

GLOBAL LAW ENTREPRENEURS: NON-GOVERNMENTAL
ORGANIZATIONS AS AMICI CURIAE IN INTERNATIONAL LAW-MAKING

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Increased participation of non-governmental organizations (NGOs) in international lawmaking is hardly questioned in scholarship. NGOs use different means to affect international lawmaking, including acting as complainants and providing legal advice to the petitioners. However, in what particular way do NGOs influence international lawmaking? The dissertation answers this question by examining how NGOs utilize the procedural instrument of *amicus curiae* intervention before international tribunals.

The dissertation shows that *amicus curiae* interventions by NGOs have become commonplace in international adjudication. In general, *amicus curiae* participation procedure serves as a legitimacy-enhancing mechanism for international tribunals. Scholars agree that in order to maintain legitimacy the international tribunals must stay cognizant of the values and preferences of stakeholders. *Amicus* intervention procedure is one of the mechanisms through which tribunals gather information about the values and attitudes of constituencies and communities subject to their lawmaking. Moreover, NGOs as *amicus* interveners act as “global law entrepreneurs”: they provide the tribunals with information as well as continuously support international lawmaking and advocate for its expansion.

BIOGRAPHICAL SKETCH

Anna Dolidze is an Assistant Professor of Law at the University of Western Ontario. Dolidze's research interests are in international law, human rights, and law and development. Dolidze has published in international law journals, peer-reviewed publications and collected volumes. Anna has also authored reports for a number of international organizations, including the United Nations Development Program and the Organization for Security and Cooperation in Europe.

Dolidze received her BA/LLB summa cum laude from Tbilisi State University and an LLM in International Law from the University of Leiden. Dolidze has taught and held visiting fellowships at the New York University Law School, Harriman Institute of Columbia University, and Duke University. In the past, Dolidze has worked with a number of international organizations, including Human Rights Watch, Russian Justice Initiative, the Permanent Court of Arbitration and Save the Children. In 2004-2006, Dolidze was the President of the Georgian Young Lawyers' Association, one of the largest legal advocacy organizations in Georgia. In 2009, Atlantik-Brücke selected Dolidze as a "Young European Leader."

To Nana and Valery

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LIST OF ACRONYMS

CIEL	Center for International Environmental Law
CMC	Center for Marine Conservation
EC	European Community
ECHR	European Court of Human Rights
ECJ	European Court of Justice
ECOSOC	United Nations Economic and Social Council
ECtHR	European Court of Human Rights
IALANA	International Association of Lawyers against Nuclear Arms
ICC	International Criminal Court
ICJ	International Court of Justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
IOM	InterOceanmetal Joint Organization
ISA	International Seabed Authority
ITLOS	International Tribunal for the Law of the Sea
IUCN	International Union for the Conservation of Nature
IUPN	International Union for Protection of Nature
NAFTA	North American Free Trade Agreement
NCCL	National Council for Civil Liberties
NGO	Non-governmental organizations
OAS	Organization of American States
OPCV	Office of Public Counsel for Victims
OSCE	Organization for Security and Co-operation in Europe
SFRY	Socialist Federal Republic of Yugoslavia
TDR	Triadic Dispute Resolution
TUC	Trades Union Congress
UDHR	Universal Declaration of Human Rights
UNCLOS	United Nations Convention on the Law of the Sea
UNEP	United Nations Environment Programme
WTO	World Trade Organization
WWF	World Wide Fund for Nature

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Chapter I: Introduction

In 1999 the President of the International Court of Justice in the case of *The Legality of the Threat or Use of Nuclear Weapons* expressed his discontent with the fact that the International Association of Lawyers against Nuclear Arms (IALANA) and other groups brought strong pressure to bear on the UN General Assembly and the World Health Organization in order to convince them to bring a request for an advisory opinion to the International Court of Justice. He expressed his hope that “[. . .] governments and inter-governmental institutions [would] still retain sufficient independence of decision to resist the powerful pressure groups which besiege them today with the support of mass communication media.”¹

The words of the Chief Justice of the World Court emphasized the significant role that non-governmental organizations (NGOs) have been playing in relation to the creation and development of international law. Currently, it is undisputable that NGOs play a prominent role in international law-relevant fields, from treaty-making to rule implementation, from support to courts to aiding delivery.² International public-interest organizations and their domestic counterparts often contribute to the shaping of international law through various legal means. They may take part in proceedings in different capacities—initiate a case, act as a court-appointed expert, appear as a witness, and submit amicus curiae briefs.³

In particular, NGOs have been an indispensable component in the functioning of the international human rights regime from the outset, and continue to be. Their

¹ *The Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, dissenting opinion of Judge Guillaume, para 2 at 67. 1999 ICJ Rep.

² Christine Bakker and Luisa Vierucci, *Introduction: A Normative or Pragmatic Definition of NGOs?* in *NGOS IN INTERNATIONAL LAW: EFFICIENCY IN FLEXIBILITY?* (PIERRE-MARIE DUPUY ED. 2008).

³ Dinah Shelton, *The Participation of Non-Governmental Organizations in International Judicial Proceedings*, 88 A.J.I.L. 612 (1994).

contributions are especially important in relation to fact-finding, reporting, standard-setting, and the overall promotion, implementation, and enforcement of human rights norms. As commentators have indicated, the state of human rights regimes in the world would not be as it is without the spur and inventiveness of NGOs.⁴

The history of NGOs stretches back more than 200 years, starting with associations established at the end of the eighteenth century in the United States, France, and the United Kingdom to bring an end to the slave trade. For instance, Anti-Slavery International was established in the UK in 1839 as the Anti-Slavery Society.⁵ However, the significance of NGOs appears to have reached new heights after the 1990s.⁶ They are among the basic conditions of existence and sources of power of all systems of human rights protection, both within individual States and at the international level.⁷

Moreover, never before has the number of NGOs been so great. Some devote their work to broad issues such as racial discrimination, development, or environmental protection, while others tackle more specific matters such as child soldiers, sexual exploitation of children, eradication of nuclear weapons, and prisoners of conscience.⁸ For example, there are approximately ten to twenty thousand NGOs in Haiti alone, a country with a population of nine million.⁹ Moreover, there are an estimated 5,000 world congresses annually for the 50,000 NGOs operating at a global

⁴ Steve Charnovitz, *Two Centuries of Participation: NGOs and International Governance*, 18 MICH. J. INT'L. L. 183, 268-70 (1997).

⁵ Menno T. Kamminga, *The Evolving Status of NGOs under International Law: A Threat to the Inter-State System?* STATE, SOVEREIGNTY, AND INTERNATIONAL GOVERNANCE (GERARD KREIJEN ET AL EDS. 2002).

⁶ *Id.*

⁷ Marek Antoni Nowicki, *NGOs before the European Commission and the Court of Human Rights*, 14 NETH. QUART. HUM. RIGHTS. 291 (1996).

⁸ PAUL GORDON LAUREN, *THE EVOLUTION OF INTERNATIONAL HUMAN RIGHTS: VISIONS SEEN* 277 (2003).

⁹ PETER HALLWARD, *DAMMING THE FLOOD: HAITI, ARISTIDE, AND THE POLITICS OF CONTAINMENT* 177 (2007).

level.¹⁰ The growth in the number of NGOs with an international mandate is evidenced by the fact that number of NGOs with a consultative status at the UN increased from several in 1945 to 3,413 today.¹¹

In this dissertation I aim to carefully examine international lawmaking activity of NGOs, by analyzing the means they use to influence the development of international law. The central question of this dissertation, therefore, is this: What methods do NGOs use to influence the development of international law? In order to answer this question, I examine NGOs' participation within one specific procedural institution in international tribunals, namely that of *amicus curiae* interventions. A close study of how NGOs develop and use *amicus curiae* intervention procedures internationally allows us to draw conclusions about how NGOs identify, engage, and use specific mechanisms to influence the development of international law by courts. By looking at the NGOs' use of the specific procedural institution of *amicus curiae* intervention, I suggest conclusions about NGOs' strategies to influence the development of international law in general.

1. Definitions

Although scholars from different disciplinary approaches have studied NGOs' work, there hasn't been a universal agreement on the definition of an NGO or on the criteria for assessing the degree of required integrity, transparency, or independence of NGOs. In this part I elaborate on the main approaches to the definition and put forth the definition that will be used throughout this dissertation.

¹⁰ JOHN KEANE, *GLOBAL CIVIL SOCIETY?*, 5 (2003).

¹¹ *Consultative Status with ECOSOC and Other Accreditations*, NGO Branch, United Nations Department of Economic and Social Affairs, available at <http://esango.un.org/civilsociety/displayConsultativeStatusSearch.do?method=search&sessionCheck=false>, accessed on 20 September 2010.

International and regional regimes, institutions, and bodies maintain their own definitions of NGOs, which often diverge and contradict one another. Scholars are hardly to blame here because, as with other recently widely explored phenomena, such as terrorism, international law does not offer an authoritative definition of “a non-governmental organization.” Therefore, much confusion surrounds the subject.¹² Similarly, scholarly debate and research on NGOs proceeds without an agreement about the specific definition of an NGO.¹³

The following difference in the understandings of the term by the United Nations and the Council of Europe exemplifies this problem. The term “non-governmental organization” was first mentioned in an international treaty in Article 71 of the United Nations Charter, which reads, “The Economic and Social Council may make suitable arrangements for consultation with non-governmental organizations which are concerned with matters within its competence.”¹⁵ The Charter did not, however, define “non-governmental organization.” The UN Economic and Social Council (ECOSOC) adopted a definition in 1950, which established that for the purpose of consultative arrangements with the Council, NGO meant “[. . .] any international organization which is not created by intergovernmental agreement.”¹⁶ The definition was further elaborated in 1996, providing that “[. . .] any such organization that is not established by a governmental entity or intergovernmental agreement shall be considered a non-governmental organization for the purpose of these arrangements, including organizations that accept members designated by

¹² Menno T. Kamminga, *The Evolving Status of NGOs under International Law: A Threat to the Inter-State System?* STATE, SOVEREIGNTY, AND INTERNATIONAL GOVERNANCE 95 (GERARD KREIJEN ET AL EDS. 2002).

¹³ See Anthony Lester, *Amici Curiae: Third Party Intervention Before the ECHR*, in PROTECTING HUMAN RIGHTS: THE EUROPEAN DIMENSION 341 (FRANZ MATCHER AND HERBERT PETZOLD EDS. 1988); John Razzaque, *Changing Role of Friends of the Court in the International Courts and Tribunals*, 1 NON-STATE ACTORS AND INTERNATIONAL LAW 169 (2002).

¹⁵ Art. 71, UN Charter.

¹⁶ *Review of Consultative Agreements with Non-governmental Organizations*, , 27 February 1950, E/RES/288(x), para 8.

governmental authorities, provided that such membership does not interfere with the free expression of views of the organization.”¹⁷ There were other conditions added as well, such as that the aims of an NGO must be in conformity with the spirit, purposes, and principles of the UN Charter.¹⁸ The definition does not, therefore, include possession of a non-profit or public interest aim as a requirement.

The only international treaty aimed at facilitating transnational recognition of the legal personality of NGOs, the 1986 European Convention on the Recognition of the Legal Personality of International Non-Governmental Organizations, enumerates certain conditions that associations, foundations, and other private institutions should meet to be recognized as “non-governmental.”¹⁹ Contrary to the above-cited 1996 UN ECOSOC resolution, it establishes the requirement of a “non-profit-making aim of an international utility.”²⁰

There is no established consensus on the definition of NGOs among scholars.²¹ For example, a frequently quoted article in the *Encyclopedia of Public International Law* suggests that the concept of NGOs may encompass multinational corporations and even national liberation movements.²² Menno Kamminga, on the other hand, insists on distinguishing between NGOs and national liberation movements, armed opposition groups, and political parties. NGOs do not aspire to overthrow governments, and while they do seek policy changes they do not aim to acquire State

¹⁷ *Consultative Relationship Between the United Nations and Non-Governmental Organizations*, 25 July 1996, E/RES/1996/31, para 2.

¹⁸ *Id.*

¹⁹ 1986 *European Convention on the Recognition of the Legal Personality of International Non-Governmental Organizations*, available at <http://conventions.coe.int/treaty/en/Treaties/Html/124.htm>.

²⁰ *Id.* Art. 1.

²¹ PIERRE-MARIE DUPUY & LUISA VIERUCCI EDS. *NGOS IN INTERNATIONAL LAW: EFFICIENCY IN FLEXIBILITY?* 13 (2008).

²² HH-K Rechenberg, *Non-Governmental Organizations*, in *ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW* 612 (R BERNHARDT ED. 1997).

power by themselves.²³ Others have written about the necessity of distinguishing between NGOs and criminal organizations.²⁴ For Daniel Thürer, NGOs (a) are not established by a government, or by an intergovernmental agreement; (b) are typically private institutions, associations, foundations, federations, or other organizations founded on the basis and under the regime of private law of a state; and (c) have concerns, purposes, and objects which are, in contrast to the origins of NGOs, of a public nature.²⁵ These criteria would allow for criminal organizations, and sometimes for political parties, to be qualified as NGOs, as they do not exclude groups which operate via violent means or have violent aims. The debate also concerns other questions related to the nature of the activities of NGOs, their membership, and other features.²⁶

The implications of this disagreement of a definition are manifold. First, as the boundaries of the state and civil society have been reconfigured, it is becoming increasingly difficult to discern which entities maintain a connection to the state, and which are independent from it. This question is important not only from a legal point of view, but also from the point of view of the independence of NGOs and the state's ability to control them. This ambiguity has led to the fiercest attacks and debates.²⁷

²³ Menno T. Kamminga, *The Evolving Status of NGOs under International Law: A Threat to the Inter-State System?* STATE, SOVEREIGNTY, AND INTERNATIONAL GOVERNANCE 96 (GERARD KREIJEN ET AL. EDS. 2002).

²⁴ Alex P. Schmid, *Non-State Actors: Organized Crime, Human Rights NGOs, and the United Nations*, in THE LEGITIMACY OF THE UNITED NATIONS: TOWARDS AN ENHANCED LEGAL STATUS OF NON-STATE ACTORS 125 (VAN BOVEN ET AL. EDS. 1997).

²⁵ Daniel Thürer, *The Emergence of Non-Governmental Organizations and Transnational Enterprises*, in NON-STATE ACTORS AS NEW SUBJECTS OF INTERNATIONAL LAW: FROM THE TRADITIONAL STATE ORDER TOWARDS THE LAW OF THE GLOBAL COMMUNITY, PROCEEDINGS OF AN INTERNATIONAL SYMPOSIUM OF THE KIEL WALTHER-SCHÜCKING-INSTITUTE OF INTERNATIONAL LAW, March 25-28, 1998 (RAINER HOFMANN AND NILS GEISSLER EDS, 1999).

²⁶ PIERRE-MARIE DUPUY & LUISA VIERUCCI ED., *NGOS IN INTERNATIONAL LAW: EFFICIENCY IN FLEXIBILITY?* (2008)

²⁷ See, e.g., *Latin America Scholars Urge Human Rights Watch to Speak up on Honduras Coupe*, available at http://www.huffingtonpost.com/robert-naiman/latin-america-scholars-ur_b_265282.html, accessed on 12 December 2010 (arguing that Human Rights Watch's 'reporting on Latin America is often heavily influenced by the agendas of official Washington.');

Robert Bernstein, *Rights Watchdog, Lost in the Mideast*, New York Times, Oct. 19, 2009 available at

Therefore, it is reasonable to expect that attempts to draw clear lines between the state and non-state, governmental and non-governmental actors will necessarily involve certain difficulties.

Second, a lack of mutually agreed-upon criteria for defining NGOs across different international and regional rulemaking bodies contributes to the lack of clarity in the sophisticated web of relationships between these inter-governmental and non-governmental bodies. Lack of clarity in turn affects issues of accountability. An organization perceived as non-governmental which is engaged in transnational advocacy work might include government representatives as founders or members of its highest decision-making bodies, or might receive substantial amounts of funding from governments. Furthermore, an organization acting as an NGO in one regional system might be refused recognition as such in another, due to differences in the criteria for identifying NGOs.

Third, a lack of agreement on common criteria between international bodies and scholars creates a kind of analytical cacophony that eliminates the possibility of a meaningful debate. Scholars across different disciplines refer to NGOs interchangeably with advocacy organizations, activists, human rights groups, interest groups, civil society, and non-state actors. Inability to reach agreement on defining NGOs undermines prospects of a serious cross-disciplinary exchange. This has important scientific consequences as well. Despite the abundance of research on NGO participation in international lawmaking, it is hard to come to a definitive agreement on research conclusions if the criteria for considering an entity to be non-governmental are not clarified in the first place.

<http://www.nytimes.com/2009/10/20/opinion/20bernstein.html> accessed on January 11, 2011 (founder of the Human Rights Watch criticized the organization for allegedly biased reporting on human rights abuses in the Israeli-Arab Conflict); Scott Macleod 'Sneak Attack on Human Rights Watch' available at <http://articles.latimes.com/2009/oct/30/opinion/oe-macleod30>, accessed on 12 December 2010 (arguing that the attacks on Human Rights Watch for its Middle East policies are unfounded);

In this dissertation I adopt a narrower definition. Drawing on Daniel Thürer's definition, for the purposes of this research, those entities are considered NGOs which (a) are not established by government or governmental entities, (b) are established under private law of a state, (c) aim at furthering the good of those beyond their members and/or founders, and (d) do not utilize violent means and do not participate in competition for political office.

Therefore, this definition excludes political parties and corporations from being considered NGOs.

2. Methodology

In order to answer the research question, I undertake a series of steps. First, on a general level, I put forth a comparative study of NGO participation in two international tribunals: the European Court of Human Rights (ECtHR) and the International Tribunal for the Law of the Sea (ITLOS). Based on the methodology of paired comparison,²⁸ I compare and contrast the participation of NGOs as amici in these two international tribunals. Specifically, Tarrow highlights the use of using similar systems design to uncover key independent variables.

The European Court of Human Rights is one of the oldest international courts that has jurisdiction over claims presented by states as well as claims submitted by individuals. Currently, the Court's ever-increasing caseload amounts to hundreds of thousands of cases. Forty-seven European countries are subject to the Court's jurisdiction. ITLOS, on the other hand, is a body endowed with the specific mandate to adjudicate disputes arising out of the application and interpretation of the United

²⁸ Sidney Tarrow, *The Strategy of Paired Comparison: Toward a Theory of Practice*, 43 COMP. POL. STUD. 230 (2010).

National Convention on the Law of the Sea. Although the Tribunal has existed since 1996, it has dealt with only 19 cases so far.

Second, in order to understand specifically the modalities of NGO participation as amici, I examine NGO appearances before the ECtHR as claimants as well. This comparison of NGO dynamics within the structure of one Court, in the capacity of both applicants and amici, allows discerning characteristics that are specific to participation as *amicus curiae*.

Third, I offer a micro historic study of the internationalization of *amicus curiae* procedure from the UK, pointing out the processes that led to the international adoption of this English legal institution.

The analysis is based on secondary materials, as well as the study of primary sources such as briefs submitted by amici. The archival material referred to in the dissertation is drawn from archival work at the European Court of Human Rights in Strasbourg. I am also thankful to the Archives of the European Court, as well as specific individuals, such as Daniel Simons of Greenpeace, for providing additional materials indicated in the dissertation. The cases indicated here were acquired through the publicly accessible search system for the Court. The system assigns rankings depending on the significance of the case to the development of the Court's human rights principles. It is also possible to find the Court's case law by the Article of the Convention on which the applicant relies. Therefore, I searched for cases in which applicants alleged a violation of Article 1 of Protocol 1 of the Convention and which the system ranked as highly significant in terms of their contribution to the development of relevant international principles.

3. Contribution to Scholarship

The proliferation of non-state actors and the increased roles they play in international relations urges scholars to reconsider their views about the making of international law.²⁹ The issue of NGO participation in international relations has been addressed from a number of angles. Nevertheless, the scholarship is characterized by a series of gaps, which in this dissertation I aim to fill.

First, most international relations scholars have focused on examining the political or advocacy strategies employed by NGOs to advance their aims. Moreover, the scholarship on legal opportunity structure has emphasized disproportionately the structures that generate action by public-interest groups, downplaying the activity and role of NGOs themselves in creating these structures.

Second, legal scholarship has paid much more attention to the conceptualization of international dispute-resolution from the perspective of tribunals, overlooking the need to study closely the activity of litigants, although it is precisely this activity that fuels the tribunals' work. Moreover, the scholars examining the legitimacy of international tribunals agree that the international adjudicatory bodies enhance their own legitimacy by having in mind the preferences of stakeholders and public. However, the role of *amicus curiae* in providing the courts with this valuable information has been overlooked. Third, in cases when the objectives and strategies of litigants are reflected upon, scholarship has concentrated on the parties to litigation, while the impact and role of *amici interveners* has not been covered. On the other hand, a number of legal commentators have studied *amici* interventions internationally and have agreed on their relative influence. Nevertheless, they stop short of theorizing on the *amici*'s strategies and their influence.

²⁹ ANTHONY AREND, *LEGAL RULES AND INTERNATIONAL SOCIETY* 8-9 (1999).

Fourth, comparative law studies on legal transplants has put forth important insights on the movement of legal institutions and the role of private actors in this process, yet the main unit of study for comparative law scholarship remains the transnational as opposed to international movement of legal ideas. However, the insights from the literature have been beneficial in analyzing the internationalization of amicus curiae procedure from Britain.

Last but not least, the International Legal Process school, which has offered a grand theory of how international law is made and developed and has studied the role of NGOs in the process, falls short of case studies specifically and systematically examining NGO activity across international tribunals. Chapter II, on Theoretical Frameworks, elaborates on each of these schools of thought.

This dissertation addresses these lacunae in scholarship. It posits that amicus curiae interventions serve as governance mechanisms with which international tribunals gather information about the public's preferences. In general, amicus curiae are legitimacy enhancing i.e. by drawing information about the views and values of its constituencies through amicus curiae submissions, international tribunals enhance their sociological legitimacy. Furthermore, amicus curiae interventions by NGOs are distinct because they perform two roles. First, they inform the courts of the organizations' and the public's views on particular controversial issues. Second, NGOs support the development of international law by continuously advocating for more international law-making.

4. Roadmap

The dissertation proceeds as follows. Chapter II overviews scholarship on NGO participation in international law-making. Here I lay out and discuss three

specific strands of scholarship, insights of which are pertinent to the issue in question. First, I put forth applicable concepts and theories from international relations scholarship. Second, I map ideas from comparative law as far as they touch upon the transnational diffusion of legal institutions and the role of NGOs in the process. Third, I elaborate on legal literature on this subject, explaining how the international legal process school's suggestions are particularly applicable to the issues under consideration here.

Chapter III shows that *amicus curiae* interventions are becoming increasingly commonplace in major international tribunals. It illustrates from a chronological perspective how international courts have been moving toward admission of *amicus* briefs by NGOs.

Chapter IV concentrates on examining the role of NGOs within the ECtHR. Section 1 explains the general structure of the Court. Section 2 puts forward a study of NGO participation as claimants before the Court and how the Court has dealt with the issue of delineating the boundary between "governmental" and "non-governmental organizations." It shows that opportunities to act as claimants increase for NGOs as the Court is moving towards expanding the test of admissibility for non-governmental organizations and allowing more entities to claim a non-governmental status.

Chapter V focuses on the procedural institution of *amicus curiae* interventions, explaining the domestic legal origins of the *amicus curiae* institution.

Chapter VI showcases the history of the procedure's internationalization from the UK to the Court.

Chapter VII shows how NGOs engage with the Court in the capacity of *amicus curiae* by looking at the Court's case load in relation to the right to property. Among other things, it highlights the difference between NGO and state *amicus* claimants, by showing that although NGOs always intervene in cases in support of the applicant's

position, they do not possess a specific connection to the case. States, on the other hand, when using the *amicus curiae* procedure, always have a “transnational link” to the legal issue in question. Section 5 summarizes the findings within the chapter and puts forth the main conclusions.

Chapter VIII analyzes NGO participation within ITLOS. Section 1 explains the basic structure of the Tribunal, underscoring the questions related to the standing of NGOs. Section 2 specifically examines the most recent precedent that made the Court confront the issue of admissibility of NGO *amicus curiae* petitions. Section 3 concludes by highlighting the implications of the Tribunal’s approach to NGOs, especially in light of broader trends of NGO *amicus* participation in international tribunals.

Chapter IX puts forth the conclusions that can be drawn from the study. It underscores the study’s contribution to the scholarship on the role of NGOs in international lawmaking, specifically to the legal process school’s approach to the role of non-state actors in international law. The chapter also showcases the issues that can be explored in further research in this area.

Chapter II: Theoretical Framework

A number of commentators has conceptualized the transnational lawmaking activity of NGOs as their participation in the international legal process. For instance, the New Haven School of International Law³⁰ arose out of dissatisfaction with conventional explanations of the emergence of international law and aimed at offering new ways to conceptualize the process of making international law.³¹ The New Haven School was launched as a response to Cold War realism, which, according to one of the proponents of the School, “underestimates the role of rules and of the legal processes in general, and over-emphasizes the importance of naked power.”³² However, neither does the school understand international law as static, created and implemented through states.³³

As one commentator points out, “Private parties, non-governmental organizations (NGOs), and/or mid-level technocrats coalesce around shared, on- the ground experiences and perceived ‘self-interests,’ ‘codify’ norms that at ones reflect and condition group practices. Over time, these informal rules embed, often unintentionally, in a more formal legal system and thereof become ‘law.’”³⁴

³⁰ See, in general, Myres McDougal, *International Law, Power, and Policy: A Contemporary Conception*, 82 *Requel Des Cours* 136, 157 (1953); Myres McDougal, Harold D. Lasswell & W. Michael Reisman, *The World Constitutive Process of Authoritative Decision*, 19 J. LEGAL EDUC. 253 (1967); Myres McDougal & W. Michael Reisman, *The Prescribing Function in the World Constitutive Process: How International Law is Made*, 6 YALE STUD. WORLD PUB. ORD. 249 (1980); W. Michael Reisman, *The Democratization of International Law Law-making Processes and the Differentiation of Their Application*, in DEVELOPMENT OF INTERNATIONAL LAW IN TREATY MAKING 16, 26 (RÜDIGER WOLFRUM & VOLKER RÖBEN EDS. 2005).

³¹ See Myres McDougal & W. Michael Reisman, *The Prescribing Function in the World Constitutive Process: How International Law is Made*, 6 YALE STUD. WORLD PUB. ORD. 249, 249 (1980).

³² Myres McDougal, *International Law, Power, and Policy: A Contemporary Conception*, 82 *Requel Des Cours* 136, 157 (1953).

³³ Janet Kovel Levit, *Bottom- Up International Lawmaking: Reflections on the New Haven School of International Law*, YALE J. INT’L L. 393, 394 (2007).

³⁴ Janet Kovel Levit, *Bottom- Up International Lawmaking: Reflections on the New Haven School of International Law*, YALE J. INT’L L. 393, 395 (2007).

Nevertheless, scholarship has so far overlooked the processes which relate to or result from the NGO uses of the *amicus curiae* procedure in international tribunals.

1. International Relations Scholarship

There is ample scholarship documenting involvement of NGOs in the creation of specific international legal regimes. The international activist campaign for a ban on nuclear testing and the international campaign to ban landmines resulting in the Comprehensive Test Ban Treaty and the International Treaty to Ban Landmines are two textbook examples of the effective mobilization of NGOs in the wake of vehement opposition by states.³⁶ Naturally, international relations scholarship concentrates on studying the political strategies that have been employed by NGOs and activists.

Sidney Tarrow provides a typology of forms of interaction of domestic and transnational non-state actors. By analyzing two main variables—sites of interaction (domestic and transnational) and number of actors involved—Tarrow discerns four types of processes that result from the interaction in the domestic and international spheres: internationalization, externalization, transnationalization of collective action, and formation of insider–outsider coalitions.³⁷

He examines the gender-equality litigation before the European Court of Justice, where British women’s rights activists have leveraged the Court to voice their grievances.³⁸

³⁶ See Kenneth Anderson, *The Ottawa Convention Banning Landmines: the Role of International Non-governmental Organizations and the Idea of International Civil Society*, 11 E.J.I.L. 91 (2000).

³⁷ Sidney Tarrow, *Outsiders Inside and Insiders Outside: Linking Transnational and Domestic Action for Human Rights*, 11 HUM RGTS. REV. 180 (2010).

³⁸ *Id.* at 177.

Tarrow suggests that international tribunals, among whom he specifically mentions the International Court of Justice and the European Court of Human Rights, “can serve as a kind of coral reef to attract social actors whose weakness at home leads them to look for a venue in which their rights may be recognized.”³⁹ He discerns the process of “externalization,” a form of interaction of domestic and transnational actors. Tarrow defines “externalization” as a process by which domestic actors mount resistance to a government that was not responsive to their demands through “a process of international access to put forward their claims.”⁴⁰ According to Tarrow, externalization is a difficult process, in which the actors distance themselves from domestic resources, utilizing which they are capable. Therefore, “externalization” is a process which occurs rarely and in “spurts.”⁴¹

As a result, Tarrow puts forth three positive aspects brought about by the interactions: (a) translation of international norms and practices domestically, (b) experience that local actors draw from working with their foreign allies and at international institutions, and 3) a possibility to develop transnational coalitions, or nascent social movements.⁴²

Furthermore, while determining the dynamics of legalization of transnational dispute resolution, Keohane, Moravcsik, and Slaughter attribute a key role to access. Transnational dispute resolution, according to them, removes the ability of states to perform gate-keeping functions and, by providing incentives to domestic actors to mobilize, and to increase the legitimacy of their claims, gives it a capacity for “endogenous expansion.” Their analysis, however, is highly centered on courts themselves. According to them, a steady flow of cases in transnational litigation

³⁹ *Id* at 176.

⁴⁰ *Id* at 177.

⁴¹ *Id* at 177.

⁴² *Id* at 181.

allows the court to become an actor on the legal and political stage, raising its profile to the extent that the potential litigants become aware of its existence. This in turn contributes to increased flow of case law. Therefore, the court gains political capital from a growing number of cases “by demonstrably performing a needed function.”⁴³ This type of analysis, however, downplays the character, motivation, multiplicity of strategies, and tactics employed by litigants as well as those entities that choose to take part in the proceedings as amici curiae. Given that it falls precisely upon claimants to start the machinery of court jurisdiction, more empirical study of the pool of litigants is warranted.

In this vein, as it was emphasized, even with regard to the EU legal system, the most studied of all transnational litigation processes,⁴⁴ we know “surprisingly little about the behavior and organization of litigators of EC law, and nothing from a comparative perspective.”⁴⁵

Second, discussion of the Courts’ interest in expansion and minor attention to the role of litigants discounts the role of third-party interveners in shaping and expanding the influence of international courts. Because amici interventions in international courts continuously increase,⁴⁶ assessment of their role in the process of legalization is needed even more.

One area where one could look for help in understanding the relationship between NGOs and international courts in general is the literature on Transnational Advocacy Movements. This literature, however, suffers from its own shortcomings.

⁴³ Robert O. Keohane *et al*, *Legalized Dispute Resolution: Interstate and Transnational*, 3 INT. ORG. 98 (2000).

⁴⁴ *Id.* at 100.

⁴⁵ Alec Stone Sweet, *Constitutional Dialogues in the European Community*, in THE EUROPEAN COURT AND NATIONAL COURTS-DOCTRINE AND JURISPRUDENCE: LEGAL CHANGE IN ITS SOCIAL CONTEXT, 330 ANNE-MARIE SLAUGHTER ET AL. EDS. 1998).

⁴⁶ See e.g. John Razzaque, *Changing Role of Friends of the Court in the International Courts and Tribunals*, 1 NON-STATE ACTORS AND INTERNATIONAL LAW (2002).

Interest groups sometimes externalize their claims, that is, transform them into universalistic terms that would appeal to international allies.⁴⁷ Externalization of domestic contention is not a new phenomenon; domestic actors frustrated at their inability to gain redress from their own governments have long sought support of external allies.⁴⁸ Keck and Sikkink developed a model about externalization of their claims by networks of non-governmental groups in their seminal work *Activists beyond Borders* called “the boomerang pattern.”⁴⁹ According to Keck and Sikkink, “when channels between state and its domestic actors are blocked, the boomerang pattern of influence characteristic of transnational actors may occur: domestic NGOs bypass their state and directly search out international allies to try to bring pressure on their states from outside. This is most obviously the case in human rights campaigns.”⁵⁰ However, Keck and Sikkink’s work has been justifiably criticized for looking only at forms of pressure that involved what they themselves called “information politics.” Their book left unspecified other pathways of externalization, including the use of institutionalized access.⁵¹ Indeed, not only do the authors ignore international legal dispute-resolution institutions as venues for possible use by non-state actors for holding governments accountable, they also allege that the centrality of the US courts in politics as a venue for representation of diffuse interests is unique to the US and is not available in most European democracies. By this unique-to-US character, they explain the large number of US advocacy organizations that specialize in litigation. Furthermore, they allege that “the existence of legal mechanisms does not necessarily make them feasible instruments.”⁵²

⁴⁷ See CLIFFORD BOB, *MARKETING OF REBELLION: INSURGENTS, MEDIA AND TRANSNATIONAL SUPPORT* (2005).

⁴⁸ SIDNEY TARROW, *THE NEW TRANSNATIONAL ACTIVISM* 145 (2006).

⁴⁹ MARGARET E. KECK AND KATHRYN SIKKINK, *ACTIVISTS BEYOND BORDERS: ADVOCACY NETWORKS IN INTERNATIONAL POLITICS* 13 (1998).

⁵⁰ *Id.* at 12.

⁵¹ SIDNEY TARROW, *THE NEW TRANSNATIONAL ACTIVISM* 145 (2006).

⁵² MARGARET E. KECK AND KATHRYN SIKKINK, *ACTIVISTS BEYOND BORDERS*, 25 (1998).

The problems with this assertion are the following: on the one hand, it could be argued that lack of consideration by the authors of the use of international dispute-resolution institutions by NGOs is due to the fact that the practice has proliferated only recently in parallel with the proliferation of such institutions. Therefore, the authors could not have taken into account a practice that did not exist at the time of publication of their manuscript, in 1998. This argument, however, would discount well-known instances in which NGOs have successfully leveraged international courts to bring about legal decisions on important international issues. One such instance is the considerable pressure that a coalition of organizations led by the International Association of Lawyers against Nuclear Arms brought to bear on the International Court of Justice to bring about the advisory opinion on the Legality of the Threat or Use of Nuclear Weapons in 1996.⁵³ As expressed by Judge Guillaume: “These associations worked very intensively to secure their adoption of resolutions referring the question to the Court and to induce States hostile to nuclear weapons to appear before the Court. Indeed, the Court and the Judges received thousands of letters inspired by these groups, appealing both to the Members’ conscience and to the public conscience.”⁵⁴

Furthermore, the authors did not elaborate on the relationship of NGOs *vis-à-vis* international dispute-resolution mechanisms because their case studies on human rights advocacy networks are confined to Latin America, where the Inter-American regional system of human rights protection “stands in stark contrast to its European

⁵³ PHILIP ALSTON ET AL., *INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS* 1422 (3rd ED. 2008).

⁵⁴ *The Legality of the Threat or Use of Nuclear Weapons Advisory Opinion*, ICJ Rep. 226 at 287 (1996).

counterpart, lacking as it does, historical, political, economic, and sociological forces that have been propelled a united Europe to the forefront of the world politics.”⁵⁵

Besides, in defining the components of transnational human rights advocacy networks, Keck and Sikkink include “parts of intergovernmental organizations, at both international and regional levels.” Although they do not specify the category further, while discussing the development of human rights advocacy campaigns in Argentina and Mexico they mention the activities of the Inter-American Commission of Human Rights, established in 1959, which was reorganized and strengthened when the American Convention for Human Rights entered into force.⁵⁶ This suggests that the authors consider the Commission to be part of the advocacy network rather than an independent, quasi-judicial institution, even though its right to examine individual complaints on human rights violations was formalized in 1965 and its institutional structure is superficially similar to and its normative provisions are, in most respects, very similar to those of its European counterpart.⁵⁷ Notably, according to some scholars the Commission has been operating also as a court of first instance, handling over 12,500 cases since its creation.⁵⁸ The fact that authors consider the Commission to be part of the human rights advocacy network makes it impossible for the authors to evaluate the role of network members in expanding the legalization of the Commission.

Moreover, Keck and Sikkink’s reasoning alleges that the sole form of NGO participation before courts is litigation, which again ignores other forms of NGO participation, including third-party interventions. The abundance of literature on

⁵⁵ John F. Stack, *Constructing Human Rights in the Americas: Institutional Development and Practice in the New World* in *COURTS CROSSING BORDERS: BLURRING THE LINES OF SOVEREIGNTY*, 130 (MARY L. VOLCANSEK & JOHN F. STACK JR. EDS. 2005).

⁵⁶ MARGARET E. KECK AND KATHRYN SIKKINK, *ACTIVISTS BEYOND BORDERS* 97, 107-113 (1998).

⁵⁷ PHILIP ALSTON AT AL., *INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS* 1021 (3rd ED. 2008).

⁵⁸ Cristina M. Cerna, *The Inter-American System for the Protection of Human Rights*, 16 FL. J. INT’L L. 195 (2004).

amicus curiae interventions by advocacy organizations before US and international courts proves that this mode of intervention at least deserves consideration. Keck and Sikkink therefore omitted from their analysis the whole area of relations between international advocacy networks and international dispute-resolution institutions. It is this gap that I try to remedy by mapping those relations in the area of the European Court of Human Rights.

Sydney Tarrow partially remedied these deficiencies by focusing on a case study of the gender-equality campaign in the European Court of Justice (ECJ). Tarrow describes the pay-equity litigation before the ECJ which was started by a Belgian stewardess, Gabrielle Defrenne, and her lawyer in 1976. Judgment in the case of Defrenne was followed by a series of equal-pay cases, a majority of which adjusted women's pay scales upward. The key decision came in 1982, when the Court found that the UK was in violation of the Equal Pay Directive.⁵⁹ Tarrow's study, however, does not go deep enough to track the specifics of the dynamic of pay-equity litigation by NGOs or research main trends (increased or decreased use of litigation), and, most importantly, does not provide a comparison with NGO litigation efforts regarding other issues.

The volume *The Legalization of Human Rights*⁶⁰ provides an important opportunity for scholars to reflect on the trend of legalization of human rights from the perspective of different disciplines; however, most of the contributors provide a normative view of legalization rather than an empirical study of the dynamics of legalization.

⁵⁹ SIDNEY TARROW, *THE NEW TRANSNATIONAL ACTIVISM*, 163 (2005).

⁶⁰ See SALADIN MECKLED- GARCIA & BASAC CALI EDS., *THE LEGALIZATION OF HUMAN RIGHTS: MULTIDISCIPLINARY PERSPECTIVES ON HUMAN RIGHTS AND HUMAN RIGHTS LAW* (2006).

Another area of scholarship, which could be helpful in understanding the influence of non-state actors' litigation efforts, is research on the impact of courts as instruments for social change and legal mobilization.

While there have been many attempts to explain judicial impact, two of the most prevalent approaches in US literature are the "top-down" approach, which provides that structural factors influence whether a specific judicial decision will turn out to be beneficial to the claimant, and the "dispute-centered" approach, which argues that the explanatory power of specific features of concrete disputes influences specific outcomes for rights claimants.⁶¹

In his "bottom-up" analysis of the use of legal action by pay-equity reform activists in the United States, McCann concludes that "legal action greatly enhanced the opportunities for effective political organizing around the pay equity issue."⁶² By analyzing the cases when activists used pay-equity reform litigation to create new allies and invigorate movement participants, McCann argues that "court decisions and legal norms are not self-generating forces of defiant action. Rather, they constitute only potential resources that may or may not be mobilized in practical action."⁶³ However, there is no uniform opinion on the positive effects of litigation on social movements or the impact of court judgments adopted after such litigation. Among major opponents of McCann's findings is Gerald Rosenberg, who in his study of the influence of US Supreme Court judgments argues that "what is radical is the belief that litigation can produce significant social reform, that rights triumph over politics."⁶⁴

⁶¹ Troy Q. Riddell, *The Impact of Legal Mobilization and Judicial Decisions: The Case of Official Minority-Language Education Policy in Canada for Francophones outside Quebec*, 38 *Law & Soc'y Rev.* 585 (2004).

⁶² MICHAEL W. MCCANN, *RIGHTS AT WORK: PAY EQUITY REFORM AND THE POLITICS OF LEGAL MOBILIZATION* 48 (1994).

⁶³ *Id.* at 91.

⁶⁴ GERALD ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 430 (2008).

Nevertheless, this scholarly debate is interesting from the point of view of understanding the use of legal means by non-state actors to advance their political aims. For our purposes, though, the literature has a major deficiency, which I will attempt to remedy, at least in part—that being that the discussion is confined to the case studies within the United States of America and that while some of its theories could be tested in the context of international dispute-resolution institutions, they are still marked by the peculiarities characteristic to the judiciary in the US, with its specific socio-political, cultural, and legal denominators.

The same is true of other scholarship that has the ambition of taking the concept of legal mobilization to an international level. For example, in his 2004 study, Troy Riddell applies “factor-oriented” and “dispute-centered” theories developed within the US to study the impact of legal mobilization and judicial decisions on Official Minority-Language Education Policy in the Canadian provinces outside Quebec. He concludes that the Canadian experience supports both a bottom-up approach, in that judicial decisions and constitutional rights can have constitutive effects for furthering policy change, and the contention of the top-down model, that certain factors, like the positive Supreme Court decision, have been important contributors to policy change. He then suggests the analysis of judicial impacts to be situated in an institutional framework where political and social environment around the institutions would also be considered. Institutionally centered analysis, Riddell argues, could take the US-centered study of judicial impact to become more comparative, as the different characters of institutions in the US and elsewhere might lead to different results of legal mobilization.⁶⁵

⁶⁵ Troy Q. Riddell, *The Impact of Legal Mobilization and Judicial Decisions: The Case of Official Minority-Language Education Policy in Canada for Francophones outside Quebec*, 38 *Law & Soc'y Rev.* 603-604 (2004).

In a similar pattern, for example in the compilation of essays *Law and Globalization from Below: Towards a Cosmopolitan Legality*, all the contributors examine use of law by social movements in specific national contexts.⁶⁶

Furthermore, Tamara Kay provided a very useful definition of Legal Transnationalism. Nevertheless, her work is focused only on the development of the transnational labor movement in one regional context, in the context of the North American Free Trade Agreement (NAFTA). Moreover, she studied the movement-building impact of a legal instrument that was inherently designed to foster transnational legal mobilization.⁶⁷

Tamara Kay defines Legal Transnationalism as “processes by which transnational laws and legal mechanisms facilitate social movement building at the transnational level.” She identified three important dimensions of legal transnationalism: (1) formation of collective identity and interests (constitutive effects), (2) facilitation of collective action (mobilizing effects), and (3) adjudication and enforcement (redress effects).⁶⁸ However, I consider it important to differentiate between Public Interest Law Transnationalism and legal transnationalism in general. Public Interest Law Transnationalism denotes a reciprocal relationship between transnational legal instruments and transnational NGO networks which facilitate and engage in public interest litigation⁶⁹ as opposed to transnational litigation in general.

Although several works have mentioned the emergence of Transnational Legal Mobilization in Europe, little is actually known about the various modes through which public interest organizations take part in legal mobilization or about their

⁶⁶ See BOAVENTURA DE SOUSA SANTOS AND CÉSAR A. RODRÍGUEZ-GARAVITO EDS., *LAW AND GLOBALIZATION FROM BELOW: TOWARDS A COSMOPOLITAN LEGALITY* (2005).

⁶⁷ Tamara Kay, *Legal Transnationalism: Opportunities and Constraints of Transnational Law and Movement Building*, 36 *LAW AND SOC. INQUIRY* 419 (2011).

⁶⁸ Tamara Kay, *Legal Transnationalism: Opportunities and Constraints of Transnational Law and Movement Building*, 36 *Law and Society Inquiry*, 419 (2011).

⁶⁹ See Scott L. Cummings, *Globalizing Public Interest Law*, 13 *UCLA J' INT. LAW & FOR. AFF.* 1, 32 (2008).

litigation methods in a capacity other than that of complainant. For example, Cummings and Trubek indicate that the admission of the Central and Eastern European Countries to the Council of Europe with the simultaneous requirement of ratifying the European Convention of Human Rights has drawn public interest activists to the European Court as a sympathetic venue for litigation and has stimulated domestic impact litigation.⁷⁰

Furthermore, in their studies of international tribunals, most scholars continue to analyze international courts as a dynamic between a triad i.e. two adversary parties and the judge, in the courtroom. Representatives of all major schools of thought share on this subject the same fundamental premise about the triadic structure of international tribunals.

Terrence Hopmann conceptualizes international dispute-resolution mechanisms as third parties intervening in resolving the conflict between two parties.⁷¹ He observes, “[I]nternational courts, such as the International Court of Justice . . . are often introduced to arbitrate disputes. In this instance, the arbitrator listens to the arguments of the two sides and then renders a decision that is binding on the parties.”⁷² Similarly, Anne-Marie Slaughter and Laurence Helfer, in theorizing on the effectiveness of international tribunals, also focus on the relationship between the Court and litigants.⁷³ They elaborate that the power of the Court to compel litigants to appear before the Court and to enforce rendered judgments is a special characteristic of courts.⁷⁴

⁷⁰ *Id.*

⁷¹ TERRENCE P. HOPMANN, *THE NEGOTIATION PROCESS AND THE RESOLUTION OF INTERNATIONAL CONFLICTS* 228 (1998).

⁷² *Id.*

⁷³ Laurence A. Helfer & Anne-Marie Slaughter, *Towards a Theory of Effective Supranational Adjudication*, 107 *YALE L. J.* 273, 283 (1997).

⁷⁴ *Id.*

In a similar vein, Martin Shapiro and Alec Stone Sweet understand the process of judicial governance as a triadic relationship between the parties to the conflict and the judge.⁷⁵ The growing reach and influence of international dispute-resolution tribunals has been explained by the theory of judicialization. The “judicialization of dispute resolution” is the process through which a Triadic Dispute Resolution (TDR) mechanism appears, stabilizes, and develops authority over the normative structure governing exchange in a given community.⁷⁶ TDR performs governmental functions: to generate normative guidance about how one ought to behave, to stabilize one’s expectations about the behavior of others, and to impinge on *ex ante* distributions of values and resources. Stated simply, the social function of TDR (governance) is to regulate behavior and to maintain social cohesion as circumstances change. Courts are the paradigmatic form of the compulsory Triadic Dispute Resolution.⁷⁷

In their article on legalized international dispute-resolution, Robert Keohane, Andrew Moravcsik, and Anne-Marie Slaughter discuss interstate and transnational dispute-resolution.⁷⁸ The authors maintain an underlying assumption that international dispute-resolution functions as a triad. For instance, they state, “[D]elegation means that disputes must be framed as ‘cases’ between two or more parties, at least one of which, the defendant, will be a state or an individual acting on behalf of a state.”⁷⁹ In their article on the independence of international courts, Eric Posner and John Yoo

⁷⁵ Alec Stone Sweet, *Judicialization and Construction of Governance*, Center for Culture, Organizations and Politics, University of California Berkeley, 17. Jan 3, 1999, available at <http://www.escholarship.org/uc/item/2fc6571w>

⁷⁶ *Id.*

⁷⁷ *Id.* at 4.

⁷⁸ Robert O. Keohane, Andrew Moravcsik & Anne-Marie Slaughter, *Legalized Dispute Resolution: Interstate and Transnational*, 54 INT. ORG. 457, 459 (2000).

⁷⁹ *Id.*

understand tribunals as triads.⁸⁰ Karen Alter conceptualizes international tribunals as triads as well.⁸¹

The view of international judicial decision-making as a triad obscures important dynamics between the participants in the judicial process. Judicial processes internationally no longer involve just a relationship between the parties to the litigation and the Court. In many cases, individuals, NGOs, international organizations, and states take part in litigation as *amicus curiae* and present their arguments. The Court engages with their submissions and in some cases expressly draws on them to substantiate its reasoning. Scholarship has yet to properly theorize on the role and the influence of amici in international judicial decision-making.

Furthermore, in general, scholars agree that a growing caseload is an important factor in guaranteeing an international tribunal's effectiveness. Slaughter and Helfer consider a growing caseload to be an important factor contributing to the effectiveness of a supranational tribunal.⁸² Courts that build a sufficiently high-profile caseload at the outset, they argue, attract a steady stream of cases.⁸³ They provide that this factor, "at least initially," is within the control of member states, which can assist or hamper this endeavor with the material and financial resources and the degree of complexity that they impose regarding the Court's procedures and operations.⁸⁴ The authors extrapolate these principles from the experience of the European Court of Justice and the ECHR. In the case of the European Court of Human Rights, whose caseload, as indicated by the authors, has grown considerably, the authors indicate many factors that can contribute to such growth, including the growing number of member states of

⁸⁰ Eric A. Posner & John C. Yoo, *Judicial Independence in International Tribunals*, 95 CAL. L. REV. 1, 28-29 (2005).

⁸¹ Karen J. Alter, *Do International Courts Enhance Compliance with International Law?*, 25 REV. ASIAN & PAC. STUD. 51, (2003).

⁸² Laurence A. Helfer & Anne-Marie Slaughter, *Towards a Theory of Effective Supranational Adjudication*, 107 YALE L. J., 273, 301 (1997).

⁸³ *Id.*

⁸⁴ *Id.*

the Convention, ECHR's comfortable working conditions, and its location, as well as the relative responsiveness of the rules of procedure of the Court to the need of effective decision-making; all factors that can be influenced by states' decisions to allocate resources to the Court.⁸⁵

Slaughter and Helfer argue that as a matter of practical decision-making the judges of the ECJ and the ECHR do not pander to powerful states that appear before them but regularly decide high-profile cases and contentious cases according to the rule of law, frequently employing prudential doctrines to control their docket and advance their jurisprudence incrementally.⁸⁶

Posner and Yoo suggest that the effectiveness of the Tribunal could be measured through usage.⁸⁷ Approaching the question of international dispute-resolution from the perspective of rational choice analysis, Andrew Guzman makes it plausible for an international tribunal to acquire an agenda of its own, distinct from any legitimate authority delegated to it by states, and to use its authority to pursue this agenda. As an example of such behavior, the author refers to the United National Human Rights Committee.⁸⁸ The idea of a runaway tribunal is, of course, a concern for states; hence, they strive to implement certain safeguards when tribunals are formed. Guzman mentions specifically mentions an enlargement of the tribunals' power and jurisdiction as possible priorities for strategic tribunals.⁸⁹

While discussing the ECtHR's sister Court, the European Court of Justice, Anne-Marie Slaughter and Mattli emphasize that "a refinement of our analysis at the subnational level must start with private litigants. Without individual litigants, there

⁸⁵ *Id.* at 302.

⁸⁶ *Id.* at 313 & n.161.

⁸⁷ Eric A. Posner & John C. Yoo, *Judicial Independence in International Tribunals*, 95 CAL. L. REV. 1, 28-29 (2005).

⁸⁸ Andrew Guzman, *International Tribunals: A Rational Choice Analysis*, 157 U. PENN. L. REV. 171, 183 (2008).

⁸⁹ *Id.* at 184.

would be no cases presented to national courts and thus no basis for legal integration. The various identities, motivations and strategies of litigants inevitably influenced the nature and pace of integration.”⁹⁰

2. Comparative Law Approach

Amicus curiae procedure was internationalized from England to the European Court of Human Rights. The Court was the first international tribunal to allow amicus participation by individuals and organizations. Comparative law scholarship on legal transplants studies the diffusion of legal institutions across states. Although this dissertation is concerned with the movement of legal institutions from the nation-state to an international organization, some of the concepts and ideas from legal transplants scholarship are still pertinent. For instance, as discussed below, legal transplants scholarship discusses the role of private actors in the transplantation of legal institutions. It also highlights the reasons why legal institutions are adopted.

The expression “legal transplant” signifies “the moving of a rule or a system of law from one country to another or from one people to another.”⁹¹ Legal transplants have been traced back to the Code of Hammurabi in the 17th century BC.⁹² The concept of legal transplants was advanced and popularized by Alan Watson.⁹³ In the 1990s, legal transplants had become the main object of study of comparative law scholarship.⁹⁴

⁹⁰ Walter Mattli and Anne-Marie Slaughter, *Constructing the European Community System from the Ground Up: the Role of Individual Litigants and National Courts*, Jean Monnet Working Paper, June 1996 <http://centers.law.nyu.edu/jeanmonnet/papers/96/9606ind.html>

⁹¹ ALAN WATSON, *LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW*, 21 (2nd ED. 1993).

⁹² *Id.* at 22-24.

⁹³ ALAN WATSON, *THE EVOLUTION OF LAW* (1989); ALAN WATSON, *SOCIETY AND LEGAL CHANGE* (1977); Alan Watson, *Aspects of Reception of Law*, 44 AM. J. COMP. L. 335 (1991); ALAN WATSON, *LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW* (2nd ED. 1993).

⁹⁴ Ugo Mattei, *Why the Wind Changed: Intellectual Leadership in Western Law*, 42 AM. J. COMP. L. 195, 196, (1994).

The legal transplants literature has been classified in a number of ways.

Maximo Langer delineates two main schools of thought on legal transplants. One school explores “the common issues, processes, and incentives” that drive the process of the transferring of rules.⁹⁵ The other school of thought emphasizes the geographic horizontal dimension of legal transplants and studies the processes of legal transplants from central to peripheral countries.⁹⁶

John Gillespie points out the contributions that the legal evolutionary theory, legal autonomy theories, sociological scholarship on Law and Globalization, and systems theories have made to the scholarship on legal transplants. He suggests a discourse analysis as a methodology for studying legal transfers.⁹⁷

Ugo Mattei describes the contributions to the legal transplants scholarship from the common law and civil law perspectives.⁹⁸ In a different piece, Mattei critiques the taxonomy of scholarship on legal transplants. According to Mattei, scholarship on transplants traditionally distinguishes between two patterns. The first pattern focuses on “[l]aw as dominance without hegemony.” This scholarship focuses on the spread of legal institutions as parts of coercive apparatus without domestic consent. The other strand emphasizes the role of consent by recipients and the influence of prestige in this process.⁹⁹

Early comparative law scholarship understood legal transplants in a positivist sense, including legislation, institutions, principles, and doctrines.¹⁰⁰ Positivism, as opposed to other schools of thought, such as legal pluralism, understands law as the

⁹⁵ Maximo Langer, *Revolution in Latin American Criminal Procedure: Diffusion of Legal Ideas from the Periphery*, 55 AM. J. COMP. L. 617, 622 (2007).

⁹⁶ *Id.*

⁹⁷ John Gillespie, *Towards a Discursive Analysis of Legal Transfers into Developing East Asia*, 40 N.Y.U. J. INT’L L. & POL. 657 (2007-2008).

⁹⁸ Ugo Mattei, *Why the Wind Changed: Intellectual Leadership in Western Law*, 42 AM. J. COMP. L. 195 (1994).

⁹⁹ Ugo Mattei, *A Theory of Imperial Law: A Study on U.S. Hegemony and the Latin Resistance*, 383 IND. J. GLOBAL LEGAL STUD. 385 (2003).

¹⁰⁰ ALAN WATSON, *LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW* (2nd ED. 1993).

creation of the State.¹⁰¹ A notable exception, which moves beyond focusing only on the positive law diffusion between countries, is legal pluralism.¹⁰² Legal pluralism perceives law as a plural structure, which consists of three levels of law—official law, unofficial law, and legal postulates.¹⁰³ Commentators who share this fundamental assumption about the nature of law elaborate how the transplanted law is shaped through the interaction of the “official law” with local customs, unwritten rules, and cultural paradigms. For instance, in his account of the reception of Chinese and Japanese law, Masaji Chiba elaborates on the fusion of indigenous Japanese law with received law and highlights how some elements of the former were maintained in the “official law” of Japan—the only kind of law that Japan officially recognizes.¹⁰⁴ However, the sections below outline the main terms and approaches that have been expressed in relation to the study of legal transplants in the positivist sense. These are the approaches which are most directly relevant to our study of the establishment of juries in Georgia.

Scholars have used a number of different terms to describe various processes of legal transplantation. Terms such as diffusion, export, transfer, and translation have been coined. In relation to terminology, however, Alan Watson maintains,

[. . .] receptions and transplants come in all shapes and sizes. One might think also of an imposed reception, solicited imposition, penetration, infiltration, crypto-reception, inoculation and so on, and it would be perfectly possible to distinguish these and classify them systematically. [. . .] There is no point in

¹⁰¹ Rodolfo Sacco, *Legal Formants: A Dynamic Approach to Comparative Law*, 39 AM. J. COMP. L. 1, 7 (1991) (arguing, inter alia, that Positivism, through which stateless peoples written language were denied the ability to have laws, is a byproduct of the European Eurocentrism).

¹⁰² Guenther Teubner, *The Two Faces of Janus: Rethinking Legal Pluralism*, 13 CARDOZO LAW REV. 1443 (1992); Guenther Teubner, *Global Bukowina: Legal Pluralism in World Society* in GLOBAL LAW WITHOUT THE STATE 29 (GUNTHER TEUBNER ED. 1996); DAVID NELKEN AND JOHANNES FEEST (EDS.) ADAPTING LEGAL CULTURES (2001).

¹⁰³ Masaji Chiba, *Introduction* in ASIAN INDIGENOUS LAW IN INTERACTION WITH RECEIVED LAW, 4-5 (MASAJI CHIBA ED. 1986).

¹⁰⁴ *Id.*

elaborating a details classification of borrowing until individual instances have been examined to see what they reveal.¹⁰⁵

Nevertheless, different expressions indicate the authors' different approaches to a number of issues, including the relationship between the structure and agency,¹⁰⁶ and law's relationship to society. Below I focus on the main debates concerning five concepts: legal transplants, imposed law, translation and transposition, reception, and the Americanization thesis.

A. Legal Transplants

According to Alan Watson, "most changes in most systems are the result of borrowing."¹⁰⁷ The simple and standard example of a legal transplantation might be described as follows: in Year X, ". . . Country A imported from Country B a statute, a code, or body of legal doctrine and this has remained in force ever since."¹⁰⁸ As William Twining indicates, however, this uncomplicated way of illustrating the legal transplantation process contains a number of assumptions and simplifications that require interrogation.¹⁰⁹ Rich scholarly debates on legal transplants have unpacked these assumptions and put forth a sophisticated kaleidoscope of processes involved in the process of legal transplantation.

The comparative law¹¹⁰ debate on legal transplants can be traced back to the publication in 1974 of two divergent approaches by Alan Watson and Otto Kahn-

¹⁰⁵ ALAN WATSON, *LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW* 30 (2nd ED. 1993).

¹⁰⁶ See Alexander E. Wendt, *Agent- Structure Problem in International Relations Theory*, 41 INT.ORG. 3 (1987).

¹⁰⁷ ALAN WATSON, *LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW* 94 (1974).

¹⁰⁸ William Twining, *Diffusion of Law: Global Perspective*, 4 available at <http://www.ucl.ac.uk/laws/academics/profiles/twining/diffusion.pdf>

¹⁰⁹ *Id.*

¹¹⁰ See Konrad Zweigert and Hein Kotz, *EINFÜHRUNG IN DIE RECHTSVERGLEICHUNG*, 16-17, I (2nd ED. 1984) (indicating that "the primary object of comparative law--as in the case of all scientific methods--- is knowledge... Comparative law, however, has four more specific practical objectives: comparison provides material for the legislator; it serves as an instrument of interpretation; it plays a role in university instruction; and it is of significance for the supranational unification of law.")

Freund. The difference between the views rests in their different assumptions regarding law's relationship to society.¹¹¹ In his now seminal work *Legal Transplants: An Approach to Comparative Law*, Watson posits that law is autonomous of the social structures in which it exists. Thus, law is fully mobile: "[t]here is no exact, fixed, close, complete, or necessary correlation between social, economic, or political circumstances and a system of rules of private law."¹¹²

Watson distinguishes between major and minor transplants. Voluntary major transplants—movement of an entire legal system or a large part of it to a new area—take place in three situations, all of which are related to the movement of peoples: (1) when people move to a new territory, where there is no comparable civilization, and take the law with them; (2) when people move to a new territory with comparable civilization and transmit their law with them; and (3) when people voluntarily accept a large part of the laws of another people.¹¹³ In his initial work on the subject, Watson does not elaborate further on the issue.

In his subsequent work Watson proposes nine conditions that determine the transferability of laws. These are pressure force, opposition force, transplant bias, the discretion factor, the generality factor, societal inertia, felt-needs, source of law, and law-shaping lawyers.¹¹⁴

In January 1974, *Modern Law Review* published Otto Kahn-Freund's Chorley Lecture, which he had given at the London School of Economics on June 26, 1973. Kahn-Freund expressed skepticism concerning the use of comparative law as a tool for law reform and offered an approach resting on the conception that legal rules have an inherent connection to the environment in which they develop. Thus, using the

¹¹¹ Loukas A. Mistelis, *Regulatory Aspects: Globalization, Harmonization, Legal Transplants, and Law Reform- Some Fundamental Observations*, 34 INT'L L. 1055, 1066 (2000).

¹¹² Alan Watson, *Comparative Law and Legal Change*, 37 CAMBRIDGE L. J. 313, 321 (1978).

¹¹³ ALAN WATSON, *LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW*, 29-30 (2nd ED. 1993).

¹¹⁴ Alan Watson, *Comparative Law and Legal Change*, 37 CAMBRIDGE L.J. 313, 322 (1978).

metaphors of a kidney transplant and a carburetor, Kahn-Freund inquires about the processes and conditions that are necessary for successful transplantation of laws.¹¹⁵ Therefore, the transferability of laws cannot be taken for granted.¹¹⁶ There are “degrees of transferability,” which are determined by the nature of the rule and the structures within which it was born as well as the socio-political conditions in the recipient state.¹¹⁷

Legal transplants scholarship has not developed without its opponents. Pierre Legrand, one of the best-known critics¹¹⁸ of the concept, argues that rules are deeply embedded in the local legal culture. Whereas rules can be transposed from one culture to another, epistemology, in which the rules are embedded, is not transferable.¹¹⁹ Therefore, as seemingly similar rules are given meaning during implementation by officials and individuals with divergent underlying worldviews and cultural paradigms, the end result is not a “transplant” but a completely different rule. “A crucial element of the ruleness of the rule—its meaning—does not survive the journey from one culture to another.”¹²⁰

Pierre Legrand’s position on the intrinsic connection between the social context and laws has been echoed by other commentators. In relation to the question of whether Alternative Dispute Resolution mechanisms have been transplanted from pre-modern societies to Western countries, Elisabetta Grande has argued that it is

¹¹⁵ Otto Kahn-Freund, *On Use and Misuse of Comparative Law*, 37 MODERN L. REV. 1, 5-6 (1974).

¹¹⁶ *Id.* at 27.

¹¹⁷ *Id.* at 18.

¹¹⁸ Legrand has been one of the many critics who took issue with Watson’s approach to the relationship between law and society. See, e.g. Richard L. Abel, *Law as Lag: Inertia as a Social Theory of Law*, 80 MICH. L. REV. 785 (1982); William Ewald, *The American Revolution and the Evolution of Law*, 42 AM. J. COMP. L. 1 (1994); William Ewald, *Comparative Jurisprudence (II): The Logic of Legal Transplants*, 43 AM. J. COMP. L. 489 (1995).

¹¹⁹ Pierre Legrand, *On the Singularity of Law*, 47 HARV. INT’L. L.J. 517, 522-525 (2006); See also, Pierre Legrand, *What “Legal Transplants”?* in ADAPTING LEGAL CULTURES (DAVID NELKEN & JOHANNES FEES EDS., 2001).

¹²⁰ Pierre Legrand, *The Impossibility of Legal Transplants*, 4 MAASTRICHT J. EUR. COMP. L. 111, 117 (1997).

unadvisable to divorce the conflict resolution practices in Africa from their context. She elaborates how these practices are premised on the importance of communities and the failure of a Western model of a State in Africa. Therefore, scholars should analyze the concepts in relationship with the context. In Western societies, where the state is a viable institution, the African model of dispute resolution would be incompatible.¹²¹ Echoing Legrand's arguments, Grande provides, "[. . .] the institutions are complex devices and can be understood only in context. No useful knowledge can be obtained by insulating them; even less by mystifying their operation."¹²²

Jonathan Miller suggests a typology of transplants. Arguing that knowing the motivating factors that drive the process of translation is paramount for understanding the process of legal transplantation, Miller provides a typology of transplants based on the recipients' motivating factors. The types are (a) the Cost-Saving Transplant, (b) the Externally-Dictated Transplant, (c) the Entrepreneurial Transplant, and (d) the Legitimacy-Generating Transplant. Miller emphasizes that often transplants include elements of different types and that the types rarely exist in the ideal form.¹²³

Most literature on transnational norm diffusion explores the diffusion of legal norms in the context of the center-periphery relationship. Scholarship in what is termed the "country and Western" tradition explores diffusion of formal law from the parent civil or common legal system or from a country to the recipient developing country.¹²⁴ However, relatively recently, this relationship has been reconfigured to the studies of diffusion from the periphery to the center. Maximo Langer puts forth an

¹²¹ See Elisabetta Grande, *Alternative Dispute Resolution, Africa, and the Structure of Law and Power: The Horn in Context*, 43 J. AFR. L. 63 (1999).

¹²² *Id.* at 70.

¹²³ Jonathan Miller, *A Typology of Legal Transplants: Using Sociology, Legal History and Argentine Examples to Explain the Transplant Process*, 51 AM. J. COMP. L. 839, 842 (2003).

¹²⁴ See e.g. William Twining, *Social Science and Diffusion of Law*, 32 J. L. SOC'Y. 203, 204-207 (2005).

account of the diffusion of criminal procedural norms in Latin America and describes the process, which he calls the “diffusion from the periphery.” Langer’s model centers the role of norm entrepreneurs from the periphery, namely that of Latin American activist lawyers in the role of regional norm diffusion.¹²⁵

Sociological scholarship on legal transplants, namely the work of Yves Dezalay and Bryan Garth, highlights the processes of legal transplantation in the wider context of globalization and transnational activity of lawyers. Dezalay and Garth develop the concept of “international strategies” as “the ways that national actors seek to use foreign capital, such as resources, degrees, contacts, legitimacy, and expertise . . . to build their power at home.”¹²⁶ International strategies provide access for domestically disadvantaged groups to international capital, which they can then reinvest in their domestic political battles.¹²⁷

Thus, Dezalay and Garth indicate that it is not helpful “to ask whether a transplant fits or does not fit the culture.” Rather, they focus on the positioning of legal transplants within the wider dynamics of international strategies and the power relationships between legal actors from different countries.

B. Imposition

A significant strand of the literature explores the imperial foundations of the process of legal diffusion and examines the colonial and post-colonial implications of transplantation. For some commentators within this school of thought, legal transplants occur in a wider context of international politics marred by structural inequalities. Therefore, the perceptions of consent by the domestic actors in the

¹²⁵ Maximo Langer, *Revolution in Latin American Criminal Procedure: Diffusion of Legal Ideas from the Periphery*, AM. J. OF COMP. L., (2007).

¹²⁶ YVES DEZALAY AND BRYANT G. GARTH, THE INTERNATIONALIZATION OF PALACE WARS, LAWYERS, ECONOMISTS, AND THE CONTEST TO TRANSFORM LATIN AMERICAN STATES, 7 (2002).

¹²⁷ *Id* at 34.

process of reception should be evaluated while keeping in mind these larger structures. However, it must be stressed that authors who write about the processes of imposition of laws do so from a variety of perspectives and assumptions.

The terminology used in this scholarship reflects the fundamental attitudes toward structure. To describe the processes of diffusion, these scholars usually speak of the process of “imposition” of legal transplants, rather than using expressions such as “translation.” For example, Ugo Mattei posits that “[l]egal transplants impose aspects of the rule of professional law in non-western countries”¹²⁸

Sandra Burman and Barbara Harrell-Bond as well as the contributors to the volume *The Imposition of Law* theorize the concept of Imposition of Law. The academic discussion on this issue was launched at the conference “The Social Consequences of Imposed Law” held in April 1978.¹²⁹ The contributors approach the issue from a social science perspective.¹³⁰

Vilhelm Aubert defines Imposed Law as “. . . the lack of correspondence between the interests, needs, attitudes, and convictions of a population and the interests and norms embedded in the law that is governing them.”¹³¹

Robert Kidder puts forth a taxonomy of existing theorizations on imposed law and provides an alternative framework with which to analyze it.¹³² The primary example of imposed law is law in the colonial context, when legal systems of metropolies were imposed on the dominated populations.¹³³ Kidder critiques what he calls a “command model” of imposed law for, primarily, being too static and missing

¹²⁸ Ugo Mattei, *Taxonomy and the World's Legal Systems*, 45 AM. J. COMP. L. 5, 16 (1997).

¹²⁹ Sandra B. Burman and Barbara E. Harrell-Bond, *Introduction in THE IMPOSITION OF LAW*, 2 (SANDRA B. BURMAN AND BARBARA E. HARRELL-BOND EDS. 1979).

¹³⁰ *Id.*

¹³¹ Vilhelm Aubert, *On Methods of Legal Influence in THE IMPOSITION OF LAW* 28 (SANDRA B. BURMAN AND BARBARA E. HARRELL-BOND EDS. 1979).

¹³² Robert L. Kidder, *Toward an Integrated Theory of Imposed Law in THE IMPOSITION OF LAW*, 289 (SANDRA B. BURMAN AND BARBARA E. HARRELL-BOND EDS. 1979).

¹³³ *Id.*

the interactive aspect of imposed law.¹³⁴ As an alternative to this dominant model, Kidder develops what he calls a “hypodermic,” or interactive, view of imposed law. The interactive model is based on two main concepts: the idea of external law, and power relations.

For Kidder, “externality” is determined by the distance between the interests, institutions, and values of the law-makers and the community that is subject to lawmaking. Conversely, the lesser the “layers of intervening organizational complexity between the lawmakers and the governed,” the smaller the degree of externality.¹³⁵ Externality means that outsiders will find externally relevant reasons to become involved in the conflict, which gives rise to the application of rules. When the legal system is external, the conflict to be resolved will be applied meanings external to the community where the conflict originated.¹³⁶ Moreover, externality should be understood as a continuum rather than as part of the internal/external dichotomy. Therefore, it is important to examine the different layers and degrees of externalities in any given situation.¹³⁷

According to Kidder, the intentions of the imposers do not matter in the process of conceptualizing the imposed law. The introduction of external law will result in the disruption of local social relations notwithstanding the intentions of those who introduce it.¹³⁸ Moreover, external law also brings a specific power dynamic to the relationship where it is imposed. External law increases the power of external actors, while making the internal system and actors more vulnerable.¹³⁹

¹³⁴ *Id.* at 291.

¹³⁵ *Id.* at 297.

¹³⁶ *Id.*

¹³⁷ *Id.* at 298.

¹³⁸ Robert L. Kidder, Robert L. Kidder, *Toward an Integrated Theory of Imposed Law* in *THE IMPOSITION OF LAW* 296 (SANDRA B. BURMAN AND BARBARA E. HARRELL-BOND EDS. 1979).

¹³⁹ *Id.* at 297.

Okoth-Agendo disagrees with the use of the concept of imposition of law only in the context of the institutional aspects of colonialism.¹⁴⁰ He defines imposition as “any situation where fundamental change is contemplated in society through the medium of laws or legal institutions whose content is clearly contrary to the perceived and accepted normative order of those whose behavior it seeks to regulate or change.”¹⁴¹

Okoth-Agendo puts forth three criteria that compose the process of imposition. First, the aim of the imposition of law aims to foster change. Second, it includes the reliance on norms, which are external to the society where it is applied. Third, during imposition there is an absence of democratic consensus from the society.¹⁴² Okoth-Agendo provides both epistemological and ideological explanations for why legal impositions happen. From the epistemological point of view, imposition of law is an intellectual process, which takes place through providing new models to the decision-makers through the educational process.¹⁴³ From the ideological point of view, imposition is a part of the political economic system that the elites share.¹⁴⁴ From this perspective, the imposition is seen to be originating outside the country.¹⁴⁵ From the micro perspective, the imposition can be understood as an act of commitment to a specific set of values from the decision-makers in a state. New laws perform the role of the institutional framework within which these commitments can be implemented. As a result, the new institutions contribute to reshaping the system into the new structures. These new structures, put in place by elites, reaffirm their dominant position.¹⁴⁶

¹⁴⁰ H.W.O. Okoth-Agendo, *The Imposition of Property Law in Kenya*, *THE IMPOSITION OF LAW*, 147 (SANDRA B. BURMAN AND BARBARA E. HARRELL-BOND EDS. 1979).

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 148.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 149.

Ugo Mattei suggests conceptualizing the phenomenon of legal transplants through the lens of hegemony and counter-hegemony.¹⁴⁷ Drawing on the works of Antonio Gramsci, Louis Althusser, Foucault, and Guy Debord, Mattei suggests three specific models for understanding the diffusion of laws: (1) direct imperial/colonial rule or imposition of legal institutions through force; (2) imposition through legal bargaining, that is, when the process of legal transplantation involves blackmail or threats; and (3) diffusion through admiration and prestige, which is, in turn, conditioned by the operation of larger ideological apparatuses.¹⁴⁸ The process of reception of legal transplants is a complicated one, which operates on the level of the spread of legal consciousness facilitated by ideological forces. The concept of “Imperial Law” is necessary to explain the process of Americanization of law and the intricacies of processes at what Mattei calls “the context of production” and “the context of reception.”¹⁴⁹

For Mattei the exchange of knowledge takes place efficiently and smoothly when the systems from which the knowledge is derived and to which it is transmitted have shared institutional foundations. The process of legal transplantation between legal systems which have very little in common with each other can be best explained by the idea of “legal imperialism.”¹⁵⁰ The transfer of knowledge, rather than being a pattern of communication and exchange between different legal systems, becomes a one-sided exportation of legal rules and concepts that usually end up being rejected, or creating intellectual dependency.¹⁵¹

¹⁴⁷ Ugo Mattei, *A Theory of Imperial Law: A Study on U.S. Hegemony and the Latin Resistance*, 383 Indiana J. of Global Legal Studies 387-389 (2003).

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 407-408.

¹⁵⁰ Ugo Mattei, *Taxonomy and the World's Legal Systems*, 45 AM. J. COMP. L. 5, 7 (1997).

¹⁵¹ *Id.*

Political scientist John Owen discusses the phenomenon of forcible domestic institution promotion defined as “any effort by state A to create, preserve, or alter the political institutions (as distinguished from the ruler of government) within a State B.”¹⁵² Otherwise, he calls this phenomenon “impositions.”¹⁵³ He explores how foreign countries build and maintain institutions in other countries by force. Through the statistical analysis of forcible institutional promotion, Owen posits that great powers engage in forcible institutional promotion (1) when they need to expand their power, (2) by establishing the institutions they can support maintaining their ideological allies in power and thus bring the countries under influence.¹⁵⁴

C. Translation and Transposition

A number of scholars have written about the concept of translation in comparative law. Rodolfo Sacco emphasizes the problems related to the translation of legal concepts. Translation, according to Sacco, requires the work of a jurist familiar with the linguistics and legal concepts of the language from which the concept is translated as well as the language to which it is translated. Moreover, the process of translation involves not only linguistic and legal knowledge, but knowledge of extralegal circumstances, such as, for instance, the existence of a scholarly consensus on the meaning of a particular expression.¹⁵⁵

Maximo Langer further develops the concept of “translation.” According to Langer, the metaphor of legal transplants suffers from a number of shortcomings, including that it might convey the impression that legal institutions could be simply copied from one system to another. The concept of “translation” cures these

¹⁵² John M. Owen, *The Foreign Imposition of Domestic Institutions*, 56 Int’l Org. 375, 377 (2002).

¹⁵³ *Id.* at 375.

¹⁵⁴ *Id.* at 376.

¹⁵⁵ Rodolfo Sacco, *Legal Formants: A Dynamic Approach to Comparative Law*, 39 AM. J. COMP. L. 1, 13-21(1991).

imperfections. It accounts for the processes that “legal translators” (law reforms) embark upon in order to transform an institution from one system to being applicable to another.¹⁵⁶

In the course of exploring the processes of legal transplantation that have unfolded in Turkey, Esin Örüçü developed the term “legal transposition.”¹⁵⁷ In the perception of the author, the term remedied the deficiencies of existing terminology in adequately describing the interpreting processes that the recipients of the new norms engage in. The process of “transposition” involves steps in “tuning” by local actors, during which the actors can even apply wrong epistemology.¹⁵⁸

D. Reception

Authors use the term “reception” to indicate the reasons behind the voluntary adoption of legal transplants by actors. Reception can be defined as “adoption of that which is foreign.”¹⁵⁹ One could discern several undercurrents of thought on reception. It has been explained as alliance, as construction, as due to the prestige of the originating system, and as due to the efficiency of the transplant.

Patrick Glenn contrasts two sources of authority: binding law and persuasive authority. Glenn posits that as the phenomenon of binding law has been extensively explored, the concept of persuasive authorities has been understudied and under-theorized.¹⁶⁰ Glenn posits that reception of law is explained, generally, by obedience to the persuasive authority of the received law. In the process of describing the process of reception of law, Glenn suggests that reception is necessarily voluntary even in the

¹⁵⁶ Maximo Langer, *From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure*, 45 HARV. INT’L L. J. 1, 5 (2004).

¹⁵⁷ Esin Örüçü, *Law as Transposition*, 51 INT. AND COMP. L. QTRLY. 205 (2002).

¹⁵⁸ *Id.*

¹⁵⁹ Patrick Glenn, *Persuasive Authority*, 32 REVUE DE DROIT DE MCGILL 262, 266 (1987).

¹⁶⁰ *Id.* at 263-264.

case of adherence to colonial legal structures. “It is . . . inappropriate to consider reception as either imposed, following conquest, or voluntary, since all reception which occurs is necessarily voluntary.”¹⁶¹ Glenn distinguishes between two modes of reception: reception as alliance and reception as construction. Reception as alliance occurs when the recipient actors act in the spirit of alliance with the sources of origin of law. Reception as construction takes place when the recipient actors do not share any ideological affiliation with the sources of law but count to derive advantages from the appropriation of the foreign model. As an example of reception as alliance, Glenn proposes the instance of reception of Roman law in Europe, which occurred as a result of political affinities with earlier Rome or the Holy Roman Empire as well as reception of Roman law, common law, and laws of European countries in North America.¹⁶² Reception by alliance, therefore, is predicated on overarching political loyalty to the originator of the adopted law.

Reception as construction occurs without an overarching political commitment or loyalty. Such reception is more “discriminating and particularized.”¹⁶³ Glenn substituted “reception” with “borrowing.” Such reception is driven by instrumental purposes and lacks underlying commitment to a particular philosophy of law.¹⁶⁴

Reception involves the workings of persuasive authority. Persuasion leaves room for local creativity.¹⁶⁵ The fact of reception of formal law marks the end of persuasive authority and the start of binding law.¹⁶⁶

Gianmaria Ajani asserts that “. . . It is certainly true that today, in contrast to the past, reception takes place not only on the initiative of those who receive the new

¹⁶¹ *Id.* at 264-265.

¹⁶² *Id.* at 266-271.

¹⁶³ *Id.* at 274.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at 272.

¹⁶⁶ *Id.* at 277.

models, but also on that of those who propose them.”¹⁶⁷ In the process of unpacking the process of transplantation, Ajani asserts that there is a local “demand for new models.”¹⁶⁸ He then identifies the specific areas within the civil and commercial law which, according to him, have necessitated foreign intervention.¹⁶⁹ He does not, however, investigate further to what extent this demand is socially constructed, or how this demand is perceived/comprehended or assessed by the actors who supply these models.

Rodolfo Sacco divides the process of legal transplantation into “global reception,” according to which ideas are received as part of widespread and transnational movement, and “selective adoption,” according to which countries adopt particular institutions and laws.¹⁷⁰

According to Sacco, most instances of reception happen as a result of the degree of prestige that is attendant on the legal instrument transplanted. “Usually reception takes place because of the desire to appropriate the work of others. The desire arises because this work has a quality one can only describe as ‘prestige.’” This explanation, however, has been criticized for being tautological and for lacking an adequate definition of prestige.¹⁷¹

Gianmaria Ajani also points to the factor of prestige in the adoption of reception of legal transplants in the countries of the former Soviet Union. Since the breakdown of Communism, the countries of the Soviet Union have drawn upon legal models from Continental Europe and the EU, as well as Anglo-American principles.¹⁷²

¹⁶⁷ Gianmaria Ajani, *By Chance and Prestige: Legal Transplants in Russia and Eastern Europe*, 43 AM. J. COMP. L. 97 (1995).

¹⁶⁸ *Id.* at 103.

¹⁶⁹ *Id.* at 104.

¹⁷⁰ Rodolfo Sacco, *Legal Formants: A Dynamic Approach to Comparative Law*, 39 AM. J. COMP. L. 1, 3 (1991).

¹⁷¹ Ugo Mattei, *Efficiency in Legal Transplants: An Essay in Comparative Law and Economics*, 14 INT. REV. L. & ECON. 3, 4, note 8 (1994).

¹⁷² Gianmaria Ajani, *By Chance and Prestige: Legal Transplants in Russia and Eastern Europe*, 43 THE AM. J. COMP. L., 117 (1995).

Ugo Mattei argues that the concept of efficiency to explain the reasons behind legal transplants. Mattei asserts that existing explanations within comparative law scholarship for why transplants occur are unsatisfactory.¹⁷³ The concept of efficiency, alongside that of prestige, can explain why legal change occurs in a society. Efficiency may be a method to evaluate different transplants. Mattei develops the construct of a “market of legal culture” where different legal instruments developed by various legal systems compete. The most efficient legal doctrine survives the competition.¹⁷⁴

E. Americanization Thesis

Another, relatively recent, aspect of comparative law literature is concerned with the worldwide spread of American law and American legal principles’ influence. This scholarship, relevant to our study on juries, advances the so-called Americanization thesis. The section below outlines the main arguments within this school of thought and delineates how the thesis has been applied in particular to rule of law reform efforts by state and non-state actors in the former Communist countries.

Comparative law scholars have been accustomed to studying legal families in four classifications: (1) common law, (2) civil law, (3) socialist law, and (4) other conceptions of law.¹⁷⁵ Although there have been more contemporary attempts to add refinement to this classification,¹⁷⁶ it has persisted.¹⁷⁷

¹⁷³ Ugo Mattei, *Efficiency in Legal Transplants: An Essay in Comparative Law and Economics*, 14 INT. REV. L. & ECON. 3, 4 (1994).

¹⁷⁴ *Id.* at 8.

¹⁷⁵ See RENE DAVID AND C. JAUFFRET SPINOSI, *LES GRANDS SYSTEMES DE DROIT CONTEMPORAINS* (10th. ED. 1992).

¹⁷⁶ See Zweigert and Kötz, *An Introduction to Comparative Law* 62ff (T. WEIR ED. 1977); See also Ugo Mattei, *Taxonomy and the World’s Legal Systems*, 45 AM. J. COMP. L. 5, 16(1997) (providing an alternative classification of legal patterns into the Rule of Professional Law, Rule of Political Law, and Rule of Traditional Laws).

¹⁷⁷ See Ugo Mattei, *Taxonomy and the World’s Legal Systems*, 45 AM. J. COMP. L. 5, 8 (1997).

Although this classification remains one of the basic conceptual devices with which to understand law and legal developments in the world, the cross-fertilization of principles from different legal families and countries is not a new phenomenon. Borrowing of principles and institutions from Common Law to Continental Law and vice versa has been taking place for centuries. Germanic and Romano Canonical origins have been at the foundation of both systems, although each system drew from Germano or Roman origins disproportionately and differently than the other one.¹⁷⁸ Just as Anglo-American civil procedural principles have made advancements towards approximation with the principles of continental civil procedure, so have Continental procedural institutions incorporated principles characteristic of Anglo-American procedure.¹⁷⁹ US law has borrowed and built upon certain principles from English law, in particular, the fundamental tradition of the independent judiciary. The US has also borrowed richly from continental European legal traditions, such as, for instance, the idea of codified universal rights from France.¹⁸⁰ Moreover, the influence of Dutch legal concepts on the Anglo-American conflict of laws theories has been well documented.¹⁸¹

According to Arthur Miller,

If we consider the trend of English and American Procedural reform in the past three quarters of a century . . . we are bound to admit that the inexorable logic of events is approximating our procedural institutions more and more to those in use on the Continent.¹⁸²

¹⁷⁸ Miller, Editorial Preface, *THE CONTINENTAL LEGAL HISTORY SERIES: A HISTORY OF CONTINENTAL CIVIL PROCEDURE*, xxxix (ROBERT WYNESS MILLER TRANSL. AND ED. 1927).

¹⁷⁹ *Id.*

¹⁸⁰ Ugo Mattei, *A Theory of Imperial Law: A Study on U.S. Hegemony and the Latin Resistance*, 383 IND. J. OF GLOBAL LEGAL STUD. 390-391 (2003) (stating that some of the fundamental characteristics of the European legal institutions have been appropriated and even “exaggerated” in the US).

¹⁸¹ James Weinstein, *The Dutch Influence on the Conception of Judicial Jurisdiction in 19th Century America*, 38 AM. J. COMP.L. 73 (1990).

¹⁸² Arthur R. Millar, *Some Comparative Aspects of Civil Pleading under the Anglo-American and Continental Systems*, American Bar Association Journal, XII, 407 (1926).

However, since the 1960s legal scholars have written about the increasing spread and dominance of American law and legal principles. Marc Galanter alluded to the trend in his 1966 article “The Modernization of Law.”¹⁸³ Wolfgang Wiegand articulated the trend in more detail in his study *Reception of American Law*.¹⁸⁴ Wiegand compared the spread of American Law in Europe to the rediscovery and the reception of the Roman law in the 11th century—the phenomenon which dramatically changed European legal systems. The argument was solidified as the Americanization thesis.

In 1993 Martin Shapiro wrote about the overlap between the globalization of law and Americanization. Shapiro understands Americanization of law, the worldwide adoption of certain aspects of US-style law, as one aspect of globalization of law.¹⁸⁵ Shapiro described the trend of adoption of American law models abroad, the extensive involvement of US legal experts in the former Soviet Union law reform efforts, and adoption of the American regulatory style in the European Union. Americanization of law will not proceed, maintained Shapiro in a predictive mode, as a reciprocal process of Europeanization or borrowing of principles of any other system. Changes in the American law itself will most likely come from domestic, rather than transnational, sources.¹⁸⁶ Although Shapiro briefly notes what can be the driving process of Americanization—establishment of the United States as the leading industrialized economy after the Second World War, he mainly describes the trend and stops short of in-depth examination of the reasons behind Americanization.

Ugo Mattei suggests a meta theory about the global leadership of legal ideas. According to Mattei, there is a relationship between the locality and positivism of law

¹⁸³ Marc Galanter, *The Modernization of Law in MODERNIZATION* (MYRON WEINER 1966).

¹⁸⁴ Wolfgang Wiegand, *Reception of American Law in Europe*, AM. J. COMP. L. 39, 229ff (1991).

¹⁸⁵ Martin Shapiro, *Globalization of Law*, 1 IND. J. GLOBAL LEGAL STUD. 37, 62 (1993-1994).

¹⁸⁶ *Id.* at 63-64.

and the potential of its global leadership. The more that legal ideas are conceived to facilitate the social organization of a society and the less they are intertwined with the particularities of the localities where they originate, the bigger the potential for global influence.¹⁸⁷ Mattei claims that this theory explains the influence of the French, German, and American legal ideas in the Western world.¹⁸⁸

For Mattei, “test of leadership is the capacity of a legal system or of some of its products (codes, pieces of legislation, legal institutions, scholarly writings) to exert influence not only within closely related legal systems but also outside of them.”¹⁸⁹ However, legal leadership can be easily lost. Mattei points out the history of French influence on German law, and then the influence of European civil law on American Law. After the 1930s, however, Mattei notes, the influence of American law on European law was evident.¹⁹⁰

Although Mattei does not develop a full theory of the leadership of American legal ideas, he provides some explanations for the ascendance in leadership. The ideas of wide application are generated within the scholarly domain, whereas legal ideas that are more parochial belong to the domain of practice and politics. Therefore, the first are capable of moving out from the loci of their prestige, whereas the latter need to be pushed out from their initial origins by politicians and made acceptable mainly as a result of the prestige of the system where they originate.¹⁹¹ Prestige is the main factor of the leadership of any legal system. In order to maintain influence, legal ideas must be accepted by the thinkers within their own realms. Hence the leading legal culture must be at the same time “meta positivist and politically acceptable.”¹⁹²

¹⁸⁷ Ugo Mattei, *Why the Wind Changed: Intellectual Leadership in Western Law*, 42 AM. J. COMP. L. 195, 195-196 (1994).

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* at 201.

¹⁹⁰ *Id.* at 205.

¹⁹¹ *Id.* at 217.

¹⁹² *Id.* at 218.

In 1996 Wolfgang Wiegand expanded his Americanization thesis further. Wiegand documented changes in civil procedure, criminal procedure, constitutional law, and other areas of substantive law in Europe and credited the change to the influence of American law and legal thinking. His explanation of the reasons behind this influence is the leading role that the US has been playing in the world as the most industrialized nation. For Wiegand, the adoption of American law in Europe is a “natural phenomenon.” He disagrees with the assertion that the changes could be explained simply by the convergence of legal systems of industrialized economies. Rather, “It is a true reception, in a sells well-known from history: the leading power . . . acts as a model; other societies adopt this model, including the legal culture of the dominant nation.”¹⁹³ In Wiegand’s analysis the freedom of the recipients to adopt the model or not is part of the process of reception. For Wiegand, European nations opt to choose American models for legal issues where the United States was an innovator, such as legal issues dealing with capital markets or prohibition of discrimination.¹⁹⁴ Although Wiegand delineates the areas where American influence is most present, he stops short of describing through which processes and specifically how this influence permeates legal systems of European countries.

The influence of Anglo-American legal thinking has been explained by a number of other factors, including the connection between the efficiency, flexibility, and independence of private international law from public law models of the Anglo-American legal models.

¹⁹³ Wolfgang Wiegand, *Americanization of Law: Reception or Convergence?* LEGAL CULTURE AND THE LEGAL PROFESSION, 148 (LAWRENCE M. FRIEDMAN & HARRY N. SCHEIBER EDS. 1996).

¹⁹⁴ *Id.*

According to Ugo Mattei, the hegemonic spread of imperial law, at the foundation of which is US law, can be well understood in relation to the United States' dominance in the economic, military, and political arenas.¹⁹⁵

Maximo Langer differentiates between two—"the strong" and "the weak"—Americanization theses. Exploring the transposition of the American plea-bargaining system to a number of European countries, Langer argues that the "thick" Americanization thesis is inadequate.¹⁹⁶ His research on the acceptance of plea-bargaining in civil law jurisdictions in Europe shows that the countries have accepted the institution in divergent ways. The Americanization thesis in the "thick" sense implies that after importing "American-inspired" reforms, the recipient systems will resemble the American legal system. The effect, Langer argues, is rather "thin" Americanization. The result of Americanization in the "thin" sense is that the recipient systems will not altogether resemble the American legal system. By translating some principles and ideas differently in different countries, and by merging the new principles with the underlying inquisitorial culture of criminal law, the borrowing results in the differentiation of those aspects of recipient systems which were previously homogeneous.¹⁹⁷

3. International Law Scholarship

The scholarship on the legitimacy of international tribunals has examined the role that NGO participation plays in increasing the international courts' legitimacy. International institutions, including international courts, suffer from the lack of

¹⁹⁵ Ugo Mattei, *A Theory of Imperial Law: A Study on U.S. Hegemony and the Latin Resistance*, 383 IND. J. OF GLOBAL L. STUD. 384-385 (2003).

¹⁹⁶ Maximo Langer, *From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure*, 45 HARV. INT'L L. J. 1, 6 (2004).

¹⁹⁷ *Id.* at 4-5.

legitimacy characteristic to domestic institutions.¹⁹⁸ Nevertheless, the number of international, regional and hybrid courts is gradually growing.¹⁹⁹ As the tribunals exercise public authority beyond the state, they face questions about the legitimacy of their actions.

For example, Armin von Bogdandy and Ingo Venzke question the legitimacy of international tribunals specifically in light of the democratic theory,

[m]any domestic courts decide in the name of the people and thus invoke the authority of the democratic sovereign literally at the very beginning of their decisions. International courts, to the contrary, do not say in whose name they speak the law. This void sparks our driving question: how does the power of international courts relate to the principle of democracy?²⁰⁰

The authors state that the actions of international tribunals “[...] require a genuine mode of justification that lives up to basic tenets of democratic theory.”²⁰¹ The authors examine the potential of the procedures of international tribunals to respond to the pressures for legitimation. They indicate that the provision of more avenues for intervention and participation is one possibility with which international courts can respond to the problems in justification of authority.²⁰² In particular, they argue about the legitimating potential of the procedures for third party interventions and amicus curiae submissions. For instance, they stress the legitimating potential of NGO amici interventions, “[a]bove all NGO participation may open up legitimacy potential.”²⁰³ The commentators point out two specific reasons how NGOs’ amici

¹⁹⁸ David D. Caron, *The Legitimacy of the Collective Authority of the Security Council*, 87 AM. J. INT’ L. 552, 561 (1993).

¹⁹⁹ See e.g. Thomas Buergenthal, *Proliferation of International Courts and Tribunals: Is It Good or Bad?* 14 LEIDEN J. INT’L. L. 267 (2001); Benedict Kingsbury, *Foreword: Is the Proliferation of International Courts and Tribunals a Systemic Problem?* 31 NYU J INT’L L & POL 679, 680 (1999). Chester Brown, *The Proliferation of International Courts and Tribunals: Finding Your Way Through the Maze*, 3 MELB. J. INT’L. L. 453, 454 (2002).

²⁰⁰ Armin von Bogdandy & Ingo Venzke, *In Whose Name? An Investigation of International Courts’ Public Authority and Its Democratic Justification*, 2 E.J.I.L. (2012).

²⁰¹ *Id.*

²⁰² *Id.* at 21-22.

²⁰³ *Id.* at 26.

interventions can contribute to the international courts' legitimation: first, NGOs may serve as intermediaries between the legal procedures and the wider public; second, NGO participation may contribute to the diversification of perspectives represented before the tribunal, "scandalization" of cases and the mobilization of the public, especially from the periphery.²⁰⁴

Nienke Grossman argues that the traditional explanations of the legitimacy of international courts are outdated. There is a scholarly consensus that international tribunals routinely engage in law-making. Therefore, their decisions impact states and individuals beyond those who take part in the proceedings. Therefore, according to Grossman, the traditional explanations of legitimacy, primarily based on state consent, are no longer sufficient.²⁰⁵ Applying Daniel Bodansky's definition to international adjudicatory bodies, Nienke Grossman defines legitimacy as a combination of qualities that "[...]that leads people (or states) to accept [its] authority . . . because of a general sense that the authority is justified." Advancing her theory of legitimacy, Grossman suggests that the international tribunals are legitimate when, "it is (1) fair and unbiased, (2) interpreting and applying norms consistent with what states believe the law is or should be, and (3) transparent and infused with democratic norms."²⁰⁶

Grossman points out the relationship between the sociological legitimacy of international tribunals and the views and values of stakeholders. She indicates, "If a tribunal makes decisions over time that run contrary to an international actor's interests and values, its legitimacy is likely to decline. Also, tribunals risk undermining their authority to interpret a normative regime by failing to address international actors' concerns external to the law, or by ignoring shifting ideological and political winds

²⁰⁴ *Id.*

²⁰⁵ Nienke Grossman, *The Normative Legitimacy of International Courts*, 8 (December 5, 2012). Available at SSRN: <http://ssrn.com/abstract=2185304> or <http://dx.doi.org/10.2139/ssrn.2185304>

²⁰⁶ Nienke Grossman, *Legitimacy and International Adjudicative Bodies*, 41 GEO. WASH. INT'L L. REV. 107 (2009).

and moral concerns.” Grossman emphasizes that the tribunal that constantly adopts the decisions against the interests and values of actors will be perceived as less legitimate.²⁰⁷

Other scholars also stress the relationship between the stakeholders’ values and the legitimacy of international tribunals. For instance, in their study of highest national courts in Europe and the United States, James Gibson and Gregory Caldeira indicate that there is a relationship between the public’s support of the court’s policy outcomes with overall support for the institution itself. According to the authors, public’s satisfaction with the individual decisions over time significantly influences the public support for the institution itself.²⁰⁸

Yonatan Lupu explains the mechanisms through which the international tribunals enhance their legitimacy. He shows that the legitimacy deficit of international courts might be related to the information problems encountered by international tribunals. As international tribunals serve publics with diverse and often contradictory preferences, “international courts are more likely to make decisions without anticipating the extent to which they may be opposed by national publics and actors, especially constituent governments.” As a result courts face instances of “curbing,” i.e. instances when the courts are rebuked for their decision-making and when their legitimacy is questioned.²⁰⁹

Calls for NGO participation as *amici curiae* in order to increase legitimacy of international law making have been most pertinent in the area of international environmental law.²¹⁰ For example, Barbara Gemmill and Abimbola Bamidele-Izu

²⁰⁷ *Id.*

²⁰⁸ James L. Gibson & Gregory A. Caldeira, *The Legitimacy of Transnational Legal Institutions: Compliance, Support, and the European Court of Justice*, 39 AM. J. POL. SCI. 459, 464 (1995).

²⁰⁹ Yonatan Lupu, *International Judicial Legitimacy: Lessons from National Courts*, THEOR. INQ. IN L. (Forthcoming 2013).

<http://dss.ucsd.edu/~ylupu/Lupu%20-%20International%20Judicial%20Legitimacy.pdf>

²¹⁰ Neil A.F. Popovic, *The Right to Participate in Decisions that Affect the Environment*, 10 PACE ENV'T. L. REV., 683 (1993); Kal Raustiala, *The “Participatory Resolution” in International*

have indicated the need to create structures for NGO participation in advocacy for environmental justice.²¹¹ They welcome the creation of opportunities for NGO participation as *amicus curiae*, “the submission of ‘friends of the court’ opinions would be well-suited to the skills and interests of NGOs.”²¹²

However, writing about the legitimacy deficit of the international environmental law, Daniel Bodansky cautions against confusion between NGO involvement and public participation. As Bodansky emphasizes, “[w]hat is meant more precisely is participation by non-governmental groups, such as Greenpeace, the Sierra Club, and the Global Climate Change Coalition, which often have opposing positions and may or may not reflect ‘the public interest’ – if such a thing exists at all. Indeed, even if international meetings were opened up and NGOs given unrestricted access, few members of the public would as a practical matter be able to participate.”²¹³

Sally Engle Merry has illustrated how local civil society organizations and social movements serve as intermediates in translating and adapting to the vernacular international human rights instruments against domestic violence.²¹⁴ Harold Koh has written about “the transnational legal process”—the process through which norm entrepreneurs or “agents of internalization” facilitate the internalizing of international rules by States.²¹⁵ According to Koh, Transnational Legal Process is a theory which explains the “critical issue of compliance with international law.”²¹⁶ Koh asserts that

Environmental Law, 21 HARV. ENVTL. L. REV. 537 (1997).

²¹¹ Barbara Gemmill and Abimbola Bamidele-Izu, *The Role of NGOs and Civil Society in Global Environmental Governance*, GLOBAL ENVIRONMENTAL GOVERNANCE: OPTIONS AND OPPORTUNITIES 20 (DANIEL C. ESTY & MARIA H. IVANOVA, EDS. 2002).

²¹² *Id.* at 19.

²¹³ Daniel M. Bodansky, *The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?* Scholarly Works. Paper 443, 619 (1999) http://digitalcommons.law.uga.edu/fac_artchop/443

²¹⁴ SALLY ENGLE MERRY, *HUMAN RIGHTS AND GENDER VIOLENCE, TRANSLATING INTERNATIONAL LAW INTO LOCAL JUSTICE* (2006).

²¹⁵ See generally, Harold Koh, *Why Do Nations Obey International Law?* 106 YALE LAW JOURNAL 2599, 1997; H.H. Koh, *How is International Human Rights Law Enforced?* 74 IND. J.L. 1397 (1999).

²¹⁶ Harold Hongju Koh, *Transnational Legal Process*, Faculty Scholarship Series, Paper 2096, Yale Law School Legal Scholarship Repository 183 (1996).

in the process of internationalization of international law by states, NGOs play the role of “norm entrepreneurs.” Literature on “law from below” has acquired a normative dimension, as authors aim to map and resurface local civil society resistance to international law, including to international human rights law.²¹⁷

International courts, including the ECtHR, have mostly been explored “top-down,” as scholarship has been centered on examining the impact of international courts on domestic legal systems or concentrated on the judges themselves.²¹⁸ In particular, the influence of the ECtHR on the political and social change in member countries has been amply documented.²¹⁹ However, as was indicated even with regard to the European Court of Justice, the most studied of all transnational litigation processes,²²⁰ “we know surprisingly little about the behavior and organization of litigators of EC law, and nothing from a comparative perspective.”²²¹ So far, minor attention has been paid to mapping the development of international regimes from the perspective of the actors who take part in it. We are even less informed about the

²¹⁷ See e.g. LAW AND GLOBALIZATION FROM BELOW: TOWARDS A COSMOPOLITAN LEGALITY (BOAVENTURA DE SOUSA SANTOS AND CESAR A. RODRÍGUEZ-GARAVITO EDS.); BALAKRISHNAN RAJAGOPAL, INTERNATIONAL LAW FROM BELOW: DEVELOPMENT, SOCIAL MOVEMENTS AND THIRD WORLD RESISTANCE, 262 (2003).

²¹⁸ Erik Voeten, *Judicial Behavior on International Courts: the European Court of Human Rights*, available at <http://irtheoryandpractice.wm.edu/seminar/papers/Voeten.pdf>; Dean Zagorac, *International Courts and Compliance Bodies: the Experience of Amnesty International* in CIVIL SOCIETY, INTERNATIONAL COURTS AND COMPLIANCE BODIES (TULIO TREVES ET AL EDS. 2005); Fred J. Bruinsma, *Judicial Identities in the European Court of Human Rights*, in MULTILEVEL GOVERNANCE IN ENFORCEMENT AND ADJUDICATION (AUKJE VAN HOEK ET AL. EDS. 2006); Nina-Louisa Arold, *The European Court of Human Rights as an Example of Convergence*, 76 NORDIC J. OF INT. LAW 1-18 (2007).

²¹⁹ See generally, Helen Keller & Alec Stone Sweet, *The Reception of the ECHR in National Legal Orders*, in EUROPE OF RIGHTS: THE IMPACT OF THE ECHR ON NATIONAL LEGAL SYSTEMS (HELEN KELLER & ALEC STONE SWEET EDS. 2008). See also, ROBERT BLACKBURN AND JORG POLAKIEWICZ EDS., FUNDAMENTAL RIGHTS IN EUROPE: THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND ITS MEMBER STATES, 1950-2000 (2001) (documenting the impact of the Convention on the social and legal transformation of 32 countries in Europe).

²²⁰ Robert O. Keohane, Andrew Moravcsik *et al*, *Legalized Dispute Resolution: Interstate and Transnational*, in LEGALIZATION AND WORLD POLITICS, 100 (JUDITH GOLDSTEIN ET AL. EDS.) (2001).

²²¹ Alec Stone Sweet, *Constitutional Dialogues in the European Community* in THE EUROPEAN COURT AND NATIONAL COURTS-DOCTRINE AND JURISPRUDENCE: LEGAL CHANGE IN ITS SOCIAL CONTEXT, 330 (ANNE-MARIE. SLAUGHTER, ALEC STONE SWEET AND JOSEPH H.H. WEILER EDS. 1998).

forces that drive amicus interventions specifically and the conditions under which the dynamics of interventions change.

Writing about amicus curiae submissions by NGOs in the World Trade Organization (WTO) and drawing on Jurgen Habermas's work, Robin Eckersley argues that NGO participation as amicus curie has the potential to create a transnational space for dialogue on environmental matters, or a transnational "green public sphere." "Cosmopolitan public spheres are conceptualized as specialized, intermediary structures, with multiple strategic and communicative functions, that mediate between supra-national governance structures and regional and domestic civil societies."²²⁵ According to Eckersley, transnational public spheres can partly remedy concerns about the lack of external accountability of international courts.

Furthermore, there is a scholarly consensus that amicus curiae interventions before the European Court have an impact on its judgments and pronouncements on international human rights law.²²⁷ Nevertheless, most legal articles in this area are descriptive: they provide a picture of NGO participation before the Court yet do not theorize about the phenomena they encounter. Second, most of the materials on the subject are dated, in most cases including analysis of judgments only up to 1995. Third, the authors have not looked at the dynamics of NGO interventions over time and have not compared different modes of NGO litigation strategies.

Putting aside natural law theories on international lawmaking, McDougal and Reisman have argued that international lawmaking is a process based on prescription.²³⁴ By "prescription," the authors mean "a process of communication

²²⁵ Robyn Eckersley, *A Green Public Sphere in the WTO? The Amicus Curiae Interventions in the Transatlantic Biotech Dispute*, 13 EUR. J. INT. REL. 329 (2007).

²²⁷ Dinah Shelton, *The Participation of Non-Governmental Organizations in International Judicial Proceedings*, 88 A.J.I.L. 678 (1994).

²³⁴ Myres McDougal & W. Michael Reisman, *The Prescribing Function in the World Constitute Process: How International Law is Made*, 6 YALE STUD. WORLD PUB. ORD. 250 (1980).

which creates, in a target audience, a complex set of expectations”²³⁵ This process of communication can be relatively formal and homogenous, or highly informal, heterogeneous, and involving a multiplicity and diversity of actors.²³⁶

A number of commentators have built on the New Haven School and have explained NGOs’ transnational lawmaking activity as their participation in the international legal process. As one commentator points out, “Private parties, non-governmental organizations (NGOs), and/or mid-level technocrats coalesce around shared, on the ground experiences and perceived ‘self-interests,’ ‘codifying’ norms that at once reflect and condition group practices.” Over time, these informal rules embed, often unintentionally, in a more formal legal system and thereof become “law.”²³⁷

Jost Delbruck has analyzed the role of NGOs in the international legal process from the perspective of the Legal Process School and has termed NGOs “limited derivative legal subjects under secondary rules of international law.”²³⁸

Scholars working on the international legal process tradition have emphasized their normative approach to the trend of increased NGO participation in international lawmaking. For instance, Janet Levit remarks, “in an era of globalization, the international lawmaking universe is disaggregating into multiple—sometimes overlapping—lawmaking communities, and neither the President, political elites, nor any of the other protagonists that star in the neo-conservative account are at the center of many of these communities.” Some may recoil at this reality; I, on the other hand, celebrate this moment as one of possibility and promise, as an opportunity “to invite

²³⁵ *Id.*

²³⁶ *Id.* at 252-253.

²³⁷ Janet Kovel Levit, *Bottom-Up International Lawmaking: Reflections on the New Haven School of International Law*, YALE J. INT’L L. 393, 395 (2007).

²³⁸ Jost Delbruck, *Transnational Federalism: Problems and Prospects of Allocating Public Authority Beyond the State*, 11 IND. J. GLOBAL LEGAL STUD. 31, 43-44 (2004).

new worlds.”²³⁹ Other commentators as well regard participation of NGOs at various levels of international governance as “mechanisms for democracy.”²⁴⁰

Nevertheless, scholarship has so far overlooked the processes which relate to or result from the NGO uses of the *amicus curiae* procedure in international tribunals.

²³⁹ Janet Kovel Levit, *Bottom-Up International Lawmaking: Reflections on the New Haven School of International Law*, YALE J. INT’L L. 393, 395 (2007).

²⁴⁰ Boutros Boutros-Ghali, *Democracy: A Newly Recognized Imperative*, 1 GLOB. GOVERNANCE 1, 10 (1995).

Chapter III: NGOs as Amici in International Tribunals

Amicus curiae participation submissions are a form of third-party intervention, which consist in the presentation of views of a party not represented before the judge on points of law or fact.²⁴¹ This type of intervention in judicial proceedings has rapidly expanded from common law systems, where it originated in countries with a civil law tradition as well as international adjudication. Its role is increasing in parallel with the expansion of international litigation.²⁴² Amici are not bound by the decision of the court in the case, and amici do not bear the full burden of proving their legal standing in the case.²⁴³ Amici do not receive case materials, they cannot control in which direction the trial will go, and they are not compensated for their costs at the end of the hearing. Although the disadvantages might outweigh the advantages in some instances, amicus curiae participation is the only way for NGOs to participate in a case. Original parties to the case are entitled to respond to any comments submitted by the third-party intervener.²⁴⁴

The number of international tribunals has been gradually increasing.²⁴⁵ This chapter provides a chronological overview of the legalization of NGO amicus curiae submissions by five important international tribunals, arguing that international tribunals have been moving towards formalization of amicus curiae procedure for NGOs.

²⁴¹ Luisa Vierucci, *International Courts and Compliance Review Mechanisms in NGOs in International Law: Efficiency in Flexibility?* 163 (PIERRE-MARIE DUPUY & LUISA VIERUCCI EDS. 2008).

²⁴² See Ernst Angell, *The Amicus Curiae Brief: American Development of English Institution*, I.C.L.Q. 16 (1967); Samuel Krislov, *The Amicus Curiae Brief: From Friendship to Advocacy*, Y. L. J. 72 (1963).

²⁴³ Dinah Shelton, *The Participation of Non-Governmental Organizations in International Judicial Proceedings*, 88 A.J.I.L. 612 (1994).

²⁴⁴ Art. 61 (5), Rules of the Court.

²⁴⁵ See Thomas Buergenthal, *Proliferation of International Courts and Tribunals: Is It Good or Bad?* 14 LEIDEN J. INT'L. L. 267 (2001); Cesare Romano, *The Proliferation of International Judicial Bodies: The Pieces of the Puzzle*, 31 NYU J. INT'L. L. & POL. 709 (1999).

All of these tribunals have legally formulated a procedure for accepting amicus curiae submissions by NGOs. Each has chosen an individual approach to amicus curiae petitions. The International Court of Justice, for instance, authorizes NGOs to submit amicus curiae briefs and provides a specific procedure for addressing them, while not making such submissions part of the official case file. The Inter-American Court of Human Rights, on the other hand, accepts all amicus briefs indiscriminately without specifying if and based on what criteria they may be rejected. Nevertheless, it is indisputable that over the last 30 years, all the major international courts have chosen to regulate amicus participation for NGOs.

The first international court to legalize the procedure formally for amicus submission by non-state actors was the European Court of Human Rights (ECHR), which was set up in 1959. The Court was based on the European Convention for the Protection of Human Rights and Fundamental Freedoms after eight state parties delivered their instruments recognizing the compulsory jurisdiction of the Court.²⁴⁶ The Court's initial structure allowed neither for the right of individuals to address the Court nor for the right of third parties to request the Court to hear their views.²⁴⁷ However, the European Convention recognized the procedure in 1998 when in addition to other reforms in the Convention structure, the newly adopted Article 36 (2) granted the states, individuals, and organizations that are not party to the proceedings to intervene. The ECHR's approach to NGO amicus briefs has been more expansive relative to the International Court of Justice's as amici. Under the ECHR, NGOs have a right to submit unsolicited requests to the Court, though the requests may be rejected by the Court "in the interests of justice."

²⁴⁶ Paul Mahoney, *Developments in the Procedure of the European Court of Human Rights: the Revised Rules of the Court*, YEARBOOK OF EUR. LAW 3, 127 (1983).

²⁴⁷ STEVEN GREER, THE EUROPEAN CONVENTION ON HUMAN RIGHTS: ACHIEVEMENTS, PROBLEMS AND PROSPECTS, 37-38 (2006).

Currently, NGOs are very active in participating as amici in litigation in the European Court of Human Rights.²⁴⁸ For instance, on March 18, 2011, the European Court of Human Rights handed down the judgment in *Lautsi v. Italy*, concerning the display of religious symbols in classrooms in Italy.²⁴⁹ The case is noteworthy for its record number of amicus curiae interveners. The Court's final judgment mentions amicus submissions from the governments of Armenia, Bulgaria, Cyprus, the Russian Federation, Greece, Lithuania, Malta, the Republic of San Marino, and the principalities of Monaco and Romania. Submissions from the NGOs included the Greek Helsinki Monitor, *Associazione nazionale del libero Pensiero*, the European Center for Law and Justice, Eurojuris, International Commission of Jurists and Human Rights Watch, *Zentralkomitee der deutschen katholiken*, *Semaines sociales de France*, *Associazioni cristiane lavoratori italiani*, and thirty-three members of the European Parliament.²⁵⁰

Moreover, the Court sometimes rejects NGO submissions. For instance, the US-based organization Rights International was denied the possibility of submitting an amicus intervention in the case of *Ahmed Sadik v. Greece*.²⁵¹ In the case of *McGinley and Egan v. UK*, the President of the Court granted the right to submit amicus briefs to two non-governmental organizations, Liberty and the Campaign for Freedom of Information, whereas it declined this possibility without further justification for another organization, the New Zealand Nuclear Test Veterans' Association.²⁵²

The International Court of Justice, the principal judicial organ of the United Nations, is an adherent of a more restrictive model of accepting NGO amicus

²⁴⁸ See Anna Dolidze, *Making International Property Law: Amici Curiae in International Judicial Decision-Making*, 43 SYR. J. INT. L. & COM. (2012).

²⁴⁹ *Lautsi and others v. Italy*, App. No. 30814/06, Mar. 18, 2011, para.8.

²⁵⁰ *Id.* paras. 47-56.

²⁵¹ *Ahmet Sadik v. Greece*, App. No. 46/1995/552/638, Nov. 15, 1996, para.4.

²⁵² *McGinley and Egan v. the UK*, App. No. 10/1997/794/995-996, June 9, 1998, para. 5.

interventions. Article 34 of the Statute of the ICJ allows “public international organizations” to submit their views about a case before the Court *proprio motu* as well as to authorize the Court to inform the named organization if the construction of the constituent instrument of the organization or international convention has been invoked in the case.²⁵³ NGOS have petitioned the Court to accept their briefs as amici curiae in contentious proceedings.²⁵⁴ However, the Court has never formally accepted an amicus brief from an NGO in such proceedings.²⁵⁵

Nonetheless, the Court has been more welcoming of amicus submissions by NGOs in its advisory proceedings than in the contentious ones. Article 66 of the International Court of Justice’s Statute refers to two types of entities that can voice their opinion as amici curiae in advisory proceedings: “States” and “international organizations.” The practice under the Article has been varied, for the Court has requested an amicus curiae brief from Palestine (neither a State nor an international organization at the time), and it has also consented to receiving an amicus curiae brief from the International League for the Rights of Man in 1950 in the *International Status of South-West Africa* case.²⁵⁶ Furthermore, in 2004, the Court adopted Practice Direction XII, an addition to earlier Practice Directions, for which it regulated amicus curiae submissions by international NGOs.²⁵⁷ Practice Direction IX states,

1. Where an international non-governmental organization submits a written statement and/or document in an advisory opinion case on its own initiative, such statement and/or document is not to be considered as part of the case file.

²⁵³ Art. 34, Statute of the International Court of Justice.

²⁵⁴ In 1950, in the Asylum case the International League for the Rights of Man petitioned the Court to receive its brief as amicus curiae. Yet, the Court declined; See Lance Bartholomeusz, *The Amicus Curiae Before the International Courts and Tribunals*, 5 NON-ST. ACTORS & INT’L L. 216, 231 (2005).

²⁵⁵ Lance Bartholomeusz, *The Amicus Curiae Before the International Courts and Tribunals*, 5 NON-ST. ACTORS & INT’L L. 216, 215 (2005).

²⁵⁶ *Id.* at 223.

²⁵⁷ Dinah Shelton, *The International Court of Justice and Nongovernmental Organizations*, 9 Int. Community Law Review 139, 139 (2007).

2. Such statements and/or documents shall be treated as publications readily available and may accordingly be referred to by States and intergovernmental organizations presenting written and oral statements in the case in the same manner as publications in the public domain.

3. Written statements and/or documents submitted by international non-governmental organizations will be placed in a designated location in the Peace Palace. All States as well as intergovernmental organizations presenting written or oral statements under Article 66 of the Statute will be informed as to the location where statements and/or documents submitted by international non-governmental organizations may be consulted.²⁵⁸

Thus, although the Court does not officially recognize NGO *amicus curiae* submission, the practice direction does indicate that it has decided to take the issue of accessibility of NGO submissions seriously.²⁵⁹

Issues arose in 1998 related to whether WTO Dispute Panels should accept *amicus curiae* briefs or not in the *Shrimp/Turtle* case.²⁶⁰ The two briefs were submitted by the Center for Marine Conservation (CMC) and the Center for International Environmental Law (CIEL) jointly, and by the World Wide Fund for Nature (WWF).²⁶¹ The Panel's decision to accept or to reject the briefs rested on the interpretation of 13 of the Understanding on Rules and Procedures Governing the Settlement of Disputes. Article 13 states, "1. Each Panel shall have the right to seek information and technical advice from any individual or body which it deems appropriate. However, before a panel seeks such information or advice from any individual or body within the jurisdiction of a Member it shall inform the authorities

²⁵⁸ International Court of Justice, Practice Directions

<http://www.icj-cij.org/documents/index.php?p1=4&p2=4&p3=0>

²⁵⁹ Lance Bartholomeusz, *The Amicus Curiae Before the International Courts and Tribunals*, 5 NON-ST. ACTORS & INT'L L. 216, 224 (2005).

²⁶⁰ Appellate Body Report, United States—Import Prohibition of Certain Shrimp and Shrimp Products ("U.S.—Shrimp"), WT/DS58/AB/R, adopted 6 November 1998, DSR 1998:VII, 2755; Panel Report, United States—Import Prohibition of Certain Shrimp and Shrimp Products ("U.S.—Shrimp"), WT/DS58/R and Corr.1, adopted 6 November 1998, as modified by the Appellate Body Report, WT/DS58/AB/R, DSR 1998:VII, 2821.

²⁶¹ See Laurence Boisson de Chazournes & Makane Moise Mbengue, *The Amici Curiae and the WTO Dispute Settlement System: The Doors are Open*, 2 LAW AND PRACTICE OF INTERNATIONAL COURTS AND TRIBUNALS, 205 (2003).

of that Member . . . 2. Panels may seek information from any relevant sources and may consult experts to obtain their opinion on certain aspects of the matter”²⁶²

In relation to the Panel’s right to receive unsolicited briefs, the Appellate Body in the *Shrimp/Turtle* case held on November 6, 1998, that “authority to seek information is not properly equated with prohibition on accepting information which has been submitted without having been requested by a panel. A panel has a discretionary authority either to accept or to reject information and advice submitted to it, whether requested by a panel or not.”²⁶³

In November 2000, in relation to the case between Canada and France concerning France’s ban on the import of asbestos, the Division of the Appellate Body tasked with considering the dispute issued “The Additional Procedure for Purposes of Canada’s Appeal Only.”²⁶⁴ The procedure specified the process through which entities interested in submitting amicus curiae briefs could request participation. The Additional Procedure also established relatively stringent criteria that the petitions for amicus curiae intervention should have met, including the requirement to provide information about the petitioner’s relationship to the case and the parties.²⁶⁵

ICC’s procedural rules regarding amicus curiae interventions mirror the phrasing of a similar rule, Rule 74 of the Rules of Procedure and Evidence of the International Criminal Tribunal for the Former Yugoslavia (ICTY), and Rule 74 of the Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda (ICTR).²⁶⁶

²⁶² KARIN OELLERS- FRAHM & ANDREAS ZIMMERMAN (EDS.), *DISPUTE SETTLEMENT IN PUBLIC INTERNATIONAL LAW*, 650 (2nd ed. 2001).

²⁶³ Report of 6 November 1998 (WT/DS58/AB/R), para.108.

²⁶⁴ Ulrich Beyerlin, *The Role of NGOs in International Environmental Litigation*, 61 *ZaöRV* 357, 366 (2001).

²⁶⁵ Doc. WT/DS135/9 of 8 November 2000, 498. Reprinted in ILM 40 (2001).

²⁶⁶ See Sarah Williams & Hannah Woolaver, *The Role of Amicus Curiae before International Criminal Tribunals*, 6 INT. CRIM. L. REV. 151 (2006).

The Rules of Procedure of the International Criminal Court allow for amicus curiae interventions by entities other than states. Rule 103 indicates the power of the Chamber to invite a State, organization, or person to submit written or oral observations.²⁶⁷ Rule 149 extends the same authority to the Appeals Chamber.²⁶⁸ NGOs have used the possibility of amicus curiae intervention a number of times. For instance, on May 12, 2012, the ICC Pre-Trial Chamber I agreed to hear the views of two organizations, Lawyers for Justice in Libya and the Redress Trust, in relation to *The Prosecutor v. Saifal-Islam Gaddafi and Abdullah Al-Senussi* case.²⁶⁹

Moreover, the ICC continues to provide an important and expansive interpretation of the amicus curiae procedure. On June 8, 2012, the ICC put forth an important interpretation of Rule 103. The Office of Public Counsel for Victims filed a motion requesting leave to reply to the *amicus*'s submission, even though the entity's right to reply to amicus briefs is not mentioned explicitly in the rules. The Chamber granted the request, finding that the Chamber also has discretion to grant participants leave to reply to such filings. The Chamber "reviewed the Request, and considering the issues for which leave to submit amicus curiae observations has been granted, the Chamber is of the view that it is appropriate in the present circumstances to accord the OPCV the opportunity to submit a response to the amicus curiae observations."²⁷⁰

The Inter-American Court of Human Rights formalized the amicus procedure for NGOs in 2009, although in practice it has admitted amicus interventions by NGOs. The Inter-American Court of Human Rights was created in 1979 as an autonomous

²⁶⁷ Rule 103, ICC Rules of Procedure

²⁶⁸ Rule 149, ICC Rules of Procedure

²⁶⁹ *Situation in Libya in the Case of The Prosecutor v. Saif Al Islam Gaddafi and Abdullah Al Senussi*, Pre Trial Chamber N°:ICC-01/11-01/11, June 8, 2012
<http://www.icc-cpi.int/iccdocs/doc/doc1424525.pdf>

²⁷⁰ *Situation in Libya in the Case of The Prosecutor v. Saif Al Islam Gaddafi and Abdullah Al Senussi*, Pre Trial Chamber N°:ICC-01/11-01/11, June 4, 2012
<http://www.icc-cpi.int/iccdocs/doc/doc1423306.pdf>

judicial organ of the Organization of American States (OAS). Its creation came about through the entry into force of the Inter-American Convention on Human Rights on July 18, 1978.²⁷¹ The Inter-American Convention created the Court for the purpose of applying and interpreting the Convention and formalized the relationship between the Commission and the Court. The Court's jurisdiction extends only to the 25 states that have ratified the Convention, whereas the Commission has a more general competence under the OAS Charter.

The Court adopted its rules of procedure during its third ordinary session held from June 30 to August 9, 1980. The rules have been subsequently amended several times; the most recent amendments were adopted in 2009. In the amendments, the Court formalized the procedure for submitting *amicus curiae* interventions, which should be emphasized. Although recent cases at the Inter-American Court have witnessed burgeoning *amici* interventions both from domestic and international non-governmental organizations,²⁷² this activity has so far remained unregulated.

Henceforth, *amicus curiae* interventions will be sent to the Court and be admissible within 15 days following a hearing. If no hearing has been appointed, *amici* brief should be submitted following the Order that set the deadlines for submission of final arguments and documentary evidence.²⁷³ In its unconditional acceptance of *amicus* briefs, the Inter-American Court is even more welcoming to civil society's participation than its European counterpart.²⁷⁴

²⁷¹ See Chapter VIII American Convention on Human Rights, Sep. 22, 1969, OAS T.S. No. 36.

²⁷² Consider, for example, the case of *Marcel Claude Reyes and Others v. Chile* (Case no. 12.108) where five civil society organizations submitted a joint *amicus* brief: Open Society Justice Initiative, Article 19, Libertad de Informacion Mexico, Instituto Presa y Sociedad, Access Info Europe http://www.soros.org/initiatives/justice/focus/foi/articles_publications/articles/chile_20071219 http://www.cemda.org.mx/artman2/uploads/1/Amicus_Curiae_CEMDA_y_AIDA_caso_Cabrera_y_Montiel_vs_Mexico_sin_firmas-1.pdf

²⁷³ Article 56, amendments of January 2009, available at <http://www.cidh.org/basicos/english/basic20.RulesCourt.pdf>; later article 61, available at <http://www.cidh.org/basicos/english/RulesIACourtNov2009.pdf>.

²⁷⁴ Anna Dolidze, *Inter-American Court on Human Rights*, Reports on International Organizations http://www.asil.org/rio/iccourt_hr_oct2010.html#_ftnref14

Chapter IV: NGOs within the European Court of Human Rights

NGOs have an impact on the jurisprudence of the ECHR²⁷⁵ in four main ways: filing direct complaints, acting as witnesses, providing legal assistance to victims to bring cases before the Court, and filing *amicus curiae* briefs.

NGOs can file applications under Article 34 of the ECHR, which specifies the following:

The Court may receive applications from any person, non-governmental organization or group of individuals claiming to be the victim of violation by one of the High Contracting Parties of the rights set forth in the Convention or the protocols thereto.

Thus, NGOs, on equal footing with individuals, can claim to have been victims of violations of rights enshrined in the Convention and bring the claim before the ECtHR.

NGO representatives can also appear as witnesses. For example, Amnesty International's first direct involvement with the Court took place in 1968, when the Council of Europe Human Rights Commission declared admissible applications by Denmark, Norway, Sweden, and the Netherlands in January 1968 against widespread torture in Greece. Amnesty's lawyers Anthony Marreco and James Becket, who had conducted a research trip to Greece a year earlier, appeared as witnesses before the court.²⁷⁶

Another way to study NGO influence on the ECtHR is to research NGO legal services for complaints to be brought before the Court. NGOs provide legal assistance

²⁷⁵ MICHAEL GOLDBABER, A PEOPLE'S HISTORY OF THE EUROPEAN COURT OF HUMAN RIGHTS (2007); J.G. MERILLS, THE DEVELOPMENT OF INTERNATIONAL LAW BY THE EUROPEAN COURT OF HUMAN RIGHTS (1993).

²⁷⁶ Dean Zagorac, *International Courts and Compliance Bodies: the Experience of Amnesty International* in CIVIL SOCIETY, INTERNATIONAL COURTS AND COMPLIANCE BODIES 18 (TULIO TREVES ET AL EDS. 2005).

in multiple ways, including just providing legal advice to victims of human rights violation, counseling them on the ECHR procedures for applications, as well as representing them before the Court as attorneys on the record. In fact, one of Amnesty International's first experiences with ECHR was indirect, when the founder of Amnesty, the British lawyer Peter Benenson, established a Human Rights Advocacy Service designed to give assistance to persons wishing to bring cases before the ECHR.²⁷⁷

The Convention also allows for amicus curiae briefs, which will be elaborated on below.

1. The European Court of Human Rights: General Structure

NGOs, together with legal activists, have become central participants in the enforcement of human rights law in Europe—all with the effect of demanding and achieving more accessible legal institutions.²⁷⁸

The ECtHR has particular importance within the context of international human rights for several reasons: it was the first comprehensive treaty in the world in this field; it established the first international complaints procedure and first international court for the determination of human rights matters; it remains the most judicially developed of all human rights systems; and it has generated a more extensive jurisprudence than any other part of the international system and is now applied to roughly 30% of the nations in the world.²⁷⁹ The ECtHR exerts a profound influence on the laws and social realities of its Member States and has become the

²⁷⁷ *Id.* at 18.

²⁷⁸ Rachel Cicowski, *Civil Society and The European Court of Human Rights*, in *THE EUROPEAN COURT OF HUMAN RIGHTS BETWEEN LAW AND POLITICS* (JONAS CHRISTOFFERSEN AND MIKAEL RASK MADSEN EDS. 2011).

²⁷⁹ STEINER, HENRY J., RYAN GOODMAN & PHILIP ALSTON. *INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS* 933 (2007).

paradigm for other regional human rights courts, not to mention other international judicial bodies in general.²⁸⁰ Beginning from a modest position, the Court has succeeded in transforming its relatively empty docket into a teeming one.²⁸¹ From a feeble regional institution the European Court of Human Rights has developed into “[. . .] an instrument of the European public order (*ordre public*) for the protection of individual human beings.”²⁸² In the words of its late President, Rolv Ryssdall, the Court has become “a quasi-constitutional court for the whole of Europe” and “has developed into a regional human rights protection system of unparalleled effectiveness.”²⁸³

NGOs participate in shaping the jurisprudence of the ECtHR in the following ways: filing direct complaints, acting as witnesses, providing legal assistance to victims to bring cases before the Court, and filing *amicus curiae* briefs. The system of considering individual complaints of human rights violations is the hallmark of the ECtHR regime. The right of individual petition for violation of human rights has been called “a key component” of the machinery for the protection of human rights.²⁸⁴ It took several waves of reform to change the individual petition procedure from an optional mechanism to a widely accepted and influential instrument. Initially, all complaints were heard by the European Commission on Human Rights, which aimed at arriving at friendly settlements between complainants and respondent States. Later, more States accepted the compulsory jurisdiction of the Court, and in 1990 the acceptance of the complaints procedure became mandatory. After a major reform in

²⁸⁰ HE Rosalyn Higgins, *The International Court of Justice and the European Court of Human Rights: Partners for the Protection of Human Rights*, 9 available at www.echr.coe.int/.../30012009PresidentHigginsHearing_eng.pdf.

²⁸¹ Laurence R Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 Y. L. J. 273-293 (1997).

²⁸² *Loizidou v. Turkey* App. No. 15318/89, Dec. 18 1996, para. 239.

²⁸³ Rolv Ryssdall, *The Coming of Age of the European Convention on Human Rights*, 1 EUR. HUM. RTS. L. REV. 22. (1996).

²⁸⁴ *Loizidou v. Turkey* (preliminary objections), Mar. 23 1995, Series A No 310 para 70; *Mamatkulov and Askarov v. Turkey* [GC], Nos 46827/99 and 46951/99, §§ 100 and 122, ECHR 2005-I).

1998, individuals obtained the right to bring a complaint directly to the Court. Member States supported a much-needed modernization of the system through the reforms of Protocol 11,²⁸⁵ which strengthened the independent judicial character of the Convention machinery. Instead of the original system characterized by the complex interplay of three institutions, the Commission and Court of Human Rights and the Committee of Ministers,²⁸⁶ a new, single European Court of Human Rights was created whose judges would work full-time, and the right of individual petition became mandatory.²⁸⁷ The Convention established that the Court can award just satisfaction to an injured party if it has “[found] that there has been a violation of the Convention or the Protocols thereto.”

The work of the Court has transformed the regional human rights regime and has added considerable concreteness to abstract human rights promulgated in the European Human Rights Convention.²⁸⁸ The Court has generated a more extensive jurisprudence than any other part of the international system.²⁸⁹ It has had a profound influence on the laws and social realities of its Member States and has become the paradigm for other regional human rights courts, not to mention other international judicial bodies in general.²⁹⁰

²⁸⁵ Protocol No 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, restructuring the control machinery established thereby, entered into force 1 November 1998. For background and analysis of Protocol 11, see Andrew Drzemczewski, *The European Human Rights Convention: Protocol No 11. Entry into Force and First Year of Application*, at <http://www.bibliojuridica.org/libros/5/2454/25.pdf>; Jonathan L. Black-Branch, *Observing and Enforcing Human Rights under the Council of Europe: The Creation of a Permanent European Court of Human Rights*, 3 BUFF. J. INT’L. L. 1 (1996).

²⁸⁶ STEVEN GREER, *THE EUROPEAN CONVENTION ON HUMAN RIGHTS: ACHIEVEMENTS, PROBLEMS AND PROSPECTS* 37-38 (2006).

²⁸⁷ Peter Lauprecht, *Innovations in the European System of Human Rights Protection: Is Enlargement Compatible with Reinforcement?* 8 TRANSN. L. CONT. PROB. 313 (1998).

²⁸⁸ JOSE E ALVAREZ, *INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS* 474 (2005).

²⁸⁹ STEINER, HENRY J., RYAN GOODMAN & PHILIP ALSTON, *INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS* 933 (2007).

²⁹⁰ H.E. Rosalynn Higgins, *The International Court of Justice and the European Court of Human Rights: Partners for the Protection of Human Rights*, p.9 www.echr.coe.int/.../30012009PresidentHigginsHearing_eng_.pdf

The European Convention for the Protection of Human Rights and Fundamental Freedoms (hereafter ECHR) was signed in 1950.²⁹¹ The European Court of Human Rights was established in 1959 when eight state parties delivered their instruments recognizing the compulsory jurisdiction of the Court.²⁹² From its time as a feeble regional institution, the Court has subsequently developed into “[. . .] a quasi-constitutional court for the whole of Europe” and “a regional human rights protection system of unparalleled effectiveness.”²⁹³ The long-term effect of the Court’s jurisprudence on the domestic policy changes in Member Countries is amply documented.²⁹⁴ Today, the Court’s jurisdiction encompasses 800 million people in 47 countries.²⁹⁵

The initial structure of the Court was based on the dynamics between three parties: the Human Rights Commission, the respondent state, and the Court. The Court’s original design allowed neither for the right of individuals to address the Court nor for the right of third parties to request that the Court hear their views. However, this structure was fundamentally changed in 1998. The Commission was abolished, and individuals obtained the right to directly petition the Court.²⁹⁶ Currently, the system of considering individual complaints of human rights violations is the hallmark of the ECHR regime.²⁹⁷ Article 41 of the Convention establishes that the Court can

²⁹¹ ED BATES, *THE EVOLUTION OF THE EUROPEAN CONVENTION OF HUMAN RIGHTS* 2 (2010).

²⁹² Paul Mahoney, *Developments in the Procedure of the European Court of Human Rights: the Revised Rules of the Court*, 3 YEARBOOK OF EUR. LAW 127 (1983).

²⁹³ Rolv Ryssdall, *The Coming of Age of the European Convention on Human Rights*, 1 EUR. HUM RTS. L. REV 22 (1996).

²⁹⁴ See generally, Helen Keller & Alec Stone Sweet, *The Reception of the ECHR in National Legal Orders*, in *EUROPE OF RIGHTS: THE IMPACT OF THE ECHR ON NATIONAL LEGAL SYSTEMS* (HELEN KELLER & ALEC STONE SWEET EDS. 2008).

²⁹⁵ Laurence R. Helfer, *Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Convention*, 19 EUR. J. INT’ L 125, 125 (2008).

²⁹⁶ STEVEN GREER, *THE EUROPEAN CONVENTION ON HUMAN RIGHTS: ACHIEVEMENTS, PROBLEMS AND PROSPECTS*, 37-38 (2006).

²⁹⁷ See generally, MICHAEL D. GOLDBABER, *A PEOPLE’S HISTORY OF THE EUROPEAN COURT OF HUMAN RIGHTS* (2007);

award just satisfaction to the injured party if it has been previously “[found] that there has been a violation of the Convention or the Protocols thereto.”²⁹⁸

The Court considers on merits only a tiny number of applications. The Court declares some 90% of applications inadmissible.²⁹⁹ Hence, the applications that surpass admissibility are the tip of the iceberg of all claims of rights violations in Europe.³⁰⁰ Even more so, the number of those instances in which the Court rectified the violations of rights is minimal compared with the number of rights violations experienced by stateless persons. The Convention mandates that local judicial remedies be exhausted before any case reaches the European Court.³⁰¹ Although in some circumstances the requirement to exhaust domestic remedies can be waived,³⁰² statelessness had not served as an excuse to avoid their exhaustion. The stateless themselves usually do not make such requests. In all cases at hand, the applicants exhausted local legal remedies as required by the Court.³⁰³ In certain cases, (i.e., those in response to overly excessive claims made by the government), the Court exhibited a small measure of flexibility in exercising the requirement.³⁰⁴

²⁹⁸ Art. 41, the European Convention.

²⁹⁹ Council of Europe FactSheet, *Protocol 14- The Reform of the European Court of Human Rights* <http://www.echr.coe.int/NR/rdonlyres/57211BCC-C88A-43C6-B540-AF0642E81D2C/0/CPProtocole14EN.pdf>

³⁰⁰ See Gregory Dikov, *The Ones That Lost: Russian Cases Rejected at the European Court*, Dec. 7, 2009, <http://www.opendemocracy.net/od-russia/grigory-dikov/ones-that-lost-russian-cases-rejected-at-european-court> (arguing that as the majority of applications is rejected by the ECtHR, researchers should devote more attention to studying the dynamic in the applications which had been declared inadmissible).

³⁰¹ Article 35(1) of the Convention provides, “[t]he Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognized rules of international law, and within a period of six months from the date on which the final decision was taken,” Convention for the Protection of Human Rights and Fundamental Freedoms, art. 35.

³⁰² Alberto M. Aronovitz, *Notes on the Current Status of the Rule of Exhaustion of Local Remedies in the European Convention on Human Rights*, 25 ISR. Y. B. HUM. RTS., 73, 89-98 (1995).

³⁰³ See, e.g., *Sisojeva and others v. Latvia*, App. No. 60654/00, Jan. 15, 2007 at 1-34.

³⁰⁴ In *Hummatov v. Azerbaijan* the applicant exhausted all remedies except the civil action seeking compensation for inadequate medical treatment. The respondent government argued that the applicant failed to exhaust domestic remedies. The Court paid attention to the “peculiar” situation of the applicant (the fact that he was stripped of citizenship and had to leave the country) and considered that notwithstanding this last omission, the applicant “has done as much as he could reasonably be expected

The process of exhaustion of legal remedies, coupled with the time spent in waiting for the Court's judgment, usually spans from five years to more than a decade. For example, in *Kaftailova v. Latvia*, the applicant lodged her first legal request with the Interior Ministry in February 1993.³⁰⁵ She had to litigate for eleven years until the Court handed down the judgment in her case in 2007.³⁰⁶ In the case of *Sisojeva and others v. Latvia*, the applicants applied for regularization of their stay in 1993.³⁰⁷ The final decision of the Senate of the Supreme Court denying their appeals was handed down on April 12, 2000.³⁰⁸ The judgment of the European Court was handed down on January 15, 2007.³⁰⁹ In other words, the applicant spent approximately fourteen years waiting for the verdict from the Court and for the solution to her legal status.

In some cases, the claimants underwent long periods of detention and impending deportation.³¹⁰

The problem is exacerbated by the Court's enormous backlog of cases. By 2009 the Court had a backlog of 119,300 cases.³¹¹ Commentators have emphasized the Court's difficulty handling the backlog and the toll it was taking on the length of proceedings.³¹² The backlog significantly contributed to the current situation where the cases remain on the Court's docket sometimes for longer periods than the Court allows for domestic courts of respondent states.³¹³ Both the outsiders as well as the

of him" to exhaust local remedies, *Hummatov v. Azerbaijan*, App. Nos. 9852/03 and 13413/04, November 29, 2007, paras. 93-96.

³⁰⁵ *Kaftailova v. Latvia*, App. No. 59643/00, Dec. 7, 2007 at 19.

³⁰⁶ *Id.*

³⁰⁷ *Sisojeva and others v. Latvia*, App. No. 60654/00, Jan. 15, 2007, para. 19.

³⁰⁸ *Id.* at 33.

³⁰⁹ *Sisojeva and others v. Latvia*, App. No. 60654/00, Jan. 15, 2007.

³¹⁰ *Shevanova v. Latvia*, App. No. 58822/00, Dec. 7, 2007, para. 49; *Sisojeva and others v. Latvia*, App. No. 60654/00, Jan. 15, 2007; *Kaftailova v. Latvia*, App. No. 59643/00, Dec. 7, 2007 at 53.

³¹¹ Council of Europe FactSheet, Protocol 14- The Reform of the European Court of Human Rights <http://www.echr.coe.int/NR/rdonlyres/57211BCC-C88A-43C6-B540-AF0642E81D2C/0/CPProtocole14EN.pdf>

³¹² See, e.g., Lucius Caflisch, *The Reform of the European Court of Human Rights: Protocol No. 14 and Beyond*, 6 HUM. RGTS. L. REV. 403 (2006).

³¹³ Laurence R. Helfer, *Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Convention*, 19 EUR. J. INT'L L. 125, 133 (2007).

representatives of the Court stress the negative effect that the backlog has had on claimants' rights.³¹⁴

Prohibitively high financial costs associated with such prolonged domestic and international litigation is another factor that stands in the way of bringing claims.

For example, the ECtHR considered that to account for an hourly rate for legal work in Bulgaria to USD 40, USD 25 is a reasonable fee.³¹⁵ In another situation, the Court considered a rate of GBP 100 to prepare a case before the Grand Chamber to be reasonable.³¹⁶ Although legal fees fluctuate from one country to another, even the lowest common denominator of these fees is a heavy burden for stateless individuals, who usually are economically at the margins of society.³¹⁷

Moreover, the Legal Aid Fund has granted aid to some applicants whose complaints were examined above.³¹⁸ The Legal Aid Fund was established to help with costs of litigation before the ECtHR. However, eligibility for the Fund is highly selective. Applicants can receive legal aid only in the later stage of proceedings, after the respondent government writes its observations on the admissibility of the case or when the Court declares the case admissible.³¹⁹ In addition, most member states of the Council of Europe do not provide domestic legal aid for litigation in Strasbourg.³²⁰

³¹⁴ Alastair Mowbray, *Crisis Measures of Institutional Reform at the European Court of Human Rights*, 9 HUM. RGTS. L. REV. 647 (2009).

³¹⁵ *Al-Nashif v. Bulgaria*, App. No. 50963/99, Sept. 20, 2002, p. 20.

³¹⁶ *Kaftailova v. Latvia*, App. No. 59643/00, Dec. 7, 2007 at 58.

³¹⁷ *See, infra* at 5-6.

³¹⁸ *See, e.g.*, *Hummatov v. Azerbaijan*, App. Nos. 9852/03 and 13413/04, Nov. 29, 2007 #2; *Sisojeva and others v. Latvia*, App. No. 60654/00, Jan. 15, 2007 at 2; *Slivenko v. Latvia*, App. No. 48321/99, Oct 9, 2003 at 2; *Tatishvili v. Russia*, App. No. 1509/02, Feb. 22, 2007 at 2.

³¹⁹ Andrew S. Butler, *Legal Aid Before Human Rights Treaty Monitoring Bodies*, 49 INT. AND COMP. L. QUAR. 360, 363 (2000).

³²⁰ *Id.* at 365-366.

2. *NGOs as Claimants*

This part examines the role of NGOs as claimants in front of the ECtHR. This is done through analyzing the ECtHR's handling of the admissibility of NGO applications. It is through this *ratione personae* admissibility test that the Court establishes its understanding of the term “non-governmental organization.”

It should be noted that the number of admissibility decisions in which NGO complaints were declared inadmissible is certainly higher; for example, a complaint by the Association of Victims of Terrorism against Spain was declared inadmissible in 2001. Similarly, an application by “Domowina—Association for the Protection of Serbian Interests” against Germany was declared inadmissible in 2000. The decision regarding inadmissibility of applications by NGOs should certainly be studied in order to gain a fuller picture of NGO efforts to access the ECtHR.

Development of the ECtHR's approach to defining “a non-governmental organization” in pursuance of its admissibility requirements illustrates that the Court does not have an easy task. In line with literature on the proliferation of non-state actors in international law, this account of case law shows that NGO applications have become increasingly diverse in their legal forms and objectives. As more of these different organizations attempt to defend their rights under the European Convention, the Court's task is becoming more complicated and difficult. Increasingly sophisticated organizational forms of applicant organizations prompt the Court to move from a relative simple “public functions” test, with which the Court responded to the earliest applications by NGOs, to a sophisticated legal exercise.

The fact that the Court had to develop this relatively complicated matrix from its early “public functions” test confirms that its response to the newly emerging types of organizations is becoming more sophisticated.

Initially, the Court aspired to maintain a strict binary governmental/non-governmental system, including all commercially and publicly oriented organizations in the same “non-governmental” category. In certain cases, this task was easy. When the Court examined applications by associations/companies founded by private individuals or by local municipalities, it encountered no difficulty in completing the task. As time passed, however, preservation of the simple binary system became more difficult. Entities which maintain the characteristics of both categories emerged, and the line between the two became more blurred. Hence the Court could no longer survive with the simple dichotomy. It had to create a more complicated approach to determine into what category applicant organizations fall.

It is in relation to this relatively complicated task that the category of the “degree of independence” became gradually more important. For the purposes of admissibility test, the Court had to determine whether the applicant organizations were independent from the government. In the process of reconfiguring its general admissibility test, the Court expanded its definition of the category of “degree of independence,” thus allowing a flow of more NGO applications. In 1994, having first elaborated the requirement of “independence,” the Court insisted that applicant organizations must be “completely independent” from the government. In 2003, while revisiting its approach, the Court indicated that the applicant organizations can be “substantively independent.” However, in 2007, the Court stated that it would not admit the applications of those organizations that are strictly controlled by a government. In this environment, where the Court is asked to adjudicate on the claims of numerous organizations, whose ties with the state are extremely blurred, maintaining a strict independent test, as it was envisaged initially, becomes less feasible. By relaxing the test, the Court remains welcoming to the increasing flow of the applications by these organizations, thereby strengthening its jurisdiction and

authority. Thus, over time, more and more opportunities for claim-making on the international plane arise for entities that claim to be “non-governmental.”

Portrayal of the Court’s struggles to define the “governmental” and the “non-governmental,” in which the Court often bends its own previously stated principles, confirms the difficulties associated with the changed nature of the nation-state and of the institutions affiliated with it. Second, the case law confirms that as more and more entities of a hybrid nature emerge, combining features of both public and private law and operating on the borderline of each, the ECtHR is having difficulty devising principles based on the Treaty text written more than 70 years ago. Third, the study shows that as the Court relaxed its “independence” test over time, more and more entities acquire the opportunity to claim rights as applicant NGOs. Therefore, international legal opportunities for NGOs are expanding further.

In this chapter I argue that the ECtHR develops its relationship with NGOs through changing the interpretation and the construction of the definition of “a non-governmental organization,” that is, through regulating the admissibility of applications by NGOs. This chapter evidences the fact that the Court has first constructed a “negative-substantive” test to ascertain which entities’ applications should be admissible. The criterion of “independence” from government appears to be the most crucial in determining whether an applicant entity is indeed non-governmental. However, the Court has remained flexible in interpreting the required threshold of “independence” from the State. As the legal form and nature of applicant organizations has become gradually more sophisticated, the Court has been faced with the task of coming up with more refined doctrines of *ratione personae* admissibility.

It is also noteworthy that despite the growing number of applications that threaten the Court with case backlogs, it has remained welcoming to NGO applications by broadening, rather than restricting, certain criteria within the test. The

broadening of the definition allows more applicants to take advantage of the Convention system and bring applications before the Court. This process continues notwithstanding the mounting criticisms by lawyers and experts of the Court's existing backlog.

The ECtHR develops its doctrine as it encounters new types of organizations active in different areas and performing different functions. As the Court grapples with the task of responding to challenges presented by the status and activity of an applicant organization, it develops its own approach to categorizing this organization as “a non-governmental organization.”

A. Evolving Negative-Substantive Admissibility Test

The ECtHR will only admit NGOs' applications for examination if it is ascertained that the organizations concerned can claim to be victims of a breach of one of the rights protected by the Convention.³²¹ This is possible through Article 34 of the European Convention on Human Rights, which states: “The Court may receive applications from any person, non-governmental organization or group of individuals claiming to be the victim of violation by one of the High Contracting Parties of the rights set forth in the Convention or the protocols thereto.” Therefore, for applications by legal entities to pass the Court's *ratione personae* admissibility test, they must prove that they fall within the category of “non-governmental organization” and claim to have been victims of violations of rights enshrined in the Convention, and bring the claim before the ECtHR.

However, the term “non-governmental organization” in Article 34 was not unequivocal. The specific meaning of the term, which could result in admitting an

³²¹ Marek Antoni Nowicki, *NGOs before the European Commission and the Court of Human Rights*, 14 NETH. QUART. HUM. RGHTS. 290 (1996).

organization's application or denying its admission, has been subject to arguments between applicants and respondent States. The Court has controlled the admission of NGO applications through carefully constructing the criteria allowing it to recognize whether a specific entity was "non-governmental" or not. Construction of the criteria took place through what I call a "negative-substantive" test with which the Court dealt with applications by legal entities. This test is "negative" because instead of engaging in discussion about what "non-governmental" would mean, the Court strives to explicate the nature of "governmental" organizations and exclude those organizations which it considers to be too closely related to government. Therefore, if the answer to this question is negative, then the applicant entity could be characterized as "non-governmental."

Furthermore, the test is "substantive" because the Court, as opposed to following a "formalistic" view according to which it would look only at formal legal criteria with respect to whether an entity is legally defined as "non-governmental" under domestic law or not, took a much broader substantive approach. As will be seen below, applicant entities could be considered non-governmental irrespective of whether they were registered under domestic private or public law. However, in considering their nature the Court goes much further than just looking at the status of the applicant organization and, where needed, examines the nature of its powers, the degree of its independence, the level of control exercised by the government, and other substantive questions.

The Court elaborated the test as it proceeded to respond to applicants who maintain different levels of connection to the State. The Court found it easiest to respond to two types of cases: applications by municipalities and by corporations established under domestic private law by private individuals seem to be the easiest to handle. In response to such applications the Court proceeded with a simple

admissibility test. However, as the organizational forms of applicant organizations became more complicated, so did the Court's reasoning on their admissibility.

Therefore, the Court took a further step in complicating its *ratione personae* admissibility test as applications from public corporations came in. These are corporations registered under domestic public law (under Statutes) that retain certain ties to the government. In such organizations, as we shall see in the cases below, the State plays a certain role either in governance, financing, or supervision, or in all of the above. However, such organizations are technically not part of the State machinery and maintain formal legal independence. The Court found it difficult to use preexisting legal concepts with such complicated organizational and legal forms and devised a more sophisticated test in response to their pleas for admissibility. Finally, it was equally complicated for the Court to respond to applications by companies, registered under domestic private law, engaged in commercial activity, but founded by the State or government officials.

There are applications brought under the prong of "non-governmental organization" in which the question of admissibility is not even raised. These organizations unequivocally fall into the orbit of the "non-governmental." Applicant organizations in such cases are registered under domestic private law and are established by and run by private individuals. The nature of applicant organizations varies: some engage in religious activities, while others are aimed at making a profit. Despite this variation in their objectives, the Court does not hesitate to qualify them as "non-governmental." What seems to be of paramount importance for the Court is that applicant organizations have no ties with the government, that is, that their independence is in no doubt. Therefore, it is noteworthy that contrary to the position of some scholars, for whom NGOs are only those organizations that do not aim at making a profit, the ECtHR maintains a broader definition of an NGO. It considers

both companies and non-profit-making entities to be “non-governmental organizations.” These organizations do share several traits: all were founded by private individuals under the private law of the state. Such organizations include business companies, charities, religious organizations, and trade unions. The following series of cases illustrate this point.

Interestingly, the first case decided on the basis of the complaint by a non-governmental organization was a case lodged by a trade union of policemen. The National Union of Belgian Police launched a complaint against the Kingdom of Belgium.³²² The Union alleged that Belgium violated its rights under Article 11 (freedom of association) and Article 14 (prohibition of discrimination) of the Convention.³²³ The Union was established as a non-profit-making association and function under the civil law of the country.³²⁴

The issue of inadmissibility of the application based on the status of the applicant organization was not raised. The respondent government did not contest that the complainant qualified as a non-governmental organization. The Court, in its turn, had no trouble in admitting this claim without any debate on the admissibility of the applicant, and proceeded to the discussion of the merits of the case.

Similar processes take place in relation to other applicants, who are founded by private individuals under domestic private law, notwithstanding the objective (profit-making or not) of the applicant organization. For example, in the case of *National and Provincial Building Society et al v. The UK*, the applications were brought by three building societies.³²⁵ Building societies operate as “mutual societies” as opposed to the status of companies established under company law. The building society’s members

³²² Case of the National Union of Belgian Police v. Belgium, App. No. 4464/70, Oct. 27, 1975.

³²³ *Id.* para.2.

³²⁴ *Id.* para. 12.

³²⁵ *National & Provincial Building Society, the Leeds Permanent Building Society and the Yorkshire Building Society v The UK*, App. No. 117/1996/736/933-935, Oct. 23, 1997.

were investors who deposited savings with it and received interest in return. Its borrowers were charged interest on their loans. Mostly, loans were taken out by borrowers to buy private residential property.³²⁶ Again, as in the case of the National Union of Belgian Police, the question of admissibility of the complaint was not raised. No one doubted that the applicant organization indeed qualified to act as a non-governmental organization under the Convention. Building societies at hand, just as any other organization whose status as an NGO was not questioned by the Court, were established by private citizens and functioned solely under the private law of the respondent State.

In *Cha'are Shalom Ve Tsedek v. France*, the applicant was a Jewish liturgical association.³²⁷ The applicant organization alleged that the French state had violated the provisions on freedom of religion and non-discrimination of the Convention by refusing to grant it the approval necessary for access to slaughterhouses to perform ritual slaughter in accordance with the religious prescriptions of its members.³²⁸ The applicant was an association registered under French Law.³²⁹ Its aims were religious, and included among other things, “[. . .] to organize, subsidize, encourage, revive, assist, promote and finance, in France, public Jewish worship and any other related or connected activities of a religious nature [. . .].”³³⁰ As in previously mentioned cases, the admissibility of the application by this organization was not challenged during the proceedings. Although this particular applicant had been pursuing religious activities, it was regarded as a non-governmental organization.

³²⁶ *Id.* para. 6.

³²⁷ *Cha'are Shalom Ve Tsedek v France*, App. No. 27417/95, June 27, 2000.

³²⁸ *Id.* para. 2

³²⁹ *Id.*

³³⁰ *Id.* para. 27.

In *Vgt Verein Gegen Tierfabriken v. Switzerland*, the applicant was an association against animal cruelty registered in Switzerland.³³¹ The applicant claimed that the Swiss authorities' refusal to grant it permission to broadcast an advertisement against animal cruelty violated the right to freedom of expression under the Convention.³³² The applicant organization's aim was to protect animals.³³³ The application was admitted without any discussion of the nature of the applicant organization or doubts about its status as a non-governmental organization for the purposes of the Convention.

In the same year, the Court recognized that Italy had breached the rights of the Masonic association.³³⁴ The applicant, Grande Oriente d'Italia di Palazzo Giustiniani, was an association registered under the civil law of Italy. It was a Masonic organization affiliated with Universal Freemasonry. It had the status of an unrecognized private-law association under the civil law of Italy.³³⁵ As with all other previously mentioned cases, the respondent government did not raise preliminary objections with regard to the non-governmental status of the applicant organization. Because the Court regarded the complaint admissible without any further discussion, we can conclude that it was clear for the Court as well, for admissibility purposes, that by the way of its incorporation the applicant met the requirements for admissibility under then-Article 25 of the Convention.

The above-cited judgments evidence that the Court had been experiencing no difficulty in admitting the applications by organizations, which had been established and run by private individuals under the private/civil law of the state. The number of judgments issued in response to applications by similar non-governmental

³³¹ *Vgt Verein Gegen Tierfabriken v Switzerland*, App. No. 24699/94, June 21, 2001, para. 1

³³² *Id.* para. 3.

³³³ *Id.* para. 8.

³³⁴ *Case of Grande Oriente D'Italia Di Palazzo Giustiniani v. Italy*, App. No. 35972/97, Aug. 2, 2001.

³³⁵ *Id.* para. 8.

organizations is much higher than the few cases indicated above. However, the instances referenced above prove one of my main points: it has been easiest for the Court to handle applications by those organizations that are completely segregated from the government, that is, established and run by private individuals under the private law of the state. The aims and objectives of applicant organizations, for example whether profit making or not, do not play a role in relation to their status as non-governmental organizations under the admissibility provision of the Convention.

The Court's approach to applications brought by local territorial entities is also clear-cut. They fall within the ambit of "governmental organizations," as opposed to non-governmental organizations and hence are not eligible to submit applications. However, this set of cases is interesting because in these decisions the ECtHR developed the "public functions" prong of the negative-substantive test.

In the case of *Sixteen Austrian Communes v. Austria* (1974), the applicants were Communes that had discontinued their existence after one of the Austrian provinces passed an Act reorganizing the communes and merging several of them. They alleged that their rights had been violated by this decision, as well as in the process pursued, which followed their appeal of the decision.³³⁶ The Commission examined whether the applicants could be recognized as non-governmental organizations for the purposes of Article 25 of the Convention. At this point the Court pronounced the "public functions" test: it finds that local government organizations such as communes, which exercise "public functions" on behalf of the State, are clearly "governmental organizations" as opposed to the non-governmental organizations referred to in Article 25.³³⁷

³³⁶ *Sixteen Austrian Communes v Austria*, App. No. 5767/72, May 31, 1974.

³³⁷ *Id.*

In a similar vein, the Court in the decision of *Ayuntamiento de M v. Spain* (1989) reaffirmed the “public functions” test. In this case the City Council appealed to the European Commission, requesting that it be regarded as a non-governmental organization within the meaning of Article 25 since, inter alia, “the system of administrative decentralization that obtains in Spain makes it independent of Government.” The applicant, who was prevented from submitting an amparo appeal to the Spanish Constitutional Court, alleged that it had not been given a fair hearing in Spain. The Commission considered whether the Council would qualify as a non-governmental organization for the purposes of the treaty. It noted that local authorities are public law bodies, which perform official duties assigned to them by the Constitution and by substantive law. As such, they “quite clearly” were governmental organizations and were unable to submit the complaints. However, the Commission went further to elaborate, with reference to international law, which “governmental organizations” refer not only to the government or the central organs of the State but also to “any national authority that exercises public functions.”³³⁸ The decision was reinforced several times, including in the case of *Danderyds Kommun v. Sweden*,³³⁹ in which an applicant Swedish municipality was regarded as “clearly a public organ exercising public functions.”

The Court reaffirmed the same approach when dealing with municipalities of other countries.³⁴⁰ In the case of *Ayuntamiento de Mula v. Spain* (2000),³⁴¹ the applicant municipality argued that it had not received a fair hearing in the Supreme Court of Spain. Nevertheless, the Commission considered whether it qualified as a

³³⁸ *Ayuntamiento de M v Spain*, App. No. 15090/89, Jan. 7, 1991.

³³⁹ *Danderyds Kommun v Sweden*, App. No. 52559/99, June 7, 2001.

³⁴⁰ *Municipal Section of Antilly v France*, App. No. 45129/98, ECHR 1999-VIII; *Province of Bari, Sorrentino and Messeni Nemagna v. Italy*, No 41877/98, Sept. 15, 1998, unreported; *Rothenthurm Commune v Switzerland*, App. No. 13252/87, Commission decision of 14 December 1988, Decisions and Reports (DR) 59, p 251; *Municipal Section of Antilly v. France* (dec), App. No. 45129/98, ECHR 1999-VIII; *Danderyds Kommun v Sweden* (dec), App. No. 52559/99, June 7, 2001.

³⁴¹ *Ayuntamiento de Mula v Spain*, App. No. 55346/00, Feb. 1, 2001.

non-governmental organization. Again with reference to international law, the Commission reiterated that “non-governmental organizations” could not only refer to the Government or the central organs of the State, but should rather refer to any national authority that exercised public functions. The applicant municipality attempted to convince the Court that local authorities exercised both public and private functions, and during the latter acted as non-governmental organizations. In Spain, in the case at hand, local authorities were authorized to defend their property rights, among other things by filing submissions to the Court. Moreover, as the local authorities had existed before the State, and owned the property, they could have been regarded as non-governmental organizations. Nevertheless, the Court opted for stating that due to the exercise of public functions, and notwithstanding the fact that local municipalities owned property and could defend it in court, they could not be equated with non-governmental organizations.³⁴²

One of the first cases where the Commission established its “public functions” test was *Consejo General de Colegios Oficiales de Economistas de Espana v. Spain* (1995).³⁴³ The General Council of Official Economists’ Associations in Spain, a public law corporation established under the laws of Spain, alleged that inability to bring a claim under domestic law violated its right to a fair trial under the Convention. The European Commission for Human Rights, however, stressed that “[t]he General Councils of Professional Associations are public law corporations which perform official duties assigned to them by the Constitution and the legislation.” The Commission emphasized that no national authority exercising “public functions,” even along decentralized lines, can bring a claim. After analyzing the legislation with respect to such Councils, the Commission concluded that it could not have been

³⁴² *Id.*

³⁴³ *Consejo General de Colegios Oficiales de Economistas de Espana v. Spain*, App. No. 26114/95 and No. 26455/96, June 28, 1995.

characterized as a non-governmental organization under the meaning of Article 25 of the Convention and hence that its complaint was inadmissible.

The first instance when the Court moved to a “substantive test,” looking beyond the functions endowed by the founding public law, is the 1994 case of *The Holy Monasteries v. Greece*.³⁴⁴ In this case, in response to applications brought by several Greek monasteries, the Court established its three-pronged substantive test. As a new type of public corporation, different in its objectives from those that brought earlier applications, the Court was prompted to continue the discussion of its principles beyond the question of delivering public functions.

Law No 1700/1987 of the State of Greece changed the rules with respect to the management and representation of monastery property. It also provided that within six months of its publication the State would become the owner of all monastery property unless the monasteries proved title (kyriotita) established either by a duly registered deed (metegrammeno), a statutory provision, or a final court decision against the State.³⁴⁵ The applicants alleged that State action against monastic property would “deprive them of the means necessary for pursuing their religious objectives.”

In a preliminary objection to the admissibility of the application, government representatives argued “[. . .] The applicant monasteries were not non-governmental organizations within the meaning of Article 25 of the Convention.”³⁴⁶ To prove their argument, they stressed the historical, legal, and financial links with the Hellenic nation, which included the public law attribution of legal personality to the Church and its constituent parts, the monasteries.³⁴⁷

³⁴⁴ *The Holy Monasteries v. Greece*, App. No. 13092/87, Nov. 21, 1994.

³⁴⁵ *Id.* para. 24.

³⁴⁶ *Id.* para 48.

³⁴⁷ *Id.*

The fact that the Court’s approach is substantive, rather than formalistic, is substantiated by its handling of the question of the organization’s registration under the public or private law of a country. When registration of an organization under public law was mentioned as an impediment to its recognition as a non-governmental organization, the Court has taken a more substantive look at the nature and purpose of such registration. The mere fact of registering under public law was not sufficient to dismiss the entity’s recognition as an NGO. For example, in the case of Holy Monasteries, the Court stated, “[f]rom the classification as public law entities it may be inferred only that the legislature—on account of special links between the monasteries and the State—wished to afford them the same legal protection vis-à-vis third parties as was accorded to other public law entities.”³⁴⁸ So the Court was not satisfied that the mere fact of the monasteries’ registration under public law was sufficient to deprive them of NGO status. The Court took a further step and examined the purpose of such registration. Moreover, in response to its “governmental powers” doctrine, the Court stressed that the monasteries do not exercise such powers but that their objectives—ecclesiastical, spiritual, cultural, and social ones—do not allow for their classification as governmental organizations established for public-administration purposes.³⁴⁹

Moreover, the Court went on to consider the degree of independence of the monasteries from the State and stated that “[. . .] the monasteries come under the spiritual supervision of the local archbishop (s39 (2)), not under the supervision of the State, and they are accordingly entities distinct from the State, of which they are completely independent.”³⁵⁰

³⁴⁸ *Id.* para 49.

³⁴⁹ *Id.* at 49.

³⁵⁰ *Id.*

For the first time, the Court elaborated on the applicant entity's degree of independence from the State. In this particular case the fact that the monasteries were supervised by the Archbishop, and not a State agency, spoke in favor of admissibility of the claim. Nevertheless, by the same token, the Court established the precedent of not only speaking about registration under public or private law, or possession of "governmental powers," but also of the need for "complete independence" from the State.

The precedent and emphasis on the nature of powers exercised by the body in question was later reinforced in the decision *Finska församlingen i Stockholm & Teuvo Hautaniemi v. Sweden*.³⁵¹ The case concerned a religious public corporation from another state. In this decision the Church of Sweden and its members were recognized as non-governmental organizations even though they had been registered as corporations in public law. The Court established that, "[A]s these religious bodies cannot be considered to be exercising governmental powers, the Church of Sweden and notably the applicant parish can nevertheless be regarded as non-governmental organizations [. . .]"³⁵²

Therefore, in trying to justly respond to claims of applicant organizations, the Court moves from the public functions test to something more complicated.

The case of *RENFE v. Spain* (1997) is both similar to and different from the previous cases. RENFE, the Spanish national railway company, submitted an application before the Commission alleging violation of the right to a fair hearing in Spanish Courts.³⁵³ The applicant was a public-law corporation created by the State to run the state rail network as an industrial company. The applicant had its own distinct

³⁵¹ *Finska församlingen i Stockholm & Teuvo Hautaniemi v Sweden*, App. No. 24019/94, Admissibility Decision, Apr. 11, 1996.

³⁵² *Id.* para.1.

³⁵³ *RENFE (Red Nacional de los Ferrocarriles Espanoles) v SPAIN*, App. No. 35216/97, Sept. 8, 1997.

legal personality, different from the State, and was administratively independent, although its board of directors was answerable to the government; its internal structure and the conduct of its activities were regulated by a Decree, later supplemented by Law. Nevertheless, the organization maintained a monopoly in providing a public railway service.³⁵⁴ Noting that governmental organizations cannot introduce an application at any stage of proceedings, the Commission engaged in the test of assessing whether the entity was “governmental.” The Commission noted that although the company had its own legal personality and was administratively independent, a combination of several factors did not allow it to claim to be non-governmental and submit an application: (a) it was a public law corporation established by the law to run the state rail network as an industrial company; (b) its board of directors was answerable to the government; (c) it was a monopoly, that is, “the only undertaking with the license to manage, direct and administer the state railways, with a certain public-service role in the way it does so”; and (d) the applicant’s internal structure and manner of conducting business was regulated by a decree.

The Court followed up on the criteria of “public functions” and “independence” that it had elaborated earlier. To these, it added the new category of “monopoly with a public service role,” to respond to the specific situation of RENFE. As a result the Commission concluded that the applicant entity was not qualified to appear as a non-governmental entity and declared the application inadmissible.³⁵⁵

The case of Radio France against France is seminal in this regard.³⁵⁶ Here the main applicant was Radio France, a media company incorporated under the French

³⁵⁴ *Id.*

³⁵⁵ *Id.*

³⁵⁶ Radio France v. France, App. No. 53984/00, Sept. 23, 2003.

statute.³⁵⁷ The government contended that because Radio France belonged to the public sector it did not qualify as a “non-governmental organization” under the Convention and did not have the right to bring the application.³⁵⁸ The Court’s reasoning proceeded as follows: first, returning to its “negative” test, the Court defined a “governmental organization” as opposed to a “non-governmental organization.” In this respect the Court stated that the term “applies not only to the central organs of the State, but also to decentralized authorities that exercise ‘public functions,’ regardless of their autonomy vis-à-vis the central organs; likewise it applies to local and regional authorities.”³⁵⁹ Furthermore, the Court summed up and refined the principles briefly set out in *Holy Monasteries* and *RENFE*, stating:

The category of “governmental organizations” includes legal entities that participate in the exercise of governmental powers and run a public service under government control.³⁶⁰

But the court further developed the test, stressing that in order to determine whether any given legal person other than a territorial authority falls within that category, “[. . .] account must be taken of its legal status and, where appropriate, the rights that status gives it, the nature of the activity it carries out and the context in which it is carried out, and the degree of its independence from the political authorities.”³⁶¹

“Where appropriate” shows that the Court will consider factors other than formal status, once again exceeding the pure formal legal aspect of the fact of incorporation of the application entity, and thereby reinforcing its “substantive test.”

³⁵⁷ *Id.* para 1.

³⁵⁸ *Id.* para 24.

³⁵⁹ *Id.* para 26.

³⁶⁰ *Id.* para 26.

³⁶¹ *Id.*

In the decision of *Radio France v. France* the category of “degree of independence” emerged as decisively important. The applicant is still granted the status of “non-governmental” despite the fact that Radio France “[. . .] depends to a considerable extent on the State for its financing.” Yet, this fact of dependency is negated, in the Court’s view, by the fact that “[. . .] the legislature has devised a framework which is plainly designed to guarantee its editorial independence and institutional autonomy [. . .]”³⁶²

It should be emphasized that the Court changed the degree of independence required for the admissibility of applications. As indicated above in *Holy Monasteries*, the Court stated that in order for the applicant entity to be recognized as “non-governmental” it should have been “completely independent” from government. In *Radio France*, however, the French state held all the capital in Radio France, its memorandum and articles of association were approved by decree, its resources were to a large extent public, it performed “public-service missions in the general interest” (prescribed by the Act), and it was obliged to comply with terms of reference and to enter into a contract with the state setting out its objectives and means.³⁶³ However, in this case the Court moved to allowing “substantive independence.”

By discussing the specific circumstances related to the Radio’s functioning, for example the fact that it falls not under the control of the State but under the supervision of a specially created authority, and the fact that its actions are essentially governed by the company law, the Court opted for considering the applicant as a “non-government organization.” The Court thus moved beyond the “complete independence” test to a test through which it would assess step by step whether the applicant organization was substantively independent. Hence, the Court has moved

³⁶² *Id.* para 25.

³⁶³ *Id.* para 26.

from the initial “complete independence” test to a broader and less strict “substantive independence” test.

The application by Radio France was closest to being recognized as an application by a governmental agency and thus at risk of being dismissed. Nevertheless, the ECtHR stayed faithful to its initial “broad” definition of a non-governmental organization. In its words, the Court found that the national French company Radio France was a non-governmental organization “[. . .] despite the fact that the State held all of the capital in Radio France, its memorandum and articles of association were approved by a Decree, its resources were to a large extent public, it performed public service missions in general interest, and it was obliged to comply with terms of reference and to enter into a contract with the State setting out its objectives and means.”³⁶⁴

In *Islamic Republic of Iran Shipping Lines v. Turkey* (2007)³⁶⁵ the Court reaffirmed and further developed the principles already set in *Radio France*. The case was brought by a company registered in Tehran alleging that Turkey violated Article 1 of Protocol 1 of the European Convention by unlawfully seizing and detaining vessels chartered by it. The respondent raised the admissibility objection, arguing that the company was a state-owned corporation, which could not be distinguished from the Government of Iran.³⁶⁶

The Court set out through its routine negative test by clarifying the meaning of “governmental organization”³⁶⁷ and then applying the test of “governmental organization” to the applicant company. The Court affirmed that although the applicant company was wholly owned by the state at the time of lodging the

³⁶⁴ *Id.* para. 80.

³⁶⁵ *Islamic Republic of Iran Shipping Lines v Turkey*, App. No. 40998/98, Dec. 13 Dec 2007, para. 80-81.

³⁶⁶ *Id.* para. 66.

³⁶⁷ *Id.* para.79.

application, and although a majority of the members of its Board of Directors were appointed by the State, it was legally and financially independent from the State as evidenced by its Memorandum of Association. It reaffirmed the “substantive independence” test by examining both the legal and financial independence of the applicant company.³⁶⁸ And, more importantly, it reinterpreted the principle of “substantive independence” mentioned in *Radio France* to the requirement of “strict control by the State.” The Court established that “Public corporations under the strict control of a State are not entitled to bring an application under Article 34 of the Convention.”³⁶⁹ In order to strengthen its point, for the first time in this line of cases, the Court recalled the *travaux préparatoires* of the Convention by interpreting the “strict control” test in light of the object and purpose of this provision. The Court provided that the idea behind this principle was to prevent a Contracting Party from acting as both an applicant and a respondent party before the Court.³⁷⁰

Moreover, to distinguish this case from all other cases where applications were brought by public corporations, and to create a further aid for the purposes of its “independence test,” the Court devised additional criteria for judging whether a privately registered corporation is “run as a commercial business.” The court indicated that three particular circumstances would be considered in judging whether a company, even if established by a state, qualifies as “a non-governmental organization”: (a) company law essentially governs the corporation, (b) it does not enjoy any powers beyond those conferred by ordinary private law in the exercise of its activities, and (c) it is subject to the jurisdiction of the ordinary rather than the administrative courts.³⁷¹ On the one hand, with this new addition to the preexisting

³⁶⁸ *Id.* para. 80.

³⁶⁹ *Id.* para. 81.

³⁷⁰ *Id.*

³⁷¹ *Id.*

test, the Court eased its own task—it merely summed up in a separate drill the criteria applicable to companies. On the other hand, the overall exercise became even more difficult.

B. Conclusions

It should be pointed out that the analysis started from associations established by private individuals under domestic private law, in relation to which the Court had no difficulty recognizing that they were NGOs. These include profit-making entities, religious organizations, and non-profit advocacy groups. Applications from local governments and municipalities followed next, the Court finding it relatively easy to provide reasoning to decline their recognition as NGOs. As the Court moved on to considering applications by public law corporations, it was prompted to make its response more nuanced. Therefore, it continued to elaborate the concepts that it had already adopted, making them more sophisticated in response to more complicated case scenarios. Finally, as applications from companies established by state agencies under domestic private law came in, the ECtHR elaborated the admissibility test further by adding more criteria for recognition of independence from the state.

The case of *Islamic Republic of Iran Shipping Lines v. Turkey* is the last case in which the Court ended up complicating even further its own principles regarding admissibility of NGO claims. Recall that the Court started out considering the claims by entities of public law with a relatively straightforward “public functions” test. Later, as the Court continued to receive applications by public corporations of diverse natures and objectives (religious, public service delivery, media), it moved to creating more elaborate responses to their admissibility claims. Through judgments on *Holy Monasteries* and *RENFE*, the court supplemented the “public functions” test with the criteria of “monopoly / public service delivery” and “degree of independence.”

However, the types of applicant organizations became further complicated. And as the line between the state and non-state, the governmental and non-governmental, grew even harder to discern, the Court became more and more stranded in its attempt to draw a strict line between “governmental” and “non-governmental” organizations, and in the case of *Radio France v. France* it had to change its previous test and suggest a more comprehensive one. At this point the Court remained concentrated on the “negative-substantive test” for public law corporations. However, in *Islamic Republic of Iran*, having first based its judgment on the negative-substantive test for public law corporations, the Court realized that the nature of the applicant was different. As opposed to those in previous cases, the applicant here was registered and run under domestic company law.

Furthermore, it must be stressed that in this process of interpretation the Court referred to the *travaux préparatoires* of the Convention only once. In other instances, as the Court moved forward with elaborations of the admissibility test, it did not deem it necessary to refer to the intentions of the Convention drafters or relevant discussions. The Court aspired to create new approaches to the sophisticated and hybrid entities that present the Court with a set of new challenges. Therefore, the Court moved ahead with creating concepts that can serve as useful tools in dealing with new legal issues.

One should also keep in mind the fact that the Court does not differentiate between profit-oriented and non-profit organizations in recognizing them as NGOs. Instead, the Court places importance on the category of “degree of independence” from the government. The “degree of independence” first emerged as a separate criterion in the case of *Holy Monasteries*, where the entities were “completely independent.” The determination, did not however, remain static. The court reformulated it in the case of *Radio France*, where the fact of “substantive

independence” was sufficient. In *Iranian Shipping Lines* the test was relaxed further, when the Court stated that only claims made by entities “strictly controlled by the State” would be inadmissible.

With this changed definition the Court achieved several outcomes. First of all, the threshold for admissibility of claims by organizations was lowered. In the beginning the entity should have been completely independent from the state to be admitted, but later claims by organizations of lesser independence were also held acceptable as long as they were not “strictly controlled” by the state. Second, in lowering and relaxing the threshold, the Court acknowledged that it is unfeasible to maintain the strict admissibility test in an environment in which the nature of applicant organizations is becoming more and more hybrid. By reviewing the applications of organizations active in various new areas, whether religious affairs, media, or commerce, many of which retained characteristics of both governmental and non-governmental entities, insistence on “complete independence” from the state would result in turning down and alienating them. In a world in which the trend toward the blurring of public–private lines could not be reversed, the Court opted for admitting their grievances.

No doubt, by maintaining a broad definition of NGOs the Court facilitated submission of more such claims, even in instances where the organization was established by the state, where the capital was owned by the state, and where the resources were to a large extent public. This self-serving strategy by international tribunals of incrementally increasing their caseload and authority is familiar to scholars of judicial politics.³⁷² Nevertheless, the European Court of Human Rights

³⁷² See, for example, Robert O. Keohane, Andrew Moravcsik and Anne-Marie Slaughter who argue that “transnational dispute resolution seems to have an inherently more expansionary character” in *Legalized Dispute Resolution: Interstate and Transnational*, in *INTERNATIONAL LAW AND INTERNATIONAL RELATIONS* 133 (BETH A. SIMMONS & RICHARD A. STEINBERG EDS., 2007).

continues to engage in it despite widespread criticism of its backlog and recognition that the backlog of cases resembles “a catastrophe.” Whether these moves by the ECtHR can inform us substantially about the politics of judicial expansion is a question worthy of a separate study.

Chapter V: Domestic Legal Origins of Amicus Curiae Procedure

The Principles of Transnational Civil Law, a codification of internationally accepted “best practices” of civil procedure by the influential American Law Institute and UNIDROIT, put forth the following description of the *amicus curiae* procedure:

Written submissions concerning important legal issues in the proceeding and matters of background information may be received from third persons with the consent of the court, upon consultation with the parties. The court may invite such a submission. The parties must have an opportunity to submit written comment addressed to the matters contained in such a submission before the court considers it.³⁷³

The commentary to the Principles indicates that in general civil law, nations do not possess a practice of allowing *amicus curiae* submissions, though some countries from civil law tradition, such as France, have developed the practice in their case law.³⁷⁴

Amicus curiae intervention practice has been an integral part of English law and practice. Some sources reveal that the practice of *amicus curiae* or “friend of the court” has existed in England since at least Edward I.³⁷⁷ Other sources indicate that the practice was enacted in 1403 by Henry IV, who mandated that any layperson or stranger might petition the Court as “*amicus curiae*,” or as one “who assists the court, upon the case already before it, by acting as an adviser, or by calling the court’s attention to law, or to facts and circumstances that may have escaped consideration.”³⁷⁸

³⁷³ PRINCIPLES OF TRANSNATIONAL CIVIL PROCEDURE, UNIDROIT & The American Law Institute, 32 (2006).

³⁷⁴ *Id.* at 33.

³⁷⁷ SIR FREDERICK POLLOCK AND FREDERICK WILLIAM MAITLAND, HISTORY OF ENGLISH LAW 216 (2nd Ed. 1898).

³⁷⁸ K.F. O’Leary, *The Attorney General and the Role of Amicus Curiae*, 54 THE AUSTRALIAN LAW J. 559 (1980).

Although the practice, mirroring its predecessor, involved only the barristers or counselors, by the statute of Henry IV, “a bystander” was also endowed with the possibility of amicus curiae functions including “instructing, warning, informing, and moving the court.”³⁷⁹

Amici did not have an entitlement to intervene. However, the discretion was wide, for amicus interventions took place for different purposes, including relieving problems created by an adversarial system.³⁸⁰ Moreover, amicus interveners were allowed to expand their role from neutral informers of the Court, on matters that the Court would have otherwise overlooked, to advocates of parties, whose interests might have been prejudiced by the impending judgment.³⁸¹ Samuel Krislov cites a number of early English cases that refer to the participation of amici curiae.³⁸²

Indeed, amicus curiae submissions are customary in a number of countries that share the fundamental principles of common law, including the United States, Canada, the United Kingdom, and Australia. As Professor Michael Reisman wrote in 1970, “In common law countries, the amicus curiae brief has been an institution which has provided useful information to courts, permitted private parties who were not litigating to inform the court of their views and the probable effects the outcome might have on them and, overall, has served as means for integrating and buttressing the authority and conflict-resolving capacities of domestic tribunals.”³⁸³

In the United States, the procedural institution of amicus curiae has a long, rich history. For instance, Rule 29 of the Federal Rules of Appellate Procedure establishes the process in accordance with which entities can file amicus briefs in the US

³⁷⁹ *Id.* at 188.

³⁸⁰ Samuel Krislov, *Amicus Curiae Brief: From Friendship to Advocacy*, 72 Y. L. J. 694, 696 (1963).

³⁸¹ *Id.* at. 697.

³⁸² *Id.* at 695.

³⁸³ Roger S Clark, *The International League for Human Rights and South West Africa 1947-1957: Human Rights NGO as Catalyst in the International Legal Process*, 3 HUM. RTS. Q. 115, 119 (1981).

appellate courts.³⁸⁴ Rule 37 of the Supreme Court Rules indicates the methods for filing amicus briefs before the US Supreme Court.³⁸⁵ Scholars have extensively written on the amicus curiae institution.³⁸⁶

The Canadian Supreme Court has allowed amicus curiae interventions since the first rules of procedure were adopted in 1878.³⁸⁷ Further, amicus curiae interventions also have a long history in Australia.³⁸⁸ The amicus curiae participation procedure has also been accepted recently by countries of civil law tradition. For instance, Mitchel Lasser indicates that amicus curiae style petitions have recently become acceptable in France.³⁸⁹

³⁸⁴ Rule 29, Federal Rules of Appellate Procedure, Dec. 1, 2011.

³⁸⁵ Rule 37, Rules of the Supreme Court of the United States, adopted Jan. 12, 2010.

³⁸⁶ See Karen O'Connor & Lee Epstein, *Court Rules and Workload: A Case Study of Rules Governing Amicus Curiae Participation*, 8 JUST SYS. J. 35 (1983).

³⁸⁷ Amanda Jane Burgess, *Intervenors Before the Supreme Court of Canada, 1997-1999: A Content Analysis* (2000).

<http://www.collectionscanada.gc.ca/obj/s4/f2/dsk2/ftp03/MQ62193.pdf>

³⁸⁸ Jason Pierce, *The Road Less Travelled: Non-Party Intervention and Public Litigation Model in the High Court*, 28 ALTERNATIVE L. J. 69 (2003); See, also, Ronnit Redman, *Litigating for Gender Equality: The Amicus Curiae Role of the Sex Discrimination Commissioner*, 27 U.N.S.W.L.J. 849 (2004); For a discussion of the amicus curiae in Australia, see, George Williams, *The Amicus Curiae and Intervener in the High Court*, 28 FEDERAL LAW REVIEW 1 (2000).

³⁸⁹ MITCHEL DE S.-O.-I' E. LASSER, *JUDICIAL TRANSFORMATIONS: THE RIGHTS REVOLUTION IN THE COURTS OF EUROPE* 246 (2009).

Chapter VI: Internationalization of Amicus Procedure to the ECtHR

In the middle of the nineteenth century a French commentator to the old *Napoleonic Code de Procédure Civile* wrote, “*Ilest quasi impossible d’exporter des institutions de la Procédure civile: iln’existeaucuneexemple de réussite à cetégard.*”³⁹⁰ In other words, “it’s nearly impossible to export civil procedure institutions: there isn’t a sole example of success in this regard.” The aim of this section is to refute this claim specifically and to illustrate how the procedure for amicus curiae intervention was internationalized from the United Kingdom to the European Court of Human Rights.

Internationalization of procedural change occurs in three stages. Initially, at the stage of “norm externalization,” domestic actors externalize the norm from domestic law and practice to an international setting. At this stage the communication between the actors and the decision-makers takes place. Actors use persuasion strategies, leverages, and allies to convince the decision-makers to implement the procedure. The next stage is “piloting.” After successful persuasion, both decision-makers and actors proceed to piloting, during which stage the decision-makers and the entrepreneurs implement the practice without the relevant legal foundation. It is a tryout of the procedure and at the same time a form of concession from the decision-makers to the interveners. Piloting meets the instrumental needs of the interveners. Piloting can encounter resistance from other parties with more established interests. Decision-makers aspire to retain control over the piloting stage by setting the boundaries for the activities of actors, and by making sure that piloting is not perceived as a precedent for a permanent representation of interests. After piloting, the decision-makers move to adoption.

³⁹⁰ MASAHIISA DEGUCHI & MARCEL STORME (EDS.), *THE RECEPTION AND TRANSMISSION OF CIVIL PROCEDURAL LAW IN THE GLOBAL SOCIETY: LEGISLATIVE AND LEGAL EDUCATIONAL ASSISTANCE TO OTHER COUNTRIES IN PROCEDURAL LAW* 134 (2008).

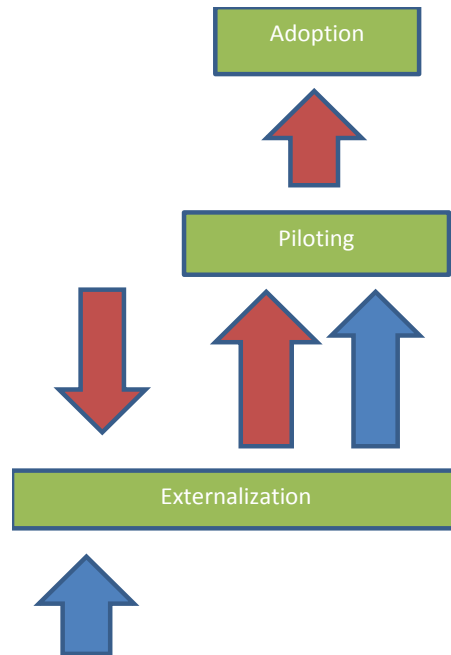


Figure 1. The internationalization of domestic procedure. Blue arrows denote domestic actors; red arrows, international actors.

In the present instance, piloting took place after the persuasion efforts by the allies and the interveners succeeded and the Court allowed for the interveners' documents to be circulated. The piloting phase builds on a precedent. However, the decision-makers are careful to retain control over the stage of piloting and not to promise precedent-setting. The difference between successful and unsuccessful attempts allows us to conclude that the Allies and Persuasion Strategies built on possession of allies are paramount for successful internationalization.

During piloting, actors and decision-makers implement innovative procedures. This stage is characterized by flexibility of terms. Therefore, it gives actors some room to maneuver. Actors and decision-makers might encounter resistance from other parties to the innovation in practice. Decision-makers maintain control over the process by emphasizing the uniqueness of the situation and avoiding the impression of setting a precedent.

A. The Initial Structure of the Court

The initial structure of the ECtHR allowed neither for the right of individuals to address the Court nor for the right of third parties to request that the Court hears their views. The procedure operated on the basis of a similar provision incorporated into the Rules of Procedure in 1982. On November 24, 1982, the judges of the Court held a plenary session in which they adopted the revisions to the procedural rules.³⁹¹ The new Rule 37 in Chapter III established the possibility of intervention by third persons. Clause 2 stated:

The President may, in the interest of proper administration of justice, invite or grant leave to any Contracting State that is not a Party to the proceedings to submit written comments within a time limit and on issues that he shall specify. He may also extend such an invitation or grant such a leave to any person concerned other than the applicant.³⁹²

The procedural amendment of 1983 instituted two important changes. First, the entities other than parties (i.e., States) acquired the right to request the intervention in cases. The President of the Chamber would agree to such request or decline it. Previously, it was only up to the Chamber to invite such persons to intervene. Second, third parties became entitled to make written submissions. Prior to the amendment, entities other than parties were able to make oral representations before the Court when asked to do so. The section below outlines in detail the framework for participation in the Court proceedings prior to the 1983 amendment.

The Court's initial structure allowed for a number of forms of individual participation. Subjects allowed to participate in the proceedings were (a) parties to the case, and their agents; (b) Commission delegates, advisers, and aides; (c) witnesses; (d) experts; and (e) other persons, whom the Chamber would decide to invite.

³⁹¹ YEARBOOK OF THE EUROPEAN COURT OF HUMAN RIGHTS, Vol. 25, 1982, 3 (1986).

³⁹² Eur. Court Gen. 17, Revised Rules of the Court, Council of Europe, YEARBOOK OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS, Vol. 25 (1982).

Article 25 of the Convention and the relevant Rule 26 provided the right of persons, groups of individuals, and non-governmental organizations to submit applications before the Commission. However, the initial version of the Rules of the Procedure did not allow direct participation of applicants in the proceedings before the Court.³⁹³ In the initial version of the Rules of Procedure, even the issue of whether victims have the right to appear before the Court in the capacity of witness was equivocal. The preparatory working paper drafted by the Directorate for Human Rights laying the groundwork for the Rules of Procedure to be adopted by the Court's judges inquired whether individuals who appealed before the Commission or victims had the right to appear before the Court in the capacity of witness.³⁹⁴ On the other hand, the Court's capability to summon witnesses and experts was not questioned.³⁹⁵

The initial version of the Court's Rules defined as Parties as "Those Contracting Parties which are the Applicant and the Respondent Parties."³⁹⁶ Parties could be represented by Agents, who, in turn, may have been assisted by advocates or advisers.³⁹⁷ Rule 1 of the 1982 Rules, titled "definitions," did not mention third parties. The Rules define the term "Parties" as "those Contracting Parties which are the Applicant and Respondent Parties."³⁹⁸ The legal standing as parties has remained limited just to States, parties to the Convention.

Rule 29 allowed the Commission to appoint one or more of its members as Delegates before the Court. Rule 29 (1) indicated that the Delegates, chosen by the

³⁹³ Art. 44, the European Convention.

³⁹⁴ *Preparatory Working Paper drafted by the Directorate of Human Rights*, European Court of Human Rights, First Session, Council of Europe, Feb. 16 1959, CDH (59)1 at 23.
<http://www.echr.coe.int/library/DIGDOC/Travaux/ECHRTTravaux-ART55-CDH%2859%291-EN3811033.pdf>

³⁹⁵ *Id.* at 38.

³⁹⁶ Rule 1, at 2. Revised Rules of the Court (adopted on 24 November 1982), Rule 1, Yearbook of the European Convention on Human Rights, Council of Europe, Vol.25, 5 Eur. Court Gen.

³⁹⁷ *Id.* Rule 28.

³⁹⁸ *Id.* Rule 1.

Commission to take part in presenting the case before the Court, “may be assisted by other persons.”³⁹⁹

Participation in the proceedings was open to other persons as well, as long as they were called upon by the Chamber. The Chamber was entitled to “. . . Hear as a witness or expert or in any other capacity any person whose evidence or statements seem likely to assist it in the carrying out of its task.”⁴⁰⁰ However, this possibility could be triggered only by the initiative of a Party, Commission Delegates, or the Chamber itself.⁴⁰¹ Rule 39 detailed the procedures for summoning experts, witnesses, and any other persons that the Chamber requested and apportionment of relevant expenses.⁴⁰²

Rule 39 (conduct of the hearings) indicated that the President of the Chamber will prescribe the order within which various actors speak in the Court. It is noteworthy that persons assisting the Commission’s delegates were entitled to speak before the Court.⁴⁰³ The Parties could object to hearing a witness or an expert. Nevertheless, the Court retained to hear the person who could not be heard as a witness “for the purpose of information.”⁴⁰⁴

³⁹⁹ Rule 29 (1), Eur. Court Gen. 17, Revised Rules of the Court, Yearbook of the European Convention on Human Rights, Vol. 25, 1982.

⁴⁰⁰ *Id.* Rule 38.

⁴⁰¹ *Id.*

⁴⁰² *Id.* Rule 39.

⁴⁰³ *Id.* Rule 39.

⁴⁰⁴ *Id.* Rule 41.

Table 1 The Court's Structure Prior to Amendments of 1982

Component	Rule
Parties	<p>Rule 1</p> <p>“Parties” defined as State Parties.</p>
Witnesses & Experts	<p>Rule 38 (inquiry, expert opinion and other measures for obtaining information) The Chamber may, at the request of a Party or of Delegates of the Commission or proprio motu, decide to hear as a witness or expert on any other capacity any person whose evidence or statements seem likely to assist it in carrying out its task.</p> <p>Rule 39 (conduct of the hearings) The President of the Chamber will prescribe the order within which various actors speak in the Court. Third parties are not mentioned.⁴⁰⁵</p>
Commission Delegates	<p>Rule 29 (1) (Relations between the Court and the Commission) Commission Delegates can be assisted by other persons.</p>
Other persons	<p>Rule 38 (inquiry, expert opinion and other measures for obtaining information) The Chamber may, at the request of a Party or of Delegates of the Commission or proprio motu, decide to hear as a witness or expert or <u>any other capacity any person</u> whose evidence or statements seem likely to assist it in carrying out its task.</p>

The European Convention recognized the procedure in 1998 when, in addition to other reforms in the Convention structure, the newly adopted Article 36 (2) granted

⁴⁰⁵ *Id.* Rule 39.

to states, individuals, and organizations that are not party to the proceedings the right to intervene. Article 36(2) stipulates:

The President of the Court may, in the interest of the proper administration of justice, invite any High Contracting Party which is not a party to the proceedings or any person concerned who is not the applicant to submit written comments or take part in hearings.⁴⁰⁶

Two authors, Anthony Lester and Paul Mahoney,⁴⁰⁷ both of whom have had a close relationship with the Court, indicate that the initial change in relation to the rules was made in the light of three cases in which the Court consented or declined to receive representations from a “third party.” The insights of these individuals acquire even greater importance when considering that the *travaux preparatoires* of the Rules of Procedure are confidential.⁴⁰⁸ Both commentators personally took part in the cases at hand. At the time when the facts unfolded, Paul Mahoney worked as an Administrator at the Court. In fact, he signed one of the letters on behalf of the Registrar in his absence.⁴⁰⁹

Anthony Lester is a QC, a practicing barrister, and a member of Blackstone Chambers, London. He is a member of the House of Lords (Lord Lester of Herne Hill) and Co-Founder and Honorary President of Interights (The International Centre for the Legal Protection of Human Rights).⁴¹¹ He has been involved in an extensive number of cases before the European Court of Human Rights and has been a prolific author on the subject of the European Court. Lester argued one of the first cases at the Human Rights Commission, soon after the Government had accepted the Court’s compulsory

⁴⁰⁶ Art. 36(2), the European Convention.

⁴⁰⁷ See Paul Mahoney, *Developments in the Procedure of the European Court of Human Rights: The Revised Rules of the Court*, YEARBK. EUR. L. , 141-154 (1983).

⁴⁰⁸ Letter from the Registry of the Court to the author, available with the author.

⁴⁰⁹ *Id.*

⁴¹¹ Anthony Lester, *The European Court of Human Rights After 50 Years*, University of Copenhagen, March 21, 2009, note 1, www.blackstonechambers.com/document.rm?id=274

jurisdiction. At that time, the Court had decided only one case: *Lawless v. UK*.⁴¹²

However, the commentators have not provided specific accounts and details about the change. By putting forth the account of the emergence of this procedure, this chapter will remedy the gap.

Before 1983, there were three informal attempts, one unsuccessful and two successful, to intervene as a third party before the Court. All three instances originated from the United Kingdom. The first request for intervention took place on June 22, 1977, in a case known as *Tyrer v. the United Kingdom*. The second attempt to intervene was in the case of *Winterwerp v. the Netherlands*. The third intervention took place in *Young, James, and Webster* on January 30, 1981.

B. Tyrer v. the United Kingdom

The *Tyrer v. the United Kingdom* intervention is not mentioned in official case reports because the attempt was unsuccessful in that the actors did not persuade the decision-makers to adopt their claims. However, relevant case files do contain correspondence between the parties.

The actors were established organizations, or individuals who acted on behalf of the organizations. In addition, the actors in the case at hand were legal professionals and possessed expertise in the domestic law of the UK, of which the amicus curiae procedure was an integral part.

At the age of 15, Anthony Tyrer was subjected to three strikes of the birch on the Isle of Man, a punishment imposed by the local juvenile court. Tyrer's birching took place at a police station, where his father, a doctor, and some police officers were present. After the birching, Tyrer contacted the National Council for Civil Liberties,

⁴¹² Anthony Lester, *The European Court of Human Rights After 50 Years*, University of Copenhagen, 4 March 21 2009, available at www.blackstonechambers.com/document.rm?id=274

which put forth the complaint before the European Court of Human Rights on the day Tyrer turned 16.⁴¹³ The applicant alleged, amongst other complaints, that his birching violated Article 3 (prohibition of torture) of the European Convention.⁴¹⁴

Tyrer was represented by Cedric Thornberry, who acted on behalf of the National Council for Civil Liberties (NCCL).⁴¹⁵ The NCCL, founded in 1934, was one of the oldest legal advocacy organizations in the United Kingdom. At the time of Tyrer's request, it already had a rich history of defending civil rights through litigation.⁴¹⁶ Cedric Thornberry was himself a barrister and Lecturer in Law. He appeared alongside Tyrer's other counsel, all of whom were UK-trained lawyers: W.A. Nash, Legal Officer for the NCCL; L. Grant, of the Law Clinic of the University of Kent at Canterbury; and Nigel Rodley, Legal Officer of Amnesty International (acting in private capacity).⁴¹⁷

However, in January 1976, Messrs. Dickinson, Cruikshank and Co., solicitors based on the Isle of Man, notified the Commission that the applicant wished to withdraw his application and had already withdrawn his instructions from the NCCL,⁴¹⁸ but the Commission declined the applicant's request.⁴¹⁹ The Court defied public opinion and the will of the nominal applicant himself, who seemed to agree that the punishment was justified. Even without the applicant's consent, the Commission decided that the merits of the case deserved closer examination. Tyrer's family friend, Susan Kelly, when commenting on the case, indicated that Tyrer always believed that the birching was justified. He was "totally mystified and annoyed about the whole

⁴¹³ Tyrer v. The United Kingdom, Apr. 25, 1978, para 109.

⁴¹⁴ Anthony M. Tyrer against the United Kingdom, Report of the Commission, adopted on 14 December 1976, App. No. 5856/72, Series B, no. 24, at 12.

⁴¹⁵ The organization was later renamed into Liberty. Liberty <http://www.liberty-human-rights.org.uk/about/index.php>

⁴¹⁶ *Id.*

⁴¹⁷ Series B. Vol. 24, Report of the Commission at 13.

⁴¹⁸ *Id.*

⁴¹⁹ *Id.* at 8.

matter.”⁴²⁰ The British judge on the bench, Sir Gerald Fitzmaurice, had written a powerful and memorable dissent.⁴²¹

The UK submitted that the case should be struck from the list, because, *inter alia*, in the future, some forms of corporal punishment were to be abolished by legislation. Nevertheless, both the Commission and the Court opposed striking the case from the list. The Court reasoned that the suggested move by the respondent did not address the fundamental question raised by the case, whether “the corporal punishment as inflicted on the applicant in accordance with Manx legislation is contrary to the Convention.”⁴²²

On March 21, 1977, Cedric Thornberry, on behalf of the NCCL, inquired with the Registrar about the opportunity to intervene before the Court.⁴²³ With the response on March 25, 1977, the Registrar explicated that only the Chamber could, *proprio motu*, invite any person to be heard before the Court. Alternatively, the Commission could decide to employ the assistance of any individual it deemed necessary.⁴²⁴

Following the instructions by the Registrar, Thornberry pursued the matter further with the Secretary of the Human Rights Commission. In a letter on March 31, 1977, he requested “audience” with the Court, despite the “somewhat mysterious events of early 1976 when the Applicant purported to withdraw his petition.” The Council had been involved in preparing the applicant’s submission, and would appreciate it if the Commission would consider its involvement in the case necessary.⁴²⁵ The Commission’s Secretariat responded that considering that the

⁴²⁰ MICHAEL D. GOLDBERGER, A PEOPLE’S HISTORY OF THE EUROPEAN COURT OF HUMAN RIGHTS 102 (2009).

⁴²¹ William Dale, *Human Rights in the United Kingdom- International Standards*, INT’L. & COMP. L. QRTLY. XXV, 292, 302 (1976).

⁴²² Series A, Vol. 26, para.26.

⁴²³ Letter from the Registrar of the Court to Mr. Cedric Thornberry, Strasbourg, 25 March, 1977, Series B. Vol. 24, at 43.

⁴²⁴ *Id.*

⁴²⁵ Letter from Mr. Cedric Thornberry to the Registrar of the Court, 22 June 1977, Annex I, Series B. at 45.

applicant had withdrawn his instructions from the NCCL, it would not be “appropriate” to request its assistance for the hearing.⁴²⁶

Having been rejected this time by the Commission, Mr. Thornberry wrote again to the Registrar of the Court. This time he annexed a Memorandum to the letter, elucidating certain questions related to the case that otherwise might not become available. In addition, on behalf of the NCCL, he requested the opportunity to develop the issues in oral submission.⁴²⁷ On June 29, the Court’s Registrar explained that the memorandum could not be treated as part of the official case file because the Commission had declined the participation of the organization, which was entirely in the hands of the Court. The Registrar assured Mr. Thornberry that the letter along with the enclosures would be transmitted to the President of the Chamber. However, they could not be treated as part of the official case file.⁴²⁸ In a follow-up letter to Mr. Thornberry, the Court’s Registrar informed him that the Court had decided not to hear the Council’s position at the public hearings.⁴²⁹

Communication with the NCCL, however, remains mostly entirely in writing with one exception: Mr. Thornberry and Mr. Eissen, the Court’s Registrar, met in person in Strasbourg on October 13, 1977.⁴³⁰

C. Winterwerp v. Netherlands

The first intervention that the Court welcomed was by Eileen Denza, Agent on behalf of the UK government. Ms. Eileen Denza, now a Professor at the University College London, was a member of the Bar at Lincoln’s Inn and worked as a Legal

⁴²⁶ *Id.* Annex II.

⁴²⁷ Series B. Vol. 24 at 44.

⁴²⁸ *Id.* 47.

⁴²⁹ *Id.* 51.

⁴³⁰ *Id.*

Adviser at the Foreign and Commonwealth Office.⁴³¹ She had a Master's Degree in Jurisprudence from Oxford University and a Master's Degree in Law (LLM) from Harvard.⁴³²

The *Winterwerp v. the Netherlands* (1979) case concerned the lawfulness of detention under Article 5(4) of the applicant, a mentally unstable citizen of the Netherlands. The Commission submitted the report to the Court, emphasizing that both the applicant and the respondent Dutch government agreed that lawfulness of the procedural and substantive bases of detention was subject to the Court's scrutiny. This interpretation contravened the position of the UK, against which similar cases were pending before the Commission. Thus, the UK sought to prevent a precedent that would adversely impact its national policies.⁴³³ Eileen Denza, the Agent of the UK government in the case of *X v. the United Kingdom*, requested the possibility of intervention.⁴³⁴ Because the views of the Commission and the UK government diverged on important issues, the Agent asserted that the UK government's views could only be properly presented directly to the Court and not through the Commission.⁴³⁵

The UK Agent chose a different strategy in *Winterwerp*. Even after multiple rejections, the Agent persevered with the requests just with the Court and modified the claims. In terms of outcomes, the latter approach turned out to be more favorable, for the Court allowed the submission of written opinions.

The UK Government took a different strategy in pursuing their intervention. In a letter dated November 1, 1978, the Agent for the UK, Ms. Denza, asked the Court to

⁴³¹ UCL Laws Research: Academics

http://www.ucl.ac.uk/laws/experts/academics.shtml?z_denza [03.12. 2012 11.30 PM]

⁴³² United Nations Audiovisual Library of International Law, Aileen Denza, <http://untreaty.un.org/cod/avl/pdf/ha/notewriters/denza.pdf>

⁴³³ *Winterwerp v. The Netherlands*, App. No. 6301/73, 24 Oct. 1979, para. 7.

⁴³⁴ Series B. Vol. 31 at 65.

⁴³⁵ *Id.* 68.

hear the UK Government's oral submissions under Article 38.1 of the Rules.⁴³⁶ The Court's response was similar to its reaction in *Tyrer*. The Registrar advised the UK Government Agent to submit the views through the Commission Delegates, pursuant to the procedures envisaged in the Rules.⁴³⁷ However, in contrast to the reaction by Mr. Thornberry in *Tyrer*, the UK Government Agent did not comply with the recommendation and persisted with her position, “. . . The United Kingdom Government believes that their position could only be adequately safeguarded by the opportunity to present their argument orally to the Chamber through their own representative.”⁴³⁸

The Agent requested that the Court hearings be adjourned until the judges decided whether to allow UK intervention in the case or not.⁴³⁹ The Court rejected this request as well. Having learned of the rejection, the Agent expressed disappointment on behalf of the UK Government.⁴⁴⁰ Later, the Agent modified the claim, requesting that the Court proceedings not be closed on the scheduled date. Leaving the proceedings open formally would allow the UK Government to submit the Government's views, which would “go some way to protect the position of the United Kingdom.”⁴⁴¹

The Court met the position favorably. Although the original request would not be satisfied, the Court did deem it appropriate to allow the UK Government to submit its written views through the Commission “during or soon after the hearings fixed for 28 November.”⁴⁴² The President of the Court implemented this promise with his

⁴³⁶ Series B, Vol. 31, at 65 (1983).

⁴³⁷ *Id.* 67.

⁴³⁸ *Id.* 68.

⁴³⁹ *Id.*

⁴⁴⁰ *Id.* 69.

⁴⁴¹ *Id.*

⁴⁴² Series B, Vol. 31, at 70.

announcement at the end of the public hearing and through subsequent correspondence.⁴⁴³

In *Winterwerp*, the UK Government Agent acknowledged possessing “no right to intervene” in the case. Nonetheless, he suggested making use of Rule 38(1). According to the argument put forward by the UK representative, if the judges so desired, they could call on this representative to make submissions on the proper interpretations of the convention article in question.⁴⁴⁴ At the same point, the representative promised to confine the submissions to the question of Article 5(4) and not extend them to other cases.⁴⁴⁵ The agent made a plea that the Court hear the party’s legal submission “in the interest of justice.”⁴⁴⁶

However, in *Winterwerp*, the very first letter in the case files contained signs of prior informal communication between the Government and the Court. In the initial letter to the Registrar of the Court, a representative of the UK government in the case *X v. the UK* wrote, “David Anderson has already spoken to you informally about the concern . . .”⁴⁴⁷ At the time, David Anderson served as a Legal Counselor in the Foreign and Commonwealth Office.⁴⁴⁸

In another period that involved negotiation processes with the Court, the Agent for the UK indicated that there had been a telephone communication between the negotiating parties, in addition to the written correspondence. In a letter to the Court dated November 21, 1978, the agent wrote, “I have been informed by telephone that the President of the Chamber has not felt able to agree to the request of the United Kingdom Government . . .”⁴⁴⁹

⁴⁴³ *See infra*

⁴⁴⁴ Series B, Vol. 31, 65 (1983).

⁴⁴⁵ *Id.* at 66.

⁴⁴⁶ *Id.* at 66.

⁴⁴⁷ *Id.* at 65.

⁴⁴⁸ *Tyrer v. the United Kingdom*, App. No 5856/72, Apr. 25, 1978, para. 7.

⁴⁴⁹ Series B, Vol. 31, 69 (1983).

Informal communication between the Court and the Agent for the UK continued. In a letter written the next day, the Court's Registrar indicated that a later telephone conversation on November 21 had taken place between Paul Mahoney, an employee of the Registrar, and the Agent's office: "The present reply is to confirm the information communicated to your Government by Mr. Mahoney of the registry in his telephone conversation yesterday with your colleague Mrs. Glover."⁴⁵⁰

Informal communications continued after the hearing. At the conclusion of the public hearing on December 5, 1978, the Court's Registrar wrote to the Agent of the UK, acknowledging previous communication again by telephone, "in confirmation of what Mr. Petzold told you by telephone on 24 November last."⁴⁵¹

In a later letter from the UK Agent to the Commission, in which the Agent requested an extension of a time limit to file a written statement, the Agent noted that "the President of the Court has indicated informally that there will be no difficulty in meeting this request but has asked that it should be formally be transmitted to you."⁴⁵²

In the *Winterwerp* case, the submissions of the interveners were circulated through the Commission. Sir James E.S. Fawcett, the President of the Commission, who also served as the Commission delegate to the Court, appealed to the Court to hear the intervener's submission.

Sir James Edmund Sandford Fawcett, Q.C. was elected as the Member of the Commission on January 30, 1962, to replace Sir Humphrey Waldock, the previous Commissioner from the UK. At the time of election, Sir Fawcett was a Bursar of All Souls College, Oxford.⁴⁵³ On June 30, 1979, the Committee of Ministers re-elected Sir

⁴⁵⁰ *Id.* at 70.

⁴⁵¹ *Id.* at 110.

⁴⁵² *Id.* at 113.

⁴⁵³ YEARBOOK OF THE EUR. CON. H.R. 38 (1962).

Fawcett as a member of the Commission; the previous year, on July 7, 1978, they re-elected him as President. His term was to expire on May 17, 1984.⁴⁵⁴

As the President of the Commission and the Commission's Principal Delegate, Fawcett appeared before the Court to present the case and the rationale behind the Commission's decision.⁴⁵⁵ This time the Commission's decision was unanimous.⁴⁵⁶ The main objective behind bringing this case before the Court was the Commission's request for the Court to interpret Article 5.1 and 5.4 of the Convention, particularly to specify the scope of review necessary to satisfy the requirements of the condition involving "lawful detention of persons of unsound mind" under the respective article.⁴⁵⁷ The bigger issue at stake was whether the psychiatric detention should have been subject to judicial review or left under the jurisdiction of the administrative authorities.⁴⁵⁸

Fawcett's efforts to persuade the Court to become acquainted with the UK submissions are evident from the record of public hearings. In one of his addresses to the Court, Fawcett mentioned the impact that the Court's judgment would have on psychiatric detention in countries other than the Netherlands, mentioning the request of the UK government to present its views on the legal interpretation of Article 5.4. He suggested that if the Court would interpret the article so that it would have implications for countries other than the Netherlands, the Court should consider leaving the proceedings open so as to allow submission of opinions by the UK Government: "We believe that this would be of assistance and we believe that, when

⁴⁵⁴ YEARBOOK OF THE EUR. CON. H.R. 38 (1978).

⁴⁵⁵ Series B, Vol. 31, 72 (1983).

⁴⁵⁶ *Id.* at 11.

⁴⁵⁷ *Id.*

⁴⁵⁸ *Id.* at 73.

the Court is making possibly a wider interpretation . . . it is important that the counter-arguments be fully presented.”⁴⁵⁹

In fact, the Court’s President explicitly relied on the efforts by Commissioner Fawcett in his decision to extend the time limits of the proceedings and to allow the UK Government to make a written submission. At the end of the public hearing, the President of the Court announced:

Based on the suggestions by the President of the Commission, I will not declare the procedure closed. I declare it only provisionally closed so as to allow the Commission, should it consider it useful to submit to us another document from . . . the British Government. The Commission could submit this document, within . . . let us say, a fortnight.⁴⁶⁰

Reliance on Fawcett’s request was repeated in a follow-up letter from the Court, with which the Court fixed the specific conditions for the British Government’s submission: “The Chamber, after duly considering your Government’s request and the submission made by the President of the Commission at the public hearing on 28 November, has decided that the proceedings in the Winterwerp case should not be formally closed for the present.”⁴⁶¹

After hearing the request by the President of the Commission, the President announced his decision to extend the time limit for the proceeding and, with this gesture, to allow the UK Government to make their submissions:

And possibly it [British Government submission] might be submitted with some comments from the Commission. In any event, I am not at present in a position to indicate what the further procedure will be; we must wait and see.⁴⁶²

⁴⁵⁹ Series B, Vol. 31, 100 (1983).

⁴⁶⁰ *Id.* at 107.

⁴⁶¹ *Id.* at 110.

⁴⁶² *Id.*

Within his final statement, the President outlined the main principle that would be relevant at that particular stage. At this moment of uncertainty, it would be important to continue to safeguard interests of the parties appearing in the case: “It is only then that we shall be able to take a final decision as to the closure of the oral procedure.”⁴⁶³

The flexibility of that stage is also shown in the lack of fixed boundaries in terms of time limits. The Court’s President set the initial time limit at his statement during the hearing, using expressions in relation to fixing the time limit that illustrate that the time limit was flexible. The President stated, “. . . [t]he Commission should submit this document, within, let us say, a fortnight . . .”⁴⁶⁴ The term was more a suggestion that required an agreement, rather than a determination, for Sir Fawcett replied, “[Y]es, I believe that is possible, Mr. President.”⁴⁶⁵

Subsequent events confirmed that the time setting was adaptable. The UK government made two requests to extend the time limit, both of which were satisfied by the Court. First, the Government Agent requested that the deadline be moved from December 13 to December 22. This extension had been informally negotiated with the President of the Court.⁴⁶⁶ Later, the Government asked for the second extension, having realized that postal service would be delayed over the Christmas holidays. The Government asked for the time limit to be extended until January 5.⁴⁶⁷ Both extensions were granted on the same day.⁴⁶⁸ Therefore, the Commission sent the UK Government’s submission to the Court on January 5, 1979.⁴⁶⁹

⁴⁶³ *Id.*

⁴⁶⁴ *Id.* at 107

⁴⁶⁵ *Id.*

⁴⁶⁶ *Id.* at 112-113.

⁴⁶⁷ *Id.*

⁴⁶⁸ *Id.* at 112.

⁴⁶⁹ *Id.* at 114.

The Court itself acknowledged the presence of specific case-related interests. In a letter explaining to the representatives of the Trades Union Congress (TUC) why the Court had decided to hear the UK government in the case of *Winterwerp v. the Netherlands*, although the UK had not been a party to the case, the Registrar maintained: “. . . in an earlier case . . . the Court, by way of an ad hoc solution and without prejudice to the question of principle involved, accepted the written observations from the United Kingdom government, which was not a party to the case but had an interest therein . . .”⁴⁷⁰

Thus, for instance, even if the Court was interested in building the precedent and repeating the experience from the previous case, the Registrar made an effort to show that the final decision-making authority remained with the judges. As a matter of retaining control over the precedent and indicating that the precedent would not imply any entitlements, the Registrar stated, “If such a course was taken, it would, needless to say, still be for the Court to determine whether and to what extent those observations would be taken into account.”⁴⁷¹

In both cases, the Court constructed the boundaries in relation to the submissions. However, in *Winterwerp*, the Court found it acceptable to hear the intervener’s observations on the issue of legal interpretation: “He [the President] would look favorably upon the Delegates of the Commission filing written observations from the Government on the construction of Article 5.4 of the Convention, within the limits indicated in paragraph 1 of your letter . . .”⁴⁷²

⁴⁷⁰ Series B, Vol. 39, 151 (1984).

⁴⁷¹ *Id.*

⁴⁷² Series B, Vol.31, 70 (1983).

D. Young, James, and Webster v. the United Kingdom

In *Young, James, and Webster*, J.E.S. Fawcett acted as a Commission Delegate to the Court, having dissented with the Commission's majority finding that the UK had breached its obligations under the Convention by mandating a "closed-shop" system of union membership.⁴⁷³ Thus, his position coincided with the position of the TUC. Although there was no adequate legal foundation for his action, it was through Mr. Fawcett that the document was circulated during the hearing and introduced to the Court's consideration.⁴⁷⁴

In the case, the applicants alleged a "closed shop" agreement between British Rail and three railway workers' unions. As a result of the "closed shop" agreement, which was concluded between trade unions and employees, the employees were required to be or to become members of a specified union. The applicants alleged that the practice violated their rights to freedom of association under Article 11 of the Convention.⁴⁷⁵

In their letter of January 30, 1981, requesting the possibility of intervention, the solicitors for TUC provided that the three unions implicated in the cases were part of the TUC's umbrella structure. The organizations affiliated with the TUC were engaged with Union Membership agreements. Therefore, the judgment would have great importance in the law and practice of the conduct of labor-industrial relations in the UK.⁴⁷⁶

The representatives of the TUC indicated that they did not expect the UK Government, even though it was acting as a respondent in the case, to put forward the

⁴⁷³ Series B. vol. 39 at 50 (1984).

⁴⁷⁴ *Id* at 218.

⁴⁷⁵ The European Court of Human Rights Factsheet *Trade Union Rights*
http://www.echr.coe.int/NR/rdonlyres/DF8FD53-E057-4F42-A266-07BC3422A9EF/0/FICHES_Libert%C3%A9_syndicale_EN.pdf

⁴⁷⁶ Series B. vol. 39 at 111 (1984).

adequate argumentative defense for their position.⁴⁷⁷ Having examined the memorial submitted by the UK Government to the Court, TUC's representatives asserted that the UK would not put forward adequate information and justification in defense of its own laws.⁴⁷⁸ Although the UK was the only party with the full power to provide the Court with relevant knowledge and "historical, legal, and social" information, the failure of the UK Government to do so would create an important detriment for a judgment.⁴⁷⁹

J.E.S. Fawcett also used the term *amicus curiae* during the public hearings on the Trades Union case, even though the term was nowhere mentioned in the Convention or the Rules. In his efforts to persuade the Court to consider the document put forth by the TUC, Mr. Fawcett introduced it as an extension of the Commission's existing function to assist the Court. He explicated this *amicus curiae* function as an activity separate from, yet related to, the Commission's established mission to represent the position of applicants.⁴⁸⁰

TUC sought an opportunity to voice its views on the issues raised in the *Young, James, and Webster* case. On January 30, 1981, the lawyers for the TUC requested that the Court's registrar admit their application in relation to the case. Their legal argument was twofold: First, they argued that their application should have been admitted based on Rules 38 and 41 of the existing Court. Alternatively, they requested that the Court allow their application "under its inherent jurisdiction."⁴⁸² Moreover, Commission President James Fawcett introduced the document submitted by the TUC as an extension of the Commission's existing mandate to assist the Court.⁴⁸³

⁴⁷⁷ Series B, vol. 39 at 111 (1984).

⁴⁷⁸ *Id.* at 112.

⁴⁷⁹ *Id.* at 113.

⁴⁸⁰ *Id.* at 219.

⁴⁸² *Id.* at 111.

⁴⁸³ *Id.* at 219.

Even a minor accusation that the interveners intended to abuse the existing rules could be the cause of a strong defensive reaction. Lord Wedderburn of Carlton, in reply to the accusations that the TUC's attempted intervention defied the rules, maintained, "First, it was suggested that the procedure that we adopted was an attempt to abuse the procedure of this Court. This is a proposition which we vigorously resist, both on behalf of myself and even more on behalf of the senior members of the Trades Union Congress."⁴⁸⁴ He then continued to explain that the main legal foundation, on which the intervention had been based, was primarily Rule 38.

Indeed, the records indicate that the parties involved understood a minor semantic move by the TUC as a very brave form of disobedience and subversion. In their initial letter, requesting the right to submit their views to the Court, the lawyers for the TUC used the word "application."

In the *Trades Union* case, the Court insisted that the submissions be strictly limited to factual circumstances. In a letter confirming the Court's willingness to hear the oral submission by the TUC's representatives, the Registrar underlined the framework for their presentation. The oral submission was to be limited only to the facts of the case as well as to English law and practice. Therefore, the interveners in *Trades Union* were not allowed to do exactly what the UK government did in the previous instance.

In strict authoritative language, the Registrar indicated,

Accordingly, it is to be understood that the matters on which that representative will be heard do not include pleading as to the interpretation of the law of the European Convention on Human Rights.⁴⁸⁵

⁴⁸⁴ *Id.* at 284.

⁴⁸⁵ *Id.* at 161.

In the *Trades Union* case, even after the public hearings, as the TUC presented its submissions, the Court opened up the opportunity for the UK Government and the applicants to provide their comments on the TUC's intervention. Nevertheless, the Registrar insisted on a strict division between facts and arguments on the legal questions raised by the case. In his letter, asking the UK Government to submit its observations on Lord Wedderburn's intervention, the Registrar insisted: “. . . [I]t is to be understood that they are to be limited to issues of fact, including English law and practice. The decisions taken by the Court are not to be construed as authorizing the filing of observations or submissions on the issues of law arising in this case.”⁴⁸⁶ The Registrar used exactly the same phraseology in his correspondence with the Commission.⁴⁸⁷ The Court's intent was clearly understood by the applicants, who indicated that “[i]t was the Court's express intention that Lord Wedderburn should confine his remarks to issues of fact on which TUC information might be useful to the Court, and that he should refrain from presenting argument, making submissions or expressing particular opinions.”⁴⁸⁸

⁴⁸⁶ *Id.* at 307.

⁴⁸⁷ *Id.* at. 308.

⁴⁸⁸ *Id.* at. 333.

Chapter VII: NGOs as Amici Curiae before the ECtHR

1. *The International Human Right to Property*

This part puts forth a study of the role of amici interventions in the cases before the ECtHR. It must be stressed that the analysis includes only those amicus briefs that were declared admissible by the Court. For example, in 1997 the Court declined the submission of an amicus brief by Rights International.⁷² Similarly, in *McGinley and Egan v. the UK* the court rejected third-party participation by the New Zealand Nuclear Test Veterans' Association and allowed submission of briefs by Liberty and the Campaign for Freedom of Information.⁴⁸⁹ Although instances of rejection of NGO participation are relatively rare, I still concentrated on the analysis of only those amicus submissions that were declared admissible. Contrasting the analysis of those briefs that were admitted to those that were rejected is a worthwhile subject for further study.

This part provides a case study of amicus curiae participation in the development of the international human rights law on property by the European Court of Human Rights.⁴⁹⁰ Some commentators claim that a new body of international law, international property law, is emerging.⁴⁹¹ Human rights law on property is part of this new corpus of international rules.⁴⁹² On the one hand, the human right to property is enshrined in the earliest international human rights instruments.⁴⁹³ Moreover, a wide variety of states' policy measures, including those related to debt cancellation,

⁴⁸⁹ *McGinley and Egan v. the UK*, June 9 1998, App. No. 10/1997/794/995-996, para.5

⁴⁹⁰ See ALEXANDER L. GEORGE AND ANDREW BENNETT, *CASE STUDIES AND THEORY DEVELOPMENT IN THE SOCIAL SCIENCES* (2005); See also Harry Eckstein, *Case Study and Theory in Political Science*, in *STRATEGIES OF INQUIRY* (FRED I. GREENSTEIN AND NELSON W. POLSBY EDS.1975.)

⁴⁹¹ See John Sprankling, *The Emergence of International Property Law*, 90 N.C. L. REV. 461 (2012).

⁴⁹² *Id.*

⁴⁹³ Article 17, The Universal Declaration of Human Rights; Article 23, American Declaration of the Rights and Duties of Man, OAS Res. XXX, BASIC DOCUMENTS PERTAINING TO HUMAN RIGHTS IN THE INTER-AMERICAN SYSTEM, OEA/Ser. L. V/II.82 doc.6 rev.1 at 17 (1992).

taxation, and banking and financial policies, currently fall under international scrutiny within the rubric of interfering with the human right to enjoyment of property.⁴⁹⁴ A combination of these factors makes the development of the international human right to property an interesting topic for study.

On June 30, 2005, the ECtHR announced its judgment in the case of *Bosphorus hava yollari turizm ve ticaret anonym sikreti v. Ireland* (hereinafter the *Bosphorus Airline Company* case). The case concerned the impoundment by Ireland of an aircraft leased by a Turkish company from the Socialist Federal Republic of Yugoslavia (SFRY).⁴⁹⁵ The applicant argued that Ireland's actions breached its right to the peaceful enjoyment of possessions under the European Convention.⁴⁹⁶ The Court ruled that Ireland acted within its duties of membership within the European Communities, and that therefore its actions did not constitute a violation of the Convention.⁴⁹⁷

This case is noteworthy not just for substantive reasons. A variety of entities took part in the judicial proceedings as amici curiae. The Italian and the United Kingdom governments, the European Commission, as well as a French organization, the *Institute de formation en droit de l'homme du barreau de Paris*, took part in the proceedings by submitting their briefs.⁴⁹⁸

⁴⁹⁴ See, e.g. *Kovacic and Others v. Slovenia*, App. No. 44574/98, 45133/98, 48316/99, Oct. 3, 2008 (the decision discusses Slovenia's banking reform under the rubric of the right to property); See, also *Jelicic v. Bosnia-Herzegovina*, App. No. 41183/02, October 31, 2007 (the judgment elaborates on the hard currency reforms by Bosnia-Herzegovina under the aegis of the human right to property); See, also *Back v. Finland*, App. No. 37598/97, July 20, 2004 (in the judgment the Court considers the legality of Finland's debt cancellation reform under the Convention right to property).

⁴⁹⁵ *Bosphorus hava yollari turizm ve ticaret anonym sikreti v. Ireland*, App. No. 45036/98, June 30, 2005.

⁴⁹⁶ *Bosphorus hava yollari turizm ve ticaret anonym sikreti v. Ireland*, App. No. 45036/98, June 30, 2005.

⁴⁹⁷ *Bosphorus hava yollari turizm ve ticaret anonym sikreti v. Ireland*, App. No. 45036/98, June 30, 2005.

⁴⁹⁸ *Id.*, para. 9.

This part posits that there are five types of amici interveners: (1) individuals, (2) NGOs, (3) international organizations, (4) states, and (5) national independent statutory bodies. They influence judicial decision-making, primarily, through practices of knowledge production. I define “knowledge production practice” as a systematic practice of assigning meaning to information.⁴⁹⁹ Amici interventions engage in two disparate modes of knowledge production, which I call here “activist” and “expert” modes. In the activist mode, in which organizations originating in the United Kingdom engage, amici follow a four-step process.

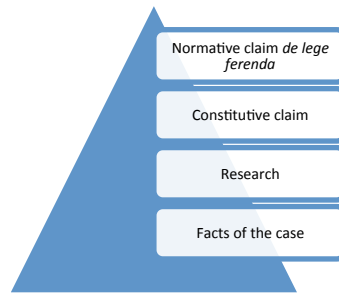


Figure 2. The activist mode of knowledge production.

In the activist mode, intervening entities make a claim in the realm of *de lege ferenda*, or what the law should be. In the activist mode, the amici formulate a “constitutive claim,” a claim about a new factual reality that necessitates development of new international law and principles.⁵⁰⁰

⁴⁹⁹ The definition draws on the concept of knowledge in constructivist scholarship in international relations. According to this concept, knowledge production includes the process of assigning meaning to information. “Creating knowledge by giving meaning to information shapes social reality and prompts action. It is only because of the meaning information has to us that we act in response.” MICHAEL BARNETT & MARTHA FINNEMORE, RULES FOR THE WORLD: INTERNATIONAL ORGANIZATIONS IN GLOBAL POLITICS, 30 (2004). *See also*, PETER BERGER AND THOMAS LUCKMANN, THE SOCIAL CONSTRUCTION OF REALITY: A TREATISE IN THE SOCIOLOGY OF KNOWLEDGE (1981).

⁵⁰⁰ I draw the terms from the constructivist scholarship on the constitutive powers of international organizations. Michael Barnett and Martha Finnemore write about the “constitutive powers” of International Organizations, that is the power to “create, define, and map social reality.” MICHAEL BARNETT & MARTHA FINNEMORE, RULES FOR THE WORLD: INTERNATIONAL ORGANIZATIONS IN GLOBAL POLITICS, 30 (2004). Constructivist scholars have written also about the constitutive powers of

However, most amici engage in an expert mode of knowledge production. An “expert” is defined as somebody “skillful by practice or experience.”⁵⁰¹ This mode misses a larger constitutive claim about the changed reality in relation to which new law needs to be developed. In the expert mode, the amici support a resolution of a particular case in relation to one of the sides, the applicant or the respondent. This chapter shows that amici present factual information and research and argue about how the law should be applied to the facts as understood in the context of the submitted research. However, in the “expert” mode, the intervening entities make claims in the realm of *de lex lata*, of what the law is, and not in the sphere of *de lege ferenda*. In doing so, the interveners marshal information and evidence from domestic jurisdictions, and make claims for how the existing international law should apply to these facts.

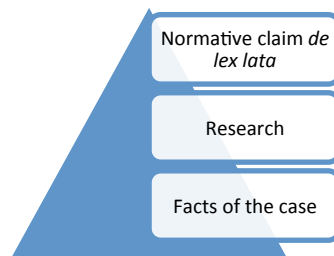


Figure 3. The expert mode of knowledge production.

Through analyzing the claims by amici, I show that amici employ these modes of knowledge production to support the position of party, the applicant, or the respondent government. Individuals and NGO interventions, including the NGOs that

non-governmental organizations to define and to create the new areas of international action, norms and law. See JOHN BOLI AND GEORGE M. THOMAS, CONSTRUCTING WORD CULTURE (1999).

⁵⁰¹ SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (1899).

engage in the activist mode of knowledge production, support applicants; international organizations' support varies.

This chapter evidences that the fact of the possession of a link to the applicant determines the support by states. If the intervening state has a connection to the case through the applicant, then the state supports the applicant. If not, the intervening state invariably supports the respondent government's position. NGO amici, on the other hand, do not possess such a direct link to the case in question. They are related to the issue discussed with their organizational mandate.

The Court engages with the amici in three specific ways: acknowledgment, refutation, and corroboration. Almost all amici interventions are acknowledged either through a statement in passing, or as a summary of each intervener's arguments in a specifically designated section. In certain cases, the Court engages specifically with arguments put forth by amici, including with their claims *de lege ferenda*, and explains why it cannot share amici's arguments. In the mode of corroboration, however, the Court expressly relies on the evidence put forth by amici in the expert mode.

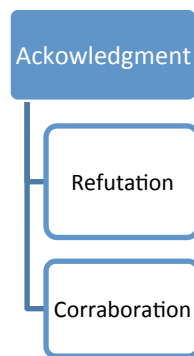


Figure 4. The methods of the Court's engagement.

The emergence of international human rights law has eroded the position that states will not be held accountable for the ill treatment of residents. The principles of human rights maintain that being human is the sole and non-arbitrary basis for the

possession of rights.⁵⁰² As Jack Donnelly succinctly puts it, “human rights are, literally, the rights that one has simply because one is a human being.”⁵⁰³ The essence of human rights principles is to protect human agency from abuse and oppression.⁵⁰⁴

From the Universal Declaration of Human Rights to the Rome Statute, increasing kinds of human rights have found expression in international law.⁵⁰⁵ Similarly, more states subject themselves to human rights obligations by signing or ratifying human rights treaties.⁵⁰⁶ The proliferation of international courts, tasked with enforcing these obligations, has occupied a prominent place on the scholarly agenda.⁵⁰⁷

Some commentators allude to the emergence of international property law. In his recent article John Sprankling argues international property law doctrines emerge from four different sources: (a) regulation of the global commons; (b) transnational coordination of property rights; (c) adoption internationally of rules to prevent specific, including the environmental harm; and (d) development of human rights law.⁵⁰⁸ According to Sprankling, a body of rules about property has developed under the umbrella of international human rights law.⁵⁰⁹ The subject of internationalization of property law has been a recurring theme in the critical scholarship of B.S. Chimni. Chimni writes, “the phenomenon of internationalization of property rights is crucial to the creation of a unified global economic space. By internationalization of property

⁵⁰² David S. Weissbrodt and Clay Collins, *The Human Rights of Stateless Persons*, 28 HUM. RTS. Q. 245, 248 (2006).

⁵⁰³ JACK DONNELLY, *UNIVERSAL HUMAN RIGHTS: IN THEORY AND PRACTICE*, 10 (2nd ED. 2003).

⁵⁰⁴ *See generally*, MICHAEL IGNATIEFF, *HUMAN RIGHTS AS POLITICS AND IDOLATRY* (2001).

⁵⁰⁵ *See generally*, JUDITH E. GOLDSTEIN, MILES KAHLER ET AL. (EDS.), *LEGALIZATION AND WORLD POLITICS*, (2001).

⁵⁰⁶ For an illustrative table on the proliferation of human rights treaties, *see* TODD LANDMAN, *PROTECTING HUMAN RIGHTS: A COMPARATIVE STUDY* 23 (2005).

⁵⁰⁷ *See generally*, MARY L. VOLCANSEK & JOHN F. STACK, JR. (EDS.) *COURTS CROSSING BORDERS: BLURRING THE LINES OF SOVEREIGNTY* (2005).

⁵⁰⁸ John Sprankling, *The Emergence of International Property Law*, 90 N.C. L. REV. 461 (2012).

⁵⁰⁹ *Id.*

rights, I mean that the change in the form and substance of property rights is brought about through the intervention of international law.”⁵¹⁰

Indeed, the right to property is mentioned in the Universal Declaration of Human Rights (hereinafter UDHR), a document that serves as a cornerstone of international human rights law. Article 17 of the UDHR maintains, “everyone has the right to own property alone as well as in association with others. No one shall be arbitrarily deprived of his property.”⁵¹¹ Due to ideological tensions during the Cold War, states did not include the right to property in two important international conventions: the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social, and Cultural Rights.⁵¹² However, the United Nations Convention on the Elimination of All Forms of Discrimination against Women includes the right to property in Article 16 (h).⁵¹³ The Convention endorses a woman’s right to “the ownership, acquisition, management, administration, enjoyment and disposition of property” in the context of elimination of discrimination against women.⁵¹⁴

Article 15 of the International Convention on the Protection of the Rights of All Migrant Workers and Their Families guarantees the right to property and the right to adequate compensation in case of expropriation.⁵¹⁵

The European Convention on Human Rights, the drafting of which was inspired in part by the Universal Declaration,⁵¹⁶ includes the right to peaceful enjoyment of possessions in Article 1 of Protocol 1.

⁵¹⁰ B. S. Chimni, *A Just World Under Law: A View from the South*, 22 AM. U. INT’L. L. REV. 199, 206 (2007); B.S. Chimni, *International Institutions Today: An Imperial Global State in Making*, 15 E.J.I.L. 1 (2004).

⁵¹¹ Art. 17, UDHR

⁵¹² See, generally, THEO R.G. VAN, *THE HUMAN RIGHT TO PROPERTY* (2002) (discussing the development of the right to property in positive international law).

⁵¹³ Art. 16 (h), CEDAW

⁵¹⁴ *Id.*

⁵¹⁵ Art.15, International Convention on the Protection of the Rights of All Migrant Workers and Their Families, GA Res 45/158 of 18 December 1990.

The First Protocol to the European Convention was concluded on March 20, 1952, in Paris and entered into force on May 18, 1954, when the first ten required ratifications were delivered.⁵¹⁷ The First Protocol encompasses the right to property, to education, and to free elections to the legislature, and was drafted almost concurrently with the Convention text itself.⁵¹⁸

Article 1 of Protocol No. 1 of the European Convention provides for the following:

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a state to enforce such laws, as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions and penalties.⁵¹⁹

The Court has interpreted the Article to rest on three interrelated rules. The first is of a general nature and embodies general principles of peaceful enjoyment of possessions.⁵²⁰ The second covers deprivation of possessions and subjects the deprivation to certain conditions.⁵²¹ The third reaffirms the right of Contracting Parties to control the use of property considering general interests.⁵²² In relation to the phrase “general principles of international law,” the Court has maintained that these principles refer to the principles of compensation applicable to non-nationals.⁵²³

⁵¹⁶ ED BATES, THE EVOLUTION OF THE EUROPEAN CONVENTION OF HUMAN RIGHTS 41-48(2010).

⁵¹⁷ *Id.* at 70.

⁵¹⁸ *Id.*

⁵¹⁹ Art. 1, Protocol No. 1, the European Convention.

⁵²⁰ James and Others v. the United Kingdom, 21 February 1986, para. 37. Series A., no. 98;

⁵²¹ *Id.*

⁵²² James and Others v. the United Kingdom, 21 February 1986, para. 37. Series A., no. 98; Holy Monasteries v. Greece, December 9, 1994, para 56, Series A no. 301-A.

⁵²³ James and Others v. the United Kingdom, 21 February 1986, para. 37. Series A. no. 98.

The right to property was not included in the initial draft text of the European Convention. Although initial drafts leading up to the Convention referred to the right to property, due to political tensions in the process of drafting, the drafters decided not to include the provision in the Convention. Instead they included the right to property, alongside the right to education, in a separate Protocol No. 1.

The European Movement Convention, drafted by the advocates for the unification of Europe, served as the first draft of the European Convention. The initial draft presented by the European Movement to the Consultative Assembly of the Council of Europe, the agency tasked with the elaboration of the Convention text, included “the freedom from arbitrary deprivation of property.”⁵²⁴ With regard to the substantive scope of the Convention, the initial draft specifically mentioned “[T]hose fundamental, personal and political rights which it is practicable to enforce through the process of a court of a law.”⁵²⁵ The European Movement Convention was delivered to the legal arm of the Consultative Assembly—the Committee on Legal and Administrative Questions, presided over by Sir Maxwell-Fife, himself the author of the European Movement Convention text. Twenty-four European lawyers were members of the Committee.⁵²⁶

The Committee was divided on a number of issues, including the right to property and the rights of parents to choose the modes of education for their children.⁵²⁷ Some members of the Committee objected to the inclusion of the right to property in the Convention, maintaining that measures adopted by states in relation to property should have been considered in the context of social economic circumstances in a given country; an international institution would hardly be adequate to evaluate

⁵²⁴ ED BATES, THE EVOLUTION OF THE EUROPEAN CONVENTION OF HUMAN RIGHTS, 56 (2010).

⁵²⁵ *Id.* at 66.

⁵²⁶ *Id.* at 61.

⁵²⁷ *Id.* at 63.

these circumstances.⁵²⁸ The critics were in a minority, and the majority opted to include the right because it was important “for the independence of the individual and of the family.”⁵²⁹

The Rapporteur of the Committee presented the report on behalf of the Committee to the Assembly. The Assembly debated the report and as a result adopted the Assembly Recommendation 38. The Recommendation was referred to the Committee of Ministers.⁵³⁰

The Recommendation listed a number of substantive rights in Article 22. However, both the right to education and the right to property were excluded from the recommendation.⁵³¹ After a heated debate, the Delegates could not reach consensus on the formulation of these rights, although everybody agreed that they were important for the overall purposes of the Convention—guarantying those substantive rights, which were most abused in totalitarian Germany and behind the iron curtain.⁵³² The difficulty of reconciling ideological tensions was the crux of the Assembly members’ inability to agree on the draft of the two clauses. While it was important to guarantee that the precedent of indoctrination of children in school as it took place in Nazi Germany would not be repeated, the members aspired to maintain the possibility of teaching some religious and philosophical views within schools in their countries.⁵³³

Similar considerations played out in relation to the drafting of clauses on the right to property. The members regarded the inclusion of this article as important, because deprivation of property was a strategy used by totalitarian states to repress their opponents, as well as because the right was important “for the independence of

⁵²⁸ *Id.*

⁵²⁹ *Id.*

⁵³⁰ *Id.* 61.

⁵³¹ *Id.* 64.

⁵³² *Id.* 68

⁵³³ *Id.*

the individual and of the family.” However, specific draft language could not be reconciled with the domestic policy intentions of some of the member governments, in particular the British.⁵³⁴

On August 7, 1950, after a series of debates and amendments, the Committee of Ministers approved the Convention text. The final text of the Convention reflected the spirit of compromise described by MacBride, the President of the Committee of Ministers: “very often the choice had to be made between being able to reach agreement on a modified text or no text at all.”⁵³⁵ The Committee promised that additional rights, including the right to property and education, would be included in the Convention later.⁵³⁶ The text was open for signature on November 4, 1950.⁵³⁷

2. Amicus Curiae and the International Human Right to Property

A search of the important property case law of the Court identifies 23 such cases of high significance in relation to the right to property. Of these, two were excluded as irrelevant. Out of the remaining 21, amicus curiae interventions took place in all but 2 cases. In all other 19 cases the Court allowed amici curiae interventions. There are five types of interveners: (1) individuals, (2) NGOs, (3) international organizations, (4) states, and (5) national independent statutory bodies.

Individuals that act as interveners are a minority. Out of 19 cases, in only one case was the intervener an individual, the adoptive father of the applicant. In *Koua Poirrez v. France*, Bernard Poirrez was granted leave to intervene in support of the application by his adoptive son.⁵⁴⁰

⁵³⁴ *Id.*

⁵³⁵ *Id.* 96.

⁵³⁶ *Id.* 98.

⁵³⁷ *Id.*

⁵⁴⁰ *Koua Poirrez v. France*, App. No. 40892/98, Sept. 30, 2003.

Similarly, there was only one intervention by a national independent statutory body. In *J.M. v. the United Kingdom*, the Equality and Human Rights Commission intervened to support the applicants' claim. The British Parliament established the Commission under the Equality Act 2006 with the mandate "to challenge discrimination, and protect, and promote human rights."⁵⁴¹

A variety of NGOs are allowed by the Court to provide submissions. In cases related to the right to property, the European Roma Rights Centre is a repeat player. They were granted leave to submit third-party comments in four cases: *Jane Smith v. the United Kingdom* (2001), *Lee v. the United Kingdom* (2001), *Coster v. the United Kingdom* (2001), and *Chapman v. the United Kingdom* (2001).⁵⁴²

The amicus briefs are drawn from organizations on issues related to their mandates. All the cases in which the European Roma Rights Centre participated concern claims brought by British citizens of Roma origin. The applicants complained that government measures against occupation of land by their caravans violated their rights under the Convention, including the right to peaceful enjoyment of property.

For instance, both Age Concern and Help the Aged submitted the briefs in *Carson and Others v. the United Kingdom*. The applicants claimed that the UK Government's failure to uprate their pension in line with inflation violated their property rights and the prohibition against discrimination under the Convention.⁵⁴³ The two organizations, which joined in 2009 to form Age UK, aim to improve later life for everyone through consultation, campaigns, training, and research.⁵⁴⁴

⁵⁴¹ *Vision and Mission*, Equality and Human Rights Commission, <http://www.equalityhumanrights.com/about-us/vision-and-mission/> [Apr. 14, 2012, 10:55AM].

⁵⁴² *Chapman v. the United Kingdom*, App. No. 27238/95, January 18, 2001, para. 89; *Coster v. the United Kingdom*, App. No. 24876/94, January 18, 2001, para. 103; *Jane Smith v. the United Kingdom*, App. No. 25154/94, January 18, 2001, para. 96; *Lee v. the United Kingdom*, App. No. 25289/94, para. 91.

⁵⁴³ *Carson and Others v. The United Kingdom*, App. No. 42184/05, March 16, 2010.

⁵⁴⁴ *What We Do*, Age UK <http://www.ageuk.org.uk/about-us/our-work/> [Apr. 22, 2012, 11:05AM].

In *Maria Atanasiu and Others v. Romania*, the Court granted leaves to intervene to two organizations from Romania, *Asociatia pentru Proprietatea Privata* and *Res Ro Interessenvertretung Restitution in Romanien*.⁵⁴⁵ Both organizations aim at implementation of restitution laws in Romania. *Asociatia pentru* strives to advocate for the right of private property ownership and enactment of adequate legislation in Romania.⁵⁴⁶ *Res Ro* is an organization registered in Germany in 2007 whose objective is “to ensure the enforcement of restitution claims against Romania and the observance of human rights by the Romanian authorities.”⁵⁴⁷

Furthermore, intervention by international organizations has been commonplace in the Court’s litigation. For instance, in the case of *Blecic v. Croatia* (2004),⁵⁴⁸ the Organization for Security and Co-operation in Europe (OSCE) intervened as a third party, to illuminate the Court on the status of “occupancy rights” in Bosnia-Herzegovina.⁵⁴⁹ Similarly, the European Commission participated as a third party in *Bosphorus Airways v. Ireland*.⁵⁵⁰

States are active amici as well. Out of 19 cases, in 7 the President of the Court granted leave for third-party intervention to at least one state. In a number of cases the interventions were predetermined by the presence of a relevant link to the case, most often the applicant. The position of the intervening state is closely related to this link: states that have a relationship to the applicant, whether through his or her nationality,

⁵⁴⁵ *Maria Atanasiu and Others v. Romania*, App. No. 30767/05 and 33800/06, October 12, 2010.

⁵⁴⁶ The Statute of the *Asociatia pentru Proprietatea Privata* <http://www.a-p-p.ro/statut.htm> [Apr. 04.23, 2012, 11:10AM].

⁵⁴⁷ *Res Ro* Statute, <http://www.resro.eu/> [Apr. 23, 2012, 10:15AM].

⁵⁴⁸ *Blecic v. Croatia*, App. no. 59532/00, July 29, 2004.

⁵⁴⁹ Third Party Intervention of the Organization for Security and Cooperation in Europe, Mission to Bosnia and Herzegovina, in *Blecic v. Croatia*, App. No. 59532/00, available at [http://www.internal-displacement.org/8025708F004CE90B/%28httpDocuments%29/0CB324D577548D42C125713B00396D0F/\\$file/Amicus+OSCEBIH+BLECIC+MAIN+BRIEF9_clean.pdf](http://www.internal-displacement.org/8025708F004CE90B/%28httpDocuments%29/0CB324D577548D42C125713B00396D0F/$file/Amicus+OSCEBIH+BLECIC+MAIN+BRIEF9_clean.pdf)

⁵⁵⁰ *Bosphorus hava yollari turizm ve ticaret anonym sikreti v. Ireland*, App. No. 45036/98, June 30, 2005, para 9.

place of residence, or another factual circumstance, intervene in cases to support the applicant's position.⁵⁵¹

In *Xenides-Arestis v. Turkey*, the Government of Cyprus intervened as a third party.⁵⁵² Cyprus was implicated in the case because the applicant was a Cypriot national who lived in Nicosia. The applicant owned property in the territory of the so-called Turkish Republic of Northern Cyprus. She alleged that she had been forced to leave her native town by the Turkish military forces and since then had been unable to enjoy her possessions.⁵⁵³

In *Baklanov v. Russia*, the applicant, a Russian national, lodged a claim against Russia. Latvia intervened as a third party. Latvia's connection to the case was determined by the fact that the applicant was born and lived in Riga. In 1997 he decided to move from Latvia to Russia and asked one of his acquaintances to move all his savings from Latvia to Russia. His savings, in the amount of 250,000 USD, were confiscated as "an object of smuggling" upon crossing the border at the airport.⁵⁵⁴ Latvian intervention supported the applicant's claim and alleged that Russia had violated his rights under the Convention.

Similarly, in *Kovacic and Others v. Slovenia*, Croatia intervened as a third party⁵⁵⁵ because it had a connection to the case. The bank whose status was the concern of the dispute was a branch of a Slovenian bank located in Zagreb, Croatia. Croatia maintained that the measures taken by Slovenia interfered with the applicants' exercise of their rights.

⁵⁵¹ This argument has been stated in a different context, Anna Dolidze, *Lampedusa and Beyond: Recognition, Implementation, and Justiciability of Stateless Persons' Rights under International Law*, 6 INT. J. HUM. RTS. L. 1, 20 (2011-2012).

⁵⁵² *Xenides-Arestis v. Turkey*, App. No. 46347/99, December 22, 2005, para. 8.

⁵⁵³ *Id.* para. 11.

⁵⁵⁴ *Baklanov v. Russia*, App. No. 68443/01, June 9, 2005, paras. 8-14.

⁵⁵⁵ *Kovacic and Others v. Slovenia*, App. No. 44574/98, 45133/98, 48316/99, Oct. 3, 2008, para. 10.

In all other cases, when the intervening state does not have a link to the case, it supports the position of the respondent government.

Entities acting in the activist mode gather information and conduct research in order to make constitutive claims about a new social reality. This new social reality, in turn, requires new legal principles from the Court. Hence, the Court is urged to reinterpret some of its old principles and, in effect, create new law. In making their constitutive claims, intervening entities rely on information-gathering and research findings. Organizations put forth constitutive claims through the production of knowledge. To be clear, I do not claim that this is the only way that amici curiae's normative arguments are structured. This is one of the patterns that emerge in the analysis of their claim-making.

Intervenors who make claims in the expert mode do not purport to convince the Court to innovate. They produce information and either directly or indirectly urge the Court to apply its law taking this information into consideration.

The interventions by Interights and by the OSCE in the case of *Blecic v. Croatia* illustrate the differences between the activist and expert modes of knowledge production.⁵⁵⁶ The *Blecic* case concerned the tenancy rights of ethnic Serbians in Croatia in the early 1990s. Interights's amicus submission gathered evidence from the Court's case law to urge a narrow interpretation of the principle of a state's margin of appreciation in interpreting Article 8 (the right to family life) within the Convention. The organization argued that the Court should adopt a special approach and exercise special vigilance in interpreting widely a State's margin of appreciation when the applicant concerned is particularly vulnerable.⁵⁵⁷

⁵⁵⁶ *Blecic v. Croatia*, App. No. 59532/00, July 29, 2004. para. 10.

⁵⁵⁷ Interights' submission, May 2, 2005, on file with the author.

The OSCE submitted an amicus brief in the same case. The OSCE's submission has a different objective. The amicus brief states, "The purpose of this submission is to provide the Court with an analysis of the legal status accorded to 'occupancy rights' to former socially-owned apartments in Bosnia-Herzegovina." In a ten-page brief, OSCE provided a detailed study of the history of occupancy rights in the Socialist Federal Republic of Yugoslavia (SFRY), before and after its dissolution.⁵⁵⁸

The interventions of the European Roma Rights Centre in a series of cases illustrate the structure of a normative argument. The Court granted permission to the Centre to file amicus submissions in four concurrent cases, all of which were filed in the court on December 10, 1999. In all cases the Centre submitted identical submissions. The organization claimed that the Convention had to be reinterpreted in light of the international consensus regarding the urgent need for international action in response to the plight of Roma,

There had emerged a growing consensus among international organizations about the need to take specific measures to address the position of Roma, *inter alia*, concerning accommodation and general living conditions.⁵⁵⁹

To support their claim about the international consensus, the organization pointed out the newest reports by international organizations and marshaled research on the growing number of international instruments regarding the rights of Roma.⁵⁶⁰

The Equality and Human Rights Commission also acted an activist mode in the case of *J.M. v. the United Kingdom* (2010). The Commission urged the Court to

⁵⁵⁸ Third-Party Intervention by the Organization for Security and Cooperation in Europe, Mission to Bosnia and Herzegovina, April 25, 2003, on file with the author.

⁵⁵⁹ *Chapman v. the United Kingdom*, App. No. 27238/95, January 18, 2001, para. 89; *Coster v. the United Kingdom*, App. No. 24876/94, January 18, 2001, para. 103; *Jane Smith v. the United Kingdom*, App. No. 25154/94, January 18, 2001, para. 96; *Lee v. the United Kingdom*, App. No. 25289/94, para. 91.

⁵⁶⁰ *Jane Smith v. the United Kingdom*, App. No. 25154/94, January 18, 2001, para. 96.

reconsider its definition of “family life” under Article 8 of the Convention and to include in this definition the relationships of same-sex couples. To support their request, the Commission pointed out that the reality within Member States in terms of attitudes towards cohabitation of same-sex couples has changed since the Court’s earlier decision.

Given the Court’s strong stance against discrimination on groups of sexual orientation, it necessary followed that the Court should accept in principle that a same-sex relationship is no less capable of constituting family life than a heterosexual relationship. . . . In that (earlier) decision the court had noted that there was little common ground among the Contracting States at that point in time with respect to the recognition of homosexual relationship. Since then, however, there had been a clear and well-documented movement across Europe towards such recognition.⁵⁶¹

To illustrate their conviction that a new pattern of consensus has been emerging in Europe, the Commission relies on research on the legislative changes in different countries.

In *Carson and Others v. the United Kingdom* (2010), two organizations registered in the UK, Age Concern and Help the Aged, intervened. This collective claim by applicants claimed that the UK Government’s failure to uprate their pensions in line with inflation violated their property rights and the prohibition against discrimination under the Convention.⁵⁶² Thirteen applicants had spent most of their working lives in the United Kingdom and had emigrated abroad, including to South Africa, Canada, and Australia, upon retirement. Their pensions, however, had remained fixed while they lived abroad. The applicants argued that their pensions would have grown had they been uprated correspondingly with inflation.

The interveners relied on research findings to prove that the existence of family ties abroad was an important factor in older peoples’ decision to emigrate

⁵⁶¹ J.M. v. the United Kingdom, App. No. 37060/06, Sept. 28, 2010, para. 44.

⁵⁶² Carson and Others v. The United Kingdom, App. No. 42184/05, March 16, 2010.

abroad. According to the interveners, the Court should have taken into account the hardship into which the retired individuals would fall if it did not consider their need to keep adequate pensions in order to join their families abroad.⁵⁶³

The amicus submission by the European Commission in the *Bosphorus Airlines* case illustrates the “expert” mode. In the *Bosphorus* case, the EU Commission brief clearly maintained, “[t]he commission supports Ireland in this case.”⁵⁶⁴ The brief proceeded to explain the degree of fundamental rights protection within the European Union, the case law of the European Court of Justice, as well as the obligations of Member States. Based on the knowledge presented in the brief, the Commission argued that Ireland should be absolved of its responsibility under the European Convention.⁵⁶⁵

In *Maria Atanasiu and Others v. Romania*, two organizations, *Asociatia pentru Proprietatea Privata* and *Res Ro Interessenvertretung Resrtitution in Romanien*, were granted leave to intervene.⁵⁶⁶ The applicants attempted to obtain restitution of property that had been confiscated from their ancestors in the period when large-scale nationalization was conducted by the Communist government in Romania. Although after the fall of the Communist regime the Romanian government enacted legislation with respect to property restitution, the applicants’ attempts to recover their confiscated property failed. They alleged that Romania violated both their right to peaceful enjoyment of property and their right to a fair trial.

The two intervening organizations provided information about the restitution procedures available in Romania. They critiqued the procedures, which, according to the interveners, were marred by procedural and administrative irregularities. They

⁵⁶³ Carson and Others v. The United Kingdom, App. No. 42184/05, March 16, 2010, para. 62, 69.

⁵⁶⁴ Brief of the European Commission, June 30, 2004, on file with the author, para. 2.

⁵⁶⁵ *Id.*

⁵⁶⁶ Maria Atanasiu and Others v. Romania, App. No. 30767/05 and 33800/06, Oct. 12, 2010.

argued that legal mechanisms other than restitution were available domestically. The amici also asserted that reduction of the amount of compensation was not justified.⁵⁶⁷

In *Jelicic v. Bosnia and Herzegovina*, an association from Bosnia-Herzegovina, the Association of Foreign-Currency Savers, submitted an amicus curiae brief. The Association explained the background to the problems associated with hard-currency reserves in the Socialist Federal Republic of Yugoslavia. The organization also provided information about legal judgments on the release of foreign-currency savings in Bosnia-Herzegovina.⁵⁶⁸

In *Suljagic v. Bosnia and Herzegovina*, the Court permitted the submission by the same Association of Foreign-Currency Savers together with the submission from the Association for the Return of Foreign-Currency Savings of Bosnia-Herzegovina and Diaspora.⁵⁶⁹ The third parties described in detail the circumstances under which the foreign-currency holders accepted privatization certificates for their currency savings.⁵⁷⁰

3. The Court's Methods for Engagement with Amici

The Court engages with the amici curiae in three modes. Almost all amici submissions are acknowledged by the Court's summary of the amici's arguments. Summaries are of two forms. On the one hand, the Court may mention an amicus submission in passing, as one sentence alongside the summary of the applicants' and respondents' arguments. On the other hand, the Court may summarize the amicus

⁵⁶⁷ Maria Atanasiu and Others v. Romania, App. No. 30767/05 and 33800/06, October 12, 2010., paras. 207-209.

⁵⁶⁸ Jelicic v. Bosnia-Herzegovina, App. No. 41183/02, October 31, 2007, paras. 36-37.

⁵⁶⁹ Suljagic v. Bosnia-Herzegovina, App. No. 27912/02, November 3, 2009, para.4.

⁵⁷⁰ *Id.* para. 47.

position under a separate sub-section, spelling out the position of each of the amici and their arguments.

Regarding submissions of some amici, the Court goes further than just acknowledging their participation. In such instances, the Court uses two specific modes: refutation and corroboration. In refutation, the Court engages with amici's stand, discussing their arguments, yet disagrees with them and provides its own reasoning for a decision contrary to amici's suggestions. In corroboration, the Court agrees with some of the arguments by amici and builds its reasoning in part on their expertise expressed in their submissions.

A. Acknowledgment

In almost all cases the Court acknowledges amici interventions. For instance, the Belgian and Irish governments submitted amicus curiae briefs in *Burden v. the United Kingdom*.⁵⁷¹ The final judgment summarized their submissions under the Section "The Third Parties' Submissions." However, the Court did not discuss the submissions or engage with them otherwise. In a similar mode, submissions by two organizations were acknowledged through summary in *Maria Atanasiu and Others v. Romania*.⁵⁷²

B. Refutation

The adoptive father of the applicant, Koua Poirrez, was permitted to intervene in the case of *Koua Poirrez v. France*. The father supported the application of his son, who alleged that France's refusal to award him disability allowance for adults due to

⁵⁷¹ *Burden v. the United Kingdom*, App. No. 13378/05, April 29, 2008, para. 7.

⁵⁷² *Maria Atanasiu and Others v. Romania*, App. No. 30767/05 and 33800/06, October 12, 2010. paras 207-209.

his lack of French nationality discriminated against his exercising of property rights.⁵⁷³ The intervener also requested damages in addition to the compensation claims presented by the applicant.⁵⁷⁴ In response to his claim, the Court explicated the scope of rights associated with the status of an intervener. According to the Court, the status did not include a number of rights, including the right to claim damages, associated with the status of a party.⁵⁷⁵

In *Kovacac and Others v. Slovenia* (2008), the Court permitted the intervention of Croatia.⁵⁷⁶ Prior to the dissolution of the Socialist Federal Republic of Yugoslavia (SFRY), the applicants, Croatian nationals, had deposited their hard foreign-currency savings in the Zagreb (Croatia) office of a Slovenian bank, the Ljubljana Bank. The Ljubljana Bank was one of the main banks with branches in many other Republics in SFRY.⁵⁷⁷ In response to the financial crisis which followed the dissolution of the SFRY, Slovenia adopted banking system reforms in the 1990s. The applicants alleged that the Slovenian government's actions prevented them from withdrawing their savings and thus violated their property rights. The intervening government of Croatia presented an extensive overview of the financial and banking situation in the SFRY. The government provided its own explication for the legal status of the Bank, where applicants had made their deposits.⁵⁷⁸ The Court noted, "[T]he applicants, the respondent Government and the intervening Government have in effect requested the Court to go into a number of issues pertaining to the circumstances of the break-up of

⁵⁷³ Koua Poirrez v. France, App. No. 40892/98, Sept. 30, 2003, paras 3,7.

⁵⁷⁴ *Id.* para 67.

⁵⁷⁵ *Id.* para. 69.

⁵⁷⁶ Kovacic and Others v. Slovenia, App. Nos 44574/98, 45133/98., and 48316/99, Oct. 3, 2008, para 10.

⁵⁷⁷ *Id.* para. 26.

⁵⁷⁸ *Id.* para. 243-254.

the SFRY, its banking system [. . .]” However, the Court decided that these issues were subject to the decision-making of the domestic policy-makers.⁵⁷⁹

In *Scordino v. Italy* the Court engaged in a dialogue with amici, the Polish, Czech, and the Slovakian governments, refuting some of their statements, which the Court perceived as criticism. Four Italian nationals complained that the Italian Government unjustly interfered with their right to peaceful enjoyment of possessions and that their right to a fair trial was breached as well.⁵⁸⁰ The applicants had inherited a plot of land from Mr. Scordino. The land had been expropriated with a view to the construction of housing. Subsequently, the Calabria Regional Council included the plot in a zonal development plan and allowed a cooperative society to carry out construction work.⁵⁸¹ Mr. Scordino was offered compensation, the amount of which they contested. The proceedings, including the appeal, lasted almost eight years, and the judgment of the Court of Cassation was pronounced on August 3, 1998.⁵⁸² The applicants alleged that the expropriation violated their property rights and that the length of the proceedings interfered with their right to a fair trial.

The intervening governments posited that states should have been allowed a wide margin of appreciation in determining the length of time to be considered “reasonable” in judicial proceedings. Their intervention rested, primarily, on the argument that domestic authorities are better equipped to judge what time frames are considered reasonable and what compensation is adequate for compensation claims when the indicated time frames are breached. The judgment summarized the position of each Government.⁵⁸³ The Court opened up its reasoning by responding to the

⁵⁷⁹ *Kovacic and Others v. Slovenia*, App. Nos 44574/98, 45133/98., and 48316/99, Oct. 3, 2008, paras. 255-256.

⁵⁸⁰ *Scordino v. Italy* (No.1), App. No. 36813/97, March 29, 2006, para. 3.

⁵⁸¹ *Id.* para. 13-14.

⁵⁸² *Id.* paras. 22-41.

⁵⁸³ *Id.* paras. 166-172.

allegations articulated by the amici: “[t]he Court will begin by responded to the observations of the different Governments.”⁵⁸⁴ Afterward the Court presented in detail its rationale for gradually increasing the awards for non-pecuniary damage incurred through lengthy trials. In response to the aforementioned governments’ statements, which the Court perceived as indirect critique, the Court explicated that it had developed its approach as a result the failure of some states to respond to its previous pronouncements on significant delays in judicial proceedings.⁵⁸⁵

In *Carson and Others v. the United Kingdom*, the Court reflects on the arguments put forth by third parties:

Much is made in the applicants’ submissions and in those of the third party intervener of the extreme financial hardship which may result from the policy not to up-rate pensions and of the effect that this might have on the ability of certain persons to join their families abroad.⁵⁸⁶

Nevertheless, having acknowledged the arguments of the interveners, the Court maintained that it cannot take this consideration into account. The Court refused to generalize on the situation of many individuals who might be in a position similar to that of the applicants.⁵⁸⁷

C. Corroboration

In *Back v. Finland*, the Court allowed intervention by the governments of the Netherlands, Norway, Sweden, and the United Kingdom.⁵⁸⁸ The applicant had agreed to serve as a guarantor on a loan to N. The debtor could not pay off his debt and had applied for debt adjustment in 1995. In 1993, in response to the financial crisis leading

⁵⁸⁴ *Id.* para. 173.

⁵⁸⁵ *Id.* paras 173-177.

⁵⁸⁶ *Carson and Others v. The United Kingdom*, App. No. 42184/05, March 16, 2010. para 62.

⁵⁸⁷ *Id.* para 62.

⁵⁸⁸ *Back v. Finland*, App. No. 37598/97, July 20, 2004, para. 10.

up to the high volume of unpaid debts, Finland had adopted legislation allowing the writing-off of debts as long as the debtor met certain conditions, including following a payment schedule. Based on this legislation, the Finnish courts adjusted N's debt, which substantially reduced the amount that Back could recover from N.⁵⁸⁹ The applicant, a Finnish national, alleged that his right to peaceful enjoyment of property under the Convention was violated by Finland's actions.⁵⁹⁰

The judgment summarized the arguments of all interveners. The Netherlands, Norway, Sweden, and the United Kingdom all indicated that the respective countries possessed domestic legislation allowing for debt adjustment. More specifically, the Netherlands pointed out that it had passed the relevant act in 1998, Norway indicated that the Norwegian Debt Settlement Act was passed in 1992, the Swedish Government pointed out that the Swedish legislature adopted a similar Act in 1994, while the UK brief generally described the debt-cancellation system in the UK.⁵⁹¹

In its assessment the Court touched on a number of legal issues raised by the applicant's claim, including the applicant's allegation that the Finnish debt-adjustment act had a retroactive effect because it applied to contracts concluded prior to its entry of force. The Court indicated that this concern about the lawfulness of the measure was valid. Nevertheless, the Court observed that in remedial social legislation and in particular in the field of debt adjustment the legislature should be able to take measures that affect the execution of previously concluded contracts in order to attain the aim of the policy adopted.⁵⁹² In the process of substantiating this argument, the Court referred to Norway's and Sweden's debt-cancellation legislation with retroactive effect.⁵⁹³

⁵⁸⁹ Back v. Finland, App. No. 37598/97, July 20, 2004, paras. 13-19.

⁵⁹⁰ *Id.* para. 3.

⁵⁹¹ *Id.* paras 25-35.

⁵⁹² *Id.* para. 68.

⁵⁹³ *Id.* para. 68.

In *Bosphorus Airline Company* (2005), the Court granted leave for intervention to the Italian and UK Governments, the European Commission, and the *Institute de formation en droit de l'homme du barreau de Paris*. The applicant, a chartered airline company registered in Turkey,⁵⁹⁴ had leased two aircraft from Yugoslav Airlines, the national airline of the former Yugoslavia when the United Nations passed, and the European Community implemented, sanctions against the Federal Republic of Yugoslavia. On May 17, 1993, one of the aircraft arrived in Dublin for a technical check to be conducted by an Irish company. Upon completion of the check, the aircraft was not permitted to leave the airport, in accordance with the UN sanctions. Ireland had a wide margin of discretion in choosing the methods for implementing its UN as well as its European Community obligations concerning the sanctions.⁵⁹⁵ The applicant company submitted that Ireland's impoundment of the aircraft constituted a deprivation of its possessions as understood under Article 1 of Protocol 1.⁵⁹⁶ The case raised the question of the degree of Ireland's responsibility with the view that Ireland possessed international obligations within other international organizations.

In the judgment the Court spelled out in detail the arguments of each of the interveners, underlining the differences of opinion among them. The judgment presented a summary of arguments of the Italian and British Governments, the European Commission, and the Institut. Moreover, the Court expressly shared arguments presented by one of the interveners—the European Commission:

The Court finds persuasive the European Commission's submission that the State's duty of loyal cooperation . . . required it to appeal the High Court

⁵⁹⁴ *Bosphorus hava yollari turizm ve ticaret anonym sikreti v. Ireland*, App. No. 45036/98, June 30, 2005, para. 11.

⁵⁹⁵ *Id.* para. 115-116.

⁵⁹⁶ *Id.* para. 120.

judgment of June 1994 to the Supreme Court in order to clarify the interpretation of Regulation [. . .]⁵⁹⁷

The Court also openly agreed with another argument, presented by both the intervener and the Government of Ireland, with the following words: “The Court would also agree with the Government and the European Commission that the Supreme Court had no real discretion to exercise, either before or after its preliminary reference to the ECJ.”⁵⁹⁸

Although amici curiae interventions have become commonplace in litigation within international tribunals, international relations and international law scholarship on international judicial decision-making have so far overlooked their impact. The literature has yet to conceptualize the role and influence of amicus curiae interventions on the development of international law. I argue that one of the main modes of amici influence on decision-making by international judges is knowledge production. Amici engage in two, activist and expert, modes of knowledge production. NGOs originating from the UK engage in the “activist” modes. The Court engages with amici by acknowledging their submissions, refuting their arguments, or using their knowledge to corroborate its own reasoning. The Court explicitly draws on knowledge provided by amici when they put forth the knowledge as “experts.”

⁵⁹⁷ *Id.* para. 146.

⁵⁹⁸ *Id.* para. 147.

Chapter VIII: NGOs as Amici Curiae in the International Tribunal for the Law of the Sea

On February 1, 2011, the Seabed Disputes Chamber of the International Tribunal on the Law of the Sea (hereafter ITLOS) issued an advisory opinion in Case No. 17, *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area* (hereinafter Case No. 17).⁵⁹⁹ The commentators have highlighted a number of important aspects in this opinion. First, from a substantive viewpoint, the Advisory Opinion was hailed as historic because it set the highest standards of due diligence, a legal obligation to apply precaution, best environmental practices, and Environmental Impact Assessment by the sponsoring states in relation to the activities of the sponsored organizations in the Area. Second, for the first time, the advisory jurisdiction of ITLOS was invoked. Third, the Advisory Opinion in Case No. 17 was unanimous, an unprecedented occasion in the line of the Tribunal's earlier decisions marked by separate and dissenting views by judges.⁶⁰⁰

This article highlights another aspect of the case, hitherto unrecognized. Case No. 17 was the first instance in which non-governmental organizations (NGOs) took part in the Tribunal's proceedings in the capacity of amici curiae. First, the Tribunal requested the amicus curiae brief of the International Union for the Conservation of Nature (hereafter IUCN). Under the United Nation's definition the IUCN is considered an NGO. Second, on August 17, 2010, the ITLOS Registry received a request by Stichting Greenpeace Council (Greenpeace) and the World Wide Fund for

⁵⁹⁹ International Tribunal for the Law of the Sea Advisory Opinion *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area* (Case No. 17), February 1, 2011 (hereinafter Advisory Opinion). http://www.itlos.org/fileadmin/itlos/documents/cases/case_no_17/adv_op_010211.pdf

⁶⁰⁰ David Freestone, *Advisory Opinion of the Seabed Disputes Chamber of International Tribunal for the Law of the Sea on "Responsibilities and Obligations of States Sponsoring Persons and Entities With Respect to Activities in the Area."* March 9, 2011, Vol. 15, Issue 7, available at <http://www.asil.org/insights110309.cfm>

Nature (WWF) to permit them to participate in the Advisory proceedings as amici curiae.⁶⁰¹ The President of the Court informed the organizations with individual letters on August 27 that their statement would not be included in the case file because it was not submitted in accordance with the procedural rules. However, it would be transmitted to the states, intergovernmental organizations, and the Seabed Authority. On September 10, 2010, the Chamber decided not to grant the request for participation to the two organizations and informed them of this decision on the same day.⁶⁰² The Advisory Opinion was issued on February 1, 2011.⁶⁰³

NGO participation in the ITLOS Case No. 17 is an example of a larger trend in which entities not party to litigation take part in the proceedings before international tribunals as amici curiae. More often than not, litigation within the international tribunals involves a number of amicus curiae interventions by NGOs.

I analyze ITLOS's action with respect to the NGO amicus curiae petition on two levels. On an immediate level, the Tribunal's actions represent a cautious welcome to NGO participation in the Tribunal's proceedings. The Tribunal's actions towards the amici petition point to its favorable disposition. This, in turn, widens the possibility of NGO participation and influence in the lawmaking process within the Tribunal. In this regard, I discern the Tribunal's positive approach in two specific actions: first, in its decision in Case No. 17, ITLOS clarified that it was open to considering amicus briefs by organizations other than those whose members were exclusively states. By requesting amicus curiae views from a number of organizations, including the International Union for Conservation of Nature and Natural Resources (IUCN), ITLOS expressed its welcome to amicus curiae briefs by NGOs—at least as

⁶⁰¹ Responsibility and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area, Advisory Opinion, Case No. 17, 1 February, 2011 Para 13 available at http://www.itlos.org/fileadmin/itlos/documents/cases/case_no_17/adv_op_010211.pdf

⁶⁰² *Id.*, para 14.

⁶⁰³ *Id.*

the term is understood by the United Nations. The Tribunal established a precedent by which NGOs that contain states, state agencies, and their representatives as members can be invited as *amici curiae* to submit their views.

Second, the Tribunal was neither required nor authorized to undertake the steps they did in relation to the submission by Greenpeace and the WWF. However, the Tribunal used its discretion favorably towards the NGO petition and allowed it to attain the maximum effect: even though the Tribunal officially declined to admit the *amici curiae* submission, it in fact fostered the dissemination of NGO arguments.

From a more general perspective, the case has important implications for NGO participation as *amici* in the international legal process. Alongside the International Court of Justice, up until this case the ITLOS remained as one of the last bastions untouched by NGO attempts to participate as *amici* and to put forth their views. Many other international tribunals were already accustomed to handling NGO petitions for intervention as *amici*. Moreover, international tribunals often draw on research and expertise provided in NGO *amicus* briefs. By its most recent actions in Case No. 17, the Tribunal followed the path that many other international courts had traveled earlier.

This chapter proceeds as follows: part II stresses that NGO participation as *amici curiae* in international dispute resolution is one form of NGOs' activity in international lawmaking. It maps the theoretical discussions regarding the role of NGOs in international lawmaking, and specifically, in international environmental lawmaking. Part III sketches out the domestic legal origins of the procedural institution of *amicus curiae* intervention. Part IV highlights how the *amicus curiae* participation procedure was adopted by international tribunals. It shows the active role that NGOs play as *amici curiae* before five major international tribunals. Part V presents the jurisdiction of ITLOS and outlines the contours of the legal framework

regulating non-state actor access to the Tribunal. Part VI provides the factual background to the advisory opinion in Case No. 17 and amicus curiae petitions in the case. Part VII analyzes the Tribunal's approach and explores the implications of the Tribunal's approach from the perspective of NGO participation as amici within ITLOS. Finally, Part VIII highlights the importance of the Tribunal's approach to NGOs in Case No. 17 from the general perspective of NGO participation in the international legal process.

1. NGO Access in the International Tribunal for the Law of the Sea

ITLOS was founded as a dispute resolution mechanism under the United Nations Convention on the Law of the Sea (UNCLOS).⁶⁰⁴ Although there has been extensive academic discussion on whether the Tribunal allows access to NGOs as applicants and as amicus curiae, prior to Case No. 17 the issue had not been tested in practice. Moreover, when referring to amicus curiae interventions, the Tribunal's Statute and Rules of Procedure mention "intergovernmental organizations." The commentators have been discussing whether the term includes "NGOs." Furthermore, amicus curie can participate in the Tribunal's proceedings only if requested by the Chamber. The section below outlines ITLOS's basic structure and delineates the main procedural aspects related to the applicant and amicus curiae access.

A. Background

ITLOS is a judicial body entrusted with the adjudication of disputes that arise out of application and interpretation of the United Nations Convention on the Law of

⁶⁰⁴ Cathrin Zengerling, *NGOs versus European Pirates: Fisheries Agreements, IUU Fishing and ITLOS in West African Cases* in INTERNATIONAL ENVIRONMENTAL LAW-MAKING AND DIPLOMACY REVIEW 107, 121 (ED COUZENS & TUULA HONKONEN EDS. 2008).

the Sea (UNCLOS).⁶⁰⁵ UNCLOS resulted from one of the most complex and protracted diplomatic negotiations in the 20th century, and as such was hailed as a success.⁶⁰⁶ The Tribunal was established pursuant to Annex VI of UNCLOS. Annex VI contains the Statute of the International Tribunal for the Law of the Sea.⁶⁰⁷ The Tribunal had its first session in October 1996,⁶⁰⁸ in which its judges adopted the Rules of Procedure in accordance with Article 16 of Annex VI on October 28, 1997.⁶⁰⁹

The Tribunal, which is composed of 21 members,⁶¹⁰ has its seat in Hamburg, Germany.⁶¹¹ The first case of ITLOS, *M/V Saiga (St. Vincent and the Grenadines v. Guinea)* was submitted to the Court on November 13, 1997.⁶¹² ITLOS is split into four chambers: the Chambers for Summary Procedure, Fisheries Disputes, Marine Environments Disputes, and Seabed Disputes. The Seabed Disputes Chamber that issued the Advisory Opinion in Case No. 17 consists of 11 members.⁶¹³

The Tribunal has jurisdiction in two kinds of proceedings: contentious and advisory.⁶¹⁴ In terms of access, the Tribunal is a hybrid mechanism. The issues related

⁶⁰⁵ Cathrin Zengerling, *NGOs versus European Pirates: Fisheries Agreements, IUU Fishing and ITLOS in West African Cases* in INTERNATIONAL ENVIRONMENTAL LAW-MAKING AND DIPLOMACY REVIEW 107, 121 (ED COUZENS & TUULA HONKONEN EDS. 2008).

⁶⁰⁶ Sicco Rah and Tilo Wallrabenstein, *Sustainability Needs Judicial Support: What Does the International Tribunal for the Law of the Sea (ITLOS) Offer in This Respect?* in INTERNATIONAL MARITIME ORGANISATIONS AND THEIR CONTRIBUTION TOWARDS A SUSTAINABLE MARINE DEVELOPMENT 285, 286 (PETER EHLERS AND RAINER LAGONI EDS. 2006).

⁶⁰⁷ Annex VI, Statute of the International Tribunal for the Law of the Sea http://www.un.org/depts/los/convention_agreements/texts/unclos/annex6.htm

⁶⁰⁸ Cathrin Zengerling, *NGOs versus European Pirates: Fisheries Agreements, IUU Fishing and ITLOS in West African Cases* in INTERNATIONAL ENVIRONMENTAL LAW-MAKING AND DIPLOMACY REVIEW 107, 121 (ED COUZENS & TUULA HONKONEN EDS. 2008).

⁶⁰⁹ Rules of the Tribunal, Adopted on 28 October, 1997
ITLOS, Basic Texts <http://www.itlos.org/index.php?id=12>

⁶¹⁰ Art. 2 (1), *Statute of the Tribunal*, ITLOS Basic Texts
<http://www.itlos.org/index.php?id=12>

⁶¹¹ Art. 1(2), *Statute of the Tribunal*, ITLOS Basic Texts
<http://www.itlos.org/index.php?id=12>

⁶¹² ITLOS, Cases
<http://www.itlos.org/index.php?id=10&L=0%20%5Co%20Opens%20internal%20link%20in%20current%20window>

⁶¹³ Randa Salama, *Fragmentation of International Law: Procedural Issues Arising in Law of the Sea Disputes*, 19 AUS. & NEW ZEALAND MAR. L. J. 24, 27 (2005).

⁶¹⁴ Art. 44-53, Rules of the Tribunal.

to access to the tribunal should be considered in two separate areas: (a) access in the contentious proceedings, with special considerations given to the issues of access to the Seabed Disputes Chamber; and (b) access to advisory proceedings.

B. Access as Applicants

Article 20 of Annex VI of UNCLOS stipulates provisions regarding access to the Tribunal. First, the Tribunal is open to state parties of UNCLOS. However, access is not just foreclosed to them. Article 20(2) states:

The Tribunal shall be open to entities other than States Parties in any case expressly provided for in Part XI or in any case submitted pursuant to any other agreement conferring jurisdiction on the Tribunal which is accepted by all the parties to that case.

First, we have to inquire what is meant by a “state party” in 20(1). Article 1(2.1) defines state parties as states that have consented to be bound by the Convention and for which the UNCLOS is in force.⁶¹⁵ Moreover, the meaning of “state parties” is extended to entities other than states by virtue of Article 305, which stipulates that UNCLOS will accept signatures by entities other than states, including by self-governing associated states and international organizations.⁶¹⁶ Article 305 of Annex IX (Participation by International Organizations) establishes:

For the purposes of article 305 and of this Annex, “international organization” means an intergovernmental organization constituted by States to which its member States have transferred competence over matters governed by this Convention, including the competence to enter into treaties in respect of those matters.⁶¹⁷

⁶¹⁵ Art.1 (2.1.) UNCLOS.

⁶¹⁶ Art. 305(1). UNCLOS.

⁶¹⁷ Annex IV, Art. 1. UNCLOS.

Commentary to the UNCLOS has also suggested that the definition entails only those organizations to which states transfer competence.⁶¹⁸ Some commentators argue that this definition includes the European Community (EC) only.⁶¹⁹ Indeed, the EC ratified the UNCLOS in 1998. Up until now, EC is the only international organization and non-state member of the Convention.⁶²⁰

Second, the Part XI referred to in Article 20 is the Part that regulates activities in the Area. Article 187 of Part XI of UNCLOS provides that in the cases when disputes arise from the activities in the Area, the relevant Chamber of the Tribunal has jurisdiction over disputes between states as well as non-state parties, including state enterprises and natural or juridical persons.⁶²¹

The third prong, in “any case submitted pursuant to any other agreement conferring jurisdiction on the Tribunal which is accepted by all the parties to that case,” has been the subject of much academic discussion.

There are several opinions on how to interpret the word “agreement” in this part. Thomas Mensah, for instance, argues that the “agreement” can only be a public international agreement as also stated in Article 288(2), which would mean that the general contentious jurisdiction is not open for private entities.⁶²² Others, such as Sicco Rah and Tilo Wallrabenstein, argue that the phrasing exhibits “theoretical

⁶¹⁸ MYRON H. NODQUIST, SHABTAI ROSENNE AND LOUIS B. SOHN, UNITED NATIONS CONVENTION ON THE LAW OF THE SEA 1982: A COMMENTARY, Vol. V, 193, 456 (1989).

⁶¹⁹ L.B. DE CHAZOURNES, C. ROMANO & R. MACKENZIE, INTERNATIONAL ORGANIZATIONS AND INTERNATIONAL DISPUTE SETTLEMENT: TRENDS AND PROSPECTS 40 (2002).

⁶²⁰ Cathrin Zengerling, *NGOs versus European Pirates: Fisheries Agreements: IUU Fishing and ITLOS in West African Cases*, International Environmental Law-Making and Diplomacy Review 107, 125 (COUZENS AND TUULA HONKONEN ED., 2008).

⁶²¹ Art. 1, Annex IV, UNLCOS.

⁶²² Art. 187, UNCLOS.

⁶²² Thomas A. Mensah, *The Place of the International Tribunal for the Law of the Sea in the International System for the Peaceful Settlement of Disputes*, in THE INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA: LAW AND PRACTICE 30 (P. CHANDRASEKHARA RAO AND RAHMATULLAH KHAN EDS., 2001).

openness” towards NGOs.⁶²³ Philippe Gautier, the Registrar of the Tribunal,⁶²⁴ considers that even if the “agreement” in Article 20(2) does imply the public international law agreement as in Article 288(2), access to ITLOS remains open to entities that have international legal personality. However, the question of which entities possess the international legal personality should be determined based on the “needs of the international community.”⁶²⁵

Moreover, even if meeting the conditions under these provisions theoretically, a plaintiff before ITLOS needs to have legal standing according to the general rules of international public law. Thus, NGOs would either have to claim infringement on their own rights or have the option of arguing altruistically in the common interest. ITLOS could develop criteria for such standing.⁶²⁶ In any event, so far the Tribunal’s practice has not provided definitive answers for solving these debates.

Section H of the Rules of Procedure concerns advisory proceedings,⁶²⁷ in which Article 133 of the Rules of Procedure spells out the system for advisory proceedings, which fall within the domain of the Seabed Disputes Chamber.⁶²⁸ The request for an advisory opinion should rest on a legal question arising within the scope of the Assembly’s activities. It should also contain a concise formulation of the question and be accompanied by the relevant documentation.⁶²⁹

⁶²³ Sicco Rah, *Introduction in* INTERNATIONAL MARITIME ORGANISATIONS AND THEIR CONTRIBUTION TOWARDS A SUSTAINABLE MARINE DEVELOPMENT 7, 18 (PETER EHLERS AND RAINER LAGONI EDS., 2006).

⁶²⁴ Press Release, ITLOS, 21 September 2011, http://www.itlos.org/fileadmin/itlos/documents/press_releases_english/PR_No.56.pdf

⁶²⁵ Philippe Gautier, *NGOs and Law of the Sea Disputes*, in CIVIL SOCIETY, INTERNATIONAL COURTS AND COMPLIANCE BODIES, 233, 236 (TULIO TREVES ET AL. EDS. 2004).

⁶²⁶ Cathrin Zengerling, *NGOs versus European Pirates: Fisheries Agreements: IUU Fishing and ITLOS in West African Cases*, International Environmental Law-Making and Diplomacy Review 107, 126 (COUZENS AND TUULA HONKONEN ED., 2008).

⁶²⁷ Section H, Rules of Procedure.

⁶²⁸ *Id.* at Art. 130.

⁶²⁹ *Id.* at Art. 131.

⁶³⁰ Donald K. Anton et al, *Advisory Opinion on Responsibility and Liability for International Seabed Mining (ITLOS Case. No. 17): International Environmental Law in the Seabed Disputes Chamber*,

C. Access as Amicus Curiae

The possibility of amicus intervention is not mentioned in the ITLOS Statute. However, the Tribunal's Rules of Procedure allow amici curiae interventions in both contentious and advisory proceedings. Rule 84 regulates the procedure of such interventions in contentious proceedings. The Tribunal's procedure allows for amici interventions of two basic forms: (a) top-down, that is, when requested by the Tribunal; and (b) unsolicited, when an intergovernmental organization seeks to furnish information relevant to a case.

The top-down occasions may have three specific origins: (a) when requested by the state party, (b) when requested by the Tribunal *proprio motu*, or (c) in a special instance, when the case before the Tribunal is concerned with the interpretation of the constituent instrument of an international organization or a related international convention.⁶³⁰ At any time prior to the closure of the oral proceedings, the Tribunal may request that the organization "furnish information relevant to a case before it."⁶³¹

In advisory proceedings, the amicus curiae procedure is top-down only. The Registrar communicates to all state parties that a request for advisory opinion was submitted.⁶³² Article 133 (2) establishes, "The Chamber, or its President if the Chamber is not sitting, shall identify the intergovernmental organizations which are likely to be able to furnish information on the question. The Registrar shall give notice of the request to such organizations."⁶³³ Then the Chamber, or its President, if the Chamber is not sitting, will identify an intergovernmental organization that can furnish information pertinent to the legal question raised. The organizations and states are

ANU College of Law Research Paper No. 11-06, 3 Available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1793216

⁶³⁰ Art. 84, ITLOS, Rules of the Tribunal.

⁶³¹ Art. 84, ITLOS Rules of the Tribunal.

⁶³² *Id.* at Art. 133.

⁶³³ *Id.* at Art.133 (2).

invited to submit their opinions within fixed time limits. If the oral proceedings are held, then the States and organizations are invited to take make oral submissions.⁶³⁴

However, scholars have debated the exact meaning of the word “intergovernmental” in Rule 133. As noted above, amici interventions under both Rules 84 and 133 are limited to “intergovernmental organizations.” Because neither the Tribunal’s Statute nor the Rules of Procedure define the characteristics of “intergovernmental organizations,” considerable scholarly discussion has been generated around the Rules’ use of this term. In particular, scholars have deliberated about the frequent and seemingly interchangeable uses of the phrases “intergovernmental organization” and “international organization” by the Rules of Procedure.

For instance, Rule 52 elaborates on the procedure for communication to the parties and mentions both types of organizations. It indicates that “in the case of the International Seabed Authority or the Enterprise, any international organization and any other intergovernmental organization [emphasis added] the Tribunal shall direct all communications to the competent body or executive head of such organization at its headquarters location.”⁶³⁵

With regard to the possibility of amicus interventions by NGOs, it is important to inquire whether the “intergovernmental organization” mentioned in the Rules of Procedure provisions about amicus interventions are equivalent to the “International Organization” defined in UNCLOS. Could the Tribunal, hypothetically speaking, call on an internationally recognized NGO to submit its views under Rules 84 and 133? And if not, in what way are “intergovernmental organizations” different from “international organizations” for the purposes of submitting amicus briefs?

⁶³⁴ *Id.* at Art.133 (4).

Lance Bartholomeusz highlights the drafting history of the procedural rules of ITLOS. He indicates that Article 133 of ITLOS rules of procedure was modeled on Article 66 of the ICJ statute and notes that the wording of the rules changed from “international” to “intergovernmental organization” only in later drafts.⁶³⁶ According to Bartholomeusz, the reading precludes NGOs from participation as amici.⁶³⁷ Beyerlin agrees with Bartholomeusz’s conclusion, yet does not elaborate in what sense an “intergovernmental organization” is different from an “international organization.”⁶³⁸

Philippe Gautier adds that “intergovernmental organization” is broader than “international organization” and includes all international organizations, except when they are parties or intervening parties in the case.⁶³⁹ According to Gautier, it is “difficult to see how the term “intergovernmental organization” could cover an NGO.”⁶⁴⁰

2. Amicus Curiae in Case No. 17

Case No. 17 concerns an unprecedented instance when the International Seabed Authority faced a request by private entities to allow them to explore the seabed. However, one of the sponsoring states, Nauru, asked that the Seabed Authority request an advisory opinion regarding the contours of state liability for damage in the Area incurred by private actors. The Case is noteworthy for amicus participation in two respects: first, based on its procedural rules the Tribunal requested amicus briefs

⁶³⁶ Lance Bartholomeusz, *The Amicus Curiae Before the International Courts and Tribunals*, 5 NON-ST. ACTORS & INT’L L. 216, 231 (2005).

⁶³⁷ *Id.*

⁶³⁸ Ulrich Beyerlin, *The Role of NGOs in International Environmental Litigation*, 61 ZAÖRV 357, 364 (2001).

⁶³⁹ Philippe Gautier, *NGOs and Law of the Sea Disputes*, in CIVIL SOCIETY, INTERNATIONAL COURTS AND COMPLIANCE BODIES, 233, 239 (TULIO TREVES ET AL. EDS. 2004).

⁶⁴⁰ *Id.*

by a number of “intergovernmental” organizations that possess Observer status at the Assembly of the International Seabed Authority. One of the organizations, which submitted a brief in response, was the International Union for the Conservation of Nature (IUCN). At the same time, two groups, Greenpeace and the WWF, petitioned the Tribunal to accept their *amicus curiae* brief. This section outlines the relevant background to the Tribunal’s opinion, as well as the founding history, organizational structure, and membership base of intervening and petitioning amici.

A. Facts of the Case

UNCLOS declares the seabed and its resources that lie beyond national jurisdiction (known as “The Area”) to be “the common heritage of mankind.”⁶⁴¹ The Area comprises two-thirds of the earth’s surface. The doctrine of common heritage establishes norms preserving a large part of ocean space as a commons accessible to and shared by all states and taking into particular consideration the interests and needs of developing states.⁶⁴² The International Seabed Authority (ISA) supervises the exploration and exploitation of the Area.⁶⁴³ The Authority adopts rules and procedures for the protection and conservation of the natural resources of the Area.⁶⁴⁴

All prospective exploration and exploitation activities (carried out by either a state entity or a private entity) are required to be sponsored by a party to UNCLOS. Sponsoring states must apply to the ISA for approval of a work plan for exploration and licenses for exploitation.

In 2008, the ISA received two applications for approval of work plans for exploration in a reserved area.⁶⁴⁵ They were lodged by Nauru Ocean Resources, Inc. (a

⁶⁴¹ Art. 136, UNCLOS.

⁶⁴² Art. 140 (1), UNCLOS.

⁶⁴³ Art. 156, UNCLOS.

⁶⁴⁴ Art. 145, UNCLOS.

⁶⁴⁵ Advisory Opinion, para. 4.

Nauruan corporation sponsored by Nauru) and Tonga Offshore Mining Ltd. (a Tongan corporation sponsored by Tonga).⁶⁴⁶ In 2009, as sponsoring countries became anxious about the possible liability caused by exploration, they requested that the ISA postpone both applications.⁶⁴⁷ Before proceeding, Nauru proposed that the ISA seek an Advisory Opinion from the Chamber on several specific questions to clarify the liability of sponsoring states.⁶⁴⁸

The ISA Council requested an Advisory Opinion from the Chamber on three questions.⁶⁴⁹ Based on Rule 82 of its Rules of Procedure, the Tribunal asked for an amicus opinion only of those intergovernmental organizations that serve as observers in the Assembly of the Authority.⁶⁵⁰ A study of the entities that submitted written statements as requested by the Tribunal shows that 11 states, three organizations, and the International Seabed Authority furnished such statements.⁶⁵¹

B. Amicus Brief by IUCN

Rule 82 of the Rules of Procedure of the Assembly specifies the types of entities that may be granted observer status. The list includes states that are not members of the Authority and the United Nations along with its agencies and non-governmental organizations. Rule 82.1(e) of the rules of procedure of the Assembly defines two types of organizations that can receive an observer status in the Assembly: (a) non-governmental organizations with which the Secretary-General has entered into arrangements in accordance with article 169, paragraph 1, of UNCLOS; and (b) other

⁶⁴⁶ *Id.*

⁶⁴⁷ *Id.*

⁶⁴⁸ *Id.*

⁶⁴⁹ *See*, in general, Advisory Opinion.

⁶⁵⁰ Art. 82.1, Rules of Procedure of the Assembly of the International Seabed Authority http://www.isa.org.jm/files/documents/EN/Regs/ROP_Assembly.pdf

⁶⁵¹ Advisory Opinion, para. 7.

non-governmental organizations invited by the Assembly that have demonstrated their interest in matters under consideration by the Assembly.⁶⁵²

Therefore, from the wide range of entities that serve as Observers of the Assembly, the Chamber invited only several organizations. The Interoceanmetal Joint Organization (IOM), the International Union for the Conservation of Nature (IUCN), and the United Nations Environment Programme (UNEP) submitted statements.⁶⁵³ The Tribunal invited organizations that are either fully constituted by states, such as UNEP and the IOM, or those that have States as members (IUCN).

The IOM was founded in 1987 by an intergovernmental agreement. The current IOM sponsoring states are Bulgaria, Cuba, the Czech Republic, Poland, Russia, and Slovakia. It is headquartered in Poland. In fact, since 2001, the IOM has had an agreement with the International Seabed Authority for exploration activity in the area.⁶⁵⁴ UNEP is a United Nations arm regarding environmental issues around the world. UNEP's mandate is based on the United Nations General Assembly Resolution 2997 (XXVII) of December 15, 1972, and subsequent amendments.⁶⁵⁵

IUCN is the most hybrid of all the participating organizations. In its submission, the organization defined itself as “an intergovernmental organization.”⁶⁵⁶ However, in academic literature IUCN and its predecessor are referred to as NGOs.⁶⁵⁷ Nevertheless, its membership base goes beyond governments alone. The statement

⁶⁵² Rule 82, Rules of Procedure of the Assembly of the International Seabed Authority http://www.isa.org.jm/files/documents/EN/Regs/ROP_Assembly.pdf

⁶⁵³ About the International Organization of Migration, <http://www.iom.gov.pl/welcome.htm> [04.05.2012 11:20AM]

⁶⁵⁴ See, International Seabed Authority website, Contractors <http://www.isa.org.jm/en/scientific/exploration/contractors> [04.05.2012 12.20PM]

⁶⁵⁵ Adopted at UNCED in 1992, the Nairobi Declaration on the Role and Mandate of UNEP, adopted at the Nineteenth Session of the UNEP Governing Council, and the Malmö Ministerial Declaration of 31 May, 2000.

⁶⁵⁶ Statement of International Union for Conservation of Nature, Commission on Environmental Law, Oceans Specialist Group, Para 3.

http://www.itlos.org/fileadmin/itlos/documents/cases/case_no_17/StatementIUCN.pdf Para 2.

⁶⁵⁷ See Anna-Katharina Wobse, *The World After All Was One: The International Environmental Network of UNESCO and IUPN: 1945-1950*, 20 CONTEMPORARY EUROPEAN HISTORY 331-348 (2011).

notes, “IUCN is the world’s oldest and largest global environmental network. It has a democratic membership union with more than 1,000 government and NGO member organizations, and almost 11,000 volunteer scientists and other experts in more than 160 countries.”⁶⁵⁸ In it, the Statute of the IUCN indicates that it is registered under “Article 60 of the Swiss Civil Code as an international association of governmental and non-governmental members.”⁶⁵⁹ In terms of its members, IUCN classifies membership, and in this system of classification, states and integration organizations founded by states are Category A, although non-governmental organizations registered within states and international NGOs affiliated with more than one state can become members of Category B.⁶⁶⁰ The difference in categories is reflected in the difference of rights of entities in these categories, including voting rights. For instance, each member state has three votes, while each NGO has one vote.⁶⁶¹

C. Amicus Curiae Petition by WWF and Greenpeace

On August 17, 2010, the ITLOS Registry received a request by Greenpeace and the WWF to permit them to participate in the Advisory proceedings as amici curiae.⁶⁶² The President of the Court informed the organizations with individual letters on August 27 that their statement would not be included in the case file, as it was not submitted in accordance with Rule 133 of the Court. However, it would be transmitted to the states, intergovernmental organizations, and the Seabed Authority. The

⁶⁵⁸ Statement of International Union for Conservation of Nature, Commission on Environmental Law, Oceans Specialist Group, Para 3.

http://www.itlos.org/fileadmin/itlos/documents/cases/case_no_17/StatementIUCN.pdf

⁶⁵⁹ Art. 1, IUCN Statute

http://cmsdata.iucn.org/downloads/statutes_en.pdf

⁶⁶⁰ *Id.* at Art. 4.

⁶⁶¹ *Id.* at Art. 34.

⁶⁶² Responsibility and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area, Advisory Opinion, Case no. 17, 1 February, 2011, para. 13.

recipients were also informed that the statement would not be a part of the official case file.

The amicus curiae pleading was submitted by two organizations: Stichting Greenpeace (Greenpeace International) and the WWF.⁶⁶³ The petitioners' pleading was innovative relative to requests for intervention as amici in other international courts in that it was composed of two related, yet separate documents: the Petition and the Memorial. The Petition put forth the organizations' request to participate as amici in the proceedings as well as their justifications for intervention, and the Memorial presented the petitioners' substantive arguments.⁶⁶⁴

In particular, in the petition, the organizations requested that (a) the petition and the memorial be considered as part of the pleadings in Case No. 17, and (b) the intervening organizations be permitted to make oral submissions during the hearings.⁶⁶⁵

The Petition touches upon three specific issues: (a) the authority of ITLOS to accept NGO amicus curiae submissions, (b) the desirability of admitting amici submissions, and (c) the interests of the intervening organizations in relation to the case. In the section addressing the Tribunal's authority, the petitioners' main claim rested on the argument that the Tribunal's statute and rules of procedure neither authorize nor bar amici participation. The petitioners write, "In summary, although there is no express legal basis for amicus curiae participation in ITLOS proceedings in general . . . neither is there a bar to it"⁶⁶⁶ The argument in the petition regarding desirability of accepting amici submissions rests on a number of claims.

⁶⁶³ See Petition of Stichting Greenpeace Council and the World Wide Fund for Nature to be granted amicus curiae status,

<http://www.greenpeace.org/international/Global/international/publications/oceans/2011/ITLOS%20Petition%20-%20final.pdf> [10.10.2013 9:30 AM]

⁶⁶⁴ *Id.*

⁶⁶⁵ *Id.* at 2.

⁶⁶⁶ *Id.* at 5.

First, in what can be called a “lacuna” argument, the petitioners indicate that the proceedings before the international tribunals raise many issues that cannot be adequately expressed via the views of just governments and intergovernmental organizations.⁶⁶⁷

Second, the petitions put forth the “diffusion argument,” asserting that amici participation is becoming more accepted in international dispute-resolution, marshaling evidence from the practice of other international courts, including the European Court of Human Rights and the WTO.⁶⁶⁸ Third, the petitioners highlight specific features of the deep seabed regime that warrant representation by entities other than governments.⁶⁶⁹ Last, the petitions respond to an anticipated concern of the ITLOS judges in the so-called floodgates argument by arguing that the acceptance of amicus briefs will not result in an overwhelming submission of amici petitions. The petitioners put forth research from ICJ and the ECHR in this regard.⁶⁷⁰

In a separate section, the petitions outline their “interest” in participating in the case as amici.⁶⁷¹ Both organizations are “foremost environmental organizations globally, and both have campaigned for protection of the marine environment for decades.”⁶⁷² They petitioned the Court to highlight that the Law of the Sea Convention as well as the customary international law impose serious obligations on states sponsoring activities in the Seabed.⁶⁷³

The combined purpose of these obligations is to ensure that the risk of activities in the Area is properly internalized, to discourage ill-advised projects, and to ensure that the risk of these activities is not simply transferred to third parties and the

⁶⁶⁷ *Id.* at 6.

⁶⁶⁸ *Id.* at 7.

⁶⁶⁹ *Id.* at 11-12.

⁶⁷⁰ *Id.* at 14-15.

⁶⁷¹ *Id.* at 15.

⁶⁷² *Id.*

⁶⁷³ *Id.*

environment.⁶⁷⁴ Last, the petitioners described their organizations, objectives, and involvement with the International Seabed Authority.⁶⁷⁵

The WWF is a trailblazer in amicus curiae procedures and was one of the organizations in relation to which the WTO had to confront the issue of admitting amicus curiae submissions. The issue of whether WTO Dispute Panels should accept amicus curiae briefs arose in the *Shrimp/Turtle* case.⁶⁷⁶ One of the two organizations that filed an unsolicited amicus submission in that case was the WWF.⁶⁷⁷ The two briefs were submitted jointly by the Center for Marine Conservation (CMC) and the Center for International Environmental Law (CIEL), and by the WWF.⁶⁷⁸

Interestingly, the ITLOS petition refers to the precedent within the WTO instance, yet does not highlight the fact that the WWF was there as well as the first petitioner.⁶⁷⁹

Greenpeace International describes itself as “an independent global campaigning organisation that acts to change attitudes and behaviour, to protect and conserve the environment and to promote peace”⁶⁸⁰ It is present in 40 countries across the globe and does not accept funds from governments or corporations.⁶⁸¹ Greenpeace is an experienced amicus curiae submitter both internationally and before

⁶⁷⁴ *Id.*

⁶⁷⁵ *Id.* at 16-17.

⁶⁷⁶ Appellate Body Report, United States—Import Prohibition of Certain Shrimp and Shrimp Products (“U.S.—Shrimp”), WT/DS58/AB/R, adopted 6 November 1998, DSR 1998:VII, 2755; Panel Report, United States—Import Prohibition of Certain Shrimp and Shrimp Products (“U.S.—Shrimp”), WT/DS58/R and Corr.1, adopted 6 November 1998, as modified by the Appellate Body Report, WT/DS58/AB/R, DSR 1998:VII, 2821.

⁶⁷⁷ Henry S. Gao, *Amicus Curiae in WTO Dispute Settlement: Theory and Practice*, China Rights Forum 1, 2006

http://hrichina.org/sites/default/files/oldsite/PDFs/CRF.1.2006/CRF-2006-1_Amicus.pdf

⁶⁷⁸ *Id.*

⁶⁷⁹ *Petition of Stichting Greenpeace Council and the World Wide Fund for Nature to be granted amicus curiae status*,

[8http://www.greenpeace.org/international/Global/international/publications/oceans/2011/ITLOS%20Petition%20-%20final.pdf](http://www.greenpeace.org/international/Global/international/publications/oceans/2011/ITLOS%20Petition%20-%20final.pdf) [09.11.2012 10.30AM]

⁶⁸⁰ Greenpeace International Home,
<http://www.greenpeace.org/international/en/home/>
[09.11.2012 11.05AM]

⁶⁸¹ Greenpeace International About,
<http://www.greenpeace.org/international/en/about/> [09.11.2012 11.05AM]

domestic courts. For instance, in 2004, Greenpeace submitted an amicus curiae brief before the WTO together with 14 other non-governmental organizations in the so-called Biotech dispute.⁶⁸²

Nevertheless, Greenpeace has much more experience in amicus curiae participation domestically. Greenpeace USA has also been active in filing amicus briefs in the courts at home.⁶⁸³ The two organizations have a history of collaboration on the submission of amicus briefs. They submitted a joint brief along with other organizations in the case of European Communities—Measures Affecting Asbestos and Asbestos-Containing Products (“EC—Asbestos”).⁶⁸⁴

3. The Tribunal’s Approach

In Case No. 17 the Tribunal expressed its cautious, yet favorable, approach to NGO participation through two distinct means. First, by admitting an amicus brief by IUCN under Rule 133, the Tribunal conceded that “intergovernmental organizations” as understood under its Rules could include NGOs within the UN definition of this term. Second, although the Tribunal dismissed the brief by the WWF and Greenpeace, indicating that it was contrary to the Tribunal’s Rules of Procedure, the Tribunal

⁶⁸² *Before the World Trade Organization, European Communities-Measures Affecting the Approval and Marketing of Biotech Products (DS 291, DS 292, DS 293), Request for Permission to Submit Information to the Panel by the Following Non-Parties*, <http://www.greenpeace.org/international/Global/international/planet-2/report/2004/6/amicus-curiae-submitted-to-the.pdf>

[09.01.2012 10.00AM]

⁶⁸³ Brief of Amicus Curiae, Greenpeace U.S.A and the Environment Defence Fund, <http://www.law.fsu.edu/library/flsupct/75128/75128amicus.pdf> [09.02.2012 10.30.AM]

⁶⁸⁴ WTO Appellate Body, *Report of the Appellate Body: EC — Asbestos*, WTO Doc WT/DS135/AB/R (12 March 2001), fns 32–3.; See Mary Footer & Saman Zia-Zarifi, *European Communities- Measures Affecting Asbestos and Asbestos Containing Products: The World Trade Organizations on Trial for Its Handling of Occupational Health and Safety Issues*, 3 MELBOURNE J. INT’L L.120 (2002). See also “NGOs welcome WTO Green Light to French Ban on Asbestos but remain skeptical about the WTO Dispute Settlement Process,” Joint Position Statement by Greenpeace International, IBAS (International Ban Asbestos Secretariat), FIELD (Foundation for International Environmental Law and Development) and WWF (World Wide Fund for Nature, International), March 2001, www.field.org.uk..

undertook a number of steps which point to a favorable treatment of the amicus submission by these two public interest organizations.

A. ITLOS's Approach to IUCN

The practice of Case No. 17 refined the meaning of “the intergovernmental organization” under Rule 133. By admitting an amicus brief by IUCN, the Tribunal approximated the meaning of “intergovernmental organization” to an NGO, at least as it is understood by the United Nations.

The character of organizations invited to submit their views is clarified in the meaning of “intergovernmental organizations” under Article 133 of the Rules of Procedure: “intergovernmental organizations” is a broader category than “international organizations” under Article 305 of UNCLOS. The latter is characterized by two conditions: (a) it is constituted by States, and (b) its member States have transferred competence to it over matters governed by this Convention, including the competence to enter into treaties in respect to those matters.⁶⁸⁵

On the other hand, “inter-governmental organizations” are those organizations that contain states as members. As Case No. 17 shows, the defining character is not the type of the instrument that founded the organization. The IOM was established by an intergovernmental agreement, and UNEP was established by a UN General Assembly Declaration, whereas the IUCN was founded as an Association under the Swiss Civil Code.⁶⁸⁶ However, all the organizations are “intergovernmental” in that states are members of these organizations. In the case of IOM, its membership consists of states only, whereas IUCN unites states as well as non-governmental organizations, even though states have more rights.

⁶⁸⁵ Art. 305, <http://www.itlos.org/index.php?id=109>

⁶⁸⁶ Art. 60, Swiss Civil Code available at <http://www.admin.ch/ch/e/rs/2/210.en.pdf>

The practice of Case No. 17 also shows that membership of “intergovernmental organizations” as opposed to “international organizations” might not be limited exclusively to states. As indicated above, IUCN’s members are states as well as state agencies, NGOs, and individuals.

By admitting the brief by IUCN, ITLOS approximated its interpretation of an “intergovernmental organization” to the definition of an NGO at least as understood by the United Nations. The term “non-governmental organization” was first mentioned on the global level in Article 71 of the UN Charter, which reads: “The Economic and Social Council may make suitable arrangements for consultation with non-governmental organizations which are concerned with matters within its competence.” The Charter did not, however, define “non-governmental organization.” A definition was adopted in 1950 by the UN Economic and Social Council, which established that for the purpose of consultative arrangements with the Council, NGO meant “[. . .] any international organization which is not created by intergovernmental agreement.”⁶⁸⁷ The definition was further elaborated in 1996, providing that “[. . .] any such organization that is not established by a governmental entity or intergovernmental agreement shall be considered a non-governmental organization for the purpose of these arrangements, including organizations that accept members designated by governmental authorities, provided that such membership does not interfere with the free expression of views of the organization.”⁶⁸⁸ There were other conditions added as well, such as that the aims of an NGO must be in conformity with the spirit, purposes,

⁶⁸⁷ Review of Consultative Agreements with Non-governmental Organizations, para. 8. E/RES/288(x), Feb. 27, 1950.

⁶⁸⁸ Consultative Relationship Between the United Nations and Non-Governmental Organizations, para. 2. E/RES/1996/31, July 25, 1996.

and principles of the UN Charter.⁶⁸⁹ The definition does not, therefore, include possession of a non-profit or public-interest aim as a requirement.⁶⁹⁰

IUCN meets this UN definition of an NGO. The UN definition excludes from NGO recognition those organizations that were established solely by governments. IUCN was founded as the International Union for Protection of Nature (IUPN) in Fountainebleau in 1948.⁶⁹¹ At the time of founding, it comprised an amalgamation of states and non-governmental organizations.⁶⁹² In 1956, IUPN was renamed the IUCN, while its objectives remained. It is hardly doubtful that these purposes correspond to the purposes of the United Nations and its principles.

B. The Tribunal's Favorable Treatment of the WWF and Greenpeace Brief

Despite the fact that ITLOS rejected NGO amicus submissions based on its Rules of Procedure, with its actions the Tribunal subtly welcomed the WWF and Greenpeace brief. Although the amicus brief did not become part of the official case file, the actions of ITLOS in regard to the brief, including its display of the brief on its website, facilitated its dissemination to a wide audience of the amici's arguments. As a result, the submission is noted and discussed on other websites and scholarly blogs.⁶⁹³ The NGOs themselves refer to their submission as it is displayed on the Tribunal's page.⁶⁹⁴ In short, by displaying the submission on its website, the Tribunal granted exposure to the amici brief. Moreover, by furnishing the brief to the state parties and

⁶⁸⁹ *Id.*

⁶⁹⁰ Anna Dolidze, *The European Court of Human Rights' Evolving Approach to Non-Governmental Organizations*, GLOBALIZATION AND GOVERNANCE (LAURENCE BOULLE ED. 2011).

⁶⁹¹ Bill ADAMS, GREEN DEVELOPMENT: ENVIRONMENT AND SUSTAINABILITY IN A DEVELOPING WORLD (3rd ED. 2009).

⁶⁹² *Id.*

⁶⁹³ Letter from the International Tribunal for the Law of the Sea to Mr. Daniel Simons, Greenpeace International, Dated August 27, 2010, available with the author.

⁶⁹⁴ Possible NGO Amicus in ITLOS Advisory Opinion Case, Don Anton, <http://donanton.org/2010/08/29/possible-ngo-amicus-in-itlos-advisory-opinion-case/> (05.05.2012 1.48PM).

intergovernmental organizations, ITLOS supported the process of sharing NGO arguments with the parties, which allowed the parties to take into account the arguments and concerns raised in the brief. Through these actions, the Tribunal allowed the NGOs to achieve the aims that would have been attained with their official participation in the case.

First, although the Rules do not expressly authorize or obligate the Tribunal to do so, the Tribunal disseminated the NGO submission to the State Parties, Seabed Authority, and the organizations that had submitted their statements. The judgment notes that these entities “would be informed that the document was not part of the case file and that it would be posted on a separate section of the Tribunal’s website.”⁶⁹⁵ Indeed, while the letter from the Tribunal to the submitter informs them that their submission will not be included in the case file, it includes a promise that “. . . State Parties and intergovernmental organizations admitted to participate in the advisory proceedings will be informed of the received of the statement and will receive an electronic copy thereof.”⁶⁹⁶

Second, the Tribunal displayed the amici brief on their website,⁶⁹⁷ although the Rules of Procedure are also silent on this matter. Article 133 of the Rules of Procedure addresses submission of documents within advisory proceedings. It states, “The written statements and documents annexed shall be made accessible to the public as soon as possible after they have been presented to the Chamber.”⁶⁹⁸ The question arises: which statements and annexed documents are meant under this provision? The reading of Article 133 in its entirety answers the question. In 133(1), the Tribunal is obligated to inform all State Parties of the request for the advisory procedure. The

⁶⁹⁵ Advisory Opinion, para. 13.

⁶⁹⁶ *Id.*

⁶⁹⁷ See ITLOS website, Case No. 17, *Statement received from a non-governmental organization (not part of the case file)* <http://www.itlos.org/index.php?id=109>

⁶⁹⁸ Art. 134.

following provision allows the Tribunal “to identify the intergovernmental organizations which are likely to be able to furnish information on the question.” Afterward, the state parties and intergovernmental organizations are invited to submit their “written statements and documents annexed” regarding the questions raised in the proceedings.⁶⁹⁹

Thus, according to the Rules, the Court shall make available to the public these documents submitted by States and Intergovernmental Organizations. The Tribunal indeed did so in this case.⁷⁰⁰ However, in addition, the Tribunal did more than it was required to do in accordance with the Rules and displayed the submission of NGO amici briefs.⁷⁰¹

Moreover, the Tribunal’s response to the petitioners includes a promise that their submission will be displayed on the website. The letter specifies how the submission will be presented: “The statement will be placed on the website of the Tribunal in a separate opinion of documents relating to Case No. 17 entitled ‘statement submitted by a non-governmental organization.’” The statement would also indicate that it is not part of the official case file.⁷⁰² Indeed, the Tribunal followed up on the promise.⁷⁰³

⁶⁹⁹ Art. 133 (3).

⁷⁰⁰ See ITLOS website Case No. 17

<http://www.itlos.org/index.php?id=109#c587>

⁷⁰¹ Donald K. Anton *et al*, *Advisory Opinion on Responsibility and Liability for International Seabed Mining (ITLOS Case. No. 17): International Environmental Law in the Seabed Disputes Chamber*, ANU College of Law Research Paper No. 11-06, 1. Available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1793216

⁷⁰² Advisory Opinion, para 13.

⁷⁰³ See Statement of Stitching Greenpeace Council (Greenpeace International) and the World Wide Fund for Nature <http://www.itlos.org/index.php?id=109> [05.01.2013 10.00AM].

4. Findings

The international legal process school has captured the modalities of NGO participation in international lawmaking. This chapter underscores one more, hitherto overlooked, yet increasingly popular method through which NGOs take part in making international law. Although the *amicus curiae* participation procedure originated within the UK and has become a traditional procedural instrument within domestic law of common law countries, an increasing number of international tribunals allows for the *amicus* procedure and accepts and engages with *amicus curiae* briefs submitted by NGOs. Up until now ITLOS has remained one of the few international tribunals not accepting NGO *amicus* briefs. However, Case No. 17 signals a change in this policy.

ITLOS's approach to *amicus* briefs in Case No. 17 indicates that opportunities for NGO participation in international lawmaking are expanding. First, by admitting and considering a brief by IUCN under Rule 133, the Tribunal interpreted "intergovernmental organization" to mean an entity that includes states and non-state actors as founders and members. This precedent approximated "intergovernmental organization" with the term NGO as it is used within the United Nations. This practice, if continued, could serve as a pathway for *amicus* briefs by other organizations whose membership is similar to that of the IUCN.

Second, ITLOS's approach to WWF's and Greenpeace's *amicus curiae* petition showed that the Tribunal is at least partially receptive to hearing NGO claims. Although the Tribunal declined the petition by Greenpeace and WWF, the Tribunal's actual response, including the display of the petition on its website, allowed the dissemination of NGO arguments.

Interestingly, records indicate that the Tribunal judges met in 2004 to review a number of issues with regard to the Rules of Procedure, including the question of

amicus curiae participation.⁷⁰⁴ During the meeting, the Members of the Tribunal discussed whether it was necessary to adopt rules regarding the amicus curiae proceedings. In the end, they decided that it was too early to resolve this question; thus, they determined that the issue should be resolved by considering future developments in the Court's case law.⁷⁰⁵

The decision of the 2004 meeting to discuss the possibility of admitting NGO amicus briefs and the judges' conclusion to wait for relevant precedents demonstrated the readiness of the Tribunal to hear NGO arguments. Case No. 17, which concerned the issue of the seabed, recognized as the "common heritage of mankind," served as an appropriate opportunity to hear views about the implications of the case beyond the interests of the immediate parties to the case. Indeed, to represent the interests that are circumvented by the adversarial procedure is one of the inherent functions of the amicus curiae procedural instrument, a function which, needless to say, should be performed primarily when the fate of the commons of mankind is at stake.

On a more general level, the cautious welcome by ITLOS of NGO participation is an important development for considering the role of NGOs in international dispute-resolution. ITLOS was still one of the few international tribunals that did not allow for amicus submissions by non-state actors. The welcome to NGO briefs in Case No. 17, although timid, may signal that international dispute-resolution is becoming more receptive than before to participation by actors other than states. Whether or not more opportunities for NGOs' participation and their active involvement in international, and in particular, international environmental law-

⁷⁰⁴ STATEMENT BY MR. L. DOLLIVER M. NELSON, PRESIDENT OF THE INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA, ON THE REPORT OF THE TRIBUNAL AT THE FIFTEENTH MEETING OF THE STATE PARTIES TO THE CONVENTION ON THE LAW OF THE SEA, 16 June 2005, The International Tribunal for the Law of the Sea, 3.

http://www.itlos.org/fileadmin/itlos/documents/statements_of_president/nelson/msp_160605_eng.pdf

⁷⁰⁵ ANNUAL REPORT OF THE INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA FOR 2004. SPLOS/122, March 30, 2005, para.41.

making, will lead to more legitimacy or democratization of such lawmaking, this is an issue that future research must answer.

Chapter IX: Conclusion

1. Findings

The study allows us to draw a number of conclusions. First, as a comparison of NGO participation as claimants and as amici shows, opportunities for NGO participation are increasing in both realms. The ECtHR has expanded its negative-substantive admissibility test for NGOs, thus allowing more entities to claim rights within the Court's litigation structure. At the same time, NGOs have become almost routine participants as amici in the cases before the Grand Chamber of the Court. The study of the most recent instance of NGO petition within ITLOS further strengthens the claim that NGO amicus interventions are coming to be accepted by all major international tribunals. In Case No. 17, the Law of the Sea Tribunal for the first time in its history requested and accepted an amicus brief from one NGO, the IUCN, and expressed an indirect welcome to the joint amicus brief by Greenpeace and the WWF. Moreover, as records of recent judges' meetings show, the Tribunal had already considered the possibility of amending the amicus procedure and making it more expansive so that it unequivocally allows for NGO participation.

Second, NGO amicus participation has a character distinct from NGO appearances in the capacity of claimants. The study shows that NGOs take part in cases to which they do not possess any kind of connection. This trend is most visible when contrasted with the States' usage of amicus procedure within the ECtHR. States draw on amicus procedure when they have a connection, or what I call a "transnational link," to a case. States apply the amicus procedure when they are related to a case based on some fact, for instance when the applicant is a national of the intervening state. This right of third-party intervention has been often utilized by the Member

States to indirectly support applications by their nationals in a variety of cases.⁷⁰⁶ For example, in the case *Slivenko v. Latvia*, the applications were brought by former stateless residents of Latvia, who later received Russian citizenship.⁷⁰⁷ Russia exercised its rights under Article 36(1).⁷⁰⁸ Russia again intervened in support of applications in *Sisojeva et al v. Latvia*.⁷⁰⁹ The same is not true of NGOs, who intervene as amici without such a link to the case in question.

Furthermore, the claim that NGO interventions as amici curiae have a strong public-interest dimension, contrary to NGO participation as complainants, is evidenced by the fact that all NGO complaints were directed against the same country where the NGO is based, while the transnational element is much stronger in cases involving NGO amicus brief submissions. A typical case involving a complaint by an NGO concerns an organization registered in the same country against which the claim is directed. For instance, *Unabhängige Initiative Informationsvielfalt*, a newspaper publisher registered as a non-profit in Austria, filed a complaint against Austria in the case of *Unabhängige Initiative Informationsvielfalt v. Austria* (2002).⁷¹⁰ Similarly, an association against animal cruelty based in Switzerland—*Vgt Verein Gegen Tierfabriken*⁷¹¹—filed an application against Switzerland in the case *Vgt Verein Gegen Tierfabriken v. Switzerland*.⁷¹²

⁷⁰⁶ E.g., in *Scozarri and Giunta v. Italy*, Belgium intervened in support of the application of its nationals, App. Nos. 39221/98 and 41963/98, July 13, 2000, para 8; In the case of *A, B and C v. Ireland*, the Lithuanian government exercised its right under article 36(1) and intervened with a third party submission to support the claims of one of the applicants, that was a Lithuanian national, in *A, B and C v. Ireland*, App. No. 25579/05, December 19, 2010, para. 5.

⁷⁰⁷ *Slivenko v. Latvia*, App. No. 48321/99, October 9, 2003, para. 46.

⁷⁰⁸ *Id.* para 6.

⁷⁰⁹ *Sisojeva et al v. Latvia*, para. 114.

⁷¹⁰ Case of *Unabhängige Initiative Informationsvielfalt v. Austria*, 26.05.2002 available at <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=AUSTRIA%20%20Initiative&sessionId=40393769&skin=hudoc-en> accessed on December 3, 2009.

⁷¹¹ *Vgt Verein Gegen Tierfabriken* website <http://www.vgt.ch> [19.09.2013 10:00AM].

⁷¹² *Vgt Verein Gegen Tierfabriken v. Switzerland*, App. No. 24699/94, June 28, 2001.

Nevertheless, amicus interveners do not take part in cases randomly. As the study of NGO amicus interventions within the ECtHR shows, NGO amici take part in cases and bring forward their views about issues that relate to their organizational mandate. For instance, organizations that work on gender equality take part in cases relating to gender equality, and NGOs whose mandate concerns property restitution become involved in disputes related to property restitution.

The analysis of the first amicus interventions within ITLOS supports this conclusion. In ITLOS the mandate of all three amicus NGOs is related to the study of or advocacy about environmental matters, including the questions related to the marine environment.

Moreover, noteworthy findings follow from the historical micro study of the internationalization of amicus curiae procedure from the UK to the European Court of Human Rights. Contrary to the structuralist perspectives on international legal opportunity structure, this part shows that NGOs alongside States take part in creating international avenues for their legal action. The case study provides that British NGOs and the UK Government, acting independently, engaged with the staff and judges of the ECtHR and persuaded the Court to adopt the amicus curiae intervention procedure. Recall, however, that originally, amicus procedure offered a possibility for NGOs as well as the UK Government to intervene in cases when their interests were not presented in the proceedings. Yet later amicus curiae procedure has turned into a pathway for NGOs to present arguments in the public interest. As we see from the study, NGOs have extensively used the procedure to advance their public interest claims.

In addition, this finding is supported by the study of NGO participation within ITLOS. In Case No. 17, two NGOs, Greenpeace and the WWF, petitioned the Tribunal to adopt their submission even though there was no relevant legal basis for

this in the Tribunal's procedures. Therefore, although international structures, such as international dispute-resolution bodies, attract and foster international claim-making by NGOs, the activities of these organizations in turn influence further development of these structures. The conclusion has interesting implications for the scholarship on international opportunity structures and mobilization.

Subsequently, it must be noted that NGOs engage with the Court in a specific manner: NGOs engage in making what I term "constitutive claims," arguing that newer challenges in reality necessitate development of new international law. States that intervene as amici do not go as far, instead indicating what the Court should do in the realm of existing law. NGOs support their constitutive claims in relation to the ever-increasing need to develop international law by supplying the Court with research and area-specific knowledge. It is specifically due to these characteristics, including their activity to tap existing international legal structures and to develop them further, that I have called public interest NGOs "Global Law Entrepreneurs."

A. Normative Considerations

The admission of NGO amicus briefs and the legalization of amicus submission procedure raise a number of normative issues. The sections below lists the main considerations that arise in relation to this process.

First, NGO amicus participation can remedy a gap created by the adversarial model of litigation. It can provide the Court with representation of interests beyond those of the parties involved in the cases.

Second, speaking on a more general level, an NGO amicus curiae submission might allow the court to create a space for dialogue, or as Robin Eckersley calls it, a "transnational public sphere." Writing about amicus curiae submissions by NGOs in the WTO and drawing on Jurgen Habermas's work, Robin Eckersley states,

“Cosmopolitan public spheres are conceptualized as specialized, intermediary structures, with multiple strategic and communicative functions, that mediate between supra-national governance structures and regional and domestic civil societies.”⁷¹³ Transnational public spheres can partly remedy concerns about the lack of external accountability of international courts.

The third argument relates to the international courts whose legitimacy has long been questioned. International institutions, including international courts, suffer from the lack of democratic legitimacy characteristic of domestic institutions.⁷¹⁴ Legitimacy in international law may be generally defined as “a property of a rule, or a rulemaking institution, which itself exerts a pull towards compliance on those addressed normatively.”⁷¹⁵ Commentators have pointed out that inclusion of a variety of actors, including civil society organizations, in international lawmaking may address the problem of legitimacy.⁷¹⁶ Thus, the courts’ engagement with civil society organizations might create the perception of more legitimacy for their pronouncements.

Fourth, on a more practical level, the research provided by NGO submissions can serve a valuable function for the Courts, and even more so when NGOs provide information and expertise from or about geographic areas that are less accessible. NGOs that aspire to participate as *amici curiae* are often experts in domestic law, and in this capacity they can provide important information to judges, information that otherwise might be inaccessible or easily overlooked.⁷¹⁷ This function is also related to research costs and expenses. Hiring staff to conduct case-specific research can be

⁷¹³ Robyn Eckersley, *A Green Public Sphere in the WTO? The Amicus Curiae Interventions in the Transatlantic Biotech Dispute*, 13 EUR. J. INT. REL. 329 (2007).

⁷¹⁴ See, e.g. David Caron, *Legitimacy of the Collective Authority of the Security Council*, 87 E.J.I.L. 552 (1993).

⁷¹⁵ THOMAS M. FRANCK, *THE POWER OF LEGITIMACY AMONG NATIONS*, 16 (1990).

⁷¹⁶ See Jen Steffek and Ulrike Ehling, *Civil Society Participation at the WTO—A Cure for its Democratic Deficit?* Paper presentation 3rd ECPR General Conference. Budapest (2005).

expensive for Courts whose resources are limited. The information and research put forth by NGOs can remedy this shortage.

Last, but not least, is the Courts' increased publicity as a result of their engagement with NGOs. For advocacy organizations, amici curiae briefs are usually part of a larger advocacy strategy related to a particular issue. Amicus curiae briefs for NGOs serve as a possibility for expanding advocacy campaigns and targeting the Court with advocacy efforts. By accepting amicus briefs, the Courts become part of these NGO advocacy campaigns, a role that leads to greater exposure for the Court and the possibility of attracting public attention to its activities.

For example, in the first request to submit an amici curiae brief, the International League of Human Rights was seen as a possibility for advancing views on the issue of colonialism in a legal forum. The League's main objective was to combat colonialism in all its forms, and the fact that the ICJ was seized for the matter gave the League a chance to voice its opinions on the issue.⁷¹⁸ Even after the case concluded, the League continued to advocate for its issues of concern⁷¹⁹ through what Keck and Sikkink call "information politics."

Fifth, submission of amicus briefs leads to the parties encountering amicus arguments and entails their right to respond to them, a possibility that may lead to party awareness of the position of amici, including their stance on the public interest implication of the parties' arguments and the Court's decision.

Nevertheless, the issue of engaging with NGO amicus submissions has its own disadvantages. First is the danger of "opening the floodgates." The Registrar of the International Court of Justice mentioned the floodgates counter-argument in his reply

⁷¹⁸ Roger S. Clark, *The International League for Human Rights and South West Africa 1947-1957: Human Rights NGO as Catalyst in the International Legal Process*, 3 HUM. RTS. Q. (1981).

⁷¹⁹ *Id.*

to the amicus petition by the International League of Human Rights.⁷²⁰ The argument is certainly true in relation to the high-profile cases, that such cases draw a wide variety and a relatively large number of amicus participants. An example of this situation is the *Lautsi* case of the European Court of Human Rights, in which 33 entities were allowed to participate as amici.⁷²¹

Second, interacting with a number of NGOs and their submissions, disseminating the submission to the parties, and coordinating the parties' responses require additional human as well as material resources; thus, the Courts need to weigh these considerations.

Third, the Tribunals can also be rightfully concerned with the claims of representation raised by amicus submissions. The channel of amicus briefs can be exercised by some parties to put forth their views by other means such as funding research and production of amicus briefs by interest groups. This issue is related to the much-discussed issue and debate on accountability and transparency of NGOs,⁷²² a risk that is higher when the dispute at hand results in significant revenues or other material incentives.

Fourth, the judges must also be aware of the undue pressure that can be associated with the submission of amicus briefs by interest groups.⁷²³ Wariness of this issue was expressed by the ICJ Chief Justice in *The Legality of the Threat or Use of Nuclear Weapons* case.

⁷²⁰ *Id.*

⁷²¹ *Lautsi and others v. Italy*, App. No. 30814/06, March 18, 2011, para. 8
http://www.echr.coe.int/echr/resources/hudoc/lautsi_and_others_v_italy.pdf

⁷²² DAVID KENNEDY, *The International Human Rights Movement: Part of the Problem?* 15 Harv. Hum. Rts. J. 101 (2002) (summarizing main criticisms advanced against the global human rights movement, primarily driven by human rights NGOs); Makau W. Mutua, *Human Rights International NGOs: A Critical Evaluation*, in *NGOS AND HUMAN RIGHTS: PROMISE AND PERFORMANCE* (CLAUDE W. WELCH JR. ED. 2001).

⁷²³ Wariness of this issue was expressed by the Chief Justice of the International Court of Justice in *The Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1999 *ICJ Rep.*, dissenting opinion of Judge Guillaume, para. 2 at 67.

Fifth, the issue of whether to admit amici briefs might require some hostility from the parties that have standing in the proceedings. The courts, therefore, can expect that the issue of admitting NGO briefs might be controversial. The parties to the procedure might feel disadvantaged by the possibility that the court will expand its exposure to entities other than parties and that non-parties will gain a form of access to the court, which was the case when the ECHR admitted its amicus briefs initially. For instance, when the WTO Appellate Body decided to invite amicus briefs in the *Asbestos* case, states expressed their discontent with the body's decision. The States even convened an extraordinary meeting of the WTO General Council to voice their dissatisfaction with the possibility of the Body being influenced by non-party views.⁷²⁴ Similarly, in the above-mentioned *Trades Union* case of the ECtHR, the applicant's Dr. Calcutt expressed his discontent with the fact that a memorial of amicus interveners was distributed to the Court.

2. Implications of Findings and Contributions to Literature

The study is the first attempt to treat comprehensively the issue of amicus curiae participation in international adjudication. The study finds that amicus curiae intervention serves a legitimacy- enhancing function for international tribunals. The study shows that international tribunals are becoming gradually open to amicus curiae participation, including to participation by NGOs. This study also illustrates how the European Court of Human Rights acknowledges and engages with the amici's submissions. By getting acquainted with the amicus curiae briefs submitted by various petitioners, including states, NGOs, and intergovernmental organizations, the courts

⁷²⁴ See, in general Petros Mavroidis, *Amicus Curiae Briefs before the WTO: Much Ado About Nothing*, Jean Monnet Working Paper 2/01 (2001). Available at <http://www.worldtradelaw.net/articles/mavroidisamicus.pdf>

receive information about and become aware of their stakeholders' and public's preferences.

This study has most important implications for the scholarship on the legitimacy of international tribunals. As it was explained in Chapter II, scholars agree that international tribunals suffer from a legitimacy deficit. Moreover, there is a broad scholarly consensus that in order to maintain legitimacy international tribunals should remain cognizant of the attitudes and preferences of entities subject to their lawmaking. By putting forward information about the policy preferences and the values of the public, petitioning states, and NGOs, amicus briefs supply the courts with the information crucial for its legitimacy.

The study contributes to scholarship from a number of other perspectives. As indicated in Chapter II, scholarship on international judicial decision-making does not adequately capture the involvement of amici in international dispute-resolution. While most scholars emphasize the roles of judges and applicants in the "triadic" process of governance, they overlook the role that amicus interveners have come to play in dispute resolution. This study evidences that amicus curiae interveners are frequent participants of the international judicial proceedings. It does so by approaching the question from a number of perspectives.

First, the study provides a chronological overview of gradual acceptance of NGO amici interventions by international tribunals. Chapter II shows that most active international tribunals have moved to accepting NGO amicus briefs. Furthermore, as explained in Chapter V on NGO submissions within the Law of the Sea Tribunal, the Law of the Sea Tribunal has most recently moved to an informal welcome of amicus submissions by NGOs.

Second, from an empirical perspective, Chapter IV shows that NGOs utilize opportunities afforded by the procedural rules and become frequent participants of the

judicial dispute-resolution process. The chapter shows that 19 of 21 highly important cases in relation to the right to property within the ECtHR involved an amicus submission.

Third, the chapter shows that NGOs do not merely submit their briefs. Their submissions are always acknowledged by the Court. The Courts' willingness to acknowledge the NGO briefs is also supported by the fact that, as Chapter V explains, ITLOS displayed the brief on its website without having any obligation to do so. Moreover, in some cases, as indicated in Chapter IV, the European Court of Human Rights responds to amici's submissions either by agreeing with their views or refuting them.

Fourth, NGO amicus briefs engage the existing parties as well. As we have seen within the European Court of Human Rights and the WTO Dispute Resolution body, new possibilities for amicus briefs for NGOs generate discussion among parties to the proceedings.

One of the basic contributions of the transnational legal process school has been the emphasis that the dichotomy between the domestic and international law realms has been eroded.⁷²⁵ As pointed out by Peer Zumbansen, the concept of Transnational Law breaks the boundaries "of traditional thinking about inter-state relationships by pointing to the myriad forms of border-crossing relations among state and non-state actors."⁷²⁶ As emphasized by Harold Koh, the concept of Transnational Legal Process originates in the idea of Transnational Law coined by Phillip Jessup.⁷²⁷ In his book *Transnational Law*, Jessup famously emphasized that Transnational Law includes "all law which regulates actions or events that transcend national frontiers.

⁷²⁵ Peer Zumbansen, *Transnational Law*, *ENCYCLOPEDIA OF COMPARATIVE LAW*, 738 (JAN SMITS ED., 2006).

⁷²⁶ *Id.*

⁷²⁷ Harold Hongju Koh, *Transnational Legal Process*, Faculty Scholarship Series, Paper 2096, Yale Law School Legal Scholarship Repository 183 (1996).

Both public and private international law are included, as are other rules which do not wholly fit into such standard categories.”⁷²⁸ As Koh indicates, Transnational Legal Process questions the traditional boundaries between “the domestic and the international, public and private.”⁷²⁹ Chapter IV Section 4 of this study contributes to the scholarship on Transnational Legal Process. Through a study of the internationalization of amicus curiae procedure from the UK, this section shows that international law and rules emerge as a result of a process of borrowing from domestic law driven by state as well as non-state actors. As international law is created through the process of internationalization of domestic law, the distinction between international law and domestic law is blurred. Moreover, as the section shows, the process of internationalization is driven both by the state (UK) and a number of domestic non-state actors.

From the perspective of comparative law scholarship on legal transplants, the study offers valuable insights as well. Although the concept of legal transplants is concerned with the movement of legal ideas and institutions across states, this study shows that legal transplants are also internationalized. As illustrated in the case study on the internationalization of the amicus curiae procedure, the ECtHR judges adopted the procedure from the UK. This particular section evidences that transplantation can occur beyond the national levels. Moreover, similar to the scholarship on legal transplants, the section underscores the role of private actors, that is, norm-makers and their allies, in the process of internationalization of legal institutions.

Furthermore, the study contributes to the scholarship on non-state actors and international norm-making. As indicated in Chapter II, the international relations scholarship has expounded on the question of non-state actor participation in

⁷²⁸ PHILIP JESSUP, *TRANSNATIONAL LAW* 136 (1956).

⁷²⁹ Harold Hongju Koh, *Transnational Legal Process*, Faculty Scholarship Series, Paper 2096, Yale Law School Legal Scholarship Repository 183, 184 (1996).

international relations. Keck and Sikkink, Tarrow, and Chichowski have explained the relationship between international organizations and domestic NGOs. This study outlines another aspect of the relationships. As shown in Chapters IV and V, acting as Global Law Entrepreneurs, NGOs use opportunities afforded by international organizations to advance their agenda while at the same time expanding opportunities to further the opportunities for their participation. As the case studies of the NGO participation as amici in the European Court of Human Rights and the Law of the Sea Tribunal show, first NGOs engage with the existing structures of the respective tribunals. However, they do so to increase opportunities for their own participation. For instance, they take advantage of the existing procedures to request that tribunals expand their rules and allow their views to be heard in the capacity of amici curiae. This same trend emerges when NGOs act as claimants, as the Court's test for recognizing "non-governmental organizations" is expanding and more entities are recognized as NGOs.

In addition, the study advances constructivist perspectives, in particular the work of Martha Finnemore and Michael Barnett, on international norm-making. Chapter IV shows how NGOs create knowledge and mobilize research in order to advance "constitutive claims." These constitutive claims about the reality in Europe then allow NGOs to argue that the Court needs to address the new reality with the evolving law.

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