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Alternative appointment procedures for the commissioners and judges in the Inter-American System of Human Rights*

*Judith Schönsteiner***

Introduction

The independence of members of international human rights bodies has been the object of reiterative discussion, not only in the Inter-American System of Human Rights (IAS).[1] The demand for the candidates' expertise in human rights matters is also raised repeatedly,[2] usually citing the requirements laid down in Arts. 34 and 52.1 of the American Convention on Human Rights (ACHR). The current discussions on procedural reform in the Committee on Juridical and Political Affairs of the organization (CAJP), however, has not brought into focus the selection process for commissioners and judges, although some NGOs who advocate the issue in the Committee on Inter-American Summits Management and Civil Society Participation in OAS Activities (CISC) have briefly mentioned it in their observations to the CAJP.[3] .

* I am grateful for very helpful comments by Kevin Boyle and Clara Sandoval on a previous version of this article. Needless to say, the responsibility for any inaccuracies and errors, as well as any opinions expressed, remains with the author.

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1 See for example Shelton, Dinah, "Legal norms to promote the independence and accountability of international tribunals," in: 2 *The Law and Practice of International Courts and Tribunals: A Practitioners' Journal* 27-62 (2003); Brown, Chester, "The evolution and application of the rules concerning independence of the 'International Judiciary'," in: 2 *The Law and Practice of International Courts and Tribunals: A Practitioner's' Journal* 63-96 (2003); Posner, Eric/Yoo, John, "Judicial independence in international tribunals," 93 *California Law Review* 1, 2005. For the IAS, see for example Faúndez Ledesma, Héctor, "La independencia e imparcialidad de los miembros de la Comisión y de la Corte: Paradojas y Desafíos," in: Méndez/Cox, *El futuro del sistema interamericano de protección de los derechos humanos*, 2001, at 185.

2 See for example CEJIL, "Aportes para el proceso de selección de miembros de la Comisión y la Corte Interamericanas de Derechos Humanos," 2005 (in the following, "Aportes 2005").

3 For example, CEJIL, Inter-American Bar Association. While the main initiative for the debate comes from seven states party to the ACHR, the two main bodies of

This article proposes that, in addition to the topics already on the agenda of the CAJP, it is necessary to consider improvements to the nomination and selection processes for commissioners and judges. The main aim of reforms in that respect must be to institutionally *guarantee* that the future members of the two bodies will always fulfil the high requirements of human rights expertise and independence that are laid down in the American Convention on Human Rights. This could be achieved through the constitution of a tripartite expert committee that reviews the curricula vitae, and possibly also interviews the candidates before the voting procedure in the OAS General Assembly. The members of this committee could be elected by states, representatives of civil society, and former commissioners and judges.

That said, the article does not in any way judge or assess the performance, independence, or expertise of current and former judges. Rather, it points to a "structural bias"[4] inherent in the system that places the capacities of determining the outcome of the selection process for commissioners and judges on states only, although they may be called to defend themselves before these very organs for alleged violations of human rights protected through the ACHR. Petitioners and their representatives do not have such a possibility. This might entail consequences regarding the procedural balance in the system as a whole and with respect to individual cases.[5] First and foremost, a review procedure would allow to assure that only candidates with sufficient human rights experience are proposed to the General Assembly for election.

To analyse these issues, the article briefly summarizes the current reform proposals to set the context of the discussion, describes the

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the IAS are elaborating proposals for reforms to their current rules of procedure. They are expected to be made public by the end of this year.

4 See, for a development of the antonym, the concept of "structural impartiality" in the context of interstate adjudication in the International Court of Justice, Franck, Thomas M., *Fairness in International Law and Institutions*, 1995, at 319-324.

5 There is a recent tendency in the Court to change the regime of national judges sitting on cases concerning their country. Since 2006, judges have excused themselves repeatedly from hearing cases that concerned their country of nationality. This step could promote the idea that the judges are not only impartial but also perceived to. For example, Judge Cecilia Medina Quiroga in Almonacid Arellano v Chile, Judge Leonardo Franco in Bueno Alves v Argentina, Kimel v Argentina, and Bayarri v Argentina, Judge Sergio García Ramírez in Castañeda v Mexico, and González Banda v Mexico; see each time the footnote marked by * on the first page of the judgment, and Resolution of 30.10.2008 in González Banda.

current selection process, proposes an overview of national and international selection procedures for judges and commissioners, and finally suggests elements of diversified participation in the selection process to guarantee expertise and independence of the candidates.

The reform discussion in the IAS[6]

In 2006, a resolution of the OAS General Assembly[7] institutionalized the dialogue between states and organs of the system, and has so far led to two formal meetings (March 2007 and April 2008) and a series of informal sessions between November 2007 and June 2008, which were initiated by state parties to the ACHR. Several states brought forward reform agendas to the IAS, some of which are summarized in a document endorsed by seven state parties.[8] Discussion of these proposals has been mainly among state parties, although the presidents and executive secretaries of the Court and Commission have regularly participated. The presence and intervention of NGOs was occasionally allowed, and two NGOs submitted written observations to the state proposals.[9] During the dialogue, the presidents of the Commission and Court reiterated that the amendment of the Rules of Procedure of both organs is at the discretion of the organs, although dialogue is welcome and beneficial.

Although reform discussions have intensified in 2008 and were an issue at the OAS General Assembly in June, most topics have been on the agenda for quite some time, especially since the procedural reforms of 2006. The most relevant issues were discussed in the dialogue meeting of 4 April 2008,[10] and address the need to reform

6 As of 26.9.2008, based on documents that are publicly available.

7 See AG/RES.2220 (XXXVI-O/06).

8 See "Nota de las delegaciones de Panamá, El Salvador, Brasil, Chile, Perú, Colombia y México remitiendo documento para el diálogo sobre el funcionamiento del sistema interamericano de derechos humanos, entre los estados miembros y los miembros de la Comisión Interamericana de Derechos Humanos y la Corte Interamericana de Derechos Humanos," OEA/Ser.G CP/CAJP-2584/08, 4.4.2008.

9 CEJIL, "Aportes para la reflexión sobre posibles reformas al funcionamiento de la Comisión Interamericana y la Corte Interamericana de Derechos Humanos," submitted 27.3.2008, incorporated as OEA/Ser. G CP/CAJP-INF.100/08, 2.4.2008, (in the following, "Aportes 2008") and Inter-American Bar Association, for full footnote, see below. During the debates, there were additional interventions by Rights and Democracy from Canada, and the Comisión Colombiana de Juristas.

10 See OEA/Ser.G CP/CAJP-2584/08, of 4.4.2008. Most of the issues discussed are already reported in the debate of 30.3.2007, see OEA/Ser.G CP/CAJP-2526/07, 25.5.2007.

the Rules of Procedure of both the Court and the Commission. The state proposal does not address the selection processes for judges and commissioners. The Court's call for submission of observations on the current Rules of Procedure does not invite suggestions on this specific topic; further calls for consultation are however pending.[11] In contrast, the Inter-American Bar Association recalls that it is necessary to create adequate implementation mechanisms and introduce reforms with regard to the selection process of commissioners and judges.[12] The NGO suggests introducing an obligatory process of selection and qualification for candidates to the Commission and reducing the role of the General Assembly in the designation of the commissioners.[13] CEJIL has reiterated its advocacy for a revision of the selection process in the current reform discussion.[14]

The Commission and the Court are expected to make public their draft amendments in the coming months. The President of the IACHR announced during the OAS General Assembly in June that the Court and Commission "have agreed upon a concrete timetable for the elaboration of the details of such reforms, that includes ample opportunity for a full and transparent consultation with the Member States as well as civil society." He added that the process could be concluded by the end of 2008.[15] This article contributes to the current discussions by presenting some thoughts on the selection process for members of the Commission and the Court.

The current system of appointment of judges and commissioners

a. The current selection process

The American Convention and the Statutes of the organs of the IAS contain several provisions on the selection process, as well as

11 See the Court's call for submission of observations, available at http://www.corteidh.or.cr/reformas.cfm.

12 See OEA/Ser.G CP/CAJP-INF.100/08 add.1, 3.4.2008, Inter-American Bar Association, submitted 24.3.2008. The full document is also available at http://www.iaba.org/Spanish_site/Opinion%20FIA_Documento%20OEA.pdf (in the following "FIA 2008").

13 FIA 2008. The association also recommends a contest-based selection process for staff lawyers at the Commission and the Court.

14 CEJIL, Aportes para la reflexión sobre posibles reformas al funcionamiento de la Comisión Interamericana y la Corte Interamericana de Derechos Humanos, Documento de Coyuntura, October 2008.

15 See Press Release of the IACHR 23/08, available at http://www.cidh.org/Comunicados/English/2008/23.08eng.htm.

on the required qualifications of candidates for the Commission and the Court. Judges are elected by absolute majority through a secret vote[16] in the OAS General Assembly by those states party to the Convention.[17] Commissioners are elected by all OAS member states.[18] Both procedures are sufficiently similar to be analysed together. Up to three candidates are proposed by each state party.[19] The candidates may have the nationality of any OAS member state, including of those not party to the Convention.[20] However, the requirements for the candidates logically vary, due to the different mandates of the two organs. In the case of the judges, the Convention calls for them to be:

> jurists of the highest moral authority and of recognized competence in the field of human rights, who possess the qualifications required for the exercise of the highest judicial functions in conformity with the law of the state of which they are nationals or of the state that proposes them as candidates.[21]

The seven commissioners "shall be persons of high moral character and recognized competence in the field of human rights."[22]

In addition to these qualities, the incompatibilities listed in Art. 18 of the Court's Statute can be interpreted as further prerequisites for the candidates. The Statute of the Inter-American Court of Human Rights (IACtHR) excludes especially the appointment of:

> 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; Officials of international organizations.[23]

There are no specifically mentioned incompatibilities for commissioners, but there is a general prohibition of incompatible activities.[24]

16 Art. 9.1 Statute of the IACtHR, and Art. 5 Statute of the IACHR.

17 Art. 6.1 Statute of the IACtHR.

18 Art. 3.1 Statute of the IACHR.

19 Art. 6.2 Statute of the IACtHR, and Art. 3.2 Statute of the IACHR.

20 Art. 53.2 ACHR.

21 Art. 52(1) ACHR.

22 Art. 34 ACHR.

23 Faúndez Ledesma considers these rules on incompatibility insufficient, as they are restricted for the executive and do not prohibit judges holding any position in government, or the diplomatic cadre. See Faúndez Ledesma 2001, at 186ss.

24 In Art. 4.1, the Statute restricts itself to signalling that "The position of members 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."

The independence of commissioners and judges is enhanced through provisions on personal interest in individual cases in which a member may need to excuse him or herself from making decisions on a specific case.[25]

Whereas the selection procedure at the international level is thus regulated, there are hardly any requirements for the process by which the national list of candidates is drawn up, besides the prohibition that any government present more than two candidates of that country's nationality. Two recent General Assembly resolutions on the public presentation of candidates recommend that states conduct consultations with civil society in order "to help propose the best candidacies for positions" in the IAS.[26] Nonetheless, the resolutions do not go into further detail on the point.

Currently, there is no mechanism that formally and systematically screens the merits and expertise of all candidates. At a later stage, civil society and other states are invited to comment on the CVs of those candidates that have been nominated by the states.[27] According to a General Assembly resolution of 2005, the General Secretariat of the OAS must publish the candidates CVs on its website. In 2006, the General Assembly added that the publication has to be announced through a press release.[28] Still, this process does not guarantee that all candidates are examined; in particular, candidates from countries with less NGO activity might receive insufficient scrutiny and attention.

Furthermore, the proposal of and voting on candidates remains at the states' entire discretion, thereby allowing that critical or even disqualifying observations during the public consultation process may be only insufficiently taken into account. While considerable improvement is possible in the current system of state-focused appointment, it has its rationale and explanation in the history of the IAS. In order to understand the current procedure, its advantages as well as deficiencies, the reasons behind the selection process as it stands shall be briefly recalled.

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25 Art. 19 Statute of the IACtHR. The Statute of the IACHR does not have a similar provision. The membership in an organization which files an amicus curiae is nor per se requiring the judge to excuse himself/herself; the Presidency, however, accepts the decision of a judge who sees a conflict of interests, see for example Apitz v Venezuela, para. 8, and footnote 2.

26 See AG/RES. 2166 (XXXVI-O/06), para. 2.

27 See AG/RES. 2120 (XXXV-O/05).

28 See AG/RES. 2166 (XXXVI-O/06), para. 3.

b. The rationale of the current system

The human rights regime of the IAS was created by states. States were originally the sole authors of the system, with state representatives drafting and approving the OAS Charter, the American Declaration on the Rights of Man, the General Assembly resolution creating the Commission,[29] and finally the American Convention. The appointment procedures for commissioners and judges were inspired by the Statutes of the Permanent Court of Justice and the International Court of Justice, courts that deal exclusively with adjudication between states.[30] It should not come as a surprise, therefore, that the selection procedures for a regional human rights court are also determined by states, and only states. This is true even if the parties coming before the organs are not only states, but also "[a]ny person or group of persons, or any nongovernmental entity legally recognized in one or more member states of the Organization."[31]

The independence of the organs was sought to be guaranteed through certain specific faculties; for example, important, albeit not exclusive, decision-making power over removal of members,[32] or diplomatic immunities for the members when exercising their functions.[33] Furthermore, the Court's and Commission's autonomy of adopting and amending their own rules of procedures is a crucial guarantee of the bodies' independence.[34] This is especially relevant in an international system that does not know the usual guarantees of independence such as life-time tenure, strict rules of incompatibility,[35]

29 Resolution VIII of 5th Meeting of Consultation of Ministers of Foreign Affairs, Final Act, Santiago de Chile, 12-18 Aug 1959, OEA/Ser.F/II.5, at 10-11, available at http://www.wcl.american.edu/pub/humright/digest/Inter-American/english/sessions/one.html.

30 See especially, Brown, Chester, "The evolution and application of the rules concerning independence of the 'International Judiciary'," in: 2 *The Law and Practice of International Courts and Tribunals: A Practioners' Journal* 63-96 (2003).

31 Art. 44 ACHR.

32 The dismissal of judges or commissioners is regulated by Art. 20.2 Statute of the IACtHR, and Art. 10 Statute of the IACHR, respectively. The OAS General Assembly in both cases takes the decision, but cannot act unless requested to do so by the majority of the remaining members of the organization in question. Peer-control is thus intermingled with state party control.

33 Art. 70 ACHR, and Art. 12 Statute of the IACHR.

34 Arts. 39 and 60 ACHR.

35 The Statutes allow that some members of the executive or diplomatic corps serve as commissioners or judges (Art. 8.1 Statute of the Commission, Art. 18 Statute of the Court). Also, the bodies function only part-time which means the commissioners and judges have to affiliate with some other institution or

or the prohibition of re-election,[36] and which, at the same time, has a series of institutionalized mechanisms that leave the controlling power to states. These are, for example, an option to exit the respective treaties, refusal to implement authoritative decisions by the organs, amendments to the constitutive treaty, and budget cuts.[37]

c. The problems

Two principal problems arise with the current selection system for judges and commissioners. First, there is a theoretical dilemma between independence and control of the decision-makers that arises in any judicial or quasi-judicial setting. Given the crucial role that the IAS organs play in shaping the procedures and interpretation of the ACHR, transparency and accountability, expertise in and commitment to the protection of human rights, as well as independence over time is vital. Professional ethics are usually considered to be a very important tool for ensuring such commitment.[38] However, the stability of the system in the long run seems to suggest that mandate holders and system users should not without institutional guarantees be left to these standards of professional ethics. Candidate screening through the current selection process is not sufficiently systematic to guarantee that the Convention requirements are always met in the future. Introducing a mechanism to provide these guarantees would enhance the expertise-based legitimacy enjoyed by the IACHR and IACtHR members.

Second, civil society plays a vital role in the OAS, but participation in the selection procedure as it currently stands does not adequately reflect the plurality of actors in the IAS. Only states can make decisions on the nomination and selection of candidates. This fact can

profession to earn their living.

36 Commissioners and judges can be re-elected once, see Arts. 37.1 and 54.1 ACHR.

37 See Ginsburg, Tom, "Bounded discretion in international judicial lawmaking," 45 *Virginia Journal of International Law* (2005) 631.

38 Internationally recognized ethical standards for the exercise of the judicial role can be found in the Bangalore Principles of 2002, available at http://www.unodc.org/pdf/crime/corruption/judicial_group/Bangalore_principles.pdf. The Burgh House Principles on The Independence of the International Judiciary of 2004 unite standards for judicial independence and concrete suggestions of best practice for international tribunals. The text was elaborated by a group of international lawyers and judges, and is available at http://www.ucl.ac.uk/laws/cict/docs/burgh_final_21204.pdf. The provisions of the IAS fall short of at least two of the standards laid down in the Burgh House Principles, in that the incompatibility rules in the IACtHR do not exclude any political activity and do not exclude ex parte communications (Arts. 8.2, and 12.2 Burgh House Principles).

generate considerable problems. Héctor Faúndez Ledesma observes that the election of suitable candidates may depend on vote-trading rather than exclusive consideration of the qualifications and merits of a candidate. This practice includes trading of posts with those in other international organs and institutions.[39] Therefore, he proposes making a distinction between those who propose candidates and those who vote on them. Law and/or political science faculties and national NGOs should influence proposals of candidates from each country during an open consultation process after which the national legislature approves or endorses the three candidates that are finally proposed at the international level.[40] This suggested reform shows concern for the diversification of control over the selection process, as it involves both academics and civil society in the nomination procedure. The following paragraphs explore models of national and international judicial appointments and elections that might additionally inspire improved and diversified control mechanisms in international human rights adjudication.

Domestic and international practice in the appointment of commissioners and judges

This section examines some solutions to the puzzle of designing selection procedures that enhance assurances for the candidates' independence and expertise. Of course, the theoretical exercise undertaken here cannot possibly propose a ready-made solution; rather it identifies the advantages and disadvantages of different approaches.

a. Appointment and election of national judges

Constitutionalist Axel Tschentscher has developed a useful systematization of different mechanisms for judicial appointment.[41] First, in a variety of models, the executive appoints the judges.

39 Faúndez 2001, at 187.

40 Faúndez 2001, at 188. Second, candidates with nationalities different from the proposing state should be enhanced, see at 190. Also, re-election should be abolished to enhance the independence of the mandate holders, see at 191.

41 Tschentscher, Axel, *Demokratische Legitimation der dritten Gewalt*, Mohr Siebeck, Tübingen 2006, at 270-299. A similar, but simpler scheme is proposed in Larkin, Elizabeth, "Judicial selection methods: Judicial independence and popular democracy," in: 79 *Denv. U. L. Rev.* 65 (2001-2002), at 66. The author distinguishes between election, appointment and merit models. For the purpose of this contribution, it is more beneficial to consider a more detailed scheme, bearing in mind, however, that any national systematization requires adaptation to the international level.

Some systems opt for executive appointment of judges pursuant to an expertise-based process managed by the administrative organs of the state.[42] In a second model, called co-optation, the judges themselves decide on the appointment of new colleagues.[43] Italian and Spanish courts are examples of this form of control.[44] In Latin America, Colombia uses such a model. For appointment of judges to the Supreme Court and the Council of State, the Colombian *Consejo Supremo de la Judicatura*,[45] an organ created to regulate the judiciary, sends a list of candidates to the respective organ that then decides upon its future members.[46] The principal disadvantage of a pure co-optation model in the IAS would be the fact that it leaves the decision on appointment and selection to only a handful of actors who are furthermore compromised by their possibility to be re-elected once.

The democratic election of judges is yet another model. The crucial question here is who has the right to elect. One option is a direct democratic election by all citizens.[47] This model is impracticable at the international level due to the sheer number of people who would be called to vote. There are also models of delegated elections, like the Federal Supreme Court of the United States[48] or the Bundesverfassungsgericht in Germany,[49] and other models of

42 See Tschentscher, *Demokratische Legitimation* 2006, at 286-7, discussing the French example of career-based executive appointments.

43 Tschentscher, *Demokratische Legitimation* 2006, at 291-3..

44 See Tschentscher, Axel, "Nombramiento de jueces: entre la elección popular y el autonombramiento," in: Cardinaux, Nancy/Clérico, Laura/D'Auria, Aníbal (eds.), *Las razones de la producción del derecho. Argumentación constitucional, argumentación parlamentaria y argumentación en la selección de jueces*, Universidad de Buenos Aires, 2006, at 205-207..

45 Supreme Council of the Judiciary.

46 Constitución Política de la República de Colombia del 1991, Art. 231 and Art. 256(2). The selection process for judges of the Constitutional Court is different, see Art. 239 Constitución Política.

47 Tschentscher, Nombramiento 2006, at 198-200, mentioning State courts in the United States, and Canton courts in Switzerland.

48 According to Article II of the U.S. Federal Constitution, Supreme Court judges are nominated by the President and appointed by the Senate.

49 Basic Law Art. 94(1), available at http://www.bundestag.de/parlament/funktion/gesetze/gg_jan2007.pdf. The necessity of reaching a 2/3 majority in the Bundestag and the Bundesrat for the election of the constitutional judges has led to a system in which the big parties have informally agreed to divide the seats among them, see Vanberg, Georg, *The Politics of Judicial Review in Germany*, CUP 2004. Judges of the other highest federal courts are appointed by the competent minister, in collaboration with a judicial election council, the members of which are the correspondent State ministers plus the same number of people elected by the Parliament, see GG Art. 95(2).

parliamentary election, as in Switzerland.[50] Parliamentary election in the strict sense is not an option, since the OAS does not have a parliament as does, for example, the European Union. It could be argued that currently, the members of the IAS bodies are determined through delegated election. Two difficulties arise with this interpretation: if national elections were not democratic, or did not take place at all, the legitimacy would also suffer internationally. Also, one vote per government (and no voice for regional governments) does not allow for the representation of the opinion of minorities, or of non-governing majorities. In some Latin American countries, judicial appointment follows mixed models of executive appointment, legislative election, and judicial co-optation.

The different models of judicial appointment follow their own logic of legitimacy. For example, appointment after a contest leads to legitimacy based on expertise, whereas elections provide democratic legitimacy of some sort. Finally, in practice, mixed models are not uncommon, thus diversifying control over the appointment process for judges. For example, judges of the Chilean Supreme Court are appointed by the President, who chooses the candidate from a list of five that was previously drawn up by the Supreme Court. The president's choice must be approved with a two-thirds majority in the Senate.[51] Such a mixed approach offers inspiration in that diversified control might make up for the lack of separation of powers at the international level.

b. Selection processes for international judges and commissioners

International human rights commissioners and judges are appointed through procedures that are borrowed from the procedures stemming from the PCIJ and the ICJ.[52] However, there are also significant variations from one mechanism to another. A complete survey of all international quasi-judicial and judicial bodies would be too ambitious in the context of this article. However, describing a series of mechanisms will provide some input as to possible variations of nomination, election, and appointment procedures in the IAS.

50 Tschentscher Nombramiento 2006, at 284.

51 Constitución Política de la República de Chile, Art. 75.

52 See for the precedent setting role of the PCIJ and ICJ Statutes in the standards of independence for international judges, Brown 2003, at 65.

b.1 Commissioners and Committee Members

Independent experts who are elected by the states that are party to the respective human rights treaty constitute the seven UN treaty bodies that have monitoring or quasi-judicial functions. The pattern is fairly similar for all bodies. Generally, members are expected to be "persons of high moral character" with a "recognized competence in the field of human rights."[53] All Committee members are elected based on their personal capacity.[54] Thus, the eighteen members of the Human Rights Committee (HRC) of the United Nations are elected by the state parties to the International Covenant on Civil and Political Rights (ICCPR)[55] upon nomination by state parties. Each state can nominate two candidates who must be nationals of that state.[56] Similarly, the eighteen members of the Committee on Economic, Social and Cultural Rights are elected by the state parties to the respective Covenant. However, the ECOSOC Resolution establishing the Committee requires proportional representation of the five UN regions in the Committee.[57] The other UN treaty bodies are equally constituted through election.[58] Any nomination procedure for candidates at the national level remains de facto at the discretion of the states; the treaties are silent on the point. This does not exclude the possibility for civil society organizations to lobby for or against certain candidates before the nomination or election.

According to the African Charter on Human and Peoples' Rights (ACHPR), the Commissioners in the African System of Human Rights are appointed by the Secretary General of the African Union (AU).[59] In practice, however, the selection is similar to the UN process. Member states submit nominations for the candidates which are then voted upon in the AU Executive Council. In some states, the

53 See for example, Art. 28(2) ICCPR.

54 See for example, Art. 17(1) CEDAW.

55 Art. 30(4) ICCPR.

56 Art. 29(2) ICCPR.

57 ECOSOC Resolution 1985/17, para. (b). Similarly, Art. 43(3) CRC, and Art. 72(2a) International Convention on the Protection of the Rights of All Migrant Workers and the Members of their Families (ICRMW).

58 Art. 8(2) Convention on the Elimination of Racial Discrimination (CERD), Art. 17(2) Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), Art. 17(2) Convention Against Torture and other Forms of Cruel, Inhuman, or Degrading Treatment or Punishment (CAT), Art. 43(2) Convention on the Rights of the Child (CRC), Art. 72(2a) ICRMW.

59 Art. 41 ACHPR. The Constitutive Act, adopted on 11/7/2000 in Lomé, Togo, transformed the Organization of African Unity into the African Union.

nomination of the national candidate for the Commission receives quite some attention; in other countries, where civil society is weak, the nomination process passes rather unnoticed. Recently, the AU has adopted clear guidelines on the non-compatibility of the position of Commissioner with that of a government minister.[60]

At the international level, an election by states party to the constitutive treaty is thus the process that is considered conveying the necessary legitimacy to Commission and Committee members. However, none of the appointment procedures considers a formal, pre-election check of the requisites of office laid down in the respective treaties. This differs from some selection procedures for international human rights judges.

b.2 Judges

With the proliferation of international tribunals and courts in recent years, a review of all of them would be too extensive. It can be observed, however, that judges at the international level are generally elected by states that are party to the respective constitutive treaties. In that sense, there is an important parallel with the selection procedures for commissioners or committee members. However, for judges, the requirements of office focus on judicial experience, which candidates should have prior to the appointment as well as their expertise in the court's area of jurisdiction. Thus, the judges of the International Tribunal for the Law of the Sea (ITLOS) shall be "of recognized competence in the field of the law of the sea."[61] They are elected by the states that are party to the Convention on the Law of the Sea through a procedure similar to that of the UN treaty bodies, including respect for "equitable geographical distribution."[62] As for the treaty bodies, however, there are no procedural requirements for the nomination process leading to the list of candidates presented at the meeting of states that are party to the Convention.

The Council of Europe (CoE) most clearly regulates the national nomination process for candidates who aim at being part of the judicial function. The judges to the European Court of Human Rights (ECtHR) are elected by a majority vote in the Parliamentary Assembly. Each state party proposes a list of three candidates, out

60 My thanks go to Rachel Murray for providing information on the current practice in the African System of Human and Peoples' Rights. See also African Union, Note verbale BC/OLC/66.5/8/Vol.V., 5.4.2004.

61 Art. 2(1) Statute of the International Tribunal for the Law of the Sea.

62 Art. 2(2) Statute ITLOS.

of which the Parliamentary Assembly elects the judge that shall sit on the Court "for" this country.[63] There are as many judges on the Court as there are state parties to the European Convention on Human Rights and Fundamental Freedoms (ECHR). In drawing up the lists and electing members, a balanced representation of the sexes shall be aimed at.[64] The candidates shall "possess the qualifications required for appointment to high judicial office or be jurisconsults of recognised competence."[65]

Whereas, in some countries, the candidate list is determined exclusively by the government, elsewhere, the positions are publicly advertised and the list of candidates is set up from the applications received.[66] The Parliamentary Assembly recommends this procedure to governments,[67] insisting that, besides such publicity, "the process of appointment must reflect the principles of democratic procedure, the rule of law, non-discrimination, accountability and transparency."[68] Some years earlier, the Parliamentary Assembly adopted a model curriculum vitae for applicants to judicial positions in the Council of Europe;[69] this was first used in the 1997 call for candidates.[70]

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63 Art. 22.1 ECHR.

64 Rule 14, Rules of Court, ECtHR. The recently adopted Protocol on the Statute of the African Court of Justice and Human Rights presents a similar requirement, see Art. 5(2). The Protocol was adopted by the Eleventh Ordinary Session of the Assembly in Sharm El-Sheik, 1.7.2008, and is available at http://www.africa-union.org/root/AU/Documents/Treaties/text/Protocol%20on%20the%20Merged%20Court%20-%20EN.pdf.

65 Art. 21(1) ECHR.

66 The United Kingdom, for example, published an advert calling for applications to fill the position of a judge to the ECtHR in 1998. See Coomber, Andrea, "Judicial independence: Law and practice of appointments to the European Court of Human Rights," 5 *European Human Rights Law Review* 2003, at 492. Ireland used a similar procedure, see interview with Judge John Hedigan, in: Terris, Daniel/Romano, Cesare/Swigart, Leigh, *The International Judge. An Introduction to the Men and Women who Decide the World's Cases*, Oxford University Press, Oxford 2007, at 213.

67 Recommendation 1649 (2004) of the Parliamentary Assembly of the Council of Europe recommends that the selection process be transparent and posts advertised through the "specialised press," para. 19.i, available at http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta04/EREC1649.htm.

68 Recommendation 1649, para. 3. Further criteria include: "ii. that candidates have experience in the field of human rights; iii. that every list contains candidates of both sexes; iv. that the candidates have a sufficient knowledge of at least one of the two official languages," see para. 19.

69 CoE, Parliamentary Assembly, Resolution 1082 (1996), adopted on 22/4/1996, Appendix, available at http://assembly.coe.int/main.asp?Link=/documents/adoptedtext/ta96/eres1082.htm.

70 Committee of Ministers, Reply to Recommendation 1295 of the Parliamentary Assembly, adopted 22/4/1996), Document 7989, adopted 14/1/1998, available at

The Statute of the International Criminal Court (ICC) allows for the creation of an Advisory Committee for nominations to the bench.[71] The committee's mandate would have to be established by state parties. To date, this has not happened, mostly because of doubts about its necessity, differences among state representatives about its competence and composition, and the fear of time constraints for the selection process.[72] Thordis Ingadottir argues that the committee would improve the selection process for judges, especially if the committee had purely advisory functions.[73] It should be able to request information about and from candidates and to interview them before emitting a recommendation to the state parties.[74] Although the Committee has thus received "little [state] support in practice," it is nevertheless considered to be "an interesting model" by observers.[75]

In the ECtHR, the possibility of appointing a committee in charge of examining the candidatures to the court benches has been enacted. Thus, the Parliamentary Assembly created a permanent[76] sub-committee to the Committee on Legal Affairs and Human Rights that is responsible for reviewing state-made nominations. This committee guarantees that the candidates meet the requirements for judges at the ECtHR as set out in the ECHR, examining their curricula vitae and carrying out individual selection interviews with each candidate prior to voting in the Parliamentary Assembly.[77]

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http://assembly.coe.int/main.asp?Link=/documents/workingdocs/doc98/edoc7989.htm.

71 Art. 34(4c) Statute of the ICC.

72 See Ingadottir, Thordis, "The International Criminal Court nomination and election of judges. A discussion paper," 2002, available at http://www.pict-pcti.org/publications/ICC_paprs/election.pdf, at 30.

73 She argues: "A power to eliminate candidates off the list would be questionable." See Ingadottir 2002, at 31.

74 See Ingadottir 2002, at 31.

75 Mackenzie, Ruth/Sands, Philip, "International courts and tribunals and the independence of the international judiciary," 44 *Harvard International Law Journal* No. 1, 2003, at 279.

76 If draft resolution from the Committee on Legal Affairs and Human Rights of 4/7/2008 is approved in the 4th session of the Parliamentary Assembly from September 29th to October 3rd, 2008.

77 See the Terms of reference of the Committee on Legal Affairs and Human Rights, Resolution 1425 (2005), para. B.II.5, available at http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta05/ERES1425bis.htm#JUR. The committee has 27 appointed members. For further details and a critical assessment of the details of the process, see Coomber 2003, at 494-496. The nomination procedure is currently under review, and the Committee on Legal Affairs and Human Rights has charged a rapporteur to elaborate a report on the issue. The deadline for the report has recently been extended, as the committee has not approved the rapporteur's preliminary report. See Synopsis AS/Jur No 2008/06 of 11/9/2008,

In order to understand the role of the committee, it is important to consider how it is constituted. The Committee on Legal Affairs and Human Rights is composed of 83 parliamentarians. The country groups are determined according to the size of the country and the Bureau of the Assembly[78] nominates its members out of proposals from countries and political groups. The composition of the committee has to be approved by the Assembly.[79] Consequently, the committee is still a political and state-focused organ, but it has the sufficient time and resources to individually examine each candidature and make a recommendation to the Parliamentary Assembly.

c. The role of public opinion and civil society at the international level

The influence of public opinion has grown in conjunction with the rising importance of civil society in international relations. For example, civil society participation has been on the OAS agenda for about ten years[80] and it has been strengthened over time.[81] In the IAS, the element of public opinion control was partly introduced in the 2006 election of judges[82] and is currently the only tool used to counterbalance the state monopoly on determining the selection process. As mentioned above, such consultation procedures are also demanded for the national leg of the nomination procedure. Thus, Amnesty International proposes that "member states put in place consultations and participative nomination processes at the national level, including public calls for nominations and the publication of the CVs of the national candidates."[83] It has to be noted, however,

available at http://assembly.coe.int/Committee/JUR/2008/JUR006E.pdf.

78 For the Bureau's composition, see http://assembly.coe.int/Main.asp?link=/committee/BUR/Role_E.htm.

79 Rule 43(3) Rules of Procedure of the Parliamentary Assembly.

80 An important Permanent Council Resolution on the issue contains the Guidelines for the Participation of Civil Society Organizations in OAS Activities of 1999, CP/RES. 759 (1217/99).

81 Based on resolution AG/RES. 1852 (XXXII-O/02), and AG/RES. 1915 (XXXIII-O/03), "Increasing and strengthening civil society participation in OAS activities", and reaffirmed in resolution AG/RES. 2092 (XXXV-O/05), "Increasing and strengthening civil society participation in OAS activities and in the Summits of the Americas process."

82 CEJIL had earlier proposed strategies for transparency and a consultation process, see CEJIL, Aportes 2005.

83 See CP/CISC/INF.2/08 rev.1, of 13.2.2008, contribution by amnesty international, section IV. Additionally, both Amnesty International and CEJIL call for more women candidates, and CEJIL advocates for "[t]he recognition that said bodies should also reflect the ethnic and cultural diversity of the region in addition to the required geographic diversity." See CP/CISC/INF.2/08 rev.1., contribution by

that the participation of civil society is limited to the usual lobbying tools and cannot generate binding decisions.[84] There is no mandatory consultation process at the national level and, at the international level, it remains at the states' discretion whether they take into account any of the concerns or preferences voiced by civil society.

d. The most interesting mechanisms to consider

In sum, a wide variety of selection processes exist for judges at the national level, ranging from executive appointment models, to co-optation among the judiciary, to models of direct and delegated election. Most countries practice a mixed approach, a fact that should be borne in mind when analyzing international selection mechanisms. Selection processes for commissioners, committee members, and judges at the international level are more homogeneous, at least with respect to the different human rights bodies. A very interesting model is practiced in the Council of Europe, with the election of judges by state representatives being complemented, indeed, preceded by an examination of the application by a Committee of the Parliamentary Assembly.

The second tendency that seems to be worth considering, ideally in conjunction with the idea of a committee, is the prominent role that civil society plays in contributing knowledge on and assessment of candidates. Although there might be a lack of democratic legitimization, civil society could also participate more directly in the decision-making process, especially if participating through elected delegates who can represent a consensus among many NGOs throughout the region.

Diversifying the appointment procedures in the IAS – a proposal

In response to these considerations, this article proposes some concrete thoughts on a review mechanism for candidatures. Ideally, for reasons of efficiency and economy, one mechanism would be used to review both candidates to the Commission and to the Court. This is theoretically possible, since the current appointment mechanisms are very similar. The mechanism would have to take into account the different requirements for the offices of commissioner and judge and

CEJIL, section 1c.

84 For example, the consultation process on the CVs of candidates before the election in the General Assembly of the OAS, see AG/RES. 2166 (XXXVI-O/06), para. 2.

assess the candidatures accordingly. In practice, however, a single mechanism could prove to be problematic because the acceptance of the Court's jurisdiction is not universal throughout the OAS. This fact has to be taken into account when suggesting a review mechanism. The examination will, therefore, first turn to a committee reviewing the candidatures for the Court. By analogy, a similar mechanism would be created for the Commission, with the sole difference that the states participating in the mechanism would be all the OAS member states.

A tripartite advisory committee could guarantee that all candidates for judicial office meet the requirements of expertise and independence. It would assess the CVs of the candidates, request further information if needed, and carry out a personal interview with each candidate. The committee's members could be elected from renowned figures in the Americas and beyond who possess the necessary experience and authority to assess judicial candidatures. One third of the committee's members could be elected by the state representatives to the CAJP, one third by the NGOs accredited before the IAS,[85] and one third by former members of the two inter-American bodies. The three groups bring to bear their specific experience with the system when electing the experts who represent them. Thus, civil society contributes a wide array of lobbying and litigating experience at both the national and international level. States contribute with their responsibility of protection laid down in Art. 2 ACHR. Finally, former commissioners and judges accord experience in making impartial and independent decisions as well as first-hand experience as a commissioner or judge.

Such a tripartite committee could issue, according to previously adopted clear guidelines, a recommendation or discouragement of a candidature with a majority of at least 50% + one of the votes, including at least one or two vote(s) from each of the three groups, depending on the size of the whole committee. Adding the specific requirement for votes from each group, the tripartite committee could ensure that each candidate's expertise and assurance of independence receives at least minimal approval from all three groups, and thus

85 Currently, NGOs are accredited before the OAS as a whole. See, for criteria and registration procedure, Guidelines for the participation of civil society organizations in OAS activities, CP/RES. 759 (1217/99), 15.12.1999. The accreditation could also be authorized by the Court and the Commission together, in order to avoid any influence by states on the question which NGOs should be accepted. I am grateful to Dean Tom Farer for discussing this detail with me. Telephone interview, July 8th, 2008.

does not only run on one group's ticket. If the Committee reaches a *unanimous* decision to reject a candidacy, the proposing state should be required to withdraw the candidate. This state could then be allowed to present another candidate to the committee; after two rejections, this candidature would remain unfilled. Of course, a unanimous *acceptance* of the candidature would not bind the General Assembly in its vote which would still be the decisive step in the decision-making process. Passing through the committee stage would only mean that the candidature is formally consistent with the ACHR requirements. No candidature should be accepted without passing the reviewing process.

The tripartite committee for the screening of Commission candidatures could work similarly. It would specifically have to consider the commitment of candidates to the purpose and aim of the ACHR, as even being completely impartial does not necessarily prevent being "lethargic"[86] with respect to the promotion and protection of human rights. The promotional function of the IACHR shows the importance of the commitment to human rights. Besides attention to the different criteria of office, it is in the composition of the committees where the Court and Commission mechanisms need to diverge. In the case of the Commission committee, the states electing "their" members would be all OAS member states; for the Court committee, however, only those states would vote that have accepted the jurisdiction of the Court, and NGOs from or with activity in these countries.

In both cases, the members of the committee would have to fulfil certain criteria as to their experience and knowledge on the aim and necessities of the IAS. They should be drawn from the national high judiciaries, former judges from other international human rights courts, NGO representatives competent in the area of judicial independence and impartiality, and academics specializing on the issue. Membership in both committees should be encouraged so that upon universal recognition of the Court's jurisdiction, only one committee could continue the work. The committees could be elected for six years, anti-cyclical to the election of commissioners and judges, respectively.

One might object that the establishment and functioning of one to two additional committees are quite cumbersome. However, this need not be the case. The screening process in the committees could

86 Telephone interview with Tom Farer, July 8th, 2008.

be, as far as possible, based on email contact and online voting, so that the process would work with minimal resources. The committees would only have to meet to interview the candidates. Furthermore, the additional resources invested in the screening process would improve the long-term stability of the system and ensure the candidates' suitability for the posts. The committees' members would make sure that the candidates emerging from national nomination procedures meet the high standards for membership in the Commission and Court. This process would be especially important with respect to candidates proposed by governments that did not carry out a meaningful consultation process before nominating their slate of candidates. The committees could also be the bodies that receive comments on the candidates, by larger civil society, individual users of the system, academics, and states. The committees would thus carry out the consultation process the GA resolutions of 2005 and 2006 had entrusted the OAS General Secretariat to initiate.

It may be argued that such committees do not offer a real advantage over the current procedure. One might say that it would be as difficult to guarantee the independence of the committee members as it is to guarantee the independence of commissioners and judges. However, the committees are tripartite and, thus, all the main actors of the system are represented with their interests. In that sense, a possible lack of independence of individual committee members is expected to be balanced out by the voting procedure in approving or discouraging the candidature. The committee would to a certain extent free the Commission and the Court from the possibility of such bias.

The three groups of actors that elect the committee members contribute to legitimize the committees in each group. It is important to note that none of the three groups that elect the committee members are bound to choose only persons from within that constituency. They may also elect other experts who they think can best represent their view in the screening process. So it would be possible, for example, that former judges and commissioners elect to the committees a former member of a UN treaty body or a former rapporteur who excelled due to his or her expertise on the functioning of international human rights monitoring and adjudication.

Some final remarks

It seems important to reiterate that this article does not pretend to comment on the performance, expertise or independence of any current

or former Commissioners and Judges. The contribution is merely an institutional analysis and attempts to transfer the idea and experience of advisory committees in international courts to the Americas, combining it with the richness of NGO participation, the experience of former commissioners and judges, and the traditional authoritative position of states in international law. In that sense, the suggestion wants to call to mind the importance of considering the selection process of commissioners and judges in the IAS reform agenda. Any procedural details of how the committees could work needs to be specified in the light of the experience of similar mechanisms and the IAS as a whole, always however bearing in mind the specific conditions of the western hemisphere. Any facets mentioned are thus to be understood as food for thought and debate among the actors in the system.