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Between Idealism and Realism: A Few Comparative Reflections and Proposals on the Appointment Process of the Inter-American Commission and Court of Human Rights Members

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Between Idealism and Realism: A Few Comparative Reflections and Proposals on the Appointment Process of the Inter-American Commission and Court of Human Rights Members

ARTICLE

Laurence Burgorgue-Larsen[†]

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Abstract

In this Article, Professor Laurence Burgorgue-Larsen, a renowned scholar in European and Latin-American law, explores flaws in the process by which members are appointed to the Inter-American Commission and Court of human rights, respectively. Seeking to strike a balance between “Idealism” and “Realism,” Burgorgue-Larsen seeks methods for improving the independence and impartiality of the Commissioners and Judges in the Inter-American system in the hopes of ultimately lending greater credibility and

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I would like to warmly thank Paolo G. Carozza and Doug Cassel for their kind invitation to participate in a very creative, vivid and fruitful “seminar-retreat” at the University of Notre Dame at the end of March 2014 concerning “The Future of the Inter-American System of Human Rights.” This article is the result of the reflections expressed on this occasion; all shortcomings are mind. I would also like to warmly thank Claire Callejon for her excellent translation work.

legitimacy to the system as a whole. Drawing comparisons to the appointment of judges on national and international courts worldwide, Burgorgue-Larsen ultimately produces specific suggestions for improving the appointment process, ranging from scrutiny of candidates' human rights competencies and language skills to increasing efforts to diversify the candidate pool, particularly in terms of gender and ethnicity. She concludes by suggesting that greater structural changes, including adjustments to tenure and appointment procedures, might eventually prove the best solution for ensuring the survival of the Inter-American system.

I INTRODUCTION

In the field of human rights—as in politics more generally—Idealism and Realism always trigger a violent pendulum movement.¹ If ideals dominate, policy goals may not be reached; worse, they could be distorted. If only Realism—even *Realpolitik*—informs policy development and implementation, it could appear harmfully cynical and damage normative progress. This Article aims, using comparative law, to propose some improvements in the appointment process of members of the Inter-American Commission and Court of Human Rights. The two extremes of Idealism and Realism often appear in the analysis: The former has helped me to propose some bold (or extreme) ideas; the latter reminded me that, very often (even in law), the “Best is the enemy of the Good.” At the end of the day, I have tried, when presenting a few proposals, to strike a happy medium.

The independence and impartiality of the judiciary have always been under scrutiny.² Many scholars have tried to identify what ensures the independence of domestic judges. Since the inception and multiplication of international judicial bodies,³ scholars have explored this new area of research at the international level.⁴ Many factors—institutional, financial, procedural, and legal—

¹ The title of this Article is borrowed from Christian Tomuschat's book, *Human Rights: Between Idealism and Realism*. CHRISTIAN TOMUSCHAT, HUMAN RIGHTS: BETWEEN IDEALISM AND REALISM (2d ed. 2008). I think these two kinds of extremes (Idealism and Realism) are inherent to scholars' work on law and, more precisely, about human rights law. It is always difficult to strike a good balance.

² Independence and impartiality are not identical concepts. The former refers to the capacity of a body to resist possible external pressures, to make decisions free from the interference of other kinds of actors; the latter refers to the ability to make a decision free from any kind of bias. Impartiality concerns, more precisely, the capacity of a judge during a trial to be as “neutral” as possible. See the legal definitions in DICTIONNAIRE DE DROIT INTERNATIONAL PUBLIC [DICTIONARY OF PUBLIC INTERNATIONAL LAW] 562, 570–72 (Jean Salmon ed., 2001).

³ See, e.g., SOCIÉTÉ FRANÇAISE POUR LE DROIT INTERNATIONAL [FRENCH SOCIETY OF INTERNATIONAL LAW], LA JURIDICTIONNALISATION DU DROIT INTERNATIONAL [THE JURSDICTIONALIZATION OF INTERNATIONAL LAW] (2003).

⁴ See Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L.J. 273 *passim* (1997); see also Ruth Mackenzie & Philippe Sands, *International Courts and Tribunals and the Independence of the International Judge*, 44 HARV. INT'L L.J. 271 (2003); Emmanuelle Jouannet, *Actualité des questions d'indépendance et d'impartialité des juridictions internationales: La consolidation d'un tiers pouvoir international?*, in INDÉPENDANCE ET IMPARTIALITÉ DES JUGES INTERNATIONAUX [INDEPENDENCE AND IMPARTIALITY OF INTERNATIONAL JUDGES] 271 (Hélène Ruiz Fabri & Jean-Marc Sorel eds., 2010); Dinah Shelton, *Legal Norms to Promote the Independence and Accountability of International Tribunals*, 2 LAW & PRAC. INT'L CTS. &

contribute to ensuring the independence as well as the impartiality of international judges. National and international processes to select and nominate candidates are among them. With the impressive growth of international judicial bodies, an extensive legal literature—including reports by independent bodies like the *Institut de droit international*⁵—has constantly pointed out the connection between the procedure of selection and appointment on the one hand and the independence of the judiciary on the other hand.⁶ This trend is quite naturally present within the Inter-American system.⁷ Good practices in the appointment processes (both at the national and international levels) are essential for the public to trust the Inter-American justice system, particularly at times when it is faced with a very strong crisis of political confidence.⁸ Ultimately, it is the crucial and very complex issue of these institutions' legitimacy that is at

TRIBUNALS 27, 27–62 (2003).

⁵ See the very interesting Resolution adopted by the 6th Commission during the Rhodes Session in 2011. Institut de droit international [Institute of International Law], *Sixth Commission: The Position of the International Judge* (Sept. 9, 2011), http://www.idi-iil.org/idiE/resolutionsE/2011_rhodes_06_en.pdf.

⁶ It is quite interesting to note that legal literature has started to develop since the international judge Charles de Visser was not re-elected to the ICJ in 1951. See Gilbert Guillaume, *De l'indépendance des membres de la Cour internationale de justice* [On the Independence of the Members of the International Court of Justice], in 1 BOUTROS BOUTROS-GHALI, AMICORUM DISCIPULORUMQUE LIBER: PAIX, DÉVELOPPEMENT, DÉMOCRATIE 476 (1998). But it is, above all, the proliferation of international judicial bodies that has been the main incentive to study the political process of selection and nomination of judges. Bold research directed by Ruth Mackenzie et al. proves it. RUTH MACKENZIE, KATE MALLESON, PENNY MARTIN & PHILIPPE SANDS, *SELECTING INTERNATIONAL JUDGES: PRINCIPLES, PROCESS AND POLITICS* (2010). In the same vein, many articles or collective books demonstrate that the topic is becoming a very important one within the academic world. See, e.g., Antonio Remiro Brotons, *Nomination et élection des juges à la Cour internationale de justice* [Nomination and Election of Judges to the International Court of Justice], in UNITY AND DIVERSITY OF INTERNATIONAL LAW 639 (Denis Alland et al. eds., 2014); Jiří Malenkovský, *L'INDÉPENDANCE DES JUGES INTERNATIONAUX* [The Independence of International Judges] (2011), reprinted in 349 RECUEIL DES COURS DE L'ACADÉMIE DE DROIT INTERNATIONAL DE LA HAYE [COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW] 9 (2011); Anja Seibert-Fohr, *International Judicial Ethics*, THE OXFORD HANDBOOK OF INTERNATIONAL ADJUDICATION 757 (Cesare P.R. Romano et al. eds., 2013); Sandra Szurek, *La composition des juridictions internationales permanentes: L'émergence de nouvelles exigences de représentativité* [The Composition of Permanent International Jurisdictions: The Emergence of New Requirements of Representativeness], 56 ANNUAIRE FRANÇAIS DE DROIT INTERNATIONAL [FRENCH Y.B. INT'L L.] (Centre National de la Recherche Scientifique) 41 (2010); Christian Tomuschat, *National Representation of Judges and Legitimacy of International Jurisdictions: Lessons from ICJ to ECJ?*, in THE FUTURE OF THE EUROPEAN JUDICIAL SYSTEM IN A COMPARATIVE PERSPECTIVE 183 (Ingolf Pernice et al. eds., 2006).

⁷ Héctor Faúndez Ledesma, *La Independencia e imparcialidad de los miembros de la Comisión y de la Corte* [The Independence and Impartiality of the Members of the Commission and of the Court: Paradoxes and Challenges], in EL FUTURO DEL SISTEMA INTERAMERICANO DE LOS DERECHOS HUMANOS [THE FUTURE OF THE INTER-AMERICAN HUMAN RIGHTS SYSTEM] 170, 185–91 (Juan E. Méndez & Francisco Cox eds., 1998); Oswaldo Ruiz-Chiriboga, *The Independence of the Inter-American Judge*, 11 LAW & PRAC. INT'L CTS. & TRIBUNALS 111, 114–26 (2012); Judith Schönsteiner, *Alternative Appointment Procedures for the Commissioners and Judges in the Inter-American System of Human Rights*, REV. IIDH, June–Dec. 2007, at 195, 196 (2007).

⁸ Douglass Cassel, *Regional Human Rights Regime and State Pushback: The Case of the Inter-American Human Rights System (2011–2013)*, 33 HUM. RTS. L.J. 1 (2013); see also Dean C. Grossman, *The Future of the Inter-American System of Human Rights: Introduction*, 20 HUM. RTS. BRIEF 2 (2013).

stake.⁹

In this context, my goal in this Article is to try and be as precise and technical as possible, using comparative law as a tool for making proposals. The purpose is to find ways to improve the selection and appointment processes of the commissioners and judges within the Inter-American human rights system. In Part II, I will discuss the *national* processes to select candidates for a post at the Inter-American Commission and Inter-American Court of Human Rights. In Part III, I explore the *international* processes. I analyze these two issues from a *procedural angle* in order to identify—following a comparative approach—the best criteria to encourage states and the Organization of the American States (OAS) to set up good practices in terms of judicial governance, as well as from a *material angle* so as to identify the candidates' profile, their gender, ethnic origin, etc. In Part IV, I conclude with remarks concerning the question of tenure and reappointment, another factor that is closely linked to the question of independence.

II NATIONAL PROCESSES TO SELECT CANDIDATES

How do we ensure that selection processes are as transparent as possible? How do we avoid following political interest only or even nepotism? In short, how do we ensure that only candidates' professional competences are taken into account? While these questions are not new,¹⁰ appropriate answers have not yet been found. The issues were considered for a long time as being part of states' "internal affairs" in the name of the sacrosanct principle of national sovereignty. However, this principle has been undermined by the increasing need for transparency. Although international law cannot entirely rule out this national aspect of selection processes, it can nevertheless provide some guidance and even limits.

A COMPARATIVE ASSESSMENT

Nowadays, at the international level, the Rome Statute of the International Criminal Court (ICC) provides for strict rules in this respect.¹¹ According to Article 36(4):

- (a) Nominations of candidates for election to the Court may be made by any State Party to this Statute, and shall be made either:
 - (i) By the procedure for the nomination of candidates for appointment to the highest judicial offices in the State in question; or

⁹ Armin von Bogdandy & Ingo Venzke, *In Whose Name? An Investigation of International Courts' Public Authority and its Democratic Justification*, 23 EUR. J. INT'L L. 7 *passim* (2012).

¹⁰ It should be noted that as early as the beginning of the twentieth century—when the Permanent Court of International Justice was set up—efforts were made to limit states' discretionary powers when selecting international judges.

¹¹ It was a way of taking into account the many criticisms of International Criminal Tribunals membership—International Criminal Tribunal for the former Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR).

- (ii) By the procedure provided for the nomination of candidates for the International Court of Justice in the Statute of that Court.¹²

With regard to the regional protection of human rights, no treaty ratified by member states providing for the procedures to select candidates—to a judge or a commissioner position—can be found. Nevertheless, international organizations within which the Inter-American and the European human rights systems operation (namely the OAS and the Council of Europe) have started to draft minimal guidelines.

At the European level, several recommendation and resolutions of the Parliamentary Assembly of the Council of Europe (CoE) have highlighted crucial elements to ensure the professional qualifications of judges.¹³ It must be said that the arrival of many countries from Eastern Europe, and of judges from these countries, has caused serious problems in terms of profile and professional competence of candidates when the Commission disappeared and the “unique” Court was set up.¹⁴ Thus, the Parliamentary Assembly—while often being strongly opposed to the Committee of Ministers, which considered for a long time that national procedures fell under national sovereignty—made a point in providing, over time, a series of basic principles that candidates put forward by states must respect. The Parliamentary Assembly provided a reminder that in order to ensure the European Court’s efficiency and legitimacy, procedures should be fair, transparent, and as homogeneous as possible between member states. It intends to fight two problems affecting national selection procedures, namely

¹² Rome Statute of the International Criminal Court, art. 36(4), *opened for signature* July 17, 1998, 2187 U.N.T.S. 3, 109–10 (entered into force July 1, 2002).

¹³ In Europe, it is the Parliamentary Assembly that pioneered improved standards for the selection of candidates. In this regard, see Eur. Parl. Ass. Res. 1646, Nomination of candidates and elections of judges to the European Court of Human Rights (2009), <http://assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewPDF.asp?FileID=17704>; Eur. Parl. Ass. Recommendation 1649, Candidates for the European Court of Human Rights (2004), <http://assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewPDF.asp?FileID=17193>; Eur. Parl. Ass. Res. 1200, Election of Judges to the European Court of Human Rights (1999), <http://assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewPDF.asp?FileID=16760>; Eur. Parl. Ass. Res. 1082, On the Procedure for Examining Candidatures for the Election of Judges to the European Court of Human Rights (1996), <http://assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewPDF.asp?FileID=16493>.

¹⁴ This was demonstrated very openly by Professor Jean-François Flauss with no concession whatsoever to the Council of Europe’s system. That is why he was persona non grata at the European Court of Human Rights until his tragic death in 2010. See Jean-François Flauss, *Brèves observations sur le second renouvellement triennal de la Cour européenne des droits de l’homme* [Brief Observations on the Second Triennial Renewal of the European Court of Human Rights], 61 REVUE TRIMESTRIELLE DES DROITS DE L’HOMME 5 (2005); Jean-François Flauss, *Le renouvellement triennal de la Cour européenne des droits de l’homme* [The Triennial Renewal of the European Court of Human Rights], 47 REVUE TRIMESTRIELLE DES DROITS DE L’HOMME 693 (2001); Jean-François Flauss, *Les élections de juges à la Cour Européenne des droits de l’homme (2005–2008)* [The Election of Judges to the European Court of Human Rights (2005–2008)], 75 REVUE TRIMESTRIELLE DES DROITS DE L’HOMME 173 (2008); Jean-François Flauss, *Radioscopie de l’élection de la nouvelle Cour européenne des droits de l’homme* [Radioscopy of the Election of the New European Court of Human Rights], 35 REVUE TRIMESTRIELLE DES DROITS DE L’HOMME 465 (1998).

the extreme politicization and the presentation of ill-qualified candidates.¹⁵

Resolution No. 1646 (2009) is quite interesting in this regard. The Parliamentary Assembly urges states to comply with the following rules when selecting and subsequently nominating candidates to the European Court of Human Rights (ECHR):

- 4.1. issue public and open calls for candidatures;
- 4.2. when submitting the names of candidates to the Assembly, describe the manner in which they were selected;
- 4.3. transmit the names of the candidates to the Assembly in alphabetical order;
- 4.4. candidates should possess an active knowledge of one official language of the Council of Europe and a passive knowledge of the other;
- 4.5. that, if possible, no candidate should be submitted whose election might result in the necessity to appoint an ad hoc judge.¹⁶

This lobbying by the Parliamentary Assembly was eventually taken seriously by the CoE's Committee of Ministers. Apart from the many "sicknesses" revealed by Professor Flauss's chronicles since the inception of the unique Court,¹⁷ following the entry into force of Protocol No. 11,¹⁸ the twists and turns taken to select the last French candidate made all relevant stakeholders realize that it was time to be firm regarding the level of candidates and to give effect to the guidelines established by the Parliamentary Assembly.¹⁹

In this context, the Committee of Ministers adopted on March 29, 2012, *Guidelines of the Committee of Ministers on the selection of candidates for the post of judge at the European Court of Human Rights*,²⁰ which should be read together with the explanatory report.²¹ This document relating to good practices is very interesting. Soon afterwards, the Brighton Declaration—where a high level conference of state parties to the Council of Europe was convened in April 2012—recalled the importance of the professional quality of judges as

¹⁵ Selection procedures that are too diverse do not allow the proposal of "homogeneous" candidates in terms of competence.

¹⁶ Eur. Parl. Ass. Res. 1646, *supra* note 13 (citation omitted).

¹⁷ See generally sources cited *supra* note 14.

¹⁸ Flauss, *Les élections de juges à la Cour européenne des droits de l'homme (2005–2008)*, *supra* note 14.

¹⁹ See *infra* Section III.A.

²⁰ Eur. Comm. of Ministers, *Guidelines of the Committee of Ministers on the Selection of Candidates for the Post of Judge at the European Court of Human Rights* (Mar. 29, 2012), Doc. No. CM(2012)40finalE, [http://wcd.coe.int/ViewDoc.jsp?Ref=CM\(2012\)40&Ver=final](http://wcd.coe.int/ViewDoc.jsp?Ref=CM(2012)40&Ver=final).

²¹ Eur. Comm. of Ministers, *Guidelines of the Committee of Ministers on the Selection of Candidates for the Post of Judge at the European Court of Human Rights—Explanatory Memorandum* (Mar. 29, 2012), Doc. No. CM(2012)40addfinalE, [http://wcd.coe.int/ViewDoc.jsp?Ref=CM\(2012\)40&Ver=addfinal](http://wcd.coe.int/ViewDoc.jsp?Ref=CM(2012)40&Ver=addfinal).

directly linked to the “authority and credibility of the Court.”²² States’ practice is extremely erratic. For a long time, it revealed the executive’s stranglehold on domestic selection procedures in most instances.²³ Nevertheless, increasing pressure from the Council of Europe’s two main bodies—the Parliamentary Assembly first, later joined by the Committee of Ministers—was successful and encouraged the progressive adoption of “good practices” in various states, even though there is still a long way to go.

At this stage, it should be said that it is extremely difficult to get a precise and detailed overview of national selection procedures in Europe. Some states officially send information regarding their selection procedure to the Parliamentary Assembly, thus making it public and accessible. This is the case with the Slovak Republic.²⁴ However, this is not the case in a majority of states. In most of them, the information I gathered was the result of a combination of elements: access to relevant legal writers’ articles, access to specific reports by the Council of Europe’s bodies, and *in fine* conversations with several judges of the European Court and members of the Registry.²⁵ Difficulty in accessing such information shows that transparency is far from effective.²⁶

²² Paragraph 21 of the Declaration reads as follows: “The authority and credibility of the Court depend in large part on the quality of its judges and the judgments they deliver.” High Level Conference on the Future of the European Court of Human Rights, *Brighton Declaration*, ¶ 21 (Apr. 20, 2012), <http://wcd.coe.int/ViewDoc.jsp?Ref=BrightonDeclaration>. Paragraph 22 details these requirements and expands them to members of the Registry:

The high calibre of judges elected to the Court depends on the quality of the candidates that are proposed to the Parliamentary Assembly for election. The States Parties’ role in proposing candidates of the highest possible quality is therefore of fundamental importance to the continued success of the Court, as is a high-quality Registry, with lawyers chosen for their legal capability and their knowledge of the law and practice of States Parties, which provides invaluable support to the judges of the Court.

Id. ¶ 22.

²³ Jean-François Flauss thus wrote in 2005 that:

In almost all cases, the national list of candidates has been either introduced, approved or decided by the Government (Poland, Germany, Croatia, Greece, Malta, Liechtenstein, Ireland, Iceland, Azerbaijan, Estonia, Norway), the Head of State (Russia, Lithuania, Bosnia Herzegovina), or presented by the State (Portugal, Sweden, Belgium, Czech Republic, France), which means that it was the executive authorities of the country that had a stranglehold over the selection of candidates.

Flauss, *Brèves observations sur le second renouvellement triennal de la Cour européenne des droits de l’homme*, *supra* note 14, at 19 (my translation).

²⁴ Eur. Parl. Ass., *Communication of the Sec’y Gen.*, 3d Part-Sess., Doc. No. 13232 (2013), <http://assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewPDF.asp?FileID=19785> (providing a thorough presentation of the national selection procedure).

²⁵ These conversations, which took place with several judges and members of the Registry we are personally acquainted with, especially focused on selection processes over the last few months. Our main goal was to get as much practical information as possible to draft this Article.

²⁶ We could imagine a periodic report published by the Council of Europe (more particularly the Parliamentary Assembly), which would be widely publicized and give as precise a picture as possible of all national selection procedures. Therefore, external monitoring (i.e., by NGOs and academics) would be strengthened and add to domestic monitoring procedures, provided states handed over relevant information in good faith.

Having said that, there are roughly three categories of national selection procedures according to the Parliamentary Assembly's criteria:²⁷ the ad hoc procedures derived from any legal basis,²⁸ the procedures established without any legal basis,²⁹ and the procedures based on a formal legal basis.³⁰ I examine below some domestic examples that highlight each kind of procedure.

The United Kingdom and Luxembourg are representatives of the first type (the ad hoc procedure). In the United Kingdom, an advertisement for the position is put in the national press, with a closing date for written applications the following month. A month later, a panel meets to select candidates for interview. The panel interviews potential candidates and recommends three nominees. The three nominees are approved by U.K. ministers and the list is transmitted to the CoE by the end of that month. The whole process takes about three months.³¹ During the election to the Court in 2004,³² the independent Panel was chaired by Sir Hayden Phillips, Permanent Secretary of the Lord Chancellor's Department (Department for Constitutional Affairs) and composed of the Lord President of the Court of Session (Lord Cullen), the former President of the European Commission's Advisory Committee of Equal Opportunities (Joanna Foster) and the principal Legal Adviser to the Foreign and Commonwealth Office (Sir Michael Wood).

In Luxembourg, the procedure does not rest on any legal basis.³³ The vacancy is advertised in *Mémorial* (the official gazette of the Grand Duchy of Luxembourg) and, rather than an assessment committee, there is a discretionary selection by the Council of States, which then hands it over to the Parliamentary Assembly of the Council of Europe. When Dean Spielmann (the actual President of the European Court) was re-elected, no other candidate applied to the position. An advertisement was aired on the radio to encourage potential candidates. It was a relative failure. Names of civil servants—who were not particularly enthusiastic and who knew that Dean Spielmann was going to be re-elected anyway—were added to the three name list with the sole purpose of formally meeting the requirements set up by the Parliamentary Assembly. This example demonstrates the difficulties faced by a small country when trying to find suitable candidates.

²⁷ Eur. Parl. Ass., *Rep. of the Comm. on Legal Affairs & Human Rights*, 1st Part-Sess., Doc. No. 11767, ¶ 17 (2008), <http://assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewHTML.asp?FileID=12219>.

²⁸ Armenia, Bulgaria, the Czech Republic, Finland, Iceland, Italy, Lithuania, Luxembourg, Moldova, Norway, Poland, Saint-Marin, Serbia, United Kingdom. We must add that the Brighton Declaration raises that for Bulgaria, Italy, and Luxembourg, the answers given by the state were not complete and were an obstacle to a definitive evaluation. See *Brighton Declaration*, *supra* note 22.

²⁹ Azerbaijan, Austria, Belgium, Cyprus, Denmark, France, Germany, Hungary, Ireland, Liechtenstein, Malta, Monaco, the Netherlands, Sweden, Switzerland.

³⁰ Bosnia-Herzegovina, Estonia, Latvia, Romania, the Russian Federation, Slovenia, the Former Yugoslav Republic of Macedonia, Ukraine, the Slovak Republic.

³¹ VAUGHNE MILLER, INT'L AFFAIRS & DEF. SECTION, SN/IA/5949, THE EUROPEAN COURT OF HUMAN RIGHTS: THE ELECTION OF JUDGES 8 (2011).

³² Flauss, *Brèves observations sur le second renouvellement triennal de la Cour européenne des droits de l'homme*, *supra* note 14, at 19–20.

³³ The information on Luxembourg came from an interview with a national citizen.

Belgium and France are typical of the second kind of procedure established without any legal basis. Belgian judge Françoise Tulkens' term expired in 2012. Her replacement was found according to the following informal procedure.³⁴ A call for candidacy was advertised in the Belgian official gazette, in specialized publications, in the calendar of the supreme court's activities, the Bar, and through academia. Thirteen applicants made themselves known and were later interviewed by a jury panel composed of six people in charge of selecting the most suitable candidates. The presence amongst the expert panel of two members of the office of the government agent before the European Court was seen as inappropriate by many observers. This procedure reveals that the government has kept playing a key role in the process. In the end, the five candidates who had been short-listed by the jury panel were submitted to the Council of Ministers, which narrowed the field to three candidates that they presented to the Council of Europe's Parliamentary Assembly with the one woman who had applied not appearing on the list.

France has a long history in this regard and was not spared of criticism, as we will later see. Its tradition lies in the "classic rules" about the "national groups" set up to appoint members to the Permanent Court of Arbitration (PCA).³⁵ According to the Statute of the International Court of Justice (ICJ), such national groups are responsible for the national selection of candidates. As a matter of fact, France has expanded its national group's mandate;³⁶ not only does it participate in the selection of candidates to the ICJ, but also to the ECHR and the ICC. In other words, France has "homogenized" as much as it could the selection procedure of its candidate to the international judges' mandates by expanding the mechanism provided by the Statute of the ICJ—which was also considered "codified" by Article 36(4)(ii) of the Rome Statute of the ICC.³⁷ This is not a problem in and of itself. However, although the national group's membership (members are appointed by the executive power, more precisely by the Ministry of Foreign Affairs) does not expose any qualification issue (members' competence is in no way questionable), it certainly shows obvious and continuous corporatism. The very fact that lawyers from the Ministry of Foreign Affairs and members of the Council of State sit in the French group of the PCA, and generally have careers in both institutions, demonstrates how confined the system is to those who have worked at the *Quay d'Orsay* as diplomats or government agents or

³⁴ Information was obtained thanks to several informal interviews with members of the Court.

³⁵ The constitution of such groups goes back to the Hague International Convention for the Pacific Settlement of International Disputes of 1907, in which Article 44 deals with its membership. See Szurek, *supra* note 6, at 41–78.

³⁶ It should be recalled that no national group may nominate more than four persons "of high moral character, who possess the qualifications required in their respective countries for appointment to the highest judicial offices, or are jurisconsults of recognized competence in international law." Convention for the Protection of Human Rights and Fundamental Freedoms art. 21(1), Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter The European Convention]. They are elected for a six-year term. It is quite interesting to note that "[i]n certain countries, national groups play a role in the selection of candidates to other international courts and tribunals. *This practice deserves to be applied more broadly.*" Institut de droit international, *supra* note 5, art. 1(4) (emphasis added). We can assume that the French example was prominent in the author's mind.

³⁷ See Institut de droit international, *supra* note 5.

at the Council of State, which is the highest and most prestigious administrative jurisdiction. In France, things are pretty clear and emblematic of the country's culture: Academics are barely represented in the international courts because they have never been a majority within the "French group" of the PCA. For a long time, they were not present at all; today they are limited to the "smallest share."³⁸ As a consequence, in the whole history of French selection, very few academics have ever been elected as international judges to the ICJ (only Jules Basdevant and André Gros were professors in International Law), the ECHR, the Court of Justice of the European Union (CJEU), the ICC, or the International Criminal Tribunal for the former Yugoslavia (ICTY). The only notable exception was the French judge to the International Tribunal for the Law of the Sea. This professor, Jean Pierre Cot, was, however, also a political since he was a former Minister of Cooperation under François Mitterrand.

The Slovak Republic and Romania are countries where the formalization of the appointment is complete; the former chooses a constitutional basis and the latter chooses a regulatory basis established by the government. In the Slovak Republic, the 1992 Constitution outlines the selection procedure of candidates to international judicial bodies. According to Article 141a(5)(f) of the Constitution, the Judicial Council has the authority to submit to the government proposals of candidates for judges who should act in international judicial bodies.³⁹ When endorsing the selection of the candidates, the government may act only upon proposals submitted to it by the Judicial Council. Therefore, it is a constitutionally-regulated mechanism that leaves an important role to an independent body. Nevertheless, the government does not have to follow the Judicial Council's advice. In practice, however, it has always done so.

The Judicial Council is the judiciary's highest body, independent from both the legislative and the executive powers. This body consists of eighteen members, almost all of them being serving judges. When selecting candidates for the position of the judge at the ECHR, the Judicial Council currently performs its duties in accordance with national procedure provided for in Section 27g of the Act 185/2002 Coll. on the Judicial Council as amended (hereinafter the "Act on Judicial Council").⁴⁰ According to the list and curricula vitae of candidates submitted by the Government of the Slovak Republic for the election of judges of the ECHR:

Section 27g § 1 [sic] of the Act on Judicial Council stipulates that

³⁸ At the moment, the list, as established in 2013, comprises two former members of the Council of State who were international judges (Gilbert Guillaume and Jean-Pierre Puissochet) and were nominated on the CPA's list several times (the former in 1980 and 2011 and the latter in 1990 and 2010.) The third person is also a member of the Council of State, former Director of Legal Affairs at the Ministry of Foreign Affairs (Edwige Belliard). Finally, the list also mentions a Professor, Ms. Geneviève Burdeau, Professor at the Sorbonne Law School (Paris I University), who retired from academia in September 2014. It is the first time the last two persons have been nominated on the CPA's list.

³⁹ ÚSTAVA SLOVENSKEJ REPUBLIKY [CONSTITUTION] Sept. 3, 1992, Čl. 141a(5)(f) (Slovk.).

⁴⁰ Zákon o Súdnej rade Slovenskej republiky a o zmene a doplnení niektorých zákonov [Act concerning the Judicial Council of the Slovak Republic, and Amending Certain Acts], Zákon č. 185/2002 Z.z., Čl. I, § 27g(1) (Slovk.) (amended 2004).

the nomination for the election of the candidate for the position of a judge . . . can be submitted to the Judicial Council by:

- a. a member of the Judicial Council;
- b. the Minister of Justice of the Slovak Republic;
- c. professional organisation of judges;
- d. other professional organisation of lawyers.

. . . .

Nomination for a judge who should act . . . in an international judicial body, shall be submitted to the Judicial Council. For the nomination to be approved it has to obtain a majority of votes of all Judicial Council members in a secret ballot.⁴¹

In Romania, the national selection procedure is ruled by Government Ordinance No. 94/1999 on the participation of Romania in the proceedings before the European Court of Human Rights and the Committee of Ministers of the Council of Europe.⁴² Pursuant to Article 5(1), the nomination of the candidates for the position of judge to the Court is made by the government, with the advisory opinion of the Superior Council of Magistracy (SCM) following interviews.⁴³ While there is no detailed selection procedure—be it provided by primary or secondary legislation—the SCM detailed a selection procedure in 2007 at the request of the Ministry of Foreign Affairs. The procedure has three steps.

First, a call for candidacy is published; the announcement is published on the websites of the SCM together with the model for the CV required by the Council of Europe,⁴⁴ the dates given by the Secretary General of the Council of

⁴¹ Eur. Parl. Ass., *Communication of the Sec'y Gen.*, 4th Part-Sess., Doc. No. 13612, 3–4 (2013), <http://assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewPDF.asp?FileID=21156>.

Requirements for the candidates for the position of the judge of the Slovak Republic in international judicial bodies are as follows:

- a. have acquired legal education by completion of an MA course at the law faculty of a university in the Slovak Republic, or possess recognised or nostrified document of law education obtained by completion of studies of the same level at a foreign university;
- b. be of integrity; is probably a credible personality in the field of law and his/her moral qualities give a guarantee that he/she will duly perform his/her mandate;
- c. have permanent residence in the territory of the Slovak Republic;
- d. have full legal capacity and health conditions which allow him/her to perform the judicial mandate;
- e. have passed the judicial professional exam, prosecutor's exam, bar exam or notary exam and has at least five years of legal practise.

Id.

⁴² Eur. Parl. Ass., *Communication of the Sec'y Gen.*, 4th Part-Sess., Doc. No. 13305 (2013), <http://assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewPDF.asp?FileID=20068>.

⁴³ *Id.*

⁴⁴ *See infra* Section III.A.2.

Europe, as well as all of the additional documents to be sent to the Ministry of Foreign Affairs. The announcement is also published in a daily newspaper. The announcement indicates the requirements stipulated for this position:

[C]andidates shall be of high moral character; possess the qualifications required for appointment to high judicial office or be jurists of recognized competence; have human rights experience; 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.⁴⁵

Second, the interview of candidates takes place before the SCM Plenary. The questions cover mostly the experience and mastering of the human rights standards at the European level, implementation of relevant legislation and knowledge of the ECHR's case law. Third, the list of candidates is transmitted by the SCM, following the interviews, to several parliamentary committees for advisory opinion (the legal and the human rights committees of each parliamentary Chamber) and to the government, which decides on a list of three shortlisted candidates to forward to the Council of Europe.

Based on these European case studies, what would be appropriate to set up in the Inter-American system?

B PROPOSALS FOR THE INTER-AMERICAN SYSTEM

The Inter-American system has started, though timidly, to try to put pressure on the OAS member states as shown by the General Assembly Resolution 2166.⁴⁶ States are encouraged to integrate civil society in the national selection process of candidates to the Inter-American Commission and Court and to ensure some transparency with regard to the chosen candidates (notably by publishing their CVs). However, there are no other detailed guidelines compelling states to harmonize their national selection procedures.

While it is only the beginning, these first steps should not only be reiterated but also strengthened for the states to take seriously the obligation to make their selection procedures transparent. To this end, more detailed resolutions should be adopted so as to outline good governance criteria.⁴⁷ It is important that these criteria are the same for both the Commission and the Court, for they are the two pillars of the Inter-American system. They should be guided by the same principles regarding the selection process of their members in order to reinforce

⁴⁵ See Eur. Parl. Ass., *Election of judges to the European Court of Human Rights*, 3d Part-Sess., Doc. No. 12936 (2012) (for a similar announcement).

⁴⁶ O.A.S. G.A. Res. 2166 (XXXVI), Public Presentation of Candidates for Membership on the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights (June 6, 2006).

⁴⁷ Would it be suitable for the General Assembly to delegate this task to another OAS body? The question remains. It would be interesting to see which body's working are taken most by states and which proposals are most authoritative. It could be either the Inter-American Juridical Committee or the Committee on Juridical and Political Affairs (CJPA).

their legitimacy. Therefore, the proposed requirements must be understood as being applicable to both bodies.

Two leading ideas guide the following proposals: ensuring that the procedure is objective so as to avoid any kind of politicization, and avoiding all sorts of “corporatism.”

The first requirement is that the national selection procedure must rest on a detailed and accessible legal basis. The very existence of a legal basis undeniably contributes to ensuring a certain degree of predictability, coherence, and transparency in the selection procedure. It is a basic rule of the rule of law—no more, no less. The public and potential candidates should know the rules of the game upfront. The nature of the legal basis can vary. Only one European country, the Slovak Republic, went for a constitutionally-vested rule. In most countries that have adopted a legal basis,⁴⁸ it rests on a text from the executive power (Russia, Romania, and Ukraine) and exceptionally, from the legislature (Slovenia and Finland). In any case, what is important is that a pre-established legal basis organizes clearly and precisely the national selection procedure. Much progress remains to be made in this regard in Europe, and Latin America could lead the way.

The norms organizing the selection procedure should be made as accessible as possible. All means of communication and publication should be used: publication in the Official Gazette, on the websites of the Ministry of Justice and Ministry of Foreign Affairs, in national newspapers (and federal states’ newspapers where applicable), in specialized law reviews, on the judicial bodies’ websites (High Courts of justice, judges and bar associations, etc.), on the websites of Ombudsmen and national human rights commissions, on the websites of universities and human rights research centers, and on the websites of human rights NGOs.

The Inter-American Commission and Court could also make information on national selection procedures accessible online to increase visibility. This would make it easier for candidates to apply in countries in which they are not citizens. It is all the more important since Article 53(2) of the American Convention states: “When a slate of three is proposed, *at least one of the candidates shall be a national of a state other than the one proposing the slate.*”⁴⁹ A reasonable deadline should be given to candidates to allow them to apply: a three-month period seems adequate.

The second rule requires that the national selection procedure be undertaken by an independent expert committee. Several questions must be examined: the method for creating the committee (who sets it up?), its membership rules (who does it consist of?), its assessment method (how does it make decisions?), and its decisions’ scope (what decisions does it make?).

The European practice shows that the expert panels have almost all been set up by the executive, generally under the supervision of the Ministry of Foreign

⁴⁸ As we have seen before, a large majority of states opted for ad hoc procedures. Such procedures have been set up swiftly in order to answer a pressing need. Therefore, they should clearly be avoided.

⁴⁹ American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, art. 36(2) (entered into force July 18, 1978) (emphasis added) [hereinafter *The American Convention*].

Affairs, but sometimes the Ministry of Justice. Hence, there is no independence, in the political sense of the term, from the executive power. Practice also demonstrates that some of these panels have nonetheless managed to function independently from the executive power's influence, thanks to their members (e.g. in the United Kingdom). That said, an "umbilical cord" with the creating body (the executive power) remains, as well as government representatives on expert panels, looking suspicious to public opinion and observers (as has been revealed in the Belgian case). Therefore, the OAS could take a stand in this regard and encourage states to give judicial authorities the mandate to set up independent expert committees. It would be appropriate as the task is about selecting candidates for judicial posts.

Quite a few Latin American countries have set up a Supreme Council of Magistracy, such as Ecuador, Colombia, El Salvador, Mexico, Venezuela, Paraguay, Peru, and Argentina. In these countries, the fact that the expert panel would be established by the Supreme Council of Magistracy would be a guarantee of independence from the executive power and avoid "politicization" of the process. There is no Supreme Council of Magistracy in other countries, such as Chile, Uruguay, Guatemala, Honduras, Nicaragua, the Dominican Republic, and Panama. In these countries, supreme courts appoint judges in lower courts. We could thus imagine that supreme courts would set up the independent expert committee. In countries where judges are elected by the people (Bolivia), by the Parliament (Haiti, Puerto Rico, Costa Rica), or by the president of the republic (Brazil), a *particular* solution should be found (and ultimately institutionalized) to avoid the risk of such naturally "politicized" processes having unfortunate consequences on national selection. The independent expert committee could be set up by a national bar association or a nationally-recognized university institution.

One of the keys to the de-politicization of the procedure is to separate the selection body from the official nominating body. The following analysis of the committee's membership aims to avoid all kinds of corporatism. National expert panels' membership should be as representative as possible and give room to various stakeholders who have different statuses and reasons for legitimacy.

Membership of the expert committee is crucial to its independence in order to avoid any dominance of one professional status over another in the selection process (as unfortunately demonstrated by the French case study). It should thus be systematically composed (no matter which authority sets it up) in equal shares of one representative from the Magistracy, one representative from the Bar, and one representative from academia. These first three components are "classical" and necessary. We found them more or less in ad hoc panels set up in some European countries (see the British and Belgian examples). However, two other representatives should be added due to distinctive Latin American features: one representative from a human rights NGO and a representative from the institution of the *Defensor del Pueblo* (Ombudsman). Regarding the NGO representative, it is essential given the importance of civil society in Latin American countries, but also in the Anglo-Saxon culture (such countries are, for the most part, under the jurisdiction of the Inter-American Commission). Moreover,

NGOs' role in the Inter-American system is old and permanent. Old, because the system would have had problems getting started without NGOs, and permanent because it keeps consolidating thanks to them.⁵⁰ NGOs support many petitions and submit many *amicus curiae* briefs. Besides, the OAS itself has strong ties to "civil society."⁵¹ Hence, it seems obvious to give it some room in national expert panels. The last representative might be from the institution of the *Ombudsman*. This major institution, which exists in almost all Latin American countries⁵² (apart from Anglo-Saxon countries like the United States of America), should be taken into consideration. The national Ombudsman's presence in expert committees would be particularly welcome for two reasons: not only because they are in general very prestigious due to their proven independence,⁵³ but also because their mandate—focused on mediation and human rights education—makes their participation in such a committee particularly appropriate. Given the above, I consider that the expert committee should be comprised of no more than five persons. Countries in which there is no Ombudsman could appoint four persons or find a similar institution in their legal system (such as the National Human Rights Commission). Apart from the statutory representativeness of the expert committee members, the question arises of their representativeness from a gender and ethnicity perspective. The earlier it is required in the process at the national selection stage to put forward women and representatives of ethnic minorities (persons of African descent, indigenous people), the higher the chances of a Commission and Court membership reflecting the variety of American societies (both Anglo-Saxon and Latin).⁵⁴ Therefore, the expert committee should consist of at least one woman and one "ethnic" representative, that is, two members out of five (provided the expert committee comprises five mem-

⁵⁰ Viviana Krsticevic, *El papel de las ONG en el sistema interamericano de protección de los derechos humanos: Trámite de los casos ante la Corte Interamericana de Derechos Humanos* [The Role of NGOs in the Inter-American System of Human Rights Protection: Case Procedure before the Inter-American Court of Human Rights], in 1 EL SISTEMA INTERAMERICANO DE PROTECCIÓN DE LOS DERECHOS HUMANOS EN EL UMBRAL DEL SIGLO XXI [THE INTER-AMERICAN SYSTEM OF HUMAN RIGHTS PROTECTION AT THE THRESHOLD OF THE TWENTY-FIRST CENTURY] 407, 407–36 (2d ed. 2003); Mónica Pinto, *NGOs and the Inter-American Court of Human Rights*, in CIVIL SOCIETY, INTERNATIONAL COURTS AND COMPLIANCE BODIES 47–56 (Tullio Treves et al. eds., 2005); J. Hugo Rodríguez Brignardello, *OEA y participación de la sociedad civil: Entre un modelo para armar y otra posibilidad perdida* [The OAS and Participation of the Civil Society: Enter a Model for Arming and Another Lost Opportunity], *REV. CEJIL*, Dec. 2005, at 27.

⁵¹ O.A.S. Permanent Council Res. 759, Guidelines for the Participation of Civil Society Organizations in OAS Activities (Dec. 15, 1999); Hugo de Zela, *The OAS and Human Rights: The Role of Civil Society Organizations*, *APORTES DPLF*, June 2012, at 48, 49–50.

⁵² Lorena González Volio, *The Institution of the Ombudsman: The Latin American Experience*, *REV. IIDH*, Jan.–June 2003, at 219; MARÍA TERESA PAREJA ROSALES DE CONRAD, *EL DEFENSOR DEL PUEBLO. UN ESTUDIO CON ESPECIAL REFERENCIA AL ECUADOR* [THE OMBUDSMAN: A STUDY WITH SPECIAL REFERENCE TO ECUADOR] 327 (Jan Woischnik ed., 2004).

⁵³ We should recall that Ombudsmen have intervened before the IACHR against their own states. These interventions undeniably demonstrate their independence.

⁵⁴ In this respect, the current membership of the Inter-American Court does not reflect the ethnic diversity of the continent per se. Likewise, the fact that there are no longer any women is an issue in terms of fairness and representativeness. The fact that there have only been four women in the whole history of the Court shows *a contrario* that there is still a long way to go. Things are different with the membership of the Commission, which is generally much better balanced.

bers). At the outset, it should be indicated that the ethnic representativeness requirement should not be imposed on a country that has not “constitutionalized” the indigenous question or does not have any important indigenous of communities of African descent. It should be imposed if they have. In fact, apart from Chile, Argentina and Uruguay,⁵⁵ persons of African descent (e.g., in Barbados, Brazil, Colombia, Haiti, Jamaica, Suriname, the United States, and Venezuela) and indigenous communities are present in all other countries on the continent. The more the expert committee is representative of the society, the more likely it is to select, based on equal competence, women and members of ethnic minorities. Here again, the Americas could lead the way. In Europe, this requirement does not appear until a later stage, when the committee selects candidates and at the *international* selection stage.

Based on the legal text of each state launching a call for candidacy—which should provide some time for responses (three months should be enough)—the committee members, having received the candidates’ CVs (which could be “model CVs” drafted by the OAS as per the Council of Europe and which states would use for their national selection procedure),⁵⁶ would interview them. This kind of individual interview already exists in European countries and provides for a varied and effective assessment of candidates. When too many CVs have been received (for all candidates to be interviewed), a short list could be established. Only candidates who *prima facie* meet the following criteria and excel would be interviewed: legal qualifications, human rights experience, and language skills. Candidates should be proficient in Spanish as well as in English in order to avoid—notably at the Inter-American Court—high fees for the translation of procedural documents. Ideally, the list of candidates who are considered suitable to be appointed to a commissioner or judge position would be established by consensus. In case of insurmountable divisions, voting could be a last resort. Each representative from the judiciary, academia, the bar, NGOs, and Ombudsmen would then have one vote, and the two or three candidate short list,⁵⁷ established by the independent expert committee, would be adopted by a simple majority. It would also be appropriate for the committee to state the reasons for its decisions. Stating the reasons for the choice of short-listed candidates would help guarantee the “de-politicization” of the procedure to the best extent possible.

The comparative analysis of European countries shows that the expert panels do not have any binding power. They only give non-binding advisory opinions to the executive power, whether it is the Ministry of Justice, the Ministry of Foreign Affairs, or the Presidency of the Republic, depending on national traditions. This is a relic of classical foreign affairs rules. This monopoly of executive power should, in this particular field, cease. Once again, the Inter-American sys-

⁵⁵ There are a few indigenous communities in Chile (Mapuches) and in Argentina, but they do not represent a significant share of the population.

⁵⁶ See *infra* Section III.A.2.

⁵⁷ The list would comprise two candidates if no citizen from another OAS state party has been shortlisted; otherwise the list would be composed of three candidates. See The American Convention, *supra* note 49.

tem could encourage states to make the expert committee's assessment legally binding. Ideally, the expert committee would issue a verdict, which the government would be legally bound to follow. In other words, the government would only act as a communication channel between the committee, which effectively shortlists the three candidates, and the General Assembly of the OAS.⁵⁸

This practice would imply important changes. As a matter of fact, within the Inter-American system, provisions of Article 53(2) of the American Convention are purely discretionary: "Each of the States Parties *may* propose up to three candidates,"⁵⁹ whereas they are binding according to the European Convention: "The judges shall be elected by the Parliamentary Assembly with respect to each High Contracting Party by a majority of votes *cast from a list of three candidates nominated by the High Contracting Party.*"⁶⁰ This mere option in the Inter-American system should become a legally binding obligation⁶¹ so the later selection procedure (i.e., at the international level) becomes an effective "filter" resting on a real and effective assessment of candidates proposed by states.⁶² Setting up a transmission obligation of a list of two or three candidates (if candidates from third countries have been selected in the end), implementation of this procedure could take two forms. The first is revising the American Convention according to Article 76.⁶³ This is obviously the most complicated option, not least because it would imply convincing the General Assembly to undertake a revision process and getting the votes from two-thirds of states. It is also the most dangerous political option because of the crisis that the Inter-American system of human rights has been facing for several years. Amending the American Convention could open "Pandora's Box" and start a downward spiral, leading to a worse position than the current one. Here, realism—a realistic approach—must be considered. Another option would be to promote a custom that would ultimately be followed due to encouragement from the General Assembly of the OAS and high pressure from civil society, both within each state and in the Inter-American system. It is obviously the most realistic and also the more suitable remedy; permanent political pressure could work in the end.

⁵⁸ Is this proposal too idealistic given the typical power of the executive? Possibly. The idea here would be for the executive power to imperatively motivate any decision disregarding opinions transmitted by the Panel so as to endorse responsibility for appointing a "bad" candidate.

⁵⁹ The American Convention, *supra* note 49, art. 53(2) (emphasis added).

⁶⁰ The European Convention, *supra* note 36, art. 22 (emphasis added).

⁶¹ This is all the more important as practice shows that, in fact, states present one candidate only.

⁶² See *infra* Part III.

⁶³ The provision reads:

1. Proposals to amend this Convention may be submitted to the General Assembly for the action it deems appropriate by any State Party directly, and by the Commission or the Court through the Secretary General.
2. Amendments shall enter into force for the States ratifying them on the date when two-thirds of the States Parties to the Convention have deposited their respective instruments of ratification. With respect to the other State Parties, the amendments shall enter into force on the dates on which they deposit their respective instruments of ratification.

The American Convention, *supra* note 49, art. 76.

III INTERNATIONAL PROCEDURES TO ASSESS CANDIDATES

Assessing how we could strengthen the European processes for nominating judges is relevant in order to make a comparative assessment in Part A, which will then allow us to propose suitable options for the Inter-American system in Part B.

A COMPARATIVE ASSESSMENT

In Europe, we can see a revealing trend whereby both supranational systems of selection and nomination procedures are converging. As a matter of fact, faced with many criticisms, the legal systems of the European Union (Section III.A.1) and the European Convention (Section III.A.2), have improved the *international* process for assessing candidates. The common element to both European procedures is the establishment of an independent expert selection committee.

I THE EUROPEAN UNION SYSTEM (CJEU)

Before the Treaty of Lisbon came into force on December 1, 2009,⁶⁴ members of the Court of Justice and of the General Court were appointed by common accord by the governments of the member states. The only requirement concerned competencies of the chosen candidates. States were the only actors in charge of the nominating procedures and of the choice of members of both these courts. Inevitably, all that this selection method did was endorse nominations that had been decided upon at the national level. Criteria were far from transparent, often disputed, and sometimes political. Following the many criticisms developed by legal doctrine, Article 255 of the Treaty on the Functioning of the European Union (TFEU)⁶⁵ improved the procedure to nominate judges and advocates-general so as to strengthen transparency. Under Article 255, a panel was set up—the “255 Panel”—to give opinions on the suitability of candidates proposed for appointment to the offices of judge and advocate-general.⁶⁶

⁶⁴ Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, Dec. 13, 2007, 2007 O.J. (C 306) 1 [hereinafter Treaty of Lisbon].

⁶⁵ This provision states:

A panel shall be set up in order to give an opinion on candidates' suitability to perform the duties of Judge and Advocate-General of the Court of Justice and the General Court before the governments of the Member States make the appointments referred to in Articles 253 and 254.

The panel shall comprise seven persons chosen from among former members of the Court of Justice and the General Court, members of national supreme courts and lawyers of recognised competence, one of whom shall be proposed by the European Parliament. The Council shall adopt a decision establishing the panel's operating rules and a decision appointing its members. It shall act on the initiative of the President of the Court of Justice.

Consolidated Version of the Treaty on the Functioning of the European Union art. 255, May 9, 2008, 2008 O.J. (C 115) 47 [hereinafter TFEU].

⁶⁶ Information on the functioning of the “255 Panel” was obtained through the reports of the Panel—e.g., *Third Activity Report of the Panel Provided for by Article 255 of the*

Based on my analysis above,⁶⁷ I will briefly present how the Panel is set up, its membership, its functioning, and the scope of its decisions.⁶⁸

The Council of the European Union, which is the body representing member states' governments, not only established the Panel's operating rules,⁶⁹ but also appointed its members. These appointments were based on the initiative of the President of the Court of Justice and the European Parliament, according to Article 255(2) of the TFEU.⁷⁰

The Panel is comprised of seven members, each appointed for four years. Their term is renewable once. Six members are proposed by the serving President of the Court of Justice (Mr. Skouris) and one by the European Parliament. The seven members are chosen from the former members of the Court of Justice and the General Court,⁷¹ members of national supreme courts,⁷² and lawyers of recognized competence, one of whom is proposed by the European Parliament.⁷³ Some experts feared former EU judges' "corporatism" since six members were proposed by the serving President of the Court of Justice. However, we observe that the highest national courts' judges are well represented, for example, when the EU Council appointed the Vice-President of the French Council of State (Jean-Marc Sauvé), President of the Panel.⁷⁴

To fulfill its duties, the Panel implements a procedure allowing for a thorough

Treaty on the Functioning of the European Union (Dec. 13, 2013), <http://curia.europa.eu/jcms/upload/docs/application/pdf/2014-02/rapport-c-255-en.pdf>—as well as the articles written by some of its members. See, e.g., Lord Mance, Justice of the Supreme Court of the U.K., *The Composition of the European Court of Justice* (Oct. 19, 2011), http://ukael.org/past_events_46_1935078262.pdf; Olivia Dufour, *Les juges européens désormais nommés après un avis d'un comité indépendant* [European Judges are now Appointed after Consultations with an Independent Committee], PETITES AFFICHES, Mar. 16, 2011, at 3, 7 (interviewing Jean-Marc Sauvé); Jean-Marc Sauvé, *Qu'est-ce qu'un bon juge européen?* [What Makes a Good European Judge?], 187 RECUEIL DALLOZ 1336 (2011); Jean-Marc Sauvé, President of the 255 Panel, Intervention before the Legal Affairs Committee of the European Parliament (May 30, 2013), http://www.conseil-etat.fr/content/download/3457/10399/version/1/file/2013-05-30_audition-au-parlement-europeen.pdf; Jean-Marc Sauvé, *La sélection des juges de l'Union européenne: La pratique du Comité de l'article 255* [The Selection of Judges of the European Union: The Practice of the 255 Panel], Intervention at the College of Europe Conference: Selecting Europe's Judges: A Critical Appraisal of Appointment Processes to the European Courts (Nov. 4, 2013), http://www.conseil-etat.fr/content/download/3670/11038/version/1/file/261113_selection_juges_union_europeenne.pdf [hereinafter Sauvé, *The Selection of Judges*]. For an academic analysis, see Bo Vesterdorf, Editorial, *La nomination des juges à la Cour de Justice de l'Union européenne* [The Nomination of Judges to the European Court of Justice], 47 CAHIERS DE DROIT EUROPÉEN [EUR. L. REP.] 601, 601–08 (2011).

⁶⁷ See *supra* Part II.

⁶⁸ All of the following information comes from the 255 Panel's annual reports and speeches by some of its members (Lord Mance, Jean-Marc Sauvé). See sources cited *supra* note 66.

⁶⁹ Council Decision 2010/124, 2010 O.J. (L 50) 18 (EU).

⁷⁰ *Id.*

⁷¹ Peter Jann, former CJEU judge; Virpi Tiili, former Finnish judge of the General Court.

⁷² Lord Mance, Supreme Court of the U.K.; Torben Melchior, former President of the Supreme Court of Denmark; Péter Paczolay, former President of the Constitutional Court of Hungary; Jean-Marc Sauvé, Vice-President of the French Council of State.

⁷³ Ana Palacio, Lawyer and Professor of Law, former member of the European Parliament and member of the Spanish Council of State.

⁷⁴ Council Decision 2010/124, *supra* note 69, art. 4.

assessment of candidates. In particular, it benefits from an investigation power. It requires governments to hand over information on the national selection procedure and to state the reasons for their proposal. Applications must contain, apart from a curriculum vitae, a list of publications—in part or in full—and a cover letter. The Panel does not rule out taking into account publicly available and objective information, provided it allows for an adversarial debate with the candidate and the state proposing the candidature. The key point of the investigation carried out by the Panel is a hearing in private, the duration of which the Panel decided should be one hour. It thus enables members to ask many questions. Under the Panel's operating rules, such a hearing only takes place when candidates are being assessed for a first term, not for a renewal. Apart from the conditions in which candidates are assessed, the Panel, based on the TFEU provisions, has also specified the assessment criteria. These two criteria—namely legal expertise and professional experience, in particular with regard to level, duration, and diversity—allow the Panel to evaluate whether candidates are able to pursue high or very high judicial duties or whether they can be regarded as jurisconsults of recognized competence under Article 253 of the TFEU. The Panel also assesses candidates' aptitudes for working in an environment in which a number of legal traditions are represented. It pays particular attention to candidates' ability to perform their duties with independence and impartiality. The most critical aspect of the Panel's functioning is the absence of publicity of its opinions. In its first activity report, the Panel explained why neither its opinions nor hearings could be made public. The Panel's analysis of Regulations (EC) No. 1049/2001 and (EC) No. 45/2001, as interpreted by the Court of Justice of the European Union in its judgment of June 29, 2010, led it to judge that the content of the opinions it gives, whether favorable or not, may not be made public either directly or indirectly.⁷⁵ However, Panel members explain that its proceedings are transparent. In this regard, Jean-Marc Sauvé's point of view can be reproduced *in extensor*:

The Panel, however, through its activity reports, has decided to elaborate and publish public statements by its members, notably before the European Parliament, which ensures a real transparency as to what it does. It thus gives account of its process to investigate candidatures, detailed evaluation criteria it established and their concrete implementation and, finally, detailed statistics on its opinions, be they favorable or not. Before arguing for greater transparency, it seems to me that the current process should not be undermined—for example by dissuading candidates whom, whilst not meeting all criteria, such as the number of expected years of professional experience, could nevertheless be suitable. The principle of transparency should be reconciled with the protection of candidates' private life and the full liberty of choice that Member States are given by the Treaty: the publicity of hearings or opinions could, unnecessarily,

⁷⁵ Case C-28/08, *Comm'n v. Bavarian Lager Co.*, 2010 E.C.R. I-6055.

penalize candidates who were given an unfavorable opinion. For the hearing is not a mere formality and the opinion given, whilst trying to ensure respect due to candidates, does not hide the obvious shortcomings of some candidates.⁷⁶

The Panel gives advisory opinions only, which are non-binding. The Panel's opinions are forwarded to the member states, which remain competent to present judges to the Court of Justice and appoint them. The President of the Panel considers that, over time, the Panel's opinions benefit from an increased "moral value." More importantly, according to him, the architecture of the nomination process compensates for the fact that the Panel's opinions are not legally binding. Since candidates are appointed by common accord,⁷⁷ that is, unanimously, opposition from only one state is enough to bar an appointment. As a consequence, all states have to agree if they want to bypass an unfavorable opinion given by the Panel. Such unanimity has never occurred to make a decision contrary to the Panel's. As a matter of fact, when an unfavorable opinion has been given, candidacies have been withdrawn by the states that presented them. In one instance, the states' meeting at an intergovernmental conference noted that consensus was lacking over a candidate. This shows that, in fact, it is very difficult, if not impossible, for states to oppose the Panel's opinions.

2 THE EUROPEAN CONVENTION SYSTEM (ECHR)

The European Convention system for selecting judges to the ECHR is similar to the European Union. An independent Advisory Panel was also set up. However, it is different since the Panel's opinion is not forwarded to member states, but to the Parliamentary Assembly of the Council of Europe, which then votes to elect one of the three proposed candidates. Moreover, the Assembly's choice goes through an "internal control" procedure. A "sub-commission" is supposed to make another assessment of the candidature's credibility. We will see, however, that practice shows that political considerations can prevail within the "sub-commission" at the cost of candidates' qualification.⁷⁸

The first step is characterized by the intervention of the Advisory Panel of Experts. One more time, based on my analysis above, I will briefly present how the Advisory Panel is set up, its membership, functioning, and the scope of its decisions.

⁷⁶ Sauvé, *The Selection of Judges*, *supra* note 66 (my translation).

⁷⁷ Article 253 of the TFEU states: "They shall be appointed by common accord of the governments of the Member States for a term of six years, after consultation of the panel provided for in Article 255." TFEU, *supra* note 65, art. 253.

⁷⁸ Andrew Dremczewski, *Election of Judges to the Strasbourg Court: An Overview*, 2010 EUR. HUM. RTS. L. REV. 377, 380–82; Norbert P. Engel, *More Transparency and Governmental Loyalty for Maintaining Professional Quality in the Election of Judges to the European Court of Human Rights*, 32 HUM. RTS. L.J. 448, 448–55 (2012); Corneliu-Liviu Popescu, *La cour européenne des droits de l'homme [The European Court of Human Rights]*, in INDÉPENDANCE ET IMPARTIALITÉ DES JUGES INTERNATIONAUX, *supra* note 4, at 39–135.

The Panel was set up on Jean-Paul Costa's initiative,⁷⁹ in accordance with a resolution adopted by the Committee of Ministers of the Council of Europe on November 10, 2010,⁸⁰ with a view to assessing the relevance of the list of three candidates presented by state parties before it is forwarded to the Parliamentary Assembly. It was, among other elements, a consequence of Ukraine's unacceptable political attitude in presenting a list of three inappropriate candidates.⁸¹ The seven member Panel was established on December 8, 2010. Its members were chosen by the Committee of Ministers in agreement with the President of the European Court as provided in the Committee of Ministers Resolution on the Establishment of an Advisory Panel of Experts on Candidates for Election as Judge to the European Court of Human Rights.⁸²

It is composed of the following representatives:⁸³ members of the highest national courts,⁸⁴ former judges of international courts, including the European Court of Human Rights,⁸⁵ and lawyers of recognized competence. It should be noted that this last category was not filled. Only national judges and former international judges found favor with the Committee of Ministers. It is also interesting to observe that, in accordance with paragraph 3 of the resolution,⁸⁶ there was some geographic distribution (lawyers from Western and Eastern Europe) as well as a gender-balanced representation (two women out of seven members).

⁷⁹ French President of the European Court of Human Rights, Jean-Paul Costa, took this initiative, closely following the Interlaken Declaration. He sent a letter to the Committee of Ministers expressing his great concern: "The system will fail if judges do not have the necessary experience and authority." The Declaration adopted at the Interlaken Conference called on the state parties to ensure the "full satisfaction of the Convention's criteria for office as a judge of the Court, including knowledge of public international law and the national legal systems as well as proficiency in at least one official language." High Level Conference on the Future of the European Court of Human Rights, *Interlaken Declaration*, at 5 (Feb. 19, 2010), http://www.echr.coe.int/Documents/2010_Interlaken_FinalDeclaration_ENG.pdf. It should be noted that following the Interlaken Declaration, the Committee of Ministers adopted Guidelines on the selection of candidates for the post of judge at the European Court of Human Rights, which go further than the Interlaken Declaration on the question of linguistic competence. See Eur. Comm. of Ministers, *Guidelines of the Committee of Ministers on the Selection of Candidates for the Post of Judge at the European Court of Human Rights*, *supra* note 20 ("Candidates must, as an absolute minimum, be proficient in one official language of the Council of Europe . . . and should also possess at least a passive knowledge of the other"); Eur. Comm. of Ministers, *Guidelines of the Committee of Ministers on the Selection of Candidates for the Post of Judge at the European Court of Human Rights—Explanatory Memorandum*, *supra* note 21. This is in reference to Eur. Parl. Ass. Res. 1646, *supra* note 13, ¶ 4.4.

⁸⁰ Eur. Comm. of Ministers Res. 26, On the establishment of an Advisory Panel of Experts on Candidates for Election as Judge to the European Court of Human Right (Nov. 10, 2010), [http://wcd.coe.int/ViewDoc.jsp?Ref=CM/Res\(2010\)26](http://wcd.coe.int/ViewDoc.jsp?Ref=CM/Res(2010)26).

⁸¹ For an explanation of the "Ukraine Case," and other examples of very poor and disappointing governmental attitudes (including France), see Engel, *supra* note 78, at 451.

⁸² Eur. Comm. of Ministers Res. 26, *supra* note 80, ¶ 3.

⁸³ *Id.* ¶ 2.

⁸⁴ Katarzyna Gonera, Supreme Court of Poland; Chief Justice John L. Murray, Supreme Court of Ireland; Sami Selçuk, Professor and President of the Turkish Court of Appeal; Valery D. Zorkin, President of the Constitutional Court of Russia.

⁸⁵ Renate Jaeger, former German judge of European Court of Human Rights (ECHR); Matti Pellonpää, former Finnish judge of the ECHR; Lucius Wildhaber, former Swiss President of the ECHR.

⁸⁶ Eur. Comm. of Ministers Res. 26, *supra* note 80, ¶ 3.

The Advisory Panel's mandate is to confidentially advise the states whether candidates for election as judge to the Court meet the criteria stipulated in Article 21 of the Convention: "The judges shall be of high moral character and must either possess the qualifications required for appointment to high judicial office or be jurisconsults of recognised competence."⁸⁷ The Advisory Panel receives the CVs of three candidates proposed by the states that have to propose a new judge to the ECHR. The principle is that the Advisory Panel carries out a written investigation. Apart from the CVs, the Panel also resorts to its network (mostly judges) to get a clearer view of candidates' profiles. If deemed necessary, it may also organize hearings. Although the Advisory Panel suggested early in its existence that it might publish an annual report to the Committee of Ministers on its activities, it has so far not done so. The activities of the Advisory Panel, however, have twice been discussed during exchanges between the Chair of the Panel and the Ministers' Deputies.⁸⁸ In addition, there have been informal meetings between the Chair of the Panel and representatives of the Parliamentary Assembly, such as the Chairperson of the Sub-committee on the Election of Judges, the President of the Parliamentary Assembly, and the Secretary General of the Parliamentary Assembly.⁸⁹

If the list of three candidates does not cause any problems in terms of quality, the Panel informs the state. The state then forwards its list to the Parliamentary Assembly. On the other hand, when one or more names on the list present difficulties, the Panel asks the state for more information; herein lies its *raison d'être*: give the state an opinion that must remain confidential. It is a bilateral and confidential dialogue. If, after discussion with the state, the Panel is still not convinced of the candidate's quality, it can reject them. The Panel informs the state, which must then present a new list of three candidates.

Here is a more detailed overview of the procedure with a time-line:

The members shall give their opinion on a list of candidates within five working days following the receipt of the list from its Secretariat. This should ensure that there is sufficient time to request additional information from the government concerned, if necessary. Within four weeks after the State Party submits the names of the proposed candidates and their curricula vitae (using the model CV form as supplied by the Parliamentary Assembly), the Government is informed of the views of the Advisory Panel. Given the fact that the

⁸⁷ The European Convention, *supra* note 60, art. 22.

⁸⁸ This took place on April 4, 2012 and January 30, 2013. Comm. of Experts on the Reform of the Court [DH-GDR], *Ministers' Deputies Exchange of Views with Mr. Luzius Wildhaber, Chairman of the Advisory Panel of Experts on Candidates for Election as Judge to the European Court of Human Rights*, CDDH Doc. DH-GDR(2013)005 (Feb. 5, 2013), [http://www.coe.int/t/dghl/standardsetting/cddh/reformechr/DH_GDR/DH-GDR\(2013\)005_Exchange_views_Wildhaber.pdf](http://www.coe.int/t/dghl/standardsetting/cddh/reformechr/DH_GDR/DH-GDR(2013)005_Exchange_views_Wildhaber.pdf).

⁸⁹ Steering Comm. for Human Rights [CDDH], *Rep. on the Review of the Functioning of the Advisory Panel of Experts on Candidates for Election as Judge to the European Court of Human Rights*, ¶ 27, Doc. No. CDDH(2013)R79, add. 2 (Nov. 29, 2013), [http://www.coe.int/t/dghl/standardsetting/cddh/CDDH-DOCUMENTS/CDDH\(2013\)R79_Addendum%20II_EN.pdf](http://www.coe.int/t/dghl/standardsetting/cddh/CDDH-DOCUMENTS/CDDH(2013)R79_Addendum%20II_EN.pdf) [hereinafter The CDDH Report].

governments are requested to provide the necessary information to the Advisory Panel *six weeks before the time-limit* set by the Parliamentary Assembly for submission of the national list of candidates, this then leaves only *two weeks* to present a new candidate in case the Advisory Panel expresses doubts as to the qualifications of any of the candidates. Before the State Party submits the list to the Assembly, the newly proposed candidates' qualifications should also be assessed by the Advisory Panel.⁹⁰

A report by the Steering Committee of Human Rights of the Council of Europe of November 29, 2013 points out some of the shortcomings of this procedure and makes proposals for improvement.⁹¹ First, the opinions are not always followed.⁹² This was the case when the Czech government obtained, thanks to a very aggressive policy, the election of "its" candidate who was the legal adviser to the Czech President, Vaclav Klaus. As Engel stressed:

When a Government—like the Czech Government in the Pejchal case—ignores the negative opinion of the Evaluation Panel set up to ensure the quality of the judges elected and when it subsequently pushes through the rejected candidate in the plenary session of the Assembly Sub-Committee competent to make an election recommendation—that is not a sign of good faith cooperation. On the contrary, it reveals a systemic dysfunction that undermines the Court's stability and authority.⁹³

In this worrisome context, the Steering Committee proposes the following: "While the opinion of the Advisory Panel is non-binding, it may be assumed that the Sub-Committee of the Parliamentary Assembly gives due consideration to an opinion of the Advisory Panel on a particular list of candidates."⁹⁴ The Assembly should understand that the Advisory Panel is not a competitor, but a helpful body aimed at introducing political confidence, based on an objective expertise, in the appointment process. It should be noted, however, that there is at least one counter example with regard to France: The process to name a successor to the French judge Jean-Paul Costa (who was President of the European Court of Human Rights) in 2010 was tainted by political maneuver that proved disastrous for France's image. Nicolas Sarkozy's government presented a list of three

⁹⁰ *Id.* ¶ 23 (emphasis added) (citations omitted).

⁹¹ *See id.*

⁹² As noted by the CDDH:

Although neither is the government concerned required to follow the Advisory Panel's advice, nor is the Parliamentary Assembly required to act consistently with it, it was noted that there was an instance in 2012 when despite the Advisory Panel's view that a candidate was not qualified, the Government concerned maintained that person on the list of candidates and the Parliamentary Assembly subsequently elected that person to the Court.

Id. ¶ 30.

⁹³ Engel, *supra* note 78, at 450.

⁹⁴ The CDDH Report, *supra* note 89, ¶ 32.

candidates, one of whom clearly did not have the required qualifications. The expert Panel's control proved efficient since France did not hesitate to come up with a new, more credible, list. It should be recalled that this process appeared in the press and it damaged France's reputation in the Human Rights Palace in Strasbourg! The CDDH Report, combined with the French experience, shows that states' "bona fides" vary. The Panel's unfavorable opinion was an affront to France, which swiftly presented a new list. Other states do not have the same foreign policy in terms of legal affairs and the same idea of "standing" or a legal and political reputation to be maintained. The second shortcoming is that some states do not wait for the Panel to give its opinion and directly forward their list to the Parliamentary Assembly.⁹⁵ In the Steering Committee's view, this is unacceptable:

The CDDH considers such practices by States Parties to be incompatible with the *raison d'être* of CM Resolution (2010) 26. States Parties are reminded of the need to submit lists of candidates well before the deadline by which they must submit their list to the Parliamentary Assembly. Likewise, the Parliamentary Assembly is invited not to proceed with the election process without allowing the Advisory Panel a reasonable time within which to inform the State Party concerned of its views on the intended candidates. Where a list of candidates has already been transmitted to the Parliamentary Assembly, the Advisory Panel should simultaneously transmit its views to the latter.⁹⁶

The third and last shortcoming concerns the original operating rules: The Advisory Panel indicated that it found them too restrictive, e.g., with respect to the holding of meetings and the use of information from sources other than the government. In its view, this warrants a re-evaluation of the operating rules in place.⁹⁷

⁹⁵ The CDDH Report states:

There have been instances in which State Parties have submitted lists of candidates to the Parliamentary Assembly and the Advisory Panel simultaneously, or only to the Parliamentary Assembly, without awaiting the Advisory Panel's opinion and despite the Advisory Panel having requested additional time for examination of the curricula vitae concerned. In two instances, the Advisory Panel requested the Parliamentary Assembly not to proceed with the election process before it had been able to issue an opinion.

Id. ¶ 33.

⁹⁶ *Id.* ¶ 34.

⁹⁷ The CDDH Report notes:

In the Operating Rules, a primarily written procedure is foreseen. The Advisory Panel can decide to hold a meeting "where it deems this necessary to the performance of its function." In practice, seven meetings of the Advisory Panel were convened between January 2011 and October 2013 which seems to suggest that meetings have become the rule and not the exception. The Advisory Panel suggests making meetings the norm, considering that a purely written procedure does not allow for a meaningful discussion based on direct exchange of views.

Id. ¶ 41 (citation omitted).

The second phase of the procedure is the intervention of the Sub-Committee of the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly.

Article 22 of the European Convention on Human Rights states that: "The judges shall be elected by the Parliamentary Assembly with respect to each High Contracting Party by a majority of votes cast from a list of three candidates nominated by the High Contracting Party."⁹⁸ National authorities must therefore forward their list directly to the Assembly. In order to fulfill its mandate in the most effective way possible the Assembly created a Sub-Committee on the Election of Judges to the ECHR in 1997. The appendix to Resolution 1432 (2005)⁹⁹ provides that the list of candidates for the election of judges, once submitted to the Parliamentary Assembly, should not be modified. The Assembly shall interrupt the procedure if one of the three candidates on a list withdraws before the first ballot. In such cases, it shall ask the government concerned to recomplete the list of candidates. The Assembly confirms its practice of listing candidates in alphabetical order on the ballot paper. It also underlines that any expression of governmental preference shall play no role in the deliberations of the Sub-Committee on the Election of Judges to the European Court of Human Rights. The Sub-Committee hears the candidates (transport and accommodation expenses are provided for in the budget of the Council of Europe). The relevant criteria are the following: language skills and gender equality.

Regarding language skills, candidates must have a sufficient knowledge of at least one of the two official languages, English or French. When a candidate, who is otherwise considered suitable for the office of judge, does not have the required level of language skills at the date of the election, some members have proposed that the candidate could commit to taking an intensive course before taking office or, exceptionally, at the beginning of his or her term. With regard to the gender balance, in 2004, the Parliamentary Assembly took a new measure in terms of positive action. It decided to consider lists of three candidates on the condition they would contain at least one member of each sex. It went even further by inviting the Committee of Ministers to amend Article 22 to take this requirement into account.¹⁰⁰ Nevertheless, some states, and notably the smallest ones, have underlined that in rare cases, where there is only a limited number of qualified women, meeting this criteria was complicated. Therefore, should the Convention be amended, they could not comply with it. Following a dispute with Malta, which twice presented only male candidates to replace the Maltese judge Giovanni Bonello, the Committee of Ministers requested the European Court's opinion. The Court itself declared that although the Assembly's approach relating to the promotion of gender equality was sensible, its automatic implementation, without any exception, did not comply with Article 21 of the

⁹⁸ The European Convention, *supra* note 60, art. 22.

⁹⁹ Eur. Parl. Ass. Res. 1432, Procedure for Elections Held by the Parliamentary Assembly other than those of its President and Vice-Presidents (2005), <http://assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewPDF.asp?FileID=17316>.

¹⁰⁰ Eur. Parl. Ass. Recommendation 1649, *supra* note 13.

Convention.¹⁰¹ Following the Court's Advisory Opinion and two heated debates within the Assembly, it decided to promulgate Resolution 1627 of September 30, 2008, which would allow exceptions to this rule, but only once the concerned state party has demonstrated that it tried in vain to find a qualified candidate of the under-represented sex.¹⁰²

B PROPOSALS FOR THE INTER-AMERICAN SYSTEM

The experience of both European systems in terms of selection of candidates to the office of judge demonstrates two things. First, that it is extremely difficult to achieve a system beyond reproach. Second, and most importantly, that the Council of Europe system which, a priori, could be considered to be the most sophisticated in practice, is revealed to have important shortcomings. Based on the European experience in terms of selection procedures, I have decided to give some food for thought below, taking into account the downward slide observed in the European practices to help prevent any recurrence in the Inter-American system.

The first important good governance rule would be the creation of an independent Advisory Panel within the OAS. In my opinion, the power to set up the Advisory Panel should lie with the General Assembly of the OAS. In the European systems, the Advisory Panels were established by both intergovernmental bodies, representing states at the ministerial level. This "intergovernmental" element cannot be erased. It would not be realistic to dramatically change things at this stage. One could imagine that, in order to perform this duty, the General Assembly would be supported by the Inter-American Juridical Committee (IAJC) in accordance with Article 99.¹⁰³ The criteria regarding the composition of this Panel may also be borrowed from the European experience. Both European Advisory Panels are comprised of seven members. This number has given full satisfaction to date. This would probably also be the case in the Inter-American system. The General Assembly of the OAS must be bound, when establishing membership of the Panel, to take into account representation of different legal cultures, different geographic areas, differences in terms of gender, and, last but not least, for the American continent, ethnic differences. The more representative the Panel is, the more legitimate and able it will be to be especially sensitive to candidatures—of equal competence—from women and ethnic minorities.

The seven members would be appointed by the General Assembly for a four-year term renewable once, by the General Assembly (in order to allow customs to be established in terms of the assessment and selection of candidates). Eu-

¹⁰¹ 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, Advisory Opinion, Eur. Ct. H.R. (Feb. 12, 2008), <http://hudoc.echr.coe.int/eng?i=003-2268009-2419060>.

¹⁰² Eur. Parl. Ass. Res. 1627, Candidates for the European Court of Human Rights (2008), <http://assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewPDF.asp?FileID=17670>.

¹⁰³ "The purpose of the Inter-American Juridical Committee is to serve the Organization as an advisory body on juridical matters," and "[t]he Inter-American Juridical Committee shall undertake the studies and preparatory work assigned to it by the General Assembly." Charter of the Organization of American States, Apr. 30, 1948, 2 U.S.T. 2416, 119 U.N.T.S. 48.

ropean criteria to choose the members of the Panel could be maintained and completed by another, which is essential in the Inter-American context: the role of civil society. Likewise, it would be good to provide a rule setting precisely the number of experts by origin so as to avoid a status being over-represented, whilst giving a small preference to former members of the Inter-American Court and Commission, given their experience. The Advisory Panel could thus be composed of two members of the highest national courts;¹⁰⁴ three former judges of the Inter-American Court (for the office of judge) or three former members of the Inter-American Commission (for the office of commissioner); and two representatives of the civil society.¹⁰⁵ Practice shows that the inquiry procedure cannot be a written one only. Hearings must be mandatory as they have been proven essential to the concrete and effective understanding of candidates' qualifications. Hearings and related expenses would be taken into account by the General Assembly of the OAS. Candidates should send a model CV similar to the one drafted by the General Assembly of the Council so that there are as many comparable elements as possible. When the Panel members do not agree on the list presented by a state—because they consider it to be particularly weak—the Panel could ask the state to propose another one within a set time frame (one month for example). If not, the Panel could determine that the state has renounced presenting candidates. It is also important to make publication of an annual report compulsory. This would guarantee that the selection process is transparent and would enhance the Panel's legitimacy. In this respect, it is very interesting to note the different practices of both European Panels. Reports by the "255 Panel" as well as public statements by its members have contributed to making its assessment work transparent; it has established legitimacy gradually, whilst managing to protect candidates' private lives (notably for those who were rejected). On the other hand, the fact that the Advisory Panel of the Council of Europe has never published an annual report has proven frustrating for its members and contributed to its activities being very confidential—a negative. In its annual report, the Panel would present the number of candidates, the number of women and ethnic representatives, candidates' profiles (judges, lawyers, professors), and the criteria taken into account to select them. At this stage, the important question is: What would the Inter-American Advisory Panel make decisions on?

Practice in the European Union shows that non-legally binding opinions, which at first appeared as a weakness, have actually become legally binding ones because EU member states take the moral value of the Panel's opinion very seriously. Since the opinion given concerns all candidates, states can only reject the Advisory Panel's point of view unanimously, which has never happened. Practice in the Council of Europe—which a priori is seen as more democratic—has had the negative effects observed above. The Panel's expertise is not systematically

¹⁰⁴ These "highest national courts" are those of the states who have recognized the competence of the Court to provide candidates to the office of judge; on the other hand, regarding assessment of candidates to the office of commissioner, the "highest national courts" are those of all OAS member states.

¹⁰⁵ They could be chosen from NGOs recognized by the OAS.

taken seriously by some states. Besides, “internal democracy” within the Council of Europe has meant that political bargaining at the election stage could not only bypass the Advisory Panel’s opinion, but could also circumvent the opinion of the Sub-Committee of the Parliamentary Assembly. In short, democracy has run counter to competence several times. In the Inter-American system, the question of the competence of members of the Court and the Commission is not so central.¹⁰⁶ As a matter of fact, it is easier to reach excellence when electing “only” seven judges and seven commissioners as opposed to twenty-eight judges (CJEU) or, even worse, forty-seven (ECHR)! Consequently, what matters most for the Inter-American System is the transparency of the procedure that must rely on the objectivity of candidate assessment. This will, in turn, protect the credibility of these two bodies’ members.

A first option would be to grant the Advisory Panel decision-making power to help promote competence. The power of election, which currently sits with the General Assembly of the OAS, should be eradicated because it generates the classic problem of vote trading. This solution would also give a better chance to excellent candidates from small countries,¹⁰⁷ and avoid politically or economically powerful states winning more easily the election of one of their nationals to the Commission or the Court.¹⁰⁸ Therefore, decision-making power would lie with the Panel. This new feature would be even easier to accept, as members of the Panel would be selected by the General Assembly of the OAS, together with the IAJC. A certain power would thus be granted to states ahead of the process; however, subsequently, they should accept the choice of the experts and endorse it. This dramatic change is the only one that can prevent any political bargaining in the election (be it the election by states (OAS) or by peoples’ representatives (as shown with the experience of the Parliamentary Assembly of the Council of Europe). In the end, political bargaining damages elected members.¹⁰⁹ For states

¹⁰⁶ Although a number of NGOs as important as the CEJIL have stated the contrary, and despite the history of the Inter-American System, it has been noted that some candidates did not entirely possess all the required qualifications; we think that the existence of “isolated cases” cannot be compared to the underlying problem that has greatly destabilized the European system, to the point where the European Court’s “legitimacy” was undermined. See *CTR. FOR JUSTICE & INT’L LAW, APORTES PARA EL PROCESO DE SELECCIÓN DE MIEMBROS DE LA COMISIÓN Y LA CORTE INTERAMERICANAS DE DERECHOS HUMANOS [CONTRIBUTIONS TO THE PROCESS OF SELECTION OF MEMBERS OF THE INTER-AMERICAN COMMISSION AND COURT OF HUMAN RIGHTS]* 9 (2005); see also *supra* Part II.

¹⁰⁷ Similarly, it is revealing that some countries have never had any judges elected to the Court (such as Bolivia, El Salvador, Guatemala, or Paraguay), whereas Colombia, Costa Rica, Venezuela, Chile, and Mexico have had judges from their country elected several times.

¹⁰⁸ As of 2014, Mexico had three important representatives in the Inter-American System (the President of the Commission, the Executive Secretary of the Commission, and a judge of the Court). This demonstrates a degree of political power of a country that managed to have three personalities of unquestioned competence elected. Thankfully, it can be considered positively as Mexico’s foreign policy in terms of legal affairs is characterized by the promotion of excellence with regard to international nominations and defense of the Inter-American System. See *CTR. FOR JUSTICE & INT’L LAW, supra* note 106, at 19. However, one can imagine the devastating effect if a country promoting a more questionable policy got the same results.

¹⁰⁹ It is obvious that we are rather “radical.” While many authors have denounced the “politicization” of the election process for the offices of judge and commissioner, none went as far as

to accept this rule, we could imagine a “safeguard clause,” stating that only state unanimity could overthrow the Panel’s choice.

This kind of proposal is probably the boldest but, at the same time, the least realistic given the continued power of sovereignty in international law. States nowadays would never accept such a dispossession of their political power, especially in the current Latin American context. A second solution is much more realistic. If, one day, the creation of the Panel is a success, it would certainly be more suitable to leave the final decision in the hands of the states (i.e., through the General Assembly of the OAS). They will be accountable for their final choice. But at this stage, the creation of an Inter-American Panel has not yet been discussed within the OAS bodies.

So, for now, a very fruitful and easy to implement idea would be to use the new public appointment process for the commissioners agreed to in 2013 before the Permanent Council for the appointment of judges.¹¹⁰ Some actors agreed that the hearing was very positive and instructive.¹¹¹ The best candidates were clearly and quickly identified. This kind of new custom is part of the good governance rules. It would be important that the same kind of scrutiny existed for candidates for a position in the Inter-American Court: a hearing before the Permanent Council, followed by the election by the General Assembly.

The second important good governance rule would be to take into account some material criteria for selecting candidates. This rule is completely independent of the existence of an Inter-American Advisory Panel within the OAS. In other words, although its creation is still a mere proposal, the criteria presented below can be used either by the General Assembly or the Permanent Council if the custom of hearings becomes stronger.

The specific competence of the candidates in the human rights field could be scrutinized. Analysis of the profile of former judges of the Inter-American Court demonstrates that this requirement has not been taken into consideration systematically. In other words, the main question in the Americas—as opposed to Europe—does not lie specifically within the candidates’ qualifications as such, but rather, their orientation. I believe the competence of Inter-American judges is remarkable in many ways.¹¹² On the other hand, a study of their profile shows that they did not all have a human rights background. Yet, it is legitimate to

proposing to get rid of the election system. See Faúndez Ledesma, *supra* note 7; Judith Schönsteiner, *supra* note 7; Ruiz-Chiriboga, *supra* note 7.

¹¹⁰ See O.A.S. Secretary of the Permanent Council, Letter dated Apr. 22, 2013 from the Secretary of the Permanent Council to the Representatives of the Permanent Council, O.A.S. Doc. OEA/Ser.G./CP/INF.6711/13, at 2 (Apr. 22, 2013), http://www.oas.org/en/ser/dia/civil_society/docs/050113/ob_en.pdf (stating the second order of business was “Forum of candidates to the Inter-American Commission on Human Rights”).

¹¹¹ These actors include, members of the diplomatic corps (like the Mexican and Jamaican Ambassadors before the OAS, Joël Antonio Hernandez Garcia and Stephen Vasciannie) as well as representatives of NGOs like Viviane Krsticevic (Executive Director of CEJIL), and Katya Salazar (Executive Director of the Due Process of Law Foundation). They all seriously considered the hearing of candidates for positions to the Inter-American Commission held on Wednesday May 1, 2013 at a Regular Meeting on the Permanent Council.

¹¹² Perhaps this point of view cannot be easily presented to the Commissioners.

strengthen this requirement's effectiveness, as mentioned in the Statutes,¹¹³ for positions at the Inter-American Court and Commission of Human Rights.

The rules on the incompatibility of functions should be carefully scrutinized by the Panel in the Inter-American Convention,¹¹⁴ the Statute of the Court for judges,¹¹⁵ and Article 4 of the Rules of Procedures of the Commission.¹¹⁶ As judges and commissioners do not work full time, very strict rules on incompatibility will have to be put in place ahead of the process to make sure that the candidates' functions in their own countries are absolutely compatible with those they would have in the Inter-American system. The exception provided for in Article 18(1) of the Statute of the Court relating to the office of judge should be interpreted as strictly as possible—not to say ruled out.¹¹⁷ Apart from the real problems that arise in terms of independence from holding a position in the executive branch of government, even if there is no direct control by the executive, or in a diplomatic mission, it is the image and therefore the legitimacy of the Court that is ultimately at risk.

¹¹³ O.A.S. G.A. Res. 448 (IX), Statute of the Inter-American Court of Human Rights, art. 4(1) (Oct. 31, 1979) [hereinafter Statute of the Court]; O.A.S. G.A. Res. 447 (IX), Statute of the Inter-American Commission of Human Rights, art. 2(1) (Oct. 31, 1979) [hereinafter Statute of the Commission] (“The Inter-American Commission on Human Rights shall be composed of seven members, who shall be persons of high moral character and recognized competence in the field of human rights.”).

¹¹⁴ “The 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.” The American Convention, *supra* note 49, art. 71.

¹¹⁵ Statute of the Court, *supra* note 113, art. 18:

1. The position of judge of the Inter-American Court of Human Rights is incompatible with the following positions and activities:
 - a. Members or high-ranking officials of the executive branch of government, *except for those who hold positions that do not place them under the direct control of the executive branch and those of diplomatic agents who are not Chiefs of Missions to the OAS or to any of its member states;*
 - b. Officials of international organizations;
 - c. Any others that might prevent the judges from discharging their duties, or that might affect their independence or impartiality, or the dignity and prestige of the office.

Id. (emphasis added).

¹¹⁶ Inter-American Commission on Human Rights Res. 1/2013, Reform of the Rules of Procedure, Policies and Practices, art. 4(1) (Mar. 18, 2013), *reprinted in* Inter-Am. Commission on Human Rights, Rules of Procedure of the Inter-American Commission on Human Rights, <http://www.oas.org/en/iachr/mandate/Basics/RulesIACHR2013.pdf> (last visited June 25, 2015) [hereinafter Rules of the Commission].

The position of member of the Inter-American Commission on Human Rights is incompatible with the exercise of activities which could affect the independence or impartiality of the member, or the dignity or prestige of the office. Upon taking office, members shall undertake not to represent victims or their relatives, or States, in precautionary measures, petitions and individual cases before the IACHR for a period of two years, counted from the date of the end of their term as members of the Commission.

Id.

¹¹⁷ Statute of the Court, *supra* note 113.

The language skills could be strictly controlled. This aspect has become crucial in Europe. In a bilingual Court like the ECHR, it is absolutely necessary to possess an active knowledge of one official language of the Council of Europe and a passive knowledge of the other (i.e., enough to understand nuances of complex legal documents). This point is also important in the Inter-American context. It is utterly crucial, if not fundamental, to the office of commissioner (given the location of headquarters and its remit). This is also the case for the Court. First of all, it would be a way of further ensuring unity between Anglo-Saxon and Latin worlds, thus reinforcing a “common” approach to legal cultures and interpretation of rights.¹¹⁸ Second, and more pragmatically, it would guarantee that in the future, if a judge came from an Anglo-Saxon country, costly translation of debates and procedural documents would not be required. If a candidate, otherwise fully qualified to pursue the duties of judge, does not possess the necessary language skills at the date of election, the Inter-American Advisory Panel—or the Permanent Council, or the General Assembly—could require that at the hearing, they make a firm commitment to take an intensive course before taking office or, exceptionally, at the beginning of their term.

Last but not least, representativeness in terms of gender equality and ethnic minority representatives could be much improved. This is a major issue. It should be on the agenda of the General Assembly of the OAS and of the main civil society organizations in Latin America over the next few years. Presentation of female candidates and of ethnic minorities should be strongly encouraged, especially in countries where the “indigenous issue” has been “constitutionalized.” If the composition of the Commission has been quite representative over the years, the composition of the Court is clearly unacceptable. In thirty-five years, out of thirty-five judges, only four have been women.¹¹⁹ There are none on the current Court. In 2015, such a state of affairs is outrageous. The idea is not to promote women or ethnic minority representatives with profiles not as good as men. The idea is to encourage *qualified* women and ethnic minority representatives. I find it hard to believe that “big” countries, in political and economic terms, could not find female candidates or ethnic minorities with strong competence.¹²⁰ On the other hand, we can imagine that in “small” countries it can be hard—as it

¹¹⁸ On the “Anglo-Latin Divide” question, see Paolo G. Carozza, Essay, *The Anglo-Latin Divide and the Future of the Inter-American System of Human Rights*, 5 NOTRE DAME J. INT'L & COMP. L. 153 (2015).

¹¹⁹ Women former judges have included Cecilia Medina Quiroga (2004–2009, Chile), Sonia Picado Sotela (1988–1994, Costa Rica), Rhadys Iris Abreu Blondet (2007–2012, Dominican Republic), and Margaret May Macaulay (2007–2012, Jamaica). J. Mo Pasqualucci has painted a very interesting portrait of Sonia Picado. See Jo M. Pasqualucci, *Sonia Picado, First Woman Judge on the Inter-American Court of Human Rights*, 17 HUM. RTS. Q. 794 (1995). Cecilia Medina Quiroga’s academic work has been impressive. See, e.g., CECILIA MEDINA QUIROGA, *THE BATTLE OF HUMAN RIGHTS, GROSS SYSTEMATIC VIOLATIONS AND THE INTER-AMERICAN SYSTEM* 363 (1988); CECILIA MEDINA QUIROGA, *LA CONVENCION AMERICANA: VIDA, INTEGRIDAD PERSONAL, LIBERTAD PERSONAL, DEBIDO PROCESO Y RECURSO JUDICIAL [THE AMERICAN CONVENTION: LIFE, PERSONAL INTEGRITY, PERSONAL LIBERTY, DUE PROCESS, AND JUDICIAL RECOURSE]* 428 (2005).

¹²⁰ It is hard to realize that even if a feminist approach to international law has created a lot of inventive legal literature, normative change is still very slow. See HILARY CHARLESWORTH, *SEXE, GENRE ET DROIT INTERNATIONAL [SEX, GENDER, AND INTERNATIONAL LAW]* (2013).

has been in Malta—to draw up lists including women and minority representatives. In such cases, the state will have to demonstrate that it has complied, in the national selection procedure, with all the requirements listed in Part II of this Article, in order to encourage female and ethnic candidates. The potential absence of a woman or a minority representative should be exceptional.¹²¹

IV CONCLUDING REMARKS

This Article has tried to explore only one of the numerous factors that have an impact on the independence of both bodies of the Inter-American human rights system. I would like to conclude by examining the question of tenure and reappointment. While the issue of the term of office for judges and commissioners is not strictly part of the questions relating to their selection and election process, it should be mentioned that their independence would be much better protected if the term was longer and non-renewable. Yet, today, judges are elected for six years and can be reelected only once,¹²² while commissioners are elected for four years and can also only be reelected once.¹²³ It would be preferable to have their term coincide with judges by making it longer but non-renewable. The European experience is key. The Council of Europe, having tried several solutions and realizing the very serious negative aspects of renewable terms, has opted in Protocol No. 14 for a non-renewable term of nine years.¹²⁴ This step was unanimously welcomed by practitioners such as lawyers and NGOs, representatives of academia, and, last but not least, the judges themselves.¹²⁵ In this context, we could imagine a similar non-renewable term of office of eight or nine years for judges and commissioners. Jurisprudential coherence and continuity would be ensured, as well as the independence of members of the Commission and Court who could, without any difficulty, implement the famous “duty of ingratitude” towards their country of origin.

Within the Latin American context, this is an idealistic proposal. First, it would require revision of the American Convention—at least for the tenure of the judges—and, as we have seen, it is not currently realistic or appropriate.

¹²¹ The ECHR, the International Criminal Court, and the African Court on Human and Peoples’ Rights have non-legally binding rules aimed to encourage a fair representation of genders amongst their members.

¹²² “The judges of the Court shall be elected for a term of six years and may be reelected only once.” The American Convention, *supra* note 49, art. 54(1).

¹²³ “The members of the Commission shall be elected for a term of four years and may be reelected only once. Their terms of office shall begin on January 1 of the year following the year in which they are elected.” The Statute of the Court, *supra* note 113, art. 6; *see also* Statute of the Commission, *supra* note 113.

¹²⁴ “The judges’ terms of office have been changed and increased to nine years. Judges may not, however, be re-elected. These changes are intended to reinforce their independence and impartiality, as desired notably by the Parliamentary Assembly in its Recommendation 1649 (2004).” Council of Europe, *Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention: Explanatory Report*, ¶ 50 (May 13, 2004), <http://conventions.coe.int/Treaty/EN/Reports/Html/194.htm>.

¹²⁵ Popescu, *supra* note 78, at 83.

Nonetheless, it is something important to keep in mind for the long run, when the crisis of the Inter-American human rights system will become an old story.