

Judicial Independence:

Law and
Practice of
Appointments
to the European
Court of
Human Rights

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Preface

In early 2003, the question of the law and practice of judicial appointments to the European Court of Human Rights was considered by a group of eminent European jurists (the Group).

The Group comprised of:

- Professor Dr. Jutta Limbach, former President of the Federal Constitutional Court of Germany (Chair);
- Professor Dr. Pedro Cruz Villalón, former President of the Constitutional Court of Spain;
- Mr Roger Errera, former member of the Conseil d'Etat and of the Conseil supérieure de la magistrature in France;
- The Rt. Hon. Lord Lester of Herne Hill QC, President of INTERIGHTS;
- Professor Dr. Tamara Morshchakova, former Vice President (now Consultant) of the Constitutional High Court of the Russian Federation;
- The Rt. Hon. Lord Justice Sedley, judge in the English Court of Appeal; and
- Professor Dr. Andrzej Zoll, former President of the Constitutional High Court of Poland.

Members of the Group met on 14 February 2003 in London to examine appointment procedures in Strasbourg. Their discussions were informed by Council of Europe documentation concerning judicial appointments, and by research, analysis and private interviews with interested individuals conducted by the International Centre for the Legal Protection of Human Rights (INTERIGHTS), which acted as rapporteur for the Group. This report is the result of the Group's deliberations.

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Executive Summary

In February 2003, a group of eminent European jurists met in London to consider the issue of judicial independence with respect to the current procedure for judicial appointments to the European Court of Human Rights. This report details their deliberations and contains their recommendations.

In the last forty years, the European Court of Human Rights has been at the forefront of the development of regional and international human rights jurisprudence. While paying tribute to the Court, this report notes that its credibility and authority risk being undermined by the ad hoc and often politicised processes currently adopted in the appointment of its judges.

As a leading human rights court internationally, it would be anomalous and unacceptable if appointments to the Court failed to meet the international human rights standards that it is charged with implementing, including those requirements relating to the independence and impartiality of judges. In addition, flawed appointment procedures leave open the prospect that judges selected will lack the requisite skills and abilities to discharge their duties. This risks having an adverse effect on the Court's standing and on the development of authoritative human rights jurisprudence in Europe.

The current system of appointments to the Court involves the nomination of three candidates at a national level, followed by an election by the Council of Europe's Parliamentary Assembly. At both stages, the processes lack transparency and accountability.

At a national level, States are given absolute discretion with respect to the nomination system they adopt. The Council of Europe does not provide guidelines on appropriate procedures; nor does it require States to report on or account for their national procedures. Even in the most established democracies, nomination often rewards political loyalty more than merit.

At the international level, the Convention provides that the power to appoint judges lies solely with the Parliamentary Assembly. The Committee of Ministers has adopted a limited review role, which on paper allows it to question States' lists of nominees and nomination procedures. However, in practice the Committee of Ministers gives the impression of being more interested in safeguarding State sovereignty, than in ensuring the quality of candidates nominated.

The only safeguard in the current system lies with the Sub-Committee on the election of judges, appointed by the Parliamentary Assembly's Committee on Legal Affairs and Human Rights. The Sub-Committee consists of parliamentarians, most of whom lack experience in human rights or international law. It makes recommendations to the Parliamentary Assembly on the most suitable candidate based on a

superficial assessment of the *curricula vitae* of nominees and a 15-minute interview. The deliberations of the Sub-Committee are held *in camera* and it does not give reasons for its ranking of candidates.

This report describes the operation of the current system of judicial appointments to the Court, in light of the principles of judicial independence. It contains a number of recommendations. In particular, it proposes that:

- The Council of Europe should devise and distribute minimum standards for national nomination procedures. These would include requiring States to establish an independent body to arrive at the list of nominees and to submit an account of their nomination procedures to the Council of Europe. The report also recommends that the Council of Europe should provide a template to States for interviewing candidates.
- The list of nominees submitted by States and the description of nomination procedures adopted should be scrutinised by the Council of Europe. Those lists that have been devised pursuant to procedures that do not meet the prescribed minimum standards should be returned to States.
- The body making recommendations to the Parliamentary Assembly on the eligibility or suitability of candidates should itself be independent, possess the requisite expertise to fulfil its role, and follow a fair and open procedure. This could be done either by engaging a group of independent experts to provide advice on candidates to the Parliamentary Assembly, or by making an expert group of judicial assessors available to the existing Sub-Committee. In both cases, candidates would be interviewed by an independent group expert in international human rights law and would provide reasons for its ranking of candidates.

Introduction

Over the past fifty years, the European Court of Human Rights (the Court) has been critical in strengthening and promoting human rights protection in Europe, and has had a pioneering role in developing international human rights jurisprudence. The Court is a remarkable institution: it was the first international human rights court, and indeed one of the oldest international courts generally,¹ and it is currently the only human rights court before which cases may be initiated by individuals directly claiming a violation of human rights by a State.

In 1998, Protocol 11 to the European Convention on Human Rights (the Convention) established a permanent human rights court in Europe. While it altered the judicial structure in Strasbourg, Protocol 11 did not amend the existing procedures for the election of judges to the Court. With the continued expansion of the Council of Europe, attention has been paid to improving the working methods of the Court,² but little focus has been directed to the way in which its judges are appointed. An evaluation of the practice and procedure for judicial appointments to the Court is long overdue.

The issue of how judges are appointed is important in two respects. First, appointment procedures impact directly upon the independence and impartiality of the judiciary. Since the legitimacy and credibility of any judicial institution depends upon public confidence in its independence, it is imperative that appointment procedures for judicial office conform to — and are seen to conform to — international standards on judicial independence. It would be anomalous and unacceptable if the Court failed to meet the international human rights standards that it is charged with implementing, including the requirement that cases are heard by an independent and impartial court of law.

Second, without the effective implementation of ‘objective and transparent criteria based on proper professional qualification,’³ there is the very real possibility that the judges selected will not have the requisite skills and abilities to discharge their mandate. Declining standards will ultimately impact negatively on the standing of the Court, as well as on the application and development of human rights law on the international and (ultimately) national level.

Several factors combine to make consideration of judicial appointments to the Court increasingly necessary, and particularly timely. First, the number of member States of the Council of Europe has greatly increased the reach of the Court’s jurisdiction and necessitated new appointments to the Court.

1 After the International Court of Justice and the Permanent Court of Arbitration.

2 *Report of the Evaluation Group to the Committee of Ministers on the European Court of Human Rights*, EG Court(2001)1, 27 September 2001; *Guaranteeing the long-term effectiveness of the European Court of Human Rights: Final report containing proposals of the CDDH*, Steering Committee for Human Rights, CDDH(2003)006 Final, 4 April 2003

3 Article 9, Universal Charter of the Judge

Second, the Court's law and practice has increasing influence on the law and practice of the Member States, assuming a quasi-constitutional nature that underlines the importance of the standards maintained by the Court itself.⁴ Third, since 1998, the Court has been composed of full-time judges with a shorter term of office (six years instead of nine), who can be re-elected. Finally, the Council of Europe's current evaluation of the operations of the Court is providing the opportunity for wider reflection upon the institution, and the potential for reform of it.

Consideration of appointment procedures to international courts generally is also important outside the European context. At present there are over two hundred judges sitting on twenty international judicial bodies.⁵ In addition, the International Criminal Court has been established recently, and the African Court of Human Rights will soon come into being. The process for appointment of judges to these judicial bodies ensuring judicial independence and diverse representation by candidates of the highest merit — will be instrumental in determining the future success and legitimacy of these important institutions.

While this report focuses on the practice and procedures of the European Court of Human Rights, it has been informed by consideration of the experience of appointments to other international judicial bodies.⁶ In places, appointments to these bodies — and perhaps to some domestic courts — may highlight elements of better practice from which the European Court can learn. It is hoped that the principles that emerge from this report might be of relevance to the practice and procedure of other international judicial bodies.

This report does not propose the amendment of the Convention. It is acknowledged, however, that if the Convention is to be revised, for example as a result of the Evaluation Group's proposals for reform of the Court, then certain of the issues raised in this report could be addressed in that context.⁷

This report seeks to highlight problematic aspects of the current law and practice with respect to appointments, and to propose ways of ensuring better practice. In order to safeguard the independence of judges against the control or influence of governments or political majorities, it emphasises the importance of minimum standards with respect to judicial appointments. It is hoped that this report will trigger analysis by policy makers within the Council of Europe and beyond, as to the mechanisms through which necessary change might most effectively be achieved.

Background to the appointment procedures

The delicate politics that surrounded the adoption of the Convention and establishment of the Court arguably contributed to shortcomings in the appointment processes. The *travaux préparatoires* indicate that the issue of how the nominations' procedure would be conducted was not even discussed. It was originally envisaged that judges would be elected by a simple majority of the votes cast in both the Parliamentary Assembly and the Committee of Ministers, with each body voting independently.⁸ While

4 L.Wildhaber, "Un avenir constitutionnel pour la Cour européenne des droits de l'homme ?", *Revue universelle des droits de l'homme*, vol. 14, N° 1-4, October 31, 2002, page 1. Mr. Luzius Wildhaber is President of the European Court of Human Rights.

5 See Annex I.

6 *Ibid.*

7 The current Evaluation Group is considering altering the terms of judges - addressed also in this report - which would require amendment of the Convention.

8 Report presented by Mr P.H. Teitgen to the Consultative Assembly of the Council of Europe; Doc.A 290 of 5 September 1949), *Collected Edition of the "Travaux Préparatoires" of the European Convention of Human Rights*, Volume I, (Martinus Nijhoff, The Hague, 1977), page 210.

subsequent drafts of the Convention suggested an absolute majority of votes, they too envisaged that both organs of the Council of Europe would elect judges.⁹ With no explanation, the draft that was ultimately adopted omitted reference to the Committee of Ministers and consolidated the role in the Parliamentary Assembly.

In addition, the Committee of Experts originally proposed that the Court be comprised of only nine judges, “in order to make it clear that the Court was a Court of Justice and not a political council of Member States”.¹⁰ A number of smaller States expressed concern that their interests might not be reflected in such a court. As a compromise, the Committee of Experts advising on the draft convention recommended that the Court be composed of that number of judges equal to the number of signatory States to the Convention.¹¹

Overview of the current procedures

The current procedure for judicial appointments to the Court is complex, and is detailed in Section Two of this report. In summary, the process is as follows:

In the case of a vacancy, the Directorate General of Human Rights of the Council of Europe asks each Contracting State for a list of three candidates to be submitted within a prescribed time frame. Each State is provided with information on the criteria set out in the Convention and the recommendations of the Parliamentary Assembly concerning criteria and the format of lists. The Council of Europe provides no guidance on the procedures to be adopted by the State to arrive at its list of nominees.

While State nomination procedures vary between countries, with very few exceptions they are politicised and lack transparency. Following a decision — usually of the government, taken without consultation — the State submits a list of three candidates, along with each candidate’s model curriculum vitae. In most cases, States rank candidates in order of preference, although the Parliamentary Assembly of the Council of Europe has recommended that they submit them in alphabetical order.

Upon receipt of the list, the Directorate General of Human Rights undertakes a superficial review of the curricula vitae, apparently to check for candidates’ compliance with formal requirements such as language ability, and in practice forwards the lists, as submitted, to the Committee of Ministers. A small group from the Committee of Ministers considers the applications, in theory with the power to review and reject unacceptable lists, either on the basis of the procedures adopted at the national level or because the candidates do not meet the Convention criteria for appointment. In practice they are reluctant to look behind the ‘sovereign veil’ and the Committee of Minister as a whole sends the lists unchanged to the Parliamentary Assembly.

Within the Parliamentary Assembly, the Committee on Legal Affairs and Human Rights’ Sub-Committee on the election of judges to the European Court of Human Rights (the Sub-Committee) then considers the nominations’ lists. On the basis of the model curricula vitae and fifteen-minute interviews of candidates, the Sub-Committee ranks candidates in its order of preference. The Sub-Committee’s deliberations are *in*

9 Report to the Committee of Ministers submitted by the Committee of Experts instructed to draw up a draft convention of collective guarantee of human rights and fundamental freedoms; Doc. CM/WP I (50) 15; A 924 of 16 March 1950), *Collected Edition of the “Travaux Préparatoires” of the European Convention of Human Rights*, Volume IV, (Martinus Nijhoff, The Hague, 1977), page 72.

10 *Ibid.*, page 42.

11 *Ibid.*

camera and it does not give reasons for recommending one candidate over the others. It may reverse the expressed preferences of governments without giving any reasons, and even without noting that it is re-ranking candidates.

Finally, the Parliamentary Assembly votes on the three names submitted by each State. Lobbying by governments, on occasion together with the judicial candidates and other institutions and individuals, accompanies this process. While the Sub-Committee's report is available to voters, it provides members of the Parliamentary Assembly with negligible information on the candidates beyond the model *curricula vitae*. Members appear to be instructed on how to vote by their political groupings.

Overview of the problems

The key problems can be distilled as follows:

- 1 States have absolute discretion with respect to the nomination system they adopt. Governments are not given guidelines on procedures, nor are they required to report on or account for their national nomination processes. In practice, even in the most established democracies, nomination often involves a “tap on the shoulder” from the Minister of Justice or Foreign Affairs, and frequently rewards political loyalty more than merit. Nominees often lack the necessary experience and even fail to meet the very general criteria set out in the Convention.
- 2 The Committee of Ministers, while on paper the body that should be empowered to engage with governments on their nomination procedures and reject unacceptable lists, is concerned more with safeguarding State sovereignty than with ensuring the quality of nominated candidates. Accordingly it fails to engage in meaningful dialogue with States on their internal nomination procedures and to evaluate the quality of candidates submitted.
- 3 The only safeguard in the procedure lies at the Sub-Committee level. Regrettably, this mechanism is at best limited, and at worst is fundamentally flawed. The Sub-Committee consists of parliamentarians, most of whom lack human rights or international law expertise. The Sub-Committee ranks candidates after a cursory 15-minute interview. Its deliberations are secret and it does not give reasons for its ranking of candidates. There have been cases where its ranking of candidates has appeared to be based on or influenced by party politics rather than the merits of the prospective judges.
- 4 At the final stage, the Parliamentary Assembly is provided with limited information on candidates and the five political groups appear to dictate voting patterns. Lobbying by States, and occasionally by judicial candidates, jeopardises the future independence (actual and apparent) of judges.
- 5 The current possibility of re-appointing sitting judges renders them particularly susceptible to unacceptable interference from their governments and risks obedience to their governments.
- 6 The result is a Court less qualified and less able to discharge its crucial mandate than it might otherwise be. The Court also suffers from gender imbalance, at least in part due to the opaque and politicised nature of the nomination and election procedure.

Recent reforms

Some of the weaknesses in the system have been recognised by the Parliamentary Assembly, resulting in efforts at reform. While most of these steps have led to improvements in the system, they have not addressed the problems to which we have referred.

In Resolution 1082 (1996) and Recommendation 1295 (1996), the Parliamentary Assembly proposed two innovations in respect of the international procedures. First, it introduced a model curriculum vitae to be filled in by all candidates to “systematically... facilitate comparison between them.” The model curriculum vitae was slightly revised by Resolution 1200 (1999). Second, it decided that candidates would be interviewed by a sub-committee of the Committee on Legal Affairs and Human Rights.

In Recommendation 1429 (1999), the Parliamentary Assembly recognised a number of weaknesses in the existing system. Specifically, it observed that: the method of selecting candidates varies considerably from one country to another; that in most cases there are no rules governing selection of candidates; that many governments do not include women on their lists; and that the candidates do not always meet the criteria established by the Convention. To this end, the recommendation asked the Committee of Ministers to invite nominating governments to: call for candidates through the specialised press; ensure that they have experience in human rights “either as practitioners or as activists in non-governmental organisations working in this area”; always select candidates of both sexes; ensure that they are fluent in either French or English; and put the names of candidates in alphabetical order.¹²

The Committee of Ministers sought an opinion of the Court on Recommendation 1429. The Court expressed an view that:

*The Parliamentary Assembly is thus right in stressing the importance of the composition of the lists of the candidates by governments. This exercise is the starting point of the process of election and, if it is not properly done, the scope for the Parliamentary Assembly to carry out effectively its elective duty is correspondingly reduced.*¹³

In its reply to the Parliamentary Assembly, the Committee of Ministers emphasised that the “details of the procedures chosen by states in order to nominate candidates for election to the Court are a matter for sovereign national decisions.”¹⁴ It noted that while issuing a call for candidates in the specialised press “would be one way of satisfying the criteria of transparency and fairness... there are also other ways through which this could be achieved.” In respect of the recommendation that States should not rank candidates, the Committee of Ministers stated that “this is a matter for individual states.”¹⁵

While some of these recommendations may highlight certain shortcomings in the system (as will be detailed later), they have had limited impact on State practice.

12 Recommendation 1429 was adopted by Order 558 (1999). This recommendation instructed the Sub-Committee on the election of judges to ensure that, in future elections, States apply these criteria to their list of candidates.

13 Opinion of the European Court of Human Rights on Parliamentary Assembly Recommendation 1429 (1999), adopted 6 March 2000.

14 National procedures for nominating candidates for election to the European Court of Human Rights, Document 8835 revised, 10 October 2000.

15 *Ibid.*

Structure of this report

Section One considers international standards on judicial independence in respect of the question of judicial appointments. Section Two examines in more detail the current practice of appointments to the Court. Specifically, it studies the criteria for appointments, the nomination procedure at a national level, the procedures of review and election in Strasbourg, and the issue of non-renewable terms for judges. Section Three contains conclusions and recommendations.

A summary of relevant law and practice from other international courts and tribunals is set out in Annex One. Annex Two outlines the structure and procedures of the parts of the Council of Europe involved in judicial appointments. Annex Three includes some Council of Europe recommendations and public documents concerning appointments.

Section I: International standards

This section sets out some of the many international treaties and declarations relating to judicial independence and the appointment of judges, dealing first with the standards elaborated in the Council of Europe context, then international standards more broadly. It is against these standards that the procedure of appointments and its implications for judicial independence should be assessed.

I.1 The European Convention on Human Rights

The Convention expressly recognises the importance of judicial independence and impartiality, providing at Article 6 (1) that:

In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

The Court's credibility in determining human rights cases brought by individuals of Member States — often on the basis of their Article 6 rights — depends on its ability to meet the same standards of independence and impartiality imposed on national courts.

The importance of independence and impartiality in the Court is reflected in the Convention criteria for the appointment of judges. Article 21(3) requires that:

During their term of office the judges shall not engage in any activity which is incompatible with their independence, impartiality or with the demands of a full-time office; all questions arising from the application of this paragraph shall be decided by the Court.

The standards contained in Article 6 of the Convention and their implications for judicial independence and impartiality, and appointment processes have been considered by the Court itself.

In *Bryan v United Kingdom* the Court set out several principles to be taken into account in establishing the independence of the judiciary, including the manner of appointment of its members and their term of office, the existence of guarantees against outside pressures, and whether the body presents the appearance of independence.¹⁶

¹⁶ *Bryan v United Kingdom* (1995) 21 EHRR 272, paragraph 37. The Court distilled these elements from previous judgments in the *Le Compte, Van Leuven and De Meyere v Belgium* (1982) 4 EHRR I, paragraphs 55 and 57; *Piersack v Belgium* (1983) 5 EHRR 169, paragraph 27; *Delcourt v Belgium* (1970) 1 EHRR 355, paragraph 31. Although in *Campbell and Fell v. United Kingdom* the Court held that appointment by the executive is permissible, even normal; (1984) 7 EHRR 165.

The Court has also acknowledged the importance of independence and impartiality, which require that judges do not have prejudicial connections to, or views about, any party to a dispute, either because of involvement in a previous stage of the dispute, or because of a personal pecuniary connection to a party or issue involved in the dispute.¹⁷ Judges must similarly be seen to be independent and impartial.¹⁸

In addition to being binding on individual State Parties to the Convention, the Court's jurisprudence provides guidance to other States about acceptable mechanisms and standards to ensure the quality of judges and the capacity for independence, competence and impartiality.

1.2 Council of Europe guidelines

Over the years, the Council of Europe has issued numerous guidelines on the appointment of domestic judges in Member States. Specifically, the Committee of Ministers has noted that:

*All decisions concerning the professional career of judges should be based on objective criteria, and the selection and career of judges should be based on merit, having regard to qualifications, integrity, ability and efficiency. The authority taking the decision on the selection and career of judges should be independent of the government and the administration. In order to safeguard its independence, rules should ensure that, for instance, its members are selected by the judiciary and that the authority decides itself on its procedural rules.*¹⁹

The Committee of Ministers notes that where “constitutional or legal provisions or tradition allow judges to be appointed by the government, there should be guarantees to ensure that the procedures to appoint judges are transparent and independent in practice.” Guarantees suggested by the Committee of Ministers include a “special independent and competent body to give the government advice which it follows in practice.”²⁰

1.3 International treaties (beyond Europe)

International treaty law recognises the right to have one's rights and obligations heard before and determined by an independent and impartial tribunal.

Article 14(1) of the *International Covenant on Civil and Political Rights* (ICCPR) similarly underscores the right to a hearing before an independent judiciary:

All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law...

17 See *Daktaras v Lithuania* (42095/98 of 10 October 2000) in which the President of the Criminal Division of the Supreme Court of Lithuania both lodged a cassation petition and convened the Chamber hearing the case. The Court held that a tribunal must be impartial from an objective view point – that is, it must offer sufficient guarantees to exclude any legitimate doubt as to its impartiality.

18 *Delcourt v. Belgium* (1970) I EHRR 355, paragraph 31.

19 Recommendation No. R(94)12, adopted by the Committee of Ministers on 13 October 1994, paragraph 2(c).

20 *Ibid.*, paragraph 2(c)(i).

The ICCPR makes explicit the requirement of ‘competence’, as well as those of independence and impartiality. Article 14 implies an obligation on States to create the conditions for judges to adjudicate independently.²¹

1.4 International declarations and resolutions

Internationally recognised standards, in the form of guidelines or recommendations emanating from institutions that enjoy a high level of international support, offer a point of reference in assessing State practice relating to judicial independence. While not binding, these standards have given substance to the basic principles of judicial independence enshrined in treaty (and customary international) law. They make clear the obligations of States, judges and others in safeguarding judicial independence, and highlight the essential link between an independent judiciary and the role of objective criteria and appropriate independent procedures for its appointment.

Article 10 of the *Universal Declaration in Human Rights* (UDHR) refers to the importance of judicial independence:

Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.

The *United Nations Basic Principles on the Independence of the Judiciary* were endorsed by the United Nations General Assembly in 1985. Principle 1 provides:

The independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary.

Furthermore, Principle 10 of the resolution holds:

Persons selected for judicial office shall be individuals of integrity and ability with appropriate training or qualifications in law. Any method of judicial selection shall safeguard against judicial appointments for improper motives. In the selection of judges, there shall be no discrimination against a person on the grounds of race, colour, sex, religion, political or other opinion, national or social origin, property, birth or status, except that a requirement, that a candidate for judicial office must be a national of the country concerned, shall not be considered discriminatory.

While not binding, the Basic Principles represent a statement of the community of States’ minimum aspirations for an independent judiciary. Principle 10 acknowledges that the methods and standards for judicial selection and promotion are essential both to protecting the independence of the judiciary and for ensuring the quality of judges.

In addition to United Nations provisions, a number of organisations representing judges have adopted standards with respect to judicial independence.²²

21 While the ICCPR does not further elaborate on the content of judicial independence, the General Comment of the Human Rights Committee on Article 14 suggests a more detailed range of requirements: See Office of the High Commissioner for Human Rights, “Equality before the courts and the right to a fair and public hearing by an independent court established by law (Art. 14)”: 13/04/84, CCPR General Comment 13, (21st session 1984).

22 The Universal Charter of the Judge was adopted by the Central Council of the International Association of Judges in 1999; the Judges Charter of Europe was adopted by the European Association of Judges in 1993; and the European Charter on the Statute for Judges was adopted by the European Association of Judges in 1998.

Conclusion to Section One

The independence of the judiciary is one of the cornerstones of the rule of law. Rather than being elected by the people, judges derive their authority and legitimacy from their independence from political or other interference. It is clear from the existing international standards that the selection and appointment of judges plays a key role in the safeguarding of judicial independence and ensuring the most competent individuals are selected. While national court compliance with these standards is monitored and enforced by international courts, paradoxically these international courts may themselves fail to meet international human rights standards.

Section 2: Appointments to the Court

This section considers the current procedures for appointments to the Court. Specifically, it considers five matters: the criteria for judicial appointments, domestic nomination procedures, review and election procedures on the international level, the question of re-election of judges and gender imbalance on the Court.

2.1 Criteria for nominations and appointments

Article 21(1) of the Convention establishes the formal criteria for appointments to the Court:

The 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.

These terms are commonly used in respect of international courts and tribunals.²³ Accordingly, it is often suggested that States ‘know what they mean’. That said, they are undefined and aspects of their scope remain unclear, possibly laying the foundation for the nomination or election of unqualified or otherwise unsuitable candidates.

First, the level of qualification required for appointment to judicial office varies greatly within the Member States of the Council of Europe. For example, in the Ukraine, judges must be no younger than 25 years of age, must have a higher legal education and work experience in the legal sphere for no less than three years. In Norway a judge must be over 30, have a law degree, be eligible to vote and be reliable. Across Europe, the standards for eligibility for judicial office vary. What is meant by “high judicial office” is undefined.

Similarly, the meaning of “jurisconsults of recognised competence” leaves ample room for interpretation. It would appear in some cases that candidates’ competence is recognised only by the government of the Member State. There have been instances where States have proposed candidates who have been only recently out of law school.

The criterion of “high moral character” is vague and general. In a recent case, a State justified the omission of its sitting judge from its list of candidates on the basis that he was not of “high moral

character”. The allegations made against the judge were widely considered to be baseless, but the State maintained that it was upholding its obligations under the Convention by excluding him from its list.

Within the criteria for appointment, there is no mention of relevant experience, such as judicial or human rights experience. The Parliamentary Assembly has, however, urged States to nominate candidates who have a range of practical human rights experience either as practitioners or as NGO activists.²⁴ In its opinion on this recommendation, the Court stressed the importance of appointing judges who are — and are seen to be — non-partisan.²⁵

To command public confidence, the Court should be diverse in its composition. This includes ensuring a visible equality of opportunity for women to be nominated and elected to the bench in Strasbourg. Certain other treaties mention gender not as a criterion, but as a factor to be taken into account in the selection of judges (see Annex One). Perhaps as a function of its time, the Convention does not do so. The Parliamentary Assembly has urged States to nominate candidates of both sexes. While this is important, it has twice been exploited by States which, for allegedly political reasons, attempted to exclude sitting male judges by submitting lists comprising solely of female candidates in the name of gender balance.

Attention to the appropriate criteria could help better identify judges with the requisite skills and experience to perform their function on the Court. A dominant view in Strasbourg is that while a balance of professional backgrounds is desirable, there should be an emphasis on individuals with judicial experience on the bench. The long-term constitutional impact of the Court’s jurisprudence may also suggest the need for judges with constitutional law and human rights expertise.

There was however also some wariness among those we interviewed that with prescription comes a degree of inflexibility that could serve to further narrow the field of potentially capable candidates. Perhaps most importantly, suggestions for more rigorous criteria are belied by the fact that a large number of States currently fail to nominate candidates who satisfy the existing standards.

States are free to nominate persons who are not nationals of that State. While they are unsurprisingly reluctant to do so, if there were a situation where a State lacked able candidates from within, the State can nominate from elsewhere.

The predominant view appears to be that the problem lies not only with the vagueness of criteria, but with the nomination procedure and the absence of oversight thereof and with the international procedures that review and ultimately elect candidates.

2.2 Nomination procedures

The Convention is silent on the procedural steps that Member States should take when drafting their nomination lists. There are no comprehensive guidelines on national nomination procedures.

In a number of States, the absence of transparent and consistent nomination procedures is largely a function of domestic custom and practice: judges have always been appointed through informal “old-

24 Parliamentary Assembly Recommendation 1429 (1999).

25 *Supra*, n. 13.

boys' networks". Although it may be true that non-transparent nomination procedures in some States lead to good candidates, the principle of judicial independence — and the perception of judicial independence — are jeopardised by the fact that procedures are, with very limited exceptions, neither open nor accountable.

A number of factors contribute to the problem with respect to national nominations. First, while most Member States have accepted in theory the need for an independent judiciary, in a number of Member States notions of judicial independence remain novel and weakly observed in practice. As all of the respondents before the Court are States, there is a particular danger that governments will favour a political ally on the bench. Second, judges at the Court earn around EUR170,000 per annum, which in some States amounts to an individual's life savings. Appointments to the Court therefore become a favoured method of rewarding political loyalty. On the other hand, it must be recognised that levels of judicial remuneration need to be sufficient to attract candidates of outstanding calibre willing to leave good careers in their own countries.

Openness and transparency on a national level

In the vast majority of cases, the national processes adopted are unclear, apparently politicised and unaccountable. In Recommendation 1429, the Parliamentary Assembly gave States only very limited guidance with respect to nomination procedures, namely that they should advertise in the specialised press for candidates. During the 2001 round of nominations, a small number of States advertised for candidates. However, where this happened, the transparency ended there and governments still arrived at the list themselves, occasionally upon consultation with parliament. Only a small number of States followed any pre-established national procedures in selecting their candidate.²⁶

States rarely confer with civil society, such as human rights organisations, bar associations and, perhaps most critically, judicial bodies. In cases where civil society is consulted, the opaque nature of procedures means that the impact of such consultations is unclear.

Independent nominations' bodies

Historically, all Member States have employed unsatisfactory nomination procedures. The United Kingdom has been cited as the first to adopt a largely independent, transparent process, in 1998. The procedure was conducted as follows. A public advertisement was placed for nominations, to which thirty-three individuals responded. Five candidates were then interviewed for over an hour by a government-appointed panel charged with devising the United Kingdom's list. The panel consisted of two senior judges, two government officials with legal backgrounds and one lay member (who in this case was a former chair of the Equal Opportunities Commission). The panel then ranked its top three candidates and the United Kingdom sent the decision in that ranked order to Strasbourg as its list of three.

In another case, a government appointed an independent body for the purpose of devising its list of candidates, and then failed to follow the independent body's recommendations.

26 For example, Slovenia and Lithuania. J. Flauss, "Analysis of the election of the new European Court of Human Rights", AS/Jur (1999) 3, 20 January 1999, page 2. This study has been published in the *Revue trimestrielle des droits de l'homme*, No. 35, 1 July 1998.

As seen in Section One, international standards indicate that an independent body, consisting of judges, or human rights and international law experts, should draft the State lists.²⁷ Such a body should advertise widely and in a timely fashion for candidates, and engage in a rigorous review of applicants, including through meaningful interviews and consultation. States should then be bound by the body's decisions. If, for reasons given, a State fails to establish an independent body for nominations, they should, at a minimum, advertise widely, consult with authoritative civil society actors on the suitability of potential candidates and be transparent as to decisions taken.

Candidates nominated as a result of these procedures

Perhaps as a result of the lack of transparency and accountability in the current nomination procedures, questions have been raised as to the quality of the candidates proposed by some States, and their suitability to hold the office in question.

It is not unusual for States to propose individuals who are former government ministers, senior diplomats or the relatives of key political figures. A number of the judges on the present Court were formerly permanent representatives of their governments to the Council of Europe. In 1998, the Slovakian permanent representative to the Council of Europe not only stood as a candidate, but sent the State's list to the Secretariat on behalf of the government.

It is common practice for States to propose one candidate who has some of the qualifications required for the post, along with two candidates who are manifestly unsuitable. In devising such lists and offering only one 'real' candidate, States try to guide the hand of the Parliamentary Assembly at the time of the election.

The level of expertise of candidates proposed for election is often manifestly inadequate. In 1998, for example, around one third of candidates failed to mention any worthwhile human rights activities on their *curricula vitae*.²⁸ The 2001 elections, similarly revealed a large number of candidates devoid of meaningful expertise in human rights or international law.²⁹

In other cases, States have favoured the election of candidates where the information provided on the *curricula vitae* accompanying the list was allegedly inaccurate in significant respects, and included references to judicial or legal experience that the candidate did not possess. In relation to the 1998 election, Flauss notes that "numerous candidates were able to lay claim to several qualifications and professional activities simultaneously."³⁰

2.3 International selection procedures

Article 22 of the Convention provides that the Parliamentary Assembly of the Council of Europe elects one of three candidates nominated by each Member State. The Convention does not provide for the Committee of Ministers to have a role in this process. On paper a number of bodies at the Council of

27 Article 9, Universal Charter of the Judge; Point 4, Judges Charter in Europe; General Principle 1.3, European Charter on the Statute for Judges.

28 *Supra*, n. 26, page 9.

29 See *Election of judges to the European Court of Human Rights following the expiry of the terms office of one half of the judges*, Kevin McNamara MP (Rapporteur), AS/Jur/cdh (2001) 23, 18 April 2001.

30 *Supra*, n. 26, page 8.

Europe would appear to scrutinise these nominations prior to the election, although in practice there is little meaningful review. The international selection procedure involves a number of stages, set out below.

Directorate General for Human Rights

First, the Directorate General for Human Rights (DGHR) reviews the model curriculum vitae of each candidate to ensure that their applications confirm that they fulfil the formal requirements, such as language ability. This assessment is made purely on the basis of material provided in the curriculum vitae: the DGHR does not check any of the information. There are no known cases in which the DGHR has questioned the calibre of candidates submitted by States.

Committee of Ministers

Second, the list together with the government's ranking (if any) and the model curricula vitae are then forwarded to the Committee of Ministers, which is authorised to review lists. In practice, this function is exercised by the Committee of Ministers' Deputies.³¹ An ad hoc group of the Committee of Deputies meets to consider the applications, at which time it will engage in an "informal exchange of views on such candidates before the lists are formally submitted to the Committee of Ministers for transmission to the Parliamentary Assembly."³²

When this system of review was established in 1997, the Committee of Deputies noted that:

*It is understood that the results of this exchange of views would neither bind governments, who would retain the right to present candidates of their choosing, nor interfere with the Parliamentary Assembly's function of electing judges from the lists provided.*³³

Accordingly, while in theory the Committee of Ministers may scrutinise the lists and call on States to explain their domestic nomination procedures, in practice it seldom calls States to account. The Committee of Ministers rarely expresses any reservations with respect to the candidates proposed. As a body representing governments, the Committee appears in this respect mainly inclined to safeguard State interests and is rarely prepared to lift the "sovereign veil" to investigate the domestic processes that created the candidate lists or to criticise the outcome of such processes. At best, it considers only whether the candidates appear to comply with the formal requirements provided in the Convention.

Sub-Committee of the Parliamentary Assembly

Currently, the only mechanism for review that has any real impact on the appointment processes is the Parliamentary Assembly's *ad hoc* Sub-Committee on the election of judges. As noted, the Sub-Committee was introduced in 1998 to facilitate a more informed election of candidates by the Parliamentary Assembly.

Prior to the establishment of the Sub-Committee, members of the Parliamentary Assembly had virtually no information about candidates. As one former member of the Parliamentary Assembly described the election:

We would be presented with the names of three people. We would be told to vote for one of them

31 For an explanation of these organs of the Council of Europe, see Annex Two.

32 CM/Del/Dec/Act(96)547/1.3.

33 *Ibid.*

*but, usually, no one told us anything about the three people. One could sometimes obtain a little information from the delegation of the country whose judges we were about to select. However, sometimes we would have been better off sticking a pin in the piece of paper to determine our choice of vote. Indeed, on a number of occasions I flatly refused to exercise the vote because I knew nothing about the candidates.*³⁴

The Sub-Committee appears to represent an improvement on the previous system, as it guards against the Parliamentary Assembly simply rubber-stamping the rankings emanating from generally unsatisfactory nomination procedures within the national systems. However, the operations of the Sub-Committee may mean that not only is it an ineffective filter of candidates, but that it risks adding an additional level of arbitrariness to the appointments' procedure.

Role of the Sub-Committee

The terms of reference of the Sub-Committee are unclear.

When it was established, it was thought that Sub-Committee “in most cases, would limit itself to giving its opinion on [candidates’] *eligibility*, leaving it to the Assembly to elect such of the candidates as it desires”³⁵ (emphasis added). As such it would provide a basic filter to eliminate clearly unqualified candidates. However, in practice, the Sub-Committee makes recommendations on the *suitability* of candidates for the Court by expressing a preference for a particular candidate. In so doing it may, and in practice on occasion does, reverse the ranking that resulted from the national nomination procedure. While in many cases that national procedure was itself cursory and unsatisfactory, this is not always the case. The Sub-Committee comes to its decisions on the basis of their *curricula vitae* and a cursory interview.

The inadequacies of the Sub-Committee interview process are largely a function of its composition and working methods.

Composition of the Sub-Committee

The Sub-Committee is comprised of approximately 27 members of the Parliamentary Assembly’s Committee on Legal Affairs and Human Rights. Members are appointed by the five political groups of the Parliamentary Assembly, with consideration as to their region, but not their States of origin. In the past there have been up to three nationals from one State on the Sub-Committee at the same time. Alternate members are also appointed along these lines.

There is no requirement of legal expertise, although some members of the Sub-Committee are lawyers. Others are qualified in other disciplines. Very few have any knowledge or experience of international human rights law.³⁶

The Sub-Committee’s composition significantly inhibits its ability to provide a competent, independent assessment of candidates’ legal professional capability, even though the questions asked by the Sub-Committee include such points, as noted below.

34 Lord Hardy of Wath, House of Lords, 13 July 1998, Hansard, Volume 592, Number 185, page 81.

35 *Memorandum, Election of judges to the European Court of Human Rights*, submitted by Lord Kirkhill, Rapporteur, AS/JUR (1997) 29, 7 July 1997, paragraph 17.

36 Biographical information on members of the Parliamentary Assembly is available at the Council of Europe’s website: <http://assembly.coe.int>.

Working methods of the Sub-Committee

In 1998, all judicial positions at the Court needed to be filled, meaning that the Sub-Committee had to interview over 100 individuals. Time restraints resulted in 15 minutes being allocated to each candidate. However, in 2001 — when there were half as many candidates to interview — the Sub-Committee continued the practice of 15-minute interviews. This is thought by at least some members to be an adequate, if not an ideal, amount of time to assess candidates, and in Resolution 1200 (1999) the Parliamentary Assembly expressed its opinion that the “interviews were most helpful in order to obtain a better insight into the qualities of the candidates and thus facilitate a better-informed choice.” However, the interview format and brevity are widely criticised by others.

Like the role of the Sub-Committee, the precise purpose of the interviews is not entirely clear. An important focus would appear to be on assessing the personality and sociability of candidates. For example, in a July 1997 paper, the Committee on Legal Affairs and Human Rights stated that “the interviews should... take place in an informal way starting with some questions referring to the curricula vitae submitted by the candidates, which will give the candidates an opportunity to express themselves and enable the members of the Sub-Committee to obtain an idea of their personality.”³⁷

The Sub-Committee also poses questions regarding international human rights law. In this respect, the difficulty with the interview has been described as being both with the legal intelligibility of the questions asked and, in particular, with the lack of professional competence of the Sub-Committee to assess the answers given.

The Sub-Committee is also clearly concerned with testing the language ability of candidates, although the extent to which it does this is somewhat *ad hoc*. It also verifies straightforward issues such as the candidate’s willingness to live in Strasbourg.

The dearth of legal knowledge aside, the composition of the Sub-Committee means that political considerations may affect the decisions taken by the panel. In the past, it has been claimed on several occasions that members of the Sub-Committee have held very firm views about the suitability of candidates from their own States based on the prospective judge’s perceived political persuasion, rather than on his or her professional competence. There has been criticism that, as a result, a number of exceptional candidates have been passed over in favour of less qualified individuals.

Concerns have also been expressed about the scheduling of candidate interviews. There have been cases where the Sub-Committee was unable to interview all three candidates at once, in one instance with a month separating the consideration of one candidate from the others. The fluctuating availability of Sub-Committee members to attend all interviews, and fading impressions of candidates’ performances, undermine the effectiveness and consistency of interviews scheduled in this manner and the appropriateness of the Sub-Committee’s expression of preference as between candidates.

Finally, it should be noted that the Sub-Committee is not informed of, and does not enquire into the domestic processes that lead to the creation of candidate lists. Nor does it look beyond the curricula vitae and interview to gain a better understanding of the candidates themselves. On occasion, the panel has considered additional information provided by NGOs on State nomination procedures and the suitability of candidates, however, the Sub-Committee will not itself seek out additional information.

Recommendations of the Sub-Committee

Following the three interviews, the Sub-Committee decides — by consensus or a vote, if necessary — on its preferred candidate. In stating its preferences, the panel considers the merits of individuals and the “harmonious composition of the Court”, presumably in terms of a balance of professional backgrounds.

In light of poor nomination procedures and States giving preference to “favoured sons,” the Parliamentary Assembly has recommended that States no longer rank the three candidates on their lists.³⁸ However, in practice, some States continue to express a preference. Recently, the Sub-Committee has arranged for its Secretariat to place the names in alphabetical order, even if they are submitted with a ranking. In practice however, the State lobbying surrounding the election means that the preferred ‘government’ candidate is generally known to the Sub-Committee.

Where States rank candidates and (as until recently) this information is made available to the Sub-Committee, there are cases where the Sub-Committee agrees with the State’s preference. In others, it inverts the ranking. The Sub-Committee does not seem to have any concern for the quality of the State nomination process when taking these decisions.

In a few cases, the Sub-Committee has recommended that the Parliamentary Assembly reject the list entirely and call on the capital for a new set of candidates.³⁹ There are no public guidelines for the circumstances in which lists should be rejected.⁴⁰ In some cases, lists comprising of only one barely qualified candidate or overtly politicised nominees have been transmitted to the Parliamentary Assembly for election.⁴¹

Just as there are no guidelines for rejecting lists, there is no procedure for stopping States withdrawing their lists. It is reported that in the past, governments have withdrawn their list of candidates in response to an unwelcome ranking by the Sub-Committee. This reflects the fact, as already noted, that not infrequently States submit one real candidate and two manifestly unqualified individuals to ensure that the favoured candidate prevails. Where this does not work, the list has been withdrawn.

The Sub-Committee’s deliberations are not recorded, although a brief report is transmitted to the Committee on Legal Affairs and Human Rights. The report notes whether the candidates were qualified — sometimes noting that only one was qualified; generally stating that all were qualified. It then recommends the election of one individual without giving reasons for its preference. The report has been described as anodyne and uninformative.

Election by the Parliamentary Assembly

The final stage of the international selection process is the election at the Parliamentary Assembly. The election of judges is one of the few powers that the Parliamentary Assembly enjoys and this role is therefore jealously guarded. At the same time, there seems to be a lack of interest from members in the process and not infrequently relatively few attend to vote.⁴²

38 Parliamentary Assembly Recommendation 1429 (1999).

39 In 1998, the first lists of Bulgaria, San Marino and Croatia were rejected. In the first two cases this was because the candidates were not of equivalent quality. In the case of Croatia, the rejection was in light of political considerations.

40 In 2001, the Sub-Committee did however indicate that in future it would not consider lists that did not include candidates of both sexes; *supra*, n. 29, page 3.

41 For a list of candidates’ qualifications as evaluated by the Sub-Committee see Appendix Five to *Election of judges to the European Court of Human Rights following the expiry of the terms office of one half of the judges*; *Ibid*.

42 The low voter-turn out at the election of the Polish judge in June 2002 is a case in point. While in the morning session 238 parliamentarians voted for the Deputy General Secretary of the Council of Europe, that afternoon only 127 votes were cast in respect of the appointment of the Polish judge.

Although there are exceptions, voting in the Parliamentary Assembly tends to follow the recommendations of the Sub-Committee, which reflects the political composition of its parent body.

Parliamentary Assembly Resolution 1200 (1999) notes that the report of the Sub-Committee is “made available” to the members of the Parliamentary Assembly prior to elections. Members of the Parliamentary Assembly may seek information on the candidates, which is kept in the library, but neither the curricula vitae of candidates, nor the report of the Sub-Committee is distributed to voters.

However, as all of the political groups are represented on the Committee on Legal Affairs and Human Rights, the Sub-Committee’s report is generally provided to the political groups. Twice a week during the Parliamentary Assembly’s session the political groups meet to discuss the agenda and items such as the election of judges. Potential judges are on occasion affiliated formally or informally with a political party, or are perceived so to be, and the political groups often advise their members to vote on this basis.

Finally, the election at the Parliamentary Assembly is commonly characterised by lobbying on the part of governments, who frequently “parade” preferred candidates around Strasbourg to enhance their chances of election. On occasion, candidates themselves electioneer to secure votes. While such lobbying is far from unique to the European context, and reflects the realities of an otherwise inadequate appointment procedure, it has a detrimental effect on the independence, and the perception of independence, of the judge ultimately elected.

2.4 Re-election of judges

While States and politicians alike generally embrace the principle that their judges on the Court must be independent, there is concern that the current system of six-year, renewable terms gives certain States political leverage over their judges while in office.

Given the problems with the transparency, consistency and accountability of State nomination procedures, judges are vulnerable to the possibility that they will not be renominated in the event that they demonstrate independence from their governments. In a number of cases, there are claims that sitting judges have not been renominated for such reasons. Accordingly, there is a danger that some judges will spend the final years of their term trying not to upset their nominating government, rather than fulfilling their obligations to the Court.

For many judges, these problems are made more acute because they will ultimately have to return home to their State pension or to their pre-Court employment. The Council of Europe is currently examining establishing a pension for the Court’s judges that would provide some safeguard for their financial future, as well as their judicial independence.

Judicial independence may require that, so far as judges have renewable terms of office, sitting judges should be automatically renominated by their States. There have been instances where, allegedly as de facto punishment for unacceptable levels of independence, States have failed to include sitting judges on their list.⁴³

43 The Sub-Committee merely noted that a number of sitting judges were not renominated “for reasons which remain unknown to the Sub-Committee”. *Supra*, n. 29, page 3.

However, even when they are renominated, the Parliamentary Assembly's procedures provide that the judges must again be interviewed and recommended by the Sub-Committee. In its 2001 report, the Sub-Committee noted that there were sitting judges on 15 of the 18 lists presented to the Assembly and that in all cases, the Sub-Committee recommended the reappointment of sitting judges. In so doing, the Sub-Committee was cognisant of the need for continuity on the Court, but its decision was based primarily on the qualifications of the candidates as evident in candidate's curriculum vitae and from the interview.⁴⁴ The report notes that the special circumstances of the partial renewal meant that the selection of sitting judges should not be considered to constitute a precedent by judges or nominating countries.⁴⁵

The interview and intervention by the Parliamentary Assembly and its Sub-Committee allow for the possibility that sitting judges who have been involved in judgments perceived to be unfavourable to a particular political point of view may be treated prejudicially. The complications that arise from a judge having to face renomination and re-election destabilise the judges personally, and the Court as a whole.

Given this, a proposal was recently put forward to introduce a nine-year, non-renewable term of office. The proposal appears as part of the on-going evaluation of the effectiveness of the Court. The *Report of the Evaluation Group to the Committee of Ministers on the European Court of Human Rights* notes that,

*... the Convention should be amended so as to lay down that judges of the Court are elected for a single, fixed term, without possibility of re-election. This term should not be less than nine years. The effect of these changes would be to ensure continuity within the Court and, moreover, to offer a further guarantee of the Court's independence.*⁴⁶

While the Evaluation Group's report does not speak to procedures for appointment to the Court more generally, it underlines the high standards of independence expected from it.⁴⁷

It is common practice in a number of European States for Constitutional Court judges to be appointed for one long, non-renewable term. This insulates judges from charges of interference or political manipulation. In the case of judges in Strasbourg, the argument in favour of non-renewable terms is more pronounced, as judges depend entirely on States and parliamentarians for their renomination and reelection.

2.5 Gender imbalance on the Court

Due to its focus on procedures for appointment to the Court, this report does not address issues relating specifically to gender imbalance on the Court. The under-representation of women is however a significant problem in Strasbourg, and the lack of women on the Court may be — at least in part — a function of flawed appointment processes. There are currently 11 female judges and 32 male judges on the Court. Women therefore make up approximately a quarter of the Court's composition, which is better than in the case of other international courts.⁴⁸

44 *Ibid.*

45 The partial renewal in 2001 was unique in that the judges were being renewed after only three years on the bench.

46 *Supra*, n. 2, paragraph 89.

47 The Report notes that the principles contained in the Committee of Ministers Recommendation No. R(94)12 on judicial independence hold true for judges of the Strasbourg Court; *Ibid.*

48 Women are traditionally unrepresented or underrepresented on international judicial bodies. Gender imbalance as been identified as a threat to the legitimacy and authority of international bodies and United Nations' bodies have urged greater representation of women in international courts and tribunals; Report of the Fourth World Conference on Women, Beijing 4-15 September 1995, UN. Doc.A/CONF.177/20, 17 October 1995, paragraph 142(b). Resolution adopted by the General Assembly, Improvement of the status of women in the United Nations system, UN Doc.A/RES/56/127, 30 January 2002; Security Council Resolution 1325(2000), 31 October 2000. Also see H. Charlesworth and C. Chinkin, *The Boundaries of International Law* (London, 2000).

The Parliamentary Assembly has taken up the issues of the under-representation of women on the bench in Strasbourg and the impact on the appointments' process. In Recommendation 1429 (1999), States were urged to include candidates of both sexes on their lists. Given the failure of a large number of countries to include both women and men on its lists, in 2001 the Sub-Committee indicated that in future it would not consider candidates from States that had not included candidates of both sexes. The degree to which the Sub-Committee itself considers the gender of candidates when drafting its recommendations is unclear.

If States and the Council of Europe were to adopt more independent and transparent appointments' processes, one likely effect would be the redressing — at least in part — of the gender imbalance at the Court.

Section 3: Conclusions and recommendations

Significant weaknesses in the current system lie at both the State nominations and the international review and election stages.

3.1 Nominations

The current system of appointments provides wide discretion to States with respect to their nomination systems. In practice, internal processes vary greatly, but are often inadequate, politicised and so opaque that they are barely understood, even by some of the judges appointed by them. There is no meaningful review of these procedures at the international level, and no effective safeguards against arbitrariness.

Recommendations

- 1 While accepting the diversity of legal systems in Europe, minimum standards should be issued to States on the essential procedural steps and safeguards that should be undertaken in the judicial nomination processes. To this end, the Council of Europe should devise and distribute a template for national nomination procedures. The minimum standards would require States to:
 - a. Advertise in the specialised press — where it exists — or in the national press for candidates (pursuant to Parliamentary Assembly Recommendation 1429).
 - b. Establish an *independent* body to devise the State's list.
 - The independent body would consist of independent persons including judges and individuals with academic and other experience of international law and human rights.
 - The independent body would *consult* with interested civil society such as judicial and other State bodies and where possible human rights organisations and national bar associations. It would then shortlist and interview candidates, and forward the names of three nominees to the national government, for transmission to the Council of Europe.
 - Where, as a result of a thorough procedure, three suitable candidates emerge but there is a hierarchy between them, the independent body should be free to rank the candidates.
 - c. As a general rule, the government should *follow the recommendation* of the independent body.

- d. The State should submit an account of *its nomination procedure* with its list of three candidates, to facilitate transparency and oversight. Where the government departs from the recommendation of the independent body, this too should be noted and explained.
- 2 To ensure fair and effective interviewing of candidates, the Council of Europe should provide States with an *interview template*. The template would require interview panels to:
 - a. Abide by the criteria for judicial appointments in the Convention and Council of Europe recommendations concerning candidates
 - b. Agree in advance what areas should be covered in the questions
 - c. Ensure that these are relevant to the criteria and do not carry built-in advantages for some candidates (especially in relation to gender, e.g. family commitments)
 - d. Cover the same areas with each candidate, and
 - e. Mark the candidates' performances on an agreed scale under agreed (and relevant) heads
 - 3 The interview panel should be the same for all candidates, and as far as possible, all candidates should be interviewed on the same day.

3.2 International procedures

The following recommendations reflect first the need for effective procedures for international oversight of a State's nomination process, and second recognition of the critical role of a review body in providing meaningful screening of nominees at the international level.

Recommendations

- 1 The accuracy of information provided in candidates' curricula vitae should be verified before lists are forwarded to the Committee of Ministers.
- 2 The lists of nominees submitted by States as well as the description of the nomination procedure adopted should be scrutinised. Where appropriate, States should be asked to provide details of these domestic nomination procedures. Where procedures do not meet the minimum standards outlined by the Council of Europe, as recommended above, or otherwise do not reflect the principles of judicial independence, the lists should be returned to States.
- 3 The body making recommendations on the eligibility or suitability of candidates to the Parliamentary Assembly should itself be independent, follow a fair and open procedure and possess the requisite expertise to fulfil its role.
 This could be done by engaging a *body of independent persons* with relevant expertise, including persons with judicial experience, to provide advice to the Assembly on the candidates submitted to it. It would review the submitted curricula vitae and interview candidates thoroughly, with a view to identifying the most suitable professional judge. The independent body would provide reasons for its views.
 In the alternative, the existing Sub-Committee should be strengthened by having available to it a group of independent judicial assessors. The judicial assessors would be involved in the interviewing of candidates and would provide reasoned advice to the Sub-Committee with a view to identifying the most qualified candidate.

- 4 In either case, the interview panel should, reflecting the standards that should apply on the national level, ensure that it adheres to minimum standards with respect to:
 - certainty of criteria
 - certainty, consistency and fairness of questions asked, and
 - the objective assessment of candidates' performancesTo this end, the interview template set out in relation to nominations above could be followed at the international, as well as the national level.
- 5 In the interests of consistency, the interview panel should be the same for all candidates, and as far as possible, all three candidates should be interviewed on the same day.
- 6 In addition to its current practice of exploring the suitability of candidates submitted, the Sub-Committee, or the other independent body established, should give more detailed reports, including reasons for its views, including the ranking of candidates. Where States propose rankings and these are changed, this should be noted, together with the reasons for the change.
- 7 Guidance should be provided and procedures should be established for the circumstances in which the Parliamentary Assembly can or should reject lists in their entirety. These should include where States fail to provide three sufficiently qualified candidates.
- 8 Once a State has submitted a list, it should not, in principle, be empowered to withdraw it, absent compelling reasons (such as the non-availability of candidates).
- 9 All members of the Parliamentary Assembly should be provided with a copy of the Sub-Committee's report, along with the curricula vitae.

Annexes

Annex I: Comparative appointment procedures

This annex focuses on the procedures adopted by some other international judicial and quasi-judicial bodies in the appointment and selection of judges. It considers the way in which the criteria for judicial office and the procedures for the nomination and election of judges operate in other contexts, with a view to reviewing elements of best practice. It suggests that the European Court of Human Rights (the Court) could look to the better practice of newer bodies such as the International Criminal Court (ICC) with respect to criteria for judicial appointment and, to some degree, appointment procedures.

The procedures for judicial appointments to international bodies appear to be moving towards more prescriptive criteria and greater transparency. With the ICC, for example, there have been concerted efforts to give a more modern look to the composition of this international institution, largely in an attempt to solidify its legitimacy. While the criteria for judicial office seem to be becoming more specific, and more considerate of gender and geographical imbalance, the problems of domestic nomination procedures and international election procedures remain.

Reform of appointment procedures to the Court could pave the way for better practice in other international judicial bodies. This may be of particular relevance to emerging bodies such as the African Court on Human and Peoples' Rights, which is expected to come into being in the next five years, and to the procedure for future elections to the ICC.

A. Criteria for judicial office

The criteria for judicial office to international bodies are for the most part uniform. The requirements of “high moral character” and “recognised competence” appear across the board. Other international judicial bodies, such as the European Court of Justice (ECJ), the International Court of Justice (ICJ) and the International Criminal Tribunal for the former Yugoslavia (ICTY) share the European Convention on Human Rights’ “qualification for high judicial office” requirement. A number of bodies also explicitly require qualities such as “integrity” and “impartiality” in judges.⁴⁹

The Court excepted, regional human rights commissions and courts all require judges’ competence to lie in “the field of human rights”.⁵⁰ Internationally, the European Convention is anomalous in that it

49 Article 31 African Charter; Article 13 Statute of the ICTY

50 See for example Article 52(1) American Convention on Human Rights; Article 31(1) African Charter on Human and Peoples' Rights; Article 11 Protocol to the African Charter on Human and Peoples' Rights. Membership of the Human Rights Committee similarly requires recognised competence in the field of human rights: Article 28(2) ICCPR.

establishes a court exclusively for human rights, and yet does not explicitly require human rights experience in its judges.

It is the Rome Statute establishing the ICC that has made the greatest innovations in respect to the requirements for judicial office by providing clearer, more specific criteria for nomination and appointment. Beyond the standard criteria, the Rome Statute requires candidates to have either:

- (i) Established competence in criminal law and procedure, and the necessary relevant experience, whether as a judge, prosecutor, advocate or in other similar capacity, in criminal proceedings.
- (ii) Established competence in relevant areas of international law such as international humanitarian law and the law of human rights, and extensive experience in a professional legal capacity which is of relevance to the judicial work of the court.⁵¹

The candidates are placed on one of the two lists, depending on their experience.⁵² These lists are used as the basis of the voting procedure.⁵³

Women have been traditionally unrepresented or underrepresented on international judicial bodies and the use of gender-based selection criteria has been suggested as one way of ensuring greater representation of women in international courts and tribunals. While there are no quotas, in the appointment of *ad litem* judges to the ICTY and judges to the (yet to be established) African Court on Human and Peoples' Rights and the International Criminal Court (ICC), provision is made for the need to ensure fair gender representation.⁵⁴

In addition to the requirements for judicial office, the Rome Statute directs States Parties on factors they should 'take into account' when composing the ICC—such as breadth of legal experience, particular types of experience relevant to the work of the Court, and gender representation.⁵⁵

Significantly, the Rome Statute requires that the nomination of judges be accompanied by a statement specifying how the candidate fulfils the requirements for judicial appointment.⁵⁶

While this report suggests that the problem at the European level lies not so much with criteria, but with the processes that lead to appointment of judges, the Rome Statute's experiment in clearer, more stringent requirements for judges could provide an interesting lead in the future.

B. Nominations and oversight of nomination procedures

Little guidance is provided by international institutions, or their constituent instruments, in respect of the type of nomination procedures that States should adopt. In the case of the African and Inter-American Commissions and Courts, the Human Rights Committee, the ECJ and the ICTY/R, the choice of nomination procedure is left entirely to the state.

51 Article 36(3)(b) Rome Statute of the International Criminal Court

52 The dual list approach ensures a range of experience in key fields on the bench, without the need for very broad criteria.

53 Described below under "International election procedures".

54 Article 13(1)(b) Statute of the ICTY; Article 12(2) Protocol to the African Charter on Human and Peoples' Rights; Article 36(8)(a)(iii) Rome Statute

55 Article 36(8): these requirements will be discussed below, under Nominations and Elections

56 Article 36(4) Rome Statute

Some guidance is however provided by the ICJ, and more recently by the Rome Statute.

There are two safeguards built in to the ICJ system. First, the nomination of judges to the ICJ is indirect: governments do not propose individuals directly, rather candidates are nominated by the “National Groups” of the Permanent Court of Arbitration (PCA).⁵⁷ In the case of States Parties which are not members of the PCA, they form National Groups in a similar fashion. On paper, the system provides some transparency and protection against political manipulation—in that National Groups not States nominate judges. In practice, however, they are weak⁵⁸ and, as the system allows for members of National Groups to nominate members of their group, State interests still predominate.⁵⁹ This may, in any event, be unlikely to provide a useful model in the context of a regional, as opposed to a global, institution.

The second aspect of the ICJ nomination system of note, is that the ICJ procedure recommends that each National Group consult its highest court of justice, legal faculties and schools of law, and local international legal academics before taking a decision.⁶⁰ This recognition of the importance of consultation with civil society is unique in the international system and may be worthy of replication elsewhere.

The Rome Statute was built to some degree on the ICJ system. In nominating judges to the ICC, States must use either the procedure in place for the selection of their highest domestic judges, or the ICJ procedure.⁶¹

Further, the Rome Statute provides that, “[t]he Assembly of States Parties may decide to establish, if appropriate, an Advisory Committee on nominations.”⁶² While at the first round of nominations to the ICC, the nascent Assembly has not taken up this opportunity, it may do so in the future. The mere inclusion of the provision is itself a significant development in recognising the need for international oversight of nomination procedures.

Also in the ICC context, the fact that candidates’ details are openly posted on the Internet, together with the government’s supporting statements, places pressure on States to be open and transparent in their selection procedure. The ICC procedure has also been characterised by an unprecedented degree of NGO engagement in pressing for a transparent and objective State nomination procedures for the ICC. The active involvement of civil society in the ICC nominations in this way may be a welcome development that again can be replicated elsewhere.

While the ICC has therefore signalled some progress with respect to nomination procedures, it should be remembered that other nomination systems allow for absolute State discretion. Further, the Rome Statute still fails to provide the type of detailed guidance that might structure decision-making at the national level. For example, there are no provisions compelling states to advertise posts, interview candidates or involve an independent body in the selection process. There are no obligations in relation to the transparency of the process and the accountability of decision-making procedures.

57 The system was originally established with respect to the PCA. In 1920, it was adapted for the Permanent Court of International Justice. It was maintained for the ICJ.

58 Eyffinger notes to date there are 81 parties to the Hague Conventions and the PCA, while there are 186 parties to the Statute of the Court. These hundred and three States must ‘artificially’ constitute National Groups for the sole purpose of nominating ICJ judges. As cited by John R W D Jones, “Composition of the Court”, *The Rome Statute of the International Criminal Court: A Commentary*, A Cassese, P Gaeta, J RWD Jones (eds), (Oxford University Press, 2002), page 250

59 *Ibid.*

60 Article 6, Statute of the International Court of Justice

61 Article 36(4)(a) Rome Statute

62 *Ibid.*

C. International election procedures

In most but not all international courts and bodies, judges are elected.⁶³ In respect of election procedures, none of the international institutions considered give rise to clear best practice. Political bargaining and electioneering by and/or on behalf of judges is widespread, and vote trading remains common.

Of interest in the international system is the Rome Statute's prescription of the kinds of considerations States Parties should entertain when voting for judges. Article 36(8)(a) provides a number of factors to be taken into account by States Parties when considering the overall composition of the ICC, namely:

- (i) the representation of the principal legal systems of the world;
- (ii) an equitable geographical representation; and
- (iii) a fair representation of female and male judges.

The manner in which States should give effect to this provision has been outlined by the Resolution on the Procedure for the Election of Judges to the ICC, which was adopted by the Assembly of States Parties on 9 September 2002. The Resolution—which is binding on States—provides that States must vote for at least three candidates from each of the African, Asian, Eastern European, Latin American and Western European Groups. They are also obliged to vote for at least six candidates of each gender.

It may be that the European Court of Human Rights could benefit from guidance as to the considerations that should be at play when electing judges.

In terms of the information provided to the electing body, while the operation of voting processes varies according to the institution, in most cases considered biographical information on the candidates is provided, and the candidates are proposed in alphabetical order.

Finally, it should be noted that international judicial bodies tend to allow for the re-election of judges. The exception is the Rome Statute: judges to the ICC will be elected for a single, nine-year term.⁶⁴

When it comes to international oversight of State nomination lists, as noted above, the ICC anticipates a possible 'advisory committee on nominations.' However, the Council of Europe leads the way over other bodies in at least recognising the need for review of candidates, even if its current mechanism is weak and politicised.

63 The exception is the European Court of Justice, where the European Parliament is not involved in the appointments of judges. Judges are appointed by the "common accord" of the EU Member States.

64 Article 36(9)(a) Rome Statute. This does not apply to the first elections, which may be for 3, 6 or 9 years.

Annex 2:

Basic structure and procedures within the Council of Europe

The Council of Europe has two main bodies: the Committee of Ministers, and the Parliamentary Assembly, which are serviced by a Secretariat.⁶⁵

The Committee of Ministers is the Council of Europe's decision-making body, comprising the Foreign Ministers of the 45 Member States⁶⁶ or their permanent diplomatic representatives. The Parliamentary Assembly is the Council's deliberative body, grouping 306 members (and 306 substitutes) from the 44 national parliaments and delegations from observer States. Members are appointed by their national parliaments.

The Council of Europe's 1300-strong Secretariat is divided into specialised directorates for various matters including political affairs, legal affairs and human rights.

In order to develop a European outlook, the formation of political groups in the Parliamentary Assembly has been promoted. From 1964 onwards these groups were granted certain rights within the Rules of Procedure. At present the Parliamentary Assembly counts five political groups: the Socialist Group (SOC); the Group of the European People's Party (EPP/CD); the European Democratic Group (EDG); the Liberal, Democratic and Reformers Group (LDR) and the Group of the Unified European Left (UEL). Members of the Parliamentary Assembly are entirely free to choose the Group they wish to join. The President of the Assembly and the Leaders of the Groups form the Presidential Committee of the Parliamentary Assembly.

65 Article 10, Statute of the Council of Europe, adopted 5 May 1949. While the Statute refers to the deliberative body as the 'Consultative Assembly', it is commonly termed the 'Parliamentary Assembly'.

66 Albania (1995), Andorra (1994), Armenia (2001), Austria (1956), Azerbaijan (2001), Belgium (1949), Bosnia and Herzegovina (2002), Bulgaria (1992), Croatia (1996), Cyprus (1961), Czech Republic (1993), Denmark (1949), Estonia (1993), Finland (1989), France (1949), Georgia (1999), Germany (1950), Greece (1949), Hungary (1990), Iceland (1950), Ireland (1949), Italy (1949), Latvia (1995), Liechtenstein (1978), Lithuania (1993), Luxembourg (1949), Malta (1965), Moldova (1995), Netherlands (1949), Norway (1949), Poland (1991), Portugal (1976), Romania (1993), Russian Federation (1996), San Marino (1988), Serbia and Montenegro (2003), Slovak Republic (1993), Slovenia (1993), Spain (1977), Sweden (1949), Switzerland (1963), "the former Yugoslav Republic of Macedonia" (1995), Turkey (1949), Ukraine (1995), United Kingdom (1949). The Observers to the Committee of Ministers are: Canada (1996), Holy See (1970), Japan (1996), Mexico (1999) and United States of America (1996). The Observers to the Parliamentary Assembly: Canada (1997), Israel (1957) and Mexico (1999). Monaco has applied for membership to the Council of Europe.

I. The Committee of Ministers

Comprising of the Foreign Minister of the 45 Member States, the Committee of Ministers is the Council of Europe's decision making body. It is mandated to "consider the action required to further the aim of the Council of Europe, including the conclusion of conventions or agreements and the adoption by governments of a common policy with regard to particular matters."⁶⁷

The Committee of Ministers is both a governmental body, where national approaches to problems facing European society can be discussed, and a collective forum, where Europe-wide responses to such challenges are formulated. In collaboration with the Parliamentary Assembly, it is the guardian of the Council's fundamental values, and monitors Member States' compliance with their undertakings.

The Committee of Ministers operates on several levels. At their twice-yearly sessions the Ministers review European co-operation and matters of political concern. The Ministers' Deputies, acting on behalf of the Ministers, conduct most of the day-to-day business of the Committee of Ministers. They hold separate meetings for human rights (execution of judgements) and the monitoring of commitments.

Article 15.b of the Statute of the Council of Europe provides for the Committee of Ministers to make recommendations to Member States on matters for which the Committee has agreed "a common policy". The adoption of a recommendation requires a unanimous vote of all representatives present, and a majority of those entitled to vote.⁶⁸ However, at their meeting in November 1994 the Ministers' Deputies decided to make their voting procedure more flexible and subject to a "Gentleman's agreement" not to apply the unanimity rule to recommendations. Recommendations are not binding on Member States. The Statute also permits the Committee of Ministers to ask member governments "to inform it of the action taken by them" in regard to recommendations.⁶⁹

Although the records of the Committee of Ministers' sessions are confidential, a final communiqué is issued at the end of each meeting. The Ministers may also issue one or more declarations.

2. The Parliamentary Assembly

The Parliamentary Assembly is the deliberative organ of the Council of Europe. It is mandated to debate any matters within the scope of the Council of Europe and to present its conclusions, in the form of recommendations, to the Committee of Ministers.⁷⁰

The members and substitute members of the Parliamentary Assembly are appointed from their national or federal parliaments, where they also sit as parliamentarians. Whilst in the Committee of Ministers each Member State has one vote, in the Parliamentary Assembly the number of representatives and consequently of votes is determined by the size of the country. The biggest number is eighteen, the smallest two. At present there are over around 640 representatives and substitutes in the Parliamentary Assembly, including 18 Observers.

67 Article 15, Statute of the Council of Europe, adopted 5 May 1949

68 Article 20, Statute of the Council of Europe, adopted 5 May 1949

69 Article 15b, Statute of the Council of Europe, adopted 5 May 1949

70 Article 22, Statute of the Council of Europe, adopted 5 May 1949

The President, nineteen Vice-Presidents and the Chairpersons of the political groups or their representatives make up the Bureau of the Parliamentary Assembly. The duties of the Bureau include: the preparation of the Parliamentary Assembly's agenda, the reference of documents to committees, the arrangement of day-to-day business, and relations with other international bodies

The Parliamentary Assembly can adopt four different types of texts: recommendations, resolutions, opinions, and orders. Recommendations contain proposals addressed to the Committee of Ministers, the implementation of which is beyond the competence of the Parliamentary Assembly, but within the competence of national governments.⁷¹ Resolutions embody decisions by the Parliamentary Assembly on questions of substance, which it is empowered to put into effect or expressions of view for which it alone is responsible.⁷² Opinions are expressed by the Parliamentary Assembly on questions put to it by the Committee of Ministers, such as the admission of new Member States to the Council of Europe, but also on draft conventions, the budget, and the implementation of the Social Charter. Orders are generally instructions from the Parliamentary Assembly to one or more of its committees. An Order is concerned with form, transmission, execution or procedure and cannot deal with the substance of the matter.⁷³

A motion for a recommendation or resolution in the Parliamentary Assembly may request that a committee generate a report. A motion for a recommendation or resolution has to be tabled by ten or more members of the Parliamentary Assembly belonging to at least five national delegations.⁷⁴ It is then referred to the relevant committee for report and possibly to other committees for opinion. Ultimately, when a report has been adopted in the committee it is tabled for discussion by the Parliamentary Assembly either at a part-session or at a meeting of the standing committee. Following the debate on the Committee's report, the Parliamentary Assembly then votes on the draft text or texts that it may contain.

According to its Rules of Procedure, the Parliamentary Assembly has ten committees in addition to the Bureau and the Standing Committee. These include the Committee on Legal Affairs and Human Rights, which has 80 seats.

The terms of reference of the Committee on Legal Affairs and Human Rights include examination of "all candidatures for judges of the European Court of Human Rights, before the election of judges by the Assembly." The Committee on Legal Affairs and Human Rights currently has two subcommittees: the Sub-Committee on Human Rights and the Sub-Committee on Penal Law and Criminology. The Sub-Committee on the election of judges is an ad hoc sub-committee.

3. Summary of potential Council of Europe processes for adopting a review of judicial appointment procedures

A possible review of current practice on judicial appointments could be initiated by one of a number of bodies within the Council of Europe hierarchy:

- 1 The Committee on Legal Affairs and Human Rights of the Parliamentary Assembly could initiate a report into the matter;⁷⁵

71 Rule 23.1.a, Rules of Procedure of the Parliamentary Assembly

72 Rule 23.1.b, Rules of Procedure of the Parliamentary Assembly

73 Rule 23.1.c, Rules of Procedure of the Parliamentary Assembly

74 Rule 23.2, Rules of Procedure of the Parliamentary Assembly

75 The report would be voted on and adopted by that Committee, and proceed through the Parliamentary Assembly, which may vote to make recommendations to the Committee of Ministers.

- 2 The Bureau could refer the matter to the Committee on Legal Affairs and Human Rights following the tabling of a motion by a representative or a substitute.⁷⁶
- 3 The Parliamentary Assembly, at the initiative of a group of its members, could adopt a recommendation or resolution, or request the above Committee initiate a report⁷⁷;
- 4 The Committee of Ministers could request of the Parliamentary Assembly a report, opinion or further consideration;⁷⁸
- 5 The Committee of Ministers could consider the matter, either on the basis of a request or recommendation from the Parliamentary Assembly or on its own initiative, and take appropriate action.⁷⁹ The Statute permits the Committee of Ministers to ask member governments “to inform it of the action taken by them” in regard to its recommendations.⁸⁰

76 Pursuant to Rule 22.2 Rules of Procedure of the Parliamentary Assembly

77 The resolution or recommendation would have to be tabled by ten or more members of the Assembly belonging to at least five national delegations; Rule 23.2 Rules of Procedure of the Parliamentary Assembly.

78 By way of the procedure in Rule 22.2 Rules of Procedure of the Parliamentary Assembly, the Bureau could then request that the Committee on Legal Affairs and Human Rights, or the Sub-Committee, consider the matter.

79 Article 15.a Statute of the Council of Europe

80 Article 15.b Statute of the Council of Europe

Annex 3: Relevant Council of Europe documents

A Resolutions and recommendations of the Council of Europe

- i Parliamentary Assembly Resolution 1200 (1999)
- ii Parliamentary Assembly Recommendation 1429 (1999)
- iii Reply from the Committee of Ministers to Parliamentary Assembly Recommendation 1429 (1999), Doc. 8835, 25 September 2000
- iv Opinion of the European Court of Human Rights on Parliamentary Assembly Recommendation 1429 (1999), 6 March 2000

B Report on the election of judges to the European Court of Human Rights, submitted by Lord Kirkhill on behalf of the Committee on Legal Affairs and Human Rights, Doc. 8460, 9 July 1999. The report reviews the Sub-Committee's consideration of candidates to the Court in 1998.

C Jean-François Flauss, "Analysis of the election of the new European Court of Human Rights", AS/Jur (1999) 3, 20 January 1999.

A. Resolutions and recommendations of the Council of Europe

i. Resolution 1200 (1999)¹

Election of judges to the European Court of Human Rights

1. The Assembly recalls that, for the election of the judges to the new single Court of Human Rights, the candidates were invited to interviews organised by a sub-committee of the Committee on Legal Affairs and Human Rights.
2. The conclusions of the sub-committee were made available to all members of the Assembly, prior to elections during one of its part-sessions.
3. The Assembly is of the opinion that these interviews were most helpful in order to obtain a better insight into the qualities of the candidates and thus facilitate a better-informed choice.
4. The Assembly considers, therefore, that the system of holding interviews should be continued, not only in the case of partial renewals of the Court (which take place every three years and in theory concern one half of the judges) but also for any election in the case of, for instance, resignation or death of one of the judges.
5. Consequently, it instructs the Committee on Legal Affairs and Human Rights — through one of its sub-committees — to continue organising interviews of all candidates standing for election to the Court and to make its findings available to members of the Assembly.
6. For the first election to the Court, candidates were invited to send in a curriculum vitae on the basis of a model adopted by the Assembly in its Resolution 1082 (1996).
7. This model curriculum vitae proved to be very useful as it contains a number of questions considered to be essential and facilitates comparison between the candidates.
8. Following the experience of the first election of judges to the new Court — and after informal consultation with the Committee of Ministers — the Assembly considers that the practice of inviting candidates to answer the questions in a model curriculum vitae is to be continued, but that the model could be improved upon on a number of points.
9. The Assembly adopts, therefore, the model curriculum vitae which is reproduced below as an appendix to this resolution.
10. The Assembly, furthermore, calls on the Secretary General, and all others involved in the process of selection and election, to start the proceedings at least twelve months before the expiration of the term of office of the sitting judge and to respect the indicative time-table set out in Appendix II to this resolution.
11. The Assembly asks its President to bring this resolution to the attention of the President of the European Court of Human Rights.

¹ Assembly debate on 24 September 1999 (32nd Sitting). See Doc. 8460, report of the Committee on Legal Affairs and Human Rights (rapporteur: Lord Kirkhill).
Text adopted by the Assembly on 24 September 1999 (32nd Sitting).

Appendix I

Model curriculum vitae for candidates seeking election to the European Court of Human Rights

In order to ensure that the members of the Parliamentary Assembly of the Council of Europe have comparable information at their disposal when electing judges to the European Court of Human Rights, candidates are invited to submit a short curriculum vitae on the following lines:

I. Personal details

Name, forename
Sex
Date and place of birth
Nationality/ies

II. Education and academic and other qualifications

III. Relevant professional activities

- a. Judicial activities
- b. Non-judicial legal activities
- c. Non-legal professional activities
(Please underline the post(s) held at present)

IV. Activities and experience in the field of human rights

V. Public activities

- a. Public office
- b. Elected posts
- c. Posts held in a political party or movement
(Please underline the post(s) held at present)

VI. Other activities

- a. Field
- b. Duration
- c. Functions
(Please underline your current activities)

VII. Publications and other works

(You may indicate the total number of books and articles published, but mention only the most important titles (maximum 8))

VIII. Languages

Language Reading
Writing
Speaking

- a. First language
(Please specify)
- b. Official languages:
- English
- French
- c. Other languages:

IX. Other relevant information

X. Please confirm that you will take up permanent residence in Strasbourg if elected a judge on the Court.

Appendix II

Indicative time-table for the partial renewals of the Court

Time to be granted to the governments of member states for the selection of their candidates and their transmission to the Secretary General of the Council of Europe	4 months
Time to be granted to the Committee of Ministers for consideration of the candidates and deliberation prior to transmission to the Assembly	1½ months
Time to be granted to the Assembly for its election procedures	2½ months (this time may be longer depending upon the Assembly's part-sessions)
Time to be granted to the judge elected for terminating his/her previous employment and settling in Strasbourg (this is important for newly-elected judges but it may, of course, also be important for a sitting judge, who was a candidate but was not re-elected and must therefore make preparations for finding other employment and, possibly, removal to his home country)	4 months
Total time needed for the proceedings	12 months

ii. Recommendation 1429 (1999)¹

National procedures for nominating candidates for election to the European Court of Human Rights

(Extract from the Official Gazette of the Council of Europe - September 1999)

1. Looking ahead to the entry into force of Protocol No. 11, the Assembly adopted Resolution 1082 (1996) on the procedure for examining candidatures for the election of judges to the European Court of Human Rights, in which it agreed to improve its own procedure for the selection of candidates.
2. In Order No. 519 (1996), it also instructed its Committee on Legal Affairs and Human Rights to examine the question of the qualifications and manner of appointment of judges to the European Court of Human Rights, with a view to achieving a balanced representation of the sexes.

¹ Assembly debate on 24 September 1999 (32nd Sitting) (see Doc. 8505, report of the Committee on Legal Affairs and Human Rights, rapporteur: Mrs Wohlwend; and Doc. 8525, opinion of the Committee on Equal Opportunities for Women and Men, rapporteur: Mrs Aguiar).

Text adopted by the Assembly on 24 September 1999 (32nd Sitting).

3. In accordance with these decisions, the Assembly sent all candidates a model curriculum vitae, set up an ad hoc sub-committee, which interviewed the candidates, and then elected the judges in January 1998, April 1998 and June 1999.
4. However, it remains the case that the national procedures for selecting candidates, a matter on which the European Convention on Human Rights is silent, are not always satisfactory.
5. In the light of the replies provided by national delegations to a questionnaire, and of the experience gained on the occasion of the procedure for electing judges to the Court, the following observations may be made:
 - i. the method of selecting candidates varies considerably from one country to another;
 - ii. in the majority of cases there are no rules governing the selection of candidates;
 - iii. a substantial number of governments did not include a woman on their list of three candidates;
 - iv. the candidates put forward did not always meet the criteria established by the Convention: either they lacked experience in human rights, had never held judicial office, or were not sufficiently fluent in at least one of the Council of Europe's two official languages.
6. In order to remedy these shortcomings and assist the governments of the member states in their procedures for selecting candidates for the next elections, the Assembly recommends that the Committee of Ministers invite the governments of the member states to apply the following criteria when drawing up lists of candidates for the office of judge in the European Court of Human Rights:
 - i. issue a call for candidatures through the specialised press, so as to obtain candidates who are indeed eminent jurists satisfying the criteria laid down in Article 21, paragraph 1, of the Convention;
 - ii. ensure that the candidates have experience in the field of human rights, either as practitioners or as activists in non-governmental organisations working in this area;
 - iii. select candidates of both sexes in every case;
 - iv. ensure that the candidates are in fact fluent in either French or English and are capable of working in one of these two languages;
 - v. put the names of the candidates in alphabetical order.
7. The Assembly also recommends that the Committee of Ministers invite the governments of member states to consult their national parliaments when drawing up the lists so as to ensure the transparency of the national selection procedure.

iii. Reply from the Committee of Ministers on Recommendation I 429 (1999) adopted at the 722nd meeting of the Ministers' Deputies (21 September 2000)

Doc. 8835; 25 September 2000

The Committee of Ministers recognises the importance of the considerations which led the Assembly to adopt Recommendation 1429 (1999).

In preparing its reply to the Recommendation, the Committee has sought the opinion of the European Court of Human Rights, which is the object of broad agreement, and the text of which is appended to this reply.

The Committee considers that all the phases of the procedure of election of Judges of the Court should be such as to ensure that the most appropriate persons are elected, and that in this context national procedures for nominating candidates are of key importance.

The Committee recalls that Article 21, paragraph 1, of the Convention, which provides that “the judges shall be of high moral character and must possess the qualifications required for appointment to high judicial office or be jurisconsults of recognised competence” constitutes an obligation upon High Contracting Parties to the Convention with direct relevance to the procedures they adopt, and the criteria they apply, in nominating candidates.

The details of the procedures chosen by states in order to nominate candidates for election to the Court are a matter for sovereign national decision. The Committee notes that judicial structures and cultures vary considerably from country to country, and that consequently a corresponding variation of selection methods is inevitable and not necessarily deleterious. Nonetheless, the Committee shares the view of the Assembly that these procedures should satisfy a number of important criteria, including in particular transparency and fairness, and that such procedures should be applied in a consistent matter.

With regard to the recommendations presented in paragraph 6 of the Recommendation, therefore, the Committee makes the following comments:

- With regard to paragraph 6.i, issuing a call for candidates in the specialised press would be one way of satisfying the criteria of transparency and fairness, but there are also other ways through which this could be achieved;
- With regard to paragraph 6.ii, the Committee draws attention to point C 3 of the Court's opinion;
- With regard to paragraph 6.iii, the Committee recalls that, in May 1997 (593rd meeting, item 4.1b: balanced representation of women and men in the new European Court of Human Rights), the Deputies,
“in order to achieve a more balanced representation of women and men in the new European Court of Human Rights, invited the governments of States Parties to the European Convention on Human Rights:
 - i. to foster a more balanced representation of women and men when drawing up the national lists of candidates to be put forward for election to the Court;
 - ii. to ensure that the qualifications and experience of all the candidates put forward, whether men or women, allow their candidatures to be taken into consideration on an equal footing.”

This decision was appended to the Secretary General's letter of 6 October 1997 to Governments calling for the submission of candidates.

- With regard to paragraph 6.iv, the Committee agrees with the Assembly that the requisite linguistic skills are essential for the efficient functioning of the Court.

- With regard to paragraph 6.v, the Committee notes the view of the Assembly that states submitting lists should avoid expressing any official preference for a particular candidate. The Committee of Ministers considers that it is a matter for individual states, in the light of their domestic procedures for nominating candidates, whether they wish to express a preference or not. In this regard the Committee notes that neither the Committee of Ministers, in its examination of states' lists, nor the Assembly in its selection procedure, is obliged to accept the expressed preference of a state for a particular candidate.

Views may differ as to the question of consulting national parliaments (paragraph 7), having regard, in particular, to the fact that it is the Parliamentary Assembly, composed of national delegations, which takes the ultimate decision on the election of the judges. However, the Committee notes that, in addition, some states involve their parliaments in the process to varying extents. It acknowledges that such consultation may contribute to satisfying the criteria mentioned above, but considers that the decision as to whether or not to do so is a matter of national competence.

Finally, the Committee wishes to inform the Assembly that the Secretariat General has indicated its intention to enclose the text of the present reply with the letter to be sent to the States Parties inviting them to proceed with the nomination of candidatures.

iv. Opinion of the European Court of Human Rights on Parliamentary Assembly Recommendation 1429 (1999)

on national procedures for nominating candidates for election to the Court

(adopted by the Court at its thirteenth plenary administrative session on 6 March 2000)

A. CONSULTATION OF THE COURT

The outcome of the process for the periodic renewal of the membership of the European Court of Human Rights being critical for its good functioning, the Court is pleased to accept the invitation received from the Ministers' Deputies through their chairman, Ambassador Harman, to express its views on Parliamentary Recommendation 1429 (1999). In so far as it might help the Parliamentary Assembly and the nominating governments to perform their respective roles in the election process, the Court will always be available, within a framework of dialogue compatible with its judicial functions, to explain to them the reality of the way in which it works and what is expected of its members. More generally, the Court would welcome the opportunity to be consulted at a sufficiently early stage by the Parliamentary Assembly and the Committee of Ministers prior to the adoption of any text having a direct bearing on its activities.

B. THE LEGITIMACY OF THE PARLIAMENTARY ASSEMBLY'S CONCERNS

From the outset in 1950 the European Convention on Human Rights has invested the Parliamentary Assembly with the power of electing the judges of the Court. The institution of a full-time Court makes all the more justified the Parliamentary Assembly's concerns to ensure that as far as possible the appointment of the judges be the product of a genuine and informed election from among candidates who are fully qualified to discharge the complex and sensitive duties involved in the office. The Parliamentary Assembly is thus right in stressing the importance of the composition of the lists of the candidates by the governments. This exercise is the starting point of the process of election and, if it is not properly done, the scope for the Parliamentary Assembly to carry out effectively its elective duty is correspondingly reduced.

C. THE COURT'S CONCERNS

Apart from having the basic interest in the appointment of judges of the highest quality, the Court does have two other main concerns to which it would respectfully draw the attention of the Committee of Ministers and the Parliamentary Assembly, namely

- (a) that the ongoing process of renewal of membership through elections should not have as a consequence to weaken the effectiveness over time or the independence of the Court;
- (b) that care should be taken in defining the relevant experience required of candidates.

1. Practical importance of having a certain continuity in the Court's membership

In order to be effective in both quantitative and qualitative terms, the Court needs to acquire and preserve an accumulated judicial experience through a certain continuity in its membership. Too radical and frequent a turnover in judges carries with it a risk of adversely affecting

- (a) the Court's operational efficiency in processing the vast volume of applications lodged (since new judges need time to become fully operational, not only in terms of their familiarity with the procedure and law under the Convention but also, as experience has shown, often as regards their capacity to work effectively in both of the official languages), and
- (b) the consistency of the case-law, to the detriment of legal certainty (which is a virtue in the interest of both applicants and respondent governments).

With a relatively short term of office for the judges - six years as compared with nine years under the former system - it will be difficult to counter this dual risk unless a reasonable proportion of the judges serve more than one term. The problem is exacerbated by the even shorter term (three years) allocated to the half of the Court's membership which is involved in the forthcoming first round of renewals. This is therefore a consideration that should be borne in mind in the selection of candidates and the election of judges.

2. The effect of a short term of office on judicial independence

One of the aspects of Protocol No. 11 to the Convention on which reservations have been expressed is precisely the shortness of the judges' term of office. Against the background of a system enabling re-election of judges, commentators have pointed to the dangers of undermining the independence of the judges that such a short term entails.¹ In the Court's view, therefore, national procedures for nominating candidates should embody safeguards securing the independence of judges, notably those susceptible of serving a further term.

3. Wisdom of making experience as a human rights practitioner or activist a required qualification

Paragraph 6 (ii) of the Parliamentary Assembly's Recommendation 1429 (1999)² might be read as suggesting that experience as a human rights practitioner or activist is not merely one relevant form of experience among others but an essential requisite for all candidates. The Court would find it unfortunate, and indeed detrimental to the balanced membership it needs, if such an approach were to be taken in relation to the selection of candidates. For its part, the Court would urge the adoption of a different, broader conception of relevant experience. The European Convention on Human Rights not only protects against the kind of naked abuse of governmental power that prompted its adoption in the aftermath of the Second World War, but also provides for the international judicial review of the exercise of democratic discretion in good faith by national authorities. As the Court's case-law has explained on countless occasions, at the heart of this review lies an assessment whether a fair balance has been struck between the requirements of the protection of the individual's fundamental rights and the demands of the general interest of the community.³ The role of an activist is necessarily partisan: to espouse a cause, to take sides; whereas a judge on the Strasbourg Court has to set himself or herself above the parties, be impartial, weigh up the competing interests, notably those of the individual and the community at large, and decide judicially in the light of all the circumstances. This being so, judicial experience or other experience of striking the "fair balance" in a national context would constitute an invaluable attribute for any candidate for judicial office in Strasbourg. This is especially so since those elected as judges will often be called on to review legislation enacted by national parliaments and decisions of national supreme and constitutional courts, which moreover are expected to follow the Convention case-law. In the Court's view, candidates should above all have a proven commitment to the democratic values underlying the Convention, ideally combined with a thorough practical knowledge of their own domestic legal order and linguistic proficiency in the Court's official languages. Finally, it will be recalled that the Court has traditionally been composed of roughly one third professional judges, one third practitioners and one third academics. This blend of experience has proved its worth over the years.

1 See, for example, two articles by judges on the former Court: Rudolf Bernhardt, "Reform of the Control Machinery under the European Convention on Human Rights, Protocol No. 11", 89 *American Journal of International Law* p145 at p. 153 (1995); and Nicolas Valticos, "Quels juges pour la prochaine Cour européenne des Droits de l'Homme?", *Liber Amicorum Marc-André Eissen*, pp. 415-33 (Bruylant, Bruxelles, 1995).

2 Which states that one of the criteria for the governments to apply when drawing up the lists of candidates is to "ensure that the candidates have experience in the field of human rights, either as practitioners or as activists in non-governmental organisations working in this area".

3 See, for example, *Sporrong and Lönnroth v. Sweden*, judgment of 23 September 1982, Series A no. 52, § 69.

B. Report on the Election of judges to the European Court of Human Rights

Report of the Committee on Legal Affairs and Human Rights
Rapporteur: Lord Kirkhill, United Kingdom, Socialist Group
Doc. 8460; 9 July 1999

Summary

The system of interviewing the candidates to the European Court of Human Rights is considered most helpful and is to be continued, not only in the case of partial renewals of the Court but also for any election the Assembly carries out in the case of resignation or death of one of the judges. The Committee on Legal Affairs and Human Rights – through one of its sub-committees – should therefore continue to organise interviews of all candidates standing for election to the Court and make its findings available to the members of the Assembly.

In addition, candidates are invited to submit a curriculum vitae on the basis of the model which is appended to the draft resolution.

I. Draft resolution

The Assembly recalls that, for the election of the judges to the new single Court of Human Rights, the candidates were invited to interviews organised by a sub-committee of the Committee on Legal Affairs and Human Rights.

The conclusions of the sub-committee were made available to all members of the Assembly, prior to elections during one of its part-sessions.

The Assembly is of the opinion that these interviews were most helpful in order to obtain a better insight into the qualities of the candidates and thus facilitate a better-informed choice.

The Assembly considers, therefore, that the system of holding interviews should be continued, not only in the case of partial renewals of the Court (which take place every three years and in theory concern one half of the judges) but also for any election in the case of, for instance, resignation or death of one of the judges.

Consequently, it instructs the Committee on Legal Affairs and Human Rights – through one of its sub-committees – to continue organising interviews of all candidates standing for election to the Court and to make its findings available to members of the Assembly.

For the first election to the Court candidates were invited to send in a curriculum vitae on the basis of a model adopted by the Assembly in its Resolution 1082 (1996).

This model curriculum vitae proved to be very useful as it contains a number of questions considered to be essential and facilitates comparison between the candidates.

Following the experience of the first election of judges to the new Court – and after informal consultation with the Committee of Ministers – the Assembly considers that the practice of inviting candidates to answer the questions in a model curriculum vitae is to be continued but that the model could be improved upon on a number of points.

The Assembly adopts, therefore, the model curriculum vitae which is reproduced below as an appendix to this resolution.

The Assembly furthermore calls on the Secretary General, and all others involved in the process of selection and election, to start the proceedings at least twelve months before the expiration of the term of office of the sitting judge and to respect the indicative time-table set out in Appendix II to this resolution.

Appendix I to Draft resolution:

Model curriculum vitae for candidates seeking election to the European Court of Human Rights

In order to ensure that the members of the Parliamentary Assembly of the Council of Europe have comparable information at their disposal when electing judges to the European Court of Human Rights, candidates are invited to submit a short curriculum vitae on the following lines:

I. Personal details

Name, forename
Sex
Date and place of birth
Nationality/ies

II. Education and academic and other qualifications

III. Relevant professional activities

Judicial activities
Non-judicial legal activities
Non-legal professional activities
(Please underline the post(s) held at present)

IV. Activities and experience in the field of human rights

Public activities
Public office
Elected posts
Posts held in a political party or movement
(Please underline the post(s) held at present)

VI. Other activities

Field
Duration
Functions
(Please underline your current activities)

VII. Publications and other works

You may indicate the total number of books and articles published, but mention only the most important titles (maximum 8)

VIII. Languages

Language Reading Writing Speaking
First language

(Please specify)

b. Official languages:
- English
- French

c. Other languages:

IX. Other relevant information

X. Please confirm that you will take up permanent residence in Strasbourg if elected a judge on the Court.

Appendix II to Draft resolution:

Indicative time-table for the partial renewals of the Court

Time to be granted to the governments of member states for the selection of their candidates and their transmission to the Secretary General of the Council of Europe	4 months
Time to be granted to the Committee of Ministers for consideration of the candidates and deliberation prior to transmission to the Assembly	1 1/2 months
Time to be granted to the Assembly for its election procedures	2 1/2 months (this time may be longer depending upon the Assembly's part-sessions)
Time to be granted to the judge elected for terminating his/her previous employment and settling in Strasbourg (this is important for newly-elected judges but it may, of course, also be important for a sitting judge, who was a candidate but was not re-elected and must therefore make preparations for finding other employment and, possibly, removal to his home country)	4 months
Total time needed for the proceedings	12 months

II. Explanatory memorandum by Lord Kirkhill

A. Introduction

When the new single Court of Human Rights was inaugurated, on 3 November 1998 in Strasbourg, many members of the Committee on Legal Affairs and Human Rights as well as other members of the Assembly were present - and rightly so! Indeed, the Committee and the Assembly had played a very important role both in the elaboration of Protocol No 11 to the Convention setting up the single Court, and at my suggestion, in the election procedures for the judges.

Perhaps it is useful to recall that the new Protocol did not significantly change the system of the election. In fact, it is the statutory responsibility of the Assembly to elect a judge in respect of each contracting State to the Convention on the basis of a list of three candidates – who do not necessarily have to be nationals of that State – submitted to it by the Committee of Ministers. The three candidatures thus transmitted by the Committee of Ministers are those proposed by the member State in question. As far as I know, the Committee of Ministers has never modified such a list nor even changed the order of priority in which the candidates are presented for Assembly determination.

Although Protocol No 11 only introduced minor changes in respect of the election procedure¹ the Assembly itself, acting upon a proposal of the Committee on Legal Affairs and Human Rights, decided to improve its own procedures in respect of the elections. First, it was decided to draw up a model curriculum vitae to be sent to all candidates and, secondly, it was decided to invite the candidates to brief

¹ See Articles 20-23 of the Human Rights Convention as amended by Protocol No 11 – see Appendix II.

interviews to be held by the sub-committee of the Committee on Legal Affairs and Human Rights in accordance with Resolution 1082 (1996).²

The aim of this report is to reassess the Assembly's action and to decide, subsequently, whether it should be modified or improved for future elections. In this respect it may be recalled that the judges in the Court are elected for six years, but in order to avoid the entire renewal of the Court at the end of this period, the Convention provides for a partial renewal every three years. As a consequence, one half of the judges elected in 1998 will see their terms of reference expire in three years' time, that is to say on 31 October 2001. In accordance with the Convention "the terms of office of one-half of the judges elected at the first election shall expire at the end of three years. The judges whose terms of office are to expire at the end of the initial period of three years shall be chosen by lot by the Secretary General of the Council of Europe immediately after their election".³ As they must be re-elected or not in 2001, at the January, April or June session of the Assembly at the latest, I do not consider it premature to draw such lessons as are appropriate from our current procedures especially since these are still fresh in our minds.

In addition, one should consider how to proceed in the case of a by-election, which may be necessary in the case of the resignation or death of one of the judges, or when he or she reaches the age of 70, now an age-limit set by the Convention itself.⁴

B. The interviews

Well before Protocol No 11 to the Human Rights Convention, setting up the single Court, entered into force the Committee on Legal Affairs and Human Rights started to organise the interviews of the candidates. In the Resolution it had been foreseen to organise these interviews in Strasbourg – and, in fact, I had presented some good reasons for holding the interviews at the seat of the Council of Europe in my explanatory report to the Resolution – but in the end members decided it would be more practical – for example ease of transport, etc. for all the participants - to hold them in Paris. For that reason the Committee requested a derogation by the Assembly's Bureau from the Resolution.

The interviews were held therefore at the Council of Europe's Paris Office which was suitable for this purpose. We held interviews on 17-19 December 1997, 7-9 January 1998, 6 April 1998 and on 7 January 1999. The last interviewing session was necessary to hear the candidates from Russia, which had ratified the Convention in May 1998. Subsequently, that country rapidly submitted a list of three candidates, but the first candidate – the Permanent Representative of the Russian Federation in Strasbourg – was killed in a car accident and a new list was not submitted until the autumn. For that reason no Russian judge could sit among the 39 judges at the inauguration ceremony of the Court on 3 November 1998. Shortly after the interviews of the three Russian candidates on 7 January 1999 the Russian government informed the Council of Europe that it wished to withdraw its list of three candidates. When this report was written (April 1999) there was, therefore, still no sitting judge on behalf of the Russian Federation.

Resolution 1082 left it to the Committee on Legal Affairs and Human Rights to decide whether it should ask its Sub-Committee on Human Rights to carry out the interviews or whether a special ad hoc sub-committee should be set up. The Committee opted for the latter solution since in that way the sub-committee could be made up of members who would be available on the dates chosen for the interviews. In addition, given the great importance of the interviews, a balance had to be struck among the members of the Sub-Committee between the four main political groups in the Assembly. Every titular member of the Sub-Committee was expected to attend and a great effort was made to have the member replaced by

2 See Appendix I.

3 See Article 23, sections 1 and 2.

4 In accordance with Article 23 § 6 of the Convention, the terms of office of judges shall expire when they reach the age of 70.

another member of the same political group if he or she were not available. Nominations for the Sub-Committee were thus made by the political groups, but, of course, it was in the end the Committee on Legal Affairs and Human Rights which appointed the Sub-Committee's members, in accordance with the Rules of Procedure of the Assembly.

Personally, I had the honour to be elected Chairperson of the Sub-Committee which then elected Mrs Wohlwend (Liechtenstein, EPP/CD) as its Vice-Chairperson.

As for the interviews themselves, for each Contracting Party the Sub-Committee reserved one hour, ie fifteen minutes for each candidate, followed by fifteen minutes of deliberations to evaluate and compare the three candidates in each case. Whilst an interview which lasts only fifteen minutes is not ideal for possible appointment to such an important position – critics should keep in mind that the Sub-Committee interviewed more than 120 candidates – holding the interviews had at least the merit of a measure of democratic transparency and was a considerable improvement upon the Assembly's appointments procedure from that which had previously obtained relative to the part-time Commission and part-time Court.

Almost all of the Contracting Parties accepted the Sub-Committee's recommendation the most notable exception being that of the United Kingdom which used its influence to successfully promote a candidate who had not been the original choice of the Sub-Committee.

After the interviews the conclusions were reproduced in a report which was submitted to the Committee on Legal Affairs and Human Rights and to the Bureau of the Assembly.

Immediately after having been considered by the Bureau the report was made available to all members of the Assembly.

C. *Curricula vitae*

In the past the Assembly always proceeded to the election of the judges on the basis of the *curricula vitae* which were submitted to it. These *curricula vitae* were drawn up either by the candidates themselves or by their governments, who felt free to produce the information they wished to give and to present it in the way they preferred. Because there was no uniform structure to these *curricula vitae* it was sometimes difficult to compare the candidates and quite often essential information on the candidates was not provided. In Resolution 1082 (1996) the Assembly considered that it would be useful if the information to be provided by the candidates was presented systematically and on broadly similar lines to facilitate comparison between them. For that reason, a model curriculum vitae was established which formed an integral part of Resolution 1082 (1996). This model curriculum vitae was sent to all candidates who were invited to complete it.

Most candidates completed their curriculum vitae seriously and concisely, but a number of them tended to be far too prolific. One candidate submitted a curriculum vitae containing 20 pages of bibliography! His whole curriculum vitae was 25 pages long. It is obvious that if all candidates had done likewise Assembly members would have had to study 25 pages pertaining to each of the 120 candidates.

Professor Jean-François Flauss of the Law Faculty of Strasbourg University has produced a very interesting "x-ray" of the election of the new Court in the "Revue trimestrielle des droits de l'homme" of 1 July 1998.⁵ This excellent article, which is reproduced as a working document of the Committee on

Legal Affairs and Human Rights, contains, on pages 448-451,⁶ a very useful description and summary of the replies to the curriculum vitae sent to the candidates, which I am reproducing below:

“6. Layout of the curriculum vitae

The Parliamentary Assembly invited the candidates to use the model *curriculum vitae* appended to its Resolution 1082 (1996). That model had been drawn up with a view to making candidatures more transparent and allowing genuine comparison between them. However, it was officially criticised by the Irish government, which found it positively unsuited to the situation in English-speaking countries “the model CV appears to follow the framework of the judicial and parajudicial systems of continental Europe. The Irish legal system is rather different.” It is true that the Irish candidates had been invited to revise the layout of their *curriculum vitae*.

While that was not the case for other candidates, it nevertheless has to be said that the decisions of the Parliamentary Assembly were far from having been followed to the letter. Some *curricula vitae* were incomplete while others were excessive and even superfluous.

The omissions in several *curricula vitae* are either “admissions of lacking ability”, or accidental omissions or oversights. On the other hand, omissions relating to public activities of a political nature cannot be systematically assimilated to oversights. Firstly, it is to be noted that the section entitled “political activities” under Resolution 1082 (1996) was re-labelled “public activities”. This shift of meaning is clearly not a totally innocent one. Nevertheless the change of terminology did not cut much ice with a great many candidates (if not most of them): they contented themselves with an indifferent approach to this section, other than considering that a failure to reply was to be understood as a no. The candidates who expressly pointed out that they held neither a position of responsibility within a political movement nor political office (parliamentary or other) were in the minority. The candidates who expressly declared such activities were just as few.

It is true that the political transparency wished by the Parliamentary Assembly is narrowly restricted in its scope. In other words, the candidates who did pursue political activities could consider, in all good faith and quite legitimately, that these did not have to be declared, or that they had already been declared under another section of their CV, at the very least implicitly.

Anecdotally, certain candidates, from Europe’s new democracies, were keen to mention their anti-communist feelings before 1990. Indeed it is not to be excluded that such declarations are partly suspect and more generally that certain candidates, if only out of necessity, were politically committed to the former regime.

The same comment applies, all things being equal, to the lectures or colloquy addresses listed by the candidates. Ultimately such inventories become laughable when they are nothing more than a list of passive attendances at academic or other such events.”

This applies to the absence of any reference to publications or any detailed bibliographical references.

In this connection the CVs of I Paduvaru, E Carpov, T Pantiru (Moldova), the three Andorran candidates, M Hion (Estonia), M Ospelt and H Schädler (Liechtenstein), E Fazzini (San Marino, 2nd list), M Fischbach and M Mathekowisch (Luxembourg), J Briede (Latvia), V Milius (Lithuania), J N Popova and

6 See document AS/Jur (1999) 3, pp 11-14 of the English version.

S V Cherner (Bulgaria, 1st list), M Burgogni and M Ghiotti (San Marino, 1st list), I Hötzl (Hungary), D Vaughan Buckley (Ireland).

See for example the candidates Lorenzen (Denmark) and Caflisch (Liechtenstein) who give no indication of their language skills.

K Grosshof (Germany), M Fiorilli (Italy), G Malinverni (Switzerland), S Trechsel (Switzerland), N Bratza, R Carnwath, R Reed (United Kingdom), F Tulkens (Belgium), I Goranic (Croatia, 1st list), K Stayanova (Bulgaria, 2nd list), V Straznicka (Slovakia), K Traja (Albania) who felt prompted to declare that he had never belonged to any political party.

Ch Clerides (Cyprus) stated that he was vice-chairman of a political party set up in 1996 (“New horizons”).

W Fuhrmann (Austria) declared his parliamentary terms of office and his party responsibilities.

M Fischbach (Luxembourg) present Minister of Justice stated that he had also been a member of the national parliament and the European Parliament.

G Marjanovik (“the Former Yugoslav Republic of Macedonia”) said that he was founder and chairman of the first opposition party in the Republic of Macedonia.

L Ferrari Bravo (San Marino) set out a list of political and economic activities.

D Ianculescu (Romania) mentioned his ministerial positions.

V Butkevych (Ukraine) said that he was a member of the national parliament and had responsibilities within it.

T A Tchepev (Bulgaria, 2nd list) was a former Minister of Justice.

E Levits (Latvia) said that he had been a minister and currently held parliamentary office (but the latter point is somewhat ambiguous).

A few examples are Ch Rozakis (Greece) former under-secretary of State, G Papadimitriani (Greece) legal adviser to the Prime Minister, and P Kuris (Lithuania), former Minister of Justice.

D Botoucharova-Dotcheva (Bulgaria) - legal adviser to the Union of Democratic Forces and several times deputy in the National Assembly - did not reply under the section entitled “other public activities”.

It is true that Mrs Botoucharova-Dotcheva had, in the past, fulfilled the function of secretary in local communist party branches. Similarly C Casini did not mention his (numerous) political offices and responsibilities under the section provided for that purpose.

In this connection: G Marjanovik (“the Former Yugoslav Republic of Macedonia”) who detailed the political views he had expressed on freedom of conscience and opinion in the 1980s;

K Jungwiert (Czech Republic) who mentioned his expulsion from the Bar between 1970 and 1973 after publicly protesting against the occupation of Czechoslovakia by Warsaw Pact troops in 1968;

D Ianculescu (Romania) who mentioned the communist persecution of his family (uncles and cousins) in the 1950s and 1960s.

D Ianculescu was a judge between 1957 and 1989 and even a counsellor at the Ministry of Justice from 1965 to 1989.

This may have been the case in particular for those candidates having previously occupied (in the 1950s, 60s and 70s) functions within the judiciary, particularly under the public prosecutor at the Ministry of Justice.

In this respect see the professional backgrounds of M Voicu (Romania) and T Pantiru and I Panduvaru (Moldova), K Traja (Albania), Z Horvatic (Croatia, 1st list).

M A Lopes Rocha listed in minute detail 50 or so lectures that he had given in highly diverse frameworks and contexts.

In this connection see the list drawn up by I Garanic (Croatia, 1st list) or by J Rodriguez-Zapata Perez (Spain).

There is not much which I would like to add to the comments by Professor Flauss, except to mention that the information provided in the curricula vitae of the candidates was not always easy to verify and that, to a very large extent, the Sub-Committee had to assume it was correct.

On the basis of our experience I think it would be useful to modify the model curriculum vitae along the following lines:

Under Section III (relevant professional activities) of the model curriculum vitae as appended to Resolution 1082 (1996) I propose that candidates be asked to underline the posts they hold at the time of the application.

This proposal is based on my experience that many candidates often failed to make it clear which posts were or were not held at the time of the completion of the curriculum vitae.

I recommend that Section V of the curriculum vitae should be called “Public activities” and not “Political activities”. We should make this change at the wish of the Committee of Ministers, several members of which expressing the view that “political activities” was too limited and that the question in itself was not entirely relevant. I propose, therefore, to replace it by “Public activities”. Subsequently, this paragraph should read:

“Public activities
- public office
- elected posts
- posts held in a political party or movement
(Please underline the post(s) held at present)”

It is proposed to add at the end of Section VI: “Other activities”:

“(Please underline your current activities)”

In Section VIII (languages) it is proposed to make a breakdown for the languages similar to the one which is used in the Council of Europe for the assessment of the staff’s linguistic abilities:

Language Reading Writing Speaking

a. First language

(Please specify)

b. Official languages:

- English

- French

c. Other languages:

.....

.....

.....

At the very end of the model curriculum vitae one should add a new section X, worded as follows:

“Please confirm that you will take up permanent residence in Strasbourg if elected a judge on the Court”

This is, of course, very important because one wants to make sure that all the judges live in Strasbourg. As Chairperson of the Sub-Committee on the Election of Judges to the European Court of Human Rights I always asked this question, as did Mrs Wohlwend, Vice-Chairperson of the Sub-Committee when she replaced me in the Chair. We always received confirmation that the candidate would reside in Strasbourg, if elected and we consider this to be very important for the regular functioning of the Court.

D. The renewals of the Court

The judges of the Court are elected for a period of six years. They may be re-elected once or several times until they reach the age of 70 when they must retire. Although normally elected for six years the Convention provides that the term of office of one half of the judges elected at the first election shall expire at the end of three years. Those so elected have been drawn by lot by the Secretary General. As a result, there will be partial renewals of the Court every three years when one half of the judges is to be elected or re-elected. It may be recalled that in the old Court the term of office of the judges was nine years and that there was a partial renewal every three years of one third of the judges. The list of judges whose term of office expires on 31 October 2001 and of those whose term of office expires on 31 October 2004 is reproduced in Appendix III.

In addition to these regular three-yearly renewals of the Court, by-elections will have to be held in order to replace judges who reach the age of 70, resign or die before the end of their term of office. As a result, it may be expected that the election of a judge in respect of one or several member States will quite often be on the order of business of the Assembly’s sessions.

With the exception of cases of resignation or death, when the proceedings will have to be carried out as quickly as possible in order to fill the vacant seat, it will be important to reserve sufficient time for the selection and election procedures or – to put it in other words – these need to be in place well in advance of actual need.

In the past, when there was a partial renewal of the old Court, judges were normally elected at short notice when the terms of office of the sitting judge was about to expire or – in some cases – had already expired. I think this system was unsatisfactory, even for the old Court, where the judges were not sitting

on a permanent basis and remained resident at home where they normally had their principal occupation. Yet such a situation could easily have been avoided if the whole proceedings had started a little earlier. For the new Court precipitation should be avoided as far as possible. Of course, it may be expected that a number of the sitting judges will always stand for re-election and that in many cases they will be re-elected. But one could also think of newcomers who should have sufficient time to prepare themselves for the important work in Strasbourg they might be called upon to do.

Taking into account the above considerations I suggest the following indicative time-table for the partial renewals of the Court:

Time to be granted to the governments of member States for the selection of their candidates and their transmission to the Secretary General of the Council of Europe	4 months
Time to be granted to the Committee of Ministers for consideration of the candidates and deliberation prior to transmission to the Assembly	1½ months
Time to be granted to the Assembly for its election procedures	2½ months (this time may be longer depending upon the Assembly's part-sessions)
Time to be granted to the Judge elected for terminating his/her previous employment and settling in Strasbourg (this is important for newly-elected judges but it may, of course, also be important for a sitting judge, who was a candidate but was not re-elected and must therefore make preparations for finding other employment and, possibly, removal to his home country)	4 months
Total time needed for the proceedings	12 months

Given the fact that the first partial renewal of the Court is to take place on 1 November 2001, the election proceedings for the judges in this renewal should start one year before, ie on 1 November 2000, the date before which the Secretary General should send out his first letter to the Governments of Contracting Parties inviting them to nominate three candidates.

If judges reach the age of 70 the same procedure should also be followed. The judge on behalf of Italy, Mr Conforti, will reach this age-limit in September 2000 and, as a result, the Secretary General's letter to the Government of Italy should be sent not later than September of this year.

It may perhaps be argued that, in accordance with Article 23 § 7 of the Convention, judges shall hold office until being replaced. Therefore, if one were not in a hurry to replace Mr Conforti he might go on well beyond the age-limit! Personally, however, I reject such reasoning and think that judges should be

replaced on time. Some of the judges will continue to sit in the Court anyway as they will “continue to deal with such cases as they already have under consideration”, as provided for in the same Article. Perhaps I might add that the selection at national level of the three candidates for consideration has been criticised in several countries. For example, it was argued that the appointment of judges at national level is usually subordinated to very strict rules which have to be complied with by the governments, the candidates, and all others concerned. However, in respect of the selection of candidates for the Court of Human Rights at national level frequently no such procedures were applied or respected. I should add that it was only in Slovenia that the three candidates were elected by parliament.

Given the shortage of time, governments had to proceed rapidly, but, as a result, many potential candidates were not informed in time and did not have the possibility to apply. There seemed to be little transparency in many of the national proceedings. One effect of such a lack resulted in rather fewer female candidates being presented than might reasonably have been expected. In some cases, there were doubts as to whether the candidates selected by the governments were always the best possible candidates a country could propose or whether some other (political) arguments were involved in their nomination. This is, however, a matter to be discussed in another report which at the moment is under preparation by the Committee on Legal Affairs and Human Rights (Rapporteur: Mrs Wohlwend).⁷

E. Conclusions

In this report I have described the new proceedings which were followed in the Assembly for the election procedure of the first 40 judges in the new single Court of Human Rights. These procedures were new in two respects. There was a model curriculum vitae which all candidates were invited to complete and then they were invited to interviews of the Committee on Legal Affairs and Human Rights’ Sub-Committee on the Election of Judges to the Court.

All this was in the nature of an experiment and the second aim of this report is to make an evaluation of the procedures followed and to see how they may be continued and improved.

In conclusion, it may be said that there is an overwhelming majority of members in the Committee on Legal Affairs and Human Rights who feel that the election proceedings as described in this report were largely satisfactory and that the Assembly should proceed in similar fashion for the next elections.

Consequently, this report contains a draft resolution to confirm the Assembly’s clear wish to continue the proceedings in the manner outlined.

The election procedure is a matter in which the Committee of Ministers and the Parliamentary Assembly must closely cooperate. Clearly it is not only a matter of courtesy but I think also of common sense if, prior to its final adoption, this report were to be discussed once in a Joint Committee meeting, that is to say, between Assembly members and members of the Committee of Ministers.

Having said this I would like to underline that this report does not seek in any way to enlarge the powers of the Assembly in the election procedures, but rather to implement, as best we can, the provision in the European Convention on Human Rights which grants the Assembly the right to elect the judges of the Court on the basis of making a choice of one from three candidates submitted by the respective member States.

Finally, I should like to place on record my appreciation of the advice and help the secretariat gave to me and to my Sub-Committee whenever it was requested of them and in my capacity as Chairperson I would

like to thank also the members of the Sub-Committee for their regular attendance and for the many hours of their time which they spent in responsible deliberation.

Appendix I to Explanatory memorandum by Lord Kirkhill:

Resolution 1082 (1996) I on the procedure for examining candidatures for the election of judges to the European Court of Human Rights

1. Protocol No. 11 to the European Convention on Human Rights is expected to be ratified by all Contracting Parties to the Convention in the course of 1996, in which case it will enter into force a year later, probably in the course of 1997.
2. The protocol will introduce a single European Court of Human Rights on a permanent basis in Strasbourg to replace the existing Commission and Court. It will preserve, in essence, the proceedings and guarantees under the Convention. The judges (one in respect of each Contracting Party - as against one for each member state at present) will be elected by the Assembly for a period of six years (nine years at present) from a list of three candidates proposed by the Contracting Party concerned.
3. Now that a single Court is to be set up on a fully professional basis, with judges residing permanently in Strasbourg, the Assembly wishes to improve its own procedure for the selection of candidates from a list of three names proposed by the Contracting Party concerned.
4. Undoubtedly, it would be useful if the information to be provided by the candidates was presented systematically and on broadly similar lines to facilitate comparison between them. For this reason a model curriculum vitae should be established and sent to each candidate, who will complete the document as part of his or her submission of candidature. The model curriculum vitae which is attached forms an integral part of this resolution.
5. The Assembly shall undertake to call upon candidates to participate in a personal interview, to be organised in Strasbourg by the Sub-Committee on Human Rights or by an ad hoc sub-committee of the Committee on Legal Affairs and Human Rights.
6. Finally, the Assembly calls upon all member states of the Council of Europe and upon all candidates to the new European Court of Human Rights to co-operate with this new procedure which should considerably improve the system of the election of judges by the Assembly.

Appendix

Model curriculum vitae for candidates seeking election to the European Court of Human Rights

In order to ensure that the members of the Parliamentary Assembly of the Council of Europe have comparable information at their disposal when electing judges to the European Court of Human Rights, candidates are invited to submit curriculum vitae on the following lines.

I. Personal details

Name, forename
Sex
Date and place of birth
Nationality/ies

II. Education and academic and other qualifications

III. Professional activities

- a. Details of judicial activities
- b. Details of non-judicial legal activities
- c. Details of all non-legal professional activities

IV. Activities and experience in the field of human rights

V. Political activities

- Posts held in a political party
- Duration
- Membership of parliament

VI. Other activities

- Field
- Duration
- Functions

VII. Publications and other works

(Indicate the total number of books and articles published but select only the most important ones (maximum twelve))

VIII. Languages

(Indicate degree of fluency: speaking, reading, writing)

- a. Mother tongue
- b. Official languages
 - English
 - French
- c. Other languages

IX. Other relevant information

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- I. Assembly debate on 22 April 1996 (9th Sitting) (see Doc.7439, report of the Committee on Legal Affairs and Human Rights, rapporteur: Lord Kirkhill).
Text adopted by the Assembly on 22 April 1996 (9th Sitting).

Appendix II to Explanatory memorandum by Lord Kirkhill:

Articles 20-23 of the European Convention on Human Rights and Fundamental Freedoms

Article 20 _ Number of judges

The Court shall consist of a number of judges equal to that of the High Contracting Parties.

Article 21 _ Criteria for office

1. The 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.
2. The judges shall sit on the Court in their individual capacity.
3. During their term of office the judges shall not engage in any activity which is incompatible with their independence, impartiality or with the demands of a full-time office; all questions arising from the application of this paragraph shall be decided by the Court.

Article 22 _ Election of judges

1. The 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.
2. The same procedure shall be followed to complete the Court in the event of the accession of new High Contracting Parties and in filling casual vacancies.

Article 23 _ Terms of office

1. The judges shall be elected for a period of six years. They may be re-elected. However, the terms of office of one-half of the judges elected at the first election shall expire at the end of three years.
2. The judges whose terms of office are to expire at the end of the initial period of three years shall be chosen by lot by the Secretary General of the Council of Europe immediately after their election.
3. In order to ensure that, as far as possible, the terms of office of one-half of the judges are renewed every three years, the Parliamentary Assembly may decide, before proceeding to any subsequent election, that the term or terms of office of one or more judges to be elected shall be for a period other than six years but not more than nine and not less than three years.
4. In cases where more than one term of office is involved and where the Parliamentary Assembly applies the preceding paragraph, the allocation of the terms of office shall be effected by a drawing of lots by the Secretary General of the Council of Europe immediately after the election.
5. A judge elected to replace a judge whose term of office has not expired shall hold office for the remainder of his predecessor's term.
6. The terms of office of judges shall expire when they reach the age of 70.
7. The judges shall hold office until replaced. They shall, however, continue to deal with such cases as they already have under consideration.

Appendix III to Explanatory memorandum by Lord Kirkhill:

Judges of the Court

Judges whose term of office expires on 31 October 2001

Mr András BAKA (Hungary)
Mr Corneliu BÎRSAN (Romania)
Mrs Snejana BOTOUCHAROVA (Bulgaria)
Mr Volodymyr BUTKEVYCH (Ukraine)
Mr Josep CASADEVALL (Andorra)
Mr Benedetto CONFORTI (Italy)
Mr Luigi FERRARI BRAVO (San Marino)
Mr Marc FISCHBACH (Luxemburg)
Mr Willi FUHRMANN (Austria)
Mr Egils LEVITS (Latvia)
Mr Peer LORENZEN (Denmark)
Mr Loukis LOUCAIDES (Cyprus)
Mr Tudor PANTIRU (Moldova)
Mr Antonio PASTOR RIDRUEJO (Spain)
Mr Kristaq TRAJA (Albania)
Mrs Margarita TSATSA-NIKOLOVSKA (the former Yugoslav Republic of Macedonia)
Mr Riza TÜRMEŒ (Turkey)
Mr Luzius WILDHABER, President (Switzerland)
Mr Bostjan ZUPANËË (Slovenia)

Judges whose term of office expires on 31 October 2004

Mr Giovanni BONELLO (Malta)
Mr Nicolas BRATZA, Section President (United Kingdom)
Mr Ireneu CABRAL BARRETO (Portugal)
Mr Lucius CAFLISCH (Liechtenstein)
Mr Jean-Paul COSTA (France)
Mrs Hanne Sophie GREVE (Norway)
Mr John HEDIGAN (Ireland)
Mr Gaukur JÖRUNDSSON (Iceland)
Mr Karel JUNGWIERT (Czech Republic)
Mr Pranas KÛRIS (Lithuania)
Mr Jerzy MAKARCZYK (Poland)
Mr Rait MARUSTE (Estonia)
Mrs Elisabeth PALM, Vice-President (Sweden)
Mr Matti PELLONPÄÄ, Section President (Finland)
Mr Georg RESS (Germany)
Mr Christos ROZAKIS, Vice-President (Greece)
Mrs Viera STRÁ-NICKÁ (Slovakia)
Mrs Wilhelmina THOMASSEN (Netherlands)
Mrs Françoise TULKENS (Belgium)
Mrs Nina VAJIË (Croatia)

Reporting committee: Committee on Legal Affairs and Human Rights

Budgetary implications for the Assembly: none

Reference to committee: Order No. 485 (1995)

Draft resolution unanimously adopted by the committee on 25 May 1999

Members of the committee: MM Jansson (Chairperson), Bindig, Frunda, Moeller (Vice-Chairpersons), Mrs Aguiar, MM Akçali, Arzilli, Attard Montalto, Bal, Bartumeu Cassany, Brand, Bulic, Clerfayt, Columberg, Contestabile, Demetriou, Enright, Mrs Frimansdóttir, Mr Fyodorov, Mrs Gelderblom-Lankhout, Ms Hlavac, Mr Holovaty (alternate: Zvarych), Mrs Imbrasiene, MM Jaskiernia, Jurgens, Kelam, Kelemen, Lord Kirkhill, Mr Kresak, Mrs Krzyzanowska, Mr Le Guen, Ms Libane, MM Lintner, Loutfi, Magnusson, Mancina, Mrs Markovic-Dimova, MM Martins, Marty, McNamara, Mozetic, Mrs Näslund (alternate: Mr von der Esch), MM Nastase (alternate: Mrs Ionescu), Pavlov, Pollo, Polydoros, Mrs Pourtaud, MM Rippinger, Robles Fraga, Rodeghiero (alternate: Speroni), Roth, Mrs Roudy, MM Saakashvili, Schwimmer, Shishlov, Simonsen, Solé Tura (alternate: Mrs Calleja), Solonari, Svoboda, Symonenko, Tabajdi, Verivakis, Vishnyakov, Vyvadil, Weyts, Mrs Wohlwend.

N.B. The names of those members who were present at the meeting are printed in italics.

Secretaries to the committee: Mr Plate, Ms Coin and Ms Kleinsorge

C. “Analysis of the election of the new European Court of Human Rights”

by Jean-François FLAUSS, Professor of Law,

Jean Monnet Chair, “European Human Rights Law”

(published in the Revue trimestrielle des Droits de l’Homme, No. 35, 1 July 1998)

Following the adoption of Protocol No 11 to the European Convention on Human Rights, varying views were expressed as to who the future European Court would be composed¹. As more and more countries ratified this protocol, the procedure for appointing the new judges became a topical concern. To follow up the measures agreed by the Parliamentary Assembly of the Council of Europe as regards the examination of candidatures², veritable manuals were proposed³. Once ratification of Protocol No 11 by all the States Parties to the Convention became a certainty, early last autumn when Italy definitively announced that it would shortly be acceding, national ministries of justice were plunged into frenzied but in general highly confidential activity. The drawing up of lists of candidatures then moved into its decisive phase. At the beginning of October 1997 the member States received official notification from the Secretary General of the Council of Europe. Most of them submitted the names of the three candidates whom they were putting forward for election by the end of October or in November⁴.

The national procedure for selecting candidates was determined by each State in a fully independent manner. In order to ensure that the candidates chosen were in effect eminent legal experts meeting the requirements laid down in Article 21 (1) of the Convention, it had been suggested that the selection process be “degovernmentalised”.

“As the responsibility for proposing candidates lies with the government, consultation with an eminent national authority external to the government as regards the candidates proposed might be envisaged. Such an authority might be the country’s Constitutional Court or Supreme Court, the committee responsible for selecting judges on an internal basis or the legal affairs committee of the national parliament”⁵.

In other words it was a matter not of depoliticising the candidate selection process but of limiting the weight of strictly partisan considerations. In the process, it was also, and perhaps above all, a matter of making the procedure for selecting candidates less secret and/or confidential. There were indeed grounds for thinking it desirable, in accordance with the theory of appearances, for a modicum of transparency to feature in the selection of the individuals who were to become the zealous guarantors of the publication and transparency of procedures before the courts, or national authorities.

The fact remains, though, that the aforementioned concerns were far from present, with one or two exceptions, in national candidate selection practices. With a few exceptions, governments shunned any

1 See *inter alia* N.VALTICOS, «Quels juges pour la prochaine Cour européenne des droits de l’homme?», *Liber amicorum M.-A. Eissen*, Bruylant 1995, pp. 415-433; J. CARRILLO-SALCEDO, «Quels juges pour la nouvelle Cour européenne des droits de l’homme?», R.U.D.H., 1997, pp. 1-3.

2 Recommendation 1295 (1996) on the procedure for examining candidatures for the election of judges to the European Court of Human Rights; Resolution 1082 (1996) on the procedure for examining candidatures for the election of judges to the European Court of Human Rights; Order No 519 (1996) on the procedure for examining candidatures for the election of judges to the European Court of Human Rights.

3 Ch. KRÜGER, «Procédure de sélection des juges de la nouvelle Cour européenne des droits de l’homme», R.U.D.H., 1996, pp. 113 et seqq.

4 The tight deadline given for States’ replies was officially called into question by the Irish Government.

5 Ch. KRÜGER, «Sélection des juges de la nouvelle Cour européenne des droits de l’homme», R.U.D.H., 1996, pp. 115 et seqq.

public advertising for candidates⁶. In a few cases they advertised within a closed circle⁷. Some seem even to have taken unsolicited applications into account⁸. Apparently, only two countries followed a pre-established national procedure for selecting candidates⁹.

In the other countries, the decision to select and submit the list of candidates was officially down to the government but was the end result of highly empirical processes, very often dominated by political power play¹⁰. Indeed, in many countries (and it is without doubt a euphemism), it was the “full political spectrum” option that was followed¹¹. Political ties or leanings were in fact decisive. The same may have been the case, alternatively or cumulatively, where friendships or confraternal relationships were concerned. In short, some candidates owe their proposal, and where it was the case their election, above all to context-related considerations¹².

The European phase of the examination of the candidatures was also sealed by confidentiality. An *ad hoc* sub-committee, set up by the Parliamentary Assembly Committee on Legal Affairs and Human Rights, examined the dossiers. In mid-December and at the beginning of January, it interviewed the candidates at the Paris office of the Council of Europe. At the end of January, during its first 1998 session, the Parliamentary Assembly appointed 31 of the 39 judges to be elected. The eight remaining judges¹³ were appointed at the end of April, after the sub-committee had met for the third time, at the beginning of that month.

I. The presentation of the candidatures

The lists of candidatures which States customarily drew up for the Parliamentary Assembly in the past suffered from a number of shortcomings and even failings¹⁴. The arrangements adopted in 1996 by the Assembly with a view to improving the procedure for examining candidatures aimed above all to ensure greater transparency of the candidatures and greater equality between candidates.

To judge by the practice now followed by the States and the candidates, the Assembly has without doubt partially achieved its aims. It has to be said, however, that the candidatures presented did not always faithfully respect the concerns of the Parliamentary Assembly.

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- 6 The United Kingdom did opt for the rather original measure of advertising in the 13 September 1997 issue of the Times.
 - 7 The Czech Republic or Poland, for example.
 - 8 The letter in which Greece passed on the names of candidates expressly refers to the on-spec applications of the selected individuals.
 - 9 In Lithuania, the three candidates were proposed in a presidential decree, adopted on the recommendation of the prime minister. The decree was described as complying with the usual appointment procedure required by the country's internal processes. In Slovenia the list was established by the Slovenian national assembly, incidentally following a double ballot.
 - 10 The wording usually used was as follows: “the government presents”, “the government proposes”, “the government has selected” (for the use of these latter terms see *inter alia* Cyprus and Ireland).
 - 11 In the case of Italy, for example, the government placed B. Conforti (serving commission member and renowned specialist in international law) ahead of M. Casini, a candidate who was without doubt politically closer to it. It is true that the shorter term of office of the future Italian judge was a significant factor.
 - 12 The choice of the Czech Republic candidate for example was the result of a double screening of candidatures proposed by the high courts and the law faculties. After an initial selection on the basis of criteria which were not pre-determined by a ministerial commission, the final decision was officially a joint decision by the Ministries of Justice and Foreign Affairs. In fact, the Ministry of Justice played a dominant role in grading the candidates, which was to the advantage of the outgoing judge. The drawing up of the list of French candidates was marked by the sudden interest shown by the *Conseil d'Etat* in the European Court of Human Rights. Although the vice-president of the *Haute Assemblée du Palais Royal* continued to speak of “the gnomes of Strasbourg”, he nevertheless made considerable efforts to get the better of the Court of Cassation candidate.
 - 13 Those in respect of Bulgaria, Croatia, Liechtenstein, Portugal, United Kingdom, San Marino, Slovenia and Ukraine.
 - 14 For a summary of criticism of the traditional manner of presenting candidates see Ch. KRÜGER, “Procédure de sélection des juges de la nouvelle Cour européenne des droits de l'homme”, op. cit., part. , pp 113-114.

1. Presentation by order of preference or presentation by alphabetical order

In order to place the three candidates presented by each State on an equal footing it had been suggested to do away with the practice of placing candidates in order of priority, the first on the list being the one whom the national government wished to see elected¹⁵. In reality, take-up of the proposal was limited. Only a minority of States (one sixth of them) opted for presentation by alphabetical order. In some cases identification of the respective positions of the States begs discussion. On the one hand some States did adopt an order of preference that was “implicit” but nevertheless patent, where the presentation of candidates was not in exact alphabetical order. On the other hand, other States did follow alphabetical order but did not make it clear that there was no order of preference¹⁶.

2. Presentation of female candidatures

The Parliamentary Assembly had recommended that each list include at the very least one female candidature and, if possible, not simply for “decorative” purposes¹⁷.

Yet it has to be admitted that this recommendation largely fell on deaf ears. Of the 117 candidates put up for the Assembly’s vote, only 18 were women¹⁸. But above all, it was only very rarely that a female candidate was placed first on the list (Netherlands, Slovakia, Bulgaria). On the other hand, there were a great many lists, 26 in all, which included no female candidates¹⁹.

Since mixed-gender lists were not an essential requirement, the Parliamentary Assembly was not able to reject the male-only lists, nor could it bring pressure to bear on the States concerned. Nevertheless the very low proportion of female candidates may have affected the workings of the election. Certainly not as much as some had feared or hoped, but it is certain that the Parliamentary Assembly, so obviously keen to secure stronger representation for women within the court, could but appoint those women from the lists on which they appeared. In other words, the refusal of more than a majority of the States to present at least one female candidate meant that the male candidates on the mixed-gender lists were penalised, especially those competing with good female candidates. In these circumstances, it is not to be excluded that the failure of some good male candidates was a spin-off from the “macho” approach of certain States.

15 For the possible advantages and drawbacks of such a method of presentation, see Ch. KRÜGER, *ibid.*, p.115.

16 *Presentation by order of preference*

Explicit: Finland, Netherlands, United Kingdom, “the Former Yugoslav Republic of Macedonia”, Turkey, Malta, Moldova, San Marino (1st and 2nd list), France, Andorra, Greece, Hungary, Lithuania, Luxembourg, Bulgaria (1st and 2nd list), Croatia, Cyprus, Czech Republic, Denmark, Slovenia, Ireland (indicating that this complied with usual practice), Iceland (specified in an accompanying letter), Portugal (1st list - specified in a subsequent letter providing implicit confirmation upon presentation of 2nd list), Romania, Germany, Poland.

Implicit: Latvia, Italy, Slovakia, Albania, Austria

Presentation by alphabetical order

Explicit: Switzerland, Sweden, Spain, Norway, Bulgaria, Estonia

No indication: Liechtenstein (in reality in order of priority), Ukraine (in reality a classification in the light of the formal presentation which favoured the first candidate on the list).

17 Directive No 519 (1996) on the procedure for examining candidatures for the election of judges to the European Court of Human Rights instructs the Parliamentary Assembly Committee on Legal Affairs and Human Rights to examine candidatures with a view to achieving a balanced representation of the sexes.

In the view of Ch. KRÜGER (*op cit.*, *R.U.D.H.*, 1996, p.115) “Obviously, equality of the sexes should be respected. It is clear that one of the three candidates proposed must not be of the same sex as the other two”.

18 *Countries submitting two female candidates*: Bulgaria, Croatia, Albania, Slovakia.

Countries submitting one female candidate: Slovenia, Belgium, Sweden, Netherlands, Norway, Estonia, Denmark, Finland, “the Former Yugoslav Republic of Macedonia”, Germany.

19 Andorra, Austria, France, Italy, Latvia, Lithuania, Luxembourg, Malta, Moldova, Poland, Romania, Spain, Turkey, Greece, Hungary, Ireland, Iceland, Cyprus, Czech Republic, San Marino (1st and 2nd list), United Kingdom, Ukraine, Switzerland, Portugal (1st and 2nd list), Liechtenstein.

3. Presentation of outgoing members of the European Court and Commission of Human Rights

By fixing the age limit for the office of judge at 70 years, Protocol No. 11 rendered a great many serving Court judges (18) and Commission members (9) ineligible for candidature from the outset.

However, not all the “outgoing” judges and Commission members meeting the age requirement were included on the candidature lists. As far as the Court was concerned, 3 serving judges were not presented. It appears that P Van Dijk, the Dutch judge, did not secure the guarantees he sought for his reincorporation in the State Counsel of the Netherlands at the end of his term of office. The Slovenian judge, P Jambreck, was ruled out for political considerations and to prevent any competition with the official candidate, M Perenic, member of the Commission. As for the Bulgarian judge, D Gotchev, he was purely and simply the victim of a “settling of scores”, since the national authorities had not forgiven him for voting in favour of a violation in the Loukanov case²⁰.

As far as the Commission was concerned, the failure to propose Mrs Liddy (Ireland) and Mrs Thune (Norway) must be seen as a political sanction. The fact that the individuals concerned were women - and above all chamber presidents of the Commission - evidently carried little weight. Political considerations also explained the elimination of the serving Bulgarian member, A Stroganov-Arabadjiev. The case of the Andorran Commission member, M Vila Amigo, is less obvious: however, one may well imagine that the Principality’s government found it preferable not to present a candidate who would have made the election of the outgoing judge less of a certainty. The failure to present M Marxer, member of the Commission in respect of Liechtenstein, results largely from his own wish not to be included on a list headed by an eminent member of Swiss legal circles.

Outgoing judges and Commission members competed on the candidate lists of several countries: Switzerland, Sweden, Romania, Poland, Lithuania, the Czech Republic, Estonia and Portugal. Only the first two of those countries opted for alphabetical order. The others placed candidates in an order favouring the outgoing judge²¹, with the exception of Estonia which gave its preference to a third candidate²² and Portugal and Romania which placed their Commission member top of the list. On lists including only one outgoing representative, that individual was generally placed first²³. Only in a few cases were outgoing representatives placed second²⁴ or in no particular order²⁵. Ultimately, there were nevertheless eleven States²⁶ whose lists did not include an outgoing member of the supervisory bodies²⁷ and three further States which did not include an outgoing judge or Commission member²⁸. This meant that, whatever the case, at least 14 members of the new Court would by definition be judges with no recognised experience of the European supervisory system.

20 His vote in favour of the violation was assimilated to treason. The applicant, Loukanov, had been a leader of the former communist regime. Whatever the legitimate grounds for not including Judge Gotchev on the list of candidates - and these doubtlessly existed - it goes without saying that the circumstances of his removal are a clear indication that “objective distancing” is a virtue not yet very widely shared in Bulgarian leadership circles. Given the circumstances of the Loukanov case, the violation was bound to be found by virtue of established precedents. Judge Gotchev had no real margin for manoeuvre, therefore, other than to appear as a spokesman for the thesis of the respondent government.

21 For Poland, the Czech Republic and Lithuania, the judge and Commission member were placed first and second respectively.

22 On the Estonian list, the judge and Commission member were placed only second and third.

23 The lists of Slovenia, Moldova, Cyprus, Italy, Denmark, Iceland, Greece, Latvia, Germany, Finland, Andorra, Portugal (2nd version), the United Kingdom and Ukraine.

24 Netherlands, Slovakia and Hungary.

25 Belgium.

26 France, Spain, Turkey, San Marino, Ireland, Luxembourg, Austria, Bulgaria, Malta, Norway and Liechtenstein.

27 Court and Commission. If the Committee of Ministers is further included, then it is to be noted that one candidate was a serving member of the Committee of Ministers: the permanent representative of the Slovak Republic.

4. Profile of the candidates presented

a. Nationality

Very rarely did countries put forward a candidate of foreign nationality. There were just 2 examples, both concerning small States: M L Ferrari Bravo, of Italian nationality, put forward by San Marino, and M L Caflisch presented in respect of Liechtenstein. No other micro-state (such as Andorra) or small State (such as Malta, Luxembourg or Iceland) envisaged such an option, presumably regarding this as a delicate step. Either the foreign candidates had a considerable reputation, which would offend native candidates, or the native candidates were of a high standard, in which case foreign candidates did not wish to play the role of extra.

b. Age

Not all candidates were presented with a view to completing a full term in office. In fact, ten or so of them had already reached the age of 65 or would do so by 1 November 1998²⁹. Moreover, several others were already 64 years of age³⁰.

The proportion of “very young” candidates, ie aged under 36 years, was low but not totally insignificant (8 out of 117). However, none of them were placed at the top of the list³¹.

c. Professional background

The most heavily represented category is undeniably that of the judiciary (judges and public prosecutors); there were 40 such candidates of a total of 117, with a distinct predominance of members of superior courts³². Members of the judiciary serving in appeal courts or the equivalent represented only a quarter of the candidates³³. In second place, with some 30 representatives, were academics teaching in legal establishments³⁴. Rather curiously, the States put forward only a few lawyers, not even 20 in the event³⁵. Candidatures by officials from national central administrations, numbering 15, were above all civil servants with responsibilities in the legal field generally within the Ministry of Justice or the Ministry of Foreign Affairs³⁶. Proportionately speaking, candidatures from representatives of diplomatic status were relatively few and far between (6 in all)³⁷; however, two permanent representatives to the Council of Europe did stand as candidates³⁸. There were also very few candidates holding national political office, namely three parliamentarians and two members of government³⁹.

28 Albania, Croatia and “the Former Yugoslav Republic of Macedonia”.

29 P E Fazzini 69 years (San Marino), B Conforti 68 years (Italy), T Djunov 67 years (“the Former Yugoslav Republic of Macedonia”), M A Lopes Rocha 67 years (Portugal, 1st list), D Ianulescu 66 years (Romania), A Rais de Sousa 66 years (Portugal, 1st list), Th Ban 66 years (Hungary), L Ferrari Bravo 66 years (San Marino) and A Selih 65 years (Slovenia).

30 H Danelius (Sweden), T Dalvo (Norway), A Björnsson (Iceland) and Z Horvatic (Croatia, 1st list).

31 M Burgogni 32 years (Malta), M Semini 32 years (Albania), E Carпов 32 years (Moldova), M Hion 32 years (Estonia), V Duenos Jemeny 34 years (Spain), P Sturma 35 years (Czech Republic), M Ospelt and H Schädler 36 years (Liechtenstein).

32 Notwithstanding the differences between the types of supreme court recognised by the different countries and where comparison is significant:

- superior courts of civil law (courts of cassation included) were represented by 17 candidates
- superior administrative courts were represented by four candidates.

The number of presidents of superior courts stood *a priori* at three (in each case from small countries) and presidents of sections or divisions numbered just two.

33 Luxembourg (1), Latvia (1), Lithuania (1), Malta, Netherlands (1), Norway (1), Romania (1), Slovakia (1), Portugal 2nd list (1), San Marino 2nd list (1).

34 Greece (2), Austria (1), France (1), Germany (1), Finland (2), Albania (1), Italy (1), Poland (2), Czech Republic (1), Romania (1), Switzerland (3), Hungary (1), Belgium (2), Netherlands (2), Croatia 1st list (1), Denmark (2), Latvia (1), Slovakia (1), “the Former Yugoslav Republic of Macedonia” (1), Slovenia (1), Bulgaria 2nd list (1), Liechtenstein (1), San Marino 2nd list (1), Croatia 2nd list (3).

35 Andorra (3), United Kingdom (2), Poland (1), Cyprus (2), Ireland (3), Bulgaria (1), Czech Republic (1), Estonia (2), Malta (1), Moldova (1), Italy (1), Liechtenstein (1).

36 Greece (1), Albania (1), Hungary (2), Norway (1), Liechtenstein (1), Luxembourg (1), Bulgaria (1), Croatia, 1st list (1), Moldova (1), San Marino, 1st list (2), Spain (2) and Turkey (2).

37 Bulgaria, 1st and 2nd list (1), Austria (1), Croatia, 1st list (1), Turkey (1), Slovakia (1).

Subsidiarily, three candidates claimed to have worked in the capacity of international expert⁴⁰. Since numerous candidates were able to lay claim to several qualifications and professional activities simultaneously, possible conclusions as to the professional profile of candidates require careful weighing up.

It is clear however that not all of the candidates presented can claim in the absolute to fully satisfy the requirements of the amended Article 21 (1) of the Convention: “the judges shall be of high moral character and must either possess the qualifications required for appointment to higher judicial office or be jurisconsults of recognised competence.”⁴¹.

d. Experience in the human rights field

The standardised model for the curriculum vitae gave the candidates an opportunity to describe their academic work in the human rights field but above all obliged them to detail their activities in that sphere.

All in all, relatively few candidates mentioned responsibilities of a militant nature or the equivalent exercised within or on behalf of non-governmental human rights or humanitarian organisations⁴².

It is true that the proportion of candidates having served or still serving on Council of Europe committees of experts dealing with human rights issues was not insignificant but it was not very high either; there were just under ten members or former members of the Steering Committee for Human Rights or subordinate committees⁴³, and not even five from other committees such as the one dealing with legal co-operation.⁴⁴ There were even fewer candidates working or having worked for United Nations committees or commissions responsible for monitoring or supervision in the field of human rights protection - barely half a dozen.⁴⁵

The presentation of individuals having worked as national government agents or counsel before the European Court or Commission of Human Rights had been criticised in advance⁴⁶. Yet the States did not hesitate to put such candidates forward⁴⁷.

38 The Turkish and Slovakian ambassadors (the latter actually signed the list of candidatures submitted to the Secretariat).

39 Austria (1): candidate simultaneously a member of the national parliament and of the Council of Europe Parliamentary Assembly

Italy (1): member of the European Parliament

Ukraine (1): member of the national parliament

Luxembourg (1): Minister of Justice

Romania (1): secretary of state.

40 Moldova (1), Lithuania (1) and Latvia (1).

41 Anecdotally, one of the Bulgarian candidates (1st list) wrote “driving: clean driver’s licence” in the “*other qualifications*” section of his cv.

42 Strong track records were in evidence however: M Scheinin (Finland), L Loucaides (Cyprus), F Tulkens (Belgium), Sir R Carnwath (United Kingdom), MA Nowicki (Poland), H S Greve (Norway) and M Fiorilli (Italy).

43 J. Hedigan (Ireland), T. Dolva (Norway), I. Cabral Barreto (Portugal), R. De Gouttes (France), E. Möses (Norway), A-M Ozmen (Turkey); L. Hölztl (Hungary), M. Mathekowisch (Luxembourg), P. Lorenzen (Denmark), G. Regner (Sweden).

44 Th. Ban (Hungary), L. Loucaides (Cyprus), G. Regner (Sweden).

45 Human Rights Committee (Th. Ban and M. Scheinin).

Committee against Torture (B.-M. Zupancic).

Commission on Human Rights (J-A Pastor Ridriejo).

Sub-Commission on the Prevention of Discrimination and Protection of Minorities (V. Butkevych).

46 In particular, see J Carrillo-Salcedo: “In my view, it is not enough for the judges of the new Court to be independent and impartial; they also have to appear as such, so that they are not open to any kind of suspicion” *Quels juges pour la nouvelle Cour européenne?* R.U.D. H., 1997, page 3.

47 J-A Pastor Ridruejo (Spain), L Ferrari Bravo (San-Marino), M Mathekowisch (Luxembourg), Th. Ban and L Hölztl (Hungary), R Türmen (Turkey), E. Möses (Norway), K Drzewicki (Poland), M Sigurbjörnsson (Iceland), N Bratza and R Reed (United Kingdom), F Cede (Austria).

What is most surprising, however, is that something like one third of the candidates found it virtually impossible to mention any human rights activities worthy of the name in their CVs⁴⁸. While some candidates got around this difficulty by paralipsis⁴⁹, most attempted, more or less cleverly, to save face.⁵⁰ Rare were those who simply admitted to their lack of experience without beating about the bush.⁵¹

5. The structure of lists presented

In order to ensure that all legal circles were represented⁵², it had been suggested that the list of three candidates comprise the name of a university professor, an official or member of the judiciary (judge or public prosecutor), and a legal adviser (lawyer or company lawyer)⁵³.

There were only very patchy efforts to do so. Three types of lists may be distinguished. Firstly, there were the “balanced” and “diversified” lists, ie not including any two candidates with the same basic activity⁵⁴. Secondly, several States drew up “single-category” lists.⁵⁵ Finally, for half the lists, a professional category predominated, being “represented” by two candidates⁵⁶.

Those keen to reform the method of presenting candidatures had also hoped that there would be equality or at least equivalence between the candidates. In other words, the election would be meaningful only if

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- 48 Even if we allow for the laconic sole reference to work as a member of the Court of Human Rights made by the outgoing judges of Lithuania, Romania and Moldova.
- 49 M Burgogni and M Ghotti (San Marino 1st list), J A Chipev (Bulgaria (2nd list)), J Casadevall Medrano, A Lopez Montanyo and J Sinson Torres (Andorra), SV Chernev and J N Popova (Bulgaria 1st list), A Rais de Sousa (Portugal 1st list), D Krapoc (Croatia 2nd list).
- 50 - Either by mentioning their participation in seminars or conferences in the sphere of human rights protection such as I Garanic (Croatia), K Traja, J Zaka, M Semini (Albania), J-A Filletti (Malta), V Milius (Latvia), S Murtanova (Slovakia), K Siyanova (Bulgaria 2nd list).
 - or by referring to their membership of human rights movements, such as the “famous” (dixit) Human Rights Forum of Macedonia (G Marjanovik) or the Helsinki Charter Committee, in the given case since 1997 (P Sturma).
 - or by using the power of suggestion by referring to their work as a lawyer or judge during which they would have gained knowledge of cases touching on human rights, such as A Björnsson (Iceland), M Opselt (Liechtenstein), G A Durak (Turkey), V Radzievsky and O Zadorozhnyg (Ukraine).
 Whatever the case, the information provided all too often followed meaningless stock formulae (“member of numerous Greek and international associations as well as scientific organisations working in the field of human rights protection and the problems of modern democracy” (G Papadimitriou, Greek candidate, or was extremely vague (“activities in connection with UNESCO, the Conference of European Constitutional Courts and French research centres.”) (Y Gaudemet, French candidate).
- 51 One example was G Hogan (Irish candidate): “Apart from peripheral involvement in human rights groups during my student days, I claim no particular active involvement in the field of human rights, unless it be a personal commitment to the rule of law and the protection of human rights in Ireland through the mechanism of the Constitution of Ireland and the European Convention on Human Rights.”
- 52 Except for the political sphere as such.
- 53 Ch KRÜGER, “Procédure de sélection des juges de la nouvelle Cour européenne des droits de l’homme, op. cit. p 115.
- 54 Czech Republic (member of the judiciary, lawyer, academic)
 Austria (Parliamentarian-lawyer, academic, senior official)
 Italy (academic, member of judiciary, lawyer)
 Bulgaria 2nd list (ambassador, academic, judge)
 Bulgaria 1st list (ambassador, lawyer, academic)
 Albania (official, member of the judiciary, academic)
 Moldova (member of the judiciary, official, international expert)
 Liechtenstein (academic, lawyer, official)
 Slovakia (ambassador, judge, academic)
 Romania (academic, minister, judge)
 Latvia (member of the judiciary, academic, politician/international expert)
 San Marino 2nd list (senior official, lawyer, academic).
- 55 Andorra (three lawyers), Ireland (three lawyers), United Kingdom (three lawyers), Switzerland (three academics), Iceland (two judges and one Ombudsman), Portugal 1st and 2nd list (three members of the judiciary), Sweden (three members of the judiciary), Slovenia (three professors), San Marino 1st list (three officials), Croatia 2nd list (three academics).
- 56 France (two members of the judiciary, one academic), Estonia (one member of the judiciary, two lawyers), Hungary (two officials, one academic), Germany (two members of the judiciary, one academic), Lithuania (two members of the judiciary, one official), Malta (two members of the judiciary, one lawyer), Netherlands (two academics, one member of the judiciary), Belgium (two academics, one member of the judiciary), Denmark (two academics, one member of the judiciary), Finland (two academics, one member of the judiciary), Croatia 1st list (two officials, one academic), “the Former Yugoslav republic of Macedonia” (two members of the judiciary, one academic), Spain (two officials, one member of the judiciary), Poland (two academics, one lawyer), Norway (two judges, one official).

the list respected a certain balance of candidate quality. Implicitly but necessarily, this excluded the presentation of candidates to make up the numbers or cast others in a better light. Nevertheless, a number of lists can hardly be said to have satisfied this requirement. This was manifestly the case for the lists initially submitted by Bulgaria and San Marino, which were rejected by the interviewing sub-committee on the grounds that the free choice of the Assembly was signed away from the outset by blatant inequality between candidatures⁵⁷. The lists of Luxembourg, Liechtenstein, if not Latvia and even Andorra followed this pattern⁵⁸. Finally, other lists, such as that of Ukraine, were outstanding to say the least for the relative “weakness” of the second and third candidates.⁵⁹

6. Layout of the curriculum vitae

The Parliamentary Assembly invited the candidates to use the model *curriculum vitae* appended to its Resolution 1082 (1996). That model had been drawn up with a view to making candidatures more transparent and allowing genuine comparison between them. However, it was officially criticised by the Irish government, which found it positively unsuited to the situation in English-speaking countries “... the model CV appears to follow the framework of the judicial and parajudicial systems of continental Europe. The Irish legal system is rather different ... “. It is true that the Irish candidates had been invited to revise the layout of their *curriculum vitae*.

While that was not the case for other candidates, it nevertheless has to be said that the decisions of the Parliamentary Assembly were far from having been followed to the letter. Some *curricula vitae* were incomplete while others were excessive and even superfluous.

The omissions in several *curricula vitae* are either “admissions of lacking ability”⁶⁰, or accidental omissions or oversights⁶¹. On the other hand, omissions relating to public activities of a political nature cannot be systematically assimilated to oversights. Firstly, it is to be noted that the section entitled “political activities” under Resolution 1082 (1996) was re-labelled “public activities”. This shift of meaning is clearly not a totally innocent one. Nevertheless the change of terminology did not cut much ice with a great many candidates (if not most of them): they contented themselves with an indifferent approach to this section, other than considering that a failure to reply was to be understood as a no. The candidates who expressly pointed out that they held neither a position of responsibility within a political

57 In the case of Bulgaria, the candidatures competing with Botoucharova-Dochera, Ambassador to the United States and former speaker of the National Assembly, seemed second-rate. The case of Liechtenstein (1st list) was even more blatant, since L. Ferrari Brao - “official” candidate was put up against two very young candidates, therefore with no real professional experience, and moreover holders of nothing more than a masters degree.

58 In the case of Liechtenstein, L. Cafilisch - “unofficially the official” candidate - jurisconsult of the Swiss government, was competing with two relatively young candidates who did have some professional experience, but whose level of responsibilities could be more readily assimilated to that of a head of a Ministry Office in a country such as France. As regards Luxembourg, the Minister of Justice in person was up against one of his subordinates ... and the first vice-president of the administrative court! As far as Latvia was concerned, E. Levits - outgoing judge was competing with a post-graduate degree holder teaching business law and human rights (!) in a state grammar school and a young lecturer responsible for drafting the Latvian version of the European Convention on Human Rights.

59 These had no qualification or experience in the field of human rights.

60 This applies to the absence of any reference to publications or any detailed bibliographical references. In this connection the CVs of I. Paduvaru, E. Carpov, T. Pantiru (Moldova), the three Andorran candidates, M. Hion (Estonia), M. Ospelt and H. Schädler (Liechtenstein), E. Fazzini (San Marino, 2nd list), M. Fischbach and M. Mathekowisch (Luxembourg), J. Briede (Latvia), V. Milius (Lithuania), J. N. Popova and S. V. Cherner (Bulgaria, 1st list), M. Burgogni and M. Ghiotti (San Marino, 1st list), I. Hötzl (Hungary), D. Vaughan Buckley (Ireland).

61 See for example the candidates Lorenzen (Denmark) and Cafilisch (Liechtenstein) who give no indication of their language skills.

movement nor political office (parliamentary or other) were in the minority⁶². The candidates who expressly declared such activities were just as few⁶³.

It is true that the political transparency wished by the Parliamentary Assembly is narrowly restricted in its scope. In other words, the candidates who did pursue political activities could consider, in all good faith and quite legitimately, that these did not have to be declared⁶⁴, or that they had already been declared under another section of their CV, at the very least implicitly⁶⁵.

Anecdotally, certain candidates, from Europe's new democracies, were keen to mention their anti-communist feelings before 1990⁶⁶. Indeed it is not to be excluded that such declarations are partly suspect⁶⁷ and more generally that certain candidates, if only out of necessity, were politically committed to the former regime⁶⁸.

In addition to paralipsis, "excessive zeal" was also in evidence but with less problematic consequences. Under the publications section, the maximum list of 12 most important references recommended by the Parliamentary Assembly was interpreted in a highly diverse manner⁶⁹. A number of candidates either failed to understand the scope of this restriction or blissfully ignored it and listed their publications in the form of a catalogue, rather like a historical museum⁷⁰.

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- 62 K Grosshof (Germany), M Fiorilli (Italy), G Malinverni (Switzerland), S Trechsel (Switzerland), N Bratza, R Carnwath, R Reed (United Kingdom), F Tulkens (Belgium), I Goranic (Croatia, 1st list), K Stayanova (Bulgaria, 2nd list), V Straznicka (Slovakia), K Traja (Albania) who felt prompted to declare that he had never belonged to any political party.
- 63 Ch Clerides (Cyprus) stated that he was vice-chairman of a political party set up in 1996 ("New horizons").
W Fuhrmann (Austria) declared his parliamentary terms of office and his party responsibilities.
M Fischbach (Luxembourg) present Minister of Justice stated that he had also been a member of the national parliament and the European Parliament.
G Marjanovik ("the Former Yugoslav Republic of Macedonia") said that he was founder and chairman of the first opposition party in the Republic of Macedonia.
L Ferrari Bravo (San Marino) set out a list of political and economic activities.
D Ianculescu (Romania) mentioned his ministerial positions.
V Butkevych (Ukraine) said that he was a member of the national parliament and had responsibilities within it.
T A Tchepev (Bulgaria, 2nd list) was a former Minister of Justice.
E Levits (Latvia) said that he had been a minister and currently held parliamentary office (but the latter point is somewhat ambiguous).
- 64 A few examples are Ch Rozakis (Greece) former under-secretary of State, G Papadimitriani (Greece) legal adviser to the Prime Minister, and P Kuris (Lithuania), former Minister of Justice.
- 65 D Botoucharova-Do?tcheva (Bulgaria) - legal adviser to the Union of Democratic Forces and several times deputy in the National Assembly - did not reply under the section entitled "other public activities".
It is true that Mrs Botoucharova-Do?tcheva had, in the past, fulfilled the function of secretary in local communist party branches ... Similarly C Casini did not mention his (numerous) political offices and responsibilities under the section provided for that purpose.
- 66 In this connection: G Marjanovik ("the Former Yugoslav Republic of Macedonia") who detailed the political views he had expressed on freedom of conscience and opinion in the 1980s;
K Jungwiert (Czech Republic) who mentioned his expulsion from the Bar between 1970 and 1973 after publicly protesting against the occupation of Czechoslovakia by Warsaw Pact troops in 1968;
D Ianculescu (Romania) who mentioned the communist persecution of his family (uncles and cousins) in the 1950s and 1960s.
- 67 D Ianculescu was a judge between 1957 and 1989 and even a counsellor at the Ministry of Justice from 1965 to 1989.
- 68 This may have been the case in particular for those candidates having previously occupied (in the 1950s, 60s and 70s) functions within the judiciary, particularly under the public prosecutor at the Ministry of Justice. In this respect see the professional backgrounds of M Voicu (Romania) and T Pantiru and I Panduvaru (Moldova), K Traja (Albania), Z Horvatic (Croatia, 1st list).
- 69 For those candidates in a position to do so, only 14 remained within the limit of 12: LA Sicilianos (Greece), A Baka (Hungary), B Conforti (Italy), V Straznicka (Slovakia), G Malinverni, S Trechsel and L Wildhaber (Switzerland), E Alkema (Netherlands), E Möses (Norway), K Drzewicki (Poland), M A Lopes Rocha (Portugal), C Birsan (Romania), M Nowak (Austria), F Tulkens (Belgium) and N Vajic (Croatia, 2nd list).
- 70 The undisputed champion of them all was L Caffisch (Liechtenstein) with 105 publications. Trailing some way behind were L Ferrari Bravo (Liechtenstein) with 55 publications, J Rodriguez-Zapata Perez (Spain) with 53 references and Pastor Ridruejo (Spain) with 48 publications, all outside the sphere of human rights.

The same comment applies, all things being equal, to the lectures or colloquy addresses listed by the candidates⁷¹. Ultimately such inventories become laughable when they are nothing more than a list of passive attendances at academic or other such events⁷².

II. The appointment of the judges

With the enlargement of the Council of Europe, extra caution is required when appointing the members of bodies fulfilling a supervisory function in the area of human rights protection, in order to prevent the election of candidates whose past activities could undermine the credibility of the institution where they will sit. That is why, a short time ago, the Committee of Ministers established informal procedures for examining candidatures, not in order to submit candidates to close analysis but simply to prevent unfortunate choices. The lists of candidate judges were subjected to such checks but it appears that the Committee of Ministers, in this case the *ad hoc* group of the Deputies, expressed no reservations as to the candidatures submitted to it. This was not quite the case when the candidatures were examined by the Sub-committee on the Election of Judges, responsible for preparing the vote to be held at the public Assembly sitting.

I. The hearing of the candidates by the Sub-committee on the Election of Judges

This sub-committee, formed on an ad hoc basis from the Committee on Legal Affairs and Human Rights, was set up in accordance with the rule on proportional representation of the political groups. Consisting of 13 members (and as many substitutes) it included 5 representatives from the Socialist Group (including the chairman), 4 from the European People's Party, 2 from the Liberal, Democratic and Reformers' Group and another 2 from the European Democratic Group.

From the point of view of nationalities represented⁷³, the lion's share of seats on the Sub-committee went to the small countries and the new democracies⁷⁴. And perhaps their share was a little too large⁷⁵.

Moreover and above all, the vast majority of the members were far from eminent figures. In other words, it is not certain that the principle of equality of arms between interviewers and interviewees was particularly well guaranteed in every case.

The Sub-committee met on several occasions (mid-December, early January, late March) to interview candidates: each interview lasted 15 minutes and focused on questions concerning the candidate's curriculum vitae or the functioning of the European convention system⁷⁶. No specific checks were made on language ability, other than the fact that the participants conversed in one of the two official languages of the Council of Europe and the future Court, with the assistance of simultaneous interpreting.

On the basis of the interviews, the Sub-Committee on the Election of Judges made proposals for consideration by the Parliamentary Assembly. But since these are officially classified as confidential, gauging the real importance and value of the examination of candidatures is a tricky business.

71 MA Lopes Rocha listed in minute detail 50 or so lectures that he had given ... in highly diverse frameworks and contexts.

72 In this connection see the list drawn up by I Garanic (Croatia, 1st list) or by J Rodriguez-Zapata Perez (Spain).

73 The States represented were: the United Kingdom, Poland, Slovakia, Andorra, Italy, Liechtenstein, Albania, Ukraine, Spain, Finland, Croatia, Turkey and "the Former Yugoslav Republic of Macedonia".

74 At least 6 or 7 of the former, and certainly 6 of the latter.

75 Numerically speaking, the new States and micro-states did in fact form a decision-making majority.

76 For criticism of the brevity of interviews, see the point of view expressed by the informal working group set up by the Deputy Secretary General to consider the implementation of Protocol No. 11 in A DRZEMCZWESKI, "Protocol No. 11 to the ECHR: preparation for entry into force", JEDI, 1997, No. 1, p. 72.

Even so, one or two points can be commented upon as they have become more or less public knowledge. More often than not, the order in which States had placed candidates was endorsed, quite simply because the candidate at the top of the list was objectively the best one. In the few cases where the Sub-committee changed the order of presentation, it was not followed in all cases⁷⁷. Equally rare were the cases where the Sub-committee refrained from recommending a name, given the excellence of all the candidatures proposed⁷⁸. The relatively high age of several candidates compared with the limit of 70 years was not an off-putting factor, it seems⁷⁹.

There were 3 known cases of lists being rejected, or at least so it would appear. The first list presented by Bulgaria was rejected on the grounds that the principle of equivalence of candidatures was not complied with. The first list submitted by San Marino was rejected on the same grounds: 2 candidates were far too obviously included to make up the numbers, moreover with qualifications that were more than scant, in fact downright indecent given the position applied for.

The first list submitted by Croatia was rejected in the light of political considerations: the candidate placed at the top of the list had held relatively high public office in the golden age of the Tito regime, and for aeons at that, which indicated political convictions that were not desirable or fitting for the job.

2. Two phases of voting

The judges should have been elected by the Parliamentary Assembly in a single ballot at the end of January, during the first annual session for 1998. But eventually only 31 judges could be appointed, as the dossiers of the eight remaining countries were not ready. This hitch was without doubt regrettable, certainly as regards the operational status of the new Court which could not hold its first meeting until mid-May whereas it could have (and should have) done so at the beginning of February: to put it plainly, the drawing up of the new rules of the Court was put back by three months. Furthermore, two phases of voting provided opportunities, albeit on a limited basis, for giving candidates a second chance and/or manoeuvring.

Several factors explain staggering of the election of the judges. Some lists were declared “inadmissible” by the Sub-committee as the candidates were so unequal that assessing them was impossible⁸⁰. Other lists were not submitted in time, owing to delays in the national procedure for selecting candidates⁸¹. In one case, the delay was due to the withdrawal of the list initially presented, as two of the candidates selected stood down⁸². Finally there were two lists for which not all of the candidates appearing could be interviewed in December 1997 or January 1998, since candidates either could not be reached in time or could not travel to the hearing⁸³.

3. Voting by the members of the Parliamentary Assembly

The outcome of voting was very much “predetermined” by preliminary meetings bringing together the heads of national delegations but above all the leaders of the political groups: voting instructions were

77 For Malta, the candidate proposed by the Sub-committee was not elected. The situation was different for “the Former Yugoslav Republic of Macedonia”: the candidate placed in third position by the State became the recommended candidate and was subsequently elected.

78 This was the case for Switzerland and Austria.

79 See, *supra* I,4, the age of candidates in *infra* II,4, the age of the new judges.

80 This was the case for the lists submitted by San Marino, Bulgaria and Croatia.

81 In the case of Slovenia, the fact that the outgoing judge was not presented gave rise to complications at the stage of ratification by parliament of the candidatures. As for Liechtenstein, there was a deliberate policy of wait and see, with a view to recovering the outgoing Swiss judge if by chance he was not elected to the new Court in respect of the Confederation.

82 The Portuguese candidates MA Lopes Rocha and A Pais de Sousa decided to stand down when they realised that the government had indeed established an order of preference to their disadvantage.

83 In this connection see the cases of Ukraine and United Kingdom.

given to the parliamentarians, these being in most cases to vote for the candidates recommended by the interviewing sub-committee.

Since the majority required in the first round of voting is the absolute majority of votes cast, it would have been conceivable for a number of appointments to be made only in the second round of voting, where a relative majority was required. But this was not the case.

In January 1998, 30 of the 31 judges' posts were filled in the first round of voting. The appointment of the Belgian judge was an exception. The scores achieved by the three candidates in the first round were relatively close, and it was a particularly tight contest between the two leading candidates⁸⁴. But the second round was decisive, the female candidate being narrowly elected⁸⁵.

Similarly, in April 1998, the remaining eight judges were elected in the first round of voting, even though in two cases the candidate elected only just scraped an absolute majority⁸⁶. Once again, the Assembly confirmed its determination to have stronger female representation⁸⁷.

Analysis of the votes cast reveals a relatively high percentage of blank votes: an average of around 10%⁸⁸. Could it be that the parliamentarians could not make up their minds and/or made a protest vote? It is certainly both. Many candidates romped in well ahead of their rivals and with considerably more than the majority required⁸⁹. Inversely, some candidates were elected with a far narrower margin⁹⁰. Finally, several candidates did not even receive 5 votes, which boils down to 2% or less of the votes cast⁹¹: the low score of those candidates, some of whom could objectively be described as good candidates, indicates a lack of favour among national parliamentarians.

In a few rare cases, the State's official candidate, placed at the top of the list, was beaten⁹². The outgoing members of the supervisory bodies were not automatically elected⁹³.

84 J C Geus received 87 votes , F Tulkens 81 votes and W Van Gerven 61 votes.

85 Mrs Tulkens was elected with 58 votes against 52 for Mr Geus and 14 for Mr Van Gerven.

86 This was the case for N Bratza (United Kingdom) elected with 89 votes with the absolute majority standing at 87, and B Zupancic (Slovenia) who received 95 votes while requiring at least 90.

87 Mrs N Vajic was elected despite being placed third on the Croatian list.

88 Countries for which there were less than 20 blank votes in the first round: Austria (19), Italy (19), Belgium (16, first round), Malta (14) and France (13).

Countries for which there were over 30 blank votes in the January vote: Denmark (31), Sweden (32), Iceland (33), Turkey (33), Greece (34) and Moldova (39).

89 The "best elected" candidates: A Pastor Ridruejo (Spain), M Fischbach (Luxembourg), G Jonrundsson (Iceland), J Hedigan (Ireland) and J-P Costa (France). Respectively, they received 93, 92, 91, 90 and 89 votes in excess of the majority required.

For the April ballot (when fewer parliamentarians were present) we can add to this list the names of L Ferrari Bravo, L Caffisch and Cabral Barreto who exceeded the absolute majority by 78, 74 and 73 votes respectively.

90 This was the case in April for B Conforti (Italy) and A Baka (Hungary) who received only 25 votes more than the majority required. It was even closer for N Bratza and B Zupancic who received only 2 and 5 votes more than the absolute majority respectively.

91 M Schenin (Finland), G Regner (Sweden), M Sigurbjörnsson (Iceland), E Möse (Norway), H Schädler, R Carnwath - 4 votes, K Hoagen Jensen (Denmark) - 3 votes, G Guidi - 1 vote, C Flinterman (Netherlands) - 0 votes.

92 See the election in respect of Hungary of A Baka who beat Th Ban and that of M Caca-Nikolovska who was placed only third on the list. Similarly, see the election in respect of Slovenia of B Zupancic who beat A Perenic as well as that of N Vjic in respect of Croatia, placed only third on the list.

93 Belgium: F Tulkens beat J-C Geus (outgoing Commission member).

Estonia: R Maruste was elected in preference to U Lohmus (outgoing judge) and M Hion (outgoing Commission member).

Slovenia: A Perenic (first-placed outgoing Commission member) was beaten by B Zupancic (ranked number 2).

Netherlands: E Alkema (second-placed outgoing Commission member) was beaten by W Thomassen (ranked number 1).

Slovakia: V Straznicka (ranked number 1) beat D Svaby (second-placed outgoing Commission member).

The duels between outgoing judges and Commission members generally turned in favour of the judges⁹⁴, whether the order of priority had been established in favour of the judge⁹⁵ or the presentation of candidates was strictly in alphabetical order⁹⁶. The defeated candidates were beaten very markedly⁹⁷ or even crushingly in three cases⁹⁸.

4. The composition of the new Court

Continuity and/or renewal

Still at the end of 1997, speculation as to the composition of the future Court pointed to the risk or the godsend, depending on one's point of view, of a break in continuity: it was generally agreed that the present members of the Court and Commission would only make up between a quarter and a third of the new judges. However, that was not to be the case: half of the new judges would in fact be members of the present supervisory bodies⁹⁹ with an equivalent number of former judges¹⁰⁰ and former Commission members¹⁰¹. Proportionately speaking, the rate of "election" was higher for the present members of supervisory bodies sitting in respect of the "new democracies"¹⁰². It is true that the latter had age on their side: with one or two exceptions they were all in a position to apply for one or even two terms of office¹⁰³.

The presence within the new Court of a majority, at least arithmetically speaking, of "former" members of the supervisory bodies should have two major consequences. Firstly, the new Court should be largely operational as soon as Protocol No. 11 enters into force, since the various benches will benefit from the experience of the former judges and Commission members. In fact it is probable that the new judges who are currently serving Commission members will not be "mobilised" to work for the Commission during the transition period. Were this to be the case, the 11 Commission members concerned would be subjected to a stakhanovite work-rate.

Secondly, the new Court should ensure the continuity of case-law, by safeguarding established precedents. At the very least, the "old hands" of the Court and Commission could act as a driving force in

94 The only exception was C Birsan, outgoing Commission member in respect of Romania.

95 See in this respect the election:

- J Makarczyk, Poland (ranked no. 1) who beat M-A Nowicki (ranked no. 3)
- P Kuris, Lithuania (ranked no. 1) who beat E Bielunas (ranked no. 2)
- K Jungwiert, Czech Republic (ranked no. 1) who beat J Mucha (ranked no. 2).

96 See in this respect the election:

- E Palm (Sweden) over H Danelius
- L Wildhaber (Switzerland) over S Trechsel.

97 E Bielunas received a mere 29 votes against 181 for P Kuris, H Danelius 43 votes against 163 for E Palm.

98 S Trechsel, President of the Commission, received only 20 votes compared with 150 for L Wildhaber and 50 for G Malinverni.

- M Voicu (outgoing Romanian judge) received 6 votes against 160 for C Birsan.
 - M-A Nowicki scored no more than 9 votes compared with 152 for J Makarczyk.
- For all these beaten candidates, defeat was particularly bitter.

99 Of 30 judges elected, 21 are members of the Court or Commission.

100 J Casadevall Medrano (Andorra), A Baka (Hungary), E Levits (Latvia), P Kuris (Lithuania), T Pantiru (Moldova), J Makarczyk (Poland), K Jungwiert (Czech Republic), E Palm (Sweden), L Wildhaber (Switzerland), V Butkevych (Ukraine).

101 G Ress (Germany), L Loucaides (Cyprus), P Lorenzen (Denmark), M Pellonpaa (Finland), Ch Rozakis (Greece), G Jörundsson (Iceland), B Conforti (Italy), C Birsan (Romania), N Bratza (United Kingdom), I Cabral Barreto (Portugal).

102 Seven judges and one Commission member were elected in respect of central and east European countries currently holding 12 seats in the Court (Russia not included) and 9 seats on the Commission. By way of comparison, in the "other countries" the figures were 3 judges and 9 Commission members respectively whereas those countries currently hold 23 seats in the Court and 24 seats on the Commission. This is tantamount to saying, for example, that the present judges from central and east European countries elected to the new Court could form an entire chamber while their colleagues from other countries would constitute no more than a committee.

103 The only candidates concerned by the age limit were B Repik (Slovakian judge) and I Bekes (Hungarian Commission member), as compared with 17 judges and 8 Commission members from the other countries.

this area, all the more so since, in the past, it seems that they were rather inclined, on the whole, to uphold fairly “progressive” viewpoints.¹⁰⁴.

Profile of the new judges

The new Court will have eight women judges. Compared with the make-up of the present Court (only one woman), this is a notable change. It is not certain however that it fully satisfies the wishes of the hard-core supporters of parity, among whom the Parliamentary Assembly of the Council of Europe must be included.

No third country national has been elected to the new Court. However, there are two Italian nationals and two Swiss citizens¹⁰⁵.

The average age of the judges of the present Court, very high before the arrival of new judges from 1992 onwards, has been heavily criticised: indeed, it was very much the reason why the age limit was fixed at 70 years.

In contrast, the new Court has a fairly even spread of different age groups. While it has no 30 year-olds, it does have judges in their forties, fifties and sixties forming relatively equivalent categories¹⁰⁶. In other words, the concern of the authors of Protocol No. 11 has been assuaged: objectively, the members of the Court are largely in what is generally termed “the prime of life”, and therefore presumed capable of handling a large work-load.

The life expectancy of the new Court judges is very uneven. While a very great majority of judges may envisage holding several terms of office¹⁰⁷, practically one third of them could not realistically aspire to more than one term¹⁰⁸ unless some of them (nearly half) have their first term of office reduced to three years by the drawing of lots.

The term of office of one of the judges, B Conforti, should in any case be curtailed, regardless of its allotted length, since he will reach the age limit in September 2000¹⁰⁹.

104 For the viewpoints upheld by the present judges from central and east European countries elected to the new Court, see J-F Flauss, “Les juges des pays d’Europe centrale et orientale à la Cour européenne des droits de l’homme: vues de l’extérieur” (to be published). More generally, also see F J Bruisma and M De Blois, “Rules of law from Westport to Wladivostok: Separate Opinions in the European Court of Human Rights”, *Netherlands Quarterly of Human Rights*, vol. 15, No. 2, June 1997, pp. 173-186. However, the role that might be played by judges who were previously Commission members must be seen in relative terms: initially, those judges will have to withdraw from cases that they have already had to deal with when working for the Commission. Of course, it remains to be seen at which stage of the procedure (communication to the respondent Government, decision of admissibility, opinion) they will be obliged to withdraw.

105 Since L Ferrari Bravo (San Marino) is Italian and L Caflisch (Liechtenstein) is Swiss. Both have been or still are, depending on the case, jurisconsults of their national government...

106 Judges between 40 and 49 years: 10
Traja (43 years) — Botoucharova-Doitchewa (43 years) — Levits (43 years) — Maruste (45 years) — Baka (46 years) — Greve (46 years) — Pantiru (47 years) — Caca-Nikolovska (48 years) — Pellonpaa (48 years) — Thomassen (49 years)
Judges between 50 and 59 years: 17
Hedigan (50 years) — Vajic (50 years) — Zupancic (51 years) — Butkevych (52 years) — Fischbach (52 years) — Casadevall Medrano (52 years) — Bratza (53 years) — Fuhrmann (54 years) — Jungwiert (54 years) — Lorenzen (54 years) — Straznicka (56 years) — Birsan (55 years) — Tulkens (56 years) — Costa (57 years) — Cabral Barreto (57 years) — Rozakis (57 years) — Türmen (57 years)
Judges between 60 and 69 years: 12
Makarczyk (60 years) — Kuris (60 years) — Wildhaber (61 years) — Loucaides (61 years) — Bonnell (62 years) — Palm (62 years) — Caflisch (62 years) — Ress (63 years) — Jörundsson (64 years) — Ferrari Bravo (65 years) — Pastor-Ridruéjo (66 years) — Conforti (68 years).

107 26 of them.

108 Clearly the case for five judges. For the seven others, ie those not having reached but approaching the age of 63, the possibility of a second candidature is more than uncertain.

109 It is always conceivable, of course, that the Italian Government will not immediately present a new candidate. But it has to be said that this would be a stalling tactic in the light of Article 23 paragraph 6 of the Convention. At the most one might imagine that a judge reaching the age limit would remain in post for several months, as provided for in Article 23 paragraph 7 of the Convention.

As for the two judges aged 66 and 65 respectively, only a six-year term of office would bring them to the cut-off point imposed by the age limit of 70.

The drawing of lots for terms of office will be of considerable importance. If it is a genuine drawing of lots in line with statutory texts, ie placing all judges' terms of office on a strictly equal footing, it is conceivable that for several judges, their election to the Court will amount to a term of office of three years¹¹⁰.

If one supposes that a judge having to seek (or hope for) the renewal of his term of office is bound to be less independent than a colleague whose functions will be necessarily terminated once his term of office expires, it is to be feared that the independence of the new Court is less well guaranteed than that of the present Court¹¹¹.

Consideration of the origin and professional situations of the new judges prompts, to say the least, two sets of conclusions. While the Court brings together numerous highly qualified individuals, in some cases holding high office at national level, it nevertheless has to be said that leading figures, which efforts to promote Protocol No. 11 sought to attract to Strasbourg, are completely absent. This might ultimately be an advantage: a solid and homogeneous team often performs better than one featuring too many stars. Even so, the presence of this or that leading European figure would certainly have helped to give the Court greater authority, particularly symbolically speaking. It would also have had the advantage of settling in advance the matter of the presidency, and secondarily the vice-presidencies of the new Court. Although at present candidates who objectively have the potential to be elected president of a chamber are fairly easily identifiable at first glance¹¹², the drawing up of a list of judges capable of making a serious bid for the presidency and the two vice-presidencies of the Court is more debatable¹¹³.

A breakdown of the new judges by professional categories reveals (although they might belong to several categories) that the judiciary is the most strongly represented¹¹⁴, followed fairly closely by law professors¹¹⁵. Senior officials and diplomats are less well represented¹¹⁶. But above all, and it is without

110 In theory this could apply to five judges.

111 All the more so since the failure to have a six-year term of office renewed is equivalent to a gross loss of earnings of some seven million French francs.

112 Among the judges currently serving in the Court or on the Commission, one might immediately think of Ch Rozakis, N Bratza, M Pellonpaa, G Ress, I Cabral Barreto, A Baka (plus, obviously, the candidates who might be considered for the overall presidency and vice-presidencies). Among the newly arrived judges, one might think of J-P Costa, L Cafilisch and perhaps L Ferrari Bravo.

113 It would not be surprising however if the presidency was coveted above all by L Wildhaber and J Makarczyk, or perhaps E Palm. In addition to his academic expertise and experience as international judge and arbiter, Mr Wildhaber has several assets: he speaks several languages fluently, he comes from a geographical area and civilisation never having had a president in the Court and he was elected in respect of the country which initiated Protocol No. 11.

Mr Makarczyk can lay claim to personal and professional qualities comparable to those of the Swiss judge, plus high-level diplomatic experience. But would his Polish nationality perhaps constitute a handicap? As for Mrs Palm, she has great experience in the courts; she is also a woman, but she is a national of a Scandinavian country. R Ryssdal, who presided over the present Court for a marathon period ending in February 1998, was Norwegian.

As the presidency would prompt such a tough contest, the candidature of the senior member, B Conforti, should be envisaged in a spirit of "appeasement" and "transition". His election would have the advantage of placing a temporary president well-versed in the pre-existing system at the head of the Court. This solution might inter alia meet with the approval of many new judges, not currently members of the Court or the Commission. They could make use of the two years of the Italian presidency to make themselves better known and prepare, if they wish, their own candidature for the vote at the end of the year 2000.

114 Fourteen members of the judiciary (judges or prosecutors) if the function of ombudsman is included: M Caca-Nikolovska, J-P Costa, H A Greve, I Cabrol-Barreto, G Jörundsson, P Kuris, E Palm, L Loucaides, K Jungwiert, P Lorenzen, R Maruste, B Zupancic. Although virtually all of these sit in a superior court, rare are those who preside one (see however P Kuris and R Maruste, presidents of the supreme courts of Lithuania and Estonia respectively). It is also to be noted that there are just a few members of constitutional courts: (B Zupancic sits in the Slovenian Constitutional Court and R Maruste presides at the European Court of Estonia which acts as a constitutional court).

115 One may count 11, 12 or 13 law professors, depending on how they are categorised: (L Wildhaber, G Ress, Ch Rozakis, A Baka, B Conforti, J Makarczyk, C Birsan, F Tulkens, M Pellonpaa, L Cafilisch and N Vajic where applicable, L Ferrari Bravo, B Zupancic and V Straznicka).

116 Six at the most: K Traja, R Türmen, V Straznicka, A Pastor Ridrueja, S D Botoucharova-Doitcheva.

doubt regrettable, the new Court includes only very few lawyers¹¹⁷, in fact fewer than the judges drawn from political circles¹¹⁸.

Deciding on which languages are to be used within the procedure is one of the major challenges of drawing up the new rules for the Court. The challenge could be all the trickier in that analysis of the language skills of the new judges reveals blind spots concerning the practice of the official languages. A sizeable proportion of the judges, some 15, have only sketchy knowledge of English¹¹⁹ or of French¹²⁰.

In these circumstances it is highly likely that the rule of the lowest common denominator will apply: in other words that English will become the most frequently used working language. It is even conceivable that, depending on the composition of the chambers, it becomes practically the only working language. Once more, failure to respect the statutory requirements will be to the detriment of French and once again there will be a linguistic dumbing down. However, the risk of monolingualism to the advantage of English is tempered by certain factors. Other languages might be unofficially spoken between judges. This is the case chiefly for Russian, definitely known by 12 judges¹²¹, Italian which is undoubtedly known by eight judges¹²² and also German spoken by at least seven judges¹²³.

Although the formation of chambers on the basis of linguistic criteria must be discounted from the outset, it could well be the case that shared language skills lead the members of the chamber but above all of a committee to discuss cases amongst themselves in an unofficial language.

Looking ahead to the forthcoming renewals of half the Court's judges, ie in 2001 and 2004, the Parliamentary Assembly intends to draw lessons from the 1998 vote by means of appraisal reports. These should assess the role played by the committee responsible for considering and interviewing judges, gauge the financial cost of the new procedure for selecting judges¹²⁴, recommend remedies for shortcomings in the procedure and make recommendations with a view to making the national candidate selection processes more transparent.

While the election of the new Court was the first step in implementing Protocol No. 11, the second, which will fully and actively involve the new judges, officially began on 28 April 1998 with the drawing of lots to establish which judges' terms of office would expire after three years¹²⁵ and the holding of an initial administrative session to establish the schedule of work for drawing up the new rules of the Court. Some broad outlines have doubtlessly been drawn up already both within the informal working party set

117 Three, namely: J Casadevall Medrano, G Bonello, J Hedigan.

118 V Butkevych, W Fuhrmann, M Fischbach, and perhaps E Levits (the layout of his CV may lend to confusion).

119 P Kuris (English, reading), J Casadevall Medrano (English spoken), C Birsan (English, reading only), I Cabrol Barreto (English, read - not fluently).

120 G Bonello (French, read only), T Pantiru (French, presently studying), H A Greve (French, limited ability), V Straznicka (French, studying), M Caca-Nikolovska (some knowledge of French), R Türmen (French, fair), N Bratza (French, reading only), A Baka (French, basic reading skill), J Hedigan (French to school standard), E Levits (French, limited communication), W Fuhrmann (French, not absolutely fluent yet), R Maruste (French, very limited), P Lorenzen (no indications on CV).

121 These being T Pantiru, J Makarczyk, C Birsan, A Baka, E Levits, P Kuris, K Traja, K Jungwiert, R Maruste, S D Botoucharova-Doitcheva, V Butkevych, V Straznicka.
Ultimately, only three judges from central and east European countries do not speak Russian: B Zupancic (Slovenia), M Caca-Nikolovska ("the Former Yugoslav Republic of Macedonia") and N Vajic (Croatia). The arrival of a Russian judge will obviously broaden the field of Russian speakers within the Court.

122 G Bonello, L Ferrari-Bravo, J-P Costa, B Conforti, L Wildhaber, Ch Rozakis, K Traja.

123 G Ress, L Wildhaber, M Fischbach, W Fuhrmann, V Straznicka, M Pellonpaa, L Ferrari-Bravo, N Vajic.

124 The cost of covering candidates' travel expenses amounted to around one million French francs.

125 The judges allocated a three-year term of office by the drawing of lots are as follows: B Conforti (Italy), L Pastor Ridruejo (Spain), L Ferrari Bravo (San Marino), L Wildhaber (Switzerland), L Loucaides (Cyprus), R Türmen (Turkey), C Birsan (Romania), P Lorenzen (Denmark), W Fuhrmann (Austria), M Fischbach (Luxembourg), V Butkevych (Ukraine), J Casadevall (Andorra), B Zupancic (Slovenia), M Caca-Nikolovska ("the Former Yugoslav Republic of Macedonia"), T Pantiru (Moldova), A Baka (Hungary), E Levits (Latvia), K Traja (Albania), S D Botoucharova-Doitcheva (Bulgaria).

up in 1995 by the Secretary General of the Council of Europe¹²⁶ and within the Steering Committee for Human Rights.

Where applicable, the judges will also be able to take advantage of the comments and suggestions made by non-governmental organisations, such as the Advisory Council of Bars of the European Community, or university institutions¹²⁷.

Since, practically speaking, the new Court will have only four months of really useful preparation, it is rather unlikely that revolutionary innovations will feature in the new rules. These rules will without doubt take the form of an adapted consolidated version of the present rules of the Commission and the Court. Among all the difficulties to be resolved (conducting of the procedure by a judge rapporteur, formation of chambers and committees, role of the Court in friendly settlements, transparency of the procedure, languages used), the new judges will have to devote special attention to the management of their “agenda”. In fact, they will have to try to pull off the impossible.

If the new Court is supposed to substantially cut down the time taken to judge cases, solutions will have to be found for all the tasks weighing down the procedure: on-the-spot investigations (required in greater number with the accession of Croatia and Russia), public hearings (but is it conceivable, in symbolic terms, to restrict the right of applicants to the hearing?), the public reading of Court judgments (the flexibility of solutions enshrined in Article 6, paragraph 1, of the Convention does make it possible, however, to envisage *mutatis mutandis* less constraining forms of publicity).

This boils down to saying that unless “politically incorrect” measures are resorted to, the new judges will have to put in a lot of work. However, it is not certain that all of them are fully aware of the constraints to which they will shortly be subjected.

126 A Drzemczewski, “Protocol No. 11 to the ECHR: preparation for entry into force”, JEDI, 1997, pp 68 et seqq.

127 In this connection see for example the proceedings of the round table organised on 24 April 1998 by the Institut des hautes études européennes de Strasbourg, Nemesis-Bruylant, 1998 (to be published).

