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SELECTING STRASBOURG JUDGES: A CRITIQUE

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Abstract

This paper analyses the issue of selection of Strasbourg judges and argues that that judicial elections to the European Court of Human Rights (ECtHR) by the Parliamentary Assembly of the Council of Europe are no longer considered a success story by many stakeholders in Europe. Instead, the inadequate qualification, experience and stature of some of the Strasbourg judges pose a threat to the institutional legitimacy of the ECtHR, which is already being perceived in some States. The structure of this paper is as follows. Sectoin 1 sets the stage and describes the scope og the paper. Section 2 explains the breadth and depth of the problems concerning the selection of judges of the ECtHR and highlights the importance of electing stellar judges to the Strasbourg bench for maintaining the legitimacy of the ECtHR. Section 3 briefly summarizes the good practices and recent improvements in the selection process. Section 4 focuses on problems regarding the use of certain substantive criteria. More specifically, it addresses the role of gender, the issue of the minimum and maximum ages of Strasbourg judges, their language skills, their knowledge of national law and their expertise in public international law. Section 5 then discusses recent examples of elections that raised eybrows across Europe and shows the politics behind them. Section 6 revisits the key question of how to attract top candidates to Strasbourg. Section 7 concludes.

Keywords
European Court of Human Rights, selection of judges, legitimacy of judicial power, judicial independence, Parliamentary Assembly of the Council of Europe

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Abstrakt

Tento příspěvek se zabývá výběrem soudců Evropského soudu pro lidská práva (ESLP) a tvrdí, že volby soudců do štrasburského soudu Parlamentním shromážděním Rady Evropy již dlouho nevykazují optimální výsledky. Právě naopak, nedostatečná kvalifikace, profesní zkušenosti, jazykové znalosti a formát některých soudců ESLP ohrožují dokonce institucionální legitimitu tohoto soudu. Struktura tohoto příspěvku je následující. Část 1 definuje záběr příspěvku. Část 2 vysvětluje rozsah a hloubku problémů, se kterými se volby štrasburských soudců potýkají. Část 3 shrnuje pozitiva současného modelu výběru soudců ESLP a opatření přijata za účelem jeho zlepšení. Část 4 se detailně zaměřuje na nedostatky týkající se nastavení a aplikace pěti kritérií používaných při výběru štrasburských soudců: pohlaví kandidátů, jejich minimálního a maximálního věku, jazykových znalosrí, znalosti národního práva a kvalifikaci v mezinárodním právu veřejném. Část 5 poukazuje na několik konkrétních nedávných příkladů, při nichž došlo v průběhu volby soudce ESLP k problematickým událostem. Část 6 se vrací ke klíčové otázce, jak přilákat k ESLP kvalitní kandidáty. Část 7 shrnuje závěry tohoto příspěvku.

Klíčová slova
Evropský soud pro lidská práva, výběr soudců, legitimita soudů, nezávislost soudců, Parlamentní shromáždění Rady Evropy

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SELECTING STRASBOURG JUDGES: A CRITIQUE

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1. Introduction

Since the major overhaul of the Strasbourg system of protection of human rights in 1998, thousands of articles have engaged with the case law of the European Court of Human Rights (hereinafter also the "ECtHR" or just the "Court") and explained its working. In contrast, very little scholarly attention has been paid to the actual selection of Strasbourg judges.[1] This is

* I am grateful to far too many colleagues to mention them here (moreover, many of them were willing to discuss these issues only on the basis of confidentiality) for comments and discussions on earlier drafts of this chapter. Usual caveats apply. The research leading to these results has received funding from the European Community´s Seventh Framework Programme (FP7/2007-2013) under grant agreement No. 303933.

[1] Most exceptions are relatively recent; see Jutta Limbach et al. *Judicial Independence: Law and Practice of Appointments to the European Court of Human Rights* (INTERIGHTS, 2003); JF Flauss, 'Les élections de juges à la Cour européenne des Droits de l'Homme (2005-2008)' (2008) 19 Revue trimestrielle des droits de l'homme 713; Andrew Drzemczewski, 'Election of judges to the Strasbourg Court: an overview' [2010] E.H.R.L.R. 377; Loukis G. Loucaides, 'Reflections of a Former European Court of Human Rights Judge on his Experiences as a Judge' [2010] Roma Rights Journal 61; Norbert P. Engel, 'More Transparency and Governmental Loyalty for Maintaining Professional Quality in the Election of Judges to the European Court of Human Rights' (2012) 32 HRLJ 448; Andrew Drzemczewski, 'L'élection du juge de l'Union européenne à la Cour européenne' (2013) 24 Revue trimestrielle des droits de l'homme 551; Başak Çali, Anne Koch and Nicola Bruch, 'The Social Legitimacy of Human Rights Courts: A Grounded Interpretivist Theory of the Elite Accounts of the Legitimacy of the European Court of Human Rights" (2013) 35 Hum.Rts.Q. 955; Tom Zwart, 'More human rights than Court: Why the legitimacy of the EurCourtHR is in need of repair and how it can be done' in Spyridon Flogaitis, Tom Zwart and Julie Fraser (eds), *The European Court of Human Rights and its Discontents* (Edward Elgar Publishing 2013) 71; and Yuval Shany, *Assessing the Effectiveness of International Courts* (OUP 2014). On the selection of international court judges in general, see in particular Ruth Mackenzie et al., *Selecting International Judges: Principle, Process, and Politics* (OUP 2010); Jiří Malenovský, '*L'indépendance des juges internationaux*' in Recueil des cours de l'Académie de droit international de la Haye (Martinus Nijhoff 2011) 1; Daniel

surprising since everybody knows that it matters who decide cases and, therefore, it matters who picks those people who will eventually decide cases. Moreover, several Strasbourg judges have been subject to criticism in the press and rumours about how the lists of candidates are made at the national level and how the voting coalitions in the Parliamentary Assembly of the Council of Europe (hereinafter also the "PACE") are built have spread across Europe for quite some time.

To be sure, the selection of the Strasbourg judges is a sensitive issue. In addition, it is a political process at both the national and PACE levels. This leads many stakeholders, especially in PACE, to the view that the solution to the existing problems concerning the selection of Strasbourg judges is also political, by which they mean more PACE recommendations and intensive diplomatic negotiations. Conversely, these stakeholders argue that "washing their dirty laundry" in public might be detrimental to the legitimacy of the ECtHR, which is particularly fragile these days. This chapter accepts the advantages of political solutions, but it believes that the problems that bedevil the selection of Strasbourg judges have reached such a pitch that political means alone cannot tackle them effectively and that brushing this issue under the carpet would probably engender resentment and suspicion, which would be much more detrimental in the long term. In other words, the aim of this chapter is to identify problematic issues in selecting Strasbourg judges so that they can be addressed, which in turn should make the ECtHR stronger.

The process of selection of Strasbourg judges is described by Koen Lemmens in the chapter 5. This chapter highlights the problematic aspects of this process. It builds heavily on Lemmens' contribution as well as on a seminal article by Norbert Paul Engel, who openly addressed current problems regarding particular elections and particular judges.[2] However, this chapter also looks at the bigger picture. It discusses the recent report on the legitimacy of the ECtHR, and, based on its findings, it argues that the inadequate qualification, experience and stature of some of the Strasbourg judges provide a serious threat to the institutional legitimacy of the ECtHR. This combination of concrete examples and structural issues should provide a reasonably accurate picture of the current state of selection of Strasbourg judges.

Given the breadth of the current problems, this chapter cannot deal with all problems that plague the selection process. Nor does it address all selection criteria.[3] Several issues are deliberately omitted. These include the issues of ad hoc judges,[4] impartiality, social security payable to Strasbourg judges,[5] and diversity issues. Moreover, substantive criteria for Strasbourg office are

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Terris, Cesare PR Romano, Leigh Swigart, *The International Judge: An Introduction to the Men and Women Who Decide the World's Cases* (Brandeis University Press 2007) chapter 2.

[2] Engel (n 1). See also Flauss (n 1).

[3] For a concise summary of the selection criteria for selecting Strasbourg judges see Guidelines of the Committee of Ministers on the selection of candidates for the post of judge at the European Court of Human Rights, CM(2012)40 final, 29 March 2012 (hereinafter "Guidelines of the Committee of Ministers"); Steering Committee for Human Rights, *Report of Ad Hoc Working Group on National Practices for the Selection of Candidates for the Post of Judge at the European Court of Human Rights*, CDDH-SC(2011)R1, Appendix III, 14 September 2011; Committee on Legal Affairs and Human Rights, *Procedure for electing judges to the European Court of Human Rights*', AS/Jur/inf(2014)03, 7 January 2014; Andrew Drzemczewski, 'L'élection du juge de l'Union européenne à la Cour européenne des droits de l'homme', (2013) Revue trimestrielle des droits de l'homme, 551.

[4] The issue of ad hoc judges is very specific and, in my opinion, not capable of challenging the institutional legitimacy of the ECtHR.

[5] Even though this might have been a "deal breaker" for some qualified candidates in the past; see s 7 below in this chapter.

prioritized over procedural issues, as the latter usually receive more attention and are sufficiently addressed in the previous chapter. Finally, the PACE part of the selection process is given greater emphasis than the national part.[6]

The structure of this chapter is as follows. Section 2 explains the breadth and depth of the problems concerning the selection of judges of the ECtHR. It highlights the importance of electing stellar judges to the Strasbourg bench for maintaining the legitimacy of the ECtHR. Section 3 briefly summarizes the good practices and recent improvements in the selection process. Section 4 focuses on problems regarding the use of certain substantive criteria. More specifically it addresses the role of gender, the issue of the minimum and maximum ages of Strasbourg judges, their language skills, their knowledge of national law and expertise in public international law. Section 5 then discusses recent examples of elections that raised eybrows across Europe and shows the politics behind them. Section 6 revisits the key question of how to attract top candidates to Strasbourg. Section 7 concludes.

2. Breadth and Depth of the Problem

Before this chapter zeroes in on the substantive issues in the selection of Strasbourg judges, it is necessary to understand the breadth and depth of the problem. It seems that many stakeholders, especially within Strasbourg circles, downplay the problem.[7] They either dismiss the criticism of the selection process, qualification and competence of judges as unsubstantiated or blame the signatory parties to the Convention.

For instance, Mr. De Vries, the Chairperson of the Sub-Committee on the Election of Judges to the European Court of Human Rights, claims that "if … the very best candidate is not always elected, it is too easy to blame the Assembly", as "[s]urely here, the principal responsibility rests in the hands of State Parties to ensure that all three candidates submitted are of the highest calibre".[8] In other words, he suggests that the proverbial ball is in the signatory states' court.

Jean-Paul Costa, the former president of the ECtHR, also considers the logic of criticism concerning the Court's membership "flawed",[9] because the older signatory states to the Convention had implicitly accepted the ratification of the Convention by "new democracies" and because "it is the sovereign states themselves who are responsible for putting forward candidates for the [Strasbourg] Court and it is the Parliamentary Assembly, made up of delegations from national parliaments, that elects them".[10] He thus echoes De Vries' argument and likewise blames

[6] The national procedures concerning nomination of candidates for Strasbourg office vary from one State to another and over time. It is thus an impossible task for one researcher to understand all the nuances of this process in all 47 member states of the Council of Europe.
[7] See also Zwart (n 1) 76-77.
[8] Id. (both citations).
[9] Jean-Paul Costa, 'On the Legitimacy of the European Court of Human Rights' Judgments' (2011) 7 EuConst, 173, 176.
[10] Ibid. 176.

the States. Moreover, Costa implicitly suggests that "problematic" candidates come only from CEE countries, which is not true.[11]

Another line of defence of the Strasbourg Court is that "a single judge does not have the power to hold that there has been a violation of the Convention".[12] It is true that only a three-member panel, a chamber or the Grand Chamber can do so. However, since the entry into force of Protocol No. 14 single judges have filtered cases and thus they may decide on the outcome of the application. Moreover, legitimacy is not only about outcomes.[13] Even if problematic judges cannot decide a case by themselves or change the outcome of the panel decision, the very fact that they are on the bench is a legitimacy problem. This is so because people in the Council of Europe Member States, or at least domestic elites, constantly compare the credentials of Strasbourg judges with those of judges of domestic apex courts.[14]

András Sajó, a current judge of the ECtHR, provides a more nuanced position and criticizes the confusion of the problem of the ECtHR's independence within the Council of Europe with the problem the ECtHR's "staffing".[15] He argues that "there is little evidence that the quality of judges lies at the heart of the Court's current difficulties" and that "[t]here is no evidence in the scholarly literature of national bias in the Court's judgments and, on the contrary, scholarly studies indicate the personal integrity of the judges."[16] I agree with Sajó that the internal independence[17] of the ECtHR and its judges within the Council of Europe has been neglected[18] and that the issue of the independence of Strasbourg judges should not be reduced to the problem of proper "staffing". However, the competence[19] of Strasbourg judges actually lies at the

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[11] As will be shown below in s 5, "old" Council of Europe member states have also failed to nominate judges of the highest calibre and submitted lists containing candidates below the apex courts and sometimes even below the appellate courts. See also Engel (n 1) or the examples discussed in the previous ch 5, s 4.

[12] See e.g. Costa (n 10) 176.

[13] On the distinction between outcome legitimacy and process legitimacy concerns see e.g. Shany (n 1) 264-267.

[14] See Çali, Koch and Bruch (n 1) discussed in further detail below.

[15] András Sajó, 'An All-European Conversation: Promoting a Common Understanding of European Human Rights', in Spyridon Flogaitis, Tom Zwart and Julie Fraser (eds), *The European Court of Human Rights and its Discontents* (Edward Elgar Publishing 2013) 188.

[16] Sajó (n 15) 189. For the actual numbers see e.g. Martin Kuijer, 'Voting Behaviour and National Bias in the European Court of Human Rights and the International Court of Justice' (1997) 10 LJIL 49; Erik Voeten, 'The Impartiality of International Judges: Evidence from the European Court of Human Rights' (2008) 102 American Political Science Review 417; or most recently, in Erik Voeten, 'Politics, Judicial Behaviour, and Institutional Design', in Jonas Christoffersen and Mikael Rask Madsen (eds), The European Court of Human Rights between Law and Politics (Oxford University Press 2011) 61 and ff. Note that Voeten has argued in the abovementioned articles that there *is* some national bias among Strasbourg judges, but given the large size of panels at the ECtHR, it has a minuscule impact on the outcome of the ECtHR's judgments.

[17] Internal independence means independence within the Council of Europe at large and within the ECtHR itself (that is vis-à-vis the court president and his "Bureau", the section presidents and the Registry). In contrast, external independence means independence from actors outside the Council of Europe. For a standard distinction between the internal and external independence of judges see Peter Russell and David O'Brien (eds), *Judicial Independence in the Age of Democracy: Critical Perspectives from around the World* (The University Press of Virginia 2001) 11-13. On the related interplay between internal and external judicial accountability see David Kosař, 'The Least accountable branch (review essay)' (2013) 11 Int'l J. of Const. Law 234, 244-245.

[18] See also Loucaides (n 1). In fact, most PACE documents emphasize only external independence from actors (the latest example being Committee on Legal Affairs and Human Rights, *Need to reinforce the independence of the European Court of Human Rights*, AS/Jur (2013) 34, 12 November 2013) and leave internal independence untouched.

[19] The notion of "competence" is understood broadly here so as to encompass not only Strasbourg judges' knowledge of human rights law, but also their qualification, experience, stature, and language skills.

heart of the Court's current difficulties and, in fact, presents the major legitimacy challenge for the ECtHR.[20]

For instance, Loukis Loucaides, the retired ECtHR judge, put it bluntly:

> "Lawyers who had no training or even a background acquaintance with human rights and/or did not have essential or adequate knowledge of one, and on some occasions of both, official working languages of the Court, namely English and French, became members of the Court with self-evident negative consequences".[21]

He concluded that "the procedure of selecting and appointing judges was quite defective".[22] Other authors concur.[23] Leif Sevón, former President of the Supreme Court of Finland and former Member of the Court of Justice stated that "[a]lthough a number of bodies in the Council of Europe would appear to scrutinize the nominations, there is in practice little meaningful review".[24] The late Jean-François Flauss identified the key problems plaguing the selection of Strasbourg judges as early as in 2008.[25] Norbert Engel assumed Flauss's mantle and updated the list of current problems in his seminal article in 2012.[26] More recently, Andreas Follesdal and Yuval Shany echoed this criticism of the qualification and experience of Strasbourg judges.[27]

If anything, it is the recent work of Başak Çali, Ana Koch and Nicola Bruch on the ECtHR's legitimacy[28] that should ring a bell in relevant circles, because it empirically confirms this dissatisfaction regarding the competence of Strasbourg judges. Their study on the Court's legitimacy (hereinafter the "2011 Legitimacy Report") is the most rigorous research on this topic to date.[29] It was based on in-depth interviews with 107 domestic politicians, judges, and human rights lawyers carried out in Turkey, Bulgaria, the United Kingdom, the Republic of Ireland, and Germany between 2008 and 2010. Their central argument is that the social legitimacy of the ECtHR is built on constant comparison between the purposes and performance of domestic institutions and the purposes and performance of the ECtHR.[30] They include the quality of judges among the criteria of the performance dimension of the ECtHR's legitimacy and their conclusions are worrying. They argue that "concerns about the quality of the [Strasbourg] judges

[20] See Çali, Koch and Bruch (n 1); and Zwart (n 1).
[21] Loucaides (n 1).
[22] Ibid.
[23] For early criticism see Limbach (n 1). See also Mackenzie (n 1) 156-157.
[24] Leif Sevón, 'The Procedure for Selection of Members of the Civil Service Tribunal: A Pioneer Experience', 2010, at 3.
[25] Flauss (n 1).
[26] See Engel (n 1); and Norbert Paul Engel, 'Mehr Tansparenz für die Wahrung professionneller Qualität bei den Richter-Wahlen zum EGMR' (2012) EuGRZ, 486.
[27] Andreas Follesdal, Johan K. Schaffer and Geir Ulfstein (eds), *The Legitimacy of International Human Rights Regimes* (CUP 2013) 287; see also Andreas Follesdal, 'The legitimacy of international human rights review: The case of the European Court of Human Rights' (2009) 40 *Journal of Social Philosophy* 595, 605; and Shany (n 1) 267.
[28] See Başak Çali, Anne Koch and Nicola Bruch, 'The Legitimacy of the European Court of Human Rights: The View from the Ground' (2011); and Çali, Koch and Bruch (n 1).
[29] Çali, Koch and Bruch 'The Legitimacy of the European Court of Human Rights: The View from the Ground' (n 28).
[30] Çali, Koch and Bruch 'The Social Legitimacy of Human Rights Courts' (n 1).

… are not only routine criticism but signal legitimacy erosion and inform deeper trends that undermine respect for the institution".[31]

The 2011 Legitimacy Report, which Çali et al. build their theory on, offers additional insights regarding the perception of the quality of Strasbourg judges. First of all, judges' experience and qualification is the second most widely emphasized legitimacy standard in the "managerial" part of the performance dimension, lagging behind only the well-known problem of the length of proceedings before the ECtHR (see Table 1). Interestingly, interviewees found judges' experience and qualification more important than their independence, and significantly more important than the transparency of their selection. Of all the interviewees, 26% included the experience and qualifications of Strasbourg judges in their accounts, while only 16% mentioned judicial independence and a mere 6% cited transparency of selection of Strasbourg judges (see Table 1). This is the reverse order from that which recent PACE documents, which focus primarily on transparent selection and judicial independence, would suggest.

Normative		**Managerial**	
Standard	*%*	*Standard*	*%*
Transformative quality	44	Length of proceedings	43
Intervention	44	**Judges: qualification, experience**	**26**
Balance between law & politics	40	Knowledge of domestic fact/law	20
Living instrument	21	Enforcement	18
Effective HR protection	19	Case-law coherence	16
		Judicial independence	**16**
		Admissibility procedure	12
		Reasoning of a judgment	6
		Judges: selection transparency	**6**
		Hearing procedure	4

Table 1: Ranking: Performance Dimension, cited from the 2011 Legitimacy Report, p. 13[32]

Second, interviews reinforced the view that the quality of judges needed rethinking and improvement.[33]A closer look at the 2011 Legitimacy Report reveals that the assessment of the qualifications and experience of Strasbourg judges was far from positive. On the contrary, out of

[31] Ibid 981.

[32] All emphases added; footnotes in the original table are omitted since they concerned only the normative part of the performance dimension.

[33] Çali, Koch and Bruch, 'The Social Legitimacy of Human Rights Courts' (n 1) 967-968.

26 assessments, 16 were negative. This amounts to 62% of interviewees who mentioned judges' qualifications and experience as a legitimacy concern and 15% of all interviewees.[34] This in itself should be taken seriously. However, things get worse.

Third, perception of the qualifications and experience of the ECtHR's judges is particularly low in the eyes of domestic judges. Judges interviewed not only were more concerned with the qualifications and experience of the Strasbourg Court's judges than other professional groups (40% as opposed to an average of 26%),[35] but also came to a more critical assessment (8 negative, 3 positive).[36] In other words, the majority of domestic judges who mentioned the quality of Strasbourg judges as a legitimacy factor viewed it negatively. Although this sample of domestic judges is not representative and any overgeneralization should be avoided,[37] this erosion of support among the key allies of the Strasbourg Court should be taken very seriously.

Fourth, given the choice of countries covered by Çali et al., one would expect the UK respondents to be the most critical of Strasbourg judges. However, the actual results were different. The UK interviewees were split regarding the assessment of the qualifications and experience of the Strasbourg Court's judges. Out of eight assessments, four were positive and four negative.[38] Only the Bulgarian respondents, where the quality of the Strasbourg judges is not a significant concern due to the low trust in domestic decision making, were more positive.[39] In contrast, all the comments of Turkish interviewees on the legitimacy concerns connected with the independence, experience and selection of judges were negative.[40] Similarly, the quality of the Strasbourg judges was a concern that figured in German interviews.[41] All assessments of the experience and qualifications of Strasbourg judges by German respondents were negative.[42] Irish interviewees also questioned the quality of the Strasbourg judges as four out of six assessments on judicial qualification and experience were negative.[43]

The key message of this cross-country comparison is that the qualifications and experience of Strasbourg judges have been questioned not just in the United Kingdom. Interviewees from all countries covered by Çali's study, apart from Bulgaria, were very critical and dissatisfaction with the quality of Strasbourg judges is thus more widespread than expected.

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[34] Çali, Koch and Bruch, 'The Legitimacy of the European Court of Human Rights: The View from the Ground' (n 28) 17.
[35] Ibid. 19. See also Çali, Koch and Bruch 'The Social Legitimacy of Human Rights Courts' (n 1) 972.
[36] Çali, Koch and Bruch 'The Legitimacy of the European Court of Human Rights: The View from the Ground' (n 28) 19. See also table "Emphasis on Performance Standards, By Profession" in ibid at 23.
[37] Domestic judges might feel particularly threatened or alienated by activities and competencies of the Strasbourg Court. See also Çali, Koch and Bruch, 'The Legitimacy of the European Court of Human Rights: The View from the Ground' (n 28) 20.

[38] Ibid. 26. However, the negative assessments were very harsh; see Çali, Koch and Bruch, 'The Social Legitimacy of Human Rights Courts' (n 1) 970.
[39] Çali, Koch and Bruch, 'The Social Legitimacy of Human Rights Courts' (n 1) 979.
[40] Çali, Koch and Bruch, 'The Legitimacy of the European Court of Human Rights: The View from the Ground' (n 28) 25.
[41] Çali, Koch and Bruch, 'The Social Legitimacy of Human Rights Courts' (n 1) 971.
[42] Çali, Koch and Bruch, 'The Legitimacy of the European Court of Human Rights: The View from the Ground' (n 28) 29.
[43] Ibid. 28. See also Çali, Koch and Bruch, 'The Social Legitimacy of Human Rights Courts' (n 1) 971.

In sum, there is a growing consensus that how judges are selected has an impact on the ECtHR's legitimacy.[44] Çali's findings show how widespread and deep the negative perception of the quality of Strasbourg judges is.[45] The criticism raised by other authors confirms the depth and breadth of the problems concerning the selection of Strasbourg judges.[46] The current situation might have become worse than Çali's findings suggest. It is important to take into account the fact that interviews were conducted between 2008 and 2010, which is before several recent controversies broke concerning the selection of Strasbourg judges,[47] and before the problems concerning the selection of judges became a salient issue in academic literature. The increased turnover of Strasbourg judges after the entry into force of Protocol No. 14, which introduced the non-renewable term, further exacerbated these problems. There were times when judges sat in Strasbourg for almost two decades. Now each State has to find three stellar candidates *every* nine years.[48] All of these arguments call for greater attention to be paid to selecting judges for the ECtHR.

3. The Good

Even though this chapter focuses on problematic aspects of the selection of judges of the ECtHR, it is important to emphasize that, in general, huge progress has been made in improving the process in the last two decades.[49] The Convention itself was amended several times to make this happen. Most importantly, Protocol No. 14 introduced a non-renewable term for Strasbourg judges,[50] which eliminated judges' incentives to please their Governments in order to secure their renomination.[51] The back-and-forth changes in the upper age limit require a more nuanced assessment,[52] but the new rule introduced by Protocol No. 15 may indeed broaden the pool of competent candidates.

PACE and the Committee of Ministers have been particularly active in improving the national part of the selection process. Guided by the principles of transparency, equality and non-

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[44] See Brighton Declaration, para. 21; Committee on Legal Affairs and Human Rights, *Nomination of candidates and election of judges in the European Court of Human Rights*, 1 December 2008, Doc. 11767, Part B (Explanatory memorandum), para. 3; Follesdal, 'The legitimacy of international human rights review: The case of the European Court of Human Rights' (n 27) 601; Mackenzie (n 1) 25 and 177; Shany (n 1) 136-158; Kanstantsin Dzehtsiarou and DK Coffey, 'Legitimacy and Independence of International Tribunals: An Analysis of the European Court of Human Rights' (2014) 37 Hastings Int'l & Comp. L. Rev. 271.

[45] Of course, this study must be interpreted with caution. There is no longitudinal study on the legitimacy of the ECtHR and thus we do not know whether the Strasbourg Court was perceived as more legitimate 10 or 20 years ago. Maybe the Court remained the same, but the expectations have changed.

[46] See notes 1 and 23-27 above.

[47] See Section 4 below, and Engel (n 1).

[48] As will be shown below in s 6 of this chapter, this may prove difficult especially in small States.

[49] For a succinct summary of these developments see above ch 5, s 2 and 3; see also Committee on Legal Affairs and Human Rights, *Procedure for electing judges to the European Court of Human Rights*', As/Jur/Inf (2011) 02 rev 3, 28 June 2011, paras. 5-11.

[50] See Art. 23(1) ECHR.

[51] But, as will be shown below, it created a new problem as Strasbourg judges had to seek new jobs after the end of their term, which increased the likelihood that they might try to please their Governments. This problem is further exacerbated by the election of young judges to the ECtHR.

[52] The issue of the age requirements is discussed thoroughly below in s 4.3.

discrimination, they nudged States towards open and fair competition at the national level.[53] They created standardized curricula vitae for candidates seeking election to the European Court of Human Rights and required Governments to submit their lists of three candidates in alphabetical order,[54] both of which reforms stopped Governments clearly prioritizing one candidate[55] and ensured that PACE could make an informed choice.

Positive developments took place also in the Council of Europe's part of the selection process. PACE's Sub-Committee on the Election of Judges to the European Court of Human Rights became a permanent sub-committee in 2007,[56] which increased its status within PACE and signalled the growing importance of getting the selection process right. Three years later, the Committee of Ministers introduced an Advisory Panel of Experts on Candidates for Election as Judge to the European Court of Human Rights,[57] which was supposed to add a long-awaited expert element to the selection process.[58]

Finally, all stakeholders devoted resources and time to fine-tuning non-binding substantive criteria. Both PACE and the Council of Ministers have steadily raised the standards regarding language skills, fought gender inequality, discussed and eventually approved the pension scheme for Strasbourg judges the lack of which might have deterred some applicants in the past, tackled the issue of reintegration of Strasbourg judges after the end of their term, and developed additional criteria such as the knowledge of domestic law and public international law.

This is a long list of accomplishments. So what is wrong with the selection of Strasbourg judges? The simple answer is that the current system does not work properly. As will be shown in Sections 5 and 6, it is not able to "deliver the goods", that is to "produce" stellar judges, on a consistent basis.[59] The immediate follow-up question is: how is that possible? A response to that question is far more complex – sometimes the criteria themselves are suboptimal,[60] sometimes the problem lies in the under-enforcement of the existing criteria,[61] sometimes the necessary criterion does not exist at all,[62] and sometimes it is the combination of too many criteria that

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[53] See PACE, Recommendation 1649 (2004), 30 January 2004; Committee on Legal Affairs and Human Rights, *Nomination of candidates and election of judges in the European Court of Human Rights*, 1 December 2008, Doc. 11767, Part A, para. 1 and Part B (Explanatory memorandum), paras. 14-22; Committee on Legal Affairs and Human Rights, *National procedures for the selection of candidates for the European Court of Human Rights*, 7 October 2010, Doc. 12391 (2010); and Guidelines of the Committee of Ministers (n 4), parts III-V.

[54] See PACE, Resolution 1646 (2009), para. 4.3 See also PACE, Recommendation 1429 (1999), 23 September 1999; PACE, Recommendation 1649 (2004), 30 January 2004; Appendix to Resolution 1432 (2005); and Committee on Legal Affairs and Human Rights, *Nomination of candidates and election of judges in the European Court of Human Rights*, 1 December 2008, Doc. 11767, Part B (Explanatory memorandum), paras. 27-28.

[55] For specific examples of expressions of governmental preference see ch 5, s 4.

[56] See footnote to Rule 48.6 in the Rules of Procedure of the Assembly, Strasbourg 2008, p. 72, and document AS/Jur/Cdh (2008) 05.

[57] See Committee of Ministers, Resolution (2010) 26, 10 November 2010. For a history of the proposal to create such panel see Committee on Legal Affairs and Human Rights, *National procedures for the selection of candidates for the European Court of Human Rights*, 7 October 2010, Doc. 12391 (2010), Part B.

[58] On how the Advisory Panel met the expectations see ch 5, s 3.3.

[59] See e.g. above ch 5, Limbach (n 1), Flauss (n 1), Engel (n 1), Loucaides (n 1), Malenovský (n 1), or Sevón (n 24) 3.

[60] This is the case of a current *maximum* age limit of Strasbourg judges that fails to take into account corresponding age limits of domestic judges – further below, s 4.3. of this chapter.

[61] Under-enforcement plagues the evaluation of judges' language skills.

[62] A typical example of this type of problem is the lack of a *minimum* age limit; see below in s 4.3.

might dissuade top candidates. To get a more nuanced picture, the next section will address five key substantive criteria for Strasbourg office, point out the current deficiencies and suggest what can be done to remedy them.

4. The Bad

This Section examines in depth five non-binding[63] substantive criteria for the office of a judge of the European Court of Human Rights: gender, language skills, age, knowledge of domestic law, and expertise in general international law. These five criteria are mentioned in almost every PACE document and in the Council of Ministers' Guidelines, and thus form the core of the non-binding requirements for candidates for Strasbourg judicial office.[64] The order of these criteria does not indicate their relative importance, but rather the attention paid to them. For that reason, this section starts with the gender issue, which resulted in two advisory opinions of the ECtHR, followed by language skills and age requirements, both of which have been discussed widely in numerous PACE documents, and concludes with knowledge of domestic law and expertise in general international law, which have been less salient issues so far.

4.1. Gender

Gender has been the most widely discussed substantive non-binding criterion for selecting Strasbourg judges. PACE adopted several resolutions touching upon the gender issue,[65] the ECtHR's first advisory opinion dealt with the gender balance of the lists of candidates nominated by the States,[66] and scholars paid significant attention to this issue.[67] One might thus think that this issue is settled. However, despite some progress,[68] there is still room for improvement. A typical example is the Belgian "male only" list submitted in April 2012.[69]

In order to understand the current problems with gender balance on the Strasbourg bench, it is important briefly to address the development of the position of PACE. In fact, the source of the problems that bedevil the national nominations is the fact that PACE went from one extreme to another on the gender issue, and then it did not strictly follow the rules it itself set. This created a sense among the States that they did not have to take the gender criterion seriously.

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[63] Some commentators consider one or more of these criteria as "implicit" requirements set by the Convention, and thus they treat them as binding. However, I believe that it is more accurate to treat them as non-binding criteria.

[64] Of course, other criteria are also plausible. For instance, the Advisory Panel seems to prefer the criteria of the so-called "Article 255 Panel" envisaged by the Treaty on the Functioning of the European Union; see Steering Committee for Human Rights, *CDDH report on the review of the functioning of the Advisory Panel of experts on candidates for election as judge to the European Court of Human Rights*, CDDH(2013)R 79 Addendum II, 29 November 2013, para. 19.

[65] See in particular PACE, Resolution 1366 (2004); PACE, Resolution 1426 (2005); and PACE, Resolution 1627 (2008).

[66] See ECtHR, *Advisory opinion on certain legal questions concerning the lists of candidates submitted with a view to the election of judges to the European Court of Human Rights*, 12 February 2008.

[67] Virtually every law review article touching upon the selection of Strasbourg judges addresses the gender issue. On the role of gender in the selection of international judges in general see Mackenzie (n 1), 47-49.

[68] In 2008, the number of women rose to 17 out of 47 judges. On further development see also Engel (n 1) 452-453.

[69] For further details of the selection of a Belgian judge of the ECtHR in 2012 see above, ch 5, s 4.1.

How did the rules change from one extreme to another? Until the 1990s, there was little emphasis on the gender balance of the Strasbourg Court and no criteria for gender-balanced nomination lists existed. However, after the turn of the century PACE started to attach greater importance to the gender balance of the ECtHR and developed criteria in order to ensure that lists contained candidates of the sex that was underrepresented in the ECtHR.[70] In 2004, PACE adopted Resolution 1366 (2004) and Recommendation 1649 (2004) that stressed the need for gender balance in the Strasbourg Court. A year later, it amended Resolution 1366 (2004) by Resolution 1426 (2005), under which single-sex lists of candidates could be considered by PACE only if the sex was under-represented in the Court.[71] Resolution 1426 (2005) defined the threshold for under-representation as under 40 % of judges. Given the composition of the ECtHR at that time, this rule meant that no "men only" lists were acceptable under any circumstances.

The new strict standard (hereinafter "the general rule on gender") immediately caused problems. Several States, especially the smaller ones with a limited number of women candidates with credentials equivalent to those of male candidates,[72] argued that they were not able to produce a gender-balanced list without compromising the other selection criteria. As a result of these development, in 2007 the Committee on Legal Affairs and Human Rights prepared a draft resolution[73] amending paragraph 3.ii of Resolution 1366 (2004), as amended by Resolution 1426 (2005), which would enable the existing general rule on gender to be waived in exceptional circumstances. However, this draft resolution was rejected by PACE and the matter eventually ended up before the ECtHR itself. In the key dicta of the 2008 Advisory Opinion, the ECtHR held that

> "in not allowing any exceptions to the rule that under-represented sex must be represented, the current practice of the Parliamentary Assembly is not compatible with the Convention: where a Contracting Party has taken all the necessary and appropriate steps with a view to ensuring that the list contains a candidate of the under-represented sex, but without success, and especially where it has followed the Assembly's recommendations advocating an open and transparent procedure involving a call for candidatures (…), the Assembly may not reject the list in question on the sole ground that no such candidate features on it." and that "exceptions to the principle that lists must

[70] See Committee on Legal Affairs and Human Rights, *Nomination of candidates and election of judges in the European Court of Human Rights*, 1 December 2008, Doc. 11767, Part B (Explanatory memorandum), para. 26. The reasons behind the lack of women with equivalent credentials are beyond the scope of this chapter. However, it is a well-known fact in many European States women are still severely underrepresented at apex courts as well as in academia. For an excellent overview of the politics behind establishing a new rule of gender balance for the ECtHR, see Stéphanie Hennette-Vauchez, *More Women-but which Women? The Rule and Politics of Gender Balance at the European Court of Human Rights* (forthcoming in European Journal of International Law in 2015).

[71] Article 3.ii of PACE, Resolution 1366 (2004), as modified by PACE, Resolution 1426 (2005).

[72] This, of course, does not mean that the PACE members changed their views within one year. In fact, the people inside the PACE who pushed the gender equality agenda were mobilized for much longer and by the late 1990s the topic was a serious topic of concern already.

[73] Committee on Legal Affairs and Human Rights, *Candidates for the European Court of Human Rights*, 19 March 2007, Doc. 11208.

> contain a candidate of the under-represented sex should be defined as soon as possible".[74]

Following two controversial debates, PACE eventually adopted Resolution 1627 (2008) which allows for exceptions to the general rule on gender, but only when a State demonstrates that it has tried and failed to find a qualified candidate from the under-represented sex. The exception to the general rule on gender reads as follows:

> "The Assembly decides to consider single-sex lists of candidates of the sex that is over-represented in the Court in exceptional circumstances where a Contracting Party has taken all the necessary and appropriate steps to ensure that the list contains a candidate of the under-represented sex, but has not been able to find a candidate of that sex who satisfies the requirements of Article 21 § 1 of the European Convention on Human Rights."[75]

The report of the Committee on Legal Affairs and Human Rights makes it clear that such exception should be allowed only in "truly exceptional circumstances".[76] The States must take "all the necessary and appropriate steps to ensure that the list contains a candidate of the under-represented sex",[77] but "without success because of the requirement to satisfy the other criteria",[78] and the burden of proof lies exclusively with the State concerned.[79] These stringent criteria for the exception to the general rule on gender were reiterated in Guidelines of the Committee of Ministers.[80]

The new moderate rule on gender – that is the general rule with the strictly interpreted exceptions – seems to strike a good balance between the need to ensure gender equality on the Strasbourg bench and other criteria for the office. In fact, the risk of compromising the other selection criteria for the sake of submitting a gender-balanced list could easily backfire against the very policy of positive discrimination of women candidates and eventually undermine the stature and legitimacy of the ECtHR.[81]

Unfortunately, PACE relaxed the criteria for exceptions to the general rule on gender too far. The 2012 Belgian "male only" list is a prime example. Belgium is not a small country such as Malta. Nor it is a small post-communist country with a limited number of qualified women candidates due to a language barrier, social stereotypes and average legal education. On the contrary, Belgium hosts some of the finest law schools in Europe, most of which have several

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[74] ECtHR, *Advisory opinion on certain legal questions concerning the lists of candidates submitted with a view to the election of judges to the European Court of Human Rights*, 12 February 2008, § 54.
[75] PACE, Resolution 1627 (2008), para 4. The second part of this paragraph that stipulates the quorum for accepting such lists is omitted.
[76] Committee on Legal Affairs and Human Rights, *Candidates for the European Court of Human Rights*, 4 July 2008, Doc. 11682, para. 23.
[77] Ibid, para. 24 (emphasis in the original).
[78] Ibid, para. 23 (emphasis added).
[79] Ibid, para. 24.
[80] Guidelines of the Committee of Ministers (n 4), para. II.8.
[81] The other option to ensure a gender-balanced list in countries with a limited number of stellar female candidates – to place women of foreign nationality on the list – was ruled out by the ECtHR as incompatible with the ECHR; see ECtHR, *Advisory opinion on certain legal questions concerning the lists of candidates submitted with a view to the election of judges to the European Court of Human Rights*, 12 February 2008, § 52.

stellar female professors in their faculties; it is bilingual; and Belgian female judges have been active in various international professional associations of judges. It is thus very implausible that the Belgian Government took all the necessary and appropriate steps to ensure that its list contained a candidate of the under-represented sex and there is no sign that it was asked by PACE to prove it.[82] To be sure, the chapter by Koen Lemmens shows that gender is just one legitimate criterion in Belgium and the Belgian Government had to weigh it against other concerns, but this cannot in itself serve as an excuse for submitting "no female" list,[83] because other Governments are in similar situation and since 2004 all of them, with the exception of the Maltese (in 2004 and 2006), Slovak (in 2004) and Moldovan Governments (in 2012), managed to produce a list with at least one woman.

This by no means suggests that the candidate who was eventually elected the Judge of the ECtHR on behalf of Belgium was a bad or illegitimate choice. The problem does not lie with the successful candidate, who was a stellar nominee, but exclusively with PACE. By departing from its own standards on gender in the Belgian case PACE sent an implicit message to other States that they might submit male only lists without detailed justification and they might still get them through. Even more importantly, one of the cornerstones of the rule of law is the principle that the very body, be it a king, the parliament or the executive, that issues the rule is itself bound by it.[84] Given the fact that the raison d'être of the Council of Europe is to promote the rule of law, PACE should be particularly vigilant to adhere to this principle.

4.2. Language Skills

Language skills have always been considered one of the most important non-binding substantive criteria for Strasbourg judges. Several PACE documents even suggest that language skills rank at the very top of the hierarchy among the criteria for Strasbourg office.[85] This is not surprising since sufficient language skills in an international court are vital for judges to participate

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[82] The explanation of the "male only" list provided by in ch 5 s 4.1. is persuasive, but I still respectfully disagree. If we accept that the State may submit a "male only" list to replace a sitting female judge or that gender is just one criterion among many in compiling the list, then we are not talking about "truly exceptional circumstances". See also the Slovak all-male list rejected by PACE in 2004, Malta's all-male lists rejected by PACE in 2004 and 2006, and the Moldovan all-male list presented to PACE in 2012. For further details, see Stéphanie Hennette-Vauchez, *More Women-but which Women? The Rule and Politics of Gender Balance at the European Court of Human Rights* (forthcoming in European Journal of International Law in 2015).

[83] For instance, at first sight it seems laudable and neutral that the Belgian Government preferred candidates with judicial experience at a top national court. But when one takes into account the fact that women are severely underrepresented at apex courts in most "old" EU Member States, this criterion indirectly prioritizes male candidates (note that in 2012 only one out of twelve judges on the Belgian Constitutional Court was female). The Strasbourg selection process thus reveals a deeper problem in striving for a gender balance on the bench.

[84] For a standard account of this principle see F. A. Hayek, *The Road to Serfdom* (London 1944) 54: "[the rule of law] means that government in all its actions is bound by rules fixed and announced beforehand --- rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances and to plan one's individual affairs on the basis of this knowledge."

[85] See e.g. Committee on Legal Affairs and Human Rights, *Candidates for the European Court of Human Rights*, 4 July 2008, Doc. 11682, para. 26: "There is a clear hierarchy among the various criteria for office"; or Committee on Legal Affairs and Human Rights, *Nomination of candidates and election of judges in the European Court of Human Rights*, 1 December 2008, Doc. 11767, Part B (Explanatory memorandum), para. 24: "… language abilities must be considered among the most important criteria for office" (see also para. 41 in ibid.).

effectively in discussions and reading documents.[86] There seems to be a consensus that the lack of sufficient language skills of a Strasbourg judge hampers effective communication with her colleagues as well as with the Registry, prevents her from working as a judge rapporteur and reviewing the validity of translated versions of judgments in the second official language, impairs the functioning of the ECtHR as a whole, and undermines the ECtHR's credibility.[87] In addition, judges' inadequate language skills empower the Registry,[88] as such judges cannot meaningfully fight back if they disagree with the Registry's lawyers who draft most decisions.

But despite the strong emphasis on this criterion, knowledge of the two official languages of the Council of Europe (English and French) among nominees is still a huge problem. For instance, Ruth Mackenzie et al. suggested that "the language skills of the [Strasbourg] judges have become a particularly problematic and controversial issue"[89] and argued that PACE introduced more stringent language standards "[i]n response to concerns that some recently appointed judges have not had adequate command of both French and English (and in some cases neither)".[90] Loukis Loucaides,[91] a former Strasbourg judge, and Norbert Engel[92] confirmed these allegations.

In response to these concerns, PACE has paid significant attention to this problem. In order to understand these developments, where they have succeeded and where they are still failing, it is important to remember that the requirement of language skills in fact consists of two key issues that are interrelated but separate: (1) language proficiency; and (2) bilingualism (knowledge of both official languages of the Council of Europe).[93] While this chapter acknowledges that both of these aspects are important, it contends that there is a hierarchy among them[94] and that

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[86] Brandeis Institute for International Judges, *International Justice: past, present and future* (Brandeis University, 2009), available at https://www.brandeis.edu/ethics/pdfs/internationaljustice/biij/BIIJ2009.pdf, 25.

[87] See ibid, and Steering Committee for Human Rights, *Report of Ad Hoc Working Group on National Practices for the Selection of Candidates for the Post of Judge at the European Court of Human Rights*, CDDH-SC(2011)R1, 14 September 2011, para. 6.

[88] See Paul L. McKaskle, 'The European Court of Human Rights: What It Is, How It Works, and Its Future' (2005) 40 U.S.F. L. REV. 1, 28 (raising the problem of registrar's power due to the language deficiencies of judges). The significant powers of the Registry, not envisaged by the ECHR, have recently been subject to strong criticism. See Loucaides (n 1); or McKaskle's article mentioned above in this note, at 26-31 . Recent PACE documents have also started addressing the issue (albeit only regarding lawyers seconded to the Registry); see e.g. Committee on Legal Affairs and Human Rights, *Need to reinforce the independence of the European Court of Human Rights*, AS/Jur (2013) 34, 12 November 2013, para. 33. On the role of the registries and legal secretariats in international courts in general see Stéphanie Cartier and Cristina Hoss, 'The Role of Registries and Legal Secretariats in International Judicial Institutions' in Cesare Romano, Karen Alter and Yuval Shany (eds), *Oxford Handbook of International Adjudication* (OUP 2013) 711-736.

[89] Mackenzie (n 1) 170.

[90] Id.

[91] See note 21 above.

[92] See Engel (n 1) 452.

[93] There are of course other factors as well. For instance, several PACE documents suggest that knowledge of other languages is also an asset: "knowledge of other European languages frequently used in the correspondence with the Court by applicants from different countries (such as Russian or German) should also be taken into account in assessing a candidate's language abilities" (Committee on Legal Affairs and Human Rights, *Nomination of candidates and election of judges in the European Court of Human Rights*, 1 December 2008, Doc. 11767, Part B (Explanatory memorandum), para. 24).

[94] Of course, in the ideal scenario, all nominees (or at least elected judges) should be proficient in both English and French. However, this is not always possible in the real world. Some States, especially small countries, can hardly produce a list with three nominees who are fluent in both.

proficiency in judges' "first language"[95] is more vital for the ECtHR's functioning and legitimacy than bilingualism.[96] For that reason, the issue of language proficiency will be adressed first.

In general, standards regarding proficiency in judges' first language have risen steadily, but perhaps too slowly. As of 2004, it was still enough for candidates to have a "sufficient knowledge" of at least one of the two official languages.[97] In other words, candidates who had a sufficient knowledge of the first official language and no knowledge of the second were still eligible. This was a rather low standard, as

> "the requirement that a judge have 'sufficient' knowledge of one language could mean, in practice, that his or her level of proficiency may be below the standard that is necessary in order to be aware of linguistic subtleties and nuances necessary for an understanding of a complex case and which are clearly inherent in legal drafting and arguments".[98]

It was only in 2009 that PACE required candidates to possess an "active knowledge" of the first language.[99] Finally, the Committee of Ministers increased the first language standard in the 2012 Guidelines that stipulate that "[c]andidates must, as an absolute minimum, be *proficient* in one official language of the Council of Europe".[100]

The current proficiency standard thus seems to be fine and on a par with standards applicable to other international courts.[101] However, this standard must also be enforced. The one way to ensure that the proficiency standard is met is to require thorough language testing (of non-native speakers) in the national nomination contests. This seems to be the current path taken by PACE and the Committee of Ministers to tackle this issue.[102] But this proved to be insufficient. The testing of language skills at the national level has often been less thorough than necessary and, moreover, "proficiency" in foreign languages in certain countries means a somewhat lower standard than would be expected in Strasbourg circles.

The solution to this problem is three-fold. First, the required level of proficiency should be clarified by reference to the Council of Europe's Common European Framework of Reference for Languages.[103] Second, the Common European Framework of Reference for Languages

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95 By the "first language" I mean the one of the two official languages which a given candidate is more proficient in.
96 Some interviewees with whom I discussed a draft of this chapter went further and suggested that knowledge of the "second language" is even less important than generally thought, because deliberations are always interpreted into the other official language and each judge of the ECtHR who acts as a judge rapporteur can tell lawyers in the Registry to draft a decision in his "first language". I tend to disagree as textual nuances matter in legal reasoning, and thus all Strasbourg judges should have at least passive knowledge of the "second language".
97 PACE, Recommendation 1649 (2004), 30 January 2004.
98 Committee on Legal Affairs and Human Rights, *Nomination of candidates and election of judges in the European Court of Human Rights*, 1 December 2008, Doc. 11767, Part B (Explanatory memorandum), para. 11.
99 PACE, Resolution 1646 (2009), para. 4.4.
100 Guidelines of the Committee of Ministers (n 4), para. II.3 (emphasis added).
101 See e.g. Art. 36(3)(c) of the Rome Statute of the ICC, which enunciates perhaps even more stringent standard: "Every candidate for election to the Court shall have an *excellent* knowledge of and be *fluent* in at least one of the working languages of the Court" (emphasis added).
102 See Guidelines of the Committee of Ministers (n 4), para. IV.3; or Committee on Legal Affairs and Human Rights, *Nomination of candidates and election of judges in the European Court of Human Rights*, 1 December 2008, Doc. 11767, Part B (Explanatory memorandum), para. 24.
103 See Steering Committee for Human Rights, *Report of Ad Hoc Working Group on National Practices for the Selection of Candidates for the Post of Judge at the European Court of Human Rights*, CDDH-SC(2011)R1, Appendix III, 14 September 2011, para. 6, note 5.

should also be used in the model curriculum vitae,[104] like the European Language Passport. Third, proficiency in the *first* language should be tested at the Strasbourg level as well. Currently, only the Sub-Committee on the Election of Judges to the European Court of Human Rights can interview candidates. However, this interview has failed to sift out candidates with insufficient knowledge of the first language. Therefore, it would be beneficial both to the States and to the PACE if the Advisory Panel of Experts were allowed to interview the candidates and test their ability to communicate complex legal issues effectively and understand linguistic nuances in official languages[105] of the Council of Europe.[106]

Regarding the second issue, bilingualism, standards have also increased over time. As of 2004, candidates had to possess only a sufficient knowledge of one of the two official languages and hence, a contrario, no requirement regarding the second official language was set.[107] This is surprising since the ECtHR's documents have not been produced in both languages.[108] More specifically, according to the Registry of the ECtHR, "typically around two-thirds of documents before Chambers were in English only and one-third in French only".[109] Protocol No. 14 made the knowledge of the second official language even more important. After its ratification, knowledge of both official languages became increasingly important, because judges sitting alone decide on the admissibility of applications, and three-judge panels deliver judgments with respect to manifestly well-founded cases.[110] This change inevitably increases the exposure of all Strasbourg judges to both working languages. For that reason,[111] PACE raised the standard for the second language and stipulated that all candidates should possess at least a passive knowledge of the second official language.[112]

This standard regarding bilingualism is far from being perfect,[113] but a more stringent standard regarding the second official language, especially in small countries that use neither English nor French as their official language, might eliminate many, or even most, top candidates. On the other hand, bilingualism should not be underestimated. Apart from changes brought about by Protocol No. 14 and the fact that the sections are rearranged every three years, which increases the likelihood that a judge may have to switch working languages, bilingualism is also critical for the consistency and coherence of ECtHR case law. If Strasbourg judges do not have sufficient command of the second official language, there is an increased danger that the "French strands"

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[104] The "proficiency" should mean that C2 level is required for the first language. Or at the very least it should be made clear that, as an absolute minimum, each candidate must be able to speak, read and write on the "very good" level (according to the current fair/good/very good scale) in one of the official languages.

[105] This means that both English and French native speakers should be on the Advisory Panel of Experts.

[106] The other option is to make the Sub-Committee's assessment of candidates' linguistic competence public.

[107] PACE, Recommendation 1649 (2004), 30 January 2004.

[108] Note that although simultaneous translation between the two official languages is generally provided during the ECtHR's hearings and deliberations, individual sections often work (and produce their working documents) in only one of the two official languages.

[109] See Steering Committee for Human Rights, *Report of Ad Hoc Working Group on National Practices for the Selection of Candidates for the Post of Judge at the European Court of Human Rights*, CDDH-SC(2011)R1, 14 September 2011, para. 6.

[110] See Arts. 27 and 28 ECHR.

[111] See Committee on Legal Affairs and Human Rights, *Nomination of candidates and election of judges in the European Court of Human Rights*, 1 December 2008, Doc. 11767, Part B (Explanatory memorandum), paras. 11-12 and 24.

[112] PACE, Resolution 1646 (2009), para. 4.4. See also, more recently, Guidelines of the Committee of Ministers (n 4), para. II.3.

[113] Note that for all "Grade A" positions the Council of Europe requires a very good knowledge of one of the official languages (English or French) and *good* knowledge of the other.

and "English strands" of Strasbourg case law develop over time and unless there is a Grand Chamber on a given issue, the case law might diverge.[114]

Thus, it is important to keep an eye on the candidates' knowledge of the second official language and raise the standard when the time is ripe. Until that moment, the same steps as those regarding proficiency can be taken: (1) to stipulate what a "passive knowledge" means on the Common European Framework of Reference for Languages scale; (2) to use this scale in the model curriculum vitae; and (3) to test the knowledge of the second official languages at the national as well as the Strasbourg level.

4.3. Age

The age of judges at the moment of taking office at the ECtHR was not for many decades at the forefront of discussion concerning the selection of Strasbourg judges. However, it is increasingly understood that this overlooked criterion may have serious repercussions for the functioning of the ECtHR as well as for its legitimacy. The compulsory retirement age of 70 years is perceived by many as too low for an international court and, according to the critics, deterred otherwise well-equipped scholars and judges from applying for Strasbourg office.[115] This rule came under closer scrutiny when judges who could not finish even half of their term due to their age were appointed to the Strasbourg bench, resulting in an increased turnover of the ECtHR's membership. However, it was the recent appointments of "30-something" judges that came in for severe criticism.[116] The appointment of young judges is not only capable of undermining the legitimacy of the ECtHR, but also creates an additional problem of their subsequent reintegration into their member state.

It is thus clear that there are in fact two issues at stake:

(1) the upper age limit, and

(2) the lower age limit.[117]

The recent documents of the Council of Europe attempt to tackle both issues simultaneously. However, as each of these issues raises different problems, they will be discussed separately.

Regarding the upper age limit, the Convention itself has switched back and forth within the last twenty-five years, always without proper explanation. Until 1998, the Convention set no age limit for Strasbourg judges. It was only Protocol No. 11 that introduced a mandatory retirement age of 70 years.[118] This sudden shift was neither properly discussed nor justified.[119] Protocol No. 11 also

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[114] This is to a certain extent already happening. Judgments drafted in English tend to cite primarily case law available in English, whereas judgments drafted in French prefer case law available in French.

[115] See Explanatory Report to Protocol No. 14, para. 53; and Committee on Legal Affairs and Human Rights, *Need to reinforce the independence of the European Court of Human Rights*, AS/Jur (2013) 34, 12 November 2013, para. 12

[116] See e.g. Engel (n 1), Loucaides (n 1), Malenovský (n 1) 187 and Sevón (n 24) 3.

[117] For further discussion of the age requirement see e.g. Limbach (n 1), Flauss (n 1), Engel (n 1), Loucaides (n 1), Malenovský (n 1) 187, and Sevón (n 24) 3 (regarding the ECtHR); and Malenovský (n 1) 184-188 (regarding international courts in general).

[118] See Article 23(3) of ECHR, as amended by Protocol No. 11: "The terms of office of judges shall expire when they reach the age of 70."

reduced the term for Strasbourg judges from nine to six years. Therefore, if a judge wanted to serve a full term in Strasbourg, she had to be 64 years old or younger at the moment of her appointment. Given the relatively short term, one would expect that PACE selected only those candidates who could serve a full term, but even during the applicability of the six-year mandate it elected several judges who were in their late sixties and did not complete their terms due to their age.[120]

However, the election of judges who could not finish six years on the Strasbourg bench did not provoke much controversy at that time.[121] The rules stipulated by Protocol No. 11 regarding the terms of office of Strasbourg judges were eventually modified for another reason. As judges were elected for a period of 6 years with a possibility of re-election, it created incentives for judges to decide cases in a manner that would not jeopardize their re-election prospects.[122]

Protocol No. 14, which came into force on 1 June 2010, echoed this criticism and introduced a non-renewable term of 9 years. As the compulsory retirement age of 70 years remained untouched, it meant that those candidates who intended to serve a full term had to be 61 years old or younger. The Explanatory Report to Protocol No. 14 moderated this criterion and suggested that the two criteria – 9-year term and the age limit of 70 years – read together, "may not be understood as excluding candidates who, on the date of election, would be older than 61".[123] However, it also stipulated that "it is generally recommended that High Contracting Parties avoid proposing candidates who, in view of their age, would not be able to hold office for at least half of the nine-year term before reaching the age of 70".[124] In other words, every judge was supposed to serve at least 4.5 years. Unfortunately, neither the High Contracting Parties nor PACE followed this advice and again elected a judge in his late sixties in 2012.[125]

Yet another change in the maximum age limit, which reflects a recommendation of the Brighton Declaration,[126] is envisaged in Protocol No. 15.[127] This Protocol, when it enters into force, will

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[119] See para. 63 of the Explanatory Report to: "Since the Court will function on a permanent basis, it was deemed appropriate to introduce an age limit, as exists in most domestic legal systems". Note that courts and tribunals established by the UN (the International Court of Justice, the International Criminal Court, the International Criminal Tribunal for the former Yugoslavia, and the International Criminal Tribunal for Rwanda) as well as other regional human rights courts do not provide for a mandatory retirement age. For further details regarding maximum age of judges of international courts see Malenovský (n 1) 184-186.

[120] There are several such judges. Antonio Pastor Ridruejo (Spain) was appointed at the age of 66 years and served 5 years (1998-2003) in Strasbourg. Giorgio Malinverni (Switzerland) was appointed at the age of 66 years and served only 4 years (2007-2011) as a judge of the ECtHR. In addition, Vladimiro Zagrebelsky was 67 years old when he was re-elected in 2007. Finally, Benedetto Conforti (Italy) was appointed at the age of 68 years and served only 3 years (1998-2001) at the ECtHR, but this was not a problem as his term of office was to expire after three years due to transitional provisions after the entry into force of Protocol No. 11 (for further details see Drzemczewski, 'Election of judges to the Strasbourg Court: an overview' (n 1)).

[121] But see Flauss (n 1) 739.

[122] See Committee on Legal Affairs and Human Rights, *Need to reinforce the independence of the European Court of Human Rights*, AS/Jur (2013) 34, 12 November 2013, para. 11. Erik Voeten's empirical study actually provides modest support for the claim that career insecurities made Strasbourg judges more likely to favor their national government when it was a party to a dispute; see Erik Voeten, 'The Impartiality of International Judges: Evidence from the European Court of Human Rights' (2008) 102 American Political Science Review 417, 421 and 427-428.

[123] Explanatory Report to Protocol No. 14, para. 53.

[124] Explanatory Report to Protocol No. 14, para. 53. See also Guidelines of the Committee of Ministers (n 3), para. II.5; and Brighton Declaration, para. 24.

[125] Paul Mahoney (United Kingdom) was almost 66 years old at the date of his election.

[126] Brighton Declaration, paras. 24-25. See also the ECtHR's opinion on the Brighton Declaration, para. 29.

replace the age limit of 70 with a new requirement that candidates for judges be no older than the age of 65 when the list of three candidates is requested by PACE.[128] The new rule thus allegedly creates a *de facto* age limit of 74.[129]

There are three rationales for the new rule. First, this modification aims at enabling highly qualified judges to serve the full nine-year term of office and thereby reinforce the consistency of the membership of the Court.[130] Second, this change provides for the possibility of electing more experienced judges and of judges who are closer to retirement in their home countries and therefore less likely to feel the need to prepare the ground for their future employment once they step down as judges in Strasbourg.[131] Finally, the third rationale, which is well-known in Strasbourg circles but has not been discussed in public, stems from the fact that the only chance of attracting the very top candidates from certain old Council of Europe' Member States is to "hire" them after their compulsory retirement in their home countries.[132]

The change regarding the upper age limit brought about by Protocol No. 15 is generally considered to be a good solution to the problems caused by the previous rule. But its justification is again dubious and the new rule must be approached with caution. As to the first rationale, the need to reduce the turnover of Strasbourg judges, it could have been achieved even under the previous rule, had PACE accepted only lists containing candidates aged 61 years or less. Moreover, judges well into their seventies might cause new problems, be it lower productivity, health problems and, in the worst case scenario, even deaths on the bench. Here it should be emphasized that a de facto age limit is in fact higher than 74. As the critical date on which the age requirement is checked is the date when PACE requests the list of three candidates,[133] and given the length of the process leading to election of a judge, a judge who was 65 years old at the critical date will most probably be 66 when elected, if everything goes well. If the nomination list is rejected, which might happen and has already happened,[134] she will be even older. In other words, a de facto maximum age limit is at least 75. One thus wonders why, if judges in their mid-seventies are still considered suitable for Strasbourg office, the upper age limit should not be abolished altogether?

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[127] For a succinct summary of the innovations brought about by this protocol see David Milner, 'Protocols no. 15 and 16 to the European Convention on Human Rights in the context of the perennial process of reform: a long and winding road' (2014) 17 Zeitschrift für Europarechtliche Studien 19.

[128] Art. 21(2) ECHR, as amended by Protocol No. 15, reads as follows: "Candidates shall be less than 65 years of age at the date by which the list of three candidates has been requested by the Parliamentary Assembly, further to Article 22."

[129] See e.g. Committee on Legal Affairs and Human Rights, *Need to reinforce the independence of the European Court of Human Rights*, AS/Jur (2013) 34, 12 November 2013, para. 12. However, it will be shown below that the de facto age limit will be higher.

[130] Explanatory Report to Protocol No. 15, para. 12.

[131] Committee on Legal Affairs and Human Rights, *Need to reinforce the independence of the European Court of Human Rights*, AS/Jur (2013) 34, 12 November 2013, para. 12.

[132] Put more bluntly, for most lawyers in the United Kingdom being a judge of the Court of Appeal or the Supreme Court of the United Kingdom means more than being a judge of the ECtHR. The same logic applies to several other "West" European countries. A good indicator of this phenomenon is the number of judges of apex courts on the nomination lists submitted to PACE.

[133] In this aspect the final wording of Protocol No. 15 differs from the wording of the Brighton Declaration, which proposed "that judges must be no older than 65 years of age at the date on which their term of office commences" [see Brighton Declaration, para. 25(f)]. For justification of this departure see Committee on Legal Affairs and Human Rights, *Need to reinforce the independence of the European Court of Human Rights*, AS/Jur (2013) 34, 12 November 2013, para. 13.

[134] Note also that the list can be rejected more than once.

The second rationale sought by the new rule, to reduce the need for the reintegration of Strasbourg judges within their home countries and thereby strengthening judicial independence, is also questionable. First of all, if a Strasbourg judge is good she will have no problem finding an appropriate job afterwards, although not necessarily in her home country and not necessarily within the judiciary. In fact, a recent study revealed that former Strasbourg judges often do not return to their home countries:[135] out of a sample of 30 recently retired judges three were appointed to positions at international organizations such as the United Nations or European Union institutions, six were appointed or elected to other international courts or tribunals, 10 were appointed or elected to be judges on national courts or to serve as ombudspersons, at least four worked for some time as academics and eight served in their national administrations as, for example, advisors, and some of them even became MPs and ministers.[136] Moreover, virtually any law school in Europe, and even beyond, would like to have a former Strasbourg judge as a member of its faculty.

Of course, it would be desirable if a national judge who finished her Strasbourg term returned to at least the same position within the domestic judiciary she originally came from.[137] However, this is not always possible, because the number of seats at apex courts is often fixed and there is no immediate vacancy.[138] The situation regarding constitutional justices is even more complex, as most European constitutions set a non-renewable term for constitutional justices and hence there is no chance to return to the same post at all. But these are the terms of Strasbourg judicial office and everybody knows them in advance. In addition, there is no evidence of national bias in the ECtHR's judgments and virtually all scholarly studies indicate the personal integrity of Strasbourg judges.[139] The recent study on the legitimacy of the ECtHR confirms this state of affairs by showing that judicial independence is not perceived as a major legitimacy issue by the relevant stakeholders.[140] Finally, the new rule cannot prevent the reintegration of Strasbourg judges entirely, since at several European constitutional courts there is neither a maximum age nor a compulsory retirement age for their Justices.[141] In other words, some Strasbourg judges will always try to seek reintegration within the domestic judiciary. In sum, reintegration's threat to judicial independence is doubtful at best, especially when we compare Strasbourg judges with their Luxembourg colleagues.[142]

The third rationale, to attract top national judges after their compulsory retirement in their home countries, thus seems the most promising explanation of why the new rule came into being. For

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135 But it must be noted that many of the following positions, especially at supranational or international institutions, are dependent upon nomination by a home State.

136 See Nina Vajić, 'Some Remarks Linked to the Independence of International Judges and the Observance of Ethical Rules in the European Court of Human Rights' in *Grundrechte und Solidarität:Durchsetzung und Verfahren Festschrift für Renate Jaeger* (N. P. Engel Verlag 2010) 179, 185 (cited also in Committee on Legal Affairs and Human Rights, *Need to reinforce the independence of the European Court of Human Rights*, AS/Jur (2013) 34, 12 November 2013, para. 21).

137 See also Committee on Legal Affairs and Human Rights, *Need to reinforce the independence of the European Court of Human Rights*, AS/Jur (2013) 34, 12 November 2013, paras. 22-23.

138 Forcing governments to keep the seat of a Strasbourg judge vacant for nine years is quite a stretch.

139 See note 16 above.

140 See Çali, Koch and Bruch 'The Legitimacy of the European Court of Human Rights: The View from the Ground' (n 28), discussed in Section 1.

141 This applies, for instance, to the Italian Constitutional Court.

142 Judges of the Tribunal and the Court of Justice not only face the same hurdles regarding reintegration, but also have to seek reappointment every six years.

instance, Justices of the German Constitutional Court face compulsory retirement at the age of 68, and thus the increase in the upper age limit brought about by Protocol No. 15 might indeed increase their interest in Strasbourg office. The same logic applies to judges in other States that stipulate the retirement age for judges as 65 years or below.[143] Moreover, even those judges who face compulsory retirement at the age of 70 may give the Strasbourg application a thought as it would prolong their active judicial careers for several more years. However, if this was the intention of the drafters of Protocol No. 15, they should have studied the maximum age of domestic judges more systematically to choose the "right" maximum age.

In contrast to the upper age limit, the Convention never explicitly set a minimum age requirement. The only formal limit set by the Convention can be found in Article 21(1) ECHR, which states: "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". It was suggested that the criterion of eligibility for "high judicial office" in this article may, in itself, amount to an implicit lower age requirement,[144] but in practice States as well as PACE interpreted this criterion in a very flexible way and PACE elected several judges in their thirties.[145]

Despite the growing criticism of this phenomenon,[146] little attention was paid to it in Strasbourg circles.[147] However, this ignorance soon backfired against the ECtHR. When PACE in 2009 elected a 36-year-old Ukrainian lawyer, who was working at the ECtHR's Registry at the moment of her election, many commentators felt that too much was too much and started criticizing this practice openly.[148] This is somewhat unfair vis-à-vis the Ukrainian judge,[149] because seven other judges elected since the establishment of the permanent Court in 1998 had been under 40 at the moment of their election.[150] Moreover, the election of a Ukrainian judge in 2009 was rather special, because there had been no Ukrainian judge since 2007[151] and the selection process was severely protracted due to the battle over the lists of candidates.[152]

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[143] According to the 2012 CEPEJ Report the retirement age of judges or ordinary courts varies between 63 years (Cyprus) and 72 years (Ireland); see CEPEJ, *European judicial systems, Edition 2012 (data 2010): Efficiency and quality of justice*, available at http://www.coe.int/t/dghl/cooperation/cepej/evaluation/2012/Rapport_en.pdf, p. 274.

[144] See e.g. Committee on Legal Affairs and Human Rights, *Nomination of candidates and election of judges in the European Court of Human Rights*, 1 December 2008, Doc. 11767, Part B (Explanatory memorandum), paras. 5 and 32; or Malenovský (n 1) 186.

[145] These judges came from Albania (Kristaq Traja, 33 years old, 1998-2008), Lithuania (Danutė Jociene, 34 years old, 2004-2013), Latvia (Ineta Zimele, 35 years old, 2005-), Georgia (Nona Tsotsoria, 34 years old, 2007-), Albania (Ledi Bianku, 36 years old, 2008-), San Marino (Kristina Pardalos, 36 years old, 2009-), Ukraine (Ganna Yudkivska, 36 years old, 2010-), and Estonia (Julia Laffranque, 36, years old, 2011-).

[146] See the references to this problem in Limbach (n 1) and Flauss (n 1).

[147] For exceptions see e.g. Committee on Legal Affairs and Human Rights, *Nomination of candidates and election of judges in the European Court of Human Rights*, 1 December 2008, Doc. 11767, Part B (Explanatory memorandum), para. 32.

[148] See e.g. Engel (n 1), Loucaides (n 1), Malenovský (n 1) 187 and Sevón (n 24) 3.

[149] The low age of the Ukrainian judge seemed to operate as a mere proxy. What was more controversial was the length and nature of professional experience she had acquired before she was elected a judge of the ECtHR; see also s 4.4. below in this chapter.

[150] See note 145 above.

[151] As a result, ad hoc judges had to be appointed for applications concerning Ukraine (which was among the top four countries against which the ECtHR issued judgments at that time) between 2007 and 2009.

[152] Ukraine withdrew the entire list of three candidates after one of the initial three had indicated she was no longer interested for personal reasons, and submitted an entirely new list. PACE disagreed with this solution and asked Ukraine to add only a new third candidate. This dispute eventually came before the ECtHR, which sided with PACE;

Thus, it is the considerable number of "30-something" judges on the Strasbourg bench that is staggering and the election of a Ukrainian judge was just the proverbial straw that broke the camel's back. These "30-something judges"[153] may currently present the biggest problem for the legitimacy of the ECtHR. Recent appointments of such young judges have been criticized by scholars as well as national judges, and they significantly reduced the legitimacy of the ECtHR in comparison to domestic courts.

Most national legal systems stipulate a lower age limit for judges of top ordinary courts as well as for justices of the Constitutional Court. For instance, justices of the Czech, German, Slovak, Slovenian and Turkish Constitutional Courts must be at least 40 years old. Other national systems require a minimum number of years of professional experience. For instance, the Czech Republic requires 10 years of such experience for appointment to the apex courts, and Montenegro requires 15 years.[154] Even those countries that do not lay down any formal requirement concerning the minimum age, such as the United Kingdom, set a de facto minimum age limit as judges under 40 years are never appointed to the High Court or above. Interestingly, the Article 255 Panel also made clear that it is no longer possible, as a general rule, to appoint someone in her mid-thirties to the CJEU or even to the Tribunal.[155] This view is shared by the Advisory Panel.[156]

These States as well as the European Union do not lay down minimum age and/or minimum professional experience criteria just for the sake of having them. They have reasons for introducing them. They want their apex court judges to possess sufficient experience and wisdom to deal with complex legal issues and their judgments to carry sufficient weight vis-à-vis other constitutional organs, such as the Parliament, the head of state, the Prime Minister, the Ministries, senior civil servants and so on. Judges at top courts simply must have sufficient gravitas. If this is perceived as crucial for domestic judges, it is at least equally important for Strasbourg judges. In other words, if the ECtHR wants its judgments to carry sufficient weight among key stakeholders in the signatory states, Strasbourg judges must have proper stature, experience and credentials,[157] which should translate into a minimum age requirement.

A recent PACE document reacted to this criticism and suggested that "States Parties (and the Assembly) ought perhaps to be more vigilant in the nomination of candidates and election of judges who may still be in their 30s or early 40s when more experienced candidates can be elected".[158] The Advisory Panel echoes this call and suggests that "the European Court of Human

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see ECtHR, *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 (No. 2)*, 22 January 2010.

[153] Specific historical situation in some countries (e.g. in Baltic States in the 1990s) might have justified the exceptional election of younger judges in the past. However, times have changed and these specific historical circumstances no longer exist.

[154] Sometimes, both a minimum age and a number of years in practice are required.

[155] Further see above, ch 3, s 2.

[156] See Excerpt from GT-GDR-E(2013)004, published as Appendix to Steering Committee for Human Rights, *CDDH report on the review of the functioning of the Advisory Panel of experts on candidates for election as judge to the European Court of Human Rights*, CDDH(2013)R 79 Addendum II, 29 November 2013.

[157] See also Resolution 1764 (2010), para. 2 (which emphasises the necessary "qualifications, experience and stature" of Strasbourg judges].

[158] Committee on Legal Affairs and Human Rights, *Need to reinforce the independence of the European Court of Human Rights*, AS/Jur (2013) 34, 12 November 2013, para. 25.

Rights, by its nature, status and pan-European role assumes that its members already have, on election, all the fully developed judicial qualities that come from long experience", as a result of which "[i]t would appear unlikely to find such qualities in a candidate of a relatively young age".[159]

This effort to raise the lower age limit of Strasbourg judges is laudable, but one should be careful not to "throw out the baby with the bathwater". First, if PACE increases the lower limit, either de iure or de facto, too much, it will just perpetuate the problems experienced in the 1990s and the early 2000s. As Malenovský has suggested, in several Central and Eastern European countries the old guard judges are disqualified, as either they do not speak English and French or for their cooperation with the previous regime, and thus these States tend to nominate younger judges.[160] The statistical data confirm this claim: out of eight judges under 40 elected between 1998 and 2013, five came from post-Soviet countries (three from the Baltic States, one from Ukraine and one from Georgia), two from Albania, and one from San Marino.[161]

In addition, if PACE prefers candidates in their late 50s or 60s, it may be forced to compromise other selection criteria, since lawyers who graduated from the reformed law schools in the mid-1990s are still in their forties, and there will again be a very small pool of good candidates. Second, age diversity on the Strasbourg Court is healthy as it invites a richer and more robust debate. Moreover, younger judges have some comparative advantages too, as they may have better knowledge of new technologies or EU law.[162] Finally, the fact that judges return from the ECtHR to their "home base" also has several positive effects, since "former [Strasbourg] judges are likely to enrich the legal profession's knowledge of Strasbourg case law with their uniquely acquired European experience".[163]

Therefore, it would suffice if a reasonable lower age limit were added to the Convention[164] or, at least, were de facto required by PACE, as suggested by the Advisory Panel.[165] A good starting point is to look at the minimum age limit for constitutional court justices, because constitutional courts are the closest equivalents to the ECtHR at the domestic level. The most common minimum age for constitutional justices is 40 years, which is suitable for Strasbourg judges too. The minimum age of 40 years would improve the stature of the ECtHR, but at the same it would keep the pool of candidates large enough. Contrary to what some commentators claim,[166] it would not unduly limit the choice of the post-communist states in the Central and Eastern Europe as they already have enough lawyers trained in the democratic regime and well versed in

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[159] Excerpt from GT-GDR-E(2013)004, published as Appendix to Steering Committee for Human Rights, *CDDH report on the review of the functioning of the Advisory Panel of experts on candidates for election as judge to the European Court of Human Rights*, CDDH(2013)R 79 Addendum II, 29 November 2013 (both citations).

[160] Malenovský (n 1) 187. See also ch 13, s 4.

[161] See note 145 above.

[162] This applies in particular to judges from new EU Member States, where EU law was not taught until the late 1990s.

[163] Committee on Legal Affairs and Human Rights, *Nomination of candidates and election of judges in the European Court of Human Rights*, 1 December 2008, Doc. 11767, Part B (Explanatory memorandum), para. 38.

[164] Art. 21(2) of ECHR, as amended by Protocol No. 15, could read as follows: "Candidates shall be *more than 40 years* and less than 65 years of age at the date by which the list of three candidates has been requested by the Parliamentary Assembly, further to Article 22."

[165] See Excerpt from GT-GDR-E(2013)004, published as Appendix to Steering Committee for Human Rights, *CDDH report on the review of the functioning of the Advisory Panel of experts on candidates for election as judge to the European Court of Human Rights*, CDDH(2013)R 79 Addendum II, 29 November 2013.

[166] See, most recently, Committee on Legal Affairs and Human Rights, *Reinforcement of the independence of the European Court of Human Rights*, 5 June 2014, Doc. 13524, Part C (Explanatory memorandum), para. 32.

foreign languages who are in their mid-forties. This also means that I disagree with the Committee on Legal Affairs and Human Rights which suggests that judges in their early 40s present a problem.[167] There are quite a few constitutional justices on the Continent that were appointed in their 40s and some of them assumed the highest offices.[168] The current President of the Federal Constitutional Court of Germany, Andreas Voßkuhle, is a prime example. He was elected a justice and the vice-president of the Federal Constitutional Court of Germany when he was 44 years old and became the President of the Federal Constitutional Court of Germany in the age of 46.

I prefer the minimum age requirement to the minimum professional experience requirement, because the new rule must be easy to police and because critics care primarily about the young age.[169] Viewed from this angle, age is objective and universally accepted. In contrast, a minimum professional experience limit requires diving into national laws and discovering what counts as "practice" in each Council of Europe Member State, because the criteria are not uniform. Moreover, even the requirement of 15 years of practice, as suggested by a former Strasbourg judge, Elisabeth Palm,[170] may not be enough. In some countries legal education takes only four years and if someone finishes law school at the age of 22 years, after 15 years of practice she will still be only 37 years old. Finally, length of practice itself is not a good indicator of judicial capacity, as one must also take into account the nature of the practice.[171]

In sum, getting judges' minimum and maximum age limits right presents a big challenge for the Advisory Panel, PACE and the signatory states. However, the key stakeholders must rise to this challenge. Setting the maximum age limit too low may dissuade good candidates, but if it is too high it may jeopardize the functioning and legitimacy of the ECtHR. Any rule on minimum age contains the same trade-off, but the need to entrench a proper minimum age requirement is even more critical, as "30-something judges" have had deleterious effects on the Court's legitimacy.

4.4. Knowledge of National Law

Like the age requirements, knowledge of domestic law has not attracted much attention as a criterion for Strasbourg office. However, its importance should not be underestimated. The study

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[167] See note 158 above.

[168] For other advantages of the age diversity on the ECtHR, see note 162 above.

[169] PACE documents and the majority of commentators seem to prefer the latter. See Committee on Legal Affairs and Human Rights, *Nomination of candidates and election of judges in the European Court of Human Rights*, 1 December 2008, Doc. 11767, Part B (Explanatory memorandum), para. 5; Drzemczewski, 'Election of judges to the Strasbourg Court: an overview' (n 1) 381-382; Malenovský (n 1)188. I also accept a de facto minimum professional experience requirement, but under the knowledge of domestic law criterion; see s 4.4 below in this chapter.

[170] See Committee on Legal Affairs and Human Rights, *Nomination of candidates and election of judges in the European Court of Human Rights*, 1 December 2008, Doc. 11767, Part B (Explanatory memorandum), para. 5. See also Drzemczewski, 'Election of judges to the Strasbourg Court: an overview' (n 1) 381-382; Malenovský (n 1) 188 (both quoting Palm's suggestion with approval).

[171] See Steering Committee for Human Rights, Ministers' Deputies exchange of views with Mr. Luzius Wildhaber, Chairman of the Advisory Panel of Experts on Candidates for Election as Judge to the European Court of Human Rights, DH-GDR (2013)005, 5 February 2013, 2 (exchange of views of 4 April 2012), para. 9; and Excerpt from GT-GDR-E(2013)004, published as Appendix to Steering Committee for Human Rights, *CDDH report on the review of the functioning of the Advisory Panel of experts on candidates for election as judge to the European Court of Human Rights*, CDDH(2013)R 79 Addendum II, 29 November 2013.

on the ECtHR's legitimacy conducted by Başak Çali et al.[172] showed that stakeholders ranked this criterion very highly.[173] They considered knowledge of domestic law and fact the third most important legitimacy standard in the "managerial" part of the performance dimension, lagging behind only the length of proceedings before the ECtHR and the qualification and experience of Strasbourg judges (see Table 1 in Section 1).

The importance of knowledge of domestic law was stressed also by the ECtHR. In its first advisory opinion the Grand Chamber rejected the argument that in order to fulfil the criterion concerning the sex of candidates, States can be forced to nominate non-nationals. It provided the following explanation:

> "this would be liable to produce a situation where the elected candidate did not have the same knowledge of the legal system, language or indeed cultural and other traditions of the country concerned as a candidate from that country. Indeed, the main reason why one of the judges hearing a case must be the "national judge", a rule that dates back to the beginnings of the Convention and is today enshrined in Article 27 § 2, is precisely to ensure that the judges hearing the case are fully acquainted with the relevant domestic law of the respondent State and the context in which it is set".[174] .

This requirement was further reiterated by the Committee of Ministers which stressed that "[c]andidates need to have knowledge of the national legal system(s)"[175] and suggested that "a high level of knowledge … [of the national legal system] should be taken as an implicit requirement for candidates for judge at the Court and relative levels of knowledge could be taken into account when choosing between applicants of otherwise equal merits".[176]

Sufficient exposure to the national legal system is a critical requirement for Strasbourg judges also for another reason. The ECtHR judge is often the only senior lawyer from his country in Strasbourg who can explain to her colleagues how the respective law applicable in a given case works at the national level with all the nuances such as whether and how it was modified by case law, how it fits into the legal system as a whole, what the specifics of a given legal culture are, what the view of doctrine is about this law, what the vexing human rights issues are in a given country and what are not, and so forth.[177] This problem is exacerbated by the fact that many lawyers at the Court's Registry are junior lawyers[178] who joined the ECtHR soon after their graduation and/or have little experience of practising law in their home countries. But even if

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[172] See s 2 above.
[173] See also Lucius Caflisch 'Independence and Impartiality of Judges: The European Court of Human Rights' (2003) 2 The Law and Practice of International Courts and Tribunals 169, 173; and Malenovský (n 1) 110.
[174] ECtHR, *Advisory opinion on certain legal questions concerning the lists of candidates submitted with a view to the election of judges to the European Court of Human Rights*, 12 February 2008, § 52. See also Brighton Declaration, para. 22 *in fine*.
[175] Guidelines of the Committee of Ministers (n 3), para. II.4
[176] Explanatory Memorandum to the Guidelines of the Committee of Ministers on the selection of candidates for the post of judge at the European Court of Human Rights, CM(2012)40 addendum final, 29 March 2012, para. 27.
[177] See, *mutatis mutandis*, ECtHR, *Advisory opinion on certain legal questions concerning the lists of candidates submitted with a view to the election of judges to the European Court of Human Rights*, 12 February 2008, § 52.
[178] Note that this does not apply to all sections.

there are senior lawyers from a given country in Strasbourg, they do not take part in deliberation and cannot communicate the nuances of national law as effectively as judges themselves.[179]

In other words, a Strasbourg judge must be fully acquainted with the relevant domestic law. This means that "globetrotters" who spent their entire careers outside the country of their nationality, including in the Council of Europe organs, and have never practised, lectured or served as judges, or did so only for a marginal period of time, in the national jurisdiction they come from are not good candidates for the position of judge in the ECtHR.

If PACE decides otherwise, it invites easy criticism. The recent elections of Ukrainian and British judges are typical examples.[180] Ganna Yudkivska became a Strasbourg judge in 2009, even though she was called to the Ukrainian Bar only in 2003 and after a mere two years started to work as a lawyer at the Court's Registry.[181] This is in fact a far more problematic aspect of her election than her relatively young age. The election of Paul Mahoney in 2012 is even more problematic in this respect. After a short period of legal practice in London in the 1970s Mahoney worked for 31 years in various posts at the ECtHR and then served as Judge and President of the European Union Civil Service Tribunal in Luxembourg between 2005 and 2011. In other words, he did not practise in the United Kingdom for four decades in a row. Even though one should certainly approach the Daily Mail with caution, it is not surprising that it calls Mahoney a "Eurocrat" and "celebrates" his election with the following headline "Meet our new Euro human rights judge... who's not even a real judge: Top Strasbourg job for man who's never sat in a British court".[182]

The headline is, typically for the Daily Mail, misleading. I do not want to convey the message that Strasbourg judges should recruit only from national judges. However, Strasbourg judges should recruit from lawyers who have substantial experience with the national legal order, culture and traditions, irrespective of whether or not this experience is of a judicial nature. Even though I strongly disagree with the content and style of the Daily mail reporting about the ECtHR, this article also shows how easy it is to delegitimize the choice of the PACE by claiming that the elected judge is "not one of us",[183] which implicitly suggests that he might not share "our values". In other words, sufficient professional experience of a Strasbourg judge in *her* country of nationality is important not only for "functional" reasons (expertise in national law and ability to explain the national law and legal culture to other Strasbourg judges), but also for "legitimacy" reasons (the people and the legal community of judge's home country[184] must treat "their" judge

[179] Moreover, some senior lawyers at the Registry did not practise law in their home countries at all.
[180] These two elections are problematic also for another reason. They create the sense that ECtHR's "insiders" have an extra advantage in the PACE stage of the election process.
[181] On the latter, see s 4.3. above in this chapter.
[182] James Slack, 'Meet our new Euro human rights judge... who's not even a real judge: Top Strasbourg job for man who's never sat in a British court', *Daily Mail* (27 June 2012), online at <http://www.dailymail.co.uk>, last accessed 15 April 2014.
[183] This may happen also on the national level. A recent appointment of Justice Marc Nadon to fill the Quebec seat at the Supreme Court of Canada is a prime example. When Prime Minister Stephen Harper announced that he intends to fill the *Quebec* spot with a *federal* judge was perceived by the province's legal community as "a blow in [their] faces, a disavowal of the Quebec bench". For further details, see Sean Fine, *The secret short list that provoked the rift between Chief Justice and PMO*, The Globe and Mail, 23 May 2014. Note that Justice Nadon was eventually found ineligible to fill the Quebec Supreme Court spot by the Supreme Court of Canada in *Reference re Supreme Court Act, ss. 5 and 6*, 2014 SCC 21.
[184] I leave aside here that some small states occasionally nominate a judge of other nationality.

as "one of them"). Otherwise, there is a danger that a Strasbourg judge can be easily labelled as a part of a "transnational power elite".[185]

On the other hand, the requirement of knowledge of national law should not be applied too strictly. For instance, if someone is *at the moment* of the election holding a position outside the State of her nationality, she should not be excluded, provided that she was sufficiently exposed to national law prior to her appointment abroad. By "exposure" to national law I mean clerkship, attorney's practice, lecturing, serving as a national judge or being a member of another legal profession. "Sufficient" exposure is more difficult to define, but I believe that any candidate, at the moment of her election, should have been exposed to the national legal system for at least 10 years throughout her career, but not necessarily in the period immediately before her election. This period should be enough to ensure that a Strasbourg judge has the necessary gravitas not only on the transnational plain, but also within the domestic legal and political milieus.[186]

4.5. Expertise in General International Law

Under this heading I would like to raise one issue, which is often overlooked. Despite some efforts to prevent it,[187] expertise in general international law, in contrast to human rights specialization, on the Strasbourg Court has been declining for a while. If we leave aside a huge group of judges elected in 1998 immediately after the entry into force of Protocol No. 11, the only expert in general international law elected to the ECtHR between 1999 and 2011 was Ineta Ziemele.[188] The situation improved after 2011, because several generalists, such as Helen Keller (2011-), Linos-Alexander Sicilianos (2011-), Erik Møse (2011-) and Iulia Motoc (2013-), joined the ECtHR, but if it had not been for these recent additions to the Strasbourg bench, the expertise in general international law among its judges could have withered away completely.

There may be several reasons behind this decline, including the changing perception of the role of the ECtHR and its constitutionalization. But, irrespective of one's position in the 'ECtHR-as-a-constitutional-court' debate,[189] the ECtHR is still an *international* human rights court and must

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[185] See ch 13, s 2.

[186] See ch 13, s 4.

[187] See in particular Guidelines of the Committee of Ministers (n 3), para. II.4, and Explanatory Memorandum to the Guidelines of the Committee of Ministers (n 176), para. 27, discussed below.

[188] Of course, the definition of a "generalist international law expert" is somewhat subjective. Some commentators might also include Davíd Thór Björgvinsson (2004-2013), Mark Villiger (2008-), Işıl Karakaş (2008-), and Ledi Bianku (2008-), all of whom taught international law, but I believe that their primary specialization were human rights, general legal theory and/or EU law.

[189] For supporters of the constitutionalization of the ECtHR see Luzius Wildhaber, 'A Constitutional Future for the European Court of Human Rights?' (2002) 23 HRLJ 161, 161; Alec Stone Sweet, 'Sur la constitutionnalisation de la Convention Européenne des Droits de l'Homme: Cinquante ans après son installation, la Cour Européene des Droits de l'Homme conçue comme une cour constitutionelle' (2009) 80 *Revue trimestrielle des droits de l'homme* 923; or Steven Greer, 'What's wrong with the European Convention on Human Rights?' (2008) 30 Hum.Rts.Q. 701. For a more sceptical view, see Nico Krisch, 'The Open Architecture of European Human Rights Law' (2008) 71 MLR 183, 184; or David Kosař, 'Policing Separation of Powers: A New Role for the European Court of Human Rights?' (2012) 8 EuConst 33, 60-62.

tackle many vexing issues of general international law such international responsibility of States,[190] implementation of the United Nations Security Council resolutions,[191] prosecution of war crimes,[192] the law of armed conflict,[193] and the law of the sea.[194] In addition, it needs to maintain expertise beyond the narrow confines of human rights law to maintain a dialogue with and be taken seriously by other international courts, such as the International Court of Justice, the International Criminal Court or the International Tribunal for the Law of the Sea.

The recent tendency to prefer human rights specialists and scholars is not per se bad, but it should not go too far. There should be a plurality of backgrounds among judges so that both human rights and general international law expertise is guaranteed. This does not mean that the pendulum should be swung back to the 1980s, when the majority of Strasbourg judges had a background in international law. However, a "critical mass" of judges who are well versed in general international law must be ensured at all times. The ECtHR has always been and will be an international court and thus it should be staffed accordingly.

Therefore, it is laudable that the 2012 Guidelines of the Committee of Ministers on the selection of candidates for the post of judge at the European Court of Human Rights explicitly stress that "[c]andidates need to have knowledge of the national legal system(s) and of public international law"[195] with the following justification: "[a]s the [Strasbourg] judges sit on an *international* court playing a subsidiary role in supervising national implementation of the Convention, it is important for them to have knowledge of *both public international law* and the national legal system(s)."[196] As a result, "a high level of knowledge … [of public international law] should be taken as an implicit requirement for candidates for judge at the Court and relative levels of knowledge could be taken into account when choosing between applicants of otherwise equal merits".[197]

Finally, one caveat must be added here. If the European Union indeed accedes to the Convention, which seems very likely now, there may be pressure to increase the number of judges with sufficient expertise in EU law in future. However, there is a danger in the

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[190] See, most recently, ECtHR, *Al-Skeini and Others v. the United Kingdom* [GC], 7 July 2011, no. 55721/07; ECtHR, *Al-Jedda v. the United Kingdom* [GC], 7 July 2011, no. 27021/08; or ECtHR, *Ivanţoc and Others v. Moldova and Russia*, 15 November 2011, no. 23687/05.

[191] See e.g. ECtHR, *Bosphorus Airways v. Ireland* [GC], 30 June 2005, no. 45036/98; or ECtHR, *Behrami and Behrami v. France* (dec.) [GC], 2 May 2007, no. 71412/08.

[192] See e.g. ECtHR, *Kononov v. Latvia* [GC], 17 May 2010, no. 36376/04; ECtHR, *Maktouf and Damjanović v. Bosnia and Herzegovina* **[GC]**, 18 July 2013, nos. 2312/08 and 34179/08; or ECtHR, *Marguš v. Croatia* [GC], 27 May 2014, no. 45036/98.

[193] See e.g. *Varnava and Others v. Turkey* [GC], 18 September 2009, nos. 16064/90 and other (concerning the Turkey-Cypriot issue); *Sarusyan v. Azerbaijan* (dec.) [GC], 14 December 2011, no. 40167/06 (concerning the Armenian-Azerbaijani conflict over Nagorno-Karabakh); or the cases in the previous three footnotes.

[194] See e.g. ECtHR, *Medvedyev and Others v. France* [GC], 23 March 2010, no. 3394/03; or ECtHR, *Hirsi Jamaa and Others v. Italy* [GC], 23 February 2012, no. 27765/09.

[195] Guidelines of the Committee of Ministers (n 3), para. II.4

[196] Explanatory Memorandum to the Guidelines of the Committee of Ministers (n 176), para. 27 (both emphases added).

[197] Id. (both emphases added).

overrepresentation of EU law experts on the Strasbourg bench, because it might lead to reading EU law into the Convention at the expense of the States that are *not* members of the EU.[198]

5. The Ugly

The previous part addressed systemic problems. This part provides several examples of the controversial techniques[199] employed in recent elections of Strasbourg judges. These examples are not so much about general criteria, but rather about the ways of rigging or bypassing these criteria. Some of the might have resulted from sloppiness, but most were driven by politics. This part builds heavily on Norbert Engel's account, but it adds few more examples of the use of questionable tricks. Finally, it provides a more detailed account of the 2012 election of the Czech judge that provoked the greatest shock-waves behind the scenes.

To start with problematic cases which were eventually contained, they concern Spain, Bulgaria, France and Slovakia.[200] The Spanish case reminds us that there must be someone who checks the accuracy of information on nominees' CVs. According to Engel, the Spanish Government submitted the curriculum vitae of a candidate who had wrongly claimed to have held high office.[201] This deception was revealed at the national level by a leading newspaper and PACE eventually rejected the nominee. The Bulgarian case serves as an example of blatant nepotism as a Minister of Justice put his wife's name on the list of nominees. This time, it was noticed only at the Strasbourg stage by a non-Bulgarian member of PACE. As a result, PACE eventually rejected the nominee.

The French case is more complex and involves sophisticated politicking on the national level. In a nutshell, the French Government pushed its protégé, a law professor and an MP who was not shortlisted by the national selection panel, in order to vacate the seat held by him in the French Parliament.[202] This is not as such condemnable.[203] Moreover, the French Government transparently acknowledged that it put on the list a complementary candidate who had not been shortlisted by an expert panel. The problem was that the French Government favoured a candidate who had so little knowledge of the second official language (English)[204] that he was

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198 This is already, to some extent, happening. See e.g. ECtHR, *Schalk and Kopf v. Austria*, 24 June 2010, no. 30141/04, §§ 60-61.

199 It is important to stress that I do not consider the exercise of political influence or politicking problematic as long as political manoeuvres do not aim at pushing through an ineligible candidate and do not deceit the members of PACE. Like Koen Lemmens, I believe that a complete "depoliticization" of the election process is neither healthy nor possible; see above ch 5, s 3.4.

200 The first three examples are covered by Engel (see Engel (n 1) 450-451), the last one has not, to my mind, been discussed by scholars. I do not include the Moldovan case discussed by Engel as it concerns the re-election of Strasbourg judges, which is no longer relevant.

201 Engel (n 1) 450.

202 Franck Johannès, 'Petite manœuvre de l'Elysée pour placer un ami' *Le Monde* (14 March 2011) <http://libertes.blog.lemonde.fr/2011/03/14/petite-manoeuvre-de-lelysee-pour-placer-un-ami/> accessed 15 April 2014.

203 See note 197 above.

204 Note that "for judges whose native tongue is one of the official languages, the level of proficiency required for the other may well be pitched higher than for judges for whom both official languages are foreign (Committee on Legal Affairs and Human Rights, *Nomination of candidates and election of judges in the European Court of Human Rights*, 1 December 2008, Doc. 11767, Part B (Explanatory memorandum), para. 24 in fine).

rejected by both the Advisory Panel and the Sub-Committee on the Election of Judges to the European Court of Human Rights.[205]

The election of the Slovak judge in 2004 reveals an even more sophisticated plan. It is a perfect example of a risk described by the late Flauss that the States might not put together a list with equivalent candidates and, instead, intentionally submit a list in which one candidate stands out and the other two are supposed to play the role of mere "figurants".[206] That is exactly what happened in Slovakia. Prior to the 2004 vote in PACE, everything was cleared at the national level to pave the way for the election of the former Justice of the Slovak Constitutional Court to the ECtHR. There was a "careful" selection of two weak opponents at the national level, with no experience at the top courts, so that a Justice of the Slovak Constitutional Court clearly stood out among them.[207] Nevertheless, the rumour about the rigged selection process at the national level reached PACE, which eventually elected someone else.

In the previous cases, "fire alarms" worked. PACE eventually either rejected the list containing a problematic nominee or elected someone else. In contrast, the election of a Czech judge in 2012 was fatal. To sum up, PACE chose a candidate who knowledge of both English and French was questionable at the time of the elections, whose writings on the law of the Convention were considered marginal even in the Czech Republic,[208] whose expertise in general international law was minimal, who had been twice rejected as a candidate for the position of a Justice of the Czech Constitutional Court, and who had very close ties to the former President of the Czech Republic.[209]

So why did the election of the Czech judge in 2012 go wrong? There is no easy straightforward answer to this question. The following paragraphs will show that, for one thing, the (s)election process of a Czech judge was far more complex than generally acknowledged.[210]

First of all, it must be stressed that the selection process started at the national level as early as in 2009, because Protocol No. 14 had not yet been ratified by Russia, and the term of Karel Jungwiert, a Czech judge of the ECtHR since 1993, was supposed to expire in October 2010. In fact, the Government of the Czech Republic adopted Rules on the Selection of Candidates for

[205] Engel (n 1) 451. Further see ch 5, s 4.2.
[206] Flauss (n 1); see also Malenovský (n 1) 120; and John Hedigan, 'The Election of Judges to the European Court of Human Rights' in Marcelo Kohen (ed.), *Promoting Justice, Human Rights and Conflict Resolution Through International Law. Liber amicorum Lucius Caflisch* (Leyden, Brill, 2007) 238.
[207] Unfortunately, similar problems plagued the national selection of three Slovak nominees in 2013 and 2014 (note that the first as well as the second Slovak list was rejected by PACE). However, I refrain from commenting on this process since at the moment of submitting this chapter it is not yet finished.
[208] If one looks at the case law of all three Czech apex courts, which is available online, as of 31 March 2014 Pejchal's publications are cited once by the Constitutional Court in a decision dismissed at the admissibility stage, twice by the Supreme Court, and not at all by the Supreme Administrative Court. Moreover, all three citations refer to the co-authored commentary on the Czech Act on the Advocacy.
[209] I would doubt whether all members of PACE had this information on the day of the election of a Czech judge.
[210] Note that I co-authored a casebook on Czech constitutional law and two policy papers on the state of the Czech judiciary with one of the unsuccessful Czech candidates in 2012, Zdeněk Kühn (full disclosure). However, I personally believe that even under somewhat more relaxed PACE criteria applicable in 2012 this entire list should have been rejected.

the Position of a Judge of the European Court of Human Rights (hereinafter only "Czech Selection Rules") as early as in August 2009.[211]

The Czech Selection Rules defined the criteria in abstract terms taking the view that individual invitations calls would specify them. They looked perfect on paper. Article 1 clearly defined the timeframe – the invitation to submit names must be made at least 14 months prior to the expiry of the term of the sitting Strasbourg judge on behalf of the Czech Republic and candidates must have at least 2 month for lodging their applications. Article 2 defined substantive criteria, both compulsory and "bonus" ones,[212] which closely followed PACE's recommendations. Article 3 required the Minister of Justice to ensure "the broadest possible publicity" of the invitation by uploading it on his website as well as distributing the invitation to courts, prosecutors' offices, professional organizations and law schools. Article 4 defined the composition of the selection panel: the Minister of Justice (chairman), the Czech Agent before the ECtHR, one member nominated by the Minister of Foreign Affairs, two members nominated by the Minister of Justice from jurisconsults of recognized competence, the Chief Justice of the Constitutional Court; the Chief Justice of the Supreme Court; the Chief Justice of the Supreme Administrative Court; and the Ombudsman. Article 5 then set detailed criteria on how the selection panel should proceed. It stipulated, among other things, compulsory interviews with candidates and careful consideration of gender issues.

The first invitation was issued on 1 September 2009. At that time, 13 candidates applied, including the Chief Justice of the Supreme Court, another judge of the Supreme Court (who was elected a judge of the International Criminal Court in 2011), and the Czech Agent before the ECtHR (currently the Chairman of the Steering Committee for Human Rights). The national selection panel eventually shortlisted the following three candidates: Iva Brožová (Chief Justice of the Supreme Court), Robert Fremr (at that time a judge of the Supreme Court, now a judge of the ICC), and Mahulena Hofmannová (at that time a Law Professor at the University of Giessen).

However, Russia ratified Protocol No. 14 in February 2010, as a result of which the mandate of the then sitting Czech judge, Karel Jungwiert, was extended from the autumn of 2010 to the autumn of 2012.[213] This timing of the entry into force of Protocol No. 14 did not work well for the Czech selection process. The two-year postponement made a huge difference. What changed during those two years? The Chief Justice of the Czech Supreme Court was no longer interested due to her age. Robert Fremr, another shortlisted candidate in 2009, chose a different career path and ran for the position of a judge of the ICC in 2011 and was eventually successful. He was elected to the ICC on 13 December 2011.

Therefore, when the second invitation was issued on 8 August 2011, only one shortlisted candidate from the 2009 call, Mahulena Hofmannová, applied. The other factor that came into play in 2011 was the fact that between 2012 and 2015 a complete reshuffle of the Czech

[211] Decision of the Government of the Czech Republic No. 1063 adopted on 26 August 2009.
[212] The "bonus" criteria included perfect knowledge of both official languages, age that would allow a candidate to serve a full term on the ECtHR, and no necessity to appoint ad hoc judges for complaints against the Czech Republic; see Art. 2(2) of the Czech Selection Rules.
[213] For a similar scenario, with somewhat different consequences, see above ch 5, s. 4.1.

Constitutional Court was due,[214] and many potential candidates preferred the post at the Constitutional Court to the Strasbourg one. All in all, the abovementioned personal circumstances and the institutional factors led to a very low number of applications in 2011. Out of 6 applicants, there was no Justice of the Constitutional Court, no judge of the Supreme Court, only one judge of the Supreme Administrative Court, and two law professors (Mahulena Hofmannová and Pavel Šturma).[215] Things got worse as two applicants withdrew before the interview stage, including Professor Šturma who was elected to the U.N. International Law Commission in November 2011.

The selection panel shortlisted Mahulena Hofmannová, at that time a law professor at the University of Luxembourg, and Zdeněk Kühn, a judge of the Supreme Administrative Court. Actually, it was not "shortlisting" in the true sense, because the panel found the other two candidates ineligible. As a result, the third position remained vacant. Interestingly, Aleš Pejchal, did not answer the August invitation. Later, he explained in an interview with the Czech law journal Právní rádce that his view was that "answering the open call is for recent law school graduates" and that he preferred "a prior practice, when respectable institutions … nominated their candidates".[216]

The separate invitation for the third vacant position on the list was eventually issued on 15 December 2011. This time two candidates applied: Aleš Pejchal, a member of the Czech Bar and a personal advisor to the President of the Czech Republic; and Jana Reschová, Assistant Professor at the Faculty of Law at the Charles University. Out of the two candidates who replied to the December call, the selection panel eventually shortlisted Aleš Pejchal. Subsequently, the Czech Government submitted the complete list to the Advisory Panel and PACE.

What happened next at the Strasbourg level is difficult to piece together as the relevant documents are confidential. According to Engel, the Advisory Panel concluded that "in view of [Mr. Pejchal's …] professional career to date and the list of his publications on the area of law relating to the Convention, [he …] did not have the necessary qualification for the office of judges in Strasbourg",[217] while the Czech sources suggest that the Panel simply was not satisfied that Mr. Pejchal qualified as a jurisconsult of recognized competence.[218] Luzius Wildhaber, the chair of the Advisory Panel, indirectly confirms the latter version, even though he does not mention Mr. Pejchal explicitly.[219] Engel also claims that PACE's Sub-Committee on the Election of Judges to the European Court of Human Rights, after interviewing all three Czech nominees, had likewise voted not to recommend Mr. Pejchal to the plenary for election.[220] I can neither

[214] Due the flawed design of the Czech Constitution, which does not stipulate a staggered system of appointing Justices of the Czech Constitutional Court, virtually the entire Constitutional Court is staffed de novo every 10 years.
[215] The other four candidates included one judges of the regional court, one advocate in his early forties, and one advocate in his mid-thirties.
[216] *Vyšlo to moc hezky*, Právní rádce, 23 August 2012, p. 42.
[217] Engel (n 1) 450.
[218] Note that Mr. Pejchal had never served as a judge before he was put forward as a candidate for the ECtHR and thus he had not had sufficient judicial experience either.
[219] Steering Committee for Human Rights, Ministers' Deputies' exchange of views with Mr. Luzius Wildhaber, Chairman of the Advisory Panel of Experts on Candidates for Election as Judge to the European Court of Human Rights, DH-GDR (2013)005, 5 February 2013, 2 (exchange of views of 30 January 2013).
[220] Engel (n 1) 450.

support nor refute this assertion conclusively, but Engel's claim is not consistent with the subsequent practice of the Sub-Committee once it declassified its advice.[221]

In the meantime, the Czech Government intensified its lobbying in PACE. According to Engel, the Czech Ministry of Justice sent a letter to PACE members, in which he underlined his support for the election of Mr. Pejchal, even though the latter was considered unsuitable.[222] Engel's account is to some extent misleading. The Czech Minister of Justice did not support Mr. Pejchal as a person, but rather lobbied in order to prevent the rejection of the entire Czech list[223] and to save the reputation of the Czech Republic. Here it is important to recall that all other participants in the national selection process were found *ineligible*. The Czech Government was simply desperate, because it had no candidate on the reserve list and, given an extremely low number of responses to the previous two invitations to apply, the prospects of another round were dim either. It was Mr. Pejchal, his wife[224] and his supporters,[225] and not the Czech Government, who successfully lobbied the Czech delegation in PACE, which in turn lobbied for Mr. Pejchal in other delegations.

Due to these efforts, the Czech list was eventually not rejected. On the very day of the first round of elections, one more attempt to reconsider Mr. Pejchal's eligibility was made: Lord Tomlinson wanted to comment on his qualifications in an open Assembly, but he was silenced on the ground of confidentiality.[226] As a result, the election of the Czech judge could proceed. The first round of elections ended inconclusively. In the second round, Mr. Pejchal was eventually elected by a qualified majority,[227] despite the negative assessment by the Advisory Panel and PACE's Sub-Committee.

In order to get the full picture, it is important to add Mr. Pejchal's own account of the election process at the Strasbourg level, published in a Czech law journal shortly after his election: "We must acknowledge that *selection* ended on the Czech level, on the European level it was *election*. … It was on each candidate to persuade the Parliamentary Assembly that he or she is the most suitable candidate. … It was not about comparing knowledge [of the nominees]. The important thing was to impress MPs and persuade them, either directly on the Sub-Committee … or by one's CV or by greater support of NGOs".[228] He thus indirectly confirms his active lobbying in

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[221] The practice of the Sub-Committee once it declassified its advice is to recommend the most qualified candidate(s) and not to discuss eligibility of the candidates on the list; see e.g. Conclusions of the Sub-Committee on the lists of candidates submitted by Iceland, Lithuania and the Slovak Republic, Contracting States to the European Convention on Human Rights Progress report, Doc. 13233 Addendum II, 17 June 2013. The Czech sources likewise suggest that the Sub-Committee merely chose and recommended the most qualified candidate and did not discuss Mr. Pejchal's eligibility.

[222] Ibid. 450.

[223] According to Czech insiders, the Advisory Panel had some doubts not only about Mr. Pejchal for the reasons mentioned above, but also about Mr. Kühn because of his youth and relatively short judicial experience and about Mrs. Hofmannová because of her limited exposure to the Czech law (as she had spent most of her career before her candidacy abroad).

[224] On the "assignment" of Mr. Pejchal's wife to PACE see below.

[225] According to Czech sources, the Czech Bar Association and the Archbishop of Prague, among other actors, wrote letters of support for Mr. Pejchal to PACE.

[226] Lord Tomlinson wanted to quote from the Sub-Committee's recommendation, which is confidential. See 2012 Ordinary Session (Third part), Report, Twenty-first Sitting, Tuesday 26 June 2012 at 10 a.m., Document AS (2012) CR 21, available at <http://assembly.coe.int>.

[227] The final election result of 27 June 2012 was as follows: Pejchal 90, Kühn 40, and Hofmannová 24 votes.

[228] *Vyšlo to moc hezky*, Právní rádce, 23 August 2012, p. 42 (emphasis added).

PACE. It sounds like crude politics. However, that is how it works in other cases too,[229] and it is not per se reprehensible.[230]

What Pejchal does not mention, though, is that he had an unfair advantage in access to PACE's members in comparison to the other two candidates. It is a public secret in the Czech Republic that Pejchal's wife, who was at that time working for the lower chamber of the Czech parliament, was in dubious circumstances "assigned" to the Council of Europe before the election of a new judge on behalf of the Czech Republic.[231] What exactly Pejchal's wife did in Strasbourg is difficult to tell, but appearances matter. All insiders in Strasbourg circles and in the Czech Republic, as well as the other two candidates, interpreted her "assignment" as a way of lobbying in PACE for her husband. It is also obvious that the other two candidates could hardly match that.

The 2012 election raised many eyebrows in the Czech Republic. In fact, PACE managed something that no one else has achieved so far – to unite Czech lawyers irrespective of their political affiliation and judicial philosophy. NGOs, advocates and judges in unison shook their heads at PACE's choice. Not only did the ECtHR's, but also PACE's and the Council of Europe's credibility suffer. The already little trust of Czech elites in European institutions was further reduced. As mentioned above, Pejchal had twice been rejected as a nominee for the Czech Constitutional Court.[232] Many people in the Czech Republic thus wonder how someone like him could have been elected to the ECtHR. Czech commentators also pointed to double standards. On the one hand, PACE requires maximum transparency in the national selection process, but then it keeps most of its own documents confidential. Similarly, PACE requires the national Governments to justify any departure from the trio of candidates shortlisted by the national selection panel, but it finds it normal to ignore the advice of the Advisory Panel as well as of its own Sub-Committee. From a pragmatic point of view, it may prove difficult to attract top candidates from the Czech Republic in the next election round. They will think twice before they apply, because the process at the Strasbourg level is unpredictable and PACE is not following even its own criteria.

Finally, it is useful to make a short detour and look at the selection of a Czech judge to the EU's Tribunal which took place a year later. The Czech Government of the day wanted to place its protégé to the EU's Tribunal in 2012. This time it completely ignored the advice of the national selection panel, which recommended renewing the term of the then sitting judge at the Tribunal, Irena Pelikánová, and instead nominated one of its Ministers, Petr Mlsna, who was 34 years old,[233] had never held judicial office, and had spent his entire career as a civil servant at the Office of the Czech Government. Nevertheless, the Article 255 Panel rejected Mlsna and, after several

[229] Actually, most accepted as well as rejected candidates whom I interviewed attest to it. See also Erik Voeten, 'The Politics of International Judicial Appointments: Evidence from the European Court of Human Rights' (2007) 61 Int'l Org. 669; or, more broadly, Erik Voeten, 'The Politics of International Judicial Appointments' (2009) 9 Chicago J. of Int'l L. 387.

[230] See note 197 above.

[231] The circumstances were dubious, because the Czech Republic has a permanent representative to the Council of Europe and the Czech Parliament had never made such "assignment" before or after this case.

[232] See also Engel (n 1) 450, note 4.

[233] Mr. Mlsna famously compared himself to Koen Lenaerts, who became a judge of the Court of First Instance of the European Communities (the predecessor of the Tribunal) at the age of 35.

months, Irena Pelikánová was reappointed. This example thus shows that the 255 Panel worked properly,[234] whereas PACE failed.

The Czech case teaches us several lessons. First, it reminds us that virtually nothing is known publicly about the internal mechanics of the election process within PACE.[235] To my knowledge, no comprehensive study has been conducted on the selection of Strasbourg judges – comparable to the analysis of the selection of judges of the International Court of Justice and the International Criminal Court by Ruth Mackenzie, Kate Malleson, Penny Martin and Philippe Sands. We do not know the lobbying strategies of Governments and other actors, how voting coalitions are built, whether package deals are struck, or how often members of PACE are told to vote for a particular candidate. While it is clear that lobbying and political deals cannot be eliminated, it is necessary to adopt basic rules on lobbying in PACE, including the disclosure of the family ties of candidates. Second, the confidentiality of the Advisory Panel's assessment and Sub-Committee's position is problematic as it benefits ineligible and weak candidates. No matter how well PACE defines the criteria for Strasbourg office, if it does not effectively police their fulfilment it is useless. Moreover, the functioning of the 255 Panel shows that public rejection of a Tribunal/CJEU candidate does not discourage good candidates from applying. On the contrary, it stops ineligible or weak candidates from being put forward.

6. How to Attract Top Candidates?

The previous sections have addressed improvements in the selection of Strasbourg judges (the good), explained the problems concerning selected substantive criteria (the bad) and pointed to the worst examples of rigging the selection process. Not unlike in PACE's documents, several improvements were suggested and few amendments were recommended. However, one should not forget the ultimate aim of these efforts. As Mackenzie and others concluded regarding the selection of judges for international courts in general,

> "[a]ny proposal for reform in relation to judicial appointments should start with the caveat that the role of the procedures and practices in determining the nature and quality of the courts should not be overstated. An entity is only as good as the individuals that are nominated and elected. We can have the best procedure and criteria, but that doesn't guarantee you a great court."[236]

In other words, all efforts to improve the selection procedure of Strasbourg judges should aim at electing judges of the highest calibre[237] and everything thus boils down to a simple question: how can one attract top candidates?

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[234] However, it is important to acknowledge that the Czech Government that initially nominated Mlsna was replaced in the meantime.

[235] For brief remarks on this subject see Engel (n 1) 453. However, this lack of information on the election mechanics is not specific to the ECtHR; see Mackenzie (n 1) 100.

[236] Mackenzie (n 1) 177.

[237] See Committee on Legal Affairs and Human Rights, *Nomination of candidates and election of judges in the European Court of Human Rights*, 1 December 2008, Doc. 11767, Part A, para. 1; Resolution 1764 (2010), para. 1; and Brighton Declaration, para. 22.

Put more bluntly, if Çali and her colleagues are right,[238] then people in the United Kingdom compare Strasbourg judges with judges of the Supreme Court of the United Kingdom, Germans compare them with Justices of the *Bundesverfassungsgericht*, Frenchmen with judges of the *Conseil d'État*, Poles with judges of the *Trybunał Konstytucyjny* and so forth. If they think that judges of their top domestic courts perform better, then the social legitimacy of the Strasbourg Court is in danger. The key question thus can be rephrased as: how can one lure judges of *these* courts and candidates from other legal professions with the same gravitas to Strasbourg?

Finding an answer to this question requires a holistic, proactive and knowledge-based approach. First, the Council of Europe shall address the recruitment of Strasbourg judges in a holistic way. Hitherto, most documents drafted by PACE or the Committee of Ministers have been good at the detail, but one could not see the wood for the trees. Even some amendments to the Convention have suffered from the same malaise. The back and forth changes in the upper age limit for judges serve as a prime example.[239] New rules on the upper age limit in Protocols Nos. 11, 14 and 15 were just quick fixes done in a piecemeal fashion, with no vision regarding the big picture. There simply has not been any serious debate about how the new rule affects the selection of Strasbourg judges as a whole.

Instead of discussing how to attract top candidates, States and PACE blame each other for being responsible for electing less-than-stellar judges. To be sure, PACE is right that "it is the principal responsibility of *states* to submit … lists of top quality candidates".[240] In other words, "[i]f good candidates are not put forward, or do not come forward, the election procedure cannot lead to good results".[241] However, PACE must also understand that its actual choices have an impact on who may apply in the future. If it eventually does not elect the very best candidate from the list or, even worse, elects the worst candidate, top candidates may not apply in future at all. At the same time, less-than-stellar candidates will get the message that they indeed have a chance. In other words, top candidates will not apply as PACE is unpredictable and unprincipled, whereas less-than-stellar candidates will apply precisely because PACE is unpredictable and unprincipled.

However inconvenient it is, PACE should also acknowledge that there is a "high demand and low supply" of well-qualified candidates for the position of an international judge.[242] In particular, smaller EU Member States have to find stellar nominees for the Luxembourg Courts, namely for the CJEU, the Tribunal and the position of Advocate General; may want to nominate candidates for international courts such as the ICC or the ICJ; and, of course, want to keep some of their best legal minds for their apex courts.[243] Other competent candidates are not willing to apply to the ECtHR for personal or family reasons, and yet another group of candidates has recently been appointed to another position and does not want to be perceived as ungrateful or as "ruthless

[238] See s 2 above in this chapter
[239] Further above, s 4.3. of this chapter.
[240] Introductory statement made by Mr. De Vries at the Standing Committee's meeting held in Paris on 8 March 2013, published in Committee on Legal Affairs and Human Rights, *Information note: Standing Committee's exchange of views with the Sub-Committee's Chairperson*, As/Jur/Cdh (2013) 05, 29 April 2013, p. 3 (emphasis in the original).
[241] Michael Wood, 'The selection of candidates for international judicial office: recent practice' in Tafsir M. Ndiaye and Rüdiger Wolfrum (eds), *Law of the sea, environmental law and settlement of disputes* (Koninklijke Brill 2007) 357, 357-8.

[242] See also Mackenzie (n 1) 61.
[243] See e.g. the situation in the Czech Republic in 2011 described above in s 5.

promotionists".[244] As a result, some States are not always able to submit a list with three top candidates as they are simply not available at the moment.[245] In addition, PACE must recognize that Governments will from time to time decide not to follow the advice of their advisory bodies and place their own protégés on the list.[246]

In such situations, the role of PACE is to choose the best out of the three, or at least not to elect the candidate who clearly does not meet one of the key requirements such as language skills and knowledge of domestic law, or whose experience or age would raise an eyebrow. Unfortunately, PACE has recently elected several judges who were unfit for Strasbourg office, while disregarding its own criteria. If PACE itself is not able to identify such problematic candidates, then another filtering body must do that job. PACE's Sub-Committee on the Election of Judges to the European Court of Human Rights has been the subject of severe criticism[247] and, judging by recent embarrassing examples, has failed to fulfil this "sifting" role. It is thus surprising that the Advisory Panel, which is the expert body, is not allowed to interview the candidates and check their language skills and other eligibility criteria.[248]

One caveat must be added here. For an outsider who does not live in Strasbourg and does not have access to confidential information it is difficult to identify what went wrong between PACE and the Advisory Panel. In my opinion, the Advisory Panel should not act as a "ranking agency",[249] but must be able to stop ineligible candidates from going any further. Otherwise it does not make sense to have it. However, PACE and the Committee of Ministers think differently.[250]

Second, the Council of Europe must also be more active in attracting top candidates.[251] It is now generally accepted that any improvements at the nomination and selection stages "should be coupled with efforts to expand the selection pool through proactive efforts to seek out highly qualified candidates who might not be as visible as those in traditional networks".[252] The Steering Committee for Human Rights (CDDH) did a good job on this issue and proposed the following measures:

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[244] For instance, it is considered *chuepe* if someone who was appointed to the domestic apex court just two years ago before the vacancy for the ECtHR arose applies for Strasbourg office. There is always an unwritten rule that such a judge must serve several years or a substantial part of her term before seeking another position.

[245] The Advisory Panel seems to be aware of this problem; see Excerpt from GT-GDR-E(2013)004, published as Steering Committee for Human Rights, *CDDH report on the review of the functioning of the Advisory Panel of experts on candidates for election as judge to the European Court of Human Rights*, CDDH(2013)R 79 Addendum II, 29 November 2013 ("in countries with a small population it might prove to be difficult to find three candidates of an equally long professional experience") . See also Malenovský (n 1) 187.

[246] See the ch 5 s 4.2. and Engels (n 1) for specific examples.

[247] Limbach (n 1) 20-23; Sevón (n 24) 3; Lord Hoffmann, *The Universality of Human Rights*. Judicial Studies Board Annual Lecture, available online at <https://www.judiciary.gov.uk>, last accessed 19 March 2009, para. 38. See also Mackenzie (n 1) 156-157.

[248] See above ch 5 s 3.3.

[249] This role seems to be played by the Sub-Committee on the Election of Judges to the European Court of Human Rights.

[250] See the contributions of Mr. Cilevičs and Mr. de Vries, published in Committee on Legal Affairs and Human Rights, *Information note: Standing Committee's exchange of views with the Sub-Committee's Chairperson*, As/Jur/Cdh (2013) 05, 29 April 2013, pp. 2 and 4; and Steering Committee for Human Rights, *CDDH report on the review of the functioning of the Advisory Panel of experts on candidates for election as judge to the European Court of Human Rights*, CDDH(2013)R 79 Addendum II, 29 November 2013, paras. 31-32.

[251] See Izmir Declaration, p. 2.

[252] Mackenzie (n 1) 179.

- maximum transparency in the selection procedure;
- awareness-raising on the work and life of a judge in Strasbourg, including with a view to correcting misconceptions about the conditions of employment;
- transmitting information to legal networks about the imminent call for applicants;
- particular measures aimed at increasing applications by people from backgrounds that are historically less likely to produce applicants;
- asking relevant independent persons'/organizations to encourage potentially suitable people to apply;
- the use of new media, including government websites;
- taking measures to ensure the availability of suitable professional opportunities for former judges upon leaving office.[253]

Third, the Council of Europe should also know what top judges and top candidates from other legal professions care about, or, more precisely, what is a deal-breaker for them. Is it the salary? Is it the suspension of the pension scheme in their home countries? Is it the need to reintegrate after the end of their Strasbourg term? Is it their inability to choose their own law clerks themselves? Is it the difficulty for their partners to find jobs in Strasbourg? Or is it something else? Do they consider the nine-year term too short to justify moving to another country or rather too long? Unless the Council of Europe knows the answers to these questions, it can hardly solve the problem of attracting top candidates effectively and systematically.

Hitherto, this chapter has proceeded on the assumption that the current system of selection of Strasbourg judges can still be improved to produce stellar judges whose independence, qualification and stature would be beyond doubt. However, it is perhaps time to start thinking outside the box and question the very foundations of the current system of electing Strasbourg judges, because the view that the current procedure is "undoubtedly a major success story"[254] is no longer shared by many.

The current system rests on three basic principles:

(1) that *each* State nominates its own candidates;

(2) that each State submits a list of *three* candidates; and

(3) that *PACE* elects Strasbourg judges.

The first and the third principles will hardly be abandoned without a complete overhaul of the selection process, but changing the second one should be considered. It was already mentioned above that especially some smaller States sometimes have problems putting together a list of

[253] Steering Committee for Human Rights, *Report of Ad Hoc Working Group on National Practices for the Selection of Candidates for the Post of Judge at the European Court of Human Rights*, CDDH-SC(2011)R1, 14 September 2011, p. 18.
[254] Introductory statement made by Mr. De Vries at the Standing Committee's meeting held in Paris on 8 March 2013, published in Committee on Legal Affairs and Human Rights, *Information note: Standing Committee's exchange of views with the Sub-Committee's Chairperson*, As/Jur/Cdh (2013) 05, 29 April 2013, p. 3.

three stellar candidates.[255] The key question is thus whether reducing the number of candidates to two or just one would mitigate this problem.[256]

Whether having two instead of three candidates on the list would have any positive impact is unclear, but switching to one would certainly make the selection process easier. The responsibilities of the relevant players would be clearer and States could no longer blame PACE for not choosing the first best candidate. Similarly, Governments would have no incentive to prioritize "their" candidate.[257] There is one more advantage. All candidates for Strasbourg office are risk averse and no one wants to be labelled as an "unsuccessful candidate for the position of a judge of the European Court of Human Rights". Especially for top candidates such "rejection" has reputational costs. Hence, switching to one candidate would put pressure on the nominating government to submit the best possible candidates and increase the chances that the top candidates would be willing to join the contest.[258]

This solution thus seems to be a "win-win". However, there is always a trade-off. In this case, the reduction of the number of candidates to one would change PACE's role. It would no longer have a real choice. Instead, it would become a veto gate. But that is the way it works in Luxembourg and it works much better than the Strasbourg rule. To my knowledge, no one has questioned the qualifications, experience or stature of Luxembourg judges.[259] Moreover, PACE itself has already indicated that it invites the prioritization of candidates by national governments in order to make its choice "easier".[260]

7. Conclusion

Mr De Vries, a member of PACE and its Sub-Committee on the Election of Judges to the European Court of Human Rights, in his speech on 8 March 2013 said that "[the] procedure [of selecting Strasbourg judges] is undoubtedly a major success story, despite occasional mishaps or unpleasant surprises, which to us, parliamentarians, well-versed in the daily realities of power-

[255] See notes 240-243 above.

[256] The other option would be to allow each State to present a list of 1 to 3 candidates according to its choice. Smaller countries would be relieved of the need to "produce" three stellar candidates every nine years, while bigger countries could present three good candidates who know they may not be elected, but would also not be vetoed and stigmatized. I am grateful to Shai Dothan for this suggestion.

[257] Note that the requirement to present the three nominated judges in alphabetical order, as stipulated by PACE, Resolution 1646 (2009), para. 4.3, is often not followed in practice (see e.g. Malenovský (n 1) 121). For further discussions of the pros and cons of the prioritization of candidates by Governments see Committee on Legal Affairs and Human Rights, *Nomination of candidates and election of judges in the European Court of Human Rights*, 1 December 2008, Doc. 11767, Part B (Explanatory memorandum), paras. 27-28.

[258] One reviewer suggested that non-nomination on the national level has similar reputational costs for a rejected candidate. I disagree, since the reputational costs are far lower on the national level as the names of candidates are known to only a few insiders.

[259] Further see ch 1-3 in this volume.

[260] See Committee on Legal Affairs and Human Rights, *Nomination of candidates and election of judges in the European Court of Human Rights*, 1 December 2008, Doc. 11767, Part B (Explanatory memorandum), para. 23 *in fine*.

politics and behind-the-scenes arrangements, comes as no surprise".[261] This chapter respectfully disagrees. It argues that there are flaws in the procedure and, more importantly, there is no room for further "mishaps" or "unpleasant surprises".

The very legitimacy of the Strasbourg Court is at stake. Recent empirical studies and the burgeoning literature on the selection of judges of the ECtHR show that the qualifications and experience of Strasbourg judges rank among the most important legitimacy criteria for key stakeholders, and that a significant number of these stakeholders assess this criterion negatively. Given the recent "mishaps", especially in the 2012 elections, this picture became even dimmer and the reservoir of trust in the ECtHR shrank further. It is important to keep in mind that the election of one sub-optimal judge to the ECtHR has more far-reaching consequences for the Court's legitimacy than one controversial judgment. Most controversial rulings are forgotten after a few years or can be at least moderated by subsequent judgments, but a problematic judge will take part in thousands of decisions. Such a judge thus not only undermines the legitimacy of the ECtHR at the moment of her election, but also becomes the Court's "legitimacy baggage" for nine years.[262]

It is thus unfortunate that the problems regarding the selection of judges have only recently started to be openly discussed. While it is understandable that procedural reforms of the Convention, such as reducing the time for lodging an application to the ECtHR or efforts to reduce the backlog, receive more attention than institutional issues, such as upper age limits for or language skills of Strasbourg judges, it is short-sighted to underestimate the latter. The ECtHR is not an "it", but a "they". It is thus critical to move beyond second-tier principles such as non-politicization, diversity and the transparency of national procedures,[263] and pay more attention to the higher-level principles of professional competence and integrity.[264] This means that we must start addressing key questions such as which substantive criteria are the most important, which standards cannot be compromised under any circumstances, how to attract the top candidates to Strasbourg, and how to eliminate those whose presence will not advance Strasbourg's reputation. The recent controversies regarding selection of Strasbourg judges may in fact lead to the increased institutional robustness of the ECtHR vis-à-vis its critics and make it stronger.[265] There is still time to do so. But if the current problems are not taken seriously now, we may soon learn that it is too late to save the Court.

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[261] Introductory statement made by Mr. De Vries at the Standing Committee's meeting held in Paris on 8 March 2013, published in Committee on Legal Affairs and Human Rights, *Information note: Standing Committee's exchange of views with the Sub-Committee's Chairperson*, As/Jur/Cdh (2013) 05, 29 April 2013, p. 3.

[262] Moreover, there is neither initial nor in-service training for Strasbourg judges; see Egbert Myjer, 'Are Judges of the European Court of Human Rights so Qualified that they are in No Need of Initial and In-Service Training? A "Straatsburgse Myj/mering" (Myjer's Musings from Strasbourg) for Leo Zwaak' in Yves Haeck et al. (eds), *The Realisation of Human Rights: When Theory Meets Practice: Studies in Honour of Leo Zwak* (Intersentia 2014) 151-166.

[263] In fact, several commentators on the draft of this chapter provocatively suggested that the road to hell (the best candidates do not apply) is often paved with good intentions (that is with transparent national selection process).

[264] For the distinction between these two tiers of principles involved in selecting international judges see Mackenzie (n 1) 137.

[265] The current criticism of selection of Strasbourg judges is thus not by definition a sign of defeat; see ch 13, s 1.