
1138 Meeting, 28-29 March 2012

4 Human Rights

4.4 Guidelines of the Committee of Ministers on the selection of candidates for the post of judge at the European Court of Human Rights – Explanatory Memorandum

A. GENERAL INTRODUCTION

1. The human rights protection system based upon the European Convention on Human Rights (“the Convention”) is in large part distinguished and made effective by the judicial nature of its control mechanism, the European Court of Human Rights (“the Court”). The authority and credibility of that Court, and thus of the Convention system as a whole, depends upon the quality of its judges. Each judge of the Court is elected by the Parliamentary Assembly from a list of three candidates nominated by a High Contracting Party. It is therefore vital that these candidates are of the highest possible quality.
2. The Interlaken High Level Conference on the future of the Court (held by the Swiss chairmanship of the Committee of Ministers on 18-19 February 2010) reaffirmed “the need for maintaining the independence of the judges and preserving the impartiality and quality of the Court” and called upon States Parties and the Council of Europe to “ensure, if necessary by improving the transparency and quality of the selection procedure at both national and European levels, full satisfaction of the Convention’s criteria for office as a judge of the Court, including knowledge of public international law and of the national legal systems as well as proficiency in at least one official language. In addition, the Court’s composition should comprise the necessary practical legal experience”.¹
3. Likewise, the Izmir High Level Conference on the future of the Court (held by the Turkish chairmanship of the Committee of Ministers on 26-27 April 2011) invited the Committee of Ministers “to continue its reflection on the criteria for office as judge of the Court and on the selection procedures at national and international level, in order to encourage applications by good potential candidates and to ensure a sustainable recruitment of competent judges with relevant experience and the impartiality and quality of the Court”.²
4. The present Guidelines have been adopted further to these Conferences and the decisions taken by the Committee of Ministers subsequent to them, as part of the Interlaken Process of reform of the Convention system.

¹ See the Preamble to the Interlaken Declaration, paragraph 8.a.

² See the Izmir Declaration, paragraph 7.

B. SOURCES OF STANDARDS AND NORMS

5. The Convention deals with the issue of the Court's judges in Articles 20-23, which read as follows:

*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**

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.

*Article 23***Terms of office and dismissal**

1. *The judges shall be elected for a period of nine years. They may not be re-elected.*
2. *The terms of office of judges shall expire when they reach the age of 70.*
3. *The judges shall hold office until replaced. They shall, however, continue to deal with such cases as they already have under consideration.*
4. *No judge may be dismissed from office unless the other judges decide by a majority of two-thirds that that judge has ceased to fulfil the required conditions.*

6. As can be seen, the criteria of Article 21(1) are expressed in general terms. As this Explanatory Memorandum will make clear, these may be interpreted and applied in different ways in the context of different national legal systems, provided that their underlying purpose is fulfilled.

7. It is apparent from Article 22 of the Convention that the quality of the Court's judges depends in the first place on the quality of the candidates that are nominated by the High Contracting Parties. Article 22 of the Convention gives to the Parliamentary Assembly exclusive competence for electing a judge to the Court from the national lists. If a list is not composed of suitable candidates, all that the Assembly can do is reject it.

8. In order to clarify its expectations and thereby assist States in fulfilling their own responsibilities, the Parliamentary Assembly has over the years used its direct practical experience to develop a body of recommendations to States Parties concerning national procedures for the selection of candidates for judge at the Court. Many of these recommendations have been incorporated into the Committee of Ministers' Guidelines. The present Explanatory Memorandum indicates where this is the case.

9. The Court has in the past been asked to give an opinion on certain of the Assembly's practices.³ This opinion – which concerned the Assembly's requirement that the lists of candidates presented by States respect the principle of gender equality, despite this not being one of the criteria set out in the Convention – contains important clarification of the legal significance of the Assembly's approach.

10. The Court found that “the Assembly may take account of additional criteria [to those found in Article 21 of the Convention] for the purposes of choosing between candidates put forward by a Contracting Party and may, as it has done in a bid to ensure transparency and foreseeability, incorporate those criteria in its resolutions and recommendations. Indeed, neither Article 22 nor the Convention system sets any explicit limits on the criteria which can be employed by the Parliamentary Assembly in choosing between the candidates put forward. Hence, it is the Assembly's custom to consider candidates also “with an eye to a harmonious composition of the Court, taking into account, for example, their professional backgrounds and a gender balance”... [The] Court notes that the inclusion of a member of the under-represented sex is not the only criterion applied by the Assembly which is not laid down by Article 21(1). The same is true of the criterion that candidates should have “sufficient knowledge at least one of the official languages” ... and of the criteria listed in the report of the Committee on Legal Affairs and Human Rights concerning Resolution 1366... In the Court's view, however, the latter criteria can be legitimately considered to flow implicitly from Article 21(1) and, in a sense, explain it in greater detail... [Although] the aim of ensuring a certain mix in the composition of lists of candidates is legitimate and generally accepted, it may not be pursued without provision being made for some exceptions designed to enable each Contracting Party to choose national candidates who satisfy all the requirements of Article 21(1).”

11. In effect, the Court held that Article 22 of the Convention does not limit the Assembly to assessing candidates only against the criteria set out in Article 21(1) of the Convention; it may elaborate on Article 21(1) by introducing additional criteria that “flow” from them and “explain them in greater detail”; and it may apply other legitimate principles (such as gender balance), provided that in doing so, it does not impede satisfaction of the Article 21(1) criteria.

12. Given the Assembly's decisive role in the election of judges, High Contracting Parties must therefore present lists of candidates that conform to all of the criteria applied by the Assembly, to avoid the risk that they are rejected.

13. Finally, it should be recalled that, on 10 November 2010, the Committee of Ministers adopted Resolution Res(2010)26 on the establishment of an Advisory Panel of Experts on Candidates for Election as Judge to the European Court of Human Rights. In this resolution, the Committee of Ministers, having recalled the Interlaken Declaration, stated its conviction that “the establishment of a Panel of Experts mandated to advise on the suitability of candidates that the member States intend to put forward for office as judges of the Court would constitute an adequate mechanism in this regard”. This new mechanism was explicitly framed in the context of “the responsibility of the High Contracting Parties to the Convention to ensure a fair and transparent national selection procedure”.

Definitions

14. For the purposes of the Guidelines and the present Explanatory Memorandum, “applicant” is taken to mean a person applying at national level to be a candidate for election as judge of the Court and “candidate” is taken to mean an applicant successful at national level whose candidature is transmitted by a State Party to the Parliamentary Assembly, in accordance with Article 22 of the Convention.

³ See *Advisory opinion on certain questions concerning the lists of candidates submitted with a view to the election of judges to the European Court of Human Rights*, 12 February 2008.

C. EXPLANATION AND EXAMPLES OF GOOD PRACTICE

I. Scope of the Guidelines

15. The Guidelines apply to national procedures for the selection of candidates for judge at the European Court of Human Rights. They are intended to cover all stages of this procedure, including the establishment of the procedure, the identification of criteria applicable to the inclusion of candidates on a list, the composition and procedures of the selection body responsible for recommending candidates to the final decision-maker and the role of the final decision-maker. They apply prior to presentation of a proposed list of candidates to the Advisory Panel and thus also before submission of the list to the Parliamentary Assembly.

16. Fundamental principles of democracy and the rule of law underpin and inform the Guidelines, notably those of fairness, transparency and consistency. Where relevant, the Explanatory Memorandum clarifies the principles applicable to particular issues.

17. The Guidelines are addressed to member States and in particular to those authorities that are involved in the selection of candidates for judge at the Court. They contain both binding and non-binding standards, as reflected in the language used and made clear in the Explanatory Memorandum.

18. The Guidelines relate only to the selection by a High Contracting Party of a list of candidates for election to the Court; they do not relate to the selection of lists of potential ad hoc judges. The principles set out in the Guidelines may nevertheless also be applicable *mutatis mutandis* to the selection of potential ad hoc judges.

II. Criteria for the establishment of lists of candidates

19. Section II sets out the requirements that apply to individual candidates and to lists of candidates. These requirements are either taken directly from the Convention – some of them being conditions that must implicitly be met if relevant Convention provisions are to be satisfied – or from recommendations of the Parliamentary Assembly or exhortations found in the Interlaken Declaration that flow from and elaborate upon Convention provisions. The only exception is the requirement relating to gender balance, whose status has been clarified by the Court in its advisory opinion (see para. 9 above).

1. *Candidates shall be of high moral character.*

20. The requirement that judges be of high moral character is contained in Article 21 of the Convention, which is binding on States as a matter of international treaty law. This implies that candidates must also be of high moral character. A candidate's behaviour and personal status must be compatible with holding judicial office.

21. As an example of good practice, applicants are asked to declare whether anything they have said, written or done, should it be made public, would be capable of bringing the Court into disrepute (United Kingdom). Written declarations to the same end are also required of candidates in Poland.

2. *Candidates shall possess the qualifications required for appointment to high judicial office or be jurisconsults of recognised competence.*

22. The requirement relating to the qualifications and competence of judges of the Court is contained in Article 21 of the Convention, which is binding on States as a matter of international treaty law. This implies that candidates must also possess these attributes. They must be professionally qualified and competent to exercise the office of judge at the Court. This may be reflected in requirements for specific qualifications or a certain length of experience, possibly fixed.

23. Examples of good practice include the following:

- Applicants must have at least a Master's degree in law and practical experience in legal affairs. They must fulfil the criteria for judges in Estonia as set out in art. 47 of the Court's Act (Estonia).
- Applicants must show a high level of achievement and experience (Ireland).
- Candidates must meet the requirements for election to judge of either the Constitutional or the Supreme Court (Slovenia).
- Candidates must meet the requirements for appointment to higher national courts or be of equivalent professional standing (Poland, United Kingdom).

3. *Candidates must, as an absolute minimum, be proficient in one official language of the Council of Europe (English or French) and should also possess at least a passive knowledge of the other, so as to be able to play a full part in the work of the Court.*

24. The first element ("absolute minimum") is taken from the paragraph 8.a. of the Interlaken Declaration, adopted by high representatives of the States Parties. The second element is taken from paragraph 4.4 of Parliamentary Assembly Resolution 1646(2009) on the nomination of candidates and election of judges to the European Court of Human Rights.⁴ In its Resolution 1366(2004) on candidates for the European Court of Human Rights, as amended, the Assembly has decided not to consider lists of candidates where the candidates "do not appear to possess an active knowledge of one and a passive knowledge of the other official language of the Council of Europe", although the Assembly may accept from candidates statements of an intention to follow intensive classes in the weaker language, if elected.

25. The Court's working methods involve many documents in either English or French only and relatively few in both. This requires that judges be able to read and assimilate technical, complex and nuanced documents in both languages. They must be able to direct and supervise the drafting of such documents in one of the official languages. Their language abilities must be such as to inspire confidence on the part of other courts, lawyers, applicants to the Court and the general public. Between otherwise equivalent candidates, States should therefore prefer those with the relevant levels of ability in both languages. Information on this requirement could be made public well in advance of the launching of the selection procedure, so as to allow the possibility to develop any required additional language skills in the meantime.⁵

26. Examples of good practice include the following:

- Applicants must be proficient in one of the official languages of the Council of Europe and possess a passive knowledge of the other (Bosnia and Herzegovina).
- Active knowledge of one official language of the Council of Europe and passive knowledge of the other (Croatia).
- Active knowledge of one official language is a basic criterion; knowledge of the other is a criterion of preference (Czech Republic).
- Applicants must have advanced proficiency in one official language and at least passive knowledge of the other (Estonia).
- Operational working knowledge of French (Ireland, where English is one of the official languages).
- Applicants must have a good command of written and spoken English or French and, as a minimum, the ability to read and understand the other (Norway).
- Applicants must be fluent in at least one official language; fluency in both is an advantage (Serbia).

4. *Candidates need to have knowledge of the national legal system(s) and of public international law. Practical legal experience is also desirable.*

⁴ See also Parliamentary Assembly Resolution 1366(2004) (as modified by Resolutions 1426(2005), 1627(2008) and 1841(2011)), para. 3(iii)(a); and Parliamentary Assembly doc. 11767 of 2008, paras. 11-12, 21 & 24-25.

⁵ Potential applicants may find it useful were the required level of language proficiency to be expressed by reference to the European Language Passport.

27. The requirement relating to candidates' legal knowledge derives from paragraph 8.a. of the Interlaken Declaration. Although this criterion does not supersede Article 21 of the Convention, a high level of knowledge in these fields should be taken as an implicit requirement for candidates for judge at the Court and relative levels of knowledge could be taken into account when choosing between applicants of otherwise equal merits. As the judges sit on an international court playing a subsidiary role in supervising national implementation of the Convention, it is important for them to have knowledge of both public international law and the national legal system(s). Although the Court's composition benefits from a range of legal expertise, it is generally advantageous that applicants have expertise in human rights, notably the Convention and the Court's case-law.

28. Examples of good practice include the following:

- Applicants must have knowledge of public international law and of the national legal system (Albania).
- Applicants must possess a good knowledge of national law and a solid training and practical experience in the field of European human rights protection (Monaco).
- Applicants should in principle have judicial experience and a thorough knowledge of the Convention (the Netherlands).

5. *If elected, candidates should in general be able to hold office for at least half of the nine-year term before reaching 70 years of age.*

29. The requirement relating to judges' age is contained in Article 23 of the Convention. High Contracting Parties should avoid proposing candidates who, in view of their age, would not be able to hold office for at least half the nine-year term before reaching the age of 70.⁶ This contributes to a Court of stable, experienced composition, avoiding the disruption that may be caused by more frequent election of new judges.

30. Examples of good practice include the following:

- Between applicants of equal merit, preference would be given to the applicant who would be able to serve all or at least more of the term of office (the Netherlands).
- Applicants who would be unable to serve a full term may be asked whether they feel they would nevertheless be able to make a significant contribution to the Court's activities (United Kingdom).

6. *Candidates should undertake not to engage, if elected and for the duration of their term of office, in any activity incompatible with their independence or impartiality or with the demands of a full-time office.*

31. The requirement relating to incompatible activities is contained in Article 21(3) of the Convention. Although this criterion does not relate to the quality of a candidate, it is relevant to determining whether they may fulfil the requirements to be a judge of the Court. The possibility of a candidate, if elected, then failing to satisfy this requirement may be reduced by their giving an appropriate undertaking during the national selection procedure. It should be recalled that the Court is the final authority to determine whether or not judges meet the requirements of Article 21(3).

32. Examples of good practice include the following:

- Applicants are asked to complete and sign a form including a provision stating that there are no obstacles to their taking office as judge at the Court (Poland, Russian Federation).
- Applicants make a declaration accepting nomination as candidate, implying inter alia a willingness to cease any incompatible activities (Slovakia).
- Applicants may be asked at interview whether they currently engage in any potentially incompatible activities and, if so, whether they would be willing to cease doing so should they be elected (United Kingdom).

⁶ See the Explanatory Report to Protocol No. 14 to the Convention, para. 53.

7. *If a candidate is elected, this should not foreseeably result in a frequent and/or long-lasting need to appoint an ad hoc judge.*

33. This requirement is based upon Parliamentary Assembly Recommendation 1649(2004), which the Committee of Ministers, in its reply thereto, has invited member States' governments to make every effort to meet. Its purpose is to minimise the foreseeable recourse to ad hoc judges, whose appointment procedures are not subject to the same safeguards of independence and impartiality and whose presence would affect the stability of the Court's composition. This criterion may create a dilemma between attracting the largest possible number of applicants, on the one hand, and not appointing judges whom it will be often necessary to exempt, on the other.

8. *Lists of candidates should as a general rule contain at least one candidate of each sex, unless the sex of the candidates on the list is under-represented on the Court (under 40% of judges) or if exceptional circumstances exist to derogate from this rule.*

34. The first element ("general rule") is taken from the Committee of Ministers' reply to Parliamentary Assembly Recommendation 1649(2004). The second element ("unless") is taken from Parliamentary Assembly Resolution 1426(2005). The third element ("exceptional circumstances") is taken from Parliamentary Assembly Resolutions 1627(2008) and 1841(2011), adopted subsequent to the Court's Advisory Opinion.⁷

35. The Assembly's requirement sets the general rule that lists of candidates should contain persons of both sexes. There are two possible exceptions. The first exception arises if, when the list is presented, either of the sexes makes up less than 40% of judges on the Court, in which case the list of candidates may be composed only of persons of that sex. The second exception arises if there are exceptional circumstances which justify derogation from the general rule. The Assembly has defined "exceptional circumstances" as being "where a Contracting Party has taken all the necessary and appropriate steps to ensure that the list contains candidates of both sexes meeting the requirements of paragraph 1 of Article 21 of the European Convention on Human Rights."⁸

36. Examples of good practice include the following:

- The selection is carried out respecting the principle of equity of genders (Albania).
- The call for applicants specifically mentions women (Belgium).
- This rule is followed in Bosnia and Herzegovina and Poland.
- The selection commission must produce a long list including both sexes: if there are two possible candidates for third place on the list, the candidate of the otherwise unrepresented sex is preferred. If there is no candidate of the sex under-represented (<40%) on the Court, the list is accompanied by a note explaining the procedure and reasons for a single-sex list (Czech Republic).
- Every list should contain candidates of both sexes (Denmark).
- Lists of candidates should as a rule contain at least one candidate of each sex (Hungary).
- The attention of the independent selection panel is brought to the Parliamentary Assembly's requirements (Ireland).
- The call for applicants includes information on the Parliamentary Assembly's requirements for gender balance (Slovakia).
- This requirement is observed in "the former Yugoslav Republic of Macedonia".
- The call for applicants states that the list must contain at least one man and at least one woman; the selection panel is asked to bear the Parliamentary Assembly's requirement in mind (United Kingdom).

⁷ See *Advisory opinion on certain legal questions concerning the lists of candidates submitted with a view to the election of judges to the European Court of Human Rights*, 12 February 2008.

⁸ See Parliamentary Assembly Resolution 1366(2004), as modified by its Resolutions 1426(2005), 1627(2008) and 1841(2011).

III. Procedure for eliciting applications

1. *The procedure for eliciting applications should be stable and established in advance through codification or by settled administrative practice. This may be a standing procedure or a procedure established in the event of each selection process. Details of the procedure should be made public.*

37. The need for a stable and established procedure reflects the rule of law principles of transparency and consistency, and thus also legal certainty. Applicants and the general public should be able to rely upon a certain procedure being followed, although that procedure need not be the same for every successive selection process. The need for accessibility of details of the procedure reflects the principle of transparency. Applicants and the general public should be able to know in advance the procedure that will be followed.

38. Examples of good practice include the following:

- The procedure is codified by Government Resolution no. 1063 of 26 August 2009 (Czech Republic).
- The procedure is codified by Amendment No. 741/2010 to the Act on Judicial Appointments, No 205/2000 (Finland).
- The procedure is described in a policy document signed by the Ministers of Foreign Affairs and of Justice (the Netherlands).
- The procedure is governed by Order no. 1 of the Minister of Foreign Affairs of 13 January 2012 (Poland).
- The legal framework is represented by Art. 5 of the Government Decree no. 94/1999 on the participation of Romania in proceedings taking place before the European Court of Human Rights and the Committee of Ministers (Romania).
- The formal legal basis is set up by the acts of the Ministry of Justice, which outline the overall sequence of the selection procedure and define the bodies involved in it (Russian Federation).
- The procedure is governed by Article 141a of the Constitution, which gives competence to the Judicial Council to submit a list of candidates to the Government, coupled with the Law on the Judicial Council, which lays down the selection criteria and requirements to be met by candidates, names the authorities that are competent to nominate applicants and sets out the rules of procedure (Slovakia).
- The procedure for nominating candidates is extensively regulated by the Act on the Nomination of Candidates from the Republic of Slovenia to Judges at International Courts (Slovenia).
- The procedure is governed by decrees of the Government and President. The former regulates the composition of the selection body; the latter regulates the requirements for candidates (Ukraine).

39. As regards making public in advance the details of the procedure to be followed, examples of good practice include the following:

- details appear in the call for applications;⁹
- details appear on the government website;¹⁰
- details appear in the relevant legal text, which is publicly available.¹¹

2. *The call for applications should be widely publicly available, in such a manner that it could reasonably be expected to come to the attention of all or most potentially suitable candidates.*

40. The need for an effectively public call for applications reflects the principles of transparency and also fairness. The wider the variety of means of publication that are employed, as appropriate in national circumstances, the more fully these principles will be satisfied.

⁹ As in e.g. Croatia, Finland, Portugal, Russian Federation, Serbia.

¹⁰ As in e.g. Croatia, the Netherlands, Portugal, Russian Federation, Serbia, Ukraine.

¹¹ As in e.g. Republic of Moldova, Slovakia, Ukraine.

41. Examples of practices that may be employed, in combination, to achieve this result include the following:

- publication in the official journal/ other official publications;¹²
- publication on Government websites;¹³
- publication in national and, where appropriate, regional newspapers;¹⁴
- publication in the specialised legal press;¹⁵
- dissemination via judicial bodies (e.g. presidents of the highest courts, judicial council, association of judges);¹⁶
- dissemination via lawyers' professional associations;¹⁷
- dissemination via Ombudsmen/ national human rights institutions;¹⁸
- dissemination via universities;¹⁹
- dissemination via human rights NGOs.²⁰

3. *States should, if necessary, consider taking additional appropriate measures in order to ensure that a sufficient number of good applicants present themselves to allow the selection body to propose a satisfactory list of candidates.*

42. Whether or not experience shows that there is difficulty in attracting a sufficient number of applications of the necessary quality to allow the selection body to propose a satisfactory list of candidates, it may nevertheless be considered advisable to take appropriate measures to raise awareness of the call for applicants and, for example, Court judges' working conditions. It may also be considered appropriate to take measures reflecting gender-related considerations and to encourage interest on the part of ethnic or other minorities historically less likely to produce applicants. Such steps would also have the advantage of reinforcing measures taken under Guideline III.2 (see above).

43. The following measures, if necessary, may be considered appropriate:

- maximum transparency in the selection procedure;
- awareness-raising on the work and life of a judge in Strasbourg, including with a view to correcting misconceptions about the conditions of employment:
 - o public lectures;
 - o articles in relevant journals;
 - o interviews and articles in the wider media (e.g. legal sections of national newspapers);
 - o speeches and interventions by the sitting/ former judge;
- transmitting information about the imminent call for applicants to legal networks, including the women's barristers' network, and/ or universities:
 - o providing support to relevant events organised by such networks;
- particular measures aimed at increasing applications by persons from backgrounds that are historically less likely to produce applicants or, for example, to encourage applications from members of the sex under-represented on the Court;
- asking relevant independent persons/ organisations to encourage potentially suitable persons to apply;
- use of new media, including government websites;
- taking measures to ensure suitable professional opportunities for former judges upon leaving office.

¹² As in e.g. Belgium, Cyprus, Estonia, Finland, Lithuania, Republic of Moldova, Portugal, Russian Federation, Serbia, Slovenia, "the former Yugoslav Republic of Macedonia," Ukraine.

¹³ As in e.g. Czech Republic, Denmark, Estonia, Finland, Germany, Greece, Ireland, Norway, Portugal, Russian Federation, Serbia, Slovakia, Slovenia, Ukraine.

¹⁴ As in e.g. Estonia, Finland, Germany, Ireland, the Netherlands, Lithuania, Portugal, Bosnia and Herzegovina, Slovakia, Switzerland, "The former Yugoslav Republic of Macedonia".

¹⁵ As in e.g. Denmark, Germany, Ireland, the Netherlands, Norway, Russian Federation, Slovenia.

¹⁶ As in e.g. Belgium, Croatia, Cyprus, Czech Republic, Germany, Greece, Ireland, Norway, Poland, Portugal, Slovakia, Switzerland.

¹⁷ As in e.g. Croatia, Cyprus, Czech Republic, Denmark, Estonia, Germany, Ireland, Lithuania, Norway, Poland, Portugal, Slovakia, Sweden.

¹⁸ As in e.g. Cyprus, Germany, Ireland, Norway, Poland.

¹⁹ As in e.g. Belgium, Croatia, Czech Republic, Greece, Hungary, Ireland, Lithuania, Norway, Poland, Slovenia.

²⁰ As in e.g. Hungary, Poland.

4. *If the national procedure allows or requires applicants to be proposed by third parties, safeguards should be put into place to ensure that all applicants are considered fairly and impartially, and that suitable applicants are not deterred or prevented from putting themselves forward.*

44. In some countries, it is considered useful and appropriate to invite certain third parties, including public authorities, national human rights institutions and non-governmental organisations, either to invite suitable persons to apply or themselves to nominate such persons. Such a practice may be seen as helping to ensure that there are sufficient suitable applicants to allow a list of three candidates of the highest possible calibre to be presented to the Parliamentary Assembly. Should consideration be given to introducing such a practice, it should be accompanied by procedural safeguards ensuring that such applicants are not improperly advantaged, which would be inconsistent with the principles of fairness and impartiality and could deter other potentially suitable applicants from presenting themselves.

45. Examples of such practices include the following:

- Federal courts, the Office of the federal Public Prosecutor General, the Bar Association and the Institute for Human Rights are reminded that they are free to encourage persons to apply. All applicants are treated in the same way (Germany).
- The Supreme Court, the Office of the Attorney-General, the Norwegian Centre for Human Rights and the Norwegian Bar Association are encouraged to put forward the names of one woman and one man (Norway).
- The Supreme Judicial Council and the Supreme Council of the Administrative and Fiscal Courts are asked to nominate two potential candidates, one man and one woman, judges at the respective courts. Any such applicants are treated in the same way as any others (Portugal).
- Candidates must be proposed by members of the Judicial Council, the Ministry of Justice, the professional association of judges or other lawyers' professional associations (Slovakia).

5. *A reasonable period of time should be given for submission of applications.*

46. This requirement reflects the principle of fairness: potentially interested persons should not lose the opportunity of applying because of their circumstances at a particular moment in time (e.g. absence for personal or professional reasons, illness, etc.) and should have enough time to prepare and submit their applications properly.

47. In the Czech Republic, a minimum period of two months following the call for applications is allowed for applications.

IV. Procedure for drawing up the recommended list of candidates

1. *The body responsible for recommending candidates should be of balanced composition. Its members should collectively have sufficient technical knowledge and command respect and confidence. They should come from a variety of backgrounds, be of similar professional standing and be free from undue influence, although they may seek relevant information from outside sources.*

48. The composition of the selection body is an essential consideration. It is generally established under the authority of the government and contains members drawn from the administration, and thus cannot be considered independent in the strict sense of the word. It should nevertheless be free from undue influence since the composition of the final list of candidates must not be, and must not appear to be a result of political patronage or preference: all those eventually included on the list of candidates should be able to meet the requirements of independence and impartiality and to sit in an individual capacity, as set out in Article 21 of the Convention.

49. The selection body, taken as a whole, must have the technical knowledge necessary to be able to engage with applicants on matters of relevant substance and thereby to assess their relative merits. This expertise may be supplemented by that of outside experts for specific purposes, such as testing language abilities. It should also be pluralistic, representing a variety of backgrounds and institutional perspectives and avoiding any appearance of partiality. Its members should be of similar professional standing, so that their views may carry equal weight during deliberations.

50. Similarly, the standing of members of the selection body must be sufficient as to allow them to engage freely and effectively with applicants, without undue (and inappropriate) deference.

51. Depending on national circumstances, members of the selection body may be drawn from some of, for example, the following:

- Office of the Prime Minister;²¹
- Ministry of Justice;²²
- Ministry of Foreign Affairs;²³
- Office of the Attorney-General/ Prosecutor-General;²⁴
- Government Agent;²⁵
- parliamentarians (member of relevant parliamentary committee);²⁶
- highest national court(s), judicial council, other judiciary;²⁷
- academics or human rights experts;²⁸
- Ombudsmen;²⁹
- bar association or other professional legal association or senior practicing lawyer(s);³⁰
- non-governmental organisation(s).³¹

52. Relevant to this guideline is the practice in Estonia, where members of the selection body are required to act on the basis of the interests of the Republic of Estonia and their own convictions, in accordance with legal acts, ethical considerations and good practices.

53. In some countries, it may be considered useful and appropriate for the selection body to seek advice from an outside source. This may depend on the composition of the selection body, for example the extent of its technical knowledge. It is important that, should it have recourse to information or advice from an outside source, the selection body continues to act fairly and impartially and does not give any appearance of failing to do so.

54. Examples of such practices include the following:

- All members of the Committee are entitled to consult with the institution that they are representing and ask for an expert opinion (Estonia).
- The Committee may, if necessary, liaise with the relevant international bodies (Finland).
- The selection body may consult with whomsoever it sees fit; for example, the bar association (the Netherlands).
- The Committee may seek advice from relevant external actors and should seek advice from former Norwegian judges at the Court (Norway).

2. All serious applicants should be interviewed unless impracticable on account of their number, in which case the body should draw up, based on the applications, a shortlist of the best candidates. Interviews should generally be based upon a standardised format.

²¹ As in e.g. Finland, Lithuania, Poland.

²² As in e.g. Croatia, Cyprus, Czech Republic, Estonia, Finland, Greece, Lithuania, Republic of Moldova, Poland, Russian Federation, Sweden, "the former Yugoslav Republic of Macedonia," Ukraine.

²³ Cyprus, Czech Republic, Estonia, Finland, Greece, Lithuania, Republic of Moldova, Poland, Russian Federation, Serbia, Sweden, "the former Yugoslav Republic of Macedonia," Ukraine.

²⁴ As in e.g. Finland, Ireland, Republic of Moldova, Norway, Portugal.

²⁵ As in e.g. Belgium, Czech Republic, Republic of Moldova, Poland, Russian Federation.

²⁶ As in e.g. Belgium, Croatia, Lithuania, Switzerland, "the former Yugoslav Republic of Macedonia," Ukraine.

²⁷ As in e.g. Belgium, Croatia, Cyprus, Czech Republic, Estonia, Finland, Greece, Lithuania, Republic of Moldova, the Netherlands, Norway, Portugal, Romania, Slovakia, Switzerland, "the former Yugoslav Republic of Macedonia," Ukraine.

²⁸ As in e.g. Croatia, Finland, Republic of Moldova, the Netherlands, Russian Federation.

²⁹ As in e.g. Czech Republic, Estonia, Norway, Ukraine.

³⁰ As in e.g. Czech Republic, Finland, Ireland, Republic of Moldova, Norway, Portugal, Russian Federation.

³¹ As in e.g. Republic of Moldova, Russian Federation, Ukraine.

55. This requirement reflects the principles of fairness and consistency in the treatment of applicants. The preference should therefore be to interview all applicants. Should, however, there be so many that this becomes impracticable, or should certain applicants be so clearly unsuitable that their prospects of success may be immediately discounted, then it may be acceptable for the selection body to draw up a shortlist of applicants on paper, who would then be interviewed. In this case, there may be a need for procedural safeguards to ensure that this process is foreseeable and transparent.

56. Examples of good practice include the following:

- All applicants are interviewed (Belgium).
- Clearly unsuitable applications are excluded administratively; the selection body is then asked whether it wishes to interview all remaining applicants or prepare a shortlist of applicants for it to interview (United Kingdom).

57. The requirement that interviews should generally be based upon a standardised format reflects the principles of fairness and consistency. All applicants should be assessed against the same essential standards. They should be asked to give details of how their qualifications and experience satisfy the criteria for office. Questions should address both technical issues relating to, for example, legal or linguistic knowledge, and issues relating to professional ethics. This, of course, should not exclude further exploration of issues arising in answers given to standard questions or of issues specific to the qualifications, experience or other characteristics of a particular applicant.

58. Examples of good practice include those in Belgium; Croatia; and the Russian Federation, where the interview format and essential questions are standardised.

3. *There should be an assessment of applicants' linguistic abilities, preferably during interview.*

59. Given the particular nature of linguistic competence and its importance to the operational capacity of Court judges, it should be specifically assessed during the selection process. This should preferably occur during interview, by members of the selection body or otherwise; the alternative, of assessment on the basis of certificates, may not be sufficient.

60. Examples of good practice include the following:

- Applicants are asked at interview to translate an extract from a Court judgment within a certain time-limit and are subsequently interviewed in English or French on issues relating to their legal experience and knowledge of the Convention (Russian Federation).
- Language proficiency is usually tested by the members of the selection body during verbal interviews and written examination (Republic of Moldova).
- Language is also tested at interviews in countries such as Belgium, Germany and Hungary.

4. *All members should be able to participate equally in the body's decision, subject to the requirement that its procedures ensure that it is always able to reach a decision.*

61. The requirement that all members should be able to participate equally in the body's decision relates to the principles of fairness and impartiality. It is connected to the need for the selection body to be free from undue influence and sufficiently pluralistic to ensure a variety of backgrounds and institutional perspectives and to consist of individuals of equal status. Examples of good practice include Belgium, Croatia and the United Kingdom.

62. Given the importance of filling vacancies on the Court in good time, it is essential that procedural obstacles to the nomination of lists of candidates do not arise on account of the selection body being unable to reach a decision.

63. Examples of good practice include the following:

- In Croatia, the body seeks to decide by consensus but there may be majority vote if necessary.

- In Switzerland, members of the selection body rank applicants in order, with points being given in accordance with this order, the recommended list of candidates containing those applicants that have accumulated the lowest number of points (similar to the "Borda count" system).
- In Poland and Ukraine, decisions are taken by majority vote, with the Chairperson having a casting vote in case of a split decision.

V. Finalisation of the list of candidates

1. *Any departure by the final decision-maker from the selection body's recommendation should be justified by reference to the criteria for the establishment of lists of candidates.*

64. This requirement reflects the principles of fairness, transparency, consistency and impartiality. The final decision will be a matter for the government, as the State's representative in international affairs, which thus retains the possibility of departing from the selection body's proposal. Any departure from the selection body's recommendation should nevertheless be justified by reference to the same underlying criteria for the establishment of lists of candidates (see Guideline II), in order to avoid the final decision either being or appearing to be arbitrary.

65. Examples of good practice include the following:

- The government may only choose from amongst the first five on the selection body's ordered list of applicants (Belgium), on the basis of objective, relevant criteria.
- The Ministry of Justice takes the final decision on the list of candidates; if it considers deviating from the selection committee's proposal, it must ask the committee for an opinion on any applicants who were not on the committee's short-list (Norway).

2. *Applicants should be able to obtain information concerning the examination of their application, where this is consistent with general principles of confidentiality in the context of the national legal system.*

66. This requirement reflects the principle of transparency. Applicants should be able to obtain information on the treatment and outcome of their application (but not necessarily on that of other applicants, other than to know which were included on the final list of candidates), in accordance with national laws on confidentiality and data protection.

67. Examples of good practice include Belgium and the United Kingdom, where an applicant who is interviewed but not successful is usually able to obtain reasons, usually from the chair of the selection body.

3. *The final list of candidates to be presented to the Parliamentary Assembly should be made public by the High Contracting Party at national level.*

68. The need for making public the outcome of the procedure, i.e. the final list of candidates presented to the Parliamentary Assembly, reflects the principle of transparency.

69. Examples of good practice include:

- publication of the list via the government's website;³²
- publication of the list in the official journal;³³
- other means ensuring wide dissemination of the list.³⁴

³² As in e.g. Croatia, Estonia, Greece, Iceland, Latvia, the Netherlands, Poland, Portugal, Slovakia, Switzerland.

³³ As in e.g. Estonia, Portugal.

³⁴ As in e.g. Finland (publication in an appropriate manner), Lithuania (list finalised by a government decision), Republic of Moldova (wide dissemination), Ukraine (announcement and publication by the selection body on the final day of the competition).