

Conversations with Friends: ‘Friends of the Court’ Interventions of the State Parties to the European Convention on Human Rights

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Abstract

The European Convention on Human Rights allows its Contracting Parties to submit third-party interventions. This Article analyses the reasons for engagement of the states with the European Court of Human Rights beyond what they are strictly expected to do: respond in contentious cases and execute judgments. It is argued here that the states mainly engage with the Court for the purposes of self-interest. This paper fills the gap in the literature by substantiating this claim using empirical methods of content analysis of the case law and research interviews with the governmental representatives. Finally, this paper looks at the impact that third-interventions on the Court’s reasoning and concludes that the Court is aware of the aims of the government and bears those aims in mind.

Introduction

Although it does not always feel like it, human rights matter. Since the end of the World War II dozens of human rights treaties were drafted, signed and ratified by almost every country in the World. It has been widely discussed why states enter human rights treaties² and why they (almost entirely voluntarily) comply with the (some) judgments of international courts.³ Although the moral value and authority of human rights are duly acknowledged by various theories, the key reasons for participating and compliance are often identified as ‘selfish’ reasons of self-interest. Human rights compliance improves the reputation of the obedient states,⁴ and in combination with its relatively low price,⁵ it becomes seemingly attractive as it enhances the chances for continuity of democratic political regimes,⁶ and as a result protects peace and prosperity.⁷ These reasons can perhaps explain why states join human rights systems like the one established by the

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² See for example, Alex Geisinger & Michael Ashley Stein, 'Rational Choice, Reputation, and Human Rights Treaties' (2008) 106 Mich L Rev 1129, 1134-1335; Hathaway OA, 'Why Do Countries Commit to Human Rights Treaties?' (2007) 51 Journal of Conflict Resolution 588, Andrew Moravcsik, 2000. The origins of human rights regimes: Democratic delegation in postwar Europe. *International Organization* 54 (2): 217-52, Simmons, Beth 2002. Why commit? Explaining state acceptance of international human rights obligations. Paper prepared for meeting of the Conference on Delegation to International Organizations, May 3-4, Brigham Young University, Provo, Utah.

³ See, for example, Dothan S, *Reputation and Judicial Tactics: A Theory of National and International Courts* (Comparative Constitutional Law and Policy, Cambridge University Press 2014); de Londras F and Dzehtsiarou K, 'Mission Impossible? Addressing Non-Execution through Infringement Proceedings in the European Court of Human Rights' (2017) 66 *International and Comparative Law Quarterly* 467; von Staden A, *Strategies of Compliance with the European Court of Human Rights* (University of Pennsylvania Press 2018).

⁴ See, Dothan (n 3).

⁵ The compensations paid in human rights cases are relatively low. See, Krisch N, 'The Open Architecture of European Human Rights Law' (2008) 71 *The Modern Law Review* 183.

⁶ See, Moravcsik (n 2).

⁷ See, for example, Bailliet, C. M., and K. M. Larsen. 2015. "Introduction." In *Promoting Peace Through International Law*. (OUP); Richmond O, 'Human rights and the development of a twenty-first century peace architecture: unintended consequences?' (2019) 73 *Australian Journal of International Affairs* 45.

European Convention on Human Rights (ECHR), and can also partially explain why states comply with their judgments. However, these reasons can hardly shed much light on why states engage with these human rights systems beyond what is absolutely necessary. The reasons why states participate in proceedings as respondent states and engage with the Committee of Minister in the process of execution of the judgments when the Court finds violations are relatively clear, but other forms of engagements are much less so.⁸

Much less academic attention has been drawn to the question of why states actively engage in human rights litigation as applicants or via other forms of participation. There are a few paths by which this can be done. The most obvious one is submitting an inter-state application against the state which violates human rights.⁹ The numbers of inter-state applications to the European Court of Human Rights (ECtHR or the Court) has significantly increased over the last decade.¹⁰ One needs to bear in mind that states very rarely submit applications out of mere respect to human rights; in the vast majority of cases,¹¹ the applicant states are somehow involved in the case and submit these applications out of self-interest (the most common case, the applicant and the respondent are (or were) the sides in a military conflict). More generally, inter-state applications are not a good case study to explore the engagement of states with the human rights treaties because submitting such applications can be seen as an unfriendly or even confrontational move. Therefore, it might be the case that although states do feel concerned about the human rights standards in other countries, they do not wish to undermine their diplomatic relations with these countries. However, there is another less confrontational means for the states to become more involved with a human rights tribunal, namely entering a case as a third party. As the following discussion will demonstrate, it is not totally neutral from the diplomatic relations point of view but clearly less hostile than an inter-state application. Third-party interventions are accepted by various national and international courts and tribunals worldwide. They are seen as important instruments for providing the tribunals with various arguments and considerations, and hence result in better decision-making.¹² The first aim of this article is to see what drives the Contracting Parties to the ECHR to go beyond the minimal core of participation in a human rights regime and engage with it as third parties.

This paper offers two possible explanations as to why states act as third-party interveners. First, states intervene because they are genuinely interested in supporting human rights and advancing the standard set by the ECtHR forward. Second, they intervene in their own self-interest, namely they try to persuade the Court to develop its case law in a particular direction because this direction is somehow beneficial to the intervening state. It will be demonstrated that the Contracting Parties enter as third parties when they might face a similar issue and if the ECtHR is likely to set a standard they do not prefer, this can have negative consequences in cases against them. So, these

⁸ Apart from the third-party interventions and acting as applicants in contentious cases, other forms of engagement are also possible such as requesting of advisory opinions, diplomatic relations with the Court, participating in High-Level Conferences on the Future of the Court.

⁹ See, Risini I, *The Inter-State Application under the European Convention on Human Rights* (Brill 2018).

¹⁰ Fifteen inter-state applications are currently pending before the Court. At the same time, the Court made only 16 rulings in inter-state cases in more than 60 years of its existence. See, List of Cases (<https://www.echr.coe.int/Pages/home.aspx?p=caselaw/interstate&c=>).

¹¹ Only the Greek case comes to mind. *Government of Denmark v. The Government of Greece*; *The Government of Norway v. The government of Greece*; *The Government of Sweden v. The Government of Greece*; *The Government of the Netherlands v. The Government of Greece* (3321/67).

¹² Chi Carmody, "Of Substantial Interest: Third Parties under GATT," *Michigan Journal of International Law* 18, no. 4 (1997); Duane W. Layton and Jorge O. Miranda, "Advocacy before World Trade Organization Dispute Settlement Panels in Trade Remedy Cases," *Journal of World Trade* 37, no. 1 (2003), 95–96. Marc L. Busch, Eric Reinhardt "Three's a Crowd: Third Parties and WTO Dispute Settlement" (2006) *World Politics* volume 58, 2, 446, 448.

interventions are driven by self-interest and cannot clearly be seen as neutral. It has been argued that the Contracting Parties almost always have some identifiable interest when they intervene and this interest is to prevent the ECtHR to develop a standard that would make their internal regulations or approaches incompatible with the Convention.¹³ In the words of one of the governmental agents interviewed for this article: ‘... what determines the state to intervene? Surely, it is the interest of that state in the case’.¹⁴ It means that in many cases the governments have an agenda and try to push for a particular outcome of the case. Altruistic motives are not impossible but are rare, as a case law analysis of the ECtHR seems to demonstrate. However, this argument has never been seriously tested in academic literature and this article fills this gap.

The second aim of this paper is to inquire whether the ECtHR is aware of the self-interested nature of third-party interventions and if so how it is reflected in the Court’s practice. It seems that the ECtHR approaches state third-party submissions with caution. Although it has been widely accepted that third-party interventions in other national and international jurisdictions are effective,¹⁵ analyses of the judgments of the Grand Chamber of the ECtHR seem to suggest that on average third-party interventions by states do not lead to a significant change in the number of violations that the Court establishes. In fact, on average the Court finds a comparable number of violations in cases with third-party interventions by the states as it does without such interventions.

So, this paper will demonstrate that states make their submissions in self-interest, and that the ECtHR seems to acknowledge this self-interest and it does not treat these submissions as overly authoritative. This paper does not purport to make an argument that efforts should be made to encourage the Contracting Parties to submit more third-party interventions. Although, they might benefit the Court they can have some significant drawbacks. For example, a high number of interventions would require Court’s resources to be processed.

I need to make an important clarification here. In this article, I simplify the complexity of what the term ‘state’ actually means. Certainly, different branches of power do not always speak with one voice and their views might differ in different times and on different hierarchal levels. For instance, the Joint Committee on Human Rights of the UK Parliament was less than satisfied with the position that the UK government has taken in their third-party interventions in *Saadi v. Italy* or *Shalk and Kopf v. Austria*.¹⁶ Although these complexities are acknowledged, the article assumes that the position of the government *is* the position of the state as otherwise each third-party intervention would need to be analysed against the internal debate on the issue; this would go outside the remit of this paper. This line of inquiry however creates an interesting avenue for further research in this area.

In order to find out what motivates states to intervene as third parties, the author interviewed seven governmental agents representing various member states of the Council of Europe. The

¹³ Pastor Vilanova P. (2019) Third Parties Involved in International Litigation Proceedings. What Are the Challenges for the ECHR?. In: Pinto de Albuquerque P., Wojtyczek K. (eds) Judicial Power in a Globalized World. Springer, Cham. https://doi.org/10.1007/978-3-030-20744-1_25, 381

¹⁴ Interview with Agent 7.

¹⁵ The influence and impact of the Solicitor General’s third-party interventions in the US are widely recognised. See Michael A. Bailey, Brian Kamoie, and Forrest Maltzman, “Signals from the Tenth Justice: The Political Role of the Solicitor General in Supreme Court Decision Making,” *American Journal of Political Science* 49, no. 1 (2005); Kevin T. McGuire, “Repeat Players in the Supreme Court: The Role of Experienced Lawyers in Litigation Success,” *Journal of Politics* 57, no. 1 (1995); Timothy R. Johnson, Paul J. Wahlbeck, and James F. Spriggs II, “The Influence of Oral Arguments on the U.S. Supreme Court,” *American Political Science Review* 100, no. 1 (2006).

¹⁶ The opinion was expressed in Report: Enhancing Parliament’s role in relation to human rights judgments, para 180 <https://publications.parliament.uk/pa/jt200910/jtselect/jtrights/85/85.pdf>.

selection was made on the basis of the geographical principle: there are representatives of Eastern European and Western European states, larger and smaller jurisdictions, common law and civil law countries. The interviews were semi-structured¹⁷ and the interviewees did not know the questions in advance. The questions revolved around the following main themes:

1. The aim of interventions;
2. The process of intervention and their practical implications;
3. The drawbacks of third-party interventions;
4. The evolution of third-party interventions.

All transcripts were sent to the interviewees and asked for comments. After that all interviews were anonymised¹⁸ and analysed using NVivo software. Some of the quotes were changed in order to prevent revealing the member states the agents were representing. Then the quotes were checked by the interviewees again for correctness.

To understand the level of engagement of the states with the Court by means of third-party interventions and the level of engagement of the Court with such interventions the author conducted a content analysis of the Grand Chamber case law of the Court. I analysed all judgments delivered by the Grand Chamber between 1998 and 2020.¹⁹ I use Grand Chamber cases because they deal with the most complex questions and states are perhaps more likely to intervene in these cases. Although there was some disagreement among the interviewed state representatives as to whether they are more likely to intervene in Chamber or Grand Chamber cases, the predominant view was expressed by Agent 6:

I think it is related to the fact that the cases before the Grand Chambers are more important and they are perceived like that. But apart from that, it is not such a huge difference. I can imagine intervening before the Chamber but sometimes the alert is just triggered when the case appears before the Grand Chamber.²⁰

Agent 2 added that 'I think that it [third-party intervention] would be more likely on the Grand Chamber level... There is no going back from the Grand Chamber. If the Chamber got it wrong, there is always a Grand Chamber'.²¹ Moreover, since there are much fewer judgments of the Grand

¹⁷ For a description of semi-structured interviews see, Steinar Kvale, *Interviews: an Introduction to Qualitative Research Interviewing* (Sage Publications 1996); Ian Dobinson and Francis Johns, 'Qualitative Legal Research' in Mike McConville and Wing Hong Chui (eds.), *Research Methods for Law* (Edinburgh University Press 2007). Wengraf points out that '[s]emi-structured interviews are designed to have a number of interviewer questions prepared in advance but such prepared questions are designed to be sufficiently open that the subsequent questions of the interviewer cannot be planned in advance but must be improvised in a careful and theorized way. As regards such semi-structured interviews, they are ones where research and planning produce a session in which most of the informant's responses cannot be predicted in advance and where you as interviewer therefore have to improvise probably half and maybe 80 per cent or more of your responses to what they say in response to your initial prepared question or questions'. Tom Wengraf, *Qualitative Research Interviewing: Biographic Narrative and Semi-structured Methods* (Sage Publications 2001), 5.

¹⁸ All state representatives were coded as Agent 1, Agent 2, etc.

¹⁹ 1 January 2021 was chosen as a cut off point for the analysis of the case law in this project. However undoubtedly there will be further developments in this area. For instance, 23 states have requested the leave to intervene as third parties in *Ukraine v Russia* (11055/22), the case related to the military aggression of Russia against Ukraine, see, <https://hudoc.echr.coe.int/eng-press?i=003-7442168-10192988>. For some preliminary analysis, see J Batura and I Risini, *Of Parties, Third Parties, and Treaty Interpretation: Ukraine v. Russia (X) before the European Court of Human Rights EJIL:Talk* <https://www.ejiltalk.org/of-parties-third-parties-and-treaty-interpretation-ukraine-v-russia-x-before-the-european-court-of-human-rights/>.

²⁰ Interview with Agent 6.

²¹ Interview with Agent 2.

Chamber than Chamber judgments it is easier to conduct an in-depth examination of such judgments.²²

For my analysis, I used 1998 as a starting point because Protocol 11 entered into force in 1998 and the Court as we know it today commenced its operation. I used HUDOC search engine²³ for this analysis. Between 1998 and 2020 the Grand Chamber delivered 449 rulings which are available in English. Some of these rulings should be excluded from the sample because they are concerned with the issues of just satisfaction,²⁴ admissibility²⁵ or friendly settlements.²⁶ 45 rulings therefore were removed from the sample, leaving 404 judgments to be considered. After doing so, I established that states requested leave to intervene as third parties in 53 cases.²⁷ I only considered the cases in which governments intervened. Those cases in which international organisations,²⁸ groups of parliamentarians,²⁹ attorneys general³⁰ and other similar entities acted as third parties were not considered as representing states for the purposes of this analysis. The analysis of this statistical data is presented in Sections 2 and 4 of this article.

This paper proceeds as following. First, it explains the legal background of third-party interventions by the state parties. Section 2 explores the level of engagement of the Contracting Parties with the ECtHR through third-party interventions. Section 3 analyses the reasons for which Contracting Parties intervene. It will demonstrate that the predominant reasons are the ones of self-interest. Finally, Section 4 shows that the ECtHR acknowledges the self-interest nature of the third-party submissions and their impact on the Court's decision-making is limited.

1. Legal Rules Concerning Third-Party Interventions

As it is the case with some other instruments that are currently used by the ECtHR,³¹ third-party interventions developed through the Court's practice and were not initially provided for in the text of the ECHR. The very first third-party intervention was submitted by the UK government in the case of *Winterwerp v. the Netherlands*.³² In the 1970s, neither the Convention nor the Rules of Court contained any specific legal basis for such interventions. The request to intervene was made on

²² An attempt to estimate the number of third-party interventions in Chamber judgments was made but an automated search is hardly possible and since this was not the primary aim of the project, the detailed content analysis was not undertaken. In order to count the relevant Chamber judgments between 1 January 1998 and 1 January 2021, the HUDOC database was searched using the keyword 'Article 36 § 2 of the Convention' and 295 hits were returned. However, these include both state parties' interventions as well as NGOs, academics and all other third parties' submissions, so the real number is perhaps smaller. Then the key word 'third-party comments were received from the Government' with only 45 hits. Although one can be confident that in these cases the state parties submitted their third-party interventions, not in all cases the Court uses this particular formula to indicate the submission of a third-party intervention from the states. See, *Danell and Others v. Sweden* (friendly settlement), no. 54695/00, ECHR 2006-I, para 15 for a different way of indicating the submission of the third-party. Therefore, it seems that the number of third-party interventions by state in Chamber judgments is somewhere between 45 and 295.

²³ HUDOC database is available here: <https://hudoc.echr.coe.int/>.

²⁴ For example, *Beyeler v. Italy* (just satisfaction) [GC], no. 33202/96, 28 May 2002.

²⁵ For example, *Gross v. Switzerland* [GC], no. 67810/10, ECHR 2014.

²⁶ For example, *Hutten-Czapka v. Poland* (friendly settlement) [GC], no. 35014/97, 28 April 2008.

²⁷ Pursuant to Article 36-2.

²⁸ For instance, the Venice Commission intervened in *Sejdić and Finci v. Bosnia and Herzegovina* [GC], nos. 27996/06 and 34836/06, ECHR 2009.

²⁹ Thirty-three members of the European Parliament acting collectively intervened in *Lautsi and Others v. Italy* [GC], no. 30814/06, ECHR 2011.

³⁰ The Attorney General for Northern Ireland intervened in *X and Others v. Austria* [GC], no. 19010/07, ECHR 2013.

³¹ For example, interim measures or pilot judgment proceedings. See, K Dzehtsiarou, *Can the European Court of Human Rights Shape European Public Order?* (CUP, 2021), chapter 5.

³² *Winterwerp v. the Netherlands*, 24 October 1979, Series A no. 33.

the basis of Rule 38 of the Rules of Court which enshrined the provisions related to ‘enquiry, expert opinion and other measures for obtaining information’.³³ A more specific provision appeared in the 1982 edition of the Rules of Court. Section 2 of Rule 37 provided that ‘[t]he President may, in the interest of the proper administration of justice, invite or grant leave to any Contracting State which is not a Party to the proceedings to submit written comments within a time-limit and on issues that he shall specify’.³⁴ In 1998, the ECHR was amended by Protocol 11 and the reference to third-party interventions was included in the text of the Convention. At the same time, Rule 61 of the Rules of Court (1999 edition) provided a more detailed procedure as to how third-party submissions can be allowed and processed.³⁵

According to Article 36 of the current edition of the Convention, the Contracting Parties have a right to submit a third-party observation when its national is an applicant in the case³⁶ or may be allowed to submit such an observation in any other case pending before the Court.³⁷ Although, in the latter scenario the Court is competent to reject the Contracting Party’s request to enter into a case as a third party, this rarely happens.³⁸ So, effectively, it is the decision of the state whether to enter the case or not. The current Rule 44 of the Rules of Court elaborates on how this right to submit third-party interventions can be realised. The regulations enshrined in the Rules of Court related to third-party interventions have evolved significantly since 1999. While in 1999, the rules were very flexible, a lot was left to the discretion of the President of the Section or the Court’s President. The current regulations enshrine much clearer guidelines: they include the time-limits for submission of requests to grant leave, they list the issues that the requests should include and they envisage the power of the Court to set the time limits for the submission of third-party interventions. It seems that stricter deadlines aim to reduce the overall time and resources that the Court has to spend on considering the third-party interventions. A lack of resources is a very legitimate reason to introduce stricter deadlines but as a consequence some interveners might not be able to submit their requests or third-party reports on time. Pursuant to Rule 44(4), the Contracting Parties have 12 weeks to request a leave to submit a third-party intervention from the moment of the decision to transfer the case to the Grand Chamber. This might create logistical difficulties for the state representatives. For instance, Agent 6 pointed out

I remember having been refused the leave to intervene in a couple of [...] cases, because we were out of the time limit for one week. By the way, this question of 12 weeks should be clarified by an amendment to the Rules as it should run from the publication of the decision either to relinquish or to refer the case to the Grand Chamber on the website, and not from the real decision, because you do not know that and you learn it only with a certain delay.

It seems that third-party interventions have become more populated by rules and processes since 1999. Although this makes the whole exercise more predictable and arguably more stable, it also means that a special effort is required from the state representatives to apply successfully. That

³³ Rule 38 of the Rules of Court (1976 edn) https://www.echr.coe.int/Documents/Library_1976_RoC_BIL.PDF, see also Bürli N, *Third-Party Interventions before the European Court of Human Rights* (Intersentia 2017), 4.

³⁴ Rule 37 of the Rules of Court (1982 edn) https://www.echr.coe.int/Documents/Library_1982_RoC_Revised_Nouveau_BIL.PDF

³⁵ https://www.echr.coe.int/Documents/Library_1998_RoC_BIL.pdf

³⁶ Article 36-1.

³⁷ Article 36-2.

³⁸ Bürli pointed out that ‘There is no indication in judgments or literature that the Court has rejected an intervention request by a member state. Also the interviewed judges and members of the registry could not recall a rejection of a member state.’ Bürli (n 33) 152.

said, the statistical analysis in Section 2 shows that the number of interventions in the Grand Chamber cases have stayed roughly on the same level since 2005 and tightening the rules did not in reality discourage the states from submitting their third-party observations.³⁹

The rules related to submission of third-party interventions by the state parties are not exhausted by the Convention and the Rules of Court. The states themselves set their internal rules and processes which need to be complied with in order to intervene. Unlike third-party interventions by individuals or NGOs, the state representatives cannot simply decide to intervene; in many cases they need to get internal approval in order to do that. Therefore, they might need additional time to comply with this extra layer of legal requirements. The procedures in different states are very diverse and can be more or less time consuming. Moreover, the rules can range from unwritten internal conventions to codified legal regulations. The variety of legal provisions covering third-party interventions to the ECtHR domestically has never been studied comprehensively; here, I will offer a few illustrative examples as to how this issue can be regulated. In some states the state representatives at the ECtHR can more or less single-handedly decide to intervene. In some other states, the Minister of Justice or Minister of Foreign Affairs should approve the intervention and this in turn makes the process more complicated and time consuming. This is how one of the agents explained the process that exists in their country:

I would have to have an approval from [my ministry]. It would not always need to go all the way up, depending on the importance of the case. Sometimes the approval from the head of division is enough. If this case is politically sensitive, it would need to go to the minister. If other departments are involved they need to consent. The foreign office usually should be asked because it is always concerned with the relations with other involved member states. I would have to have their approval at least on the working level. Of course, this would not be at the level of the minister for them but I would have to have approval from our counterparts. Usually, it is not that difficult.⁴⁰

In some other states, the process is regulated by law. In the words of Agent 7

It was quite complex procedure. And in 2015, a law on the governmental agent was adopted in [my country]. And according to this law from 2015, the procedure of intervention was simplified and the governmental agent shall consult the Minister of Foreign Affairs regarding the decision to intervene. In the past the Government [as a whole] had to decide. So, it is easier from the procedural point of view now.⁴¹

Although the process of third-party interventions by states is relatively complex and well superintended by legal norms and regulations, it seems that these regulations do not present an insurmountable difficulty for the states to intervene if there is a political will to do so. The following Sections will demonstrate that the complexity of legal regulation would not prevent states from applying if there is a clear self-interest in doing so.

2. Scale of Interventions.

As explained in the introduction, in order to understand the scale of interventions I analysed all judgments delivered by the Grand Chamber of the ECtHR between 1998 and 2020. A small caveat

³⁹ See, Section 2 of this article.

⁴⁰ Interview with Agent 2.

⁴¹ Interview with Agent 7.

needs to be mentioned here. In 2006, the Grand Chamber of the Court considered a series of cases against Italy. These cases are similar in terms of facts and legal issues but for some reason the Court did not join them in one judgment. The same states⁴² intervened in all these cases and if they are considered separately they can distort the outcomes of my analysis. So, nine judgments against Italy⁴³ will be considered as one for the purposes of this analysis. After this adjustment is made, we are left with 45 Grand Chamber judgments in which states interfered pursuant to Article 36(2) ECHR between 1998 and 2020.

It seems that the Contracting Parties to the Convention do not use this avenue of interaction with the Court very often; they only intervened in slightly over 11% of all cases⁴⁴ that were heard by the Grand Chamber. There is a number of possible explanations for this relatively low level of engagement, some of which were confirmed by the state representatives interviewed for this project and elaborated upon in Section 3. Many countries might not see that a particular case pending before the Court can have any impact on their legal system and therefore do not wish to spend resources and provide the Court with their feedback on a particular legal standard. In some states, civil servants entrusted with working with the Court might not be too keen to take additional workload, some states might be reluctant to engage as they see a limited impact of such observations, some states might not wish to intervene ‘against’ the position of another state if this might damage their diplomatic relations.

By means of comparison, non-governmental organisations,⁴⁵ academics,⁴⁶ other international bodies⁴⁷ entered in 124 cases, which is over 30% of all cases and three time more often if compared with the state interventions. It has to be noted that this comparison is illustrative only. There are many actors that can submit their third-party observations. Although some NGOs or academic institutions do it fairly regularly,⁴⁸ the majority of them submitted their observations only once or twice.⁴⁹

Although there were no third-party interventions by state parties in the Grand Chamber between 1998 and 2004, from 2005 onwards the number of interventions is relatively stable: states intervene pursuant to Article 36(2) in three cases per year on average.

⁴² Poland, Czech Republic and Slovakia.

⁴³ *Cocchiarella v. Italy* [GC], no. 64886/01, ECHR 2006-V, *Riccardi Pizzuti v. Italy* [GC], no. 62361/00, 29 March 2006, *Giuseppe Mostaccinolo v. Italy (no. 2)* [GC], no. 65102/01, 29 March 2006, *Scordino v. Italy (no. 1)* [GC], no. 36813/97, ECHR 2006-V, *Apicella v. Italy* [GC], no. 64890/01, 29 March 2006, *Musci v. Italy* [GC], no. 64699/01, ECHR 2006-V, *Giuseppe Mostaccinolo v. Italy (no. 1)* [GC], no. 64705/01, 29 March 2006, *Ernestina Zullo v. Italy* [GC], no. 64897/01, 29 March 2006, *Giuseppina and Orestina Procaccini v. Italy* [GC], no. 65075/01, 29 March 2006

⁴⁴ 396 judgment remained after then adjustments when a series of cases against Italy referred in note 43 are considered as one.

⁴⁵ By far the highest number of interventions was submitted by NGOs. See, among plenty of examples, NGO Redress applied in *Mocanu and Others v. Romania* [GC], nos. 10865/09 and 2 others, ECHR 2014.

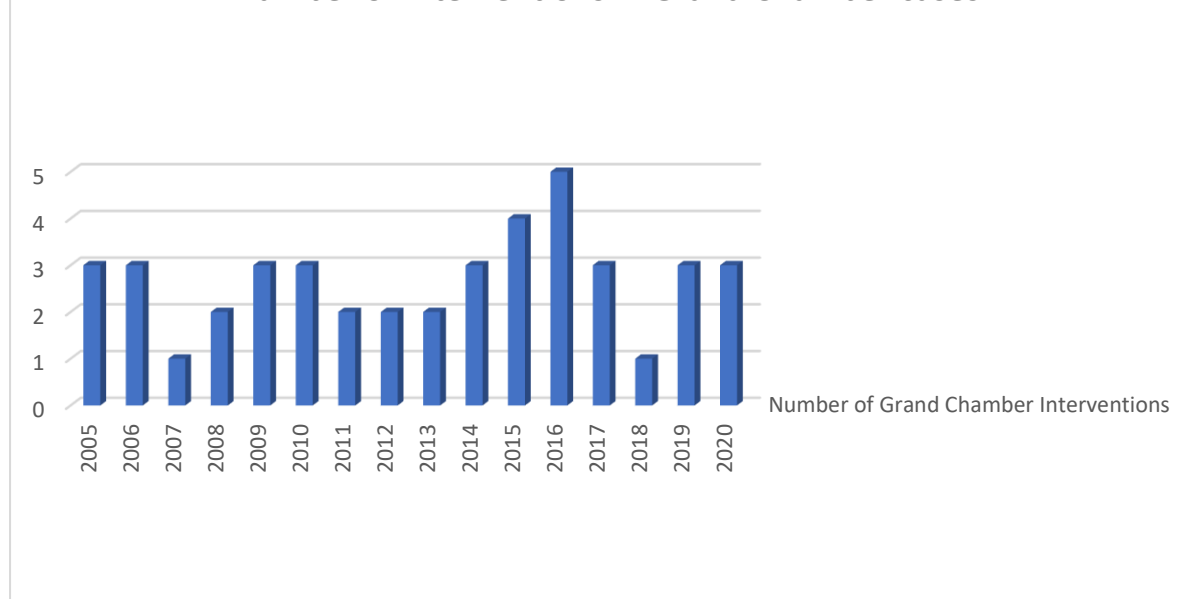
⁴⁶ A group of academics for instance applied in *Khoroshenko v. Russia* [GC], no. 41418/04, ECHR 2015.

⁴⁷ The United Nations Office of the High Commissioner for Human Rights intervened in *El-Masri v. the former Yugoslav Republic of Macedonia* [GC], no. 39630/09, ECHR 2012.

⁴⁸ For instance, the International Commission of Jurists intervened in thirteen cases, Amnesty International and Aire Centre in twelve cases,

⁴⁹ For instance, NGO ‘Christian Concern’ only intervened in *Molla Sali v. Greece* [GC], no. 20452/14, 19 December 2018.

Number of Interventions in Grand Chamber cases



31 out of 47 Contracting Parties to the ECHR⁵⁰ submitted their third-party interventions in Grand Chamber cases. The United Kingdom is by far the most prolific: it submitted third-party observations in 16 cases or in over 35% of all cases in which states made their third-party submissions. France and the Czech Republic submitted eight, Slovakia - seven, Italy - five, Poland, Ireland, Belgium and Bulgaria - four, the others - three or less.⁵¹

States intervened even in fewer cases according to Article 36(1) ECHR when their national is the applicant or is one of the applicants in a case against another Contracting Party to the Convention. There are only ten such cases.⁵² The majority of these cases are ‘quasi-inter-state cases’. It means that they relate either to the ongoing⁵³ or historical⁵⁴ tensions between two Contracting Parties. In a way, in these cases the intervening Contracting Party tries to convince the Court to adopt a particularly beneficial ruling by means of an individual application.

⁵⁰ Poland, Denmark, Belgium, France, Italy, Hungary, Bulgaria, Russia, the United Kingdom, the Czech Republic, Slovakia, Ireland, Croatia, Greece, Moldova, Switzerland, Estonia, Monaco, Armenia, The Netherlands, Sweden, Norway, Finland, Georgia, Germany, Cyprus, Lithuania, Malta, Romania, San Marino, Latvia.

⁵¹ There is limited data of third-party submissions before the Court of Justice of the European Union (CJEU), so the comprehensive comparison is problematic. Favale, Kretschmer and Torremans explored the state submissions in copyright cases of the CJEU. Their conclusion is ‘France and Italy seem the most invested, followed by the UK and then Spain, Poland, Germany, Austria, Finland, Poland, Czech Republic, Belgium and the Netherlands.’ Favale M, Kretschmer M and Torremans PLC, ‘Who is steering the jurisprudence of the European Court of Justice? The influence of Member State submissions on copyright law’ (2020) 83 *The Modern Law Review* 831, 848. Although, the results are not miles apart – France, the UK and Italy are quite active in both courts, there are significant differences. Although explanation of these differences goes beyond the remit of this paper, it can only be noted that the copyright litigation might seem less political than the litigation in the ECtHR. So, the intervention in the ECtHR cases would be less likely from the states where it is difficult to get political approval for intervention in sensitive areas.

⁵² *Tănase v. Moldova* [GC], no. 7/08, ECHR 2010, *A, B and C v. Ireland* [GC], no. 25579/05, ECHR 2010, *Kurić and Others v. Slovenia* [GC], no. 26828/06, ECHR 2012, *Janowiec and Others v. Russia* [GC], nos. 55508/07 and 29520/09, ECHR 2013, *Chiragov and Others v. Armenia* [GC], no. 13216/05, ECHR 2015, *Sargsyan v. Azerbaijan* [GC], no. 40167/06, ECHR 2015, *Paposhvili v. Belgium* [GC], no. 41738/10, 13 December 2016, *Kononov v. Latvia* [GC], no. 36376/04, ECHR 2010, *Perinçek v. Switzerland* [GC], no. 27510/08, ECHR 2015, *Marković and Others v. Italy* [GC], no. 1398/03, ECHR 2006-XIV.

⁵³ See, *Sargsyan v. Azerbaijan* (n 52), *Chiragov and Others v. Armenia* (n 52).

⁵⁴ See, *Janowiec and Others v. Russia* (n 52), *Perinçek v. Switzerland* (n 52), *Kononov v. Latvia* (n 52).

The number of Article 36(1) interventions is unsurprisingly low because foreign nationals bring individual applications more rarely than nationals of the respondent states.⁵⁵ It also shows that the Contracting Party needs to have a special interest that goes beyond the facts of a particular case to intervene even if the citizen of their country is an applicant. In the words of Agent 2, ‘we would not intervene in all cases of [our] citizens. If we have a feeling that there is an adequate legal representation and no further issues, we will just let it go’.⁵⁶ Agent 5 explained the reasons why they did not intervene under Article 36(1):

I decided not to pursue a case against [neighbouring country] for a violation of Article 3 with respect to the prison conditions, because [this neighbouring country] is an important ally. And second, [our country] has the same problem. And it would not look good if we, having the same problem, would basically start saying something to [the neighbouring country]. And I am not sure that [their] prisons are much worse than [ours]. I am not sure which one is better.⁵⁷

This short statistical survey shows that states do not use the opportunity to intervene in Grand Chamber cases too often. It does not seem that they see it as their priority and some states have never intervened. The following Section will look into the reasons why states intervene and what obstacles might prevent them from doing this more often.

3. Why Do States Intervene?

3.1 Reasons for Interventions Revealed by the State Representatives

When states act as respondents in the ECtHR cases, their aim is relatively clear - they wish to be found in violation of the ECHR as rarely as possible. When states agree with the applicant that the alleged violations have happened, they might engage in friendly settlement⁵⁸ or submit a unilateral declaration⁵⁹ which will normally bring the case to a close. If the authorities contest the allegations, their aim is to convince the Court to find no violation of the Convention. If this aim is successful the Court might develop a standard that would be applicable beyond the immediate case at hand.

These outcomes, namely finding no violation and pushing for a beneficial standard in terms of interpretation of the Convention in a given case reflect two distinct but intrinsically connected functions of the ECtHR. Finding no violation on the facts of a particular case is a representation of the adjudicatory function; while setting a broader standard is the meta-function which creates a corpus of ECHR jurisprudence applicable beyond the details of a particular case.⁶⁰ The adjudicatory outcome of a particular case might be of interest for the intervening state when this intervention is pursued under Article 36(1) (in other words when the national of the state is a party to the case) because at least in some cases the state intervenes to support this particular individual.

⁵⁵ There are only 36 Grand Chamber judgments in which Article 36-1 was mentioned. So, only in 36 cases the opportunity to intervene under this Article presented. Out of these 36 in only 10 judgments the submissions were made. The keyword “Article 36 § 1” was used in HUDOC search.

⁵⁶ Interview with Agent 2.

⁵⁷ Interview with Agent 5.

⁵⁸ Rule 62 of the Rules of Court. See also, Fikfak, Veronika, Against Settlement Before the European Court of Human Rights (May 17, 2021). iCourts Working Paper Series, No. 247, Forthcoming International Journal of Constitutional Law 2022. Available at SSRN: <https://ssrn.com/abstract=3847608>.

⁵⁹ Ruled 62A of the Rules of Court. Unilateral declarations: policy and practice. European Court of Human Rights. https://www.echr.coe.int/Documents/Unilateral_declarations_ENG.pdf.

⁶⁰ See, Dzehtsiarou (n 31) Chapter 4.

In other cases, presumably when states intervene as third parties they are more interested in the standards set in a particular case because this standard might be applicable to them and it is in their interest to prevent this.

At the outset, it needs to be stated that overall states intervene more often under Article 36(2) than under 36(1) in Grand Chamber cases. This statistic can be deceptive, however, as the numbers are low and inconclusive. So, the following analysis is here for illustrative purposes. Between 1998 and 2020, state parties intervened in 10 Grand Chamber cases⁶¹ under Article 36(1) and in 45 cases under Article 36(2). The hypothesis here might be that when a state intervenes under Article 36(1), it is more likely to be interested in a specific outcome of the case. Therefore, it seems plausible to initially suggest that this statistic demonstrates that the intervening states are more interested in the meta-function of the Court, namely in setting standards beyond the facts of a particular case because they intervene more often pursuant to Article 36(2) than according to Article 36(1). However, this hypothesis is problematic for two reasons. First, the states can intervene under Article 36(1) only in a limited number of cases: only in those cases where the applicants are citizens of the intervening state.⁶² Between 1998 and 2020, there were only 30 cases in which this situation could have happened. Therefore, states apply much more often under 36(1) than under 36(2) if the overall numbers are assessed per eligible case.⁶³ This is also not a very accurate comparison because under Article 36(1) the Court informs the states and asks if they are willing to intervene and this creates an extra incentive to do so; under Article 36(2) no such information is provided and the third-party submission is initiated by the intervening state. The more important second reason why the hypothesis is problematic is that even when a Contracting Party enters to support their nationals, the discussion in the Grand Chamber is rarely only about the specific facts of the case, but more about the broader interpretation of the Convention and standard-setting.⁶⁴

This idea was also reflected by the state representatives interviewed for this project. Agent 3 pointed out that ‘we are not so keen to intervene, when the problem is very specific to the respondent states. And the situation would be different in [our country].’⁶⁵ Agent 6 pointed out that for them the key reason that would push them to intervene is ‘the risk of proliferation of similar cases.’⁶⁶ Agent 7 suggested that under the rubric of Article 36(1) they would consider applying in ‘complex quasi-interstate cases.’⁶⁷ These quasi-interstate cases are dealing with a dispute concerning with a situation that is broader than a particular outcome of a given case. This situation might lead to establishing a standard that will be important for the relations between two Contracting Parties to the Convention. For instance, Russia intervened in the case of *Kononov v. Latvia*.⁶⁸ The applicant was a Soviet partisan during the World War II. He lived in Latvia but also had Russian citizenship. After gaining the independence the Latvian authorities decided to

⁶¹ *Markovic and Others v. Italy* (n 52), *Tănase v. Moldova* (n 52), *Kononov v. Latvia* (n 52), *A, B and C v. Ireland* (n 52), *Kurić and Others v. Slovenia* (n 52), *Janowiec and Others v. Russia* (n 52), *Chiragov and Others v. Armenia* (n 52), *Sargyyan v. Azerbaijan* (n 52), *Perinçek v. Switzerland* (n 52), *Paposhvili v. Belgium* (52).

⁶² For instance, out of 10 Grand Chamber judgments in 2020, only 2 applications were not submitted by the respondent state nationals (*Muhammad and Muhammad v. Romania* [GC], no. 80982/12, 15 October 2020 and *N.D. and N.T. v. Spain* [GC], nos. 8675/15 and 8697/15, 13 February 2020). None of these two were nationals of other Contracting Party to the Convention, so none of the Contracting Parties to the Convention would have any opportunities to intervene in a Grand Chamber case in 2020.

⁶³ The states intervened in 10 cases out of 30 under Article 36-1 (33%) and in 45 cases out of 395 under Article 36-2 (11%).

⁶⁴ See, Waldron J, 'The Core of the Case against Judicial Review' (2006) 115 *The Yale Law Journal* 1346, 1379-1380.

⁶⁵ Interview with Agent 3.

⁶⁶ Interview with Agent 6.

⁶⁷ Interview with Agent 7.

⁶⁸ *Kononov v. Latvia* (n 52).

prosecute the applicant for killing civilians on their territory more than 70 years ago. The applicant brought a case to the ECtHR claiming that this constitute a retrospective application of criminal law contrary to Article 7 ECHR. The intervention of Russia focused mainly on the interpretation of retrospective application of law to the acts committed during the War, not a particular episode that the applicant was accused of.⁶⁹ This case touches upon a politically sensitive issue of high importance for the Russian authorities. Another example is the case of *Tănase v. Moldova* in which the Court was asked to establish whether the limitation of the political participatory rights of dual citizens is compatible with the Convention. In other words, the Moldovan authorities prevented dual citizens from running for a position of the Member of Parliament. Here, the Romanian government intervened as the applicant was also a citizen of Romania, while dual citizenship of Moldova and Romania is very common and politically sensitive.⁷⁰ This demonstrates that the higher number of interventions under Article 36(2) than under 36(1) is not decisive. Although, interventions pursuant to Article 36(2) would almost always aim at the standard-setting meta-function of the ECtHR, interventions submitted according to Article 36(1) might also pursue the same purpose. This means that in both cases, the interventions can be motivated by self-interest beyond the immediate outcome of the case.

A significant portion of the interviews with the state representatives was dedicated to the discussion of the motivation and rationales behind states' interventions as third parties. The representatives were very clear that the main reason is the self-interest of the state in question. It does not mean that there is only one single motive but it seems to be the most explicit and consistent one.

All state representatives acknowledged that there should be some degree of direct self-interest in applying as a third party. Under direct self-interest, I mean here that the possible outcome of the case might have impact on the state in question. If the state applies under Article 36(1), the self-interest is evident because the applicant is the citizen of the intervening state. Agent 1 mentioned that the aim of intervention in this case is 'diplomatic protection of citizens'.⁷¹ However, even when the state intervenes under Article 36(2), their self-interest plays a significant role in the decision to intervene. Agent 2 explained:

We can intervene where the outcome of the case can have impact on [our] legal system and on our practice... Sometimes the judgments of the Court are of general value for every member state of the Council of Europe and we would consider intervening. But sometimes it is just [our] legal situation, similar to another...⁷²

Agent 6 made a similar observation, stating that

I think in terms of the interpretation and application of the Convention, the aim [of intervention] is very often to explain to the Court and to support the respondent government that a national system, which is similar in other states, is compatible with the Convention. And sometimes, the situation is somewhat worrying, in the sense that if the standard developed by the Court is reproduced in many other cases, then it becomes a real problem.⁷³

⁶⁹ Ibid, para 170-177.

⁷⁰ *Tănase v. Moldova* (n 52), para 102-103.

⁷¹ Interview with Agent 1.

⁷² Interview with Agent 2.

⁷³ Interview with Agent 6.

Agent 7 concluded by saying ‘what determines the state to intervene? Surely, it is the interest of that state in this case’.⁷⁴ I then asked Agent 7 if there might be any altruistic motives in applying, and they answered as follows: ‘I cannot exclude it but it is mostly determined by pragmatic state interests’.⁷⁵

Self-interest can also explain why states do not intervene on a larger scale. This point was mentioned by the interviewees but also it was mooted in the academic literature. For instance, Bürli explains why the Contracting Parties do not normally intervene to push for their liberal and more progressive laws:

If, for instance, a state intervenes in a case against Ireland on abortion, promoting its own liberal approach to abortion and Article 8 of the Convention, this could be tantamount to telling Ireland how to implement the Convention. Activist interventions could accordingly be regarded as unfriendly or undiplomatic.⁷⁶

The interviewees identified other political constraints that might prevent them from intervening. Agent 5 emphasised:

First, whether this participation would or would not worsen some important international relationship of [our country]. For example, probably, it would not look good if we, for instance, participated as a third party against [state X]. This country is an ally of [our country], we receive important military material from them, support. It probably would not look good if we intervene against this state. We also consider whether [our state] has a problem which is similar to the issue in the case. Once, I decided not to intervene in a case against [state Y] for a violation of article 3 with respect to the prison conditions. I did so, first, because [state Y] is an important ally. And second, our country has the same problem. And it would not look good if we having the same problem would basically start saying something to [state Y].⁷⁷

The state representatives see state self-interests as the key motivator for submitting third-party interventions or abstaining from them. However, some agents acknowledged that there is scope for more altruistic motives and the general support of human rights may act as a trigger for intervening. Agent 1 pointed out that:

There are cases where it is a general policy of the government [to intervene]; for instance, we have a lot of interest in women's rights or LGBTI rights. And now on the rule of law, we are considering to intervene in cases where there are issues with the rule of law, especially with respect to EU member states.⁷⁸

To conclude preliminarily, self-interest dominates the decision of the state representatives to intervene in both Articles 36(1) and 36(2) procedures. The key interest of the states lays outside the outcome of a particular case and states seem to be more interested in standard-setting meta-function of the Court than in a more straightforward adjudicatory one. The following Sub-section will compare these findings with what can be revealed from the summaries of the third-party interventions presented by the Court in its judgments.

⁷⁴ Interview with Agent 7.

⁷⁵ Ibid.

⁷⁶ Bürli (n 33), 137-138.

⁷⁷ Interview with Agent 5.

⁷⁸ Interview with Agent 1.

3.2 Reasons for Interventions Revealed by the Case Law

Another way of identifying the reasons for interventions is through the analysis of the summaries of the state's third-party reports that the ECtHR includes in its judgments. This analysis unsurprisingly revealed that the self-interest in the outcome of a particular case is the primary motivation of the intervening states. The key reasons for interventions are

1. The interest of the state in the outcome of the case;
2. Provision of relevant information on domestic law and practice;
3. Request to clarify the case law.

The majority of third-party interventions are related to of the standard developed in the case. For instance, the UK government intervened in *Scoppola No 3 v. Italy*⁷⁹ in which it argued that the Court effectively erred in its previous judgment of *Hirst No 2 v. UK* on a similar issue.⁸⁰ The Court rejected these arguments and kept the core principle established in *Hirst*,⁸¹ but on the facts did not find a violation of the Convention in *Scoppola No 3*. The state can intervene if it might be exposed to a similar claim in Strasbourg. For instance, the Belgian government intervened in *S.A.S v France* concerning the French Burka Ban because it was only other state in Europe with a similar ban at that particular time.⁸²

If the case was referred to the Grand Chamber after the Chamber had a chance to deliver its judgment,⁸³ the intervening government can express its support or dissatisfaction with the findings of the Chamber. For instance, in *Perincek v Switzerland*, the case concerning Armenian genocide denial, the Armenian government argued that:

[t]he real vice of the Chamber judgment was that it had been seen by genocide deniers as authority for the proposition that there was doubt about the reality of the Armenian genocide. For a human rights court to send such a message was deeply hurtful and unfair. It had been based on mistaken or misleading evidence produced by the applicant on this point, on which there could be no doubt.⁸⁴

The intervening states can identify a particular aspect of the Chamber judgment with which they disagree. For example, in *Sindicatul "Păstorul cel Bun" v. Romania*, the Polish government argued that

the Chamber should have focused more on the special nature of the relationship between the Church and its clergy. The fact that the rights claimed by a group of clergymen were of an economic, social or cultural nature did not support the conclusion that recognition of their trade union would be unlikely to undermine the autonomous operation of the religious community in question.⁸⁵

⁷⁹ *Scoppola v. Italy (no. 3)* [GC], no. 126/05, 22 May 2012.

⁸⁰ *Hirst v. the United Kingdom (no. 2)* [GC], no. 74025/01, ECHR 2005-IX.

⁸¹ *Ibid* para 96. For more information on prisoner voting case law see: K Dzehtsiarou, *Prisoner Voting Saga: Reasons for Challenges in H Hardman and B Dickson Electoral Rights in Europe* (Routledge, 2017).

⁸² *S.A.S. v. France* [GC], no. 43835/11, ECHR 2014.

⁸³ An application can appear before the Grand Chamber of the Court via two routes. First, through the referral under Article 43 of the Convention. When one of the parties (or both parties) is not satisfied with the judgment of the Chamber they can request the Panel of the Court to allow the Grand Chamber to reconsider the case. Second, through the relinquishment pursuant to Article 30 of the Convention, when the Chamber decides to pass this case to the Grand Chamber.

⁸⁴ *Perincek v. Switzerland* (n 52), para 178.

⁸⁵ *Sindicatul "Păstorul cel Bun" v. Romania* [GC], no. 2330/09, ECHR 2013, para. 115.

In *Nait-Liman v. Switzerland* the Court dealt with access to civil courts in relation to the claims for compensation for torture that happened outside the territory of the respondent state.⁸⁶ Here, the UK government expressed its support for the outcome produced by the Chamber. The intervening government argued that ‘the Chamber had carried out a careful analysis of the international and comparative law with regard to international jurisdiction, and they were in full agreement with its conclusions.’⁸⁷

In the second and much smaller group of interventions, states provide a clarification or explanation of their relevant domestic law. Usually, the ultimate aim of this is to demonstrate that such laws are compatible with the Convention but it is done not through arguing in favour of a particular outcome of the case but rather by explaining the rationale behind a particular legal provision or the nuances of their application. For instance, in *Karácsony and Others v. Hungary*⁸⁸ the Court considered whether the Parliament should be able to sanction its members. The Czech government ‘provided information about the domestic regulation of parliamentary disciplinary proceedings’.⁸⁹ In *Kyprianou v. Cyprus*, dealing with the compatibility of the contempt of court provisions with the Convention, the Maltese government ‘referred to the laws applicable in Malta concerning contempt in the face of the court’.⁹⁰ Of course, informing the Court about the states’ domestic law is not an aim in itself. The states perhaps wish to show that this provision is well established and finding a violation of the Convention might have a spill-over effect to other member states. This category also reveals the self-interest of the state but in a subtler manner than in the first category.

Finally, the third-party interveners might request the clarification of the case law from the Court. In *Schatschaschwili v. Germany*, the Czech government invited the Court to clarify the standard related to legality of reliance on hearsay evidence in the context of Article 6 ECHR. The position of the Czech government can be summarised as following: ‘the more flexible approach adopted by the Court in *Al-Khawaja and Tahery* in respect of sole or decisive evidence made its case law less predictable. They proposed that the Court should clarify which counterbalancing factors would be considered sufficient for preventing a breach of Article 6 of the Convention’.⁹¹

Quite naturally states mostly submit their third-party observations in cases where the matter at issue has some resonance with their domestic situation and they either explicitly or implicitly state their interest in their submissions. Having said that, self-interest alone cannot explain why states apply as third-parties. If it was only down to self-interest states would apply more often perhaps. The following sub-section analyses what prevents states from more active engagement with the Court through third-party interventions.

3.3 Challenges to Third-Party Interventions by States

This Sub-section presents the challenges for submitting third-party interventions by states that the interviewed state representatives specified. Some challenges are state-specific but in what follows this article summarises the most common of them. The source of the majority of challenges is within the national states. In some states third-party interventions are not commonly used or the agents just do not have enough resources to submit interventions regularly. However, there are

⁸⁶ *Nait-Liman v. Switzerland*, no. 51357/07, 15 March 2018

⁸⁷ *Ibid*, para 157.

⁸⁸ *Karácsony and Others v. Hungary* [GC], nos. 42461/13 and 44357/13, 17 May 2016

⁸⁹ *Ibid*, paras. 110-113.

⁹⁰ *Kyprianou v. Cyprus* [GC], no. 73797/01, ECHR 2005-XIII, para 117.

⁹¹ *Schatschaschwili v. Germany* [GC], no. 9154/10, ECHR 2015, para 99.

also challenges that originate from the Court. For example, it has been pointed out that information about the cases of interest is not always easily accessible by state representatives. The Court does not contact the state representatives and inform them about upcoming important cases. Agent 1, for example, highlighted this issue by stating that ‘the difficulty [is] finding the cases of interest...; all the cases that are communicated are published on the website of the Court, but there are so many, so we don't have the capacity to follow [them all].’⁹² If the ECtHR is interested in increasing the number of third-party interventions from the state parties, they might be more active in attracting such interventions. However, the Court’s interest in doing so was also questioned by the representatives of the states. Agent 6 for example, pointed out

the Court is not very keen on receiving interventions. My feeling is that they do not do much in order to stimulate third-party interventions. They never ask for an intervention according to the letter of Article 36(2), they never invite. Maybe sometimes they invite the Council of Europe Commissioner for Human Rights, but I have never had an invitation.⁹³

All other challenges originate from the internal conditions existing within the Council of Europe member states. Familiarity of the governmental lawyers with third-party intervention procedures is an important factor that can explain the reluctance of some representatives to submit their requests. Agent 2 opined that

we have been generally reluctant to intervene. It is not so much the practice in [my country]. I think that the UK is more used to that. That’s one reason. It is getting more usual now, we are getting more requests from other member states to join and we contemplate it more often than we did before.⁹⁴

Naturally, in the states where third-party interventions are a long-standing legal tradition, governmental lawyers are perhaps more inclined to use this mechanism. The familiarity with the process is closely connected to the familiarity with the matter at issue in a particular case. In the majority of states the third-party reports are prepared in-house. Only in very important cases and only in some states are they contracted out to external experts. Therefore, one of the representatives pointed out that there might be no expertise on a particular issue in their department and therefore they would be reluctant to apply, they pointed out:

We get a communication that eighteen nationals of another member state are complaining about property re-distribution and one of them have [our] nationality. What can we do to help the European Court in these cases – we know nothing about the matter at issue. Even if they are [our] citizens, they have their lawyers – there is no point in intervening.⁹⁵

However, the vast majority of challenges that were identified in the interviews are concerned with resources and technical complications related to approvals of such applications on the national level. Funding and human resources were mentioned by effectively all interviewed representatives. It seems that third-party interventions are the first to suffer if there is a particularly busy period. Third-party interventions clearly have resource implications, and unlike their work in cases where they act as respondent states, this activity is effectively voluntary. Agent 2 pointed out that

⁹² Interview with Agent 1.

⁹³ Interview with Agent 6.

⁹⁴ Interview with Agent 2.

⁹⁵ Ibid.

When we have plenty of submissions we will be more reluctant to intervene. If we are swamped, this is the first thing that goes out from the board unless there are cases where we desperately feel that there is a need for our intervention.⁹⁶

Other representatives made similar observations. Agent 4, for example, pointed out that

I think, from my experience, there are not any sort of fixed criteria that we routinely apply for intervening. But we have got limited resources, and we want to intervene effectively, not every single time we have an opportunity. So, we limit our interventions to situations where there is a point of principle, where we want to make sure the case law of the court develops in the right way.⁹⁷

Agent 3 pointed out that they lead a small team and therefore they have to choose the most important cases to intervene.⁹⁸ Agent 6 explained that

...sometimes we just do not intervene, because we tell ourselves we do not have time to devote to this or that case, but I would say that we are quite in favour of cooperation amongst the government agents, and also in favour of interventions.⁹⁹

Agent 7 clearly stated that ‘human resources, financial resources that can be dedicated to such aims are very limited’.¹⁰⁰

Finally, some representatives identified that there are bureaucratic challenges in submitting third-party interventions. Agent 2 pointed out that in sensitive political cases the government ministers should have the similar position on the matter at issue and then the intervention would be possible.¹⁰¹ Agent 4 highlighted the issue of coordination between various governmental departments. They pointed out that ‘the busy part for us is ... getting views from other departments and putting together instructions and reviewing the drafts...’.¹⁰²

The key practical challenges to wider submission of third-party interventions by the Contracting Parties originate either from the ECtHR or from the procedures existing in the member states. In order to increase the number of third-party interventions the Court might be more active in sharing information about the cases with the states and invite them to intervene. It is a different matter whether the ECtHR would indeed wish to do that as third-party interventions can prolong the already lengthy proceedings in the Court.¹⁰³ If the Contracting Parties would like to increase the number of submissions they might want to invest more resources into cooperation with the ECtHR and invite external experts to increase the ability of state representatives to be involved in a higher number of cases.

This article argues that states predominantly intervene for self-interest, and although there are some challenges that prevent states from intervening if they see no benefit for themselves it is unlikely that they would intervene even if they have resources and can overcome bureaucratic obstacles. This means that such interventions are hardly ‘independent’ or ‘objective’ but more akin

⁹⁶ Ibid.

⁹⁷ Interview with Agent 4

⁹⁸ Interview with Agent 3.

⁹⁹ Interview with Agent 6.

¹⁰⁰ Interview with Agent 7.

¹⁰¹ Interview with Agent 2.

¹⁰² Interview with Agent 4.

¹⁰³ See, K Dzehtsiarou, *Keep Me in the Loop: Feedback Exchange between the European Court of Human Rights and the States* (forthcoming, on file with the author).

to state's submissions in contentious cases. The subsequent Section will aim to substantiate the point that the Court is well aware of this key motive of states in submitting third-party intervention and therefore they have a limited impact on the decision-making of the Court.

4. Do Interventions Matter?

A significant body of literature demonstrates that written observations and identifiable preferences by the member states impact the decision-making of international tribunals such as for instance the Court of Justice of the European Union.¹⁰⁴ The preliminary analysis demonstrates that this is not evidently the case in relation to the ECtHR. This Section tries to empirically test the connection between third-party interventions by states and the outcome of Grand Chamber cases of the ECtHR.

My hypothesis for this Section is that the Court's decision-making pattern in Grand Chamber cases is not significantly affected by the third-party interventions. In order to consider the impact of third-party interventions, I will seek to establish whether the Court finds fewer violations in cases in which states intervene as third parties by comparing the average number of violations in such cases to the overall average number of violations. The key question of this analysis is whether the state submissions might have any identifiable impact on the outcome of the case in which these submissions were made. Out of 45 cases in which states intervened, the Court found a violation of at least one Article of the Convention in 28 cases which is around 62% of all such cases. In all Grand Chamber judgments, the Court found violations of at least one Article of the Convention in under 63% of cases: in 254 out of 404 judgments. One can therefore suggest that from the purely numerical perspective presence of third-party interventions by states has little impact on the overall average outcome in Grand Chamber cases. However, a more nuanced overview is perhaps in order. Although in the majority of cases, the third-party intervenors argue in favour of no violation, it is not always the case. Furthermore, if the state argues in favour of a violation then finding no violation would not be a desired outcome for the said third party. Moreover, the Court might find a minor violation that was not the key issue of contestation. Finally, an intervention of only one third party might not impact the outcome but intervention of a significant number of states might have a more tangible impact. I will try to consider all these questions in reverse order in the subsequent analysis. I will first examine whether the number of intervening states might have any influence on the outcome of the cases and then I will closely review the substance of the arguments that states make in their observations.

In the vast majority of cases only one state intervened as a third-party in a given case. This happened in 23 cases and in 15 of them the Court found a violation (65%). A similar trend can be identified in cases in which two countries intervened: 12 cases in which seven violations were found (58%). In 10 cases three or more countries intervened and in six violations were found (60%). Thus, numerically, the average outcome of the cases stays roughly the same when one, two, three or four countries intervene.

¹⁰⁴ See, for example Larsson O and Naurin D, 'Judicial Independence and Political Uncertainty: How the Risk of Override Affects the Court of Justice of the EU' (2016) 70 *International Organization* 377, 379 and Favale, Kretschmer and Torremans (supra note 51), A. Cullen and H. Charlesworth, 'Diplomacy by other means: the use of legal basis litigation as a political strategy by the European Parliament and Member States' (1999) 36 *Common Market Law Review* 1243.

An interesting although possibly statistically insignificant finding is when a really high number of states intervene. In five cases¹⁰⁵ four or more states intervened as third parties and in only 2 of these cases the Court found a violation (40%) which is significantly lower than the ‘normal’ average of 60%. One can hypothesise that only when there is a very large number of intervening states there might be some impact on the Court’s decision-making. This hypothesis is easy to challenge due to the small numbers of such cases. The link between the outcome and third-party interventions here might be coincidental. So, in general, in the small sample of the Grand Chamber cases analysed, the number of intervening parties does not seem to significantly impact the outcome. Of course, the numbers cannot tell the whole story. The states might strategize and decide to apply only in the cases where the violation is likely; if so, even a small number of finding of ‘no violations’ by the Court might demonstrate significant impact. It is very hard to test this hypothesis as it is hardly possible to establish the intention of intervening states in every case. Although the state representatives interviewed for this project have not mentioned this strategy, it cannot be ruled out. This statistical survey however demonstrates that there is no obvious and numerical dependency between finding a violation or no violation by the Court and the intervention of states as third parties in the Grand Chamber cases.

One might argue that although third-party interventions might not significantly impact the outcome of the case, they influence the reasoning of the Court. This argument can hardly be decisively proven as it requires access to the Court’s deliberations which are confidential. In order to shed some light on this issue, I looked at how the ECtHR refers to the states’ third-party reports in its judgments. At the outset, I should point out that the Court normally provides a very short summary of the reports. So, for this paper I did not request the full texts of such reports from the Court¹⁰⁶ and I only made my observations based on the details provided in the judgments. This Section perhaps would be more comprehensive if the full reports were studied but there is identifiable value in looking at the summaries of these reports provided by the ECtHR because they represent the Court’s own understanding of the most important points enshrined in these reports. After considering all of the Court’s summaries, it was decided to employ the traffic light system for the purposes of this Section. In green cases, the Court agreed with the outcome supported by the third parties. In red cases, the Court rejected the outcome supported by the third parties. In amber cases, the position of the third parties was not entirely clear. In some cases, there were more than one intervener and they argued in favour of different outcomes of the case.¹⁰⁷ In some other cases, the interveners were successful in persuading the Court in relation to some issues of the case but failing in some other aspects.¹⁰⁸ In some cases, the intervening government seemed to support the respondent state but not in every aspect of the case. As a result, the finding of a violation cannot be seen as a failure to persuade the Court.¹⁰⁹ In some cases, the intervening governments mainly requested the Court to clarify its case law without articulating its own

¹⁰⁵ *Lautsi and Others v. Italy* (n 29), *Strand Lobben and Others v. Norway* [GC], no. 37283/13, 10 September 2019; *A and B v. Norway* [GC], nos. 24130/11 and 29758/11, 15 November 2016; *Tarakbel v. Switzerland* [GC], no. 29217/12, ECHR 2014; *Sindicatul “Păstorul cel Bun” v. Romania* (n 85).

¹⁰⁶ The reports are not confidential and can be provided by the ECtHR upon request.

¹⁰⁷ *Strand Lobben and Others v. Norway* (n 105). In this case the Governments of Slovakia (para. 187) or Czech Republic (para. 180) effectively argued in favour of finding a violation while the government of Denmark (para. 182) or United Kingdom (paras. 189-191) argued against.

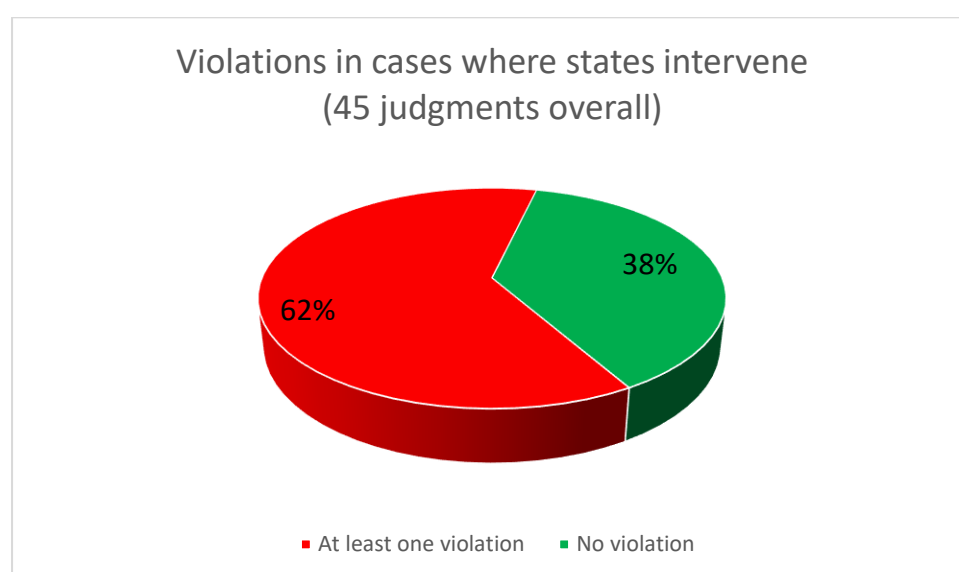
¹⁰⁸ In *Ilias and Ahmed v. Hungary* [GC], no. 47287/15, 21 November 2019 the Court rejected the argument of Russia related to Article 3 (see, para 135-138) and accepted the argument of the Polish government related to Article 5.

¹⁰⁹ In *Bărbulescu v. Romania* [GC], no. 61496/08, 5 September 2017 the French government while arguing that the state should be allowed broad margin of appreciation in relation to regulation privacy at the workplace also pointed out that the balance between competing interests could have been struck differently.

position.¹¹⁰ Finally, in some other cases, although the Court confirmed the result argued by the third-party interveners, some of their arguments were explicitly rejected.¹¹¹

When the traffic light system is applied to the cases, the results appear as following. In 17 judgments the Court supported the outcome favoured by the intervening governments. The Court either explicitly¹¹² or implicitly¹¹³ agreed with their line of arguments. Seven judgments would fall within the amber category for various reasons explained above. In 21 cases the Court either explicitly¹¹⁴ or implicitly¹¹⁵ rejected the arguments of the intervening governments.

This more nuanced analysis of the case law shows that finding a violation does not always mean that the arguments of intervening states were rejected. Even if the Court concludes that there was a violation it does not immediately mean that this finding is clearly contrary to the point that the intervening government is making. In around 38% of judgments in which states intervened as third parties the Court confirms the outcome favoured by this third party, in 47% of judgments the Court rejects the arguments of the third party and in 15% of cases the outcome is ambiguous.



¹¹⁰ *Schatschaschnili v. Germany* [GC], no. 9154/10, ECHR 2015, para 99.

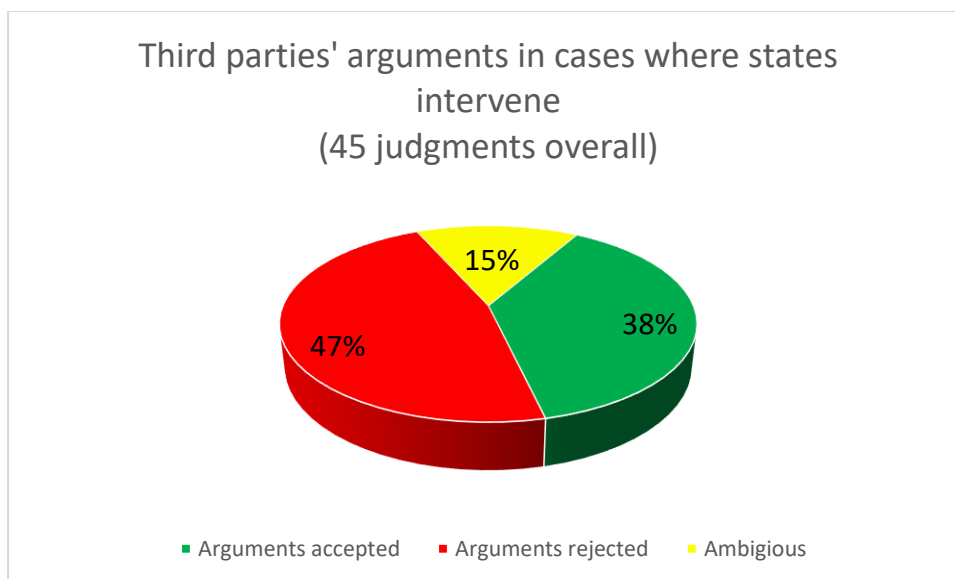
¹¹¹ *Markovic and Others v. Italy* (n 52), para 53.

¹¹² In *Stoll v. Switzerland* [GC], no. 69698/01, ECHR 2007-V the Court stated: 'In this context the Court shares the opinion of the Swiss and French Governments' para. 114. While Switzerland was a respondent state, the French government intervened as a third party in this case.

¹¹³ In *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* [GC], no. 45036/98, ECHR 2005-VI the Court generally shared the line of reasoning of the Italian and UK governments (para. 129-132) but did not explicitly referred to their arguments in its reasoning.

¹¹⁴ In *Saadi v. Italy* [GC], no. 37201/06, ECHR 2008 the Court has explicitly rejected the argument of the UK government with interfered as a third party (para. 138).

¹¹⁵ In *Condere and Hachette Filipacchi Associés v. France* [GC], no. 40454/07, ECHR 2015 the Court rejected the arguments of the intervening government of Monaco without explicitly referring to them in its reasoning.



Irrespective of how these cases are approached there is no clear statistical evidence that mere intervention of a state as a third party crucially changes the decision-making of the Court.

In order to understand the impact of third-party interventions one needs to analyse whether the Court actually engages with the arguments presented by the states in their third-party interventions. This might shed some light on the value of these arguments for the decision-making of the Court. The Court summarises the arguments of the third-party interveners in the descriptive part of its judgment. These summaries range from just a couple of sentences¹¹⁶ to a much more substantive outline.¹¹⁷ The Court is not consistent in how it treats the arguments presented in the observations. In some cases, it clearly refers to the arguments presented by the third parties and expresses its view on the utility of these arguments. For instance, in *Z.A. and others v. Russia*, the Court stated that ‘contrary to the Russian and Hungarian Governments’ submissions before the Grand Chamber, in the Court’s view this case has little to do with the issue of whether a right to asylum as such or a right to asylum-shopping exist under current international law’.¹¹⁸ In other cases, the Court explicitly agrees with the arguments submitted by third parties. For instance, in *Dubská and Krejzová v. the Czech Republic* the Court noted ‘the Government’s argument, supported by the Government of the Republic of Croatia and the Government of the Slovak Republic, that the risk for mothers and new-borns is higher in the case of home births than in the case of births in maternity hospitals ...’.¹¹⁹ However, in the majority of cases, the Court does not react to the arguments of third parties directly and explicitly. Even in the cases in which the third-party interventions seem to make some difference, the Court is reluctant to refer explicitly to the arguments made by the third parties.¹²⁰ The oft-repeated example of *Lautsi v. Italy* provides ad hoc evidence that a high number of interveners can persuade the Grand Chamber of the ECtHR to overturn the Chamber judgment. In *Lautsi* the Grand Chamber found no violation and subscribed to a more restrictive reading of the Convention.¹²¹ In this case, the Court considered whether the

¹¹⁶ For example, *Z.A. and Others v. Russia* [GC], no. 61411/15 and 3 others, 21 November 2019, paras 124-125.

¹¹⁷ For example, *Saadi v. Italy* (n 114) paras 117-123.

¹¹⁸ *Z.A. and Others v. Russia* (n 116) para 126.

¹¹⁹ *Dubská and Krejzová v. the Czech Republic* [GC], nos. 28859/11 and 28473/12, 15 November 2016, para 186

¹²⁰ See, for instance, *Lautsi v. Italy* (n 29).

¹²¹ *Ibid.* See also, Pasquale Annicchino, ‘Winning the Battle by Losing the War: The Lautsi Case and the Holy Alliance between American Conservative Evangelicals, the Russian Orthodox Church and the Vatican to Reshape European Identity’ (2011) 6 *Rel & Hum Rts* 21

display of a crucifix in the state-run school violated the freedom of religion of the applicants under the Convention. Ten states submitted their third-party intervention in this case.¹²² In its reasoning, the Court has not explicitly referred to the states' third-party intervention despite the fact that it picked some of the points argued in their submission. For instance, the key contention of the interveners: 'whether the State opted to allow or prohibit the presence of crucifixes in classrooms, the important factor was the degree to which the curriculum contextualised and taught children tolerance and pluralism'.¹²³ The Court implicitly replied to this point by stating:

the effects of the greater visibility which the presence of the crucifix gives to Christianity in schools needs to be further placed in perspective by consideration of the following points. Firstly, the presence of crucifixes is not associated with compulsory teaching about Christianity. Secondly, according to the indications provided by the Government, Italy opens up the school environment in parallel to other religions.¹²⁴

This limited explicit engagement with third-party interventions can be perhaps explained as the Court's attempt to downplay the role of these submissions. Even in the case where the Court agreed with third-party interventions it did not chose to highlight their impact on the decision-making.

Conclusion.

The Contracting Parties to the ECHR engage with the ECtHR beyond what is absolutely required from them. The majority of states submitted third-party interventions in Grand Chamber cases. The case law of the ECtHR and the interviews with the representatives of governments reveal that self-interest is the dominant motivation for submission of such interventions. The Court seems to be well aware of this motivation and the interventions of the states do not change the average decision-making pattern of the Court. This finding is significant and it is contrary to what was often argued in relation to other international tribunals. Although, the outcome of my numerical analysis can be contested from various angles, it creates a strong assumption that the Court does not evidently and strictly follow the arguments made by the third-party interveners. It does not however necessarily mean that third-party interventions by the states are nor important. For example, some preliminary indications suggest that high numbers of states can have some impact on the judgments of the Court.

Third-party interventions submitted by the Contracting Parties also create a useful feedback loop. The states can clearly indicate their preferences and expect the Court to react to them. It would perhaps be helpful if the Court responded to the arguments of third parties in its judgments properly and this would create further incentives for the states to engage.

It is however acknowledged that third-party interventions create additional workload for the Court and their value is conditioned by the self-interest motivation of the submitting parties. The Court needs to maintain a very delicate balance between encouraging interested and engaged member states in submitting third-party interventions and preventing itself from suffocating from additional workload. It seems that currently the latter objective is prevailing.

¹²² *Lautsi v. Italy* (n 29), para 8.

¹²³ *Ibid*, para 47.

¹²⁴ *Ibid*, para 74.