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Ad hoc judges: a problem for the legitimacy of the European Court of Human Rights

Motion for a resolution
tabled by Ms Marie-Louise BEMELMANS-VIDEC and other members of the Assembly

This motion has not been discussed in the Assembly and commits only those who have signed it

The authority of any court depends on the independence and legitimacy of its judges.

The judges of the European Court of Human Rights derive a high degree of legitimacy from being elected by the Parliamentary Assembly, despite the need for further improvements of the national pre-selection procedures pointed out in Resolution 1646 (2009).

When a judge on the Court is precluded from participating in a given case due to the judge's prior involvement, for example as a government agent or senior national judge deciding on the final internal appeal, an *ad hoc* judge is needed.

Presently, *ad hoc* judges are simply appointed by the government of the defendant state, after the commencement of the Strasbourg procedure. But the *ad hoc* judge lacks the legitimacy conferred by the normal election procedure for judges.

A simple solution to the legitimacy problem is the appointment, as *ad hoc* judge, of another judge already sitting on the European Court of Human Rights – an option that is already open to governments, but rarely used.

Protocol No. 14 to the European Convention on Human Rights foresees that *ad hoc* judges shall be appointed by the Court's President, from shortlists drawn up by the governments (new Article 26, paragraph 4).

But as long as governments can draw up these shortlists without the Assembly's approval, *ad hoc* judges will still lack legitimacy when Protocol No. 14 is in force, as the Assembly noted in its Opinion on Protocol No. 14 (see Opinion 251 (2004), paragraph 10).

Furthermore, as demonstrated by the case of the Ukrainian government, the appointment of an *ad hoc* judge can also be abused to circumvent the election procedure foreseen by the Convention: see Resolution 1674 (2009). This is unacceptable.

The Assembly therefore urges the states parties to the European Convention on Human Rights to devise a system that satisfactorily resolves the concerns expressed by the Assembly.

Signed (see overleaf)

Signed[1]*:*

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