

The Composition of the European Court of Justice

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Lord Mance

Introduction

1. The Court of Justice has been a central achievement of the European Union - a court with unparalleled transnational power. It has cemented European development in fields expanding far beyond the original common market concept. At an early stage it established the principles of direct effect and primacy of European law in the cases of *Van Gend en Loos* and *Costa v ENEL*¹. Their full implications were brought home – in many quarters probably only understood - after the much later decisions in Case C-231/89 *Factortame* and Cases C-6 and 9/90 *Francovich*. So long at least as the European Communities Act 1972 remains unrepealed, they involve an approach to Parliamentary legislation at radical variance with prior understandings of the operation of Parliamentary sovereignty.
2. Some of the Court's decisions are from time to time criticised by British legal and political commentators. The United Kingdom is not unique in this respect, and I believe that it has loyally given effect to whatever European Union law proves to require. Sometimes the requirements may have surprised. Sometimes, something can be done about this, although the difficulties of obtaining agreement at a European level to legislation to reverse or change the effect of a European Court decisions are obvious, especially if this would involve a Treaty change. Nonetheless, I mention two instances where something was or is being done.
3. First, the Court of Justice developed a controversial² criminal jurisdiction under the first pillar of the previous Treaties in environmental and pollution matters (in other words a jurisdiction which did not depend upon qualified

¹ Case 26/62 *Van Gend en Loos v Nederlandse Administratie der Belastingen* [1963] ECR 1 and Case 6/64 *Costa v ENEL* [1964] ECR 585

² See the House of Lords European Union Select Committee's 42nd Report of Session 2005-2006 (HL Paper 227) and 11th Report of Session 2006-2007 *Criminal Law Competence of the European Community* (HL Paper 63) on *The Criminal Law Competence of the European Community*.

majority voting). Under the Treaty of Lisbon, this now appears to have been subsumed within the new Title V of the revised Treaty on the Functioning of the European Union (TFEU). So future like measures should be subject to qualified majority voting (QMV) and moreover, in the case of the UK, to the right not to opt into new legislative proposals: see the views expressed by the House of Lords European Union Select Committee in *The Treaty of Lisbon: an Impact Assessment* (HL Paper 62-I), paras 6.187-6.189.

4. Secondly, the Court of Justice's jurisprudence under the Brussels I Regulation regulating jurisdiction and judgments³ has been quite generally regarded as problematic. It is an area where a firm grasp of the practical requirements of transnational litigation is of particular importance to London, as a world financial and legal centre. But current proposals by the Commission for a revised form of Regulation, into which the UK has opted, offer all the countries concerned a very positive opportunity to address the problems, through the process of tri-partite discussion which operates involving the Commission, Council of Ministers and European Parliament.
5. The Luxembourg Court of Justice is not the only European court with which British lawyers interact daily. The European Court of Human Rights (ECtHR) in Strasbourg also shapes the modern European legal scene. At the international level, the requirement of unanimity makes it difficult to conceive of protocols reversing or altering the substantive effect of any of its decisions. But at the domestic level, its norms operate at a slightly softer level, at least under the British regime of the Human Rights Act. British courts have in general taken as their motto Lord Bingham's statement in *R v Special Adjudicator (ex p Ullah)* [2004] UKHL 26 – that they will do no more, but certainly no less, or, as Lord Brown later transposed it⁴, “no less, but certainly no more” than Strasbourg requires. But British courts are under the Act strictly only bound to “take into account” Strasbourg jurisprudence, when giving effect to Convention rights. Unlike the Luxembourg Court of Justice, the Strasbourg court also gives the comfort of occasional minority judgments and, more importantly, of the possibility of seeking a grand chamber decision, after an unfavourable ordinary section result. The aim,

³ Council Regulation (EC) No 44/2001.

⁴ *R (Al-Skeini) v Secretary of State for Defence* [2007] UKHL 26; [2008] AC 153, para 106.

and to a considerable extent the reality I think, is one of dialogue with Strasbourg, with each side being prepared to reconsider and sometimes change its jurisprudence. British courts have not yet found themselves faced with a critical case of conflict between loyalty to the European Court of Human Rights and the UK's international obligations and loyalty to the will of Parliament or basic common law principles.

6. European Union law itself has acquired an increasing fundamental rights content. Under article 6(2) of the Treaty on the European Union (TEU), the EU is bound to respect fundamental rights as guaranteed by the European Convention on Human Rights (ECHR) as general principles of EU law, and the Lisbon Treaty confers legal status on the Charter of Fundamental Rights. The Court of Justice has been concerned to develop a significant fundamental rights jurisprudence. A famous example is Cases C-402/05 P and C-415/05 *Kadi and Al Barakaat v Council and Commission*. A European Regulation had been adopted to give effect to resolutions of the United Nations Security Council, by freezing the assets of persons suspected of association with terrorist organisations. The Resolution contained a list of such persons, based in fact on an equivalent Security Council list. The Regulation gave no effective way of challenging listing. The Court held that it had jurisdiction to review the Regulation and that it infringed Mr Kadi and Al Barakaat's fundamental rights under Community law. Proceedings based on subsequent developments in the same case remain on foot. A recent Commission Opinion of 30.9.11 (COM(2011) 596) identifies as the highest growth rate area in the General Court appeals against sanctions imposed on people or entities based on mechanisms established under the Common Foreign and Security Policy. Issues of human rights are thus increasingly likely to become European Union issues.
7. There is an ancillary aspect to this. The relationship between the EU and the European Court of Human Rights has not yet been worked out. But, on the face of it, any decision taken by the Court of Justice on fundamental rights binds UK courts absolutely. The limited, but deliberate and potentially significant, flexibility provided by the Human Rights Act cannot in that context exist. As and when the Luxembourg Court determines the meaning and scope of what have hitherto been purely Strasbourg rights, British courts

may become bound absolutely, albeit that this will strictly only be in the context of European Union law.

The appointment of judges

8. Against this background, it is opportune to look at how our European Courts are constituted. This has become a matter of direct personal interest over the last year, through membership of a seven-person panel established by the Lisbon Treaty, more particularly under article 255 of the TFEU, to scrutinise and advise on the suitability of candidates for appointment to the Court of Justice in Luxembourg.

9. The appointment of judges to international courts has long been an unstudied area of sovereign activity. It has been described as a “shrouded process”. Its traditional working was illustrated by a Foreign Office legal memorandum quoted by Ruth Mackenzie and Philippe Sands QC in *Judicial Selection for International Courts: Towards Common Principles and Practices*⁵. It relates to a candidacy for the ICJ in 1960. The memorandum said:

“M. Nisor has a very difficult personality and I should imagine he is somewhat of a problem child from the point of view of the Belgian Government, as he must be almost unplaceable in any normal Foreign Service post, and this probably accounts for the fact that he has been with the Belgian Permanent Mission in New York pretty well since the foundation of the United Nations in one capacity or another.

Nevertheless, despite his cantankerous nature and the jaundiced view that he takes of most things, there are a number of points in his favour. He is completely honest; he is also a man of considerable intellectual ability and a very sound lawyer. Furthermore, although he has strong prejudices, these would mostly operate in our favour and he would bring to the Court a conservative element which, in view of its present general bias, it could well do with.”

⁵ Chap 11 in *Appointing Judges in an Age of Judicial Power: Critical Perspectives from around the World* edited by Kate Malleson and Peter H. Russell (University of Toronto Press).

10. The memorandum shows proper concerns for integrity and intelligence, and more partisan concerns for the candidate's politics and likely predispositions. My judicial assistant's research indicates that Mr Nisor never in fact sat, so he was presumably not elected. Whether it was his supposed demerits or his identified merits about which States were chary, history does not relate. In considering this story, we should however remember that the memorandum dates from 1960. Our own domestic position to that date comes off little better. Near the end of his long life, Patrick Devlin – Lord Devlin – naughtily published a short account (written many years before) about the Bodkin Adams trial in 1957. It was entitled “Easing the Passing”. One feature is Devlin's scathingly dismissive attitude towards the Attorney-General, Reginald Manningham-Buller. Another, presently relevant, is that Devlin and Manningham-Buller were at the time rivals for the succession to the Chief Justiceship of England and Wales, held by Lord Goddard, then over 80 years old. Devlin describes the position then current regarding appointments to that office:

“It was known that [the Attorney-General] intended to assert vigorously his claim to be the next Lord Chief Justice of England. As a claim it was not at all concerned with his merits which in relation to so great a judicial post could fairly be said to be negligible: what he was claiming was the time-honoured reward for political services” (pp. 91-93)

The tradition was an old one. Sir Edward Coke as Attorney General invoked it to succeed to the Chief Justiceship of the Common Pleas in 1606. Lord Devlin recounted that, since 1880, the serving Attorney-General's demand to be appointed Lord Chief Justice had been “honoured on five occasions and denied on none”. He recounted two remarkable instances⁶, which repay reading in the original. It is fair to suppose that it was as an immediate result of the Bodkin Adams trial, and of a motion in Parliament to examine the conduct of the prosecution, that the chief justiceship did not settle on Manningham-Buller. The combination of public and legal opinion led thereafter to the institution of a more objective approach to that great office. Lord Parker CJ was instead appointed in 1958 on evident merit.

⁶ Concerning the appointments of Sir Rufus Isaacs and Sir Gordon Hewart as Chief Justice.

11. Over recent years, there have been successive changes in our own domestic system of judicial appointments. The system of appointments by the Lord Chancellor after confidential soundings no longer gave any risk of politically motivated appointments, and it did give scope for imaginative and highly successive individual appointments, including at the highest level those of Lord Bingham, as Chief Justice and then Senior Law Lord, and of his successor Lord Woolf as Chief Justice. But there was a wish for greater objectivity and transparency. A judicial ombudsman, instituted in the cause of greater oversight and transparency, proved something of a thorn in the Lord Chancellor's flesh. Then, as we all know, in 2003 Prime Minister Blair announced his back-of-the-envelope plan for constitutional reform, and, in due course and after much work, this led to the more completely thought through outcomes and procedures instituted by the Constitutional Reform Act 2005. The House of Lords Select Committee on the Constitution is currently considering how far the judicial appointments procedures thereby introduced are efficient and effective, whether they address appropriately the question of diversity and whether they ensure due accountability and transparency.
12. In my view, this is timely. The present system, especially at an appellate level, is not immune to some of the criticisms of lack of transparency and of external review which were directed at the old Lord Chancellor system. The present appellate commissions can also be viewed as judicially dominated or led. Baroness Neuberger made some positive suggestions for changes in her Report on Judicial Diversity in 2010, and I have set out mine in evidence to the House of Lords inquiry. There is scope for somewhat larger and more broadly based commissions for appellate appointments, which could well include not only legal practitioners and an academic element, but also some Parliamentary representation. Judicial independence does not mean judges appointing themselves, and the public have an important interest in judicial appointments.
13. In that respect, I disagree with a change of view by my colleagues on the Council of Europe's Consultative Council of European Judges ("CCJE"). In its first Opinion in 2001, the CCJE's view was that there should be "substantial judicial representation" on appointing councils. Their current

view, with which I disagree, is that such councils should have a *substantial majority* of judges⁷. This may be understandable in a context where many Council of Europe states were until recently under effective political control, but the position and issues in the UK are quite different. Equally, however, I cannot agree all that was said by The Hon Michael Kirby, recently retired from the High Court of Australia. He has written a witty monograph entitled *A Darwinian Reflection on Values and Appointments in Final National Courts*. His thesis is that the value of diversity is better achieved by “the wisdom of politicians” than by “turning judicial appointments over, effectively, to a perpetual professional elite” of “judges appointing judges”. I sympathise with the latter part of this observation – there should be no risk of judges reproducing themselves in their own image. But I cannot agree the right course would be to return judicial appointments in this country to politicians. In my view, as I have said, the right course is to expand the scope and diversity of the appellate appointing commissions.

14. Behind the systematisation of judicial appointments systems introduced in this country by the 2003 announcement and the 2005 Act was a European element. The UK’s process was regarded as anomalous in Strasbourg and a poor example to the newly emerged democracies of Eastern Europe. But the processes for the appointment of judges remained themselves vulnerable to like criticism. In its Opinion No 5 (2003) the CCJE addressed this, saying that:

“the importance for national legal systems and judges of the obligations resulting from international treaties such as the European Convention on Human Rights and also the European Union treaties makes it vital that the appointment and re-appointment of judges to the courts interpreting such treaties should command the same confidence and respect the same principles as national legal systems. The CCJE further considered that involvement by the independent authority referred in the paragraphs 37 and 45 should be encouraged in relation to appointment and re-appointment to international courts.”

⁷ Compare paras 23-24 of Opinion No 1 (2001) with paras 24-25 of Opinion No 10 (2007) and the Magna Carta of Judges (2010). These will all be found at <http://www.coe.int/t/dghl/cooperation/ccje>

15. From 1998, the European Court of Human Rights consisted of full-time professional judges, resident in Strasbourg, one of each member state of the Council of Europe. Article 21(1) of the ECHR establishes the only formal criteria for appointment to the Court:

“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.

In practice, member states were and are required to submit a list of three candidates, who they were asked to rank in alphabetical order, though many gave an order of preference. After generally cursory review on behalf of the Committee of Ministers, this list was submitted to the scrutiny of a sub-committee of the Parliamentary Assembly, which could accept or reject it in whole or part, but if it accepted it would determine its own order of preference before submitting the list to the Assembly for a vote.

16. An Interights Report, in May 2003, prepared by a group chaired by Professor Dr Jutta Limbach, former president of the German Constitutional Court and with members including Lord Lester and Sir Stephen Sedley, identified five main problems about this system. In summary:

- a. States had absolute discretion with respect to the nomination system they adopt. ... nomination often involves a “tap on the shoulder” from the Minister of Justice or Foreign Affairs, and frequently rewards political loyalty more than merit.
- b. The Committee of Ministers was concerned more with safeguarding state sovereignty than with ensuring the quality of nominated candidates.
- c. The only safeguard in the procedure, existing at a sub-committee level, was at best limited and at worst fundamentally flawed, in that the sub-committee consists of parliamentarians, most of whom lack human rights or international law expertise.
- d. At the final stage of elections, the Parliamentary Assembly had limited information, voting appeared to be dictated by five political groups, and lobbying by states and occasionally judges jeopardised actual and apparent judicial independence.

e. The possibility of reappointing sitting judges rendered them particularly susceptible to unacceptable governmental interference.

17. Writing in the same year, 2003, M. Gilbert Guillaume, former President of the International Court of Justice, noted an even more primitive position in relation to the European Court of Justice:

“the nominees presented by each Government are in fact endorsed by the Council of Ministers without any real discussion”.

Under the European Treaties, all judges (including advocates general) of the then European Court of Justice and Court of First Instance were (as they still are) appointed “by common accord of the Governments of the Member States”. Article 221 of the Treaty of Nice as amended by the Treaty of Nice provided that “The Court of Justice shall consist of one judge per Member State”, and article 224 that “The Court of First Instance shall comprise at least one judge per Member State”. The words “at least”, applicable to the latter court only, contemplated some future development. This is now on the cards, as I shall explain. Tenure was (and remains) limited to six years renewable, with terms being staggered so as to ensure a renewal or replacement of some judges every three years. Article 223 provided that appointees to the Court of Justice should be

“persons whose independence is beyond doubt and who possess the qualifications for appointment to the highest judicial offices in their respective countries or who are jurists of recognised competence”.

Article 224 required appointees to the Court of First Instance to be

“persons whose independence is beyond doubt and who possess the ability required for appointment to judicial office”.

But there was no sub-committee or even European parliamentary scrutiny. Appointment was for governments alone, and it is not clear that any nominee was ever refused.

18. In 2004 a Study Group of the International Law Association issued the Burgh House Principles on the Practice and Procedure of International Courts and Tribunals. These stated that the nomination, election and appointment of judges, “appropriate personal and professional qualifications must be the overriding consideration” and “procedures ... should be transparent and provide appropriate safeguards against nominations, elections and appointments motivated by improper considerations” (paras 2.2 and 2.3).

19. In October 2008, Mr Paul Mahoney, former Registrar of the European Court of Human Rights and then President from 2005 to 2011 of the Civil Service Tribunal at the Court of Justice in Luxembourg, gave a paper at a Lancaster House conference. It summarised the then current position in these forthright terms:

“The process of appointing international judges is often presented as constituting the first source of threat to judicial independence. The selection procedures (domestic and international) are described as “*ad hoc* and often politicised processes”, “scattered and haphazard”, “in many ways flawed” and “shrouded in mystery”, being “neither open nor accountable”, with “some countries [being] accused of seeing their judge as a ‘legal ambassador’ on the court [in question]”. In addition to “the statutory requirements for the qualifications of candidates for international judicial office [being] for the most part rudimentary”, “the instruments establishing the courts and tribunals...are, with a few exceptions, silent on the national selection procedures, thereby leaving the Governments free to do more or less what they want. Nominees are generally chosen by the same Governments which are thereafter parties in the judicial proceedings. The appointment of States Parties of *ad hoc* judges to sit in specific cases poses a particular problem (“horses for courses”). If there is an election of judges, Governments have been seen to indulge in political lobbying and bargaining in favour of their (preferred) national candidate, with increasing recourse to professional marketing methods. Terms of office of limited, and in particular short, duration mean that many international judges will be looking to their Governments for re-employment in the national public sector on leaving

international office. Worse still, systems allowing re-appointment of sitting judges carry the suspicion of throwing candidates for re-appointment at the mercy of their national (and other appointing) Governments during their terms of office”.

20. As this passage recognises, in some international courts judges are elected, usually because of the small numbers of judges involved. Examples are the International Court of Justice⁸, the International Criminal Court⁹ and the International Court for the Law of the Sea. The two main European Courts have, with one exception, operated under the rule of one judge per State. The exception relates to the lowest tier tribunal in Luxembourg, the Civil Service Tribunal, constituted in 2005 to deal with internal staff issues; the limited number of judges involved (7 in all) made another solution inevitable; under Article 3 of Annex 1 to Protocol No 3 to the Statute of the Court of Justice a selection panel was established (quite distinct from that on which I sit) to interview candidates and produce a list of the most suitable containing at least twice the number of any vacancies. The 2005 panel cleverly ranked their list in order of preference. However, article 3 also requires the Council of Ministers to “ensure a balanced composition of the Civil Service Tribunal on as broad a geographical basis as possible from among nationals of the Member States and with respect to the national legal systems represented”. After the expiry recently of three of the initial six-year terms, a fresh selection panel sat in 2011. While the list it produced remains confidential, there have in the event and for whatever reason been no renewals of mandate, and judges from three states hitherto without a judge on the Tribunal have been appointed¹⁰.

⁸ The procedure is regulated by the ICJ’s Statute. Candidates are nominated from each Member State by a national group (consisting in the case of members of the Permanent Court of Arbitration of the State’s panel of arbitrators) which “is recommended to consult its highest court of justice, its legal faculties and schools of law, and its national academies and national sections of international academies devoted to the study of law”.

⁹ Article 36 of its Rome Statute (<http://www.icc-cpi.int>) makes elaborate provision for the qualifications and process of appointment of its 18 judges, including provision for separate lists of candidates with criminal and human rights expertise, as well as equitable or fair representation as regards the principal world legal systems, geography, the sexes and legal expertise on specific legal areas. As to the latter, States are required to “take into account the need to include judges with expertise on specific legal issues, including but not limited to violence against women or children”. This is vital in view of the Court’s role in relation to countries like the Congo, where rape and violence against women and children are used systematically as weapons of war or oppression.

¹⁰ Council Decision of 18 July 2011 (2011/459/EU).

21. In the Court of Justice and General Court and in the European Court of Human Rights, the national principle remains firmly established: there must be one judge for each state. There are some oddities of wording under the Treaty of Lisbon. Article 19(2) of the TEU provides that the Court of Justice “shall consist of one judge from each Member State” (formerly it was “per”), whereas “the General Court shall consist of at least one judge per Member State”. Neither the word “from” nor the word “per” seems to require a candidate to have the nationality of his or her nominating State. Nonetheless, at least one EU country has a formal requirement that any candidate it considers for nomination should have its nationality. Discrimination of this kind (which could operate for example against a French national who has worked in the UK, or a UK national who has worked in France, all his or her professional life) may be questionable. The European Convention on Human Rights provides (in articles 20 and 22) for a number of judges equal to the number of member states, with one judge elected by the Council of Europe’s Parliamentary Assembly “with respect to” each contracting state. There is, in this context, precedent for one state (Lichtenstein) nominating a judge of the nationality of another member state (Switzerland).

22. The Treaty of Lisbon also maintains broadly the same requirements for appointment to the Luxembourg Court as the Treaty of Nice. Under what is now article 252, appointees to the Court of Justice must therefore “persons whose independence is beyond doubt and who possess the qualifications for appointment to the highest judicial offices in their respective countries or who are jurists of recognised competence” (phraseology which in fact echoes the ICJ requirement). Under article 254, appointees to the General Court must now “possess the ability required for appointment to high judicial office”; the word “high” is new, and an appropriate recognition of the importance of that Court. Tenure remains the same as before, six years renewable, making it unavoidable that some judges may feel or at least appear to feel under stress as to whether they may or may not be appointed. That risk is diminished by the *secret des délibérés* and the appearance of unanimity which results from the practice of not disclosing any minority vote and of not permitting concurring or dissenting judgments. But the practice of unanimous judgments may sometimes also be regretted, for the obscurity of the committee style compromises to which it may lead. It also

contrasts, a little strangely, with the different practice of permitting minority judgments which prevails satisfactorily in the Court of Human Rights.

The Article 255 TFEU panel

23. Thus far, the current system largely reflects the old traditional practices. But the Treaty of Lisbon introduces one significant change found now in TFEU article 255, in force since 1st December 2009. That article provides that:

“A panel shall be set up in order to give an opinion on candidates' suitability to perform the duties of Judge and Advocate-General of the Court of Justice and the General Court before the governments of the Member States make the appointments referred to in Articles 253 and 254.

The panel shall comprise seven persons chosen from among former members of the Court of Justice and the General Court, members of national supreme courts and lawyers of recognised competence, one of whom shall be proposed by the European Parliament. The Council shall adopt a European decision establishing the panel's operating rules and a European decision appointing its members. It shall act on the initiative of the President of the Court of Justice.”

24. TFEU article 255 has led to the creation in February 2010 to the panel on which I sit by Council Decisions of 25 February 2010 nominating its members on the initiative of the President of the Court and setting its operating rules¹¹. In view of my previous comments about appointments commissions, I mention that its membership consists of its chair, M Jean-Marc Sauvé, head of the Conseil d'Etat, a retired member of the Court of Justice, a retired member of the General Court, three national judges (the President of the Hungarian Constitutional Court, the former President of the Danish Supreme Court and myself) and a European Parliamentarian, Senora Ana Palacio. This largely judicial composition should be seen in the light of the panel's very specific role and its limits, to which I will come.

25. The General Secretariat of the Council of Ministers acts as the secretariat. Any proposal for a candidate is submitted to the panel via the General

¹¹ Council Decisions of 25 February 2010 (2010/125/EU) and (2010/124/EU).

Secretariat. The panel can ask the relevant Government for additional information or other material. Except where the proposal relates to a re-appointment, it hears the candidate (in private). The panel has interpreted its rules to mean that, while in the case of a new appointment it *must* have a hearing, in the case of re-appointments it *cannot* have a hearing. That interpretation might appear controversial, but appeared borne out by the drafting history.

26. At least five members must be present at any meeting. Its deliberations take place *in camera*. It must give a reasoned opinion on each candidate, setting out the principal grounds for its opinion. Such opinion is forwarded to the Representatives of the Governments of Member States, and the rules further provide that, if the Presidency of the Council of Ministers so requests, the President of the panel shall present it to the Representatives meeting within the Council. Presumably, if a Member State wished seriously to challenge the panel's view, this course could well be taken. It should be remembered that the nomination of a judge to the Court of Justice requires unanimous agreements of the Governments of Europe. So even one adverse voice could in theory prevent nomination. The Governments of Europe are not of course bound to follow the panel's advice in respect of any particular candidate, although the panel might not serve much purpose if they did not do so.
27. Earlier this year, the panel issued a public report on its first year's activity, excluding any reference to the outcomes of individual opinions, which it viewed as confidential. The report notes at the outset that the panel lacks any possibility of choice between candidates: the practice is for each state to put up only one candidate for consideration at a time. The essential responsibility for the nomination of candidates therefore rests on individual Member States. It is their task in particular to present the best candidates, taking into account the criteria foreseen in articles 253 or 254 and 255. The panel's role in relation to any candidate presented to it for consideration is, taking into account the same criteria, to give its reasoned opinion on that individual candidate's suitability to perform the duties of Judge or Advocate-General (as the case may be).
28. Let me in these circumstances underline two things that the panel cannot do. First, it can also be no part of the panel's role to shape the composition of the

Court of Justice or General Court, or to favour any particular professional career or expertise. In view of the current practice of Member States to present only one candidate at a time, the panel's role is necessarily limited. Save perhaps in a very extreme case, it also seems improbable that the Governments of Member States, when they later come together to agree whether to appoint a candidate, would address their minds to the balance of skills, experience or gender on the Court. Nothing in the European Treaties parallels the provisions of the Rome Statute for the International Criminal Court specifically requiring States to give attention to this area¹²; in any event it is difficult to see how EU Governments could do so, firstly, without some procedure whereby the Court of Justice itself identified its needs in advance, and, secondly, so long as the current practice for States to nominate one candidate at a time continues.

29. The absence of any consideration of the Court's needs at any stage may be regretted. Darwin concluded that mankind had developed through natural selection. The present system is one of random selection. Natural selection means that, over time, those with particular characteristics or skills survive and prosper better than those without. Random selection means that it is a matter of luck whether the Court ever gets the benefit of those with particular skills and experience. Nor, with so small a bench, can the law of averages ensure that candidates independently selected for their individual merits by different Governments for appointment to the Court of Justice or General Court will necessarily meet the EU's growing and changing needs.

30. It would be impossible, as well as invidious, for me to try to analyse in detail the particular skills and experience of the present members of the Court. The CVs set out in the Court's annual report indicate for the Court of Justice itself a professorial bias among Advocates General and a mix of backgrounds among the judges, including backgrounds as judges nationally and/or at the Strasbourg Court of Human Rights, state lawyers, legal advisers in the Commission or Council and legally qualified civil servants and politicians. For the heavily worked and specialised General Court, they indicate, as one might hope, a membership with an extensive European legal

¹² See footnote 9 above.

background, as well as some members with prior ministerial, judicial or professorial activity.

31. An indication that more targeted selection processes might still contribute something useful is provided by evidence given by Sir David Edward, former UK judge on the Court, to the House of Lords Select Committee enquiry into the Lisbon Treaty in December 2007¹³. He said that, when he went to the Court, there was “a preponderance of public lawyers and professors”, but that latterly there had been a tendency for the Member States to appoint professional judges, but also in general to appoint judges from constitutional or public law courts”, and went on:

“The difficulty to which I have alluded is that to the extent that you enlarge very extensively the competences of the Court of Justice and in particular require it to give rulings, particularly at high speed, on a range of issues, then it is extremely difficult for that jurisdiction to be exercised, if the Court does not contain people who are accustomed to dealing with that kind of question”.

32. He took as a possible problem area one which I have already mentioned – the Brussels Regulation (EC) No 44/2001 on civil jurisdiction and judgments. He even went to far as to suggest that it might have been better not to have included this within the Court of Justice’s jurisdiction, but to have “a tribunal consisting of civil judges of the Member States who would perhaps sit once every three or six months to deal with the relatively small number of cases arising”, and whose expertise would be sufficient for that purpose. He pointed out the countervailing dangers of having too many specialist judges on any court, but he concluded that:

“It is highly regrettable that more time is not given to thinking how the Court should be structured. This is the Cinderella of all inter-governmental conferences”.

33. Taking another different aspect of the composition of the Court, its gender, in 2010, although half the advocates general were women, only just over a

¹³ 10th Report of Session 2007-2008; HL Paper 62-II, Vol II Evidence, Q132-134.

quarter of the judges of the Court of Justice were. In the General Court the percentage is under 20%. This is still higher than in UK appellate courts, but nonetheless figures which one would believe should and hope could be improved.

34. Secondly, the panel can do nothing about the question of non-renewal of a judge's mandate to which Interights drew attention in the case of the European Court of Human Rights. Under article 19(2) TEU, the EU still maintains a system whereby judges and advocate generals are appointed for six years, and are re-appointable. The UK has a healthy tradition of re-appointing its judges and advocate generals, if they wish to continue (though I suppose that age might at some point be regarded as relevant). Other countries, even among the old founder members do not, regarding the post as politically significant. No doubt this must be seen, in the case of Germany, against the backdrop of their domestic view that judges need to acquire democratic legitimacy through the medium of legislative involvement in their nomination. But the potential effect of relatively short term tenure may be that judges are concerned as to whether they will be re-appointed. Even if this is not capable of having any effect, conscious or subconscious, on decision-making, as I understand that Interights feared, it does have other effects. For example, the debate (which is at least worth having) about whether individual judgments might in some circumstances be permitted is undoubtedly constrained by concerns that this would enable governments to know the opinions of "their" judge. For present purposes, what matters is that the panel can have no role in preventing an inappropriate or politically motivated non-renewal of the mandate of a judge who is rendering sterling service. All the panel will see is that a vacancy has occurred, and a replacement nomination is coming forward for its consideration.

The panel's process

35. In relation to the candidates it considers, the panel can solicit information. In practice, before hearing every new candidate it ensures that it has not only the government's written motivation, but also the candidate's, accompanied wherever possible by written material in the form of a publication or transcript on a legally relevant issue. It may also consult any other publications by the candidate. But it will not take into consideration any

material of an unfavourable nature coming to its attention without questioning the candidate about their substance.

36. An important feature of the panel's practice is, in my view, that it enquires of each nominating state whether any national selection committee was constituted, and, if it was, of whom it consisted and what its recommendations were. There is increasing evidence of formal selection processes being instituted in a number of European countries. The UK has been at the forefront, with ad hoc, but nonetheless quite well-established procedures in place for the appointments made over the last decade to the positions of judge and advocate general at the Court of Justice, and to the position of judge at the ECtHR. The existence of an objective appointments procedure independent of executive influence can provide some assurance about the quality of a candidate for judicial office.
37. The hearing by the panel of any candidate seeing first time appointment lasts an hour. The candidate is asked to justify his or her candidature during the first ten minutes, and then to answer questions, so far as possible in either of the two languages, French and English, which are used in questioning. Other candidates nominated for renewal are considered on paper at a panel meeting. The annual report identifies specific aspects at which the panel looks under the heads: (i) juridical capabilities, (ii) professional experience, (iii) aptitude to exercise the functions of a judge, (iv) independence and impartiality and (v) linguistic capabilities and ability to work in an international environment in which different legal traditions are represented.
38. Under (i), juridical capabilities, the panel attaches relevance to an understanding of EU law, but even more to the demonstration of a real capacity for analysis and for reflection upon the conditions and mechanisms of application of EU law, in particular in the internal systems of Member States.
39. Under (ii), professional experience, the panel has suggested that, speaking generally, it could be difficult to be satisfied with high level experience of less than 20 years in the case of a judge of the Court of Justice or advocate general or of less than 12 or 15 years in the case of a judge at the General Court, but that such experience could be as advocate, university professor or

high functionary or of another professional nature, though, whatever it was, the panel would look for an understanding of the role and scope of the functions of the post sought and evidence of capability to fulfil it. The reference contemplating that activity as an advocate or professor or high functionary may constitute satisfactory high level experience enables consideration of persons who in a common law or civil law tradition may be expected to apply as candidates, although they have not previously served as judges.

40. As to (iii), aptitude, the panel will look for clarity of analysis and an understanding of practical implications, as well as an ability to discuss issues in a collegiate atmosphere. As to (iv), independence and impartiality, the panel will examine closely the material before it regarding the candidate's career, as well as the candidate's interview for any reserves on this score. As to (v), the panel regards the mastery of more than one of the EU's official languages as a positive, even not determining, element, especially for the light it may throw on a candidate's ability to work in an international environment. Similarly, the publication of any texts in a language other than the candidate's maternal language, participation in international meetings, seminars or colloquies, and evidence of understand the nature, principles and concerns of Member States other than his or her own.

The panel's opinions and confidentiality

41. The published report speaks in necessarily general terms about the nature of the opinions which the panel has issued. A more specific report was issued to the Governments of the EU, who were anyway apprised of the panel's individual opinions. In preparing its annual report, the panel faced the question how far it could disclose such opinions. Issues of transparency are faced by all appointments systems. The panel's operating rules were framed on the basis that its proceedings are confidential and private. It would deter and be unfair to candidates, if they were to be public.
42. The legal position appears to be this. Our reports are typed and held by the General Secretariat of the Council of Ministers. They therefore constitute third party documents held within the Council for the purpose of Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents. Under article 4 of that Regulation, "the Council

shall refuse access to a document where disclosure would undermine the protection of (b) the privacy and the integrity of the individual, in particular in accordance with Community legislation regarding the protection of personal data”.

43. This article was recently considered in Case C-28/08P *Commission v The Bavarian Lager Co Ltd*. The Commission had decided to permit a modified tied public house regime, which would continue to exclude Bavarian Lager’s product from the relevant UK pubs. Its decision was reached after a meeting, to which Bavarian Lager was refused attendance, but which was attended by individuals whose identity Bavarian Lager wanted to know. The General Court ordered the disclosure of their identities. In its view, article 4(b) involved no more than the application of article 8 of the ECHR.

44. The Court of Justice allowed an appeal. It held that article 4(b) must be read with the almost contemporaneous Regulation (EC) no 45/2001 of 18 December 2000, on the protection of individuals with regard to the processing of personal data. The identity of persons who had attended the meeting and not consented to disclosure of their identity constituted personal data. In these circumstances it was under the latter Regulation for Bavarian Lager to provide express and legitimate justification or convincing argument to demonstrate the necessity of disclosure. They had not attempted to do this, so that it was impossible to weigh the competing interests. Disclosure was therefore refused by the Court. My knowledge of the case is necessarily limited to the law report. In some other contexts, for example actual or suspected lobbying, one might think that the identity of lobbyists, especially in Brussels (one of the homes of lobbying), could be a matter of legitimate, indeed great, interest. It remains to see whether that is a factor that will be identified in some future case.

45. The decision in *Bavarian Lager* came to the panel’s knowledge while preparing its report. The panel readily concluded both that the content of its opinions, whatever their purport, on individual candidates constituted personal data, and that it could not be disclosed in any way in its report. As I have indicated, I have little doubt about the prima facie justification for maintaining confidentiality in this situation – to encourage candidates to come forward and to facilitate frank discussions and opinions on the part of

the panel. Nominations of candidates by individual governments for consideration by the panel under article 255 TFEU are however public, as of course are actual appointments made by the Governments of EU States under article 253.

Comparison with the ECtHR

46. Looking at the system of appointments generally, it is interesting to compare the position established by the Council of Europe for the European Court of Human Rights. In some respects the Council has gone further or faster than the EU. In others it has followed and done so on a more limited basis. Council of Europe bodies have repeatedly, and with some success, addressed the question of gender balance.

47. Resolutions 1366 (2004), Recommendation 1649 (2004) and Resolutions 1426 (2005) and 1627 (2008), declare that that single-sex lists are not acceptable, where the opposite sex is under-represented (meaning made up less than 40% of the Court) or unless exceptional circumstances exist (as where, despite all necessary steps, an appropriate candidate of the relevant sex cannot be identified). Recommendation 1649 (2004) and Resolution 1426 (2005) also address national selection processes. The first invites open calls for candidates with human rights experience and sufficient knowledge of at least one of the two official languages through the specialised press, and in the second the Assembly

“strongly urges the governments of member states which have still not done so, to set up – without delay – appropriate national selection procedures to ensure that the authority and credibility of the Court are not put at risk by ad hoc and politicised processes in the nomination of candidates.

Furthermore:

“it invites the governments of member states to ensure that the selection bodies/panels (and those advising on selection) are themselves as gender-balanced as possible.”

48. On 12 February 2008 the Strasbourg Court also issued the first of two advisory opinions relating to the election of judges. It confirmed that it was vital to the Court's authority and the quality of its decisions that any candidate must meet the Convention criteria that they

“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”.

But it went on to say that, provided that he or she satisfies these criteria, there is nothing to prevent the member states from taking into account other criteria or considerations such as achieving “a certain balance between the sexes or between different branches of the legal profession or within the Court” (para 42), not only when choosing between candidates on a list, but also when assessing the appropriateness of a list presented. The Council of Europe's gender requirements and admonitions have had their intended effect. Over 40% of the Court's judges are women.

49. The problem of renewal of judges' mandates, which Interights identified, has now also been addressed. After a long delay, Protocol No 14 to the Convention has come into force, and judges will have a single non-renewable nine year term for the future. I have a concern about the shortness of this term, that it may not give sufficient time for suitable presidents of the court and of its chambers to emerge and hold office for any significant period.

50. Most recently of all, by Resolution CM/Res(2010)26 of 10th November 2010, the Committee of Ministers has itself followed the EU's lead, by establishing a seven-person panel with the mandate

“to advise the High Contracting Parties whether candidates for election as judges of the [ECtHR] meet the criteria stipulated in Article 21 para 1 of the [ECHR]” (para 1).

Its members are to be “chosen from among members of the highest national courts, former judges of international courts, including the ECtHR and other lawyers of recognised competence, who shall serve in their personal

capacity”, with the further provision that “The composition of the panel shall be geographically and gender balanced”. In fact, it consists in five men, including the former President of the ECtHR, Lucius Wildhaber, and two women. So too does the Article 255 panel, a feature I only mention now that Strasbourg has repeated it!

51. However, the operating rules of the Strasbourg panel differ from those of the article 255 panel. There is express provision that the panel adopt opinions by consensus or by a qualified majority of five out of seven. It is not clear what this would mean if, for example, four members held one opinion and three another. The panel’s procedure is basically written, with members transmitting their views to the chair in writing, and meetings only being held where deemed necessary. The panel is to “assess the suitability of candidates on the basis of the information provided by” the nominating state, but may seek additional information or clarification from that state, and, in exceptional circumstances when it decides this to be necessary, it may have a meeting *in camera* with representatives of that state. The exclusion of provision for interviews or even, save exceptionally, meetings, seems to have arisen from financial considerations. The panel’s proceedings are, like the EU panel’s, confidential.

52. The Parliamentary Assembly and Committee of Ministers of the Council of Europe have thus been able to act in respects which would be problematic in the context of the European Union. Past experience makes the EU wary of Treaty changes of any sort, and, as Sir David Edward said, the legal architecture of the EU has so far been the Cinderella of EU Treaty discussions. That is a pity, since the Court is a major institution. Since the Tampere meeting of the European Council in 1999, the development of an area of freedom, security and justice by making full use of the Treaty possibilities has been, to quote, an “objective at the very top of the political agenda”. We must envisage an active future programme of initiatives in the civil, criminal and family arenas. The Lisbon Treaty amendments have crystallised and to some extent amplified the scope for EU legislative action in this area, particularly by bringing criminal cooperation within the scope of QMV and by permitting enhanced cooperation by a limited number of Member States in cases where any individual state feels that draft legislation would affect fundamental aspects of its criminal justice system. They also

bring the whole FSJ area within the competence of the Court of Justice. The UK is among those states which have not hitherto accepted Court of Justice jurisdiction over third pillar measures, such as those in the criminal field. New measures in the FSJ area will fall automatically within such competence¹⁴. The Court's jurisdiction is likely to continue substantially to expand¹⁵, and the Court's smooth and efficient running, as well as its capabilities to undertake the new and wide-ranging role assigned to it are or ought a matters of concern of us all.

53. How overall does the position in respect of the EU stand in comparison with the position in respect of the ECtHR? What follow are of course my own remarks, not the panel's:

- a. First, the two main Luxembourg courts require "independence beyond doubt", while Strasbourg requires "high moral character". This difference is unlikely to be significant. The Court of Justice requires qualification for appointment to the "highest judicial office", whereas Strasbourg only requires qualification for appointment to "high judicial office". But in both courts there exists an alternative basis for appointment - being a jurisconsult of recognised competence. Since this is in identical terms in relation to each court, any argument that the Strasbourg standard is lower is much weakened.
- b. Under the EU Treaties, each state in practice nominates one candidate at a time; the requirement in Strasbourg for a list of three candidates gives the Council of Europe bodies inherently greater opportunities of choice.
- c. The European Court of Human Rights has held that the Council of Europe has a right to stipulate for additional requirements, when

¹⁴ In relation to existing third pillar measures, there is a five year transitional period, during which any measures which are amended will come within such competence, although the UK will have its usual right not to opt into any such amendments. Any measures which remain unamended will remain outside the Courts' jurisdiction, and, at the end the five year period, the UK has, under the relevant Protocol, a choice. It can either accept such jurisdiction, or it can opt out of all such measures as a whole and then seek to opt back in to any particular measures in relation to which it does not object to the Courts' jurisdiction. In the latter event, controversial though it would be, it seems unlikely that the Council would refuse to allow it to do this.

¹⁵ And, if the Commission's recent proposal for a Regulation on a Common European Sales Law COM(2011) 635 of 11 October 2011 under Article 114 TFEU were to become law, the Court would acquire a major new involvement in substantive private law.

considering and rejecting any list in whole or in part, as well as when choosing between those on a list. No doubt the Governments of EU States *could* introduce similar stipulations, but there is no sign that they have ever contemplated doing so.

- d. Before the introduction of a single non-renewable term in the European Court of Human Rights, it would have been open to the Council of Europe bodies examining a list to question why a sitting judge was not proposed for re-selection. The Governments of EU States could also do this in relation to the Court of Justice, but there is no sign that they ever have done it. The article 255 panel has no role in relation to governmental decisions not to renew a judge's appointment (nor does the Strasbourg panel appear to have).
- e. The panels introduced in respect of the Luxembourg and Strasbourg Courts have differently phrased functions. The article 255 panel gives "an opinion on candidates' suitability to perform the duties of Judge and Advocate-General of the Court of Justice and the General Court". This, according to the language, involves considering both whether the formal requirements of articles 253 and 254 are satisfied and generally whether a candidate is suitable. The Strasbourg panel advises member states of the Council of Europe "whether candidates for election as judges of the [ECtHR] meet the criteria stipulated in Article 21 para 1". This involves on its face looking simply at the question whether the candidates are "of high moral character and possess the qualifications required for appointment to high judicial office or [are] jurisconsults of recognised competence". However, the Strasbourg panel's operating rules refer to its role as being to "assess the suitability of candidates". So its role may well be open to the more general interpretation.
- f. The ability of the article 255 panel to hold interviews, while the Strasbourg panel's role is essentially documentary and remote, may prove significant when it comes to expressing a view on a candidate's qualifications or suitability for appointment.

Future EU developments?

54. Finally, there is a possible future development that might affect the article 255. The Court of Justice has, one might say, undertaken to be its own Prince Charming in addressing its status as Cinderella (and has been warmly

welcomed for doing so). It is at the level of the General Court that the most pressing concerns about workload and delays have been voiced, not least by the House of Lords European Union Select Committee in a Report on 6 April 2011¹⁶. The Report, made after hearing evidence and visiting the Court, recommended an increase in the General Court's judiciary, by perhaps one-third. By coincidence on the next day, 7 April 2011, the Court issued its own proposal to the Commission for an enlargement of the General Court by at least 12 judges from its present size of 27 judges, to cater for the General Court's workload. At the end of 2010, 1300 cases were pending (up from 1191 at the end of 2009), whereas during 2010 527 cases were disposed of. The average duration of proceedings was over two years, and much greater in certain classes of case¹⁷. The General Court deals not only with a large volume of often relatively standard form trade mark cases, but with many particularly complex and heavily documented cases involving detailed facts in, for example, the areas of competition, including State aid, and Export Agricultural Guidance and Guarantee Fund cases. The REACH (Registration, Evaluation, Authorisation and Restriction of Chemicals) Regulation (EC) No 1907/2006 is expected to generate further litigation¹⁸, and, as already mentioned, legislative and regulatory acts of the EU, particularly in the field of sanctions, have already done so. The Court raised the possibility that the additional judges would enable the creation of specialised chambers within the General Court¹⁹.

¹⁶ In its 14th Report of Session 2010-2011 (HL Paper 128) on the Workload of the Court of Justice of the European Union. The Report was debated in the House of Lords on 17 October 2011 (Hansard Vol. 731, No. 295 cols. 80-95).

¹⁷ The Select Committee Report referred to in the previous footnote contains statistics and graphs. The Court of Justice has twice found that General Court decisions were not delivered within a reasonable time, most recently in Case C-385/07 *Der Grüne Punkt-Duales System Deutschland v Commission*, a competition case where first instance proceedings (Case T-151/01) took 5 years 10 months.

¹⁸ In the House of Lords debate to which footnote 16 above refers, it was recorded that an original estimate of 250,000 chemicals licences under this Regulation had now increased to over 2 million.

¹⁹ It did not favour the creation of any further specialised court below the General Court, i.e. at the same level as the Civil Service Tribunal. That would have the disadvantage of bringing an additional layer of appeals, and of inflexibility of constitution. For such reasons, the House of Lords EU Select Committee did not favour the creation of any such court at that level either, when considering the possibility of a new Competition Court in its 15th Report of Session 2006-2007 (HL Paper 75) or more recently in its Report mentioned in footnote 16 above.

55. The Council and Commission have both reacted positively²⁰ to the Court of Justice's current initiative and proposal of an enlarged and more flexible General Court. The Commission has taken up not only the idea of specialised chambers within the General Court itself, but also the important question how any new judges should be chosen. It has proposed either an extension of the national principle, giving each state in turn a chance to appoint, or a modified system whereby six new judges would be chosen in that way, but the other six would be selected from among candidates to be put forward by states, upon an opinion received from the article 255 panel stating an order of merit for the candidates whose suitability is confirmed, having regard to the judicial qualifications required to sit in one of the specialised chambers to be established by the General Court. This would, self-evidently, represent an important increment in the role and work of the panel.

Conclusion

56. In conclusion, international law is, here as in many other fields, under development. The appointment processes which we have do not yet guarantee that the judges on our international courts are the best able to meet the needs of such courts. The introduction on different bases of panels in relation to the Court of Justice and the Court of Human Rights are valuable initiatives. Traditionally, States have regarded international appointments as a sovereign prerogative, sometimes exercised for domestic reasons, sometimes with the aim of international advantage. But the recent initiatives have been taken by States voluntarily. They recognise that it is in States' just as much as their citizens' interests to ensure that justice is administered with competence and efficiency at an international level. This is vital, as the CCJE noted in 2003. The initiatives are to be welcomed for what they have already achieved and as a sign of hope for the future. The decisions of international courts are put increasingly under legal and public spotlights. Such courts must, like any other courts - domestic and international, command the respect of those for whom they interpret and make law.

²⁰ The UK Government's response has been more nuanced: see the report of the debate referred to in footnote 16 above, mentioning inter alia cost implications.