

Legitimacy and Independence of International Tribunals: An Analysis of the European Court of Human Rights¹

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Abstract: This paper explores the theoretical framework of judicial independence of international tribunals, with specific reference to the independence of the European Court of Human Rights. It then argues that independence is a key aspect of the legitimacy of an international tribunal and suggests that legal reforms designed to enhance the judicial independence of the European Court of Human Rights should focus on the two main structural parts of the Court, namely the judiciary and the Registry. This paper analyses a number of proposed reforms that can make the European Court of Human Rights more independent and credible. These insights are applicable to other international judicial fora.

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I. Introduction

An international human rights tribunal which lacks independence cannot be legitimate. An international tribunal without legitimacy cannot be effective. International justice lacks a mechanism for the coercive execution of judgments. Neither sheriff nor enforcement officer exists to impose the will of an international court on sovereign states, execution is almost always voluntary.⁴

4. The Contracting Parties experience political pressure from the Committee of Ministers of the Council of Europe. However the effect of this pressure varies depending on the size and importance of the Contracting Party concerned, and other relevant considerations such as cost of execution. See Paul Mahoney, *The International Judiciary - Independence and Accountability*, 7 LAW & PRAC. INT'L CTS & TRIBUNALS 313, 317 (2008); see also DANIEL TERRIS ET AL., *THE INTERNATIONAL JUDGE. AN INTRODUCTION TO THE MEN AND WOMEN WHO DECIDE THE WORLD'S CASES* 149 (2007).

The Member States must first accept an international court as a legitimate decision maker and only then can effective execution be secured.

This paper analyses the notion of independence in international law. While the need for ensuring independence of justice is an axiom in domestic legal systems, some commentators have argued this is not the case in international law. This paper considers the latter argument and concludes this approach is questionable in relation to international law tribunals and totally unacceptable in the case of human rights tribunals dealing with individual complaints. This article argues independence is a requirement of the rule of law for international adjudicators. Unbiased rulings enhance the trust of stakeholders in an international tribunal. Independence is especially important if the court can adjudicate claims against state institutions because the state retains more influence over courts than private parties by default.⁵

The primary focus of this paper is the European Court of Human Rights (ECtHR), which was created more than 50 years ago and is currently the most successful international human rights tribunal in the world. The ECtHR supervises compliance of the Contracting Parties with the European Convention on Human Rights which establishes a basic list of fundamental rights and freedoms. The ECtHR has jurisdiction over 47 Contracting Parties.⁶ 47 judges elected in respect of every Contracting Parties can review individual complaints brought against the Contracting Parties. This paper argues the effectiveness of the Strasbourg system depends on its legitimacy which, in the eyes of stakeholders, is inextricably linked to the real and perceived independence of the Court.⁷

5. As Christopher Larkins argues, "judicial independence takes on critical significance when the government is one of the parties to a dispute, as the case then involves general issues of the rule of law. If the enforcement of this principle is to be entrusted to the courts, then it is absolutely essential that judges not be biased in favor of the government." Christopher M. Larkins, *Judicial Independence and Democratization: A Theoretical and Conceptual Analysis*, 44 AM. J. COMP. L. 605, 608 (1996).

6. Belarus is the last major European state that has not yet ratified the ECHR. See COUNCIL EUR., RIGHTS AND FREEDOMS IN PRACTICE (2014), http://www.echr.coe.int/Documents/Pub_coe_Teaching_resources_ENG.pdf.

7. The legitimacy of the ECtHR is the subject that attracted substantial academic attention in recent years. See, e.g., Kanstantsin Dzehtsiarou & Alan Greene, *Legitimacy and the Future of the European Court of Human Rights: Critical Perspectives from Academia and Practitioners*, 12 GERMAN L.J. 1707 (2011); BASAK ÇAL I ET AL., THE LEGITIMACY OF THE EUROPEAN COURT OF HUMAN RIGHTS: THE VIEW FROM

The second section of this paper sets the theoretical framework for inquiry into the independence of the international judiciary. It shows the link between independence, the rule of law and the legitimacy of international tribunals. It observes independence is important for international tribunals adjudicating disputes between sovereign states, but it is even more important in the case of international human rights tribunals dealing with individual applications, such as the ECtHR. This section then argues that the independence of the ECtHR depends on two intrinsically linked but logically separable considerations. First, the independence of the ECtHR judges should be secured. Second, the Court's Registry should be independent.

The third section focuses on the independence of the ECtHR judges who are the key decision-makers at the Court and collectively determine the outcomes of the human rights disputes. Interference by the national authorities is mostly possible at the national nomination stage of the election process. Increased transparency and stakeholder-involvement should be promoted at this stage. Moreover, it is observed here that if the principle of national representation is removed from the Convention, then the politically sensitive aspect of the election process will wane. The principle of national representation means that the judge elected in respect of a Contracting Party will have to be on the bench when a case against this Contracting Party is adjudicated by the Court. This principle applies to Chambers of 7 judges and Grand Chambers of 17 judges which deal with the most important cases. This paper advocates for the removal of the principle of national representation from the ECHR. Among other important aspects of judicial independence this paper analyses judicial tenure, social security and immunities of judges.

The fourth section explores an important but largely ignored component of the independence of an international tribunal, the

THE GROUND (2011); Andreas Follesdal, *The Legitimacy of International Human Rights Review: The Case of the European Court of Human Rights*, 40 J. SOC. PHIL. 595 (2009); George Letsas, *The ECHR as a Living Instrument: Its Meaning and Legitimacy*, in CONSTITUTING EUROPE: THE EUROPEAN COURT OF HUMAN RIGHTS IN A NATIONAL, EUROPEAN AND GLOBAL CONTEXT 106 (Andreas Follesdal et al. eds., 2013); Tom Zwart, *More Human Rights than Court: Why the Legitimacy of the European Court of Human Rights is in Need of Repair and How It Can Be Done*, in THE EUROPEAN COURT OF HUMAN RIGHTS AND ITS DISCONTENTS (Spyridon Flogaitis et al. eds. 2013); Kanstantsin Dzehtsiarou, *Does Consensus Matter? Legitimacy of European Consensus in the Case Law of the European Court of Human Rights*, PUB. L. 534 (2011).

independence of its personnel. In the case of the ECtHR this is called the Registry. This paper argues that independence should not only be secured from external actors but also from the political branches of the Council of Europe—the parent organisation of the ECtHR. Key areas for securing the independence of the Registry mostly repose in the areas of human resource management and the financial autonomy of the Court. This paper discusses the recruitment policy of the Court and the Council of Europe, the use of seconded lawyers in the Registry and considers the budgetary independence of the Court.

II. The Theoretical Importance of Judicial Independence in International Law

Judicial independence in international law is in purgatory. This may be somewhat surprising given the judicial independence of domestic courts is recognised as a cornerstone of modern legal systems and is relatively uncontroversial.⁸ Posner and Yoo argue international tribunals are more effective if staffed by judges who can be influenced by the State-parties. Only then will the judges be forced to find a solution that will best serve the interest of both parties.⁹

Helfer and Slaughter are unconvinced by this argument; they observe that “[i]ndependent tribunals act as trustees to enhance the credibility of international commitments in specific multilateral contexts.”¹⁰ Moreover, they argue that independent tribunals are more detached from the momentary interests of the parties and tribunals and they are likely to advance states’ long-term interests.¹¹

While the argument elaborated by Posner and Yoo may have

8. See, e.g., E.S.C. Res. 2006/23, U.N. Doc/ E/RES/2006/23 (July 27, 2006); Piersack v. Belgium, No. 8692/79, 5 E.H.R.R. 169, 179 (1983). See also Shimon Shetreet, *Standards of Conduct of International Judges: Outside Activities*, 2 L. & PRAC. INT’L CTS. & TRIBUNALS 127, 128 (2003); Dinah Shelton, *Legal Norms to Promote the Independence and Accountability of International Tribunal*, 2 L. & PRAC. INT’L CTS. & TRIBUNALS 27, 27 (2003); TERRIS, *supra* note 4, at 147; Erik Voeten, *The Impartiality of International Judges: Evidence from the European Court of Human Rights*, 102 AM. POL. SC. R. 417, 417 (2008); John Ferejohn, *Independent Judges, Dependent Judiciary: Explaining Judicial Independence*, 72 S. CALIF. L. REV. 353, 354 (1998-1999).

9. Eric A. Posner & John C. Yoo, *Judicial Independence in International Tribunals*, 93 CALIF. L. REV. 1, 27 (2005).

10. Laurence R. Helfer & Anne-Marie Slaughter, *Why States Create International Tribunals: A Response to Professors Posner and Yoo*, 93 CALIF. L. REV. 899, 904 (2005).

11. *Id.* at 6-7.

some foundation in classical international law tribunals which deal with cases between state parties, this argument is inapplicable to human rights tribunals which can accept individual complaints against State Parties.¹² In fact, the overwhelming majority of commentators argue that international tribunals should indeed be independent to fulfil their mission effectively.¹³

The multivalent nature of an international tribunal that interacts with both States and individuals means that such tribunals operate from a position of overlapping legitimacies; they must appear legitimate to all applicants, not merely to State actors.¹⁴ A court that seeks to protect state parties' interests alone crucially undermines its legitimacy with individual applicants, and it cannot maintain "diffuse support" from the public.¹⁵ The ECtHR is increasingly conceptualised as a constitutionalist court¹⁶ which

12. Posner and Yoo have discussed the ECtHR in their study but did not arrive at a firm conclusion as to whether the ECtHR also fits into their model. See Posner & Yoo, *supra* note 9, at 63-67.

13. Judge Julia Laffranque of the ECtHR notes, "judges draw their legitimacy from the law, which requires them to be independent and impartial." Julia Laffranque, *Judicial Independence – as Natural as the Air We Breathe*, in DOMMERNES UAVHENGIGHEIT 327, 327-328 (Nils Asbjorn Engstad et al. eds. 2012). Eyal Benvenisti and George Downs argue that legitimacy of international tribunals is "critically tied to the extent to which they are viewed as independent." See Eyal Benvenisti & George W. Downs, *Prospects for the Increased Independence of International Tribunals*, 12 GERMAN L.J. 1057, 1057 (2011).

14. Armin von Bogdandy and Ingo Venzke argue that there is a new cosmopolitan approach to operations of international tribunals: "[i]t takes the individual citizen to be the ultimate reference point in the justification of public authority and invests it with a national as well as a cosmopolitan identity." Armin von Bogdandy & Ingo Venzke, *In Whose Name? An Investigation of International Courts' Public Authority and Its Democratic Justification*, 23 EUR. J. INT'L L. 7, 34 (2012).

15. Shai Dothan states, "'diffuse support' . . . measures whether the public is generally inclined to accept a court's judgments, even if they disagree with a specific judgment." Shai Dothan, *How International Courts Enhance Their Legitimacy*, 14 THEO. INQ. L. 455, 456 (2013); see also, James L. Gibson, Gregory A. Caldeira & Lester Kenyatta Spence, *Why Do People Accept Public Policies They Oppose? Testing Legitimacy Theory with a Survey-Based Experiment*, 58 POL. RES. Q. 187, 188 (2005) (discussing "diffuse support").

16. There is a tendency in academic literature to accept that the ECtHR is a constitutionalist court. See, e.g., Martin Shapiro & Alec Stone Sweet, in ON LAW, POLITICS, & JUDICIALIZATION 155 (2002); see also Fiona de Londras, *Dual Functionality and the Persistent Frailty of the European Court of Human Rights* EUR. HUM. RTS. L. REV. 38 (2013); Steven Greer and Luzius Wildhaber, *Revisiting the Debate about 'Constitutionalising' the European Court of Human Rights* 12 HUM. RTS. L. REV. 655 (2012); Kanstantsin Dzehtsiarou & Alan Greene, *Restructuring the European Court of Human Rights: Preserving the right of Individual Petition and Promoting*

should not only find a solution capable of satisfying the interests of the State parties, but must also look for a solution which will enhance human rights protection in Europe.¹⁷ This means the ECtHR must be independent in order to secure legitimacy.¹⁸

Paul Mahoney also argued that the Contracting Parties benefit from independent human rights courts:

[T]he truly independent international judicial control of national action in the field of human rights is not only of occasional benefit for the few individuals who once in a while “win” a case but also one means (among many others, of course) of strengthening and developing a healthy, dynamic democratic society.¹⁹

An independent international tribunal not only strengthens the legitimacy of the tribunal itself, but also strengthens the national legal system.²⁰

Furthermore, independence is an inherent aspect of the rule of law. Academic discussions of the rule of law typically separate it into two conceptions: a thick conception, which incorporates substantive elements, and a thin conception, which focuses on more formal elements. The importance of an independent judiciary is conceded by both schools of thought. In the formal school, Joseph Raz argues:

The rules concerning the independence of the judiciary—the method of appointing judges, their security of tenure, the way of fixing their salaries, and other conditions of service—are designed to guarantee that they will be free from extraneous pressures and

Constitutionalism, PUB. L. 711 (2013).

17. In 2003, international human rights NGO Interights published a report about independence of the ECtHR. Interights experts stated that the Court's independence is important because, “the Court's law and practice has increasing influence on the law and practice of the Member States, assuming a quasi-constitutional nature that underlines the importance of the standards maintained by the Court itself.” JUTTA LIMBACH ET AL., JUDICIAL INDEPENDENCE: LAW AND PRACTICE OF APPOINTMENTS TO THE EUROPEAN COURT OF HUMAN RIGHTS 7 (2003) (discussing the Interights report).

18. Lord Hoffmann, for instance, emphasized the drawbacks in elections to the ECtHR. This led him to conclude that, “to the people of the United Kingdom, this judicial body [the ECtHR] does not enjoy the constitutional legitimacy.” Leonard Hoffmann, *The Universality of Human Rights*, 125 LAW Q. REV. 416, 429 (2009).

19. Paul Mahoney, *Parting Thoughts of an Outgoing Registrar of the European Court of Human Rights*, 26 HUM. RTS. L.J. 345, 345 (2005).

20. This is particularly the case in young democracies. See Andrew Moravcsik, *The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe*, 54 INT'L ORG. 217 (2000).

independent of all authority save that of the law. They are, therefore, essential for the preservation of the rule of law.²¹

Similarly, proponents of the thick conception such as Tom Bingham recognise the importance of an independent judiciary for the rule of law.²² The “rule of law” is mentioned as part of the common heritage of the signatories of the European Convention of Human Rights in the Preamble. It therefore forms part of the value framework of Convention jurisprudence.

Judicial independence is required by the rule of law²³ and is “indissociable from the very concept of justice.”²⁴ Consequentially, more than a dozen international conventions, regulations and protocols codify the standards of independence of domestic courts.²⁵ One must now consider which standards should be applicable to international judges: should existing national standards be adopted or should new standards be created?

This paper argues that the elaboration of the standards of judicial independence in the ECtHR has often occurred without consideration of the insights which national court independence can

21. JOSEPH RAZ, *THE AUTHORITY OF LAW* 217 (1979).

22. Tom Bingham, *The Rule of Law*, 66 CALIF. L. REV 67, 80 (2007).

23. Mahoney, *supra* note 4, at 317.

24. *Id.* at 316.

25. See, e.g., SHIMON SHETREET & JULES DESCHENES, *JUDICIAL INDEPENDENCE: THE CONTEMPORARY DEBATE* 139 – 42, 481, 489, 490, (Shimon Shetreet & Jules Deschenes eds., 1985) (discussing in detail, *Syracuse Draft Principles on the Independence of the Judiciary Adopted at Syracuse, Sicily* (1981), *the Universal Declaration on the Independence of Justice Adopted at Montreal, Canada* (1983)). See also *United Nations Basic Principles on the Independence of the Judiciary* G.A. Res. 40/146, U.N. Doc. A/RES/40/146 (Dec. 13, 1985); COUNCIL EUR., *EUROPEAN CHARTER ON THE STATUTE FOR JUDGES AND EXPLANATORY MEMORANDUM* (1998) http://www.coe.int/t/dghl/monitoring/greco/evaluations/round4/European-Charter-on-Statute-of-Judges_EN.pdf;

COMMENTARY ON THE BANGALORE PRINCIPLES OF JUDICIAL CONDUCT (2007), [http://www.unrol.org/files/publications_cnodc_commentary-E\[1\].pdf](http://www.unrol.org/files/publications_cnodc_commentary-E[1].pdf). A number of documents were adopted by the Consultative Council of European Judges (CCJE). See, e.g., *CONSULTATIVE COUNCIL EUR. JUDGES, MAGNA CARTA OF JUDGES* (2010) <https://wcd.coe.int/ViewDoc.jsp?id=1707925>; *CONSULTATIVE COUNCIL EUR. JUDGES, FOR THE ATTENTION OF THE COMMITTEE OF MINISTERS OF THE COUNCIL OF EUROPE, ON STANDARDS CONCERNING THE INDEPENDENCE OF THE JUDICIARY AND THE IRREMOVABILITY OF JUDGES*, OPINION NO. 1, (2001) [hereinafter *Irremovability of Judges*], [https://wcd.coe.int/ViewDoc.jsp?Ref=CCJE\(2001\)OP1&Sector=secDGHL&Language=lanEnglish&Ver=original&BackColorInternet=FEF2E0&BackColorIntranet=FEF2E0&BackColorLogged=c3c3c3](https://wcd.coe.int/ViewDoc.jsp?Ref=CCJE(2001)OP1&Sector=secDGHL&Language=lanEnglish&Ver=original&BackColorInternet=FEF2E0&BackColorIntranet=FEF2E0&BackColorLogged=c3c3c3).

provide. The development of standards designed to protect independence, while recognising the special supranational nature of the ECtHR means direct transposition of national standards is not always appropriate,²⁶ should take due account of those national protections. We offer a number of proposed reforms based on a synthesis of national and supranational considerations.

A. Unique Features of Supranational Systems

There are a number of features of a supranational legal system which mean the direct transposition of national standards is not always suitable. One such feature is how the judgments of the ECtHR are enforced. Since the ECtHR cannot coercively implement its decisions, the Contracting Parties must still accept the legitimacy of the Court's judgments even when the Court rules against them. It is technically correct that national courts often cannot *stricto sensu* enforce their judgments and have to rely on the executive branch of Government to do so.²⁷ Nonetheless, national courts usually have more clear remedies entrenched in their national constitutional architecture. Therefore, the judgments of domestic courts are nearly always automatically executed. In the case of international tribunals, the execution of judgments is more complex, and the Contracting Parties generally have to accept and execute them. Therefore, Terris, Romano and Swigart argue "the work of international courts can never be entirely divorced from the world of international politics."²⁸ The ECtHR deals with sovereign states and the "capacity of international courts to flourish depends on the support of the States."²⁹ This tension must be borne in mind when considering the development of standards designed to protect the independence of international judges.

Another difference between national and international judges is

26. Mahoney has pointed out that, "[a]s a matter of principle, standards of judicial independence [of international courts are] analogous, though not necessarily identical, to those applicable to national judges apply to international judges." Mahoney, *supra* note 4, at 315 and 346. Laffranque also claims that the principles and standards created for the judiciary of the Member States should not be forgotten in relation to independence of the ECtHR. Laffranque, *supra* note 13, at 338. See also, Benvenisti & Downs, *supra* note 13, at 1058.

27. There are, of course, famous instances where the executive branches of national governments have simply refused to execute a decision. See, e.g., *Ex Parte Merryman* (1861) 17 F. Cas. 144 (C.C.D. Md. 1861).

28. TERRIS, *supra* note 4, at xxi.

29. Mahoney, *supra* note 4, at 318.

that the independence of the latter should be guarded from the interventions of multiple States.³⁰ Such pressure from multiple States can be more effective than an intervention by a single State. In the (in)famous case of *Lautsi and others v Italy* the Court had to decide if the mandatory display of crucifixes in Italian public schools violated Article 9 of the ECHR (freedom of religion).³¹ The Governments of 10 Contracting Parties³² intervened at the Grand Chamber stage with third party submissions. In this case the Grand Chamber reversed the chamber decision and found no violation.

The relative infrequency of such interventions means that this threat to the independence of the ECtHR has not appeared particularly pressing. This may change with the accession of the EU to the ECtHR. First, the ECtHR will have to take into account what the EU has decided because it will represent 29 Contracting Parties to the Convention.³³ This is likely to be accorded particular importance in relation to the ascertainment of European consensus.³⁴ Second, the accession may provide greater possibilities of collective action approaches by national States. An agreed strategy by European-wide groupings such as the European People's Party or the Progressive Alliance of Socialists and Democrats could result in concerted submissions by the national State Governments, which belong to those groupings.

B. The Standard of Judicial Independence

One further difficulty in any attempt to consider the application of judicial independence to the ECtHR is that there is no consensus on the definition of judicial independence.³⁵ We proceed on the basis of the Commentary on the Bangalore principle of judicial

30. Shetreet, *supra* note 8, at 129 and 148.

31. *Lautsi and others v. Italy*, 54 Eur. Ct. H.R. 3 (2011).

32. Armenia, Bulgaria, Cyprus, the Russian Federation, Greece, Lithuania, Malta, Monaco, Romania and the Republic of San Marino.

33. 28 Member States of the EU and the EU itself.

34. See Kanstantsin Dzehtsiarou and Pavel Repyeuski, *European Consensus and the EU Accession to the ECHR*, in *THE EU ACCESSION TO THE ECHR* (Vasiliki Kosta et al. eds. 2014).

35. While most of the definitions contain similar aspects, there is no single universally accepted definition. As such, Larkins argued that judicial independence is "one of the least understood concepts of political science and law." Larkins, *supra* note 5, at 607.

conduct,³⁶ which explains:

Judicial independence refers to both the individual and the institutional independence required for decision-making. Judicial independence is, therefore, both a state of mind and a set of institutional and operational arrangements. The former is concerned with the judge's independence in fact; the latter with defining the relationships between the judiciary and others, particularly the other branches of government, so as to assure both the reality and the appearance of independence. The relationship between these two aspects of judicial independence is that an individual judge may possess that state of mind, but if the court over which he or she presides is not independent of the other branches of government in what is essential to its functions, the judge cannot be said to be independent.³⁷

On various occasions the ECtHR assessed the independence of domestic tribunals and elaborated a set of criteria for independence. In *Langborger v Sweden* the ECtHR 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 pressures and to the question whether the body presents an appearance of independence."³⁸ The Court has elaborated the basic principles of judicial independence but as Paul Mahoney observes international tribunals are reluctant to affirm the applicability of these principles to an assessment of their own independence.³⁹ Nonetheless the *Langborger* criteria provide a useful metric to assess whether the judiciary of the ECtHR is independent.

36. The United Nations Social and Economic Council, by resolution 2006/23, has invited member States consistent with their domestic legal systems to encourage their judiciaries to take into consideration the Bangalore Principles of Judicial Conduct when reviewing or developing rules with respect to the professional and ethical conduct of the members of the judiciary. U.N. Economic and Social Council Res. 2006/23: Strengthening Basic Principles of Judicial Conduct, E/RES/2006/23 (July, 23 2006), available at <http://www.refworld.org/docid/46c455ab0.html>.

37. *Commentary on the Bangalore Principles of Judicial Conduct*, JUDICIAL INTEGRITY GROUP, <http://www.judicialintegritygroup.org/index.php/jig-resources/jig-documents> (last visited Mar. 21, 2014).

38. *Langborger v. Sweden*, 12 Eur. Ct. H.R. 416 at ¶32 (1990); see also Ben Olbourne, *Independence and Impartiality: International Standards for national Judges and Courts*, 2 L. & PRAC. INT'L CTS. & TRIBUNALS 97, 109--113 (2003) (discussion of the standards for judicial independence elaborated by the ECtHR).

39. Mahoney, *supra* note 4, at 317.

C. Independence of the ECtHR

Many external commentators agree that the ECtHR “presents an appearance of independence.”⁴⁰ Dzehtsiarou has canvassed the opinion of 50 lawyers and NGO activists from Russia, Moldova, Azerbaijan, and Ukraine about judicial independence. The participants were first asked whether they consider their domestic courts to be independent. Only about 5% of participants answered “yes” to this question.⁴¹ The participants were then asked if they consider the ECtHR more independent than their domestic courts, and all participants answered they believed the ECtHR is more independent. These results were confirmed by semi-structured interviews with the lawyers from Moldova which revealed that trust in domestic judicial institutions is very low. The vast majority of Moldovan lawyers, however, perceive the ECtHR as an independent court. Moldovan lawyers were asked the open question “why do you consider the ECtHR more independent?” and the following answers were most prevalent:

- 1) remoteness from the parties,
- 2) judges are from different countries and the bias of one judge can be mitigated by other judges,
- 3) there are usually better safeguards of independence than for local judges,
- 4) there is a clear procedure and good convincing reasoning of the judgments.

Some participants have observed that the ECtHR is indeed more independent than national Courts but that it is not absolutely independent. One of the lawyers of the ECtHR explained that

[I]ndependence of the Court is secured by the *modus operandi* of the Court meaning that there are too many people (judges and lawyers) involved in the Court’s adjudication and if one person is biased it is normally rectified by the others. Moreover, the fact that the Court is geographically remote from the parties to the case also helps. State interference is normally not justified because the major part of the Court’s docket consists of repetitive cases of low importance. It is also unwise for the private parties to try to influence the Court because the Court proceedings are long and

40. See Voeten, *supra* note 8; Helfer & Slaughter, *supra* note 10, at 21; Posner & Yoo, *supra* note 9, at 63.

41. Kanstantsin Dzehtsiarou Interviews with lawyers from Russia, Ukraine, Azerbaijan, and Moldova.

the just compensation is usually relatively small.⁴²

Furthermore, academics such as Voeten argue that national governments themselves may have reasons to appoint activist judges who can bolster judicial independence.⁴³ First, national governments that favour European integration tend to appoint more independent judges.⁴⁴ Second, countries which seek to become members of the EU may try to signal their adherence to international human rights standards by appointing independent judges.⁴⁵

Given the positive response by interviewees to these questions and the fact that national governments often favour judicial independence, Europeans must consider whether there is any need to alter the current system of judicial independence in the ECtHR. First, perceived independence is obviously a relative concept, and it seems likely that lawyers in countries with more robust domestic human rights protections will have different responses to the ECtHR compared to those in more newly fledged democracies. Second, some commentators have expressed concerns about different areas relating to judicial independence in the ECtHR including, for instance, the election of judges.⁴⁶ Third, there have been a few cases reported when a judge of the Court were publicly and personally criticised for their decisions,⁴⁷ or as in case with Judge Wildhaber⁴⁸

42. Kanstantsin Dzehtsiarou Interview with a lawyer of the ECtHR Registry.

43. Voeten, *supra* note 8.

44. *Id.* at 697.

45. *Id.* at 678 – 679, 697.

46. LIMBACH, *supra* note 17, at 18 (calling the national nomination of candidates, “unclear, apparently politicised and unaccountable.”).

47. Voeten lists a few instances of such influence. Voeten, *supra* note 8, 419-422. (Voeten describes how, for example, the British tabloid *The Sun* calling the judges of the ECtHR “Euro clowns,” or the Albanian opposition party expressed embarrassment for the vote of the Albanian judge in the case of Abu-Hamsa.)

48. Luke Harding, *I Was Poisoned by Russians, Human Rights Judge Says*, THE GUARDIAN (Jan. 31, 2007) available at <http://www.guardian.co.uk/world/2007/feb/01/russia.topstories3>. In the interview published by the European Human Rights Law Review, Judge Wildhaber asked rhetorically, “Is there any reason to suspect that someone tried to poison me? Look, I had repeated clashes and disagreements with the Russians and I think this was inevitable. If you have people who come into your office in Strasbourg and tell you that you should order the judges about how to vote in a given case, or the Head of State sends you a message about what should happen in another case, you are bound to have disagreements. But is that enough to want to kill someone? I should say no. So my

has even been allegedly poisoned in Russia. If the court delivers unpopular judgments, the Court as an institution, or even the individual judges can become targets of very unfair critiques.⁴⁹ Fourth, Benvenisti and Downs argue that the more influential a court becomes the more its independence will be threatened.⁵⁰ Since the Court's importance and weight continues to grow,⁵¹ attempts to intervene in the Court's functioning will increase. Moreover, the early threats to the Court's independence, such as the threat to denounce the Convention, are likely to be superseded by more subtle methods of interference (except in the case of Judge Wildhaber, where the interference was more direct).⁵² Fifth, the fact that there are too many people for one national government to systematically influence the decisions of the ECtHR in its favour does not mean it is not possible for national governments to influence split decisions, because a national judge is always appointed to hear a case.⁵³ Finally, the changing institutional nature of the Court in light of the changes in the tenure of the judges of the Court and increase in personnel of the registry, and the accession of new, influential, signatories to the Convention means that new vistas of interference have opened up which the current institutional framework may be

conclusion is this: I had septicaemia. We do not know how it originated. That does not mean I was poisoned." Steven Greer, *Reflections of a former President of the European Court of Human Rights*, EUR. HUM. RTS. L. REV. 165, 169-170 (2010). Examples of such direct influence are rare. "I have never experienced nor heard any other judge talk of any pressure or effort from either his government or one of the parties or anything of that kind," says a veteran of one of the European Courts. "As far as my own government is concerned" says another European judge, "I am in a most felicitous situation of being able to say I have never had a phone call from my government nor did I have any phone calls from the attorneys of the applicants. That's really very comfortable." TERRIS, *supra* note 4, at 150. Recently retired Russian judge Judge Kovler also stated that he has never been subjected to "administrative pressure" from Russia. Anatoly Kovler, *When One Disagrees One Should Remain Professional: Interview with Judge Anatoly Kovler*, 5 INT'L JUST. J. (in Russian) 66, 68 (2013). Judges of the ECtHR interviewed by the author have also expressed similar views.

49. Ferejohn, *supra* note 8, at 374.

50. Benvenisti & Downs, *supra* note 13, at 1060.

51. Shapiro and Stone Sweet conclude that the ECtHR "has rendered enough judgments that have caused enough changes in state practices so that it can be counted to a rather high degree as a constitutional review court." Shapiro & Stone Sweet, *supra* note 16, at 155.

52. ED BATES, THE EVOLUTION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 311 (2010). Anne-Marie Slaughter & Laurence Helfer, *Towards a Theory of Effective Supranational Adjudication*, 107 YALE L.J., 273, 367 (1997).

53. See Voeten, *supra* note 8, at 426.

inadequate to protect against.

This paper will discuss the organisational and architectural safeguards of judicial independence. Judicial independence cannot be guaranteed only by measures like security of tenure or a proper social security system for judges and judicial assistants.⁵⁴ These conditions are necessary but not sufficient to establish true judicial independence.

Some commentators argue that the Court's independence waxes and wanes, and it depends on "political competition [which] plays a key role in determining judicial independence [. . .]."⁵⁵ It has been argued the independence and effectiveness of the Court can be enhanced by the judicial strategies it deploys in its judgments.⁵⁶ This paper will not analyse this aspect of judicial independence since in order to discuss these more advanced elements of judicial independence one should first put in place some basic legal safeguards.

Legal safeguards of the independence of the ECtHR should be divided into two categories, depending on whether they guarantee the independence of judges or the independence of the ECtHR beyond merely judicial independence. The independence of the judiciary is at the forefront of every discussion of the independence of the Court. The Council of Europe has made significant progress in securing the independence of judges. It does not mean that nothing more can be done in this area⁵⁷ but it is already densely populated by legal norms and regulations.

The second category of measures secures the independence of the Court beyond the membership of the bench itself. As the Working Paper on the Conclusions of the Committee on the Judiciary and the Legal Profession under the Rule of Law noted: "It is . . . important to have regard to the independence not only of the judge but also of the Judiciary as an institution; the latter may

54. McNollgast, *Conditions for Judicial Independence*, 15 J. CONTEMP. LEGAL ISSUES 105, 106 (2006).

55. Benvenisti & Downs, *supra* note 13, at 1071.

56. "Independent international tribunals have been able to further increase interstate competition by weighing in on behalf of weaker state interests rather than operating as the agents of powerful states as they would have been forced to do under conditions of dependency." *Id.* at 1078. See Shai Dothan, *Judicial Tactics in the European Court of Human Rights*, 12 CHI. J. INT'L. L. 115 (2011) (discussing various strategies available to the ECtHR).

57. Mahoney, *supra* note 4, at 327.

provide traditions and a sense of corporate responsibility which are a stronger guarantee of independence than the private conscience of the individual judge.”⁵⁸ In the context of the ECtHR, it is impossible to consider the corporate responsibility of the Court without due consideration of the role of the Registry. It maintains the institutional memory of the Court. The judges of the Court are on the bench for only 9 years.⁵⁹ Some lawyers in the Registry have permanent contracts and stay in the Court for much longer terms. For instance, Erik Fribergh the current Registrar of the Court has been working first in the Commission and then the Court since 1981.⁶⁰ The institutional importance of the Registry has been recognised by the Judiciary of the ECtHR; one judge interviewed noted “the way the system is now with the registry which is permanent, the registry is extremely strong, extremely powerful.”⁶¹ Moreover, the role of the Registry is much more important than the provision of simple administrative support. The Registry plays a larger role in ensuring the legitimacy of the structure of the ECHR. Tyler has demonstrated the most important element that affects individuals in legal disputes is the process by which their case is handled.⁶² The most important considerations in determining whether a legal procedure is viewed as fair or not include: participation, trustworthiness, interpersonal respect, and neutrality.⁶³ Any elements of the composition of the Registry or the ECtHR which undermine these elements pose a potential problem for the perceived legitimacy of the ECtHR as a whole.

This category also includes the institutional autonomy of the Court from the Council of Europe. The Council is a political organisation comprised of the Member States’ representatives. One should not forget that the States are the parties in the cases heard by the

58. INT’L COMMISSION OF JURISTS, *The Rule of Law in a Free Society: A Report on the International Congress of Jurists*, New Delhi, India (1959).

59. European Convention on Human Rights, art. 23, Sept. 4, 1950, 213 U.N.T.S. 222.

60. *Judges of the Court*, EUR. CT. HUM. RTS., <http://www.echr.coe.int/ECHR/EN/Header/The+Court/The+Court/Judges+of+the+Court/> (last visited Jan. 24, 2014).

61. Kanstantsin Dzehtsiarou Interviews with the Judges of the ECtHR.

62. Tom Tyler, *Citizen Discontent with Legal Procedures: A Social Science Perspective on Civil Procedure Reform*, 45 AM. J. COMP. L. 871, 882 (1997).

63. *Id.* at 887-892. These considerations hold through in heterogeneous societies. See generally Tom Tyler, *Multiculturalism and the Willingness of Citizens to Defer to Law and to Legal Authorities*, 25 L. & SOC. INQUIRY 983 (2000).

ECtHR. It is surprising that the issue of administrative autonomy of the Court has not been much discussed in academic literature until recently.⁶⁴

III. The Independence of the Judges of the ECtHR

One major threat to the independence of the judiciary of the ECtHR is national representation, the process by which a judge elected from a Member State is automatically appointed in any case to which the Member State is the respondent. This process can give the Member States a false impression judges should act to represent the interests of the country to which they are a national. Although Posner and Yoo believe this is one of the sole grounds on which the legitimacy of international human rights tribunals rests, we argue such a cramped conception of legitimacy should be rejected. In fact, the legitimacy of the ECtHR is undermined if it rests solely on Posner and Yoo's conception of legitimacy.⁶⁵

The ability of Member States to promote their interests in the Court is most powerful during the election process. States gain an advantage through the monopolisation of relevant information by Member State Governments, preventing informed decision-making, nominating partisan candidates, and other processes such as lobbying. This article advocates an approach based on the principles of transparency and informed assent by the members of the Parliamentary Assembly of the Council of Europe (PACE). Such a system can further legitimise the ECtHR. This paper identifies how national representation distorts the election process and advocates the abolition of the national representation procedure. However, national representation might not be abandoned for political or policy reasons. If it cannot be eliminated, other checks should be introduced in order to safeguard the independence of the judiciary.

A. Election of the Judges

The manner in which a judge is appointed or elected presents

64. Laffranque argues that, "[i]t might be very surprising at first glance that, e.g., talks about administrative autonomy of the European Court of Human Rights from the Council of Europe are only recently, and in a very cumbersome way, beginning to take concrete shape." Laffranque, *supra* note 13, at 337.

65. See also Dzehtsiarou, *supra* note 7.

one of the key areas in which political manipulation can occur.⁶⁶ The election of the judges is one of the cornerstones of the judicial independence of any court, including the ECtHR. These elections have evolved from simply rubber-stamping the choice of the Member States by the PACE to more insightful consideration and meritorious assessment of the candidates. Despite this development, the selection of judges by the PACE has recently been called a "Byzantine appointments procedure."⁶⁷ The procedure of the election of the judges should be further improved.

The election of the judges of the ECtHR is a three stage process. A Member State first nominates three candidates for the position of judge. The second stage is an interview with the candidates conducted by the special Sub-Committee of the PACE. The Sub-Committee can suggest to the PACE to return the list to the Member State, if the list, for instance, contains only one 'real candidate' or if it is not gender balanced. The authority of the PACE to do so was confirmed by the ECtHR in an advisory opinion.⁶⁸ If there are no reasons for rejection, the Sub-Committee passes the list to the PACE and encloses a confidential report with its evaluation of the candidates. The final stage of the appointment procedure is to hold an election where the PACE can vote twice: the judge is elected during the first round if one of the candidates receives an absolute majority of votes. If nobody receives an absolute majority, a simple majority is sufficient in the second round.⁶⁹

66. Limbach argues that the "appointment procedures impact directly upon the independence and impartiality of the judiciary. Since the legitimacy and credibility of any judicial institution depends upon public confidence in its independence, it is imperative that appointment procedures for judicial office conform to - and are seen to conform to - international standards on judicial independence." LIMBACH, *supra* note 17, at 6. According to Burbank, "'the political branches' control of the judicial appointments process poses . . . a threat to judicial independence." Pamela S. Karlan, *Two Concepts of Judicial Independence*, 72 S. CAL. L. REV. 535, 545 (1998-1999).

67. Owen Bowcott, *Paul Mahoney Appointed UK's New Judge in Strasbourg*, THE GUARDIAN (June 27, 2012, 18:37 EDT), <http://www.theguardian.com/law/2012/jun/27/paul-mahoney-european-court-judge>.

68. 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, (Eur. Ct. H.R. 2008), *available at* <http://www.echr.coe.int/echr/> (last visited Mar. 27, 2010).

69. EUR. PARL. ASS., RESOLUTION 1726 ON THE EFFECTIVE IMPLEMENTATION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS: THE INTERLAKEN PROCESS, para. 8 (2010); *see also* EUR. PAR. ASS., COMMITTEE ON LEGAL AFFAIRS AND HUMAN RIGHTS PROCEDURE FOR ELECTING JUDGES TO THE EUROPEAN COURT OF HUMAN RIGHTS INFORMATION

1. Nomination

The first stage of the election procedure—nomination of the candidates—is crucial, and the quality of nomination at the national level will determine the quality of the judge ultimately elected by the PACE.⁷⁰ This stage is troublesome for primarily two reasons. Despite the importance of this stage, it is often seen as the most troublesome element of the election procedure for two main reasons. First, the Convention does not provide detailed criteria for office. Although the Council of Europe has since provided some guidance on this issue, this has been criticized and has been the subject of political controversy.⁷¹ Second, some procedures at national level might be politically motivated. The fact the candidates are nominated by political institutions makes some political influence inevitable, but more importantly, there is a lack of transparency in how the selections are made. The stakes are elevated for the Member States, because they know any appointee will sit on cases that affect it. The influence of Member States on sitting judges is likely to be largely illusory due to the strong collegial independence which the European Court enjoys, but is

DOCUMENT PREPARED BY THE SECRETARIAT (2014) [hereinafter Committee on Legal Affairs Report], http://assembly.coe.int/CommitteeDocs/2014/ajinfdoc03_2014.pdf (“The candidate having obtained an absolute majority of votes cast is declared elected a member of the Court. If no candidate obtains an absolute majority, a second ballot is held, after which the candidate who has obtained a relative majority of votes cast is declared elected. Election results are publicly announced by the President of the Assembly during the part-session.”) (citing Resolution 1726).

70. It is worth mentioning that two factors may have contributed to defects in the election process: (1) a lack of precise criteria about training in the area of human rights, and (2) deficient language competence contributed to some defects in election process. See Loukis G. Loucaides, *Reflections of a Former European Court of Human Rights Judge on His Experiences as a Judge*, 1 ROMA RIGHTS (2010), available at <http://www.errc.org/roma-rights-journal/roma-rights-1-2010-implementation-of-judgments/3613/8>.

71. The Council of Europe requires that the list submitted is gender balanced. See EUR. PARL. ASS., RESOLUTION 1366 ON CANDIDATES FOR THE EUROPEAN COURT OF HUMAN RIGHTS (2010), http://assembly.coe.int/nw/xml/RoP/RoP-XML2HTML-EN.asp?id=EN_CEGCAIFG#Format-It (“[T]he political groups, when nominating their representatives to the sub-committee, should aim to include at least 40% women, which is the parity threshold deemed necessary by the Council of Europe to exclude possible gender bias in decision-making processes.”). The list from Malta was therefore rejected due to the fact that it contained only male candidates for the position of a judge. The Maltese authorities expressed their concerns by this rejection and the ECtHR had to deliver an advisory opinion on the issue. See Advisory Opinion, *supra* note 68, at para. 14.

immaterial if the national government perceives it to be otherwise.

The lack of detailed criteria for office is comparatively easy to rectify. Pursuant to article 21(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. These criteria are broad and call for further elaboration. The Committee of Ministers has developed guidelines on the selection of candidates for the post of judge at the ECtHR that must be implemented by the Contracting Parties. The guidelines explain the essential qualities the candidates should possess: apart from those mentioned in the Convention, the candidates need to have knowledge of the national legal system(s) and of public international law. The candidates should not engage in any activity incompatible with their independence, impartiality or with the demands of a full-time office if elected, for the duration of their term of office.⁷²

The removal of the national representation requirement would considerably lessen any partisan interest a national government might have in the nomination of a judge, as they could not be certain the judge would sit on cases where it was a respondent. Moreover, the domestic nomination procedures should be modified to ensure that they are all transparent and politically neutral.⁷³ The Committee of Ministers has set an Advisory Panel of Experts on Candidates for Election as Judge to the ECtHR, which can advise the Contracting Parties whether candidates for election as judges of the ECtHR meet the criteria for office.⁷⁴ According to the Resolution of the Committee of Ministers of the Council of Europe that established this Panel, before submitting a list to the PACE, each Contracting Party will forward the names and CVs of the intended candidates to the Panel. If the Panel finds that all of the persons put forward by a Contracting Party are suitable candidates, no further comments will be provided. Where it is likely the Panel may find one

72. COUNCIL OF EUROPE, GUIDELINES OF THE COMMITTEE OF MINISTERS ON THE SELECTION OF CANDIDATES FOR THE POST OF JUDGE AT THE EUROPEAN COURT OF HUMAN RIGHTS - EXPLANATORY MEMORANDUM (2012), <https://wcd.coe.int/ViewDoc.jsp?id=1919201&Site=CM>.

73. LIMBACH, *supra* note 17, 5 - 6.

74. 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, at para. 1 1 (Nov. 10, 2010) <https://wcd.coe.int/ViewDoc.jsp?id=1704555&Site=CM>.

or more candidates not suitable for office, the chair of the Panel contacts the Contracting Party concerned to inform it or to request comments. This is done confidentially. If the Contracting Party persists with its choice then the views of the Panel are confidentially forwarded to the PACE.⁷⁵ While the creation of this panel is undoubtedly a positive development, it does not prevent the Contracting Parties from submitting inadequate candidates. The States are not bound by the conclusions of the Panel, as it is a merely advisory panel, and can submit their list even if it received negative feedback. That said, the fact that the opinion of the Panel will become known to the PACE raises the chances the Contracting Parties will take its recommendations seriously.

The abovementioned guidelines on the selection of candidates do not only contain a longer list of criteria for the office but also enshrine procedural recommendations of the national nomination process. The explanatory memorandum to these guidelines provides the States should have:

[A] stable and established procedure [which] reflects the rule of law principles of transparency and consistency, and thus also legal certainty. Applicants and the general public should be able to rely upon a certain procedure being followed, although that procedure need not be the same for every successive selection process. The need for accessibility of details of the procedure reflects the principle of transparency. Applicants and the general public should be able to know in advance the procedure that will be followed.⁷⁶

These rules should be endorsed because they increase the chances the most skilful individuals will be selected. However, as was rightly pointed by the Consultative Council of European Judges, "what is critical is not the perfection of principle . . . it is the putting into full effect of principles already developed."⁷⁷ Even

75. *Id.* at para. 5.

76. COUNCIL OF EUROPE, MINISTERS' DEPUTIES, EXPLANATORY MEMORANDUM, GUIDELINES OF THE COMMITTEE OF MINISTERS ON THE SELECTION OF CANDIDATES FOR THE POST OF JUDGE AT THE EUROPEAN COURT OF HUMAN RIGHTS (2010), <https://wcd.coe.int/ViewDoc.jsp?id=1919201&Site=CM>.

77. CONSULTATIVE COUNCIL OF EUROPEAN JUDGES, FOR THE ATTENTION OF THE COMMITTEE OF MINISTERS OF THE COUNCIL OF EUROPE, *ON STANDARDS CONCERNING THE INDEPENDENCE OF THE JUDICIARY AND THE IRREMOVABILITY OF JUDGES*, OPINION NO. 1, (2001), [https://wcd.coe.int/ViewDoc.jsp?Ref=CCJE\(2001\)OP1&Sector=secDGHL&Language=lanEnglish&Ver=original&BackColorInternet=FEF2E0&BackColorIntranet=FEF2E0&BackColorLogged=c3c3c3](https://wcd.coe.int/ViewDoc.jsp?Ref=CCJE(2001)OP1&Sector=secDGHL&Language=lanEnglish&Ver=original&BackColorInternet=FEF2E0&BackColorIntranet=FEF2E0&BackColorLogged=c3c3c3).

after the guidelines had been adopted some nomination procedures remain non-transparent and vulnerable to political manipulation.⁷⁸ Some states treat their national judges in international tribunals as their ambassadors aiming to promote their interests.⁷⁹ This ideology is totally unacceptable in the context of human rights courts, and this should be clearly and consistently emphasised by the Council of Europe.

The Council of Europe should ensure the nomination process includes as many stake holders as possible in order to lend credibility to the process. The following criticism of the current nomination process should be properly addressed:

States rarely confer with civil society, such as human rights organisations, bar associations and, perhaps most critically, judicial bodies. In cases where civil society is consulted, the opaque nature of procedures means that the impact of such consultations is unclear.⁸⁰

However, the Council of Europe is limited in what it can do to ensure implementation of the Guidelines and other relevant rules. Nonetheless, the fact remains that the judiciary of the ECtHR is almost exclusively drawn from the initial list submitted by the national Governments. Any manipulation of the process by political actors is likely to seriously undermine the credibility of the court if it brings the process itself into disrepute, or if it means less-than-capable jurists are appointed for partisan reasons. Therefore, the integrity of the process must be safeguarded as rigorously as possible.

78. "With a few exceptions, governments shunned any public advertising for candidates. In a few cases they advertised within a closed circle. Some seem even to have taken unsolicited applications into account." LIMBACH, *supra* note 17, at 67-68. Loucaides further argues that "[t]here were countries in which the selection was made on the basis of criteria such as the friendly relations of the candidate with influential political personalities or the affiliation of the person proposed with the political party in power." Loucaides, *supra* note 70. Human Rights Watch sent a letter to the ECtHR regarding pitfalls in nomination of candidates from Russia in 2012. The letter mentions the following: very brief contest period, the contest was not broadly advertised, lack of transparency in relation to the selection committee and the fact that civil society was not at all consulted. Letter from Hugh Williamson, Executive Director Human Rights Watch, to Klas de Vries, Chairman of Sub-Committee on Election of Judges to the European Court of Human Rights (Apr. 11, 2012), available at <http://www.hrw.org/news/2012/04/11/letter-european-court-human-rights-regarding-selection-procedure-candidates-russian>

79. Bogdandy & Venzke, *supra* note 14, at 34.

80. LIMBACH, *supra* note 17, at 18.

2. Interview with the Candidates

After States nominate their candidates, the nominees proceed to an interview conducted by the Sub-Committee on the election of Judges to the European Court of Human Rights. In 2003 the Committee on Legal Affairs and Human Rights, of which the Sub-Committee is part, presented a report that provided some guidance as to the considerations the Sub-Committee should look to when assessing a candidate.⁸¹ This report includes an assessment of the “integrity and independence” of the candidate.⁸² However, the interviews with the candidates are extremely brief and it is doubtful the proper evaluation of a candidate for such an important position can be completed in 15 minutes.⁸³ Given the fact that the 2003 report indicated twelve separate criteria to consider, this leaves 1.5 minutes to assess the nominee on each criterion.

Further criticism has been levelled at the personnel of the Sub-Committee itself. Lord Hoffmann has emphasised the lack of legal background of the members of the Sub-Committee.⁸⁴ The inclusion of independent experts in the Sub-Committee would increase its legitimacy and credibility.

The Sub-Committee also presents a potential arena in which political influence can be brought to bear in the interview process itself. This can again be remedied by implementing a more transparent process. For example, the Sub-Committee should be able to conduct a more profound check on the candidates beyond the formal CV it is presented and prepare a report on each candidate. This report, containing open source materials, should be available to the members of the PACE before an election is held.

3. Election

The final stage of the appointment process is the election held by

81. EUR. CONSULT. ASS., CANDIDATES FOR THE EUROPEAN COURT OF HUMAN RIGHTS, (2003), <http://assembly.coe.int/ASP/Doc/XrefViewHTML.asp?FileID=10348&Language=EN>.

82. *Id.* at para. 56.

83. LIMBACH, *supra* note 17, at 5. It seems that currently interviews go for about 30 minutes, it nevertheless leaves very little time for an in-depth assessment of the merits of the candidates. Often interviews for entry level positions at law firms can last for a couple of days and the position of the ECtHR judge is considerably more important than entry level law firm positions.

84. *See generally*, Lord Hoffmann, *supra* note 18, at 429.

the PACE. While judges elected by the members of the PACE cannot claim the same level of democratic legitimacy as representatives elected directly by people, this important stage can increase the credibility of the judges. This is particularly important because mass media often criticise the ECtHR judges as being unelected officials challenging decisions of elected parliaments.⁸⁵ The election of judges provides an additional mechanism for enhancing the legitimacy of the Court.⁸⁶

Despite its legitimacy-enhancing potential, the election of judges by the PACE has been criticised for two primary reasons. First, while members of the PACE now possess basic information about the relevant qualifications of the candidates, they lack sufficient information to make an informed decision about the candidates' suitability for the position.⁸⁷ Second, Member States lobby in favour of their preferred candidate.⁸⁸

One answer to the first criticism could be to prepare reports as advocated above. Another option would be to ensure the participation of the PACE members in the election beyond the report of the Sub-Committee. A simple question and answer session would give the members of the PACE more insight into the qualities of the candidates and would allow them to make more informed choices. The authors appreciate that the PACE sessions are very short and have a very intensive agenda. However, potential

85. "We may have become wearily accustomed to the crazy verdicts of the *unelected* European Court of Human Rights, which appears to delight in taking sides with rapists, murderers and terrorists against the British public. But even by the standards of this pack of remote, often poorly qualified *Eurocrats*, today's judgment in favour of Abu Qatada defies logic." James Slack, *Unelected Euro Judges are Bringing Terror to the Streets of Britain*, DAILY MAIL (Jan. 18, 2012) (emphasis added), <http://www.dailymail.co.uk/debate/article-2087831/Abu-Qatada-human-rights-Unelected-euro-judges-bringing-terror-streets-Britain.html#ixzz2Rs4oGIyD>.

86. Nicolas Bratza, *The Relationship Between the UK Courts and Strasbourg Eur.*, HUM. RTS. L.REV. 505, 506 (2011).

87. The candidates are rarely much known across Europe because very well-known lawyers are often reluctant to leave their domestic practice behind and go to Strasbourg for 9 years. Judge Hedigan (a former judge elected in respect to Ireland) in his interview explained that he had to leave his successful practice as a barrister in Dublin for some vague career prospect as a Strasbourg judge elected in 1998 when the permanent Court was just created. See TERRIS, *supra* note 4, at 214.

88. Some commentators argue that "[l]obbying by States, and occasionally by judicial candidates, jeopardises the future independence (actual and apparent) of judges." LIMBACH, *supra* note 17, at 9.

workload cannot outweigh the goal of ensuring that the nominees of sufficiently high calibre are elected to the ECtHR.

A more transparent process also responds to criticism of the ability of Member States to lobby for their preferred candidates. When members of the PACE lacked sufficient information to make an independent and informed choice, the national delegations often became the source of information about the nominees.⁸⁹ The possibility of partisan influence in such circumstances is obvious. The solution is to provide sufficient information to the PACE that is independently verified in order to ensure an informed decision can be made without relying on information from backroom channels.

The election process can be manipulated by the Contracting Parties through an opaque nomination process, through the provision of insufficient information to the PACE, and through lobbying of the members of the PACE. These issues have to be addressed in order to ensure the independence of the Court. If the national representation rule is abandoned, then the national interest in manipulating the process dissipates. If it is not possible to get rid of the national representation rule, these reforms will also increase the transparency of the whole process, which is crucially important to maintain public trust in the institution.⁹⁰

B. Principle of National Representation and Ad-Hoc Judges

Article 26(4) of the ECHR states:

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

89. One of the members of the PACE has described the voting process prior to the establishment of the Sub-Committee in the following terms: "We would be presented with the names of three people. We would be told to vote for one of them but, usually, no one told us anything about the three people. One could sometimes obtain a little information *from the delegation of the country whose judges we were about to select*. However, sometimes we would have been better off sticking a pin in the piece of paper to determine our choice of vote. Indeed, on a number of occasions I flatly refused to exercise the vote because I knew nothing about the candidates." Lord Hardy of Wath, House of Lords, 592 HANSARD 81 (1998) (emphasis added).

90. See Mahoney, *supra* note 4, at 345 - 346.

This provision creates numerous threats to the judiciary of the ECtHR. First, this provision creates an incentive for the Member States to push to elect an individual who is most likely to act in the State's interest. Second, Member States may be tempted to try to sway the decision of a judge hearing a case. This seems to be a mainly theoretical problem, as there is scant evidence such attempts have been made.⁹¹ However, stakeholders may perceive this as a conflict of interest, which creates a legitimacy problem for the court. Third, if the judge cannot hear the case, the principle of appointing an ad-hoc judge compounds the first two problems as ad-hoc judges are not subjected to the same level of institutional scrutiny as permanent judges

National representation is a principle that has been embraced by many different international tribunals. For example, in the International Court of Justice (ICJ) both parties to the case is entitled to have a judge of their nationality on the bench.⁹² There is a significant difference between tribunals such as the ICJ and the ECtHR. The former do not deal with individual complaints.⁹³ If the principle of equal representation were applied strictly to the ECtHR, then individual complainants should also be afforded representation. Applying this principle would undermine the legitimacy of the ECtHR, and it demonstrates the inadvisability of extending a direct parallel from other international tribunals to the ECtHR. Even in international tribunals, national judges do not always act as a national representative on the bench.⁹⁴

91. LIMBACH, *supra* note 17, at 18.

92. Under art. 31, paras. 2 and 3, of the Statute of the Court, a State party to a case before the International Court of Justice which does not have a judge of its nationality on the Bench may choose a person to sit as judge ad hoc in that specific case under the conditions laid down in arts. 35 to 37 of the Rules of Court. See Statute of the International Court of Justice arts. 31(2)-(3), 35-37, June 26, 1945, 33 U.N.T.S. 993 [hereinafter ICJ Statute]; see also *Judges Ad Hoc*, INT'L CT. JUST. (2014), <http://www.icj-cij.org/court/index.php?p1=1&p2=5>.

93. See *Judges Ad Hoc*, *supra* note 92; ICJ Statute, *supra* note 92 at art. 34, para. 1.

94. While there is no consensus among commentators on whether nationality influences the voting of the judges it makes little difference to this discussion since justice should not be only done but should be seen to be done. For more detailed analysis of correlations between voting and nationality. See TERRIS, *supra* note 4, at 153; Rosalyn Higgins, *Remarks by Rosalyn Higgins in Alternative Perspectives on the Independence of International Courts*, 99 AM. SOC'Y INT'L. L. PROC. 135, 137 (2005); Eric A. Posner & Miguel F. P. Figueiredo, *Is the International Court of Justice Biased?*, 34 J. LEGAL STUD. 599 (2005); Lucius Caflisch, *Independence and Impartiality of Judges: The European Court of Human Rights*, 2 LAW AND PRAC. INT'L CTS. & TRIBUNALS 169 (2003).

The Inter-American Court of Human Rights (IACtHR) is a regional human rights body in which individuals can make claims against States.⁹⁵ The ECtHR is more similar to the IACtHR than the ICJ. The issue of national representation was the subject of an advisory opinion delivered by the IACtHR, which stated judges nominated by a particular Contracting Party could not be on the bench when this Contracting Party is a respondent in the case.⁹⁶ This approach should be adopted by the ECtHR.

The national representation rule also creates a procedural anomaly when decisions are reviewed. The judge elected from a particular Member State sits in the Chamber, but also in the Grand Chamber if the case is reviewed. In this case the judge will be the one to review her own decision made at the Chamber level.⁹⁷

The text of the Convention itself makes clear that there is a possibility that national representation may give rise to a perception of bias. Article 26.3 states that when sitting as a single judge, the judge cannot deal with applications which relate to the Member State of which they are a national. This is clearly predicated on the basis that such a situation would give rise to a perception of bias. However, it is not clear how the perception of bias disappears when the case proceeds to consideration on the merits; the judge still sits in consideration of the case. The perception of bias is merely reduced given the fact that the judge in question casts only one vote amongst others. This still admits the underlying possibility of bias.

95. See art. 25 of the Commission's Rules of Procedure, at 5 (Inter-Am. Comm'n H.R. Oct. 19, 2010).

96. The IACtHR stated that "the question of a judge's nationality is a factor that must be taken into account by the Court to strengthen the perception of the judge's impartiality [I]t is possible to conclude, with the same validity, that the titular judge national of the respondent State must not participate in contentious cases originated in individual petitions." Art. 55 of the American Convention on Human Rights (Argentina), Ser. OC-20, para. 84 (Inter-American Court of Human Rights Advisory Opinion of Sept. 29, 2009), available at http://www.corteidh.or.cr/docs/opiniones/seriea_20_ing.pdf.

97. Pursuant to art. 23 of the ECHR, there shall sit as an *ex-officio* member of the Chamber and the Grand Chamber, the judge elected in respect of the Contracting Party concerned. If there is none or if that judge is unable to sit, a person chosen by the President of the Court from a list submitted in advance by that Party shall sit in the capacity of judge. It often means that the same judge has to sit in both Chamber and Grand Chamber hearings if the case was referred to the Grand Chamber pursuant to art. 43 ECHR. European Convention on Human Rights, art. 23, Sept. 4, 1950, 213 U.N.T.S. 222.

Moreover, there is some statistical evidence to indicate the perception of bias may be more than a perception. In his survey of decision-making in the ECtHR, Voeten observed national judges voted in favour of their state in 24 out of 32 cases in which national judges held the casting vote and did so in favour of their State in 24 instances. Voeten points out the “hung” nature of the decision means the case was likely to be 50-50, and therefore the inclusion of the national judge in these instances meant that national governments likely avoided a finding of liability in 8 cases.⁹⁸ Although this is a statistically small number in the context of all of the jurisprudence of the ECtHR, it was a considerable defeat for the applicants.

Even more invidious is the corollary of national representation which provides for ad-hoc judges to be called when the elected judge is not available or cannot sit in a particular case. These ad-hoc judges do not enjoy all the protections of elected judges.⁹⁹ Moreover, the ad-hoc judges are more amenable to outside influence than elected judges. Before Protocol 14 came into force the ad-hoc judges were appointed by the State for a particular case. This was an inherently problematic situation. Protocol 14 obliges the Contracting Parties to submit a list of 3-5 names. This was a direct result of Ukraine’s actions, which resulted in appointing an ad hoc judge for a prolonged period of time. In this case Ukraine submitted the list of three candidates, then withdrawn this list and subsequently was not able to submit the final list.¹⁰⁰

Such manipulation undermined the independence and credibility of the ECtHR. The procedure under Protocol 14 is therefore a marked improvement, but even under the new

98. Voeten, *supra* note 8, at 426.

99. At the very minimum these judges do not live in Strasbourg and continue working in their home states. Often their career is much more dependent on the authorities than the careers of the permanent judges.

100. PARLIAMENTARY ASSEMBLY, AD HOC JUDGES AT THE EUROPEAN COURT OF HUMAN RIGHTS: AN OVERVIEW. INFORMATION REPORT. COMMITTEE ON LEGAL AFFAIRS AND HUMAN RIGHTS, para. 3 (2012), http://www.coe.int/t/dgi/brighton-conference/Documents/PACE_documents/AP_DOC_12827_EN.pdf; For more background information on the issue See PARLIAMENTARY ASSEMBLY, RECONSIDERATION ON SUBSTANTIVE GROUNDS OF PREVIOUSLY RATIFIED CREDENTIALS OF THE UKRAINIAN DELEGATION (RULE 9 OF THE ASSEMBLY’S RULES OF PROCEDURE). REPORT. COMMITTEE ON LEGAL AFFAIRS AND HUMAN RIGHTS (2009), <http://assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewHTML.asp?FileID=12239&lang=EN>.

procedure, there are still Contracting Parties that have not yet submitted their lists¹⁰¹ and some have been submitted with fewer than three names.¹⁰² The new procedure has been criticised by the Council of Europe. According to Protocol 14, if the list is submitted, then the President of the Court selects one judge from the list for a particular case. The Report prepared by the Committee on Legal Affairs and Human Rights by the Council of Europe stated:

[T]he appointment procedure may still give rise to a legitimacy problem in that the ad hoc judge is appointed from a list submitted by the states parties directly to the President of the Court, whereas the Assembly remains excluded from the process. Not only does the procedure therefore lack democratic legitimacy, it is also unclear how the President of the Court will choose the ad hoc judge from the list provided by the state.¹⁰³

The lack of criteria according to how the President of the Court should select a judge for a particular case can create an impression the decision was made arbitrarily.

These threats to the independence of the Court stem from the principle of national representation. If this principle is removed, the need to appoint ad-hoc judges disappears. The removal of the principle would also eradicate any perceived bias in the decision-making process, and would dissuade governments from manipulating the election process.

One can argue a national judge is able to explain certain national particularities, e.g. national background, laws, traditions, to other judges. While it would be beneficial to have a national judge serve as a resource to other judges, it is not clear why such a judge should be allowed to vote. Furthermore, the appointment of a non-judicial rapporteur, who could be a lawyer, or a national of the respondent state, would also address this concern.

Tomuschat argues national representation is important because States “must be able to trust that their legitimate concerns are taken

101. See, e.g., Armenia, Denmark or Hungary. *List of Ad Hoc Judges*, EUR. CT. HUM. RTS., (Mar. 20, 2014) http://www.echr.coe.int/Documents/List_adhoc_judges_BIL.pdf.

102. See, e.g., Andorra or Spain. *Id.*

103. EUR. PARL. ASS. COMMITTEE ON LEGAL AFFAIRS AND HUMAN RIGHTS, AD HOC JUDGES AT THE EUROPEAN COURT OF HUMAN RIGHTS: AN OVERVIEW, para. 14 (2011) [hereinafter *Ad Hoc Judges Overview*], http://www.assembly.coe.int/CommitteeDocs/2011/ajdoc36_2011.pdf.

into account with the requisite care.”¹⁰⁴ It is not clear, however, what concerns Tomuschat considers legitimate, but any expansion beyond legal concerns, for example, diplomatic concerns would surely be inappropriate for the judiciary to consider. Any legitimate legal concerns can be met by the appointment of effective counsel to appear before the court. Any such concerns should surely be presented to the ECtHR during the course of argument.

Practical difficulties exist in securing the unanimous assent of the Contracting Parties required to enact such a change. However, some movement towards reform in this area is evident in the report by the Committee on Legal Affairs and Human Rights:

The principle of ‘national representation’ and, hence, in most instances, the institution of an ad hoc judge, must be carefully balanced against the risk posed to the Court by a lack of legitimacy and independence of judges. The states parties, the Court and the Assembly must all play a part in achieving this balance.¹⁰⁵

In light of the foregoing analysis, this paper advocates the removal of the principle of national representation *in toto*, in line with the practice of the Inter-American Court of Human Rights. The legitimate concerns of the Member States can be met by the appointment of non-judicial rapporteurs, or through the appointment of a judge of that State in a non-voting capacity. A debate about the existence of the “national representation” rule could reveal the views of the Member States regarding the judicial independence of the ECtHR. It could expose any State that still believes such a judge is merely a national representative on the Court.

C. Social Security and Immunities

The removal of the national representation principle would greatly reduce the likelihood Member States would be able to manipulate the Court by influencing their own nationals. This paper assumes that national representation will remain for the

104. Christian Tomuschat, *National Representation of Judges and Legitimacy of International Jurisdictions: Lessons from ICJ to ECJ?* in *THE FUTURE OF THE EUROPEAN JUDICIAL SYSTEM IN A COMPARATIVE PERSPECTIVE: 6TH INTERNATIONAL ECLN-COLLOQUIUM/IACL ROUND TABLE BERLIN, 2-4 NOVEMBER 2005* 183, 184 (Ingolf Pernice, et al. eds. 2006).

105. Ad Hoc Judges Overview, *supra* note 100, at para. 37.

foreseeable future because attempts to abandon it will require support of all 47 Contracting Parties. However, even if national representation is abandoned, external actors can utilize other strategies to undermine the Court. These will also be considered.

The keys to judicial independence depend largely on prosaic, yet important concerns, including judicial salaries, pensions and immunities. While ECtHR judges receive comparatively high salaries,¹⁰⁶ the development of an equivalent network of support in areas other than salaries is not as advanced. The judges of the ECtHR do not have the status of national judges in some countries¹⁰⁷ and they are treated as unemployed insofar as national labour law is concerned.¹⁰⁸ This can have a detrimental effect on the retirement prospects of the judge. In 2007, Judge Hedigan complained that “[t]he conditions of work here [in the ECtHR] are extremely poor for the judges, despite the fact that, like most people at international level, they get a fairly high salary... judges have no social protection at all. Indeed, they are treated almost as though they are nonpersons!”¹⁰⁹

A significant step forward in providing social protection for judges was the adoption of the 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 for Human Rights.¹¹⁰ This resolution confirmed elected members of the Court should enjoy the special status of “judges of the European Court of Human Rights.”¹¹¹ This

106. In 2004 the basic salary was EUR 177,912.

107. As such this is not a problem: the ECtHR judges are not national judges.

108. This is the case in Russia.

109. TERRIS, *supra* note 4, at 214.

110. 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 FOR HUMAN RIGHTS, art. 2 (2009) [hereinafter RESOLUTION (2009)5], <https://wcd.coe.int/ViewDoc.jsp?id=1508697>; for an overview of social security and pension entitlement see COMMITTEE ON LEGAL AFFAIRS AND HUMAN RIGHTS, RESOLUTION (2013)34 ON THE NEED TO REINFORCE THE INDEPENDENCE OF THE EUROPEAN COURT OF HUMAN RIGHTS, Introductory Memorandum, 5 [hereinafter Introductory Memorandum] (*available at* http://www.assembly.coe.int/CommitteeDocs/2013/ajdoc34_2013.pdf).

111. See RESOLUTION (2009)5, *supra* note 110, at art. 1. It is a replication of the statement enshrined in earlier Resolution (97)9 on the Status and Conditions of Service of Judges of the European Court of Human Rights to be Set up under Protocol no. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms adopted by the Committee of Ministers on September 10,

resolution has clarified important aspects of social security such as annual leave, sick leave, maternity and paternity leave, and adoption leave. Perhaps the most important aspect of the resolution was that it provided a pension scheme for the judges of the ECtHR. Prior to the adoption of this measure, Mahoney observed

[T]here is one international organisation which—at least at present (October 2008)—signally fails to observe the minimum standard, namely the Council of Europe. The failing is located, not in an inadequacy of the pension, but in the total absence of any pension at all for the full-time judges of the Strasbourg Court.¹¹²

Pursuant to Article 10 of the Resolution the judges receive benefits from the Pension Scheme for staff members, which is in force at the Council of Europe at the time of their appointment. This is a positive development in securing social benefits, and hence the independence of the judges. The manner in which judges of the ECtHR enjoy their office, in particular the fact that they can be elected for only one 9-year term, makes an exact equivalence between judges and other employees of the Council of Europe questionable, but the provision of this scheme is undeniably better than having no provision at all before.

The issue of the functional and personal immunity of the judges is also crucial for ensuring the independence of the ECtHR. Pursuant to Article 2 of the above mentioned Resolution, judges and ad hoc judges shall be entitled, during the exercise of their functions, to privileges and immunities.¹¹³ According to Article 18 of the General Agreement on Privileges and Immunities of the Council of Europe the judges are immune from legal processes in respect of what they say in their official capacity, they are exempt from taxation, and they are immune from immigration restrictions. It is worth mentioning that all officials of the Council of Europe enjoy these immunities. The Sixth Protocol to the General Agreement on Privileges and Immunities of the Council of Europe specifically regulates judicial immunities. Pursuant to this Protocol in addition to the above immunities the

1997. Mahoney has criticised the latter resolution stating that art. 1 declares the status but the Resolution “offers no further specification as to what this ‘special status’ entails or consists of.” Paul Mahoney, *Separation of Powers in the Council of Europe/ The Status of the European Court of Human Rights vis-a-vis authorities of the Council of Europe*, 24 HUMAN RIGHTS L.J. 152, 160 (2011).

112. Mahoney, *supra* note 4, at 332.

113. Resolution (2009)5, *supra* note 110.

judges of the ECtHR, their spouses, and minor children have the privileges and immunities, exemptions and facilities accorded to diplomatic envoys in accordance with international law.¹¹⁴ This norm provides the judges with the same privileges and immunities which are accorded to the Secretary General and Deputy Secretary General of the Council of Europe.¹¹⁵ It seems that the judges are well protected during their term in office—this protection is guaranteed by the formal immunities and privileges but also because they are based in Strasbourg¹¹⁶ and in the majority of cases are geographically detached from the pressures of their home countries.

The judges should also be protected when their term in office is over. Pursuant to Article 3 of the Sixth Protocol to the General Agreement on Privileges and Immunities of the Council of Europe, “in order to secure for the judges complete freedom of speech and independence in the discharge of their duties, the immunity from legal process in respect of words spoken or written and all acts done by them in discharging their duties shall continue to be accorded, notwithstanding that the persons concerned are no longer engaged in the discharge of such duties.”¹¹⁷ It means as soon as the judge retires, he or she is only immune in relation to what was said by this judge during his term in office. All other immunities and privileges cease to exist in his or her respect.

D. Tenure and Accountability

Harvey argues that tenure is a measure of judicial independence.¹¹⁸ The length of tenure is consistently considered one of the aspects of judicial independence. Shelton notes that life tenure is the least problematic from the point of view of independence.¹¹⁹ And while life tenure is unusual for international

114. General Agreement on Privileges and Immunities of the Council of Europe (Sixth Protocol), 250 UTS 12&32 (1949) [hereinafter *Privileges and Immunities*], available at <http://conventions.coe.int/Treaty/en/Treaties/Html/162.htm>. See Also Introductory Memorandum, *supra* note 110, at 4-5.

115. Andrew Drzemczewski, *A Major Overhaul of the European Human Rights Convention Control Mechanism: Protocol 11*, in COLLECTED COURSES OF THE ACADEMY OF EUROPEAN LAW 121, 195 (1995).

116. Resolution (2009)5, *supra* note 110.

117. See *Privileges and Immunities*, *supra* note 114.

118. Anne Harvey, *What's So Great About Independent Courts? Reexamining the Economic Effects of Judicial Independence*, DEPT. OF POL. N.Y.U. (2011).

119. INTERNATIONAL BAR ASSOCIATION, *IBA Minimum Standards of Judicial*

tribunals we submit that it would be beneficial from the point of view of independence for the Court if the judges were protected by irremovability.¹²⁰ If this suggestion is rejected by the Contracting Parties, an alternative solution can be adopted, namely providing a place for the former ECtHR judges in the senior judiciary of the Member State.

Pursuant to Article 23 of the Convention the judges are elected for a period of 9 years and cannot be reelected. This provision was adopted by Protocol 14. Hitherto judges were elected for a period of 6 years but they could be reelected once. The possibility of reelection was widely criticised as the main tool of influencing judges.¹²¹ They could be “punished” by the states for being too activist by not being included in the list for reelection. It was pointed out that the Bulgarian authorities had not included Judge Gotchev in the list of candidates because of his vote in the *Loukanov* case.¹²² National authorities did not necessarily have to hold out the possibility of punishment in order to alter a judge’s decision. Voeten found some evidence that countries with fewer attractive career opportunities available to judges after their tenure were more likely to decide in favour of their States.¹²³ After Protocol 14 came into force, the direct threat of not being reappointed faded, but the problem Voeten relates is not solved.

Life tenure obviates this problem.¹²⁴ Quite apart from the career perspective concern one can argue that life tenure will also increase the professional competence of the Court as a whole.¹²⁵ In an ideal

Independence (1982); Shelton, *supra* note 18, at 38.

120. Irremovability is a standard requirement for national judges. The fact that ECtHR is an international court does not provide a reason for lack of irremovability. According to Recommendation CM/Rec (2010)12 which enshrines basic guarantees for national judiciary. COMMITTEE OF MINISTERS, RECOMMENDATION (2010)12 TO MEMBER STATES ON JUDGES: INDEPENDENCE, EFFICIENCY AND RESPONSIBILITIES, para. 49 (2010), (“Security of tenure and irremovability are key elements of the independence of judges. Accordingly, judges should have guaranteed tenure until a mandatory retirement age, where such exists.”) <https://wcd.coe.int/ViewD oc.jsp?id=1707137>.

121. Ruth Mackenzie & Philippe Sands, *International Courts and Tribunals and the Independence of the International Judge*, 44 HARV. INT’L L.J. 271, 279 (2003); see also Voeten, *supra* note 8, at 427.

122. LIMBACH, *supra* note 17, at 70.

123. Voeten, *supra* note 8, at 427.

124. Life tenure means that a retirement age can be stipulated.

125. Mahoney points out that “[e]ven more problematic is the issue of underperforming or incompetent judges, as opposed to judges guilty of

situation new judges should be as competent in the area of ECHR law as the judges who spent some time in Strasbourg. In reality it is likely that new judges are less familiar with the *modus operandi* of the Court and need some time to learn the procedure.¹²⁶ With life tenure the judges will change less often meaning there will be fewer new inexperienced judges. Another positive aspect of life tenure is that it will better ensure consistency and continuity of case law, again due to the fact that the judges will know the case law better. Finally, it has been argued that the longer a judge stays in Strasbourg the more likely “that judge becomes divorced from affinity towards the homeland.”¹²⁷ This would be a further guarantee of independence. We should specify that under life tenure we mean tenure until retirement at the age of 65 or 70.

It has been argued that a 9 year term is too short to make a real impact.¹²⁸ Moreover, the fact that the judges have to go back to their states creates further challenges to their independence.¹²⁹ There are suggestions that the judges that retire from the Court should have a guaranteed position in the Contracting Party. One method of ensuring the continued protection of judges from national pressure would be to guarantee the individual would be appointed in a senior judicial position in their home country. This is obviously a complex issue, given *inter alia* that the number of judges varies wildly between Member States,¹³⁰ but the suggestion could be trialled by a Committee of Ministers recommendation and then migrate to the Convention if successful. It is becoming increasingly recognised that the embeddedness of the Convention in the national legal orders is the key to the continued vitality of the Convention system.¹³¹ The proposed change would ensure judges familiar with the Convention system occupy high judicial office in the Member States and can act as

impropriety.” Mahoney, *supra* note 4, at 344.

126. This is another criterion to be assessed by the Sub-Committee prior to appointment, but it suffers from the same structural issues outlined above in relation to assessment by the Sub-Committee.

127. Voeten, *supra* note 8, at 420.

128. Kanstantsin Dzehtsiarou Interviews with the Judges of the ECtHR.

129. Voeten’s empirical study substantiates this point. Voeten, *supra* note 8, at 427; *see also*, Karlan, *supra* note 66, at 544; Mahoney, *supra* note 4, at 325.

130. These include areas such as the number of vacancies, technical requirements, etc.

131. *See* Laurence R. Helfer, *Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime*, 19 EUR. J. INT’L L. 125 (2008).

ambassadors for the ECtHR in the national judiciary. This is an argument in favour of this proposal that is not based on purely judicial independence concerns, and may cut against the arguments for life tenure.

A minimum age requirement for the candidates for the position of a judge has been discussed, but has not been implemented yet. If life tenure is accepted it becomes even more important to implement a minimum age requirement. Coupling this with life tenure could enhance the credibility¹³² of the Court and contribute to the acceptance of life tenure, because requiring a substantial amount of experience will prevent judges from serving extremely long terms. Drzemczewski rightly argues that

Although the Convention does not specify a minimum age for the post of judge on the Court, it can be argued that such an age limit ought to be imposed. . . . A requirement, as suggested by the former Swedish judge on the Court, Elisabeth Palm, that candidates possess at least 10 to 15 years of relevant work experience—which implies a certain age requirement—merits serious consideration.¹³³

Some commentators suggest life tenure is not an ideal or even feasible solution in the context of an international tribunal.¹³⁴ New judges may bring more up-to-date knowledge of local law and better explain new developments in their legal systems. However, some judges recently elected had long international careers working for various international organisations, and following this logic, ties with their national states would have diminished.¹³⁵ So, at least in respect to these appointees, this argument does not stand. Furthermore, the fact that national judges are invariably attached to cases involving their home countries ensures they have some continued expertise in the local law of the country. In general, life tenure can be a crucial safeguard of the independence of the

132. It has been argued that sometimes the States have proposed candidates who have been only recently out of law school. LIMBACH, *supra* note 17, at 16.

133. Andrew Drzemczewski, *Election of Judges to the Strasbourg Court: an Overview*, EUR. HUM. RTS. L. REV. 377, 381 - 382 (2010).

134. Mahoney notes that "there is no dispute that the substitution of unlimited for limited terms of office for international judges would be politically impossible." Mahoney, *supra* note 4, 327.

135. Current Judges Paul Mahoney, Hanna Yudkivska and Mark Villiger as well as former Judges Bratza, Loucaides, and Rozakis had international careers before being elected to the bench.

Court.¹³⁶

If life tenure is accepted then the appointment procedure would become even more important, and the changes related to these issues would become even more pressing. Another pressing issue is the accountability of the ECtHR judges. Accountability is not understood here as responsibility for the decisions they make in virtue of their discretion but rather accountability in a sense of judicial ethics and carrying on their duties free of bias. In the most extreme cases the judge can be dismissed from office for unethical behaviour. According to Article 23 of the ECHR no judge may be dismissed from office unless the other judges decide by a majority of two-thirds that that judge has ceased to fulfil the required conditions.¹³⁷

The procedure for dismissal is further specified in the Rules of Court,¹³⁸ which are complimented by the Resolution on Judicial Ethics adopted by the Plenary Court. The Resolution, for example, prohibits engagement of the judges in activities outside the court unless those activities are compatible with independence, impartiality and the demands of their full-time office. Pursuant to the Resolution judges must not accept any gift, favour or advantage that could call their independence or impartiality into question.¹³⁹

These legal documents are designed to ensure proper accountability of judges. However, no judge has ever been dismissed from an international tribunal for disciplinary reasons. Sometimes it is suggested the mere existence of these norms is enough to deter the judges from committing unethical acts.¹⁴⁰ If the proposal of life tenure for the judges is accepted then the accountability of sitting judges should be taken even more seriously.

136. Mackenzie and Sands argue in favour of tenure until retirement. While they accept that there are certain concerns they conclude that these concerns are trumped by the benefits to judicial independence. Ruth Mackenzie & Philippe Sands, *International Courts and Tribunals and the Independence of the International Judge*, 44 HARV. INT'L L.J. 271, 279 (2003). Shelton points out that "lifetime tenure or a lengthy tenure with no possibility of reelection would enhance the independence of judges and remove some of the political considerations that come with campaigns for re-nomination and election." Shelton, *supra* note 18, at 38.

137. European Convention on Human Rights, *supra* note 97, art. 24, para. 2.

138. EUR. CT. H.R., RULES OF COURT, Rule 2, 7 (2014) [hereinafter RULES OF COURT], http://www.echr.coe.int/documents/rules_court_eng.pdf.

139. EUR. CT. H.R., RESOLUTION ON JUDICIAL ETHICS ADOPTED BY THE PLENARY COURT (2008), http://www.echr.coe.int/Documents/Resolution_Judicial_Ethics_EN_G.pdf.

140. See Mahoney, *supra* note 4, at 342 - 343.

Further consideration should be given to the grounds of dismissal to include hitherto unforeseen possibilities such as medical incompetence.

This section identified a number of areas which require reform. The abolition of national representation is the most straightforward, but also most politically difficult to secure. A more informed election procedure, life tenure or appointment in the national legal system, and further protection in relation to pensions can significantly improve the independence and credibility of the ECtHR.

IV. The Registry of the Court

The discussion of independence in the ECtHR focuses almost exclusively on the independence of the judiciary. This is somewhat misleading in that the judges rotate every 9 years, but the Registry of the Court operates as its institutional memory. In order to assess the impact of the Registry on the independence of the Court, this paper will first consider the role the Registry plays in the operation of the Court. It will then discuss three issues that can threaten the independence of the Registry: it will first look at the lawyers of the Registry seconded by the Contracting Parties; it will then discuss the non-renewability of the B-lawyers contracts; and it will finally examine the institutional independence of the Registry from the political organs of the Council of Europe. A survey of the practical significance of the Registry in the work of the ECtHR demonstrates the extent to which reform of the Registry is necessary in order to avoid any possible damage to the Convention institutions.

A. The Role of the Registry

The Registry of the ECtHR is unseen, but it is heard. For the majority of people it is unclear what the lawyers of the Registry do and what their impact on the Court agenda and decision-making is. While the judges are often in the spotlight, it is lawyers of the Registry who prepare the cases and often draft the judgments.

The Registry is mentioned in the ECHR in Article 24 which provides: the Court shall have a Registry, the functions and organisation of which shall be laid down in the rules of the Court. After Protocol 14 entered into force the members of the Registry acquired a legal right to act as non-judicial rapporteurs assisting

judges sitting as single judges.¹⁴¹ One crucial safeguard is that the organisation of the Registry is undertaken by the Court itself. As Sorel puts it, “self-regulation is the prevailing system, which implies mutability of the rules of procedure within the framework of the statute. This is an important source of independence and one of the ways in which such a creature may escape its makers.”¹⁴²

Formally the task of the Registry is to provide legal and administrative support to the Court in the exercise of its judicial functions.¹⁴³ In fact this role goes beyond simple administrative support. The former judge of the ECtHR Loucaides explains the role of the Registry in following terms:

In general, the substantial work—studying the application, the documents attached to it, preparing the report and suggesting the solution—was done by the member of the Registry. The extent of intervention, supervision and work of the judge Rapporteur depended on the personality, diligence and industry of the particular judge. Not all the judges had such qualities. The result was that the view of the member of the Registry frequently prevailed; he or she gave the direction to the solution of the case; i.e. whether the case should be declared admissible or inadmissible, whether it should be communicated and whether a violation should be found.¹⁴⁴

The Registry seems to be able to crucially influence the judgments of the ECtHR; Loucaides calls its role decisive.¹⁴⁵

The importance of the Registry’s role calls into question the extent to which applicants feel that they can trust the legal system. Tyler points out people only value participation if the authority involved has considered their case.¹⁴⁶ This can be allayed by providing reasons for the decision, but a perception that the decision has not been decided by the court can undermine this

141. See European Convention on Human Rights, *supra* note 97, at art. 24(2).

142. Jean-Marc Sorel, *International Courts and Tribunals, Procedure*, in MAX PLANCK ENCYCLOPAEDIA PUB. INT’L L. (Rudiger Wolfrum ed., 2009).

143. COUNCIL EUR., SUPERVISION OF THE EXECUTION OF JUDGMENTS AND DECISIONS OF THE EUROPEAN COURT OF HUMAN RIGHTS, Para. 28 (2011) http://www.coe.int/t/dghl/monitoring/execution/Source/Publications/CM_ann_report2011_en.pdf,

144. Loucaides, *supra* note 70.

145. *Id.*

146. Tyler, *supra* note 62, at 889.

element of procedural justice. Furthermore, Tyler notes the importance that people ascribe to the neutrality of the decision-making process.¹⁴⁷ The fact that the Registry is an important, and sometimes decisive, element in the decision-making process makes any problem relating to a lack of neutrality particularly troubling.

The Registry has a pyramid structure, with the Registrar and Deputy Registrar(s) on the top, other lawyers working in the sections and finally the grade B-lawyers. Each lawyer is assigned to the country of which they are a national. This means the structure and roles of individual lawyers varies depending on the number of such lawyers assigned to a country, the size of the national backlog and other factors. B-lawyers often deal with clearly inadmissible cases, they do preliminary filtering of the applications.¹⁴⁸ B-lawyers are usually employed on a temporary basis, typically receiving four-year nonrenewable contracts. A-lawyers are usually permanently employed and often deal with more important meritorious cases.

This paper argues that the independence of the Registry requires greater discussion. Taking into account its influence on the Court, it is important to maintain public trust in the Registry.

B. Seconded Lawyers of the Registry

It is commonly accepted that the Court faces an unsustainable backlog of pending applications. One possible solution to alleviate the backlog is to increase the number of the lawyers working at the Registry. Following the Interlaken and Izmir Declarations, the Contracting Parties were encouraged to send seconded lawyers to the Court's Registry.¹⁴⁹ This idea was supported by the Court; the Registry of the Court even sent an information note to the representatives of the Contracting Parties requesting they provide

147. *Id.* at 892.

148. Special filtering sections were set in relation to applications, which arrive from five of the highest case-count countries: Russia, Turkey, Romania, Ukraine and Poland.

149. COUNCIL EUR., INTERLAKEN DECLARATION: HIGH LEVEL CONFERENCE ON THE FUTURE OF THE EUROPEAN COURT OF HUMAN RIGHTS (2010), <https://wcd.coe.int/ViewDoc.jsp?id=1591969>; COUNCIL EUR., IZMIR DECLARATION: HIGH LEVEL CONFERENCE ON THE FUTURE OF THE EUROPEAN COURT OF HUMAN RIGHTS - APRIL 26-27 (2011), <https://wcd.coe.int/ViewDoc.jsp?Ref=IzmirDeclaration&Language=lanEnglish&Ver=original&Site=COE&BackColorInternet=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864>.

seconded lawyers to the Court's Registry.¹⁵⁰ The aim of tackling the backlog is very pressing but the means of solving this problem should not compromise the independence of the Court.

Before turning to the arguments *pro* and *contra* having seconded lawyers in the Registry, some terminological clarification is needed. Seconded lawyers are funded by the Contracting Parties; in other words, their salaries are paid directly by the Contracting Party. Often these salaries are smaller than salaries of regular employees of the Council of Europe – this on its own can contribute to an unhealthy environment in the Registry. The shortlisting of the candidates is also done by the Contracting Party. The seconded lawyers are finally selected by the Court from the shortlisted candidates. Their contract usually lasts two years and it is non-renewable. It should be noted that seconded lawyers worked in the Court even before the Interlaken Declaration.¹⁵¹ For instance, Sweden has been seconding judges to the ECtHR for a long period of time. However, the number of seconded lawyers has increased significantly after the Interlaken Declaration. Russia, for example, sent 20 lawyers to work in the Court's Registry.¹⁵² The Registrar of the Court explained the purpose of secondment is twofold: "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."¹⁵³

This initiative has not received universal endorsement. Russian civil society has reacted immediately and negatively. For example, one of the leading Russian NGOs, Memorial, sent a letter to the Registrar of the Court questioning the real and perceived independence of the seconded lawyers.¹⁵⁴

150. *Information Note from the Registrar. Secondment to the Registry of National Lawyers*, EUR. CT. HUM. RTS. (Aug. 10, 2012) [hereinafter *Information Note*], <http://www.justice.gov.sk/SiteAssets/Lists/Aktuality/EditForm/informat%C3%ADvna%20n%C3%B3ta.pdf>

151. *See, e.g.*, Letter from Erik Freiberg, Registrar of the ECHR, to Oleg Orlov, Head of Council of the Human Rights Centre, Memorial (Dec. 5, 2011) [hereinafter *Letter from Freiberg*], *available at* <http://www.memo.ru/eng/news/2011/12/29/2912113.pdf>; *See Also* Introductory Memorandum, *supra* note 110, at 7-8.

152. Freiberg, *supra* note 151.

153. *See* *Information Note*, *supra* note 150.

154. *Id.*

In response to these concerns, the Registrar of the Court has advanced the following rationales to demonstrate seconded lawyers remain independent: first, they have to observe the Court's rules on confidentiality and, upon arrival, take the same oath or make the same solemn declaration as Registry staff; second, this practice existed for many years; third, the final selection will be undertaken by the Court; fourth, the candidates should be highly qualified and should speak English and French.¹⁵⁵ While some of these reasons possess merely symbolic value, the fact that the Court makes the final selection cannot be ignored.

A number of judges of the ECtHR were questioned about their perception of the independence of seconded lawyers. Judges and lawyers from new democracies were much more concerned about independence of the seconded lawyers than judges elected from more mature Western democracies. Some admitted they had initial concerns, but have since been reassured by the role of the Court in the appointment process.¹⁵⁶ However, one judge believed that members of the general public who do not have this internal knowledge might question the perceived independence of such lawyers, particularly given there are "very few people who really know the ins and outs of the court."¹⁵⁷ If such perceptions were to become widespread, they could potentially undermine the legitimacy of the Court.

Secondment is widespread in various international organisations and it has a long pedigree in the political bodies of the Council of Europe.¹⁵⁸ However, there is a crucial difference between international political organisations and international tribunals. Secondments to the former can provide a useful operational fillip for these organisations; secondments to the latter can be detrimental. International organisations typically are composed of a number of disparate interests and one key concern of such organisations is the accommodation of such interests. Therefore seconded members of international organisations provide an informational channel about the interests concerned. The role of the ECtHR is to adjudicate

155. *Id.*

156. Kanstantsin Dzehtsiarou Interviews with the Judges of the ECtHR.

157. *Id.*

158. The Council of Europe has recently adopted regulations for secondments to the Council of Europe. Eur. Consult. Ass., Resolution CM/Res(2012)2, 1134th Sess., (Feb. 15, 2012).

human rights disputes, not to accommodate conflicting interests.

Another reason that is often advanced by the Registry of the ECtHR in favour of seconded lawyers is that such lawyers are dealing with clearly inadmissible cases. These are the cases which have already been looked at and no human rights violations were preliminarily identified, but because these cases had complex facts, they were not disposed of immediately.¹⁵⁹ The task of the seconded lawyers is to bring these cases to completion.¹⁶⁰

There is an inherent controversy in the use of seconded lawyers. It aims to feed well trained lawyers back into the national legal system—lawyers who are aware of the ECHR standards. However, it is hardly possible to learn these standards by routinely disposing of inadmissible complaints. The aim of secondment could be most effectively achieved if the seconded lawyers were national judges and were allowed, under supervision, to deal with the gamut of issues an ordinary lawyer of the Registry deals with. This will be the most effective way to embed the norms of the Convention into the domestic legal order. The internalisation of Convention norms by the national judiciary would provide an important conduit for the dissemination of Convention jurisprudence. Also it is likely national judges will be more independent from the state than lawyers who might, for example, work as part of the civil service of the State.

The possible controversy of the seconded lawyer scheme means more open debate is needed to discuss this scheme. This concern is reflected in the initiative of some members of the PACE, who tabled a motion for a resolution entitled “Need to Reinforce the Independence of the European Court of Human Rights.” This motion observed that

[T]he Brighton Declaration of 20 April 2012, adopted at the recent Conference on the Future of the European Court of Human Rights, underlined the need of maintaining a high-quality Registry, with lawyers chosen for their legal qualifications and knowledge of the law and practice of States Parties, and encouraged greater use of secondments of national judges and lawyers. But situations may occur in which serious complaints against a given State may be dealt with by a seconded judge/lawyer who is paid by the State against which applications

159. See Letter from Freiberg, *supra* note 151.

160. *Id.*

are lodged and/or whose professional career may depend on the State concerned. Such a situation may create an intrinsic conflict of interest that can have an adverse impact on the effective independence of the Court.¹⁶¹

While having independent national judges as seconded lawyers who are supervised by experienced members of the Registry seems to be the most beneficial arrangement, it is clear that further consideration should be given to how seconded lawyers can affect the independence of the Registry.

C. Recruitment Policy

While the independence of regular lawyers is less problematic than seconded lawyers, the recruitment procedure poses challenges to the continued independence of the Registry. A major portion of the lawyers of the ECtHR are employed on the basis of 4-year nonrenewable contracts.¹⁶² This is a blanket rule which provides no exceptions and in which merit plays no role. This rule is relevant to the B-lawyers who normally deal with applications that have just been submitted to the ECtHR (there are currently more than 100,000 pending applications).¹⁶³ The role of B-lawyers is not decisive, but it is extremely important. They are at the forefront of the Court's attempts to reduce its enormous docket. However, the fact that every four years the Court has to train new inexperienced lawyers means they are not efficient in tackling the backlog. At the same time well-trained, experienced lawyers who worked at the Court for four years are forced to leave irrespective of whether they wish to do so.

The rationale behind this seemingly counter-intuitive human resources policy can be found in a broader social role the ECtHR claims to play. The experienced lawyers leaving the Court after 4 years of service are seen as ambassadors who are supposed to bring the values of the ECHR to the member states. However, it does not always work this way. Frequently, former lawyers of the ECtHR start working in other international organisations without any

161. Eur. Parl. Ass., *Motion for a Resolution. Need to Reinforce the Independence of the European Court of Human Rights*, 3rd Part-Sess., Doc. No. 12940 (2012).

162. This system is called the Young Lawyers Scheme. See Mahoney, *supra* note 19, at 346.

163. The Court's backlog in 2012 was approximately 128,100 pending applications. EUR. CT. HUM. RTS., ANNUAL REPORT 2012, 149 (2013), http://www.echr.coe.int/D ocuments/Annual_report_2012_ENG.pdf.

considerable impact on their home countries. Some of them remain in Strasbourg, studying at the University of Strasbourg or working at the law firms or NGOs.¹⁶⁴ Of course, the Court should attempt to improve human rights in the Member States not only through their judgments but through training of well qualified personnel who return to the Member States. However, even those B-lawyers who come back to the Member States are unlikely to create a critical mass of 'new informed lawyers' that can support structural changes in the Member States due to an overall insignificant number of them.¹⁶⁵

This policy is questionable not only from the point of view of the effectiveness of the Court, but also because it raises issues related to the independence of such lawyers. 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 considerations including loyalty to a particular state institution or private party. As a result of these considerations, the policy of non-renewability of the contracts should be changed and there should at least remain the possibility that the B-lawyers' contracts could be extended.

D. Administrative Autonomy of the ECtHR from the Political Bodies of the Council of Europe

This article has been primarily concerned with the ways in which Member States can undermine the independence of the ECtHR and the Registry. However, there is also an institutional threat to the independence of the ECtHR from the political bodies of the Council of Europe. The Council of Europe is the ECtHR's parent organisation. Lawyers and assistants working in the Court's Registry, for instance, are considered staff members of the Council of Europe and are subject to the Council of Europe's Staff Regulations.¹⁶⁶ The Court's budget is part of the general budget of

164. Kanstantsin Dzehtsiarou, *One of the Keys to the ECtHR Problems*, HUM. RTS. IRELAND (Sept. 11, 2012), <http://humanrights.ie/announcements/one-of-the-keys-to-the-ecthr-problems/>.

165. This can be contrasted with the position of judges who return to Member States and occupy a senior position in a relatively numerable, but highly influential, judicial role.

166. *Registry*, EUROPEAN COURT OF HUMAN RIGHTS, <http://www.echr.coe.int/ECHR/EN/Header/The+Court/How+the+Court+works/The+Registry/> (last visited Mar. 9, 2014).

the Council of Europe.¹⁶⁷

The ECtHR is closely linked to other institutions of the Council of Europe such as the PACE or the Committee of Ministers at least in the areas of finances and human resources.¹⁶⁸ Some argue because the ECHR was drafted under the auspices of the Council of Europe, it is logical and appropriate that the Court is dependent on its parent institution to some extent. This argument is not very convincing. The Council of Europe does not have propriety rights in every treaty which was signed under the umbrella of this organisation. Kruger and Polakiewicz argue that, "the Convention is not an act of the Council itself, but an independent international treaty which may contain special regulations going beyond the Statute's provisions."¹⁶⁹ Drzemczewski agreed, noting that "[o]nly those links with the Council of Europe which are explicitly foreseen by the Treaty itself, maintain it in the sphere of the Organisation."¹⁷⁰ Moreover, Mahoney has conducted a comprehensive historical overview of the relations between the Council of Europe and the ECtHR and concluded the Council of Europe *de facto* acknowledged the independence of the Court's Registry from the moment it was established.¹⁷¹

Many commentators including the current Registrar of the Court point out that normally the relations between the ECtHR and the Council of Europe are cooperative and mutually beneficial. In some cases misunderstandings between the ECtHR and the Council of Europe have led to 'inefficient management of resources.'¹⁷²

167. *Budget*, EUROPEAN COURT OF HUMAN RIGHTS, <http://www.echr.coe.int/ECHR/EN/Header/The+Court/How+the+Court+works/Budget/> (last visited Mar. 9, 2014).

168. Lambert-Abdelgawad E, *The Court as a Part of the Council of Europe: the Parliamentary Assembly and the Committee of Ministers*, in CONSTITUTING EUROPE THE EUROPEAN COURT OF HUMAN RIGHTS IN A NATIONAL, EUROPEAN AND GLOBAL CONTEXT 291, 291-292 (Follesdal A., Peters B., and Ulfstein G. eds. 2013).

169. Hans Christian Kruger & Jorg Polakiewicz, *Proposals for a Coherent Human Rights Protection System in Europe/The European Convention on Human Rights and The Charter of Fundamental Rights*, 22 HUM. RTS. L.J. 1, 12 (2001).

170. Andrew Drzemczewski, *The Prevention of Human Rights Violations: Monitoring Mechanisms of the Council of Europe*, in THE PREVENTION OF HUMAN RIGHTS VIOLATIONS 139-177 (Linos-Alexander Sicilianos ed., 2001).

171. Mahoney, *supra* note 111, at 153 -159.

172. Erik Fribergh, *The Authority over the Court's Registry within the Council of Europe Human Rights - Strasbourg View*, in LIBER AMICORUM LUZIUS WILDHABER 146 (Lucius Cafilisch et al. eds. 2007); *see also*, Mahoney, *supra* note 111, at 159.

Furthermore, in times of economic crisis the tensions between institutions¹⁷³ might become aggravated due to tightening fiscal constraints. Mahoney points out that

[I]n recent years, within the Council of Europe, there have been disquieting signs of a tendency to swim against this universal tide [of the operational independence of international courts], through revived attempts by the executive arm of the Council of Europe to assume ultimate responsibility, in place of the Court, for staff appointments and structures, for budgetary preparations, for internal working methods, and so on.¹⁷⁴

One solution to these problems of misunderstanding and power balancing would be to subordinate the Court's Registry to the Secretary General of the Council of Europe. This logistical solution is totally unacceptable from the point of view of the rule of law. The Council of Europe is an organisation of states: it does not claim it is completely independent from its Member States. Arguably, such independence is not only unnecessary but is positively undesirable in the case of the Council of Europe, because it is an arena for political negotiations and for promoting human rights, rule of law and democracy via political routes. However, the nature of the ECtHR is different and the fact that independence is crucial component of the Court has been established in section 1 of this paper. Therefore, the Court must be independent not only from the influence of the Contracting Parties *per se* but also from "the political entities that are the Secretary General and the Committee of Ministers."¹⁷⁵

This paper does not advocate a complete separation between the ECtHR Registry and the political arms of the Council of Europe. The Committee of Ministers, the PACE and the Secretary-General play an important role in ensuring the effectiveness of the Convention system. The Committee of Ministers, for instance, supervises the execution of the Court's judgments. The symbiotic nature of the Convention system renders a divorce of the ECtHR Registry and the political branches of the Council undesirable. That being said, the Court's autonomy should be protected.

This article suggests the institutional autonomy of the ECtHR

173. See Fribergh, *supra* note 172, 154–155 (discussion of practical examples of such challenges).

174. Mahoney, *supra* note 19, at 347.

175. Mahoney, *supra* note 111, at 158.

Registry can be secured by the articulation of clear and straightforward rules of interaction between the Registry on one side and the Secretariat General and the Committee of Ministers on the other.¹⁷⁶ Until now the relations between the Council of Europe and the ECtHR were based on ad hoc rules and *de facto* support of the Court from the Secretary Generals.¹⁷⁷ The growth of the Court's importance means a more coherent legal architecture governing relations between the ECtHR and the Council of Europe is necessary. Such rules can be established through the formal agreement between the ECtHR and the Secretary General of the Council of Europe. The Inter-American Court of Human Rights and the Organisation of American States came to a similar agreement.¹⁷⁸ It has been suggested that the Statute of the Council of Europe should also reflect the importance of the ECtHR.¹⁷⁹ The Statute was drafted before the ECtHR came into existence. Nowadays, the Court is arguably the most prestigious institution in the Council of Europe, and this state of affairs has to be reflected in its "Constitution" – the Statute.

Two areas that would certainly require regulation in such a scheme are the Court's autonomy on the issues of human resources and financial independence. The discussion of the Court's independence in relation to human resources usually covers the following themes:

1. Should members of Registry¹⁸⁰ be considered Council of Europe staff? At present the lawyers of the Registry are staff

176. "As the President of the Court, Judge Luzius Wildhaber, said . . . to the Wise Persons' Group: 'There is a striking gap in the Council of Europe's institutional arrangements, which lack a clear text setting out the Court's status and its relationship with its staff. The plain terms of the Convention have yet to be reflected in an appropriate instrument at Council of Europe level.'" Mahoney, *supra* note 19, 347.

177. Fribergh, *supra* note 172, at 155.

178. See generally Report of the Inter-American Court of Human Rights to the Special Committee on Inter-American Summits Management, Agreement between the General Secretariat of the Organisation of American States and the Inter-American Court of Human Rights on the Administrative Operation of the Court's Secretariat, May 7 1998, OEA/Ser.G CE/GCI-134/98 (discussing in pertinent part, the "Principle of 'juez natural' the competent, independent, and impartial judge or court") available at <http://www.summit-americas.org/CEGCI%20Docs/ce-gci-134-98-English.htm>.

179. Mahoney, *supra* note 19, 347.

180. "Members" of the Registry include assistants, IT services, and other administrative personnel.

members of the Council of Europe,¹⁸¹ however there are convincing arguments against the status quo. Presently Registry staff members have to take the oath or make the solemn declaration expressing their loyalty to the Court (not only to the Council of Europe).¹⁸² This is because the lawyers of the Registry should be independent, not only from their individual States, but from the political branches of the Council of Europe.

The unity of the Council of Europe staff can arguably be undermined by this 'special status' of the ECtHR staff especially in relation to staff mobility – transfers from the Court to various bodies of the Council of Europe.¹⁸³ This argument however is questionable for at least two reasons. First, as was eloquently pointed out by Paul Mahoney, other international tribunals maintain separate staff from their parent organisations without undermining the unity of staff between these organisations.¹⁸⁴ Second, even if there will be some distancing between the Council and the Court, the latter is a special body which should be autonomous, and this justifies such 'distancing.' Unity of staff is a positive feature of the Strasbourg system, and both the Court and the Council of Europe should benefit from transfers of highly qualified lawyers; however this unity is not a sufficient trade-off compared to possible damage it may cause to the perceived independence of the Court.

2. The special status of the Court's Registry staff is closely

181. The ECtHR website states: "Registry staff members are staff members of the Council of Europe, the Court's parent organisation, and are subject to the Council of Europe's Staff Regulations." *Registry*, EUR. CT. HUM. RTS, <http://www.echr.coe.int/ECHR/EN/Header/The+Court/How+the+Court+works/The+Registry/>.

182. RULES OF THE COURT, *supra* note 138 (The oath/solemn declaration of the Members of the Registry is the following: "I solemnly declare (I swear) that I will exercise loyally, discreetly and conscientiously the functions conferred upon me as an official of the Registry of the European Court of Human Rights." Pursuant to Article 25 of Staff Regulations of the Council of Europe all other employees of the Council of Europe make the following solemn declaration: "I solemnly declare that I will carry out the duties entrusted to me as a member of the staff of the Council of Europe loyally and conscientiously, respecting the confidence placed in me. In discharging these duties and in my official conduct I will have regard exclusively to the interests of the Council of Europe. I will not seek or receive any instructions in connection with the exercise of my functions from any government, authority, organisation or person outside the Council. I will refrain from any action which might reflect upon my position as a member of the staff of the Council or which might be prejudicial morally or materially to the Council.").

183. Mahoney, *supra* note 19, at 347.

184. *Id.*

connected to the issue of which body the staff members should answer to. As Paul Mahoney puts it "[i]t is surely indisputable that the staff of the Registry should be answerable only to the Court and not to the Secretary General or, ultimately through the Secretary General, to the Committee of Ministers, both of which are political entities."¹⁸⁵ Paul Mahoney articulated this argument in 2003. In 2011 the Committee of Ministers of the Council of Europe adopted Resolution CM/Res(2011)9 which has amended the Staff Regulations of the Council of Europe, and certain staff management powers were transferred from the Secretary General to the Registrar of the Court. These powers include authority to make appointments and promotions,¹⁸⁶ powers related to authorising secondary activities, accepting gifts and other advantages,¹⁸⁷ and even imposing disciplinary measures.¹⁸⁸ Having said that, the staff members of the Registry are still ultimately answerable to the Secretary General of the Council of Europe since the above mentioned Resolution has not amended Article 2 of the Staff Regulations, which provide that staff members of the Council answer to, and are under the authority of the Secretary General.¹⁸⁹ Some improvements have been made in the status of the employees of the ECtHR but this process should be continued.

3. Election of the Registrar and Deputy Registrar(s) of the Court. One of the important safeguards of the independence of the ECtHR is the competence of the Court to elect its Registrar and Deputy Registrar(s). This authority is laid down in the Rules of Court which provide that the plenary Court shall elect its Registrar and Deputy Registrar(s).¹⁹⁰ However, according to Article 26 of the

185. Mahoney, *supra* note 111, at 158.

186. COMMITTEE OF MINISTERS, RESOLUTION AMENDING THE STAFF REGULATIONS WITH REGARD TO DELEGATION OF STAFF MANAGEMENT POWERS TO THE REGISTRAR OF THE EUROPEAN COURT OF HUMAN RIGHTS, art. 2 (2011), <https://wcd.coe.int/ViewDoc.jsp?id=1848861&Site=CM>.

187. *Id.*

188. *Id.*

189. COUNCIL OF EUROPE, STAFF REGULATIONS, art. 2 (1981) ("Staff members of the Council shall be under the authority of the Secretary General and answerable to him or her. Hierarchical superiors in the Secretariat shall exercise their authority in the name of the Secretary General."), [https://wcd.coe.int/ViewDoc.jsp?Ref=COMP/CM/Res\(2007\)1&Language=lanEnglish&Ver=part1&Site=COE&BackColorInternet=99CCFF&BackColorIntranet=99CCFF&BackColorLogged=99CCCC](https://wcd.coe.int/ViewDoc.jsp?Ref=COMP/CM/Res(2007)1&Language=lanEnglish&Ver=part1&Site=COE&BackColorInternet=99CCFF&BackColorIntranet=99CCFF&BackColorLogged=99CCCC).

190. Rules of Court, *supra* note 138, Rule 15(1).

regulations on appointments in the Council of Europe the Registrar of the ECtHR shall be elected by the Plenary Court after the President has obtained the opinion of the Secretary General. The Rules of Court do not require the Court to obtain the Secretary General's opinion on this matter. In 2007 the Registrar of the Court, Erik Fribergh, drew attention to this legal mismatch and urged the Council of Europe to amend the regulations.¹⁹¹ However, the difference between the Rules of Court, which reflect the real practice of the election procedure,¹⁹² and the Council of Europe Regulations on appointment has not been rectified.

This short study does not aim to exhaust all possible points of disagreement between the Secretary General and the ECtHR in the area of human resources. Its main purpose is to show these issues exist, and that clear regulations which reflect the Court's special status as an independent tribunal should be adopted by the Council of Europe. Even in areas where improvements have been made, points of contention remain.

Another crucial aspect necessary to ensure the survival of an independent court is to provide an adequate budget. The Court's website gives the following information on the budget of the ECtHR:

According to Article 50 of the European Convention on Human Rights the expenditure on the European Court of Human Rights is to be borne by the Council of Europe. Under present arrangements the Court does not have a separate budget, but its budget is part of the general budget of the Council of Europe. As such it is subject to the approval of the Committee of Ministers of the Council of Europe in the course of their examination of the overall Council of Europe budget.¹⁹³

Mahoney points out that while the pre-1998 Court did not question the budgetary competence of the Committee of Ministers it "prevented the Court from for example, deciding on the creation or

191. Fribergh, *supra* note 172, at 155.

192. *Id.*

193. *Budget*, EUR. CT. HUM. RTS., (Mar. 20, 2014) ("The Court's budget for 2014 amounts to 67,650,400 euros. This covers Judges' remuneration, staff salaries and operational expenditure . . . It does not include expenditure on the building and infrastructure . . .")
http://www.echr.coe.int/Pages/home.aspx?p=court/howitworks&c=#newComponent_1346157778000_pointer.

upgrading of posts”¹⁹⁴ One option to promote judicial independence from the political institutions of the Council would be to provide the Court the power to maintain a completely independent budget from the Council of Europe. This solution is superficially appealing, but is sub-optimal as it risks the possibility of external influence by the Contracting Parties by threatening the independent budget of the Court without thereby calling into question the budget of the Council of Europe. That is, an independent Court budget which is dependent on Member States’ contributions provides a potential means by which Member States’ can register their displeasure with a decision of the court. Furthermore, conflicts over budgeting could lead to unseemly disputes between the Court and Member States. This paper argues the Court should have a “ring-fenced,” or guaranteed, portion of the overall budget of the Council of Europe. Elisabeth Lambert-Abdelgawad points out that “[i]t would . . . be desirable for the ECtHR to co-decide on its own budget or, at least, to have the competence to propose it; the lack of financial autonomy is dangerous and could jeopardise the capacity of the Court to perform its functions in the future.”¹⁹⁵ Therefore, certain autonomy is necessary within the Council of Europe budget.

The importance of the Registry to the institutional competence of the Court should not be underestimated. Therefore, any consideration of the institutional independence of the Court must also incorporate a consideration of the role of the Registry. This section has addressed the use of seconded lawyers by the Registry, the tenure and financial provisions relating to the Registry, and considered the position of the Registry in relation to the wider Council of Europe system.

V. Conclusion

Independence begets legitimacy begets effectiveness. While some scholars believe independence should be subordinated to the interests of Contracting Parties, we argue that the independence of international human rights tribunals is a key component in ensuring

194. Mahoney, *supra* note 111, at 159.

195. Elisabeth Lambert-Abdelgawad, *The Court as a part of the Council of Europe: the Parliamentary Assembly and the Committee of Ministers*, in CONSTITUTING EUROPE: THE EUROPEAN COURT OF HUMAN RIGHTS IN NATIONAL, EUROPEAN AND GLOBAL CONTEXT 263, 292-293 (Andreas Follesdal et al. eds. 2013).

their legitimacy.

The protection of judicial independence in the ECtHR has typically focused on a corollary to the formal requirements of the rule of law – fixity of tenure, and the guarantee of salary. More recently, however, there has been a burgeoning recognition that such formal indicia fail to recognise both the ancillary considerations related to judicial office, and the fact that threats to the independence of the court can both pre- and post-date the judicial term of office. This article has argued that the abandonment of the system of national representation removes an unfavourable incentive for Member States to elect partisan nominees and also eliminates the challenges of the ad hoc judge procedure. Moreover, an appropriate system of judicial election should be predicated on the fundamental norm of transparency.

Judicial tenure itself is threatened by the limited term of office and the implications for judges once that term has ended. This is an invidious form of pressure, which necessitates a concerted response by the institutions of the Council of Europe. A judge who is uncertain of their future once they leave the bench cannot be fully independent. A system which provides either for life tenure, or where judges can rely on a guarantee of judicial appointment in the national system would remove this uncertainty. Furthermore, the return of judges to the national system provides an important normative role in that system whereby the returning judges help embed the ECHR in the domestic legal system of that country.

Finally, this article considered the position of the Registry in the ECtHR. The importance of the Registry is difficult to overstate. Independence under the Convention is rooted in the independence of the Registry. This independence is threatened by the recent increase in the appointment of B-lawyers and seconded lawyers. Moreover, the Registry should preserve a measure of autonomy from the political branches of the ECHR.

The judicial independence of the ECtHR is in purgatory. It is insufficiently protected against the winds that buffet it, yet it retains sufficient formal protection to provide the chimera of stable independence. Reform of the institutions of the ECtHR is necessary to ensure such winds do not threaten the cornerstone of the ECHR system itself.
