

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

THE SECRETARIAT



Advisory Panel (2017)2

30 June 2017

Third activity report for the attention of the Committee of Ministers

1) Introduction

1. This is the third activity report of the Advisory Panel of Experts on Candidates for Election as Judge to the European Court of Human Rights (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 second activity report covered the period from 1 January 2014 to 31 December 2015 (document Advisory Panel (2016) 1 of 25 February 2016). The present report covers the period from 1 January 2016 to 30 June 2017 which was the end of the mandate of four members of the Advisory Panel of Experts on Candidates for Election as Judge to the European Court of Human Rights and contains in the conclusions a *bilan* of six years of operation (paragraphs 56 and seq.).
2. During that period from 1 January 2016 to 30 June 2017, the Panel considered the *curricula vitae* of 38 candidates (taking into account replacement candidates). Notwithstanding the challenging nature of this workload the Panel (whose work is 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 that called on the High Contracting Parties to ensure “*full satisfaction of the Convention 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 opinions, 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) demands.

3) Members of the Panel

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

Ms Nina Vaji (Croatia) (Chairperson)

Mr John L. Murray (Ireland) (Chairman until 31 May 2017)

Mr Matti Pellonpää (Finland)

Mr Jean-Paul Costa (France)

Mr Christoph Grabenwarter (Austria)

Ms Lene Pagter Kristensen (Denmark)

Ms Maria Gintowt-Jankowicz (Poland)

8. Following the resignation of **Mr Michael Vilaras (Greece)** in October 2015, the Ministers Deputies appointed **Ms Maria Gintowt-Jankowicz** as a new Panel member for a full term of three years on 30 March 2016. On 6 July 2016, the Ministers Deputies reappointed **Ms Nina Vaji** for a second full term of three years ending on 7 May 2019.

9. To replace the four members of the Panel whose term would expire on 30 June 2017, namely of **Mr John L. Murray**, **Mr Matti Pellonpää** (term of both members renewed already once so no possibility for re-appointment), **Mr Jean-Paul Costa** and **Mr Christoph Grabenwarter**, the Committee of Ministers launched a call for proposals for appointment on 3 April 2017.
10. Given the expiry of the term of the Chair of the Panel **Mr John L. Murray** in the end of June 2017 and the impossibility for its further renewal, the Panel elected in the end of its meeting in Vienna in May 2017, **Ms Nina Vajithén** Vice-chairperson of the Panel, as the new Chairperson in order to facilitate an orderly transition by having a chairperson in situ to conduct the meeting when the newly composed Panel first meets and to perform other functions of chair during the transitional period.
11. The Panel members welcome the fact that letters inviting candidates to fill a vacancy 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.
12. 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.

4) Working methods

13. 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 Party's attention to the existence of the Panel. Copies of those letters are sent to the Advisory Panel Secretariat.
14. Upon receipt of the Panel'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.
15. 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 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.

16. 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 "with [the Panel] deems it necessary to the performance of its function".
17. 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.
18. 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).
19. 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.
20. 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.
21. If the Panel members have doubts as to a candidate's qualifications, the Panel requests either additional information or clarifications from the government concerned. Requests are invariably made in writing.
22. In cases where the Panel considers one or more candidates not suitable, the High Contracting Party is expected to submit new candidates to the Panel. In that context, the question arises whether the High Contracting Party needs to reopen the whole national selection procedure in order to identify suitable replacement candidates or whether it may simply present (an) other candidate(s) from the previous selection procedure. This question cannot be answered in the abstract. Depending on the national selection procedure and the quality of candidates participating, it may in certain cases be justified not to start a new procedure, in particular if only one candidate has to be replaced. In this context, it may be recalled that the CDDH had "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" (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, CM(2013)175, paragraph 39). In other cases, in particular if two or three candidates were not found qualified, it is difficult to imagine that other candidates from the same selection procedure will be more qualified than the ones chosen and subsequently rejected by the Panel (unless more meritorious candidates had been discarded for extraneous motives which in itself would be an indicator of serious flaws in the initial selection procedure).

23. 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 whom the Panel had rejected, the reasons given for their rejection to the High Contracting Party are reproduced. In the case of candidates whom 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.

5) Sources of information

24. In addition to the *curricula vitae* and any further information provided by the governments upon the Panel's requests, 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.

25. 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 that 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.

6) Organisation of meetings, budget and secretariat

26. From 1 January 2016 to 30 June 2017, the Panel held three meetings (compared to four meetings during the previous two years and 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 considering ways to further improve relations with the PACE's Committee on the Election of Judges as well as for reflecting upon ways to strengthen the role of the Panel in the (s)election process of ECtHR Judges. Meetings were also occasions for new Panel members to present themselves and become familiar with the Panel's working methods.

27. 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.

28. In order to organise meetings in the most economical manner, the Panel members met in venues put at its disposal free of charge, such as in Vienna, at the invitation of the Austrian Constitutional Court, or in Copenhagen, at the invitation of the Supreme Court of Denmark. All meetings have been carried out without interpretation because all members present had at least a passive knowledge of both official languages. The meetings have also been organised in a way to reduce the number of overnight stays, as far as possible, to one overnight stay.
29. The Chairman also held a number of bilateral meetings with major stakeholders in the election process, such as 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 approach and evaluation criteria as well as gaining enhanced appreciation of the parliamentary process. The Panel members had an exchange of views with the Secretary General of the PACE on the respective roles of the Panel and the PACE Committee on the election of judges during the Panel meeting in Copenhagen in November 2016.
30. On 2 March 2016 and 1 March 2017, the Chairman had a fruitful exchange of views with the Committee of Ministers. The text of both interventions is contained in Appendix II.
31. Budgetary appropriation for the Panel in the Council of Europe primary budget for 2016-2017 amounted to € 1 900 per year. This amount did not cover the actual costs of the Panel activities. 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 allocated resources do not reflect actual needs. Operational costs could only be covered thanks to additional budgetary resources provided from the Council budget that also allowed the short-term recruitment of a temporary lawyer.

7) Criteria for the evaluation of the qualifications of the candidates

32. According to Article 21(1) ECHR, the judges “ s h a l l b e of high moral character and must either possess the qualifications required for appointment to high judicial office or to be jurisconsults of recognised c o m p e t e n c e .” 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.¹ 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

¹ CM(2012)408

33. 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” 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”.² Of 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.
34. 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.³ 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 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.
35. 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

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

³ 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).

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).

36. “ Q u a l i f i c a t i o n s f o r a p p o i n t m e n t s t o h i g h j u d i c i a l o f f i c e s ” o f t h e C o u r t c a n i s s u e j u d g m e n t s t h a t i n e f f e c t d e p a r t f r o m o r e v e n i m p l i c i t l y o v e r r u l e j u d g m e n t s o f t h e h i g h e s t n a t i o n a l c o u r t s . T h o s e c o u r t s m a y n o n e t h e l e s s b e o b l i g e d , i n a c c o r d a n c e w i t h n a t i o n a l l a w s i m p l e m e n t i n g t h e C o n v e n t i o n , t o r e s p e c t a n d f o l l o w t h e d e c i s i o n o f t h e E u r o p e a n C o u r t o f H u m a n R i g h t s . T h e P a n e l h a s o f c o u r s e t o b a s e i t s v i e w s o n t h e w o r d i n g o f A r t i c l e 2 1 (1) E C H R , i . e . o n t h e e x p r e s s i o n “ h i g h j u d i c i a l o f f i c e ” (r a t h e r t h a n “ h i g h t h i s e x p r e s s i o n w o u l d s e e m t o i n c l u d e j u d g e s w h o h a v e h e l d o f f i c e i n n a t i o n a l s u p r e m e a n d c o n s t i t u t i o n a l c o u r t s , w h e r e a s i t w o u l d s e e m t o e x c l u d e j u d g e s o f l o w e r n a t i o n a l f i r s t - i n s t a n c e c o u r t s u n l e s s t h e y o t h e r w i s e q u a l i f y a s j u r i s c o n s u l t s . T h e p r o v i s i o n m u s t b e g i v e n a s u b s t a n t i v e i n t e r p r e t a t i o n c o n s i s t e n t w i t h i t s p u r p o s e a n d n o t a p u r e l y f o r m a l o n e . A c c o r d i n g l y , e v e n i n t h e c a s e o f c a n d i d a t e s h o l d i n g o f f i c e i n a h i g h e s t n a t i o n a l C o u r t , t h e P a n e l ’ s v i e w i s t h a t s u c h p e r s o n s w o u l d n o t , f o r t h a t r e a s o n a l o n e , b e a u t o m a t i c a l l y c o n s i d e r e d q u a l i f i e d t o b e c a n d i d a t e s f o r e l e c t i o n t o t h e C o u r t . N o n e t h e l e s s , a c t u a l s e r v i c e f o r a s i g n i f i c a n t n u m b e r o f y e a r s o n a S u p r e m e C o u r t s h o u l d m e a n t h a t a j u d g e i s q u a l i f i e d . T h e p u b l i c a t i o n o f i m p o r t a n t b o o k s o r a r t i c l e s m a y a l s o b e a n i m p o r t a n t f a c t o r w h e n c o n s i d e r i n g a c a n d i d a t e ’ s q u a l i f i c a t i o n s , i n a d d i t i o n t o l o n g e x p e r i e n c e a s a p r o f e s s i o n a l l a w y e r o r s i g n i f i c a n t l e n g t h o f j u d i c i a l s e r v i c e a t a h i g h l e v e l .
37. I n t h i s c o n t e x t i t s h o u l d b e b o r n e i n m i n d t h a t n a t i o n a l j u d i c i a l s t r u c t u r e s v a r y c o n s i d e r a b l y . F o r e x a m p l e , i n s o m e c o u n t r i e s a p e r s o n m a y b e n o m i n a t e d t o a S u p r e m e C o u r t (o f t e n c o n s i s t i n g o f m a n y m e m b e r s) a t a r e l a t i v e l y y o u n g a g e b e c a u s e o f h i s o r h e r i n n a t e a b i l i t y , b u t n o n e t h e l e s s w i t h l i m i t e d j u d i c i a l e x p e r i e n c e . T h i s l i m i t e d e x p e r i e n c e c a n b e a c c o m m o d a t e d i n v a r i o u s w a y s i n a n a t i o n a l s t r u c t u r e a n d o v e r t i m e t h e j u d g e w i l l a c q u i r e s t a n d i n g w i t h i n t h e n a t i o n a l c o u r t a s h i s o r h e r j u d i c i a l s k i l l s a n d e x p e r i e n c e w i l l m a t u r e . O n t h e o t h e r h a n d , s o m e n a t i o n a l s y s t e m s r e q u i r e e x p e r i e n c e a s a j u d g e o f a t l e a s t t e n t o f i f t e e n y e a r s m i n i m u m b e f o r e b e i n g e l i g i b l e f o r a p p o i n t m e n t t o t h e h i g h e s t c o u r t . C o n s i s t e n t w i t h t h e g l o b a l a p p r e c i a t i o n o f a c a n d i d a t e ’ s q u a l i t i e s , a c c o u n t i s o b v i o u s l y t a k e n o f t h e e n t i r e j u d i c i a l c a r e e r o f a c a n d i d a t e , i n c l u d i n g w h e t h e r h e o r s h e s a t o n a c o u r t c o n c e r n e d w i t h , d i r e c t l y o r i n d i r e c t l y , e n f o r c i n g h u m a n r i g h t s o r c o m p l e x i n t e r p r e t i v e i s s u e s o f l a w .
38. T h e E u r o p e a n C o u r t o f H u m a n R i g h t s , b y i t s n a t u r e , s t a t u s a n d p a n - E u r o p e a n r o l e a s s u m e s t h a t i t s m e m b e r s a l r e a d y h a v e , o n e l e c t i o n , a l l t h e f u l l y d e v e l o p e d j u d i c i a l q u a l i t i e s t h a t c o m e f r o m l o n g e x p e r i e n c e . I t w o u l d a p p e a r u n l i k e l y t o f i n d s u c h q u a l i t i e s i n a c a n d i d a t e o f a r e l a t i v e l y y o u n g a g e . H o w e v e r , m a n y c o u n t r i e s f i n d i t

difficult to attract three candidates of an equally long professional experience.⁴ It is, therefore, even more important that the High Contracting Parties widely advertise calls for candidatures at national level⁵ in order to ensure to have the highest number of qualified candidates possible.

39. 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.
40. 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.
41. 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.
42. Article 21(1) ECHR also looks for “ J u r i s o f r e c o g n i s e d c o m p e t e n c e ” : letter to the M i n i s t e r s then President Jean-Paul Costa wrote: “ T o b e a ‘ j u r i s o f r e c o g n i s e d c o m p e t e n c e ’ r e q u i r e s e x t e n s i v e e x p e r i e n c e i n t h e p r a c t i c e a n d / o r t e a c h i n g o f l a w , t h e l a t t e r g e n e r a l l y e n t a i l i n g p u b l i c a t i o n o f i m p o r t a n t a c a d e m i c w o r k s . O n e o b j e c t i v e i n d i c a t i o n o f t h i s r e q u i r e m e n t w o u l d b e t h e l e n g t h o f o c c u p a t i o n o f a p r o f e s s o r i a l c a r e e r . E x p e r i e n c e o f w o r k i n g i n t e a m s a t i n t e r n a t i o n a l l e v e l w o u l d b e a n i m p o r t a n t a s s e t , a s j u d g e s n e e d t o b e a b l e t o w o r k i n

⁴ 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.

⁵ See the Guidelines of the Committee of Ministers on the selection of candidates at national level.

a collective body such as a court in an international environment representing different legal traditions.

43. 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 “ r e c o g n i s e c o m p e t e n c e ” 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 ‘ j u r i s t ’ 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 “ j u r i s t ” 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.
44. 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 “ j u r i s t s o f r e c o g n i s e c o m p e t e n c e ” .
45. It is also the case that a judge who may not meet the criteria of Article 21(1) ECHR as someone qualified “ f o r a p p o i n t m e n t t o h i g h j u d i c i a l o f f i c e ” because of a parallel academic career with important publications in relevant fields of law, meet the criteria of jurisconsult “ o f r e c o g n i s e c o m p e t e n c e ” .
46. 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.

8) Examination of *curricula vitae* of candidates in 2016-17

47. During the period from 1 January 2016 to 30 June 2017, the Panel examined 12 lists of candidates (compared to 17 lists in the previous two years and 17 lists during the first three years of the Panel's existence). One more list was partly examined but the Panel had not yet adopted its final views as of 30 June 2017, pending the examination of additional information by the country in question.
48. In the period from 1 January 2016 to 30 June 2017, three governments submitted the *curricula vitae* to the PACE before the Panel had the opportunity to give its (final) views on the candidates. In two cases, the modified lists contained replacement candidates on which the Panel did not have the opportunity to express a view either because the government did not wait for its view or because it did not even submit the replacement candidate's *curriculum vitae* to the Panel. In another case, the government submitted in parallel the list of candidates to both the Panel and the PACE, in which case the Panel immediately suspended the examination of the list. The Panel also notes with concern that one High Contracting Party submitted its list which was partially rejected by the Panel to the PACE without replacing the candidate who was found not qualified by the Panel. Furthermore, in another case one High Contracting Party submitted the list on which consensus could not be reached on one candidate without any changes to the PACE hence maintaining on the list the candidate on which no consensus could be reached.
49. Candidates were consisting of approximately 35% lawyers, 30% judges, 22,5 % university professors, and 12,5% others (e.g. senior civil servants with legal background).
50. In respect of only two country lists the Panel considered all candidates to be qualified within the meaning of Article 21(1) ECHR without requesting further information.
51. 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 one list, the Panel came subsequently to the final conclusion that the candidates met the requirements of Article 21(1) ECHR. In some cases, candidates were replaced by their governments, but in only two cases such replacement candidates were eventually considered qualified whereas in another two cases governments did not wait for/seek the Panel's views on the replacement candidate.
52. In one case, the Panel could not reach the required majority on one candidate who was not replaced by another candidate in the list submitted to the PACE.
53. However, in three 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 another one in which case one of the candidates who had been considered qualified by the Panel became judge of the Court. In the third case, the Election Committee of the PACE recommended that the

entire list of candidates be rejected, considering that the national selection procedure was not in accordance with the *Assessment Standards*. The three candidates then withdrew and a new selection procedure was launched.

54. The Panel notes with concern that several governments did not respect the time-limits set by the PACE and the Panel. There were in fact, two cases where the submission of the lists to the Panel was delayed, in one case for six months where there was an agreed extended deadline and in another for one year on grounds linked with the national selection procedure. In another two cases and for reasons linked with national political circumstances, no lists have been submitted at all amounting to a delay of several months or even one year. Fortunately in these 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.
55. Despite a heavy workload in 2016 - June 2017 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.

9) Conclusions and outlook

56. “ The system will fail if judges do not have the necessary experience and authority ” wrote Jean-Paul Costa, then President of the ECtHR, on 9 July 2010 to the Committee of Ministers. Six months later, the Committee of Ministers established the Advisory Panel to “ advise the High Contracting Parties whether candidates for election as judges of the European Court of Human Rights meet the criteria stipulated in Article 21§1 of the European Convention on Human Rights . ”
57. The only armour of a court is the cloak of public trust. The Committee of Ministers itself has repeatedly emphasised that the overall success of the Convention 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.
58. During its six years of existence the Panel has examined 46 lists of candidates (17 lists during the first three years of its existence, 17 lists in 2014-2016 and 12 lists in 2016 – June 2017) in respect of 37 member states. Based on this unique experience, the Panel is satisfied that in broad terms, the quality of candidates that have come forward has improved, at least in part, because of the existence of the Panel. The Panel has required governments to focus on the issue of the quality of candidates in a way that perhaps some of them have not done before.

59. Overall, compliance with the Panel's views has improved over the years. The Panel has received certain excellent lists which did not require much scrutiny (e.g. Finland, United Kingdom, the Netherlands). It has by now become an almost regular practice to request clarifications or additional information in relation to some candidates. The Panel welcomes that such requests have usually been swiftly followed-up by the governments which provided comprehensive information. The Panel members are motivated by this very good cooperation that allows them the possibility of entering into a real dialogue with governments in the context of the examination of the lists of proposed candidates. More importantly, a number of governments have replaced candidates not considered suitable by the Panel or even submitted a whole new list, without even submitting anything to the Parliamentary Assembly. This is tangible evidence of the trust that governments have in the Panel and its competence to evaluate candidates.
60. At the same time, there continue to be instances of non-compliance with the Panel's views. In 2016, the Panel was faced with particular challenges when a few governments tried to bypass it, effectively depriving it of exercising its function in relation to a list or candidate on a list (see above paragraphs 48, 53). While the Panel's views are not legally binding, the Panel members sometimes have the impression that their views are not given sufficient weight in the election procedure.
61. 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. 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 give due and full weight to the opinions which the Panel is 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 meaning of Article 21(1) ECHR.
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 pan-European level in respect of the Court.
63. In March 2016, the Committee of Ministers instructed the Steering Committee for Human Rights (CDDH) to examine the whole selection and election process of ECHR judges. The Panel has already contributed substantially to this process through exchange of views of its Chairperson with the Committee of Experts on the System of the ECHR (DH-SYSC), the participation of the Panel's Secretary in

meetings of the relevant drafting group (DH-SYSC-I) as well as written contributions. The Parliamentary Assembly has also started to evaluate the election process. The Chairperson of the Panel will participate in a hearing of the ~~Assessment Committee~~ on the Election of Judges to be held in Riga on 22 October 2017.

64. All this is work in progress. The Panel stands ready to continue its active participation in this process if so requested by the Committee of Ministers or the Parliamentary Assembly. There are various avenues and ideas that need to be carefully considered, weighted and assessed in order to ensure that the Court retains its high credibility and output. A consistently high quality of candidates for election as judges can only be ensured via a robust selection and election procedure and through the expertise of a Panel with a stronger role in the procedure. The Panel members have no personal stake in the election procedure and were elected in light of their professional experience as judges of highest national or international courts. It is for them an honour to carry out such a crucial task conscientiously.

65. A broad review of the (s)election process at national and European level is now under way. While radical changes may require amendments to the Convention or the Committee of Ministers ~~Resolution~~ CM/Res(2010)26, certain pragmatic short-term measures may be taken immediately. In particular synergies with the Parliamentary Assembly could easily be improved even further. In his farewell speech, the former Registrar of the Court, Mr Erik Fribergh launched the “ i d.e to integrate the members of the Advisory Panel of judges into the procedure before the Parliamentary A s s e m b l e Without ’putting into question its prerogatives, the Assembly could for example unilaterally commit already now to give greater weight to the P a n e l o p i n i o n s or to associate, under conditions that remain to be defined, the P a n e l c h a i r p e r s o n (or a member) to the meetings of its Election Committee.

66. The Panel members are grateful for all the support they have received from the Committee of Ministers. They look forward to continued good cooperation with the Committee of Ministers and the Parliamentary Assembly.

Appendix I

Overview of the Panel meetings and activities (omitted for reasons of confidentiality)

Appendix II

Intervention by Mr John Murray at the 1249th meeting of Ministers on 2 March 2016

Monsieur le Président,

Mesdames et Messieurs les délégués des ministres

Avant d'entrer dans le vif du sujet, je souhaite au nom du Panel pour cette fois-ci vous parler avec vous aujourd'hui. Il s'agit en effet du Ministres et un président du Panel.

Le Panel est une création du Comité des Ministres et votre soutien tout au long de l'existence du

L'objet de mon intervention d'aujourd'hui est le Panel consultatif d'experts sur les droits de l'Homme. Ce rapport qui couvre la période a été distribué et je vais me concentrer sur

Permettez-moi d'abord de vous présenter quelques points depuis sa création en décembre 2010. Le Panel a évalué les curricula vitae de 53 candidats, plus que nonobstant cette charge de travail considérable, le Panel s'est efforcé de délais de réponse impartis par la Résolution

Dans la plupart des cas, nous étions obligés de suppléer à l'absence d'un autre candidat(e) que les gouvernements. Mes collègues et moi nous nous permettons d'entretenir un vrai dialogue avec vous. Il faut souligner le fait qu'aucun gouvernement n'a eu à avoir reçu auparavant l'avis du Panel. Notre coopération avec les gouvernements a permis l'adoption des avis définitifs pour les dates des entretiens avec les candidates.

I shall now continue in English. There are a few points arising from the Activity Report of the Panel on which I would like to further elaborate. They concern principally the application of Article 21 ECHR criteria, certain issues of concern and a brief look at some future perspectives.

As to the first matter, the Panel has continued over the last two years to reflect further on the criteria as set out in Article 21(1)ECHR based on its continuing experience, although the fundamentals of its views remain the same by reference to the basic criteria, namely that a candidate is qualified for appointment to high judicial office or is a jurisconsult of recognised competence. The second Activity Report which you have before you dedicates a whole section to these criteria explaining in substance that these criteria should be understood in the context of the Convention as a whole.

The role and function of the Court as a judicial body, and its prime importance to the governments of Europe in the field of human rights, means that one must constantly bear in mind that this is a judicial body and not a committee of experts. I think there is a general consensus that only a court composed of persons with the necessary breadth and depth of professional experience can, in the eyes of their peers in national supreme and constitutional courts, provide the Court with the required authority to effectively exercise its judicial functions. These considerations are equally important from the perspective of the Committee of Ministers when it calls upon High Contracting Parties to implement judgments of the Court.

If I indicate or comment on weaknesses in the selection and election procedures for judges at the Court, I do not wish to take anything away from the unparalleled contribution which the Court continues to make to the rule of law in upholding of human rights in Europe. That said, everyone, not least the Committee of Ministers, have identified a problem. The Panel was not created to deal with a hypothetical problem or to be simply an aid to good governance. The various statements of the Committee of Ministers, the Presidents of the Court itself, have identified a weakness and a risk to the Court if persons nominated to it are not of the highest or at least a high calibre.

The two fundamental criteria of Article 21 have in common that the required professional experience be one of long duration at a high level. The first responsibility of selecting candidates that fully meet these criteria lies with the High Contracting Parties. The ultimate responsibility lies obviously with the Parliamentary Assembly of the Council of Europe to elect candidates on that basis.

The Panel endeavours to take a comprehensive view and make a global assessment of every candidate's curriculum vita for the purpose of ensuring that the Parliamentary Assembly always has three fully-qualified candidates to choose from. Part of the continuing problem (mentioned the last time I addressed the Committee in July) is that, notwithstanding some notable exceptions, we get quite a number of candidates who are just over the minimum threshold. It is evident that there should always be, on any court, and in particular on a court of final instance which takes decisions which can have a fundamental effect on society and on the function of governments, a significant proportion of persons of the very highest experience and calibre. States generally seek to achieve that result at a national level and there is no reason why one should not envisage the same at the highest European level.

The two career paths and qualifications for appointment – high judicial office or a jurisconsult of recognised competence - have an equal and valuable role to play in the composition of the Court. It is a question of balance. For such a court one is looking for persons of sound judgment in balancing complex and competing interests and considerations. These are qualities acquired by long professional experience at a high level whatever the career path. Therefore, I do not think one can overemphasise the importance and validity of the statement recently made by the retiring

Registrar of the Court, Mr. Erik Fribergh, when he said “ [whatever we do in terms of strategy and dialogue as regards the Court , t h e k e y . ” è l e m e n t

So, if the Court is perceived to have a weakness in this regard it will be quite dangerous for the authority of the Court. I have to say that, in our Activity Report, the Panel has been obliged to highlight the paucity of the number of candidates with long judicial experience at a high level who have been put forward by the High Contracting Parties. Ideally, such persons should have served at the highest constitutional or supreme court level and that has been achieved only occasionally in recent times.

Certainly, with the thousands of cases that come before the Court, it might be said that many of them are readily resolved within the ambit of existing jurisprudence or well-established principles or concern self-evident breaches of the Convention. But the capacity of a candidate to deal with these kinds of cases is not the test.

Certainly a good judge, a person with general experience would be able to readily address those kinds of cases from a judicial point of view. But the real test of a court, of a constitutional court and/or a court of such high level as the European Court of Human Rights comes when it has to rely on its standing and authority to resolve novel and complex issues, balancing competing rights or state interests and the rights of the individual. There are many complex subjects which the highest courts today have to encounter such as the status of embryos or their genetic, trade in genetic material, euthanasia, rights of refugees, same-sex marriages, the balancing of individual fundamental rights against the need to tackle terrorism – to name but some. These are not academic or abstract challenges: these are issues on which the making of authoritative judgments requires experience and high professional qualities. If Member States are required to implement without reservation the judgments of the Court in difficult areas such as these then one really needs to attract, at national level, more candidates of the very highest calibre and experience.

As has been observed in our Report, the only armour which a court has is public confidence. Public confidence is accrued, like in the case of the constitutional courts created after the Second World War in Europe, or those created after the fall of the Soviet Union, incrementally and gradually through the quality and integrity of the rationale of their judgments. Equally, the reverse can happen. A court can have its authority gradually eroded or incrementally weakened until it is discovered suddenly, at some point, that something has gone very wrong. Then it would be too late and would take decades to re-establish. This is a subject that has been of course discussed many times and I do not pretend, for one moment, to have all the answers. But I would suggest that there needs to be a collective search for answers and the search for achieving enduring improvements for the future. Regarding, for example, the question of whether there should be a review of the selection and election process, the CDDH has certainly recommended such an approach in its report on the long- term future of the system of the European Convention on Human Rights.

The Court has fundamentally changed since the 1950s when it was first created. There are many reasons why it now has a wholly different character. As Mr Fribergh pointed out, it now plays such a dominant and important role in our societies that this is a situation which places the judges under a particularly heavy responsibility. The fundamental changes in the Court have stemmed at least in significant part from the adoption by the Court of the doctrine according to which the Convention must be interpreted as a living instrument.

This is a method of interpretation according to which the provisions of the Convention must be interpreted in the light of present day mores and conditions, often by reference to some perceived consensus in Europe. I do not propose to go into this, much debated, topic. I just wish to note that it is a doctrine that leaves the Court somewhat at large to reverse its jurisprudence (even recent jurisprudence) by reference to its understanding of current mores. It is a doctrine which allows the Court to imply or attach novel meanings to long-established interpretations of provisions of the Convention so that rights which had not understood as guaranteed by the Convention or that matters that fell within the purview of the Member States are now actually rights protected by the Convention. In other words, the Convention means what the judges say it means. On the 50th anniversary of the Court it published a book about the Court. On a personal note, I have been a judge for 25 years as a member firstly of the European Court of Justice and then the Supreme Court of Ireland and I wonder if I am better placed to be anybody's conscience more than a butcher or an accountant or anyone else?

The point is that the Court has taken on a very heavy responsibility if it perceives itself as the conscience of Europe and for that purpose deciding what the mores of pan-European society are at a given time for the purpose of interpreting the actual text of the Convention. It was not a rule perceived by the Court in the 1950s or for many decades thereafter. This particular aspect of the role of the Court today goes to show that it is all the more important that there is a system in place that attracts persons of sound judgment who understand the limits of the judicial function, when interpreting the norms of the Convention, and who exercise the judicial function with due rigour and restraint. So, when a question of reviewing the whole procedure for the election of judges arises, as it has been raised by the CDDH, one would hope that such a review does not overlook what can also be done in the short-term at the expense of focusing what must be done for the long-term. I appreciate that long-term proposals for changes in the Convention system is, as I understand it, a way of saying such changes that require amendments of the Convention a difficult process. This may not be a very appetising subject to broach because of the very reality that it will take a long time. But I am reminded of the Seigneur of the manor who asked his gardener to plant an oak tree because he wished to have a shade on the terrace during the hot summers. When the gardener replied that it would take almost a hundred years growth before it would provide such a shade, the Seigneur replied, "Well you better get on with it." Concerning the Convention system are identified and it is perceived that it going to take a long time to carry out that review and implement proposals, it is all the more reason that the review should start now. This is just a personal view, though I do not think any of my colleagues would disagree with it. We voluntarily participate in the work of the Panel because we passionately believe in the importance of the Court and its role and in the need to ensure that its authority is both maintained and enhanced.

One of the questions that could be addressed in the shorter term is the need to examine whether the career structure of a judge on the Court could be made more attractive in some way. As we know, it is a fixed nine-year appointment, so how does that work? It is likely that many judges and professors, who have an important high-level career, are put off if they do not know what is going to happen to them after a single nine-year mandate. There is an informal decision of the Committee of Ministers calling upon State Parties to ensure that a person who retires from the Court is found a post commensurate with their judicial status. This appears to be an attempt to give some career structure to potential candidates for the election to the Court whose term of office would expire before they have reached retirement age. Not all High Contracting Parties have subscribed to this decision. Due observance by those who have, including

a greater transparency concerning its implementation, would be a positive step in the right direction as well as applying it to all state parties.

As I bring my remarks to a conclusion, I would like simply to add at this point that I believe the Panel has contributed to improving the quality of candidates. In spite of the problems which I have highlighted, there have indeed been some excellent candidates who have come through the process. I think, in broad terms, the quality of candidates that have come forward has improved perhaps, at least in part, because the existence of the Panel has required governments to focus on the issue of the quality of candidates in a way that perhaps some of them have not done before.

We have had six cases where the governments have brought their list to the Parliamentary Assembly notwithstanding that the Panel had not approved one or more candidates on the list because they had failed to meet the criteria of Article 21. The committee of the Parliamentary Assembly proceeded to interview such candidates and allowed the list to go before the Assembly which elected judges from those lists. The Panel views the role that your Committee has conferred on it as a means, *inter alia*, of assisting the Parliamentary Assembly by ensuring that it has three candidates who are all qualified. Also, two countries twice submitted to the Panel new lists which contained candidates which the Panel had previously found not to be qualified. These are the kind of situations that arises if sufficient weight is not given to the conclusions of the Panel. I do not for one moment suggest that the Panel is infallible, but if sufficient weight is not given to its conclusions then its role will be gravely undermined.

Finally, I would like to mention that there is a vacancy in the Panel and it has been vacant for quite some time. While I fully appreciate the heavy agenda of the Committee of Ministers, I would take the opportunity, since you have given me the privilege of addressing you as Chairman of the Panel, to ask that this matter be addressed as soon as possible. There has already been one case in which we were not able to express an opinion because we did not have the qualified majority of five. Of the current six members of the Panel, only two are women. We have three former members of the European Court of Human Rights, including a former President. We have one former judge of a supreme court, one who is a professor and judge of a constitutional court and the sixth who is currently a member of a supreme court.

Moreover, our budget is very small and I do not propose to elaborate here on that. My colleagues from the Secretariat fight valiantly for a reasonable budget and I do think more help should be given to them on this issue. One of the factors that helps us to reduce costs is to have members who are bilingual in the working languages of English and French. So when we do meet, we do not have to have interpretation; that and diversity on the Panel are important. It is, of course, entirely a matter for the Committee of Ministers but we are anxious that a new Panel member is appointed as soon as you reasonably can.

In the meantime, let me say that we are grateful for all the support we have received from the Committee. We will endeavour to carry out our mission as best we can. We hope that the Committee of Ministers, perhaps on the proposal of the CDDH or others, will embark or initiate a process of review of the whole selection and election procedure. This seems inevitable one way or the other in the foreseeable future and it would be as well to start it now rather than later. I am confident that members of the Panel would be available if anybody thought their views, individually or collectively, would be of assistance in any such review.

[Madame la Presidente, Members of the Committee, I would like to thank you most sincerely again for giving me the opportunity to be present today and to continue now with further exchanges of views]

Intervention by Mr John Murray at the 1279th meeting of Ministers Deputies on 1 March 2017

Madame la Présidente,

Mesdames et Messieurs les Délégués des Ministres

Avant d'entrer dans le vif du sujet, je souhaite au nom du Panel pour cette fois-ci vous proposer un débat avec vous aujourd'hui. Il s'agit en effet du Panel des Ministres et un président du Panel.

Le Panel est une création du Comité des Ministres de votre soutien tout au long de l'existence du

L'objet de mon intervention d'aujourd'hui est En même temps, je veux utiliser cette occasion d'œil un peu plus critique sur ce qui est le Panel. J'ai eu l'honneur d'avoir été membre du Comité des Ministres de décembre 2010. Mon discours a été consacré à la rétrospective, mais aussi de perspective

Permettez-moi d'abord de vous présenter quelques chiffres depuis ma dernière intervention devant le Panel. Le Panel a examiné les curricula vitae de 30 (très) considérable, le Panel s'est efforcé avec succès de la Résolution CM/Res(2010)26 au cours de plus de 10 ans d'expérience pratique unique en matière d'évaluation des gouvernements.

En deuxième lieu, je veux saisir cette occasion pour au Secrétaire Général de l'Assemblée Parlementaire intensifier les relations entre le Panel et l'Assemblée

M. Sawicki a fait l'effort de nous présenter les travaux de 2016. Nous avons eu l'occasion et le bénéfice d'un dialogue donné au Panel une meilleure compréhension de la situation des juges et de leur rôle dans le processus électoral. Le Comité des Ministres nous a également permis d'explorer des idées sur l'élection des juges et le Panel.

Nous avons déjà remarqué de nombreux progrès dans notre commun Parlementaire, notamment en fournissant, via le Panel, des avis du Panel. Depuis sa création, le Panel a permis à l'Assemblée Parlementaire de monter négativement un dialogue et horizontal va nous porter plus proche à la réalisation de ce qui est faisable dans le cadre actuel de nos mandats à réaliser.

Permettez-moi de maintenant continuer en anglais.

First of all, I wish to acknowledge the important work that is currently being undertaken by the various elements of the Council of Europe; the Committee of Experts on the election of judges and particularly the Steering Committee for Human Rights (CDDH), all under the guidance of the Committee of Ministers. It is both reassuring and of great importance that such a review of the functioning of the European Court of Human Rights, from so many dimensions, is taking place, not least because, as you know, the Court is always referred to as the jewel in the crown of the Council of Europe. It is more than that; it is an international treasure because the protection of fundamental rights is a continuing and ever present challenge to the political and social order of all countries and entities around the world. The Court thus provides an iconic template for the judicial supervision of human rights observance at an international level. And things as precious as a jewel do not continue to exist simply because they exist, anything precious continues to exist because it is looked after and it is nurtured. Even though when we discuss these matters, there is often a significant element of *déjà vu* the challenges are present and the need to meet them is present and continuing. Therefore, I very much appreciate the work that is currently being done in the field and I am glad that the Panel has been able, at the invitation of the Committee of Experts and the CDDH to make a contribution.

One of the features of the foregoing is the solidarity of all actors in this process working together, to look at supporting and improving the functioning of the Court, and from the perspective of the Panel, the process of attracting candidates of calibre as judges. I would hope that collaboration and dialogue between the Parliament, the Committee of Ministers and others (with a contribution from the Panel where relevant) would become a more routine feature of giving information and working in a degree of solidarity and not confined to the kind of process that the CDDH is currently carrying out.

As regards the role of the Panel, from my experience over the last six years, I think the mere establishment of the Panel by the Committee has made an impact. One gets a sense that increasingly, governments, where they may not have done so before, are now beginning to have a greater understanding of the need to more carefully seek and select the candidates which they put forward. There seems to be a growing consciousness of the need to meet Convention criteria for election to the Court in a substantial way. I think the very existence of the process of submitting the list of candidates to the Panel, of having to consider and a v assessment has strengthened the overall process of selection.

Of course, this has not been a solution to all the problems and challenges in this matter. The problem concerning a more consistent level of quality candidates has already been identified and analysed by the former President of the Court, Jean-Paul Costa. Mr Erik Fribergh, who retired from the Court as registrar last year after 3 sufficiently high percentage of candidates with fundamental credibility and standing for the Court. So we are dealing with a real, and not a hypothetical problem. The governments bear primary responsibility for selecting candidates of high calibre. The more that can be done to focus on s t r e n g t h e n i n g g o v e r n m e n t s ' u n d e r s t a n d i t i v e l y a t t the criteria of Article 21 the better. The Panel has explained in its Activity Reports the substantive elements of such criteria and often referred to them in its correspondence and dialogue with member states. That is of crucial importance at the initiation of the process of selection at national level. In a certain sense, the Committee of Ministers bears a responsibility for stressing to those at national level who are responsible for taking these decisions, the importance of selecting

candidates of the necessary calibre. We have had on the agenda so far 40 vacancies at the Court. So, only seven countries have not actually come onto our agenda. All those seven will inevitably be replaced in the near future.

I understand part of the reform which is currently being considered is the length of the mandate of judges. Judicial leadership of experience is very important to a Court of such standing, given the impact of its jurisprudence on the constitutional governance and conduct of member states. I think the Court has been very fortunate in the high calibre of the Presidents that it has had throughout the years to the present day; but a President needs other experienced judges around him or her, to be judicial and intellectual leaders of experience, which is difficult to achieve when members are confined to a nine-year mandate. By definition someone becomes a President when they have been less than nine years at the Court. Compared to many other institutions of similar standing and level, that is an unusually short period in which to attain the office of president who will be likely to have a relatively short mandate in that capacity. So, I stress the importance of considering the proposals regarding the reform of the existing period of the mandate.

Let me just make some brief remarks about the kind of candidates we have had to consider. Obviously we do our best to apply the objective criteria, as a minimum threshold as laid down by Article 21. It is a very serious decision and we do not lightly decide somebody does not meet that threshold. Once candidates are over the threshold and we are satisfied with that, that is the end of our function and we communicate that to the government concerned and to the Parliamentary Assembly. That may be enlarged upon now if the Parliamentary Assembly would like some more information from us, other than the simple fact that we consider a candidate qualified. If we consider a candidate not qualified we explain the general reasons for that conclusion. Of those we do not consider qualified, many of them are candidates of real merit, a real level of expertise, people who have had a good career, maybe in the field of human rights law, and expert knowledge on the Convention and the case law. But this is something most postgraduates of calibre in their 30s have. So what happens is that good experts have been put forward, very good quality people at that stage of their career, but nonetheless persons who do not have the length or the breadth of experience at a sufficiently high level to exercise a judicial function in a very superior court such as the European Court of Human Rights. So in such cases, member states cannot be accused of acting in bad faith, and they may be due to a misunderstanding of what is required by Article 21. For some of these candidates, one could say that a perfect candidate for the Court, but not with the 7, 8 or so years of the kind of experience he or she has had to date. There are not very many candidates who really are, what one would classify as very poor, so in a sense, that is a good sign. Maybe the member states need to be sensitised to the level and breadth of experience which they should look for in candidates. It is not someone who may be known as a very good expert, even a well-respected expert in human rights law but someone who has reached the level of necessary experience for the exercise of high judicial functions.

It is important that people have experience of such high level because, as I have said before, judges are called upon to interpret the Convention in a way that can impact on major social and political issues at national level. First there is the law and then there is its interpretation by judges, and then the interpretation is the law. That is the modern reality. The time of Montesquieu, the era when the judge was the so-called mouthpiece of the law, is long gone. So the calibre of judges refers to people who can make judgments on sensitive issues like the status of the embryo or whether you can trade in embryos for research purposes or the right to suicide and so on. A Court

must be capable of dealing with these sensitive issues and where the boundary of Convention obligations and national sovereignty needs to be drawn.

For the purpose of attracting candidates of calibre, the conditions of engagement of judges and the kind of career path which membership of the major court offers is also a crucial consideration. In its submission to the CDDH, the Court itself addresses some conditions like schooling provision because it is a major decision for somebody who has had a very satisfactory career at national level and a high level to suddenly leave for a defined mandate in another country. So the career structure which is being addressed by the Committee of Experts and the CDDH is an important consideration. It is equally important that governments exercise their responsibilities fully and should be persuaded and educated at political level to do so.

At the other end of the spectrum lies the communication of our conclusions on candidates to the Parliamentary Assembly. As I have mentioned, we are in contact with Mr Sawicki and of course the Parliamentary Committee. There are very good prospects for improving cooperation and communication between the Assembly and the Panel. Without questioning in any sense the functions of the Parliamentary Committee, we may be able to contribute more with increased dialogue between us. It may even be possible to have a member of the Panel or the Chairman being present during the Committee's deliberations. I
between the Panel and the Parliamentary Committee, the Assembly could very much see the positive benefit of that to the overall process. Communication between the Panel and the Assembly is already improved and holds good prospects for the future.

So, on those observations I would close my presentation and thank you again Madame President for your invitation and the invitation of the Committee to make this presentation and to say adieu.

[Final observations of My Murray following the views expressed and questions raised by the Ministers]

The Panel was established by the Committee of Ministers and it does not have its own budget line. I understand when the Secretariat are looking for funding, they are told their budget and expenditure is so small that funding can always be found somewhere, but it is a very unsatisfactory basis for the Panel to work on, as you can appreciate. Given its very modest needs, it seems all the more obvious that it could readily be given its own budget line so that Panel activities can be properly structured and administered with more efficiency.

The Panel was established by the Committee of Ministers to carry out a certain function. Therefore, the first important consideration of the function of the Panel is that it is consulted by all member states, not bypassed. You will be aware that my letter of November 2016 to the President was prompted by some problems in this regard. We had had such problems in the past and obviously it is a very serious matter. However, since November 2016, there have been some positive developments which give good reason to be optimistic in this regard. This year, we recently had a list from a member state where we found one candidate not qualified, the government promptly replaced the candidate with a candidate we found to be qualified, so all three have gone forward to the Parliamentary Assembly. So the important thing is that there are procedures in place that ensure that the Panel is consulted and not bypassed.

The Panel, as I said, decides on a minimum threshold. So in principle, if somebody does not meet the minimum objective threshold, one would hope that member states will replace him/her, or that

the Parliamentary Assembly and Parliamentary Committee will react accordingly. How that is achieved by one method or the other is something which I had mentioned in my letter to the President in November. That letter also referred to the possibility of consulting the Panel being made an obligatory part of national selection procedures. That would procedurally impose an obligation on the member states. Given that the Parliamentary Assembly rejected two of the lists referred to in my letter, on the grounds that the member states in question had not complied with standards for the selection procedures of candidates laid down by the Parliamentary Assembly or the Committee of Ministers, it could be a basis on which the Parliamentary Assembly could reject a list which had bypassed the Panel. Then there is the question of, and it is of concern, when the Parliamentary Assembly decides to consider a list of three among which there is one or more that have not been considered qualified by the Panel. But particularly disturbing and very unsatisfactory from everybody's point of view (claiming infallibility), considered not to be qualified is elected as a judge. That has been fairly rare but it has happened. So there could be structural changes to improve the process; whether the obligation of governments to consult the Panel is strengthened or whether the Panel should have a more structured connection with the Parliamentary Assembly. We do not have definitive views on the precise measures to achieve this.

I have indicated that we have now a dialogue with the Assembly that is very positive. I speculated on the presence of a member of the Panel in the Parliamentary Committee. I do not want to take it further than that. Though I think it is a good idea, on its face it is a good idea, but it is not for us to decide. I would hope, without getting into any kind of difficulties over who is responsible for what, that if a member of the Panel were to attend interviews and functions, even as a silent observer, and was there to respond to questions from members of the Parliamentary Committee - should they choose to ask questions - that over time a rapport of mutual confidence would develop.

I think everybody would agree on more cohesion, solidarity and working together between all the stakeholders. There are various ways that it can be achieved and I do not want to be prescriptive in saying that it has to be done this way or that way. But for the moment, I am very happy to rely on the goodwill of the Parliamentary Committee and the positive contribution and relationship that we have developed with Mr Sawicki and hopefully will develop further.

The Court must be a diverse court and there are various pathways to the Court but, with clear and notable exceptions, there is a paucity of candidates who have had long judicial experience at a high national level, which in times past used to be the case. There is a need to bear in mind the need for a career path and framework which is attractive to this kind of candidate for election as a judge.

Regarding the question of interviews, I have an open mind on interviews of candidates by the Panel. I suppose that if the Panel had a facility and the modest financing to carry out interviews when it was thought that would be profitable, it would probably add to the experience. It is not an essential for the evaluation of candidates by the Panel because we are not evaluating the candidates in order of merit but if we were given such a mandate, certainly interviews would be essential.