

Strasbourg, 1 December 2017

DH-SYSC(2017)R4Add

**STEERING COMMITTEE FOR HUMAN RIGHTS
(CDDH)**

COMMITTEE OF EXPERTS ON THE SYSTEM
OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS
(DH-SYSC)

**Draft Report on the process of selection and election of judges
of the European Court of Human Rights**

The present document contains the Draft Report as adopted by the DH-SYSC at its 4th meeting (9–10 November 2017). In view of its discussion and possible adoption at the 88th meeting of the CDDH(5–7 December 2017) and further to the call for written comments from the Secretariat to the member States (deadline: 1 December 2017 at 13:00), this Draft Report includes proposals for minor editorial modifications put forward by the Chair of the DH-SYSC-I. They appear in track changes below.¹

¹ The French expert suggested that §§ 5–7 should be moved respectively to §§ 11, 10 and 18 so as to preserve the order in which these points are addressed in the draft report.

Table of contents

EXECUTIVE SUMMARY	4
A. Selection procedure (§§ 54–103 of the report)	4
B. Election process (§§ 104–146 of the report)	6
C. Conditions of employment and working conditions at the Court (§§ 147–164 of the report)	7
D. <i>Ad hoc</i> judges (§§ 165–174 of the report)	8
E. General conclusion	8
INTRODUCTION	9
A. Terms of reference	9
B. Methodology for the preparation of the report	11
<i>i) Co-operation with all actors concerned</i>	<i>11</i>
<i>ii) Inclusive approach</i>	<i>12</i>
<i>iii) Structure of the report</i>	<i>13</i>
I. THE SELECTION PROCEDURE	14
A. National selection procedures	14
B. The selection criteria	16
<i>i) The linguistic requirements</i>	<i>16</i>
<i>ii) The duration of the term of office</i>	<i>16</i>
<i>iii) A minimum age or minimum level of legal experience for candidates</i>	<i>17</i>
<i>iv) Gender balance</i>	<i>18</i>
<i>v) The requirement to present a list of three candidates</i>	<i>19</i>
C. The role of the Advisory Panel in the selection and election process	20
<i>i) The role of the Advisory Panel in the selection process</i>	<i>21</i>
<i>ii) The interaction with the procedure of the Parliamentary Assembly</i>	<i>23</i>
D. The interpretation of the criteria	25
II. THE ELECTION PROCESS	26
A. The procedure	26
B. Challenges	28
C. Possible responses within the framework of the existing structures	30
<i>i) The procedure before the Committee on the Election of Judges</i>	<i>30</i>
<i>ii) Refinement of the current procedure before the plenary Assembly</i>	<i>31</i>
<i>iii) Reduction in the number of candidates placed before the plenary Assembly</i>	<i>33</i>
D. Possible responses outside the framework of the existing structures	36
III. THE CONDITIONS OF EMPLOYMENT AND WORKING CONDITIONS AT THE COURT	38
A. Challenges	38

B. Conditions of employment at the Court: possible responses within the framework of the existing structures	39
i) <i>Aspects related to the exercise of the mandate as judge.....</i>	39
ii) <i>Aspects relating to the situation of judges after the end of their mandate.....</i>	40
C. Working conditions at the Court: possible responses within the framework of the existing structures	42
IV. AD HOC JUDGES.....	43
A. Challenges	43
B. Possible responses within the framework of the existing structures	44
CONCLUSION.....	45
APPENDIX: LIST OF REFERENCE DOCUMENTS.....	47

EXECUTIVE SUMMARY

1. The present report is a follow-up to the 2015 CDDH report on the longer-term future of the system of the European Convention on Human Rights. In accordance with its terms of reference, the CDDH examines in this report the options with a particular view to ensuring that highly qualified candidates are attracted by the post of judge at the European Court of Human Rights, that they are put forward to the Parliamentary Assembly by States after an appropriate national selection process and that the best amongst them are indeed appointed.

2. Four themes were identified for the above purpose: the selection procedure; the election process; the conditions for employment and working conditions at the Court; and *ad hoc* judges. The analysis was conducted with an inclusive approach, i.e. without excluding options that would require an amendment of the Convention, while focusing on practical solutions within the existing structures, on the one hand, and by securing the participation of all the actors concerned at the level of the Council of Europe as well as by making a call for contributions at the level of national judiciaries on the other hand. On the basis of this analysis the CDDH draws certain conclusions which are summarised below.

A. Selection procedure (§§ 54–103 of the report)

3. The CDDH first examines various aspects of the task of each State to present candidates for the post of judge at the Court, such as the national selection procedure *stricto sensu*, the requirements put on the candidates to the post of judge at the Court, the requirements as to the composition and presentation of the national lists of candidates, as well as the role of the Advisory Panel of Experts on Candidates for Election as Judge to the European Court of Human Rights.

4. For the CDDH it is essential to attract the interest and confidence of the most highly qualified candidates. The CDDH stresses the importance of the full implementation of the Committee of Ministers' Guidelines of 2012 on the selection of candidates for the post of judge at the European Court of Human Rights.

~~4.5. With regard to the interpretation of the selection criteria, the Guidelines should remain the text of reference for all actors in the process with a view to their application, while respecting the diversity of national systems. For the above purpose~~ For there have been deficiencies in the national selection procedures leading even to the rejection of some lists by the Parliamentary Assembly, follow-up work should be conducted within the framework of the existing structures taking into account the particularities of the national systems. An update of the Guidelines or the elaboration of a recommendation stating the essential characteristics which every national selection procedure should present could constitute an additional step if it is found necessary.

6. With regard to the interpretation of the selection criteria, the Guidelines should remain the text of reference for all actors in the process with a view to their application, while respecting the diversity of national systems.

~~5. As to the lists of candidates, the CDDH having examined some other options, in particular that of a single candidate presented by the State as it is the case of the Court of~~

~~Justice of the European Union, the CDDH favours the three candidate model since any change to the current system would require an amendment to the Convention.~~

~~6. The CDDH considers that the goal of achieving a gender balance on the Court is already adequately addressed and no additional measures need to be proposed.~~

~~7. When it comes to the requirements put on the candidates, the CDDH deems it unnecessary at this stage to proceed to a further codification of the interpretation of the criteria set out in Article 22 § 1 of the Convention, and refers to the Guidelines.~~

~~8.7. It also~~The CDDH decides against any modification of the linguistic requirements and recalls that there are some indispensable minimum prerequisites so that judges can be operational in an international court having French and English as its two official languages.

~~9.8.~~ The current duration of the term of office for judges, introduced only recently by Protocol No. 14, should be preserved. Since it may be a discouraging factor for potential candidates, an analysis of its effects and the pros and cons of possible alternatives could nonetheless be conducted.

~~9.~~ The CDDH is against the formal introduction of a minimum age for candidates in the light of the diversity of national systems. Focus should be given on the professional (judicial) experience at the domestic level as well as on the knowledge of general international law. The requirement was adequately set out in the Convention read in conjunction with the Committee of Ministers' Guidelines and no amendment of these texts is considered necessary.

~~10. The CDDH considers that the goal of achieving a gender balance on the Court is already adequately addressed and no additional measures need to be proposed.~~

~~10.11. As to the lists of candidates, having examined some other options, in particular that of a single candidate presented by the State as it is the case of the Court of Justice of the European Union, the CDDH favours the three-candidate model since any change to the current system would require an amendment to the Convention.~~

~~11.12.~~ Regarding the role of the Advisory Panel in the selection and election process, the CDDH considers that the initial role of the Panel of giving confidential advice on candidates should be preserved. The proposal of making the opinion delivered by the Panel binding is not retained by the CDDH, since it would go against the advisory nature of the Panel.

~~12.13. Similarly,~~ ~~t~~The idea of a participation of the Advisory Panel in the national selection interview is rejected, but the CDDH notes that certain States put forward an enhanced interaction with the Panel before reaching the final decision. This practice should be encouraged. The existing practical modalities of communication between the States and the Advisory Panel could be presented as good practices in the follow-up work. The possibility to further enhance the consultation by States of the Panel before the transmission of the list to the Assembly through a revision of the Guidelines in the sense of an automatic rejection of a list in the absence of consultation of the Panel is not retained by the CDDH ~~and t~~. The importance to observe the existing Guideline VI.1 is stressed.

~~13.14.~~ The CDDH does not retain the possibility of the Panel to hold interviews as this option would go against the role of the Panel, which consists in advising the States, and would prolong the selection process. Enhanced interaction between the Panel and the Committee on the Election of Judges of the Parliamentary Assembly would compensate for the absence of interviews.

~~14.15.~~ The CDDH indeed considers that enhancing that interaction would significantly benefit the whole process. The possibility for the Advisory Panel to be present at the hearing of the candidates and to explain its views on them to the Committee on the Election of Judges would contribute to a more informed opinion of the Committee. The CDDH therefore welcomes the current reflections in this sense within the Parliamentary Assembly.

~~15.16.~~ The CDDH encourages the strengthening of the motivation of the Panel's decisions to facilitate the work of the Committee on the Election of Judges. Such a motivation should respect the confidentiality principle, in order not to harm the reputation of candidates, in light of the CDDH report of 2013 on the review of the functioning of the Advisory Panel.

~~17.~~ The CDDH agrees that the Panel should be allocated the necessary resources and budget line to achieve its task.

~~16.18.~~ When it comes to the requirements put on the candidates, the CDDH deems it unnecessary at this stage to proceed to a further codification of the interpretation of the criteria set out in Article 22 § 1 of the Convention, and refers to the Guidelines.

B. Election process (§§ 104–146 of the report)

~~17.19.~~ In this area, work should concentrate on the improvement of the current system in which the election of judges to the Court falls under the Parliamentary Assembly, in accordance with the Convention, as it may provide democratic legitimacy to the judges. The CDDH stresses that its suggestions in relation to the procedure followed by the Assembly regarding the election of judges are guided by the paramount importance of this election and its distinct features. This election fully justifies the application of different rules from the ones applied in other election procedures of the Assembly so as to ensure the election of the most suitable candidate at the Court. The creation by the Assembly of a specialised Committee for this election is a demonstration of this.

~~18.20.~~ The CDDH makes a number of suggestions in this report in order to feed into the work of the Parliamentary Assembly on this issue. These suggestions aim to prevent, to the extent possible, the hazards of the political process, and to ensure the election of the best judge to the Court. The CDDH is of the view that the main safeguards of the entire appointment procedure lie within the procedure in the Committee on the Election of Judges. The proposed changes could be made within the framework of the existing structures, namely the Assembly's Rules of Procedure.

~~19.21.~~ There is a need to ensure a composition of the Committee on the Election of Judges which will guarantee the election of the best candidate, also from the point of view of the candidates and their perception of the democratic legitimacy of the process. The CDDH is of the view that the current limited number of the Committee's members as well as the overrepresentation of certain nationalities would need to be considered to this effect. The presence of senior members within the Committee as well as of the Chairs of all political groups would strengthen the weight of the Committee's recommendation to the plenary.

~~20.22.~~ Furthermore, it is necessary to consider the means to ensure the effective presence of the Committee members at the meetings. The interviews should be prepared and conducted so as to ensure that the capacity of the candidate to be a judge at the Court is assessed adequately. The publication of the Committee's guidelines for the interviews is to be encouraged in view of the necessity to enhance the transparency of the process. In light of the importance of the post as well as of the perception of the seriousness of the nomination

process by the candidates, the CDDH concludes that the duration of the interviews requires further consideration.

21-23. The election by the plenary needs to be carefully examined as it is at the heart of the criticism against the appointment procedure, often characterised by lobbying. ~~The~~ Here also, the suggestions of the CDDH do not require any amendments to the Convention and can be achieved by a change to the Assembly's Rules.

22-24. The CDDH considers that the question of the quorum is crucial for the legitimacy of this particular election. There is a need to consider whether its threshold could be enhanced. It is also necessary to consider afresh the necessity of maintaining two voting rounds in view of the risk of lobbying contained therein; there could be a system of one round of election where each parliamentarian would have two votes (preferential system).

23-25. The CDDH explored the possibility to present to the plenary Assembly fewer than three candidates for election. Regarding the possibility where the Committee on the Election of Judges considers that one candidate is not suitable for election by the plenary Assembly but does not find it appropriate to reject the list in its entirety, the CDDH deems that recognising the Committee's ability to recommend to the plenary that the election only takes place with the other two candidates put forward does not reduce the powers of the Assembly in this area. It would rather provide a more prominent role to its Committee which, unlike the plenary, interviews the candidates and by virtue of this very fact is in a position to assess directly their suitability for the post of judge.

24-26. The CDDH considers that when two candidates have shown themselves to be more suitable than the remaining one, even if such a conclusion is reached just in comparative terms, the possibility for the Committee on the Election of Judges to submit only the two more suitable candidates to the plenary Assembly should be envisaged.

25-27. Regarding the model in which the Committee on the Election of Judges would put forward only one candidate from the list of candidates to the plenary Assembly, thus having the election take the form of endorsement of a candidate, the CDDH formulated arguments in favour of and against this model to feed into the work of the Parliamentary Assembly, in particular the report under preparation by the Committee on the Election of Judges.

26-28. The CDDH explored alternative models of appointment outside the framework of existing structures but did not retain them. It prefers focusing on the improvement of the election process before the Assembly at this stage. Alternative models could be considered again in the future within the framework of a follow up work to review the results of the present exercise.

C. Conditions of employment and working conditions at the Court (§§ 147–164 of the report)

27-29. The CDDH concludes that the immunity of the judges during their term of office is sufficiently regulated by the existing arrangements. Practices of issuing diplomatic passports to the judges vary between the member States and the CDDH encourages them to reflect on possible practical arrangements.

28-30. On the issue of the situation of family members of the judges, the CDDH agrees with the Court that member States should be encouraged to take a wider view as to the possibility of professional mobility for judges' spouses. Concerning in particular the difficulties in finding suitable schooling and day-care facilities in Strasbourg for the children of the judges,

the CDDH considers that the issue should be raised by the Council of Europe with the relevant authorities of the host State in order to find a solution to the problem.

~~29-31.~~ When it comes to the situation of judges after the end of their mandate, the CDDH agrees that the question of post-mandate immunity should be further explored based on practical experience, possibly leading to a further revision of Resolution CM/Res(2009)5 on the status and conditions of service of judges of the European Court of Human Rights.

~~30-32.~~ The CDDH concludes that any follow-up work concerning recognition of service as a judge of the Court and post-mandate employment could be conducted within the existing structures, possibly leading to a Committee of Ministers' recommendation. This follow-up work should take into account the diversity of legal, constitutional and political systems. Consideration could be given to the possibility for the relevant authorities of the Council of Europe to establish sufficiently early communication with the State concerned as regards the future situation of the judge whose term of office at the Court is approaching its end.

~~31-33.~~ As regards the working conditions at the Court, the CDDH considers that all measures to enhance the swift integration of the judges and their continuous training should be encouraged. Any responses regarding the working conditions at the Court facilitating the swift integration of judges and their continuous training would mainly be implemented by the Court itself.

D. *Ad hoc* judges (§§ 165–174 of the report)

~~32-34.~~ The CDDH agrees that a distinct regime for *ad hoc* judges is notably justified by the rarity of the procedure's use. It notes that the Court could envisage prolonging or rendering more flexible the two-year period for the list of *ad hoc* judges.

E. General conclusion

~~33-35.~~ The CDDH, bearing in mind the importance for the authority of the Court and of the Convention system as a whole of having judges of the highest calibre in Strasbourg, highlights that there is room for improvement for all the four themes identified in this report within the framework of existing structures. With a view to follow-up on this report, possible responses in this regard should be considered by all relevant actors involved in the process. Even though this report advocates possible responses within the framework of existing structures, the CDDH does not exclude the possibility of amending the Convention, should such responses prove insufficient in addressing the challenges outlined in this report.

INTRODUCTION

A. Terms of reference

34-36. The importance of the quality of judges has been emphasised on many occasions, in particular in the Declarations adopted at the Interlaken, Izmir, Brighton and Brussels Conferences, as well as by all actors involved in the process. “The authority of the Court is vital for its effectiveness and for the viability of the Convention system as a whole. These are contingent on the quality, cogency and consistency of the Court’s judgments, and the ensuing acceptance thereof by all actors of the Convention system,² including governments, parliaments, domestic courts, applicants and the general public as a whole”,³ as the CDDH recently noted in its Report on the longer-term future of the system of the European Convention on Human Rights (also “the CDDH report”).⁴ In this report, the CDDH concluded:

A central challenge for the long-term effectiveness of the system is to ensure that the judges of the Court enjoy the highest authority in national and international law. A comprehensive approach examining all parameters regarding the selection and election process, including all factors that might discourage possible candidates from applying, is needed. The CDDH concludes that all the above considerations and possible measures to be adopted deserve an in-depth analysis that should be conducted as a follow-up to this report. As noted above, this follow-up may result in responses outside the existing structures.⁵

35-37. In its comments on the CDDH report⁶, the Court “note[d] the conclusion that a thorough analysis of all these points is needed [...] and expressed the wish to be closely associated with such an exercise. The experience that the sitting judges have had with the procedure, and their thoughts on improvements, will be an important element in the review”.

36-38. At their 1252nd meeting, the Ministers’ Deputies welcomed the report of the CDDH, took note of the Court’s comments on the report and agreed on its follow-up. The Deputies “deemed it essential that the judges of the Court enjoy the highest authority in national and international law and to this end instructed the CDDH to examine, while securing the participation of the Court and all other relevant actors concerned, the whole selection and election process, **including all factors that might discourage possible candidates from applying**, in the light of conclusion § 203 i) and the relevant paragraphs of the report”.

37-39. This work was entrusted by the CDDH to the Committee of experts on the system of the European Convention on Human Rights (DH-SYSC). It was further decided that the preparatory work would be carried out by the first Drafting Group of the DH-SYSC (DH-SYSC-I; “the Drafting Group”).

² In the solemn hearing for the opening of the judicial year of the European Court of Human Rights, the former President of the Court noted: “We face a constant challenge as regards the acceptability of our decisions”, opening speech, President Dean Spielmann, 30 January 2015.

³ [CDDH\(2013\)R79, Addendum II](#), § 1.

⁴ § 96.

⁵ § 203 i).

⁶ Doc. [#5281071](#), § 5.

38-40. In light of the terms of reference given by the Ministers' Deputies and before the work of the Drafting Group started, the DH-SYSC held on 26 April 2016 an exchange of views with all actors concerned, in the Council of Europe, by the selection and election process of judges of the Court, namely the Parliamentary Assembly, represented by Mr Wojciech SAWICKI, Secretary General of the Parliamentary Assembly, accompanied by Mr Andrew DRZEMCZEWSKI, then Head of the Legal Affairs and Human Rights Department; the Registry of the European Court of Human Rights, represented by Mr Roderick LIDDELL, Registrar of the Court, and the Advisory Panel of Experts on Candidates for Election as Judges to the Court ("the Advisory Panel" or "the Panel"), represented by Mr John MURRAY, then Chairperson, accompanied by Mr Jörg POLAKIEWICZ, Director of Legal Advice and Public International Law and Secretary to the Advisory Panel.

39-41. Furthermore, the DH-SYSC (1st meeting: 25–27 April 2016)⁷ and the CDDH (85th meeting: 15–17 June 2016)⁸ gave the following guidance to the Drafting Group as to the interpretation of the terms of reference and the working methods applied:

- Consider all the parameters of the selection and election process in light of the CDDH report while **preserving the credibility of the Court**. The situation of judges of the Court once their term of office has expired will as well be considered, also in light of information provided by member States;⁹
- Take into consideration the work and reflections of all actors concerned, including good practices developed and outstanding challenges, while ensuring the **appropriate level of confidentiality**. The latter would fall within the responsibility of the Chair of the Drafting Group and the Secretariat, notably when drafting the meeting reports, but all the participants to this work would also bear responsibility;
- Take into consideration the previous work carried out by the CDDH, including the work of the *Ad hoc* Working Group on national practices for the selection of candidates for the post of judge at the European Court of Human Rights (CDDH-SC);
- Examine the procedures and practices of selection and election of judges in other international and regional courts and in highest national courts;
- Examine possible measures to respond to the challenges identified with an **inclusive approach** (i.e. without excluding responses that would require an amendment to the Convention) while focusing on practical solutions improving the current system. This work should involve a feasibility study;
- The working methods of the Drafting Group should correspond to those which are normally followed by the other groups working under the CDDH or the DH-SYSC;

⁷ See doc. [DH-SYSC\(2016\)R1](#), § 7.

⁸ See doc. [CDDH\(2016\)R85](#), §§ 4 and 13.

⁹ In March 2014, following concerns expressed by the President of the Court, the Ministers' Deputies adopted a number of decisions on the recognition of service as a judge of the Court. They called upon States Parties to address appropriately the situation of judges of the Court once their term of office has expired and invited them to provide any relevant information on the follow-up given to this decision. Some member States have indeed provided that information. The Committee of Ministers' decision of 30 March 2016 on the CDDH Report on the longer-term future of the Convention system covers also this question.

- States wishing to participate in the work of the Drafting Group were invited to appoint an experienced representative.

B. Methodology for the preparation of the report

40-42. The preparatory work was carried out by the Drafting Group through four meetings (29 June – 1st July 2016; 19–21 October 2016; 27 February – 1st March 2017 and 18–20 October 2017),¹⁰ with Mr Vít A. SCHORM (Czech Republic) in the Chair. The Drafting Group elected Mr Morten RUUD (Norway) as its Vice-Chairperson.

i) Co-operation with all actors concerned

41-43. The Council of Europe actors involved noted the importance of the work carried out by the CDDH.¹¹ In accordance with the terms of reference as well as with the guidance and working methods decided by the CDDH and the DH-SYSC and in addition to the relevant documents of the various instances that were examined by the Drafting Group, the latter as well as the DH-SYSC continuously sought their involvement in the preparatory work:

- At its first meeting (29 June – 1st July 2016), the Drafting Group held an exchange of views with Mr Jörg POLAKIEWICZ regarding the functioning of the Advisory Panel on the occasion of the Second activity report of the Advisory Panel which became public on 24 June 2016 (doc. Advisory Panel(2016)1).
- At its second meeting (19–21 October 2016), the Drafting Group held an exchange of views with Mr Wojciech SAWICKI accompanied by Mr Günter SCHIRMER, Head of the Legal Affairs and Human Rights Department of the Secretariat of the Parliamentary Assembly (see doc. DH-SYSC-I(2016)008 for the summary of this exchange of views).
- At its third meeting (27 February – 1st March 2017), the Drafting Group held an exchange of views with Ms Ganna YUDKIVSKA, President of the Fourth Section of the Court and of the Court's Status Committee, following her presentation of the contribution of the Court to its work (doc. DH-SYSC-I(2017)011) as adopted by the Court sitting in plenary session. Furthermore, the Drafting Group and the DH-SYSC at its 3rd meeting (10–12 May 2017) discussed the questions relating to the role of the Advisory Panel as well as those relating to the election procedure before the Parliamentary Assembly with Mr Wojciech SAWICKI, accompanied by Mr Günter SCHIRMER, and Mr Jörg POLAKIEWICZ.

42-44. As regards the specific modalities of certain proposals, the Drafting Group instructed the Secretariat to **seek the advice of the Directorate of Legal Advice and Public International Law** (“the DLAPIL”).¹² The legal opinion of the DLAPIL was submitted on 2 May 2017 (doc. [DH-SYSC-I\(2017\)015](#)).

43-45. All these contributions constituted invaluable sources and assisted the CDDH in the thorough and comprehensive examination of all aspects of the process.

¹⁰ Three meetings were planned initially. At its 86th meeting, the CDDH responded positively to the request to hold a 4th meeting of the DH-SYSC-I given the importance of the work for the system of the Convention as well as its scope.

¹¹ See the contribution of the Court (doc. [DH-SYSC-I\(2017\)011](#); § 1); see the observations of the then President of the Advisory Panel, Mr John Murray (doc. [DH-SYSC-I\(2017\)016](#), p. 5).

¹² The specific wording of the questions was first approved by the participants of the meeting by written procedure (see doc. [DH-SYSC-I\(2017\)012REV](#)).

ii) *Inclusive approach*

44-46. In light of the guidance given by the CDDH and the DH-SYSC to examine possible measures to respond to the challenges identified with an inclusive approach, the Drafting Group considered that, in addition to the contributions by all Council of Europe actors and by national experts, it could also be useful **to obtain information regarding the various opinions and experiences, positive or negative, concerning the national processes of selection of the candidates for the post of judge at the Court and of election of the judges of the Court**. It was noted that in order to avoid relying only on hypotheses, it was necessary at least to ascertain to which extent the factors pre-identified in the CDDH report – which seem to discourage potential candidates for the post of judge at the Court – correspond to reality. While noting the difficulty of this exercise, the Drafting Group indicated that the request for information should be made by national experts in accordance with the appropriate methods chosen by each expert. The modalities regarding the request for information and its submission were laid down in Appendix III of the report of the first meeting (doc. DH-SYSC-I(2016)R1).

45-47. Contributions were received directly from individuals or transmitted to the Secretariat by national experts:

- 4 contributions from individuals whose profiles correspond to the post of judge at the Court but do not wish to be candidates, more particularly with regard to the factors that might discourage them;
- 4 contributions from individuals who were candidates for the post of judge at the Court but were not retained in the national selection procedure;
- 3 contributions from individuals who were candidates for the post of judge at the Court but were not elected following the procedure conducted before the Parliamentary Assembly;
- 3 contributions from former judges of the Court;
- 4 contributions from judges of highest national courts without indication of the category under which they fall.

46-48. As agreed by the Drafting Group, the Secretariat ensured the anonymity of this information as well as the absence of any elements enabling the identification of the State or the persons concerned.¹³

47-49. In addition, the procedures in other international and regional courts were examined.¹⁴ On that basis, the Drafting Group decided at its 1st meeting that inspiration could mainly be drawn from the EU procedures which are closer to the Convention system. Finally, relevant academic work was taken into consideration.¹⁵

¹³ They appear in document DH-SYSC-I(2016)006 Restricted.

¹⁴ See Part IV of [DH-SYSC-I\(2016\)003](#). See also doc. [DH-SYSC-I\(2016\)004](#) regarding the relevant provisions relating to other international or regional Courts or tribunals.

¹⁵ See document [DH-SYSC-I\(2016\)003](#).

iii) Structure of the report

48-50. The present report is the result of a thorough examination in the DH-SYSC and in the CDDH in 2016 and 2017.¹⁶ The structure of the report follows the guidance given, namely to “examine possible measures to respond to the challenges identified with an inclusive approach (i.e. without excluding responses that would require an amendment to the Convention) while focusing on practical solutions improving the current system. This work should involve a feasibility study”.

49-51. The CDDH report contains a comprehensive analysis of the four themes identified¹⁷ (**the selection procedure; the election process; conditions of employment and working conditions at the Court; and *ad hoc* judges**), including the examination of alternative models. Each part presents the challenges identified and the responses that could be given within the framework of the existing structures as well as possible reforms outside the framework of the existing structures. In line with the approach followed by the CDDH report, for the purposes of the present analysis, the possible responses that are presented outside the framework of the existing structures are the ones that might presuppose the creation of a new mechanism or a new function carried out by an existing mechanism, or the elimination of an existing mechanism. As noted in the CDDH report, the distinction between proposals requiring or not requiring an amendment to the Convention was not relevant for the present purposes as certain proposals are not related to the Court’s procedures. The report nevertheless specifies which responses would require an amendment to the Convention.¹⁸ In the report, when a response within the framework of the existing structures is retained against a response outside the framework of the existing structures regarding the same proposal, they both appear under the heading “within the framework of the existing structures”.

50-52. It is again recalled that the examination of the different themes takes into account the fact that **all angles and steps of the process form an aggregate where all parts are interlinked**. The possible responses to one particular challenge aim at keeping sight of their bearing on other parts of the process as well as on the purpose of the present exercise, which is to seek how to ensure that the best possible candidates apply, are selected and elected as judges of the Court.

51-53. Finally, it is worth noting the remarks of the then President of the Advisory Panel, Mr John MURRAY, in his exchange of views with the Ministers’ Deputies on 1st March 2017. They could serve as a guiding principle for this exercise and its follow-up: “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 [...]. I would hope that collaboration and dialogue between the Parliament[ary Assembly], the Committee of Ministers and others (with a contribution of 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.”¹⁹

¹⁶ See most recently, report of the 3rd meeting of the DH-SYSC (doc. [DH-SYSC\(2017\)R3](#), §§ 3–14) and report of the 87th meeting of the CDDH (doc. [CDDH\(2017\)R87](#), §§ 6–9).

¹⁷ It was decided that the question of the situation of the EU accession to the Convention in light of Article 6 of the draft Accession Agreement, entitled “Election of judges”, would not be addressed in the context of this work.

¹⁸ As requested by the CDDH Bureau at its 96th meeting, see doc. [CDDH-BU\(2016\)R96](#), § 7 ii) and the CDDH at its 87th meeting, see doc. [CDDH\(2017\)R87](#), § 9 iii).

¹⁹ See doc. [DH-SYSC-I\(2017\)016](#), p. 6.

I. THE SELECTION PROCEDURE

A. National selection procedures

Challenges

52-54. Over the years, the Parliamentary Assembly has used its direct practical experience to develop a body of recommendations to States Parties concerning national procedures for the selection of candidates for the post of judge at the Court.²⁰ The Parliamentary Assembly, in its Resolution 1646 (2009), “referring to its Recommendation 1649 (2004) on candidates for the European Court of Human Rights, [...] yet again reiterates that the process of nominating candidates to the Court must reflect the principles of democratic procedure, transparency and non-discrimination. In the absence of a real choice among the candidates submitted by a State Party to the Convention, the Assembly shall reject lists submitted to it. In addition, in the absence of a fair, transparent and consistent national selection procedure, the Assembly may reject such lists”. In that resolution, member States were also asked, when submitting the names of candidates to the Assembly, to describe the manner in which they were selected (§ 4.2).

53-55. Many of these recommendations have been incorporated into the Committee of Ministers’ Guidelines on the selection of candidates for the post of judge at the European Court of Human Rights (“the Guidelines”)²¹ that had been prepared by the CDDH through its *Ad hoc* Working Group on national procedures for the selection of candidates for the post of judge at the European Court of Human Rights (CDDH-SC). The Guidelines as well as the accompanying examples of good practices apply to national procedures for the selection of candidates for the post of judge at the Court. They are intended to cover all stages of this procedure, including the establishment of the procedure, the identification of criteria applicable to the inclusion of candidates on a list, the composition and procedures of the selection body responsible for recommending candidates to the final decision maker and the role of the final decision maker. They apply prior to presentation of a proposed list of candidates to the Advisory Panel and thus also before submission of the list to the Parliamentary Assembly. The Guidelines also provide that “[t]he High Contracting Parties are requested to submit information about the national selection procedures to the Panel when transmitting the names and curricula vitae of the candidates” (new Part VI).

54-56. Throughout the intergovernmental work for the elaboration of this report, it was noted that national selection procedures may be considered as the most important part of the process. If all three candidates on the list are of “the highest possible quality”,²² it would at least mean that any subsequent process would elect a highly qualified candidate.²³ Along the

²⁰ See doc. [Procedure for electing judges to the European Court of Human Rights](#) – Information document prepared by the Secretariat of the Parliamentary Assembly – Committee on the Election of Judges to the Court, [AS/Cdh/Inf\(2017\) 01 rev 7](#).

²¹ See doc. [CM\(2012\)40](#), 29 March 2012, as amended on 26 November 2014.

²² See the Preamble of the Committee of Ministers’ Guidelines on the selection of candidates for the post of judge at the European Court of Human Rights, adopted on 28 March 2012.

²³ See also the opening address of the then President of the Parliamentary Assembly and current member of the Committee on the Election of Judges to the Court (the AS/Cdh) at the High-Level Conference on “the Implementation of the European Convention on Human Rights, our shared responsibility” held in Brussels on 26–27 March 2015, [Proceedings](#) of the Brussels Conference, p. 20: “If the findings of the Strasbourg Court are to be recognised as authoritative – in particular by their peers at the domestic level – the Assembly must be in a position to elect judges with appropriate stature and experience. Hence, it is – I submit – not only necessary to ensure national selection procedures which are rigorous, fair and transparent [...]”.

same lines, the Court noted that national selection procedures and practices “should meet the conditions that are necessary in order to attract the interest and confidence of the most highly qualified candidates, and ensure a fair and objective assessment of the candidates’ professional qualifications, their experience and competence, as well as their aptitude for exercising the high-level function of judge of an international court, so that all of the listed candidates fully satisfy the criteria”.²⁴

~~55-57.~~ However, it appeared that important challenges persist. During the exchange of views of the DH-SYSC with all actors concerned on 26 April 2016, it was more than evident that **the national selection procedures remain among the most crucial issues of the present reflection**. It was further recalled that during the elaboration of the CDDH report²⁵ it was noted that the quality of lists has not been adequate in a number of cases. Certain contributions received in the framework of the present preparatory work concurred with that conclusion. Concerns have been put forward regarding practices that departed from the Guidelines, such as the lack of confidentiality in certain instances, which may be harmful for the reputation of candidates and a deterring factor to apply; the insufficient motivation of the selection decision; the lack of hearings; the political influence (or the appearance thereof) in the selection committee or in the decision-making process. These deficiencies have led to the rejection of a list by the Parliamentary Assembly in some instances.

Possible responses within the framework of the existing structures

~~56-58.~~ The CDDH underlined **the importance of the full implementation of the Guidelines**. In particular, as it had already been envisaged,²⁶ follow-up work should be conducted. This follow-up remains within the existing structures and does not require any amendment to the Convention.

~~57-59.~~ This follow-up work should take into account the fact that it is necessary to **preserve the particularities of the national systems**. However, in light of the important concerns expressed in § 57 above, a first step could be to update the examples of good practices in the Guidelines. Indeed, during the discussion and in certain written national contributions, recent good practices have been put forward. They concern in particular the establishment and composition of national selection bodies, which for many experts are at the heart of the selection procedure. Those bodies guarantee the legitimacy of the selection process and the credibility of the candidates. Other practices aim to contain the political influence in the selection process. **Putting forward those practices would help prevent the above-mentioned shortcomings and in particular the political influence in the selection process**. The updating of good practices could be carried out in co-operation with the Secretariat of the Parliamentary Assembly.²⁷

~~58-60.~~ The **update of the Guidelines** (including national good practices) or the elaboration of a recommendation stating the essential characteristics which every national selection procedure should present (such as an open call, the composition and status of the national

²⁴ See § 13 of the contribution of the Court.

²⁵ Contribution by Mr Christoph Grabenwarter, doc. [GT-GDR-F\(2014\)018](#), also reproduced in doc. [DH-SYSC-I\(2016\)001](#), pp. 2–6.

²⁶ See § 104 of the CDDH report (doc. [CDDH\(2015\)R84 Addendum I](#)).

²⁷ As noted in the CDDH report, the Secretariat of the Committee on the Election of Judges to the European Court had confirmed its readiness to participate in any review of national selection procedures in co-operation with the CDDH. Consideration could also be given to carrying out such work in co-operation with the Secretariat of the Advisory Panel (§ 104 of the CDDH report).

selection body, and a stable procedure established in advance) could constitute an additional step, only if it is found necessary.²⁸

~~59-61.~~ To facilitate this follow-up work, on the basis of the information available,²⁹ a table with the most recent data per country was prepared by the Secretariat (see document DH-SYSC(2017)017).³⁰

B. The selection criteria

~~60-62.~~ Judges must meet the criteria for office stipulated by **Article 21 of the Convention**. The criteria require judges to be of high moral character, to possess the qualifications required for appointment to high judicial office or be jurisconsults of recognised competence, to sit in their individual capacity, and not to engage in any activity which is incompatible with their independence, impartiality or with the demands of full-time office.

i) *The linguistic requirements*

~~61-63.~~ **The CDDH decided against any modification of the linguistic requirements**, recalling that there are some indispensable minimum requirements so that judges can be operational in an international court having French and English as its two official languages. This matter was also addressed in the context of the work previously carried out by the CDDH-SC when it was agreed that whilst proficiency was required in one official language, only passive knowledge – notably the ability to read and assimilate legal texts such as Court judgments and case-notes – was required in the other.³¹

ii) *The duration of the term of office*

Challenges

~~62-64.~~ The CDDH agreed that the duration of the term must preserve the independence of judges and the institutional stability of the Court. **A term of office that is (too) long may discourage a certain number of otherwise very qualified candidates**, in particular when they take into account the evolution of their career or other predictable personal reasons. The CDDH therefore considered that the question deserved to be further explored.

~~63-65.~~ It is recalled that the current non-renewable nine-year term of office for the Court's judges was introduced by **Protocol No. 14** in order to “reinforce their independence and impartiality, as desired notably by the Parliamentary Assembly in its Recommendation 1649

²⁸ See also the contribution of the Court, § 15: “[T]he idea of reinforcing the status of the guidelines, or the essential elements of them, should not be excluded.”

²⁹ National contributions received to date; the [Compilation of replies to the questionnaire on national practices for the selection of candidates for the post of judge at the European Court of Human Rights](#) prepared in the framework of the work of the CDDH-SC and the [Summary and preliminary analysis of the replies to the questionnaire](#); the information provided by member States to the Parliamentary Assembly with the submission of the list; the information provided in the context of the follow-up to the Brighton Declaration (doc. [DH-SYSC-I\(2016\)002](#)).

³⁰ In view of a first analysis, it appears that in 36 out of 47 member States the call for applications is made widely available to the public (Guideline III.2.); the body responsible for recommending candidates is of balanced composition in 30 out of 47 member States (Guideline IV.1.); all members are able to participate equally in this body's decision in 14 out of 47 States (Guideline IV.4.); any departure by the final decision maker from the selection body's recommendation is justified in 3 out of 47 States (Guideline V.1.).

³¹ See doc. [CDDH-SC\(2016\)R2](#), § 3; see also the contribution of France in doc. [DH-SYSC-I\(2017\)013](#).

(2004)".³² This change echoed the conclusion of the Evaluation Group to the Committee of Ministers on the European Court of Human Rights that "the Convention should be amended so as to lay down that judges of the Court are elected for a single, fixed term, without possibility of re-election". It was noted that the concerns related to the nine-year term, which could form an obstacle in the career of younger judges, may be allayed in the framework of responses provided as regards the recognition of service as a judge at the Court and future employment perspectives (see under III. below).

Possible responses outside the framework of the existing structures

~~64-66.~~ The possibility for a longer term (e.g. a twelve-year term of office)³³ would be to ensure continuity within the Court and, moreover, to offer a further guarantee of the Court's independence.³⁴

~~65-67.~~ However, as noted by the Representative of the Registry of the Court, in the post-Protocol No. 14 era, 10 judges have resigned before their term of office for professional or family reasons. On the other hand, some experts feared the impact of such an option in the situation where "a less qualified judge" was in the bench. In addition, a long commitment to a judicial position which entails interrupting a domestic career might have a possible dissuasive effect.

~~66-68.~~ The option of **dividing a long term of office into certain regular intervals** (for example, two six-year periods) when judges are asked whether they want to continue their service at the Court was considered as a way to mitigate the dissuasive effects of a longer term of office. This would allow a judge to declare in advance his or her intention to serve for example eight years of their permitted 12 at the Court. It might lead to judges choosing to leave the Court at more predictable times. It was noted that if this option were to be applied, the decision to renew the term should lie only with the sole discretion of the judge concerned so as to protect him/her from any undue pressure. However, this option might still leave unpredictability for the Court as when the judges decide to leave the Court.

~~67-69.~~ The CDDH found that both proposals had merit but decided that **the current duration, introduced only recently by Protocol No. 14, should be preserved**. It considered, however, that a future analysis of the effects of the current duration, which may be a discouraging factor for potential candidates, and of the pros and cons of possible alternatives, could be conducted.

iii) A minimum age or minimum level of legal experience for candidates

Challenges

~~68-70.~~ The CDDH noted that the minimum age could be an issue of concern to be examined in connection with the necessity to emphasise sufficient experience and seniority at national level.³⁵ The question of a maximum age was not addressed: when Protocol No. 15 enters into

³² Explanatory report of Protocol No. 14 to the Convention, § 50.

³³ See the contribution of Mr Christoph Grabenwarter in the document [DH-SYSC-I\(2016\)001](#); see also the remarks of the then President of the Advisory Panel, Mr John Murray, in doc. [DH-SYSC-I\(2017\)016](#), p. 7.

³⁴ Report of the Evaluation Group to the Committee of Ministers on the European Court of Human Rights, EG Court(2001)1, § 89.

³⁵ As of 27 October 2017, the profiles of judges of the Court are mostly divided amongst three distinct categories of judges, civil servants, lawyers and academics. Amongst the current 47 sitting judges at the Court, 20 have a judge profile, 13 have a background in the civil service, 7 have an academic profile, and one comes from the sector of non-governmental organisations (NGOs). Furthermore, 6 of the judges at the Court have a mixed profile. Amongst them, 3 have a profile combining academia and civil service; one has the mixed background of

force, candidates must be less than 65 years of age at the date by which the list of three candidates has been requested by the Parliamentary Assembly (Article 2 of the Protocol).

Possible responses outside the framework of the existing structures

~~69-71.~~ The CDDH decided that **the formal introduction of a minimum age for candidates should not be envisaged in the light of the diversity of national systems.** The requirement would be countered by putting emphasis on sufficient practical (judicial) experience in domestic legislation, as previously noted in the CDDH report³⁶ and also highlighted in recent contributions following the “open call”. An explicit mention of the necessity for candidates to have extensive (judicial) experience was, however, not deemed necessary.

~~70-72.~~ This requirement is also closely linked to the possession of “qualification required for appointment to high judicial office” or to the qualification of “jurisconsult of recognised competence” in accordance with Article 21 § 1 of the Convention. It was further recalled that the CDDH in its aforementioned report underlined the importance of an additional qualification, namely the “knowledge of general international law”, and concluded that it should be considered whether both requirements should be more clearly stipulated in the Convention.³⁷

~~71-73.~~ The CDDH considered whether a possible formalisation of the importance of both qualities was necessary within the Convention or through a revision of the Guidelines. It noted that both qualities already appear in Guidelines II.2. and II.4.³⁸ and decided that the requirements were adequately set out in the Convention read in conjunction with the Guidelines and that no amendment of these texts was necessary. Furthermore, appropriate guidance was offered by the interpretation of Article 21 § 1 by the Advisory Panel.

~~72-74.~~ Although the requirement for a minimum age refers to a certain life experience necessary to hold the post of judge at the Court, the discussions of the Drafting Group demonstrated that **it would be inappropriate to set up an age limit that would not correspond to the reality and the needs in all 47 States Parties.** This is the case even if a minimum of 40 or 45 years is a requirement for many national highest courts. Similarly, **professional (judicial) experience is an advantage, but its length should not be a requirement, so as not to undermine the diversity within the Court.**

iv) Gender balance

~~73-75.~~ The Convention does not require a gender-balanced Court. However, lists of candidates from member States should as a general rule contain one candidate of each sex³⁹ with the goal of achieving a gender balance on the Court, and this is therefore a consideration in the selection and election process. The CDDH considers that this matter is already adequately addressed and therefore does not propose any new measures to be taken with regard to this issue.⁴⁰

being a judge and a civil servant, while another has a background in academia and a private law firm. Finally, one judge combines all three profiles of judge, civil servant and academic.

³⁶ Doc. [CDDH\(2015\)R84 Addendum I](#), § 105.

³⁷ *Ibid.*, see § 117.

³⁸ According to which: “2. Candidates shall possess the qualifications required for appointment to high judicial office or be jurisconsults of recognised competence. [...] 4. Candidates need to have knowledge of the national legal system(s) and of public international law. Practical legal experience is also desirable.”

³⁹ See Parliamentary Assembly Resolution 1366(2004), as modified by its resolutions 1426 (2005), 1627 (2008) and 1841 (2011).

⁴⁰ See II.8 of the Guidelines of the Committee of Ministers on the selection of candidates for the post of judge at the European Court of Human Rights.

v) *The requirement to present a list of three candidates*

Challenges

74-76. The difficulty to present a list of three candidates of “the highest possible quality” was noted. It was decided that the question of the number of candidates deserved further examination not only in light of the above-mentioned difficulty but in view of the examination of the system of selection and election as a whole.

Possible responses outside the framework of the existing structures

75-77. The question of a **one-candidate list** was considered in light of the proposal by David KOSAŘ⁴¹ arguing that switching to one candidate would make the selection process easier and noting that the responsibilities of the relevant players would be clearer and States could no longer blame the Parliamentary Assembly for not choosing the first best candidate. He also argued that switching to one candidate would put pressure on the nominating government to submit the best possible candidates and increase the chances that top candidates would be willing to join the contest. While this model was not retained, an alternative solution was proposed, namely the possibility for the Committee on the Election of Judges of the Parliamentary Assembly (“the Committee on the Election of Judges”) to present one candidate to the plenary Assembly (see §§ 136–137 below).

76-78. Regarding the **two-candidate model**, certain experts noted that this option could overcome the difficulty to find three qualified candidates, raise the level of competition and allow the presentation of the most qualified ones. It was, however, argued at the same time that the pluralistic element of the two-candidate model list would, in fact, be rather artificial in light of the need to respect the gender requirement.

77-79. However, the Drafting Group agreed that consideration should be given to the possibility, without changing the Convention, to present a list of less than three candidates when a member State advanced exceptional circumstances making it impossible to present three sufficiently qualified candidates. The State concerned would need to provide proper justification that all necessary efforts have been undertaken and to advance objective reasons to justify these exceptional circumstances, including reasons based on characteristics of the national selection procedure concerned. It was also noted that according to the Court, “the requirement to submit a list of three candidates should be maintained, without prejudice to consideration being given to possible alternatives that might emerge in due course. It would observe that the issue of the list of three names is closely linked, *inter alia*, to the quality of the national selection procedures” (§ 10 of the contribution of the Court). The DH-SYSC instructed the Secretariat to seek the advice of the DLAPIL on the modalities of this option and the necessity to amend the Convention.⁴² The DLAPIL concluded that “the obligation of submitting for election by the Assembly a list containing the names of three candidates is of a compulsory nature and cannot be waived or subject to exemption, even under exceptional circumstances. Only a formal amendment of the Convention by the High Contracting Parties could dispense with this condition” (see §§ 4–11 of the Legal opinion, doc. doc. [DH-SYSC-I\(2017\)015](#)). **The CDDH decided in favour of the three-candidate model, since any change to the current system would require an amendment of the Convention.**

⁴¹ David Kosař, “Selecting Strasbourg Judges: A Critique” in *Selecting Europe’s Judges, A Critical Review of the Appointment Procedures to the European Courts*, ed. Michal Bobek, Oxford University Press, 2015, p. 160.

⁴² See Question 1 in doc. [DH-SYSC-I\(2017\)012REV](#).

C. The role of the Advisory Panel in the selection and election process

Challenges

78-80. On 10 November 2010, the Committee of Ministers adopted Resolution CM/Res(2010)26 on the establishment of an Advisory Panel of Experts on Candidates for Election as Judge to the European Court of Human Rights.⁴³ Referring to “the responsibility of the High Contracting Parties to the Convention to ensure a fair and transparent national selection procedure”, the Committee of Ministers stated its conviction that “the establishment of a Panel of Experts mandated to advise on the suitability of candidates that the member States intend to put forward for office as judges of the Court would constitute an adequate mechanism in this regard”. This underlines the fact that the principal role of the Advisory Panel is to provide advice to States during the process of selection of candidates. According to the resolution, **the Advisory Panel’s mandate is to confidentially advise the States whether candidates for election as judges to the Court meet the criteria stipulated in Article 21 of the Convention.** According to the aforementioned resolution, “the Panel shall be composed of seven members, chosen from among members of the highest national courts, former judges of international courts, including the European Court of Human Rights and other lawyers of recognised competence, who shall serve in their personal capacity. The composition of the Panel shall be geographically and gender balanced”.

79-81. The CDDH’s report of 2013 on the review of the functioning of the Advisory Panel notably addressed procedural questions, the interaction between the various stakeholders involved in the process, the reasons for the Panel’s opinions and the confidentiality of the process. There was a general agreement that **the work of the Advisory Panel is a useful additional safeguard to guarantee that proposed candidates for the post of judge at the Court are of the highest standards.**⁴⁴ The report was commented upon by the Court.⁴⁵ Following the submission of the report, the Committee of Ministers adopted Resolution [CM/Res\(2014\)44](#) amending Resolution [CM/Res\(2010\)26](#) to take account of some of the recommendations made by the CDDH.⁴⁶ It also amended the Guidelines, specifying that **the States should submit their list of candidates to the Parliamentary Assembly after having obtained the Advisory Panel’s opinion on the candidates’ suitability to fulfil the requirements under the Convention.**

80-82. The Advisory Panel adopted its first activity report for the period 2010–2013 on 11 December 2013.⁴⁷ The second activity report for the period 2014–2015 of 25 February

⁴³ The Advisory Panel is composed of seven personalities. In September 2017, the members are: Ms Nina Vajic – Chairperson (Croatia), Mr Christoph Grabenwarter (Austria), Ms Lene Pagter Kristensen (Denmark), Ms Maria Gintowt-Jankowicz (Poland), Mr Maarten Feteris (Netherlands), Mr Paul Mahoney (United Kingdom), Mr Bernard Stim (France).

⁴⁴ Document [CDDH\(2013\)R79 Addendum II](#), § 55.

⁴⁵ Document [DD\(2014\)513](#), 16 April 2014.

⁴⁶ An explicit reference to the Committee of Ministers’ Guidelines and the recommendation to submit the lists of candidates to the Advisory Panel at least three months before the time-limit set by the Assembly for submission of the list of candidates, see §§ 38 and 48 of the CDDH report on the review of the functioning of the Advisory Panel.

⁴⁷ [Final activity report for the attention of the Committee of Ministers \(2010–2013\)](#), Document Advisory Panel (2013)12 EN; in line also with the CDDH comments on the perceived lack of visibility (§ 50 of the CDDH 2013 report).

2016 was made public on 24 June 2016.⁴⁸ The Third activity report for the period 2016–2017 was made public on 30 June 2017.⁴⁹

81.83. From the practical experience deriving from the Second and Third activity reports as well as from the views brought forward in the context of the drafting of the CDDH report,⁵⁰ it appears that the Panel considers that it is facing challenges regarding its role in the selection procedure.

- **The opinions are not always followed:** during the period between January 2014 and June 2017, among the 29 lists examined by the Panel, in 9 cases the candidates were maintained on the list despite the Panel’s negative opinion.
- **The need for meetings to conduct its business properly:** as originally set up, it was not expected that the Panel would meet routinely to conduct its business. However, the Panel members considered 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.⁵¹
- **The financial means for a proper functioning of the Panel:** for the time being it does not have sufficient means if it is to meet regularly. Budgetary appropriation for the Panel in the Council of Europe’s ordinary budget for 2014–2015 amounted to 18 400 euros per year. This amount barely covered the costs of two meetings. The DLAPIL provides secretariat services to the Panel in addition to its statutory functions and without any compensation. The unprecedented workload in 2014–2015 could only be dealt with effectively thanks to additional budgetary resources provided from the Court’s budget which allowed the short-term recruitment of a temporary lawyer.⁵² The Panel’s budget for 2016–2017 amounted to 16 900 euros per year, which, similarly to the period 2014–2015, did not cover the actual costs of the Panel’s activities.⁵³
- **The difficulty to decide in borderline cases without an interview** despite the possibility to ask for additional information.

82.84. The work of the Advisory Panel and the aforementioned challenges were discussed in detail in the course of the preparation of this report. The responses identified by the CDDH concern the role of the Panel and the procedure followed as well as its co-operation with the Parliamentary Assembly.

i) The role of the Advisory Panel in the selection process

Possible responses within the framework of the existing structures

83.85. The CDDH confirmed its conclusions reached in 2013, namely that the existence of the Advisory Panel has had a positive impact on the improvement of the national selection

⁴⁸ [Second activity report for the attention of the Committee of Ministers](#) (2014–2015), document Advisory Panel(2016)1.

⁴⁹ [Third activity report for the attention of the Committee of Ministers](#) (2016–2017), document Advisory Panel(2017)2.

⁵⁰ Contribution by Mr Christoph Grabenwarter, doc. [GT-GDR-F\(2014\)018](#), also reproduced in doc. [DH-SYSC-I\(2016\)001](#), pp. 2–6.

⁵¹ See the [Second activity report for the attention of the Committee of Ministers](#), § 28.

⁵² See the [Second activity report for the attention of the Committee of Ministers](#), § 32.

⁵³ See the [Third activity report for the attention of the Committee of Ministers](#), § 31.

procedure. As also noted by the then President of the Advisory Panel, Mr John MURRAY, “the mere establishment of the Panel by the Committee [of Ministers] has made an impact. 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 await the outcome of the Panel’s assessment has strengthened the overall process of selection”.⁵⁴

84.86. Consequently, **the CDDH decided that the initial role of the Panel of giving confidential advice on candidates should be preserved. The proposal of making the opinion delivered by the Panel binding was not retained by the CDDH, deeming it would also go against the advisory nature of the Panel.**

85.87. Similarly, **the idea of the participation of the Panel in the national selection interview was rejected.** The CDDH noted however that certain States proposed an **enhanced interaction with the Panel** before reaching the final decision. Such practices have also been envisaged by the CDDH in its 2013 report.⁵⁵ This interaction is to be encouraged. It would be useful that the existing practical modalities of communication between the States and the Advisory Panel are presented in the follow-up work envisaged regarding the national selection procedures (see §§ 58–60 above).

86.88. **The possibility to hold interviews by the Advisory Panel⁵⁶ (even in exceptional circumstances) was not retained.** It has been argued, *inter alia* that this option would go against the role of the Panel advising the States and would prolong the selection process. The enhanced interaction between the Panel and the Committee on the Election of Judges would compensate for the absence of interviews. The possibility for the Panel to interview candidates only in exceptional circumstances was considered discriminatory towards other potential candidates.⁵⁷

87.89. Another crucial question was that of **governments not submitting the list to the Panel before its presentation to the Assembly.** This issue was examined in light of three incidents in 2016 whereby the lists were submitted to both instances almost simultaneously or by completely circumventing the Advisory Panel. In two cases, the 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 the third case, the government submitted simultaneously the list of candidates to both the Panel and the Assembly, in which case the Panel immediately suspended its examination of that list.

⁵⁴ See doc. [DH-SYSC-I\(2017\)016](#), p. 6.

⁵⁵ See doc. [CDDH\(2013\)R79, Addendum II](#), § 60 b. and c.: “it is suggested that a particular candidate be discretely informed by the government concerned of an Advisory Panel opinion that he/she does not fulfil the criteria for office, thereby giving the opportunity for the candidate to withdraw; it is suggested that the Advisory Panel provide the government concerned with a confidential written opinion stating specific reasons why it considers a particular candidate not to fulfil the criteria for election”.

⁵⁶ See contribution by France, doc. [DH-SYSC-I\(2017\)013](#).

⁵⁷ During his exchange of views with the Ministers’ Deputies on 1st March 2017, the then President of the Panel noted: “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” (see doc. [DH-SYSC-I\(2017\)016](#), p. 12).

~~88-90.~~ In light of the above, **the possibility to further enhance the consultation of the Panel before the transmission of the list to the Parliamentary Assembly was considered.** This could be achieved through a revision of the Committee of Ministers' Guideline VI.1., which reads as follows: "the High Contracting Parties should submit their list of candidates to the Parliamentary Assembly after having obtained the Advisory Panel's opinion on the candidates' suitability to fulfil the requirements under the Convention". The amendment could indicate that without the consultation of the Panel, the list would be automatically rejected. **This proposal was not retained while the importance to observe Guideline VI.1. was stressed.** A revision of the Assembly's Rules could also be considered to this end. It was also noted that **the enhanced interaction with the Committee on the Election of Judges would run counter to those situations.**⁵⁸

~~89-91.~~ Finally, as regards the means allocated to the Advisory Panel, the CDDH agreed that **the Panel should be allocated the necessary resources and budget line to achieve its task.**

ii) The interaction with the procedure of the Parliamentary Assembly

Possible responses outside the framework of the existing structures

~~90-92.~~ The CDDH examined the role of the Panel vis-à-vis the Parliamentary Assembly, taking into account the received contributions by Belgium and Estonia (see their detailed presentation in doc. DH-SYSC(2017)010, §§ 58–65).

~~91-93.~~ The Belgian proposal suggested that the members of the Panel should be present in the hearing of the candidates before the Committee on the Election of Judges without the right to intervene and to vote. This would allow the Panel to confirm or not its initial views through its presence in the interview and also to enlighten the members of the Committee on the Election of Judges. It would also allow the combination of the political element with the expert one, thus reinforcing the motivation of both instances.

~~92-94.~~ Estonia suggested integrating the Panel, i.e. the members of the Panel, into the procedure before the Assembly.⁵⁹ The Panel's integration into the Committee on the Election of Judges would mean that the Panel's mandate would no longer be giving prior advice to the States but rather giving advice to the Committee on the Election of Judges (the Panel retains its advisory function) or that the members of the Panel act on equal basis with the members of the Committee (full integration). According to the proposal, different options were possible for the integration.

~~93-95.~~ The possible benefits presented in the Estonian proposal can be summarised as follows:

- It would shorten the selection process.
- It would simplify the procedure and reduce the possible levels of conflict between the different bodies involved in the selection/election procedure. Instead of three different levels of decision-making bodies, there would be two, one at a national level and the other at an international level.

⁵⁸ See also the remarks of the then President of the Panel, doc. [DH-SYSC-I\(2017\)016](#), p. 11.

⁵⁹ The former Registrar of the Court had envisaged such integration, although it is not clear to which of the two options identified above he referred: "One idea could for instance be to integrate the members of the Advisory Panel of Judges into the procedure before the Parliamentary Assembly," noted Erik Fribergh, the former Registrar of the Court, in "The European Convention and Court of Human Rights: our shared treasures", HRLJ, Vol. 35, No. 9–12, p. 313–318.

- The Panel’s contribution would become more effective and transparent since they could actively take part in interviewing the candidates and probing their qualifications and professional merit. Simultaneously, the Committee on the Election of Judges would benefit from the expertise of the Panel members while conducting the interviews.

94-96. The CDDH did not retain the proposal of Estonia, considering that it would fundamentally change the advisory role of the Panel (see § 86 above). It considered, however, along the lines of the proposal by Belgium, that **enhancing the interaction between the Panel and the Committee on the Election of Judges would significantly benefit the whole process.**

95-97. It was recalled that the communication with the Assembly is regulated by Resolution (2010)26 of the Committee of Ministers, which provides that “when a list of three candidates nominated by a High Contracting Party is being considered in accordance with Article 22 of the European Convention on Human Rights, the Panel shall make available to the Parliamentary Assembly in writing its views as to whether the candidates meet the criteria stipulated in Article 21 § 1 of the Convention. Such information shall be confidential”. **From the data available in the Second activity report of the Panel, it is noted that, despite the negative views of the Panel in six cases, the candidates were maintained on the list. The Parliamentary Assembly rejected only one of those lists and accepted all others. In two cases, candidates who, in the Panel’s view, did not fulfil the criteria of Article 21 § 1 of the Convention were recommended by the Committee on the Election of Judges.**

96-98. The Advisory Panel has taken measures to enhance its communication with the Parliamentary Assembly, notably by providing its Secretariat with clarifications of its opinions through its own Secretariat. It has been noted in this regard that a more direct and horizontal approach in the interaction between the two bodies would further this objective.⁶⁰ The possibility for the Advisory Panel to orally explain its views on the candidates to the Committee on the Election of Judges could contribute to making the Committee’s opinion more informed, in keeping with the confidentiality principle.⁶¹

97-99. The merits of this co-operation were shared by the then President of the Advisory Panel as well as by the Secretary General of the Assembly.⁶² According to the information provided by the Secretary General of the Assembly at the 3rd meeting of the Drafting Group, confirmed by the then President of the Advisory Panel during its exchange of views with the Ministers’ Deputies on 1st March 2017, the idea of having the President of the Panel or his/her representative to attend the meeting of the Committee on the Election of Judges was being considered. The details need to be defined (observer role or possibility to put questions to the candidates). In addition, this oral report by the Panel could be supplemented by a more thorough written one. To this effect, the strengthening of the motivation of the Panel’s decisions would be important in order to facilitate the work of the Committee on the Election of Judges. Such a motivation should respect the **confidentiality principle**, in order not to harm the reputation of candidates, in light of the CDDH report of 2013 on the review of the functioning of the Advisory Panel.

⁶⁰ See also the remarks of Mr Murray in doc. [DH-SYSC-I\(2017\)016](#), p.5.

⁶¹ During his 1st exchange of views with the DH-SYSC-I, Mr Sawicki noted that “there is nothing in the existing guidelines of the Election Committee allowing it to invite people of its choice for interviews but theoretically speaking this could be changed”, see doc. [DH-SYSC-I\(2016\)008](#), § 10.

⁶² See the intervention by Mr John Murray at the 1233rd meeting of the Ministers’ Deputies, 8 July 2015, Appendix II of the Second activity report of the Advisory Panel; see doc. [DH-SYSC-I\(2016\)008](#), § 10.

D. The interpretation of the criteria

Challenges

~~98-100.~~ Certain elements regarding the interpretation of the criteria of Article 21 of the Convention have been compiled in the Guidelines taking into account the practice developed by the Parliamentary Assembly. Since then, all actors concerned have developed their interpretation, not least the Advisory Panel (for the detailed analysis of this interpretation, see §§ 33–47 of the Second Activity Report of the Advisory Panel, February 2016).

~~99-101.~~ The **risk of diverging interpretations of the criteria** by the different actors of the process has been raised. The Drafting Group considered that it would be useful to obtain more elements concerning notably the substance of the complementary information solicited by the Panel from the States. The contribution received from the Secretariat of the Advisory Panel demonstrated that the additional questions asked by the Panel concern the verification of factual elements mainly related to the professional experience of the candidate.⁶³ It was also noted that additional, unsolicited sources of information received by the Panel never constituted the basis of rejection of a candidate but only means for further verification. The Panel's final assessment of a candidate's suitability was only based on material supplied by the government concerned.⁶⁴

Possible responses within the framework of the existing structures

~~100-102.~~ The necessity for a codification of the interpretation of the criteria with a view to securing, as far as possible, their homogenous interpretation and application by all actors concerned in the selection and election process was further examined on the basis of the following arguments:

- It was argued that certain criteria are complex to interpret:⁶⁵ while some are objectively measurable, despite inevitable variations in the designation or election processes of judges, certain others are nuanced, such as the determination as to whether a person is of “high moral character”;
- A non-homogenous interpretation of the criteria by all actors concerned may create the perception of a lack of transparency and misunderstandings both for the member States and the candidates.

~~101-103.~~ While noting that a follow-up work on the interpretation of the criteria could facilitate the work of the States in the selection process and stressing that a homogeneous interpretation would be useful, the CDDH decided that **the Guidelines should remain the text of reference for all actors in the process with a view to their application**, while respecting the diversity of national systems. No further codification of the interpretation of the criteria was therefore necessary at this stage.

⁶³ See doc. [DH-SYSC-I\(2017\)009](#), pp. 12 and 13.

⁶⁴ See the [Third activity report of the Advisory Panel](#), 30 June 2017, doc. Advisory Panel (2017)2, § 25.

⁶⁵ See exchange of views with Mr Wojciech Sawicki, doc. [DH-SYSC-I\(2016\)008](#), § 5; see also the Second activity report of the Advisory Panel, § 28.

II. THE ELECTION PROCESS

A. The procedure

~~102-~~104. The *travaux préparatoires* of the adoption of the Convention indicate that the issue of how the nominations procedure would be conducted was not even discussed. It was originally envisaged that judges would be elected by a simple majority of the votes cast in both the Parliamentary Assembly and the Committee of Ministers, with each body voting independently. While subsequent drafts of the Convention suggested an absolute majority of votes, they too envisaged that both organs would elect judges. One version of what was eventually to become Article 22 of the Convention provided for election of the judges jointly “by the Consultative Assembly and by the Committee of Ministers of the Council of Europe” (Article 37 § 1 of the draft Convention annexed to the Report of the Conference of Senior Officials, 8/6-17/6/1950, Volume IV, Chapter XV, p. 288). With no explanation, the draft that was ultimately adopted omitted reference to the Committee of Ministers and consolidated the role of the Parliamentary Assembly.⁶⁶ It was observed that what prevailed in the end seems to have been not so much the concern to create democratic legitimacy, through the election of the judges by a parliamentary organ (i.e. the Assembly), but simply the concern to have a different voting mechanism from the one mandated for the members of the Commission, for whom election by the Committee of Ministers was foreseen (see Article 21 § 1 of the Convention in its original version).⁶⁷

~~103-~~105. The procedure has been developed over the years.⁶⁸ The Assembly’s latitude (“certain autonomy”) when it comes to establishing the procedure for the election of judges has been also acknowledged by the Court.⁶⁹ The **creation of a new general Committee on the Election of Judges in January 2015**⁷⁰ was considered an important step in the process. By transforming it into a full-fledged committee and by attaching more visibility to the outcome of its work, as the report on the candidates is now published before the election, the Assembly gave a more prominent role to this body.

~~104-~~106. The procedure can be described as follows:⁷¹

⁶⁶ Report presented by P.H. Teitgen to the Consultative Assembly of the Council of Europe (1949) in *Collected Edition of the “Travaux Préparatoires” of the European Convention on Human Rights*, Martinus Nijhoff, the Hague, 1977), Volume I, p. 210; Volume IV, p. 72.

⁶⁷ See the legal opinion from the Directorate of Legal Advice and Public International Law, doc. [DH-SYSC-1\(2017\)015](#).

⁶⁸ See doc. [Procedure for electing judges to the European Court of Human Rights](#) – Information document prepared by the Secretariat of the Parliamentary Assembly – Committee on the Election of Judges to the Court, [AS/Cdh/Inf\(2017\)01 rev 7](#).

⁶⁹ See Advisory opinion on certain legal questions concerning the list of candidates submitted with a view to the election of judges at the European Court of Human Rights, Grand Chamber, 12 February 2008, § 45; see Advisory opinion (No. 2) on certain legal questions concerning the list of candidates submitted with a view to the election of judges at the European Court of Human Rights, Grand Chamber, 22 February 2010, § 39: “The third fundamental principle in this sphere is the balance and division of powers between the High Contracting Parties and the Parliamentary Assembly under Article 22 of the Convention. By virtue of that provision, each High Contracting Party must nominate candidates who each satisfy all the criteria laid down in Article 21 § 1; the Assembly, meanwhile, has the task of electing a judge from among them. The system thereby established seeks to ensure that the entities involved – the State concerned and the Assembly – enjoy a certain autonomy, within the limits of their respective powers, allowing them to determine how the procedural rules laid down in Article 22 are to be applied (see the first advisory opinion [...] §§ 43–44).”

⁷⁰ See [Parliamentary Assembly Resolution \(2002\)2014](#).

⁷¹ The description of the procedure in §§ 96–102 is based on an article by Andrew Drzemczewski, the then Head of the Legal Affairs and Human Rights Department of the Assembly, “The Parliamentary Assembly’s

The Assembly invites its Committee on the Election of Judges [...] (AS/Cdh) to make recommendations based on personal interviews with all the candidates and assessments of their curricula vitae. Upon receipt of these recommendations, the Assembly proceeds to the election of judges for a single term of office of nine years. The Committee is composed of 20 titular members and 20 alternates appointed by the Bureau of the Assembly on the basis of proposals by the Assembly's five political groups according to the D'Hondt system (subject to ratification by the Assembly).⁷² In order to assess the skills and knowledge of candidates, members of the Committee must, as specified in paragraph 5 of its term of reference, have the necessary level of competence and experience in the legal field [...]. The meetings of the Committee are held in camera and interpretation is provided in the two official languages of the Council of Europe, English and French. The chairpersons of the Assembly's Committee on Legal Affairs and Human Rights and the Committee on Equality and Non-Discrimination are *ex officio* members of this Committee.

~~105-107.~~ Article 22 of the Convention specifies that “[t]he judges shall be elected by the Parliamentary Assembly [of the Council of Europe] with respect to each High Contracting Party by a majority of votes cast from a list of three candidates nominated by the High Contracting Party.” It does so on the basis of the recommendations it receives from its Committee on the Election of Judges.

~~106-108.~~ The Committee – specially constituted by the Assembly's Bureau on the basis of proposals by the political groups, and composed of 20 titular members and 20 alternates – is mandated by the plenary Assembly to **interview each of the three candidates in person, scrutinise their curricula vitae and make specific recommendations to the Assembly concerning the qualifications of these candidates.**⁷³

~~107-109.~~ Prior to the interview session in respect of each list of three candidates, the Committee on the Election of Judges holds a briefing session during which a number of issues are discussed, including the “position” taken by the Advisory Panel which has had confidential consultations with States prior to the transmission of the lists to the Assembly.⁷⁴ Then **each candidate is interviewed for 30 minutes**, with the first five minutes of the interview being allotted for a short self-presentation, if the candidate so wishes. The candidate is informed of the possibility of making such a presentation by the Secretary General of the Assembly in the letter convening him or her for interview. Members (then) pose questions, in English or in French, and the candidate responds in either or both languages: simultaneous interpretation is provided. The Chairperson ensures that both questions and answers remain short so that as many topics as possible can be raised during the interview to enable members of the Committee to make an informed choice on the suitability of candidates.

Committee on the Election of Judges to the European Court of Human Rights”, HRLJ, Vol. 35, No. 1–8, 2015, pp. 269–274.

⁷² This is a mathematical formula, named after a Belgian mathematician, which ensures that representation is fairly distributed in proportion to the number of seats held in the Assembly as a whole. It requires the number of seats for each political group to be divided successively by a series of divisors (1, 2, 3, 4), with seats on committees allocated successively to political groups to secure the highest resulting quotient or average.

⁷³ The Committee on the Election of Judges to the Court may also propose to the Assembly the rejection of lists: see § 4 (i) of the AS/Cdh's terms of reference as found in the appendix of [Resolution 2002 \(2014\)](#), modifying [Resolution 1842 \(2011\)](#); see also “Candidates for the European Court of Human Rights”, [Resolution 1366 \(2004\)](#), as modified by [Resolutions 1426 \(2005\)](#), [1627 \(2008\)](#) and [1841 \(2011\)](#).

⁷⁴ See Resolution [CM/Res\(2010\)26](#), as amended, on the establishment of an Advisory Panel of Experts on Candidates for Election as Judges to the European Court of Human Rights. [...] The views of the Panel – provided to the Committee on a confidential basis – are “always giv[en] substantial weight when assessing the suitability of candidates” by the Assembly's [sub-]Committee (see Committee of Ministers Ministers' Deputies decision, 1213th meeting, 26 November 2014, item 1.5).

~~108-110.~~ The interviews are carried out in the alphabetical order of the names of the candidates. After all three candidates have been interviewed, the Chairperson provides the Committee members with a brief summary of his or her impressions of the candidates, after which general discussion ensues for approximately 15 to 20 minutes, in the course of which members express their views on the respective candidates. A vote is then taken – by secret ballot – after which the Chairperson announces the result of the vote. **This procedure takes place in camera and all proceedings are confidential.** At the end of each meeting, the Chairperson systematically reminds members of this.

~~109-111.~~ The Committee’s report, containing its recommendations, addressed to the plenary Assembly, is prepared by its Chairperson and is transmitted to the Assembly via its Bureau. An important development of the new procedure is that **the report is now made public prior to the commencement of the election procedure.**

~~110-112.~~ The election by the Assembly is by **secret ballot**. An absolute majority of votes cast by parliamentarians is required in the first round of voting when the Assembly meets in plenary session. If this is not achieved, a second vote takes place, for which a relative majority of votes is sufficient. Election results are announced publicly by the President of the Assembly during the part-session and published – in the form of a press release – on the Assembly’s website shortly afterwards.

B. Challenges

~~111-113.~~ The CDDH report noted that, in light of the establishment of the new general Parliamentary Assembly Committee on the Election of Judges, the effect of the role of the Assembly in the process should be considered. During the elaboration of the CDDH report, a number of elements were highlighted, such as the **unpredictability of the procedure** and the **lack of its transparency**.⁷⁵ The combination of these characteristics with the whole length of the selection and election process (which may last up to 18 months) may cause potential good candidates to abstain since in the midst of their professional career, they may find it difficult to refrain from seeking other opportunities.

~~112-114.~~ From the contributions received following the “open call”, it appeared that **the hazards of the political process and its outcome, which may prevent the best candidate from being elected, constitute a crucial deterring factor for potential candidates.** Furthermore, certain contributions questioned the conduct of interviews (short duration, general nature of questions asked, lack of guidelines for the interviews; lack of sufficient information available to candidates) as well as the voting procedure and the risks of political influence or lobbying between the rounds of voting. If the democratic element of the process was deemed to constitute one of the guarantees of the present system⁷⁶ and of the judges’ legitimacy,⁷⁷ consideration ought to be given to the measures that need to contain the negative

⁷⁵ Contribution by Mr Christoph Grabenwarter, doc. [GT-GDR-F\(2014\)018](#), also reproduced in doc. [DH-SYSC-I\(2016\)001](#), pp. 2–6.

⁷⁶ “I believe I can say with certainty that there are not many international procedures of designation of judges that is more democratic than the one that concerns the judges of the Strasbourg Court [...] It is a particularly democratic process that results in the election of judges for a non-renewable mandate of nine years. It is very crucial to point this out in this era where certain people sometimes question the legitimacy of European judges”, stated the then President of the Court, Dean Spielmann on 17 June 2015, Hearing before the Law Committee of the French National Assembly, unofficial translation.

⁷⁷ It was also argued that “the injection of political choice into the process is no bad thing. The strength of opinion expressed highlights the fact that the values and perspectives of judges in the ECHR matter a great deal. These judges are reaching decisions which, though legal in nature, can have a significant social and political

aspects of the political element. The latter have been often subject to criticism.⁷⁸ The Court also noted that it: “shares this concern. In the present context, there appears to be a real risk that unless candidates for the post of judge of the Court are able to have confidence that the electoral process is firmly and reliably focused on their professional merits, qualities and relevant experience, then persons who are the most highly qualified and experienced may be dissuaded from entering into the process at all.”⁷⁹

~~113-115.~~ The election process in the Parliamentary Assembly was discussed in detail in the course of the preparation of this report, including through several exchanges of views with the Secretary General of the Assembly (see above §§ 40 and 43). Furthermore, the Chair and the Vice-Chair of the Drafting Group were invited by the Committee on the Election of Judges for an **exchange of views**, held on 12 January 2017, regarding the work carried out for the preparation of this report.⁸⁰ It was also noted that a report on “Election of Judges at the European Court of Human Rights” was under preparation by the Committee on the Election of Judges that would be finalised in 2018.⁸¹

~~114-116.~~ The CDDH decided that **work should concentrate on the improvement of the current system** in which the election of judges to the Court falls under the Parliamentary Assembly, in accordance with the Convention, as it may provide democratic legitimacy to the judges.

~~115-117.~~ The CDDH considered that **suggestions should be drawn up in order to feed into the work of the Parliamentary Assembly on this issue**, and in particular the relevant report under preparation by the Committee on the Election of Judges. These suggestions aimed to prevent, to the extent possible, the hazards of the political process and to ensure the election of the best judges to the Court.

~~116-118.~~ Furthermore the possibility for the Committee on the Election of Judges to present to the plenary Assembly for election a list of less than three candidates for election is addressed in light of the opinion given by the DLAPIL, following a request by the Drafting Group. Finally, in the framework of the comprehensive analysis which was conducted, alternative models of appointment were explored.

~~117-119.~~ ~~Finally, t~~The CDDH stressed that its suggestions in relation to the procedure followed by the Assembly regarding the election of judges are guided by the paramount importance of this election and its distinct features. This election fully justifies the application of different rules from the ones applied in other election procedures of the Assembly so as to

impact across Europe. All members of the Assembly are national parliamentarians and it enhances the democratic legitimacy of the Court for them to have some say in the selection of its judges and some ownership of the process.” See Kate Malleson and Dr Patrick O’ Brien, “The merits of the judicial appointment process to the European Court of Human Rights”, The Constitution Unit Blog: <https://constitution-unit.com/>.

⁷⁸ See *inter alia*, “Judicial Independence: Law and Practice of Appointments to the European Court of Human Rights”, Interights, May 2003. This report was the result of a group of eminent European jurists: Professor Dr. Jutta Limbach, former President of the Federal Constitutional Court of Germany (Chair); Professor Dr. Pedro Cruz Villalón, former President of the Constitutional Court of Spain; Mr Roger Errera, former member of the *Conseil d’Etat* and of the *Conseil supérieur de la magistrature* in France; The Rt. Hon. Lord Lester of Herne Hill QC, President of INTERIGHTS; Professor Dr. Tamara Morshchakova, former Vice President of the Constitutional High Court of the Russian Federation; The Rt. Hon. Lord Justice Sedley, judge in the English Court of Appeal; and Professor Dr. Andrzej Zoll, former President of the Constitutional Court of Poland.

⁷⁹ See § 19 of the contribution of the Court.

⁸⁰ See doc. [AS/Cdh \(2017\) OJ 01 Rev 2](#); It is recalled that the meetings of the Committee are held in camera.

⁸¹ The Committee appointed its Chairperson, Mr Boriss Cilevičs, as rapporteur, see the Synopsis of the meeting of 6 April 2017, doc. [AS/Cdh\(2017\)CB 03](#).

ensure the election of the most suitable candidate at the Court. The creation by the Assembly of a specialised Committee for this election further highlights its importance.

C. Possible responses within the framework of the existing structures

~~118-120.~~ The considerations below concern aspects such as the composition of the Committee on the Election of Judges, the conduct of the interviews, the nature of the recommendations given to the plenary, the voting procedure and the plenary's role. These changes could be made within the framework of the existing structures, namely the [Assembly's Rules of Procedure](#). As demonstrated recently in particular through the creation of an [independent external investigation body](#) to carry out a detailed independent inquiry into allegations of "corruption and fostering of interests" made against certain of its members or former members, the Assembly has the capacity to adjust its Rules of Procedure and working methods to address current challenges.⁸²

i) *The procedure before the Committee on the Election of Judges*

~~119-121.~~ In general, all questions regarding the procedure within the Committee are crucial given that the main safeguards of the entire appointment procedure lie within that very procedure.

Composition of the Committee

~~120-122.~~ As far as the composition of the Committee on the Election of Judges is concerned, concerns were raised as to its limited character. The Secretary General of the Assembly explained that the choice was made to have a smaller specialised committee with members having legal backgrounds or experience nominated by political groups⁸³ instead of a larger committee allowing for an equitable geographical distribution (see also § 106 above). The CDDH is of the view, however, that **this limited number may not be sufficient, in particular in the eyes of the candidates and of their perception of the democratic legitimacy of the process**. Similarly, the overrepresentation of certain nationalities in the Committee⁸⁴ while some geographical regions have no or very limited representation also raises concerns. More importantly, the presence of senior members within the Committee, as well as of the Chairs of all political groups needs to be considered so as to strengthen the weight of the Committee's recommendation (see also § 126). The CDDH strongly encouraged careful consideration of all these elements.

The interviews

~~121-123.~~ As far as the interviews are concerned, three points have come out of the discussions. The first question concerns **the effective presence of members at the meetings**.⁸⁵ Even if domestic parliamentary duties are a matter of priority and justify the

⁸² See also [Resolution \(2169\) 2017](#) "Recognition and implementation of the principle of accountability in the Parliamentary Assembly".

⁸³ Among the other 8 Committees of the Parliamentary Assembly, only the members of the Monitoring Committee (they are 93 members including 8 *ex officio* members) and of the Committee on the Rules of Procedure, Immunities and Institutional Affairs (they are 38 including 8 *ex officio* members) are appointed by the 5 political groups according to the D'Hondt system.

⁸⁴ For example, 2 full members from Latvia, [2 from Romania](#), [32](#) from Greece, and 3 from Ukraine, [including one ex officio member](#).

⁸⁵ According to the Assembly's Rules (in particular Rule 47.3), a committee may deliberate when one third of its members are present. (As indicated in footnote 5 of this Rule, if it is not possible to divide the number of members of a committee by 3, the quorum shall be calculated on the basis of the next lower multiple of 3.)

absence of certain members, there might be room to consider the ways of ensuring their full participation to the meetings in light of the importance of the questions examined by this Committee.⁸⁶

~~122-124.~~ The second question concerned **the conduct of the interviews**. During the discussions for the preparation of this report, it was agreed that the candidates are interviewed for this very important function and should be able to deal with the uncertainties and difficulties of this interview; they will be confronted with situations that are at least equally difficult when they will be serving the Court. It was however stressed that the quality of interviews was a key step in the entire process. The CDDH noted that the main objective of the interview was to assess whether the candidate was up to the function of a judge. It required a thorough preparation, a component that would be particularly important if a representative of the Panel would be present (see §§ 98–99 above) and harmonised rules. The CDDH was of the view that it was necessary to enhance the transparency of the process. Against this background, what could be considered is the publication of the Committee’s guidelines for these meetings.⁸⁷

~~123-125.~~ The third question concerned **the duration of the interviews**. In light of the contributions received following the “open call” as well as by the experts, the 30-minute interview does not appear to be sufficient in light of the importance of the post as well as of the perception of the seriousness of the nomination process by the candidates. These concerns merit consideration, even if the prolongation of the interviews would require taking into account practical, logistical and budgetary elements (overnights stays, cost of interpretation, etc.).

ii) Refinement of the current procedure before the plenary Assembly

~~124-126.~~ The election by the plenary needed to be carefully examined as it is at the heart of the criticism against the appointment procedure, often characterised by lobbying. Even if the recommendation of the Committee on the Election of Judges (and previously the Sub-Committee) had been in principle respected by the plenary,⁸⁸ **examples in 2016 and 2017 trigger the necessity to consider the procedure anew**. The proposal to hold a debate within the plenary Assembly after the Chair of the Committee on the Election of Judges has explained the Committee’s recommendation was not retained in light of the need to protect

However, if so requested by one sixth of its members before voting begins on a draft opinion, recommendation, or resolution as a whole, or on the election of the Chairperson or Vice-Chairpersons, the vote may be taken only if a majority of the committee’s members are present.

⁸⁶ The presence from 2015 until ~~January-September~~ 2017 was as follows: [29 September – 15 members](#); [6 April – 10 members](#); 24 January 2017 – 15 members; 12 January 2017 – 13 members; 6 October 2016 – 12 members; 19 June 2016 – 14 members; 17 April 2016 – 13 members; 12 January 2016 – 8 members; 17 September 2015 – 11 members; 9–10 June 2015 – 13 titular members and 6 alternates; 30–31 March 2015 – 16 titular members and 6 alternates. It may be recalled that the Committee on the Election of Judges is composed of 20 titular members and 20 alternates.

⁸⁷ See doc. [DH-SYSC-I\(2016\)008](#), § 7: “the Committee is guided by the rules of PACE and by its own guidelines”.

⁸⁸ Out of 23 elections in 2013–2017, the plenary Assembly followed the recommendations of the Committee on the Election of Judges 20 times. Until April 2017, the plenary Assembly did not follow the Committee’s first recommendation in any of the two elections that have taken place. The Assembly elected a judge despite the Committee having recommended another candidate on the list by a large majority, and another judge despite the Committee having recommended another candidate by a majority. In 2016, the plenary Assembly followed the Committee’s recommendation in 4 out of 5 elections. It elected a judge despite the Committee having recommended another candidate by a narrow majority. In 2013, 2014 and 2015, the plenary Assembly followed the Committee’s recommendation in all elections (12 elections in 2015, 1 election in 2014 and 3 elections in 2013).

the candidates' reputation. In addition to its suggestions as to the composition of the Committee and the presence of senior members of the Assembly and the presidents of the political groups (see § 122 above), the CDDH considered that a more reasoned recommendation by the Committee on the Election of Judges would contribute to the plenary forging an informed opinion.⁸⁹ A balanced and reasoned recommendation would not harm the candidate's reputation.⁹⁰ The aim of this recommendation would not be to indicate that the candidate was not qualified but that he/she was not the most suitable candidate for the post of judge at the Court. It was further argued that the candidates to such a post must be prepared to a certain level of exposure.

~~125-127.~~ The question of the **quorum** is crucial for the legitimacy of this particular election. There is a need to consider whether its threshold could be enhanced.⁹¹ As noted during the exchange of views with the Secretary General of the Parliamentary Assembly of 19 October 2016, the plenary Assembly proceeds with the votes during one full day in order to have more people voting. When there is one single list of candidates, it happened that there was a relatively low participation in the vote. Now, out of a total of 324 votes possible, there are often between 160 and 200 votes cast for some lists, which is a better result.

~~126-128.~~ It would be crucial to **consider the necessity of maintaining two rounds of voting in view of the risk of lobbying** contained therein. It has been demonstrated that the number of rounds of voting and even the voting's scheduling play a very important role in the elections of international judges.⁹² During the exchange of views on 19 October 2016, the question was raised as to the reasons for holding two rounds of election. It was explained that according to the rules which apply for all elections carried out by the Parliamentary Assembly, for the first round, an absolute majority is required. For the second round, a simple majority is sufficient. Mr SAWICKI noted that there could theoretically be a **possibility of an election in just one round with a simple majority of votes**. The CDDH was of the view that **this change could indeed be envisaged with the precondition that the quorum for the election of the judge to the Court is reinforced**.

~~127-129.~~ An additional question that should be explored was that of the **voting method**. It was argued that there could be a system of one round of election where each parliamentarian would have two votes (preferential system). The main vote would be calculated in the first round, and if it gave the final result corresponding to the criteria about majority, etc., it would be sufficient. But each parliamentarian could also express support to a second suitable candidate. So, if the first round of voting does not fulfil the majority criteria, the second vote would enter into consideration. This system encourages people to vote against

⁸⁹ At present, the actual wording of the recommendation followed by the candidates' curricula vitae is for instance: "The Committee recommends X with a narrow/large majority / over Y as the most qualified candidate; "The Committee recommends Z with overwhelming majority as the most qualified candidate".

⁹⁰ It was noted that the Bureau of the Assembly communicated succinct information to the Committee of Ministers on the reasons motivating the order of preference regarding the election of members of the European Committee for the prevention of torture and inhuman or degrading treatment (CPT).

⁹¹ According to Rule 42.3 of the Assembly's Rules of Procedure, the quorum is one third of the numbers of representatives of the Assembly authorised to vote. As indicated in footnote 3 of this Rule, the number of representatives of the Assembly authorised to vote shall correspond to the number of seats allocated to each of the member States under Article 26 of the Statute of the Council of Europe, and to which appointments were made in accordance with Article 25 of the Statute and Rules 6 to 11 of the Assembly's Rules of Procedure, excluding representatives, who have been deprived of their voting rights in the Assembly or whose voting rights have been suspended under Rule 10. If the number of representatives authorised to vote is not divisible by three, the number obtained as a result of the division is rounded down.

⁹² *Selecting International Judges, Principle, Process and Politics*, ed. Ruth Mackenzie, Kate Malleson, Penny Martin and Philippe Sands, Oxford University Press, 2010, pp. 100–136.

the candidate they least like as well as positive affirmation of the qualities of one candidate. All the above options do not require any amendment to the Convention and can be achieved through a change to the Assembly's Rules.

iii) Reduction in the number of candidates placed before the plenary Assembly

~~128~~.130. During the preparatory work, the Drafting Group considered the possibility to present to the plenary Assembly fewer than three candidates for election. It decided to seek the advice of the DLAPIL on the feasibility of these options without amending the Convention (see questions 2 and 3 in document DH-SYSC-I(2017)012REV).

Election taking place between two candidates

~~129~~.131. The first question concerned the situation where the Committee on the Election of Judges considers that one candidate is not suitable for election by the plenary Assembly but does not find it appropriate to reject the list in its entirety. The DLAPIL concluded that "in [such] a situation [...], it may recommend to the plenary Assembly that an election be held with only two candidates proposed. The Assembly may provide for such a possibility in its (internal) regulations governing the procedure for the election of [the Court] judges without the need to amend the Convention" (see §§ 12–28 of the Legal opinion, doc. [DH-SYSC-I\(2017\)015](#)). Two arguments in the opinion are of particular importance (§§ 16–19):

- The requirement that each State submits a list of three qualified candidates to the Assembly for election is unconditional under the Convention. On the basis of the wording of Article 22 of the Convention, it may also be argued that an election must always take place in the presence of three candidates. Such an interpretation would be compelling if one were to read Article 22 of the Convention as meaning that the plenary Assembly must, for each election, have the choice between three candidates. Certain considerations may nonetheless be invoked to contest such a reading of Article 22 of the Convention. The wording of that provision does not mention the plenary Assembly or indeed the role of any Assembly committee. This is normal because, as one of the two statutory organs of the Council of Europe (Article 10 of the Statute of the Council of Europe), the Assembly enjoys autonomy in the organisation of its internal procedures.
- The Assembly has established a Committee on the Election of Judges. If the Committee is entitled to recommend the rejection of a whole list, it should *a fortiori* be possible to empower it to recommend that one of the candidates should be excluded from election by the plenary Assembly. The prerogatives of the plenary Assembly would be safeguarded as long as the Committee would only issue a recommendation to that effect, which would have to be confirmed, ratified or otherwise endorsed by the plenary.

~~130~~.132. The CDDH shared the view that from a purely legal point of view, this possibility would not require an amendment to the Convention. Article 22 of the Convention does not mention the plenary Assembly or indeed the role of any Assembly committee. This reading is also compatible with the practice regarding the appointment of judges at the highest national courts in some States where a parliamentary committee plays a predominant role in the process of appointment. As a whole, accepting this option would not reduce the powers of the Parliamentary Assembly in this area but only give a more prominent role to its Committee on the Election of Judges that, unlike the plenary, interviews the candidates and by virtue of this very fact is in a position directly to assess their suitability for the post of judge.

~~131-133.~~ As noted during the discussion held at the 3rd meeting of the DH-SYSC, attended by the Secretary General of the Assembly, the Director of Legal Advice and the Secretary of the Panel, the parameters as to the opportunity of this option needed to be considered. The CDDH attached particular importance to the following argumentation in the opinion (§§ 24–27):

- To allow the Assembly to adopt a procedure which would provide for the possibility to present, exceptionally, only two candidates for election by the plenary Assembly does not contradict any of the fundamental principles laid down in the matter of submission of the lists of candidates by the Court.⁹³ Such a procedural possibility could avoid the rejection of a whole list in cases where only one candidate is considered unsuitable for election. In that way, the State concerned will not present a new list which, depending on the applicable national procedures, can cause significant delays in the filling of vacancies in the composition of the Court. While fully preserving the Assembly's prerogatives in respect of the procedure for the election of judges of the Court, the proposed possibility may provide for more flexibility, thus improving its effectiveness.
- It remains to be examined whether the procedural possibility in question would in any way contradict the requirement that each State must nominate candidates who each satisfy all the criteria laid down in Article 21 § 1 of the Convention. Could it not be considered that by allowing, albeit in exceptional cases, election between only two candidates, the States could be tempted to present lists which include only two suitable candidates, thereby circumventing the requirements of Article 21 § 1 of the Convention? The Committee has the mandate to ensure that candidates satisfy all the criteria laid down in Article 21 § 1 of the Convention. At the same time, neither the Convention nor the Committee's current terms of reference require it to [propose rejecting] a list if only one candidate is considered not suitable for election by the plenary Assembly.
- Apart from the situation where the Committee finds that a candidate clearly does not fulfil the criteria of Article 21 § 1 of the Convention, there may also be borderline cases where the Committee has serious doubts about one candidate, also taking into account the views of the Panel, but nevertheless decides to put the list forward for election by the plenary Assembly. It may even be that a recommendation to reject a certain list is not adopted because the required two-thirds majority in the Committee is not reached. All this shows that there may be various reasons which may prompt the Committee to conclude in exceptional

⁹³ The opinion of the DLAPIL makes reference to the second 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 of 22 January 2010, §§ 37–39. These principles can be summarised as follows: (i) The provisions of the Convention – including those relating to the organisation and functioning of the Court – must be interpreted in such a way as to ensure their effectiveness and, in the context of Articles 21 and 22, to ensure the prompt filling of all vacancies in the composition of the Court. (ii) The need to ensure the authority and the proper functioning of the Court entails interpreting these provisions in a way that best serves the preservation of the independence and impartiality both of the Court and of its judges. Article 21 § 1 and Article 22 of the Convention are intended to ensure the election, as members of the Court, of judges who are of high moral character and possess the qualifications required for appointment to high judicial office. (iii) There is the balance and division of powers between the States and the Assembly under Article 22 of the Convention: the States must nominate candidates who each satisfy all the criteria laid down in Article 21 § 1; the Assembly, meanwhile, has the task of electing a judge from among them. The system thereby established seeks to ensure that the entities involved – the State concerned and the Assembly – enjoy certain autonomy, within the limits of their respective powers, allowing them to determine how the procedural rules laid down in Article 22 are to be applied.

cases that a particular candidate is not suitable for election by the plenary Assembly.

~~132-134.~~ Notwithstanding the possibility that one candidate is not qualified and thereby not suitable for the post of judge in absolute terms, another hypothesis may be envisaged. Indeed, since the Committee's role, unlike that of the Advisory Panel whose task is to assess the candidates individually, consists in recommending a certain choice, it may happen that although all the three candidates are deemed qualified, two of them score much better in the interview than the remaining one (who may be seen as not being suitable, but only in comparison with the other two). If such a candidate was not presented for election to the plenary, there would simply be a progressive funnelling down of the list through the process in the Assembly.

~~133-135.~~ In light of the above, the CDDH considered that in borderline cases as regards the suitability of a candidate, even if such a conclusion is reached just in comparative terms, **the possibility for the Committee on the Election of Judges to submit only two more suitable candidates to the plenary Assembly should be envisaged.**

Election taking the form of endorsement of a candidate

~~134-136.~~ The second question addressed to the DLAPIL was whether it is possible, without amending the Convention, that the Committee on the Election of Judges puts forward only one candidate from the list of candidates to the plenary Assembly. The CDDH took particular note of the argument in the opinion that "the wording of Article 22 of the [Convention] does not exclude such a procedural possibility. In the presence of only one candidate, one sometimes speaks of a 'nomination' or an 'appointment', as does for example Article 253 of the Treaty on the Functioning of the European Union as regards the judges and advocates-general of the Court of Justice. The practice is, however, far from being firmly established. The President of the Parliamentary Assembly for example 'shall be declared elected' if only one candidature is proposed (Article 15.3 of the Rules of Procedure). By contrast, in the situation contemplated in question 3, an election by secret ballot would still be held. Members of the Assembly would be asked to vote in favour or against the only remaining candidate" (see § 30 of the Legal opinion of the DLAPIL, doc. [DH-SYSC-I\(2017\)015](#)).

~~135-137.~~ The CDDH considered that this option places the centre of gravity of the decision on the Committee on the Election of Judges. As noted above, this was also the practice regarding the appointment of judges at the highest national courts in many States. **A key advantage of this proposal would be that of containing the political hazards of the process.** As noted in § 126 above, these hazards mainly occur in the election by the plenary. A precondition for this change would be that the Committee's composition is reinforced by the presence of senior members of the Assembly and the Chairs of all political groups. **There are however also counter-arguments** to this option. The first more important one was put forward by the DLAPIL (see § 31 of the Legal opinion of the DLAPIL, doc. [DH-SYSC-I\(2017\)015](#)): "There may be risks inherent in that proposition. Introducing such a practice could be perceived as giving a possibility to a High Contracting Party to impose its choice of a candidate on the Assembly by proposing only one excellent candidate together with two clearly less qualified candidates and hoping that the latter two would be excluded from the election. However, as recalled above [...], the obligation to nominate three candidates who each satisfy the criteria of [Article 21 § 1] of the Convention remains unaffected. In practice, it is therefore difficult to imagine cases where it would be objectively justified to exclude two candidates from election by the plenary Assembly while proceeding with the election rather

Formatted: Font: Bold

Formatted: Font: Bold

than rejecting the whole list. It may indeed be argued that the Assembly has an obligation to reject a list if two out of three candidates are considered not suitable for election”. Another element that needs to be considered was the length of the process, should the Assembly reject the candidate suggested by the Committee on the Election of Judges.

D. Possible responses outside the framework of the existing structures

~~136-138.~~ As requested by the CDDH and the DH-SYSC, the final report should contain a comprehensive analysis of the themes, including the examination of alternative models. The models below are based on their presentation as it appeared in the first working document (doc. DH-SYSC-I(2016)003).

Model of the Court of Justice of the European Union

~~137-139.~~ A first possible alternative model might be that of the Court of Justice of the European Union,⁹⁴ where each State party nominates only one candidate who needs the approval by common accord of the governments of the member States, after consultation of the Panel provided for in Article 255 of the Treaty on the Functioning of the European Union (TFEU).

~~138-140.~~ The Panel’s mission is to “give an opinion on candidates’ suitability to perform the duties of Judge and Advocate-General of the Court of Justice and the General Court before the governments of the member States make the appointments referred to in Article 253 and 254 of that Treaty”. In accordance with Article 255 TFEU, the Panel comprises seven persons chosen from among former members of the Court of Justice and the General Court of the European Union, members of national supreme courts and lawyers of recognised competence, one of whom is proposed by the European Parliament. The Panel began its work immediately after the entry into force on 1 March 2010 of the two Decisions [2010/124/EU](#) and [2010/125/EU](#) of 25 February 2010 whereby the Council of the European Union established the operating rules of the Panel and appointed its members. The members are appointed for four years and may be reappointed once.

~~139-141.~~ Once member State governments have selected their nominee, they are to send their proposal to the General Secretariat of the Council. The latter forwards the proposal to the President of the Panel. The operating rules do not elaborate on the criteria that are to be used to assess a candidate’s suitability. In order to carry out its tasks, the Panel has put in place a procedure that allows detailed examination of the candidatures. The examination procedure and the assessment criteria are explained in detail in its activity reports and in particular in the third one.⁹⁵

~~140-142.~~ The key component of the Panel is a hearing which is not public, like its opinions. As explained by the Panel in its First activity report, provisions of EU law in the area of protection of personal data as interpreted by the Court of Justice have led the Panel to the conclusion that its opinions cannot be disclosed to the public. The transparency of the Panel’s activities is secured through the publication of its activity reports.

⁹⁴ The Drafting Group decided at its 1st meeting that inspiration could mainly be drawn from the EU procedures which are closer to the Convention system and not from procedures in other international and regional courts presented in doc. [DH-SYSC-I\(2016\)004](#).

⁹⁵ First report of 17 February 2011; Second activity report of 22 January 2013 and third report of 13 December 2013. All three reports are available online at <http://curia.europa.eu>. The first and second reports are published at 33 HRLJ, pp. 459–464 and pp. 465–470(2013); the Third activity report is published at 34 HRLJ, pp. 197–203 (2014).

~~141-143.~~ According to the data provided in its Third activity report, the Panel has issued seven unfavourable opinions out of 67 opinions rendered in total. In light of the data available until December 2013, the Panel's opinions, whether favourable or otherwise, had been followed by the governments of the member States.⁹⁶ All candidates considered unsuitable were withdrawn and replaced.⁹⁷ According to the President of the Panel, Jean-Marc SAUVÉ,⁹⁸ the procedure, as provided for by the Lisbon treaty, allowed for the control of manifest error with respect to the choice of the members of the Court of Justice. Jean-Marc SAUVÉ stressed that the role of the Panel is limited. "Its task is not to replace the member States; either with respect to the nomination of the candidates or as far as the appointment is concerned".⁹⁹ Regarding the absence of binding force of the opinion, he noted that it is offset by the mechanism of the appointment procedure, namely by a unanimous decision of all member States. The disagreement of one single member State suffices for there to be no appointment.

~~142-144.~~ Certain elements of the procedure have however been subject to criticism like the lack of democratic legitimacy, the absence of verification of the domestic selection procedure of the candidate and the lack of transparency of the procedure.¹⁰⁰

Examination of the suitability of candidates by an external body

~~143-145.~~ The second possible alternative model examined was proposed in the framework of the drafting of the CDDH report concerns the inclusion a specific norm in the new protocol to the Convention which would stipulate that:¹⁰¹

1. A State proposes a list of three or alternatively six candidates who are suitable to serve as judges of the Court.
2. A Commission of seven members (two representing the general public, two representing legal doctrine, two representatives of the judiciary and one representing the Council of Europe) shall decide on the suitability of candidates, referred to in point 1, for the Court's work.
3. The Commission shall report to the Parliamentary Assembly on one or alternatively three candidates from the list proposed by a State.

~~144-146.~~ The two models were considered not only in light of their feasibility and of the possibility to depart from the present system but also of their bearing on the system as a whole and on all the actors concerned. **The CDDH decided that at this stage, focus should be placed on the improvement of the election process before the Assembly.** The alternative

⁹⁶ Third activity report, p. 10.

⁹⁷ Henri de Waele, "Not Quite the Bed that Procrustes Built – Dissecting the system for selecting judges at the Court of Justice of the European Union", *Selecting Europe's Judges, A Critical Review of the Appointment Procedures to the European Courts*, ed. Michal Bobek, Oxford University Press, 2015, pp. 24–50.

⁹⁸ Jean-Marc Sauvé, "Selecting the European Union's Judges: the Practice of the Article 255 Panel", *Selecting Europe's Judges, A Critical Review of the Appointment Procedures to the European Courts*, ed. Michal Bobek, Oxford University Press, 2015, pp. 78–83.

⁹⁹ *Ibid*, p. 82.

¹⁰⁰ See Armin von Bogdandy and Cristoph Krenn, "On the democratic legitimacy of Europe's Judges – A Principled and Comparative Reconstruction of the Selection Procedures", *Selecting Europe's Judges, A Critical Review of the Appointment Procedures to the European Courts*, ed. Michal Bobek, Oxford University Press, 2015, pp. 162–180; see AccessInfo Project on Judicial Transparency: <http://elab-europe.eu/cjeu-judicial-transparency/>.

¹⁰¹ Proposal submitted in the framework of the GT-GDR-F by Justice Neshataeva, doc. [DH-SYSC-I\(2016\)001](https://www.consilium.europa.eu/media/106244/main/attachment_data/file/106244/DH-SYSC-I(2016)001).

models (not necessarily only the two described above) could be considered in the future within the framework of a follow-up work to review the results of the present exercise.

III. THE CONDITIONS OF EMPLOYMENT AND WORKING CONDITIONS AT THE COURT

A. Challenges

~~145-147.~~ A number of factors that discourage possible candidates are related to the attractiveness of the post. Some of those factors had already been identified in the CDDH report.¹⁰² They were confirmed and complemented in the course of the discussions and contributions received for the preparation of the present report. They can be summarised as follows:

1. attractiveness of the post, including the conditions of employment;
2. difficulties of finding suitable re-employment at the end of the term of office;
3. impossibility to contribute to national pension schemes;
4. separation from family;
5. impossibility for the partners of the judges to find their employment upon return to the country of origin;
6. lack of knowledge about the requirements of the work at the Court.

~~146-148.~~ Some of these factors concern the conditions of employment and others the working conditions at the Court; hence, they are examined separately. The possible responses to address the first challenge are mainly based on the contribution of the Court (doc. DH-SYSC-I(2017)011) as adopted by the Court sitting in plenary session. As noted in § 43 of the present report, this contribution was presented to the Drafting Group by the President of the Fourth Section of the Court and of the Court's Status Committee and was subsequently discussed at the DH-SYSC and the CDDH. When considering the possible responses, the CDDH agreed that it would be important to check their feasibility against the nature and the requirements of an international appointment, which as highlighted in contributions received is prestigious, a high progress in one's career and a very high professional recognition. However, the CDDH also noted the remarks of the then President of the Advisory Panel: "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 DH-SYSC and the CDDH is an important consideration".¹⁰³ Similarly, the Court in its contribution emphasized that "in order to attract candidates of the highest professional standing, it is necessary to ensure that they are

¹⁰² CDDH report on the longer-term future of the system of the European Convention on Human Rights (doc. [CDDH\(2015\)R84 Addendum I](#)), §§ 107–108.

¹⁰³ See doc. [DH-SYSC-I\(2017\)016](#), p. 9.

in position to have [...] motivation for taking up a position as an international human rights judge, both in terms of the professional aspects of the position and the personal considerations which such a change would involve; and security as regards their professional prospects after the end of the term of office”.¹⁰⁴

~~147-149.~~ As no written proposals or remarks were submitted on the matter, the CDDH has not considered the salary paid to judges of the Court.

B. Conditions of employment at the Court: possible responses within the framework of the existing structures

i) Aspects related to the exercise of the mandate as judge

Immunity of the judges during their term of office

~~148-150.~~ **The immunity of the judges during their term of office is sufficiently regulated** by the existing arrangements. Judges enjoy “privileges and immunities, exemptions and facilities” as provided for in Article 51 of the Convention, Article 40 of the Statute of the Council of Europe and in the agreements made thereunder, including, in particular, the Sixth Protocol to the General Agreement on Privileges and Immunities of the Council of Europe (Article 1) as interpreted by the Court (see § 25 of the Court’s contribution).

Formatted: Font: Bold

Diplomatic passports to judges

~~149-151.~~ A related issue to diplomatic immunity is the issue of diplomatic passports to judges. The Court noted that some judges, in possession of standard passports, have reported **incidents occurring while travelling** between their home States and Strasbourg that were not consistent with their official immunity, and which it proposed, would have been avoided with a diplomatic passport. According to the Court, consideration should be given to making practical arrangements, including the issue of a diplomatic passport, which would help judges to benefit fully from the protection accorded to them under the Sixth Protocol (§ 26 of the doc. DH-SYSC-I(2017)011). Certain experts in the CDDH noted that the possession of diplomatic passports was limited to persons with the status of a “diplomat”, a status which was not appropriate for a judge at the Court. The CDDH agreed that practices vary between **the member States** and encouraged the latter **to reflect on possible practical arrangements to prevent such situations** to the extent possible.

Formatted: Font: Bold

Formatted: Font: Bold

Formatted: Font: Bold

Situation of family members of the judges

~~150-152.~~ The situation of family members was another essential aspect going to the attractiveness of the post for any potential candidate for whom family considerations would be among the factors to be taken into account. Like the Court, the CDDH welcomed the French authorities’ undertaking to **grant spouses of international civil servants access to the French labour market**. The CDDH agreed with the Court that member States should be encouraged to take a wider view as to the possibility of professional mobility for judges’ spouses, who often interrupt their career in their home country in order to join their spouse in Strasbourg.

~~151-153.~~ As regards judges with children, the CDDH took note of two issues raised in the contribution of the Court. Regarding school-age children, the Court referred to **persistent**

¹⁰⁴ See doc. [DH-SYSC-I\(2017\)011](#), § 4.

difficulties in finding suitable schooling in Strasbourg. A European School was established in the city in 2008 to meet the educational needs of the personnel of the European institutions and of staff of the diplomatic representations based there. According to the Court, it has become increasingly difficult to gain admission to this school. A growing number of judges have had their applications in respect of their children rejected. In some cases this caused disruption of family life, with the children having to remain in the home State in order to continue their schooling. The Court regarded this situation as a factor that could well deter prospective candidates from considering seeking election. The CDDH noted that this issue is not unique to the judges of the Court, and considered that it should be raised by the Council of Europe with the relevant authorities of the host State in order to find a solution to the problem. As regards younger children, the Court referred to difficulties faced by judges' children in gaining access to the onsite day-care facility of the Council of Europe. Here too, the CDDH considered that the issue should be addressed by the Organisation, in consultation with the local authorities who are involved in the running of the facility.

ii) *Aspects relating to the situation of judges after the end of their mandate*

Post-mandate immunity

~~152-154.~~ According to the Court and in light of Resolution 1914 (2013) of the Parliamentary Assembly,¹⁰⁵ it was necessary to explore all possible means to ensure that former judges are protected from the **risk of disguised reprisal** they may face after the end of their mandate. The CDDH noted that a diplomatic immunity for life was a too far reaching proposal. However, as noted by the Court, the idea behind this proposal appears to be that former judges should be afforded protection against retaliatory acts that might be taken against them by the domestic authorities through the introduction of a procedural safeguard. In essence, this would mean that it would not be possible to prosecute or subject to legal process a former judge unless the plenary Court was satisfied that any such action was not related to the exercise of his or her mandate at the Court. The CDDH agreed that the question should be further explored, based on practical experience, so as to ensure that former judges would not be subject to prosecution or other legal process after their mandate that is in practice a response to opinions taken when they served at the Court. This work could lead to a further revision of Resolution (2009)5 of the Committee of Ministers on the status and conditions of service of judges of the European Court of Human Rights.

*Recognition of service as a judge of the Court and post-mandate employment*¹⁰⁶

~~153-155.~~ In its Resolution 1914 (2013), the Parliamentary Assembly stated that “a judge’s term of office at the Court should be included in the national employment record in judicial or other occupation”.¹⁰⁷ The Court stressed the importance of the recognition of service as a judge of the Court insofar as his or her national employment record in a judicial, or other, occupation is concerned, as well as, where appropriate, pension entitlements. Furthermore, regarding more specifically the question of post-mandate employment, the Court noted that the recognition of the judge’s qualification level as set out in Article 21 § 1 of the Convention should be automatic. This, however, should not be read as requiring member States to give preference to former judges of the Court vis-à-vis other candidates in appointments to public positions at the national level. Although it would be desirable that

¹⁰⁵ The view was expressed therein that judges of the Court and their families should be provided with “diplomatic immunity for life”; See paragraph 7.6.1 of the Resolution.

¹⁰⁶ It is noted that some judges of the Court do not have employed status before joining the Court (e.g. some may be self-employed or holders of public office).

¹⁰⁷ See paragraph 7.6.3 of the Resolution.

incoming judges of the Court be entitled to suspend their previous positions during their term of office and to return to those positions after the end of their mandate, the Court acknowledged that there may be legitimate constraints in that regard given the diversity of national systems and the differences in the situation of judges who previously held public office or worked in the private sector before their election to the Court.

~~154-156.~~ **The question of recognition of service as a judge is key for the attractiveness of the post** of judge at the Court. As noted by the then President of the Court,¹⁰⁸ “it is clear that the most qualified potential candidates, and in particular those who already hold high judicial office in the domestic system, may be deterred by the prospect of uncertainty after a term on the European Court”. However, certain contributions received noted that a former judge at the Court would easily find suitable re-employment. This issue is **also essential for the independence of the Court** for “where a judge is not provided with any guarantee regarding his or her future employment their independence can be undermined”.¹⁰⁹ There is a need to guarantee that judges in office do not fear their conditions of return (see also § 154 above).

Formatted: Font: Bold

Formatted: Font: Bold

Formatted: Font: Bold

~~155-157.~~ It is recalled that the question of recognition of service as a judge was being discussed by the Committee of Ministers ([CM/Del/Dec\(2014\)1195.4.3](#)), following the concerns voiced by the then President of the Court in his letter of 22 November 2013. The Ministers’ Deputies have accordingly called on the States parties to address in an appropriate way the situation of the Court’s judges upon the expiry of their term of office, by seeking to ensure that, to the extent possible under the applicable domestic law, former judges have the opportunity to maintain their career prospects at a level consistent with the office they have held. The Ministers’ Deputies invited the member States to provide any relevant information on the follow-up given to this decision and decided to resume consideration of this matter before 31 December 2015, especially in the light of the information contained in the comparative survey provided by the Court¹¹⁰ and any other information that member States may provide on the issue.¹¹¹ To date, four States have provided updated information in response to the Committee of Ministers’ invitation.¹¹²

~~156-158.~~ The question has also been raised in the CDDH report¹¹³ as to whether a national system consisting of automatically nominating a judge of the Court whose term of office has expired for the next vacant position at the Constitutional Court or one of the highest national courts or tribunals could help increase interest among possible candidates.¹¹⁴ It was however noted that, in some States, this is constitutionally impossible. Following the adoption of the CDDH report, it was decided by the Committee of Ministers that the issue would be examined in the context of the follow-up that would be carried out by the CDDH and the DH-SYSC.

~~157-159.~~ During the 1st meeting of the Drafting Group, it was decided to consider whether the data in the above-mentioned study of the Court are still valid and update them as

¹⁰⁸ Letter of President Spielmann of 22 November 2013, contained in the Comparative survey produced by the Court, doc. [DD\(2013\)1321](#).

¹⁰⁹ *Ibid.*

¹¹⁰ Comparative survey produced by the Court, doc. [DD\(2013\)1321](#).

¹¹¹ This question has also been dealt with by the Parliamentary Assembly in its work on the “[Reinforcement of the independence of the European Court of Human Rights](#)”, which led to its [Recommendation 2051 \(2014\)](#).

¹¹² Andorra (doc. DD(2016)359); France and Greece (doc. DD (2016)104); Monaco (doc. DD (2016)360).

¹¹³ Doc. [CDDH\(2015\)R84 Addendum I](#), § 108.

¹¹⁴ Contribution by Mr Christoph Grabenwarter, doc. [GT-GDR-F\(2014\)018](#), also reproduced in doc. [DH-SYSC-I\(2016\)001](#), pp. 2–6. In this contribution, the obligation of residence is also discussed.

appropriate (see also the meeting report, doc. [DH-SYSC-I\(2016\)R1](#), § 6). With a view to assisting the Drafting Group in its work on that question, the Secretariat prepared a distinct working document (doc. [DH-SYSC-I\(2017\)018](#)) containing three tables¹¹⁵ based on the comparative survey [DD\(2013\)1321](#) and subsequent follow-up information by member States concerning the recognition of service as a judge of the Court. This document could serve as basis for any follow-up work conducted. This **follow-up work could be considered in order to secure an appropriate response by member States to this matter**. Any follow-up to this question could take place within the existing structures, possibly leading to a Committee of Ministers' recommendation. This work should take into account the diversity of legal, constitutional and political systems. In this context and as noted by the Court, consideration could be given to the possibility for the relevant authorities of the Council of Europe to establish sufficiently early communication with the State concerned as regards the future situation of the judge whose term of office at the Court is approaching its end. Consideration could also be given to different ways of using the expertise of former judges.

Formatted: Font: Bold

Formatted: Font: Bold

Transitional allowance

[158-160](#). According to the contribution of the Court, providing former judges with a transitional allowance for a certain period after the end of the mandate may be an alternative means to afford them a measure of security. The modalities of such allowance could if appropriate be explored both at the national level and within the Council of Europe (see § 42 of the Court's contribution).

C. Working conditions at the Court: possible responses within the framework of the existing structures

[159-161](#). The responses regarding the working conditions at the Court facilitating the swift integration of judges and their continuous training would mainly be implemented by the Court itself. The working conditions were not addressed in the Court's contribution.

[160-162](#). The CDDH noted however with particular interest the information provided by the Representative of the Court's Registry on the **project of personalised judicial assistance**. The Court had received in 2016 a group of nine trainees who would be working directly with nine judges, assisting them with legal research in different contexts (for example, opinions, lectures, articles, etc.). This was a test scheme, making use of the trainees who come to the Court as part of the usual intake of trainees by the Council of Europe (two groups of trainees each year; September – January and March – July). They are non-remunerated traineeships, with the judges taking on the role of trainer/mentor for the duration of the *stage*. Other persons, such as those coming to the Court as part of an agreement with an external body (for example, university), can work as judicial assistants on the same basis. The minimum academic requirement is to have completed at least the first years of a master's degree in law. Assistants are subject to the same duties as staff regarding independence, loyalty and discretion. The programme was evaluated in 2017 by the judges and the assistants. In view of the very satisfactory results obtained, it was decided that this project will run on a regular, systematic basis.

¹¹⁵ The three tables, respectively focusing on the professions of judges, public servants, and university professors, provide detail as to whether service as a judge of the Court is recognised for them 1) to interrupt their domestic career to join the Court, 2) to have the right to regain their former post after having served in an international organisation, as well as 3) to have their years of international service count for the purposes of career advancement and pension rights.

~~161-163.~~ With respect to the lack of knowledge about the work at the Court as a deterrent to apply, it was suggested that one of the means to inform potential candidates without infringing upon the independence and autonomy of the Court would be to consider **asking the former judge/judges to make themselves available to answer any questions from those candidates on a confidential basis**. This measure is already in place in some member States on an unofficial basis.

~~162-164.~~ The CDDH considered that **all measures to enhance the swift integration of the judges and their continuous training should be encouraged**. One observation in the Court's contribution should be borne in mind in this respect: "before addressing these issues in detail, it is important to refer in this context also to the general situation of the Court. As highlighted in its most recent Annual Report,¹¹⁶ the Court is facing very difficult challenges in terms of its workload and its continuing ability to meet these challenges within the current resource constraints. While this is a major aspect of the reform process, which is being directly addressed by the relevant authorities at the European and national levels, it is undoubtedly relevant also to the present subject. After all, whether or not the Court is able to fulfil its important mission, *inter alia* in terms of managing its workload and having available the necessary resources to do so, is bound to be among the key factors that bear on the willingness of persons of the highest professional standing to put themselves forward as candidates".¹¹⁷ As regards the workload, the CDDH referred to its relevant conclusions in its report on the longer-term future of the Convention system.

IV. AD HOC JUDGES

A. Challenges

~~163-165.~~ The CDDH noted that a comprehensive approach examining all parameters of the selection/election of judges could not set aside questions related to *ad hoc* judges.¹¹⁸ An *ad hoc* judge may be appointed when the elected judge is unable to sit in the Chamber, withdraws, or is exempted, or if there is none. This may occur, for instance, where a conflict of interest prevents the sitting judge from ruling on a case brought before the Court. The need to appoint an *ad hoc* judge may also arise when a sitting judge resigns or retires to cover the gap until his or her successor begins at the Court.¹¹⁹ The procedure for appointing an *ad hoc* judge that was in place before the adoption of Protocol No. 14 allowed the State Party substantial discretion in choosing the person to be appointed as *ad hoc* judge for a given case after the proceedings had begun, namely, when the content of the complaint was already known. Thus, it was argued that this procedure contradicted the equality of arms principle and raised concerns regarding the independence and impartiality of the *ad hoc* judge.

~~164-166.~~ Protocol No. 14 remedied this situation. New Article 26 § 4 of the Convention provides for a judge's replacement by a person – the *ad hoc* judge – "chosen by the President

¹¹⁶ See chapter 6 of the Annual report 2016 at: http://www.echr.coe.int/Documents/Annual_report_2016_ENG.pdf

¹¹⁷ See § 6 of the Contribution of the Court.

¹¹⁸ The possibility for States Parties to nominate a judge of common interest (e.g. *Behrami and Saramati v. France, Germany and Norway*, Nos. 71412/01 and 78166/01) did not require any specific examination.

¹¹⁹ See Rule 29 of the Rules of Court.

of the Court from a list submitted in advance by that Party”.¹²⁰ When a State party fails to appoint an *ad hoc* judge within thirty days or fails to provide a satisfactory list, the Rules state that the President of the Chamber shall invite the State to indicate within thirty days the name of the persons it wishes to appoint from among the other elected judges.

~~165-167.~~ The question of *ad hoc* judges was examined on the basis of a [report](#) of the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly.¹²¹ This report noted that “the new system strengthens the appearance of independence since a State party will no longer play a decisive role in the appointment of an *ad hoc* judge”. However, it was argued therein that the appointment procedure may still give rise to a problem of democratic legitimacy in that the *ad hoc* judge is appointed from a list submitted by the States parties directly to the President of the Court, whereas the Assembly remains excluded from the process. Furthermore, the report suggested a number of unresolved issues such as the question of nomination of *ad hoc* judges by the State and the difference in the selection procedure applicable to elected judges and *ad hoc* judges and the delays posed by the appointment of *ad hoc* judges which can range from a few months to one or two years.

~~166-168.~~ While the Court envisaged that the process for selecting a list of *ad hoc* judges would be a straightforward task for States, in practice, some States have found themselves obliged to operate a measure of procedural formality at the national level in the preparation of the list, which can take months to complete.

B. Possible responses within the framework of the existing structures

~~167-169.~~ It appeared that the actual system worked well due in particular to its flexibility. In order to decide if and how to pursue consideration of this matter, certain questions had been raised for the attention of the Registry of the Court.¹²²

~~168-170.~~ In response to the question as to know why the Rules envisage a two-year term of office, it was noted that the 2-year period for the list of *ad hoc* judges (Rule 29.1a) was a decision reached by the plenary Court when it discussed the issue in March 2010. Judges considered various periods, from 2 to 5 years, before deciding on a short period. It was not anticipated that this would be particularly burdensome for States, since it was believed the list could be renewed with minimum formality.

~~169-171.~~ With regard to the question concerning what aspects the President takes into account when choosing an *ad hoc* judge from a list,¹²³ it was indicated that there are no internal guidelines or standard criteria. It is left to the discretion of each Section President. Regarding the frequency of the recourse to *ad hoc* judges (per country), statistics are not systematically kept but these cases are rare. According to HUDOC, there were just 34 cases decided in 2015 (judgments and decisions) that included an *ad hoc* judge. Of these, 16 were “external” judges, 18 were either current or former members of the Court.

¹²⁰ As specified in the amended Rules of Court, the States parties have to submit to the Court in advance a list containing the names of three to five persons eligible to serve as *ad hoc* judges for a renewable period of two years, from which the President of the Chamber will choose, when the need arises, to appoint an *ad hoc* judge.

¹²¹ “*Ad hoc* judges at the European Court of Human Rights: an overview”, information report, Committee on Legal Affairs and Human Rights, rapporteur: Ms Marie-Louise Bemelmans-Videc (the Netherlands, doc. 12827, 23 January 2012).

¹²² See doc. [DH-SYSC-I\(2016\)005REV](#).

¹²³ The report cited in note 55 stated: “Not only does the procedure therefore lack democratic legitimacy, it is also unclear how the President of the Court will choose the *ad hoc* judge from the list provided by the State” (§§ 13–14).

~~170-172.~~ Lastly, with respect to the way the Court deals with a request of a Party to ask for recusal of a judge, it is indicated that the matter will be brought to the attention of the presiding judge and the judge concerned. Where either of these has a doubt about the judge taking part in the examination of the case, the procedure in Rule 28 § 4 of the Rules of Court will be followed.

~~171-173.~~ In light of the above, the CDDH decided that a distinct regime for *ad hoc* judges is notably justified by the rarity of the procedure's use. It decided not to consider this question further. It hoped that **the Court**, in view of the extended appointment procedure in some States, **could envisage prolonging or rendering more flexible the two-year validity period for the list of *ad hoc* judges**. Any possible change could be made **in the Rules of Court**. This is one of the matters illustrating the relevance of an enhanced consultation of the High Contracting Parties with regard to the development of the Rules of Court, as highlighted by the CDDH in 2014¹²⁴ and reiterated in 2015.¹²⁵ It is now possible through new Rule 111.¹²⁶

Formatted: Font: Bold

Formatted: Font: Bold

Formatted: Font: Bold

~~172-174.~~ During the discussions, it was noted that the designation procedure of the *ad hoc* judge from a list previously submitted by the State concerned could be more transparent through the Rules of Court. It could also be envisaged to regulate further the recusal of an *ad hoc* judge. However, the CDDH did not retain these proposals, due to the rarity of the use of the procedure.

CONCLUSION

~~173-175.~~ In discharging its terms of reference, which represent a follow-up of its 2015 Report on the longer-term future of the system of the European Convention on Human Rights, the CDDH examined the options with a particular view to ensuring that highly qualified candidates are attracted by the post of judge at the Court, that they are put forward to the Assembly by States after an appropriate national selection process and that the best amongst them are indeed appointed.

~~174-176.~~ The CDDH concluded that there is room for improvement for all the four themes identified in this report within the framework of existing structures. With a view to follow-up on this report, possible responses in this regard should be considered by all relevant actors involved in the process, notably the Committee of Ministers and the CDDH, the Court and its Registry, the member States, the Advisory Panel, and the Parliamentary Assembly. Even though this report advocates possible responses within the framework of existing structures, the CDDH does not exclude the possibility of amending the Convention, should such responses prove insufficient in addressing the challenges outlined in this report.

¹²⁴ CDDH Report containing conclusions and possible proposals for action concerning the procedure for the amendment of the Rules of Court and the possible “upgrading” of the Convention of certain provisions of the Rules of Court (doc. [CDDH\(2014\)R82 Addendum I](#)); see, in particular §§ 10–14.

¹²⁵ CDDH Report on the longer-term future of the system of the European Convention on Human Rights (doc. [CDDH\(2015\)R84 Addendum I](#)), § 87. The CDDH noted with interest the information ([The Interlaken process and the Court, 2015 Report](#), 12 October 2015, p. 7) that the Court’s Rules Committee is examining the issue and is awaiting the outcome of such considerations.

¹²⁶ According to Rule 111 § 2, as amended on 14 November 2016, “the Registrar shall inform the Contracting Parties of any proposals by the Court to amend the Rules which directly concern the conduct of proceedings before it and invite them to submit written comments on such proposals. The Registrar shall also invite written comments from organisations with experience in representing applicants before the Court as well as from relevant Bar associations.”

~~175-177.~~ The substantive conclusions brought by the work of the CDDH are reflected in the executive summary, which appears at the beginning of this report.

APPENDIX: LIST OF REFERENCE DOCUMENTS

I. Contributions submitted to the Drafting Group (DH-SYSC-I)

Contribution submitted in view of the 3 rd DH-SYSC meeting	DH-SYSC-I(2017)013
Contributions in view of the 3 rd DH-SYSC-I meeting	DH-SYSC-I(2017)009
Contributions in view of the 2 nd DH-SYSC-I meeting	DH-SYSC-I(2016)005 REV

II. Relevant work of Council of Europe bodies

A. Documents of the Committee of Ministers

Decisions adopted at the 1252 nd meeting of the Ministers' Deputies on the CDDH Report on the longer-term future of the system of the European Convention on Human Rights (30 March 2016)	DH-SYSC(2016)009
--	------------------

Decisions adopted at the 1213th meeting of the Ministers' Deputies (26 November 2014)

Comparative survey prepared by the Court on the recognition of service as a Judge of the European Court of Human Rights – Letter from the President of the Court	DD(2013)1321
--	--------------

Guidelines of the Committee of Ministers on the selection of candidates for the post of judge at the European Court of Human Rights	CM(2012)40-final CM(2012)40-addfinal
---	---

Committee of Ministers' Resolution CM/Res(2011)24 on intergovernmental committees and subordinate bodies, their terms of reference and working methods	CM/Res(2011)24
--	----------------

Resolution CM/Res(2010)26 on the establishment of an Advisory Panel of Experts on Candidates for Election as Judge to the European Court of Human Rights	CM/Res(2010)26
--	----------------

Report of the Evaluation Group to the Committee of Ministers on the European Court of Human Rights, EG Court (2001)1 (27 September 2001)

B. Documents of the Parliamentary Assembly of the Council of Europe

Resolution 2169 (2017), "Recognition and implementation of the principle of accountability in the Parliamentary Assembly"

DH-SYSC(2017)R4Add

Committee on the Election of Judges to the European Court of Human Rights – Synopsis of the meeting of 6 April 2017

AS/Cdh/Inf(2017)CB 03

Committee on the Election of Judges to the European Court of Human Rights – Draft agenda of the meeting of 12 January 2017

AS/Cdh/Inf(2017)OJ 01 Rev 2

Committee on the Election of Judges to the European Court of Human Rights – Procedure for electing judges to the European Court of Human Rights – Information document prepared by the Secretariat of the Parliamentary Assembly

AS/Cdh/Inf(2016) 01 rev4

Recommendation 2051 (2014), “Reinforcement of the independence of the European Court of Human Rights”

Resolution 2002 (2014), “Evaluation of the implementation of the reform of the Parliamentary Assembly”

Resolution 1914 (2013), “Ensuring the viability of the Strasbourg Court: structural deficiencies in States Parties”

“*Ad hoc* judges at the European Court of Human Rights: and overview”, information report, Committee on Legal Affairs and Human Rights, rapporteur: Ms Marie-Louise Bemelmans-Videc (the Netherlands), doc. 12827 (23 January 2012)

AS/Jur (2011) 36

Resolution 1842 (2011), “Terms of reference of Assembly Committees”, as modified by Resolution 2002 (2014)

Resolution 1366 (2004), “Candidates for the European Court of Human Rights”, as modified by Resolutions 1426 (2005), 1627 (2008) and 1841 (2011)

Resolution 1202 (1999), “Rules of Procedure of the Assembly”, with subsequent modifications

Committee on the Election of Judges to the European Court of Human Rights – Elections of judges to the European Court of Human Rights – table of progress by Contracting Party – Information document prepared by the Secretariat of the Parliamentary Assembly

C. Documents of the European Court of Human Rights, of the Registry of the European Court of Human Rights and speeches

DH-SYSC(2017)R4Add

Contribution from the Court regarding certain issues under consideration as part of the follow-up to the report of the CDDH on the longer-term future of the Convention system

DH-SYSC-I(2017)011

Annual Report 2016 of the European Court of Human Rights

Rules of Court (14 November 2016)

Comment from the Court on the report of the CDDH on the longer-term future of the Convention system (February 2016)

#5281071

“The Interlaken Process and the Court”, 2015 Report (12 October 2015)

Opinion of the European Court of Human Rights on the CDDH Report on the Advisory Panel of experts on candidates for election as judge to the European Court of Human Rights (16 April 2014)

DD(2014)513

Advisory opinion (No. 2) on certain legal questions concerning the list of candidates submitted with a view to the election of judges at the European Court of Human Rights, Grand Chamber (22 February 2010)

Advisory opinion on certain legal questions concerning the list of candidates submitted with a view to the election of judges at the European Court of Human Rights, Grand Chamber (12 February 2008)

D. CDDH Reports and other documents

Report of the 87th CDDH meeting (6–9 June 2017)

CDDH(2017)R87

Report of the 3rd DH-SYSC meeting (10–12 May 2017)

DH-SYSC(2017)R3

Legal opinion from the Directorate of legal advice and public international law (4 May 2017)

DH-SYSC-I(2017)015

Exchange of views between Mr. John Murray, President of the Advisory Panel of Experts on Candidates for Election as Judge to the European Court of Human Rights and the Ministers’ Deputies (4 May 2017)

DH-SYSC-I(2017)016

Request for legal advice addressed to the DLAPIL (3 April 2017)

DH-SYSC-I(2017)012 REV

Report of the 3rd DH-SYSC-I meeting (27 February – 1st March 2017)

DH-SYSC-I(2017)R3

DH-SYSC(2017)R4Add

Contributions submitted in the framework of the GT-GDR-F work (20 June 2016)	DH-SYSC-I(2016)001
Compilation of information submitted in the framework of the national reports on the implementation of the Brighton Declaration (20 June 2016)	DH-SYSC-I(2016)002
Report of the 86 th CDDH meeting (6–8 December 2016)	CDDH(2016)R86
Report of the 96 th CDDH Bureau meeting (24–25 November 2016)	CDDH-BU(2016)R96
Report of the 2 nd DH-SYSC meeting (8–10 November 2016)	DH-SYSC(2016)R2
Exchange of views with Mr Wojciech SAWICKI, Secretary General to the Parliamentary Assembly of the Council of Europe (4 November 2016)	DH-SYSC-I(2016)008
Report of the 2 nd DH-SYSC-I meeting (19–21 October 2016)	DH-SYSC-I(2016)R2
Report of the 1 st DH-SYSC-I meeting (29 June – 1 st July 2016)	DH-SYSC-I(2016)R1
Report of the 85 th CDDH meeting (15–17 June 2016)	CDDH(2016)R85
Report of the 1 st DH-SYSC meeting (25–27 April 2016)	DH-SYSC(2016)R1
Relevant provisions relating to other international or regional Courts or tribunals (28 June 2016)	DH-SYSC-I(2016)004
Terms of reference of the Committee of Experts on the System of the European Convention on Human Rights (DH-SYSC) for 2016–2017	DH-SYSC(2016)003
Report of the 84 th CDDH meeting (7–11 December 2015)	CDDH(2015)R84
CDDH Report on the longer-term future of the system of the European Convention on Human Rights	CDDH(2015)R84 Addendum I
Report of the 9 th DH-GDR meeting (17–20 November 2015)	DH-GDR(2015)R9
Report of the CDDH 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	CDDH(2013)R79 Addendum II
Report of the 2 nd CDDH-SC meeting (11–13 January 2012)	CDDH-SC(2012)R2

Compilation of replies to the questionnaire on national practices for the selection of candidates for the post of judge at the European Court of Human Rights, prepared by the Secretariat in the framework of the CDDH-SC (25 October 2011)

CDDH-SC(2011)002 Rev.2

Summary and preliminary analysis of the replies to the questionnaire on national practices for the selection of candidates for the post of judge at the European Court of Human Rights, prepared by the Secretariat in the framework of the CDDH-SC (2 September 2011)

CDDH-SC(2011)003 REV.

E. Documents elaborated by other bodies

Intervention by Mr John Murray at the 1233rd meeting of the Minister's Deputies (8 July 2015)

Advisory Panel (2016)1
Appendix II

Third Activity Report of the Advisory Panel of Experts on Candidates for Election as Judge to the Court for the attention of the Committee of Ministers (2016–2017)

Advisory Panel (2017)2

Second Activity Report of the Advisory Panel of Experts on Candidates for Election as Judge to the Court for the attention of the Committee of Ministers (2014–2015)

Advisory Panel (2016)1

Activity Report of the Advisory Panel of Experts on Candidates for Election as Judge to the Court for the attention of the Committee of Ministers (2010–2013)

Advisory Panel (2013)12

Explanatory Report to Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention

III. Relevant documents of European Union bodies or representatives

Third activity report of the panel provided for by article 255 of the treaty on the functioning of the European Union (13 December 2013)

Second activity report of the panel provided for by article 255 of the treaty on the functioning of the European Union (22 January 2013)

First activity report of the panel provided for by article 255 of the treaty on the functioning of the European Union (17 February 2011)

IV. Relevant Conferences/Colloquies/Round Tables/Seminars quoted in the report

Proceedings of the Brussels High-level Conference on the Implementation of the European Convention on Human Rights, our shared responsibility (26-27 March

H/Inf (2015) 1

2015)

Proceedings of the Brighton High-level Conference on the future of the European Court of Human Rights (18-20 April 2012) H/Inf (2012) 3

Proceedings of the Izmir High-level Conference on the future of the European Court of Human Rights (26-27 April 2011) H/Inf (2011) 6

Proceedings of the Interlaken High-level Conference on the Future of the European Court of Human Rights (18-19 February 2010) H/Inf (2010) 5

Rome Declaration

V. Other sources quoted in the report

A. von Bogdandy, C. Krenn, “On the democratic legitimacy of Europe’s Judges – A Principled and Comparative Reconstruction of the Selection Procedures”, *Selecting Europe’s Judges: A Critical Review of the Appointment Procedures to the European Courts*, edited by Michal Bobek, Oxford University Press, 2015, pp. 162–180

A. Brasseur, former President of the Parliamentary Assembly, Opening address at the Brussels High-level Conference on “the Implementation of the European Convention on Human Rights, our shared responsibility”, 26–27 March 2015

A. Drzemczewski, former Head of the Legal Affairs and Human Rights Department of the Assembly, “The Parliamentary Assembly’s Committee on the Election of Judges to the European Court of Human Rights”, HRLJ, Vol. 35, No. 1–8, 2015, pp. 269–274

D. Kosař, “Selecting Strasbourg Judges: A Critique”, in *Selecting Europe’s Judges, A Critical Review of the Appointment Procedures to the European Courts*, edited by Michal Bobek, Oxford University Press, 2015, pp. 120–161

J.-M. Sauvé, “Selecting the European Union’s Judges: the Practice of the Article 255 Panel”, *Selecting Europe’s Judges: A Critical Review of the Appointment Procedures to the European Courts*, edited by Michal Bobek, Oxford University Press, 2015, pp. 78–83

D. Spielmann, former President of the European Court of Human Rights, Hearing before the Law Committee of the French National Assembly (17 June 2015)

D. Spielmann, former President of the European Court of Human Rights, Opening speech at the Opening of the judicial year of the European Court of Human Rights (30 January 2015)

H. de Waele, “Not Quite the Bed that Procrustes Built – Dissecting the system for selecting judges at the Court of Justice of the European Union”, *Selecting Europe’s Judges: A Critical Review of the Appointment Procedures to the European Courts*, edited by Michal Bobek, Oxford University Press, 2015, pp. 24–50

E. Fribergh, former Registrar of the European Court of Human Rights, “The European Convention and Court of Human Rights: our shared treasures”, *HRLJ*, Vol. 35, No. 9–12, pp. 313–318

R. Mackenzie, K. Malleson, P. Martin, P. Sands QC, “Selecting International Judges, Principle, Process and Politics”, Oxford University Press, 2010

J. Limbach, P. Cruz Villalón, R. Errera, Lord Lester of Herne Hill QC, T. Morshchakova, Lord Justice Sedley, A. Zoll, “Judicial Independence: Law and Practice of Appointments to the European Court of Human Rights”, *Interights*, May 2003

P.H. Teitgen, Report presented to the Consultative Assembly of the Council of Europe (1949), in *Collected Edition of the “Travaux Préparatoires” of the European Convention on Human Rights*, Martinus Nijhoff, the Hague, 1977, Volume I, p. 210; Volume IV, p. 72

K. Malleson, Dr. P. O’Brien, “The merits of the judicial appointment process to the European Court of Human Rights”, *The Constitution Unit Blog*: <https://constitution-unit.com/>

CJEU Judicial Transparency – AccessInfo Project on Judicial Transparency: <http://elab-europe.eu/cjeu-judicial-transparency/>

VI. Additional sources not quoted in the report

Open Society Justice Initiative and International Commission of Jurists, *Strengthening from Within. Law and Practice in the Selection of Human Rights Judges and Commissioners*. Open Society Foundations, 2017, 120 p.¹²⁷

¹²⁷ Published too late to be fully taken into account in the work of the CDDH.