The United Kingdom, where the Judicial Appointments Commission—a permanent, independent institution—is responsible for the coordination of the selection of ECtHR candidates.<sup>308</sup>
- South Africa’s Judicial Service Commission, which has also occasionally been called in to preside over interviews in instances where there have been several interested candidates (as in the 2006 election of Judge Ngophe) in order to shortlist a single nominee.

Furthermore, as noted, the independence of several of these bodies (or their members) is not always clear. Panels with members appointed solely by the executive, or who are themselves servants of that institution, have raised questions about sufficient independence.<sup>309</sup> In principle, then, the same considerations that argue in favor of

independent selection and appointment bodies for national judiciaries should apply for the selection of nominees for regional judiciaries (and commissions) as well.<sup>310</sup> Ensuring that members are themselves familiar with the regional human rights system in question—their relevant conventions, jurisprudence, and functioning—is an added concern.<sup>311</sup> Such concerns underscore the value of establishing a legal framework for nominations, and of clarifying both the procedural and the substantive requirements for service on the international bench.

Finally, another important function that a formal nomination or review body can serve is the practice of interviewing candidates and/or administering written tests.<sup>312</sup> In the Council of Europe region, it is noteworthy that all of the states considered in this report carried out interviews with prospective nominees (as they are required to do), but this was only an occasional practice elsewhere (the United States in 2012, South Africa in 2006). Ensuring a level of public access to the interview process is also an important element of a transparent process. For instance, the Slovakian Judicial Council, in conducting interviews with ECtHR candidates, made the full session open to the public and accessible online via recordings on the Judicial Council's website.<sup>313</sup>

*In light of these findings, the Justice Initiative and ICJ make the following recommendations:*

- A demonstrably independent body, including members of the national judiciary and legal profession, should carry out the national selection procedure for nominations to regional human rights courts.
- With respect to membership, ensuring that a majority of the body's members are judges selected by the judiciary itself can enhance the independence of the selection body. Furthermore, consideration of particular experience in human rights law should be taken into account to qualify as a member of the body. Similar considerations apply to the independence of bodies for nomination of members of regional human rights commissions, although there will generally be less need for the members to be drawn from the judiciary. All members of such bodies, however, should be demonstrably able to fulfil their role impartially.<sup>314</sup>
- Particularly where a national appointing body lacks specific human rights expertise and is responsible for nominating candidates, it may invite external actors (judges, lawyers, academics) to be involved.
- If the selection body has only recommendatory power, the government should as a general rule follow the recommendation of the nomination body or review panel. If the government retains discretion to reject the recommendation, its scope of discretion should be limited and reasons must be given for the rejection.
- The panel or review body should be empowered to interview candidates. Interview questions should test the qualifications and suitability of the candidate for the

position, including his or her professional expertise and knowledge, as well as personal suitability and language proficiency.

- Interview questions should be established in advance and follow a standardized format. At a minimum, candidates should be asked questions of the same level of difficulty, to ensure that their suitability for the position is assessed fairly and objectively.

7. *There is currently insufficient and/or ineffective regional review and oversight to ensure that candidates are independently vetted and to detect and correct deficient selection procedures at the national level.*

As noted above, PACE’s Committee on the Election of Judges has rejected several CoE states’ candidates in recent years on the grounds that they failed to satisfy the objective criteria for judicial service, while the Advisory Panel of Experts has likewise provided an additional level of review. In this way, the committee has served as an essential check on deficient selection procedures. The committee’s assessment, informed by its ability to interview the candidates directly—and from a membership that includes parliamentarians with legal experience—has also led in a number of cases to states revising their initial lists, in order to ensure that state lists include candidates of relatively equal qualifications and comply with gender representative requirements.

The committee’s power is supplemented by the non-binding review of the CoE’s Advisory Panel of Experts, which consists of independent members (judges and lawyers). While the panel has not been without criticism, it has served an important role in encouraging states to develop more rigorous national level selection procedures. It has further expressed concern, for instance, about “the low number of candidates [to the ECtHR] with substantial judicial experience,” and has urged states to “take every reasonable step to encourage a greater number of very experienced judges from the highest courts to make themselves available as candidates for election to the Court.”<sup>315</sup> In the words of one commentator, the panel thus “creates an external scrutiny capable of generating incentives for a meritocratic search as opposed to a loyalty-reward system.”<sup>316</sup>

The development of such procedures in Strasbourg represents considerable progress. Indeed, in the words of one former ECtHR judge, “the procedures at regional level [in the Council of Europe] have improved beyond recognition.”<sup>317</sup> Unfortunately, to date, neither of the regional human rights systems in Africa and the Americas possesses any similar screening function as that of the PACE Committee or Advisory Panel, nor has either system provided the level of regional guidance that the CoE has to its member states on what constitutes appropriate national selection procedures. While there has been some modest progress in terms of guidelines issued by these bodies—by the

OAS in 2016 on gender equality, by the AU Assembly on the value of encouraging civil society participation in the domestic selection process—the lack of any such mechanisms means that there is effectively no oversight beyond that exercised at the national level to ensure that qualified, independent candidates are nominated to either of the regional human rights commissions or courts. To that end, both of the independent panels convened to review the IACHR and IACtHR elections in 2015 and 2017 have recommended that such an independent body be created by the OAS in order to ensure the election of candidates who fulfill the regulatory requirements and who reflect the diversity of the region.<sup>318</sup>

*In light of these findings, the Justice Initiative and ICJ make the following recommendations:*

- Within each regional human rights system, an independent advisory committee/group of experts should exist to evaluate the suitability of candidates for service as a commissioner or judge, and to assess the national selection procedure undertaken.
- Interviews should comprise a part of the committee’s review, and the committee should make a final written report to the relevant regional political body, to take into account during the casting of final votes.
- The advisory committee should be empowered to reject, or at minimum to recommend publicly the rejection of, candidates who are manifestly unqualified or unsuitable.
- Regional advisory committees should be empowered to receive and consider outside written submissions—including from civil society groups at the national, regional, and international levels, as well as NHRIs and other international institutions—on the qualifications and suitability (or lack thereof) of nominated candidates.
- Regional human rights bodies should develop directives or guidelines to guide member states on the criteria for qualified and suitable human rights commissioners and judges, including the need for equitable geographic representation, gender parity, and other forms of diversity on the bench. The Committee of Ministers’ Guidelines for Council of Europe member states may serve as a useful model in this regard.
- In advance of each election cycle or open posting, regional systems should ensure that member states are provided with information as to the current gender composition of the relevant regional court or commission, as well as the professional background and nationalities of currently serving members. The need for a broad range of experiences, along with different and complementary skill sets, should be emphasized for the regional human rights commissions in particular.

## VI. Conclusion

An independent judiciary is essential to the rule of law. At the national level, judges who are both institutionally and personally independent, who are impartial in their decision-making, and who uphold high standards of professionalism (and are held accountable where they do not), are essential to the protection of human rights. Indeed, the standards and procedures for the selection and appointment of judges are among the cornerstones on which judicial independence is built and on which public confidence in the judiciary depends.

The world's international courts and tribunals are no different. As this report makes clear, international law and jurisprudence on the right to a fair hearing, and international standards on the independence of the judiciary, establish and affirm that the process by which human rights judges and commissioners are nominated at the national level and selected at the regional level should be transparent, fair, and merit-based. The regional standards and procedures that guide nominations and elections have begun to incorporate these requirements more explicitly, but more can still be done. Indeed, much of the nomination and election process for regional human rights courts and commissions remains shrouded in secrecy.

This report is one step in piercing that veil of secrecy. By providing a detailed analysis of the nomination practices of 22 countries from across the regional human rights systems, it illustrates three fundamental points. First, states employ a wide range of good and bad practices in their nomination and selection procedures. Second, while there is no perfect nominations process or model, in almost all countries it is clear that the standards for nominations that are set out in a growing body of international norms and jurisprudence have yet to be met domestically. And finally, the selection of nominees at the national level predetermines, to a large extent, the quality and number

of candidates that run for election at the regional level. With these conclusions in mind, this report has also offered recommendations for consideration by national legislatures, executive governments, judiciaries, legal professional associations (national, regional, and global), civil society organizations, and other relevant stakeholders.

In shedding light on this largely unexplored area, it is our hope that this report contributes to improving nomination procedures at the national level—across all the regional human rights systems—in order to aid the pursuit of justice for victims of human rights violations around the world. We also hope that it inspires more comparative reflection by states and the regional systems themselves on how to maintain the high levels of expertise and professional standing among regional human rights judges and commissioners (and other international adjudicators as well). These courts and commissions have been at the forefront in elaborating and developing international human rights law and standards, in helping to articulate and define new norms, and in influencing and changing practice on the ground. Such progress is a testament to the many qualified individuals who have already served these institutions, but also to the vigilance required in ensuring that the standards and process for their appointment are not only maintained, but also raised. Their vital work demands no less.

# Endnotes

1. Daniel Terris, Cesare P.R. Romano, and Leigh Swigart, *The International Judge: An Introduction to the Men and Women Who Decide the World's Cases* (Brandeis University Press, 2007), p. 1.
2. On the relationship between national sovereignty and international adjudication, see Karen Alter, "Delegating to International Courts: Self-Binding vs. Other-Binding Delegation," *Law and Contemporary Problems* 71(1) (2008), pp. 37–76.
3. Though not the subject of this report, the UN treaty bodies have also been subject to state-led attacks on their independence. On the history of this process, see Christen Broecker and Michael O'Flaherty, "The Outcome of the General Assembly's Treaty Body Strengthening Process: An Important Milestone on a Longer Journey," Universal Rights Group Policy Brief (June 2014).
4. For useful summaries of these processes, see Due Process of Law Foundation, "Reflections on Strengthening the Inter-American Human Rights System," *Aportes DPLf* 16(5) (June 2012) and "The Reform of the Inter-American Commission on Human Rights," *Aportes DPLf* 19(7) (April 2014); concerning the European Court of Human Rights, see Mikael Rask Madsen, "The Challenging Authority of the European Court of Human Rights: From Cold War Legal Diplomacy to the Brighton Declaration and Backlash," *Law and Contemporary Problems* 79(1) (2016).
5. See letter of 15 Hungarian NGOs to Boris Cilevičs, Chairperson, Committee on the Election of Judges to the European Court of Human Rights (July 22, 2016), available at [http://mdac.org/sites/mdac.info/files/ngo\\_letter\\_hun\\_selection\\_of\\_judicial\\_candidates\\_22072016.pdf](http://mdac.org/sites/mdac.info/files/ngo_letter_hun_selection_of_judicial_candidates_22072016.pdf).
6. Mariela Belski, "Una selección que debe ser transparente," *La Nacion* (April 4, 2017), available at <http://www.lanacion.com.ar/2004073-una-seleccion-que-debe-ser-transparente>; José Miguel Vivanco, "Un mal candidato para los derechos humanos," *El País* (May 4, 2017), available at [https://elpais.com/internacional/2017/05/02/america/1493685476\\_671088.amp.html](https://elpais.com/internacional/2017/05/02/america/1493685476_671088.amp.html).
7. See, e.g., Fernando Camacho and Alma E. Munoz, "Candidatura de Joel Hernandez a la CIDH enfrenta a politicos y ONG," *Politica* (May 5, 2017), available at <http://www.jornada.unam.mx/2017/05/07/politica/011n2pol>; "OEA: Carta dirigida al Secretario sobre la candidatura de Flavia

Piovesan,” CLADEM, available at <https://www.cladem.org/es/nosotras/ultimas-noticias/737-oea-carta-dirigida-al-secretario-sobre-la-candidatura-de-flavia-piovesan>.

8. IACtHR, *Constitutional Court v. Peru*, Judgment of January 31, 2001, para. 75.

9. Ruth Mackenzie and Phillippe Sands, “Judicial Selection for International Courts: Towards Common Principles and Practices,” in Kate Malleson and Peter H. Russell (eds.), *Appointing Judges in an Age of Judicial Power: Critical Perspectives From Around the World* (University of Toronto Press, 2006), p. 225. Some notable exceptions include an important 2003 report by the NGO INTERIGHTS, “Judicial Independence: Law and Practice of Appointments to the European Court of Human Rights” (May 2003). The Center for Justice and International Law has also focused attention on nominations and elections to the Inter-American Court and Commission; in 2014, it published a series of articles on the topic, including some discussion of cross-regional perspectives. See CEJIL Position Paper No. 10, “The Selection Process of the Inter-American Commission and Court on Human Rights: Reflections on Necessary Reforms” (2014). More recently, an academic literature has begun to flourish on the topic as well, although it offers little detail about national nominations procedures. See, e.g., Malleson and Russell’s edited text, as well as Judith Schonsteiner, “Alternative Appointment Procedures for the Commissioners and Judges in the Inter-American System of Human Rights,” *Revista IIDH*, vol. 46 (2007); Ruth Mackenzie, Kate Malleson, Penny Martin, Philippe Sands, *Selecting International Judges: Principle, Process, and Politics* (Oxford University Press, 2010); Michael Bobek (ed.), *Selecting Europe’s Judges: A Critical Review of the Appointment Procedures to the European Courts* (Oxford University Press, 2015); Nienke Grossman, “Achieving Sex Representative International Court Benches,” *American Journal of International Law* 110(1) (January 2016); Nienke Grossman, “Shattering the Glass Ceiling in International Adjudication,” *Virginia Journal of International Law* 56(2) (March 2017), pp. 339–406.

10. *Selecting International Judges*, 2.

11. Grossman, “Achieving Sex-Representative International Court Benches,” p. 86.

12. Grossman, “Shattering the Glass Ceiling in International Adjudication,” p. 213.

13. *Selecting International Judges* (published as part of the well-known Project on International Courts and Tribunals) is perhaps the most thorough treatment of the subject, but it addresses judicial selection procedures for the International Court of Justice and the International Criminal Court, both of which have received far more attention than the regional human rights bodies (as has the European Court of Justice). Michael Bobek’s edited text is the first to focus significant discussion on the European Court of Human Rights; however, little to no critical attention has been paid to the Inter-American or African systems.

14. *Selecting International Judges* is one of the few other texts to draw on interviews with state actors at the national level, as well as diplomats and international officials; however, as noted above, it does not address any of the regional human rights courts or commissions.

15. Although nascent human rights systems (including with adjudicatory authority) have begun to develop in other regions—notably, in the Middle East and North African and Asian regions—this report does not address them here, either because they do not presently possess adjudicatory authority (Asia), or such proposed authority is not yet operational (MENA). For a useful critique of the proposed Arab Court of Human Rights, including its judicial selection procedure, see International Commission of Jurists, “The Arab Court of Human Rights: A Flawed Statute for an Ineffective Court” (2015).



16. *Selecting International Judges*, 2.
17. IACHR Statute, Article 1, para. 1; see also Article 41 ACHR.
18. “Final Report of the Independent Panel for the Election of Inter-American Commissioners and Judges,” June 2, 2015 (“2015 Independent Panel Report”), available at <https://www.opensocietyfoundations.org/sites/default/files/iachr-panel-report-eng-20150603.pdf>; “Final Report of the Independent Panel for the Election of Commissioners to the Inter-American Commission on Human Rights,” June 5, 2017 (“2017 Independent Panel Report”), available at <https://www.opensocietyfoundations.org/sites/default/files/iahcr-panel-2017-report-eng-20170622.pdf>.
19. See Basic Principles on the Independence of the Judiciary, adopted by the 7th United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from August 26 to September 6, 1985, and endorsed by General Assembly resolutions 40/32 of November 29, 1985, and 40/146 of December 13, 1985; Recommendation CM/Rec(2010)12 of the Committee of Ministers to member states on judges: independence, efficiency and responsibilities, adopted on November 17, 2010, at the 1,098th meeting of the Ministers’ Deputies, CoE Doc. CM/Rec(2010)12 (“CoE Recommendation on Judges”); Magna Carta of Judges, adopted by the Consultative Council of European Judges (CCJE-MC) at its 11th plenary meeting, Strasbourg, November 17–19, 2010 (“Magna Carta of Judges”), Article 3 (“judicial independence shall be statutory, functional and financial”); CCJE, Opinion No. 10(2007) of the Consultative Council of European Judges to the attention of the Committee of Ministers of the Council of Europe on the Council for the Judiciary at the Service of Society, adopted at its eighth meeting, Strasbourg, November 21–23, 2007 (“Opinion No. 10”), para. 9.
20. See generally International Commission of Jurists, “International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors,” Practitioners’ Guide No. 1, pp. 21–25. See further Council of Europe Recommendation on Judges, Article 4: “Independence of individual judges is safeguarded by the independence of the judiciary as a whole. As such, it is a fundamental aspect of the rule of law”; UNODC, Commentary on the Bangalore Principles of Judicial Conduct, September 2007 (“Commentary on the Bangalore Principles”), paras. 23, 39: “...judicial independence requires not only the independence of the judiciary as an institution from the other branches of government; it also requires judges being independent from each other. In other words, judicial independence depends not only on freedom from undue external influence, but also freedom from undue influence that might come from the actions or attitudes of other judges.”
21. See, e.g., Principle 1 of the UN Basic Principles on the Independence of the Judiciary; European Charter on the statute for judges, Council of Europe, Strasbourg, July 8–10, 1998, article 1.3.
22. UN Human Rights Committee, General Comment No. 32, “Article 14: Right to equality before courts and tribunals and to a fair trial,” UN Doc. CCPR/C/GC/32 (2007), para. 19.
23. ECtHR, *Campbell and Fell v. The United Kingdom* (Application No. 7819/77; 7878/77), Judgment, June 28, 1984, para. 78.
24. IACtHR, *Case of the Constitutional Court v. Peru*, para. 75 (emphasis added).
25. UN Basic Principles on the Independence of the Judiciary, Principle 10; ACHPR Principles and Guidelines, section A, Principles (4) (i)–(k); CoM Recommendation (2010) 12, paras. 44–45.
26. Basic Principles on the Independence of the Judiciary (1985).

27. Universal Charter of the Judge, adopted by the International Association of Judges (1999).
28. Bangalore Principles of Judicial Conduct, adopted at the Round Table Meeting of Chief Justices held in The Hague (Judicial Group on Strengthening Judicial Integrity) (2002), and annexed to ECOSOC resolution 2006/23, repeatedly cited by the UN Human Rights Council (for example, in resolution 35/12 [2007] on Independence and impartiality of the judiciary, jurors and assessors, and the independence of lawyers).
29. Measures for the Effective Implementation of the Bangalore Principles of Judicial Conduct (“The Implementation Measures”), adopted by the Judicial Integrity Group (Lusaka, Zambia, 2010).
30. Burgh House Principles on the International Judiciary, adopted by the Study Group of the International Law Association on the Practice and Procedure of International Courts and Tribunals, in association with the Project on International Courts and Tribunals (2004).
31. Resolution of the Institut de Droit International on the Position of the International Judge adopted at Rhodes (2011).
32. See International Commission of Jurists, “International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors,” Practitioners Guide No. 1 (Geneva, 2007), available at <https://www.icj.org/wp-content/uploads/2012/04/International-Principles-on-the-Independence-and-Accountability-of-Judges-Lawyers-and-Prosecutors-No.1-Practitioners-Guide-2009-Eng.pdf>; see also Due Process of Law Foundation, “Guidelines for a transparent and merit-based system for the appointment of high-level judges,” available at [http://www.dplf.org/sites/default/files/guidelines\\_selection\\_of\\_highlevel\\_judges.pdf](http://www.dplf.org/sites/default/files/guidelines_selection_of_highlevel_judges.pdf).
33. UN Basic Principles on the Independence of the Judiciary, Principles 10 and 13; see also Draft Universal Declaration on the Independence of Justice (Singhvi Declaration), paras. 10 and 14.
34. *Ibid.*, para. 10.
35. *Ibid.*
36. Bangalore Principles, Preamble.
37. *Ibid.*, para. 1.3.
38. The Implementation Measures define “irrelevant grounds” as follows: “race, colour, sex, religion, national origin, caste, disability, age, marital status, sexual orientation, social and economic status and other like causes.”
39. Implementation Measures, paras. 11.1–11.3, 12.1–12.5. The Implementation Measures define “judge” as follows: “any person exercising judicial power, however designated, and includes a magistrate and a member of an independent tribunal.”
40. Burgh House Principles, paras. 2.1–2.5.
41. *Ibid.*, para. 2.3.
42. *Ibid.*, para. 2.4.
43. *Ibid.*
44. *Ibid.*, para. 6.
45. Study No. 494 / 2008, European Commission for Democracy through Law, Report on the Independence of the Judicial System, Part I: The Independence of Judges, CDL-AD(2010)004,

March 16, 2010, para. 27, available at <http://www.thesis.disslib.info/as-juristic/119124-1-strasbourg-march-2010-cdl-ad2010004-engl-study-494-2008-european.php>.

46. CoE Recommendation on Judges, para. 44.

47. IACtHR, *Case of Reverón Trujillo v. Venezuela*, Judgment of June 30, 2009. Series C No. 197, para. 72. See also Statute of the Ibero-American Judge, Article 12.

48. European Charter on the Statute for Judges, DAJ/DOC (98) 23, Principle 1.3. See also CoE Recommendation on Judges, para. 46.

49. Report of the Special Rapporteur on the independence of judges and lawyers, UN Doc. A/HRC/11/41 (2009), para. 27.

50. The Committee of Ministers of the Council of Europe, in its Recommendation (2010)12, has stressed that “With a view to guaranteeing its independence, at least half of the members of the authority should be judges chosen by their peers. [...] However, where the constitutional or other legal provisions prescribe that the head of state, the government or the legislative power take decisions concerning the selection and career of judges, an independent and competent authority drawn in substantial part from the judiciary [...] should be authorised to make recommendations or express opinions which the relevant appointing authority follows in practice,” paras. 46–47. See also European Charter on the Statute for Judges, para. 1.3.

51. Report of the Special Rapporteur on the independence of judges and lawyers, UN Doc. A/HRC/11/41 (2009), para. 28.

52. UN Basic Principles on the Independence of the Judiciary, Principle 10.

53. Singhvi Declaration, Principle 11a.

54. The Burgh House Principles, Principle 2.2.

55. ECHR, Article 21(2); Article 22.

56. ECHR, Article 23.

57. ECHR, Article 22.

58. The Brighton Declaration called on the Council of Europe and its member states 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.” See [http://www.echr.coe.int/Documents/2012\\_Brighton\\_FinalDeclaration\\_ENG.pdf](http://www.echr.coe.int/Documents/2012_Brighton_FinalDeclaration_ENG.pdf).

59. PACE Resolution 1082 (1996) and Recommendation 1295 (1996).

60. Koen Lemmens, “(S)electing Judges for Strasbourg: A (Dis)appointing Process?” in *Selecting Europe’s Judges*, p. 101.

61. See Committee on the Election of Judges to the European Court of Human Rights, “Procedure for electing judges to the European Court of Human Rights,” AS/Cdh/Inf (2017) 01 rev 4 (April 27, 2017).

62. Committee of Ministers Resolution CM/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, adopted on November 10, 2010, at the 1097 *bis* meeting of the ministers' deputies.

63. Steering Committee for Human Rights, "CDDH report on the longer-term future of the systems of the European Convention on Human Rights," CDDH(2015)R84 Addendum I (December 7-11, 2015), para. 102.

64. *Ibid.*, para. 131.

65. In its May 2017 report, the Committee of Experts (DH-SYSC) noted that, based on its draft report, the selection criteria under Article 21 of the convention would not be significantly modified: It decided against any modification of the linguistic requirements, preserved for the time being the duration of a judge's term of office, and declined the formal introduction of a minimum age for judicial candidates. Following a legal opinion by the Directorate of Legal Advice and Public International Law, the committee also decided to retain the court's current three-candidate model. With respect to the election process itself, the committee further noted that "alternative models were explored but not retained"; thus, its work would "concentrate on the improvement of the current system in which the election of judges to the Court falls under the Parliamentary Assembly." See Committee of Experts on the System of the European Convention on Rights (DH-DYSC), Meeting Report, 3rd Meeting (May 10-12, 2017), DH-SYSC (2017)R3, pp. 2-5.

66. ECHR, Article 21(1). The Advisory Panel of Experts has described the elements that it takes into account in evaluating how these criteria are met in practice, in light of the diversity of national judicial system. See Second activity report for the attention of the Committee of Ministers (February 25, 2016), paras. 36-47.

67. PACE Recommendation 1429 (1999), para. 6(2).

68. Guidelines of the Committee of Ministers on the selection of candidates for the post of judge at the European Court of Human Rights, adopted on March 28, 2012, at the 1138th meeting of the Ministers' Deputies, CM(2012)40-final, section II, para. 4 ("CoM Guidelines").

69. See PACE Resolution 1646 (2009), para. 4(4) and PACE Recommendation 1429 (1999), para. 6(4). The language quoted can be found in CoM Guidelines, section II, para. 3.

70. See "Procedure for electing judges to the European Court of Human Rights," AS/Cdh/Inf (2017); Explanatory Memorandum to Committee of Ministers' Guidelines, CM(2012)40 addendum final, para. 59.

71. CoM Guidelines, para. 6.

72. PACE Resolution 1646 (2009), para. 4(5); CoM Guidelines, section II, para. 5. The guidelines further note that no candidate should be submitted whose election might result "in a frequent and/or long-lasting need to appoint an ad hoc judge," *ibid.*, para. 7.

73. PACE Recommendation 1429, para. 4.

74. PACE Resolution 1646, para. 4(1); CoM Guidelines, section III, para. 2.

75. As several commentators have noted, "The ECtHR is the only other international court for which independent national selection procedures have been discussed in detail." *Selecting International Judges*, p. 146.

76. PACE Resolution 1646, para. 5.
77. *Ibid.*, section IV, paras. 1, 4.
78. PACE Recommendation 1429, para. 7.
79. Should such interviews be impracticable due to the high number of applications received, candidates may be shortlisted in a process of pre-selection; alternatively, candidates who are “clearly unsuitable ... may be immediately discounted.” *Ibid.*, section IV, para. 2; Explanatory Memorandum to the Committee of Ministers’ Guidelines, March 29, 2012, para. 55.
80. CoM Guidelines, section V, para. 2.
81. *Ibid.*, para 3.
82. Committee of Ministers Resolution CM/Res(2010)26, paras. 2, 5; see also Committee of Ministers’ Guidelines, section IV.
83. Resolution CM/Res (2010)26, para. 5. The panel does not provide views on candidates it considers to be qualified for election as a judge of the court, beyond the mere statement that they are so qualified.
84. E-mail communication with Andrew Drzemczewski, July 21, 2017.
85. Advisory Panel, Second Activity Report, *op cit*, para.55 and Appendix II, p. 15 and pp. 18–19.
86. For the current composition of the Committee on the Election of Judges to the ECtHR see <http://www.assembly.coe.int/nw/xml/AssemblyList/AL-XML2HTML-EN.asp?lang=en&XmlID=Committee-Cdh>.
87. Andrew Drzemczewski, “The Parliamentary Assembly’s Committee on the Election of Judges to the European Court of Human Rights,” *Human Rights Law Journal* 35 (2015), p. 269.
88. *Ibid.*, para. 4.ii.
89. See letter of 15 Hungarian NGOs to Boris Cilevičs, Chairperson, Committee on the Election of Judges to the European Court of Human Rights, July 22, 2016. In the letter, the NGOs expressed “deep concerns about the serious deficiencies in the selection of candidates,” noting that “neither the signatory NGOs, nor Hungarian society as a whole have any information about who the candidates are, and how they have been selected.”
90. Interview with Andrew Drzemczewski, Strasbourg, December 9, 2015.
91. Drzemczewski, p. 270.
92. PACE Recommendation 1429 (1999), para. 6.3.
93. PACE Resolution 1366 (2004), para. 3.ii, as amended by PACE Resolution 1426 (2005). On the history of this contested resolution see further, Stéphanie Hennette Vauchez, “More Women—But Which Women? The Rule and the Politics of Gender Balance at the European Court of Human Rights,” *European Journal of International Law* 26(1) (2015), available at <http://www.ejil.org/pdfs/26/1/2566.pdf>.
94. ECtHR 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, February 12, 2008, para. 54.

95. See “Procedure for electing judges to the European Court of Human Rights,” AS/Cdh/Inf (2017), para 8. What constitutes “exceptional circumstances” has been the subject of some debate in recent cases where PACE has been faced with single-sex lists. David Kosar has argued, for instance, that PACE has “relaxed the criteria for exceptions to the general rule on gender too far,” noting that Belgium’s list of candidates in 2012 was all male. Interviews with PACE officials, however, suggest that this was a not a case of “relaxed criteria.” In fact, PACE made repeated efforts to have the Belgian government explain its list and conducted two special hearings on the matter, first in December 2011 and again in January 2012. E-mail communication with Andrew Drzemczewski, July 21, 2017; see also David Kosar, “Selecting Strasbourg Judges: A Critique,” in *Selecting Europe’s Judges*, pp. 130–133.

96. *Ibid.*, fn. 5; see also PACE Resolution 1627 (2008), para. 4.

97. PACE Resolution 1646 (2009), para. 5.

98. As of October 2017, 16 out of the 47 serving ECtHR judges were female.

99. At present, 25 states of the Organization of American States have ratified the American Convention on Human Rights.

100. ACHR, Articles 37(2) and 52(2).

101. ACHR, Articles 37(1) and 54(1).

102. ACHR, Article 52(1); Article 4(1) Statute of the IACtHR.

103. ACHR, Articles 36 and 53(2). One exception to this was a hearing organized at the OAS Permanent Council prior to the 2013 elections. On that occasion, an open forum was organized allowing representatives of civil society organizations to take part in a meeting arranged between candidates for the commission and state representatives. During the session, candidates answered questions posed by members of both the Permanent Council and civil society. Because this process took place at the discretion of the council, however, requests for a subsequent exercise in 2015 were denied. Interview with officials of the IACHR, December 4, 2015; see also CEJIL, “Civil society organizations express concern over OAS silence in wake of petitions for dialogue with candidates” (June 8, 2015), available at <https://www.cejil.org/en/civil-society-organizations-express-concern-over-oas-silence-wake-petitions-dialogue-candidates>.

104. Where a state puts three candidates forward, at least one of the candidates must be a national of a state other than the nominating state. Additionally, only one national of a state may be elected to the court or the commission. See Statute of the Inter-American Court (“IACtHR Statute”), Article 7; Statute of the Inter-American Commission (“IACHR Statute”), Article 3.

105. IACtHR Statute, Article 8(1); IACHR Statute, Article 4(1).

106. IACtHR Statute, Article 8(2); IACHR Statute, Article 4(2).

107. IACtHR Statute, Article 9; IACHR Statute, Article 5.

108. ACHR, Article 51 (1)–(2). See also interview with representatives from the Chilean mission to the OAS, December 3, 2015.

109. See AG/RES.2908 (XLVII-O/17) Promotion and Protection of Human Rights, xv. “Gender equity and balanced geographic and legal-system representation on the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights.” The resolution further

instructs the Committee on Juridical and Political Affairs to “include in its 2017-2018 work program follow-up” on the application of these principles, and to report to the Permanent Council as to their implementation.

110. Ibid.

111. Some candidates nevertheless participated in civil-society sponsored events, including one convened by the Center for Justice and International Law during the Summit of the Americas in Panama City, in April 2015. For the 2017 elections to the Inter-American Commission, the Permanent Council convened the six candidates in Washington, DC, on May 5.

112. Adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force October 21, 1986.

113. Adopted in Maputo, Mozambique, and came into force in 2004. Note, however, that only seven states to date have ratified Article 34(6) of the protocol, which grants petitioners direct access to the court.

114. AU Charter, Article 36; African Court Protocol, Article 15(1). For purposes of institutional continuity, the term of office of certain judges and commissioners is staggered, such that some expire after two or four years, respectively. These determinations are made by way of casting lots. See AU Charter, Articles 36–37; African Court Protocol, Article 15(1)–(2).

115. Under Article 12(1) of the protocol, states may nominate up to three candidates, “at least two of whom shall be nationals of that State.”

116. See, e.g., <https://lawyersofafrica.org/wp-content/uploads/2014/03/English-Note-Verbal.pdf>. For a useful summary of nominations and elections procedures to the ACHPR, see Frans Viljoen, “Promising profiles: An interview with the four new members of the African Commission on Human and Peoples’ Rights,” *African Human Rights Law Journal* 6 (2006), 237–247.

117. The African Commission’s rules of procedure are available at <http://www.achpr.org/instruments/rules-of-procedure-2010/>.

118. See, e.g., AU Doc BC/OLC/66/Vol XVIII, dated April 5, 2005.

119. See AU Charter, Article 31(2).

120. Rule 5 further elaborates on incompatibility by stating that members of the court may not hold political, diplomatic or administrative position, or act as “government legal advisers.” See Rule 5(3) of the Rules of Procedure.

121. ACHPR Rules of Procedure, Rule 5(2). The most common of these national positions is attorney general or minister of Justice. In elaborating this criteria, the AUC appears to borrow from early language meant to guide the then-permanent International Court of Justice: “(A) member of government, a Minister or under-secretary of State, a diplomatic representative, a director of a ministry, or one of his subordinates, or the legal adviser to a foreign office ... are certainly not eligible for appointment as judges upon our Court.” See, e.g., [http://old.achpr.org/english/\\_info/vacancy\\_commissioners.html](http://old.achpr.org/english/_info/vacancy_commissioners.html).

122. ACHR Rules of Procedure, Rule 7(1).

123. Rule 7(3) vests in the ACHR chair the competence to advise the AUC’s chairperson about a situation of incompatibility, whereupon the latter shall declare the seat vacant. This could be trig-

gered where, for instance, a sitting commissioner assumes a national post or where a nominated candidate escapes the review of the AUC.

124. For an example, see [http://old.achpr.org/english/\\_info/vacancy\\_commissioners.html](http://old.achpr.org/english/_info/vacancy_commissioners.html); see also Amnesty International, “Criteria for the nomination and election of members of the African Commission on Human and Peoples’ Rights,” AI Index: IOR 63/002/2007 (March 1, 2007).

125. It is worth noting that a state party could theoretically nominate a national of a non-state party to the protocol, although this has not yet happened.

126. See African Court Protocol, Article 13(2).

127. *Ibid.*, Article 14(1).

128. AU Charter, Article 35.

129. AU Charter, Article 34.

130. African Court Protocol, Article 12(2); see also Article 14(3).

131. The AUC Guidelines enumerate legal traditions to include civil law, common law, Islamic law, and African customary law.

132. See para. 24, available at <http://www.achpr.org/instruments/kigali/>.

133. See African Union Executive Council, 28th Ordinary Session (January 23-28, 2016), EX.CL/Dec.907(XXVIII), Decision on the Modalities on the Implementation of the Criteria of Equitable Geographical and Gender Representation in AU Organs and Institutions—Doc. EX.CL/953(XXVIII),” available at <http://www.acdhrs.org/wp-content/uploads/2016/02/EX-CL-Dec-898-918-XXVIII-E.pdf>.

134. See EX.CL/953(XXVIII), “Modalities on the Implementation of the Criteria of Equitable Geographical and Gender Representation in AU Organs and Institutions,” available at [http://archive.au.int/collect/oaoucounc/import/English/EX%20CL%20953%20\(XXXI\)%20\\_E.pdf](http://archive.au.int/collect/oaoucounc/import/English/EX%20CL%20953%20(XXXI)%20_E.pdf). In its recommendations, the AUC urges “scrupulous respect for the principle of adequate gender representation in AU organs and institutions, at least one (1) Member in each region should be a woman”; “that “[a]ll regions should submit more candidates than the existing vacancies”; and that the modalities “should be effective immediately upon their adoption by the Executive Council,” para. 34.

135. Commissioner Kamel Rezag-Bara served in the African Commission between 1995 and 2011. During that time, he served as deputy chairperson and was a member of a number of working groups, including the right to fair trial. Justice Fatsah Ouguergouz represented Algeria on the African Court. He was first elected to the Court’s inaugural bench in Khartoum in 2006, and was reelected in 2012. His term came to an end in July 2016.

136. Interview with Judge Fatsah Ouguergouz, September 9, 2016.

137. Written statement of Argentina (January 11, 2016); interview with Gaston Chillier, executive director of the Centro de Estudios Legales y Sociales (CELS), January 25, 2016.

138. Interview with Gaston Chillier, January 25, 2016.

139. There are currently no Argentinian commissioners serving on the Inter-American Commission; however, five individuals of Argentinian origin have previously served on the commission and three on the court.



140. 2017 Independent Panel Report, p. 21 (English version).
141. Europe in Law Association, Report on the Contest for the selection of the candidates for the ECtHR in respect of Armenia announced on January 28, 2015, p. 4 (“ELA Report”), available at [http://ela.am/image/data/ECtHR%202015/ECtHR%202015\\_eng/2015.04.04\\_Final-report\\_eng.pdf](http://ela.am/image/data/ECtHR%202015/ECtHR%202015_eng/2015.04.04_Final-report_eng.pdf).
142. PACE, *Election of judges to the European Court of Human Rights. List and curricula vitae of candidates submitted by the Government of Armenia*, June 1, 2015, Doc. 13798, p. 4 (“Armenia PACE Report”).
143. Armenia PACE Report, p. 3.
144. ELA Report, para. 2.4.
145. The commission was comprised of the president of the Constitutional Court, the president of the Court of Cassation, the sitting Armenian judge to the ECtHR, the ombudsman, the minister of Justice, the Office of the Government Agent, the president of the Chamber of Advocates, the dean of the Academy of Justice, and the director of an Armenian NGO (the “Union of Judges of the Republic of Armenia”). See Armenia PACE Report, p. 3ss.
146. Interview with Vahe Grigoryan, European Human Rights Advocacy Centre (and candidate in the 2014 Armenian national selection process), December 21, 2015.
147. Armenia PACE Report, p. 5.
148. Ibid.
149. Three NGOs and eight media representatives submitted notifications as to their attendance, while one media representative who arrived unannounced was also given access. Ibid., p. 4.
150. Ibid., p. 5.
151. Ibid., p. 6.
152. Report of the Committee on the Election of Judges to the European Court of Human Rights, Doc. 13813 Addendum II, June 15, 2015.
153. According to Austrian national law, all national civil servants are formally subject to directives by their relevant minister; should such directives be issued, they may object. No information was made available as to whether any directives had been issued for the selection panel.
154. PACE, *Election of judges to the European Court of Human Rights. List and curricula vitae of candidates submitted by the Government of Austria*, March 11, 2015, Doc. 13726 (“Austria PACE Report”). A more skeptical view was shared in an interview with Hannes Tretter, a human rights professor at the University of Vienna and director of the Ludwig Boltzmann Institut für Menschenrechte, December 21, 2015.
155. Upon request, one candidate was told that applications could also be sent in classical format, i.e., without using the system of electronic signatures. Interview with Hannes Tretter, December 21, 2015.
156. Ibid.
157. Austria PACE Report.

158. Written statement of Brazil (January 15, 2016). See also the 2017 Independent Panel Report, which notes that “the candidate indicated that in Brazil the selection process was handled by the Executive Branch,” p. 30 (English version).

159. *Ibid.*

160. *Ibid.* Prior to the 2014 election of current Commissioner Paulo Vannuchi, Conectas, a Brazilian NGO, with a group of 10 other organizations, sent a letter to the minister of Foreign Relations and the minister of Human Rights asking them to provide a venue for dialogue between the Brazilian candidate and civil society organizations that engage the Inter-American system. See “Organizations request meeting with Brazilian candidate to OAS,” Conectas Brazil, May 7, 2013, available at <http://www.conectas.org/en/actions/foreign-policy/news/organizations-request-meeting-with-brazilian-candidate-to-oas>.

161. Written statement of Brazil (January 15, 2016).

162. *Ibid.*

163. Chilean nationals have had a continuous presence on the IACtHR bench since 1991: Judge Máximo Pacheco Gómez served until 2003, Judge Cecilia Medina from 2004 until 2009, followed by Eduardo Judge Vio Grossi, whose second term expires in 2021. Felipe González served as a commissioner from 2008 to 2015 and, in 2017, Antonia Urrejola, who has served as a human rights advisor to the Chilean presidency’s general secretariat, was elected; her term begins in January 2018. In addition to González, there have previously been three commissioners of Chilean nationality: Manuel Bianchi Gundián (1960-1972); Claudio Grossman (1994-2001); and José Zalaquett (2001-2005).

164. Interview with representatives from the Chilean mission to the OAS, December 3, 2015.

165. *Ibid.*; interview with former Commissioner Felipe González, January 22, 2016.

166. Interview with representatives from the Chilean mission to the OAS, December 3, 2015; interview with former Judge Cecilia Medina, December 2, 2015; interview with former Commissioner Felipe González, January 22, 2016.

167. 2017 Independent Panel Report, p. 36 (English version). The candidate further noted in response to the panel’s questions that she thought it “very important for the Commission itself, with the States, to promote participatory nomination mechanisms, not only with the participation of civil society and academic entities, but also by promoting mechanisms involving other players, such as victims’ organizations and also members of Congress.” *Ibid.*

168. Interview with Ambassador Pablo Barahona Kruger, Ambassador of Costa Rica to the OAS, December 4, 2015.

169. *Ibid.* Elected in 2015, Judge Odio-Benito replaced the former Costa Rican judge, Manuel E. Ventura Robles, who was not nominated for reelection. Costa Rica has had three commissioners in the past but none at present. Prior to Judge Ventura Robles, two Costa Rican judges had served on the Inter-American Court.

170. Interview with Victor Rodriguez Rescia, member of the UN Human Rights Committee and former chair and vice chair of the UN Subcommittee on Prevention of Torture, December 2, 2015.

171. Ayele Dersso currently chairs the African Commission’s Working Group on Extractive Industries, Environment and Human Rights in Africa. Another successful candidate from Ethiopia has

been Dr. Benyam Dawit Mezmur, although he serves on the African Committee of Experts on the Rights and Welfare of the Child and the UN Committee on the Rights of the Child. Notably, Mezmur, whose term on the CRC began in 2009, was nominated for this post after having personally approached an MFA official to see whether Ethiopia would consider nominating a South African colleague to the committee. The MFA official reportedly replied that it would be diplomatically “impossible” for the Ethiopian government to consider nominating a non-national to the CRC, but offered to nominate Mezmur instead. Conversation with Benyam Dawit Mezmur, Nairobi, Kenya, July 21, 2017.

172. This information was provided by one of Ethiopia’s elected candidates and an official from the MFA.

173. Interview with Yibekal Mekonnen Feyisa, legal officer, Director General’s Office, San Remo, September 21, 2016.

174. When asked, respondents referred the existence of any such practice to the MFA.

175. In 2009, in a different process, Benyam Dawit Mezmur was nominated to the African Committee of Experts after approaching the MFA to seek its support in the nomination process. An official from the MFA had advised him to seek the nomination, as had regional civil society organizations. In the aftermath of an informal meeting with the MFA, he was required to submit a memorandum explaining why it was important for Ethiopia to nominate a candidate and a justification for his candidature if the state agreed to nominate him. After his official nomination, the MFA took over the campaigning process although, like Commissioner Dersso, he was also asked to make appeals to other governments indirectly through his personal contacts.

176. Written statement by the permanent representative of Greece to the Council of Europe (December 23, 2015).

177. PACE, *Election of judges to the European Court of Human Rights. List and curricula vitae of candidates submitted by the Government of Greece*, July 15, 2010, Doc. 12346 (“Greece PACE Report”).

178. Interview with the permanent representative of Greece to the CoE, December 11, 2015.

179. Greece PACE Report.

180. As the final decision-maker, the Foreign Affairs minister could deviate from the SG’s recommendation. Interview with the permanent representative of Greece to the CoE, December 11, 2015.

181. Greece PACE Report.

182. This country profile was compiled on the basis of information gathered from the MFA, of Ivory Coast current office holders and related desk review. An interview with Judge Ore was conducted on September 8, 2016, Arusha, Tanzania. During the interview, the judge noted that there had been a few previous, failed attempts by Ivoirians to occupy international posts but it had been several years since any such nominations were made.

183. Previous judges of Jamaican origin include Huntley Eugene Munroe (1979–1985); previous commissioners who have served are Patrick Lipton Robinson (1988–1995) and Tracy Robinson (2012–2015).

184. Interview with former Commissioner Tracy Robinson, January 14, 2016; interview with the Permanent Mission of Jamaica to the OAS, December 4, 2015.

185. Following her 2011 expression of interest, Robinson was advised that another country from the CARICOM region intended to present a candidate; however, this individual's candidature was later withdrawn. Robinson subsequently reached out to the permanent secretary of the Ministry of Foreign Affairs in 2011, again expressing her interest to be considered as a candidate. She served from 2012–2015 and did not seek re-election.

186. Interview with the Permanent Mission of Jamaica to the OAS, December 4, 2015.

187. *Ibid.*

188. *Ibid.*

189. *Ibid.* According to our interlocutor, interviews with prospective candidates were not conducted because the relevant candidates were already known to the ministry, due to Jamaica's "relatively small size."

190. Macaulay previously served as a judge to the Inter-American Court from 2007 to 2012.

191. PACE, *List and curricula vitae of candidates submitted by the Government of Liechtenstein*, February 27, 2015, Doc. 13718.

192. Interview with Manuel Frick, Office for Foreign Affairs of the Fürstentum Liechtenstein, December 8, 2015.

193. E-mail from Manuel Frick to Frank Schürmann, July 3, 2014 (following a request from Schürmann).

194. Landtag des Fürstentum Liechtenstein (Parliament of Liechtenstein), Small Parliamentary request, Neubesetzung des Richterpostens beim Europäischen Gerichtshof für Menschenrechte, May 7, 2014.

195. Fürstentum Liechtenstein, Stellenausschreibung ("March 2014 Call for Applications").

196. The goal of the decision to open applications to foreign nationals was to ensure that Liechtenstein—whose national high court justices only work on a part-time basis and typically manage law firms in addition to their role as judges—could ensure a more competitive selection procedure with highly qualified candidates. Liechtenstein considered the primary criterion for selection to be the personal qualifications of its candidates, rather than their nationality. To ensure candidates had a connection to Liechtenstein, however, all candidates were required to be familiar with the national legal system. Interview with Manuel Frick, Office for Foreign Affairs of the Fürstentum Liechtenstein, December 8, 2015; March 2014 Call for Applications.

197. March 2014 Call for Applications.

198. Concrete questions under these thematic headings were tailored to each candidate. Interview with Manuel Frick, Office for Foreign Affairs of the Fürstentum Liechtenstein, December 8, 2015; interview with Brigitte Ohms, Department for International Affairs at the Austrian Chancellery and former candidate for Liechtenstein, December 30, 2015.

199. Interview with Manuel Frick, Office for Foreign Affairs of the Fürstentum Liechtenstein, December 8, 2015.

200. In Liechtenstein, parliamentarians have the right to pose questions to members of the government at the beginning of each parliamentary session. Parliamentary sessions are partly public, and the questions and answers to particular questions are subsequently published. *Ibid.*

201. Report of the Committee on the Election of Judges to the European Court of Human Rights, April 10, 2015, Doc. 13750 Addendum II.
202. PACE, *Election of judges to the European Court of Human Rights. List and curricula vitae of candidates submitted by the Governments of Bosnia and Herzegovina, Croatia, the Republic of Moldova and the Russian Federation*, September 20, 2012, Doc. 13027 (“Moldova PACE Report”), p. 49.
203. Decision No. 276 was based on six principles set out in Article 2, para. 4: (1) open competition; (2) ensuring access of any person who satisfies the eligibility criteria; (3) conducting a merit-based election; (4) ensuring a balanced presentation of men and women; (5) ensuring transparency through the publication of information on the procedure; and (6) equal treatment through the non-discriminatory application of the selection criteria. Interview with the Moldovan representative to the Council of Europe, December 11, 2015. The text of Decision No. 276 is available at <http://lex.justice.md/index.php?action=view&view=doc&lang=1&id=343069>.
204. Moldova PACE Report, p. 50.
205. Members representing the government were the minister of Justice, the secretary general, the deputy minister of Foreign Affairs and European Integration, the government agent in Strasbourg, and the head of the Legal Drafting General Division of the Ministry of Justice. Parliament’s vice president, the vice president and secretary of the Commission for Legal Affairs, Nominations and Immunities, as well as another parliamentarian composed its representation.
206. Written statement of Moldova (January, 11 2016).
207. Moldova PACE Report, p. 50.
208. Written statement of Moldova (January 11, 2016).
209. Ibid. To facilitate evaluation, members of the commission were prepared with template answers for guidance that would enable comparison with an answer reaching maximum scores. Model answers were subsequently revealed to candidates.
210. Written statement by Moldova (January 7, 2016).
211. Ibid. For the full broadcast, refer to <http://www.privesc.eu/Arhiva/11233/Sedinta-comisieipentru-selectarea-candidatilor-la-postul-de-judecator-la-CEDO>.
212. Ibid. For the part of the session that was attended by media representatives and open to broadcasting, refer to <https://www.privesc.eu/arhiva/11566/Sedinta-Comisieide-selectarea-a-candidatilor-la-postul-de-judecator-la-CEDO>.
213. Moldova PACE Report, p. 51. According to other interviewees, the language testing was composed of self-presentations by the candidates (who could choose to speak in either English or French) followed by a reading exercise in which the candidates were given a brief passage to read in the language other than the one chosen for their presentation. Interview with Vlad Gribincea, Centrul de Resurse Juridice din Moldova (and candidate during the 2010 Moldovan national selection process), December 9, 2015.
214. Written statement by Moldova (January 7, 2016).
215. Written statement of Moldova (January 11, 2016).
216. Moldova PACE Report, p. 51ss.

217. Commissioner Angela Melo served on the African Commission between 2001 and 2015. Initially elected for a six-year term in 2001, she was re-elected in July 2007 for another term. For the court, Judge Angelo Vasco Matusse was elected in 2014.

218. Interview with Judge Angela Vasco Matusse, Arusha, August 8, 2016.

219. *Ibid.* In the interview, Judge Matusse explained that he had to personally check on the ministry's notice board.

220. Norwegian Ministry of Justice and the Police, Note Verbale of November 3, 2009 ("Note Verbale 2009"); the letter to ministries was sent out on September 15, 2009. The invitation was also addressed to the faculties of law of each Norwegian university as well as the Norwegian Centre for Human Rights, Amnesty International Norway, the Norwegian Bar Association, the Norwegian Association of Judges, the Norwegian Helsinki Committee, the International Commission of Jurists Norway, and the Norwegian Association of Lawyers.

221. For the 2010 process, the members of the committee were: District Court Judge Gunnar Lind (Salten District Court) as chair, Supreme Court Judge Hilde Indreberg, Advocate Fanny Platou Amble (Office of the Attorney General, responsible for human rights), Associate Professor Jan E. Helgesen (professor of law and member of the Venice Commission), and Advocate Mette Yvonne Larsen (private practitioner). Only one person on the committee was thus connected to the government and three of the five members were female. See Note Verbale 2009, p. 4.

222. The Ministry of Justice envisaged advertising for the position on one or several relevant, law-specific websites, however, and published the call in the national press. Interview with the Permanent Delegation of Norway to the Council of Europe, December 7, 2015.

223. Note Verbale 2009, p. 2.

224. Interview with the Permanent Delegation of Norway to the Council of Europe, December 7, 2015.

225. *Ibid.*

226. *Ibid.*

227. Written statement of the International Commission of Jurists Norwegian Section, January 14, 2016.

228. Interview with the Permanent Mission of the Republic of Panama to the OAS, November 30, 2015.

229. *Ibid.*

230. *Ibid.*

231. *Ibid.*

232. *Ibid.*

233. Report of the Sub-Committee on the Election of Judges to the European Court of Human Rights, June 17, 2013, Doc. 13233 Addendum II. In the committee's view, the candidates did "not appear to possess the appropriate professional experience and stature to meet the criteria" as laid out in Article 21 of the European Convention. See Progress Report of the Assembly's Bureau and Standing Committee, October 3, 2013, Doc. 13608, Addendum II.

234. Interview with Ambassador Drahoslav Stefanek, permanent representative of Slovakia to the Council of Europe, December 7, 2015.
235. Report of the Committee on the Election of Judges to the European Court of Human Rights, September 21, 2015, Doc. 13870, Addendum II. Notably, Poláková's inclusion on the 2015 list appears to reflect significant changes that took place within the Judicial Council in mid-2014, when its then president, Stefan Harabin (who currently serves on the Slovak Supreme Court), lost his position. Neither Poláková nor the two other candidates who were nominated in 2015 had been included on the 2013 list that was sent to PACE. Information provided by Michal Ovádek, research fellow and PhD candidate, Leuven Centre for Global Governance Studies, August 9, 2017.
236. For reference, the Constitution of the Slovak Republic is available in English at <https://www.prezident.sk/upload-files/46422.pdf>.
237. PACE, List and curricula vitae of candidates submitted by the Government of the Slovak Republic, August 27, 2015, Doc. 13861 ("Slovak Republic PACE Report").
238. Interview with Ambassador Stefanek, December 7, 2015.
239. Ibid.
240. Written statement of Ambassador Stefanek, December 8, 2015.
241. Interview with Ambassador Stefanek, December 7, 2015.
242. Act No. 185/2002 Coll. on the Judicial Council of April 11, 2002, "On the Judicial Council of the Slovak Republic and on amendments of certain Acts," section 27(g); available at [www.legislationline.org/download/action/download/id/7031/file/Slovakia\\_Law\\_on\\_the\\_judicial\\_council\\_2002\\_am2008\\_en.pdf](http://www.legislationline.org/download/action/download/id/7031/file/Slovakia_Law_on_the_judicial_council_2002_am2008_en.pdf).
243. Slovak Republic PACE Report.
244. Ibid. By contrast, Constitutional Court justices and Supreme Court justices in Slovakia must have been active in the legal profession for at least 15 years, and the minimum age for Constitutional Court justices is 40. One informant noted that, viewed in this light, the presence of candidates as young as 33 on Slovakia's ECtHR nominations lists is at odds with Article 21 of the convention (though the ECHR also provides that candidates may be "jurisconsults of recognised competence," a qualification which carries no age restriction).
245. Interview with Ambassador Stefanek, December 7, 2015. Candidates' CVs, on the other hand, are not openly published as they are considered personal data requiring protection.
246. In a written statement, the Slovakian NGO Via Iuris criticized the fact that the current ECtHR judge was not asked any questions. Written statement of Eva Kovacechova on behalf of Via Iuris, February 1, 2016 (on file).
247. Interview with Ambassador Stefanek, December 7, 2015; written statement by Eva Kovacechova.
248. Interview with Ambassador Stefanek, December 7, 2015.
249. Ibid.; Slovak Republic PACE Report.
250. Indeed, it should be noted that the list that was sent to Strasbourg in 2015 was not the same as the one that the Judicial Council first submitted to the government in early 2015. The government

rejected that list due, in part, to political controversy over the inclusion of **Ján Mazá** as one of the nominees. Mazá, a former Constitutional Court judge and university professor, filed a complaint against the government's decision to the Constitutional Court but he was unsuccessful. His nomination was ultimately replaced with that of Poláková, who was later elected to the ECtHR by PACE in 2015. Information provided by Michal Ovádek, research fellow and PhD candidate, Leuven Centre for Global Governance Studies, August 9, 2017.

251. Ibid.

252. In 2016 alone, South Africa supported successful campaigns for three candidates to the UN treaty bodies. Advocate Pansy Tlakula also currently serves as chair of the African Commission, while Judge Bernard Ngoepe's term with the African Court expired in 2014. The first South African national to be appointed to these institutions was Professor Barney Nyameko Pityana, who served on the ACHPR between 1997 and 2003.

253. This conclusion is based on questionnaires filled in by and interviews conducted with current and former South African candidates, as well as civil society organizations and South African human rights experts. Former candidates interviewed include Judge Ngoepe (interview conducted on August 11, 2016), Professor Ann Skelton (elected to the UN CRC in 2016; interview conducted on August 8, 2016, Pretoria), and Professor Julia Sloth-Nielsen (former member of the African Committee of Experts on the Rights and Welfare of the Child; interview conducted on August 10, 2016, Cape Town). A questionnaire was also sent to a DIRCO senior official but no responses were received, despite assurances from DIRCO.

254. For instance, Professor Skelton, a candidate for the UN CRC, had her expenses partly paid for by supportive NGOs and the South African government. By contrast, Professor Sloth-Nielsen paid at least 10,000ZAR out of pocket to fund printing costs for her own nomination campaign to the African Committee.

255. The late Ambassador Grace Stewart Ibingira was one of the inaugural commissioners to be elected to the African Commission and served between 1987 and 1991; Commissioner Florence Butegwa also served between 1999 and 2001. Information used to compile this information draws on from interviews with MFA officials in Kampala and the Ugandan Mission to Addis Ababa.

256. Appointments of a judicial nature are the responsibility of the Ministry of Justice, although the MFA is responsible for the logistics once a candidate has been nominated at national level.

257. Interview with Judge Solomy Balungi Bossa, Arusha, September 7, 2016.

258. Interview with Commissioner Med Kaggwa, Kampala, August 26, 2016. Commissioner Kaggwa had prior experience with the Uganda Human Rights Commission and served as minister of state in the Office of the President from 1996 to 1998. He was also a delegate to the Constituent Assembly, the body that wrote and promulgated Uganda's 1995 Constitution.

259. Interview with Judge Solomy Balungi Bossa, September 7, 2016. Notably, in Uganda, nomination to the EACJ is different than for AU institutions: The process is handled by the Judicial Service Commission rather than the MFA, which then forwards the candidate's name to the president for official endorsement. For her tenure on the International Criminal Tribunal for Rwanda, the judge had apparently been encouraged to seek the position by the then chairperson of the International Women Judges Association, who had indicated that female judges were being encouraged to



apply for positions on international courts. The MFA assessed and supported Judge Bossa's application and successfully lobbied missions in the UN General Assembly for her election.

260. Interview with UK Ministry of Justice, December 16, 2015.

261. UK Ministry of Justice, Notification of Intent to Apply for the Office of Judge of the European Court of Human Rights, December 3, 2015. The JAC regularly consists of 15 commissioners, although the full membership is not engaged in the review of ECtHR candidates. For further information on the commission's composition, see <https://jac.judiciary.gov.uk/commissioners>.

262. Interview with UK Ministry of Justice, December 16, 2015. Former ECtHR Judge Nicolas Bratza notes that this "outreach exercise," and the wide circulation of the call for applications, has resulted in an increase in the number of high quality applicants and that the procedures for applying and interviewing candidates have become more professional. E-mail correspondence with Judge Bratza, August 6, 2017.

263. *Ibid.*; see also UK Ministry of Justice, Judge of the European Court of Human Rights—Information Pack, available at [https://jac.judiciary.gov.uk/sites/default/files/sync/basic\\_page/information\\_pack\\_final\\_o.pdf](https://jac.judiciary.gov.uk/sites/default/files/sync/basic_page/information_pack_final_o.pdf). Candidates were also asked to submit two pieces of written work and a summary of the pieces cited to allow assessment of their intellectual capacity, personal qualities, ability to understand and deal fairly, and their authority and communication skills.

264. *Ibid.*

265. *Ibid.*

266. UK Ministry of Justice, Judge of the European Court of Human Rights—Information Pack.

267. *Ibid.*

268. *Ibid.*

269. *Ibid.*

270. *Ibid.*

271. Interview with US Department of State and Permanent Mission of the USA to the OAS, December 3, 2015.

272. *Ibid.* Given the travel demands placed on commissioners and the position's part-time nature, many candidates have had to withdraw their applications due to availability constraints.

273. *Ibid.*

274. 2017 Independent Panel Report, p. 15.

275. In 2009, Uruguay nominated Perez Perez as a candidate to the Inter-American Court. He served a single term (from 2010–2015) and was not nominated for reelection. There have been two previous Uruguayan commissioners: Daniel Hugo Martins (1964–1968) and Justino Jiménez de Arechega (1968–1972). Prior to Perez Perez, the only previous judge to serve on the Inter-American Court from Uruguay was Héctor Gros Espiell (1985–1990).

276. Bardazano Gradin informed the 2017 Independent Panel that the vacancy was "made known to civil society through a public announcement concerning vacancies in international organizations," and that a group of non-governmental organizations had proposed her name to the foreign ministry. See 2017 Independent Panel Report, p. 10 (English version).

277. Written statement by the Foreign Ministry of Uruguay, Dirección de Derechos Humanos y Derecho Humanitario, January 16, 2016.

278. The Burgh House Principles on the Independence of the International Judiciary, Principle 2.2 (“appropriate personal and professional qualifications must be the overriding consideration in the nomination, election and appointment of judges”).

279. Interview with the Kingdom of Norway, December 7, 2015.

280. See, e.g., interview with Ambassador Stefanek, December 7, 2015.

281. Argentina, for instance, has a process in place for the nomination of Supreme Court justices (following reforms in 2003 amended to increase transparency and democratic legitimacy) that could be similarly applied to the Inter-American system but is not in practice. However, recent dynamics—in particular the appointment of two Supreme Court judges via presidential decrees by President Macri in December 2015—provide reason for concern. Widely criticized by former justices and civil society as undermining the rule of law, the appointments did not follow the 2003 rules and took place without public consultation or the involvement of the Senate. See CELS, “Progressive jurists, NGOs blast appointments,” *Buenos Aires Herald* (December 16, 2015).

282. With the exception of the African Charter, which entitles states to nominate two candidates to the African Commission, member states of all other courts and commissions can (or must) nominate up to three candidates. In Europe, these candidates may include non-nationals; in Africa and the Americas, if three candidates are put forward, at least two must be nationals of the nominating state.

283. See EX.CL/953(XXVIII), “Modalities on the Implementation of the Criteria of Equitable Geographical and Gender Representation in AU Organs and Institutions” In its recommendations, the AUC urges that “[a]ll regions should submit more candidates than the existing vacancies” and that the modalities “should be effective immediately upon their adoption by the Executive Council,” para. 34.

284. 2015 Independent Panel Report, p. 37.

285. *The International Judge*, 35. See, e.g., Norway and Armenia. In Norway, for instance, the preferred candidate was put on the list with two other very young candidates, neither of who would qualify for national senior judicial office in Norway. See ICJ Norwegian Section’s written statement, January 14, 2016. Similarly, in Armenia, civil society criticized the fact that the candidates “Mr A. Ghazaryan and Ms L. Hakobyan were obviously included in the list of candidates to ensure the background of Mr A. Haroutyunyan’s manifest superiority among the 3 candidates in order to raise the likelihood of his election.” See ELA Report 2015, p. 23.

286. One concern raised in the European context, for instance, has been the term of service for ECtHR judges and how to ensure that, when their nine-year term in Strasbourg ends, they are not professionally disadvantaged. See Contribution of Christoph Grabenwarter (Drafting Group F: Written Contribution on Election and Quality of Judges), GT-GDR-F(2014)018.

287. E-mail correspondence with Judge Nicolas Bratza, August 6, 2017.

288. Notably, an earlier provision of the UK Human Rights Act (former section 18) did allow national judges elected to the European Court to retain their seniority on the national bench as well as their pension rights during the years of their service in Strasbourg. This provision has since been repealed, however, in light of the court’s compulsory pension scheme. *Ibid.*

289. Interview with UK Ministry of Justice, December 16, 2015.

290. For its 2014 nominations process, Liechtenstein published its call for applications in Switzerland and Austria, to ensure a wide reach of suitable candidates. The call for applications was further submitted to all faculties of law in Austria and Switzerland, all high courts and constitutional courts, and the national bar association. The selection committee further considered the primary criterion for selection to be the personal qualifications of candidates, rather than their nationality. In the end, a total of 17 applications were received, exceeding the candidate numbers for larger CoE states. Interview with Manuel Frick, Office for Foreign Affairs of the Fürstentum Liechtenstein, December 8, 2015.

291. For instance, Ethiopia's MFA maintains a department called the International Organizations Directorate, which is responsible for compiling vacancies and making recommendations to the prime minister regarding nominations.

292. Bound by Article 141a §4d of the Constitution of the Slovak Republic, the government may act only upon proposals duly submitted to it by the country's judicial council. As noted previously, the Ugandan Parliament has also proposed to adopt a law that lays out criteria and procedures for nomination to international bodies.

293. In Europe, for instance, Austria circulated a call only once, in a specialized press; it is unclear whether relevant stakeholders were even informed of the opening of the process due to conflicting information. By contrast, the UK's call for applications was circulated widely by the JAC, who cooperated with its Northern Irish and Scottish counterparts to ensure the widest possible dissemination across all parts of the UK. In the Inter-American region, none of the states surveyed from the IAC region issued open calls for application, while only several African countries did (e.g., Mozambique).

294. For example, Judge Fatsah Ougergouz was approached personally by the Algerian government for nomination to the African Court but had ample experience for the post: He had been involved in the drafting of such key AU documents as the Protocol on the Statute of the African Court of Justice and Human Rights.

295. *Selecting International Judges*, 65.

296. Grossman, "Shattering the Glass Ceiling in International Adjudication," 46.

297. See International Commission of Jurists, "Women and the World's Judiciaries: Identifying Key Challenges and Opportunities" (Geneva, 2014).

298. In January 2018, this number will rise to 10, following the election of two female candidates to the Inter-American Commission on Human Rights (Brazil and Chile).

299. For statistics on gender representation in all international courts and tribunals, see "Current Composition of International Tribunals and Monitoring Bodies," at <http://www.gqualcampaign.org/1626-2/>.

300. Norway, Note Verbale 2009, p. 4.

301. Interview with the Permanent Delegation of Norway to the Council of Europe, December 7, 2015.

302. See "GQUAL: Campaign for gender parity in international representation," available at <http://www.gqualcampaign.org/about-gqual/>.

303. Among the criteria required by the Rome Statute of the ICC for the election of judges is the principle of “fair representation” of women and men and specific legal expertise on violence against women. See Article 36(8)(a), Rome Statute; see also “Procedure for the nomination and election of judges, the Prosecutor and Deputy Prosecutors of the International Criminal Court,” ICC-ASP/3/Res.6.

304. As the terms of both Hon. Justice Fatsah Ouguerouz (Algeria) and Hon. Justice Duncan Tambala (Malawi) came to an end in September 2016, Hon. Lady Justice Ntyam Ondo Mengue from Cameroon and Hon. Lady Justice Marie Thérèse Mukamulisa from Rwanda were both elected at the elective 24th session of the Executive Council and 26th session of the AU Assembly in June 2016. A similar experience was noted at the elective session of the AU Executive Council in January 2016, which resulted in candidates who were seeking reelection to the African Committee of Experts on the Rights and Welfare of the Child, as well as other first-time nominees, being removed from the final list on the grounds that they were of the “wrong gender and regional representation.” For a related critique in the context of the European Court, see David Kosar, “Selecting Strasbourg Judges: A Critique” (arguing that PACE “went from one extreme to another on the gender issue”), in *Selecting Europe’s Judges*, p. 130.

305. Cecily Rose, “Justifying Arguments About Selection Procedures for Judges at International Courts and Tribunals: A Response to Nienke Grossman,” *AJIL Unbound*, p. 86.

306. Grossman, “Shattering the Glass Ceiling in International Adjudication,” p. 216.

307. *Selecting International Judges*, pp. 145, 147.

308. UK Ministry of Justice, Notification of Intent to Apply for the Office of Judge of the European Court of Human Rights, December 3, 2015. The review process is further carried out by an independent panel, most recently comprising a former president of the International Court of Justice, a Supreme Court justice, the master of the Rolls, a member of the House of Lords, a law professor, the permanent secretary of the Ministry of Justice, and a legal advisor of the Foreign and Commonwealth Office. Although not a country featured in this report, Sweden’s focal point is also a permanently established, independent body: the Judges Proposal Board. The Swedish government is by law required to appoint a consultant who has the right to attend and be heard by the board, in order to ensure that it has sufficient relevant expert knowledge when selecting suitable candidates. Written statement provided by Sweden (January 18, 2016).

309. In Austria, for instance, the selection panel appointed in 2014 and 2015 was composed only of persons closely affiliated to their respective ministries and the chancellery, and who were still formally subjected to the directions of their ministers.

310. See International Commission of Jurists, Practitioners Guide No. 1: *International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors* (2007), pp. 45–49. Reports of the UN Special Rapporteur on the Independence of Judges and Lawyers: UN Doc. E/CN.4/1995/39, para. 65; UN Doc. A/HRC/11/41 (2009), paras. 23 to 34, 97; UN Doc. A/HRC/35/31 (2017), para 33.

311. For instance, in Moldova, several key civil society actors were critical of the fact that, from among a panel of 17 members representing various branches of state, there were only three whom they considered to be competent and familiar with the ECtHR. Interview with Vlad Gribincea, Centrul de Resurse Juridice din Moldova, December 9, 2015.

312. The Moldovan selection process included a written test consisting of three theoretical questions and a practical example based on an anonymized ECtHR judgment. To ensure anonymous marking by the commission members, all exam papers submitted were codified through the prior allocation of numbers known only to candidates and the secretary of the commission, who did not otherwise participate in the selection procedure. Written statement by Moldova (January 7, 2016).

313. Interview with Ambassador Stefanek, December 7, 2015. Candidates' CVs, on the other hand, were not openly published as they are considered personal data requiring protection.

314. In the event that a relationship exists between a member of the body and a candidate that could give rise to a reasonable apprehension of bias, the member should not take part in the relevant decision.

315. Advisory Panel (2016) I, Second activity report for the attention of the Committee of Ministers, February 25, 2016, para. 42.

316. Alberto Alemanno, "How Transparent is Transparent Enough? Balancing Access to Information Against Privacy in European Judicial Selections," in *Selecting Europe's Judges*, p. 209.

317. E-mail correspondence with Judge Nicolas Bratza, August 6, 2017.

318. 2015 Independent Panel Report, pp. 44–45; 2017 Independent Panel Report, pp. 44–45. In this regard, it is worth noting that several OAS state are also members of the Caribbean Court of Justice (CCJ)—a sub-regional court that serves as the judicial institution for the Caribbean community (CARICOM) and is unique among international courts in that its judges are appointed by an independent selection committee known as the Regional Judicial and Legal Services Commission. Uniquely among integrative courts, the CCJ is also funded through an independent trust fund, which was developed to ensure the financial independence of the court from political interference. See further Duke E. Pollard, *The Caribbean Court of Justice: Closing the Circle of Independence* (The Caribbean Law Publishing Company, 2004).



# Annex 1: African Human Rights System Questionnaire

## QUESTIONNAIRE/INTERVIEW GUIDE African Human Rights System

### Instructions on answering:

*Please only respond to the part that applies to your category and also Part D*

### A. GOVERNMENT

1.	Which government ministry (ies) of department(s) is involved in the nomination process?
2.	Is there a guide, regulations or legislation that regulates the nomination process? If so, what criteria does it provide for?
3.	Are there any formal consultative procedures or processes that are conducted before, or during the nomination process? If so, who are the stakeholders?
4.	What international requirements are infused in the process in addition to professional qualifications required of candidates?
5.	Are there any special interviews that are conducted in the selection of a candidate?
6.	Are there financial costs associated with the nomination and election of a candidate, and if so, does government bear it in part or in whole?
7.	What changes, if any, are needed to the nomination and election procedures?

## B. CIVIL SOCIETY

*(This Part is reserved for civil society)*

1.	What role does civil society play in your country, if any, in the nomination and election of candidates to African institutions?
2.	What is the nature of civil society contribution in the selection process, (e.g., gathering information about candidates that might not be in the public realm and passing it to government or other relevant stakeholders)?
3.	What options or avenues exist for civil society to ensure that only suitable candidates are nominated and elected?
4.	What changes, if any, are needed to the nomination and election procedures?

## C. CURRENT/FORMER OFFICERS IN REGIONAL INSTITUTIONS

*(This Part is reserved for current/formerly nominated officials)*

1.	To which African institution were you ever nominated and or elected?
2.	How were you nominated and selected for this position? (Who initiated the process and for which reasons and generally how did the process roll out up to the time of your election?)
3.	Is there any marked difference between the nomination & appointment process for national judicial office and that for international institutions?
4.	What criteria was used to determine suitability of candidates and from which benchmarks was it drawn?
5.	In your view, does the nomination process have a bearing on the quality of officials that get elected? If so, what mechanisms could be infused for quality control purposes?
6.	What additional support do you receive from your home government, if any?
7.	Do nominated candidates play any active role for them to get elected? If so, what is that role and its implications on the election process
8.	What changes, if any, are needed to the nomination and election procedures?



## D. COMMON QUESTIONS

*(This Part must be answered by everyone)*

1.	Is it possible to increase the emphasis on merit and competition in the election process? If so, how could these issues be addressed with regard to vote trading and regional groups?
2.	To what extent can, or should, the views of non-state actors (bar and professional associations, NGOs, judges associations etc.) be integrated into the decision-making process?
3.	Would proposing best practice guidelines for national nomination processes be a worthwhile process? (If so, what should these guidelines cover and what examples should they draw on? For example, should states be required to indicate the procedure they have used for selecting nominated candidates, when they put forward their nominations?)
4.	To what extent (if at all) does the existing system of nominations impact upon the legitimacy and effectiveness of the international courts?

**End of Document**



# Annex 2: European and Inter-American Human Rights Systems Questionnaire

## **Nominating and Electing Judges to the Regional Human Rights Systems** Legal Frameworks and State Practice

### **A. Legal framework**

1. What is the legal framework in place?
2. If no permanent legal framework is in place, what other norms and standards apply?
3. Do any relevant ad hoc procedures exist and how do they work?

### **B. Process**

1. What is the overall process?
2. What is the general timeline?
3. Is there a call for applications? If so, please detail the call for applications regarding the drafting and initiation of the call, its content, dissemination, and other relevant countryspecific information.
4. Are you conducting interviews with prospective candidates? If not, why?
  - a. Please give a detailed account of the interview process, including its consistency.

5. How are candidates' language abilities being assessed?
6. Are any other tests conducted?
7. Is there a complaint mechanism available?
8. Are decisions for nominations reasoned?

### **C. Actors**

1. Is there an overall responsible person or institution? If so, who?
2. Who initiates the selection process?
3. Is there a selection committee/panel?
  - a. How is the committee/panel selected?
  - b. What is the composition of the committee/panel?
    - i. Is it gender-balanced?
  - c. Is the panel independent from other actors and national decision-makers?
  - d. What are the committee/panel's competences?
  - e. Can other national actors override the committee/panel's decisions or recommendations?
4. What is the role of the Government?
5. Who takes the final decision?
6. Other actors?

### **D. Inclusion**

1. What is the gender balance amongst actors and candidates, and how is it encouraged?
2. If applicable, are there provisions for national minorities?
3. If applicable, are there provisions for different language groups?
4. Are there provisions for groups of society potentially in need of particular encouragement or support, so as to enhance inclusive access (i.e. persons with disabilities, persons of a particular ethnical background)?

### **E. Transparency**

1. What mechanisms within the process provide for transparency?
2. Are any documents publicly available, and if so, which ones and how?
3. Are interviews conducted in a transparent way, and if so, how?
4. Are NGOs or other civil society actors involved in the process, and if so, how?

## **F. Other**

1. Please provide previous examples of nominations.
2. Does your country currently have any reform plans?
3. Do you ensure consistency with previous procedures?

## Open Society Justice Initiative

The Open Society Justice Initiative uses law to protect and empower people around the world. Through litigation, advocacy, research, and technical assistance, the Justice Initiative promotes human rights and builds legal capacity for open societies. Our staff is based in Abuja, Brussels, Budapest, The Hague, London, Mexico City, New York, Paris, Santo Domingo, and Washington, D.C.

**[www.JusticeInitiative.org](http://www.JusticeInitiative.org)**

## Open Society Foundations

The Open Society Foundations work to build vibrant and tolerant democracies whose governments are accountable to their citizens. Working with local communities in more than 70 countries, the Open Society Foundations support justice and human rights, freedom of expression, and access to public health and education.

**[www.opensocietyfoundations.org](http://www.opensocietyfoundations.org)**

## International Commission of Jurists (ICJ)

Composed of 60 eminent judges and lawyers from all regions of the world, the International Commission of Jurists promotes and protects human rights through the Rule of Law, by using its unique legal expertise to develop and strengthen national and international justice systems. Established in 1952 and active on five continents, the ICJ aims to ensure the progressive development and effective implementation of international human rights and international humanitarian law; secure the realization of civil, cultural, economic, political and social rights; safeguard the separation of powers; and guarantee the independence of the judiciary and legal profession.

**[www.icj.org](http://www.icj.org)**



Regional human rights courts and commissions—including the African Court of Human and Peoples’ Rights, the European Court of Human Rights, and the Inter-American Court of Human Rights—are essential safeguards for the rule of law. Yet despite their importance, the process of selecting the judges and commissioners who sit on these bodies—how they are nominated, vetted, and ultimately selected—remains largely unknown and often shrouded in secrecy. Coupled with broader political efforts to erode international judicial institutions, this secrecy underscores the pressing need to focus on strengthening these systems from within.

This report responds to that challenge, shining a light on the processes that states use to nominate and select human rights judges and commissioners. By analyzing the nomination practices of 22 countries, *Strengthening from Within* documents the ways in which nomination procedures too often fall short of the legal frameworks and international standards that should guide them. It also identifies promising practices and offers recommendations for improvement grounded in experience.

An independent judiciary is essential to the rule of law: for national courts, procedures for judicial selection must be fair, transparent, and merit-based. As this report makes clear, the world’s international courts and tribunals are no different.

