

**ADVISORY PANEL OF EXPERTS ON CANDIDATES FOR  
ELECTION AS JUDGE TO THE EUROPEAN COURT OF  
HUMAN RIGHTS**

*THE SECRETARIAT*



Advisory Panel(2016)1

25 February 2016

**Second activity report for the attention of the Committee of Ministers**

**1) Introduction**

1. This is the second activity report of the Advisory Panel of Experts on Candidates for Election as Judge to the European Court of Human Rights (“Panel”). The first activity report covered the period from the creation of the Panel on 10 November 2010 to 31 December 2013 (document Advisory Panel (2013) 12) of 11 December 2013). The present report covers the period from 1 January 2014 to 31 December 2015.
2. During that period, the Panel had to deal with an unprecedented workload. With fifteen vacancies on the Court it considered the *curricula vitae* of 53 candidates (taking into account replacement candidates and the fact that in two cases more than one list was submitted). Notwithstanding the challenging nature of this workload the Panel (whose work is of course entirely voluntary) succeeded in maintaining the quality of its scrutiny and evaluation of the candidates as well as respecting often very tight deadlines.

**2) The Panel's mandate and role in the election procedure**

3. The Panel was created by Committee of Ministers’ Resolution CM/Res(2010)26 of 10 November 2010. This decision was part of the implementation of the Interlaken Declaration of 19 February 2010 which called on the High Contracting Parties to ensure “*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.*”
4. According to Resolution CM/Res(2010)26 the Panel’s mandate is to advise the High Contracting Parties whether candidates for election as judge to the Court meet the criteria stipulated in Article 21(1) ECHR which reads as follows:

*“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.”*

The Panel is also required to send its opinions concerning the candidates on each list to the Parliamentary Assembly of the Council of Europe ("PACE").

5. In order to obtain the Panel's opinion, the governments shall provide the Panel with the names and *curricula vitae* of the three candidates selected at national level prior to their submission to the PACE. After having given its opinion to the government concerned, the Panel subsequently informs the PACE of its opinions.
6. The Panel addresses its views primarily to the High Contracting Parties and functions independently from the PACE which according to Article 22 ECHR elects the judges. However, by providing that the Panel's views are also transmitted to the PACE, Resolution CM/Res(2010)26 makes it clear that the PACE and in particular its Committee on the Election of Judges should benefit from the Panel's expertise to the fullest extent possible by taking into account the Panel's views. Taking full account of the Panel's views should be seen as complementary to the PACE's prerogatives for the election of judges under the Convention. The Panel assists in ensuring that the PACE has three candidates who fully satisfy the Convention criteria from which to elect a new judge. The presentation of three such fully qualified candidates in each list is what the PACE (and indeed the Convention) itself demands.
7. The Panel acknowledges the establishment of a full Committee on the Election of Judges by PACE whose members are required to have legal experience. This positive development underlines the fundamental importance which the process of the selection and election of new judges has with regard to functioning and integrity of the Court. The Panel was established to contribute to that process and can only do so if appropriate account is taken of its conclusions.

### **3) Evaluation of the Panel's functioning by the Committee of Ministers**

8. The Panel took note with appreciation the positive evaluation of its functions by the Committee of Ministers, and the favourable opinion of the ECHR. Following the submission of the Panel's Final Activity Report in December 2013 as well as the CDDH's report on the review of the functioning of the Advisory Panel, the Committee of Ministers took in November 2014 a series of decisions amending the 'Guidelines on the selection of candidates for the post of judge at the European Court of Human Rights'. The Deputies also adopted Resolution CM/Res(2014)44 amending Resolution CM/Res(2010)26. Many of the decisions taken followed recommendations which the Panel had made in its Final Activity Report. The Panel particularly welcomes that High Contracting Parties now regularly submit, together with the *curricula vitae* of candidates, information about their national selection procedures.
9. However, as experience in 2014-2015 demonstrated, various questions relating to the Panel's powers, its relations with the High Contracting Parties and PACE as well as the efficiency of the election procedure as a whole remain to be considered (see below paragraphs 54-56).

#### 4) Members of the Panel

10. The following members served during the period under consideration:

**Mr John L. Murray (Ireland) (Chairman)**

**Ms Nina Vajić (Croatia) (Vice-chair)**

**Mr Matti Pellonpää (Finland)**

**Mr Jean-Paul Costa (France)**

**Mr Christoph Grabenwarter (Austria)**

**Mr Michael Vilaras (Greece, until October 2015)**

**Ms Eliška Wagnerova (Czech Republic, until February 2015)**

**Ms Lene Pagter Kristensen (Denmark, as from September 2015)**

11. Following the resignation of Ms Wagnerova, the Ministers' Deputies appointed **Ms Lene Pagter Kristensen (Denmark)** as a new Panel member on 16 September 2015. **Mr Michael Vilaras** resigned in October 2015. The procedure to replace him has been launched and a new member is expected to be appointed in 2016.
12. The Panel members welcome the fact that letters inviting candidates to fill a vacancy now mention explicitly the requirement of good knowledge of at least one of the two official languages of the Council of Europe (English and French) and passive knowledge of the other. This reduces costs because it makes translation and interpretation superfluous and facilitates the organisation of telephone conferences.
13. Unlike members of other independent expert bodies in the Council of Europe, the Panel members do not receive any honoraria while working at home or otherwise. They are reimbursed expenses only while on mission in the exercise of their functions.

#### 5) Working methods

14. The procedure to elect a judge starts with a letter by the Secretary General of the PACE inviting the High Contracting Party concerned to submit a list of three candidates by a certain time-limit. The PACE communicates the letter up to fourteen months in advance before the election of the judge. This letter also draws the High Contracting Parties' attention to the existence of the Panel. Copies of those letters are sent to the Advisory Panel's Secretariat.
15. Upon receipt of the PACE's letter, the Panel immediately sends out a separate letter recalling the Panel's tasks and working methods and inviting the High Contracting Party to submit to it the names and *curricula vitae* of candidates as well as information on the national selection procedure.

16. According to the Panel's Operating Rule (vi) the Panel shall inform the High Contracting Parties of its views no later than four weeks after the submission of the *curricula vitae*. In order to allow for sufficient time to request additional information, if necessary, the Panel invites the governments to submit the *curricula vitae* at least 3 months before the expiration of the time-limit for the submission of the lists of candidates to the PACE. The Panel Secretariat collaborates with the PACE Secretariat with a view to coordinating, wherever possible, the submission of the Panel's views with the timetable of meetings of the PACE's Committee on the Election of Judges.
17. Point (iii) of the Panel's Operating Rules stipulates that the Panel's procedure shall be a written one. However, point (iv) provides for the possibility of organising meetings "where [the Panel] deems it necessary to the performance of its function".
18. Immediately after the receipt of the *curricula vitae* and information on the national selection procedure, the Secretariat forwards the documents to the Panel members with a request for comments within at the latest five working days. If needed, videoconferences or conference calls are organised.
19. The Panel seeks to adopt its final views on the candidates as far as possible by consensus. If this proves impossible, decisions are taken by a qualified majority of five votes (see point (ii) of the Panel's Operating Rules).
20. Point (viii) of the Panel's Operating Rules provides that the Panel may seek additional information or clarification from the High Contracting Party in relation to any candidate under its consideration. Should the members require additional information from the High Contracting Party, such information is normally requested within the next five working days.
21. If the Panel considers all candidates qualified, it informs the High Contracting Party of its view without providing any further information, as stipulated in Article 5(2) of Resolution CM/Res (2010)26.
22. If the Panel members have doubts as to a candidate's qualification, the Panel requests either additional information or clarifications from the government concerned. Requests are invariably made in writing.
23. If the Panel members conclude that a candidate does not meet the requirements of Article 21(1) ECHR, it provides the High Contracting Party with reasons for its opinion. If the Panel is unable to reach the required majority (see above paragraph 19), it informs the Government of this.
24. In accordance with Article 5(4) of Resolution CM/Res(2010)26, the Secretary of the Panel informs the PACE of the Panel's final views on the candidates. If candidates are presented who the Panel had rejected, the reasons given for their rejection to the High Contracting Party are reproduced. In the case of candidates who the Panel had considered qualified, only this conclusion is communicated, without providing any further information, as stipulated in Article 5(2) of Resolution CM/Res (2010)26.

## **6) Sources of information**

25. In addition to the *curricula vitae* and any further information provided by the governments upon the Panel's request, the Panel has received on several occasions unsolicited information from various sources (e. g. non-governmental organisations and individuals). The Panel does not actively seek information from such sources.
26. It should be emphasised that the Panel has never rejected a candidate as not qualified based on information received from a different source than the government. However, such (unsolicited) information from third parties could provide an objective basis for questions to be put to the government seeking further information. Thus, questions seeking clarification may be put to a government which are inspired or informed by objective elements in information from third parties. In any case, the Panel's final assessment of a candidate's suitability will only be based on material supplied by the government concerned including the responses to such questions.

## **7) Organisation of meetings, budget and secretariat**

27. In 2014-15, the Panel held four meetings (compared to seven meetings during the first three years of its existence). Appendix I contains a list of all meetings and a summary of items discussed. All meetings were used both for the evaluation of lists of candidates as well as for agreeing on the Panel's working methods and further refining criteria for the evaluation of candidates' qualifications. Meetings were also occasions for new Panel members to present themselves and become familiar with the Panel's working methods.
28. The Panel members recognised that while an exchange of information as well as the transmission of opinions may be, and is, carried out effectively in writing, a meaningful and fruitful exchange of views can in certain circumstances only take place during a meeting. This has been especially so in cases of complex matters, such as the criteria for the assessment of candidates' qualifications, the relationship with the other stakeholders in the election procedure or the examination of lists of candidates which give rise to exceptional difficulties. The Panel has not and does not propose to organise meetings at regular intervals, but only if it is justified both in terms of the workload and the importance of the issues to be discussed. In most cases, the Panel members have reached their final views exclusively through written procedure. Occasionally, conference calls have been organised, for example, to discuss additional information provided by a government or the *curricula vitae* of a replacement candidate.
29. In order to organise meetings in the most economical manner, the Panel members met either in the Council of Europe Office in Paris or in venues put at its disposal free of charge, such as in Vienna, at the invitation of the Austrian Constitutional Court, or in Dublin, with the assistance of the Courts Service. Except for one meeting, all meetings have been carried out without interpretation because all members present had at least a passive knowledge of both official languages (see above paragraph 12). The meetings have also been organised in a way to reduce the number of overnight stays, as far as possible, to one overnight stay.

30. The Chairman also held a number of bilateral meetings with major stakeholders in the election process, such as the Secretary General of the Council of Europe, the President of the European Court of Human Rights, the Secretary General of the PACE, the Chair of the Committee on the Election of Judges and the Chair of the Committee of Ministers. The Chairman valued these exchanges, in particular with the PACE, because they provided important opportunities to explain the Panel's approach and evaluation criteria as well as gaining enhanced appreciation of the parliamentary process.
31. On 8 July 2015, the Chairman had a fruitful exchange of views with the Committee of Ministers. The text of his intervention is contained in Appendix II.
32. Budgetary appropriation for the Panel in the Council of Europe's ordinary budget for 2014-2015 amounted to €18,400 per year. This amount roughly covered the costs of two meetings. The Directorate of Legal Advice and Public International Law (DLAPIL) provides secretariat services to the Panel in addition to its statutory functions and without any compensation. The unprecedented workload in 2014-2015 could only be dealt with effectively thanks to additional budgetary resources provided from the Court's budget which allowed the short-term recruitment of a temporary lawyer.

#### **8) Criteria for the evaluation of the qualifications of the candidates**

33. According to Article 21(1) ECHR, the judges "shall be of high moral character and must either possess the qualifications required for appointment to high judicial office or to be jurisconsults of recognised competence". The Panel has continuously reviewed the application of this provision in the light of its experiences. It also takes due regard 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.<sup>1</sup> As can be seen, the provision reflects the notion that a person may achieve the level of competence or experience envisaged by Article 21(1) ECHR through two main career avenues:
  - (i) Judicial experience and
  - (ii) Recognition as a jurisconsult
34. Before referring further to these two dimensions of qualification for the position of judge on the Court, it is appropriate at this point to briefly mention the requirement of "*high moral character*" as referred to in Article 21(1) ECHR. It seems that this criterion has rarely arisen as an issue. In this connection a reference can be made to the First Activity Report (December, 2013) of the Advisory Panel where it stated, at paragraph 28 that "in the Panel's discussions, qualities such as integrity, a high sense of responsibility, courage, dignity, diligence, honesty, discretion, respect for others and the absence of convictions for crimes were mentioned as key components of this requirement, as well as (obviously) independence and impartiality".<sup>2</sup> Of

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<sup>1</sup> CM(2012)408

<sup>2</sup> The Panel also made reference to the resolution on judicial ethics adopted by the Plenary of the European Court of Human Rights in 2008.

course the Panel must assume that a judge or jurist presented as a candidate by a government is of high moral character, absent any objective element, such as a record of a disciplinary or criminal offence, in the material provided to it. As the Panel also observed in its last report, it is not expressly empowered to convene candidates for interviews and it is in those circumstances in any event difficult to make judgments concerning the character of candidates unless it is otherwise manifestly apparent.

35. The criteria provided for in Article 21(1) ECHR, although very general in its terms, fall to be understood and applied in the context of the Convention as a whole. The object and purpose of the Convention, as an instrument intended to guarantee rights which are practical and effective rather than theoretical and illusory, should accordingly be taken into account in its interpretation. The effectiveness of the Convention is influenced by the willingness of national authorities to follow the judgments of the Court. They would readily do so if the quality of the reasoning is high and if the reputation of the Court is beyond question. The process of establishing and maintaining the reputation of the Court is something which occurs over the long term and is, to a large extent, dependent on the quality and experience of the judges. The Court itself has emphasised the importance of the quality of judges for its own authority.<sup>3</sup> Having as judges at the Court persons who come from positions at a high level in the Member States obviously will have positive repercussions for the reputation of the Court. If it were to pass, for example, that a disproportionate number of judges were relatively young, lacking in extended experience and had not reached a prominent position in the national judicial system or in the academic world, then acceptance of the Court's case law may be negatively influenced. In short, to fulfil the object and purpose of the Convention, a court should enjoy authority and respect with national judiciaries at the highest level and in member states generally. Apart from the importance of this for the standing and reputation of the Court as such, it also promotes a respectful dialogue between the Court and the highest national courts. This is important for the enforcement of Convention rights at national level in accordance with the jurisprudence of the Court which, in turn, would contribute to a reduction in the volume of cases coming before the Court.
36. Although the Panel has continued to reflect and examine the criteria envisaged by Article 21(1) ECHR from different perspectives in the light of its actual experience in evaluating a large number of candidates over the last two years, the fundamentals of the criteria to be applied, as explained in the First Activity Report, remain essentially the same. In the broadest terms these include professional experience of long duration at a high level. The Panel endeavours to obtain a comprehensive picture of the candidates and carries out a global assessment of all the qualities of a candidate, whatever his or her professional career path, with a view to determining whether a candidate has an aptitude for exercising the judicial function at a high level which is appropriate for a constitutional or international court (of which knowledge of human rights law is only one, albeit important, component).

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<sup>3</sup> 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)

37. “*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) ECHR, *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 unless they otherwise qualify as juriconsults. The provision must be given a substantive interpretation consistent with its purpose and not a purely formal one. Accordingly, even in the case of candidates holding office in a highest national Court, the Panel’s view is that such persons would not, for that reason alone, be automatically considered qualified to be candidates for election to the Court. Nonetheless, actual service for a significant number of years on a Supreme Court should mean that a judge is qualified. The publication of important books or articles may also be an important factor when considering a candidate’s qualifications, in addition to long experience as a professional lawyer or significant length of judicial service at a high level.
38. 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, some national systems require experience as a judge of at least ten to fifteen years minimum before being eligible for appointment to the highest court. Consistent with the global appreciation of a candidate’s qualities, account is obviously taken of the entire judicial career of a candidate, including whether he or she sat on a court concerned with, directly or indirectly, enforcing human rights or complex interpretive issues of law.
39. 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, many countries find it difficult to attract three candidates of an equally long professional experience.<sup>4</sup> It is, therefore, even more important that the High Contracting Parties widely advertise calls for candidatures at national level<sup>5</sup> in order to ensure to have the highest number of qualified candidates possible.

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<sup>4</sup>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.

<sup>5</sup> See the Guidelines of the Committee of Ministers on the selection of candidates at national level.



40. Long professional experience is also 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.
41. 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 thorough consideration so as to ensure that candidates proposed are of mature professional experience and unquestionable qualifications for the exercise of a high judicial function.
42. The Panel reiterates its concern about the low number of candidates with substantial judicial experience, particularly in the highest courts. While the Panel has considered many excellent candidates contained in the various lists, it continues to be disappointed at the relatively low number of candidates with long judicial experience at a high, and in particular highest, court at national level. Obviously, those who are judges and those who are jurisconsults play an equally important role as members of a court such as the Court of Human Rights. It is a question of achieving a balance of background and experience. It is convenient to explain at this point that many, if not most, of the candidates which the Panel have found not to meet the criteria of Article 21(1) ECHR were excellent experts in the law and, no doubt, in good standing with their professional peers but nonetheless, being at a fairly early stage of their careers, had not yet the length or breadth of experience from which it could be said they had acquired all the judicial qualities necessary for election. Article 21(1) ECHR is concerned with the election of persons as judges, not simply the search for good experts. The Panel is of the view that the High Contracting Parties should take every reasonable step possible to encourage a greater number of very experienced judges from the highest courts to make themselves available as candidates for election to the Court
43. Article 21(1) ECHR 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*”. Experience of working in teams at international level would be an important asset, as judges need to be able to work in a collective body such as a court in an international environment representing different legal traditions.
44. 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 university of standing 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. Thus, being a ‘jurisconsult’ means

more than just having good qualities and expertise as a lawyer at a certain level. One may have acquired good knowledge of human rights and the Convention by attending courses on the subject and listening to lectures. However, without long academic or other professional experience and important publications a lawyer may fail to qualify as a “jurisconsult of recognised competence”, notwithstanding a solid knowledge of Convention law. Very many post-graduates of ability with modest experience would have a solid knowledge of such law. Similarly, a professor in a relevant field of law could not be said to automatically meet the criteria of Article 21(1) ECHR if his or her appointment was of recent origin and professional experience was limited. It would also be relevant to identify whether such jurists have any experience in advising or appearing in cases involving the protection of such rights or other constitutional cases before national or international tribunals.

45. While the experience of a jurisconsult in the field of Convention law, or fields of law relevant to it, are highly material factors to be taken into account, it must be kept in mind that the essential qualifications to judge Convention issues can be acquired in a number of ways other than working with such issues on a day-to-day basis. It may be said that a professor of European and/or public international law might normally be regarded as having competence in the field covered by the jurisdiction of the Court, even if he or she has not specialised in human or fundamental rights and the same would be true for professors of constitutional law. Professors in these and other fields, however, should show some real engagement during their career with questions of human rights related to their field of law, e.g. a professor of criminal law may have dealt with the right to freedom, rule of law, fair trial, and so forth. 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 a mature professional experience qualify as “jurisconsults of recognised competence”.
46. It is also the case that a judge who may not meet the criteria of Article 21(1) ECHR as someone qualified “for appointment to high judicial office”, may, because of a parallel academic career with important publications in relevant fields of law, meet the criteria of jurisconsult “of recognised competence”.
47. The Panel also has regard to the requirement as to gender balance, although the High Contracting Parties have invariably respected this by including at least one male and one female in their lists.

#### **9) Examination of *curricula vitae* of candidates in 2014-15**

48. In 2014-15, the Panel examined 17 lists of candidates (compared to 17 during the first three years of its existence). In respect of one list, the Panel had not yet adopted its final views as of 31 December 2015, pending the examination of additional information provided by the country in question.
49. In 2014-15 no government submitted the *curricula vitae* to the PACE before the Panel had the opportunity to give its final views on the candidates.

50. Candidates were consisting of 41% judges, 22% university professors, 13% lawyers and 22% others.
51. In respect of only three country lists the Panel considered all candidates to be qualified within the meaning of Article 21(1) ECHR without requesting further information.
52. In the case of all other lists, the Panel requested additional information on one or more of the nominated candidates and the national selection procedure (requests for additional information have become the rule rather than the exception). In respect of three lists, the Panel came subsequently to the final conclusion that the candidates met the requirements of Article 21(1) ECHR. In several cases, candidates were replaced by their governments, but in only one case such replacement candidates were eventually considered qualified.
53. In one case, the Panel could not reach the required majority on one candidate who was however replaced by another candidate found to fulfil the requirements of Article 21(1) ECHR.
54. However, in six cases candidates were maintained on the list and submitted to the PACE despite the Panel's negative views on one or more of the candidates. The PACE rejected only one of those lists and accepted all others. In two cases candidates who in the Panel's view did not fulfil the criteria of Article 21(1) ECHR were recommended for election by the Committee on the Election of Judges and ultimately became judges of the Court.
55. The 'Report on the follow-up to the Brighton Declaration' submitted to 125th session of the Committee of Ministers held in Brussels in May 2015 had welcomed "*the fact that the Sub-Committee always gives substantial weight to the views of the Advisory Panel when assessing the suitability of candidates*" which was a correct statement at the time. Since then, the situation has however deteriorated. Some High Contracting Parties appear to have purposely set out to bring their lists to the PACE irrespective of the Panel's views and the PACE seem to readily accept those lists, in particular if only one of the candidates is considered by the Panel not to fulfil the requirements of Article 21(1) ECHR. The Panel acknowledges the difficulties often encountered by High Contracting Parties in finding three candidates who all fully satisfy the Convention's criteria. However, as long as such are the requirements under the Convention, such disregard for its views undermines the Panel's functions and, if it were to become a pattern, its *raison d'être*. This is an issue of mutual concern which needs to be addressed.
56. The Panel also notes with concern that two High Contracting Parties submitted twice their lists which were fully or partially rejected by the Panel. Another worrying development is the fact that several governments did not respect the time-limits set by the PACE and the Panel. Delays in the submission of lists amounted in some cases to up to a year. Fortunately in most such cases the judges sitting on the Court in respect of the countries concerned could continue to exercise their functions, so that the effective functioning of the Court was only marginally affected. While the Panel makes every effort to process the lists received rapidly, it obviously can only give an opinion after the lists are received.

57. Despite an unprecedented workload in 2014-2015, the Panel has provided its first views within the time-limits foreseen by Resolution CM/Res(2010)26 (four weeks). However, since in 80% of the cases additional information was required, the average time for communicating the final opinion was eight weeks.

## **10) Conclusions and outlook**

58. It has been said that the only armour of a court is the cloak of public trust. It is not surprising that the Committee of Ministers itself has repeatedly emphasised that the overall success of the Convention's system depends on confidence in the judicial authority of the Court. The common minimum standards for the protection of human rights in Europe are defined by the Court and must be fully observed by all High Contracting Parties, in particular at governmental and judicial level. This in turn means that it is crucial that the Court is composed of judges with the necessary breadth and depth of professional experience so that their judgments can attract the respect and confidence of its peers in national supreme and constitutional courts.

59. It must be emphasised that the overall success of the Convention system in the strengthening and enhancement of protection afforded to human rights in Europe is immense and due essentially to the contribution made by the jurisprudence of the Court itself. Although weaknesses in the system have been identified by the Committee of Ministers and others, including in the process for the selection and election of judges, nothing said in this report on that particular topic can take away from that success.

60. Based on its experience since it was established, and in particular on the large number of lists of candidates which it has had to consider since the last Activity Report, the Panel is satisfied that its existence has contributed to improving the quality of candidates selected at national level, not least because it has helped to focus the attention of most High contracting Parties on this very issue. Perhaps more important, many, though regrettably not all, governments have replaced candidates which the Panel found not to be qualified with candidates that were. Obviously, the primary responsibility lies with the High Contracting Parties to fulfil their obligations by selecting only candidates, who in a substantive way, fully meet the criteria provided for in Article 21(1) ECHR. A vacancy on the Court is a vacancy for a judicial position, and requires the election of a person who, inter alia, can exercise sound judgment based on mature professional experience.

61. Ultimate responsibility lies with the Parliament to consider three fully-qualified candidates and to elect one of them. Regrettably, it is difficult to discern to what extent the Parliamentary Assembly, in particular the Parliamentary Committee on the Election of Judges, attach weight to the views which the Panel are obliged to communicate concerning the candidates on the lists which they are considering.

62. In an ideal world the existence of the Panel might not be necessary. Nonetheless, most national systems have an independent process for evaluating the suitability of persons to be appointed to high judicial office and it would seem logical that, in one form or another (not necessarily in the form of the present Panel) such a mechanism should exist at a pan-European level in respect of the Court. Moreover, it should

also be borne in mind that the Panel was not established to address a hypothetical problem or to simply provide good governance or be an aid in the selection of candidates. It was established by the Committee of Ministers to address a real problem concerning a consistent quality of candidates for election as judges. This is a problem identified by the Court itself, including by the former President, Jean Paul Costa, and by the High Contracting Parties in the Interlaken/ Izmir/ Brighton/ Brussels Declarations. The problem so identified was also the basis of the Guidelines of the Committee of Ministers on Selection of Candidates for the Post of Judge of the European Court of Human Rights.

63. Any review of the process of selecting and electing judges, including from a short-term perspective, could examine whether steps can be taken to make election as a judge of the Court more attractive as a career from an overall perspective to persons of high calibre in the Member States.<sup>6</sup>
64. The Panel members have also taken particular note of the CDDH Report on the long-term future of the European Court of Human Rights (CDDH (2015)R84 of 11 December 2015), especially those sections on the quality of judges and the election procedure. Having regard to the matters considered in this Report, the Panel is of the view that the approach of the CDDH, suggesting a comprehensive review of the selection and election procedures for judges, is well-founded (cf. paragraph 102 of the CDDH Report). In particular, based on its experience, the Panel appreciates that such a comprehensive review could be a sometimes difficult and drawn out process, which is all the more reason that, if it is to be initiated at all, it is initiated in the immediate future. On the other hand, such a broad review should not inhibit the consideration and initiation of short-term measures could be taken to improve the quality of judges. Members of the Panel would be willing to respond to any requests for co-operation with such a review as suggested in the CDDH Report.
65. Finally, it is appropriate to recall that in evaluating candidates for judicial office being proposed by Member States, and from time to time finding that certain candidates, notwithstanding certain professional merits, do not meet the criteria of Article 21(1) ECHR, the Panel is simply fulfilling the functions conferred on it by the Committee of Ministers. For the Panel to be effective and fulfil its *raison d'être* it is important that all governments of the High Contracting Parties give due and full weight to the opinions which the Panel are obliged to express. For the same reason, it is equally important that the Parliamentary Assembly has due and sufficient regard for the views of the Panel. The Panel after all serves the interests of the Assembly by endeavouring to ensure that the three candidates submitted to it for each vacancy are fully qualified within the terms of Article 21(1) ECHR.

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<sup>6</sup> In this context reference can be made to paragraph 107 of CDDH Report on the long-term future of the European Court of Human Rights (CDDH (2015)R84 of 11 December 2015)

## **Appendix I – Meetings of the Advisory Panel**

### **4-5 September 2014, meeting held at the Constitutional Court in Vienna**

The Panel welcomed the newly elected members Ms Wagnerova and Mr Vilaras; agreed on working methods in view of the incoming tide of lists; reviewed the criteria for the evaluation of the qualification of candidates and their assessment (including the use of non-official sources); considered the situation regarding the lists of Serbia and Slovakia.

### **21-22 December 2014, meeting held at the Constitutional Court in Vienna**

The Panel considered the lists submitted by Andorra, Armenia, Finland, Latvia, Liechtenstein, and Monaco; took note of the decisions taken by Committee of Ministers on 28 November 2014 (CM/Del/Dec(2014)1213); considered several recurring questions regarding its work, such as the consideration of lists submitted by ‘microstates’ and the withdrawal of Panel members from participating in the evaluation of candidates because of personal, professional or other contacts with one or more of the candidates.

### **10-11 February 2015, meeting held at the Paris Office of the Council of Europe**

The Panel considered the lists submitted by Azerbaijan, Latvia, Luxembourg, Monaco (replacement candidate); reviewed the criteria for the evaluation of the qualification of candidates; considered the practice of seeking additional information from governments.

### **7-8 September 2015, meeting held at Dublin Castle**

The Panel considered the list submitted by Cyprus and information regarding Slovakia and Slovenia; reviewed the criteria for the evaluation of the qualification of candidates; decided to prepare a second activity report for the period 2014-15.

**Appendix II – Intervention by Mr John Murray at the 1233th meeting of Ministers’  
Deputies on 8 July 2015**

« C’est avec grand plaisir que je me présente aujourd’hui devant vous, pour la première fois, pour vous faire part des travaux du Panel consultatif d’experts sur les candidats à l’élection de juges à la Cour européenne des Droits de l’Homme.

Avant d’entrer dans le vif du sujet, je souhaiterais tout d’abord remercier le Comité des Ministres au nom du panel pour cette opportunité que vous m’offrez de tenir un échange de vues avec vous aujourd’hui. Il s’agit en effet du troisième échange de vues entre le Comité des Ministres et un président du Panel après les deux premiers échanges avec Luzius Wildhaber en avril 2012 et janvier 2013.

Pour moi c’est une opportunité précieuse de pouvoir m’adresser à l’organe qui a créé notre Panel en décembre 2010 et qui a prolongé le mandat du Panel en février 2014. Mes collègues et moi, nous sommes très reconnaissants du soutien du Comité des Ministres que nous avons reçu lors de l’évaluation des activités du Panel l’an dernier. Cette évaluation très positive et l’amendement de la Résolution ont renforcé la position du Panel et ont amélioré ses conditions de travail.

Permettez-moi de vous présenter d’abord quelques chiffres par rapport aux activités du Panel depuis sa création en décembre 2010.

Le Panel a examiné au total 33 listes de candidats, un examen est en cours et une autre liste de candidats est attendue. Dans la grande majorité des cas, c’est-à-dire 19 listes, le Panel a considéré que les candidats remplissaient les conditions de l’article 21(1) de la Convention européenne des droits de l’homme. Dans trois de ces cas des candidats étaient remplacés par les gouvernements après un premier examen par le Panel. Dans plusieurs cas le Panel a demandé des clarifications ou des informations supplémentaires qui ont été fournies par les gouvernements rapidement. Mes collègues et moi nous nous réjouissons de cette très bonne coopération en général qui nous permet d’entretenir un vrai dialogue avec les gouvernements lors de l’examen d’une liste.

Toutefois, il faut aussi mentionner des zones d’ombres. Dans trois cas des listes ont été soumises à l’Assemblée parlementaire sans attendre l’avis du Panel. Heureusement, cela ne s’est plus produit au cours de ma présidence. Dans les cas de huit listes, les gouvernements ont maintenu au moins un(e) candidat(e)s que le Panel n’avait pas considéré(e) comme remplissant les critères de l’article 21(1) de la Convention européenne de droits de l’homme. Dans certains cas ces listes ont été rejetées ensuite par l’Assemblée Parlementaires, dans d’autres cas des élections ont eu lieu. Plusieurs juges ont par la suite été élus qui n’ont pas été jugés qualifiés par le Panel. Evidemment, cette situation est préoccupante pour toutes les parties prenantes à l’élection de juges et met en question la raison d’être du Panel.

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I would add some more recent statistics. In 2014, the panel provided final opinions on three lists. In 2015, it dealt with 12 lists of candidates. In some cases we had more than one list from the same country. Certain lists were accepted without the need for clarification or further information.

In 2014-2015, which are the two years since my predecessor spoke here to your Committee, there were three countries whose lists were accepted without any need for additional information. Three lists were approved in the light of additional information furnished by the governments. During the period in question, two judges who were elected by the Assembly, had not been considered qualified by the Panel. In four cases, candidates were maintained on the list and submitted to the Parliamentary Assembly despite negative views on one or more of the candidates. The Parliament rejected one of the lists and accepted the others.

Having dealt with the factual background to the work of the Panel, I propose just for a moment to turn to the nature of the issue with which we are mutually concerned. Its nature is reflected in a statement in the Committee on Legal and Human Rights Affairs of the Parliamentary Assembly when it emphasised “the uncontested importance of ensuring that candidates are of the highest calibre so as to safeguard the quality, clarity and consistency of the Court’s case law and the latter’s authority.” These concerns are also reflected

in the Interlaken, İzmir and Brighton declarations of the High-level Conferences, namely, that the authority and credibility of the Court depend in large part on the quality of the judges and the judgments they deliver. I emphasise that it is not only the quality of the judges but the quality of the judgments which are referred to. The Declarations variously refer to the necessity of attracting candidates of the highest possible quality, or of the highest possible calibre.

There is no doubt that the aura of authority and credibility of a court depends on the quality of its judgments and the quality of its judges.

Now, we all know and acknowledge that the Court has been a tremendous success. It has made an unprecedented and extraordinary contribution to the defence and protection of human rights throughout Europe. Anything I shall say now is not intended to take away from that fact.

Judgments of the Court can deal with highly sensitive socio-political issues, deeply and profoundly affecting the diverse societies within Europe. Of course, there are tens of thousands of cases which the Court deals with which, while never routine and always particularly important for the parties concerned, relate to what is sometimes imprecisely called core rights. Perhaps to put it better, cases consisting of self-evident breaches of the Convention that are largely decided on the facts. They are often before the Court because of a lack of remedy at national level.

What one wishes to emphasise is that it is important that the Court not only has judges of the quality to decide those cases which may be relatively straightforward, but also to decide cases which involve a complex balancing of sovereign rights, the obligations of states, and the margin of appreciation to be accorded to them, cases which concern crucial decisions vital to the interests of states and individuals.

There are many areas of human rights law in which the reconciliation of such competing rights have to be resolved in a judicially objective fashion. One might have, for example, cases involving issues such as euthanasia, abortion, the status of frozen embryos, the delicate balance between anti-terrorist provisions and individual liberty, or freedom of expression and a right to a good name. All of these involve a judicial appreciation and balancing of competing rights and interests which have to be expressed in a cogent and rational way, with intellectual rigour that gives a judgment its own integrity and credibility.



If such issues were decided on the basis that the result is either a good idea, such as it is a good idea to protect human rights, in this way, well then the task is relatively easy. It's good to do this, it's not good to do that – that is what legislatures do, that is what law-makers do. Judges are supposed to – and must – anchor their decisions in the legal norms of the Convention and its principles, and credibly do so, without running the risk of being seen as philosopher kings who can impose their own personal view as to what the law should be from now on in Europe.

It is in that context that references in Council of Europe documents to the credibility of judgments assume great importance. That Brighton Declaration speaks of a dialogue between the Court and the supreme courts and constitutional courts of Council of Europe member states. If one wishes such a dialogue to take place, as envisaged, to make the Convention operate better, there must be confidence in the Court by constitutional and supreme courts.

Now having said all this, the problem is not hypothetical. The Panel was not created in order to encourage best practice. It is there to address a credibility issue which has been identified by the institutions of the Council of Europe, and in a letter to this Committee in June, 2010 by the then President Jean-Paul Costa, now a member of the Panel. I am not commenting on the degree to which this is an actual problem, but it is one that is there to be addressed and it can only be addressed by ensuring that the process of electing judges works. That is why a golden thread which runs through the criteria applied by the Panel is the need for candidates to have long or mature experience at a high level in their professional career as jurists or judges.

Why? The Panel has explained in detail how it applies its criteria in the Activity Report (December, 2013) which I shall not repeat now. But our approach consists of a global assessment of all the qualities of the candidates, whatever their professional career path, with a view to determining whether a candidate has an aptitude for the judicial function, in particular the judicial interpretation of the law at a level that is appropriate for a constitutional or international court.

I referred earlier to the number of lists submitted to the Panel. If we get a list that is manifestly qualified, then that is fine. As I said, in vast the majority of cases, lists have been approved. But there are two disappointing aspects of our experience, one of which was also mentioned as a problem at the time of our Activity Report.

First of all, we have a very high proportion of candidates who are just qualified, 'qualifiés de justesse'. A court like the European Court of Human Rights should be attracting a much higher proportion of high-calibre candidates from the member states and it is not.

There is a tendency at national level to say 'well X is a well-known lawyer or jurist with an expertise at a good level on human rights and that is sufficient.' That is too narrow a focus for selecting candidates. Frequently we have to say these are very fine lawyers of good standing at their level but they do not have the degree of experience, of long or mature experience, at a high-level which gives them the qualities necessary for the exercise of judicial function at the level of a court such as the European Court of Human Rights.

The real danger is that the Court could be perceived as a committee of experts rather than a judicial body, which would undermine its credibility. Neither would that set a good example for attracting experienced high level candidates. My main point is that there can be too much focus on knowledge and expertise in human rights without looking at whether candidates have the essential qualities and professional experience necessary to be a judge at the highest level. We are looking,

first and foremost, for a judge - of course knowledge of the law, including the Convention and its case law being evidently very important too.

The second disappointment is the paucity of judges from high-level national courts coming forward as candidates. There have been notable exceptions, but the Court needs a high proportion of judges of such calibre and experience. The Interlaken declaration and other similar documents refer to a balanced composition of the Court. Such a balance requires the inclusion of a significant number with past judicial experience at high-level, bearing in mind also that it is a nine-year term, and it may readily take two or three years to become fully familiar with the culture and working methods of a court that is new to the appointee.

If the level of experience of an appointee before they get to the Court is at a low level, questions will be raised concerning the authority of the Court. One may also find in the Committee of Ministers that judgments of the Court may be more readily contested by member states as to their implementation because of perceived weaknesses in the reasoning and thus the authority of the Court. Focus on judicial experience and aptitudes is a crucial aspect. As in all professions one tends to find those who have the best aptitudes and qualities among those who have extensive and mature professional experience. Any weakness in the quality of persons elected to the Court may also give a veneer of credibility to unfair criticism of judgments of the Court.

The Panel applies a minimum standard, by reference to Article 21(1) ECHR, and it tries as best it can to be objective and consistent by looking globally at the qualities of the candidates. We do not act rigidly and we endeavour to identify the qualities of each individual that are positive and that may make him or her qualified, but it is a minimum standard. It is a threshold and the objective lies in the mission given to the Panel to ensure that there are three qualified candidates, so that the Parliamentary Assembly can exercise its prerogative on electing judges from among substantively qualified candidates. Then it has the full plenitude of its prerogatives to exercise. Of course the Parliamentary Committee interviews candidates, which we do not do. It can conclude, as a result of interviews that something about a candidate renders him or her not qualified, because, for example, they do not have the language qualifications they are required to have or something emerges in the course of the interview that undermines their confidence in the qualities of a candidate for election.

The Panel fully acknowledges that the Parliamentary Committee has the right and the power to decide that somebody we have considered eligible is not qualified. But since we rely on objective criteria and minimum qualifications, we would expect and hope that generally the Committee and the Parliamentary Assembly would not consider qualified somebody whom the Panel did not. In the process which we have one cannot assume, I suppose, that this will never happen. It is a question of degree. I should add that I have had meetings with the Chairman of the Parliamentary Committee and on a personal level our relations are very good and very positive.

However, the Panel has been deeply concerned that in a number of cases, in particular recently, its opinions seem to have been disregarded and we shall reflect on that to consider what we can do for the future, if anything, to address such a situation.

Some member states appear to have deliberately set out to bring their lists to the Parliamentary Assembly no matter what the Panel says. Some, who have seen that happen successfully, have seemingly been inspired to do the same. If that is the way it should be, well then that is the way it

should be. In that case, there is no need for the Panel. This is an issue of mutual concern to be addressed.

It is not a happy situation to have persons elected to the Court who have not been approved by a body such as the Panel, but I do feel that there is a need in one form or another, to have at a pan-European level a body of professional experts which evaluates whether or not candidates are qualified. History tells us that national governments when they are given the choice often focus on their own particular circumstances and the landscape in front of them without looking at the broader landscape. That is in the nature of things.

At national level, most judges are appointed or promoted by professional bodies containing professionals and logically it should be the same at pan-European level. It does not have to be in the same form as we have it now. The panel is very happy to do the task we have been given because we believe it is an important task. We are not concerned whether we have enhanced powers but that somebody has powers to make a professional and effective evaluation of candidates. One would have, for example, a new body made up of multiple disciplines, a majority of judicial experts, of maybe six and then four or five others, perhaps parliamentarians, or lay people or others, to make the assessment. The Panel are not experts in what is possible in the architecture of the Council of Europe – as to what is practically or politically feasible.

Finally, let me suggest that there are grounds for reflection on the whole process for the election of judges, including how the criteria are, or should be, expressed in Article 21 ECHR. After all, the current process was created in a different era, in the 1950s when the Council of Europe was obviously much smaller, and there was a different judicial structure, a Commission, and a part-time Court.

What might also be reflected upon distinctly and separately and maybe looked into by one of the committees is what are the incentives but particularly the disincentives at national level to candidates of high quality putting themselves forward, in particular those of the higher courts. These could be identified. It may, for example, be a deterrent that there is no adequate career path if a person joins the Court for nine years and subsequently has no position or work after that single term is completed. Is there adequate provision as to what their career path will be if they have already sacrificed the one in their own country?

There is a Committee of Ministers' decision saying member states should ensure that former judges be provided or assisted in obtaining employment at an appropriate status at the end of their fixed mandate. Is this being implemented? One might look at the last 5 or 6 years and see whether this is so. But my main point on this is that there seems to be a need to identify what disincentives exist at national level to high quality candidates coming forward. Consulting members of the relevant professions, high level academics and judges would be important in that context.

Having an overall reflection on the whole process should not distract from the immediate or short-term occupation of maintaining and enhancing the quality of judges with a view to ensuring the Court's success in the future, and the status and authority which it enjoys. This gives rise to the immediate issues referred to above and which must be addressed.

That, after all, is our mutual mission.”