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STEERING COMMITTEE FOR HUMAN RIGHTS  
(CDDH)

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

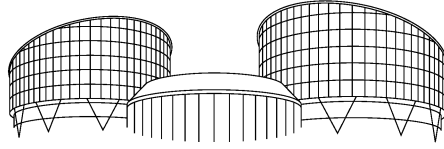
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DRAFTING GROUP I ON THE FOLLOW-UP TO THE CDDH REPORT ON  
THE LONGER-TERM FUTURE OF THE SYSTEM OF THE CONVENTION  
(DH-SYSC-I)

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**Contribution from the European Court of Human Rights**

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EUROPEAN COURT OF HUMAN RIGHTS  
COUR EUROPÉENNE DES DROITS DE L'HOMME

**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**

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## 1. Introduction

1. The Court welcomes the work initiated by the Committee of Ministers relating to the selection and election process of judges of the European Court of Human Rights<sup>1</sup>. It appreciates the opportunity to contribute to the follow-up work on the CDDH report on the longer-term future of the Convention system, in particular regarding matters that bear directly upon the authority and independence of the Court and, in this context, the professional standing and status of judges<sup>2</sup>.

2. The Court shares the opinion of the Committee of Ministers, which has deemed it essential that the judges of the Court enjoy the highest authority in national and international law<sup>3</sup>. It also shares the concern underlying the work that has been undertaken, namely to ensure that the post of judge of the European Court of Human Rights can attract the interest of persons with the requisite high level of professional qualities and experience.

3. The Court agrees with the position adopted by the Committee of Ministers, namely that it is necessary to consider all the parameters of the issue and all factors which might discourage the most suitable and qualified candidates from applying.

4. Before addressing the various aspects of the matter more specifically, the Court would like to emphasize, more generally, the following elements. In order to attract candidates of the highest professional standing, it is necessary to ensure that they are in a position to have:

- confidence in the quality of the selection process at national level and the election process at the European level;
- 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 may involve; and
- security as regards their professional prospects after the end of the term of office.

5. The Court considers it important that efforts be made and measures taken in order to improve the situation in respect of all the above-mentioned elements, of which the first one relates to the pre-election stage, the second to the judge's term of office, and the third to the period thereafter. The considerations and prospects pertaining to each of these periods may weigh heavily when persons of the highest professional standing make up their minds about whether or not to apply for a post as judge of the Court.

6. 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<sup>4</sup>, the Court is facing very difficult challenges in terms of its workload and its continuing ability to meet these challenges within the current

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<sup>1</sup> See the decisions adopted at the 1252nd meeting of the Ministers Deputies (30 March 2016) on the CDDH Report on the longer-term future of the system of the European Convention on Human Rights, Appendix 5 (Item 4.3).

<sup>2</sup> See the Court's comment on the CDDH report, available at [http://www.echr.coe.int/Documents/2016\\_Comment\\_on\\_CDDH\\_report\\_on\\_longer-term\\_future\\_of\\_Convention\\_ENG.pdf](http://www.echr.coe.int/Documents/2016_Comment_on_CDDH_report_on_longer-term_future_of_Convention_ENG.pdf)

<sup>3</sup> See paragraph 101 of the CDDH report.

<sup>4</sup> See Ch. 6 of the Annual report 2016 at: [http://www.echr.coe.int/Documents/Annual\\_report\\_2016\\_ENG.pdf](http://www.echr.coe.int/Documents/Annual_report_2016_ENG.pdf)

resources 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.

7. In this contribution, the Court will address the issues outlined above in accordance with the basic structure indicated in paragraph 5 above, i.e. in the light of the selection and election process, the situation of judges while exercising their mandate, and the situation of judges after they complete their term of office. Having noted, however, that the CDDH has endorsed an inclusive approach whereby measures requiring an amendment to the Convention should not be ruled out, the Court will begin with some comments on possible measures of this type.

## 2. Issues possibly involving an amendment to the Convention

### (i) The selection criteria (Article 21)

8. Regarding the criteria for office set out in Article 21 of the Convention, the Court does not see any need to amend the text of this provision. For the Court, high moral character, which is an indispensable requirement for the exercise of a judicial function, as well as the other criteria mentioned in paragraph 1 of Article 21 – namely that judges must possess the qualifications required for appointment to high judicial office or be jurisconsults of recognised competence – should be sufficient to identify the high standards that must be met.

9. What is implicit in the Convention criteria is a requirement of the highest professional competence as well as an aptitude for the judicial function. The Convention criteria are also fully consonant with the requirement underlined in the CDDH report that judges should have practical experience in national law, with emphasis on judicial experience, along with knowledge of general international law<sup>5</sup>. While agreeing with these points, the Court would underline the value of diversity among its judges in terms of specific legal expertise. It follows from the need to ensure that all judges elected to the Court satisfy these stringent requirements of professional qualifications and experience that the present exercise should focus primarily on the practices to be followed in the selection and election process. In this regard, the Court would welcome further development and strengthening of the relevant guidelines<sup>6</sup>. It also wishes to underline the contribution of the Advisory Panel of Experts on Candidates for Election as Judge to the European Court of Human Rights (the Advisory Panel), which has suggested an interpretation of the criteria for judicial office that can guide and assist the relevant decision-making authorities in complying with the mandatory and binding terms of Article 21<sup>7</sup>.

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<sup>5</sup> See paragraph 101 of the CDDH report.

<sup>6</sup> See paragraph 8 of the report of the second meeting of the Committee of Experts on the System of the European Convention on Human Rights (DH-SYSC), 10 November 2016, DH-SYSC(2016)R2.

<sup>7</sup> See the Advisory Panel's first report, dated 11 December 2013, paragraphs 23-36, and its second report, dated 25 February 2016, paragraphs 33-47.

## (ii) The submission of a list of three candidates (Article 22)

10. With regard to the general requirement for each High Contracting Party to present a list of three candidates from which the Parliamentary Assembly elects the judge in respect of that State, the Court notes the wish of the CDDH to explore alternative models to that currently applied. In the view of 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.

## (iii) The length of judges' term of office (Article 23 § 1)

11. The Court notes that in the discussions within the Committee of Experts on the System of the European Convention on Human Rights (DH-SYSC) it has been considered that the concerns related to the nine-year term, which might be seen as an obstacle in the career of some potential candidates, could be diminished by measures designed to strengthen the recognition of service as a judge at the Court in order to ensure and improve future employment perspectives<sup>8</sup>. The Court would agree that there is an important link between these two issues that should be borne in mind.

12. The Court further notes the view of the DH-SYSC that the question of the length of the term of office deserves further consideration<sup>9</sup>. The idea has been put forward of an automatically renewable six-year term. This is understood to mean an initial term of office of six years, with the option for the judge concerned to have, at his or her sole discretion, automatic renewal for a second six-year term. With this understanding, the Court can see some merit in considering such a proposal. It might, *inter alia*, be capable of achieving a better balance between two potentially conflicting interests. On the one hand, it might avoid the possible dissuasive effect of a long commitment to a judicial position which entails interrupting a domestic career and prolonged absence from one's country of origin. On the other hand, it would seem to address concerns for the independence of the judges since they would be guaranteed a mandate of a lengthy duration by virtue of a second term of office depending solely on their personal choice.

## 3. National selection procedures

## (i) General basic requirements

13. The Court wishes to stress the importance of the quality of the national selection procedures. These 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

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<sup>8</sup> See paragraph 7 of the report of the second meeting of the Committee of Experts on the System of the European Convention on Human Rights (DH-SYSC), 10 November 2016, DH-SYSC(2016)R2.

<sup>9</sup> *Ibid.*

function of judge of an international court, so that all of the listed candidates fully satisfy the requisite criteria.

14. While the Court readily acknowledges that there are legitimate reasons for variations in the different domestic procedures depending on the particular features of the national situation and on the domestic legal and judicial order, such variations should not be of a kind that would endanger the above-mentioned basic objectives of the national selection process.

15. The Court endorses the Guidelines adopted by the Committee of Ministers in 2012<sup>10</sup> and wishes to stress the importance of their consistent application in all of the High Contracting Parties. In this regard, the idea of reinforcing the status of the guidelines, or the essential elements of them, should not be excluded.

16. The Court would also stress the importance of ensuring adequate transparency and monitoring of the procedures and practices in the national selection processes both in order to share and promote good standards and in order to avoid and raise awareness of possible problems.

(ii) The role of the Advisory Panel

17. The Court notes that the Advisory Panel, whose composition, it should be stressed, is primarily judicial, has been conceived as a body designed to provide assistance to the High Contracting Parties before the latter submit their lists of candidates to the Parliamentary Assembly. In this sense, the role of the Panel is linked to the selection procedures at the national level, rather than the election process taking place at the level of the Council of Europe, i.e. the Parliamentary Assembly and its Committee on the Election of Judges to the Court.

18. Assuming that the role of the Advisory Panel is to be preserved in its present form, the Court finds it important that the Panel be provided with the means necessary to fulfil its task in an appropriate manner. In this regard, it appears that the resources available for the Panel's activities would need to be increased so as to allow the Panel to hold a sufficient number of meetings to conduct its business effectively and efficiently instead of operating mainly by correspondence, as well as to make it possible for the Panel to reinforce the reasoning underpinning the recommendations it makes. The Court would also see merit in the idea of making it possible for the Panel to conduct an interview where this is considered necessary for a proper evaluation of a candidate's qualifications, experience and competence.

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<sup>10</sup> Guidelines of the Committee of Ministers on the selection of candidates for the post of judge at the European Court of Human Rights, adopted on 28 March 2012.

#### 4. Procedures and practices relating to the election process at the level of the Council of Europe

19. As regards the electoral procedure conducted by the Parliamentary Assembly, the Court notes that in the discussion of this issue in the DH-SYSC there was reference to avoiding “the hazards of the political process”<sup>11</sup>. The Court 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.

20. The Court’s understanding of the recent reform by the Parliamentary Assembly of setting up the Committee on the Election of Judges to the European Court of Human Rights (upgrading to full committee status what was previously a Sub-Committee of the Committee on Legal Affairs and Human Rights) is that the aim was to reinforce the preparatory stage of the election process through a more thorough and consistent evaluation of the qualifications and experience of the candidates submitted by the High Contracting Parties, as well as their aptitude for exercising the function of judge in an international court. The Court would stress that further measures and efforts may be required to ensure that each stage in the electoral process offers the best possible guarantees that the most suitable candidate is selected after a fair and thorough appraisal of the professional merits and qualifications of all those involved.

#### 5. Aspects relating to the exercise of the mandate as judge

21. It goes without saying that the attractiveness of the post of judge of the Court will depend to a large extent on the various aspects, both professional and personal, that are linked with working at the Court, living in the host State and judges’ prospects after completing the term of office.

22. These aspects are also crucial for the independence and authority of the Court and its judges.

23. The Court regards the following as the main aspects.

(i) Immunity of judges of the Court

24. During their term of office, judges of the Court 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).

25. The Court recalls that in 2011 it had the occasion to interpret the Sixth Protocol. This arose in connection with a criminal investigation involving the spouse of a serving judge. The judge’s home in the State concerned was searched without the authorities having requested the Court to waive the immunity of the judge and his spouse. Only afterwards did the State make such a request. The Plenary Court clarified that immunity was not excluded on the basis that the requesting State was the High

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<sup>11</sup> See paragraph 11(ii) of the report of the second meeting of the Committee of Experts on the System of the European Convention on Human Rights (DH-SYSC), 10 November 2016, DH-SYSC(2016)R2.

Contracting Party in respect of which the judge concerned had been elected. It considered that the search was in violation of the immunity granted by the Sixth Protocol<sup>12</sup>.

26. A related issue to diplomatic immunity is the issue of diplomatic passports to judges. 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 a diplomatic passport would have avoided. At present, in some States there is explicit provision for the granting of a diplomatic passport to the respective judges of the Court. In other States, the possibility of obtaining one is limited or non-existent. Consideration should therefore 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.

(ii) Situation of family members

27. Taking up a post as a judge of the Court may entail a fundamental change not only in the professional and personal life of the judge but also in the life of his or her family. The situation of family members is therefore another crucial 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.

28. The Court welcomes the French authorities' undertaking to grant spouses of international civil servants access to the French labour market, as stated recently in a letter from the French Ministry of Foreign Affairs to the Council of Europe<sup>13</sup>. To this must be added that member States should be encouraged to take a wider view as to the possibility of professional mobility for judges' spouses, who often have to interrupt their career in their home country in order to join their spouse in Strasbourg.

29. The Court takes this opportunity to draw attention to difficulties faced by judges with school-age children who have not been accepted into an appropriate school, in particular into the European School of Strasbourg. This is disruptive of family life, leading in some cases to a separation of judges from their families due to the impossibility of securing appropriate schooling for their children in Strasbourg. Where this occurs, the repercussions are not limited to the private sphere but may well affect the exercise of the judicial mandate. Such a situation is not consistent with judges' status as members of a European institution. A problem of this sort may well deter a prospective candidate from putting his or her name forward. A related problem faced by judges with pre-school children is the non-availability of places in the Council of Europe's day-care facility. The Court strongly encourages joint efforts by the relevant authorities of the Council of Europe to address those concerns, in close collaboration with the competent local authorities, and it invites the Committee of Ministers to enter into dialogue with the Council of Europe Secretariat and the Court on this matter.

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<sup>12</sup> The Court also notes the worrying situation of a judge of the United Nations Mechanism for International Criminal Tribunals who was arrested in September 2016 and is currently detained by the authorities of one of the High Contracting Parties, even though he is entitled to the privileges and immunities accorded to diplomatic envoys under international law.

<sup>13</sup> Letter of the French Ministry of Foreign Affairs dated 30 September 2016.



## 6. Situation of judges after the end of their mandate

30. For those judges who have not reached retirement age, there is a real risk that the uncertainty regarding their professional and judicial prospects following the completion of their term of office at the Court will have negative repercussions for its perceived independence and for the attractiveness of the post of judge to possible candidates.

31. In raising this issue the Court has regard, in particular, to Parliamentary Assembly Resolution 1914 (2013) which called on the member States to strengthen the legal guarantees of the independence of the Court's judges by, *inter alia*, (i) securing that, when they complete their term on the Court, former judges be entitled to a similar post, if they have not yet reached retirement age; (ii) including judges' term of office at the Court in their national employment record in judicial or other occupations; and (iii) securing that, when former judges reach retirement age, they be entitled to a pension equivalent to that of judges of the highest courts or that of State officials of similar rank<sup>14</sup>, of course taking into account, where applicable, entitlements accruing to judges under the Council of Europe Pension Scheme. Also, in Resolution 2009 (2014) "Reinforcement of the independence of the European Court of Human Rights", the Parliamentary Assembly reiterated that "appropriate measures should be considered by member States to assist former Court judges to find employment upon the expiration of their term of office". This was followed by Recommendation 2051 (2014), in which the Parliamentary Assembly invited the Committee of Ministers to "actively pursue" the initiative taken in respect of the status of judges at the end of their term of office, and "ensure that follow-up is provided by States, as appropriate, at the national level"<sup>15</sup>.

32. The Court commends both the Parliamentary Assembly and the Committee of Ministers for having taken steps to address the issue of the situation of judges after the end of their term of office in the context of their work on the more general issue of reinforcing the independence and authority of the Court<sup>16</sup>. The CDDH report on the longer-term future of the Convention system takes up one of the aspects of this issue – the difficulties of finding a suitable post at the end of the judge's term of office. But it acknowledges that all factors that might discourage possible candidates from applying to the post of judge of the Court need to be comprehensively examined<sup>17</sup>.

33. The concern is certainly not without foundation. Upon the conclusion of their term of office at the Court, former judges may face a number of significant difficulties, whether as a result of prolonged absence from the domestic legal or judicial scene, or even arising out of their activities during their tenure on the Court (see paragraph 34 below). As shown by the information provided by a number of former judges<sup>18</sup>, the problem can take different forms. Some former judges have been considered as

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<sup>14</sup> See paragraph 7.6 of Resolution 1914 (2013) "Ensuring the viability of the Strasbourg Court: structural deficiencies in States Parties", adopted by the Parliamentary Assembly on 22 January 2013.

<sup>15</sup> See point 1.3 of Recommendation 2051 (2014) "Reinforcement of the independence of the European Court of Human Rights", adopted by the Parliamentary Assembly 27 June 2014.

<sup>16</sup> See, in addition to the Parliamentary Assembly resolutions and recommendation cited above, the decisions adopted by the Committee of Ministers at its 1195<sup>th</sup> and 1252<sup>nd</sup> meetings (March 2014 and March 2016 respectively).

<sup>17</sup> See paragraphs 102, 107-09, 131 and 203 of the CDDH report.

<sup>18</sup> Members of the Association of the Former Members of the European Court of Human Rights and the Former European Commission of Human Rights.

having been unemployed during their term in Strasbourg insofar as national labour and/or pension laws are concerned. For some, the States to which they return are reluctant to find solutions to the resulting problems those judges face. A number of former judges have been given no opportunity to resume their career at the national level, especially where they held public office before their election to the Court. Former judges who were in private practice before coming to Strasbourg and were not in a position to resume it have been offered no assistance whatsoever.

34. After the end of their mandate, former judges continue to be accorded limited immunity under Article 3 of the Sixth Protocol. In particular, they are immune only “from legal process in respect of words spoken or written and all acts done by them in discharging their duties”. They are thus not protected from possible pressure or even persecution in connection with their service at the Court, which can be hidden behind new or unrelated circumstances, which has been experienced by some former members.

35. Taking account of the above concerns, and of the work of the Parliamentary Assembly and the Committee of Ministers, the Court has examined a number of ideas and proposals as set out below.

(i) Post-mandate immunity

36. The Court considers it 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. In its Resolution 1914 (2013) the Parliamentary Assembly expressed the view that judges of the Court and their families should be provided with “diplomatic immunity for life”<sup>19</sup>. 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.

(ii) Recognition of service as a judge of the Court

37. In its Resolution 1914 (2013), cited above, 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”<sup>20</sup>. The Court is in full agreement with the Parliamentary Assembly on this point and wishes to stress 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.

(iii) Post-mandate employment

38. For the Court, recognition of the judge’s qualification level as set out in Article 21 § 1 of the Convention should be automatic. Failure to do so would run counter the need to ensure that the judges of the Court enjoy the highest authority in national and international law and could hardly be justified, given the complex and thorough selection and election processes for the post of judge of the Court. It is a matter of principle that former judges should be treated no less favourably than national judges. What

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<sup>19</sup> See paragraph 7.6.1 of the Resolution.

<sup>20</sup> See paragraph 7.6.3 of the Resolution.

is necessary is that former judges are given reasonable and practical opportunities to pursue their careers at the national level with due regard to their service at the Court. It is recalled that the member States have already been called upon by the Committee of Ministers “to address appropriately the situation of judges of the Court, once their term of office has expired, by seeking to ensure, to the extent possible within the applicable national legislation, that former judges have the opportunity to maintain their career prospects at a level consistent with the office that they have exercised”<sup>21</sup>.

39. 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. Nor does the Court consider that member States should be required to grant former judges automatic access to such positions. Although it would be desirable that 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<sup>22</sup>, the Court acknowledges 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. In any case, the wealth of experience gained by former judges during their term of office at the Court is of high value and should be given due weight by the domestic authorities, in particular with a view to the effective implementation of the Convention at the national level.

40. In this context, the relevant authorities of the Council of Europe could consider the possibility of establishing 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.

41. The Court would also strongly encourage the assistance of the Council of Europe in finding suitable employment for former judges at the international level or in member States other than those of the former judges. Consideration should be given to different ways of using the expertise of former judges.

(iv) Transitional allowance

42. The Court is mindful that suitable employment may not be available immediately upon the judge’s departure. Therefore, 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 can be explored both at the national level and within the Council of Europe. For instance, regard can be had to the transitional allowance scheme as applied in the Court of Justice of the European Union, under which a former judge of that court is entitled to receive not less than 40 % of his or her basic salary for a period which can last up to two years<sup>23</sup>.

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<sup>21</sup> See Item 4.3 of the decisions taken by the Committee of Ministers at its 1195th meeting, 19 and 20 March 2014.

<sup>22</sup> According to the comparative survey of national laws and regulations concerning the recognition of service of judges in the Court or in any other international jurisdiction or body, produced by the Court in 2013 (doc. DD(2013)1321), which covered the situation in all Council of Europe member States, except Armenia and San Marino, at the material time the majority of member States (31) provided for the possibility for national judges to interrupt their career in order to work for an international organization.

<sup>23</sup> See Council Regulation (EU) 2016/300 of 29 February 2016, art. 10.

## 7. Conclusion

43. The overall aim of the reform process is to strengthen the Convention system in the longer-term with the particular objectives of enabling the Court to deal effectively with the volume of cases before it, protecting judicial independence and ensuring the high quality of the judges. In this document, the Court has examined matters that bear, directly or indirectly, upon its authority and its independence, and drawn attention to several sets of issues that merit examination and consideration by the relevant national and European authorities. It is clear that there are further steps which still need to be taken as regards the procedures followed to select the best candidates for election as judges of the Court. Likewise, there are issues which should be addressed urgently, and which have been raised before, in relation to the status of judges during their term of office and after its completion, and in relation to the needs of judges' families. The Court stands ready to continue its participation in the ongoing discussion on these important questions.