

# WORKING PAPERS

## Promoting Quality, Independent and Diverse Treaty Body Membership

CLAIRE CALLEJON  
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# INTRODUCTION

The United Nations (UN) human rights treaty bodies<sup>1</sup> oversee the implementation by States of the international legal obligations they accept when they become a party to the relevant treaties. Their contribution to human rights protection globally is important,<sup>2</sup> although little known to non-expert audiences. Treaty body members are independent experts, i.e. members who serve in a personal capacity, not as State representatives. The 10 treaty bodies are composed of 172 experts in total distributed as follows:

CERD	18 members
CESCR	18 members
CCPR	18 members
CEDAW	23 members
CAT	10 members
CRC	18 members
CMW	14 members
CRPD	18 members
CED	10 members
SPT	25 members
<b>Total</b>	<b>172 members</b>

<sup>1</sup> The system is currently composed of the ten following treaty bodies : Human Rights Committee (CCPR), Committee on Economic Social and Cultural Rights (CESCR), Committee on the Elimination of Racial Discrimination (CERD), Committee on the Elimination of Discrimination against Women (CEDAW), Committee against Torture (CAT), Committee on the Rights of the Child (CRC), Committee on Migrant Workers (CMW), Committee on Enforced Disappearances (CED), Committee on the Rights of Persons with Disabilities (CRPD) and Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (SPT).

<sup>2</sup> See, *inter alia*, Geneva Academy: ‘*Optimizing the UN Treaty Body system*’ (2018), pp. 10-11. The then Secretary-General described the treaty body system as “one of the greatest achievements in the history of the global struggle for human rights”, Report of the High-Commissioner for Human Rights, A/66/860, (2012, Foreword, p. 7.

Quality treaty body membership is key to Committees discharging their mandate effectively and to their credibility to do so. Treaty body members must be perceived as being independent, qualified and representative of the global population for their output to be considered legitimate and authoritative. Yet, a number of experts who sit on treaty bodies do not appear to be independent from their government, the level of expertise is uneven and membership is not as diverse and inclusive as it should be. Therefore, the current selection process of treaty body members does not seem adequate to ensure that the most suitable candidates are elected. This issue has long been discussed in the context of the treaty body strengthening process,<sup>3</sup> including at the Geneva Academy.<sup>4</sup>

This research brief aims to contribute to the current debate, in light of the recent 2020 Treaty Body Review, following the presentation of their report by the co-facilitators<sup>5</sup> and the adoption of General Assembly resolution 75/174 on 16 December 2020. While the first part describes the current situation and challenges, the second part looks for solutions to improve treaty body membership in other systems and reform proposals. On this basis, the third part presents recommendations for a more institutionalized,

<sup>3</sup> See, *inter alia*, reports by the then High-Commissioners for Human Rights, Louise Arbour, Document HRI/MC/2006/2, ‘Concept paper on the High Commissioner’s proposal for a unified standing treaty body’, 22 March 2006, p. 18, and Navi Pillay, Document A/66/860, 26 June 2012, ‘United Nations reform: measures and proposals, Note by the Secretary-General’, from p. 74. See also Dublin Statement (2009), Poznan Statement (2010) and Dublin II Outcome Document (2011), available at: <https://www.ohchr.org/EN/HRBodies/HRTD/Pages/Documents.aspx>.

<sup>4</sup> See general report by the Geneva Academy: ‘*Optimizing the UN Treaty Body system*’ (2018). Specifically regarding TB membership, see In-Brief No. 1 on the ‘*Independence of the Treaty Body Members*’ that examined the treaty body composition as of 2012 and the more recent paper (2018) ‘*Diversity in Membership of the UN Human Rights Treaty Bodies*’ examines the composition of UN human rights treaty bodies (TBs) notably in relation to gender balance, geographical representation, as well as TBs members’ subject-matter expertise and professional background.

open and transparent selection process that aims to ensure quality, independent and diverse treaty body membership, and ultimately enhance human rights protection.

## 1. CURRENT SITUATION AND CHALLENGES

### A. RELEVANT STANDARDS AND CRITERIA

According to the relevant treaty provisions, treaty body members are expected to fulfil a number of requirements:

- They shall be nationals of the States parties to the relevant treaty;
- They shall be elected by states that are party to the instrument in question;<sup>5</sup>
- They shall be persons of high moral character and recognized competence in the field of human rights;<sup>7</sup>
- They shall serve in their personal capacity;
- Consideration shall be given to equitable geographical distribution<sup>8</sup> and to the

<sup>5</sup> Report of the co-facilitators on the process of the consideration of the state of the UN human rights treaty body system. On 8 April 2020, the President of the General Assembly mandated two co-facilitators, namely the Permanent Representatives of Switzerland and Morocco to the United Nations, to hold informal consultations on the state of the system with Member States, OHCHR, the treaty bodies and other stakeholders, including civil society organizations. The report reflects the views expressed during the consultations and presents their findings and recommendations, including on the nomination and selection of treaty body members.

<sup>6</sup> With the exception of CESCR, a subsidiary body of the Economic and Social Council (ECOSOC), whose members are appointed by ECOSOC. ECOSOC Resolution 1985/17.

<sup>7</sup> CRC, CMW and CRPD more specifically require expertise in the fields covered by the Conventions. Article 43(2) CRC; article 72(1)(b) CMW ; article 34(3) CRPD.

<sup>8</sup> Given its specificity, CMW requires that consideration should be given to both States of origin and States of employment. Article 72(2)(a).

representation of different forms of civilizations and legal systems.

In addition to these common elements, some treaties establish various specific requirements regarding the professional background of experts. For example, the International Covenant on Civil and Political Rights (ICCPR), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) and the International Convention for the Protection of All Persons from Enforced Disappearance (CED) envisage the participation of some experts with legal experience<sup>9</sup> and the Optional Protocol to the Convention against Torture (OP-CAT) mentions that members of the Subcommittee on Prevention shall have “proven professional experience in the field of the administration of justice, in particular criminal law, prison or police administration, or in the various fields relevant to the treatment of persons deprived of their liberty.”<sup>10</sup> CAT contemplates the possibility that experts might cumulate mandates by selecting persons who are also members of the Human Rights Committee.<sup>11</sup>

In terms of representation and participation, OP-CAT, CED and the Convention on the Rights of Persons with Disabilities (CRPD) provide that consideration be given to gender balance.<sup>12</sup> Given its specificity, CRPD requires that consideration be given to the participation of experts with disabilities.<sup>13</sup>

With regard to independence and impartiality, the OP-CAT<sup>14</sup> and CED<sup>15</sup> are the only treaties to mention both, while the CERD

<sup>9</sup> Article 28(2) ICCPR ; article 17 CAT ; article 26(1) CED.

<sup>10</sup> Article 5(3) OP-CAT.

<sup>11</sup> Article 17(2) CAT.

<sup>12</sup> Article 5(4) OP-CAT ; article 26(1) CED ; article 34(4) CRPD.

<sup>13</sup> Article 34(4) CRPD.

<sup>14</sup> Article 5(6) OP-CAT.

<sup>15</sup> Article 26(1) CED.

and CMW only mention impartiality<sup>16</sup>. The ICCPR and the rules of procedure of all treaty bodies require that members make a solemn declaration before the official assumption of duties that they will perform their functions impartially and conscientiously.<sup>17</sup> Such solemn declaration or oath is also required from judges of the European Court of Human Rights<sup>18</sup> and the African Court on Human and Peoples' Rights<sup>19</sup> for example. Additionally, some treaty bodies' rules of procedure contain a rule on the independence and impartiality of their members.<sup>20</sup> For its part, in 1990 CERD adopted a short General recommendation on the independence of experts in which the Committee considers that it is "essential to secure full observance of human rights and fundamental freedoms".<sup>21</sup>

Apart from those separate sets of rules, treaty bodies have also taken the common initiative to develop guidelines on the independence and impartiality of their members. The Addis Ababa guidelines were adopted in 2012.<sup>22</sup> Since then, each Committee has considered the guidelines, and either endorsed them or included express reference to them in their rules of procedure or working methods.<sup>23</sup>

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<sup>16</sup> Article 8(1) CERD ; article 72(1)(b) CMW.

<sup>17</sup> Depending on the treaty body, other adverbs include independently, faithfully, honourably, objectively, efficiently. Article 38 ICCPR. See also CERD (rule 14), Human Rights Committee (rule 14), CESCR (rule 13), CEDAW (rule 15), CAT (rule 14), SPT (rule 14), CRC (rule 16), CMW (rule 11), CRPD (rule 14), CED (rule 11).

<sup>18</sup> Rule 3 of the Rules of the Court, 1 January 2020.

<sup>19</sup> Rule 3 of the Rules of Court, 1 September 2020.

<sup>20</sup> CAT Rule 15, SPT Rule 15, CRC Rule 12, CMW Rule 12, CED Rule 10.

<sup>21</sup> CERD, General recommendation IX concerning the application of article 8, paragraph 1, of the Convention.

<sup>22</sup> Guidelines on the independence and impartiality of members of the human rights treaty bodies ("the Addis Ababa guidelines"), Document A/67/222, Annex I.

<sup>23</sup> OHCHR, Mapping the practices of treaty bodies on the Addis Ababa guidelines: key challenges and further steps to operationalize the guidelines, Document HRI/MC/2020/3, <https://undocs.org/HRI/MC/2020/3>.

## B. CURRENT SELECTION PROCESS IN A NUTSHELL

Treaty body members are selected following a two-stage process: nominations at the national level, followed by elections by States parties. Experts serve four-year terms, which are renewable only once for SPT, CED and CRPD. There is no term limit regarding other committees.<sup>24</sup>

### 1. NOMINATIONS

During the first stage, States parties to a specific treaty nominate candidates from among their nationals. Most treaties allow States parties to nominate only one person. However, the ICCPR<sup>25</sup> and OP-CAT<sup>26</sup> allow a State party to nominate up to two candidates. In accordance with relevant standards, candidates are expected to fulfil requirements relating to their nationality, expertise and moral standing.<sup>27</sup> The treaties do not provide a specific procedure that States should follow to seek and nominate candidates. Therefore, States enjoy full discretion. Nominations are compiled by the Secretary-General who submits them for consideration to all the States parties to the concerned treaty. The list, which presents the candidates in alphabetical order and nominating States, is provided to States parties and made available on the web pages of the relevant treaty body.

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<sup>24</sup> OHCHR, Human Rights Treaty Bodies and Elections of Treaty Body Members, A Guide for United Nations Delegated Based in New York, <https://www.ohchr.org/Lists/MeetingsNY/Attachments/38/treaty-body-elections-guide.pdf>.

<sup>25</sup> Article 29 ICCPR.

<sup>26</sup> Article 6 OP-CAT.

<sup>27</sup> See *supra*.

## 2. ELECTIONS

In the second phase, States parties elect treaty body members from the list of nominees compiled by the Secretariat. Elections generally take place at a meeting of States parties in New York, apart from elections to CAT and SPT which are held in Geneva.<sup>28</sup> Half the membership is elected every two years to ensure continuity. Relevant treaty provisions specify that treaty body members must be elected at a meeting of states parties at which at least two-thirds of all States parties are represented (quorum). Elections are conducted through a secret ballot. To be elected, nominees must obtain the largest number of votes and an absolute majority of votes of the representatives of States parties present and voting at the meeting. Treaty provisions also envisage the appointment of a new member if a position becomes vacant before the end of the term.

## C. REMAINING CHALLENGES TO ENSURE SUITABLE MEMBERSHIP

Relevant standards and criteria seem adequate to select the most suitable candidates to serve on treaty bodies. However, the reality is different and treaty body membership raises a number of questions in terms of expertise, independence and diversity among experts. The following analysis is based on current treaty body members' CVs which are publicly available on the web pages of each committee at the time of writing at the end of May 2021.<sup>29</sup> It

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<sup>28</sup> The elections of CRPD take place during a Conference of States parties, a meeting attended by States, CSOs and other stakeholders during which various aspects of the implementation of the Convention are also discussed. Elections to CESCRR take place at a meeting of the ECOSOC. OHCHR, Handbook for Human Rights Treaty Body Members, 2015, [https://www.ohchr.org/Documents/Publications/HR\\_PUB\\_15\\_2\\_TB%20Handbook\\_EN.pdf](https://www.ohchr.org/Documents/Publications/HR_PUB_15_2_TB%20Handbook_EN.pdf), p. 11.

<sup>29</sup> The composition will change following the next cycle of elections in June 2021 (CED, CERD and CMW) and October 2021 (CAT). One CV is missing on the CERD membership web page.

should be noted that CVs do not always follow the same template, some are very short and missing key information, while others have not been updated for several rounds of election.

## 1. EXPERTISE

Relevant treaty provisions specify that experts should be persons of “high moral standing” and “recognized competence in the field of human rights” or “the field covered by the concerned Convention”.<sup>30</sup> This is generally understood as subject-matter expertise, although the fact that “recognized competence” is not clearly defined allows flexibility in the interpretation and evaluation of this requirement. While only ICCPR, CAT and CED require experts to have legal experience,<sup>31</sup> this is an important requirement given treaty bodies' mandate to review the implementation of and interpret international treaties, especially with regard to committees that consider complaints from individuals who allege a violation of their rights.<sup>32</sup>

While the full professional background of current treaty body members is beyond the scope of this brief review,<sup>33</sup> these figures provide a general picture at the time of writing. On paper, based on their CVs, all treaty body members seem to fulfil these broad requirements. Overall, 61 experts out of 172 (35.5%) have an academic professional

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<sup>30</sup> In accordance with the relevant treaty provisions. See *supra*.

<sup>31</sup> Article 28(2) ICCPR ; article 17 CAT ; article 26(1) CED.

<sup>32</sup> Currently, eight treaty bodies out of 10 may receive and examine individual communications: CAT, CERD, CEDAW, CCPR, CRPD, CRC, CESCRR and CED. The ICMW also provides for a similar procedure but this has not yet entered into force. The SPT does not perform the same functions as the other nine treaty bodies as its preventive mandate lies in visits to places of detention and advice given to national preventive mechanisms. See Geneva Academy, ‘Treaty Bodies Individual Communications Procedures: Providing Redress and Reparation to Victims of Human Rights Violations’, May 2019.

<sup>33</sup> Only the current position or the last prior to retirement has been taken into account.

background in the relevant field. Half the CAT membership and 55% of CCPR and CESCR are composed of academics.<sup>34</sup> Besides, in terms of legal experience, apart from academics specializing in law, 24 experts (14%) exercise a legal profession as judges or lawyers. Furthermore, 17 experts (9.9%) work for a ministry, either the ministry of foreign affairs (10) or another ministry (7) relevant to the field covered by the concerned treaty. Although these treaty body members fulfil the expertise requirement, their position may conflict with the independence criteria.<sup>35</sup>

However, it has been observed that, in practice, the quality of expertise is unevenly shared. In particular, observers have noticed that some experts are more familiar with the relevant subject matter than others. Furthermore, some treaty body members are more diligent and more involved than others, for reasons pertaining to their availability, proficiency in UN working languages etc.<sup>36</sup>

## 2. INDEPENDENCE

Unlike intergovernmental bodies such as the United Nations Human Rights Council, treaty bodies are composed of experts who serve in their personal capacity, i.e. not as State representatives and are therefore required to be

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<sup>34</sup> It should be kept in mind that treaty body members work on a part-time, *pro bono* basis, which requires a degree of flexibility and availability. Not all professions accommodate spending several weeks in session, not to mention inter-sessional activities. For example, in 2018, the Human Rights Committee had 15 weeks of meeting time, CESCR 8 weeks and CAT 11 weeks. Document A/74/643, Status of the human rights treaty body system, Report of the Secretary-General, 10 January 2020, Annexes, Annex XIX, Meeting time in 2018-2019.

<sup>35</sup> See *infra*.

<sup>36</sup> Valentina Carraro, 'Electing the experts: Expertise and independence in the UN human rights treaty bodies', *European Journal of International Relations*, Vol. 25(3), 2019, pp. 826-851, from p. 839. See also Geneva Academy, Report on the regional consultation for Asia, 2017, p. 3 and p. 5; Joint NGO submission to the co-facilitators of the General Assembly review of resolution 68/268 on the human rights treaty body system, 2020, p. 3.

independent from their government. Independence of experts is essential to ensure that TB recommendations and findings are authoritative and therefore implemented.<sup>37</sup>

While a majority of experts fulfil this requirement, the selection of members who hold executive posts in their government undermines the credibility of the system as a whole. Currently, treaty body members' CVs that are publicly available on the relevant treaty bodies' webpages indicate that six experts are ambassadors or retired ambassadors, not to mention other diplomats (2) and even a Vice Minister of Foreign Affairs and a Foreign Secretary. Other experts work for different ministries in various capacity, notably as legal advisers.

The treaty body Chairpersons' repeated recommendation that "States should refrain from nominating or electing persons to the treaty bodies whose independence and impartiality was compromised by the nature of their affiliation with the executive branch of the State",<sup>38</sup> has obviously not been heeded.

## 3. DIVERSITY

According to the relevant treaty provisions,<sup>39</sup> diversity in treaty body membership can be assessed on the basis of gender balance<sup>40</sup> and geographic distribution of experts notably. The

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<sup>37</sup> See, *inter alia*, Navi Pillay report, Document A/66/860, 26 June 2012, *op. cit.*, p. 74: "the degree of authority and respect that treaty body recommendations demand is contingent on the level of actual and perceived independence and impartiality of treaty body members."

<sup>38</sup> OHCHR, Mapping the practices of treaty bodies on the Addis Ababa guidelines: key challenges and further steps to operationalize the guidelines, *op. cit.*, para. 8.

<sup>39</sup> See *supra*. All relevant treaties provide that consideration shall be given to equitable geographical distribution and to the representation of different forms of civilizations and legal systems. See also General Assembly resolution 68/268, para. 13; co-facilitators' report, para. 30.

<sup>40</sup> Article 5(4) OP-CAT; article 26(1) CED ; article 34(4) CRPD.

representation of persons with disabilities is another indicator.<sup>41</sup> The Committee on the Rights of Persons with Disabilities is the only treaty body that includes experts with disabilities in its membership, in accordance with the Convention (article 34(4)). No information is publicly available on whether persons with disabilities sit on other committees.

Although age is not mentioned in the relevant standards, the absence of any age limit to sit on treaty bodies, combined with the requirement to be available several weeks a year<sup>42</sup> and the fact that experts work on a *pro bono* basis, means that a number of treaty body members are retired and over 75 years of age.<sup>43</sup> While age does not necessarily affect the quality of membership and experience is invaluable, observers remember several experts struggling with the intensity of the sessions in Geneva.

In terms of gender balance, the current total numbers show almost equal representation of male and female members among treaty bodies, with 88 men and 84 women. However, these figures are misleading as gender parity can only be found in two committees, CRC and SPT, which has been the case for several rounds of elections.<sup>44</sup> At the other end of the spectrum, CEDAW comprises only one man and 22 women and has never had more than two male

members among its members. CMW is very imbalanced in favour of men, with only two women among its 14 members.

#### Gender representation in treaty bodies as of May 2021

Treaty body	No. of members	No. of male members (%)	No. of female members (%)
CERD	18	10 (55%)	8 (45%)
CESCR	18	13 (72%)	5 (28%)
CCPR	18	11 (61%)	7 (39%)
CEDAW	23	1 (4%)	22 (96%)
CAT	10	7 (70%)	3 (30%)
SPT	25	12 (48%)	13 (52%)
CRC	18	9 (50%)	9 (50%)
CMW	14	12 (86%)	2 (14%)
CED	10	7 (70%)	3 (30%)
CRPD	18	6 (33%)	12 (67%)
<b>TOTAL</b>	<b>172</b>	<b>88 (51%)</b>	<b>84 (49%)</b>

These figures reveal a diverse picture, with overall gender parity but only two gender balanced committees (CRC and SPT) and two very imbalanced treaty bodies: one in favour of women (CEDAW) and the other in favour of men (CMW).

Regarding geographic distribution,<sup>45</sup> as of May 2021, the Asian Group is the most represented with 27% of experts, followed by the Western Group (22%), the Latin America and Caribbean Group (20%), the Asia-Pacific Group (17%) and finally the Eastern European Group (13%). Thus the two most represented regional groups have exchanged positions, with more members now coming from the African Group than the Western Group. Apart from this evolution, the other three regional groups' representation remains largely similar to what it was in 2015.<sup>46</sup>

<sup>41</sup> Article 34(4) CRPD. See also General Assembly resolution 68/268, para. 13; co-facilitators' report, para. 30.

<sup>42</sup> For example, in 2018, the Human Rights Committee had 15 weeks of meeting time, CESCR 8 weeks and CAT 11 weeks. Document A/74/643, Status of the human rights treaty body system, Report of the Secretary-General, 10 January 2020, Annexes, Annex XIX, Meeting time in 2018-2019

<sup>43</sup> At the end of May 2021, the average of treaty body experts is 58.43 years, with 16 experts aged 70-79 years and 2 members over 80 years of age. The vast majority of experts is aged 40-69: 28 experts aged 40-49; 41 experts aged 50-59 and 71 experts aged 60-69. NB: two CVs are missing and the date of birth is missing from seven CVs on the committees' web pages.

<sup>44</sup> See Geneva Academy, *Diversity in Membership of the UN Human Rights Treaty Bodies*, *op.cit.* See also Anna-Karin Holmlund, 'Gender parity in the United Nations Treaty Bodies: a historical overview', 2018.

<sup>45</sup> According to the five UN regional groups of Member States: <https://www.un.org/dgacm/en/content/regional-groups>.

<sup>46</sup> Promotion of equitable geographical distribution in the membership of the human rights treaty bodies, Report of the Secretary-General, A/70/257, para. 22.



### Geographic distribution in treaty bodies as of May 2021

Treaty body	No. of members	Africa	Asia-Pacific	Eastern Europe	Latin America and the Caribbean	Western Europe and Others
CERD	18	6 (33%)	4 (22%)	1 (6%)	3 (17%)	4 (22%)
CESCR	18	4 (22%)	4 (22%)	3 (17%)	4 (22%)	3 (17%)
CCPR	18	6 (33%)	2 (22%)	2 (22%)	3 (17%)	5 (28%)
CEDAW	23	5 (22%)	6 (26%)	4 (17%)	4 (17%)	4 (17%)
CAT	10	1 (10%)	1 (10%)	3 (30%)	2 (20%)	3 (30%)
SPT	25	5 (20%)	2 (8%)	4 (16%)	6 (24%)	8 (32%)
CRC	18	7 (39%)	3 (17%)	2 (22%)	3 (17%)	3 (17%)
CMW	14	6 (43%)	2 (14%)	2 (14%)	3 (21%)	1 (7%)
CED	10	3 (30%)	1 (10%)	1 (10%)	2 (20%)	3 (30%)
CRPD	18	4 (22%)	5 (28%)	1 (6%)	5 (28%)	3 (17%)
<b>TOTAL</b>	<b>172</b>	<b>47 (27%)</b>	<b>30 (17%)</b>	<b>23 (13%)</b>	<b>35 (20%)</b>	<b>37 (22%)</b>

The overall geographical distribution masks greater disparities in the membership of each treaty body. Experts from the African Group represent 43% of the CMW membership and 39% of the CRC. On the other hand, the Eastern European Group is underrepresented in all treaty bodies, with only one member sitting on the CERD, CED and CRPD.

This brief analysis shows that despite existing rules relating to expertise, independence and diversity in treaty body membership, challenges remain on all fronts. One of the reasons for the current situation is generally attributed to the current selection process and the lack of procedural guarantees to oversee compliance with existing standards and requirements.

#### **4. GAP IN THE SELECTION PROCESS: NO TRANSPARENT ASSESSMENT OF CANDIDATES**

While relevant standards promote competent, independent and inclusive membership, ultimately, the selection outcome lies with States parties who nominate and elect treaty body members. Therefore, the main challenge is the current selection process, which is proving inadequate at selecting the most suitable experts to sit on treaty bodies. Currently, open and competitive national policies or processes to select candidates before they are nominated for election remain the exception.<sup>47</sup> Furthermore, once candidates are nominated by States parties, the election phase

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<sup>47</sup> Status of the human rights treaty body system, Third biennial report of the Secretary-General, A/74/643, para. 59. See also OHCHR, Mapping the practices of treaty bodies on the Addis Ababa guidelines, HRI/MC/2020/3, para. 13: “There is currently no transparent process to evaluate the merits of the nominated candidates. As the need to safeguard the perception of independence begins with the nomination process at the national level, the absence of a process, in particular on the issue of whether or not a candidate meets the criteria of “independence” before being nominated, remains a significant challenge.” This is also the case regarding other membership criteria – not only independence.

lacks formal mechanisms that would provide for a transparent, merit-based assessment of nominees to ensure that they fulfil the requisite criteria.

Additionally, informal practices affect the outcome of the election. Firstly, the practice of clean slates, i.e. when there are as many candidates as the number of seats to be filled, means that there is no competition within regional groups and no choice for election. Secondly, States parties commonly engage in vote trading, including across mechanisms outside the human rights field, which also distorts the election process.

## **5. LOOKING FOR SOLUTIONS TO IMPROVE MEMBERSHIP**

To improve treaty body membership, this section looks for solutions in the selection processes found in other systems. A number of recent reform proposals addressing this issue were also presented in the context of the 2020 Treaty Body Review.

### **A. SELECTION PROCESSES IN OTHER COURTS AND MONITORING BODIES**

#### **1. NOMINATION PHASE: MOSTLY INFORMAL PROCESSES**

Regional human rights systems share common features regarding the selection process of their judges and commissioners and follow the same two stages as the selection of treaty body members. During the first phase, States parties to the founding treaty, i.e. the American Convention on Human Rights, the African Charter on Human and Peoples’ Rights and the European Convention on Human Rights, nominate candidates at the national level. The second phase is the election by intergovernmental bodies, namely the General

Assembly of the Organization of American States (OAS), the African Union Assembly and the Parliamentary Assembly of the Council of Europe, respectively. The process for selecting members of the European Committee of Social Rights is similar. States parties to the European Social Charter nominate candidates and the Committee of Ministers elects members from among the pool of candidates that States have nominated.

As observed concerning treaty body candidates, most States lack a formal and transparent procedure for nominating regional commissioners and judges.<sup>48</sup> Furthermore, while public scrutiny is encouraged through consultation with civil society, this process is generally informal as opposed to being institutionalized. Similarly, the involvement of a screening body in the few States where they exist seems to happen on an *ad hoc* basis.<sup>49</sup> It should also be noted that, of the three regional systems, the European is the only one where States are required to nominate three candidates, thus ensuring competitive elections.<sup>50</sup>

As is the case for regional human rights systems and treaty bodies, candidates for election as judges of the International Criminal Court (ICC) are nominated by States parties<sup>51</sup>

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<sup>48</sup> Open Justice Initiative and International Commission of Jurists, 'Strengthening from Within, Law and practice in the Selection of Human Rights Judges and Commissioners', 2017, pp. 16-17.

<sup>49</sup> These bodies generally consist of interview panels that are created *Id.*, p. 19.

<sup>50</sup> See <https://pace.coe.int/en/pages/committee-30/AS-CDH>. The Parliamentary Assembly expects all three of the candidates put forward by a State for election to the post of judge on the European Court of Human Rights to be fully qualified, so that it is given a proper choice in the election. If it considers otherwise, the Assembly can decide to reject a list of candidates, and request a new one.

<sup>51</sup> Article 36(4)(a) of the Rome Statute: "Nominations of candidates for election to the Court may be made by any State Party to this Statute, and shall be made either: (i) By the procedure for the nomination of candidates for appointment to the highest judicial offices in the State in question; or (ii) By the procedure provided for the nomination of candidates for the International Court of Justice in the Statute of that Court."

following a process that in practice is far from transparent and competitive at the national level.

A different example of selection of independent experts at the global level is the process for appointing Special Procedures of the United Nations Human Rights Council (HRC). Unlike treaty bodies, the HRC is a Charter-based body composed of 47 Member States. Special Procedures are subsidiary bodies, appointed following approval by the HRC, which membership is renewed every three years.<sup>52</sup> Calls for applications are issued by the Secretariat and publicized on the Office of the High Commissioner for Human Rights (OHCHR) website.<sup>53</sup> Unlike previously mentioned examples whereby States parties to the relevant treaty nominate candidates, candidates to Special Procedures mandates can self-nominate or be nominated by a third-party. This formal process ensures a wide pool of candidates. In terms of criteria,<sup>54</sup> the HRC adopted common technical and objective requirements for candidates.<sup>55</sup> Furthermore,

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<sup>52</sup> Members of the Council are elected by the General Assembly. Member States serve for a period of three years and are not eligible for immediate re-election after serving two consecutive terms.

<sup>53</sup> See, for example, regarding the latest vacancies: <https://www.ohchr.org/EN/HRBodies/HRC/SP/Pages/HRC47.aspx>.

<sup>54</sup> According to the annex to Human Rights Council resolution 5/1, the following general criteria will be of paramount importance while nominating, selecting and appointing mandate holders: (a) expertise; (b) experience in the field of the mandate; (c) independence; (d) impartiality; (e) personal integrity and (f) objectivity. Due consideration should be given to gender balance and equitable geographic representation, as well as to an appropriate representation of different legal systems. Eligible candidates are highly qualified individuals who possess established competence, relevant expertise and proven work experience in the field of human rights.

<sup>55</sup> In its decision 6/102 of 27 September 2007, the Council adopted technical and objective requirements for candidates eligible for mandate holders:

1. *Qualifications*: relevant educational qualifications or equivalent professional experience in the field of human rights; good communication skills in one of the official languages of the United Nations.
2. *Relevant expertise*: knowledge of international human

clarification regarding the requisite professional experience is provided on the website.<sup>56</sup>

## 2. ELECTION PHASE: DIFFERENT SCREENING MODELS

### a. Regional Human Rights Systems

Concerning the election phase, the European process is also the only of the regional systems that provides for an advisory body to screen nominees before the election. The Committee on the Election of Judges to the European Court of Human Rights interviews each candidate, reviews their CVs to assess whether they are qualified and makes recommendations to the electing body, i.e. the Parliamentary Assembly.<sup>57</sup> Its members are appointed by the Bureau of the Assembly on the basis of proposals by the Assembly's five political groups. The Chairperson of the Assembly's Committee on Legal Affairs and Human Rights and the Assembly's Chairperson of the Committee on Equality and Non-Discrimination are *ex*

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rights instruments, norms and principles; as well as knowledge of institutional mandates related to the United Nations or other international or regional organizations' work in the area of human rights; proven work experience in the field of human rights.

3. *Established competence*: nationally, regionally or internationally recognized competence related to human rights.

4. *Flexibility/readiness and availability of time* to perform effectively the functions of the mandate and to respond to its requirements, including attending Human Rights Council sessions.

<sup>56</sup> "Extensive professional experience in the field of human rights " means an "advanced university degree such as Masters or equivalent (minimum duration of 4 years in full-time study), and at least 7 years of relevant professional experience in the field of human rights. A minimum of 11 years of relevant professional experience in the field of human rights may be accepted in lieu of the advanced university degree." See <https://www.ohchr.org/EN/HRBodies/HRC/SP/Pages/BasicInformationSelectionIndependentExperts.aspx>.

<sup>57</sup> PACE, Procedure for the election of judges to the European Court of Human Rights, SG-AS (2021) 01rev, 5 May 2021.

*officio* members. The parliamentary committee members must have legal experience.<sup>58</sup>

In the African and Inter-American systems, Civil Society Organization (CSO) engagement is encouraged but informal. For example, CSOs have organized a dialogue and convened an independent panel of experts to assess candidates to the Inter-American Commission and Court.<sup>59</sup> However, CSO involvement in the process is not institutionalized but organized on an *ad hoc* basis. To ensure public scrutiny, candidates' CVs are published on the OAS General Assembly Preparatory Committee webpage.<sup>60</sup>

### b. ICC Double Independent Screening

At the global level, two processes for selecting members of international bodies were mentioned by stakeholders during the 2020 treaty body review as interesting examples to ensure quality membership.<sup>61</sup> The first is the process for selecting judges to the International Criminal Court, which entails a double independent screening. Like treaty body members, judges on the ICC are elected by the Assembly of States parties.<sup>62</sup> To inform States parties' decisions, the Coalition for the ICC, a global civil society network, set up an Independent Panel on ICC Judicial Elections in 2010 to assess candidates. The Panel assesses candidates based on their answers to a standard

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<sup>58</sup> See <https://pace.coe.int/en/pages/committee-30/AS-CDH>.

<sup>59</sup> See, for example, Final Report of the Independent Panel for the 2017 Election of Commissioners to the Inter-American Commission on Human Rights and Final Report of the Independent Panel for the 2018 Election of Judge to the Inter-American Court of Human Rights. See also <https://ijrcenter.org/wp-content/uploads/2019/06/IA-System-2019-Elections-two-page-1.pdf>.

<sup>60</sup> <https://ijrcenter.org/wp-content/uploads/2020/07/IACHR-EC-mini-guide-final.pdf>.

<sup>61</sup> See, *inter alia*, Geneva Academy, 'Optimizing the UN Treaty Body system', pp. 38-39.

<sup>62</sup> [https://asp.icc-cpi.int/iccdocs/asp\\_docs/Publications/Compendium/Resolution-ElectionJudges-ENG.pdf](https://asp.icc-cpi.int/iccdocs/asp_docs/Publications/Compendium/Resolution-ElectionJudges-ENG.pdf).

questionnaire,<sup>63</sup> their CVs and live discussions, which are recorded and publicly available.<sup>64</sup> Since the 2020 election round, public hearings have been institutionalized as part of the formal selection procedure for judges. The Assembly of State parties organizes the public roundtables, with the participation of civil society.<sup>65</sup>

This CSO screening mechanism is completed by the Advisory Committee on nominations, which creation is provided by the Rome Statute.<sup>66</sup> Its first members were elected in 2012 and its mandate is “to facilitate that the highest-qualified individuals are appointed as judges” of the ICC.<sup>67</sup> To that effect, the Committee has developed a common questionnaire for all nominees and conducts interviews to assess their merits. The Committee’s reports containing its evaluation of candidates are then formally transmitted to the Assembly of States parties. The Advisory Committee is composed of nine members who are nationals of States parties “drawn from eminent interested and willing persons of a high moral character, who have established competence and experience in criminal or international law”.<sup>68</sup> In general, since its creation, the Advisory Committee has been mostly composed of former judges.

In practice, both assessing bodies function in parallel, with no hierarchy between the two. States parties are provided with both evaluations prior to the election. This double

independent screening process ensures transparent and competent assessment of candidates.

### c. HRC Special Procedures Consultative Group

In the context of the 2020 treaty body review, stakeholders also mentioned the process for selecting the UN Human Rights Council Special Procedures mandate-holders as another model to assist States in appointing the best candidates. As in other selection processes, an advisory body screens shortlisted candidates. The Consultative Group is institutionalized and composed of five ambassadors nominated by the five UN regional groups.<sup>69</sup> The Consultative Group conducts telephone interviews with shortlisted candidates, reviews their application forms and motivation letters and makes recommendations to the President of the HRC through a public report. The President selects one candidate from a list of five<sup>70</sup> and candidates are appointed following approval by the HRC. Unlike other advisory bodies, members of the Consultative Group are not independent from their governments as they are ambassadors.

## B. RECENT REFORM PROPOSALS

General Assembly resolution 68/268 launched the latest major reform initiative in 2014 and set a deadline no later than 2020 to review the treaty body strengthening process.<sup>71</sup>

<sup>63</sup> For the latest round of election in 2020, see <https://www.coalitionfortheicc.org/icc-judicial-elections-2020>.

<sup>64</sup> See discussions organized with candidates to the 2017 elections: <https://www.coalitionfortheicc.org/webcast-ICC-judicial-elections-panel-2017.y>

<sup>65</sup> See [https://www.coalitionfortheicc.org/Judicial\\_Roundtables\\_2020](https://www.coalitionfortheicc.org/Judicial_Roundtables_2020).

<sup>66</sup> Article 36(4)(c).

<sup>67</sup> Terms of reference of the Advisory Committee on nominations of judges of the ICC, 6 March 2020.

<sup>68</sup> *Id.*, paras 1-3. To guarantee independent assessment of candidacies, the Terms of reference provide that “[a]ny member who is a national of a State Party shall not participate in the assessment of candidates nominated by that State Party”, para. 3.

<sup>69</sup> As mentioned above, Special Procedures are subsidiary of the Charter-based Human Rights Council, unlike treaty bodies. Therefore, there is no assembly of States parties.

<sup>70</sup> Candidates are ranked from 1 (best candidate) to 5.

<sup>71</sup> Resolution 68/268 addresses treaty body membership requirements and selection process in the following terms:

“10. Encourages States parties to continue their efforts to nominate experts of high moral standing and recognized competence and experience in the field of human rights, in particular in the field covered by the relevant treaty, and, as appropriate, to consider adopting national policies or processes with respect to the nomination of experts as candidates for human rights treaty bodies”. (...)

“12. Requests the Office of the United Nations High Commissioner for Human Rights to include in the

In response, contributions aiming to improve membership were submitted by a variety of stakeholders. Unsurprisingly, most reform proposals concentrate on the selection process.

## 1. FORMAL, OPEN AND TRANSPARENT NOMINATION PROCESSES

With regard to nominations at the national level, the main proposal involves the adoption of more formal, open and transparent processes by States parties, as encouraged by the General Assembly in its resolution 68/268.<sup>72</sup> To ensure that the process is competitive, States parties could issue a call for applications that would be widely disseminated. Additionally, open and transparent processes would enable public scrutiny, thus promoting the nomination of suitable candidates, i.e. candidates that fulfil all relevant requirements in terms of competence, independence and high moral standing.

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documentation prepared for elections of members of human rights treaty bodies at meetings of States parties an information note on the current situation with respect to the composition of the treaty body, reflecting the balance in terms of geographical distribution and gender representation, professional background and different legal systems, as well as the tenure of current members;

13. Encourages States parties, in the election of treaty body experts, to give due consideration, as stipulated in the relevant human rights instruments, to equitable geographical distribution, the representation of the different forms of civilization and the principal legal systems, balanced gender representation and the participation of experts with disabilities in the membership of the human rights treaty bodies”.

<sup>72</sup> See, *inter alia*, Geneva Academy, ‘*Optimizing the UN Treaty Body system*’, pp. 38-39; Joint NGO submission to the co-facilitators of the General Assembly review of resolution 68/268 on the human rights treaty body system, 2020, p. 12; Women at the table, Best practices for election of members international & regional treaty bodies, pp. 4-5; TB-Net Statement on the 31st meeting of Chairpersons of the Human Rights Treaty Bodies, p. 2; ‘TB-NET Event on Treaty Body Elections, Summary report’, 10 December 2018.

## 2. EASILY ACCESSIBLE INFORMATION ON CANDIDATES AND CURRENT MEMBERSHIP

Regarding the election phase, proposals encourage increased transparency by making the relevant information on current treaty body membership and on nominees widely available, for example via a digital electoral platform.<sup>73</sup> A group of NGOs has already developed a public, digital platform that provides relevant information on candidates and that is tailored to the relevant treaty provisions.<sup>74</sup> A similar tool could be integrated to the treaty body website to assist States in identifying the best candidates for election.

To achieve balanced and inclusive membership, it has been proposed to assist States by providing information on the current group composition and take into account any gaps in expertise, geographical distribution and gender balance.<sup>75</sup> Currently, the relevant information is presented in different formats and locations depending on the Committee. For example, with regard to the upcoming 2021 elections of members of CED, CERD, CMW and CAT, the CED ‘Elections’ webpage is the only one that clearly indicates the current gender and geographic composition of the Committee.<sup>76</sup>

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<sup>73</sup> See Co-facilitators report: “the co-facilitators believe that further availability of information on all candidates to the treaty bodies would improve the current process of the nomination and election of experts. Therefore, the co-facilitators recommend to consider the value of an open and transparent web-based electoral platform to evaluate the merits of treaty body candidates and to ensure that due consideration is given to independence, impartiality as well as diversity in terms of gender, geography, background, expertise, representation of different forms of civilizations and principal legal systems, as well as the participation of persons with disabilities.”

<sup>74</sup> <http://www.untbelections.org/>.

<sup>75</sup> TB-Net Statement on the 31st meeting of Chairpersons of the Human Rights Treaty Bodies, p. 2.

<sup>76</sup> <https://www.ohchr.org/EN/HRBodies/CED/Pages/Elections2021.aspx>.

### 3. CANDIDATE SCREENING BY AN ADVISORY BODY

Taking a step further, some stakeholders promote the creation of an advisory body that would assess candidates' merits based on the existing standards and requirements. This new stage of the selection process would inform the decision of States parties when electing treaty body members, based on the examples of the European Court of Human Rights, the ICC or the Special Procedures of the UN Human Rights Council.<sup>77</sup> One of the proposals put forward consists of a draft optional protocol to the UN human rights treaties that would establish an advisory committee on nominations of experts.<sup>78</sup>

## 4. TOWARDS A MORE INSTITUTIONALIZED AND TRANSPARENT SELECTION PROCESS

Two main lessons can be drawn from this brief and limited review of selection processes in other systems, which have been translated into recent reform proposals. The first is that open, formal and transparent processes for nominating candidates at the national level remain the exception. States parties are free to organize the nomination phase of the process as they see fit. This lack of formality and transparency does not provide the guarantees necessary to ensure that the best candidates are nominated by States parties. The second main

<sup>77</sup> See, *inter alia*, Geneva Academy, 'Optimizing the UN Treaty Body system', pp. 38-39.

<sup>78</sup> Santiago Corcuera, Letter to the co-facilitators and draft optional protocol available on the co-facilitation process web page under 'UN Experts': <https://www.ohchr.org/EN/HRBodies/HRTD/Pages/Co-Facilitation-Process.aspx>. Santiago Corcuera is a former treaty body member, among other UN human rights mandates.

lesson is that screening mechanisms to review nominations are instrumental in assisting States parties to elect the most suitable candidates.

Another aspect relates to the availability and accessibility of information on nominees and the current composition of the concerned body to enable not only selection of the best candidates, but also to achieve balanced membership. Informally, Non-Governmental Organizations (NGOs) that regularly engage with the treaty body system have already taken the initiative to set up a digital platform on elections to publicize candidates' profiles and inform the selection process.<sup>79</sup> This existing practice provides a good example that can be built upon.

Based on this analysis, it seems necessary to fill the gap in the selection process and establish procedural guarantees to oversee compliance of prospective candidates with existing standards and requirements. Therefore, the following recommendations can be made:

#### *Nominations*

- Continue to encourage States parties to develop open, transparent and competitive nomination processes at the national level to ensure public scrutiny of candidates;
- Calls for applications should be publicly accessible and widely disseminated across relevant networks (academia, legal profession, CSOs);
- Ensure candidates meet criteria laid out in relevant standards in terms of competence, independence and high moral standing;
- Formalize engagement with CSOs to enhance transparency and public scrutiny.

#### *Elections*

- Encourage States parties to vote only for candidates who meet all the requirements for membership;

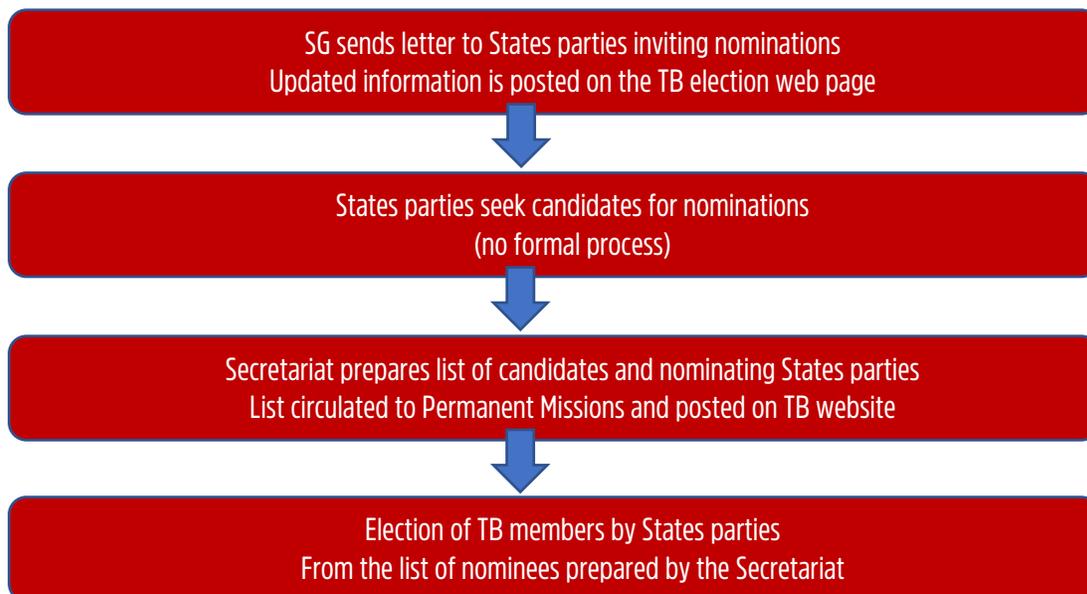
<sup>79</sup> See <http://www.unthelections.org/>.

- Encourage States parties not to trade votes for non-qualified candidates;
- Encourage States parties to ensure that there are more candidates than the number of seats to be filled and that there is the broadest pool of candidates from which to make a selection;
- Encourage States parties to give consideration to independence and impartiality as well as diversity in terms of gender, geography, background, expertise, representation of different forms of civilizations and principal legal systems, as well as the participation of persons with disabilities;
- Establish an independent advisory body to review candidates and ensure that candidates meet the criteria laid out in relevant standards;
- CSO engagement in the screening process should be formalized, i.e. their participation in the activities of the advisory body should be institutionalized.

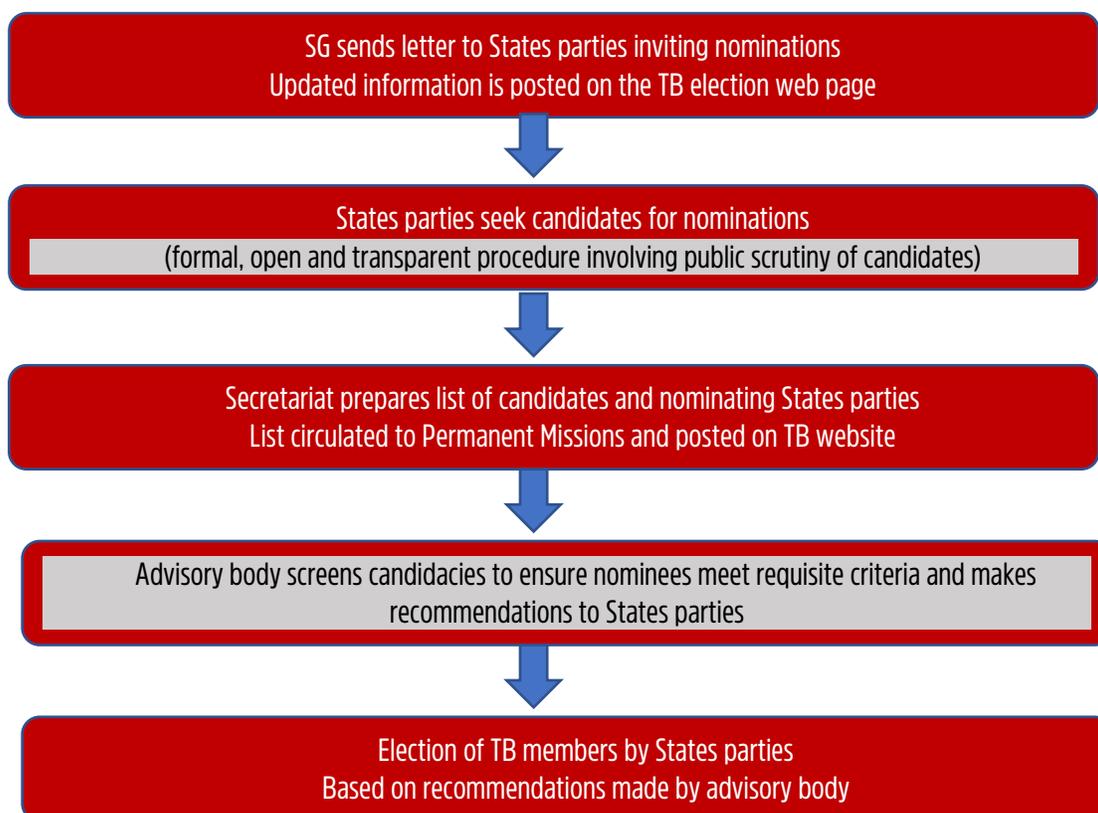
### ***Transparency and availability of necessary information***

- Ensure timely availability and accessibility of information on candidates to facilitate review. Based on the good example of <http://www.untbelections.org/>, a dedicated digital platform that would centralize all the relevant information on candidates, including CVs and questionnaires, should be available on the OHCHR treaty body election website;
- Only accept standard CVs or application forms. Relevant information on candidates should be up-to-date and transmitted in a standardized format to ensure fairness and transparency;
- Ensure availability and accessibility of information on current composition of treaty bodies to facilitate balanced and inclusive membership.

## CURRENT SELECTION PROCESS



## PROPOSED SELECTION PROCESS



## The Geneva Academy of International Humanitarian Law and Human Rights

The Geneva Academy provides post-graduate education, conducts academic legal research and policy studies, and organizes training courses and expert meetings. We concentrate on branches of international law that relate to situations of armed conflict, protracted violence, and protection of human rights.

## The Geneva Human Rights Platform

The Geneva Human Rights Platform (GHRP) provides a neutral and dynamic forum of interaction in Geneva for all stakeholders in the field of human rights to debate topical issues and challenges related to the functioning of the Geneva-based human rights system. Relying on academic research and findings, it works to enable various actors to be better connected, break silos, and, hence, advance human rights.

As a 'Mechanisms Lab', the GHRP supports the international community to engineer solutions to ensure the sustainable functioning of the Geneva-based human rights mechanisms and bodies, allowing them to address human rights challenges effectively.

The Geneva Academy of International  
Humanitarian Law and Human Rights

Villa Moynier  
Rue de Lausanne 120B  
CP 1063 - 1211 Geneva 1 - Switzerland  
Phone: +41 (22) 908 44 83  
Email: [info@geneva-academy.ch](mailto:info@geneva-academy.ch)  
[www.geneva-academy.ch](http://www.geneva-academy.ch)

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