

**Appointment of Supreme Court Judges in Mexico:**

**Recommendations regarding Transparent Selection Practices  
and Qualifications of Candidates**

**INTRODUCTION**

1. Several actors have raised concerns about judicial independence in Latin America. Within the last fifteen years most of the countries in the region amended their constitutions to improve the selection of judges and the transparency of their selection processes.<sup>1</sup> However, despite constitutional provisions requiring professional and honorable candidates and establishing specific proceedings to appoint judges, judicial independence has not been achieved in the region.<sup>2</sup> Several reports highlight the necessity to re-define and restructure these processes. For instance, a 2007 report by the Due Process of Law Foundation concluded that “the political component embodied in the judicial recruitment system, particularly at the Supreme Court level, contributes significantly to the emergence and persistence of corrupt practices.”<sup>3</sup>
2. Concerns about judicial appointments include undue influence of the President, other high ranking officials, or political parties in the appointment process; lack of independence of the body or process tasked with nominating candidates; lack of a clear process for selecting judges; lack of objective definitions for the qualifications required; lack of guidelines of how to evaluate candidates; lack of transparency and lack of civil society participation.<sup>4</sup> Mexico is not an exception and despite its legal framework for judicial appointments, concerns persist about the politicization of the process and the failure to foster judicial independence in practice.
3. The Mexican Senate will appoint two Supreme Court Judges in November 2015. The foregoing situation urges the necessity for specific proposals to overcome structural problems within the current selection process, namely, the definition and identification of objective criteria to select judges and the implementation of a genuinely transparent public evaluation process.
4. This briefing paper proposes interpretive criteria and transparent practices for the Mexican selection process based on international and national law, standards and practice. Two elements will be highlighted in this briefing paper: transparent selection practices and qualifications of candidates. Our analysis is meant to complement the assessment of the judicial candidates, separately submitted by the Due Process of Law Foundation.

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<sup>1</sup> Luis Pásara & Marco Feoli, *Prevalece la selección política en los nombramientos judiciales en América Latina*, JUSTICIA VIVA (2013).

<sup>2</sup> Linn Hammergren, *Quince años de reforma judicial en América Latina: Dónde estamos y por qué no hemos progresado más*, ORGANIZACIÓN DE LOS ESTADOS AMERICANOS (2012).

<sup>3</sup> DUE PROCESS OF LAW FOUNDATION, *EVALUATION OF JUDICIAL CORRUPTION IN CENTRAL AMERICA AND PANAMA AND THE MECHANISMS TO COMBAT IT* (2007).

<sup>4</sup> Mirte Postema, *La selección transparente y basada en el mérito es esencial para la independencia judicial*, APORTES DPLF (2012).

## **I. LEGAL FRAMEWORK FOR TRANSPARENCY CONCERNING THE SELECTION OF JUDGES**

### **A. Mexican Law**

5. In Mexico, only the Constitution regulates appointments of Supreme Court justices. Article 96 establishes that:

In order to appoint Justices to the Supreme Court of Justice, the President of the Republic shall submit three candidates to the Senate. The latter, upon previous appearance of the individuals proposed, shall designate the one of them, who shall fill the vacancy. The appointment shall be made by the vote of two thirds of the Senators present in the respective session, within a term of thirty days which may not be extended. Should the Senate not decide within such term, the position shall be filled by the individual appointed by the President of the Republic from the aforesaid group of three candidates previously submitted. In the event that the Senate should reject all three candidates proposed, the President of the Republic shall submit a new group of three candidates under the terms of the previous paragraph. Should this second group of candidates be also rejected, the position shall be filled by the individual appointed by the President of the Republic from the aforesaid group of three candidates proposed.

6. Article 17 of the Constitution establishes that federal and local laws shall provide the necessary means to guarantee the independence of the courts and the full enforcement of their judgments.
7. Finally, Article 6 of the Constitution establishes the right to access information regarding legislative and executive activities, including the appointment proceedings.

### **B. International and Regional Law and Standards concerning Transparency in the Selection of Judges**

8. International human rights treaties – in particular, the International Covenant on Civil and Political Rights (ICCPR) and the American Convention on Human Rights (ACHR), and judicial decisions interpreting these treaties – provide the foundation of the obligation on states to ensure a fair and transparent process for selecting and appointing judges. Several authoritative statements of inter-governmental bodies and experts provide precision to these obligations. Following are the most relevant documents issued or endorsed by inter-governmental bodies.
  - a. The *UN Basic Principles on the Independence of the Judiciary*, adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan in 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985.
  - b. Inter-American Democratic Charter, adopted by the General Assembly of the Organization of American States on 11 September 2001.
  - c. Recommendation CM/Rec (2010) 12 on judges: independence, efficiency and responsibilities, adopted by the Committee of Ministers of the Council of Europe on 17 November 2010, referencing Recommendation No. R (94) 12, adopted by the Committee on 13 October 1994.

- d. The *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa* adopted by the African Commission on Human and People`s Rights.
9. Professional associations of judges have issued several important statements:
- d. The *Beijing Statement of Principles of the Independence of the Judiciary* adopted in 1997 by the Law Association for Asia and the Pacific (LAWASIA).
  - e. The *Universal Charter of the Judge*, drafted by judges from around the world and approved by the International Association of Judges on November 17, 1999.
  - f. The *Statute of the Ibero-American Judge*, approved and promulgated by the Sixth Ibero American Summit of Presidents of the Supreme Courts and Tribunals of Justice, held in Santa Cruz de Tenerife, Canarias, in 2001.
  - g. The *Bangalore Principles of Judicial Conduct*, drafted by Chief Justices from common law and civil jurisdictions in 2002, and endorsed by the UN Human Rights Commission in April 2003.
  - h. The Magna Carta of Judges, adopted by the Consultative Council of European Judges in 2010.
  - i. The International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors: Practitioners Guide, International Commission of Jurists, 2012.
10. At the country level, these principles are established in codes of ethics.

#### **INDEPENDENT AND IMPARTIAL TRIBUNALS**

11. Article 8.1 of the American Convention of Human Rights establishes that “every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature.”
12. Under Article 14 of the International Covenant on Civil and Political Rights (ICCPR), anyone subject to a criminal charge is “entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.” Similarly, Principle 10 of the United Nations Basic Principles on the Independence of the Judiciary requires that “Any method of judicial selection shall safeguard against judicial appointments for improper motives. In the selection of judges, there shall be no discrimination against a person on the grounds of race, color, sex, religion, political or other opinion, national or social origin, property, birth or status, except that a requirement, that a candidate for judicial office must be a national of the country concerned, shall not be considered discriminatory.”
13. The Inter-American Court of Human Rights “considers that, under the rule of law, the independence of all judges must be guaranteed and, in particular, that of constitutional judges, owing to the nature of the matters submitted to their consideration.”<sup>5</sup> The court has referenced the European Court of Human Rights statement that the independence of any judge rests upon three pillars: an appropriate appointment process, a fixed term in the position, and a guarantee against external pressures.
14. The Inter-American Court of Human Rights also “has indicated that the scope of real

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<sup>5</sup> Inter-American Court of Human Rights, Case of the Constitutional Court v. Peru, para. 75.

judicial guarantees and of judicial protection for judges must be examined in relation to the standards of judicial independence. In the case of *Reverón Trujillo v. Venezuela*, the Court noted the need for judges to have specific guarantees of independence given that independence of the judiciary is “essential for the exercise of the judicial function.”<sup>6</sup>

15. The UN Human Rights Committee has stated that “[t]he requirement of independence refers, in particular, to the procedure and qualifications for the appointment of judges,” among other matters.<sup>7</sup>
16. Article 7 of the Statute of the Ibero-American-Judge and Principle 2.1 of the Bangalore Principles of Judicial Conduct echo such obligations. According to them, an independent appointment process is a central element of judicial independence.
17. Principles 1 and 4 of the UN Basic Principles on the Independence of the Judiciary establish that:
  1. The independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary. . . .
  4. There shall not be any inappropriate or unwarranted interference with the judicial process, nor shall judicial decisions by the courts be subject to revision. This principle is without prejudice to judicial review or to mitigation or commutation by competent authorities of sentences imposed by the judiciary, in accordance with the law.
18. Article 2 of the Statute of the Ibero-American Judge states that: “The other powers of the State and, generally speaking, all the national or international authorities, institutions and organisms, as well as the various groups and social, economic and political organizations, must respect and make the independence of the Judiciary efficient.”
19. Article 11 of Recommendation No. R (94) 12 of the Committee of Ministers to Member States on the Independence, Efficiency and Role of Judges (1994) establishes that “the external independence of judges is not a prerogative or privilege granted in judges’ own interest but in the interest of the rule of law and of persons seeking and expecting impartial justice. The independence of judges should be regarded as a guarantee of freedom, respect for human rights and impartial application of the law”.<sup>8</sup>

#### **TRANSPARENCY OF JUDICIAL APPOINTMENTS**

20. Judicial appointments must be transparent.<sup>9</sup> An objective and transparent process for the appointment of judges seeks to ensure that the best-qualified candidates are selected, and that such candidates are not indebted to any entity or person in connection to their

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<sup>6</sup> Inter-American Court of Human Rights, *Case of the Constitutional Court v. Ecuador*, para 188.

<sup>7</sup> UN Human Rights Committee, General Observation No. 32, Article 14: Right to a Fair Trial and Equality Before Tribunals and Courts of Justice, CCPR/C/GC/32, August 23, 2007, para. 19.

<sup>8</sup> International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors: Practitioners Guide (Switzerland 2012), International Commission of Jurists.

<sup>9</sup> International Association of Judges, *The Universal Charter of the Judge* (International Association of Judges 1999).

appointment.<sup>10</sup> For a process to be transparent, several requirements must be met. A transparent selection process is one that “clearly identifies the potential candidates pool, is accessible to potential applicants through advertising, publishes criteria and a procedure for its decision-making, accepts applications in a set format, assesses candidates consistently against the criteria, consults with a set range of outside institutions, makes a decision based on an objective assessment of whether the criteria has been met and provides reasons for the decision.”<sup>11</sup>

21. Article 13 of the ACHR and Article 19 of the ICCPR guarantee to “everyone” the right to freedom of opinion and expression, which includes the freedom to seek, receive, and impart information. Principle 16 of the *Beijing Statement of Principles* establishes that states must clearly define and formalize the procedures for appointment of judges and provide information about them to the public.
22. The Inter American Court of Human Rights has established that:

The appointment procedures may not involve unreasonable privileges or advantages. The equal opportunities are guaranteed through an open competition, so that any citizen who can prove that he or she complies with the requirements determined in the law may participate in the selection processes without being subject to arbitrary, unequal treatment. All those who aspire shall compete under equal conditions even regarding those who temporarily occupy the positions, who for having that condition cannot be treated with privileges or advantages, or with disadvantages, with regard to the position occupied by them or the one they aspire to occupy. In synthesis, an open and equal opportunity shall be granted through an ample public announcement, which shall be clear and transparent with regard to the requirements demanded for the fulfillment of the position. Therefore, any restriction that prevents or makes it difficult for anybody who is not part of the administration or any entity, that is, an individual who has not accessed the service, to do so based on their merits is not admissible.<sup>12</sup>
23. Article 4 of the Inter-American Democratic Charter (2001) and Principle A of the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa establish that procedures for appointing members of the judiciary must guarantee the equality of candidates and transparency of the process.
24. Article 9 of the Universal Charter of the Judge demands that each appointment of a judge “be carried out according to objective and transparent criteria based on proper professional qualifications.” It further recommends that an independent body that includes judges carry out selection. Article 9 of the Charter represents the collective thinking of judges from around the world on what a fair and open process of appointment requires.
25. The United Nations Economic and Social Council has defined transparency as “unfettered access by the public to timely and reliable information on decisions and performance in the

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<sup>10</sup> Transparency International, *Global Corruption Report 2007: Corruption in Judicial Systems* (Cambridge, University Press, 2007).

<sup>11</sup> RUTH MACKENZIE, ET AL., *SELECTING INTERNATIONAL JUDGES: PRINCIPLE, PROCESS AND POLITICS* (Oxford University Press, 2010).

<sup>12</sup> Inter-American Court of Human Rights, *Case of Reverón Trujillo v. Venezuela*, para 73.

public sectors.”<sup>13</sup>

### **Illustrative National Practice**

26. When evaluating a candidate in Argentina, the name and *curriculum vitae* of the person or persons being considered for the vacancy must be published in an Official Press Release for three days, in at least two newspapers with nationwide circulation, as well as on the official web page of the Ministry of Justice, Safety and Human Rights.<sup>14</sup> The individuals included in the aforementioned publication must submit an affidavit listing all personal property belonging to them, their spouses, marital property and that of their minor children. They must also submit another affidavit with a list of civil associations or companies of which they are members or have been members during the past eight years, law firms of which they were or are concurrently members, a list of clients or contractors for at least eight years, and any type of commitment that may affect the impartiality of their opinion due to their own activities, those of their spouse, ascendants and descendants in the first degree, in order to allow an objective evaluation of the existence of incompatibilities or conflicts of interest<sup>15</sup>. Interested citizens and nongovernmental organizations may express their points of view or objections with respect to judicial nominees. Additionally, opinions may be requested from professional, legal, academic, social, political and human rights organizations evaluating candidates.<sup>16</sup> The President then is to decide on whether or not to submit the respective nominee, and in the event of a positive decision, the nominee’s file is sent to the Senate.
27. In the United States, the “Appointments Clause” of the Constitution states that the President “shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Judges of the Supreme Court.”<sup>17</sup> The Senate has developed detailed procedures to evaluate a candidate once nominated by the President. The Senate proceedings are public, with live televised hearings and intense media coverage. The judicial nominees are reviewed first by the Senate’s Judiciary Committee. The Committee asks each nominee to complete an extensive questionnaire seeking information on the nominee’s past legal experience, financial holdings, and writings. Most of the answers are made part of the public record.
28. The Chair of the Judiciary Committee invites the American Bar Association to make an evaluation of the professional qualifications of the nominee. In making its recommendation, the ABA reviews the nominee’s personal history and any published judicial opinions, written statements and other writings. The ABA utilizes groups of law professors and others who specialize in the Supreme Court to review the materials. It conducts extensive confidential interviews with judges, lawyers and others who are familiar with the nominee’s experience and character. The ABA then interviews the nominee, providing him or her with an opportunity to rebut any unfavorable information. Finally, the ABA prepares a written report on the nominee, which is sent to the President and to the Judiciary Committee. The ABA rates the nominee as “not qualified,” “qualified,” or “well-qualified.”

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<sup>13</sup> UN Economic and Social Council, *Definition of basic concepts and terminologies in governance and public administration* (New York, 2006).

<sup>14</sup> Decree No. 222/2003 of June 19, 2003, Art. 4

<sup>15</sup> Decree No. 222/2003 of June 19, 2003, Art. 5

<sup>16</sup> Decree No. 222/2003 of June 19, 2003, Art 7

<sup>17</sup> U.S. Const., art II, § 2, cl. 2.

## II: RELEVANT LEGAL FRAMEWORK FOR PROPER PROFESSIONAL QUALIFICATIONS

### A. Mexican Law

30 Article 95 of the Mexican Constitution states:

To be elected Justice of the Nation's Supreme Court of Justice, it is required:

- I. To be a Mexican citizen by birth with legal capacity to exercise his or her political and civil rights;
- II. To be at least thirty five years old on the day of the appointment;
- III. To have held on the day of the appointment, a professional Law degree for a minimum of ten years, issued by an authority or institution legally empowered to do so;
- IV. To have a good reputation and not have been convicted for a crime punishable by imprisonment for more than one year or for a crime such as robbery, fraud, forgery or embezzlement which would seriously undermine the candidate's good reputation in the public's eye;
- V. To have resided within the country for the last two years previous to the day of the appointment; and
- VI. Not to have been State Secretary, Attorney General of the Republic or Attorney General of the Federal District, Senator, Federal Deputy or Governor of a State or Head of Government of the Federal District, in the year previous to the day of the appointment.”

Article 95 also establishes that *preference should be given to those individuals who have served with efficiency, capacity and honesty in the dispensation of justice, or who have distinguished themselves for their honorability, proficiency and good professional record in the exercise of legal activities.*

31 The Mexican Supreme Court has ruled that honesty and integrity, or “*honestidad y honorabilidad*,” is understood in relation to the candidate's reputation, competence and qualifications in the exercise of legal activity.<sup>18</sup>

### B. International and Regional Standards

32 According to the Inter-American Court of Human Rights “all appointment processes shall serve the purpose not only of appointment according to merits and qualifications of those who aspire, but to assurance of equal opportunities in the access to the Judicial Power. Therefore, the judges must be selected exclusively based on their personal merits and professional qualifications, through objective selection and continuance mechanisms that take into account the peculiarity and specific nature of the duties to be fulfilled.”<sup>19</sup>

33 In this regard, the UN Special Rapporteur on the independence of judges and lawyers,

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<sup>18</sup> Mexican Supreme Court of Justice, Tesis: P./J. 103/2000, October 2000.

<sup>19</sup> Inter-American Court of Human Rights, Case of Reverón Trujillo v. Venezuela, para 72.

Leandro Despouy, also emphasized that selection of judges must be based on merit,<sup>20</sup> a key principle also enshrined in Council of Europe Recommendation CM/Rec (2010) 12 and the Statute of the Ibero-American Judge.<sup>21</sup> The Special Rapporteur underscores that competitive examinations<sup>22</sup> conducted at least partly in a written and anonymous manner can serve as an important tool in the selection process.<sup>23</sup> Other procedures may be implemented to enhance public confidence in the nominee's integrity, such as the holding of public hearings at which citizens, non-governmental organizations and other interested parties are able to express their concern or support for particular candidates.<sup>24</sup>

34 Principle 12 of the *Beijing Statement of Principles* establishes that “The mode of appointment of judges must be such as will ensure the appointment of persons who are best qualified for judicial office and safeguard against improper influences to restrict appointments to persons of competence, integrity, and independence.

35 The following section lists several definitions for these terms by national courts, international organizations and academic papers.

### CAPACITY

36 Capacity has two components: professional and individual. With regard to professional legal capacity, the ability to apply the law refers to two distinct capacities: “knowledge of the law, and the capacity to put it into practice.”<sup>25</sup> In this regard, capacity is distinct from the requirement of expertise, which relates to a candidate's professional qualifications in the law. A candidate must demonstrate the capacity to independently assess cases, which implies independent thinking. Secondly, individual capacity refers to the mental and physical capacity of candidates to discharge fully the duties of judicial office.<sup>26</sup>

37 In relation to professional legal capacity, the American Bar Association (ABA) requires that a candidate for judicial office should possess a high degree of legal knowledge and the ability to interpret and apply it to specific factual situations. Legal knowledge and ability are not static qualities, but are acquired and enhanced by experience and the continual learning process involved in keeping abreast of changing concepts through education and study. While a candidate should possess a high level of legal knowledge, and while a ready knowledge of rules of evidence is of importance to judges who will try contested cases, a candidate should not normally be expected to possess expertise in any particular substantive field. More important is the demonstration of an attitude reflective of willingness to learn the new skills and knowledge necessary to improve judicial procedure and administration. A candidate's academic record, participation in continuing legal education forums, legal briefs, other writings, and his or her reputation among judges and professional colleagues

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<sup>20</sup> A/HRC/11/41/Add. 2, para. 99

<sup>21</sup> Art. 11.

<sup>22</sup> CCPR/CO/70/ARG, para. 6.

<sup>23</sup> E/CN.4/2005/60/Add.4 and E/CN.4/2006/52/Add.2.

<sup>24</sup> A/HRC/11/41, para 31.

<sup>25</sup> International Commission of Jurists, *International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors: Practitioners Guide No. 1*, 2012, available at <http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2012/04/International-Principles-on-the-Independence-and-Accountability-of-Judges-Lawyers-and-Procecutors-No.1-Practitioners-Guide-2009-Eng.pdf> p 188.

<sup>26</sup> UNODC, *Commentary On The Bangalore Principles Of Judicial Conduct*, available at [http://www.unodc.org/documents/corruption/publications\\_unodc\\_commentary-e.pdf](http://www.unodc.org/documents/corruption/publications_unodc_commentary-e.pdf)



who have had first-hand dealings with the candidate all are relevant in evaluating knowledge and ability.

- 38 Similarly in France, “professional legal capacity” is understood to refer to the capacity to strictly uphold the rules of law applicable in France, including international norms. Judges are obliged to ensure comprehensive, vigilant oversight when the freedom of an individual is at stake, to pursue continuing education, and to act with diligence within a reasonable time limit, irrespective of any imperfections, contradictions or loopholes in the law.
- 39 With regard to individual capacity, the ABA includes “good health” as a consideration. A past or current disabling condition would warrant further inquiry as to the degree of impairment. Good health includes the absence of erratic or bizarre behavior, which would significantly affect the candidate’s functioning as a fair and impartial judge. Addiction to alcohol or other drugs is also determinative of incapacity to hold judicial office.
- 40 In some countries, including Austria, Hungary and the Netherlands, psychological tests are utilized to measure intelligence, ability to work in teams, capacity to make decisions under stress, capacity to concentrate, and other issues.

### HONESTY AND INTEGRITY

- 41 UN bodies consider that integrity is “a key element [of qualifications] that completes the notion of accountability and transparency. It is defined as incorruptibility, an unimpaired condition or soundness and is synonymous to honesty.”<sup>27</sup> Similarly, the Inter-American Commission has defined *honorabilidad* to mean “recognized integrity”.
- 42 According to an Argentinian association of judges, honesty also implies compliance with the statutory provisions specific to their status and position, including applicable standards and best practices regarding the use of funds. It also implies discernment and caution in social life, choice of relationships, performance of their private activities and participation in public events.<sup>28</sup>
- 43 The UN Special Rapporteur on the independence of judges and lawyers defines morality to be synonymous with a “high level of professional and academic experience and integrity (*honorabilidad*).” When reviewing candidates, the Special Rapporteur cautions against the use of formal and overly general evaluations, and urges an assessment of the candidate that objectively takes into account his or her moral integrity.
- 44 Integrity is the attribute of rectitude and righteousness. A judge should always, not only in the discharge of official duties, act honorably and in a manner befitting the judicial office; be free from fraud, deceit and falsehood; and be good and virtuous in behavior and in character.<sup>29</sup> A judge must maintain high standards in private as well as public life, and display a scrupulous respect for the law.<sup>30</sup> Any previous criminal convictions, motoring offences, or declarations of bankruptcy will normally prevent a candidate from being selected for judicial appointment.<sup>31</sup>

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<sup>27</sup> UN Economic and Social Council; *Definition of basic concepts and terminologies in governance and public administration* (New York, 2006).

<sup>28</sup> ARGENJUS, *Ética e Independencia del Poder Judicial* (2003).

<sup>29</sup> [http://www.unodc.org/documents/corruption/publications\\_unodc\\_commentary-e.pdf](http://www.unodc.org/documents/corruption/publications_unodc_commentary-e.pdf), para 102.

<sup>30</sup> [http://www.unodc.org/documents/corruption/publications\\_unodc\\_commentary-e.pdf](http://www.unodc.org/documents/corruption/publications_unodc_commentary-e.pdf), paras 103 and 108.

<sup>31</sup> Judicial Appointments Commission. *Good Character Guidance*. 23 Apr. 2011, available at [http://www.judicialappointments.gov.uk/static/documents/good\\_character\\_guidance\\_2011.pdf](http://www.judicialappointments.gov.uk/static/documents/good_character_guidance_2011.pdf).

- 45 Principle 10 of the *UN Basic Principles on the Independence of the Judiciary* requires that judges be selected on the basis of integrity and ability and should be screened for improper motives. This key principle is also established by a number of regional standards.<sup>32</sup>

### *Qualifications of Judges on International and Regional Courts*

- 46 According to Article 36(3)(a) of the Rome Statute of the International Criminal Court, judges must be “of high moral character, impartiality and integrity.” In the selection of judges to the ICC, integrity is understood as enhancing public confidence in the judiciary, and should not be reasonably perceived as influencing the performance of their office by, for example, directly or indirectly accepting any gift, advantage, privilege or reward that would compromise their integrity.
- 47 Article 21 of the European Convention on Human Rights sets out general criteria for selection of judges for the European Court of Human Rights, including that judges must be of “high moral character”, and must either possess the qualifications required for appointment to high judicial office or be juris consults of recognized competence. A candidate’s behavior and personal status must be compatible with holding judicial office.

### *National practice*

- 48 In Argentina, Decree No. 222/2003 of June 19, 2003 creates a procedure to ensure the best selection of judges, and sets out requirements that nominees must fulfill related to moral integrity, technical suitability, commitment to democracy and defense of human rights. The President, before nominating a judge to the Supreme Court, conducts an assessment of his or her moral standing, reputation, technical and legal suitability, and record of, and commitment to, the defense of human rights and democratic values.<sup>33</sup> Candidates must produce their professional and academic records, public and private commitments, and fulfillment of their tax obligations.
- 49 In Colombia, every judge is required to present a declaration of assets, and a declaration of economic activities.<sup>34</sup> These are added to the candidate’s résumé. The declaration of economic activities may only be used (and accessed) for issues relating to public service, which may be made public.<sup>35</sup> However, the Constitutional Court has established that the résumés, while kept in public archives, are not deemed public, unless the individual authorizes its disclosure. Moreover, some specific information about public officials, such as the results of their psychological tests, should be kept private, according to the Court.<sup>36</sup>
- 50 In the United States, the ABA’s assessment focuses on the issues of “integrity, professional competence and judicial temperament.” Specifically, when considering “integrity,” the ABA looks to the opinions of the legal community on the nominee’s character and

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<sup>32</sup> Recommendation No. R (94) 12 of the Committee of Ministers of the Council of Europe, principle I (2) (c); Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, para. 4; Beijing Statement of Principles of the Independence of the Judiciary in the Lawasia Region, principles 11, 12 and 15.

<sup>33</sup> Decree No. 222/2003 of June 19, 2003, Art. 2

<sup>34</sup> Act 190 (1995), Anti-Corruption Statute, Art. 15.

<sup>35</sup> Due Process of Law Foundation, A Study on Access to Judicial Information in Latin America, 2007, available at <http://www.dplf.org/uploads/1196288246.pdf>.

<sup>36</sup> 2 Constitutional Court, T-073A/96

reputation, as well as the nominee's industry and diligence. Moreover, the demonstrated financial responsibility of a candidate is considered to be one of the factors in predicting the candidate's ability to serve properly. Whether there have been any unsatisfied judgments or bankruptcy proceedings against a candidate and whether the candidate has promptly and properly filed all required tax returns are pertinent to financial responsibility. Financial responsibility demonstrates self-discipline and the ability to withstand pressures that might compromise independence and impartiality. Consideration should also be given to a candidate's previous public service activities. A broad academic background, supported by varied and extensive non-academic achievements are parts of a candidate's qualifications.

- 51 In the United Kingdom, the Judicial Appointments Commission (JAC) evaluates candidates regarding their "good character."<sup>37</sup> The principles the JAC adopts in determining good character are based on the overriding need to maintain public confidence in the standards of the judiciary, and the fact that public confidence will only be maintained if judicial office holders and those who aspire to such office maintain the highest standards of behavior in their professional, public and private lives. Consideration is given to the existence of any criminal record or investigation, and the financial records of the candidate. Any previous criminal convictions, motoring offences, or declarations of bankruptcy will normally prevent a candidate from being selected for judicial appointment. The JAC considers good character to require that a candidate's tax affairs are in good order. Finally, candidates are also required to declare any factor or event, current or past, which might cause the public to doubt suitability for judicial office or cause embarrassment to the judicial office. Failure to disclose such information may be cause for disqualification. The JAC takes into account the whole picture of a candidate's character when deciding whether to recommend a candidate for judicial appointment. The JAC will not reject a candidate on the basis of issues it considers trivial – but all potentially relevant issues must be declared.
  
- 52 In El Salvador, a candidate must be of well-known morality and competence.<sup>38</sup> Article 263 of the Venezuelan Constitution also requires judicial candidates to possess "*honorabilidad*", as reflected by a good reputation; social, occupational, and professional legitimacy; demonstrable respect for social norms, the legal system and the high values of justice and democracy; and full compliance with their duties to the state and society.<sup>39</sup>
  
- 53 In Guatemala, individuals are barred from serving as public employees or officials if they have been convicted for crimes against public order, have declared bankruptcy, or are addicted to drugs or alcohol.<sup>40</sup> In addition, the Judiciary Act requires that candidates for the position of Justice of the Constitutional Court should have no business that is incompatible with the role, mission and vision of the Court.

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<sup>37</sup> Judicial Appointments Commission. *Good Character Guidance*, 23 Apr. 2011, available at [http://www.judicialappointments.gov.uk/static/documents/good\\_character\\_guidance\\_2011.pdf](http://www.judicialappointments.gov.uk/static/documents/good_character_guidance_2011.pdf).

<sup>38</sup> Artículo 176: "Para ser Magistrado de la Corte Suprema de Justicia se requiere: ser salvadoreño por nacimiento del estado seglar, mayor de cuarenta años, abogado de la República, *de moralidad y competencia notorias*; haber desempeñado un Magistratura de Segunda Instancia durante seis años o una judicatura de Primera Instancia durante nueve años, o haber obtenido la autorización para ejercerla profesión de abogado por o menos diez años antes que su elección; estar en el goce de los derechos de ciudadano y haberlo estado en los seis años anteriores al desempeño de su cargo" (emphasis added)

<sup>39</sup> Delany, B. "¿Cuáles son los requisitos para optar por un cargo de magistrado al TSJ?" 11 Oct. 2011, available at [http://www.noticias24.com/actualidad/noticia/176014/%C2%BFcuales-son-los-requisitos-para-optar-por-un-cargo-de-magistrado-al-tsj/](http://www.noticias24.com/actualidad/noticia/176014/%C2%BFcuales-son-los-requisitos-para-optar-por-un-cargo-de-magistrado-al-ts/)

<sup>40</sup> Public Employees and Officials Probity and Accountability Act of Guatemala.

54 The Dominican Republic's Supreme Court made a notable effort to select judges whose careers reflect moral and professional rectitude. Requiring explicitly grounded judicial decisions has been considered an important tool in avoiding corruption, and decisions that demonstrate the necessary correlation among the evidence, the arguments, the legal basis, and the ruling are thought to be indications that a judge's decision is less likely be the product of outside influences.<sup>41</sup>

### III: RECOMMENDATIONS

55 International, regional and national standards require that judicial selection processes safeguard against improperly motivated judicial appointments. Therefore, nominating bodies should appoint judges through a transparent process according to objective and public criteria based on proper professional qualifications. Such processes should provide qualified applicants access to the process; clearly and publicly establish the criteria and rules by which selections are made; and apply these criteria and rules consistently. The results of the process should be published, including the reasons for the appointments.

56 Procedures for the nomination, selection and appointment of judges should be transparent. Selection processes should be carried out through publically open contests.<sup>42</sup> The evaluation of candidates should include public hearings.<sup>43</sup> Senators should publish the opinions justifying their decision.<sup>44</sup> Senate sessions should be recorded and aired on the national channel (aired live if possible).<sup>45</sup> The Senate should encourage the participation of different groups of society and allow for public screening and participation of the population in the process.

57 Procedures for appointing members of the judiciary should guarantee the equality of opportunities for candidates and transparency of the process.<sup>46</sup>

58 The nomination stage should ensure that the most competent pool of candidates is put forward.<sup>47</sup>

59 Judicial appointments should be based on merit. Selection criteria should be clear and well publicized, allowing candidates, selectors and others to have clear understanding of where the bar for selection lies. Candidates should be required to demonstrate a record of superior competence and integrity.

60 Civil society groups, including professional associations of judges and others familiar with judicial activities, should be consulted on the candidates' merits.<sup>48</sup> Civil society should have access to information about candidates and should have an opportunity to comment on their

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<sup>41</sup> Popkin, M., *Efforts to Enhance Judicial Independence in Latin America: A Comparative Perspective*, Jan. 2002 available at <http://www.dplf.org/uploads/1192572321.pdf>.

<sup>42</sup> Id.

<sup>43</sup> Civiles, et al., *Una Corte para la Democracia*. 2002.

<sup>44</sup> Id.

<sup>45</sup> Id.

<sup>46</sup> Inter-American Commission of Human Rights, *Democracy and Human Rights in Venezuela* (2009).

<sup>47</sup> MACKENZIE, ET AL., *Selecting International Judges: Principle, Process and Politics*. 2010.

<sup>48</sup> International, *Global Corruption Report 2007: Corruption in Judicial Systems*. 2007.

qualifications.<sup>49</sup> NGOs and external institutions should be allowed to present before the Senate appropriate analysis of the suitability of each candidate. A public version of such hearings' minutes should be available to the public (aired live if possible). Nomination/postulation commissions should be obliged to take the views of citizens into account.<sup>50</sup>

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<sup>49</sup> Asociación por los Derechos Civiles, et al., Una Corte para la Democracia (Asociación por los Derechos Civiles, el Centro de Estudios Legales y Sociales (CELS), la Fundación Poder Ciudadano, la Fundación Ambiente y Recursos Naturales (FARN), el Instituto de Estudios Comparados en Ciencias Penales y Sociales (INECIP) y la Unión de Usuarios y Consumidores 2002).

<sup>50</sup> Postema, APOTES DPLF. 2012.