



## Compared practice at the ECtHR and its incorporation into the Rome Statute system

Different perspective, focusing on the comparative practice of the domestic nomination procedure applied at the European Court of Human Rights (ECHR) established by the Council of Europe (CoE), which we have identified as the most relevant benchmark with features of the domestic nominations procedure that could be effectively incorporated- with relevant and necessary modifications- in the Rome Statute system.

There are **two phases** of the election process:

1. **National selection procedure**, in which each member state chooses a list of **three** qualified candidates
2. The **election procedure undertaken by the Parliamentary Assembly** of the Council of Europe, in which the qualifications of the three candidates are assessed before the actual elections.

### **A) National selection procedures – transmission of a list of three candidates**

When selecting their three candidates, states should ensure that their national procedure is fair and transparent. They have to issue **public and open calls for candidates** with the **pre-established merit-based criteria for selecting the candidatures**. For instance, this entails that all candidates must have **appropriate legal qualifications and experience** and an **active knowledge of either English or French** and at least a passive knowledge of the other language.

To help ensure candidates are *fully qualified*, an international panel of **Council of Europe experts** offers governments **confidential advice on potential candidates** before the final list of three is sent to the Assembly.

### **B) Election by the Assembly – choosing one judge from the list**

Once the Assembly receives the list of candidates, a **special committee of parliamentarians with legal experience** assesses the qualifications of the three candidates, interviews each of them and scrutinises their CVs.

The committee also assesses the **fairness of the national selection procedure**. If it finds all the conditions are met, it draws up a recommendation for the Assembly indicating which candidate or candidates it believes are the strongest. If not, it can recommend that a State be asked to submit a new list.

Afterwards, the Assembly – made up of 324 parliamentarians –proceeds to vote on the candidates based on the committee's recommendations in a secret ballot during plenary sessions.

**The Committee of Ministers** of the CoE developed a **detailed guideline** for the Member States, which includes **specific recommendations** on how to proceed with the election of candidates, and also an **explanatory memorandum** containing good practices for each of the action points.

### ***How this would be applicable at the ICC to ensure transparent and merit- based procedure***

Of course, as we have heard in the example provided by Amb. Marti and we will hear during the next intervention, some States already apply these criteria in practice. Nevertheless, we believe that in order to

ensure that such domestic procedures are fully followed by all States, they should be explicitly referred to in the Rome Statute.

To this end, PGA prepared a resolution incorporating these criteria already back in 2019, which we have shared with a number of States. This resolution could be transposed into the Rome Statute based on a procedure that I am going to explain later.

The main points of the resolution make it obligatory for States to:

- publish an **open call for applications** which lay down the criteria of eligibility under List A and/or List B of Article 36 of the Rome Statute;
- This should be followed by **a thorough and transparent technical assessment** as to the qualification and competences of the candidates to serve as senior judges, including their abilities to adjudicate complex crimes.
- A State Party that has fulfilled these conditions may submit a proposed nomination of **three candidates** to the Advisory Committee on Nominations *at least **four months** before* the official term of presentation of judicial candidates. In addition, the selection committee of the State Party would produce a ranking list of the candidates that should be delivered to the Advisory Committee on Nominations.
- **-three candidates' criterion:** depending on the population of the State as it may not be feasible for all states. For instance, States with less than 5 million inhabitants could be exempted from this requirement.
- Once ACN received the list with the ranking, it would assess the candidates' **qualifications** and also the **fairness** of the procedure. As such, it would examine whether the State published an open call for applications and **pre-established merit-based criteria for selecting the candidates**. And whether it **applied such criteria** to the selection process producing an appropriate ranking-list;
- ACN would also examine whether State took all reasonable measures to avoid any conflict of interests for the nomination of the candidates.

Following such review, **the Advisory Committee** could:

- (i) **recognise the validity** of the nomination and **select one** of the three candidates for the vote at the ASP *or*
- (ii) request States to provide **further information** regarding the publicity of the call for applications and the application of the criteria for selection within the ranking-list *or*
- (iii) **reject** the proposed nomination and **request** the State to provide within a specific time-limit, **another nomination** that would fulfil the procedural and the substantive requirements on qualifications of Article 36 of the Rome Statute.

***On procedural aspects:***

The most effective modality of reform entails the modification of relevant provisions of the Rome Statute, relating to these matters in Articles 36 and 44 of the Statute. The institutional nature of these amendments permits the applicability of Article 122 of the Statute, according to which their entry into force will take place only six months after an adoption of such amendments by a qualified majority of two-thirds of the States Parties within the framework of the Assembly of States Parties. Using this procedure would significantly expedite the implementation of these provisions into practice.