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Reinforcement of the independence of the European Court of Human Rights

Report[1]
Committee on Legal Affairs and Human Rights
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Summary

The Committee on Legal Affairs and Human Rights has studied additional measures that can be taken in order to reinforce the independence of the European Court of Human Rights. Such measures include the need for member States which have not yet done so to ratify the Sixth Protocol to the General Agreement on Privileges and Immunities of the Council of Europe, to review arrangements relating to judges' social security and retirement pension schemes, as well as, where appropriate, for member States to ensure appropriate employment for former judges of the Court upon the expiration of their terms of office. The committee stresses that the independence and authority of the Court is contingent on the political will and commitment of all member States to ensure that the Court is provided with the financial means to effectively implement its human rights mandate.

1. Reference to committee: Doc. 12940, Reference 3880 of 29 June 2012.

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A. Draft resolution[2]

1. The authority and effectiveness of the European Court of Human Rights ("the Court") is contingent on the genuine independence and impartiality of its judges, backed up by a professional non-partisan Registry.

2. Notwithstanding the various measures taken over the years to strengthen the independence of the Court, there still is room for improvement.

3. In particular, the nine-year non-renewable term of office, introduced by Protocol No.14 to the European Convention on Human Rights (ETS No. 5 and CETS No. 194) may not have completely eliminated the leverage State authorities might have on judges during their term of office, especially with respect to judges who after leaving the Court have not yet reached retirement age. Some of them have experienced difficulties in finding appropriate employment at the end of their term of office.

4. The Parliamentary Assembly has studied additional measures that can be taken in order to reinforce the Court's independence, including:

4.1. for member States who have not yet done so, to ratify the Sixth Protocol to the General Agreement on Privileges and Immunities of the Council of Europe (ETS No. 162);

4.2. in so far as social security and retirement pensions of judges are concerned, for present arrangements to be reviewed. More flexibility should be offered with regard to the choice of a pension scheme (international or national, or both), as well as possibilities to withdraw from the current obligatory scheme on the basis of clear transitional rules establishing transfer and/or return of accumulated funds;

4.3. in so far as the post-retirement status of judges is concerned, to ensure that improvements to the present situation are made at the national level. Appropriate measures should be considered by member States to assist former Court judges to find employment upon the expiration of their term of office. These measures may differ depending on the position that the person had occupied before election as a judge to the Court;

4.4. the organisation of the work of the Registry of the Court may merit re-assessment, in particular with regard to the policy of non-renewable contracts for assistant lawyers.

5. Finally, the Assembly stresses that the independence and authority of the Court is contingent on the political will and commitment of all member States of the Council of Europe, including States' legislative organs, to ensure that the Court is provided with the financial means to effectively implement its human rights mandate.

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2. Draft resolution adopted unanimously by the committee on 26 May 2014.

B. Draft recommendation[3]

1. The Parliamentary Assembly refers to its Resolution … (2014) on the reinforcement of the independence of the European Court of Human Rights and invites the Committee of Ministers to:

1.1. encourage member States who have not yet done so to ratify the Sixth Protocol to the General Agreement on Privileges and Immunities of the Council of Europe (ETS No. 162);

1.2. in so far as social security and retirement pensions of judges are concerned, review present arrangements with a view to offering judges more flexibility;

1.3. in so far as the post-retirement status of judges is concerned, actively pursue the recent initiative it has taken in this respect and ensure that follow-up is provided by States, as appropriate, at the national level.

2. The Assembly stresses that the independence and authority of the Court is contingent on the political will and commitment of all member States, in particular through the Organisation's executive organ, to ensure that the Court is provided with financial means to effectively implement its human rights mandate.

3. Draft recommendation adopted unanimously by the committee on 26 May 2014.

C. Explanatory memorandum by Mr Cilevičs, rapporteur

1. Introductory remarks

1. The motion for a recommendation entitled “Need to reinforce the independence of the European Court of Human Rights” (Doc. 12940) was referred to the Committee on Legal Affairs and Human Rights for report by the Parliamentary Assembly on 30 November 2012. At its meeting on 11 December 2012 the committee designated me as rapporteur.

2. In order for the committee to be better informed of the present situation, and to see how best the Court’s independence could be reinforced, I organised – with the agreement of the committee – a hearing with two experts at the Committee’s meeting in Paris on 6 November 2013. The two experts were Professor Stefan Trechsel, the former President of the European Commission of Human Rights and *ad litem* judge on the International Criminal Tribunal for the former Yugoslavia (ICTY), and Professor Françoise Tulkens, former Vice-President of the European Court of Human Rights and presently member of the United Nations Human Rights Advisory Panel in Kosovo.[4] The Court’s Registrar, Mr Erik Fribergh, also took part in the said hearing. My introductory memorandum, entitled “Need to reinforce the independence of the European Court of Human Rights”, transmitted to the experts prior to the hearing, served as a background document.[5]

3. In addition, a meeting with the President of the Court and members of the Court’s Status Committee was held during the Assembly’s January 2014 part-session at which an open exchange of views took place on a number of topical issues touched upon in the draft report.

4. On 7 April 2014, upon my request, the committee agreed to change the title of this report to: “Reinforcement of the independence of the European Court of Human Rights”.

2. The concept of independence and impartiality

5. 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, “the Convention”) which stipulates that “everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law”. International courts are no exception to this and their independence must be guaranteed to permit them to fulfil their mission effectively. It has been observed that “[i]ndependent tribunals act as trustees to enhance the credibility of international commitments in specific multilateral contexts”.[6] Seen from the wider perspective, international courts adjudicating human rights claims advance States’ long-term interests by strengthening and developing “a healthy, dynamic democratic society”.[7] “Outside of the context of national sovereignty, separation and balance of powers, hierarchical legal system crowned by the Constitution and mandatory jurisdiction”,[8] international courts derive their authority, and the requirement for compliance by the parties with their decisions, primarily from a perception that they are independent.

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4. Any reference to Kosovo in this text, whether to the territory, institutions or population, shall be understood to be in full compliance with the United Nations Security Council Resolution 1244 and without prejudice to the status of Kosovo.

5. Document AS/Jur (2013) 34. A summary of the said hearing was subsequently also issued in AS/Jur/Inf (2014) 15. Both documents are accessible on the committee’s website: Committee documents and declarations (public): www.assembly.coe.int/Main.asp?link=/CommitteeDocs/ComDocMenuJurNewEN.htm.

6. L. R. Helfer and A.-M. Slaughter, “Why States Create International Tribunals: A Response to Professors Posner and Yoo”, Vol. 93, *California Law Review* (2005) 1, p. 6. Cited in Kanstantsin Dzehtsiarou and Donald K. Coffey, “Legitimacy and Independence of International Tribunals; an Analysis of the European Court of Human Rights” (to be published in the *Hastings International Law Journal*, draft accessed on 29 April 2014, on file with the Secretariat).

7. Paul Mahoney, “Parting Thoughts of an Outgoing Registrar of the European Court of Human Rights”, Vol. 26, *Human Rights Law Journal* (2005), pp. 345-348, at p. 345.

8. C.-L. Popescu, “La Cour européenne des droits de l’homme” in *Indépendance et impartialité des juges internationaux* (eds. Hélène Ruiz Fabri and Jean-Marc Sorel), 2010, pp. 29-136, at p. 43. As concerns the Strasbourg Court, its authority is reinforced by the Articles 19 and 32 of the Convention.

6. The European Court of Human Rights ("the Court") has itself assessed the independence of domestic courts and has elaborated a set of criteria for independence, which could equally be applied to the Court itself. For example, in *Langborger v. Sweden* the Court stated that:

> *"… in order to establish whether a body can be considered 'independent', regard must be had, inter alia, to the manner of appointment of its members and their term of office, to the existence of guarantees against outside pressure and to the question whether the body presents an appearance of independence".*[9]

7. Over the years, the Court has faced some criticism regarding the independence and impartiality of its judges and registry officials.[10] Such criticism needs to be addressed, for the sake of clarity and to avoid misunderstandings. I have therefore decided, in this report, to provide an overview of what I perceive to be the most pertinent issues concerning this and related subjects in order to determine how – if need be – the Court's independence can be further consolidated.

3. The Court and its judges: an overview

3.1. The Court

8. The Court is made up of 47 judges and a registry of over 640 staff members, including some 270 lawyers (see the Organisation Chart on the Court's website[11]). Article 20 of the Convention provides that "[t]he Court shall consist of a number of judges equal to that of the Contracting Parties". Pursuant to the Convention, judges decide cases in the following formations: single judge, committees of three judges, chambers of seven judges and the Grand Chamber of seventeen judges. All judgments on the merits are taken collegially. Dissenting and/or concurring opinions are permitted by Article 45.2 of the Convention. The Court also adopts certain decisions, usually concerning the Court's self-governance, in plenary and can provide, in specific cases, advisory opinions upon a request of the Committee of Ministers. For practical reasons, the Court is divided into five sections, each composed of a President, Vice-President and seven to eight other judges.[12] Judges belong to a section for a period of three years. Each section has several chamber formations composed of judges from that particular section. Individual cases can be heard by these chambers. A President of a section, elected by the plenary Court, presides over meetings of the section (and chamber) of which he or she is a member, except in special circumstances, such as in the event of incapacitation or a conflict of interest.[13] The Court also has a Bureau composed of the President of the Court, its Vice-Presidents and the Section Presidents, which assists the President in managing the Court.[14]

3.2. Criteria for office

9. The criteria for the office of judge are determined by Article 21 of the Convention[15] (additional criteria were also introduced by the Parliamentary Assembly, principally in 2004[16]), whereas the election of judges is undertaken by the Assembly, by virtue of Article 22 of the Convention. Upon their election, all judges are subject to the "Resolution on Judicial Ethics", adopted by the Court in 2008.[17] The quality of a judge depends on the quality of the candidates nominated by States (hence the need for fair, rigorous and open national selection procedures), which has been the subject of several important texts adopted by the Assembly and

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9. *Langborger v. Sweden*, Application No. 11179/84, judgment of 22 June 1989, paragraph 32.
10. For a recent example, see Michael O'Boyle, "Unjustified attack on ECHR", in *The Times of Malta*, 8 September 2013.
11. http://echr.coe.int/Documents/Organisation_Chart_ENG.pdf.
12. For more detailed information on the composition of the sections, see the Court's website: www.echr.coe.int/Pages/home.aspx?p=court/judges&c=#newComponent_1346152041442_pointer.
13. See Chapters II and V of Title I of the Rules of Court, which deal respectively with the Presidency and composition of the Court.
14. Ibid., Rule 9.A. For more detailed information on the structure of the Court in general, see the Rules of Court.
15. Article 21, entitled "Criteria for office" specifies:
"1. The judges shall be of high moral character and must either possess the qualifications required for appointment to high judicial office or be jurisconsults of recognised competence.
2. The judges shall sit on the Court in their individual capacity.
3. During their term of office the judges shall not engage in any activity which is incompatible with their independence, impartiality or with the demands of a full-time office; all questions arising from the application of this paragraph shall be decided by the Court."
16. See Recommendation 1649 (2004) "Candidates for the European Court of Human Rights".

more recently the Committee of Ministers (see, specifically, Assembly Recommendation 1649 (2004) on candidates for the European Court of Human Rights and Resolution 1646 (2009) on the nomination of candidates and the election of judges to the European Court of Human Rights and the 2012 Guidelines of the Committee of Ministers).[18]

3.3. The Election Process

10. The election of judges is a multi-step process.[19] Firstly, a State Party is informed of the need to submit three candidates for the position and to utilise its own national selection procedures (in accordance with relevant guidelines) in nominating its candidates. The curricula vitae of the candidates are examined by an advisory panel of experts, which advises States Parties, before they transmit the lists of candidates to the Assembly, whether all candidates meet the criteria stipulated in Article 21.[20] The State Party then formally, as required by Article 22 of the Convention, provides the list of nominees – *via* the Secretary General of the Parliamentary Assembly – to the Assembly, whose Sub-Committee on the Election of Judges to the European Court of Human Rights is mandated to consider the lists. The sub-committee examines the curricula vitae of the candidates and interviews them, taking account of both their qualifications as individuals and the need for a harmonious composition of the Court with respect to professional backgrounds and gender balance. The sub-committee reviews the proposed list of candidates and recommends, in principle, particular candidates to the Assembly. If the sub-committee proposes the rejection of the list, because the Assembly is provided with an insufficient choice among qualified candidates or if the list does not include candidates of both sexes, and the Assembly accepts this proposal, the State Party is invited to submit a new list of candidates.[21] Finally, a judge is elected from the candidates on the list by the plenary Assembly. The election of judges has been dealt with in a number of Assembly resolutions and recommendations,[22] with the result that the process has gradually become more transparent and effective. Therefore, in this report I will not propose any changes in the election process and will instead concentrate on other aspects of strengthening the Court's independence.

3.4. Ad hoc judges

11. An ad hoc judge may be appointed when the elected judge is unable to sit in a Chamber, withdraws or is exempted, or if there is none.[23] This may occur, for instance, where a conflict of interest prevents the sitting judge from ruling on a case brought before the Court (for example, when a judge had already dealt with a given case in his/her previous capacity as a national judge). The need to appoint an *ad hoc* judge may also arise when a sitting judge resigns or retires.

12. The procedure for appointing an ad hoc judge which was in place before the adoption of Protocol No. 14 to the European Convention on Human Rights (CETS No. 194) allowed the State Party substantial discretion in choosing ad hoc judges for a given case after the proceedings had begun. Following the entry into force of Protocol No. 14, Article 26.4 of the Convention now 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". This list contains the names of three to five persons eligible to serve as ad hoc judges for a renewable period of two years.[24] The list ought to include persons of both sexes and be accompanied by biographical details of the nominees.[25] The amended Rule 29 of the Rules of Court, which came into force on 1 July 2013, has

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17. www.echr.coe.int/Documents/Resolution_Judicial_Ethics_ENG.pdf. The resolution includes the requirement that "judges shall be independent of all external authority or influence" (Article I). See also Rule 3 "Oath or solemn declaration" of the Rules of Court, as well as Rule 28, "Inability to sit, withdraw or exemptions". The dismissal of judges is foreseen in Article 23.4 of the Convention.

18. Guidelines of the Committee of Ministers on the selection of candidates for the post of judge at the European Court of Human Rights (adopted by the Committee of Ministers on 28 March 2012 at the 1138th meeting of the Ministers' Deputies).

19. For further details on the election process see information document, "Procedure for electing judges to the European Court of Human Rights" AS/Jur/Inf (2014) 03 rev 1.

20. This panel was established by Committee of Ministers 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.

21. See Resolution 1366 (2004), as modified by Resolutions 1426 (2005), 1627 (2008) and 1841 (2011) "Candidates for the European Court of Human Rights", as well as the Strasbourg Court's Advisory Opinion on certain legal questions concerning the lists of candidates submitted with a view to the election of judges to the European Court of Human Rights, 12 February 2008, paragraph 44.

22. See texts referred to in document AS/Jur/Inf (2014) 03 rev.1, op. cit.

23. Rule 29.1.*a* of the Rules of Court.

24. Ibid.

implemented further changes: if the President of the Court finds that less than three persons indicated in the submitted list of judges fulfil the requisite criteria or if no list has been submitted at the time of notice being given of the application, he or she now appoints another elected judge to sit as an ad hoc judge.

13. A comprehensive study of the role and methods of designation of ad hoc judges in the Court and in other international jurisdictions was undertaken by the Committee on Legal Affairs and Human Rights back in 2011. Further details concerning the challenges posed by the use of ad hoc judges, including those relating to their legitimacy and independence, as well as possible solutions, are discussed in that paper.[26]

4. Judicial Independence of the Court

4.1. Tenure

14. Pursuant to Article 23 of the Convention, judges are elected for a non-renewable term of nine years with a compulsory retirement age of 70. This provision was adopted by Protocol No. 14 which came into force on 1 June 2010. Previously, according to Protocol No. 11 (ETS No. 155), judges had been elected for a period of six years with a possibility of re-election. This previous practice opened the door to criticism by some regarding the possible incentives that existed for judges to decide cases in a manner that would not jeopardise their re-election prospects.

15. Protocol No. 15 to the Convention,[27] when it enters into force, will replace the age limit of 70 with a new requirement that candidates be no older than the age of 65 when recommended to the Assembly, thereby creating a *de facto* age limit of 74. This change provides for the possibility of electing more experienced judges and judges who are closer to retirement in their home countries and therefore – so it has been suggested – less likely to feel the need, while on the Court, to prepare the ground for their future employment once they step down as judges in Strasbourg. Needless to add, however, the election of older judges cannot in itself be considered as a guarantee of their independence.

4.2. Privileges and Immunities

16. Judges are provided with a high degree of legal immunity, strengthening their independence. Article 51 of the Convention states that “judges shall be entitled, during the exercise of their functions, to the privileges and immunities provided for in Article 40 of the 1949 Statute of the Council of Europe and in agreements made thereunder”. The provisions covered by Article 40 of the Statute have been set out in the Sixth Protocol to the General Agreement on Privileges and Immunities of the Council of Europe (1996) (ETS No. 162).[28] This protocol applies to both permanent and *ad hoc* judges. See also, in this connection, Committee of Ministers 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 of Human Rights.[29]

17. Judges, their spouses and their minor children are entitled to the “privileges, immunities, exemptions and facilities accorded to diplomatic envoys in accordance with international law,”[30] as is also reflected in Articles 29 to 36 of the Vienna Convention on Diplomatic Relations.[31] These are equivalent to the privileges and immunities enjoyed by the Secretary General of the Council of Europe. Given the critical role played by judges, and the necessity of ensuring their independence, it was considered essential that judges be provided with greater privileges and immunities than ordinary officials of the Organisation, necessitating the adoption of this

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25. Ibid.
26. See “Ad hoc judges at the European Court of Human Rights: an overview” (Information report, rapporteur: Ms Marie-Louise Bemelmans-Videc), 19 October 2011, Doc. 12827.
27. Protocol No. 15 amending the Convention for the Protection of Human Rights and Fundamental Freedoms (CETS No. 213).
28. http://conventions.coe.int/Treaty/en/Treaties/Html/162.htm.
29. Article 2 .
30. Sixth Protocol to the General Agreement on Privileges and Immunities of the Council of Europe (1996). This protocol has been ratified by all State Parties to the convention with the exception of Azerbaijan, Portugal and San Marino.
http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=162&CM=1&DF=&CL=ENG.
I have received encouraging signals from the heads of the Parliamentary Assembly delegations of all three States, in writing, that their respective authorities are giving, or will in the very near future provide, priority to the ratification of this Protocol (texts of letters, dated respectively 3 April, 5 February and 5 March 2014, are on file with the Secretariat).
31. Vienna Convention on Diplomatic Relations, 1961.

Protocol.[32] While in office and after retirement, judges are immune with respect to words spoken or acts performed while discharging their duties as a judge. Further, the only body competent to waive this immunity is the plenary Court. The Court is under a duty to do so when the immunity would impede the course of justice and where it can be waived without prejudice to its purpose.[33]

18. The privileges and immunities granted to judges include immunity from legal process (criminal, civil, administrative) in respect of words spoken or written or acts performed in their official capacity;[34] exemption from taxation on payments from the Council of Europe; privileges regarding exchange facilities and repatriation facilities equivalent to those of diplomats; the right to import and re-export their furniture and other personal effects without taxation; and immunity from immigration restrictions.[35] It appears that this final provision should function to ensure that family members of judges from outside the Schengen Area do not experience immigration difficulties when coming to live in Strasbourg.

19. The privileges and immunities granted to judges and their families are not unlimited. These privileges and immunities are functional in nature. They include – in some instances – certain elements of "representative" immunity granted to diplomats: for example, a number of States provide judges with diplomatic passports. Also, certain parallels can be drawn with respect to the representative functions of judges on other international tribunals and diplomats, for example in the International Court of Justice.[36] That said, judges obviously do not "represent" Contracting Parties as is the case of diplomats. Also, it is essential to stress that Court judges, unlike diplomats, enjoy immunity *vis-à-vis* all States, including that of their own nationality.

20. Suggestions have been made to extend judicial immunity by granting *ad vitam* diplomatic immunity and diplomatic passports to former judges and their families even after their retirement.[37] Although these proposals have been considered unnecessary by some experts, I am of the opinion that the idea behind them is quite rational. Given a limited term in office, judges and their families may appear susceptible to pressure (and even persecution) in their professional and private life upon completion of their term of office. Unfortunately, some recent examples prove that these concerns are not of a merely theoretical nature.

21. The issue of whether judges of the Court possess diplomatic passports is an essential aspect of practical implementation of their privileges and immunities. A full-fledged unified "Council of Europe passport" does not currently exist, therefore the issue is within the formal jurisdiction of the Contracting Parties. The problem is rather complex, as legislation and practice of member States with regard to entitlement of their citizens to possess diplomatic passports are quite diverse. Some Contracting Parties explicitly stipulate in their regulations the right for judges of the Court to obtain diplomatic passports, while others resort to *ad hoc* solutions or do not issue diplomatic passports to judges at all. I am of the opinion that the current practice is regrettable, as it creates certain inequality between the judges and ensures different level of protection to judges depending of the national regulations. This issue, though of a rather technical nature, might appear essential for ensuring independence of judges in practice, and considerations of subsidiarity are hardly applicable here. The absence of such a procedure cannot be used as an excuse but rather evidence for inadequate implementation of the Sixth Protocol. Therefore, it would be desirable to introduce a uniform practice in all Contracting Parties with a view to providing all judges and their families with national diplomatic passports.

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32. Andrew Drzemczewski, "The European Human Rights Convention: A New Court of Human Rights in Strasbourg as of November 1, 1998", in Vol.55, *Washington and Lee Law Review* (1998), pp. 697-736, at p. 706.
33. Sixth Protocol, Article 5 (see footnote 30 above). This Article also extends the privileges and immunities therein to the Registrar of the Court and to the Deputy Registrar when formally notified as Acting Registrar.
34. See, in this connection, the plenary Court's decision of 29 November 2011 with respect to the Romanian judge's immunity concerning a search carried out, in Romania, in the home of the judge and his wife in the context of a criminal investigation of the Anti-Corruption Directorate against the judge's wife: in Vol. 31, *Human Rights Law Journal* (2011), pp. 426-427.
35. Sixth Protocol (with explanatory notes), explanatory report, paragraph 7 (see footnote 32 above).
36. See, for example, Resolution 90 (I) of the General Assembly of the United Nations, 11 December 1946. Privileges and Immunities of Members of the International Court of Justice, the Registry, Assessors, and Agents and Counsels of the Parties and of Witnesses and Experts: www.un.org/documents/ga/res/1/ares1.htm.
37. See "Ensuring the viability of the Strasbourg Court: structural deficiencies in States Parties" (report of the Committee on Legal Affairs and Human Rights, rapporteur: Mr Serhii Kivalov), adopted on 7 January 2013, Doc. 13087, paragraph 58 (see also Assembly Resolution 1914 (2013), paragraph 7.6.1, relating to the same subject).

4.3. Social security and pension entitlement

22. The availability of social security, including medical expenses and pension entitlements, also appears to be linked to judicial independence, as it makes them independent of the need to provide for such matters themselves.

23. Until relatively recently, the Court was the sole major international court without a pension plan for judges.[38] However, this situation was changed by the Committee of Ministers' Resolution CM/Res(2009)5, which entitled judges to a pension scheme equivalent to that existing for staff members of the Council of Europe.[39] This approach has caused some criticism, as "the manner in which judges of the ECtHR enjoy their office, in particular the fact that they can be elected for only one nine-year term, makes an exact equivalence between judges and other employees of the Council of Europe questionable".[40] Participation in this scheme is now compulsory, but only for judges elected after the scheme took effect. The pension is calculated at the rate of 1.75 per cent of the salary for each year of employment.[41] That said, it would appear that the Court is the only international court with a "contributory" pension scheme.

24. Besides their salary and pension arrangements, judges of the Court are also entitled to other benefits. These include sick leave and the same maternity, paternity and adoption leave as is accorded to Council of Europe staff members, as well as medical and social insurance.[42] Nevertheless, some benefits envisaged for staff members, such as family allowances or home leave, are not available to judges.[43]

25. As a matter of fact, judges are provided with different levels and schemes of social protection depending on the time when that they took office. Although this distinction is temporary in nature and will disappear as a result of gradual replacement of judges, the current situation gives rise to some concerns. Moreover, the lack of choice offered to judges can hardly be considered an optimal solution, given substantially different situations before and probably after service in the Court. Allegedly, the obligatory scheme may not be considered the most suitable by all the judges. More flexibility with regard to the choice of pension scheme, as well as the possibility to withdraw from the current obligatory scheme, seems to be more appropriate for such a specific and pivotal position as a judge of the European Court of Human Rights. I am of the view that further adaptation of the social security schemes, in consultation with the judges themselves, would contribute to the strengthening of the independence of judges.

4.4. Post-retirement status

26. Following their retirement from the Court, many judges may seek future employment nationally or internationally, given the wealth of experience that they possess, both due to their time at the Court and in many cases experience acquired prior to being elected.

27. Former Court judges may be dependent on their home countries' authorities to obtain employment after leaving the Court. One study found that in 2006, four of the then 25 judges on the European Union Court of Justice had previously served on the European Court of Human Rights and that two former judges and one former ad hoc judge had been put forward as candidates for the International Criminal Court.[44] Additionally, examining the subsequent careers and positions of a sample of retired judges is of interest. Out of a sample of 30 recently retired judges (all from different States) for which information could be found, a number of patterns emerged: three judges were appointed to positions at international organisations such as the United Nations or at the European Union institutions; six were appointed or elected to other international courts or tribunals; ten were appointed or elected to be judges on national courts or to serve as ombudspersons; at least four worked for some time as academics; and eight served in their national administrations as, for example,

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38. It was considered that judges coming to Strasbourg at mid- or end of career had already started accumulating pension rights at home and could make up for the "lost" years by paying into their own or a private pension insurance scheme out of their emoluments, whose amount was considered as a (sizeable) "lump sum".

39. 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 of Human Rights, Article 10.

40. Kanstantsin Dzehtsiarou and Donald K. Coffey, p. 29 (see footnote 6 above).

41. See Council of Europe Staff Regulations, Appendix V: Pension Scheme Rules, Article 10.

42. See Resolution CM/Res(2009)5, op. cit.

43. But judges do have "settling-in" and "departure" allowances: see Article 4 of Committee of Ministers Resolution CM/Res(2009)5. They also benefit from a number of so-called "light schedule" periods when their presence in Strasbourg is not required.

44. E. Voeten, "The Politics of International Judicial Appointments: Evidence from the European Court of Human Rights" in Vol. 61 International Organisation (2007), pp. 669-701, at p. 696.

advisors; some of them even became MPs or ministers. That said, a number of former judges of the Court have experienced difficulties in finding employment.[45] In some extreme cases, these difficulties may, purportedly, be caused by an "insufficiently patriotic" position taken by judges on prominent cases against their own States. To put it plainly, an "overly principled stand" by a judge may entail an element of "revenge" by national authorities upon the judge's retirement. The risk of similar treatment for a serving judge may compromise judicial independence.

28. A number of possible options exist if reform is viewed as necessary. Firstly, it has been suggested that retiring judges, who have not yet reached the age of retirement in national law, should have "a similar position" secured in the Contracting State.[46] Cited as an example is the United Kingdom's Human Rights Act of 1998 (section 18.2) containing a provision stipulating that the holder of a judicial office may take up the post of judge at the European Court of Human Rights without having to relinquish definitively his or her office in the United Kingdom.[47] However, this provision does not allow the retired judge to automatically return to his or her post upon leaving the Court – Section 68.5 of the Access to Justice Act of 1999 leaves any transitional provisions in such circumstances at the discretion of the appropriate minister.[48] Nevertheless, I am of the view that this type of arrangement represents a good practice worth disseminating, and which can serve as a model for other Contracting Parties, at least with respect to those judges who had occupied judicial positions before election to the Court.

29. Although securing a position equivalent to that of judge at the Court is likely to be difficult in many circumstances (not least due to the practice of life tenure accorded to holders of judicial office in certain States), a possible option is for incoming judges to the Court to suspend their previous positions, so that they might be entitled to return to them after serving as a judge in Strasbourg (as would appear to be possible in Andorra, Belgium, Croatia, Denmark, Estonia, Finland, Germany, Greece, Italy, Monaco, Serbia and Spain, as well as in practice in Austria, the Czech Republic and Slovenia, despite lack of clear-cut provisions of law to this effect). Such an option could be viable in the case of judges who previously served in the national judiciary and in certain cases as academics, but would be likely to prove more difficult in other circumstances, such as for those judges previously engaged in private practice. Retired judges could also, possibly, be entitled to whatever increments and promotions they would have accrued. The relevant organisations or the States themselves should be encouraged to put into place such arrangements at least for judges, prosecutors and State employees, with the need, also, to explore possible solutions for those judges who had occupied different positions before election to the Court in Strasbourg.

30. It has also been suggested that a judge's term of office at the Court should be included in the national employment record,[49] both general and professional (for example judicial or diplomatic, if envisaged in national legal regulations). This measure is particularly relevant in the case of States where an elected judge is considered unemployed insofar as national labour law is concerned,[50] and would allow a former Strasbourg Court judge to opt for the national pension plan if he or she so wishes.

31. In this context, an important recent development merits specific mention. On the basis of a comparative analysis undertaken by the Court, the President of the Court brought the issue of the post-retirement status of judges to the attention of the Committee of Ministers. In a decision dated 19-20 March 2014, the Ministers' Deputies called on States Parties to the Convention "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". The Committee of Ministers intends to resume

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45. See Nina Vajić, "Some Remarks Linked to the Independence of International Judges and the Observance of Ethical Rules in the European Court of Human Rights", in *Grundrechte und Solidarität:Durchsetzung und Verfahren Festschrift für Renate Jaeger* (2010, N. P. Engel Verlag), pp. 179-93, at p. 185. Judges are also prohibited, under the Rules of Court, from representing a party or third party in any capacity before the Court as regards applications lodged prior to the judge's retirement or, in the case of applications lodged subsequently, until two years following his or her retirement, see Rules of Court, Rule 4.
46. See "Ensuring the viability of the Strasbourg Court: structural deficiencies in States Parties", paragraph 58 (see footnote 37 above).
47. Ibid.
48. See the relevant provision at www.legislation.gov.uk/ukpga/1999/22/section/68.
49. See "Ensuring the viability of the Strasbourg Court" (see footnote 37 above). It is understood that this is provided for in Estonia and Liechtenstein (in addition to the United Kingdom), and that a legislative initiative has been taken in this respect in Lithuania.
50. Such as, so it would appear, in the Russian Federation.

consideration on this matter before the end of December 2015.[51] The harmonisation of national regulations in all the Contracting Parties, in line with the aforementioned approach would, in my view, be highly desirable. I am therefore wholeheartedly commends this decision of the Committee of Ministers.

32. Some experts have recently suggested that the imposition of a minimum age for candidates to the Court might also reduce the pressure to obtain employment subsequent to retirement from the Court. The changes to the retirement age of judges envisaged in Protocol No. 15, which would allow judges to serve up to the age of 74, could go some way towards remedying this issue as well.[52] In my view, the imposition of a minimum age requirement would unduly limit the choice of candidates by the Contracting Parties and may run contrary to the stated goal of the Assembly, namely to ensure that the best possible candidates are nominated. In several States of the former Communist bloc, it is exactly the younger candidates who may possess the most relevant education, career and practical experience to serve on the Court. An artificial age restriction could prevent the nomination of such excellent candidates. Therefore, I am not in a position to support the proposal with regard to a mandatory minimum age. That said, he obviously agrees that, when assessing the eligibility of candidates, their professional work experience is of significant importance.

5. The Court's Registry

33. Article 24 of the European Convention on Human Rights provides that: "The Court shall have a registry, the functions and organisation of which shall be laid down in the Rules of Court."

34. The task of the Registry is to provide legal and administrative support to the Court in the exercise of its judicial functions, processing and preparing for the adjudication of applications lodged by individuals with the Court, as well as with respect to interstate cases. As already indicated, it is composed of lawyers, administrative and technical staff, and translators. There are currently some 640 staff members working in the Registry, 270 lawyers and 370 other support staff, all of whom are, of course, staff members of the Council of Europe (see the Organisation Chart on the Court's website).[53]

35. The head of the Registry (under the authority of the President of the Court) is the Registrar, who is elected by the Plenary Court (Article 25.*e* of the Convention). He or she is assisted by one or more Deputy Registrars (there is only one at present), likewise elected by the Plenary Court. The remainder of the Registry's staff serve on the basis of administrative appointment, as other Council of Europe staff members.[54] The Court's Registry possesses a certain administrative autonomy within the Organisation.

36. Each of the Court's five judicial Sections is assisted by a Section Registrar and a Deputy Section Registrar. The Sections are divided into 31 case-processing divisions, each of which is assisted by an administrative team. The Registry's lawyers are assigned to one of the case-processing divisions on the basis of knowledge of the language and legal system concerned. The task of the lawyers is to maintain correspondence with the parties on procedural matters, prepare the files, and draft the Court's inadmissibility case-notes, communication reports, and drafts of decisions and judgments.[55]

37. Registry staff members are staff members of the Council of Europe and are subject to the Council of Europe's Staff Regulations. The Registry's lawyers are recruited on the basis of indefinite-term contracts, fixed-term contracts and secondment agreements with the governments of State Parties. The lawyers serving on the basis of indefinite-term contracts and fixed-term contracts are recruited following open competitions. There

51. See "Follow-up to the Brighton Declaration – Recognition of service as a judge of the European Court of Human Rights," Ministers' Deputies 1195th meeting, item 4.3.
52. "Draft Protocol No. 15 amending the Convention for the Protection of Human Rights and Fundamental Freedoms" (report of the Committee on Legal Affairs and Human Rights, rapporteur: Mr Christopher Chope), Doc. 13154, paragraph 11.
53. http://echr.coe.int/Documents/Organisation_Chart_ENG.pdf (also to be found in Appendix I of my Introductory Memorandum, see footnote 5 above). This chart does not take into account other staff members (chauffeurs, technical, security and other staff) of the Council of Europe who also provide logistic back-up, when need be, to the Court and its registry based in the Human Rights Building).
54. The Registrar and Deputy Registrars, when notified as Acting Registrars, are entitled to the same immunity as judges (see footnote 28 above).
55. Information taken from the Court's website: www.echr.coe.int/Pages/home.aspx?p=court/howitworks&c=#newComponent_1346157759256_pointer. The Court treats incoming applications in 37 languages!

also exist specific fixed-term contracts, which can be extended up to a maximum of four years, which cater for the so-called “Assistant Lawyers Scheme”, a scheme which provides work experience at the Court to legal professionals at the start of their career.

38. Unlike in the situation with the “regular” lawyers, there is no standardised scheme for national selection procedures of seconded lawyers, and each State appears to rely on its own selection/designation procedure. That said, the Court has set-out “guidelines” applicable to secondments and the Court determines, itself, who is to be accepted on secondment, as explained in the Registrar’s information note on secondment of national lawyers, which was attached to the introductory memorandum on this subject.[56]

39. While secondments of national lawyers to the Registry have existed for many years, their number has increased significantly since the Interlaken Declaration of 19 February 2010. In that Declaration, the High Level Conference on the Future of the European Court of Human Rights called on the States Parties to the Convention to consider the possibility of seconding national judges and other high-level independent lawyers to the Court’s Registry as part of the efforts to increase national authorities’ awareness of Convention standards and to implement the Convention at the national level.[57] This call was repeated in the Izmir Declaration of 27 April 2011[58] and in the Brighton Declaration of 19 April 2012.[59] At present, there are 58 lawyers seconded to the Court’s Registry.[60]

40. It should be noted, in this connection, that the Court has had to address concerns regarding the work of a certain category of seconded lawyers. Questions have been raised relating to their access to confidential or restricted information and their purported *de facto* decision-making power, to which a comprehensive answer was provided by the Court’s Registrar.[61] Nevertheless, certain NGOs have indicated to me that this situation is still in need of clarification. In any case, it seems clear that a number of essential issues relevant to the secondment are still on the table, and that these must be dealt with with great care and precaution. Serious internal work is being done – and hopefully will continue – by the Court aimed at both ensuring that only sufficiently qualified, diligent and scrupulous lawyers are accepted on secondments, and that the work of seconded lawyers is fully in line with the strict requirements set by the Convention, the Rules of Court, and best practice.

41. The Registry’s work is crucial to ensuring the effectiveness of the Court’s efforts, in particular in filtering applications and handling admissible applications within a reasonable time frame (“Justice delayed is justice denied”, as William Gladstone put it). The availability of resources is also crucial in this respect, and budgetary considerations, both at the Council of Europe and at the national level, need to be taken into account by the Court and its Registry when undertaking needs assessment.

42. One aspect of the Registry’s work is the fact that a proportion of its staff (the so called “B-lawyers”) are employed on the basis of non-renewable four-year contracts. This rule provides no exceptions, and individual merits are not taken into account. The rationale behind this policy is reportedly the need to spread the Court’s standards and experience into the national legal systems of Contracting Parties. The lawyers who have gained four years of experience, working with the applications, are seen as “ambassadors” who ought to bring the values of Convention standards into their respective State jurisdictions. Therefore, every four years the Court has to train new inexperienced lawyers – which is certainly not an optimal way to handle the backlog of cases. The independence of these lawyers may be endangered: “It seems logical for the lawyers in the last year of their term in the Court to look for a new job. Their career perspectives may be dependent on various

56. www.assembly.coe.int/CommitteeDocs/2013/ajdoc34_2013.pdf.

57. Point B.*e* of the Action Plan, text of the Declaration.

The rationale underlying this recommendation was that seconded lawyers would then return to their home States with a greater knowledge of the workings of the Court, increasing awareness and understanding of the Court within the national legal profession.

58. Point F.5 of the Follow-up Plan section of the Final Declaration.

59. Paragraph 20.*b* of the Declaration.

60. These include lawyers – not all of them necessarily seconded – from Austria, Armenia, Bulgaria, Estonia, France, Germany, Hungary, Italy, Luxembourg, the Republic of Moldova, the Netherlands, Poland, the Russian Federation, Sweden, Switzerland, Turkey and the United Kingdom (as indicated by the Court’s Registrar in his paper appended to my introductory memorandum).

61. See, for example, the Open Letter to the President of the European Court of Human Rights of 1 December 2011 from Russian human rights activists, and the reply of the Registrar of the Court.

considerations including loyalty to a particular State institution or private party."[62] I am of the opinion that the policy of non-renewability of the B-lawyers contracts should be thoroughly evaluated and possibly re-considered.

6. Conclusions

43. It is clear from the above that, notwithstanding the various measures taken over the years to strengthen the independence of the Court, there is still room for improvement. In particular, States Parties and the Assembly should pay more attention to the post-retirement situation (after the end of their nine-year mandate) of former Court judges. It is unacceptable that some of them have experienced difficulties in finding appropriate employment at the end of their terms of office. The fact that the Committee of Ministers is now seized of this matter is reassuring. The Assembly should also support the Committee of Ministers' call, addressed to member States, to take appropriate measures to ensure adequate employment for former Court judges upon the expiration of their terms of office. These arrangements may differ depending on the position the person had occupied before election as a judge on the Court.

44. Privileges and immunities of the judges, which serve as safeguards for their independence, should be consolidated. It is important that all States Parties to the European Convention on Human Rights be bound by the Sixth Protocol to the Council of Europe's General Agreement on Privileges and Immunities. In this connection, I am pleased to announce that, subsequent to my specific request addressed to the authorities of Azerbaijan, Portugal and San Marino in February 2014, all three States have indicated that we can expect ratification of the Protocol in the not too distant future. Measures taken at the national level to implement these safeguards in practice should be harmonised, in line with the Assembly Resolution1914 (2013). In particular, a uniform practice in all Contracting Parties with regard to provision of national diplomatic passports to all judges and their families should be introduced.

45. The social security system for judges should be further improved and streamlined. More flexibility should be offered with regard to the choice of a pension scheme (international or national, or both), as well as possibilities to withdraw from the current obligatory scheme on the basis of clear transitional rules establishing transfer and/or return of accumulated funds.

46. The organisation of the work of the Court's Registry may merit re-assessment, in particular, with regard to the policy of non-renewable contracts for assistant lawyers and with respect to the need to pay more attention to some NGOs' criticism alleging lack of transparency, in particular, with regard to secondments. I would like to take note of what the External Auditor, the President of the Regional Chamber of Alsace of the French *Cour des Comptes*, said when presenting his report to the Council of Europe's Audit Committee on 14 June 2012: "The Court is one of the best performing bodies we have ever audited."[63] Nevertheless, this positive evaluation should not be considered as a reason to turn a blind eye to certain issues raised in the present report. The Court is indeed "the crown jewel" of the Council of Europe, as an organisation for the protection of human rights, and further improvement of its work – for which the reinforcement of judges' independence is a key aspect – must remain high on the agenda of all the organs of our Organisation.

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62. Kanstantsin Dzehtsiarou and Donald K. Coffey (see footnote 6 above).
63. Speech made to Registry officials by the Registrar in July 2012 (on file with the Secretariat).