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# Procedure for the election of judges to the European Court of Human Rights

**Report**[1]
Committee on the Election of Judges to the European Court of Human Rights
Rapporteur: Mr Boriss CILEVIČS, Latvia, Socialists, Democrats and Greens Group

*Summary*

The quality of the selection procedure at national level and of the election procedure before the Parliamentary Assembly conditions the judges' democratic legitimacy as the guardians of fundamental rights and freedoms in Europe.

It is up to the High Contracting Parties, assisted by the Advisory Panel of Experts, to submit three candidates, each of whom must fulfil the eligibility criteria laid down in Article 21 of the European Convention on Human Rights; and it is for the Assembly, assisted by its Committee on the Election of Judges to the European Court of Human Rights, to elect the most qualified of the three candidates.

The current framework for the election of judges is laid down in a number of Assembly texts adopted over a period of more than twenty years. Possible further changes to the procedure for the election of judges to the Court have been discussed both at intergovernmental level and in this committee.

In view of these proposals, but mindful also of the fact that the election procedure as it has evolved over time has generally resulted in the election of highly qualified and well-respected judges, the committee suggests several further improvements to the election procedure.

1. Reference to committee: Doc. 14250, Reference 4282 of 10 March 2017.

**Contents** **Page**

A. Draft resolution ..... 3
B. Explanatory memorandum by Mr Boriss Cilevičs, rapporteur ..... 5
1. Introduction ..... 5
2. Summary of the existing procedure for the election of judges of the European Court of Human Rights ..... 6
2.1. Pre-selection procedure by the High Contracting Parties, assisted by the Advisory Panel of Experts ..... 6
2.2. Election procedure before the Assembly ..... 7
3. Substantive criteria regarding the election of judges of the European Court of Human Rights ..... 9
4. Proposals for the modification of the existing procedure ..... 10
4.1. Proposals to reduce the scope for political lobbying ..... 10
4.2. Proposals to improve co-operation with the Advisory Panel ..... 12
4.3. Proposals to increase the transparency of the election process in the Assembly ..... 13
4.4. Proposals to further improve the procedure within the Committee on the Election of Judges ..... 13
5. Conclusions ..... 14
Appendix – A brief discussion of proposals for changes of the election procedure made in different fora ..... 16

## A. Draft resolution[2]

1. The Parliamentary Assembly considers that the election of the best qualified judges to the European Court of Human Rights ("the Court"), based on clear criteria and following a fair and objective procedure, is one of its most important tasks. The quality of the selection procedure at national level and of the election procedure before the Assembly has a direct impact on the independence and impartiality of the judges, which in turn ensure public confidence in the Court; and it conditions the judges' democratic legitimacy as the guardians of fundamental rights and freedoms in Europe.

2. The Assembly recalls that Article 22 of the European Convention on Human Rights (ETS No. 5, "the Convention") lays down a co-decision procedure for the election of judges: it is up to the High Contracting Parties, assisted by the Advisory Panel of Experts ("Advisory Panel"), to submit three candidates, each of whom must fulfil the eligibility criteria laid down in Article 21; and it is for the Assembly, assisted by its Committee on the Election of Judges to the European Court of Human Rights ("Committee on the Election of Judges") to elect the most qualified of the three candidates.

3. The Assembly notes that considerable progress has been made regarding national selection procedures. It welcomes, in particular, the contribution of the Advisory Panel set up by the Committee of Ministers in 2010 (CM/Res(2010)26) to assist the High Contracting Parties in establishing shortlists of three qualified candidates. In addition, the Committee of Ministers adopted Guidelines on the selection of candidates for the post of judge at the European Court of Human Rights (CM(2012)40), which lay down a set of reasonable procedural requirements and selection criteria.

4. The Assembly's own procedures have also evolved considerably, in particular through the establishment of a dedicated committee on the election of judges, the extension of the duration of interviews, and through the clarification of selection criteria and procedural rules and requirements, regarding, in particular, gender balance and language skills.

5. The European Court of Human Rights, in two Advisory Opinions in 2008 and 2010, recognised the Assembly's right to stipulate additional requirements for the selection of judges, in particular those on gender balance and language skills, in the interest of the proper functioning of the Court. The Court also recalled that the Assembly must "ensure in the final instance that each of the candidates on a given list fulfils all the conditions laid down by Article 21.1, in order for it to preserve the freedom of choice conferred on it by Article 22, which it must exercise in the interests of the proper functioning and the authority of the Court".

6. The current framework for the election of judges is laid down in a number of Assembly resolutions and recommendations, which were adopted over a period of more than twenty years:

– Recommendation 1295 (1996) and Resolution 1082 (1996) on the procedure for examining candidatures for the election of judges to the European Court of Human Rights;

– Recommendation 1429 (1999) on national procedures for nominating candidates for election to the European Court of Human Rights;

– Resolution 1200 (1999) on the election of judges to the European Court of Human Rights;

– Recommendation 1649 (2004) and Resolution 1366 (2004) on candidates for the European Court of Human Rights;

– Resolution 1426 (2005) on candidates for the European Court of Human Rights;

– Resolution 1432 (2005) on the procedure for elections held by the Parliamentary Assembly other than those of its President and Vice-Presidents;

– Resolution 1627 (2008) on candidates for the European Court of Human Rights;

– Resolution 1646 (2009) on the nomination of candidates and election of judges to the European Court of Human Rights;

– Resolution 1764 (2010) on national procedures for the selection of candidates for the European Court of Human Rights;

– Resolution 1841 (2011) "The amendment of various provisions of the Rules of Procedure of the Parliamentary Assembly – implementation of Resolution 1822 (2011) on the reform of the Parliamentary Assembly";

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2. Draft resolution adopted unanimously by the committee on 27 September 2018.

– Resolution 2002 (2014) on the evaluation of the implementation of the reform of the Parliamentary Assembly.

7. Possible further improvements of the procedure for the election of judges to the Court have recently been discussed both at intergovernmental level, under the auspices of the Committee of Ministers, and in the Assembly's Committee on the Election of Judges. Relevant proposals aim at strengthening co-operation between the Committee on the Election of Judges and the Advisory Panel; at improving the functioning of the Committee on the Election of Judges, including by increasing the transparency of proceedings and by codifying substantive selection criteria in more detail; and at streamlining the election procedure in the Assembly in different ways.

8. In view of these proposals, but mindful also of the fact that the election procedure as it has evolved over time has generally resulted in the election of highly qualified and well-respected judges, the Assembly considers that the following modifications of the procedure for the election of judges ought to be made:

8.1. the Chairperson or a representative of the Advisory Panel shall be invited by the Chairperson of the Committee on the Election of Judges to explain the reasons for the Panel's views on candidates, during the briefing sessions scheduled before each set of interviews;

8.2. a list of candidates shall be rejected when:

8.2.1. not all of the candidates fulfil all the conditions laid down by Article 21.1;

8.2.2. the national selection procedure did not fulfil minimum requirements of fairness and transparency;

8.2.3. the Advisory Panel was not duly consulted;

8.3. the Committee on the Election of Judges shall decide on a proposal to reject a list of candidates by a majority of the votes cast;

8.4. members of the Committee on the Election of Judges from the country whose list is under consideration shall not have the right to vote in the Committee on the Election of Judges, either on a possible rejection of their country's list or on the expression of preferences among candidates.

9. The Assembly invites:

9.1. the Committee on Rules of Procedure, Immunities and Institutional Affairs to consider those proposed changes in the election procedure before the Assembly that would require amendments to the Rules of Procedure and to submit any such proposals to the Assembly in due course; and to consider ways and means to guarantee high attendance in the Committee on the Election of Judges;

9.2. the Secretary General of the Assembly to publish, upon completion of the above-mentioned revision process [paragraphs 8.1 and 8.2], a consolidated information document reflecting the election procedure before the Committee on the Election of Judges and the Assembly.

## B. Explanatory memorandum by Mr Boriss Cilevičs, rapporteur

### 1. Introduction

1. Electing the judges of the European Court of Human Rights is one of the Parliamentary Assembly's most important tasks. The selection procedures have a direct impact on the independence and impartiality of the judges. Both are required in order to ensure public confidence in any judicial institution. Nomination procedures must be – and be seen to be – in conformity with international standards guaranteeing judicial independence. Shortcomings could cause judges to be elected who are not properly qualified to carry out their crucial functions to the detriment of the legitimacy and authority of the Strasbourg Court and ultimately of the defence of human rights and the rule of law throughout Europe.[3]

2. Proposals for improving the election procedure for judges at the European Court of Human Rights, and in particular the work of the Committee on the Election of Judges to the European Court of Human Rights ("the committee") have been voiced on different occasions. After some discussions at its meetings in January and April 2017, the committee decided to launch a motion for a resolution on the topic of the election procedure.[4] The purpose of the present report is to sum up the existing procedure, which is laid down in scattered resolutions and recommendations adopted by the Assembly over a long period of time, and to analyse the different proposals for reform. The draft resolution also clarifies certain issues reflecting the evolution of the Assembly's and the committee's practice, such as the grounds for rejection of lists of candidates. For the sake of being complete and doing justice to other reform proposals that have been voiced in different fora, I will also discuss, in an appendix to this memorandum, a number of reform proposals that would require changes of the Assembly's Rules of Procedure, which can only be initiated by the Committee on Rules of Procedure, Immunities and Institutional Affairs. You will notice that, in the end, I am not proposing many changes to the existing procedure – in accordance with the time-honoured maxim "if it ain't broke, don't fix it": the procedure as it stands now has by and large produced excellent results and we should give it time to settle and prove its worth before we make any more changes.

3. I should like to recall that the procedure for the election of the judges to the European Court of Human Rights is also the subject of discussions in the Council of Europe's intergovernmental bodies. At their 1252nd meeting in March 2016, the Ministers' Deputies instructed the Steering Committee on Human Rights (CDDH) to examine the selection and election process for judges at the Court, including all factors that might discourage possible candidates from applying. In April 2016, the CDDH set up a Committee of Experts on the System of the European Convention on Human Rights (DH-SYSC), which in turn created two drafting groups, including one on "The Follow-Up to the CDDH Report on the Longer-Term Future of the System of the Convention" (DH-SYSC-I). Mr Vít A. Schorm, Chairperson of the DH-SYSC-I and Government Agent of the Czech Republic before the European Court of Human Rights, and Mr Morten Ruud, Vice-Chairperson and Special Adviser with the Ministry of Justice of Norway, took part in an exchange of views with our committee on 12 January 2017. In turn, the Secretary General of the Assembly, Mr Wojciech Sawicki, had exchanges of views with the DH-SYSC-I in February and with the DH-SYSC in May 2017. The draft report prepared by the DH-SYSC-I, which last met from 18 to 20 October 2017, was adopted by the DH-SYSC on 9 November 2017 and by the CDDH at its 88th meeting from 5 to 7 December 2017.[5] After a discussion at the meeting of the Deputies' Rapporteur Group on Human Rights (GR-H) on 20 February 2018, the Ministers' Deputies endorsed it at their meeting on 7 March 2018. Reference to further improvements of the procedure for the election of judges was also made in the "Copenhagen Declaration"[6] adopted by a high-level conference organised by the Danish chairmanship and in the "Report on securing the long-term effectiveness of the supervisory mechanism of the European Convention on Human Rights" adopted at the 128th Ministerial Session in Elsinore (Denmark) on 17 and 18 May 2018. In conclusion, the Ministers noted that "[t]he selection and election of judges to the Court have also been the subject of particular attention since the Brussels Declaration and improvements of the current procedures could be envisaged, notably through increased co-operation between the different actors (States Parties, Committee of Ministers, Parliamentary Assembly and Advisory Panel of Experts on Candidates for Election as Judge to the Court)".[7]

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3. See Doc. 11767 dated 1 December 2008, "Nomination of candidates and election of judges to the European Court of Human Rights" (rapporteur: Mr Christopher Chope, United Kingdom, EDG), paragraph 3.
4. See Doc. 14250. The motion for a resolution was referred for report to the Committee on the Election of Judges by the Standing Committee on 10 March 2017. The committee appointed Mr Boriss Cilevičs as rapporteur on 6 April 2017.
5. Document CDDH(2017)R88, Addendum I: https://rm.coe.int/selection-and-election-of-judges-of-the-european-court-of-human-rights/16807b915e.
6. www.coe.int/fr/web/portal/-/copenhagen-declaration-adopt-1; see in particular paragraph 62, encouraging the Assembly to take into account the proposals discussed in the above-mentioned CDDH report, ibid.
7. Document CM(2018)40-final, paragraph 61.

4. On the basis of an introductory memorandum summing up the existing procedure and reflecting the reform proposals voiced until then, the committee held a full day of discussions with experts, including the Chairperson of the Advisory Panel of Experts ("Advisory Panel"), Ms Nina Vajić, at its meeting on 20 and 21 October 2017 in Riga.

## 2. Summary of the existing procedure for the election of judges of the European Court of Human Rights

5. Article 22 of the European Convention on Human Rights (ETS No. 5, "the Convention") lays down that "[t]he judges shall be elected by the Parliamentary Assembly with respect to each High Contracting Party by a majority of votes cast from a list of three candidates nominated by the High Contracting Party". Article 22 thus foresees co-operation in the process of designating the judges of the Court: national governments select three candidates while the Assembly elects one of them as a judge.

6. The existing procedure leading up to the election of judges of the European Court of Human Rights consists of two stages. The first is the pre-selection of candidates leading up to the transmission to the Assembly of a list of three candidates. It is in principle the sole responsibility of the High Contracting Parties to the Convention (i.e. the States/Governments). Since the establishment of the Advisory Panel, the States benefit from its expert advice. The second stage of the procedure is the responsibility of the Parliamentary Assembly. Following the assessment by the committee of the candidates shortlisted by the States Parties, it is up to the Assembly's plenary to elect one of the three candidates.

### *2.1. Pre-selection procedure by the High Contracting Parties, assisted by the Advisory Panel of Experts*

7. The pre-selection procedure is triggered by a letter of the Secretary General of the Assembly inviting the national authorities to submit a list of candidates by a given deadline (about one year before the intended election date). The deadline is chosen with a view to giving the government, the Advisory Panel, the committee and the Assembly sufficient time to select and assess the candidates and proceed with the election. The national pre-selection procedure is of crucial importance for the result of the process as a whole. In fact, when all three candidates transmitted to the Assembly are excellent, it does not matter who is elected in the end, from an institutional point of view: it will necessarily be an excellent judge who, in addition, will enjoy the democratic legitimacy conferred by the election. Following some problems at the level of national pre-selection procedures, the Committee of Ministers decided in 2010 to set up an "Advisory Panel of Experts" to provide expert advice to governments on the qualification of the pre-selected candidates. Governments are invited to submit to the Panel the curricula vitae of the candidates they envisage presenting to the Assembly. The Panel, following a confidential procedure, examines the CVs and has the possibility of asking questions to the national authorities. After discussing the candidatures in light of all information received, the Panel (by written procedure or in a meeting) decides whether it considers that all candidates fulfil the requirements of Article 21 of the Convention or whether some do not, and it informs the national authorities accordingly. Governments are expected to follow the Panel's recommendations, though – formally speaking – they remain free to submit their list to the Assembly without following the Panel's views. In its recent practice, the committee, which is also informed of the Panel's conclusions on the final list submitted by the High Contracting Party, has insisted that the Panel at least be consulted in a meaningful way and its views given due consideration.

8. The national pre-selection procedures must fulfil certain requirements in order to increase the likelihood of the required outcome – namely that all three candidates are the best available. In 2012, the Committee of Ministers adopted "Guidelines on the selection of candidates for the post of judge at the European Court of Human Rights".[8] In short, the national selection procedures must be fair and transparent. The following are the key requirements: 1) the procedure should be stable and established in advance, through codification or established administrative practice;[9] 2) the call for candidatures should be made widely available to the public; 3) a reasonable period of time should be allowed for the submission of applications; 4) the body responsible for recommending candidates should have a balanced composition, its members should have sufficient technical knowledge and command respect and confidence, and they should be free from undue influence; 5) all serious applicants should be interviewed, based upon a standardised format; 6) the applicants' linguistic

8. Adopted by the Committee of Ministers on 28 March 2012, CM(2012)40-final: https://rm.coe.int/16805cb1ac.

9. The survey carried out in the preparation of Doc. 11767 (note 3 above) in 2008 shows that at the time, many States did not have a procedure that would have satisfied the requirements laid down in the "Guidelines" (see Doc. 11767, Appendix). It could be interesting to carry out a similar survey now to assess the progress made since then.

abilities should be assessed; 7) any departure by the final decision-maker from the selection body's recommendation should be justified by reference to the criteria for the establishment of lists of candidates; and finally 8) the list should be submitted to the Assembly after having obtained the Advisory Panel's opinion on the candidates' suitability.

9. The Assembly[10] also insists on fairness, transparency and consistency of the national selection procedures, including public and open calls for candidatures, though without going into the same detail as the Committee of Ministers. The committee has, however, recently begun to place a greater emphasis on this issue and has recently based the rejection of two lists on purely procedural grounds.[11] In the case of Albania, the Committee of Ministers' Guidelines were not respected. In the Hungarian case, no meaningful national selection procedure was carried out. This said, the committee limits its assessment of the national selection procedure, which must be described in the letter transmitting the list of candidates, to its fairness and transparency in general and does not second-guess the outcome of the procedure in the particular case. This means that as long as the procedure followed was generally fair and transparent, the committee will not reject the list on procedural grounds only because it found that persons other than the selected candidates should have been placed on the list. The Assembly thus respects the decision laid down in the Convention to place the responsibility for the selection of the three shortlisted candidates upon the States Parties.[12] Basing itself also on the Committee of Ministers' Guidelines, the Assembly thus merely exercises general oversight of the fairness and transparency of the procedures followed in establishing the list, which shall be transmitted to the Assembly in alphabetical order.[13]

### *2.2. Election procedure before the Assembly*

10. After the list is transmitted to the Assembly, it is published on the Assembly's website. The candidatures are then examined by the committee and the candidates are interviewed. In light of the committee's recommendation, the Assembly proceeds with the election, or rejects the list. After the list is transmitted to the Assembly, it remains its "property". It can only be withdrawn or modified by the State Party concerned as long as the deadline set for its transmission has not yet expired.[14] After the expiry of the deadline and before the Assembly proceeds to a vote, any candidate may decide to withdraw from the list. In such a case, the election procedure is interrupted and the State Party concerned is invited to complete the list.[15]

#### *2.2.1. Procedure before the Committee on the Election of Judges*

11. The committee has 22 seats (including the chairpersons of the Committee on Legal Affairs and Human Rights and of the Committee on Equality and Non-Discrimination, who are *ex officio* members). Members are nominated by the political groups in proportion to their strength in the Assembly. Nominees must have sufficient legal expertise and experience – as determined by the Chairperson. This committee is the only one in the Assembly to which such a requirement applies. The committee can only deliberate validly when a quorum of one third of its members (seven) is present.

12. The committee meetings follow a consistent procedure. In a briefing session, before each set of interviews, members receive information, such as the confidential views of the Advisory Panel and relevant information received by the chairperson from other sources. In line with established practice, the chairperson transmits communications received from widely respected representatives of civil society, whilst messages received from political parties or unsuccessful candidates are generally not considered as relevant. An expression of governmental preference shall play no role in the deliberations of the committee,[16] which bases itself solely on the criteria laid down in the Convention as "fleshed out" by the Assembly itself (see Chapter 3 below). The meetings are held in camera and all participants are subject to strict confidentiality.

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10. See Resolution 1646 (2009), paragraphs 2 and 4.1.
11. The rejection of the Albanian and Hungarian lists was recommended at the committee's meeting in September 2016.
12. See the Court's second Advisory Opinion dated 22 January 2010 "on certain legal questions concerning the lists of candidates submitted with a view to the election of judges to the European Court of Human Rights" (No. 2) ("second Advisory Opinion"), paragraph 45: "Within the framework thus defined by the Convention, the High Contracting Parties have complete latitude in constituting their lists."
13. Explicitly required by Recommendation 1429 (1999), paragraph 5, Recommendation 1649 (2004), paragraph 19.5 and the Appendix to Resolution 1432 (2005), paragraph 3.
14. See second Advisory Opinion, op. cit., paragraph 49.
15. Ibid., paragraphs 56-57.
16. See Appendix to Resolution 1432 (2005), paragraph 3, third sentence.

13. When the committee concludes that there are no reasons to reject the list on purely procedural grounds, the candidates are interviewed one by one, in alphabetical order. Each interview lasts 30 minutes. Up to five minutes can be used by the candidate to present his or her candidature. This opportunity, of which the candidates are informed ahead of time, is used by practically all candidates. Members can ask any questions, including clarifications regarding the candidate's CV. Usually, questions are asked in the two official languages. Candidates have simultaneous interpretation between both languages at their disposal and may give their answers in either official language. After the three interviews, the committee has an exchange of views on the merits of the candidates. To conclude, the committee first decides on whether all three candidates fulfil the criteria for election as a judge, failing which it shall recommend to the Assembly to reject the list. Such a recommendation must be adopted by a two-thirds majority of members entitled to vote. Only those who were present during all three interviews are entitled to vote on a given list. When the list is not rejected, the committee votes on its preference among the candidates, by secret ballot. The above procedure is repeated for each list of candidates on the agenda.[17]

14. The committee's recommendation is communicated to the Assembly in good time before the part-session during which the election is scheduled to take place. The recommendation does not include reasons for the committee's choice and does not indicate the exact majority. But the standard formulations used to express the result of the vote make it clear to what extent one or, possibly, two of the candidates succeeded in convincing the committee of their qualities. For example, it is indicated whether a recommendation in favour of one candidate was adopted "unanimously", "with an overwhelming (or large, or clear, or narrow) majority", or simply "by a majority" (sometimes "over" another candidate; it is understood that a second name is mentioned whenever the vote was fairly close between the first and second candidate, whilst the third candidate was far behind; and that a "large" majority implies a majority of at least two thirds).The recommendations are published on the Assembly's website several days before the election.

15. In case of rejection of a list, the Secretary General of the Assembly and the chairperson provide necessary information, in confidence, to the Permanent Representative of the country concerned in Strasbourg and to the chairperson of the national delegation to the Assembly, respectively. The committee's recommendation to reject a list is endorsed by the Assembly in the framework of the Progress Report of the Bureau to the Assembly. Should the proposal be defeated by a majority of votes in the Assembly, the list is sent back to the committee for reconsideration. In such a case, an election cannot take place during the same part-session as the Assembly does not have the benefit of a recommendation by the committee in favour of one or another candidate.

#### *2.2.2. Election by the Assembly*

16. As indicated above, the Assembly is empowered by Article 22 of the Convention to elect the judges "by a majority of votes cast from a list of three candidates".

17. When the Assembly does not reject the list, either on procedural grounds or because not all candidates fulfil the criteria for eligibility as a judge, a first round of election is held on the Tuesday of the part-session – in line with the Assembly's practice designed to achieve the highest possible participation. For this reason, members have the possibility to vote – by secret ballot – throughout the morning and afternoon sittings. The names of the candidates appear on the ballot paper in alphabetic order. The ballot paper does not reflect the preference expressed by the committee, nor that of the government.[18] If one candidate obtains the absolute majority of the votes cast, he or she is declared elected. Failing that, a second round takes place on the Wednesday, for which a relative majority is sufficient.

18. The Assembly is not, strictly speaking, bound by the committee's recommendation. It is not a "voting automaton". But it has delegated the assessment of the candidatures to its committee and should normally follow its conclusions. Party-political considerations, or lobbying by the national delegation concerned (or by its majority representatives) should not be tolerated as grounds to deviate from the recommendation of the committee. This recommendation reflects after all the careful assessment of the candidatures on the basis of the CVs and the interviews conducted by a – politically representative – body made up of parliamentarians having special legal expertise. It must therefore be welcomed that since April 2011, the Assembly has followed the committee's (or, before that, the sub-committee's) recommendation in 37 out of 39 cases (94.9 %). In 19 of the 37 cases, in which the Assembly followed the committee, the committee's recommendation had mentioned only one candidate. In 17 of the other 18 cases, it had expressed a

17. See Resolution 1627 (2008) and Resolution 1841 (2011), paragraph 6.1.

18. See Appendix to Resolution 1432 (2005), paragraph 3: "Any … expressions of governmental preference shall play no role in the deliberations of the [then] Ad Hoc Sub-committee on the Election of Judges."

preference of one candidate over another, whose name was also mentioned in the recommendation. In one case, it found two candidates equally qualified. In the second group, the Assembly elected the candidate recommended as the committee's first (or equal) choice in 13 cases, whereas in five cases (38.5%), the candidate recommended as a second choice was elected.

### 3. Substantive criteria regarding the election of judges of the European Court of Human Rights

19. The substantive criteria for the election of judges are laid down in Article 21.1 of the Convention, which states that "judges shall be of high moral character and must either possess the qualifications required for appointment to high judicial office or be jurisconsults of recognised competence".

20. As recognised by the Court in its first Advisory Opinion,[19] the Assembly is duty-bound to ensure a composition of the European Court of Human Rights allowing it to function properly by laying down other criteria, which "can be legitimately considered to flow implicitly from Article 21.1 and, in a sense, to explain it in greater detail". The Court recalls that the Assembly must "ensure in the final instance that each of the candidates on a given list fulfils all the conditions laid down by Article 21.1, in order for it to preserve the freedom of choice conferred on it by Article 22, which it must exercise in the interests of the proper functioning and the authority of the Court. It is obvious too that the Assembly may take account of additional criteria which it considers relevant for the purposes of choosing between the candidates put forward by a Contracting Party and may, as it has done in a bid to ensure transparency and foreseeability, incorporate those criteria in its resolutions and recommendations".[20]

21. These additional criteria laid down by the Assembly in line with the Court's interpretation of Article 21 include appropriate knowledge of both official languages. The Assembly requires an active knowledge of one of the official languages and (at least) a passive knowledge of the other.[21] In the above-mentioned first Advisory Opinion, the Court also recognised that the Assembly has the right to require that every list contains candidates of both sexes[22] – provided an exception is foreseen in appropriate cases. A single-sex list is accepted for the benefit of the under-represented sex (less than 40% of sitting judges of a given sex at the time of the sending of the Assembly Secretary General's letter inviting the High Contracting Party to present a list of candidates) or if "exceptional circumstances" exist "where a Contracting Party has taken all the necessary and appropriate steps to ensure that the list contains candidates of both sexes meeting the requirements of Article 21", but was unable to ensure that the list contained candidates of both sexes. Such exceptional circumstances must be so determined by a two-thirds majority of the committee, whose position needs to be endorsed by the Assembly.[23]

22. In addition to language skills and gender balance, the Assembly has given further indications, in different resolutions and in the reports on which they are based, of qualities it expects from candidates. These include the requirements that the areas of competence of the candidates shall not "appear to be unduly restricted"[24] and that candidates have "experience in the field of human rights",[25] "either as practitioners or as activists in non-governmental organisations working in this area".[26] The Guidelines of the Committee of Ministers state in addition that "[c]andidates need to have knowledge of the national legal system(s) and of public international law. Practical legal experience is also desirable".[27] The Committee of Ministers further requires that "if elected, candidates should in general be able to hold office for at least half of the nine-year term before reaching 70 years of age".[28] In practice, this imposes an upper age limit for candidates of about 65 at the time of the start of the procedure within the Assembly.[29] The Committee of Ministers and the Assembly have also discussed the need for a minimum age (or minimum professional experience) requirement as a matter of the "stature" of the judges elected to the Court, in particular in light of the

19. Advisory Opinion of 12 February 2008 "on certain legal questions concerning the lists of candidates submitted with a view to the election of judges to the European Court of Human Rights", paragraph 47.
20. Second Advisory Opinion, op. cit., paragraphs 44-45.
21. Resolution 1646 (2009), paragraph 4.1, and Appendix, Section VIII.
22. Recommendation 1429 (1999), paragraph 6.3, and Recommendation 1649 (2004), paragraph 19.3.
23. See Resolution 1366 (2004) as modified by Resolutions 1426 (2005), 1627 (2008), 1841 (2011) and 2002 (2014).
24. Resolution 1366 (2004), paragraph 2.
25. Recommendation 1649 (2004), paragraph 19.2.
26. Recommendation 1429 (1999), paragraph 6.2.
27. Guidelines of the Committee of Ministers on the selection of candidates for the post of judge at the European Court of Human Rights, CM(2012)40, 29 March 2012 ("CM Guidelines"), paragraph II.4.
28. Ibid., paragraph II.5.
29. Protocol No. 15 to the European Convention on Human Rights (CETS No. 213), upon its entry into force, will set the age limit at 65 (at the deadline set by the Assembly for the transmission of the list).

existence, in a number of member States, of a minimum age and professional experience requirement for eligibility to high judicial office.[30] Another requirement cited repeatedly[31] is that as far as possible no candidate should be submitted whose election might result in the necessity to appoint an ad hoc judge.[32] This requirement may however on occasion conflict with the recommendation to give preference to candidates who had previously acted as judges on the highest courts of their countries.[33]

23. In the explanatory memorandum underlying Resolution 1366 (2004),[34] the rapporteur states that "[b]y interview, members have the opportunity to explore and clarify [the candidate's] skills and abilities and make further assessment of the candidates based on:

– knowledge and awareness of the European Convention jurisprudence
– general knowledge and legal experience
– intellectual and analytical ability
– maturity and soundness of judgment
– decisiveness and authority
– communication and listening skills
– integrity and independence
– fairness and impartiality
– understanding of people and society
– courtesy and humanity
– commitment to public service
– conscientiousness and diligence".

24. This list sums up rather well the substantive criteria that should guide both the national authorities in the pre-selection procedure and the committee and the Assembly in the election process. I support this list, which should be supplemented by additional criteria mentioned in previous resolutions of the Assembly and by the excellent summary of the criteria applied by the Advisory Panel when assessing the qualification of judges and jurisconsults presented by Ms Vajić at the committee meeting in Riga: regarding candidates who are judges or prosecutors, the level (usually at the highest courts) and the length of their experience shall be decisive; jurisconsults (Article 21) are assessed in light of the depth and width of their consulting experience, how well-known in their fields of expertise they are (including through relevant publications) and how they combine both academic and practical legal experiences. In my view, these criteria cover sufficiently well the need for long-standing, high-level experience so that it is not necessary to include a minimum age rule, as was suggested by some.

## 4. Proposals for the modification of the existing procedure

25. At its meeting in Riga on 20 and 21 October 2017, the committee discussed in some depth a number of proposals to modify the existing procedure.

### *4.1. Proposals to reduce the scope for political lobbying*

26. The Assembly is, by definition, a political body composed of politicians who take political decisions. However, political lobbying and interference in the process of the election of judges to the Court should be minimised to ensure that the most qualified and highly respected candidates are elected. The success of our procedure will be measured by this benchmark. It is undeniable that political lobbying has taken place on occasion in the framework of the Assembly procedure – less so (or at least, less successfully so) at committee

30. Doc. 11767, paragraphs 29-31.
31. For example Recommendation 1649 (2004), paragraph 19.6.
32. See Resolution 1646 (2009), paragraph 4.5; see also CM Guidelines, paragraph II.7.
33. See letter of 9 June 2010 from M. Jean-Paul Costa, (then) President of the European Court of Human Rights to member States' Permanent Representatives, attached to Assembly Doc. 12391 (National procedures for the selection of candidates for the European Court of Human Rights (rapporteur: Ms Renate Wohlwend, Liechtenstein, EPP/CD)); Doc. 11767, paragraph 6.
34. Doc. 9963 of 7 October 2003, "Candidates for the European Court of Human Rights" (rapporteur: Mr Kevin McNamara, United Kingdom, SOC).

level and maybe more so, but still only in a very limited number of cases, in the Assembly. Experience also shows that such political lobbying happens far more frequently at the level of the national selection procedures than at the level of the Assembly.

27. When faced with political lobbying or interference at national level, the Assembly can only send back lists in two cases: 1) when the national procedure (because of political lobbying/interference, or for any other reason) has resulted in the transmission of candidates who do not fulfil the eligibility criteria; or 2) when the national selection procedure did not fulfil the standards of transparency and fairness laid down by the Assembly and the Committee of Ministers. When the national procedure fulfilled the Assembly's requirements and all three candidates are eligible in principle, the Assembly cannot but proceed with the election. The draft resolution states that the presence of one of these two grounds should lead the committee to "systematically" recommend the rejection of such lists by the Assembly. In future, the majority requirement for such a recommendation to be adopted by the committee could also be reduced, from the currently required two-thirds majority (Appendix VI to the Rules of Procedure, VIII.4.i) to an overall majority of all votes cast in favour or against. This would require an update of the committee's Terms of Reference by the Committee on Rules of Procedure, Immunities and Institutional Affairs, upon instruction from the Bureau (Appendix V to the Rules of Procedure, VIII.4).

28. Political lobbying in the Assembly could be minimised by altering the composition of the committee and/or by streamlining the election procedure at the plenary level.

#### *4.1.1. Proposals to alter the composition of the Committee on the Election of Judges and to strengthen attendance*

29. I am reluctant to fundamentally change the composition and mode of appointment of the committee. The existing method of nomination by political groups in proportion to their relative strength provides for a link also with the prevailing political trends in the member States of the Council of Europe as a whole. This gives judges a measure of legitimacy for interpreting the Convention as a "living instrument", taking into account constant change in European societies. The relatively small number of committee members allows for dense, high-quality discussions, provided the qualification requirements are maintained. Dropping these requirements would indeed increase the pool of eligible members, but it may also diminish the committee's standing vis-à-vis the Assembly and vis-à-vis the Advisory Panel and the High Contracting Parties. Members should be able (and be seen to be able) to ask the candidates relevant questions and properly evaluate the quality of their answers. Eligibility for membership could be assessed in a neutral way by the committee's bureau (chairperson and vice-chairpersons), in consultation with the Assembly's Secretary General.

30. Regarding attendance, it is obviously desirable that all members should attend meetings of the Committee on the Election of Judges as often as possible. Whilst conflicts with other parliamentary duties are sometimes unavoidable, the secretariat should keep detailed statistics on attendance and keep the political groups aware.[35] Political groups could decide to replace members after a defined number of meetings not attended (as discussed recently by the EPP/CD group: replacement in principle after three absences; for me this would be a good solution to reduce absenteeism – if indeed applied). I considered possible sanctions against absentee members or political groups whose members' average participation rate is below 50%. But would it be fair to sanction individual members depending on whether or not a substitute member appointed by the political group was able to attend? What if several members were absent while one substitute from the same group attended? Sanctioning political groups (for example by reducing the number of seats allocated to them in the following year) would raise other issues: given that the composition of the committee changes throughout the year, on what basis shall the average participation be calculated? Should the basis be the number of actual members nominated by the group (at the beginning of the year? or the yearly average?)?; or should it be the number of a seats allocated to a group? The latter solution would create pressure on groups to fill all their seats – but what if there are not enough suitably qualified (and available) members? Also, small political groups would risk losing their sole seat on the committee because of a temporary lack of availability of a suitable member in a given year. In view of these practical difficulties, I suggest that we ask the Committee on Rules of Procedure, Immunities and Institutional Affairs to examine the possibility of modifying the rules governing the functioning of the committee in such a way that incentives are created for more regular attendance of members. If the Rules Committee, in light of its expertise and experience, does not consider sanctions as an appropriate solution, we must content ourselves with "naming and shaming" political groups whose members, for whatever reason, do not attend the committee's meetings on a regular basis. In this

35. At its April 2017 meeting, the Committee on the Election of Judges invited the secretariat to do so.

context, let us recall that members' failure to attend diminishes the respective political groups' influence on the exercise of one of the Assembly's most important prerogatives – the election of the best possible judges to the European Court of Human Rights.

#### *4.1.2. Streamlining the election process in the Assembly*

31. Various proposals have been made, in particular in the discussions under the auspices of the CDDH, to streamline the election process in the plenary in order to reduce the scope for lobbying. Several proposals are aimed at strengthening the role of the committee, at the expense of the Assembly. Personally, I am reluctant to recommend any changes to the existing rules at this time, which would in any event require a proposal by the Rules Committee.

### ***4.2. Proposals to improve co-operation with the Advisory Panel***

32. The chairperson of the Advisory Panel, Ms Nina Vajić, made several suggestions to the committee to improve communication and co-operation between the Panel and the Assembly. In the intergovernmental discussions, such proposals were also discussed. In my understanding, there is a wide consensus, also in the committee, in favour of maintaining the division of labour laid down in the Convention, namely: on the one hand, the High Contracting Party, represented by its government, shall submit a list of three qualified candidates; on the other, the Assembly shall elect one of them as judge. In line with this division of labour, which is in harmony with the principle of separation of powers, governments are assisted by the Panel, and the Assembly is advised by its committee.

33. This division of labour foreseen by the Convention would be disturbed if the Advisory Panel were to participate actively in the election process in the Assembly, for example through "integrating" members of the Panel into the committee by inviting them to attend interviews with candidates, let alone to advise or even vote on preferences. Given the Panel's collegiate nature, its representative would in any case be in a difficult position if he or she wanted to deviate from the Panel's previously agreed views in light of the interviews.

34. But it makes perfect sense for the committee to be fully informed of the Advisory Panel's opinion with regard to the candidates whom the government finally submitted to the Assembly, after the completion of the "advisory process", which in turn must remain strictly between the Panel and the government. So far, the information provided to the committee is relatively limited – members receive, in strict confidence, only a short written note from the Panel indicating either that all candidates fulfil the minimum standards required by the Convention, or that one or the other does not. Only in the latter case does the Panel give succinct reasons for its findings.

35. It would in my view be desirable if the committee could benefit from more detailed reasons for the findings of the Advisory Panel. These reasons could be transmitted orally, either by the chairperson or another representative of the Panel participating in the briefing sessions of the committee preceding the interviews, or in a conversation between the chairpersons of the Panel and of the committee, or, finally, through the respective secretariats. The Panel has yet to indicate its own preference in this respect.

36. I would also find it desirable, as an expression of solidarity between different bodies of the Council of Europe, in the words of Ms Vajić in Riga, that the Assembly uses the tools at its disposal to help ensure that the Advisory Panel is consulted in an appropriate way by governments. Concretely, this means that the Assembly shall reject lists on procedural grounds when the Panel was either not consulted at all before the list was submitted to the Assembly, or when it was given such little time as to make the consultation meaningless. The Assembly has acted in this way before (see paragraph 9 above (Albania)), and I suggest we include this explicitly in our new resolution, also as a signal to governments.

37. Another question is whether the Assembly should consider itself bound by the findings of the Advisory Panel, in particular negative ones, as Ms Vajić argued in Riga. Personally, I am against limiting the Assembly's "margin of appreciation" in such a way. It goes without saying that the committee must afford the Panel's views serious consideration. But differences of appreciation may well occur nonetheless, not least due to the different backgrounds and experiences of the members of the Panel and of those of the committee, and due to the fact that only the committee members have the opportunity to meet the candidates personally, to ask them questions orally and to observe their reactions directly. To give the Panel a *de facto* right to veto candidates submitted by the government would amount to the Assembly granting it actual decision-making powers, which the Committee of Ministers chose not to confer on it and which would be in contradiction with the advisory nature of its mandate. This is the reason why I did not include in the list of grounds for systematic rejection in the draft resolution the scenario that the Panel found all three candidates insufficiently qualified.

This said, it is likely that such a list would end up being rejected anyway. This would trigger one of the grounds for systematic rejection that I did include in the draft resolution, namely that not all candidates fulfil the minimum requirements of Article 21 of the Convention (see paragraph 27 above).

### *4.3. Proposals to increase the transparency of the election process in the Assembly*

38. Increasing transparency is generally seen as a desirable, positive measure. It increases the accountability of decision-makers and decreases the scope for undue influences of all kinds. But in the procedure for the election of the Court's judges, too much transparency can jeopardise the reputation and the careers of the (unsuccessful) candidates and thereby have a chilling effect on high-level professionals who might consider putting their names forward. Avoiding such a chilling effect is a recurrent theme in deciding on different elements of the election procedure.

39. I am also reluctant to increase transparency by giving more detailed reasons for the committee's recommendations, which are made public before the election. The main reason for my reluctance is, again, the chilling effect on potential candidates, whose professional reputations could be damaged. Also, there would be considerable practical problems if the committee, as a collegiate body, were required to agree on the exact wording of longer texts. Drafting such sensitive language should not be left to the chairperson alone, let alone the secretariat. I therefore strongly support the continuation of the current practice of using standard formulas to express the committee's preferences, depending on the strength of support gathered by one or two of the three candidates in the secret ballot taken at the end of the discussion.[36] This said, I am in favour of allowing committee members to explain orally in the confidential meetings of their political groups why the committee gave preference to one or the other candidate. But even in this forum, which is not in the public domain, committee members should take utmost care to protect the reputation of all candidates by focusing on positive rather than negative considerations.

### *4.4. Proposals to further improve the procedure within the Committee on the Election of Judges*

#### *4.4.1. Extending the duration of the interviews?*

40. The current duration of 30 minutes marks a strong improvement over the 15 minutes the former sub-committee had at its disposal when a large number of judges' posts had to be filled over a short period of time after the current terms of office (nine years, non-renewable) entered into force. Forty-five or 60 minutes per candidate would translate into half a meeting day per list, due to unavoidable rules governing interpretation services. This would require considerably increased budgetary means. Also, I doubt that members are really in a position to allocate so much more of their time to the committee. The problem of absenteeism may well grow if too much is required. In my experience, a well-structured interview of 30 minutes can indeed provide a fairly clear impression of the personality and the legal reasoning and language skills of a candidate. Finally, I do not believe that allowing the chairperson to allot individual candidates more time on an ad hoc basis, as proposed by some, would be in conformity with the equality of treatment of all candidates.

#### *4.4.2. Systematically rejecting lists with even just one unsuitable candidate?*

41. This is one way of getting closer to the ideal scenario in which it simply does not matter – from the institutional point of view – which one of three excellent candidates submitted by a High Contracting Party will finally be elected. This requires some courage and patience at the start. Governments will in time draw the consequences from the Assembly's already established practice of rejecting a list if even one unsuitable candidate is included in it and they will ensure that "each of the candidates on a given list fulfils all the conditions laid down by Article 21.1", as the Court insisted in its Advisory Opinion. This point is also included in the draft resolution, for clarification.

#### *4.4.3. Reducing the majority required in the Committee on the Election of Judges to reject a list?*

42. A reduction of the majority requirement would obviously facilitate rejections of lists by the committee and thereby enable the committee to follow a more consistent line with respect to rejections. At the same time, reducing the majority required in the committee could also increase the risk of the Assembly overruling such a recommendation – which has never happened to date, as should be recalled. On balance, I am in favour of reducing the majority required for rejection. Under the current rules, a blocking minority can be organised quite easily, maybe too easily, which may make it difficult for the committee to apply all grounds for rejection in a

36. See paragraph 14 above.

consistent way. Reducing this threshold will make it easier to help ensure fair national selection procedures, respect for the role of the Advisory Panel and the preservation of the Assembly's choice between three qualified candidates, as required by the Convention. I have therefore included such a proposal in the draft resolution. Its implementation would of course require a change of Appendix V to the Rules of Procedure (point VIII.4.i).

*4.4.4. Excluding members from the country whose list is under consideration from participating in the discussions and/or voting in the Committee on the Election of Judges?*

43. Excluding members for the country under consideration from the decision-making process in the committee could prevent possible conflicts of interest – or what may be perceived as such. But at the same time, colleagues from the country whose list is under consideration can provide valuable background information, in particular on the quality of the selection procedure followed and the reputations of the candidates selected. The best solution would therefore be, in my view, to follow a middle path, namely to allow members from the country whose list is under consideration to participate in the interviews and discussions, but not in the voting. This is also compatible with the practice followed in the monitoring committee.

*4.4.5. Induction seminars for new committee members? More time for strategic discussions?*

44. An induction seminar or a briefing session for new members could cover both the criteria and procedure for the election of judges and some fundamentals of the functioning of the Convention system, from the point of view of the Court and with a focus on the Court's requirements in terms of the qualification and experience of judges. Budget permitting, this proposal could be further explored, in particular for new members of the committee, which could be grouped together from time to time.

45. At the meeting in Riga, several members suggested that meetings along similar lines, with the participation of the chairperson of the Advisory Panel and/or other outside experts could be held on an annual basis in order to discuss strategic issues such as the interpretation of the selection criteria and the possible further evolution of the election procedure. Ideally, the President of the Court could provide the Committee on Election of Judges with a briefing on the Court's needs in terms of knowledge and experience required in different areas of law. Budget permitting, I would be in favour of holding such discussions at regular intervals, perhaps every other year, in order to have an opportunity to discuss fundamental issues in more depth and with more detachment than what is possible in the framework of normal committee meetings dealing with concrete lists of candidates.

## 5. Conclusions

46. The procedure leading up to the election of the judges to the European Court of Human Rights must be beyond reproach, both at the level of the selection of three qualified candidates by the High Contracting Parties, and at the level of the election of the best candidate by the Assembly. This is a matter of credibility for the Council of Europe and of the authority of the Convention system as a whole.

47. Considerable improvements have been made over the past decade at both levels. In particular, national selection procedures have improved following the adoption of the Guidelines by the Committee of Ministers, which has also set up a qualified Advisory Panel to assist governments in producing lists of three competent candidates. The procedure on the Assembly's side has also evolved considerably. The Assembly has set up a full committee, whose members are lawyers or have relevant experience. It has improved the interviewing process within the committee and gradually spelt out and strengthened the substantive selection criteria regarding, in particular, gender balance, language skills and other requirements for the proper functioning of the Court, all with the support of the Court itself, as expressed in the Court's two Advisory Opinions.

48. Further improvement is always possible. A series of in-depth, constructive discussions on possible additional reforms has been held between government representatives, under the auspices of the Committee of Ministers and the CDDH and also within our committee. The latter has engaged in a dialogue with the co-chairs of the drafting group mandated by the CDDH, the chairperson of the Advisory Panel and several outside experts. As a result, some proposals have emerged which I found convincing and I have included them in the draft resolution; and others, which I have analysed and found, on balance, inappropriate.

49. Changes in relation to the current procedure include:

– the invitation addressed to the chairperson or a representative of the Advisory Panel to explain to the committee the reasons for the Panel's views on candidates, either in person, during the briefing sessions scheduled before each set of interviews, or through the committee's chairperson;

– the codification of a list of grounds for rejection of lists of candidates (including systematic rejection of lists when a national selection procedure did not fulfil minimum requirements of fairness and transparency or when the Advisory Panel was not duly consulted, and when not all three candidates are qualified) and the reduction of the majority requirement in the committee on rejections from a two-thirds to a simple majority;

– the exclusion of members of the committee from the country whose list is under consideration from voting in the committee.

These changes are reflected in the draft resolution submitted. Other proposals made in different fora which I do not support are presented, for the sake of completeness, in the Appendix.

**Appendix – A brief discussion of proposals for changes of the election procedure made in different fora**

1. For the sake of being complete, I should like to briefly discuss some other proposals for changes in the election procedure which were discussed in different fora, including the Riga meeting of the Committee on the Election of Judges to the European Court of Human Rights ("Committee on the Election of Judges") and in the relevant expert committees of the Council of Europe (see explanatory memorandum, paragraph 3). I should like to stress from the outset that I do not consider it useful at this point in time to make any other changes to the election process than those proposed in the draft resolution. The disadvantages of the proposed additional changes below clearly outweigh any possible advantages.

**1. Modifying the rules on nomination and composition of the Committee on the Election of Judges**

2. Switching away from the nomination of the members of the Committee on the Election of Judges by the political groups could theoretically, at first glance, contribute to reducing the risk of "politicisation" of the election process. But in my view, some manner of "representativeness" should be preserved in order to give a measure of democratic legitimacy to the Court's judges, which in turn is one of the arguments for their election by the Assembly in the first place. The alternative to nomination by political groups would be the nomination of the members of the committee by national delegations. But this would require increasing the number of seats on the committee to at least 47; and the committee's "representativeness" might still be seen as inadequate when large and small delegations are treated in exactly the same way. One possibility to maintain some balance would be to set up a rotation system by "constituencies" or groups of countries along the lines of the system used for the appointment of vice-presidents of the Assembly. But this would be a burdensome procedure; a rotation system would also interfere with the accumulation of knowledge and experience among committee members. Under the existing system of nomination, the need for a balanced composition of the committee from a geographical perspective could and should also be taken into account by the political groups when they nominate members.

3. Another proposal, which was notably put forward in the intergovernmental discussions, was to increase the membership of the committee and to ensure the presence of more "senior members" of the Assembly, for example the political group leaders or the Chairpersons of other committees, in addition to those of the Committee on Legal Affairs and Human Rights and of the Committee on Equality and Non-discrimination, who are presently *ex officio* members of the Committee on the Election of Judges. But in my view, this would dilute the requirement of legal qualifications or experience for the committee members, because such "senior members" of the Assembly do not necessarily fulfil these requirements. The inclusion of political group leaders would also tend to increase rather than decrease the "politicisation" of the election process and alter the proportional representation of the political currents represented in the Assembly, thus undermining rather than improving the democratic legitimacy of the election process. I would therefore be against the proposal to include additional *ex officio* members in the committee, as suggested for example by the Committee of Experts on the System of the European Convention on Human Rights (DH-SYSC).

**2. Changing the election procedure in the plenary Assembly**

4. The scope for political lobbying is said to be widest at the level of the plenary Assembly, in particular when no candidate has received an overall majority on the Tuesday of the session and a second round of voting becomes necessary on Wednesday – although in reality, this rarely happens. Various proposals have been made to modify the election process in the Plenary in order to reduce opportunities for lobbying. Proponents of such proposals say that they wish to strengthen the role of the committee, at the expense of the Assembly, but in my view, they may well weaken the role of the Assembly as a whole.

5. Discussions at intergovernmental level have even included a suggestion that the committee could be allowed to send only one or two candidates to the Assembly if it finds that one or two of the candidates submitted by the High Contracting Party are not qualified to be judges at the European Court of Human Rights or that one candidate, even though he or she fulfils the minimum requirements of Article 21, is clearly less suitable than the two others. I strongly disagree with such a suggestion. It is in direct contradiction with the clear wording of Article 22 of the Convention, which states that the judges shall be "elected", by the "Assembly", "from a list of three candidates nominated by the High Contracting Party". In practice, this suggestion could enable governments to reduce or even take away the Assembly's choice among three highly qualified candidates – a choice which the Court positively requires the Assembly to preserve and exercise in

the interest of the proper functioning of the Court (see paragraph 20 of the explanatory memorandum, with a reference to the Court's first Advisory Opinion). Article 22.1 of the Convention, as interpreted by the Court – the only instance authorised to make such an interpretation – excludes such options from the outset.

6. I therefore strongly recommend the alternative solution – namely that any list shall systematically be rejected whenever even one of the candidates is not sufficiently qualified. This would also exclude any hypothetical possibility of the "accidental" election of a candidate by the Assembly who was considered as not sufficiently qualified by the committee; and it would have the added advantage of sending a clear message to governments that the Assembly is indeed determined to uphold the requirements of Article 21.1 as explained by the Court in the above-mentioned Advisory Opinion.

7. Another proposal to abridge the procedure in the Assembly's plenary would be to use the "silent ratification procedure" (i.e. the endorsement of the committee's proposal by the Assembly in the framework of the Bureau's Progress Report to the Assembly), in particular in cases where the vote in the committee showed particularly strong support for one candidate. Should the committee's proposal be challenged and rejected by a majority of the votes in the Assembly, the election could still be held during the same session, in accordance with the normal procedure. Contrary to the case of the refusal by the Assembly to ratify a committee proposal to reject the list (see paragraph 15 of the explanatory memorandum), the Assembly could proceed with the election in the same part-session, as it does in such a case have the benefit of the committee's assessment of the candidatures. But on balance, I am reluctant to propose such a far-reaching change, which would considerably strengthen the role of the committee vis-à-vis the plenary Assembly. This would stretch the meaning of the term of "election" by the "Assembly" used in Article 22 of the Convention (see paragraph 33 above) too far.

8. The last proposal to abridge the election procedure in the Assembly's plenary consists in avoiding a second round of voting (except in one highly unlikely scenario) by using a preferential voting system. Members would have up to two votes, to express a first and, if they so wish, a second preference. If one candidate obtains a majority of all first preference votes cast, he or she shall be declared as elected. If not, the candidate who obtained the smallest number of first preference votes is eliminated from the count and any second preference votes expressed by the members who voted for the third-ranked candidate will be added to the first preference votes obtained by the other two candidates. Among those two candidates, the one with the highest sum of first and second preference votes shall be declared elected. If both remaining candidates score equal sums of first and second preference votes, the one who had scored the most first preference votes shall be declared elected. Only in the unlikely scenario that both also scored the same number of first preference votes would a run-off election between these two candidates be held on the following day.

9. The preferential voting system, which would in practice all but eliminate the need for a second round of voting, could speed up the procedure and thereby somewhat reduce the opportunity (in particular, the time available) for "lobbying", as discussed at the intergovernmental level. I am nevertheless against such a radical change, which might also affect other elections carried out by the Assembly. Given that the election procedure has really only recently settled along the lines summed up in the operative part of the draft resolution, we should really give it some time to prove itself and make further changes only if and when they really provide added value.

### 3. Increasing transparency of the election procedure

10. One of the experts at the meeting in Riga has submitted the most radical proposals in this respect, namely to webcast the interviews, or at least to invite "outside observers" to attend the interviews. In his view, total transparency is the best way to pre-empt rumours and criticism of a "byzantine" procedure. The other experts and the members participating in the discussion were far more reluctant. The main worry was that such publicity may deter good candidates and undermine the election process in the Assembly.

11. For me it is quite obvious that live transmission of the interviews should be excluded from the outset, as it could put the first interviewee at a disadvantage. But the subsequent publication of the proceedings also has far more disadvantages than advantages. In addition to their chilling effect on potential candidates, public hearings may provide an unfair advantage to persons who have more public speaking practice (typically, academics, diplomats or politicians), whilst other qualities may well be more important for being a good judge. The public nature of interviews would also alter their character: participants may be tempted to "speak to the camera" instead of focusing on the candidates' qualities. Potentially brutal public scrutiny could deter frank discussions. Candidates, in particular the ones not elected, may suffer negative consequences in their home countries for the answers they gave in public on potentially sensitive questions. Finally, any second-guessing of the committee's recommendation as a likely consequence of publicity could undermine the committee's authority and ultimately that of the judges elected on the basis of its recommendation.