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## مجلس حقوق الإنسان

الدورة الثالثة والعشرون

البند ٣ من جدول الأعمال

تعزيز وحماية جميع حقوق الإنسان، المدنية والسياسية والاقتصادية والاجتماعية والثقافية، بما في ذلك الحق في التنمية

### تقرير المقررة الخاصة المعنية باستقلال القضاة والمحامين، غابرييلا كنول

إضافة

#### مشاورة دون إقليمية بشأن استقلال السلطة القضائية في أمريكا الوسطى\*\*

موجز

أجرت المقررة الخاصة المعنية باستقلال القضاة والمحامين في يومي ٢٨ و ٢٩ تشرين الثاني/نوفمبر ٢٠١٢، في مدينة بنما، مشاورةً بشأن استقلال السلطة القضائية في أمريكا الوسطى. ويعرض التقرير معلومات بشأن الهيكل القضائي لكل بلد؛ والتحديات المبيّنة فيما يتعلق باستقلال القضاء، كإجراءات اختيار موظفي القضاء والقضاة أو تعيينهم أو انتخابهم؛ والاستنتاجات والتوصيات ذات الصلة.

وضمّت المشاورة، في اليوم الأول، خبراء في سلك القضاء وأكاديميين وممثلين عن المجتمع المدني، ولجنة البلدان الأمريكية لحقوق الإنسان، والمكتب الإقليمي

\* يعمّم موجز هذا التقرير بجميع اللغات الرسمية. أما التقرير نفسه، الوارد في مرفق الموجز، فيعمّم بالإسبانية والإنكليزية فقط.

\*\* تأخر تقديم الوثيقة.



الرجاء إعادة الاستعمال

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لمفوضية الأمم المتحدة السامية لحقوق الإنسان في بلدان المنطقة السبعة. وفي اليوم الثاني، عُقد الاجتماع مع ممثلي حكومات بلدان المنطقة الذين عرضوا رؤاهم للإجراءات الحالية والممارسات الجيدة والعقبات والتحديات المتعلقة بضمان استقلال السلطة القضائية على الصعيد الإقليمي.

وخلال المناقشات، ذُكر، ضمن أمور أخرى، أنه على الرغم من أن لجميع البلدان أُطراً دستورية وقانونية تكفل استقلال القضاء فيها عن طريق إجراءات اختيار أو تعيين أو انتخاب موضوعية وشفافة، فإن هذه الإجراءات قد أفسحت المجال، بدرجات متفاوتة، لتدخلات خارجية وداخلية في السلطة القضائية.

## Annex

### **Report of the Special Rapporteur on the independence of judges and lawyers, Ms. Gabriela Knaul, on the subregional consultation on the independence of the judiciary in Central America**

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## I. Introduction

1. On 28 and 29 November 2012, the Special Rapporteur on the independence of judges and lawyers, Ms. Gabriela Knaul, held a consultation on the independence of the judiciary in the seven countries of Central America (Belize, Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua and Panama). The first day was devoted to a meeting of experts, and the second day to a meeting with representatives of the Governments of Belize, Guatemala, Honduras and Nicaragua.
2. The consultation brought together 22 participants from the judicial service, academics, civil society, the Inter-American Commission on Human Rights and the OHCHR Regional Office to discuss current challenges to the independent action of the judiciary, such as procedures for the selection, appointment or election of magistrates and judges in the region. Procedures used in each country were explained and challenges and good practices identified.
3. The Special Rapporteur's initiative was well received by the participants, who termed it necessary and appropriate, since comparative regional studies on the subject are rare.
4. The Special Rapporteur thanks the Governments concerned for their extensive cooperation, the experts for the information provided and the OHCHR Regional Office for its assistance.

## II. Context

5. In the exercise of her mandate, the Special Rapporteur emphasized that the separation of powers and the rule of law not only constitute the pillars of democracy but also open the way to an administration of justice that provides guarantees of independence, impartiality and transparency.<sup>1</sup> A number of international instruments establish the independence of the judiciary as an essential guarantee of a proper system of justice, for example article 10 of the Universal Declaration of Human Rights, article 14 of the International Covenant on Civil and Political Rights, article 8 of the American Convention on Human Rights and the Basic Principles on the Independence of the Judiciary. General comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial states that "[t]he right to equality before the courts and tribunals and to a fair trial is a key element of human rights protection and serves as a procedural means to safeguard the rule of law".<sup>2</sup> Thus, the United Nations has recognized that an independent judiciary is "essential to the full and non-discriminatory realization of human rights and indispensable to the processes of democracy and sustainable development".<sup>3</sup>
6. One of the challenges facing States is precisely the achievement or consolidation of the independence of the judiciary. Central America must cope with a number of risks and threats that transcend the local level,<sup>4</sup> and the judicial authorities face many challenges

<sup>1</sup> See the report of the previous Special Rapporteur, Leandro Despouy (E/CN.4/2004/60), para. 28.

<sup>2</sup> CCPR/C/GC/32, para. 2.

<sup>3</sup> See Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights on 25 June 1993 (A/CONF.157/24[Part II], chap. III), para. 27.

<sup>4</sup> In this region, risks and threats to security have become transnational, simultaneously affecting more than one State. Such risks include drug trafficking, the phenomenon of youth gangs, trafficking in persons and arms trafficking.

which call for a strengthening of the administration of justice and its independence in order to put an end to impunity. A judiciary with independent magistrates and judges determined to respect human rights and promote the rule of law is indispensable in that regard.

7. Pursuant to the Basic Principles, procedures for the selection, appointment or election of magistrates and judges must be based on integrity and ability and must safeguard against “judicial appointments for improper motives”.<sup>5</sup> Accordingly, the Special Rapporteur reiterated the importance of establishing and applying objective and transparent selection and appointment criteria based on merit.<sup>6</sup>

8. The objective of the subregional consultation was to discuss the current situation regarding the independence of the judiciary in Central America and, in particular, to promote a forum for the exchange of experiences so as to identify the biggest challenges as well as good practices which might be shared by States and applied in accordance with the situation in each country.

### **III. Institutional and legal framework of the Central American States**

9. The Constitutions of the seven countries of the Central American region provide for the independence of judges and magistrates in the exercise of their functions.

#### **A. Belize**

10. The Constitution establishes the following judicial structure: the Supreme Court, Court of Appeal and first instance courts (summary jurisdiction courts and district courts). The decisions of the Court of Appeal can be overturned by the Caribbean Court of Justice, because Belize is a member of the Caribbean Community (CARICOM). The Caribbean Court of Justice replaces the role of the court of last resort played by the Privy Council, which is the appeals body for most members of the Commonwealth. The criminal justice system is based on the principles of common law.

11. Criteria for selection as justice of the Supreme Court are as follows: candidates must have at least five years’ experience practising as an attorney-at-law in a Belize court or as an advocate in a Commonwealth court with unlimited jurisdiction for civil or criminal cases or matters. They are appointed by the Governor-General, acting in conformity with the recommendations of the Judicial and Legal Services Commission and with the consent of the Prime Minister, following consultations with the leader of the opposition. They remain in office until the age of 65 and may be removed solely for reasons of physical or mental illness or for misconduct. The power to remove Supreme Court justices ultimately falls within the competence of the Governor-General.

12. The Chief Justice of the Supreme Court is appointed by the Governor-General with the consent of the Prime Minister following consultations with the leader of the opposition.

13. The criteria for the selection of judges of the Court of Appeal are as follows: candidates must hold the post of judge on a Commonwealth court with unlimited jurisdiction in civil and criminal matters or on any court with appellate jurisdiction; and they must have held a licence to practise as an attorney-at-law or advocate or in a Commonwealth court for at least 15 years. They are appointed by the Governor-General,

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<sup>5</sup> Principle 10.

<sup>6</sup> A/HRC/11/41, paras. 30, 31 and 97; A/HRC/17/30/Add.3, para. 23.

acting with the consent of the Prime Minister and following consultations with the leader of the opposition, for a term of office to be specified in the letter of appointment. The procedures for removal are identical to those for Supreme Court justices. Participants in the regional consultation were of the view that short terms of office and re-election processes make magistrates vulnerable to political interference.

14. The criteria for the selection of judges of first instance courts, which are set out in the Constitution and regulated in the Belize Legislation Acts, require that candidates have a minimum of three years' experience as attorney-at-law. The judges are appointed by the Judicial and Legal Services Commission. The Constitution guarantees tenure for judges; however, they may be removed by the Commission for inability to discharge their duties for reasons of physical or mental illness or for misconduct.

15. There is also a separate procedure for appointing judges of the Caribbean Court of Justice, which was established in 2001 under the agreement signed by the Member States of CARICOM. The criteria for the selection of judges of the Caribbean Court of Justice are as follows: candidates must have knowledge of international law, including international trade law, and a minimum of five years' experience as judge on a court with unlimited jurisdiction in civil and criminal matters in the territory of a contracting party or the Commonwealth, or at least 15 years' experience teaching law in a Member State of CARICOM or the Commonwealth. They must be persons of high moral character, intellectual and analytical ability, sound judgement and integrity and must have an understanding of people and society. The judges are appointed through a complex process in which the Chief Justice of the Court is appointed and removed by a three-quarters vote of the Member States of the Court on the recommendation of the Regional Judicial and Legal Services Commission. The other judges are elected by a majority vote in the Regional Commission.

16. There is another process for members of the Privy Council. Through its Judicial Committee, the Council exercises the function of court of last resort for those countries of the Commonwealth which continue to maintain this system in force. In Belize, apart from cases pending before the Council, this function has been transferred to the Caribbean Court of Justice. The Privy Council is composed primarily of members of the House of Lords.

17. Despite the existence of these provisions, during the consultation it was emphasized that to achieve the independence of the judiciary, magistrates and judges must be separate and independent of other State bodies. Given that the budget elaborated by the judiciary must then be approved by the National Assembly, the financial independence of the judiciary must be further strengthened.

18. The participants also stressed that judges should be appointed by their peers with the participation of civil society, because the selection and appointment process in Belize does not make provision for public hearings.

19. It was also pointed out that the biggest problem facing the country was not so much the selection procedure, but rather the poor training of aspirant judges and magistrates.

## **B. Costa Rica**

20. The Constitution establishes the following judicial structure: the Supreme Court and the lower courts (small claims, minor offences and summary proceedings courts and tribunals; first instance and penal courts; collegiate courts; and courts of cassation), with distinct selection and appointment procedures.

21. The criteria for the selection of Supreme Court justices are as follows: candidates must be Costa Rican by birth, or through naturalization with a domicile in the country for at

least 10 years since obtaining the naturalization document (the Chief Justice of the Supreme Court must be Costa Rican by birth); they must be citizens with all civil rights; they must have lay status; they must be at least 35 years old; and they must hold a law degree issued or legally recognized in Costa Rica and must have at least 10 years' experience practising law, except for judicial officials, who must have at least five years' experience in the field.

22. Supreme Court justices are elected for a term of eight years by a two-thirds majority vote of the members of the Legislative Assembly. In the exercise of their functions, they must work efficiently, and they are considered to be re-elected for an identical term unless otherwise decided in a two-thirds majority vote of the members of the Legislative Assembly. The Supreme Court appoints a Chief Justice from among its members.

23. Supreme Court justices may not be suspended except by means of a declaration of grounds for legal action or for reasons set out in articles 191 and 192 of the Act on the Organization of the Judiciary. The Legislative Assembly is empowered to decide whether or not to revoke an appointment, and it is for the Supreme Court, meeting in plenary session, to decree a suspension by means of a two-thirds majority vote of its members.

24. The criteria for the selection and appointment of judges of the lower courts are regulated by the Judicial Service Act, the Internal Regulations of the Judicial Service and the Act on the Organization of the Judiciary; they vary as a function of duties and post, but generally speaking they are as follows: candidates must be Costa Rican; they must be citizens with all civil rights; they must be licensed to practise law; and they must be members of the Bar Association of Costa Rica. The procedure is conducted by the Council of the Judiciary, and candidates are examined and evaluated on the basis of their experience and seniority in office, performance, proven ability and quality of service in previous positions held, as well as training and specialized courses taken of relevance to the post, duration of academic teaching and publications of research or works of general interest. Interviews and examinations are held that focus on the candidates' personality, knowledge of the particular field and judicial techniques of relevance to the post to which they aspire. Any medical and psychological tests deemed appropriate may also be ordered.

25. The Council of the Judiciary sends lists of three candidates to the Supreme Court or the High Council of the Judiciary, as appropriate, which are responsible for carrying out and approving the respective appointments.

26. A number of participants expressed concern about the weakness of practice in the selection and appointment procedures. Although the Council of the Judiciary is responsible for supervising the procedure for the selection of judges and for regulating appointments, transfers and promotions, it does not have decision-making power. The Council is part of the Selection Board that evaluates the candidates. However, the process for examining candidates has serious defects. For example, there are no objective criteria for determining the final score in the examination, nor is it possible to contest the final score. Another major limitation is the lack of a gender perspective in the reports, since greater importance is attached to postgraduate work, teaching and publications.

27. Another difficulty in the judicial service is the composition of the Council of the Judiciary, which is made up of one magistrate (who chairs it), one person from the High Council of the Judiciary, one person from the Governing Council of the Judicial Training School and two higher-court judges. The presence of only two judges on the Council undermines the institution, because the other members are directly or indirectly subordinate to the Supreme Court.

28. One element that affects the independence of the judiciary is related to the system of sanctions. Article 199 of the Act on the Organization of the Judiciary includes a criterion pursuant to which the Supreme Court, meeting in plenary session, is empowered to sanction

a judge. This has a direct impact on judges' discretionary power, within the framework of the law, to rule on matters within their competence.

29. Another serious problem to which reference was made was the existence of alternate judges in the Supreme Court, because they may be practising lawyers and thus are subject to interference, including of a political nature.

## C. El Salvador

30. The Constitution establishes that the judiciary is composed of the Supreme Court and the lower courts (courts of appeal, courts of first instance and magistrates' courts), with distinct selection and appointment procedures.

31. The Constitution enumerates the following criteria for the selection of Supreme Court justices: candidates must be Salvadoran by birth; they must have lay status; they must be of recognized standing and competence; they must be citizens with all civil rights; they must be at least 40 years old; they must be licensed to practise law in El Salvador; and they must have at least six years' experience in a Court of Appeal or nine years' experience in a court of first instance or have obtained a licence to practise law at least 10 years prior to election.

32. The selection of justices of the Supreme Court is a two-step process. The National Council of the Judiciary submits a list of candidates to the Legislative Assembly. The list is provided by the Federation of Lawyers' Associations of El Salvador (FEDAES), which selects its candidates through elections, and by the National Council of the Judiciary, which chooses from among lawyers who have submitted their candidacy to it. The Legislative Assembly appoints them in a public roll-call vote. Supreme Court justices are elected for a term of nine years and may be re-elected. One third of the bench is re-elected every three years. Judges may be removed by the Assembly for reasons established by law. Election and removal both require a two-thirds majority vote of the elected deputies.

33. Criteria for admission to the judicial service in all courts of lower instances are as follows: candidates must be Salvadoran; they must have lay status; they must be licensed to practise law in El Salvador; they must be of recognized standing and competence; and they must be citizens with all civil rights. The criteria of age and duration of prior experience as judge or lawyer vary. To become a judge in a Court of Appeal, candidates must be older than 35 and must have served at least six years in a court of first instance or have obtained a licence to practise law at least eight years prior to the election. To become a judge of first instance, candidates must have served as a judge in a magistrates' court for at least one year or have obtained a licence to practise law at least two years prior to their appointment. To become a judge in a magistrate's court, candidates must be older than 21. In exceptional cases, the National Council of the Judiciary may propose persons who are not lawyers for a term of one year.

34. The list of potential candidates must also include experience in legal matters and professional merits; training completed and marks obtained; posts held in State institutions, with dates and duration; research published and teaching experience; and the status or result of complaints and accusations submitted to and dealt with by the authorities over the past five years.

35. The procedure for the selection of judges and magistrates of the lower courts is conducted by the National Council for the Judiciary, which draws up and submits lists of three candidates to the Supreme Court; the Supreme Court then makes the appointment. The technical selection procedures, which involve competitive examinations, in some cases in conjunction with the Judicial Training School, are carried out by the Council and must



guarantee objectivity, equality of opportunity for candidates and the suitability of persons selected.

36. The participants referred to a number of obstacles to procedures for the selection and appointment of judges and magistrates in the country. One was the lack of representativity of the Federation of Lawyers' Associations of El Salvador in organizing the preselection of candidates for the post of Supreme Court justice. The Federation has not been impartial and transparent. Moreover, the National Council of the Judiciary does not have clear criteria and requirements for the preselection of candidates for posts of magistrates and judges. It was stressed that, although good appointments had been made of independent magistrates and judges who are not vulnerable to the wishes of political parties, what ultimately prevails is cronyism, political expediency and a distribution of posts on the basis of party quotas.

37. The participants recommended that a specific legal mechanism should be defined in the short term for each step of the selection process, with precise, motivated selection criteria and on the basis of the profile of the civil servant sought, and that transparent selection processes with public participation should be introduced. Concerning the selection of judges, they also recommended a return to the system of prior training, such as the Initial Training Programme, which guaranteed selection in accordance with the criteria of objectivity and merit.

38. In the medium term, it was recommended that administrative and jurisdictional functions should be separated at the various levels of the judiciary, in particular the Supreme Court, and that a body should be established, without political partisanship, to serve as a nominations committee for all second-tier elected officials.

39. The participants also referred to a number of serious internal threats to the independence of judges, such as article 55 of the Judicial Service Act, on removal from office, and to external threats, such as the influence of the media and organized crime in judicial bodies.

## **D. Guatemala**

40. The Constitution establishes the following judicial structure: the Supreme Court, the Court of Appeal and other collegiate courts, and the lower courts (courts of first instance and magistrates' courts), with distinct selection and appointment procedures.

41. The criteria for all magistrates and judges are as follows: candidates must be Guatemalan by birth; they must be of recognized standing; and they must be citizens with all civil rights and must be licensed to practise law, apart from the exceptions established by law with regard to the latter requirement for certain judges of private jurisdictions and juvenile courts. The following additional criteria apply for Supreme Court justices: candidates must be older than 40, and they must have served for a full term as magistrate in the Court of Appeal or a collegiate court or have practised law for more than 10 years. The Act on Nominations Committees also establishes other more specific requirements for the candidate selection process. The Committee publishes a vacancy announcement and uses a point system of 1 to 100 to score candidates, numerically quantifying ethical, academic, professional and personal merits for the elaboration of lists of names for submission to Congress.

42. Supreme Court justices are elected by Congress for a period of five years from a list of 26 candidates submitted by a Nominations Committee composed of a representative of the rectors of Guatemala's universities, who chairs the Committee, the deans of the law school or legal and social sciences faculty of each university in the country, an equal number of representatives elected by the General Assembly of the Bar and Notaries

Association of Guatemala and an equal number of representatives elected by the magistrates of the Court of Appeal and other tribunals. The election of candidates requires a two-thirds majority vote of the members of the Nominations Committee. The members of the Supreme Court elect a Chief Justice by a two-thirds majority for a term of one year; the Chief Justice may not be re-elected during that session of the Court.

43. In addition to the above-mentioned criteria, the requirements for magistrates of the Court of Appeal and the collegiate tribunals are as follows: candidates must be older than 35 and must have been a judge in a court of first instance or have practised law for more than five years.

44. The magistrates of the Court of Appeal are elected by Congress from a list containing the names of twice the number of persons to be elected, which is submitted by a Nominations Committee composed of a representative of the rectors of Guatemala's universities, who chairs the Committee, the deans of the law school or legal and social sciences faculty of each university in the country, an equal number of representatives elected by the General Assembly of the Bar and Notaries Association of Guatemala and an equal number of representatives elected by the magistrates of the Court of Appeal and other tribunals. The election of candidates requires a two-thirds majority vote of the members of the Nominations Committee.

45. The criteria for the selection of judges of the lower courts, which are established by the Constitution and the Act on Nominations Committees, are as follows: candidates must be Guatemalan by birth; they must be of recognized standing; and they must be citizens with all civil rights and must be licensed to practise law. The procedure for the selection of judges is carried out by Nominations Committees, and the list of candidates is submitted to the Supreme Court, which appoints them.

46. The participants stressed that the establishment of Nominations Committees for the purpose of reducing the decision-making power of Congress and minimizing the political nature of the process has strengthened the judicial system. According to the participants, the system has worked relatively well. However, problems persist, such as the lack of an effective judicial service and pressure exerted by politicians to elect candidates who will be favourably disposed towards them. In addition to political parties, business groups, gangs and organized crime also try to influence the members of the Nominations Committees and the Bar and Notaries Association. The participants suggested that the criteria for the selection of the members of the Nominations Committees should be reconsidered and the size of membership reduced.

47. With regard to budgetary independence, although the Constitution establishes that the Supreme Court is empowered to draft its budget (and for that purpose it is assigned at least two per cent of State revenue), the participants pointed out that allocations from the Ministry of Finance are on a quarterly basis and that there are considerable delays, thus hindering a fair, independent and impartial administration of justice.

48. Participants also referred to a bill to amend the Constitution ("Reformas a la Constitución Política de la República de Guatemala") which would strengthen the judicial service and the independence of the judiciary, but they noted that its adoption has been delayed until mid-2013.

## **E. Honduras**

49. The Constitution establishes the following judicial structure: the Supreme Court, Courts of Appeal and lower courts (civil courts and magistrates' courts), with distinct selection and appointment procedures.

50. The criteria for the selection of Supreme Court justices are as follows: candidates must be Honduran by birth; they must be citizens with all civil rights; they must be licensed lawyers; they must be at least 35 years of age; and they must have at least five years' experience as a judge or ten years' experience as a lawyer.

51. The procedure for the selection and appointment of Supreme Court justices is conducted by the National Congress. Justices are elected from a list of candidates submitted by a Nominations Committee composed of a representative of the Supreme Court (elected by a two-thirds majority of the judges); a representative of the Bar Association (elected by the Bar Association Assembly); a representative of the Office of the National Commissioner for Human Rights; a representative of the Honduran Council of Private Enterprise (elected by the Assembly of the Council); a representative of law school professors (recommended by the National Autonomous University of Honduras); a representative elected by civil society organizations; and a representative of the country's trade union confederations.

52. Election is by a two-thirds majority vote of all members of the National Congress, based on a list of no fewer than three candidates for each vacancy. In the event that there is no qualified majority for the election of the full list of judges, a direct secret vote is held to elect the remaining judges individually; the vote is repeated as many times as necessary until the two-thirds majority is attained.

53. For the election of the Chief Justice of the Supreme Court, the judges, meeting in plenary session, nominate one of their members by means of a two-thirds majority vote; the nominee's name is then submitted to Congress, whose approval of the nomination is likewise based on a two-thirds majority vote of all its members.

54. The criteria for the selection of magistrates of the Courts of Appeal and the lower courts and tribunals are set out in the Act on the Council of the Judiciary and the Judicial Service. The criteria for these categories are as follows: candidates must be Honduran; they must be practising lawyers; they must not fall under any of the cases under article 30 (such as being physically or mentally disabled or having been suspended or disqualified from holding public office), and they must be of recognized standing. To become a judge in a magistrates' court, candidates must be older than 21. To become a judge in a civil court, candidates must be older than 25 and must have at least five years' professional experience in any area of law or in the service of a court. To become a judge of a Court of Appeal, candidates must be older than 35, must have more than five years' experience in the judicial service and must not be a representative of a religious denomination at any level.

55. The procedure for the appointment of magistrates and judges specifies that the Supreme Court is empowered to appoint and remove them upon recommendation by the Council of the Judiciary. The Act on the Council of the Judiciary and the Judicial Service also sets out the various stages of the Council's selection process, such as the establishment of a Selection Board to analyse candidates' academic records, psychometric tests, theoretical and practical knowledge, and labour-related and socioeconomic research.

56. During the consultation, the participants said that significant progress had been made with the new Act on the Council of the Judiciary and the Judicial Service. The Act separates the jurisdictional functions of the Supreme Court from its administrative functions, which are transferred to the Council. However, the participants stressed that the members of the Council are still not elected or appointed by the National Congress and that the Council is still not in operation. Moreover, the Act contains a number of shortcomings, such as its provisions on disciplinary measures and the fact that it designates the Chief Justice of the Supreme Court as chair of the Council. The participants stressed that in reality, the situation is characterized by the lack of a real judicial service, that competitive examinations are the exception, that promotions are not regulated, that interim or

transitional appointments become permanent and that in many cases cronyism and political recommendations prevail.

57. The participants suggested that clear parameters should be used to evaluate candidates objectively in order to try to eliminate subjectivity and to guarantee equal terms for candidates, establishing a greater opening for persons of African origin and other minorities, as well as to eliminate discriminatory wording in some legislation, such as the notion of “moral”, because they exclude persons from competing. In this regard, initiatives have been undertaken to eliminate political influence and ensure that elections are based on merit, for example the bill on public hearings for the appointment of high State officials (which has yet to be adopted).

58. Another serious concern raised by the participants was the budgetary dependence of the judiciary. The Constitution guarantees that the judiciary has complete administrative and financial autonomy because it is allocated three per cent of current revenue by the executive branch, paid in advance on a quarterly basis. However, reductions and delays in budgetary payments to the judiciary are frequent, which hinders a proper administration of justice.

59. Reference was also made to the serious imbalance between State powers, and above all the concentration of powers in Congress. Although the Constitution establishes that the Supreme Court is the ultimate arbiter of the Constitution, Congress has passed legislation assigning itself that role, in violation of rulings by the Supreme Court’s Constitutional Chamber.

## **F. Nicaragua**

60. The Constitution establishes the following judicial structure: the Supreme Court, Courts of Appeal and lower courts (district and local courts), with distinct selection and appointment procedures.

61. The criteria for the selection of Supreme Court justices are as follows: candidates must be Nicaraguan – persons who have acquired another nationality must have renounced it at least four years prior to the date of the election; they must be lawyers of recognized standing; they must have held the office of judge or practised law for at least 10 years or have been a judge of a Court of Appeal for at least five years before becoming a Supreme Court justice; they must be citizens with all civil and political rights; they must be at least 35 years of age and no older than 75 on the day of the election; they must not have been suspended from the profession of lawyer or notary through a final court decision; they must not be in active military service and, if they were in the past, they must have left military service at least 12 months prior to the election; and they must have lived in the country continuously for four years prior to the date of the election, unless during that period they were on diplomatic mission, were working for international organizations or were studying abroad.

62. The procedures for the selection and appointment of Supreme Court justices are conducted by the National Assembly, which is empowered to elect them from lists proposed separately for each post by the President of Nicaragua and by members of the Assembly in consultation with the relevant civil associations. The lists must be submitted within 15 days from the date of the convocation of the Assembly for the election. If the President does not submit lists, the proposals made by the members of the Assembly suffice.

63. Judges are elected by a vote of at least 60 per cent of the members of the National Assembly. The Supreme Court’s Chief Justice and Deputy Chief Justice are elected from among the Court’s members by a majority vote for a term of one year; Chief Justices may

be re-elected. The term of office of Supreme Court justices is five years; they enjoy immunity and may be removed from office solely for reasons set out in the Constitution and the law.

64. The criteria for the selection of judges of the Courts of Appeal are the same as those for Supreme Court justices. In addition, the Act on the Organization of the Judiciary makes provision for the following criteria for becoming a district or local judge: candidates must be Nicaraguan; they must be citizens with all civil and political rights; they must be lawyers of recognized standing; they must not have been suspended from the profession of lawyer or notary by a final judicial decision; they must not be in active military service and, if they were in the past, they must have left military service at least 12 months prior to their election; and they must not be the subject of any legally established incompatibility. To become a judge of a district court, candidates must be at least 25 years of age; they must have held the post of judge of a local court for more than two years or court secretary for more than three years or have practised law or taught law at a university for at least three years. To become a judge of a local court, candidates must be at least 21 years of age.

65. The process for the selection and appointment of the various categories of judges and magistrates was established under the Act on the Judicial Service, which specifies that the National Council of the Administration and the Judicial Service of the Supreme Court conducts examinations for recruitment by the judicial service and submits lists of three candidates to the Supreme Court in plenary session. The Act sets out the steps involved for recruitment by the judicial service, including a merit-based selection process and a competitive examination for admission to an entry-level course on theory and practice. An assessment of a candidate's merits accounts for 40 per cent and the results of the examination for the specific post for 60 per cent of the overall score. The scoring of the candidate's merits is based on specialization, postgraduate work, years of public service and experience in a professional capacity, as well as publications of books and articles. The Supreme Court is empowered to appoint and dismiss judges through a three-quarters vote of its members.

66. During the consultation, the participants drew attention to the current serious situation in the country. They stressed that appointments of Supreme Court justices are heavily influenced by politics, above all in the current context, in which the party of the Government has a majority to reform the Constitution and appoint State officials without requiring consultations with, or the approval or support of, other political groups in the National Assembly. They also pointed out that, despite the passage of the Judicial Service Act and recent international cooperation facilitating the selection of family judges through open competitive examinations and training, the National Council of the Administration and the Judicial Service does not comply with selection and election procedures in competitive examinations. For example, it failed to set up a board to score theoretical and practical tests, which are the ultimate phase of the selection process.

67. The participants also stated that the Judicial Service Act is not applicable to tenure of office. The Act provides that judicial officials enjoy security of employment as a guarantee of their independence and that they may only be suspended or removed from office for reasons set out in the Act. However, article 37, paragraph 2, of the Act, on security of employment of such persons, opens a gap in this rule when it states that exceptionally, and for a limited period, provision may be made for the promotion or transfer of a judicial official due to the needs of the service or changes in the judicial organization; that, for the same reasons, to strengthen a judicial body, an agreement to that effect must indicate the reason and duration; and that at the completion of the time period, the person concerned must return to his or her post. The article does not make provision for or take into consideration the consent of the judge or magistrate to transfer or promotion; thus, the decision is taken on the basis of the interests of the institution. The participants

also underscored that the system for removal from office does not contain sufficient guarantees of impartiality.

68. According to the participants, the expiry of term of office of many State posts, including in the judiciary, also poses a serious problem. For example, Supreme Court justices remain at their posts upon the completion of their term of office, because there is no political will to initiate a selection and appointment process. In fact, the possibility of making changes was considered impossible. In July 2013, the term of office of all Supreme Court justices will expire, and the National Assembly will have to elect the entire bench.

69. The participants also referred to a number of positive points, such as the Strategic Plan of the Judiciary 2012–2021, whose primary objective is to guarantee the impartiality and implementation of the Code of Ethics in order to promote the independence of judges, magistrates and other civil servants. They noted that, starting in January 2013, there will be a performance appraisal of all civil servants in the judicial service, including judges and magistrates. Its purpose is to establish a ranking within the judicial service so as to be able to select persons for promotion and implement a selection system based on a competitive examination, beginning with magistrates' courts.

## **G. Panama**

70. The Constitution establishes the following judicial structure: the Supreme Court and the lower courts (higher courts of justice, judicial district courts, circuit and municipal courts, juvenile, maritime and industrial relations courts), with distinct selection and appointment procedures.

71. The criteria for the selection of judges of the Supreme Court are as follows: candidates must be Panamanian by birth; they must be at least 35 years of age; they must be citizens with all civil and political rights; they must be graduates of a law school and must have registered their university degree with the office prescribed by law; they must have 10 years' experience either as a lawyer, at a post in the judiciary or an electoral body requiring a university degree in law, or as a law professor at a university.

72. Supreme Court justices are appointed through agreements with the Council of the Executive Cabinet, subject to approval by the legislature, for a term of 10 years. Appointments are staggered: two judges are appointed every two years, except in cases in which more or fewer judges are appointed as a function of total Supreme Court membership.

73. The criteria for the selection of magistrates and judges of the lower courts are established by the Judicial Code and are as follows: candidates must be Panamanian; they must be citizens with all civil and political rights; and they must be graduates of a law school and must have registered their degree with the Ministry of Education or with the office prescribed by law. To become a judge of a higher court of justice, candidates must be at least 30 years old; they must have at least five years' experience as a lawyer, a judge of a circuit court, a prosecutor of a circuit court or higher court, Secretary-General of the Supreme Court or any of its chambers, at a post in the prosecutor-general's office or in the administration, in a higher district court or in a higher industrial relations court; or they must have taught law at a Panamanian university or any other State-certified university for the same length of time. Candidates are also deemed suitable for the post if they have been licensed to practise throughout the country and have held a post as judge on the Supreme Court or high courts of justice, prosecutor in a judicial district, or judge or prosecutor on a circuit court for at least four years, provided that the other requirements are met. To become a judge on a circuit court, candidates must be at least 30 years of age; they must have a licence to practise law issued by the Supreme Court; and they must have at least three

years' experience as a lawyer or have held, for the same length of time, a public office for which a law degree and a licence to practise law are required. To become a municipal judge, they must meet the same requirements as those for becoming a judge on a circuit court and must be at least 25 years of age.

74. In the tribunals and courts specified by law, magistrates are appointed by the Supreme Court in plenary session, and judges by their hierarchical superior. All such appointments are made in accordance with the judicial service. There is no act specifically regulating the judicial service. Instead, article 305 of the Constitution is applied, which institutes the judicial career and establishes a list of eight public service careers which expressly states that those careers must function in accordance with the merit system. The regulation of judicial careers is set out in the Judicial Code and in Supreme Court decision No. 46 of 27 September 1991, which stipulates that the Staff Committee and the Department of Personnel of the Judiciary, in coordination with the corresponding office heads, determine the types of theoretical and practical tests or examinations for each post. The appraisal and selection process also takes into consideration academic qualifications, working experience, publications, languages, probationary periods etc.

75. During the consultation, the participants stated that although a process for the selection and appointment of judges and magistrates exists, including for Supreme Court justices, there is no guarantee that selection is based on merit, abilities, academic training and vocation. The selection gives priority to persons close to or enjoying the confidence of the nominating body. Selected candidates often owe "the favour" of the appointment to those who elect them and therefore do not "dare disobey" them. The system, which functions without public participation, is therefore subject to abuse of power by higher judicial authorities and to the will of the President of Panama.

76. Thus, although the Constitution stipulates that magistrates and judges are independent in the performance of their duties, the lower courts are bound by rulings issued by higher courts which revoke or alter their judgements upon appeal. Hence the risk that the lower courts might act to anticipate judgements sought by the higher courts.

77. The participants also noted that in 2005, the process for accreditation in the judicial service was suspended because of agreements under the State Covenant for Justice to introduce a more modern system which guarantees selection based on merit and achievement. According to the participants, three years ago all vacant posts were opened to a competitive examination, but only in very few cases have decisions been taken on that basis. However, there are also positive developments, such as the recent adoption by the National Assembly on first reading of a bill on the judicial service and an ethical and disciplinary system for the judiciary which would establish a governing body for the judicial service.

#### **IV. Challenges to the independence and impartiality of magistrates and judges common to all Central American States**

78. The Special Rapporteur was able to confirm that the Constitutions or legislation of the seven States of Central America guarantee the independence of judges and magistrates in conformity with principle 1 of the Basic Principles on the Independence of the Judiciary. However, she noted that each of the States is facing a number of challenges to making institutional independence and judicial impartiality a reality and that many of those challenges are common to all the countries in the region.

## A. External and internal interference in the independence of the judiciary

### 1. Procedures and criteria for the selection, appointment or election of magistrates and judges

79. The Special Rapporteur was able to confirm that one of the main challenges is the highly politicized nature of systems for the selection, appointment or election of judges and magistrates. This begins in many cases with the procedure for the selection, appointment or election of magistrates of the highest court of justice of each country and continues with the appointment of magistrates and judges of the other courts, thus affecting the entire judicial system.

80. The appointment of magistrates of the highest courts, and in some countries even judges of lower courts, is by decision of the legislative or executive branch based on selection criteria which, although established by the Constitution and legislation, are very broad, general and subjective, thus making it difficult to adequately assess the personal integrity, independence and professional qualifications of the candidates. Consequently, although the norms of all these countries are in conformity with principle 10 of the Basic Principles, practice reveals an absence of proper and more specific selection criteria as well as a lack of transparency and public scrutiny in the procedures for the appointment or election of magistrates and judges, a circumstance which has opened the door to interference by political parties and economic groups, generating a system based on political favours and patronage.

81. For that reason, the participants emphasized the need to give consideration to criteria for measuring the abilities of candidates for judicial service. The selection processes should include written, anonymous examinations, with complete interviews and psychometric tests, in order to ascertain whether the candidate is able to discharge his or her functions independently and impartially. The Special Rapporteur is of the view that a revision of the system for the selection and appointment of magistrates and judges could help prevent appointments for improper reasons.

82. This politicization assumes very serious dimensions when the judicial body with constitutional competence is called upon to arbitrate in political conflicts or conflicts concerning matters of a political nature. In such cases, the Supreme Court or the Constitutional Chamber must rule independently and impartially on all applications referred to them; that leads to a politicization of the judiciary. Such a situation usually results in conflicts between the different branches of State power. The participants referred to serious interference in the independence of the judiciary, which takes the following forms: assaults, intimidation and threats against judges as well as their removal, especially those who have constitutional jurisdiction; attempts to create political mechanisms that make it possible to revise or disregard judicial decisions by issuing decrees; and the appointment of magistrates who are not independent.

83. The Special Rapporteur has expressed concern about recent cases in that regard in El Salvador,<sup>7</sup> Costa Rica<sup>8</sup> and Honduras.<sup>9</sup> She is also concerned about the delay in the appointment of judges after the expiry of their terms of office, as is currently the case in Nicaragua, which causes great insecurity in the administration of justice.

<sup>7</sup> A/HRC/22/67, cases SLV 1/2012 and SLV 2/2012.

<sup>8</sup> See A/HRC/22/67, case CRI 3/2012.

<sup>9</sup> Press release of the Special Rapporteur of 29 January 2013. Available at [www.ohchr.org/SP/NewsEvents/Pages/DisplayNews.aspx?NewsID=12958&LangID=S](http://www.ohchr.org/SP/NewsEvents/Pages/DisplayNews.aspx?NewsID=12958&LangID=S).



84. Another concern is related to the question of the power of organized crime and its recent intrusion in selection and appointment bodies as well as the courts. The participants noted that more and more judges and magistrates are being threatened by criminal organizations. Although some countries have laws making trafficking in influence a crime, for example in Guatemala with the Illicit Enrichment Act, the subject has yet to be discussed in political spheres.

85. Another problem is the virtual non-existence of civil society participation in processes for the selection and appointment of judges and magistrates. According to the participants, the best practices are in those countries in which society plays an active part in the process, such as in Guatemala. The participants referred to the importance of public hearings and the possibility of subjecting candidates to questioning by citizens as a way of reducing interference in those processes by the political sphere or pressure groups. However, public participation must be responsible, with representatives of society as a whole and not fictitious organizations.

## **2. Selection and appointment bodies**

86. With regard to the selection body, although most of the countries in the region have set up institutions to support the Supreme Courts in the administration of justice, such as the National Council of the Judiciary in El Salvador, the National Council of the Administration and the Judicial Service in Nicaragua and the Council of the Judiciary and the Judicial Service in Honduras (created, but not yet functioning), these institutions must be independent from the Supreme Courts in practice,<sup>10</sup> with independent members, and must establish objective and transparent procedures for the selection, appointment, promotion, suspension and dismissal of judges. The composition of such bodies must be pluralist, with a predominance of magistrates and judges as members, and they must guarantee the participation of organizations of civil society. The process for the selection of their members must be transparent and public.

## **3. Instability of employment**

87. Another challenge that affects the independence of the judiciary is the short term of office and the need for constant re-elections of magistrates and judges, who depend on those wielding political power for re-election. Ensuring tenure of office and the stability of judges in their functions would help prevent internal and external interference in the judiciary and ensure the effectiveness of the judicial service.

## **4. Misuse of the media**

88. The Special Rapporteur's attention was drawn to the role of the media in undermining the independence of judges and magistrates. She was informed that the media often attacked and slandered judges as a way of seeking to have rulings reversed or judges removed. The independence of the media must be strengthened, because in many cases, they are used by public institutions, those wielding political power and economic groups to discredit the judiciary. The participants stressed how important it was for the judiciary to have a communication strategy, for example through a "judicial spokesperson", to help the media obtain accurate information on cases and rulings, thereby preventing improper interference in the work of the courts.

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<sup>10</sup> A/HRC/11/41, para. 27.

## **B. Administration of justice**

### **1. Judicial service**

89. During the consultation, it became clear that there is a high concentration of power in the highest judicial bodies, usually the Supreme Court, which accumulate judicial and administrative functions, such as disciplinary, promotion, suspension and dismissal procedures for magistrates and judges as well as the administration of the budget.

90. This concentration of power is very dangerous for the independence of the judiciary when there is improper interference in the procedure for the selection, appointment or election of judges. Such interference may undermine the independence of the entire structure and functioning of the judicial system at all levels.

91. Hence the need for legislation on the judicial service which strengthens the independence and impartiality of magistrates and judges and impedes any interference, external or internal, in their work, such as the improper application of disciplinary procedures to intimidate judges, the practice of making telephone calls to persuade judges to revise their rulings or the improper transfer of judges to other jurisdictions.

### **2. Alternate magistrates and judges**

92. According to the participants, the presence of alternate magistrates and judges in the Supreme Court and other judicial bodies is a matter of concern for the independence of the judiciary. In some countries, alternates can be used by other branches of government to interfere in the decisions and activities of regular magistrates and judges. In other countries, alternate judges practise law at the same time, which encourages considerable trafficking in influence and court decisions that are not in conformity with the law, thereby further undermining the independence of the judiciary.

### **3. The budget of the judiciary**

93. Lack of budgetary independence also has a serious impact on the independence of the judiciary. Although in most of the countries in the region the Constitution assigns a fixed percentage of the national budget to judicial institutions, the amount concerned is not adequately transferred to the judiciary. The budgetary allocations which the judiciary requests from the executive or legislative branch are often reduced and their payment delayed, thereby hampering the proper administration of justice. That situation is contrary to principle 7 of the Basic Principles and the recommendations of the mandate which refer to how important it is for the judiciary to draft its budget and for safeguards to be introduced to guarantee the payment of budgetary funds earmarked for the courts.<sup>11</sup>

### **4. Education and training**

94. One challenge common to all the countries of the region is the low quality of education in law schools, which produce professionals who have not been properly trained to exercise the profession and hold judicial positions. The situation is aggravated by the lack of initial training and preparation of judges. According to the participants, this state of affairs is linked to a large extent to the low prestige of the judiciary in most of the countries in the region. The need to rethink the training of professionals in the judicial system was stressed. This problem is consistent with what the Special Rapporteur has reiterated in her report: that it is important to promote initial and ongoing human rights training for all

<sup>11</sup> A/HRC/11/41, paras. 37 and 41; A/HRC/17/30/Add.3, para. 94 (b)).

members of the judicial system and to strengthen the role played by universities in that process.<sup>12</sup>

95. When academic institutions are part of the selection bodies, the process of selecting their own representatives is often questionable, because there is no guarantee that selection procedures will be based on objective and transparent criteria. These institutions must review their internal procedures to ensure transparent participation in the processes for the selection and appointment of judges and magistrates.

## **V. Conclusions**

96. The administration of justice in Central America needs to be strengthened so as to make the constitutional and legal principle of the independence of the judiciary a reality. Despite the presence of two systems of justice in the region, common law in Belize and continental law in the other countries, a number of shared challenges were identified which testify to the urgent need to develop mechanisms which eliminate external and internal interference and ensure an independent, impartial, efficient and effective administration of justice. Examples of these challenges include the politicization of the system for the selection and appointment of judges and magistrates, in particular in the highest courts, the lack of a proper budget and the need to improve the quality of schooling and training for judges and magistrates.

97. As most of these countries are young democracies, the consolidation of public institutions, and the judiciary in particular, is of crucial importance for combating impunity, corruption and organized crime, curbing urban and rural violence, protecting human rights and fundamental freedoms, and promoting social and economic development.

98. The dialogue launched by the consultation may be an important starting point for the establishment of a forum for the exchange of experiences and mutual assistance between judicial bodies in the region to ensure the independence of the judiciary. A strong social consensus and political will are therefore required to bring about the changes needed so that the judiciary can play its role in the consolidation of the rule of law independently and impartially.

## **VI. Recommendations**

99. The Special Rapporteur's recommendations are made with a view to strengthening the independence and impartiality of the judiciary and making the administration of justice in the States of the region more effective.

### **A. Recommendations for the seven Central American States**

#### **1. Recommendations for Governments**

100. The Special Rapporteur recommends that:

(a) The independence of the judiciary should be observed and respected, and to that end, provision should be made to ensure compliance with judicial decisions;

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<sup>12</sup> See A/HRC/20/20.

(b) The political leadership should be encouraged to adopt measures to improve procedures for the selection and appointment of judges and magistrates, including structural and legislative changes, in order to guarantee that they are transparent and that they allow for public participation;

(c) Objective criteria, clearly defined and established by law, should be introduced for the selection and appointment of magistrates and judges; these criteria should require that persons selected for judicial office are individuals of integrity and ability with appropriate training or qualifications in law;

(d) Provision should be made to ensure the financial and budgetary autonomy of the judiciary and the administration of justice as well as the payment of budgetary allocations without delay;

(e) An inclusive dialogue on the challenges to the system of justice posed by the improper influence of organized crime in judicial bodies should be promoted, and measures to guarantee the security and protection of judges and magistrates should be adopted;

(f) The training of candidates for the judicial service as well as continuous training for judges and magistrates, in particular in international human rights law, should be improved.

## **2. Recommendations for the judiciary**

101. The Special Rapporteur recommends that:

(a) The administrative and judicial functions of the highest courts should be separated;

(b) Independent bodies (such as judicial councils), with a pluralist composition and a predominance of judges and magistrates as their members, should be strengthened, or established and made functional, in order to conduct the procedure for the selection of judges and magistrates;

(c) A judicial service should be set up in which admission, promotion and removal are based on objective criteria and merit; tenure of office for magistrates and judges should be ensured;

(d) The system of alternate magistrates and judges for the Supreme Court and other judicial bodies should be improved to prevent improper interference, and possibilities for eliminating it should be considered;

(e) Communications mechanisms should be set up in judicial bodies to improve the transparency of the justice system.

## **B. State-specific recommendations**

### **1. Belize**

102. The Special Rapporteur recommends that:

(a) The procedure for the selection and appointment of magistrates, in particular for the Court of Appeal, should be reformed so as to include public participation;

(b) The term of office of judges and magistrates should be lengthened.

**2. Costa Rica**

103. The Special Rapporteur recommends that the sanctions regime, in particular article 199 of the Act on the Organization of the Judiciary, should be revised.

**3. El Salvador**

104. The Special Rapporteur recommends that the composition of the National Council of the Judiciary should be reformed and its independence in the process of selection and appointment of judges and magistrates strengthened.

**4. Guatemala**

105. The Special Rapporteur recommends that:

- (a) The composition of the Nominations Committees should be reformed;
- (b) The bill on reforms of the political Constitution of Guatemala, which consolidates the independence of the judiciary, should be adopted.

**5. Honduras**

106. The Special Rapporteur recommends that the members of the Council of the Judiciary and the Judicial Service should be appointed and the Council's independent and impartial functioning guaranteed.

**6. Nicaragua**

107. The Special Rapporteur recommends that Supreme Court justices whose mandates have expired should be appointed as a matter of urgency.

**7. Panama**

108. The Special Rapporteur recommends that:

- (a) A judicial service act should be adopted;
- (b) An independent and impartial council of administration of the judicial service should be established.

**C. Other recommendations for States, United Nations bodies and the international community**

109. The Special Rapporteur recommends that:

- (a) A Central American forum for the judiciary should be established with a view to promoting debates and exchanging experiences and good practices on shared challenges to the independence of the judiciary, the fight against impunity, the administration of justice and the protection of human rights;
- (b) International cooperation should be encouraged in order to strengthen the functioning of the judicial system in the region.