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Committee on Legal Affairs and Human Rights

Need to reinforce the independence of the European Court of Human Rights

Introductory memorandum

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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 transmitted to the Committee on Legal Affairs and Human Rights (AS/Jur) for report by the Assembly on 30 November 2012. At its meeting on 11 December 2012 the Committee designated me as rapporteur.

2. 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 (the Convention, ECHR) 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”.¹ 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”.² “Outside of the context of national sovereignty, separation and balance of powers, hierarchical legal system crowned by the Constitution and mandatory jurisdiction”,³ international courts derive their authority, and the requirement for compliance by the parties with their decisions, primarily from a perception that they are independent.

3. The European Court of Human Rights (the (Strasbourg) 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

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¹ 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’ (unpublished as of this writing, draft accessed on 23 September 2013, on file with the Secretariat).

² 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.

³ C.-L. Popescu, ‘La Cour européenne des droits de l’homme’ in *Indépendance et impartialité des juges internationaux* (eds. Hélène Ruiz Fabri et Jean-Marc Sorel), 2010, pp.29-136, p. 43.

*guarantees against outside pressure and to the question whether the body presents an appearance of independence”.*⁴

4. Over the years, the Court has faced some criticism regarding the independence and impartiality of its judges and registry officials.⁵ Such criticism needs to be addressed, for the sake of clarity and to avoid misunderstandings. In this introductory memorandum I will therefore 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.

2. The Strasbourg Court and its judges: an overview

2.1. The Court

5. The Court is made up of 47 judges and a registry of over 640 staff members, including some 270 lawyers (see the Organisation Chart⁶ in Appendix I). 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, Chambers of seven and the Grand Chamber of seventeen judges. All decisions on the merits are taken collegially. Dissents and separate opinions are permissible: Article 45, paragraph 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 nine to ten other judges.⁷ Judges belong to a section for a period of three years. Each section has several chamber formations composed of judges of the 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.⁸ 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.⁹

2.2. Criteria for Office

6. The criteria for the office of judge are determined by Article 21 of the Convention¹⁰ (additional criteria were also introduced by the Parliamentary Assembly, principally in 2004¹¹), whereas the election of judges is undertaken by the Parliamentary 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 2008.¹² The quality of a judge depends on the quality of the candidates nominated by states (hence the need of fair, rigorous and open national selection procedures), which has been the subject of several important texts adopted by the Assembly and more recently the Committee of Ministers (see, specifically, Assembly Recommendation No.1649 of 2004,¹³ Assembly Resolution 1646 of 2009,¹⁴ and the 2012 guidelines of the Committee of Ministers.)¹⁵

⁴ European Court of Human Rights, *Langborger v. Sweden*, Application No. 11179/84, judgment of 22 June 1989, paragraph 32.

⁵ For a recent example, see Michael O’Boyle ‘Unjustified attack on ECHR,’ in *The Times of Malta*, 8 September 2013, available at <http://admin.timesofmalta.com/articles/view/20130908/opinion/Unjustified-attack-on-ECHR.485237>

⁶ http://echr.coe.int/Documents/Organisation_Chart_ENG.pdf.

⁷ For more detailed information on the composition of the sections, see the Court’s website, available at http://www.echr.coe.int/Pages/home.aspx?p=court/judges&c=#newComponent_1346152041442_pointer.

⁸ See Chapters II and V of Title I of the Rules of Court, which deal respectively with the Presidency and composition of the Court, available at http://www.echr.coe.int/Documents/Rules_Court_ENG.pdf.

⁹ See *ibid* at Rule 9A. For more detailed information on the structure of the Court in general, see the Rules of Court, *ibid*.

¹⁰ 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”.

¹¹ See Recommendation 1649(2004), ‘Candidates for the European Court of Human Rights’, adopted on 30 January 2004, available at: <http://assembly.coe.int/ASP/XRef/X2H-DW-XSL.asp?fileid=17193&lang=EN>.

¹² Available at http://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”, *ibid*, at 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. Dismissal of judges is foreseen in Article 23, paragraph 4, of the Convention.

¹³ *Ibid*.

2.3 The Election Process

7. The election of judges is a multi-step process.¹⁶ Firstly, a State Party is informed of the need to submit three candidates for the position and utilises its own national selection procedures (in accordance with relevant guidelines) to nominate its candidates. The CVs of the candidates are examined by an advisory panel of experts, which advises State Parties, before they transmit the lists of candidates to the Assembly, whether all candidates meet the criteria stipulated in Article 21.¹⁷ 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 CVs 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, as appropriate, particular candidates to the Assembly. If the Sub-Committee proposes 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.¹⁸ Finally, a judge is elected from the candidates on the list by the Assembly sitting in plenary.

2.4 Ad Hoc Judges

8. 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.¹⁹ 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.

9. The procedure for appointing an *ad hoc* judge which was in place before the adoption of Protocol No. 14 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”. The states' list contains the names of three to five persons eligible to serve as *ad hoc* judges for a renewable period of two years.²⁰ The list ought to include persons of both sexes and be accompanied by biographical details of the nominees.²¹ The amended Rule 29 of the Rules of Court, which came into force on 1 July 2013, has 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.

10. 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

¹⁴ Resolution 1646(2009) adopted on 27 January 2009, available at: <http://assembly.coe.int/ASP/XRef/X2H-DW-XSL.asp?fileid=17704&lang=EN>.

¹⁵ 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), available at: <https://wcd.coe.int/ViewDoc.jsp?id=1919137&Site=&BackColorInternet=B9BDEE&BackColorIntranet=FFCD4F&BackColorLogged=FFC679>.

¹⁶ For further detail on the election process see Information Document, 'Procedure for electing judges to the European Court of Human Rights', AS/Jur (2013)02, available at http://www.assembly.coe.int/CommitteeDocs/2013/ajinfdoc02_2013.pdf.

¹⁷ This panel was established by the 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', available at <https://wcd.coe.int/ViewDoc.jsp?id=1704555&Site=COE>

¹⁸ See Parliamentary Assembly [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.

¹⁹ Rule 29 § 1 (a) of the Rules of Court.

²⁰ Rule 29 § 1 (a) of the Rules of Court.

²¹ *Ibid.*

2011. For 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 this paper.²²

3. Judicial Independence in the Strasbourg Court

3.1. Tenure

11. Pursuant to Article 23 of the Convention, judges are elected for a non-renewable term of 9 years with a compulsory retirement age of 70. This provision was adopted by Protocol No. 14 which came into force on 1 June 2010. Since Protocol No. 11 entered into force, judges were elected for a period of 6 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.

12. Protocol No. 15 to the ECHR, when it enters into force, will replace the age limit of 70 with a new requirement that candidates for judge be no older than the age of 65 when recommended to the Assembly, thereby creating a *de facto* age limit of 74.²³ This change provides for the possibility of electing more experienced judges and of 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.

3.2. Privileges and Immunities

13. 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 1949 General Agreement on Privileges and Immunities of the Council of Europe (1996).²⁴ This protocol applies to both permanent and *ad hoc* judges. See also, in this connection, the Committee of Ministers’ Resolution (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.”²⁵

14. 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,”²⁶ 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 Protocol.²⁷ While in office and after retirement, judges are immune with respect to words spoken or acts performed while discharging their duties as 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.²⁸

15. The privileges and immunities granted to judges include immunity from legal process in respect of words spoken or written or acts performed in their official capacity²⁹; exemption from taxation on payments

²² 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, available at: <http://assembly.coe.int/ASP/Doc/XrefViewHTML.asp?FileID=13035&Language=EN>.

²³ Protocol No. 15 amending the Convention for the Protection of Human Rights and Fundamental Freedoms’, available at <http://conventions.coe.int/Treaty/EN/Treaties/Html/213.htm>.

²⁴ Sixth Protocol to the General Agreement on Privileges and Immunities of the Council of Europe, <http://conventions.coe.int/Treaty/en/Treaties/Html/162.htm>.

²⁵ Committee of Ministers’ Resolution (2009)5, Article 2, <https://wcd.coe.int/ViewDoc.jsp?id=1508697&Site=CM>.

²⁶ ‘Sixth Protocol to the General Agreement on Privileges and Immunities of the Council of Europe’ (1996), available at <http://conventions.coe.int/Treaty/en/Treaties/Html/162.htm>. 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>.

²⁷ 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.

²⁸ Sixth Protocol, *supra* note 26, Article 5. 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.

²⁹ 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

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.³⁰ It appears that this final provision should function to ensure that family members of judges from outside the Schengen Zone do not experience immigration difficulties when coming to live in Strasbourg.

16. The privileges and immunities granted to judges and their families are not unlimited, and are distinctly functional in nature (just as in other comparable international courts). Although 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, such extensions do not appear to be necessary.³¹

3.3. Social Security and Pension Entitlement

17. 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.

18. Until relatively recently, the Strasbourg Court was the sole major international court without a pension plan for judges.³² 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.³³ Participation in this scheme is now compulsory, and for all elected judges the pension is calculated at the rate of 2 per cent of the salary for each year of employment.³⁴ That said, it would appear that the Strasbourg Court is the only international court with a 'contributory' pension scheme; also, pension entitlements appear to be the lowest among comparable international courts.

19. In addition to their salary and pension arrangements, judges of the Strasbourg Court also receive other benefits. These include sick leave, the same maternity, paternity and adoption leave as is accorded to Council of Europe staff members, in addition to medical and social insurance.³⁵

3.4 Post-Retirement Status

20. Following their retirement from the Strasbourg 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.

21. Former Strasbourg 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 Strasbourg Court and that two former judges and one former *ad hoc* judge had been put forward as candidates for the International Criminal Court.³⁶ 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; 10 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

investigation of the Anti-Corruption Directorate against the judge's wife: in Vol. 31 Human Rights Law Journal (2011), pp.426-427.

³⁰ Sixth Protocol (with explanatory notes), *supra* note 26, explanatory report paragraph 7.

³¹ 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, available at <http://assembly.coe.int/ASP/Doc/XrefViewPDF.asp?FileID=19245&Language=EN> (see also Assembly Resolution 1914 (2013) paragraph 7.6.1, relating to the same subject).

³² It was considered that judges coming to Strasbourg in 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.'

³³ Resolution of the Committee of Ministers 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, available at: <https://wcd.coe.int/ViewDoc.jsp?id=1508697&Site=CM>.

³⁴ Cf. Council of Europe Staff Regulations, Appendix V: Pension Scheme Rules, Article 10, available at: [https://wcd.coe.int/ViewDoc.jsp?Ref=COMP/CM/Res\(2007\)1&Language=lanEnglish&Ver=part13&BackColorInternet=99CCFF&BackColorIntranet=99CCFF&BackColorLogged=99CCCC#P189_16990](https://wcd.coe.int/ViewDoc.jsp?Ref=COMP/CM/Res(2007)1&Language=lanEnglish&Ver=part13&BackColorInternet=99CCFF&BackColorIntranet=99CCFF&BackColorLogged=99CCCC#P189_16990).

³⁵ See Resolution CM/Res(2009)5, *supra* note 25.

³⁶ 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, p. 696.

administrations as, for example, advisors; some of them even became MPs and ministers. That said, several former judges of the Court have experienced difficulties in finding employment.³⁷

22. 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 Party.³⁸ 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.³⁹ However, this provision does not allow the retired judge to automatically return to his or her post 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.⁴⁰

23. Although securing a position equivalent to that of a judge at the Strasbourg 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 able to return to them after serving as a judge in Strasbourg (as would appear to be possible in Belgium, Germany, Greece, Monaco and Spain). 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 could be encouraged to put into place such arrangements at least for judges, prosecutors and state employees.

24. It has also been suggested that a judge’s term of office at the Court should be included in the national employment record⁴¹ – this measure is particularly relevant in the case of the states where an elected judge is considered unemployed insofar as national labour law is concerned,⁴² and would allow a former Strasbourg Court judge to opt for the national pension plan if he or she so wishes. I have it to understand that the Court has recently undertaken a comparative analysis of these and related issues.

25. The imposition of a minimum age for candidates to the Court might also reduce the pressure to obtain employment post-retirement from the Court. The changes to the retirement age of judges envisaged in Protocol No. 15, which allow judges to serve up to the age of 74, could go some way towards remedying this issue as well. In other words, States Parties (and the Assembly) ought perhaps be more vigilant in the nomination of candidates and election of judges who may still be in their 30s or early 40s when more experienced candidates can be elected: the imposition of a twelve to fifteen years requirement of relevant work experience has recently been reiterated by the AS/Jur’s Chairperson.⁴³

4. The Strasbourg Court’s Registry

26. Article 24 of the European Convention of 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.*”

27. 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,

³⁷ 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 ed.) pp. 179-93, 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, *supra* note 8.

³⁸ See “Ensuring the viability of the Strasbourg Court: structural deficiencies in States Parties” *supra* note 31, paragraph 58.

³⁹ *Ibid.*

⁴⁰ See the relevant provision at <http://www.legislation.gov.uk/ukpga/1999/22/section/68>

⁴¹ See “Ensuring the viability of the Strasbourg Court”, *supra* note 31. 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.

⁴² Such as, so it would appear, in the Russian Federation.

⁴³ “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), adopted on 28 March 2013, Doc. 13154, paragraph 11, available at <http://assembly.coe.int/ASP/Doc/XrefViewPDF.asp?FileID=19542&Language=EN>.

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 in Appendix I.⁴⁴

28. 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.⁴⁵ The Court's Registry possesses a certain administrative autonomy within the Organisation.

29. 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, drafts of decisions and of judgments.⁴⁶

30. 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 also exist specific fixed-term contracts, which can be extended up to the 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.

31. 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: see, in this connection, the Registrar's information note on secondment of national lawyers which can be found in Appendix II to the present document.

32. 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 upon 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 the awareness of national authorities of Convention standards and to implement the Convention at the national level.⁴⁷ This call was repeated in the Izmir Declaration of 27 April 2011⁴⁸ and in the Brighton Declaration of 19 April 2012⁴⁹. At present, there are 58 lawyers seconded to the Court's Registry.⁵⁰

33. 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 concerning their access to confidential or restricted information and their purported *de facto* decision-making power, to which a

⁴⁴ http://echr.coe.int/Documents/Organisation_Chart_ENG.pdf 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).

⁴⁵ The Registrar and Deputy Registrars, when notified as Acting Registrars, are entitled to the same immunity as judges, see *supra* note 28.

⁴⁶ Information taken from the ECtHR website, available at: http://www.echr.coe.int/Pages/home.aspx?p=court/howitworks&c=#newComponent_1346157759256_pointer. The Court treats in-coming applications in 37 languages!

⁴⁷ Point B. (e) of the Action Plan, text of the Declaration available at: http://www.echr.coe.int/Documents/2010_Interlaken_FinalDeclaration_ENG.pdf. 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.

⁴⁸ Point F. 5 of the Follow-up Plan section of the Final Declaration, text available at: http://www.echr.coe.int/Documents/2011_Izmir_FinalDeclaration_ENG.pdf.

⁴⁹ Paragraph 20 (b) of the Declaration, text available at <http://hub.coe.int/20120419-brighton-declaration>.

⁵⁰ 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: see Appendix II.

comprehensive answer was provided by the Court's Registrar.⁵¹ That said, certain NGOs have indicated to me that this situation is still in need of clarification.

5. Conclusions

34. It is clear from the above that, notwithstanding the various measures taken over the years to strengthen the independence of the Court, there may always be room for improvement. For example, to what extent, if at all, should States Parties and the Assembly be concerned with the post-retirement situation (after the end of their 9-year mandate) of former Strasbourg Court judges, some of whom have experienced difficulties in finding appropriate functions at the end of their terms of office (see paragraphs 19 to 23, above)? Tied to this, to a certain extent, may be the need to suggest a minimum age for candidates to the Court (see paragraph 24, above). Also, ought not the Assembly to enquire with Azerbaijan, Portugal and San Marino as to why they have still not ratified the Sixth Protocol to the Council of Europe's General Agreement on Privileges and Immunities (see paragraphs 13 to 15, above)? As concerns the Court's Registry, it may be instructive, in the light of occasional criticism alleging inefficiency, 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.*"⁵²

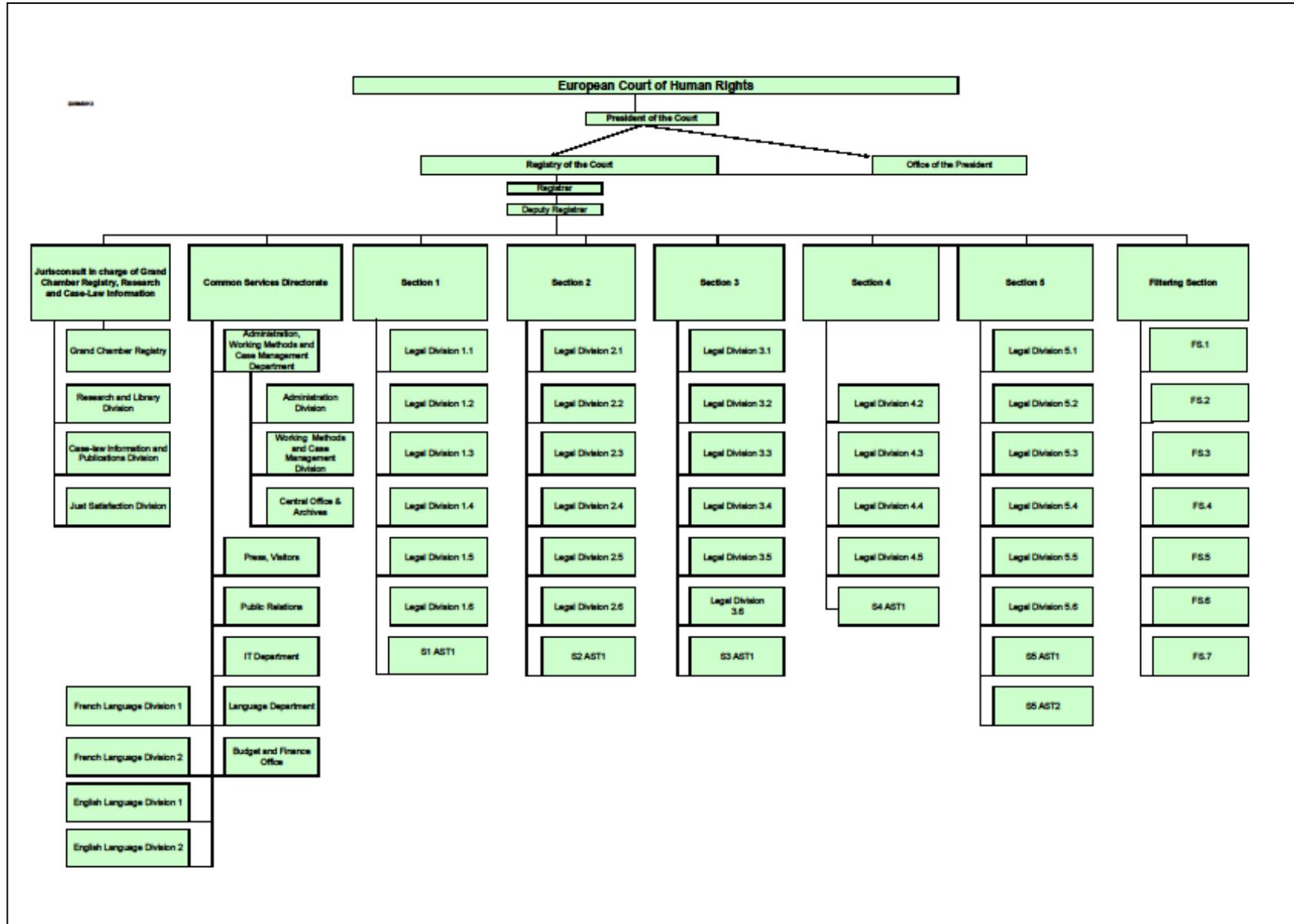
35. In order for the Committee to be better informed of the present situation, and to see how best the Court's independence could be reinforced, I have – with the agreement of the Committee – asked two experts to take part in an exchange of views with the Committee at its meeting in Paris, on 6 November 2013. The two experts are 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 UN Human Rights Advisory Panel in Kosovo.⁵³ I also intend asking the Court's registrar, Mr Erik Fribergh, to take part in the said exchange of views.

⁵¹ 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, available at: <http://www.memo.ru/eng/news/2011/12/06/0612111.pdf> and the reply of the Registrar of the Court, available at: <http://www.memo.ru/eng/news/2011/12/29/2912113.pdf>

⁵² Speech made to Registry officials by the Registrar in July 2012 (on file with the Secretariat).

⁵³ Any reference to Kosovo in this text, whether to the territory, institutions or population, shall be understood to be in full compliance with the UN Security Council Resolution 1244 and without prejudice to the status of Kosovo.

Appendix I: Organisational Chart of the European Court of Human Rights



Appendix II: Secondment to the Registry of national lawyers ⁵⁴

1. Introduction

The combination of a growing case-load and the extremely difficult budgetary situation facing the Council of Europe has led the Court to seek assistance outside the ordinary budget framework. Thus in recent years individual Governments have offered their support to the Court either through voluntary contributions to finance extra case-lawyers or by secondment of national lawyers.

Secondment of national lawyers, particularly judges, fulfils a dual aim: on the one hand, it provides the Court with the assistance of experienced national lawyers with full knowledge of national legal systems; on the other, it feeds back into the national system Convention trained lawyers and therefore promotes more effective national implementation.

This was confirmed in a report from the Council of Europe's Steering Committee for Human Rights (CDDH), examined at the meeting of the Committee of Ministers on 7 May 2008, which included a proposal to facilitate the secondment of national lawyers to the Registry of the Court. The report⁵⁵ states:

The secondment of national judges to the Registry of the Court could be beneficial both to the Court and to domestic legal systems by improving mutual understanding. It thus responded to the need for enhancing national judges' knowledge of Convention issues. The fact that an experienced national judge could work for a certain period at the Registry also had the potential to reinforce the operational efficiency of the latter. The secondment of national judges, as well as of other high-level lawyers, should therefore be strongly encouraged in future, notably by simplifying the administrative procedures.

In the Interlaken Declaration of 19 February 2010, the High Level Conference on the Future of the European Court of Human Rights called upon the States Parties to the Convention to consider the possibility of seconding national judges or other high-level independent lawyers to the Registry of the Court, as part of the efforts to increase the awareness of national authorities of the Convention standards and to implement the Convention at the national level. This call was repeated in the Izmir Declaration of 27 April 2011.

The Court welcomes this initiative and wishes to encourage it.

2. Existing secondment arrangements

The Netherlands has, for many years, been sending young judges to spend one year at the Registry, as part of their training before being appointed to a court in the Netherlands. One or two Dutch trainee judges work at the Court in the framework of this cooperation programme at any given time.

Since 2007 **Sweden** has seconded national judges usually for one year. More judges have been added to the partnership in recent years so a total of two or three judges from Sweden have been working at the Registry at any given moment since April 2011.

Germany has seconded experienced judges and prosecutors since 2009. The two current secondees will stay, respectively, until March and November 2014. The procedures to select their replacements are under way.

France has seconded judges since 2009, initially two, one from the *Cour de cassation*, the other from the *Conseil d'Etat*. The first two judges left at the end of the maximum three-year period. New magistrates from the *Cour de Cassation* arrived, respectively, in September 2012 and April 2013; their secondments have just been extended for a second year. The current magistrate from the *Conseil d'Etat* arrived on 1 October 2012 and has also been extended for a second year.

The number of judges seconded by **Turkey** has gradually risen since the initial secondments in 2010. Four seconded judges are currently working in the Registry and the Turkish Government has indicated that more may be proposed.

A judge from **Luxembourg** left after a three-year secondment in September 2013 and has not yet been replaced.

⁵⁴ Information note issued by the Court's Registrar on 25 September 2013.

⁵⁵ Doc. CM (2008)51 of 4 April 2008 – available in English and in French.

A lawyer from **Estonia** was seconded to the Court for one year and returned to her post in the Supreme Court in Estonia on 1 October 2011. A new secondee from the Supreme Court in Estonia will arrive on 1 October 2013.

A lawyer from the Office of the Attorney General in **Ireland** worked at the Registry on a one-year secondment from May 2011 to April 2012.

A judge from **Montenegro** arrived on 1 July 2011 for an initial one-year secondment, which had been extended for a second year when she had to leave for personal reasons. A replacement arrived on 1 September 2013.

The secondment of a lawyer from **Armenia**, who arrived on 1 August 2011, has been extended for a third and final year until July 2014.

Twenty lawyers seconded by the **Russian Federation** arrived at the Court in August and September 2011. The great majority has stayed since; some have been replaced to keep the strength of this task force at 20.

A lawyer from **Romania** started her secondment on 19 March 2012. Two more seconded lawyers, who had arrived in October 2012, have decided to return to their posts of judge in Romania.

Three lawyers from **Moldova** started their secondments in July 2012.

A seconded judge from **Switzerland** took up her duties on 1 September 2012.

Three seconded lawyers from **Italy** arrived between October 2012 and March 2013.

A lawyer seconded by **Finland** will start her duties at the Court on 1 October 2013.

Ukraine has also made proposals and the selection procedure for three lawyers is under way.

The **Latvian** Government has agreed to second a judge who arrived in May 2013.

Two seconded lawyers from **Bulgaria** arrived in April 2014 for an initial one-year period. In addition, three Bulgarian judges arrived in July 2013 in the framework of a programme funded by the Norway Grants. At the end of that programme in 2016, a total of nine judges will have worked at the Court for a period of one year each.

The Registry has in addition discussed secondments with some other States, but no firm arrangements have yet been agreed.

Since 2008 the Court has participated in the practical training of judges under the auspices of the EU-funded and Brussels-based **European Judicial Training Network (EJTN)**. In the framework of that programme, twenty national judges have spent up to twelve months at the Registry. Seven judges sent through the EJTN from **Austria, Estonia, Germany, Hungary, Italy, Poland** and the **UK** are currently working in the Registry.

3. Regulatory basis/funding

Secondments for periods of one year or more are governed by Resolution (2012)2 adopted by the Council of Europe's Committee of Ministers on 15 February 2012.⁵⁶

Under the terms of that Resolution, seconded officials remain in paid employment in an international, national, regional or local administration throughout the period of secondment, and receive no salary from the Council of Europe (Article 2). While the Resolution provides for the possibility of a relocation allowance paid by the Council of Europe, the Court, relying on Articles 7 and 23 of the Resolution, has made it clear that it is unfortunately not in a position to offer this advantage. Indeed for it to do so would defeat in part the

⁵⁶ Committee of Ministers' Resolution CM/Res(2012)2 establishing Regulations for secondments to the Council of Europe, available at: <https://wcd.coe.int/ViewDoc.jsp?id=1908535&Site=&BackColorInternet=B9BDEE&BackColorIntranet=FFCD4F&BackColorLogged=FFC679>.

purpose of the exercise. It follows that expenses related to secondments must be borne by the sending government.

On the other hand, the Court reimburses travel expenses incurred by seconded officials and their family members when travelling to take up their duties and on completion of their secondment (Article 23b of the Resolution) and pays a lump sum corresponding to six times the return fare between the place of residence and Strasbourg per year of secondment (Article 23c) to officials seconded for an initial minimum period of one year.

National lawyers staying for periods of less than one year, notably during their professional training, may spend their time at the Registry as study visitors.

4. Selection of national judges

In order to guarantee both the appearance and the reality of independence and impartiality the final selection of the person(s) to be seconded must be left to the Court. Experience shows that the best practice is to advertise the secondment at national level and then select the most suitable candidates. These candidates are then submitted to the Court for possible interview and final choice. In all circumstances the Judge elected in respect of the State concerned is consulted.

5. Period of secondment

In order to achieve the dual aims identified the minimum period for secondment should be one year. This period may be extended up to a maximum of three years, subject to meeting the required standards of service. In this connection it is clearly to the Court's advantage when it is able to benefit from an experienced and competent lawyer over a longer period of time.

6. Qualification requirements

National lawyers seconded to the Registry must hold a law degree obtained in their country of origin and possess sound professional legal experience acquired within the national legal system.

They must have an excellent knowledge of English or French, including the ability to draft to a high standard in one of those languages.

7. Work performed

The lawyers seconded are not legal assistants to any particular judge or any staff member in the Registry but are integrated into the Registry, usually as lawyers in one of its case-processing divisions.

8. Point of contact in the Registry

[...]