



**Discussion Paper for GQUAL Workshop #4:  
*How to improve national nomination procedures to reflect gender parity***

*This discussion paper is adapted from the executive summary of the forthcoming report “Strengthening from Within: Law and Practice in the Selection of Human Rights Judges and Commissioners.” It summarizes the report’s findings and recommendations with respect to national nomination procedures broadly but, in light of this workshop’s particular focus, the section related to gender parity (pgs. 6-8) has been expanded. Notwithstanding the report’s attention to regional human rights courts and commissions, its overall findings should be instructive for the workshop discussion as they link to broader concerns about gender parity across all international courts and tribunals.*

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

This report—a joint publication of the Open Society Justice Initiative and the International Commission of Jurists (ICJ)—is a response to such secrecy. It focuses on nominations at the national level as a critical point of entry for improving the selection process for regional human rights judges and commissioners. In so doing, and based on a wide range of interviews with state representatives, civil society advocates, and former or serving human rights regional judges and commissioners, it provides detailed country profiles of 22 countries in Africa (Algeria, Ethiopia, Ivory Coast, Mozambique, South Africa, Uganda, Uruguay); the Americas (Argentina, Brazil, Chile, Costa Rica, Jamaica, Panama, United States of America); and in the Council of Europe (Armenia, Austria, Greece, Liechtenstein, Moldova, Norway, Slovak Republic, United Kingdom).

Nominations constitute the first in two broad but distinct phases of the appointment process, the second being election by intergovernmental political bodies from among the pool of candidates that states have nominated. In the regional human rights context, these bodies encompass the Parliamentary Assembly of the Council of Europe (PACE), the General Assembly of the Organization of American States (OAS), and the African Union Assembly (AU). Before examining the nomination practices of the 22 countries that are the focus here, the report addresses the international legal framework that governs judicial selections and appointments. This framework is rooted in the international right to a fair trial, which includes not only judicial freedom from political interference, but also “the procedure and qualifications for the appointment of judges,” as well as the fundamental principle of the rule of law. International standards on the



independence of the judiciary—including the UN Basic Principles on the Independence of the Judiciary (endorsed by the UN General Assembly in 1985), the Bangalore Principles of Judicial Conduct (2002) and their Implementation Measures (2010), and the International Law Association’s Burgh House Principles on the International Judiciary (2004)—further detail normative standards relevant to the international bench, including as regards election and nomination procedures.

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

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

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

As affirmed by international standards and jurisprudence, the “overriding consideration” for service on an international bench should be merit-based. A candidate must satisfy the professional qualifications for the position of commission or judge, and should meet high standards of professionalism, integrity, and independence. An essential first step is defining what these qualifications should be for the candidates who are nominated, and what standards they are expected to meet. Among those countries profiled here, member states of the Council of Europe have more consistently elaborated such criteria, following earlier directives from the CoE Parliamentary Assembly and guidelines issued by the Committee of Ministers, but among the member states of the African and Inter-American regional systems, the United States is the only country to have done so (and it has done so only sporadically). Furthermore, to date, neither the AU nor the OAS has issued any directives or guidelines on the nomination of candidates to their regional commissions and courts. In determining what national criteria should guide candidates, some countries surveyed in the report (e.g., Norway, United Kingdom) adopted a useful general rule for nominating international judges: applying the same criteria for



appointment as those for appointment to the country's highest national court. Such practice is the exception rather than the norm, however, even in countries that have legal frameworks in place to guide the appointment process for national justices.

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

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

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

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



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

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

**3. *Most states lack a national legal framework or a transparent procedure for nominating regional human rights commissioners and judges.***

Just as states should ensure that they nominate qualified candidates, they must also ensure that the procedures by which candidates are selected are accessible and transparent. Several countries reviewed in this report follow nominations processes that are notable for their relatively transparent and consultative nature (e.g., Liechtenstein, Mozambique, Uruguay) but only one, the Slovak Republic, has an actual legal framework in place. Furthermore, European countries have a practice of publicly circulating calls for applications; however, the degree to which CoE member states ensure effective, timely dissemination of such calls varies widely. Among countries surveyed in the African and Inter-American regions, almost none have issued open calls for applications and none have a written procedure to guide the nomination process. These findings confirm a broader, enduring criticism that nominations have too often been treated as opportunities to reward political connections. Indeed, in more than half of the countries surveyed in this report, candidates were nominated as a result of having been personally approached by the government, rather than through a transparent and competitive process. Importantly, greater transparency in the nomination process would also help ensure that qualified candidates are not deterred from applying.

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

- **Legal framework.** To ensure fairness and transparency, states should develop a legal framework to govern the selection procedure or, at the very minimum, a fixed set of rules in advance of the nomination process. These should include a transparent and fair process for shortlisting, interview, and selection.



- **Public application calls.** Calls for application should be made public and accessible, and widely disseminated through social media and across academic/legal/civil society networks.
- **Appropriate disclosure.** Once a decision on the nomination(s) has been adopted, states should make public this information by issuing a press release or other form of formal notice. The degree of disclosure of the reasons for the selection, particularly as concerns personal data, interviews with, and assessment of candidates, should be reasonable considering the right of the public to such information and the privacy interests of the individual candidates.

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

Another important element of transparency in the nomination process is the engagement of civil society organizations: ensuring that they are aware when recruitment processes are underway, encouraging them to circulate vacancy notices to their networks, affording them the opportunity to submit information on prospective candidates, and providing them (and other interested citizens) with periodic updates on the selection process. States outlined in this report adhered to these norms to greater or lesser degrees, but the practice was often inconsistent (e.g., the US engaged civil society heavily for the nomination of its candidate in 2013 but did not similarly engage in 2017; similarly, the Argentine government says that it maintains an “informal process of consultation,” but interviews with civil society actors conflicted with that account). And in many cases there was simply no effort to involve or engage most national civil society organizations. Bar associations or academic institutions were most often consulted but practice was inconsistent and sporadic. Several interlocutors noted that this exclusion again reinforced the view that nominations are largely meant to reward political connections, or indeed that the exclusion of non-state actors from the nomination and election process was one way for states to indirectly exert control over the regional human rights institutions.

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

- **Encourage civil society participation.** National civil society engagement in the nomination process should be encouraged by ensuring civil society is made aware when nominations are sought, inviting them to circulate vacancy notices, and consulting with them as appropriate in the review and assessment process.
- **Invite public comments.** States should ensure that a public comment period exists to afford individuals, associations, and civil society organizations reasonable time to submit views about candidates.



- **Provide information about the process.** With due regard for the privacy interests of candidates, information on the status of the nomination process should be made publicly available and shared with civil society organizations.
5. ***Across member states of all regional human rights systems, a lack of gender parity and inclusivity in national selection procedures contributes to a low percentage of women serving as human rights commissioners and judges, and to under-representation among other social groups and geographic regions.***

The value of a diverse bench—one that represents women equally, and also reflects geographical balance and inclusion of various minority groups—also affirms the need for a greater number of national candidates and a more transparent, inclusive nomination process. Enlarging the pool of nominees from which judges and commissioners are elected is also likely to better guard against the selection of unqualified or otherwise unsuitable candidates, while creating greater potential for achieving better diversity on the bench.

The countries highlighted in the report evidence some important efforts at the regional level—notably in the African and European systems—to increase gender parity and equitable geographic representation in regional courts and commissions; however, few have made affirmative efforts to ensure that their national selection procedures are sex-representative. Indeed, only eight of the 22 countries surveyed in the report (approximately one third) have a woman serving on a regional human rights commission or court.<sup>1</sup> These practices underscore larger deficiencies at the regional and international levels. For example, at present only two women serve on the African Court on Human and Peoples’ Rights (18 percent) and one serves on the Inter-American Court of Human Rights (14 percent). And, notwithstanding the representativeness requirements for national judicial lists in the Council of Europe, currently only 15 women serve on the European Court of Human Rights (33 percent).<sup>2</sup> This statistic is broadly consistent with the low number of women serving on a range of international courts and tribunals, a phenomenon that the GQUAL campaign starkly illustrates.

These statistics underscore the need to develop national-level nomination bodies and practices that are themselves representative of and sensitive to sex and gender equality. For example, the Norwegian Ministry of Justice encourages the four institutions from which it appoints members to its national selection committee—the Supreme Court, the Office of the Attorney General, the Norwegian Centre for Human Rights, and the Norwegian Bar Association—to put forward the names of one woman and one man

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<sup>1</sup> Three of these countries are from the African region (Algeria, South Africa, Uganda) and three from the Inter-American region (Costa Rica, Jamaica, Panama); two serve on the European Court of Human Rights (Austria, Slovak Republic). It should be noted that this number will rise in the Inter-American system as of next year, following the election of two female candidates to the Inter-American Commission on Human Rights (from Brazil and Chile) in June 2017.

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



each.<sup>3</sup> Norway's call for applications also encourages candidates from the underrepresented sex to apply (indeed, most recently, the deadline for European Court applications was extended a further three weeks to ensure that applications were received from both female and male candidates).<sup>4</sup>

Gender bias is also a subconscious factor: When it is men who look for candidates to nominate, they invariably look for other male candidates. Judge Bossa of Uganda noted an important counter-example to this unfortunate bias in her own nomination to the African Court on Human and Peoples' Rights. She explained that she became aware of the vacancy through the Association of Female Judges, which then supported her candidacy alongside the government's efforts. Such examples underscore the importance of ensuring that calls for application are widely circulated to national bar and civic associations, who may be better positioned to reach out to underrepresented groups (see further Finding #4 above).

It would appear that concerns about gender disparity have begun to gain some traction at the regional level. The Council of Europe has gender representativeness requirements for its national judicial lists, as do other international courts like the ICC.<sup>5</sup> Furthermore, a resolution passed in 2016 by the Organization of American States emphasizes the importance of "the principles of nondiscrimination, gender equity, and geographic representation." The African Union has gone the furthest of the three systems: Gender quotas are now a requirement for election to the African commission and the court. However, while these provisions are welcome in principle, their implementation—which has been interpreted as requiring immediate, 50/50 representation—has not been without controversy. For instance, due to the overrepresentation of men on the African Court and an insufficient number of candidates overall at the AU's July 2016 elective session, the two female candidates who were elected faced no competition.<sup>6</sup> This lack of competition underscores the point that regional-level representativeness requirements depend upon meritorious, sex-representative practices at the national level. Without such practices, regional quotas may have the perverse effect of resulting in non-competitive elections (see further

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<sup>3</sup> Norway, Note Verbale 2009, p. 4.

<sup>4</sup> Interview with the Permanent Delegation of Norway to the Council of Europe, December 7, 2015.

<sup>5</sup> Among the criteria required by the Rome Statute of the ICC for the election of judges is the principle of "fair representation" of women and men and specific legal expertise on violence against women. See Article 36(8)(a), Rome Statute; see also "Procedure for the nomination and election of judges, the Prosecutor and Deputy Prosecutors of the International Criminal Court," ICC-ASP/3/Res.6.

<sup>6</sup> As the terms of both Hon. Justice Fatsah Ouguergouz (Algeria) and Hon. Justice Duncan Tambala (Malawi) came to an end in September 2016, Hon. Lady Justice Ntyam Ondo Mengue from Cameroon and Hon. Lady Justice Marie Thérèse Mukamulisa from Rwanda were both elected at the elective 24th session of the Executive Council and 26th session of the AU Assembly in June 2016. A similar experience was noted at the elective session of the AU Executive Council in January 2016, which resulted in candidates who were seeking reelection to the African Committee of Experts on the Rights and Welfare of the Child, as well as other first-time nominees, being removed from the final list on the grounds that they were of the "wrong gender and regional representation." For a related critique in the context of the European Court, see David Kosar, "Selecting Strasbourg Judges: A Critique" (arguing that PACE "went from one extreme to another on the gender issue"), in *Selecting Europe's Judges*, p. 130.



Finding #2 above). As one scholar has put it, “non-meritorious selection procedures are the main problem, and the gender imbalance that we see across international courts and tribunals is a manifestation of it.”<sup>7</sup>

Finally, it is important to note that, if judiciaries are to be a reflection of society at large, the need to ensure diversity on the bench extends to characteristics beyond gender. While some states surveyed herein undertook gender-sensitive recruitment practices, there was little to no evidence of efforts to reach out to disadvantaged minorities or collectives, including racial/ethnic minorities, people with a disability, and LGBTI individuals. As Professor Nienke Grossman notes, “[T]he percentage of international court judges from indigenous or poor backgrounds, minority groups within their own countries, or having disability status appears virtually unquestioned and unknown.”<sup>8</sup>

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

- **National-level gender parity.** States should take affirmative steps to ensure gender parity in the nomination of candidates, including through equal representation among national decision-makers in the process (e.g., nominating bodies or review panels), and among the candidates nominated to commissions and courts.
- **Affirmative action.** Calls for applications should explicitly encourage members of the underrepresented sex to apply. States should affirmatively seek to ensure that public calls for application are disseminated widely among underrepresented groups and communities.
- **Outreach.** Member states should take active steps to identify groups underrepresented at the bench of the regional judicial or quasi-judicial body, and to actively encourage their application, including by providing information to relevant groups and associations who may assist with outreach. -

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

In a welcome development, several countries surveyed in the report have established a dedicated working group or focal points at the national level to handle the review of applications for regional human rights courts and commissions. A crucial function that a formal nomination or review body can serve is the practice of interviewing candidates and/or administering written tests. All CoE states considered in this report carried out interviews with prospective nominees as they are required to do, but this practice was only occasional among the other countries profiled herein, with the notable exception of

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<sup>7</sup> Cecily Rose, “Justifying Arguments About Selection Procedures for Judges at International Courts and Tribunals: A Response to Nienke Grossman,” *AJIL Unbound*, p. 86.

<sup>8</sup> Nienke Grossman, “Shattering the Glass Ceiling in International Adjudication,” p. 216.



Mozambique (e.g., the United States in 2012, South Africa in 2006, Costa Rica for UN treaty body nominees but not IACtHR or IACHR candidates). Furthermore, in most cases, these interview panels are not standing entities but created on an ad hoc basis. Also, the independence of several of these bodies (or their members) is not always clear. Panels with members appointed solely by the executive, or who are themselves servants of that institution (e.g., Austria, Greece), have raised questions about sufficient independence. These concerns underscore the value of establishing a legal framework for nominations, and of clarifying both procedural and substantive requirements for service as a human rights judge or commissioner.

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

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

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

PACE's Committee on the Election of Judges has served on several occasions as an essential check on deficient selection procedures among CoE member states; recent examples include Hungary, the Slovak Republic, Azerbaijan, and Albania. The committee's assessment, informed by its ability to interview the candidates directly—and by a membership that includes parliamentarians with some legal background—has also helped ensure that state lists include candidates of relatively equal qualifications and comply with gender representative requirements. Notably, neither of the regional human rights systems in Africa or the Americas exercises any similar review function. While there has been some modest progress in terms of guidelines or resolutions issued by these bodies, such as by the OAS in 2016 on gender equality, and the AU Assembly on the value of encouraging civil society participation in the domestic selection process, the



regrettable lack of any such mechanisms means that there is effectively no oversight beyond that exercised at the national level.

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

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

## **Conclusion**

In providing a detailed analysis of the nomination practices of 22 countries from across the three human rights systems, this report seeks to pierce the secrecy that has long surrounded national-level nomination processes. While there is no perfect national model, the country profiles included herein confirm that, in almost all cases, the standards for nominations that have been set out in a growing body of international norms and jurisprudence have yet to be met. Furthermore, many of the shortcomings identified in these nomination processes—a lack of transparency and independence, limited outreach, a blind eye towards gender, and a refusal to nominate more than one qualified candidate—contribute to the sub-representation of women in international courts and monitoring bodies. Indeed, the selection of candidates at the national level predetermines, to a large extent, the quality and number of candidates running for election at the regional level, both of which are essential to ensuring gender parity.