Andrzej Drzemczewski
Former Head of the Legal Affairs and Human Rights Department of the Parliamentary Assembly of the Council of Europe, Strasbourg, France
a.drzemczewski@outlook.com
ORCID: 0009-0004-1322-027X

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Revisiting the Issue of Designation of *ad hoc* Judges in the European Court of Human Rights: Some Remarks Following the Case *Wałęsa v. Poland*

Introduction

The designation of Ioannis Ktistakis, the Greek judge, as an *ad hoc* judge subsequent to the recusal of Judge Krzysztof Wojtyczek, the judge elected in respect of Poland, in the recent *Wałęsa v. Poland* case caused quite a stir in Polish legal circles. Hence my decision to focus – in this short commentary – on this rarely discussed technical, yet important subject, in the light of the above-mentioned discussions and a misunderstanding as to the manner in which the Strasbourg Court functions. I have also added a mention, in this connection, of a Practice Directive on recusal of judges issued on 22 January 2024 by the Court's former President, Siofra O'Leary. Texts, or extracts from them, of the relevant documents mentioned in this commentary can be found in the Appendix.

1. *Ad hoc* judges

Unlike the vast majority of judges on the European Court of Human Rights who are elected by the Parliamentary Assembly of the Council of Europe by virtue of Article 22 of the European Convention on Human Rights, *ad hoc* judges are directly nominated by States.[1] They may be appointed when an elected judge is unable to sit in a Chamber

[1] For a detailed overview consult: A. Drzemczewski, *Election of Judges: European Court of Human Rights (ECtHR)* [in:] *Max Planck Encyclopedia of International Procedural Law*, 2019, https://opil.ouplaw.com/view/10.1093/law-mpeipro/e3367.013.3367/law-mpeipro-e3367 [accessed: 2024.09.06]; and, as concerns the present situation, the Parliamentary Assembly information document "Procedure for the election of judges to the European Court of Human Rights" (memorandum prepared by the Secretary General of the Assembly), document SG-AS (2025) 01 of 21 January 2025, https://pace.coe.int/en/pages/committee-30/AS-CDH [accessed: 2025.01.08]; this document is regularly updated. States should not submit candidates whose election by the Assembly might result in the need of appointing an *ad hoc* judge to replace them (as may be the case where a candidate has been a government agent

or in the Grand Chamber, withdraws, or is exempted, or if there is no judge in respect of a State in a case before the Court. This may occur, for example, when a conflict of interest prevents a sitting judge from being included in a judicial formation. The need to appoint an *ad hoc* judge may also arise when a sitting judge resigns, retires, or dies. In such cases, and since the entry into force of Protocol No. 14 to the Convention in 2010, the President of a Chamber is able to appoint an *ad hoc* judge from a list submitted in advance by a Contracting Party. Such a list should consist of the names of three to five persons possessing the same qualifications as those judges elected by the Parliamentary Assembly, as required by Article 21, paragraph 1, of the Convention. However, in certain circumstances, the President of a Chamber must appoint another elected judge to sit as an *ad hoc* judge when a Contracting Party has not provided the Court with such a list or where fewer than three persons on the list satisfy the qualifications required by Article 21, paragraph 1, of the Convention: see Article 26, paragraph 4, of the Convention and Rule 29 of the Rules of Court (in the Appendix to this commentary).

These arrangements were reviewed by the Parliamentary Assembly some time ago and, more recently, positively assessed by States Parties to the Convention.

In 2012 the Parliamentary Assembly's Legal Affairs and Human Rights Committee issued an "Information Document" in which it noted that the new system put into place by Protocol No. 14 to the Convention (supplemented by appropriate amendments to the Court's Rules) would lead to a marked improvement of prior arrangements, as it strengthened the appearance of (judicial) independence, especially as States Parties would no longer play a decisive role in the appointment of *ad hoc* judges.[2] Nevertheless, the appointment procedure gave rise – as it still does today – to legitimate concerns that an *ad hoc* judge is designated, from a list submitted by a State Party, by the President of the Court/Chamber in a procedure which totally excludes the Assembly from the process.

In 2016 and 2017, this and related issues were looked into by the Steering Committee for Human Rights (CDDH), which conducts intergovernmental work in the human rights field on behalf of the Committee of Ministers, the executive body of the Organisation. In its report, published in 2018, the CDDH considered that this distinct regime for *ad hoc* judges was justified, notably because of the infrequency of the procedure's use.[3]

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involved in preparing cases before the Strasbourg Court or where the person may have participated as a judge in decisions rejecting applicants' final internal domestic appeals). More specifically, as concerns *ad hoc* judges, see: B. van der Sloot, *The* ad hoc *judge: A rehabilitation*, "Maastricht Journal of European and Comparative Law" 2022, vol. 29, no. 5, pp. 572–595 (and references therein).

[2] See: "*Ad hoc* judges at the European Court of Human Rights: an overview" of 23 January 2012; see, in particular, §§ 13–14. Prior to the entry into force of Protocol No. 14, States had substantial discretion in choosing the person to be appointed as an *ad hoc* judge in a given case after proceedings had begun, i.e., when the content of the complaint was already known.

[3] See: *Report on the process of selection and election of judges of the European Court of Human Rights, Council of Europe*, 2018, §§ 165–174 at pp. 77–81, https://www.coe.int/en/web/human-rights-intergovernmental-cooperation/publications [accessed: 2024.09.06].

This subject was recently re-visited by the CDDH. In its report, issued in 2024, the Steering Committee, in effect, repeated its previous assessment. It confirmed that the distinct regime for *ad hoc* judges was rarely used and that it worked well. It also took specific note of the arrangement whereby the President of a Chamber is mandated to appoint another elected judge to sit as an *ad hoc* judge if a State Party has not provided the Court with a list meeting the criteria set out in the Court's Rules.[4]

2. The case of *Wałęsa v. Poland* – designation of *ad hoc* judge

In its judgment in the case of *Wałęsa v. Poland*, rendered on 23 November 2023, a Chamber of the European Court of Human Rights held, unanimously, that there had been a violation of Article 6 of the ECHR, as regards Mr Wałęsa's right to an independent and impartial tribunal established by law and the principle of legal certainty, and a violation of Article 8 of the Convention in that the right to respect his private life had been violated. Furthermore, in applying its pilot-judgment procedure, the Court specified that Poland must take appropriate legislative measures to comply with Article 6 requirements, including the principle of the independence of the judiciary.[5]

As already indicated in the Introduction, this commentary does not relate to the merits of the judgment. Instead, I have decided to focus on the specific procedural decision that was taken by the Chamber's President, namely the designation of the Greek Judge, Ioannis Ktistakis, to sit as an *ad hoc* judge in this case. Why? Simply because, on the day the judgments was rendered, I came across a somewhat unpleasant tweet (on what was formally Twitter and is now renamed 'X') by the former Minister of Justice, Zbigniew Ziobro, in which he claimed that the Court "itself broke the law and violated the ECHR" by not appointing a judge from the country against which a complaint was lodged. I also came across – subsequently – a statement on the portal of the Ministry

[4] See: Council of Europe (Steering Committee on Human Rights (CDDH)), *Report on issues relating to judges of the European Court of Human Rights* (issued on 8 February 2024 by the Committee of Ministers) document CM(2024)6-add, https://www.coe.int/en/web/human-rights-intergovernmental-cooperation/publications [accessed: 2024.09.06], §§ 89–95. In § 92 of this report it is noted that "from 1 January 2017 to 20 September 2023 ad hoc judges have been appointed in 143 cases. During the same period, 11 elected judges were appointed as ad hoc judges in 35 cases. 49 judges from the lists provided by governments were appointed as ad hoc judges in 108 cases. Accordingly, out of 60 ad hoc judges 82% were appointed from the lists provided by governments." See also the portal of the ECtHR: *List of* ad hoc *Judges for the year 2024*, https://www.echr.coe.int/Documents/List_adhoc_judges_BIL.pdf [accessed: 2024.09.06]. As concerns Poland, a new list of four *ad hoc* judges was transmitted to the Court subsequent to the election, by the Parliamentary Assembly, of Anna Adamska-Gallant onto the ECtHR on 1 October 2024.

[5] Case of *Wałęsa v. Poland*, Application No. 50849/21 (coe.int [accessed: 2024.09.06]). See also, in this connection: the letter of the Polish Minister of Foreign Affairs, Radosław Sikorski, of 13 December 2023, addressed to the Committee of Ministers of the Council of Europe, available on the Committee's portal at Result details (coe.int), document H-DD(2023)1502 of 14 December 2023, 1492nd meeting (March 2024) (CM-DH) – Rule 8.2a – Communication from the authorities concerning the case of *Xero Flor v. Poland* & *Reczkowicz v. Poland* (Applications Nos 4907/18 and 43447/19).

of Justice entitled "Illegal ECHR judgement in the case of Lech Wałęsa."[6] Even Professor Ireneusz Cezary Kamiński had "a huge problem with today's judgment of the ECtHR in the case of *Wałęsa v. Poland* […] I must thus recognize that the composition of the court in the Wałęsa case was defectively constituted, in violation of Article 26 § 4 of the Convention. To put it in Strasbourg terms – it was not a court established in accordance with the law (here the Convention')."[7] These comments were followed, a day later, by a statement issued by the Polish neo-KRS (National Council of the Judiciary) suggesting that "The ruling in this case is also questionable because of the European Court of Human Rights' failure to comply with the Convention's procedural standards, as the bench did not include a judge from the Republic of Poland as the state against which the complaint was directed, in violation of the European Convention for the Protection of Human Rights and Fundamental Freedoms."[8]

Fortunately, the above-mentioned pronouncements were followed by relatively prompt reactions to these unfounded allegations, such as the article by Dominika Sitnicka, entitled "Zbigniew Ziobro and the KRS attack the Court in Strasbourg for its judgment in the Wałęsa case. Are they right?" (in OKO.press, 25 November 2023, my translation)[9] and a comment made by Professor Roman Wieruszewski on Professor I.C. Kamiński's Facebook account.[10]

But how best to show that the Strasbourg Court had obviously not acted *ultra vires* (and that the Polish State authorities were fully cognisant of this)?

It was relatively easy for me to do so. On the basis of a request addressed to the Court, based on Article 40 of the Convention and Rule 33 of the Rules of Court,[11] I obtained access to the case file, in Strasbourg, on 30 November 2023.

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[6] Again, this is my translation of what appeared, on 23 November 2023, on the Ministry's portal, available at: *Bezprawny wyrok ETPC w sprawie Lecha Wałęsy – Ministerstwo Sprawiedliwości* – Portal Gov.pl (www.gov.pl [accessed: 2023.11.23]).

[7] My translation; the original Polish version is available on Professor Kamiński's Facebook account, at (20+) "Mam ogromny problem z dzisiejszym…" – Ireneusz Cezary Kamiński/Facebook.

[8] My translation. See the portal of the neo-KRS (National Council of the Judiciary: Krajowa Rada Sądownictwa (krs.pl [accessed: 2023.11.24]), for the full text of a "Statement" issued by the Spokesperson, available at: Komunikat z posiedzenia Krajowej Rady Sądownictwa w dniach 21–24 listopada 2023 r. (krs.pl [accessed: 2023.11.25]).

[9] Available at: *Zbigniew Ziobro i KRS atakują Trybunał w Strasburgu za wyrok w sprawie Wałęsy. Czy mają rację?* – Archiwum Osiatyńskiego (archiwumosiatynskiego.pl [accessed: 2023.11.24]).

[10] See footnote 7, above.

[11] Paragraph 2 of Article 40 of the ECHR reads: "Documents deposited with the Registrar shall be accessible to the public unless the President of the Court decides otherwise." The text of Article 33 of the Rules of Court entitled "Public character of documents" stipulates: "1. All documents deposited with the Registry by the parties or by any third party in connection with an application, except: (a) those deposited within the framework of friendly-settlement negotiations as provided for in Rule 62 or (b) those submitted in connection with proceedings under Rule 44F shall be accessible to the public in accordance with arrangements determined by the Registrar, unless the President of the Chamber, for the reasons set out in paragraph 2 of this Rule, decides otherwise, either of his or her own motion or at the request of a party or any other person concerned. 2. Public access to a document or to any part of it may be restricted in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the

Here is a short chronology of the pertinent correspondence on this subject[12]:

- On 21 June 2023, the Parties to the case were informed that Mr Krzysztof Wojtyczek, the judge elected in respect of Poland, was unable to sit in this case (Rule 28 of the Rules of Court) and that the President of the Chamber accordingly decided to appoint Mr Michał Kowalski, as an *ad hoc* judge, pursuant to Rule 29 of the Rules of Court.
- On 12 October 2023, the Parties to the case were informed that, following Mr Kowalski's correspondence with the Court in which he stated that he personally knew Ms Joanna Lemańska, the President of the Supreme Court's Chamber of Extraordinary Review and Public Affairs, and that they were employed at the same Faculty of Law of the Jagiellonian Unversity, the matter of his participation in the case as an *ad hoc* judge was referred to the Court's Chamber constituted to deal with this case (Rule 28 § 4 of the Rules of Court).

The Chamber first studied the list of three *ad hoc* judges submitted by the Polish Government and it found that fewer than three of the persons indicated on the list satisfied the conditions laid down in paragraph 1(c) of Rule 29.

In its consideration of Mr Kowalski's participation, the Chamber took into account the fact that the applicant's motion (i.e., that of Mr Wałęsa) for exclusion of the judges of the Chamber of Extraordinary Review and Public Affairs from dealing with his case, included Ms Lemańska.[13]

The Chamber then decided that in the particular circumstances of the case it would not be appropriate for Mr Kowalski to sit on the case as an *ad hoc* judge.

Thereupon, the President of the Chamber decided, pursuant to Rule 29 § 2(b) of the Rules of Court, to appoint Mr Ioannis Ktistakis, Judge elected in respect of Greece, to sit as an *ad hoc* judge in this case.

The respondent government was, as indicated, fully appraised of the manner in which the Court dealt with this procedural issue; all these steps were described in detail in the Court's letters to the Parties dated 12 October 2023. Hence, the contents of the tweet by the outgoing Minister of Justice was obviously unbecoming, not to say outright dishonest; *ditto* as concerns the statement issued by the neo-KRS (of which Mr. Zbigniew Ziobro was at the time an *ex officio* member).

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parties or of any person concerned so require, or to the extent strictly necessary in the opinion of the President of the Chamber in special circumstances where publicity would prejudice the interests of justice. 3. Any request for confidentiality made under paragraph 1 of this Rule must include reasons and specify whether it is requested that all or part of the documents be inaccessible to the public."

[12] Copies of all the correspondence cited is on file with the author; the relevant Rules of Court can be found in the Appendix to this commentary.

[13] See: *Wałęsa v. Poland*, footnote 5 above, § 34.

3. Subsequent developments and the *rationale* for the established practice

As concerns the case of *Wałęsa v. Poland*, on 8 December 2023 the Chamber of the Court rectified the preamble of the judgment which was published on the Court's HUDOC database. This rectification (editorial revision) consisted of the additional mention of "the withdrawal of Mr Krzysztof Wojtyczek, the judge elected in respect of Poland, from sitting in the case (Rule 28 § 3 of the Rules of Court); the decision of the Chamber under Rule 29 § 3(b) that less than three of the persons indicated in the list of *ad hoc* judges submitted in advance by the Government in accordance with Article 26 § 4 of the Convention and Rule 29 § 1(a) satisfy the conditions set out in Paragraph 1(c) of this Rule."[14]

In an article published in the *Dziennik Gazeta Prawna* (Daily newspaper of Legal Studies) on 2 January 2024, Professor Ireneusz C. Kamiński asserted that "the provisions of the ECHR's Rules of Procedure must be amended so as to give effect to Article 26 of the Convention, making the absence of a national judge on the bench a narrowly interpreted exception" – a suggestion which presumably does not merit follow-up in the light of explanations provided in this commentary.[15] In yet another article on this subject in the *Dziennik Gazeta Prawna* a few days afterwards, Professor Michał Balcerzak – who had actually participated, as an *ad hoc* judge, in two Chamber judgments in 2021 and 2022 – was of the view that the absence of a Polish judge in the *Wałęsa* case was indeed unfortunate, but, unlike what Professor Kamiński proposed, this fact in itself did not warrant calling into question this very important judgment.[16]

It is interesting to note, in this connection, recent changes in Rule 28 on the recusal of judges incorporated into the Court's Rules (changes which are not directly related

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[14] See footnote 5, above. Rule 81 of the Rules of Court, entitled "Rectification of errors and judgments" reads as follows: "Without prejudice to the provisions on revision of judgments and on restoration to the list of applications, the Court may, of its own motion or at the request of a party made within one month of the delivery of a decision or a judgment, rectify clerical errors, errors in calculation or obvious mistakes." A re-signed text of the judgment, as rectified, was sent to the parties on 18 December 2023.

[15] My translation is taken from his article entitled *Wałęsa przeciwko Polsce albo znikający polski sędzia* (Wałęsa versus Poland or the disappearing Polish judge), No. 1 (6166), p. D3. In his article, Professor Kamiński erroneously claims that, upon the receipt of lists of *ad hoc* judges, the Court evaluates the qualifications of the candidates (and that this was purportedly done when, in the past, his name was included on such a list of *ad hoc* judges).

[16] Article entitled *Jeszcze o sędziach ad hoc w Strasburgu* (More about *ad hoc* judges in Strasbourg), 9 January 2024, No. (6171), p. D4. Professor Kamiński argued that the case ought to have been referred to the Grand Chamber: Article 43 of the ECHR envisages the possibility of referral if a case "raises a serious question affecting the interpretation of the Convention […] or a serious issue of general importance." The judgment became final, by virtue of Article 44, § 2, of the Convention on 23 February 2024. Following Russia's expulsion from the Council of Europe and the country's subsequent cessation as a Party to the ECHR, with the office of judge ceasing as of 16 September 2022, the Court applied Rule 29 § 2 by analogy. On this subject see: A. Drzemczewski, R. Lawson, *Exclusion of the Russian Federation from the Council of Europe and the ECHR: An Overview*, "Baltic Yearbook of International Law" 2022, vol. 21, pp. 38–98, at pp. 67–68.

to the case of *Wałęsa v. Poland*).[17] This updated Rule reiterates the reasons for which a judge cannot sit in a particular case and strengthens the core procedural framework for the recusal of judges by expressly codifying the existing practice which permits parties to request recusal of a judge.

This Rule was accompanied, on the same day, by a specific Practice Direction on the recusal of judges issued by the Court's then President, Síofra O'Leary: the full text is reproduced in the Appendix, part C, below. This Practice Direction clarifies procedures provided for in Rule 28, ensuring the possibility for parties to a case to raise concerns they may have about the impartiality of a judge. Also, in order to ensure more transparency of, and accessibility to the judicial process before it, a complete list of the different judicial formations operating within each of the five Sections, including the list of single judges designated by a State, is now available on the Court's website. This permits the identification – by the parties in advance – of the judges in the Court's different judicial formations.

I have one concluding comment. In revisiting the issue in the designation of *ad hoc* judges, it is important to understand the *rationale* for the established practice. The European Court of Human Rights "speaks" *via* its judgments; it is not for the Court or its registry – as sometimes suggested – to "explain itself" with respect to various procedural aspects of its work carried out in conformity with Convention requirements. Often, after having consulted the Parties, the Court may not find it necessary or appropriate to specify that, e.g., a certain individual, at a particular moment in time, may lack the necessary qualities and/or professional gravitas to be appointed as an *ad hoc* judge (qualifications required by Article 21 § 1 of the Convention). There also exists an intrinsic logic in the Rules of Court tailored precisely so as not to make it possible for proceedings to be paralyzed by the existence of a list of *ad hoc* judges composed of inappropriately qualified persons or when such a list has not been transmitted to the Court. The appointment of an elected judge from another State is then envisaged in order to permit the Court to fulfil its jurisprudential tasks and ensure real and effective protection of Convention rights and freedoms.

[17] Press release ECHR 016 (2024), of 22 January 2024, on which this part of the text is based. These changes were adopted by the Plenary Court on 15 December 2023 and entered into force on 22 January 2024: see Appendix, part B, below. Changes to this Rule were preceded by extensive consultation with the relevant stakeholders, in particular with the States Parties, organisations with experience in representing applicants, and several bar associations which had submitted written comments to the Court.

Appendix. Recusal of judges and designation of *ad hoc* judges – relevant texts

A. Extracts from the ECHR, as amended by Protocols Nos. 11, 14 & 15

Article 21 Criteria for office

1. The judges shall be of high moral character and must either possess the qualifications required for appointment to high judicial office or be jurisconsults of recognised competence.
   […]

Article 22 Election of Judges

The judges shall be elected by the Parliamentary Assembly with respect to each High Contracting Part by a majority of votes cast from a list of three candidates nominated by the High Contracting Party.

Article 26 Single-judge formation, Committees, Chambers and Grand Chamber

1. To consider cases brought before it, the Court shall sit in a single-judge formation, in committees of three judges, in Chambers of seven judges and in a Grand Chamber of seventeen judges. The Court's Chambers shall set up committees for a fixed period of time.

[…]

3. When sitting as a single judge, a judge shall not examine any application against the High Contracting Party in respect of which that judge has been elected.
4. There shall sit as an *ex officio* member of the Chamber and the Grand Chamber the judge elected in respect of the High Contracting Party concerned. If there is none or if that judge is unable to sit, a person chosen by the President of the Court from a list submitted in advance by that Party shall sit in the capacity of judge.
5. The Grand Chamber shall also include the President of the Court, the Vice-Presidents, the Presidents of the Chambers and other judges chosen in accordance with the rules of the Court. When a case is referred to the Grand Chamber under Article 43, no judge from the Chamber which rendered the judgment shall sit in the Grand Chamber, with the exception of the President of the Chamber and the judge who sat in respect of the High Contracting Party concerned.

B. Extracts from the Rules of Court (28 March 2024)

The European Court of Human Rights, Having regard to the Convention for the Protection of Human Rights and Fundamental Freedoms and the Protocols thereto, Makes the present Rules:

Rule 1 – Definitions

For the purposes of these Rules unless the context otherwise requires:

[…]
(i) the expression "*ad hoc* judge" means any person chosen in pursuance of Article 26 § 4 of the Convention and in accordance with Rule 29 to sit as a member of the Grand Chamber or as a member of a Chamber;
(j) the terms "judge" and "judges" mean the judges elected by the Parliamentary Assembly of the Council of Europe or *ad hoc* judges;
[…]

Rule 26 – Constitution of Chambers
[…]
2. The judge elected in respect of any Contracting Party concerned or, where appropriate, another elected judge or *ad hoc* judge appointed in accordance with Rules 29 and 30 may be dispensed by the President of the Chamber from attending meetings devoted to preparatory or procedural matters. For the purposes of such meetings the first substitute judge shall sit.
[…]

Rule 28 – Inability to sit and recusal [last amended on 15 December 2023]
1. A judge has the duty to sit in all cases assigned to him or her, unless, for the reasons set out in paragraph 2, he or she may not take part in the consideration of the case.
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. Any judge who considers himself or herself to be unable to sit in a case to which he or she has been assigned, for one of the reasons listed in paragraph 2 shall, as soon as possible, in cases allocated to a Committee or Chamber formation, give notice to the President of the Section, who will decide whether the judge concerned should be exempt from sitting. 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.

4. Only parties to the proceedings may request recusal of a judge assigned to sit in their case for the reasons listed in paragraph 2 of this Rule. Any such request must be duly reasoned and lodged as soon as possible after the party concerned learns about the existence of such reasons. It shall be decided by the Chamber in accordance with the procedure described in paragraph 3 of the present Rule. The parties shall be informed whether or not their request has been accepted.
5. The provisions above shall apply, *mutatis mutandis*, in cases before the Grand Chamber, and – under the authority of the President of the Court – to judges acting as a single judge under Article 27 of the Convention and as duty judge in accordance with Rule 39 [relating to interim measures] of the Rules of Court.

Rule 29 – *Ad hoc* judges [last amended on 3 June 2019]

1. (a) If the judge elected in respect of a Contracting Party concerned is unable to sit in the Chamber, withdraws, or is exempted, or if there is none, the President of the Chamber shall appoint an *ad hoc* judge, who is eligible to take part in the consideration of the case in accordance with Rule 28, from a list submitted in advance by the Contracting Party containing the names of three to five persons whom the Contracting Party has designated as eligible to serve as *ad hoc* judges for a renewable period of four years and as satisfying the conditions set out in paragraph 1(c) of this Rule.

The list shall include both sexes and shall be accompanied by biographical details of the persons whose names appear on the list. The persons whose names appear on the list may not represent a party or a third party in any capacity in proceedings before the Court.

(b) The procedure set out in paragraph 1(a) of this Rule shall apply if the person so appointed is unable to sit or withdraws.

(c) An *ad hoc* judge shall possess the qualifications required by Article 21 § 1 of the Convention and must be in a position to meet the demands of availability and attendance provided for in paragraph 5 of this Rule. For the duration of their appointment, an *ad hoc* judge shall not represent any party or third party in any capacity in proceedings before the Court.

2. The President of the Chamber shall appoint another elected judge to sit as an *ad hoc* judge where

(a) at the time of notice being given of the application under Rule 54 § 2(b) [concerning procedure before a Chamber], the Contracting Party concerned has not supplied the Registrar with a list as described in paragraph 1(a) of this Rule, or

(b) the President of the Chamber finds that less than three of the persons indicated in the list satisfy the conditions laid down in paragraph 1(c) of this Rule.

3. The President of the Chamber may decide not to appoint an *ad hoc* judge pursuant to paragraph 1(a) or 2 of this Rule until notice of the application is given to the Contracting Party under Rule 54 § 2(b). Pending the decision of the President of the Chamber, the first substitute judge shall sit.
4. An *ad hoc* judge shall, at the beginning of the first sitting held to consider the case after the judge has been appointed, take the oath or make the solemn declaration provided for in Rule 3. This act shall be recorded in minutes.
5. *Ad hoc* judges are required to make themselves available to the Court and, subject to Rule 26 § 2, to attend the meetings of the Chamber.
6. The provisions of this Rule shall apply *mutatis mutandis* to proceedings before a panel of the Grand Chamber in connection with a request for an advisory opinion submitted under Article 1 of Protocol No. 16 to the Convention, as well as to proceedings before the Grand Chamber constituted to examine requests accepted by the panel.

Rule 30 – Common interest

1. If two or more applicant or respondent Contracting Parties have a common interest, the President of the Chamber may invite them to agree to appoint a single judge elected in respect of one of the Contracting Parties concerned as common-interest judge who will be called upon to sit *ex officio*. If the Parties are unable to agree, the President shall choose the common-interest judge by lot from the judges proposed by the Parties.
   […]

C. Practice Direction issued by the Court's President on 22 January 2024

Recusal of judges

I. Background

1. Preserving the independence and impartiality of judges is crucial for upholding the rule of law, protecting human rights, and ensuring a fair and just administration of justice. This is also one of the key principles characterising proceedings before the European Court of Human Rights, enshrined in a number of legally binding provisions.
2. Pursuant to Article 21 of the Convention, during their term of office judges are not to engage in any activity which would be incompatible with their independence or impartiality.
3. In the interest of the clear and transparent application of the requirement set out in Article 21 of the Convention, in June 2021 the Court updated the Resolution on Judicial Ethics, which sets out a series of rules on judges' integrity, independence, impartiality, limits to their freedom of expression, additional activities, acceptance of favours, advantages, decorations and honours. According to point III of

that Resolution, judges shall exercise their function impartially, ensure the appearance of impartiality, avoid conflicts of interest including 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. Several provisions of the Resolution also apply to former judges.

4. Further safeguards related to independence and impartiality may be found in Article 26 § 3 of the Convention and Rule 27A § 3 of the Rules of Court, according to which a judge shall not sit as a single judge in cases concerning the State Party in respect of which he or she has been elected or of which he or she is a national. Furthermore, Rule 13 provides that judges may not preside in cases in which the State Party of which they are nationals or in respect of which they were elected is a party. Rule 24 § 5(c) excludes the participation of the judge elected in respect of a State Party, or a national thereof, in the panel examining a referral request to the Grand Chamber concerning a case against that country.
5. The substantive criteria for a judge's inability to sit in a particular case, as well as the core procedural framework to be uniformly applied by all Court formations in all cases, are set out in Rule 28 of the Rules of Court, which aims to ensure the rigorous implementation of the principle of judicial impartiality. Rule 28 of the Rules of Court was amended and further reinforced by the Plenary Court in December 2023.
6. The purpose of the present Practice Direction is to clarify the modalities provided for in that Rule which ensure, *inter alia*, the practical and effective possibility for the parties to the proceedings to raise any concerns about the impartiality of a judge and the procedure to be followed in such instances.

II. Withdrawal of judges of their own motion

7. Whether a judge shall sit in a case is in principle not a matter of the judge's own discretion; it is a matter of duty. Rule 28 § 1 of the Rules of Court therefore reiterates a judge's obligation to sit, in principle, in all cases assigned to him or her.
8. The reasons for which a judge cannot sit in a particular case are set out in Rule 28 § 2 of the Rules of Court. They include, among other situations, any case in which the judge concerned may have a personal (spousal, parental or other) interest, in which he or she had previously acted (in any capacity, such as judge, party, representative or other) or on which he or she had expressed a public opinion.
9. In cases where a judge considers that for one of the reasons enumerated in Rule 28 § 2 of the Rules of Court, he or she is unable to sit in a particular case, that judge will notify the President of Section/President of the Grand Chamber about his/her concerns, explaining the relevant reasons. It will be for the President of Section/President of the Grand Chamber to decide whether the situation raises an appearance of bias and, in cases where it does, to accept the judge's request for withdrawal from a particular case. In case of doubt, the President of Section/President

of the Grand Chamber may refer the matter to the Chamber/Grand Chamber for discussion and decision (Rule 28 § 3).

III. External request for recusal

10. It has been the Court's consistent practice to allow the parties to the proceedings – i.e. the applicant(s) and the respondent Government(s) – to challenge the impartiality of a judge appointed to sit in their case[*]. In line with that practice, Rule 28 § 4 of the Rules of Court now clearly sets out that parties to the proceedings – i.e. the applicant(s) and the respondent Government(s) – may request recusal of any judge of the Court assigned to sit in their case (external request). A request for the recusal of a judge by another person, State or entity, which are not party to the particular case before the Court, is not allowed. This does not mean that information which comes to the attention of the Court will not be considered where warranted.
11. Should the judge whose impartiality is being challenged by one of the parties accept the reasons stated in an external request for recusal and immediately wish to withdraw from sitting in the case in question, the procedure prescribed for requests for withdrawal of the judge's own motion shall apply (see above under II).
12. In all other cases, external requests for recusal shall be decided as follows.
13. In all cases assigned to a Committee or a Chamber, a Chamber of the Section to which the case has been allocated shall hear the views of the judge in question concerning the recusal request. The Chamber shall then deliberate and vote on the request, without the judge whose impartiality is being called into question being present.
14. Similarly, in Grand Chamber cases, the relevant Grand Chamber formation shall first hear the views of the judge whose impartiality is being challenged, and then deliberate and vote on the external recusal request without that judge being present.
15. Requests for recusal in cases which are to be decided by a single judge formation shall be decided by the President of the Court, that is to say, the same authority which appoints individual judges to sit as single judges in respect of one or more Contracting Parties.
16. In all cases the party which requested recusal shall be informed of the Court's decision in writing in due course, and a mention of any decision on recusal shall be duly recorded in the Court's judgment or decision.
17. The Court shall also keep a record of cases in which a Judge withdraws of his or her own motion and in which external recusal requests are received and the decisions taken in their regard.

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[*] See, for instance, *Cyprus v. Turkey* [GC], no. 25781/94, § 8, ECHR 2001-IV; *Lekić v. Slovenia* [GC], no. 36480/07, § 4, 11 December 2018; and *Rustavi 2 Broadcasting Company Ltd and Others v. Georgia*, no. 16812/17, § 6, 18 July 2019.

IV. Form and timing of the recusal request

18. Any external request for recusal must be duly reasoned and submitted to the Court in writing in one of the official languages as provided in Rule 34 of the Rules of Court [English or French, unless otherwise decided]. Such a request should be lodged as soon as the party concerned becomes aware of the existence of one of the reasons set out in Rule 28 § 2 of the Rules of Court resulting in a specific judge's inability to sit in a particular case.
19. There is no set time-limit for lodging such external requests, the Court having clarified that the responsibility for the implementation of Rule 28 and, in particular, of the principle of objective impartiality, cannot be left to the sole initiative of the parties[**]. However, while flexibility may be accorded where warranted by the particular circumstances of a case, the Court will ensure that the recusal procedure is not subject to abuse (see further below).
20. For applicants this will normally mean that they should submit any recusal request at the earliest possible moment. They can also request recusal at a later stage of the proceedings, for instance if a new judge meanwhile takes up office, or an *ad hoc* judge is appointed in their case. The respondent Government should ideally raise any concerns of bias at the time of filing their observations with the Court, and only exceptionally thereafter.

V. Composition deciding the case

21. In order to have a real and effective opportunity of raising a possible concern about the impartiality of a particular judge before their case has been examined, parties to the proceedings must have means of knowing which judges are likely to be deciding their case. Due to the volume of cases with which the Court has to deal, and its working methods, it is not possible to inform the parties in advance of the names of the judges who will be deciding each and every case. In fact, such notification can and is systematically done only in Grand Chamber cases.
22. However, with a view to ensuring the fullest possible transparency and accessibility to the judicial process before it, the Court has published online complete lists of the different judicial formations operating within each of its five Sections, including the list of single judges designated by State, thus making it possible for the parties in most cases to identify in advance the judges which will most likely be deciding their case.
23. What this means in practice is that all applicants can consult the list of single judges appointed to decide cases against one or more respondent Contracting Parties. They are thus in a position to identify beforehand which judge may be deciding their case, should it not be notified to the respondent Contracting Party under Rule 54 § 2(b) of the Rules of Court [which concerns procedure before a Chamber].
24. As regards cases which have been notified to the respondent Contracting Party under Rule 54 § 2(b) of the Rules of Court, at the latest at that moment the parties are

[**] See *X v. the Czech Republic* (revision), no. 64886/19, § 15, 30 March 2023.

informed of the allocation of their case to a particular Section. They can consult the publicly available lists of Chamber and Committee formations operating within the Section concerned, in order to verify the possible judicial compositions that may be deciding their case. Should they consider that a particular judge should not be involved in deciding their case for one of the reasons listed in Rule 28 of the Rules of Court, they may request that judge's recusal, providing duly explained reasons.

25. Where an *ad hoc* judge has been appointed in a case against a Contracting Party, the parties shall be informed thereof by a letter as soon as such an appointment has been made. They may then ask for recusal of an *ad hoc* judge for the same reasons and following the same procedure prescribed by Rule 28 of the Rules of Court.

VI. Exceptional avenues after a case has been decided

26. There may be very rare situations in which the parties did not have objective means of knowing which judge(s) would be involved in deciding their case.
27. As regards judgments, under Rule 80 of the Rules of Court the parties may ask for a revision of a judgment in the event of the discovery of a fact which might by its nature have a decisive influence and which, when a judgment was delivered, was unknown to the Court and could not reasonably have been known to that party. Given the principle of finality of judgments in Article 44 of the Convention and, in so far as it calls into question the final character of judgments of the Court, revision, which is not provided for in the Convention but was introduced by the Rules of Court, is an exceptional procedure. Requests for revision of judgments are therefore subjected to strict scrutiny (see *Pardo v. France* (revision – admissibility), 10 July 1996, § 21, Reports of Judgments and Decisions 1996-III). As attested by the Court's recent case-law, the possibility of revision may include issues of impartiality (see *X v. the Czech Republic* (revision), no. 64886/19, §§ 7–21, 30 March 2023). The imperative to apply rigorously the principle of objective impartiality may call exceptionally for the revision of the Court's judgment where grounds for a judge's inability to sit have been shown to exist.
28. At the same time, it is not possible to request revision in relation to inadmissibility decisions, which are by their nature final and not amenable to appeal. In such situations it is nevertheless possible for the Court to reopen a case. Although neither the Convention nor the Rules of Court expressly provide for such reopening, according to its case-law, in very exceptional circumstances, where there has been a manifest error of fact or in the assessment of the relevant admissibility requirements, in the interests of justice the Court has the inherent power to reopen a case which had been declared inadmissible and to rectify any such errors (see, for instance, *Boelens and Others v. Belgium* (dec.), no. 20007/09 et al, § 21, 11 September 2012). It cannot be excluded that such errors may also relate to the impartiality of a judge.
29. However, it is important to stress that neither of these avenues are available as a means of appeal against the Court's judgments or decisions. As described above, they are only to be used in those very rare and exceptional circumstances in which the parties had no way of knowing that a particular judge would be deciding their

case, and of his or her inability to sit for one of the reasons listed in Rule 28 of the Rules of Court. The Court will carefully scrutinise any requests raising concerns of impartiality submitted after a case has been decided. It will ensure that any abusive, frivolous, vexatious or unsubstantiated complaints in this respect shall not be taken into consideration (see, *mutatis mutandis*, Rule 36 § 4(b) of the Rules of Court [which relates to representation of applicants].

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Summary

Andrzej Drzemczewski

Revisiting the Issue of Designation of *ad hoc* Judges in the European Court of Human Rights: Some Remarks Following the Case *Wałęsa v. Poland*

Subsequent to the recusal of the Polish judge elected in respect of Poland in the case of *Wałęsa v. Poland,* the President of the Strasbourg Court's Chamber assigned another elected judge to replace him; he did so after the Chamber had determined that less than three of the persons designated as *ad hoc* judges by the Polish authorities satisfied the requirements of office (Article 21, ECHR). As this procedural decision caused a stir in Polish legal circles, this text provides an explanation of this decision. The related issue of recusal is also briefly broached, following a recent Practice Directive issued by the President of the European Court of Human Rights. Relevant texts, or extracts therefrom, are appended to the commentary.

Keywords: *ad hoc* judge(s), European Convention on Human Rights (ECHR), European Court of Human Rights/Strasbourg Court (ECtHR), Parliamentary Assembly (of the Council of Europe), Practice Direction (of ECtHR President), recusal, Rules of Court, *Wałęsa v. Poland*.

Streszczenie

Andrzej Drzemczewski

Powracając do kwestii wyznaczania sędziów *ad hoc* w Europejskim Trybunale Praw Człowieka – kilka uwag na tle sprawy *Wałęsa przeciwko Polsce*

Po wycofaniu się z udziału w składzie orzekającym przez sędziego z ramienia Polski w sprawie *Wałęsa przeciwko Polsce* Przewodniczący Izby Trybunału w Strasburgu wyznaczył na jego miejsce innego z wybranych sędziów; uczynił to po tym, gdy Izba stwierdziła, że mniej niż trzy osoby wyznaczone przez polskie władze jako sędziowie *ad hoc* nie spełniały wymogów sprawowania urzędu (art. 21 EKPCz). Ponieważ ta decyzja proceduralna wywołała niemałe zamieszanie w polskich kręgach prawniczych, niniejsze opracowanie zawiera wyjaśnienie tej decyzji. Powiązana kwestia wyłączenia sędziego została również krótko omówiona ze względu na niedawno wydaną Dyrektywę Praktyczną przez Przewodniczącą Europejskiego Trybunału Praw Człowieka. Odpowiednie teksty bądź ich fragmenty są zamieszczone w apendyksie.

Słowa kluczowe: sędzia (sędziowie) *ad hoc*, Europejska Konwencja Praw Człowieka (EKPCz), Europejski Trybunał Praw Człowieka/Trybunał w Strasburgu (ETPCz), Zgromadzenie Parlamentarne (Rady Europy), Dyrektywa Praktyczna (Przewodniczącej ETPCz), wyłączenie sędziego, Regulamin Trybunału, *Wałęsa przeciwko Polsce*.