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Ad hoc judges at the European Court of Human Rights: an overview

Information report[1]
Committee on Legal Affairs and Human Rights
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Summary

Judges on the European Court of Human Rights, who are elected by the Parliamentary Assembly, are vested with democratic legitimacy: Article 22 of the European Convention on Human Rights. This is not the case when the need arises to appoint an ad hoc judge who, until recently, was designated by a High Contracting Party once proceedings had commenced.

The manner in which ad hoc judges are designated has been improved with the entry into force of Protocol No. 14 to the Convention. Under the new procedure, a High Contracting Party is required to draw up a reserve list from which the President of the Court appoints an ad hoc judge, when necessary. But this procedure still lacks democratic legitimacy. The Committee on Legal Affairs and Human Rights is of the view that further consideration of this situation is called for in the future.

1. Reference to committee: Doc. 11976, Reference 3600 of 2 October 2011. Information report approved by the committee on 16 November 2011.

Contents **Page**

1. Introduction 2
2. "Democratic legitimacy" of judges elected by the Parliamentary Assembly 3
3. Ad hoc judges at the European Court of Human Rights 4
3.1. Role and designation procedure 4
3.2. Statistical data 5
3.3. Qualifications of an ad hoc judge 7
4. Ad hoc judges in other international forums 9
4.1. In the wider context: selected examples 9
4.2. In other regional human rights courts 10
5. Practice and perspectives 11
Appendix 1 14
Appendix 2 15
Appendix 3 16

1. Introduction

1. The authority and credibility of any judicial institution depends on the independence and impartiality of its judges. This requirement has been enshrined in Article 6 of the European Convention on Human Rights (ETS No. 5, hereafter "the Convention").[2] Moreover, it is not sufficient that judges are independent and impartial – they must also appear to be so.[3] To ensure that each judge sitting on the European Court of Human Rights ("the Court") both possesses these qualities and appears to do so, a fair and transparent nomination and election procedure ought to be ensured. Recently, there has been some criticism expressed concerning the independence or appearance of independence[4] of the judges of the Court and, in a few specific instances, with regard to the appointment procedures for ad hoc judges to the Court.[5]

2. Insofar as ad hoc judges are concerned, the principal criticism has stemmed from the fact that, unlike all the other judges, who are elected by the Parliamentary Assembly by virtue of Article 22 of Convention, their appointment circumvents this procedure. Under the system that existed prior to the entry into force of Protocol No. 14 in June 2010, States Parties to the Convention, when the "national judge" was unable to sit, withdrew or was exempted, could in effect appoint virtually whomever they considered was best suited as an ad hoc judge in a given case. This prompted the Assembly to state in 2004 that, as long as ad hoc judges remained

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2. Article 6, paragraph 1, of the Convention: "… everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law …*".*

3. J. A. Carrillo-Salcedo, *"*Quels juges pour la nouvelle Cour européenne des droits de l'homme?" *Revue universelle des droits de l'homme,* Vol. 9, No. 1-4 (1997), pp. 1-3, at p. 3.

4. See, for example, V. Miller, "The European Court of Human Rights: the election of judges", briefing note of 4 May 2011, UK House of Commons Library, available at www.parliament.uk/briefing-papers/SN05949. For an overview of the procedure for electing judges to the Court, by the Assembly, see my article ***"De Parlementaire Assemblee en het Europese Hof voor de Rechten van de Mens: de verkiezing van rechters",*** in: *60 Jaar Europees Verdrag voor de Rechten van de Mens; Een lichtend voorbeeld?* Special Issue of the *Nederlands Tijdschrift voor de Mensenrechten/NJCM Bulletin,* Vol. 35, No. 7 (2010), pp. 850-58; and A. Drzemczewski, "Election of judges to the Strasbourg Court: an overview" *European Human Rights Law Review,* No. 4 (2010), pp. 377-83.

5. See, in particular, S. Lagoutte, "The future of the European HR control system: fighting with its back to the wall", in S. Lagoutte, H-O. Sano and P. Scharff Smith (eds), *Human Rights in Turmoil: Facing Threats, Consolidating Achievements,* Martinus Nijhoff Publishers, Leiden, 2007, *infra* footnote 19, pp. 41-42, and the motion for a resolution "Ad hoc judges: a problem for the legitimacy of the European Court of Human Rights", Doc. 11976, paragraph 4, which was at the origin of this report. See also N. Vajic, "Some remarks linked to the independence of international judges and the observance of ethical rules in the ECHR", in C. Hohmann-Dennhardt, P. Mausch and M. Villiger (eds), *Grundrechte und Solidarität. Durchsetzung und Verfahren: Festschrift für Renate Jaeger,* Norbert P. Engel, Kehl am Rhein, Germany, 2011, pp. 179-93, at p. 190, and K. Nalyvayko*,* mémoire entitled *"*Le rôle du juge ad hoc à la Cour européenne des droits de l'homme*"*, 2011, submitted in pursuit of a Master II Droits de l'Homme at the University of Strasbourg, France. Text available in the library of the European Court of Human Rights*;* see her description at page 33 of the dissent by the ad hoc judge G. Erönen, a justice of the Cypriot Supreme Court in *Varnava and others v. Turkey* [2008], Application No. 16064/90. Rule I (Definitions) of the Court's Rules of Court specifies "(i) the expression 'ad hoc judge' means any person chosen in pursuance of Article 26, paragraph 4, of the Convention and in accordance with Rule 29 to sit as a member of the Grand Chamber or as a member of a Chamber; (j) the terms 'judge' and 'judges' means judges elected by the Parliamentary Assembly of the Council of Europe or ad hoc judges" (the texts of Article 26 of the European Convention on Human Rights and of Rule 29 can be found in appendices 1 and 2 of this document).

excluded from the election procedure, they would continue to lack legitimacy.[6] In its 2008 report on the nomination of candidates and election of judges to the Court, the Committee on Legal Affairs and Human Rights noted that the Assembly still had no say in the manner in which ad hoc judges were appointed and that it remained unclear what role, if any, it should or could play in that respect under the new appointment procedure introduced by Protocol No. 14 to the Convention.[7] It was concluded that this subject merited further reflection.[8]

3. This subject was brought to the fore in the years 2007-2009, when Ukraine refused to provide the name of a third candidate for the post of judge to the Assembly, thereby effectively preventing the latter from proceeding with the election of a judge with respect to Ukraine. Instead, Ukraine appointed an ad hoc judge for a prolonged period of time.[9] As a reaction to this, the Assembly determined that Ukraine's action threatened to undermine the Court's credibility and constituted an illegitimate abuse of a procedure, in violation of the country's Convention and statutory obligations.[10] Fortunately, this matter was settled – after a clarification of the legal position by the Court – in a satisfactory manner.[11]

4. It is in the interests of the entire Convention system that the Court – through its judges – is in reality and in appearance absolutely free from any outside pressure, interference or suspicion of lack of impartiality. Hence the importance of obtaining a clear picture of the manner in which ad hoc judges are designated and of how the system operates today.

2. "Democratic legitimacy" of judges elected by the Parliamentary Assembly

5. It has been noted[12] that:

> *"Legitimacy can be no more important to any other institution than it is for the European Court of Human Rights. As a supranational human rights court, it does not have enforcement or sanctioning powers. Furthermore, its main task is to judge the actions of exactly those state authorities upon whose support it relies to enforce its judgments. Thus, it primarily relies on its legitimacy to gain respect and deference from domestic judges and politicians..."*

6. A judge is legitimate to the extent to which he or she is independent and impartial.[13] Democratic legitimacy requires, *inter alia*, the separation of powers secured by a strict separation of the judiciary from the political system.[14] In order to provide for this, Article 22 of the Convention assigns the Assembly the competence to elect the judges to the Court.[15] This Article states that "[t]he judges shall be elected by the Parliamentary Assembly 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".[16] This gives the process democratic legitimacy since the members of the Assembly come from the national parliaments, the legislative organs of the member states.

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6. See Assembly Opinion 251 (2004) on Draft Protocol No. 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention, and the corresponding report by Mr Kevin McNamara (United Kingdom, SOC), Doc. 10147.
7. Doc. 11767, Nomination of candidates and election of judges to the European Court of Human Rights (rapporteur: Mr Christopher Chope (United Kingdom, EDG), paragraph 36. See also paragraph 4.5 of Resolution 1646 (2009), which was based on this text.
8. Ibid.
9. See the motion for a resolution on the subject "Ad hoc judges: a problem for the legitimacy of the European Court of Human Rights" (Doc. 11976), which is at the origin of the present report.
10. See Resolution 1674 (2009) on the reconsideration on substantive grounds of previously ratified credentials of the Ukrainian delegation (Rule 9 of the Assembly's Rules of Procedure) (rapporteur: Mr Dick Marty (Switzerland, ALDE)), Doc. 11963, *passim.* It was at that time also that the initiative was taken to bring this subject under scrutiny.
11. See, in this connection, 2nd Advisory Opinion of the Court, dated 22 January 2010, in which it vindicated the position taken by the Assembly.
12. B. Çali, A. Koch and N. Bruch, Department of Political Science, University College London, "The legitimacy of the European Court of Human Rights: the view from the ground", Strasbourg, 2011, p. 5: http://ecthrproject.files.wordpress.com/2011/04/ecthrlegitimacyreport.pdf.
13. See G. Wiederkehr, "Indépendance de la justice et légitimité du juge", in B. Haller, H-C. Krüger and H. Petzold, *Law in Greater Europe, Towards a Common Legal Area, Studies in Honour of Heinrich Klebes,* Kluwer Law International, The Hague, 2000, pp. 457-62, at p. 459.
14. See the report of the Venice Commission, "Independence Through Appointment Procedure, Status of Judges and Adoption of the Budget of the Judiciary", CDL-UDT(2009)013.
15. For more details, see Resolution 1646 (2009) on the nomination of candidates and election of judges to the European Court of Human Rights.
16. Article 22 of the European Convention on Human Rights.

7. In its Resolution 1726 (2010),[17] the Assembly reiterated that:

> *"7. The authority of the Court is contingent on the stature of judges and the quality and coherence of the Court's case law. In this context it is the Assembly's responsibility to elect judges of the highest calibre to the Court from a list of three candidates nominated by states parties. Recalling its Resolution 1646 (2009) on the nomination of candidates and election of judges to the European Court of Human Rights, the Assembly reaffirms its call that national selection procedures must be rigorous, fair and transparent in order to enhance the quality, efficacy and authority of the Court."*

8. It is worth noting that the word "judge", as used in Article 22, is not defined, and it could also be understood to refer to a function rather than a status. Such an understanding would lead to the conclusion that Article 22 of the Convention also includes "persons sitting in the capacity of a judge" (see Article 26, paragraph 4, of the Convention), namely, ad hoc judges since these persons fulfil the function of a judge.

3. Ad hoc judges at the European Court of Human Rights

3.1. Role and designation procedure

9. 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.[18] 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. In such cases, the ad hoc judge covers cases until a new judge is elected by the Assembly with respect to a given state.

10. 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, this procedure not only lacked democratic legitimacy (election by the Assembly) but also – so it could be argued – contradicted the equality of arms principle and raised concerns regarding the independence and impartiality of the ad hoc judge.[19] It was also lengthy and could affect the timely examination of a case, owing to both the appointment procedure itself and the fact that the ad hoc judge, once appointed, often had other commitments in place.[20] In fact, delays have occurred in the past in processing cases as a result of difficulties relating to the nomination of ad hoc judges. For instance, the Yukos case[21] was postponed first to allow the ad hoc judge to familiarise himself with the file and second because of his ill health. Delays also occurred in a case concerning Serbia because the country had not provided a list on time, as well as in a case concerning Turkey, where there were questions about the judge's impartiality.

11. Protocol No. 14 has partially remedied this unsatisfactory situation. New Article 26, paragraph 4, of the Convention provides for a judge's replacement by a person – the ad hoc judge – "… chosen by the President of the Court from a list submitted in advance by that Party".[22] 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.[23] A further change brought in by the amended Rules of Court is that, for the purposes of the application of Article 26, paragraph 4, of the Convention, the names of the other elected judges to the Court shall, *ipso jure*, be considered to be included on the list.[24] Additionally, 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[25] – an option voluntarily exercised by some states under the previous regime.[26]

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17. Resolution 1726 (2010), "Effective implementation of the European Convention of Human Rights: the Interlaken process".
18. Rule 29.1.*a* of the Rules of Court (1 April 2011). See Appendix 2 for the full text of Rule 29.
19. See, for instance, Lagoutte, "Future of the European HR control system", pp. 41-42; Report by Mr Chope, Doc. 11767, paragraph 33. One could contend that, in addition, it contradicted the "right to a lawful judge", i.e., the right to know *ex ante* which judge/formation would rule on the case.
20. See Vajic, "Some remarks linked to the independence of international judges", footnote 26, p. 189. These obstacles may also, of course, exist with respect to the post-Protocol No. 14 procedure.
21. *OAO Neftyanaya Kompaniya Yukos v Russian Federation*, Application No. 14902/04, judgment of 20 September 2011.
22. See Appendix 1 for the complete text of this provision.
23. Rule 29.1.*b* of the Rules of Court.
24. Ibid.

12. The use of the phrase "unless a State Party has opted to appoint an ad hoc judge" in paragraph 1.*a* of the amended Rules renders the appointment of an ad hoc judge from among the elected judges the default position. For instance, if the contracting party does not reply within the above-mentioned thirty-day period[27] or if it opts to appoint an ad hoc judge but fails to supply the registrar with the required list (or if fewer than three of the persons indicated in the submitted list satisfy the required conditions), it shall be presumed to have waived its right of appointment. The right will also be regarded as waived if the chamber finds that fewer than three people on the list satisfy the requirements set out in the Rules.[28] Presumably, under these circumstances, the President of the Court appoints the replacement from among the substitute judges (that is to say, those judges who are designated to sit in on cases in a judicial formation as "substitutes" and who may be called upon to take the place of members who are unable to sit: see Rules 24 to 27 of the Rules of Court, *passim*).

13. 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. Moreover, if ad hoc judges were to be increasingly "co-opted" from the existing bench, they would obviously enjoy the same democratic legitimacy as regular judges.[29]

14. However, the appointment procedure may still give rise to a legitimacy problem 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.[30]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. With regard to regular judges, states parties must provide the Assembly with a model curriculum vitae for each candidate.[31] The Assembly examines whether candidates possess the qualifications required for appointment and the necessary high moral character and carries out an interview process.[32] Without this assessment of candidates and control over selection by the Assembly, the possibility of bias and the risk of a lower calibre of judge are greater with regard to ad hoc judges. This goes back to the basic problem of judges, in certain instances, not possessing the same "democratic legitimacy" as the (regular) judges elected by the Assembly.

3.2. Statistical data

3.2.1. General information

15. According to the figures provided by the Registry of the Court, from 2007 to 2010, 77 ad hoc judges were appointed (19 in 2007, 21 in 2008, 20 in 2009 and 17 in 2010), who participated in the delivery of a total of 516 of the Court's judgments (79 in 2007, 40 in 2008, 246 in 2009 and 151 in 2010). If these figures are compared with the overall number of judgments rendered in the years 2007 to 2010 (1 503, 1 543, 1 625 and 1 499, respectively[33]), the percentage of cases in which ad hoc judges were involved is not high but is nevertheless increasing.[34]

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25. Ibid., paragraph 1.*a*.
26. For instance, Judge Maruste was appointed to sit with respect to Latvia in *Lavents v. Latvia* (28 November 2002), Judge Garlicki was appointed to sit in *Adamsons v. Latvia* (24 June 2008), Judge Ziemele was appointed on various occasions to sit with respect to Lithuania and Judge Malinverni was appointed to sit with respect to Luxembourg, etc. Cited in Vajic, "Some remarks linked to the independence of international judges*",* op. cit., p. 189.
27. Rule 29.2.*a* of the Rules of Court. See Appendix 2 for the full text of Rule 29.
28. Ibid, paragraph 2.*b*.
29. In order to lessen the perceived inequality between regular and ad hoc judges, formal equality should be enhanced. For examples of actual inequality, see I. Scobbie, "Une hérésie en matière judiciaire? the role of the judge *ad hoc* in the international court", *The Law and Practice of International Courts and Tribunals,* Vol. 4, No. 3 (2005), pp. 421-64, at p. 441 *et seq*.
30. See Assembly Opinion 251 (2004) and the corresponding report of the Committee on Legal Affairs and Human Rights (Doc. 10147).
31. See Assembly Resolution 1646 (2009) and the information document prepared by the Secretariat on the "Procedure for electing judges to the European Court of Human Rights" (AS/Jur (2010) 12 rev 3).
32. Ibid. For an overview of the procedure, see A. Drzemczewski, "Election of judges to the Strasbourg Court", note 4, pp. 379-81.
33. Annual Report 2010 of the European Court of Human Rights, Council of Europe, p. 14.
34. However, it must be noted that the involvement of ad hoc judges increased in the new Court established by Protocol No. 11. Before the introduction of Protocol No. 11, only 26 ad hoc judges were appointed (compared to 77 in only four successive years). See, for more details, P. Lambert, "Les juges ad hoc à la Cour européenne des droits de l'homme*"*, *Revue Trimestrielle des Droits de l'Homme,* No. 39 (1999), pp. 479-85, at p. 480.

16. Against this background, it is even more important that the few cases involving ad hoc judges do not give rise to legitimacy and independence issues, thus potentially undermining the credibility of the Court. The fact that the institution of ad hoc judges has worked tolerably well in practice[35]does not alleviate the concerns it gives rise to,[36]namely, that the nomination process is not transparent and that it may appear that the ad hoc judge is not fully independent of the government whose action he or she has to adjudicate.[37]The example of the "abusive" appointment of an ad hoc judge, so as to circumvent the election procedure envisaged by the Convention, may also be mentioned in this connection.[38]

3.2.2. Voting pattern

17. Several studies have been carried out regarding the voting patterns of "national" and ad hoc judges. Many document that the ad hoc judge demonstrates a stronger national bias than the elected judge.[39] It has been argued that this is because they do not feel much solidarity with elected judges and, unlike them, are not exposed to group pressure in the same fashion.[40] Others argue, in the wider context of international litigation, that it is a consequence of the particular role that the ad hoc judge fulfils, that a person would (or even should) not accept the role of ad hoc judge if that person does not tend to agree with the government's position.[41]

18. The presence of a "national judge", regular (elected) or ad hoc, in the procedure before the Court is intended to ensure the factual knowledge of the law and legal practice of the state concerned. Arguably of greater importance is that it is thought to increase the confidence of member states in the Court, as well as the willingness of hesitant parties to accept the jurisdiction of the Court.[42] In addition, after a judgment has been handed down, parties are more likely to execute and comply with that judgment.[43] As such, 'national judges' can, so it is argued, contribute to the maintenance of the rule of law and the promotion of the necessary public confidence in the international judiciary.[44] At the same time, however, it could be argued that they present a greater risk to a Court's legitimacy because of doubts concerning their independence and impartiality.[45]

19. A study conducted in 2008[46] showed statistically significant differences in the voting pattern of judges, to an extent putting into question the hypothesis that judges are fully impartial when they evaluate their national governments.[47] According to the study, when a ruling favoured the respondent state, 100% of ad hoc judges and 95% of regular judges from the respondent's country voted with the majority. These figures compare to 81% of other judges. In cases where the ruling went against the respondent state, 33% of ad hoc judges and 16% of regular judges dissented, compared with only 8% of other judges.[48] A more recent study,

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35. See, *inter alia*, J. Collier and V. Lowe, *The Settlement of Disputes in International Law, Institutions and Procedures*, Oxford University Press, Oxford, 1999, p. 131; S. M. Schwebel, "National judges and judges ad hoc of the International Court of Justice*"*, *International and Comparative Law Quarterly,* Vol. 48, No. 4 (1999), pp. 889-900, at p. 898.
36. See, *inter alia,* B. Olbourne, "Independence and impartiality: international standards for national courts*"*, *The Law and Practice of International Courts and Tribunals,* Vol. 2, No. 1 (2003), pp. 97-126, at p. 124; L. Caflisch, "Independence and impartiality of judges: The European Court of Human Rights*"*, *The Law and Practice of International Courts and Tribunals,* Vol. 2, No. 1 (2003), pp. 169-74, at p. 173.
37. See H. G. Schermers, "Election of judges to the European Court of Human Rights*"*, *European Law Review,* Vol. 23, No. 6 (1998), pp. 568-78, at p. 575.
38. As happened in the above-cited case of Ukraine in 2009; see paragraph 3 of Resolution 1674 (2009) (see also paragraph 3 above).
39. See especially M. Kuijer, "Voting behaviour and national bias in the European Court of Human Rights and the International Court of Justice" *Leiden Journal of International Law,* Vol. 10, No. 1, pp. 49-67, at p. 60; and F. J. Bruinsma, "The room at the top: separate opinions in the grand chambers of the ECHR (1998-2006)", *Ancilla Iuris* (2008), pp. 32-43, at p. 37.
40. Bruinsma, "Room at the top".
41. N. Valticos, "Pratique et éthique d'un juge 'ad hoc' à la Cour international de justice", in N. Ando, E. McWhinney and R. Wolfrum (eds), *Liber Amicorum Judge Shigeru Oda,* Vol. I, Kluwer Law International, The Hague, 2002, pp. 107-16, at p.110.
42. Kuijer, "Voting behaviour and national bias", p. 52. Protocol No. 11 to the Convention has now, of course, made the Court's jurisdiction compulsory.
43. Ibid.
44. Vajic, "Some remarks linked to the independence of international judges*"*, op.cit., p. 193.
45. See Wiederkehr, "Indépendance de la justice et légitimité du juge", op.cit., p. 459.
46. E. Voeten, "The impartiality of international judges: evidence from the European Court of Human Rights*"*, *American Political Science Review,* Vol. 102, No. 4 (2008), pp. 417-33.
47. Ibid., p. 425.
48. Ibid., p. 425. Note also that, according to Nalyvayko, *"*Le rôle du juge ad hoc à la Cour européenne des droits de l'homme", the numbers for 2009 and 2010 differ from the average (3,07% and 2,44% of dissenting opinions, respectively), owing to the fact that two Ukrainian ad hoc judges sat in all Ukrainian cases. An excellent bibliography of studies undertaken on the topic of ad hoc judges can be found in Nalyvayko's mémoire.

which examined the voting pattern of ad hoc judges at the Court from 2006 to 2010, has indicated that, in the 26 judgments where ad hoc judges voted against the majority, they voted against the state that nominated them in only eight out of the 26 cases.[49] In nine of the 26 cases, the ad hoc judge was the only one to vote against the finding of a violation.[50]

20. Despite these statistics, the fact that an ad hoc judge favours the respondent state's position does not in itself suggest bias. It might, however, indicate that the selection procedure might not have been "neutral" and that the state put forward the individual with his or her views in mind. This renders it even more important to ensure a careful selection procedure with respect to ad hoc judges, which should guarantee the nomination/choice of persons of the highest calibre, thus reaffirming the quality, efficacy and authority of the Court.

3.2.3. Gender aspect

21. The Assembly believes that a society can be fully democratic and make full use of its potential only if both women and men are properly represented in decision-making bodies, including the judiciary,[51] and it has done its utmost to ensure that men and women are evenly represented on public bodies – not least on the European Court of Human Rights.[52]Since the Assembly imposed the requirement that a member of the under-represented sex be included on candidate lists for the Court in 2004, "the proportion of women on candidate lists has gone up considerably, and with it, the proportion of women elected to the Court".[53]

22. On the other hand, thefigures for ad hoc judges provided by the Registry of the Court for the years 2007 to 2010 show that, under the previous rules, their direct designation by member states could give rise to gender equality issues. The percentage of women appointed as ad hoc judges in the period in question amounted to 42% in 2007 (8 out of 19 ad hoc judges), 24% in 2008 (5 out of 21), 10% in 2009 (2 out of 20) and 23% in 2010 (4 out of 17).

23. Under the new Rules of Court introduced following the entry into force of Protocol No. 14, the list of persons eligible to serve as ad hoc judges must now include persons from both sexes.[54] The effect of this development on the gender balance has yet to be observed. At present, of those states that have submitted a list of ad hoc judges (35 out of 47), it would appear that four do not have women on their lists, contrary to what is required.[55] It will be interesting to observe how the Court will handle this matter.

3.3. Qualifications of an ad hoc judge

24. An unchanged rule of the Court is that an ad hoc judge shall be a person of high moral character and must either possess the qualifications required for appointment to high judicial office or be a jurisconsult of recognised competence.[56] The Rules of Court (which needed to be redrafted, in part, to take into account the new procedure instituted with the entry into force of Protocol No. 14) state that an ad hoc judge must not be ineligible to take part in the consideration of a case on any of the grounds referred to in Rule 28[57] and must be in a position to meet the demands of availability and attendance. Moreover, for the duration of an appointment, he or she shall not represent any party or third party in any capacity in proceedings before the Court.[58] The Assembly indicated the need for further criteria for the appointment of *elected* judges in its

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49. Nalyvayko, *"*Le rôle du juge ad hoc à la Cour européenne des droits de l'homme*"* p. 32.
50. Ibid.
51. See Doc. 11798, Nomination of candidates and election of judges to the European Court of Human Rights, Opinion of the Committee on Equal Opportunities for Women and Men (rapporteur: Ms Lydie Err (Luxembourg, SOC)), 2009, paragraph 1.
52. See Doc. 11767; Resolution 1646 (2009) on the nomination of candidates and election of judges to the European Court of Human Rights, paragraph 26, and Doc. 11798.
53. See the explanatory memorandum of Ms Lydie Err, Doc. 11798, paragraph 2, with further references. At present, 19 out of 47 judges at the Court are female (i.e., more than 40%, which is the threshold used to determine the "underrepresented sex").
54. Rule 29.1.*b*; see Appendix 2.
55. See Appendix 3. Note also that two countries do not have any men on their lists.
56. The minimum qualifications required of a person who could be proposed to sit as an ad hoc judge are stipulated in Rule 29.1.*d* of the Rules of Court: "An ad hoc judge shall possess the qualifications required by Article 21, paragraph 1 of the Convention …". See Appendix 2.
57. Rule 28 describes situations in which a judge may not take part in the consideration (has a personal interest in the case or has previously acted in the case; engages in any political or administrative activity or any professional activity that is incompatible with his or her independence or impartiality; has expressed opinions publicly that are objectively capable of adversely affecting his or her impartiality; or if for any other reason, his or her independence or impartiality may legitimately be called into doubt).

Resolution 1627 (2008), Resolution 1646 (2009) and its Recommendation 1649 (2004). It has introduced additional requirements, such as "… an active knowledge of one official language of the Council of Europe and the passive knowledge of the other" and the need for fair, transparent and consistent national selection procedures.[59] But these are missing from the "requirements" imposed on (persons put forward on lists of) ad hoc judges. Hence, it is advisable that at least the linguistic requirements be specifically referred to in the Rules of Court, given that an ad hoc judge, once appointed, fully replaces the regular judge on a case. Indeed, the model curriculum vitae, with its express stipulation relating to the need for a person to possess an active knowledge of one official language of the Council of Europe and a passive knowledge of the other, should be a requirement in the Rules of Court.[60] That said, the lack of other requirements concerning ad hoc judges may work to the advantage of the system; for instance, the judge may be of the nationality of another member state,[61] and the maximum age requirement (of 70) is not specified.[62]

25. Furthermore, it must be noted that, notwithstanding the changes made with the entry into force of Protocol No. 14 (and the qualifications that ad hoc judges must hold, as stipulated in Rule 29 of the Rules of Court), no requirement is imposed upon states to provide an explanation as to the procedure followed in selecting (persons placed on lists of) ad hoc judges. Article 26, paragraph 4, simply states that the President of the Court will choose the ad hoc judge from a list submitted by a state party. As indicated above, whilst this is an improvement on the previous procedure, it still lacks the legitimacy of the election procedure for regular judges, where responsibility falls to the Assembly and where it is clear what the requirements are. It is unclear how the President of the Court is expected to reach this decision. This raises the question whether there would not be advantages in ensuring that the Assembly plays a greater role in verifying the appointment or even taking over the assessment of the candidates proposed. First, it is already familiar with the evaluation of candidates and possesses the necessary expertise. Second, the necessary mechanisms are already in place, which means that financial costs could be kept relatively low. However, this possibility in itself raises two further issues. National selection criteria for regular judges have also been subject to criticism[63] and are currently the subject of on-going work within the Steering Committee for Human Rights (CDDH).[64] A report prepared by the Assembly states that minimum standards for the selection of judges must be set out to ensure the Court's credibility and authority.[65] There is also the question of whether it is advisable for the Assembly to expend significant time and effort assessing each prospective ad hoc judge on the list when there is no certainty of persons on the list ever being chosen to sit in the capacity of judge.[66] Hence, perhaps, the need to ensure that all lists, or persons put forward as potential ad hoc judges, be "filtered" by the advisory panel of experts set up on candidates for election as judges (before lists are transmitted to the Assembly) (see Committee of Ministers Resolution CM/Res(2010)26).[67]

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58. Rule 29.1.*d* of the Rules of Court.
59. See, for example, Resolution 1646 (2009), paragraph 4.4 and the last two sentences of paragraph 2.
60. See, in particular, points VIII and IX in the model curriculum vitae attached to Assembly Resolution 1646 (2009), and the relevant sections in the explanatory memorandum, by Mr Christopher Chope, in Doc. 11767, upon which Resolution 1646 (2009) on the nomination of candidates and election of judges to the European Court of Human Rights is based.
61. For instance, the state can nominate a national of another country who is an expert in this field or the elected judge of another state; see Nalyvayko, footnote 5, p. 15.
62. This opens up the possibility of the appointment of former judges, for which there are numerous advantages. See paragraph 42 of this document.
63. For instance, for being "silent and insufficiently detailed", per Olbourne, "Independence and Impartiality", pp. 123-24, and for being "politicised and lack[ing] transparency", per Jutta Limbach et al., *Judicial Independence: Law and Practice of Appointments to the European Court of Human Rights,* London (2003), at p. 8, a study commissioned by Interights, which, although slightly dated, is a useful background document: INTERIGHTS – Judicial Independence: Law and Practice of Appointments to the ECtHR.
64. An 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) held a meeting in Strasbourg from 7 to 9 September 2011.
65. Report, Doc. 11767.
66. For instance, the ad hoc judge might not be needed for a period of years after the list was submitted, by which time it may be obsolete.
67. 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. The panel is composed of seven personalities: see Committee of Ministers decision of 8 December 2010. See also Assembly Resolution 1764 (2010), adopted on 8 October 2010, based on Doc. 12391, report of the Committee on Legal Affairs and Human Rights (rapporteur: Ms Renate Wohlwend).

4. Ad hoc judges in other international forums

4.1. In the wider context: selected examples

26. The right of states to appoint an ad hoc judge is not granted by all international courts. In fact, even national representation is not universal. A few selected examples will be provided here to illustrate this.

27. The Court of Justice of the European Union (CJEU, formerly known as the European Court of Justice or Court of Justice of the European Communities) does not provide for the appointment of ad hoc judges, nor does it, in specific proceedings, guarantee national "representation" as such. It does, however, like the Strasbourg Court, provide for balanced national representativeness on the CJEU as a whole, through Article 19, paragraph 2, of the Treaty on European Union, which stipulates in this respect that the Court of Justice shall consist of one judge from each member state.[68] The Statute of the CJEU states that "[a] party may not apply for a change in the composition of the Court or of one of its chambers on the grounds of either the nationality of a Judge or the absence from the Court or from the chamber of a Judge of the nationality of that party".[69] It appears that, as "representativeness" of all 27 member States of the European Union is catered for within this jurisdiction, the internal procedural rules tend to concentrate on such matters as the need to determine, for example, who must abstain from deliberations to attain an odd number of judges in the decision-making process.[70]

28. The 15-member International Court of Justice (ICJ), within the United Nations system, guarantees national representation[71] and, hence, the right to appoint an ad hoc judge.[72] However, it must be noted that the ICJ does not deal with individual complaints; the parties to disputes before it are sovereign states. Accordingly, both parties may appoint a "national judge", which preserves the principle of equality of arms. Following the appointment, the registrar communicates this choice to the other party, which may provide the registrar with any observations it wishes to make. In the event of objection or doubt, the Court makes the final appointment.[73] The appointment of ad hoc judges before the ICJ, as well as its predecessor, the Permanent Court of International Justice (PCIJ), has prompted some criticism.[74]

29. The International Criminal Court (ICC), as an 18-judge court, does not guarantee national representation and hence does not provide for the appointment of ad hoc judges. The decision against guaranteeing national representation has not resulted, however, in a decision to prohibit this. The Rome Statute provides that, in cases where the impartiality of a judge is in doubt, for example, where he or she was previously involved in any capacity before the ICC or in a related case before the national courts, the judge shall be disqualified.[75] It does not provide for the replacement of this judge, for example, by the country that nominated him or her.

30. The International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) have 16 regular judges and a maximum of nine *ad litem* judges at any one time. These tribunals do not provide for national representation nor for ad hoc judges.

31. As indicated, the ICTY and ICTR provide instead for the appointment of *ad litem* judges.[76] An *ad litem* judge acts as a special category of "additional judge" and differs from an ad hoc judge in that he or she is elected in precisely the same manner as a regular judge.[77] United Nations Security Council Resolution 1329

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68. This is slightly different with respect to the General Court of the European Union (formerly known as Court of First Instance of the European Communities). Here, Article 19, paragraph 2, of the Treaty on European Union stipulates that it shall include at least one judge per member state. The exact number of judges on the General Court is determined by the Statute of the Court of Justice of the European Union. See Article 254, paragraph 1, of the Treaty on the Functioning of the European Union. The number currently stands at 27.

69. Article 18 of the Statute of the Court of Justice of the European Union

70. See Article 26 of the Rules of Procedure of the Court of Justice. Dissenting opinions are not permitted. See also, in this connection, J. Malenovsky, "Les opinions séparées et leurs répercussions sur l'indépendance du juge international", *Anuario Colombiano de Derecho Internacional,* Vol. 3 (2010), pp. 27-70, at p.34.

71. Article 31 of the Statute of the International Court of Justice.

72. Article 35 of the Rules of Court, International Court of Justice. See also J. Malenovsky "L'indépendance des juges internationaux" in Vol. 349, Collected Courses of The Hague Academy of International Law (2011), pp. 9-275, at pp. 106-14.

73. Articles 34, 35 and 36 of the Rules of Court, International Court of Justice.

74. See, for example, R. Mackenzie et al., *Selecting International Judges: Principle, Process, and Politics,* Oxford University Press, Oxford (2010), with respect to the ICJ, and H. Lauterpacht, *The Function of Law in the International Community*, Clarendon Press, Oxford (1933, reprinted in 2000 by the Lawbook Exchange (Union, New Jersey), with respect to the PCIJ (note that Lauterpacht's criticism is applicable to ad hoc judges generally).

75. Article 41 of the Rome Statute of the International Criminal Court, paragraph 2.*a*.

provided for their appointment in order to enable the tribunals to hear more cases and therefore "expedite the conclusion of their work at the earliest possible date".[78] They are elected for a term of four years (the same term as permanent judges) in order to allow the tribunals to deal with their fluctuating caseload. The intention is that they are appointed to a particular case, thus ensuring cases do not stall for lack of a requisite number of judges and allowing for continuity. Their election procedure is comparable with the election procedure of regular judges, that is to say, nominations by states are forwarded by the UN Secretary-General to the Security Council, which duly establishes a short list; this list is sent to the General Assembly, which elects the judges.

4.2. In other regional human rights courts

32. The American Convention on Human Rights of 1969 grants states the possibility to appoint ad hoc, unelected judges. The right to appoint an ad hoc judge is provided for in Article 55 of this convention in order to ensure their representation on the seven-member Inter-American Court of Human Rights.[79] Article 19 of the Rules of Procedure sets forth the appointment procedure, which was modelled on the pre-Protocol No. 14 procedure of the European Court of Human Rights (ad hoc judges are appointed directly by the state).

33. However, this situation has been somewhat "adjusted" following the request by Argentina, in 2008, for an advisory opinion on the institution of the ad hoc judge, indicating that the mechanism, as applied, was contrary to the object and purpose of the American Convention on Human Rights.[80] It argued that Article 55 was intended to be used only in inter-state cases and that its use with regard to individual petitions was contrary to the principle of equality of arms.[81] In its advisory opinion, the Inter-American Court of Human Rights agreed, declaring that allowing the state to appoint an ad hoc judge in cases initiated by means of an individual petition undermined the principles of equality and non-discrimination, and the argument that "national representation" was necessary to explain the domestic legal system was not sufficient justification.[82] Accordingly, it decided that ad hoc judges could be appointed only in inter-state cases.[83] As part of the same request, Argentina raised the issue of national representation and the risk of lack of impartiality. The Inter-American Court agreed with the concern and held that henceforth judges should refrain from participating in cases filed by an individual against the state of which they are a national.[84]

34. For the sake of completeness, an additional comment should be made here about yet another category of judge, namely, "interim judges" (substitute judges). The main differences between ad hoc judges and interim judges are the reasons for the appointment and the relevant appointment procedures.[85] Ad hoc judges are appointed in order to guarantee national representation. Interim judges (substitute judges) can be appointed in order to preserve the required quorum of the court. The Inter-American Court of Human Rights serves as an example in this respect, providing for the appointment of interim judges if necessary to preserve its quorum.[86] Interim judges may serve until regular judges replace them.[87]While the state party appoints its ad hoc judges, the Permanent Council of the Organization of American States can appoint an interim judge.

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76. See Article 12 of the Statute of the ICTY and Article 11 of the Statute of the ICTR, which stipulate that the chambers of these tribunals shall include *ad litem* judges. Article 13 *ter* and *quarter* of the Statute of the ICTY / Article 12 *ter* and *quarter* of the Statute of the ICTR deal with the election procedure and the status of *ad litem* judges, respectively.
77. Article 13 *bis* and Article 13 *ter* of the Statute of the ICTY.
78. Preamble to UN Security Council Resolution 1329.
79. Article 10 (Ad Hoc Judges) of the Statute, Inter-American Court of Human Rights.
80. Ministry of Foreign Affairs, International Trade and Worship, Republic of Argentina, Request for an Advisory Opinion from the Inter-American Court of Human Rights, 14 August 2008, OI 41/08.
81. This criticism has been echoed by M. Feria Tinta, "'Dinosaurs' in human rights litigation: the use of *ad hoc* judges in individual complaints before the Inter-American Court of Human Rights", *The Law and Practice of International Courts and Tribunals,* Vol. 3, No. 1 (2004), pp. 79–112, at p. 84 *et seq.* On (the needed) compliance with the principle of equality of arms in general, see A. A. Cançado Trindade *El Ejercicio de la Función Judicial Internacional – Memorias de la Corte Interamericana de Derechos Humanos* Editora Del Rey, Belo Horizonte (2011), pp. 109-26 and 133-38.
82. Article 55 of the American Convention on Human Rights, Inter-American Court of Human Rights – Advisory Opinion OC-20 of September 29, 2009, series A No. 20, at paragraphs 54 and 61, respectively.
83. Ibid., paragraph 66. This is reflected in the amended Rules of Procedure of the Inter-American Court of Human Rights, at Article 20
84. Ibid., paragraph 84. See also Rules of Procedure of the Inter-American Court of Human Rights, at Article 19.
85. See T. Buergenthal and D. Shelton, *Protecting Human Rights in the Americas, Cases and Materials* (4th edn), N.P. Engel, Kehl am Rhein, Germany, 1995, p. 57, and Feria Tinta, op.cit., p. 90.
86. See Article 6, paragraph 3, and Article 19, paragraph 4, of the Statute of the Inter-American Court of Human Rights.
87. Article 55 of the American Convention on Human Rights.

35. Finally, the appointment of ad hoc judges is not provided for in the 11-member African Court of Human and Peoples' Rights.[88] This may be attributable to the fact that the founding texts of the African Court, like the Rome Statute of the ICC, and unlike the European Convention on Human Rights and American Convention on Human Rights, do not permit national representation in individual cases.[89] On the contrary, Article 22 of the Protocol to the African Charter on Human and Peoples' Rights explicitly requires the exclusion of any judge from a case "if the judge is a national of any state which is a party to a case submitted to the Court". If a judge resigns before his or her term of office ends, the normal procedures are followed. In this case, the replacing judge sits for the remainder of the predecessor's term.[90]

36. The institutions of interim or *ad litem* judges, although quite common on the domestic plane, are rare in the case of international tribunals. However, as indicated above, the ICTY and the ICTR have successfully used *ad litem* judges to expedite the fulfilment of their mandate, while the Inter-American Court of Human Rights may use interim judges to prevent serious delays in its work.[91] Whilst these systems no doubt have their weaknesses,[92] the institution of a category of interim or *ad litem* judges, perhaps tailored to the needs of the Strasbourg system, could be worth considering in the future. The election – by the Assembly – of such judges in a procedure that has democratic legitimacy would enhance the Court's credibility and, most important, could avoid the suspicion of abusive appointment of ad hoc judges.

37. Relevant data on the experience with interim judges in the Inter-American Court of Human Rights or *ad litem* judges in the ICTY and ICTR should be collected and analysed in order to evaluate these mechanisms in more detail. A recommendation on this subject could be sent to the Committee of Ministers at some future date.

5. Practice and perspectives

38. The principle of national representation and hence, in most instances, the institution of an ad hoc judge, must be carefully balanced against the risk posed to the Court by a lack of legitimacy and independence of judges. The states parties, the Court and the Assembly must all play a part in achieving this balance. In 2009, the Assembly urged states parties to the Convention to devise a system that would satisfactorily resolve concerns expressed.[93] That initiative was taken in a specific context, when a serious abuse of the system had actually occurred.[94]

39. Many of the issues raised have subsequently been addressed in the course of the reform initiated by Protocol No. 14, if not in the Convention itself, then by the Court in its amended Rules of Procedure, as indicated in this report. These Rules should perhaps still be refined once a few years have elapsed and we have seen how the procedure introduced by Protocol No. 14 has functioned in practice.

40. However, as indicated in this report, there remain issues and concerns that must be highlighted. The first unresolved issue is that the institution of ad hoc judges still lacks the full democratic legitimacy achieved through election by the Assembly, in contrast to regular judges. The question remains: How, if at all, will the Assembly, or even the Assembly's national delegation of the respondent state, be involved in the procedure of

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88. Protocol to the African Charter on Human and Peoples' Rights, 1998, which established the African Court, came into force on 25 January 2004. The African Court started in Addis Ababa, Ethiopia, in November 2006 but moved to its permanent seat in Arusha, Tanzania, in August 2007. This Court was merged with the Court of Justice of the African Union by way of the Protocol on the Statute of the African Court of Justice and Human Rights. This was adopted at the11th Ordinary Session of the Assembly, held in Sharm el-Sheikh, Egypt, on 1 July 2008 but has yet to be ratified by the 15 states required before it can come into force. To date, it has only been ratified by Libya and Malawi. This protocol states, at Article 14, paragraph 3, that a "Judge of the nationality of a State Party to a case before the full Court or one of its Sections shall not have the right to sit on the case". For more information on the African Court of Justice and Human Rights, see www.africancourtcoalition.org/.

89. See explanatory memorandum by Mr Chope, Doc. 11767, paragraph 34.

90. See Article 15(3) (Term of office) and Article 20 (Vacancies) of the Protocol to the African Charter on Human and Peoples' Rights, 1998.

91. See T. Buergenthal, "The Inter-American Court of Human Rights", *American Journal of International Law,* Vol. 76, No. 2 (1982), pp. 231-45, at p. 235.

92. It should be noted that there are those within the ICTY and ICTR who consider the *ad litem* system flawed. In particular, they cite the discriminatory position faced by *ad litem* judges: they are denied pension rights, despite a recommendation by the Secretary-General, and are barred from voting on amendments to the rules and from voting in elections. See also D. Mundis, "The election of *ad litem* judges and other recent developments at the international criminal tribunals"*, Leiden Journal of International Law,* Vol. 14, no. 4 (2001), pp. 851-66, at p. 854.

93. See the motion for a resolution on the subject "Ad hoc judges: a problem for the legitimacy of the European Court of Human Rights" (Doc. 11976), which is at the origin of the present report.

94. By the Ukrainian authorities; see, as quoted above, Resolution 1674 (2009).

selecting an ad hoc judge (or candidates for ad hoc judges)? As explained above, it is unclear how the President of the Court is expected to fulfil this responsibility, particularly without the effective implementation of objective and transparent criteria based on proper professional qualifications. Ad hoc judges may therefore not have the requisite skills and abilities to fulfil their tasks, and even when they do, the lack of transparency surrounding the procedure may give rise to doubts.

41. The second unresolved issue is the question of how the candidates for ad hoc judge are nominated by the state. The Assembly – and indeed, member states themselves, through the work of the Committee of Experts for the Improvement of Procedures for the Protection of Human Rights (DH-PR) and the Steering Committee for Human Rights (CDDH) (perhaps resulting in a Committee of Ministers recommendation?) – ought to insist on transparent appointment procedures, inspired by requirements for states with respect to candidates put forward for election, as already stressed by the Assembly in its Recommendation 1429 (1999).[95] These procedures should be equally applicable to candidatures of both regular and ad hoc judges. In particular, states parties should be required to use a model curriculum vitae, and, like those of elected judges, these should all be available to the public on the Court's website. There is no reason why ad hoc judges should be assessed any differently from elected judges, given that they enjoy the same privileges and immunities, as decided by the Committee of Ministers.[96]

42. The third unresolved issue is the matter of the delays posed by the appointment of ad hoc judges, which can range from a few months to one or two years. This is first attributable to the fact that a state may not have provided a list of ad hoc judges and may be caught by surprise by the withdrawal, sickness or resignation or even the death of an elected judge. Alternatively, delays could be imposed by one of the parties rejecting one or more judges, as occurred several times in the case of *Cyprus v. Turkey*.[97] Finally, once the ad hoc judge has been appointed, it may take considerable time before he or she is free to attend court and/or before he or she can read all the background documents relating to the case.[98]

43. To resolve these issues, a number of measures can be taken. First, to the extent possible, states should be encouraged to appoint ad hoc judges from the Court's existing bench.[99] The advantages of this solution are threefold. First, the sitting judge has been elected by the Assembly, not appointed by a state, which means he or she is vested with the complete democratic legitimacy of a regular judge. Second, his or her qualifications have been assessed by the Assembly in a fair and relatively transparent manner. Third, he or she is fully operational at once, which ensures the expeditious examination of cases.[100] There are two alternatives to the appointment of elected judges: the appointment of candidates who have been interviewed by the Sub-Committee on the Election of Judges and who were considered well qualified though not elected;[101] and the appointment of former judges. The first of these options is not necessarily a good idea, in my view, unless it can be shown that they had been short-listed by means of a rigorous, fair and transparent national selection procedure. However, given the absence of an age limit for ad hoc judges, the advantage of appointing a former judge is clear: they are known to possess the requisite qualifications and experience, have already been elected by the Assembly and can be operational at once because of their familiarity with the Court system.

44. Second, the circumstances giving rise to the appointment of ad hoc judges should be reconsidered and perhaps readjusted. For instance, it is arguable whether an ad hoc judge adds any value in proceedings where established case law exists or in repetitive cases, given the likelihood of the outcome. This begs the question of whether their appointment justifies compromising the appearance of independence of the Court. Whilst the argument that ad hoc judges are needed to explain matters of national legal practice is often raised, this knowledge may be found within the Court itself;[102] likewise, the lawyers involved in litigating a case before the Court can provide an added guarantee in this respect. Moreover, Committee proceedings dealing

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95. Recommendation 1429 (1999) on national procedures for nominating candidates for election to the European Court of Human Rights (elements of which have, over the years, been refined and updated). See also footnote 64 of this information report in this connection, as concerns ongoing work on this subject at the intergovernmental level.
96. Resolution CM/Res (2009) 5 on the status and conditions of service of judges of the European Court of Human Rights and of the Commissioner for Human Rights.
97. [2001] ECHR 25781/94, paragraphs 7-8. See also *Varnava and others v. Turkey*, Application No. 16064/90, judgment of 18 September 2009 (Grand Chamber), and *Demopoulos and others v. Turkey*, Application No. 46113/99, inadmissibility decision of 22 April 2008 (Grand Chamber).
98. As occurred in the Yukos case; see paragraph 10 of this document.
99. Vajic, "Some remarks linked to the independence of international judges", p. 190. This has the added advantage, in my view, of judges not necessarily being of the nationality of the nominating state.
100. See also Doc. 11767, Nomination of candidates and election of judges to the European Court of Human Rights.
101. Ibid., paragraph 35. Introductory memorandum on national selection procedures for candidates for the European Court of Human Rights (rapporteur: Mr Christopher Chope), document AS/Jur (2007) 23 rev, paragraph 17.

with the merits of a case under the Convention do not cater for an ad hoc judge,[103] nor is the right to appoint an ad hoc judge provided for in the single-judge formation.[104] In any case, it should be noted that Protocol No. 14 reserves the discretionary power of the committee of three judges to request the national judge to be present in such cases.[105]

45. Given the current backlog of the Court, the states parties should be encouraged to choose one of the regular judges as ad hoc judge in repetitive cases, cases of straightforward applications of existing case law or friendly settlements.[106] The staff members of the Registry of the Court should be able to provide specialised knowledge of national practice and case law or help to resolve any language issues. However, regardless of whether the states parties choose to place elected judges on their lists of ad hoc judges, those who have not yet done so should be strongly encouraged to submit a list to the Court to prevent delays when the need to appoint an ad hoc judge becomes apparent.[107]

46. Finally, as already alluded to in paragraph 40 above, the establishment of appropriate national selection procedures merits further reflection. Recommendations for the national selection of candidates for regular judges to the Court should, *mutatis mutandis*, be applied for ad hoc judges, to ensure that the authority and credibility of the European Court of Human Rights are not put at risk by ad hoc and politicised processes in the nomination of candidates.[108]

47. At this stage, it may be premature to make specific recommendations on how the system could be improved. The Court itself can probably make adjustments in its Rules, when appropriate. Protocol No. 14 and the amended Rules of Court have been in force for a relatively short period of time, and few ad hoc judges have been appointed under the new procedure. It may also be useful to reflect upon the idea of involving in the nomination procedure the newly created advisory panel of experts that provides advice to states as to whether candidates for election by the Assembly meet the criteria stipulated in Article 21, paragraph 1, of the Convention (see paragraph 25 above). What is certain is that further consideration of these issues by the Assembly is called for, in order to evaluate how the new system is functioning.

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102. The appointment of competent lawyers from all the member states of the Council of Europe to the Registry of the Court should be sufficient in providing all the necessary information to the Court on the various domestic systems.

103. New Article 28, paragraph 3: "If the judge elected in respect of the High Contracting Party concerned is not a member of the committee, the committee may at any stage of the proceedings invite that judge to take the place of one of the members of the committee, having regard to all relevant factors, including whether that Party has contested the application of the procedure under paragraph 1.*b*." See also, in this connection, clarification provided in a letter dated 6 November 2009, by the Court's Registrar to Chair of the Ministers' Deputies, in the context of an exchange of correspondence that facilitated the Russian Federation's ratification of Protocol No. 14 to the Convention; see Ministers' Deputies 1073rd meeting, 9 and 14 December 2009, item 13.1: Letter from the Representative of the Russian Federation concerning Protocol No. 14, https://wcd.coe.int/wcd/ViewDoc.jsp?id=1562417.

104. New Article 26, paragraph 3: "When sitting as a single judge, a judge shall not examine any application against the High Contracting Party in respect of which that judge has been elected."

105. Article 28.

106. Kuijer, "Voting Behaviour and National Bias", *in the European Court of Human Rights and the International Court of Justice*, Leiden Journal of International Law, p. 54.

107. States parties are *required* to do so: see paragraph 64 of the Explanatory Report to Protocol No. 14 to the Convention (extract in Appendix 1). See also Appendix 3, which indicates that 12 out of 47 states parties have not yet submitted a list of ad hoc judges.

108. See also Doc. 11767, Nomination of candidates and election of judges to the European Court of Human Rights, paragraph 5.

Appendix 1

Relevant extract from the European Convention on Human Rights (as amended by Protocol No. 14)[109]

"Article 26 – Single-judge formation, committees, Chambers and Grand Chamber

1. To consider cases brought before it, the Court shall sit in a single-judge formation, in committees of three judges, in Chambers of seven judges and in a Grand Chamber of seventeen judges. The Court's Chambers shall set up committees for a fixed period of time.

2. At the request of the plenary Court, the Committee of Ministers may, by a unanimous decision and for a fixed period, reduce to five the number of judges of the Chambers.

3. When sitting as a single judge, a judge shall not examine any application against the High Contracting Party in respect of which that judge has been elected.

4. There shall sit as an ex officio member of the Chamber and the Grand Chamber the judge elected in respect of the High Contracting Party concerned. If there is none or if that judge is unable to sit, a person chosen by the President of the Court from a list submitted in advance by that Party shall sit in the capacity of judge.

5. The Grand Chamber shall also include the President of the Court, the Vice-Presidents, the Presidents of the Chambers and other judges chosen in accordance with the rules of the Court. When a case is referred to the Grand Chamber under Article 43, no judge from the Chamber which rendered the judgment shall sit in the Grand Chamber, with the exception of the President of the Chamber and the judge who sat in respect of the High Contracting Party concerned."

Relevant extract from the Explanatory Report to Protocol No. 14 to the Convention[110]

"Article 6 of the amending Protocol

Article 26 – Single-judge formation, committees, Chambers and Grand Chamber

…

64. Finally, paragraph 2 of former Article 27 has been amended to make provision for a new system of appointment of ad hoc judges. Under the new rule, contained in paragraph 4 of the new Article 26, each High Contracting Party is required to draw up a reserve list of ad hoc judges from which the President of the Court shall choose someone when the need arises to appoint an ad hoc judge. This new system is a response to criticism of the old system, which allowed a High Contracting Party to choose an ad hoc judge after the beginning of proceedings. Concerns about this had also been expressed by the Parliamentary Assembly. It is understood that the list of potential ad hoc judges may include names of judges elected in respect of other High Contracting Parties. More detailed rules on the implementation of this new system may be included in the Rules of Court."

109. Protocol No. 14 to the European Convention on Human Rights.
110. For the complete text, see Explanatory Report to Protocol No. 14 to the Convention.

Appendix 2

Relevant extract from the Rules of Court[111]

Rule 29

(Ad hoc judges)

1. (a) If the judge elected in respect of a Contracting Party concerned is unable to sit in the Chamber, withdraws, or is exempted, or if there is none, and unless that Contracting Party has opted to appoint an ad hoc judge in accordance with the provisions of paragraph 1 (b) of this Rule, the President of the Chamber shall invite it to indicate within thirty days the name of the person it wishes to appoint from among the other elected judges.

(b) Where a Contracting Party has opted to appoint an ad hoc judge, the President of the Chamber shall choose the judge from a list submitted in advance by the Contracting Party containing the names of three to five persons whom the Contracting Party has designated as eligible to serve as ad hoc judges for a renewable period of two years and as satisfying the conditions set out in paragraph 1 (d) of this Rule. The list shall include both sexes and shall be accompanied by biographical details of the persons whose names appear on the list. The persons whose names appear on the list may not represent a party or a third party in any capacity in proceedings before the Court. For the purposes of the application of Article 26 § 4 of the Convention and the first sentence above, the names of the other elected judges shall, ipso jure, be considered to be included on the list.

(c) The procedure set out in paragraph 1 (a) and (b) of this Rule shall apply if the person so appointed is unable to sit or withdraws.

(d) An ad hoc judge shall possess the qualifications required by Article 21 § 1 of the Convention, must not be unable to sit in the case on any of the grounds referred to in Rule 28,[112] and must be in a position to meet the demands of availability and attendance provided for in paragraph 5 of this Rule. For the duration of their appointment, an ad hoc judge shall not represent any party or third party in any capacity in proceedings before the Court.

2. The Contracting Party concerned shall be presumed to have waived its right of appointment

(a) if it does not reply within the thirty-day period set out in paragraph 1 (a) or by the end of any extension of that time granted by the President of the Chamber;

(b) if it opts to appoint an ad hoc judge but, at the time of notice given of the application to the respondent Government under Rule 54 § 2,[113] the Party had not supplied the Registrar with a list as described in paragraph 1 (b) of this Rule or where the Chamber finds that less than three of the persons indicated in the list satisfy the conditions laid down in paragraph 1 (d) of this Rule.

3. The President of the Chamber may decide not to invite the Contracting Party concerned to make an appointment under paragraph 1 (a) of this Rule until notice of the application is given to it under Rule 54 § 2. In that event, pending any appointment by it, the Contracting Party concerned shall be deemed to have appointed the first substitute judge to sit in place of the elected judge.

4. An ad hoc judge shall, at the beginning of the first sitting held to consider the case after the judge has been appointed, take the oath or make the solemn declaration provided for in Rule 3. This act shall be recorded in minutes.

5. Ad hoc judges are required to make themselves available to the Court and, subject to Rule 26 § 2, to attend the meetings of the Chamber.

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111. Rules of Court.

112. Rule 28 lists the circumstances in which a judge may not sit, including where personal interests are involved, or he or she has previously acted in a case, has engaged in any activity or has expressed any opinions that would call into question his or her independence or impartiality, or for any other reason calling into question his or her independence or impartiality.

113. Rule 54, paragraph 2, refers to the request by the Court or the president for written observations on the application from the respondent government.

Appendix 3

List of ad hoc judges[114]

Albania

Ján ŠIKUTA

Xhezair ZAGANJORI

Altina XHOXHAJ

Andorra

Isabelle BERRO-LEFEVRE

Kristina PARDALOS

Armenia

No list submitted

Austria

Gerhard BAUMGARTNER

Barbara LEITL-STAUDINGER

Katharina PABEL

Ewald WIEDERIN

Mia WITTMANN-TIWALD

Azerbaijan

Latif HÜSEYNOV

Rovshan ISMAYILOV

Jeyhun GARAJAYEV

Belgium

André ALEN

Paul LEMMENS

Pierre VANDERNOOT

Eva BREMS

Bosnia and Herzegovina

Genc TRNAVCI

Faris VEHABOVIC

Dragomir VUKOJE

Bulgaria

Pavlina PANOVA

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114. List of ad hoc judges – May 2011 (obtained from the Court's website).

Ekaterina SALKOVA

Maiia ROUSSEVA

Croatia

No list submitted

Cyprus

Effie PAPADOPOULOU

George EROTOCRITOU

Stelios NATHANAEL

Costas PAMBALLIS

Costas CLERIDES

Czech Republic

Mahulena HOFMANNOVÁ

Zdeněk KÜHN

Pavel SIMON

Pavel ŠTURMA

Denmark

No list submitted

Estonia

Pavel GONTSAROV

Oliver KASK

Julia LAFFRANQUE (born VAHING)

Priit PIKAMÄE

Finland

Gustav BYGGLIN

Petri JÄÄSKELÄINEN

Anne E. NIEMI

Johanna NIEMI

Mikko PUUMALAINEN

France

Jean-Marie DELARUE

Régis de GOUTTES

Gilbert GUILLAUME

Cécile PETIT

Georgia

Konstantine VARDZELASHVILI

Irakli ADEISHVILI

Lali PAPIASHVILI

Germany

Rhona FETZER

Angela RAPP

Christiane SCHMALTZ

Bertram SCHMITT

Andreas ZIMMERMANN

Greece

Michaïl VRONTAKIS

Paraskevi NASKOU-PERRAKI

Stelios PERRAKIS

Hungary

No list submitted

Iceland

Hjördis HAKONARDOTTIR

Ragnhildur HELGADOTTIR

Skuli MAGNUSSON

Ireland

Mary Finlay GEOGHEGAN

Peter KELLY

Mary LAFFOY

John MAC MENAMIN

Italy

Ida CARACCIOLO

Andreana ESPOSITO

Carmela PANELLA

Claudio ZANGHI

Nicola LETTIERI

Latvia

No list submitted

Liechtenstein

No list submitted

Lithuania

No list submitted

Luxembourg

Françoise TULKENS

Giorgio MALINVERNI

Egbert MYJER

Malta

Joseph FILETTI

Geoffrey VALENZIA

David SCICLUNA

Abigail LOFARO

Anna FELICE

Moldova

Igor DOLEA

Xenofon ULIANOVSCHI

Tatiana RĂDUCANU

Monaco

No list submitted

Montenegro

No list submitted

Netherlands

Evert ALKEMA

Pieter VAN DIJK

Wilhelmina THOMASSEN

Norway

Inge Lorange BACKER

Anne GRØSTAD

Dag Bugge NORDÉN

Poland

Katarzyna GONERA

Elzbieta KARSKA

Andrzej SWIATKOWSKI

Roman WIERUSZEWSKI

Pawel WILINSKI

Portugal

Alberto Augusto Andrade de Oliveira

Fernanda Martins Xavier e Nunes

Carlos Manuel Rodrigues de Almeida

Maria de Fatima Mata-Mouros de Aragao Soares Homem

Romania

Valerian CIOCLEI

Mihai POALELUNGI

Josep CASADEVALL

Russia

Andrei Yurievich BUSHEV

Olga Alexandrovna FEDOROVA

Alexei Alexandrovich KOSTIN

San Marino

Guido CASALI

Josep CASADEVALL

Nina VAJIC

Serbia

No list submitted

Slovak Republic

No list submitted

Slovenia

Arne Marjan MAVČIČ

Miodrag ĐORĐEVIĆ

Boštjan ZALAR

Spain

José Alejandro SAIZ ARNAIZ

Paz ANDRÉS SAENZ DE SANTAMARIA

Luis AGUIAR DE LUQUE

Sweden

Iain CAMERON

Johan HIRSCHFELDT

Anne RAMBERG

Krister THELIN

Switzerland

Giusep NAY

Elisabeth STEINER

Daniel THÜRER

Marc E. VILLIGER

“The former Yugoslav Republic of Macedonia”

No list submitted

Turkey

Turgut TARHANLI

Gönül ERÖNEN

Levent KÖKER

Mehmet TURHAN

Serap YAZICI

Ukraine

Mykhaylo BUROMENSKIY

Myroslava ANTONOVYCH

Sergiy Vladlenovych GONCHARENKO

United Kingdom

Stephen SEDLEY

Mary Howarth ARDEN

Robert John REED

Frederick Paul GIRVAN

John Anthony DYSON