



Strasbourg, 31 October 2013

DH-GDR(2013)R5 Addendum II

STEERING COMMITTEE FOR HUMAN RIGHTS
(CDDH)

**COMMITTEE OF EXPERTS ON THE REFORM OF THE COURT
(DH-GDR)**

**Draft CDDH report on the review of the functioning of the
Advisory Panel of experts on candidates for election
as judge to the European Court of Human Rights**

I. INTRODUCTION

1. The legitimacy of the European Court of Human Rights ('the Court') as a judicial institution is vital for the continuing effectiveness of the Court. This includes respect for the integrity and quality of its judgments, in the eyes of not only Governments and domestic courts but also applicants and the general public as a whole. As a consequence, it is crucial that candidates presented for election to the Court are persons of high standing with all the specific professional qualities necessary for the exercise of the function of judge of an international court, whose decisions have consequences for all States Parties.

2. Article 22 of the Convention states that "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." The Parliamentary Assembly has exclusive competence for electing Court judges, but the quality of those judges depends in the first place on the quality of the candidates that are nominated by the States Parties. If a list is not composed of qualified candidates, the most that the Assembly can do is reject it.

3. The Declaration adopted at the Interlaken Conference, organised by the Swiss Chairmanship of the Committee of Ministers (Interlaken, Switzerland, 18-19 February 2010), called on the States Parties to ensure "the full satisfaction of the Convention's criteria for office as a judge of the Court, including knowledge of public international law and the national legal systems as well as proficiency in at least one official language".¹

4. Following the Interlaken Declaration, the then-President of the Court, Jean-Paul Costa, by letter dated 9 June 2010 addressed to the Chairperson of the Ministers' Deputies, called on the States Parties to set up a panel of independent experts to ensure the quality of the candidates for election. He recalled that the Group of Wise Persons had already made such a proposal in its 2006 report on the reform of the Court and that the Secretary General of the Council of Europe had made a similar proposal in his contribution to the Interlaken Conference.

5. On 10 November 2010, the Committee of Ministers adopted Resolution CM/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 ('the Advisory Panel'). Referring to "the responsibility of the High Contracting Parties to the Convention to ensure a fair and transparent national selection procedure", the Committee of Ministers 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 underlines the fact that the principle role of the Advisory Panel is to provide advice to States Parties during the process of selection of candidates.

6. According to the Resolution, which is appended to this report, the Advisory Panel's mandate is confidentially to advise the States Parties whether candidates for election as judge

¹ It should be noted that following the Interlaken Declaration, the Committee of Ministers adopted Guidelines on the selection of candidates for the post of judge at the European Court of Human Rights (doc. CM(2012)40 & Addendum), which go further than the Interlaken Declaration on the question of linguistic competence ("Candidates must, as an absolute minimum, be proficient in one official language of the Council of Europe ... and should also possess at least a passive knowledge of the other"), referring to Parliamentary Assembly Resolution 1646 (2009), para. 4.4.

to the Court meet the criteria stipulated in Article 21 of the Convention (“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”).

7. Paragraph 5 of the Resolution concerns the functioning of the Advisory Panel and reads:

Before submitting a list to the Parliamentary Assembly as provided for in Article 22 of the Convention, each High Contracting Party will forward to the Panel, via its secretariat, the names and curricula vitae of the intended candidates. On the basis of these written submissions, the Panel shall perform its function in accordance with the operating rules appended to this resolution.

Where the Panel finds that all of the persons put forward by a High Contracting Party are suitable candidates, it shall so inform the High Contracting Party without further comment.

Where it is likely that the Panel may find one or more candidates not suitable for office, the chair of the Panel shall contact the High Contracting Party concerned to inform it and/or to obtain any relevant comments. If, in the light of the written submissions and any comments obtained, the Panel considers that one or more of the persons put forward by a High Contracting Party are not suitable, it shall so inform the High Contracting Party, giving reasons for its view, which shall be confidential. The Panel shall in a similar manner consider one or more new candidates who would subsequently be presented by the High Contracting Party.

When a list of three candidates nominated by a High Contracting Party is being considered in accordance with Article 22 of the European Convention on Human Rights, the Panel shall make available to the Parliamentary Assembly in writing its views as to whether the candidates meet the criteria stipulated in Article 21§1 of the Convention. Such information shall be confidential.

8. The relevant excerpts of the Operating Rules provide the following on the functioning of the Advisory Panel:

[...]

(iii) The Panel’s procedure shall be a written one. Members shall transmit their views on candidates to the chair in writing.

(iv) The Panel may hold a meeting where it deems this necessary to the performance of its function.

[...]

(vi) It shall inform the High Contracting Parties of its views no later than four weeks after the High Contracting Parties have submitted the names and curricula vitae of the intended candidates to the Panel’s secretariat.

(vii) It shall assess the suitability of candidates on the basis of the information provided by the High Contracting Party, which shall be in one of the official languages of the Council of Europe.

(viii) It may seek additional information or clarification from the High Contracting Party in relation to any candidate under its consideration.

(ix) It may in exceptional circumstances decide to hold a meeting with representatives of a High Contracting Party in the exercise of its function. It shall be for the Panel to decide whether a meeting is necessary.

(x) The Panel’s proceedings shall be confidential. Any meeting with representatives of a High Contracting Party shall take place in camera.

[...]

(xiii) The Panel may adopt such internal working methods as it deems necessary to the exercise of its function.

9. Further to paragraph (xiii) of the Operating Rules appended to the Resolution, the Advisory Panel has issued Supplementary Operating Rules (Advisory Panel(2011-II)3Erev(2)) which read as follows:

- (1) The quorum is reached when five of the seven members of the Advisory Panel are present in the case of a meeting. If a written procedure is being followed, the quorum will be reached when five members reply.
- (2) The time limit of four weeks as set out in point (vi) of the Operating Rules shall only begin to run if the list of candidates is submitted in due form, i.e. using the model CV form as supplied by the Parliamentary Assembly.
- (3) The members shall give their opinion on a list of candidates within five working days following the receipt of the list from the Secretariat.
- (4) Additional information from the Government concerned shall be requested, if necessary, within ten working days following the receipt of the list of candidates from the Secretariat.
- (5) To assess the qualifications of candidates, the Panel may use also other sources of information than the information provided by the Government.

10. The Declaration adopted at the Brighton Conference, organised by the United Kingdom Chairmanship of the Committee of Ministers on 19-20 April 2012, “[welcomed] the establishment of the Advisory Panel of Experts on Candidates for Election as Judge to the European Court of Human Rights [and noted] that the Committee of Ministers [had] decided to review the functioning of the Advisory Panel after an initial three-year period” (see paragraph 25.b).

11. Following the 23 May 2012 CM Session, the Committee of Ministers instructed the CDDH “to submit its conclusions and possible proposals for action to follow up” this decision, for which the deadline has been set as 31 December 2013.

12. At its 3rd meeting (13-15 February 2013), the Committee of experts on the reform of the Court (DH-GDR) considered that its Drafting Group E (GT-GDR-E) “should analyse and assess apparent difficulties that had arisen in the past and make constructive proposals for the future to the Committee of Ministers.”

13. At its 77th meeting (19-22 March 2013), the CDDH decided that the scope of the review should cover not only the internal working methods and procedures of the Panel but also its interaction with the States Parties to the Convention and the Parliamentary Assembly respectively, without extending to the internal procedures of these latter two.

14. The present report constitutes the CDDH’s response to the instruction given by the Committee of Ministers. The report provides factual information on the functioning of the Advisory Panel, also in relation to the other actors in the selection and election procedure of judges to the Court, i.e. the States Parties and the Parliamentary Assembly. The report then identifies certain challenges in the current working procedures, before concluding with proposals for action, some of which relate to the Advisory Panel, others to the States Parties.

II THE FUNCTIONING OF THE ADVISORY PANEL

15. Article 22 of the Convention reads: “The judges shall be elected by the Parliamentary Assembly [...] from a list of three candidates nominated by the High Contracting Party”. From

the outset, one should therefore realise that the Advisory Panel's role is situated in a process involving two principal actors, the States Parties to the Convention and the Parliamentary Assembly. Whilst the Panel's advice, if any, is addressed to the State Party concerned, paragraph 5 of the Resolution specifies that its views are transmitted in writing to the Parliamentary Assembly. An evaluation of the functioning of the Advisory Panel cannot therefore be done without examining its interaction with both of these actors.

16. The selection procedure for the post of judge at the Court is initiated by a letter of the Secretary General of the Parliamentary Assembly to the Ambassador of a State Party, requesting a list of three candidates. Generally speaking, the letter is now sent to the national authorities nearly fourteen months before the election is due. At the same time, an electronic version of the letter is sent to the national authorities so as to facilitate immediate transmission of the letter to the country's capital and to permit the authorities to have hyperlink access to all relevant background documents; copies are immediately sent by electronic means also to the Secretary General of the Council of Europe, the head of the relevant national delegation to the Parliamentary Assembly and the Chair of the Advisory Panel. In the Secretary General's letter a standard reference is made to the work of the Advisory Panel. Currently², the text included in the letter reads as follows:

I would also like to draw your attention to the establishment, by the Committee of Ministers, of an advisory panel of experts on candidates for election as judge to the Court (Resolution CM/Res (2010) 26). Therefore, before submitting your list of candidates to the Parliamentary Assembly, you are invited to submit it to the advisory panel in time for the latter to be able to provide an opinion on whether the candidates included in the said list meet the requirements stipulated by the European Convention on Human Rights. I understand that the Secretariat of the advisory panel will be contacting you on this matter.

17. Following the letter of the Secretary General of the Parliamentary Assembly, a letter is sent to the Ambassador by the Chair of the Advisory Panel. The lapse of time between both letters can be up to two months, so that in recent cases, there will be at least twelve months between the date of the letter from the Chair of the Advisory Panel and that on which the election is due. This letter includes a passage on the need to submit a list of three candidates timely:

In order to allow the Advisory Panel to exercise its functions effectively, I would therefore, recommend providing the Secretariat with the names and curricula vitae at least six weeks before the time-limit set by the Parliamentary Assembly for submission of the national list of candidates. This would leave your Government sufficient time to provide additional information on any of the candidates, if necessary. Furthermore, in case the Advisory Panel expresses doubts as to the qualifications of any of the candidates, your government would have additional time to present a new candidate.³

18. The selection process itself is conducted on the domestic level, which is outside the scope of this report. Having said that, reference should be made to the Guidelines of the Committee of Ministers on the selection of candidates for the post of judge at the European Court of Human Rights and its explanatory report, which includes examples of good practice, as well as the standards set out in the various Parliamentary Assembly texts, notably Resolution 1646 (2009). It is the responsibility of the State Party concerned to submit its list of three candidates in due time to the Secretariat of the Advisory Panel.

² As of 2012. Previously, the letter only included the first sentence cited above.

³ The current wording of this letter might lead to some confusion should the impression be given that the Advisory Panel is unilaterally competent to extend the duration of the election process, which is not the case.

19. The Advisory Panel carries out its task of assessing the proposed candidates in the light of the fundamental criteria stipulated in Article 21 § 1 of the Convention. During its meetings, the Advisory Panel has discussed substantive and reliable interpretation of these criteria for the evaluation of the candidates' qualifications. The Panel has chosen to make reference to Article 255 of the Treaty on the functioning of the European Union, which evokes the following criteria: "the candidate's legal expertise, the professional experience the candidate has acquired (characterised by both its length and nature), the suitability of the candidate to exercise the role of judge, the guarantees of independence and impartiality that the candidate presents, the linguistic abilities and suitability to work as part of a team within an international environment in which several legal traditions are represented".⁴ Further clarifications have been laid down in the written contribution by the Advisory Panel in the preparation of the current report (GT-GDR-E(2013)004), as appended to this report. The Advisory Panel's contribution does not in this context mention the Committee of Ministers' Guidelines on the selection of candidates for the post of judge.

20. In performing its task the Advisory Panel relies primarily on the information provided by the State Party (see Operating Rules (vii) and (viii)), i.e. the curricula vitae of the proposed candidates (using the model curricula vitae form as supplied by the Parliamentary Assembly; see Supplementary Operating Rule 2) and any additional information or clarifications in relation to any of the candidates if so requested by the Advisory Panel. The Advisory Panel itself does not interview the candidates.

21. However, Supplementary Operating Rule (5) clarifies that the Advisory Panel also uses "other sources of information" when assessing the qualifications of candidates. The Advisory Panel explained that it (pro-actively) uses its network of professional contacts (mainly judges) in order to obtain information on the candidates involved. Likewise, it may receive and take account of unsolicited information from (undisclosed) sources.

22. Although the Operating Rules foresee the Advisory Panel's procedure to be a written one (Operating Rule (iii)), a practice of more regular meetings has developed, which the members of the Advisory Panel consider necessary for effective consultations.

23. The members shall give their opinion on a list of candidates within five working days following the receipt of the list from its Secretariat (see Supplementary Operating Rule 3). This should ensure that there is sufficient time to request additional information from the government concerned, if necessary. Within four weeks after the State Party submits the names of the proposed candidates and their curricula vitae (using the model CV form as supplied by the Parliamentary Assembly), the Government is informed of the views of the Advisory Panel (see Operating Rule (vi) in combination with Supplementary Operating Rule 2). Given the fact that governments are requested to provide the necessary information to the Advisory Panel six weeks before the time-limit set by the Parliamentary Assembly for submission of the national list of candidates, this then leaves only two weeks to present a new candidate in case the Advisory Panel expresses doubts as to the qualifications of any of the

⁴ See the Written Contribution by the Advisory Panel, doc. GT-GDR-E(2013)004REV, section 5), p.3. It must be borne in mind that the two panels operate in very different contexts: the EU's panel advises the governments of the EU member States, before they make appointments to the Court of Justice, on the qualifications of individual candidates proposed by member States; the Advisory Panel advises individual governments – after national selection procedures – on the suitability of lists of candidates they intend transmitting to the Parliamentary Assembly, whose election procedure provides an additional guarantee of democratic legitimacy.

candidates. Before the State Party submits the list to the Assembly, the newly proposed candidates' qualifications should also be assessed by the Advisory Panel.

24. The opinion of the Advisory Panel is communicated to the government. Where the Advisory Panel finds that all the proposed candidates are qualified, it does not state reasons for doing so.

25. If, however, the Advisory Panel considers that one or more of the persons put forward by a State Party are not qualified, reasons will be given to the State Party, which shall remain confidential. The latter is a direct consequence of the primary function of the Advisory Panel, as enshrined in Resolution CM/Res(2010)26, i.e. to provide advice to the States Parties when the list of candidates is not yet submitted to the Parliamentary Assembly.

26. The Committee of Ministers' Resolution also provides for transmission of the opinion of the Advisory Panel to the Parliamentary Assembly. The Advisory Panel will provide in writing its views "as to whether the candidates meet the criteria stipulated in Article 21 § 1 of the Convention". Such information shall be confidential. A copy of the Advisory Panel's opinion, including an indication, with summary reasons, of which candidate(s) it may have found not to be qualified, is given in confidence to all members of the Sub-Committee on the Election of Judges present during its meetings.

27. Although the Advisory Panel suggested early in its existence that it might publish an annual report to the Committee of Ministers on its activities, it has so far not been done. The activities of the Advisory Panel have, however, twice been discussed during exchanges between the Chair of the Panel and the Ministers' Deputies (on 4 April 2012 & 30 January 2013: see DH-GDR(2013)005). In addition, it is worthwhile mentioning that there have been informal meetings between the Chair of the Panel and representatives of the Parliamentary Assembly, such as the Chairperson of the Sub-committee on the Election of Judges, the President of the Parliamentary Assembly and the Secretary General of the Parliamentary Assembly.

III EVALUATION OF PREVIOUS EXPERIENCES

28. From the outset, it should be noted that all stakeholders involved in the election procedure have indicated that they consider the work of the Advisory Panel as a useful additional safeguard to guarantee that proposed candidates for the post of judge at the Court are of the highest standards. Furthermore, it should be recalled that in the overwhelming majority of cases, the Advisory Panel has interacted with the other actors as foreseen in Resolution CM/Res(2010)26.

29. However, it should be borne in mind that the establishment of the Advisory Panel is fairly recent; some adjustments still need to be made to the Advisory Panel's working relationships with the States Parties and its contacts with the Parliamentary Assembly. This is clear from the fact that the members of the Advisory Panel "shared in general a feeling of frustration, exacerbated by the perceived lack of co-operation, or even interest on the part of the other stakeholders in the election procedure" (GT-GDR-E(2013)004, p. 6). This report aims to identify difficulties that have occurred in the past and to make concrete proposals for improvement.

(i) The Advisory Panel's opinion is not followed by the government concerned and/or the Parliamentary Assembly

30. Although neither is the government concerned required to follow the Advisory Panel's advice, nor is the Parliamentary Assembly required to act consistently with it, it was noted that there was an instance in 2012 when despite the Advisory Panel's view that a candidate was not qualified, the Government concerned maintained that person on the list of candidates and the Parliamentary Assembly subsequently elected that person to the Court.

31. CM Resolution (2010)26 reflects the fact that competence for the election of judges to the Court is attributed under the Convention to the Parliamentary Assembly. This implies that the (Sub-Committee of the) Parliamentary Assembly is free to conduct the election procedure according to its internal working procedures and enjoys a certain discretion when it wishes to create additional criteria for the assessment of the candidates' qualifications,⁵ and that its assessment of a candidate's qualifications is autonomous and independent.⁶ The Parliamentary Assembly may weigh the qualifications of a particular candidate differently from the Advisory Panel. This is so as the Sub-Committee conducts interviews with the candidates, which the Advisory Panel is not empowered to do.

32. While the opinion of the Advisory Panel is non-binding, it may be assumed that the Sub-Committee of the Parliamentary Assembly gives due consideration to an opinion of the Advisory Panel on a particular list of candidates.

(ii) The list is transmitted by the government to the Parliamentary Assembly without awaiting the opinion of the Advisory Panel

33. There have been instances in which State Parties have submitted lists of candidates to the Parliamentary Assembly and the Advisory Panel simultaneously, or only to the Parliamentary Assembly, without awaiting the Advisory Panel's opinion and despite the Advisory Panel having requested additional time for examination of the curricula vitae concerned. In two instances, the Advisory Panel requested the Parliamentary Assembly not to proceed with the election process before it had been able to issue an opinion.

34. The CDDH considers such practices by States Parties to be incompatible with the *raison d'être* of CM Resolution (2010) 26. States Parties are reminded of the need to submit lists of candidates well before the deadline by which they must submit their list to the Parliamentary Assembly. Likewise, the Parliamentary Assembly is invited not to proceed with the election process without allowing the Advisory Panel a reasonable time within which to inform the State Party concerned of its views on the intended candidates. Where a list of candidates has already been transmitted to the Parliamentary Assembly, the Advisory Panel should simultaneously transmit its views to the latter.

35. The CDDH also considers that, in the spirit of the Advisory Panel's existence, it could be advisable, if possible, for the State Party concerned not to make public the list of candidates or at least not finally to approve it until the Advisory Panel's views on it have been taken into account. Combined with keeping confidential the Advisory Panel's views, this

⁵ See the Court's *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, para. 43, and its *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 (No. 2)*, 22 January 2010, para. 43; see also the Explanatory Memorandum to the Committee of Ministers' Guidelines on the selection of candidates for the post of judge at the European Court of Human Rights, doc. CM(2012)40 addendum final, paras. 10-11.

⁶ In 2012, a list of candidates that had previously been considered qualified by the Advisory Panel was rejected by the Parliamentary Assembly.

would allow for further reflection on and, if necessary, revision of the list without risk of public embarrassment to candidates.

36. In order to avoid such practical problems, it might be advisable to revise the various timetables and deadlines for submission of lists. The letter by the Secretary General of the Parliamentary Assembly is now sent to the State Party almost fourteen months before the actual election is due, with a copy sent by electronic means to the Advisory Panel. Following that letter, a letter is sent to the State Party by the Chair of the Advisory Panel, usually almost immediately but occasionally after a delay of up to two months. In its letter, the Advisory Panel recommends providing the Secretariat with the names and curricula vitae at least six weeks before the time-limit set by the Parliamentary Assembly for submission of the national list of candidates.

37. The CDDH notes that these timetables and deadlines are not fixed. It would appear, however, that the timetable foreseen generally leaves too little time to remedy any deficiencies perceived by the Advisory Panel with regard to the original list of candidates, taking into account the possible complexity of the selection procedure that needs to be carried out on the domestic level, which may require involvement of a national body after a public call for candidatures, and interviews of the applicants.

38. In light of the above, the CDDH welcomes the Parliamentary Assembly's practice of writing to the relevant State Party's permanent representative well over a year in advance of the election. It is suggested that the Advisory Panel should endeavour always to write to the State Party concerned immediately upon receipt of a copy of the Parliamentary Assembly's letter, and that lists of candidates should be submitted to the Advisory Panel *at least three months* before the time-limit set by the Parliamentary Assembly for submission of the list of candidates.

39. It has also been suggested to have at least one 'reserve' candidate standing by in case the original list meets with objections from the Advisory Panel. Whilst recognising that this may not always be acceptable to legal personalities of high repute within their jurisdictions, the CDDH nevertheless recommends that States Parties consider adopting such a practice should circumstances allow.

(iii) Limitations set by the Operating Rules

40. The Advisory Panel indicated that it found the original Operating Rules too restrictive, i.e. with respect to the holding of meetings and the use of information from sources other than the government. In its view, this warrants a re-evaluation of the Operating Rules in place.

41. In the Operating Rules (see (iii) and (iv)), a primarily written procedure is foreseen. The Advisory Panel can decide to hold a meeting "where it deems this necessary to the performance of its function". In practice, seven meetings of the Advisory Panel were convened between January 2011 and October 2013 which seems to suggest that meetings have become the rule and not the exception. The Advisory Panel suggests making meetings the norm, considering that a purely written procedure does not allow for a meaningful discussion based on direct exchange of views. The CDDH recalls that the Resolution foresees flexibility to accommodate the need for a meeting, assuming this is necessary for effective consultations on lists of candidates. However, when organising meetings, due account must be taken of budgetary constraints.

42. The Operating Rules (see (vii) and (viii)) foresee an assessment of the candidates' qualifications on the basis of information provided by the governments concerned. The Advisory Panel introduced a Supplementary Operating Rule which states that the Advisory Panel may also use "other sources of information". The Advisory Panel receives unsolicited information from undisclosed sources. Likewise, it pro-actively uses its 'judicial network' in order to obtain information on the candidates involved. The Advisory Panel itself does, however, not interview the candidates.

43. As for the use of non-official sources of information, it is understandable that the Advisory Panel wishes to avail itself of as much background information on the candidates concerned in order to fulfil its assessment as thoroughly as possible. There is however an inherent risk in taking into account materials from undisclosed sources concerning individual candidates without those candidates having the possibility of responding to, or even being aware of that information. In particular, the pro-active use of a 'judicial network' may lead to unjustified considerations influencing the Advisory Panel's opinion. In general, where the Advisory Panel envisages making greater use of other (undisclosed) sources of information, it should give the government concerned an opportunity to reply. The possible deterrent effect on potential candidates of yet another level of interview should also not be neglected. The CDDH would therefore propose that this issue needs careful further discussion.

(iv) Extent of reasons given in the opinions of the Advisory Panel

44. There have in the past been expressions of dissatisfaction over the degree of reasoning given in an Advisory Panel's opinion. In response, the Advisory Panel now seems willing to provide a more detailed opinion on a candidate's qualification. Nevertheless certain concerns persist.

45. CM Resolution (2010) 26 essentially requires provision of confidential advice to the government concerned. The CDDH would therefore draw a distinction between the provision of information by the Advisory Panel to the government concerned on the one hand, and to the (Sub-Committee of the) Parliamentary Assembly on the other hand. In order to enhance the authority of the Advisory Panel's opinion that a particular candidate does not meet the required criteria, the government should be confidentially provided with a reasoned written opinion stating the exact reasons why a particular candidate is not deemed to fulfil the necessary criteria for election. In the view of the CDDH this information should be treated with the greatest care, given the potential repercussions on a person's reputation. For those reasons, the CDDH would take the view that the Advisory Panel should carefully consider what information to provide to the Sub-Committee of the Parliamentary Assembly and measures would have to be taken to ensure that the information is treated confidentially. What is essential is that the Advisory Panel continues its practice of informing the (Sub-Committee of the) Parliamentary Assembly when the government submits a list featuring a candidate who was not deemed qualified by the Advisory Panel, including the name(s) of the candidate(s) concerned.

46. The interests of the candidate concerned should not be overlooked. The CDDH therefore suggests that the government inform a particular candidate of the Advisory Panel's opinion that he/ she is not qualified for office, thereby giving the opportunity for the candidate to withdraw.

47. It has also been suggested to transmit the assessments made by the Advisory Panel stating reasons – subject to the maintenance of confidentiality – to all Governments of the

States Parties. This would enable governments to exert (albeit non-public) political peer pressure on a government disregarding a negative assessment of the Advisory Panel. As the Panel was set up in light of the shared responsibility of the States Parties for the effective operation of the Convention system, the nomination of a candidate who is not qualified in accordance with the Convention is a matter of concern to all States Parties. The CDDH therefore suggests that the Committee of Ministers consider amending its Resolution to permit an assessment by the Panel that a candidate is unqualified to be transmitted, on a strictly confidential basis, to all States Parties, if after a specified and reasonable time the nominating State has not withdrawn the candidate in question. This would not, however, permit any public comment to be made about the candidate's qualifications, thus protecting the interests of the candidate as noted above.

48. The CDDH proposes to amend the Committee of Ministers' Resolution to indicate that the Committee of Ministers' Guidelines on the selection of candidates for the post of judge at the European Court of Human Rights, alongside the Convention itself, form the basis of the Panel's assessment. It takes note that the Advisory Panel draws useful inspiration for a substantive and reliable interpretation also from other sources, including the practice of the panel instituted by Article 255 TFEU. It is important for the functioning of the Advisory Panel and in particular its interaction with the government concerned that the assessment of the qualification of the candidates be based upon foreseeable and commonly shared criteria.

(v) Flow of information between the various stakeholders

49. As mentioned above, the activities of the Advisory Panel are regularly discussed during exchanges of views between its Chair and the Ministers' Deputies. Likewise, the Chair of the Advisory Panel has held informal meetings with representatives of the Parliamentary Assembly. The CDDH welcomes these regular contacts with other stakeholders in the election procedure, whom it recommends should be informed of the content of the Advisory Panel's Supplementary Operating Rules.

(vi) Perceived lack of visibility/ low profile of the work of the Advisory Panel

50. The Advisory Panel has the impression that its work lacks visibility. To date no annual report of the Panel's activities to the Committee of Ministers has been published. In order to increase the visibility of the useful work conducted by the Advisory Panel, it is suggested that it periodically report to the Committee of Ministers. It would be important that this report focus on providing an account of the Panel's work. Furthermore, the CDDH notes that certain governments have mentioned the Advisory Panel's opinion in their letters officially submitting the list of candidates to the Parliamentary Assembly.⁷

51. Besides the obvious need for mutual respect and constructive dialogue between all partners involved, the CDDH cannot overlook the fact that a panel of such pre-eminent legal personalities has been entrusted with an understated, whilst in its consequences nevertheless very important task.

IV. CONFIDENTIALITY

⁷ See for example the transmission letters of Iceland and the United Kingdom (respectively <http://assembly.coe.int/ASP/Doc/XrefViewPDF.asp?FileID=19696&Language=EN> at p. 3 and <http://assembly.coe.int/Documents/WorkingDocs/2012/COE.PACE.WD.COM.12936.2012.EN.pdf> at pp. 125-126).

52. The issue of confidentiality is central to the Advisory Panel. It is a key principle in the functioning of the mechanism as envisaged by the Committee of Ministers, being mentioned on three occasions in the Committee of Ministers' Resolution:

- In relation to any negative view given by the Advisory Panel to a State Party on a list of candidates.
- In relation to the views made available by the Advisory Panel to the Parliamentary Assembly, bearing in mind that the list of candidates should by now have been published by the State Party concerned.
- In relation to the Advisory Panel's proceedings, with the stipulation that any meeting with representatives of a State Party be in camera.

53. Furthermore, confidentiality extends also to the Advisory Panel's contacts with the Committee of Ministers. During exchanges of views between the Chair of the Advisory Panel and the Ministers' Deputies, no specific States Parties or individual candidates have been disclosed.

54. Any changes to the provisions on confidentiality, however, may have significant repercussions for the Advisory Panel, the nature of its work and its relations with States Parties and/ or the Parliamentary Assembly; there may even be repercussions for the effectiveness of the Advisory Panel in its relations with States Parties during the process of drawing up a list of candidates. Careful consideration would have to be given to any change in the confidentiality requirements surrounding the Advisory Panel's contacts with the Parliamentary Assembly. In particular, should the information provided by the Advisory Panel to the Parliamentary Assembly be made public, this could change the relationship between the two bodies. There may be some outside expectation that the Parliamentary Assembly would follow the Advisory Panel's views; this may impact on the autonomous freedom enjoyed by the Parliamentary Assembly to elect judges, especially since the Advisory Panel was created and is appointed by the Committee of Ministers and despite its having no legal basis in the Convention. Furthermore, publicising a negative view of the Advisory Panel on an individual candidate may have detrimental consequences for the person concerned; the risk of this happening may discourage potential candidates. This risk could however be mitigated by creating an opportunity for a candidate to withdraw instead of a negative view from the Advisory Panel being made public.

V. CONCLUSIONS AND PROPOSALS FOR FOLLOW-UP

55. There is general agreement that the work of the Advisory Panel is a useful additional safeguard to guarantee that proposed candidates for the post of judge at the Court are of the highest standards. The present report is itself indicative of the Committee of Ministers' keen interest in the process and its desire to see the Advisory Panel play an effective, constructive role. As for the Parliamentary Assembly, it has already taken several significant steps to integrate the work of the Panel into its procedures, with the result that fruitful working relations have been the general rule and misunderstanding or disagreement the rare exception. The CDDH welcomes this and encourages the Assembly, in its on-going reflections on strengthening the election process, to continue taking advantage of the contribution of the Advisory Panel.

56. It is clear from the foregoing that some adjustments need to be made in the Advisory Panel's working relationships with the States Parties and its contacts with the Parliamentary Assembly. The issues identified are: (a) the government concerned not following the Advisory Panel's opinion and/ or the Parliamentary Assembly acting inconsistently with it,

(b) transmission of the list by the government to the Parliamentary Assembly prior to receipt of the Advisory Panel's opinion, (c) limitations imposed by the Operating Rules, (d) the extent of reasons given in the opinions of the Advisory Panel, (e) the flow of information between the various actors, and (f) the perceived lack of visibility of the work of the Advisory Panel.

57. The CDDH would propose giving further careful consideration to the (non-)use of non-official sources of information by the Advisory Panel.

58. It would also propose amending the Committee of Ministers' Resolution (1) to indicate that the Committee of Ministers' Guidelines on the selection of candidates for the post of judge at the European Court of Human Rights, alongside the Convention itself, form the basis of the Panel's assessment, and (2) to permit an assessment by the Panel that a candidate is unqualified to be transmitted, on a strictly confidential basis, to all States Parties, if after a specified and reasonable time the nominating State has not withdrawn the candidate in question.

59. The Advisory Panel was created for the purpose of giving confidential advice to States Parties. The idea was that the Advisory Panel would most likely be more effective if the attention of governments was drawn confidentially to unqualified candidates, so that a government could change the list before it was officially submitted to the Parliamentary Assembly. The Advisory Panel's written contribution shows that it considers the current confidentiality rules to be an impediment. There are two possible responses to this issue:

- a. the Advisory Panel is likely to be more effective if it remains the confidential advisor of Governments in an early stage of the proceedings (in which a list has not been officially submitted to the Parliamentary Assembly), which would seem to imply keeping the current confidentiality rules; or
- b. the Advisory Panel is likely to be more effective if it is not bound by strict confidentiality rules. As a consequence, the purpose of the opinion of the Advisory Panel would no longer be principally the provision of confidential advice to the governments concerned but would instead shift in emphasis towards providing relevant information and advice to (the Sub-Committee of) the Parliamentary Assembly. Although such a change may create some outside expectation that the Parliamentary Assembly would act consistently the Advisory Panel's advice (see para. 56 above), it would have no status in the legal order governing the Parliamentary Assembly's competence to elect judges and may thus risk being ineffective unless it were to be reflected by amendment in the text of the Convention itself.

[All experts who expressed a view were in favour of the first approach.]

60. There are also several measures not requiring revision of the Resolution that can be envisaged:

- a. the Panel is expected to write to the State Party immediately upon receipt of a copy of the Parliamentary Assembly's letter, and it is suggested that lists of candidates be submitted to the Advisory Panel *at least three months* before the time-limit set by the Parliamentary Assembly for submission of the national list of candidates.

- b. it is suggested that a particular candidate be discretely informed by the government concerned of an Advisory Panel opinion that he/ she does not fulfil the criteria for office, thereby giving the opportunity for the candidate to withdraw.
- c. it is suggested that the Advisory Panel provide the government concerned with a confidential written opinion stating specific reasons why it considers a particular candidate not to fulfil the criteria for election.
- d. it is suggested that the Advisory Panel report periodically to the Committee of Ministers, focusing on the Advisory Panel's work.

61. It is assumed that States Parties and the Sub-Committee of the Parliamentary Assembly give due consideration to an opinion of the Advisory Panel on a particular list of candidates. This could be facilitated by the following:

- a. States Parties should consider neither finalising nor, if possible, making public a list of candidates until after having received the Advisory Panel's views.
- b. States Parties should consider adopting the practice of selecting reserve candidates, should circumstances allow.
- c. The Parliamentary Assembly is invited, if possible, not to proceed with the election process without allowing the Advisory Panel a reasonable time within which to inform the State Party concerned of its views on the intended candidates.

Appendix**Excerpt from GT-GDR-E(2013)004**

“Article 21§1 of the Convention insists that Judges be of a “high moral character”. In the Panel’s discussions, qualities such as integrity, a high sense of responsibility, courage, dignity, diligence, honesty, discretion, respect for others and absence of conviction for crimes were mentioned as key components of this requirement, as well as (obviously) independence and impartiality. Most of these qualities are also enumerated in the Resolution on Judicial Ethics, which was adopted by the Plenary of the European Court of Human Rights in 2008. Since – contrary to the situation in the European Union² – the Panel is not empowered (at least not expressly) to convoke the candidates for interviews, it is difficult, or delicate, to make judgments concerning the character of candidates unless it is manifestly apparent. The absence of interviews makes it also very difficult to assess the candidates’ language skills.

“Qualifications for appointment to high judicial office”: Judges of the Court can issue judgments which in effect depart from or even implicitly overrule judgments of the highest national courts. Those courts may nonetheless be obliged, in accordance with national laws implementing the Convention, to respect and follow the decision of the European Court of Human Rights. The Panel has of course to base its views on the wording of Article 21§1 of the Convention, i.e. on the expression “high judicial office” (rather than “highest”). This expression would seem to include judges who have held office in national supreme and constitutional courts, whereas it would seem to exclude judges of lower national first-instance courts. The provision must be given a substantive interpretation consistent with its purpose and not a purely formal one. Even in the case of candidates holding office in a highest national Court, the Panel’s view is that such persons should not, for that reason alone, be automatically considered qualified to be candidates for election to the Court.

Additional factors may constitute key elements in qualification for election as judge, such as a significant length of service at a high level, service on international tribunals, together with publication of important books or articles. In this context it should be borne in mind that national judicial structures vary considerably. For example, in some countries a person may be nominated to a Supreme Court (often consisting of many members) at a relatively young age because of his or her innate ability, but nonetheless with limited judicial experience. This limited experience can be accommodated in various ways in a national structure and over time the judge will acquire standing within the national court as his or her judicial skills and experience will mature. On the other hand, the European Court of Human Rights, by its nature, status and pan-European role assumes that its members already have, on election, all the fully developed judicial qualities that come from long experience. It would appear unlikely to find such qualities in a candidate of a relatively young age. However, in countries with a small population it might prove to be difficult to find three candidates of an equally long professional experience.⁸

This is of particular importance in an international court where its members are elected for one fixed term of just nine years. Moreover, it takes significant time for even the most experienced judge to induct him or herself into the practices and day to day functions of a judicial institution such as the Court.

For present purposes the foregoing considerations have been necessarily expressed in the most general terms, but they do indicate that High Contracting Parties when presenting a list of candidates, and the PACE when deciding which candidate to elect as a member of the Court, should acknowledge that their decisions in this regard are of quite a momentous importance requiring careful and thorough

⁸ Another subsidiary, but nonetheless important consideration, is the implications which the election of relatively young judges to the Court of Human Rights may potentially have for judicial independence, since he or she may, in some cases, be dependent on the national authorities of his country for the continuation of his or her judicial career when they are still at a relatively young age at the completion of their nine year term at the Court.

consideration so as to ensure that candidates of mature professional experience and unquestionable qualifications are put forward or elected.

Article 21§1 of the Convention also looks for “Jurisconsults of recognised competence”: In his letter to the Ministers’ Deputies, then President Jean-Paul Costa wrote: “To be a ‘jurisconsult of recognised competence’ requires extensive experience in the practice and/or teaching of law, the latter generally entailing publication of important academic works. One objective indication of this requirement would be the length of occupation of a professorial chair”.

Once again, inherent in these observations, is the importance of electing to the Court persons of mature professional experience. In accepting the description of the former President of the Court the Panel would consider that the level of “recognised competence” of a jurist is normally reached when a person has been a professor at a well-known university for many years and has published important works, including work relating to the protection of human rights and the relationship between those rights and the constitutional functions of states. Also relevant would be any experience which such jurists have in advising or appearing in cases involving the protection of such rights or other constitutional cases before national or international tribunals. However, the selection of persons other than professors, such as advocates, legal professionals in the public (including political) or private domains, particularly where they have, through long experience, professional intimacy with the functioning of courts, is also possible as long as those persons by virtue of mature experience qualify as “jurisconsults of recognised competence”.

Requirements not expressly mentioned in Article 21§1 of the Convention: As the Court has explained in its Advisory Opinion on certain legal questions concerning the lists of candidates submitted with a view to the election of judges to the Court of 2008, “there is nothing to prevent Contracting Parties from taking into account additional criteria or considerations” (§ 42). As illustrations the Court mentioned “a certain balance between the sexes or between different branches of the legal profession” (§ 47). The aim of achieving a certain balance between the sexes has been discussed at length in recent years. The Panel has taken into account these new rules with respect to gender balance when it had to advise on an all-male list.”