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EUROPEAN CENTRE FOR LAW & JUSTICE

The Impartiality of the ECHR

Concerns and Recommendations

2023

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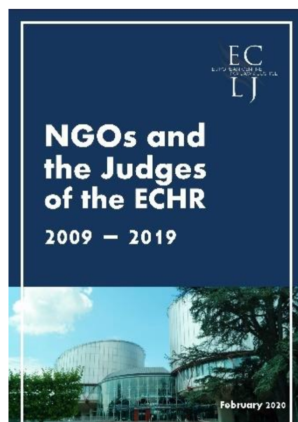
In the same range of the ECLJ's reports on international courts' integrity:



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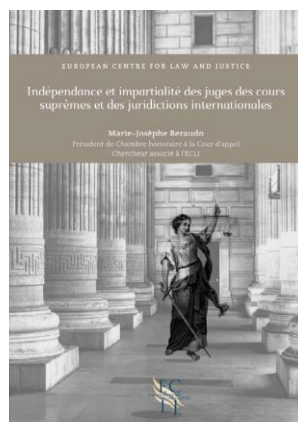

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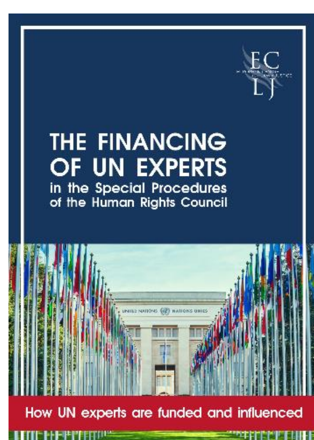

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Presentation

The European Court of Human Rights (ECtHR) should be exemplary and meet the standards of impartiality it imposes on national courts. This report demonstrates that this has not been the case to date. This is due, in part, to the fact that the ECHR is not subject to the scrutiny of any judicial body that can identify its shortcomings. Moreover, governments have not been willing to carry out this control until now, out of respect for the Court's independence. It is therefore up to civil society to take on this task of external scrutiny and whistleblowing. This is what the ECLJ has undertaken, in the interest of justice.

In 2020, the ECLJ published a report on *the NGOs and the Judges of the ECHR*, revealing the existence of a structural problem of conflicts of interest within the Court. It showed that, between 2009 and 2019, 18 judges have on 88 occasions judged cases brought or supported by seven NGOs of which they were previously directors or collaborators. Of these NGOs, the Open Society stands out because the majority of the judges involved are linked to it, and it funds the other six NGOs.

In response to the 2020 report, the ECHR and the Council of Europe undertook to correct certain aspects of the system and to propose measures to improve the selection, independence and impartiality of the Court's judges, as well as the transparency of the NGOs' work. The ECLJ welcomes these initial results.

This report continues and deepens the analysis undertaken in 2020, and aims to feed into the reform of the ECHR. It first notes that cases of conflicts of interest between judges and NGOs have not decreased. On the contrary, there have been at least 54 such cases over the last three years, 18 of which concerned Grand Chamber judgments. The report also shows that there is a problem of impartiality also within the Registry of the Court.

In addition to these cases of conflict of interest, the report goes on to outline a series of structural problems affecting the Court's impartiality, and demonstrates that the Court is not up to the standard of other major international and national courts. For example, the ECHR does not provide for a recusal procedure, judges do not publish declarations of interest, and the handling of cases is opaque, which undermines the right to a fair trial. It is also apparent that the profile of some judges does not match what can be expected from Europe's highest court.

As a result of these findings and in support of the ECHR reform process, this report presents a series of specific recommendations to address the problems identified. They have been analysed and endorsed by a number of judges and lawyers of the Court. The ECLJ thanks them for their collaboration, and is convinced that this new report will contribute to more justice.

Grégor Puppinck

Director of the ECLJ

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Introduction

The ECLJ is a non-governmental organization acting with the main international institutions of human rights protection. Since 1998, it acted with the European Court of Human Rights (ECHR) in more than sixty cases. Thus, it contributed to the elaboration of such Court's jurisprudence, including in the matter of right to life, freedom of conscience and religion.

On the basis of such experience, and willing to contribute to the right functioning of such Court, in February 2020, the ECLJ published the report *NGOs and judges at the ECHR, 2009 - 2019* disclosing that, between 2009 and 2019, at least 22 of the 100 permanent ECHR judges were former founders, managers or associates of seven foundations and private organizations highly active with the ECHR as applicants, representatives or third parties.

Yet, at 88 times during such period, some judges coming from such NGOs and foundations have stated on cases lodged or supported by their own organization, putting themselves in obvious conflict of interest situation, infringing the right to fair trial. This is the case for 18 of the 22 judges coming from NGOs, which is significant.

Such conflicts of interest have taken place in sufficiently important cases for such organizations to engage in; thus 33 of such 88 cases of conflict of interest relate to Grand Chamber decisions, i.e., the rare decisions whose jurisprudence benefits from the largest authority[1].

The 2020 report's publication generated many public reactions, worldwide, but very few criticisms as the report's accuracy was not challenged.

Three years later, it is time to take stock and continue such work, always with a constructive approach, in order to contribute to the proper functioning of the European system of protection of human rights. This is the purpose of this new report. Firstly, it presents the consequences and the main effects of the 2020 report (I), then it lays out the new conflict of interest cases noticed during the period 2020-2022 (II). It reveals then some new structural problems affecting the Court (III) and recommend to the Council of Europe and the ECHR a set of measures aiming to better guarantee the independence and impartiality of the Court's judges towards the private organizations.

With respect to the previous period, the situation shows rays of hope as, on the first hand, the Committee of Ministers of the Council of Europe officially took up the issue and, on the other hand, the Court reinforced its ethical obligations. The Committee of Ministers of the Council of Europe, that gathers the representatives of the 46 members States, has indeed required from a group of experts on the judges to draft a report to propose measures intended, *inter alia*, to offer "supplementary guarantees to preserve their independence and impartiality". The issue of conflicts of interest is addressed. The Court itself has, among others, required from the judges the explicit duty to be independent from any "organization" and "private entity", referring then to foundations and NGOs. The Court has also usefully clarified the rules on third-party interventions, taking up the recommendations of the ECLJ.

Another enhancement and result of the 2020 reports: the ECHR contains less judges coming from such activist organizations, and therefore particularly likely to be in conflicts of interest, due to

[1] ECHR renders an average of a dozen decisions in Grand Chamber per year over thousands of rendered decisions.

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the end of the mandate of four of them and of the unprecedented failure of an Open Society's employee to be elected to such position by the Parliamentary Assembly of the Council of Europe in 2021.

Nevertheless, the number of noticed conflicts of interest didn't decrease during this period. On the contrary, in only three years, from 2020 to 2022, it increased up to 54 conflicts of interest among 34 judgments or decisions. In particular, for that same period, there were 18 conflicts of interest in 7 judgments of the Grand Chamber. The reason why is that for one single case, several judges may be in a situation of conflicts of interest. This increase of conflicts of interest may be explained, among other, by the strong increase of such NGOs' activity with the Court: it doubled in annual average compared to the period 2009-2019.

Further to the issue of the conflicts of interest between judges and NGOs, already addressed in the 2020 report, other structural dysfunctions have been identified and exposed in this new report. They are, among others, the failure of recusal process within the Court, the lack of transparency of the Court, the appointment mode of the *ad hoc* judges, or the fact that the Court's judges do not issue any declaration of interest.

Some other concerns have been identified, even if they are rarer and not quantifiable, as they result from the situation of certain judges. They relate, among others, to the nomination process of the candidates to the ECHR at the national level, the accurateness of their curriculum vitae and the nepotism.

All such issues should be solved. To preserve its authority, the ECHR shall indeed be exemplary and fulfil the standard that it imposes to the national courts regarding the right to a fair trial, and specially in terms of impartiality. It is not the case to date, for various reasons, the main being that, as a supreme court, the ECHR is not controlled by any other court nor body able to evidence its errors or dysfunctions. The governments should, as a principle, perform such control, but they feel in no position to do so as any criticism of the Court from them may be seen as a political pressure. The civil society is then in charge of evidencing such dysfunctions, take the responsibility of whistle-blower. This is what the ECLJ undertook.

The ECLJ believes that the European Court should have the capacity to amend its structural dysfunctions, even if it requires time and internal reformations. These are necessary for the Court's sake. To contribute to such reformations, ECLJ identified a set of measures to implement. They have been reviewed and approved by several judges of the ECHR and are as follows:

- *Avoid the appointment of activists and preferably nominate candidates with a high-level judicial experience*
- *Require the publication of declarations of interest*
- *Ensure the sincerity of the curriculum vitae submitted by candidates*
- *Apply the same selection rules to the appointment of ad hoc judges*
- *Improve the transparency of the NGOs' action before the ECHR*
- *Ensure the Registry's transparency to reinforce the guarantees of its impartiality*
- *Avoid the national judge being appointed as judge-rapporteur in important cases*
- *Early notification to the parties of the composition of the bench*
- *Establish a challenge procedure in line with the Court's requirements for national courts*

Aware of the value of the European human rights protection system and of the necessity of its preservation, ECLJ hopes this report to be received as a useful contribution.

Part I: Institutional changes and initiatives following the February 2020 ECLJ's report

On March 28th, 2012, the Committee of Ministers adopted its *Guidelines on the selection of candidates for the post of judge at the European Court of Human Rights*. Such guidelines provide for the participation of NGOs at every stage of the national phase of the selection process. At the request of the Committee of Ministers, the Steering Committee for Human Rights (CDDH) examined the options to attract highly qualified candidates and published in 2018 a report on the *Selection and Election of the judges of the ECHR*.

In February 2020, the ECLJ published the report "NGOs and judges at the ECHR 2009 - 2019" (see above).

Such report benefited from a media coverage in whole Europe, and from governments', politicians' and lawyers' reactions. On May 7, 2020, a hundred of lawyers published an article requiring from the Court to "enforce itself the rules it imposes to the national courts regarding the right to a fair trial". Such article contained a set of recommendations[2].

In June 2020, the Committee of Ministers interviewed Mr. Linos-Alexandre Sicilianos, president of the ECHR, and questioned him about the accurateness of the ECLJ's report. According to the media[3], he didn't contest but answered that the States and not the Court are the ones who elect the judges, and that the number of identified conflicts of interest is low compared to the number of rendered decisions and, lastly, that is would be possible to revoke a judge participating to a case and being in an obvious conflict of interest situation. Mr. Spano, who replaced him at the Court's Presidency, adopted a similar approach on November 20th, 2020, during a discussion with the Parliamentary Assembly of the Council of Europe[4].

A. The three decisions taken by the Committee of Ministers of the Council of Europe

Between April 2020 and May 2022, six members of the Parliamentary Assembly of the Council of Europe (PACE) submitted each a different written question to the Committee of Ministers

[2] https://www.valeursactuelles.com/monde/une-centaine-de-juristes-lance-un-appel-pour-lindependance-et-limpartialite-de-la-cedh/

[3] https://www.valeursactuelles.com/clubvaleurs/monde/emprise-de-soros-sur-la-cedh-le-mutisme-inquietant-de-la-cour/

[4] Questioned precisely on the issue of conflicts of interest, M. Spano answered on the link between judges and NGOs. He declared: "*I'll give the same answer as my predecessor, Mr. Alexandre Sicilianos, gave to the Committee of Ministers in May. There is no allegation which is credible in our view on any influence by non-governmental organizations with the work of this Court. The fact that judges of this Court may, in their previous professional lives, have had an experience, a training in the field of human rights law through work in organizations shows the diversity of background that is necessary for an international Court. But the main issues here are directed to the Parliamentary Assembly. The parliamentary assembly elects the judges. The judges' Curriculum Vitae with all of the background information about their life's work is before you when you make your determination. It is for you to decide the diversity of the group that is within this Court. I would simply say I do not accept, and I make that very clear, I do not accept the allegations that have been made against this Court and that is the same opinion that has been presented by my predecessor Alexandre Sicilianos*." (Transcription). https://vodmanager.coe.int/coe/webcast/coe/2020-11-20-1/en

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asking what it intended to do to solve the issues identified in the ECLJ's report[5]. Such prerogative allows to the members of Parliament to question the ambassadors on issues in their area of competence.

At the ministerial meeting in Athens in November 2020[6], the Committee of Ministers "called upon all Convention actors to continue to guarantee the highest standard of qualifications, independence and impartiality of the Court's judges" and decides to encourage, inter alia, "to evaluate again by the end of 2024, in light of further experience, the effectiveness of the current system for the selection and election of the Court's judges[7]".

Through a decision dated April 8th, 2021, in response to three of the above written questions, the Committee of Ministers informed the members of parliament of its decision of Athens. The Committee of Ministers did not dispute the reality of the conflicts of interest in question; it recalled the need "to guarantee the highest standard of qualifications, independence and impartiality of the Court's judges," and indicated the measures previously taken to such purpose.

Through another decision, dated July 26th, 2021, the Committee of Ministers replied to two further written questions about the lack of judges recusal proceeding and the impossibility to require a review of the Courts decisions. While precising that the Court is in charge of solving these issues, the Committee of Ministers informs *inter alia*, that "the Court's Committee on Working Methods is reviewing the existing Rules of Court, including Rule 28.". This Rule, entitled "Inability to sit, withdrawal or exemption" addresses, among other things, the issue of conflicts of interest, but does not provide for a recusal procedure. The insufficiency of such article 28 of the Rules of the Court had precisely been criticized in the ECLJ's report as it did not provide for a formal recusal proceeding.

A last written question is still pending, at this report's publication date. It is so drafted: "Does the Committee of Ministers consider the implementation of measures aimed to require the publication of a declaration of interest by the judges of the European Court of Human Rights?"

Later on, during 2022, the President of the PACE, Tiny Kox, decided not to notify to the Committee of Ministers the new written questions from MPs addressing the ethics of ECHR. He is himself a former manager of one of the NGOs concerned by the ECLJ's report. One of such questions aimed to "*guarantee the transparency of the ECHR registry's composition"*, by enforcing the same rules as those of the court of Justice of the European Union (CJEU) or of the Inter-American Court of Human Rights (IACHR)[8]. This issue shall be examined bellow.

B. The Court review of its Resolution on Judicial Ethics

On September 2, 2021, the ECHR published a reviewed version of its "Resolution on Judicial Ethics" passed on June 21, 2021. This is a document drafted by the Court that precises its internal

[5] "How to remedy potential conflicts of interest of judges at the European Court of Human Rights ?", Doc. 15095, 23/04/2020; "Restoring the integrity of the European Court of Human Rights", Doc. 15096, 24/04/2020; "The systemic problem of conflicts of interest between NGOs and judges of the European Court of Human Rights", Doc. 15098, 29/04/2020; "Creating a right to request for a revision of decisions of the European Court of Human Rights", Doc. 15261, 08/04/2021; "Protecting the right to request the recusal of a judge of the European Court of Human Rights", Doc. 15260, 08/04/2021; "Requiring judges at the European Court of Human Rights to publish a declaration of interests", Doc. 15532, 17/05/2022.

[6] CM/Del/Dec(2020)130/4.

[7]130th Session of the Committee of Ministers, Athens, 4 November 2020, *4. Securing the long-term effectiveness of the system of the European Convention on Human Rights: assessment of the Interlaken process* CM/Del/Dec(2020)130/4, https://search.coe.int/cm/pages/result_details.aspx?ObjectId=0900001680a03db0

[8] Such question had been asked by Markus Wiechel MP on June 17th, 2022.

rules and the ethical obligations of the Judges. The previous text dated from 2008; compared to the new text, there is a deep review which partially answers to the issues raised by the ECLJ's report. The new text strengthens the obligations of integrity, independence, and impartiality of judges. Echoing the ECLJ's report, the resolution now requires from the judges to be independent of any institution, including any "*organization*" and "*private entity*." The text adds that judges "*shall keep themselves free from undue influence of any kind, whether external or internal, direct or indirect. They shall refrain from any activity, expression and association, refuse to follow any instruction, and avoid any situation that may be considered to interfere with their judicial function and to affect adversely public confidence in their independence*." The previous text was much more succinct.

On impartiality, the new text adds the explicit prohibition of being "*involved in dealing with a case in which they have a personal interest*". Judges shall further "*refrain from any activity, expression and association that may be considered to affect adversely public confidence in their impartiality*."

The new Court's Resolution on Judicial Ethics requires also from the judges to be assiduous to their functions of judge, to limit their external activities, and more significatively, not to criticize the Court, through the new prohibition from "*expressing themselves, in whatever form and medium, in a manner which may undermine the authority and reputation of the Court or give rise to reasonable doubt as to their independence or impartiality*". This relates among others to the untimely public declarations from judges on matters submitted to the Court examination. Another new prohibition relates to the acceptance of "*any decorations or honours during their mandate as a Judge of the Court*". This follows the scandal created by the acceptance from the President of the Court of a *honoris causa* doctorate in Turkey in September 2020[9].

In addition, on 20 March 2023, the ECHR published a revised edition of its Rules of court, to which it annexed a new "Practice direction on third-party intervention". Taking up recommendations made in the ECLJ report on the *NGOs and the Judges of the ECHR*, the Court now requires, significantly, that any application for third party intervention should "*contain enough information about: (a) the would-be third party; (b) any links between that would-be third party and any of the parties to the case; (c) the reasons why the would-be third party wishes to intervene.*" In its report, the ECLJ had exposed the lack of transparency of many interventions and recommended "*establishing a request form for third-party interventions in which the person requesting to intervene should declare his interests, (...) as well as his possible links with the parties, in particular if they are acting in concert*."

C. The experts' group on the judges created by the Committee of Ministers

On July 11, 2022, following the November 2020 Ministerial Meeting in Athens, the Steering Committee for Human Rights (CDDH), conducting the intergovernmental works of the Council of Europe related to human rights, mandated a "*Drafting Group on Issues Relating to Judges of the European Court of Human Rights*" to prepare, before December 31, 2024, a "*Report evaluating the effectiveness of the system for the selection and election of the Court's judges and the means to ensure due recognition for judges' status and service on the Court and providing*

[9] https://www.lemonde.fr/international/article/2020/09/09/le-Judge-europeen-robert-spano-a-istanbul-entre-flagornerie-et-esquive_6051459_3210.html

additional safeguards to preserve their independence and impartiality[10]". Such Committee shall propose to the CDDH measures aiming, among others, to solve the judges' independence and impartiality problems, including the issue of conflicts of interest. This is the most important consequence of the ECLJ's report.

D. Petition and draft resolution to the Parliamentary Assembly

On October 12, 2022, a petition entitled *Putting an end to conflicts of interest at the ECHR*, signed by 60,000 European citizens, was submitted to the Parliamentary Assembly of the Council of Europe, under Rule 71 of its Rules of Court. It requires the PACE to include this subject on its agenda, in order to draft a report and recommend solutions to the Committee of Ministers. The admissibility of the petition should be examined in May 2023 by the Committee on Legal Affairs and Human Rights of the PACE, before being possibly substantially examined.

On November 31, 2022, a motion for a resolution entitled *The serious problem of conflicts of interest at the European Court of Human Rights* (Doc. 15661) was tabled in the PACE by twenty members of Parliament of fourteen member States of the Council of Europe. Such text has been transmitted by the Bureau of the PACE to the same Commission "*for information within the frame of the examination of the admissibility of the petition received on the same issue*".

After examination of the petition, the Commission shall transmit its concluding observations and recommendations to the Bureau of the Assembly, that shall decide of the further courses of actions (probably in May 2023). The Bureau could register such petition and/or draft resolution to the Assembly's agenda, for the drafting of a report and the recommendations of measures to the Committee of Ministers. The Bureau could also decide to ignore the subject, to avoid a public discussion.

E. The departure of judges who were in conflicts of interest situation

The ECHR judges are elected by the PACE, from a list presented by the States and composed of three candidates. Their mandate has a nine-year duration. During the years 2020 to 2022, the mandates of four judges previously concerned by conflicts of interest have ended[11]. They have been replaced by other judges having no significant link with the NGOs active with the Court and identified in the 2020 report.

Furthermore, an employee of the Open Society (Maïté De Rue), Belgian candidate to the function of judge did not obtain to be elected on April 20, 2021, the Parliamentary Assembly of the Council of Europe favouring another candidate.

While on January 1, 2020, 13 of the 47 judges of the ECHR were former officials or collaborators of these NGOs, there remain 9 on March 1, 2023.

[10] CDDH, *Mandate of the drafting Group on issues related to judges of the European Court of Human Rights, CDDH*(2022)R96 Addendum 3 11/07/2022.

[11] Judges Laffranque, Pinto de Albuquerque, Turković and Yudkivska.

Furthermore, Yonko Grozev, exposed in the 2020 report for some obvious conflicts of interest, has no elective mandates within the Court any more since May 18, 2022, after having been elected Section Vice-President on August 13, 2018, and then Section President on May 18, 2020.

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Part II: Continuation of conflicts of interest (2020-2022)

The institutional changes and initiatives indicated in the first part of this report aimed to the right direction. Nevertheless, during the years 2020 to 2022, the concerns identified by the ECLJ in 2020 remain. As in 2020, the method used to identify the cases of conflicts of interest consists in identifying the NGOs active with the Court and having former associates within the judges, then observing how such judges acted in the cases initiated or supported by their former employer or NGO. This method allows the identification of undeniable cases of conflicts of interest, but deals only with the cases for which the decision has been published by the Court and those for which the NGO's action may be seen. Furthermore, we did not number the cases of indirect conflicts in which, for instance, a former manager of the Open Society would decide on a case initiated or supported by one of the many NGOs financed by the Open Society.

There is also another category of conflicts of interest, but rather more difficult to identify and enumerate: the case where an activist campaigns on a topic before becoming judge on such topic once elected to the ECHR. Such kind of conflicts of interest or of breach of impartiality, may be qualified of topical; it was not mentioned in the 2020 report, but shall be described herein.

A) Reminders on the principles of a court's impartiality

The Court clarified that the impartiality of the court, implied by the right to a fair trial, is defined by the absence of any prejudice or bias on the part of judges[12]. It can be assessed *subjectively*, by seeking "to ascertain the personal conviction or interest of a given judge in a particular case", and *objectively*, by determining if the judge "offered sufficient guarantees to exclude any legitimate doubt in this respect"[13].

> Thus, according to the Court:
>
> "It must be determined whether, irrespective of the judge's personal conduct, there are ascertainable facts which may raise doubts as to his impartiality. In this respect even appearances may be of a certain importance. What is at stake is the confidence which the courts in a democratic society must inspire in the public, including the accused. Accordingly, any judge in respect of whom there is a legitimate reason to fear a lack of impartiality must withdraw. In deciding whether in a given case there is a legitimate reason to fear that a particular judge lacks impartiality, the standpoint of the accused is important but not decisive. What is decisive is whether this fear can be held to be objectively justified (see, *mutatis mutandis*, the *Hauschildt* judgment cited above, p. 21, § 48[14])."

[12] ECHR, *Wettstein v. Switzerland*, No 33958/96, 21 December 2000, §43; ECHR, *Micallef v. Malta* [GC], No 17056/06, 15 October 2009, § 93; ECHR, *Nicholas v. Cyprus*, No 63246/10, 9 January 2018, §49.
Kyprianou v. Chypre [GC], n° 73797/01, December 15th, 2005, § 118; *Piersack v. Belgique*, n° 8692/79, October 1st, 1982, § 30; *Grieves v. United Kingdom* [GC], n° 57067/00, December 16th, 2003, § 69; *Morice v. France* [GC], n° 29369/10, April 23rd, 2015, § 73.
[14] ECHR, *Castillo Algar v. Spain*, No 28194/95, October 28th, 1998, § 45. See also, the Guide on Article 6 of the European Convention on Human Rights, *op. cit.*, § 241. Underlining from us.

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The objective assessment "mostly concerns hierarchical or other links between the judge and other protagonists in the proceedings"[15].

Thus, there is no need for the judge's partiality to be proven to be challenged; it is enough that it can be questioned, if only for its appearances.

For comparison, French Law also widely defines the conflicts of interest, as "any situation of interference between a public interest and publics or private interests, that may influence or seem to influence the independent, impartial and unbiased exercise of a function"[16].

The existence of a link between a judge and one of the parties may be sufficient to cause such doubt. It is obvious that a judge faces a conflict of interest when a request is made by an organization of which he/she is, or has been close to, or even collaborating with. This is the case not only when the organization appears in the proceedings, but also when its action has been informal. Regarding third-party interventions, the NGO is indeed not an applicant, but a third party. However, it almost always intervenes in support of one of the parties, generally the applicant, and its intervention can greatly weigh up in the final decision. The risk of partiality of the judge with regard to this intervening NGO, and therefore its arguments, also exists. It should be noted in this regard that, in its provisions relating to incompatibilities, the Rules of the Court do not distinguish between the two modes of action and forbids any former judge to "*represent a party or third party in any capacity in proceedings before the Court*" before the expiration of a period of two years after the end of their mandate (Article 4, paragraph 2).

As comparison, a scandal broke out in the United Kingdom in 1998 related to the famous Pinochet case, when it appeared that one of the judges who rendered the decision, Lord Hoffmann, was also benevolent manager of a branch of Amnesty International. Such organization participated to the case as third party. The House of Lords had to rejudge the case and ultimately rendered a different decision as the first ruling rendered with Lord Hoffmann[17].

The fact that a judge sits with other judges within a Chamber, and not as a single judge, is not sufficient to remove the doubt on his impartiality since, as indicated by the Court, due to the secrecy of the deliberations, it is impossible to know his/her real influence[18]. According to the Court's case-law, any judge whose to lack of impartiality could legitimately be feared ought thus to withdraw [19]. The fact that the applicants did not require the recusal of one judge does not free such judge from the obligation[20] to take by him/herself the necessary measures. In this regard, the Court checks the existence in national laws of a legal obligation for the judge to inform his president of circumstances which may justify his withdrawal. Furthermore, the Court requires, in the event of a challenge by a party, the courts to answer in detail the arguments given to support this demand[21], where it "does not immediately appear to be manifestly devoid of merit"[22].

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[15] ECHR, *Morice v. France*, [GC], *op. cit.,* §77; ECHR, *Micallef v. Malta* [GC], *op. cit.,* § 97.

[16] Ordinance n° 58-1270 dated December 22th, 1958 organic law on the magistrature's status, article 7-1.

[17] https://www.lemonde.fr/archives/article/1998/12/19/la-decision-des-lords-renvoie-l-affaire-pinochet-a-son-point-de-depart_3682402_1819218.html

[18] ECHR, *Morice v. France* [GC], above, § 89.

[19] ECHR, *Micallef v. Malta* [GC], above, § 98; ECHR, *Castillo Algar v. Spain, ibid*; ECHR, *Morice v. France*, above, § 78; and ECHR, and *Ramljak v. Croatia*, n° 5856/13, June 27, 2017, § 31.

[20] ECHR, *Škrlj v. Croatia*, n° 32953/13, July 11th, 2019, § 45.

[21] ECHR, *Harabin v. Slovaquia*, n° 58688/11, November 20, 2012, § 136.

[22] ECHR, *Remli v. France*, n° 16839/90, April 23, 1996, § 48.

The ECHR should, of course, ensure to apply these requirements to itself. Thus, the Court imposed on itself the rule preventing a judge from sitting twice in the same case in the event of a referral to the Grand Chamber, except, however, for the President of the Chamber and the national judge[23]. It is nevertheless surprising that there is no formal withdrawal procedure within the ECHR, unlike the Court of Justice of the European Union [24]. The Rules of the ECHR only provide for the obligation for a judge to withdraw, on his own initiative, in case of doubt as to his independence or impartiality. A "Resolution on Judicial Ethics" adopted by the ECHR on 23 June 2008 somewhat clarifies the judges' obligations [25] and the procedure to be followed in case of doubt. Lastly the Court's President has the power to "exceptionally" modify the composition of the sections "if circumstances so require"[26]. This power is necessary, but it can only be exercised in a timely manner if the President is informed by the judges of the existence of situations likely to question their impartiality.

In a judgment of 30 March 2023, in the case of *X v. Czech Republic* (64886/19), the ECHR agreed to review an earlier judgment, after the applicant had found that one of the judges had sat in violation of Rule 28 of the Rules of Court, as the judge had already participated in the proceedings in the domestic courts. The Court considered that even if the applicant had been able to anticipate the judge's potential participation in the judgment of his case, "the responsibility for the implementation of Rule 28 and, in particular, of the principle of objective impartiality, cannot clearly be left to the sole initiative of the parties" (§ 15). In other words, the fact that the applicant did not request the prior withdrawal of a particular judge, even though he or she might have been able to deduce from the composition of the Section that that judge would be likely to hear his application, was not sufficient to reject the application for review of the judgment adopted by that judge. The Court also held that it is not necessary to show that the participation of that judge could have had a "decisive influence" on the case in order to obtain a review. It is sufficient to find that the requirements of Rule 28 of the Rules of Court regarding objective impartiality have not been met.

B) The increasing involvement of the identified NGOs and foundations

The organizations identified in the 2020 report are A.I.R.E. Centre, Amnesty International, the International Commission of Jurists (ICJ), the net of Helsinki committees and foundations, Human Rights Watch[27], Interights and the Open Society Foundation (OSF) along with its various branches. Among those organizations, the Open Society Foundation of George Soros set itself apart as twelve of its associates have been judges with the ECHR during the reviewed period, and as it finances the six other organizations. Interights ceased its activities since, due to a lack of financing. Many other organizations act with the European Court but did not provide it with judges; therefore, they are not mentioned here.

[23] Article 24 §2 d) of the Rules of Court updated on September 9, 2019.
[24] Article 38 of Protocol No 3 on the Statute of the CJEU.
[25] The text of the Resolution is in appendixes.
[26] Article 25 § 4 of the Rules of the Court.
[27] At the beginning, in 1978, such NGO was called *Helsinki Watch*. In 1988, *Helsinki Watch* and its affiliates became *Human Rights Watch*. https://www.hrw.org/our-history (visited on 01/02/2020).

Such organizations act with the Court, often in concert, in the frame of strategic litigations[28], i.e., cases elaborated in a political purpose. The aim is to obtain "from the outside", through the ECHR or other international bodies, the condemnation of a practice or a law applicable in a country, failing to reach the change of the same from the interior through elections or government. Some NGOs did thus impose considerable changes to refractory governments. The ECHR's decisions are all the more strategic as they set a precedent for the 46 member States of the Council of Europe. The purpose of this report is not to question the practice of strategic litigations but to target the concerns arising from the fact that an important proportion of the Court is composed of individuals coming from activist organizations acting with the same Court.

Within cases judged between 2009 and 2019, ECLJ identified 185 in which at least one of the seven NGOs was formally involved in proceeding, which is, on average, 17 cases per year. For cases judged between 2020 and 2022, this average increases up to 38 per year, namely twice.

This sharp increase is visible although the number of cases settled per year has decreased by about 35% between these two periods. The figures for the years 2020 to 2022 therefore reveal a strengthening of the involvement of these NGOs in the Court during the past years.

These figures correspond to formal and noticeable participations in the procedure, such as the representation of the applicant or an intervention as a third party. The 2020 ECLJ's report noted that the Court does not systematically cite the NGO acting in the cases, or that NGOs do not act in a transparent manner. For the years 2020 to 2022, the failure by the Court to mention the action of NGOs could be observed on several occasions, as in the Grand Chamber cases *Muhammad and Muhammad v. Romania* and *Grzęda v. Poland*, quoted below. The same was true in the landmark case of *Muhammad v. Spain*, no. 34085/17 of October 10, 2022, where the applicant was represented by lawyers from the Open Society without the latter being mentioned in the case. As in all strategic litigation cases, the applicant was supported by a group of third-party interveners.

It is almost certain that some NGO interventions over the period could not be identified.

⇨ See Recommendation n°6

C) 54 cases of conflicts of interest with the identified NGOs between 2020 and 2022

Among the 114 cases in which at least one of the six NGOs openly intervened, in 34 of them, some judges sat and ruled, which created 54 direct conflicts of interest[29]. These judges sat even though "their" former NGO was defending the applicants or intervening as a third party. The conflict of interest was then due to the significant tie between the judge(s) and one of the parties to the case.

Thus, in the case of intervention by one of the relevant NGOs in the procedure, the impartiality of the ECHR is thus not guaranteed in 30% of the cases. It is widely important but, compared to

[28] Extracts of the *Strategic Litigation* report dated 2018 of the Helsinki Federation for Human Rights (Poland), p. 3 : "Strategic litigation as a method of obtaining ground-breaking decisions with a view to changing laws and practices could in no way do without the use of such a measure as the ECtHR application". See also the OSJI report "Global Human Rights Litigation Report", April 2018 : https://www.justiceinitiative.org/uploads/4e9483ab-a36f-4b2d-9e6f-bb80ec1dcc8d/litigation-global-report-20180428.pdf (visited on 01/02/2020).

[29] The list of the 34 judgments and decisions involving 54 situations of conflicts of interest is attached as an appendix.

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the proportion in the period 2009 - 2019, 48 %,[30] there is nevertheless an improvement. This development is mainly due to the end of the mandates of four judges linked to some of the seven NGOs (see below).

In the vast majority of those 34 cases with conflicts of interest, the Court agreed with the party that was supported by the NGO. In other words, the Court followed the logic supported by the NGO.

The judges involved in the conflicts of interest the three last years are Grozev (12 cases), Yudkivska, Schukking (9), Eicke (6), Kucsko-Stadlmayer (4), Motoc, Felici (3), Mits, Pavli, Pinto de Albuquerque (2), Kūris ans Turković (1).

Such figures deal only with the cases of institutional conflicts of interest, arising from the link between a judge and a party to the litigation. Among those 34 ECHR judgments and decisions, 7 relate to Grand Chambre decisions.

Not all identified conflicts of interest have the same degree of seriousness. This depends on the degree of past involvement of the judge concerned with the party, its representative or the third party involved in the case. For example, a judge who has founded or led one of these parties or its representative is more involved in it than a judge who has collaborated with it on a voluntary basis, or who has collaborated with a different national Helsinki committee than the one acting in the case.

As indicated above, such conflicts of interest violate the right to a fair trial and would certainly be censured by the ECHR should they take place in national courts.

We identified another type of conflicts of interest, that is mentioned at the end of this second part of the report.

⇨ See Recommendations n[s] 1, 2, 9 and 10

D) Rejection of recusal requests from Bulgaria

Yonko Grozev is the founder of the Bulgarian Helsinki Committee and was one of its managers from 1992 to 2013. He has been in a situation of conflicts of interest in various litigations filed or supported by this Committee. In March 2020, the Bulgarian Justice Minister, reacting to the ECLJ's report, publicly mentioned the hypothesis of Mr. Grozey's recusal, while recalling this is a decision of the ECHR[31].

Since 2020, to our knowledge, the Bulgarian Government challenged Mr. Grozev in (at least) four litigations, as the applicant's attorney belonged to the Bulgarian Helsinki Committee and acted in its name. It must be indicated that, contrary to other litigations, the link between the attorney and the Helsinki Committee is explicitly indicated in the four decisions.

The first litigation is *D.K. v. Bulgaria*, examined on December 8, 2020 (n° 76336/16). The Bulgarian Helsinki Committee, whose attorney was Adela Kachaunova, filed the case in December 2016, i.e., less than two years after the election of Mr. Grozev to the Court. The decision indicates that, on March 9, 2020, "*the Government required the recusal of Mr. Grozev*

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[30] Over the 185 cases heard between 2009 and 2019 in which at least one of these NGOs participated, the report identified 88 cases of conflicts of interest, i.e., in 48 % of the cases.

[31] https://www.dnevnik.bg/intervju/2020/03/06/4037509_ionko_grozev_problemut_e_deloto_kolevi_za/

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as he was a founder of the Bulgarian Helsinki Committee and its member from 1992 to 2013" (§ 4). This request has been refused by the Court on November 17th, 2020 (§ 4). The Court ultimately agreed with the applicant and the Bulgarian Helsinki Committee and condemned Bulgaria "*to directly pay on the bank account of the Bulgarian Helsinki Committee"* 1500 euros of fees and expenses (§ 102). Mr. Grozev had been elected President of the section composing this chamber in May 2020 and was, as such responsible of the judicial ethics enforcement.

In the case *Anatoliy Marinov v. Bulgaria*, examined on February 15, 2022 (n° 26081/17), the applicants were represented by the president and co-founder with Mr. Grozev of the Bulgarian Helsinki Committee [32], Krassimir Kanev. This later was further member of the Bulgarian national selection committee that selected and suggested Mr. Grozev for the position of judge at the ECHR, which was already criticised in 2014 by the Bulgarian civil society. The ECHR decision indicates that Tim Eicke, president of the Chamber, rejected the recusal request of Mr. Grozev filed by the Government, allowing him to sit[33]. Judge Eicke also sat in similar situations of conflicts of interest. The fees and expenses have been directly paid to the Bulgarian Helsinki Committee.

In the case *I.G.D. v. Bulgaria*, examined on June 7, 2022 (n° 70139/14), the situation is identical. M. Kanev represented the applicant. Tim Eicke, president of the Chamber, rejected the recusal request of Mr. Grozev filed by the Government, allowing him to sit.[34] The fees and expenses (2 451 euros) have been directly paid to the Bulgarian Helsinki Committee.

In the case *Paketova and others v. Bulgaria*, examined on October 4, 2022 (nos. 17808/19 et 36972/19), Mr. Kanev was still representing the applicants. The decision indicates a rejection of the recusal request of Mr. Grozev filed by the Government, without indicating whether it has been taken by the chamber or its president Mrs. Gabriele Kucsko-Stadlmayer. This later also sat in in similar situations of conflicts of interest. Judge Grozev sat in the court.[35] The fees and expenses (9000 euros) have been directly paid to the Bulgarian Helsinki Committee.

⇨ See Recommendation n°10

E) Some recusals

Unlike in the above cases in where judge Grozev refused to be removed, the same judge withdrew in seven other cases initiated by a Helsinki Committee between 2020 and 2022. Even then before 2020, judge Grozev had been nine times in a conflict-of-interest situation, even though he withdrew in nine other cases in the same circumstances.

Between 2020 and 2022, judge Grozev withdrew in the seven following cases:

The case *T. v. Bulgaria* (n° 41701/16), published on July 9th, 2020, was supported by the Bulgarian Helsinki Committee acting as third party. The applicant's attorney was Natasha Dobreva, Grozev former partner in the law firm he founded and that bears their two names

[32] See his short biography on the Bulgarian Helsinki Committee website (consulted le 18/01/2020).
[33] This is not the subject of this paragraph but note that judge Jolien Schukking sat also, despite his former position in the Netherlands Helsinki Committee.
[34] As in the previous case, judge Jolien Schukking also sat, in a conflict-of-interest situation.
[35] As in the previous case, judge Jolien Schukking also sat, in a conflict-of-interest situation.

(Grozev&Dobreva). Mrs Dobreva worked nine years in this law firm[36]. In this case, judge Grozev founded all at once the law firm of the applicant's lawyer and the NGO participating as third party.

The cases against Bulgaria *Vasilev and Society of the repressed Macedonians in Bulgaria victims of the communist terror* (n° 23702/15), *Fartunova and Kolenichev* (n° 39017/12) and *Yordanovi* (n° 11157/11), examined respectively on May 28th, June 16th, and September 3rd, 2020, have been initiated by the Bulgarian Helsinki Committee, whose president, Krassimir Kanev, represented the applicants. In one of those three cases, *Fartunova and Kolenichev v. Bulgaria* (n° 39017/12) one of the two applicants, Daniela Fartunova, was also lawyer with the Bulgarian Helsinki Committee and, as such, had closely worked with Yonko Grozev[37].

In the case *Macedonian Club for Ethnic Tolerance in Bulgaria and Radonov v. Bulgaria* (n° 67197/13), published on May 28th, 2020, the applicant's lawyer, Toni Menkinoski, is a member of the North Macedonian Helsinki Committee[38].

In the cases *Behar and Gutman* (n° 29335/13) and *Budinova and Chaprazov* (n° 12567/13) versus Bulgaria, published on February 16th, 2021, the applicant's attorneys were Margarita Ilieva then Adela Kachaunova, of the Bulgarian Helsinki Committee, then Mr. Kanev for the second case. The Greek Helsinki Monitor participated as third party. Margarita Ilieva and Adela Kachaunova have followed one after each other Mr. Grozev as director of the legal department of the Bulgarian Helsinki Committee[39]. Mrs Ilieva and Mr. Grozev wrote together some reports or other texts[40]. According to Mr. Grozev's curriculum, he left the Committee in 2013, i.e., the same year or shortly after the applications had been filed with the ECHR, and he may have worked on them within the Helsinki Committee.

However, the cases in which Mr. Grozev withdrew do not allow to understand his decision not to withdraw in the other cases filed by the same Bulgarian Helsinki Committee.

Regarding the other cases of judges' withdrawal, the reason has not been identified.

⇨ See Recommendation n°10

F) Politically sensitive cases in Eastern Europe

The ECLJ's report noted that the cases of conflict of interest between 2009 and 2019 mainly concerned judges and cases from Eastern Europe[41]. This is still the case between 2020 and 2022. Some cases are politically sensitive. 7 of the 34 identified cases of conflict-of-interest concern judgments of the Grand Chamber. They are as follows:

- *N.D. and N.T. v. Spain* [GC], n^{s} 8675/15 et 8697/15, 13/02/2020.
- *N. and others v. Belgium* [GC], n° 3599/18, 05/03/2020.
- *Muhammad and Muhammad v. Romania* [GC], n° 80982/12, 15/10/2020.
- *Hanan v. Germany* [GC], n° 4871/16, 16/02/2021.

[36] See her Linkedin profil (visited on 17/02/2023).
[37] See for instance the activity report dated 2006 of the Bulgarian Helsinki Committee, p. 6. For instance, they worked together in the Legal Defense Program of the Bulgarian Helsinki Committee.
[38] See for instance the activity report dated 2008 of the North Macedonian Helsinki Committee.
[39] https://www.bghelsinki.org/en/who-we-are/history
[40] See for instance the annual reports of the Bulgarian Helsinki Committee "Human Rights in Bulgaria" in 2004 and 2005 ; see this letter.
[41] Grégor Puppinck (dir.), Delphine Loiseau, « NGOs and the judges of the ECHR, 2009 – 2019 », February 2020, p. 10.

- *Big Brother Watch and others v. UK* [GC], n^{s} 58170/13, 62322/14 and 24960/15, 25/05/2021.
- *Grzęda v. Poland* [GC], n° 43572/18, 15/03/2022.
- *Kavala v. Turkey* [GC], n° 28749/18, 11/07/2022.

Some examples:

- ***Muhammad and Muhammad v. Romania* [GC]**, n° 80982/12, October 15th, 2020

The applicants are two Pakistanis involved in terrorist activities and being subject to deportation proceedings. They were represented in Court by Eugenia Crangariu, a lawyer of the Romanian Helsinki Committee, and supported by another Helsinki Committee and Amnesty International (third parties). The Court did not indicate in the judgment the attorney's membership of the Romanian Helsinki Committee. Judges Yudkivska and Pinto de Albuquerque sat on the case, despite their strong links with the Helsinki Committee and Amnesty International (respectively). The ECHR ruled in favour of the Pakistani applicants and found that Romania had violated their rights (Article 1 Protocol 7).

- ***Mándli and others v. Hungary***, n° 63164/16, May 26th, 2020

The applicants are journalists and their accreditation to enter the Hungarian Parliament had been suspended after illegal filming and recording of parliamentarians and their intrusion into a prohibited space. They were supported by a Helsinki Committee (third party). Judge Schukking sat on the case in spite of his former role in a Helsinki Committee. The ECHR ruled in favour of the applicants and unanimously held that Hungary had violated their right to freedom of expression (article 10).

- ***Grzęda v. Poland* [GC]**, n° 43572/18, March 15th, 2022

The applicant is a former Polish judge, who was dismissed in the context of the judicial reforms in Poland. He was represented in court by Mikołaj Pietrzak and Małgorzata Mączka-Pacholak, lawyers practicing for the Helsinki Foundation for Human Rights of Warsaw[42]. He was supported by the same Foundation, Amnesty International and the International Commission of Jurists (third parties). The Court did not indicate in the judgment that the attorneys belonged to the Helsinki Foundation. Judge Felici sat in the case, in spite of his former role in Amnesty International, as did Judge Grozev even though he was the founder of a Helsinki Committee and a member of it for over twenty years. The ECHR ruled in favour of the applicant, finding that Poland had violated his rights (Article 6 § 1) and that the judicial reform of the conservative government was aimed at weakening the justice' independence.

- ***I.G.D. v. Bulgaria***, n° 70139/14, June 7th, 2022

In this above-mentioned case, the applicant was a minor and was placed in special institutions on the grounds that he had committed several criminal offences (arson and sexual harassment). He was represented in Court by Krassimir Kanev, president of the Bulgarian Helsinki Committee. In contrast to the previous quoted cases, this connection between the lawyer and the Bulgarian Helsinki Committee is explicitly stated in the

[42] Those two lawyers work within the law firm Pietrzak Sidor i Wspólnicy that has a pro bono activity, including for the Helsinki Foundation, (https://pietrzaksidor.pl/pro-bono/) and each has personally collaborated with such Foundation (https://pietrzaksidor.pl/zespol/). Mikołaj Pietrzak was the coordinator of a program of the Helsinki Foundation. Małgorzata Mączka-Pacholak also worked as lawyer within the strategic litigations program for such Foundation in Warsaw.

judgment. Judge Grozev sat in the case, despite being a founder and member for more than twenty years of this Helsinki Committee. For this reason, the Bulgarian Government had requested the Court to deport Judge Grozev (see above). Judge Schukking also sat in the case, despite his former role in another Helsinki Committee. The ECHR ruled in favour of the applicant and condemned Bulgaria for not having sufficiently respected the best interests of the child (Articles 5 § 4; 8; 8 and 13 combined). The Court also awarded the applicant the sum of 2,451 euros for costs and expenses, plus any tax due on that sum, "*to be paid directly into the bank account of the Bulgarian Helsinki Committee"* (§ 104).

G) Identification of "topical" conflicts of interest

The conflicts of interest identified in the ECLJ's 2020 report and continuing between 2020 and 2022 may be qualified as institutional as they result from the institutional link between a judge and a party or third party. There is also another type of conflict of interest, resulting from the former commitment of a judge or of his/her NGO on a topic to be examined by the Court. Such topical conflicts of interest are much more difficult to identify and measure than the institutional conflicts of interest, as they result from circumstances individual for each judge.

An example of topical conflict of interest is given by the behaviour of the Albanese judge, Darian Pavli, as he ruled on the conventionality of the reform of the Albanian justice system, of which he had been one of the main designers a short time before.

Darian Pavli is a former student of the Central European University, founded and financed by George Soros. He worked among others for Human Rights Watch, and for the Open Society between 2003 and 2017. In 2015 and 2016, he indicated having advised the President of the special parliamentary committee on the reform of the Albanian justice. In 2016–2017, he indicated having supervised the activities of the Open Society Foundation for Albania, including in relationship with the reformation of the justice, as Programs Director. According to Andi Dobrushi, the executive director at the Open Society Foundation for Albania in 2016, "The Open Society Foundation for Albania has been the primary funder of the entire reform process, including the work of the high-level group and their support infrastructure, the online portal, and the bulk of the public events organized to collect public feedback[43]. » Since 2015, the OSF allocated 600 000 dollars to finance such reform[44]. Such financing and such involvement of the OSF in the national political process lasted up to its end.

The Open Society Foundation invested in Albania more than 131 million dollars between 1992 and 2020[45]; the relationship between its current Prime Minister, Edi Rama, and MM George and Alexander Soros is very close. Regarding the reform of the justice, implemented from the election of Mr. Rama, the OSF acted in collaboration with the democrat US administration, through USAID, and with the European Union, through EURALIUS. USAID paid 60 million dollars between 2000 and 2015 in the Albanian justice sector. In 2016, USAID also paid 8.8 million dollars to "enhance the judiciary performances"[46] in the context of the reform of the justice. Such amounts were often used in coordination with the OSF, that participated to the

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[43] Andi Dobrushi, *How Albania Is Reforming Its Troubled Justice System*, 2016, https://www.opensocietyfoundations.org/voices/how-albania-reforming-its-troubled-justice-system

[44] The Open Society Foundations in Albania - Open Society Foundations, (Visited on Feb. 6 2023)

[45] Ibid.

[46] USAID Announces $8.8 Million Program to Support Albanian Courts | U.S. Agency for International Development (archive.org)

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choice of their allocation. In a letter dated on March 2017, a group of US senators worried about such collaboration, as it intended, in their opinion, to reinforce the government's power over the justice[47].

The judicial reform comprises a reorganization of the process of the judges' nomination and a mechanism called "vetting", i.e., a review performed by a special parliamentary commission of the judges' assets to detect the cases of corruption and to expel from magistracy the individuals unable to explain the origin of their assets[48]. The opposition, minority in the Parliament, denounced some aspects of such reform as allowing the government to politically cleanse the judicial system of its opponents and to control it. The OSF's role in such reform was specifically denounced[49]. It is not the place to examine such question but to observe the importance of Mr. Pavli's commitment in such highly important political process.

Yet, it shall be noticed that, once appointed to the ECHR, M. Pavli decided on cases related to the compliance of such reform with the European Convention. He thus judged the main case in that respect, *Xhoxhaj v. Albania*, no. 15227/19, dated February 9th, 2021, then the cases *Besnik Cani v. Albania*, no. 37474/20 dated October 4th, 2022, and *Nikëhasani v. Albania* no. 58997/18 dated December 13th, 2022 whose decisions relied on the precedent case *Xhoxhaj.*

The case *Xhoxhaj* questioned a key point of the judicial reform, i.e., the possibility for members of parliament to judge and dismiss judges. Altina Xhoxhaj, former judge, blamed the parliamentary "special commission" that judged her, for not being a "court established by law" and thus for having condemned her in breach of the right to a fair trial guaranteed in article 6 of the Convention. Such right establishes indeed that only a real court may render a sentence, which was obviously not the case in Albania within the frame of such proceedings. Altina Xhoxhaj reproached further to such commission not to be an "independent and impartial" court. A condemnation by the ECHR would have ruined the Albanese reform. Eventually, even though the mechanism created by the reform is contrary to the well-established requirements of the ECHR in such matters, nevertheless this later considered it was acceptable in the case, due to exceptional circumstances resulting from the necessity to fight against corruption in Albania.

A part of the Albanese media denounced the conflict of interest of Mr. Pavli, declaring that "the presence of de Darian Pavli in the Strasbourg litigation violates the integrity of an impartial court, as one of its members is the author of the provisions that disqualified Mrs Xhoxhaj [and are disputed by her], it would then be unthinkable that Pavli vote today against the law he himself approved[50]." This is even more serious as the matter of such litigations was highly political and labelled with a strong contest from the opposition to the government.

Incidentally, the applicant, Altina Xhoxhaj, was a competitor of Mr. Pavli among the candidates to the position of judge with the ECHR[51].

M. Pavli did not withdraw for this litigation nor for the next ones.

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[47] https://www.cruz.senate.gov/imo/media/doc/Letters/20170314_Letter%20toTillersononMacedoniaUSAID.pdf

[48] Hoppe, Tilman: *Money Talks: The ECtHR is Getting Rid of Corrupt Judges, VerfBlog,* 2021/3/05, https://verfassungsblog.de/money-talks/, DOI: 10.17176/20210305-154025-0.

[49] On this matter, see the report drafted by Sali Berisha, former Albanian President and Prime Minister, *The role of Open society foundation in putting the justice system under the control of the Albanian socialist party through the judicial reform*, https://www.ifimes.org/en/researches/the-role-of-open-society-foundation-in-putting-the-justice-system-under-the-control-of-the-albanian-socialist-party-through-the-judicial-reform/4949?#

[50] *Drejtësi invalide nga Strasburgu*, 9.02.2021, http://www.respublica.al/2021/02/09/drejt%C3%ABsi-invalide-nga-strasburgu

[51] Government Publishes New List of ECtHR Candidates - Exit - Explaining Albania

As a former ECHR judge, Javier Borrego[52], has pointed out, another illustration of Mr Pavli's problematic behaviour is the landmark cases of *Muhammad v. Spain* (no. 34085/17) and *Basu v. Germany* (no. 215/19), both of which involve charges of racial discrimination against the police in the course of identity checks. They are, as Mr. Pavli himself puts it, "twin cases," i.e. on exactly the same subject matter, decided on the same day by the same section of the Court. Yet at least one of the two cases (Muhammad) is a strategic litigation of the Open Society. Mr Pavli did not sit on that case. He did, however, sit on the other case and published a separate cross opinion in which he comments not only on the *Basu* mare, but also on the Muhammad judgment.

⇨ See Recommendations n^os^2, 8, 9 and 10

[52] https://theobjective.com/elsubjetivo/opinion/2022-11-08/policia-nacional-no-racista/

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Part III: Other dysfunctions related to the judges and the impartiality of the European Court

Since the 2020 report, the ECLJ deepened its research and identified some new problems related to the judges and the impartiality of the European Court. Some of these problems arose after our attention focused on Messrs. Grozev and Pavli due to the identified conflicts of interest indicated above. Our intention is not to particularly or personally point one judge or another, but to expose their situation as an illustration of identified structural problems. The situation of the other judges has been examined only with regard to the NGO active with the Court, such list is then not comprehensive.

A) Contestation of some judges' impartiality due to their former activist commitment

It must be reminded that the Rules of Court indicates that a judge may not take part in the consideration of any case if, among others, *"his or her independence or impartiality may legitimately be called into doubt"* (art. 28 e). The Court stated that the impartiality is defined *inter alia* by the absence of prejudice or bias from the judges and, that in such matter, "*even the appearances may be of importance*".

Further to the cases of topical conflicts of interest, it is possible to identify other troublesome cases in which a judge's impartiality may be questioned due to his/her former commitment in an organization active on the topic he/she has to investigate as judge. Such cases may be very numerous and bear on topics dear to the NGOs active with the ECHR.

The judges' NGOs of origin act with the Court in important matters, likely to create a legal precedent, and related mostly to freedom of speech[53], right to asylum[54], sexual rights[55], conditions of detention[56], and minorities rights[57]. They act in particular through strategic litigation, i. e., by using the litigations as means to achieve a political general goal, as indicated above.

This is not the place to seek every case where an applicant could legitimately question a judge's impartiality due to his/her former commitment but to give examples.

An example of this issue is given by a decision date January 19, 2020, of Yonko Grozev in a case about euthanasia (application n°55987/20). He rejected the request of parents requiring the Court to take "interim measures", for their relative, a Polish patient in a state of coma, so that he would not be let to die and may be repatriate in his country to be cared for with dignity. The polish bishops offered to pay all expenses. Yonko Grozev decided alone on such request and briefly

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[53] Open Society Justice Initiative (OSJI) participated in 10 cases linked to freedom of speech over a total of 20 participations (third party intervention or direct participation), Human Rights Watch in 5 cases over 14, CIJ in 3 over 32.

[54] Regarding the right to asylum: Amnesty International participated in 8 cases on this topic over a total of 22, HRW in 4 over 14, Interights in 5 over 20, Aire Centre in 11 over 38 or CIJ in 5 over 32.

[55] Regarding the LGBT rights: Amnesty International participated in 3 cases on this topic over 22, Interights in 3 over 20, Aire Centre in 5 over 38, CIJ in 8 over 32.

[56] The Helsinki NGOs participated in more than 28 cases linked to custody and conditions in prison over 95, Aire Centre in 4 cases over 38, CIJ in 3 cases over 32.

[57] Regarding the minority rights, OSF participated in 2 cases on this topic over a total of 20 cases, Interights in 3 cases over 20, Aire Centre in 6 cases over 38.

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rejected it, depriving thus the patient of the chance to be cared for. Having noticed, upon its notification, that such decision had been taken by a former manager of the Open Society, the patient's family required from the President of the Court the review of the decision on the ground that such foundation pays important amounts to activist organizations acting in favour of euthanasia. The patient's family could legitimately think that Mr. Grozev agrees with such activist commitment and could thus doubt of his impartiality. Such request has been rejected by President Spano, simply declaring that the "allegations" questioning the impartiality of Mr. Grozev were groundless, thus sealing the fate of the polish patient, who died shortly later of dehydration in the United Kingdom.

Another example of such concern is the situation of judge Kūris who was an associate and manager of the Lithuanian Open Society from 1993 to 2003. He also founded in 1994 the Lithuanian Center of Human Rights. Since the beginning of his ECHR mandate, in 2013, he sat in direct situation of conflict of interest in a litigation filed by his former NGO[58]. Further, as for the judge Grozev, the impartiality of this judge may legitimately be questioned when in charge of a file on a cause or a claim for which he previously advocated. It is the case, for instance, of the promotion of sexual rights, that constitutes an operational priority of the NGO founded by Mr. Kūris[59] and of the OSF[60]. Further, after his election to the ECHR, judge Kūris expressed his opinion in the media[61]. Such personal public commitment of Mr. Kūris on this matter did not convince him to withdraw, but on the contrary he stands out from the other judges by holding the most radical positions in the four cases he judged in this matter[62].

Such cases show that it is detrimental to nominate activists as judges, as their impartiality could always be questioned when they will be in charge of cases related to issues for which their NGO or themselves have advocate.

⇨ <u>See Recommendations n^s 2, 9 and 10</u>

B) Selection mode inside the national committees

According 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", adopted by the Committee of Ministers in 2012[63], the governments shall propose three candidates after a "fair and transparent" national selection procedure, performed by a body responsible for recommending candidates with "a balanced composition", and "free from undue influence."

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[58] In the case *Kavala v. Turkey* [GC], n° 28749/18, judged on July 11th, 2022, judge Kūris sat even though the applicant belonged to the Open Society Institute, former name of OSF.

[59] See: https://ztcentras.lt/lztc/ (visited on February 9th, 2023, free translation).

[60] See inter alia : https://www.justiceinitiative.org/uploads/fd7809e2-bd2b-4f5b-964f-522c7c70e747/strategic-litigation-impacts-insights-20181023.pdf

[61] See : https://www.alfa.lt/aktualijos/lietuva/e-kuris-ar-su-pandemija-pasitrauks-ir-zmogaus-teisiu-ribojimai/-50434659/

[62] See the cases *M.V. and A.V. v. Romania*, n° 12060/12, April 12th, 2016, *Beizaras and Levickas v. Lithuania*, n° 41288/15, January 14th, 2020; *Valaitis v. Lithuania*, n° 39375/19, January 17th, 2023; *Macatė v. Lithuania* [GC], n° 61435/19, January 23th, 2023.

[63] Adopted by the Committee of Ministers on March 28th, 012, CM(2012)40-final, searchable on: https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016805cb1aa as amended on November 26th, 2014 by CM/Del/Dec(2014)1213/1.5-app5.

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The nonfulfillment of such conditions was a major cause of the reject by the Council of Europe of the two first list presented by the Polish government in 2021 et 2022[64].

The nomination of the last Albanese judge in 2019 raised also some concerns, as three lists have been refused by the Council of Europe until the acceptance of a fourth, composed of Sokol Berberi, Marjana Semini, and Darian Pavli, that has been put to vote of the Parliamentary Assembly of the Council of Europe[65]. According to the local media, "The Parliamentary Assembly of the Council of Europe rejected four times the Albanese submissions and officially notified to the Albanese government that the applicant selection process was not clear and did not guarantee professionalism and meritocracy in the selection."[66]

The national committee that chose Sokol Berberi, Marjana Semini and Darian Pavli as ECHR candidates was presided by Artur Metani, who, like Messrs. Berberi and Pavli, worked for the Open Society and was highly involved in the governmental process of judicial reform. He is also the brother of the socialist minister Eglantina Gjermeni, and the advisor of the Prime Minister[67].

The local media also lamented that those three candidates were not submitted to the anticorruption proceeding (called « vetting ») that they themselves have contributed to put in place, contrary to what the government would have suggested[68]. The reason being that M. Berberi left magistracy a short time before having to undergo such anticorruption process[69], while Mr. Pavli, was not a magistrate and was not subject to such obligation[70].

Another similar case of proximity between a candidate and member of the selection national committee concerned Mr. Yonko Grozev, also from the Open Society. The national committee that chose him as ECHR candidate included three individuals belonging to two NGO of which he had been founder or manager *(Bulgarian Lawyers for Human Rights Foundation and Bulgarian Helsinki Committee)*. A complaint denouncing the fraud of this selection process, sent to the Council of Europe by a local organization, was closed without further action[71].

⇨ See Recommendation n°1

C) Sincerity and accuracy of the candidates' and judges' curriculum vitae

The authorities of the Council of Europe seem to take for granted the accuracy of the curriculum of the judge candidates as, in principle, the national authorities are supposed to check it. Nevertheless, one might wonder on the accurateness and comprehensiveness of the notified curricula. The two bodies of the Council of Europe in charge of evaluate (the advisory panel) and elect (PACE) the judges do not seem to benefit from the necessary means to perform a

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[64] https://eclj.org/geopolitics/echr/Judges-polonais-a-la-cedh--bras-de-fer-entre-le-conseil-de-leurope-et-la-pologne
[65] CNA, "Rama nuk e lëshon kunatin e Xhafajt/ Çfarë fshihet pas dërgimit të Sokol Berberit në Strasburg?", 2018. Have been previously proposed, and refused by the Council of Europe, three lists with Ina Rama, Gent Ibrahim and Sokol Berberi for the first one, Aleksandër Muskaj, Aurela Anastasi and Sokol Berberi for the second one in April 2017, and Sokol Berberi, Suela Mëneri, and Irakli Koçollari for the third list.
[66] Politiko, "Rama s'heq dorë, kërkon emërimin e kunatit të Fatmir Xhafajt në postin e rëndësishëm", 2018.
[67] Artur Metani Nominated as State Attorney, 1.11.2018, https://exit.al/en/artur-metani-nominated-as-state-attorney/
[68] Albanian Government Misinforms the Council of Europe, Claims ECtHR Candidates Were "Vetted" - Exit - Explaining Albania (archive.org)
[69] ResPublica, Ikën nga Gjykata Kushtetuese Sokol Berberi. Letra e dorëheqjes bëhet publike sot, ishte dorëzuar që më 15 shtator, 2016. See also "The Government Announces Fourth ECtHR Candidate List without Vetting" - Exit - Explaining Albania, 25.07.2018.
[70] The situation of Marjana Semini is not known.
[71] https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-fr.asp?fileid=21354&lang=fr

comprehensive audit of the CV. Furthermore, the candidates do not deliver any supporting document. Some curricula may therefore be "embellished".

Hence, Ganna Yudkivska presented herself in 2010 as "Lecturer in human rights" (*Maître de conférences en droits de l'homme)* in Strasbourg, to indicate lessons given in an association in addition to her work at the Council of Europe; this is confusing[72]. The same judge presented herself as "Doctor in Law (in course)" (*Docteur en Droit (en course*)) (sic) of the Strasbourg University for a thesis that is not registered on the official website theses.fr[73]. Such information, emphasized on the CV, compensated the fact that Mrs Yudkivska held, before her election as Court's judge, the simple and temporary position of "jurist" with the Court[74]. She was elected in 2010, at the age of only 36, against other candidates with much more experience than her[75]. She was trained in human rights at the Dutch and Polish Helsinki Committees and at Interights.

A more serious question arises regarding Mr. Pavli. He indicated being senior attorney in his candidature curriculum notified to the Council of Europe, as well as in the media and on the ECHR's website, but without indicating in which bar he registered, nor in which year, which is contrary to such profession's practice. Yet, after verification, the New-York bar indicated that Mr. Pavli never registered there, even though he worked in this city for the Open Society. The same applies with the other US bars that was possible to question. As for the Albanese bar, it refused to certify that Mr. Palvi registered there as attorney, on the ground that it is a matter of private life, even though it agrees to do so for other individuals. Lastly, in the judicial cases indicated in his CV and to which he participated, if we are not mistaken, we did not find any in which his quality as attorney was indicated. As an example, when he acted with the ECHR in the *El-Masri*[76] case, he acted on behalf of the Open Society, an attorney being indicated among the representative of the applicant. This case evidence that the accurateness of the curriculum may be questioned, even on such a crucial point.

⇨ See Recommendation n°3

D) Nepotism

The independence of the ECHR judges towards their government should imply refraining from nominating individuals having personal close links with the governments or political personalities. This would be one of the reasons why the Panel of Experts rejected the list of candidates presented by Poland in 2022 and 2023, one of the candidates being the spouse of a Member of the European Parliament who is a member of the ruling party in Poland[77].

[72] https://assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewHTML.asp?FileID=12393&lang=FR
[73] *Ibid.*
[74] *Ibid.*
[75] The other candidates were Serhiy Holovaty, former Minister of Justice, Ukrainian parliamentarian, also a member of PACE (where he was vice-president), drafter of the Ukrainian constitution, also a lawyer in cases of human rights violations, and Stanislav Shevchuk, then an ad hoc judge at the ECHR since 2009 and having sat on more than 70 cases, Professor of Law, expert to the UN, a parliamentary committee on European integration, the European Commission and the World Bank, Director of the OSCE/Supreme Court of Ukraine Project on Assistance to the Effective Implementation of the Court's Jurisprudence in Ukraine. Their CVs include many other notable activities.
[76] *El-Masri V. The Former Yugoslav Republic of Macedonia***,** no. 39630/09, GC, 13 décembre 2012.
[77] https://eclj.org/geopolitics/echr/Judges-polonais-a-la-cedh--bras-de-fer-entre-le-conseil-de-leurope-et-la-pologne

However, lists are not systematically rejected on this ground. For example, two obvious cases of nepotism have also been identified, once again on the occasion of the review of the conflict of interest related to the judicial reform in Albania. As a matter of fact, the list displayed by Albania, and allowing the election of Mr. Pavli, comprised Mr. Sokol Berberi, whose candidature was proposed several times by the government of Edi Rama. He is the brother-in-law of Fatmir Xhafaj, minister of the interior (Home Office) in the same government. Fatmir Xhafaj resigned in 2018 "less than one week after a major police operation against the organized crime and drugs trafficking[78]." Agron Xhafaj, brother of Fatmir Xhafaj and brother-in-law of Sokol Berberi is an international drug dealer[79]. As for Darian Pavli, ultimately elected as judge to the ECHR, according to Albanese media, he is a cousin of the Prime Minister Rama[80]. Sokol Berberi and Darian Pavli share also that they worked for the Open Society. Surprisingly, such list was not rejected by the Council of Europe bodies.

Such personal links between judges and politicians may also arise during the judges' mandate. That was the case during the mandate of the Ukrainian judge Ganna Yudkivska, between 2010 and 2022. Her husband, Georgii Logvynskyi, involved in the Ukrainian party Popular Front, prior to his wife's election at the Court, was then elected in the Parliament in 2014[81]. Within the frame of his mandate, he sat between 2015 and 2019 at the Parliamentary Assembly of the Council of Europe (PACE), in which he had significant responsibilities: Vice-President of a political group, Vice-President of the Committee on Legal Affairs and Human Rights and even Vice-President of the PACE[82].

In 2020, Mr. Logvynskyi was the subject of an investigation by the National Anti-Corruption Bureau of Ukraine (NABU). He is accused of having participated in the embezzlement of 54 million Hryvnia (€1,836,735 at the time) via a friendly settlement of a case brought before the ECHR against Ukraine[83] by an oil company he controlled[84]. The Ukrainian government's agent at the ECHR is also named in the case for entering into the settlement, which obliged the government to pay this sum to Mr. Logvynskyi's company[85].

In 2020, NABU asked the ECHR to waive Mr Logvynskyi's immunity as the husband of Ms Yudkivska in order to continue its investigation[86]. Judge Yudkivska objected and the ECHR rejected the request on the grounds that the ongoing proceedings had already violated the immunity[87]. By giving a purely formal reason for refusal, the Court decided that "there is no need to make any finding as to the substance of the allegations made at national level[88]."

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[78] https://www.courrierdesbalkans.fr/Albania-demission-surprise-du-ministre-de-l-Interieur-Fatmir-Xhafaj

[79] Rama nuk i ndahet kunatit të Fatmir Xhafës për në Strasburg, 08/03/2017
See also https://pamfleti.net/familja-mafioze-xhafaj-kompletohet-me-deputet-noter-leje-e-shefa-ndertimi-e-porti-bankiere-kumar-trafikante-permbarues-e-avokati/

[80] See *The Government Announces Fourth ECtHR Candidate List without Vetting - Exit - Explaining Albania*, 25.07.2018. *Pavli dhe lidhja e ngushtë me qeverinë Rama*, https://infront-al.com/pavli-dhe-lidhja-e-ngushte-me-qeverine-rama/

[81] https://pace.coe.int/fr/members/7353/logvynskyi

[82] https://pace.coe.int/fr/members/7353/logvynskyi

[83] Six persons are suspected of UAH 54 million funds embezzlement | National Anti-Corruption Bureau of Ukraine (nabu.gov.ua)

[84] *Zolotyy Mandaryn Oyl, Tov v. Ukraine*, no. 63403/13, 12 November 2015.

[85] The New Trial: Kafkaesque Punishment for Cooperation with the ECtHR - Strasbourg Observers

[86] UAH 54 million funds embezzlement: NABU statement regarding the ECHR decision | National Anti-Corruption Bureau of Ukraine

[87] HUDOC - European Court of Human Rights (coe.int)

[88] Decision of the ECHR, 6 July 2020, HUDOC - European Court of Human Rights (coe.int)

In a similar case, the Court took the opposite decision. In 2011, the Court agreed to lift the diplomatic immunity of the wife of Romanian judge Corneliu Bîrsan, in the context of a corruption investigation, even though "the search carried out (…) in Mr and Mrs Bîrsan's home in Romania violated the immunity of Judge Bîrsan both in respect of himself and in respect of his wife"[89]. Judge Bîrsan accepted that his wife's immunity be lifted and then withdrew from all cases involving Romania for the duration of the investigation, which Mrs Yudkivska did not do[90]. All proceedings against Mrs Bîrsan were eventually dropped. To date, the NABU investigation appears to be ongoing. The defendants have since lodged applications with the ECHR in April 2021 against the NABU[91].

Without prejudging the reality of the accusations, such a situation provides an additional reason to avoid appointing to the Court persons close to politically engaged personalities.

⇨ See Recommendation n°4

E) The issue of the nomination of *ad hoc* judges

When the national judge may not sit in a case as he/she is unable, withdraws or is exempted[92], an *ad hoc* judge is appointed by the President of the Court from a list submitted in advance by the relevant government. The *ad hoc* judges are unilaterally nominated by the governments, without any selection, assessment or election process, which does not allow to "filter out" troublesome nominations if any. At date, the Court only publishes the names of such *ad hoc* judges and the State that designated them, without further details. The governments may designate anybody for this position. Protocole 14 only partially remedied to the situation by allowing the Court to choose between the *ad hoc* judges nominated by each government.

An example of this issue is here again given by Albania whose government ultimately nominated Sokol Berberi, previously quoted, as *ad hoc* judge to the ECHR[93], for the potential replacement of Mr. Pavli, among others, even though the lists on which he was registered have been refused three times by the Council of Europe. Other individuals close to the Rama government are listed among the *ad hoc* judges, including Mrs Ina Rama, who has also been candidate to the ECHR on the first list introduced by such government, and rejected by the Council of Europe.

M. Berberi has also been nominated Albanese representative inside the Venice Commission. It is the body of the Council of Europe having the highest authority after the ECHR and has for mandate to give a legal advice on constitutional maters. It has been seized, among others, for the Albanese judicial reform.

Another example of such issue is given by the case of Bianca Andrada Gutan, *ad hoc* judge for Romania. In 2013, Romania chose Mme Gutan to be one of the three candidates to the position of ECHR judge. According to the PACE's experts Advisory Panel she did not fulfil the criteria to be an ECHR judge. She had to be removed from the Romanian three candidates list.[94]

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[89] Decision of the ECHR HUDOC - European Court of Human Rights (coe.int)
[90] *Isayev v. Azerbaijan and Ukraine,* no. 4832/20, 30 July 2020.
[91] *Logvynskyy v. Ukraine and 2 other applications,* no. 32671/20.
[92] Article 29.1.a of the Rules of Court.
[93] List of Ad hoc judges for the year 2023 / Liste des Judges ad hoc pour l'année 2023 (coe.int)
[94] https://adevarul.ro/stiri-interne/evenimente/judecatoarea-bianca-gutan-respinsa-la-cedo-1465246.html

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Nevertheless, Romania appointed her as *ad hoc* judge since 2014[95]; she sat since then in a case filed against Romania[96].

It appears thus that individuals considered as unqualified by the Council of Europe have nevertheless been appointed as ECHR's *ad hoc* judges. This is sufficient to evidence the existence of a problem regarding the designation process of the *ad hoc* judges.

⇨ See Recommendation n°5

F) The impossibility to review a decision taken by a judge whose impartiality or independence may legitimately be questioned

Under article 80 of the Rules of Court, a party may request the Court to revise a "judgment" "in the event of the discovery of a fact which might by its nature have a decisive influence" on a case already decided. Thus, according to the rules, only the Court's judgments may be reviewed, which excludes the decisions of inadmissibility, even when a party discovers a fact that may have had a deciding influence on it. The impossibility to require a review is based on the final character of the inadmissibility decisions (articles 27.2, 28 and 29 of the Convention).

Nevertheless, against the letter of the Convention, sometimes the Court agreed to review a case that has been declared inadmissible, in case of "exceptional circumstances were an obvious error has been made in the setting of the factual circumstances relevant for the admissibility exigences or the appreciation that has been made of them[97]." The Court claims then to benefit from "the inherent power to reopen, in the interest of justice, the examination of a case that has been declared inadmissible and to rectify the relevant mistake[98]."

Such praetorian exception to the European Convention is welcome, but should be formalized as, of the one part, it is unknown to nearly all the lawyers and, on the other part, its enforcement fully depends on the arbitrary power of the judge. Thus, since 2020, the review requests of three inadmissibility decisions, related to the applicants doubt as regards the impartiality of the unique judge that rendered it, have been briefly rejected. It is the doubt regarding the impartiality of the unique judge that constitutes the new fact as his/her identity is revealed only upon notification of the challenged decision.

In the case *Knežević v. Montenegro* (n°54228/18), the applicant, a member of the PACE, required the review of the inadmissibility decision after having noticed that it has been taken by judge Màrtiņš Mits with whom he said he had an argument. Màrtiņš Mits was also among the judges questioned for conflicts of interest in the 2020 EDLJ' report. Yet, MP Knežević sent a written question to the Committee of Ministers on this matter (n° 748 dated April 24th, 2020). Mr. Knežević required from the President of the Court the review of such decision due to his doubt regarding the impartiality of judge Mits towards him; this was refused on the ground that inadmissibility decisions are final. The review request of the inadmissibility decisions rendered in the cases *Grimmark* (43726/17) and *Steen* (62309/17) against Sweden was also rejected. Likewise, the review request of Yonko Grozev's decision in the above euthanasia case

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[95] https://www.linkedin.com/in/biancagutan/
[96] *Dickmann and Gion v. Romania*, nos. 10346/03 and 10893/04, dated October 24th, 2017.
[97] See inter alia *Peter Boelens v. Belgium*, n°20007/09, September 11th, 2012, § 21.
[98] Idem. The Court quotes, inter alia, the cases *Le Syndicat des copropriétaires du 20 bd de la Mer à Dinard v. France* (dec.), no 47339/99, May 22 th, 2003, *Wortmann v. Germany* (dec.), no 70929/01, November 18 th, 2003 and *Ölmez et Ölmez v. Turkey* (dec.), no 39464/98, July 5 th, 2005.

(n°55987/20 dated January 19th, 2020), expressed due to a doubt regarding the judge impartiality has also been rejected.

⇨ <u>See Recommendation nos 9 and 10</u>

G) The lack of transparency of the Court's registry and of impartiality of certain registry's members

The European Court considers that the principles concerning the courts' impartiality apply also to "officials performing judicial functions, such as lay assessors and registrars or legal secretaries" (*Bellizzi v. Malta*, 2011, § 51)[99]. Such request should also apply to its own registry.

The registry plays a key role in the justice administration within the European Court. It performs the filtering of the applications and proposes to the judges (sitting alone) to declare the inadmissibility of more than 90% of the requests. When a request passed through such filtering and is judged by a panel, the judges deliberate on the basis of a summary drafted by the registry and a draft decision written by the registry and the judge rapporteur. The judges deliberate on the basis of the sole documents prepared by the registry, without inspecting the files, subject to exception[100]. Yet, the identity of the registrar in charge of the file is generally not notified to the parties. Only his/her initials appear on the mails.

Such situation raises concerns of transparency, fairness between the parties, and potentially of partiality.

Such situation raises a concern of fairness, as only the connoisseurs of the Court's staff may identify the registrar in charge of their file from his/her initials and section.

Such situation raises a concern of transparency, as the list of the Court's registrars is not public, contrary to the EU Court of Justice and the Inter-American Court of Human Rights[101]. Only the identity of the registry head office is public. The opacity of the registry's composition is in serious breach of the institution's transparency. Yet, transparency is an essential condition for every democratic control of the institutions.

Such opacity may favour a set of problems, including as regards the safety of the Court and the data confidentiality as the Court's staff is not investigated, contrary to the national civil servants with sensitive positions (cf. Art. 114.1 of the French code of internal security). It is also very easy to join as a trainee and thus to gain access to its digital system.

Such situation may also endanger the Court's impartiality due to the numerous personal links between the registry and the main NGOs acting with the ECHR. Such links result from the circulation of the staff between them. So, some registrars come from NGOs active with the Court and are in the position to participate to cases filed by such NGOs, while some NGO lawyers keep relationship with their former colleagues in the Court that may participate to their cases. This is the same conflicts of interest problem identified amongst the judges, but at the registry level.

Some registrars may have thus a link with an NGO that filed a case with the Court. This is the case for instance of Marcin Sczaniecki who worked for the Warsaw Helsinki Foundation just

[99] *Cf* ECHR, Guide on Article 6 of the European Convention on Human Rights Right to a fair trial (civil limb), § 290.

[100] Bostjan Zupancic, *Sur la cour européenne des droits de l'homme, Rétrospective d'un initié (1998-2016),* L'Harmattan, Paris, 2018.

[101] EU Whoiswho Official Directory of the European Union, Court of Justice of the European Union, 01/01/2023. The annual report of the IACHR comprises the list of its staff. See page 213 of the Annual report for 2020.

before being hired by the ECHR, where he is in charge, among others, of the Polish matters[102], many of them being filed by such Helsinki Foundation. As an example, the pending request *Bychawska-Siniarska and others v. Poland* (n°25237/18) was filed by an employee of the Helsinki Foundation (Dominika Bychawska-Siniarska) and an expert of the Helsinki Foundation (Barbara Grabowska-Moroz). It is examined jointly with another case, *Pietrzak v. Poland* (n°72038/17), filed by a former employee of the Helsinki Foundation. Marcin Sczaniecki, at the Polish ECHR registry, may have examined applications of such former colleagues. The fact that Dominika Bychawska-Siniarska, the applicant of the Helsinki Foundation, is also a former Court's employee shows the close links between such NGO and the ECHR's registry[103].

The recent cases – highly sensitive – filed against Poland relating to abortion are also symptomatic of such troublesome links between registrars and NGOs. Such applications have been filed against the decision of the constitutional Court dated October 2020 stating that eugenic abortion is unconstitutional. Thus, Agata Bzdyń and Monika Gąsiorowska, who contributed to the files drafting and work with the Helsinki Foundation, have been lawyer at the ECHR[104]. At least one polish registrar likely to work on these files, Marcin Sczaniecki (above), comes from the Helsinki Foundation, which is sufficient to question his impartiality.

Furthermore, Marcin Sczaniecki and many other registrars have publicly express, including on the social networks, their support to eugenic abortion in Poland, supported also by the applicants. This is the case, among other Polish staff of the registry, of Rafał Sokół, Radosław Tyburski or Katarzyna Szwed who was recruited as ECHR registrar even though she was an activist in the "Feminist revolutionary Brigade" (*Feministyczna Brygada Rewolucyjna*) and was spokesperson of Polish demonstrations for abortion[105] in 2019. She holds now an important position inside the Council of Europe after having wok with *Abortion Without Borders*[106].

In such highly sensitive and political abortion cases, as in other cases files by the Warsaw Helsinki Foundation, it is undoubtable that the defending Government may have legitimate grounds to doubt of the impartiality of Court's registrars and of the confidentiality of the proceedings. Such doubt is increased as the identity of the lawyer in charge of the request's examination remains confidential.

As a result, the conditions of registry transparency and impartiality are not guaranteed.

⇨ See Recommendation n°7

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[102] https://www.coe.int/fr/web/portal/-/marcin-szczaniecki

[103] https://www.facebook.com/dbychawska/about_work_and_education ; https://wszystkoconajwazniejsze-pl.translate.goog/autorzy/dominika-bychawska-siniarska/?_x_tr_sl=auto&_x_tr_tl=fr&_x_tr_hl=fr&_x_tr_pto=wapp

[104] https://www.agatabzdyn-legal.pl/agata-bzdyn-cabinet-d-avocat

[105] See as an example: "Manify w obronie praw kobiet w Gdyni, Katsowicach, Łodzi i Wrocławiu", Polska Agencja Prasowa, March 9th, 2019.

[106] https://www.linkedin.com/in/katszwed/?originalSubdomain=fr

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Part IV: Recommendations to better guarantee the Court's impartiality

The Court's operation examination allowed the identification of a set of measures whose implementation should better guarantee its impartiality and the compliance with the standards it imposes to the national jurisdictions in such matter.

The following list is not intended to be exhaustive.

A) At the judicial selection stage

Nominate candidates with high-level judicial experience (1)

The most obvious cases of conflicts of interest at the ECHR involve individuals previously employed by NGOs active at the Court, with no high-level judicial experience. These are mostly conflicts of interest between the judge and his or her former NGO, which acts as a party or third party to the case. As previously indicated, these judges may also decide on cases with politically sensitive issues on which their former NGO was active, which may legitimately call into question their impartiality in the eyes of the applicants. It must be stated that being from an NGO is no guarantee of independence from the government, as large NGOs have close ties with the governments (e.g., Albania).

The best way to avoid such conflicts of interest in the future would be to avoid the appointment of people from activist organizations. This decision would also raise the level of qualification of the judges of the ECHR. Indeed, only half of the members of the ECHR have had experience as judges before their nomination, the others being mostly attorneys and academics. Of course, these later may reveal judicial qualities while carrying out their duties, but such possibility does not constitute a guarantee. More generally, it is problematic that supreme national courts' decisions are retried by European Court's judges less qualified and experienced than these national judges.

It would be consistent for the position of judge at the ECHR to be restricted to persons from the highest national courts, as is the usual practice of some States parties (such as France) or at least to individuals from national courts (as for most of the CJEU judges[107]). Moreover, the professional judges being subject to a set of ethical rules, such circumstance would contribute, in the case of an appointment in Strasbourg, to better guarantee their independence and impartiality.

Consequently, it would be appropriate to recommend to the States Parties and the Advisory Panel, respectively, that they no longer propose or validate the candidacy for the position of judge of persons coming from militant organizations active at the ECHR, and, failing which, to require from the candidates to declare their relations with any organization active in the Court.

Require the publication of declarations of interest (2)

The Committee of Ministers, in its recommendation CM/Rec(2010)12 *Judges: independence, efficiency and responsibilities,* states that "[h]aving regard to the necessity of avoiding actual or

[107] ECLJ, *Le profil professionnel des juges de la CJUE*, 2023.

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perceived conflicts of interest, member states may consider making information about additional activities publicly available, for instance in the form of registers of interests" (§29). To this end, members of the CJUE[108] and of many national supreme courts, including in France and the United States[109], are required to publish such a declaration of interests, as are the PACE and European Parliament's members. This is not the case for judges of the European Court of Human Rights.

Therefore:

- on the one hand, the Committee of Ministers should require candidates for the office of judge to publish a declaration of interests, which should be attached to the application form;
- on the other hand, to suggest that the Court amend its Rules of Procedure in order to establish such a periodic obligation for sitting judges.

It should be noticed that the standard candidature file may be directly amended by the Parliamentary Assembly, as the "Model curriculum vitae for candidates seeking election to the European Court of Human Rights" has been adopted by Resolution 1646 (2009) of the PACE relating to the Nomination of candidates and election of judges to the European Court of Human Rights.

Ensure the sincerity of the curriculum vitae submitted by candidates (3)

The curriculum vitae of some judges and candidates are not accurate or exhaustive, which is likely to damage the credibility of the Court.

Consequently, candidates should be asked to justify their functions, titles and diplomas, and these supporting documents could be annexed to the application form and sent to the Advisory Panel and the Parliamentary Committee on the Election of Judges to the European Court of Human Rights.

Avoiding nepotism (4)

As previously indicated, sometimes candidates have close family ties to politicians, members of governments or parliaments. Any form of nepotism can undermine the credibility of the Court and the independence and impartiality of the judges.

As a consequence, it should be added to the candidature form a section requiring from the candidates to declare any family tie with any person holding an important political position, such supporting documents could be attached to the candidature form and send to the Advisory Panel and the Parliamentary Committee.

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[108] See for example: https://curia.europa.eu/jcms/upload/docs/application/pdf/2021-12/declaration_financiere_reine_inga.pdf

[109] In the United States, the Supreme court members are subject to a "public declaration of interest, updated yearly, indicating among others the advantages and gifts received during the past year". See Blandine Gardey de Soos, "La déclaration d'intérêts des magistrats judiciaires", *La semaine juridique*, Edition Générale, N° 49, - December 4th, 2017.

Apply the same selection rules to the appointment of *ad hoc* judges (5)

As previously indicated, the current appointment process of *ad hoc* judges is at sole the discretion of the governments. They are not subject to assessment or election within the Council of Europe, which allow some people, who have been declared incompetent by the Council of Europe, to still be appointed to this function. Furthermore, to date, the ECHR publishes the sole names of these *ad hoc* judges and the State party that appointed them, without further details on their paths and qualifications.

Therefore, the existing regime for the selection and appointment of permanent judges should be applied to *ad hoc* judges. Failing which, and for the sake of transparency, at a minimum, such *ad hoc* judges should fill the PACE "curriculum vitae form" which shall be published together with their annual declarations of interest.

B) At the stage of lodging the application: ensuring transparency of interests

Improving the transparency of the NGOs' action before the ECHR (6)

It frequently happens that applications are lodged on the initiative or with the support of NGOs, without those being mentioned in the application and the procedure. The reference to the NGOs in these proceedings would ensure greater transparency, which would be particularly useful when a judge or a member of the registry comes from such organization.

It is also common for third-party interveners to act in concert with one or another of the parties to the proceeding, and not actually be a true third party, thereby undermining fairness between the parties. Sometimes an NGO may even informally file a petition, provide representation for the petitioner, and simultaneously act as a third party[110].

The ECLJ is pleased that the Court has adopted in March 2023 its recommendation that third party interveners declare, in their application to intervene, their possible links with the main parties.

Applicants should also be recommended to declare voluntarily any application filed with the collaboration of an NGO.

C) At the stage of the examination of applications: ensuring the transparency of the procedure

Ensure the Registry's transparency to reinforce the guarantees of its impartiality (7)

As indicated above, the opacity of the Court's Registry rises concerns of transparency, fairness between the parties, and partiality.

Therefore, it would be appropriate:

[110] ECHR, *Neshkov and others v. Bulgaria*, n^{s} 36925/10, 21487/12, 72893/12, 73196/12, 77718/12 and 9717/13, January 27th, 2015.

- on the one hand, to communicate to the parties the name of the member or members of the Registry in charge of their case
- and on the other hand, to publish the list of the members of the Registry of the ECHR as it is the practice of the CJEU and of the Inter-American Court of Human Rights[111].

Avoid the national judge being appointed as judge-rapporteur in important cases (8)

The European Court differs from other international courts in that it provides for the participation to the decision of the judge elected in respect of the State questioned in an application. This practice is intended to strengthen the confidence of member States and litigants, limiting the recurrent criticism of a court composed of "foreign judges". Moreover, statistics show that national judges are less inclined than other judges to condemn their State of origin[112]. This is even more true for *ad hoc* judges. This observation gives rise to criticism on the partiality of judges in cases involving the State under which they have been appointed.

However, the national judge has the advantage of being familiar with the language and legal system of his country, which enables him to decide the case on his own, unlike other judges who are then more dependent on the Registry.

Without going so far as to recommend the non-participation of the national judge in the cases filed against the State for which he/she has been appointed, it seems legitimate to recommend that, in sensitive or important cases, the judge elected in respect of the State involved in the case should no longer be designated as judge-rapporteur.

At the very least, in order to improve the transparency of the procedure, the name of the judge-rapporteur should be indicated in the judgment, as is the practice in other courts and at the Human Rights Committee of the U.N.

D) At the trial stage

Early notification to the parties of the composition of the bench (9)

The "right to a judge" includes the right of litigants to know beforehand which judge will hear their case. It is a component of the requirement of publicity of justice, which protects the parties "against the administration of justice in secret with no public scrutiny"[113].

However, this requirement is not respected in the procedure before the ECHR. Indeed, in most cases, the identity of the judge(s) who ruled on an application is notified to the parties only after the judgment, when it is published. Only in the exceptional case of public hearing or referral of the case to the Grand Chamber are the parties informed of the identity of their judges before the judgment.

The fact that the parties know to which section of the Court their case has been assigned is not sufficient. Indeed, the "right to a judge" does not appear to be sufficiently guaranteed by the

[111] EU Whoiswho Official Directory of the European Union, Court of Justice of the European Union, 01/01/2023. The annual Report of the IACHR comprises its staff list. See, as an example, page 213 of its Report for 2020.
[112] E. Voeten, "The Impartiality of International Judges: Evidence from the European Court of Human Rights", *American Political Science Review*, vol. 102, 2008, p. 417-433.
[113] ECHR, *Straume v. Latvia*, (no. 59402/14), 2 jun 2022, §§ 124-125.

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assumption that an applicant could deduce the identity of the judges *likely* to rule his/her case by inferring from the Court's correspondence that his/her application has been communicated to such or such of its sections.

The breach is even more serious when the case is tried by a single judge or by an *ad hoc* judge, whose identities cannot even be assumed by the parties.

The harmful character of this lack is also very clear regarding the judge deciding on interim measures. It was so in the above euthanasia case (n°55987/20) rejected by a judge who was previously member of the board of an organization financing the promotion of euthanasia.

Moreover, this lack of transparency in the proceedings renders ineffective the right of the parties to request the recusal of a judge. This poses a major problem as this right of recusal is an essential component of the right to a fair trial (*see below*).

Establish a challenge procedure in line with the Court's requirements for national courts (10)

The European Court has often recalled the importance of the right to challenge a judge as part of the right to a fair trial[114]. As the Court's registry recalls, "Such rules manifest the national legislature's concern to remove all reasonable doubts as to the impartiality of the judge or court concerned and constitute an attempt to ensure impartiality by eliminating the causes of such concerns. In addition to ensuring the absence of actual bias, they are directed at removing any appearance of partiality and so serve to promote the confidence which the courts in a democratic society must inspire in the public."[115]

However, the European Convention and the Rules of Court do not provide for a procedure to request the recusal of a judge. The concept of recusal is absent of such texts. The Rules of Court (Article 28) only consider a procedure for the voluntary withdrawal of the judge, on his or her own initiative, which is different from a challenge procedure initiated at the request of the parties. The absence of any mention of recusal may lead the parties to believe that such a request would be impossible, assuming that the parties were aware of the composition of the bench.

In cases before the Grand Chamber, where the composition of the panel is disclosed beforehand, parties have occasionally requested the disqualification of a judge. To our knowledge, the Court's decisions refusing to disqualify have not been justified; yet, paradoxically in *Harabin v. Slovakia*, 2012, § 136, the Court held that a court must respond to the arguments put forward in support of the disqualification request and meet certain requirements.

Regarding the recusal requests from the Bulgarian Government related to Judge Grozev[116], above mentioned (part II), to our knowledge, the refusal decision have not been justified, or only in a too concise way.

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[114] See the specific provisions regarding the challenging of judges in *Micallef v. Malta* [GC], 2009, §§ 99-100; a situation where a challenge was not possible in *Stoimenovikj and Miloshevikj v. North Macedonia*, 2021, § 40; *Mikhail Mironov v. Russia*, 2020, concerning the requirements under Article 6 where a challenge for bias is submitted by a litigant and decided by a judge, including where the relevant judge is the one taking the decision, §§ 34-40 and quoted case-law references; and *Debled v. Belgium*, 1994, § 37, concerning a general challenge.

[115] CEDH, Guide on Article 6 of the Convention – Right to a fair trial (civil limb), § 296.

[116] *D.K. v. Bulgaria*, n° 76336/16, December 8th, 2020; *Anatoliy Marinov v. Bulgaria*, n° 26081/17, February 15th, 2022; *I.G.D. v. Bulgaria*, n° 70139/14, June 7th, 2022; *Paketova and others v. Bulgaria*, n^s^ 17808/19 and 36972/19, October 4th, 2022.

Accordingly, the Court should establish a procedure for recusal in its rules. It could follow the example of the Rome Statute of the International Criminal Court (Articles 41 of the Statute and 34 of the Rules)[117] and of various national constitutional courts (for example in Germany[118], France since 2010, Spain and Portugal[119]).

Part's conclusion

These are the main ECLJ's propositions to address the issues identified in the report, regarding mainly the conflicts of interest noticed between judges, registrars and some NGOs and foundations.

Other reformations should be useful for a better justice administration within the European Court, but they are less related to the topic of this report, which is the reason why they are not developed here. One of them deserves to be indicated, as it is also essential. The purpose is to correct the inequity arising from the fact that the parties to a litigation settled by national jurisdictions are not aware that such litigation is filed by a party (usually the unsuccessful party) with the European Court. Let's suppose that the jurisdictions of a country "A" refuse to condemn "B" for a litigation filed by "C". "C" may later on file a complaint against the country "A" with the ECHR, without "B" being aware of it. Only "C" will expose the relevant facts of his conflict with "B" to the ECHR, without contradictory with "B"; "B" has not even the possibility to defend him/herself. It is unrealistic to think that the defending government should be able to efficiently defend B's interests. Thus, a person who succeeded in a litigation with the national court may learn, some years after, that the ECHR decided that such decision violates the European Convention.

As a consequence, the European Court should amend its Rules so as to notify the existence of a request to all parties to a litigation filed with the Court, at the stage of the request communication, and grant them a *right* to intervene in the proceeding.

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[117] The ICC Rules of Procedure and Evidence provide grounds for disqualification of a judge, including "Performance of functions, prior to taking office, during which he or she could be expected to have formed an opinion on the case in question, on the parties or on their legal representatives that, objectively, could adversely affect the required impartiality of the person concerned" (rule 34.c). In France, for example, the *Compendium of the Judiciary's Ethical Obligations*, published by the Superior Council of Magistracy, provides, as part of impartiality, that: "*Members of the judiciary who have exercised responsibilities outside of the judicial body must ensure that their impartiality cannot as a result be undermined". It adds that the magistrates "take particular care to ensure that the relationships that they may have with people from their former profession cannot harm their impartiality or perceived impartiality. This ethical requirement may go beyond the sole incompatibilities set out by statutory rules. It is therefore the responsibility of judiciary members to consider the risks of harm to their perceived impartiality*." It is added, in this same compendium, that "*Members of the judiciary must ask to be removed or withdraw if it appears that they have a connection with a party, their counsel, an expert or any interest in the proceedings that may cast legitimate doubt on their impartiality in handling a dispute"*.

[118] Michel Fromont, *Présentation de la Cour constitutionnelle fédérale d'Allemagne*, Cahiers du Conseil constitutionnel No 15 (Dossier Allemagne), January 2004.

[119] Perlo Nicoletta, "Les premières récusations au Conseil constitutionnel : réponses et nouveaux questionnements sur un instrument à double tranchant ", *Annuaire international de justice constitutionnelle*, 27-2011, 2012. Juges constitutionnels et Parlements - Les effets des décisions des juridictions constitutionnelles. pp. 61-79.

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APPENDIX

1. List of judges that managed or worked with the main NGOs active with the ECHR (reminder)

For the drafting of the 2020 report, seven NGOs have been identified as being active before the Court and including among their former collaborators at least one person who has served as a permanent judge of the ECHR since 2009. These are (in alphabetical order) A.I.R.E. Center (Advice on Individual Rights in Europe), Amnesty International, the International Commission of Jurists (ICJ), the Helsinki committees and foundations network[120], Human Rights Watch (HRW), Interights (International Center for the Judicial Protection of Human Rights), and the Open Society Foundation (OSF) and its various branches, in particular the Open Society Justice Initiative (OSJI).

Collaborations between NGOs and future judges exist to varying degrees, from official responsibilities within NGOs to meaningful participation in their activities[121]. This is not the place for a judgement on these commitments that relate to individual freedom, but they should be mentioned as these NGOs are active before the Court. This presentation is probably incomplete as it is mainly documented by the information presented in the framework of the selection process for judges, and accessible on the website of the Parliamentary Assembly of the Council of Europe (PACE). This table does not mention the people who have participated, even on a regular basis, to meetings and conferences organized by these NGOs, nor the personal memberships to these. Then, some judges have collaborated with other NGOs, but they are not mentioned here because they are not active at the Strasbourg Court. This study also does not cover *ad hoc* judges. Lastly, political, religious or other personal affiliations are of course disregarded. The names of the interested parties are mentioned only by necessity.

Regarding the A.I.R.E. Center, Judge Eicke was a member of its Board of Directors from 2000 to 2008.

Regarding Amnesty International (AI), three judges collaborated to varying degrees with such NGO. Judge Pinto de Albuquerque was a member of the National Administration Board of Amnesty International-Portugal from 2008 to 2012[122]. Judge Šikuta was also linked to Amnesty

[120] Helsinki Foundation for Human Rights (Poland) (HFHR), the Greek Helsinki Monitor, the Romanian Helsinki Committee (Association for Defence of Human Rights in Romania- the Helsinki Committee (APADOR-CH)), the Hungarian Helsinki Committee, the Bulgarian Helsinki Committee, the Norwegian Helsinki Committee, the Helsinki Committee for Human Rights of the Republic of Macedonia, the Helsinki Committee for Human Rights in Moldova… These NGOs of the Helsinki network were organised under the authority of the International Helsinki Federation for Human Rights until 2007, when it was dissolved.
See the Human Rights House Foundation which gather some of these Committees and Foundations: https://humanrightshouse.org/ (visited on 01/02/2020) or the Civic Solidarity Platform which counts among its many members the Helsinki Committees, the Helsinki Foundation for Human Rights (Poland): https://www.civicsolidarity.org/members (visited on 01/02/2020).
[121] All the information concerning the judges was mainly found in the CVs put online by the Parliamentary Assembly of the Council of Europe (PACE) at the time of the election of the judges or by simple internet search.
[122] One must underline that Mr. Pinto de Albuquerque is, to our knowledge, the only judge who explicitly committed to immediately stop his functions within the NGO in the event of his election at the Court, showing that way that he was aware of the risk of conflict of interest (see his CV on the PACE website).

International [123]. As for Judge Felici, he participated in the human rights protection section of Amnesty International from 1993 to 1995.

Regarding the Helsinki Committees, seven judges collaborated to varying degrees with the national branches of this network. Judge Grozev founded the Bulgarian committee, Judge Kalaydjieva was one of its members. Other judges have organized or facilitated various programs and working groups. They are judges Garlicki, Shukking and Šikuta. Judge Karakaş was a member of the Helsinki Citizens' Assembly[124]. Judge Yudkviska collaborated to a lesser extent: she attended trainings of the Helsinki Committee and represented it before the court.

Regarding the International Commission of Jurists (ICJ), five judges exercised functions there:

- Judge Motoc was a member of the Council of the Commission until 2013.
- Judge Schukking was an expert there in 2014 and 2016.
- Judge Ziemele founded in 1995 the Latvian section of the ICJ of which she has been a member since.
- Judge Cabral-Barreto is a member of the "Law and Justice" group of the Portuguese section of the ICJ [125].
- Judge Kucsko-Stadlmayer has been a permanent member of the Austrian ICJ since 2000.

Regarding Human Rights Watch, Judge Pavli was a researcher in this organization from 2001 to 2003.

Regarding Interights, Judge Eicke was a member of its board of directors from 2004 to 2015.

Regarding the Open Society Foundation (OSF), 12 judges have collaborated to varying degrees with this organization:

- Judge Garlicki has been a member of an "individual-against-State" program at the Central European University since 1997 and has participated in several educational programs in cooperation with the Open Society Institute in Budapest and the Central European University in Budapest, university founded and funded by the OSF[126].
- Judge Grozev was a member of the Board of the Open Society Institute of Bulgaria from 2001 to 2004 as well as of the Board of the Open Society Justice Initiative (OSJI, New York), from 2011 to 2015.
- Judge Kūris was a member of the Board of the Open Society Foundation of Lithuania from 1993 to 1995, a member of the coordinating board from 1994 to 1998, an expert on the publishing program from 1999 to 2003 and a member of another council from 1999 to 2003. He was therefore active there from 1993 to 2003.

[123] See his comments in his CV on the PACE website.
[124] This network of individuals, movements and organizations never belonged to the former International Helsinki Federation for Human Rights. On the other hand, the choice of the "Helsinki" banner and the participation of its national branches in initiatives common to those of the Helsinki Committee make us choose to assimilate the two "Helsinki" networks, that is, that of the Citizens' Assemblies and that of the Helsinki Committees.
[125] The CV of this judge, on the PACE website, does not specify the dates of this function.
[126] The Central European University was endowed with $880 million, https://www.chronicle.com/article/For-President-of-Central/65338/ (visited on 17/04/2023).

- Judge Laffranque was, between 2000 and 2004, a member of the Executive Council of the Center for Political Studies - PRAXIS, an organization founded in 2000 and funded since by the Open Society Institute[127].
- Judge Mijović was a member of the Executive Council of the Open Society Foundation of Bosnia and Herzegovina from 2001 to 2004, as well as a member of the Bosnian OSF project team in 2001.
- Judge Mits has been teaching since 1999 at the Riga Law School,[128] of which he became a vice-rector, as well as at the Judicial Training Centre in Latvia, both founded and co-funded by the Open Society of Latvia.
- Judge Pavli, a former student of the Central European University, was a lawyer with the Open Society Justice Initiative from 2003 to 2015 and then director of programs of the OSF for Albania from 2016 to 2017.
- Judge Sajó was a member of the Board of the Open Society Justice Initiative (OSJI, New York) from 2001 to 2007, and a professor at the Central European University in Budapest from 1992 to 2008.
- Judge Šikuta was a member of expert committees of the Open Society Foundation of Slovakia from 2000 to 2003. He was not remunerated for this function.
- Judge Turković was a member of the Board of the Open Society Institute of Croatia from 2005 to 2006 and a member of the research team of this same organization from 1994 to 1998.
- Judge Vučinić wrote various articles for the Open Society Institute and contributed to its reports in 2005 and 2008; he is also a member of the board of two NGOs funded by the OSF.
- Judge Ziemele has been teaching since 2001 at the Riga Law School, founded and co-funded by the Open Society of Latvia.

Other judges have participated but on a less official way[129], thus we will not insert them in the study.

This phenomenon is not limited to the Court's members. Thus, Nils Muižnieks, Commissioner for Human Rights of the Council of Europe from 2012 to 2018, was also program director of the Latvian Open Society until 2012. In 2009, he explained that the Open Society wishes to create a new man – the *homo sorosensus* [by reference to Mr. Soros] – the man of open society, contrary

[127] http://www.praxis.ee/en/organisation/think-tank/ (visited on 17/04/2023).
[128] The OSF founded and co-finances the Riga Law School with the governments of Sweden and Latvia.
[129] Judge Bošnjak was a member of a Peace Institute team (Institute for Contemporary Social and Political Studies) in 2005 on a project co-funded by the Open Society Institute. This NGO is on the list of NGOs funded by and partners of the OSF. He was a speaker in a conference on May 26th, 2006, of the Peace Institute (Institute for Contemporary Social and Political Studies).
Judge Harutyunyan gave lectures in 2007 and 2008 at the Central European University and at institutes of the Open Society Foundation.
Judge Zdravka Kalaydjieva founded and was a member of the NGO "Bulgarian Lawyers for Human Rights" from 1993 to 2008 (and then since 2015). This NGO is funded in particular by the Open Society Institutes of New York and Sofia. She has also given lessons as part of a training course for legal practitioners from the former Soviet republics of Central Asia, organized by the Open Society Institute, in Bishkek, Kyrgyzstan in 1999.
Judge Kovler taught in 1997 and 1998 at the Soros Foundation in Kyrgyzstan.
Judge Zupančič gave lectures at the Central European University in Budapest in 1997 (Sources: see schedules).

to the *homo sovieticus*[130]. Within the frame of his functions, he condemned several initiatives of the Hungarian government, including the draft law called "anti-Soros"[131].

2. List of direct conflicts of interest identified between 2020 and 2022

Here is the comprehensive list of the 34 cases examined between 2020 and 2022 for which at least one direct conflict of interest has been identified (in chronological order, with only the relevant judge). The 54 conflicts of interest result from the fact that one or several judges sat to decide in a case filed or supported by their former NGO.

1. *D. and N.T. v. Spain* [GC], n[s] 8675/15 et 8697/15, 13/02/2020: Judges Eicke and Kucsko-Stadlmayer - Third parties: A.I.R.E. Centre, CIJ.
2. *Khadija Ismayilova v. Azerbaïdjan* (n° 2), n° 30778/15, 27/02/2020: Judges Grozev and Yudkivska - Third party: a Helsinki Committee.
3. *N. and others v. Belgium* [GC], n° 3599/18, 05/03/2020: Judge Motoc - Third party: CIJ.
4. *Mándli and others v. Hungary*, n° 63164/16, 26/05/2020: Judge Schukking - Third party: a Helsinki Committee.
5. *Fartunova et Kolenichev v. Bulgaria* (dev.), n° 39017/12, 16/06/2020: Judge Yudkivska - Applicants represented by a Helsinki Committee.[132]
6. *Bagirov v. Azerbaïdjan*, n[s] 81024/12 et 28198/15, 25/06/2020: Judge Kucsko-Stadlmayer - Third party: CIJ.
7. *Yunusova and Yunusov Azerbaïdjan* (n° 2), n° 68817/14, 16/07/2020: Judge Yudkivska - Applicants represented by a Helsinki Committee.
8. *T. v. Bulgaria*, n° 41701/16, 09/07/2020: Judge Yudkivska - Third party: a Helsinki Committee.
9. *K. and others* v. *Poland*, n[s] 40503/17, 42902/17 and 43643/17, 23/07/2020: Judge Eicke - Third party: A.I.R.E. Centre.
10. *Mirgadirov v. Azerbaidjan and Turkey*, n° 62775/14, 17/09/2020: Judge Yudkivska - Third party: a Helsinki Committee.
11. *Muhammad and Muhammad v. Romania* [GC], n° 80982/12, 15/10/2020 : Judges Pinto de Albuquerque and Yudkivska - Applicants represented by a Helsinki Committee; Third parties: a Helsinki Committee, Amnesty International (below Amnesty).
12. *X and Y v. North Macedonia*, n° 173/17, 05/11/2020: Judge Yudkivska - Third party: a Helsinki Committee.
13. *K. v. Bulgaria*, n° 76336/16, 08/12/2020: Judge Grozev - Applicant represented by the Helsinki Committee founded by Mr. Grozev.

[130] Nils Muižnieks, Creating the "Open Society Man" (and Woman!), Open Society News, Fall 2009, p. 6: "*Many of us (that is veteran staff, board members, and/or grantees of the various branches of the Open Society Institute) assumed that within two decades we could help create a new "open society man." This "new man"—homo sorosensus—would replace homo sovieticus, whose remains would slowly decompose on the ash heap of history (located in a dark alley behind the gleaming main streets of the new, "normal" open societies we would build).*" https://www.opensocietyfoundations.org/publications/open-society-news-eastern-europe-where-do-open-societies-stand-20-years-later#publications_download (visited 01/02/2020).

[131] "*Hongrie. Le Council of Europe critique la loi « anti-Soros »*", *Ouest France*, February 15th, 2018: https://www.ouest-france.fr/europe/hongrie/hongrie-le-conseil-de-l-europe-critique-la-loi-anti-soros-5567285 (visited on 01/02/2020).

[132] In this schedule, we indicated that the applicants were represented by a Helsinki Committee when their attorney(s) were member of the strategic litigations team of a Helsinki Committee. See the February 2020 report, pp. 13-14.

14. *V.C.L. and A.N. v. United Kingdom*, n^{s} 77587/12 et 74603/12, 16/02/2021: Judge Eicke - Applicants represented by A.I.R.E. Centre.
15. *Hanan v. Germany* [GC], n° 4871/16, 16/02/2021: Judges Grozev, Mits and Turković - Third party: Open Society Justice Initiative (OSJI).
16. *Behar and Gutman v. Bulgaria*, n° 29335/13, 16/02/2021: Judge Schukking - Applicants represented by a Helsinki Committee; Third party: another Helsinki Committee.
17. *Budinova and Chaprazov v. Bulgaria*, n° 12567/13, 16/02/2021: Judge Schukking - Applicants represented by a Helsinki Committee; Third party: another Helsinki Committee.
18. *Big Brother Watch and others v. United Kingdom* [GC], n^{s} 58170/13, 62322/14 et 24960/15, 25/05/2021: Judges Grozev, Kucsko-Stadlmayer, Mits, Motoc, Pavli and Pinto de Albuquerque - Applicants: Amnesty, Open Rights Group; Third parties: CIJ, a Helsinki Committee, HRW, OSJI.
19. *Broda and Bojara* v. *Poland*, n^{s} 26691/18 et 27367/18, 29/06/2021: Judge Felici - Applicants represented by a Helsinki Committee; Third parties: Amnesty, CIJ.
20. *Anatoliy Marinov v. Bulgaria*, n° 26081/17, 29/06/2021: Judges Grozev and Schukking - Applicant represented by a Helsinki Committee.
21. *Selygenenko and others v. Ukraine*, n^{s} 24919/16 et 28658/16, 21/10/2021: Judge Yudkivska - Applicant represented by a Helsinki Committee.
22. *Lee v. United Kingdom* (dec.), n° 18860/19, 07/12/2021: Judge Eicke - Third party: A.I.R.E. Centre
23. *Grzęda* v. *Poland* [GC], n° 43572/18, 15/03/2022: Judges Felici and Grozev - Applicant represented by a Helsinki Committee; Third parties: the same Helsinki Committee, Amnesty, CIJ.
24. *Y and others v. Bulgaria*, n° 9077/18, 22/03/2022: Judges Grozev and Schukking - Applicants represented by a Helsinki Committee.
25. *Bumbeș v Romania*, n° 18079/15, 03/05/2022: Judges Grozev and Schukking - Applicant represented by a Helsinki Committee; Third party: OSJI.
26. *Oganezova v. Armenia*, n^{s} 71367/12 et 72961/12, 17/05/2022: Judges Eicke, Motoc and Kucsko-Stadlmayer - Third parties: A.I.R.E. Centre, CIJ, HRW.
27. *I.G.D. v. Bulgaria*, n° 70139/14, 07/06/2022: Judges Grozev et Schukking - Applicant represented by a Helsinki Committee.
28. *Ecodefence and others v. Russia*, n^{s} 9988/13 and 60 others, 14/06/2022: Judge Pavli - Applicants: a Helsinki Committee, some financed by OSF and / or Helsinki Committees; Third parties: Amnesty, CIJ, two Helsinki Committees.
29. *Stoyanova v. Bulgaria*, n° 56070/18, 14/06/2022: Judges Grozev and Schukking - Third party: a Helsinki Committee.
30. *Akkad v. Turkey*, n° 1557/19, 21/06/2022: Judge Felici - Third party: Amnesty
31. *Kavala v. Turkey* [GC], n° 28749/18, 11/07/2022 : Judges Grozev and Kūris – Applicant belonging to the Open Society Institute.
32. *Kaganovskyy v. Ukraine*, n° 2809/18, 15/09/2022: Judge Yudkivska - Applicant represented by a Helsinki Committee.
33. *Otite v. United Kingdom*, n° 18339/19, 27/09/2022: Judge Eicke - Third party: A.I.R.E. Centre.
34. *Paketova and others v. Bulgaria*, n^{s} 17808/19 et 36972/19, 04/10/2022: Judges Grozev and Schukking - Applicant represented by a Helsinki Committee.

3. List of the other cases filed or supported by at least one of the six NGO's between 2020 and 2022

Here are 80 other cases judges between 2020 and 2022 and filed or supported by the NGO's whose associates became judges. Contrary to the 34 cases of schedule 2, in such 80 cases, no judge sat in a conflict-of-interest situation. I.e., the judgement panel that examined such 80 cases did not comprise any judge from the NGO's having filed or supported the requests.

1. *Beizaras and Levickas v. Lithuania*, n° 41288/15, 14/01/2020: Third-parties : A.I.R.E. Centre, CIJ.
2. *Strazimiri v. Albania*, n° 34602/16, 21/01/2020: Applicant represented by a Helsinki Committee.
3. *L.R. v. North Macedonia*, n° 38067/15, 23/01/2020 : Applicant: a Helsinki Committee.
4. *Elżbieta Arendarczuk* v. *Poland* (Dec), n° 39415/15, 04/02/2020 : Applicant represented by a Helsinki Committee.
5. *Baş v. Turkey*, n°66448/17, 03/03/2020: Third party: CIJ.
6. *Irena and Eugeniusz Waresiak v. Poland* (Dec), n° 58558/13, 10/03/2020: Applicants represented by a Helsinki Committee ; Third party: the same Helsinki Committee.
7. *Łukasz Kasprowicz v. Poland*, n°58400/14, 24/03/2020: Applicant represented by a Helsinki Committee.
8. *Bilalova and others v. Poland*, n° 23685/14, 26/03/2020: Applicants represented by a Helsinki Committee; Third parties: A.I.R.E. Centre, CIJ.
9. *Kövesi v Romania*, n° 3594/19, 05/05/2020: Third parties: un Helsinki Committee, OSJI.
10. *Pintér v. Hungary*, n° 39638/15, 26/05/2020: Applicant represented by a Helsinki Committee.
11. *Nagy v. Hungary*, n° 43441/15, 26/05/2020: Applicant represented by a Helsinki Committee.
12. *Kamil Marut v. Poland* (dev.), n° 38631/18, 26/05/2020: Applicant represented by a Helsinki Committee.
13. *Vasilev and 'Society of the Repressed Macedonians in Bulgaria Victims of the Communist Terror' v. Bulgaria*, n° 23702/15, 28/05/2020: Applicant represented by a Helsinki Committee.
14. *Macedonian club for ethnic tolerance in Bulgaria and Radonov v. Bulgaria*, n° 67197/13, 28/05/2020: Applicants represented by a Helsinki Committee.
15. *Jezior v. Poland*, n° 31955/11, 04/06/2020: Applicant represented by a Helsinki Committee.
16. *A.B. and others v. Poland*, n^{s} 15845/15 et 56300/15, 04/06/2020: Applicants represented by a Helsinki Committee.
17. *Joanna Ewa Przydatek v. Poland*, n° 43081/18, 16/06/2020: Applicant represented by a Helsinki Committee.
18. *K.T. and Z.K. v. Poland*, n° 46697/18, 16/06/2020: Third party: a Helsinki Committee.
19. *Yordanovi v. Bulgaria*, n° 11157/11, 03/09/2020: Applicants represented by a Helsinki Committee.
20. *Kamińska and others v. Poland*, n° 4006/17, 03/09/2020: Applicants represented by a Helsinki Committee.
21. *Vladovskiye v. Russia*, n° 40833/07, 06/10/2020: Third party: Interights.
22. *Sabuncu and others v. Turkey*, n° 23199/17, 10/11/2020: Third party: HRW.

23. *B and C v. Switzerland*, n°s 889/19 et 43987/16, 17/11/2020: Third parties: A.I.R.E. Centre, CIJ.
24. Şik *v. Turkey* (n° 2), n° 36493/17, 24/11/2020: Third party: HRW.
25. *Guðmundur Andri Ástráðsson v. Island* [GC], n° 26374/18, 01/12/2020: Third party: a Helsinki Committee.
26. *Selahattin Demirtaş v. Turkey* (n° 2), n° 14305/17, 22/12/2020: Third party: HRW.
27. *Pişkin v. Turkey*, n° 33399/18, 15/12/2020: Third parties: Amnesty, CIJ.
28. *Sabalić v. Croatia*, n° 50231/13, 14/01/2021: Third parties: A.I.R.E. Centre, CIJ.
29. *Atilla Taş v. Turkey*, n° 72/17, 19/01/2021: Third party: HRW.
30. *R.Y. v. Russia*, n° 21977/20, 23/03/2021: Third parties: A.I.R.E. Centre, CIJ, a Helsinki Committee.
31. *Murat Aksoy v. Turkey*, n° 80/17, 13/04/2021: Third party: HRW.
32. Ahmet Hüsrev Altan *v. Turkey*, n° 13252/17, 13/04/2021: Third party: HRW.
33. *Dłużewska v. Poland*, n° 39873/18, 15/04/2021: Third party: a Helsinki Committee.
34. *Xero Flor w Polsce sp. z o.o. v. Poland*, n° 4907/18, 07/05/2021: Third party: a Helsinki Committee.
35. *Valdís Fjölnisdóttir and others v. Island*, n° 71552/17, 18/05/2021: Third party: A.I.R.E. Centre.
36. *Dimov and others v. Bulgaria*, n^s^ 45660/17 and 13 others, 08/06/2021: Applicants represented by a Helsinki Committee.
37. *Palfreeman v. Bulgaria*, n° 840/18, 08/06/2021: Applicant represented by a Helsinki Committee.
38. *Bulaç v. Turkey*, n° 25939/17, 08/06/2021: Third party: HRW.
39. *Barovov v. Russia*, n° 9183/09, 15/06/2021: Applicant represented by a Helsinki Committee.
40. *Lesław Wójcik v. Poland*, n° 66424/09, 01/07/2021: Third party: a Helsinki Committee.
41. *A.M. and others v. Russia*, n° 47220/19, 06/07/2021: Third party: HRW.
42. *D.A. and others v. Poland*, n° 51246/17, 08/07/2021: Applicants represented by a Helsinki Committee.
43. *Reczkowicz v. Poland*, n° 43447/19, 22/07/2021: Third party: CIJ.
44. *Danuta Nowak c v. Poland* (dev.), n° 2290/14, 31/08/2021: Third party: a Helsinki Committee.
45. *Kuchta and Mętel v. Poland*, n° 76813/16, 02/09/2021: Third party: a Helsinki Committee.
46. *X. v. Poland*, n° 20741/10, 16/09/2021: Third party: CIJ.
47. *V.P. v. France* (dev.), n° 21825/20, 07/10/2021: Third party: A.I.R.E. Centre.
48. *Democracy and Human Rights Resource Centre and Mustafayev v. Azerbaïdjan*, n^s^ 74288/14 and 64568/16, 14/10/2021: Third parties: CIJ, OSJI.
49. *M.B. v. Poland*, n° 60157/15, 14/10/2021: Applicant represented by a Helsinki Committee.
50. *Dolińska - Ficek and Ozimek v. Poland*, n^s^ 49868/19 and 57511/19, 08/11/2021: Third party: CIJ.
51. *Fotaq Zaharia v. Albania* (dev.), n° 45022/16, 09/11/2021: Applicant represented by a Helsinki Committee.
52. *S.-H. v. Poland* (dev.), n^s^ 56846/15 et 56849/15, 16/11/2021: Third party: a Helsinki Committee.

53. *Savran v. Denmark* [GC], n° 57467/15, 07/12/2021: Third party: Amnesty.
54. *G.A. and others v. Hungary* (dec), n° 50984/21, 09/12/2021: Applicants represented by a Helsinki Committee.
55. *Abdi Ibrahim v. Norway* [GC], n° 15379/16, 10/12/2021: Third party: A.I.R.E. Centre.
56. *Ilicak (N° 2) v. Turkey*, n° 1210/17, 14/12/2021: Third party: HRW.
57. *Banaszczyk v. Poland*, n° 66299/10, 21/12/2021: Applicant represented by a Helsinki Committee.
58. *İlker Deniz Yücel v. Turkey*, n° 27684/17, 25/01/2022: Third party: HRW.
59. *Advance Pharma sp. z o.o v. Poland*, n° 1469/20, 03/02/2022: Applicants represented by a Helsinki Committee ; Third party: a Helsinki Committee.
60. *Y. v. Poland*, n° 74131/14, 17/02/2022: Third party: a Helsinki Committee.
61. *Wikimedia Foundation, Inv. v. Turkey* (dev.), n° 25479/19, 01/03/2022: Third parties: CIJ, HRW.
62. *Rudnicki v. Poland* (dev.), n° 22647/19, 03/02/2022: Applicant represented by a Helsinki Committee.
63. *Human Rights Watch v. United Kingdom* (dev.), n° 64230/16, 10/03/2022 : Applicant: HRW.
64. *A.M. v. Norway*, n° 30254/18, 24/03/2022: Third party: A.I.R.E. Centre.
65. *Śliwczyński and Szternel v. Poland* (dev.), n° 2244/14, 29/03/2022: Applicants represented by a Helsinki Committee.
66. *Wojciech Krysztofiak v. Poland* (dev.), n° 15355/14, 26/04/2022: Applicants represented by a Helsinki Committee.
67. *Khasanov and Rakhmanov v. Russia* [GC], n°s 28492/15 et 49975/15, 29/04/2022: Third party: CIJ.
68. *Bahoumou Totopa v. Spain* (dev.), n° 74048/17, 10/05/2022: Third parties: A.I.R.E. Centre, CIJ.
69. *Dragica Vangelova and others v North Macedonia* (dev.), n° 17218/17, 17/05/2022: Applicants represented by a Helsinki Committee.
70. *Taner Kiliç (n° 2) v. Turkey*, n° 208/18, 31/05/2022: Applicant: president of a branch of d'Amnesty at the time of the facts; Third parties: CIJ, HRW.
71. *Żurek v. Poland*, n° 39650/18, 16/06/2022: Applicant represented by a Helsinki Committee; Third parties: Amnesty, CIJ, a Helsinki Committee.
72. *Bieliński v. Poland*, n° 48762/19, 21/07/2022: Third party: a Helsinki Committee.
73. *Darboe et Camara v. Italy*, n° 5797/17, 21/07/2022: Third party: A.I.R.E. Centre.
74. *Juszczyszyn v. Poland*, n° 35599/20, 06/10/2022: Applicant represented by a Helsinki Committee; Third party: CIJ.
75. *Muhammad v. Spain*, n° 34085/17, 18/10/202: Applicants represented by OSJI.
76. *B.B. v. Poland*, n° 67171/17, 18/10/2022: Applicant represented by a Helsinki Committee; Third party: a Helsinki Committee.
77. *Velimir Dabetić v. Italy*, n° 31149/12, 18/10/2022: Third party: A.I.R.E. Centre.
78. *Yüksekdağ Şenoğlu and others v. Turkey*, n^s^ 14332/17 and 12 other requests, 08/11/2022: Third party: CIJ.
79. *D.Ł. v. Poland* (dev.), n° 38539/18, 22/11/2022: Applicant represented by a Helsinki Committee.
80. *Barmaxizoglou and others v. Greece*, n° 53326/14, 01/12/2022: Applicants represented by a Helsinki Committee.

4. Article 21 of the European Convention on Human Rights

1. The judges shall be of high moral character and must either possess the qualifications required for appointment to high judicial office or be jurisconsults of recognized competence.
2. 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.
3. The judges shall sit on the Court in their individual capacity.
4. During their term of office the judges shall not engage in any activity which is incompatible with their independence, impartiality or with the demands of a full-time office; all questions arising from the application of this paragraph shall be decided by the Court.

5. Article 28 of the ECHR Rules of Court, (dated 10 February 2023)

1. Any judge who is prevented from taking part in sittings which he or she has been called upon to attend shall, as soon as possible, give notice to the President of the Chamber.

2. A judge may not take part in the consideration of any case if

(a) he or she has a personal interest in the case, including a spousal, parental or other close family, personal or professional relationship, or a subordinate relationship, with any of the parties;

(b) he or she has previously acted in the case, whether as the Agent, advocate or adviser of a party or of a person having an interest in the case, or as a member of another national or international tribunal or commission of inquiry, or in any other capacity;

(c) he or she, being an ad hoc judge or a former elected judge continuing to sit by virtue of Rule 26 § 3, engages in any political or administrative activity or any professional activity which is incompatible with his or her independence or impartiality;

(d) he or she has expressed opinions publicly, through the communications media, in writing, through his or her public actions or otherwise, that are objectively capable of adversely affecting his or her impartiality;

(e) for any other reason, his or her independence or impartiality may legitimately be called into doubt.

3. If a judge withdraws for one of the said reasons, he or she shall notify the President of the Chamber, who shall exempt the judge from sitting.

4. In the event of any doubt on the part of the judge concerned or the President as to the existence of one of the grounds referred to in paragraph 2 of this Rule, that issue shall be decided by the Chamber. After hearing the views of the judge concerned, the Chamber shall deliberate and vote, without that judge being present. For the purposes of the Chamber's deliberations and vote on this issue, he or she shall be replaced by the first substitute judge in the Chamber. The same shall apply if the judge sits in respect of any Contracting Party concerned in accordance with Rules 29 and 30.

5. The provisions above shall apply also to a judge's acting as a single judge or participation in a Committee, save that the notice required under paragraphs 1 or 3 of this Rule shall be given to the President of the Section.

6. Resolution on Judicial Ethics, adopted by the Plenary Court on 21 June 2021

[…]

I. Integrity

Judges' conduct must be consistent with the high moral character that is a criterion for judicial office. They should be mindful at all times of their duty to act, in and outside the Court, with the requisite integrity, as well as loyalty, dignity and discretion inherent in the authority and reputation of the Court. Judges shall exercise particular caution in all contact with parties and other persons associated with pending cases.

II. Independence

In the exercise of their judicial functions, judges shall be independent of any public national or international institution, body or authority or any private entity. They shall keep themselves free from undue influence of any kind, whether external or internal, direct or indirect. They shall refrain from any activity, expression and association, refuse to follow any instruction, and avoid any situation that may be considered to interfere with their judicial function and to affect adversely public confidence in their independence.

III. Impartiality

Judges shall exercise their function impartially and ensure the appearance of impartiality. They shall take care to avoid conflicts of interest as well as situations in and outside of the Court that may be reasonably perceived as giving rise to a conflict of interest. Judges shall not be involved in dealing with a case in which they have a personal interest. They shall refrain from any activity, expression and association that may be considered to affect adversely public confidence in their impartiality.

[…]

VI. Expression and contacts

Judges shall exercise their freedom of expression in a manner compatible with the dignity of their office and their loyalty to the institution of the Court. They shall refrain from expressing themselves, in whatever form and medium, in a manner which may undermine the authority and reputation of the Court or give rise to reasonable doubt as to their independence or impartiality. This applies equally to the exercise of judicial function, representation of the Court, and to academic or other public or private activities outside of the Court. They shall proceed with the utmost care if using social media.

VII. Additional activity

Judges may not engage in any additional activity except insofar as this is compatible with independence, impartiality and the demands of their full-time office. They shall declare any additional activity to the President of the Court, as provided for in Rule 4 of the Rules of Court.

Only teaching, research and publishing activities may give rise to remuneration. Requests for leave for judicial or other missions should be submitted to the President of the Court.

[…]

X. Ad hoc Judges

Articles of the present Resolution, insofar as relevant, shall apply to *ad hoc* judges..

[…]

7. Procedure for the election of judges to the European Court of Human Rights

A Memorandum prepared by the Secretary General of the Parliamentary Assembly of the Council of Europe (PACE) and dated 14 March 2023 details in about ten pages the procedure for the election of ECHR judges[133]. This document is summarized as follows on the PACE website[134]. Following this summary, we reproduce an appendix to this document which lists "Criteria for evaluating candidates for the office of judge at the European Court of Human Rights."

"According to the European Convention on Human Rights, judges must "be of high moral character and possess the qualifications required for appointment to high judicial office or be jurisconsults of recognised competence."

To ensure these standards are met, there are two phases to the election process – firstly a national selection procedure, in which each State party chooses a list of three qualified candidates, and secondly the election procedure undertaken by the Assembly, in which a special parliamentary committee assesses the qualifications of the three candidates, as well as the fairness of the national selection procedure, before the Assembly proceeds with the election.

National selection procedures – transmission of a list of three candidates

When selecting their three candidates, States should ensure that their national procedure is fair and transparent, for example by issuing public and open calls for candidates. All candidates must have appropriate legal qualifications and experience and must have an active knowledge of either English or French – the languages in which Court judgements are drafted – and at least a passive knowledge of the other language.

To ensure gender-balance on the Court, States are also asked to put forward at least one candidate from each sex. Single-sex lists of candidates are only accepted when the candidates belong to the sex which is under-represented in the Court (i.e. the sex to which under 40% of the total number of judges belong), unless the Committee on the Election of Judges finds by a majority of two-thirds that exceptional circumstances justify an exception.

To help ensure candidates are fully qualified, an advisory panel of experts offers governments confidential advice on potential candidates before the final list of three is sent to the Assembly.

[133] This document is available at this link: https://rm.coe.int/procedure-for-the-election-of-judges-to-the-european-court-of-human-ri/1680aa8ddf

[134] See this page: https://pace.coe.int/fr/pages/committee-30/commission-sur-l-election-des-juges-a-la-cour-europeenne-des-droits-de-l-homme

Election by the Assembly – choosing one judge from the list

Once the Assembly has received the list of candidates, the Committee on the Election of Judges to the European Court of Human Rights – a special parliamentary committee whose members have legal experience – firstly assesses the fairness and transparency of the national procedure used to select them. It then interviews each of the candidates in person and scrutinises their CVs, which are submitted in a standardised format, to evaluate whether all three are sufficiently well qualified to do the job. If it finds all the conditions are met, the committee draws up a recommendation for the Assembly indicating which candidate or candidates it believes are the strongest. If not, it can recommend that a State be asked to submit a fresh list.

The Assembly – made up of 306 parliamentarians – then proceeds to vote on the candidates in a secret ballot, held during plenary sessions, in the light of the committee's recommendations. An absolute majority of votes cast is required in the first round. If this is not achieved, a second round is held and the candidate with the most votes is duly elected to serve on the Court for a single term of nine years.

Criteria to evaluate candidates for the post of Judge on the European Court of Human Rights

- Relevant professional work experience (judicial and/or other, characterised by its level, nature and length)
- Language proficiency: candidates should possess an active knowledge of one and a passive knowledge of the other official language of the Council of Europe
- Motivation
- Knowledge of the Council of Europe/experience of the system of the ECHR
- Clarity and precision of thought and of speech
- Judgement/specific skills

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