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STEERING COMMITTEE FOR HUMAN RIGHTS

(CDDH)

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COMMITTEE OF EXPERTS ON THE SYSTEM OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS

(DH-SYSC)

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DRAFTING GROUP ON ISSUES RELATING TO JUDGES OF THE EUROPEAN COURT ON HUMAN RIGHTS
(DH-SYSC-JC)

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Compilation of comments on the draft report on issues related to judges of the European Court of Human Rights (document DH-SYSC-JC(2023)01) /

Compilation des commentaires sur le projet de rapport sur les questions relatives aux juges de la Cour européenne des droits de l'homme document (DH-SYSC-JC(2023)01)

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ITALY / ITALIE

11. Some problematic aspects of the national selection procedures were highlighted by those responding to the DH-SYSC-JC's questionnaire.[1] 91 respondents who had considered applying at the national level but decided not to do so (potential applicants) expressed concerns in relation to the criteria used to draw up the final list of three candidates, the lack or the quality of information about the process of eliciting applications, the way in which the applications would be examined, the way in which the final list of three candidates would be drawn up, and the public nature of the national selection procedure (*see also tables 1 and 2 below*). Individual respondents considered that the nomination at the national level was politicised, within the exclusive remit of the government; that the procedures were not transparent or merit-based; that the format and fairness of interviews was questionable; or that the age requirement was restrictive. [2]

12. 33 of a total of 56 respondents who had applied at the national level (applicants) highlighted perceived shortcomings of the national procedures noting, in particular, the failure to publicise the call for applicants or to circulate it in relevant professional communities; the absence of any information regarding the selection criteria; the composition of the selection bodies; the format of the interviews and lack of feedback information to applicants; the final decision-making process on the list; the application of gender-based considerations rather than a purely merit-based approach; the overall lack of transparency; and the political nature of the process or its lengthy duration (see also tables 3 and 4).

13. The CDDH recalls that the Guidelines provide sufficient guidance to the State Parties as to how to organise national selection procedures that are conducive to the establishment of lists of candidates that meet the requirements of Article 21§1. In this context the CDDH reiterates the importance of the full implementation of the Guidelines.[3]

It's suggested to examine the part of the Guidelines covering the issues raised in the responses before drawing the final conclusions on whether the Guidelines already provide for the sufficient guidance in respect to each criticality or instead something more could be done to overcome the multiple criticalities highlighted in the replies.

14. Moreover, there have been delays in the presentation of lists of candidates by the State Parties to the Assembly, which should be done six weeks before the second-last Assembly session prior to the end of the sitting judge's mandate.[4] These may be caused by difficulties in setting up and carrying out an appropriate national selection procedure or the need to replace

[1] DH-SYSC-JC(2022)06REV.
[2] DH-SYSC-JC(2023)02
[3] See also the CDDH conclusions in CDDH(2017)R88addI, §§4, 58.
[4] Country-by-country "table of progress" on the election procedure. For the period of time January 2017 to December 2022 of the 29 State Parties which were invited by the Assembly to present their lists of candidates 10 State Parties presented their lists before the deadline; five State Parties presented their lists on the deadline; 10 State Parties presented their lists with a delay of less than one year (ranging from two weeks to seven months); one State Party presented its list after one year of the deadline; and three State Parties have still not submitted their lists after one year of the deadline indicated by the Assembly. Delays can also result following the Assembly's rejection of one or more lists presented by a State Party.

one or more candidates. Long delays, especially those over one year, will result in the *de facto* extension of the mandate of the sitting judges. While currently such delays were experienced in a relatively small number of cases, efficient national selection procedures are required in order to avoid them completely. For example, to avoid the repetition of the entire procedure following a negative opinion of the Advisory Panel on one or more of the selected candidates or the rejection of the list by the Assembly, the State Parties could establish a reserve list of candidates.[5] This issue merits further discussion.

Drawing the list of candidates together with a reserve list offers the opportunity to take advantage of the procedure already carried out in accordance with the convention standards and draw also the list of the Ad hoc judges. it seems appropriate that the selection follows the same steps and meets the same standards as for the elected judges, as required by art 29 of the Rules *("The list shall include both sexes and shall be accompanied by biographical details of the persons whose names appear on the list. The persons whose names appear on the list may not represent a party or a third party in any capacity in proceedings before the Court.…. (c) An ad hoc judge shall possess the qualifications required by Article 21 § 1 of the Convention and must be in a position to meet the demands of availability and attendance provided for in paragraph 5 of this Rule. For the duration of their appointment, an ad hoc judge shall not represent any party or third party in any capacity in proceedings before the Court "*)

17. The Advisory Panel has progressively developed, in the light of its experience, its understanding of the criteria set out in Article 21§1 of the Convention. For example, the criterion of being of high moral character has to be presumed; it cannot be examined by the Advisory Panel given that it is not empowered to convene candidates for interviews.[6] *The other two criteria of possessing the qualifications required for appointment to high judicial office or being jurisconsults of recognised competence are examined in relation to the broader objective of ensuring that the Court enjoys authority and respect with national judiciaries at the highest level and in the State Parties generally.[7] While the Advisory Panel seeks to apply the same criteria to all State Parties it takes into account the difficulty that States with a small population may have in finding three suitably qualified high-level candidates.[8] In general, the Advisory Panel considers that its clarification of the Article 21§1 criteria has led to presentation of candidates of a higher quality.[9]

An early prior disclosure of relationships, with ngos, prominent political figures and relevant economic interests, potentially affecting the impartiality of a candidate for judicial office in the ECHR, meets the need of an early assessment, also on the part of the Advisory Panel, of the high moral character requirement already at the preliminary steps of the selection procedure.

18. Based on its 12-year-long experience, the Advisory Panel has concluded that, in broad terms, the quality of candidates who have been presented has improved and that the requirement to submit the lists to it has prompted governments to focus on the quality of candidates.[10]

[5] DH-SYSC-JC(2023)03 summary of exchange of views held at the 2nd meeting of DH-SYSC-JC (25-27 January
[6] Ibid., § 39. Only very exceptionally, when there is some manifest evidence capable of rebutting this presumption, an issue concerning this criterion will arise.
[7] Ibid., § 41.
[8] Ibid., § 44.
[9] Ibid., § 85.
[10] Ibid., § 85.

Nevertheless, it has noted with disappointment the relatively low number of candidates with long judicial experience at a high, and in particular the highest, national courts. [11] * In other cases the length and breadth of experience of candidates has been considered as insufficient to qualify them as jurisconsults of recognised competence, falling below that required of an international judge adjudicating on measures adopted by national parliaments, governments and superior courts.[12] During the period 2020-2021, the Advisory Panel came to a "negative conclusion on a significant number of the candidates [12 of the 45 candidates] with there also being a number of candidates accepted as fulfilling the minimum qualifying conditions but whom the Panel had regarded as being borderline". [13] Also, for the first time it has expressed a negative opinion as to candidates' suitability on account of an objectively perceived lack of independence and impartiality on their part vis-à-vis the Government nominating them. [14] **

As established in the Interlaken Declaration and highlighted by the Advisory Panel, the States' practice to prefer judicial profile for the candidates actually seems better meet all the Convention requirements, the major suitability to the role of high court's judge, the thorough knowledge of national and international legal system, the necessary practical legal experience, together with the requested guarantee of independence and impartiality linked to the task already discharged at national level.

As highlighted by the Advisory Panel, the independence, not only vis-à-vis the Governments, should be assessed at the preliminary steps of the selection procedure.
A preliminary disclosure of relationships, with ngos, prominent political figures and relevant economic interests, potentially affecting the impartiality of a candidate for judicial office in the ECHR, meets this need of an early assessment, also on the part of the Advisory Panel, of the high moral character and independence requirement.

22. The CDDH welcomes the evolving practice of the Advisory Panel to assess the national selection procedures as part of its examination of lists of candidates. **The CDDH, in the light of the Advisory Panel experience and of the requirements set by the Convention, considers appropriate to enhance the assessment also of the moral character and the independence and impartiality of the candidates at the preliminary stage of the procedure by promoting their prior disclosure of interests.** To promote further improvements in the fairness and transparency of these procedures and **in the suitability of the candidates to the role of judges,** the CDDH considers that it may be desirable that the Advisory Panel makes public its observations concerning these aspects of the procedures, or a summary thereof, to the extent that this does not interfere with the principle of confidential communication of the views of the Panel on the proposed list of candidates to the government concerned. Such an approach would potentially encourage reflection not only in the State Party concerned but also other State Parties on how to strengthen national selection procedures. The Advisory Panel says that, overall, its dialogue with governments has improved. Its requests for clarifications or additional information in relation to one or more candidates or on the national selection procedure are usually followed up swiftly by governments providing comprehensive information.[15] There are, however, cases in which the governments have submitted to the Assembly lists which had previously been totally or

[11] Ibid., § 50.
[12] Ibid., § 51-62.
[13] Ibid.,, § 86.
[14] Ibid., §§ 35; 37; 86.
[15] Ibid., § 84.

partially rejected by the Panel.[16] In some cases, significant delays have occurred in the submission of the lists of candidates to the Panel.[17]

25. The CDDH has considered a possible revision of the Guidelines as a means of strengthening national selection procedures. The Guidelines, together with the complementary information included in their explanatory memorandum, have proved their usefulness and remain relevant. With a view to ensuring consistency of the Guidelines with Protocol No. 15 the CDDH proposes that Committee of Ministers reviews the Guidelines as follows: the CDDH proposes that the Committee of Ministers reviews Section II, point 5 of the Guidelines to state that "[c]andidates shall be less than 65 years of age at the date by which the list of three candidates has been requested by the Assembly, further to Article 22" .

In order to improve the selection procedure with a view to the independence and professional profile of the candidates, the CDDH proposes to review the Guidelines in the relevant parts by providing to indicate to the States a prior disclosure of interests on the part of the candidates and by giving preference to high court judicial experience

26. The CDDH welcomes the fact that the Advisory Panel provides comprehensive and qualitative information as to its assessment of candidates and national selection procedures in its activity reports.

The CDDH recommends that the Advisory Panel is enabled to a deeper preliminary assessment even of the moral character and independence of the candidates selected.

This serves as the basis for guiding member States in complying with the Guidelines when organising their national selection procedures. To strengthen these procedures, the CDDH suggests that the Committee of Ministers welcomes the evolving practice of the Advisory Panel to assess national selection procedures and invite it to publish its views on them, to the extent that this does not interfere with the principle of confidential communication of the view of the Panel to the government concerned.

42. The CDDH welcomes the Assembly's scrutiny of national selection procedures. It considers that when it rejects lists on procedural grounds a publication of its conclusions and its reasoning in a succinct manner which would potentially encourage reflection not only in the State Party concerned but also other State Parties regarding the improvement of national selection procedures.

The CDDH welcomes the Assembly's scrutiny of the substantive grounds of the procedure by paying attention also to the moral character and independence as well as the suitability to a high court judicial task of the candidates.

[16] Ibid., § 78. During the period 7 May 2019 to 1 July 2022, two governments submitted to the Assembly lists without replacing the candidates who had been assessed by the Panel as not being qualified and in one instance after replacing two of the initial candidates but not one of the replacement candidates whom the Panel had also found not to be qualified.

[17] Ibid., § 79. There was a delay of more than one year in one case and six months and five months respectively in two other cases. In one case the initial delay combined with complications in the procedure led to a delay of more than three years in the election of the new judge. As regards two other countries, at the date of adoption of this report no list or any other information had been submitted at all, entailing a delay so far of more than one year for one list and five months for the other list. [47] Ibid.,§§ 91, 92.

54Bis A prior disclosure of interests and connection with other entities shall be made on the part of all the actors of the decision-making process, including the members of the Registry and the Ad hoc judges. Therefore, those having declared connections with entities shall not sit in the panel when the case involves the entities concerned.

58 Bis. The CDDH has discussed that the requirements of high moral character and independence should be considered extended to all the actors of the decision-making process, including the members of the Registry and the Ad hoc judges. In order to assess such requirements in advance and avoid situations of conflict of interests in the deliberation of cases, it's necessary a preliminary disclosure of interests on relationships, with NGOs, prominent political figures and relevant economic interests, potentially affecting the impartiality on the part of all those participating to the decision making process.

59. The CDDH has discussed the issue raised by some of its members regarding the impossibility of parties to a case to request the recusal of a judge. The CDDH has noted that this question has been addressed by the Committee of Ministers in its replies to questions from members of the Parliamentary Assembly.[18] It is noted that "parties to a case are aware of which Section their case has been assigned to, at the latest as of the communication of a case for observations. The composition of the various Sections (as well as the list of the judges appointed by the President as Single Judges) being publicly available on the Court's webpage, the parties may at any time verify that composition and request the Court that a particular judge not be involved in deciding their case for duly explained reasons. In such a case, the procedure provided for in Rule 28 shall be followed."[19] Asked "what it intends to do about the scope and functionality of the Court's rules of recusal", the Committee of Ministers replied by recalling that under Article 25 of the Convention, the Court adopts its Rules and, therefore, it is not for the Committee of Ministers to take any action about the scope and functionality of the Court's rules of recusal. [90] It was, however, noted that the Court's Committee on Working Methods was reviewing the existing Rules of Court, including Rule 28.

60. ~~The CDDH sees no reason for departing from the position of the Committee of Ministers regarding the issue of recusal of judges.~~

The CDDH notes that the issue of the impartiality and conflict of interests still raises concern. The provision of a mechanism of recusal of judges and the actors of the decision-making process is still topical and calls upon the enhancement of guarantees of impartiality and appearance of impartiality of those actually deciding for the parties, of transparency in the procedure and confidence in the Court.
For this purpose, it's recommended the adoption of appropriate measures contributing to that, such as the prior disclosure of the panel of the judges and the members of the registry dealing with the case and the mechanism of recusal at certain conditions of the latter.

67 bis. The CDDH recommends **a preliminary disclosure of interests on relationships, with ngos, prominent political figures and relevant economic interests, potentially affecting the impartiality on the part of all those participating to the decision-making process, including the members of the Registry and the Ad hoc judges.**

[18] See CM/AS(2021)Quest747-748-749-final, 31 March 2021, paragraph 6; CM/AS(2021)Quest759-760-final, 7 July 2021.
[19] CM/AS(2021)Quest759-760-final, 7 July 2021, paragraph 5. [90] Ibid., paragraph 7.

~~69. The CDDH refers to the position of the Committee of Ministers regarding the issue of recusal of judges.~~

The CDDH, noting that the issue of independence of judges is still topical, with a view to further strengthen the confidence in the Court, recommends the adoption of appropriate measures contributing to enhance guarantees of impartiality and transparency in the procedures, such as the prior disclosure of the panel of judges and the members of the registry dealing with the case and the mechanism of recusal at certain conditions of the latter.

80. The Committee of Ministers and the Parliamentary Assembly did not specifically address issues relating to *ad hoc* judges in the last review process. In its 2017 report, the CDDH had examined concerns raised by the Parliamentary Assembly's Committee on Legal Affairs regarding the exclusion of the Parliamentary Assembly from the appointment procedure of *ad hoc* judges, differences in national selection procedures for elected judges and *ad hoc* judges, and delays in their appointment.[20] Noting that the system had worked well and having regard to various explanations provided by the Registry, the CDDH concluded that a distinct regime for *ad hoc* judges is justified by the rarity of their appointment. It expressed the hope that the Court could envisage changes to its Rules to prolong the period of validity of lists of *ad hoc* judges, or to make it more flexible.

As to the merits of the professional and independence of ad hoc judges, it seems appropriate that the selection follows the same steps and meets the same standards as for the elected judges, as required by art 29 pf the Rules.

81. The potential need to appoint *ad hoc* judges in case a particular candidate were to be appointed as judge of the Court should be taken into account during the selection and election procedures, in view of the fact that the appointment of *ad hoc* judges is not subject to the same safeguards of independence and impartiality and their presence would affect the stability of the Court's composition.[114] The CDDH recalls that the Guidelines state that national selection procedures should avoid any foreseeable, frequent and/or long-lasting need to appoint an *ad hoc* judge.[21] A memorandum of the Parliamentary Assembly's Secretariat on the procedure for election of judges to the Court, issued following Resolution 2248(2018), also contains a clear indication that, as far as possible, no candidate should be submitted whose election might result in the necessity to appoint an *ad hoc* judge.[22]

85. The CDDH welcomes the changes to the Rules of Court regarding the extension of the renewable period for which *ad hoc* judges are appointed from two to four years and the automatic appointment of elected judges to serve as *ad hoc* judges when State Parties have not submitted in advance lists of eligible *ad hoc* judges.

The CDDH, due to the guarantees of professionalism and impartiality required also for ad hoc judges, recommends the provision of mechanisms of selection, assessment of independence, including the disclosure of interests, and recusal as for the elected judges.

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[20] *Ad hoc* judges at the European Court of Human Rights: an overview "Doc. 12827 | 23 January 2012

[114] CM(2012)40-add) §33.

[21] CM(2012)40-final Section II,§7.

[22] SG-AS (2023) 01rev02, Appendix 2, pg. 11.

Table summarising provisional conclusions

Issue	Possible proposals
The national selection procedure	1. Revision of Section II, point 5 of the Guidelines concerning candidates' maximum age. 2. Revision of Section II, point 6 of the Guidelines by providing the prior disclosure of interests on the part of the candidates. 3. Encouraging the State's practice to give preference to the practical legal judicial experience. 4. Welcoming the Panel's assessment of national procedures and possible invitation to it to publish its views on them, to the extent that this does not interfere with the principle of confidentiality.
Election procedures	Welcoming the Assembly's scrutiny of national selection procedures and possible invitation to provide its reasoning when rejecting lists on procedural grounds. Welcoming the Advisory Panel and Assembly's scrutiny of the substantive grounds of the procedure by paying attention also to the moral character and independence as well as to the suitability to a high court judicial task of the candidates.
Active time in office	1. Inviting the Council of Europe to raise the issue of difficulties encountered by judges in finding appropriate schooling for their children in Strasbourg with the relevant authorities of the host State to find appropriate solutions, including by means of prioritising the enrolment of judges' children in suitable international schooling programmes. 2. Conclusion on the issue of judge rapporteur. 3. ~~Supporting the CM conclusion that the issue of judges' recusal remains within the remit of the Court.~~ Recommending the prior disclosure of the judges and the members of the Registry dealing with the case and the recusal at certain conditions of the latter. 4. Recommending the disclosure of interests on the part of all the actors of the decision making process, including the members of the Registry and the ad hoc judges. 5. Conclusion about the length of the term of office.
Post-mandate recognition	Possible declaration/decision of the CM concerning issues of reprisal and recognition of status.
Ad-hoc judges	Welcoming the changes to the Rules of Court regarding the extension of the renewable period for which *ad-hoc* judges are appointed and the automatic appointment of elected judges to serve as *ad hoc* judges when State Parties have not submitted their lists in advance. Recommending also for ad hoc judges' mechanisms of selection, assessment of independence and conflict of interests and recusal able to guarantee the convention requirements set in art. 21 as for the elected judges.

DH-SYSC-JC

Note de la délégation italienne

SOMMAIRE : **Avant-propos** : la nécessité que le juge soit et semble impartial - **1**. La nécessité que la majorité des juges de la CEDH soient des magistrats de carrière. **2**. La nécessité d'une *disclosure* préalable des relations susceptibles d'affecter l'impartialité d'un candidat à une fonction judiciaire dans la CEDH et d'étendre le champ d'application des articles 4 et 28 du règlement de la Cour. - **3.** La nécessité d'étendre les garanties d'impartialité également aux membres du greffe et aux juges ad hoc **- 4**. La nécessité de connaître par avance les membres du collège et la possibilité de récuser les juges qui pourraient ne pas être impartiaux.

Avant-propos. Le thème de l'impartialité des personnes appelées à rendre une décision sur des controverses est de nature cruciale afin de garantir la justice, l'objectivité et l'équité de ces mêmes décisions. Par corrélation, cette impartialité revêt également une importance particulière pour assurer la légitimité de l'organe décisionnel face à la société sur laquelle retombent aussi bien les conséquences juridiques que l'impact social et parfois même culturel des décisions prises.

Si – comme nous l'avons justement observé – l'attitude à l'impartialité est une condition intrinsèque de l'âme humaine et *habitus* mental qui ne peut pas être directement instillée par la loi à celui qui juge, il revient néanmoins aux institutions de faire en sorte que les personnes qui sont appelées à prendre des décisions puissent bénéficier des meilleures conditions externes pour rechercher, conserver et consolider leur impartialité par rapport à leur fonction pour garantir à la société que ces conditions soient respectées par l'ensemble des personnes impliquées dans la prise de décision.

Celui qui est appelé à prendre des décisions de justice "*doit non seulement être impartial mais doit également paraître comme tel et pour ce faire il ne doit pas avoir de liens politiques, économiques, sociaux, personnels ou même simplement idéologiques qui pourraient faire penser qu'il est influencé ou influençable.*" (Président de la République italienne, 30 mars 2022). De ce fait, "*l'exercice de la fonction juridictionnelle impose au juge le devoir non seulement « d'être » impartial, mais aussi de « paraître » comme tel ; cela lui impose non seulement d'être dépourvu de toute "partialité", mais aussi d'être "au-dessus de tout soupçon de partialité*". *Alors qu'être impartial doit être considéré par rapport au procès concret, paraître impartial constitue, en revanche, une valeur intrinsèque à la position institutionnelle du magistrat, indispensable pour légitimer, auprès de l'opinion publique, l'exercice de la juridiction comme fonction souveraine: être magistrat implique une "image publique d'impartialité*"" (Cass. Civ., chambres réunies, arrêt du 14 mai 1998 n. 8906).

Les principes mentionnés auparavant constituent une tradition commune des États membres du Conseil de l'Europe et sont mis en valeur par la jurisprudence de la Cour européenne des droits de l'homme qui, en matière d'impartialité, a également souligné " *l'importance des apparences* ", dans la mesure où celles-ci peuvent aussi " *donner lieu à un soupçon ou à une apparence de partialité* " et, par conséquent, font partie du périmètre à protéger au moyen de " *garanties adéquates d'impartialité aussi bien objective que subjective* " (Nicholas c. Chypre, 2018, §64). En effet, "*removing any appearance of partiality … serve[s] to promote the confidence which the courts in a democratic society must inspire in the public*" (Mežnarić c. Croatie, 2005, § 27; A.K. c. Liechtenstein, 2015, § 81). Le concept est également clairement exprimé dans la *Resolution on Judicial Ethics* dans laquelle il est rappelé que " *Judges shall exercise their function impartially and ensure the appearance of impartiality. They shall take care to avoid conflicts of interest as*

well as situations in and outside of the Court that may be reasonably perceived as giving rise to a conflict of interest".

De ces principes découlent certaines conséquences qui devraient être garanties dans toute instance judiciaire et, plus particulièrement, dans une instance telle que la Cour européenne des droits de l'homme appelée à jouer un rôle de garantie suprême en intervenant, de façon générale, à la suite de décisions judiciaires qui, dans les États, sont considérées comme étant de dernier recours.

1. La nécessité que la majorité des juges de la CEDH soient des magistrats de carrière.

Au fil du temps, les systèmes juridiques nationaux ont développé un large éventail de garanties pour assurer la sérénité et l'impartialité d'évaluation des juges.

Par conséquent, il est raisonnable de penser que ceux qui ont déjà exercé des fonctions judiciaires au niveau national, et plus particulièrement ceux qui les ont exercées à un haut niveau, ont déjà une longue expérience professionnelle au sein d'une instance indépendante, une approche aux questions et une conduite qui offre des garanties d'impartialité qui peuvent également être transférées par une instance juridique supranationale telle que la Cour européenne des droits de l'homme.

Par ailleurs, les juges nationaux sont les mieux placés, en raison de leur expérience professionnelle, pour évaluer l'application du droit interne sous l'angle conventionnel de la part des juges nationaux (dans le respect du principe de subsidiarité) et évaluer les solutions internes par rapport aux violations de la Convention, qui est en substance le *core* des examens demandés à la Cour de Strasbourg.

Une telle motivation s'appuie largement sur une tendance consolidée des différents Etats qui privilégient des candidats avec une formation juridique. En effet, il résulte de données récentes que dans les dernières années les listes de candidats étaient composées environ de 42% de juges (27 % de professeurs universitaires et 31% d'autres professions)[23]. Toutefois, et précisément pour les raisons qui viennent d'être évoquées, il faudrait ultérieurement encourager les Etats à privilégier des personnalités qui appartiennent à des juridictions et si possible de grade élevé, pour se porter candidats au rôle de juge de la CEDH.

Au cas où l'on souhaite garantir une formation hétéroclite de la Cour, comprenant des universitaires et des diplomates, on pourrait néanmoins concevoir des mécanismes garantissant une présence juridique plus large. Dans ce sens, on pourrait envisager comme solution possible une rotation dans la sélection des profils.

2. La nécessité de dévoiler préalablement si des faits concernant le candidat susceptible de devenir juge à la CEDH peuvent avoir une incidence sur son impartialité et d'étendre le champ d'application des articles 4 et 28 du Règlement de la Cour.

Une *disclosure* par rapport aux relations de droit et de fait entretenues, au moment de la demande et dans les années qui précèdent, avec des sociétés ou des organisations non gouvernementales, ou relativement à des relations familiales ou d'intérêt avec des personnalités

[23] Cfr. Activity Report Advisory Panel 2022. 1680a8e57f (coe.int). DD(2022)445. Exchange of views with Mr Paul Mahoney, Chair of the Advisory Panel of Experts on Candidates for Election as Judge to the European Court of Human Rights.

politiques ou sociales de première importance, ou relativement à l'existence d'intérêts économiques importants, demande faite aux juges nouvellement nommés, est parmi les pratiques adoptées par les Etats du Conseil de l'Europe[24] pour s'assurer que la fonction juridictionnelle se déroule dans les meilleures conditions pour garantir l'impartialité des juges.

Par conséquent, une telle déclaration devrait également être sollicitée par les organes du Conseil de l'Europe aux candidats proposés par les Etats avant d'examiner leur aptitude à devenir juge de la CEDH et il faudrait en demander une mise à jour en cas de changements.

En effet, sans toucher aux libertés et aux droits individuels des juges, en commençant par les libertés de pensée et d'opinion, il est un fait objectif que la décision des affaires suppose une forme d'abstraction de ses propres convictions, afin d'appliquer le droit de façon objective et les liens juridiques ou de fait avec certains milieux qui pourraient diminuer ou du moins donner l'idée de diminuer la sérénité et la liberté du juge dans cette action d'abstraction professionnelle.

En outre, une demande d'engagement de transparence, sous-jacente aux déclarations précitées, aurait pour ultérieur effet d'augmenter le sens de responsabilité de celui qui juge et ajouterait une limite supplémentaire à de possibles pressions externes de la part des lobbys ou de sujets intéressés à influencer de façon inappropriée les orientations juridiques et culturelles de la Cour.

Comme nous le savons, le thème de l'indépendance des juges de la Cour, de potentiels conflits d'intérêt de ces derniers et de la tendance de toutes les contre-mesures possibles fait l'objet d'un large débat au sein du Conseil de l'Europe qui s'est intensifié à l'occasion de la publication d'un rapport sur les relations entre certains juges de la CEDH et les ONG[25].

Le Comité des Ministres, à l'occasion de nombreuses interrogations de la part de l'Assemblée Parlementaire du Conseil de l'Europe sur ce sujet[26], en plus de rappeler les mesures actuelles tendant à garantir l'impartialité et la qualité de la Cour, a surtout rappelé l'attention particulière qu'il porte sur cet aspect crucial de l'efficacité du système conventionnel, en mettant en évidence ce qui suit : *« le Comité continuera à évaluer l'efficacité de l'actuel système de sélection et d'élection des juges de la Cour. Plus récemment il a invité tous les acteurs de la Convention à continuer à garantir le niveau maximum d'indépendance et d'impartialité des juges de la Cour. Il a décidé de prendre en considération d'ultérieurs moyens pour garantir la reconnaissance du status et de l'ancienneté des juges de la Cour, en fournissant de la sorte des garanties supplémentaires pour préserver leur indépendance, même après la fin de leur mandat. Il évaluera à nouveau avant fin 2024, au vu de l'expérience acquise, l'efficacité de l'actuel système de sélection et d'élection des juges de la Cour ».*

Par ailleurs, les délais entre la reprise énergique du débat et l'engagement du Comité des Ministres en faveur d'une réflexion renouvelée sur les procédures de nomination des juges dans un souci d'impartialité et d'indépendance (dont le groupe est mandataire) plaide en faveur d'une extension des approfondissements demandés au CDDH et aussi sur les aspects d'un éventuel conflit d'intérêts.

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[24] Cfr., par exemple, CSM, III sez., circ. P 18442/2014, point 7.
[25] Cfr. rapport de European Centre for Law and Justice, *Les ONG et les Juges de la CEDH*, 2009-2019, 2020, selon lequel au moins 20% des juges permanents de la CEDH entre 2009 et 2019 entretenaient des liens significatifs avec un certain nombre d'associations qui étaient actives auprès de cette même Cour, ce qui selon le rapport a donné lieu à au moins une centaine de cas documentés de conflits d'intérêt, ce qui constituerait l'indice d'un problème qui n'est ponctuel et en tant que tel, inévitable mais, au contraire, systémique.
[26] Doc. 15258 du 08 avril 2021.

Par conséquent, une déclaration d'intérêts, comme proposée ci-dessus, irait vraiment dans la direction souhaitée par le Comité des Ministres, dans la mesure où elle serait susceptible de renforcer et de rendre effectifs les principes affirmés par la *Resolution on Judicial Ethics*, selon laquelle *"Judges shall exercise particular caution in all contact with parties and other persons associated with pending cases*" et *"They shall keep themselves free from undue influence of any kind, whether external or internal, direct or indirect. They shall refrain from any activity, expression and association, refuse to follow any instruction, and avoid any situation that may be considered to interfere with their judicial function and to affect adversely public confidence in their independence".*

2.1. Dans cette optique, les articles 4 et 28 du Règlement de la Cour ne seraient pas suffisants pour couvrir un éventail plus large de potentielles situations de conflit d'intérêts, mais surtout ils se présentent comme des mécanismes qui restent internes à la Cour et confiés à l'initiative du seul juge.

L'actuelle rédaction de l'article 4 du Règlement de la Cour, d'une part, délimite les cas d'incompatibilité sur des aspects bien limités (activité politique, administrative ou professionnelle) et ne sont pas toujours suffisants pour couvrir les situations pouvant avoir une incidence sur la capacité d'abstraction du juge qui doit se faire sereinement, comme nous l'avons déjà précisé auparavant, tandis que les clauses prévues aux points a) et b) de l'article 28 ne sont pas suffisamment définies et reviennent substantiellement à l'autoévaluation du juge. D'autre part, l'actuel article 4 remet l'évaluation de l'existence de cette situation d'incompatibilité à une procédure entièrement interne à la Cour, et qui fait suite à la nomination du sujet en tant que juge.

L'article 28 du Règlement de la Cour confie à l'individu le soin d'identifier de possibles causes d'incompatibilité en laissant à ce dernier la faculté d'évaluer la pertinence de relations avec des organisations qui peuvent être des tiers-intervenants dans les affaires.

2.2. Pour cette raison, l'introduction de mécanismes de *disclosure* préventifs est essentielle, dans le sens indiqué auparavant, ainsi que l'ostentation de ces déclarations.

En outre, il apparaît opportun – pour garantir le contrôle social sur la fonction judiciaire, qui constitue la base de légitimation de l'activité des cours, comme mis en évidence par cette même CEDH (cfr., *ex multis*, les affaires déjà citées *Mežnarić c. Croatie*, 2005, § 27 ; *A.K. c. Liechtenstein*, 2015, § 81) - rendre publique la déclaration d'intérêts susmentionnée, comme il advient pour certains profils et aussi comme pour des instances judiciaires supranationales telles que la Cour de Justice de l'Union européenne[27]. Ceci permettrait un large contrôle et mettrait en lumière des situations de carence d'indépendance et d'impartialité qui ne seraient pas déclarées spontanément par le juge, ce qui apparaît difficilement réalisable par le biais de l'actuel mécanisme, essentiellement interne à la Cour, et prévu à l'article 28 du Règlement de la Cour.

Il faudrait donner le pouvoir aux organes du Conseil chargés du recrutement des juges de demander, même d'office, des éclaircissements eu égard au contenu des déclarations rendues et de demander des documents supplémentaires en démonstration des attestations effectuées dans les communications d'intérêt et dans les *curricula*.

[27] Cfr. art. 3 du *Code de conduite des membres et des anciens membres de la Cour de justice de l'Union européenne*, relativement à la *déclaration sur les intérêts personnels*. Pour une publication de ces déclarations, déclarations cfr., par ex., https://curia.europa.eu/jcms/upload/docs/application/pdf/2021-12/declaration_financiere_reine_inga.pdf , consulté le 16 février 2023.

3. La nécessité d'étendre les garanties d'impartialité également aux membres du greffe et aux juges *ad hoc*.

Considérant que l'élaboration de la décision par les organes juridictionnels les plus complexes, tels que la Cour européenne des droits de l'homme, ne se limite pas à l'intervention individuelle des juges, mais est le résultat d'une procédure complexe, à laquelle plusieurs sujets participent, ayant parfois une fonction de première importance pour l'élaboration de la décision. Il est donc nécessaire qu'également pour ces sujets soit requise une série de garanties d'impartialité et que ces dernières soient mises en place.

Pour cette raison, les juges *ad hoc*, ainsi que les membres du greffe ayant des fonctions d'instruction des affaires et de rédaction des projets, devraient au moins établir les déclarations, indiquées précédemment et être soumises aux procédures, décrites au point suivant. Ce principe, qui avait déjà été affirmé par la CEDU dans l'affaire *Bellizzi c. Malta*, 2011, § 51 avec référence aux assesseurs et aux référendaires, devrait pour cette raison être également appliqué aux greffiers, car eux aussi ont un rôle pertinent dans la formation d'une décision, en accomplissant un examen préliminaire des demandes formulées par les parties et qu'ils doivent préparer le projet de la décision.

Pour les raisons susmentionnées et pour des exigences d'impartialité et de transparence qui doivent être garanties à chaque moment de la phase de décision, on considère qu'également les juges *ad hoc* aussi, en outre, devraient être nommés selon les critères et les procédures similaires à ceux demandés pour les juges ordinaires, sous réserve d'examen par les organes du Conseil de l'Europe et des mécanismes de transparence adaptés, actuellement dépourvus d'une réglementation spécifique.

4. La nécessité de connaitre par avance les membres du collège et la possibilité de récuser les juges qui pourraient ne pas être impartiaux.

Même s'il existe des garanties d'impartialité sur un plan général, il y a toujours la possibilité qu'un juge se retrouve dans une affaire dans laquelle il pourrait avoir une forme d'intérêt. Pour cette raison, chaque système juridique associe aux garanties générales d'indépendance et d'impartialité, des mesures destinées à permettre au juge à s'abstenir dans chaque affaire (comme prévu actuellement par l'article 28 du Règlement de la Cour) et aux parties de le récuser au cas où, bien qu'ayant un potentiel intérêt dans l'affaire, il ne s'est pas abstenu spontanément.

Afin qu'un réel examen à cet égard soit effectué par les parties impliquées dans l'affaire, il est indispensable que ces derniers connaissent l'identité des sujets appelés à instruire et à décider de leur litige, de manière à permettre aux premiers de récuser ces derniers, si ceux-ci ne se sont pas abstenus volontairement (alors qu'ils étaient tenus de le faire).

En l'absence de reconnaissance de ce pouvoir aux parties, la garantie d'impartialité du juge dans l'affaire serait en définitive remise à son jugement sans appel et, comme tel, ne pourrait pas être se considérer comme effectif. Ceci, du reste, est déjà admis par les systèmes nationaux de la Cour Européenne des Droits de l'Homme (Debled c. Belgio, 1994, § 37, Micallef c. Malta, 2009, §§ 99-100, Harabin c. Slovacchia, 2012, § 136, Mironov c. Russia, 2020, Miloshevikj c. Macedonia del Nord, 2021, § 40; voir aussi le par. 296 du Guide de l'article 6 de la Convention Européenne des Droits de l'Homme – Droit à un procès équitable) et il n'apparaît pas raisonnable qu'une Cour, qui doit examiner l'équité des décisions des juges nationaux, offre des standards inférieurs de garanties et d'impartialité par rapport à ceux des juges qu'elle doit évaluer. La récusation des juges est d'ailleurs reconnue non seulement par les systèmes internes, mais aussi,

en règle générale, pour les cours judiciaires supranationales (il suffit de penser à l'article 41 du Statut et à l'article 34 du règlement de la Cour Pénale Internationale).

Et c'est à la lumière de telles considérations qu'il convient, donc, introduire des mécanismes de récusation des juges et des autres acteurs, indiqués au paragraphe précédent, appelés à prendre des décisions de la CEDH.

Comme nous pouvons facilement l'imaginer, l'exercice de ce droit de contrôle par les parties en cause ne peut avoir lieu qu'à condition que l'identité de ceux qui jugent soit connue. Il est de tradition dans de nombreux États membres du Conseil que cette publication de l'identité des membres du jury soit antécédente au contact direct entre eux et les parties (qui en principe se fait lors de l'audience) et qu'au contraire la récusation des membres par les parties devrait se faire normalement avant ce contact.

Le principe s'inspire non seulement par une exigence d'économie procédurale, mais également et plus particulièrement par l'exigence que celui qui juge, et qui pourrait avoir un intérêt dans l'affaire, n'exerce jamais la fonction de jugement qui est liée au rôle, ce qui pourrait déboucher sur des activités susceptibles d'exercer une influence sur les collègues qui suivront l'affaire par la suite ou qui vont en tous cas avoir une incidence dans les phases ultérieures du processus décisionnel.

Lorsque le fonctionnement de la juridiction n'est pas assuré uniquement par les juges mais aussi, par exemple, par le personnel du greffe chargé de l'instruction initiale ainsi que de la rédaction des projets de décision, il est primordial que les parties connaissent avant l'audience non seulement l'identité des juges, mais aussi celle des autres sujets. Ces derniers aussi, pour les raisons déjà exposées, doivent être considérés comme susceptibles d'être récusés.

Par ailleurs, l'éventuelle « procédure de récusation », suggérée dans la réponse du Comité des Ministres aux questions parlementaires de l'APCE sur le conflit d'intérêts (voir doc. n. 15345 du 26 juillet 2021)[28] apparaît générale et peu connue car non expressément codifiée, ce qui, à l'inverse, pourrait créer un risque de discrétion excessive dans la refus d'un juge.

En outre, là où ces mécanismes peuvent déjà se déduire des dispositions prévues à l'art. 28 du Règlement de la Cour, il sera plus facile de les améliorer dans le cadre de ces mêmes règles (avec une évidente utilité de clarté, transparence et sécurité juridique).

Par conséquent, même si l'application de ces mesures revient aux compétences internes de la Cour (dans ce sens, voir la réponse ci-dessus du Comité des Ministres) nous considérons que de toute façon, l'évaluation approfondie des garanties d'autonomie et d'indépendance demandées au groupes de travail, comprend nécessairement l'approfondissement de cet aspect du sujet sous un double angle, que nous venons de mettre en évidence : une préalable connaissance des sujets qui participent au processus de décision (juges et fonctionnaires de section) et la possibilité d'un mécanisme de récusation.

[28] Conformément aux méthodes de travail et au règlement de la Cour, les parties d'une affaire savent à quelle section leur affaire a été attribuée au plus tard à la date de la communication pour les observations. La composition des différents services (ainsi que la liste des juges nommés par le Président comme juges uniques) est disponible pour le public sur le site web de la Cour. Les parties peuvent donc en tout moment prendre vision de cette composition et demander à la Cour de ne pas inclure dans une décision un juge déterminé pour des raisons dûment justifiées. Dans ce cas-là, la procédure prévue à l'article 28 sera suivie.

En conclusion, pour toutes les raisons ci-dessus mentionnées, il faudrait élargir le travail d'approfondissement demandé à ce groupe pour toutes les questions mises en évidence auparavant, ainsi qu'à leurs relatifs arguments à l'appui.

POLAND / POLOGNE

Submitted on 12/05/2023

Draft report on issues related to judges of the European Court of Human Rights

– comments by the delegation of Poland

11. Some problematic aspects of the national selection procedures were highlighted by those responding to the DH-SYSC-JC's questionnaire.22 91 respondents who had considered applying at the national level but decided not to do so (potential applicants) expressed concerns in relation to the criteria used to draw up the final list of three candidates, the lack or the quality of information about the process of eliciting applications, the way in which the applications would be examined, the way in which the final list of three candidates would be drawn up, and the public nature of the national selection procedure (*see also tables 1 and 2 below*). Individual respondents considered that the nomination at the national level was politicised, within the exclusive remit of the government; that the procedures were not transparent or merit-based; that the format and fairness of interviews was questionable; or that the age requirement was restrictive. 23

Comment: After the words "the public nature of the national selection procedure" we propose to add a footnote with the information included at present in footnote no. 74 as it concerns the national selection stage: "It should be noted that the 19 responses expressed concerns about the public nature of the procedure with reference to the national selection procedure. Several respondents considered the transparency of the process as an indispensable aspect of any procedure".

It would also be useful to recall in the present report the previous position of the CDDH on the public nature of the national selection procedure.

As regards the public nature of the selection procedure, the CDDH recalls its view expressed on the previous occasion that the lack of confidentiality in certain instances may be harmful for the reputation of candidates and constitute a deterring factor to apply [footnote - CDDH Report on the process of selection and election of judges of the European Court of Human Rights, para. 57].

17. The Advisory Panel has progressively developed, in the light of its experience, its understanding of the criteria set out in Article 21§1 of the Convention. For example, the criterion of being of high moral character has to be presumed; it cannot be examined by the Advisory Panel given that it is not empowered to convene candidates for interviews.32 The other two criteria of possessing the qualifications required for appointment to high judicial office or being jurisconsults of recognised competence are examined in relation to the broader objective of ensuring that the Court enjoys authority and respect with national judiciaries at the highest level and in the State Parties generally.33 While the Advisory Panel seeks to apply the same criteria to all State Parties it takes into account the difficulty that States with a small population may have in finding three

suitably qualified high-level candidates.34 In general, the Advisory Panel considers that its clarification of the Article 21§1 criteria has led to presentation of candidates of a higher quality.35

Comment: the fact that the Advisory Panel does not organise interviews with the candidates constitutes a serious obstacle and shortcoming in the current procedure. All its opinions are formulated on the basis of CVs or unsolicited information from unknown sources. And yet, the State Parties are required to conduct interviews with the candidates, this even being considered a condition sine qua non by the Parliamentary Assembly.

In consequence, a paradoxical situation may arise that members of the selection panels at the national level assess the candidates and select them based on proven merits and not only on theoretical skills, but then the Advisory Panel may question such candidates reading the papers only. It seems that at least in doubtful cases the Panel should be able to convene candidates for interviews.

So far the main argument against such a possibility was the related cost. However, given that at present ample possibilities exist to organise such interviews online (and actually even the PACE held such interviews online during the COVID-19 pandemic), this argument does not seem to be valid anymore and we encourage the CDDH to reconsider this matter. We propose to add the following text after para. 17 or elsewhere in the document:

17bis. In the above context, the CDDH is of the opinion that a possibility for the Advisory Panel to hold interviews with the candidates may be worth consideration, at least in some cases, bearing in mind that the interviews constitute now an indispensable part of the national selection stage. The direct contact of the Advisory Panel with the candidates may facilitate the assessment of their skills and merits in practice and not only in theory based on CVs, and as such may be helpful in particular in borderline cases.

18. Based on its 12-year-long experience, the Advisory Panel has concluded that, in broad terms, the quality of candidates who have been presented has improved and that the requirement to submit the lists to it has prompted governments to focus on the quality of candidates.36 Nevertheless, it has noted with disappointment the relatively low number of candidates with long judicial experience at a high, and in particular the highest, national courts. 37 In other cases the length and breadth of experience of candidates has been considered as insufficient to qualify them as jurisconsults of recognised competence, falling below that required of an international judge adjudicating on measures adopted by national parliaments, governments and superior courts.38 During the period 2020-2021, the Advisory Panel came to a "negative conclusion on a significant number of the candidates [12 of the 45 candidates] with there also being a number of candidates accepted as fulfilling the minimum qualifying conditions but whom the Panel had regarded as being borderline". 39 Also, for the first time it has expressed a negative opinion as to candidates' suitability on account of an objectively perceived lack of independence and impartiality on their part vis-à-vis the Government nominating them. 40 ***On the other hand, opinions were voiced that it may be useful for the Advisory Panel to reflect on appropriate mechanisms in case of the potential conflict of interest between the members of the Panel and the candidates.***

Comment: In this context it would also be useful to emphasise the need for appropriate mechanisms to deal with the potential conflicts of interest between the members of the Advisory Panel and the candidates proposed or rejected by governments. Actually, among members of the Advisory Panel there are many former judges of the Court while the former or current members of the Registry often apply in the national selection procedures. This could lead to cases of conflict of interest between the members of the Advisory Panel and the candidates. It would be useful to add here or elsewhere in the report the reference to a need for the Panel to have appropriate procedures in place.

22. The CDDH ~~welcomes~~ **notes** the evolving practice of the Advisory Panel to assess the national selection procedures as part of its examination of lists of candidates. **This however has not been envisaged by the Resolution CM/Res(2010)26 on the establishment of the Advisory Panel and should not unduly influence the main mandate of the Panel which is to assess the candidates on their own merit and their compliance with the requirements of Article 21 of the Convention .** ~~To promote further improvements in the fairness and transparency of these procedures, the CDDH considers that it may be desirable that the Advisory Panel makes public its observations concerning these aspects of the procedures, or a summary thereof, to the extent that this does not interfere with the principle of confidential communication of the views of the Panel on the proposed list of candidates to the government concerned. Such an approach would potentially encourage reflection not only in the State Party concerned but also other State Parties on how to strengthen national selection procedures.~~ The Advisory Panel says that, overall, its dialogue with governments has improved. Its requests for clarifications or additional information in relation to one or more candidates or on the national selection procedure are usually followed up swiftly by governments providing comprehensive information.44 There are, however, cases in which the governments have submitted to the Assembly lists which had previously been totally or partially rejected by the Panel.45 In some cases, significant delays have occurred in the submission of the lists of candidates to the Panel.46

Comment: The assessment of the procedure is already guaranteed in a sufficient way by the Parliamentary Assembly.

The practice of the Advisory Panel to assess the national selection procedures seems relatively new and is not envisaged by the CM Resolution establishing the Panel. Before endorsing it, it would be useful for the CDDH to see how it functions in practice and whether it does not influence unduly the assessment of the candidates as such, as this is the main role of the Panel.

Moreover, there seems to be an inherent contradiction in the formulation of the proposal to publish the Panels' observations on the national selection procedure. On the one hand, it requires respecting the principle of confidential communication of the views of the Panel on the proposed list of candidates. On the other hand, if the assessment of the national procedure is made by the Panel to the extent necessary for the assessment of the candidates, then it would hardly be possible to publish the Panel's views on the procedure without at the same time compromising the candidates.

26. The CDDH welcomes the fact that the Advisory Panel provides comprehensive and qualitative information as to its assessment of candidates ~~and national selection procedures~~ in its activity reports. This serves as the basis for guiding member States in complying with the Guidelines when organising their national selection procedures. At the same time, a ***possibility for the Advisory Panel to hold interviews with the candidates may be worth considering, at least in some cases.*** **The CDDH also encourages the Advisory Panel to reflect on appropriate mechanisms in case of the potential conflict of interest between the members of the Panel and the candidates.** ~~To strengthen these procedures, the CDDH suggests that the Committee of Ministers welcomes the evolving practice of the Advisory Panel to assess national selection procedures and invite it to publish its views on them, to the extent that this does not interfere with the principle of confidential communication of the view of the Panel to the government concerned.~~

Comment: see above paras. 17, 18 and 22.

27. Several changes to the Assembly's rules on the election of judges introduced in November 2018 and April 2019 reinforced its ability to have a real choice, under Article 22 of the Convention, between three qualified candidates. Accordingly, the Assembly does not consider lists of candidates when areas of competence of the candidates appear to be unduly restricted, not all of them fulfil each of the conditions of Article 21§1 of the Convention, or one of the candidates does not appear to have an active knowledge of one of the official languages of the Council of Europe and a passive knowledge of the other.48 Also, the Assembly does not consider lists of candidates where the national selection procedure did not satisfy the minimum requirements of fairness and transparency, for example there had been no public call for candidates or interviews held with them, and **when** the Advisory Panel~~'s views were not taken into consideration~~ **was not duly consulted**. 49 In all these cases, the Committee adopts proposals to reject a list by simple majority and the Assembly endorses the Committee's proposals as contained in the Progress Report of the Assembly's Bureau, generally without a plenary vote.50

Comment: Precisely speaking, it seems that section 2.4.2 of Resolution 2278(2019) refers to consultation with the Advisory Panel and not to taking its views into consideration.

31. The Committee's practice shows a strict application of the rules described above. It first examines the lists on the sole basis of the candidates' *curricula vitae* and in light of its exchange of views with the chairperson or representative of the Advisory Panel. Should it become clear that one or more candidate(s) does not reach the minimum threshold of competence and experience required for election under Article 21§1 of the Convention, the Committee may recommend that the list is rejected by the Assembly on substantive grounds.59 Between January 2017 and January 2023, the Committee considered 38 lists of candidates. It proposed to the Assembly to reject 13 lists, of which 8 without interviewing the candidates, including three on substantive grounds.6

Comment: The fact that the Assembly rejects so many lists without interviewing the candidates is a source of serious concern. It is the Parliamentary Assembly itself that has formulated a requirement for State Parties to conduct interviews with the candidates, this even being a condition sine qua non for considering the list. In consequence, a paradoxical situation arises that

members of the national selection panels interview the candidates and select them based on direct contact and merits shown in practice, and not merely on theoretical skills and CVS. Then, however, the Parliamentary Assembly may reject such candidates, also on substantive grounds, reading the papers only or based on the opinions of the Advisory Panel prepared equally without interviewing the candidates. This results in a situation that the standards of the procedural fairness at the level of the Council of Europe do not match those required from member states and still their lists may be rejected even without giving the candidates a chance to prove their merits. This may lead to situations where the PACE rejects the lists based on CVs while the governments are fully convinced that they had selected the candidates that had proven to be the best in competition. Therefore we propose to add here, or after para. 34, the following:

The CDDH has noted the relatively high number of cases where the Parliamentary Assembly rejected the lists, including on substantive grounds, without interviewing the candidates, and observed that such an option deprives the members of the Parliamentary Assembly of an important opportunity to formulate their opinions on the candidates based on direct contact with them rather than on CVs only. Giving the candidates a chance to prove their merits before rejecting their candidatures on substantive grounds could increase the trust in the Parliamentary Assembly's decisions rejecting the list on the part of the unsuccessful candidates and the proposing governments.

37. The CDDH welcomes the Assembly's scrutiny of national selection procedures. It notes that the Committee's recommendations to reject lists of candidates on procedural grounds do not provide information as to which aspect of the national selection procedure is considered as being not in line with the Assembly's standards of procedural fairness and transparency. The CDDH considers that an explanation to this effect as well as a succinct presentation of the reasoning for the Assembly's conclusions would potentially encourage reflection not only in the State Party concerned but also other State Parties regarding the improvement of national selection procedures. **The transparency of the Assembly's decisions could also facilitate applying by the Assembly of equal standards towards all State Parties as laid down in the Committee of Ministers' Guidelines.** This is unlikely to harm the reputation of the candidates given that the Assembly clearly distinguishes between rejection on procedural grounds and substantive grounds and that the assessment of national selection procedures is separate from that of candidates' qualifications under Article 21 § 1 of the Convention

Comment: it seems that at present the Parliamentary Assembly's decisions on rejecting the lists on procedural grounds do not always follow uniform standards. There have been cases of rejecting the lists on procedural grounds in respect of some State Parties while accepting the lists from other State Parties applying similar or even the same national procedures.

Moreover, it would also be useful to recall the main point of reference for the Parliamentary Assembly's decisions, i.e. the Committee of Ministers' Guidelines on the selection of candidates for the post of judge at the European Court of Human Rights.

41. In responses to the DH-SYSC-JC's questionnaire, the large majority of those who considered but did not apply for the post of judge at the national level said they did not have any concerns

about the election stage before the Assembly (72 out of 89 responses) or with its public nature (69).74 Some of those who did express concerns noted **the lack of interview before the decision to reject the list,** the lack of detailed information about the election stage, its transparency, and the reference to personal characteristics relating to gender. The majority of the applicants at the national level who were included in the lists presented to the Assembly responded that they had not encountered obstacles or difficulties in the election stage (20 out of 24).75 ~~In the light of these findings the CDDH cannot conclude that any aspects of the election procedure by the Assembly are deterring good candidates for the post of the judge at the Court.~~

Comment: We propose to delete the last sentence as does not seem appropriate or necessary for the CDDH to summarise the outcome of the survey in such a manner, especially as some concerns actually have been expressed by the applicants. It also seems in the summary of the results of the questionnaire (see p. 14) that some candidates rejected on substantive grounds without even being interviewed also voiced legitimate concerns about the procedures applied by the Parliamentary Assembly. These procedures should not be treated as beyond any criticism or as having no room for improvement.

43. The CDDH welcomes the Assembly's scrutiny of national selection procedures. It considers that when it rejects lists on procedural grounds a publication of its conclusions and its reasoning in a succinct manner which would potentially encourage reflection not only in the State Party concerned but also other State Parties regarding the improvement of national selection procedures**, facilitating thus also the application by the PACE of equal standards towards all State Parties as laid down in the Committee of Ministers' Guidelines.**

Comment: see para. 41.

59. The CDDH has discussed the issue raised by some of its members regarding the impossibility of parties to a case to request the recusal of a judge. The CDDH has noted that this question has been addressed by the Committee of Ministers in its replies to questions from members of the Parliamentary Assembly.88 It is noted that "parties to a case are aware of which Section their case has been assigned to, at the latest as of the communication of a case for observations. The composition of the various Sections (as well as the list of the judges appointed by the President as Single Judges) being publicly available on the Court's webpage, the parties may at any time verify that composition and request the Court that a particular judge not be involved in deciding their case for duly explained reasons. **However, there is no information on the exact composition of the Court on the website and the current system does not seem to be transparent and friendly enough to the applicants who in general are not well aware of any procedural options available to them to raise the potential conflict of interest of judges hearing their case. Although i**n such a case, the procedure provided for in Rule 28 shall be followed, **its formulation lacks the requisite precision and guarantees offered to the parties in the national court proceedings. This matter provoked interest on the part of the members of the Parliamentary Assembly. "[89] In reply to written questions nos. 747-749 of the members of the Parliamentary Assembly, the Committee of Ministers noted on the specific issue of recusal, that "Rule 28 of the Rules of Court provides for a judge's inability to sit, and their withdrawal and exemption from proceedings, if for any reason, their**

independence or impartiality may legitimately be called into doubt. Reflection on the rules and procedures on recusal is a matter that comes under the competence of the Court in the context of its procedure for amending the Rules of Court. concerning this issue, the Committee of Ministers". Subsequently, **a**sked **in written questions nos. 759-760** "what it intends to do about the scope and functionality of the Court's rules of recusal", the Committee of Ministers replied by recalling that under Article 25 of the Convention, the Court adopts its Rules and, therefore, it is not for the Committee of Ministers to take any action about the scope and functionality of the Court's rules of recusal. 90 It ~~was,~~ however, noted that the Court's Committee on Working Methods was reviewing the existing Rules of Court, including Rule 28.

Comment: In the national judicial proceedings the State Parties are obliged to ensure appropriate guarantees for the parties to ask for the exemption of judges. This obligation constitutes a part of Article 6 guarantees. In turn, the current regulations of the Court do not seem to match this high standard or at least are not accessible and visible for the applicants. This at times provokes criticism on the part of the applicants, NGOs or questions from the members of the Parliamentary Assembly. Rule 28 does not speak explicitly of any rights of the parties, is formulated in a way that suggests that this issue depends on the initiative of the judge him/herself, no deadlines or timeframes are fixed for the parties to apply for the judge's exemption, to whom a motion should be addressed etc. It would be useful to encourage the Court to look into this matter, while obviously respecting its prerogatives to adopt Rules of Court.

60. The CDDH sees no reason for departing from the position of the Committee of Ministers regarding the issue of recusal of judges. **Nevertheless, it seems that this issue may deserve further reflection on the part of the Court itself which could examine, in the context of the procedure of amending Rules of Court, the advisability of setting clear guarantees for the parties.**

Comment: see para 59.

69. The CDDH refers to the position of the Committee of Ministers regarding the issue of recusal of judges**, which signalled a possibility for the Court to reflect on it in the context of the procedure of amending Rules of Court**.

Comment: see para 59.

73. Judges at the national level may leave their functions to serve in an international court on special or unpaid leave (19 member States), through suspension of their national mandate (11 member States) or on secondment by domestic authorities (nine member States), or after resigning from their post (five member States). 27 member States provide for the right to regain judicial office at the national level after service in an international court. In around 11 member States there are no specific regulations concerning recognition of service in an international court.104 The positions of judges of superior courts and of those in lower courts sometimes differ; in three member States, the provisions on interruption of the national judicial career are not applicable to judges of their constitutional courts **(especially if constitutional courts do not have a permanent composition and their judges sit on it for a determined term of office)**;

in one member State, judges of the Supreme Court and the Administrative Supreme Court cannot take leave to work on an international court; and in one member State, judges of the highest court have to resign in case of their election to an international court.105

Comment: In Poland, judges of the Constitutional Court are elected for a determined term of office and their number is fixed by the Constitution, therefore it may be difficult to ensure their return after many years of service in the Strasbourg Court – thus, long after the lapse of their term of office in the Constitutional Court and in the situation where all the posts foreseen by the Constitution have already been filled. In the same way it may be difficult to ensure the return of judges to the Strasbourg Court if they are elected to another international court during their term of office in Strasbourg.

79. The CDDH reiterates that recognition of service as judge is key for the attractiveness of the post of judge at the Court. It is also relevant to judicial independence, by ensuring that judges' professional and material situations following their return to their home countries are not dependent on the goodwill of national authorities.112 The CDDH proposes that the Committee of Ministers promotes more robust and complete recognition of service as judge on the Court by means of a decision or declaration.

Comment: It would be useful to consider preparing recommendation or guidelines on this issue as this could help moving this topic forward. Actually, it has been discussed by the CDDH for many years now but on each occasion it ends up in a survey of the situation in member states. In fact, so far no standard, even general and minimum, has been set. During such standard-setting process member states may look into matter more in-depth, share their experience, obstacles and good practices, define the parameters of the solutions etc. No such exercise has actually been held so far.

81. The potential need to appoint *ad hoc* judges in case a particular candidate were to be appointed as judge of the Court should be taken into account during the selection and election procedures, in view of the fact that the appointment of *ad hoc* judges is not subject to the same safeguards of independence and impartiality and their presence would affect the stability of the Court's composition.114 The CDDH recalls that the Guidelines state that national selection procedures should avoid any foreseeable, frequent and/or long-lasting need to appoint an *ad hoc* judge.115 A memorandum of the Parliamentary Assembly's Secretariat on the procedure for election of judges to the Court, issued following Resolution 2248(2018), also contains a clear indication that, as far as possible, no candidate should be submitted whose election might result in the necessity to appoint an *ad hoc* judge.116 **This, however may be unavoidable if State Parties are encouraged, e.g. by the Advisory Panel, to present high-level candidates for the post of the ECtHR judge with mature professional experience in national supreme courts. It rather points to the need for the Court to have in place effective procedures to deal with cases of potential conflict of interest.**

Comment: To some extent, the expectations from the Parliamentary Assembly and the Advisory Panel seem to be going in the opposite directions. If States Parties are encouraged to present candidates for judges from among the national supreme courts, it is difficult to avoid situations of

the potential conflict of interest requiring the appointment of ad hoc judges. The solution should be in the internal procedures of the Court allowing to effectively identify and deal with such potential conflicts of interest rather than in discouraging State Parties from proposing candidates from among experienced national judges.

HOLY SEE / SAINT- SIÈGE

Comments of the Holy See on the Draft report on issues related to judges of the ECHR. DH-SYSC-JC(2023)01

From a general point of view, the Holy See observes that, as it stands, the draft report does not propose any significant novelty in relation to the existing system, and that the part of the mandate relating to the impartiality of judges is absent.

More specifically, the Holy See submits the following suggestions:

The low proportion of judges from the highest national courts is a persistent problem that should be recalled, so as not to become accustomed to it. It is therefore proposed that the CDDH shares the Panel's concern in this respect. In this order, a new sentence could be inserted between §§ 24 and 25:

> The CDDH shares the concern of the Panel regarding the relatively low number of candidates with long judicial experience at a high national court, and observes that a frequent deterrent for the application such candidates is the linguistic requirement.

Include in the Committee's considerations the "Model curriculum vitae for candidates seeking election to the European Court of Human Rights" adopted by PACE Resolution 1646 (2009) on the "Nomination of candidates and election of judges to the European Court of Human Rights". It could be suggested that the PACE modify this model to add some complementary information on the candidates. These could include asking for a "declaration of interests" similar to those produced by judges of the CJEU[29] or members of PACE.

A new sentence could be introduced in Part III related to the election procedure, reading:

> The CDDH invites the Assembly to consider revising the "Model curriculum vitae for candidates seeking election to the European Court of Human Rights" adopted by Resolution 1646 (2009), in order to ask to the candidates for a declaration of interests.

The question of the independence and impartiality of the judge rapporteur could be partly resolved by greater transparency as to his or her identity. Thus, the §§ 51 and 55 could be amended as follows:

> §51. From the outset, the CDDH <u>is concerned</u> that the Court does not indicate which judge is designated as rapporteur in any given case, contrary to the practice of the CJEU/other international courts. The CDDH's considerations below are primarily based on the relevant principles of the Convention and the Rules of Court.
>
> §55. The CDDH expressed the hope that the Court could envisage changes to its Rules to indicate which judge is designated as rapporteur in any given case.

At § 58 replace "adopted in June 2021" by "amended in June 2021", as the *Resolution on Judicial Ethics* was adopted in 2008.

[29] Voici un exemple : https://curia.europa.eu/jcms/upload/docs/application/pdf/2021-12/declaration_financiere_reine_inga.pdf

Concerning the question of the recusal of judges (§ 59), the Committee could note the fact that the Rules of Court (rule 28) only provide for a procedure of withdrawal of the judges (on his or her own initiative), but not for recusal (at the request of the parties). A sentence such as the following could be added after the first sentence of § 59:

> *"The CDDH notes that the Rules of Court (Rule 28) only provide for a procedure of withdrawal of the judge (on his or her own initiative), but not of recusal (at the request of the parties), contrary to the ordinary judicial practice."*

The sentence of § 60 could be amended as such:

> "Taking notes that this issue is under consideration by the Court's Committee on Working Methods, the CDDH sees no reason for departing from the position of the Committee of Ministers regarding the issue of recusal of judges."