

NGOs and the Judges of the ECHR

2009 – 2019



February 2020

Abstract

NGOs have an increasing influence on and within international institutions, particularly within the human rights protection system.

This report shows that at least 22 of the 100 permanent judges who have served on the European Court of Human Rights (ECHR) between 2009 and 2019 are former officials or collaborators of seven NGOs that are highly active before the Court. Twelve judges are linked to the Open Society Foundation (OSF) network, seven to the Helsinki committees, five to the International Commission of Jurists, three to Amnesty International, and one each to Human Rights Watch, Interights and the A.I.R.E. Centre. The Open Society network is distinguished by the number of judges linked to it and by the fact that it funds the other six organisations mentioned in this report.

Since 2009, there have been at least 185 cases in which at least one of these seven NGOs is officially involved in the proceedings. Of these, in 88 cases, judges sat in a case in which the NGO with which they were linked was involved. For example, in the case of *Big Brother Watch v. the United Kingdom*, still pending before the Grand Chamber of the ECHR, 10 of the 16 applicants are NGOs funded by the OSF, as are 6 of the NGOs acting as third parties. Of the 17 judges who have sat in the Grand Chamber, 6 are linked to the applicant and intervening NGOs.

Over the same period, there were only 12 cases in which a judge withdrew from a case, apparently because of a link with an NGO involved in the case.

This situation calls into question the independence of the Court and the impartiality of the judges and is contrary to the rules which the ECHR itself imposes on States in this area. It is all the more problematic as the Court's power is exceptional.

It is necessary to remedy this situation. To this end, greater attention should be paid in particular to the choice of candidates for the posts of judges, avoiding the appointment of activists. This report also proposes solutions to ensure the transparency of interests and links between applicants, judges and NGOs, and formalise the procedures of withdrawal and recusal.

Aware of the value of the human rights protection system in Europe and the need to preserve it, the ECLJ hopes that this report will be received as a positive contribution to the proper functioning of the Court.

By Grégor Puppinck and Delphine Loiseau.

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The ECLJ acts in particular before the ECHR in many cases as a third-party intervener, as well as in support of applicants or governments.

The ECLJ bases its action on “the spiritual and moral values which are the common heritage of European peoples and the true source of individual freedom, political liberty and the rule of law, principles which form the basis of all genuine democracy” (Preamble of the Statute of the Council of Europe).

In this text, to ease the reading, the masculine pronouns will be used when generally referring to judges. It is meant as a neutral way to mention the judges, focusing on their function and not their gender. When one judge is particularly mentioned, of course the pronoun will be adapted to his or her gender.

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Summary

Report

I. Former professional links between NGOs and judges..... 6

Factual presentation of those links	6
Multiple causes	9

II. Interactions with NGOs during the mandates of the judges 10

A. The action of these NGOs before the Court..... 10

On the importance of NGOs actions.....	11
On the amici curiae.....	12
On the lack of transparency	13

B. Judges dealing with cases brought by, or with the support of, “their” NGO 15

Cases in which judges seated.....	15
Few withdrawals due to links between judges and NGOs.....	17

III. The questions raised by this situation..... 18

The exceptional and political power of the ECHR	18
The imbalance of the system	19
Private actors with no democratic legitimacy.....	20
Influent private actors	20
Challenging the principle of equality of arms	20
The lack of guarantees on the independence and impartiality of judges	21
Comparison with judges who are former civil servants of their government.....	23
Lack of pluralism in the interpretation of human rights	23

IV. What solutions? 23

Avoiding the appointment of activists to the office of judge.....	24
Ensuring the transparency of interests	24
Formalizing withdrawal and recusal procedures	25

Appendices (available on www.eclj.org)

Annex No. 1: ECHR judges and NGOs, biographical elements

Annex No. 2: Third-party interventions by NGOs to the ECHR

Annex No. 3: Direct actions by NGOs as representatives of applicants to the ECHR

Annex No. 4: The withdrawal by judges of the ECHR

Annex No. 5: The “Strategic litigation” team of the Helsinki Foundation for Human Rights (Poland) and cases before the ECHR

NGOs and the judges of the ECHR

By Grégor Puppink, PhD.

Several studies have already been devoted to describing and analysing the ways in which non-governmental organisations (NGOs) intervene in international courts and quasi-judicial bodies,¹ in particular before the European Court of Human Rights (ECHR).² These studies focused on analysing the action of NGOs as applicants, representatives or third-party interveners,³ as well as their contribution to the monitoring of the execution of judgments. They revealed the variety, influence and usefulness of NGO action.

This study addresses the same issue from a complementary angle: that of the relationships between NGOs and judges. These relationships are not limited to the formal channels of action of the former with the Court; they are also much deeper and more informal, since the Court is composed, in a significant proportion, of former NGO collaborators.

A reading of the *curricula vitae*⁴ of the judges who sat for the last ten years (between 1 January 2009 and 1 October 2019), makes it possible to identify seven NGOs which are both active at the Court and have among their former collaborators at least one person who has sat as a permanent judge of the ECHR since 2009. Out of the 100 permanent judges who have served during this period, it appears that 22 had strong links, prior to their election as judges,

¹ See in particular: Heidi N. Haddad, *“The Hidden Hands of Justice: NGOs, Human Rights, and International Courts”*, Cambridge University Press, 2018; Luisa Vierucci, “NGOs before international courts and tribunals”, in *NGOs in international law: efficiency in flexibility?* / edited by Pierre-Marie Dupuy, Luisa Vierucci. - Cheltenham; Northampton, Mass.: Edward Elgar, 2008, p. 155-180.

² See in particular A. Cichowski, “Civil society and the European Court of Human Rights”, in *The European Court of Human Rights between law and politics* / edited by Jonas Christoffersen and Mikael Rask Madsen. - Oxford ; New York: Oxford University Press, 2011, p. [77] - 97 ; Laura Van Den Eynde, “The ECtHR's enigmatic relationship with civil society organisations”, in *Human rights as a basis for reevaluating and reconstructing the law: acts of the 4th ACCA Conference held in Louvain-la-Neuve on May 29th, 2015* / Arnaud Hoc, Stéphanie Wattier and Geoffrey Willems (eds.). - Bruxelles: Bruylant, 2016. p. [199]-211; Julie Ringelheim, « Le rôle des ONG dans le contentieux international des droits de l'homme », *Journal européen des droits de l'homme*, n° 2 (oct. 2018), p. 71-125; Antoni Nowicki Marek, “The Role of Non-Governmental Organisations in Proceedings Before the ECtHR”, in *Reforming the European Convention on Human Rights: A Work in Progress, A compilation of publications and documents relevant to the ongoing reform of the ECHR, Prepared by the Steering Committee for Human Rights (CDDH)*. - Strasbourg: Council of Europe Publishing, 2009, p. 177-180.

³ Laurence Burgorgue-Larsen, « Les interventions éclairées devant la Cour européenne des droits de l'homme ou le rôle stratégique des amici curiae », in *La conscience des droits: mélanges en l'honneur de Jean-Paul Costa* / [work coordinated by Patrick Titiun and conducted with the assistance of Patricia Dumaine]. - Paris: Dalloz, 2011, p. [67] - 82; Nicole Bürli, *Third-party interventions before the European Court of Human Rights: amicus curiae, member-State and third-party interventions*, Intersentia, 2017; Emmanuel Decaux (ed.) *La tierce intervention devant la Cour européenne des droits de l'homme et en droit comparé : Proceedings of the symposium organized at the University Panthéon-Assas (Paris II), Bruxelles : Bruylant ; Nemesis, 2009*; Françoise Elens-Passos, « La tierce intervention dans la procédure devant la Cour européenne des droits de l'homme », in *Regards croisés sur la protection nationale et internationale des droits de l'homme*, Liber amicorum Guido Raimondi / Linos-Alexandre Sicilianos ... [et al.] (eds.). - Tilburg: Wolf Legal Publishers (WLP), 2019, p. 255-275; F. Lonardo, “Il ruolo dell’amicus curiae negli organismi giurisdizionali internazionali”, Roma, *Biblioteca della Rivista di studi politici internazionali* (Nuova Serie), n° 3, 2009.

⁴ As published on the site of the Parliamentary Assembly of the Council of Europe (PACE).

with one or more of these seven organisations, either as administrators, beneficiaries of their funding or as significant and regular participants in their activities. In addition, considering also more indirect links, several other judges could be added to this list.

This study goes further, however, to observe the interactions between NGOs and judges, after the latter's entry into office. It appeared here from the examination of the 185 cases in which these seven NGOs have visibly acted over the past ten years, that on numerous occasions judges have sat in cases brought or supported by the NGO with which they had collaborated. The links between judges and NGOs are therefore deeper and more complex than it usually appears. The purpose of this study, based on in-depth research (see appendices), is to highlight this significant reality and to question its causes, the difficulties it poses, and the means to remedy it.

Beyond that, the aim of this study is to contribute to the proper functioning of the European system of protection of human rights, in particular to its independence, which must be guaranteed with regard to the power not only of States, but also that, significant, of the large non-governmental organizations.

The ECLJ itself has been one of the most active NGOs before the Court for more than twenty years.

I. Former professional links between NGOs and judges

Factual presentation of those links

6

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,⁵ Human Rights Watch (HRW),⁶ 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.⁷

⁵ 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).

⁶ Originally in 1978, this NGO was entitled Helsinki Watch. In 1988, Helsinki Watch and its affiliates became Human Rights Watch. <https://www.hrw.org/our-history> (visited on 01/02/2020).

⁷ 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.

These commitments relate to individual freedom but should be mentioned as soon 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. Finally, 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. Finally, political, religious or other personal affiliations are naturally 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 this NGO.

Judge Pinto de Albuquerque was a member of the National Administration Board of Amnesty International-Portugal from 2008 to 2012.⁸ Judge Šikuta was also linked to Amnesty International.⁹ Judge Felici 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.¹⁰ 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.
- Tggr judge 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.¹¹
- Judge Kucsko-Stadlmayer has been a permanent member of the Austrian ICJ since 2000.

⁸ 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).

⁹ See his comments in his CV on the PACE website.

¹⁰ This network of individuals, movements and organisations 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 makes us chose to assimilate the two “Helsinki” networks, that is, that of the Citizens' Assemblies and that of the Helsinki Committees.

¹¹ The CV of this judge, on the PACE website, does not specify the dates of this function. But in any case, he must have had this function at the time of his election as a judge at the ECHR since he mentions it in his CV.

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.¹²
- 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.
- 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.¹³
- 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,¹⁴ of which he became a vice-rector, as well as at the Judicial Training Center 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 Ineta Ziemele has been teaching since 2001 at the Riga Law School, founded and co-funded by the Open Society of Latvia.

¹² The Central European University was endowed with \$880 million, <https://www.chronicle.com/article/For-President-of-Central/65338/> (visited on 01/02/2020).

¹³ <http://www.praxis.ee/en/organisation/think-tank/> (visited on 01/02/2020).

¹⁴ The OSF founded and co-finances the Riga Law School with the governments of Sweden and Latvia.

Other judges finally collaborated in a less formal manner;¹⁵ therefore, they will not be integrated in the rest of the study.

This phenomenon is not limited to members of the Court. For example, Nils Muižnieks, Commissioner for Human Rights of the Council of Europe from 2012 to 2018, was also director of programs of the Open Society of Latvia until 2012. In 2009, he explained that the Open Society wishes to create a new man - *homo sorosensus* [in reference to Soros] - man of open society, as opposed to *homo sovieticus*.¹⁶ Within the scope of his official activities, he condemned several initiatives by the Hungarian government, notably the so-called “*anti-Soros*” bill.¹⁷

Multiple causes

It should be recalled that the Court has as many judges as there are States Parties to the Convention. When a seat is available, the concerned government draws up and submits a list of three candidates to the PACE, which elects one, for a non-renewable 9-year term. PACE has the power to refuse the list as a whole.¹⁸

The election of NGO lawyers to the ECHR has multiple causes.

One of them results from the fact that in certain countries, lawyers who are both experienced in human rights matters and who have a certain independence from the government can mainly be identified within NGOs. This is compounded by the importance of the presence and influence of certain NGOs in “small” countries. Most of the judges who were salaried employees or officials of NGOs come from Albania, Bosnia and Herzegovina, Bulgaria, Croatia, Hungary, Latvia and Romania. For example, in Albania, a poor and highly corrupted

¹⁵ See, for example, Judge Bošnjak, who 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 26, 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 (See annexes).

¹⁶ 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 on 01/02/2020).

¹⁷ « *Hongrie. Le Conseil de l’Europe critique la loi « anti-Soros »* », *Ouest France*, 15 February 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).

¹⁸ As a reminder, the selection process for the judges of the Court consists of two phases: a first national one involving the selection of three candidates suggested by the Government, and a second phase involving the election of the judges by the Parliamentary Assembly of the Council of Europe (PACE). An expert advisory panel on candidates for the election of judges intervenes between the two phases to assess the quality of the candidates.

country,¹⁹ two of the three candidates for the judge election in 2018 were leaders of the Open Society Foundation. One of them was elected.²⁰ The Open Society Foundation has invested more than \$ 131 million in this country since 1992.²¹ Likewise, the last two judges elected in respect of Latvia are collaborators of the Riga Law School, founded by the Soros Foundation of Latvia, which invested more than \$ 90 million in this country between 1992 and 2014.²² The two latest Bulgarian judges also come from NGOs supported by the OSF.²³ In such small countries, the OSF and its foundations have become inescapable for anyone involved in social and media matters. They are major employers and funders. The OSF currently spends more than 90 million euros per year in Europe, mainly in Eastern Europe and the Balkans.²⁴

The presence of former NGO collaborators within the Court has been reinforced by the adoption of “Guidelines of the Committee of Ministers on the selection of candidates for the post of judge at the European Court of Human Rights” new procedure for the selection of candidates to the post of judge which provides for the intervention of NGOs at all stages of the national phase of the procedure.²⁵ They are authorized “*either to invite suitable persons to apply or themselves to nominate such persons*”.²⁶ The national body responsible for submitting a list of candidates to the government may also include representatives of NGOs.²⁷ Finally, NGOs also intervene, informally, through lobbying PACE member deputies in order to convince them to elect their candidate.

The high proportion of judges issued from NGOs also results from the fact that governments can present, as candidates for the Court, jurists without judiciary experience. Thus, 51 of the 100 judges at the Court for the last ten years are not magistrates by profession. We also observe that among the 22 judges having links with these NGOs, 14 are not professional magistrates.

II. Interactions with NGOs during the mandates of the judges

A. *The action of these NGOs before the Court*

The international system of protection of human rights was established after the Second World War to curb the power of states. It created a new political order, a globalised

¹⁹ AFP, *La justice albanaise malade de la corruption*, 18 July 2016, https://www.lepoint.fr/monde/la-justice-albanaise-malade-de-la-corruption-18-07-2016-2055240_24.php (visited on 01/02/2020).

²⁰ Twice before this election, the PACE rejected the list of candidates “in view of the national selection procedure not being in line with the standards required by the Assembly and the Committee of Ministers.”, PACE, Progress Report, Doc. 14150 Add. II, 6 October 2016.

²¹ <https://www.opensocietyfoundations.org/newsroom/open-society-foundations-albania> (visited on 01/02/2020).

²² Formerly entitled Soros Foundation-Latvia, the change of name dates from 2014: <https://www.fondsdots.lv/en/foundation-dots/open-society-/> (visited on 01/02/2020).

²³ Judges Grozev and Kalaydjieva were members of or very close to the Open Society Institutes of Sofia and of that of New York or of the Bulgarian Lawyers for Human Rights (funded by the Open Society Foundation). See Appendix.

²⁴ <https://www.opensocietyfoundations.org/what-we-do/regions/europe> (visited on 01/02/2020).

²⁵ Committee of Ministers, 1138th meeting, 28-29 March 2012, 4.4 Guidelines of the Committee of Ministers on the selection of candidates for the post of judge at the European Court of Human Rights https://www.coe.int/t/dgi/brighton-conference/Documents/Guidelines-explan-selection-candidates-judges_fr.pdf, § 41 (visited on 01/02/2020).

²⁶ *Ibid.*, § 44.

²⁷ *Ibid.*, § 48.

governance made up of networks of influence and of *soft law*. NGOs have become the main actors on this globalised normative field of human rights, to the point that some of them are now politically more powerful than many States. They also have greater resources than the operating budget of some public bodies of protection of human rights, including that of the European Court of Human Rights. Some of these NGOs, such as the Helsinki Committees and Amnesty International, have done remarkable work, particularly during the “Iron Curtain” era, and are continuing to do so in many areas. It should nevertheless be noted that they subsequently defended a more controversial interpretation of human rights.

The action of NGOs before the Court is of prime importance but lacks transparency.

On the importance of NGOs actions

The seven NGOs from which judges come act before the Court in important cases likely to set precedents, and most often relating to freedom of expression,²⁸ the right to asylum,²⁹ LGBT rights,³⁰ conditions of detention,³¹ and minority rights.³² They act in particular by means of strategic litigation, that is to say by using judicial remedies as means to achieve a more general objective of a political nature.³³ At the ECHR, it means, from a concrete case, to obtain the condemnation of national practices or laws contrary to the interests or values of the organization. Although having, in theory, a scope limited only to the case in point, the case-law of the ECHR is authoritative within the 47 Member States, and inspires many instances beyond Europe. This strategic action has been particularly effective in promoting the rights of LGBT people in Europe, as well as regarding surrogacy.

The Open Society Foundation has established itself as the most influential organization in this area. Through its policy of founding and funding other organizations, it has placed itself at the top of an important network of NGOs. The goals and actions of the OSF have aroused as much enthusiasm as concern and questions. In addition to its geopolitical actions, the OSF militates and finances initiatives in favour, for example, of freedom of expression, of the education of the Roma people, as well as of the liberalization of drugs,³⁴ of prostitution,³⁵ of

²⁸ The Open Society Justice Initiative (OSJI) intervened in 10 cases out of 20 related to the freedom of Speech (third party intervention and direct action), Human Rights Watch in 5 cases out of 14, the ICJ in 3 out of 32.

²⁹ Regarding the right of Asylum: Amnesty International intervened in 8 cases out of a total of 22 relating to this subject, HRW 4 out of 14, Interights 5 out of 20, Aire Centre 11 out of 38 or the ICJ 5 out of 32.

³⁰ Regarding the right of the LGBT: Amnesty International intervened in 3 cases out of 22 related to this subject, Interights 3 out of 20, Aire Centre 5 out of 38, the ICJ 8 out of 32.

³¹ The Helsinki NGOs intervened in more than 28 cases out of 95 related to incarceration and to prison conditions, Aire Centre in 4 cases out of 38, the ICJ in 3 cases out of 32.

³² Regarding the right of minorities, the OSF took action in 2 cases out of a total of 20 related to this area, Interights in 3 cases out of 20, Aire Centre in 6 cases out of 38.

³³ Extract of the Strategic Litigation 2018 Report of the Helsinki Foundation 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).

³⁴ See for instance: “Why We Need Drug Policy Reform”, April 2019, <https://www.opensocietyfoundations.org/explainers/why-we-need-drug-policy-reform> (visited on 01/02/2020)

³⁵ See for instance: “Understanding Sex Work in an Open Society”, April 2019, <https://www.opensocietyfoundations.org/explainers/understanding-sex-work-open-society>; “Ten Reasons to Decriminalize Sex Work”, April 2015, <https://www.opensocietyfoundations.org/publications/ten-reasons-decriminalize-sex-work> (visited on 01/02/2020).

abortion, of LGBT behaviours, or the rights of refugees and minorities. Within the OSF network, the Open Society Justice Initiative specializes in strategic litigation. This organization, like a few others, can act simultaneously before all the international bodies where the law is developed, and thus can implement global strategies for the assertion of new international standards.

Since 2009, there have been at least 185 cases which have given rise to the publication of a judgment of the ECHR in which at least one of the seven NGOs from which judges come has visibly acted. In 72 of them, at least one of these NGOs clearly acted as the applicant,³⁶ or as the applicant's legal representative.³⁷ During this same period, these NGOs were also authorized to intervene as a third party in more than 120 cases which lead to the publication of a judgment.³⁸ Frequently, due to the strategic importance of a case, several of these NGOs join forces to intervene together,³⁹ thus demonstrating their doctrinal proximity. This was the case, for example, in *A. v. The Netherlands* on July 20, 2010,⁴⁰ and in *Vallianatos and others v. Greece*,⁴¹ on November 7, 2013.

On the amici curiae

The favourite mode of action of NGOs before the Court is through third-party interventions,⁴² also called *amicus curiae* (friend of the court). This procedure is a practice, imported from *Common law*, by which a private or legal person submits to the attention of the Court elements of assessment on a case in which it is not a party to the initial proceedings. The author of the third intervention then becomes a "third party" in the case. This procedure is very beneficial, even if the neutrality and the exteriority of the participants are often only a facade. Indeed, the ECHR often has to judge complex and important questions with strong social consequences. The Court is then placed above national authorities, even legislative ones. The intervening NGOs then have the role of expert, of intermediary body, but also of lobby. In addition to factual information, both sociological and legal, NGOs can also present the Court with a plurality of ideological or philosophical approaches to the issue in question, provided that NGOs of various tendencies are involved. They thus enrich the procedure. By intervening in a case, the objective of NGOs is to enlighten the Court and in doing so to convince it to adopt its own position, and thus to contribute to the development of its case-law, and through it, of that of the European law. The influence of third-party interventions is variable. It can be null but can also be very significant, the Court being able to adopt the reasoning of an NGO, and even to quote it.

³⁶ Under article 34 of the Convention. This is the case, for instance, in the ECHR case, "*Armenian Helsinki Committee*" v. *Armenia*, No 59109/08, 31 March 2015.

³⁷ Under article 36 of the Rules of Court. See our Annex No 3: "*Direct actions by NGOs as representatives of applicants to the ECHR*" available on the ECLJ website.

³⁸ See our Annex No 2: "*Third-party interventions by NGOs to the ECHR*" available on the ECLJ website. The ECLJ intervened as third-party intervention in 36 cases since 2009.

³⁹ In the case *M.S.S. v. Belgium and Greece* [GC], No 30696/09, 21 January 2011, regarding asylum seekers in Greece, AIRE Centre, Amnesty International and the Greek Helsinki Monitor intervened.

⁴⁰ ECHR, *A. v. the Netherlands*, No 4900/06, 20 July 2010, §134-137. The following acted jointly: Amnesty International, the Association for the Prevention of Torture, Human Rights Watch, the International Commission of Jurists, Interights and Redress.

⁴¹ ECHR, *Vallianatos and others v. Greece*, No 29381/09 and 32684/09, 7 November 2013. The following intervened jointly: The Advice on Individual Rights in Europe Centre (AIRE Centre), the International Commission of Jurists (ICJ), the International Federation for Human Rights and the European branch of the *International Lesbian, Gay, Trans and Intersex Association* (ILGA).

⁴² Under Article 36 of the Convention and Article 44 of the Rules of Court.

The European Convention and the Rules of the Court give the President of the Court the power to rule on and even arouse spontaneous requests for third-party interventions having regard to “*the interests of the proper administration of justice*”. No reason is given for the decision on these requests; it is probably more the work of the Judge-Rapporteur than that of the President. From experience, one might think that in certain cases, the Court accepts the requests of certain NGOs only, and rejects others, without necessarily respecting an ideological balance;⁴³ in other cases, it chooses not to admit any NGO,⁴⁴ or conversely, seems to accept them all.

On the lack of transparency

In the absence of transparency rules, it is difficult to know precisely all the cases in which NGOs are involved in the Court, in particular when they represent the applicants. The texts, both of the summaries of the cases and of the judgments published by the Court, only make it possible to identify some of them.

As an example, the Court’s database (Hudoc) shows that the Helsinki Foundation for Human Rights in Poland intervened 9 times as representative of the applicants in cases tried and published between 2009 and 2019.⁴⁵ However, according to the activity reports of this organisation,⁴⁶ it declared having filed 16 applications in 2017 alone. It also claims to have defended 32 cases before the ECHR during that same year. The figures for 2018 are roughly the same.⁴⁷ Thus, out of four cases mentioned in the activity reports of the Helsinki Foundation for Human Rights (HFHR) as introduced between June 2017 and November 2018, only one is shown on Hudoc as being linked to this foundation.⁴⁸ In the other three cases, the affiliation of the applicants’ lawyers to the foundation’s *strategic litigation* team is not mentioned. When these lawyers act, it is difficult - if not impossible - without this mention, to know whether they are acting personally or as members of the NGO.

Thus, out of 16 cases brought by a lawyer, member of the Polish Helsinki Foundation team, and communicated from January 1, 2017 (but not judged), only 4 refer to the Helsinki Foundation. Similarly, out of 5 cases tried since that date, only one mentions the Polish NGO. Similarly, out of the 17 requests struck off the roll since January 1, 2017, only 4 indicate the

⁴³ This was the case for instance, in the case *Vallianatos and others v. Greece* in 2013 regarding discrimination in the legal recognition by the State of heterosexual and homosexual couples, where the four NGOs authorised to intervene were all in favour of Greece’s conviction. Those were the ICJ, the ILGA Europe, the International Federation for Human Rights and the AIRE Centre. ECHR, *Vallianatos et autres c. Grèce* [GC], No 29381/09 and 32684/09, 7 November 2013.

⁴⁴ For instance, in the case *Paradiso and Campanelli v. Italy* (No 25358/12, 27 January 2015 and same case before the Grand Chamber, judged on 24 January 2017), all the requests to intervene were denied by the Court.

⁴⁵ See in the annexes: “*Third-party interventions by NGOs to the ECHR*” & “*Direct actions by NGOs as representatives of applicants to the ECHR*” available on the ECLJ website.

⁴⁶ Helsinki Foundation for Human Rights Poland Report:

Landmark human rights cases 2017: <https://www.hfhr.pl/wp-content/uploads/2018/11/Raport-litygacyjny-ENG-20181108-WEB-rozk%C5%82ado%CC%81wki.pdf> (visited on 01/02/2020).

Human Rights in Strategic Litigation 2018 Report: <https://www.hfhr.pl/wp-content/uploads/2019/01/raport-roczny-PSP-2018-EN.pdf> (visited on 01/02/2020).

⁴⁷ Number of cases brought by the Helsinki Foundation for Human Rights (Poland) in 2018: 11; it featured in 40 cases before the ECHR throughout that same year.

⁴⁸ These are the following 4 cases: 3 without mention of the Helsinki Foundation: ECHR, *Kość v. Poland*, No 34598/12, 1st June 2017; ECHR, *Wcisło and Wabaj v. Poland*, No 49725/11, 8 November 2018; ECHR, *Bistieva and others v. Poland*, No 75157/14, 10 April 2018. 1 case with mention of the Helsinki Foundation of Human Rights: ECHR, *Solska and Rybicka v. Poland*, No 30491/17 and 31083/17, 20 September 2018.

role of the NGO. This is even more blatant with inadmissibility decisions where none of the 12 decisions specifies the link between the lawyer and the Polish Helsinki Foundation.⁴⁹

The same is true of *D.H. and others v. The Czech Republic*,⁵⁰ in which the president of the OSJI was a lawyer of the applicants, but without this organization appearing in the proceedings, although it claims in its activity report⁵¹ that it was at its initiative. However, other NGOs founded or funded by the OSF visibly acted as third parties.

We can also cite here the strange *Pussy Riot* case in 2018⁵² who were defended at the ECHR by a leader of the Open Society Justice Initiative, Mr. Yonko Grozev, shortly before he was elected judge to this same Court.

In other cases, the NGO appears only in the part of the judgment relating to costs. This was the case when the applicant, in *Hilgartner v. Poland* in 2009,⁵³ asked Amnesty International to be granted 500.000 euros without this organization being mentioned anywhere else in the judgment. Likewise, in the cases of the *Lupeni Greek Catholic Parish and others v. Romania*⁵⁴ and *D.M.D. v. Romania*,⁵⁵ the applicants asked the Court to grant costs to the Romanian Helsinki Committee, which the Court refused on the ground that this organization did not officially represent them. Until recently, the summaries of several cases published by the Court Registry when communicated to the respondent government do not indicate whether the applicants' lawyer also acts on behalf of an NGO.⁵⁶

This lack of clarity does not allow to know the extent of NGOs actions before the Court. More importantly, it is likely to affect the procedure, not only because the real applicant is sometimes the NGO which acts by means of a particular case, but also because only the former collaborators of these NGOs, judges or jurists of the registry, are able to identify which group is "behind" the request, whether they were informed informally by relationships, or know the lawyer. In this case, the possible links between judges and applicants are less visible, but nonetheless well present.

It is also often the case that several of the NGOs studied in this report act together, one as the representative of the applicants, and the others as third parties. Thus, in the important case of *Al Nashiri v Poland*,⁵⁷ the applicants were represented by the Open Society Justice Initiative, and were supported by the Helsinki Foundation for Human Rights, the International Commission of Jurists and Amnesty International, all three funded by the OSF. The chamber was chaired by Mrs. Ineta Ziemele, founding member of the Latvian section of the International Commission of Jurists and Professor at the Riga Law School, founded and co-funded by the OSF.

⁴⁹ See our Appendix No 5: "The "Strategic litigation" team of the Helsinki Foundation for Human Rights (Poland) and cases before the ECHR" available on the ECLJ website.

⁵⁰ ECHR, *D.H. and others v. the Czech Republic*, No 57325/00, 13 November 2007. Interview with Judge Zupančič available on the site of the ECLJ, December 2019.

⁵¹ The Open Society Justice Initiative, *Global Human Rights Litigation Report*, <https://www.justiceinitiative.org/uploads/4e9483ab-a36f-4b2d-9e6f-bb80ec1dcc8d/litigation-global-report-20180428.pdf> (visited on 01/02/2020).

⁵² ECHR, *Mariya Alekhina and others v. Russia*, No 38004/12, 17 July 2018.

⁵³ ECHR, *Hilgartner v. Poland*, No 37976/06, 3 March 2009.

⁵⁴ ECHR, *Lupeni Greek Catholic Parish and others v. Romania*, No 76943/11, 19 May 2015.

⁵⁵ ECHR, *D.M.D. v. Romania*, No 23022/13, 3 October 2017, § 77.

⁵⁶ It concerns the HFHR and the cases: ECHR, *M. K. v. Poland*, No 40503/17, released on 13 July 2017; ECHR, *D. A. and others v. Poland*, No 51246/17, released on 7 September 2017.

⁵⁷ ECHR, *Al Nashiri v. Poland*, No 28761/11, 24 July 2014.

It even happens that the NGO acts simultaneously through the representation of the applicants and through a third party in the same case. This was the case, for example, of the Bulgarian Helsinki Committee in the case of *Neshkov and others v. Bulgaria*.⁵⁸ The Court awarded costs to the Bulgarian Committee as a representative of the applicant, even though it had concomitantly acted as a third party. The Polish Helsinki Foundation also indicated in its report⁵⁹ that it wished to do so in the case of *Andrzej Jezior v. Poland* (No 31955/11).

B. Judges dealing with cases brought by, or with the support of, “their” NGO

A systematic examination of the 185 cases in which the 7 NGOs have acted since 2009 shows that in 88 cases, judges ruled even though they had links with an NGO visibly involved. Only the cases published by the Court on Hudoc, namely having been the subject of a judgment in Grand Chamber, Chamber or Committee, can be taken into account in this study, which excludes the vast majority of applications which are dismissed by decision of a single judge.

Cases in which judges seated

It appears that 18 of the 22 judges mentioned above have sat in cases involving the NGO with which they had collaborated. (*A detailed presentation is provided in Annexes 1 and 2*).

Regarding the AIRE Centre, judge Eicke sat in a case in which that NGO was a third party.

Regarding Amnesty International, judge Pinto de Albuquerque sat in one case where this organization was the applicant and in another where it was a third party. Judge Šikuta sat in a case where this organization was a third party.

Regarding the Helsinki Committees, six of the seven judges linked to these organizations have sat in cases in which these committees have acted as applicants or as third parties. Judges Yudkivska, Grozev, Garlicki, Karakaş and Kalaydjieva have sat respectively in four, six, eleven, seven and twelve cases, in which a Committee has acted as a third party, and in four, two, eight, three and nine cases in which a Committee was an applicant. Judge Šikuta sat in two cases in which a committee acted as a third party. For Judge Grozev it was the Bulgarian Committee of which he was a founder and member from 1993 to 2013.

Regarding Human Rights Watch, Judge Pavli heard a case it intervened as a third party.

Regarding the International Commission of Jurists (ICJ), three of the five judges linked to this NGO have sat in cases in which it intervened as a third party: judges Motoc, Kuckso-Stadlmayer and Ziemele in, respectively, three, four and six cases.

Regarding the Open Society Foundation (OSF) and its affiliates, eight of the twelve judges who had strong links with this organization, judged cases in which it was involved. Judges Grozev, Mits, Pavli, Šikuta and Turković each sat in a case where the OSF intervened as a third party. Judge Mijović sat in four cases where the OSF was a third party. Judges Sajó

⁵⁸ ECHR, *Neshkov and others v. Bulgaria*, Nos 36925/10, 21487/12, 72893/12, 73196/12, 77718/12, and 9717/13, 27 January 2015.

⁵⁹ Helsinki Foundation for Human Rights 2017 Report, p. 30. Landmark human rights cases 2017: <https://www.hfhr.pl/wp-content/uploads/2018/11/Raport-litygacyjny-ENG-20181108-WEB-rozk%C5%82ado%CC%81wki.pdf> (visited on 01/02/2020).

and Vučinić each sat on three cases where the OSF was a third party and Judge Garlicki in two of those cases. Judge Ziemele sat in two cases where the Open Society was a third party and in one case where the Open Society represented the applicant. Judge Laffranque sat in two cases where the Open Society intervened: one as a representative of the applicant and the other as a third party.

In addition to these cases, one must add all those in which there is an indirect link between the NGO and the judge, through OSF funding. Indeed, in very numerous cases, a judge linked to the OSF is likely to judge cases brought or supported by NGOs funded by the OSF; or conversely, a judge from an NGO funded by the OSF is likely to judge cases brought by the OSF or by its affiliated organizations. The OSF states that the link established with its beneficiaries is not only financial but aims to establish real “*alliances in pursuing crucial parts of the open society agenda*”.⁶⁰ The OSF and the NGOs it finances therefore share the same objectives.

Among the hundreds of organizations which rotate in the orbit of the OSF, some are active before the Court and benefit from significant funding taken from the US\$ 32 billion⁶¹ with which the OSF was endowed since 1984. This is the case of *Human Right Watch* which has received US\$ 100 million since 2010⁶² (and whose honorary president was also chairman of the OSF),⁶³ but also of the Helsinki committees which received more than two and a half million dollars in 2016, including US\$ 460,000 for the Bulgarian Helsinki Committee, US\$ 610,000 for the Hungarian Helsinki Committee and US\$ 1,325,000 for the Helsinki Foundation for Human Rights in Poland.⁶⁴ Moreover, according to the data appearing on the transparency register of the European Union for the year 2017,⁶⁵ the OSF endowed this Polish Helsinki Foundation with 40% of its global budget.⁶⁶ The International Commission of Jurists received US\$ 650,000 in 2017, Amnesty International received approximately US\$ 300,000 in 2016. Interights was also funded in its time.⁶⁷ Other organizations active before the ECHR in strategic cases, such as the ILGA and the Center for Reproductive Rights also received US\$ 650,000 and US\$ 365,000 respectively in 2016.

Some of these NGOs financially depend so much from the OSF that it is quite artificial to distinguish them from it. The judges who had responsibilities within these NGOs cannot ignore these links. The number of cases showing an indirect link is so considerable that we have not undertaken to assess it fully.⁶⁸

⁶⁰ https://www.opensocietyfoundations.org/uploads/2519658d-a95b-44bd-b9d3-edec9039de24/partners_20090720_0.pdf (visited on 01/02/2020).

⁶¹ <https://www.opensocietyfoundations.org/george-soros> (visited on 01/02/2020).

⁶² Human Rights Watch 2012 Financial Statement:

https://www.hrw.org/sites/default/files/related_material/financial-statements-2012.pdf; see also <https://www.hrw.org/news/2010/09/07/george-soros-give-100-million-human-rights-watch> (visited on 01/02/2020).

⁶³ This concerns Aryeh Neier: <https://www.opensocietyfoundations.org/who-we-are/staff/aryeh-neier> (visited on 01/02/2020).

⁶⁴ According to information published by the OSF: <https://www.opensocietyfoundations.org/grants> (visited on 01/02/2020).

⁶⁵ <https://ec.europa.eu/transparencyregister/public/consultation/displaylobbyist.do?id=657241221166-37&locale=en#en> (visited on 01/02/2020).

⁶⁶ In 2017, the OSF provided the Helsinki Foundation for Human Rights (Poland) with € 820,398 out of an overall budget of € 2,109,858.

⁶⁷ See the website of the closed-down foundation <https://www.interights.org/> (visited on 01/02/2020).

⁶⁸ Thus, for example, judges linked to the OSF have sat in many cases involving HRW: judge Mijović sat in five of them, judge Turković in one of them, judge Garlicki in three, judge Vučinić in four cases and judge Ziemele

The case of *Big Brother Watch v. The United Kingdom*,⁶⁹ relating to data protection, is emblematic of the ambiguous relationship between NGOs and the Court. Among the 16 applicants, 14 were NGOs, 10 of which are funded by the OSF. These are the American Civil Liberties Union (ACLU), English PEN, Amnesty International, the National Council for Civil Liberties (Liberty), the Bureau of Investigative Journalism, Privacy International, the Canadian Civil Liberties Association, the Hungarian Union for Civil Liberties, the Legal Resources Center and the Open Rights Group. The same is true of third parties, including the Open Society Justice Initiative, Human Rights Watch, the Helsinki Foundation for Human Rights, the International Commission of Jurists, Access Now and American PEN, which are also funded by the OSF. The community of interest and the institutional and financial links between the applicants and the interveners cast a shadow over the impartiality of the third parties and call into question the equality of arms before the Court because the respondent government finds itself alone faced with a cloud of NGOs which, although presenting themselves distinctly, pursue the same objective and are linked. Even more significantly, at least six of the 17 judges who sat in the Grand Chamber in this case are also linked to the applicant and intervening NGOs.⁷⁰

Few withdrawals due to links between judges and NGOs

It also happens that judges decide to withdraw themselves, that is, not to sit. These withdrawals are mentioned in the judgments without specifying their cause. There have been 313 withdrawals over the past ten years;⁷¹ they are mainly due to a few judges (Bîrsan in 110 cases, Kalaydjieva in 53 cases, López Guerra in 18 cases, Motoc in 24 cases, Grozev with 13 cases or judges Spielmann, Paolungui and Jäderblom in 6 cases each).

In only 12 of these 313 cases, the withdrawal of the judge appears to be motivated by the existence of a link between himself and an NGO involved in the case. Essentially, it was the case with Judge Grozev, with 9 withdrawals happening when “his” NGO was the applicant or his representative in a case.⁷² In three other cases, judges Garlicki, Kalaydjieva and Motoc each withdrew when “their” NGO was part of the procedure.⁷³ Judge Grozev also withdrew

in one of them and judge Šikuta in two cases. As for the Helsinki Foundation for Human Rights (Poland), judge Ziemele sat in six of those cases (2 in which the NGO represented the applicant and 4 in which it was a third party intervenor), judge Vučinić in 12 cases (4 in representation and 8 as a third party) or Garlicki in 15 cases (5 in representation and 10 as third party) and judge Laffranque in 2 cases in which this NGO was a third party intervenor. Judge Mijović sat in ten of those cases (2 cases in which the Helsinki Foundation represented the applicant and 8 cases in which it was a third-party intervenor) and judge Turković in 2 cases in which it was a third-party intervenor. See Appendix 1.

⁶⁹ ECHR, *Big Brother Watch and others v. The United Kingdom*, Nos 58170/13, 62322/14, and 24960/15, 13 September 2018.

⁷⁰ Judges Pinto de Albuquerque, Motoc, Grozev, Mits, Kucsko-Stadlmayer and Pavli.

⁷¹ See Appendix 4: “*The withdrawal by judges of the ECHR*” available on the website of the ECLJ.

⁷² This concerns the following 9 ECHR cases: *Bulgarian Helsinki Committee v. Bulgaria*, Nos 35653/12 and 66172/12, 28 June 2016; *Kulinski and Savev v. Bulgaria*, No 63849/09, 21 July 2016; *National Turkish Union and Kungyun v. Bulgaria*, No 4776/08, 8 June 2017; *M.M. v. Bulgaria*, No 75832/13, 8 June 2017; *Dimcho Dimov v. Bulgaria* (No2), No 77248/12, 29 June 2017; *Kiril Ivanov v. Bulgaria*, No 17599/07, 11 January 2018; *The United Macedonian Organisation Ilinden and others v. Bulgaria* (No 3), No 29496/16, 11 January 2018; *Yordon Ivanov v. Bulgaria*, No 70502/13, 11 January 2018; *Hadzhieva v. Bulgaria*, No 45285/12, 1st February 2018.

⁷³ It is the following 3 cases:

- *Rasmussen v. Poland*, No 38886/05, 28 April 2009: the disqualified judge is Garlicki and the lawyer (M. Pietrzak) is one of the pro bono lawyers of the Helsinki Foundation of Human Rights (Poland) to which this judge is close;

from two other cases in which the applicants were represented by his former partner,⁷⁴ As well as from one case which he had himself introduced.⁷⁵ However, he did not withdraw in other cases where his NGO represented the applicant⁷⁶ or intervened as third party.⁷⁷ He also seated in 5 cases where the Polish Helsinki Foundation intervened.

Concerning the vast majority of withdrawals; their causes are diverse. Judge Bîrsan had to withdraw in all cases concerning Romania⁷⁸ until the end of his mandate after his wife, a magistrate, was investigated for corruption. It may also happen that a judge be compelled not to sit, the decision being taken sometimes even after the hearing.⁷⁹ It may also happens that a request for withdrawal be made in the event of a referral to the Grand Chamber, against a judge who sat on the chamber formation. This was the case in at least three cases: in the first the President accepted it⁸⁰ and in the other two he refused it.⁸¹ In another case, the government challenged the composition of the Grand Chamber for impartiality and its request was rejected.⁸² Finally, in a July 2019 case, the applicants questioned the impartiality of a judge, which the chamber refused by a unanimous vote, without however justifying the grounds on which the request for withdrawal was based nor its rejection.⁸³

III. The questions raised by this situation

The factual finding established in this report is part of a context and reveals both general and specific questions.

The exceptional and political power of the ECHR

Given its position above the 47 national legal orders, the ECHR is an extraordinary jurisdiction. In addition, because of the brevity of the Convention and its protocols –

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- *Sashov and others v. Bulgaria*, No 14383/03, 7 January 2010: the disqualified judge is Zdravka Kalaydjieva. The applicants are represented by the European Roma Rights Centre. This judge was a member of the legal counsel of the Centre at the time of her election as a judge (cf. Appendix);
 - *Al Nashiri v. Romania*, No 33234/12, 31 May 2018, Judge Iulia Motoc withdrew. Third party interventions of the ICJ and of the Romanian Helsinki Committee (APADOR-CH). Mrs Motoc had been a Counsel Member of the ICJ (see Appendix).

⁷⁴ This concerns the two following cases: ECHR, *Myumyun v. Bulgaria*, No 67258/13, 3 November 2015 and ECHR, *Tomov and Nikolova v. Bulgaria*, No 50506/09, 21 July 2016. And of the lawyer N. Dobrova.

⁷⁵ In the *Dimitrovi v. Bulgaria* case, No 12655/09, 21 July 2016, Mr. Grozev was the initial representant of the applicants.

⁷⁶ *D.L. v. Bulgaria*, No 7472/14, 19 May 2016; *Aneva and others v. Bulgaria*, Nos 66997/13, 77760/14 and 50240/15, 6 April 2017.

⁷⁷ *Dimitar Mitev v. Bulgaria*, No 34779/09, 8 March 2018.

⁷⁸ Act Media, Romanian News Agency, “ECHR decided to lift the immunity of judge Gabriela Bîrsan”, 1st December, 2011: <https://www.actmedia.eu/daily/echr-decided-to-lift-the-immunity-of-judge-gabriela-birsan/37019> (visited on 01/02/2020). See also, ECHR, *Birsan v. Romania*, No 79917/13, 2 February 2016.

⁷⁹ ECHR, *Marguš v. Croatia*, No 4455/10, 27 May 2014: “After the hearing it was decided that Ksenija Turković, the judge elected in respect of Croatia, was unable to sit in the case”.

⁸⁰ ECHR, *Ališić and others v. Bosnia-Herzegovina, Croatia, Serbia, Slovenia and former Yugoslav Republic of Macedonia* [GC], No 60642/08, 16 July 2014.

⁸¹ Regarding Judge Keller, in the case ECHR, *Perinçek v. Switzerland*, No 27510/08, 15 October 2015, § 5; and Judge *ad hoc* Boštjan Zalar who replaced the Slovenian Judge Marko Bošnjak, in the case ECHR *Lekić v. Slovenia* [GC], No 36480/07, 11 December 2018, § 4.

⁸² ECHR, *Ilgar Mammadov v. Azerbaijan* [GC], No 15172/13, 29 May 2019, § 6.

⁸³ ECHR, *Rustavi 2 Broadcasting Company Ltd and others v. Georgia*, No 16812/17, 18 July 2019, § 6.

only about twenty articles guaranteeing rights and freedoms – the Strasbourg judges enjoy an extensive discretionary power, compared to that of national judges. According to the preamble to the Convention, judges have a duty not only to *protect* but also to *develop* the rights and freedoms of the Convention. As a result, the text is considered a “*living instrument which (...) must be interpreted in the light of present-day conditions*”.⁸⁴ This broad power of interpretation and this dynamic approach to the Convention can have great consequences on national laws since the cases submitted to the Court are very sensitive and diverse.⁸⁵ Yet, the higher the judicial body, the more extensive its power of interpretation, and the more political its mission and composition. Judges are elected by a parliamentary assembly (PACE), not directly appointed by governments, and the ultimate choice of judge often depends more on their ideological profile than on their competence. The selection and appointment of judges is therefore of strategic importance.

The imbalance of the system

International and non-governmental organizations form together an ecosystem for the protection of human rights. They are distinct, complementary and interdependent. NGOs are often the eyes and arms “in real life” of “disconnected”, blind and armless, bodies. They inform the authorities, introduce appeals, and ensure of the respect of international decisions. Their action is, in most cases, of great use. The authorities, such as the ECHR, are therefore major vectors of the action of these organizations since it is through them that they can act most effectively. As a result, NGOs seek to exert maximum influence within these bodies; the height being to obtain the election of a collaborator as a member of the Court. In this regard, the *Open Society Justice Initiative* and the International Commission of Jurists have jointly published a long report on the rules and practice of the selection of judges and commissioners in the field of human rights around the world.⁸⁶

As in any ecosystem, for it to be sustainable and virtuous, a balance must be established between the main body (the public bodies) and its complementary bodies (NGOs). The large NGOs mentioned in this report already largely dominate the human rights discourse in civil society. The risk is that this power will extend more directly to international bodies protecting human rights, and in particular to the ECHR. On this point, we can observe that the annual budget allocated by the OSF to its action in Europe is 90 million dollars,⁸⁷ against 70 million euros⁸⁸ for the ECHR.

⁸⁴ ECHR, *Tyrer v. United-Kingdom*, No 5856/72, 25 April 1978, § 31.

⁸⁵ Inter-state conflicts (Crimea, Ukraine, Russia, etc.), moral issues (sexuality, marriage, family, abortion, etc.), biotechnology issues (ART, surrogacy, eugenics), immigration issues (family reunification, refugee rights, etc.), freedom of religion issues (wearing the veil, minarets, etc.), or, among others, freedom of speech issues (blasphemy, etc.).

⁸⁶ Open Society Justice Initiative and the International Commission of Jurists, *Strengthening from Within Law and Practice in the Selection of Human Rights Judges and Commissioners. A report of the Open Society Justice Initiative and the International Commission of Jurists*, Open Society Foundations. Budapest, 2017. Available on: <https://www.icj.org/wp-content/uploads/2017/11/Universal-Strengthening-from-Within-Publications-Reports-2017-ENG.pdf> (visited on 01/02/2020).

⁸⁷ <https://www.opensocietyfoundations.org/what-we-do/regions/europe> (visited on 01/02/2020).

⁸⁸ Budget of the ECHR: https://www.echr.coe.int/Documents/Budget_ENG.pdf (visited on 01/02/2020).

Private actors with no democratic legitimacy

NGOs, just like intermediary bodies, fill the “democratic loophole” of supranational governance, but are not themselves democratic, even if they are generally called “civil society” organizations, as opposed to the authorities. NGOs have no other democratic legitimacy than that conferred on them by their grassroots and members. The values they defend can certainly give them political prestige and ideological legitimacy, but these cannot replace the specificity of popular support. In theory, the more representative an NGO, the more human and financial support it has. But the system is distorted when NGOs owe their existence and funding only to a very limited number of people or institutions. The power of these NGOs then depends less on their representativeness than on their funding and proximity with the bodies they set out to influence. Financial power is then enough to give the illusion of legitimacy. Such organizations, even very active and visible in society, in fact only represent the interests and ideas of their founders and funders, be them public or private. Thus, the organization Interights, which was very active at the ECHR, brutally ceased all activity following the loss of patrons, and lack of real support among the population. Similarly, the Soros foundations in Hungary preferred to move to Austria, after their foreign funding was subject to heavy taxation. Thus, the NGOs with the greatest democratic legitimacy are not necessarily the richest, but they owe their solidity to their rooting within the population.

Influent private actors

The situation described in this report reveals the importance of the presence, and therefore of the potential influence, of certain private organizations in the intergovernmental system of protection of human rights, and up to within the ECHR. This influence can take various forms. It can be diffuse, as judges who were first professional activists may have contributed to the *judicial activism* often attributed to the Court. One may wonder how a professional activist can, overnight, adopt the *forma mentis* of a magistrate. More specifically, the links between a requesting NGO and judges may, by way of illustration, allow NGOs to informally inform the courts of the introduction of requests, and thus avoid their being subjected to the fate of 95% of requests declared immediately inadmissible after an often summary examination. The influence can also be more extensive. For example, it may happen that the synchronization between local opinion campaigns and the ECHR’s decision to make public cases serving this campaign is such that one may question its fortuitous nature. This is currently the case, for example, with regard to Poland, in terms of “LGBT and reproductive rights”. In addition, as in any human group, personal ties and affinities also exist within the Court itself, to the point of contributing to the formation of “clans” and networks of influence.

Challenging the principle of equality of arms

This situation also challenges the principle of equality of arms necessary to a fair trial. This principle requires that a fair balance be struck between the parties and that “*each party must be afforded a reasonable opportunity to present his case under conditions that do not place him at a disadvantage vis-à-vis his opponent*”.⁸⁹ One may question the respect of this principle in a case such as *Big Brother Watch v. The United Kingdom*,⁹⁰ in which the respondent government is opposed to sixteen related applicant and third party organizations.

⁸⁹ ECHR, *Öcalan v. Turkey* [GC], No 46221/99, 12 May 2005, § 140.

⁹⁰ ECHR, *Big Brother Watch and others v. United-Kingdom*, *op. cit.*

The lack of guarantees on the independence and impartiality of judges

This situation especially calls into question the independence and impartiality of the courts required by Articles 21 of the Convention and 28 of the Rules of Court. According to the latter provision, no judge may participate in the examination of a case if, inter alia, “for any other reason, his or her independence or impartiality may legitimately be called into doubt”.⁹¹ 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.⁹² 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”.⁹³

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).”⁹⁴

The objective assessment “mostly concerns hierarchical or other links between the judge and other protagonists in the proceedings”.⁹⁵ These links are the cause of conflicts of interest which French law defines as “any situation of interference between a public interest and public or private interests which is likely to influence or appear to influence the independent, impartial and objective exercise of a function”.⁹⁶ 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. The existence of a link between a judge and one of the parties may be enough 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 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

⁹¹ Article 28 § 2 of the Rules of Court, updated 1st January 2020, https://www.echr.coe.int/Documents/Rules_Court_ENG.pdf (visited on 01/02/2020).

⁹² 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.

⁹³ ECHR, Guide on Article 6 of the European Convention on Human Rights – Right to a fair trial (civil limb), 31 August 2019, §237. The document refers to the following cases ECHR *Kyprianou v. Cyprus* [GC], No 73797/01, 15 December 2005, § 118; *Piersack v. Belgium*, No 8692/79, 1st October 1982, § 30; *Grievés v. United-Kingdom* [GC], No 57067/00, 16 December 2003, § 69; *Morice v. France* [GC], No 29369/10, 23 April 2015, § 73.

⁹⁴ ECHR, *Castillo Algar v. Spain*, No 28194/95, 28 October 1998, § 45. See also, the Guide on Article 6 of the European Convention on Human Rights, *op. cit.*, § 241.

⁹⁵ ECHR, *Morice v. France*, [GC], *op. cit.*, § 77; ECHR, *Micallef v. Malta* [GC], *op. cit.*, § 97.

⁹⁶ Ordonnance n° 58-1270 du 22 décembre 1958 portant loi organique relative au statut de la magistrature, article 7-1.

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 Procedure 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).

The fact that a judge sits with other judges within a Chamber, and not as a single judge, is not enough to remove the doubt on his impartiality since, as noted the Court, because of the secrecy of the deliberations, it is impossible to know his real influence.⁹⁷ According to the Court’s case-law, any judge who could legitimately be feared to lack impartiality thus ought to withdraw.⁹⁸ The fact that the applicants did not ask for the recusal of the judge does not free him from the obligation⁹⁹ to take himself 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 demands, in the case of a demand of recusal by a party, that the jurisdictions answer in detail the arguments given to support this demand,¹⁰⁰ where it “does not immediately appear to be manifestly devoid of merit.”¹⁰¹

The ECHR must, 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.¹⁰² It is nevertheless surprising that there is no formal withdrawal procedure within the European Court, unlike the Court of Justice of the European Union,¹⁰³ even though it is true that most international courts do not have such a procedure. 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 European Court on 23 June 2008 somewhat clarifies the obligations of judges¹⁰⁴ and the procedure to be followed in case of doubt. It states that “In case of doubt as to application of these principles in a given situation, a judge may seek the advice of the President of the Court.” The European judge therefore has no obligation to inform its president. The document further adds that, “if necessary”, the president “may consult the Bureau” and “report to the Plenary Court on the application of these principles”. This is a somewhat light procedure which seems to leave it to the judge concerned to make the final decision on his withdrawal and to inform the President. However, the latter has the power “exceptionally” to modify the

⁹⁷ ECHR, *Morice v. France*, [GC], *op. cit.*, § 89.

⁹⁸ ECHR, *Micallef v. Malta* [GC], *op. cit.*, § 98; ECHR, *Castillo Algar v. Spain*, *ibid.*; ECHR, *Morice v. France*, *op. cit.*, § 78; and ECHR, *Ramljak v. Croatia*, No 5856/13, 27 June 2017, § 31.

⁹⁹ ECHR, *Škrlić v. Croatia*, No 32953/13, 11 July 2019, § 45.

¹⁰⁰ ECHR, *Harabin v. Slovakia*, No 58688/11, 20 November 2012, §136.

¹⁰¹ ECHR, *Remli v. France*, No 16839/90, 23 April 1996, § 48.

¹⁰² Article 24 §2 d) of the Rules of Court.

¹⁰³ Article 38 of Protocol No 3 on the Statute of the CJEU.

¹⁰⁴ The resolution defines independence and impartiality as follows: “*Independence: In the exercise of their judicial functions, judges shall be independent of all external authority or influence. They shall refrain from any activity or membership of an association, and avoid any situation, that may affect confidence in their independence.*

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 that may be reasonably perceived as giving rise to a conflict of interest.”

composition of the sections “if circumstances so require”.¹⁰⁵ 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.

Comparison with judges who are former civil servants of their government

It could be objected that the impartiality and independence of judges coming from national jurisdictions is not guaranteed either. Indeed. This is, precisely, the reason why the committees of the United Nations prohibit any judge or national expert from ruling on a case brought against his government. However, the link between judges and NGOs is no less problematic than that with governments, since it is no longer only a relationship of hierarchical obedience, but also of ideological adherence. This is likely to be felt much more widely and in a diffuse manner in all the cases involving these organizations. A government official can be expected to have more ideological neutrality and less activism than an NGO official. While the national judge usually tries to avoid a condemnation of his government, the judge from an NGO might want the opposite.¹⁰⁶

Lack of pluralism in the interpretation of human rights

One of the reasons why the situation described in this report could be established jolt-free may be due to the fact that the ECHR has already largely adopted the value system of these NGOs, so that it is no longer possible to see conflicts of interest between organizations with broadly the same interests. It is only when the judge does not conform to the dominant ideology that his profile shocks. This explains the recent scandal caused by the election of a Spanish judge because of her Catholic religious convictions. Various progressive and liberal movements blamed her for such convictions as if being catholic was incompatible with the office of judge, to the point that the *Socialists and Democrats* group in the European Parliament publicly demanded the cancellation of her election.¹⁰⁷ This probably also explains the side-lining, or even the resignation, of some other judges.

IV. What solutions?

As highlighted in the Report on the longer-term future of the Convention system, “*The quality of judges and members of the Registry is essential to maintaining the authority of the Court and therefore also for the future of the Convention mechanism.*”¹⁰⁸ Several measures could be implemented in order to remedy the situation described in this report, after what has been done in other European and national bodies.

¹⁰⁵ Article 25 § 4 of the Rules of Court.

¹⁰⁶ Judge Malinverni was able to say on Swiss radio that a national judge could seek to have his own state condemned by the ECHR: <https://www.rts.ch/play/radio/le-grand-entretien/audio/giorgio-malinverni-juge-des-droits-de-lhomme?id=7394794> (visited on 01/02/2020).

¹⁰⁷ “S&D’s very concerned about the election of judge María Elósegui for the ECHR” Socialists & Democrats Group Press Release – Brussels, 26 January 2018.

¹⁰⁸ Council of Europe, The longer-term future of the system of the European Convention on Human Rights, Report of the Steering Committee for Human Rights (CDDH) adopted on 11 December 2015, p. 61.

Avoiding the appointment of activists to the office of judge

The Court has already declared that “it is essential to ensure that candidates who are unfit for the post of judge are not put forward for election.”¹⁰⁹ A first measure would consist in avoiding the appointment to the Court of jurists who used to be activists, even more when their engagement mainly concerned the case-law of the European Court. The involvement in certain NGOs has a strong political or ideological character which, in itself, should be seen not as an advantage, but as an obstacle to the appointment to the Court. To this end, candidates for the office of judge should have the obligation to declare their relationships with any organization active at the Court.

In any case, the over-representation of certain private groups before the Court should be avoided during the selection process for judges.

Particular attention must be paid to the Expert Advisory Panel on candidates for the election of judges to the European Court. Its task is to confidentially assess the quality of the candidates proposed by governments before the examination and the vote in the PACE. According to the Court, this Panel “has undoubtedly enhanced the procedure for the election of judges”¹¹⁰ but its opinions are not always followed.

PACE should also be given sufficient means to carry out a proper assessment of candidates before the election.

Ensuring the transparency of interests

Links between NGOs, lawyers and applicants should be made visible by asking them to indicate, in the application form, if they are accompanied in their efforts by an NGO, and to mention its name. This requirement would improve the transparency of the proceedings, both for the Court and for the respondent government.

Another measure would consist, for the Court, in establishing a request form for third-party interventions in which the person requesting to intervene should declare his interests, the origin of his financing as well as his possible links with the parties, in particular if they collaborate. The aim is not to prevent partisan third-party intervention, but to improve their transparency, following the example of the “transparency register” in use at the European Parliament.

As for the judges of the European Court, the current publication of the summary of their curriculum vitae could be complemented by that of a declaration of interests, following the recommendation of the Committee of Ministers of the Council of Europe of 17 November 2010 on “Judges: independence, efficiency and responsibilities”. The demand for declarations of interest and their publication is growing,¹¹¹ and these “constitute one of the main measures to prevent conflicts of interest”. Such a declaration has been imposed on all French magistrates since 2016. In the United States, “members of the Supreme Court are subject to a declaration of interests, updated each year, made public, notably mentioning the advantages or gifts received in the during the past year ”.¹¹²

¹⁰⁹ ECHR, Opinion on the CDDH report on the Advisory Panel, 15 April 2014.

¹¹⁰ *Ibid.*

¹¹¹ See also, Court of Cassation Symposium « La déontologie des magistrats de l’ordre judiciaire : la déclaration d’intérêts », 30 June 2017, [Online Symposium](#).

¹¹² See Blandine Gardey de Soos, « La déclaration d’intérêts des magistrats judiciaires », *La semaine juridique*, Edition Générale, No 49, - 4 December 2017.

Formalizing withdrawal and recusal procedures

Regarding the withdrawal procedure, any judge who, in a particular case, has doubts as to the requirements concerning himself on the principles of judicial ethics, should have the obligation, and no longer only the option, to inform the President of the Court.

Regarding the recusal, the Court could usefully establish in its rules a formal procedure, following the example of the Court of Justice of the European Union and various national constitutional courts (for example in Germany,¹¹³ in France since 2010, in Spain and in Portugal).¹¹⁴ Such a procedure would require the Court to justify its decisions to refuse a recusal, in accordance with the requirements of its own case-law.

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.”*

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¹¹³ Michel Fromont, Présentation de la Cour constitutionnelle fédérale d'Allemagne, Cahiers du Conseil constitutionnel No 15 (Dossier Allemagne), January 2004.

¹¹⁴ Perlo Nicoletta, Les premières récusations au Conseil constitutionnel : réponses et nouveaux questionnements sur un instrument à double tranchant. In: Annuaire international de justice constitutionnelle, 27-2011, 2012. Juges constitutionnels et Parlements - Les effets des décisions des juridictions constitutionnelles. pp. 61-79.